

SAD TIME: THOUGHTS ON JURISDICTIONALITY, THE LEGAL IMAGINATION, AND *BOWLES V.* *RUSSELL*

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The courts, and in particular the Supreme Court, have made a mess of the doctrine of jurisdiction and the idea of jurisdictionality. More specifically, they have made a mess of the relationship between time limits and the idea of jurisdictionality. That much is clear. The more interesting question, though, is why. The answer to that question has profound and deeply evocative jurisprudential implications.

*Bowles v. Russell*¹ was the Supreme Court's most recent foray into the problem of jurisdictionality. Professor Scott Dodson's short essay on the case² thoughtfully identifies some of the majority opinion's analytic defects and practical pitfalls. He argues that the Court's majority in *Bowles* was wrong to hold that the particular time limit contained in 28 U.S.C. § 2107(c) is jurisdictional. I am not sure I agree, though that is not the main thrust of my own comments here. More broadly, Professor Dodson acutely and usefully reminds all of us that time limits can be taken seriously, and even interpreted literally or peremptorily, without necessarily being labeled jurisdictional. Here I agree completely, but would add, importantly, that time limits can also be jurisdictional without being interpreted literally and peremptorily, and that the court's failure to see this is evocative of something odd and melancholy in our current legal culture.

Much of my argument here appeared in an article called *Jurisdictionality, Time, and the Legal Imagination* that I published long before *Bowles* was decided.³ I am not surprised that the Justices did not heed, and probably did not read, that article. I am intrigued, though, why they did not get the key to the jurisdictionality problem right on their own when the basic outline of the problem (though, to be sure, not the solution in any particular instance) is really so simple.

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¹ 127 S. Ct. 2360 (2007) (link).

² Scott Dodson, *Jurisdictionality and Bowles v. Russell*, 102 NW. U. L. REV. COLLOQUY 42 (2007), <http://www.law.northwestern.edu/lawreview/colloquy/2007/21/> (link).

³ Perry Dane, *Jurisdictionality, Time, and the Legal Imagination*, 23 HOFSTRA L. REV. 1 (1994).

I.

At the risk of rehashing the obvious, let's begin at the beginning: Our adversarial system of adjudication leaves most legal issues and questions in the hands of the parties. Parties can waive or stipulate most questions of law or fact. They can also lose, by delay or procedural default, the opportunity to raise most of the questions they haven't explicitly waived or stipulated. Some legal rules and principles, however, are said to go to the very power or authority of the court, and they are not in the hands of the parties. We call these rules and principles "jurisdictional."

Distinguishing jurisdictional from nonjurisdictional questions is not always easy. I teach a course, using cases and materials I have collected, devoted solely to the doctrines of jurisdictionality and their place in the legal culture.⁴ We spend several weeks in the second half of that course examining cases in which courts have tried to decide whether particular legal rules are jurisdictional or not. These cases suggest a potpourri of possible criteria, many in tension with each other, but no single overarching theory or test. All in all, Justice Holmes seems to have had it right, even if vacuously right, when he wrote that "[w]hether a given statute is intended simply to . . . define the duty of the court, or is meant to limit its power, is a question of [both] construction and common sense."⁵ That is to say, legislatures get to choose which legal rules are jurisdictional and which are not, and yet, at the same time, some legal rules just seem to fit more comfortably in the jurisdictional basket than others.

In any event, if a given legal rule is properly called jurisdictional, certain consequences follow. For example: parties cannot waive jurisdictional rules,⁶ nor can they stipulate the existence of jurisdiction.⁷ Courts have a duty to consider jurisdictional questions *sua sponte* at any point in the course of litigation, even if the parties do not raise them, and they have no discretion simply to excuse or forgive failures of jurisdiction.⁸ The exist-

⁴ For the course description, see <http://camlaw.rutgers.edu/cgi-bin/course-description.cgi?class=646> (link).

⁵ *Fauntleroy v. Lum*, 210 U.S. 230, 235 (1908) (link).

⁶ *See, e.g., Wachovia Bank v. Schmidt*, 546 U.S. 303, 316 (2006) (link); *Mansfield, C. & L. M. Ry. Co. v. Swan*, 111 U.S. 379, 382, (1884) (link); *Mennen Co. v. Atlantic Mut. Ins. Co.*, 147 F.3d 287, 294 n.9 (3d Cir. 1998).

