

MATTERS IN ABATEMENT

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I. INTRODUCTION

Section 2105 of the Judicial Code, which forbids appellate review of non-jurisdictional matters in abatement, is perhaps the most commonly ignored limitation on federal jurisdiction.¹ Certainly it is one of the most puzzling. Although it has been on the books, in one form or another, since the Judiciary Act of 1789, it has received scant attention from the bench, bar, and academy. What little regard the legal community does pay it is largely negative. Wright, Miller & Cooper, one of the few authorities that appears to be aware of this provision's existence,² went so far as to call for its "[p]rompt repeal," suggesting that it could not be applied coherently, and that sporadic invocation, facile avoidance, and blatant disregard were all inferior alternatives to its speedy demolition.³

I believe such concerns are overwrought. Congress acted wisely in removing non-jurisdictional matters in abatement from the field of appellate concerns. The courts, unfortunately, do not appear to have made as much of the statute as they might. Particularly in light of the increasing workload of the federal

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1. Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure* vol. 15A, § 3903, 141, 144 (2d ed., West 1992) (noting that "the most important feature of § 2105 is certainly its disuse"); see also *Chasser v. Achille Lauro Lines*, 844 F.2d 50, 54 (2d Cir. 1988), *aff'd* 490 U.S. 495 (1989) (suggesting that section 2105 "is not to be taken literally").

2. Wright, Miller & Cooper, *supra* n. 1, at 141-48; see also *Coastal Steel Corp. v. Tilghman Wheelabrator Ltd.*, 709 F.2d 190, 212 (3d Cir. 1983) (Rosenn, J., concurring) (citing Wright, Miller & Cooper and noting the statute's "position of obscurity").

3. Wright, Miller & Cooper, *supra* n. 1, at 147-48.

courts of appeals,⁴ the time has come to resurrect § 2105, dust off the decades of disuse, and apply it with renewed vigor. Here, I suggest how that might be done, and how a better understanding of abatement could draw new light into the void between jurisdiction and merits.

In Part II, I trace the history of the provision from its initial enactment as part of the first Judiciary Act to its reincarnation in its present form as part of the wholesale revision of the Judicial Code in 1948. In Part III, I describe how courts have employed the provision over the years, with particular emphasis on the roles played by its three main substantive components: “reversal,” “matters in abatement,” and “involve jurisdiction.” I conclude that, in an attempt to minimize the statute’s reach (and avoid analysis of “abatement”), courts have improperly read the core of the statute too narrowly and its main exception too broadly. After offering what I believe to be a more robust reading of the statute, I then proceed in Part IV to discuss ways in which courts might think about abatement generally, with a special focus on where to place it on the jurisdiction-merits spectrum and how this ancient plea could be rationally incorporated into a modern procedural system. I suggest that applying the emerging notion of mandatory rules to identify matters in abatement assists in its categorization, and that abatement adds color to this recently recognized concept.

I conclude that when properly construed, the prohibition on review of matters in abatement other than jurisdiction is a narrow, useful bar on resorting to the federal courts of appeals. Avoidance of section 2105 by the courts is neither necessary nor warranted. Rather than repeal, increased awareness of this little

4. See e.g. Matthew Funk, Student Author, *Sticks and Stones: The Ability of Attorneys to Appeal from Judicial Criticism*, 157 U. Pa. L. Rev. 1485, 1502 (2009) (citing *Boite v. Home Ins. Co.*, 744 F.2d 572, 573 (7th Cir. 1984) (referring to “an age of congested appellate dockets”)); William L. Reynolds & William M. Richman, *Studying Deck Chairs on the Titanic*, 81 Cornell L. Rev. 1290, 1290 (1996) (referring to the “rapidly growing caseload” in the federal courts of appeals); Peter B. Rutledge, *Book Review, Sorcerers’ Apprentices: 100 Years of Law Clerks at the United States Supreme Court and Courtiers of the Marble Palace: The Rise and Influence of the Supreme Court Law Clerk*, 74 U. Chi. L. Rev. 369, 384-85 (2007) (noting that “federal appellate courts have confronted an increasing workload in recent years”); but see e.g. Thomas E. Baker, *Applied Freakonomics: Explaining the “Crisis of Volume”*, 8 J. App. Prac. & Process 101 (2006) (discussing increased volume of appellate cases, but concluding that courts have adapted to larger caseloads and are deciding virtually all appeals filed).

provision by the bench and bar would assist them in achieving the “just, speedy, and inexpensive determination”⁵ of many actions by preventing another round of litigation where none should be had.

II. HISTORY OF SECTION 2105

Passed shortly before the first session of the Supreme Court (and therefore before the federal government truly began functioning),⁶ the Judiciary Act of 1789⁷ has been lauded as “probably the most important and the most satisfactory Act ever passed by Congress.”⁸ Through its thirty-five sections, the Act establishes the Supreme Court and inferior federal courts⁹ and defines the scope of their powers, from such minutia as directing the timing of their sessions and place of meeting, and permitting the appointment of clerks and marshals¹⁰ to the scope of federal jurisdiction and its allocation between the district, circuit, and Supreme courts.¹¹

Section 22 of the Judiciary Act of 1789 concerns the appellate jurisdiction of the circuit courts and Supreme Court.¹² It provides that in civil actions in which the matter in dispute exceeds fifty dollars (exclusive of costs), final judgments of the district courts “may be re-examined, and reversed or affirmed in a circuit court, holden in the same district, upon a writ of error.”¹³ Similarly, it allows for direct appeals to the Supreme Court from final judgments and decrees in civil actions and suits

5. Fed. R. Civ. P. 1 (available at <http://uscode.house.gov>).

6. Alison L. LaCroix, *The New Wheel in the Federal Machine: From Sovereignty to Jurisdiction*, 2007 Sup. Ct. Rev. 345, 345-46.

7. An Act to Establish the Judicial Courts of the United States, ch. 20, 1 Stat. 73-93 (1789) [hereinafter “Judiciary Act of 1789”] (available in electronic form from the Library of Congress at <http://memory.loc.gov/cgi-bin/ampage?collId=llsl&fileName=001/llsl001.db&recNum=196>).

8. Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 Harv. L. Rev. 49, 52 (1923) (quoting Henry B. Brown, *The New Federal Judicial Code*, in *Report of the 34th Annual Meeting of the American Bar Association* 339, 345 (Lord Baltimore Press 1911)).

9. Judiciary Act of 1789, §§ 1-4.

10. *Id.* at §§ 5, 7, 27.

11. *Id.* at §§ 9-26.

12. *Id.* at § 22.

13. *Id.*

in equity (either original actions or actions removed from state court) where the matter in dispute exceeds two thousand dollars.¹⁴ And then it addresses matters in abatement, using language that foreshadows the language now in section 2105:

But there shall be no reversal in either court on such writ of error for error in ruling any plea in abatement, other than a plea to the jurisdiction of the court, or such plea to a petition or bill in equity, as in the nature of a demurrer, or for any error in fact.¹⁵

Laws governing the structure of the federal judiciary underwent considerable change in the early years of the Republic,¹⁶ but the prohibition on review of pleas in abatement continued on, more or less unchanged, until the 1948 revisions to the Judicial Code.¹⁷ In that year, the statute, which had been codified initially in the then-new U.S. Code as section 879 of

14. *Id.* at § 22(a).

15. *Id.* at § 22(b).

