

# Systemic Jurisdictional Ambiguity

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*The purpose of jurisdictional rules is to provide reasonably clear signals about when a court does and does not have power over a case. Judging from the modern Supreme Court's rules for determining jurisdiction, however, one would think jurisdictional rules need neither be clear nor consistent. From rules for determining standing, federal question jurisdiction, and personal jurisdiction to Erie doctrine and the power of Congress to create non-Article III courts—rules that affect the administration of justice in millions of cases every year—modern jurisdictional rules are notorious for their inconsistency and ambiguity. This level of ambiguity is remarkable given the zeal with which the Court has imposed clear statement rules on Congress, the feverish concern it has shown for inefficiency in other phases of litigation such as pleading and discovery, and its own high rhetoric emphasizing the signal importance of clarity in jurisdictional rules.*

*The costs of unclear jurisdictional rules are palpable. They are internalized by ordinary people who lack the resources to make speculative investments in jurisdictional litigation or to endure the jurisdictional maneuvers of deep-pocketed adversaries who can exploit indeterminacy to impose delay and soak up court resources. Oscillation between different rules of decision also leaves Congress, state legislatures, state courts, and lower federal courts guessing about where the boundaries of their power lie.*

*Modern scholarly commentary contributes to the problem. It generally reads jurisdictional ambiguity through the lens of legal realism as understandable, if not inevitable, because jurisdiction is considered inherently complex. But, as this Article demonstrates, the most embarrassing ambiguities in modern doctrine are entirely of the Court's own making—a result not of inherent complexity, but rather a consistent failure on the part of both liberal and conservative justices to prioritize clarity as a rule of law value in developing jurisdictional rules. The Court has also exploited ambiguity by speaking the language of judicial restraint while simultaneously amplifying its own power at the expense of Congress, state courts, and lower federal courts. This Article defends the value of clarity both to the rule of law and access to justice.*

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*The Social and Legal Costs of Unclear Rules for Jurisdiction*

“[T]he court offices continue their business and the case gets passed to higher courts, gets passed back down to the lower courts and so on, backwards and forwards, sometimes faster, sometimes slower, to and fro. It’s impossible to know exactly what’s happening while this is going on . . . .”

FRANZ KAFKA, *THE TRIAL*<sup>1</sup>

## INTRODUCTION

If Oliver Wendell Holmes was right that the law is “nothing more pretentious than” what the courts “do in fact,”<sup>2</sup> what becomes of the law when their decisions are inconsistent and ambiguous? What happens when courts make it impossible to say what the law is? In legal theory, the determinacy of substantive rights, what H. L. A. Hart called “primary rules,”<sup>3</sup> is said to be the very essence of the rule of law. Without knowing what their substantive rights are, people cannot plan and take action with notice of what will subject them to legal coercion.<sup>4</sup> Uncertainty about primary rules creates uncertainty about taking action in the world. Excessive uncertainty invites both exploitation and excessive restraint—wrongful acts by some and unnecessary inhibition by others.

Are clarity and consistency important attributes of jurisdictional rules as well? In Hart’s theory, jurisdictional rules are “rules of recognition”: rules that distinguish lawful commands from brute force.<sup>5</sup> They do so by identifying authoritative legal decision makers and, therefore, who has the power to define and rectify violations of primary rules.<sup>6</sup> In this way, they are part of the architecture of the rule of law—a predicate of the shift away from “violent self help by private individuals.”<sup>7</sup> Jurisdictional rules, along with other rules of procedure, support public confidence that disputes can be peacefully resolved through identifiable legal process.<sup>8</sup> Because litigation is one of the most basic mechanisms for defining contested substantive rights, jurisdictional rules contribute not only to the resolution of specific disputes, but also to rights

1. FRANZ KAFKA, *THE TRIAL* 167 (David Wyllie trans., 2003).

2. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897).

3. H. L. A. HART, *THE CONCEPT OF LAW* 81 (3d ed. 2012).

4. *Id.* at 97.

5. A “rule which confers jurisdiction will also be a rule of recognition, identifying the primary rules through the judgments of the courts,” and making these judgments a valid “‘source’ of law.” *Id.*

6. Jurisdictional rules empower courts to make “authoritative determinations” of the question whether, on a particular occasion, a primary rule has been broken, and to “direct the application of penalties.” *Id.* at 97–98; see also BRIAN Z. TAMANAHA, *ON THE RULE OF LAW: HISTORY, POLITICS, THEORY* 66 (2004) (explaining that laws should be certain so that individuals subject to the laws know what legal rules govern their conduct and how the rules will be applied). The Supreme Court accepts this basic function of jurisdictional rules. See *Boechler, P.C. v. Comm’r of Internal Revenue*, 142 S. Ct. 1493, 1497 (2022) (“Jurisdictional requirements mark the bounds of a ‘court’s adjudicatory authority.’” (quoting *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004))).

7. HART, *supra* note 3, at 97.

8. *Id.*

definition. A jurisdictional rule fails as a rule of recognition if it fails to signal when participation in litigation is necessary, where a case can or must be filed, and when a judicial decision defining primary rules counts as authoritative.

Judging from the modern Supreme Court's rules for determining jurisdiction, however, one would think that jurisdictional rules needn't be either clear or consistent. From its rules for determining standing, federal question jurisdiction, and personal jurisdiction, to *Erie* doctrine and the power of Congress to create non-Article III courts, the defining features of modern doctrine are inconsistency and ambiguity. These features are all the more remarkable given the Pavlovian zeal with which the Court has imposed "clear statement" rules on Congress,<sup>9</sup> its feverish concern for wasteful transaction costs in other phases of litigation (including discovery and trial),<sup>10</sup> and its own rhetoric repeatedly emphasizing the importance of clarity in jurisdictional rules.<sup>11</sup>

Perfecting jurisdictional clarity can, like consistency, become a fool's errand. Indeed, the Court may not even mean what it says when it emphasizes the importance of jurisdictional clarity. As Scott Dodson has compellingly argued, "virtually every jurisdictional doctrine contains opacity that the Court continues to defend, despite its simultaneous rhetoric to the contrary."<sup>12</sup> The most fundamental reason for persistent ambiguity and inconsistency, he contends, is not *stare decisis*, a "silent penchant for flexibility and discretion," or a belief "that Congress intended such uncertainty."<sup>13</sup> It is that jurisdiction "is inherently complex, uncertain, and difficult. As a result, attaining jurisdictional clarity is practically impossible, and it is no small wonder that attempts to do so have fallen short or been abandoned."<sup>14</sup> As Elizabeth McCuskey pithily

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9. For a recent example in the law of jurisdiction itself, see *Wilkins v. United States*, 143 S. Ct. 870, 876–77 (2023), which applies a clear statement rule to avoid the conclusion that a time bar imposed by Congress is jurisdictional. See also *Boechler*, 142 S. Ct. at 1498–99 (same). On the more general proliferation of clear statement rules, see John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399 (2010). Even more broadly, there is an emerging critique of how the Court and Congress use other substantive clarity rules to limit or expand judicial review. See Richard M. Re, *Clarity Doctrines*, 86 U. CHI. L. REV. 1497, 1498–99 (2019) (examining clarity rules in the context of habeas corpus, *Chevron* deference, qualified immunity, constitutional avoidance, and the rule of lenity); Leah Litman, *Remedial Convergence and Collapse*, 106 CALIF. L. REV. 1477, 1482–83 (2018) (examining clarity rules in the context of qualified immunity, *Bivens*, habeas corpus, and the exclusionary rule).

10. See, for example, the Court's discussion of the difficulty of managing discovery costs in reversing five decades of precedent interpreting Federal Rule of Civil Procedure 8 in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007), and the Court's expansion of the role of summary judgment in *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986).

11. See, e.g., *Hertz Corp. v. Friend*, 559 U.S. 77, 96 (2010) (explaining that "in view of the necessity of having a clearer rule, we must accept" problems of under and over inclusiveness in adopting a headquarter test of corporate citizenship for diversity jurisdiction; it "is the price the legal system must pay to avoid overly complex jurisdictional administration while producing the benefits that accompany a more uniform legal system").

12. Scott Dodson, *The Complexity of Jurisdictional Clarity*, 97 VA. L. REV. 1, 14 (2011).

13. *Id.*

14. *Id.*; see also Dustin E. Buehler, *Solving Jurisdiction's Social Cost*, 89 WASH. L. REV. 653, 657 (2014) (arguing that federalism and efficiency are "fundamentally incommensurable" and that "jurisdictional values are inherently pluralistic and multipolar").

observes, “clarity is somewhat overvalued in theory and underachieved in practice.”<sup>15</sup>

But the fact that a legal task is difficult does not mean it is any less valuable or that abandoning it leads to more socially beneficial outcomes. Naïve legal realists may throw their hands up in the face of indeterminacy, but neither courts nor litigants have this luxury. To avoid wasting resources, both litigants and courts need to know at the earliest possible phase of litigation whether a court has power. The costs of unclear jurisdictional rules are palpable, especially for ordinary people who cannot afford to make speculative investments in litigation or to endure the jurisdictional maneuvers of deep-pocketed adversaries.<sup>16</sup>

For example, whatever one thinks the rule for determining personal jurisdiction should be, it shouldn’t take years to sort out. Having lost four fingers in a metal shearing machine in 2001, Robert Nicastro had to wait ten years to learn whether the courts of the state of New Jersey—where he lived and the accident occurred—had personal jurisdiction over the English company that made the machine.<sup>17</sup> Whatever one thinks the best rule for determining the constitutionality of adjudication in federal administrative agencies and legislative courts should be, the basic test should be clear. Millions of litigants need to know the answer each year to resolve disputes for everything from securities fraud to disability benefits. Yet, for more than four decades, neither the litigants who appear before these non-Article III courts, nor the judges who sit on them, nor Congress have known what test governs their constitutionality.<sup>18</sup> Whatever qualities one thinks should define a suit that “arises under” federal law, it is embarrassing that litigants whose cases rest on state law causes of

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15. Elizabeth Y. McCuskey, *Clarity and Clarification: Grable Federal Questions in the Eyes of Their Beholders*, 92 NEB. L. REV. 387, 388 (2013). On the history of jurisdictional complexity, see generally Daniel Klerman, *Jurisdictional Competition and the Evolution of the Common Law*, 74 U. CHI. L. REV. 1179 (2007).

16. Systematic empirical evidence is limited, but there is a consensus among courts and commentators on the cost of litigating jurisdiction. See *Henderson v. Shinseki*, 562 U.S. 428, 434–35 (2011) (“Jurisdictional rules may [ ] result in the waste of judicial resources and may unfairly prejudice litigants. . . . [I]f the trial court lacked jurisdiction, many months of work on the part of the attorneys and the court may be wasted.” (citations omitted)); *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 818 (1988) (“Parties often spend years litigating claims only to learn that their efforts and expense were wasted in a court that lacked jurisdiction.”). For scholarly assessments gathering research on litigation incentives and costs associated with unclear jurisdictional rules, see Dustin E. Buehler, *Jurisdictional Incentives*, 20 GEO. MASON L. REV. 105, 109 (2012) (“Unclear and restrictive jurisdictional rules increase the likelihood of procedural disputes, inflate litigation costs, and decrease the expected benefit from suit, making it less likely that plaintiffs will file lawsuits. This in turn increases the likelihood that injurers will escape liability and will be inadequately deterred from engaging in wrongful conduct.”). On the importance of cost as a factor in litigating jurisdiction, see generally Geoffrey P. Miller, *In Search of the Most Adequate Forum: State Court Personal Jurisdiction*, 2 STAN. J. COMPLEX LITIG. 1 (2014); cf. Daniel Klerman, *Rethinking Personal Jurisdiction*, 6 J. LEGAL ANALYSIS 245, 250–53 (2014) (using economic theory to suggest that with respect to personal jurisdiction there are contexts in which “the forum is unlikely to significantly affect overall litigation costs”).

17. *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 894 (2011) (Ginsburg, J., dissenting).

18. See *Stern v. Marshall*, 564 U.S. 462, 504 (2011) (Scalia, J., concurring) (“The sheer surfeit of factors that the Court was required to consider in this case should arouse suspicion that something is seriously amiss with our jurisprudence in this area. I count at least seven different reasons given in the Court’s opinion for concluding that an Article III judge was required to adjudicate this lawsuit . . .”).

action involving federal issues cannot ascertain with confidence whether they can be filed in or removed to federal court. Confusion persists a century and a half after Congress established general federal question jurisdiction.<sup>19</sup>

As these examples suggest, one problem is that the Supreme Court has repeatedly oscillated between different rules fundamental to the administration of justice. This lack of clarity leaves lawyers, litigants, Congress, state courts, and lower federal courts guessing what rule applies. This is true not only of personal jurisdiction and non-Article III courts doctrine, but also of *Erie* doctrine. I take up these cases in Part II.

A second problem is that, even when the Court eventually lands on a single rule, the rule is all too often riddled with ambiguity. This is true of recent developments in personal jurisdiction and arising under jurisdiction—issues I examine in Part III.

A third issue is the Court's inconsistent application of well-established rules in ways that arrogate power to the Court even as it speaks the language of judicial restraint. This is true in the doctrines of standing, *Erie*, non-Article III courts, and, to a lesser extent, personal jurisdiction. I discuss these cases in Part IV.

Notably, scholarly commentary on jurisdictional ambiguity tends to focus on the second problem—problems of ambiguity as they arise in the context of a single doctrine of jurisdiction.<sup>20</sup> There has been no effort to grapple with

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19. See *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 314 (2005). Subject matter jurisdiction defects “cannot be waived or forfeited, must be raised by courts *sua sponte*, and [generally] do not allow for equitable exceptions.” *Boechler, P.C. v. Comm’r of Internal Revenue*, 142 S. Ct. 1493, 1497 (2022). Litigation costs are amplified by the non-waivability of subject matter jurisdiction defects. See Buehler, *supra* note 14, at 655.

20. On ambiguity in non-Article III courts doctrine, see Erwin Chemerinsky, *Formalism Without a Foundation*: Stern v. Marshall, 2011 SUP. CT. REV. 183, 185 (criticizing the Court’s test for determining constitutionality of non-Article III adjudication); Ralph Brubaker, *Non-Article III Adjudication: Bankruptcy and Nonbankruptcy, With and Without Litigant Consent*, 33 EMORY BANKR. DEVS. J. 11, 15 (2016) (attempting to rationalize the inconsistency between the courts functional and categorical tests for determining the constitutionality of non-Article III adjudication); Anthony J. Casey & Aziz Z. Huq, *The Article III Problem in Bankruptcy*, 82 U. CHI. L. REV. 1155, 1157–59 (2015) (“[The Court’s approach] has yielded an entangling briar patch of ambiguous rules and a sheaf of doctrinal puzzles . . . about the fundamental premises of Article III’s application to the bankruptcy context.”).

On ambiguity in “arising under” jurisdiction, see generally McCuskey, *supra* note 15 (examining *Grable*’s rejection of a “bright line” rule for “arising under” jurisdiction); Paul R. Gugliuzza, *Rising Confusion About “Arising Under” Jurisdiction in Patent Cases*, 69 EMORY L.J. 459 (2019) (analyzing the ambiguity surrounding the scope of the lower federal courts’ exclusive jurisdiction over cases arising under patent law).

On ambiguity in specific personal jurisdiction, see Allan Ides, *Foreword: A Critical Appraisal of the Supreme Court’s Decision in J. McIntyre Machinery, Ltd. v. Nicastro*, 45 LOY. L.A. L. REV. 341, 345 (2012) (noting that *Nicastro* “exacerbated rather than ameliorated the doctrinal confusion” in personal jurisdiction and showed “a disappointing level of judicial competence”); Henry S. Noyes, *The Persistent Problem of Purposeful Availment*, 45 CONN. L. REV. 41, 78 (2012) (“Although the three opinions in *Nicastro* reveal agreement on several principles—including the shared view that purposeful availment is a requirement—they did not resolve the confusion regarding what constitutes purposeful availment.”); *id.* at 44 n.8 (gathering other commentary critical of *Nicastro*); Buehler, *supra* note 16, at 111 (“[T]he Court’s *Nicastro* opinion creates significant uncertainty in jurisdictional law.”); Peter R. Bryce, Note, *Whither Fairness? In Search of a Jurisdictional Test*

*systemic* ambiguity across jurisdictional rules.<sup>21</sup> Modern commentary is also generally apologetic regarding jurisdictional ambiguity, seeing it as largely understandable, if not inevitable.<sup>22</sup> But even if clarity should not be a “thoughtless mantra” pursued at all costs, it is still properly considered a ground norm, and it deserves higher priority in the elaboration of jurisdictional law than either the modern Court or civil procedure commentary gives it.<sup>23</sup> This is the thesis I defend in the following pages.

Clarity is not without costs (bright line rules can be blunt, inequitable instruments), but pervasive ambiguity is by far the greater problem in the law of jurisdiction as it currently stands. Strikingly, as I shall seek to demonstrate, the most embarrassing ambiguities in modern doctrine are entirely of the Court’s own making—a result not of inherent complexity, but rather failure by both liberal and conservative justices to prioritize clarity as a rule of law value in developing the law of jurisdiction. The principal culprit is a form of “maximalism,” in which justices tend to approach the definition of jurisdictional law as an exercise in individual crude preference maximization.<sup>24</sup> The justices

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*After J. McIntyre Machinery v. Nicastro*, 80 *FORDHAM L. REV.* 2975, 3001–02 (2012) (noting that due to the ambiguities of Justice Breyer’s concurring opinion in *Nicastro*, foreign corporations “continue under the uncertainty of the old regime”).

On ambiguity in *Erie* doctrine, see Suzanna Sherry, *Wrong, Out of Step, and Pernicious: Erie as the Worst Decision of All Time*, 39 *PEPP. L. REV.* 129, 142 (2011) (noting that seventy years after *Erie*, “[t]here is no more a ‘satisfactory line of demarcation’ between substance and procedure . . . than there was between general and local law under [Swift v. Tyson, 41 U.S. 1 (1842)]” (quoting *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 74 (1938))); Kevin M. Clermont, *The Repressible Myth of Shady Grove*, 86 *NOTRE DAME L. REV.* 987, 990 (2011) (arguing that *Shady Grove* “does little to move the *Erie* doctrine” in part “because of its splintered opinions”).

A notable exception is Scott Dodson’s work on the Court’s ongoing struggle to distinguish rules that are merely procedural from those which should be considered jurisdictional. See generally Scott Dodson, *A Critique of Jurisdictionality*, 39 *REV. LITIG.* 353 (2020).

21. There are thoughtful works comparing two doctrines, such as Glenn S. Koppel, *The Functional and Dysfunctional Role of Formalism in Federalism: Shady Grove Versus Nicastro*, 16 *LEWIS & CLARK L. REV.* 905, 907 (2012). But few papers address problems of ambiguity across more than one or two jurisdictional rules, limiting our understanding of the breadth of jurisdictional ambiguity and the role of maximalism in exacerbating it. A notable exception is Howard M. Wasserman’s examination of the Roberts Court’s treatment of jurisdiction in the context of other developments in procedure. See generally Howard M. Wasserman, *The Roberts Court and the Civil Procedure Revival*, 31 *REV. LITIG.* 313, 315–16 (2012) (praising the Roberts Court’s efforts to bring clarity to some areas of jurisdiction in the context of a broader analysis of the Court’s procedure precedents). As the following analysis shows, even if there are some areas of increased clarity, the problem of ambiguity persists and in some cases has been exacerbated by the modern Court.

22. See Dodson, *supra* note 12, at 14, 42. Frederic Bloom goes farther, characterizing jurisdiction doctrine as a kind of “noble lie” resting on a false façade of jurisdictional clarity. See generally Frederic M. Bloom, *Jurisdiction’s Noble Lie*, 61 *STAN. L. REV.* 971 (2009) (discussing the flexibility and complexity of jurisdiction).

23. Dodson, *supra* note 12, at 23.

24. Maximalism is a term of many meanings. Here, I use it in the sense derived from political science to capture the “predisposition to seek unconditional victory,” along with its by-products under conditions of value pluralism and shared power: division, dissensus, alienation of potential allies, “gridlock,” and “polarization.” David Close & Gary Prevost, *Introduction: Transitioning from Revolutionary Movements to Political Parties and Making the Revolution “Stick,”* in *FROM REVOLUTIONARY MOVEMENTS TO POLITICAL PARTIES: CASES FROM LATIN AMERICA AND AFRICA* 10 (Kalowatie Deonandan, David Close & Gary Prevost eds., 2007). Empirical debate about preference ordering on the Court is rich. See generally, e.g., Douglas R. Rice, *Issue*

regularly give priority to specific outcomes, policy objectives, and interpretive commitments over decision values such as adherence to precedent, balancing competing policy objectives, and speaking with one voice. The result is not just confusion and increased litigation costs for people seeking justice. Some forms of jurisdictional ambiguity have significantly amplified the Court's power under the guise of judicial restraint.

