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Subject Matter Jurisdiction as a New Issue on Appeal: Reining in an Unruly Horse

*Robert J. Martineau**

I. Introduction

In the world of appellate procedure, one of the best known rules is that in order for an issue to be considered on appeal, it must first have been raised in the trial court.[1] This rule can be traced back to the origins of appellate review in the English common law.[2] It also has a modern justification premised on the concept of avoidance of error, i.e., that if the alleged error had been raised in the trial court the opposing party or the trial court could have avoided the error by not taking the action objected to, taking an alternative course of action, or ensuring that the record included the basis for the action taken.[3] Notwithstanding both the historical and modern rationales for the rule,

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1. Ohio v. Madeline Marie Nursing Homes, 694 F.2d 449, 459 (6th Cir. 1982) (defenses not timely raised in trial court usually may not be asserted for first time on appeal); *Ex parte* Smith, 438 So. 2d 766 (Ala. 1983) (court exercising appellate jurisdiction may consider only matters raised on appeal to it); R. MARTINEAU, MODERN APPELLATE PRACTICE—FEDERAL AND STATE CIVIL APPEALS § 3.1 (1983) [hereinafter R. MARTINEAU, MODERN APPELLATE PRACTICE] (general rule of appellate procedure that only issues raised at trial can be raised on appeal); Martineau, *Considering New Issues on Appeal: The General Rule and the Gorilla Rule*, 40 VAND. L. REV. 1023 (1987) [hereinafter Martineau, *Considering New Issues*] (general rule against considering new issues on appeal).

2. R. MARTINEAU, MODERN APPELLATE PRACTICE, *supra* note 1, at § 1.1 (formal means of appellate review in England included special procedures to permit judgment in one court to be questioned in another); Martineau, *Considering New Issues*, *supra* note 1, at 1026-28.

3. Pfeifer v. Jones & Laughlin Steel Corp., 678 F.2d 453, 457 n.1 (3d Cir. 1982), *vacated on other grounds*, 462 U.S. 523, *on remand*, 711 F.2d 570 (3d Cir. 1983); R. MARTINEAU, MODERN APPELLATE PRACTICE, *supra* note 1, at § 3.2 (promotes efficient judicial administration because of fewer new trials or remands); Martineau, *Considering New Issues*, *supra* note 1, at 1028-34 (significance of error as basis for appellate review has functional basis in correction and avoidance of error).

in a previous article this author has demonstrated that the general rule against considering new issues on appeal is applied so inconsistently, and that so many exceptions have been carved out of it, that the rule can no longer be fairly described as general. It has, rather, been consumed by an even more general rule that allows an appellate court in its discretion to consider any new issue it thinks appropriate.[4] This new rule has been characterized as the "gorilla" rule in recognition of the appellate court's ability under the rule to consider any new issue it wants.[5]

Even under the broadest and most stringent application of the traditional general rule, however, the courts and the commentators have almost universally accepted one major exception—that accorded to the issue of the subject matter jurisdiction of the trial court.[6] Simply stated, the exception provides that the issue of subject matter jurisdiction can be raised in the appellate court by either party or the appellate court at any time until the appellate court has issued its mandate returning the case to the trial court.[7] The subject matter jurisdiction exception is a corollary to the even more basic rule that a judgment rendered by a court without subject matter jurisdiction is void and can be attacked at any time, either directly or collaterally.[8]

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4. Singleton v. Wulff, 428 U.S. 106, 121 (1976), *on remand*, 538 F.2d 811 (8th Cir. 1976) (questions taken and resolved for first time on appeal left primarily to discretion of court of appeals); Martineau, *Considering New Issues*, *supra* note 1, at 1061:

> The general rule has been replaced by a system in which the question of whether an appellate court will consider a new issue is decided solely on the basis of whether a majority of the court considers the new issue necessary to decide the case in accordance with their view of the relative equities of the parties.

Id.

5. Martineau, *Considering New Issues*, *supra* note 1, at 1023.

6. Louisville & Nashville Ry. Co. v. Mottley, 211 U.S. 149 (1908) (although jurisdiction not questioned by parties, court had duty to determine that jurisdiction of lower court was not exceded); Martineau, *Considering New Issues*, *supra* note 1, at 1045 ("The most universally recognized exception to the general rule is subject matter jurisdiction."). This article is limited to the jurisdiction of the trial court. The subject matter jurisdiction of the appellate court as an exception to the general rule will be considered in a future article.

7. Martineau, *Considering New Issues*, *supra* note 1, at 1045-46.

8. *See, e.g.*, *In re* Marriage of Morton, 11 Kan. App. 2d 473, 474, 726 P.2d 297, 298 (1986) (judgment is void if court lacked subject matter jurisdiction; motion to set aside void judgment may be made at any time); Fredman Bros. Furniture Co. v. Department of Revenue, 109 Ill. 2d 202, 215, 486 N.E.2d 893, 898 (1985) (lack of subject matter jurisdiction can be raised at any time, in any court, either directly or collaterally); 7 J. Moore & J. Lucas, Moore's Federal Practice § 60.25 (2d ed. 1985) (jurisdiction over subject

Allowing the issue of subject matter jurisdiction to be raised for the first time on appeal has enormous implications for the parties to a legal proceeding, the trial and appellate courts, and the proper functioning of a judicial system. If a case can be litigated for years in the trial court, briefed, argued and considered first in an intermediate appellate court and subsequently in a supreme court, and after a decision on the merits by the supreme court the party who initially filed the suit or the supreme court itself can for the first time challenge the subject matter jurisdiction of trial court and have the entire matter dismissed, the waste of private and public resources is enormous. Before this waste should be tolerated, an examination should be made to ascertain whether courts limit the exception to those matters that properly fall within the definition of subject matter jurisdiction. A further examination should be made to ascertain whether accepted limitations on collateral challenges to subject matter jurisdiction should not also be made applicable to belated direct challenges, including appeals from the original judgment, so as to limit the occasions when the courts utilize the exception. The purpose of this article is to make these examinations.

II. Subject Matter Jurisdiction in Theory and in Practice

A. *Defining Subject Matter Jurisdiction*

Courts and commentators have little difficulty in agreeing on an abstract definition of subject matter jurisdiction. There is a consensus that subject matter jurisdiction means the authority to adjudicate the type of controversy involved in an action.[9] The difficulty comes when appellate courts apply the definition or, ignoring the definition, characterize various other defects in a proceeding as the lack of subject matter jurisdiction in order to permit a belated attack on the judgment rendered by the trial court. When this occurs, not only is the finality of the judgment in the particular case put at risk, but so are the judgments in

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matter is requisite for valid judgment; void judgment may be attacked at any time).

9. The Restatement (Second) of Judgments § 11 (1982), states that a judgment may be properly rendered only if the court has authority to adjudicate this type of controversy. The provisions of law investing a court with this authority are usually referred to as the rules of subject matter jurisdiction but sometimes they are referred to as rules of competency. Competency is also used to refer to procedural requirements, which leads to confusion between subject matter jurisdiction and territorial jurisdiction.

similar types of cases which may be subject to a similar belated attack. This section of the article reviews various categories of cases in which courts have dealt with attacks on judgments because of an alleged lack of subject matter jurisdiction. The subsequent section will then analyze whether any of these categories properly fall within the definition of subject matter jurisdiction.

B. *Specific Applications*

1. *Procedural prerequisites to initiating an action*

Courts have often held that if a party has not met certain procedural prerequisites before filing suit, the court in which the suit is filed does not have subject matter jurisdiction over the suit. For example, the untimely filing of an appeal from an administrative agency bars the subject matter jurisdiction of the trial court to which the appeal is taken.

In *Fredman Brothers Furniture Co. v. Department of Revenue*,[10] for example, a taxpayer sought a rehearing of a decision of the Department of Revenue rather than filing a complaint for review. The court first held that the rehearing request began a new proceeding and did not postpone the time when the original decision became final for appeal purposes. The decision being final, the action to review it had to be filed within the statutory thirty-five day period.[11] Failure to do so prevented the trial court from acquiring subject matter jurisdiction because, the court reasoned, the trial court's jurisdiction was of a special statutory nature and had to be strictly followed.[12] The thirty-five day appeal period was not a statute of limitation but was a condition precedent to the complaining party's right to seek a remedy. The statutory appeal procedure was a substantive right unknown at common law, and the time limit constituted an inherent element of the procedural right created and thus was a condition for bringing the right into existence.[13] The court then concluded: "In the exercise of special statutory jurisdiction, if the mode of procedure prescribed by statute is not strictly pursued, no jurisdiction is conferred in the circuit court."[14] The court further held that the issue could be raised for the first

10. 109 Ill. 2d 202, 486 N.E.2d 893 (1985).
11. *Id.* at 213, 486 N.E.2d at 897.
12. *Id.* at 211, 486 N.E.2d at 896.
13. *Id.* at 209, 486 N.E.2d at 895.
14. *Id.* at 210, 486 N.E.2d at 896.

time after the complaint had originally been dismissed on another procedural point in the trial court. Plaintiff appealed, and the appellate court reversed and remanded the case for a hearing on the merits. The appellate court reasoned that because the issue involved subject matter jurisdiction, the issue could be raised at any time.[15]

The Supreme Court of Missouri rendered a similar decision in *Randles v. Schaffner*,[16] which involved an effort to seek review in a circuit court of the revocation of a driver's license by an administrative agency. The petition to review was not timely filed, but the administrative agency first raised the point in its brief to the supreme court.[17] The court first stated that the issue concerned subject matter jurisdiction and thus could be raised at any time. The court then reversed the action of the trial court, holding that the trial court's order was void because the filing of the timely review petition was necessary to give the trial court subject matter jurisdiction.[18] The court noted that although the circuit court was a court of general jurisdiction, when it was engaged in the exercise of a special statutory power, its jurisdiction is limited by the statute because the time limits in the statute were held to be jurisdictional.[19]

Courts have reached the same result and applied the same rationale to requirements that: a claim against a city for disability benefits be filed first with a city official;[20] a demand for a sum certain to be made in a claim letter against a state agency for damages arising out of an arrest;[21] a rehearing be sought before an administrative agency prior to seeking review in the courts;[22] a petition seeking custody of a child allege that the

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15. *Id.* at 215, 486 N.E.2d at 898.