⁷ *See, e.g., California v. La Rue*, 409 U.S. 109, 112 n.3 (1972) (link). *But cf. Weaver v. Hollywood Casino-Aurora, Inc.*, 255 F.3d 379, 384–85 (7th Cir. 2001) (noting that a court has no obligation to inquire into parties' stipulation of facts necessary to jurisdiction).

⁸ *See, e.g., Grupo Dataflux v. Atlas Global Group, L.P.*, 541 U.S. 567, 593 (2004) (link) ("[B]y whatever route a case arrives in federal court, it is the obligation of both district court and counsel to be alert to jurisdictional requirements."); *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986) (link) ("[E]very federal appellate court has a special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review,' even though the parties are prepared to concede it.") (quoting *Mitchell v. Maurer*, 293 U.S. 237, 244 (1934); *Greenbriar Hills Country Club v. Dir. of Revenue*, 47 S.W. 3d 346, 350 (Mo. 2001) ("This Court is a court of limited jurisdiction, and it has a duty to determine the question of its jurisdiction *sua sponte*.")).

tence of jurisdiction must, at least usually,⁹ be considered before nonjurisdictional questions are decided. Dismissals for lack of jurisdiction are not claim-preclusive,¹⁰ though they can be issue-preclusive on the jurisdictional question itself.¹¹ Certain avenues might be available to police abuses of jurisdictional limits that might not be available to correct mere errors of law.¹²

These two questions—whether a legal rule is jurisdictional, and what follows if it is—are not sealed off from each other. In particular, one consideration in deciding whether a legal rule is jurisdictional might be whether it is the sort of rule to which the consequences of jurisdictionality should attach. Indeed, my course on jurisdiction considers the consequences of jurisdictionality before moving on to the problem of telling which rules are jurisdictional in the first place, much as many contracts casebooks cover the topic of remedies before they discuss formation and breach. Nevertheless, a fundamental postulate of the idea of jurisdiction, as a classical feature of our legal culture, is that jurisdictionality is more than just a label for certain consequences. If a rule is jurisdictional, it really does implicate the authority of a court; it really is, in Justice Holmes’s words, a limit on a court’s “power” and not only a statement of its “duty.”

More fundamentally, the notion of jurisdictionality suggests that the authority of courts is not grounded merely in their identity as courts, but in a set of discrete, legally delimited, grants of power, beyond whose bounds a judge in a robe might almost as well be any common person on the street.

What does all this have to do with the doctrine of “jurisdictional time limits”? Very little. To be sure, if a rule setting out a time limit is jurisdictional, the usual consequences follow: it cannot be waived by the opposing party or by the court, it can be raised at any point in the litigation, it should be raised *sua sponte* by the court, and so on. Moreover, a dismissal based on failure to comply with a jurisdictional time limit is not claim-preclusive,

⁹ See *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83 (1998) (link) (rejecting recourse to doctrine of “hypothetical jurisdiction”). *But cf.*, e.g., *Sinochem Int’l Co. v. Malay. Int’l Shipping Corp.*, 127 S. Ct. 1184 (2007) (link) (allowing dismissal for *forum non conveniens* even though challenges to subject-matter and personal jurisdiction had not been definitively settled). The problem posed in *Sinochem* raises an important conceptual puzzle of its own, but it is not one that I can deal with here.

¹⁰ See, e.g., *Goldsmith v. Mayor and City Council of Baltimore*, 987 F.2d 1064, 1068–69 (4th Cir. 1993); *By-Prod Corp. v. Armen-Berry Co.*, 668 F.2d 956, 962 (7th Cir. 1982).

¹¹ For two classic modern cases supporting this proposition, though with different understandings of the exact reach of issue-preclusion in the wake of dismissals for lack of jurisdictions, see *Dozier v. Ford Motor Co.*, 702 F.2d 1189 (D.C. Cir. 1983). See also *Mann v. Merrill Lynch, Pierce, Fenner and Smith, Inc.*, 488 F.2d 75 (5th Cir. 1973).

