NOTES

THE JURISDICTIONAL LABEL: USE AND MISUSE

Alex Lees*

* J.D. Candidate, Stanford Law School, 2006; B.A., Williams College, 2003. I would like to thank Alan Morrison for his help and guidance throughout the writing process, Frank Lees and Fran Mascia-Lees for their keen editing and much-needed encouragement, and the members of the editing team at the *Stanford Law Review* for their helpful comments. I owe a special debt of gratitude to Norm Spaulding, not only for his valuable insights on this topic, but also for his unending support and mentorship.

INTRODUCTION

It is a basic axiom of American jurisprudence that legal issues are classified as either "jurisdictional" or "nonjurisdictional."[1] If a rule or requirement is classified as jurisdictional, then "courts will interpret and apply it rigidly, literally, and mercilessly."[2] Jurisdictional defects are absolutely fatal to a claim. Moreover, parties neither waive jurisdictional requirements nor consent to noncompliance with them. Parties can raise jurisdictional defects at any time in the litigation, including for the first time on appeal, and courts are obliged to raise such defects sua sponte, even after litigation on the merits. Finally, courts may not consider using equitable doctrines to bend jurisdictional rules under any circumstances.

But how are courts to know when a rule is jurisdictional? How are they to know when to apply a rule with jurisdictional rigidity? One answer is that a rule's jurisdictional status (its "jurisdictionality") should follow from the consequences of a rule: a court decides first that the rule should be applied rigidly and then labels the rule jurisdictional. The problem with this approach is that it turns the word "jurisdiction" into a legal "trope"—that is, a word that courts invoke as a convenient way of reaching certain consequences that have come to be associated with it.[3] The word becomes "a hook that judges use when they want to achieve certain ends, like construing a rule strictly and literally, or raising a legal issue *sua sponte*, or engaging in collateral review of another court's judgment."[4] The jurisdictional label thus becomes "only a conclusory label for a judicial refusal to act."[5] This in turn leads to two problematic results. First, it leads to opaque court decisions. If jurisdiction is a trope, then courts can declare, essentially in a word ("jurisdictional!"), that a rule should be applied rigidly, without ever explaining *why* the rule should be applied rigidly. Moreover, and perhaps more problematically, when the jurisdictional label is an expedient tool of reaching harsh consequences, it allows courts to apply rules rigidly even where such consequences seem unfair and unnecessary. For example, the Sixth Circuit used the jurisdictional label to deny an appeal to a pro se litigant who submitted an otherwise timely and complete notice of appeal, but who signed the notice by typewriter instead of by hand.[6] The Supreme Court used the jurisdictional label to deny certiorari to

1. *See, e.g.*, Perry Dane, *Jurisdictionality, Time, and the Legal Imagination*, 23 HOFSTRA L. REV. 1, 4 (1994) ("In modern Anglo-American legal doctrine, legal issues are either 'jurisdictional' or 'non-jurisdictional.'").

2. *Id.* at 5.

3. *See id.* at 95.

4. *Id.* at 95-96.

5. *Id.* at 96.

6. *See* Becker v. Montgomery, 532 U.S. 757, 768 (2001) (overruling the Sixth Circuit's denial of appellate jurisdiction and refusal to let the appellant amend his notice of appeal).

a litigant's petition that arrived at the courthouse two days late because a massive snow storm delayed the mail.[7]

In the words of Wright and Miller, "unthinking use of the [jurisdictional] label" leads to "untoward consequences."[8] The Supreme Court recently agreed in *Kontrick v. Ryan*,[9] and noted that "jurisdiction" is a word of "too many meanings,"[10] is used too freely, and is attached to too many legal issues. The Court lamented the tendency of courts to call certain claim processing rules "jurisdictional," and to apply the doctrines of jurisdiction to them, when such harshness is neither necessary nor justified.[11] In the very same Term, in *Scarborough v. Principi*,[12] the Court went so far as to accuse courts of "misusing" the label of jurisdiction.[13] In both *Kontrick* and *Scarborough*, the Court saw a need to eliminate such misuse. If jurisdiction entails such harsh consequences, the Court implied, it ought not to be invoked too freely.[14]

The purpose of this Note is to offer a solution to the problem of courts misusing the jurisdictional label. I suggest turning the assumption that jurisdictionality flows from jurisdictional consequences on its head and propose that courts should start operating instead under the assumption that jurisdictional consequences flow from a rule's jurisdictionality. In other words, there are some properties (which I call "jurisdictional properties") that a rule can have that alone justify its rigid application. The *Kontrick* Court suggested this approach when it recommended that the jurisdictional label be reserved only for rules that "delineat[e] the classes of cases . . . falling within a court's adjudicatory authority."[15] The Court suggested looking to the function of a rule and deciding, based on this function, whether it ought to be applied rigidly. However, the *Kontrick* Court's recommendation is not entirely helpful, since any rule can be seen as delineating the classes of cases a court may hear: a court is authorized to hear cases in which the parties comply with the rule and not the cases in which they do not.

In this Note, I continue the project the Court set out in *Kontrick* of

7. *See* Teague v. Comm'rs of Customs, 394 U.S. 977 (1969).

8. CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3901 (2d ed. 1984).

9. 540 U.S. 443 (2004).

10. *Id.* at 454 (quoting Steel Co. v. Citizens for a Better Env't, 523 U.S. 83 (1998)).

11. *Id.* at 454-55 (citing examples of the Supreme Court itself using the jurisdictional label and suggesting that such use be reigned in).

12. 541 U.S. 401 (2004).

13. *Id.* at 413 ("Courts, including this Court have more than occasionally *misused* the term 'jurisdictional.'" (quoting *Kontrick*, 540 U.S. at 454-55) (emphasis added and alterations omitted)).

14. The *Kontrick* Court recognized the tendency of the lawyers in that very case to turn jurisdiction into a trope. *See Kontrick*, 540 U.S. at 454 (citing to the transcript of oral arguments and noting that "counsel for Kontrick used the word 'jurisdiction' 'as a shorthand' to indicate a nonextendable time limit").

15. *Id.* at 455.

identifying what functions or properties a rule should have in order to justify its rigid application. I argue that if a rule operates to shift authority from one law-speaking institution to another in the case of compliance, and is premised on a policy decision that compliance makes that institution more proper for resolution of law than another, then the rule can justifiably be treated rigidly. This is because rules that shift authority—that say who can "speak law" under what circumstances—keep our law-speaking institutions (federal courts, state courts, legislatures, agencies, and so on) separate and distinct, and prevent them from encroaching on one another. Such rules therefore reflect our deeply seated political principle of governance that law-speaking institutions ought to be separate, that some issues are best decided through some processes, by certain people, under the auspices of some institutions as opposed to others.

As I show below in Part IV, rules with this authority-shifting function come with a built-in justification for the harsh consequences of the doctrines of jurisdiction. By virtue of having the function of preserving institutional identity, such rules embody values and interests so important and fundamental to our legal order—such as federalism and separation of powers—that they should not be manipulable by litigants or the courts that implement them. Furthermore, reserving the term "jurisdiction" for describing rules with the authority-shifting function comports with an intuitive sense, shared by lawyers and judges, of what the word "jurisdiction" means. Though we are accustomed to saying things such as "the court has jurisdiction to do this," or "the court was beyond its jurisdiction when it did that," the word "jurisdiction" can also refer to an institution itself, such as when we speak of "this jurisdiction" or "that jurisdiction."[16] Rules that outline the authority of an institution by preventing it from encroaching on the province of another institution outline the boundaries of "a jurisdiction" in this sense of the word. They tell us, for example, what makes federal courts, one jurisdiction, different and distinct from state courts, another jurisdiction. These rules give each institution, each jurisdiction, its unique identity in a complex multi-institutional legal order.

Misuse of the jurisdictional label, and the unjustified harsh results that follow, can be avoided if courts limit their uses of the label to situations where rules have these jurisdictional properties. If courts have more precise guidance than the *Kontrick* Court gave of when to use the jurisdictional label, they will be less likely to reach unnecessary and unjustified harsh results when applying a rule. This will also lead to less confounding and opaque court decisions. The jurisdictional label will cease to be a legal trope and will come to signify that jurisdictional properties are present and that rigid application is therefore justified. Jurisdiction will no longer have too many meanings, but instead a rather precise meaning, which courts can then use as shorthand to justify harsh

16. *See* OXFORD ENGLISH DICTIONARY ONLINE, www.oed.com (last visited Feb. 23, 2006) ("Jurisdiction: A judicial organization; a judicature; a court, or series of courts, of justice.") [hereinafter OED ONLINE].

application of a rule.

This Note proceeds as follows. In Part I, I expose the tendency of lower courts to "misuse" the language of jurisdiction and reach a result essentially in a word (either "jurisdictional" or "nonjurisdictional") without adequately justifying that result. I show how the Supreme Court's attempt to buck this trend in *Kontrick* did not give sufficient guidance to lower courts on how to distinguish between what should be classified as jurisdictional rules and what should be considered nonjurisdictional rules. In Part II, I consider some scholarly positions on how jurisdictional rules can be separated from nonjurisdictional rules. I examine the arguments that jurisdictional rules go to the power of courts, that they go to the legitimacy of court orders, and that they are whatever legislatures call "jurisdictional" in a statute. I show how these frequently proffered accounts are incomplete and so fail to give an adequate answer to the questions I have raised.

In Part III, I develop the idea that the jurisdictional status of a rule should be determined by looking to whether a rule shifts authority from one law-speaking institution to another because of a policy decision that deems one institution more proper for dispute resolution than another. In Part IV, I show how limiting the use of the jurisdictional label to rules that serve this function helps justify rigid application. First, if a rule serves the function of defining the circumstances under which one forum is more appropriate than another for resolving an issue of law, then that rule protects institutions from encroachment and so should not be manipulable by litigants nor by the very courts that may be doing the encroaching. Second, if rules play the role of shifting authority, noncompliance with them does not mean the absolute end to a party's day in court but rather that the party has selected the improper forum for resolution. Unlike the situation when a party files outside a limitations period, for example, and so is denied relief altogether, when a party fails to comply with an authority-shifting rule, he is, at least in theory, sent to another law-speaking institution for relief. Courts therefore do not need the same safety valve of equitable flexibility that is needed when limitations periods run and when the potential effects on the parties are more severe.

Finally, in Part V, I return to the cases discussed in Part I in order to analyze them under the conceptualization of jurisdiction discussed in the preceding Parts. Part V asks how those cases that mysteriously reach results by invoking the word "jurisdictional" or "nonjurisdictional" could have been better and more clearly decided. I close by offering some suggestions for how courts can address the question of whether or not to apply a rule rigidly without using the opaque language of jurisdiction, in order to prevent jurisdiction from being so confounding.

I. THE PROBLEM OF JURISDICTION: LABELS AND CONSEQUENCES

Perry Dane has summarized the consequences of calling a rule jurisdictional, or what he calls the "doctrines of jurisdiction," as follows:[17] (1) "[i]f a court does not have jurisdiction, its actions do not bind";[18] consequently, anything a court does without jurisdiction is ultra vires, and so jurisdictional questions can be raised at any time in the litigation process, including on appeal and even sua sponte by the court;[19] (2) "jurisdictional questions are not under the control of the parties," so parties cannot waive, forfeit, or consent to jurisdiction;[20] and (3) "[j]urisdictional requirements are . . . mandatory," so the court has no discretion to change them, bend them, or apply flexible equitable doctrines to overcome them in order to achieve justice.[21] When a court calls something "jurisdictional," therefore, it uses a word loaded with legal meaning, a word with serious implications for the parties of a case. "Jurisdiction" connotes rigidity: if noncompliance with a rule means that a court is stripped of jurisdiction, then the parties are powerless to argue for exceptions, and the court is not allowed to grant them.

How are courts to know when the doctrines of jurisdiction ought to apply? The easy case would involve a statute that, in establishing a rule, explicitly called for the application of the doctrines. Clear legislative intent would be enough to justify rigid application of the rule. But what about rules for which legislatures have not given such clear guidance? Can the doctrines still be justified? I suggest that there are situations in which harsh application of a rule is still justified but that courts, including the Supreme Court, have not been clear in explaining what those situations are. This, I contend, is what leads courts to misuse the jurisdictional label and attach the label to rules that cannot (in the absence of clear legislative intent) justifiably be applied with rigidity. This also is what allows the jurisdictional label to become a legal trope and to

17. Dane, *supra* note 1, at 30. Dane cites a few more doctrines than I have listed, but these three doctrines are the ones that are relevant for this Note.

18. *Id.* at 32-35.

19. *See, e.g.*, ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 5.1, at 262 (4th ed. 2003) ("[B]ecause subject matter jurisdiction must exist at every level of appeal, all federal courts—trial and appellate—can challenge the existence of federal subject matter jurisdiction.").

20. Dane, *supra* note 1, at 36-37; *see also* WRIGHT ET AL., *supra* note 8, § 3522 ("[P]arties cannot waive lack of jurisdiction by express consent, or by conduct, or even by estoppel.").