16. 485 S.W.2d 1 (Mo. 1972).

17. *Id.* at 2.

18. *Id.*

19. *Id.* at 3; *accord* McLean Contracting Co. v. Maryland Transp. Auth., 70 Md. App. 514, 521 A.2d 1251, *cert. denied*, 310 Md. 130, 527 A. 2d 51 (1987) (appeal directly from administrative agency to court dismissed because statute mandated appeal to state board of contract appeals as prerequisite to circuit court jurisdiction).

20. Coffelt v. City of Omaha, 223 Neb. 108, 388 N.W.2d 467 (1986) (Supreme Court of Nebraska affirmed that district court did not have jurisdiction over police officer's breach of contract claim against city because no evidence presented that he filed claim in accordance with statute).

21. Dassinger v. Oden, 124 Ariz. 551, 606 P.2d 41 (Ariz. Ct. App. 1979) (claim letter which detailed incident causing injury and discussed nature of the injuries but did not contain demand for sum certain did not satisfy statutory requirements; court did not have subject matter jurisdiction).

22. Utah Dep't of Bus. Reg. v. Public Serv. Comm'n, 602 P.2d 696 (Utah 1979) (re-

child was abused and neglected;[23] a claim be submitted in a probate proceeding prior to filing suit against the estate on the claim;[24] and a petition to register a foreign judgment in a proceeding to enforce the judgment be verified.[25]

Some courts have also held that the filing of a claim within the applicable statute of limitations goes to subject matter jurisdiction.[26] Federal courts have applied this rule to claims filed under the Miller Act[27] and Title VII of the Civil Rights Act.[28] The court in the Miller Act case reasoned that the statute of limitations is an integral part of the statute creating the remedy and is jurisdictional, and that compliance with it is a condition precedent to maintaining an action.[29] In each federal case the court allowed the issue to be raised for the first time on appeal because it went to subject matter jurisdiction.[30]

Other courts have taken a contrary view.[31] In a case involv-

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quirement that application for rehearing with Public Service Commission be filed within 20 days of order becoming effective is prerequisite to supreme court jurisdiction).

23. *In re* Green, 67 N.C. App. 501, 313 S.E.2d 193 (1984) (court of appeals vacated and dismissed judgment of trial court for lack of subject matter jurisdiction because a petition, alleging child was abused and neglected, not signed and verified as required by statute).

24. *In re* Estate of Mora, 611 P.2d 842 (Wyo. 1980) (defendants' failure to plead or prove counterclaim in wrongful death action presented first in probate of decedent's estate not before filing as required by statute, was jurisdictional defect that could not be waived).

25. American Indus. Resources, Inc. v. T.S.E. Supply Co., 708 S.W.2d 806 (Mo. Ct. App. 1986) (court of appeals held that petition to register foreign judgment was not verified as required by law; this statutory requirement was jurisdictional, therefore trial court lacked subject matter jurisdiction).

26. *See In re* Estate of Daigle, 634 P.2d 71 (Colo. 1981) (court of appeals affirmed district court decision that statute which bars claim not filed against a decedent's estate within four months after it arises is jurisdictional and not subject to tolling provisions applicable to statutes of limitations).

27. United States *ex rel.* Celanese Coatings Co. v. Gullard, 504 F.2d 466 (9th Cir. 1974) (court of appeals reversed district court decision and held that Miller Act requirement that action be brought within one year of when supplier last provided paint was jurisdictional; failure to comply with that provision could be raised at any time).

28. Verzosa v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 589 F.2d 974 (9th Cir. 1978) (appeals court held that although failure of Title VII complainant to file charges with the EEOC within 180 days of the alleged act of discrimination deprives the district court of jurisdiction, in this case appellant's stipulation to jurisdiction must be construed as admission of facts which show jurisdiction).

29. *Gullard*, 504 F.2d at 468.

30. *Id.* at 469; *Verzosa*, 589 F.2d at 977.

31. Wallace v. Springs Indus., Inc., 503 So. 2d 853 (Ala. Civ. App. 1987) (judgment entered more than 90 days after filing of motion to set aside earlier judgment was void); Greco v. Thyssen Mining Constr., Inc., 500 So. 2d 1143 (Ala. Civ. App. 1986) (motion to alter or amend workmen's compensation award automatically overruled 90 days after filing; court without subject matter jurisdiction to subsequently rule on the motion);

ing the appointment of an administrator of an estate, the Louisiana Court of Appeals reversed the appointment on an issue raised for the first time in the appellate court.[32] The petition that sought the appointment alleged the jurisdictional facts for the estate proceeding (death, domicile and heirship) but was not accompanied by an affidavit proving those facts.[33] The court held that this defect destroyed the jurisdiction of the trial court making the appointment of the administrator void.[34] One judge dissented, arguing that there was no contention that the decedent was not domiciled in the parish, only that there was no affidavit filed. He argued that this defect did not mean that the trial court did not have subject matter jurisdiction, only that the jurisdictional facts did not appear on the record. In order for the trial court action to be void, he reasoned, the record would have to show that the court did not have jurisdiction.[35] An appeal was then taken to the Louisiana Supreme Court which reversed, citing only the dissenting opinion in the court of appeals.[36]

A similar case arose in the Indiana Court of Appeals.[37] The court was confronted with an appeal from the denial of a petition to revoke a consent to an adoption. The appellant attempted in an untimely post-trial motion to challenge the jurisdiction of the trial court. The appellant contended that the original petition seeking adoption did not contain all of the required allegations and was not referred to the welfare department for its recommendations, and that these defects destroyed the jurisdiction of the trial court.[38] The appellate court, while acknowledging that questions of subject matter jurisdiction could be raised at any time, even on appeal, rejected the argument that the procedural defects went to subject matter jurisdiction. It distinguished subject matter jurisdiction, i.e., "the

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Leathers v. Gover, 447 So. 2d 810 (Ala. Civ. App. 1984) (judgment granting relief more than 90 days after unruled upon motion for rehearing on child support provisions is void); Hill, Lehnen & Driskill v. Barter Sys., Inc., 707 S.W.2d 484 (Mo. Ct. App. 1986) (order directing pay out of garnished funds was conditional, not final, so circuit court had jurisdiction over motion to quash garnishment filed more than 10 days after entry of that order).

32. Succession of Fuller, 480 So. 2d 754 (La. Ct. App. 1985), *rev'd*, 482 So. 2d 619 (La. 1986).

33. *Id.* at 758.

34. *Id.* at 759.

35. *Id.* at 760 (Hall, C.J., dissenting).

36. Succession of Fuller, 482 So. 2d 619 (La. 1986).

37. *In re* Adoption of H.S., 483 N.E.2d 777 (Ind. Ct. App. 1985).

38. *Id.* at 780.

power of the court to hear and determine a general class of cases to which the proceedings belong" from jurisdiction over the particular case.[39] The latter includes failure to follow the procedural requirements for invoking the jurisdiction of the court. Such defects may result in dismissal of the case for failure to state a claim, the court concluded, but do not go to subject matter jurisdiction.[40]

The Supreme Court of Rhode Island has made a more sophisticated analysis of the relationship between procedural requirements for filing an action and subject matter jurisdiction. In *Mesolella v. City of Providence*,[41] the court considered an appeal from a judgment declaring a zoning ordinance void and awarding damages resulting from the enactment of the ordinance. One defense, first raised four years after the action had been filed, challenged the jurisdiction of the court over the subject matter of the case. The city argued that the plaintiff had not filed notice of the claim with the city council prior to filing suit as it was required to do by the statute which abrogated the city's sovereign immunity in this type of case.[42] In making this argument, the city relied on an earlier case decided by the supreme court which had so held.[43] The supreme court held that the defense did not go to subject matter jurisdiction and thus could not be raised belatedly. The court stated:

> We are of the opinion that the city in the case at hand, and the court in *Barroso*, confused the lack of jurisdiction over a particular action for failure to comply with the conditions precedent with a lack of jurisdiction over the class of cases to which that action belongs—blurring the distinction, as has often been done before, between the "appropriate exercise of power" and the "absence of power." . . . The term "subject matter jurisdiction," when properly used, refers only to the court's power to hear and decide a case and not to whether a court having the power to adjudicate should exercise that power.[44]

The court went on to point out that the trial court had jurisdiction to hear a claim against the city. The only issue was the appropriateness of the court's exercise of the power in the par-

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39. *Id.*
40. *Id.* at 780-81.
41. 508 A.2d 661 (R.I. 1986).
42. *Id.* at 665.
43. *Id.* (construing Barroso v. Pepin, 106 R.I. 502, 261 A.2d 277 (1970)).
44. *Id.* at 665-66.

ticular case. Under the rules of procedure, the defense of compliance with a condition precedent was waived when not presented specifically and with particularity.[45]

The court, in coming to this conclusion, relied on an earlier case involving the grant of injunctive relief mandating that an administrative agency allow discovery procedures in a proceeding before the agency.[46] The agency, in a post judgment motion, for the first time argued that the statute creating it permitted judicial review only of its final orders and thus the trial court lacked subject matter jurisdiction over a claim for preliminary relief.[47] The court held that the trial court had subject matter jurisdiction over claims for protection from the actions of administrative agencies. The only issue was whether the court's action was an "appropriate exercise of power," not whether there was an absence of power.[48] Not having been raised at the beginning of the proceedings, the issue was waived.[49] The court expressed frustration with counsel who appear before the court in an attempt to convert claims of trial court error into subject matter jurisdiction arguments.[50]

2. *Residence requirements in divorce proceedings*

Issues of subject matter jurisdiction often arise in divorce proceedings because of the common requirement that one or both of the parties to the proceeding be residents of the forum state. In many of these cases the courts have concluded that if the residency requirements are not met, the court in which the divorce petition was filed did not have subject matter jurisdiction and that its judgment is void.

A typical case is *In re Marriage of Passiales*,[51] which involved a petition to set aside a divorce granted two years earlier on the ground that the plaintiff husband did not meet the required one-year residency. The petition was granted and on appeal the decision was affirmed. The court stated that the "plain-

45. *Id.* at 667.

