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REVISITING JURISDICTION'S SOCIAL COST: A BRIEF REJOINDER TO PROFESSOR KLERMAN

Dustin E. Buehler*

My recent article *Solving Jurisdiction's Social Cost* examines issues implicated by nonwaivable federal court subject-matter jurisdiction.¹ I argue that courts and commentators are prone to monistic theories of jurisdictional value, failing to consider the full range of interests implicated by jurisdictional rules.² I then catalogue the various interests arising from jurisdictional rules.³ Lastly, I advance several solutions, including early jurisdictional certification orders, a cut-off point for jurisdictional challenges, interlocutory appeals of jurisdictional rulings, and sanctions to deter private-party abuse.⁴

Daniel Klerman's response to my article is articulate, well-reasoned, and persuasive.⁵ Among other contentions, he suggests that mandatory jurisdictional certification by district courts may incur greater costs than those associated with nonwaivable jurisdictional rules.⁶ Professor Klerman challenges the notion that the efficiency and structural interests underlying jurisdictional rules are incommensurable.⁷ And he outlines a novel alternative approach in which federal courts could call for the views of state attorneys general when appropriate to identify and protect federalism concerns and state prerogatives.⁸

I commend Professor Klerman for his significant contribution to the economic literature on federal court subject-matter jurisdiction. This

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

2. *Id.* at 658–72.

3. *Id.* at 672–88.

4. *Id.* at 689–706.

5. See Daniel Klerman, *An Economic Analysis of Subject Matter Jurisdiction Waiver: A Response to Professor Buehler*, 89 WASH. L. REV. ONLINE 1 (2014).

6. *Id.* at 3–6.

7. *Id.* at 6–10; see also Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779, 796 (1994) (“Incommensurability occurs when the relevant goods cannot be aligned along a single metric without doing violence to our considered judgment about how these goods are best characterized.”).

8. Klerman, *supra* note 5, at 10–12.

rejoinder briefly responds to a few of his key arguments, with the goals of advancing the discussion even further and encouraging others to join the debate.

Although the costs of jurisdictional certification identified by Professor Klerman deserve serious consideration, many are not as insurmountable as they first appear. The parties' attorneys and federal courts will easily confirm the existence of jurisdiction in the vast majority of cases, with virtually no effort. For example, confirming the existence of jurisdiction in most federal question cases arising under 28 U.S.C. § 1331 requires no effort at all—the complaint cites a federal law cause of action that the attorney presumably already found while researching the plaintiff's claims for relief. In cases with thorny jurisdictional issues, district courts perhaps could adjudicate other potentially dispositive procedural matters (i.e., any relatively straightforward venue or personal jurisdiction defects) *before* turning to subject-matter jurisdiction—a sequencing of issues that would be consistent with my proposals.⁹ Moreover, early jurisdictional certification provides valuable information for settlement discussions, allowing parties to negotiate with confidence that the court has jurisdiction over the dispute (and, more importantly, jurisdiction to issue any orders necessary to effectuate a settlement).¹⁰

Courts and parties also can find ways to mitigate the burdens associated with jurisdictional certification. Done in an efficient manner, jurisdictional certification would be worthwhile because it would eliminate costs associated with jurisdictional uncertainty, while allowing federal courts to assess important structural values as a matter of course.¹¹ For instance, district court clerks' offices could promulgate a standard form for certification orders, with auto-populated fields that draw relevant case information from the electronic case filing system.¹² This would allow judges to quickly certify jurisdiction by filling in a terse sentence or two, reciting key facts. If Professor Klerman is correct

9. Buehler, *supra* note 1, at 697 & n.278 (citing *Sinochem Int'l Co. v. Malay. Int'l Shipping Co.*, 549 U.S. 422, 431–32 (2007); *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 588 (1999)).

10. See generally Anthony DiSarro, *Six Decrees of Separation: Settlement Agreements and Consent Orders in Federal Civil Litigation*, 60 AM. U. L. REV. 275 (2010).

11. Buehler, *supra* note 1, at 695–96.

12. Auto-populated forms have been used effectively in other governmental contexts to reduce the time and expense of routine functions. See, e.g., Art Heinz, *One Million State Police Traffic Citations Issued Electronically*, ALLEGHENY CNTY. BAR ASS'N LAWYERS J., May 4, 2012, at 10. A vast amount of relevant information on pending civil cases is easily accessible due to electronic case filing in federal courts nationwide. See *Public Access to Court Electronic Records*, <https://www.pacer.gov> (last visited Nov. 20, 2014).

that most judges' chambers already routinely check subject-matter jurisdiction in all cases,¹³ then the additional time necessary to complete an auto-populated form would be minimal, even in the aggregate, and especially when compared to other routine functions performed by federal courts.¹⁴

In any event, the benefits of my proposals likely outweigh the costs of certification. Notably, the efficiency gains from early jurisdictional rulings would not be limited to cases with latent jurisdictional defects. Instead, mandatory jurisdictional certification in every case—paired with the availability of discretionary appellate review on an interlocutory basis—would significantly increase the number of precedential opinions on these matters, providing future litigants with valuable information and predictability regarding the boundaries of federal court subject-matter jurisdiction.¹⁵

Furthermore, even if the aggregate costs of jurisdictional certification were to exceed costs associated with nonwaivable jurisdictional rules,¹⁶ the crux of my argument is that we should not view these costs to efficiency values in isolation.¹⁷ Jurisdictional rules must accommodate significant structural interests, and at least some of those interests probably cannot be easily reduced to a metric that is also common to efficiency values. Although Professor Klerman likely is correct that many federalism sub-values can be expressed in a way that is commensurable with litigation costs,¹⁸ I doubt that is true for all relevant structural interests. Suppose, for example, that in a particular lawsuit there would be no difference between state court and federal court litigation costs and accuracy, the case presents no novel legal questions, and the case would not meaningfully impact the workload of either court system. From the vantage point of accuracy and litigation costs, there is no reason why we would care whether the parties litigate in state or federal court. But if the lawsuit does not have a basis for federal court

13. Klerman, *supra* note 5, at 4.

14. *See, e.g.*, FED. R. CIV. P. 16 (requiring federal district courts to issue case scheduling and pretrial conference orders in all civil cases).

