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JURISDICTIONAL EXCEPTIONALISM

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INTRODUCTION

FEDERAL courts exercise limited jurisdiction. They can hear only those cases and controversies provided for in Article III of the Constitution and implemented by Congress.[1] Arising from the limited nature of their power is a long-standing "first principle of

[1] For recent reminders, see *Bowles v. Russell*, 127 S. Ct. 2360, 2364–65 (2007), *DaimlerChrysler Corp. v. Cuno*, 126 S. Ct. 1854, 1860–61 (2006), *Marshall v. Marshall*, 547 U.S. 293, 298–99 (2006), and *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 505 (2006).

federal jurisdiction"[2] that requires federal courts to dismiss a suit at any stage of the proceedings if subject matter jurisdiction is lacking. Closely related to this first principle are the presumption against the existence of jurisdiction and the imposition of the burden to establish it upon the party who invokes it.[3] Among the familiar qualities associated with federal court subject matter jurisdiction are its insusceptibility to waiver by the parties, its resistance to procedural rules regarding the time and manner of objecting to it, and its imposition of an affirmative duty on the federal courts to police for jurisdictional defects.[4] Also related to this first principle is the notion that jurisdictional issues should ordinarily be resolved ahead of the merits.[5] In each of these respects, jurisdictional questions are exceptional and escape the application of many ordinary principles that would be applicable to the resolution of nonjurisdictional questions.

The scholarly consensus is that "[s]ince the beginning, federal courts have indulged in the expensive habit of investigating the existence of jurisdiction on their own and at any stage of the proceedings."[6] This Article will argue that, as an historical matter, certain of the qualities commonly associated with the federal courts' concededly limited subject matter jurisdiction remained less than fully settled throughout much of the nation's history. It will show that, beginning in the early Republic, there was heavy, and sometimes

[2] Henry M. Hart, Jr. & Herbert Wechsler, The Federal Courts and the Federal System 719 (1953) (discussing *Mansfield, Coldwater & Lake Michigan Railway Co. v. Swan*, 111 U.S. 379 (1883)). Regrettably, the phrase has disappeared from the casebook that created it. See Richard H. Fallon, Jr. et al., Hart and Wechsler's The Federal Courts and the Federal System 1506 (5th ed. 2003) (referring to *Mansfield*'s "principle" as creating a "first duty").

[3] Turner v. Bank of North-America, 4 U.S. (4 Dall.) 8, 11 (1799).

[4] See *Arbaugh*, 546 U.S. at 514 (noting that parties cannot forfeit or waive objections to jurisdiction and that courts have an "independent obligation" to ascertain its existence, even when unchallenged); see also Alex Lees, Note, The Jurisdictional Label: Use and Misuse, 58 Stan. L. Rev. 1457, 1472 (2006) (noting qualities traditionally associated with jurisdiction).

[5] See Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 101 (1998) (rejecting the notion of "hypothetical jurisdiction" to resolve merits first, ahead of jurisdiction).

[6] David P. Currie, The Federal Courts and the American Law Institute (pt. 2), 36 U. Chi. L. Rev. 268, 298 (1969). More recent criticism of this first principle proceeds from a similar baseline. See, e.g., Qian A. Gao, Note, "Salvage Operations Are Ordinarily Preferable to the Wrecking Ball": Barring Challenges to Subject Matter Jurisdiction, 105 Colum. L. Rev. 2369, 2371 (2005).

exclusive, reliance on the parties' pleadings to settle jurisdictional questions in the federal courts, even when jurisdiction might be lacking "in fact." This reliance upon the pleadings was particularly true in diversity-of-citizenship litigation—a mainstay of the early federal courts—but also in admiralty, federal question, and other litigation.

This reliance on allegations of jurisdiction, often to the exclusion of evidence outside the pleadings, was largely the consequence of the federal courts' dependence on now obscure eighteenth-century common-law practices borrowed from the states and on the limited record available for trial courts and appellate courts to police for jurisdictional defects. As a consequence, the proper pleading of jurisdiction was a necessary and often sufficient condition to securing a federal forum. At common law, a proper showing of jurisdiction on the face of the complaint was said to constitute "prima facie" jurisdiction—an important principle that would not be abandoned until well into the twentieth century.

In addition, because of other peculiarities of common-law procedure, a party could even waive an objection to properly pled jurisdiction if the objection was not made by a pre-answer plea. The possibility of waiver may seem surprising. But because a formally sufficient allegation could itself constitute evidence of jurisdiction, federal courts in the early Republic continued to hear cases in the absence of rebuttal made in the time and manner called for by the common law. By contrast, disputes over jurisdictional facts arose only when a plaintiff properly alleged jurisdiction and the defendant properly pled an objection. Even then, the burden rested on the party objecting to jurisdiction to prove its absence and thus overcome a prima facie showing.

The tension between common-law procedures for raising jurisdictional objections in the federal courts and the notion of limited subject matter jurisdiction was one that, in hindsight at least, seemed slow to surface. The practice of borrowing common-law procedures was awkward because state courts were not courts of limited jurisdiction in the same sense that federal courts were, and state court practices—themselves largely drawn from English practices—did not fully honor this essential feature of federal judicial power. Emphasis on the pleadings, when coupled with limited procedural opportunities to go behind the narrowly construed record,

carried with it the possibility—often realized—that cases outside of Article III or Congress's implementing statutes would be heard by the federal courts. Early Anti-Federalist fears that the federal courts' jurisdiction could be enhanced through fictions and collusion based on English practices were soon realized.[7]

This common-law regime for establishing and contesting jurisdiction persisted with little alteration for nearly a century following the enactment of the 1789 Judiciary Act. It started to give way in part because of the federal courts' use of more liberal state procedures by which jurisdiction could be challenged—procedures associated with the arrival of code pleading in the states. Code pleading generally placed a greater emphasis on facts and less on formal (and possibly fictitious) allegations than had been true at common law.[8] The federal judiciary began to absorb such state court developments with the Conformity Act of 1872 and its requirement of federal court adherence to up-to-date state procedures in actions at law. The arrival of the Act was critical to the erosion of common-law procedures as the exclusive means for challenging jurisdictional defects in federal court.

Even more significant to the development of modern understandings of subject matter jurisdiction, however, was the 1875 Judiciary Act. Best known for its grant of federal question jurisdiction, the Act gave specific instructions to federal courts to toss out suits that did not "really and substantially" involve a case within the federal courts' jurisdiction and required them to police for jurisdiction that was collusively or improperly imposed. Consistent with ongoing developments in pleading, the focus thereby shifted more to the facts of jurisdiction than their allegation. This focus, in turn, was reflective of other expansions of federal jurisdiction during the Civil War and Reconstruction that were often more fact based, including removal for local prejudice and for race-based denials of certain rights. These fact-centered jurisdictional develop-

[7] See Stewart Jay, Origins of Federal Common Law (pt. 2), 133 U. Pa. L. Rev. 1231, 1258 n.138 (1985) (gathering Anti-Federalist statements); see also Laura S. Fitzgerald, Is Jurisdiction Jurisdictional?, 95 Nw. U. L. Rev. 1207, 1258–63 (2001) (indicating that English equity courts' historic practices of aggrandizing their jurisdiction could have provided a basis for the (feared or actual) aggrandizement of federal jurisdiction).

[8] See Christopher M. Fairman, Heightened Pleading, 81 Tex. L. Rev. 551, 555 (2002); Richard L. Marcus, The Revival of Fact Pleading Under the Federal Rules of Civil Procedure, 86 Colum. L. Rev. 433, 437–38 (1986).

ments also enlarged the record upon which jurisdiction could be assessed and attacked, both at the trial level and on review in the Supreme Court.

Nevertheless, neither these mid-century developments in pleading nor the 1875 Act resulted in the immediate extinction of the old regime when it came to procedural limits on the raising and preserving of jurisdictional objections in federal courts. Although state procedures for objecting to jurisdiction were no longer as rigid as they once were, neither were they wholly open-ended. The immediate post-1875 Act era therefore proved to be a transitional period in the development of modern approaches to policing jurisdictional defects. Throughout this period, a party's proper allegations of jurisdiction continued to carry their prima facie character, thus continuing to place the burden on the party opposing jurisdiction to establish its nonexistence. It was only much later—two years before the promulgation of the Federal Rules in 1938—that the Supreme Court squarely placed the burden of proof on the party invoking federal jurisdiction and indicated that the pleading of jurisdiction would no longer supply evidence of it. The Federal Rules' provision that jurisdictional objections in the district courts could be made at any time and by any means turns out to have been more of a culmination of a longer, historically determined process than a reaffirmation of long-established understandings.

The historical relationship between pleading and jurisdiction, and its possible significance for modern federal courts law, is not one that has been much developed.[9] Part I of this Article will reconstruct the treatment of jurisdictional issues in the antebellum federal courts, in which a highly stylized and formal record was both a necessary and sufficient condition for jurisdiction. Part II will explore how Civil War and Reconstruction-era dissatisfaction with that earlier regime, along with changes in pleading, improved the federal courts' ability to police their expanding jurisdiction by

[9] The main exception is Dan B. Dobbs, Beyond Bootstrap: Foreclosing the Issue of Subject-Matter Jurisdiction Before Final Judgment, 51 Minn. L. Rev. 491, 507–24 (1967) (discussing practice under the 1875 Act and its modern implications). See also Kevin M. Clermont, Jurisdictional Fact, 91 Cornell L. Rev. 973, 1006–19 (2006) (discussing the modern relationship between pleading and jurisdiction). Neither article discusses the antebellum federal court practices on which this Article focuses, and I will take issue with some of Professor Dobbs's generally helpful history regarding post-1875 Act developments.

assessing the facts of jurisdiction in particular cases. Part II will also show that this shift, while clearly heralding the modern approach, did not immediately overturn all aspects of the old regime, such as the notion of prima facie jurisdiction or the application of procedural limits on the raising and preserving of jurisdictional objections. That distinction seems instead to belong to the Court of the 1930s and the drafters of the Federal Rules. Finally, Part III will briefly assess the significance of these pre-modern practices for early understandings of federal judicial power, as well as for modern federal courts law. Although critics have attacked the exceptional, nonwaivable treatment of jurisdictional issues as both inefficient and unfair, constitutional problems may still surround proposals to permit foreclosure of jurisdictional objections. Part III will conclude that the history recounted herein may be responsive to some of those problems, but perhaps not to all of them.

I. COMMON-LAW PROCEDURES AND FEDERAL JURISDICTION

A. Background and Context

The structure of the antebellum federal judicial system looked much different than it does today. The First Judiciary Act, which remained in place until late into Reconstruction, provided for a district court in each state that could hear admiralty cases, minor federal crimes, and certain civil actions brought by the United States. Itinerant circuit courts could hear trials of suits between citizens of different states or between aliens and citizens, major federal crimes, and appeals from the district courts in certain matters such as admiralty. Appeals from the circuit courts, when available, went straight to the Supreme Court. Significant by its absence was a general provision for federal question jurisdiction. Civil actions implicating federal law could, of course, be heard in the state courts, with appellate review in the Supreme Court when a claim of federal right had been raised and rejected.[10]

The rules governing substance and procedure in the federal courts were also fundamentally different in many respects. In actions not governed by federal law, federal courts were obliged to

[10] See Judiciary Act of 1789, ch. 20, §§ 9, 11, 25, 1 Stat. 73, 76–79, 85–86. See generally Fallon et al., supra note 2, at 28–33.

apply the relevant "laws of the several states" as their rules of decision, just as they are today.[11] Nevertheless, federal courts early on exercised an independent judgment as to the meaning of the general common law adopted and applied by the states—a practice most famously associated with *Swift v. Tyson*.[12] In addition, in actions at common law, early congressional "Process Acts" required federal courts to conform their procedures to those of the state in which they sat. A peculiarity of those early statutes, as construed by the Court, was that federal courts had to conform to state procedure "as it existed in September, 1789,"[13] rather than as it might develop. As a consequence, federal court procedures in the early Republic were firmly rooted in eighteenth century common-law practices, which the federal courts similarly felt at liberty to construe. Admiralty actions and suits in equity were not required to conform to state practice, but, as noted below, pleading conventions in such cases still shared many similarities with those at common law.

It was in this context that the practices governing the assertion of jurisdiction in the federal courts, as well as challenges to it, were developed. As discussed below, common-law procedures might not and did not fully address the structural concerns presented by exercises of federal court authority that threatened to overstep either constitutional or congressional authorization. Common-law practices could sometimes be highly protective of federal court jurisdiction. But far more often, common-law practices seem—in retrospect—to have maintained an uneasy coexistence with fundamental notions of limited jurisdiction.

B. The Example of Diversity

1. The Necessity of Good Pleading

The first principle of federal jurisdiction is well reflected in the Marshall Court's decision in *Capron v. Van Noorden*.[14] In *Capron*,

[11] Section 34, 1 Stat. at 92.

[12] 41 U.S. (16 Pet.) 1, 18–19 (1842).

[13] Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 32 (1825) (interpreting the Process Acts of Sept. 29, 1789, ch. 21, § 1, 1 Stat. 93, 93–94, and May 8, 1792, ch. 36, § 2, 1 Stat. 275, 276).

[14] 6 U.S. (2 Cranch) 126 (1804).

the federal trial court rendered a judgment on the merits in favor of the defendant in an apparent diversity suit. But on the plaintiff's appeal in the Supreme Court, the Court reversed for want of jurisdiction. The Court declared that "it was the duty of the Court to see that they had jurisdiction, for the consent of parties could not give it."[15] The case reflected an already firmly rooted principle that lower federal courts had jurisdiction only when conferred by statute and consistent with Article III. Unlike the tradition in English courts of general jurisdiction, the federal courts' jurisdiction would not be presumed, but must be shown.[16] *Capron* provided the added wrinkle that even the party invoking the federal court's jurisdiction could challenge it on appeal after losing on the merits.

Capron, however, did not conclude that the parties in the case were not in fact diverse. Rather it concluded that the plaintiff had failed sufficiently to plead the citizenship of the parties so as to show their diversity.[17] For all anyone knows, the parties may well have been diverse. But that possibility was not part of the Court's inquiry, as opposed to the sufficiency of the plaintiff's pleading.[18] At the pleading stage, as Justice Story once put it: "the question was, whether the citizenship of the parties, as described in the record, gave the court jurisdiction; not whether that citizenship as alleged was true in fact."[19]

[15] Id. at 127; see also Jackson v. Ashton, 33 U.S. (8 Pet.) 148, 149 (1834) (dismissing case on jurisdictional grounds, despite an apparent lack of any objection from the parties).

[16] See Turner v. Bank of North-America, 4 U.S. (4 Dall.) 8, 11 (1799) ("[T]he fair presumption is (not as with regard to a Court of general jurisdiction, that a cause is within its jurisdiction unless the contrary appears, but rather) that a cause is without its jurisdiction till the contrary appears."); see also Hodgson v. Bowerbank, 9 U.S. (5 Cranch) 303, 304 (1809); Mossman v. Higginson, 4 U.S. (4 Dall.) 12, 14 (1800). See generally Anthony J. Bellia, Jr., The Origins of "Arising Under" Jurisdiction, 57 Duke L.J. 263 (2007) (noting early examples of this approach and its English antecedents).

[17] See *Capron*, 6 U.S. (2 Cranch) at 126–27.

[18] Other persnickety rules could make an allegation of citizenship deficient. Statements that a party either "resided" in a state or was "of" a particular state, or that left a "blank" in the complaint, were all held insufficient. See Thomas Sergeant, Constitutional Law 114 (Philadelphia, Abraham Small 1822). Because the initial presumption was against jurisdiction, it had to appear affirmatively in the pleadings rather than be "inferred argumentatively." Brown v. Keene, 33 U.S. (8 Pet.) 112, 115 (1834).

[19] Wood v. Mann, 30 F. Cas. 447, 449 (C.C.D. Mass. 1834) (No. 17,952) (characterizing the Supreme Court's jurisdictional inquiry in *Chappedelaine v. Dechenaux*, 8 U.S. (4 Cranch) 306, 308 (1808)).

The result in *Capron* was not new even at the time. It had been foreshadowed by an earlier decision in which the Court struck a case from its docket—along with "many others"—because of the imprecision with which the plaintiff had pled federal jurisdiction in the court below.[20] Counsel had argued for the result based on English precedents that had resolved that, in courts of limited jurisdiction, jurisdiction had to appear on the face the complaint. Absent such a showing, the defect was "intrinsic,"[21] and a jurisdictional objection could be made at any time during the course of the proceedings, including by the court on its own motion. Allegations as to jurisdictional amount fell under a similar pleading requirement.[22]

2. The Sufficiency of Good Pleading

The idea that jurisdiction had to appear on the face of the record and be sufficiently alleged, and that its absence could be noted at any time, is perhaps a familiar one. Less well known is what might be called the flip-side of *Capron*. Not only was a proper allegation of citizenship necessary for jurisdiction to attach, but such an allegation could be sufficient to empower a federal court to proceed to judgment on the merits, even when jurisdiction was lacking in fact. Thus, for example, a plaintiff might plead the diverse citizenship of the parties and thereby make out a case that the federal courts could hear, absent an objection. Somewhat remarkably in light of current understandings, a defendant could actually waive objections to federal jurisdiction if he did not contest it in the time and manner required by the common law.[23] Indeed, as discussed below,

[20] Bingham v. Cabot, 3 U.S. (3 Dall.) 382, 383–84 (1798); see also Emory v. Grenough, 3 U.S. (3 Dall.) 369, 370 (1797).

[21] Tyler v. Hand, 48 U.S. (7 How.) 573, 584 (1849) ("If the matter of abatement be . . . intrinsic, the court will act upon it upon motion, or notice it of themselves.").

[22] See, e.g., Wilson v. Daniel, 3 U.S. (3 Dall.) 401, 407–08 (1798) ("Where the law gives no rule, the demand of the Plaintiff must furnish one . . . ."); Martin v. Taylor, 16 F. Cas. 906, 906 (C.C.D. Pa. 1803) (No. 9166) ("[B]y the decisions in the supreme court, the amount of the plaintiff's claim laid in the declaration, furnishes the rule for testing the jurisdiction of the federal courts.").

[23] See, e.g., Carter v. Bennett, 56 U.S. (15 How.) 354, 357 (1853) ("[I]f the defendant means to deny the fact [of diverse citizenship] and the jurisdiction, he must plead it in abatement; and if he omits to plead it in abatement, and pleads in bar to the action, he cannot avail himself of the objection at the trial."). For similar statements, see *Smith v. Kernochen*, 48 U.S. (7 How.) 198, 216 (1849), *Evans v. Gee*, 36 U.S. (11 Pet.) 80, 83 (1837), and *D'Wolf v. Rabaud*, 26 U.S. (1 Pet.) 476, 498 (1828). Cf. *Wood*, 30 F. Cas.

the parties could even collude to have their case tried in federal court with a combination of a plaintiff's proper jurisdictional plea and a defendant's non-objection.[24]

De Sobry v. Nicholson[25] provides a mid-nineteenth century illustration of this largely forgotten rule. The suit was for breach of contract and involved an assignment by someone who, at the time of the suit's commencement, was a citizen of the same state as one of the defendants.[26] The case thus ran afoul of the Assignee Clause of the First Judiciary Act, which required diversity between the assignor and the defendant in suits over assigned promissory notes.[27] After pleading to the merits, the defendant moved to dismiss the case based on evidence adduced at trial that diversity did not exist between the assignor and the defendant. The lower court overruled the motion. After litigating and losing on the merits, the defendant raised the jurisdictional issue in the Supreme Court. His effort failed there as well. Justice Swayne summed up what he considered to be the settled common-law practice:

> The objection to jurisdiction upon the ground of citizenship, in actions at law, can only be made by a plea in abatement. After the general issue [i.e., a plea to the merits], it is too late. It cannot be raised at the trial upon the merits. If a plea in abatement be filed with the general issue, the latter waives the former. Where a plea in abatement is relied upon, the burden of proof rests upon the defendant.[28]

In such cases, the proper allegation of citizenship by the plaintiff was said to constitute a "*primâ facie*" showing of jurisdiction,[29] challengeable only through a pre-answer "plea in abatement" that could bring a halt to the proceedings.[30] In this respect, the raising

at 450 ("All pleas to the jurisdiction are objections to entering into the litis contestatio; and they must, and ought, therefore, to precede the litis contestatio.")