21. Dane, *supra* note 1, 37-42; *see* WRIGHT ET AL., *supra* note 8, § 3522 (noting that even the doctrine of estoppel cannot overcome jurisdiction); *id.* § 3602 (discussing the requirements for federal diversity jurisdiction, and noting that "jurisdiction cannot be conferred by consent of the parties, nor can the requirements be waived by inaction; the court has a duty to determine on its own whether [jurisdictional requirements are met]"); *see also* Shendock v. Dir., Office of Workers' Comp. Programs, 893 F.2d 1458, 1466 (3d Cir. 1990) (en banc) (noting that equitable tolling and estoppel do not apply when jurisdiction is at issue).

signify only consequences without also signifying justifications for those consequences, thus leading to courts using the jurisdictional label as an unhelpful shorthand.

In this Part, I examine some cases in which courts attach the jurisdictional label to certain rules to reach the harsh results of the doctrines of jurisdiction. I go on to argue that the justifications given for such rigidity are not adequate to explain why the doctrines are required, called for, or prudent.

A. *The Jurisdictionality of Time Limits*

Courts frequently attach the jurisdictional label to the time limits that govern claim processing rules.[22] A paradigm case is the Third Circuit's *Shendock v. Director, Office of Workers' Compensation Programs*,[23] in which a pro se black lung claimant sought review of an adverse ruling by the Department of Labor. Instead of filing a petition for review with a federal court of appeals, he simply left a letter indicating his intention to appeal with the local black lung complaint office.[24] A federal statute required the filing of the petition to be made within sixty days of the Department of Labor's ruling, and though Shendock had left his letter in the complaint office within sixty days, he did not file his actual petition until after the statutory time limit had expired. Shendock claimed that the equitable doctrines of tolling and estoppel should apply since he had submitted a timely letter signifying his intent to appeal and because the delay in filing the actual petition was largely due to the actions of the local black lung complaint office.[25]

The Third Circuit rejected Shendock's plea for equitable flexibility because it assumed the sixty-day time limit to be "jurisdictional." The court reasoned that the statute giving Shendock a right to appeal described the several filing requirements (including the time limit) that would make a filing proper. It explicitly stated: "*Upon such filing, the court shall have jurisdiction of the proceeding*."[26] Thus, the filing of a proper petition was what the Supreme Court and Mark Hall have described as "an event of jurisdictional significance,"[27] that is, an event that vests jurisdiction in the appellate court. Unless and until that event transpires (the filing of a notice that meets all of the statutory requirements), the court has no jurisdiction. The Third Circuit went on to deny application of equitable tolling and reject Shendock's petition for review, conscious of the harsh results of such a decision:

---

22. *See, e.g.*, Dane, *supra* note 1; Mark A. Hall, *The Jurisdictional Nature of the Time To Appeal*, 21 GA. L. REV 399, 399 (1986).

23. 893 F.2d 1458 (3d Cir. 1990) (en banc).

24. *Id.* at 1460-61.

25. *Id.* at 1459.

26. *Id.* at 1462 (citing 33 U.S.C.A. § 921(c) (1990)) (emphasis supplied by court).

27. Hall, *supra* note 22, at 409 (citing Griggs v. Provident Consumer Disc. Co., 459 U.S. 56, 58 (1982) (per curiam)).

> Equitable tolling or estoppel simply is not available when there are jurisdictional limitations. . . . Jurisdictional limitations and the policies which they embody must be honored even in the face of apparent injustice or an administrative agency's obvious misapplication or violation of substantive law. . . . [A] lack of appellate jurisdiction mandates an inability to act, not merely in unappealing cases, but in compelling cases as well. . . . [J]urisdictional legislation must be observed even though a harsh result may obtain. . . . If the time limitation is jurisdictional in nature, thus going to the very power to adjudicate, the court must consider the delay *sua sponte* and apply the statute strictly.[28]

Another example of a time limit courts have consistently deemed jurisdictional is the time limit for filing notices of appeal. As Mark Hall has observed, "appellate courts have made a fetish of their own authority by characterizing timing defects in notices of appeal as 'jurisdictional' and dismissing untimely appeals late in the appellate process even though the parties overlook the error."[29] Wright and Miller, in their treatise on federal court jurisdiction, also note that the jurisdictional label is inappropriately applied to the timing requirements for notices of appeal and call for reform:

> The rule is well settled that failure to file a timely notice of appeal defeats the jurisdiction of a court of appeals. Application of this rule leads to untoward dismissals of appeals with distressing frequency. . . . [T]his area remains in need of continuing study and further revision of the controlling rules.[30]

Thus, Wright and Miller urge, we should consider "discarding the 'jurisdiction' label so as to minimize the risk that untoward consequences may follow unthinking use of the label."[31]

B. *The Jurisdictionality of Claim Processing Rules*

However, the loose language of jurisdiction is not limited to cases involving time limits for complying with a claim processing rule. In some situations, the courts address the jurisdictionality of the rule itself. Consider *Becker v. Montgomery*,[32] in which a pro se civil rights litigant filed a notice of appeal with his typewritten signature but forgot to hand-sign the notice as required by the rules of procedure.[33] The Court of Appeals for the Sixth Circuit

---

28. *Shendock*, 893 F.2d at 1466 (internal quotations and citations omitted).

29. Hall, *supra* note 22, at 399. Hall goes on to cite nearly twenty federal appeals court cases in a "nonexhaustive, illustrative list of decisions in which the courts have raised timing defects sua sponte." *Id.* at 399 n.2.

30. WRIGHT ET AL., *supra* note 8, § 3901.

31. *Id.*

32. 532 U.S. 757 (2001). The portion of the Sixth Circuit case discussed here is taken from the Supreme Court's review of the case. The Court was unanimous in overturning the Sixth Circuit and finding that jurisdiction vests in the court of appeals despite the appellant's failure to hand-sign the notice of appeal, so long as he makes a prompt correction.

33. FED. R. CIV. P. 11(a) (stating that "[e]very pleading, written motion, and other

dismissed the appeal on its own motion, holding that Becker's notice of appeal was fatally defective because it was not signed. The Sixth Circuit deemed the defect "jurisdictional" and therefore not curable outside the time allowed for filing the notice: "This court *lacks jurisdiction* over this appeal. The notice of appeal is defective because it was not signed by the pro se appellant or by a qualified attorney."[34]

In other situations, courts discuss both the jurisdictionality of the time limit and the requirement governed by that limit. In these cases, courts explicitly use a time limit as the jurisdictional hook, but in so doing implicitly label "jurisdictional" the claim processing rule whose time limit is at issue. Many cases declaring time limits to be jurisdictional come about in the following context: There is a time limit on filing a certain paper, which requires, among other things, compliance with rule *X*; a party files the paper before time is up, and complies with every rule except *X*; only after the time has run does the party realize her mistake and then attempt to amend the paper. If a court declares the time limit jurisdictional, and uses that as the basis for disallowing amendment to the paper, it is saying two things: not only is the court not allowed to extend the time limit, but it is also not allowed even to treat the initial submission of the paper as cognizable; the submission, because it was defective, did not give the court jurisdiction to hear the claim. In other words, in declining to allow the party to amend, the court treats the initial submission as though it never existed, as though it never vested the court with jurisdiction. In the defective paper context, a declaration of a time limit as jurisdictional is tantamount to a declaration that the requirement to which that time limit applies is jurisdictional, too.

Scarborough v. Principi[35] is a prime example of this situation. At issue in that case was the Equal Access to Justice Act (EAJA), which allows veterans to recover attorney's fees when they are successful in claims for benefits against the government, but also requires the application for fees to include an allegation that the government's position in the underlying litigation was not substantially justified.[36] Scarborough failed to make this allegation in his otherwise timely and complete application; he attempted to amend only after the time for filing had passed. The government argued, and the Federal Circuit agreed, that his claim for fees should be dismissed on the grounds that his omission stripped the Court of Appeals for Veterans Claims (CAVC) of jurisdiction: EAJA is a waiver of sovereign immunity, and so the court only had jurisdiction to hear the claim if every condition was met upon which that

paper [filed in a district court] shall be signed" by counsel or, if the party is unrepresented, by the party himself).

34. *Becker*, 532 U.S. at 761 (citing the court of appeals decision) (emphasis added).

35. 319 F.3d 1346 (Fed. Cir. 2003), *rev'd*, 541 U.S. 401 (2004).

36. 28 U.S.C. § 2412(d)(1)(A) (2006). Section 2412(d)(1)(B) of the same statute establishes the thirty-day time limit for filing an application with the elements enumerated in § 2412(d)(1)(A).

waiver was based. The Federal Circuit's holding reveals how the "jurisdictionality" of a time limit for a requirement and the requirement itself converge in the defective paper context: "We read the plain language of the EAJA statute to require not only that an application be filed by the thirty-day deadline, but that it contain averments addressing each of the four other requirements [including the not-substantially-justified allegation] enumerated in the statute."[37]

C. *The Problem*

The problem with courts using the jurisdictional label in these contexts is twofold. On the one hand it leads to unnecessarily unfair results. Surely a party who does not satisfy the federal question or diversity requirements should have his claim dismissed from federal court, but should a party who fails to hand-sign his notice of appeal be denied relief in the appellate courts for such a trivial error? Few would so contend. On the other hand, loose application of the term leads to opaque decisions and courts failing adequately to explain why they reach the harsh results they do. Cases like *Shendock*, *Becker*, and *Scarborough* seem simply to invoke the word "jurisdictional" without giving any more explanation of why the rule at issue ought to be treated rigidly. Why should the time limit in *Shendock* be treated as a jurisdictional rule instead of as a statute of limitations?[38] Why shouldn't Becker be allowed to cure his omission of a signature or Scarborough his omission of the not-substantially-justified allegation? These questions are especially pressing if one argues that such omissions caused no prejudice to the other party and did not substantially disrupt the litigation process. The courts should explain why such harsh results are necessary.

The Supreme Court recently attempted to fix this problem in *Kontrick v. Ryan*,[39] in which Justice Ginsburg, speaking for a unanimous Court, offered the following advice to practitioners and judges about how to decide whether a rule is jurisdictional or not: "Clarity would be facilitated if courts and litigants used the label 'jurisdictional' not for claim-processing rules, but only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority."[40] The Court found in *Kontrick* that Rule 4004 of the Federal Rules

37. *Scarborough*, 319 F.3d at 1351.

38. The Third Circuit did suggest that the jurisdictionality of the time limit in *Shendock v. Director, Office of Workers' Compensation Programs*, 893 F.2d 1458 (3d Cir. 1990), could be deduced from the fact that the legislature used the word "jurisdiction" in the statute establishing the requirement. The problem with assuming that mere use of the term jurisdiction in a statute automatically justifies the doctrines of jurisdiction is discussed more fully below in Part II.

39. 540 U.S. 443 (2004).

40. *Id.* at 455.

of Bankruptcy was not jurisdictional. One reason for this ruling was that, in describing a time limit for filing a complaint, the Rule did not delineate the classes of cases courts could hear and so did not describe the jurisdiction of the court.[41] Therefore the debtor could not challenge the untimeliness of the creditor's complaint after the court had already reached the merits. The time limit, in being both overlooked by the parties and not challenged before the court, had been forfeited, which was only possible because it was nonjurisdictional.[42]

The Supreme Court had an opportunity to put its *Kontrick* rule to work in the very same Term when it reversed the Federal Circuit's *Scarborough* decision. Again through Justice Ginsburg, the Court wrote that the EAJA's not-substantially-justified allegation requirement

> does not describe what classes of cases the CAVC is competent to adjudicate; instead, the section relates only to postjudgment proceedings auxiliary to cases already within that court's adjudicatory authority. Accordingly, as *Kontrick* indicates, the [EAJA] provision's 30-day deadline for fee applications and its application-content specifications are not properly typed "jurisdictional."[43]

Justice Ginsburg therefore tried to distinguish between rules that merely guide litigation behavior and rules that delineate classes of cases falling under a court's authority. But the distinction is not sufficient to solve the problem of the jurisdictional label. Any rule can be read to describe the classes of cases courts can hear. Bankruptcy Rule 4004 could be read to direct the courts only to hear cases in which the creditor's complaint is timely filed. The EAJA can be read to direct the courts only to hear claims for attorney's fees when the claimant makes the not-substantially-justified allegation. Similarly, with any statutory time limit, we can interpret the time limit as instructing the court not to hear

41. *Id.* at 453-56.

42. The Supreme Court reaffirmed *Kontrick* recently in *Eberhart v. United States*, 126 S. Ct. 403 (2005). In *Eberhart*, the Court considered the jurisdictionality of Rules 33 and 45 of the Federal Rules of Criminal Procedure. Rule 33 allows a district court to vacate a jury verdict or order a new trial if justice so requires, so long as a motion is made within seven days of a verdict. FED. R. CRIM. P. 33(a), 33(b)(2). Rule 45(b)(2) dictates that this time limit is rigid. FED. R. CRIM. P. 45(b)(2). After a guilty verdict, defendant Eberhart moved for a new trial. He cited one ground for relief in a timely motion; he cited two additional grounds in a supplemental memorandum six months later. The government argued that the court could not consider these additional grounds because they were untimely under Rules 33 and 45, which set forth jurisdictional time limits. The Supreme Court disagreed, noting that "[t]he Rules we considered in *Kontrick* closely parallel those at issue here," and used almost identical language. *Eberhart*, 126 S. Ct. at 405. Thus, the Court concluded, "[i]t is implausible that the Rules considered in *Kontrick* can be nonjurisdictional claim processing rules, while virtually identical provisions of the Rules of Criminal Procedure can deprive federal courts of subject-matter jurisdiction." *Id.* The Court again reiterated its insistence that courts be more careful in their use of the jurisdictional label. *See id.* (quoting *Kontrick*, 540 U.S. at 454).

