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Colloquy Essays

THE DEMISE OF "DRIVE-BY JURISDICTIONAL RULINGS"[†]

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INTRODUCTION

In an October 2009 Term marked by several significant constitutional rulings,[1] the Supreme Court quietly continued an important multi-Term effort towards better defining which legal rules properly should be called "jurisdictional." In each of four cases that considered the issue, the Court unanimously rejected a jurisdictional characterization of the challenged legal rule.[2] The trend continued in the October 2010 Term, when the Court unanimously held that the time limit for filing an appeal to an Article I court is not jurisdictional.[3] These cases continue an almost uninterrupted retreat from the Court's admittedly "profligate" and "less than meticulous" use of the word "jurisdiction" and a move towards "discipline" in the use of the term.[4] The Court has rejected "drive-by jurisdictional rulings," in which

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[1] *See* McDonald v. City of Chicago, 130 S. Ct. 3020 (2010); United States v. Stevens, 130 S. Ct. 1577 (2010); Citizens United v. FEC, 130 S. Ct. 876 (2010).

[2] Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2877 (2010); United Student Aid Funds, Inc. v. Espinosa, 130 S. Ct. 1367, 1377–78 (2010); Reed Elsevier, Inc. v. Muchnick, 130 S. Ct. 1237, 1241 (2010); Union Pac. R.R. Co. v. Bhd. of Locomotive Eng'rs & Trainmen, 130 S. Ct. 584, 590–91 (2009).

[3] Henderson *ex rel.* Henderson v. Shinseki, 131 S. Ct. 1197, 1200 (2011).

[4] *Id.* at 1202; Arbaugh v. Y & H Corp., 546 U.S. 500, 510–11 (2006).

a legal rule is labeled as jurisdictional only through "unrefined" analysis without rigorous consideration of the label's meaning or consequence.[5]

Jurisdiction essentially means "legitimate authority."[6] Adjudicative jurisdiction refers to a court's constitutional and statutory authority (or power) to hear a class of cases and to consider and resolve the legal and factual issues raised.[7] Adjudicative-jurisdictional rules contrast, and often are confused, with two other types of rules: (1) substantive-merits rules that control real-world conduct and function as rules of decision determining the validity and success of a plaintiff's claim for relief from a defendant over a particular transaction or occurrence[8] and (2) procedural, or "claim-processing," rules, which determine how a court processes and adjudicates the claim for relief and how the parties and the court behave within the litigation process.[9]

The doctrinal move to identify jurisdiction, to create and maintain clear and determinate lines between jurisdictional and nonjurisdictional rules, and to end rampant confusion and overuse of the concept of jurisdiction is a welcome development for which I have argued for several years.[10]

This Essay examines and critiques the jurisdictionality rulings from the previous two Supreme Court Terms and offers some thoughts on how the Court might continue to develop sharp lines between distinct concepts and to eliminate, once and for all, drive-by jurisdictional rulings.

I. JURISDICTION, MERITS, AND THE "REACH" OF FEDERAL LAW

The sharpest distinction should be between jurisdiction and substantive merits—between rules defining a court's adjudicative authority and rules

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[5] *Arbaugh*, 546 U.S. at 511; *accord Reed Elsevier*, 130 S. Ct. at 1244; *see* John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 145 (2008) (Ginsburg, J., dissenting); Bowles v. Russell, 551 U.S. 205, 215–16 (2007) (Souter, J., dissenting); Eberhart v. United States, 546 U.S. 12, 13 (2005) (per curiam); Kontrick v. Ryan, 540 U.S. 443, 453–54 (2004).

[6] Evan Tsen Lee, *The Dubious Concept of Jurisdiction*, 54 HASTINGS L.J. 1613, 1620 (2003).

[7] *See Morrison*, 130 S. Ct. at 2877; *Reed Elsevier*, 130 S. Ct. at 1243; *Union Pac.*, 130 S. Ct. at 596; *Arbaugh*, 546 U.S. at 510–11; Howard M. Wasserman, *Jurisdiction and Merits*, 80 WASH. L. REV. 643, 649–51 & n.32, 669–70 (2005) [hereinafter Wasserman, *Jurisdiction*]; Howard M. Wasserman, *Jurisdiction, Merits, and Non-extant Rights*, 56 U. KAN. L. REV. 227, 261 (2008) [hereinafter Wasserman, *Non-extant*]; Howard M. Wasserman, *Jurisdiction, Merits, and Procedure: Thoughts on a Trichotomy*, 102 NW. U. L. REV. 1547, 1547–48 (2008) [hereinafter Wasserman, *Trichotomy*].

