

THE JURISDICTIONAL TIME LIMIT FOR AN APPEAL: THE WORST KIND OF DEADLINE— EXCEPT FOR ALL OTHERS*

*E. King Poor***

“In order to know what it is, we must know what has been, and what it tends to become.”
—*Oliver Wendell Holmes****

Notices of appeal have traveled to courthouses in many ways over the past century and a half: horse-drawn carriage, steam locomotive, gas-powered truck, propeller and jet planes, and now, in some districts, by electronic case filing. But whatever the mode of delivery, there has been remarkable uniformity as to how federal judges have treated notices of appeal when they have arrived past the deadline set by Congress. This time limit has always been deemed to be “jurisdictional,” meaning that neither the parties nor the trial judge could change it and the appellate court could raise it on its own. While American law has changed in countless ways since the mid-nineteenth century, the fundamental nature of time limits has not, nor has the judicial treatment of the time for an appeal. So the question arises, is this longstanding treatment of the time for an appeal simply the result of hundreds of judges unthinkingly following precedent? Or is there something else going on here? There is something else. And this Essay explains what that is and why. In particular, practical experience teaches that the judicial system as a whole works far better—with greater stability and overall

* With apologies to Winston Churchill for borrowing from his remark: “[D]emocracy is the worst form of government except for all other forms that have been tried from time to time.” 444 PARL. DEB., H.C. (5th ser.) (1947) 206–07.

** Partner, Quarles & Brady LLP, Chicago, IL. I did not set out to become steeped in this topic. But having represented the petitioner in the Supreme Court in the *Kontrick* case discussed in this Essay, I saw that the questions surrounding this topic over the past four years are essentially the same ones that have been raised for generations and that this history is instructive. See E. King Poor, *Jurisdictional Deadlines in the Wake of Kontrick and Eberhart: Harmonizing 160 Years of Precedent*, 40 CREIGHTON L. REV. 181 (2007). Also, I would like to thank Professor Richard D. Freer of Emory University School of Law for his comments on a draft of this Essay and my assistant, Mary A. Sullivan, for her help on this project.

*** OLIVER WENDELL HOLMES, *THE COMMON LAW* 5 (Mark DeWolfe Howe ed., Harvard Univ. Press 1963) (1881).

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fairness—when the time for an appeal cannot be manipulated by the parties or overridden by the trial court and thus is treated as jurisdictional.

This Essay responds to those of Professors Scott Dodson and Elizabeth Chamblee Burch.¹ Each of their essays criticizes the Supreme Court's recent decision in *Bowles v. Russell*, which held that the time for filing an appeal in civil cases under 28 U.S.C. § 2107(c) is jurisdictional.² Professor Dodson argues that *Bowles* is only half right because, though the statutory deadline to file an appeal should not be deemed "jurisdictional," it should still be considered "mandatory" in the sense that—if timely raised—it will be enforced without resort to equitable exceptions.³ Professor Burch, on the other hand, maintains that Professor Dodson is only half right because *Bowles* is all wrong. She argues that the statutory deadline for an appeal is neither mandatory nor jurisdictional, and that it should be malleable based on general equitable exceptions whether or not it is timely invoked.⁴

This Essay looks at the issue differently. It begins with the recognition that thousands of federal court decisions over a century and a half have unequivocally held that the time for filing an appeal is jurisdictional and that Congress has never intervened to change that view. As such, close to 160 years of case law could not have been silently swept away by *dicta* in Supreme Court decisions over the past three years dealing with other deadlines, as Professors Dodson and Burch suggest.

The Essay next examines the reasons behind this history. While much of the criticism of *Bowles* has revolved around theoretical arguments about the precise meaning of the word "jurisdiction" or the particular facts of the case itself, the decisions holding that a timely appeal is jurisdictional have persisted for practical reasons. To understand these reasons, several hypothetical situations are presented. These illustrate that ignoring an unambiguous time limit set by statute in the name of "flexibility" or "equity" is hardly innocuous and actually causes uncertainty and confusion as to when a judgment is final, invites wasted resources in sorting out whether exceptions apply, and undermines the reliability and evenhandedness that are essential for a system of justice. As a result, there are sound reasons why generations of federal judges have consistently treated this deadline as jurisdictional. Thus, *Bowles* is a reaffirmation of this long line of authority and was correctly decided.

¹ Scott Dodson, *Jurisdictionality and Bowles v. Russell*, 102 NW. U. L. REV. COLLOQUY 42 (2007), <http://www.law.northwestern.edu/lawreview/colloquy/2007/21/>; Elizabeth Chamblee Burch, *Nonjurisdictionality or Inequity*, 102 NW. U. L. REV. COLLOQUY 64 (2007), <http://www.law.northwestern.edu/lawreview/colloquy/2007/24/>.