16. The Judiciary Act of 1789 was cautious in its grant of jurisdiction to federal courts. The Judiciary Act of 1801, 2 Stat. 89-100 (1801), by contrast, expanded federal jurisdiction significantly. For a thorough and extensive discussion of why this occurred, see LaCroix, *supra* n. 6. But the expansion was short-lived. The 1801 act, along with an amending act, An Act for Altering the Times and Places of Holding Certain Courts Therein Mentioned and for Other Purposes, ch. 32, 2 Stat. 123-24 (1801), were repealed in 1802, restoring the organization and powers of the courts as they were in 1789. See An Act to Repeal Certain Acts Respecting the Organization of the Courts of the United States; and for Other Purposes, ch. 8, 2 Stat. 132 (1802). The federal courts were further reorganized that year, see An Act to Amend the Judicial System of the United States, ch. 31, 2 Stat. 156-67 (1802), and a further amendatory act was passed in 1803. See An Act in Addition to an Act Intituled "An Act to Amend the Judicial System of the United States," ch. 40, 2 Stat. 244 (1803). It is this last amendatory act that is cited in the later statute books discussing the origins of the prohibition on reviewing pleas in abatement, see e.g. 28 U.S.C § 879 (1940) (noting that § 879 was derived from 2 Stat. 244), perhaps because it repeals so much of the Judiciary Act of 1789 as is contrary to it. The 1803 act, however, has nothing to say regarding appellate jurisdiction over pleas in abatement.

17. *Gasparini v. Ctr. for the Humanities, Inc.*, 518 U.S. 415, 451 n. 1 (1996) (Scalia, J., Rehnquist, C.J., and Thomas, J., dissenting) (pointing out that the "restriction remained in place until the 1948 revisions of the Judicial Code"). In 1948, the entire Judicial Code was revised, codified, and enacted into positive law. An Act to Revise, Codify, and Enact into Law Title 28 of the United States Code, Entitled "Judicial Code and Judiciary," Pub. L. No. 80-773, 62 Stat. 869-1009 (1948). Note, however, that there had been one small change in the relevant section prior to 1948: After its codification in the Revised Statutes of the United States at section 1011, a clerical amendment was passed to return "for error in ruling *and* plea in abatement" to its correct form "any plea in abatement." See An Act to Correct Errors and to Supply Omissions in the Revised Statutes of the United States, ch. 80, 18 Stat. 316, 318 (1875).

Title 28, was moved to its present location at section 2105.¹⁸ More significantly, the prohibition on review of facts was lifted. The revisers' notes observe that the language was deleted "to avoid any construction that matters of fact are not reviewable in nonjury cases."¹⁹ The previous incarnation of the statute had applied only to writs of error, which were available only in actions at law.²⁰ As the Federal Rules of Civil Procedure, enacted in 1938, abolished any distinction in federal courts between actions at law and suits in equity,²¹ the revisers concluded that clarification was appropriate. Their comments also note that as Rule 7(c) abolished all pleas and required that all requests for a court order be made by motion, it was necessary to replace the phrase "plea in abatement" with "matter in abatement."²² Changes were made to phraseology as well.²³

The result is the little-known statute that we are left with today. Its twenty-seven words read: "There shall be no reversal in the Supreme Court or a court of appeals for error in ruling upon matters in abatement which do not involve jurisdiction."²⁴

III. INTERPRETATIVE PROBLEMS

Given the paucity of cases construing—or even applying—section 2105,²⁵ it is hardly surprising that no overarching theory has developed to explain what falls within its ambit. How much jurisdiction section 2105 removes from federal appellate courts is governed by three terms in the statute: "reversal," "involve jurisdiction," and "matters in abatement."²⁶

18. 28 U.S.C. § 2105 (available at <http://uscode.house.gov>).

19. *Id.* (advisory comm. notes).

20. *Id.*

21. Fed. R. Civ. P. 2 (available at <http://uscode.house.gov>).

22. 28 U.S.C. § 2105.

23. *Id.* For example, the earlier reference to the now-defunct circuit courts of the United States was replaced by a reference to the modern "courts of appeals."

24. 28 U.S.C. § 2105.

25. Wright, Miller & Cooper, *supra* n. 1, at 144 (remarking on "disuse"). Perhaps only two things are certain: Section 2105 does not apply in criminal cases, *Roche v. Evaporated Milk Assn.*, 319 U.S. 21, 27 n. 3 (1943), and it does not apply to review of state-court decisions in the Supreme Court, *Buck Stove & Range Co. v. Vickers*, 226 U.S. 205, 213 (1912).

26. 28 U.S.C. § 2105.

As section 2105 is generally thought a nuisance (or at best a relic of a bygone legal era), the general tendency with regard to “reversal” and “involve jurisdiction” has been to construe the former narrowly and the latter broadly, so as to make section 2105 applicable in as few cases as possible.²⁷ The meaning of the phrase “matters in abatement,” as the courts have come to realize, is a difficult question. The biggest problem seems to be that no one knows what it means, and a number of courts have suggested that this has been the case for some time.²⁸ The result is a poorly developed, poorly understood, and poorly grounded body of law. Before courts can apply this statute in a consistent, sensible manner, it is necessary to interpret each of its functional clauses in a way that is internally consistent with each of the others and that gives substantive content to the statute as a whole.

A. “Reversal”

One way in which courts have avoided applying section 2105 has been to construe the statute as prohibiting only reversal in the narrowest sense of the word. In *United States v. Alcon Laboratories*,²⁹ the FDA initiated a seizure and injunction action against Alcon for distributing a drug called WANS without having undergone the necessary procedure for new drugs.³⁰ Alcon responded that WANS was not a “new drug,” and moved for a remand to the FDA for a determination of whether WANS was a “new drug.”³¹ The district court remanded the action with instructions to defer regulatory action until WANS’s “new

27. See Wright, Miller & Cooper, *supra* n. 1, at 143-44, 145-46.

28. *Coastal Steel*, 709 F.2d at 196 (“Nineteenth century lawyers were obviously better versed in the meaning of pleas in abatement than are we.”); *McHie v. McHie*, 78 F.2d 351, 353 (7th Cir. 1935) (“[W]e find difficulty in understanding the section from its wording alone.”); cf. *Dellaripa v. N.Y., New Haven & Hartford R.R. Co.*, 257 F.2d 733, 734 (2d Cir. 1958) (citing *Snyder v. Buck*, 340 U.S. 15, 32 (1950) (Frankfurter, J., dissenting), and *Bowles v. Wilke*, 175 F.2d 35 (7th Cir. 1949), but providing no explanation for why statute does not apply); but see *Aetna St. Bank v. Altheimer*, 430 F.2d 750, 753 (7th Cir. 1970) (suggesting rather hopefully that “[t]he language of this section of the statute is clear and explicit”).

29. 636 F.2d 876 (1st Cir. 1981).

30. *Id.* at 879-80.

31. *Id.* at 880.

drug”-status had been determined.³² The government appealed, and the First Circuit held, *inter alia*, that the remand order was appealable under the collateral order doctrine, but in so doing was obliged also to respond to Alcon’s argument on appeal that section 2105 prevented it from taking jurisdiction of the matter.³³ Without reaching the question whether the issue involved a “matter in abatement,” the court reasoned that its vacating the district court’s order and remanding for further proceedings was “not, technically, a ‘reversal.’”³⁴

Wright, Miller & Cooper find this reasoning unpersuasive,³⁵ and I agree. Conditioning appellate jurisdiction on the outcome of an appeal is absurd. Jurisdiction grants courts the authority to reach the merits of a dispute.³⁶ Reading the statute to require a court to reach the merits in order to decide whether it could reach the merits is utter nonsense. Of course, courts always retain jurisdiction to determine their own jurisdiction.³⁷ But that rule permits courts to determine facts and reach legal conclusions generally apart from (although sometimes overlapping with) the merits of the case.³⁸ Collapsing

32. *Id.*

33. *Id.* at 884-85.

34. *Id.* at 885 n. 2. Similar reasoning was employed in *S.E. Fed. Power Customers, Inc. v. Geren*, 514 F.3d 1316, 1321 n. 1 (D.C. Cir. 2008) (pointing out that “because reversal is not justified, the court need not decide whether 28 U.S.C. § 2105, which precludes reversal by ‘a court of appeals for error in ruling upon matters in abatement which do not involve jurisdiction,’ prevents review of the abatement motion”).

35. Wright, Miller & Cooper, *supra* n. 1, at 145-46 (noting that it is “barely possible to argue” the point).

36. *E.g. Haywood v. Drown*, 556 U.S. ___, ___, 129 S. Ct. 2108, 2126 (2009) (“Subject-matter jurisdiction determines only whether a court has the power to entertain a particular claim—a condition precedent to reaching the merits of a legal dispute.”); *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94 (1998) (citing *Ex Parte McCordle*, 74 U.S. 506, 514 (1869): “Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.”).