### I. CLARITY AND LEGAL INDETERMINACY: THE REALIST CRITIQUE

Before turning to the case law, it will be helpful to address the charge that certainty is a fool's errand in legal interpretation. H. L. A. Hart rather famously dismissed the problem of legal indeterminacy. He was not a formalist who believed in strict legal determinacy. But he did believe that in a functional legal system the application of a rule to a given set of facts usually "need[s] no interpretation" because "the recognition of instances seems unproblematic or 'automatic,' [and] . . . there is general agreement in judgments as to the applicability of the classifying terms."<sup>25</sup> Indeterminacy exists, but it arises mainly from the "open texture" of language in which rules are expressed, and therefore arises only in the "penumbra": an outer "fringe of vagueness" surrounding a core of determinate settled meanings.<sup>26</sup>

Hart also thought that indeterminacy at the margins was "an advantage rather than a disadvantage, in that it allows rules to be reasonably interpreted

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*Divisions and US Supreme Court Decision Making*, 79 J. POL. 210 (2017) (summarizing studies of increase in and strategy behind dissenting opinions). But there is no debate that the Court has become more fractured over the last fifty years, issues more dissenting opinions, decides fewer cases, and writes much longer opinions. See Brian Goff, *Supreme Court Consensus and Dissent: Estimating the Role of the Selection Screen*, 122 PUB. CHOICE 483, 483 (2005) ("Before 1940 justices wrote dissenting opinions in only about 10 percent of the cases, while after 1940 the typical percentage approached 70 percent. Likewise, justices voting with the majority began to express their differing views about the bases for their votes by writing concurring opinions in a much greater percentage of cases after this date. For most of the first century and one-half of the Court's existence, fewer than one in twenty cases were decided by a one-vote majority in a given year. Over the past sixty years about one in every six cases and sometimes more than one out of every four cases hinged on the ballot of a single justice."); Adam Feldman, *Empirical SCOTUS: Something We Haven't Seen in the Supreme Court Since the Civil War*, SCOTUSBLOG (Apr. 16, 2020), <https://www.scotusblog.com/2020/04/empirical-scotus-something-we-havent-seen-in-the-supreme-court-since-the-civil-war> (noting that the Supreme Court regularly decides fewer than sixty cases a term, reaching "historic lows"); Adam Feldman, *Empirical SCOTUS: An Opinion Is Worth at Least a Thousand Word*, SCOTUSBLOG (Apr. 3, 2018), <https://www.scotusblog.com/2018/04/empirical-scotus-an-opinion-is-worth-at-least-a-thousand-words> (observing that "the mean majority-opinion length steadily increased from under 4,000 words to over 6,000 words" between 1950 and 2016). I leave to empiricists generalizations about causation and correlation across the Court's docket. This Article simply provides evidence of maximalism in the jurisdiction cases it examines. Note that this use of the term "maximalism" is different from the debate about whether the Court should issue sweeping "maximalist" decisions or "minimalist" decisions strictly confined to the contours of the specific case before it. See CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* 9–10 (1999) (contrasting "maximalism" and "minimalism" in judicial decisions).

25. HART, *supra* note 3, at 126. Hart was in good company. See BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 129 (1921) ("In countless litigations, the law is so clear that judges have no discretion. They have the right to legislate within gaps, but often there are no gaps. We shall have a false view of the landscape if we look at the waste spaces only, and refuse to see the acres already sown and fruitful.")

26. HART, *supra* note 3, at 123.

when they are applied to situations and to types of problems that their authors did not foresee or could not have foreseen.”<sup>27</sup> Over time, as new situations are dealt with, consensus develops around them, and new “fact-situations” are “continually thrown up by nature or human invention, which possess only some of the features of the plain cases but others which they lack.”<sup>28</sup> Hart conceded that “[n]othing can eliminate this duality of a core of certainty and a penumbra of doubt when we are engaged in bringing particular situations under general rules.”<sup>29</sup> But the existence of indeterminacy at the margin does not undermine the rule of law. Rather, it is part of what makes a legal system flexible and responsive to social needs—providing sufficient guidance to avoid arbitrariness without the inelasticities in meaning that can make law stifling and authoritarian.

Mid-twentieth century legal realists, by contrast, believed the problem of indeterminacy was pervasive and unavoidable.<sup>30</sup> “For the realist, there is no way to confine indeterminacy to some peripheral region of the law.”<sup>31</sup> Not only did they see “multiple potential points of indeterminacy due to rule vagueness,” rather than “a single point as Hart’s account” suggests, realists believe that “in almost any case which reached the state of litigation, a judge could find opinions which read relevant precedents as stating a contrary rule. The common-law judge thus faced an indeterminate legal situation in which he had to render a decision by choosing which of the competing rules was to govern the case,”<sup>32</sup> knowing that the choice among competing rules would “lead[] to opposing outcomes. It is this [ ] form of indeterminacy which the realist saw as the deepest and most pervasive.”<sup>33</sup> Not only might there be ambiguity in how a known rule applies because of “some vague general term”—what linguists call lexical and semantic ambiguity<sup>34</sup>—realists argued that “the choice of which rules to apply in the first place is not dictated by the law . . . .”<sup>35</sup>

Hart was somewhat dismissive of the realists’ charge, claiming that—much like lexical and semantic ambiguity—indeterminacy about the controlling rule was also a problem at the margins. In the “vast majority of decided cases,” he argued, “there is very little doubt” what the controlling rule is or at least “that a

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27. Brian Bix, *H. L. A. Hart and the “Open Texture” of Language*, 10 *LAW & PHIL.* 51, 52 (1991).

28. HART, *supra* note 3, at 126.

29. *Id.* at 123.

30. *Id.* at 126.

31. Andrew Altman, *Legal Realism, Critical Legal Studies, and Dworkin*, 15 *PHIL. & PUB. AFFS.* 205, 208 (1986).

32. *Id.* at 209.

33. *Id.*

34. See, e.g., Ron Borowsky & Michael E. J. Masson, *Semantic Ambiguity Effects in Word Identification*, 22 *J. EXP. PSYCH.: LEARNING, MEMORY, & COGNITION* 63, 63 (1996).

35. Altman, *supra* note 31, at 209. On linguists’ analysis of ambiguity, see DAVID LANIUS, *STRATEGIC INDETERMINACY IN THE LAW* 129 (2019) (discussing the presence and significance of semantic ambiguity in the law).

given formulation is adequate.”<sup>36</sup> Whereas Hart assumed that interpretation is constrained by common professional norms and values in ways that hold indeterminacy at the margins, realists tended to treat the problem of indeterminacy as intractable. No matter how hard a judge tries, and no matter what common norms and values judges share, indeterminacy bedevils the enterprise of interpretation.

The realists’ claim was not purely jurisprudential. Realism was instrumental to the mid-century New Deal project of replacing adjudication in court with the technocratic social-scientific expertise of agencies.<sup>37</sup> Indeed, the project was as *jurisdictional* as it was jurisprudential—it established entirely new rules of recognition limiting the power of courts over the definition and enforcement of substantive rights and expanded the power of agencies.<sup>38</sup>

The realist critique has proved durable, but the most sophisticated modern treatments of the debate over legal indeterminacy recognize that all language requires interpretation (a concession to realism) while recognizing Hart’s contention that conventions (shaped among other things by the professional training, norms, habits, and dispositions of an interpretive community) do in fact constrain interpretation.<sup>39</sup> Joseph Singer insists both that we are all legal realists now and that mature realism recognizes the existence and utility of interpretive categories.<sup>40</sup> Interpretation requires the exercise of judgment, and good judgment entails taking responsibility for indeterminacy rather than obscuring it in formalisms or giving free rein to passion, preference, and politics. When this responsibility is embraced, it limits the areas in which it is plausible to contend that no reading is incorrect. When this responsibility is rejected, on the other hand, indeterminacy expands and, paradoxically, it leaves one “unable to say that a case was wrongly decided (or, of course, rightly) . . . an appalling predicament for a lawyer to land in.”<sup>41</sup> By glorifying or “touting indeterminacy,” naïve and radical legal realists “squander the possibility of saying anything.”<sup>42</sup>

36. Altman, *supra* note 31, at 210 (quoting HART, *supra* note 3, at 131). On the connection to linguistic theory on how conventions determine interpretation, see J. L. AUSTIN, HOW TO DO THINGS WITH WORDS 31–32 (J. O. Urmson & Marina Sbisa eds., 2d ed. 1975).

37. See RONEN SHAMIR, MANAGING LEGAL UNCERTAINTY: ELITE LAWYERS IN THE NEW DEAL 131–57 (1995); see also Marcus J. Curtis, *Realism Revisited: Reaffirming the Centrality of the New Deal in Realist Jurisprudence*, 27 YALE J.L. & HUMANS. 157, 171 (2015) (“The realist call for judicial deference to administrative agencies similarly stemmed from a belief that these agencies’ expertise and greater familiarity with social conditions made them better adjudicators of the proper scope of regulations than the courts.”).

38. It is no accident that landmark mid-century precedents on jurisdiction (*Erie*, *Crowell*, *Shoe*) are saturated in realism.

39. A fine example, summarizing this as a consensus view, is Timothy A. O. Endicott, *Linguistic Indeterminacy*, 16 OXFORD J. LEGAL STUD. 667, 671 (1996).

40. Joseph William Singer, *Legal Realism Now*, 76 CALIF. L. REV. 465, 470–72 (1988). Mature realism thus incorporates pragmatic sensibilities about the importance of categories in legal interpretation. See Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787, 821–25 (1989); Thomas C. Grey, *Hear the Other Side: Wallace Stevens and Pragmatist Legal Theory*, 63 S. CAL. L. REV. 1569, 1590 (1990) (“[P]ragmatism is the implicit working theory of most good lawyers.”).

41. Endicott, *supra* note 39, at 674.

42. *Id.*

The following analysis defends these premises about the possibility of achieving, and the wisdom of pursuing, reasonable determinacy in the rules that define jurisdiction. That is the standard of clarity to which judges should aspire.

## II. PLURAL RULES OF DECISION

Plural rules of decision are disturbingly common in the modern law of jurisdiction. As I demonstrate in this Part, this is largely a problem of the Court's making through its abandonment of norms of consensus, restraint, and clarity, rather than a problem of insurmountable ambiguities in the underlying constitutional principles. Not surprisingly, indeterminacy is amplified when justices attempt to maximize their own policy preferences. The phenomenon is pronounced in cases involving personal jurisdiction, *Erie* doctrine, and non-Article III courts.

### A. SPECIFIC PERSONAL JURISDICTION

*International Shoe Co. v. Washington* upheld the exercise of long arm jurisdiction over foreign defendants based on their business contacts with a state,<sup>43</sup> rejecting the strict territorial conception of jurisdiction tied to defendants' property, physical presence, or consent to suit.<sup>44</sup> *International Shoe's* minimum contacts test is situationally ambiguous because its multiple factors invite courts to make "all things considered" judgments about the nature and degree of contact with a forum state and whether the exercise of jurisdiction would be reasonable.<sup>45</sup> But the governing principle of minimum contacts analysis was clear when the Court decided *International Shoe*: As a general matter, there is no due process objection to having to answer in the courts of a forum for significant activities there.<sup>46</sup>

The hard questions were of the kind Hart predicts, out at the margins—for example, just how incidental could a corporation's contacts with a forum be? Did intent matter? These questions came to the Court because of predictable incentives that shape forum shopping on the part of both plaintiffs and defendants and that induce state courts to hold foreign corporations to answer for injuries caused in their states. Answers to hard questions can, as Hart argued, elicit consensus as they are decided. But the Burger and Rehnquist Courts instead fractured the rule, seeking to create a test that would expand due process objections to the exercise of personal jurisdiction over foreign corporations. The Court's division is evident at least as early as *World-Wide Volkswagen Corp. v.*

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43. 326 U.S. 310, 316 (1945).

44. *Pennoyer v. Neff*, 95 U.S. 714, 722 (1878).

45. *Int'l Shoe Co.*, 326 U.S. at 317 ("[The] demands [of due process] may be met by such contacts of the corporation with the state of the forum as make it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there.").

46. *Id.* ("'Presence' in the state . . . has never been doubted when the activities of the corporation there have not only been continuous and systematic, but also give rise to the liabilities sued on, even though no consent to be sued . . . has been given.").

*Woodson* in 1980.<sup>47</sup> The case involved the assertion of jurisdiction in the courts of Oklahoma over a New York importer and dealer who sold an Audi that crashed while the plaintiffs were driving through Oklahoma.<sup>48</sup> What made this a boundary case is that, unlike the German car manufacturer who did not contest jurisdiction because it had significant sales in the state, the New York dealer and importer had no direct contact with the state of Oklahoma apart from selling the car that happened to crash there.<sup>49</sup> They conducted no business in the state at all. Instead, the question was whether the use of the car in Oklahoma was a foreseeable contact.<sup>50</sup>

The Court could have held that inquiry into the foreseeable stream of commerce is irrelevant when a plaintiff unilaterally takes a product into another forum—even if it is foreseeable, what matters for due process purposes is that the defendant played no role in it. That would have accorded with the longstanding principle in *Hanson v. Denckla* that “unilateral activity” of the consumer cannot create jurisdiction over the producer.<sup>51</sup> Alternatively, the majority could have elaborated a precise test for foreseeability. Instead, however, the majority held both that foreseeability was relevant (stating tautologically that foreseeability assesses whether a defendant “should reasonably anticipate being haled into court”)<sup>52</sup> and that defendants are liable only when they “purposefully avail” themselves of a forum.<sup>53</sup> Purposeful availment requires *intentional* acts of the defendant: “[S]ome act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State . . . .”<sup>54</sup> This is a considerably narrower standard than foreseeability, which encompasses constructive knowledge. If the Court meant to endorse purposeful availment by arguing that it is a limited category of foreseeable contact with a forum state, this was a clumsy way to do it.

The dissents were even less faithful to *International Shoe*. Justice Brennan, for example, argued that the minimum contacts test was “outdated” given the dynamic nature modern commercial transactions.<sup>55</sup> In his view, the

47. 444 U.S. 286 (1980).

48. *Id.* at 288.

49. *Id.* at 289.

50. *Id.* at 295.

51. 357 U.S. 235, 253 (1958) (“The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State.”).

52. *World-Wide Volkswagen*, 444 U.S. at 287.

53. *Compare id.* at 297 (“This is not to say, of course, that foreseeability is wholly irrelevant. But the foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant’s conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.” (citation omitted)), *with id.* (“When a corporation ‘purposefully avails itself of the privilege of conducting activities within the forum State,’ it has clear notice that it is subject to suit there, and can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to consumers, or, if the risks are too great, severing its connection with the State.” (citation omitted)).

54. *Hanson*, 357 U.S. at 253.

55. *World-Wide Volkswagen*, 444 U.S. at 308 (Brennan, J., dissenting).

“constitutional concepts of fairness no longer require the extreme concern for defendants that was once necessary.”<sup>56</sup> Endorsing an even more “liberal view of jurisdiction,” Justice Brennan argued that foreign defendants should be subject to suit in any state that has “a substantial interest in seeing its own law applied to the transaction” where “considerations of fairness or efficiency” do not “point in the opposite direction.”<sup>57</sup>

The result of the majority’s fuzzy handling of foreseeability and the dissents’ maximalism was that state and lower federal courts had no idea whether foreseeability, traditional minimum contacts analysis, or purposeful availment provided the required measure of due process. When the Court next addressed the issue in *Asahi Metal Industry v. Superior Court of California*,<sup>58</sup> the doctrine notoriously fractured even further. Four justices concluded that purposeful availment was the proper test and four concluded that foreseeability was the proper test. A judgment was entered only because eight justices agreed that the exercise of jurisdiction on the facts of the case would be unreasonable.<sup>59</sup>

When the Court finally returned to the issue decades later in *J. McIntyre Machinery, Ltd. v. Nicastro*, foreseeability was squarely rejected, but remarkably, the Court could not agree on a coherent formulation of purposeful availment.<sup>60</sup> Four justices held that conduct by the defendant must target the forum state, two concurring justices thought the plurality’s test was too narrow but declined to offer an alternative, and three dissenting justices argued that targeting a market in the United States is purposeful availment of all states in which the market exists.<sup>61</sup> As a result, ambiguity about the scope of purposeful availment lingers.

Prior to *Nicastro*, purposeful availment generally applied to outer boundary cases—that is, cases involving “unilateral activity” of a plaintiff taking a product to a forum *outside* the chain of distribution, beyond the point of sale, customer service, advertising, and so on.<sup>62</sup> A defendant obviously does not intentionally target a jurisdiction to which the plaintiff unilaterally carries a product if they do no other business there. But in *Nicastro*, the plurality held that purposeful

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56. *Id.* at 309.

57. *Id.* at 310 (Brennan, J., concurring) (quoting *Shaffer v. Heitner*, 433 U.S. 186, 225–26 (1977)).

58. 480 U.S. 102 (1987).

59. *Id.* at 116. Perhaps hoping that contractual clarity could compensate for the mess the Court had made of the due process limits on personal jurisdiction, the Court held that almost any forum selection clause would be enforceable. *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 593–94 (1991).

60. 564 U.S. 873, 883, 885 (2011).

61. *Id.* at 877; *id.* at 890 (Breyer, J., concurring); *id.* at 893 (Ginsburg, J., dissenting).

62. *Hanson v. Denckla* used the language of purposeful availment in the sentence immediately following its emphasis on the plaintiff’s “unilateral activity” taking the trust instrument to a state in which the defendant had no commercial relations whatsoever. 357 U.S. 235, 253 (1958). Justice O’Connor’s opinion in *Asahi Metal Industry v. Superior Court of California* contemplated a broader role for purposeful availment, but there were only four votes in favor of that approach, and even her definition of purposeful availment would uphold jurisdiction beyond the point of sale if the defendant advertises, provides customer service, designs the product for the forum state, or uses a distributor to make sales in the forum state. 480 U.S. 102, 105, 108–13 (1987) (plurality opinion).

availment could preclude jurisdiction even *within* the chain of distribution as long as a nominally independent distributor was responsible for the sale in the forum state rather than the manufacturer.<sup>63</sup> Gone too was the language from *World-Wide Volkswagen* indicating that a defendant may be subject to personal jurisdiction in a forum it targets “*indirectly*.”<sup>64</sup>

After the embarrassing divisions in *Asahi*, it is puzzling, to say the least, that the Court granted certiorari only to decide *Nicastro* in a plurality opinion.<sup>65</sup> The votes to reject foreseeability were available—no Justice in *Nicastro* advocated for Justice Brennan’s foreseeability test. The only question was what version of purposeful availment should decide the case. By inventing a new, narrow version, the conservative justices in the plurality guaranteed that there would be no majority opinion.<sup>66</sup> In an effort to lend weight to its maximalist analysis, the plurality stressed the hypothetical plight of a “small Florida farm” selling to a large distributor and then having to answer in “Alaska or any number of other States’ courts.”<sup>67</sup> But this is precisely the inequity that the reasonableness inquiry of the traditional minimum contact test was designed to address. It focuses on the burden to the defendant of having to answer in a distant

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63. *Nicastro*, 564 U.S. at 885–86. To support this new version of purposeful availment the majority had to revive the idea that personal jurisdiction rests on state sovereignty—that “if another State were to assert jurisdiction in an inappropriate case, it would upset the federal balance, which posits that each State has a sovereignty that is not subject to unlawful intrusion by other States.” *Id.* at 884. This raises a welter of questions about what exercises of personal jurisdiction “intru[de]” upon other states or “upset the federal balance.” *Id.*

64. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295 (1980) (“Nor does the record show that [the defendants] regularly sell cars at wholesale or retail to Oklahoma customers or residents, or that they *indirectly, through others*, serve or seek to serve the Oklahoma market.” (emphasis added)).

65. On the prevalence of plurality opinions and the uncertainty they produce, see Pamela C. Corley, Udi Sommer, Ami Steigerwalt & Artemus Ward, *Extreme Dissensus: Explaining Plurality Decisions on the United States Supreme Court*, 31 JUST. SYS. J. 180, 181 fig. 1 (2010) (noting a steady increase over twentieth century).