² 127 S. Ct. 2360 (2007).

³ Dodson, *supra* note 1, at 46–47.

⁴ Burch, *supra* note 1, at 67.

I. THE WORLD OF JURISDICTIONAL DEADLINES DID NOT BEGIN IN 2004

The *Bowles* case arose when counsel for a habeas petitioner did not receive notice of a judgment denying the petition before the thirty-day time limit for an appeal under 28 U.S.C. § 2107(a) expired.⁵ Yet § 2107(c), as well as a parallel provision in Federal Rules of Appellate Procedure 4(a)(6),⁶ provide a safeguard for such situations and allow an appeal to be reopened for another fourteen days if a party did not receive notice of the judgment and other conditions are met.⁷ In *Bowles*, counsel for the habeas petitioner moved to reopen the time to appeal and correctly cited the provision allowing another fourteen days to appeal.⁸ The district court granted the request to reopen, but incorrectly added another three days to the fourteen days permitted by statute and the rule.⁹ The petitioner's counsel then filed an appeal two days after the fourteen days allowed by statute. The Supreme Court affirmed the Sixth Circuit's unanimous decision that it did not have jurisdiction to consider an appeal that was filed beyond the time set by statute.¹⁰

Professors Dodson and Burch begin their criticisms of *Bowles* by arguing that it is inconsistent and a “break from recent, uniform precedent characterizing time limits as nonjurisdictional.”¹¹ But such criticism overlooks too much history; it treats the subject of jurisdictional deadlines as if it sprang into being in the year 2004 with the Supreme Court's decision in *Kontrick v. Ryan*.¹² In *Kontrick*, the Court held that a deadline set by a bankruptcy rule for objecting to discharge was not jurisdictional, but something else—what it referred to for the first time as a “claim-processing rule.”¹³ The *Kontrick* decision was followed in 2005 by *Eberhart v. United States*, in which the Court held that the time to move for a new trial under the Federal Rules of Criminal Procedure was not jurisdictional as lower federal courts had always held, but instead was also a claim-processing rule

⁵ *Bowles v. Russell*, 432 F.3d 668, 670 (6th Cir. 2005).

⁶ FED. R. APP. P. 4(a)(6).

⁷ To reopen a judgment, § 2107(c) also requires that the notice be received more than 21 days after it was entered, that no party be prejudiced, and that the motion to reopen be filed within 180 days of the judgment or 7 days after it was received whichever is earlier. 28 U.S.C. § 2107(c) (2006).

⁸ *Bowles*, 432 F.3d at 670.

⁹ *Id.*

¹⁰ *Bowles v. Russell*, 127 S. Ct. 2360, 2366 (2007).

¹¹ See Burch *supra* note 1, at 65; Dodson, *supra* note 1, at 44

¹² 540 U.S. 443 (2004)

¹³ *Id.* at 444. The “claim-processing rule” that the Court described for the first time in *Kontrick* was not a typical nonjurisdictional deadline. The Court stated it was one that could be “forfeited,” if not timely raised. *Id.* at 458. But, at the same time, the Court pointed out that whether the rule setting the time limit “could be softened on equitable grounds is therefore a question we do not reach.” *Id.* at 457. The Court also stated that it did not suggest that parties could stipulate to extend the time limit when it would prejudice creditors. *Id.* at 458 n.11.

like that in *Kontrick*.¹⁴ But the Court's longstanding case law holding that the statutory time for an appeal is jurisdictional was not at issue in *Kontrick* or *Eberhart*. And since the time of Chief Justice Marshall, it has been settled that when deciding other issues the Court does not overrule other authority directly on point.¹⁵ Therefore, neither *Kontrick* or *Eberhart* could have overturned such deeply entrenched precedent.

Moreover, the debate about jurisdictional deadlines did not begin in 2004; it is really quite old. Thousands of reported decisions, reaching back to the 1840s, have concluded that a small group of deadlines—chief among them the time to appeal—are jurisdictional or “jurisdictional in nature,” and thus cannot be altered by the parties or ignored by the courts.¹⁶ Therefore, when Professors Dodson and Burch criticize Justice Thomas's opinion in *Bowles*,¹⁷ they are taking to task not just that opinion, but also federal judges in thousands of decisions.¹⁸ They are also criticizing such eminent scholars of the federal courts as the late Professor Charles Alan Wright, whose well-known treatise states—as the Court noted in *Bowles*—that “[t]he rule is well settled that failure to file a timely notice of appeal defeats the jurisdiction of a court of appeals.”¹⁹ And the inveterate rule that a

¹⁴ 546 U.S. 12 (2005) (per curiam).

