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# AN ECONOMIC ANALYSIS OF SUBJECT MATTER JURISDICTION WAIVER: A RESPONSE TO PROFESSOR BUEHLER

Daniel Klerman\*

## INTRODUCTION

For nearly a century, black letter law has dictated that subject matter jurisdiction is non-waivable.<sup>1</sup> Both litigants and judges can raise subject matter jurisdiction defects at any time, even on appeal. Current doctrine indicates that the parties' consent to federal jurisdiction, whether explicit or tacit, is insufficient, because subject matter jurisdiction involves federalism. It is not the prerogative of the parties to derogate from state court jurisdiction. Rather, it is the constitutional obligation of federal judges to self-police the line between federal and state courts.

Despite its solid basis in precedent, a parade of commentators has attacked the rigidity of current law as wasteful. Commentators argue that cases dismissed for jurisdictional reasons after trial or on appeal are often followed by costly duplicative litigation in state court. In addition, critics assert that the non-waivability of subject matter jurisdiction encourages inefficient strategic behavior. For example, if a defendant has information unknown to the plaintiff that would defeat subject matter jurisdiction, the defendant can wait to raise the jurisdictional defect until it feels threatened by an adverse judgment. This gives the defendant an option to relitigate the case in state court. Plaintiffs can also engage in the same strategic, yet inefficient, behavior, and wait to raise jurisdictional defects. Therefore, these commentators have called upon the federal courts to give up their jurisdictional "fetish" and treat

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1. For the surprisingly recent emergence of the no-waiver rule, see generally Michael G. Collins, *Jurisdictional Exceptionalism*, 93 VA. L. REV. 1829, 1861–1876 (2007); Dan B. Dobbs, *Beyond Bootstrap: Foreclosing the Issue of Subject-Matter Jurisdiction Before Final Judgment*, 51 MINN. L. REV. 491, 507–512 (1967).

subject matter jurisdiction like personal jurisdiction: if neither the parties nor the court raises the jurisdictional problem early in the proceedings, these critics argue, the objection should be waived and therefore cannot be raised later.<sup>2</sup>

Dustin Buehler's article, *Solving Jurisdiction's Social Cost*,<sup>3</sup> makes a worthy contribution to this debate. He steers a middle course between current law (non-waivability) and proposals that would allow federal courts to continue adjudicating cases with jurisdictional defects as long as neither party objected in a timely fashion. He proposes a rule requiring federal district court judges to issue a "jurisdictional certification order," including findings of fact and conclusions of law, at the close of pleadings.<sup>4</sup> To facilitate preparation of such orders, parties would have to plead jurisdictional facts with particularity.<sup>5</sup> A party could immediately appeal a jurisdictional order. However, if a party failed to appeal, it would lose the ability to challenge subject matter jurisdiction later.<sup>6</sup>

In addition, on a theoretical level, Professor Buehler criticizes prior reform proposals as "monistic," because they consider only efficiency values, without taking into account structural values such as federalism.<sup>7</sup> Instead, he argues that efficiency and structural values are incommensurable and must be brought into "equilibrium."<sup>8</sup>

While I share Professor Buehler's view that reforms must take into account both litigation costs and federalism, I disagree with his analysis and proposed solution. In Part I, I contend that jurisdictional certification, although typically a simple task, would be too costly, because it would need to be performed in all of the more than 250,000 civil cases filed in federal court every year.<sup>9</sup> I also disagree that

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2. See generally AM. LAW INST., STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 366–369 (1969) (labeling jurisdictional nonwaivability a "fetish"); Qian A. Gao, "Salvage Operations Are Ordinarily Preferable to the Wrecking Ball": Barring Challenges to Subject Matter Jurisdiction, 105 COLUM. L. REV. 2369 (2005); Bruce A. Wagman, *Second Bites at the Jurisdictional Apple: A Proposal for Preventing False Assertions of Diversity of Citizenship*, 41 HASTINGS L.J. 1417 (1990).

3. Dustin E. Buehler, *Solving Jurisdiction's Social Cost*, 89 WASH. L. REV. 653 (2014).

4. *Id.* at 694–97.

5. *Id.* at 698.

6. *Id.* at 703–05.

7. *Id.* at 663.

8. *Id.* at 668.

