

RECONCILING SUBJECT-MATTER JURISDICTION

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I. INTRODUCTION

Few, if any, concepts in civil procedure are more important than subject-matter jurisdiction.¹ Subject-matter jurisdiction has long been regarded as an essential component of every civil action, a prerequisite to a valid and enforceable judgment.² Indeed, so important is this concept, at least in federal courts, that the defense of lack of subject-matter jurisdiction (which generally results in a dismissal) may be raised at almost any time, even on appeal, and even by the court itself.³

* Professor of Law, Florida Coastal School of Law. I thank Professor Philip Pucillo, Michigan State University College of Law, for inviting me to present this Article as part of the Workshop on Civil Procedure at the 2017 Southeastern Association of Law Schools Annual Conference in Boca Raton, Florida; Professor David Marcus, University of Arizona James E. Rogers College of Law, for inviting me to present the Article at the Third Annual Civil Procedure Workshop in Tucson, Arizona; and Anthony M. Deardurff, Deputy Director, Faculty Division of The Federalist Society for Law and Public Policy Studies, for inviting me to do the same at the their 2018 Annual Faculty Conference in San Diego, California.

1. *See, e.g.*, JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 2.1, at 9 (5th ed. 2015) (“When deciding where to file suit one of the first questions that must be answered is whether the chosen court has the power or competence to decide the matter to be adjudicated. This requirement most often is stated in terms of whether the court has subject-matter jurisdiction over the dispute and should be distinguished from questions of personal jurisdiction, which focus on the court’s authority to enter a judgment that is binding on the particular defendants involved.” (footnote omitted)).

2. *See, e.g.*, *Lightfoot v. Cendant Mortg. Corp.*, 137 S. Ct. 553, 562 (2017) (“A court must have the power to decide the claim before it (subject-matter jurisdiction) and the power over the parties before it (personal jurisdiction) before it can resolve a case.”); *see also* 2 RESTATEMENT (SECOND) OF JUDGMENTS § 1 cmt. a, at 30 (AM. LAW. INST. 1982) (“A fundamental element of procedural fairness is that a tribunal presuming to adjudicate a controversy have legal authority to do so. One aspect of the question of authority is whether the tribunal is empowered to adjudicate the type of controversy that is presented. This is conventionally referred to herein, as the question of subject matter jurisdiction.”). Incidentally, though subject-matter jurisdiction presumably is something of a universal legal concept, the focus of this Article is the operation of subject-matter jurisdiction in American courts, primarily (though not exclusively) federal district courts as it relates to civil (as opposed to criminal) proceedings.

3. *See, e.g.*, *Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149, 152-53 (1908) (holding that the defense of lack of subject-matter jurisdiction may be raised by the court sua sponte on

It is therefore somewhat surprising that the law relating to subject-matter jurisdiction remains unsettled. Yet, over the past two terms alone, the Supreme Court of the United States has dealt with this issue more than once.⁴ Subject-matter jurisdiction also continues to be a topic of scholarly debate.⁵

Why the controversy? Undoubtedly, part of the reason relates (again) to subject-matter jurisdiction's stature. Particularly when the stakes are high, whether a court has subject-matter jurisdiction can have enormous consequences, thus providing incentives for creative arguments in this regard. But stature alone does not seem to explain the extent of the disagreement.

Perhaps another reason why subject-matter jurisdiction remains controversial relates to the incoherence of the term "jurisdiction," which even the Supreme Court has described as "a word of many, too many, meanings."⁶ Courts and commentators have had difficulty determining whether any particular concept is "jurisdictional," and if jurisdictional, the consequences of that determination.

In a recent Article, *Jurisdiction and Its Effects*,⁷ Professor Scott Dodson posits that "jurisdiction" simply "determines forum in a multiform legal system"—that is, "[i]t is a structural concept that helps allocate cases, define boundaries, and maintain relationships among competing forums."⁸ Thus, Dodson concludes (unsurprisingly) that concepts such as subject-matter jurisdiction and personal jurisdiction are, in fact, "jurisdictional."⁹ But also jurisdictional are several other concepts not ordinarily so regarded, such as venue.¹⁰ Dodson further posits that "jurisdiction's effects are separate from its label; a jurisdictional limit—just like a nonjurisdictional limit—could have

appeal, resulting in the dismissal of the action).

4. In addition to *Lightfoot*, see *V. L. v. E. L.*, 136 S. Ct. 1017, 1020-21 (2016).

5. See Jessica Berch, *Waving Goodbye to Non-Waivability: The Case for Permitting Waiver of Statutory Subject-Matter Jurisdiction Defects*, 45 MCGEORGE L. REV. 635, 638 n.3 (2014) ("Federal subject-matter jurisdiction has also received renewed scholarly attention in recent years.").

6. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 90 (1998) (quoting *United States v. Vanness*, 85 F.3d 661, 663 n.2 (D.C. Cir. 1996)); see also Dan B. Dobbs, *The Decline of Jurisdiction by Consent*, 40 N.C. L. REV. 49, 49 n.1 (1961) ("It is not clear why some procedural requirements are 'jurisdictional.'").

7. Scott Dodson, *Jurisdiction and Its Effects*, 105 GEO. L.J. 619 (2017) [hereinafter Dodson, *Jurisdiction and Its Effects*]. This latest Article builds on Dodson's earlier work in this area. See, e.g., Scott Dodson, *Jurisdictionality and Bowles v. Russell*, 102 NW. U. L. REV. COLLOQUY 42 (2007); Scott Dodson, *Mandatory Rules*, 61 STAN. L. REV. 1 (2008).

8. Dodson, *Jurisdiction and Its Effects*, *supra* note 7, at 621.

9. *Id.* at 635.

10. See *id.* at 622, 636.

some, all, or none of the effects commonly tied to jurisdiction.”¹¹ Thus: “Because jurisdiction has neither unique nor immutable effects, Congress (or a court, if appropriate) can supply whatever attendant effects best implement the underlying goals of a particular jurisdictional limit.”¹² Moreover: “Nothing inherent in jurisdiction’s identity necessarily precludes consideration of party preference, judicial discretion, or the equities. These features ought to be considered part of the lawmaking authority’s arsenal for maintaining workability and fairness in the legal landscape.”¹³

Professor Dodson’s work represents a significant breakthrough in our understanding of this concept. But even assuming Dodson is correct—and certainly he advances a powerful argument in that direction—more work remains. Understanding whether some particular concept is “jurisdictional” is helpful, but still unanswered are the ramifications of that determination. The current challenge seemingly is to determine, as a normative matter, precisely what “effects” each form of jurisdiction must or should possess, and whether and to what extent those effects should vary among those different forms and even between different types of courts.

Given the length of Dodson’s “nonexhaustive” list of jurisdictional doctrines,¹⁴ a full exploration of these issues could prove to be a daunting task.¹⁵ The goals of this Article accordingly are more modest. This Article will focus primarily on subject-matter jurisdiction (and specifically, the original subject-matter jurisdiction of the United States District Courts), “freed from effects-based definitions.”¹⁶ By so limiting the inquiry, perhaps we can not only assess the propriety of current subject-matter jurisdiction practice, but also begin to imagine how this exercise might apply to other forms of jurisdiction.

So: What *should* be the effect(s) of subject-matter jurisdiction (or a lack thereof)? To what extent (if at all) should these effects differ from those associated with other forms of “jurisdiction,” such as personal jurisdiction and venue? To what extent (if at all) should these effects differ between federal and state courts? And to what extent (if at all) should there be differences in the ability to raise jurisdictional defects on

11. *Id.*

12. *Id.*

13. *Id.* at 637.

14. *See id.* at 635 (listing more than ten such doctrines).

15. *See id.* at 657 (observing that “nothing about jurisdiction—including the current approach—is simple”).

16. *Id.* at 636.

direct and collateral review? It is these various effects that this Article will explore.

Following this Introduction, this Article moves (in Part II) to an investigation and critique of many of the “effects” commonly associated with federal subject-matter jurisdiction, including the requirement that the basis for subject-matter jurisdiction be pleaded in the complaint (and accordingly receive a response in the answer); the almost unlimited time currently given to defendants to raise lack of subject-matter jurisdiction as a defense; and the somewhat disparate treatment given to cases on direct review in relation to those on collateral review. This Article will then suggest (in Part III) some ways in which federal subject-matter jurisdiction practice perhaps might be “reconciled” with state subject-matter jurisdiction practice and with the practice relating to other Dodsonian forms of “jurisdiction,” such as venue.

This Article will conclude that many of the differences in the effects of federal subject-matter jurisdiction vis-à-vis other forms of jurisdiction cannot be justified, or at least that the benefits of maintaining these divergent practices do not outweigh the costs. This Article will further conclude that in most instances, federal subject-matter jurisdiction practice should move closer to state subject-matter jurisdiction practice and to the practice associated with other procedural defenses, such as lack of personal jurisdiction or improper venue. The hope, therefore, is that, through this exercise, we might be able to achieve some “reconciliation” between federal subject-matter jurisdiction practice and these various other areas. And if so, then perhaps we can expect not only some simplification of this area of procedural law, but also fewer disputes in the application of this doctrine.¹⁷ Judges, lawyers, and law students alike should be most interested in this possibility.

II. THE SINGULAR EFFECTS OF FEDERAL SUBJECT-MATTER JURISDICTION

This Article considers a number of “effects” (or qualities or characteristics) of federal subject-matter jurisdiction as currently understood and tries to determine whether these various effects, to the extent they diverge from those relating to other forms of “jurisdiction”

17. See, e.g., CLYDE SPILLINGER, PRINCIPLES OF CONFLICT OF LAWS 265 (2d ed. 2015) (“Students naturally want to know if the principle [that full faith and credit is not due a judgment rendered without personal jurisdiction] applies in the same way when what was lacking in [the first case] was *subject matter*, rather than personal, jurisdiction. The answer to this question is murkier than it should be.”).