43. Scarborough v. Principi, 541 U.S. 401, 414 (2004) (internal quotations and citation omitted).

any cases in which it is not met. Every rule implicitly distinguishes between those cases in which there is compliance and those in which there is not. A rule can be read to imply that the court cannot hear the latter *class of cases*.

In pre-*Kontrick* cases, the Court's attempt to justify the flexible application of nonjurisdictional rules was also problematic. Consider the opinion in which the Supreme Court reversed the Sixth Circuit's *Becker* decision.[44] The unanimous Court, speaking through its ostensible jurisdiction expert, Justice Ginsburg, found that the rule requiring a notice of appeal to be hand-signed was not jurisdictional. It therefore allowed Becker to amend his notice of appeal, even after the time limit for filing had expired. The reasoning of the Court, in relevant part, was as follows: Rule 11(a) of the Federal Rules of Civil Procedure requires that all papers filed with the district court be signed by at least one attorney or, in the case of a pro se litigant, by the party himself. Notices of appeal unquestionably fall within the ambit of this rule, and so they must be signed. However, the Court went on:

> As plainly as Civil Rule 11(a) requires a signature on filed papers, however, so the rule goes on to provide in its final sentence that "omission of the signature" may be "corrected promptly after being called to the attention of the attorney or party." "Correction can be made," the Rules Advisory Committee noted, "by signing the paper on file or by submitting a duplicate that contains the signature."[45]

The Court then made the following conclusion: "Becker's lapse was curable as Civil Rule 11(a) prescribes; his initial omission was not a 'jurisdictional' impediment to pursuit of his appeal."[46]

There is little doubt that the Court was correct in reaching this conclusion. Since the very same rule that requires a hand-written signature also deems omission of the signature a curable defect, Becker should have been allowed to amend his notice of appeal. Rule 11 specifically allowed him to do so.[47] But it is the second part of the Court's conclusion—"his initial omission was not a 'jurisdictional' impediment to pursuit of his appeal"—that is mysterious. Why the need to invoke the language of jurisdiction? Why not simply declare the defect curable and move on? Indeed, the jurisdictional argument in *Becker* is circular. The Court seems to be turning the doctrine of jurisdiction on its head; instead of saying that the rule was nonjurisdictional and so curable, it is saying that it is curable, and so nonjurisdictional. This is the equivalent of saying it is curable because it is curable.

How can courts avoid the problem of misusing the jurisdictional label? One answer might be to eliminate the jurisdictional label from the legal lexicon

---

44. Becker v. Montgomery, 532 U.S. 757 (2001).

45. *Id.* at 764 (internal citations omitted).

46. *Id.* at 765.

47. *See* FED. R. CIV. P. 11(a) ("An unsigned paper shall be stricken *unless omission of the signature is corrected promptly after being called to the attention of the attorney or party*.") (emphasis added).

altogether. If courts are prevented from ever using the label as shorthand, they would be forced to justify explicitly, with respect to each rule, why they would apply that rule rigidly or flexibly. This may be a desirable solution to some, and in Part V, I discuss ways in which courts can justify rigid or flexible application of rules without resorting to jurisdictional language. However, eliminating talk of jurisdiction altogether is impractical and unnecessary. "As a preliminary matter, banishing the term 'jurisdiction' from our legal lexicon is out of the question," Evan Tsen Lee notes, because "[c]enturies of Anglo-American jurisprudence are built on the notion that something called 'jurisdiction' is a predicate for moving forward in adjudication."[48] It would be impossible to get judges and lawyers to stop speaking in terms of jurisdiction.

Second, retaining the jurisdictional label can be helpful and useful. Some rules specify not how a court is to reach a decision on an issue, but "whether a given tribunal has the authority to decide [that] issue[], and to bind the rest of the world to its decision[]"[49] in the first place. One of the many meanings of the term "jurisdiction" reflects this. Though we are accustomed to saying things such as "the court has jurisdiction to do this," or "the court was beyond its jurisdiction when it did that," the word "jurisdiction" can also refer to an institution itself,[50] such as when we speak of "this jurisdiction" or "that jurisdiction." Some rules serve to answer the questions of whether the issue should be decided in this jurisdiction, or that jurisdiction, and why. Calling rules "jurisdictional" can reflect that they serve this purpose.

Moreover, while some may argue that the doctrines of jurisdiction are outdated and are no longer premised on sound policy,[51] I argue that that there are certain situations in which the doctrines are justified. Indeed, I suggest they are justified precisely when a rule serves the purpose of specifying who ought to decide an issue of law. We inhabit a legal system where many institutions are granted a portion of the state's sovereignty and authority to "speak law"; we also pride ourselves—as demonstrated most clearly, for example, by the notions of federalism and separation of powers—on keeping those institutions separate and distinct. Rules that specify who has authority, under which circumstances, and why, prevent institutions from encroaching on one another. As I will show in Part IV, these rules perform a function that ought to be beyond the power of litigants to waive and beyond the power of courts, whose very authority is limited by such rules, to alter.

Thus, I suggest, the jurisdictional label can still be helpful as shorthand.

48. Evan Tsen Lee, *The Dubious Concept of Jurisdiction*, 54 HASTINGS L.J. 1613, 1628 (2003).

49. Dane, *supra* note 1, at 22.

50. *See* OED ONLINE, *supra* note 16.

51. *See, e.g.*, Dan B. Dobbs, *The Decline of Jurisdiction by Consent*, 40 N.C. L. REV. 49 (1961) (arguing that the rule against jurisdiction by consent arose in medieval England when inferior courts were corruptly coercing litigants into consenting to their jurisdiction and that the rule today is outdated since such problems of corruption no longer persist).

There are some properties and characteristics that rules can have—that is, specifying which institution should speak law on an issue and why, thus shaping and giving identity to "a jurisdiction"—that justify rigid application. By calling a rule "jurisdictional," a court can convey that a rule has those jurisdictional properties and that the doctrines of jurisdiction are justified. But the label will only be useful if its use is constrained to those situations in which rules have these "jurisdictional properties." If courts limit the use of the label to rules with these properties, then the label will come to be associated with rules that fit our common understanding of what "jurisdiction" means, and the label will lead courts to apply the doctrines of jurisdiction when they are indeed justified. Courts could therefore still use the jurisdictional label as shorthand, but not be open to the attack that they misuse it.

Implicit in the accusation that courts misuse the jurisdictional label is the assumption that there is a proper use. The goal of this Note is to figure out what that proper use might be. *Kontrick* hinted at an answer but did not give a satisfactory one. I intend to continue the project *Kontrick* began, but to explain more fully how to distinguish jurisdictional rules from nonjurisdictional rules and what it is about that distinction that justifies rigid application of the former and flexible application of the latter. In Part III, I explain more fully what properties rules should have before they are worthy of the jurisdictional label. First, however, I turn to previous attempts at this project and show how they are helpful, but do not adequately solve the problem of the jurisdictional label.

II. WHAT MAKES A RULE JURISDICTIONAL: PREVIOUS EXPLANATIONS

In this Part, I examine some attempts by scholars and courts to identify what might qualify as "jurisdictional properties." First, I examine the argument that "jurisdiction is power"—that is, that jurisdictional rules are those rules that somehow affect the power of the court. Next, I look at the argument that jurisdictional rules relate to the legitimacy of a court. Finally, I examine the argument, exemplified in *Shendock*, that jurisdictional rules are whatever the legislature calls "jurisdictional" in a statute. I argue that while these accounts of jurisdiction are helpful for solving the problem of the jurisdictional label, they are not entirely adequate.

A. *Jurisdiction as Power*

One of the most frequently given explanations for what jurisdiction is and why it cannot be treated with flexibility is that it defines the "power" of the court to adjudicate a case.[52] More specifically, Justice Holmes once wrote that

52. BLACK'S LAW DICTIONARY 867 (8th ed. 2004) (defining jurisdiction as "[a] court's *power* to decide a case or issue a decree") (emphasis added). The power metaphor is common in legal scholarship, too. *See, e.g.*, William M. Wiecek, *The Reconstruction of*

"[t]he foundation of jurisdiction is physical power."[53] Therefore, the reasoning goes, a rule is jurisdictional when compliance vests the court with a power the court cannot generate on its own. A court without jurisdiction is, to use Evan Tsen Lee's imagery, like a car without fuel,[54] or an "unplugged electrical appliance."[55]

This metaphor is unhelpful for our purposes. An unplugged electrical appliance is surely not what lawyers think of when they think of a jurisdiction-less court. The court can proceed, in some regards, with an adjudication even if, as a legal matter, it lacks jurisdiction: the judge can wear his robe, pound his gavel, and write and publish decisions; parties can litigate and, once the judge has issued an order, can conform their actions to that order. Indeed, there may be countless situations in which a court mistakenly concluded it had jurisdiction when it really did not, but where the parties nevertheless did not object or appeal. In such a case, the court did, in effect, exercise its ability to adjudicate, and its decision, though made in the absence of jurisdiction, actually had an effect on the parties.[56]

Since no legal rule actually deprives a court of its ability to adjudicate in the way unplugging a blender deprives the appliance of its ability to spin its blades, saying a rule is jurisdictional only when it goes to the court's power is to say close to nothing. Becker's failure to sign his name on the notice of appeal did not grind the litigation to a halt by making it impossible to proceed; nor would a prompt signing have jump-started the court and given it the ability to adjudicate. Moreover, the metaphor of power does not help us answer the "why" questions of jurisdiction: why should jurisdictional rules be treated with

---

Federal Judicial Power, 1863-1875, 13 AM. J. LEGAL HIST. 333, 333 (1969) ("To a court, jurisdiction is power: power to decide certain types of cases, power to hear the pleas and defenses of different groups of litigants, power to settle policy questions which affect the lives, liberty, or purses of men, corporations, and governments. An increase in a court's jurisdiction allows that court to take on new powers, open its doors to new parties, and command the obedience of men formerly strangers to its writ.").

53. McDonald v. Mabee, 243 U.S. 90, 91 (1917).

54. Lee, *supra* note 48, at 1634 ("[I]t does not matter how many good reasons there may be to permit [a court to adjudicate when it lacks jurisdiction], just as a car without gas cannot be driven no matter how good a reason there is to go somewhere.").

55. *Id.* at 1616.

56. On the other hand, as Lee notes, even courts that have jurisdiction do not necessarily have the power to enforce their orders. Lee considers the examples of *Brown v. Board of Education*, 347 U.S. 483 (1954) and *Cooper v. Aaron*, 358 U.S. 1 (1958). After the Supreme Court ordered the desegregation of public schools, the governor of Arkansas was not inclined to obey the Court's order; nor could the Court exert much physical force since all it had "was a handful of rather feckless marshals." Lee, *supra* note 48, at 1617-18. It was only when President Eisenhower sent federal troops to Arkansas to enforce desegregation that the Court's order was enforced. But, as Lee points out, the Court did not gain jurisdiction at *this* moment. It had jurisdiction when the case came properly before it, and when it was generally agreed that it was up to the Supreme Court to decide whether the Constitution necessitated desegregation. The Court had jurisdiction long before physical power was employed. *See id.* at 1618.

rigidity? All it does is reiterate what we already know about the consequences of jurisdiction: without it a court cannot go on with an adjudication, and a court cannot expand the scope of its jurisdiction.

B. *Jurisdiction as Legitimacy-Preserving Device*

The metaphor of physical power does not help explain what jurisdiction ought to mean. But, as Evan Tsen Lee has pointed out, "power," like "jurisdiction," is a word of many meanings.[57] It can mean, in addition to physical ability, something like legitimate authority. Perry Dane describes this understanding of jurisdiction in terms of the following image:

> The most important image associated with the Idea of Jurisdiction is that of the judge who, or the court that, lacks jurisdiction. The Idea of Jurisdiction imagines that judge or court to be in essence, though obviously not in every detail, no different from any person on the street. He might hold the title and earn the salary of a judge. She might wear a robe and wield a gavel. None of that is irrelevant. But absent jurisdiction, it is all peripheral. The judge without jurisdiction might as well be an imposter. He or she might almost as well be you or I (judges in the company excluded).[58]

Lee therefore suggests that we drop the language of power and ability when describing jurisdiction and instead speak of jurisdiction as authority: "The ability to *enforce* an order is a matter of power—a descriptive matter. Jurisdiction to *enter an order* is a matter of authority—a normative matter and one entirely divorced from the question of [physical] power."[59] Paul Schiff Berman makes a similar argument when he notes that a

> judgment is not self-executing; some entity with police power must enforce it. Thus, the question becomes not whether a community can assert jurisdiction, but whether other communities are willing to give deference to the judgment rendered and enforce it as if it were their own. This is the process of judgment recognition familiar to those who study conflict of laws. A tribunal asserts jurisdiction over a dispute, and then other [communities] must decide whether to confer legitimacy on that tribunal by recognizing and enforcing its judgment. Thus, even at the moment that a community daringly invents its own legal jurisdiction, it is immediately forced to acknowledge that its invention is limited by the willingness of others to accept the judgment as normatively legitimate.[60]

Both Lee and Berman note that jurisdiction means the willingness of communities to accept the judgment of a court as final and binding. A court's actions have no meaning if they are not legitimized, either by collective

57. Lee, *supra* note 48, at 1616-19.

58. Dane, *supra* note 1, at 23-24.

59. Lee, *supra* note 48, at 1618 (emphasis added).

60. Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. REV. 311, 502 (2002).

sociological acceptance, or by the executive's use of force.[61] Lee takes the analysis one step further and points out that jurisdiction is not equivalent to legitimacy but is rather the name we give to the presumption of the legitimacy of court orders.[62] If a court has jurisdiction, that fact both provides a reason for the litigants to obey any resulting order and increases the likelihood that people, including the litigants, will recognize the resulting order as something that ought to be obeyed. By the same token, if the court lacks jurisdiction, this provides a reason for the litigants to ignore any resulting order, and it decreases the likelihood that people will see the order as being worthy of obeisance. So, jurisdiction goes to the legitimacy of a resulting judgment.[63]

Does this conception of jurisdiction shed light on the questions of jurisdiction we are seeking to answer? On the one hand, it does help explain why jurisdictional rules must be applied rigidly. The logic must be this: a rule is jurisdictional if compliance with it establishes a presumption of the legitimacy of the court's resulting order; any flexibility in the application of the rule will call that legitimacy into question, and so the court should not be flexible. That, perhaps, is what is going on in the Supreme Court's decisions in *Scarborough* and *Becker*. The Court was saying in *Becker*, for example, that the instrument an appellant uses to sign his notice of appeal—pen or typewriter—in no way goes to the legitimacy of the resulting order, and so Becker should be allowed to amend his defective notice.

