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THE "FACTS" OF FEDERAL SUBJECT MATTER JURISDICTION

William Marshall*

It is well-settled regarding contentions of law that a party cannot waive, consent to, or agree to overcome a lack of federal subject matter jurisdiction. Either party or the court may raise the issue of subject matter jurisdiction at any time, including on appeal. However, the relationship of the foregoing rule to disputed facts is unclear. Are factual as well as legal issues concerning jurisdiction open to determination or redetermination at any time prior to final judgment?

The Supreme Court has never explicitly focused on the jurisdictional facts problem, and the cases that do address the issue are inconsistent. Two relatively recent Supreme Court cases suggest that normal rules of adjudication are suspended when factual disputes concern the existence of subject matter jurisdiction. In these cases, the Court questioned the use of traditional fact-finding tools, including party admissions, to establish subject matter jurisdiction. Other Supreme Court cases, however, suggest that no special rules apply to the adjudication of jurisdictional facts.

This issue is significant. Its answer ultimately depends on an understanding of the concepts of jurisdiction and of "fact" as developed in an adversarial system. From a policy standpoint, the issue is equally weighty. On the one hand is the premise that a federal court cannot exceed its jurisdictional limitations; on the other are the rules and principles of adjudication which limit, and may foreclose, consideration of factual issues at points long before final judgment.

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This article is gratefully dedicated to my colleagues and former students at DePaul College of Law, and especially to Professor John Randolph Block, whose intellectual vigor and spirit in the face of overwhelming odds is a remarkable inspiration to us all.

2. See infra notes 29-96 and accompanying text.
4. See infra notes 29-62 and accompanying text.
5. See Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 77 (1978) (jurisdictional facts reviewed under "clearly erroneous" standard applicable to review of facts generally); Railway Co. v. Ramsey, 89 U.S. (22 Wall.) 322, 327 (1874) ("parties may admit the existence of facts which show jurisdiction, and the courts may act judicially upon an admission"). See also infra notes 92-93 and accompanying text.
7. See supra notes 112-136 and accompanying text.
Finally, resolution of the jurisdictional facts issue may have significant practical ramifications. An unsuspecting litigant may be without a forum if a court suddenly "redetermines" an initial and favorable jurisdictional fact determination to negate jurisdiction. In short, federal court litigation requires an understanding of the jurisdictional facts issue.

This article, as the reader has undoubtedly surmised, will discuss this issue, assuming as a given that the non-foreclosure principle is valid at least with respect to contentions of law. Part I of this article reviews the Supreme Court cases in which the jurisdictional facts issue has surfaced. Part II explores its inherent competing interests, and Part III proposes an appropriate resolution.

I. THE CASES

A. The Rule Against Foreclosure of Subject Matter Jurisdictional Issues: Mansfield and its Attendant Policies

The rule that allows a party to attack subject matter jurisdiction at any time, including on appeal, was summarily announced in Capron v. Van Noorden, but received its first expansive treatment in Mansfield, Coldwater & Lake Michigan Ry. v. Swan, and therefore is frequently referred to as the Mansfield rule. The historical antecedent behind the non-foreclosure rule is actually broader than Mansfield itself. Originally, courts held that a decision without subject matter jurisdiction was void, and therefore vulnerable to attack at all stages, including after final judgment. Subsequent cases, however, rejected the voidance theory and held that subject to certain exceptions, a final federal court decision deserves res judicata effect even if the court lacked proper jurisdiction.

8. This is not an uncontroversial premise. See infra notes 25-27.
9. 6 U.S. (2 Cranch) 126, 127 (1804).
10. 111 U.S. 379 (1884).
14. As the United States Supreme Court stated:

We see no reason why a court, in the absence of an allegation of fraud in obtaining the judgment, should examine again the question whether the court making the earlier determination on an actual contest over jurisdiction between the parties, did
In federal jurisdiction, the non-foreclosure principle derives not only from the general policy which insures "that judgments are rendered not only by courts having the power to do so," but also from particular concerns regarding the allocation of judicial power in a federal system. Mansfield was a diversity case in which the specific concern was whether federal courts could infringe upon the judicial power that otherwise belonged to the states. In other jurisdictionally related circumstances, such as standing, the purpose in applying Mansfield's non-foreclosure principle is to assure that federal courts remain within their constitutional authority and to protect the coordinate branches of the federal government from unwarranted judicial intrusion. In this regard, Mansfield provides two safeguards against federal court infringement. First, by allowing the court or the parties to raise jurisdiction at any time in the proceedings, the rule prevents inadvertent federal court jurisdiction. Second, by allowing the court to investigate the jurisdictional issue on its own motion, the rule safeguards against those who might improperly seek access to a federal forum.

have jurisdiction of the subject matter of the litigation.

Stoll v. Gottlieb, 305 U.S. 165, 172 (1938). See also Chicot County Drainage District v. Baxter State Bank, 308 U.S. 371, 378 (1940) (litigants had opportunity to raise jurisdictional challenge in original action and were not "privileged to remain quiet and raise it in a subsequent suit"); Treinies v. Sunshine Mining Co., 308 U.S. 66, 78 (1939) ("The principles of res judicata apply . . . as well to jurisdiction of the subject matter as of the parties"); Baldwin v. Iowa State Traveling Men's Ass'n, 283 U.S. 522 (1931) (party who appeared to contest court's personal jurisdiction could not subsequently attack judgment on jurisdictional grounds).

15. Moore, supra note 12, at 534.

16. Mansfield, 111 U.S. at 383. Federal courts have limited jurisdiction. Federal courts are only empowered to hear cases that are within the judicial power of the United States, as defined in the Constitution and entrusted to them by a jurisdictional grant by Congress. See also C. Wright, Law of Federal Courts § 7 (4th ed. 1983).

17. 111 U.S. at 383.


20. See, e.g., Louisville & Nash. R.R. v. Mottley, 211 U.S. 149, 152 (1908). In Mottley, the parties apparently remained unaware that federal subject matter jurisdiction was lacking throughout the entire litigation, including argument to the United States Supreme Court.

21. The Mansfield rule, however, is not necessary to prevent jurisdiction obtained by fraud since other mechanisms provide a remedy for that specific abuse. See, e.g., 28 U.S.C. § 1359 (1982) (jurisdiction by collusion not allowed); Fed. R. Civ. P. 60(b)(3) (allowing relief from a judgment obtained by fraud).
The *Mansfield* rule is not without its costs. For example, a claimant whose assertion of federal jurisdiction is questioned late in appellate proceedings may lose the cause of action due to the expiration of the statute of limitations. Even when the claim is not barred, a finding that a federal court does not have jurisdiction will result in complete relitigation of the merits in state court at considerable expense, delay, and inconvenience to the parties. Moreover, *Mansfield's* non-foreclosure principle is inconsistent with traditional notions of fairness because a party may take advantage of its own error to the detriment of its opponent. For example, a party who initially sought jurisdiction in a federal forum may avoid losing on the merits by bringing a belated jurisdictional attack.

For these reasons, various commentators have severely criticized the *Mansfield* rule. Professor Dobbs has suggested that because of *Mansfield's* inherent inefficiencies, the rule should be discretionary. Similarly, the American Law Institute has proposed a relaxation of the rule to promote judicial efficiency, administration, and fairness. Nonetheless, the Supreme Court,

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22. See, e.g., Louisville & Nash. R.R. v. Mottley, 211 U.S. 149 (1908). In *Mottley*, the plaintiffs refiled in state court after their original suit was dismissed for lack of jurisdiction, only to lose on the merits before the United States Supreme Court. Louisville & Nash. R.R. v. Mottley, 219 U.S. 467 (1911).
23. This argument was first noted in a dissent in Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 566 (1857) (Curtis, J., dissenting), and later quoted in *Mansfield* and American Fire & Cas. Co. v. Finn:

> It is true, . . . as a general rule, that the court will not allow a party to rely on anything as cause for reversing a judgment, which was for his advantage. In this, we follow an ancient rule of the common law. But so careful was that law of the preservation of the course of its courts, that it made an exception out of that general rule, and allowed a party to assign for error that which was for his advantage, if it were a departure by the court itself from its settled course of procedure.

111 U.S. at 383; 341 U.S. 6, 18 n.17 (1951).
24. See American Fire & Cas. Co. v. Finn., 341 U.S. 6 (1951). The Eighth Circuit stated the point well in the *Kroger* opinion:

> By subtle and adroit pleading the defendant has gained a substantial advantage. If the trial goes well, he can keep the jurisdictional point hidden. If the trial seems to be going badly or, indeed, if it loses on the merits, it asserts that it can even then challenge jurisdiction and successfully, so it argues, since it insists that it is clear to all that jurisdiction may be challenged by anyone at any time.