[24] See infra Subsection I.B.4.

[25] 70 U.S. (3 Wall.) 420 (1866).

[26] Id. at 421.

[27] Act of Sept. 24, 1789, ch. 20, § 11, 1 Stat. 73, 78–79.

[28] *DeSobry*, 70 U.S. (3 Wall.) at 423 (citations omitted).

[29] See, e.g., Sheppard v. Graves, 55 U.S. (14 How.) 505, 510 (1853).

[30] The First Judiciary Act recognized that a plea in abatement could be a vehicle for challenging jurisdiction. See Act of Sept. 24, 1789, ch. 20, § 22, 1 Stat. 73, 85 (barring appeals from lower federal courts "for error in ruling any plea in abatement, other than a plea to the jurisdiction of the court").

and preserving of an objection to subject matter jurisdiction resembled the manner in which personal jurisdiction continues to be treated today—a personal defense, subject to waiver if not timely and properly asserted. Of course, as *Capron* demonstrated, when subject matter jurisdiction was not properly alleged, no such plea was required to preserve the objection.[31]

Consequently, federal courts would permit challenges to jurisdiction with evidence "extrinsic" to the pleadings only when good jurisdictional allegations were met with a good jurisdictional plea in response.[32] But as indicated in *DeSobry*, because the plaintiff's allegations amounted to a prima facie showing of jurisdiction, the burden was actually on the defendant to establish its absence. It therefore took the combination of the defendant's "denial of . . . citizenship *and* proof of the non-existence of the citizenship of either party as alleged" to secure dismissal on jurisdictional grounds.[33] Roughly similar practices existed in suits in equity[34] and, as noted below, in admiralty.[35] Although there is evidence that more liberal opportunities for objecting to jurisdiction may have once existed in some of the circuits, the requirement of a pre-answer plea was apparently well settled by the early nineteenth century.[36]

[31] Capron v. Van Noorden, 6 U.S. (2 Cranch) 126, 127 (1804); see also Shedden v. Custis, 21 F. Cas. 1218, 1219 (C.C.D. Va. 1793) (No. 12,736). If the complaint showed that complete diversity was lacking, the plaintiff could still amend the complaint by dropping the nondiverse party, assuming that the party was dispensable. See Conolly v. Taylor, 27 U.S. (2 Pet.) 556, 565 (1829).

[32] See Tyler v. Hand, 48 U.S. (7 How.) 573, 584 (1849) ("If the matter of abatement be extrinsic, the defendant must plead it.").

[33] Wood v. Mann, 30 F. Cas. 447, 448 (C.C.D. Mass. 1834) (No. 17,952) (emphasis added). In *Sheppard v. Graves*, the Court stated: "wherever jurisdiction shall be averred in the pleadings, . . . it must be taken *primâ facie* as existing, and . . . it is incumbent on him who would impeach that jurisdiction for causes *dehors* the pleading, to allege and prove such causes." 55 U.S. (14 How.) at 510.

[34] See Livingston's Executrix v. Story, 36 U.S. (11 Pet.) 351, 393 (1837); see also De Sobry v. Nicholson, 70 U.S. (3 Wall.) 420, 423 (1866) ("In equity, the defence must be presented by plea or demurrer, and not by answer.").

[35] See infra Subsection I.C.1.

[36] See Jones v. League, 59 U.S. (18 How.) 76, 81 (1855) (noting that "[a]t an early period of this court, it was held in some of the circuit courts, that the averment of citizenship, to give jurisdiction, must be proved on the general issue," but that this practice had for "many years" been abandoned); Lanning v. Dolph, 14 F. Cas. 1120, 1122 (C.C.E.D. Pa. 1826) (No. 8073) ("question[ing]" and "regret[ting]" an earlier, contrary practice).

3. Common-Law Disincentives to Challenging Jurisdiction

Common-law pleading requirements discouraged objections to jurisdiction when it had been properly alleged. At common law, a party who raised a plea in abatement requiring the resolution of a disputed issue of jurisdictional fact would automatically lose on the merits if he lost on the motion.[37] Of this sporting regime, former Justice Benjamin Curtis once remarked: "[Y]ou perceive that it is a very delicate matter for a defendant to take his chance of denying the citizenship alleged on the record; because, if he prevails, he only defeats that suit; but if he fails, he fails altogether."[38] Thus, the parties—who, often more than the courts, were the primary guardians of the limits of the federal courts' jurisdiction—faced disincentives to objecting to jurisdiction even when they might otherwise have been so inclined. Only if the jurisdictional objection presented a question of law, as opposed to fact, could such harsh results be avoided.[39]

Curtis's observations were nothing new, nor unfamiliar to the antebellum Court. In a dissent to the Court's decision to import common-law pleading practices respecting questions of jurisdictional fact into the realm of equity, Justice Henry Baldwin point-

[37] See James Gould, A Treatise on the Principles of Pleading, in Civil Actions 300 (Boston, Lilly, & Wait 1832) ("If an issue in *fact* is joined on a plea in abatement, and found for the *plaintiff*; *final* judgment is awarded in his favour . . . ."); see also Benjamin Robbins Curtis, Jurisdiction, Practice, and Peculiar Jurisprudence of the Courts of the United States 126 (Boston, Little, Brown, & Co. 1880) (making a similar observation). The draconian sanction was supposed to "discourage *false* dilatory pleas." Gould, supra, at 300.

[38] Curtis, supra note 37, at 126–27. Curtis's remarks were made in a series of lectures just prior to the Conformity Act of that same year, which would considerably alter federal procedure. Act of June 1, 1872, ch. 255, § 5, 17 Stat. 196, 197; see also Alfred Conkling, Treatise on the Organization Jurisdiction and Practice of the Courts of the United States 375 (Albany, W. C. Little & Co. 3d ed. 1856) (noting peremptory consequences upon loss of jurisdictional plea in abatement).

[39] See, e.g., Mollan v. Torrance, 22 U.S. (9 Wheat.) 537, 539 (1824) (finding that a plea to properly alleged jurisdiction was defective because it alleged a lack of diversity at the time of the plea rather than filing); Bank of the United States. v. Deveaux, 9 U.S. (5 Cranch) 61, 92 (1809) (overruling a plea in abatement, finding that diverse citizenship was sufficiently alleged); Codwise v. Gleason, 5 F. Cas. 1164, 1167 (C.C.D. Conn. 1807) (No. 2938) (ordering the case to be tried after rejecting a plea in abatement as "defective" because, in the plea, "[i]t is not alleged that the original parties to the note were not citizens of different states").

edly called the majority's attention to the "perils" of the plea in abatement:

> The plaintiff's privilege is the defendant's oppression; the plaintiff is a favoured suitor; not because he is a citizen of New York in truth or in fact, *but merely because he says in his bill that he is*; and the [Louisiana] defendant must submit to all the consequences of the averment being true, unless he will also consent to undergo the perils and inflictions of a plea in abatement. We have seen what its requisites are . . . . It must be on oath, the fact [of plaintiff's citizenship] is not within his [i.e., the defendant's] knowledge; he swears to a negative of a fact asserted in the bill, whereby he is compelled to incur the risk of perjury. . . . [T]here is another rule worthy of notice: "If the plaintiff take issue on a plea in abatement, and it be found against the defendant, then final judgment is given against him."[40]

Baldwin also observed that it would be an easy matter for a party having a dispute with a co-citizen to steer a case into a federal court where, at the time, the applicable rule of decision might be different from that in the state courts.[41] Such a result might occur in common-law actions because of principles associated with *Swift v. Tyson*, or in equity actions where federal courts exercised a similar independence from state law.[42]

Although Baldwin's argument attracted no support at the time, it had been foreshadowed in a very early circuit court decision of Supreme Court Justice James Iredell, in which he too rejected the idea that a plea in abatement should be the exclusive vehicle for challenging jurisdictional defects. He did so on grounds that went straight to the exceptional nature of federal subject matter jurisdiction. In *Maxfield v. Levy*, Iredell stated that such a plea would be of little use to a defendant unless he knew "not only the fact" of the plaintiff's alleged citizenship, but had "disinterested proof of it"[43]—an apparent reference to the difficulty of proving the negative and the consequences of failure. "This, in a thousand instances,

[40] Livingston's Executrix v. Story, 36 U.S. (11 Pet.) 351, 416 (1837) (Baldwin, J., dissenting) (emphasis added).

[41] Id. at 394–402, 411–12, 416–17.

[42] See Robinson v. Campbell, 16 U.S. (3 Wheat.) 212, 221–23 (1818).

[43] Maxfield v. Levy, 16 F. Cas. 1195, 1198 (C.C.D. Pa. 1797) (No. 9321).

would be impossible; and in no instance can be expected. To insist on this, therefore, as the only method, would leave the constitution, and the law, in almost every instance, open to certain evasion."[44] Iredell therefore upheld a defendant's efforts to raise the jurisdictional issue by way of answer to the complaint, to seek discovery directed to the question of citizenship, and to place the burden of establishing the contested facts of jurisdiction on the plaintiff.[45] Anything less, Iredell suggested, would place the court in the position of being a "usurper of jurisdiction not belonging to it."[46] Nevertheless, and for reasons explored in Part III, Iredell's assessment, like Baldwin's, appeared to gain little traction. But as a descriptive matter, Iredell and Baldwin were likely correct in their assessment of the consequences of these common-law practices for the enhancement of federal jurisdiction.

4. Federal Jurisdiction and Real Parties in Interest

a. Jurisdiction by Assignment

In keeping with the early federal courts' focus on the face of the record, concern that real parties in interest prosecute a case did not operate in a strong way to defeat jurisdiction that otherwise appeared on the face of the pleadings. As historian G. Edward White has pointed out, the Marshall Court in *M'Donald v. Smalley* "gave its blessing to a common early-nineteenth-century device to obtain federal jurisdiction"—that is, "the arranged sale to a nonresident."[47] Because it involved a suit to recover mortgaged property, the case was not covered by the Assignee Clause, which would have resulted in dismissal given the assignor's nondiverse citizenship.[48] In addition, *M'Donald* held that a possible motive in the transferor to secure a federal forum for a lawsuit that could otherwise only have been brought in state court would not vitiate an

[44] Id.
[45] Id. at 1198–99.
[46] Id. at 1198.
[47] 3–4 G. Edward White, History of the Supreme Court of the United States: The Marshall Court and Cultural Change, 1815–35, at 845 (1988) (discussing *M'Donald v. Smalley*, 26 U.S. (1 Pet.) 620, 624 (1828)).
[48] See Deshler v. Dodge, 57 U.S. (16 How.) 622, 631 (1854).

otherwise bona fide transfer.[49] The question whether a transfer was bona fide or merely "fictitious"—thus making the transferee only a nominal party whose citizenship could be ignored in calculating diversity—would have to focus on evidence other than the motive behind it.[50] Presentation of such evidence, however, would itself have to conform to common-law practices. And a real-party-in-interest challenge to jurisdiction could come "too late"[51] if raised after pleading to the merits.

Other decisions may have gone even further. On circuit, Justice Story upheld diversity jurisdiction based on the transfer of legal title to real property, even though the owner still retained equitable title.[52] Such an arrangement created a trust relationship in which the transferee was the trustee, and trustees could sue in their own name, like executors and administrators of estates. In such cases, it was the trustee's citizenship that mattered.[53] Yet the likely object of the trust was simply to maintain an action in federal court respecting the property, and, unlike in the arranged sale in cases such as *M'Donald*, the face of the pleadings showed that the transferor still retained an interest in the property. Upholding the device therefore offered a simple way for in-state owners to settle property disputes with co-citizens in federal court.[54] Here too there had once been objection, and again from Justice Iredell, who viewed such

[49] *M'Donald*, 26 U.S. (1 Pet.) at 624 (rejecting inquiry into motive behind assignment, "whether justifiable or censurable").

[50] Id. at 625; see also Barney v. Baltimore City, 73 U.S. (6 Wall.) 280, 288 (1868) ("If the conveyance . . . had really transferred the interest of [*A*] to [*B*], although made for the avowed purpose of enabling the court to entertain jurisdiction of the case, it would have accomplished that purpose."); Cooper v. Galbraith, 6 F. Cas. 472, 476 (C.C.D. Pa. 1819) (No. 3193) (same).

[51] Smith v. Kernochen, 48 U.S. (7 How.) 198, 199, 216 (1849). In *Kernochen*, the defendant argued that a mortgage conveyance to the plaintiff was fictitious, that the plaintiff was only a nominal party, and that the real party in interest was the nondiverse assignor. The Supreme Court held that, "assuming" all this to be true, the objection "came too late" when it was raised by the defendant after pleading to the merits. Id. at 216.

[52] Briggs v. French, 4 F. Cas. 117, 118–19 (C.C.D. Mass. 1835) (No. 1871).

[53] See Childress v. Emory, 21 U.S. (8 Wheat.) 642, 668–69 (1823); see also Chappedelaine v. Dechenaux, 8 U.S. (4 Cranch) 306, 307–08 (1808) (upholding jurisdiction when aliens sued a Georgia citizen as trustees to administer estate of Georgia citizen).

[54] *Briggs*, 4 F. Cas. at 119 ("A *controversy* may exist between parties claiming adversely to each other, whether the title be legal or equitable, bona fide or mala fide.") (emphasis added).

transactions as fictitious on their face.[55] Yet Justice Story would reject Iredell's reasoning as "wholly unsatisfactory," largely on the validity of such arrangements outside the jurisdictional setting.[56]

It is not as though the Court ignored real-party-in-interest concerns in these cases. The plaintiff still had to allege what would amount to a cognizable controversy at common law between himself and the diverse defendant.[57] In addition, the requirement that the citizenship of indispensable parties be taken into account, even where they were not named in the complaint, could operate as a real-party-in-interest rule that, in some cases, might block jurisdiction.[58] Also, when it applied, the Assignee Clause could police for jurisdiction by fraudulent assignments (along with bona fide ones).[59] But when the Clause did *not* apply, proving that a particular transfer by a nondiverse party was fraudulent in fact and that the plaintiff's interest was only nominal—while not impossible[60]—

[55] See Maxfield v. Levy, 16 F. Cas. 1195, 1198–99 (C.C.D. Pa. 1797) (No. 9321). Justice Washington agreed. See Hurst v. McNeil, 12 F. Cas. 1039, 1043 (C.C.D. Pa. 1804) (No. 6936). Story expressly rejected Washington's suggestion as well. *Briggs*, 4 F. Cas. at 120.

[56] *Briggs*, 4 F. Cas. at 118 ("I am yet to learn, that a conveyance made by a party to a citizen of another state, for the purpose of enabling the latter to maintain a suit on it in a court of the United States, is not in point of law operative to pass the legal title between the parties."). In *Maxfield*, there may not have been a bona fide transfer, quite apart from questions of motive. See 16 F. Cas. at 1198; see also 1 James Kent, Commentaries on American Law 324 (New York, O. Halsted 1826) (noting the lack of consideration for the transfer at issue in *Maxfield*).

[57] See Ann Woolhandler & Caleb Nelson, Does History Defeat Standing Doctrine?, 102 Mich. L. Rev. 689, 720 (2004).

[58] See Shields v. Barrow, 58 U.S. (17 How.) 130, 132 (1855) (noting that some nondiverse necessary parties would be indispensable to the litigation, thus requiring dismissal of the entire suit).

[59] The Assignee Clause could operate as a real-party-in-interest rule by insisting that the plaintiff allege that the assignor, as well as the assignee-plaintiff, was diverse from the defendant. See Montalet v. Murray, 8 U.S. (4 Cranch) 46, 47 (1807); Turner v. Bank of North-America, 4 U.S. (4 Dall.) 8, 11 (1799). But when the required allegations were made, an Assignee Clause challenge to the jurisdictional allegations could only be made by a pre-answer plea, or else was waived. See De Sobry v. Nicholson, 70 U.S. (3 Wall.) 420, 423 (1866).

[60] See, e.g., Barney v. Baltimore City, 73 U.S. (6 Wall.) 280, 288 (1868) (finding assignment was fictitious); Jones v. League, 59 U.S. (18 How.) 76, 79 (1855) (same); *Maxfield*, 16 F. Cas. at 1195, 1198 (same); see also Lord v. Veazie, 49 U.S. (8 How.) 251, 254 (1850) (concluding on appeal, based on examination of the record, that "the contract set out in the pleadings was made for the purpose of instituting this suit, and that there is no real dispute between the plaintiff and defendant"); cf. M'Donald v.

was tough sledding. As just noted, the defendant had to raise the objection through a plea in abatement, encrusted with all of its limitations and disincentives. And because the parties named in the record were the presumptive real parties, the practice was to place the burden on the defendant to show otherwise.[61]

Although real-party-in-interest analysis had only limited success in denying jurisdiction when it otherwise appeared, such analysis operated in a fairly robust way to uphold federal jurisdiction when state law would have defeated it. For example, when state law required an alien suing an in-state citizen to sue in the name of a local official of the state in which the alien resided,[62] or required an out-of-state citizen suing a local sheriff to sue in the name of the governor,[63] the Court ignored the local parties and upheld diversity jurisdiction. To prevent states from thus curtailing otherwise available federal jurisdiction, the Court now professed that it would "look to things[,] not names" or "mere forms."[64] In light of all this, it is hard to avoid the conclusion that federal courts deployed real-party-in-interest analysis in ways that favored federal jurisdiction during the antebellum period. It was not until much later in the nineteenth century that the courts would routinely apply real-party-in-interest analysis in such a way as to result in dismissal of cases that, on their face at least, were properly within the federal courts' jurisdiction.[65]

Smalley, 26 U.S. (1 Pet.) 620, 625 (1828) (inquiring whether assignment was "real or fictitious").

[61] See, e.g., *Briggs*, 4 F. Cas. at 118.

[62] Browne v. Strode, 9 U.S. (5 Cranch) 303, 303 (1809).

[63] McNutt ex rel. Leggett v. Bland, 43 U.S. (2 How.) 9, 14 (1844); see also Wormley v. Wormley, 21 U.S. (8 Wheat.) 421, 451 (1823) (ignoring citizenship of nondiverse defendant as nominal where no relief was sought against him).

[64] *McNutt*, 43 U.S. (2 How.) at 14. In *Walden v. Skinner*, 101 U.S. 577, 589 (1880), the Court explained *Browne* and *McNutt* as cases in which state law "compelled [the plaintiff] to use" the name of a local citizen who had no real interest in the litigation. In such cases, moreover, the nominal nature of the local parties was probably visible from the pleadings.

[65] See, e.g., Hayden v. Manning, 106 U.S. 586, 588 (1883) (finding that a diverse plaintiff had "no real interest" in the suit); see also Hawes v. Oakland, 104 U.S. 450, 461 (1882) (requiring, in derivative actions, sworn assurances that the suit was not collusive).

b. Friendly Litigation

The antebellum courts' heavy focus on the pleadings may help explain other seeming anomalies of early federal practice. For example, federal courts once appeared willing to entertain feigned or friendly contests in a way that they certainly no longer would.[66] *Fletcher v. Peck* was a notable instance in which friendly parties contrived a breach of contract action to litigate, in a Massachusetts federal court, the constitutionality of Georgia's retroactive impairment of a grant involving Mississippi territorial lands[67]—a contrivance not lost on the dissent in that case.[68] But if there were limited means by which friendliness could be smoked out (as was true of real-party-in-interest questions generally), and an unwillingness to pry into jurisdictional facts sua sponte, such cases are understandable, even if federal courts would later disclaim jurisdiction over them.[69] What seemed necessary was that adversariness appear on the face of the pleadings in the form of a viable common-law claim between the named parties. In addition, a federal court once

[66] See Susan Low Bloch, The Early Role of the Attorney General in Our Constitutional Scheme: In the Beginning There Was Pragmatism, 1989 Duke L.J. 561, 612 ("[C]ontrived suits were reasonably common in this period . . . . "); 1 Charles Warren, The Supreme Court in United States History 146–47, 392–95 (rev. ed. 1926) (discussing as feigned litigation both *Hylton v. United States*, 3 U.S. (3 Dall.) 171 (1796), and *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810)).