However, this conception of jurisdiction cannot be the whole picture. As Lee concedes, "legitimate authority [cannot be] the metaphysical 'essence' or *sine qua non* of jurisdiction" because other factors, including the strength of the plaintiff's case on the merits, go to legitimacy as well.[64] Conceiving of jurisdictional rules as legitimacy-creating or legitimacy-preserving helps explain why *non*jurisdictional rules are *non*jurisdictional. Few will question the legitimacy of a court order if a veteran is granted attorney's fees, even though he did not allege in his application that the government's position in the underlying litigation was unjustified. Nor will communities riot in front of a courthouse or refuse to let their executives exercise their police power to enforce an appellate court's order when an appellant does not hand-sign his notice of appeal. And this is not just because cases like *Scarborough* and *Becker* were small-time cases with little implication for society at large. As Lee

61. And frequently these two things are one and the same. Berman was considering how jurisdiction arises over new subject matter that was not previously the province of any court (such as novel issues dealing with cyberspace that cross national borders). Berman recognizes that when one institution claims jurisdiction—that is, authority—over a novel subject matter, its authority is legitimized when other communities accept the authority sociologically, and in so doing command police forces to enforce the institution's orders.

62. Lee, *supra* note 48, at 1622 ("[J]urisdiction denotes *a presumption in favor of the legitimacy of the prospective judgment*.") (emphasis added).

63. *Id.* at 1620.

64. *Id.*

points out, even if there were a technical pleading error in *Brown v. Board of Education*, that error would easily have been forgotten and "rationalized away."[65] Conversely, those who did resist *Brown*, advocated disobedience, or wanted to see the decision overturned, would probably not have pointed to a small technical error as the grounds for resistance.[66]

Equating jurisdiction with legitimacy is both underinclusive and overinclusive. It is underinclusive because many things legitimate a court ruling, such as the persuasiveness of the court's reasoning in its opinion, that we would not classify as "jurisdictional." It is overinclusive because there are many rules that we agree are justifiably applied rigidly, such as the complete diversity requirement for federal jurisdiction, that have little to do with the sociological acceptance of a court order. This in no way undermines Lee's thesis. Lee is quite upfront about the fact that legitimacy is not the essence of jurisdiction but is rather one device among many to establish a presumption of legitimacy. This recognition, however, leaves us still with an inadequate understanding of jurisdiction to help us answer the questions of what separates jurisdictional rules from nonjurisdictional rules and why jurisdictional rules are to be applied so strictly.

C. *Jurisdiction as Legislative Decree*

Another way courts try to determine whether or not a rule or requirement is jurisdictional is to look at the language of the statute establishing the rule. Such an analysis would say that if the statute codifying the procedural requirement uses the word "jurisdiction," then the rule must be considered jurisdictional, and all the consequences of the doctrine of jurisdiction must attach.

Shendock is a clear example of a court appealing to the legislative language to do the jurisdictional calculus. In deciding whether or not the time limit for filing an appeal was jurisdictional, the Third Circuit noted that whether a procedural requirement should be applied rigidly is up to the legislature that imposes the requirement and that the language the legislature uses is indicative of its intentions regarding rigid versus flexible application:

> When Congress intends the sixty days [time limit] . . . to be a mandatory condition upon the availability of the judicial remedy of review, the statutory provisions relating to the time and place of filing are termed "jurisdictional." If, on the other hand, Congress intends to grant us discretion to consider the particular circumstances surrounding the efforts of the party seeking review to meet the statute's requirements, the provisions are treated as a statute of

65. *Id.* at 1624 (discussing Brown v. Bd. of Educ., 347 U.S. 483 (1954)).

66. *Id.* (considering the hypothetical discovery that *Brown* had been decided despite an improperly filed paper, and noting that "[i]n the end, I doubt whether most Americans would view such an historical discovery as anything more than a curio, much as the technical illegality of the United States Constitution under the terms of the Articles of Confederation is hardly considered grounds for disobeying the Constitution").

> limitations that can be tolled when the principles of equity would make their rigid application unfair.[67]

However, the court then went on to describe how it knew that the legislature's use of "jurisdiction" connoted intent to specify rigid rules: jurisdiction is defined as the court's power or authority to hear a case, and Congress surely "knew the meaning of the term 'jurisdiction'" when it imposed the time limit.[68]

Yet introducing legislative intent into the picture does not satisfactorily explain which rules should be considered jurisdictional and which rules should not; nor does it give us any deeper understanding of why certain rules should be applied rigidly. I caution against too easily acquiescing to the reasoning of *Shendock*. It is not certain that in every situation where the legislature says "jurisdictional," it really intended all of the doctrines of jurisdiction to apply, especially in cases in which justice would seem to call for flexibility.

Consider Justice Black's dissent from the Supreme Court's denial of certiorari in *Teague v. Regional Commissioner of Customs*,[69] which Perry Dane calls "the most powerful criticism of the doctrine of jurisdictional time limits."[70] *Teague* involved the time limit for filing a petition of certiorari to the Supreme Court. The Court denied a petition because it was filed two days after the ninety-day time limit for filing set forth in 28 U.S.C. § 2101(c). Once again, the Court decided on "jurisdictional" grounds, apparently agreeing with the Solicitor General that § 2101(c), which specifies the requirements for petitioning for certiorari, "is 'jurisdictional,' and that we must follow it."[71]

In *Teague*, the jurisdictionality of the time limit had dramatic effects, as emphasized by the case's rather extreme facts. A severe snowstorm hit New York City the night before the petitioner sent his petition for certiorari by first-class mail to Washington, D.C. The storm caused

> considerable disruption of many services including, as it turned out, the mails. Counsel for petitioners no doubt anticipated that some delay might possibly result from the storm, but since first-class mail from New York normally reaches Washington overnight, they could not have anticipated that it would take more than the remaining two and one-half days for their petition to arrive. In fact, however, the petition took four days to reach Washington and was docketed [at the Supreme Court two days after the ninety-day limit had expired].[72]

The Court nevertheless held that it must deny certiorari, since § 2101(c) was

67. Shendock v. Dir., Office of Workers' Comp. Programs, 893 F.2d 1458, 1462 (3d Cir. 1990).

68. *Id.* at 1462-63.

69. 394 U.S. 977 (1969).

70. Dane, *supra* note 1, at 16. Dane goes on to disagree with Justice Black's ultimate proposal that courts allow flexibility in certain circumstances.

71. *Teague*, 394 U.S. at 982 (Black, J., dissenting).

72. *Id.* at 981.

jurisdictional.[73] Justice Black went on to criticize the Court's "draconic interpretation"[74] of the statute:

> I agree, of course, that we should follow the statute. But we must first determine what the statute means. Commentators and this Court alike have often said that the statute is "jurisdictional," and no doubt this statement is true in certain senses of that term. But the statement certainly is not true if it is intended to suggest that the statute deprives this Court of all power to hear cases filed after the 90-day period, regardless of whether the delay was caused by snowstorms making the transportation of the mails impossible. . . .
>
> . . . .
>
> [T]he Court's Draconian interpretation of the statute is not supported by our prior decisions. Nor does the language of the statute itself 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. I for one cannot think of any purpose Congress might have had that could possibly be served by holding that a litigant can be defeated solely because of a delay that was entirely beyond his control.[75]

Justice Black explicitly calls into question the assumption that just because the legislature says "jurisdictional," it means that there are absolutely no circumstances under which a court can budge. This in turn calls into question the reasoning of *Shendock*. Did Congress really intend, in making the time limit on black lung claims, to deny courts the option to make exceptions in rare circumstances, such as those surrounding Shendock's delayed notice of appeal? Did Congress really mean to deny the Court the option to make exceptions for snowstorms that delay the sending of a certiorari petition by mail? Perhaps more to the point: did Congress even consider that these circumstances would ever arise? Surely not. If anything, it implicitly assumed that such circumstances were too rare to warrant explicit legislation and that the courts could deal with them if and when they arose. Justice Black summed this up best at the end of his dissent in *Teague*:

> It might be well to imagine for a moment what would have happened if some Senator or Representative had suggested an amendment to "clarify" the proposed § 2101(c) by stating that a petition filed after the 90-day period will not be out of time "when the delay is caused solely by an interruption of the

73. This certainly would not be the last time the statute would be held "jurisdictional." *See, e.g.*, Missouri v. Jenkins, 495 U.S. 33, 45 (1990) ("We deal first with the question of our own jurisdiction. Title 28 U.S.C. § 2101(c) requires that a petition for certiorari in a civil case be filed within 90 days of the entry of the judgment below. This 90-day limit is mandatory and jurisdictional. We have no authority to extend the period for filing . . . . Unless the . . . petition was filed within 90 days of the entry of the Court of Appeals' judgment, we must dismiss the petition.").

74. *Teague*, 394 U.S. at 983 (Black, J., dissenting).

75. *Id.* at 982-83.

> mail service due to snowstorms." It is conceivable that more than a few members of Congress would consider such an amendment an insult to this Court's intelligence and would feel it unnecessary to lead this Court by the hand on such matters of elementary common sense. It is impossible, however, to believe that any of them would have regarded an amendment to the opposite effect as properly reflecting the purpose of the statute, and yet this opposite amendment, ruling a petition out of time under these circumstances, is precisely the amendment that the Court today tacitly engrafts onto § 2101(c).[76]

Legislatures can and do instruct courts as to how they should process claims. If a legislature were to say clearly and unambiguously that the doctrines of jurisdiction should govern a rule, then this edict would justify harsh application of that rule as a matter of legislative supremacy. But this would not necessarily make the rule jurisdictional. I began with the premise that a rule is jurisdictional for reasons independent of the consequences that attach to it. Furthermore, this Note is not intended to address such circumstances. I am trying to sketch a methodology for identifying jurisdictionality in the absence of such clear legislative intent, and so to provide courts with a justification for applying certain rules with jurisdictional rigidity when looking to legislative intent alone will not suffice. The question in this Part has been whether casual invocation of the term "jurisdiction" in a statute—as in, "the court shall have jurisdiction over cases in which rule *X* has been satisfied"—is enough to connote clear legislative intent to have a rule be treated as the functional equivalent to a jurisdictional rule. I conclude that it is at best questionable whether a legislature really intends all of the consequences of jurisdiction to apply in cases such as *Shendock* and *Teague*. If we are inclined to agree with Justice Black's *Teague* dissent, then it does not help us to say that jurisdictional rules can always be identified in the language of the statute. While the use of the word "jurisdiction" in the statute may add credence to a claim that a rule is jurisdictional, this cannot be the whole picture.[77]

---

76. *Id.* at 984.

77. In an interesting twist on the jurisdiction-as-legislative-decree issue, the Supreme Court held recently that when Congress does not explicitly invoke jurisdictional language in a provision, that provision's requirements will be deemed nonjurisdictional. In *Arbaugh v. Y & H Corp.*, 126 S. Ct. 1235 (2006), the Court considered whether Title VII's definition of "employer" as "a person who has fifteen or more employees," 42 U.S.C. § 2000e-2(a)(1) (2006), was jurisdictional. The Court, again through Justice Ginsburg, held that it was not jurisdictional. It reasoned that Congress's grant of subject matter jurisdiction to federal courts over Title VII claims was embodied in 28 U.S.C. §§ 1331-1332 and Title VII's jurisdictional provision, 42 U.S.C. § 2000e-5(f)(3), and that the district court had jurisdiction over the claim so long as the plaintiff satisfied the requirements of *those* statutes. *Arbaugh*, 126 S. Ct. at 1243-44. The Court went on: "Of course, Congress could make the employee-numerosity requirement 'jurisdictional,' just as it has made an amount-in-controversy threshold an ingredient of subject-matter jurisdiction in delineating diversity-of-citizenship jurisdiction." *Id.* at 1245. However, since neither § 1331 nor Title VII's jurisdictional provision listed the numerosity requirement as a condition of jurisdiction, and since the numerosity requirement does not "speak in jurisdictional terms or refer in any way to the

II. WHAT MAKES A RULE JURISDICTIONAL: DRAWING BOUNDARIES OF AUTHORITY

This Part is intended to sketch a more complete conception of jurisdiction. I propose that use of the word "jurisdiction" should be reserved for those times when we refer to the boundaries of authority that keep that court separate from other courts and from other branches of government. Jurisdiction cannot just be what a court can and cannot do; that definition is too broad. Instead, it should refer to what a court can and cannot do precisely because of what other law-speaking institutions can and cannot do. Whatever defines the boundaries of an institution's authority with respect to other institutions, whatever rules and requirements play a role in shaping those boundaries, should be labeled jurisdictional.