¹⁵ As the court stated in *Hohn v. United States*: “This is not to say opinions passing on jurisdictional issues *sub silentio* may be said to have overruled an opinion addressing the issue directly.” 524 U.S. 236, 252 (1998) (citing *United States v. More*, 7 U.S. 159 (1805) (Marshall, C.J.)). The issue of the jurisdictional nature of other time limits is still before the Court. On November 6, 2007, the Supreme Court heard oral argument in *John R. Sand & Gravel Co. v. United States*, No. 06-1164 to decide whether the time to bring an eminent domain action against the government is jurisdictional, as the Court has held since the 1880's.

¹⁶ The Supreme Court's precedent has been consistent for a century and a half. See, e.g., *Barnhart v. Peabody*, 537 U.S. 149, 159 n.6 (2003) (noting that it is an “accepted fact that some time limits are jurisdictional”) (Souter, J.); *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 203 (1988) (noting that the time for appeal is mandatory and jurisdictional); *Browder v. Director of Dept. of Corrections*, 434 U.S. 257, 264 (1978) (recognizing that the time to appeal under statute “set[s] a definite point of time when litigation shall be at an end” and therefore is jurisdictional); *United States v. Robinson*, 361 U.S. 220, 226 (1960) (explaining that the time for criminal appeal is “mandatory and jurisdictional” and if it is to be changed, that is for the rule makers); *Old Nick Williams Co. v. United States*, 215 U.S. 541, 545 (1910) (stating that the trial court “had no power” to extend time for appeal after the time limit had expired); *Credit Co. v. Ark. Cent. R.R. Co.*, 128 U.S. 258, 261 (1888) (dismissing appeal after oral argument; since time to appeal expired, it cannot be “called back”, and if it could, then the time limit would be a “dead letter”); *Edmondson v. Bloomshire*, 74 U.S. 306, 310 (1869) (noting that time to appeal involved “foundations of our jurisdiction” and late appeal dismissed, even though no party objected); *United States v. Curry*, 47 U.S. 106, 113 (1848) (explaining that Congress sets time for appeal, and untimely appeal dismissed for “want of jurisdiction”).

¹⁷ See Dodson, *supra* note 1, at 44; Burch *supra* note 1, at 66.

¹⁸ As an approximate measure of the huge number of cases holding that the time to appeal is jurisdictional, a Lexis Nexis Shepard search using the terms “jurisdiction!” within 20 words of “deadline,” “period,” or “time” shows that just one decision, *United States v. Robinson*, 361 U.S. 220 (1960), holding that the time to appeal is jurisdictional, has been cited over 1,300 times using those criteria.

¹⁹ *Bowles v. Russell*, 127 S. Ct. 2360, 2364 (2007) (quoting 15A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3901 (2d ed. 1992)). See also CHARLES ALAN WRIGHT, LAW

timely appeal is jurisdictional is not limited to federal courts; it has long been a fundamental precept of state court jurisprudence as well.²⁰

Yet the criticism of Professors Dodson and Burch does not stop with judges and law professors; it goes right to Congress. It is a well-known principle that if a statute enacted by Congress has been construed by the courts in a certain way and Congress does not intercede to change that interpretation, then Congress has implicitly endorsed that interpretation.²¹ As noted above, for close to 160 years, the Supreme Court has stated time and again that the statutory deadline for an appeal is jurisdictional.²² Yet Congress has never altered that precedent, and thus has tacitly endorsed it. In fact, in other cases, the passage of fifteen or thirty years without Congressional action has been deemed to fortify the Court's interpretation of a statute.²³ Therefore, if the principle of Congressional endorsement of judicial precedent has any meaning, it applies when Congress has not acted to change over a century and a half of case law.

As such, can it be that generations of judges, lawyers, professors, and Congress have all had it wrong? That is not likely. The principles of stare decisis, reinforced by Congress' unspoken endorsement, should counsel against a quick dismissal of *Bowles* as being "overly technical" or not adhering sufficiently to dicta in decisions such as *Kontrick* and *Eberhart* since 2004. The concerns raised by Professor Dodson about "wasted resources" and by Professor Burch about "equity," though understandable, are essentially the same arguments that have been made all along.²⁴ And all along,

OF FEDERAL COURTS § 104 (5th ed. 1994) ("[T]he notice of appeal is the one jurisdictional prerequisite to an appeal.").