15. *See* Buehler, *supra* note 1, at 679–80 (“Published jurisdictional decisions have precedential value for similarly situated litigants, and deter other parties from transcending jurisdictional boundaries.”).

16. *See* Klerman, *supra* note 5, at 3–6 (arguing the costs of jurisdictional certification may exceed costs associated with jurisdictional nonwaivability); Buehler, *supra* note 1, at 696–97 (acknowledging this possibility).

17. Professor Klerman and I agree on this point. *See* Buehler, *supra* note 1, at 668–72; Klerman, *supra* note 5, at 2.

18. Klerman, *supra* note 5, at 7–10.

subject-matter jurisdiction, the federal courts cannot hear the case—suggesting that some of the structural sub-values underlying jurisdictional boundaries cannot easily be reduced to metrics commensurable with efficiency and accuracy concerns.¹⁹

Finally, I am intrigued by Professor Klerman’s alternative proposal to allow federal courts to call for the views of state attorneys general in order to identify and protect various state interests implicated by jurisdictional rules.²⁰ A state-attorney-general approach has the benefit of being relatively easy to implement within the current federal court system; federal courts already ask for the views of state attorneys general in some situations. For example, federal appellate courts sometimes request amicus briefing from state attorneys general in appeals of prisoner civil rights cases dismissed at the screening stage (before state defendants are served), especially when a case involves matters of first impression or other potentially important legal questions.²¹

A state-attorney-general approach is not without potential drawbacks and limitations, of course. As commentators have noted in other contexts, some attorney general offices can be “understaffed and underfunded” and “highly political” at times.²² It is not unusual for those offices to be primarily “concerned with more politically remunerative areas of law enforcement.”²³ That said, involvement of state attorneys general to help protect state prerogatives in the jurisdictional context is an idea worth considering. It may even be possible to implement a modified version of Professor Klerman’s state-attorney-general approach

19. Indeed, my skepticism regarding our ability to quantify and weigh *all* relevant values using a common metric extends beyond the jurisdictional context. Professor Klerman cites environmental policy as an example of an area in which policymakers work around incommensurable values by surveying and measuring people’s willingness to pay for environmental quality. Klerman, *supra* note 5, at 7. And yet, commentators have noted that such methods can encounter difficulties in accurately measuring certain types of values. *See, e.g.*, Note, “Ask a Silly Question . . .”: *Contingent Valuation of Natural Resource Damages*, 105 HARV. L. REV. 1981, 1982 (1992) (arguing that contingent valuation surveys do not accurately measure nonuse values associated with environmental damage).

20. Klerman, *supra* note 5, at 10–12.

21. *See, e.g.*, Order, *Nordstrom v. Ryan*, No. 12-15738 (9th Cir. Mar. 29, 2013), ECF No. 13 (requesting the Arizona Attorney General to enter an appearance or file an amicus curiae brief); Order, *Belanus v. Clark*, No. 12-35952 (9th Cir. June 19, 2014), ECF No. 18 (requesting the same from the Montana Attorney General).

22. Geoffrey A. Manne, *Agency Costs and the Oversight of Charitable Organizations*, 1999 WIS. L. REV. 227, 251 (1999); *see also* Mary Grace Blasko et al., *Standing to Sue in the Charitable Sector*, 28 U.S.F. L. REV. 37, 48 (1993) (“Attorneys general’s offices are traditionally understaffed, underfunded, and have many pressing concerns[.]”).

23. Manne, *supra* note 22, at 251.

consistent with many of the proposals I advance in my article. For instance, when a federal court suspects that issues underlying jurisdictional certification would implicate state prerogatives,²⁴ it could give the state attorney general an opportunity to file an *amicus curiae* brief. Similarly, appellate courts hearing interlocutory appeals of jurisdictional rulings could invite participation by state attorneys general at that phase of the litigation. This would allow states to assert their prerogatives during the jurisdictional certification process.

In sum, there is much merit in Professor Klerman's well-written response, which makes an important contribution to existing literature. His state-attorney-general approach deserves consideration. Nevertheless, I contest the notion that the costs of my proposals would outweigh their benefits. Jurisdictional certification can be accomplished efficiently in the vast majority of cases, and a conclusive determination of jurisdictional issues at the onset of litigation will offer much-needed certainty and predictability to all litigants.

24. *See, e.g.*, 28 U.S.C. § 1367(c)(1) (2012) (allowing district courts to refuse to exercise supplemental jurisdiction when a "claim raises a novel or complex issue of State law"); *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 314 (2005) (holding that courts must consider the "balance of federal and state judicial responsibilities" when determining whether federal question jurisdiction exists over federal issues embedded in state-law claims).