Professor Currie wryly suggests that one "modern" view "that questions of federal jurisdiction should be foreclosed if not timely raised" may be inconsistent with another "modern" view that state laws requiring timely presentation should not be allowed to foreclose state court considerations of federal questions. D. CURRIE, *FEDERAL COURTS* 181 (3d ed. 1982). *See generally* Henry v. Mississippi, 379 U.S. 443 (1965) (discussing whether unasserted federal rights in state court proceeding are entitled to subsequent review by federal courts).
subject matter jurisdiction, has consistently applied the Mansfield doctrine to prevent foreclosure of legal issues that affect the existence of subject matter jurisdiction. The foreclosure of factual disputes, however, has not had a similarly consistent history.27

B. Kroger and Ireland: A Restrictive Rule on the Adjudication of Federal Jurisdictional Facts

The Supreme Court cases which hold that certain fact-finding methods cannot be used to establish federal jurisdiction are relatively recent.29 In Owen Equipment & Erection Co. v. Kroger,30 decided in 1978, the Court held the facts necessary to establish federal subject matter jurisdiction may

27. See Kroger v. Owen Equip. & Erection Co., 558 F.2d 417, 426 (8th Cir. 1977), rev'd, 437 U.S. 365 (1978) (discussed infra notes 38-52 and accompanying text); Murphy v. Kodz, 351 F.2d 163, 168 (9th Cir. 1965) (motion to remand to state court denied despite judgment for and deletion of only party entitled to involve federal jurisdiction). See also DiFrischia v. New York C. R.R., 279 F.2d 141, 144 (3d Cir. 1960). In DiFrischia the defendant objected to diversity jurisdiction of the court, but subsequently withdrew his objection. After two years of pretrial preparation and the expiration of the plaintiff's statute of limitation, the defendant renewed his jurisdictional challenge. The trial court concluded that diversity was lacking and dismissed the case. The Third Circuit reversed, and noted that "[a] defendant may not play fast and loose with the judicial machinery and deceive the courts." Id. at 144.

28. Some commentators, like Professor Dobbs, argue that Mansfield does not properly apply to the adjudication of jurisdictional facts since his interpretation of the rule requires a court to re-open the jurisdictional issue only when "the record does not affirmatively show jurisdiction." Mansfield, 111 U.S. at 383. Since "facts" are part of the record, they are outside the scope of the Mansfield rule. Professor Dobbs' argument does have some force, but it is nonetheless true, as Dobbs admits, that the United States Supreme Court and lower federal courts have not limited the jurisdictional inquiry, as he has suggested. Dobbs, supra note 11, at 510, 519. See also Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365 (1978) (discussed infra notes 35-44 and accompanying text); Morris v. Gilmer, 129 U.S. 315 (1889) (discussed infra note 29).

29. One might argue that an older case, Morris v. Gilmer, 129 U.S. 315 (1889), also stands for this proposition. In Morris, the Court allowed the defendant to belatedly challenge the plaintiff's factual assertion of his own (the plaintiff's) citizenship. Although normal rules of adjudication would not have allowed belated attack, the Court allowed this challenge. As Professor Dobbs has noted, however, Morris is best explained as a party's attempt to gain jurisdiction by fraud. Dobbs, supra note 11, at 510. Belated jurisdictional attacks based on fraudulent conduct are permissible and do not represent a deviation from normal rules of adjudication. See Fed. R. Civ. P. 60(b).

not be established by estoppel. In Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee,\footnote{31} a 1982 decision, the Court held that lower courts could not establish jurisdictional facts through discovery sanctions. What is remarkable about Kroger and Ireland is that the Court reached these results without considering jurisdictional precedent or implication. In Kroger, the Court’s entire discussion of the jurisdictional facts issue occurred in one footnote.\footnote{32} The Court’s discussion in Ireland was dicta.\footnote{33} Moreover, the expansive reasoning that supports both decisions places into serious question the ability to effectively resolve jurisdictional fact disputes by any fact-finding means.\footnote{34}

The plaintiff in Kroger was an Iowa citizen who sued a Nebraska defendant in a diversity action.\footnote{35} The original defendant impleaded a third-party defendant, Owen Equipment and Erection Co. (Owen), who initially admitted that it was also a Nebraska citizen.\footnote{36} The plaintiff subsequently amended her complaint and named Owen as an additional defendant to the original suit. After the court dismissed the original defendant from the action, the case proceeded to trial. On the third day of trial, however, Owen indicated that its principal place of business was in Iowa and not Nebraska. Owen therefore moved for dismissal of the suit based on the non-diversity between the parties.\footnote{37}

Both the district court and the Eighth Circuit Court of Appeals rejected Owen’s motion.\footnote{38} The principal holding of the Eighth Circuit was that the doctrine of ancillary jurisdiction allowed the court to retain jurisdiction over Owen.\footnote{39} Alternatively, the appellate court suggested, the defendant was estopped from denying its earlier admission.\footnote{40}

The Supreme Court reversed. The Court’s central holding, and the one for which Kroger has achieved immortality in casebooks, was that ancillary

\footnote{31. 456 U.S. 694 (1982).}
\footnote{32. 437 U.S. at 377 n.21.}
\footnote{33. The Ireland Court focused on the use of discovery sanctions to confer personal jurisdiction. Subject matter jurisdiction was not at issue. See infra notes 45-49 and accompanying text.}
\footnote{34. See infra notes 110-35 and accompanying text.}
\footnote{35. Kroger was a wrongful death action in which the plaintiff alleged that her husband was electrocuted due to defendant’s negligence.}
\footnote{36. Owen’s answer stated, in pertinent part, that it “[a]dmits that Owen Equipment and Erection Company is a corporation organized and existing under the laws of the State of Nebraska.” 437 U.S. at 369.}
\footnote{37. The confusion was apparently caused by a change in the course of the Missouri River, which serves as the boundary line between Iowa and Nebraska. This change placed the scene of the accident and Owen’s main office within the state of Iowa. Id. at 369 n.5.}
\footnote{39. Kroger, 558 F.2d at 427.}
\footnote{40. Id. at 427. The Eighth Circuit argued that the defendant’s silence concerning the jurisdictional issue estopped that party from raising the belated jurisdictional attack “under the most elementary considerations of judicial fairness.” Id.}
jurisdiction may not be applied to allow the maintenance of a claim of a non-diverse plaintiff against a third party defendant.\textsuperscript{41} In a footnote, the Court rejected the Eighth Circuit's estoppel argument as well. The Court stated that "the asserted inequity in the respondent's alleged concealment of its citizenship is irrelevant."\textsuperscript{42}

If Owen had attempted to avoid a previous non-jurisdictional admission at trial, the courts doubtlessly would have treated the issue differently. Generally, the Federal Rules of Civil Procedure allow a party to avoid pre-trial admissions only when the amendment will not prejudice the opponent party.\textsuperscript{43} The Supreme Court, however, held that any prejudice suffered by Mrs. Kroger was "irrelevant," even though the statute of limitations might bar her claim in state court.\textsuperscript{44} The Court's decision, in essence, gave Owen's admission of domicile no legal effect. The thrust of \textit{Kroger} therefore is apparent that parties are not able to conclusively admit jurisdictional facts.

The Court's decision in \textit{Ireland} was more surprising because the case concerned personal, not subject matter, jurisdiction. In \textit{Ireland}, Compagnie de Guinee (CBG) brought a diversity action against its insurers for failure to indemnify.\textsuperscript{45} Certain defendants contended that the court lacked jurisdiction over the persons.\textsuperscript{46} In response, the plaintiffs sought to discover one

\begin{footnotes}
\item[41.] 437 U.S. at 375-76.
\item[42.] \textit{Id.} at 377 n.21.
\item[43.] See \textit{Fed. R. Civ. P.} 15 (pleadings); \textit{Fed. R. Civ. P.} 36 (requests to admit). In \textit{Kroger} the relevant rule would have been Rule 15(b), since the admission was in the pleadings and the effort to avoid the admission occurred at trial. Rule 15(b) in total provides as follows:

(b) \textit{Amendments to Conform to the Evidence}. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

\item[44.] 437 U.S. at 376-77 n.20.
\item[45.] In \textit{Ireland}, CBG obtained $10,000,000.00 of business interruption insurance from the Insurance Co. of North American (INA) and $10,000,000.00 of excess insurance from a group of foreign insurance companies, including the Insurance Corp. of Ireland. Ultimately, CBG sought indemnification from all of its insurers when the company lost over $10,000,000.00 from mechanical problems in its bauxite mines. 456 U.S. at 696-97.
\item[46.] When CBG instituted its suit, INA submitted to the jurisdiction of the court; however, the foreign insurers challenged the Pennsylvania court's \textit{in personam} jurisdiction. The insurer's sought summary judgment on the personal jurisdiction issue, and the motion was denied. \textit{Id.} at 698 n.5.
\end{footnotes}
defendant insurer's business records that ostensibly would have established the propriety of the court's personal jurisdiction.\footnote{47} Even after the court order, however, the defendants repeatedly failed to respond to the discovery request. The district court therefore issued a discovery sanction that allowed the plaintiff to establish jurisdictional facts through discovery.\footnote{48} \textit{Ireland} raised the specific question of whether the use of discovery sanctions to "find" a fact necessary to establish personal jurisdiction was constitutionally permissible.