37. *E.g. Steel Co.*, 523 U.S. at 118 (Stevens & Souter, JJ., concurring); *U.S. v. United Mine Workers of Am.*, 330 U.S. 258, 290-91 (1947).

38. *See e.g. In re LimitNone*, 551 F.3d 572, 577-78 (7th Cir. 2008) (observing, among other things, that it “would be awkward, at best, to suggest that district courts must resolve their own jurisdiction before proceeding to factual disputes necessary to that very determination”). The same holds true for courts of appeals. *See e.g. Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006) (differentiating between factual inquiries necessary to determine jurisdiction, which may be decided by the judge, from claims for relief, for which the jury is the trier of fact, and stating that “courts, including this Court, have an

jurisdiction and merits into a single—if not backward—inquiry would work an extraordinarily significant alteration in federal practice, one that should not be assumed absent a clear congressional directive.³⁹

Moreover, the word “reversal” in section 2105 reaches back to the first version of the statute in the Judiciary Act of 1789.⁴⁰ Section 22 of the Act provides for appellate jurisdiction of the circuit courts and Supreme Court, noting that in each, final judgments may “be re-examined and reversed or affirmed.”⁴¹ But vacatur, modification, and other dispositions after appeal are not found in the first Judiciary Act.⁴² The jurisdictional nature of that early provision would be clearer if rather than noting that there shall be no “reversal,” Congress had instead specified no “reversal or affirmance,” as it did in other provisions of section 22, but the intent of the provision to limit jurisdiction of reviewing courts is obvious from the context⁴³ and there is now no serious question that the modern statute is anything other than jurisdictional.⁴⁴

The best reading of “there shall be no reversal” in section 2105 is therefore simply as a notice that the statute prohibits appellate review of matters in abatement not involving jurisdiction. In modern legal parlance, it might be rendered as

independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party”).

39. *Cf. Cleveland v. U.S.*, 531 U.S. 12, 24 (2000) (declining to extend federal criminal jurisdiction in the absence of a clear congressional statement); *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 483-84 (1991) (concluding that jurisdiction existed to review immigration-amnesty program absent clear congressional language to the contrary); *Christianson v. Colt Indus. Op. Corp.*, 486 U.S. 800, 814 (1988) (relying on clear congressional intent to determine limits of Federal Circuit’s jurisdiction); *Ex parte Yerger*, 75 U.S. 85, 102-03 (1868) (declining to assume that appellate jurisdiction does not extend to petitions for writs of a habeas corpus); *but see generally* Evan Tsen Lee, *The Dubious Concept of Jurisdiction*, 54 *Hastings L.J.* 1613 (2003) (acknowledging that it is well settled that jurisdiction and merits are distinct, but contending that they are conceptually part of the same inquiry).

40. Judiciary Act of 1789, § 22(b).

41. *Id.* at § 22.

42. *See generally* Judiciary Act of 1789, 1 Stat. 73, 73-93. However, remands are discussed in Sections 24 and 25 of the Act.

43. *See id.* at § 22; *see also* nn. 40-42, *supra*, and accompanying text.

44. *See Teixeira v. Goodyear Tire & Rubber Co.*, 261 F.2d 153, 154 (1st Cir. 1958) (dismissing appeal for lack of jurisdiction); *Bowles*, 175 F.2d at 38 (concluding that appeal must be dismissed); *McHie*, 78 F.2d at 354; *see also Coastal Steel*, 709 F.2d at 196-97 (assuming that statute is jurisdictional).

“neither the Supreme Court nor any court of appeals shall have jurisdiction to hear” them. Such a reading conforms to the historical understanding of the statute,⁴⁵ interprets it in a manner consistent with the common canons of statutory interpretation,⁴⁶ and dispenses with one element of the “facile avoidance” decried by Wright, Miller & Cooper.⁴⁷

B. “Involve Jurisdiction”

“Jurisdiction,” it has been said, is a word of “many, too many meanings.”⁴⁸ And the word’s inherent ambiguity⁴⁹ in section 2105 is amplified by its equally vague neighbor and modifier, “involve.” What “involve[s] jurisdiction”? The courts have been quick to answer “almost everything.” This interpretation of the most obvious exception⁵⁰ to the general rule against reviewing matters in abatement creates several problems: It fits poorly into the prevailing modern judicial conception of federal jurisdiction. It extends the reach of the statute to situations it was not intended to reach. It makes the outer limits of the exception difficult to define. And, as a result, it permits the exception to start down the path toward swallowing the rule. These results are not commanded by the statute, nor are they necessary to its proper application. Of course, some matters in abatement truly do involve jurisdiction in a narrow sense, and they are, by the statute’s own terms, outside of its reach. But there is no need to construe this exception so broadly as to render the other limitations on its application unnecessary or to empty the statute of nearly all of its substance.

45. See *Piquignot v. Penn. R.R. Co.*, 57 U.S. 104, 105-06 (1854) (assuming statute is jurisdictional).

46. See e.g. *Small v. U.S.*, 544 U.S. 385, 404 (2005) (Thomas, Scalia & Kennedy, JJ., dissenting) (discussing canon against absurdities); see also *U.S. v. Mannava*, 565 F.3d 412, 417 (7th Cir. 2009) (Posner, J.) (explaining that “[l]iteral interpretations that produce absurd results are not only unacceptable grounds for legal rulings that affect rights and interests; they also misunderstand ‘interpretation’”).

47. Wright, Miller & Cooper, *supra* n. 1, at 148.

48. *Bowles v. Russell*, 551 U.S. 205, 215 (2007) (Souter, Stevens, Ginsburg & Breyer, JJ., dissenting) (quoting *Steel Co.*, 523 U.S. at 90, and collecting cases).

49. See *id.* at 215-16 (citing the “erroneous jurisdictional conclusions that flow from indiscriminate use of the ambiguous word”).

50. Wright, Miller & Cooper, *supra* n. 1, at 143.

The most notorious example of using the jurisdictional exception to read out the rest of the statute occurred in the Supreme Court's opinion in *Snyder v. Buck*.⁵¹ In that case, the widow of a sailor sued the paymaster general of the Navy for an unpaid survivor's benefit.⁵² While the action was pending, the paymaster general retired, and the widow failed to move to substitute the new paymaster general within the six months permitted.⁵³ The court of appeals held that the action had abated, vacated the district court's judgment, and remanded the case with instructions to dismiss the action.⁵⁴ The Supreme Court affirmed, and noted—almost in passing and without explanation—that section 2105 posed no obstacle to review because “[t]he absence of a necessary party and the statutory barrier to substitution go to jurisdiction.”⁵⁵

Two of the more recent cases from the courts of appeals go further. In *Alcon Labs*,⁵⁶ the First Circuit held, in the alternative to its holding applying the term “reversal,”⁵⁷ that the district court's order remanding the case to the FDA “can be understood as involving jurisdiction.”⁵⁸ The *Alcon* court relied heavily on the Seventh Circuit's decision in *Aetna State Bank v. Altheimer*,⁵⁹ in which the decedent had pledged shares of a corporation as collateral for a loan. The bank sold the shares after his death, applied the proceeds against the outstanding debt,⁶⁰ and then filed an action in state court against the estate for the remaining deficiency. The estate counter-claimed, asserting that the sale was not commercially reasonable and that

51. *Snyder v. Buck*, 340 U.S. 15, 16 (1950).

52. *Id.*

53. *Id.* at 16-17.

54. *Id.* at 17-18. The holding was premised on section 11(a) of the Judiciary Act of 1925, 43 Stat. 936, 941. The modern rule, permitting automatic substitution of successors in office, was implemented in 1961. See Fed. R. Civ. P. 25(d) & 1961 advisory comm. notes (available at <http://uscode.house.gov>).

55. *Snyder*, 340 U.S. at 22.

56. *U.S. v. Alcon Labs.*, 636 F.2d 876 (1st Cir. 1981).

