2008

The Failure of Bowles v. Russell

Scott Dodson

THE FAILURE OF *BOWLES V. RUSSELL*

Scott Dodson*

I. INTRODUCTION

Last term was a banner year for the Court, deciding such important issues as the constitutionality of partial-birth abortions,[1] the standing of states to challenge the EPA's ability to regulate greenhouse gases,[2] the constitutionality of racial preferences in schools,[3] the free speech rights of students,[4] and the constitutionality of campaign finance reforms,[5] among others.

Even the rather mundane world of civil procedure received a spark when the Court interred the famous statement by *Conley v. Gibson*[6] "that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[7] The culprit, *Bell Atlantic Corp. v. Twombly*,[8] has received significant attention, with commentators heavily critiquing or defending it and exploring its aftermath in provocative ways.[9]

There is another civil procedure case, however, that, though outshone by the more high profile cases, is perhaps the most underrated case of the term. The scant attention it has received[10] does not do it justice: *Bowles v. Russell*[11] is critically important at the

* Assistant Professor of Law, University of Arkansas School of Law. I am grateful to Irma Russell, Len Strickman, and Erwin Chemerinsky for their encouragement in submitting this article to the *Supreme Court Review Issue*. Thanks also to Phil Pucillo for providing valuable comments on an earlier draft.

1. *Gonzales v. Carhart*, 127 S. Ct. 1610 (2007).
2. *Mass. v. EPA*, 127 S. Ct. 1438 (2007).
3. *Parents Involved in Community Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007).
4. *Morse v. Frederick*, 127 S. Ct. 2618 (2007).
5. *FEC v. Wis. Right to Life, Inc.*, 127 S. Ct. 2652 (2007).
6. 355 U.S. 41 (1957).
7. *Id.* at 45-46 (citation omitted).
8. 127 S. Ct. 1955 (2007).
9. *See e.g.* Scott Dodson, *Pleading Standards after* Bell Atlantic Corp. v. Twombly, 93 Va. L. Rev. In Br. 121 (2007); Allan Ides, Bell Atlantic *and the Principle of Substantive Sufficiency under Federal Rule of Civil Procedure 8(a)(2): Toward a Structured Approach to Federal Pleading Practice*, ___ F.R.D. ___ (forthcoming 2008); A. Benjamin Spencer, *Plausibility Pleading*, ___ B.C. L. Rev. ___ (forthcoming 2008); Suja A. Thomas, *Why the Motion to Dismiss is Now Unconstitutional*, 92 Minn. L. Rev. ___ (forthcoming 2008). For a bibliography listing both articles and blog entries on *Bell Atlantic*, see Scott Dodson, PrawfsBlawg, *The Mystery of* Twombly *Continues*, http://prawfsblawg.blogs.com/prawfsblawg/2008/02/the-mystery-of.html (Feb. 5, 2008).
10. *See* Scott Dodson, *Jurisdictionality and* Bowles v. Russell, 102 Nw. U. L. Rev. Colloquy 42 (2007) [hereinafter Dodson, *Jurisdictionality*]; Elizabeth Chamblee Burch, *Nonjurisdictionality or Inequity*, 102 Nw. U. L. Rev. Colloquy 64 (2007); E. King Poor, *The Jurisdictional Time Limit for an Appeal: The Worst Kind of*

broadest level.

In a nutshell, *Bowles* held that the time limit to file a civil notice of appeal is jurisdictional.[12] Perhaps that holding hardly seems remarkable. But in reaching it, the Court overstated the supporting precedent, inflated the jurisdictional importance of statutes, and undermined an important recent movement to clarify when a rule is jurisdictional and when it is not.

This did not have to be. The Court missed a golden opportunity to chart a middle course—holding the rule mandatory but nonjurisdictional—that would have been more consistent with precedent while resolving the case on its narrowest grounds. In failing to do so, the Court leaves lower courts and litigants to wonder whether statutory limits in other areas can be waived or excused for equitable reasons, or whether they could come back to unravel the entire case for the first time on appeal.

Part I has provided an overview of *Bowles* and some of its implications. Part II takes a close look at *Bowles*, its holding, and the reasoning it used to get there.

Part III embarks on a critical analysis of *Bowles* encompassing three important flaws. First, the Court overstated the precedent supporting its decision. It relied upon cases of dubious or ambiguous support and it failed to acknowledge contrary cases. It also failed to put that precedent in context—as just one factor of a more holistic framework for resolving the difficult characterization issue it confronted. Second, the Court inflated the importance of a jurisdictional distinction between statutory limits and nonstatutory limits by suggesting that statutory limits are jurisdictional. That is simply not true as a general rule, and does not follow from the modest jurisdictional distinction between statutes and rules. And, third, the Court called into question—wrongly and unnecessarily—more recent precedent that attempted to develop a meaningful and principled framework for resolving difficult characterization issues.

Part IV then proposes a better course that *Bowles* should have taken. Characterizing the deadline at issue as mandatory rather than jurisdictional would have provided at least two important benefits. First, it would have alleviated the criticisms of *Bowles* identified in Part III. And, second, it would have allowed the Court to decide the case on the narrowest grounds possible.

Finally, Part V concludes with some thoughts about the effects that the Court's error may have on lower courts and litigants in future cases involving statutory limits.

II. A CLOSE LOOK AT *BOWLES*

Keith Bowles was convicted of murder and sentenced by an Ohio jury.[13] After unsuccessfully appealing his conviction and sentence, he filed a petition for a writ of habeas corpus in federal district court challenging the constitutionality of his

Deadline—Except for All Others, 102 Nw. U. L. Rev. Colloquy 151 (2008); Perry Dane, *Sad Time: Thoughts on Jurisdictionality, the Legal Imagination, and* Bowles v. Russell, 102 Nw. U. L. Rev. Colloquy 164 (2008); Scott Dodson, *Appreciating Mandatory Rules: A Reply to Critics*, 102 Nw. U. L. Rev. Colloquy 228 (2008).

11. 127 S. Ct. 2360 (2007).

12. *Id.* at 2362.

13. *Id.*

confinement.[14]

The federal district court denied his petition and entered final judgment.[15] Because habeas proceedings are civil in nature, Bowles had thirty days to file a notice of appeal.[16] He failed to file a notice within that time limit.[17]

Instead, three months later, Bowles sought to reopen the time to file a notice of appeal,[18] as permitted by rule and statute.[19] The district court granted his request on February 10, 2004, and stated in the court order that Bowles had until February 27—seventeen days—to file such a notice.[20] The law, however, allowed the district court to reopen the time period only for fourteen days.[21]

Bowles then filed a notice of appeal on February 26, within the time granted by the district court but outside the time allowed by federal rule and statute.[22] On appeal, the state argued that the notice was untimely and that the court of appeals therefore lacked jurisdiction to hear the appeal.[23] Bowles argued that the equitable "unique circumstances" doctrine applied to excuse his noncompliance.[24] The court of appeals rejected that argument and held the time limit to be jurisdictional.[25]