46. La Petite Auberge, Inc. v. Rhode Island Comm'n for Human Rights, 419 A.2d 274 (R.I. 1980), *construed in*, Mesolella v. City of Providence, 508 A.2d 661 (R.I. 1986).

47. *Id.* at 279.

48. *Id.*

49. *Id.* at 279-80.

50. *Id.* (The court stated that it would not permit a party to blur the distinction between failure to state a claim and lack of subject matter jurisdiction in order to make timely a motion that was not timely.).

51. 144 Ill. App. 3d 629, 494 N.E.2d 541 (1986).

tiff's residence in a divorce case is necessary to confer subject matter jurisdiction on the court."[52] The question of residency was not raised in the original divorce proceeding nor was there an appeal. The Minnesota Supreme Court held to the same effect in a case in which the court raised the residency issue on its own motion.[53]

There are, however, some variations on this theme. In *Heckathorn v. Heckathorn*,[54] a wife filed a petition for divorce alleging that the parties had been residents of New Mexico for more than the one-year statutory minimum. The husband's answer denied this allegation as to both parties. The divorce decree recited that the parties were residents of New Mexico but made no reference to the length of residence. No appeal was taken from the judgment. Two years later the husband filed a motion in the trial court to have the divorce decree declared void because neither party met the residency requirement. The trial court granted the petition, which was affirmed by the supreme court. In its opinion, however, the supreme court stated that there were three jurisdictional requirements for a valid judgment: jurisdiction over the person, jurisdiction over the subject matter, and "power or authority to decide the particular matter presented."[55] It then stated: "Involved here is the question of power or authority to grant the divorce."[56] The court then determined that the plaintiff had not met the residency requirement, which was jurisdictional, and held that the divorce judgment was a nullity.[57] The court did not explain the distinction it drew between subject matter jurisdiction and power or authority to decide the particular question presented or why the residence requirement fell within the latter rather than the former. In any event, the result was the same—the judgment was set aside as a result of a belated challenge to the residency of the parties.

A distinction has been made as to the validity of the judgment between parties to the original proceeding and those not parties. The Supreme Judicial Court of Massachusetts recog-

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52. *Id.* at 634, 494 N.E.2d at 546.

53. Wyman v. Wyman, 297 Minn. 465, 212 N.W.2d 368 (1973). The same principle was stated in Edwards v. Edwards, 709 S.W.2d 165 (Mo. Ct. App. 1986), but there it was held that the party challenging a jurisdictional claim in the petition had the burden of proof which it did not meet.

54. 77 N.M. 369, 423 P.2d 410 (1967).

55. *Id.* at 371, 423 P.2d at 412.

56. *Id.*

57. *Id.* at 372, 423 P.2d at 412.

nized this distinction in *Old Colony Trust Co. v. Porter.*[58] In *Old Colony*, persons not bound by the divorce judgment under res judicata principles were permitted to attack, in a collateral proceeding, a divorce decree on the grounds that the plaintiff in the divorce proceeding had not met the statutory residence requirement. The court held that the parties to the divorce proceeding were limited to making a direct attack on the decree, but non-parties could make a collateral attack.[59] Notwithstanding the fact that the court found that the residency requirement went to subject matter jurisdiction and that the decree was rendered without jurisdiction and was thus "inherently void,"[60] the court cited to the RESTATEMENT OF JUDGMENTS in support of its opinion that insofar as the parties to the original proceeding were concerned, the divorce court had jurisdiction to decide its jurisdiction, and the parties were bound by the judgment unless attacked directly.[61] The court, however, pointed to a long line of Massachusetts cases which permitted non-parties to attack the same judgment collaterally.[62]

The New York Court of Appeals took a completely different approach to the relationship between the residency requirement in a divorce proceeding and subject matter jurisdiction in *Lacks v. Lacks.*[63] In that case, a husband was granted a divorce which was affirmed on appeal. Two years later the wife filed a post-judgment motion alleging that the husband had not met New York's residency requirement. The trial court granted the motion, but the appellate division reversed and reinstated the divorce. The court of appeals affirmed in an opinion by Chief Judge Brietel.

The court of appeals began its analysis by noting that confusion in New York law arose because earlier cases had stated that the jurisdiction of New York courts in divorce proceedings is limited to the powers conferred by statute.[64] It further noted that jurisdiction is a word of "elastic, diverse, and disparate meanings."[65] The court then drew a distinction between "a

58. 324 Mass. 581, 88 N.E.2d 135 (1949).

59. *Id.* at 584, 88 N.E.2d at 138.

60. *Id.* at 587, 88 N.E.2d at 139.

61. *Id.* at 586-87, 88 N.E.2d at 139 (citing RESTATEMENT OF JUDGMENTS §§ 4, 7-12, 33, 74, 93, 112, 114 (1942)).

62. *Id.* at 587, 88 N.E.2d at 139.

63. 41 N.Y.2d 71, 359 N.E.2d 384, 390 N.Y.S.2d 875 (1976).

64. *Id.* at 74, 359 N.E.2d at 386, 390 N.Y.S.2d at 877.

65. *Id.*

court's competence to entertain an action and its power to render a judgment on the merits."[66] It pointed out the serious implications of the distinction because of the black letter principle that a judgment rendered without subject matter jurisdiction is void, can be raised at any time, and cannot be waived. The court then noted that the trial court was a court of general jurisdiction and that the statute establishing the residency requirement did not even mention jurisdiction.[67] It then stated: "In no way do these limitations on the cause of action circumscribe the power of the court in the sense of competence to adjudicate causes in the matrimonial categories."[68] After reviewing the court's earlier decisions and determining that none of them reached the precise question raised by the case, the court enunciated the rule that "the overly stated principle that lack of subject matter jurisdiction makes a final judgment absolutely void is not applicable to cases that, upon analysis, do not involve jurisdiction but merely substantive elements of a cause of relief."[69] The court reasoned that to do so would undermine the doctrine of res judicata and eliminate the certainty and finality in litigation that the doctrine is designed to protect. It then affirmed, holding that the residency requirement was merely a substantive element of the cause of action, not subject matter jurisdiction.[70]

3. *Indispensible party*

The lack of an indispensible party and its relationship to subject matter jurisdiction is another area on which courts differ. *Vale Chemical Co. v. Hartford Accident & Indemnity Co.*[71] represents one view. In that case, a drug manufacturer filed a declaratory judgment action against two of its insurers to determine whether the insurers had the duty to defend the manufacturer in an action brought by a purchaser of the manufacturer's product. The trial court granted summary judgment for the manufacturer and the superior court affirmed. On appeal, the supreme court reversed, considering *sua sponte* the question of whether the plaintiff purchaser was an indispensible party without whom the trial court lacked subject matter jurisdiction over

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66. *Id.* at 75, 359 N.E.2d at 387, 390 N.Y.S.2d at 877.
67. *Id.* at 75, 359 N.E.2d at 387, 390 N.Y.S.2d at 878.
68. *Id.*
69. *Id.* at 77, 359 N.E.2d at 388, 390 N.Y.S.2d at 879.
70. *Id.*
71. 512 Pa. 290, 516 A.2d 684 (1986).

the action. The declaratory judgment statute provided that all persons who have a claim or interest that would be affected by the proceeding "shall be made parties" and that no declaration shall prejudice those not made parties.[72] Without any analysis, the court simply cited one of its earlier decisions which held that the failure to join an indispensible party was "fatal" to the action.[73] Based on this decision, it held that the defect went to subject matter jurisdiction and that the case must be dismissed.[74]

The Eighth Circuit, sitting en banc, adopted a contrary view in *Kansas City Southern Railway Co. v. Great Lakes Carbon Corp.*.[75] That case began with a claim by a railroad against a shipper for undercharges. The shipper filed a counterclaim for overcharges on another shipment. The trial court referred the interpretation of certain tariffs to the Interstate Commerce Commission (ICC). After the ICC decision, the district court entered summary judgment for each of the parties on their claims, the shipper's claim being substantially larger. No timely notice of appeal was taken, and after the railroad made various procedural moves to get a review on the merits, it filed a motion under Federal Rule of Civil Procedure 60(b)(4) to set aside the judgment as void because of the failure to join the United States as a party as required by statute. The trial court denied the motion, but a panel of the Eighth Circuit reversed, holding that the judgment was void and should be set aside. The court of appeals, sitting en banc, vacated that decision and affirmed.

For its analysis, the court of appeals assumed that joinder of the United States was required by the statute. After reviewing the federal cases on what makes a judgment void, the court held that even if the trial court erred by not joining the United States as a party, such a jurisdictional error did not make the judgment void.[76] The court noted that the trial court

> was vested with power to deal with this type of case and had acquired jurisdiction over the parties before it. . . . It had ju-

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72. 42 PA. CONS. STAT. ANN. § 7540 (Purdon 1982).

73. *Vale Chem. Co.*, 512 Pa. at 293-94, 516 A.2d at 686 (citing Township of Pleasant v. Erie Ins. Exch., 22 Pa. Commw. 307, 311, 348 A.2d 477, 479-80 (1975)).

74. *Id.* at 297, 516 A.2d at 688; *accord* Bolus v. United Penn Bank, 360 Pa. Super. 234, 520 A.2d 433 (1987) (superior court held that in declaratory judgment action failure to join party upon whom declaration would impact deprived trial court of subject matter jurisdiction).

75. 624 F.2d 822 (8th Cir.), *cert. denied*, 449 U.S. 955 (1980).

76. *Id.* at 824-25.

risdiction over the general subject matter and accordingly could decide whether the United States should be joined and whether its non-joinder was a jurisdictional defect. Even assuming the district court erred, the error has no bearing on its power to decide those issues.[77]

4. *Venue*

The traditional rule is that venue merely goes to the place of trial and not subject matter jurisdiction.[78] Venue is thus waivable and may not be raised for the first time on appeal.[79] There are, however, a number of cases in which the question of where an action is brought has been treated as subject matter jurisdiction rather than venue and has been considered without having been challenged in the trial court. These cases include actions seeking judicial review of the decisions of state administrative agencies[80] and probate proceedings.[81] The decisions are based on statutes that specify that only where an action seeking a particular type of relief must be brought; they do not express the limi-

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77. *Id.* at 825-26.