66. State and lower federal courts continue to apply a broader test for minimum contacts. *See, e.g.*, *Book v. Doublestar Dongfeng Tyre Co.*, 860 N.W.2d 576, 596 (Iowa 2015) (emphasizing that whether the defendant was aware of sales directly to Iowa “is irrelevant” and counting indirect shipments of the product to the forum state by third parties); *id.* at 597 (agreeing with Justice Ginsburg’s *Nicastro* dissent that “a manufacturer cannot ‘Pilate-like wash its hands of a product by having independent distributors market it.’” (quoting *Nicastro*, 564 U.S. at 894 (Ginsburg, J., dissenting))); *Ainsworth v. Moffett Eng’g, Ltd.*, 716 F.3d 174, 177 (5th Cir. 2013) (refusing to adopt the plurality approach in *Nicastro*, narrowly construing Justice Breyer’s concurring opinion, and continuing to apply the “stream of commerce” approach “under which the minimum contacts requirement is met so long as the court finds that the defendant delivered the product into the stream of commerce with the expectation that it would be purchased by or used by consumers in the forum state” (internal quotation marks omitted) (citation omitted)); *L.W. v. Audi AG*, 108 Cal. App. 5th 95, 114 (2025) (similar); *Boustred v. Align Corp.*, 410 P.3d 640, 646 (Colo. Ct. App. 2016) (collecting cases that read *Nicastro*’s plurality “only on the narrowest rationale contained in the concurrences”); *Boat Serv. of Galveston, Inc. v. NRE Power Sys., Inc.*, 429 F. Supp. 3d 261, 269 (E.D. La. 2019) (“[I]n the Fifth Circuit ‘foreseeability’ is still the ultimate arbiter of whether a foreign manufacturer defendant has subjected itself to the jurisdiction of a forum state under the stream-of-commerce standard.”); *Cincinnati Ins. v. Samsung SDI Co.* 612 F. Supp. 3d 1220, 1231 (N.D. Ala. 2020) (“Because no test ‘clarifying’ *World-Wide Volkswagen* has garnered a majority, foreseeability as a criterion for purposeful availment remains limited to the amorphous test articulated in that case . . . .”); *see also* Frank Deale, J. McIntyre and the *Global Stream of Commerce*, 16 CUNY L. REV. 269, 301–17 (2013) (discussing various state and lower federal court applications of *Nicastro*).

67. *Nicastro*, 564 U.S. at 885.

forum.<sup>68</sup> Tellingly, the plurality said not a word about this part of minimum contacts analysis in its expansion of purposeful availment.

The decision is thus a textbook example of maximalism, not unlike Justice Brennan's effort to unwind *International Shoe* from the other direction in *World-Wide Volkswagen*. The plurality made its narrow version of purposeful availment a priority over the clarity available through a more moderate, consensus definition.<sup>69</sup> The result is that specific personal jurisdiction has depended on multiple conflicting rules for decades. Lower courts have subsequently divided along the lines of the plurality and concurring opinions in *Nicastro*, as well as the fractured opinions in *Asahi*.<sup>70</sup>

## B. *ERIE* DOCTRINE

### 1. The Roots of *Erie* Maximalism

Maximalism and oscillation between different rules are also prominent features of diversity jurisdiction. In this area, unlike specific personal jurisdiction, it is progressive rather than conservative maximalism that has amplified ambiguity. *Erie Railroad Co. v. Tompkins* required federal courts sitting in diversity to apply state law rules of decision concerning substantive rights.<sup>71</sup> The holding is grounded in federalism—the proposition that federal courts have no power to create general federal common law.<sup>72</sup> State law is the only valid source of substantive rules of decision. At the level of policy, deference to state substantive law was supposed to reduce forum shopping between state and federal courts invited by *Swift v. Tyson*.<sup>73</sup> Justice Brandeis was especially concerned about forum shopping by corporations which, with the stroke of a pen, could alter their state citizenship to create diversity jurisdiction

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68. See *Asahi Metal Indus. Co. v. Sup. Ct. of Cal.*, 480 U.S. 102, 114 (1987).

69. *Id.* at 110. The Court knows how to give clarity priority in personal jurisdiction. It has done so with general personal jurisdiction. See *Daimler AG v. Bauman*, 571 U.S. 117, 121–22 (2014); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 920 (2011).

70. For lower courts' reliance on Justice Kennedy's *Nicastro* plurality opinion, see, for example, *LNS Enters. LLC v. Cont'l Motors Inc.*, 464 F. Supp. 3d 1065, 1074 (D. Ariz. 2020); *Tile Unlimited, Inc. v. Blanke Corp.*, 47 F. Supp. 3d 750, 756 (N.D. Ill. 2014). For reliance on Justice Breyer's *Nicastro* concurring opinion, see, for example, *Knox v. MetalForming, Inc.*, 914 F.3d 685, 691 (1st Cir. 2019); *Bros. & Sisters in Christ, LLC v. Zazzle, Inc.*, 42 F.4th 984, 953 (8th Cir. 2022); *Polar Electro Oy v. Suunto Oy*, 829 F.3d 1343, 1349 (Fed. Cir. 2016); *Ainsworth*, 716 F.3d at 176. Among the courts that continue to look to *Asahi*, there remains disagreement as to whether Justice Brennan or Justice O'Connor set forth the proper approach. *Compare Innovation Ventures, LLC v. Custom Nutrition Lab'ys, LLC*, 946 F. Supp. 2d 714, 721 n.3 (E.D. Mich. 2013) (explaining that because *Nicastro* failed to "conclusively resolve the debate between the two main competing *Asahi* opinions," the court would continue to apply the "Sixth Circuit's preference for the 'stream of commerce plus'" test set forth in Justice O'Connor's *Asahi* plurality), with *Smith v. Teledyne Cont'l Motors, Inc.*, 840 F. Supp. 2d 927, 929 (D.S.C. 2012) (similar); and *Boat Serv. of Galveston, Inc.*, 429 F. Supp. 3d at 269 (relying on the foreseeability analysis).

71. 304 U.S. 64, 78 (1938).

72. *Id.* at 78–80.

73. 41 U.S. 1 (1842).

and either take advantage of favorable general federal common law, avoid unfavorable state substantive law, or both.<sup>74</sup>

But *Erie* and the Federal Rules of Civil Procedure enabled forum shopping based on *procedural* differences between state and federal court. The Court sought to reduce this pressure in *Guaranty Trust Co. v. York*, declaring that all rules that “significantly affect the result” of a case are substantive.<sup>75</sup> The Court stressed that the “nub of the policy that underlies *Erie* is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away should not lead to a substantially different result.”<sup>76</sup> The Court concluded that statutes of limitation are therefore substantive rules, despite the fact that they regulate the timing of litigation, not the underlying conduct that is the subject of the dispute. This reached well beyond the holding of *Erie*. The Court went so far as to suggest that “a federal court adjudicating a State-created right solely because of the diversity of citizenship of the parties is for that purpose, in effect, *only another court of the State . . .*”<sup>77</sup>

By expanding federalism-based deference to state law in the name of strict uniformity, however, the Court eviscerated the common sense distinction between substantive rules that govern social action and procedural rules that govern litigation conduct. Labeling that distinction an unhelpful “abstraction,” the *York* Court replaced it with a blunt imperative drawn from *Erie*’s federalism policy.<sup>78</sup> Under the outcome determination test, even rules that are plainly and purely procedural (rules having *zero* bearing on primary social action) become “substantive.” Litigants adapted, expending litigation resources in an *Alice in Wonderland* “down the rabbit hole” exercise of arguing that procedural law is in fact substantive when the federal rule is unfavorable, but procedural when it is favorable.<sup>79</sup>

*York*’s federalism jurisprudence is unmistakably maximalist. Even distinctions between substance and procedure explicitly recognized by state law—the very law to which deference is supposedly due—were deemed irrelevant. Thus, a state court’s characterization of a rule as “procedural” or “remedial” rather than substantive was, as the majority insisted, “immaterial.”<sup>80</sup> The Court would decide what best satisfied *Erie*’s commitment to federalism. This was too much for Justice Rutledge, who called in a lone dissent for a more

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74. See *Erie*, 304 U.S. at 73–74 (discussing *Black & White Taxicab Co. v. Brown & Yellow Taxicab Co.*, 276 U.S. 518 (1928)); see also EDWARD A. PURCELL, *BRANDEIS AND THE PROGRESSIVE CONSTITUTION: ERIE, THE JUDICIAL POWER, AND THE POLITICS OF FEDERAL COURTS IN TWENTIETH CENTURY AMERICA* 101 (2000) (discussing the jurisprudence of Justice Brandeis and the controversy *Erie* has caused).

75. 326 U.S. 99, 109 (1945).

76. *Id.*

77. *Id.* at 108 (emphasis added).

78. *Id.* at 109.

79. See, e.g., *Hanna v. Plumer*, 380 U.S. 460, 461 (1965) (deciding whether method of service of process is procedural or substantive).

80. *York*, 326 U.S. at 109.

pragmatic approach grounded in common sense distinctions between substance and procedure:

One may give full adherence to the rule of *Erie*, and its extension to cases in equity insofar as they affect clearly substantive rights, without conceding or assuming that the long tradition, both federal and state, which regards statutes of limitations as falling within the category of remedial rather than substantive law, necessarily must be ruled in the same way . . . . The words ‘substantive’ and ‘procedural’ or ‘remedial’ are not talismanic. . . . But they have come to designate in a broad way large and distinctive legal domains [creating a] . . . danger either of nullifying the power of Congress to control not only how the federal courts may act, but what they may do by way of affording remedies, or of usurping that function, if the *Erie* doctrine is to be expanded judicially to include such situations to the utmost extent.<sup>81</sup>

Justice Rutledge was also the only justice to see that even if the line between substance and procedure is not perfectly clear, it is discernable in many cases. Over-enforcement of *Erie*’s federalism policy, he added, raises the specter of Supreme Court interference with, indeed, usurpation of, the prerogatives of Congress to control the jurisdiction and procedures of the Article III courts. He was right. Deference grounded in federalism to state rules of decision must ultimately be reconciled with separation of powers, the Supremacy Clause, and congressional authority over the rules of decision of Article III courts. *Erie*’s federalism principle, no matter how sacrosanct, does not license judicial arrogation of power belonging to Congress.

Congress had valid *substantive* lawmaking authority over the specific cause of action in *York*, not just power to create procedural rules of decision. The dispute, he noted, concerned “interstate transactions” closely related to “the kind of rights which Congress acted to safeguard when it adopted the Securities and Exchange legislation.”<sup>82</sup> Thus, although the “basic rights may be controlled by state law” in the complaint as written, those rights did not involve an area of exclusive state concern or common law beyond the power of Congress to regulate.<sup>83</sup> In this domain, the federalism principle of *Erie* was considerably weaker, counterbalanced by distinctive national interests in ensuring “adequate federal remedies, whether judicial or legislative, for the protection of security holders against the misconduct of issuers or against the breach of rights by trustees.”<sup>84</sup>

There had always been tension between *Erie* maximalism and the New Deal Court’s muscular regulatory jurisprudence under the Commerce Clause. With the New Deal Court’s approval, Congress used the Commerce Clause to

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81. *Id.* at 113, 115–16 (Rutledge, J., dissenting) (citations omitted).

82. *Id.* at 117.

83. *Id.* at 118.

84. *Id.* The risk to securities holders increases if defendants can use personal jurisdiction limits to forum shop for state choice of law rules that provide favorable state statutes of limitation to support dismissal.

regulate many areas traditionally governed by state common law,<sup>85</sup> and the Rules Enabling Act itself rested on congressional legislative authority to regulate the federal courts.<sup>86</sup> But the *Erie* maximalists in *York* simply ignored this tension, just as Justice Brandeis said nothing about it in *Erie* itself. Matters came to a head in *Hanna v. Plummer* when the Warren Court confronted a challenge to the enforcement of method of service of process under Federal Rule of Civil Procedure 4—a purely procedural rule created under the Rules Enabling Act.<sup>87</sup> According to the Court:

[I]t is difficult to argue that permitting service of defendant's wife [under Rule 4] to take the place of in-hand service of defendant himself [as required by state law] alters the mode of enforcement of state-created rights in a fashion sufficiently "substantial" to raise the sort of . . . problems to which the *Erie* opinion alluded.<sup>88</sup>

In this way, the Court broke from *York* by requiring *Erie* policy analysis of federal procedural rules rather than blunt outcome determination. But it went farther, addressing "the more fundamental flaw" in the idea that *Erie*'s federalism principles can override the Federal Rules of Civil Procedure and other validly legislated federal procedural law such as Title 28 of the United States Code and other statutes.<sup>89</sup> The majority in *Hanna* emphasized that *Erie* did not deal with a Federal Rule backed by the Rules Enabling Act, but rather the duty of care owed to a pedestrian walking along a railroad track—a question "which was 'substantive' in every [ ] sense."<sup>90</sup> In the context of procedural rules of decision, the Court continued:

[T]he constitutional provision for a federal court system . . . carries with it congressional power to make rules governing the practice and pleading in those courts, which in turn includes a power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either. . . . *Erie* and its offspring cast no doubt on the long-recognized power of Congress to prescribe housekeeping rules for federal courts even though some of those rules will inevitably differ from comparable state rules.<sup>91</sup>

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85. Compare *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937) (upholding the National Labor Relations Act under the Interstate Commerce Clause), with *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 550 (1935) (invalidating provisions of Live Poultry Code of Fair Competition for Metropolitan New York Area as an invalid exercise of federal power under the Interstate Commerce Clause).

86. Pub. L. No. 73-415, 48 Stat. 1064 (1934) (codified as amended at 28 U.S.C. § 2072); see also 28 U.S.C. §§ 2071–2077. *Erie* was decided in 1938, emphasizing the absence of federal authority over a tort committed by a railroad operating in interstate commerce, but the Court's famous switch on interpretation of the Commerce Clause began in 1937 in *Jones & Laughlin Steel Corp.*, 301 U.S. 1, and the Federal Rules of Civil Procedure took effect in 1938 under the Rules Enabling Act.

87. 380 U.S. 460, 468–69 (1965).

88. *Id.* at 469.

89. *Id.* at 469–70.

90. *Id.* at 471–72.

91. *Id.* at 472–73.

Federalism must give way to the Supremacy Clause and congressional regulatory authority over federal courts, at least when it comes to procedural rules Congress has enacted. Whatever else one makes of *Hanna*, it revealed the wisdom of Justice Rutledge's dissent in *York*, and it sought to conclusively resolve the substance/procedure debate as long as the relevant procedural law derives from a valid federal legislative source. *Erie* policy analysis applies to court-fashioned federal procedural rules in diversity cases but, in the absence of a Rules Enabling Act flaw,<sup>92</sup> federal courts must apply validly legislated federal procedural rules irrespective of conflicting state law.

Notably, the line *Hanna* drew for federally legislated procedural rules was even brighter than the line drawn earlier in *Byrd v. Blue Ridge Rural Electrical Cooperative* for constitutionally protected elements of the "federal system of allocating functions between judge and jury."<sup>93</sup> There, the Warren Court held that *Erie* and *York* did not, in view of the constitutional guarantee of a right to a jury trial under the Seventh Amendment, require federal courts to adhere to a state rule providing for a bench trial on the existence of an employment relationship between the injured plaintiff and alleged tortfeasor when the accident occurred.<sup>94</sup> But instead of announcing a clear default rule favoring the enforceability of constitutionally protected rules for federal trials under the Supremacy Clause, as it later would in *Hanna* for federally legislated procedural rules, the Court adopted a vague balancing test.<sup>95</sup> Under the spell of *Erie* and *York* maximalism, the *Byrd* Court characterized the Seventh Amendment as a mere "policy favoring jury decisions of disputed fact questions . . ."<sup>96</sup> The *Byrd* Court then inquired whether that policy "should yield to the state rule in the interest of furthering the objective that litigation should not come out one way in the federal court and another way in the state court."<sup>97</sup> The Court admitted that jury trial is an "essential factor" in the process of federal adjudication, but nevertheless subjected it to balancing.<sup>98</sup> Only after finding that the risk of nonuniform state-federal outcomes was low in the specific context of adjudicating employment status did the Court uphold the right to jury trial.<sup>99</sup>

Thus, even after *Hanna* clarified the rule for congressionally legislated rules of procedure, the Court had three different *Erie* tests: one for constitutionally required federal procedures that situationally assessed the effect on uniformity; one for federally legislated procedures that established a clear

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92. A. Benjamin Spencer, *Substance, Procedure, and the Rules Enabling Act*, 66 UCLA L. REV. 654, 687–88 n. 161 (2019).

93. 356 U.S. 525, 538 (1958).

94. The issue mattered to the jurisdictional determination whether the dispute would have to be resolved by a state workers compensation commission—employment status was thus an affirmative defense to the state law personal injury claim. *Id.*

95. *Id.* at 539.

96. *Id.* at 538.

97. *Id.*

98. *Id.* at 539 (citation omitted).

99. *Id.* at 540.

preemption-like default rule; and a third for judge-made procedural doctrine that applied traditional *Erie* policy analysis supported by *York*'s maximalist emphasis on outcome determination.

## 2. Modern *Erie* Confusion

Substantial uncertainty would have remained had the Court adhered to this already byzantine framework, but some of the most speculative strategic litigation over the enforceability of the Federal Rules would have been mitigated. *Hanna* also restricted the Court from superimposing its procedural policy preferences over the judgement of Congress expressed in Title 28, the Federal Rules, and other procedural legislation. However, just as the modern Court has fractured over specific personal jurisdiction, it has been unable to maintain even this minimal determinacy in *Erie* doctrine. The Court has further undercut the Seventh Amendment, muddied analysis of judge-made procedural rules, and splintered *Hanna*'s test for resolving questions about conflict between state law and the Federal Rules of Civil Procedure. Much of the confusion is a product of maximalism on the part of liberal justices attached to the federalism gospel expressed in *Erie* and *York*.

First, in *Gasperini v. Center for Humanities, Inc.*, a divided Court held that the re-examination clause of the Seventh Amendment does not protect the amount of a jury verdict in a federal trial from revision according to a state standard for excessive verdicts that is considerably more intrusive than the federal standard.<sup>100</sup> Under New York law, a jury verdict can be revised as excessive if, in the judgment of the court, it “deviates materially from what would be reasonable compensation.”<sup>101</sup> This standard confers vast discretion on the trial judge over a jury's verdict. The federal standard, by contrast, permits judicial intervention only if the verdict amount is so excessive that it “shock[s] the conscience.”<sup>102</sup> One might have thought that the re-examination clause—a constitutional guarantee of the Seventh Amendment far more specific than the right to a jury trial in *Byrd*—requires application of the federal standard in a federal court setting in diversity. But Justice Ginsburg's majority opinion didn't even begin its analysis by recognizing that the Seventh Amendment requirements are “essential factors” of federal adjudication. Instead, she began by emphasizing that the state rule is quasi-substantive because, like statutory damage caps, it limits damage recoveries.<sup>103</sup> Therefore, if federal courts sitting in diversity did not apply the state rule, the consequences could be outcome determinative, introducing “‘substantial’ variations between state and federal”

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100. 518 U.S. 415, 436 (1996).

101. N.Y. C.P.L.R. § 5501(c) (McKinney 2024).

102. *Gasperini*, 518 U.S. at 422 (citation omitted).