²⁰ A sample of decisions in 2007 alone shows that the rule is also pervasive among state courts. *See, e.g.*, *Reidy v. Whitehart Ass'n.*, 648 S.E.2d 265, 271 (N.C. Ct. App. 2007) (noting that a timely notice of appeal is jurisdictional); *Rahn v. State*, 736 N.W.2d 488, 491 (N.D. 2007) (explaining that a timely notice of appeal is "mandatory and jurisdictional and cannot be waived by the appellate court"); *People v. Anderson*, 872 N.E.2d 581, 591 (Ill. App. Ct. 2007) (recognizing that timely appeal is jurisdictional and court required to dismiss untimely appeal "even if no party to the appeal has raised the issue"); *Moore v. Wilson*, 966 So. 2d 853, 855 (Miss. Ct. App. 2007) ("Timely notice of appeal is jurisdictional."); *James v. State*, 158 P.3d 905, 908 (Ariz. Ct. App. 2007) (stating that the law is settled that "perfecting of an appeal within the time prescribed is jurisdictional"); *Day v. Civil Service Comm'n*, 931 A.2d 646, 651–52 (Pa. 2007) ("Timeliness of an appeal involves jurisdiction.").

²¹ *See, e.g.*, *Patterson v. McLean Credit Union*, 491 U.S. 164, 172–73 (1989) ("Considerations of stare decisis have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done.").

²² *See* discussion *supra* note 15 and accompanying text.

²³ *Shepard v. United States*, 544 U.S. 13, 21 (2005) ("[T]ime has enhanced even the usual precedential force, nearly 15 years having passed [since the Court's interpretation of the statute] without action by congress to modify the statute . . ."); *Hilton v. South Carolina Public Ry. Comm'n*, 502 U.S. 197, 202 (1991) ("Congress has had almost 30 years in which it could have corrected our decision in *Parden* if it disagreed with it, and has chosen not to do so. We should accord weight to this continued acceptance of our earlier holding.").

²⁴ As far back as 1869, the Court noted in *Edmondson v. Bloomshire*, when reaffirming that the statutory time to appeal is jurisdictional, that if this view was "deemed unwise or inconvenient" it was

such arguments have been weighed in the balance, and courts have still concluded that the time set by statute to appeal is no ordinary deadline.

This time limit is the one action that marks whether a lawsuit will end or whether it will continue on in a new court. Much is at stake for the parties, the court system, and society at large, in knowing whether a judicial decision has come to rest and cannot be altered or may still be overturned or modified by a reviewing court. Those who create the time limits—Congress and the rulemakers—have already established clearly defined exceptions and safe harbors,²⁵ and therefore, to allow parties an indefinite period to appeal based on notions of “equity” undermines stability and reliability, creates delay, and adds expense. First, giving the parties or the trial court discretion to alter the time to appeal indefinitely means that there will be no assurance as to when a judicial pronouncement is really final. The lives of individuals and organizations rely on the finality of a court’s decision. To allow a judgment to be altered for an open-ended period is unfair to all who have placed their reliance on a court’s ruling. Second, keeping the time to appeal always open for equitable exceptions invites more litigation as to whether such exceptions apply and thus engenders more delay and expense. Finally, when considering “equity,” replacing the express language of the statute with ad hoc exceptions scarcely contributes to the sense that the law has been applied equally to all.²⁶ Thus, while there have always been arguments for more exceptions beyond those already provided, courts have consistently held that ensuring reliability and evenhandedness and avoiding additional cost and delay are themselves important values such that the time to appeal cannot be changed by the parties’ actions or inactions, or by the deliberate or inadvertent actions of the trial court.²⁷

for Congress to change, rather “than that the court depart from its settled course of action for a quarter of a century.” 74 U. S. 306, 311(1869). Ninety years later, the Court made much the same observation in *United States v. Robinson*, though “powerful policy arguments may be made both for and against greater flexibility” regarding the jurisdictional nature of the time to appeal, that was a matter for the rulemaking process and not the Court. 361 U.S. 220, 229 (1960).

²⁵ See *infra* note 45 and accompanying text.

²⁶ The Court in *Bowles* noted that while exceptions created by Congress would give “rise to litigation testing their reach,” such statutory exceptions “would likely lead to less litigation than court-created exceptions without authorization.” *Bowles v. Russell*, 127 S. Ct. 2360, 2367 (2007).