¹² See, e.g., *In re James*, 940 F.2d 46, 52 (3d Cir. 1991) (federal bankruptcy court can “vacate” state court judgment when the state court proceedings were void *ab initio*); PAUL P. CRAIG, *ADMINISTRATIVE LAW* 818 (4th ed. 1999) (discussing courts’ “jurisdictional control” of administrative agencies under British administrative law); David McCord, *Visions of Habeas*, 1994 B.Y.U. L. REV. 735, 746 (emphasizing that for much of the nineteenth century, “the only legitimate sphere of operation of the writ [of habeas corpus] in the context of imprisonment pursuant to a judicial directive was if the sentencing court lacked jurisdiction over the subject matter or the person of the defendant.”).

although this will be of little practical consequence unless there happens to be another tribunal, proceeding, or legal theory to which the fatal time limit does not apply.

But the doctrine of jurisdictional time limits asserts more than any of this. It also holds that if a time limit is jurisdictional, it should be applied literally and mercilessly. In my *Jurisdictionality* article,¹³ I trace the evolution of this idea from the confluence of two pieces of doctrinal history. First, courts have long interpreted certain species of time limits more strictly than others, for various historical and conceptual reasons, but they at some point began to attach labels such as “mandatory and jurisdictional” or just plain “jurisdictional” to those strictly-interpreted time limits. Second, courts have long interpreted certain time limits as “jurisdictional,” but at some point their efforts to think carefully and specifically through what that might mean “began to overflow into a more general, loosely defined notion of literal and strict application.”¹⁴

Despite these historical developments, however, the notion that jurisdictional time limits admit no leniency is simply a mistake. It confuses the *consequences* that should flow if a rule of law is jurisdictional with the *meaning* or content of the rule itself. Or to put it another way: it treats as mandatory not only the jurisdictional rule itself, but also one particular, literal, and draconian interpretation of that rule. This move is not only entirely unnecessary, it is belied by the treatment of jurisdictional questions in other, less arithmetical, contexts. Thus, for example, the “final judgment” rule governing review of state court judgments in the United States Supreme Court is a jurisdictional requirement, but the Court has been willing to allow review in various situations in which a literal “final judgment” is not present.¹⁵ Similarly, the principle requiring federal courts not to hear controversies that have become moot is a jurisdictional rule drawn from the Constitution itself, but the Court has been willing to treat as justiciable certain categories of controversies, including those that are “capable of repetition, yet evading review.”¹⁶

To see the error in the received doctrine of jurisdictional time limits, consider *Teague v. Commissioner of Customs*.¹⁷ In *Teague*, the Supreme Court refused to hear a petition for certiorari that, apparently because of “snowstorms making the transportation of the mails impossible,”¹⁸ had been delivered to the Court after the ninety-day period set out by statute. In a

¹³ Dane, *supra* note 3, at 99–112.

¹⁴ Dane, *supra* note 3, at 107.

¹⁵ The classic treatment of this issue appears in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477–85 (1975) (link) (setting out four categories of cases in which Court has treated a state court decision as a “final judgment” even though additional proceedings were contemplated in the state courts).

¹⁶ See, e.g., *FEC v. Wisc. Right to Life*, 127 S. Ct. 2652 (2007) (link); *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 546–47 (1976) (link).

¹⁷ 394 U.S. 977 (1969) (link).

¹⁸ *Id.* at 982.

dissent from the denial of certiorari, Justice Hugo Black made this eminently simple observation:

It is suggested by the Solicitor General, on behalf of respondents here, that this statute is “jurisdictional,” and that we must follow it. I agree, of course, that we should follow the statute. But we must first determine what the statute means. . . .

. . .

. . . [T]he language of the statute itself [does not] dictate the Court’s result. The statute does not say explicitly that the time limitation may be inapplicable under certain extenuating circumstances, but it also does not say that the time limit must be ruthlessly applied in every conceivable situation, without regard to hardships involved or extenuating circumstances present. The Court therefore must decide what is the more sensible interpretation of the statute.¹⁹

Jurisdictionality defended Justice Black’s argument at great length. Among other issues, I discussed the possibility that, in the context of time limits, the adjective “jurisdictional” just *means* draconian or literal. This solution, however linguistically annoying and confusing, would at least be conceptually coherent. Unfortunately, though, most courts have not been brave enough to cut the knot. To the contrary, they have routinely concluded that if a time limit is “jurisdictional” for other purposes, it must be “jurisdictional” in the sense of being interpreted literally, and that, if it is “jurisdictional” in the sense of being interpreted literally, it must be “jurisdictional” for other purposes.²⁰ Since that article, several Supreme Court opinions have suggested that it “is a word of many, too many meanings,”²¹ and that courts have sometimes been “less than meticulous” in loosely using the term just to refer to “nonextendable” or “emphatic” time prescriptions.²² For reasons that I discuss, below, however, these refreshing admissions did not go far enough to untangle the conceptual muddle of the received wisdom on jurisdictional time limits.

