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RESPONSE

CLEAR RULES—NOT NECESSARILY SIMPLE OR ACCESSIBLE ONES

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IN *The Complexity of Jurisdictional Clarity*, Professor Dodson argues that the traditional call for clear and simple rules *über alles* in subject matter jurisdiction is misplaced.¹ With his typical aplomb, Dodson disentangles the concept of clarity from the analytically distinct, though often conflated, debates over rules versus standards and mandates versus discretion. He critically examines the many difficulties that render the creation of clear and simple jurisdictional rules utopian. And he tallies the traditionally uncounted costs of jurisdictional clarity. Dodson's piece is perceptive, challenging, and thought provoking.

In this response essay, I begin by arguing that Dodson, while offering many valuable insights, does not adequately distinguish between the separate notions of simplicity, clarity, and accessibility. Second, I note that crafting a clarity-enhancing rule, even if complex and inaccessible, may be a more promising endeavor than the search for a regime that is at once clear, simple, and accessible. In the third section, I contend that a focus on clarity in isolation, in lieu of simplicity or accessibility, both furthers Dodson's project of illustrating that the value of clarity is often a false idol and reveals the inherently empirical nature of the question. I close by noting that although Dodson's piece importantly demonstrates that jurisdic-

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¹ Scott Dodson, *The Complexity of Jurisdictional Clarity*, 97 Va. L. Rev. 1 (2011).

tional clarity comes at a cost, his inability to resolve these underlying empirical questions makes it unlikely that he will quiet those advocating clarity-based jurisdictional reform.

I. DEFINING SIMPLICITY, CLARITY, AND ACCESSIBILITY

Although throughout the piece Dodson helpfully parses concepts that are often confused, he tends to lump together the ideas of simplicity, clarity, and the related concept of accessibility. An understanding of these notions in relation to jurisdictional regimes, however, would benefit from a dose of Dodson's typical exacting usage. Thus, I first provide an examination of these notions as distinct concepts.

A rule is simple, it seems obvious to note, if it is not complex. Thus, one might recast the quest for simple jurisdictional rules as the search for noncomplex ones. Professor Peter Schuck offers a definition of complexity in the legal context, which he defines along at least two axes: density and institutional differentiation.² Dense regimes, under this formulation, are those systems with numerous and widely encompassing rules or standards. And institutionally differentiated regimes are ones in which varying types of decision making processes and bodies are used. A rule is simple, then, to the degree it lacks density and differentiation.

Clarity, in my view, presents as a distinct concept. Clarity, which I also define by way of contrast, is the opposite of indeterminacy. Indeterminate legal rules and standards are those that produce unpredictable outcomes *ex ante*. That is to say, clear regimes are those that lend themselves to the production of predictable outcomes prior to litigation. Indeed, clarity is often understood at law in terms of

² Peter H. Schuck, *Legal Complexity: Some Causes, Consequences and Cures*, 42 *Duke L.J.* 1, 3 (1992). Professor Schuck also includes third and fourth "complexity" concepts: technicality and indeterminacy. But he notes that indeterminacy may equally well be seen as a consequence of, as opposed to an element of, complexity. *Id.* at 4 ("Indeterminacy's relation to legal complexity is itself complex . . . Indeterminacy, then, may be a consequence, as well as a defining feature, of complexity."). As I attempt to illustrate below, the notions of technicality and indeterminacy appear to more readily map on to notions distinct from complexity, and I differ slightly from Schuck and use it in this sense. Also, I do not suggest this take on complexity is the unequivocal definition. Others have defined procedural simplicity in terms of aesthetic attraction. See Janice Toran, "Tis a Gift to be Simple: Aesthetics and Procedural Reform," 89 *Mich. L. Rev.* 352, 356 (1990).

predictability *ex ante*—not necessarily equated with density, technicality, and differentiation.³

Similarly, accessibility presents yet a third, though related, notion. Accessible regimes are those that are not technical, in Schuck's sense of the term, meaning they do not rely upon rules or standards that require expertise and specialized sophistication to deploy. By accessibility I mean the ease with which the substance of a rule is understandable by nonexperts. Dodson, following Schuck, holds that indeterminacy and technicality may be understood as elements of complexity. I find, however, that predictability and accessibility are often enough at odds with density and differentiation to support their inclusion as ideas distinct from complexity.