Jurisdictional rules, on this account, draw boundaries of an institution's authority and give each institution its unique identity. For example, as we will see below, the requirements for federal subject matter jurisdiction tell us under what circumstances state judiciaries are more appropriate law speakers than federal courts and vice versa. They give the state and federal judiciaries distinct identities with respect to each other, by keeping them separate and saying when one institution would be encroaching on the province of another. Jurisdictional rules do not just say if a certain institution should "have say" on an issue, but say under what circumstances it should "have say," and if those circumstances are not present, what other institution should. Jurisdictional rules establish relations between institutions.

Therefore, rules should be classified as jurisdictional when they operate to shift authority, when they identify two possible law-speaking institutions (say, the federal and the state judiciaries), and place authority by default in the hands of one institution, but specify the circumstances in which authority will shift to the other. Furthermore, to be properly jurisdictional, these rules must be premised on policy decisions explaining why those circumstances justify a shift, and why, absent those circumstances, authority remains with the default institution. This second requirement is an important qualification. Some rules

---

jurisdiction of the district courts," it is not properly labeled jurisdictional. *Id.* (citing Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 394 (1982)).

As with *Shendock*, such reasoning is not entirely helpful. Just as a rule that is labeled jurisdictional may not really be intended by the legislature to have the doctrines of jurisdiction apply, so too a rule that is not labeled jurisdictional may be intended to have the doctrines apply. Suppose Congress had written 28 U.S.C. §§ 1331-1332 slightly differently and had said the district courts "may hear" federal question or diversity cases, instead of "shall have original jurisdiction" over such cases. Few would contend that this slip of the pen would render those provisions nonjurisdictional and would allow courts to treat them flexibly. Thus, whereas *Shendock* demonstrates the problem with automatically attaching the doctrines of jurisdiction to jurisdictional language, *Arbaugh* demonstrates the inverse problem with automatically finding an absence of jurisdictionality wherever there is the absence of jurisdictional language.

do happen to shift authority by coincidence. For example, when statutes of limitations run in one state, parties are frequently motivated to look for another state with a longer limitations period. In this sense, statutes of limitations operate to shift authority from states with shorter periods to states with longer ones. But this is incidental to those time requirements. Statutes of limitations are not premised on a policy decision that one state's judiciary is more proper for adjudication than another in the way that, for example, subject matter jurisdiction requirements are premised on the policy decisions that there are some situations in which state judiciaries are better suited to adjudication and others where federal courts are more proper.

To make this idea more concrete, consider the rules establishing subject matter jurisdiction for federal courts, the justiciability requirements of Article III, and the final judgment rule for federal appellate jurisdiction. These rules all operate to set boundaries of authority between institutions and therefore keep those institutions separate. I suggest that the jurisdictionality of a rule can be determined by comparing it to rules like these and deciding whether or not they serve analogous functions, and thus have the same jurisdictional properties.

A. *Federal Subject Matter Jurisdiction: Boundaries Between State and Federal Judiciaries*

A federal court is said to have subject matter jurisdiction over a case when the case meets the requirements for either federal question jurisdiction or diversity jurisdiction. Federal question jurisdiction arises when a case states a claim based on federal law; diversity jurisdiction arises whenever the parties to a suit are citizens of different states. A federal court lacks jurisdiction, and so is forbidden from hearing a case, when neither of these conditions is met.

What is the function of subject matter jurisdiction requirements, and why do we have them? The federal question requirement, on the one hand, establishes a presumption against federal courts being allowed to hear cases and relieves the federal courts from hearing most lawsuits that are ever filed. On the other hand, the requirement also can be seen as a method of removing authority from state courts in some situations. By granting litigants the option to file federal question claims in federal court, or to remove those claims to federal court, the requirement at least allows the possibility that state courts will be denied the authority to hear some federal question cases. The rule thus functions to distinguish between the state and federal judiciaries by delineating the circumstances under which one system is presumed to be the proper adjudicator and the circumstances under which that presumption is overcome.

The federal question requirement ensures that state courts have say on a majority of issues, like questions of state statutory or common law. It therefore

serves the goals of federalism by "preserv[ing] the role of the state courts"[78] and ensuring that each state maintains local authority to declare law and govern its citizens without a national government trying to impose national standards on issues we think are best resolved by local authorities (perhaps to encourage jurisdictional diversity and legal experimentation). The federal question requirement serves the converse goal of making sure that federal courts can preserve federal interests. Some scholars have argued that one of the rationales behind federal question jurisdiction—besides the obvious and incontrovertible explanation that a government ought to be allowed to create courts to enforce its own laws—is that federal question jurisdiction allows a federal judiciary to "protect" important federal interests with which state courts cannot be trusted.[79]

The alternative requirement for federal subject matter jurisdiction is that the parties to the litigation be citizens of different states. This requirement, too, establishes the presumption that state courts will have say on matters of state law and so divests federal courts of authority except in certain narrow circumstances when the parties to the suit are citizens of different states. It also, however, empowers federal courts to have say when state courts cannot be trusted, that is, when the out-of-state party seeks a "neutral" federal court because the forum state's judges and juries may be unfairly biased against out-of-staters.[80]

Further modifications of federal subject matter jurisdiction requirements also serve the same function of allocating authority. The restrictions that have been placed on diversity jurisdiction are the clearest examples. One of those restrictions, the amount-in-controversy requirement of 28 U.S.C. § 1332 imposed by Congress, prohibits lower federal courts from hearing diversity cases where the amount at issue is $75,000 or less. Another restriction, the judicially created complete diversity requirement articulated in *Strawbridge v. Curtiss*,[81] is the bright-line rule requiring all parties on one side of a lawsuit to be diverse from all parties on the opposing side before a lower federal court can

78. CHEMERINSKY, *supra* note 19, at 261.

79. *See id.* at 273-76 (discussing scholarship on the issue of "protective jurisdiction").

80. James Madison, who was one of the supporters of diversity jurisdiction in the founding era, and who defended diversity jurisdiction from the strong attacks of the Anti-Federalists, identified the possibility of state bias as the motivating factor behind diversity's allocation of power to the federal courts:

> I sincerely believe this provision will be rather salutary, than otherwise. It may happen that a strong prejudice may arise in some states, against the citizens of others, who may have claims against them. We know what tardy, and even defective administration of justice, has happened in some states. A citizen of another state might not chance to get justice in a state court, and at all events he might think himself injured.

WRIGHT ET AL., *supra* note 8, § 3601 (quoting JONATHAN ELLIOT, 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 486 (1836)).

81. 7 U.S. (3 Cranch) 267 (1806).

have diversity jurisdiction. Both restrictions operate to reduce the number of diversity cases that federal courts are authorized to hear and so take the diversity requirement's allocation of authority and shift it even more towards state courts. The policy goals motivating these restrictions are not entirely clear, but they stem in part from a growing distaste for diversity jurisdiction[82] and an attempt to reduce the ever-increasing caseloads of federal courts.[83] One commentator has asserted that the purpose of the amount-in-controversy requirement is to "enabl[e] federal courts to devote adequate attention to 'important' matters by keeping small claims off the dockets."[84] Under this rationale, the amount-in-controversy requirement reflects a policy decision about how best to use limited federal judicial resources and how to preserve the prestige of the federal judiciary.

We can now say explicitly what "federal subject matter jurisdiction" ought to refer to: the collection of policy decisions that separate the federal judiciary from state judiciaries. Subject matter jurisdiction is the bundle of legislatively and judicially created policy decisions that balance federalism concerns, the need for a national arbitrator when states cannot be trusted to do justice, and concerns for how to distribute limited judicial resources. Those policy decisions, taken together, establish the boundary between federal and state judiciaries and give them their separate identities with respect to one another.

B. *Justiciability Rules: Boundaries Between the Judiciary and the Political Branches*

Judicially created doctrines of justiciability, such as standing requirements and the prohibition against advisory opinions, serve an analogous authority-shifting function. They, too, serve to define the role of federal courts. Unlike subject matter jurisdiction, however, they do not define the institutional role of the federal judiciary with respect to state courts, but rather with respect to the other branches of the federal government.

Justiciability doctrines are deeply rooted in separation of powers

---

82. *See, e.g.*, WRIGHT ET AL., *supra* note 8, § 3601 (discussing the history of diversity jurisdiction and noting that it has always been controversial, with opponents ranging from the Anti-Federalists to Justices Jackson and Frankfurter).

83. *See, e.g.*, *id.* § 3701 (noting that there has been an amount-in-controversy requirement for diversity jurisdiction since the beginning of the republic, and further positing that "[a]lthough there is little legislative history relating to [the latest increase in the amount-in-controversy requirement to $75,000], it seems reasonable to surmise that Congress again was attempting to reduce the caseload in the federal courts . . . and to compromise between competing legislative proposals for the further reduction of diversity jurisdiction").

84. Note, *Federal Jurisdictional Amount: Determination of the Matter in Controversy*, 73 HARV. L. REV. 1369, 1369 (1960) (citations omitted); *see also* Evan A. Creutz, Note, *Two Sides to Every Story: Measuring the Jurisdictional Amount in Federal Courts*, 68 FORDHAM L. REV. 1719, 1723 (2000) (citing as a justification for the jurisdictional amount the need to "reduce the caseload in an already congested federal court system").

concerns.[85] In *Flast v. Cohen*,[86] Chief Justice Warren discussed the constitutional hook for the justiciability requirements—the language in Article III authorizing federal courts to hear only "cases and controversies"—and concluded that "in part those words define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government."[87] The notion of separation of powers of course bespeaks a distribution of authority; the entire concept revolves around deciding what legal issues are appropriate for which branch of government to decide. The justiciability doctrines thus dictate in what areas of law the judiciary should have say, as opposed to the areas where the President or Congress should have say.

Questions of standing ask whether a particular plaintiff's case ought to be cognizable to a court, or whether the plaintiff's alleged harm is best addressed by the political branches of government.[88] For example, the requirement that a plaintiff must have suffered an acute and particularized harm, rather than a harm felt widely throughout society, prevents the judiciary from essentially legislating from the bench. Remedying widely diffused harms felt by the public at large is generally conceived to be the duty of the political branches.[89] The related standing requirements for causation and redressability also limit the federal court's authority and preserve the roles of other law-speaking entities. In *Allen v. Wright*,[90] the Supreme Court made this point clear. Parents of black

85. *See, e.g.*, CHEMERINSKY, *supra* note 19, at 45.

86. 392 U.S. 83 (1968).

87. *Id.* at 95.

88. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998), is a clear example of the Supreme Court declaring standing to be a jurisdictional issue. The Court's energy in that decision was spent debating the primacy of the standing issue over the merits issue in a case and justifying the rule that issues of standing must be decided prior to reaching the merits.

89. *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 576 (1992) ("Vindicating the *public* interest (including the public interest in Government observance of the Constitution and laws) is the function of Congress and the Chief Executive."); Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, 454 U.S. 464, 475 (1982) ("[A]bstract questions of wide public significance which amount to generalized grievances, pervasively shared [are] most appropriately addressed in the representative branches.") (internal quotations omitted); Schlesinger v. Reservists Comm. To Stop War, 418 U.S. 208, 222 (1974) ("To permit a complainant who has no concrete injury to require a court to rule on important constitutional issues in the abstract would create the potential for abuse of the judicial process, distort the role of the Judiciary in its relationship to the Executive and the Legislature and open the Judiciary to an arguable charge of providing 'government by injunction.'"); United States v. Richardson, 418 U.S. 166, 179 (1974) ("In a very real sense, the absence of any particular individual or class to litigate these claims gives support to the argument that the subject matter is committed to the surveillance of Congress, and ultimately to the political process. . . . Lack of standing within the narrow confines of Art. III jurisdiction does not impair the [plaintiff's] right to assert his views in the political forum or at the polls.").

90. 468 U.S. 737 (1984).

public-school children sued the Internal Revenue Service (IRS) for failing to follow its own policy of denying racially discriminatory private schools special tax-exempt status. The plaintiffs claimed that the IRS's failure to comply with its policy by giving ongoing tax breaks to discriminatory private schools increased "white flight" to those schools, reduced the number of white children who would attend the public schools, and lowered the chance for black public-school pupils to receive an integrated education. The Court denied standing on the ground that the actual injury, discrimination, was caused by the "independent action of some third party not before the court,"[91] namely the parents of white children who chose to send their kids to private school. More importantly, the Court held that to enjoin the IRS to enforce its antidiscrimination policy would mean

> pav[ing] the way generally for suits challenging, not specifically identifiable Government violations of law, but the particular programs agencies establish to carry out their legal obligations. Such suits, even when premised on allegations of several instances of violations of law, are rarely if ever appropriate for federal-court adjudication. Carried to its logical end, respondents' approach would have the federal courts as virtually continuing monitors of the wisdom and soundness of Executive action; such a role is appropriate for the Congress acting through its committees and the "power of the purse"; it is not the role of the judiciary, absent actual present or immediately threatened injury resulting from unlawful governmental action.[92]

In other words, the Court's requirement that a plaintiff show causation is a recognition that without such a showing, federal courts would risk becoming micromanagers of executive agencies. This would allow unelected federal judges to make executive policy and to speak law where the political branches are considered to be the most appropriate law speakers.