[67] 10 U.S. (6 Cranch) 87 (1810); see Lindsay G. Robertson, "A Mere Feigned Case": Rethinking the *Fletcher v. Peck* Conspiracy and Early Republican Legal Culture, 2000 Utah L. Rev. 249, 255–60 (noting the "different pleading climate" in which *Fletcher* was decided and arguing that a contract action was structured to avoid the "'local' action" problem of an ejectment suit in the Mississippi territorial courts).

[68] 10 U.S. (6 Cranch) at 147 (Johnson, J., dissenting).

[69] See Chicago & Grand Trunk Ry. v. Wellman, 143 U.S. 339, 345 (1892) (indicating hostility to "friendly" constitutional challenges to legislative enactments absent an "honest and actual antagonistic" relationship between the parties); see also John A. Ferejohn & Larry D. Kramer, Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint, 77 N.Y.U. L. Rev. 962, 1007 (2002) (noting that *Wellman* involved a changed attitude compared with that of the early Republic). Even in one of the earliest decisions to condemn such practices, the Taney Court commented favorably on certain aspects of "amicable" litigation. See Lord v. Veazie, 49 U.S. (8 How.) 251, 252–55 (1850) (stating that "such amicable actions . . . are always approved and encouraged, because they facilitate greatly the administration of justice," but that "there must be an actual controversy, and adverse interests"). *Veazie* involved a friendly bet on the meaning of federal law to secure a ruling from the Supreme Court that would adversely impact third parties. The nature of the arrangement was only brought to light by a motion in the Supreme Court filed by an interested third party as amicus curiae.

granted mandamus against a federal officer—despite the likely absence of subject matter jurisdiction over such actions at the time[70]—upon the "voluntary submission" of the case by the parties who wished to have their rights declared.[71] When the Supreme Court later held federal jurisdiction lacking in such cases, it explained away the earlier decision as a case of consent.[72]

As these decisions suggest, the limited means of policing for fraud or collusion proved significant beyond just diversity cases grounded in state law. At a time prior to general federal question jurisdiction, many constitutional challenges to state and local regulation could be brought under the diverse-citizenship rubric, and the Supreme Court seemed inclined to massage diversity jurisdiction to enable such challenges.[73] For example, the antebellum Court eventually settled on an irrebuttable presumption that a corporation's shareholders were all citizens of the state of incorporation, and that it was their citizenship that mattered for purposes of establishing diversity when a corporation was a party.[74] Given the rule of complete diversity,[75] and given that corporations were not yet conceived of as having their own citizenship apart from that of their shareholders, this nontraversable fiction regarding the shareholders' citizenship[76] enhanced corporate opportunities for federal jurisdiction that would not otherwise have existed—not just for state law claims, but for federal claims as well.

The antebellum decision of *Dodge v. Woolsey*[77] provides a nice illustration of the jurisdictional opportunities presented by this ap-

[70] Gilchrist v. Collector of Charleston, 10 F. Cas. 355 (C.C.D.S.C. 1808) (No. 5420) (allowing mandamus against a federal revenue collector) (Johnson, Circuit Justice).

[71] M'Intire v. Wood, 11 U.S. (7 Cranch) 504, 506 (1813) (Johnson, J.) (characterizing *Gilchrist*).

[72] Id. ("*Volenti non fit injuria.*").

[73] See Ann Woolhandler, The Common Law Origins of Constitutionally Compelled Remedies, 107 Yale L.J. 77, 89–99 (1997); see also White, supra note 47, at 837 (noting the Marshall Court's "relatively aggressive" efforts to foster diversity jurisdiction, and discussing decisions issued primarily in the second half of Marshall's tenure).

[74] Marshall v. Balt. & Ohio R.R., 57 U.S. (16 How.) 314, 328–29 (1854).

[75] See Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267, 267 (1806).

[76] Fictions in pleading were nontraversable—that is, no evidence would be allowed to contradict them—for the simple reason that traversability "would defeat the end for which they were designed." Gould, supra note 37, at 57; see also David P. Currie, The Constitution in the Supreme Court, The First Hundred Years, 1789–1888, at 261 (1985) (calling *Marshall*'s irrebuttable presumption "patently fallacious").

[77] 59 U.S. (18 How.) 331 (1856).

proach. *Dodge* involved a challenge to the constitutionality of a tax imposed by the State of Ohio on an Ohio-chartered corporation. In upholding diversity jurisdiction, the Supreme Court allowed a non-Ohio shareholder to bring a derivative suit against the Ohio corporation and an Ohio official for an injunction against enforcement of the statute.[78] The Court did so despite its practice of irrebuttably presuming that all of the corporation's stockholders were citizens of the state of incorporation for purposes of assessing corporate citizenship. In short, although the Court took account of the real citizenship of the out-of-state shareholder plaintiff, it adhered to the fictionalized citizenship of all shareholders (including the plaintiff) as Ohio citizens for purposes of the defendant corporation. In *Dodge*, the plaintiff shareholder and the defendant corporation had a common interest in seeing the statute struck down in a federal court—something the corporation would not have been able to accomplish if it had sued the state official on its own, because the official and the in-state corporation were nondiverse.

Here, too, it was only later that the Court would insist on a greater showing of antagonism between the stockholder and the corporation as a precondition to bringing a derivative suit, precisely to prevent such friendly suits.[79] And it was later still before the Court considered the facially adverse alignment of potentially friendly parties to be a problem in need of a solution. Only then would it call on federal courts to "look beyond the pleadings"[80] and to reconfigure a lawsuit to produce a genuinely adversarial structure (and perhaps with it, a loss of jurisdiction). Of course, by then federal question jurisdiction was available to the corporation to do directly what diversity was initially asked to do indirectly.[81]

[78] Id. at 336, 356.

[79] Hawes v. Oakland, 104 U.S. 450, 461 (1882) (requiring sworn assurances that a derivative suit was not collusive). Noncompliance with *Hawes* was said to create a problem not of subject matter jurisdiction, but of equity jurisdiction—that is, whether the plaintiff shows "standing in a court of equity." Venner v. Great N. Ry., 209 U.S. 24, 34 (1908) (quoting *Hawes*, 104 U.S. at 462).

[80] Dawson v. Columbia Ave. Sav. Fund, 197 U.S. 178, 180 (1905) (using realignment to defeat jurisdiction); cf. Doctor v. Harrington, 196 U.S. 579, 587 (1905) (indicating that realignment of a corporation might be proper depending on its adverseness to the suing shareholder); see also Equity R. 27, 226 U.S. 649, 656 (1912).

[81] Woolhandler, supra note 73, at 96.

c. Sovereign Immunity

The early treatment of real parties in interest also played a role in settling jurisdictional questions associated with sovereign immunity and the Eleventh Amendment. In *Osborn v. Bank of the United States*, the Supreme Court adhered to a pleading rule that a state would not be considered a party whose joinder was forbidden unless it was a "party named in the record."[82] The Court therefore concluded that an action brought against a state official to recover monies in his possession that he had seized from the Bank for nonpayment of state taxes posed no jurisdictional problem.[83] Even though the state had a clear interest in the suit, it was not a party of record, and the allegations of trespass against the officer indicated that he had a personal stake in the outcome.[84] In reaching his conclusion, Marshall expressly drew on what he saw as the Court's diversity practices regarding real parties in interest.[85]

Here again, it was only much later in the century that the Court began to consider whether a given suit brought against an officer was "in effect"[86] a suit against the state, and if so, to dismiss on jurisdictional grounds.[87] The Court then had to concede that its party-of-record approach in sovereign immunity cases "ha[d] been qualified to a certain degree" and that federal courts could now look behind the pleadings "to ascertain . . . the real parties to the suit."[88] As the Court in *In re Ayers* put it: "This, it is true, is not in har-

[82] 22 U.S. (9 Wheat.) 738, 857 (1824) (stating that the rule "admits of no exception"); see also id. at 856 ("[J]urisdiction is neither given nor ousted by the relative situation of the parties concerned in interest, but by the relative situation of the parties named on the record.").

[83] Id. at 857–58.

[84] See Woolhandler & Nelson, supra note 57, at 720–21 n.150 (noting that the officer was more than a nominal party, and that the state was not a necessary party).

[85] *Osborn*, 22 U.S. (9 Wheat.) at 856. Marshall added that whether the named defendants should be considered as having "a real interest, or as being only nominal parties" was "not one of jurisdiction." Id. at 858. That arguably contrasts with the Court's recognition in diversity cases that, if a diverse party was merely nominal, jurisdiction could be defeated if the real party in interest was nondiverse.

[86] Louisiana v. Jumel, 107 U.S. 711, 736 (1883).

[87] Perhaps the only inroad on *Osborn*'s party-of-record rule in the first half of the nineteenth century was the Court's conclusion that a suit against a state officer in other than his individual capacity would be treated as a suit naming the state itself. Governor of Ga. v. Madrazo, 26 U.S. (1 Pet.) 110, 123–24 (1828).

[88] Pennoyer v. McConnaughy, 140 U.S. 1, 12 (1891).

mony with what was said by Chief Justice Marshall in *Osborn*."[89] Consequently, a suit against an officer that would have had the effect of forcing the state to comply with its contractual obligations (as in *Ayers*) would be treated as a forbidden suit against the state, at least when the relief sought against the officer did not have a sufficient common-law hook.[90]

5. Dred Scott*, Jurisdiction, and Waiver*

It was this fixation on common-law practices that helped produce one of the more extraordinary jurisdictional questions ever considered by the antebellum Court. In *Scott v. Sandford*, the Court faced the question whether descendants of African slaves could be citizens for purposes of the federal courts' diversity jurisdiction.[91] The defendant, Dred Scott's supposed owner, had objected to federal jurisdiction over Scott's lawsuit to determine whether he was free. Scott alleged that he was a citizen of Missouri and the defendant a citizen of New York. Thus, diversity was properly alleged, meaning that there was prima facie jurisdiction. Scott also alleged matters tending to show that, although once enslaved, he had become free during his lifetime because of his travels to nonslave states.[92]

The defendant filed a plea in abatement, alleging that Scott was not a citizen of Missouri because he was the descendant of African slaves and that such persons could not be citizens for purposes of Article III's diversity clause.[93] The plaintiff did not contest the factual correctness of the defendant's jurisdictional allegations, but—in the trial court—successfully challenged their legal sufficiency.[94]

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[89] 123 U.S. 443, 487 (1887).

[90] Id. at 502–03. Such a suit would not likely have survived before then, either. Officers were not personally liable for breaches of contracts made on behalf of the state, unlike for torts committed as a consequence of their enforcing an unconstitutional statute. But the lack of any common-law action against the officer would once have been treated as going to the merits, not jurisdiction. See Michael G. Collins, The Conspiracy Theory of the Eleventh Amendment, 88 Colum. L. Rev. 212, 224–25 (1988) (reviewing John V. Orth, The Judicial Power of the United States—The Eleventh Amendment in American History (1987)).

[91] 60 U.S. (19 How.) 393, 400 (1857).

[92] Id. at 397–98, 400.

[93] Id. at 400.

[94] Id. at 398.

Because the parties did not dispute any question of fact in connection with the jurisdictional plea, the defendant's loss on the plea did not result in an automatic loss on the merits respecting Scott's freedom;[95] rather, it was Scott who lost on the merits in the trial court.[96]

On appeal to the Supreme Court, there was a dispute whether the legal question presented by the defendant's jurisdictional plea was properly before it. Chief Justice Taney's "Opinion of the Court" concluded that it was, and also concluded that no descendant of African slaves could be a citizen of the United States or of a state for purposes of Article III.[97] But Justices McLean and Catron expressly denied that the defendant's plea to jurisdiction was properly before the Court.[98] They argued that by pleading to the merits after losing on the jurisdictional question in the trial court, the objection had been waived, and that the party in whose favor the plea had been resolved below (Dred Scott) could not benefit from a contrary ruling on appeal. Both of these arguments were based on what these Justices argued was general practice at common law in similar settings.[99] Others likely supported them.[100]

By contrast, Chief Justice Taney argued—as did Justice Curtis—that the ordinarily applicable common-law rules should not apply where federal subject matter jurisdiction was concerned. They urged the limited nature of the federal courts' jurisdiction and the lack of any real analogy at common law for preserving such issues on appeal. More importantly, Taney and Curtis identified the jurisdictional problem as one that was court-centered rather than

[95] See supra text accompanying notes 37–39.

[96] *Scott*, 60 U.S. (19 How.) at 398–99.

[97] Chief Justice Taney also went on, however, to resolve the merits of the case, deciding that Scott was not free, and famously concluding that the Missouri Compromise was unconstitutional. See, e.g., Currie, supra note 76, at 268–69.

[98] *Scott*, 60 U.S. (19 How.) at 530–32 (McLean, J., dissenting); id. at 518–19 (Catron, J., dissenting). On the merits, McLean concluded Scott was free; Catron concluded the opposite. See Don E. Fehrenbacher, The Dred Scott Case 324, 327 (1978).

[99] *Scott*, 60 U.S. (19 How.) at 518–19, 530–31.

[100] Fehrenbacher, supra note 98, at 324 (counting only four Justices as concluding the plea in abatement was before the Court); cf. Currie, supra note 76, at 267 & n.233 (doubting whether Taney spoke for a majority in concluding that the plea was before the Court).

party-centered and thus subject to waiver.[101] Only two others, however, expressly agreed with Taney and Curtis on this particular point.[102]

The position of the other Justices on this jurisdictional question has been the subject of dispute.[103] Perhaps the most one can say confidently is that the Court was closely divided on the question. But the fact that there was considerable doubt about whether the jurisdictional objection was even before the Court shows the grip of common-law pleading rules as they related to the question of federal jurisdiction, even on appeal. It is almost unthinkable today that the objection could have been considered off-limits. But the appealability of jurisdictional objections in such settings would not be definitively resolved for another quarter century—well after the Civil War and Reconstruction.

C. Common-Law Procedures and Jurisdiction—Beyond Diversity

Although diversity cases provide the best illustration of the impact of common-law practices in resolving questions of federal jurisdiction, there were parallel developments in areas outside of diversity. This Section will sketch these developments in three areas: federal question and admiralty jurisdiction; the appellate jurisdiction of the Supreme Court; and collateral attacks on final judgments for lack of subject matter jurisdiction. In each of these areas, common-law practices (and pleadings in particular) played an enormous role in settling jurisdictional questions.

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[101] *Scott*, 60 U.S. (19 How.) at 401–02 (Taney, C.J.); id. at 567 (Curtis, J., dissenting). Taney and Curtis disagreed, however, whether Scott could be a citizen under Article III.

[102] See Currie, supra note 76, at 267 n.233.

[103] With the sources referenced at note 100, compare 2 Charles Warren, The Supreme Court in United States History, 1836–1918, at 300–01 (rev. ed. 1926) (indicating that a majority ruled that the jurisdictional plea was properly before the Court); John S. Vishnewski III, What the Court Decided in *Dred Scott v. Sandford*, 32 Am. J. Legal Hist. 373, 379–83 (1988) (same). Warren does not explain his calculation. Vishnewski concludes that Justice Grier provided the deciding vote that the plea in abatement was before the Court: "When Grier asserted 'that the record shows a *prima facie* case of jurisdiction,' he could only have been referring to the plea in abatement." Id. at 381. Quite the contrary, the phrase likely meant that the plaintiff's pleading had adequately pled jurisdiction and that the Court *could* therefore hear the merits, even if the defendant's jurisdictional plea was *not* properly before the Court.

1. Federal Questions and Admiralty

Federal courts heard a number of federal question cases in the antebellum period pursuant to specialized grants of jurisdiction. As with sovereign immunity, *Osborn* provides the point of departure. The Supreme Court made some broad statements in *Osborn* about when a case would arise under federal law for the purposes of Article III. But as Professor Anthony Bellia has suggested, the Court seemed more constrained in its approach to the lower federal courts' original jurisdiction, focusing on what a plaintiff in the position of the Bank of the United States would have had to allege, under common-law pleading requirements, to show its entitlement to relief.[104] Among other things, those requirements would have called for the Bank to plead its relevant capacity under its federal charter as an "ingredient" or essential component of its claim—for example, its capacity to enter into contracts and to sue over them, if enforcement of a contract was sought.[105] For Chief Justice Marshall, whether there was ultimately a contest over that federal ingredient was of no moment, given that the assessment of original jurisdiction "must depend on the state of things when the action is brought."[106]

Similarly, in early patent litigation, jurisdiction could ordinarily be based on the plaintiff's pleading of a duly issued patent and title to it, plus an allegation of infringement.[107] That the case might turn on the defense that a licensing agreement (governed by nonfederal law) authorized the defendant's actions, would not upset jurisdiction any more than if it turned out that the patent was invalid, or

[104] Anthony J. Bellia, Jr., Article III and the Cause of Action, 89 Iowa L. Rev. 777, 801–03, 808 (2004) (arguing that *Osborn*'s "ingredient" language, in contrast to the dissent's gloss on it, "did not mean something that might arise in connection with the litigation of a cause of action, but rather an essential component of a cause of action"); see also Bellia, supra note 16, at Section III.C–III.D (elaborating on this point).

[105] Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 823 (stating that Article III is satisfied when a federal question "forms an ingredient of the original cause").

[106] Id. at 824 (noting also "whether it [sc. the charter] be in fact relied on or not, in the defence, it is still a part of the cause").

[107] See, e.g., Allen v. Blunt, 1 F. Cas. 444, 446–47 (C.C.S.D.N.Y. 1849) (No. 215); Cutting v. Myers, 6 F. Cas. 1081, 1082 (C.C.D. Pa. 1818) (No. 3520).

that the plaintiff lacked good title to it.[108] Unlike in the diversity setting, however, factual inaccuracies or falsehoods in the allegations giving rise to federal jurisdiction would typically be intertwined with the merits of the patent claim. Consequently, there was far less opportunity to raise a separate pretrial challenge to jurisdictional facts in federal question cases than would have been possible respecting the analytically severable allegations of citizenship in diversity cases.

More importantly, these decisions also show that jurisdictional objections to federal question cases were less likely to be subject to a notion of waiver than in diversity, because a jurisdictional defect, if one existed, would typically be apparent on the face of the complaint. For example, a complaint that alleged a breach of a licensing agreement based on a patent could be dismissed—at any time—for failure to set forth a claim that the federal courts had power to adjudicate.[109] In this respect, federal question cases tracked diversity practices in those cases in which the lack of jurisdiction was intrinsic: visible from the pleadings, and thus fatal at any time.[110]

Admiralty—which, like diversity, featured prominently in the early federal courts' jurisdiction—shared features with both federal question and diversity jurisdiction. Although pleading requirements were somewhat less technical, failure of the pleadings to show a claim properly heard in admiralty, like the failure to allege a federal claim in the federal question setting, was an intrinsic de-

[108] See, e.g., Day v. New Eng. Car Co., 7 F. Cas. 248, 248–49 (C.C.S.D.N.Y. 1854) (No. 3686) (noting that license goes to possible defense); Pierpont v. Fowle, 19 F. Cas. 652, 654 (C.C.D. Mass. 1846) (No. 11,152) (noting that the court retained jurisdiction although the sole question remaining was the validity of a licensing agreement); see also *Osborn*, 22 U.S. (9 Wheat.) at 826 (indicating that jurisdiction in patent cases would not be affected simply because the case did not implicate a question of patent validity). Patent jurisdiction offers a clear foreshadowing of the well-pleaded complaint rule in federal question jurisdiction associated with *Louisville & Nashville Railroad v. Mottley*, 211 U.S. 149 (1908).