A legal rule, then, might be simple and accessible yet unclear, or complex and inaccessible yet clear and so on. For example, pendent subject matter jurisdiction is not overly complex, but it lacks clarity and accessibility. Federal courts may hear state-law claims in supplemental jurisdiction if the state-law "claims . . . are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution."⁴ While this statute employs some technical terminology—"related to"—it is not dense nor does it establish an institutionally differentiated decision making scheme. While this rule may not be easily accessible to a layperson, it should not be seen as overly complex. The statute's relative simplicity, however, is coupled with a lack of clarity given that district courts are granted the discretion to decline jurisdiction under the supplemental jurisdiction statute, leading to unpredictability of application.⁵ Similarly, a legal scheme might be simple and accessible yet not clear. For example, the rules for consolidation or separation of trials are simple

³ See, e.g., *Edwards v. Aguillard*, 482 U.S. 578, 639–40 (1987) (Scalia, J., dissenting) ("In the past we have attempted to justify our embarrassing Establishment Clause jurisprudence on the ground that it 'sacrifices clarity and predictability for flexibility.'") (citation and footnote omitted); *The Supreme Court 2009 Term Leading Cases: Federal Jurisdiction and Procedure*, 124 Harv. L. Rev. 309, 317 (2010) (discussing clarity in predictive terms); Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 Yale L.J. 1750, 1856 (2010) (similar) ; Robert J. Pushaw, Jr., *Limiting Article III Standing to "Accidental" Plaintiffs: Lessons from Environmental and Animal Cases*, 45 Ga. L. Rev. 1, 9 (2010) (similar).

⁴ 28 U.S.C. § 1367(a) (2006).

⁵ *Id.* § 1367(c).

and (at least in my opinion) accessible to nonexperts.⁶ Yet these rules lack clarity in many cases because the decision to grant separate trials is discretionary.⁷ Or a legal regime can be complex and inaccessible yet clarity-enhancing for experts. For example, the rules for the perfection of interests under revised Article 9 of the Uniform Commercial Code (UCC) are complex. (UCC Article 9 is a dense and institutionally differentiated code, if there ever was one). Article 9 is likely inaccessible to the lay public. Yet revised Article 9, at least among specialists, is a clarity-enhancing regime (in other words, it increases the predictability of outcomes).⁸ The lesson, then, is that clarity does not necessarily coincide with simplicity or accessibility. As such, marking a regime as complex or inaccessible does not necessarily mark the regime as unclear.

II. FOCUS ON CLARITY AND RULE CREATION

Dodson contends that crafting a rule of jurisdiction that is simple, accessible, and clear is a utopian project. Jurisdictional rules, he reminds us, must balance competing policy preferences. Yet they are crafted by institutions lacking expertise. Further, simplicity and clarity require, in Dodson's view, a jurisdictional rule to speak to multiple audiences, albeit often with a rule that is arbitrarily chosen. This is a bleak picture for advocates of clear, simple, and accessible jurisdictional rules. Dodson's antagonists, however, are most often advocates for clarity full stop—not necessarily simplicity or accessibility.⁹ As such, striving for clarity alone may well ease the rule cre-

⁶ See Fed. R. Civ. P. 42.

⁷ See, e.g., *United States ex rel. Bahrani v. ConAgra, Inc.*, 624 F.3d 1275, 1283 (10th Cir. 2010).

⁸ See, e.g., Lawrence R. Ahern, III, "Workouts" Under Revised Article 9: A Review of Changes and Proposal for Study, 9 *Am. Bankr. Inst. L. Rev.* 115, 121 (2001) ("While former Article 9 applied generally to transactions that were intended to secure the repayment of a debt or performance of an obligation, with only a few exceptions, the revised legislation pulls in a broader range of special types of 'security interests,' which will help create clarity for specialists.").

⁹ See, e.g., *Grable & Sons Metal Prod., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 320–22 (2005) (Thomas, J., concurring) (lamenting the lack of clear-cut rules for 28 U.S.C. § 1331 jurisdiction); *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 818 (1988) (arguing that uncertain jurisdictional rules have the regrettable effect of allowing "[p]arties [to] . . . spend years litigating claims only to learn that their efforts and expense were wasted in a court that lacked jurisdiction"); *Merrell Dow Pharm., Inc. v. Thompson*, 478 U.S. 804, 821 n.1 (1986) (Brennan, J., dissenting) (stating a view held

ating task of these jurisdictional reformers. If one could craft a complex and less accessible jurisdictional regime that, like revised UCC Article 9, enhanced clarity at least among specialists, I suspect that Dodson's foils would be—if not pleased—less woeful.