As noted at the start of these comments, Professor Dodson helps the process of conceptual clarification along significantly by emphasizing that time limits might be draconian without necessarily being jurisdictional.²³ But, as Justice Black recognized, the mirror image of and complement to

¹⁹ *Id.* at 982–83.

²⁰ *See, e.g.*, *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 394 (1982) (link); *Nilsen v. City of Moss Point*, 701 F.2d 556, 562 (5th Cir. 1983). For a more complete discussion, see Dane, *supra* note 3, at 51–60. As I point out in that article, some judges have occasionally suggested a more purely semantic understanding of the idea of “jurisdictional time limits.” Ironically, one of those judges was Justice Thomas, the author of the majority opinion in *Bowles*, writing when he was still a federal court of appeals judge, in *Cross-Sound Ferry Servs., Inc. v. Interstate Commerce Comm’n*, 934 F.2d 327, 340–41 (D.C. Cir. 1991) (Thomas, J., concurring in part).

²¹ *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 90 (1998) (link).

²² *Kontrick v. Ryan*, 540 U.S. 443, 454 (2004) (link).

²³ Dodson, *supra* note 2, at 46–48.

Professor Dodson's insight is equally true and important: time limits can be jurisdictional without necessarily being draconian.

II.

If time limits can indeed be jurisdictional without necessarily being draconian, that suggests that the jurisdictionality of a time limit and its precise strictness need to be approached as distinct issues. More specifically, to really nail the matter down right a case such as *Bowles v. Russell* should actually be analyzed in three careful and distinct steps.

The first step is to decide whether the 28 U.S.C. § 2107(c) specification of a fourteen-day outer bound on extensions of time to appeal is a "jurisdictional" provision, in the sense of limiting judicial power. I will have more to say about this below, but for now, assume that the fourteen-day provision *is* jurisdictional.

The second step, then, is to decide whether the fourteen-day provision could even colorably be read, consistent with its jurisdictional character, as allowing a federal court of appeals to hear Keith Bowles's appeal even though it was submitted on February 26, 2004—two days after the fourteen days specified in the statute but before the due date of February 27, 2004 that the District Court had (presumably mistakenly) specified in its order. Here, I admit to being of two minds.

On the one hand, if we take the idea of jurisdiction seriously, it would be inconsistent with the jurisdictional character of the fourteen-day provision to read into it simple discretion to extend the outer bound from fourteen to seventeen days. Separately, but equally important, while Justice Black in *Teague* could plausibly read the time limit he was interpreting to include an implicit exception for Acts of God, no similar extenuating circumstance could justify the District Court's order in *Bowles*.

On the other hand, it might be better to focus not on the District Court's authority to grant Bowles a seventeen-day extension (it had none), but on the jurisdiction of the Court of Appeals to hear the appeal in the wake of the District Court's misstep. Keith Bowles, after all, was the victim of a "bait and switch."²⁴ This particular ill turn seems to have been accidental. But imagine, for example, that a malicious District Judge had physically prevented an attorney from filing an appeal within the number of days set out in the statute. In that case, Justice Black would certainly argue that the statute, even if jurisdictional, could coherently be read to allow an appeal filed beyond the literal number of days. That is to say, while the District Court's action could not be justified or excused, it could constitute a fact in the world—like a snowstorm—that might excuse a late filing of the appeal on a reasonable reading of the statute itself. The relevant question, then, is whether the same might even plausibly be said when a judge mis-

²⁴ *Bowles*, 127 S.Ct. at 2367 (Souter, J., dissenting).

takenly calculates the end-date of an extension and an attorney fails to check the judge's arithmetic (or does not know he should). This would be a longer stretch, to be sure, but maybe not so much of a stretch as to break faith with the idea of jurisdiction. In any event, it bears emphasis that even a liberal reading of § 2107(c) could not, consistent with the jurisdictional character of the rule, authorize a judge just to ignore the literal rule as a matter of grace.²⁵ Moreover, even such a liberal reading would not affect the other usual incidents of the rule's jurisdictional character.

