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**An Economic Analysis of Subject Matter  
Jurisdiction Waiver: A Response to Professor  
Buehler**

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# An Economic Analysis of Subject Matter Jurisdiction Waiver: A Response to Professor Buehler

Daniel M. Klerman

## Abstract

For nearly a century, it has been black letter law that federal subject matter jurisdiction is non-waivable. Both parties and judges can raise subject matter jurisdiction problems at any time, even on appeal. This doctrine has been criticized as wasteful, because cases are sometimes dismissed after trial and relitigated in state court. Dustin Buehler proposes that federal judges be required to issue a subject matter certification order near the beginning of every federal case, but that judges no longer routinely dismiss cases if it later becomes apparent that subject matter jurisdiction is lacking. While this proposal has much merit, its costs are likely to exceed its benefits. Judges and their clerks will have to prepare certification orders in all cases in order to prevent relitigation of a very small number of cases. Because the number of certification orders prepared will exceed the number of relitigations avoided by about a 500-to-1 ratio, the aggregate cost of certification orders (even though individually each order will require relatively little effort) is likely to be greater than the aggregate benefit of cases where relitigation in state court is avoided (even though each relitigated case imposes significant costs on parties and courts). While an economic analysis of the federalism concerns underlying the current non-waivability of subject matter jurisdiction suggests that the costs of occasional jurisdictional mistakes is low, there are better alternatives than requiring jurisdictional certification in every case. One alternative is notifying the relevant state Attorney General when subject matter jurisdiction defects are belatedly discovered; such cases would be dismissed only if the Attorney General asserts a state interest in having the case resolved in state court. In addition, the benefits of the current rule should not be ignored. The non-waivability of subject matter jurisdiction may, paradoxically, have the salutary effect of encouraging parties to be more careful about jurisdiction early in each case.

# An Economic Analysis of Subject Matter Jurisdiction Waiver:

## A Response to Professor Buehler

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### I. Introduction

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

Nevertheless, the rigidity of this practice has been criticized as wasteful. When cases are dismissed for jurisdictional reasons after trial or on appeal, costly duplicative litigation is likely to follow in state court, unless the parties settle or the plaintiff gives up. In addition, the non-waivability of subject matter jurisdiction encourages inefficient strategic behavior. For example, a defendant who has information not known to the plaintiff that would defeat subject matter jurisdiction can litigate the case to trial, and then if an adverse judgment threatens, raise the jurisdictional defect and relitigate the case in state court. A parade of commentators has therefore called upon the federal courts to give up their jurisdictional “fetish” and to treat subject matter jurisdiction like personal jurisdiction.<sup>2</sup> If neither the parties nor the court raises the

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<sup>1</sup> For the surprisingly recent emergence of the no-waiver rule, see Michael G. Collins, *Jurisdictional Exceptionalism*, 93 Va. L. Rev. 1827 (2007); Dan B. Dobbs, *Beyond Bootstrap: Foreclosing the Issue of Subject Matter Jurisdiction before Final Judgment*, 51 Minn. L. Rev. 491 (1967).

<sup>2</sup> AMERICAN LAW INSTITUTE, *STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS* 366 (1969) (labeling jurisdictional nonwaivability a “fetish”); Gian A Gao, “*Salvage Operations are Generally Preferable to the Wrecking Ball*”: *Barring Challenges to Subject Matter Jurisdiction*,” 105 Columbia L. Rev. 2369 (2005); Bruce A. Wagman,

jurisdictional problem early, these critics argue, the objection is waived and cannot be raised later.

Dustin Buehler's article, "Solving Jurisdiction's Social Cost," 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 timely fashion. He proposes that federal district court judges be required to issue a "jurisdictional certification order," including findings of fact and conclusions of law, at the close of pleadings. To facilitate preparation of such orders, parties would have to plead jurisdictional facts with particularity. A party could immediately appeal a jurisdictional order, but if there were no appeal, subject matter jurisdiction could not later be challenged. Professor Buehler's solution shares with other proposals a cut-off for jurisdictional challenges, but adds mandatory jurisdictional certification, heightened jurisdictional pleading, and interlocutory jurisdictional appeals to protect federalism concerns.