This raises the question of whether a complex, yet clarity-enhancing-for-specialists, regime for jurisdiction can be crafted. I am on record arguing that, at least in the 28 U.S.C. § 1331 context, a more complex, three-part regime would increase clarity of outcomes—at least in the eyes of courts and attorneys.¹⁰ In this regard, the fact that original jurisdictional statutes in the district courts mask a “welter” of competing policies, as Dodson and the Court¹¹ have noted, does not render the quest for clarity entirely quixotic. In short, increased clarity is not necessarily at odds with increased complexity or less accessibility. A more complex jurisdictional rule, even if less accessible to the general public, might well lead to clarity—or at least I have so argued.

Focusing on clarity instead of accessibility and simplicity also resolves the tension that arises from Dodson's supposition that clarity requires jurisdictional rules to be accessible to the laity yet remain coherent within our larger jurisprudence. To be sure, there are times when a rule should be both clear and accessible by the populace at large. In criminal law, for example, where ignorance of the

by many that 28 U.S.C. § 1331 doctrine as it now stands is “infinitely malleable”); Barry Friedman, *Under the Law of Federal Jurisdiction: Allocating Cases Between Federal and State Courts*, 104 *Colum. L. Rev.* 1211, 1225 (2004) (“One ought not make a fetish of bright line rules, but they have their place, and one place in particular is the law of jurisdiction.”); John F. Preis, *Jurisdiction and Discretion in Hybrid Law Cases*, 75 *U. Cin. L. Rev.* 145, 190–92 (2006) (calling for the adoption of a rule, as opposed to a standard, in *Smith*-style cases); Martin H. Redish, *Reassessing the Allocation of Judicial Business Between State and Federal Courts: Federal Jurisdiction and “The Martian Chronicles,”* 78 *Va. L. Rev.* 1769, 1794 (1992) (suggesting that “jurisdictional uncertainty can surely lead to both a waste of judicial time and added expense to the litigants”).

¹⁰ See Lumen N. Mulligan, *A Unified Theory of 28 U.S.C. § 1331 Jurisdiction*, 61 *Vand. L. Rev.* 1667, 1674 (2008) (advocating that 28 U.S.C. § 1331 jurisdiction be recast as a more complex, three-standard rule and contending that this would be clarity enhancing).

¹¹ See *Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 8 (1983) (stating that the vesting of 28 U.S.C. § 1331 jurisdiction “masks a welter of issues regarding the interrelation of federal and state authority and the proper management of the federal judicial system”) (footnote omitted).

law is not a defense,¹² legal rules must not only produce predictable outcomes, but they must be accessible enough to provide the citizenry with notice of the prohibited conduct.¹³ But not every legal rule requires this same scope of accessibility. The fairness norms (for example, foreknowledge that punishment will follow certain conduct) and the consequentialist norms (for example, general deterrence), which support the mandate that criminal law be both predictable and accessible by the public at large, do not adhere to questions of federal jurisdiction over civil suits with the same strength. Without going too far afield defending the notion, it does not appear unfair—at least not to the same degree as is the case in the criminal law context—that a party might end up in a federal, as opposed to a state, court without foreknowledge. And it seems dubious to believe that, in most contexts anyway, foreknowledge that a civil suit will be heard in a federal, as opposed to a state, court will deter civil wrongs. Of simplicity, accessibility, and clarity, then, clarity may well be all that is normatively valuable in the context of jurisdiction over civil disputes.

Furthermore, Dodson often points to complexities of interpretation as strikes against the ability to craft clear jurisdictional rules. To take an example, Dodson looks to judicial interpretation of 28 U.S.C. § 1291, in particular the collateral order doctrine,¹⁴ to demonstrate the impracticability of obtaining clear jurisdictional rules. I agree with Dodson that 28 U.S.C. § 1291, with the inclusion of the collateral order doctrine, is more complex and less accessible than the unadorned text of the statute would suggest. Nevertheless, I am not convinced that this added complexity renders the rule unclear to practitioners.¹⁵ Indeed, the Court's recent jurisprudence has cabined

¹² See *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 130 S. Ct. 1605, 1611 (2010) (stating “the general rule that mistake or ignorance of law is no defense”).