57. See *supra* Part III.A., nn. 29-34 and accompanying text.

58. *Alcon Labs.*, 636 F.2d at 885 n. 2.

59. 430 F.2d 750 (7th Cir. 1970) *abrogated by Calvert Fire Ins. Co. v. Will*, 560 F.2d 792 (7th Cir. 1977) (holding *Aetna* no longer good law in light of *Colo. River Water Conserv. Dist. v. U.S.*, 424 U.S. 800 (1976)), *rev'd*, 437 U.S. 655 (1978).

60. *Id.* at 751.

the bank knowingly sold the shares to insiders.⁶¹ A few months later, the bank filed an action in federal court alleging that the decedent's actions amounted to fraud and deceit under Rule 10b-5.⁶² Only after initiating the federal action did the bank raise a Rule 10b-5 defense in the action pending in state court.⁶³

The estate eventually moved the federal court to abate the federal action in favor of the earlier-filed state-court action; the federal court granted the motion.⁶⁴ The bank appealed, and the Seventh Circuit affirmed. Construing the motion as a request for an abstention, the court of appeals held that, as the district court intended to abstain from exercising its jurisdiction, the order involved jurisdiction and therefore could be reviewed without running afoul of section 2105.⁶⁵

Alcon Labs and *Aetna State Bank*, which remand and stay proceedings over which the court would otherwise have cognizance, suggest that the term "involve jurisdiction" extends beyond the question whether the court is endowed with jurisdiction over the person and the subject matter to the court's discretion in the exercise of its jurisdiction. This is justifiable only as a means to escape deciding whether a particular order qualifies as a matter in abatement in the first place.

As Wright, Miller & Cooper note, the approach taken in *Aetna State Bank* "obviously would permit review of all matters of abatement, since all involve the same basic question whether the court should presently exercise its jurisdiction."⁶⁶ Taken to its logical conclusion, this approach would permit the exception to swallow the rule. Reading the statute in this manner should be avoided if at all possible.⁶⁷ Exceptions to statutes must be read narrowly "in order to preserve the primary operation of the provision."⁶⁸ An expansive reading of an ambiguous exception

61. *Id.* at 751-52.

62. *Id.* at 752.

63. *Id.*

64. *Id.*

65. *Id.* at 753-58.

66. Wright, Miller & Cooper, *supra* n. 1, at 144.

67. The canon against the exception swallowing the rule is so frequently invoked by the Supreme Court that recently it has been unaccompanied by further citation or explanation. See e.g. *Cuomo v. Clearing House Assn. L.L.C.*, 557 U.S. ___, ___, 129 S. Ct. 2710, 2718 (2009).

68. *Commr. of Internal Revenue v. Clark*, 489 U.S. 726, 739 (1989).

would “eviscerate” the underlying policy of Congress.⁶⁹ And it is no answer that the underlying policy itself may be ambiguous. If the prohibition on reviewing matters in abatement is to mean anything, it must mean something apart from the exception for matters involving jurisdiction.

But *Snyder* still presents something of a roadblock to acceptance of this analysis. The best way around it may be to acknowledge that the case concerned a procedural requirement that has been defunct for nearly fifty years, and it may be time to read *Snyder* as limited to its archaic facts. Certainly, it does not appear from the opinion that the Court had anything grander in mind. Its treatment of the jurisdictional exception to section 2105 is terse in the extreme; it provides no rationale—and no roadmap—for future application. Matters concerning the exercise of jurisdiction should not fall within the exception to section 2105; only those that concern the existence of federal jurisdiction should be excepted.

At its narrowest, federal jurisdiction is composed of subject-matter jurisdiction and personal jurisdiction.⁷⁰ Matters in abatement involving these issues have historically been held to fall within the exception.⁷¹ For instance, subject-matter jurisdiction may be premised on the diverse citizenship of the parties to the action.⁷² If the parties are not diverse and there is no other basis for federal jurisdiction, no subject-matter jurisdiction is conferred on the federal courts. Accordingly, a party’s citizenship has always been held to involve jurisdiction in a diversity case because it is a necessary precondition to the federal courts’ exercising authority over the case.⁷³ Similarly, the Supreme Court has suggested that proper service of process is necessary to obtaining jurisdiction over the person, and so review of its effectiveness not barred by section 2105.⁷⁴

69. *Id.*

70. See e.g. *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004) (defining jurisdiction as “the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court’s adjudicatory authority”).

71. Wright, Miller & Cooper, *supra* n. 1, at 143 (“The exception clearly permits review of rulings on subject matter jurisdiction or personal jurisdiction.”).

72. 28 U.S.C. § 1332 (available at <http://uscode.house.gov>).

73. See e.g. *Pac. Mut. Life Ins. Co. of Cal. v. Tompkins*, 101 F. 539, 541-42 (4th Cir. 1900).

74. *Goldey v. Morning News*, 156 U.S. 518 (1895).

This narrow definition of jurisdiction as only those conditions necessary to the exercise of the judicial power of the United States is gaining firm ground in the federal courts. In a number of recent cases, the Supreme Court has explained what is not jurisdictional,⁷⁵ and scholars are working on disentangling the traditional formulation of “mandatory and jurisdictional,” and treating each of its components as a separate limitation on federal judicial power.⁷⁶ This understanding, as well, is gaining traction.⁷⁷ Given this definition of jurisdiction, the only matters in abatement excepted from the rule are those that are necessary to determining whether the federal courts are empowered to decide the cases before them. Assuming for now that they are in fact matters in abatement, matters that “involve jurisdiction” would include service of process, citizenship and amount in controversy (for diversity cases), and any other precondition necessary to either subject-matter or personal jurisdiction. All other matters in abatement are unreviewable. Under this definition, the stays and remands in cases like *Alcon Labs* and *Aetna State Bank* would be barred from review under section 2105—but only if they are indeed matters in abatement.

C. Matters in Abatement

From the outset, courts have disfavored resolving an action on a plea in abatement, as it turns on procedure rather than the merits of the action.⁷⁸ Now the procedure itself is obscure, clouded both by the passage of time and its unfamiliarity to the modern legal mind.⁷⁹ No one seems to know what abatement entails. The Fourth Circuit recently noted that abatement is “the equivalent of a dismissal,” although not all dismissals qualify as

75. *Arbaugh*, 546 U.S. 500; *Eberhart v. U.S.*, 546 U.S. 12 (2005); *Kontrick*, 540 U.S. 443.

76. See e.g. Scott Dodson, *Mandatory Rules*, 61 Stan. L. Rev. 1 (2008); Scott Dodson, *In Search of Removal Jurisdiction*, 102 Nw. U. L. Rev. 55 (2008); but see *Bowles*, 551 U.S. at 209 (continuing to use the term, though not in an outcome-determinative manner).

77. See e.g. *Wis. Valley Improvement Co. v. U.S.*, 569 F.3d 331, 334 (7th Cir. 2009) (Easterbrook, C.J.) (explaining that a rule can be mandatory without being jurisdictional); *Zhong v. U.S. Dept. of Just.*, 480 F.3d 104, 117-25 (2d Cir. 2007).

78. *Aetna St. Bank*, 430 F.2d at 754 (citing 1 C.J.S. Abatement and Revival §§ 4, 193 (1936)).

79. See n. 28, *supra*.

abatement.⁸⁰ Examples of defenses raising abatement may include

- prematurity, i.e., the plaintiff commenced the lawsuit before the underlying cause of action accrued;
- the plaintiff's interest in the pending lawsuit has terminated or transferred to another party;
- a lawsuit cannot proceed because of the death of either the plaintiff of the defendant; and
- there is a separate, identical lawsuit pending.⁸¹

In addition, irregularity in service of process may serve as the basis for a motion in abatement⁸² (though one “involving jurisdiction”)⁸³ and that, prior to 1961, a public official's retirement or resignation abated actions against him in his official capacity.⁸⁴ Abatement on the death of a party is not limited to natural persons, but includes the dissolution of a corporation as well.⁸⁵ Finally, abstention in favor of ongoing state-court proceedings has been held to constitute a matter in abatement.⁸⁶

Out of these decisions, courts have attempted to extract a workable definition of “matter in abatement.” They have largely been unsuccessful. In fact, there appear to be at least three competing interpretations, though courts sometimes allude to more than one definition as though they were complementary.