(such as personal jurisdiction and venue), as well as state practice, are justifiable. But before getting into the details, a little more context might help set the stage. Normative considerations aside, the “effects” of federal subject-matter jurisdiction are well-established. Perhaps the classic recapitulation is that found in what is perhaps the leading authority in this area, which, after laying the constitutional and statutory foundation, states:

From the twin principles discussed above—that Article III of the Constitution delineates the possible range of federal subject-matter jurisdiction and that congressional enactments define the actual scope of that jurisdiction at any given time—it follows that federal jurisdiction is limited in nature. The practical effect of this proposition is that there is a presumption *against* federal jurisdiction: whereas the ability to hear a case is presumed in state courts of general jurisdiction, in the federal system the existence of subject-matter jurisdiction generally must be demonstrated at the outset by the party seeking to invoke it. It cannot be conferred by consent of the parties, nor can its absence be waived. If a subject-matter jurisdiction defect exists, it may be raised at any time, even on appeal, and the court is under a duty to point it out if the parties do not.¹⁸

Several observations can be made with respect to this summary. The first is its canonical nature. It is literally hornbook law, and similar statements are both ubiquitous and almost completely uncontroversial. The thinking here is well-entrenched.

A second observation is that this summary, though seemingly uncontroversial, does place federal subject-matter jurisdiction in a relatively unusual, almost unique position. Though a few concepts, such as personal jurisdiction and venue, produce similar effects, nothing else operates quite like subject-matter jurisdiction in terms of the presumption surrounding its propriety, the obligation to plead it, its invulnerability to waiver, etcetera. Of course, this fact alone does not mean that this summary is in any way incorrect. But it does cause one to consider what it might be about the nature of federal subject-matter jurisdiction that justifies these distinctions.

A final observation is related to the second. The first sentence of this summary is (again) uncontroversial; of course federal subject-matter jurisdiction is limited in nature, for it does not even purport to cover all actions.¹⁹ But the remainder of this paragraph is a non-sequitur. Why, for example, should the fact that such jurisdiction is not unlimited result in a

18. FRIEDENTHAL ET AL., *supra* note 1, § 2.2, at 13 (footnotes omitted).

19. *Id.*

presumption against such jurisdiction, or require a plaintiff to plead it? Why is federal subject-matter jurisdiction not subject to consent or waiver, when other important, even constitutional, provisions are? Why is there almost no limit as to when a defect in subject-matter jurisdiction may be raised? And what is the source of the “duty” to raise such defects *sua sponte*? It is these and other questions that will be explored in more detail in the remainder of this Part.

A. *The Pleading Requirement*

As students of federal civil procedure know well, subject-matter jurisdiction must be pleaded in the plaintiff’s complaint (as well as any other pleading asserting a claim). Specifically, Federal Rule of Civil Procedure 8—which has changed little since its inception²⁰—provides: “A pleading that states a claim for relief must contain: (1) a short and plain statement of the grounds for the court’s jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support”²¹

According to one leading treatise, “[t]he reason for the rule is evident.”²²

As Article III of the Constitution makes clear, the federal courts are courts of limited jurisdiction, and there is no presumption that they have subject matter jurisdiction to adjudicate a particular case. Indeed, until the court’s jurisdiction is demonstrated, the converse is true. Hence, the complaint in a federal court action must demonstrate that a basis for federal jurisdiction exists²³

At least at first blush, there does seem to be some logic behind this requirement. Under the Constitution, the “judicial power of the United

20. See 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1201, at 85 (3d ed. 2004) (“Rule 8 has been amended only twice since its promulgation and those alterations were of a relatively minor nature.”).

21. FED. R. CIV. P. 8(a)(1). Incidentally, for simplicity and clarity, this Article will use “plaintiff” as a proxy for any claiming party (which, overwhelmingly, are in fact plaintiffs), and “complaint” for any pleading that states (or purports to state) a claim for relief. Similarly, this Article will use “defendant” for any responding party, and “answer” to represent any responsive pleading. Finally, this Article will use “Rules” to refer to the Federal Rules of Civil Procedure.

22. 5 WRIGHT & MILLER, *supra* note 20, § 1206, at 110.

23. *Id.* (footnote omitted); accord 13 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: CIVIL 3522, at 100, 103-04 (3d ed. 2008) (“It is a principle of first importance that the federal courts are tribunals of limited subject matter jurisdiction. Most state courts are courts of general jurisdiction, and the presumption is that they have subject matter jurisdiction over any controversy unless a showing is made to the contrary. The federal courts, on the other hand, cannot be courts of general jurisdiction Accordingly, there is a presumption that a federal court lacks subject matter jurisdiction, and the party seeking to invoke federal jurisdiction must affirmatively allege the facts supporting it.” (footnote omitted)).

States” is “vested” in “inferior courts” (such as the district courts) only as ordained and established by Congress.²⁴ The Constitution also limits the judicial power of such courts to certain “cases” or “controversies,”²⁵ and has been interpreted as conferring upon Congress not only the power to specify the jurisdictional reach of those courts, but to do so in a manner that falls short of constitutional limits.²⁶ For these reasons, it is probably fair to conclude (as many have) that “[t]he subject matter jurisdiction of the federal courts is limited because the limited nature of federal power is a constitutional priority.”²⁷ And from this, one may fairly surmise that care should be made to ensure that federal district courts do not overstep their jurisdictional bounds, and certainly one way to help achieve that might be to implement a jurisdictional pleading requirement.

But though there are undoubtedly good and valid reasons why any court—federal or otherwise—must have subject-matter jurisdiction of the action, it also seems that one still may fairly ask whether a pleading requirement is truly necessary, or if not, whether such a requirement, on balance, is even a good idea. And upon closer inspection, it seems that a jurisdictional pleading requirement is not at all necessary, and though it probably has some salutary benefits—it might cause some plaintiffs to consider the issue more carefully, and it might provide some limited guidance for defendants and courts²⁸—it is questionable whether the benefits of such a requirement exceed the costs associated therewith.

Let us start with the supposed distinction between courts of “limited” jurisdiction and those of “general” jurisdiction. Though federal district courts are, indeed, courts of limited jurisdiction, such jurisdiction is not all that limited. Federal district courts in fact have jurisdiction of a wide array of actions, including (most significantly) those “arising under” federal law²⁹ and those where the amount in controversy exceeds \$75,000 and involve parties regarded as being “diverse.”³⁰ This is not a trivial number of actions; for example, during the twelve-month period

24. U.S. CONST. art. III, § 1.

25. *Id.* § 2, cl. 1.

26. *See, e.g.*, *Keene Corp. v. United States*, 508 U.S. 200, 207 (1993) (“Congress has the constitutional authority to define the jurisdiction of the lower federal courts . . .”).

27. SPILLENGER, *supra* note 17, at 266.

28. *See, e.g.*, 5 WRIGHT & MILLER, *supra* note 20, § 1206, at 117 (“In spite of [some] manifestations of a liberal judicial attitude toward Rule 8(a)(1), the pleader always is safer if he or she complies with the rule and alleges the basis for the court’s jurisdiction separately and plainly.”).

29. 28 U.S.C. § 1331 (2012).

30. *Id.* § 1332. “In addition, federal jurisdiction is exercised in suits in which the United States is a party, in admiralty and maritime cases, in actions between two or more states, and in a few other limited situations.” FRIEDENTHAL ET AL., *supra* note 1, § 2.2, at 14.

ending December 31, 2016, the number of civil actions filed in federal district courts exceeded 292,000.³¹ On the other hand, though state courts of “general” jurisdiction undoubtedly enjoy a greater jurisdictional reach than their federal counterparts, such jurisdiction certainly is far from unlimited. For example, a number of federal statutes vest exclusive federal jurisdiction of certain federal actions.³² The bottom line is that there is no court in the United States—including (contrary to popular belief) the Supreme Court of the United States—that has subject-matter jurisdiction of all actions. All American courts are limited in significant respects.³³

It is, therefore, not entirely clear why one should presume that a state court of general jurisdiction in fact has subject-matter jurisdiction of any given action, or that a federal district court does not.³⁴ It is probably true that, simply as a matter of probability, a state court is more likely to have jurisdiction of any given action than a federal court. But it is difficult to see why anything of significance—including a special pleading requirement that applies in one court and not the other—should follow from this fact. Court selection is almost never random, and the propriety of subject-matter jurisdiction must be evaluated on a case-by-case basis.³⁵ The reason for a special pleading rule for actions in federal court, in other words, is far from evident.

Of course, these observations do not necessarily show that the federal court jurisdictional pleading requirement should be eliminated. To the contrary, perhaps they suggest that state courts also should adopt a similar requirement. But for the reasons that follow, it seems, on balance, that the better approach would be to eliminate all such requirements.

31. See Table C, *U.S. District Courts—Civil Cases Commenced, Terminated, and Pending During the 12-Month Periods Ending December 31, 2015 and 2016*, U.S. CTS., http://www.uscourts.gov/sites/default/files/data_tables/stfj_c_1231.2016.pdf (last visited Apr. 15, 2018). It might also be observed that, but for budgetary and other, more “political,” reasons, this number could be much higher. For example, it is well-established that the amount-in-controversy requirement, as well as the “complete diversity” rule, being statutory (rather than constitutional) limits, could be eliminated by Congress. Even federal question jurisdiction could be expanded if taken to its constitutional limit.

32. See, e.g., 28 U.S.C. § 1333 (“Admiralty, maritime and prize cases”); *id.* § 1334 (“Bankruptcy cases and proceedings”); *id.* § 1338 (“Patents, plant variety protection, copyrights, mask works, trademarks and unfair competition”).

33. This fact largely explains why subject-matter jurisdiction is a topic in virtually every course on civil procedure.

34. Cf. FRIEDENTHAL ET AL., *supra* note 1, § 2.1, at 14 (“By and large, federal court subject-matter jurisdiction is concurrent with that of the courts of the various states. This means that most cases over which the federal courts have jurisdiction also can be heard in the state courts.”).

35. *Id.* § 2.1, at 9.