¹³ See *Kolender v. Lawson*, 461 U.S. 352, 357 (1983) (holding that to satisfy due process, “a penal statute [must] define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement”).

¹⁴ See *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949).

¹⁵ See, e.g., Erwin Chemerinsky, *Court Keeps Tight Limits on Interlocutory Review*, 46 *Trial* 52, 52–53 (March 2010) (“The Court made it clear that the collateral order doctrine applied only in very narrow circumstances: “To come within the “small class” of decisions excepted from the final-judgment rule by *Cohen*, the order must conclusively determine the disputed question, resolve an important issue completely separate from

the collateral order doctrine to a finite set of circumstances, such as qualified immunity, sovereign immunity, double jeopardy, and contempt cases.¹⁶ The point being that jurisdictional reform that focuses upon clarity, even at costs to simplicity and accessibility, may be more forthcoming than Dodson describes. Again, increased complexity does not necessarily equate to decreased clarity.

In a similar vein, Dodson often counts the difficulties of finding facts in any given case as an impediment to the creation of a clear jurisdictional regime. This is a misplaced complaint. Legal systems are designed to resolve disputes in the real world. Tough factual questions are unavoidable. Unless jurisdiction is to be based in all instances upon mere assertions in complaints, factual adjudication will be a feature of any conceivable jurisdictional scheme. Thus, this point seems to address a bit of a straw man. In any event, the adjudication of facts needed to operate a jurisdictional scheme does not render the regime unclear—at least not as unclear as legal indeterminacy renders such rules. Jurisdictional findings of fact are usually made at the beginning of a suit¹⁷ and are subject to clear error review, drastically reducing the chance of reversal on appeal.¹⁸ Thus, unlike legal indeterminacy, jurisdictional factual complexities are not as likely to lead to substantial sunk costs (for example, adjudicating a case on the merits only to find on appeal that the trial court lacked subject matter jurisdiction).¹⁹ Nor do factual complexities lead to the inability to predict what legal conclusions will flow from the finding of certain facts. Given this backdrop, the more charitable presentation of the clarity-based reformers' position is one that focuses upon alleviating legal indeterminacy—not factual quandaries.

As clarity is the primary goal of Dodson's foils, even at the cost of adding complexity and lowering accessibility, the jurisdictional re-

the merits of the action, and be effectively unreviewable on appeal from a final judgment.”).

¹⁶ See, e.g., *Mohawk Indus., Inc. v. Carpenter*, 130 S. Ct. 599 (2009) (declining to extend the collateral order doctrine to issues of attorney-client privilege).

¹⁷ See, e.g., *Perry Dane, Jurisdictionality, Time, and the Legal Imagination*, 23 *Hofstra L. Rev.* 1, 47 (1994).

¹⁸ See, e.g., *Price v. Wolford*, 608 F.3d 698, 702 (10th Cir. 2010) (stating that the court “review[s] for clear error any district-court findings of fact relevant to the question” of subject matter jurisdiction).

¹⁹ Cf. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 5 (2004) (raising a jurisdictional issue, standing, for the first time in the Supreme Court).

form project they advocate seems not as doomed to failure as Dodson's search for a regime that is at once clear, simple, and accessible. Complexity and decreased accessibility often lead to increased clarity among experts. There is no reason to believe such a practice could not be mimicked in jurisdictional regimes.

III. FOCUSING ON CLARITY AND INSTRUMENTAL VALUES

Drawing the distinctions between the calls for simple, clear, and accessible rules with greater precision not only increases the odds that a jurisdictional reform project might get off the ground, but it also brings Dodson's overall thesis—that clarity is not always worth the costs entailed—into greater focus. Dodson contends that jurisdictional clarity is an instrumental value that promotes three sometimes competing core norms: (1) jurisdictional clarity decreases costs to litigants and courts; (2) jurisdictional clarity enhances the legitimacy of the judiciary; and (3) jurisdictional clarity promotes intergovernmental relations by demarcating lines of authority for trial and appellate courts, state and federal court systems, and judicial and legislative power. A greater focus on clarity—not necessarily simplicity or accessibility—would aid in selecting fora where the effective promotion of these norms is likely to flourish and also reveals the empirical nature of Dodson's thesis.