As noted, I am conflicted whether a forgiving reading of § 2107(c) is actually conceptually available under the peculiar circumstances of *Bowles*. Even if it is, though, that still leaves the third step in the analysis, which is to decide whether such a reading would actually be correct. This, it seems to me, is a fairly ordinary question of statutory interpretation, to which the usual tools of the trade easily apply. For purposes of this short comment, though, I want, with regard to this question, to remain entirely agnostic.

III.

The problem in Justice Thomas's majority opinion in *Bowles*, of course, is that he conflated these three steps into one. He simply assumed, in line with the received doctrine of jurisdictional time limits, that if a rule containing a time limit is jurisdictional, that rule can only be read literally and unforgivingly. The dissent, though, does not do a much better job of disentangling the problem. Justice Souter protests that it was "intolerable for the judicial system to treat" Keith Bowles as it did.²⁶ Rather than suggesting that even a jurisdictional time limit might not apply literally in the face of such a "bait and switch," however, Justice Souter implicitly accepts the received wisdom that this would be impossible, and must resort instead to arguing that the time limit could not be jurisdictional in the first place.

The key here is Justice Souter's explanation that "if a limit is taken to be jurisdictional, waiver becomes impossible, meritorious excuse irrelevant (unless the statute so provides), and *sua sponte* consideration in the courts of appeals mandatory."²⁷ Souter's recitation of these three incidents of jurisdictionality is exactly correct in principle, but he unnecessarily concedes, even in the face of a result he finds absurd and cruel, that if a statute "provides" for "meritorious excuse," it must do so literally and explicitly. This axiom runs counter to how courts treat a wide variety of other jurisdictional norms, and also runs counter to how courts sometimes read jurisdictional

²⁵ For that matter, even under circumstances similar to those in *Bowles*, a more liberal reading of the statute would probably be inherently self-limiting, in that the *Bowles* case itself would put attorneys on notice that they *should* check the judge's arithmetic. "Fool me once shame on you; fool me twice shame on me."

²⁶ *Bowles*, 127 S. Ct. at 2367 (Souter, J., dissenting).

²⁷ *Id.* at 2368.

time limits themselves before they fell into, or when they managed to see beyond, the rut of the received doctrine.

Justice Souter, of course, has a larger agenda in mind. He chides the majority for not following the lead of recent cases such as *Kontrick v. Ryan*²⁸ and *Arbaugh v. Y & H Corp.*,²⁹ that tried to prune the conceptual muddle of jurisdictionality by sharply restricting the universe of rules properly called “jurisdictional.” According to this new wisdom, courts should generally use “the label ‘jurisdictional’ not for claim-processing rules [such as time limits], but only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court’s adjudicatory authority.”³⁰ There are at least three serious problems, however, with this effort at conceptual reform.

First, Justice Souter’s own categories are not conceptually straightforward. For example, a naïve reading of the term “subject-matter jurisdiction” might restrict it to rules defining the “subjects” or topics appropriate to a given court. Indeed, many early cases explicitly distinguished between jurisdiction grounded in “the subject-matter of the suit” and jurisdiction grounded, as in diversity cases, in “the character of the parties.”³¹ Yet Justice Souter would probably accept the ordinary but actually quite arbitrary assimilation of issues such as diversity,³² as well as questions such as standing and mootness,³³ into “subject matter jurisdiction.” He might even agree that more technical requirements such as the final judgment rule³⁴ are matters of “subject-matter jurisdiction.” Thus, where to draw the conceptual line between “subject-matter” jurisdiction, as a coherent conceptual category, and mere “claim processing” might be harder than Justice Souter thinks.³⁵

²⁸ 540 U.S. 443 (2004).

²⁹ 546 U.S. 500 (2006).

³⁰ *Kontrick*, 540 U.S. at 455.

³¹ See *McCormick Harvesting Mach. Co. v. Walthers*, 134 U.S. 41, 43 (1890) (link); *Case of Sewing Mach. Cos.*, 85 U.S. 553 (1874) (link).

³² See, e.g., *Wachovia Bank, N.A. v. Schmidt*, 546 U.S. 303, 318 (2006); *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 73 (1996) (link).