78. Newton v. Board of Trustees, 142 Ind. App. 391, 235 N.E.2d 84 (1968) ("Venue is the geographical location where the particular case should be tried."); Hulburd v. Eblen, 239 Iowa 1060, 1064, 33 N.W.2d 825, 827 (1948) ("Jurisdiction, as construed with venue, refers to the power of a court to decide an issue on its merits, whereas venue refers to the place where the cause sued upon should be tried."); Shopper Advertiser v. Wisconsin Dep't of Rev., 117 Wis. 2d 223, 344 N.W.2d 115 (1984) ("venue is not a question of subject matter jurisdiction"); J. FRIEDENTHAL, M. KANE, & A. MILLER, CIVIL PROCEDURE § 2, at 11 (1985) ("The most common purpose of venue rules is to limit plaintiff's forum choice. . . . Venue must be carefully distinguished from jurisdiction.).

79. *Newton*, 142 Ind. App. at 401, 235 N.E.2d at 90 (question regarding any action brought in wrong county is waived without proper objection); State *ex. rel* Lawrence Dev. Co. v. Weir, 11 Ohio App. 3d 96, 97, 463 N.E.2d 398, 399 (1983) ("The defenses of . . . improper venue may be waived."); J. FRIEDENTHAL, M. KANE, & A. MILLER, CIVIL PROCEDURE § 2.15 at 84 (1985) ("objections to the venue of a particular court are waived if not asserted properly").

80. *See, e.g.*, Collins & Assoc. Dietary Consultants, Inc. v. Labor & Indus. Relations Comm'n, 724 S.W.2d 243 (Mo. 1987) (statute placed authority to judicially review administrative decision in circuit court of particular county and action filed in circuit court in wrong county must be dismissed for lack of subject matter jurisdiction); State *ex rel.* Lawrence Dev. Co. v. Weir, 11 Ohio App. 3d 96, 463 N.E.2d 398 (1983) (statute provided that Director of Transportation could only be sued in Franklin County except in actions brought by property owner to prevent taking of property without due process of law); Sarkies v. State Dep't of Transp., 58 Ohio St. 2d 166, 389 N.E.2d 491 (1979) (complaint seeking to recover compensation for alleged completed taking of property dismissed for lack of subject matter jurisdiction when not filed according to statute).

81. Succession of Guitar, 197 So. 2d 921 (La. Ct. App. 1967) (statute providing where succession of deceased could be opened held to be matter of subject matter jurisdiction).

tation in terms of the jurisdiction of the court in which the proceeding is filed.[82]

Wederath v. Brant[83] presented a more complicated set of facts. In *Wederath*, a landlord instituted an action against a tenant for possession and damages for continuing to occupy property after the lease was terminated. As a preliminary matter, the tenants moved for a change of venue, which was granted. After that motion was granted but before the landlord caused the papers to be filed in the transferee court, the landlord filed for summary judgment in the original court. The tenant filed an answer to the merits of the motion, but did not raise the venue question. The original court entered judgment for the landlord and the tenant appealed, raising for the first time the venue question. After the appeal was pending for two years, it was dismissed as moot, the lease having by its terms expired. After the matter was returned to the trial court, the landlord sought rental for the occupation of the land during the pendency of the appeal. An award was made to the landlord, and the judgment was affirmed by the court of appeals. However, the supreme court reversed. It found that because the papers were not timely filed in the transfer court after the granting of motion for change of venue, the action was automatically dismissed. This being so, there was no action pending in which judgment could be granted, and thus the original judgment on possession and the second judgment for damages were both void.[84] The court relied on several of its prior decisions that held that when the rules

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82. The statute referred to by the court in *Collins & Assoc. Dietary Consultants, Inc.* stated that judicial review of decisions of the Labor & Industrial Relations Commission could be secured by "commencing an action in the circuit court of the county of claimant's residence or, in respect to those matters not involving a claimant . . ., the circuit court of Cole County." Mo. Rev. Stat. § 288.210 (1986). In *Sarkies* and *State ex rel. Lawrence Dev. Co.*, the statute referred to was Ohio Rev. Code Ann. § 5501.22 (Anderson 1985), which provided that "[t]he director of transportation shall not be suable . . . in any court outside Franklin county except [under certain circumstances]." The Louisiana statute referred to in *Succession of Guitar*, La. Code Civ. Proc. Ann. art. 2811 (West 1961), provides:

> A proceeding to open a succession shall be brought in the district court of the parish where the deceased was domiciled at the time of his death.
>
> If the deceased was not domiciled in this state at the time of his death, his succession may be opened in the district court of any parish where:
>
> (1)Immovable property of the deceased is situated; or,
>
> (2)Movable property of the deceased is situated, if he owned no immovable property in the state at the time of his death.

83. 287 N.W.2d 591 (Iowa 1980).

84. *Id.* at 594.

required a dismissal of an action, the trial court was without further authority to act in the case.[85] With no action pending, the "trial court had no legal authority to enter judgment. . . . When a court acts without legal authority to do so, it lacks jurisdiction of the subject matter."[86] The court commented that its earlier dismissal of the appeal from the first judgment did not change the situation because the earlier judgment was void.[87] The court held that it could consider the issue on the second appeal because "the question of subject matter jurisdiction 'must be disposed of, no matter in what manner of form or stage presented.' "[88] Thus, a matter that started out as one of venue was converted into a question of subject matter jurisdiction.

Courts in Wisconsin and Indiana have attempted to develop rationales for distinguishing between venue and subject matter jurisdiction. In *Shopper Advertiser, Inc. v. Wisconsin Department of Revenue*,[89] the Wisconsin Supreme Court held that a statute that specified a particular county in which judicial review of an administrative action must be sought related only to venue. The court, relying on an earlier case, attempted to distinguish between the subject matter jurisdiction of a court and its competency, treating venue as falling within the latter. It gave the usual definitions of subject matter jurisdiction and venue and then stated that "a judgment rendered by a court of improper venue would be invalid not for lack of subject matter jurisdiction, but for lack of competency to proceed to judgment."[90] Noting that the trial court was a court of general jurisdiction, it viewed the administrative review statute specifying a particular county as going to venue and not subject matter jurisdiction.[91]

The Indiana Court of Appeals has also attempted to distinguish subject matter jurisdiction from venue by developing the concept of jurisdiction of the case.[92] In an action seeking specific performance of an option to purchase out-of-state real estate, the trial court granted the relief sought. On appeal, the defendants sought for the first time to challenge the subject matter ju-

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85. *Id.*
86. *Id.* at 595.
87. *Id.* (quoting Walles v. International Bhd. of Elec. Workers, 252 N.W.2d 701, 710 (Iowa), *cert denied sub. nom.*, Walles v. Bechtel Corp., 434 U.S. 856 (1977)).
88. *Id.*
89. 117 Wis. 2d 223, 344 N.W.2d 115 (1984).
90. *Id.* at 230, 344 N.W.2d at 118.
91. *Id.* at 231, 344 N.W.2d at 119.
92. Newton v. Board of Trustees, 142 Ind. App. 391, 235 N.E.2d 84 (1968).

risdiction of the trial court on the ground of improper venue. The appellate court quoted from an earlier Indiana Supreme Court case which defined jurisdiction as embracing three distinct elements—jurisdiction of the subject matter, jurisdiction of the person, and jurisdiction of the particular case.[93] Without defining jurisdiction of the case, it concluded that venue went to jurisdiction of the case and was waivable.[94]

5. *Granting relief beyond power of court*

One line of cases extends notions of subject matter jurisdiction beyond that which is required to initiate a proceeding to the type of relief granted by the court. The Minnesota Court of Appeals, for example, has held that a judgment awarding ownership of property was void and would be set aside on a rule 60(b)(4) type motion because the judgment did not comply with the state's Torrens Act under which the property had been registered.[95] The appellate court stated that "because the trial court acted completely outside its authority in tampering with Mooney's torrens title, we hold that its judgment was tantamount to one rendered despite a lack of subject matter jurisdiction."[96] An Alabama court, in *Hocutt v. Hocutt*,[97] also held that a judgment modifying an earlier divorce decree to provide for a distribution of property was void and could be set aside pursuant to a rule 60(b)(4) type motion. The court reasoned that because under Alabama case law a divorce court's jurisdiction to modify its decree terminated after thirty days, "the trial court was without authority to reopen the divorce case to order a property division; hence, the 1983 modification order was void for lack of subject matter jurisdiction."[98]

One case that discussed the authority of the court to enter a specific type of relief was *Corban v. Corban*.[99] Over a year after a husband had been granted a divorce, the wife sought to have the divorce set aside and also sought a property settlement. The trial court refused to set aside the divorce but made a financial

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93. *Id.* at 400, 235 N.E.2d at 90 (citing State *ex rel.* Johnson v. Reeves, 234 Ind. 225, 228, 125 N.E.2d 794, 796 (1955)).

94. *Id.* at 401, 235 N.E.2d at 90.

95. Park Elm Homeowners Ass'n v. Mooney, 398 N.W.2d 643 (Minn. Ct. App. 1987).

96. *Id.* at 647.

97. 491 So. 2d 247 (Ala. Civ. App. 1986).

98. *Id.* at 249.

99. 161 Mont. 93, 504 P.2d 985 (1972).

award to the wife. On appeal, the husband challenged for the first time the subject matter jurisdiction of the trial court to make the award. The supreme court agreed with the challenge, holding that because the matter of a property settlement had not been raised in the original proceedings, "the district court acquired no jurisdiction over the subject matter of property rights in the first instance. The matter of property rights was foreign to the litigation and beyond the scope of any issue in the case."[100]

When the trial court found that the divorce decree should not be set aside, "no basis remained for the exercise of jurisdiction over the subject matter of property rights in that action. The divorce action was at an end, and the jurisdiction of the district court therein exhausted."[101] The court held that the husband could raise the issue for the first time on appeal because it went to subject matter jurisdiction.[102]

Furthermore, the Supreme Court of Iowa, on its own motion, considered the authority of an adoption court to award visitation rights to the natural grandparents of an adopted child in an appeal from an order modifying those rights.[103] The court first determined that under the adoption statute there was no authorization for visitation rights. Relying on its previously declared rule that "[w]hen a court acts without legal authority to do so, it lacks jurisdiction of the subject matter,"[104] it held that the original award of visitation rights was void and of no legal effect.[105] It then dismissed the appeal from the modification of the original order because the trial court, having no jurisdiction to enter the original order, also had no jurisdiction to modify it. Thus, the appellate court did not have subject matter jurisdiction of the appeal.[106]

In addition, two courts have held that the failure of an agreement concerning the payment of benefits in a divorce proceeding to be in writing as required by statute is a failure of subject matter jurisdiction, thus making that portion of the decree incorporating the agreement void. In *Arseniadis v. Ar-*

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100. *Id.* at 96, 504 P.2d at 987.