²⁷ Sampling courts of appeals decisions for over a century shows how little this issue has changed and the consistent approach courts have taken to it. See, e.g., *Marquez v. Mineta*, 424 F.3d 539, 541 (7th Cir. 2005) (suspending briefing and holding that the district court did not properly extend the time for appeal and dismissing the appeal for lack of jurisdiction); *Lewis v. IRS*, 691 F.2d 858, 859 (8th Cir. 1982) (dismissing late appeal because it was the court’s “duty to observe it and to dismiss the petition even if the respondent had not raised the point, or attempted to waive it”); *Reed v. Michigan*, 398 F.2d 800, 801 (6th Cir. 1968) (per curiam) (holding that timely appeal is jurisdictional and “this Court cannot waive or modify that requirement”); *Slater v. Peyser*, 200 F.2d 360, 361 (D.C. Cir. 1952) (dismissing appeal dismissed because parties could not stipulate to extend the time for post-trial motion to toll appeal period); *Nw. Pub. Serv. Co. v. Pfeifer*, 36 F.2d 5, 8 (8th Cir. 1929) (finding that though “counsel for appellees made no objection,” late appeal dismissed because statutory time limit is jurisdictional and “no acquiescence by parties could affect it”); *Stevens v. Clark*, 62 F. 321, 324 (7th Cir. 1894) (holding that

Criticism of *Bowles* tends toward either the abstract or overly particular. Some of the debate focuses on concepts such as whether this deadline is “structural” or “systemic,” or the meaning of the word “jurisdictional.” Other criticism narrowly focuses only on the particular facts of *Bowles*. But, looking at this question from too far away or too close obscures the practical difficulties of applying a time limit impartially and without manipulation—especially for an appellate system that received over 66,000 new appeals in 2006 alone.²⁸

Professors Dodson and Burch discuss whether time limits should be considered “structural” (meaning jurisdictional) versus “systemic” (meaning non-jurisdictional).²⁹ But it is not self-evident that the time for filing an appeal is any more or less “structural” than other requirements for subject matter jurisdiction. For example, whether a plaintiff can allege a claim in excess of \$75,000 for diversity jurisdiction under 28 U.S.C. § 1332(a) is certainly a “technical” requirement. Yet parties cannot simply agree to litigate a claim for \$74,000 in federal court, and a judge could not overlook that “technicality” if they did.

In addition, while thousands of decisions have stated that a timely appeal is “jurisdictional” or “jurisdictional in nature,” only with Justice Ginsburg’s opinion in *Kontrick* did the observation emerge that courts, including the Supreme Court, had been “less than meticulous” when using the term.³⁰ But arguments about whether time limits are “structural” or “systemic,” or whether they are purely “jurisdictional,” fail to explain why the law has always treated certain deadlines differently than others. To understand this difference, it is helpful to begin with Justice Holmes’ observation that “[t]he life of the law has not been logic: it has been experience.”³¹ A few scenarios illustrate the practical reasons why courts have treated the statutory time to appeal as jurisdictional.

the statutory time for review jurisdictional and “neither consent nor anything can take the place of it, at the option of the parties”).

²⁸ See ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, FEDERAL COURT MANAGEMENT STATISTICS (2006), <http://www.uscourts.gov/fcmstat/index.html>.

²⁹ Dodson, *supra* note 1, at 47; Burch, *supra* note 1, at 66.

³⁰ *Kontrick v. Ryan*, 540 U.S. 443, 454 (2003). After first describing the past use of the term as “less than meticulous,” two years later Justice Ginsburg then described it as “profligate” in *Arbaugh v. Y&H Corp.* 540 U.S. 500, 510 (2006). And in his dissent in *Bowles*, Justice Souter states that courts have been “insidiously tempted” in their use of the word. *Bowles v. Russell*, 127 S. Ct. 2360, 2367 (2007). But the law has always functioned with a variety of meanings for the word “jurisdiction.” For example, in describing the several ways in which “jurisdiction” is used, Judge Easterbrook stated in *Am. Nat’l Bank & Trust Co. v. City of Chicago* that “[w]e do not think the precise characterization matters, however, because ‘jurisdiction is a verbal coat of too many colors.’” 826 F.2d 1547, 1552 (7th Cir. 1987) (quoting *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 39 (1952) (Frankfurter, J., dissenting)).

³¹ HOLMES, *supra* note ***, at 1.

II. CAN THE DEADLINE SET BY CONGRESS BE CHANGED BY WORDS,
WINKS OR SILENCE?

A. *Hypothetical 1—Agreeing to Move the Deadline for Convenience*

Attorney A just lost at trial and calls opposing counsel, Attorney B: “Say, the time for my notice of appeal is this Friday. I have a brief due the day before, then I’m going on vacation and afterwards I’ll need to do some research to decide if we want to go forward. Do you mind if I take another forty-five days to file my appeal?”

Attorney B responds, “No problem. Have a good vacation and maybe further research will convince you not to take the appeal.”