The Supreme Court found that the use of the sanction was constitutional.\footnote{49} The Court relied heavily on \textit{Hammond Packing v. Arkansas},\footnote{50} a non-jurisdictional case which held that the creation of a presumption of fact against a party who refuses to present proof on a disputed issue is not a constitutional violation.\footnote{51} According to \textit{Hammond}, the disputed fact could be determined as "constructively" admitted without offending due process principles. Viewing the discovery sanction as an incorporation of \textit{Hammond}'s constructive admission principle, the \textit{Ireland} Court affirmed the propriety of its application even when disputed fact issues affect the legal issue of personal jurisdiction.\footnote{52}

\footnote{47} For CBG to establish the insurers' contacts with Pennsylvania, the company sought access to the insurers' business records through the use of discovery requests. CBG initially requested "[c]opies of all business interruption insurance policies issued by Defendant during the period from January 1, 1972 to December 31, 1975." The request was later narrowed to copies of any policies delivered in, or which covered a risk in, Pennsylvania. \textit{id.} at 698.

\footnote{48} The discovery sanction was issued pursuant to Federal Rule of Civil Procedure 37(b)(2). The rule states:

\begin{quote}
(2) Sanctions by Court in Which Action is Pending. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order . . . .
\end{quote}


\footnote{49} 456 U.S. 694 (1982).

\footnote{50} 212 U.S. 322 (1909).

\footnote{51} \textit{id.} at 351. \textit{Hammond Packing Company}, an Illinois corporation doing business in Arkansas, challenged the constitutionality of an Arkansas statute that authorized the state to order the production of witnesses, books, and documents located outside the state from a foreign corporation for evidentiary use. Hammond's refusal to produce the materials resulted in an action against it for forfeiture of its Arkansas business license. The Court upheld the statute and found that a state's authority over foreign corporations includes the power to compel production of documents for investigation, including documents located outside the state.

\footnote{52} 456 U.S. at 705-07.
In the *Ireland* holding, the Court resolved an important controversy regarding personal jurisdiction and the use of discovery sanctions. Because of the manner in which the Court crafted the opinion, however, *Ireland* is likely to have a substantial impact on the adjudication of subject matter jurisdictional issues as well. The *Ireland* Court extensively discussed federal subject matter jurisdiction as a foil to the personal jurisdictional issue. For the Court it was critical that a party could waive or consent to personal jurisdiction but not to subject matter jurisdiction. On this basis, the Court concluded that a party may use discovery sanctions to establish facts pertinent to personal jurisdiction, but not pertinent to subject matter jurisdiction.

The *Ireland* Court’s distinction between personal and subject matter jurisdiction in the use of discovery sanctions is perplexing. The Court unquestionably overreached in deciding the subject matter jurisdictional issue. *Ireland* did not raise subject matter jurisdiction issues, and the Court’s analysis placed it, at the very least, on unsettled ground. More importantly, the Court’s differentiation between the two doctrines is of dubious relevance to the issue of discovery sanctions.

The *Ireland* Court’s distinction between personal and subject matter jurisdiction was superficially correct. It is axiomatic that a party may waive or consent to personal jurisdiction, but not to subject matter jurisdiction.

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53. The Eighth Circuit’s decision to allow the use of discovery sanctions to establish facts pertinent to the existence of personal jurisdiction directly conflicts with the Fifth Circuit’s decision in Familia de Boom v. Arosa Mercantil, S.A., 629 F.2d 1134 (5th Cir. 1980), cert. denied, 451 U.S. 1008 (1981).
54. 456 U.S. at 701-05.
55. The Court’s discussion in *Ireland* is contrary to its decision in World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 256 (1980), a landmark personal jurisdiction decision that construed the doctrine to implicate federalism concerns that transcend the rights of the individual defendant.


During the 1985 term, the Supreme Court again entered the personal jurisdiction debate, this time without implicating federalism concerns at all. See Burger King Corp. v. Rudzewicz, 105 S. Ct. 2174 (1985).


What the *Ireland* Court ignored, however, was that jurisdictional findings based upon the existence of background facts are wholly distinct from establishing jurisdiction by waiver or consent. If the defendant does not contest the existence of certain facts, its recourse is an admission. This factual admission does not constitute consent or waiver of the legal defense. A defendant may, for example, admit that its product injured a party in the forum state without waiving its defense that it has insufficient contacts with the forum state to justify the imposition of personal jurisdiction. Conversely, a defendant may waive its personal jurisdiction defense without admitting the existence of facts which justify the imposition of personal jurisdiction. Since the *Ireland* Court previously equated the discovery sanction with the constructive admission of background facts, the notion that a party may waive personal jurisdiction would appear to be beside the point.

The sole question in *Ireland* was "when does 'due process' allow facts to be constructively admitted?" The Court's analysis, however, equated the

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60. One practical difference in this regard is the effect that a judgment has. Jurisdiction found pursuant to the existence of background facts would be collaterally estopped in suggested cases. Jurisdiction by consent has no such effect.

61. *Ireland* has also been soundly criticized on its conclusions regarding the due process limitations on discovery sanctions issue. The Court distinguished between constitutionally permissible sanctions based upon presumptions of fact and punitive sanctions which are not allowed to support a finding of fact. Compare Hammond Packing v. Arkansas, 212 U.S. 322 (1909) (presumption upheld) with Hovey v. Elliot, 167 U.S. 409 (1897) (presumption denied). One commentator has argued, however, that discovery sanctions are punitive and have the purpose of deterring the violation of discovery orders. Thus, according to that writer, under the Court's own analysis the disputed fact should not be presumed. See Note, *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinea: Justifying Establishment of Jurisdiction as a Discovery Sanction*, 70 Calif. L. Rev. 1446 (1982). In this respect it is notable that in some cases the Court has acknowledged that discovery sanctions do serve a deterrent purpose. Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980); National Hockey League v. Metropolitan Hockey Club, 427 U.S. 639 (1976). The conclusion that non-compliance with jurisdictional discovery indicates bad faith and willful avoidance of jurisdiction on meritless grounds is also subject to criticism. Instances of willful non-compliance may arise from a good faith belief that the court lacks jurisdiction. See Note, *Sanctions to Enforce Jurisdictional Discovery: Constitutional & Prudential Limitations*, 68 Va. L. Rev. 921, 936 (1982).

62. Some confusion may occur because both constructive admissions and personal jurisdiction are termed "due process" issues. The two due process issues, however, are analytically distinct. Constructive admissions concern the constitutionality of presumptions in fact finding. See Hammond Packing v. Arkansas, 212 U.S. 322 (1909); Tot v. United States, 319 U.S. 463 (1943). The other due process issue pertains to the power of a court over the person of the defendant. See International Shoe Co. v. Washington, 326 U.S. 310 (1945).
"constructive" admission with waiver and consent. It therefore brings factual admissions under the rule that a party cannot consent to or waive subject matter jurisdiction. Thus, Ireland, like Kroger, appears to stand for the proposition that jurisdictional facts cannot be admitted.

C. Opposing Authority

Other authority suggests that the adjudication of jurisdictional facts deserves treatment similar to the adjudication of facts generally. The first case, Pacific & St. Louis Railway Co. v. Ramsey, decided in 1874, appeared to be explicitly dispositive of the issue. In that case the Supreme Court stated:

Consent of parties cannot give the courts of the United States jurisdiction but the parties may admit the existence of facts which show jurisdiction, and the courts may act judicially upon such an admission.

Ramsey, however, may be easily confined to its unusual circumstances. The case arose out of the administrative problems that occurred in the aftermath of the Chicago fire of 1871. Critical court documents were lost during the fire, including those pertinent to the federal court's jurisdiction over the Ramsey litigation. In an effort to compensate for the destroyed documents, both parties stipulated that the requisite documents were filed properly but were destroyed by fire. The Supreme Court addressed the validity of this stipulation.

The Court's opinion indicated that the parties' stipulation to the existence of the documents sufficiently established the jurisdictional requisites. The Court was careful not to rely exclusively on the parties' admissions, and found "irresistable" the conclusion that the original papers established jurisdiction. If the papers were insufficient, the Court argued:

Either party . . . could have moved to remand, or the court itself, without a motion, could have sent the case back if the jurisdiction did not appear. As both the court and the parties accepted the transfer, it cannot for a moment be doubted that the files did then contain conclusive evidence of jurisdictional facts.

In short, the Supreme Court did not rely on the parties' agreement, but assumed that the lower federal court had already found jurisdiction established.