For one thing, simply pleading a basis for federal subject-matter jurisdiction obviously does not make it so. The plaintiff might be mistaken, and though pleading a basis for subject-matter jurisdiction might point the defendant and the court in a certain direction, such indications fall short of proof. For example, simply alleging diversity of citizenship jurisdiction under 28 U.S.C. § 1332 does not show how the parties are diverse, that they are in fact diverse, or that the amount in controversy in fact exceeds \$75,000.³⁶

Of course, the opposite is true as well, for subject-matter jurisdiction might well be proper even if not pleaded. Thus: “While a statement of jurisdiction is required by Rule 8, failure to include one does not necessarily require that the action be dismissed.”³⁷ “Indeed, it has been held that the absence of a complete allegation of jurisdiction does not even require amendment of the complaint when the district judge readily can recognize the existence of a federal question or diversity of citizenship and the requisite amount in controversy.”³⁸ Accordingly, when “determining whether a federal district court actually has subject matter jurisdiction, compliance with Rule 8(a)(1) is ascertained by looking at the entire complaint, not merely to what purports to be the jurisdictional statement.”³⁹

Thus, allegations of the district court’s subject matter jurisdiction, which standing alone might be sufficient, will not protect the pleader against a motion to dismiss under Rule 12(b) if an examination of the entire complaint reveals that the assertion of jurisdiction is not substantial or that the jurisdictional statements were not made in good faith. Conversely, the district court may sustain jurisdiction when an examination of the entire complaint reveals a proper basis for assuming subject matter jurisdiction other than one that has been improperly asserted by the pleader or otherwise demonstrates that jurisdiction exists when the Rule 8(a)(1) allegation is defective in some regard.⁴⁰

Second, whether pleaded or not, the basis for federal subject-matter jurisdiction usually will be apparent from the other allegations in the complaint. For example, a claim based on a federal statute almost certainly raises a federal question for purposes of 28 U.S.C. § 1331.⁴¹

36. See 28 U.S.C. § 1332.

37. 2 JAMES WM. MOORE, MOORE’S FEDERAL PRACTICE § 8.03[1], at 8-10 (3d ed. 2017).

38. 5 WRIGHT & MILLER, *supra* note 20, § 12.14, at 163-64.

39. *Id.* § 12.06, at 113-14.

40. *Id.* at 114-16 (footnotes omitted).

41. See *id.* at 113.

Thus: “[i]n most cases . . . subject-matter jurisdiction will not involve a difficult inquiry.”⁴²

Third—and perhaps most importantly—plaintiffs have tremendous incentives to plead subject-matter jurisdiction even in the absence of any requirement to do so. Plaintiffs desperately want to avoid a dismissal, or even an argument along this line. Pleading subject-matter jurisdiction would probably be prudent in those situations where the basis is unclear, or perhaps even debatable. And certainly pleading subject-matter jurisdiction would not be prohibited even if this requirement were to be eliminated.⁴³ This dynamic, coupled with past practice,⁴⁴ provides good reason to think that the pleading of subject-matter jurisdiction would not suddenly disappear if not mandated. The question here, though, is whether plaintiffs should be *required* to plead subject-matter jurisdiction *in every action*. The proper comparison, then, is not between a requirement to plead jurisdiction and no ability to plead jurisdiction whatsoever, but rather between a mandatory pleading requirement and a more voluntary regime.

Fourth, with or without a jurisdictional allegation, there are also tremendous incentives for the plaintiff to “get it right.” Defendants tend to scrutinize the complaint and make their own determination as to subject-matter jurisdiction, and if lacking, to seek a dismissal at the earliest opportunity. A motion to dismiss results in delay and added cost to the plaintiff, both of which generally inure to the benefit of the defendant. If the motion is granted, the action will be terminated, at which point the plaintiff will be forced to decide whether to abandon the action or recommence in a state or foreign court—events that not only result in additional cost (including, potentially, embarrassment) but also increase the likelihood of a statute of limitations problem. There is, in other words, good reason to think that subject-matter jurisdiction will almost always be proper whether pleaded or not. Though many of the cases relating to subject-matter jurisdiction might be well-known, the litigation of this issue is actually quite rare in practice.⁴⁵

42. 2 MOORE, *supra* note 37, § 12.30[1], at 12-40.

43. *Id.* § 8.03[1], at 8-10.

44. Though plaintiffs without legal training and without the benefit of counsel might be oblivious to these issues, one can take some solace in the fact that the sample “Complaint in a Civil Case” form (Pro Se 1) on the United States Court website includes a detailed “Basis for Jurisdiction” section. See *Complaint for a Civil Case*, U.S. CTS., <http://www.uscourts.gov/forms/pro-se-forms/complaint-civil-case> (last visited Apr. 15, 2018) (follow “Download Form” hyperlink).

45. Cf. DANIEL KAHNEMAN, *THINKING FAST AND SLOW* 142, 144 (2011) (“In today’s world, terrorists are the most significant practitioners of the art of inducing availability cascades. . . . [Defined as] a self-sustaining chain of events, which may start from media reports of a

Fifth, the district court itself has some incentive, as well as something of a duty, to make the same inquiry. Though a court might not be obligated to assess the propriety of subject-matter jurisdiction in every action,⁴⁶ it “may, and often does, consider the question of jurisdiction of its own accord even though the defendant has not moved for dismissal on this ground. Thus, the absence of a challenge to the jurisdictional allegations does not immunize the pleading from attack.”⁴⁷ And though we generally presume that courts are indifferent as to which party should prevail, there is probably some incentive to clear one’s calendar. Less work generally is better than more.⁴⁸ Though one can imagine that some judges, for various reasons, might want to retain certain cases, the balance seemingly will usually tip in the other direction. Bottom line, between the defendant and the court, it seems quite unlikely that an action lacking subject-matter jurisdiction would survive the pleading stage, with or without a jurisdictional allegation.⁴⁹

And sixth, there is the fact that defective jurisdictional allegations are easily curable, in that the pleading in question almost certainly may be amended both by rule⁵⁰ and per statute.⁵¹ This actually creates some disincentives for plaintiffs to properly plead jurisdiction in the first instance (even if jurisdiction exists in fact). Of course, if a defective jurisdictional allegation is not curable, the fact that a plaintiff has failed

relatively minor event and lead up to public panic and large-scale government action.”).

46. Certainly, one can find statements in the literature saying that district courts are so obligated. *See, e.g.*, 13 WRIGHT ET AL., *supra* note 23, § 3522, at 126 (“Even if the parties remain silent, a federal court, whether trial or appellate, is obliged to notice on its own motion its lack of subject matter jurisdiction . . .”). But it is probably more accurate to say that if a district court “becomes aware of a lack of subject-matter jurisdiction, it must dismiss. It does not seem to require a court to conduct an independent inquiry regarding subject-matter jurisdiction in every case.” Bradley Scott Shannon, *Some Concerns About Sua Sponte*, 73 OHIO ST. L.J. FURTHERMORE 27, 31 (2012); *see also* Steel Co. v. Citizens for a Better Env’t, 523 U.S. 83, 95 (1998) (“[I]f the record discloses that the lower court was without jurisdiction this court will notice the defect, although the parties make no contention concerning it.” (quoting *United States v. Corrick*, 298 U.S. 435, 440 (1936))).

47. 5 WRIGHT & MILLER, *supra* note 20, § 1214, at 164.

48. There is probably also some incentive for the district court to avoid getting reversed on this basis on appeal, though here this presumes that this issue may be raised by the defendant even in the absence of a ruling on this issue. As will be discussed, currently this is possible, though this Article will argue that this practice should cease. *See infra* Part III.C.

49. *See* SPILLENGER, *supra* note 17, at 265 (positing that a judgment rendered without federal jurisdiction “is an infrequent thing, since both litigants and the federal courts themselves are generally fastidious about raising and determining the question of the court’s subject matter jurisdiction”).

50. *See* FED. R. CIV. P. 15(a) (describing the extremely liberal federal pleading amendment scheme).

51. *See* 28 U.S.C. § 1653 (2012) (“Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts.”).

to plead a proper basis for subject-matter jurisdiction is the least of that party's problems.

One might also consider that while the basis for subject-matter jurisdiction must be pleaded in federal court, the same is not true of other "jurisdictional" prerequisites, such as personal jurisdiction and venue.⁵² Admittedly, there might be some occasions when the basis for personal jurisdiction might not be known until the service of the complaint, an act that cannot be accomplished prior to commencement.⁵³ But venue almost always may be pleaded, and though not required, it often is,⁵⁴ for pleading venue provides some of the same benefits to defendants and courts as pleading subject-matter jurisdiction currently does. The larger point, though, is that defendants seem to have little trouble raising such other procedural defects even in the absence of any pleading requirement.⁵⁵

And then there is state practice. As intimated earlier, in many (if not most) states, there is no requirement that subject-matter jurisdiction be pleaded in trial courts of "general" jurisdiction.⁵⁶ Yet the lack of subject-matter jurisdiction constitutes a defense that results in the dismissal of the action,⁵⁷ and notwithstanding the lack of a pleading requirement, defendants and courts seem to have little trouble raising this defense when appropriate.

52. See FED. R. CIV. P. 8(a).

53. See FED. R. CIV. P. 3 ("A civil action is commenced by filing a complaint with the court."); FED. R. CIV. P. 4(c) ("A summons must be served [on the defendant] with a copy of the complaint.").

54. See, e.g., Complaint at 2, *Washington v. Trump*, 2017 WL 6817641 (W.D. Wa. Feb. 1, 2017) (No. C17-0141JLR).

55. Some might attempt to distinguish such other procedural defects on the ground that a defendant conceivably could consent to personal jurisdiction otherwise lacking, or improper venue, etc. But even assuming that some courts might respect such decisions (which, it must be conceded, are rare), it is less clear that they would be obligated to do so. The idea that subject-matter jurisdiction is not subject to consent might also be contestable, a topic that will be taken up later. See *infra* Part III.E.1. In any event, such possibilities (again) do not detract from the larger point, which is that other jurisdictional defects rarely go undetected, pleading requirement or not.

56. See, e.g., CAL. CODE CIV. PROC. § 425.10(a) (2005) ("A complaint or cross-complaint shall contain both of the following: (1) A statement of the facts constituting the cause of action, in ordinary and concise language. (2) A demand for judgment for the relief to which the pleader claims to be entitled. If the recovery of money or damages is demanded, the amount demanded shall be stated."); WASH. SUP. CT. CIV. R. 8(a) (2015) ("Claims for Relief") ("A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross claim, or third party claim, shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief and (2) a demand for judgment for the relief to which the pleader deems the pleader is entitled.").

57. See, e.g., CAL. CODE CIV. PROC. § 430.10 ("The party against whom a complaint or cross-complaint has been filed may object, by demurrer or answer as provided in Section 430.30, to the pleading on any one or more of the following grounds: (a) The court has no jurisdiction of the subject of the cause of action alleged in the pleading."); WASH. SUP. CT. CIV. R. 12(b)(1) (providing for the defense of "lack of jurisdiction over the subject matter").