103. “We start from a point the parties do not debate . . . that a statutory cap on damages would supply substantive law for Erie purposes . . . . Although [the New York rule for review of excessive verdicts] is less readily classified, it was designed to provide an analogous control.” *Id.* at 428–29.

judgments.<sup>104</sup> From this foundation in *York*'s concern with strict uniformity, she concluded that the state standard should be controlling.<sup>105</sup> Justice Ginsburg noted that the Seventh Amendment prohibition was satisfied in spirit if not by the letter because an abuse of discretion standard would apply to federal appellate review of district court excessiveness decisions, whereas appellate review was more open ended under New York law and therefore less protective of the integrity of jury verdicts.<sup>106</sup>

Although the *Gasperini* opinion characterizes this approach and the conclusion it supports as consistent with *Byrd* and as avoiding conflict between the state standard and the Seventh Amendment, it surrenders Seventh Amendment analysis to *Erie*'s policy test for ordinary, judge-made procedural law. In this way, *Erie* federalism prevails over a textually specific constitutional right—perversely, a right which the framers created to *limit the power of judges* over juries. Justice Scalia's dissent characterized the majority approach as making “the classic *Erie* mistake of regarding whatever changes the outcome as substantive.”<sup>107</sup> The mistake here was even more grave given the constitutional prohibition on re-examination of facts and Rule 59, which under *Hanna* “undeniably” establishes a federal standard that should control over conflicting state law.<sup>108</sup>

Five years later in *Semtek International Inc. v. Lockheed Martin Corp.*, the Court introduced confusion into the one part of *Erie* jurisprudence that had seemed solid since the case was decided: the assessment of *judge-made* federal procedural rules.<sup>109</sup> Traditionally, judge-made procedural law was assessed through *Erie* policy analysis, asking if nonuniformity and forum shopping would be increased by application of the federal rule. Writing for a unanimous Court, Justice Scalia instead determined whether state or federal law governed the claim preclusive effect of a dismissal by looking to historical practice and tradition.<sup>110</sup> The Court reasoned that the law governing claim preclusion for federal courts is federal, but in diversity cases federal courts should incorporate state claim preclusion rules<sup>111</sup> as, for example, federal courts have long done for choice of law under *Klaxon Co. v. Stentor Electricity Manufacturing Co.*<sup>112</sup> The

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104. *Id.* at 429–30 (footnote omitted).

105. *See id.* at 437–38.

106. *Id.* at 435.

107. *Id.* at 465 (Scalia, J., dissenting).

108. *Id.* at 465, 468. *Erie* itself may rest on a grave mistake of statutory interpretation. Historians have shown that the Court's interpretation of the “laws of the several states” clause of the Rules of Decision Act was erroneous. The more plausible reading supports *Swift*'s conclusion that federal courts were authorized to generate substantive rules of decision sitting in diversity. *See* WILFRED J. RITZ, REWRITING THE HISTORY OF THE JUDICIARY ACT OF 1789: EXPOSING MYTHS, CHALLENGING PREMISES, AND USING NEW EVIDENCE, 137–48 (Wythe Hold & L. H. LaRue eds., 1990); Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 899–900 (1986).

109. 531 U.S. 497, 509 (2001).

110. *See id.* at 504.

111. *Id.* at 508.

112. 313 U.S. 487 (1941).

Court observed only in passing that federal reference to state law would be consistent with *Erie* policy analysis and, as if to underscore its ambivalence about *Erie*'s federalism principles in this context, it emphasized that "federal reference to state law will not obtain . . . in situations in which the state law is incompatible with federal interests."<sup>113</sup> The decision was unanimous, presumably because the result (adherence to state rules of decision) pleased *Erie* maximalists even if the method of analysis was quite different.

The Roberts Court has also muddied the rule in *Hanna* for federally legislated procedural rules. Its resolution of *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*<sup>114</sup> is embarrassingly fractured—the *Erie* equivalent of *Asahi* in specific personal jurisdiction. The case involved a federal class action under Rule 23 to recover statutory interest for late health care insurance reimbursements.<sup>115</sup> Allstate challenged the jurisdiction of the district court on the grounds that New York state law categorically prohibits aggregate litigation for statutory damages. In light of that state law prohibition, Allstate argued that the case could not proceed as a class action in federal court. Five justices agreed that the case could proceed in federal court under Rule 23.<sup>116</sup> But Justice Scalia's *Hanna*-like opinion reaching this conclusion—that Federal Rules rationally classifiable as procedural are controlling over conflicting state law<sup>117</sup>—was joined by only three other justices, and one section by just two other justices.<sup>118</sup>

In a four-vote dissent, Justice Ginsburg not only reached a different conclusion, but she justified it through an entirely different framework reminiscent of her opinion in *Gasperini*. In her view, the proper test is whether Rule 23 and the New York statute truly conflict.<sup>119</sup> Relying heavily on pre-*Hanna* maximalist cases and the Rules Enabling Act, she argued that the Court's first obligation is to seek out interpretations of Federal Rules that avoid conflicts with state rules and protect state regulatory policies. Only completely irreconcilable conflicts are "unavoidable" and trigger *Hanna*'s preemptive effect.<sup>120</sup> She emphasized that New York's remedy-specific aggregate litigation ban serves a "manifestly substantive end: Limiting a defendant's liability in a single lawsuit in order to prevent the exorbitant inflation of penalties."<sup>121</sup> Rule 23 can be rendered consistent with this important state regulatory interest by distinguishing the process of certification set out in the rule from the remedies that may be pursued under state law through certification (an issue on which

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113. *Semtek*, 531 U.S. at 509.

114. 559 U.S. 393, 416 (2010).

115. *Id.* at 397.

116. *Id.* at 395.

117. *Hanna v. Plumer*, 380 U.S. 460, 472 (1965).

118. *Shady Grove*, 559 U.S. at 395–96.

119. *Id.* at 437 (Ginsburg, J., dissenting).

120. *Id.* at 440, 452.

121. *Id.* at 445 (citation omitted).

“Rule 23 is silent”).<sup>122</sup> Because Shady Grove could pursue any remedy *other than statutory damages* in a federal class action (such as actual damages, injunctive or declaratory relief) or sue in New York court individually for statutory damages, there simply was no conflict. Full effect could be given to both Rule 23 and New York’s prohibition on statutory damages in class actions. “By finding a conflict without considering whether Rule 23 rationally should be read to avoid any collision, the Court unwisely and unnecessarily retreats from the federalism principles undergirding *Erie*.”<sup>123</sup>

Justice Stevens wrote separately to endorse most of Justice Ginsburg’s method of analysis, including the view that even state *procedural* law is controlling whenever it is “so intertwined with a state right or remedy that it functions to define the scope of the state-created right,”<sup>124</sup> but he disagreed that this approach required accommodation of the New York statute in this case. Blaming the ambiguity manufactured by the Court’s *Erie* jurisprudence on Congress, he emphasized that “[t]he question is what rule Congress established. Although Justice Scalia may generally prefer easily administrable, bright-line rules, his preference does not give us license to adopt a second-best interpretation of the Enabling Act. Courts cannot ignore text and context in the service of simplicity.”<sup>125</sup>

Put to one side the peculiarity of Justice Ginsburg defending corporate immunity from aggregate liability in the name of *Erie* federalism (peculiar because *Erie* was animated by realist concern over corporate manipulation of jurisdiction to avoid liability under state law). Put to one side as well Justice Scalia’s defense of Rule 23 after having spent a career on the bench expanding federalism in other contexts and limiting class actions.<sup>126</sup> The split decisions and the surprising pairings of justices in *Shady Grove* (Justice Sotomayor joined part of Justice Scalia’s opinion, whereas Justice Ginsburg was joined by Justices Kennedy, Alito, and Breyer) virtually guarantee future strategic litigation to exploit the Court’s divisions.<sup>127</sup> Decades after *Hanna*, *Erie* maximalists on the modern Court remain eager to find ambiguities in Federal Rules, to prioritize

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122. *Id.* at 450.

123. *Id.* at 451.

124. *Id.* at 423 (Stevens, J., concurring).

125. *Id.* at 426.

126. See Brian T. Fitzpatrick, *Justice Scalia and Class Actions*, 92 NOTRE DAME L. REV., 1977 (2017); Bradford R. Clark, *The Constitutional Structure and the Jurisprudence of Justice Scalia*, 47 ST. LOUIS U.L.J. 753 (2003).

127. Ambiguity has divided circuit courts, for example, on a question central to surviving a motion to dismiss in the earliest phases of pleading. Compare *Corley v. United States*, 11 F.4th 79, 84 (2d Cir. 2021) (concluding that a state heightened pleading rule is procedural); *Abbas v. Foreign Pol’y Grp., LLC*, 783 F.3d 1328, 1337 (D.C. Cir. 2015) (same); *Pledger v. Lynch*, 5 F.4th 511, 523 (4th Cir. 2021) (same); *Los Lobos Renewable Power, LLC v. Americulture, Inc.*, 885 F.3d 659, 673 (10th Cir. 2018); *Martin v. Pierce Cnty.*, 34 F.4th 1125, 1131 (9th Cir. 2022); and *Gallivan v. United States*, 943 F.3d 291, 296-97 (6th Cir. 2019) (same), with *Schmiguel v. Uchal*, 800 F.3d 113, 125 (3d Cir. 2015) (concluding that a state notice requirement is substantive); and *Godin v. Schencks*, 629 F.3d 79, 91-92 (1st Cir. 2010) (holding that Maine’s anti-SLAPP statute is substantive).

state policies over national interests, and doggedly committed to subjective, situational analysis of *Erie* policy factors over clear rules of decision.

The result is that within what was already a triumvirate of *Erie* rules (constitutional, federally legislated, judge-made), there are now: (a) three competing tests for assessing federally legislated rules (*Hanna* and Justice Scalia's opinion in *Shady Grove* versus Justice Ginsburg's test and Justice Stevens' different application of that test in *Shady Grove*); (b) two tests for determining when the Seventh Amendment prevails over conflicting state rules (*Gasperini* and *Byrd*); and (c) two tests for assessing judge-made federal procedural rules (*Semtek* and *Erie* policy analysis).

In *Erie* and *York*, the New Deal Court criticized the self-aggrandizing hubris of federal courts creating substantive rules of general federal common law under *Swift*. *Erie* declared emphatically that “[t]here is no federal general common law,” and that “no clause in the Constitution purports to confer . . . power upon the federal courts” to make it.<sup>128</sup> “[T]he doctrine of *Swift v. Tyson* is . . . ‘an unconstitutional assumption of powers by the Courts of the United States.’”<sup>129</sup> *York* supposedly exposed the fallacy that substantive law is “a ‘brooding omnipresence’ of Reason” which federal courts were “free to ascertain . . . wholly independent of authoritatively declared State law, even in case where a legal right as the basis for relief was created by State authority . . . .”<sup>130</sup> Both opinions thus drew legal realism into the service of *Erie* maximalism, exposing the fiction of federal court authority to make common law.

But modern *Erie* doctrine is itself haunted by a “brooding omnipresence” of federalism, and it has eviscerated common sense distinctions between procedure and substance.<sup>131</sup> Jurisprudentially, it is possible to design a legal system that makes jurisdiction and procedure acutely sensitive to the nature of substantive rights—one that subordinates procedure to substance. This was a defining attribute of the writ system—procedure varied according to the specific substantive right and remedy the plaintiff invoked; remedies defined pleading practice and subject matter jurisdiction.<sup>132</sup> But a principal critique of the writ system was the systematic inequality produced by its devilishly arcane procedural rules. Nineteenth century reformers acidly referred to parties being “forced into the degrading paths of Norman subtleties,” unmeaning “stubborn forms,” and “parasitical growths” shrouded in a “veil of mystery”—all guarded

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128. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

129. *Id.* at 79 (quoting *Swift v. Tyson*, 41 U.S. 1 (1842)).

130. *Guaranty Tr. Co. of N.Y. v. York*, 326 U.S. 99, 102 (1945).

131. This is despite the fact that revisionist historical research has exposed the error of *Erie*'s conclusion that the Rules of Decision Act requires federal courts to look to state law. See RITZ, *supra* note 108, at 134; Patrick J. Borchers, *The Origins of Diversity Jurisdiction, the Rise of Legal Positivism, and a Brave New World for Erie and Klaxon*, 72 TEX. L. REV. 79, 81 (1993). And the fact that, in many other settings, the liberal wing of the Court has dissented from expansive interpretations of federalism. See, e.g., *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 76 (1996) (Stevens, J., dissenting).

132. G. EDWARD WHITE, *AMERICAN LEGAL HISTORY: A VERY SHORT INTRODUCTION* 97–98 (2013).

jealously and undemocratically by lawyers and judges rather than “bend[ing] to the convenience and exigencies of the people for whose use it subsists.”<sup>133</sup> *Erie* maximalism has produced its own veil of mystery and its own form of judicial imperialism as maximalists superimpose their preferred rules of decision over those legislated by Congress and embedded in the Constitution. Oddly, a decision animated by the progressive impulse to limit federal judicial activism and corporate manipulation of citizenship to defeat the claims of injured workers and consumers—a decision, fundamentally about access to justice for ordinary people—has drifted into arcana, abstraction, and judicial subordination of congressional power.

### C. NON-ARTICLE III COURTS

Non-Article III courts are run by judges who do not enjoy the protections against removal and diminution of salary provided by Article III to ensure judicial independence. Congress has created both legislative courts and courts within federal executive branch agencies on this model. Every year these courts decide millions of cases—more cases, by an order of magnitude, than the dockets of all the lower federal courts combined.<sup>134</sup> Federal adjudication would grind to a standstill without the assistance of these courts.

Veterans’ disability benefits, for example, are decided through an administrative process in the Veterans Administration (VA). Appeals can be taken to the Board of Veterans Appeals, the highest administrative tribunal within the VA. Each year the Board has approximately 200,000 pending appeals—approximately two thirds of the civil docket of the entire United States

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133. WILLIAM SAMPSON, ANNIVERSARY DISCOURSE: DELIVERED BEFORE THE HISTORICAL SOCIETY OF NEW YORK, ON SATURDAY, DECEMBER 6, 1823, SHOWING THE ORIGIN, PROGRESS, ANTIQUITIES, CURIOSITIES, AND THE NATURE OF THE COMMON LAW 6–7, 52–53 (E. Bliss & E. White 1824).

134. In 2013, social security disability claims alone amount to “roughly 800,000 cases a year” by Administrative Law Judges. HAROLD J. KRENT & SCOTT MORRIS, ADMIN. CONF. OF THE U.S., ACHIEVING GREATER CONSISTENCY IN SOCIAL SECURITY DISABILITY ADJUDICATION: AN EMPIRICAL STUDY AND SUGGESTED REFORMS 1 (2013). There are a comparable number of veterans disability benefits claims. *Veterans Benefits Administration Reports: Claims Inventory*, U.S. DEP’T OF VETERANS AFFS. (Feb. 17, 2026), [https://www.benefits.va.gov/reports/mmwr\\_va\\_claims\\_inventory.asp](https://www.benefits.va.gov/reports/mmwr_va_claims_inventory.asp). In 2024, the Executive Office for Immigration Review reported 3.5 million pending immigration cases. Exec. Off. for Immigr. Rev., *Adjudication Statistics: Pending Cases, New Cases, and Total Completions*, U.S. DEP’T OF JUST. (July 31, 2025), <https://www.justice.gov/eoir/media/1344791/dl?inline>. Data on lower federal court filings show that the United States District Courts handle less than half a million cases a year and the Courts of Appeals fewer than 50,000. *Federal Judicial Caseload Statistics 2022*, U.S. CTS., <https://www.uscourts.gov/data-news/reports/statistical-reports/federal-judicial-caseload-statistics/federal-judicial-caseload-statistics-2022> (last visited Feb. 21, 2026). Justice Breyer, dissenting in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, found that “the Federal Government relies on 1,584 [Administrative Law Judges (ALJ)] to adjudicate administrative matters in over 25 agencies. These ALJs adjudicate Social Security benefits, employment disputes, and other matters highly important to individuals.” 561 U.S. 477, 542–43 (2010) (Breyer, J., dissenting) (citations omitted). These figures indicate that there are twice as many ALJs as Article III judges. There are also thousands of Administrative Judges who also conduct agency adjudications. See RAYMOND LIMON, OFF. OF THE ADMIN. L. JUDGES: THE FEDERAL ADMINISTRATIVE JUDICIARY THEN AND NOW: A DECADE OF CHANGE 1992-2002 app. C (2002).

District Courts.<sup>135</sup> The Board is a non-Article III court. The Chairman is appointed to a six year term and can be removed by the President for “misconduct, inefficiency, neglect of duty, [ ] engaging in the practice of law[,] or for physical or mental disability which, in the opinion of the President, prevents the proper execution of the Chairman’s duties.”<sup>136</sup> The Chairman appoints other staff to compose the Board. Board decisions may be appealed to the United States Court of Appeals for Veterans Claims—also a non-Article III court.<sup>137</sup> The judges on that court serve fifteen-year terms and can be removed by the President for “misconduct, neglect of duty, engaging in the practice of law, or residing more than fifty miles outside the Washington, D.C., area.”<sup>138</sup> Fact determinations of the Court of Veterans Claims are final, but questions of law may be appealed to the United States Circuit Court for the Federal Circuit—a full Article III court.

The advantages of non-Article III adjudication are many. First, they allow Congress to increase or decrease resources and staff in response to shifting litigation needs. Second, they can be designed to function without the cost and delay of full adversarial trial—with “informality and solicitude for the claimant,” as the Court recognized in a case involving veterans disability benefits.<sup>139</sup> Third, because they are usually restricted to specific subject matter, they can be staffed with judges who have specialized expertise. Fourth, because they are subject to supervision and control by Congress and/or the Executive branch, they are more democratically accountable than Article III courts. On the other hand, the virtues that flow from not having to make lifetime appointments and guaranteeing salary are also potential vices, some of constitutional dimension. Without Article III’s structural guarantees of independence, non-Article III courts are susceptible to political capture and manipulation by repeat players who appear in their courts (including the government) and by political appointees and the President in the executive branch. Their specialized expertise can result in confirmation bias, and informality can be a source of procedural iniquity. Underfunding and bureaucratic complexity can also cause massive delays. For example, veterans have died of combat related disabilities before the VA has been able to make determinations of eligibility for subsidized medical treatment.<sup>140</sup>

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135. BD. OF VETERANS’ APPEALS, U.S. DEP’T OF VETERANS AFFS., ANNUAL REPORT FISCAL YEAR (FY) 2024 6, [https://department.va.gov/board-of-veterans-appeals/wp-content/uploads/sites/19/2025/04/2024\\_bva2024ar.pdf](https://department.va.gov/board-of-veterans-appeals/wp-content/uploads/sites/19/2025/04/2024_bva2024ar.pdf).

136. 38 U.S.C. § 7101(b).

137. 38 U.S.C. §§ 7101A, 7104, 7252; *see also* Veterans’ Judicial Review Act, Pub. L. No. 100-687, 102 Stat. 4105 (1988).

138. JONATHAN M. GAFFNEY, CONG. RSCH. SERV., IF11365, U.S. COURT OF APPEALS FOR VETERANS CLAIMS: A BRIEF INTRODUCTION (2021).

139. *Walters v. Nat’l Ass’n of Radiation Survivors*, 473 U.S. 305, 311 (1985).

140. Scott Bronstein, Nelli Black & Drew Griffin, *Veterans Dying Because of Health Care Delays*, CNN (Jan. 30, 2014, at 21:34 ET), <https://www.cnn.com/2014/01/30/health/veterans-dying-health-care-delays/index.html>; Susan Seliger, *The ‘Long and Unacceptable’ Wait for a Veterans’ Benefit*, N.Y. TIMES: NEW OLD AGE (May 15,

The constitutional and jurisdictional problem is whether applications of law to fact outside the Article III courts constitute impermissible exercises of “judicial power.” Article III declares that “[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”<sup>141</sup> As early as *Murray’s Lessee v. Hoboken Land & Improvement Co.*, decided in 1856, the Court recognized the practical reality that the performance of many “administrative duties” outside the Article III courts “involve[ ] an inquiry into the existence of facts and the application [of] them [to] law. . . . But it is not sufficient to bring such matters under the judicial power, that they involve the exercise of judgment upon law and fact.”<sup>142</sup> That holding was vitally important to the development of the administrative state. The Executive branch could not function if every application of federal law to a set of facts required an Article III proceeding. Furthermore, the Article III courts are neither competent, nor authorized, nor sufficiently numerous to handle every application of federal law to fact.

The Court in *Murray’s Lessee* also repudiated the idea that because Congress *could* grant federal courts “arising under” jurisdiction over the application of federal law to a specific set of facts, Congress *must* do so. Not every dispute that arises under federal law must be given to Article III courts.<sup>143</sup> As an example, the Court emphasized:

[T]here are matters, *involving public rights*, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which [C]ongress may or may not bring within the cognizance of the courts of the United States, as it may deem proper.<sup>144</sup>

By matters “involving public rights,” the Court referred to disputes concerning the government named as a party and acting in a sovereign capacity.<sup>145</sup> The Court reasoned that, in such cases, Congress is free to set up non-Article III courts. *Murray’s Lessee* was just such a case. The public right was the power of the Treasury Department to use a summary process of seizure to recover public funds—money that had been embezzled by a federal customs officer from the customs office.<sup>146</sup> Article III judicial review was not constitutionally necessary

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2013, at 06:00 PT), <https://archive.nytimes.com/newoldage.blogs.nytimes.com/2013/05/15/the-long-and-unacceptable-wait-for-a-veterans-benefit>; James Dao, *Veterans Wait for Benefits as Claims Pile Up*, N.Y. TIMES (Sep. 27, 2012), <https://www.nytimes.com/2012/09/28/us/veterans-wait-for-us-aid-amid-growing-backlog-of-claims.html>.