9. Judicial Business 2013–U.S. District Courts, UNITED STATES COURTS, <http://www.uscourts.gov/Statistics/JudicialBusiness/2013/us-district-courts.aspx> (last visited Nov. 1, 2014).

efficiency and structural values are incommensurable. In Part II, I point out that efficiency considerations encompass more than litigation costs and include the benefits of the decentralized decision-making fostered by federalism. In Part III, I propose that federalism concerns could be more efficiently handled by giving federal judges discretion to retain or dismiss cases in which jurisdictional defects are belatedly discovered, depending on whether the case implicates significant federalism concerns. In order to identify cases in which such concerns are important, federal judges could be empowered and encouraged to call for the views of the relevant state attorney general. Finally, in Part IV, I note that, before making any changes to jurisdictional procedures, it is important to recognize the ways in which the current rules may encourage early and thorough investigation of subject matter jurisdiction by both parties and judges.

#### I. THE COST OF JURISDICTIONAL CERTIFICATION, HEIGHTENED PLEADING, AND INTERLOCUTORY APPEALS

There are seven reasons that the costs of Professor Buehler's proposal may outweigh its benefits. First, although the proposed certification would usually be easy to prepare, it would have to be issued in all of the more than 250,000 civil cases filed in federal court each year.<sup>10</sup> In contrast, Professor Buehler estimates that only about 500 cases are belatedly dismissed on jurisdictional grounds each year.<sup>11</sup> This estimate indicates that for every relitigation avoided, district courts would have to produce 500 certification orders. It seems likely that the aggregate time required to prepare jurisdictional certification in all cases would far exceed the time saved by avoiding relitigation in the roughly 0.2 percent of cases that might require relitigation.<sup>12</sup> The high settlement rate reinforces the idea that certification would probably be unnecessarily costly. Certification orders would be required even in the majority of cases in federal court that would likely settle before courts expend

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10. *Id.*

11. Buehler, *supra* note 3, at 655 n.7.

12. The reasoning here is similar to the analysis of ex ante regulation versus ex post liability. Buehler's solution is similar to regulation (requiring parties and judges to incur the cost of jurisdictional certification in every case), whereas the current rule is like liability (imposing costs on the parties only when jurisdictional mistakes actually occur). See Steven Shavell, *Liability for Harm Versus Regulation of Safety*, 13 J. LEGAL STUD. 357, 364 (1984) (arguing that "there seems to be an underlying advantage in favor of liability, for most of its administrative costs are incurred only if harm occurs. As this will usually be infrequent, administrative costs will be low.").

significant resources.<sup>13</sup>

Second, many of the cases belatedly dismissed for jurisdictional defects would probably settle before relitigation in state court, meaning that the post-dismissal costs in those cases are likely to be small. Uncertainty and mutual optimism are the key impediments to settlement.<sup>14</sup> Litigation in federal court provides the parties with information, such as how well witnesses would testify and a judicial view of contested legal issues. That information reduces uncertainty and optimism and thus increases the likelihood of settlement after dismissal.

Third, the costs of the proposed jurisdictional certification would be high due to the difficulty of determining jurisdiction in some cases. That is, while certification will be relatively easy in most cases, some would require resolution of intricate factual or legal issues. For example, deciding where an individual is domiciled or a corporation is headquartered may involve challenging factual inquiries. Similarly, supplemental jurisdiction under 28 U.S.C. § 1367 can require both intricate legal analysis and the exercise of judicial discretion. Since most cases settle, deferring resolution of jurisdictional issues in such cases can save both judges and parties considerable time and money. To streamline adjudication, Professor Buehler proposes that judges rely on pleadings and affidavits rather than live testimony.<sup>15</sup> Even if it were possible to resolve difficult jurisdictional issues with only pleadings and affidavits, the costs are likely to be large when multiplied by the thousands of cases each year in which difficult jurisdictional issues probably arise.

Fourth, most judges already check subject matter jurisdiction at the outset of all cases. In many chambers, that task is delegated to law clerks,<sup>16</sup> while in others the task is performed by interns or the judge herself. Nevertheless, judges do not ordinarily write up their findings or have their staff do so. Rather the clerks or interns just check off a box on a form or checklist. While it is true that judges are likely to be more careful if they have to issue an order explaining their reasoning, they would likely find only a small number of additional jurisdictional

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13. About two-thirds of cases in federal court settle. Theodore Eisenberg & Charlotte Lanvers, *What is the Settlement Rate and Why Should We Care?*, 6 J. EMPIRICAL LEGAL STUD. 111, 115 (2009). Nevertheless, it is not known how many of these cases settle after significant judicial resources are incurred in resolving pre-answer motions, discovery disputes, or summary judgment motions.

14. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 779–84 (9th ed. 2014).