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

While I share Professor Buehler's view that reforms must take into account both litigation costs and federalism, I think his proposed solution would be too costly, because, as discussed in Section II, jurisdictional certification, although it would be relatively easy, would need to be performed in all of the more than quarter million civil cases filed in federal court every year. I also disagree that efficiency and structural values are incommensurable. As explained in Section III, efficiency is more than litigation costs and includes the benefits of the decentralized decisionmaking fostered by federalism. Nevertheless, in Section IV, I propose that 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 were important, federal judges could be empowered and encouraged to call for the views of the relevant state attorney general. In addition, as discussed in Section VI, 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.

## II. The Cost of Jurisdictional Certification, Heightened Pleading, and Interlocutory Appeals

Dustin Buehler proposes that, to protect federalism values, district court judges prepare a jurisdictional certification order in every case at the close of pleadings. The required certification, although it would usually be easy to prepare, would have to be prepared in all of the

more than two-hundred fifty thousand civil cases filed in federal court each year.<sup>3</sup> In contrast, although relitigating cases dismissed for lack of subject matter jurisdiction is expensive, it is an expense that is incurred in relatively few cases. Professor Buehler estimates that cases are belatedly dismissed on jurisdictional grounds in about five hundred cases per year. That is, under Professor Buehler's proposal, for every relitigation avoided, district courts would have to produce five hundred certification orders. It seems likely that the aggregate time to prepare jurisdictional certification in all cases would far exceed the time saved by avoiding relitigation in the roughly 0.2% of cases that might require relitigation.<sup>4</sup>

The idea that the cost of certification orders would likely exceed the cost of relitigation is reinforced by the fact that most cases settle. Certification orders would have to be prepared even in cases that would have settled before significant judicial resources were expended, which is probably the majority of cases in federal court.<sup>5</sup> In addition, many of the cases belatedly dismissed for jurisdictional defects would also probably settle, so the post-dismissal costs in many cases are likely to be small. Although I am aware of no statistics on the settlement rate for cases dismissed and then relitigated, a key impediment to settlement is uncertainty and mutual optimism.<sup>6</sup> Litigation in federal court likely 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 makes settlement after dismissal likely.

While certifying jurisdiction would often be relatively easy, in some cases it would be difficult, because it would require resolution of intricate factual or legal issues. Since most cases settle, deferring resolution of jurisdictional issues in such cases can save both judges and parties considerable time and money. Professor Buehler's proposal would require resolution of jurisdictional issues in such cases. To streamline adjudication, Professor Buehler proposes that judges rely on pleadings and affidavits rather than live testimony. Even so, the costs are likely to be large when multiplied by the thousands of cases each year in which difficult jurisdictional issues would have to be resolved.

One fact that may mitigate the cost of preparing jurisdictional certification orders is that many, if not most, federal district court judges perform some sort of subject matter check at the beginning of each case. In many chambers, that task is delegated to law clerks, while in others the task is performed by interns or the judge herself. Nevertheless, judges do not ordinarily write

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<sup>3</sup> <http://www.uscourts.gov/Statistics/JudicialBusiness/2013/us-district-courts.aspx>

<sup>4</sup> 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 S Steven M. Shavell, *Liability for Harm versus Regulation of Safety*, 13 J. of L. Stud 357, 365 (1984) (arguing that "there seems to be an underlying advantage to 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.").

<sup>5</sup> About two-thirds of cases in federal court settle. Theodore Eisenberg and Charlotte Lanvers, *What is the Settlement Rate and Why Should We Care?* 6 J. Empirical Legal Stud. 111 (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.

<sup>6</sup> Richard Posner, *ECONOMIC ANALYSIS OF LAW*.

up their findings or have their staff do so. Rather the clerks or externs just check off a box on a form or checklist. The additional time it would take 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>7</sup> Even if each order took only fifteen minutes to prepare, that is still more than one hundred hours per year, or roughly two weeks of law clerk time.