63. Interestingly, these opinions resemble the suggestions that Ireland and Kroger make by implication rather than suggestion. See infra notes 70-95, 136 and accompanying text.
64. 89 U.S. (22 Wall.) 322 (1874).
65. Id. at 327.
66. The documents in question indicated that Ramsey, a removal case, was properly transferred from state court.
67. 89 U.S. at 324.
68. Id. at 328.
69. Id.
70. Id.
Ramsey, therefore, cannot be read to establish a broad rule for the adjudication of jurisdictional facts by admission or otherwise.\textsuperscript{71}

A second decision actually supports the proposition that proof of jurisdictional facts will be treated more leniently than proof of non-jurisdictional facts. In St. Paul Mercury Indemnity Co. v. Red Cab Co., \textsuperscript{72} the Supreme Court held that the federal jurisdictional monetary amount requirement\textsuperscript{73} would be deemed satisfied absent proof to a legal certainty that the requisite amount did not exist.\textsuperscript{74} Moreover, the Court indicated that a still more lenient standard might be applied in a removal case if the plaintiff unfairly sought to deprive a defendant of the federal forum.\textsuperscript{75} The plaintiff in St. Paul originally commenced a state suit and alleged an amount over the jurisdictional limit.\textsuperscript{76} After the defendant removed the case to federal court, the plaintiff submitted a bill of particulars which indicated that the damages in the case were less than the jurisdictional amount.\textsuperscript{77} Nonetheless, the Supreme Court held that the federal court appropriately retained jurisdiction. The Court stated that as long as the plaintiff had a good faith belief in the damage amount at the institution of the suit, the court's jurisdiction should be maintained even if it is later shown to a legal certainty that the jurisdictional amount did not exist.\textsuperscript{78}

It is difficult to reconcile St. Paul with Kroger and Ireland. In order to bring a diversity case, both the amount of damages and the parties' diversity of citizenship must be shown.\textsuperscript{79} St. Paul presumed that the jurisdictional fact existed unless it was shown to a certainty that it did not.\textsuperscript{80} Ireland, however, apparently presumed that jurisdiction did not exist even when there existed a factual presumption in its favor.\textsuperscript{81} Second, St. Paul held that a plaintiff need only establish a good faith belief that the amount in controversy existed at the outset of the suit.\textsuperscript{82} Kroger, on the other hand, struck down a similar good faith belief as to the existence of diversity even when the defendant misled the plaintiff into believing that diversity existed.\textsuperscript{83} Third, St. Paul indicated that if the state court action were removed to a federal

\begin{itemize}
\item \textsuperscript{71} But see Dobbs, supra note 11 (Ramsey established that jurisdictional facts may be admitted).
\item \textsuperscript{72} 303 U.S. 283 (1938).
\item \textsuperscript{73} 28 U.S.C. § 1331 (1976) provides in part that "the district court shall have original jurisdiction where the amount in controversy exceeds $10,000."
\item \textsuperscript{74} 303 U.S. at 289.
\item \textsuperscript{75} Id. at 290-92.
\item \textsuperscript{76} Id. at 284.
\item \textsuperscript{77} Id. at 285.
\item \textsuperscript{78} Id. at 289.
\item \textsuperscript{79} The amount in controversy must exceed $10,000 and the parties in the action must be citizens of different states. 28 U.S.C. § 1332 (1976).
\item \textsuperscript{80} 303 U.S. at 289.
\item \textsuperscript{81} The presumption was created by the defendant's non-answer. See supra notes 45-53 and accompanying text.
\item \textsuperscript{82} 303 U.S. at 296.
\item \textsuperscript{83} Kroger, 437 U.S. at 383 (White, J., dissenting).
\end{itemize}
court, the case should be maintained even if a party subsequently proved to a legal certainty that the amount in controversy was lacking at the outset of the suit. "Kroger, however, held that if litigants subsequently present information showing that diversity did not exist, the case should be dismissed."

St. Paul arguably is distinguishable from Kroger and Ireland. One potential argument is that the jurisdictional amount requirement is clearly a statutory limitation and therefore does not present any Article III problems. The validity of this argument, however, is not clear. The Kroger Court explicitly stated that its holding was statutorily and not constitutionally based. However, the Court may have been referring to its ruling on ancillary jurisdiction rather than jurisdiction by estoppel.

A second argument is that the jurisdictional amount is in itself a peculiar "fact" that is not easily ascertainable with any degree of precision. A greater latitude for proof of this fact is therefore required. This argument undoubtedly has merit. At the very least, however, the argument presumes that under some circumstances the adjudication of facts deserves a greater level of flexibility than the Mansfield rule provides.

Mansfield has also been notably relaxed in reference to the adjudication of jurisdictional facts on appeal. If the adjudication of jurisdictional facts is tantamount to raising jurisdictional issues, as Kroger and Ireland suggest, a complete or at least partial reopening of the jurisdictional facts dispute is presumably required on appeal. However, the Supreme Court held otherwise in Duke Power v. Carolina Environmental Study Group.

84. 303 U.S. at 292-93.
85. 437 U.S. at 374.
87. 437 U.S. at 371-73.
88. The Court's holding that estoppel principles were irrelevant was footnoted to the Court's statement (in reference to ancillary jurisdiction) that, "[t]o allow the requirement of complete diversity to be circumvented would simply flout the Congressional command." 437 U.S. at 377 n.21. The reference to statutory considerations at this juncture seems to indicate that the basis of the estoppel holding was statutory. Yet, in the footnote itself, the Court cited American Fire & Cas. Co. v. Finn, 341 U.S. 6 (1951), which has been considered an Article III case, thereby suggesting that the Court's holding was constitutionally based. The simplest and most likely interpretation, however, is that the Court did not consider the issue.
90. However, the domicile requirement likewise may not be susceptible to ascertainment with any degree of precision. See Mas v. Perry, 489 F.2d 1396 (5th Cir. 1974). The determination of the principal place of business of a corporation, for example, often is particularly difficult to ascertain. Sabo v. Standard Oil Co. of Indiana, 295 F.2d 893 (7th Cir. 1961); Kelly v. U.S. Steel Corp., 284 F.2d 850 (3d Cir. 1960); Scot Typewriter Co. v. Underwood Corp., 170 F. Supp. 862 (S.D.N.Y. 1959).
The constitutionality of the Price-Anderson Act was at issue in *Duke Power*. The act imposed a limitation on liability for nuclear accidents that result from the operation of federally licensed private nuclear power plants. The *Duke Power* plaintiffs, an environmental group, a labor union, and local residents sued a public utility and the Nuclear Regulatory Commission to declare the act unconstitutional. The plaintiffs' purported injuries were, in part, environmental harms created by the operation of a nuclear power plant in "dangerous proximity to [their] living and working environment." The plaintiffs claimed that these injuries established their standing. Since their injuries were not directly caused by the act itself, the plaintiffs had to demonstrate a causal relationship between the operation of the facility and the Price-Anderson Act in order to establish standing. In short, the plaintiffs had to show that the nuclear facility would probably not be built absent the act's liability protections.

The district court heard disputed testimony on the causation issue, and concluded that the construction and operation of the nuclear facility would not be maintained absent the Price-Anderson Act protection. The plaintiffs therefore succeeded in their standing assertion. The Supreme Court affirmed the decision by deferring to the lower court's factual finding under the "clearly erroneous" standard, which applies to the review of facts generally. No de novo or other extraordinary review was required in *Duke Power* simply because the questioned facts were jurisdictional, as a literal application of *Mansfield* would suggest.

*Duke Power*, of course, may not apply to the adjudication of jurisdictional facts in the trial court since different policy considerations govern the litigation of facts on appeal. Even so, *Duke Power* is significant in that, like *St. Paul*, it apparently recognized that litigation-related policy issues are critical to the jurisdictional facts issue. More importantly, however, was the Court's cavalier approach to the jurisdictional facts issue. Review of the jurisdictional facts was limited to the extremely lenient "clearly erroneous" standard. Yet, if courts are to protect the limits of federal jurisdiction as stringently as *Kroger* and *Ireland* suggest, should not a more searching review be required? The Court, after all, has set forth a special standard of review in libel cases because of the significance attached to the factual determination. The thrust of *Duke Power*, on the other hand, is that a jurisdictional

92. *Id.* at 73.

93. The *Duke Power* Court stated: "[W]e cannot say . . . that the finding by the trial court of a substantial likelihood that the McGuire and Catawba nuclear power plants would be neither completed nor operated absent the Price-Anderson Act is clearly erroneous; and hence, we are bound to accept it." *Id.* at 77.

94. For example, to reopen the jurisdictional issue on appeal might require the submission of new evidence that, in turn, might lead the appellate court to remand the case to the trial court. Non-literal adherence to *Mansfield* would avoid this inefficiency. Cf. *Hartog v. Memory*, 116 U.S. 588 (1886) (case remanded for hearing on disputed issues of jurisdiction).
fact is simply just a fact. In this sense, the *Duke Power* holding is clearly at odds with *Kroger* and *Ireland*.96

II. THE COMPETING INTERESTS

Given the contrasting results of the preceding cases and the Supreme Court’s failure to articulate a clear doctrine, it is fair to state that no cohesive pattern has emerged regarding the adjudication of jurisdictional facts. Certainly the disarray of lower court decisions amply demonstrates this confusion.97 An independent examination of the jurisdictional facts issue, therefore, is necessary.