80. *Hyman v. City of Gastonia*, 466 F.3d 284, 287 (4th Cir. 2006).

81. *Id.*

82. *Knox v. Summers*, 14 F. Cas. 831 (C.C.D.C. 1805), *rev'd*, 7 U.S. 496 (1806) (holding that appearance by attorney waived irregularity of process).

83. *Goldey*, 156 U.S. 518.

84. *Snyder*, 340 U.S. at 22; *Bowles*, 175 F.2d at 38; *cf. Acheson v. Fujiko Furusho*, 212 F.2d 284 (9th Cir. 1954) (denying motions to dismiss and directing substitution of new office-holders as parties).

85. *U.S. Shipping Bd. Emerg. Fleet Corp. v. S. Atl. Dry Dock Co.*, 300 F. 56, 61 (5th Cir. 1924).

86. *Aetna St. Bank*, 430 F.2d at 754-55.

1. The Expansive Definition: Nonjurisdictional Dismissal without Prejudice

The least promising definition is a product of the Third Circuit's opinion in *Coastal Steel Corp. v. Tilghman Wheelabrator Ltd.*⁸⁷ In that case, the defendants sought review of both an order denying them leave to appeal an order from the bankruptcy court, and review of a district-court order affirming the bankruptcy court's dismissal of a related case.⁸⁸ The defendants maintained that a forum-selection clause on which their contract liability was premised dictated the claims to be adjudicated elsewhere.⁸⁹

The Third Circuit court considered, first, whether the collateral order doctrine permits interlocutory appeal of the denial of a motion to dismiss based on a forum-selection clause. Although the appellate jurisdiction of the courts of appeals is generally limited to "final decisions" of the district courts,⁹⁰ a small class of interlocutory, "collateral" orders are immediately reviewable if they conclusively determine issues that are important and completely separate from the merits, and will be effectively unreviewable on appeal from a final judgment.⁹¹ It is the last element of unreviewability on which the court focused.

The Third Circuit concluded at the outset that, because the collateral order doctrine did not yet exist when section 2105 was first enacted, that section applies only to appeals after a full trial "to prevent post-trial consideration of non-jurisdictional pleas in abatement."⁹² Next, the court defined "matter in abatement" broadly—to include all "those non-jurisdictional motions which, if granted, would result in the dismissal of an action without prejudice to its reconsideration when re-filed in another forum or in another pleading."⁹³ The court noted that a motion to dismiss on grounds of a forum selection clause fit that definition: it was not jurisdictional and had no bearing on the

87. 709 F.2d 190 (3d Cir. 1983).

88. *Id.* at 192.

89. *Id.*

90. See 28 U.S.C. § 1291 (available at <http://uscode.house.gov>).

91. See e.g. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978).

92. *Coastal Steel*, 790 F.2d at 196.

93. *Id.* (citing *Bowles v. Wilke*).

merits underlying the action.⁹⁴ Because the dismissal order was a matter in abatement and could not, under its reading of section 2105, be appealed after final judgment, the court determined that the order satisfied the third prong of the *Coopers & Lybrand* test for effective unreviewability.⁹⁵ And because the court had already held that section 2105 does not apply to interlocutory appeals, it was no bar to review before trial.⁹⁶ As a result, the court concluded that it possessed appellate jurisdiction over the non-final order denying the motion to dismiss. Not surprisingly, the case provoked one judge to concur with a lengthy and vigorous challenge to the majority's logic, which has not been followed elsewhere.

The chief problem with *Coastal Steel's* expansive definition of abatement is readily apparent. If review of an order denying a motion to dismiss based on a forum selection clause was barred by section 2105, appellate jurisdiction would not exist over a number of other types of orders as well. Abstention or deference to state, administrative, or private proceedings, motions to dismiss on grounds of forum non conveniens or, in some instances, improper venue, all fit the *Coastal Steel* definition.⁹⁷ Yet no one has seriously suggested that courts of appeals lack jurisdiction over these orders by reason of section 2105, and the concurring judge in *Coastal Steel* observes that given that section's obscurity, it would be anomalous to suggest that it represents a heretofore unknown, but striking, limitation on federal appellate jurisdiction, particularly since the point was raised only by way of inquiry into the collateral order doctrine.⁹⁸ "Matters in abatement," therefore, must mean something narrower than any (nonjurisdictional) ground for a dismissal without prejudice.

94. *Id.* at 196-97.

95. *Id.* at 197.

96. *Id.*

97. See *Coastal Steel*, 709 F.2d at 212 (Rosenn, J., concurring); Wright, Miller & Cooper, *supra* n. 1, at 142 n. 27 (noting the *Coastal Steel* definition is "not persuasive").

98. *Coastal Steel*, 709 F.2d at 212 (Rosenn, J., concurring); see also *Chasser v. Achille Lauro Lines*, 844 F.2d 50, 54 (2d Cir. 1988), *aff'd*, 490 U.S. 495 (1989) (collecting numerous cases including *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981) (review of forum non conveniens dismissal) and *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947) (same)).

Confidence in *Coastal Steel* is also hampered by problems with the majority's analysis apart from its definition of abatement. The Second Circuit observes that the majority's distinction between interlocutory appeals and appeals after final judgment with regard to section 2105 cannot hold because if Congress has stripped jurisdiction from the court, the Supreme Court is not empowered to revive it by announcing a new doctrine in the absence of a constitutional mandate.⁹⁹ In any event, the collateral order doctrine purports to be an application of, rather than a true exception to, the final judgment rule¹⁰⁰ and it assumes, aside from finality, that the order in question is otherwise reviewable.¹⁰¹ Finally, the majority's foundational suggestion that section 2105 was intended to reach only post-trial pleas in abatement seems highly suspect, as abatement precedes a determination on the merits; it is a request to refrain from a merits adjudication. I have found no authority suggesting that an action can abate after a determination on the merits.

2. *The Broad Definition: "Suspension or Defeat"*

The Fourth Circuit recently, in *Hyman v. City of Gastonia*,¹⁰² approached a more workable definition of what constitutes a matter in abatement. There, the court held that "[g]enerally speaking, abatement refers to '[t]he suspension or defeat of a pending action for a reason unrelated to the merits of the claim.'"¹⁰³ And a recent decision from the Ninth Circuit echoes this "suspension or defeat" language.¹⁰⁴ Conversely, a

99. *Chasser*, 844 F.2d at 53.

100. See e.g. *Behrens v. Pelletier*, 516 U.S. 299, 307 (applying collateral order doctrine and noting that denial of qualified immunity "is a 'final' judgment" within the meaning of section 1291).

101. *Chasser*, 844 F.2d at 53.

102. 466 F.3d 284 (4th Cir. 2006).

103. *Id.* at 287 (quoting *Black's Law Dictionary* 3 (Bryan A. Garner, ed., 8th ed. West 2004) (second set of internal brackets in original)). Curiously, *Hyman* also cites the Seventh Circuit's decision in *Bowles*, 175 F.3d at 38, which employs quite a different definition of abatement. See *infra* Part III.C.3.

104. *Andrews v. King*, 398 F.3d 1113, 1118 n. 5 (9th Cir. 2005) (citing *Black's Law Dictionary*). *Black's* also explains that, although suspension of an action may constitute abatement under some circumstances, abatement in that sense is not coterminous with a stay. *Black's Law Dictionary* 3 (Bryan A. Garner, ed., 9th ed. West 2009). *Black's* also notes that, unlike a stay, which may be denied in the discretion of the court, abatement of an action is a matter of right. *Id.*; cf. *Nken v. Holder*, 556 U.S. ___, ___, 129 S. Ct. 1749,

court may grant a stay where a plea in abatement could not be sustained.¹⁰⁵

This definition, although not as facially problematic as that employed in *Coastal Steel*, is not frequently employed. No court of appeals has addressed, in the context of this definition, what order might constitute a matter in abatement that suspends the action without defeating it. Although it is written more generally, this definition may suffer from the same problems as the *Coastal Steel* definition. Abstention, for example, suspends an action and is unrelated to the merits. In the absence of some compelling reason why a definition that is not well-pedigreed (Black's cites only the legal encyclopedia *Corpus Juris Secundum*) and not well known should be given any more credence than it presently has, the preferable course must be to define abatement through reasoning and reference to better authority.