The fact that most judges already check subject matter jurisdiction also calls into question the benefits of requiring certification. While it is true that judges are likely to be more careful if they have to issue an order explaining their reasons, the number of additional jurisdictional defects found is likely to be small. Judges (and clerks) already have a significant incentive to find jurisdictional defects, because doing so reduces their case load and thus increases their leisure and/or the quality of work they can perform on their remaining cases.

In addition, when a case is dismissed, that does not mean that all the time spent in federal court was wasted. The most expensive part of litigation is discovery, and nothing ordinarily prevents parties from re-using in state court the depositions, documents and other materials generated in federal court.<sup>8</sup> Similarly, much of the legal research the parties did (except research about federal procedure) will remain relevant in state court. The work that experts performed for federal court litigation, except trial testimony, can also probably be reused with minor editing and reformatting. This is not, of course, to assert that relitigating a case in state court is not expensive, but only that the cost may not be as high as in a case originally filed in state court, because some of the work done in federal court will still be useful.

Professor Buehler also proposes that parties be required to plead subject matter jurisdiction with specificity so as to facilitate preparation of jurisdictional certification. 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 two hundred and fifty thousand civil cases filed in federal court each year.

Similarly, the cost of interlocutory appeals of subject matter rulings should not be underestimated. Although parties are not likely to appeal very often, appeals take substantial time and effort. In addition, parties may appeal for strategic reasons, such as delay.

### III. The Commensurability of Efficiency and Structural Values

Whether subject matter jurisdiction should be waivable requires consideration of both litigation costs and federalism. That is, 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. As a preliminary matter, it is not clear why this matters. Even if they are incommensurable, judges and other policymakers must make tradeoffs. No one claims that federalism is so important that it would justify extremely large litigation expenditures, such as allowing collateral attack on subject matter jurisdiction grounds or requiring state representatives to monitor federal courts to

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<sup>7</sup> <http://www.uscourts.gov/Statistics/JudicialBusiness/2013/us-district-courts.aspx>

<sup>8</sup> Cal. Prac. Guide Fed. Civ. Pro. Before Trial Ch2D-11b[2:3862].

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-offs between litigation costs and federalism. Professor Buehler calls the appropriate balance “equilibrium,” but it is not clear what that means, and his idea of equilibrium does not seem related to the more rigorous concepts of equilibrium that one finds in game theory or elsewhere.

Incommensurability is usually an issue when one is dealing with fundamental, core values, such as autonomy, equality, or dignity. 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 values 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 to see that efficiency was much more than minimizing litigation costs or other costs easily or ordinarily measured in dollars and cents. 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 don’t like being 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, the fact that environmental policy requires consideration of both cost and environmental quality 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 decisionmaking (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 tradeoffs between litigation costs and accuracy and that accuracy has a monetary value.<sup>9</sup> When cases are wrongly decided, they 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, or may breach (or perform) inefficiently, or otherwise behave in ways that impose excessive costs on others (or themselves). The more accurate adjudication is, 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, accuracy has the same economic value as the substantive law itself. Like criminal justice, environmental regulation, and procedure generally, subject matter jurisdiction can be subjected to economic analysis in a way that take into account values, such as federalism, that might initially seem to be incommensurable.

What is the value of the proper allocation of cases between federal and state court? When a case that should be adjudicated in state court is resolved in federal court, there are five



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<sup>9</sup> Richard Posner, *ECONOMIC ANALYSIS OF LAW*.

sorts of costs.<sup>10</sup> Examination of those costs helps understand the magnitude of the benefits that might be achieved by dismissing cases in which jurisdictional defects are belatedly found.