³³ See, e.g., *St. John’s United Church of Christ v. City of Chicago*, 502 F.3d 616 (7th Cir. 2007); *KH Outdoor, L.L.C. v. Clay County*, 482 F.3d 1299, 1303 (11th Cir. 2007).

³⁴ See *Digital Equip. Corp. v. Desktop Direct*, 511 U.S. 863, 869 n.3 (1994) (link).

³⁵ Part of the problem is, again, semantic. Our legal culture has generally habituated us to think that there are, by definition, two types of jurisdictional questions—subject-matter jurisdiction and personal jurisdiction—so that any jurisdictional question that is not a matter of personal jurisdiction is, by default, a matter of subject-matter jurisdiction. But we are also tempted to think, as Justice Souter does, that the category of “subject-matter jurisdiction” has independent conceptual meaning. In fact, conceptual clarity would probably be advanced if we just rejected the assumption that there are two, and only two, fundamental categories of jurisdictional questions. The law of international tribunals, for example, posits three and sometimes four categories: subject-matter jurisdiction, personal jurisdiction, temporal jurisdiction, and (often) territorial jurisdiction. See, e.g., CHITTHARANJAN F. AMERASINGHE, JURISDICTION OF INTERNATIONAL TRIBUNALS 53 (2d ed. 2003); JEROME B ELKIND, NON-APPEARANCE BEFORE THE

Second, as Justice Souter admits, the relevant legislator is entitled to designate virtually any legal rule as “jurisdictional,” including so-called “claim-processing rules.”³⁶ Thus, the Court’s effort to “clean up [its] language”³⁷ is at best a canon of construction, not a matter of conceptual or jurisprudential necessity. And if Justice Souter is operating in the realm of statutory construction rather than conceptual necessity, it might be worth considering another important canon of construction: that Congress is presumed to understand statutes against the background of prior judicial interpretations of similar statutes and statutory language. Thus, if courts have, wisely or not, traditionally interpreted time limits on appeal as jurisdictional, it might require an explicit congressional repudiation of that understanding to undo it.³⁸

Third, and most important, Justice Souter’s effort to weed out excessive or misleading use of the term “jurisdictional” is in tension with the rich, varied, widespread, and venerable traditions surrounding jurisdictional ascriptions. Jurisdictionality, as a concept, does not only figure in the practice of federal courts. It is also a commonplace in state courts,³⁹ and in the courts of other common law jurisdictions,⁴⁰ and has a history going back many hundreds of years.⁴¹ And, as I suggested at the start of this comment, if one examines that rich tapestry of doctrine and jurisprudence (in the double sense of the word as both case law and legal theory), it becomes clear

INTERNATIONAL COURT OF JUSTICE: FUNCTIONAL AND COMPARATIVE ANALYSIS 107 (1984); Susan W. Tiefenbrun, *The Role of the World Court in Settling International Disputes: A Recent Assessment*, 20 LOY. L.A. INT’L & COMP. L. REV. 1, 6–7 (1997). The category of temporal jurisdiction (*ratione temporis*), I should add, bears no direct relation to our problem of jurisdictional time limits. Rather, it refers to limits on a court’s competence to adjudicate events that occurred before or after certain points in time; it is particularly germane, for example, to controversies regarding retroactivity.

³⁶ *Bowles v. Russell*, 127 S.Ct. 2360, 2369 (2007) (Souter, J., dissenting).

³⁷ *Id.* at 2367.

³⁸ A careful reader might ask, of course, whether that same presumption of congressional acquiescence in judicial interpretations should not counsel against my suggestion that the Court might treat some time limits as jurisdictional but not necessarily draconian. This is a fair question, but there are several plausible arguments the other way. First, as even Justice Thomas admits, there is long-standing precedent, even with regard to jurisdictional statutes, for excusing untimely filings in the face of “unique circumstances.” *Id.* at 2366. Second, if Justice Souter is correct that the majority’s draconian result is inequitable and “strange,” *id.* at 2371, n. 8 (Souter, J., dissenting), that would bring yet another canon of construction into play: that statutes should, if possible, not be read to produce “absurd” and “unjust” results. *See, e.g.*, *Clinton v. City of New York*, 524 U.S. 417, 428–29 (1998) (link); *Church of Holy Trinity v. United States*, 143 U.S. 457, 459 (1892) (link).

