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JURISDICTIONAL PROCEDURE

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ABSTRACT

Scholars have lavished attention on the substance of jurisdictional doctrines such as standing, mootness, diversity, and federal question. They have left largely unexamined, however, the procedures courts use to address these doctrines; collectively, I refer to these procedures as "jurisdictional procedure." A paramount feature of jurisdictional procedure is the unique and virtually unqualified obligation federal courts possess to identify and decide issues of subject matter jurisdiction even if the parties and lower courts overlook these issues. Courts have reached no consensus about how to identify the facts necessary to effectuate this obligation. The confluence of court-initiated legal inquiry and unpredictable factual investigation has profound consequences for the administration of justice.

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The courts' duty to inquire into jurisdiction departs dramatically from the adversarial norms that dominate the American legal system. This departure, however, is necessary to preserve separation of powers. As judicial review and judicial supremacy have gained acceptance, courts have transcended the system of checks and balances through which the Constitution seeks to constrain federal power. In the absence of external checks on judicial authority, self-applied jurisdictional limitations, effectuated through an inquisitorial procedure nested within our adversarial system, fill a crucial role.

In inquiring into jurisdiction, courts often require parties to have developed the facts related to jurisdiction in the district court, even if the jurisdictional issue was not identified during that stage of the litigation. This marriage of traditional adversarial rules allocating responsibility to parties and the largely inquisitorial duty of courts to inquire into jurisdiction creates several problems. First, plaintiffs unfairly have their cases dismissed without the opportunity to provide facts related to newly arising jurisdictional concerns. Second, judicial resources go to waste because in some circumstances plaintiffs can file new claims that will require entirely new judicial proceedings. Third, courts inaccurately dismiss cases in circumstances in which jurisdiction would plainly exist if the court considered a completed factual record.

Courts can remain true to separation of powers principles while avoiding the pitfalls that often arise out of current jurisdictional procedure. To do so, they should investigate the facts necessary to correctly assess their jurisdiction. A duty to investigate jurisdictional facts would enable courts to balance their obligations to act when they have jurisdiction and to dismiss when they do not. It would more fully vindicate separation of powers. And, ultimately, it would create a fairer, more efficient, and more accurate legal process.

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INTRODUCTION

Early in the Republic, the Supreme Court explained, "Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing th[at] fact and dismissing the cause."[1] To carry out that function, federal courts have developed a host of doctrines delineating the metes and bounds of subject matter jurisdiction. Plaintiffs must have standing,[2] cases must be ripe,[3] and parties must be fully diverse or present federal questions.[4]

Despite the foundational nature and profound consequences of these doctrines, the *process* by which courts determine whether they have jurisdiction remains sorely underexamined. Ongoing debates about the substance of jurisdictional doctrines—such as standing, mootness, diversity, and federal question—have obscured persistent issues with what I refer to as "jurisdictional procedure": the procedure that courts use to decide questions of jurisdiction.[5] Most critically, there is no consensus regarding the proper way for courts to adjudicate the facts on which jurisdiction depends.

Consider these examples. In *Heartwood, Inc. v. Agpaoa*, a panel of the Sixth Circuit raised standing at oral argument, asking whether the district court record contained evidence that the

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1. *Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 514 (1868).

2. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 559-62 (1992).

3. *See* Nat'l Park Hospitality Ass'n v. Dep't of Interior, 538 U.S. 803, 807-08 (2003).

4. *See* 28 U.S.C. §§ 1331-1332 (2006).

5. That is not to say that all corners of jurisdictional procedure have been ignored. For example, Kevin Clermont and others have written about the sequencing of jurisdictional and nonjurisdictional threshold issues, *see, e.g.*, Kevin M. Clermont, *Sequencing the Issues for Judicial Decisionmaking: Limitations from Jurisdictional Primacy and Intrasuit Preclusion*, 63 FLA. L. REV. 301 (2011), Amy Wildermuth and Lincoln Davies have considered appropriate procedures for developing a factual record related to standing to bring petitions for review, *see* Amy J. Wildermuth & Lincoln L. Davies, *Standing, on Appeal*, 2010 U. ILL. L. REV. 957, 999-1011, and Scott Dodson has examined the incorporation of nonjurisdictional procedural rules, like rules of evidence and proof, *see* Scott Dodson, *Hybridizing Jurisdiction*, 99 CALIF. L. REV. 1439, 1466-70 (2011). All of these procedural rules relate to one another because they govern courts' resolution of jurisdiction. This Article suggests that jurisdictional procedure should be recognized as a distinct field of inquiry and, moreover, that much of its idiosyncrasy flows from the rule that courts bear the responsibility to identify and decide jurisdictional questions even absent any involvement by the parties.

environmental-organization plaintiffs had members who used the precise corner of a national forest slated for timber harvest.[6] Neither the government defendant nor the district court had ever questioned standing.[7] Nonetheless, based solely on the state of the record at the time of final judgment in the district court, the Sixth Circuit ordered the case dismissed.[8] In *America's Best Inns, Inc. v. Best Inns of Abilene, L.P.*, the Seventh Circuit noticed that the district court record lacked evidence of citizenship of each partner in a limited partnership.[9] The court required the parties to "enlarge the record" so that the court could assess the existence of diversity jurisdiction.[10] After considering affidavits filed after oral argument, the court dismissed.[11] And in *Bartee v. Reed*, the Fifth Circuit considered a death-row prisoner's claim that the prosecution had not conducted court-ordered DNA testing and the prosecution's argument that the testing was underway.[12] Without prompting from the parties, the court explained that the case may have become moot and remanded to the district court because "the mootness determination depends on record development that does not commonly take place in appellate courts."[13]

We thus have three courts, three decisions related to subject matter jurisdiction, and three different approaches that may result in different outcomes. Note, however, a striking similarity. All three courts of appeals raised the issue of subject matter jurisdiction sua sponte.

That may sound blindingly obvious. The courts raised the question of jurisdiction on their own because subject matter jurisdiction is so fundamental a limitation on the authority of courts that, as the Supreme Court has explained, courts "are not *of course* precluded from reexamining ... jurisdiction ... merely because no challenge was made by the parties."[14] Indeed, courts have an

6. 628 F.3d 261, 267-68 (6th Cir. 2010).

7. *See id.* at 266-67 (noting that the district court never addressed plaintiff's showing of standing).

8. *Id.* at 268-69.

9. 980 F.2d 1072, 1073 (7th Cir. 1992).

10. *Id.*

11. *Id.* at 1073-74.

12. No. 12-70012, 2012 WL 1933560, at *1 (5th Cir. May 29, 2012).

13. *Id.*

14. McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 16 (1963)

"independent obligation to assure [them]selves that jurisdiction is proper,"[15] an obligation that I refer to as "the duty of jurisdictional inquiry."

Jurisdictional procedure has largely escaped consideration.[16] Yet it diverges significantly from the ordinary course of business in federal courts. The American legal system is perhaps the most avowedly adversarial system of law in history.[17] It is an article of faith that the presentation of facts and legal issues by opposing sides in a case is the best way to divine truth, respect autonomy, and secure justice.[18] Courts do occasionally deviate from the adversarial formula, for example, to apply the "right body of law" even when it has not been articulated properly by the parties.[19] But these deviations are exceptional.[20]

The opposite is true of jurisdictional procedure. Courts have an unflagging obligation to raise and resolve questions of jurisdiction.[21] In so doing, they take on an active role in litigation that bears a striking resemblance to the role assumed by courts from inquisitorial traditions.[22]

(emphasis added); *see also* North Carolina v. Rice, 404 U.S. 244, 246 (1971).

15. Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 324 (2008).

16. For a discussion of the reasons that jurisdictional procedure has largely escaped the notice of courts and commentators, see Justin R. Pidot, *The Invisibility of Jurisdictional Procedure and Its Consequences*, 64 FLA. L. REV. 1405, 1411-17 (2012).

17. *See, e.g.*, Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*, 90 CORNELL L. REV. 1181, 1183-85 (2005).

18. *See, e.g.*, 3 JOHN H. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 1395, at 94, 96-97 (2d ed. 1923).

19. *See, e.g.*, Smith v. Mallick, 514 F.3d 48, 51 (D.C. Cir. 2008) (quoting Mwani v. Bin Laden, 417 F.3d 1, 11 n.10 (D.C. Cir. 2005)); Barry A. Miller, *Sua Sponte Appellate Rulings: When Courts Deprive Litigants of an Opportunity to Be Heard*, 39 SAN DIEGO L. REV 1253, 1255-56 (2002).

20. *See* Miller, *supra* note 19, at 1264-68 (discussing the general rule that appellate courts only consider issues raised by the parties).

21. The full extent of this obligation is not always clear. Parties clearly cannot consent to jurisdiction. *See* Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 (1982). It is possible, however, that parties jointly seeking a federal forum could circumvent this rule by stipulating to the facts necessary to establish jurisdiction. *See* Dodson, *supra* note 5, at 1469-70.

22. Inquisitorialism is often associated with the civil law system of justice practiced in much of Europe, *see, e.g.*, Howard M. Erichson, *Mass Tort Litigation and Inquisitorial Justice*, 87 GEO. L.J. 1983, 2005-09 (1999) (discussing the inquisitorial systems of Germany and France); Douglas H. Ginsburg, *Appellate Courts and Independent Experts*, 60 CASE W. RES.

Courts approach jurisdictional facts, however, based on diverging and unspoken assumptions about the nature of jurisdiction. Different treatment of jurisdictional facts transcends substantive doctrines. With respect to standing, for example, courts most often adhere to the *Heartwood* model and raise and resolve questions of standing based on whatever facts happen to be in the district court record at the time of final judgment.[23] But occasionally, courts expand the record on appeal[24] or remand to the district court to allow further factual development.[25] Without any clear pattern, panels within the same circuit, often without explanation, apply these different mechanisms to determine their jurisdiction.[26]

Each approach involves a different mixture of inquisitorial and adversarial process.[27] The duty of jurisdictional inquiry is essen-

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L. REV. 303, 314 (2010), even though modern European procedure converges in significant ways with adversarial rules associated with common law countries. *See* David A. Sklansky, *Anti-Inquisitorialism*, 122 HARV. L. REV. 1634, 1640 (2009). Categorizing the nature of the legal system in civil law countries is unnecessary to this Article's project.

23. *See supra* notes 6-8 and accompanying text. The same diversity of approaches exists with respect to other jurisdictional doctrines as well. For courts addressing mootness, compare *Coral Springs Street Systems, Inc. v. City of Sunrise*, 371 F.3d 1320, 1328 (11th Cir. 2004) (dismissing as moot upon de novo review), and *Tandy v. City of Wichita*, 380 F.3d 1277, 1290 (10th Cir. 2004) (dismissing in part for mootness because plaintiff had died), with *DeFunis v. Odegaard*, 416 U.S. 312, 315-16, 319-20 (1974) (dismissing as moot based on answer to question asked at oral argument), and *Bankshot Billiards, Inc. v. City of Ocala*, 634 F.3d 1340, 1351-52 (11th Cir. 2011) (remanding to district court to evaluate mootness). For courts addressing diversity of citizenship, compare *America's Best Inns, Inc. v. Best Inns of Abilene, L.P.*, 980 F.2d 1072, 1073-74 (7th Cir. 1992) (vacating for lack of subject matter jurisdiction because parties failed to establish diversity), with *Mullins v. Testamerica Inc.*, No. 07-10340, 2008 U.S. App. LEXIS 23446, at *1-8 (5th Cir. Nov. 13, 2008) (remanding to district court to further develop jurisdictional facts), and *Von Dunser v. Aronoff*, 915 F.2d 1071, 1072-76 (6th Cir. 1990) (remanding for determination of diversity).

24. *See, e.g.*, Ouachita Watch League v. Jacobs, 463 F.3d 1163, 1169-72 (11th Cir. 2006). The Supreme Court has recently cast some doubt on the viability of appellate fact-finding with respect to standing. *See* Summers v. Earth Island Inst., 555 U.S. 488, 495 n.*, 500 (2009).

25. *See, e.g.*, Friends of the Earth, Inc. v. Gaston Copper Recycling Corp., No. 06-1714, 2008 U.S. App. LEXIS 2854, at *1 (4th Cir. Feb. 7, 2008).

26. *Compare id.* (remanding for further factual findings), *with* Benham v. City of Charlotte, 635 F.3d 129, 134 (4th Cir. 2011) ("If an appellate court determines that the district court lacked jurisdiction, vacatur of the district court's ruling, along with a remand with instructions to dismiss, is the appropriate disposition.").

27. In a recent article, Scott Dodson provides a provocative analysis of the nonjurisdictional doctrines that infuse the adjudication of jurisdiction. *See* Dodson, *supra* note 5. As Dodson explains, jurisdictional doctrines are often "hybridized" with nonjurisdictional rules and procedures. *See id.* at 1439. Dodson contends that this hybridity indicates greater commonality between the jurisdictional and nonjurisdictional. *See id.* at 1448-50. He is no

tially inquisitorial insofar as it obliges judges to play an active role in litigation. Courts, however, adjudicate jurisdictional facts along a spectrum. When courts leave the development of jurisdictional facts to the parties, they rely more heavily on adversarial norms, and when courts inquire into those facts themselves, they rely more heavily on inquisitorial norms.

These choices matter to case outcomes. The facts in *Heartwood* strongly suggest that the organization could have satisfied the standing test articulated by the Sixth Circuit had the court either requested additional information or remanded for further fact-finding: the case involved a plan to commercially harvest 4,845 acres of the 706,000 acre Daniel Boone National Forest; the efforts of Kentucky Heartwood, one of the plaintiff organizations, focused on that national forest; and the organization had over 200 members.[28] This means that had the *Heartwood* court chosen to expand the record or remand for further fact-finding, the case would likely not have been dismissed.

Courts and commentators have failed to identify an appropriate uniform approach to jurisdictional procedure, explain its theoretical underpinnings, or even consider its importance. This is all the more striking because jurisdictional procedure serves as a backdrop to many of the great debates over the substantive dimensions of jurisdictional doctrines. For example, Justice Scalia has advanced provocative arguments that rigid and strict standing requirements serve vital separation of powers principles by keeping courts from encroaching on the territory of the political branches of government.[29] Cass Sunstein, on the other hand, has rejoined that this view of standing "should not be accepted by judges who are sincerely committed to the original understanding of the Constitution and to

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doubt correct that jurisdiction is less distinct than commonly conceived. This Article suggests, however, that jurisdictional procedure stands on different footing, incorporating rules and practices that diverge more drastically from those that prevail outside of the jurisdictional context than is commonly recognized.

28. *See* Heartwood, Inc. v. Myers, 628 F.3d 261, 265 (6th Cir. 2010); Complaint ¶ 5, Heartwood, Inc. v. Myers, 611 F. Supp. 2d 675 (E.D. Ky. 2009) (No. 5:07-cv-114); *About Kentucky Heartwood*, CAUSES.COM, http://www.causes.com/causes/103428-kentucky-heartwood/about (last visited Sept. 26, 2012); *About*, KY. HEARTWOOD, http://www.kyheartwood.org/about.html (last visited Sept. 26, 2012).

29. *See, e.g.*, Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1983).

judicial restraint."[30] This debate over the scope of standing necessarily implicates jurisdictional procedure because, absent the duty of courts to raise standing sua sponte, the doctrine could not serve the gatekeeping role envisioned by Scalia and critiqued by Sunstein.

Consider also the claim that appellate courts invoke standing on ideological grounds to avoid deciding cases that particular judges do not like. In a study of Supreme Court and appellate court standing decisions, Richard Pierce, Jr. found a strong correlation between the votes of judges and their political affiliation.[31] Standing provides a tempting target for judges seeking to avoid deciding the merits of cases in a manner counter to their preferences because jurisdictional procedure permits the court to raise the issue at any time and allows courts of appeals to direct the dismissal of cases based on the facts contained in the existing district court record.

Like the substance of jurisdictional doctrines, jurisdictional procedure raises profound questions about the role of courts in American society and the burdens placed on parties seeking justice, including: Do the principles supporting jurisdictional procedure justify its radical departure from the ordinary adversarial process? Does the distinctly un-adversarial premise that courts, and not parties, bear the responsibility for raising issues of jurisdiction have ramifications for the procedures courts use to carry out the duty of jurisdictional inquiry? And, if jurisdictional procedure imposes costs on parties, courts, or the public, can reform avoid or reduce these costs?

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30. Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 166 (1992). *See generally, e.g.*, John D. Echeverria, *Standing and Mootness Decisions in the Wake of* Laidlaw, 10 WIDENER L. REV. 183 (2003); Daniel A. Farber, *A Place-Based Theory of Standing*, 55 UCLA L. REV. 1505 (2008); Gene R. Nichol, Jr., *Standing for Privilege: The Failure of Injury Analysis*, 82 B.U. L. REV. 301 (2002); Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C. L. REV. 1741 (1999). Erwin Chemerinsky recently called adoption of increasingly stringent jurisdictional requirements "one of the most pernicious aspects of the conservative assault on the Constitution." ERWIN CHEMERINSKY, THE CONSERVATIVE ASSAULT ON THE CONSTITUTION 201 (2010); *see id.* at 211-15 (discussing standing). These commentators, Chemerinsky included, do not question that courts should be in the business of policing their own jurisdiction.

31. *See* Pierce, *supra* note 30, at 1754-55, 1759-60; *see also* Madeline Fleisher, *Judicial Decision Making Under the Microscope: Moving Beyond Politics Versus Precedent*, 60 RUTGERS L. REV. 919, 924 (2008) (finding a similar result); Nichol, *supra* note 30, at 326 ("[T]he rationale for access to the courthouse likely lies in ideology.").

To answer those questions, this Article proceeds in four parts. Part I locates jurisdictional procedure and, specifically, the duty of jurisdictional inquiry that it imposes on courts within the constitutional order of the federal government. Good reasons exist for requiring courts to inquire into their jurisdiction. Courts must police their own authority because no other branch of government can effectively check its scope. Unlike the executive and legislative branches, the federal judiciary faces few external checks. The courts therefore properly exercise restraint to avoid overstepping their constitutional role, vindicating separation of powers principles and maintaining legitimacy. Although the federal courts have not characterized the duty of jurisdictional inquiry in precisely these terms, the explanation presented in this Article makes sense of significant changes that have occurred in jurisdictional procedure over the history of the American Republic.

Part II provides theoretical consideration of the two legal theories —adversarialism and inquisitorialism—that contribute to jurisdictional procedure. The American adversarial system is often favorably contrasted with inquisitorialism. This cultural hostility creates obstacles to legal reform drawing on inquisitorial theory. Yet the present system uncontroversially incorporates a number of inquisitorial features. As other legal scholars have suggested, acknowledging the existing hybridity of the American legal system may reduce unfounded objections to using procedures that redress existing problems.[32]

Part III turns to jurisdictional facts. It begins by identifying situations in which questions of jurisdiction most often turn on jurisdictional facts. The environmental context provides a good illustration because the standing of environmental plaintiffs often requires courts to consider facts altogether unrelated to the merits of the relevant legal claims and, in some circumstances, requires courts to resolve scientific disputes. Climate change litigation, for example, brings this problem to the fore.

Part III then identifies problems caused by the currently predominant practice in which appellate courts raise and resolve jurisdictional issues based on whatever facts happen to have been

32. *See, e.g.*, Kessler, *supra* note 17, at 1183-85.

in the district court record at the time of final judgment, even if no question of jurisdiction had been raised at that time, and even after years of litigation and the expenditure of significant resources. In so doing, courts dismiss cases based on an incomplete factual record. That leads to problems: It risks unfairly penalizing plaintiffs for a district court's error in failing to accurately assess jurisdiction. It leads to arbitrary results when certain plaintiffs may file new claims and others may not, based simply on how long it takes the federal courts to dismiss and whether the statute of limitations has run in the interim. It risks wasting judicial resources. And it results in courts failing to exercise the full extent of their constitutional authority.

Part IV begins with a brief return to the separation of powers principles that animate jurisdictional procedure and explains that, properly understood, the system of checks and balances that the duty of jurisdictional inquiry substitutes for both provides a mechanism to prevent overreaching, and also a means of correcting underimplementation of constitutional duties. Just as courts draw on inquisitorial tradition to internally check their own excesses, by drawing on the inquisitorial tradition courts can assure themselves that they fully carry out their constitutional charge. To be clear, this Article does not suggest that courts exercise an outdated model of inquisitorial procedure whereby judges call and question witnesses without notice to parties and outside of their presence. Rather, courts should act more inquisitorially by recognizing that to best fulfill the duty of jurisdictional inquiry, they must also assure themselves that the record contains necessary jurisdictional facts. In carrying out that obligation, courts should act in concert with the parties, but the ultimate responsibility for developing the record should rest with the courts, and most appropriately, district courts. This reform will not only more perfectly vindicate separation of powers but will also address persistent problems with current practice.

I. THE CONSTITUTIONAL FOUNDATIONS OF JURISDICTIONAL PROCEDURE

This Section examines the role of courts in the constitutional separation of powers and details the co-evolution of judicial power and jurisdictional procedure. This historical and theoretical grounding illuminates the reasons that jurisdictional procedure has evolved to require courts to assess jurisdiction even when the parties remain silent. Separation of powers principles provide a strong justification for the unique dimensions of jurisdictional procedure, suggesting that, despite its potential costs, courts should continue to carry out the duty of jurisdictional inquiry. A need to advance those principles will, therefore, inform the possible avenues for reform discussed in Part IV.

A. Checks, Spurs, and Courts in Constitutional Design

The principle of separation of powers undergirds the structure of the federal government established by the Constitution. The Framers viewed "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands ... [as] the very definition of tyranny."[33] To prevent aggrandizement of power, the Constitution confers three types of governmental power on three different branches, and simultaneously creates external restraints—often referred to as checks and balances—to assure that the institutions do not overstep their authority.[34] Or, at least, that is the received version of constitutional theory.

In reality, the Constitutional Convention lavished attention on the legislative and executive branches and considered the judiciary as an afterthought.[35] The Constitution reflects this history, creating

33. THE FEDERALIST NO. 47 (James Madison).

34. *See* M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127, 1132 (2000); *see also* THE FEDERALIST NO. 48 (James Madison); Richard A. Brisbin, Jr., *The Judiciary and the Separation of Powers*, *in* THE JUDICIAL BRANCH 89, 89-90 (Kermit L. Hall & Kevin T. McGuire eds., 2005).

35. *See* William E. Nelson, *The Historical Foundations of the American Judiciary*, *in* THE JUDICIAL BRANCH, *supra* note 34, at 3-4. Each article of the Constitution vests the legislative, executive, and judicial power in Congress, the President, and the federal courts,

intricate checks on Congress and the President without creating similarly robust structures to limit judicial authority.

In support of this point, consider the following thought experiment. Judges, lawyers, and academics have long viewed advisory opinions as beyond the scope of the federal judiciary.[36] But what if the Supreme Court issued a decision tomorrow deciding otherwise? What if the Court announced that from here on out any person could ask the federal judiciary to decide questions about the interpretation of the Constitution, statutes, regulations, or the common law —or even about public policy—and the federal courts could definitively answer those questions because "[i]t is emphatically the province and duty of the judicial department to say what the law is"?[37] Congress and the President would surely react with outrage. Perhaps they would pass a law purporting to strip the federal courts of this new power, a law which the federal courts could then hold unconstitutional. The point is that the Constitution as currently understood provides no obvious and effective mechanism for the other branches to stop the Court's excess.