[109] See, e.g., Brown v. Shannon, 61 U.S. (20 How.) 55, 56, 58 (1858); Wilson v. Sandford, 51 U.S. (10 How.) 99, 101–02 (1851); cf. Jack H. Friedenthal, The Crack in the *Steel* Case, 68 Geo. Wash. L. Rev. 258, 269 (2000) (suggesting a jurisdictional dimension in failure to state a claim).

[110] The treatment of federal question cases underwent revision after 1875 when, as noted in Part II, federal courts could dismiss suits in which the complaint may have showed a claim arising under federal law, but which ultimately failed "really and substantially" to be within their jurisdiction. See infra note 149.

fect that could be raised at any time.[111] Thus, for example, disputes about whether marine insurance claims were cognizable in admiralty were treated as "jurisdictional" questions,[112] open for reinvestigation even after litigation on the merits.[113] On the other hand, and more like diversity jurisdiction, admiralty cases could present questions of jurisdictional fact that were readily separable from the merits, such as the locality of an allegedly maritime tort or the seizure of a vessel. In such cases, if jurisdiction was "apparent . . . on the face of the [complaint]," a court would ordinarily continue to entertain the suit unless an objection to such jurisdictional facts was made in a seasonable manner.[114] In this latter respect, admiralty exhibited a notion of prima facie jurisdiction, and as to these sorts of issues of properly alleged jurisdictional facts, waiver was possible[115] and jurisdictional issues could be abandoned on appeal.[116] This notion of prima facie jurisdiction continued in admi-

[111] See, e.g., Cutler v. Rae, 48 U.S. (7 How.) 729, 731–32 (1849) (denying admiralty jurisdiction over in personam claims for the "general average"); see also Erastus C. Benedict, The American Admiralty: Its Jurisdiction and Practice 221 (Banks, Gould & Co. 1850) (noting that the limited nature of federal jurisdiction requires "that the libel must, on its face, state a case which is within the jurisdiction of the Court").

[112] See, e.g., Gloucester Ins. Co. v. Younger, 10 F. Cas. 495, 498–99 (C.C.D. Mass. 1855) (No. 5487); DeLovio v. Boit, 7 F. Cas. 418, 418 (C.C.D. Mass. 1815) (No. 3776).

[113] Similarly, in *Cutler v. Rae*, the Supreme Court reversed a lower court's determination that a particular transaction was subject to admiralty jurisdiction after litigation on the merits. Jurisdiction was deficient on the face of the record, and the parties could not waive it. 48 U.S. (7 How.) at 730–32.

[114] Skidmore v. The Polly, 22 F. Cas. 298, 299 (D.N.Y. 1808) (No. 12,923) (upholding jurisdiction when it appeared "on the face of the libel"); see also Knight v. The Attila, 14 F. Cas. 755, 757 (E.D. Pa. 1838) (No. 7881) (overruling a plea to jurisdiction because it was not in the proper form, and stating that unless a plaintiff's incapacity to sue "does not appear in the libel, although true in point of fact," a demurrer would be improper). A plaintiff alleging a maritime tort had to allege that it occurred on waters covered by admiralty. Thomas v. Lane, 23 F. Cas. 957, 960 (C.C.D. Me. 1813) (No. 13,902).

[115] See Lewis v. The Orpheus, 15 F. Cas. 492, 493 (D. Mass. 1858) (No. 8330); see also The Abby, 1 F. Cas. 26, 28 (C.C.D. Mass. 1818) (No. 14) (hearing the merits on appeal from a district court, despite an objection to jurisdiction over the alleged high sea seizure, and noting that the defendant should have made an "allegation, in the nature of a plea to the jurisdiction").

[116] The Monte Allegre, 22 U.S. (9 Wheat.) 616, 640 (1824); see also id. at 638 ("The jurisdiction of the Court below, as a Court of Admiralty, was admitted; the objection to it having been waived.") (argument of Attorney General). Nevertheless, the Court once stated that when a seizure—alleged to have occurred at sea—turned out to have been made on land, the admiralty court's "jurisdiction ceased." The Sarah, 21 U.S. (8 Wheat.) 391, 394 (1823). The district court might have heard the same claim as a

ralty until well into the last century, and it imposed a heavy burden on the party resisting jurisdiction to show its absence.[117]

2. The Supreme Court's Appellate Jurisdiction

Allegations in the record also proved determinative of the Supreme Court's jurisdiction over cases coming to it from state courts under Section 25 of the First Judiciary Act.[118] Section 25 provided for mandatory review (but limited to federal questions "appear[ing] on the face of the record") when the record on appeal showed that the appellant had properly set up a claim of federal right in the state courts and that they had decided against it.[119] "These things appearing, this court has jurisdiction and must examine the judgment so far as to enable it to decide whether this claim of right was correctly adjudicated by the State court."[120] By contrast, a party's imprecision in getting the requisite federal matter to appear on the face of the record could result in a jurisdictional dismissal, even when it was otherwise apparent to the Court that federal law "probably, was disregarded."[121]

(nonadmiralty) land-based seizure, but the Court rejected that possible fix at the appellate level, remanding the case to consider an amendment of the pleadings. Id. at 395. Although *The Sarah* focused on territorial jurisdiction (as did much of admiralty), the Court's willingness to permit midcourse factual determinations to undo jurisdiction appearing on the face of the pleadings is in tension with the diversity and federal question cases noted above. In the admiralty setting, English decisions routinely allowed patently false geographical allegations to pass unnoticed. See Christopher Hill, Intellectual Origins of the English Revolution *Revisited* 212 (rev. ed. 1997).

[117] Ex parte Muir, 254 U.S. 522, 532 (1921); see also Sutton v. Pac. S.S. Co., 3 F.2d 72, 73 (W.D. Wash. 1924) ("The petition on removal prima facie fixes the jurisdiction in this court, which continues until it is established to a 'legal certainty' that the court is without jurisdiction." (quoting Hill v. Walker, 167 F. 241, 243 (8th Cir. 1909))).

[118] Act of Sept. 24, 1789, ch. 20, § 25, 1 Stat. 73, 85–87.

[119] Id. at 86. The record on appeal in common law actions consisted of "the pleadings and the verdict and judgment" and any exceptions to the rulings of the court in a jury trial. Curtis, supra note 37, at 36. In *Murdock v. Memphis*, 87 U.S. (20 Wall.) 590, 633 (1875), the Court noted that then-recent departures from common law pleading in some states had muddied the waters as to what constituted "the record" and had "confused the matter very much."

[120] *Murdock*, 87 U.S. (20 Wall.) at 636.

[121] Miller v. Nicholls, 17 U.S. (4 Wheat.) 311, 315 (1819); cf. Crowell v. Randell, 35 U.S. (10 Pet.) 368, 398 (1836) ("[I]t is sufficient if it appears by clear and necessary intendment that the question must have been raised, and must have been decided . . . ."); Davis v. Packard, 31 U.S. (6 Pet.) 41, 48 (1832) (indicating that a federal

In addition, until the late-nineteenth century, the Supreme Court would decide properly raised federal questions even when there was an adequate state ground to uphold the judgment below.[122] This older practice clearly created the possibility of unnecessary decisions on federal questions—something the Court would later consider to be a jurisdictional hurdle.[123] When combined with the formal ease of setting up a claim of federal right, this practice led the Court to take, by its own admission, "[v]ery many cases" in which a claim of federal right without "a particle of truth" had been formally set up in the state courts as "a mere device to get the case into this [C]ourt."[124] Jurisdictional dismissals for want of a substantial federal question were slow to develop, and before such time even frivolous appeals were routinely affirmed on the merits.[125] At the same time—and analogous to its treatment of cases arising under federal statutes—the Court would dismiss an appeal on jurisdictional grounds if the asserted right was one the Court was not prepared to recognize as genuinely federal, even if the assertion of a federal right was nonfrivolous.[126]

question might be sufficiently raised even absent a statement "that an act of congress was in point of fact drawn in question" if it were otherwise clear from the record).

[122] See Richard A. Matasar & Gregory S. Bruch, Procedural Common Law, Federal Jurisdictional Policy, and Abandonment of the Adequate and Independent State Grounds Doctrine, 86 Colum. L. Rev. 1291, 1358–63 (1986) (tracing modern adequate state grounds doctrine to *Eustis v. Bolles*, 150 U.S. 361 (1893)). At the time of *Murdock*, if the Court concluded that the state courts properly decided the federal question, it would affirm the judgment below, whether or not there were adequate state grounds. If the federal question was improperly decided, the Court would reverse the judgment when adequate state grounds were lacking, but affirm when they were present. *Murdock*, 87 U.S. (20 Wall.) at 635.

[123] See Fallon et al., supra note 2, at 497. Why the Court was once willing to hear federal questions that might not affect the outcome of the case, and why it only later became a jurisdictional problem, "is not entirely clear." Kermit Roosevelt III, Light from Dead Stars: The Procedural Adequate and Independent State Ground Reconsidered, 103 Colum. L. Rev. 1888, 1895 (2003).

[124] *Murdock*, 87 U.S. (20 Wall.) at 629.

[125] See Matasar & Bruch, supra note 122, at 1347 (dating jurisdictional dismissals from *Millingar v. Hartupee*, 73 U.S. (6 Wall.) 258 (1868)).

[126] See, e.g., Barron v. Baltimore, 32 U.S. (7 Pet.) 243, 251 (1833) (dismissing, for want of jurisdiction, an appeal claiming that the city had violated the Fifth Amendment's Takings Clause, because provisions of the Bill of Rights were applicable only against the federal government).

3. Collateral Attack (Including Diversity)

Focus on the record may have been somewhat less determinative when it came to collateral attacks on federal judgments for lack of subject matter jurisdiction, although common-law practices still played a prominent role. There was an early history of disallowing such attacks, certainly when good jurisdiction appeared on the record, but even when the record revealed a jurisdictional defect.[127] Collateral attack practices thus differed from practices on appeal of lower federal court judgments where jurisdictional defects on the face of the record would result in dismissal.

The Marshall Court concluded early on that lower federal courts were not "inferior" courts in the English common law sense whose judgments might be ignored when jurisdiction was lacking; rather, said the Court, they were inferior only in the sense of being subject to appellate review.[128] Jurisdictionally defective judgments could be reversed on appeal; but until reversed or set aside by the court that issued them, they were "not absolute nullities" that might be disregarded on collateral attack.[129] The Court, therefore, treated the final judgments of federal courts more like those of superior courts in England whose jurisdictionally defective judgments were not void, but voidable—that is, subject to reversal on appeal.[130] In not-

[127] See, e.g., M'Cormick v. Sullivant, 23 U.S. (10 Wheat.) 192, 199–200 (1825) (denying collateral attack although the record failed to show jurisdiction).

[128] Id.; see also Turner v. Bank of North-America, 4 U.S. (4 Dall.) 8, 11 (1799) ("A Circuit Court, though an *inferior* Court, in the language of the constitution, is not so in the language of the common law"). It is sometimes said that "traditional theory" was otherwise and that judgments from courts without subject matter jurisdiction were treated as *coram non judice* and void. See Karen Nelson Moore, Collateral Attack on Subject Matter Jurisdiction: A Critique of the *Restatement (Second) of Judgments*, 66 Cornell L. Rev. 534, 537 (1981). That may have been true of federal courts' treatment of judgments of state courts, particularly state courts of limited or statutory jurisdiction. See, e.g., Elliott v. Lessee of Peirsol, 26 U.S. (1 Pet.) 328, 340–41 (1828); Fisher v. Harnden, 9 F. Cas. 129, 130–31 (C.C.D.N.Y. 1812) (No. 4819), rev'd on other grounds, Harden v. Fisher, 14 U.S. (1 Wheat.) 300, 304 (1816). But it does not seem to have been true of judgments of Article III courts.

[129] See *M'Cormick*, 23 U.S. (10 Wheat.) at 199; see also Ex parte Watkins, 28 U.S. (3 Pet.) 193, 207 (1830). *Watkins* contrasted judgments of non-Article III courts-martial that might be treated as nullities if jurisdiction were lacking. Id. at 209 (distinguishing *Wise v. Withers*, 7 U.S. (3 Cranch) 331, 337 (1806)).

[130] See Edward P. Krugman, Note, Filling the Void: Judicial Power and Jurisdictional Attacks on Judgments, 87 Yale L.J. 164, 166 n.8 (1977) (noting the "seemingly absolute invulnerability" of early superior court judgments in England).

ing why a federal court judgment would have to be honored although jurisdictionally defective on its face, the Court once stated: "[b]ecause it would be a judgment rendered by a court, not of inferior, but only limited, jurisdiction, and the merits would have been investigated and decided by consent."[131]

Skillern's Executors v. May's Executors provides an early example of this approach.[132] Following an appeal and final judgment of a case in the Supreme Court, *Skillern* held that the federal trial court was obligated to enforce that judgment, even though the trial court noticed on remand that the pleadings had failed to allege jurisdiction.[133] This was a classic jurisdictional defect that would have warranted dismissal had the Supreme Court noticed it in the earlier appeal. Although *Skillern* involved the effect of a prior federal judgment in a subsequent stage of the same case,[134] the collateral attack limitation also prevented (and may have been designed to prevent) state courts from refusing to recognize federal judgments based on their own assessment of whether there had been federal jurisdiction.[135] Similar concerns for finality and supremacy help explain the antebellum Court's refusal to permit state courts to entertain "jurisdictional" challenges to federal criminal convictions by means of state habeas corpus brought against federal custodial officials.[136]

Significantly, this limitation on collateral attacks on federal judgments remained firm even when collateral attacks on *state* court judgments on subject matter jurisdictional grounds underwent ag-

[131] Bank of the United States v. Moss, 47 U.S. (6 How.) 31, 40 (1847) (noting further that "[t]his view is supported by the English doctrine"). A federal court might reopen its own judgment for a jurisdictional defect, but reopening had to occur at the same term of court as that in which the judgment was rendered. Id.

[132] 10 U.S. (6 Cranch) 267 (1810).

[133] Id. at 268.

[134] Some might view this as an example of "law of the case" rather than collateral attack. But the collateral attack decisions were of a piece with *Skillern* in rejecting post-final judgment jurisdictional challenges.

[135] See Ann Woolhandler, Demodeling Habeas, 45 Stan. L. Rev. 575, 593–95 (1993). The Court did state once that a foreign judgment condemning, as a prize of war, a vessel that was never captured would lack legal effect. Rose v. Himely, 8 U.S. (4 Cranch) 241, 269 (1808). But *Rose* seemed to focus on territorial jurisdiction over property, and on comity to foreign judgments.

[136] Ableman v. Booth, 62 U.S. (21 How.) 506, 524–26 (1859). By mid-century, a court would lack "jurisdiction" for habeas purposes if its conviction was premised on an unconstitutional statute. See Woolhandler, supra note 135, at 582–87.

gressive expansion in the latter part of the nineteenth century.[137] Indeed, it was arguably strengthened to prevent challenges to federal judgments in which the record affirmatively showed that jurisdiction was bad—as opposed to where jurisdiction was simply not alleged, as in *Skillern*.[138] Whereas in other areas the realities of jurisdictional fact took a back seat to the recitals of it, here there was no notice of either.

II. THE SHIFT TO JURISDICTION IN FACT

A. The Judiciary Act of 1875

This heavily pleadings-focused approach to assessing federal jurisdiction continued in place until developments near the end of Reconstruction and, in particular, the advent of the 1875 Judiciary Act.[139] The 1875 Act is best known for its grant of general federal question jurisdiction,[140] but Section 5 of the Act stated that a federal court "shall dismiss" a suit "at any time" after being filed in or removed to federal court when "it shall appear to the satisfaction of . . . [the] court" that the suit "does not really and substantially involve a dispute or controversy properly within the jurisdiction" of the court, "or that the parties . . . have been improperly or collusively made or joined."[141] The new provision was potentially applicable to all jurisdictional categories of cases filed in the federal courts.

[137] See, e.g., Thompson v. Whitman, 85 U.S. (18 Wall.) 457, 468–69 (1874) (indicating that a state court record that affirmatively showed subject matter jurisdiction could be factually contradicted collaterally, at least when jurisdiction had not been actually litigated).

[138] See Des Moines Navigation and R.R. v. Iowa Homestead Co., 123 U.S. 552, 558–59 (1887). *Iowa Homestead* hypothesized that jurisdiction in such cases must have been "impliedly recognized" by the federal courts that rendered and reviewed the initial judgment. Id. at 559.

[139] Act of Mar. 3, 1875, ch. 137, 18 Stat. 470.

[140] Id. § 1, 470.

[141] Id. § 5, 472. The legislative history of § 5 is unhelpful. See Ray Forrester, Federal Question Jurisdiction and Section 5, 18 Tul. L. Rev. 263, 276 (1943) (noting that "discussions concerning the bill were scant").

1. Solving Old Problems

At a practical level, Section 5 remedied the pre-existing problem of federal courts' having to continue to hear cases on the merits even though jurisdiction was revealed to be lacking in fact—because, for example, properly alleged diversity was not properly controverted at the outset. As the Supreme Court explained, "under the act of 1875, the trial court is not bound by the pleadings of the parties, but may, of its own motion, if led to believe that its jurisdiction is not properly invoked, inquire into the facts as they really exist."[142] Such a possibility was altogether new.

Section 5 also allowed the federal courts to dismiss a case at any time when litigants had manipulated party structure to create jurisdiction, but the jurisdictional objection came too late or proved too risky. As discussed in Part I, the pre-1875 regime had made it difficult for federal courts to remedy such problems, at least when the face of the pleadings showed jurisdiction. Courts construing the 1875 Act frequently mentioned this corrective to prior practices as one of the primary purposes of Section 5.[143] By contrast, the 1789 Judiciary Act did not address collusion on a case-by-case basis, but instead disallowed, by category, certain suits over assigned claims that Congress considered especially susceptible to such abuse.

2. Anticipating New Problems

Section 5 also ensured that there would be rigorous judicial scrutiny over the expanded jurisdictional opportunities ushered in by Reconstruction and the Civil War, many of which were heavily fact based. Jurisdictional expansion often took the form of removal from state court of state law claims that depended on such particularized showings as the "prejudice or local influence" of the state

[142] Wetmore v. Rymer, 169 U.S. 115, 120 (1898).

[143] Hartog v. Memory, 116 U.S. 588, 590 (1886) (stating that the 1875 Act "changed the rule so far as to allow the court at any time, without plea and without motion, to 'stop all further proceedings and dismiss the suit the moment a fraud on its jurisdiction was discovered'" (quoting Williams v. Nottawa, 104 U.S. 209, 211 (1881))); Farmington v. Pillsbury, 114 U.S. 138, 144 (1885) (noting that under the 1875 Judiciary Act, but not before, "courts were given full authority to protect themselves against the false pretences of apparent parties"); cf. Hill v. Walker, 167 F. 241, 246 (8th Cir. 1909) (noting that, before the 1875 Act, federal courts "though cognizant of the wrong, felt themselves powerless to afford a remedy without the aid of legislation").

forum,[144] or the race-based denial of, or inability to enforce, certain state-created civil rights in state courts.[145] As jurisdictional grants had themselves become more fact-intensive, testing for jurisdictional defects became more fact-intensive as well.[146] Habeas corpus statutes coming out of the same era were early adopters of greater factual inquiry to ferret out "jurisdictional" defects surrounding the custody of persons held by state officials, including inquiry into facts that were outside of what then constituted the record in habeas proceedings.[147] The Supreme Court's appellate jurisdiction also arguably underwent an analogous expansion when the Reconstruction Congress removed older language that had limited review to federal questions "appear[ing] on the face of the record."[148]

In the area of general federal question jurisdiction, Section 5's requirement that the suit must "really and substantially" involve a dispute within the federal courts' jurisdiction protected against suits that may have successfully pled jurisdiction, but ultimately failed to implicate it.[149] In addition, the 1875 Act provided for re-

[144] Act of Mar. 2, 1867, ch. 196, 14 Stat. 558.

[145] Act of Apr. 9, 1866, ch. 31, §§ 1–3, 14 Stat. 27, 27.