The bottom line is that a federal court jurisdictional pleading requirement, though familiar, is not at all necessary. What this requirement actually does is compel both plaintiffs and the defendants to engage in behavior that is largely inconsequential and is typically ignored by courts. Though it might provide something in the way of benefits, such benefits are almost certainly outweighed by the costs. What really matters is whether there is a valid basis for federal subject-matter jurisdiction, not whether it is pleaded.

There is also a cost resulting from the disunity between federal and state practice. Of course, state courts need not follow federal practice, and some have actually touted the benefits of disunity.⁵⁸ But just as variations in local rules (i.e., intrasystem disunity) add costs, so does intersystem disunity. So although a jurisdictional pleading requirement might be nice, so would a uniform pleading requirement. That, of course, might never occur. Still, it seems that any differences should require special justification, and tradition alone is not always sufficient. In most instances, the better practice, traditional or not, probably should prevail. And here, the better practice seems to point toward the elimination of the subject-matter jurisdiction pleading requirement.

B. Responding to the Complaint

The Rule 8(a) pleading requirements discussed above—including the pleading of the grounds for subject-matter jurisdiction—of course apply only to plaintiffs.⁵⁹ But once a plaintiff has pleaded (or has attempted to plead) a claim for relief, the attention turns to the defendant. Rule 8(b)(1) requires a defendant to respond to the complaint, and in his answer “(A) state in short and plain terms its defenses,” and “(B) admit or deny the allegations asserted against it.”⁶⁰ Notwithstanding the order in which these requirements are set forth in this rule, it has become customary to present them in reverse order—i.e., defendants

58. See, e.g., Stephen N. Subrin & Thomas O. Main, *Braking the Rules: Why State Courts Should Not Replicate Amendments to the Federal Rules of Civil Procedure*, 67 CASE W. RES. L. REV. 501, 502 (2016) (“States could follow their federal counterparts; indeed, the pursuit of uniformity can be instinctive. Yet this Article urges states to resist the siren song of uniformity in favor of more noble pursuits.”). See generally Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PENN. L. REV. 1999 (1989) (describing the reform of civil procedure pursuant to federal and state jurisdictions).

59. See FED. R. CIV. P. 8(a).

60. FED. R. CIV. P. 8(b)(1). This pleading of defenses seems to be particularly important, given the number of times this requirement is mentioned in the Rules. In addition to Rule 8(b)(1)), see FED. R. CIV. P. 8(c)(1) (“In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense”); FED. R. CIV. P. 12(b) (“Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required.”).

typically admit or deny the plaintiff's allegations first, and then state any defenses.⁶¹

Starting with subparagraph (B): because Rule 8(a) requires a plaintiff to plead subject-matter jurisdiction, the defendant (again) must admit or deny this allegation.⁶² Of course, if the subject-matter jurisdiction pleading requirement were to be eliminated (as this Article will suggest in Part III, below), there might be no need to respond to allegations of this nature, a double benefit. Still, as discussed above, a plaintiff conceivably could include a jurisdictional allegation even absent any requirement to do so, which would then resurrect this obligation.⁶³ Fortunately, this is typically a straightforward exercise. But there remain are some aspects of this requirement that seem rather curious.

The first relates to the scope of the defendant's obligation. Assume, for example, that the plaintiff alleges that the court has subject-matter jurisdiction pursuant to 28 U.S.C. § 1332 (diversity of citizenship).⁶⁴ Assume further that although the parties in fact are not diverse, the court nonetheless has subject-matter jurisdiction pursuant to 28 U.S.C. § 1331 (federal question) a la *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*.⁶⁵ Should the plaintiff's allegation be admitted or denied? The answer to that question might depend upon whether the relevant portion of the allegation is the *assertion* of jurisdiction or the *basis* asserted. But if the former, then does this mean that a defendant is obliged to find a basis for subject-matter jurisdiction that the plaintiff has not pleaded?⁶⁶ The answer seems unclear.

Also curious is the effect of an admission. Ordinarily, allegations admitted by the opposing party are conclusively established for purposes of the action.⁶⁷ The same is generally true if the defendant fails to

61. See, e.g., *The Defendant's Answer to the Complaint (Pro Se 3)*, U.S. CTS., <http://www.uscourts.gov/forms/pro-se-forms/defendants-answer-complaint> (last visited Apr. 15, 2018) (follow "Download Form" hyperlink).

62. It seems possible that a defendant might lack knowledge or information sufficient to form a belief about the truth even of a jurisdictional allegation. See FED. R. CIV. P. 8(b)(5). Though in practice that is rare. In any event, by rule such a statement has the effect of a denial. See *id.*

63. See *supra* notes 53-56 and accompanying text.

64. 28 U.S.C. § 1332 (2012).

65. 545 U.S. 308, 314-15 (2005) (holding that district court has federal-question subject-matter jurisdiction of a state-law claim that necessarily raises a stated federal issue, is actually disputed and substantial, and that a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities).

66. Notice that this problem does not go away if the defendant were to admit that the court has jurisdiction but deny the basis pleaded.

67. See, e.g., FED. R. CIV. P. 36(b) ("A matter admitted under this rule is conclusively established unless the court, on motion, permits the admission to be withdrawn or amended.").

respond to an allegation.⁶⁸ But neither of these statements seem to be quite true with respect to allegations of subject-matter jurisdiction. The orthodox view (at least in federal court) seems to be that a defendant may not consent to subject-matter jurisdiction, nor may such a defense be waived or forfeited.⁶⁹ Accordingly, a failure to deny subject-matter jurisdiction in the defendant's answer seems to have little effect on the court's ability to dismiss on this basis⁷⁰ or on the defendant's ability to raise this defense in the future.⁷¹ Indeed, in *Owen Equipment & Erection Co. v. Kroger*,⁷² the defendant initially admitted jurisdiction (and nothing else), and did not contest jurisdiction until the third day of trial.⁷³ Nonetheless, the Supreme Court held on appeal that such jurisdiction was lacking.⁷⁴ Thus, just as the pleading of subject-matter jurisdiction largely seems to be a pointless exercise, so does the requirement that the defendant respond to such an allegation.

Similar problems surround subparagraph (A). Rule 8(b)(1)(A) requires that all defenses be pleaded in the answer,⁷⁵ and that certainly includes the defense of lack of subject-matter jurisdiction.⁷⁶ But Rule 12(b) also permits the assertion of seven specified defenses (again including subject-matter jurisdiction) by motion, with the caveat that a "motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed."⁷⁷ The obvious purposes of these provisions are, first, to compel the defendant to bring potential defenses (particularly the seven defenses specified in Rule 12(b)) to the plaintiff's and the court's attention early in the proceedings (and certainly no later than the service and filing of the answer), and second, to give the defendant the opportunity to obtain a ruling as to these defenses prior to

68. See FED. R. CIV. P. 8(b)(6) ("An allegation—other than one relating to the amount of damages—is admitted if a responsive pleading is required and the allegation is not denied.").

69. See *infra* Part III.E.1.

70. See FED. R. CIV. P. 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action."); FED. R. CIV. P. 60(b)–(c) (empowering district courts to grant motions for relief from final judgments that are "void" so long as made within a "reasonable time").

71. See, e.g., 2 RESTATEMENT (SECOND) OF JUDGMENTS § 1 cmt. a, at 32 (AM. LAW. INST. 1982) ("Broadly speaking, an objection to subject matter jurisdiction may be taken at any time during the action, even on appeal, and may be taken after the action has become final under a wider variety of circumstances than the objection to territorial jurisdiction.").

72. 437 U.S. 365 (1978).

73. See *id.* at 368–69.

74. See *id.* at 369.

75. See FED. R. CIV. P. 8(b)(1)(A).

76. See FED. R. CIV. P. 12(b)(1) (reiterating this requirement, and referring specifically to the defense of lack of subject-matter jurisdiction).

77. See FED. R. CIV. P. 12(b).

the filing of an answer.⁷⁸ Because a defendant has tremendous incentives to move for a dismissal on this basis as soon as practicable, it would seemingly be the rare defendant who would not take advantage of this alternate procedure. In most situations, to not do so would be a mistake, for if the motion is granted, the action is dismissed, meaning there would then be no need to serve and file an answer, something a defendant would rather not do.

With respect to subject-matter jurisdiction, this essentially means that the only time a defendant would have occasion to plead this defense is if the court were to deny the motion to dismiss. But in that situation, it seems that the defendant's record as to this defense has already been made, thus rendering its inclusion in the answer superfluous and unnecessary. It therefore appears that the set of answers in need of a defense of lack of subject-matter jurisdiction is probably an empty one.

A second problem with Rule 8(b)(1)(A) relates to the effect of pleading such a defense. Simply pleading a lack of subject-matter jurisdiction does not, of itself, compel a ruling on this defense (incidentally, the same also seems to be true of the denial of an allegation of subject-matter jurisdiction).⁷⁹ Only a motion (whether by the defendant or the court itself) accomplishes this.⁸⁰ Though the pleading of this defense might provide something in the way of notice, it accomplishes little else. The allegation just sits there.⁸¹ Accordingly, much like the requirement that a defendant respond to allegations of subject-matter jurisdiction, the requirement that this defense be pleaded in the answer seems almost pointless. This is decidedly *not* true of certain other procedural defenses (such as the defenses of lack of personal jurisdiction and improper venue) that are expressly waived if a defendant either fails to "make it by motion under [Rule 12]" or "include it in a responsive pleading or in an amendment allowed by Rule 15(a)(1) as a matter of course."⁸² But this statement does appear to be true of lack of subject-matter jurisdiction, which "[u]nder prevailing procedural rules . . . is not lost by failure to plead it."⁸³

78. 2 MOORE, *supra* note 37, § 12.02, at 12-11 to 12-12.

79. See FED. R. CIV. P. 8(b)(1); FED. R. CIV. P. 12(b)(1).

80. FED. R. CIV. P. 12(b).

81. Rule 12(i) does provide: "If a party so moves, any defense listed in Rule 12(b)(1)-(7)—whether made in a pleading or by motion—and a motion under Rule 12(c) must be heard and decided before trial unless the court orders a deferral until trial." FED. R. CIV. P. 12(i). But though this rule does provide some mechanism for resolving such issues prior to the conclusion of trial, a motion still is required.

82. FED. R. CIV. P. 12(h)(1)(B).

83. 2 RESTATEMENT (SECOND) OF JUDGMENTS § 12 cmt. b, at 118 (AM. LAW INST. 1982).

