Rethinking Jurisdictionality

Author : James E. Pfander

Date : October 24, 2011

Scott Dodson, *Hybridizing Jurisdiction*, 99 **Calif. L. Rev. __** (forthcoming 2011), available on SSRN; Scott Dodson, Mandatory Rules, 61 **Stan. L. Rev.** 1 (2008).

I recall quite clearly when, as a rookie law professor some years back, it occurred to me to wonder why we accorded so much weight to questions of jurisdiction. What was so special about making sure the amount in controversy really exceeded the statutory threshold or that the citizens, apparently from different states, were really so? Why regard jurisdiction as an especially favored defense; one that the courts must raise on their own motion and that the parties may mount at any time, even for the first time on appeal or when they have consented to the court's jurisdiction or have invoked it themselves? What about the well-known waste of resources associated with jurisdictional failure? In my search for better understanding, I approached a senior colleague who explained that some things were just too well settled to question. After kicking the issue around for a while, I moved on to another project, concluding that jurisdiction was (as Mark Twain reportedly observed) too various for me.

Happily, at least for those who (like me) enjoy a good jurisdictional puzzle, others have decided to tackle the varieties of jurisdictional experience. In fact, over the past ten years or so, a group of mostly junior scholars have done much to broaden our understanding of the nature of jurisdiction. Instead of thinking of jurisdiction as a monolith, as I did, these scholars have taught us to think of jurisdiction more as a bundle of sticks (to borrow that construct from our property colleagues). Jurisdiction may have a number of different legal characteristics and not all of them need to apply to all issues that touch the power or ability of a court to adjudicate a claim. Merits and jurisdiction, though placed in separate boxes by jurisdiction casebooks, often blend in practice.

Among the most productive assessments of jurisdictionality have come from Scott Dodson. In his Stanford Law Review article *Mandatory Rules*, Dodson demonstrated that many rules of law outside the jurisdictional box share features (such as non-waivability) in common with jurisdictional rules. He thus came to ask when should a rule simply be regarded as mandatory and when should it have the other characteristics that we associate with jurisdictional law, such as the requirement that courts raise the issue on their own motion. Applying this set of ideas to the familiar problem of state sovereign immunity, Dodson provides a useful way to organize our thinking about some of the arbitrary stops and starts that have come to characterize immunity law. While the Court has often treated all invocation of state sovereign immunity as jurisdictional, Dodson shows that the doctrine might be better regarded as a mandatory rule that the states may waive or forfeit either formally or through conduct in litigation.

Dodson has continued to interrogate the construct of jurisdiction in his forthcoming article in California Law Review, *Hybridizing Jurisdiction*. There, he returns to his argument against the simple dichotomous view of jurisdictional and non-jurisdictional rules, urging instead a hybrid form of doctrine that would allow courts and parties to regulate jurisdiction (and thereby tame it to some degree). Dodson's approach provides a new set of conceptual possibilities (and new names to boot) with which lawyers and courts can begin to break down and better understand jurisdictional problems. Dodson gives us incorporated hybridization, linked hybridization, and indirect hybridization, the better to understand the way non-jurisdictional elements may usefully creep into jurisdictional doctrine. Whether his nomenclature will catch on remains to be seen, but he has a knack for framing the issues in a way that

allows us to conduct a more nuanced analysis. For example, Dodson shows that jurisdiction often depends on the way courts find jurisdictional facts, but the adversary process and the complications of discovery often shape the factual record and influence the jurisdictional determination (thereby making it less purely jurisdictional). One appealing feature of the work is its generality: Dodson's approach provides insights into such wide-ranging jurisdictional problems as the timing rules for appeals and the prudential aspects of mootness doctrine.

Dodson does not stand alone in his engagement with the elements of jurisdictionality. Much of the interest in the topic, in fact, has grown out the Court's own attempt to offer a better account of the difference between jurisdictional rules and others. One oft-criticized case from 2007, *Bowles v. Russell*, woodenly insisted on treating time limits as a jurisdictional barrier to appellate review, despite the strong factual case for an equitable extension of the deadline that the lower courts had accepted. Other judicial decisions have attracted jurisdictional inquiries. In an earlier piece in the genre, Laura Fitzgerald posed the question, Is Jurisdiction Jurisdictional?, in connection with an assessment of the jurisdictional ideas reflected in the Rehnquist Court's embrace of state sovereign immunity. Similarly, Evan Lee was moved to examine jurisdiction and the merits in reacting to the Supreme Court decision eliminating so-called hypothetical jurisdiction in Steel Co. v. Citizens for a Better Environment.

The work of these scholars suggests something of a revival of scholarly interest in the field of federal jurisdictional law, born of current legal controversies. I have sometimes speculated that the prison camp at Guantanamo Bay has done more to spark an interest in jurisdiction and the reach of habeas corpus than all of the brilliant outpourings of Hart and Wechsler. Inquiries into the nature of jurisdiction suggest that somewhat more mundane decisions can trigger scholarly engagement as well. Whatever its origins, the revival offers a lesson in the importance of youthful energy to vital scholarship. Almost by definition, new scholars must question and re-think the most basic assumptions of their field. In the case of jurisdictionality, the revisionist project has been a most fruitful one indeed. Dodson has been a careful and constructive reviser.

Cite as: James E. Pfander, *Rethinking Jurisdictionality*, JOTWELL (October 24, 2011) (reviewing Scott Dodson, *Hybridizing Jurisdiction*, 99 **Calif. L. Rev. __** (forthcoming 2011), available on SSRN; Scott Dodson, *Mandatory Rules*, 61 **Stan. L. Rev.** 1 (2008)), https://courtslaw.jotwell.com/rethinking-jurisdictionality/.