The Supreme Court affirmed, in a 5-4 opinion authored by Justice Thomas. The Court began by stating, "This Court has long held that the taking of an appeal within the prescribed time is 'mandatory and jurisdictional.'"[26] The Court cited both decisions interpreting the time limit of an appeal from district courts to the courts of appeals[27] and decisions interpreting the time limit of an appeal from the district courts to the U.S. Supreme Court prior to the creation of the courts of appeals.[28] In light of this history, *Bowles* stated: "[I]t is indisputable that time limits for filing a notice of appeal have been treated as jurisdictional in American law for well over a century."[29]

Bowles did acknowledge that recent precedent had attempted to construct a principled framework for resolving the jurisdictional character of limits,[30] but it treated those decisions as drawing a distinction between limits contained in court rules and

14. *Id.*
15. *Id.*
16. *Bowles*, 127 S. Ct. at 2362 (citing 28 U.S.C. § 2107(a) (2006); Fed. R. App. P. 4(a)(1)(A)).
17. *Id.*
18. *Id.*
19. *Id.* (citing 28 U.S.C. § 2107(c); Fed. R. App. P. 4(a)(6)).
20. *Id.*
21. *Bowles*, 127 S. Ct. at 2362 (citing 28 U.S.C. § 2107(c); Fed. R. App. P. 4(a)(6)).
22. *Id.*
23. *Id.*
24. *Id.* at 2366.
25. *Id.* at 2362-63; *see also Bowles*, 127 S. Ct. at 2366 ("Today we make clear that the timely filing of a notice of appeal in a civil case is a jurisdictional requirement.").
26. *Id.* at 2363 (citing *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 61 (1982) (per curiam)).
27. *See id.* at 2363-64 (citing *Hohn v. U.S.*, 524 U.S. 236, 247 (1998); *Browder v. Dept. of Corrects.*, 434 U.S. 257, 264 (1978)).
28. *Id.* at 2364 (citing *Scarborough v. Pargoud*, 108 U.S. 567, 568 (1883); *U.S. v. Curry*, 47 U.S. 106, 113 (1848)).
29. *Id.* at 2363-64 n. 2; *see also Bowles*, 127 S. Ct. 2362 ("We have long and repeatedly held that the time limits for filing a notice of appeal are jurisdictional in nature.").
30. *Id.* at 2364-65.

limits prescribed by statute.[31] *Bowles* repeatedly proclaimed the "jurisdictional significance" of a statutory basis for a limit,[32] citing to its own certiorari practice for support.[33] "Jurisdictional treatment of statutory time limits makes good sense," *Bowles* asserted, because only "Congress decides what cases the federal courts have jurisdiction to consider."[34]

Having resolved the time limit to be jurisdictional, *Bowles* concluded that "[t]he resolution of this case follows naturally."[35] Bowles' noncompliance with the time limit "deprived the Court of Appeals of jurisdiction,"[36] and, because the limit was jurisdictional, no equitable excuses, such as the "unique circumstances" doctrine could apply.[37]

III. A CRITICAL APPRAISAL OF *BOWLES*

Bowles went wrong on several fronts. First, it overstated the precedential support. Second, it assumed a logical fallacy in the distinction between statutes and court rules. And, third, it created doctrinal tension with recent precedent tending to characterize such limits as nonjurisdictional.

A. The False Simplicity of Stare Decisis

As noted above, *Bowles* relied heavily—even dispositively[38]—on its view that the Court previously has held, consistently and for many years, that the time to file an appeal was a jurisdictional requirement.[39] At the outset, *Bowles* expressly said, "We have long and repeatedly held that the time limits for filing a notice of appeal are jurisdictional in nature."[40] The Court then asserted that "[t]his Court has long held that the taking of an appeal within the prescribed time is 'mandatory and jurisdictional.'"[41] The Court stated later, "it is indisputable that time limits for filing a notice of appeal have been treated as jurisdictional in American law for well over a century."[42] *Bowles* characterized the

31. *Id.*

32. *Id.* at 2364; *see also id.* at 2365 (asserting a "jurisdictional distinction between court-promulgated rules and limits enacted by Congress").

33. *Bowles*, 127 S. Ct. at 2365 (noting that the time limit for certiorari in civil cases, which is prescribed by statute, had been termed "jurisdictional," see *FEC v. NRA Political Victory Fund*, 513 U.S. 88, 90 (1994), whereas the same non-statutory time limit for certiorari in criminal cases is not, see *Schacht v. U.S.*, 398 U.S. 58, 64 (1970)).

34. *Id.* at 2365.

35. *Id.* at 2366.

36. *Id.*

37. *Id.* ("Because this Court has no authority to create equitable exceptions to jurisdictional requirements, use of the 'unique circumstances' doctrine is illegitimate."). Indeed, the Court overruled two prior cases that applied the exception. *Bowles*, 127 S. Ct. at 2366 (overruling *Thompson v. INS*, 375 U.S. 384 (1964) (per curiam); *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962) (per curiam)).

38. *Id.* at 2363-64 n. 2 ("Given the choice between calling into question some dicta in our recent opinions and effectively overruling a century's worth of practice, we think the former option is the only prudent course.").

39. *See supra* nn. 26-29.

40. 127 S. Ct. at 2362.

41. *Id.* at 2363 (quoting *Griggs*, 459 U.S. at 61).

42. *Id.* at 2363-64 n. 2.

"longstanding treatment"[43] as a "consistency of this Court's holdings"[44] and stated that a contrary decision would amount to the "repudiation of a century's worth of precedent . . . effectively overruling" it.[45]

The precedent is not as clear as *Bowles*'s characterizations of it make it seem. Two cases cited by *Bowles* did not even address the characterization of a tardy appeal. The other cases did, but their characterizations were unnecessary because their facts supported the narrower ground of a mandatory characterization. And other cases, not cited by *Bowles*, tend to undermine the conclusion that appeal time limits are jurisdictional. As a result, *Bowles*'s reliance on precedent as a justification is highly questionable.

1. Precedent Failing to Address the Issue

Bowles relied on *Torres v. Oakland Scavenger Co.*[46] and *Griggs v. Provident Consumer Discount Co.*,[47] neither of which addressed time limits for appeals.

Torres held that the failure to specify a party in the notice of appeal renders the appellate court without jurisdiction over that party.[48] Such an omission constitutes a failure of that party to appeal at all.[49] The Court did not hold that the time limit for filing a notice of appeal was jurisdictional; rather, it held that the failure to appeal at all deprived the appellate court of jurisdiction.[50]

Griggs also addressed the effect of failing to file any effective notice of appeal rather than addressing the time limit to appeal. There, the district court granted summary judgment and entered an order on November 5, 1981, that judgment be entered.[51] On November 12, the respondent filed a timely motion to alter or amend the judgment under Rule 59.[52] While that motion was pending, the respondent filed a premature notice of appeal.[53] The district court denied the motion, but no other notice of appeal was filed.[54] The petitioners immediately contested the jurisdiction of the appellate court by arguing that the notice of appeal was insufficient.[55] The Court concluded that a premature notice of appeal was a "nullity . . . as if no notice of appeal [was] filed at all."[56]

Both *Torres* and *Griggs* hold that the *event* of filing a notice of appeal is a jurisdictional prerequisite;[57] they say nothing about the jurisdictional significance of the time limits to file a notice of appeal.