[146] For example, under the local prejudice statute, prejudice had to be set forth in a sworn affidavit and the court had to be "satisfied of the truth of the allegation." In re Pa. Co., 137 U.S. 451, 457 (1890); see Edward A. Purcell, Jr., Litigation and Inequality 127–47 (1992).

[147] See, e.g., Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385, 385–86. At common law, the custodian's "return" to the writ of habeas corpus was said to be nontraversable. See Marc M. Arkin, The Ghost at the Banquet: Slavery, Federalism, and Habeas Corpus for State Prisoners, 70 Tul. L. Rev. 1, 13–14 (1995). The greater factual inquiry into the lawfulness of custody allowed by the 1867 Habeas Act was foreshadowed by prior sporadic judicial developments. See id. at 23–33.

[148] Act of Feb. 5, 1867, ch. 28, § 2, 14 Stat. 385, 386–87 (amending Act of Sept. 24, 1789, ch. 20, § 25, 1 Stat. 73, 85–87). The provision was part of the same Act that expanded original and appellate jurisdiction over habeas corpus.

[149] See, e.g., Robinson v. Anderson, 121 U.S. 522, 524 (1887); see also Excelsior Wooden Pipe Co. v. Pac. Bridge Co., 185 U.S. 282, 287 (1902) (stating that although the Court would have "no difficulty whatever in sustaining" jurisdiction based on plaintiff's claimed infringement, "averments of the answer" might show that the case was not "'really and substantially'" (quoting the 1875 Act) within the federal courts' jurisdiction). As one court put it: "While it seems reasonable to say that a jurisdiction once acquired by the filing of a proper bill ought not to be taken away by any subsequent pleading, the [1875] statute is peremptory in this particular . . . ." Harrington v. Atl. & Pac. Tel. Co., 185 F. 493, 496 (2d Cir. 1911) (quoting *Excelsior*, 185 U.S. at 287). Whether these decisions under the 1875 Act actually concluded that such cases did not arise under federal law as an initial matter is unclear. See James H. Chad-

moval based on a federal defense[150]—a novel and quickly exploited grant that Section 5's substantiality language kept in check. The 1875 Act also greatly cut back on the reach of the 1789 Assignee Clause by allowing previously forbidden suits on assigned promissory notes to go forward, thus presenting added potential for abuse.[151] It was for this reason, in part, that Section 5—unlike the 1789 Act—included language barring jurisdiction when parties were "improperly or collusively" joined.[152] Policing for abuse would therefore call for a fact-based, case-by-case inquiry in a way that the earlier, categorical provision against jurisdiction by assignment had not.

B. Procedural Opportunities and Limits

The 1875 Act also suggested that jurisdictional issues could be raised in cases brought in federal courts other than by a common-law plea in abatement, insofar as the Act required dismissal "at any time" when it appeared to the court's satisfaction that jurisdiction was lacking. That possibility was especially significant when combined with the 1872 Conformity Act. The Conformity Act told federal courts to conform to state procedures in actions at law, but unlike the earlier Process Acts, it required federal courts to mimic ongoing changes in state procedural law.[153] By the mid- to late-nineteenth century, a number of state courts were drifting away from common-law pleading in favor of fact-conscious code pleading, under which jurisdictional objections could be raised in the an-

bourn & A. Leo Levin, Original Jurisdiction of Federal Questions, 90 U. Pa. L. Rev. 639, 652–62 (1942).

[150] See Tennessee v. Union & Planters' Bank, 152 U.S. 454, 459–62 (1894) (recounting removal practice under 1875 Act, but finding such removal no longer available under intervening legislation).

[151] The 1875 Act explicitly permitted suits by diverse assignees on "promissory notes negotiable by the law merchant." Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470, 470. The 1789 Act had barred such diverse assignee suits unless the assignor was diverse. See supra note 27.

[152] Farmington v. Pillsbury, 114 U.S. 138, 144 (1885) (noting that the Assignee Clause changes "opened wide the door for frauds upon the jurisdiction of the court by collusive transfers").

[153] Act of June 1, 1872, ch. 255, § 5, 17 Stat. 196, 197; see Fallon et al., supra note 2, at 607 (referring to the Act's "dynamic conformity" requirement).

swer or through other procedures rather than only by a particular pre-answer plea.[154]

Nevertheless, limits on the manner in which jurisdictional defects could be raised apparently persisted, at least when jurisdiction had been properly pled. Federal courts noted that although Section 5 had not dictated any particular method of raising jurisdictional objections, state practice under the Conformity Act could supply the mode. Courts therefore upheld various practices, including jurisdictional objections by pre-answer motion or plea, or in the answer ahead of pleading to the merits,[155] or through a general denial of all allegations in the answer, at least when state practice allowed for it.[156] Reliance on state law also prompted some federal courts to deny efforts to raise jurisdictional challenges when they did not conform to state practice.[157] Thus, matters were not altogether freewheeling, as a defendant might still have to raise a jurisdictional objection in some procedurally recognized manner. On other occasions, however, courts seemed less concerned with strict adherence to state practice and suggested that the procedure for raising a jurisdictional objection was largely left up to the trial court.[158]

1. Flexible Versus Inflexible Readings of Section 5

In addition, the Court was not always consistent in its approach to Section 5's new duty to guard against jurisdictional overreaching. In one early decision, the Court stated that "[n]either party has the right . . . without pleading at the proper time and in the proper

[154] See Roberts v. Lewis, 144 U.S. 653, 656–58 (1892) (recognizing that code pleading departed from common law practices respecting challenges to jurisdiction).

[155] See Gilbert v. David, 235 U.S. 561, 567 (1915).

[156] A general denial in the answer could even permit evidence to go before the jury on questions such as citizenship. See *Gilbert*, 235 U.S. at 567–68 (indicating that courts nevertheless might resolve such factual questions on their own).

[157] See, e.g., Draper v. Town of Springport, 15 F. 328, 330–31 (C.C.N.D.N.Y. 1883) (stating that the court would normally disallow jurisdictional evidence at trial when the defendant does not sufficiently raise the issue in his pleadings, consistent with state practice); Gubbins v. Laughtenschlager, 75 F. 615, 619, 626 (C.C.S.D. Iowa 1896) (disallowing a proposed amendment to defendant's answer that would have denied citizenship).

[158] See, e.g., *Gilbert*, 235 U.S. at 567–68; Wetmore v. Rymer, 169 U.S. 115, 121 (1898); cf. Hill v. Walker, 167 F. 241, 243–44 (8th Cir. 1909) (concluding that, the Conformity Act notwithstanding, state practice could not control the manner in which jurisdiction could be challenged in federal court).

way, to introduce evidence, the only purpose of which is to make out a case for [jurisdictional] dismissal."[159] Although the defendant had successfully raised a post-trial objection to diversity jurisdiction based on evidence introduced at trial, the Supreme Court reversed and upheld jurisdiction. It stated that when the pleadings showed jurisdiction, they could not be gone behind except "by a plea to the jurisdiction or some other appropriate form of proceeding."[160]

On this reading, Section 5 arguably did very little. At the same time, however, the opinion acknowledged that a federal court could itself initiate a factual inquiry into the existence of jurisdiction if it was led "from any source" to suspect that "its jurisdiction ha[d] been imposed upon by the collusion of the parties or in any other way."[161] A party's evidence, conceivably, could supply the "source" of the court's suspicion, thereby permitting the court, if not the parties themselves, to raise the jurisdictional defect on its own.

Later decisions took a tougher stance, indicating that federal courts were duty-bound to entertain a party's jurisdictional objection whenever the jurisdictional allegations were shown "to be untrue."[162] In *Morris v. Gilmer*, for example, the Court reversed a lower court's rejection of the defendant's tardy objection to jurisdiction made after pleading to the merits.[163] Downplaying its earlier suggestion that, in analogous circumstances, the defendant's evidence came too late, the Court concluded that it had "not intend[ed] . . . to modify or relax" the 1875 Act's "inflexible" requirements.[164] Significantly, the Court re-characterized its earlier decision as one in which the plaintiff had not been given a chance to rebut the defendant's factual showing prior to dismissal on jurisdictional grounds.[165]

[159] Hartog v. Memory, 116 U.S. 588, 590 (1886).

[160] Id. at 590–91. *Hartog* indicated that a court could dismiss a suit on a party's post-trial motion only if evidence in the record, otherwise relevant on the merits of the case at trial, incidentally revealed the lack of jurisdiction.

[161] Id. at 591.

[162] Morris v. Gilmer, 129 U.S. 315, 326 (1889).

[163] Id. at 317, 329.

[164] Id. at 325, 327–28.

[165] Id. at 327. One scholar has argued that *Gilmer* was repudiated, and *Hartog* reinstated, in *Mexican Central Railway Co. v. Pinkney*, 149 U.S. 194, 200–201 (1893),

Gilmer's apparent backpedaling is understandable in context. The decision came just as the appellate crunch on the Supreme Court was nearing its zenith, and just before the creation of intermediate appellate courts in 1891 relieved the pressure.[166] Additionally, between the two decisions, Congress had curtailed some of the 1875 Act's expansions of jurisdiction in a statute that the Court quickly read as expressing a general policy of post-Reconstruction jurisdictional retrenchment.[167] After these congressional palliatives, and after *Gilmer*, courts seemed to oscillate between insisting that a party follow some "proper"[168] procedure before permitting a challenge to properly pled jurisdiction, and more rigorous enforcement of the "inflexible" duty of the federal courts to dismiss a case whenever it should appear that jurisdiction was lacking.[169] The history therefore partially confirms what Professor Dobbs, over four decades ago, found to be the pattern of Section 5 cases: jurisdic-

when the Court upheld a trial court's refusal to permit a jurisdictional plea to be raised for the first time at trial. Dobbs, supra note 9, at 514 (referring to *Gilmer* as "excruciating nonsense"). But whereas *Gilmer* explicitly disavowed *Hartog*, *Pinkney* mentions neither decision. To be sure, *Pinkney* supplies evidence that trial courts had discretion to deny a tardy jurisdictional objection, which is inconsistent with modern practice. But it cannot be read as saying that federal courts always had the discretion to refuse all tardy objections. Other decisions, moreover, strongly reaffirm *Gilmer*. See cases cited infra note 169.

[166] See Felix Frankfurter & James M. Landis, The Business of the Supreme Court 100–02 (1928) (noting that the Evarts Act of 1891 shrank the Supreme Court's workload by creating intermediate appellate courts).

[167] Act of Mar. 3, 1887, ch. 373, 24 Stat. 552, 552–55; see Purcell, supra note 146, at 135–36.

[168] Gilbert v. David, 235 U.S. 561, 567 (1915); see Deputron v. Young, 134 U.S. 241, 251 (1890); see also *Pinkney*, 149 U.S. at 200–01.

[169] See, e.g., Steigleder v. McQuesten, 198 U.S. 141, 142–43 (1905) (allowing defendant to maintain a post-trial motion to dismiss on jurisdictional grounds, although jurisdiction was properly alleged and not denied in the answer; attack could be made "at any time"); Anderson v. Watt, 138 U.S. 694, 701 (1891) ("[T]he time at which [a jurisdictional objection] may be raised is not restricted. Although the averment as to citizenship may be sufficient, yet, if it appear that that averment is untrue, it is the duty of the Circuit Court to dismiss the suit . . . ."); Hill v. Walker, 167 F. 241, 246–47 (8th Cir. 1909) (referring to the "right to hear the objection at any time, or in any manner" in the trial court, even when jurisdiction was shown on the face of the pleadings); Adams v. Shirk, 117 F. 801, 804 (7th Cir. 1902) (stating that the Supreme Court had abandoned *Hartog* in favor of *Gilmer*). The modern Court continues to side with *Gilmer*. See Rockwell Int'l v. United States, 127 S. Ct. 1397, 1409 (2007) ("The state of things [at the time the action is originally brought] and the originally alleged state of things are not synonymous; demonstration that the original allegations were false will defeat jurisdiction." (citing *Gilmer* and *Anderson*)).

tional challenges did not altogether escape procedural regulation.[170] Nevertheless, it may have been a more ambivalent history than he suggested, insofar as many courts seemed insistent that jurisdictional questions could be raised at any time and in any manner, even when jurisdiction otherwise appeared on the face of the record.[171]

2. Mansfield *and First Principles*

Emblematic of the inflexible-duty reading of the 1875 Act (and the source of federal jurisdiction's "first principle")[172] was the Supreme Court's decision in *Mansfield, Coldwater & Lake Michigan Railway Co. v. Swan*.[173] *Mansfield* is generally understood as reading Section 5 to require dismissal of a pending case when the lack of jurisdiction becomes apparent, by whatever means and at whatever time.[174] *Mansfield* concluded that the rule was "inflexible and without exception" and, more ambitiously, that it "spr[ang] from the nature and limits of the judicial power of the United States."[175] In *Mansfield*, however, the lack of diversity was apparent from the face of the record (the defendant's petition for removal), a problem that federal courts had been able to address even before the 1875 Act.[176] But some aspects of *Mansfield* may have been in doubt

[170] See Dobbs, supra note 9, at 507–24.

[171] Professor Dobbs has suggested that post-1875, federal courts always had the discretion to deny tardy jurisdictional objections unless the record "affirmatively" revealed the absence of jurisdiction. Id. at 508–09 & n.89, 512–13. It is open to question whether this fairly reflects post-1875 practices. See cases cited supra note 169; see also infra Subsection III.B.1.

[172] See supra text accompanying note 2.

[173] 111 U.S. 379, 382 (1884).

[174] See, e.g., William A. Fletcher, A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction, 35 Stan. L. Rev. 1033, 1091–92 (1983) (noting the traditional reading of the "*Mansfield* rule").

[175] *Mansfield*, 111 U.S. at 382.

[176] Id. at 381, 386. For removed cases, diverse citizenship had to exist at the time of the initial filing in state court, as well as on removal. See, e.g., Gibson v. Bruce, 108 U.S. 561, 562–63 (1883). The statement in the *Mansfield* removal petition that one plaintiff was a co-citizen with a defendant when the case was initially filed affirmatively showed the lack of jurisdiction. But the removal petition's statement that the formerly nondiverse plaintiff's citizenship was now "unknown" was a failure to allege citizenship sufficiently. *Mansfield*, 111 U.S. at 381–82.

before then, and the decision was heavily influenced, if not commanded, by the 1875 Act.

In *Mansfield*, the party objecting to jurisdiction was the same one who invoked it below, and jurisdiction was defective on the face of the pleadings. In this respect, the decision resembled *Capron v. Van Noorden*, on which *Mansfield* relied. But in *Capron* there had been no jurisdictional objection raised or ruled upon in the lower court, whereas in *Mansfield* there had been, and the party who benefited from the jurisdictional ruling below would now benefit from its reversal.[177] The jurisdictional issue in *Mansfield* thus bore some resemblance to one that had divided the antebellum Court in *Scott v. Sandford*:[178] whether the party who invoked federal jurisdiction and who, when jurisdiction was challenged, benefited from the lower court's jurisdictional ruling, could then benefit from reversal on the jurisdictional issue following litigation on the merits, free of any notion of waiver.[179] While the impossibility of waiver may be clear today, it was not obvious to the Court at the time of *Dred Scott*, and it probably took *Mansfield* to tidy things up. The *Mansfield* Court therefore invoked language from Justice Curtis's dissent in *Dred Scott* to the effect that when it appears that a case is one to which federal judicial power did not extend, an appellate court cannot affirm or reverse on the merits, but must dismiss without regard to notions of waiver.[180]

To the extent the Court was stating that the question of jurisdiction remained in play throughout the proceedings if the allegations did not show its existence, the decision was perhaps not much of an improvement on *Capron* and cases like it. But the decision did clear up a disputed point: even a party who had litigated the merits after staving off a jurisdictional challenge in the court below would not be foreclosed from raising and benefiting from the jurisdictional challenge on appeal. And *Mansfield* specifically relied on

[177] See id.; Capron v. Van Noorden, 6 U.S. (2 Cranch) 126, 126 (1804).

[178] 60 U.S. (19 How.) 393 (1857).

[179] See supra Subsection I.B.5.

[180] *Mansfield*, 111 U.S. at 383, 384. *Mansfield* assumed that Curtis's opinion reflected the holding of *Dred Scott* on the reviewability of the jurisdictional question. But see supra Subsection I.B.5.

then-recent cases construing Section 5 of the 1875 Act as calling for rigorous policing of jurisdictional issues.[181]

3. Fixing Defective Pleadings

The 1875 Act was therefore greatly responsible for reducing the role of pleadings in settling jurisdiction questions. On the other hand, if jurisdiction were actually present, yet defectively alleged, the 1875 Act provided no solution. Such cases would continue to be dismissed unless the trial court exercised its discretion to permit an amendment to the pleadings.[182] Nevertheless, the shift to jurisdiction-in-fact reflected in the 1875 Act would catch up to this problem as well. In 1915, Congress let plaintiffs in diversity cases freely amend their defective jurisdictional allegations "at any stage of the proceedings," provided that diversity "in fact existed" when suit was filed.[183] This was another important development in the decline and fall of the pleadings-based regime in favor of a focus on jurisdiction-in-fact. After 1875, good pleading was less important for challenging jurisdiction, and, later, less important for asserting it in the first instance.

C. The Burdens of Establishing Jurisdiction

1. Prima Facie Jurisdiction and the 1875 Act

Despite its admonition to federal courts to notice jurisdictional defects "at any time," the 1875 Act produced a long-simmering dispute over who had the burden of proving jurisdiction. The initial presumption had always been against jurisdiction, but as noted in Part I, it was easily overcome by a plaintiff's proper pleading, at which point the burden shifted to the defendant. The 1875 Act, however, was not initially read as affecting the defendant's burden once jurisdiction had been properly pled. In other words, the Court

[181] *Mansfield*, 111 U.S. at 386.

[182] See Robertson v. Cease, 97 U.S. 646, 650–51 (1878). Appellate courts might reverse and remand if a party sought to amend a pleading to cure defective jurisdictional allegations, but they had no power to allow an amendment on their own. See, e.g., Kennedy v. Bank of Ga., 49 U.S. (8 How.) 586, 611 (1850) (noting this was the ordinary practice in the absence of an amendment below or consent of the parties).

[183] See Act of Mar. 3, 1915, ch. 90, § 274c, 38 Stat. 956, 956; Fallon et al., supra note 2, at 1508.

continued to treat the plaintiff's good jurisdictional allegations as prima facie evidence of jurisdiction, just as it had under the first judiciary statute.[184]

Indeed, the burden could be high on the party seeking to defeat jurisdiction. The Supreme Court declared that a suit could not be dismissed on jurisdictional grounds "unless the facts when made to appear on the record create a legal certainty of that conclusion."[185] The Court made that statement in connection with a post-verdict motion asserting that the plaintiff was not the real party in interest but instead had been collusively brought in to secure jurisdiction. Finding the defendant's showing insufficient to meet that legal certainty standard, the Supreme Court affirmed the motion's denial. Although the Court continues to use the language of "legal certainty" in connection with the amount in controversy requirement,[186] it is clear that the old Court intended the language to apply to jurisdiction generally, as did the lower courts.[187]

It took nearly forty years of practice under the 1875 Act before the Court would acknowledge a "conflict of opinion" as to whether pleadings should constitute prima facie evidence of jurisdiction, and whether its treatment of pleadings as prima facie evidence of jurisdictional fact "entirely harmonizes with the provision of the act of 1875 requiring a Federal court of its own motion to dismiss a pending suit when it is found not to be really within its jurisdiction."[188] But even as it made that statement, the Court declined the opportunity to resolve the conflict, perhaps because of the wide disparity of practices in the federal courts under the Conformity

[184] See, e.g., Ex parte Muir, 254 U.S. 522, 532 (1921); Hunt v. N.Y. Cotton Exch., 205 U.S. 322, 333 (1907); Knickerbocker Ice Co. v. Hofstatter, 32 F.2d 184, 186 (2d Cir. 1929).