³⁹ I could cite thousands of cases, of course, but four drawn from the materials in my course are *Head v. Caddo Hills Sch. Dist.*, 745 S.W.2d 595 (Ark. 1988); *Fogg v. Macaluso*, 892 P.2d 271, 278–81 (Colo. 1995) (Scott, J., concurring in the result); *Fort Trumbull Conservancy, LLC v. City of New London*, 925 A.2d 292, 308–11 (Conn. 2007); *Duvall v. Duvall*, 80 So. 2d 752, 753–56 (Miss. 1955).

⁴⁰ *See, e.g.*, *Bodruddaza v. Minister for Immigration and Multicultural and Indigenous Affairs* (2007) 234 A.L.R. 114 (Austl.); *Mills v. The Queen* [1986] 1 S.C.R. 863 (Can.); *In re Racial Communications, Ltd.* (1981) A.C. 374 (U.K. H.L.).

⁴¹ For a comprehensive, if obviously dated, survey of the full range of doctrines relating to the idea of jurisdictionality, and their history, see WILLIAM F. BAILEY, *THE LAW OF JURISDICTION* (1899).

very quickly that, while there might be any number of overlapping and occasionally contradictory rules of thumb to distinguish jurisdictional from nonjurisdictional rules, they are weak generalizations at best. Jurisdictional issues are usually separate from, and prior to, the existence of a cause of action or a right to relief.⁴² But sometimes they come close together or even merge.⁴³ In one particularly narrow formulation, jurisdictional issues have been said to go only to whether “a case is brought in the court which has the authority and power to determine the type of action at issue” rather than to whether the court should be hearing a particular instance of that type of action.⁴⁴ But, most jurisdictional litigation is precisely about specific instances rather than general types. Jurisdictional issues are often said to arise by definition with respect to statutes that create rights not available at common law.⁴⁵ But this generalization, if applied to federal courts, would render almost every question jurisdictional. Jurisdictional requirements are sometimes said to be a subset of procedural requirements, as opposed to substantive rules.⁴⁶ But in some specific contexts, courts have identified a rule as jurisdictional because it is “substantive” rather than merely “procedural.”⁴⁷ Jurisdictional issues usually arise at the very threshold of litigation, but some jurisdictional questions arise later.⁴⁸ Finally, jurisdictional

⁴² See, e.g., *Whitmore v. Arkansas*, 495 U.S. 149, 154–55 (1990) (link) (petitioner must establish jurisdictional standing before federal court can consider merits of his legal claim, and the threshold inquiry into standing does not depend on merits of petitioner’s substantive arguments); *Bell v. Hood*, 327 U.S. 678, 682 (1946) (link) (“Jurisdiction . . . is not defeated . . . by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover.”); *Fauntelroy v. Lum*, 210 U.S. 230, 234–35 (1908) (“No doubt it sometimes may be difficult to decide whether certain words in a statute are directed to jurisdiction or to merits, but the distinction between the two is plain.”).

⁴³ See, e.g., *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 487 n.13 (1975) (conceding that deciding whether a case fits one of the qualifications to the final judgment rule can involve “consideration of the merits in determining jurisdiction” but “only to the extent of determining that the issue is substantial”); *The Careau Group v. Luberski*, 940 F.2d 1291, 1293 (9th Cir. 1991) (“In this case, the jurisdictional issue *is* the merits.”); *Roskelley & Co. v. Lerco, Inc.*, 610 P.2d 1307, 1309–1313 (Utah 1980) (noting that existence of personal jurisdiction in long-arm suit alleging breach of contract can depend, in the absence of general jurisdiction, on whether parties actually entered into a contract).

⁴⁴ See, e.g., *Washington v. Whitaker*, 451 S.E.2d 894, 898 (S.C. 1994).

⁴⁵ See, e.g., *Bullock v. Amoco Production Co.*, 608 S.W.2d 899, 901 (Tex. 1980) (“These statutes created a right not existing at common law and prescribed a remedy to enforce the right. Thus, the courts . . . [only have jurisdiction according to the rules] provided by the statute which created the right.”).

⁴⁶ See, e.g., *Emmon v. Dinelli*, 133 N.E.2d 56, 62–63 (Ill. 1956) (explaining that because adoption statute is in derogation of the common law, its procedural requirements are jurisdictional, but this principle does not extend to the substantive requirements of the law).