Take the Supreme Court's jurisdiction to grant certiorari from the state court systems under 28 U.S.C. § 1257. Dodson rightly illustrates that the Court's interpretation of the term "finality" in this statute is malleable at best. He uses this as an example of the inherent lack of clarity that the task of judicial interpretation injects into jurisdictional regimes, rendering, in part, the search for clear, simple, and accessible jurisdictional rules utopian. Perhaps more to the point of Dodson's project, however, the creation of a clear (in other words, predictable) jurisdictional rule under 28 U.S.C. § 1257 would not foster the very norms that clear jurisdictional rules are designed to serve. Unlike original district court jurisdiction—where the finding of jurisdiction, abstention excepted, leads to the court hearing the case, assuming personal jurisdiction, venue, and service—the existence of the Supreme Court's appellate jurisdiction under 28 U.S.C. § 1257 is merely a precursor to the main event of the exercise of its discretion to issue a writ of certiorari. As such, even with a regime of clear 28 U.S.C. § 1257 jurisdictional rules, litigants seeking

Supreme Court review would still have to expend substantial funds without the guarantee that the Court will address their case. Given the discretionary nature of the case selection of the Court, clear rules under 28 U.S.C. § 1257 are not likely to enhance the legitimacy of the Court's decision making process.²⁰ Moreover, given the hierarchical nature of the Supreme Court vis-à-vis the state-court systems, a more unpredictable "threat" of Supreme Court review, as Dodson later notes, might further federalism considerations as much as hinder them.²¹ Jurisdictional clarity in this context, then, is unlikely to foster the values upon which it is grounded. Separating clarity from complexity and accessibility, therefore, strengthens Dodson's thesis by illustrating with greater precision that there is little benefit to be gained from clear jurisdictional rules in some contexts, such as 28 U.S.C. § 1257.

This focus on clarity, in lieu of simplicity or accessibility also reveals a deeper issue with Dodson's project in relation to the norms clarity aims to promote. Achievement of decreased costs and smoother intergovernmental relations—two of the three values that Dodson outlines as the objects of a clear jurisdictional regime—raises difficult empirical questions. Dodson, for example, contends that the well-pleaded complaint rule,²² although clear and simple, is flawed because it is both underinclusive and overinclusive as to the principles upon which it is based. But if we are to test whether a different jurisdictional regime for vesting federal question jurisdiction produces better results in terms of wasted costs and ease of intergovernmental relations, this raises an empirical question—and a quite complex one at that. Unlike differing jurisdictional regimes among the states, federal subject matter jurisdiction is uniform across the country. Excepting the possibility of making comparisons based upon circuit splits, there is not a control group against which to measure. The cost-saving feature, for instance, of federal jurisdictional regime one versus regime two, then, remains a matter of pure

²⁰ See, e.g., Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 Colum. L. Rev. 1643, 1713–30 (2000) (questioning whether certiorari is consistent with the traditional conceptions of judicial review, the nature of judicial power, and the rule of law).

²¹ See *id.* at 1731–32 (arguing the selective application of Supreme Court review of state courts as aiding the development of selective incorporation doctrine).

²² See *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149, 152 (1908).

conjecture. Dodson, in fact, acknowledges this unresolved empirical quandary.

This lack of key factual data may well end the clarity-based reform debate as a productive enterprise. Dodson's contribution to this discussion—that clarity comes at a cost—is a worthy one. But without answers to the essential empirical questions underlying this debate, it is hard to see the discussion advancing much farther. Some discussants, such as myself, will remain inclined to view the implementation of a more complex and inaccessible jurisdictional regime as likely to reduce net costs and intergovernmental friction. Others may disagree. Dodson himself decries the lack of empirics here, which suggests that with no means available to test competing empirical intuitions the debate may be at an impasse.

CONCLUSION

Once again, Professor Dodson has offered an important contribution to jurisdictional scholarship. Even if, after discounting complexity and inaccessibility expenses, the costs of clarity are not as significant as he presents them, Dodson is right to demand that these costs of clarity be included into the calculus for those advancing jurisdictional reform. Nevertheless, we are left to measure these costs by guesstimation alone, which may well doom this reformation debate to one of the many insoluble intuitional clashes that plague legal scholars.