First, state court judges may more accurately adjudicate cases not properly within federal court jurisdiction, because such cases are likely to involve state law, and state court judges are more familiar with state law. Although federal judges are skilled, their very independence 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. In addition, federal district court judges generally lived or practiced in the state where they serve and so are likely to be influenced by local values. The extent to which federal adjudication is less accurate or less in tune with state values is thus likely to be small. In addition, if the result of federal and state court adjudication were likely to be different, 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. It is thus likely that the benefit 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 what state legislators and judges view as the optimal balance between cost and accuracy for cases within state court jurisdiction. Most, if not all, state courts are less generously funded 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 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 state court only aggravates the excessive litigation cost problem. Relitigation in state court thus 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, and the result is probably less accurate adjudicate of the cases properly in federal court. Of course, that reduction in accuracy could be mitigated by hiring more federal judges, but that would probably reduce the average quality of federal judges or require higher pay. Nevertheless, 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 the federal adjudicatory time saved by dismissal pales in comparison to the additional state court time that relitigation requires.

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<sup>10</sup> For a somewhat different analysis of the costs and benefits of federal jurisdiction, see Richard Posner, *FEDERAL COURTS: CHALLENGE AND REFORM*, Ch. 9 (1996).



Fourth, when a case is improperly adjudicated in federal court, precedents in that area of law develop more slowly in state court. That increases uncertainty (and thus reduces settlement) and delays the adoption of what state court judges consider to be the most appropriate law. The law could, of course, be clarified by legislation, but that is also costly. Nevertheless, the number of cases in which jurisdictional defects are discovered late is relatively low. Professor Buehler estimates jurisdictional defects are belatedly corrected in about 500 cases per year. 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. It is also very small in comparison to the real degradation of state capacity to develop precedent that comes from the fact that in certain areas, such as mass tort, 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 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 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, costs one, two, four, and five can be seen as economic interpretations of the responsiveness to local concern aspect of federalism. Similarly, the fifth cost 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 values are truly threatened by occasionally 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 suggests 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.

#### IV. Involving State Attorney Generals

The economic analysis in the prior section suggests that the current practice of allowing subject matter defects to be raised at any time is problematic and not justified by cost-benefit analysis or efficiency, even when such analysis takes into account both federalism concerns and litigation costs. Section II, however, argued that Professor Buehler's solution was likely to be even more costly than the status quo. Nevertheless, 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 not seen as determinative. Nevertheless, as discussed in the prior section, for most cases, the impact of occasional judicial mistakes on these federalism concerns is minimal, so routinely dismissing such cases is problematic. It would be best if there were some way to identify the cases for which the impact on state precedent and law making were large enough to justify the cost of relitigation. Dismissal would be appropriate only in such cases, where the benefits outweigh the costs.

It might be sufficient so give federal judges discretion to retain cases where jurisdictional defects were discovered late, with the expectation that they would dismiss only cases involving significant issues of state law for which the benefits of relitigation in state court would be high. In making that decision, it might be wise to allow federal judges to call for the views of someone with a direct interest in state law making capacity, such as the relevant state attorney general. Just as the Supreme Court can call for the views of the Solicitor General when deciding whether to grant certiorari in cases that affect the federal government, 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 after considerable time has elapsed in federal court. One suspects that state attorneys general would generally respond (if at all) that the state courts are overcrowded and that any benefit to state lawmaking capacity would 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 good sign that the case is one in which the benefits of relitigation outweigh the costs.

#### V. 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 if jurisdictional defects are later found, they may try harder to find jurisdictional defects early in the case. In fact, this concern may motivate the current practice of many district court judges to have their clerks check jurisdiction soon after filing. Similarly, 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 nevertheless 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 later dismissed *sua sponte* by the judge or on a motion by the plaintiff. 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, there are offsetting considerations. 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 to 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>11</sup>

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

## VI. Conclusion

Dustin Buehler is correct to point out that the current jurisdictional regime is potentially problematic and 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 is likely to impose higher costs in aggregate than relitigating the 0.5% of cases in which jurisdictional defects are belatedly found. A better 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.

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<sup>11</sup> Bruce A. Wagman, *Second Bites at the Apple: A Proposal for Preventing False Assertions of Diversity of Citizenship*, 41 *Hastings L. J.* 1417 (1990).