To begin, it is noteworthy that some rules of adjudication, if applied to jurisdictional issues, would clearly offend *Mansfield* principles. For example, a party may admit a non-jurisdictional legal conclusion.98 However, in

96. Larson v. Valente, 456 U.S. 228 (1982), is also inconsistent with *Kroger* and *Ireland*. In *Larson*, the plaintiff, the Unification Church, attacked provisions of a Minnesota statute which required that certain religious organizations file reporting statements with the state’s department of commerce. The defendants argued that the plaintiff lacked standing to attack this provision since the church had not yet established that it was a religious organization. The Court responded to this argument by noting that the state purposely used the provision against the plaintiff in order to “compel the Unification Church to register and report under the Act.” *Id.* at 241. Thus, the Court held that the “attempted use of the . . . rule as the State’s instrument of compulsion necessarily gives appellees standing to challenge the constitutional validity of the rule.” *Id.* The Court argued that since the state, in its regulatory capacity, was purportedly treating the organization as a religious entity, the state would not be permitted in its litigation capacity to allege that the organization was not religious for purposes of denying standing. As the Court stated: “It is logically untenable for the State to take the position that the Church is not [a religious] organization because that position destroys an essential premise of the exercise of statutory authority at issue in this suit.” *Id.* at 240. Therefore, this decision can be construed only as an application of estoppel principles. However, the ambiguous nature of the Court’s ruling and its failure to articulate estoppel principles clearly limits *Larson*’s precedential value regarding the jurisdictional issues presented in the case. *But see id.* at 258 (Rehnquist, J., dissenting).


98. Federal Rule of Civil Procedure 36 allows for the admission of “any matters . . . set forth in the request that relate to statements or opinions of fact or of the application of law to fact.” This provision was added to Rule 36 in a 1970 amendment. Prior to that only matters “of fact” were allowed. The Advisory Committee Notes on Rule 36 explain that allowing parties to admit legal applications and conclusions aids the trial process because admissions “even more clearly narrow the issues.”
a jurisdictional dispute, a party who admits that "this court has jurisdiction" or that "diversity exists" has admitted precisely what Mansfield prohibits.99 The admission is, in effect, a consent that jurisdiction exists. Similarly, while a party generally may admit facts that are not within its personal knowledge,100 this admission has little, if any, probative value when applied to jurisdictional issues. Thus, an admission without personal knowledge again may be viewed as simply a concession of jurisdiction.101 For these reasons, there is justifiable resistance in finding that such admissions are binding. In fact, these admissions were vulnerable to belated attacks even before Kroger and Ireland.102

Arguably, other methods of proof are also simply waivers of the legal issue. The theoretical basis of the conclusiveness of judicial admissions103 whether within or without a party's personal knowledge is that the admission constitutes a waiver of proof.104 To waive proof on the issue is to waive the issue itself. As such, one could argue that the waiver is inappropriate when the issue is subject matter jurisdiction.

99. Page v. Wright, 116 F.2d 449 (7th Cir. 1940). In Page, the plaintiff alleged that she was a resident of Florida, and upon "information and belief" she also alleged that the defendant was a resident of Kentucky. The defendant responded that "this defendant admits that this court has jurisdiction of the parties hereto, and of the subject matter hereof." The defendant subsequently attempted to show that he too was a resident of Florida. The trial court, however, denied the defendant leave to amend the answer and motion to dismiss for lack of jurisdiction. The appellate court reversed, holding that the defendant's admission of the legal conclusion that the court had jurisdiction was nothing more than consent. "The defendant admitted no facts from which the court could say, as a matter of law, that jurisdiction existed." Id. at 451.

100. FED. R. EVID. 801 (1975).

101. In non-jurisdictional disputes, personal knowledge is arguably unnecessary for an admission to have probative value. One reason for this argument is that admissions are often against interest, and "when a man speaks against his own interest it is to be supposed that he has made an adequate investigation." C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE 778 (3d ed. 1984). Probative value is also presumed because a litigant has incentive to be informed on issues in which no personal knowledge exists. Neither rationale applies to admissions of jurisdictional facts when the party making the assertion does not oppose jurisdiction. Since the party is disinterested in the jurisdictional issue, the admission is not against the party's interest, and is therefore unlikely to lead to an independent investigation.


103. Judicial admissions are those voluntarily made in court by a party and, until withdrawn or amended, are conclusive of the disputed issue. Judicial admissions should be distinguished from extra-judicial (or evidential) admissions which are a party's words or conduct that are offered into evidence against the party's interest. See MCCORMICK, supra note 101, at 778.

104. 9 J. WIGMORE, A TREATISE ON THE ANGLO AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT THE COMMON LAW § 2588 (1940). Wigmore, under the heading "Theory of Judicial Admissions," refers to an admission as an "express waiver," by a party or his attorney, such that the truth of an alleged fact is conceded, and the other party need not offer any evidence to prove it. See also 4A MOORE'S FEDERAL PRACTICE, supra note 89, at 36.02 ("judicial admissions expedite trial by weeding out facts over which there is no dispute").
However, the admissibility of a judicial admission is not based on waiver concerns alone. There is also probative value to the matter admitted, particularly when based on personal knowledge. For example, a person who admits he resides and intends to remain in Nebraska does more than potentially waive a diversity objection. The admission also provides factual support for the conclusion that the person in fact is a citizen of Nebraska. Indeed, this example demonstrates how critical the admissions are to the adjudication of diversity jurisdiction. Intent to remain living in a particular area, a fact necessary to establish domicile, is uniquely within the personal knowledge of the party. The disallowance of the party's admission creates a severe roadblock to the resolution of the domicile issue.

Nonetheless, there remains a second, strongly persuasive argument against the use of admissions (either judicial or extra-judicial) in establishing subject matter jurisdiction. The primary theoretical basis for the admissibility of admissions is the adversarial nature of our legal system, and not the reliability of the matter asserted. However, the interests of the parties may not always be adverse regarding disputes of subject matter jurisdiction. A party, for example, may "admit" domicile in a given state in response to an allegation of diversity jurisdiction. If this party actually is predisposed, or is ambivalent to litigating in the federal forum, its interest is not in any real sense adverse to its opponent. Thus, one of the major theoretical bases for the admissibility of an admission is absent, and the admission itself may legitimately be questioned.

Does this argument require a court to disallow a party's admission of jurisdictional facts? If so, it holds extraordinary implications because so much of factual proof depends on adversary system considerations. There are

105. "When a pleading is amended or withdrawn, the superseded portion ceases to be a conclusive judicial admission; but it still remains as a statement once seriously made by an authorized agent, and as such it is competent evidence of the facts stated, though controvertible, like any other extra-judicial admission made by a party or his agent." Contractor Utility Sales Co. v. Certain-Teed Prod., 638 F.2d 1061, 1084 (7th Cir. 1981). See also C. McCormick, Handbook of the Law of Evidence 633-34 (2d ed. 1974) (prior pleadings not conclusive judicial admissions but admissible as evidentiary admissions).

106. Courts do not require that a judicial admission used for evidentiary purposes be within the party's personal knowledge. However, the admission of a jurisdictional fact has little probative value unless a party has personal knowledge. See supra note 103 and accompanying text.

107. See also Basso v. Utah Power & Light Co., 495 F.2d 906 (10th Cir. 1974) (one may be held to admission of facts regarding own jurisdictional status).

108. Domicile is determined by a fixed, permanent home and an intention to return to that place whenever absent. See C. Wright, supra note 16, at § 26.


111. For example, decisions concerning which witness to call or what evidence to introduce are left to the adversary process regardless of the wisdom of such choices in ascertaining the truth of the matter sought to be proved.
three major considerations, fairness, finality, and the juridical nature of a
fact, however, suggest otherwise. 112

The first consideration is fairness. A person who defeats federal court
jurisdiction by avoiding a previous admission may gain four important
tactical advantages. First, as illustrated in Kroger, a defendant may avoid
the litigation entirely if the statute of limitations passes before the plaintiff
reinstates a state court suit. 113 Second, even if the statute of limitations has
not run, relitigation of the jurisdictional issue and/or relitigation of the
entire case will increase the cost of litigation. Increased costs may cause a
party to settle unfavorably or to abandon the matter entirely. Third, reliti-
gation will delay any possible decision, again benefitting the party incurring
financial liability. Finally, the loser in the original action will get a second
chance to prevail on the merits following a successful jurisdictional attack.
As the Ninth Circuit noted, allowing a party to escape its own jurisdictional
assertions "would encourage litigants to wager on their success on the merits,
and if they lost, permit them to call the contest a nullity." 114

As already noted, the prevention of unfairness alone is not dispositive
because unfairness inheres in the application of the Mansfield rule. 115 For
example, despite the inequities involved, the Court in American Fire & Casu-
alty Co. v. Finn 116 applied the Mansfield rule in holding that a party who

112. It is also noteworthy that with some jurisdictional issues, notably citizenship, the
defendant may be the only actor in possession of the information. See supra note 108 and
accompanying text.

belatedly presented a motion to amend its answer to deny diversity jurisdiction. Two years
earlier, the defendant had admitted that diversity existed. Four days before the two-year statute
of limitations was to expire, the defendant asserted that it was a corporation and citizen of
Ohio and Pennsylvania, and that the suit should be dismissed because the plaintiff was also a
Pennsylvania resident. Id. at 254. In response, the court stated that the Federal Rules of Civil
Procedure favor a liberal policy toward amendments. However, the court noted that it would
"constitute a monstrous injustice to permit, in effect, a defendant to change its citizenship
immediately prior to the running of the statute of limitations and thus deprive the plaintiff of
his cause of action." Id. at 255. Consequently, the court denied the defendant's motion. Id.
See also Young v. Handwork, 179 F.2d 70 (7th Cir. 1949), cert. denied, 339 U.S. 949 (1950)
(belated attack on jurisdiction denied); accord Biggs v. Public Serv. Coordinated Transp., 280
F.2d 311 (3d Cir. 1964) (same). See generally Stephens, Estoppel to Deny Federal Jurisdiction—
Klee and Di Frischia Break Ground, 68 DICK. L. REV. 39 (1969). In Kroger, of course, the
United States Supreme Court was unconcerned with the possibility of the passage of the statute
of limitations. 437 U.S. at 376 n. 20.