43. *Id.* at 2364.
44. *Id.*
45. *Bowles*, 127 S. Ct. at 2364 n. 2.
46. 487 U.S. 312 (1988).
47. 459 U.S. 56 (1982) (per curiam).
48. 487 U.S. at 314.
49. *Id.*
50. *Id.* at 317-18.
51. *Griggs*, 459 U.S. at 57.
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.*
56. *Griggs*, 459 U.S. at 61.
57. *Id.* at 61 ("[I]f no notice of appeal is filed at all, the Court of Appeals lacks jurisdiction to act.").

A third case *Bowles* cited is *Hohn v. United States*,[58] but that case is even further removed from the issue. The question in that case was "whether the Court has jurisdiction to review decisions of the courts of appeals denying applications for certificates of appealability."[59] Hohn was convicted of use of a firearm during a drug trafficking offense.[60] He filed a petition for a writ of habeas corpus, which was denied.[61] He then filed a notice of appeal in the court of appeals, which treated the notice as an application for a certificate of appealability, which was a precondition to an appeal required by statute.[62] The court of appeals denied the certificate.[63]

Hohn then sought certiorari review of that denial in the U.S. Supreme Court.[64] The Court questioned its own appellate jurisdiction, for the statute authorized the Court to hear "[c]ases in the courts of appeals," and it was unclear whether an application for a certificate of appealability was a "case" that was "in" the court of appeals.[65]

In the context of a variety of arguments, the Court reasoned that even if the court of appeals as a court improperly considered the application for a certificate (because only a "circuit judge[ ]"[66] could grant the certificate), the Supreme Court nevertheless had exercised jurisdiction in analogous cases, such as over appeals when the appellate court dismissed for want of jurisdiction.[67] Citing *Torres* and *United States v. Robinson*, whose characterization of the time limit to appeal a criminal case as "mandatory and jurisdictional"[68] has since been disavowed,[69] the Court repeated the mantra that "[t]he filing of a proper notice of appeal is mandatory and jurisdictional."[70] But the argument was by analogy and hardly critical to the outcome, which did not turn on the characterization of the timely filing of a notice of appeal in any way. *Hohn*'s reference to the jurisdictional character of the "filing of a proper notice of appeal" is best seen as an unexamined and tangential point that itself relies on cases that do not support it.

2. Overbroad Precedent

The other three cases cited by *Bowles* did use the word "jurisdictional" to describe the time limit for taking an appeal. But each case could have been decided on far narrower nonjurisdictional grounds—namely, that the limit was a mandatory limit properly invoked by the appellee and immune to equitable excuses—and nothing in the reasoning or facts suggested that the blunter characterization was warranted.[71] The

58. 524 U.S. 236 (1998).
59. *Id.* at 238-39.
60. *Id.*
61. *Id.*
62. *Id.* at 240.
63. *Hohn,* 524 at 240.
64. *Id.*
65. *Id.* at 241-42 (citation omitted).
66. *Id.* at 245.
67. *Id.* at 246-47.
68. 361 U.S. 220, 229 (1960).
69. *See Eberhart v. U.S.*, 546 U.S. 12, 17-18 (2005) (interpreting *Robinson*'s phrase "mandatory and jurisdictional" to mean "emphatic time prescriptions" but nonjurisdictional).
70. *Hohn*, 425 U.S. at 247.
71. *See* Perry Dane, *Jurisdictionality, Time, and the Legal Imagination*, 23 Hofstra L. Rev. 1, 51-52 (1994).

characterization of the limit as "jurisdictional" in each case was unnecessary dicta at best and careless use of the term at worst.

For example, *United States v. Curry*[72] dismissed an appeal for untimeliness and called it a dismissal for "want of jurisdiction,"[73] but it was dismissed on the basis of a timely motion made by the appellee.[74] The appellant tried to argue for an equitable excuse—that the order in the lower court was served on him late and that that was why his appeal was tardy—but the Court would have none of it, reasoning that the appeal deadline "is regulated by acts of Congress, which the court can neither change nor modify."[75] Thus, the only question in *Curry* was whether the Court could excuse noncompliance for equitable reasons.

Scarborough v. Pargoud also dismissed an appeal purportedly for lack of jurisdiction,[76] but the opinion is far from persuasive. The opinion does not state that the Court was raising the timeliness issue on its own motion or that the appellee had forfeited or attempted to waive the issue or that equitable excuses were considered and rejected. Nor does *Scarborough* set forth any principled rationale for holding the limit to be jurisdictional per se, as opposed to simply inflexible on the facts at issue in the case. Instead, the Court disposed of the appeal in summary disposition: "[T]he writ of error in this case was not brought within the time limited by law, and we have consequently no jurisdiction."[77]

Of course, both *Curry* and *Scarborough* were decided before 28 U.S.C. § 2701 was enacted in 1948. Indeed, both were decided before the U.S. courts of appeals were created in 1891. *Curry* was an appeal to the U.S. Supreme Court from a federal district court, and *Scarborough* was an appeal to the U.S. Supreme Court from a state court.

The one case *Bowles* cites that did address § 2107 is *Browder v. Department of Corrections*, in which the Court stated that the time limit was "mandatory and jurisdictional,"[78] again borrowing that phrase from the now-discredited *Robinson*.[79] But *Browder* had no need to appropriate that unfortunate doublet anyway, for the question in *Browder* was whether an untimely motion for a hearing in a habeas corpus proceeding—

> As used in the phrase "jurisdictional time limit," the word [jurisdictional] might just mean "literal" or "unqualified" or "peremptory" or some such thing. And that definition might be distinct from the sense of the work in the doctrines associated with the Idea of Jurisdiction. A time limit could be "jurisdictional" in the sense of being literal or peremptory whether or not it was jurisdictional in the general sense, and vice versa.

Id. (emphasis omitted); Mark A. Hall, *The Jurisdictional Nature of the Time to Appeal*, 21 Ga. L. Rev. 399, 410 (1986) ("In each instance where the Supreme Court has referred to the thirty-day appeal period as 'mandatory and jurisdictional,' it might have simply said 'mandatory,' for the only issue was whether the court of appeals had authority to relax the exact requirements of Rule 4(a).").

72. 47 U.S. 106 (1848).

73. *Id.* at 113.

74. *Id.* at 109.

75. *Id.* at 112.

76. 108 U.S. 567, 586 (1883).

77. *Id.* I have found one additional case (not cited by *Bowles*) similar to *Scarborough*, in which the Court summarily dismissed an untimely appeal for lack of jurisdiction and in which it is unclear whether the appellee objected or moved to dismiss the appeal. *See Credit Co. v Ark. C. Ry. Co.*, 128 U.S. 258 (1888). Like *Scarborough*, this case also antedated the creation of the courts of appeals.

78. 434 U.S. 257, 264 (1978).

79. *See supra* text accompanying nn. 69-70.

timely objected to by the habeas petitioner at each point in the proceedings—tolled the time to appeal the district court's judgment.[80] The Court agreed with the petitioner and stated that the appellate court lacked jurisdiction,[81] but it needed only have gone so far as to resolve a simple equitable tolling issue, not whether the time limit was jurisdictional.