The most obvious checks the Constitution provides to Congress and the President are negative in nature. Each branch has tools to

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respectively. *See* U.S. CONST. art. I, § 1, art. II, § 1, art. III, § 1. Article I, Sections 8 and 9 provide elaborate specification of the legislative power provided to Congress, identifying numerous spheres of authority and restraints. *Id.* art. I, §§ 8-9. Article II, Sections 2 and 3 provide similar specifications for the executive power. *Id.* art II, §§ 2-3. Article III, by contrast, provides little explication of the "judicial power." *Id.* art. III. Article III, Section 2 identifies those "Cases" and "Controversies" that fall within the original jurisdiction of the federal courts, but does not define judicial power. *Id.* art. III, § 2.

36. *See, e.g.*, Note, *Advisory Opinions and the Influence of the Supreme Court over American Policymaking*, 124 HARV. L. REV. 2064, 2064-66 (2011). This assumption about the nature of courts runs deep. For example, Alexander Bickel described the respective roles of the judicial and legislative branches by asserting that "[t]he courts are concerned with the flesh and blood of an actual case." ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 26 (2d ed. 1986); *see also* Flast v. Cohen, 392 U.S. 83, 95-97 (1968) (discussing what makes an issue justiciable). This is surely true as a description of the practice of federal courts, but nothing in the Constitution's text necessarily limits the courts to such cases. Indeed, Article III vests the courts with jurisdiction not only over certain types of cases but also over categories of controversies, a distinction that easily could have been interpreted as vesting the courts with broad authority in certain situations.

37. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803). Some state constitutions empower state courts to issue advisory opinions, and the Supreme Court of Minnesota assumed that power for itself without an obvious constitutional or statutory source. *See* Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1845-46 (2001).

stop the other from exercising extraconstitutional authority. The nature of the relationship between the political branches, however, also gives rise to additional mechanisms that allow the President and Congress to spur each other to exercise the constitutional authority they each possess.[38]

Consider the explicit tools that the Constitution provides each political branch to restrain the other: The President can veto legislation that Congress passes, and Congress, through the Senate, has a parallel opportunity to reject the President's choice of leaders for the executive branch and must ratify any treaties the President negotiates.[39] Congress funds the executive branch, and the President enforces the laws that Congress passes.[40] And the Constitution divides authority over the war power between the President and Congress; although the President serves as the Commander in Chief of the armed forces, only Congress can declare war.[41]

Congress and the President also possess tools implicit in the constitutional structure to spur each other to action.[42] For example,

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38. *See* Benjamin Ewing & Douglas A. Kysar, *Prods and Pleas: Limited Government in an Era of Unlimited Harm*, 121 YALE L.J. 350, 354, 359-67 (2011) (explaining that governmental actors can perform their roles in a way that signals other institutional actors through a system of "prods and pleas").

39. U.S. CONST. art. I, § 7, art. II, § 2.

40. *Id.* art. I, § 7, art. II, § 1.

41. *Id.* art I, § 8, art. II, § 2. A modern critique suggests that the constitutional order has broken down because Congress has become unable or unwilling to carry out its assigned tasks, thereby paving the way to either a complete breakdown of government or the rise of an imperial presidency. *See generally* BRUCE ACKERMAN, THE DECLINE AND FALL OF THE AMERICAN REPUBLIC (2010). The problems ascribed to Congress have little to do with separation of powers itself. Instead, that problem arises out of trends in American politics and congressional rules that make nonaction an appealing and successful strategy for members of Congress more interested in reelection than good public policy.

42. *See* Ewing & Kysar, *supra* note 38, at 361-62. In policing the separation of powers, the courts serve both as checks and spurs. For example, when the Court struck down the line item veto in *Clinton v. City of New York*, 524 U.S. 417, 448-49 (1998), it not only prevented aggrandizement of power in the executive branch but concomitantly spurred Congress to fully carry out its legislative function. Nonetheless, opportunities for courts to spur, or be spurred by, the executive branch and legislative branch appear rare because there are few formal channels of communication to guide such interaction and little informal communication between the judiciary and the other branches occurs due to concerns about propriety. *See* Deanell Reece Tacha, *Judges and Legislators: Renewing the Relationship*, 52 OHIO ST. L.J. 279, 279-83 (1991) (contrasting perceived constitutional limits on interbranch communication between the political branches and with the judiciary).

the Vice President serves as the president of the Senate, providing the executive branch with direct means to influence congressional activity.[43] The President also routinely prepares legislation for Congress and possesses substantial leverage to pressure Congress to take action on pressing national problems. Congress has complementary powers to pressure agencies to comply with their duties by holding oversight hearings or exercising power over appropriations.[44] Additionally, through the Administrative Procedure Act, Congress provides a right of action to aggrieved individuals should administrative agencies fail to execute the law.[45]

Whereas the Constitution imposes a complex scheme to govern the relationship between Congress and the President, it primarily concerns itself with insulating the federal judiciary from outside influence.[46] The President, acting in concert with the Senate, selects judges.[47] Once selected, however, judges may remain in office for life.[48] Article III also prohibits any reduction in judicial compensation, which prevents Congress from directly influencing judges through its power over the purse.[49] The power to appoint judges may have seemed a potent form of control in the eighteenth century, when it was presumed that life tenure would rarely last very long.[50] As life expectancy increased, Supreme Court appointments became rarer, diminishing the ability of the political branches to control the Supreme Court through appointments.[51]

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43. U.S. CONST. art. I, § 3.

44. *See id.* art. I, § 9.

45. *See* 5 U.S.C. § 706(1) (2006).

46. *See, e.g.*, Martin H. Redish, *Federal Judicial Independence: Constitutional and Political Perspectives*, 46 MERCER L. REV. 697, 729-30 (1995); *see also* Larry D. Kramer, *"The Interest of the Man": James Madison, Popular Constitutionalism, and the Theory of Deliberative Democracy*, 41 VAL. U. L. REV. 697, 705 (2006) (discussing how Madison viewed the judiciary as too weak to play a meaningful role).

47. U.S. CONST. art. II, § 2.

48. *Id.* art. III, § 1.

49. *Id.* This limitation is striking because Congress otherwise exercises virtually unfettered authority over federal spending.

50. *See* Roger C. Cramton, *Reforming the Supreme Court*, 95 CALIF. L. REV. 1313, 1315-16 (2007).

51. *See id.* at 1316, 1321; *see also* John Ferejohn, *Independent Judges, Dependent Judiciary: Explaining Judicial Independence*, 72 S. CAL. L. REV. 353, 383 (1999) (explaining how low turnover on the bench and a respect for stability and predictability make legal doctrine evolve slowly).

The Constitution does permit impeachment of judges for "high Crimes and Misdemeanors."[52] But this power is limited because the terms "high Crimes and Misdemeanors" suggest that Congress can remove judges for personal failings, rather than for the performance of official duties.

History confirms that reading of the Impeachment Clause. On only one occasion has Congress considered removing a member of the federal judiciary based on legal philosophy.[53] In 1804, the House of Representatives served Justice Samuel Chase with eight articles of impeachment.[54] Congress's chief complaint was that Justice Chase, an avowed Federalist, had severely criticized the Republican administration while issuing a jury charge and had eagerly overseen the sedition prosecution of certain Republican operatives.[55] Justice Chase conceded that his remarks may have been ill-considered, but contended that judges may properly incorporate political values into the conduct of their official duties.[56] The floor managers for the House of Representatives argued that the Impeachment Clause permitted Congress to remove a judge from office based on a fundamental disagreement about the law and the proper role of the judiciary.[57] The Senate, however, declined to convict, and Congress has never again attempted to exercise its impeachment power as a check on the judiciary's official conduct.[58]

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52. U.S. CONST. art. II, § 4. Article II, Section 4 provides for impeachment of "all Civil Officers of the United States," and the Constitution vests that power in the House of Representatives and the Senate. *Id.* art. I, §§ 2-3, art. II, § 4. Article III, Section 1 also provides that "Judges ... shall hold their Offices during good Behavior." *Id.* art. III, § 1. Arguably, the Good Behavior Clause could provide an alternative authority for the removal of federal judges. *See* Saikrishna Prakash & Steven D. Smith, *How to Remove a Federal Judge*, 116 YALE L.J. 72, 88-89 (2006). Neither the courts nor Congress have embraced this reading of the impeachment power. *See, e.g.*, Martin H. Redish, *Response: Good Behavior, Judicial Independence, and the Foundations of American Constitutionalism*, 116 YALE L.J. 139, 140 (2006); Keith E. Whittington, *Reconstructing the Federal Judiciary: The Chase Impeachment and the Constitution*, 9 STUD. AM. POL. DEV. 55, 76-82, 102 (1995).

53. *See* Redish, *supra* note 52, at 150; *see also* Whittington, *supra* note 52, at 55-56 (noting that the impeachment of Justice Chase was purely political).

54. 14 ANNALS OF CONG. 85-88 (1804).

55. *Id.*

56. *See id.* at 116.

57. *See id.* at 592-96.

58. *See* Redish, *supra* note 52, at 150; *see also* William H. Rehnquist, *The American Constitutional Experience: Remarks of the Chief Justice*, 54 LA. L. REV. 1161, 1167 (1994) (noting that ever since the failed attempt to impeach Justice Chase "a judge's *judicial* acts

Just as Congress and the President have implicit power to influence one another, so too is it possible that the political branches possess implicit mechanisms to prevent courts from usurping unconstitutional power, or to encourage—or force—courts to fulfill their constitutional role. In limited circumstances, the political branches have spurred judicial action. For example, the Civil Justice Reform Act requires the judiciary to report to Congress any motion that remains undecided for more than six months, and there is some evidence that this public disclosure has resulted in swifter decisions.[59] The courts, however, have generally resisted efforts by the political branches to more expansively adjudicate disputes, viewing separation of powers as "establishing high walls and clear distinctions" that limit the power of the political branches over the courts.[60] These "high walls" significantly limit the ability of the

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may not serve as the basis for impeachment"). Congress could attempt to alter the standard for impeachment and attempt to remove judges from office based on their judicial acts. *See, e.g.*, Ferejohn, *supra* note 51, at 358. John Ferejohn has suggested that "[t]he only real barriers to frequent resort to impeachment are ... political." *Id.* I am not so sure. If Congress attempted to impeach judges as a means of influencing judicial decision making, the Supreme Court could assert authority to review Congress's decision, notwithstanding *Nixon v. United States*, 506 U.S. 224, 237-38 (1993) (holding that courts cannot review the impeachment of a federal officer because that power is reserved for the Senate).

59. *See* Charles Gardner Geyh, *Adverse Publicity As a Means of Reducing Judicial Decision-Making Delay: Periodic Disclosure of Pending Motions, Bench Trials and Cases Under the Civil Justice Reform Act*, 41 CLEV. ST. L. REV. 511, 512-13, 533 (1993). For the view that the Civil Justice Reform Act unconstitutionally violates separation of powers, see Linda S. Mullenix, *Unconstitutional Rulemaking: The Civil Justice Reform Act and Separation of Powers*, 77 MINN. L. REV. 1283, 1295-98 (1993). The Civil Justice Reform Act—with its goal of increasing the speed with which the judiciary carries out its constitutional obligations—is somewhat different than the "prods and pleas" discussed by Benjamin Ewing and Douglas Kysar, which involve one branch engaging in activity to "signal to other institutional actors that a given problem demands attention and action." *See* Ewing & Kysar, *supra* note 38, at 354. Nonetheless, it involves the political branches implementing a novel tool to shape the behavior of the judiciary.

60. Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 239 (1995); *see also* Lujan v. Defenders of Wildlife, 504 U.S. 555, 562 (1992) (refusing to entertain lawsuit authorized by citizen suit provision on standing grounds); Judith Resnik, *The Federal Courts and Congress: Additional Sources, Alternative Texts, and Altered Aspirations*, 86 GEO. L.J. 2589, 2593 (1998) ("Article III judges have asserted the structural authority of Article III *against* congressional decisions authorizing decisionmaking by life-tenured judges."); *id.* at 2613-15 (discussing judicial rejection of jurisdiction conferring statutes). The judiciary engages in activity that appears intended to spur congressional action with more regularity, including concerted lobbying efforts on issues of particular import to judges. *See id.* at 2594-95, 2616-27; Tacha, *supra* note 42, at 282-83.

executive and legislative branches to ensure that the judiciary fully carries out its constitutional role. Commentators have identified a series of possible avenues by which the political branches can check courts.[61] As we shall see, these "checks," like their action-forcing counterparts, appear more illusory than substantial.

John Ferejohn and Larry Kramer eloquently argue that the political branches retain ample authority to check the judiciary. They identify several tools: Congress's ability to restrict federal jurisdiction, manipulate the organization of lower courts, enact procedural rules to govern judicial proceedings, control the courts' budgets—apart from judicial salary—and vest administrative agencies and Article I "courts" with authority to adjudicate certain types of disputes subject to deferential review in the federal courts.[62]

At first blush, this appears a formidable arsenal, and the historical record suggests its potency. Soon after the election of 1800, for example, the new Republican majority abolished the federal courts established by the Federalists the previous year, effectively removing all newly appointed judges from office.[63] In 1867, Congress used an alternative means of restraining the federal judiciary: eliminating part of its jurisdiction to entertain habeas corpus petitions.[64] And before 1870, Congress varied the size of the Supreme Court to allow for additional appointments.[65]

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61. *See infra* note 62 and accompanying text.

62. John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962, 975, 977, 988-91, 998 (2002); *see also* Ferejohn, *supra* note 51, at 382 (noting that the independence of the judiciary depends on the deference of the popular branches); Judith Resnik, *Judicial Independence and Article III: Too Little and Too Much*, 72 S. Cal. L. Rev. 657, 661, 668 (1999) (using the creation of non-Article III judges to illustrate how Congress and the judiciary rely on mutual good will to interact). As courts have become more powerful and required more resources, Congress's influence through the budget could arguably have increased as well. Judith Resnik has explained, "As the judiciary transforms itself ... it is ever more reliant on Congress—for staff, for surrogate and subsidiary judges, for its very ability to work, let alone to be a player in [governance]." *Id.* at 668.

63. *See, e.g.*, Cramton, *supra* note 50, at 1327. In *Stuart v. Laird*, 5 U.S. (1 Cranch) 299, 306 (1803), the Supreme Court upheld the constitutionality of Congress's abolition of the federal courts created in the Judiciary Act of 1801.

64. Habeas Corpus Act of 1867, ch. 28, 14 Stat. 385; *see also Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 514 (1868).

65. *See* Cramton, *supra* note 50, at 1316 n.12.

Times have changed. As a result of three developments, avenues by which the political branches could once check the judiciary prove largely ineffective today. First, with the ascendance of judicial supremacy, the courts themselves retain ultimate authority to interpret any legislation purporting to restrict their authority and pass upon its constitutionality.[66] Consider, for example, the Antiterrorism and Effective Death Penalty Act (AEDPA). Under the AEDPA, federal courts have only limited authority to vindicate constitutional rights in habeas proceedings arising out of state court.[67] Federal courts, however, have the last word on what the AEDPA means and can decide what limits it places on their authority.[68] More importantly, in *Felker v. Turpin*, the Supreme Court had the opportunity to pass on the constitutionality of the

66. This is not a purely theoretical consideration as the courts have actively read jurisdictional statutes to their own ends. Consider, for example, the Extension of Admiralty Jurisdiction Act of 1948, which extended admiralty jurisdiction to "all cases of damage or injury, to person or property, caused by a vessel on navigable water." Pub. L. No. 80-695, 62 Stat. 496 (codified as amended at 46 U.S.C. § 30101 (2006)). Notwithstanding the clear language of the statute, the Supreme Court interpreted the Act as requiring "that the wrong bear a significant relationship to traditional maritime activity" based on its apprehension of difficulties that arise from a pure locality test. Exec. Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249, 267-68 (1972); *see also* Scott Dodson, *The Complexity of Jurisdictional Clarity*, 97 VA. L. REV. 1, 12 (2011). Barry Friedman has described the development of jurisdiction as a dialectic between Congress and the courts, *see* Barry Friedman, *A Different Dialogue: The Supreme Court, Congress and Federal Jurisdiction*, 85 NW. U. L. REV. 1, 2-3 (1990), and demonstrated that in numerous areas, the courts have interpreted jurisdictional grants to serve their own purposes, rather than in accord with congressional intent, *see, e.g.*, *id.* at 24 ("Congress's intent has had little or nothing to do with the Court's decisions concerning what constitutes a federal question."); *see also id.* at 10-28 (surveying the law of federal jurisdiction and providing examples of dialogue between Congress and the courts).

67. Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, § 104, 110 Stat. 1214 (1996).

68. *See, e.g.*, Williams v. Taylor, 529 U.S. 362, 378-79 (2000) ("A construction of the AEDPA that would require the federal courts to cede [their judicial] authority to the courts of the States would be inconsistent with ... Article III of the Constitution.").

AEDPA.[69] The Court upheld the statute.[70] In other words, the AEDPA limits courts because they have consented to those limitations.[71] There likely would not have been any meaningful backlash if the Court had found the AEDPA unconstitutional, and the same would hold true for any other law Congress passes to shape or limit federal jurisdiction.[72]

The same could be said for many other limits that might be placed on federal courts. Since 1948, Congress has entrusted the courts

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69. 518 U.S. 651 (1996). Even the Suspension Clause of the Constitution, which would appear to provide the political branches with the ability to drastically limit judicial authority, at least for a time, *see* U.S. CONST. art. I, § 9, cl. 2, is arguably subject to judicial override. That is because the Due Process Clause of the Fifth Amendment, as a later enacted portion of the Constitution, may override any deprivation of due process, even if pursuant to an otherwise valid suspension of habeas corpus. *See* Martin H. Redish & Colleen McNamara, *Habeas Corpus, Due Process and the Suspension Clause: A Study in the Foundations of American Constitutionalism*, 96 VA. L. REV. 1361, 1365 (2010). The courts will have the final say on how to resolve this conflict.

70. *Felker*, 518 U.S. at 654. When the judiciary considers the constitutionality of federal statutes, the political branches may, of course, express their views in the judicial proceeding either as a party, intervenor, or amicus. *See, e.g.*, FED. R. CIV. P. 24(b)(2) (allowing government officials to seek permissive intervention in cases involving statutes or regulations related to their office); FED. R. APP. P. 29(a) (allowing the federal government to file an amicus brief in any appeal). The final word, however, rests with the courts.

71. Some scholars have argued that the AEDPA simply "push[ed] the courts in a direction in which they [had] already been moving for purposes of receiving political credit for that direction." Vicki C. Jackson, *Introduction: Congressional Control of Jurisdiction and the Future of the Federal Courts—Opposition, Agreement, and Hierarchy*, 86 GEO. L.J. 2445, 2451 (1998); *see also* Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 DUKE L.J. 1, 84-85 (1997). In other words, the courts may have permitted the AEDPA to stand because Congress was essentially doing what the courts wanted.

72. Academics disagree as to whether Article III's statement that the federal judicial power shall be vested "in such inferior Courts as the Congress may from time to time ordain and establish" provides Congress with plenary authority to regulate federal jurisdiction. *See* U.S. CONST. art. III, § 1; Friedman, *supra* note 66, at 3-10. *Compare* Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. Rev. 205, 206-07 (1985) (arguing that Article III constrains Congress's ability to reduce federal jurisdiction), *with* Redish, *supra* note 46, at 713 (contending that Congress has broad power to limit federal jurisdiction). The Supreme Court has historically permitted Congress to limit the jurisdiction of lower federal courts, but has appeared less willing to countenance alteration of its own jurisdiction. *See, e.g.*, Lockerty v. Phillips, 319 U.S. 182, 187 (1943); United States v. Klein, 80 U.S. (13 Wall.) 128, 145-47 (1871); Sheldon v. Sill, 49 U.S. (8 How.) 441, 448-49 (1850). *But see* Alex Glashausser, *A Return to Form for the Exceptions Clause*, 51 B.C. L. REV. 1383, 1388-90 (2010) (noting judicial submission to Congress's encroachment on the Court's appellate jurisdiction).

with setting their own procedural rules.[73] Even though Congress retains authority to disapprove a rule adopted by the courts, it is the courts themselves that have ultimate authority to interpret the rules that exist. For example, in *Ashcroft v. Iqbal*, the Supreme Court radically reinterpreted Rule 8 of the Federal Rules of Civil Procedure to impose a previously unknown pleading requirement.[74] Were Congress to repeal the Rules Enabling Act and rewrite the rules of procedure in a way disapproved of by the courts, it would not come as any surprise for the courts to achieve their ends through interpretation or constitutional review.

Litigants have similarly presented federal courts with repeated opportunities to interpret the statutes authorizing administrative adjudication and to determine whether they pass constitutional muster.[75] It seems possible, or even likely, that litigants—perhaps a judge turned plaintiff[76]—would similarly provide the judiciary with the opportunity to pass on the constitutionality of a congressional effort to substantially constrict the budget of the federal judiciary, depriving judges of judicial clerks, courtrooms, and staff.[77]

Second, popular opinion has shifted. The political branches may have successfully modified the number of Supreme Court justices prior to 1870, but even a president as popular as Franklin D. Roosevelt could not accomplish a similar goal in the twentieth century.[78] And Roosevelt's court-packing plan preceded *Cooper v.*

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73. *See* 28 U.S.C. § 2072 (2006) (originally enacted in 1948).

74. 556 U.S. 662, 677-78 (2009); *see also* Hanna v. Plumer, 380 U.S. 460, 473 (1965) (noting that courts measure a federal rule against the standards of the Constitution).

75. *See, e.g.*, Resnik, *supra* note 62, at 660.

76. *See, e.g.*, United States v. Will, 449 U.S. 200 (1980) (holding unconstitutional a statute eliminating already-provided cost of living adjustments for judicial salaries in a suit brought by district court judges).

77. *See, e.g.*, Richard A. Epstein, *The Independence of Judges: The Uses and Limitations of Public Choice Theory*, 1990 BYU L. REV. 827, 834. *But see* Redish, *supra* note 46, at 703 (opining that the Compensation Clause does not protect appropriations related to judicial support services); Eugenia Froedge Toma, *Congressional Influence and the Supreme Court: The Budget as a Signaling Device*, 20 J. LEGAL STUD. 131, 131-32, 136, 146 (1991) (finding that Congress uses the budget to signal its approval or disapproval of the Supreme Court's direction). Historically, Congress does not appear to have exercised budgetary control to influence the courts. *See* Richard S. Arnold, *Money, or the Relations of the Judicial Branch with the Other Two Branches, Legislative and Executive*, 40 ST. LOUIS U. L.J. 19, 21-22 (1996).

78. *See* Stephen B. Burbank, *The Architecture of Judicial Independence*, 72 S. CAL. L. REV. 315, 322-23 (1999). *See generally* William E. Leuchtenburg, *FDR's Court-Packing Plan: A Second Life, a Second Death*, 1985 DUKE L.J. 673 (discussing the political opposition to

Aaron by several decades. It is virtually unthinkable that a President or Congress could successfully manipulate the size of the Supreme Court today.[79]

The story of Newt Gingrich's bid for the 2012 Republican presidential nomination demonstrates the deep entrenchment of support for the judiciary. In October 2011, Gingrich released a position paper attacking the constitutional and historical foundation of judicial supremacy, leaning heavily on views of judicial limitation popular in the eighteenth and nineteenth centuries.[80] Drawing implicitly from popular constitutionalism,[81] the paper contends that "the executive and legislative branches can use their constitutional powers to take meaningful actions to check and balance any judgments rendered by the judicial branch that they believe to be unconstitutional,"[82] including by reinvigorating the impeachment power to allow removal of judges based on the substance of their decisions; requiring judges to justify controversial decisions in hearings before Congress; abolishing lower federal courts, and even individual judgeships, that interpret the Constitution differently than the political branches; and, in some circumstances, simply ignoring judicial decisions.[83]

Across the political spectrum, the response to Gingrich's proposals was swift and emphatic. Not surprisingly, liberal media outlets and politicians bridled at Gingrich's suggestions.[84] But so too did their

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Franklin D. Roosevelt's court-packing plan).