15. Buehler, *supra* note 3, at 699–700.

16. *See, e.g.*, CALVERT G. CHIPCHASE, *FEDERAL DISTRICT COURT LAW CLERK HANDBOOK* 66 (2007).

defects. Judges (and clerks) already have a significant incentive to find jurisdictional defects, because doing so reduces their caseload and thus increases their leisure and/or the quality of work they can perform on their remaining cases. The additional time required to write the jurisdictional orders should not be underestimated. The average federal district court judge has more than 400 civil case filings per year.<sup>17</sup> Even if each jurisdictional certification order took only fifteen minutes to prepare, that is still more than 100 hours per year, or roughly two weeks of work.

Fifth, in addition to the costs placed on the courts, Professor Buehler's proposals would also require increased effort by lawyers. The lawyers would likely then pass the costs along to their clients. Buehler proposes a requirement that parties plead subject matter jurisdiction with specificity in order to facilitate jurisdictional certification.<sup>18</sup> Although lawyers can probably prepare such pleadings without much difficulty, a small amount of time and effort per case translates into a large aggregate cost when multiplied by the more than 250,000 civil cases filed in federal court each year. Even if complying with the heightened pleading standard took only ten extra minutes per case, that would translate into more than 20,000 extra hours of work per year.

Sixth, the cost of interlocutory appeals of subject matter rulings must be considered. Although appeals will probably be infrequent, they demand substantial time and effort for both litigants and judges. In addition, parties may appeal for strategic reasons, such as delay. Such strategic appeals could prolong litigation and strain plaintiffs' lawyers' resources, which are often scarce.

Finally, the cost of relitigation may not be as high as commentators suggest. When a case is dismissed, the time spent in federal court does not amount to time wasted. The most expensive part of litigation is discovery, and nothing ordinarily prevents parties from reusing, in state court, the depositions, documents, and other materials gathered and generated in federal court.<sup>19</sup> Similarly, much of the legal research (except research about federal procedure) will remain relevant in state court. In general, parties can reuse the work performed by experts, except trial testimony, with only minor editing and reformatting. This is not, of course, to assert that relitigating a case in state court is not

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17. See Judicial Business 2013—U.S. District Courts, *supra* note 9.

18. Buehler, *supra* note 3, at 697–700.

19. See, e.g., WILLIAM W. SCHWARZER ET AL., FEDERAL CIVIL PROCEDURE BEFORE TRIAL ch. 2D-11b (National ed. 2014) (“Discovery obtained while the case was [in federal court] is certainly admissible in the state court proceedings.”).

expensive, but only that the costs will not equal those of bringing a new lawsuit.

## II. THE COMMENSURABILITY OF EFFICIENCY AND STRUCTURAL VALUES, AND THE BENEFITS OF FEDERALISM

In order to determine whether subject matter jurisdiction should be waivable, Professor Buehler and most commentators would require consideration of both litigation costs and federalism. For example, a belated dismissal on jurisdictional grounds increases litigation costs (by requiring relitigation), but enhances federalism (by sending appropriate cases to state court). Professor Buehler asserts that these two values are incommensurable.<sup>20</sup> At the outset, it is not clear why this matters. Even if litigation costs and federalism are incommensurable, judges and other policymakers must make trade-offs. No one claims that federalism is so important that it would justify extremely large litigation expenditures, such as allowing collateral attacks on subject matter jurisdiction grounds or requiring state representatives to monitor federal courts to ensure that they stay within statutory and constitutional grounds. Conversely, no one claims that litigation costs are so much more important than federalism that subject matter jurisdiction should just be ignored in order to save costs. The question is how to reach the appropriate balance or trade-off between litigation costs and federalism. Professor Buehler calls the appropriate balance “equilibrium,” a term not clearly defined in his article.<sup>21</sup> His idea of equilibrium does not seem related to the more rigorous concepts of equilibrium that one finds in game theory or elsewhere.<sup>22</sup>

Incommensurability is usually an issue when one is dealing with fundamental values, such as autonomy, equality, or dignity.<sup>23</sup> Federalism is not such a value. It is not a value in itself, but rather is instrumental towards other values, such as responsiveness to local concerns and the prevention of tyranny.

One of the major achievements of the pioneers of law and economics, most importantly Gary Becker and Richard Posner, was the insight that efficiency means much more than minimizing costs easily or ordinarily

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20. Buehler, *supra* note 3, at 665–68.