3. *The Narrow Definition: "Overthrow or Destruction"*

Probably the most common definition of matter in abatement comes from *Bowles v. Wilke*, in which the Seventh Circuit explained that

[a]batement at law is the overthrow or destruction of a pending action apart from the cause of action. . . . it is [t]he overthrow of an action. . . which defeats the action for the present, but does not debar the plaintiff from commencing it in a better way.¹⁰⁶

The *Bowles* court relied on *McHie*, in which it had already concluded that

[t]he defense [of abatement] is one which merely defeats the present proceeding, and does not conclude the plaintiff forever, either as to his right to sue in the circuit court of the United States or as to the merits of the matter in dispute.¹⁰⁷

1754 (2009) (distinguishing a stay from an injunction: "the authority of a court of appeals to stay an order . . . is not affected by the statutory provision governing injunctions").

105. *Nken*, 556 U.S. at ___, 129 S. Ct. at 1761 (noting that former practice included automatic stay because alien's petition for review of an immigration decision once "abated upon [his] removal" from the United States).

106. *Bowles*, 175 F.2d at 37-38 (internal quotation marks omitted).

107. *McHie*, 78 F.2d at 353.

And the *McHie* court, in turn, quoted from *Stephens v. Monongahela National Bank*,¹⁰⁸ which appears to have been the Supreme Court's first and last word on the subject.¹⁰⁹ In addition to having the imprimatur of the Supreme Court, the *Bowles* definition remains relatively current.¹¹⁰

The *Bowles* definition has several advantages. It avoids the pitfalls courts have found with the *Coastal Steel* definition. Likewise, it bypasses the ambiguity in the *Hyman* definition. It is, as a general matter, consistent with modern notions of federal appellate jurisdiction by permitting review of orders that are now routinely reviewed. Finally, it is also relatively simple and, as a result, should not be difficult to apply. The most important substantive difference between this definition and the others is that an order that does not overthrow or destroy the action cannot be a matter in abatement. Under this definition, for example, it is clear that orders staying proceedings for any reason are not matters in abatement, and therefore there is no jurisdictional bar in section 2105 to their review. (Of course, 28 U.S.C. § 1291 may pose a greater barrier.) Dismissals on grounds of duplicity, capacity, or failure to substitute a successor in office under the old rule all fit under this definition. The action is defeated for the present—dismissed without prejudice—but the plaintiff's rights are not impaired (provided the statute of limitations has not expired). The plaintiff may file another action, for example, if the earlier-filed duplicate action

108. 111 U.S. 197 (1884).

109. The *Stephens* court, like that in *McHie*, cites *Piquignot*, 57 U.S. 104, and although *Stephens* treats *Piquignot* as turning on the predecessor to section 2105, see *Stephens*, 111 U.S. at 198, I am not convinced. The *Piquignot* court explained that the court below had followed the Pennsylvania practice of simply providing a record that a judgment had been made and in which party's favor instead of specifying the grounds for the judgment. As a result, on writ of error, the Supreme Court could not determine whether the circuit court had dismissed the action for lack of subject-matter jurisdiction due to a failure in the pleadings to allege the citizenship of the railroad company, or whether the court had abated the action as duplicative of another action pending in state court. Addressing jurisdiction first, the Supreme Court affirmed what it assumed to have been a dismissal for lack of subject-matter jurisdiction. As it appears that the Court never reached the question of abatement, I can only conclude that the predecessor to section 2105 never came into play.

110. See e.g. *Nascone v. Spudnuts, Inc.*, 735 F.2d 763, 771 (3d Cir. 1984) (noting that "a matter in abatement is a matter that *defeats* an action but that does not prevent it from being *commenced in a better way*") (italics in original); Wright, Miller & Cooper, *supra* n. 1, at 142 (quoting *Bowles*).

is also dismissed without prejudice, if the incapacity to sue or be sued is removed, or if the proper party is named.

D. Toward a Standard

Treating the statute's phrase "there shall be no reversal" as a notice that the rule is jurisdictional,¹¹¹ defining "matters in abatement" to include only those dismissals without prejudice on grounds other than the merits that destroy the action but not the cause of action,¹¹² and limiting the phrase "involve jurisdiction" to its intended role as an exception for those dismissals that relate to the court's power to adjudicate the present dispute,¹¹³ improves significantly upon the current interpretive goulash permeating section 2105. First, it casts aside the wholly unpersuasive¹¹⁴ and the bizarre¹¹⁵ arguments that some courts have suggested. Second, it provides a modicum of guidance regarding how the statute could be coherently applied to future cases. This is essential, as the infrequency of courts' citation to section 2105—which seems to increase as time passes—and the almost complete lack of commentary on, or explanation of, its language compounds as each new case rests on older ones, whose own foundations are not always clear.

Perhaps most importantly, this interpretation also suggests a decisional framework. The "reversal" factor, as it describes the nature of the statute but is not otherwise substantive, can be disregarded in analyzing whether a particular matter is reviewable. It provides the outcome of a positive analysis (dismissal), but is not itself a factor in determining whether a matter is reviewable. That inquiry is limited only by whether an order qualifies as a matter in abatement and whether it involves jurisdiction. These should not be independent inquiries. Only if an order qualifies as a matter in abatement should the jurisdictional exception be examined.¹¹⁶ Applying this

111. See *supra* Part III.A.

112. See *supra* Part III.B.

113. See *supra* Part III.C.

114. See *supra* Part III.A.

115. See *supra* Part III.C.1.

116. Unlike the rules articulated in *Pearson v. Callahan*, 555 U.S. ___, 129 S. Ct. 808 (2009) (qualified immunity) and *Strickland v. Wash.*, 466 U.S. 668 (1984) (ineffective

framework will prevent courts from reading the exception too broadly. It will also force them to grapple with the meaning of what it means, in the era of the federal rules, for an order to be a matter in abatement. To be sure, the question is a difficult one. But when squarely confronted with the issue, courts should at least attempt to find a reasonable place for this ancient law in modern practice. I believe such a place exists.

IV. ABATEMENT AS A MANDATORY RULE

One of the problems that confronted the *Coastal Steel* court was how to classify abatement—a category of ground upon which a case may be disposed—along a spectrum that does not readily admit of new categories. A court may resolve a case in a number of ways. First, a case may be dismissed for lack of jurisdiction if the court lacks the power to adjudicate the controversy for want of either subject-matter jurisdiction or personal jurisdiction over the parties. Once jurisdiction is secure, a case may still be dismissed for a number of reasons, and the dismissal may be with prejudice (that is, claim preclusion attaches: if the same claims are raised in another action against the same party, that action must itself be dismissed with prejudice) or without prejudice (that is, without claim preclusion, leaving the plaintiff free to raise the same claims again in a new action). Dismissal with prejudice may be appropriate, for example, if the defendant is immune from suit, as a sanction for severe abuse of the legal process, or, more often, if the complaint fails to state a claim and no amendment could save it. A dismissal without prejudice likewise may be granted for a number of reasons: if, for example, the allegations are not definite enough to permit an answer, but an amended complaint might be made, or if administrative remedies must be exhausted as a precondition to suit, but have not been. A complaint may also be dismissed without prejudice for prudential reasons: *forum non conveniens* and the several

assistance of counsel), section 2105 does not appear to envision a two-part test, in the application of which the order of decision is a matter of judicial discretion. The plain language of the statute suggests that the better reading is to construe it as stating a rule and an exception, and to infer that a court must find that the rule would otherwise apply before considering the applicability of the exception.

abstention doctrines come to mind.¹¹⁷ But if the court has the power to adjudicate the controversy, the complaint states a recognized cause of action, and there is no good reason to defer to proceedings in some other tribunal, the court will generally resolve the matter on the merits by determining the rights and liabilities of the parties based on the facts giving rise to the controversy.¹¹⁸

Abatement, as *Hyman* explains, is a species of dismissal without prejudice.¹¹⁹ It is a decision apart from the merits. At the same time, abatement is surely not a matter limited to jurisdiction, or else the exception in the statute would be unnecessary and the statute would apply to no cases at all. The Seventh and Ninth circuits have recognized that abatement falls between the two poles of jurisdiction and merits, but stopped there.¹²⁰ Yet the gulf between jurisdiction and merits is wide.¹²¹ Defining matters in abatement subject to section 2105 simply as non-judicial, non-merits dismissals without prejudice is not particularly helpful. This sort of negative definition (even a partial one) does not draw firm lines,¹²² nor does it square with the case law.¹²³ Something more is needed.