The time for an appeal comes and goes. Then, as agreed, Attorney A files his appeal on the forty-fifth day after the time set by 28 U.S.C. § 2107(a). Months later, after all the briefs are filed and a week before oral argument, a clerk notices that the appeal was filed forty-five days late and the court *sua sponte* dismisses the appeal, citing *Bowles*. According to Professors Dodson and Burch, such an outcome would be wrong. And according to the reasoning and language of Justice Souter’s dissent in *Bowles*, such a result would be “intolerable,” “thoughtless,” and “incoherent.”³²

Generations of federal judges, however, have seen it differently and have uniformly held that when the statute plainly states that an appeal must be brought within a certain time, the parties cannot disregard that express requirement and fashion whatever new deadline suits them—whether it be forty-five days, six months, or a year later.³³ If the parties are free to set their own deadlines, then the time set by Congress would become little more than a “helpful hint” that could be ignored when convenient and the appellate court would be powerless to enforce it. Indeed, if the time limit for an appeal can be controlled solely by the parties like an ordinary statute of limitation, then the parties could hold it in abeyance for months or even years, if for instance, they were discussing settlement.³⁴ To avoid such outcomes, courts of appeal have been vigilant so that the time set by statute for

³² *Bowles*, 127 S. Ct. at 2367, 2369–70 (Souter, J., dissenting). Despite the harsh language in his dissent leveled at the long-established precedent that the § 2107(a) deadline is jurisdictional, when considering the virtually identical deadline governing petitions for certiorari in § 2101(c), Justice Souter is non-committal: “The status of § 2101(c) is not before the Court in this case, so I express no opinion on whether there are sufficient reasons to treat it as jurisdictional,” but then suggests that it too should be “reconsidered.” *Id.* at 2369 n.4.

³³ See, e.g., *United States v. Austin*, 217 F.3d 595, 597 (8th Cir. 2000) (noting that because time to appeal is jurisdictional, it must be raised *sua sponte*, “even if the parties appear to concede jurisdiction”)

³⁴ That can happen. See *Endicott Johnson Corp. v. Liberty Mut. Ins. Co.*, 116 F.3d 53, 55–58 (2nd Cir. 1997) (dismissing appeal when parties while discussing settlement stipulated to court orders extending time to appeal three months past the deadline).

an appeal cannot be manipulated by the parties—through words, winks, or silence—and thus have raised it on their own.³⁵

B. Hypothetical 2—Who Agreed to What?

There are, of course, any number of variations on the scenario with Attorneys A and B agreeing to extend the time for an appeal. For example, Attorney A may leave a message with Attorney B requesting more time. After not hearing back, Attorney A assumes there was no objection and files the appeal within the time requested. Later, Attorney B contends that he never received the message and *does* object. As a result, a judge must sort out who did or did not say or intend what, and when. When the deadline ceases to be enforced by the court as written, and becomes one that *may* be followed depending upon the individualized understandings of the parties, then satellite litigation over issues of waiver and estoppel will not be far behind. Thus, by holding that deadlines may not be altered by the parties for their convenience, courts have sought to avoid disputes that add not only uncertainty but also more cost and delay to litigation.

C. Hypothetical 3—Doing By the Backdoor What Could Not Be Done By the Front

Alternatively, Attorney A could just say nothing and simply file a late appeal. And for any number of reasons, Attorney B could say nothing as well. In such a case, should the parties be allowed to do tacitly what they could not do overtly? Again, courts have not allowed that; the law does not permit parties to do indirectly what they could not do directly.³⁶

III. BEWARE THE LAW CLERK—AND THE JUDGE

A. Hypothetical 4—Some Advice From the Clerk

In his dissent in *Bowles*, Justice Souter states that the majority opinion means that statements from federal courts should come with a disclosure: “Beware of the Judge.”³⁷ But consider the following. A judgment is entered against Attorney C’s client on October 3. Then, on October 26, the court *sua sponte* entered a new judgment that was exactly the same as the first one, but merely corrected a date referred to in the original judgment. Attorney C called the judge’s chambers and spoke to the law clerk who

³⁵ See, e.g., *Marcangelo v. Boardwalk Regency*, 47 F.3d 88, 91 (3d Cir. 1995) (“[C]ourts are required to dismiss untimely appeals *sua sponte*” and therefore, “[t]he parties may not confer jurisdiction on the Court by consent.”) (internal citation omitted).

³⁶ See, e.g., *O’Keefe v. Mercedes-Benz USA, LLC*, 214 F.R.D. 266, 283 (E.D. Pa. 2003) (explaining that in securing subject matter jurisdiction, “litigants cannot do indirectly what they may not do directly”) (citing *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 325 (1866)).