79. *See* Burbank, *supra* note 78, at 324.

80. NEWT GINGRICH, BRINGING THE COURTS BACK UNDER THE CONSTITUTION 2 (Position paper draft Oct. 7, 2011), *available at* http://www.newt.org/sites/newt.org/files/Courts.pdf.

81. *See* Eric Posner, *Newt and His Surprising Liberal Allies*, SLATE (Dec. 20, 2011, 11:23 AM), http://www.slate.com/articles/news_and_politics/jurisprudence/2011/12/newt_gingrich_and_the_supreme_court_the_liberal_scholars_who_support_his_critique_on_judicial_supremacy_.single.html.

82. GINGRICH, *supra* note 80, at 6.

83. *Id.* at 20-22.

84. Andrew Cohen, *Newt Gingrich and His 'Rock, Paper, Scissors' Constitution*, THE ATLANTIC (Dec. 18, 2011, 4:41 PM), http://www.theatlantic.com/politics/archive/2011/12/newt-gingrich-and-his-rock-paper-scissors-constitution/250152/; Dahlia Lithwick, *Courting Disaster*, SLATE (Dec. 19, 2011, 5:27 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2011/12/what_logic_could_possibly_be_behind_newt_gingrich_s_crazy_attacks_on_the_federal_courts_.html; Jamin Raskin, *Newt May Be Zany on the Courts, But Mitt Is Just as Dangerous*, HUFFINGTON POST (Dec. 19, 2011, 12:30 PM), http://www.huffingtonpost.com/jamie-raskin/newt-may-be-zany-on-the-c_b_1154686.html; *see also* Editorial, *Mr. Gingrich's Misreading of History*, WASH. POST, Dec. 20, 2011, at A20.

conservative counterparts.[85] Other candidates for the Republican nomination distanced themselves from Gingrich's views.[86] The National Review Online ran a series entitled "Gingrich's Awful Proposal to Abolish Judgeships."[87] Michael Mukasey, a former attorney general under President George W. Bush, described Gingrich's proposals as "dangerous, ridiculous, totally irresponsible, outrageous, [and] off-the-wall," sentiments echoed by Alberto Gonzales, another attorney general under Bush.[88]

Third, judges themselves do not appear to feel constrained by the machinations of the political branches.[89] Consider, for instance, the writings of Justices Antonin Scalia and Stephen Breyer, both of whom have published books about interpreting the Constitution, and have toured the country together debating their views.[90] That

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85. *See, e.g.*, *EXCLUSIVE: Former Bush Attorneys General Call Gingrich Position on Courts 'Dangerous,'* FOX NEWS (Dec. 15, 2011), http://www.foxnews.com/politics/2011/12/15/former-bush-attorneys-general-call-gingrich-position-on-courts-dangerous/ [hereinafter FOX NEWS]. That is not to say that other candidates for the 2012 Republican presidential nomination embraced the judiciary. A number of the candidates advanced their own more modest proposals to check judicial power. *See, e.g.*, George F. Will, Op-Ed., *How About a Debate of Substance?*, WASH. POST, Nov. 6, 2011, at A21.

86. Danny Yadron, *Perry, Romney Attack Gingrich Plan on Judges*, WALL ST. J. (Dec. 19, 2011, 11:49 PM), http://blogs.wsj.com/washwire/2011/12/19/perry-romney-attack-gingrich-plan-on-judges/.

87. Ed Whelan, *Gingrich's Awful Proposal to Abolish Judgeships—Part 1*, NAT'L REV. ONLINE (Dec. 16, 2011, 12:54 PM), http://www.nationalreview.com/bench-memos/286013/gingrich-s-awful-proposal-abolish-judgeships-part-1-ed-whelan; Matthew J. Franck, *Gingrich's Awful Proposal to Abolish Judgeships—Part 2*, NAT'L REV. ONLINE (Dec. 16, 2011, 3:09 PM), http://www.nationalreview.com/bench-memos/286040/gingrich-s-awful-proposal-abolish-judgeships-part-2-matthew-j-franck. Conservative commentator George Will also criticized Gingrich's plan. *See* Will, *supra* note 85.

88. *See* FOX NEWS, *supra* note 85. Former Attorney General Alberto Gonzales explained: "I cannot support and would not support efforts that would appear to be intimidation or retaliation against judges." *Id.*

89. *See* Pamela S. Karlan, *Two Concepts of Judicial Independence*, 72 S. CAL. L. REV. 535, 538 (1999).

90. Dahlia Lithwick, *The Steve and Nino Show,* SLATE (Oct. 6, 2011, 7:33 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2011/10/breyer_and_scalia_unintentionally_make_the_case_for_cameras_in_t.html. An essay by Justice Breyer on judicial independence does not even mention the sources of limitation identified by Ferejohn and Kramer. *See* Stephen G. Breyer, *Judicial Independence in the United States*, 40 ST. LOUIS U. L.J. 989 (1996). In a similar vein, Deanell Reece Tacha, while serving as a judge on the Tenth Circuit and as chairperson of the Committee on the Judicial Branch of the United States Judicial Conference, examined the relationship between judges and legislators in depth, calling for increased interbranch communication. *See* Tacha, *supra* note 42, at 295. Judge Tacha expressed a firm conviction that the independence of the judiciary is maintained

the Justices have taken their show on the road may suggest their concern about the view the public has of the judiciary. But they hardly seem concerned that Congress will restrict jurisdiction, reduce budgets, or pack courts.[91] The Justices do not agree on much, but they both articulate visions of judicial review that firmly place the courts at the top of the constitutional pecking order. Instead of acknowledging a checking role of the other branches, both suggest that the judiciary must self-regulate.

B. Evolving Judicial Power

We have a constitutional order that provides the executive and legislative branches with the power to check one another, but robustly protects the independence of the federal judiciary, leaving the courts as the only branch of the federal government without a source of external constraint.[92]

As a matter of history, this makes some sense. The English system in place before the Revolutionary War subjected judges to the overriding authority of the King.[93] The Declaration of Independence complained that the King had "made Judges dependent on his Will alone, for the Tenure of their Offices, and the Amount and Payment of their Salaries."[94] The Framers, therefore, had no experience with a powerful judiciary and instead focused their efforts

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through the Constitution's structure, *see id.* at 279, and nowhere did she discuss the techniques identified by Kramer and Ferejohn as constraining judicial independence.

91. *Cf.* Gordon Bermant & Russell R. Wheeler, *Federal Judges and the Judicial Branch: Their Independence and Accountability*, 46 MERCER L. REV. 835, 836 (1995) (considering evidence of judicial attitudes and concluding that "[f]ederal judges do not now generally believe that their decisional independence is directly threatened from within or from outside of the judicial branch").

92. *See* Epstein, *supra* note 77, at 854 ("Because splitting power across separate branches is the preferred strategy, the Constitution probably is unsound in conferring appointments of judges during good behavior, effectively for life.").

93. *See* Cramton, *supra* note 50, at 1315; Kermit L. Hall, *Judicial Independence and the Majoritarian Difficulty*, *in* THE JUDICIAL BRANCH, *supra* note 34, at 60, 68.

94. THE DECLARATION OF INDEPENDENCE para. 11 (U.S. 1776). In his influential *Commentaries on the Laws of England*, Lord William Blackstone similarly called for a judiciary insulated from other branches of government. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 259 (Oxford 1765). Even after the Revolutionary War, the early Republic experienced troubling encroachments on judicial independence. *See* Charles Gardner Geyh & Emily Field Van Tassel, *The Independence of the Judicial Branch in the New Republic*, 74 CHI.-KENT L. REV. 31, 35-38 (1998).

elsewhere: they were concerned that without external constraints, Congress could run roughshod over the states and prove toxic to liberty, and that the President could exercise many of the powers of the monarchy from which the colonies had only recently broken. The federal judiciary, on the other hand, was the "least dangerous branch" because it could assert "no influence over either the sword or the purse."[95]

Moreover, when the Constitution was adopted, the political branches needed no direct check on the judiciary because the courts exercised only limited power.[96] The dual innovations of judicial review and judicial supremacy, neither of which Article III addresses, threaten to upend the tripartite government in favor of judicial rule.[97] As we shall see, even as the courts increased their authority, they crafted internal checks to protect separation of powers.

In the earliest days after the ratification of the Constitution, the federal courts resolved private disputes without clear authority to test the constitutionality of congressional or executive action. In 1803, the Supreme Court famously asserted the power of judicial review, determining that aspects of the Judiciary Act of 1801 violated Article III of the Constitution.[98] The power of judicial review, however, did not encompass the authority to definitively determine the meaning of the Constitution. As the Court explained, "the framers of the constitution contemplated that instrument, as a rule for the government of courts, as well as of the legislature."[99] In other

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95. THE FEDERALIST NO. 78 (Alexander Hamilton). As Larry Kramer has noted, the founding era gave rise to "extraordinarily little discussion about how judicial review would work or what exactly it would mean in practice. Realistically, though, how could there be? Judicial review was a novel doctrine, outside the Framers' actual experience." Larry D. Kramer, *But When Exactly Was Judicially-Enforced Federalism "Born" in the First Place?*, 22 HARV. J.L. & PUB. POL'Y 123, 125 (1998); *see also* Geyh & Van Tassel, *supra* note 94, at 48 (noting that the Convention's failure to protect the judiciary's structural independence was the result of their lack of experience and time).

96. *See, e.g.*, LARRY D. KRAMER, THE PEOPLE THEMSELVES 77-83, 91-92 (2004); Burbank, *supra* note 78, at 323-24.

97. To remedy that problem, some have argued that we abandon judicial review and judicial supremacy. *See, e.g.*, KRAMER, *supra* note 96; MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 163-65 (1999); Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1348, 1353 (2006).

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

99. *Id.* at 179-80 (emphasis omitted).

words, the Court exercised authority coordinate with the other branches to interpret the Constitution. As Larry Kramer has argued, *Marbury v. Madison* left intact the ability of Congress and the President to also interpret the Constitution.[100] The decision of a court would bind the parties before it as to the facts at issue. This would leave Congress and the President free to adopt their own, perhaps conflicting, interpretations of the Constitution. Those conflicts could be resolved only by "the people themselves," who constitute the only source of ultimate governmental authority.[101]

Even when a controversy raised the constitutionality of legislation, the early Supreme Court exhibited what would today be an unthinkable degree of deference to Congress and the President.[102] Justices explained that they had authority to declare legislation void only when it was plainly contrary to the Constitution.[103] In *Hylton v. United States*, for example, Justice Chase explained that "[t]he deliberate decision of the National Legislature ... would determine me, if the case was doubtful, to receive the construction of the [Constitution by the] Legislature."[104]

Over time, deference gave way to suspicion, and by the time of *Lochner v. New York*, the Court gave little weight to the views of

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100. *See* KRAMER, *supra* note 96, at 125-27.

101. *Id.* at 207-13. Whereas extensive history suggests that the Framers, or at least many of them, did not view the courts as exercising supreme authority to interpret the Constitution, evidence indicates that the Framers intended the courts to referee questions about the separation of powers. For example, Federalist 78 explains that courts would function to keep the other branches "within the limits assigned to their authority." THE FEDERALIST NO. 78 (Alexander Hamilton). Thus concern about the historical precedent for judicial supremacy when it comes to constitutional interpretation may have less force in the context of separation of powers decisions.

102. These cases remained firmly rooted in private law tradition. In 1893, James B. Thayer explained that Congress ordinarily had the final word with respect to the constitutionality of legislation "except as some individual, among the innumerable chances of his private affairs, found it for his interest to raise a judicial question about it." James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 136 (1893).

103. *See* Sinking-Fund Cases, 99 U.S. 700, 730-31 (1878); Cooper v. Telfair, 4 U.S. (4 Dall.) 14, 18 (1800) (Washington, J.); *id.* at 19 (Paterson, J.); Calder v. Bull, 3 U.S. (3 Dall.) 386, 395 (1798) (Chase, J.); Hylton v. United States, 3 U.S. (3 Dall.) 171, 175 (1796) (Chase, J.); *see also* BICKEL, *supra* note 36, at 35-36; KRAMER, *supra* note 96, at 103; Thayer, *supra* note 102, at 144.

104. 3 U.S. (3 Dall.) 171, 173 (1796) (emphasis omitted); *see also* DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 1789-1888, at 55-58 (1985); KRAMER, *supra* note 96, at 103 & n.71 (noting that the Court ignored procedural issues in order to rule in favor of the legislature).

Congress and the President in considering questions about the Constitution.[105] Even during that period, however, the courts had yet to establish with certainty their paramount role in interpreting the Constitution.[106] From the nullifiers in the 1830s to the Republicans in the 1870s to southern segregationists in the 1950s, the theory that the courts had no more than a coordinate ability to interpret the Constitution, and could not bind the other branches of the federal government or the state government, remained vibrant.[107]

Not until the landmark *Cooper v. Aaron* decision in 1958 did the Supreme Court assert that its interpretation of the Constitution unequivocally bound all others. Referring to *Marbury*, the Court asserted that "decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution" and, as a result, the Supreme Court's constitutional interpretation has "binding effect on the States."[108] *Aaron* engaged in historical revision because the Court had never before declared its interpretation of the Constitution universally binding.[109] Nevertheless, *Aaron* cemented the Court's position as the ultimate constitutional authority and that role has remained stable ever since.[110]

Federal courts have also dramatically increased their capacity to act. In the Founding Era, Supreme Court justices rode circuit, presiding over federal trials throughout the fledgling nation. By 1915, the federal judiciary had expanded only slightly to include 120 judges scattered about the United States.[111] During the remainder

105. Although the federal judiciary held only two federal statutes unconstitutional during its first century, that number has climbed to over 150 today. *See* Keith E. Whittington, *Judicial Review and Interpretation: Have the Courts Become Sovereign When Interpreting the Constitution?*, *in* THE JUDICIAL BRANCH, *supra* note 34, at 116, 126.

106. *See* KRAMER, *supra* note 96, at 213-14.

107. *See id.* at 179-80. The nullification movement argued that the Constitution was in essence a treaty between sovereign states and that, as a result, each state had independent authority to interpret it irrespective of any pronouncement by federal courts. *Id.*

108. Cooper v. Aaron, 358 U.S. 1, 18 (1958).

109. *See* KRAMER, *supra* note 96, at 221.

110. In an era of judicial supremacy, Hamilton's reassurance that the courts are the least dangerous branch because they lack power over the sword or purse sounds hollow. The federal courts must rely on the machinery of the executive branch to carry out judgments, but if the courts are acknowledged to have the final word on constitutional meaning, then the executive branch would seem to have little, if any, discretion to disobey.

111. Resnik, *supra* note 62, at 662.

of the twentieth century, however, the number of federal judges exploded. By the end of the century, there were 2,000 judges, overseeing over 30,000 staff.[112]

At that point, the federal courts possessed the authority and capacity to shape political and social life through binding interpretations of the Constitution, federal statutes, and the common law. And the Constitution provided few clear mechanisms by which the political branches could check the power of the courts. Although they retained the power to change the law, this has proven to be a flimsy check on judicial power.

To the extent the courts resolve cases arising from statutes, regulations, or the common law, the other branches retain an important power: they can always change the law.[113] In this way, aspects of the judicial power are naturally subordinate to the legislative and executive branches.[114] If, for example, a federal court issued an advisory opinion about the requirements of public nuisance law, that decision would be subject to Congressional override. Although Congress and the President may not have constitutional means of checking such a usurpation of authority by the courts, they may be able to achieve similar results by changing the law through legislation.

Judicial decisions interpreting statutes and the common law prove surprisingly resilient given the authority of the political branches.[115] Congress has difficulty changing the law, particularly when powerful interest groups take opposing positions, which is often the case in the wake of a Supreme Court decision.[116] Even

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112. *Id.* at 663.

113. *See, e.g.*, William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 334 (1991).

114. Judges may make the common law, *see* Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 6 (Amy Gutmann ed., 1997), but legislatures can supplant the common law by statute. Canons of statutory construction limit the legislature's power to some extent because "[s]tatutes which invade the common law ... are to be read with a presumption favoring the retention of long-established and familiar principles." Pasquantino v. United States, 544 U.S. 349, 359 (2005) (alteration in original) (quoting United States v. Texas, 507 U.S. 529, 534 (1993)).

115. *See* Eskridge, *supra* note 113, at 377.

116. *Id.* Eskridge's model suggests that in many circumstances the Court has the power to "read its own raw preferences into statutes without congressional override." *Id.* at 416. Moreover, Eskridge overlooks the ability of the judiciary to interpret legislation overriding

when a statute purports to override a statutory or common law decision, the courts then have the opportunity to interpret the new statute and can also invoke constitutional provisions to achieve their desired result.[117]

Although the constitutional pronouncements of the federal courts theoretically face a similar check through the amendment process, in reality, Article V imposes such high hurdles to constitutional amendment that it places this approach beyond practical reality.[118]

C. Internal Checks on Judicial Authority

Because courts lack meaningful external checks on their authority, jurisdictional procedure has developed to provide a mechanism by which courts can prevent themselves from overstepping their constitutional authority. Through jurisdictional procedure, courts police themselves, serving both theoretical and pragmatic goals.

From a theoretical perspective, the courts have found themselves in the position most feared by the Framers: they exercise authority without obvious constitutional constraint.[119] Although the Constitution does not provide a meaningful external constraint on judicial power, the courts have internalized the Framers' concerns and developed rules to serve as a second-best approximation of checks and balances.[120] These internal checks look quite different from the

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prior judicial decisions.

117. The story of congressional abrogation of state sovereign immunity in the context of disability rights provides an example of the Supreme Court repeatedly frustrating the purpose of legislation, *see, e.g.*, Eskridge, *supra* note 113, at 409-10, as does the Court's repeated narrowing of Title VII despite repeated congressional overrides. *See, e.g.*, Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 618-19 (2007), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5; Price Waterhouse v. Hopkins, 490 U.S. 228, 228, 241 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071; Geduldig v. Aiello, 417 U.S. 484, 497 (1974), *superseded by statute* Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076 (1978). Moreover, constitutional principles prevent Congress from overruling the courts with respect to a case already decided. *See* Karlan, *supra* note 89, at 544.

118. *See* Whittington, *supra* note 105, at 132-33. Amendments have reversed constitutional decisions of the Supreme Court only four times. *See* Toma, *supra* note 77, at 131.

119. Wyeth v. Levine, 555 U.S. 555, 584 (2009); Boumediene v. Bush, 553 U.S. 723, 742-43 (2008); THE FEDERALIST NO. 47 (James Madison); *see also* Loving v. United States, 517 U.S. 748, 756 (1996); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952).

120. *Cf.* R.G. Lipsey & R.K. Lancaster, *The General Theory of Second Best*, 24 REV. ECON. STUD. 11, 11 (1956) (discussing the economic theory of the second best). In a similar vein, Neal

system of interbranch competition that restrains the other branches.[121] Jurisdictional procedure is self-imposed, but nonetheless, serves the basic purpose of keeping the judiciary within constitutional bounds.[122]

Jurisdictional procedure incorporates robust limitations on judicial authority because courts have recognized the importance of adhering to separation of powers principles. To protect fundamental ordering of the federal government, courts correctly do not rely on the parties to raise jurisdictional issues.[123] The stakes are high and the incentives faced by parties may differ dramatically from the values reflected in the Constitution. Indeed, one can easily conceive of litigants that would happily turn to the courts to definitively resolve questions of public policy rather than relying on the tumult of the political process. Even when rigid enforcement of separation of powers would instrumentally facilitate the interests of individual parties, these issues are simply too important to the legitimacy of the federal government to trust parties to identify and fully litigate jurisdictional issues.[124]

Policing jurisdiction also fulfills a more pragmatic concern of the federal courts because it helps maintain legitimacy.[125] Courts have

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Kumar Katyal has proposed that the executive branch develop internal checks on its authority. *See* Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2316-18 (2006). Because Congress no longer functions as a check against the President, Katyal argues that creating internal checks serves as a second-best option. *Id.*

121. Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1155-56 (1992).

122. Founding fundamental aspects of government on self-restraint may seem like flimsy stock from which to build a constitutional order, but there are aspects of the judiciary that lend themselves to the endeavor. Of all of the branches, judges are the most professionalized, and the practice of judging incorporates long-lived institutional customs that remind judges of their role in our separation of powers. *See* BICKEL, *supra* note 36, at 25-26. So perhaps the enterprise is less desperate than it would first appear.

123. *See infra* note 130 and accompanying text.

124. When it comes to separation of powers, those with the most at stake—the President and Congress—are not necessarily participants in the case and may not even know of its existence. Numerous legal doctrines—third-party standing, collateral estoppel, and class certification criteria, for example—recognize the pitfall of adjudicating the rights of those outside the four corners of a case.

125. The Supreme Court has acknowledged that self-restraint relates to the legitimacy of the courts. *See* Duke Power Co. v. Carolina Envtl. Study Grp., Inc., 438 U.S. 59, 103 (1978) (Stevens, J., concurring in judgment).

few means of directly enforcing judgments, and so they rely on the respect of the other branches and the public. The Constitution may provide no meaningful check against judicial authority, but Congress and the President could resort to extraconstitutional mechanisms should they lose faith in courts.[126] Indeed, President Abraham Lincoln engaged in just such a course of conduct when he issued orders to the military "suspending" the writ of habeas corpus.[127] Based on these orders, the military refused to comply with judicial orders requiring the production of prisoners.[128] Some have suggested that the decision in *Bush v. Gore* could have led to similar extraconstitutional resistance if former Vice President Gore had not withdrawn gracefully from the field.[129] It is a testament to the effectiveness of jurisdictional procedure that the American public continues to hold the federal courts in high regard, especially when compared to the other branches, and that the courts have faced few other serious challenges to their authority.

Understanding that jurisdictional procedure creates a substitute for checks and balances theoretically justifies the duty of jurisdictional inquiry's significant departure from the ordinary rules of our adversarial system. It also helps explain its history. Jurisdictional procedure developed in three stages—a common law era, a statutory era, and a constitutional era—which correspond with the evolving power of the federal courts in important ways.

The first period lasted for roughly the first one hundred years of the federal courts. During this common law era, courts approached jurisdiction formalistically. The courts recognized an obligation to

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126. The writings of James Madison and Alexander Hamilton suggest that they viewed the judiciary as weak precisely because the other branches could resort to extraconstitutional means to undermine the judiciary. For example, James Madison wrote that "a State which would violate the Legislative rights of the Union, would not be very ready to obey a Judicial decree in support of them," similarly suggesting nonconstitutional means to undermine judicial authority. *See* Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), *in* 10 THE PAPERS OF JAMES MADISON 205, 211 (Robert A. Rutland et al. eds., 1977).

127. *See* David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941, 999 (2008).

128. *Id.*

129. ACKERMAN, *supra* note 41, at 30. Cass Sunstein suggests that the "largest lesson of *Bush v. Gore* lies in its utter failure to damage the Court as an institution." Cass R. Sunstein, *Judges and Democracy: The Changing Role of the United States Supreme Court*, *in* THE JUDICIAL BRANCH, *supra* note 34, at 32, 55.

independently evaluate jurisdiction,[130] but this reflected a view commonly held by state courts and preconstitutional common law courts that a pleading must properly invoke jurisdiction to empower a court to decide a case.[131] The theory bore no relationship to separation of powers, federalism, or the Constitution, but rather reflected prevailing notions about the nature of courts.[132] Perhaps consequently, courts' approach to jurisdiction was more formal than effective.