141. U.S. CONST. art. III.

142. 59 U.S. (18 How.) 272, 280 (1856).

143. *Id.* at 280–81.

144. *Id.* at 284 (emphasis added).

145. *Id.* For a modern synthesis of “public rights” that reinforces the definition in *Murray’s Lessee*, see Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 967 (1988) (describing three categories: claims against the United States, non-criminal government enforcement proceedings such as customs, and plenary congressional enforcement power over immigration).

146. *Murray’s Lessee*, 59 U.S. (14 How.) at 274.

prior to the seizure given the interests of the government in recovering revenue belonging to the Treasury and misappropriated by one of its own employees.

Much of the federal administrative state relies on initial adjudication outside Article III Courts. As the New Deal Court observed in *Crowell v. Benson*: “Familiar illustrations of administrative agencies created for the determination of [public rights] are found in connection with the exercise of the congressional power as to interstate and foreign commerce, taxation, immigration, the public lands, public health, the facilities of the post office, pensions and payments to veterans.”<sup>147</sup>

In addition to public rights cases, where the government is necessarily a party, non-Article III adjudication has long been upheld for territorial courts in view and acts in a sovereign capacity of Congress’s plenary Article I power over the territories,<sup>148</sup> for the enforcement of military regulations through military courts (in view of the delegation of power in Article I and Article II to regulate the armed forces),<sup>149</sup> and for “private rights” disputes (those in which the government is not a party) as long as the non-Article III adjudicator is a mere “adjunct” of an Article III judge.<sup>150</sup> The adjunct category for private rights is traditionally applied to advisory court staff such as special masters who operate under the direct supervision of Article III judges, but the New Deal Court dramatically expanded it in *Crowell*. Agency adjudicators are “adjuncts” of the Article III courts under *Crowell* if their subject matter jurisdiction is specialized and Congress vests both judicial review and enforcement authority in the Article III courts.<sup>151</sup>

Modern disintegration of this framework for assessing the constitutionality of non-Article III adjudication began with congressional deviation from the adjunct constraint *Crowell* imposed on private rights cases and the Court’s muddled response. Congressional deviation was particularly acute in two areas in the late twentieth century. The first is bankruptcy, which often combines litigation over the federal right to restructure and discharge debts with a range of related claims arising under state law between the bankruptcy petitioner and other private parties. Because a bankruptcy petitioner’s debts and assets are tied to state law instruments such as contracts, trusts, and corporate law, state law

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147. 285 U.S. 22, 51 (1932).

148. *Am. Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511, 534 (1828).

149. *Dynes v. Hoover*, 61 U.S. (15 How.) 65, 79 (1857).

150. *Crowell*, 285 U.S. at 51.

151. *Crowell* itself was a pure private rights case involving the determination of workers compensation awards between private employers and their employees by a federal workers compensation commission. The Court upheld the commission’s adjudication of these claims because it functioned as an adjunct—its decisions were confined to one aspect of the employment relationship (workplace injuries) and were subject to review and enforcement through U.S. District Courts. The Court emphasized that workers compensation awards were had “limited application, being confined to the relation of master and servant” as it concerned workplace injuries as measured by a statutory standard, that the statute reserved “full authority to the court to deal with matters of law.” *Id.* at 54. Enforcement of workers compensation awards is available by application to a federal district court. *Id.* at 45.

claims and counterclaims are easily incorporated into litigation over the bankrupt estate. The bankruptcy petitioner may be owed money (by third parties or by creditors who also have claims on the estate); suits to recover these debts may invite counter-claims; and the petitioner may have fraudulently transferred money to avoid handing it over to creditors. All of these are private rights cases. The government is not a party. But they are related to federal bankruptcy claims as to which federal jurisdiction is exclusive.

In 1978 and 1984, Congress created non-Article III judges to handle bankruptcy litigation.<sup>152</sup> These judges served limited terms, were removable by the judicial council of the circuit in which they sit, and had salaries that were set and revisable by statute. However, they were not designed as traditional adjuncts with limited subject matter jurisdiction and enforcement power: cases could be adjudicated to final judgment in the bankruptcy court, orders could be enforced by the court, and subject matter jurisdiction extended to a wide range of common law claims.<sup>153</sup>

The second area of deviation from the adjunct model is administrative agency adjudication of private rights disputes that are bound up with federal regulatory systems. Congress, for example, decided that a comprehensive system for federal pesticide regulation should include an efficient system for manufacturers of products containing pesticides to file data with the Environmental Protection Agency (EPA) to assess health, safety, and environmental effects of products using the pesticide. Given that the data of first filers is often relevant to other manufacturers who use similar chemical compounds and given that some of the data involves trade secrets, an efficient method of resolving disputes between manufacturers over shared data served the regulatory objective of eliciting high quality information to inform EPA pesticide policy. In 1978, Congress required manufacturers to submit to binding arbitration in order to avoid protracted litigation in federal courts.<sup>154</sup> Arbitrators are obviously not Article III judges, but they also are not traditional adjuncts of Article III courts. This is because their orders are binding and subject to very limited judicial review.<sup>155</sup>

As Congress shifted its design of non-Article III adjudication in these two contexts, the modern Court's doctrine for determining the constitutionality of these non-Article III design choices has oscillated between two different tests. This oscillation now spans more than forty years. In bankruptcy litigation, it has created rank confusion and a "significant spike in litigation" on the jurisdictional

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152. See Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified as amended in scattered sections of 11 U.S.C.); Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (codified as amended in scattered sections of 11 and 28 U.S.C.). During economic downturns case filings can rise to over a million a year. See, e.g., Bill Fay, *Bankruptcy Statistics*, DEBT.ORG (Mar. 24, 2025), <https://www.debt.org/bankruptcy/statistics> (showing bankruptcy rates from 2001 through 2022).

153. See 11 U.S.C. § 105(c); 28 U.S.C. § 1334.

154. See *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 573 (1985).

155. See 9 U.S.C. § 10(a) (defining limited grounds for federal court review of an arbitration award).

question of the bankruptcy court's powers.<sup>156</sup> Here, and in agency adjudication,<sup>157</sup> parties with the resources to contest jurisdiction do so. Those who don't may be stuck in a non-Article III court when they have a constitutional right to be in an Article III court. Congress is partly to blame for failing to rectify the situation by legislating within the adjunct model, but the Court's unclear jurisprudence has also left Congress without clear guidance about how to set up dispute resolution outside the federal courts in compliance with Article III.

Oscillation began in the context of bankruptcy in 1982 in *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*<sup>158</sup> With only four votes, the liberal wing of the late Burger Court supported the traditional categorical test for determining the constitutionality of non-Article III courts. Conservatives, by contrast, supported a multipart functional test and secured majorities in agency cases such as *Thomas v. Union Carbide*<sup>159</sup> and *CFTC v. Schor*.<sup>160</sup> In the Roberts Court, political allegiances have flipped. In its principal non-Article III courts case, *Stern v. Marshall*,<sup>161</sup> conservatives favored a categorical test close to the plurality opinion in *Northern Pipeline*, but they could not agree on precisely how categorical. The four liberal justices all supported the functional approach of *Thomas* and *Schor*. In subsequent Roberts Court decisions since *Stern*, oscillations have persisted.<sup>162</sup>

The principal area of disagreement and uncertainty is how to define public rights. The categorical test treats public rights as a relatively fixed set of cases defined by traditional criteria: the government must be a party, and the case must involve sovereign prerogatives of the politically accountable branches of government. As the plurality described in *Northern Pipeline*:

This doctrine may be explained in part by reference to the traditional principle of sovereign immunity, which recognizes that the Government [as a potential defendant] may attach conditions to its consent to be sued [including the choice of forum]. But the public-rights doctrine also draws upon the principle of separation of powers, and a historical understanding that certain prerogatives were reserved to the political Branches of Government. The doctrine extends only to matters arising “between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments,” and only to matters that historically could have been determined exclusively by those departments.

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156. Jonathan C. Lipson & Jennifer L. Vandermeuse, *Stern, Seriously: The Article I Judicial Power, Fraudulent Transfers, and Leveraged Buyouts*, 2013 WIS. L. REV. 1161, 1161.

157. See *Thomas*, 473 U.S. at 587 (emphasizing that there are “many quasi-adjudicative activities carried on by administrative agencies involving claims between individuals”).

158. 458 U.S. 50, 70 (1982).

159. 473 U.S. at 587 (1985).

160. 478 U.S. 833, 854 (1986).

161. 564 U.S. 462, 487 (2011).

162. Compare, for example, the functionalist approach of *Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 665, 678 (2015), with the public rights categorical approach in *Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 584 U.S. 325, 334 (2018).

The understanding of these cases is that the Framers expected that Congress would be free to commit such matters completely to nonjudicial executive determination, and that as a result there can be no constitutional objection to Congress' employing the less drastic expedient of committing their determination to a legislative court or an administrative agency.<sup>163</sup>

According to this theory, Congress may use non-Article III courts to serve as the court of first instance in public rights cases<sup>164</sup> because it can either deny the right to litigate altogether on grounds of sovereign immunity or, as in territorial and immigration courts where Congress has plenary regulatory authority, because the matter involves other sovereign prerogatives. If, on the other hand, a case involves private rights—"the liability of one individual to another"—it "lie[s] at the core of the historically recognized judicial power,"<sup>165</sup> and Congress may use non-Article III courts only within the confines of the adjunct model in order to ensure adequate Article III supervision of delegated judicial power.<sup>166</sup>

The liberal plurality in *Northern Pipeline* found the 1978 bankruptcy statute unconstitutional because it granted bankruptcy judges sweeping subject matter jurisdiction to reach beyond the "core . . . federal bankruptcy power" involving "restructuring of debtor-creditor relations."<sup>167</sup> Jurisdiction extended to "state-created private rights, such as the right to recover contract damages" in order to "augment [the bankruptcy petitioner's]" estate—matters that are "obviously . . . not" public rights. Moreover, the bankruptcy courts were authorized to enter final judgments and enforce their orders—two things true adjuncts cannot do.<sup>168</sup>

Justices Rehnquist and O'Connor concurred in the judgment on the narrow ground that the 1978 statute created a non-Article III court that could not be squared with any precedents. They refused to endorse the plurality's view that those precedents "in fact support a general proposition and three tidy

163. 458 U.S. at 67–68 (plurality opinion) (citations omitted) (quoting *Crowell v. Benson*, 285 U.S. 22, 51 (1932)).

164. Justice Brennan was careful to distinguish litigation in the court of first instance from appellate review. *Id.* at 69 n.23 ("[W]hen Congress assigns these matters to administrative agencies, or to legislative courts, it has generally provided, and we have suggested that it may be required to provide, for Art. III judicial review [on appeal]."); see also *Thomas*, 473 U.S. at 592 (emphasizing that FIFRA "limits but does not preclude review of the arbitration proceeding by an Article III court" and that appellate review "preserves [an] 'appropriate exercise of the judicial function'" (quoting *Crowell*, 285 U.S. at 54)); cf. *United States v. Erika, Inc.*, 456 U.S. 201, 208 (1982) (concluding that given Medicare Part B's "precisely drawn provisions," the statute's failure to authorize Article III court determinations of the amount of Part B awards "provides persuasive evidence that Congress deliberately intended to foreclose further review of such claims").

165. *N. Pipeline*, 458 U.S. at 69–71.

166. The traditional conception was never free from ambiguity—whether non-Article III adjudication reflects sovereign prerogatives could be defined by inquiring whether the subject matter is tied to a central attribute of sovereignty, whether the Constitution gives Congress and/or the executive plenary power over the subject matter, whether that power can be exercised free from judicial review, or, more loosely, whether a specific statute is properly legislated under Article I. An example of the latter is *Atlas Roofing Co. v. OSHA*, 430 U.S. 442, 461 (1977).

167. *N. Pipeline*, 458 U.S. at 71.

168. *Id.* at 71, 85.

exceptions” or rather than mere “landmarks on a judicial ‘darkling plain’ where ignorant armies have clashed by night . . . .”<sup>169</sup> Justice White’s dissent, joined by the Chief Justice and Justice Powell, characterized the Court’s non-Article III jurisprudence as “one of the most confusing and controversial areas of constitutional law.”<sup>170</sup> It accused the plurality of “gross oversimplification,” creating a “distracting and superficial gloss on” one hundred fifty years of “complicated and contradictory” precedent, and ignoring the “reality of bankruptcy proceedings.”<sup>171</sup> Justice White instead advocated a freewheeling balancing test, looking to “the strength of the legislative interest” in non-Article III adjudication and asking “whether and to what extent the legislative scheme accommodates” or “undermines” the “values furthered by Art[icle] III.”<sup>172</sup>

This reflected a shift for Justice White, who just five years earlier wrote for a unanimous Court upholding OSHA’s administrative hearing process for civil penalty enforcement using a traditional public rights analysis, not a balancing test.<sup>173</sup> But Justice White’s plea for functionalism in *Northern Pipeline* prevailed by 1985 in *Thomas*<sup>174</sup> and *Commodity Futures Trading Commission v. Schor*.<sup>175</sup> Much as *Erie* maximalists dissolved the common sense distinction between substance and procedure, the result in *Thomas* represented a wholesale redefinition of the public rights doctrine to incorporate certain private rights cases. At issue was the constitutionality of binding arbitration for compensation claims between pesticide registrants.<sup>176</sup> The Court upheld binding arbitration between these private parties by, for the first time in the Court’s history, concluding that certain private rights cases are in fact properly understood as public rights cases.<sup>177</sup>

In perhaps the most distorted semantic manipulation in the entire canon of non-Article III cases, the *Thomas* Court held that “Congress, acting for a valid legislative purpose pursuant to its constitutional powers under Article I, may create a *seemingly ‘private’ right* that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary.”<sup>178</sup> The Court insisted that the holding was necessary to avoid “erect[ing] a rigid and formalistic restraint on the ability of Congress to adopt innovative measures such as negotiation and arbitration with respect to rights created by a regulatory scheme.”<sup>179</sup> To crystalize the realism of its repudiation of the traditional definition of public

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169. *Id.* at 91 (Rehnquist, J., concurring).

170. *Id.* at 93 (White, J., dissenting).

171. *Id.* at 93, 98, 113.

172. *Id.* at 115.

173. *Atlas Roofing Co. v. OSHA*, 430 U.S. 442, 460–61 (1977).

174. 473 U.S. 568, 593–94 (1985).

175. 478 U.S. 833, 857 (1986).

176. *Thomas*, 473 U.S. at 573.

177. *Id.* at 588–90, 593–94.

178. *Id.* at 593–94 (emphasis added).

179. *Id.* at 594.

rights, the Court stressed that “practical attention to substance rather than doctrinaire reliance on formal categories should inform application of Article III.”<sup>180</sup> Signaling the drift of liberal justices on the issue, Justice Brennan concurred in *Thomas*. He defended the categorical test he supported in *Northern Pipeline*, but insisted that it was not a “straightjacket” in the context of administrative agency adjudication. He agreed with the Court that “the determinative factor in this case should not be the presence or absence of the government as a party.”<sup>181</sup> Either Justice Brennan had a change of heart or he failed to appreciate the full implications of his categorical test in *Northern Pipeline* for adjudication outside the context of bankruptcy.

The *Thomas* majority said next to nothing about how the Court should determine when non-Article III adjudication is sufficiently “closely integrated” into a public regulatory scheme. Instead, it observed tautologically that providing compensation for use of “registrant’s data to support a follow-on registration serves a public purpose as an integral part of a program safeguarding the public health.”<sup>182</sup> Asking whether there are important “public purposes” in a regulatory scheme is deeply subjective. And the Court was well aware of this risk in adopting balancing tests. The same year *Thomas* was decided, Justice Rehnquist criticized the indeterminacy of a functional test the Court had relied upon for a decade in due process analysis, noting that balancing government and private interests invites justices to submerge policy preferences in abstractions, placing “a thumb on the scale, depending upon the result the Court desired.”<sup>183</sup> But he joined Justice O’Connor’s majority opinion in *Thomas*. To be sure, the connection between a regulatory goal and an adjudicatory process incident to it is not entirely open-ended: an efficient compensation resolution procedure very likely increases the probability that first-registrants will provide high quality data to the EPA—without it there is a free rider problem that disincentivizes cooperation. But there are other incentives to provide the required data, the efficacy of which, it must be said, the Court has no particular institutional competency to assess.

The *Thomas* majority observed rather limply that, if it had wanted to, Congress could have empowered the EPA to enter compensation awards directly.<sup>184</sup> But the fact that Congress could have turned compensation determinations into public rights cases by empowering the EPA to enter compensation orders itself (thus making the government a party) doesn’t mean the selection of a completely different framework in which the government is not a party is also a public rights proceeding. This conflates the longstanding principle in true public rights cases that Congress is free to choose between

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180. *Id.* at 587.

181. *Id.* at 598–99 (Brennan, J., concurring).

182. *Id.* at 589 (majority opinion).

183. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 562 (1985) (Rehnquist, J., dissenting).

184. *Thomas*, 473 U.S. at 590.

Article III and non-Article III adjudication, with a very different proposition—that because a determination could be structured with the government as a party, any process Congress elects to deal with the issue counts as a public right process.

Deeper ambiguity was introduced by the *Thomas* Court's gesture to consent as a relevant factor in the determination of a structural constitutional limit on non-Article III jurisdiction, noting that follow-on registrants relying on the data of earlier filers "explicitly consent[ ]" to their rights being "determined by arbitration."<sup>185</sup> It is axiomatic in standing, diversity jurisdiction, and arising under jurisdiction, that consent cannot cure a structural constitutional defect in jurisdiction.<sup>186</sup> But in *Thomas*, the Court nevertheless relied explicitly on consent, emphasizing that the "danger of Congress or the Executive encroaching on the Article III judicial powers is at a minimum when no unwilling defendant is subjected to judicial enforcement power as a result of the agency 'adjudication.'"<sup>187</sup> This was another unprecedented innovation in light of the fact that, in every prior case in which consent was a factor, the adjudicator was a true adjunct of an Article III court.

A year later in *Schor*, the Court not only reinforced the functionalist framework of *Thomas*, it relied even more heavily on consent, emphasizing that a customer challenging the constitutionality of agency adjudication of his financial dealings with a broker under the Commodity Exchange Act voluntarily sought relief before the Commodity Futures Trading Commission.<sup>188</sup> The customer objected only after he lost before the agency. Unlike *Thomas*, the Court recognized in *Schor*:

[T]he parties cannot by consent cure [a structural] constitutional difficulty for the same reason that the parties by consent cannot confer on federal courts subject-matter jurisdiction beyond the limitations imposed by Article III, § 2. When these Article III limitations are at issue, notions of consent and waiver cannot be dispositive because the limitations serve institutional interests that the parties cannot be expected to protect.<sup>189</sup>

But the Court's functional analysis promptly eviscerated this bedrock principle. The Court emphasized that consent was but one of several factors and if, in the aggregate, the factors demonstrate that there is not a structural flaw under Article III, then only a personal, imminently waivable right to Article III adjudication remains. The other factors are:

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185. *Id.* at 584, 592.

186. *Gonzalez v. Thaler*, 565 U.S. 134, 141 (2012) ("Subject matter jurisdiction can never be waived or forfeited.").

187. *Thomas*, 473 U.S. at 591 (citations omitted).

188. *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 847 (1986) ("[T]he constitutionality of a given congressional delegation of adjudicative functions to a non-Article III body must be assessed by reference to the purposes underlying the requirements of Article III.").

189. *Id.* at 851 (citation omitted).