[185] Deputron v. Young, 134 U.S. 241, 252 (1890) (citing Barry v. Edmunds, 116 U.S. 550 (1886)); see also Lehigh Mining & Mfg. v. Kelly, 160 U.S. 327, 354 (1895) (Shiras, Field, and Brown, JJ., dissenting) (arguing that the objection to a corporation's citizenship had not been proved to a "legal certainty").

[186] See, e.g., St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 289 (1938); Barry v. Edmunds, 116 U.S. 550, 559 (1886). *Deputron* took its "legal certainty" language from *Barry*—a jurisdictional amount decision.

[187] See, e.g., Cobb v. Sertic, 218 F. 320, 323 (6th Cir. 1914); Pike County v. Spencer, 192 F. 11, 13 (3d Cir. 1911); Hill v. Walker, 167 F. 241, 243, 249 (8th Cir. 1909); see also 1 C.L. Bates, Federal Equity Procedure 321, 323 (1901) (noting that the "legal certainty" standard was the prevailing practice under the 1875 Act).

[188] Chase v. Wetzlar, 225 U.S. 79, 85–86 (1912).

Act and uncertainty whether the Conformity Act or the 1875 Act should control.[189]

2. The Decline and Fall of Prima Facie Jurisdiction

The Court would not soon resolve the question it had previously skirted, concluding only in 1936—just two years before the promulgation of the Federal Rules of Civil Procedure—that the party asserting jurisdiction had to justify its allegations of jurisdictional fact by a preponderance of the evidence. In *McNutt v. General Motors Acceptance Corp.*, the Court held that the 1875 Act, because it permitted a court "to enforce the limitations of its jurisdiction," was inconsistent with "the idea that jurisdiction may be maintained by mere averment or that the party asserting jurisdiction may be relieved of his burden by any formal procedure."[190]

Significantly, as part of that conclusion, the Court appeared to indicate that the plaintiff's allegations of jurisdictional fact could not be treated as evidence of jurisdiction at all.[191] This was the culmination of a sea change from earlier practice that always had regarded such allegations as sufficient by themselves to establish jurisdiction. The decision seemed to foreclose any argument that courts still had discretion to ignore a party's jurisdictional objections on the ground that they were made in a procedurally improper manner. The whole premise behind jurisdictional waiver was the notion that good pleading could independently satisfy the requirements of Article III and Congress's statutes, and—in default of an objection—give the federal courts something over which

[189] In jurisdictions in which objection was made by pre-answer motion or plea, the burden tended to remain on the party seeking to overcome the force of the prima facie showing of jurisdiction. See, e.g., Big Sespe Oil Co. v. Cochran, 276 F. 216, 220 (9th Cir. 1921); Hill v. Walker, 167 F. 241, 243 (8th Cir. 1909). In code-pleading states, the burden might or might not rest with the party objecting to jurisdiction. Compare, e.g., Roberts v. Lewis, 144 U.S. 653, 658 (1892) (recognizing that in code-pleading states, the burden was no longer on the party who objected to properly pled jurisdiction to show its absence), with Auto Acetylene Light Co. v. Prest-O-Lite Co., 276 F. 537, 539 (6th Cir. 1921) (stating that the burden was still on defendant to disprove good jurisdictional allegations, despite denial in answer).

[190] 298 U.S. 178, 189 (1936). *McNutt* was a federal question case in which the issue was whether there was evidence to support the then-required jurisdictional amount.

[191] Id. Although the defendant contested the plaintiff's allegation, the Court noted that the failure to make such an objection would not prevent the court from demanding proof by a preponderance of the evidence.

to retain jurisdiction and proceed to the merits. For much of the 1875 Act's existence, the insistence of certain courts that jurisdictional objections be raised in some proper mode was similarly premised. If, however, the plaintiff's pleadings of jurisdictional facts could no longer constitute evidence of jurisdiction, there would seem to be no real procedural limit on the defendant's ability to raise a jurisdictional objection, because there would be no jurisdictional premise for holding onto the case once a valid objection was raised—whenever and however.

3. Rule 12(h)

The implications of the pre-Rules decision in *McNutt* were soon confirmed by Rule 12(h) and its provision that a district court "shall dismiss" an action "[w]henever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter."[192] The history of jurisdiction and pleading discussed above, however, suggests that Rule 12 enshrined not a long-standing practice of the federal courts, but rather one that fully crystallized only in the mid-1930s. Moreover, when Rule 12 and the New Deal Court's reading of the 1875 Act were coupled with the provision for liberal amendment of jurisdictionally defective pleadings, the vestigial jurisdictional work being performed by the pleadings in party-based cases was approaching the vanishing point. Although the new Federal Rules would require that a complaint begin with a jurisdictional allegation,[193] such an allegation would serve less to establish prima facie jurisdiction than the largely administrative function of making sure that potential jurisdictional issues were identified and placed up front.

That Rule 12 was the culmination of a much longer and contested process is also reflected in the persistence of arguments reflective of the old regime even after the Rules' arrival. It was argued, for example, that courts still had discretion to disallow jurisdictional objections when first made as late as trial.[194] Pre-Rules precedent supported such an argument,[195] and the original

[192] Fed. R. Civ. P. 12(h)(3).

[193] Fed. R. Civ. P. 8(a).

[194] See, e.g., Page v. Wright, 116 F.2d 449, 454 (7th Cir. 1940); Klee v. Pittsburgh & W. Va. Ry., 22 F.R.D. 252, 254 (W.D. Pa. 1958).

[195] See Mexican Cent. Ry. v. Pinkney, 149 U.S. 194, 200–01 (1893).

version of Rule 12(h) cross-referenced Rule 15(b)'s provisions regarding mid-trial amendments to pleadings, which treated such amendments as a matter of discretion.[196] Courts understandably hesitated, however, to read the permissive language of Rule 15(b) in such a way as to run counter to the 1875 Act's newly perceived command.[197] In addition, even after the Rules' promulgation, some lower courts attempted to impose notions of estoppel on parties who had invoked the federal courts' jurisdiction, to disable them from making belated jurisdictional attacks after losing on the merits.[198] But those decisions proved to be outliers, and the exceptional treatment of jurisdiction has prevailed—occasional uncharitable academic commentary notwithstanding.[199]

4. Countertrends?

Despite the enhanced review of jurisdictional facts signaled by *McNutt* and Rule 12, the modern era simultaneously witnessed a relaxation of jurisdictional prerequisites in other areas, particularly outside the diversity setting.[200] For example, federal courts continued to exercise federal question jurisdiction based largely on the allegations in the complaint, and they could do so even when the claim alleged was legally insufficient, so long as it was nonfrivolous.[201] By contrast, nineteenth century courts tended to see little

[196] Original Rule 12(h)(2) provided: "[W]henever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action. The objection or defense, if made at the trial, shall then be disposed of as provided in Rule 15(b) . . . ." Fed. R. Civ. P. 12(h)(2) (1938), transmitted in Letter from the Attorney General, H.R. Doc. No. 75-460, at 17–18 (1938). The original version of Rule 15(b), in turn, allowed such amendments as a matter of discretion. Fed. R. Civ. P. 15(b) (1938), transmitted in Letter from the Attorney General, H.R. Doc. No. 75-460, at 21 (1938).

[197] See *Page*, 116 F.2d at 451, 454.

[198] See, e.g., Kroger v. Owen Equip. & Erection Co., 558 F.2d 417, 427 (8th Cir. 1977), overruled by Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 377 (1978); Di Frischia v. N.Y. Cent. R.R., 279 F.2d 141, 144 (3d Cir. 1960). In *American Fire & Casualty Co. v. Finn*, three Justices were prepared to support a notion of estoppel in limited circumstances on removal. 341 U.S. 6, 19 (1951) (Douglas, Black & Minton, JJ., dissenting).

[199] See infra Subsection III.B.1.

[200] See Perry Dane, Jurisdictionality, Time, and the Legal Imagination, 23 Hofstra L. Rev. 1, 113, 114–20 (1994) (noting the erosion of the "classic" idea of jurisdiction around the time of the New Deal).

[201] Bell v. Hood, 327 U.S. 678, 682–83 (1946).

daylight between a legally insufficient complaint and the want of federal question jurisdiction.[202] In addition, questions that would once have involved issues of jurisdiction on federal habeas corpus were soon converted into questions on the merits.[203] And the Supreme Court concluded that federal courts could issue injunctive orders that had to be obeyed on penalty of contempt, even when the court may have lacked jurisdiction to issue them—another reversal of prior practice.[204]

In addition, even as Rule 12 opened up the opportunities for fact-based and other challenges to jurisdiction, courts were assimilating questions of jurisdictional fact to questions of ordinary fact at a more general level—including in diversity. For example, opportunities for post-judgment attacks on federal civil judgments for jurisdictional error arguably declined, as litigated questions of jurisdictional fact came to be treated like any other fact to which preclusion could attach.[205] Courts also routinely applied a more-likely-than-not standard to questions of jurisdictional fact (such as citizenship), as opposed to some more exacting, jurisdiction-protective, standard.[206] And appellate courts accorded subsidiary factfindings on jurisdictional questions the same deference ordinarily accorded nonjurisdictional factfindings.[207] Finally, although fed-

[202] See supra text accompanying notes 108–113, 128.

[203] The malleable category of "jurisdictional" defects that could be reinvestigated on federal habeas continued, however, to garner close scrutiny, see, e.g., Johnson v. Zerbst, 304 U.S. 458, 469 (1938) (calling an error of constitutional procedure a jurisdictional defect), until the jurisdictional characterization was formally abandoned in *Brown v. Allen*, 344 U.S. 443 (1953).

[204] Compare United States v. United Mine Workers, 330 U.S. 258, 293 (1947) (holding order of contempt for violating an injunction enforceable even if the court lacked jurisdiction to enter the injunction), with Ex parte Young, 209 U.S. 123, 143 (1908) (indicating that the validity of a contempt order for violating an injunction hinged on whether the court had jurisdiction).

[205] See Stoll v. Gottlieb, 305 U.S. 165, 172 (1938) (applying res judicata to litigated questions of jurisdictional fact); cf. Noble v. Union River Logging R.R., 147 U.S. 165, 173 (1893) (treating factual questions of citizenship as not "strictly jurisdictional" but "quasi-jurisdictional," erroneous determinations of which do not render a judgment void on collateral attack). Nevertheless, the New Deal Court indicated that collateral attacks on federal judgments on jurisdictional grounds were subject to "no inflexible rule," United States v. U.S. Fid. & Guar. Co., 309 U.S. 506, 514 (1940), arguably a retreat from earlier judgment-protective practices.

[206] See Clermont, supra note 9, at 978–79.

[207] See Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 74 n.19, 77 (1978) (finding that the "clearly erroneous" standard of Fed. R. Civ. P. 52(a) gov-

eral courts could raise the absence of jurisdiction on their own, there was still no requirement to force a hearing on the question when nothing suggested a problem.[208] In these respects, the modern procedural regime made many jurisdictional questions less than wholly exceptional.

III. HISTORICIZING JURISDICTION

A. Early Understandings of Judicial Power

1. Common-Law Pleading and Limited Jurisdiction

The willingness of the early federal courts to focus on the record as both a necessary and sufficient condition for jurisdiction, as discussed in Part I, is not quickly reconciled with modern understandings of the federal courts' limited jurisdiction. Nor is the post-1875 transitional period's occasional willingness to disallow tardy jurisdictional objections, as discussed in Part II, any easier to reconcile. To be sure, many traditional features of jurisdiction were honored in the old regimes: Federal courts were acknowledged to be courts of limited jurisdiction; jurisdiction could not be conferred solely by the parties' consent; the initial presumption ran against its existence; and jurisdictionally defective proceedings—to the degree that procedural rules allowed them to be identified—were treated as voidable on direct review. In this respect the exceptional nature of federal jurisdiction was freely acknowledged. In addition, courts recognized the basic structural differences between the federal courts and English courts of general jurisdiction whose jurisdiction was presumed.

Prior to the modern era, however, the initial burden of showing jurisdiction could be satisfied by good pleading alone, thereby imposing on the party resisting jurisdiction the task of showing its absence. In addition, waiver of jurisdictional objections was com-

erned the district court's factfindings relating to standing to sue). See generally William Marshall, The "Facts" of Federal Subject Matter Jurisdiction, 35 DePaul L. Rev. 23, 33–49 (1985).

[208] Nor do courts often grant motions for relief from judgment simply for jurisdictional defect or error. See, e.g., United States v. Tittjung, 235 F.3d 330, 335 (7th Cir. 2000) (stating that post-judgment relief for jurisdictional error under Fed. R. Civ. P. 60(b)(4) is confined to "egregious" error (quoting In re Edwards, 962 F.2d 641, 644 (7th Cir. 1992))).

monplace. Although federal courts were concerned that there be a real dispute between real parties in interest, those concerns were presumptively met by the proper pleading of such a dispute. Proof to the contrary would be ignored if presented inconsistently with common-law practices. Of course, this willingness to credit a party's recitals of jurisdiction as evidence of it seems to place considerable weight on their veracity, even though it was not until the advent of code pleading that allegations in complaints had to be verified in common-law actions.[209] At the same time, verification *was* required for pleas objecting to jurisdiction. The common law's unequal imposition of verification requirements therefore discouraged challenges to jurisdiction while simultaneously facilitating its initial invocation. The extreme adverse consequences of unsuccessful jurisdictional challenges also encouraged gaming of the system to secure jurisdiction when it did not—under some alternative set of proofs—really exist. Practices that created such incentives may have made perfect sense in common law courts of general jurisdiction, but they fit somewhat uncomfortably with the presumption against jurisdiction associated with the federal courts. The result was that federal courts continued to hear cases even when it became clear that jurisdiction may have been lacking in fact, or even concocted.

The Constitution, however, had not spelled out the procedures by which federal jurisdiction would be tested, and it is hardly surprising that Congress would look to existing ones. This, presumably, was a virtue of the Process Acts, which had adopted these ready-made procedures for the federal courts. The common law, moreover, was famous for its ability, through the minuet of pleading and response, to narrow the issues that would ultimately be subject to factual contest.[210] That proved to be no less true for jurisdictional matters than the merits. And if there was a less than perfect fit between the common law and enforcement of constitutional limitations, it was not as though such misalignment was unique to questions of jurisdiction.[211]

[209] See Stephen N. Subrin, How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective, 135 U. Pa. L. Rev. 909, 936 (1987).

[210] See Fairman, supra note 8, at 556–57.

[211] See, e.g., Jerry L. Mashaw, Recovering American Administrative Law: Federalist Foundations, 1787–1801, 115 Yale L.J. 1256, 1335–37 (2006) (noting imperfect con-

Overall, the focus on the face of the record, the obligation to take jurisdiction when it appeared, and the limited means of challenging it, likely combined to enhance rather than restrict the federal courts' jurisdiction, especially in the diversity setting. To be sure, many cases could be and were dismissed for such things as failure sufficiently to allege citizenship, and such dismissals might occur at any step along the way. Still, the learning curve was probably steep after a spate of dismissals very early in the history of the federal courts, as litigants learned what not to do, and, indeed, what they could get away with. And, as just noted, the extraordinary disincentives associated with the plea in abatement must have meant that challenges to jurisdictional facts that were anything short of sure winners would simply not be made. It took the legislation of 1875 to begin to remedy the problem, and still later the Federal Rules, by which time diversity jurisdiction was no longer playing so prominent a role as it once did.

2. Judicial Acquiescence and Dissent

It is not as though the relevant actors were unaware of the jurisdictional consequences of strict adherence to common-law practices. As discussed in Part I, Justice Baldwin's opposition to the intrusion of the plea in abatement into equity offered a realistic assessment of the inefficacy of such pleas in preserving the federal courts' limited jurisdiction. Baldwin hit the mark when he noted that, with such constricted means for challenging jurisdiction, cocitizens could easily secure a federal forum and a potentially different decisional rule from that in state court. As also discussed in Part I, Justice Iredell had made a similar objection in *Maxfield v. Levy*, and there is some evidence that the alternative practices he championed may have once existed in some of the circuits.[212] Neither Baldwin nor Iredell, however, was proposing schemes in which

gruence between common law actions and the enforcement of federal law and the Constitution).

[212] See supra Subsection I.B.3; cf. Brown v. Noyes, 4 F. Cas. 414, 416 (C.C.D. Mass. 1846) (No. 2023) (indicating that "when going to the evidence offered in the case, should it appear from that, this court had in truth no jurisdiction" it would "probably" dismiss because of "the peculiar structure of this court"). The disagreement in *Dred Scott* discussed in Subsection I.B.5 may also have reflected some mid-century misgivings with common-law approaches to jurisdiction.

un-raised jurisdictional issues remained open for reinvestigation at any time or in any manner. Their proposals had more to do with allowing flexibility in the raising of jurisdictional objections and shifting the burden of proving disputed jurisdictional facts to the party invoking jurisdiction. Still, their concerns foreshadow those that produced the post-Reconstruction regime, discussed in Part II, that shifted the emphasis from jurisdictional allegations to proof of jurisdiction-in-fact.

Anticipating these judicial expressions of skepticism had been the prophetic warnings of the Anti-Federalists. They had expressed fears that federal courts, by the use of falsehoods, "fictions"[213] and "ingenious sophisms,"[214] would make hash of their limited jurisdiction in a way that certain English courts were known to have expanded their own jurisdiction.[215] Although Anti-Federalist fears of jurisdictional usurpations by "fictions" may seem odd in light of current understandings of Article III, they proved well-founded given the pleading milieu in the early Republic in which jurisdictional questions would initially be resolved.

Given these dire predictions, the congressional measures that were partially responsive to them (such as the Assignee Clause), the candid assessment of certain antebellum Justices, and the Reconstruction Court's later acknowledgment of prior jurisdictional abuses that the 1875 Act was designed to remedy, there must have been a clear appreciation that strictly applied common-law pleading rules were less than fully effective in policing the federal courts' limited jurisdiction. To be sure, the federal courts may have felt genuinely constrained by the modes of practice that Congress had given them in the Process Acts. Indeed, later courts explained earlier practice as having arisen from judicial "powerlessness" in the face of such Acts.[216] And although those early Acts permitted federal courts to deviate from common-law practices by rule, no such

[213] See, e.g., Essays of Brutus, No. XII (Feb. 14, 1788), *in* 2 The Complete Anti-Federalist 426, 426–27 (Herbert J. Storing ed., 1981) (noting that by "recourse to fiction," patterned on British practice, nondiverse parties could bring their suits in federal court).

[214] Letters of Centinel, No. I (Oct. 5, 1787), *in* 2 The Complete Anti-Federalist, supra note 213, at 136, 140.

[215] Letters from The Federal Farmer, No. XVIII (Jan. 25, 1788), *in* 2 The Complete Anti-Federalist, supra note 213, at 339, 346.

[216] See Hill v. Walker, 167 F. 241, 246 (8th Cir. 1909).

rules respecting jurisdictional objections were made before Congress stepped in to remedy the problem in 1875. Moreover, despite its rhetoric of strict compliance with the common law in jurisdictional matters, the Supreme Court was not always consistent in holding federal courts to the strictures of such practices.[217]

3. Encouraging Federal Jurisdiction

In an effort to explain the early disappearance of more liberal opportunities for jurisdictional challenges as in *Maxfield*, eminent counsel once argued to the antebellum Court that the decision was a product of early skepticism and jealousy of federal courts, at a time when it looked as though they might claim broad jurisdiction "and swallow up the States."[218] "Experience," he suggested, had shown those fears were "groundless."[219] In a similar vein, William Rawle observed in his 1829 constitutional treatise that "[e]xperience ha[d] already shown that" the earlier "apprehension" of collisions between state and federal judicial power "was unfounded."[220] Instead, "[i]f any objection could be sustained to the procedures of the judges of the supreme and circuit courts, it would be that of excessive caution, arising from a systematic anxiety not to exceed their jurisdiction."[221] Others offered a similar assessment of the rapid decline and fall of early skepticism of federal judicial power.[222]

[217] For example, as noted in Part I, federal courts were contrasted with common-law superior courts that exercised a general jurisdiction and in which jurisdiction need not appear on the record. At the same time, they were contrasted with inferior courts at common law, and were treated more like superior courts, to the extent that federal court judgments were generally protected from collateral attack.