C. *Motions to Dismiss and for Relief from Judgment*

Yet another set of problems with subject-matter jurisdiction relate to motions to dismiss and for relief of judgment on this basis.

As discussed above, Rule 12(b) provides that a motion asserting any of the seven defenses described therein “must be made before pleading if a responsive pleading is allowed.”⁸⁴ Again, this language seems to be true with respect to motions to dismiss for defects such as lack of personal jurisdiction⁸⁵ or improper venue,⁸⁶ in that such defenses are waived if the defendant fails to either “make it by motion under this rule” or “include it in a responsive pleading or in an amendment allowed by Rule 15(a)(1) as a matter of course.”⁸⁷ But this portion of Rule 12(b) does not seem to apply to motions to dismiss for lack of subject-matter jurisdiction. Despite the fact that this defense is included in Rule 12(b),⁸⁸ a motion to dismiss for lack of subject-matter jurisdiction seemingly need not be made prior to the service and filing of the answer, or even during trial.⁸⁹ Instead, Rule 12(h)(3) rather bluntly states that “[i]f the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.”⁹⁰ Indeed, Rule 60 gives the court the power to relieve a party from a final judgment if it determines that subject-matter jurisdiction was lacking, the only limitation being that the motion be made within a “reasonable” time.⁹¹

It is generally said that the issue can be raised at any time by anyone—even on appeal by the court itself, or even by a party who participated actively in the action without challenging the jurisdiction or invoked the jurisdiction in the first place. Subject-matter jurisdiction, unlike territorial jurisdiction, cannot be conferred by the defendant’s consent, collusion, waiver, or estoppel.⁹²

Indeed, as mentioned previously, federal subject-matter jurisdiction is considered so important that federal courts have something of an

84. FED. R. CIV. P. 12(b).

85. *See* FED. R. CIV. P. 12(b)(2).

86. *See* FED. R. CIV. P. 12(b)(3).

87. FED. R. CIV. P. 12(h)(1)(B).

88. FED. R. CIV. P. 12(b)(1).

89. *Cf.* FED. R. CIV. P. 12(h)(1), (2).

90. FED. R. CIV. P. 12(h)(3).

91. FED. R. CIV. P. 60(b).

92. ROBERT C. CASAD & KEVIN M. CLERMONT, *RES JUDICATA: A HANDBOOK ON ITS THEORY, DOCTRINE, AND PRACTICE* 268 (2001) (footnote omitted) (citing *Thompson v. Whitman*, 85 U.S. (18 Wall.) 457, 459 (1874)).

obligation to raise any defects in this regard sua sponte, on their own motion, if the matter is not raised by a party.⁹³ In sum, “[w]hile other defects may be waived, subject-matter jurisdiction stands alone as the single unwaivable defect.”⁹⁴ But why all of this is not reflected in Rule 12(b) remains unclear.⁹⁵

Perhaps more importantly, why the disparate treatment of subject-matter jurisdiction? Tradition aside, the reasons here also are not entirely clear. For example, Professors Casad and Clermont, in line with the lore in this area, state: “The issue of subject-matter jurisdiction is regarded as being of fundamental importance.”⁹⁶ Certainly, subject-matter jurisdiction is important (at least as much as anything in procedure is important). But of “fundamental” importance? What exactly does that mean? And even if true, why does this justify some special treatment? Similar explanations have been advanced, but none seem particularly persuasive.⁹⁷

93. See, e.g., 2 MOORE, *supra* note 37, § 12.30[1], at 12-35 (footnote omitted) (“Lack of subject matter jurisdiction may be raised at any time. Indeed, even if the litigants do not identify a potential problem in that respect, it is the duty of the court—at any level of the proceedings—to address the issue sua sponte whenever it is perceived.”).

94. Berch, *supra* note 5, at 639.

95. Incidentally, the federal practice in this area stands in some contrast to state practice. See, e.g., SPILLENGER, *supra* note 17, at 266 (“A defendant who makes a general appearance in Case A and who fails to challenge the court’s subject matter jurisdiction (for example, to argue that the case instead should have been heard by the small claims court) can be said to have waived his objection. (This is not true for the subject matter jurisdiction in federal courts, but is generally true in the state courts.)”). A recent example of the confusion of these standards can be found in *V. L. v. E. L.*, 136 S. Ct. 1017 (2016). *V.L.* involved an adoption decree entered (erroneously?) by a Georgia Superior Court that was later attacked in an Alabama court. *Id.* at 1019. Though the Supreme Court of the United States ultimately held that the Georgia decree was entitled to full faith and credit, it first considered whether the Georgia court had jurisdiction of the adoption proceeding. *Id.* at 1020-21. Arguably, the Supreme Court instead should have simply found that the defendant had waived any objection to subject-matter jurisdiction by not raising it in the Georgia court. The Supreme Court’s further finding that the Georgia court was a court of general jurisdiction, though perhaps not necessary, also should have been sufficient. I thank Professor Joseph Glannon for bringing these points to my attention.

96. CASAD & CLERMONT, *supra* note 92, at 268.

97. Representative is this passage from a leading treatise:

[A]lllocations of subject matter among the courts in a state, important as they are, do not usually rise to the same level of constitutional gravity as do the limitations of federal jurisdiction. The subject matter jurisdiction of the federal courts is limited because the limited nature of federal power is a constitutional priority; the subject matter jurisdiction of the various courts of a state (putting aside the degree to which Congress may have conferred exclusive jurisdiction on federal courts to hear claims arising under certain parts of federal law) is usually just a decision by a state concerning how it wishes to allocate its judicial resources.

SPILLENGER, *supra* note 17, at 266.

Perhaps the best explanation is that advanced in the *Restatement (Second) of Judgments*:

In this respect the question of subject matter jurisdiction is very different from the question of territorial jurisdiction or one of regularity of notice. This difference has been explained by the fact that an objection to subject matter jurisdiction is in some sense more fundamental than objections to territorial jurisdiction or notice, in that a court is powerless to decide a controversy with respect to which it lacks subject matter jurisdiction. But such an analysis would require that a court's decision as to its own subject matter jurisdiction could not be accorded conclusive effect, contrary to the established rule in that regard. It would also require that a judgment be forever vulnerable to attack in subsequent proceedings, on the ground that the court by which it was rendered had lacked jurisdiction. Furthermore, it would take for granted that the presently prevailing rule on timing of an objection to subject matter jurisdiction is required in the nature of things, and would thus make it impossible to foreclose objections to subject matter jurisdiction after judgment in the trial court.

A more satisfactory analysis of the treatment of the objections to subject matter jurisdiction is simply historical. The proposition that the subject matter jurisdiction of a court could be questioned in an attack after judgment originally found expression in the English common law courts in cases dealing with judgments of courts of limited jurisdiction. It was reinvigorated in early decisions of our federal courts in cases involving their own jurisdiction, which was then new and regarded with some hostility. In these contexts, the interest of securing rigorous adherence to jurisdictional limitations was a strongly predominant policy consideration. It was one that therefore could appropriately be given precedence over the interest of fairness that would otherwise dictate that a challenge to subject matter jurisdiction ought to be unavailable unless raised before trial on the merits. In modern context, the relative weight of these interests has shifted. It may well be that procedural rules of the future will be reformulated to require that objections to subject matter jurisdiction be raised before trial on the merits, thus expressing a policy approaching that now applied to objections to territorial jurisdiction.⁹⁸

Perhaps, as a normative matter, that time has come. In any event, as things now stand, the language in Rule 12(b) regarding the timing of

98. 2 RESTATEMENT (SECOND) OF JUDGMENTS § 11 cmt. d, at 110-11 (AM. LAW INST. 1982) (citations omitted); *see also id.* § 12 cmt. b, at 118 (referring to the “peculiar procedural treatment of subject matter jurisdiction,” and observing that the “special treatment of the issue of subject matter jurisdiction is . . . an obstacle to a rational theory as to when the right to litigate the issue should finally terminate”).

motions to dismiss on this basis does not seem to reflect reality as it relates to the assertion of the defense of lack of subject-matter jurisdiction.

One further thought: this internal inconsistency in the deadline for motions to dismiss for lack of subject-matter jurisdiction, in addition to being problematic, seems unnecessary. There does not seem to be any reason why such a motion could not—or should not—be made prior to pleading. There is also little reason to think that this is not already happening. As discussed previously, the defendant, as well as the court itself, not only have tremendous incentives to raise this defense, but to do so sooner (usually at the earliest opportunity) rather than later. Even the plaintiff has some incentives in this regard, for an early resolution of this issue allows that party to avoid wasting time in the wrong court and possibly avoiding a statute of limitations problem.

Admittedly, the current Rule 12(b) deadline for making such a motion (generally twenty-one days) is short, perhaps too short.⁹⁹ But this deadline may be extended (or perhaps this portion of Rule 12 should be amended; more on that, below).¹⁰⁰ In any event, it would be naïve to think that even today, there is not some number of actions lacking federal subject-matter jurisdiction that go undetected. It is difficult to imagine that the imposition of a deadline similar to that used for defects in personal jurisdiction and venue would result in a significant increase.¹⁰¹

D. *Direct and Collateral Review*

Finally, there is the somewhat aberrational treatment of subject-matter jurisdiction on direct and collateral review, at least when compared with other “jurisdictional” prerequisites such as personal jurisdiction and venue. Once again, many of these discrepancies can be traced to the (historically) nonwaivable and nonforfeitable nature of the defense of lack of subject-matter jurisdiction, at least in federal courts.

Starting with direct review: If the issue of subject-matter jurisdiction was litigated in the district court, an adverse ruling generally may be appealed by the losing party.¹⁰² In this sense, subject-matter jurisdiction is treated no differently from personal jurisdiction and venue.

99. FED. R. CIV. P. 12(a)(1), (b).

100. FED. R. CIV. P. 12(a)(4).

101. All of this also assumes that the failure to eliminate actions lacking subject-matter jurisdiction would be something of a travesty. This notion will be addressed (debunked?) in the next Part. *See infra* Part III.

102. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 11 cmt. d.