⁴⁷ See, e.g., *Ecker v. Town of West Hartford*, 530 A.2d 1056, 1062 (Conn. 1987) (stating that when a time limitation “is a substantive element of the right itself,” it is “jurisdictional and cannot be waived”).

⁴⁸ The classic formulation of this insight is found in *Windsor v. McVeigh*, 93 U.S. 274, 282–83 (1876) (link) (Recognizing that ordinarily, “where a court has once acquired jurisdiction, it has a right to decide every question which arises in the cause.” But a court acts outside its jurisdiction, and its judg-

rules usually reflect, in Professor Dodson's words, "structural values" rather than litigant-centered values. But particular caution is warranted here, for it is often precisely in the history of jurisdictional ascription that we can discern whether structural values are at stake in the first place.⁴⁹

It turns out, then, that both the majority and the dissent in *Bowles* fail to reason their way out of the legal and practical dilemma posed by strict time limits under conditions of unusual stress. And as suggested earlier, this shared failure is much more interesting than the particular questions of interpretation and application raised by the case. In his essay, Professor Dodson observes that *Bowles* was a case "watched primarily by procedure geeks."⁵⁰ But it might well be such apparently technical and low-stakes cases that can best reveal, in their most pristine form, some deep truths about the current state of the legal culture.

Both the majority and the dissent in *Bowles* display a parallel, and deeply consequential, reluctance to embrace the potential of the legal imagination. The majority seems to believe that the only way to respect the importance of jurisdiction and jurisdictionality is to construe jurisdictional rules literally and mercilessly.⁵¹ Indeed, to reach its conclusion, the Court goes so far as to reject prior decisions that at least opened the door to excusing untimely filings in limited cases involving "unique circumstances."⁵² This still strikes me as reflecting a "neurotic turn" in legal thought,⁵³ a failure—born of ambivalence and doubt about the very project of legal interpretation—to understand that true respect for legal ideas (such as jurisdictionality) and legal enactments (such as section 2107(c)) would require plumbing their meaning rather than settling for the literal. As suggested earlier, this sort of neurosis appears most starkly in "geeky" corners of the law such as the interpretation of time limits on appeal, but it is also apparent and profoundly consequential in the flight from the legal imagination and genuine legal reasoning that dominates constitutional law's current obsession with various forms of "originalism."⁵⁴

The dissent, meanwhile, buys into the majority's equation of "jurisdictional" with "literal," but also raises the stakes in trying to chop away at the rich and complicated tradition of the idea of jurisdiction in American law.

ment can be collaterally attacked, if it "transcend[s] the power conferred by the law" by departing from "established modes of procedure.")

⁴⁹ For a particularly powerful, and conceptually and historically rich, illustration of this point, see Roger A. Fairfax, Jr., *The Jurisdictional Heritage of the Grand Jury Clause*, 91 MINN. L. REV. 398 (2006) (link).

⁵⁰ Dodson, *supra* note 2, at 42.

⁵¹ *Bowles v. Russell*, 127 S.Ct. 2360, 2366–67 (2007).

⁵² *Id.* at 2366.

⁵³ Dane, *supra* note 3, at 132.

⁵⁴ Cf. CASS R. SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* 173–75 (1996); Robert W. Bennett, *The Mission of Moral Reasoning in Constitutional Law*, 58 S. CAL. L. REV. 647, 648–49 (1985).

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In some sense, the dissent reveals a mistrust of the basic notion of jurisdictionality. Stuck with the word, though, it wants to understand it through the limited lens provided by the standard federal courts course in American law schools. It thus cannot appreciate, for example, the long tradition, in both federal and state jurisprudence, that time limits on appeal are considered jurisdictional because the authority of appellate courts, as distinguished from courts of general jurisdiction, is shaped in large part by the various procedural prerequisites governing access to those courts. Again, this failure to draw connections and to investigate the roots of legal ideas is apparent in more consequential form elsewhere, including constitutional law.

The immediate consequences of *Bowles v. Russell* will probably be fairly minimal. They might even be, on the whole, salutary to the extent that judges and lawyers will be more careful in their arithmetic. But the case is still very sad, and should make those of who care about the law and distinctively legal ideas more than a little regretful about shallow debates and lost opportunities.