21. Buehler, *supra* note 3, at 668.

22. See generally ERIC RASMUSEN, GAMES AND INFORMATION (4th ed. 2001).

23. See generally Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779 (1994).

measured in dollars and cents.<sup>24</sup> For example, criminal justice policy does not involve consideration of incommensurable values simply because it involves both costs (such as the cost of policing) and public safety. Rather, public safety itself can be expressed in monetary terms. People prefer not to be assaulted or robbed, and their preferences can be expressed in monetary terms and measured by looking at how much they actually pay to avoid such risks (such as by living in a safer neighborhood or hiring private security). Similarly, environmental policy requires consideration of both cost and environmental quality. However, that does not mean that it requires consideration of incommensurable values, because the value of environmental quality can be measured by surveys of willingness to pay (or accept) or by looking at actual decision-making (such as how much people are willing to pay to live in less polluted places).

The fundamental insights of the economic analysis of procedure are that most procedural issues involve trade-offs between litigation costs and accuracy, and that accuracy has a monetary value.<sup>25</sup> Wrongly decided cases provide suboptimal incentives for later behavior. That is, parties, anticipating a certain rate of court error, may take less (or more) than optimal precautions against tort injuries. Alternatively, they may breach (or perform) inefficiently or otherwise behave in ways that impose excessive costs on others (or themselves). The more accurate the adjudication, the more people have incentives to conform their actions to law. As long as the law is efficient or has other goals that can be measured in economic terms, one can therefore sensibly think about procedures that increase or decrease accuracy in monetary terms, because one can evaluate the monetary impact of more or less compliance with the relevant substantive law. As a result, one can make trade-offs between litigation costs and accuracy, because both can be measured in monetary terms. Like criminal justice, environmental regulation, and procedure generally, subject matter jurisdiction can be subjected to economic analysis in a way that takes into account values, such as litigation costs and federalism, which might initially seem to be incommensurable.

What is the value of the proper allocation of cases between federal and state court? What are the benefits of state-court adjudication of cases not within federal subject matter jurisdiction? Examination of those

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24. See Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (1st ed. 1972).

25. See POSNER, *supra* note 14, at 773–74.



benefits helps determine whether the benefits of dismissing cases with belatedly-discovered jurisdictional defects outweigh the costs discussed in Part I.<sup>26</sup>

First, state court judges may be in the best position to accurately adjudicate cases that do not fall under federal jurisdiction. Such cases likely involve state law, an area with which state court judges are more familiar than their federal counterparts. The very independence of federal judges may mean that they are not influenced by local values in the way that state legislators and common law judges intended. Federal judges may therefore reach decisions not in accord with the preferences of the state residents who elected the legislators and, directly or indirectly, the judges. Nevertheless, although federal judges are not experts in state law, they are generally very competent, and probably, on average, of higher quality than state court judges.<sup>27</sup> In addition, local values likely influence federal district court judges, too, as they generally live and formerly practiced in the state where they sit. Thus, the extent to which federal adjudication is less accurate or less in tune with state values is likely to be small. Furthermore, if different outcomes resulted from a case being adjudicated in federal and state courts, such differences would likely have benefited one of the parties. The cases in which neither party objects to subject matter jurisdiction are likely to be the cases in which neither party anticipated that federal judges would decide the case much differently than state court judges. Thus, it is likely that the benefits of relitigation in state court in terms of increased accuracy would be very small, if they exist at all.

Second, even if one were skeptical that state judges were more accurate, state procedures and funding levels reflect the views of state legislators and judges about the optimal balance between cost and accuracy for cases within state court jurisdiction. Most, if not all, state courts receive less funding per case than federal courts, reflecting an assessment that accuracy is less valuable in state court cases. When a case is improperly adjudicated in federal court, the additional litigation costs incurred as a result of having litigated in federal courts may not be justified by the increase, if any, in accuracy. Nevertheless, when jurisdictional mistakes are caught late in the litigation process, the higher costs of federal adjudication are sunk costs. Requiring relitigation in

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26. For a somewhat different analysis of the costs and benefits of federal jurisdiction, see RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 273–303 (1996).

27. See Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 *UCLA L. REV.* 233, 276–77 (1988) (discussing the literature comparing the quality of federal and state judges).

state court only increases litigation costs. Relitigation in state court, therefore, provides no benefit in terms of achieving the optimal balance between accuracy and cost.