117. Abstention, of course, is “a common-law doctrine that ‘causes strange things to happen in federal courts.’” Frederic M. Bloom, *Jurisdiction’s Noble Lie*, 61 *Stan. L. Rev.* 971, 990 (2009) (quoting James C. Rehnquist, *Taking Comity Seriously: How to Neutralize the Abstention Doctrine*, 46 *Stan. L. Rev.* 1049, 1050 (1994)). But a consideration of abstention and its permutations is beyond the scope of this article.

118. See *Colo. River Water Conservation. Dist. v. U.S.*, 424 U.S. 800, 813, 817 (1976) (quoting *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185 (1959) in noting that district courts have a general duty to adjudicate cases properly before them and referring to federal courts’ “virtually unflagging obligation . . . to exercise the jurisdiction given them”).

119. *Hyman*, 466 F.3d at 287.

120. *Andrews v. King*, 398 F.3d 1113, 1118 n. 5 (9th Cir. 2005) (indicating that abatement is a non-merits issue); *Hayes v. Allstate Ins. Co.*, 722 F.2d 1332, 1333 n. 1 (7th Cir. 1983) (same).

121. *But see Lee*, *supra* n. 39.

122. *Cf. Aulson v. Blanchard*, 83 F.3d 1, 6 (1st Cir. 1996) (noting, in class-action context, the “ambiguities inherent in . . . negative definition” and that such a definition “draws no readily identifiable line”). The difficulty is lessened when the choice of definitions is binary, see *Sentinel Comms. Co. v. Watts*, 936 F.2d 1189, 1202 (11th Cir. 1991) (discussing differences between “public” and “non-public” fora in First Amendment context), but that is not the case here.

123. Here is just one example: Dismissals without prejudice to re-filing after exhausting administrative remedies are common in actions filed by prisoners subject to the restrictions of the Prison Litigation Reform Act. Exhaustion is an affirmative defense; it is a non-

Marshalling the orders that do fall within a negative definition is a useful starting point for analysis of what that “something more” might be.¹²⁴ The class relevant here, that defined as cases involving non-jurisdictional, non-merits dismissals without prejudice, is large. It would include, at a minimum, *Younger*,¹²⁵ *Burford/Thibodaux*,¹²⁶ and *Colorado River*¹²⁷ abstentions (but not *Pullman*¹²⁸ abstentions); dismissals due to lack of capacity of a party to sue or be sued, including dismissals due to death, corporate dissolution, and (prior to the enactment of Fed. R. Civ. P. 25) successors in public office;¹²⁹ failure to exhaust administrative remedies; improper venue;¹³⁰ forum non conveniens;¹³¹ failure to pay the filing fee or file a proper motion to proceed *in forma pauperis*; and likely more. Of course, most of these types of orders are routinely reviewed by the appellate courts. What distinguishes those that should fall within section 2105 from those that should not? I suggest that in

merits, non-jurisdictional dismissal without prejudice. Yet the question of exhaustion is routinely heard and decided by the courts of appeals. See e.g. *Woodford v. Ngo*, 548 U.S. 81, 81 (2006) (holding in a PLRA case that “proper exhaustion of administrative remedies is necessary” and reversing the Ninth Circuit’s decision that the exhaustion requirement could be satisfied by actions that do not follow established procedural rules).

124. Cf. *Hershey Foods Corp. v. Hershey Creamery Co.*, 945 F.2d 1272, 1276-77 (3d Cir. 1991) (beginning analysis of injunction orders under 28 U.S.C. § 1292(a)(1) by reviewing types of orders that have been held not to fall under the section).

125. *Younger v. Harris*, 401 U.S. 37 (1971) (holding that federal courts are barred from hearing civil rights torts claims by a person who is being criminally prosecuted in state court for his actions arising from the same course of events).

126. See *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943); *La. Power & Light Co. v. City of Thibodaux*, 360 U.S. 25 (1959), together holding that courts sitting in diversity are permitted to defer to state courts where state courts have special expertise in a complex area of state law, or where the action concerns issues of state law of great importance to the state, such that a federal court’s exercising jurisdiction would infringe on state sovereignty.

127. *Colo. River*, 424 U.S. at 819-20 (holding federal litigation duplicative and indicating that it should be dismissed in deference to comprehensive state proceedings).

128. Abstentions under *Railroad Commn. of Tex. v. Pullman Co.*, 312 U.S. 496 (1941), involve stays only, not dismissals. In a case of this type, the district court retains jurisdiction while state courts resolve issues of state law. Accordingly, a *Pullman* abstention would not fall within this negative definition of matters in abatement.

129. See *supra* nn. 51-55 and accompanying text.

130. See Wright, Miller & Cooper, *supra* n. 1, at 142 n. 27. Dismissals for improper venue are rare when transfer to another federal court is possible. See e.g. 28 U.S.C. § 1404(a) (providing that “a district court may transfer any civil action to any other district or division where it might have been brought”) (available at <http://www.uscode.house.gov>).

131. See Wright, Miller & Cooper, *supra* n. 1, at 142 n. 27 (contrasting *Coastal Steel* with *Chasser*).

order for a non-jurisdictional, non-merits dismissal without prejudice to fall within section 2105, the dismissal must be predicated on a mandatory rule.

In several recent articles Scott Dodson and other scholars have begun the work of severing the word “mandatory” from the oft-invoked phrase “mandatory and jurisdictional,” and describing the characteristics that might make a rule mandatory without being jurisdictional.¹³² Dodson explains that a true jurisdictional rule is not subject to waiver, forfeiture, consent, or estoppel; that it must be policed by the court *sua sponte*; and that it can be raised at any time by any party or the court.¹³³ A mandatory rule, in contrast, is not jurisdictional in the sense of affecting the power of the court to adjudicate a particular class of disputes, but it may nonetheless possess certain jurisdictional qualities.¹³⁴ Dodson suggests that a mandatory rule is subject to waiver, forfeiture, consent, and estoppel, it need not (yet perhaps may) be policed by the court *sua sponte*, but importantly, if it is properly invoked, the court “has no discretion to excuse noncompliance.”¹³⁵ The definition of matters in abatement that I suggested above would make them fall within this category:

- Abatement does not affect the power of the court to adjudicate a controversy;
- It perhaps could be, but generally is not, policed by the court *sua sponte*; and
- When it is properly raised, courts do not appear to believe that they have discretion to continue the litigation.

Thus, abatement is a mandatory rule. A dismissal without prejudice is a matter in abatement only when it is the result of a

132. See e.g. Dodson, *supra* n. 75 (examining waiver, forfeiture, consent, equitable exceptions, and *sua sponte* policing as attributes of mandatory rules).

133. *Id.* at 5 (citing cases).

134. *Id.* at 9 (explaining that “[a] mandatory rule is nonjurisdictional but nevertheless has the jurisdictional attribute of being unsusceptible to equitable excuses for noncompliance”).