During the common law era, courts considered their jurisdiction simply by reviewing the complaint. So long as the complaint alleged adequate facts to trigger federal jurisdiction, the courts viewed themselves as possessing power to enter judgment, even if it turned out that the facts in the complaint were false.[133] In other words, the courts did not apply an internal constraint on their authority, but rather, assured themselves that the parties complied with a pleading requirement. The factual underpinnings of jurisdiction only came before the courts if the defendant filed a plea for abatement prior to answering and disputing the allegations in the complaint.[134] If the defendant failed to file such a plea, the defendant was deemed to waive any objection to the jurisdictional facts, even if they were disproven at trial.[135] Indeed, the courts erected substantial barriers to contesting jurisdictional facts. If defendants chose to file pleas for abatement, and the courts ruled against them, then the defendants were deemed to have conceded their liability on the merits.[136]

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130. *See* Capron v. Van Noorden, 6 U.S. (2 Cranch) 126, 127 (1804); Turner v. Bank of N. Am., 4 U.S. (4 Dall.) 8, 11 (1799).

131. *See, e.g.*, Stephens v. Bales of Cotton, 22 F. Cas. 1278, 1279 (D.S.C. 1800) (No. 13366); Respublica v. Cobbet, 3 U.S. (3 Dall.) 467, 476 (Pa. 1798); Kirkbride v. Durden, 1 U.S. (1 Dall.) 288, 289-91 (Pa. 1788). *See generally* Dan B. Dobbs, *The Decline of Jurisdiction by Consent*, 40 N.C. L. REV. 49, 49 (1961).

132. *See* Mansfield, Coldwater & Lake Mich. Ry. Co. v. Swan, 111 U.S. 379, 382 (1884); *Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 514 (1868).

133. For a discussion of the early practice of viewing many jurisdictional issues as subject to waiver, see Michael G. Collins, *Jurisdictional Exceptionalism*, 93 VA. L. REV. 1829, 1838-40 (2007); Dodson, *supra* note 5, at 1452-53.

134. *See* Steigleder v. McQuesten, 198 U.S. 141, 142 (1905).

135. Collins, *supra* note 133, at 1839-40; *see also* DeSobry v. Nicholson, 70 U.S. (3 Wall.) 420, 423 (1865).

136. Collins, *supra* note 133, at 1841.

This was a period dominated by private law. Courts considered the personal affairs of litigants and only occasionally touched upon the acts of other branches of the federal government.[137] Courts rarely dealt with litigation in which private parties sought to vindicate the rights of the public against the government or other private actors. As a result, the day-to-day activities of the federal courts bore little relationship to separation of powers. Courts largely acted in the same way as the common law courts of England, with little opportunity to consider far-reaching questions of public policy.[138] They did not need to police jurisdiction with vigor because they were rarely asked to reach beyond the obvious contours of the federal judicial power.[139]

The statutory era commenced with the passage of the Judiciary Act of 1875 in the wake of the Civil War. The Act significantly expanded federal jurisdiction and granted litigants a broad right to remove cases to a federal forum.[140] Predictably, this resulted in a significant increase in the number of cases heard in federal court.[141] In response, Congress expanded the federal court system in 1891, creating the familiar appellate hierarchy that exists today through the Circuit Court of Appeals Act.[142]

The 1875 Judiciary Act not only thrust the federal courts into an increasing number of controversies, but it also significantly modified jurisdictional procedure, requiring courts to consider throughout a proceeding whether a case "really and substantially involve[s] a dispute or controversy properly within [its] jurisdiction."[143] In 1898, the Supreme Court interpreted that language to require courts to assess jurisdiction based on "the facts as they really exist."[144]

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137. *See* Ann Stuart Anderson, *A 1787 Perspective on Separation of Powers*, *in* SEPARATION OF POWERS—DOES IT STILL WORK? 138, 154 (Robert A. Goldwin & Art Kaufman eds., 1986).

138. *See id.*

139. When courts were asked to act outside of their authority, they responded swiftly and firmly. For example, when President Washington requested an advisory opinion from the Chief Justice of the Supreme Court, he refused. *See id.* at 146. But those few occasions did not require a systematic doctrine to preserve separation of powers.

140. *See* Barry Friedman & Erin F. Delaney, *Becoming Supreme: The Federal Foundation of Judicial Supremacy*, 111 COLUM. L. REV. 1137, 1162 (2011).

141. *Id.* at 1164.

142. Circuit Court of Appeals Act of 1891, ch. 517, 26 Stat. 826, 826.

143. Judiciary Act of 1875, ch. 137, § 5, 18 Stat. 470, 472.

144. Wetmore v. Rymer, 169 U.S. 115, 120 (1898).

The statutory era was dominated by corporations seeking to protect their private interests in federal courts.[145] Often, they challenged state and federal statutes on constitutional grounds.[146] The increasing public law docket of the federal courts triggered parallel transformations in the approach to jurisdiction. Prior to the 1920s, jurisdictional determinations remained confined to questions about the amount in controversy, the citizenship of parties, and whether a case presented a federal question. Each of those questions turn on statutory criteria provided by Congress to govern federal jurisdiction.

But then, seismically, jurisdiction took on constitutional dimensions as the Supreme Court developed doctrines like standing, ripeness, and mootness, which impose limitations on federal jurisdiction under Article III of the Constitution.[147] In its 1921 decision in *Fairchild v. Hughes*, the Supreme Court dismissed a suit challenging the constitutionality of the Nineteenth Amendment explaining that the case "[i]n form ... is a bill in equity; but it is not a case within the meaning of § 2 of Article 3 of the Constitution."[148] The following year, the *Massachusetts v. Mellon* Court explicitly linked limitations derived from Article III to separation of powers, explaining:

> We have no power *per se* to review and annul acts of Congress on the ground that they are unconstitutional.... To do so would be not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and co-equal department, an authority which plainly we do not possess.[149]

Jurisdictional procedure also took on constitutional dimensions. In the 1934 decision in *Mitchell v. Maurer*, the Supreme Court

145. *See* Friedman & Delaney, *supra* note 140, at 1162-63.

146. *See, e.g.*, Adair v. United States, 208 U.S. 161, 162 (1908); Lochner v. New York, 198 U.S. 45, 49 (1905); Allgeyer v. Louisiana, 165 U.S. 578, 579-80 (1897); *see also* Friedman & Delaney, *supra* note 140, at 1167-68 (discussing liberty of contract jurisprudence).

147. *See, e.g.*, Daniel E. Ho & Erica L. Ross, *Did Liberal Justices Invent the Standing Doctrine? An Empirical Study of the Evolution of Standing*, 62 STAN. L. REV. 591, 594-96 (2010); Sunstein, *supra* note 30, at 165, 168-69; Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1432-34 (1988).

148. 258 U.S. 126, 129 (1922).

149. 262 U.S. 447, 488-89 (1923).

articulated the procedural rule that remains true today: "Unlike an objection to venue, lack of federal jurisdiction cannot be waived or be overcome by an agreement of the parties. An appellate federal court must satisfy itself not only of its own jurisdiction, but also of that of the lower courts in a cause under review."[150] In so stating the rule, the Court altogether ignored the Judiciary Act of 1875 and the precedent that interpreted it, relying instead on a case from the common law era that had required only a formalistic review of the pleadings.[151]

So began the constitutional era of jurisdictional procedure.[152] During this period, which continues today, litigants often ask federal courts to consider the constitutionality of statutes and the legality or wisdom of executive branch activity, and the courts freely entertain these claims. The Supreme Court struck down only two statutes between ratification and the civil war. Between 1990 and 2000, however, it struck down thirty federal laws.[153] Litigants also frequently attempt to enforce statutes intended to protect public rights against alleged violators. The era of public interest law has required a robust procedural mechanism to keep the courts in their constitutionally assigned place.[154]

Gone are the days when a court would merely look at the face of the complaint and decide that the plaintiff properly invoked jurisdiction.[155] Courts and commentators alike assume that Article III

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150. 293 U.S. 237, 244 (1934).

151. *Id.* (citing Mansfield, Coldwater & Lake Mich. Ry. Co. v. Swan, 111 U.S. 379, 382 (1884)). While the Supreme Court decided *Mansfield* after passage of the 1875 Judiciary Act, the case was commenced in 1874. *See Mansfield*, 111 U.S. at 380.

152. *See, e.g.*, Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 (1982); Juidice v. Vail, 430 U.S. 327, 331 (1977); North Carolina v. Rice, 404 U.S. 244, 245-46 (1971). The constitutionalization of jurisdictional procedure occurred relatively slowly. As late as 1969, the American Law Institute considered only briefly the constitutional dimensions of jurisdiction when it proposed new rules that would prevent parties from raising questions of subject matter jurisdiction on appeal. *See* THE AM. LAW INST., STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 368-69, 373-74 (1969); *see also* Dan B. Dobbs, *Beyond Bootstrap: Foreclosing the Issue of Subject-Matter Jurisdiction Before Final Judgment*, 51 MINN. L. REV. 491, 520 (1964).

153. *See* KRAMER, *supra* note 96, at 213.

154. *See id.* at 131, 135 (advocating minimal court involvement in federalism). There is no doubt that the increased role of the courts has led to development and expansion of substantive jurisdictional doctrine. *See* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1302-04 (1976); Ho & Ross, *supra* note 147, at 594.

155. During this same period, courts began to view justiciability doctrines as requiring,

mandates substantive limitations on the jurisdiction of federal courts, although they frequently disagree about what those limitations should be.[156] "Although raised by neither of the parties," courts are now "obliged to examine the standing of appellees, as a matter of the case-or-controversy requirement associated with Art[icle] III."[157]

As we have seen, jurisdictional procedure evolved in lockstep with the increasing scope of authority of the federal courts. As judicial supremacy became part of the fabric of our federal government, placing the courts beyond any meaningful external check—either explicit or implicit—the courts developed the duty of jurisdictional inquiry to serve as an internal apparatus preserving separation of powers and limiting federal court activity to the domain assigned by the Constitution.[158]

II. THE THEORETICAL UNDERPINNINGS OF JURISDICTIONAL PROCEDURE

Appreciating the radical nature of jurisdictional procedure requires an examination of the bedrock adversarial principles that undergird the United States' legal system. Jurisdictional procedure blends two different theories of legal process: adversarial and inquisitorial theory.[159] It is inquisitorial in that the duty of jurisdictional inquiry places courts—rather than parties—in control of litigation, requiring termination of a case for lack of jurisdiction on the court's own motion regardless of whether the parties have ever raised or even addressed a jurisdictional issue. Yet jurisdictional procedure often includes significant adversarial features because

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rather than authorizing, dismissal. *See* Matthew I. Hall, *Asymmetrical Jurisdiction*, 58 UCLA L. Rev. 1257, 1269 (2011).

156. *See, e.g.*, Allen v. Wright, 468 U.S. 737, 750 (1984) (quoting Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 471-76 (1982)).

157. *Juidice*, 430 U.S. at 331.

158. It is, of course, impossible to demonstrate that courts' increased power caused shifts in their approach to jurisdiction. Rather, I claim only that the two should be viewed as aspects of the same evolution of federal judicial power.

159. Francesco Parisi, *Rent-Seeking Through Litigation: Adversarial and Inquisitorial Systems Compared*, 22 INT'L REV. L. & ECON. 193, 207 (2002); *see also supra* notes 16-22 and accompanying text.

courts view parties as obliged to present relevant facts, even if no jurisdictional issue has yet been raised.[160]

The labels inquisitorial and adversarial evoke a rich history of legal theory developed in both common law and civil law countries. Section A provides a sketch of those theories, emphasizing the aspects of adversarialism and inquisitorialism most relevant to jurisdictional adjudication.[161] Section B explains that despite the common description of adversarialism and inquisitorialism as antithetical to one another, no legal system perfectly embodies either. Instead, all systems borrow rules and principles from both.[162] Nonetheless, the inquisitorialism woven throughout the American legal system remains largely unacknowledged. A collective insistence that our system is adversarial, accompanied by denial of its inquisitorial features, obscures fruitful avenues for legal reform.

A. Adversarial Theory and Inquisitorial Theory

Two procedural theories form the basis of modern legal systems.[163] Those theories—inquisitorialism and adversarialism—arose out of the two predominant western legal traditions, civil law and common law: with civil law jurisdictions that dominate Europe and South America considered fundamentally inquisitorial, and common law jurisdictions that dominate England and its former colonies, including the United States, considered fundamentally adversarial.[164]

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160. *See supra* note 22 and accompanying text.

161. This discussion is couched in terms of theory—rather than discussing the adversarial and inquisitorial "systems"—to emphasize that these sets of norms are philosophical in nature and not always, or even ever, applied whole-cloth.

162. *See* J.A. Jolowicz, *Adversarial and Inquisitorial Models of Civil Procedure*, 52 INT'L & COMP. L.Q. 281, 281 (2003).

163. Each theory arose from the ashes of distinctly religious mechanisms of European dispute resolution such as trial by combat or ordeal. *See* STEPHAN LANDSMAN, THE ADVERSARY SYSTEM: A DESCRIPTION AND DEFENSE 8-9 (1984); Ellen E. Sward, *Values, Ideology, and the Evolution of the Adversary System*, 64 IND. L.J. 301, 320-21 (1989). Those mechanisms disappeared in 1215, when the Fourth Lateran Council prohibited churches from officiating over trial by ordeals, sapping them of any legitimacy. LANDSMAN, *supra*, at 10. Thereafter, the jury system arose in England, developing into today's common law tradition, and continental Europe developed the Roman-canon system that evolved into the civil law tradition. *See id.* at 10-12.

164. *See supra* notes 17-20 and accompanying text.

Broadly stated, both theories share the same goal: to uncover the truth underlying a dispute and reach a fair and just outcome based on the law. But the two theories approach that task very differently. Inquisitorial theory charges judges with uncovering the facts through impartial investigation and reaching the correct decision based on those facts. Professional judges are deemed to know best what information to compile and law to consider and, as a result, inquisitorialism has been described as embodying a communitarian or paternalistic view that advantages truth over the autonomy of the individual.[165] Inquisitorialism is also viewed as valuing efficiency over procedure because it does not provide robust procedural rights that parties can use to obstruct courts' truth-divining function.[166]

Adversarialism also concerns itself with reaching the correct result, but delegates to opposing parties responsibility for ferreting out the relevant law and facts, on the presumption that the parties themselves are best situated to ascertain both. Adversarial theory also posits that permitting parties to control the contours of their cases serves a legitimizing function, creating an impression of fairness that may lead to societal acceptance of court judgments.[167] Judges concern themselves with truth only in so far as it arises from the presentation of opposing viewpoints.[168] As a former Chief Judge of the High Court of Australia put it, "Within the adversarial system ... the function of the courts is not to pursue the truth but to decide on the cases presented by the parties."[169]

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165. *See* Felicity Nagorcka et al., *Stranded Between Partisanship and the Truth? A Comparative Analysis of Legal Ethics in the Adversarial and Inquisitorial Systems of Justice*, 29 MELB. U. L. REV. 448, 452 n.14 (2005); Sward, *supra* note 163, at 315.

166. *See* Parisi, *supra* note 159, at 206-07.

167. *See* STEPHAN LANDSMAN, READINGS ON ADVERSARIAL JUSTICE: THE AMERICAN APPROACH TO ADJUDICATION 33-34 (1988); George C. Christie, *Objectivity in the Law*, 78 YALE L.J. 1311, 1329 (1969).

168. *See* Nagorcka et al., *supra* note 165, at 462.

169. The Honorable Sir Anthony Mason, The Future of Adversarial Justice 4 (Aug. 7, 1999) (transcript available at http://www.docstoc.com/docs/2459633/THE-FUTURE-OF); *see also* Jolowicz, *supra* note 162, at 284 (quoting Lord Denning). Some proponents of adversarial theory contend that contested hearings are the best way of arriving at the truth. *See, e.g.*, WIGMORE, *supra* note 18, § 1395, at 94; Lon Fuller, *The Adversary System*, *in* TALKS ON AMERICAN LAW 34, 40 (Harold J. Berman ed., 1971). Others disagree. For example, John Jolowicz suggests that "cross-examination can discover and reveal untruth ... [but] that it can actually reveal the hitherto unrevealed truth is much more doubtful." Jolowicz, *supra* note 162, at 283; *see also* John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI.

These broad differences in philosophy manifest in contrasting approaches to the relative roles of the judge and parties. Adversarial theory posits active and engaged parties that present their cases to a passive judge.[170] Adversarial judges do not investigate facts, they do not consider legal principles apart from those presented by the parties, and they do not involve themselves in cases until the moment at which they announce judgment.[171] Instead, parties have exclusive purview to frame their case. And that framing occurs almost entirely within a hearing in which the parties have the opportunity to muster the law and facts and to rebut the presentation of their opponents.[172] As the Supreme Court has explained it: "What makes a system adversarial rather than inquisitorial is ... the presence of a judge who does not (as an inquisitor does) conduct the factual and legal investigation himself, but instead decides on the basis of facts and arguments pro and con adduced by the parties."[173] As a result, adversarial theory posits appellate review limited to the record and legal issues raised in the lower court. When a lower court renders a decision based on incomplete facts or in ignorance of relevant law, the fault is that of the parties, not the court.[174]

Inquisitorial theory, in contrast, places the judge, rather than the parties, in the dominant role.[175] The judge is charged with investigating the facts relevant to a dispute and identifying and researching the legal issues.[176] This generally does not occur during a single hearing, but rather over the course of a case the court seeks out evidence as its relevance becomes apparent.[177] When the judge is satisfied that she has all the evidence she needs and has fully apprised herself of the law, she renders a decision. The parties remain

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L. REV. 823, 833 (1985). *But see* Ronald J. Allen et al., *The German Advantage in Civil Procedure: A Plea for More Details and Fewer Generalities in Comparative Scholarship*, 82 NW. U. L. REV. 705, 707 (1988) (arguing that Langbein fails to adequately support alleged benefits of German civil procedure); *see also* Ronald J. Allen, *Idealization and Caricature in Comparative Scholarship*, 82 NW. U. L. REV. 785 (1988) (same argument).

170. *See* Jolowicz, *supra* note 162, at 289.

171. *See* Parisi, *supra* note 159, at 195-96.

172. *See id.* at 194.

173. McNeil v. Wisconsin, 501 U.S. 171, 181 n.2 (1991).

174. *See* Coleman v. Thompson, 501 U.S. 722, 753 (1991).

175. Parisi, *supra* note 159, at 193-94.

176. *Id.*

177. *See id.*; *see also* Langbein, *supra* note 169, at 826-28 (discussing German civil procedure).

passive, supplying the court with information on demand, but otherwise awaiting judgment.[178] Because the court has the duty to gather facts and identify the relevant law, any error in a decision is attributable to the court.[179] As a result, appellate bodies may consider whatever additional facts or law they deem necessary.[180]

Numerous other institutional differences demark the boundaries between the two approaches. Adversarial judges rely largely on oral testimony; inquisitorial judges rely largely on written records.[181] In adversarial theory, complex codes of evidence guide what information may be considered; in inquisitorial theory, everything may be considered and the judges determine for themselves what weight to place on any particular evidence.[182] And, in adversarial theory, parties are represented by openly partisan counsel versed in the rules of law and charged with placing their client's interests in the best light possible.[183] Inquisitorial theory does not require counsel at all.[184]

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178. *See, e.g.*, Peter J. van Koppen, *Miscarriages of Justice in Inquisitorial and Accusatorial Legal Systems*, 7 J. INST. JUST. & INT'L STUD. 50, 51 (2007); Parisi, *supra* note 159, at 196; Sward, *supra* note 163, at 313; John Thibaut et al., Comment, *Adversary Presentation and Bias in Legal Decisionmaking*, 86 HARV. L. REV. 386, 388 (1972); Jeffrey S. Wolfe & Lisa B. Proszek, *Interaction Dynamics in Federal Administrative Decision Making: The Role of the Inquisitorial Judge and the Adversarial Lawyer*, 33 TULSA L.J. 293, 315 (1997).

179. John Jackson explained the political and historical divergence between adversarial and inquisitorial theory nicely:

> [T]hese approaches were developed in domestic legal systems to correspond with the social and political climates of their time. Thus, an adversarial procedure centered around the notion of proceedings as a contest was more suited to a political climate that saw the need for justice as conflict-resolution within a reactive state which is "limited to providing a framework within which citizens can pursue their chosen goals." In contrast ... inquisitorial procedure ... was more suited to seeing justice as implementing policy within an active state dedicated to the "material and moral betterment of its citizens."

John Jackson, *Finding the Best Epistemic Fit for International Criminal Tribunals: Beyond the Adversarial-Inquisitorial Dichotomy*, 7 J. INT'L CRIM. JUST. 17, 19-20 (2009) (footnotes omitted) (quoting MIRJAM DAMASKA, THE FACES OF JUSTICE AND STATE AUTHORITY 73, 80 (1986)).

180. *See* Sanchez-Llamas v. Oregon, 548 U.S. 331, 356-57 (2006).

181. *See* van Koppen, *supra* note 178, at 53.

182. Parisi, *supra* note 159, at 195-96.

183. Thibaut et al., *supra* note 178, at 388.

184. *Id.*

B. Translating Theory into Practice

Although the adversarial and inquisitorial approaches are antithetical in theory, in practice, legal systems draw something from each, even if such hybridization goes largely unnoticed.[185] Just as legal systems traditionally associated with inquisitorialism have borrowed from adversarial theory, so too has the American legal system borrowed from inquisitorial theory. Nonetheless, our legal culture often frames itself in opposition to inquisitorialism. That mindset conceals the inquisitorial nature of certain legal practices like jurisdictional procedure and blinkers identification of fruitful avenues for reform.

At a general level, the American legal system is clearly an adversarial one. The parties to a lawsuit frame its factual and legal terms in the complaint and answer. Plaintiffs must substantiate their claims with admissible evidence, and defendants similarly must prove any affirmative defenses they wish to raise. In general, the court does not reach beyond the contours of the case presented by the parties.

But that appearance masks numerous inquisitorial features that operate in the shadows of our legal system's overarching adversarial architecture. The mandatory disclosure provisions of Federal Rule of Civil Procedure 26(a) and the case management responsibilities assigned to district courts under Rule 26(f) are inquisitorial processes that give courts an active hand in shaping cases even before trial.[186] In the criminal context, grand juries have always assumed investigative duties that can only be described as inquisitorial.[187] Certain federal administrative proceedings also draw from the inquisitorial tradition, particularly in the context of federal benefits

185. As John Jolowicz has put it: "[T]he most that can be said is that some systems are more adversarial—or more inquisitorial—than others." Jolowicz, *supra* note 162, at 281; *see also* Mason, *supra* note 169, at 1; Thibaut et al., *supra* note 178, at 388.

186. *See, e.g.*, Jolowicz, *supra* note 162, at 286; Rogelio A. Lasso, *Gladiators Be Gone: The New Disclosure Rules Compel a Reexamination of the Adversary Process*, 36 B.C. L. REV. 479, 481 (1995); Wolfe & Proszek, *supra* note 178, at 308; Mason, *supra* note 169, at 1.