The prohibition against advisory opinions similarly defines the role and identity of the federal judiciary by keeping federal courts out of the legislative process and preventing them from giving policy advice to Congress and the President.[93] From the earliest days of the republic, the Supreme Court's refusal to give advisory opinions was seen as a method of keeping the branches of government separate and allowing Congress and the President to make policy and speak law on certain matters without the influence of the courts. During the administration of George Washington, the Supreme Court declined to answer then-Secretary of State Thomas Jefferson's legal questions about the United States' involvement in the war between France and England. The Supreme Court Justices responded to Jefferson's questions by noting that the "three departments of the government—their being in certain respects checks upon each other—and our being judges of a court in the last resort—are considerations which afford strong arguments against the propriety of our

91. *Id.* at 757.

92. *Id.* at 759-60 (internal citations and quotations omitted).

93. CHEMERINSKY, *supra* note 19, at 49.

extrajudicially deciding the questions alluded to."[94] The Justices insisted on deferring to the judgment of the President, confident that his decisions would be the appropriate ones in that instance. Since the questions of law did not arise in a controversy between two adverse litigants, one of whom had suffered acute injury at the hands of the other, the questions were not best answered through the adjudicative process, but rather through the executive policymaking of the President.

The prohibition against advisory opinions not only keeps the judiciary's hands out of the business of the political branches, but it also helps preserve the independence of the federal courts. Advisory opinions, because they are just that—advisory—are capable of being overruled or ignored by the political branch that seeks them. In *Hayburne's Case*,[95] one of the earliest Supreme Court cases dealing with advisory opinions, the Court noted that a mere recommendation to Congress is "not of a judicial nature,"[96] since the judiciary's decision in the case could be "revised and controlled by the legislature, and by an officer in the executive department. Such revision and control we deemed radically inconsistent with the independence of that judicial power which is vested in the courts."[97]

The Court more recently reiterated this point in *Plaut v. Spendthrift Farm, Inc.*,[98] in which it found unconstitutional a federal statute that overturned a Supreme Court decision to dismiss certain cases. The Court found that the law violated separation of powers because the judiciary has the authority "not merely to rule on cases, but to *decide* them"[99] and that a law expressly undoing the decision of a court order disrupts the Court's authority to "render dispositive judgments."[100] The implication is that if a court order is not substantially likely to bring about actual change in the world because another branch of government can overturn the court's decision, then the court is not properly acting in a judicial manner. The job of the federal courts is to make binding decisions; any order that is not binding is not properly judicial, and any act by another branch of government that undoes the effects of the order unconstitutionally impinges on the judiciary's authority.

94. RICHARD H. FALLON ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 92-93 (4th ed. 1996) (relaying the correspondence between Jefferson and the Court); *see also* CHEMERINSKY, *supra* note 19, at 50 (citing FALLON ET AL. and discussing the correspondence between Jefferson and the Court and the implications for the prohibition against advisory opinions).

95. 2 U.S. (2 Dall.) 409 (1792).

96. *Id.* at 410 & n.*.

97. *Id.*

98. 514 U.S. 211 (1995).

99. *Id.* at 218-19.

100. *Id.* at 219.

C. *The Final Judgment Rule: Boundaries Between Trial Courts and Appellate Courts*

The final judgment rule of 28 U.S.C. § 1291 is another example of an authority-shifting rule and is considered a prerequisite to federal appellate jurisdiction. Section 1291 states that "[t]he courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all *final decisions* of the district courts of the United States."[101] The requirement of finality for appellate jurisdiction "precludes consideration of decisions that are subject to revision, and even of fully consummated decisions [that] are but steps towards final judgment in which they will merge."[102] The term "final decisions" in § 1291 therefore establishes that federal courts of appeals shall have the authority to speak law only on matters that have already been fully and completely decided in federal district courts, or on those matters that "do not terminate litigation . . . [but which are] conclusive, resolve important questions separate from the merits, and are effectively unreviewable on appeal from final judgment in the underlying action."[103] In other words, for a federal appeals court to have authority to hear an appeal, the issue appealed must have been fully resolved by the court below, such that the district court decision "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment."[104]

The purpose of the final judgment rule is to establish the "efficient ordering of relationships between appellate and trial courts, in light of the occasionally pressing needs for immediate review of [certain] orders."[105] The rule serves to preserve appellate courts' resources by ensuring that the courts do not spend time deciding issues that could still be resolved below. Even more importantly, it prevents appellate courts from unnecessarily getting involved in disputes that have not been finally resolved and that may turn out not to require an appeal. The rule can be viewed primarily as establishing *when* an appellate court can hear a case. In that sense, it seems different from the authority-shifting rules previously analyzed in this Part, which mostly establish *who* can resolve an issue of law. But in another sense, the final judgment rule is indeed about a "who" question: for any issue in a case, at any given moment, the rule tells us who may speak law on that issue. That issue will either still be undecided by the trial court, in which case the trial court will "have say," or it will have been finally decided, in which case authority shifts to the appellate court. The final judgment rule is about both a "when" and a "who" issue: certain events must transpire before authority will vest. The shifting of authority from a district

101. 28 U.S.C. § 1291 (2006) (emphasis added).

102. Behrens v. Pelletier, 516 U.S. 299, 305 (1996) (citations and quotations omitted).

103. *See* Cunningham v. Hamilton County, 527 U.S. 198, 204 (1999) (citations and quotations omitted).

104. Coopers & Lybrand v. Livesay, 437 U.S. 463, 467 (1978).

105. WRIGHT ET AL., *supra* note 8, § 3905.

court to an appellate court is contingent on developments in time.

The rule establishes, depending on developments in the litigation, which process ought to be used to decide an issue of law and, therefore, which institution should do the deciding. Trial courts are the institution designed to review evidence, interact with live parties, generate "hot records" (rather than review "cold" ones), and decide disputes without the ongoing supervision of a more removed appellate court. Appellate courts are the institution established to review a previously decided issue, rather than to make the first call. If an appellate court were to make the first call (without the explicit grant of authority to do so), it would be performing the presumed function of the district court. If a district court were to review another court's previously made decisions (barring the unusual habeas corpus exception), it would be performing the presumed function of an appellate court. The rule embodies the decision to make district courts the presumed law speakers on previously undecided issues, expressing the policy decision that trial courts and trial court process are best suited to resolve those issues, and the decision to make appellate courts the presumed law speakers on decided issues, expressing the policy that appellate courts and appellate review are best suited to resolve those issues.[106] Only when a final decision has been made does the district court (the institution best suited to have the first say) cease to be the presumed law speaker, replaced by the appellate court (the institution designed to do removed appellate review). The final judgment rule thus emphasizes the fact that we differentiate between trial and appellate court processes and that we have trial courts as distinct institutions from appellate courts. In this way, it is jurisdictional. Indeed, it might even be said to emphasize the boundary between original and appellate jurisdiction.

I note here as well that § 1291's cousin, 28 U.S.C. § 1257, establishes a similar (and stricter) finality requirement for the Supreme Court's appellate jurisdiction over a case heard by the highest court in a state. That finality requirement is also jurisdictional since it, too, allocates authority, though not between appellate and trial courts, but rather between state and federal courts. The statute shifts authority to state courts and promotes the values of comity and federalism by setting up a presumption in favor of a state court proceeding and restricting federal intrusion into that proceeding until such intrusion is

106. The final judgment rule is much like an exhaustion requirement for judicial review of agency decisions. Exhaustion rules in the administrative law context prevent unnecessary judicial meddling in the policymaking of administrative agencies that are thought to have specialized expertise and so are thought to be more appropriate institutions for speaking law on certain issues. Judicial review is meant to be a backup when the presumption in favor of administrative decisionmaking is overcome. Though there is no room in this Note, it might be worth investigating how certain exhaustion requirements in the administrative law context are treated as "jurisdictional" and whether the rules that are labeled as such fit the model developed in this Note.

"required by the absolute necessity of complete finality."[107] As Wright and Miller observe, the postponement of federal review is supported by the possibility that "state proceedings may reach on other grounds the same result as would be required by the federal question, forestalling the need to [render a decision]."[108] This allows state courts to develop state law by deciding issues on nonfederal grounds; it also allows the Supreme Court a chance to avoid making a constitutional determination and establishing a national standard when the creation of a more local standard will suffice. In this way, like the rules governing subject matter jurisdiction, § 1257 reflects our deep commitment to federalism, and our belief that federal decisionmaking ought to be separate and distinct from state decisionmaking.

IV. JUSTIFYING THE RIGIDITY OF THE DOCTRINES OF JURISDICTION

The rules analyzed above all share the same feature of distributing authority and therefore preserving the unique identities of law-speaking institutions vis-à-vis each other. Moreover, they are all treated rigidly by courts, and the doctrines of jurisdiction apply to them. But is this justified? What is it about having the authority-shifting function that would justify this treatment? These are the questions to which I now turn.

A. *Jurisdictional Rigidity: Preserving Institutional Identity*

Wright and Miller hint at the reason for applying jurisdictional rules rigidly when they write that jurisdiction "is *too basic a concern* to the judicial system to be left to the whims and tactical concerns of the litigants."[109] Implicit in this statement is that jurisdictional rules cannot be applied flexibly and cannot be left to litigants to waive because they embody concerns that go beyond the interests of the parties to a suit. However, that the interests implicated by certain rules go beyond the case-specific interests of the parties to a suit should not, in and of itself, imply the need for absolute and harsh rigidity. Compliance with almost any rule can serve the interests of society by easing the litigation process and leading to faster, more accurate, and fairer dispute resolution. Compliance with statutes of limitations—rules usually considered nonjurisdictional and applied flexibly[110]—can be seen as serving societal

107. *See* WRIGHT ET AL., *supra* note 8, § 3908.

108. *Id.*

109. *Id.* (emphasis added).

110. As a practical matter, most statutes of limitations are not treated as jurisdictional rules since there are entire equitable doctrines created around them. *See generally* Bruce A. McGovern, *The New Provision for Tolling the Limitations Periods for Seeking Tax Refunds: Its History, Operation, and Policy, and Suggestions for Reform*, 65 MO. L. REV. 797, 802-15 (2000) (discussing the general principles of statutes of limitations and describing the equitable doctrines that apply to them). Courts also expressly note the nonjurisdictionality of

interests that reach beyond the immediate interests of the litigants, such as the broad interest in preserving judicial resources.[111]

What Wright and Miller must mean is that compliance with jurisdictional rules protects very special interests. For the most part, jurisdictional rules embody a deeply seated political principle of governance, namely that law-speaking authority is divided and distributed to multiple law-speaking institutions and that those institutions ought to be kept separate from one another. The rules of federal subject matter jurisdiction embody the ideal of federalism; the rules of justiciability preserve the ideal of separation of powers. And as demonstrated above in the case of appellate jurisdiction, to be jurisdictional, a rule does not necessarily have to embody those lofty constitutional ideals. The principle that institutions should be separate and distinct is also at work when we divide law-speaking authority in other ways. The concepts of appellate and original jurisdiction reflect our commitment to establishing multiple levels of a court system and separating first impression review from appellate review. Rules of territorial jurisdiction reflect our commitment to keeping states and other sovereign entities distinct and preventing them from encroaching on one another.[112]

Rules like statutes of limitations are primarily intended to serve the interests of the parties and, in so doing, have the collateral effect of aiding the administration of justice in the aggregate and thus serving broader societal ends. Those broad societal ends are ancillary concerns of those rules, and, moreover, those ends can be accomplished in any number of ways. It is possible to preserve judicial resources using many other techniques besides limiting the time for the filing of complaints (for example, legislatures could eliminate causes of action, or could heighten pleading requirements). Jurisdictional rules, on the other hand, are primarily enacted to serve broad and important societal goals. By virtue of the fact that they allocate authority, jurisdictional rules are designed primarily to serve the function of institutional

---

statutes of limitations. *See, e.g.*, Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393-98, 395 n.12 (1982) (distinguishing jurisdictional time limits from statutes of limitations and holding that the time limit for filing a Title VII claim with the Equal Employment Opportunity Commission is nonjurisdictional, more appropriately considered a statute of limitations, and so subject to waiver and the equitable doctrines of tolling and estoppel).

111. *See, e.g.*, McGovern, *supra* note 110, at 802 ("The limitations period that a statute sets forth represents a policy decision concerning the appropriate balance among the interests of those asserting claims, those defending them, and society as a whole.").