135. *Id.*

non-jurisdictional condition precedent to suit or to a decision on the merits that is not fulfilled.¹³⁶

This rule can be illustrated by examining those categories in which either a stay or a dismissal might result. Compare, for example, *Younger* abstention with the failure to exhaust administrative remedies: In both situations, the court may either order a stay or order the complaint dismissed while the state court or administrative tribunal proceeds. Generally, it seems, courts have a preference for dismissal, but if there is good cause for a stay (for example, if the other proceedings do not toll the statute of limitations), stays are granted as well.¹³⁷ In either case, if the court enters a stay, that order does not destroy the action, but merely suspends it, so the stay order is not a matter in abatement. If, however, the court dismisses the complaint, there is a difference. *Younger* abstentions are mandatory. That is, courts have no discretion to proceed further once the standard for abstention is met.¹³⁸ It is a non-jurisdictional, non-merits condition precedent to a decision on the merits, so review of the district court's decision should be prohibited. Failure to exhaust, however, is an affirmative defense.¹³⁹ Courts have no obligation to raise it on their own and, indeed, should not unless it is plain on the face of the complaint that the action is frivolous.¹⁴⁰ Because the courts are permitted to entertain actions when there

136. As I use the term "mandatory" here, I mean that the rule does not go to the power of the court to adjudicate the dispute, but is one that must be satisfied nonetheless before the court will do so. This is actually somewhat narrower than Dodson's use. *See id.*

137. *See e.g. Tucker v. Kingston*, 538 F.3d 732, 735 (7th Cir. 2008) (explaining, in habeas context, that either dismissal or stay may be appropriate, depending on certain factors including statute of limitations: "[D]istrict courts are to consider whether a stay might be more appropriate than an outright dismissal").

138. *See New Orleans Pub. Serv., Inc. v. City of New Orleans*, 491 U.S. 350, 364 (1989) (observing that *Younger* held that "federal courts should not enjoin pending state criminal prosecutions"); *Middlesex County Ethics Comm. v. Garden St. Bar Assn.*, 457 U.S. 423 (1982) (instructing federal court of appeals to abstain from deciding a challenge to state disciplinary rules so long as a state action was pending); *Sendak v. Nihiser*, 423 U.S. 976, 978 (1975) (Brennan, Stewart & Marshall, JJ., dissenting from order vacating judgment and remanding case for further consideration) (noting that *Younger* is a "limit").

139. In *Jones v. Bock*, 549 U.S. 199, 211-12 (2007), the Supreme Court held exhaustion under the Prison Litigation Reform Act to be an affirmative defense, and suggested that, absent a special pleading requirement in the Federal Rules of Civil Procedure, it was the default position for all exhaustion requirements.

140. *Walker v. Thompson*, 288 F.3d 1005, 1009-10 (7th Cir. 2002) (Posner, J.) (collecting cases); *see also Pino v. Ryan*, 49 F.3d 51, 53 (2d Cir. 1995).

has been a failure to exhaust administrative remedies but the defendant has elected not to raise the point, the rule is not mandatory, the issue is not a matter in abatement, and, accordingly, it is not barred from appellate review by section 2105.

Defining matters in abatement subject to section 2105 in this way has several useful advantages. First, the definition is quite narrow (narrower even than that required by my synthesis of the cases above), and therefore potentially upsets as little settled law as possible. Reading the statute to forbid appellate review of orders relating to abstention, improper venue, or forum non conveniens should be avoided, as the Supreme Court hears such issues with some regularity.¹⁴¹

Second, this definition makes sense with regard to the division of labor between the district and appellate courts. Most final judgments should be appealable. Experience makes clear that section 2105, if it is anything, is an exception to the general rule embodied in 28 U.S.C. §1291.

Next, the proposed definition can be applied in practice. There are few rules unrelated to jurisdiction that must be fulfilled before a court will entertain an action. They include payment of the filing fee (or properly filing a motion to waive it); *Younger* abstentions that result in dismissal; and failure to substitute a deceased party within ninety days after the personal representative is served with the suggestion of death.¹⁴² There may be more, but not likely many.¹⁴³ And these issues are generally so fact intensive that little would be accomplished by permitting review. It seems unlikely that a court of appeals would ever find that a district judge clearly erred in determining whether a filing fee has been paid or whether a motion to substitute was filed.

141. See *Sinochem Intl. Co. v. Malay Intl. Shipping Corp.*, 549 U.S. 422 (2007) (forum non conveniens); *Lauro Lines S.R.L. v. Chasser*, 490 U.S. 495 (1989) (forum-selection clause); Wright, Miller & Cooper, *supra* n. 1, at 142 n. 27.

142. See Fed. R. Civ. P. 25(a)(1) (available at <http://uscode.house.gov>). The language of Rule 25(a)(2), indicating that "the action does not abate" after the death of a party, suggests that the mandatory dismissal explained in subsection (a)(1) is called abatement.

143. Perhaps dismissal under the doctrine of *Totten v. U.S.*, 92 U.S. 105 (1875) (prohibiting actions against the government based on covert espionage agreements), would be among them. I make no attempt to assemble an exhaustive list, but note only that its components are few.

Finally, this definition is largely consistent with historical precedent. At common law, abatement was broader than jurisdiction, applying when, for reasons unrelated to the merits of the case, the action could not be maintained as filed, though a new action might cure the defect. The apparent rationale for abatement at common law was that once the basis for the abatement was brought to the attention of the court, the action could not proceed and there was no alternative to dismissal. This rationale is carried forward under section 2105 by excluding from the definition of abatement matters that are discretionary or otherwise do not prevent a resolution of the case on the merits.

The current state of the law could be brought into accord with this framework without much difficulty, although it would require some adjustments. The first roadblock concerns *Stephens*, *Piquignot*, and *Colorado River*. *Stephens* and its reading of *Piquignot* hold that a dismissal on the ground that the action duplicates another is a matter in abatement and unreviewable under section 2105. The *Colorado River* Court, by contrast, reviews an order dismissing an action as duplicative. But this is less a problem of application and more a problem of synthesizing precedent. Given that *Colorado River* is by far the more recent case, perhaps it would simply be best to consider *Stephens* implicitly overruled to the extent that it conflicts with that decision. The other obstruction is the small array of orders that are presently reviewed but, under this interpretation of section 2105, ought not to be.¹⁴⁴ Put simply, they should not be reviewed. It is possible that section 2105 extends only to review of the facts. But that seems unlikely given that the section states generally that “there shall be no reversal,” not that there shall be no reversal with regard to law only. And as there was a separate prohibition on review of facts in the predecessor to section 2105 as early as the eighteenth century, the logical conclusion is that section 2105 is intended to include reversals on the law as well.

144. See e.g. *Atkins v. City of Chicago*, 547 F.3d 869 (7th Cir. 2008) (Posner, J.) (reviewing order under Rule 25(a)).

V. CONCLUSION

In the 220 years since it was first enacted, Congress has altered the prohibition on reviewing non-jurisdictional matters in abatement remarkably little. The legal world, in contrast, has undergone singular change. As a result, incorporating section 2105 into the modern legal vernacular has proved surprisingly difficult. Courts have ignored it,¹⁴⁵ abused it,¹⁴⁶ and pushed and pulled it,¹⁴⁷ some for no reason other than unfamiliarity.¹⁴⁸ Functionally, the provision remains potentially a useful tool in limiting appellate jurisdiction and conserving judicial resources. Given an appropriate level of analysis, the statute can be applied coherently and, although it is not likely to be invoked frequently, a more nuanced understanding of its provisions would offer much to the ongoing exploration of the nature of the jurisdiction-merits spectrum. And indeed, that analysis by courts and scholars has already suggested a new class of mandatory rules. Repeal of section 2105 is certainly unnecessary. The work essential to a modern understanding of the statute has only begun.



145. Wright, Miller & Cooper, *supra* n. 1, at 141.

146. *Coastal Steel*, 709 F.2d at 196-97 (characterizing 2105 as among the sections of Title 28 “most commonly ignored”).

147. *Snyder*, 340 U.S. at 22 (construing “involve jurisdiction” broadly); *Alcon Labs.*, 636 F.2d at 885 n. 2 (construing “reversal” narrowly).

148. *See* n. 27, *supra*, and accompanying text.