101. *Id.*

102. *Id.*

103. *In re* Adoption of Gardiner, 287 N.W.2d 555 (Iowa 1980).

104. *Id.* at 559 (citing State *ex rel.* Cairy v. Iowa Coop. Ass'n, 248 Iowa 167, 169-70, 79 N.W.2d 775, 776 (1956)).

105. *Id.*

106. *Id.*

seniadis,[107] the Connecticut Appellate Court allowed a party to challenge for the first time on appeal the validity of orders of the trial court concerning support of the adult children of the parties. The court stated that an agreement that was only stipulated to in open court, but not reduced to writing and signed by the parties, did not comply with the statute.[108] The court held that such failure resulted in a lack of subject matter jurisdiction. The judgment was void and thus the issue could be raised for the first time on appeal.[109]

The court in *In re Marriage of Morton*[110] held to the same effect. That case concerned compliance with a federal statute governing a court's authority to require a military retiree to elect to provide an annuity to a former spouse. On a rule 60(b)(4) type motion, the court held that a journal entry did not comply with the federal statute's requirement for an agreement in writing. The court concluded: "Because appellant did not voluntarily agree in writing to elect to provide appellee with the [federal] annuity, the lower court acted outside its authority, or subject matter jurisdiction, by ordering appellant to elect to provide such an annuity to appellee."[111] It then declared that portion of the decree void and ordered that it be set aside.[112]

There is a also line of cases in Illinois that holds that an order of a court exercising statutory jurisdiction is void not only if the court does not have subject matter jurisdiction or jurisdiction over the parties, but also if the court lacks the inherent power to make or enter the particular order involved.[113] Being void, the order may be attacked at any time either directly or

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107. 2 Conn. App. 239, 477 A.2d 152 (1984).

108. *Id.* at 243, 477 A.2d at 154.

109. *Id.* at 246, 477 A.2d at 155.

110. 11 Kan. App. 2d 473, 726 P.2d 297 (1986).

111. *Id.* at 477, 726 P.2d at 300.

112. *Id.*

113. *See* City of Chicago v. Fair Employment Practices Comm'n, 65 Ill. 2d 108, 357 N.E.2d 1154 (1976) (supreme court affirmed decision that agency exceeded its jurisdiction by awarding attorney fees not authorized by statute and therefore judgment was void); People *ex rel.* Nordlund v. Association of the Winnebago Home for the Aged, 40 Ill. 2d 91, 237 N.E.2d 533 (1968) (supreme court held that county court lacked equity power to perpetually enjoin taxation of realty not used exclusively for charitable purposes; county court's order was void); Thayer v. Village of Downers Grove, 369 Ill. 334, 16 N.E.2d 717 (1938) (supreme court affirmed lower court's order to vacate judgment; statutory requirements were not fulfilled therefore court did not have jurisdiction to enter order rendered); Armstrong v. Obucino, 300 Ill. 140, 133 N.E. 58 (1921) (supreme court held that sale made contrary to provisions of statute but in conformity with decree is void).

collaterally.[114] The rule as it was most recently stated was restricted to courts of limited jurisdiction,[115] but the first case,[116] which established the rule, involved a court of general jurisdiction exercising a statutory power. In that case, the court acknowledged a distinction between subject matter jurisdiction and jurisdiction to enter a particular order, but held that the effect is the same—an order that transcends either is void and may be attacked collaterally.[117]

Courts are not unanimous, however, in treating the granting of relief beyond the authority of the court as a lack of subject matter jurisdiction. The Rhode Island Supreme Court made a careful analysis of the question in *Hartt v. Hartt*.[118] In that case, a husband appealed from a decree holding him in contempt for failure to pay attorney fees as ordered by the divorce court. The court first noted that the divorce court had only statutory jurisdiction, that its orders could be attacked in a contempt proceeding for lack of subject matter jurisdiction, and that a long line of cases have held that the issuance of an order by a court beyond its jurisdiction may be attacked collaterally as void. It went on to point out that in analyzing the problem, distinctions must be made between subject matter jurisdiction, excess of jurisdiction, and mere error. The court acknowledged that the distinctions are difficult to draw, particularly between the latter two, and that some authorities considered excess of jurisdiction to be more akin to a lack of subject matter jurisdiction.[119] Nonetheless, it concluded that "[a]s a practical matter, once a court has jurisdiction over the subject matter and person, it is virtually impossible to distinguish acts in excess of jurisdiction from mere error."[120] Pointing to decisions of the United States Supreme Court and other courts, which attempt to distinguish lack of subject matter jurisdiction in a fundamental sense from excess of jurisdiction, the court held that the challenge to the divorce court's order, for which there was no express statutory authority,

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114. *City of Chicago*, 65 Ill. 3d at 112, 357 N.E.2d at 1155; *People ex rel. Nordlund*, 40 Ill. 2d at 94, 237 N.E.2d at 536; Barnard v. Michael, 392 Ill. 130, 135, 63 N.E.2d 858, 861-62 (1945); *Thayer*, 369 Ill. at 339, 16 N.E.2d at 719; *Armstrong*, 300 Ill. at 142-43, 133 N.E. at 59.

115. *City of Chicago*, 65 Ill. 3d at 112, 357 N.E.2d at 1155.

116. *Armstrong*, 300 Ill. at 140, 133 N.E. at 58.

117. *Id.* at 142-43, 133 N.E. at 59.

118. 121 R.I. 220, 397 A.2d 518 (1979).

119. *Id.* at 227, 397 A.2d at 522 (citing 1 FREEMAN, JUDGMENTS § 354, at 734 (1925)).

120. *Id.*

did not raise a question of subject matter jurisdiction but only one of error. Thus, subject matter jurisdiction could not be attacked collaterally.[121]

In a virtually identical case,[122] the Connecticut Supreme Court has taken a similar position. The court held that the question of the authority of a divorce court to order support payments for a person divorced for her own misconduct could not be raised initially on appeal. Only challenges to the competency of the court raise the question of subject matter jurisdiction, and the appellant did not question the court's competency.[123]

The Indiana Court of Appeals took a contrary position to that taken in *Hocutt*[124] in a case involving an award of attorney fees and litigation expenses made after a divorce decree, including a property settlement, had been entered.[125] In the post-judgment motion required by Indiana procedure, the husband challenged the award of attorney fees but did not argue any specific grounds. On appeal, the husband attempted to argue that the award of attorney fees was entered after the time allowed by the rules for modification of a decree and that the trial court thus had no subject matter jurisdiction to make the award. The court rejected the argument, stating that

> expiration of the time during which the court can amend a judgment does not deprive the court of its power to act in all divorce cases, but only its power to act in the particular case. Obviously, then, even assuming merit in the husband's argument, the court was deprived not of subject matter jurisdiction but of jurisdiction over the particular case.[126]

The latter being waived if not timely raised, the court refused to consider the issue on the merits.[127]

One court treated the power to grant specific relief as one of subject matter jurisdiction but still refused to permit a belated challenge in *Commonwealth ex rel. Cook v. Cook*.[128] In that case, the court held that the divorce court did not have subject matter jurisdiction to order support after the final divorce decree be-

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121. *Id.* at 228, 397 A.2d at 522-24.
122. Vogel v. Vogel, 178 Conn. 358, 422 A.2d 271 (1979).
123. *Id.* at 363-64, 422 A.2d at 274.
124. *See supra* notes 97-98 and accompanying text.
125. Farley v. Farley, 157 Ind. App. 385, 300 N.E.2d 375 (1973).
126. *Id.* at 398, 300 N.E.2d at 383.
127. *Id.*
128. 303 Pa. Super. 61, 449 A.2d 577 (1982).

came effective, but that the matter could not be raised in a proceeding to enforce the order on the ground that the issue was res judicata.[129]

6. *Sovereign and eleventh amendment immunity*

There is general agreement among courts that when a governmental entity is sued, the defense of sovereign immunity goes to subject matter jurisdiction and thus may be raised at any time. The defense is available to state entities against claims arising under the laws of that state,[130] to federal entities,[131] and to Indian tribes.[132] Similarly, it applies to the immunity granted to states under the eleventh amendment from suits in the federal courts.[133]

The Supreme Court, however, has recognized a distinction for federal jurisdictional purposes between federal subject matter jurisdiction as established by Congress (e.g., federal question, diversity) and the jurisdiction of federal courts over suits against a state.[134] The Court stated

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129. *Id.* at 69, 449 A.2d at 582.

130. *See, e.g.*, State Dep't of Highway Safety v. Kropff, 491 So. 2d 1252 (Fla. Dist. Ct. App. 1986) (state may raise issue of sovereign immunity at any time during proceedings, including appeal); North v. State, 400 N.W.2d 566 (Iowa 1987) (state immune from suit alleging tortious interference of business opportunity, state had no express contract therefore had not waived its immunity from suit); Maes v. Old Lincoln County Memorial Comm'n, 64 N.M. 475, 330 P.2d 556 (1958) (suit to quiet title to property against agency of state could not be maintained in absence of consent by state).

131. Stanley v. CIA, 639 F.2d 1146 (5th Cir. 1981) (where no consent to be sued exists, court had no jurisdiction to entertain a suit against the United States).

132. Ramey Constr. Co. v. Apache Tribe of Mescalero Reservation, 673 F.2d 315 (10th Cir. 1982) (sovereign immunity of Indian tribe is jurisdictional and can be raised at any time).

133. Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89 (1984) (eleventh amendment prohibits federal court from ordering state officials to conform their conduct in administering state institution for care of mentally retarded to state law); Charley's Taxi Radio Dispatch Corp. v. Sida of Haw., Inc., 810 F.2d 869 (9th Cir. 1987) (under eleventh amendment unconsenting state is immune from suits brought in federal court); Demery v. Kupperman, 735 F.2d 1139 (9th Cir. 1984) (eleventh amendment) bars from federal courts most suits against states that have not consented to being sued), *cert. denied*, 469 U.S. 1127 (1985); Jordan v. Gilligan, 500 F.2d 701 (6th Cir. 1974) (eleventh amendment prohibits awarding of attorney fees against unconsenting sovereign states), *cert. denied*, 421 U.S. 991 (1975). However, the Court in *Pennhurst* attempted to draw a distinction between a jurisdictional issue that could be raised at any time by a party and one which could be raised *sua sponte* by the Court. The Court held that the eleventh amendment issue was within the former, but not the latter and thus refused to consider the issue when the state agency did not want it considered. *Pennhurst*, 465 U.S. at 119.

134. Patsy v. Board of Regents, 457 U.S. 496 (1982).

> that the Eleventh Amendment sufficiently partakes of the nature of a jurisdictional bar that it may be raised by the State for the first time on appeal. . . . [But] because of the importance of state law in analyzing Eleventh Amendment questions and because the State may, under certain circumstances, waive this defense, we have never held that it is jurisdictional in the sense that it may be raised and decided by this Court on its own motion.[135]

III. Analysis

The foregoing groupings of cases demonstrate the wide range of procedural defects or trial court error on which appellate courts have differed as to whether they are properly characterized as subject matter jurisdiction. In this section, the differing views as to each of the categories will be examined to ascertain which view is correct.

The first category, procedural prerequisites for initiating an action,[136] is representative of the contrasting approaches taken by courts under each of the categories. Decisions such as *Fredman*[137] and *Randles*[138] treat procedural obligations placed on a party to initiate an action as a restriction placed on the subject matter jurisdiction of the court in which the action is filed. While such an obligation may be a condition precedent insofar as the party is concerned, it should not be treated as a limitation on the court's subject matter jurisdiction. The latter goes to the type of case the court can hear, not what a party must do to invoke the court's authority to hear the case. The authority exists by virtue of a constitutional or statutory provision. All that a party does is invoke it. Subject matter jurisdiction is determined by reference to those provisions without regard to obligations imposed on the parties. If this were not the case, the anomalous situation would be created in which subject matter jurisdiction would be dependent upon the actions of a

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135. *Id.* at 515 n.19. In Ohio v. Madeline Marie Nursing Homes, 694 F.2d 449 (6th Cir. 1982), the court held that whether there was compliance with procedural requirements imposed by state law for waiver of eleventh amendment immunity was a condition precedent to the exercise of subject matter jurisdiction and could be raised in the same manner as subject matter jurisdiction. *Id.* at 460.

136. *See supra* text accompanying notes 10-50.

137. Fredman Bros. Furniture Co. v. Department of Revenue, 109 Ill. 2d 202, 486 N.E.2d 893 (1985).

138. Randles v. Schaffner, 485 S.W.2d 1 (Mo. 1972).

party, exactly the opposite of the principle that subject matter jurisdiction cannot be conferred by the parties.

The Indiana and Rhode Island courts, while agreeing that procedural requirements do not go to subject matter jurisdiction, offer slightly different analyses for so holding. The Rhode Island court[139] pointed out that treating the failure to comply with conditions precedent as a lack of subject matter jurisdiction confused the appropriate exercise of power with the absence of power. As it noted, " 'subject matter jurisdiction,' when properly used, refers only to the court's power to hear and decide a case and not to whether a court having the power to adjudicate should exercise that power."[140]

The Indiana court,[141] on the other hand, drew the distinction between subject matter jurisdiction and jurisdiction over the particular case. According to its analysis, conditions precedent to the filing of a claim go not to subject matter jurisdiction but to jurisdiction over the particular case.[142] This analysis is less useful because it introduces another type of jurisdiction into an already crowded field. Rather than adding to the confusion by labeling various procedural requirements as jurisdiction over the case, it is far better to use jurisdiction as referring only to subject matter and personal jurisdiction. All other legal requirements relating to the parties or court go merely to whether the court acted appropriately under the circumstances of the particular case. Failure to do so is at most error by the trial court and should not be characterized as jurisdictional.

For the same reason, Louisiana's effort to distinguish lack of subject matter jurisdiction from the failure of the record to show jurisdictional facts[143] adds not only confusing terminology but also adds the notion that subject matter jurisdiction can depend upon what is shown in the record, i.e., a matter of proof. In the terminology of the Rhode Island court, however, what is shown in the record does not go to subject matter jurisdiction but to whether the exercise of authority was appropriate in the particular case.[144]

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139. Mesolella v. City of Providence, 508 A.2d 661 (R.I. 1986).

140. *Id.* at 666.

141. *In re* Adoption of H.S., 483 N.E.2d 777 (Ind. Ct. App. 1985).

142. *Id.* at 780.

143. *In re* Succession of Fuller; 480 So. 2d 754 (La. Ct. App. 1985), *rev'd*, 482 So. 2d 619 (La. 1986).

144. Mesolella v. City of Providence, 508 A.2d 661, 665 (R.I. 1986).

The same analysis applies to the filing of a claim within the statute of limitations.[145] Even assuming the limitation is part of the cause of action and is thus not waivable, the defect goes only to whether a claim for relief is stated by the complaint; it does not go to subject matter jurisdiction. Even though a matter may be a condition precedent to the filing of a claim, it does not thereby become a limitation on the subject matter jurisdiction of the court in which the claim is filed. Rules 9 and 12 of the Federal Rules of Civil Procedure and their state counterparts recognize this essential difference.[146]

The various cases discussed above[147] reflect the relationship between residence requirements in divorce proceedings and subject matter jurisdiction. *In re Passiales*[148] viewed the residence requirement simply as a matter of subject matter jurisdiction.[149] In *Heckathorn*[150] the court treated the residence requirement as going to the court's power to decide the particular matter, as distinguished from subject matter jurisdiction. The effect, however, of its absence was the same as for subject matter jurisdiction—the judgment was void.[151] In *Old Colony*,[152] the residence defect was said to make the judgment inherently void because it went to subject matter jurisdiction. The judgment was, nonetheless, subject to collateral attack only by nonparties.[153] Going all the way to the other extreme is *Lacks*,[154] which held that the residence requirement went to the court's power to render a judgment on the merits, not to the "competence to entertain an action."[155] Residency was only a substantive element of the cause of action, not subject matter jurisdiction.[156]

If subject matter jurisdiction is not to be extended to in-

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145. *See supra* text accompanying notes 26-30.

146. FED. R. CIV. P. 9(c) and N.J. CIV. PRAC. R. 4:5-8(b) state that it is sufficient to aver generally that all conditions precedent have been performed. N.Y. CIV. PRAC. L. & R. 3015(a) (McKinney 1974) states that performance or occurrence of conditions precedent in a contract need not be pleaded. FED. R. CIV. P. 12(h)(3) states that whenever it appears by suggestion of the parties or otherwise that the court lacks subject matter jurisdiction, the court shall dismiss the action.

147. *See supra* notes 51-70 and accompanying text.

148. 144 Ill. App. 3d 629, 494 N.E.2d 541 (1986).

149. *Id.* at 634, 494 N.E.2d at 546.

150. 77 N.M. 369, 423 P.2d 410 (1967).

151. *Id.* at 372, 423 P.2d at 412.

152. 324 Mass. 581, 88 N.E.2d 135 (1949).

153. *Id.* at 584, 88 N.E.2d at 138.

154. 41 N.Y.2d 71, 359 N.E.2d 384, 390 N.Y.S.2d 875 (1976).

155. *Id.* at 75, 359 N.E.2d at 387, 390 N.Y.S.2d at 877.

156. *See supra* notes 67-70 and accompanying text.

clude every element of a cause of action, and particularly every statutorily prescribed condition precedent, then the position of the *Lacks* court is the only position consistent with the universally accepted definition of subject matter jurisdiction. As with procedural requirements, the requirements only affect the parties' right to relief. They are not restrictions on the authority of the court to try the type of controversy involved in the action.

Making a requirement that a particular person or type of person be made a party an element of subject matter jurisdiction cannot be justified by even an expansive interpretation of the concept. Even when the confusion over necessary and indispensable parties was at its height, there was no suggestion that a court's subject matter jurisdiction was involved. In the *Vale Chemical* case,[157] even the Pennsylvania rule, which permitted lack of an indispensable party to be raised by the appellate court *sua sponte*, drew a distinction between indispensable party and subject matter jurisdiction.[158] The Eighth Circuit was correct, in the *Kansas City Southern Railway Co.*[159] case, in pointing out that the district court had "jurisdiction over the general subject matter" and that if it erred in deciding whether a particular person or entity should be made a party "the error has no bearing on its power to decide those issues."[160] Once again, the Federal Rules of Civil Procedure in rule 19 and similar state rules made it clear that the lack of an indispensable party does not raise a question of subject matter jurisdiction.[161]

Given the general acceptance of the treatment of venue as not involving subject matter jurisdiction, it is surprising that some courts still find that statutory provisions that specify a particular county or district in which an action must be brought involve subject matter jurisdiction. While superficially it may appear that when a statute requires that a particular kind of

157. 512 Pa. 290, 516 A.2d 684, *cert. denied* 449 U.S. 955 (1980).

158. *See supra* notes 71-74 and accompanying text.

159. 624 F.2d 822 (8th Cir. 1980).

160. *Id.* at 826.

161. FED. R. CIV. P. 19 states that a person whose joinder will not deprive the court of jurisdiction over the subject matter will be joined if feasible. If such a person cannot be made a party the court must determine whether to go forward without him. His joinder or nonjoinder does not affect the subject matter jurisdiction of the court. 42 PA. CONS. STAT. § 7540 (1982) states that when declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. If the court has jurisdiction to make the declaration, the joinder or nonjoinder of parties will not affect that jurisdiction.

action must be brought in a particular locale, it means that the courts in all other locales do not have subject matter jurisdiction over that type of action, a closer analysis shows the contrary. If a statute specifies the county in which the estate of a decedent is to be probated, but there is a court in each county with probate jurisdiction, the statute is not a limit on the subject matter jurisdiction of the probate court in each county. It is merely a direction as to the proper venue for a particular probate proceeding. To justify treating the venue provision as one of subject matter jurisdiction, the statute must be interpreted to mean that the only type of proceeding over which the probate court of a particular county had subject matter jurisdiction was that involving persons who were residents of the county. This is not, however, what "type of controversy" means in the accepted definition of subject matter jurisdiction. "Type" means the general type without regard to the facts of the particular case. Unless this is so, all venue provisions would become subject matter jurisdiction limitations.