These cases illustrate what I and others have exposed as a careless conflation of the jurisdictional moniker and a mandatory rule.[82] Each case could have been supported on the narrow grounds of a mandatory characterization without involving the broader (and even more difficult) question of whether the rule was also jurisdictional. None gave any normative or principled reason why the time limit should be jurisdictional as opposed to merely mandatory. Accordingly, they need not have commanded the weight that *Bowles* cited and relied upon.[83]

3. Contrary Precedent

Bowles also characterized the precedent holding the time limits to file a notice of appeal as "consistent[ ]."[84] In reality, the precedent is ambiguous.

At least one case is fairly characterized as contrary to the precedent relied upon by *Bowles*. In *United Public Workers of America v. Mitchell*,[85] the judgment of the district court was entered on September 26, 1944, and an order was entered a month later, on October 26, allowing an appeal.[86] The statute provided that the record had to be docketed in the Supreme Court within sixty days,[87] but the appeal was not docketed until February 2, 1945, outside of the sixty-day period.[88] The Government moved to dismiss the appeal on that basis.[89] The Supreme Court disagreed and held that the statutory deadline to docket appeals in the Supreme Court was nonjurisdictional: "We do not construe the requirement of docketing within sixty days as a limitation on our power to hear this appeal."[90]

Other cases, though not specifically addressing the time to file a civil appeal, nevertheless deal with issues sufficiently related that they undermine the consistency

80. *See* 434 U.S. at 261-63.

81. *Id.* at 264-65, 267.

82. *See e.g.* Dane, *supra* n. 71, at 39 (describing the phrase "mandatory and jurisdictional" as "one of those standard doubles ('null and void,' 'cease and desist') that so fill legal poetics. But there is less to this than one might think. First, legal rules can be mandatory without being jurisdictional."); Dodson, *Jurisdictionality*, *supra* n. 10, at 46-47; Hall, *supra* n. 71, at 409 ("'[M]andatory and jurisdictional' . . . is merely a technique for emphasizing the strict enforcement of the mandatory terms of Rule 4(a). It does not sanctify timing requirements so as to require them to be noticed sua sponte.").

83. I do not mean to imply that these cases did not treat the deadline as jurisdictional. Those courts no doubt meant what they said. My point, however, is that those courts made a characterization that was overbroad and largely unnecessary, and therefore they may be reformed through the lens of more recent caselaw that attempt to resolve jurisdictional characterization questions on a more principled basis. *See infra* text accompanying nn. 143-55.

84. 127 S. Ct. at 2364.

85. 330 U.S. 75 (1947).

86. *Id.* at 84.

87. *Id.* (citing 28 U.S.C. § 380a (1945)).

88. *Id.*

89. *Id.*

90. *Mitchell,* 330 U.S. at 86.

relied upon by *Bowles*. For example, *Foman v. Davis*[91] held that the failure in the notice to specify what judgment the appeal was taken from—a requirement under Rule 3[92]—is a nonjurisdictional defect.[93] That is important because the Court has "clarif[ied] [that Rules 3 and 4] are indeed linked jurisdictional provisions."[94] Similarly, *Becker v. Montgomery*[95] held that the failure of an appellant to sign the notice of appeal—a requirement of Rule 11—is a nonjurisdictional defect.[96] Finally, in *Eberhart v. United States*,[97] the Court reinterpreted *Robinson*—which had characterized the time to file a criminal appeal as "mandatory and jurisdictional"[98]—as a decision merely invoking the mandatory and inflexible nature of the rule.[99]

These cases undermine *Bowles*'s assertion that the precedent interpreting time limits for filing civil appeals universally supports a jurisdictional characterization.

B. The Misguided Link between Statutes and Jurisdictionality

In addition to overstating the value of precedent to its result, *Bowles* relied on a logical flaw in reasoning. *Bowles* overinflated a distinction between deadlines contained in court rules and deadlines prescribed by statute.[100] *Bowles* repeatedly proclaimed the "jurisdictional significance" of a statutory basis for a deadline,[101] citing to its own certiorari practice for support.[102] *Bowles* asserted that "[j]urisdictional treatment of statutory time limits makes good sense" because only "Congress decides what cases the federal courts have jurisdiction to consider."[103]

Bowles is correct that there is a jurisdictional significance to the source of the deadline, but it does not lead to *Bowles*'s conclusion. The jurisdictional significance is that if a deadline is nonstatutory, it almost certainly is nonjurisdictional. But that does not mean, as *Bowles* implies, that all statutory rules are (or even are presumptively) jurisdictional. In truth, statutory rules can be jurisdictional or nonjurisdictional, and the mere fact that they are statutory does not resolve the characterization issue.

---

91. 371 U.S. 178 (1962).

92. Fed. R. App. P. 3(c)(1).

93. *Foman*, 371 U.S. at 180-81.

94. *Becker v. Montgomery*, 532 U.S. 757, 765 (2001).

95. *Id.*

96. *Id.* at 765.

97. 546 U.S. 12 (2005) (per curiam).

98. *Robinson*, 361 U.S. at 228-29.

99. *Eberhart*, 546 U.S. at 17-18 (interpreting *Robinson*'s phrase "mandatory and jurisdictional" to mean emphatically mandatory but nonjurisdictional).

100. 127 S. Ct. at 2364.

101. *Id.*; *see also id.* at 2365 (asserting a "jurisdictional distinction between court-promulgated rules and limits enacted by Congress").

102. *Id.* at 2365 (noting that the time limit for certiorari in civil cases, which is prescribed by statute, had been termed "jurisdictional," see *FEC v. NRA Political Victory Fund*, 513 U.S. 88, 90 (1994), whereas the same non-statutory time limit for certiorari in criminal cases is not, see *Schacht v. U.S.*, 398 U.S. 58, 90 (1970)).

103. *Id.* The Court never addressed—and never confronted—the fact that § 2107 was amended to conform to the preexisting Rule 4 of the Federal Rules of Appellate Procedure. In other words, for a period of time, the authorization (and restrictions on that authorization) of a court to extend the deadline to file a notice of appeal in a civil case was governed solely by federal rule rather than by statute. *See Statutory Time Limits to Appeal*, 121 Harv. L. Rev. 315, 322-24 (2007). For an interesting admission of this error, see Transcr. of Oral Argument, *John R. Sand & Gravel Co. v. U.S.*, 128 S. Ct. 750 (2008).

The jurisdictional significance of the dichotomy begins with nonstatutory rules. Only Congress may limit a lower court's subject-matter jurisdiction.[104] In light of that, the Rules Enabling Act provides that the Court may create "rules of practice and procedure,"[105] not rules limiting or expanding the jurisdiction of the federal courts. Indeed, the Court itself has stated that "it is axiomatic" that such rules "do not create or withdraw federal jurisdiction."[106] In most cases, the rule schema make this explicit, with the Federal Rules of Civil Procedure and the Federal Rules of Bankruptcy Procedure disavowing any attempt to "extend or limit the jurisdiction" of the courts.[107] Even the Court's own rules are not jurisdictional.[108] The upshot to all this is that a nonstatutory rule has a difficult row to hoe before it can be called jurisdictional.