187. *See, e.g.*, George H. Dession & Isadore H. Cohen, *The Inquisitorial Functions of Grand Juries*, 41 YALE L.J. 687, 691 (1932). The Supreme Court has long recognized the inquisitorial dimensions of grand juries. *See, e.g.*, McNeil v. Wisconsin, 501 U.S. 171, 181 n.2 (1991); United States v. John Doe, Inc., 481 U.S. 102, 118-19, 123 (1987) (Brennan, J., dissenting); *In re* Oliver, 333 U.S. 257, 262, 264 (1948).

determinations.[188] For example, the Social Security Administration self-consciously charges the hearings officer that presides over a benefits contest with the duty of identifying legal questions, discovering facts, and rendering a determination.[189]

Courts that raise issues sua sponte do not act within the confines of adversarial theory, either.[190] Indeed, Thomas Marvall suggests that "[t]he adversary process is no more starkly challenged than when a court decides an issue not raised, for it actually decides something other than what the parties asked it to decide."[191] Yet courts, on occasion, raise a host of issues on their own initiative, including issues of federalism and comity.[192] Based on principles of avoidance, courts sometimes consider questions of statutory interpretation, even when the parties have brought and briefed only constitutional claims.[193] Courts also sometimes raise plain errors committed in criminal trials.[194] Courts broadly retain the discretion to apply the correct law, even if the parties have not argued it.[195]

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188. *See* Jon C. Dubin, *Torquemada Meets Kafka: The Misapplication of the Issue Exhaustion Doctrine to Inquisitorial Administrative Proceedings*, 97 COLUM. L. REV. 1289, 1301 (1997); William W. Milligan, Essay, *Torquemada and Unemployment Compensation Appeals*, 29 U. MICH. J.L. REFORM 389, 393 (1996) (identifying certain unemployment compensation hearings as inquisitorial).

189. *See* 20 C.F.R. § 416.1400(b) (1987); Dubin, *supra* note 188, at 1291; *see also* Heckler v. Campbell, 461 U.S. 458, 471 (1983) (Brennan, J., concurring). The inquisitorial nature of proceedings before the Social Security Administration demonstrates that adversarial norms are less dominant in the United States than many might think: approximately 80 percent of the administrative law judges employed by the federal government work for the Social Security Administration. *See* Wolfe & Proszek, *supra* note 178, at 294. *But see* Dubin, *supra* note 188, at 1293-94 (noting that the procedural rigidity of SSA proceedings harms social security claimants).

190. *See* Jeffrey C. Metzcar, Note, *Raising the Defense of Procedural Default* Sua Sponte*: Who Will Enforce the Great Writ of Liberty?*, 50 CASE W. RES. L. REV. 869, 907-08 (2000).

191. THOMAS B. MARVELL, APPELLATE COURTS AND LAWYERS: INFORMATION GATHERING IN THE ADVERSARY SYSTEM 121 (1978).

192. *See* Metzcar, *supra* note 190, at 870. In *Turner v. Rogers*, the Supreme Court required procedural safeguards to further the due process rights of indigent parents threatened with civil contempt for non-payment of child support. 131 S. Ct. 2507, 2517-18 (2011). The procedural safeguards considered by the Court included procedures by which state courts would inquire into the ability to pay of the non-custodial parent, implicitly acknowledging that inquisitorial procedures can further due process in some circumstances. *See id.* at 2518.

193. *See, e.g.*, Boynton v. Virginia, 364 U.S. 454, 457 (1960).

194. *See, e.g.*, Silber v. United States, 370 U.S. 717, 718 (1962); United States v. Gonzalez, 259 F.3d 355, 359 (5th Cir. 2001).

195. Kamen v. Kemper Fin. Servs., Inc., 500 U.S. 90, 99 (1991); Smith v. Mallick, 514 F.3d 48, 51 (D.C. Cir. 2008).

And, of course, courts *must* raise issues of jurisdiction regardless of whether the parties prompt them to do so.[196]

Despite the widespread hybridization of adversarial and inquisitorial theory, both within the United States and abroad,[197] the American legal system perpetuates an "adversarial myth,"[198] proudly proclaiming adherence to adversarialism and disdain for procedures labeled as inquisitorial.[199] American legal commentators have described the American system of procedure as "avowedly adversary,"[200] and exhibiting "anti-inquisitorialism."[201] Others have noted that "[t]he hallmark of American adjudication is the adversary system,"[202] and called adversary process "[t]he heart of the American legal system."[203] Some of the greatest American legal thinkers have propounded the virtues of adversarialism at the expense of inquisitorialism. Henry Wigmore described adversarial cross-examination as "beyond any doubt the greatest legal engine

196. Some have simply ignored the inquisitorial dimensions of jurisdictional procedure. For example, Neal Devins has explained that "[a] central tenet of our adversarial system is that (save for jurisdictional issues) the parties to a case—not the judges deciding the case—raise the legal arguments." Neal Devins, *Asking the Right Questions: How Courts Honored the Separation of Powers by Reconsidering* Miranda, 149 U. PA. L. REV. 251, 252 (2000). Simply accepting that the procedure for resolving jurisdiction deviates from a "central tenet" of our legal system minimizes the deeply inquisitorial nature of jurisdictional procedure. *See* Miller, *supra* note 19, at 1307-08 ("[I]f one accepts the premise that writ of error review remains the best model, appellate courts should be permitted to raise *nonjurisdictional matters* sua sponte only in the most exceptional cases, to remedy the gravest injustices." (emphasis added)).

197. Traditionally inquisitorial legal systems also exhibit adversarial features. *See* Jolowicz, *supra* note 162, at 281; Kessler, *supra* note 17, at 1261-62; *see also* JOHN HARRY MERRYMAN & ROGELIO PÉREZ-PERDOMO, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA 4-5 (3d ed. 2007); Leonard L. Cavise, Essay, *The Transition from the Inquisitorial to the Accusatorial System of Trial Procedure: Why Some Latin American Lawyers Hesitate*, 53 WAYNE L. REV. 785, 785-86 (2007) (discussing the transition in Latin American countries). International tribunals have also developed procedures that draw on both the inquisitorial and adversarial tradition. *See* Michael Asimow & Lisl Dunlop, *The Many Faces of Administrative Adjudication in the European Union*, 61 ADMIN. L. REV. 131, 141-44 (2009).

198. Brianne J. Gorod, *The Adversarial Myth: Appellate Court Extra-Record Factfinding*, 61 DUKE L.J. 1, 68 (2011).

199. *See* William T. Pizzi, *Sentencing in the US: An Inquisitorial Soul in an Adversarial Body?*, *in* CRIME, PROCEDURE AND EVIDENCE IN A COMPARATIVE AND INTERNATIONAL CONTEXT 65, 66 (John Jackson et al. eds., 2008); *see also* Gorod, *supra* note 198, at 2-5.

200. Thibaut et al., *supra* note 178, at 388.

201. Sklansky, *supra* note 22, at 1635.

202. Sward, *supra* note 163, at 301.

203. Adam A. Milani & Michael R. Smith, *Playing God: A Critical Look at Sua Sponte Decisions by Appellate Courts*, 69 TENN. L. REV. 245, 247 (2002).

ever invented for the discovery of truth;"[204] Lon Fuller lauded "adversary presentation [as] the only effective means for combating [the] natural human tendency to judge too swiftly in terms of the familiar that which is not yet fully known;"[205] and Karl Llewellyn expressed deep skepticism "for any decision which is placed in part on any basis dug up by the court itself, but which is theretofore new to the [parties to the] case."[206] Supreme Court opinions also reflect these beliefs. Justice Souter has opined that "[s]ound judicial decisionmaking requires 'both a vigorous prosecution and a vigorous defense' of the issues in dispute,"[207] and Justice Scalia explained that the rule that issues may not be raised for the first time on appeal "distinguishes our adversary system of justice from the inquisitorial one."[208] A quip offered by D.C. Circuit Judge Ginsburg at an oral argument exemplifies this anti-inquisitorial sentiment. In *Cobell v. Norton* he scoffed, "[A] judicial officer with investigative responsibilities ... [is,] dare we say, [a] French approach."[209]

In light of the exalted status of adversarialism in American legal culture, it comes as little surprise that the label inquisitorial is something of a taboo.[210] Considering the criminal law context, David Sklansky recently explained, "A lengthy tradition in American law looks to the Continental, inquisitorial system of criminal adjudication for negative guidance about our own ideals. Avoiding inquisitorialism is taken to be a core commitment of our legal heritage."[211] Amalia Kessler has noted a similar phenomenon in American civil law. She writes that "we have mistakenly come to view our legal

204. WIGMORE, *supra* note 18, § 1367, at 27.

205. Fuller, *supra* note 169, at 44.

206. KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 325 (1960).

207. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 572-73 (1993) (Souter, J., concurring in part and concurring in the judgment) (quoting Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 419 (1978)).

208. United States v. Burke, 504 U.S. 229, 246 (1992) (Scalia, J., concurring in judgment); *see also* Penson v. Ohio, 488 U.S. 75, 84 (1988) (emphasizing the importance of vigorous representation); Polk Cnty. v. Dodson, 454 U.S. 312, 318 (1981) (noting that an adversarial system advances the public interest); Mackey v. Montrym, 433 U.S. 1, 13 (1979) ("[O]ur legal tradition regards the adversary process as the best means of ascertaining truth.").

209. Kessler, *supra* note 17, at 1182 (alteration in original) (quoting Transcript of Proceedings at 25-26, Cobell v. Norton, 334 F.3d 1128 (D.C. Cir. 2003) (No. 02-5374)).

210. *See, e.g.*, Kent Roach, *Wrongful Convictions: Adversarial and Inquisitorial Themes*, 35 N.C. J. INT'L L. & COM. REG. 387, 425 (2010).

211. Sklansky, *supra* note 22, at 1636.

tradition as exclusively adversarial and tend to regard all inquisitorial modes of procedure as alien." Kessler concludes, therefore, that legal reform drawn from inquisitorial theory "has been hindered by our adversarial self-conception."[212]

Despite our cultural hostility, our legal system can learn from the inquisitorial tradition.[213] This is particularly true for jurisdictional procedure. I turn now to that issue.

III. THE FACTUAL DIMENSION OF JURISDICTIONAL PROCEDURE

The reliance of many courts on an adversarial process to surface the facts necessary to resolve an inquisitorial obligation poses particular problems of fairness, accuracy, and efficiency. This Part begins by outlining the important role of jurisdictional facts and then discusses each problem in turn.

A. Facts and Subject Matter Jurisdiction

Many questions of jurisdiction involve little or no factual component. For example, in *Florida v. Thomas*, the Supreme Court held that a decision of the Florida Supreme Court did not constitute a final judgment and, as a result, the Supreme Court lacked jurisdiction.[214] The jurisdictional question turned entirely on the nature of the decision below and the proper interpretation of the statute

212. Kessler, *supra* note 17, at 1184-85; *see also* Parisi, *supra* note 159, at 207.

213. Commentators increasingly invoke aspects of inquisitorial theory as fertile ground from which to draw reforms for the American legal system. For example, Amalia Kessler suggests that applying inquisitorial practices to civil discovery could improve the fairness and efficiency of complex litigation. Kessler, *supra* note 17, at 1192. George Marlow has argued that judges should independently seek out scientific information relevant to the resolution of cases. George D. Marlow, *From Black Robes to White Lab Coats: The Ethical Implications of a Judge's* Sua Sponte, Ex Parte *Acquisition of Social and Other Scientific Evidence During the Decision-Making Process*, 72 ST. JOHN'S L. REV. 291, 292-93 (1998). Kent Roach has suggested that adversarial criminal proceedings could benefit from the incorporation of "[i]nquisitorial features [that] generally place less reliance on party presentation of the evidence and the strategic decision-making of the parties." Roach, *supra* note 210, at 424; *see also* Sharon Finegan, *Pro Se Criminal Trials and the Merging of Inquisitorial and Adversarial Systems of Justice*, 58 CATH. U. L. REV. 445, 447-48 (2009); Raneta Lawson Mack, *It's Broke So Let's Fix It: Using a Quasi-Inquisitorial Approach to Limit the Impact of Bias in the American Criminal Justice System*, 7 IND. INT'L & COMP. L. REV. 63, 67 (1996).

214. 532 U.S. 774, 777 (2001).

granting the Supreme Court jurisdiction.[215] Similarly, in *Louisville & Nashville Railroad Co. v. Mottley*, the Supreme Court held that the possibility that a defendant would raise a federal law defense in a breach of contract suit did not trigger federal question jurisdiction.[216] In neither case did the Court need to consider jurisdictional facts.

In other circumstances, the factual bases of jurisdiction are uncomplicated and often beyond dispute. Cases involving diversity jurisdiction, for example, may require courts to consider the citizenship of the parties,[217] and admiralty jurisdiction often turns on whether the activity that gave rise to the suit predominantly occurred at sea.[218] Although courts need some information to correctly determine if they can assert diversity or admiralty jurisdiction, the necessary jurisdictional facts will often, but not always, be limited in nature and easily obtained.[219]

Questions of standing, ripeness, and mootness, on the other hand, often require consideration of substantially more complex and disputable facts. To assess standing, courts must undertake a tripartite inquiry into injury in fact, causation, and redressability.[220] Each of these issues involves facts, and these facts are often bitterly contested. Similarly, to assess ripeness, courts must consider the "fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration."[221] Assessing hardship,

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215. *Id.* at 777; *see also* 28 U.S.C. § 1257(a) (2006).

216. 211 U.S. 149, 152 (1908).

217. *See, e.g.*, Am.'s Best Inns, Inc. v. Best Inns of Abilene, L.P., 980 F.2d 1072, 1073 (7th Cir. 1992).

218. *See, e.g.*, Archawski v. Hanioti, 350 U.S. 532, 533 n.2 (1956) (quoting N.J. Steam Navigation Co. v. Merchs.' Bank, 47 U.S. (6 How.) 344, 392 (1848)).

219. There remain circumstances in which determining the existence of admiralty jurisdiction or diversity jurisdiction is fact-intensive and complex. For example, federal courts use competing techniques to value injunctive relief as part of satisfying the amount in controversy requirement of 28 U.S.C. § 1. *See* Christopher A. Pinahs, Note, *Diversity Jurisdiction and Injunctive Relief: Using a "Moving-Party Approach" To Value the Amount in Controversy*, 95 MINN. L. REV. 1930, 1931-32 (2011). Similarly, courts may face complexity and difficulty in determining whether a "wrong bear[s] a significant relationship to traditional maritime activity" as required for admiralty jurisdiction. Exec. Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249, 268 (1972). Even determining the citizenship of all of the parties relevant to complicated lawsuits can prove challenging. *See Am.'s Best Inns*, 980 F.2d at 1073-74.

220. *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992).

221. Abbott Labs. v. Gardner, 387 U.S. 136, 148-49 (1967); *see also* Ohio Forestry Ass'n v.

in particular, requires examination of the factual record in order to assess the circumstances of the plaintiff. Mootness also often implicates complex factual issues. As a general rule, a case becomes moot when events have transpired such that the court can no longer provide meaningful relief.[222] That itself raises factual issues. But the general rule of mootness also has two exceptions: Cases do not become moot when a defendant voluntarily ceases allegedly illegal conduct, unless "subsequent events ma[ke] it absolutely clear that the allegedly wrongful behavior [can]not reasonably be expected to recur."[223] And, courts retain jurisdiction over otherwise moot cases when alleged legal violations are capable of repetition but evading review.[224] Untangling those issues requires substantial factual information about the current and future state of affairs.

Courts typically glean this information through affidavits or declarations proffered by the parties. When parties fail to provide sufficient information on their own, district courts retain broad authority to order parties to supplement the record with information relevant to a potential jurisdictional problem.[225]

Sierra Club, 523 U.S. 726, 732-33 (1998); Reno v. Catholic Soc. Servs., Inc., 509 U.S. 43, 57 (1993). Ripeness "draw[s] both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction." Nat'l Park Hospitality Ass'n v. Dep't of Interior, 538 U.S. 803, 808 (2003) (quoting *Catholic Soc. Servs., Inc.*, 509 U.S. at 57 n.18). Whether constitutional or prudential, ripeness defines the contours of subject matter jurisdiction and "serves as a bar to judicial review whenever a court determines a claim is filed prematurely." Dealer Computer Servs., Inc. v. Dub Herring Ford, 547 F.3d 558, 560-61 (6th Cir. 2008); *see also* BICKEL, *supra* note 36, at 124.

222. *See, e.g.*, United States v. Concentrated Phosphate Exp. Ass'n, 393 U.S. 199, 203 (1968).

223. *Id.*; *see also* L.A. Unified Sch. Dist. v. Garcia, 669 F.3d 956, 958 n.1 (9th Cir. 2012) (raising mootness sua sponte and ruling that the school district's treatment of an individual incarcerated in county jail was capable of repetition but evading review).

224. *See* Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 189-93 (2000). Some question the status of mootness as a jurisdictional doctrine because of these exceptions that appear prudential in nature. *See, e.g.*, Matthew I. Hall, *The Partially Prudential Doctrine of Mootness*, 77 GEO. WASH. L. REV. 562, 576-77 (2009). *But see* Dodson, *supra* note 5, at 1474-77. That mootness has prudential dimensions does not alter the fact that courts address the issue using jurisdictional procedure.

225. Wetmore v. Rymer, 169 U.S. 115, 120 (1898). Of course, district courts do not always exercise that discretion. For example, in *Bingham v. Massachusetts*, defendants challenged plaintiffs' standing in their reply brief before the district court, arguing that plaintiffs could not bring claims on behalf of a Native American tribe because they had not provided evidence of their ancestry. No. 08-11770-GAO, 2009 WL 1259963, at *1 (D. Mass. May 6, 2009), *denying reconsideration*, No. 08-11770-GAO, 2009 WL 1886128 (D. Mass. July 2, 2009), *aff'd*, 616 F.3d 1 (1st Cir. 2010). The district court agreed and dismissed the suit. *Id.* The plaintiffs then

When, however, a jurisdictional problem is not identified until the case is on appeal and the factual record established in district court proceedings is insufficient to resolve it, the situation is more complicated and courts have utilized starkly different procedures. Sometimes courts permit or require an expansion of the factual record on appeal ("expansion"),[226] although this approach may be invalid after the Supreme Court's decision in *Summers v. Earth Island Institute*;[227] sometimes courts remand for further fact-finding by the district court ("remand");[228] and sometimes courts dismiss for lack of jurisdiction without considering new information or even asking the parties to address the issue at all ("dismissal").[229]

Two examples illustrate the expansion approach. In *Ouachita Watch League v. Jacobs*, the Eleventh Circuit addressed a standing issue raised for the first time on appeal and relied on a declaration submitted on appeal to find that standing existed.[230] The court explained that "it is in the interests of justice and efficiency to consider the supplemental declarations."[231] The Seventh Circuit took a more aggressive approach in *America's Best Inns, Inc. v. Best Inns of Abilene, L.P.*[232] In considering a contract dispute, the court recognized that the district court record did not disclose the citizenship of every member of a limited partnership and, therefore, the court could not determine if it possessed diversity jurisdiction.[233]

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proffered genealogical records and asked the district court to reconsider its ruling. The district court refused, ruling that the evidence came too late. *Bingham*, 2009 WL 1886128, at *2. In affirming, the First Circuit relied on an analysis for which proffered genealogical records were irrelevant. *Bingham*, 616 F.3d at 7 ("Plaintiffs' motion to reconsider and to amend their complaint ... [would] not have changed the outcome."). As a result, the decision does not address the propriety of the district court's refusal to consider those documents.

226. *See, e.g.*, Winzler v. Toyota Motor Sales U.S.A., Inc., 681 F.3d 1208, 1212-13 (10th Cir. 2012) (taking judicial notice of facts that demonstrated that case was moot); Catholic League for Religious & Civil Rights v. City of S.F., 624 F.3d 1043, 1048 (9th Cir. 2010) (en banc) ("After raising the question of standing sua sponte, we asked the parties for letter briefs addressing it."); Piedmont Envtl. Council v. U.S. Dep't of Transp., No. 01-2286, 2003 U.S. App. LEXIS 2176, at *10 (4th Cir. Feb. 7, 2003) ("We grant the plaintiffs' motion for leave to submit those declarations and accept them as part of the record, but we find that they are nonetheless insufficient to establish standing on all counts of the plaintiffs' complaint.").

227. 555 U.S. 488, 495 n.* (2009).

228. *See, e.g.*, Pa. Prison Soc'y v. Cortés, 508 F.3d 156, 169 (3d Cir. 2007).

229. *See, e.g.*, McCauley v. Univ. of the V.I., 618 F.3d 232, 253 (3d Cir. 2010).

230. 463 F.3d 1163, 1170 (11th Cir. 2006).

231. *Id.* at 1171.

232. 980 F.2d 1072, 1074 (7th Cir. 1992).

233. *Id.* at 1073-74.

"At oral argument ... the court stated that it would be necessary to enlarge the record to show the citizenship of every partner as of the date the complaint was filed."[234] The court then considered post-argument affidavits before resolving its jurisdiction.[235]

In other cases, courts apply the remand approach. The Third Circuit adopted that approach in *Pennsylvania Prison Society v. Cortés*, explaining that "[b]ecause the issue of standing was raised for the first time on appeal, none of the plaintiffs have had the opportunity to present evidence or to litigate this issue."[236] As a result, the court "dismiss[ed] this appeal without prejudice for lack of jurisdiction and remand[ed] to the District Court."[237] The Fourth Circuit similarly remanded for further proceedings in *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*,[238] explaining "the record is not sufficiently clear for us to decide" whether the plaintiffs' members "are among the injured."[239]

Lastly, and most commonly, courts implement the dismissal approach, deciding jurisdiction on the record assembled in the district court. The Sixth Circuit took this approach in *Heartwood, Inc. v. Agpaoa*,[240] as did the Tenth Circuit in *Dias v. City & County*

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234. *Id.* at 1073.

235. The court found that even the post-argument affidavits were incomplete and dismissed the case explaining that "[t]hese litigants have had chance after chance to establish diversity of citizenship—the complaint, the answer, the jurisdictional statements in their appellate briefs, and finally the memoranda and filings ... called for at oral argument.... At some point the train of opportunities ends." *Id.* at 1073-74; *see also* Guar. Nat'l Title Co. v. J.E.G. Assocs., 101 F.3d 57, 59 (7th Cir. 1996) (reprimanding litigants for failure to file necessary documentation). *America's Best Inns* and *Guaranty National Title Co.* evidence an approach that the Seventh Circuit uses. Where the court assures itself of its jurisdiction based on information it obtains through such means, it seems unlikely that the jurisdictional issue would even be mentioned in the opinion.

236. 508 F.3d 156, 169 (3d Cir. 2007).

237. *Id.* (emphasis omitted).

238. No. 06-1714, 2008 U.S. App. LEXIS 2854, at *22-23 (4th Cir. Feb. 7, 2008). On remand, the district court ruled that plaintiffs had standing, and the Fourth Circuit then affirmed this finding. Friends of the Earth v. Gaston Copper Recycling Corp., 629 F.3d 387, 394-97 (4th Cir. 2011).

239. 2008 U.S. App. LEXIS 2854, at *16; *see also* Nat'l Air Traffic Controllers Ass'n v. Pena, 78 F.3d 585, at *6 (6th Cir. 1996) (unpublished table decision). Courts of appeals have also remanded for further factual development where jurisdictional issues other than standing were involved. For example, in *Lucero v. Trosch*, 121 F.3d 591, 595 (11th Cir. 1997), the court recognized a possible issue of mootness and remanded for further proceedings in the district court.