114. Murphy v. Kodz, 351 F.2d 163, 168 (9th Cir. 1965) (quoted in Kroger v. Owen Equip.
& Erection Co., 558 F.2d 417, 426 (8th Cir. 1977), rev'd, 437 U.S. 365 (1978)). Nevertheless,
the defendant in Kroger was allowed to raise the jurisdictional infirmity despite his previous
admission of the jurisdictional fact.

115. See supra notes 23-24 and accompanying text; see also C. WRIGHT, supra note 16, at 24.
removed a matter to federal court would not be estopped after an unfavorable decision from subsequently arguing that removal was improper as a matter of law.\textsuperscript{117}

But \textit{Mansfield} and \textit{Finn} are distinguishable when factual disputes, rather than legal disputes, are at issue. The significance of the fact/law distinction rests on a party's ability to protect itself from actions by opponents. In \textit{Finn}, for example, the opposing parties were equally able to reach their own legal conclusion concerning the propriety of the defendant's removal. In factual matters, on the other hand, only one of the parties may have access to the "truth" of the jurisdictional assertion.\textsuperscript{118} In these circumstances, a party is at the mercy of the opponent's assertions.\textsuperscript{119} Therefore, the unfairness created by a belated jurisdictional attack is more pronounced than a belated attack based on a change in legal position.\textsuperscript{120} The party without independent knowledge is left without any protection at all.\textsuperscript{121}

The second consideration is finality, which is more troublesome than would appear at first blush. Admissions, of course, may be elicited at trial as well as on the pleading.\textsuperscript{122} Thus if admissions are held insufficient to establish jurisdictional facts, a litigant whose testimony established subject matter jurisdiction could reopen the jurisdictional issue even after trial with new testimony contrary to its previous statements.

The problem with this conclusion is best illustrated by a little creative distortion of the facts that occurred in \textit{Duke Power}.\textsuperscript{123} In \textit{Duke Power}, the Court found that the plaintiffs had standing to attack the liability limitations of the Price Anderson Act on grounds that absent the liability limitations, the defendant Duke Power would be unable to build and operate a nuclear

\textsuperscript{117} Id. at 19.

\textsuperscript{118} Note, \textit{The Use of Discovery To Obtain Jurisdictional Facts}, 59 VA. L. REV. 533, 542 (1973).

\textsuperscript{119} Id. As one commentator noted, "Only by having the opportunity to contest the defendant's self-serving affidavits by use of discovery can the plaintiff meaningfully challenge the defendant's assertions that the court lacks jurisdiction." \textit{Id.}

\textsuperscript{120} "Unless the party securing an admission can depend on its binding effect, he cannot safely avoid the expense of preparing to prove the matters on which he has secured the admission, and the purpose of the rule is defeated." \textit{Fed. R. Civ. P.} 36, advisory committee notes 1970. \textit{See also} Finman, \textit{The Request for Admissions in Federal Civil Procedure}, 71 YALE L.J. 371, 418 (1962) (if rule is to fulfill function, admissions should be binding at trial).

\textsuperscript{121} A cautious plaintiff, therefore, might elect to avoid this risk by bringing its action initially in the state court. In other contexts the Supreme Court has liberalized jurisdictional limitations to dissuade plaintiffs from foregoing their choice of the federal forum. \textit{See United Mine Workers v. Gibbs}, 383 U.S. 713 (1966).

\textsuperscript{122} The distinction between judicial admissions and extra-judicial admissions does not suggest otherwise since both have evidentiary or extra-judicial value. \textit{See supra} note 103.

power plant. Assume momentarily that the corporate officers of Duke Power testified that the company would not build the reactor without the Price-Anderson protection. On this basis, the district court could properly conclude that standing was appropriate, could proceed to reach the merits of the case, and could hold, as the district court did in the case itself, that the Price-Anderson Act was unconstitutional.

Further assume that after an adverse judgment on the merits, the corporate officers changed their testimony and indicated that regardless of the existence of the Price-Anderson Act limitations, the nuclear power plant would be built. If the court were to follow the Ireland and Kroger path, the matter of the plaintiffs' standing would have to be relitigated. Moreover, this result would occur even absent bad faith on the part of the corporate officers. The officers might reasonably conclude that proceeding in the absence of the Price-Anderson limitation would still be more cost efficient than to suspend the project.

Indeed, this problem may occur even without changes in pre-existing testimony. Suppose in the Duke Power example that additional evidence was presented to the Court after judgment. The evidence indicated that if Duke Power did not complete the project, another utility company would. Presumably, the inclusion of such evidence would defeat standing because the requisite causal relationship between the Price-Anderson Act and the construction of the nuclear facility would be denied. Again, strict adherence to Mansfield would require that the standing issue be re-opened.

This absurd scenario is not far removed from what actually occurred in Kroger. In Kroger, the third-party defendant, Owen, first admitted citizenship solely in Nebraska. On the third day of trial, however, it alleged

124. The Court noted that establishing the requisite personal stake in the outcome of the controversy required both a "distinct and palpable injury" and "a 'fairly traceable' causal connection between the claimed injury and the challenged conduct." Id. at 72.

125. In the actual case, Duke Power's Executive Vice-President testified that "it would be [his] recommendation that Duke proceed even in the absence of Price-Anderson." Id. at 77 n.22. Nevertheless, the willingness of nuclear parts suppliers and utility shareholders to agree to construction absent the limitations was doubtful. Id.

126. See supra note 124.


129. If Duke Power did not complete the nuclear facility, the plaintiffs could not show a causal connection between the injury of the power plant and the Duke Power Company. See supra note 124.

130. Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365 (1978). The Kroger Court was completely unmoved by what the court of appeals labelled "the most elementary considerations of judicial fairness." 558 F.2d at 427. "Our holding is that the District Court lacked power to entertain the respondent's lawsuit against the petitioner. Thus, the asserted inequity in the respondent's alleged concealment of its citizenship is irrelevant. Federal judicial power does not depend upon 'prior action or consent of the parties.'" 437 U.S. at 377 n.21.
Iowa citizenship as well. Apparently, Owen's second assertion was unchallenged (but assume for the moment that it was contested). If the Court heard evidence on the citizenship issue, and then ruled against Owen, the Kroger logic suggests that Owen would still be free to present more evidence to defeat diversity jurisdiction. But, when would the fact-finding process end?

The final factor mitigating against the Kroger-Ireland approach is the juridical nature of a fact. Courts reach factual conclusions even in jurisdictional disputes that may or may not be accurate. The derivation of facts in the legal system is not the derivation of "truth." Indeed, Jerome Franke once characterized juridical facts as mere guesses:

No matter how certain the legal rules may be, the decision remains at the mercy of the courts' fact-finding. If there is doubt about what a court, in a law-suit, will find were the facts, then there is at least equal doubt about its decision . . . .

What is [a fact]? Is it what actually happened between [the parties]? Most emphatically not. At best it is only what the trial court—the trial judge or jury—thinks happened. What the trial court thinks happened may, however, be hopelessly incorrect. But that does not matter legally speaking. For court purposes, what the court thinks about the facts is all that matters . . . . Judicially, the facts consist of the reaction of the judge or jury to the testimony. The [fact found in the adjudicative process] is merely a guess about the actual facts. There can be no assurance that that [fact], that guess, will coincide with those actual, past facts.132

The uncertainty of factual determinations is compounded by other factors. Franke's skepticism is appropriate even when all relevant evidence is introduced at trial. However, this optimum condition for the adjudication of facts seldom, if ever, occurs. The "facts" determined by litigation are often a function of disparate factors. The type of inadvertence sought to be avoided by Mansfield is certainly one factor. Other factors include the abilities of the attorneys, the credibility of the witnesses, the choice in presentation of evidence due to tactical considerations, and the appearance and intelligibility of the documentary support. This list obviously is not exhaustive, yet neither

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131. "[E]very court has jurisdiction to decide its own jurisdiction, unless the legislature has decreed otherwise. When a court has jurisdiction to decide an issue, it has the power to decide wrongly as well as rightly." Dobbs, supra note 11, at 494.