But the fact that nonstatutory rules are highly unlikely to be jurisdictional does not mean that all statutory rules are (or even are highly likely to be) jurisdictional. In contrast to the strong presumption that nonstatutory rules are not jurisdictional, statutory rules can go either way. Indeed, a number of statutory limits are nonjurisdictional. For example, Title VII's time limit to file a complaint[109] is a nonjurisdictional statutory requirement.[110] And the statutory requirement that a removal petition be filed within a specific time[111] has repeatedly been held to be nonjurisdictional.[112] And, finally, federal statutes of limitations have long been held to be nonjurisdictional.[113] Thus, the fact that a deadline is statutory does not mean it is jurisdictional.

---

104. *See* U.S. Const. art. III, § 1.

105. 28 U.S.C. § 2072.

106. *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 370 (1978); *see also Schacht*, 398 U.S. at 63–64.

> We cannot accept the view that . . . [Supreme Court Rule 22(2)'s] time requirement is jurisdictional and cannot be waived by the Court. [The rule] contains no language that calls for so harsh an interpretation, and it must be remembered that this rule was not enacted by Congress but was promulgated by this Court under authority of Congress to prescribe rules concerning the time limitations for taking appeals and applying for certiorari in criminal cases. . . . The procedural rules adopted by the Court for the orderly transaction of its business are not jurisdictional and can be relaxed by the Court in the exercise of its discretion when the ends of justice so require.

Id.; *Sibbach v. Wilson & Co.*, 312 U.S. 1, 10 (1941) (observing that court rules cannot extend or restrict the jurisdiction conferred by statute).

107. Fed. R. Bankr. P. 9030; Fed. R. Civ. P. 82; *cf.* Fed. R. Crim. P. 1(a)(1) ("These rules govern the *procedure* in all criminal proceedings in the [federal courts].") (emphasis added); *Eberhart*, 546 U.S. at 13 (concluding partly on this basis that Rule 33 of the Federal Rules of Criminal Procedure is not jurisdictional).

108. *Schacht*, 398 U.S. at 64 ("The procedural rules adopted by the Court for the orderly transaction of its business are not jurisdictional . . . .").

109. 42 U.S.C. § 2000e-16(c).

110. *See Zipes v. Trans World Airlines, Inc.*, 455 U.S. 394 (1982).

111. 28 U.S.C. § 1446(b).

112. *See e.g. Ariel Land Owners, Inc. v. Dring*, 351 F.3d 611, 614-15 (3rd Cir. 2003); *Barnes v. Westinghouse Electric. Corp.*, 962 F.2d 513, 516 (5th Cir. 1992); *Wilson v. Gen. Motors Corp.*, 888 F.2d 779, 781 (11th Cir. 1989); *see also* James Wm. Moore, *Moore's Federal Practice* vol. 16, § 107.41[1][c][iv], 107-197 (3d ed., Lexis 2007) (concluding that the better view is a nonjurisdictional characterization); *cf. Caterpillar, Inc. v. Lewis*, 519 U.S. 61, 75 n. 13 (1996). *But see Smith v. MBL Life Assurance Corp.*, 727 F. Supp. 601, 602-03 (N.D. Ala. 1989) (holding the one-year limit for diversity removal to be jurisdictional); *Perez v. Gen. Packer, Inc.*, 790 F. Supp. 1464, 1470-71 (C.D. Cal. 1992) (same); *Gray v. Moore Bus. Forms, Inc.*, 711 F. Supp. 543, 544-45 (N.D. Cal. 1989) (same); *Brock v. Syntex Laboratories., Inc.*, 791 F. Supp. 721, 723 (E.D. Tenn. 1992) (same), *aff'd*, 7 F.3d 232 (6th Cir. 1993); *Rashid v. Schenck Constr. Co.*, 843 F. Supp. 1081, 1086-88 (S.D. W. Va. 1993) (same).

113. *See e.g.* Fed. R. Civ. P. 8(c) (characterizing statutes of limitations as waivable affirmative defenses); *Day v. McDonough*, 547 U.S. 198, 205 (2006); *Irwin v. Dept. of Vets. Affairs*, 498 U.S. 89, 93-96 (1990); *Zipes*, 455 U.S. at 394.

It may be that *Bowles* was attempting not to create a rigid dichotomy between rules and statutes but instead to create a presumption of jurisdictionality when a deadline is set by statute. But there is no more reason to presume a deadline to be jurisdictional just because it is statutory than to hold a deadline to be jurisdictional just because it is statutory.

In addition, there are two dangers to presuming jurisdictionality in the face of congressional silence on the matter. First, such a presumption conflicts with the Court's prior precedent establishing a presumption of *non*jurisdictionality in the absence of a clear congressional statement of jurisdictionality.[114] Second, a jurisdictional rule often entails heavy costs on the litigants and legal system.[115] Presuming jurisdictionality from congressional silence risks incurring these costs without due consideration from Congress.

C. Doctrinal Confusion

In the process of oversimplifying precedent and making unjustified leaps of logic, *Bowles* trampled on recent precedent attempting to provide a principled framework for resolving what is jurisdictional and what is not. In dismissing it as "dicta,"[116] or as limited to the precise facts before the Court at those times,[117] *Bowles* has undermined much of that sensible effort.

Over the last few years, the Court has obsessed over jurisdictional characterization questions and bemoaned lower courts' and its own careless use of the term "jurisdictional."[118] In response, the Court had begun to develop a core set of principles to help distinguish between jurisdictional rules and nonjurisdictional rules. For example, in the unanimous decision *Kontrick v. Ryan*, the Court stated:

> 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.[119]

---

114. *See Arbaugh v. Y & H Corp.*, 546 U.S. 500, 516 (2006) ("[W]hen Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character.").

115. Because jurisdiction can be raised at any time and even obligates courts to monitor it sua sponte, a jurisdictional defect discovered well into the appeal can cause disruption, unfairness, and tremendous waste of time and resources. *See* Scott Dodson, *In Search of Removal Jurisdiction*, 102 Nw. U. L. Rev. 55, 66 (2008).

116. *Bowles*, 127 S. Ct. at 2364 n. 2.

117. *Id.* at 2365 (summarily distinguishing *Arbaugh* and *Scarborough*).

118. *Id.* at 2363 n. 2 (criticizing "this Court's past careless use of [jurisdictional] terminology"). "This variety of [jurisdictional] meaning has insidiously tempted courts, this one included, to engage in less than meticulous, sometimes even profligate use of the term." *Id.* at 2367 (Souter, Stevens, Ginsburg & Breyer, JJ., dissenting) (internal quotation marks, citations, and ellipses omitted). *Sinochem Intl. Co. v. Malay. Intl. Ship. Corp.*, 127 S. Ct. 1184, 1193 (2007) (admitting that phrases from prior precedent using the term "jurisdiction" were "less than felicitously crafted") (internal quotation marks omitted); *Arbaugh*, 546 U.S. at 510 (confessing that federal courts, itself included, had "sometimes been profligate in its use of the term [jurisdictional]"); *Eberhart*, 546 U.S. at 19 (noting that the lower court's improper characterization of a federal rule as jurisdictional "is an error shared among the circuits, and that it was caused in large part by imprecision in our prior cases"); *Kontrick v. Ryan*, 540 U.S. 443, 454 (2004) ("Courts, including this Court, it is true, have been less than meticulous . . . they have more than occasionally used the term 'jurisdictional' to describe emphatic time prescriptions in rules of court.").

119. 540 U.S. 443, 455 (2004).