240. 628 F.3d 261, 268-69 (6th Cir. 2010).

of Denver, in which the court held that plaintiffs could not seek prospective relief against the City of Denver because "none had alleged an intent to return" to the city, even though that issue had never arisen before the district court.[241] This appears to be the dominant approach of the Supreme Court.[242] In a footnote to the decision in *Summers*, the Court explained that it would not consider standing declarations submitted to the court of appeals because "[i]f [the plaintiffs] had not met the challenge to their standing at the time of judgment, they could not remedy the defect retroactively."[243]

These multifarious approaches to jurisdictional procedure are fundamentally inconsistent. If jurisdiction exists only if supported by facts in the district court record, then a court of appeals exceeds its jurisdiction when it considers supplemental information or remands for further factual investigation. If, on the other hand, jurisdiction turns on facts as they actually exist, courts incorrectly dismiss cases when they decline to consider information proffered on appeal. That inconsistency would be resolved if courts of appeals read the *Summers* footnote to foreclose in all circumstances the augmentation of the factual record when a jurisdictional issue arises for the first time on appeal. But that would improperly exclude from judicial review cases that the courts ought to hear, and the alternative approach of remanding for further development is not inconsistent with *Summers*.

B. Problems with Dismissing Based on the District Court Record

Resolving jurisdictional questions on appeal based on the record assembled in the district court leads to an array of problems. These problems highlight the need for reform.

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241. 567 F.3d 1169, 1176, 1184 (10th Cir. 2009); *see also* Gaslin v. Fassler, No. 09-3833, 2010 U.S. App. LEXIS 10819, at *1-2 (8th Cir. May 27, 2010) (dismissing without prejudice); United States v. Diekemper, 604 F.3d 345, 350-51 (7th Cir. 2010) (finding a lack of standing and dismissing).

242. *See, e.g.*, Summers v. Earth Island Inst., 555 U.S. 488, 495 n.* (2009); Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) (implementing the dismissal approach).

243. 555 U.S. at 495 n.*; *see also* FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 234-35 (1990); W. Watersheds Project v. Kraayenbrink, 620 F.3d 1187, 1197 n.6 (9th Cir. 2010) (accepting supplemental declarations because parties were interveners not original plaintiffs).

1. Unfairness

Current jurisdictional procedure requires plaintiffs to foresee possible jurisdictional issues and construct a record related to those issues, even when the opposing party and district court remain silent.[244] Attorneys are ordinarily not expected to exercise such foresight. American lawyers are steeped in the adversarial tradition; lawyers are trained to refute the claims of adversaries, not to anticipate them. Indeed, the American legal system embraces the notion that due process requires a meaningful opportunity to be heard,[245] and lawyers without robust federal practices would likely be surprised to learn that they may lose a case without ever receiving the opportunity to proffer evidence related to an issue first raised on appeal.[246]

It is unfair to penalize parties when the record before the district court contains insufficient facts to establish jurisdiction because the fault lies, in part, with the district court itself. That is because the district court failed to fulfill its duty to determine jurisdiction so that "the failure to raise a legal error can in part be attributed to the magistrate."[247] If the district court had acted properly, then potential jurisdictional problems would have been raised at a time when the parties could respond and provide additional facts, avoiding the dismissal.[248]

Freezing the factual record at the time the district court renders judgment also has the potential to skew litigation incentives. Defendants could strategically decline to raise jurisdictional issues

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244. *See* Pidot, *supra* note 16, at 1407-11 (discussing the unfairness of sandbagging plaintiffs with standing problems on appeal).

245. *See, e.g.*, Milani & Smith, *supra* note 203, at 262-65; Miller, *supra* note 19, at 1289.

246. Milani & Smith, *supra* note 203, at 248 ("[M]ost lawyers probably never think about the possibility that a court will decide a case on an issue that the court itself raises and which was neither briefed nor argued by the parties.").

247. Sanchez-Llamas v. Oregon, 548 U.S. 331, 357 (2006). In *Sanchez-Llamas*, the Supreme Court stated that this facet of inquisitorial courts explained why procedural default rules do not apply to their proceedings. But the Court's explanation applies with equal force when American courts overlook jurisdictional issues. *See, e.g.*, Capron v. Van Noorden, 6 U.S. (2 Cranch) 126, 126-27 (1804) ("A party may take advantage of an error [on jurisdiction] in his favor ... [because] it was the duty of the Court to see that [it] had jurisdiction.").

248. *See, e.g.*, Adventus Ams., Inc. v. Calgon Carbon Corp., No. 3:08-CV-497-RJC-DCK, 2009 WL 2998094, at *5 (W.D.N.C. Sept. 15, 2009); Milligan v. United States, Nos. 3:07-1053, 3:08-0380, 2009 WL 2905782, at *2 (M.D. Tenn. Sept. 4, 2009).

before the district court.[249] Then, they could ask the court of appeals to dismiss the case because the record is incomplete. In so doing, defendants not only win—at least in the short term—but also have the ability of securing binding precedent from the court of appeals on an issue that could have been corrected below.

Of course, plaintiffs' lawyers bear some responsibility for the factual records in the district court, and the American legal system generally charges parties with the failures of their counsel. That principle normally makes sense because the system vests parties, and by proxy their lawyers, with control over their cases.[250] Protecting the autonomy of parties requires, as a necessary corollary, that we hold parties accountable for mistakes.[251] Control over jurisdictional issues, however, already resides with the judge, undercutting the rationale for holding parties accountable for oversights committed by their lawyers.

Heartwood, Inc. v. Agpaoa aptly highlights the unfairness of current practice.[252] In that case, the federal government raised no objection to plaintiffs' standing and the district court did not consider the issue. Nor did the government raise a question about standing in its appellate brief. At oral argument, the Court raised the issue itself, and then dismissed the case.[253]

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249. *See* THE AM. LAW INST., *supra* note 152, at 366-68; Dobbs, *supra* note 152, at 492. This problem may be more hypothetical than real. During my time as a lawyer at the Department of Justice, I never knew of a case in which the United States declined to raise a jurisdictional issue for strategic reasons. The temptation exists, however, and not all attorneys are as scrupulous as my former colleagues.

250. *See, e.g.*, Castro v. United States, 540 U.S. 375, 386 (2003) (Scalia, J., concurring in part and concurring in the judgment); Milani & Smith, *supra* note 203, at 282-86.

251. *See* Yakus v. United States, 321 U.S. 414, 444 (1944).

252. 628 F.3d 261 (6th Cir. 2010). I do not believe that the government intentionally ignored the jurisdictional issue identified by the court, particularly because the government never challenged the plaintiffs' standing. Rather, the court raised the issue on its own. *See* Citation of Supplemental Authority: "Standing" Raised by Judge Clay at Oral Argument at 1, *Heartwood*, 628 F.3d 261 (No. 09-5761).

253. *Heartwood*, 628 F.3d at 266, 269. Similar unfairness can occur at the district court stage. For example, in *Scanlan v. Eisenberg*, the district court ruled that the beneficiary of a discretionary trust lacked standing to bring a breach of fiduciary duty claim against the trustee because she had failed to allege facts showing a likelihood that the trusts' corpus would be insufficient. No. 09 C 5026, 2010 WL 4065628, at *2, *4 (N.D. Ill. Oct. 14, 2010), *rev'd*, 669 F.3d 838 (7th Cir. 2012) (reversing on legal standard). The district court raised this issue during an oral hearing and the defendant conceded that the plaintiff had standing at that time. Without asking for further briefing or inviting additional factual submissions, the district court dismissed the case. *Id.*

The unfairness of penalizing parties for records lacking jurisdictional facts is particularly acute because the requirements for subject matter jurisdiction change, making it impossible for parties to anticipate all of the jurisdictional problems that might lie in wait. Ordinarily, when a trial court applies the wrong standard to evidence in the record, appellate courts will correct the standard and remand for further proceedings, during which new evidence may be provided.[254] This often does not occur when it comes to jurisdictional issues. For example, in *Lujan v. Defenders of Wildlife*, the Supreme Court held that the members of Defenders of Wildlife needed to allege a "date certain" on which they planned to visit threatened natural areas far from their homes in order to allege a sufficiently imminent injury.[255] As the Eighth Circuit had decided below, however, the law existing when Defenders of Wildlife filed its complaint imposed a more lenient imminence requirement for standing.[256] Thus, Defenders of Wildlife did not know and could not know what facts it needed to allege to prove standing until the Supreme Court decided the case. At that point it was too late. The Supreme Court ordered the case dismissed, even though one or more of Defenders of Wildlife's members may have had sufficiently concrete plans to satisfy the new rule.[257]

Supreme Court decisions can similarly affect other cases in the judicial pipeline. A good example is *Wilderness Society, Inc. v. Rey*, in which an environmental group challenged a timber sale in the Umpqua National Forest.[258] At the time the suit was filed, Ninth Circuit law provided that environmental groups could prove standing based on purely procedural injuries.[259] The Wilderness

254. *See, e.g.*, Humphrey v. Humphrey, 434 F.3d 243, 245 (4th Cir. 2006); Roberts v. Royal Atl. Corp., No. CV 03-2494, 2010 WL 749944, at *2 (E.D.N.Y. Mar. 3, 2010).

255. 504 U.S. 555, 579 (1992) (Kennedy, J., concurring in part and concurring in the judgment).

256. *See* Defenders of Wildlife v. Lujan, 911 F.2d 117, 120-21 (8th Cir. 1990), *rev'd*, 504 U.S. 555 (1992). In reversing, the Supreme Court relied on cases that had involved injuries speculative in nature because they would not manifest until numerous intervening circumstances had come to pass. *Lujan*, 504 U.S. at 564 & n.2 (citing Whitmore v. Arkansas, 495 U.S. 149, 155 (1990); Los Angeles v. Lyons, 461 U.S. 95, 102 (1983)). But those cases are not fairly read to require a plaintiff to allege a date certain upon which it will be injured.

257. *Lujan*, 504 U.S. at 578.

258. 622 F.3d 1251, 1256 (9th Cir. 2010).

259. *See* Earth Island Inst. v. Ruthenbeck, 490 F.3d 687, 693 (9th Cir. 2007), *aff'd in part, rev'd in part sub nom.* Summers v. Earth Island Inst., 555 U.S. 488 (2009).

Society proceeded on that basis and the district court entered judgment in its favor. During the appeal to the Ninth Circuit, the Supreme Court handed down *Summers*, holding that procedural injuries could not themselves sustain standing.[260] Recognizing the change in law, the Ninth Circuit held that the Wilderness Society had not proven standing and dismissed the case, without offering the Wilderness Society an opportunity to provide additional evidence.[261]

Even when the law itself remains constant, jurisdictional procedure can lead to arbitrary results. Courts dismiss without prejudice when they lack jurisdiction, and as a result, some courts view their jurisdictional decisions as having no preclusive effect on future litigation.[262] In other words, after dismissal, a plaintiff can file anew, alleging additional facts.[263] There are some limitations. A dismissal without prejudice generally bars future litigation of the precise issue decided.[264] In other words, if a plaintiff alleges standing based on her desire to visit the Nile River someday in the future, and the case is dismissed, future courts will refuse to reconsider whether these allegations are sufficient under the doctrine of direct estoppel.[265] In some jurisdictions, this principle applies to prevent relitigation of the same legal issue, even if a plaintiff alleges

260. *Summers*, 555 U.S. at 496.

261. *Wilderness Soc'y, Inc.*, 622 F.3d at 1260.

262. *See, e.g.*, Brereton v. Bountiful City Corp., 434 F.3d 1213, 1219 (10th Cir. 2006); Hernandez v. Conriv Realty Assocs., 182 F.3d 121, 123 (2d Cir. 1999); Mann v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 488 F.2d 75, 76 (5th Cir. 1973).

263. *See* Robinson v. Sherrod, 631 F.3d 839, 843 (7th Cir. 2011); Johnson v. Boyd-Richardson Co., 650 F.2d 147, 149 (8th Cir. 1981); *Mann*, 488 F.2d at 76; *see also* Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 505 (2001) ("The primary meaning of 'dismissal without prejudice,' we think, is dismissal without barring the plaintiff from returning later, to the same court, with the same underlying claim.").

264. *See* 18 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE § 132.02(2)(e), at 132-27 (3d ed. 2012).

265. *See, e.g.*, Steele v. Fed. Bureau of Prisons, 355 F.3d 1204, 1215 (10th Cir. 2003), *abrogated by* Jones v. Bock, 549 U.S. 199 (2007); MOORE, *supra* note 264, § 131.30(1)(d)(iv), at 131-89. Direct estoppel will not apply "where a jurisdictional defect has been cured or loses its controlling force." Eaton v. Weaver Mfg. Co., 582 F.2d 1250, 1256 (10th Cir. 1978); *see also* Dozier v. Ford Motor Co., 702 F.2d 1189, 1192 & n.4 (D.C. Cir. 1983); CHARLES A. WRIGHT, ARTHUR B. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4437 (2d ed. 2002) ("In ordinary circumstances a second action on the same claim is not precluded by dismissal of a first action for prematurity or failure to satisfy a precondition to suit. No more need be done than await maturity, satisfy the precondition, or switch to a different substantive theory that does not depend on the same precondition.").

new facts. That rule would seem to prevent parties from bringing new suits once courts have dismissed their claims for lack of jurisdiction. Even the more restrictive courts permit relitigation of jurisdictional issues based on facts that arise after dismissal of the original suit.[266]

When it comes to questions of standing, the exception will almost usually swallow the rule. That is because plaintiffs typically can engage in activities after dismissal that will satisfy standing. Consider *Heartwood v. Agpaoa*. To satisfy the Sixth Circuit, one of Heartwood's members need only head out for a hike in the area subject to the Forest Service's timber sale. That hike can easily occur the day after the court dismissed the first suit, and, as a result, that dismissal will not bar a second suit.

Dismissal without prejudice will typically impose no direct obstacle to a plaintiff refiling suit. While the court adjudicates a suit, however, time is ticking. If the court does not dismiss until after the statute of limitations has run, then the plaintiffs will have no further opportunity to litigate their claim. In other words, the real effect of a jurisdictional dismissal largely depends on the length of time it took for the court to recognize a jurisdictional defect, a matter over which the parties have little control. If too much time passes before a case is dismissed, a plaintiff will be unable to renew suit because the statute of limitations will have run. Thus, similarly situated plaintiffs may end up with very different legal results for reasons that have nothing to do with the worthiness of their cause or the legal viability of their claim, a state of affairs that runs counter to our general notions of due process and equal protection.[267]

Contrasting the Supreme Court decisions in *Sierra Club v. Morton* and *Lujan v. Defenders of Wildlife* illustrates the arbitrary effect of jurisdictional rulings. The decision in *Sierra Club v. Morton* came only three years after the Forest Service authorized development, permitting the Sierra Club to continue its fight and eventually obtain an injunction against the project.[268] On the other hand,

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266. MOORE, *supra* note 264, § 132.02(2)(e), at 132-27 to -28.

267. *See, e.g.*, Griffith v. Kentucky, 479 U.S. 314, 323 (1987) ("[S]elective application of new rules violates the principle of treating similarly situated defendants the same.").

268. *See* Tom Turner, *The Saga of Mineral King*, HIGH COUNTRY NEWS (Feb. 2, 2009), http://www.hcn.org/wotr/the-saga-of-mineral-king; *see also* Sierra Club v. Morton, 405 U.S. 727 (1972).

the Supreme Court decided *Lujan v. Defenders of Wildlife* nine days after the six-year statute of limitations had expired.[269] Sierra Club received the relief it wanted and Defenders of Wildlife received nothing, simply because the court system took different amounts of time to decide the cases. Ironically, the Sierra Club appears to have acted strategically when it limited its allegations of standing in an effort to get the Supreme Court to articulate a very broad theory of standing in environmental cases.[270] The record does not suggest that Defenders of Wildlife made a similar strategic choice. As a matter of equity, a party that acts unintentionally should surely receive more lenient treatment than a party that purposefully declines to provide relevant facts to a court.

The arbitrary nature of jurisdictional procedure may also create perverse litigation incentives for plaintiffs. A plaintiff confident that a court will resolve a jurisdictional issue before a statute of limitations runs has the opportunity to secure a binding decision about a hypothetical factual situation without negative repercussion. Consider a hypothetical version of the *Heartwood, Inc. v. Agpaoa* case. Imagine that the plaintiff organization hoped to secure judicial approval for the proposition that a person has standing to challenge anything that occurs in a national forest if she uses any part of that forest. The organization files suit making such general allegations. So long as the court decides whether those facts are sufficient for jurisdiction within six years, the plaintiff will be able to secure a judicial ruling on the organization's theory of jurisdiction and, even if the court dismisses the case, file a new lawsuit to adjudicate the merits of her claim. While not technically an advisory opinion beyond the jurisdiction of the federal courts,[271] this looks very similar to one. Dismissal will formally terminate litigation, but it will not resolve the legal rights of the parties in any meaningful way because the suit can simply be renewed. The court, in essence, will have "declare[d] rights in [a] hypothetical case[ ]."[272]

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269. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 555 (1992); Interagency Cooperation—Endangered Species Act of 1973, 51 Fed. Reg. 19,926 (June 3, 1986) (codified at 50 C.F.R. pt. 402).

270. *See Sierra Club*, 405 U.S. at 735 n.8.

271. *See supra* note 36 and accompanying text.

272. Thomas v. Anchorage Equal Rights Comm'n, 220 F.3d 1134, 1138 (9th Cir. 2000); *see also* Hayburn's Case, 2 U.S. (2 Dall.) 409, 409 (1792).

This risk is more than just a thought experiment. For example, in *Sierra Club v. Morton*, the Sierra Club wanted to learn the Supreme Court's view of whether it could assert standing based solely on its interest in the environment.[273] Everyone knew that the Sierra Club had additional—plainly sufficient—interests, but those interests were excluded from the Club's allegations.[274] And when the Supreme Court rendered a decision about a hypothetical state of affairs,[275] the Sierra Club simply advanced new allegations and continued to pursue its claims.[276]

Jurisdictional procedure may also undermine our legal system by creating a perception of unfairness. Studies have shown that litigants see themselves as unfairly treated when courts resolve cases based on issues that were not raised by the parties.[277] As Lon Fuller explained, "[I]f the grounds for the decision fall completely outside the framework of the argument ... the adjudicative process has become a sham, for the parties' participation in the decision has lost all meaning."[278] That feeling of unfairness can only be exacerbated when a court raises a jurisdictional issue at a time when the factual record is closed. Parties are essentially sandbagged by the court, precluded from furnishing the evidence necessary to pursue their case because a district court overlooked a jurisdictional problem.

Litigating jurisdictional issues is complex and difficult because it requires lawyers to foresee problems never identified by opposing counsel, district courts, or—in the extreme—by any existing precedent. As a result, parties with more experienced and skilled law-

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273. *See Sierra Club*, 405 U.S. at 729-31, 734-35 & n.8.

274. *Compare id.*, *with Sierra Club*, 348 F. Supp. 219, 220 (N.D. Cal. 1972).

275. *See Sierra Club*, 405 U.S. at 741.

276. *See Sierra Club*, 348 F. Supp. at 219-20. The Supreme Court has cautioned that parties should not be permitted to secure advisory opinions through artful pleadings. In *U.S. National Bank of Oregon v. Independent Insurance Agents of America, Inc.*, the Court explained that it must determine whether a statute had been repealed, even though the parties agreed that it had not, because to do otherwise "would permit litigants, by agreeing on the legal issue presented, to extract the opinion of a court on hypothetical Acts of Congress or dubious constitutional principles, an opinion that would be difficult to characterize as anything but advisory." 508 U.S. 439, 446-47 (1993); *see also* Eric D. Miller, Comment, *Should Courts Consider 18 USC § 3501 Sua Sponte?*, 65 U. CHI. L. REV. 1029, 1041 (1998).

277. *See* LANDSMAN, *supra* note 167, at 44-45; MARVELL, *supra* note 191, at 122.

278. Lon L. Fuller, *The Forms and Limits of Adjudiciation*, 92 HARV. L. REV. 353, 388 (1978); *see also* LLEWELLYN, *supra* note 206, at 29.

yers will fare better. Because experienced and skilled lawyers tend to charge a higher fee, the pitfalls created by jurisdictional procedure will fall more heavily on those with fewer resources.[279] That disparity is particularly troubling in the environmental context. Environmental plaintiffs often lack the financial ability to hire lawyers with extensive experience in federal court to represent their effort to protect cherished natural resources.[280] Moreover, industrial, commercial, and government facilities that adversely affect public health, quality of life, or aesthetics are often built in and around communities with few financial means.[281] While public interest organizations sometimes champion the causes of those unable to afford their own lawyers,[282] the amount of free representation available is limited. That means that poorer plaintiffs are likely to be disadvantaged by a system that requires their less experienced lawyers to exercise the unfamiliar skill of preemptively papering the record with evidence related to jurisdictional issues that may never arise before a district court.[283]

2. Inaccuracy

Courts vindicate constitutional values when they ensure that they do not decide cases that fall beyond their jurisdiction. Courts also support the Constitution when they resolve cases over which they have jurisdiction. Those two reciprocal obligations suggest that courts should resolve jurisdictional questions based on "the facts as they really exist."[284] Current judicial practice risks inaccurate

279. *See* Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 114 (1974). I do not mean to suggest that public interest lawyers representing organizations or individuals and charging little or no fee do not provide as good or better legal service than their highly paid counterparts at firms. Organizations such as the Natural Resource Defense Counsel, Earth Justice, NAACP, Public Citizen, and ACLU have highly talented and experienced litigators on staff. But these legal resources are limited.

280. *See* Helen H. Kang, *Pursuing Environmental Justice: Obstacles and Opportunities—Lessons from the Field*, 3 WASH. U. J.L. & POL'Y 121, 123-24 (2009).

281. *See, e.g.*, Jeremy Linden, Note, *At the Bus Depot: Can Administrative Complaints Help Stalled Environmental Justice Plaintiffs?*, 16 N.Y.U. ENVTL. L.J. 170, 171-72 (2008).

282. *See, e.g.*, Kang, *supra* note 280, at 123-24, 130-32; Linden, *supra* note 281, at 173.

283. Even the most experienced attorney may fall into a standing trap, particularly if an appellate court announces a new rule in the course of dismissing her case.

284. Wetmore v. Rymer, 169 U.S. 115, 120 (1898). Truth can, of course, be slippery and

results because courts decide jurisdictional issues based on incomplete facts.

The federal courts have long recognized an obligation to adjudicate cases that fall within their jurisdiction. As the Supreme Court explained in *Cohens v. Virginia*: "It is most true that this Court will not take jurisdiction if it should not[;] but it is equally true, that it must take jurisdiction if it should."[285] The courts must, therefore, tread a careful path and ensure that they decide jurisdictional questions correctly. Some courts exercise just such care. As discussed, the Seventh Circuit has directed parties to provide additional information regarding citizenship in an effort to correctly determine the existence of diversity jurisdiction.[286] Similarly, in the context of petitions for review filed first in the court of appeals, the D.C. Circuit has explained that it "retains [the] discretion to seek supplemental submissions from [the] parties if it decides that more information is necessary to determine whether petitioners, *in fact*, have standing."[287]

The importance of courts rendering factually correct jurisdictional decisions is even more apparent in the context of mootness. When a case is moot, "Article III [of the Constitution] denies federal courts the power to decide the case[ ]."[288] Yet courts generally consider mootness based on the facts presented by the parties. Courts do, on occasion, inquire as to relevant facts, but courts are not obliged to

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impossible to reconstruct. There are circumstances in which important values require procedures acknowledged to make the discovery of truth more difficult, resulting in divergence between judicially found facts and substantive, on-the-ground truth. *See* Robert S. Summers, *Formal Legal Truth and Substantive Truth in Judicial Fact-Finding—Their Justified Divergence in Some Particular Cases*, 18 LAW & PHIL. 497, 505-10 (1999). That this Article suggests that jurisdiction should turn on the actual truth about jurisdictional facts does not imply that a court will always be able to ascertain the objective facts necessary to accurately determine jurisdiction. The point is, however, that current procedure is particularly inaccurate in this regard.