112. It is also interesting to note that while the concepts of equity and law jurisdiction no longer describe the boundaries outlining the roles of different institutions, they once did. Those kinds of jurisdiction arose in medieval England where two distinct institutions of the Chancery and Courts of Law existed, each of which had different kinds of authority, used different processes for adjudication, and heard cases at different times (the Chancery was supposed to hear cases only after a Court of Law had already done so). Equity jurisdiction refers to the set of rules telling courts when they are to operate under processes, and perform functions, analogous to those of the medieval Chancery, as opposed to those of the Courts of Law.

identity formation and preservation. To have an identity at all, an institution must be distinct from other institutions based on the issues of law it can decide and the processes it can use to decide them.

Mark A. Hall makes a similar point to Wright and Miller's in his critique of the alleged jurisdictionality of time limits governing the filing of federal appeals. Hall argues that these time limits are much more like limitations periods: "[T]hey involve primarily the interests of the immediate parties, not fundamental societal interests. They should therefore be subject to waiver by the parties."[113] Hall goes on to state that the policies behind the rules against jurisdictional waiver must be that jurisdictional rules, properly conceived, "protect[] interests larger than those of the immediate parties."[114] Thus,

> if there are greater societal concerns at stake [in demanding compliance with a rule], then waiver may not be appropriate. In such cases, the immediate parties' cognizance of the error is not an adequate proxy for the degree of societal harm. The interests that are prejudiced by the defect may outweigh the harms to judicial efficiency caused by delay in raising the defect. Such is the case implicitly for defects in subject matter jurisdiction. . . . Defects in subject matter jurisdiction must be noticed in order to prevent one sovereign from encroaching on the prerogative of another. The courts also seek to exercise cautiously their coercive power to enforce judgments and their authority to bind others through precedent. These societal concerns are seen as justifying extraordinary treatment of subject matter jurisdiction.[115]

But, as Hall notes, parallel reasoning is hardly convincing when dealing with notices of appeal: "The same concerns certainly do not exist. There is no question of the courts' basic capacity or competency to exercise judicial authority. There is also no question of jealousy, power struggle, or political sensitivity vis-à-vis another forum or sovereign."[116]

Hall concludes that the courts' treatment of the time limits for appeal as jurisdictional rules is another example of the misuse of the jurisdictional label. Hall is right, and I agree that time limits for filing appeals ought not to be considered jurisdictional. They do not have the formal quality of distributing authority, nor do they represent a policy decision about when a district court as opposed to an appeals court, or vice versa, is the better law speaker on an issue. However, I wish to push Hall's argument one step further and note that the rigidity of jurisdictional rules can be justified not only by the fact that these rules serve broad societal interests, but also by the fact that they serve the goal of defining the shape of our institutions, and so the inner workings of our multi-institutional legal system itself. They keep the federal judiciary from encroaching on the province of state judiciaries and the political branches; they keep appellate courts from encroaching on the province of trial courts; they

113. Hall, *supra* note 22, at 400.
114. *Id.* at 419.
115. *Id.* at 419-20.
116. *Id.*

keep territorial sovereigns from encroaching on the province of other territorial sovereigns; and so on. Surely such rules are beyond the power of the parties and the court to overlook or bend. Recall Lee's thesis that jurisdictional issues affect the legitimacy of a court.[117] Though a small jurisdictional defect—like a federal district court hearing a state law claim worth exactly $75,000—may not really call into question a court's sociological legitimacy, at least in a descriptive sense, it nevertheless does raise doubts about the court's perceived legitimacy in a normative sense.[118] It raises eyebrows and opens the court up to the critique that it is overstepping its bounds, doing the work properly reserved for another institution (another "jurisdiction"), and so is impermissibly self-aggrandizing. In a legal system where much value is placed on dividing law-speaking authority among different institutions and processes, a court ought not to be able to do the work of another law-speaking institution. Such overstepping should be discouraged at every turn.

A possible response to this argument is that, indeed, we have a strong ideological and practical interest in keeping institutional roles distinct, but a single jurisdictional error should not warrant the harshness of the doctrines of jurisdiction in every case. This is especially so when we consider the doctrine that jurisdictional defects can be raised for the first time on appeal. David P. Currie argues against this rule when "[t]he marginal gain in terms of jurisdictional purity from leaving the issue open even on appeal cannot justify the waste of time and money caused by throwing a case out after it has been tried."[119] For example, a single oversight leading a district court to hear a case worth one dollar less than the jurisdictional amount could not possibly warrant such harsh consequences as, for example, dismissal on appeal even after litigation of the merits. This argument has an intuitive appeal. In addition, many commentators argue that the value gained from observing the doctrine does not outweigh the costs in many cases.

Whether or not the doctrines of jurisdiction really ought to apply in all circumstances where a rule is properly labeled jurisdictional is certainly up for debate, and much ink has been spilled on the question. I do not propose to resolve that debate here. I simply wish to emphasize the justification that has been given, that jurisdictional rules go not just to the interest of the parties, but rather to the deeply seated ideological interests of federalism, separation of powers, and the idea that certain issues of law are best handled by different institutions operating under different procedures. When a lower federal court rules on the merits of a case that is worth exactly $75,000 and then ultimately

117. *See supra* Part II.B.

118. However, some jurisdictional defects may lead to sociological illegitimacy. A drastic overlooking of the justiciability doctrines may open the Supreme Court up to the critique that it has seriously overstepped its bounds and started to perform the job of the politically accountable branches of government.

119. David P. Currie, *The Federal Courts and the American Law Institute: Part II*, 36 U. CHI. L. REV. 268, 298 (1969).

gets overturned on appeal when the losing party raises the jurisdictional defect for the first time, there may indeed be a waste of judicial resources. But the counterargument is that all that is suffered is merely a material loss; what is averted by preventing a jurisdictionless court from ruling on a case is an ideological loss.[120]

B. *Nonjurisdictional Flexibility: Preserving Fairness*

If rules with the jurisdictional function of allocating authority ought to be applied rigidly, what is it about rules lacking jurisdictional properties that suggests we ought to apply them with flexibility and allow them to be waivable and subject to equitable doctrines?

I look to statutes of limitations for a possible answer. The main purpose of statutes of limitations is to protect the interests of defendants:

> The primary consideration underlying such legislation is undoubtedly one of fairness to the defendant. There comes a time when he ought to be secure in his reasonable expectation that the slate has been wiped clean of ancient obligations, and he ought not to be called on to resist a claim when "evidence has been lost, memories have faded, and witnesses have disappeared."[121]

---

120. On this note, consider the Supreme Court's decision in *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998). In *Steel Co.*, the Court ended the tradition of courts exercising "hypothetical jurisdiction," the practice in which a court, faced with an easy merits question and a difficult jurisdictional question, would decide the merits question first, if the same party lost on the merits who would have lost if there were no jurisdiction. Even though the practice seems to make sense pragmatically, since a court could avoid difficult litigation over jurisdictional questions and still reach a correct result, the Court nevertheless held that the jurisdictional issue *must* be decided first. Justice Breyer, concurring in part and concurring in the judgment, suggested a pragmatic approach:

> [T]o insist upon a rigid "order of operations" in today's world of federal-court caseloads that have grown enormously over a generation means unnecessary delay and consequent added cost. . . . It means a more cumbersome system. It thereby increases, to at least a small degree, the risk of the "justice delayed" that means "justice denied."

Id. at 111-12 (Breyer, J., concurring in part and concurring in the judgment). Nevertheless, the Court chose the more rigid approach and implicitly emphasized the importance of principle over practicality:

> The statutory and (especially) constitutional elements of jurisdiction are an essential ingredient of separation and equilibration of powers, restraining courts from acting at certain times, and even restraining them from acting permanently regarding certain subjects. For a court to pronounce upon the meaning or the constitutionality of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act ultra vires.

Id. at 101-02 (internal citations omitted).

121. Note, *Developments in the Law: Statutes of Limitations*, 63 HARV. L. REV. 1177, 1185 (1950) (internal citations omitted) (quoting Order of R.R. Telegraphers v. Ry. Express Agency, Inc., 321 U.S. 342, 349 (1944)); *see also* Wilson v. Garcia, 471 U.S. 261, 271 (1985) (noting that statutes of limitations represent "the State's judgment on the proper balance between the policies of repose and the substantive policies of enforcement embodied in the state cause of action"), *superseded by statute on another issue by* Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5114, *as recognized in* Jones v. R.R. Donnelley & Sons Co., 541 U.S. 369, 379-80 (2004).

Since statutes of limitations are designed to protect defendants, there is little question that defendants ought, to some degree, to maintain control over their operation. If a defendant does something that makes him unworthy of the protection of the limitations period, he ought not to receive its benefits. Hence, courts have applied the equitable doctrines of tolling and estoppel. These doctrines together reveal the commonsense position that defendants cannot take advantage of rules designed primarily to protect them if they choose instead to abuse them. In the end, the argument goes: Statutes of limitations are designed to promote fairness. Equitable flexibility is needed to help those rules adapt to circumstances where blind application leads to unfairness. Furthermore, since the rules are designed to aid the parties themselves, there is little problem in letting the parties judge for themselves when the rules ought to operate in their favor. It is hardly inappropriate for a party to waive a requirement that is meant solely to benefit him, if he so chooses, or, as happens more frequently, if he could have but failed to speak up and assert his rights.

This argument is certainly correct. But it does not completely answer our specific question regarding what it is about the nonjurisdictional character of statutes of limitations that justifies more considerations of fairness to the parties when applying those rules as opposed to, say, the *Strawbridge* full diversity requirement for federal subject matter jurisdiction. Diversity jurisdiction is certainly rooted in the concept of fairness to the plaintiff. Why shouldn't the plaintiff be able to manipulate the rules of diversity jurisdiction through consent and waiver the way a defendant can manipulate statutes of limitations?

I suggest the following answer: strict application of limitations periods could actually lead to harsher results than strict application of jurisdictional rules. This stems again from the primary distinction between jurisdictional and nonjurisdictional rules: whereas jurisdictional rules shift authority, non-jurisdictional rules either create or dispel authority altogether. When a plaintiff files a complaint in federal court raising only state law claims, and properly alleges that the claim is worth at least $75,001 and that all of the parties on the plaintiff side are from different states than all the parties on the defendant side, the authority to hear that claim shifts from the presumed law speaker, the state court, to the federal district court. If the complaint fails to allege either the jurisdictional amount or complete diversity, the jurisdictional moment never occurred, and the state court (the default law speaker) retained the authority to adjudicate the case the entire time; the federal court's subsequent dismissal of the case, or even the appellate court's eventual reversal of the district court on jurisdictional grounds, is simply a recognition that the proper shift in authority never occurred. The plaintiff is sent back to the default law speaker.

When a limitations period has not expired and the plaintiff files a complaint, authority does not shift from one presumed law speaker to another. Nor does authority shift when the limitations period expires. No other law speaker receives or retains authority because a certain event occurs or fails to occur. Expiration of limitations periods means that the plaintiff no longer has

the right to get any kind of relief (barring the possibility of seeking jurisdiction in another state where a different limitations period applies and has not run). Limitations periods set up on/off switches of authority, rather than mechanisms for shifting. This, I contend, is why they deserve, at least in some situations, to be treated with flexibility. When a court makes a decision to alter the limitations period, it in no way encroaches on another law speaker. Moreover, its dismissal is the end of the plaintiff's ability to find any kind of relief and the end of the possibility that any law speaker will have say on the issue involved in the case.

This point is driven home by considering the difference between Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. Rule 12(b)(1) allows dismissal of a claim if the court finds a lack of subject matter jurisdiction—that is, the plaintiff has not complied with all of the rules of subject matter jurisdiction;[122] Rule 12(b)(6) allows dismissal if the plaintiff has failed to state a cognizable claim.[123] The common wisdom is that the primary difference between the two rules is that the former goes to the jurisdiction of the court, and the latter goes to the merits of the case. Though there is debate about whether merits can really be adequately distinguished from jurisdictional issues in a case,[124] there is consensus that if they can be separated, decisions on the merits have different implications for the parties than jurisdictional decisions. As Joshua Schwartz observes, "[c]ases dismissed under Rule 12(b)(1) are dismissed without prejudice, meaning a claimant can resubmit a complaint with more facts or in a different court, while Rule 12(b)(6) motions imply a dismissal with prejudice."[125] Dismissals without prejudice, as Schwartz implies, leave room for the plaintiff to seek the review of another court. This is the essence of dismissal on jurisdictional grounds: such a decision reiterates the distribution of law-speaking authority and sends the plaintiff to find the more proper forum. Dismissals with prejudice do not send the plaintiff to another law-speaking entity, but rather say that he is out of luck altogether. Granted, some Rule 12(b)(6) dismissals may be dismissals without prejudice; the point of such dismissals is not to make the plaintiff find another forum

122. FED. R. CIV. P. 12(b)(1).

123. FED. R. CIV. P. 12(b)(6).

124. *See, e.g.*, Nowak v. Ironworkers Local 6 Pension Fund, 81 F.3d 1182, 1187 (2d Cir. 1996) ("While distinguishing between a dismissal for lack of subject matter jurisdiction under Rule 12(b)(1) and a dismissal for failure to state a claim under Rule 12(b)(6) appears straightforward in theory, it is often much more difficult in practice."); Lee, *supra* note 48 (using his argument that jurisdiction is a legitimacy-preserving device to argue that the merits, too, serve the exact same function and so are indistinguishable from jurisdiction); Joshua Schwartz, Note, *Limiting* Steel Co.*: Recapturing a Broader "Arising Under" Jurisdictional Question*, 104 COLUM. L. REV. 2255, 2261 (2004) (quoting *Nowak*, 81 F.3d at 1187, and noting that "[c]ourts are often hard pressed to define the difference between jurisdiction and the merits and have been forced to concede that . . . '[the distinction] is often much more difficult [to make] in practice'").