³⁷ *Bowles*, 127 S. Ct. at 2371 (Souter, J., dissenting).

stated that the time for appeal would start from the later judgment on October 26. So instructed, Attorney C filed his notice of appeal more than thirty days after the first judgment, but within thirty days of the corrected judgment. But the law clerk's advice was wrong. Under settled precedent, a later judgment which does not alter the substance of an earlier judgment does not reset the time to appeal.³⁸

This scenario is taken directly from the Second Circuit's recent, post-*Bowles* decision in *In re American Safety Indemnity Co.*³⁹ There, the appellant, relying on erroneous advice from the judge's clerk, filed a notice of appeal within the thirty days of the corrected judgment, but thirty days beyond the original one.⁴⁰ In dismissing the late-filed appeal, the unanimous panel stated:

The wisdom of *Bowles* is confirmed in this case by the mischief that would be spawned by excusing untimeliness on the basis of law clerk statements. Litigants should not seek legal advice from judges or legal staff, and in any case, attorneys should know better than to rely on such advice. Moreover, ad hoc inquiries regarding purported advice are difficult to conduct, lead to uncertain results and meddle in the internal workings of judges' chambers.⁴¹

Presumably, Professor Dodson would agree with the outcome in *American Safety* because there the appellee raised the untimely filing.⁴² On the other hand, Professor Burch presumably would disagree with *American Safety* because, even though the appellee objected, the appellant relied on erroneous advice from an agent of the court, and therefore, the time to appeal should be extended based on the erroneous advice. Yet, as the Second Circuit emphasized, such an approach would create uncertainty about who said what to whom and when—which would not only be intrusive into the workings of the judicial system, but a waste of resources.

B. Hypothetical 5—Leading the Court Down the Wrong Path

Assume yet another scenario. This time, Attorney C approaches the court three days before the deadline for an appeal expires on September 15:

³⁸ *Farkas v. Rumore*, 101 F.3d 20, 23 (2d Cir. 1996) (citing *FTC v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 211–12 (1952)).

³⁹ 502 F.3d 70 (2d Cir. 2007) (per curiam).

⁴⁰ *Id.* at 72.

⁴¹ *Id.* at 73.

⁴² *Id.* at 72. *But see* *Alva v. Teen Help*, 469 F.3d 946, 955–56 (10th Cir. 2006) (“[A] holding that a court may not enforce its own rules unless a party timely invokes them would be nonsensical. Such a holding would place the court at the mercy of the parties.”). Moreover, courts have a duty to raise an untimely appeal on their own. *See, e.g., supra* notes 34–36; *Huang v. Caterpillar, Inc.*, No. 06-1291, 2007 WL 3325657, *1 (7th Cir. Nov. 9, 2007) (citing *Bowles*, court holds that the thirty-day time to appeal is “essential to our jurisdiction” and even if the parties do not raise it, the court has an “independent obligation” to do so). And since courts have such a duty to raise untimely appeals on their own, it follows that they would exercise that duty whether the late-filed appeal is raised by court personnel or an appellee.

“Your Honor, I have a number of professional commitments over the next month, and I would request that the court extend the time for any appeal to October 18.”

The Judge turns to Attorney D, “You don’t have a problem with that do you, counsel?”

Not wanting to seem uncooperative, Attorney D says, “No, Your Honor.”

But the law expressly does not permit what Attorney C requested and the judge allowed. Under § 2107(c), the district court may extend the time for an appeal either before the deadline or within a thirty-day period after the deadline for “excusable neglect or good cause.” In addition, under Federal Rule of Appellate Procedure 4(a)(5), any extension of time is limited to the initial thirty-day grace period or ten days after the court grants the extension, whichever is later.⁴³ In this scenario, that would mean the court could extend the time only to October 15. Here, Attorney C induced the error and the court overlooked it, and an error initiated by counsel is not grounds to extend the time for appeal.⁴⁴

In contrast, in *Bowles*, counsel correctly recited the rule that allowed for another fourteen days to appeal, but the court added another three days to what was permitted.⁴⁵ Yet discerning whether to attribute an error solely to counsel or the court is a difficult task at best—such errors often arise from a combination of factors. Attempting to draw distinctions between who was most responsible for an error or whether the deviation was unintentional or deliberate hardly promotes clarity and would only fuel additional post-judgment litigation. Further, nothing in the language of the statute would allow for extending the deadlines for some errors, but not for others.