285. 19 U.S. 264, 404 (1821); *see also* New Orleans Pub. Serv., Inc. v. Council of New Orleans, 491 U.S. 350, 358 (1989); Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976).

286. *See, e.g.*, Am.'s Best Inns, Inc. v. Best Inns of Abilene, L.P., 980 F.2d 1072, 1073 (7th Cir. 1992).

287. Am. Library Ass'n v. FCC, 401 F.3d 489, 494 (D.C. Cir. 2005) (emphasis added).

288. Lewis v. Cont'l Bank Corp., 494 U.S. 472, 477 (1990) (internal quotation marks omitted); *see also* Liner v. Jafco, Inc., 375 U.S. 301, 306 n.3 (1964). For an explanation of the exception to mootness for alleged violations capable of repetition but evading review, see *supra* note 224 and accompanying text.

investigate such facts and, as a result, may incorrectly retain or abandon jurisdiction based on an incomplete factual record.

If courts do not concern themselves with whether they have jurisdiction "in fact," but rather consider only the record before the district court, they are at a much greater risk of reaching an incorrect jurisdictional decision. *Sierra Club v. Morton* again provides a clear example. The Sierra Club relied exclusively on the general environmental interest of its members to assert standing, even as amicus briefs before the Supreme Court noted that the Sierra Club "has conducted regular camping trips into the Mineral King area, and that various members of the Club have used and continue to use the area for recreational purposes."[289] The Sierra Club did not dispute those facts, but rather "declined" to rely on them,[290] and the Supreme Court held that the Sierra Club had failed to establish standing.[291]

The courts of appeals have followed suit. In *Friends of Tims Ford v. Tennessee Valley Authority*, the Sixth Circuit considered a suit brought by the owners of land bordering a reservoir against the approval of a plan to increase the density of development around the reservoir and permit the construction of additional community docks.[292] The owners alleged that boat traffic from existing community docks impaired water quality and boater safety in waters adjoining their property.[293] The Sixth Circuit dismissed for lack of standing, finding that the harms associated with the existing docks did not necessarily mean that new docks would injure the plaintiffs.[294] That decision pays scant attention to real world facts; it is likely that, had the plaintiffs been given an opportunity to supplement the factual record, they could have shown that increasing the number of community docks was likely to increase the amount of boat traffic on the reservoir, which, in turn, would likely increase their injuries due to boat traffic. If the court had bothered to inquire, it could almost certainly have found that such increased

289. Sierra Club v. Morton, 405 U.S. 727, 735 n.8 (1972).
290. *See id.*
291. *See id.* at 741.
292. 585 F.3d 955, 960 (6th Cir. 2009).
293. *Id.* at 962.
294. *Id.* at 971.

injuries were more likely than not the result of the planned development.

Pollack v. U.S. Department of Justice raises the same concern. In that case, an environmental organization sued the federal government for operating a shooting range that discharged lead bullets into Lake Michigan.[295] One of the members of the organization, Pollack, alleged that he was concerned about the effects of lead on fish and wildlife in and around the lake.[296] In holding that the plaintiffs lacked standing, the Seventh Circuit relied on two omissions from Pollack's declaration: First, the declaration stated that Pollack was concerned about the effect of lead on freshwater fish; it noted that he enjoyed eating such fish but did not specify whether he ate fish from Lake Michigan.[297] Second, Pollack explained that he enjoyed observing birds around Lake Michigan but did not discuss whether he visited the area immediately around the shooting range to observe birds.[298] Because Pollack lived only thirteen miles away, it seems likely that, if asked, he would have reported that he observed birds in the area of the shooting range. But the court did not ask Pollack that question and its decision rendered him unable to furnish the relevant information.[299]

3. Inefficiency

When courts dismiss cases based on omissions in the factual record, they also waste the resources of both the judicial system and the parties. By the time a case reaches the appellate stage, the court system has invested substantial resources in resolving the merits of the dispute. Dismissing a case on appeal based on jurisdictional objections that could be answered by an expanded factual record means that the parties will have to incur the expenses of a whole new trial, should the plaintiff file a new lawsuit.[300]

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295. 577 F.3d 736, 737-38 (7th Cir. 2009).

296. *Id.* at 738.

297. *Id.* at 742.

298. *Id.* at 742-43.

299. *Id.*

300. *See* Stuart Minor Benjamin, *Stepping into the Same River Twice: Rapidly Changing Facts and the Appellate Process*, 78 TEX. L. REV. 269, 327, 363 (1999). Of course, remanding to the district court also imposes costs because it requires the district court judge to reacquaint herself with the case. *See id.* at 362. When it comes to deciding factual issues,

The inefficiency created by such revolving-door litigation is manifold. From the perspective of the courts, a successor case may end up on the docket of a new district court judge, requiring a redundant investment of resources as the new judge familiarizes herself with the parties, the facts, and the law. Even the same judge will likely have to reacquaint herself with the facts and law if a new suit is filed.[301] A second appeal will impose similar costs on the court of appeals.[302] All of these effects are intensified in contexts, such as environmental suits, in which the factual record tends to be lengthy, dense, and heavily scientific in nature.

Litigants, too, waste substantial resources when courts dismiss a case only to have a new suit filed. Parties must draft new pleadings and motions, attend another round of status conferences, and eventually prepare for and attend a new hearing. They may also seek temporary restraining orders or preliminary injunctions, multiplying their effort and expense. By essentially securing a redo of the first case, parties can modify their litigation strategy to respond to the earlier proceeding. Courts ordinarily require parties to bring their claims at one time precisely to avoid such strategizing and the attendant expense it causes.[303]

Delay imposes costs beyond the court and litigants. When a plaintiff challenges allegedly illegal conduct, that conduct may persist throughout the period of litigation. This can be a particular problem in the environmental context. Consider an environmental organization that has challenged a mining plan. While litigation drags on, mining will likely occur, disturbing the natural landscape and habitat it contains. That exacts an unjustifiable toll on the environment if the mining plan is ultimately found to be illegal. Such a situation also disadvantages the mining company because it may well have to fund clean-up and restoration efforts in the wake of a judicial decision invalidating its mining plan. Those costs will only increase as time passes. The converse problem arises if in-

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however, the district court has expertise; and besides, holding a hearing before one judge consumes fewer resources—at least on a judge-hour basis—than holding a hearing before three.

301. *See id.* at 329-30.

302. Even if judges remember a lot about a case's earlier incarnation, their clerks may well have turned over in the meantime.

303. *See* Duane Reade, Inc. v. St. Paul Fire & Marine Ins. Co., 600 F.3d 190, 199 (2d Cir. 2010); United States v. Gammage, 580 F.3d 777, 780 (8th Cir. 2009).

junctive relief delays a project that a court ultimately decides is legal. The longer it takes to resolve a case, the greater the economic effect on those relying on the authorized activity.

Finally, delay may impair the accuracy of subsequent litigation. Witnesses become harder to locate as time passes, and even when they can be located, memories fade. In the worst case scenario, an essential party may die just before a second trial, wasting all of the efforts consumed by two rounds of litigation.[304]

That jurisdiction is involved does not render these efficiency concerns irrelevant. The Supreme Court has considered judicial efficiency in construing the contours of its jurisdiction to review the decisions of state courts and in assessing whether statutory elements are of a jurisdictional nature.[305] It relied on judicial efficiency to hold that a party's consent to try a case before a magistrate judge could be appropriately inferred.[306] And it has limited the breadth of the collateral order doctrine, which extends the jurisdiction of appellate courts over nonfinal orders in limited circumstances, out of concern for the costs faced by litigants.[307] When a court adjudicates a defense of qualified immunity, for example, the Supreme Court has held that interlocutory appeal is available because the doctrine provides a defense to having to withstand suit, not merely a defense to liability. The justification is, in part, the desire to avoid distraction of government officers from their job responsibilities.[308] Scholarly analysis of jurisdiction has followed suit, considering

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304. *See* Friends of the Earth, Inc. v. Gaston Copper Recycling Corp., No. 06-1714, 2008 U.S. App. LEXIS 2854, at *9-10 (4th Cir. Feb. 7, 2008).

305. *See* Arbaugh v. Y & H Corp., 546 U.S. 500, 513-14 (2006); Nike, Inc. v. Kasky, 539 U.S. 654, 660 (2003) (Stevens, J., concurring). The Court has on occasion indicated that efficiency may not appropriately be considered in deciding jurisdiction. *See, e.g.*, Thermtron Prods., Inc. v. Hermansdorfer, 423 U.S. 336, 344 (1976) ("[A]n otherwise properly removed action may no more be remanded because the district court considers itself too busy to try it than an action properly filed in the federal court in the first instance may be dismissed or referred to state courts for such reason.").

306. Roell v. Withrow, 538 U.S. 580, 590 (2003). The Court explained: "Inferring consent in these circumstances thus checks the risk of gamesmanship by depriving parties of the luxury of waiting for the outcome before denying the magistrate judge's authority. Judicial efficiency is served; the Article III right is substantially honored." *Id.*

307. Will v. Hallock, 546 U.S. 345, 350 (2006); Digital Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, 868 (1994).

308. *See generally* John C. Jeffries, Jr., Essay, *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 90 (1999); Nancy Leong, *The* Saucier *Qualified Immunity Experiment: An Empirical Analysis*, 36 PEPP. L. REV. 667, 667-69 (2009).

whether particular jurisdictional rules enhance or impair efficiency.[309]

IV. THE REFORM OF JURISDICTIONAL PROCEDURE

What is to be done? Section II argued that the duty of jurisdictional inquiry imposed by jurisdictional procedure serves as a second-best mechanism to preserve separation of powers. As we have seen, however, courts create all manner of problems when they consider jurisdiction sua sponte without also investigating jurisdictional facts. Moreover, the most prevalent manifestation of jurisdictional procedure advances one aspect of separation of powers, while ignoring another. The Constitution explicitly provides mechanisms by which the political branches can prevent each other from usurping unconstitutional authority. The duty of jurisdictional inquiry analogously constrains courts from acting outside of their constitutional authority. The political branches also possess implicit means of spurring each other to exercise their constitutional power. Jurisdictional procedure often fails in that regard because courts frequently make no effort to ensure that they exercise the full extent of their constitutionally delegated authority in those cases brought before them.

This Article suggests a conceptually straightforward solution: reform jurisdictional procedure so that the duty of jurisdictional inquiry also includes investigation of jurisdictional facts. This means that courts will bear the ultimate responsibility of assuring themselves that the record contains adequate jurisdictional facts to allow for a correct assessment of jurisdiction. Parties bring jurisdictional issues to the attention of courts and provide their legal analysis even though courts themselves have the responsibility of raising and resolving those issues. In just the same way, parties would continue to play a crucial role in providing courts with the factual information necessary to resolve jurisdictional issues. This procedure will increase the inquisitorialness of jurisdictional

309. *See, e.g.*, Donald L. Doernberg, *There's No Reason for It; It's Just Our Policy: Why the Well-Pleaded Complaint Rule Sabotages the Purposes of Federal Question Jurisdiction*, 38 HASTINGS L.J. 597, 653-55 (1987) (considering and rejecting the argument that the well-pleaded complaint rule enhances efficiency); Michael Wells, *Who's Afraid of Henry Hart?*, 14 CONST. COMMENT., 175, 182-83 (1997).

procedure, but not at great expense to the autonomy interests of parties. Moreover, by investigating jurisdictional facts, courts can better check themselves to assure that they exercise the power delegated to them by the Constitution, but no more.[310]

A. The Duty to Investigate Jurisdictional Facts

In our legal system we do not think of judges as investigators. Instead, judges should remain above the fray so as to preserve their neutrality.[311] Even outside the judiciary, principles of administrative law generally require agencies to separate the functions of investigators and decision makers.[312] But the courts' existing obligation to raise questions of jurisdiction means they have entered the investigatory field.[313] Expanding that role to include the duty to investigate the facts that will permit a correct determination of jurisdiction does not, therefore, disturb an otherwise carefully calibrated adversarial procedure.[314]

Charging judges with factual investigation should not arouse suspicion. The American legal system already condones such activity. For example, the Federal Rules of Evidence empower judges to question witnesses and even call individuals to the stand whom they believe possess knowledge relevant to a case,[315] and district courts may permit jurors to submit questions to witnesses as well.[316]

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310. Commentators have argued that certain jurisdictional doctrines may create a sphere within which the courts have discretion to decide whether to entertain a case. *See, e.g.*, BICKEL, *supra* note 36, at 127-32; *see also* Dodson, *supra* note 5, at 1442-43 (discussing how non-jurisdictional elements can affect whether cases are heard).

311. *See, e.g.*, LANDSMAN, *supra* note 167, at 37 (contending that parties must remain in control of the production of evidence "to preserve the neutrality of the fact finder").

312. *See* 5 U.S.C. § 554(d) (2006) ("An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review.").

313. *See, e.g.*, MARVELL, *supra* note 191, at 121 ("The adversary process is no more starkly challenged than when a court decides an issue not raised, for it actually decides something other than what the parties asked it to decide.").

314. *See* LANDSMAN, *supra* note 167, at 2 ("The adversary process should not be viewed as a single technique or collection of techniques; it is a unified concept that works by use of a number of interconnecting procedures, each of real importance to the process as a whole."). As explained previously, scholars have argued that inquisitorial procedures could improve many aspects of American law. *See supra* note 213 and accompanying text.

315. FED. R. EVID. 614.

316. *See, e.g.*, United States v. Sutton, 970 F.2d 1001, 1005 (1st Cir. 1992).

Courts seek out scientific information they believe essential to the proper resolution of cases and, when necessary, appoint experts to provide them that information.[317] Courts direct parties to enter mediation programs in which court-assigned mediators solicit information from the parties and attempt to broker deals,[318] and they grant special masters charged with implementing injunctions broad authority to investigate.[319] The practice of judicial notice also involves investigation.[320] In state court, probate proceedings[321] and grand jury proceedings[322] both give judicial decision makers investigatory authority.[323] Even courts of appeals sometimes engage in independent fact finding.[324] Most relevantly, the Supreme Court has held that district courts may inquire into jurisdictional facts, explaining that "it is within the trial court's power to allow *or to require* the plaintiff to supply, by amendment to the complaint or by affidavits, further particularized allegations of fact deemed supportive of plaintiff's standing."[325] Thus jurisdictional procedure already bridges between leaving parties in exclusive control of their cases and giving courts the authority to seek out the truth.[326] The

317. *See* FED. R. EVID. 706(a) ("The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection."); Marlow, *supra* note 213, at 306-07 (collecting cases).

318. *See* Kessler, *supra* note 17, at 1191.

319. *Id.* at 1194.

320. *See* FED. R. EVID. 201(b); Benjamin, *supra* note 300, at 350.

321. *See, e.g.*, CHARLES J. GROPPE ET AL., 2 HARRIS 6TH NEW YORK ESTATES: PROBATE, ADMINISTRATION, AND LITIGATION § 22:13 (6th ed. 2011).

322. *See, e.g.*, 33 FLA. JUR. 2D *Juries* §§ 295-96 (2012); 64 OHIO JUR. 3D *Jury* §§ 129-133 (2012). A West Virginia court directly investigated the work of a forensic expert suspected of misconduct. *In re* Investigation of the W. Va. State Policy Crime Lab., Serology Div., 438 S.E.2d 501, 502-05, 508 (W. Va. 1993); *see also* Roach, *supra* note 210, at 432 & n.221.

323. Other common law systems that largely adhere to adversarialism also permit judges to exercise investigative powers in limited circumstances. In Australia, Canada, and England, for example, judges are authorized to conduct inquiries into suspected wrongful convictions. *See* Roach, *supra* note 210, at 430-31.

324. *See generally* Gorod, *supra* note 198, at 25-37.

325. Warth v. Seldin, 422 U.S. 490, 501 (1975) (emphasis added); *see also* Wetmore v. Rymer, 169 U.S. 115, 120 (1898); Am. Library Ass'n v. FCC, 401 F.3d 489, 494 (D.C. Cir. 2005).

326. Indeed, some have argued that the American legal system would benefit if it entrusted judges with all factual investigation. *See, e.g.*, Langbein, *supra* note 169, at 824. Professor Langbein's article advocating reform of the American legal system based on German civil procedure generated substantial controversy. Some commentators questioned the benefits ascribed to the German system. *See* Allen et al., *supra* note 169, at 706. *But see* John H. Langbein, *Trashing* The German Advantage, 82 NW. U. L. REV. 763, 764 & n.11 (1988). Others

judicial system accepts whatever harm this imposes to individual autonomy as a cost for more accurate, and thus more just, judicial decisions.[327]

Experience suggests that the current practice of permitting judges to exercise control and inquire into law and facts outside the four corners of a case as presented by the parties has not corrupted the objectivity of the American legal system or the faith that society places in it. Even if placing judges in active control risks bias, jurisdictional procedure already incorporates that risk because it requires judges to do more than passively decide.[328]

Moreover, the American legal tradition once entrusted the judiciary with even greater responsibilities of investigation. As Amalia Kessler established in her exhaustive treatment of the inquisitorial tradition of American equity courts in the eighteenth and nineteenth centuries, prior to the merger of law and equity, federal equity courts appointed masters

> to direct the necessary discovery, including ordering the parties and/or witnesses to produce documents and to submit to examination under oath. Thus, unlike what the common-law jury had long since become, the master was not simply a passive audience for whatever evidence the parties chose to present, but instead played an active, inquisitorial role in determining what evidence should be heard and which questions asked.[329]

The traditional equity framework provided minimal avenues for parties to participate in collecting evidence by excluding parties

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questioned the viability of reform due to American legal culture. *See* John C. Reitz, *Why We Probably Cannot Adopt the German Advantage in Civil Procedure*, 75 IOWA L. REV. 987, 988 (1990). The argument presented here does not require adoption of a broader investigative role for judges. Instead, it suggests only that judges should have a duty to investigate facts where they have already adopted inquisitorial procedures related to the legal question of jurisdiction.

327. In responding to *The German Advantage in Civil Procedure*, John Reitz argues that American legal culture would strenuously resist entrusting judges with a generalized responsibility for fact finding. *See* Reitz, *supra* note 326, at 988.

328. The limited research available suggests that active engagement does not necessarily create biased decision making. *See* Thibaut et al., *supra* note 178, at 396.

329. Kessler, *supra* note 17, at 1209 (footnotes omitted); *see also* FED. R. EQUITY 77 (1842), *in* THE NEW FEDERAL EQUITY RULES 59 (8th ed. 1933) (authorizing masters to "direct all other inquiries and proceedings in the matter before him, which he may deem necessary and proper to the justice and merits thereof and the rights of the parties").

from the room when masters received testimony and only permitting parties to suggest questions that masters might choose to ask. But times have changed and modern inquisitorial proceedings in the United States and elsewhere permit both judges and parties to participate actively in evidence gathering.[330]

Thus, American courts already investigate facts and without apparent negative repercussions. Extending the duty of jurisdictional inquiry to require that judges investigate jurisdictional facts before dismissing cases fits comfortably within the contours of the American legal system. In practical terms, this extension would require courts to recognize potential jurisdictional questions and then gather evidence relevant to those questions. For example, when a plaintiff alleges that a timber sale will harm her recreational interests, a court should ask her if she uses the affected area, rather than simply dismissing for lack of standing. When a plaintiff challenges a forest plan without identifying a project authorized by the plan, a court should ask whether delaying judicial review would cause her hardship, rather than simply dismissing for lack of ripeness. And when it appears that a case may be moot, a court should seek out evidence as to whether allegedly illegal conduct will recur. In each case, the court should satisfy itself that it has enough information to rule on its jurisdiction rather than relying upon the parties to do so.

Courts could investigate facts in a variety of ways. In some circumstances, issuing to the parties an order seeking relevant information will suffice. In others, when facts are contested or less certain, the court may need to convene an evidentiary hearing at which both the court and the parties could question witnesses.[331] Alternately, a court could appoint a special master to gather evi-

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330. *See* Wolfe & Proszek, *supra* note 178, at 295; *see also* Kessler, *supra* note 17, at 1261-62 (describing the joint fact-finding role of parties and judges in the French system); Wolfe & Proszek, *supra* note 178, at 297-98 (describing the fact-finding role of administrative law judges). Because judges could inquire into jurisdictional facts in the presence of the parties, such factual investigation would not run afoul of modern rules of judicial ethics. *See, e.g.*, MODEL CODE OF JUDICIAL CONDUCT R. 2.9(A) (2011) ("A judge shall not initiate, permit, or consider ex parte communications ... concerning a pending or impending matter." (footnote omitted)); Marlow, *supra* note 213, at 292-93.

331. Such a practice already exists under American law. Administrative benefit determinations utilize similar processes that charge the judge and the parties with joint responsibility to develop the factual record. *See* Wolfe & Proszek, *supra* note 178, at 295.

dence and recommend findings of fact. When a scientifically disputable question arises, courts may appoint independent experts to provide them needed information and perspective.[332] It is possible that courts may even discover jurisdictional facts lurking in the record that have gone unnoticed by the parties. That may be particularly likely when extensive administrative records are concerned. For example, an environmental impact statement prepared under the National Environmental Policy Act may contain ample evidence that a government activity is likely to harm the aesthetic or recreational interests of environmental plaintiffs, but the plaintiff may not notice.[333]

Investigating facts will often require only modest effort. In the case of *Sierra Club v. Morton*, for example, a court could have determined that the Sierra Club had standing by simply asking if its members used the Mineral King Valley.[334] The same goes for *Pollack v. U.S. Department of Justice*. The court had to ask only if the plaintiff observed birds in the area around the challenged shooting range or ate fish from Lake Michigan.[335] In such cases, the task of formulating the appropriate question requires much less energy than writing an order dismissing the case because of an incomplete factual record.

Friends of Tims Ford v. Tennessee Valley Authority, in which plaintiffs challenged a plan to construct additional public docks, presents a more complex situation. While as a matter of intuition it seems likely that more docks will lead to more boat traffic, and thus increase plaintiffs' injuries, that intuition masks technical questions about future demand for public boating access and the relationship between the number of boaters on the lake and harm to the plaintiffs. A court might rely on that intuition, order the parties to

332. *See* FED. R. EVID. 706.

333. As Amy Wildermuth and Lincoln Davies have explained, administrative records often do not include facts relevant to a plaintiff's standing because the agency has no need to consider that issue. Wildermuth & Davies, *supra* note 5, at 1001-02. When plaintiffs allege personalized injuries related to environmental harms, however, administrative records may yield relevant information. Under the National Environmental Policy Act, federal agencies must assess the significant environmental effects of their activities. 42 U.S.C. §§ 4321-4370f (2006). That information may validate the standing of those that use affected resources.

334. Indeed, briefs before the Supreme Court alleged as much. Instead of considering those facts, however, the Supreme Court honored the Sierra Club's decision to "decline[ ] to rely on its individualized interest[ ] as a basis for standing." 405 U.S. 727, 735 n.8 (1972).