In deciding that the time prescriptions at issue in *Kontrick* were forfeitable and nonjurisdictional, the Court looked to their "primary purposes" and found those to be claim-processing purposes: Informing the pleader of the time to file a complaint, instructing the court on the limits of its discretion to grant time enlargements, and affording an affirmative defense to a complaint filed outside the time limits.[120] The Court reaffirmed *Kontrick* the following year in the per curiam decision *Eberhart*,[121] holding that the deadline at issue there was "[a] claim-processing rule[ ] . . . [that] assure[s] relief to a party properly raising [it], but do[es] not compel the same result if the party forfeits [it]."[122]

Kontrick did not end the framework's development. In *Scarborough*, the Court held that the statutory time limits on fee shifting under the Equal Access to Justice Act[123] also were nonjurisdictional.[124] The Court held that the time period does not concern subject-matter jurisdiction; rather, "it concerns a mode of relief (costs including legal fees) ancillary to the judgment of a court that [already] has plenary jurisdiction."[125] The limit does not delineate classes of cases that the court is competent to adjudicate; it "relates only to post judgment proceedings auxiliary to cases already within that court's adjudicatory authority."[126] Thus, in *Scarborough*, the Court added another principle to its developing framework: That limits that affect only the mode of relief in a proceeding ancillary to a case already within the court's jurisdiction are nonjurisdictional.

Finally, in *Arbaugh v. Y & H Corp.*,[127] the Court added new layers to the framework. The Court construed the employer-numerosity requirement of Title VII[128] as a nonjurisdictional element of the merits rather than a jurisdictional prerequisite.[129] In resolving the characterization issue, the Court looked to the consequences of a jurisdictional characterization, including the burden on courts to police compliance sua sponte and the waste of resources if a jurisdictional defect is discovered late in the case.[130] Given the potential unfairness and waste of resources, the Court created a presumption of nonjurisdictionality:

> If the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue. . . . But when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character.[131]

Thus, through *Kontrick*, *Scarborough*, *Eberhart*, and *Arbaugh*, the Court has made a concerted effort to dispense with careless and unexamined use of jurisdictional

120. *Id.* at 456.
121. 546 U.S. 12.
122. *Id.* at 19.
123. 28 U.S.C. § 2412(d)(1)(A).
124. 541 U.S. at 405.
125. *Id.* at 413 (internal quotation marks omitted).
126. *Id.* at 414.
127. 546 U.S. 500 (2006).
128. 42 U.S.C. § 2000e(b).
129. *Arbaugh*, 546 U.S. at 516.
130. *Id.* at 513-14.
131. *Id.* at 515-16 (footnote omitted).

characterizations and to embark on a more principled approach.

Bowles was undoubtedly correct when it distinguished these cases. *Kontrick* and *Eberhart* were perhaps easier cases than they made out because they addressed the characterization of nonstatutory court rules. *Scarborough* could be distinguished based on the peculiar statutory provision at issue—a fee-shifting requirement for a case already within federal jurisdiction. And *Arbaugh* deals with the characterization of statutory coverage—merits v. jurisdiction.

But that does not mean, as *Bowles* seems to suggest, that these cases are irrelevant and unimportant beyond their facts. The principles they develop have equal value for the characterization of the kind of statutory time limit that *Bowles* confronted.[132] That these cases are distinguishable is no reason to dismiss out of hand the valuable characterization principles they develop.

Yet by dismissing the importance of these cases, dispensing with their framework in favor of a new unitary reliance on precedent, and by overinflating the distinction between statutes and court rules, *Bowles* has called into question the entire framework these cases developed. After *Bowles*, it is unclear what survives from *Kontrick* and *Eberhart* besides their narrow holdings. Does *Bowles* suggest that the distinction between a claim-processing rule and a rule that separates classes of cases should be discarded in favor of a bright-line distinction between rules and statutes? Does *Bowles* suggest that, because the procedural provision in *Scarborough* was in a statute that *Scarborough* was wrongly decided (or at least wrongly reasoned)? And does *Bowles* suggest that *Arbaugh*'s presumption of nonjurisdictionality for statutory questions is backwards?

In short, *Bowles* calls the methodology and reasoning of each of these cases into doubt. The resulting doctrinal confusion that *Bowles* engenders is likely to create more work and uncertainty for litigants and lower courts whenever a characterization issue arises—which is likely to be quite often.

IV. A BETTER APPROACH

I have argued that *Bowles* overstated the applicable precedent, made a logical leap connecting statutes with jurisdictionality, and unnecessarily called into question more recent precedent and the salutary framework it had been developing. It did not have to be this way. *Bowles* could have alleviated each of these concerns and still reached the result that it did by holding the time limit to appeal to be nonjurisdictional but mandatory.

A. A Nonjurisdictional Time to Appeal

As I have suggested above, the weakness of the "longstanding treatment" *Bowles* relied upon, coupled with the more recent precedent trending away from rote jurisdictional characterizations, would have allowed *Bowles* to consider the jurisdictionality of the deadline to file a notice of appeal in a more principled way.

132. *See* Dodson, *supra* n. 115, at 66-77.

Elsewhere and in a different context, I have proposed a principled framework for resolving whether a rule is jurisdictional or not.[133] At the outset, a court should consider whether Congress expressly designed the rule as jurisdictional. If so, then courts should presume the rule to be jurisdictional. If not, then courts should consider three other factors.[134] For § 2107, there is no clear statement of jurisdictionality. Congress used the word "shall," but nothing suggests that that word means "jurisdictional" as opposed to "mandatory." Thus, the presumption, in my view, is inapplicable, and the Court should have turned to other factors.

First, courts should consider the functions of the rule. Does the rule separate classes of cases, or does the rule merely process claims and relate to modes of proceedings? Is the rule directed primarily at the power of the court and underlying societal values such as federalism, or is it directed at the rights, obligations, or conveniences of the parties? Based on the different natures of jurisdiction and procedure, a rule separating classes of cases or directed at the power of the court or underlying societal values serves jurisdictional purposes and, therefore, should support a jurisdictional characterization, whereas a rule regulating the process or mode of the case and directed to the rights and obligations of the parties serves procedural purposes.[135]

This factor might support a procedural characterization of the deadline to file an appeal because time limits to file a civil appeal are more likely to serve procedural rather than jurisdictional functions. The time limit is primarily for the benefit of the litigants—providing notice of the appeal and discouraging appellate review of stale issues—not for broader societal interests.[136] In addition, the deadline applies to civil actions generally, and thus it is classified more properly as a claim-processing rule than as a rule that separates classes of cases. Finally, it is doubtful that the time limit to file a notice of appeal speaks to the power of the appellate court. A notice of appeal does shift authority from a district court to a court of appeals.[137] But that shift is triggered by the filing, not the timing, of the notice. There is no reason to think that the timing of the notice of appeal has any jurisdictional function.

Second, courts should consider the effects of characterizing the rule as jurisdictional or procedural, such as (1) the burdens on courts to monitor compliance sua sponte, (2) the benefits of allowing parties to consent to noncompliance, (3) the burden on the appellee to discover and prove noncompliance, and (4) the resulting inefficiencies and equities of a particular characterization.[138]

On a quick analysis, this factor probably supports a nonjurisdictional characterization. The first and third effects cancel each other out. The burden on the

133. *Id.* at 66-78.