[T]he extent to which the “essential attributes of judicial power” are reserved to Article III courts, and, conversely, the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts, the origins and importance of the right to be adjudicated, and the concerns that drove Congress to depart from the requirements of Article III.<sup>190</sup>

After discussing how these factors applied to congressional regulation of brokers, the Court concluded that “the magnitude of any intrusion on the Judicial Branch can only be termed *de minimus*,” and therefore the customer’s consent was a proper consideration.<sup>191</sup>

Congress gave the CFTC the authority to adjudicate such matters, but the decision to invoke this forum is left entirely to the parties and the power of the federal judiciary to take jurisdiction of these matters is unaffected. In such circumstances, separation of powers concerns are diminished, for it seems self-evident that just as Congress may encourage parties to settle a dispute out of court or resort to arbitration without impermissible incursions on the separation of powers, Congress may make available a quasi-judicial mechanism through which willing parties may, at their option, elect to resolve their differences.<sup>192</sup>

Relying on its decision in *Thomas*, the Court insisted that:

[W]e have . . . been faithful to our own Article III precedents, which counsel that bright-line rules cannot effectively be employed to yield broad principles applicable in all Article III inquiries. Rather, due regard must be given in each case to the unique aspects of the congressional plan at issue and its practical consequences in light of the larger concerns that underlie Article III.<sup>193</sup>

With such a vague standard, Congress and litigants are left to guess when and under what conditions the Court would balance all the factors in such a way as to approve of non-Article III adjudication.

*Schor* is an unusually vivid example of unnecessary ambiguity. The Court could have decided the case under *Crowell* because, unlike the binding arbitration at issue in *Thomas*, the Commodities Futures Trading Commission’s (CFTC) process for resolving disputes between brokers and customers fit the traditional adjunct model for private rights. Customer reparations claims and broker counterclaims concern a narrow subject matter, and the CFTC relies on federal district courts for enforcement of its orders.<sup>194</sup> The only innovation from *Crowell* arose from the fact that the CFTC entertains transactionally related counterclaims. But instead of applying *Crowell*’s private rights/adjunct analysis, the Court obscured the dispositive fact of adjunct status and took the case as an

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190. *Id.* (citations omitted).

191. *Id.* at 856.

192. *Id.* at 855.

193. *Id.* at 857 (citation omitted).

194. *Id.* at 836.

opportunity to advance its repudiation of categorical analysis, its redefinition of public rights to include private rights, and its elevation of consent.

The left-right convergence in *Thomas* and *Schor* in the 1980s was possible because the Court's newfound functionalism favored both the supposed efficiencies of alternative dispute resolution (a darling of late 20th century legal reform fueled by bipartisan consensus on the limitations of the adversary system) and the supposed efficiencies of agency adjudication at a time when both liberal and conservative justices endorsed *Chevron* deference.<sup>195</sup> The *Schor* Court repeatedly extolled the virtues of "an inexpensive and expeditious alternative forum through which customers could enforce the provisions of the CEA,"<sup>196</sup> just as *Thomas* emphasizes the "pragmatic solution" of binding arbitration to efficiently dispose of compensation claims between pesticide registrants.<sup>197</sup>

The modern Court may still be committed to alternative dispute resolution—certainly the conservative justices who have regularly composed majorities to extend the Federal Arbitration Act remain committed.<sup>198</sup> But consensus on agency deference has eroded.<sup>199</sup> And as *Stern* shows, the Roberts Court has fared no better than the Burger Court in bringing clarity to non-Article III court doctrine as it applies to bankruptcy. Although Chief Justice Robert's opinion in *Stern* has all the hallmarks of an effort to mitigate jurisdictional ambiguity, including a prologue that draws from Charles Dickens's *Bleak House* to criticize delay and complexity in the administration of justice, the opinion failed to secure five votes for the ratio decidendi and introduced greater complexity. As a result, *Stern* has inaugurated a new series of oscillations over the proper constitutional test for non-Article III courts.

Congress enacted the new bankruptcy process at issue in *Stern* in 1984 after *Northern Pipeline* struck down the 1978 bankruptcy statute. Among other things, the 1984 statute retained the non-Article III status of bankruptcy judges. The statute also modified their jurisdiction by distinguishing so-called "core proceedings," where the bankruptcy judge is not an adjunct and could therefore enter final judgments, from "non-core" proceedings, where the judge is an adjunct whose decisions are proposed findings of fact and conclusions of law subject to de novo review and enforcement by the district court.<sup>200</sup> The difficulty is that core proceedings were defined to include many private rights disputes

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195. *Schor* itself relied on the now defunct doctrine of *Chevron* deference in its analysis of the power of the CFTC to take jurisdiction of counterclaims. *Id.* at 844; see *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844–45 (1984).

196. See *Schor*, 478 U.S. at 840, 844, 855.

197. *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 590 (1985).

198. See *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 345 (2011); *Vaden v. Discover Bank*, 556 U.S. 49, 70 (2009); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 20 (1991).

199. On the elimination of *Chevron* deference, see *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2273 (2024). On the growth of the major questions doctrine, see *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 326 (2014).

200. *Stern v. Marshall*, 564 U.S. 462, 471, 477 (2011) (quoting 1 COLLIER ON BANKRUPTCY ¶ 3.02[2] n.5 (16th ed. 2010)).

between petitioners and either creditors with claims against the estate, or third parties who might owe money to the estate.<sup>201</sup> *Stern* struck down a bankruptcy judge's adjudication of such a private rights dispute—a bankruptcy petitioner's counterclaim of tortious interference with a promised nine figure testamentary bequest, filed in response to a libel suit regarding the petitioner's public statements about the bequest which the libel plaintiff wanted to recover from the bankruptcy estate.

Five justices agreed that the bankruptcy court could not constitutionally exercise jurisdiction over the petitioner's counterclaim. But Chief Justice Roberts could secure only four votes for an opinion that sought to harmonize *Northern Pipeline* and functionalism by inquiring not only whether the counterclaim fit any of the traditional categories, but also whether it fit the *Thomas-Schor* conception of "seemingly private rights" that are deemed public because they are integral to a federal regulatory scheme, and whether other functional elements such as consent were present. Justice Scalia's concurring opinion sharply criticized the redefinition of public rights to include cases in which the government is not a party. More broadly, he rejected the plurality's effort at harmonization that involved "at least seven different" factors having "nothing to do with the text or tradition of Article III," and which invite an "intuitive balancing of benefits and harms."<sup>202</sup> Outside the historically recognized categories, he insisted, "an Article III judge is required in *all* federal adjudications."<sup>203</sup> Justice Breyer, joined by three other liberal justices, analyzed the case through the framework of the functionalist factors in *Thomas* and *Schor*.<sup>204</sup>

Four years after *Stern*, the Court revisited "core proceedings" in bankruptcy in *Wellness International Network, Ltd. v. Sharif*.<sup>205</sup> Instead of following Chief Justice Robert's harmonization approach or conducting a full functional analysis, the Court relied exclusively on consent, expanding the doctrine to include implied consent and mischaracterizing *Stern* and *Northern Pipeline* as turning mainly on the absence of consent. Moreover, *Schor* considered consent in the context of a multi-factor functional analysis of structural Article III concerns and Congress regulatory scheme. *Wellness*, by contrast, separates consent from these other factors and accords it dispositive significance. The party objecting to non-Article III adjudication in *Wellness* was the party who initially filed the case in the non-Article III court—as in *Schor*, the petitioner complained only after losing in a court of his choosing.<sup>206</sup> But

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201. See 28 U.S.C. § 157(b).

202. *Stern*, 564 U.S. at 504–05 (Scalia, J., concurring).

203. *Id.* at 504–05.

204. *Id.* at 511–19 (Breyer, J., dissenting).

205. 575 U.S. 665, 670–71 (2015).

206. *Id.* at 671 (noting that Sharif pursued bankruptcy to avoid collection of a prior money judgment by Wellness, that Sharif resisted discovery in the bankruptcy court, and that Sharif challenged the jurisdiction of the bankruptcy court when that court entered a default judgment against him).

unlike *Schor*, a judge adjudicating a core bankruptcy proceeding is not an adjunct. The majority in *Wellness* utters not a word about adjuncts even though the precedents it relies on in addition to *Schor* are also traditional adjunct cases—cases involving magistrate judges who operate under “the district court’s total control and jurisdiction.”<sup>207</sup> Chief Justice Roberts, joined by Justice Scalia, and in part by Justice Thomas, dissented, arguing that the majority had taken functionalism beyond its foundations and misconstrued the theory of consent.<sup>208</sup> But having attempted to incorporate functionalism into bankruptcy analysis in *Stern*, the Chief Justice was hardly in a position to complain that a different majority of justices was prepared to take functionalism in a different direction than he preferred.

In *Oil States Energy Services, LLC v. Greene’s Energy Group, LLC*, the Court shifted rules of decision again, returning to traditional public rights analysis in the context of inter partes review of patent validity before the Patent and Trademark Office (PTO).<sup>209</sup> The Court concluded that PTO determinations of patent validity involve the government’s reconsideration of a public franchise and therefore “fall[ ] squarely within the public-rights doctrine.”<sup>210</sup> It made no reference to functional considerations, emphasizing instead the historical authority of the executive branch to reconsider and cancel a patent.

Most recently, in *SEC v. Jarkesy*, the Court has held that the Securities and Exchange Commission (SEC) cannot bring civil penalty claims for fraud before the Commission.<sup>211</sup> Only an Article III court can entertain such claims because damages for fraud trigger the Seventh Amendment jury trial right—unavailable before the Commission—and enforcement of a statutory right grounded in a traditional common law claim such as fraud is a private right. To reach this conclusion, the majority narrowly construed the public rights doctrine, distinguishing a series of earlier cases permitting non-Article III adjudication of civil penalties (such as civil fines for immigration violations, tariffs on imported goods, and OSHA civil fines) on the ground that they did not involve statutory claims derived from the common law.<sup>212</sup> A concurring opinion by Justice Gorsuch, joined by Justice Thomas, would have adopted an even narrower test that limited public rights doctrine to claims with a “‘deeply rooted’ tradition of

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207. *Id.* at 677 (quoting *Peretz v. United States*, 501 U.S. 923, 937 (1991)); see also *Gomez v. United States*, 490 U.S. 858, 872–76 (1989).

208. *Wellness*, 575 U.S. at 699 (Roberts, C.J., dissenting) (describing the majority’s derivation of its theory of consent from *Stern* as an erroneous, “imaginative reconstruction” of the case).

209. 584 U.S. 325, 334 (2018).

210. *Id.* at 334–35.

211. 144 S. Ct. 2117, 2130–36 (2024). The *Jarkesy* Court relied on *Granfinanciera, S.A. v. Nordberg*, which held that fraudulent conveyance claims traditionally received jury trial at common law and therefore, under the Seventh Amendment and Article III, cannot be tried before a bankruptcy judge, and *Tull v. United States*, which concluded that the nature of remedy—not whether the cause of action derives from a statute—is the dispositive consideration in Seventh Amendment analysis. See *id.* at 2128–29 (first citing *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 53 (1989); then citing *Tull v. United States*, 481 U.S. 412, 414–15, 417–25 (1987)).

212. *Id.* at 2132, 2137 (distinguishing *Oceanic Steam Nav. Co. v. Stranahan*, 214 U.S. 320 (1909); *Ex parte Bakelite Corp.*, 279 U.S. 438 (1929); and *Atlas Roofing Co. v. OSHA*, 430 U.S. 442 (1977)).

nonjudicial adjudication.”<sup>213</sup> A dissent by the Court’s three most liberal members argued that, as long as the government is a party, the Seventh Amendment should be no barrier to agency enforcement.<sup>214</sup> Thus, only four justices were unequivocally committed to the test announced in the majority opinion. Because there are dozens of agencies that enforce civil penalties in administrative proceedings,<sup>215</sup> the case will invite new constitutional challenges by regulated entities wherever nonfrivolous analogies between the enforcement action and common law claims can be drawn. Moreover, as the Seventh Amendment is a waivable right, collisions with the Court’s functionalist reliance on consent in *Wellness*, *Schor*, and other cases are likely.

Oscillations in the controlling rule of decision by the Roberts Court thus rival earlier oscillations during the Burger Court between *Northern Pipeline*, on the one hand, and *Thomas* and *Schor*, on the other. The result is that, over the entire forty year period between *Northern Pipeline* decided in 1982 and *Jarkesy* in 2024, it is rare to find two cases in a row which rest on the same test for the constitutionality of non-Article III courts.<sup>216</sup> Beginning instead from *Crowell*, decided in 1932, the range of possible tests varies widely. It encompasses Justice Brandeis’s dissenting position in *Crowell*, that there is no Article III barrier to non-Article III adjudication at all, only a question whether judicial process before an Article III court is a requirement of due process under the Fifth Amendment,<sup>217</sup> to Justice Scalia’s position in *Stern* that outside the three narrow,

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213. *Id.* at 2147 (Gorsuch, J., concurring). History is relevant to the majority’s analysis, but dispositive in the latter.

214. *Id.* at 2158 (Sotomayor, J., dissenting).

215. *Id.* at 2173–74 (gathering examples).

216. *Cf.* *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 593–94 (1985) (“Congress, acting for a valid legislative purpose pursuant to its constitutional powers under Article I, may create a seemingly ‘private’ right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary.”); *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 851 (1986) (“[I]n reviewing Article III challenges, we have weighed a number of factors, none of which has been deemed determinative, with an eye to the practical effect that the congressional action will have on the constitutionally assigned role of the federal judiciary. Among the factors upon which we have focused are the extent to which the ‘essential attributes of judicial power’ are reserved to Article III courts, and, conversely, the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts, the origins and importance of the right to be adjudicated, and the concerns that drove Congress to depart from the requirements of Article III.” (citations omitted)); *Oil States Energy Servs., LLC v. Greene’s Energy Grp., LLC*, 584 U.S. 325, 334 (2018) (explaining that the Court determines “whether a proceeding involves an exercise of Article III judicial power” by “distinguish[ing] between ‘public rights’ and ‘private rights,’” where “Congress [has] significant latitude to assign adjudication of public rights to entities other than Article III courts”; noting that the public-rights doctrine “applies to matters ‘arising between the government and others, which from their nature do not require judicial determination and yet are susceptible of it’” (first quoting *Exec. Benefits Ins. Agency v. Arkison*, 573 U.S. 25, 32 (2014); then quoting *Crowell v. Benson*, 285 U.S. 22, 50 (1932)); *Jarkesy*, 144 S. Ct. at 2131–32 (explaining that if a suit, “from its nature, is the subject of a suit at the common law,” comes within federal jurisdiction, “an Article III court must decide it,” unless it concerns a public right, i.e., the cause of action is one that “historically could have been determined exclusively by [the executive and legislative] branches” (first quoting *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1856); then quoting *Stern v. Marshall*, 564 U.S. 462, 484, 493 (2011))).

217. *Crowell*, 285 U.S. at 86–87 (Brandeis, J., dissenting).

historically grounded exceptions (military, territorial, and traditional public rights) an Article III court is constitutionally mandatory. Permutations in between these poles currently span from the holding in *Wellness* that consent cures all to heterogeneous applications of public rights doctrine in *Oil States* and *Jarkesy*.

There are so many tests not because the issue is irretrievably complex, but because of the Court's casual disregard for the importance of consensus in developing jurisdictional rules for the administration of justice. It has made a habit of sacrificing clarity on the altar of ideological preferences regarding the growth of the administrative state and the role of Article III supervision of non-Article III courts. In his dissent in *Schor*, Justice Brennan warned that functionalism would gradually "eviscerate[]" the protections of judicial independence in Article III.<sup>218</sup> A balancing test pits the "legislative interest in convenience and efficiency . . . the benefits of which are immediate, concrete, and easily understood," against "the competing interest[s] in judicial independence . . . which are almost entirely prophylactic, and thus often seem remote and not worth the cost in any single case."<sup>219</sup> The concern is well founded.

But oscillating unpredictably between functionalism and categorical analysis is arguably worse. Plural, erratic, situational rule formulation serves no true Article III purpose. Indeed, it makes a mockery of the concept of *structural* constitutional law, which rests on the premise that the principles being elaborated are indeed derived from the structure of the Constitution and not the impulses of shifting majorities of the Court. It also multiplies strategic jurisdictional litigation and delay on the order of *Bleak House*.<sup>220</sup> If the parties in *Stern* could afford this gamesmanship given the multi-million dollar value of the estate involved, most non-Article III litigants cannot. Yet the invitation to delay and strategic litigation has remained wide open because, without a settled rule of decision, the only certainty is that precedent does not constrain the Court. The victims are the millions of litigants who cannot be sure if the courts before which they appear have authority over their cases and Congress, whose power to create non-Article III courts lingers in uncertainty.

### III. AMBIGUITY WITHIN RULES OF DECISION

There are important areas of jurisdiction in which the Court has reached consensus on a rule of decision. But even in these areas, the rule is very often internally ambiguous. Among the most prominent and enduring examples is the

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218. *Schor*, 478 U.S. at 864 (Brennan, J., dissenting).

219. *Id.* at 863.

220. For a comprehensive study of lower court decisions struggling to apply *Stern* and subsequent cases, see Mawerdi Hamid, *Constitutional Authority of Bankruptcy Judges: The Effects of Stern v. Marshall as Applied by the Courts of Appeals*, 27 ABIL. REV. 51, 53 (2019) (finding *thousands* of cases attempting to deal with the fallout of the Supreme Court's decisions).

power of lower federal courts to decide cases that involve federal law.<sup>221</sup> There are two essential prerequisites of federal question jurisdiction. The first is constitutional. Article III declares that the “judicial power” of the federal courts “shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority.”<sup>222</sup> Congress cannot enlarge federal court jurisdiction beyond what Article III provides. The Court’s interpretation of this language in Article III has been clear since *Osborn v. Bank of United States*, where it held that a dispute “arises under” federal law if it contains a federal “ingredient.”<sup>223</sup> Most cases are “mixed” in the sense that they contain elements of both federal and state law. As the Court emphasized in *Osborn*, “[t]here is scarcely any case, every part of which depends on the [C]onstitution, laws, or treaties of the United States.”<sup>224</sup> Under *Osborn*, only cases that involve *no* federal ingredient of any kind are outside the jurisdictional grant of Article III.

The second component of arising under jurisdiction is statutory—that is, of the constitutionally authorized Article III judicial power over federal questions, how much has been made available by Congress? In 1875, amidst the heat of state court resistance to Reconstruction, Congress authorized the lower federal courts to take up cases that “arise under” federal law.<sup>225</sup> Prior to that jurisdictional grant, federal law was principally adjudicated in state courts. Although the statute uses the same language as Article III, the Court has never read the statute to extend as far as *Osborn* permits. Instead, the Court has

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221. The problem is not limited to federal question jurisdiction. For example, Court recently introduced sweeping uncertainties into the relatedness element of minimum contacts in *Bristol-Myers Squibb Co. v. Superior Court of California*. 582 U.S. 255, 265–66 (2017) (holding that a defendant’s sales in a state where some class members were harmed is not related to the identical claims of class members who purchased and used the same product in another state). The opaque rationale of that decision has invited strategic litigation challenging relatedness outside the context of complex party joinder. See *Ford Motor Co. v. Mont. 8th Jud. Dist. Ct.*, 592 U.S. 351, 371 (2021); see also *infra* Part.IV (discussing the ambiguity in standing doctrine).

222. U.S. CONST. art. III, § 2.

223. 22 U.S. (8 Wheat.) 738, 823 (1824) (“[W]hen a question to which the judicial power of the Union is extended by the constitution, forms an ingredient of the original cause, it is in the power of Congress to give the Circuit Courts jurisdiction of that cause, although other questions of fact or of law may be involved in it.”); *id.* at 822 (“[T]he title or right set up by the party, may be defeated by one construction of the constitution or law of the United States, and sustained by the opposite construction.”); cf. Anthony J. Bellia Jr., *The Origins of Article III ‘Arising Under’ Jurisdiction*, 57 DUKE L.J. 263, 343 (2007) (offering a narrow reading of “arising under” jurisdiction in Article III to protect the supremacy of federal laws but not federal interests).

224. *Osborn*, 22 U.S. (8 Wheat.) at 820.

225. 28 U.S.C. § 1331. Other Reconstruction-era jurisdictional statutes contained sweeping new grants of power to the federal courts to aid in Reconstruction enforcement and deal with state court hostility. *E.g.*, Civil Rights Act of 1866, Pub. L. No. 39-31, § 3, 14 Stat. 27, 27; Enforcement Act of 1870, Pub. L. No. 41-114, § 8, 16 Stat. 140, 142; Enforcement Act of 1871, Pub. L. No. 41-99, § 15, 16 Stat. 433, 438; Civil Rights Act of 1871, Pub. L. No. 42-22, §§ 2, 6, 17 Stat. 13, 13–15. The Court, however, often inhibited the reach of these jurisdictional grants. See, e.g., *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590, 590 (1874) (narrowing construction of amendments to Section 25 of the First Judiciary Act); William M. Wiecek, *The Great Writ and Reconstruction: The Habeas Corpus Act of 1867*, 36 J.S. HIST. 530, 545 (1970) (“The federal courts formulated doctrines which inhibited the opportunities of habeas petitioners seeking federal court vindication of federal constitutional and statutory rights.”).

interpreted the statute to confer jurisdiction over two classes of cases: those in which federal law “creates the cause of action”<sup>226</sup> and those in which state law creates the cause of action but “a right or immunity created by the Constitution and laws of the United States [is] an element, and an essential one, of the plaintiff’s cause of action.”<sup>227</sup> The possibility, even probability, that federal law will be raised at some point in the litigation is not enough—the federal issue must be contained in the plaintiff’s prima facie case.<sup>228</sup> One of the principal goals of precluding anticipated defenses is the promotion of clarity in handling mixed cases. By assessing the existence of a necessary and “substantial” federal issue in the plaintiff’s complaint and eliminating guesswork about possible federal defenses,<sup>229</sup> federal district courts can be certain, at the earliest possible phase of litigation, that the case in fact arises under federal law.