The primary difference relates to how these issues are treated if *not* litigated in the district court, or if litigated, are not appealed by the losing party. In this context, defects in personal jurisdiction and venue (among other procedural prerequisites) are considered waived or forfeited, and thus cannot be considered further on appeal.¹⁰³ But because subject-matter jurisdiction, unlike most defenses, cannot be waived or forfeited or be the product of consent, a purported lack of subject-matter jurisdiction may be raised on appeal regardless of whether litigated below, even by the appellate court itself.¹⁰⁴ All of the major treatises in this area seem to be in accord.¹⁰⁵

The rationale for this divergent treatment of subject-matter jurisdiction vis-à-vis other procedural defenses is essentially the same as the rationale behind the absence of any meaningful deadline for the assertion of the defense of lack of subject-matter jurisdiction in the district court, and is similarly weak. It is a distinction that does not appear to be compelled under the Constitution or by federal statute.¹⁰⁶ Rather, it seems to be nothing more than a common law practice. It is, though, a practice that produces yet another complication in this area of civil procedure, and potentially imposes a tremendous cost.¹⁰⁷

103. *Leroy v. Great W. United Corp.*, 443 U.S. 173, 180 (1979) (“[N]either personal jurisdiction nor venue is fundamentally preliminary in the sense that subject-matter jurisdiction is, for both are personal privileges of the defendant, rather than absolute strictures on the court, and both may be waived by the parties.”).

104. *See Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149, 152-53 (1908).

105. As one leading treatise puts it:

Because a party may not waive the defense of subject matter jurisdiction, it is clear that the issue may be raised for the first time on appeal. Indeed, the independent establishment of subject matter jurisdiction is so important that a party ostensibly invoking federal jurisdiction may later challenge it as a means of avoiding an adverse result on the merits.

13 WRIGHT ET AL., *supra* note 23, § 3522, at 122-23 (footnote omitted); *accord* PETER HAY ET AL., CONFLICT OF LAWS § 5.17, at 381 (5th ed. 2010) (“Unlike issues of personal jurisdiction and notice, which are waived if not contested at the case’s outset, the issue of subject matter jurisdiction remains open on direct review of the case, even upon the court’s own motion.”).

106. For example, with respect to the ability to challenge subject-matter jurisdiction for the first time on direct review, one treatise states: “This harsh rule would be indefensible if what was involved was a simple question of procedural regulation of practice. It can be justified only because the issue concerns the fundamental constitutional question of the allocation of judicial power between the federal and state governments.” 13 WRIGHT ET AL., *supra* note 23, § 3522, at 124-25 (footnote omitted). But is not the ability to raise this defense by a pre-answer motion protection enough, when it is enough for defenses implicating equally important constitutional concepts, such as personal jurisdiction? Why or how does the Constitution require a different result here?

107. As one scholar describes it:

If a case can be litigated for years in the trial court, briefed, argued and considered first in an intermediate appellate court and subsequently in a supreme court, and after a decision on the merits by the supreme court the party who initially filed the suit or the supreme court itself can for the first time challenge the subject matter jurisdiction of the

A well-known example can be found in the venerable case of *Capron v. Van Noorden*.¹⁰⁸ As the hornbook explains:

In *Capron*, plaintiff brought a tort action against defendant in the North Carolina federal court. The plaintiff appealed from the jury's verdict for the defendant, alleging, among other things, that the trial court lacked subject-matter jurisdiction because the pleadings, although identifying the defendant as a citizen of North Carolina, were silent as to the citizenship of the plaintiff. Since federal jurisdiction would exist only if the plaintiff were of diverse citizenship from the defendant, and since diversity had not been demonstrated, the Supreme Court reversed the judgment. This case strikingly exemplifies the paramount importance attached to the limitations on federal-court jurisdiction: the plaintiff, who had chosen the federal forum, was permitted to challenge, for the first time on appeal, the jurisdiction of the court of his own selection. The Supreme Court, in effect, declared that allowing unscrupulous or careless plaintiffs to escape adverse jury verdicts, thus wasting precious judicial resources, was of less concern than the possibility of extending federal jurisdiction beyond its constitutional and statutory limits.¹⁰⁹

Though this summary represents an accurate description of the *Capron* Court's decision, that decision—which was not at all required by the limited nature of federal subject-matter jurisdiction—should strike even a non-lawyer as quite obviously ridiculous.¹¹⁰

It might be observed once again that state courts generally do not treat subject-matter jurisdiction as it is treated in the federal courts. Rather, most state courts treat this matter as they treat personal jurisdiction and venue—i.e., as waivable and forfeitable defenses.¹¹¹ The reason they are able to do this (again) seems to relate to the common law nature of this doctrine, coupled with differing notions as to how to handle deficiencies of this nature.¹¹² Again, the particular results here do

trial court and have the entire matter dismissed, the waste of private and public resources is enormous.

Robert J. Martineau, *Subject Matter Jurisdiction as a New Issue on Appeal: Reining in an Unruly Horse*, *BYU L. REV.* 1, 3 (1988).

108. 6 U.S. (2 Cranch) 126 (1804).

109. FRIEDENTHAL ET AL., *supra* note 1, § 2.2, at 13.

110. *Cf. Smith v. United States*, 508 U.S. 223, 244 (Scalia, J., dissenting). In this case, the late, great Justice used this memorable line (albeit in a quite different context).

111. *See* WRIGHT ET AL., *supra* note 23, § 3522, at 100 (“Most state courts are courts of general jurisdiction, and the presumption is that that they have subject matter jurisdiction over any controversy unless a showing is made to the contrary.”); *see also* *Leroy v. Great W. United Corp.*, 443 U.S. 173, 180 (1979).

112. *See, e.g.*, RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS § 4.1, at 131 (4th ed. 2010) (“Whether a court's competence to adjudicate the subject matter is jurisdictional,

not seem to have been pre-ordained; rather, it seems more a balancing of competing policy interests, a balancing that for some reason results in a more exalted treatment of subject-matter jurisdiction in federal courts.

As for collateral review, complicated might be the most charitable way to describe the current treatment of subject-matter jurisdiction,¹¹³ at least when compared with the rules relating to personal (or “territorial”) jurisdiction and notice. With respect to the latter concepts, Professors Casad and Clermont state:

In summary, if the defendant appears and does not litigate the threshold defense of territorial jurisdiction or adequate notice, the defendant waives it. If the defendant litigates one of these threshold defenses but the court finds authority, the ruling precludes the defendant on both. Either way, the appearing defendant cannot attack the resulting judgment on these grounds in subsequent litigation. Thus, relief from judgment on the ground of territorial jurisdiction or adequate notice can lie only from a judgment entered after the attacker had completely defaulted.¹¹⁴

On the other hand, with respect to subject-matter jurisdiction, Casad and Clermont state:

Putting the cases and the Second Restatement together, then, we can say that a holding of the existence of subject-matter jurisdiction precludes the parties from attacking the resultant judgment on that ground in subsequent litigation, except in special circumstances such as where the court plainly lacked subject-matter jurisdiction or the judgment substantially infringes on the authority of another court or agency. Because unraised subject-matter jurisdiction is supposedly always implicitly determined to exist in any action litigated to judgment, such determination has the *res judicata* consequences of an actually litigated determination of the existence of subject-matter jurisdiction insofar as foreclosing attack on the judgment, although the court in subsequent litigation may be more likely to find applicable an exception to *res judicata*. The bottom line is that relief from judgment

in the sense that a judgment rendered in violation of a state or nation’s internal rules of judicial competence is void and subject to collateral attack, or whether a court’s exceeding its subject matter competence is merely error that may be corrected only by direct appeal, depends upon the rules of the state or nation in which the court sits.”).

113. Actually, the law in this area sometimes seems closer to confused, if not contradictory. Compare *Kontrick v. Ryan*, 540 U.S. 443, 456 n.9 (2004) (“Even subject-matter jurisdiction, however, may not be attacked collaterally.”), with RESTATEMENT (SECOND) OF JUDGMENTS § 69 (AM. LAW INST. 1982), and *id.* § 69 cmt. a, at 176 (describing the “very limited circumstances” for such an attack).

114. CASAD & CLERMONT, *supra* note 92, at 267-68.

on the ground of subject-matter jurisdiction is readily available only in cases where all defendants defaulted.¹¹⁵

Still, when looking at the law in this area as a whole—and without getting into all of the detail that usually accompanies attempts to explain these distinctions—perhaps two general observations may be made. The first is that although the standards for collateral review of alleged defects of personal jurisdiction and notice and that for subject-matter jurisdiction do not yet seem quite the same, in that the latter still seems to include some exceptions not found in the former, the law relating to these matters is tantalizingly close to convergence. All seem to agree that relief should be available in the default judgment context, but probably (or mostly) unavailable otherwise.¹¹⁶

The second (related) observation is that the rationales for additional opportunities for collateral review of subject-matter jurisdiction, like those relating to direct review, seem somewhat weak. As another leading treatise describes it:

The *res judicata* effects of a judgment entered by a court that lacked subject-matter jurisdiction have not been captured in any rule or clear statement of controlling policies. The approach to such judgments has instead sought to reconcile two competing perceptions. *Res judicata* effects have been resisted in order to serve the traditionally strong desire to confine courts within the proper limits of appointed competence. At the same time, it is recognized that the general values of *res judicata* not only apply but may apply with particular force when the only objection is that correct substantive rules have been administered in a fair procedure in a court that simply lacked subject-matter jurisdiction. The broad terms of this competition may be particularized into more specific tests that seek to measure the importance of maintaining specific jurisdictional lines. Recent

115. *Id.* at 270; accord FRIEDENTHAL ET AL., *supra* note 1, at 14 (“However, once a final judgment has been rendered in a federal-court action, the concern for stability and repose underlying the doctrine of preclusion, combined with the philosophy that courts of one system should give effect to the judgments of the courts of another system, generally outweighs the principles of limited federal jurisdiction. Thus, although direct attacks on subject-matter jurisdiction are permitted even in the Supreme Court, as illustrated by the Capron case, in the absence of extraordinary countervailing circumstances, collateral attacks on the judgment of a federal court in a later proceeding alleging a defect in subject-matter jurisdiction are not permitted.” (footnotes omitted)).