132. J. FRANKE, COURTS ON TRIAL: MYTHS AND REALITIES 15-16 (1949). Franke's argument was echoed by the late Justice Harlan in In Re Winship, 397 U.S. 358 (1970) (Harlan, J., concurring). In Winship, Justice Harlan commented on whether instructing a jury on different standards of proof actually led to different results:

[In a judicial proceeding in which there is a dispute about the facts of some earlier event, the factfinder cannot acquire unassailably accurate knowledge of what happened . . . . A second proposition, which is really nothing more than a corollary of the first, is that the trier of fact will sometimes, despite his best efforts, be wrong in his factual conclusions.

Id. at 370.
these nor any other factors tend to achieve a high correlation with what is actually true.¹³³

What the foregoing suggests is that Mansfield, if applied to factual disputes, may only minimally accomplish its goal of protecting against improper federal court intrusion.¹³⁴ While a court may occasionally discover an inadvertent factual mistake, the nature of "facts" is too variable to place much stake in any increased certitude by reopening the factual issue. As the Court stated in Stoll v. Gottlieb,¹³³ retrial provides "no reason to expect that the second decision will be more satisfactory than the first."¹³⁶ There is no guarantee of truth.

III. Resolution

Having recognized the competing factors with respect to attacking subject matter jurisdiction at any time, it must be determined how the issue should be resolved. Fortunately, the framework for resolving the issue may already exist in cases in which the Supreme Court determined the res judicata effect of judgments from courts that did not have subject matter jurisdiction. In most of these cases, the Court has held that res judicata applied.¹³⁷

¹³³. See generally I. Goldstein & F. Lane, Goldstein Trial Technique (2d ed. 1977).
¹³⁴. As the authors state in Moore's Federal Practice:

Jurisdiction represents the distribution of judicial power in our federal system as blueprinted by the Constitution and declared by Congress; and the federal courts ought therefore to be mindful that they stay within defined limits. These are broad working principles and ought not to be applied destructively . . . . [I]t is very questionable whether a party who has invoked the federal court's jurisdiction should be allowed to raise lack of federal jurisdiction after he has lost on the merits. And only in rare cases should an appellate court on its own motion raise lack of the district court's jurisdiction.

¹³⁵. See, e.g., Stoll v. Gottlieb, 305 U.S. 165, 172 (1938), in which the Court stated, "[a]fter a federal court has decided the question of the jurisdiction over the parties as a contested issue, the court in which the plea of res judicata is made has not the power to inquire again into the jurisdictional fact." See also Underwriters Nat'l Assurance Co. v. North Carolina Life & Accident & Health Ins. Guar. Ass'n, 455 U.S. 691 (1982) (judgment in one state conclusive upon merits in another state if first had jurisdiction). Some commentators suggest that application of res judicata depends on whether the issue was actually litigated. See W. Richman & W. Reynolds, Understanding Conflict of Laws 294-96 (1984). See also Durfee v. Duke, 375 U.S. 106 (1963) (holding that collateral attacks are precluded if jurisdictional issues have been fully and fairly litigated in an earlier proceeding). The Supreme Court, however, recently indicated that subject matter jurisdiction issues may not be raised in a collateral proceeding when the party could have done so in the first action. See Underwriters Nat'l Assurance Co. v. North Carolina Life & Accident & Health Ins. Guar. Ass'n, 455 U.S. 691, 712 (1982);
The process that the Supreme Court utilized, however, to decide those cases is more significant than the actual results. In each case, the Court weighed the related litigation policies of finality and judicial administration against the policies behind the limited grant of federal jurisdiction. The requirement of "true" subject matter jurisdiction was not absolute and, indeed, in the majority of cases was subordinated to the countervailing litigation concerns. Thus, extrapolating from this framework, resolution of the jurisdictional facts issue does not necessitate blind adherence to the Mansfield rule.

Although the Court was unclear in this regard, this is undoubtedly what occurred in Duke Power when the Court did not apply Mansfield literally to resolve jurisdictional facts on appeal. Had the Court literally applied Mansfield to issues on appeal, the violence to litigation-related policies would have been especially obvious. One concern is the need for finality, a policy that expressly underlies the "clearly erroneous" rule governing review of facts on appeal. A second concern is inefficiency. If a party desires to introduce new evidence regarding jurisdictional issues, the court must remand the case to the trial court for further proceedings. This problem may become particularly troublesome since Mansfield does not limit the number of times that the issue may be redetermined.

The more difficult issue is how the jurisdictional facts issue should be resolved at the trial court level. An examination of the most extreme case places this issue in perspective. After losing the jurisdictional issue at trial, should a court permit a defendant to reopen the controversy and introduce additional evidence? It is almost a virtual certainty that such tactics would be disallowed. The question is why?

There are two potential answers. First, retrial promotes an egregious inefficiency that parallels the reopening of a factual inquiry on appeal. Although remand problems are not an issue, the trial court would still be unable to complete the litigation effectively. A defendant could continually attempt to introduce new evidence in a war of attrition. The second concern, however, is not simply limited to administrative efficiency, but again relates to the nature of "facts" in the legal system. Continual relitigation of an issue does

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The Supreme Court has sustained collateral attacks for lack of subject matter jurisdiction only in Bankruptcy Act cases, see Kalb v. Feuerstein, 308 U.S. 433 (1940), in which Congress "pre-empted" state court jurisdiction, or where sovereign immunity was at stake. See United States v. United States Fidelity & Guar. Co., 309 U.S. 506 (1940).

138. See generally Moore, supra note 12.


140. But see Dobbs, supra note 11.

141. Limited instances exist when factual issues may be reopened after trial. See Fed. R. Civ. P. 60(b)(2).
not assure a greater degree of "truth."" 142 Thus, once a matter is determined, there is little sense in redetermining the issue.

Once this is understood, it is apparent that retrial is not the telling point at which the reopening of the jurisdictional fact issue should be prohibited. 143 Rather, the appropriate solution is to foreclose the issue when the jurisdictional fact has been "proved" rather than simply waived. The test, in short, is whether the jurisdictional facts have been established by probative means or established only by waiver. When the facts are established by probative means, non-foreclosure harms fairness and finality concerns, and does so with only limited or negligible benefits. On the other hand, requiring a fact to have a probative basis in order to establish jurisdiction assures both that an indication of jurisdiction will affirmatively appear in the record, 144 and also prevents consensual access to federal jurisdiction, whether framed in a legal or factual context. 145

142. See supra note 135.
143. A plausible response to this aspect of the model is that the line is best drawn at retrial. Drawing the line at retrial guards against the situation resulting in jurisdiction gained by inadvertance. See supra note 20. A trial, simply because of its showcase nature, highlights issues in a much more dramatic way than do pleadings. Similarly, before testifying in a public trial, a party might be more diligent in ascertaining the correctness of all statements. For both of these reasons, the jurisdictional issue might not escape unnoticed, as it may if resolved in the pleadings.

As a theoretical matter, however, this rationale is not persuasive. A trial judge has no more license to be lax in finding jurisdiction based on pleadings than upon in-court testimony. Similarly, a litigant or the attorney is charged both in pleadings, FED. R. CIV. P. 11, and in testimony, to make truthful assertions.

Some have suggested that when intentional conduct, as opposed to inadvertence, causes jurisdictional infirmity, the remedy should be disciplinary action, not assumption of jurisdiction. See Page v. Wright, 116 F.2d 449, 455 (7th Cir. 1940); Basso v. Utah Power & Light Co., 495 F.2d 906 (10th Cir. 1974).

144. See Dobbs, supra note 11.
145. But see Eisler v. Stritzler, 535 F.2d 148 (1st Cir. 1976). In Eisler, the court held, in contrast to the position taken in this article, that Mansfield allows jurisdictional questions to be reopened in all circumstances at least where the jurisdictional facts are based on admissions. In so holding, the Eisler court cited numerous cases. The cases cited in Eisler, however, do not go so far as to allow a defendant to disavow assertions regarding its own jurisdictional status. Rather, the admissions in question were either admissions of legal conclusions or admissions of an opponent's jurisdictional status without personal knowledge. For example, in Gilbert v. David, 235 U.S. 561 (1914), a defendant admitted the plaintiff's domicile without personal knowledge. The plaintiff was not allowed to use this admission against the defendant. In Page v. Wright, 116 F.2d 449 (7th Cir. 1940), the defendant admitted the legal conclusion and not the jurisdictional facts. In Morris v. Gilmer, 129 U.S. 315 (1889) and Steigleder v. McQuesten, 198 U.S. 141 (1905), the defendants' original answers were silent as to the jurisdictional status of the plaintiffs, and the courts correctly held that any tacit "admission" as to the jurisdictional status of the plaintiffs by the defendants would not save the plaintiffs' status from later attack. Again, a party's admission of his own jurisdictional status was not involved. Finally, in Basso v. Utah Power & Light Co., 495 F.2d 906 (10th Cir. 1974), also cited by Eisler, the court held that the jurisdictional facts admitted by the defendant did not conclusively establish jurisdiction.
This approach, moreover, is consistent with the principles underlying a court's jurisdiction to determine its jurisdiction. These principles recognize that a court may erroneously find federal jurisdiction without offending statutory or constitutional limitations. Such error may occur in a legal determination or in a factual determination. The nature of limited jurisdiction presupposes that the imperfection inherent in the judicial system may lead to the exercise of jurisdiction in cases in which, if the "actual" facts were determined, the exercise of jurisdiction would be inappropriate. Any problem with this result is in the nature of the legal system, not in the jurisdictional limitation.