125. Schwartz, *supra* note 124, at 2268-69.

(though he may choose to do so), but rather to encourage the plaintiff to allege more facts so that his claim will become cognizable. Moreover, as Schwartz points out, "dismissals under rule 12(b)(1) for lack of Article III standing frequently operate similarly to a dismissal with prejudice";[126] nevertheless, just because a case is dismissed with prejudice does not mean another law-speaking institution will not or cannot speak on the issue of law it raises. Dismissal for lack of Article III standing does not imply the end of the discussion of the issue of law in a case. It means the case as a question presented to the federal judiciary is finished. Standing doctrines, however, shift authority to the legislature or the executive branch. Though the plaintiff may not be able to file in another court, he still in theory has the political process as a mode of recourse.

V. ALTERNATIVES TO JURISDICTION

The previous analyses reveal how courts can avoid the untoward results of misusing the jurisdictional label. When they are deciding the jurisdictionality of a rule, courts should be advised to look for the jurisdictional properties I have identified. First, can the rule be seen not as creating or removing authority—such as statutes of limitations, which remove adjudicative authority altogether when they run, or the existence of a cause of action, which creates judicial authority where there was none when certain facts are alleged—but instead as shifting authority? In other words, is it possible to think of the rule as identifying at least two law-speaking institutions that could possibly speak law on the issue at stake and setting the parameters for deciding which institution ought to have say in a given set of circumstances? Second, is the rule premised on a policy decision deeming one institution more appropriate than another for resolving the issue of law?

With this analysis, courts can alleviate the worry that the term "jurisdiction" will be nothing more than a legal trope, a word whose mere invocation in a court opinion would suffice to reach the harsh consequences of the doctrines of jurisdiction, without adequate explanation for why the results were just or necessary. Once we cease speaking of jurisdictional rules as authority-creating, and begin speaking of them as authority-shifting, we recognize the clear nonjurisdictionality of the rules at issue in *Becker* and *Scarborough*.

The hand signature on the notice of appeal does not function, for example, like the final judgment rule for appellate jurisdiction. In a superficial sense, it does have a formal jurisdictional quality of establishing when a certain law-speaking institution should have say and when another's judgment is going to remain in force; it does create a presumption, albeit one that is very weak and easily overcome, that the district court's order will stand and the appellate court

126. *Id.* at 2269.

will not hear an appeal unless the plaintiff signs a paper. But even so, the rule does not embody a policy rationale that explains why one institution is more proper than another in the case of compliance. The hand-signature requirement goes in no way to the appropriateness of one process (trial court adjudication versus appellate court adjudication) over another for resolving cases like Becker's. And so, unlike the final judgment rule, the signature requirement does not help separate the institutional identities of the district and appellate courts. Hearing a case in which a paper has been hand-signed rather than merely type-signed is in no way unique to district court process as opposed to appellate court process. Being the first court to issue a ruling on a set of facts and legal issues, however, is unique to trial courts—that is what it means to be a "lower" court, rather than a "higher" appellate court, or to have "original jurisdiction," as opposed to "appellate jurisdiction." For an appellate court to take on this function would be to take over the province of the district court, and so to operate without jurisdiction.

The not-substantially-justified allegation requirement in *Scarborough* also is nonjurisdictional, since it does not shift authority between courts. It lacks the form of a jurisdictional rule even more clearly than the *Becker* hand-signature requirement, since it does not identify any other law-speaking institution besides the CAVC that would, in theory, entertain Scarborough's application for attorney's fees in the absence of compliance with the rule. Nor is it based on a policy decision deeming one law speaker more appropriate than another. More like a statute of limitations, the EAJA's requirement is designed to guide and facilitate the litigation process. Indeed, as the Supreme Court itself noted, like the signature requirement in *Becker*, "EAJA's ten-word 'not substantially justified' allegation is a 'think twice' prescription that 'stems the urge to litigate irresponsibly.'"[127] As a result, the reasons for treating jurisdictional rules with rigidity—that they protect uniquely important ideological values and that they do not, in theory, have the same harsh consequences of denying a plaintiff relief altogether—do not apply.

Similar arguments can be made for the time limits for filing appeals, like the one at issue in *Shendock*. This is a thornier issue, however, since the question of whether the doctrines of jurisdiction apply to these time limits is well settled: they certainly do. The Supreme Court would have to undo much precedent to remove the label of jurisdiction, which I contend (as does Mark Hall[128]) has likely been inappropriately applied to these rules. This probably

127. Scarborough v. Principi, 541 U.S. 401, 403 (2004) (quoting Edelman v. Lynchburg Coll., 535 U.S. 106, 116 (2002)). The Court made this observation, however, not in the portion of its *Scarborough* opinion discussing the nonjurisdictionality of the rule, but rather in the portion discussing why the equitable doctrine of relation back ought to apply in Scarborough's case. By this point in the opinion, the Court had already disposed of the jurisdictional issue in the problematic way of simply saying the EAJA's rule did not specify the classes of cases that courts had the power to hear. *See id.* at 413.

128. *See* Hall, *supra* note 22, at 416-18.

explains why, unlike the results in *Becker* and *Scarborough*, the Supreme Court did not reverse the Third Circuit's *Shendock* opinion. The Court has on many occasions reiterated the so-called jurisdictionality of time limits to appeal.[129] Nevertheless, I add my own argument to the plethora of voices calling for the removal of the jurisdictional label from time limits for appeals, though I put a new theoretical spin on the issue. The timing of the hearing of an appeal is not bound up in the nature of the process that defines appellate court review and so does not establish a boundary between appellate courts qua appellate courts and district courts qua district courts. These time limits are therefore unlike, for example, the final judgment rule or the requirements for subject matter jurisdiction or justiciability. They are much more like statutes of limitations, designed to protect the interests of appellees: they function more to remove authority altogether rather than to shift authority to another court.[130]

This is not to say that courts cannot find grounds for dismissing cases when parties fail to comply with nonjurisdictional rules. Nor is it to suggest that because a rule is nonjurisdictional it cannot also be mandatory. Perry Dane reminds us that part of the messiness of courts' use of the word "jurisdiction" is that they have come to see "mandatory" and "jurisdictional" as equivalent and

---

129. *See, e.g.*, Becker v. Montgomery, 532 U.S. 757, 765 (2001) (reiterating that Federal Rules of Appellate Procedure 3 and 4, which specify the time limits for appeal, "are indeed linked jurisdictional provisions"); Torres v. Oakland Scavenger Co., 487 U.S. 312, 315 (1988) (holding that Rules 3 and 4 of the Federal Rules of Appellate Procedure together form "a single jurisdictional threshold"); United States v. Robinson, 361 U.S. 220, 224 (1960) (deeming the timely filing of a notice of appeal "mandatory and jurisdictional"); *see also* Hall, *supra* note 22, at 399 n.2 (citing nearly twenty federal cases that have treated the limitations on the time to appeal as jurisdictional by raising timing defects sua sponte).

130. Here it is important to consider the Supreme Court's recent decision in *Arbaugh v. Y & H Corp.*, 126 S. Ct. 1235 (2006), where the Court deemed "nonjurisdictional" Title VII's fifteen-employee requirement since the requirement did not appear in explicitly jurisdictional provisions and did not use the language of jurisdiction itself. *Id.* at 1245. A better way to resolve the issue in *Arbaugh* is to apply the concept of jurisdiction delineated in this Note. First, we ask whether the numerosity requirement draws boundaries between the federal courts and other law-speaking bodies. If states have similar sexual harassment laws to Title VII, then it likely does: it shifts authority to federal courts only in those cases where the defendant has at least fifteen employees. If federal courts are the only forums for sexual harassment grievances, the rule is not jurisdictional, but is more like the boundaries of a cause of action, creating an on/off switch of authority.

Further, the rule will only be jurisdictional if it is also premised on a policy decision that state courts are more proper than federal courts for deciding sexual harassment cases against employers with fewer than fifteen employees. This question is somewhat trickier. On the one hand, perhaps the numerosity requirement, like the amount-in-controversy requirement, was designed to keep certain "small-time" cases out of federal courts and reduce the federal docket. On the other hand, perhaps, as the Supreme Court suggested, the requirement was designed "[t]o spare very small businesses from Title VII liability." *Id.* at 1239. If the former is correct, the law might be properly typed jurisdictional. If the latter, the law might properly be typed as nonjurisdictional, since it would be founded more on notions of fairness to certain defendants. The rule would be akin to a statute of limitations, designed for the defendant's benefit, and properly waivable. A more thorough study of the requirement's purpose would help answer the question more definitively.

interchangeable,[131] when in fact "legal rules can be mandatory without being jurisdictional."[132] Courts can still apply nonjurisdictional rules with rigidity and decide, for example, that even if a particular rule is nonjurisdictional, it still cannot be waived. However, if we are to clean up the language of jurisdiction, then courts will have to give clear reasons for *why* they will treat those rules with rigidity, without simply exclaiming "jurisdictional!"

The Supreme Court, in reversing the appellate courts in *Becker* and *Scarborough*, has possibly suggested one method for determining the appropriate label and treatment of rules. It has implied that a better inquiry to use for deciding if noncompliance with certain claim processing rules should lead to dismissal is to ask whether the noncomplying party has caused prejudice to the other side. For example, the Sixth Circuit, in deciding whether to dismiss Becker's appeal, should have inquired whether Becker's lack of a hand signature in some way caused prejudice to the appellee and whether concerns of fairness cut against allowing him to sign his appeal retroactively. The Federal Circuit could have taken a similar approach in *Scarborough*. Instead of asserting the jurisdictionality of the not-substantially-justified allegation requirement, it should have instead inquired into whether the allegation gave some kind of notice to the other party as required by fundamental norms of fair process.

This was the crux of the Supreme Court's arguments in its decisions reversing the appellate courts. In its *Becker* opinion, the Court expressly distinguished *Torres v. Oakland Scavenger Co.*,[133] in which the Court held that a clerical error leading to the omission of the name of an appellant on the notice of appeal would suffice to justify the appellate court's dismissal of that particular appellant's appeal. In *Torres*, it was at least arguable that the omission of the appellant's name failed to give the appellee sufficient notice of who was appealing, from what judgment, and to what court. Such notice is considered necessary to give an appellee sufficient information to prepare a defense to the appeal. The *Becker* Court distinguished *Torres* by observing that "Becker's notice, however, did not suffer from any failure to specify the party or parties taking the appeal. . . . [I]mperfections in noticing an appeal should not be fatal where no genuine doubt exists about who is appealing, from what judgment, to which appellate court."[134]

In *Scarborough*, too, the Supreme Court suggested that looking to prejudice was a better way to decide whether noncompliance with a rule ought

131. Dane, *supra* note 1, at 39. Dane observes that courts frequently say things like "mandatory and jurisdictional," which is "one of those standard doublets ('null and void,' 'cease and desist') that so fill legal poetics." *Id.*

132. *Id.*

133. 487 U.S. 312 (1988).

134. *Becker*, 532 U.S. at 767 (citations and quotations omitted) (citing precedent suggesting that whether imperfection in a notice of appeal should be fatal depends on whether it can arguably cause prejudice by denying notice to the appellee).

to be fatal. The Court explicitly relied on *Becker* for the proposition that if compliance with a requirement does not "serve an essential notice-giving function,"[135] then noncompliance should not to be detrimental to the case. In litigation for attorney's fees in veteran-benefits cases, the "[g]overnment is aware, from the moment a fee application is filed, that to defeat the application on the merits, it will have to prove its position 'was substantially justified.'"[136] Thus, omission of such an allegation does not prejudice the government in any way, and so dismissal for that omission is unwarranted.

Finally, this may even point us towards a resolution of the debate over whether time limits for appeals ought to be applied rigidly. My suggestion is that courts stop simply declaring the jurisdictionality of the rules and, instead, find a way to justify harsh and rigid application based on prejudice and norms of fairness. If they are unable to do this, as commentators have suggested,[137] then they ought to consider the other side of the fairness equation: Is the harsh treatment of these time limits somehow leading to unfair results with respect to the noncomplying party?

CONCLUSION

If the jurisdictional label is used too freely, it allows courts to reach harsh consequences without fully justifying them; it also tends to lead courts to reach such results even when they are unnecessary and unfair. This Note argues that the use of the jurisdictional label must be grounded and constrained to avoid these untoward results. Use of the jurisdictional label should be limited to those situations where a rule has certain jurisdictional properties, which can be identified without looking to the consequences a rule has always been said to entail or that a court in a particular case thinks it ought to entail. A rule, to be worthy of the jurisdictional label, must limit a court's authority with respect to another institution's authority and establish the boundary that separates institutions from one another. If a rule performs this function, then a court may attach the jurisdictional label to it. The label will then be helpful as a shorthand, for it will signify that the rule serves this function, and it will trigger the doctrines of jurisdiction precisely when they are most justified.

135. Scarborough v. Principi, 541 U.S. 401, 416 (2004).

136. *Id.* at 416-17.

137. *See, e.g.*, WRIGHT ET AL., *supra* note 8; Hall, *supra* note 22.