The requirement that judicial review of the decision of an administrative agency be filed only in the county in which the agency sits[162] presents more difficult problems. It could be argued that under such a statute courts in all of the other counties do not have subject matter jurisdiction over that type of administrative appeal.

Neither the Wisconsin[163] nor Indiana[164] decisions offer satisfactory rationales for concluding that administrative appeal venue statutes do not go to subject matter jurisdiction. Again, the answer must be found in the proper interpretation of the term "type" in the definition of subject matter jurisdiction. If "type" means administrative appeals in general, and not appeals of a particular administrative agency, then the venue provision is just that—a venue provision. The answer to the problem is found in the fact that a state's court of general jurisdiction will have jurisdiction over many types of administrative appeals, with venue provisions specifying the venue of particular appeals depending upon the residence of the individual who is the sub-

162. *See supra* note 80.

163. Shopper Advertiser, Inc. v. Wisconsin Dep't of Revenue, 117 Wis. 2d 223, 344 N.W.2d 115 (1984); *see supra* notes 89-91 and accompanying text.

164. Newton v. Board of Trustees, 142 Ind. App. 391, 235 N.E.2d 84 (1968); *see supra* notes 92-94 and accompanying text.

ject of the administrative action,[165] the location of the office of the agency,[166] or both.[167] For different agencies, different places for filing the appeal may be provided.[168] All that is done by the venue provisions of such statutes is what venue provisions are designed to do—specify in which county or district the appeal is to be filed. They do not, consequently, go to subject matter jurisdiction.

Converting lack of authority to grant a specific type of relief into a lack of subject matter jurisdiction occurs surprisingly often, yet with far less justification than matters relating to the initiation of a proceeding. In each of the cases discussed above,[169] the court granting the relief alleged to be beyond its power had subject matter jurisdiction not only over the type of proceeding but of the particular proceeding in which the disputed relief was granted. The only thing allegedly lacking was the authority to grant the relief. This clearly has nothing to do with subject matter jurisdiction, which is limited to authority to adjudicate the type of controversy before the court. Once again the focus must be on the words "type of controversy." If the type of controversy is within the subject matter jurisdiction, then all other defects or errors go to something other than subject matter jurisdiction. Thus, in *Park Elm*[170] the trial court had jurisdiction over real-property matters; it simply did not follow statutory procedures for affecting a specific type of real estate title.[171] In *Hocutt*[172] and *Corban*,[173] the divorce court had jurisdiction over divorce proceedings including property settlements; the courts simply acted after the time specified in the rules for

165. *See, e.g.*, Mo. Rev. Stat. § 288.210 (1986) (county of claimant's residence); Wis. Stat. Ann. § 227.16(1)(a) (West 1987) (county where taxpayer resides).

166. *See, e.g.*, Ohio Rev. Code Ann. § 5501.22 (Anderson 1985) (county of agency's location); Wis. Stat. Ann. § 77.59(6)(b) (West 1987) (location of Tax Appeals Commission).

167. *See, e.g.*, Mo. Rev. Stat. § 288.210 (1986) (county of claimant's residence or if no claimant, county of agencies location).

168. *Compare* Wis. Stat. Ann. § 77.59(6)(b) (West 1987) (Dane county for appeals from Tax Appeals Commission decisions) *with* Wis. Stat. Ann. § 497.6(3) (West 1987) (order of Public Service Commission with respect to Wisconsin Valley Improvement Co. could be challenged in county in which property located).

169. *See supra* notes 95-129 and accompanying text.

170. Park Elm Homeowners Ass'n v. Mooney, 398 N.W.2d 643 (Minn. Ct. App. 1987).

171. *Id.* at 646.

172. Hocutt v. Hocutt, 491 So. 2d 247 (Ala. Civ. App. 1986).

173. Corban v. Corban, 161 Mont. 93, 504 P.2d 985 (1972).

modifying judgments expired.[174] In *Gardiner*[175] the court had jurisdiction over visitation rights; it simply did not have authority to grant them to grandparents.[176] In *Arseniadis*[177] and *Morton*,[178] the courts had jurisdiction over property settlements; they merely erred in not following the procedure mandated by statute to affect certain property.[179] The Illinois cases[180] simply added another reason to hold a judgment void—lack of authority to enter the particular order.[181] Even they did not attempt to convert this defect into one of subject matter jurisdiction.

The analysis of the Rhode Island Supreme Court in *Hartt*[182] is helpful because it rejects the concept of a court acting in "excess of jurisdiction." Its holding—that when a court grants relief it is not authorized by statute to grant is mere error rather than either "excess of jurisdiction" or subject matter jurisdiction[183]—helps to maintain the crucial distinction between the latter and all other types of error that may involve a court acting in a manner not authorized by law. When a court in a case over which it has subject matter jurisdiction grants relief for which it has no express authority, has not been requested by the parties to do so, or grants relief after the time for doing so has expired, it is a defect in the court's authority to perform a particular act. It is not one of subject matter jurisdiction.

Whether the immunities granted by the judicial doctrine of sovereign immunity and the eleventh amendment go to subject

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174. *Hocutt*, 491 So. 2d at 248; *Corban*, 161 Mont. at 96, 504 P.2d at 987.

175. *In re* Adoption of Gardiner, 287 N.W.2d 555 (Iowa 1980).

176. *Id.* at 559.

177. Arseniadis v. Arseniadis, 2 Conn. App. 239, 477 A.2d 152 (1984).

178. *In re* Marriage of Morton, 11 Kan. App. 2d 473, 726 P.2d 297 (1986).

179. *Arseniadis*, 2 Conn. App. at 243, 477 A.2d at 154; *In re* Marriage of Morton, 11 Kan. App. 2d at 475-76, 726 P.2d at 299.

180. City of Chicago v. Fair Employment Practices Comm'n, 65 Ill. 3d 108, 357 N.E.2d 1154 (1976); People *ex rel.* Nordlund v. Association of the Winnebago Home for the Aged, 40 Ill. 2d 91, 237 N.E.2d 533 (1968); Thayer v. Village of Downers Grove, 369 Ill. 334, 16 N.E.2d 717 (1938); Armstrong v. Obucino, 300 Ill. 140, 133 N.E. 58 (1921).

181. *City of Chicago*, 65 Ill. 3d at 112, 357 N.E.2d at 1155; *People ex rel. Nordlund*, 40 Ill. 2d at 94, 237 N.E.2d at 536; *Thayer*, 369 Ill. at 339, 16 N.E.2d at 719; *Armstrong* , 300 Ill. at 142-43, 133 N.E. at 59.

182. Hartt v. Hartt, 121 R.I. 220, 397 A.2d 518 (1979).

183. *Id.* at 224, 397 A.2d at 520. The United States Supreme Court failed to make this distinction in Commissioner v. McCoy, 108 S. Ct. 217 (1987) when it reversed a decision of a court of appeals for forgiving interest and penalty. The Court held that neither the tax court nor the court of appeals had any authority other than to review the correctness of the tax assessment. It discussed the authority of the lower courts over interests and penalties in terms of "jurisdiction" rather than legal authority. *Id.* at 218.

matter jurisdiction is more problematical.[184] From one viewpoint, suits against state and federal governments barred by the sovereign immunity doctrine or the eleventh amendment could be said to be types of controversies over which the courts do not have subject matter jurisdiction. From another viewpoint, however, the types of controversies could also be described as involving contract, tort, or constitutional claims that are the types of controversies over which the courts have subject matter jurisdiction. But, the courts are simply barred from granting relief against certain classes of defendants.

The latter approach is supported as to sovereign immunity (as distinguished from eleventh amendement immunity) by the fact that the immunity was judicially created and in many states has been judicially abolished.[185] If the doctrine were truly one of subject matter jurisdiction, the courts themselves would be incapable of expanding it by judicial fiat to include the state and its subdivisions; only the legislature could do it. But one of the principal reasons that the courts give for deciding to abolish sovereign immunity is that the legislatures refused to do so.[186] Exactly the same process occurred as to immunity for charitable institutions.[187] It was never claimed, however, that the courts did not have subject matter jurisdiction over claims against these institutions, only that it was against public policy to award relief against them.[188]

Furthermore, the fact that both sovereign immunity and

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184. *See supra* notes 130-35 and accompanying text.

185. *See* Williams v. City of Detroit, 364 Mich. 231, 111 N.W.2d 1 (1961) (doctrine of governmental immunity overruled); Molitor v. Kaneland Community Unit Dist., 18 Ill. 2d 11, 163 N.E.2d 89 (1959) (prospective absolution of rule of governmental immunity).

186. *See* Williams v. City of Detroit, 364 Mich. at 284, 111 N.W.2d at 16-17 (Edwards, J., concurring).

187. *See, e.g.*, McDonald v. Massachusetts Gen. Hosp., 120 Mass. 432 (1876) (adopted immunity from tort claims for charitable organizations); Perry v. House of Refuge, 63 Md. 20 (1885) (common law of Maryland concerning immunity of charitable organizations established); *see also* President & Directors of Georgetown College v. Hughes, 130 F.2d 810 (D.C. Cir. 1942) (discussing the history of immunity for charitable organizations).

188. *See, e.g.*, President & Directors of Georgetown College v. Hughes, 130 F.2d 810 (D.C. Cir. 1942) (rule of immunity out of step with trend of judicial and legislative policy); Ray v. Tucson Medical Center, 72 Ariz. 22, 230 P.2d 220 (1951) (when reason for declared public policy no longer exists court should abolish it); Haynes v. Presbyterian Hosp. Ass'n, 241 Iowa 1269, 45 N.W.2d 151 (1950) (fact that court created immunity from wrongdoing is not reason to continue rule when it is basically unsound); Noel v. Menninger Found., 175 Kan. 751, 267 P.2d 934 (1954) (changed conditions have rendered unnecessary rule of immunity for charitable organizations).

eleventh amendment immunity can be waived also argues against treating them as subject matter jurisdiction, as the Sixth Circuit has pointed out.[189] One of the key elements of subject matter jurisdiction is that it cannot be conferred by consent of the parties.[190] Yet as to both immunities, that is exactly what occurs. It is irrelevant that the courts have held that the waiver can be made only by the state legislature and not by the attorney for the governmental unit (even though this was not always the case).[191] The essential point is that they can be waived even though the language of the eleventh amendment would not appear to permit waiver.[192] As interpreted, the amendment essentially goes only to the requirement of personal jurisdiction, which can be waived. This being so, the immunities should not be considered as going to subject matter jurisdiction.