134. *Id.* at 66-71.

135. *Id.* at 71-77.

136. Hall, *supra* n. 71, at 399-400 ("[A]ppeal periods are like original jurisdiction limitations periods: they involve primarily the interests of the immediate parties, not fundamental societal interests."); Alex Lees, Student Author, *The Jurisdictional Label: Use and Misuse*, 58 Stan. L. Rev. 1457, 1496 (2006).

137. *See* E. King Poor, *Jurisdictional Deadlines in the Wake of* Kontrick *and* Eberhart*: Harmonizing 160 Years of Precedent*, 40 Creighton L. Rev. 181, 182 (2007) ("[Some deadlines] mark the beginning or ending of significant parts of litigation. Because of that, the law has long recognized that the goals of finality and evenhandedness do not allow these time limits to be extended by the parties or overlooked by the court.").

138. Dodson, *supra* n. 115, at 77.

appellee to discover and prove noncompliance is relatively light, suggesting that the appellee would not need the unlimited time to discover the defect that a jurisdictional characterization would allow. On the other hand, the burden on the court to monitor compliance sua sponte also is relatively light because dates generally are counted easily and because any extension must be applied for by motion.[139]

But the second and fourth effects support a nonjurisdictional characterization. Allowing the appellee to be able to consent to an extension of the time to appeal allows the parties to choose to avoid litigating what constitutes "excusable neglect or good cause,"[140] a determination that might otherwise be fact intensive, time consuming, and difficult for the court. Similarly, a jurisdictional characterization for a timing defect that happens to go unnoticed may ultimately unravel a fully-argued appeal, including even a rehearing and rehearing en banc, wasting litigant and judicial time and resources. On balance, this second factor probably supports a nonjurisdictional characterization.

And, third, courts should consider doctrinal and cross-doctrinal consistency.[141] This factor probably either supports a jurisdictional characterization or is neutral. On the one hand, as discussed above, there is language in prior precedent, such as *Curry*, *Scarborough*, and *Browder*, that characterizes the time limit to file a notice of appeal in a civil case as jurisdictional.[142] On the other hand, in a broader context, that precedent is far from clear or consistent.[143] In addition, the treatment of a time limit to appeal as jurisdictional is in tension with the long tradition of characterizing statutes of limitations as nonjurisdictional.[144] Even if this factor supports a jurisdictional characterization, it probably is too weak to outweigh the other factors suggesting the deadline to be nonjurisdictional.[145]

Thus, application of a holistic framework that considers more fully the factors relevant to jurisdictionality might well lead to a conclusion opposite that of *Bowles*—that the time to file a notice of appeal in a civil case is nonjurisdictional. But my broader criticism is that *Bowles* erred methodologically by failing to even engage in this more nuanced analysis. If the Court had been intent on resolving the jurisdictional question, it at least ought to have done so in a principled and thoughtful way.

B. A Mandatory Time to Appeal

Had *Bowles* considered the characterization issue more carefully, it might well have recognized that the result it reached did not require it to resolve the jurisdictional characterization anyway. A rule can be nonjurisdictional and yet still be "mandatory"—unsusceptible to equitable excuses for noncompliance.[146]

---

139. 28 U.S.C. § 2107(c) (conditioning extensions on the filing of a motion).

140. *Id.*

141. Dodson, *supra* n. 115, at 78-79.

142. *See supra* text accompanying nn. 71-83.

143. *See supra* text accompanying nn. 46-99..

144. *See e.g.* Fed. R. Civ. P. 8(c) (characterizing statutes of limitations as waivable affirmative defenses); *Day*, 547 U.S. at 205; *Irwin*, 498 U.S. at 93-96; *Zipes*, 455 U.S. at 394.

145. Dodson, *supra* n. 115, at 78 ("If the other factors discussed above strongly point to a characterization unsupported by an historical pedigree, then the historical pedigree should give way.").

146. *See* Dodson, *Jurisdictionality*, *supra* n. 10, at 46-47; *cf.* Lees, *supra* n. 136, at 1497 ("Courts can still

Characterizing the deadline to file a notice of appeal as mandatory rather than jurisdictional would have had at least two salutary effects. First, it would have been consistent with each line of precedent discussed above. Second, it would have given the Court a way to reach the same result in a far narrower way, without risking deciding other attributes of the deadline that were not technically presented to the Court.

1. Consistency with Precedent

As discussed above, *Bowles* relied on precedent that either is ambiguous or is overbroad in its characterization of the deadline to file a notice of appeal as jurisdictional.[147] The cases cited by *Bowles* either did not address time limits for appeals or could have been decided by characterizing the time limit as mandatory rather than jurisdictional.[148] Had *Bowles* held the time limit to be mandatory as well, it would have been entirely consistent with that precedent.

Several of those cases did state that the time limit is "jurisdictional," but, as I have explained, those characterizations were unnecessary,[149] and nothing required the Court to adhere to that dicta. Indeed, in *Zipes v. Trans World Airlines, Inc.*, the Court dispensed with a long tradition of calling the deadline for filing a Title VII suit jurisdictional when the precise holdings of precedent did not turn on that characterization.[150] Similarly, in *Arbaugh*, the Court acknowledged prior opinions characterizing Title VII's definitions as "jurisdictional"[151] but refused to follow that characterization because the "decision did not turn on that characterization, and the parties did not cross swords over it."[152] Finally, in *Eberhart*, the Court distinguished *Robinson*—which had characterized the time to file a criminal appeal as "mandatory and jurisdictional"[153]—as a decision merely invoking the mandatory and inflexible nature of the rule. *Eberhart* interpreted *Robinson*'s phrase "mandatory and jurisdictional" to mean emphatically mandatory.[154] *Zipes*, *Arbaugh*, *Eberhart* and other cases[155] demonstrate that it would have been entirely appropriate for *Bowles* to give less deference to the precedent that it cited.

In addition, a mandatory but nonjurisdictional characterization would have been more consistent with the more recent cases of *Kontrick*, *Eberhart*, *Scarborough*, and *Arbaugh*. Indeed, *Eberhart* itself construed the deadline at issue there to be mandatory, stating that courts "may not extend the time to take any action under [the rule] . . . except as stated [in it]."[156] *Kontrick* also classified the rule at issue in that case as an

apply nonjurisdictional rules with rigidity and decide, for example, that even if a particular rule is nonjurisdictional, it still cannot be waived.").

147. *See supra* text accompanying nn. 46-83.

148. *See supra* text accompanying nn. 46-83.

149. *See supra* text accompanying nn. 58-83.

150. 455 U.S. 385, 395 (1982).

151. *Arbaugh*, 546 U.S. at 512 (citing *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 249 (1991)).

152. *Id.* at 512.

153. *Eberhart*, 546 U.S. at 17 (citing *Robinson*, 361 U.S. at 229).

154. *Id.* at 17-18.

155. *See e.g. Steel Co. v. Citizens for a Better Env.*, 523 U.S. 83, 91 (1998) (declining to follow a decision characterizing a limit as jurisdictional because the case did not turn on it).

156. 546 U.S. at 15 (quoting Fed. R. Crim. P. 45(b)(2)).