The suggested model, of course, is not free from difficulty. A first objection is basic. Does a fact/law distinction make a difference? Assume that a plaintiff alleges Michigan residence. Is there a difference between the defendant answering the pleading by claiming that "diversity jurisdiction exists" as opposed to answering by claiming to be from Iowa? Any distinction between these two responses may seem merely formalistic. Yet, no matter how unsatisfactory, or at times blurred, the fact/law distinction is, it is one that permeates legal analysis. Indeed, in a matter almost directly on point, the Supreme Court held that a judgment may be granted collateral estoppel effect on an issue of fact, even if an estoppel of law would be impermissible. Collateral estoppel is, moreover, appropriate even when the factual resolution effectively decides the legal issue. As the Court stated,

The court so held not because the admission was improper, but because the admission stated only that the defendant engaged in business in Utah, and not that its principal place of business was there. In actuality, Basso and Eisler conflict over the proposition that facts admitted by a party regarding its own jurisdictional status subsequently may not be disavowed by that party.

146. United States v. United Mine Workers, 330 U.S. 258 (1947) (violation of order subject to contempt citation even if order made without jurisdiction). See Moore, supra note 12 (if court finds jurisdiction, collateral attack permissible only if plainly beyond jurisdiction); Dobbs, The Validation of Void Judgments: The Bootstrap Principle, 53 VA. L. REV. 1003 (1967) (determination that court has jurisdiction is binding, whether correct or incorrect, unless reversed on appeal).

147. See Dobbs, supra note 11, and cases cited therein. "When a court had jurisdiction to decide an issue, it has the power to decide wrongly as well as rightly." Id. at 494. See also Stoll v. Gottlieb, 305 U.S. 165 (1938) (judgment by court is controlling until reversed by appellate court).

148. Even Page v. Wright, 116 F.2d 449 (7th Cir. 1940), which is normally cited to the effect that Mansfield should be applied stringently, suggests that the harsh Mansfield requirements may be unnecessary when the issue is factual and not legal. In Page the defendant admitted that "this court has jurisdiction of the parties hereto." The Seventh Circuit rejected estoppel principles and allowed the defendant to raise a belated jurisdictional attack, but nonetheless indicated that the result may have differed had the defendant admitted the facts of its jurisdictional status rather than simply stated a legal conclusion.

149. Other critical fact/law distinctions occur in pleading, evidence, judge/jury findings, and appellate procedure and jurisdiction. See generally C. Wright, A. Miller & E. Cooper, Federal Practice & Procedure (1982).

“[e]stablishing a fact and giving a specific effect to it by judgment are quite distinct.”¹⁵¹ Employing the fact/law distinction to issues of jurisdiction is not an anomaly.

Moreover, the fact/law distinction promotes Mansfield concerns because requiring a factual basis for jurisdiction to be established serves to prevent, or at least limit, a grant of inadvertent jurisdiction.¹⁵² A prudent plaintiff, for example, will insist that the opponent admit the factual basis of any admission of jurisdiction, rather than answer that “jurisdiction exists.” In essence, an incentive will be created for the court and the opposing parties to more thoroughly consider the jurisdictional issue.

A second difficulty with the model is in its application as it requires a determination of whether the fact-finding was accomplished by probative means or by waiver. Some cases may be easy. For example, an admission that is beyond the personal knowledge of a party (an admission of an opponent’s domiciliary) is not probative.¹³³ This type of admission may appropriately be viewed as a concession of the issue and, therefore, is an insufficient basis for jurisdiction. Other particular fact-finding methods, however, must be scrutinized in order to determine if they are based on probative or waiver principles.

Applying this analysis to the estoppel and discovery sanction issues present in Kroger and Ireland is insightful. The use of estoppel will depend upon what is to be estopped. When, as in Kroger, a party seeks to avoid an admission based upon personal knowledge, estoppel or its comparable provisions in the Federal Rules¹³⁴ should apply. Estoppel based simply upon the actions of the party, however, will not sustain jurisdiction. Thus, the estoppel sought in American Fire & Casualty Co. v. Finn¹³⁵ was properly denied since its premise was that the party who originally removed the case to federal court should not later be allowed to avoid the federal court decision by denying diversity. A party’s request for removal, however, is not an admission of fact, and is not in any sense probative of a factual issue.

¹⁵¹. Id.
¹⁵². The court may similarly demand that the party asserting subject matter jurisdiction justify the allegations by a preponderance of the evidence. See generally McNutt v. General Motors Acceptance Corp., 298 U.S. 178 (1936) (burden of proving jurisdiction on asserting party); Backhorn v. Adiv Assoc., Inc., 345 F.2d 173 (9th Cir. 1965) (factual inquiry must be conducted when question of diversity is raised); Rock Island Millwork Co. v. Hedges-Gough Lumber Co., 337 F.2d 24 (8th Cir. 1964) (must show substantial dispute between diverse parties to maintain action in federal court).
¹⁵³. See supra note 101.
¹⁵⁴. A matter is deemed admitted unless the party to whom the request for admission is directed responds with a written answer or objection within 30 days after service of the request. FED. R. CIV. P. 36.
¹⁵⁵. After the defendant in Finn removed the case to federal court, he sought and was allowed to avoid federal court jurisdiction. A party's request for removal is not an admission of fact. 341 U.S. at 6.
The discovery sanction in *Ireland* presents an easier issue than estoppel. Although it is arguable that establishing jurisdiction by sanction is equivalent to finding jurisdiction "by judicial fiat," the manner in which the Court decided *Ireland* belies this argument. The *Ireland* Court applied the rule that failure to respond to a request for proof establishes a presumption in favor of the truth of the matter sought to be discovered. Such a presumption is expressly a more-likely-than-not conclusion. Thus, accepting the rationale utilized in *Ireland*, the discovery sanction is permissible when applied to any issue, including subject matter jurisdiction. The sanction is simply a method of factual proof.

The final objection to the proposed analysis is that it allows any method of proof that has significant probative value to establish jurisdiction, even though the method of proof may also be based primarily on waiver principles. For example, returning again to the party admission, no question exists that the admissibility of that evidence is primarily based on waiver notions. The problem with this objection, however, is that it again wholly undercuts the ability to prove the jurisdictional issue. Elements of waiver pervade the legal system. Decisions concerning which evidence to introduce, which questions to pose on cross-examination, and which objections to raise, all contain various waiver elements. To suggest that an element of waiver in any factual proof can totally disallow that element’s validity in the determination of jurisdiction is to return to square one. It “fetishistically” suggests that any factual issue that relates to jurisdiction cannot be foreclosed prior to final judgment. This result is far too great a price for the minimal benefit that may be gained by a belated jurisdictional attack.

**CONCLUSION**

In *Kroger* and *Ireland* the Supreme Court, without serious consideration, suggested that normal fact-finding rules cannot be employed in the adjudi-
cation of federal subject matter jurisdiction issues. In so holding, the Court rejected finality and fairness policies and placed into question even the most straightforward method of factual proof—the party admission of its own jurisdictional status. Most important, these opinions did not apply a proper understanding of the inherent vagaries of factual proof in an adversary system. Rather, in the interest of protecting limited jurisdiction, the Court set unrealistic goals for the fact-finding process. A margin of error is implicit in fact-finding and cannot be eliminated even when the underlying issue is jurisdiction.

A better approach to resolving the jurisdictional facts issue is to examine the theoretical bases that underlie the factual findings rather than to apply an unrealistically stringent rule. When "facts" are found pursuant to mechanisms that are simply waivers of the disputed issue, the rule allowing questions about subject matter jurisdiction to be raised at any time in the proceedings is fully implemented, and accordingly, is appropriately applied. On the other hand, when the "facts" supporting jurisdiction are found by probative means, the suspension of normal rules of adjudication is unwarranted. Facts are not certainties.

161. "[I]t is a grievous hardship for litigants to be led over the long course of federal justice in the belief that they are having their rights adjudicated, only to learn at the end that the entire proceeding is a nullity." Hill v. Walker, 167 F. 241, 247 (8th Cir. 1909). See also Morse, Judicial Self Denial and Judicial Activism: The Personality of the Original Jurisdiction of the District Courts, 4 CLEVE-MAR. L. REV. 7 (1955) (court's responsibility cannot be facilitated by denying jurisdiction upon technicalities).