116. *See, e.g.*, 2 RESTATEMENT (SECOND) OF JUDGMENTS § 12 cmt. d, at 120 (“Even if the issue of subject matter jurisdiction has not been raised and determined, the judgment after becoming final should ordinarily be treated as wholly valid if the controversy has been litigated in any other respect.”); CASAD & CLERMONT, *supra* note 92, at 271 (observing that “most successful attacks on invalidity come against default judgments”); HAY, *supra* note 105, § 5.21, at 387 (“Even objections to subject matter jurisdiction, which are not cured by a defendant’s appearance, generally may not be contested collaterally unless the judgment was taken by default.”).

decisions have worked these tests more and more toward supporting *res judicata*. Today, it is safe to conclude that most federal-court judgments are *res judicata* notwithstanding a lack of subject-matter jurisdiction.¹¹⁷

These observations, coupled with the unlikelihood that an erroneous determination with respect to subject-matter jurisdiction could survive through the entry of a final judgment (and, if necessary, an appeal) in the non-default context—such defects simply do not seem to arise with any frequency in the modern world¹¹⁸—there seems to be little reason not to equate these standards.

III. RECONCILING THE “EFFECTS” OF FEDERAL SUBJECT-MATTER JURISDICTION

As the discussion in Part II suggests, many of the procedural rules relating to subject-matter jurisdiction make little sense, as does the law relating to how this topic is treated on direct and collateral review. History aside, there seems to be little reason to maintain the status quo. Something should be done. It does little good—and in fact, it is downright counterproductive—to have procedural rules that are routinely observed in their breach and legal “principles” that are fraught with exceptions.

The best course, it seems, would be to treat federal subject-matter jurisdiction more like state subject-matter jurisdiction and more like personal jurisdiction. There is no compelling reason why subject-matter and personal jurisdiction, both prerequisites to the entry of a valid judgment,¹¹⁹ should be treated differently, and between the two, the law

117. 18A WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE: CIVIL § 4428, at 7 (2d ed. 2002); *see also id.* at 22-23 (“Unintentional mistakes of jurisdiction do not threaten any enduring values, particularly in many of the more arcane quibbles of complete diversity, properly pleaded federal questions, and supplemental jurisdiction. . . . Despite the emphasis in some opinions on the fact that the jurisdictional question was actually litigated and resolved in the first action, failure to raise the question should not permit the question to be opened later in ordinary circumstances” (footnotes omitted)). Putting these cases together, it seems clear that a federal court judgment is binding notwithstanding a simple lack of subject-matter jurisdiction, without regard to whether the jurisdictional question was litigated or appealed.

118. *See* SPILLENGER, *supra* note 17, at 266 (observing that “[p]roblems like these don’t arise very often”).

119. *See, e.g.*, 2 RESTATEMENT (SECOND) OF JUDGMENTS § 1, at 30 (AM. LAW INST. 1982) (“Requisites of a Valid Judgment”).

A court has authority to render judgment in an action when the court has jurisdiction of the subject matter of the [case] . . . , and

- (1) The party against whom judgment is to be rendered has submitted to the jurisdiction of the court, or
- (2) Adequate notice has been afforded the party . . . and the court has territorial

relating to personal jurisdiction seems the more workable and is more in line with how other procedural prerequisites are treated. The benefits from the resulting reconciliation would be substantial.

A. *The Pleading Requirement*

Despite its familiarity to those who engage in federal civil practice, it seems that there should be no requirement that subject-matter jurisdiction be pleaded in the plaintiff's complaint. In this area, the practice in most states (which generally have no such requirement) seems superior.¹²⁰ Subject-matter jurisdiction certainly *may* be pleaded, and that might even be a good idea in many actions, but there is little to be gained from a firm rule in this regard.¹²¹ Even without a pleading requirement (which, again, provides little assurance that subject-matter jurisdiction is proper in fact), plaintiffs have adequate incentives for getting subject-matter jurisdiction right, and defendants have adequate incentives for ensuring that they do. Rule 8 should be amended accordingly.

B. *Responding to the Complaint*

Obviously, eliminating the jurisdictional pleading requirement would dramatically lessen the need for defendants to respond to such allegations in the answer, a practice that borders on useless. This would also save the parties time and money. On the other hand, were the defendant to respond to the plaintiff's jurisdictional allegations (whether required to or not) any admissions should be binding on that party. This should include any allegations that might be regarded as "legal," as opposed to "factual," for ultimately there is no coherent distinction between the two.¹²²

Serious thought also could be given to eliminating the obligation to allege at least some of the defenses enumerated in Rule 12(b), including lack of subject-matter jurisdiction, in the answer. Such defenses typically can and should be asserted (and resolved) by motion pre-

jurisdiction

Id.

120. See *supra* note 57 and accompanying text.

121. FED. R. CIV. PRO. 12(b).

122. See Ronald J. Allen & Michael S. Pardo, *The Myth of the Law-Fact Distinction*, 97 NW. U. L. REV. 1769, 1770, 1790-800 (2003); Gary Lawson, *Stipulating the Law*, 109 MICH. L. REV. 1191, 1209 (2011).

answer.¹²³ Simply alleging such defenses provides some measure of notice, but little else.

C. *Motions to Dismiss and for Relief from Judgment*

With respect to motions to dismiss, subject-matter jurisdiction should be treated like personal jurisdiction and venue. Specifically, Rule 12(b) should mean what it says: that a motion to dismiss on this basis “must be made before pleading,” under penalty of waiver.¹²⁴ The propriety of such a defense, like lack of personal jurisdiction, should be resolved at the pleading stage. The possibility of a dismissal for lack of subject-matter jurisdiction should not hang over the plaintiff through judgment and even appeal. Such a practice generally would compel the court to resolve the issue of subject-matter jurisdiction before getting to the merits of the plaintiff’s claims. There is no reason why this could not be accomplished in the vast majority of actions. And no longer would plaintiffs or courts have to deal with the specter of a tardy motion to dismiss made months or even years down road. Nothing about this defense seems to mandate this sort of practice, a practice that makes scant sense and need not be tolerated. That an erroneous trial court ruling on subject-matter jurisdiction may be appealed should be assurance enough that a correct ruling ultimately will be made.

D. *Direct and Collateral Review*

Finally, reconciling subject-matter jurisdiction with other procedural defenses would bring to an end the anomalous treatment of subject-matter jurisdiction on direct and collateral review, both between these forms of review and in relation to the treatment of other procedural defects. Again, defects in subject-matter jurisdiction should be deemed waived unless asserted in a pre-answer motion to dismiss as suggested in Rule 12(b). This change

is justified because both the other party and the judicial system have been put to substantial expense in time and money to decide the case on the merits. This expense may all have been avoided if the party objecting to subject matter jurisdiction had done so as a preliminary matter prior to trial.¹²⁵

123. FED. R. CIV. P. 12(b).

124. *Id.*

125. Martineau, *supra* note 107, at 34.

It also “will further enhance the finality of judgments.”¹²⁶ Finally, this change would provide even more incentive for defendants to consider the propriety of subject-matter jurisdiction and to raise any objections thereto early in the proceedings.

These are not new ideas, and there does not appear to be any legal impediment to implementing them. Indeed, more than fifty years ago, Professor Dan Dobbs concluded: “There is no reason why ordinary procedural rules cannot apply to issues of jurisdiction so that objections not timely raised are deemed waived.”¹²⁷ Similarly, a leading treatise states:

Arguably, Congress may ameliorate, if not abolish altogether, the doctrine that a jurisdictional defect may be noticed at any time and the action dismissed. Clearly this is so if the defect is that the case is not within the statutory grant of jurisdiction, for example, when the amount-in-controversy requirement in diversity cases is not satisfied. After all, Congress, having created that limitation, may determine at what stage of the case it can be asserted. The matter is more difficult if the defect is that the case does not fall within the constitutional grant of judicial power. Even in this context, however, a tenable argument may be made that the “necessary and proper” clause of the Constitution gives Congress the power to avoid wasteful burdens on the courts by setting a time limit for raising jurisdictional questions.¹²⁸

126. *Id.* at 35.

127. See Dan B. Dobbs, *Beyond Bootstrap: Foreclosing the Issue of Subject Matter Jurisdiction Before Final Judgment*, 51 MINN. L. REV. 491, 491 (1967); see also Dobbs, *supra* note 6, at 51, 78 (“We have come to think of the no consent rule as the inevitable product of either logic or the rational demands of policy. It is not. The rule has not always existed, even in England [A]lmost every reason that history suggests to support the rule against jurisdiction by consent has disappeared.”). A similar proposal was floated at about that same time by a very august group of procedural scholars on behalf of the American Law Institute. See generally AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS (Tentative Draft Nos. 4-6 1966-1968) (proposing a unified treatment of federal question jurisdiction).

128. 13 WRIGHT ET AL., *supra* note 23, 3522, at 137; cf. 18A WRIGHT ET AL., *supra* note 117, § 4430, at 40.

In contrast to the rules surrounding lack of subject-matter jurisdiction, the rules that relate res judicata to an asserted lack of personal jurisdiction are simple and well settled. If a defendant appears to challenge personal jurisdiction, disposition of the challenge is directly binding as a matter of res judicata. A defendant who appears to litigate the merits without properly preserving an objection to personal jurisdiction forfeits the right to raise the objection in the initial proceeding and is bound by the resulting judgment. Objections to personal jurisdiction remain open to the defendant who remains entirely aloof from the original proceeding, but if it is later concluded that personal jurisdiction existed the merits of the action are foreclosed unless relief can be had from the default judgment.

Id.

Thus, though trial court rulings on jurisdictional matters certainly may be raised on appeal following the entry of a final judgment, most procedural defects are not subject to direct attack if not timely raised below.¹²⁹ Subject-matter jurisdiction should be added to that list. This would seemingly also prevent unasserted objections to subject-matter jurisdiction from being raised collaterally. The only general exception to this approach (again) should be the treatment of this defense in the default judgment context. There has long been a tradition of allowing defendants to raise issues involving subject-matter jurisdiction, personal jurisdiction, and notice collaterally if the first judgment was the product of a default.¹³⁰ In the default judgment situation, the defendant might not have been given a reasonable opportunity to litigate these issues, which are regarded in this context to be fundamental.¹³¹ This presumption (which also has the virtue of placing subject-matter and personal jurisdiction on equal footing) should be preserved.

E. Two Further Thoughts

Before concluding, two additional matters might warrant some consideration. The first relates to the court's role vis-à-vis the assertion of defenses other than lack of subject-matter jurisdiction. The second

129. 18A WRIGHT ET AL., *supra* note 117, § 4427, at 22-23.