"inflexible" rule "unalterable on a party's application, [that] can nonetheless be forfeited if the party asserting the rule waits too long to raise the point."[157]

Because a mandatory characterization would have comported with the more recent attempts to take care with the jurisdictional label and, at the same time, would not have broken from past cases using the moniker "mandatory and jurisdictional" unthinkingly, *Bowles* should have charted the middle course. By failing to do so, *Bowles* has compounded the doctrinal confusion on jurisdictionality.

2. A Narrower Decision

In addition to being more consistent with precedent, a mandatory characterization would have been the narrowest basis for decision in *Bowles*. *Bowles* would have come out exactly the same as it did if the Court had found the time limit to file an appeal to be mandatory but nonjurisdictional. Bowles's appeal was late, and the state timely and properly raised the deadline in its appellate brief.[158] Thus, the only question was whether the deadline was subject to Bowles's equitable excuse of reliance upon the district court's order. By definition, a mandatory rule is not subject to such an equitable exception. Thus, Bowles's appeal was properly dismissed by the court of appeals.

Characterizing the deadline as mandatory would have been the narrowest decision for the Court. In fact, because both jurisdictional and some nonjurisdictional rules alike are mandatory, the Court need not have resolved the jurisdictional character of the deadline at all. By deciding instead the blunter issue of jurisdictionality, *Bowles* did resolve the deadline's mandatory nature, but it logically also decided the deadline's invulnerability to waiver, forfeiture, and consent, and obligated lower courts to raise and police compliance sua sponte. If the deadline was mandatory, *Bowles* had no reason to go further to call it jurisdictional as well.

Indeed, the Court previously has resolved the mandatory character of a rule without speaking to the broader jurisdictional nature if the mandatory characterization will resolve the case more narrowly. In *Hallstrom v. Tillamook County*,[159] individuals sued a county for alleged violations of the Resource Conservation and Recovery Act ("RCRA"), which requires plaintiffs to notify the alleged violator, the state, and the EPA at least sixty days prior to commencing suit.[160] The plaintiffs failed to comply with the notification requirement, and the defendant moved for summary judgment on that basis. The plaintiffs then immediately notified the appropriate authorities and, when it became clear that neither they nor the defendant had any intention of taking remedial action, argued that its original noncompliance should be deemed to be cured.[161]

The district court agreed, but the Ninth Circuit reversed, holding the requirement to

157. *Kontrick*, 540 U.S. at 456. To be accurate, the Court did not hold the rule to be mandatory as in being impervious to equitable excuses, *id.* at 457, but its treatment of the rule as forfeitable yet unalterable on a party's application is consistent with a mandatory characterization.

158. *Bowles*, 127 S. Ct. at 2362.

159. 493 U.S. 20 (1989).

160. 42 U.S.C. § 6972(b)(1).

161. *Hallstrom*, 493 U.S. at 23-24.

be jurisdictional.[162] The Supreme Court affirmed, though on different grounds. The Court concluded that the statute was mandatory and did not allow for the kind of excuse that the plaintiffs sought.[163] Importantly, however, the Supreme Court declined to decide whether the rule was jurisdictional or not, despite the fact that the Ninth Circuit had so decided, that the parties had argued it, and that the question presented asked that exact question. Instead, the Court put it this way:

> Therefore, we hold that the notice and 60-day delay requirements are mandatory conditions precedent to commencing suit under the RCRA citizen suit provision; a district court may not disregard these requirements at its discretion. The parties have framed the question presented in this case as whether the notice provision is jurisdictional or procedural. In light of our literal interpretation of the statutory requirement, we need not determine whether [RCRA] is jurisdictional in the strict sense of the term.[164]

Thus, the Court decided the case on the narrower ground of whether the rule was mandatory, rather than determining whether it was jurisdictional.[165]

Hallstrom is a model for what *Bowles* should have considered doing. Rather than begin with the blunter characterization of jurisdictional and let the mandatory nature "follow naturally"[166] from that, *Bowles* should have decided the narrower ground of whether the rule was mandatory first. Deciding that question in the affirmative would have obviated the need to address the more complicated issue of jurisdictionality.[167]

V. CONCLUSIONS AND THOUGHTS FOR THE FUTURE

In light of the failure of *Bowles* and its missed opportunity to fashion a narrower and more consistent approach, it is no surprise that litigants and lower courts have cited *Bowles* for a variety of confusing propositions.

The Tenth Circuit, for example, has applied *Bowles* to the time to file a notice of appeal from a criminal sentence based principally on *Bowles*'s statements that the time to file a notice of appeal is jurisdictional.[168] Several courts have interpreted *Bowles* as calling into question the availability of equitable tolling to the one-year statute of limitations for habeas corpus petitions under 28 U.S.C. § 2244(d).[169] Finally, at least

---

162. *Id.* at 24-25.

163. *Id.* at 25-31.

164. *Id.* at 31.

165. *Cf. id.* at 34 n. * (Marshall & Brennan, JJ., dissenting).

> As there is no dispute in this case that respondent timely raised the claim that petitioners had not complied with the notice provision, the question whether a defendant may waive the notice requirement is not before the Court . . . . I do not understand the Court to express any view on whether the notice requirement is waivable.

Hallstrom, 493 U.S. at 34 n. *.

166. *Bowles*, 127 S. Ct. at 2366.

167. The Court recently engaged in a similar methodology in *John R. Sand & Gravel Co. v. United States*, 128 S. Ct. 750 (2008), in which the Court declined to resolve the jurisdictionality of the limitations period of the Tucker Act and instead addressed the narrow issue presented by the facts, namely, whether a court of appeals could raise noncompliance sua sponte despite the government's waiver of the issue in the lower courts. *Id.* at 752.

168. *U.S. v. Smith*, 238 Fed. Appx. 356, 358-59 (10th Cir. 2007) (unpublished).

169. *Enright v. Acton*, 2007 WL 2225828 at *2 (D. Mont. July 30, 2007) (awarding a certificate of appealability on the issue); *Howe v. Mahoney*, 2007 WL 2159321 at *1 (D. Mont. July 25, 2007). The

one litigant has argued before the U.S. Supreme Court that *Bowles* renders jurisdictional the thirty-day time period for an alien to file a petition for judicial review of a final order of removal.[170]

These developments are unsurprising in light of *Bowles*'s errors, and my strong suspicion is that this is just the beginning. *Bowles* could have avoided such problems had the Court more carefully considered the consequences of its characterization and of the reasoning it used to get there.

But all is not lost. A future Court may place *Bowles* where it belongs—alongside cases like *Robinson*, *Torres*, and *Griggs*, which characterized the time to file a notice of appeal as "mandatory and jurisdictional" but for which the narrow issue presented was whether the deadline was merely "mandatory." Doing so would bring principle and consistency back to the Court's jurisdictional characterization jurisprudence.

Supreme Court has not decided whether equitable tolling applies to § 2244. *See e.g. Lawrence v. Fla.*, 127 S. Ct. 1079, 1085 (2007) ("We have not decided whether § 2244 allows for equitable tolling.").

170. Br. for the Respt. in Opposition, *Ndreca v. Gonzales*, 2007 WL 2030540 at *4 (U.S. July 13, 2007) (arguing under *Bowles* that 8 U.S.C. § 1252(b)(1) is jurisdictional).