IV. The Timing of Challenges to Subject Matter Jurisdiction

The preceding sections have focused on the problems courts have had in understanding what is properly within the accepted meaning of subject matter jurisdiction. The question of the timing of challenges to subject matter jurisdiction is just as important. To phrase it another way, can the question of subject matter jurisdiction be foreclosed, and if so, how early in the judicial process should this occur?

Black letter law has long provided that a judgment can be attacked at any time as void for lack of subject matter jurisdic-

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189. Ohio v. Madeline Marie Nursing Homes, 694 F.2d 449 (6th Cir. 1982); *see supra* notes 134-135 and accompanying text.

190. *See, e.g.*, Dassinger v. Oden, 124 Ariz. 551, 606 P.2d 41 (Ariz. Ct. App. 1979) (filing of proper claim is jurisdictional prerequisite to filing of suit against the state which parties cannot confer by consent); DuShane v. DuShane, 486 N.E.2d 1106 (Ind. Ct. App. 1985) (party to divorce proceeding estopped to later challenge subject matter jurisdiction even though subject matter jurisdiction may not be conferred by consent, agreement or waiver); Dobbs, *The Decline of Jurisdiction by Consent*, 40 N.C.L. Rev. 49 (1961) (parties cannot give a court jurisdiction of the subject matter by their consent or acquiesence).

191. *See e.g.*, Clark v. Barnard, 108 U.S. 436 (1883) (state consented to exercise of jurisdiction by appearing as an intervening claimant). This position reappeared in *Patsy v. Board of Regents*, 457 U.S. 496, 515 n.19 (1982), when the Court held that in the face of the refusal of a state agency to raise an eleventh amendment defense, the Court could not consider it *sua sponte*.

192. The eleventh amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI.

tion.[193] As a result of a series of Supreme Court decisions beginning in the 1930s, however, it became almost impossible to challenge subject matter jurisdiction *collaterally*. These decisions established the following principles:

1. Every court in every case has subject matter jurisdiction to decide whether the particular case is within its subject matter jurisdiction.
2. A court is presumed to decide that it has subject matter jurisdiction over a case unless it expressly decides that it does not, whether or not the issue is litigated.
3. If the trial court is incorrect in its decision (express or implied) on subject matter jurisdiction, the mistake is merely error and does not render the court's final judgment void.
4. Once the judgment is final and not subject to further appeal, the question of subject matter jurisdiction is res judicata and cannot be attacked collaterally.[194]

These decisions, as can be seen, foreclose only collateral attacks. Even though there is some confusion over the distinction between a direct and collateral attack on a judgment,[195] direct is

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193. RESTATEMENT OF JUDGMENTS § 7 (1942) (a judgment is void if the rendering court lacks competency, i.e., jurisdiction over the subject matter, and this judgment can be collaterally attacked in subsequent proceedings).

194. In Stoll v. Gottlieb, 305 U.S. 165 (1938), the Supreme Court found that where subject matter jurisdiction was actually litigated, this finding was res judicata and collateral attack was precluded. In Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371 (1940), it was determined that res judicata applies to jurisdiction even when the parties had the opportunity to litigate subject matter jurisdiction but did not. The Supreme Court continued the trend of applying the principles of res judicata to questions of subject matter jurisdiction in Durfee v. Duke, 375 U.S. 106 (1963). The court approved of "the general rule that a judgment is entitled to full faith and credit—even as to questions of jurisdiction—when the second court's inquiry discloses that those questions have been fully and fairly litigated and finally decided in the court which rendered the original judgment." *Id.* at 111. Despite this shift in emphasis to the policy of finality of judgments, the voidness doctrine has not entirely disappeared. In Kalb v. Feuerstein, 308 U.S. 433 (1940), the court relied on the traditional voidness theory to hold a state court's foreclosure judgment as void. The Court held that the res judicata rules of *Stoll* and *Chicot* did not apply because Congress, using its plenary power over bankruptcy, had deprived the courts of jurisdiction by enacting the Frazier-Lemke Act, ch. 792, 49 Stat. 942 (1935). In United States v. United States Fidelity and Guar. Co., 309 U.S. 506 (1940), the Court held that the *Chicot* holding regarding sovereign immunity was not applicable.

195. *See* Comment, *The Value of the Distinction Between Direct and Collateral Attacks on Judgments*, 66 YALE L.J. 526 (1957) ("The distinction between a 'direct' and 'collateral' attack on a final judgment is one of the most obscure areas of procedural law.").

usually defined as an attack within the framework of the original case, either in the trial court or on appeal and either pre- or post-judgment.[196] A collateral attack, on the other hand, is one made in subsequent litigation outside the framework of the original case, possibly involving different parties, claims, issues, or courts.[197] A motion under Federal Rule of Civil Procedure 60(b) is, under these definitions, a direct attack because it is filed in the same proceeding.[198]

Notwithstanding this distinction, courts have begun to treat the issue of subject matter jurisdiction as foreclosed in all post-appeal challenges,[199] whether technically considered as direct or collateral. There are sound reasons for this trend. Under the Supreme Court's decisions on foreclosing the issue of subject matter jurisdiction, there is no reason to distinguish between a post-appeal direct challenge and a collateral attack. This is because even though the court may not have had subject matter jurisdiction, its judgment is not void. It may have been in error, but it is not the type of error that can be the basis for a rule 60(b) type motion.

The logic of the Supreme Court's decisions can, however, be carried even one step further. As has been suggested by the American Law Institute, both in its RESTATEMENT (SECOND) OF JUDGMENTS[200] and in its proposals on diversity jurisdiction;[201] and by Professors Moore[202] and Dobbs;[203] there is no reason why the issue of subject matter jurisdiction cannot be foreclosed in the trial court under the same rules that apply to preserving other types of error. Namely, counsel must raise it in the trial court, have the objection noted in the record, and then present

196. *Id.* at 530-31.

197. *Id.* at 533-34.

198. 7 J. MOORE & J. LUCAS, MOORE'S FEDERAL PRACTICE § 60.25(2) (2d ed. 1985) (motion under power reserved to court by rule 60(b) is direct attack).

199. *See* Hodge v. Hodge, 621 F.2d 590 (3d Cir. 1980) (issue of subject matter jurisdiction in divorce proceeding was res judicata even though it was neither litigated nor contested in the original proceeding).

200. RESTATEMENT (SECOND) OF JUDGMENTS § 11 (1982).

201. ALI Study of the Division of Jurisdiction Between State and Federal Courts 366-69 (1968). *See also* Holzhauer, Longshoremen v. Davis *and the Nature of Labor Law Preemption*, 1986 SUP. CT. REV. 135, 140 ("There is nothing in the Constitution or other federal law that prohibits waiver of untimely claims of lack of subject matter jurisdiction.").

202. Moore, *Collateral Attack on Subject Matter Jurisdiction: A Critique of the Restatement (Second) of Judgments*, 66 CORNELL L. REV. 534 (1980).

203. Dobbs, *Beyond Bootstrap: Foreclosing the Issue of Subject-Matter Jurisdiction Before Final Judgment*, 51 MINN. L. REV. 419 (1967).

the issue in the principal brief on appeal. If the issue of subject matter jurisdiction were raised in the trial court but not on appeal, the party objecting would not then be able to attack the judgment as void because the party would be considered to be bound by the ruling either by the law of the case (in subsequent direct attacks) or res judicata (in subsequent collateral attacks). If the party does not raise the issue of subject matter jurisdiction in the trial court, the party similarly should be bound by the rule that prohibits new issues being raised on appeal. The essential point is that the trial court is held both to have subject matter jurisdiction to decide the issue and to have decided that the case was within it. If the subject matter jurisdiction ruling has the same status as an express decision on any other issue, then the party seeking to challenge it on appeal must show in the record that it did so in the trial court. Otherwise the issue is foreclosed. An incorrect decision is at most error, and a court's judgment on the merits is not void.

Foreclosing the issue of subject matter jurisdiction is justified because both the other party and the judicial system have been put to substantial expense in time and money to decide the case on the merits. This expense may all have been avoided if the party objecting to subject matter jurisdiction had done so as a preliminary matter prior to trial. Not permitting the party to challenge subject matter jurisdiction for the first time on appeal is not unfair to that party and does not violate the principle of validity of judgments, because under principles enunciated by the Supreme Court the judgment is valid. At most, the judgment may be based upon an erroneous exercise of jurisdiction, but the general rule against raising new issues on appeal presumes that it is better to have erroneous judgments than to disrupt the adversary process by allowing new issues to be raised on appeal.

V. Conclusion

The most-recognized exception to the general rule against considering new issues on appeal is that of challenging the subject matter jurisdiction of the trial court. This exception has its justification in the even more universal rule that a judgment rendered by a court without subject matter jurisdiction is void and can be attacked at any time either collaterally or directly.

An examination of the cases shows that courts have classified a whole range of matters as involving subject matter jurisdiction that are not properly within its definition. In doing so

they have permitted these matters to be raised for the first time on appeal or in subsequent proceedings to set aside the judgment as void. Courts should recognize that these matters do not involve subject matter jurisdiction and should not be permitted to be raised for the first time on appeal or thereafter.

Even as to those matters that do fall within the definition of subject matter jurisdiction, principles developed in a series of Supreme Court decisions concerning jurisdiction to decide jurisdiction and foreclosing collateral attacks on judgments as void are equally applicable to direct attacks on judgments, including the appeal. If these principles are so applied, the general rule against considering new issues on appeal applies to the question of subject matter jurisdiction in the same manner as any other potential error by the trial court. Recognition of this application will further enhance the finality of judgments.