335. *See* Pollack v. U.S. Dep't of Justice, 577 F.3d 736, 742-43 (7th Cir. 2009).

address the issue, or call upon an expert. The environmental impact statement prepared by the Tennessee Valley Authority may also have shed light on these questions if reviewed with a careful eye because, presumably, it considered the environmental effects of increasing the number of public docks.[336]

Some litigation will pose thornier questions, such as lawsuits related to climate change. For example, in *Amigos Bravos v. U.S. Bureau of Land Management*, environmental organizations challenged the approval of oil and gas leases in New Mexico on the grounds that the Bureau of Land Management had not adequately considered that greenhouse gases associated with the project would contribute to climate change.[337] As a basis for standing, the organizations relied primarily on claims that climate change generally, which would be exacerbated by the project, would adversely affect specific ecosystems in New Mexico enjoyed by their members.[338] The scientific question of what localized effects climate change will have on specific ecosystems is complicated and debatable.[339]

The *Amigos Bravos* case presents an added twist, because there is reason to believe that the plaintiffs in the case limited their claims of injury to those resulting from climate change in order to secure judicial consideration of a theory that anyone affected by the climate—that is, everyone—has standing to challenge any project that contributes to climate change. The organizations declined to allege that members use the areas directly affected by the oil and gas leases at issue.[340] I suspect, however, that the membership, which consists of many New Mexico residents, does use those areas and would have standing based on aesthetic and recreational interests likely to be affected by oil and gas development. An investigation court could, therefore, dodge the scientific issues related to

336. In *Massachusetts v. EPA*, the Supreme Court adopted that approach, relying, in part, on the administrative record complied by the EPA to determine that Massachusetts had established injury in fact. 549 U.S. 497, 521 (2007).

337. 816 F. Supp. 2d 1118, 1122-23 (D.N.M. 2011).

338. Declaration of Joanie Berde at 5-6, *Amigos Bravos*, 816 F. Supp. 2d 1118 (D.N.M. 2011) (No. 6:09-cv-00414-RB/LFG); Declaration of Anna Frazier at 3-4, *Amigos Bravos*, 816 F. Supp. 2d 1118 (D.N.M. 2011) (No. 6:09-cv-00414-RB/LFG); Declaration of Jeremy Nichols at 7-9, *Amigos Bravos*, 816 F. Supp. 2d 1118 (D.N.M. 2011) (No. 6:09-cv-00414-RB/LFG).

339. That is not to say that all claims related to climate change are debatable. The weight of scientific evidence links changes in the climate to the release of greenhouse gases, and the Supreme Court has already recognized as much. *See Massachusetts*, 549 U.S. at 523.

340. *See Amigos Bravos*, 816 F. Supp. 2d at 1122-23.

climate change altogether by inquiring into this alternative and more traditional avenue of standing.

In practice, some courts already institute limited procedures to collect information related to jurisdiction. The D.C. Circuit, for example, requires parties filing a petition for review to "set forth the basis for the claim of standing ... [and] [w]hen ... standing is not apparent from the administrative record, ... include arguments and evidence establishing the claim of standing."[341] The court "retains the discretion to seek supplemental submissions from the parties if it decides that more information is necessary to determine whether petitioners, *in fact*, have standing."[342] And the court has exercised that discretion. In *Public Citizen v. National Highway Traffic Safety Administration*, the court considered a challenge to a regulation based on an allegation that the agency should have adopted a more stringent alternative that would have better protected public health.[343] In its initial decision, the court concluded that "the record [was] incomplete" because it contained insufficient information to determine whether the increased risk of harm associated with the adopted regulation was sufficiently great to satisfy the injury in fact requirement.[344] Rather than dismissing for lack of standing, the court ordered Public Citizen to

> file affidavits ... addressing (i) whether [the regulation] as adopted creates a substantial increase in the risk of death, physical injury, or property loss over the interpretation ... that Public Citizen has advanced, and (ii) whether the ultimate risk of harm to which Public Citizen's members are exposed ... is "substantial" and sufficient "to take a suit out of the category of the hypothetical."[345]

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341. D.C. CIR. R. 28(a)(7); *see also* Wildermuth & Davies, *supra* note 5, at 986-90.

342. Am. Library Ass'n v. FCC, 401 F.3d 489, 494 (D.C. Cir. 2005) (emphasis added).

343. 489 F.3d 1279, 1284 (D.C. Cir. 2007), *on further consideration* 513 F.3d 234 (D.C. Cir. 2008).

344. *Pub. Citizen*, 489 F.3d at 1296.

345. *Id.* at 1297 (quoting Natural Res. Def. Council v. EPA, 464 F.3d 1, 6 (2006)). Whether the court imposed the correct burden on Public Citizen to demonstrate standing is beyond the scope of this Article. *See generally* Amanda Leiter, *Substance or Illusion? The Dangers of Imposing a Standing Threshold*, 97 GEO. L.J. 391, 394-95 (2009) (criticizing the substantial increase of risk standing threshold). I am interested, instead, in the court's decision to identify and request the information it believed necessary to correctly rule on standing.

In response, both the federal agency and Public Citizen submitted technical declarations discussing the public health risks related to the case.[346] The D.C. Circuit's practice exemplifies the type of fact investigation that courts can easily undertake. In doing so, courts will more often correctly decide whether a case falls within their jurisdiction.

The American legal system currently does not *oblige* judges to investigate facts related to jurisdiction. But it could. Courts already possess the discretion to conduct such investigation and transforming that discretion into duty does not run crosswise with the existing traditions of the American legal system.

B. Reposing the Duty in the District Court

When a district court identifies a jurisdictional issue, the district court should also investigate the facts. Even when a court of appeals recognizes jurisdictional issues overlooked by the district court, it makes sense to charge district courts with the task of investigating. When a district court fails to assure itself that the record contains sufficient jurisdictional facts, the appellate court should reverse and remand, as they already do on an ad hoc basis.[347]

Obliging district courts to investigate jurisdictional facts also recognizes that "[t]he trial judge's major role is the determination of fact[s], and with experience in fulfilling that role comes expertise."[348] Simply put, district courts have the primary obligation to find facts. Nothing may prohibit courts of appeals from finding facts

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346. *See* Pub. Citizen, Inc. v. Nat'l Highway Traffic Safety Admin., 513 F.3d 234, 238 (D.C. Cir. 2008). For an excellent discussion of standing issues that arise in the context of petitions for review, and the possible means that courts have for addressing disputed jurisdictional facts when a case originates in the court of appeals, see generally Wildermuth & Davies, *supra* note 5.

347. *See* Icicle Seafoods, Inc. v. Worthington, 475 U.S. 709, 714 (1986) ("If the Court of Appeals believed that the District Court had failed to make findings of fact essential to a proper resolution of [a] legal question, it should ... remand[ ] to the District Court to make those findings.... [I]t should not simply have made factual findings on its own."); Pullman-Standard v. Swint, 456 U.S. 273, 291-92 (1982) ("When an appellate court discerns that a district court has failed to make a finding because of an erroneous view of the law, the usual rule is that there should be a remand for further proceedings to permit the trial court to make the missing findings."). *But see* Benjamin, *supra* note 300, at 334-35 (noting that the Supreme Court often engages in appellate fact finding rather than remanding a case).

348. Anderson v. City of Bessemer City, 470 U.S. 564, 574 (1985).

in appropriate circumstances.[349] Only long-standing tradition precludes courts of appeals from directly taking evidence.[350] Judges practiced at presiding over oral arguments, however, may have little experience or skill at eliciting factual information from witnesses. There is no reason to require appellate judges to become practiced at investigating facts when district court judges can serve that role—indeed, such division of labor serves judicial efficiency.

Remanding to district courts also provides for orderly appellate review. Parties have a right of appeal because we recognize the value in having a second judicial body consider each case, guard against bias in the judge below, and provide greater consistency to the law.[351] When courts of appeals find facts on their own, those advantages evaporate. The Supreme Court offers a limited check against incorrect court of appeals decisions, but the odds that the Supreme Court will grant certiorari to correct an erroneous finding of fact is infinitesimally small.[352] Nor is it clear what standard of review would govern Supreme Court review of appellate fact-finding. When district courts find jurisdictional facts, on the other hand, the familiar appellate process can unfold through ordinary application of the clear error standard of review.[353]

Appellate review can proceed when district courts explicitly find jurisdictional facts. There may, of course, be situations when jurisdiction is so obvious that requiring findings of fact would constitute a formalistic waste of judicial resources. Whenever questions about jurisdiction arise, however, the courts of appeals will benefit from

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349. For example, the Supreme Court permits de novo appellate review of certain constitutional facts in the First Amendment context. *See, e.g.*, Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 508 n.27 (1984); Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 229-30 (1985).

350. *See* Benjamin, *supra* note 300, at 353.

351. *See* 28 U.S.C. § 1291 (2006) ("The courts of appeals ... shall have jurisdiction ... from all final decisions of the district courts."); *see also* Judith Resnik, *Precluding Appeals*, 70 CORNELL L. REV. 603, 607 (1985) (explaining that the "three-tiered, appeal-as-of-right system" used in federal courts addresses corrective, consistency, and bias concerns).

352. Indeed, the Supreme Court's rules do not contemplate granting certiorari to correct such an error. *See* SUP. CT. R. 10.

353. *See* FED. R. CIV. P. 52(a); Collins, *supra* note 133, at 1875. Clear error review, rather than de novo review, applies even when district courts find jurisdictional facts at the dismissal or summary judgment stage. *See, e.g.*, Rio Grande Silvery Minnow (Hybognathus Amarus) v. Bureau of Reclamation, 599 F.3d 1165, 1175 (10th Cir. 2010); Canadian Lumber Trade Alliance v. United States, 517 F.3d 1319, 1330-31 (Fed. Cir. 2008); Valentin v. Hosp. Bella Vista, 254 F.3d 358, 365 (1st Cir. 2001).

district court fact finding; when district courts fail to find such facts, a limited remand is appropriate.[354] Whether jurisdiction is reasonably called into question is, however, a matter of perspective, and courts of appeals will need to develop standards to govern when they will remand for fact finding. D.C. Circuit practice may serve as a useful guide. As discussed, that court requires petitions for review to address standing in which "the petitioner's standing is not self-evident."[355]

To consider the practical applications of this procedure, return again to the *Heartwood, Inc. v. Agpaoa* case. Recall that Heartwood provided standing affidavits alleging that its members used a national forest, but did not specify whether they used those areas of the forest subject to the proposed timber harvest. Under the procedure I propose, if the case arrived in the court of appeals as it did—including no findings of jurisdictional fact by the district court—the Sixth Circuit would remand for further proceedings. Suppose instead that the district court had addressed the declarations in the initial proceeding, accepted the facts they contained as true, and determined them sufficient to establish standing; the Sixth Circuit could then reverse and remand, holding that the district court had applied an improper legal standard. The district court would then have the opportunity to conduct additional factual investigation under the proper standard articulated by the court of appeals. If, on the other hand, the district court had inferred from the affidavits that the members used the project area, and made such a finding of fact, the court of appeals would review only for clear error.

There are, of course, other options.[356] Courts of appeals could themselves fill gaps in the evidentiary record or they could appoint special masters to do so. Recent scholarship has endorsed those approaches for situations in which the need for fact finding becomes apparent in proceedings before the courts of appeals. Amy

354. *See* Friends of the Earth, Inc. v. Gaston Copper Recycling Corp., No. 06-1714, 2008 U.S. App. LEXIS 2854, at *23 (4th Cir. Feb. 7, 2008).

355. Sierra Club v. EPA, 292 F.3d 895, 900 (D.C. Cir. 2002); *see also* Am. Library Ass'n v. FCC, 401 F.3d 489, 490 (D.C. Cir. 2005) ("Both petitioners and the Commission reasonably, if inaccurately, concluded that petitioners' standing was self-evident .... [W]e have concluded that more is required.").

356. *See* Pidot, *supra* note 16, at 1417-19 (discussing avenues of reform).

Wildermuth and Lincoln Davies suggest that courts of appeals appoint special masters when they consider petitions for review arising in the court of appeals and the record does not disclose sufficient facts to determine if the petitioners have standing.[357] Stuart Benjamin suggests that courts of appeals engage in direct fact finding when facts relevant to the merits of a case change after the district court entered judgment.[358]

While Benjamin, Wildermuth, and Davies disfavor remand, their objections do not apply in the context this Article considers. Wildermuth and Davies address circumstances when a case challenging action taken by an administrative agency arises in the court of appeals. In that context, remanding to the district court is not a viable option because the district court possesses no jurisdiction over the case. Wildermuth and Davies do not believe that appellate courts should remand to administrative agencies because agencies are not disinterested in the question of whether petitioners have standing to bring administrative law challenges and have no expertise or business determining facts related to the jurisdiction of federal courts.[359] Instead, they suggest that courts of appeals appoint special masters to find jurisdictional facts. There is significant merit to their argument that such appointments prove preferable to direct fact finding by appellate judges. But when courts of appeals review district court decisions, a remand to the district court does not raise the same problems. After all, courts of appeals routinely remand when they conclude that district courts have erred.

Benjamin's concerns also do not apply. He considers the need for appellate courts to find facts when the merits of a case turn on a rapidly changing situation. He worries that remanding risks an "infinite remand loop" in which new facts will arise after each district court ruling, which will then result in another remand.[360] The facts related to jurisdiction do not typically experience such rapid change over the course of a lawsuit. Most jurisdictional questions focus on circumstances as they existed at the time that a

357. *See* Wildermuth & Davies, *supra* note 5, at 1003-07.
358. *See* Benjamin, *supra* note 300, at 311-12.
359. *See* Wildermuth & Davies, *supra* note 5, at 1001-02.
360. Benjamin, *supra* note 300, at 332.

plaintiff filed suit;[361] jurisdiction must exist then, and those historical facts are static. Although mootness does rely on occurrences subsequent to the commencement of litigation, the inquiry should be unidirectional. Once a case has become moot, the court need not consider any further development in the facts.

Benjamin further opines that remanding wastes judicial resources. He argues that a court of appeals must familiarize itself with a case to determine if a remand is necessary. Remanding at that point will waste the effort of the court of appeals, require the district court to regain familiarity with the case, and if further appeals arise, require yet more attention from the court of appeals.[362] The situation of jurisdiction should impose only minimal costs of these kinds.[363] Appellate courts do not need to become familiar with the merits of a case to identify jurisdictional issues. Indeed, such cases may be candidates for summary disposition when the court of appeals notes a jurisdictional issue and issues a limited remand to the district court.[364]

C. Potential Pitfalls and Alternatives

I envision three types of primary criticisms of my proposal, one practical, one theoretical, and one financial. In addition, there are at least three alternatives to the new jurisdictional procedure that I have suggested that would accomplish some of its goals. I discuss each of these in turn.

Practically speaking, a skeptic might argue that the Supreme Court's decision in *Summers v. Earth Island Institute* forecloses implementing the duty of jurisdictional inquiry in the way that I propose. The *Summers* Court refused to consider standing declarations submitted to the court of appeals, explaining that "[i]f [the

361. *See* Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826, 830 (1989).

362. Benjamin, *supra* note 300, at 361-63.

363. Cases will arise in which an appellate court could easily ascertain the facts necessary to establish jurisdiction and, in such circumstances, a remand rule would seem inefficient. But a requirement of remand will save courts the effort of discerning these circumstances. More importantly, requiring remand will enhance the legitimacy of judicial proceedings and curtail perception that courts of appeals manipulate jurisdiction to achieve ideological ends. *See, e.g.*, Pierce, *supra* note 30, at 1759-60.

364. *See, e.g.*, DAVID G. KNIBB, FEDERAL COURT OF APPEALS MANUAL § 25:4, at 589-90 (5th ed.).

plaintiffs] had not met the challenge to their standing at the time of judgment, they could not remedy the defect retroactively."[365] That logic might suggest that the court of appeals must resolve jurisdictional questions, or at least standing questions, based on the record at the time that the district court first entered judgment. The Court, however, did not consider whether a court of appeals can remand to allow the *district court* to further develop the record. Narrowly speaking, therefore, *Summers* does not undermine my approach.[366] I also think it possible that the Supreme Court's decision was motivated by a concern that courts of appeals should not enter the fact-finding business whenever the district court record is incomplete, a concern that complements, rather than contradicts, my conclusions here. That consideration suggests that current jurisdictional procedure has substantial room for development and refinement; nothing the Supreme Court has said precludes a procedure that maintains the district court's responsibility for developing the factual record, but allows remand when the record is incomplete.

From a theoretical perspective, a skeptic might contend that investigating jurisdictional facts exceeds the courts' competence and entrusts too much authority to the district judge. Judges are not trained as investigators. Nor are judges scientists, and in some circumstances jurisdictional fact finding requires investigation and resolution of highly technical issues. In *Amigos Bravos v. Bureau of Land Management*, for example, it could be argued that the district court lacked the requisite knowledge and skill to determine whether it was more likely than not that climate change would degrade those ecosystems enjoyed by the plaintiffs. Similarly, under the system proposed in this Article, district judges could initiate burdensome procedures to unnecessarily identify facts based on a misunderstanding of the legal standard. Parties faced with such a burdensome process, perhaps requiring them to disclose personal, privi-

365. 555 U.S. 488, 495 n.* (2009); *see also* FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 235 (1990) (explaining that the post-judgment affidavit was not part of the record, but then explaining that it was insufficient evidence to show standing).

366. The Supreme Court has not explained how its ruling in *Summers* relates to 28 U.S.C. § 1653 (2006), which provides that "[d]efective allegations of jurisdiction may be amended, upon terms, in the trial or *appellate courts*." *Id.* (emphasis added).

leged, or proprietary information, might have no choice but to voluntarily dismiss or settle.

These related objections, however, run counter to the broad responsibilities that our legal system entrusts to judges. Judges already engage in factual and legal investigation in a variety of contexts. We trust them to serve as investigators when the need arises, and we should do so when it comes to jurisdictional facts. District court judges already have broad discretion to define the scope of discovery. Appellate courts can curb district judges requiring unusual, extreme, and unnecessary fact investigation through the mandamus process.[367] Moreover, objections based on the competence of the courts to resolve scientific issues do not directly challenge the ability of courts to investigate those issues. Current jurisdictional doctrine—particularly standing—already requires courts to assess and resolve scientific disputes. This Article merely proposes that courts should seek out more information so that they can make better decisions on matters in which they must act independently of the parties.

From a financial perspective, a skeptic might challenge my proposal as improperly shifting litigation costs from the parties to the public. Investigating jurisdictional facts will often be easy, but at times it may require sustained attention by a district court and could even involve appointment of technical or scientific experts. It may be possible to shift those costs back to the parties, even if the courts head up the investigation. Even if that proves impracticable, I believe that more fully vindicating separation of powers principles, more fairly treating parties, and arriving at more just results, is worth the cost. My proposal may also have the worthy benefit of counteracting perceptions of illegitimacy that currently surround decisions about jurisdiction, and in particular, dismissals for lack of standing. Commentators have long speculated that appellate courts invoke standing on ideological grounds to avoid deciding cases that they do not like.[368] Empirical evidence provides some support for that charge. In a study of Supreme Court and courts of appeals' standing decisions, Richard Pierce, Jr. found a highly significant correlation between the votes of judges and their political affil-

367. *See* Holt-Orsted v. City of Dickson, 641 F.3d 230, 236 (6th Cir. 2011).

368. *See, e.g.*, Fleisher, *supra* note 31, at 924; Nichol, *supra* note 30, at 326.

iation.[369] The malleable legal standards that define standing may present too tempting a target for judges seeking to avoid deciding cases in a manner counter to their preferences. If so, shifting the locus of jurisdictional decision making from the courts of appeals to the district court may temper that temptation. Courts of appeals will be unable to permanently terminate cases for lack of standing except in the exceptional case. Instead, they will correct any legal error committed below and then remand for the district court to take evidence, find facts, and apply the correct legal rule. Whether a particular plaintiff has standing will generally turn on those findings of fact, and the court of appeals will review those findings for clear error.

Even if these pitfalls are surmountable, requiring courts to investigate jurisdictional facts may seem like unnecessarily radical surgery. Other possibilities could meet some of the goals of this new jurisdictional procedure, while seemingly requiring more insignificant changes.

Jurisdictional procedure could become wholly adversarial, requiring defendants to raise subject matter jurisdiction defenses just as they must raise other defenses. The American Law Institute proposed such reform in a 1969 report focusing on concerns that defendants losing before a federal district court could strategically raise new challenges to diversity jurisdiction on appeal.[370] Attempting to reform jurisdictional procedure in this way would make it fairer, but the attempt would face considerable obstacles. Modern procedures grew out of the Judiciary Act of 1875 and were once statutory in character.[371] But the courts now view themselves as constitutionally bound to consider jurisdiction, making reform of this sort difficult. I also believe that recasting jurisdictional procedure as an adversarial process would be a mistake. Federal courts have assumed an increasingly important position in our separation of powers in the centuries since the framing of the Constitution. Judicial review has broadened, and judicial supremacy now reigns.[372] Today, federal courts exercise unparalleled authority to

369. Pierce, *supra* note 30, at 1759-60.

370. *See* THE AM. LAW INST., *supra* note 152, 366-69; *see also* Dobbs, *supra* note 152, at 525-26 (opining that the proposed reform does not go far enough).

371. *See supra* notes 140-46 and accompanying text.

372. *See* KRAMER, *supra* note 96, at 77-78.

police the other branches of the federal government. Because they have the final say about the meaning of the Constitution and federal statutes, federal courts largely operate beyond the kinds of external checks and balances that the Constitution places on the President and Congress.[373] Jurisdictional procedure fills this gap, creating an important internal constraint on judicial authority, and preventing courts from "intrud[ing] into areas committed to the other branches of government."[374]

Jurisdictional procedure could also include a rule that tolled the statute of limitations during the pendency of a case. This would allow all plaintiffs to attempt to renew suit based on new allegations of jurisdictional fact, rather than having that opportunity turn on the amount of time that it takes courts to dismiss. This reform would also address issues of fairness by allowing all plaintiffs an opportunity to cure jurisdictional defects in successive litigation. In increasing the fairness of jurisdictional procedure, however, its efficiency would markedly suffer. Moreover, modifying tolling rules could face substantial doctrinal hurdles. In at least some circumstances, the Supreme Court has held that statutes of limitation are themselves jurisdictional,[375] which would seem to make a tolling regime impermissible. Furthermore tolling would not address the separation of powers concerns that adhere to courts dismissing cases that fall within their jurisdiction.

Finally, jurisdictional procedure could include a rule that appellate courts—including the Supreme Court—should remand, rather than decide jurisdictional questions themselves. If questions of standing return to trial judges, then parties could supplement the record to try to meet the legal standard identified on appeal. This too would serve fairness and enhance efficiency and accuracy. Even a remand rule, however, would not create a self-checking mechanism to ensure that courts "exercise the jurisdiction given to them."[376] Rather, it would maintain the existing asymmetry in which courts protect against overreaching, but do not ensure that they fulfill their constitutional responsibilities. Vesting courts with

373. *See supra* notes 66-77 and accompanying text.
374. Flast v. Cohen, 392 U.S. 83, 95 (1968).
375. *See, e.g.*, John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 133-34 (2008).
376. Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976).

the power and obligation to assure themselves of jurisdiction by investigating both law and facts can best accomplish this purpose.

CONCLUSION

Courts address jurisdictional issues through jurisdictional procedure. Yet this area of the law has remained unidentified and undertheorized, despite its marked departure from the ordinary course of business in America's adversarial legal system. This departure is important because it vindicates constitutional principles of separation of powers. Current jurisdictional procedure does so imperfectly, however, because courts do not see themselves as obligated to investigate jurisdictional facts. Recognizing such an obligation will ensure that federal courts exercise the full extent of their jurisdiction, but no more. It would also cure serious ills arising out of current jurisdictional procedure, which can result in the dismissal of a case based on an issue never raised by the parties, never raised by the district court, and for which the plaintiff is never afforded an opportunity to present evidence.