[218] Smith v. Kernochen, 48 U.S. (7 How.) 198, 210 (1849). Counsel was John Sergeant, considered one of the three foremost Supreme Court advocates of the antebellum era, along with Henry Clay and Daniel Webster. See 2 Warren, supra note 103, at 241.

[219] *Kernochen*, 48 U.S. (7 How.) at 210.

[220] William Rawle, A View of the Constitution of the United States of America 201 (Philadelphia, Philip H. Nicklin 2d ed. 1829).

[221] Id. Rawle thought that there could be jurisdictional overreaching "too obvious to be denied," but that in such "extreme" and "improbable" cases there would be "no colour of jurisdiction." When matters were "doubtful and ambiguous," though, a federal court could properly go forward. Id. at 201–02.

[222] See Girardey v. Moore, 10 F. Cas. 444, 446 (C.C.S.D. Ga. 1877) (No. 5462) (Bradley, Circuit Justice) (describing the earliest years of the judiciary as "a period when a strict construction of federal jurisdiction in judicial matters was in vogue. The circum-

Jurisdictional developments on the antebellum Court fairly reflect this assessment. Although the Court of Chief Justice Marshall is normally associated with broad assertions of judicial power, a number of principles more accommodating of such power developed only after the first quarter century of practice under the 1789 Act. For example, despite Marshall Court precedents, it was the Taney Court that liberalized the treatment of corporate citizenship in diversity cases,[223] made mandamus available against federal officers,[224] and oversaw dramatic inland expansions of admiralty jurisdiction that the Marshall Court had resisted.[225] In addition, the Marshall Court at first decided that suits by the Bank of the United States did not come within federal jurisdiction through a narrow reading of Congress's statutes creating the Bank, and then almost fifteen years later, based on a broad reading of an intervening statute, concluded that they did.[226] On the point of diversity jurisdiction more generally, Marshall came to regret his early complete-diversity ruling in *Strawbridge v. Curtiss*.[227] And late in his tenure, Marshall seemed to back away from the strictness with which citizenship had to be pled.[228]

stances which induced this tendency are familiar to every student of American history."). What those "familiar" circumstances were, Justice Bradley did not explain.

[223] Compare Marshall v. Baltimore & Ohio R.R., 57 U.S. (16 How.) 314, 327–28 (1854) (holding that shareholders' citizenship was conclusively that of the state of incorporation), with Bank of the United States v. Deveaux, 9 U.S. (5 Cranch) 61, 90–92 (1809) (requiring party opposing a corporation to be diverse from every shareholder). See also Currie, supra note 76, at 259 ("In diversity cases, as in admiralty, the Taney Court defined federal jurisdiction more broadly than had its nationalist forebears.").

[224] Compare Kendall v. United States ex rel. Stokes, 37 U.S. (12 Pet.) 524, 618–26 (1838) (upholding mandamus jurisdiction in the District of Columbia federal courts), with M'Intire v. Wood, 11 U.S. (7 Cranch) 504, 505–06 (1813) (denying such jurisdiction to federal circuit courts except in aid of their jurisdiction).

[225] Compare The Propeller Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443, 457 (1852) (abandoning the tidal ebb and flow limitation on admiralty jurisdiction), with The Steam-Boat Thomas Jefferson, 23 U.S. (10 Wheat.) 428, 429 (1825) (adhering to the limitation).

[226] Compare Osborn v. Bank of the United States 22 U.S. (9 Wheat.) 738, 757 (1824) (upholding federal question jurisdiction in suits by the Bank of the United States based on the Bank's charter), with Bank of the United States v. Deveaux, 9 U.S. (5 Cranch) 61, 85–86 (1809) (rejecting such jurisdiction).

[227] 7 U.S. (3 Cranch) 267 (1806). Marshall's doubts were mentioned by the Court in *Louisville Railroad v. Letson*, 43 U.S. (2 How.) 497, 555–56 (1844).

[228] Marshall stated that the niceties of pleading had "gone far enough," and upheld jurisdiction when a party recited he was a naturalized citizen "residing" in a particular state. Gassies v. Ballon, 31 U.S. (6 Pet.) 761, 762 (1832); cf. Gracie v. Palmer, 21 U.S.

Perhaps, then, initial skepticism of federal court powers—best illustrated in the furious debate over common-law crimes in the late eighteenth and early nineteenth centuries[229]—subsided somewhat once earlier crises had passed. If so, that may help explain the early disappearance of alternative and more liberal means of challenging federal jurisdiction than those traditionally available at common law. In addition, the Marshall Court's eventual admonition to federal courts to ignore post-1789 state court procedural developments guaranteed that state procedural innovations respecting jurisdictional challenges would have no impact outside of state courts.[230]

The conclusion that there was something more than simple tolerance of (or judicial helplessness in the face of) common-law procedures seems hard to avoid. The Court was ready and willing to enlarge the scope of diversity jurisdiction to maintain a relatively free hand in the interpretation and administration of state substantive law.[231] Similarly, the insistence on compliance with state practices as they stood in 1789 gave federal courts the freedom to interpret and apply a general common law of procedure, also free of state modification. In addition, enhancement of diversity jurisdiction ensured the availability of the one vehicle by which general federal question litigation could be conducted in the lower federal courts before 1875.[232] Even on direct review of the state courts, the Supreme Court's willingness to take up cases presenting a claim of federal right, notwithstanding the existence of adequate state grounds, enhanced its power to speak on questions of federal law.[233] Overall, the early Court appears to have embraced procedures re-

(8 Wheat.) 699 (1823) (concluding that if defendant "voluntarily appeared," the record need not show that he was an inhabitant of, or found in, the district in which he was sued, as called for by Section 11 of the 1789 Judiciary Act).

[229] See Jay, supra note 7, at 1249–54 (discussing the fate of federal common law crimes).

[230] Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 6 (1825).

[231] See Woolhandler, supra note 73, at 89–99; White, supra note 47, at 843–49 (noting the liberal construction of lower federal court jurisdiction by the Marshall Court between 1817 and 1835).

[232] Antebellum expansions in the scope of equity and admiralty jurisdiction further enhanced federal judicial power at the expense of state power. See Ann Woolhandler & Michael G. Collins, The Article III Jury, 87 Va. L. Rev. 587, 612–40 (2001).

[233] Matasar & Bruch, supra note 122, at 1360–61.

specting jurisdictional challenges that were in sync with its often-generous construction of the federal courts' limited jurisdiction.

B. Does History Support Foreclosure of Jurisdictional Objections?

The practices discussed in this Article show that the raising of jurisdictional objections in federal courts was long subject to procedural regulation and even to a notion of waiver. And to the extent that history can provide a gloss on the Constitution, such practices would appear to be compatible with Article III and congressional limits on jurisdiction. These earlier traditions might seem, therefore, to provide support for all kinds of procedural regulation today, but the matter is not so simple. As discussed in this Section, the main difficulty is that the older regimes were premised on the idea that prima facie jurisdiction, based largely on the parties' pleadings, could provide a basis for a federal court to hold on to a case in default of a timely objection. In other words, the foreclosure of jurisdictional objections was allowed only in cases in which there was affirmative evidence of jurisdiction in the record. That such arrangements may have the constitutional sanction of history speaks perhaps only indirectly to the constitutionality of more recent proposals—most of which involve time limits on the raising of jurisdictional objections and do not appear to insist on any such predicate jurisdictional showing.

This Section focuses primarily on the extent to which the history discussed in this paper would provide plausible constitutional support for such proposals and secondarily on their constitutionality in general. It concludes that even though the Constitution might not stand in the way of legislative measures based on procedural regimes such as those discussed in Parts I and II, history provides only limited support for the kinds of broad proposals that have been floated in the modern era.

1. Modern Proposals

There has been no shortage of criticism directed to the current treatment of jurisdictional questions, nor a shortage of proposals for reforming the manner in which courts now handle jurisdictional

challenges.[234] Those calls are grounded mainly in concerns about inefficiencies that arise from eleventh-hour objections, as well as concerns for fairness to parties who may be blindsided by them.[235] Two of the more familiar proposals for subjecting jurisdictional objections to procedural time limits are discussed in the subsections that follow. Both rely, to a greater or lesser degree, on history: one on the historical treatment of federal judgments on collateral attack; the other on the post-1875 discretion sometimes exercised by federal courts to disallow tardy jurisdictional objections.

a. The Preclusion Model

In perhaps the best-known proposal of the modern era, the American Law Institute called for limiting jurisdictional objections to the pre-trial stage subject to only a few exceptions, the most significant being for "collusion or connivance."[236] The best historical analogy it could muster, however, was the limitation on collateral attack on final judgments from federal courts. The ALI's argument seemed to be that preclusion rules showed that there could be a point in time after which jurisdictional issues could be foreclosed. And what that point was, was simply a question of good jurisdictional policy. For the ALI, the historic treatment of preclusion showed that considerations of finality of decisionmaking could trump structural considerations that inform the limited nature of federal jurisdiction.[237]

To the extent that the ALI proposed statutory foreclosure of objections to jurisdictional defects that were themselves merely statutory (such as federal question jurisdiction premised solely on a federal defense, or incomplete diversity), the proposal seems constitutionally unproblematic. If Congress would have the power

[234] See Friedenthal, supra note 109, at 272–73 & n.102 (cataloging academic criticism of current jurisdictional practices).

[235] See, e.g., Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 376–77 & nn.20–21 (1978) (finding the possible hardship to the plaintiff arising from the interim running of the statute of limitations to be "irrelevant"); E.R. Squibb & Sons, Inc. v. Accident & Cas. Ins. Co., 160 F.3d 925, 929, 940 (2d Cir. 1998) (vacating judgment after sixteen years of litigation).

[236] American Law Institute, Study of the Division of Jurisdiction Between State and Federal Courts 366–69 (1969) [hereinafter ALI Study]; see also Currie, supra note 76, at 298–99 (endorsing the proposal).

[237] ALI Study, supra note 236, at 368.

under Article III to let federal courts hear such suits in the first instance or on removal, it presumably has the power to keep them out initially but allow them to remain if the objection to the statutory defect is made unseasonably.[238] In fact, one need not rely on preclusion analogies to reach such results.

As discussed below, however, the preclusion model may not be a complete answer to the question whether un-raised jurisdictional defects of a constitutional dimension must remain open, at least while the merits remain in play. Asking a federal court to continue to hear the merits of a case in the teeth of an Article III defect has no precise parallel in collateral attack practices under which federal courts enforcing a judgment might be asked to ignore underlying jurisdictional defects, but are not asked to continue to determine the merits. In any event, the ALI's proposal to import jurisdictional objection practices surrounding collateral attack into the setting of pending litigation would be a clear break with historic practices.[239]

b. The Discretion Model

Other critics draw support for jurisdictional foreclosure from post-1875 developments showing that federal courts sometimes exercised discretion to deny belated jurisdictional attacks.[240] For example, Professor Dobbs argued that, on his reading, the *Mansfield* decision held that jurisdictional defects could be raised at any time and in any manner only when the record "affirmatively" showed that jurisdiction was lacking. By that he meant that if the allegations of citizenship showed, for example, that the parties were not diverse, then the jurisdictional defect could be raised at any time

[238] See Charles Alan Wright & Mary Kay Kane, Law of Federal Courts 31 (6th ed. 2002).

[239] Prior to the 1875 Act, if a complaint showed jurisdiction, but the defendant failed to object, he could no more attack the judgment collaterally than challenge jurisdiction after answering or on appeal. On the other hand, insulating from collateral attack a litigated federal court judgment that revealed facial jurisdictional defects—an early and continuing practice—was in tension with the practice of treating such defects as fair game at all other times. In this respect, early practice sought to draw a distinction between its rules for assessing jurisdiction in the pre- versus post-final judgment settings. The ALI would erase that distinction.

[240] See, e.g., Dobbs, supra note 9, at 507–24; see also Friedenthal, supra note 109, at 272–73 (proposing a discretion model, based in part on post-1875 historical practices).

before final judgment.[241] But if diversity was properly alleged, or even when the plaintiff had failed to allege it or allege it sufficiently, then *Mansfield* left it wholly within the trial court's discretion whether to allow a jurisdictional objection that was untimely in some respect. He also gave a narrow reading to the language in Section 5 of the 1875 Act which stated that a jurisdictionally defective case "shall" be dismissed "at any time," viewing it as requiring no more than *Mansfield*.[242]

So conceived, the discretion model understates the role of nondiscretionary jurisdictional dismissals. *Capron v. Van Noorden* and the many cases like it belie the suggestion that federal courts had discretion to ignore the lack of jurisdiction when jurisdictional allegations were lacking or insufficient.[243] Jurisdiction was considered to be defective on the face of the record in such cases, making dismissal obligatory at any time. *Mansfield* itself was arguably a case in which the jurisdictional defect was, in part, the failure adequately to allege jurisdiction.[244] Moreover, federal courts interpreting Section 5 consistently read it as requiring dismissal unless the pleadings "affirmatively" showed that jurisdiction was *present*.[245] In addition, the discretion model underemphasizes the extent to which Section 5 was designed to remedy common-law practices and to permit challenges to jurisdictional facts "at any time," even when citizenship had been properly pled. To be sure, courts sometimes rejected belated jurisdictional challenges, but other courts

[241] Dobbs, supra note 9, at 504–05, 507–08 & n.89.

[242] Id. at 512–13.

[243] 6 U.S. (2 Cranch) 126 (1804); see Kendall v. United States, 37 U.S. (12 Pet.) 524, 640–41 (1838) (Taney, C.J., dissenting) ("There are a multitude of cases where this Court [has reversed] upon the ground that the circuit court had not jurisdiction of the case, for the want of the proper averments in relation to the citizenship of the parties."); Hill v. Walker, 167 F. 241, 243 (8th Cir. 1909) (stating that "by far the greater number" of jurisdictional dismissals have involved inadequate jurisdictional allegations). But cf. Dobbs, supra note 9, at 508–09 n.89 (stating that "*Capron* has had very little application as a matter of fact").

[244] See supra note 176.

[245] See, e.g., Minnesota v. N. Sec. Co., 194 U.S. 48, 62–63 (1904) ("If the record does not affirmatively show jurisdiction in the Circuit Court, we must, upon our own motion, so declare . . . ."); Great S. Fireproof Hotel Co. v. Jones, 177 U.S. 449, 453 (1900) ("[T]he jurisdiction of a Circuit Court fails, unless the necessary citizenship affirmatively appears in the pleadings or elsewhere in the record."). *Mansfield* itself seemed to say as much. See 111 U.S. at 382 (stating that dismissal is required "in all cases where such jurisdiction does not affirmatively appear in the record").

clearly perceived that it was their duty under Section 5 to allow them.[246]

Nevertheless, based on his reading of *Mansfield* and Section 5, and decisions construing them, Dobbs urged that jurisdictional challenges be limited to the pleading stage, leaving most tardy challenges (even ones for fraud), to the discretion of the trial court.[247] On the strongest reading of his proposal,[248] a jurisdictional objection could be made at any time, but only if the record affirmatively showed a lack of jurisdiction. Other proposals support an equally early deadline, but minus all discretion, and minus an exception for cases that affirmatively show the absence of jurisdiction.[249]

2. Accounting for Prima Facie Jurisdiction

What these proposals miss—particularly the preclusion model—is that earlier practices reflected a notion that allegations in the record could themselves supply sufficient proof of jurisdiction, and that notions of jurisdictional waiver hinged on such a showing. In other words, these modern proposals tend to focus on the foreclosure-of-jurisdictional-objections side of the historical equation rather than the affirmative requirement that there be some evidence of jurisdiction in the record before foreclosure can be triggered.

Perhaps the ALI chose preclusion practices as its model because it was uninterested in whether any evidence of jurisdiction existed as a precondition to allowing a federal court to continue to hear a case. Limits on jurisdictional reexamination on collateral attack of federal judgments, after all, were not dependent on such a showing.

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[246] See supra note 169.

[247] Dobbs, supra note 9, at 526 (suggesting a deadline at the "answer or the first motion").

[248] At times, Dobbs argues that a jurisdictional challenge could be made at any time (and not subject to the court's discretion) only when the pleadings affirmatively showed an absence of jurisdiction, but not when there was a failure to allege it or to allege it properly. Id. at 504–06, 508 n.89, 512–13. At other times, however, he acknowledges that an insufficient allegation could be a defect on the face of the record, fatal at any time. Id. at 514–15, 521, 528. This second perspective reflects a fairer characterization of developments under the 1875 Act, and it meshes better with the conclusions of this paper.

[249] See, e.g., Gao, supra note 6, at 2405–07 (proposing a strict cut-off at the time of defendant's answer or twenty days after removal, but with an exception for fraud or certain other misconduct).

Similarly, those favoring a discretion model may have wished to minimize the availability of automatic jurisdictional inquiry into any cases other than those in which the record affirmatively showed its absence. But neither pre- nor post-1875 Act practices would support such broad versions of jurisdictional waiver.

a. Requiring Evidence of Jurisdiction

In addition, whether a notion of estoppel or waiver can survive constitutional scrutiny in the absence of evidence of jurisdiction in the record, so long as the merits remain in play, is open to doubt. It is not clear, for example, that congressional legislation allowing federal courts to continue to hear a case on the merits—even if it never revealed colorable jurisdiction—would be necessary and proper to "carrying into Execution" some power under Article III (or any other constitutional power).[250] Some have argued, however, that jurisdictional foreclosure might be a reasonable way to safeguard federal judicial resources already expended on jurisdictionally defective cases whose defects had gone unnoticed over some pre-set period of time,[251] on analogy to the treatment of jurisdictional defects after a final judgment. But regard for the finality of federal judgments on collateral attack has always been coupled with a structural concern that a federal court asked to enforce a jurisdictionally defective judgment refrain from addressing the merits. Modern proposals for cut-offs of jurisdictional objections do not, of course, purport to confer jurisdiction to decide the merits beyond the limits of the Constitution, but they have the potential to do so in those cases in which there is no evidence of Article III jurisdiction whatsoever.

[250] See U.S. Const. art. I, § 8, cl. 18. The ALI asserted: "It is necessary and proper to the exercise of Article III power that procedures be devised to require issues of jurisdiction to be timely raised, and to prevent their use to take unfair advantage of opposing parties or to impede the administration of justice." ALI Study, supra note 236, at 368. Assuming that foreclosure of jurisdictional objections is reasonably adapted (i.e., "necessary") to achieving such ends, the question remains whether foreclosure is always "proper." See Gary Lawson & Patricia B. Granger, The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause, 43 Duke L.J. 267, 288–97 (1993).

[251] See Wright & Kane, supra note 238, at 31 (calling this a "tenable argument"); Gao, supra note 6, at 2399 (calling this a "protective jurisdiction" argument).

Critics of the current regime might argue, however, that the long-standing presumption against the existence of federal jurisdiction is not itself constitutionally compelled. If so, then it might mean that no affirmative showing of jurisdiction is called for beyond a party's decision to come to federal court. Perhaps one might even treat such a decision as itself some evidence of jurisdiction, akin to a party's say-so respecting citizenship at common law. Traditionally, and necessarily, the jurisdiction of a court to determine whether it has jurisdiction has been premised on nothing more than such a decision. But this notion of incipient jurisdiction does not readily translate to a power to continue to resolve the merits of a pending case absent some additional evidence of jurisdiction beyond the parties' decision to come to court. Of course, the limitation on post-judgment inquiry into jurisdiction might itself be seen as based on nothing more than a decision to come to court coupled with the passage of time. But after a final judgment, one might reasonably indulge the assumption—as the Court has[252]—that the federal court that rendered the initial judgment might have implicitly passed upon any question of jurisdiction and resolved it favorably. Much before that point, however, the assumption becomes less easy to maintain and hard to square with historic practices.[253]

b. The Persistence of a Threshold Focus

(i). Federal Questions—At a practical level, the problem of belated jurisdictional challenges mainly affects diversity cases. In most settings, federal question jurisdiction continues to operate in a manner that is reminiscent of the old prima facie jurisdiction regime. As noted above, if the well-pleaded complaint shows that the case arises under federal law, jurisdiction will exist, even as to le-

[252] Des Moines Nav. & R.R. Co. v. Iowa Homestead Co., 123 U.S. 552, 557–58 (1887); cf. Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 377–78 (1940) (applying res judicata to a jurisdictional question not raised in the prior proceeding).