Third, when federal judges adjudicate cases that should be heard in state court, they have less time to hear cases properly in their jurisdiction. This could result in less accurate adjudication of the cases properly in federal court. Of course, that reduction in accuracy could be mitigated by hiring more federal judges. Nevertheless, that would probably reduce the average quality of federal judges or require higher pay. In addition, when jurisdictional mistakes are discovered at trial or on appeal, federal judges and their staff have already invested considerable time. Sending the case to state court to be adjudicated again does not allow federal judges to recoup the time already spent and so does not improve the accuracy of adjudication in federal court. In addition, the federal adjudicatory time saved by dismissal pales in comparison to the additional state court time that relitigation requires. Furthermore, the additional state court time spent on relitigated cases reduces time spent on other cases, thus lowering overall state court accuracy.

Fourth, a case improperly adjudicated in federal court causes precedent in that area of law to develop more slowly in state court. That increases uncertainty and, in turn, reduces settlement. It also delays the adoption of what state court judges consider to be the most appropriate law. Clarification of the law could, of course, come from legislation, but that is also costly. Nevertheless, as previously mentioned, jurisdictional defects are belatedly discovered in only about 500 cases per year.<sup>28</sup> That is, on average, ten cases per state per year. Given that state courts hear millions of cases per year, the impact on the development of state law is trivial. The impact is also very small in comparison to the real degradation of state capacity to develop precedent that comes from the fact that federal courts often decide state law issues. For example, in certain areas, such as mass tort law, many, if not most, cases are properly heard in federal court (because of diversity) even though state law governs.

Fifth, if federal courts usurped most, or all, state court cases, states would lose much of their ability to shape state law. To the extent that conditions are different from state to state, and state legislators and judges are best able to formulate law appropriate to state conditions, federalization of the law may result in less efficient law. If federal courts

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28. Buehler, *supra* note 3, at 655 n.7.

routinely made mistakes, that would cripple state lawmaking and invoke the sorts of concerns about federal tyranny that concerned anti-federalists in the founding era and that animate Tea Party activists today. Nevertheless, the rate of federal court jurisdictional error is so low as to make this concern irrelevant. In fact, far from usurping state court jurisdiction, federal judges seem to go out of their way to avoid cases that arguably are within their jurisdiction. For example, federal courts created the complete diversity requirement, the well-pleaded complaint rule, and the exemption of family law cases from diversity jurisdiction, even though neither Article III of the Constitution nor the text of the relevant jurisdictional statutes require these limitations. In addition, if one were suspicious that federal judges would usurp state judicial power, it would be odd to remedy that problem by requiring those same federal judges to dismiss cases for jurisdictional reasons. Rather, if one were concerned about federal judicial tyranny, one would want to design a mechanism in which a state official had the power to intervene to protect state court jurisdiction.

The five costs discussed above show that it is possible to analyze federalism and related structural values in a way that is commensurable with litigation costs. Although federalism is not usually analyzed in this way, benefits one, two, four, and five can be seen as economic interpretations of the responsiveness to the local concern aspect of federalism. Similarly, the fifth benefit relates to the concerns about the prevention of tyranny that are also an important strand of federalism. Nevertheless, by analyzing federalism as a set of particular concerns rather than a single “value,” one can more easily appreciate whether federalism is truly threatened by occasional federal court mistakes relating to subject matter jurisdiction. This analysis suggests that the cost of jurisdictional mistakes (or at least those currently caught by federal judges) is far lower than the cost of sending those cases back to state court for relitigation. While federalism costs are commensurable with litigation costs in that one could, in theory, put a dollar amount on them, they are certainly hard to measure with any precision. Nevertheless, the sort of common-sense reasoning used above shows that one can make rough comparisons. This analysis suggests that both prior commentators and Professor Buehler are probably correct to limit the time in which jurisdictional objections can be raised so as to avoid the cost of relitigation in state court. That is, the federalism benefits of relitigation are smaller than the additional litigation costs of doing so.

### III. INVOLVING STATE ATTORNEY GENERALS

The economic analysis above suggests that the current practice of

allowing subject matter defects to be raised at any time is not justified by cost-benefit analysis or efficiency, even when such analysis takes into account both federalism concerns and litigation costs. Part I, however, argued that Professor Buehler's solution was likely to be even more costly than the status quo. Nevertheless, as suggested in Part II, Professor Buehler may be correct that other proposals, which would cut off jurisdictional objections without adding additional safeguards, may be insufficiently attentive to federalism concerns. This section suggests an alternative that might better protect state court prerogatives without adding significant extra costs.