130. *See, e.g.*, 2 RESTATEMENT (SECOND) OF JUDGMENTS § 65 (AM. LAW INST. 1982) (“Invalid Default Judgment: Lack of Subject Matter or Territorial Jurisdiction or Adequate Notice,” “Except as stated in § 66, a judgment by default may be avoided if it was rendered without compliance with the requirements stated in § 1.”). A contrary view is expressed in 13D CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: CIVIL § 3536, at 9-11 (3d ed. 2008).

Suppose, however, that the first case ended in a default judgment, and that there was no litigation of any issue. In such a case, as seen above, the defendant could mount a collateral attack on the judgment by asserting that the court lacked personal jurisdiction. There appears to be little support, however, for allowing a collateral attack with regard to subject matter jurisdiction. This is as it should be. It is important to remember the profound difference between personal jurisdiction and subject matter jurisdiction. The latter concerns the allocation of power between different sovereigns. A court is under a continuing obligation to determine whether it has subject matter jurisdiction—even in cases involving default judgment. Thus, it seems appropriate to assume that the court entering the default judgment did make a determination that it had subject matter jurisdiction. After all, the court had no business entering a judgment unless it had already determined that the case was properly before it.

Id. (footnote omitted). But with all due respect, there seem to be some flaws in this argument, an argument that runs contrary to other authorities in this area. Default judgments are often entered not by the court itself, but by the court's clerk. Even in those situations where the default judgment is entered by the judge, it is not at all clear (at least based on the experience of the author of this Article) that it would be appropriate to assume that the court made a proper determination as to subject-matter jurisdiction. The court might well lack the information it needs to make this determination, even assuming it attempted to do so.

131. *See* 2 RESTATEMENT (SECOND) OF JUDGMENTS § 65, 155 cmt. b.

relates to the possible need for some judicial discretion were the reforms proposed in this Article to be implemented. Essentially, both of these matters relate to the seemingly eternal battle between efficiency and achieving the “correct” or “best” result in every case.

1. Enhanced Judicial Supervision as to Other Procedural Defects

As discussed previously, there is a long tradition of *sua sponte* supervision of subject-matter jurisdiction by the federal courts themselves.¹³² Though this Article argues that subject-matter jurisdiction should be treated essentially the same as other “jurisdictional” matters, such as personal jurisdiction and venue, at least insofar as waiver, forfeiture, and consent are concerned,¹³³ it seems that there is still some role for the courts to play.

Though a defendant generally might be permitted to waive or forfeit some procedural defense, or even consent to some result not otherwise permitted, this does not necessarily mean that the courts must abide by that result. The primary reason is that such conduct by the parties potentially implicates values or interests beyond the parties themselves.¹³⁴ When such values or interests become significant, it seems that the court, the only other “interested person” involved in the action, has something of a duty to enforce important procedural requirements. Courts, acting *sua sponte*, can “represent” the interests of the judiciary (perhaps even the Constitution) to ensure that actions lacking essential “jurisdictional” elements are dismissed prior to trial.

It seems, therefore, that a court not only may dismiss an action for lack of subject-matter jurisdiction *sua sponte*, it almost certainly should. But it also seems that the same should be true, at least to some extent, of other certain other “jurisdictional” defenses. Take venue, for example. The consensus view seems to be that the primary purpose of venue is to protect the defendant from having to litigate in a district with little or no connection to that party or to the activities giving rise to the plaintiff’s claim.¹³⁵ As a result, the federal courts seem to have taken somewhat of a hands-off approach to efforts by the parties to consent to litigate in districts where venue might otherwise be improper.¹³⁶ But venue statutes

132. See *supra* note 93 and accompanying text.

133. See *supra* Part III.C.

134. See 2 RESTATEMENT (SECOND) OF JUDGMENTS § 12 cmt. d, at 121-22 (“The interests primarily at stake in resolving [at least some questions of subject-matter jurisdiction] are governmental and societal, not those of the parties.”); Shannon, *supra* note 46, at 32 (concluding that in deciding whether to act *sua sponte*, a court “is attempting to balance competing policy interests”).

135. See FRIEDENTHAL ET AL., *supra* note 1, § 2.15, at 83, 83-84 n.5.

136. See 28 U.S.C. § 1404(a) (2012) (providing that venue may be transferred “to any

have other purposes as well. For example, it is surely better for juries (and perhaps even judges) to hear cases involving local events.¹³⁷ And if a substantial number of litigants were to suddenly start choosing forums based on factors not provided for by statutes—for example, if everyone started including contractual forum-selection clauses specifying the District of Hawaii because it is, well, Hawaii—should such clauses unthinkingly be upheld, even if they result in serious resource allocation issues?¹³⁸ It seems that the answer is (or should be) “not necessarily.”¹³⁹ Sua sponte supervision seemingly has a role to play here as well.¹⁴⁰ Admittedly, there should probably be a sliding scale here; arguably, judicial supervision (and intervention) should be at its peak with respect to subject-matter jurisdiction, and play a much lesser role with respect to things like personal jurisdiction and venue. But that is a far cry from the seemingly all-or-nothing approach taken by courts in these areas today.

2. A Continuing Role for Limited Judicial Discretion

As also discussed previously, current subject-matter jurisdiction practice is to some extent marred by the potentiality of a number of ad hoc exceptions to more general rules.¹⁴¹ Amending some of the rules relating to subject-matter jurisdiction and changing some of the baseline presumptions about how it should operate on direct and collateral review should help minimize the need for such exceptions.¹⁴² But will these changes eliminate the need for exceptions entirely? The answer is unclear. Though the hope is that they will, subject-matter jurisdiction has

district . . . to which all parties have consented”); *Olberding v. Ill. Cent. R.R. Co.*, 346 U.S. 338, 340 (1953) (recognizing that parties may consent or waive objections to venue).

137. *FRIEDENTHAL ET AL.*, *supra* note 1, § 2.16, at 87.

138. This question is not merely hypothetical. Similar issues have arisen in the Eastern District of Texas with respect to patent cases, at least prior to the Supreme Court’s decision in *TC Hartland v. Kraft Foods Grp. Brands*, 581 U.S. 1514 (2017). See Jonas Anderson, *Judge Shopping in the Eastern District of Texas*, 48 *LOYOLA U. CHI. L. REV.* 539, 539, 544-50 (2016) (“Judge Rodney Gilstrap has a lot of patent cases on his docket. In fact, in 2015 there were 1686 patent cases that were filed and assigned to Judge Gilstrap, an astronomical number for a single judge.”).

139. *Cf. Nw. Nat’l Ins. Co. v. Donovan*, 916 F.2d 372, 376 (7th Cir. 1990) (recognizing that the enforcement of some contractual forum-selection clauses “could interfere with the orderly allocation of judicial business and injure other third-party interests (that is, interests of persons other than the parties to the contract containing the clause)”).

140. See, e.g., 14D *CHARLES ALAN WRIGHT ET AL.*, *FEDERAL PRACTICE AND PROCEDURE: CIVIL* § 3826, at 551 (2007) (“[S]ome courts occasionally say that the objection [to venue] may be raised *sua sponte* under extraordinary circumstances.”).

141. See *supra* Part II.

142. To a large extent, the battle here, as Casad and Clermont point out, is between validity and finality. “Validity here represents the yearning to get things right, to pursue truth to the end. Finality represents the concession to the brevity of life, to the reality that justice demands an end to litigation.” *CASAD & CLERMONT*, *supra* note 92, at 272. This Article (like the law generally) “ultimately favors finality.” *Id.*

always been a complicated subject. Exceptions probably cannot be foreclosed entirely. It is conceivable, therefore, that even under a regime in which objections to subject-matter jurisdiction are waived if not timely asserted, there might be a need for exceptions under extraordinary circumstances.¹⁴³ But such exceptions seemingly should be quite rare.

IV. CONCLUSION

Current subject-matter jurisdiction practice, though well-entrenched, seems upon closer examination to be somewhat indefensible. Changes should be made. Federal Rule of Civil Procedure 8 should be amended to eliminate the pleading of subject-matter jurisdiction. This should help obviate the need to respond to allegations of this nature. Moreover, Rules 12 and 60 should be amended to prevent the assertion of this defense beyond the pleading stage (except in the default judgment context). Such a move would significantly (and appropriately) limit the ability to raise this defense on direct or collateral review. It would, in short, help “secure the just, speedy, and inexpensive determination of every action.”¹⁴⁴ Perhaps more importantly, the practice relating to federal subject-matter jurisdiction would be reconciled with that relating to other “jurisdictional” concepts such as personal jurisdiction and venue, as well as state subject-matter jurisdiction practice, which has avoided many of these problems without incident.

143. One example might be the approach taken in the *Restatement (Second) of Judgments*, which provides:

When a court has rendered a judgment in a contested action, the judgment precludes the parties from litigating the question of the court’s subject matter jurisdiction in subsequent litigation except if:

- (1) The subject matter of the action was so plainly beyond the court’s jurisdiction that its entertaining the action was a manifest abuse of authority; or
- (2) Allowing the judgment to stand would substantially infringe the authority of another tribunal or agency of government; or
- (3) The judgment was rendered by a court lacking capability to make an adequately informed determination of a question concerning its own jurisdiction and as a matter of procedural fairness the party seeking to avoid the judgment should have opportunity belatedly to attack the court’s subject matter jurisdiction.

RESTATEMENT (SECOND) OF JUDGMENTS § 12 (AM. LAW. INST. 1982). Regarding this section, Casad and Clermont state:

It is to be noted that preclusion of the issue under this section does not necessarily require in all cases that the question be actively litigated, and it may be enough that the court implicitly determined its own jurisdiction. At the same time, by virtue of the section’s exceptions, there may be no preclusion in some cases where the issue was actually litigated and determined. Generalization is difficult, and so the Second Restatement’s black-letter rule does little more than identify certain factors to be considered in weighing the competing policies in each case.

CASAD & CLERMONT, *supra* note 92, at 270.

144. FED. R. CIV. P. 1.

Alas, sound reasoning might not be enough to get the Rules Committee to proceed on some of these matters. Tradition is a powerful thing. Moreover, the fact that the amendments proposed here would, in actuality, have little effect on post-pleading practice, though seemingly a virtue, might actually be a deterrent. Hopefully it will be enough that these amendments would promote simplicity, uniformity, predictability, and avoid unnecessary waste. Exceptions might be unavoidable regardless of which way one goes on these issues, and cases probably will continue to be decided suboptimally. The questions for now relate to baseline presumptions and how best to minimize errors and increase the efficiency of the federal courts.