There have always been hard cases. Most obviously, interpreting the 1875 grant to confer less than Article III allows, even though the statute uses language identical to Article III, has resulted in some degree of “confusion” from the very beginning.<sup>230</sup> As the Court has put it, attempting to “define broadly and in the abstract ‘a case arising under the Constitution or laws of the United States’” contains inherent “hazards.”<sup>231</sup> Sound decisions avoiding these hazards require “common-sense accommodation of judgment to kaleidoscopic situations . . . . [T]here [must be] a selective process which picks the substantial causes out of the web and lays the other ones aside.”<sup>232</sup> In terms of structural constitutional concerns, federalism militates against the exercise of federal court jurisdiction over mixed cases that contain insubstantial federal issues (most of the law is

226. *Am. Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916).

227. *Gully v. First Nat’l Bank in Meridian*, 299 U.S. 109, 112 (1936). It is not always the case that a suit that enforces a federal right arises under federal law. *See Shulthiz v. McDougal*, 225 U.S. 561, 569 (1912); *Shoshone Mining Co. v. Rutter*, 177 U.S. 505, 507 (1900).

228. “Although such allegations show that very likely, in the course of the litigation, a question under the Constitution would arise, they do not show that the suit, that is, the plaintiff’s original cause of action, arises under the Constitution.” *Louisville & Nash. R.R. Co. v. Mottley*, 211 U.S. 149, 152 (1908). Notably, the possibility that a federal issue will arise is sufficient under Article III. Chief Justice Marshall’s opinion in *Osborn* discusses the possibility that the right of the Bank of the United States to sue may be challenged—a right set out in the legislation creating the Bank—is sufficient to bring the case within the judicial power of the federal courts under Article III. Justice Johnson dissented precisely on the ground that the “principle of a possible occurrence of a question as a ground of jurisdiction, is transcending the bounds of the constitution.” *Osborn*, 22 U.S. (8 Wheat.) at 889.

229. Federal defenses may or may not be raised in an answer, and under the liberal amendment standard of Rule 15 need not be pled at that time. FED. R. CIV. P. 15.

230. For discussion of the late nineteenth century cases, an argument that the statute is properly construed to confer *all* the jurisdiction permitted under Article III, as well as evidence that critics of the rule delight in highlighting complexity to leverage their critique, see James H. Chadbourn & A. Leo Levin, *Original Jurisdiction of Federal Questions*, 90 U. PA. L. REV. 639 (1942). The Court itself has recognized that the statute may have been intended to confer all the jurisdiction permitted by Article III. *See Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Tr.*, 463 U.S. 1, 8 n.8 (1983) (noting that the “limited legislative history” of 1875 grant “suggests that the 44th Congress may have meant to ‘confer the whole power which the Constitution conferred’” (quoting 2 CONG. REC. 4986 (1874) (statement of Sen. Matthew Carpenter))).

231. *Gully*, 299 U.S. at 117.

232. *Id.* at 117–18.

state law so these kinds of cases arguably belong in state court). But federalism properly gives way to supremacy concerns as the federal issues become more substantial and numerous, calling for the uniformity, expertise, and solicitude of federal courts. The well pleaded complaint rule makes a common sense accommodation by requiring lower federal courts to distinguish, at the very outset of litigation, disputes over federal law “that are basic and those that are collateral . . . disputes that are necessary and those that are merely possible.”<sup>233</sup>

Although no one would describe the twentieth century cases on the well pleaded complaint rule as tidy, the Court spilled the inkwell on the pages of this jurisprudence in the 1985 case *Merrell Dow Pharmaceuticals Inc. v. Thompson*.<sup>234</sup> Divided 5–4, with all conservative justices in the majority, the Court appeared to restrict arising under jurisdiction to cases in which Congress had created an express federal cause of action, the so-called “Holmes Test.” The case concerned incorporation of a federal regulatory standard for the labeling of the drug Bendectin into a state common law negligence claim for birth defects allegedly caused by the drug.<sup>235</sup> Under Ohio state law, the violation of a federal statute alters the standard of causation, creating a “presumption of negligence.”<sup>236</sup> As such, the elements of the plaintiffs’ state law negligence claim incorporated a necessary and substantial federal issue—whether FDCA labeling regulations were violated in the health advisory language in the label for Bendectin. Merrell Dow removed the case to federal court, and the plaintiffs sought remand. The Court concluded that there was no federal jurisdiction because, in the absence of a federal right of injured consumers to sue under the FDCA, Congress could not have intended state law claims enforcing provisions of the statute to be filed in federal court.<sup>237</sup> If Congress does not create a federal cause of action to enforce its regulatory commands, the Court reasoned, state law claims that incorporate those commands do not belong in federal court either.

It is true that Congress was silent about private enforcement in the statute. One could infer from this that Congress was opposed to private enforcement in federal court. But one could also infer that Congress assumed private

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233. *Id.* at 118. A challenging issue is how to proceed when a party, which would have a federal defense if sued, tries to settle the matter through declaratory relief based on federal law. See *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 673–74 (1950). An anticipated lawsuit which itself would not arise under federal law does not give rise to jurisdiction just because someone seeks declaratory relief to prevent it. On the other hand, when a declaratory judgment plaintiff seeks relief against someone who would have a claim under federal law, the case arises under federal law. *Franchise Tax Bd.*, 463 U.S. at 19 n.19 (“[F]ederal courts have consistently adjudicated suits by alleged patent infringers to declare a patent invalid, on the theory that an infringement suit by the declaratory judgment defendant would raise a federal question over which the federal courts have exclusive jurisdiction.”).

234. 478 U.S. 804, 817 (1986).

235. *Id.* at 805–06.

236. *Id.* at 806 (citation omitted).

237. *Id.* at 817 (“[A] complaint alleging a violation of a federal statute as an element of a state cause of action, when Congress has determined that there should be no private, federal cause of action for the violation, does not state a claim ‘arising under’ [federal law].” (quoting 28 U.S.C. § 1331)).

enforcement would occur since the FDCA provisions for drug testing and labeling were passed in 1962,<sup>238</sup> when the Warren Court was in the habit of implying private rights of action from federal statutes that were silent on the issue.<sup>239</sup> Other inferences are equally plausible: that Congress was indifferent to the issue of private enforcement because its focus was agency enforcement, or that Congress assumed federal jurisdiction exists if state law incorporates federal standards into state common law claims.

The majority disregarded these possibilities.<sup>240</sup> It simply grafted a set of concerns about implying private rights of action which the Burger Court had just announced in a separate line of cases<sup>241</sup> onto a long line of twentieth century precedent extending federal jurisdiction to mixed cases irrespective of whether there was a parallel federal right of action.<sup>242</sup> In this new approach, federal courthouse doors swing open for mixed cases bottomed on state causes of action whenever Congress has already made federal jurisdiction available by creating a federal private right of action, but, if it has not they are categorically closed. Congress must provide for double-barreled private enforcement in federal court, or there is no federal court enforcement at all.

The decision is emblematic of the modern Court's federalism revival—its commitment to limiting the enforcement of federal law in lower federal courts under the aegis of deference to state law, state courts, and state's rights.<sup>243</sup> But the purpose of the 1875 grant was quite the opposite—opening lower federal courts to ensure expert, uniform, and faithful interpretation of federal law in the

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238. Wallace F. Janssen, *The Story of the Laws Behind the Labels*, FDA CONSUMER, June 1981, at 32, 40 (discussing the Drug Amendments of 1962).

239. See, e.g., *Tunstall v. Bhd. of Locomotive Firemen & Enginemen*, 323 U.S. 210, 213 (1944); *Steele v. Louisville & Nash. R.R. Co.*, 323 U.S. 192, 207 (1944); see also *J.I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964). The point is not that the Warren Court would have implied a right of action under the FDCA but rather that the assumption Congress did not want private enforcement is persuasive only if one ignores the “contemporary legal context” of the period in which the legislation was passed—a practice the Court had endorsed within three years of *Merrell Dow*. See *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 381 (1982); cf. *Alexander v. Sandoval*, 532 U.S. 275, 287–88 (2001) (noting that the Court would no longer treat contemporary legal context as dispositive).

240. *Merrell Dow*, 478 U.S. at 810 (emphasizing instead the parties' concession that the statute created no express right of action).

241. See *Touche Ross & Co. v. Redington*, 442 U.S. 560, 568–71 (1979); *Cannon v. Univ. of Chi.*, 441 U.S. 677, 688 (1979).

242. *Merrell Dow*, 478 U.S. at 812.

243. On the Court's federalism revival, see Norman W. Spaulding, *Constitution as Countermonument: Federalism, Reconstruction, and the Problem of Collective Memory*, 103 COLUM. L. REV. 1992 (2003). On the influence of Felix Frankfurter on modern federalism jurisprudence, see Mary Brigid McManamon, *Felix Frankfurter: The Architect of “Our Federalism,”* 27 GA. L. REV. 697, 701–02 (1993) (“Today's concept of judicial federalism can be traced largely to the work of one man: Felix Frankfurter.”); Lael Weinberger, *Frankfurter, Abstention Doctrine, and the Development of Modern Federalism: A History and Three Futures*, 87 U. CHI. L. REV. 1737, 1739 (2020) (“Justice Frankfurter made federalism a central consideration in assessing whether a particular case should be in state court instead of federal court.”).

face of state court infidelity to federal law during Reconstruction.<sup>244</sup> The *Merrell Dow* Court thus enforced, sub silentio, a federalism principle associated with the retreat from Reconstruction in its reading of Section 1331.<sup>245</sup> If the Reconstruction Congress could not have anticipated thousands of state tort cases coming into federal court because state law incorporates regulatory standards of the modern administrative state, they well understood the federalism implications of opening federal courts to mixed cases by creating general federal question jurisdiction given that there were far fewer federal private rights of action at the time.<sup>246</sup>

Whatever one makes of the wisdom of elevating federalism over the purposes of the 1875 grant, rank confusion was created by the Court's decision in *Merrell Dow*. Some lower federal courts read the decision narrowly, but others read it broadly for the proposition that arising under jurisdiction depends on the existence of a federal cause of action.<sup>247</sup> The Court let this jurisdictional ambiguity fester for nearly twenty years before clarifying that *Merrell Dow* did not overrule the longstanding doctrine that a necessary and substantial federal issue in a state law cause of action arises under federal law. But even when the Court finally addressed the issue in *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, its attempt to cabin *Merrell Dow* introduced new ambiguities.<sup>248</sup> The case involved a state quiet title action asserting that Darue's title was invalid because the Internal Revenue Service (IRS) failed to follow statutory requirements for providing notice when it seized and sold property to Darue to satisfy Grable's tax delinquency.<sup>249</sup> The federal tax code provides no private right of action to enforce the notice requirements of its provisions for seizure of land belonging to a delinquent taxpayer. After Darue removed the case to federal court, Grable sought remand, relying on *Merrell Dow* and arguing that the case did not arise under federal law in the absence of a federal private right of action.

The Court unanimously upheld removal, emphasizing that interpretation and enforcement of the federal tax code calls for the expertise and uniformity federal courts can provide. But rather than simply overrule *Merrell Dow* as

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244. Civil rights statutes of the period contained their own jurisdictional clauses, Act of Apr. 9, 1866, § 3, 14 Stat. 27; Act of May 31, 1870, § 8, 16 Stat. 142; Act of Feb. 28, 1871, § 15, 16 Stat. 438, 438–39; Act of Apr. 20, 1871, §§ 2, 6, 17 Stat. 13, 13–15, and removal jurisdiction was also expanded. See William M. Wiecek, *The Reconstruction of Federal Judicial Power, 1863-1875*, 13 AM. J. LEGAL HIST. 333, 333 (1969) (“In no comparable period of our nation’s history have the federal courts, lower and Supreme, enjoyed as great an expansion of their jurisdiction as they did in the years of Reconstruction.”); *id.* (describing both expansion and ensuing contraction of other jurisdictional grants).

245. On the role of federalism in the retreat from Reconstruction, see Spaulding, *supra* note 243, at 2005–06.

246. See Wiecek’s complementary analysis of removal jurisdiction. Wiecek, *supra* note 244, at 336.

247. *E.g.*, Patti Alleva, *Prerogative Lost: The Trouble With Statutory Federal Question Doctrine After Merrell Dow*, 52 OHIO ST. L.J. 1477, 1532–38 nn.195–227 (1991) (collecting cases).

248. *Grable & Sons Metal Prods., Inc. v. Darue Eng’g & Mfg.*, 545 U.S. 308, 316–17 (2005).

249. *Id.* at 310–11.

inconsistent with well-established precedent,<sup>250</sup> the Court introduced new complexities. The Court held that whether Congress has created a private right of action is a factor “relevant to, but not dispositive of,” decisions about what federal issues Section 1331 covers.<sup>251</sup> Reinforcing the federalism concerns underlying *Merrell Dow*, the Court emphasized that inquiry must be made into any potential disturbance of “Congress’s intended division of labor between state and federal courts” in upholding federal jurisdiction of a mixed case.<sup>252</sup> Whereas state quiet title actions based on compliance with federal tax seizure provisions are relatively “rare” and “portend only a microscopic effect on the federal-state division of labor,” state negligence claims resting on a violation of federal regulatory standards like those in *Merrell Dow* are common and could flood the federal courts.<sup>253</sup>

It is therefore no longer sufficient to establish federal jurisdiction to show that a federal issue in a mixed case is necessary to the plaintiff’s claims and substantial in the conventional sense of calling for the expertise, uniformity, and solicitude of federal courts. Paradoxically, mixed cases involving federal issues that are quite substantial in the conventional sense may not arise under federal law because they happen to be numerous. Even when their numerosity is a direct consequence of how substantial they are, they may not arise under federal law because federal jurisdiction would disturb the balance division of labor between state and federal courts. *Grable*’s effort to rescue *Merrell Dow* conspicuously offered no metric for numerosity, only generalities, so litigants and lower courts are left to conjecture regarding what counts as too numerous to warrant jurisdiction, too few to warrant dismissal or remand. And because *Grable* does not overturn *Merrell Dow*, the Court continues to treat the existence of a federal private right of action as relevant, but in unpredictable ways.<sup>254</sup>

Lastly, the decision gave new indeterminate breadth to the inquiry into what makes a federal issue in a mixed case substantial—requiring detailed, situational, and therefore subjective scrutiny of the federal interests behind the federal law components of a state law claim, rather than simply inquiring if the federal law components are necessary and non-trivial. In *Empire HealthChoice Assurance, Inc. v. McVeigh*, a case decided just a year after *Grable*, the Court split 5-4 (with the author of *Grable* shifting over to the dissent) over whether a dispute involving a state contract claim to enforce the reimbursement provisions of a federal health insurance contract for federal employees involved sufficiently

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250. See *id.* at 312–13 (noting that at least since *Smith v. Kansas City Title & Trust*, 255 U.S. 180 (1921), the Court has upheld arising under jurisdiction of state law causes of action that incorporate federal issues without an associated federal private right of action).

251. *Id.* at 318.

252. *Id.* at 319.

253. *Id.* at 315.

254. See *Empire HealthChoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 679–80 (2006) (creating an express right of action of one type supports conclusion that Congress did not want “arising under” jurisdiction at all for a different type of claim under the same statutory framework).

important federal interests to arise under federal law.<sup>255</sup> The majority concluded that fact-specific decisions about reimbursement amounts were insubstantial, distinguishing *Grable* as representing a “slim” category of mixed cases permitted in federal court, and emphasizing that “Congress has not expressly created a federal right of action enabling insurance carriers like Empire to sue health-care beneficiaries in federal court.”<sup>256</sup>

As a result, parties remain incentivized to federal question jurisdiction whenever there is no parallel federal right of action, and lower federal court judges are left to guess what federal issues shifting majorities of the Court will decide are sufficiently substantial to arise under federal law. Indeterminacy exists not just at the margins, but in the ordinary application of the rule to mixed cases.<sup>257</sup> A situational, context sensitive rule is not always the enemy of clarity, but poorly designed, unprincipled contextual standards are.

#### IV. RESTRAINT AS ARROGATION OF POWER

Ambiguous jurisdictional rules diminish the resources of both the parties and courts for merits adjudication, and they create pre-filing confusion and cost for parties struggling to determine what court(s) would have proper jurisdiction of their cases. But that is not their only detrimental effect on the administration of justice. They can also mask arrogation of power in the discourse of judicial restraint. For example, the default assumption invented in *Merrell Dow* that

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255. *Id.* at 678.

256. *Id.* at 693, 701; *see also* *Burrell v. Bayer Corp.*, 918 F.3d 372, 385 (4th Cir. 2019) (suggesting that only a “pure issue of [federal] law” generalizable to other parties arises under federal law (quoting *Empire HealthChoice*, 547 U.S. at 700–01)).

257. *Compare* *Bennett v. Sw. Airlines Co.*, 484 F.3d 907, 910–12 (7th Cir. 2007) (“We have a fact-specific application of rules that come from both federal and state law rather than a context-free inquiry into the meaning of a federal law.”); *Adventure Outdoors, Inc. v. Bloomberg*, 552 F.3d 1290, 1301–03 (11th Cir. 2008) (concluding that the plaintiffs’ defamation claims do not raise a substantial issue of federal law because they pertain to “the factual basis for the defendants’ statements accusing the plaintiffs of violating federal law”); *Mikulski v. Centerior Energy Corp.*, 501 F.3d 555, 561 (6th Cir. 2007) (“Resolution of this [jurisdictional] appeal will require an inquiry into the federal interest in having the federal issue decided by a federal court . . . in order to ensure that we do not misconstrue the nature of the federal interest or become misled by some histrionic fear that allowing state courts to decide federal law issues might lead to some disastrous consequence.”); *and* *Singh v. Duane Morris LLP*, 538 F.3d 334, 339–40 (5th Cir. 2008) (explaining that because “this case involves no important issue of federal law,” but rather “the federal issue is predominantly one of fact,” and “would sweep innumerable state-law malpractice claims into federal court,” the court lacked jurisdiction), *with* *Air Measurement Techs., Inc. v. Akin Gump Strauss Hauer & Feld, LLP*, 504 F.3d 1262, 1273 (Fed Cir. 2007) (“[W]e hold that at least where, as here, establishing patent infringement is a necessary element of a malpractice claim stemming from alleged mishandling of patent prosecution and earlier patent litigation, the issue is substantial and contested, and federal resolution was intended by Congress, there is ‘arising under’ jurisdiction . . . .”); *Burrell*, 918 F.3d at 382–83 (“We look only to the necessary elements of the [plaintiffs’] causes of action to determine whether they raise federal questions under [28 U.S.C.] § 1331. . . . [S]o long as ‘even one theory’ for each of [plaintiffs’] claims does *not* require ‘interpretation of federal law,’ resolution of the federal-law question is not necessary to the disposition.” (quoting *Pressl v. Appalachian Power Co.*, 842 F.3d 299, 304 (4th Cir. 2016))); *and* *Cent. Iowa Power Coop. v. Midwest Indep. Transmission Sys. Operator, Inc.*, 561 F.3d 904, 919 (8th Cir. 2009) (“We decline to find the required federal question here based on the possibility that the adjudicating court’s calculation of damages will have some effect on a jurisdictional utility’s future, yet-to-be-formulated rate.”).