One of the reasons that subject matter jurisdiction is non-waivable and can be raised *sua sponte* by federal judges is that it affects interests not directly represented in the litigation. Most importantly, as discussed in the prior section, jurisdictional mistakes affect the capacity of state courts to develop precedents and of states more generally to develop their own law. The parties to litigation do not ordinarily take those concerns into account, so their consent to jurisdiction or failure to object is rightly considered not to be determinative. Nevertheless, as I also discussed in Part II, the impact of occasional judicial mistakes on these federalism concerns is minimal. Thus, routinely dismissing such cases is unnecessary. An optimal solution would identify the cases for which the impact on state precedent and lawmaking were large enough to justify the cost of relitigation. Dismissal would then only be appropriate in such cases.

It might be sufficient to give federal judges discretion to retain cases in which jurisdictional defects are discovered late, with the expectation that they would dismiss only cases involving significant issues of state law. In these situations, the benefits of relitigation in state court would be high. In making that decision, it might be wise to allow federal judges to consult persons with interests in state lawmaking capacity, such as the appropriate state attorney general. Just as the United States Supreme Court can call for the views of the Solicitor General when deciding whether to grant certiorari in cases that affect the federal government,<sup>29</sup> so might federal judges call for the views of the relevant state attorney general when deciding whether to dismiss a case in which a jurisdictional defect has been found late in the proceedings.

I suspect that state attorneys general would generally respond (if at

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29. See David C. Thompson & Melanie F. Wachtell, *An Empirical Analysis of Supreme Court Certiorari Petition Procedures: The Call for Response and the Call for the Views of the Solicitor General*, 16 GEO. MASON L. REV. 237 (2009); John F. Duffy, *The Federal Circuit in the Shadow of the Solicitor General*, 78 GEO. WASH. L. REV. 518, 525 (2010).

all) that they do not think relitigation in state court would be appropriate. State courts tend to be overcrowded, so any benefit to state lawmaking capacity would usually be outweighed by further burdens on the state court system. Nevertheless, if a state attorney general asserted a significant state interest in having a case relitigated in state court, that would be a signal to the federal judge that the case is one in which the benefits of relitigation may outweigh the costs.

#### IV. POSSIBLE BENEFITS OF THE CURRENT RULE

Before concluding, it is important to consider whether the current practice of allowing jurisdictional objections to be raised at any time has benefits that might justify its costs. One possible benefit is that it may encourage litigants and judges to be more careful about jurisdiction at the outset. If judges know that their hard work will be for naught in cases in which jurisdictional defects are later found, they may try harder to find jurisdictional defects early. In fact, this concern may motivate the current practice employed by many district court judges—having their clerks check jurisdiction soon after filing. If a plaintiff knows that a judge or defendant may raise jurisdictional objections late in the case and force expensive relitigation, it makes sense for the plaintiff to research jurisdiction more carefully before filing suit. Similarly, defendants, who often prefer to be in federal court, may be incentivized to raise jurisdictional problems if they know that the consequence of not doing so early on is that they may incur significant litigation expense only to have the case ultimately dismissed. These considerations paradoxically suggest that a rule allowing later challenges to subject matter jurisdiction may be a good way of incentivizing early and thorough investigation of subject matter jurisdiction.

Although the arguments in the prior paragraph are plausible, offsetting considerations exist. District court judges may be less diligent about subject matter jurisdiction early in a case if they know that they can correct jurisdictional defects later. Similarly, if one party has private information undermining jurisdiction, it may strategically conceal that information and then reveal it later only if the federal litigation is going badly and relitigation in state court offers a welcome “second bite at the apple.”<sup>30</sup>

The current regime is also beneficial in situations where jurisdictional issues are closely connected to the merits of the case. In such situations,

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30. Wagman, *supra* note 2, at 1432.

it is very difficult, if not impossible, to ascertain jurisdiction early in the case, and it makes sense to defer consideration until the relevant facts have been investigated through discovery and possibly even until they are resolved at trial.

#### CONCLUSION

Professor Buehler correctly points out potential problems with the current jurisdictional regime. The issue certainly requires further examination. Nevertheless, his analysis in terms of incommensurable efficiency and structural values does not take into account modern economic analysis. In addition, his proposal to require district court judges to issue jurisdictional certification orders in all cases would likely impose higher costs in the aggregate than relitigating the estimated 0.2 percent of cases in which jurisdictional defects are belatedly found. A more efficient solution might be to give discretion to district court judges to retain or dismiss such cases, perhaps after calling for the views of the relevant state attorney general. In addition, before changing the current regime, it is also important to recognize the ways in which allowing later challenges to subject matter jurisdiction may, paradoxically, incentivize more thorough, early investigation into subject matter jurisdiction.