Finally, in *Bowles* and in this scenario, the court set a new deadline three days beyond the time limit. But what if it had set the new date ten, twenty, thirty, or more days beyond what was allowed? When dealing with the statutory time for an appeal, courts have never fashioned a test to deter-

⁴³ Courts will dismiss appeals if the district court grants extensions beyond those permitted by Rule 4(a)(5). See, e.g., *Mendes Junior Int’l Co. v. Banco Do Brasil, S.A.*, 215 F. 3d 306, 312–14 (2d Cir. 2000) (dismissing appeal, since after time for appeal expired, district court could not use filing of motion for attorney fees to revive time period).

⁴⁴ See *Certain Underwriters at Lloyds of London v. Evans*, 896 F.2d 1255, 1257–58 (10th Cir. 1990) (dismissing appeal where party “invited” error by having court extend deadline past time allowed by Rule 4(a)(5)).

⁴⁵ *Bowles v. Russell*, 127 S.Ct. 2360, 2362 (2007). Professor Burch likens the result in *Bowles* to an employee being fired after the boss says take a ten-day vacation, when the company policy did not permit more than an eight-day absence. Burch, *supra* note 1, at 64. But *Bowles* is really closer to this same employee who, knowing the eight-day rule, tells the boss on October 8, “I’ll see you in eight days” and the boss saying, “Great, I’ll see you on the 19th.” Without more, it would not be fair for the employee to simply assume that contrary to company policy, the boss’ comment meant an extra three days of vacation.

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mine when “late” becomes “too late.” Again, that would lead to not only uncertainty and more litigation, but a moveable notion of “lateness” is by definition uneven and does not instill confidence that the time to appeal would be applied evenhandedly.

CONCLUSION—NOT LETTING A HARD CASE MAKE BAD LAW

In *Bowles*, the Court resisted allowing a hard case to make bad law. Yet applying jurisdictional deadlines often involves some form of a “hard case,” in the sense that it cuts off a decision on the merits. But courts have also recognized that applying the statute as written is far better than the alternatives. From the nineteenth century to the twenty-first, there have always been arguments for allowing more exceptions to the statutory time to appeal for any number of reasons. But experience has taught that allowing innumerable exceptions that run directly contrary to the language of a statute would, over the long term, engender far more instability, expense, delay, and ultimately unfairness to those who must rely on the finality of a court’s decision. And when an unambiguous statute can be altered by the parties at their convenience or based on a judge’s view of “equity,” then the law has not been applied equally and the rule of law itself has been undermined.

Professor Burch also contends that *Bowles* means that victims of emergencies such as September 11th or Hurricane Katrina would lose access to the courts.⁴⁶ That is not so. Federal Rule of Civil Procedure 6(a)(3) already provides that if the courthouse is closed because of “weather or other conditions [that] make the clerk’s office inaccessible,” then the due date is extended until the day it reopens.⁴⁷ There is also the additional safeguard in 28 U.S.C. § 2107(c) and Federal Rule of Appellate Procedure 4(a)(5) that allows the district court to extend the time for an appeal upon a showing of excusable neglect or good cause during the thirty days *after* the deadline.⁴⁸ These exceptions are clear and straightforward, apply equally to all, and are the product of deliberations by Congress and the rule makers to balance the policies of stability and fairness.⁴⁹ If they are to be changed, then they must be changed by those who created the time limits and exceptions in the first place.

⁴⁶ Burch, *supra* note 1, at 67.

⁴⁷ FED. R. CIV. P. 6(a)(3).

⁴⁸ See, e.g., *United States v. Vogl*, 374 F.3d 976, 982 (10th Cir. 2004) (“[I]nclement weather that interfered with the attorney’s and the court’s operations” was sufficient excusable neglect to extend time for appeal.) (internal citation omitted).

⁴⁹ For a discussion of how the procedures for extensions of time have been refined over the years by the rule makers, see 16A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3950.3 (3d ed. 1999 & Supp. 2007).

Courts at times refer to the “fabric of the law,”⁵⁰ a fabric woven from the thread of judicial decisions. In the case of jurisdictional time limits, the fabric is longer than most and has been woven from thousands of threads. The idea that a hole should be cut in the fabric here and there may seem immediately satisfying for a particular case. But the experience of generations of judges teaches that cutting such holes in the fabric will, in the long run, only cause the fabric as a whole to unravel. And ultimately, that is why *Bowles* was correctly decided.

⁵⁰ See, e.g., *Wilson v. Arkansas*, 514 U.S. 927, 933 (1995) (noting that the “knock and announce” rule is part of the “fabric” of Fourth Amendment law); *Nisselson v. Lernout*, 469 F.3d 143, 151 (1st Cir. 2006) (The in pari delicto defense has long been “woven into the fabric of the law.”).