Congress disfavors adjudication of mixed cases in federal court whenever it has not established a federal private right of action appears to be an exercise in judicial restraint. The immediate effect is to reduce the number of mixed cases that can be filed in federal court and enhance the authority of state courts. But it also restricts congressional power over the jurisdiction of Article III courts by forcing Congress either to create federal rights of action (not just in new legislation, but in every area in which it has previously made federal law under the assumption that mixed cases concerning that statute could come into federal court) or to expressly and retroactively declare that the absence of a federal private right of action does not modify the ordinary effect of Section 1331. This substitutes the Court's judgment for Congress'—in particular, the judgment that litigation of mixed cases in federal court is preferable to creating an independent federal cause of action. That option, notice, is also consistent with federalism principles because states that do not want state law decided in federal court can refuse to incorporate federal standards into state law.

We have also seen that fuzzy rules for determining the constitutionality of non-Article III courts likewise hamstring Congress by depriving it of clear signals about how to set up alternatives to Article III courts. Meanwhile, the Court is free to impose its own shifting preferences. That approach inverts the text and structure of Article III, which gives Congress, not the Supreme Court, plenary control over the jurisdiction (indeed the existence) of the lower federal courts. There are—and ought to be—limits to congressional control of Article III jurisdiction, but, as the Court has repeatedly emphasized in its separation of powers jurisprudence, separation of powers limitations should be clear: “[E]stablishing high walls and clear distinctions” is necessary “because low walls and vague distinctions will not be judicially defensible in the heat of interbranch conflict. . . . Separation of powers, a distinctively American political doctrine, profits from the advice authored by a distinctively American poet: Good fences make good neighbors.”<sup>258</sup> The Court typically uses this language in cases reviewing congressional intrusion upon judicial functions, but the risk of judicial encroachment upon the prerogatives of Congress is no less real. Indeed, given that the Court has insisted that it is “emphatically the province of the [courts]” to determine constitutional limits, judicial encroachment is more susceptible to self-interested manipulation through Court-generated ambiguity.<sup>259</sup>

A third example of arrogation is *Erie* maximalism, which substitutes the Court's judgment about what rules of decision apply when federal courts sit in diversity for congressionally legislated rules of decision. As we saw in Part II, the Court has even subordinated constitutional rules of procedure, such as the Seventh Amendment, to *Erie* policy principles of its own making. Yet all this

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258. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 239–40 (1995).

259. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

travels under the guise of judicial restraint in the form of deference to state rules of decision.

A fourth example is specific personal jurisdiction. The doctrine sets a constitutional limit on state and federal judicial power over foreign defendants derived from the Due Process Clause of the Fourteenth Amendment.<sup>260</sup> On the one hand, if the test is too loose, there is a risk of “destructive competition”—states may extend long arm jurisdiction over foreign defendants in ways that advantage injured home state plaintiffs and undermine the authority of the courts of other states.<sup>261</sup> In dicta, *Nicastro*’s plurality emphasizes this potential problem of a state court’s exercise of personal jurisdiction interfering with the prerogatives of other states. But holding foreign defendants accountable for in-state harm does not obviously interfere with the power of other states to regulate that defendant (or the right of other states, if they wish, to provide classes of defendants with jurisdictional immunity). No state lost regulatory power over McIntyre by virtue of New Jersey asserting jurisdiction to determine tort liability for an accident that occurred in New Jersey. Simply put, not every exercise of long arm jurisdiction raises problems of federalism and comity regarding the regulatory powers of other states.

Tellingly, the plurality in *Nicastro* is silent on the ways in which constitutionalizing personal jurisdiction rules may undercut federalism by *narrowing* the discretion of states to define their long arm statutes in ways that suit local interests.<sup>262</sup> The Court has been concerned with lack of restraint by state courts too eager to assert personal jurisdiction, but constitutionalizing sensitive questions of political economy over which the Court has no comparative institutional competence betrays the principle of judicial restraint—placing the Court in control of long arm jurisdiction rather than deferring to state legislatures.<sup>263</sup> The point is not that the best rule would be permissive of state court jurisdiction, it is simply that there are risks of judicial overreach on both

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260. See *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945).

261. Klerman, *supra* note 16, at 261–62 (“Whether competition of that sort occurs is a subject of some dispute . . . [and whether] those claims are correct has . . . never been rigorously analyzed.”). Klerman argues that constitutional analysis of personal jurisdiction should be concerned with bias. *Id.*; see also Geoffrey P. Miller, *In Search of the Most Adequate Forum: State Court Personal Jurisdiction*, 2 STAN. J. COMPLEX LITIG. 1, 26 (2014) (“The only institution capable of policing against the tendency of state courts to exercise such ‘exorbitant jurisdiction’ is the United States Supreme Court. Lower federal courts cannot do the job.” (footnote omitted)). But it is worth noting that bias need not be, and is not, regulated exclusively, or even principally, through jurisdictional rules. Due process as a measure of the quality and impartiality of a hearing, judicial ethics standards, and appellate review are all designed to regulate bias.

262. Douglas D. McFarland, *Dictum Run Wild: How Long-Arm Statutes Extended to the Limits of Due Process*, 84 B.U. L. REV. 491, 496–97 (2004) (finding that prior to *Nicastro* approximately two-thirds of state long-arm statutes allowed their courts to exercise personal jurisdiction to the limits set by the Supreme Court under the Due Process Clause).

263. Notably, in other contexts involving due process, the Court has explained its reluctance to expand due process mandates by emphasizing that this leaves room for states to adjust “wise public policy” to meet evolving needs for the proper administration of justice. *E.g.*, *Lassiter v. Dep’t of Social Servs.*, 452 U.S. 18, 33–34 (1981).

ends of the spectrum. The modern Court has been silent about the risks attendant to over-constitutionalizing the boundaries of long arm jurisdiction.

A final example of jurisdictional arrogation of power by the Court is modern standing doctrine. The doctrine ostensibly promotes judicial restraint, separation of powers, and federalism by preventing Article III courts from taking up disputes that belong in the political process of the states and/or the federal government. But because the test is notoriously vague, it concentrates power in the Supreme Court in at least two subterranean ways. First, when remedies and merits determinations become standing questions, cases tend to survive challenges to standing if they involve rights and remedies preferred by the Court. These cases are then more likely to develop a full trial record. Disfavored causes of action, by contrast, are more likely to lose on standing grounds at the Federal Rule of Civil Procedure 12(b)(1) phase before discovery and trial. Appeals are taken, but on a weaker factual footing, and they must survive less deferential standards of review.

A paradigmatic example in the modern Court is its more generous standing rules for anti-affirmative action claims under the Equal Protection Clause of the Fourteenth Amendment as compared to standard anti-discrimination claims.<sup>264</sup> Anti-affirmative action claims have for decades received relaxed causation analysis, meaning plaintiffs have not been required to show that they would receive the benefit they claim is distributed according to a race conscious standard in order to challenge it. Standard anti-discrimination claims, by contrast, have to meet a higher causation threshold. The effect is to ensure that claims involving de facto discrimination are more likely to be dismissed for standing defects before plaintiffs reach discovery that could force disclosures about how a defendant actually made the decisions alleged to be discriminatory.<sup>265</sup> Dismissals early in litigation are also easier to affirm on appeal precisely because the factual record is thin. Anti-affirmative action claims resting on de jure discrimination, by contrast, are more likely to survive standing challenges and thus receive full fact development before appeal—resulting in a broader docket of cases with richly detailed fact records to assess on appeal.<sup>266</sup> This jurisdictional channeling effect reflects and reinforces a

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264. Compare *Allen v. Wright*, 468 U.S. 737, 766 (1984) (denying standing to Black plaintiffs challenging an IRS policy for granting tax exempt status to private schools allegedly engaged in racial discrimination in admissions on ground that plaintiffs could not show that public school desegregation would be affected by correcting IRS policy), *abrogated by* *Lexmark Int'l, Inc. v. Static Control Components*, 572 U.S. 118 (2014), with *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 280–81 n.14 (1978) (explaining that “even if Bakke had been unable to prove that he would have been admitted in the absence of the special program, it would not follow that he lacked standing” because “apart from failure to be admitted,” the affirmative action plan meant that he was not “permit[ted] to compete for all 100 places in the class, simply because of his race”); *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 524, 545 (1983) (same); *Grutter v. Bollinger*, 539 U.S. 306, 317 (2003) (same); and *Fisher v. Texas*, 579 U.S. 365, 375–76 (2016) (same).

265. The effect is enhanced by *Washington v. Davis*, which requires evidence of intent for Fourteenth Amendment equal protection claims. 426 U.S. 229, 237–39 (1976).

266. See *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 197–98 (2023).

substantive hierarchy within the Equal Protection Clause that is entirely of the Court's making. The hierarchy prioritizes anti-affirmative action claims over the kinds of Equal Protection violations racial minorities are traditionally more likely to suffer—all under the guise of a rule framed in the discourse of judicial restraint. The modern Court did not invent the practice of modifying standing analysis for favored and disfavored substantive rights. Similar channeling effects can be identified in the Warren and Burger Court's treatment of Establishment Clause and free speech claims.<sup>267</sup> But in both instances, judicial restraint masks activism in favor of constitutional rights that are favored by a majority of the Court.

In the context of remedies, a similar channeling effect is produced by the requirement, imposed for the first time in *City of Los Angeles v. Lyons*, that standing be established independently for each remedy a plaintiff seeks.<sup>268</sup> Prior to *Lyons*, a party seeking both injunctive relief to prevent the recurrence of harm and damages for past harm would have standing as long as there was injury, causation and redressability with respect to the past harm. Whether or not injunctive relief was warranted would arise after discovery and trial. In a case such as *Lyons*, involving the use of a chokehold by police officers on a black driver at a traffic stop,<sup>269</sup> addressing remedies after discovery and trial would have permitted full development of a factual record regarding the police department's use of force policy. By making standing analysis specific to each remedy, however, the Court converted an issue grounded in equitable discretion and dependent on the fact-finding process of a trial court into a non-waivable Rule 12(b)(1) requirement that must be met at the earliest phases of litigation. The effect is that fewer cases in which injunctive relief is sought are likely to develop a record to support injunctive relief or to arrive at the Court on a full factual record.<sup>270</sup>

The modern Court has also narrowed the concreteness and particularity elements of injury analysis to conform with conventional, retrospective, monetary remedies at law. This means that cases involving ordinary transactional, economic, retrospective money damages tend to survive standing analysis, whereas cases involving dignitary, intangible, anticipatory harms, and

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267. See *Flast v. Cohen*, 392 U.S. 83, 105–06 (1968) (relaxing traditional standing requirements for Establishment Clause claims); *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973) (relaxing traditional standing requirements for Free Speech claims); *id.* (“Litigants [ ] are permitted to challenge a statute not because their own rights of free expression are violated, but because . . . the statute’s very existence may cause others not before the court to refrain from constitutionally protected speech or expression.”).

268. 461 U.S. 95, 105 (1983) (“*Lyons*’ standing to seek the injunction requested depended on whether he was likely to suffer future injury from the use of the chokeholds by police officers. . . . That *Lyons* may have been illegally choked by the police on October 6, 1976, while presumably affording *Lyons* standing to claim damages . . . does nothing to establish a real and immediate threat that he would again be stopped . . .”).

269. *Id.* at 97–99.

270. The plaintiff must either split her case, pursuing injunctive relief in state court and money damages in federal court, perilous as that is under preclusion rules, file the entire case in state court if it has lower standing barriers, abandon the claim for injunctive relief in order to stay in federal court, or find a way to bolster the claim for injunctive relief so it meets the standing requirements.

associated requests for preventive equitable relief or structural reform are more likely to be dismissed.<sup>271</sup>

It would be one thing if the law of equity was insensitive to concerns about separation of powers, federalism, and equitable overreach. We might then expect standing to protect against defects in equitable standards that become relevant after jurisdiction is established. But the standard for equitable relief has, *for centuries*, included a presumption in favor of common law remedies in the form of the requirement that the remedy at law be inadequate and that the balance of hardships tip in favor of the party seeking an injunction. Moreover, years before *Lyons* was decided, the Court had already expressly required lower federal courts deciding public law cases to assess not only the traditional elements for equitable relief, but also the interests of states and their political branches in managing matters of traditional local concern.<sup>272</sup> Equitable discretion, which traditionally rested with the judge closest to the facts, has in this way been centralized in and curtailed by the Court through jurisdictional innovation.<sup>273</sup>

Finally, although the Court asserts that standing enforces separation of powers—keeping the Court out of matters that belong to Congress and the executive branch—it has used standing doctrine to limit the power of Congress to enforce federal law through private rights of action. In a series of standing cases, the modern Court has held that Congress cannot create standing in federal courts by creating a new right or regulatory scheme and authorizing “aggrieved persons” to sue.<sup>274</sup> The principle that federal courts should not adjudicate “generalized grievances” is imminently sensible and has a strong foundation in the history of Article III.<sup>275</sup> The fact that someone is disturbed that the law isn’t being followed, but otherwise unharmed, doesn’t mean they are a proper plaintiff. To treat such grievances as Article III cases or controversies would give ideologically motivated plaintiffs who have suffered no injury in fact access to the remedial power of federal courts to reshape the law and fashion directives for its enforcement by federal agencies. On the other hand, many citizen suits are brought by people who suffer injury and are better suited than government

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271. See *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 420, 422 (2013); *Lewis v. Casey*, 518 U.S. 343, 359–60 (1996); *Lyons*, 461 U.S. at 111; cf. *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 153, 155 (2010) (finding that alfalfa growers and environmental groups had standing to seek injunctive relief against a deregulation order).

272. *Milliken v. Bradley*, 433 U.S. 267, 280–81 (1977) (explaining that in “devising” an equitable remedy for school desegregation, the federal courts “must take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution”); *Milliken v. Bradley*, 418 U.S. 717, 744–45 (1974) (emphasizing the importance of deference to “local control” in designing school desegregation decrees).

273. There is vituperative debate about whether federal district court judges still have too much equity power, particularly in the context of requests to enjoin federal executive branch action. Whatever the merits of that debate, the point for present purposes is that standing doctrine both constitutionalizes and concentrates power over equity jurisdiction in the Supreme Court as against the traditional prerogatives of both Congress and the lower federal courts.

274. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2205 (2021); *Spokeo v. Robins*, 578 U.S. 330, 339 (2016); *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 576–77 (1992).

275. *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 225 (1974) (citation omitted).

bureaucrats in regulatory agencies to know about the wrongdoing that caused it and to seek rectification.<sup>276</sup> Denying standing in these cases, when Congress has authorized enforcement in federal court, sets the Court up as the arbiter of lower court jurisdiction despite the fact that Congress is given this power by Article III.

Simultaneously, the Court's standing cases make it relatively easy for businesses to challenge government regulations because concrete financial harm is almost always a consequence of regulatory compliance. This produces another oft-noted channeling effect—underenforcement of federal law is difficult to challenge through citizen suits, but corporations challenging regulatory overreach face open federal courthouse doors.<sup>277</sup>

Although the Court regularly speaks the language of separation of powers in its standing cases (the need to prevent federal courts from interfering with other branches of government by limiting jurisdiction), congressional control over Article III jurisdiction is also affected. That control is the very foundation of the Madisonian Compromise. Masked in the manipulable ambiguities of standing doctrine, the Court has developed a discourse of judicial restraint that allows it to play favorites with respect to rights and remedies and trench on the power of a coordinate branch at the same time.

#### CONCLUSION

Persistent ambiguity in jurisdictional rules undermines the rule of law. Rules designed to identify whether a court has power over a case that consume years and hundreds of attorney hours to litigate are profoundly inequitable, restricting access to justice for ordinary people while amplifying the power of well-resourced litigants to convert jurisdictional rules into transaction costs for their opponents. Rules that conceal arrogation of power under the guise of judicial restraint undermine federalism, separation of powers, and the integrity of the administration of justice.

It would be one thing if this state of affairs were necessary, unavoidable, or even accidental. The tragedy of the status quo is that ambiguity pervades rules

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276. *TransUnion*, 141 S. Ct. at 2210 (upholding standing for debtors whose inaccurate credit reports were published but denying it to debtors at imminent risk of suffering publication). The denial of standing to the second subclass displaces congressional policy decisions about the most effective way to deter inaccurate credit reports, forcing the subclass rather than credit reporting agencies to internalize the costs of ensuring accuracy. The case is quite different than a generalized grievance where someone who is merely worried about inaccurate credit reports decides to sue. The Court's injury in fact jurisprudence has produced sharp divisions about other kinds of informational harm notwithstanding the fact that we live in an information economy. See *FEC v. Akins*, 524 U.S. 11, 20 (1998) (narrowly upholding standing to challenge Federal Election Commission (FEC) political action committee reporting requirements). The Court will also have to resolve tensions between its new injury in fact requirement and earlier cases upholding standing for testers who help uncover discrimination without purchasing or intending to purchase goods or services. The outer boundaries of tester standing and informational harm are present in *Acheson Hotels, LLC v. Laufer*, 601 U.S. 1, 1, 5 (2024) (vacating as moot challenge to tester standing in antidiscrimination litigation).

277. See generally AZIZ HUQ, *THE COLLAPSE OF CONSTITUTIONAL REMEDIES* (2021) (discussing the basis and implications of disparate distribution of remedies for constitutional wrongs); *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477 (2010).

central to the administration of justice because of the modern Court's repeated indulgence of maximalism over consensus, innovation over stare decisis, ideology over principled decision, and, ultimately, expansion of its own power over genuine judicial restraint. Both liberal and conservative justices have contributed to a state of affairs in which some of the most basic questions about a court's power over a case (specific personal jurisdiction, diversity jurisdiction, non-Article III jurisdiction, arising under jurisdiction, and standing) cannot be answered with reasonable certainty.

Realists will surely conclude from this critique that determinacy is indeed a fool's errand. What I have tried to demonstrate, however, is that ambiguity flourishes when norms like self-restraint (the practice of it, not disingenuous discourse about it), speaking with one voice, and regard for stare decisis deteriorate. Principles such as these matter not because they are immune from the influence of power—a completely impregnable bulwark of integrity—but because without them all that remains is unprincipled power. Naïve realism, to the extent that it rejects the idea that these principles and their attendant norms of deliberation can constrain judges, actually exacerbates the very problem it complains of. This was well put by Justice Cardozo in *The Nature of the Judicial Process* when he observed that “[a]nalysis is useless if it destroys what it is intended to explain.”<sup>278</sup> Realism is not innocent of power itself. After all, it had its own power project—a jurisdictional agenda directly tied to its critique of judicial review. The critique was designed in part to delegitimize adjudication in the service of erecting and expanding the modern administrative state, replacing judges and juries with technocratic expertise. There are ample grounds, then, to question its more iconoclastic implications.

Having said that, the precise line at which clarity should give way to other values is not easy to define. But the crisis of the present state of affairs is not indeterminacy about the point at which clarity should give way. It is outright disregard for clarity as a rule of law value. Clarity too rarely figures in the elaboration of jurisdictional rules at all. There are notable exceptions which prove that the Court can incorporate clarity into its analysis. Both the Court's definition of “principal place of business” for purposes of determining corporate citizenship in diversity jurisdiction under 28 U.S.C. § 1332,<sup>279</sup> and the Court's definition of a corporate defendant's “home” for purposes of general personal jurisdiction, are laudable examples.<sup>280</sup> These state cases explicitly describe the

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278. See CARDOZO, *supra* note 25, at 126–27 (describing true realism as that which recognizes “the possibility of rules of general operation”). Realism, it must be remembered, had its own power project. It was designed in part to delegitimize adjudication in the service of erecting and expanding the modern administrative state, replacing judges and juries with technocratic expertise. The goal was to make law more responsive to the problems of ordinary people. It is one of the great ironies of the New Deal Court's innovations in the law of jurisdiction (standing, non-Article III courts doctrine, personal jurisdiction all come to mind) that they have been taken up by the modern Court to aggrandize its own power and make litigation less accessible to ordinary people.

279. *Hertz Corp. v. Friend*, 559 U.S. 77, 81 (2010).

280. *Daimler AG v. Bauman*, 571 U.S. 117, 121 (2014); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011).

value of clarity in jurisdictional doctrine, weigh the benefits of clarity against associated costs, make compromises entailed in achieving clarity on a divided Court (as opposed to indulging the pathologies of maximalism), and, whether one agrees with the outcomes or not, the Court states rules that lawyers and courts can follow with reasonable predictability. The modern Court has also made admirable progress in reducing so-called “drive-by jurisdictional rulings” that mischaracterize other rules as jurisdictional.<sup>281</sup> What appears to be missing in other areas of the Court’s jurisdiction jurisprudence is any comparable commitment to bring clarity into conversation with other decision values, and recognition that jurisdiction regulates not just power, but access to justice and faith in the judicial process.

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281. Wasserman, *supra* note 21, at 317–18.

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