[253] Such an assumption becomes impossible to maintain when the jurisdictional cutoff is linked to the time within which to plead because, at that juncture, it is unlikely that the district court will have had any occasion even to look at the complaint.

gally insufficient claims that are nonfrivolous.[254] If the claim is "substantial" in this respect, then subsequent events are irrelevant to the continued existence of judicial power.[255] And if, for example, there are accompanying supplemental state law claims between co-citizens, a federal court may hear them on the merits, even after dismissing the federal claim.[256] The predicate for continued jurisdiction over the state law claims, however, is the initial assertion of a nonfrivolous federal claim for relief—a claim whose dismissal remains a live issue for appeal.

One of the few qualifications to this pleading-focused approach is that jurisdictional dismissal may occur when post-complaint factual development reveals justiciability problems. For example, a plaintiff may be unable to demonstrate constitutional standing even though she may have stated a claim for relief under a federal law with broad statutory standing.[257] There are also congressionally created claims that treat certain statutory prerequisites as questions of jurisdictional fact to be resolved ahead of the merits, but

[254] See Arbaugh v. Y & H Corp., 546 U.S. 500, 513 n.10 (2006) (stating that jurisdictional dismissal is proper if the claim "is not colorable, *i.e.*, if it is 'immaterial and made solely for the purpose of obtaining jurisdiction' or is 'wholly insubstantial and frivolous'" (quoting Bell v. Hood, 327 U.S. 678, 682–83 (1946))).

[255] See Clermont, supra note 9, at 1011–13 (noting that the substantiality requirement operates as a prima facie showing of jurisdiction).

[256] See 28 U.S.C. § 1367(a), (c) (2000) (predicating supplemental jurisdiction on a claim within the federal court's "original jurisdiction," and stating that dismissal of the supplemental claim is a question of discretion); cf. United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966) (stating, prior to the enactment of § 1367, that the exercise of supplemental jurisdiction is discretionary). Scholars trace the jurisdictional substantiality requirement in this setting to *Levering & Garrigues Co. v. Morrin*, 289 U.S. 103 (1933). See Richard A. Matasar, Rediscovering "One Constitutional Case": Procedural Rules and the Rejection of the *Gibbs* Test for Supplemental Jurisdiction, 71 Cal. L. Rev. 1399, 1419 & n.78 (1983) (criticizing, however, *Gibbs*'s reliance on *Levering*).

[257] See, e.g., Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992). Focusing the jurisdictional inquiry merely on the successful allegation of a claim under such a statute may sometimes be inadequate because the plaintiff could conceivably prevail at trial on the statutory claim without adducing evidence directed to the requirements of Article III. Other justiciability issues, such as mootness, may also present questions that cannot be resolved on the face of the complaint. See also Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49, 68 (1987) (Scalia, J., concurring in part and concurring in the judgment) ("[S]ubject-matter jurisdiction can be called into question *either* by challenging the sufficiency of the allegation *or* by challenging the accuracy of the jurisdictional facts alleged.").

post-complaint.[258] Yet despite such examples, federal question jurisdiction remains largely a threshold inquiry, one that focuses primarily on the pleadings.[259] In addition, whether the requisite jurisdictional showing has been met remains an open question throughout the litigation, whether or not objected to initially.

It is uncertain, however, whether those who propose limits on raising jurisdictional objections are prepared to permit the defendant to raise a belated jurisdictional challenge to a plaintiff's jurisdictionally insubstantial federal claim. Perhaps, if these critics are prepared to uphold the maintenance of jurisdiction over state law claims when diversity may be lacking and not even alleged, they would not be troubled by a federal court's continuing to hear a claim between nondiverse parties, even though no part of it even colorably arose under federal law. History would not support them in that effort, however, and there is no argument that discretion ever existed to ignore such a defect when brought to the court's attention before final judgment.

Admittedly, it is not likely that many complaints wholly lacking such allegations would go unnoticed for long, any more than would a complaint that failed to allege diverse citizenship. The minimal requirements, embodied in the Rules, that jurisdictional allegations be made in good faith and up-front, obviously help avoid such problems.[260] But the argument that Congress could give the federal courts the ability to continue to resolve the merits of a federal

[258] See, e.g., Rockwell Int'l Corp. v. United States, 127 S.Ct. 1397, 1405–06 (2007) (finding the requirement that a qui tam relator be the "original source" of the underlying allegations was expressly jurisdictional); see also Clermont, supra note 9, at 1018 (noting that questions of jurisdictional fact may sometimes overlap with the merits). Professor Clermont persuasively argues that when questions of jurisdictional fact are inseparable from the merits, only a prima facie jurisdictional showing should be needed for the case to go forward. Id. at 1018–19. As an historical matter, however, a prima facie showing could also establish even wholly severable jurisdictional facts (such as citizenship), and pleading alone could suffice for such a showing. See supra Subsection I.B.2.

[259] In addition, what may look like a jurisdictional question is often better treated as a merits question. See *Arbaugh*, 546 U.S. at 516 (2006) (denying jurisdictional status to Title VII's fifteen-employee requirement); see also Howard M. Wasserman, Jurisdiction and Merits, 80 Wash. L. Rev. 643 (2005). Some find the merits-jurisdiction divide untenable as a general proposition. See Evan Tsen Lee, The Dubious Concept of Jurisdiction, 54 Hastings L.J. 1613, 1615–27 (2003).

[260] See Fed. R. Civ. P. 8(a) (requiring a statement of jurisdiction); Fed. R. Civ. P. 11(b) (requiring a good faith basis for factual and legal assertions).

question case after belatedly noticing its jurisdictional insubstantiality is a difficult one,[261] and one that would have seemed foreign even in earlier pleading regimes that freely countenanced jurisdictional waiver.

(ii). Diversity—In addition, and notwithstanding the demise of the evidentiary value of allegations of citizenship, vestiges of the prima facie jurisdiction regime continue to lurk even in diversity suits. Questions regarding jurisdictional amount have long been resolved largely on the face of the plaintiff's allegations.[262] In addition, courts still insist that diverse citizenship exist at the time the complaint is filed,[263] failing which, dismissal may follow at any stage before final judgment. If diversity was initially present, however, the traditional practice has been that post-filing changes, such as a change in a party's domicile, will ordinarily not defeat it.[264]

To be sure, the old Court allowed jurisdictionally valid parts of incomplete diversity cases to continue to be heard by permitting the nondiverse parties to be jettisoned, assuming they were otherwise dispensable.[265] Similarly, the modern Court has upheld a federal court's judgment when complete diversity existed at the time judgment was entered, although it did not exist at the time of the lawsuit's removal from state court.[266] It has even allowed the salvaging of jurisdictionally valid slices of judgments on appeal by the post-judgment dismissal of the jurisdiction-offending claim or party.[267] The "'all's well that ends

[261] Of course, under a regime of jurisdictional foreclosure, a court might finesse the problem by dismissing the case for failure to state a claim. But such a dismissal would not be jurisdictional, nor would it necessitate the dismissal of supplemental claims.

[262] See supra notes 22 & 186. As Professor Clermont has noted, it is hard to imagine any other approach because, as is also often true of federal question cases, the factual allegations that bear on jurisdiction are wrapped up in the merits. Clermont, supra note 9, at 1008.

[263] As the Court did in *Morgan's Heirs v. Morgan*, 15 U.S. (2 Wheat.) 290, 297 (1817). Removal jurisdiction additionally focuses at the point the suit is filed in state court. See supra note 176.

[264] See, e.g., Mollan v. Torrance, 22 U.S. (9 Wheat.) 537, 539 (1824).

[265] See Conolly v. Taylor, 27 U.S. (2 Pet.) 556, 565 (1829).

[266] Caterpillar Inc. v. Lewis, 519 U.S. 61, 64 (1996). Removal jurisdiction has long been treated less rigorously than original jurisdiction. See, e.g., Mackay v. Uinta Dev. Co., 229 U.S. 173, 176 (1913) (disallowing a post-judgment attack on removal by the removing party when the original jurisdiction requirements were met).

[267] Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826, 832–33, 837 (1989). In *Carneal v. Banks*, 23 U.S. (10 Wheat.) 181, 188 (1825), the Court appeared to uphold

well'"[268] attitude toward the cure of jurisdictional defects of these last-mentioned decisions is perhaps in some tension with the otherwise single-minded focus on the pleadings and the time of filing. But it is not as though these modern practices were wholly lacking in historical pedigree.[269] Furthermore, these decisions, unlike some of the proposals for jurisdictional foreclosure, still insist on an evidentiary showing that diversity existed at the commencement of litigation as between the remaining parties.[270]

3. Limited Jurisdictional Foreclosure

Although history may provide support for proposals to limit the raising of jurisdictional objections in federal courts, the discussion above has identified limits that may attend certain of the more ambitious features of those proposals. Those limits indicate that critics of the present system might have to settle for something less than what they have thus far proposed. But how much less? Least controversially, the practices discussed in Parts I and II of this paper might support an effort to resurrect some aspects of the older prima facie jurisdiction regime that existed well into the last century. That is, Congress might attempt to restore evidentiary status to pleadings of jurisdictional fact,[271] including in diversity litigation,

jurisdiction, post-judgment, over a portion of a case that involved diverse parties, despite the presence of dispensable nondiverse parties.

[268] *Caterpillar*, 519 U.S. at 74.

[269] See supra notes 266–267.

[270] These expressions of jurisdictional flexibility are not without their critics. For example, Justices have objected to retroactive post-judgment cures of jurisdictional defects. See *Newman-Green*, 490 U.S. at 839–43 (Kennedy & Scalia, JJ., dissenting). In addition, the Court declined to apply the "all's well" rationale when a partnership was diverse from its opponent at trial, but not at the outset of litigation. Grupo Dataflux v. Atlas Global Group, L.P., 541 U.S. 567, 574–75 (2004). The Court has also opined that joinder of a nondiverse party in a diversity case could jurisdictionally "contaminate[]" the case, making the entire suit appropriate for dismissal, apparently even if the party was not indispensable. Exxon Mobil Corp. v. Allapattah Serv., 545 U.S. 546, 564–65 (2005).

[271] If such pro forma allegations seem entirely too easy at a time when pleadings tend to perform so little work, one could insist on a more detailed or sworn showing. The ALI proposed a heightened pleading option, under which a plaintiff could disable a defendant from relying on a proposed exception that would have allowed the defendant to raise a belated jurisdictional objection if it was based on facts not previously discoverable with the exercise of reasonable diligence. ALI Study, supra note 236, at 423–24.

sufficient for a federal court to continue to hear a case in the absence of a timely attack. Returning an evidentiary quality to jurisdictional allegations would not necessarily mean that the burden of establishing jurisdiction, if challenged, would have to lie with the challenger (as was once the case). Nor would such allegations retain their evidentiary status in the face of timely raised contradictory evidence outside the pleadings (as was also once the case). Finally, free amendment could continue to prevent inadequate allegations from resulting in dismissal.

The New Deal Court's eventual decision to deny pleadings their evidentiary status on questions of jurisdictional fact was a result of a plausible but not inevitable interpretation of the 1875 Judiciary Act. The Court did not suggest, however, that its reading was constitutionally compelled (nor, likely, were the confirmatory Rules and statutes enacted soon thereafter),[272] and consistent practice both before and after the Act argues against such a reading. On the other hand, as urged above, the Constitution may well pose a barrier to foreclosing jurisdictional objections before final judgment if the record cannot sustain even prima facie jurisdiction. A similar constitutional barrier may also prevent foreclosure of certain issues connected with justiciability and other Article III defects.[273]

[272] Current jurisdictional statutes—based on the 1948 Judicial Code—lack the 1875 Act's language requiring dismissal "at any time" when jurisdiction was shown lacking. Instead, they bar improper or collusive joinder to secure jurisdiction in diversity cases. See 28 U.S.C. § 1359 (2000); see also 28 U.S.C. § 1447(c) (2000) (requiring remand of removed cases when the absence of jurisdiction appears "at any time before final judgment"). Legislative history suggests the post-Rules elimination of the older language was inconsequential because federal courts would always dismiss whenever their jurisdiction was shown to be lacking, thus perhaps indicating a constitutional understanding of such a requirement. See 28 U.S.C. § 1359 (2000) (historical and revision notes). While a constitutional reading may be plausible, it is probably not the best one. See Matasar, supra note 256, at 1432–38. *Mansfield*'s observation that its whenever-and-however approach to jurisdictional objections inheres in the constitutional structure remains valid, however, when the pleadings reveal insufficient evidence of jurisdiction or positively contradict it, as in *Mansfield* itself. See supra Subsection II.B.2.

[273] It might be arguable that allegations that, on their face, satisfy justiciability concerns should suffice to permit a case to proceed to trial in the absence of a timely challenge. Cf. David M. Roberts, Fact Pleading, Notice Pleading, and Standing, 65 Cornell L. Rev. 390 (1980) (arguing for a notice-pleading approach to standing). If the facts relevant to justiciability diverge from the merits, however, resolution of the merits at trial might fail to address jurisdictional facts relating to justiciability. Some might find

To conclude that there may be historical and constitutional warrant for some kind of limited jurisdictional foreclosure is not to endorse it, however. Whether to adopt any such proposal raises a complex set of issues different from those on which this paper has focused, and they can only be highlighted here. At the level of policy, however, the various proposals probably merit more skepticism than they have received, and history may be instructive on this score as well.

An across the board cut-off of objections after the passage of a fixed amount of time—perhaps a very brief amount of time—has the potential to compromise the federal courts' limited jurisdiction in a manner not unlike the common-law pleading regime of the early Republic. Even if one takes as a given that that older regime had constitutional sanction, the more open-ended policing of the accuracy of jurisdictional allegations ushered in by the 1875 Act was surely an improvement, particularly in an era of expanded jurisdictional opportunities. To be sure, the current system's allowance of tardy jurisdictional objections, whenever and however, occasionally results in wasted resources in individual cases. But foreclosing objections too quickly is likely to result in unnecessary expenditure of federal judicial resources overall.[274] Discretion to allow tardy objections on an ad hoc basis could counter-balance some of those costs, but carries with it the usual problems of unpredictability and unevenness of application associated with non rule-like solutions. Furthermore, to the extent that discretion may have once played a role in the allowance of jurisdictional objections under the 1875 Act, it was probably more a vice than a virtue of the nonuniform procedural regime of that era. In any event, assigning a cut-off date for objections as early as the initial responsive pleading seems calculated more toward guaranteeing a lack of care in the invocation of jurisdiction and in the courts' consideration of it than toward the conservation of any significant resources.

this problematic, even if justiciability is shown on the face of the complaint. See supra note 257.

[274] In addition, some costs are simply unavoidable. For example, unless critics mean to deny appeals of even timely jurisdictional objections (or, unless such issues must be appealed immediately, at perhaps even greater costs to the system), eleventh-hour jurisdictional reversals following trials on the merits will continue, as with any reversible error.

Instead of scrapping the existing regime wholesale as most critics have proposed, perhaps the prima facie jurisdiction model could be better deployed in a category-specific manner. That is, Congress might selectively target those last-minute jurisdictional objections that seem especially odious and to which critics routinely point. Obvious candidates could include parties who successfully invoke federal jurisdiction only to attack it after losing on the merits, or the "wily defendant"[275] who conceals jurisdiction-negating information peculiarly within its knowledge, only to reveal it if it later becomes advantageous to do so. Apart from these more egregious examples, it might make sense to attempt to identify recurring patterns of successful, late-raised jurisdictional objections worthy of legislative consideration.[276] At the moment, however, it is not clear how severe a problem of wasted resources is presented by the last minute raising of jurisdictional issues, or, if it is a problem, whether it is something that the older notion of prima facie jurisdiction could always solve.

CONCLUSION

Although the Constitution makes clear that federal courts are limited in their jurisdiction, it does not prescribe the manner in which jurisdictional issues are to be resolved or the degree to which a court must be persuaded that jurisdiction exists. Many questions of jurisdiction turn on issues of fact which, in turn, present eviden-

[275] See ALI Study, supra note 236, at 366.

[276] Jurisdictional missteps associated with unincorporated business organizations, for example, appear to present a recurring, if still infrequent, phenomenon. See Belleville Catering Co. v. Champaign Mkt. Place, L.L.C. 350 F.3d 691, 692 (7th Cir. 2003) (chastising "litigants' insouciance toward the requirements of federal jurisdiction" and listing six cases over seventeen years in which the U.S. Court of Appeals for the Seventh Circuit reversed or vacated because of unnoticed jurisdictional defects in cases involving business organizations). As in *Belleville Catering* itself, however, diversity may not even sufficiently appear on the face of the pleadings, meaning that prima facie jurisdiction is lacking as well. A less problematic solution might be legislative redefinition of the citizenship of unincorporated organizations. Cf. 28 U.S.C.A. § 1332(d)(10) (2006) (redefining citizenship of "unincorporated association[s]" in certain class action litigation along the lines of corporate citizenship). Alternatively, meaningful sanctions or other orders to redress fast practices or simple sloppiness could shift litigants' costs to the attorneys even if they might not always remedy costs incurred by the federal courts. See *Belleville Catering Co.*, 350 F.3d at 694 (stating that counsel should perform future services in connection with the dismissed case for free).

tiary questions that can admit of a variety of rational solutions. In the early Republic, Congress and the courts understandably relied on common-law practices and thereby gave pleadings a sizeable role in settling jurisdictional questions. Later eras have made different choices as to the role that pleadings should play in resolving disputes over jurisdictional facts. But whatever the choice, traditionally and necessarily there always has been a requirement of a sufficient evidentiary basis from which a court can rationally resolve the jurisdictional question, one way or another.

Tied in with such choices are questions of constitutional structure. Lowering the jurisdictional showing that the party who seeks entry into federal court must make, while keeping the barriers to jurisdictional objections high, promises the fullest exercise of federal judicial power, yet it does so at the potential cost of compromising constitutional and congressional limits. Raising the jurisdictional showing while lowering the barriers to objections is more likely to safeguard those limits, but it may impose other costs on the system and litigants. Over time, and paralleling the expansion of federal jurisdiction, Congress and the courts have moved from arrangements resembling the first of these options to arrangements more nearly resembling the second. They seem to have done so in large part because changing procedural climates have made the litigation of jurisdictional facts a progressively easier proposition than may once have been true at common law, when such litigation was affirmatively discouraged.

The current regime that allows the raising of jurisdictional defects in pending cases in any manner and at any time may seem like a "fetish" to some.[277] But all-out attacks on it have had a somewhat ritualistic quality to them as well. At the end of the day, the current system's costs might well be managed by relatively minor alterations to the existing framework that have historical and constitutional support. For much of the nation's history, and particularly in the early Republic, pleadings could supply independent evidence of jurisdiction, sufficient to uphold it in default of a timely objection. A partial return to this older idea of prima facie jurisdiction would permit legislative targeting of the most glaring practices associated with the current regime, including last-minute challenges

[277] ALI Study, supra note 236, at 366.

to jurisdiction by the disappointed party who successfully invoked it. But this theory cannot be stretched to permit across-the-board or even ad hoc jurisdictional foreclosure in the absence of any evidence of jurisdiction, as some proposals would allow. Besides, there has been no suggestion that these sorts of practices are anything other than exceptional, either now or formerly. Consequently, even if there may be some historical and constitutional warrant for doing so, there may be little cause for wholesale abandonment of federal jurisdiction's venerable (if sometimes overstated) "first principle."