[8] *See Arbaugh*, 546 U.S. at 511; Wasserman, *Non-extant*, *supra* note 7, at 236; Wasserman, *Trichotomy*, *supra* note 7, at 1548.

[9] *See Reed Elsevier*, 130 S. Ct. at 1243–44; *Bowles*, 551 U.S. at 213; Scott Dodson, *In Search of Removal Jurisdiction*, 102 NW. U. L. REV. 55, 59–60, 71–72 (2008) [hereinafter Dodson, *Removal*]; Scott Dodson, *Jurisdictionality and* Bowles v. Russell, 102 NW. U. L. REV. COLLOQUY 42, 44, 47 (2007), http://www.law.northwestern.edu/lawreview/colloquy/2007/21/ [hereinafter Dodson, *Jurisdictionality*].

[10] *See* Wasserman, *Jurisdiction*, *supra* note 7, at 662, 669; Howard M. Wasserman, *Jurisdiction, Merits, and Substantiality*, 42 TULSA L. REV. 579, 584 (2007) [hereinafter Wasserman, *Substantiality*]; Wasserman, *Non-extant*, *supra* note 7, at 259; Wasserman, *Trichotomy*, *supra* note 7, at 1559.

determining the validity and success of a substantive claim of right on its merits. I have argued previously that, particularly in typical federal statutory and constitutional claims, there should be no overlap between these concepts. Legislatures and courts must maintain sharp, clear, and clean lines between the issues; success or failure on the merits should not affect whether the court had authority to decide the case.[11]

In *Morrison v. National Australia Bank*, Justice Scalia, writing for a unanimous Court, appears to have drawn just such a sharp line.[12] At issue was extraterritorial application of section 10(b) of the Securities Exchange Act to misconduct by foreign defendants that harmed foreign plaintiffs in securities transactions on foreign exchanges.[13] Justice Scalia insisted that extraterritoriality was a merits question, properly resolved on a Rule 12(b)(6) motion, rather than a jurisdictional question resolved on a 12(b)(1) motion to dismiss for lack of subject matter jurisdiction, and the parties did not dispute that characterization. As he put it, "[T]o ask what conduct § 10(b) reaches is to ask what conduct § 10(b) prohibits, which is a merits question."[14] The *Morrison* Court adopted Justice Scalia's reasoning from his 1993 dissent in *Hartford Fire Insurance Co. v. California*.[15] Considering extraterritorial application of the Sherman Act, Justice Scalia had insisted that extraterritoriality has nothing to do with the district court's jurisdiction and everything to do with "whether, in enacting [the statute], Congress asserted regulatory power over the challenged conduct."[16]

Justice Scalia's rhetorical framings overlap: if Congress has not asserted regulatory authority over the challenged conduct, the statute does not reach or prohibit that conduct and does not constrain the defendant. As a result, the plaintiff fails to state a claim under the applicable federal law. If Congress has asserted regulatory authority over the challenged conduct, the statute does reach and prohibit that conduct and does constrain the defendant. The plaintiff may prevail on the merits of her substantive claim if she can show a violation of the applicable legal rules.

Justice Scalia's position presumes that there is something essential, definable, and recognizable as "jurisdiction" that is, and must remain, distinct from substantive merits. Jurisdictional rules typically appear in separate provisions, speaking to courts about judicial authority and the categories of cases that courts can adjudicate.[17] They are grounded in unique structural

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[11] Wasserman, *Jurisdiction*, *supra* note 7, at 645; Wasserman, *Trichotomy*, *supra* note 7, at 1548.

[12] *Morrison*, 130 S. Ct. 2869.

[13] *Id.* at 2875; *see* 15 U.S.C. § 78j(b) (2006) (forbidding "any manipulative or deceptive device or contrivance" in connection with the purchase or sale of securities).

[14] *Morrison*, 130 S. Ct. at 2877.

[15] 509 U.S. 764, 812 (1993) (Scalia, J., dissenting).

[16] *Id.* at 813; *see also* Wasserman, *Jurisdiction*, *supra* note 7, at 688–89 (arguing that the issue of what real-world conduct a statute shall apply to is a merits question).

[17] *See* Reed Elsevier, Inc. v. Muchnick, 130 S. Ct. 1237, 1244 (2010) (quoting Arbaugh v. Y & H Corp., 546 U.S. 500, 515–16 (2006)); Wasserman, *Jurisdiction*, *supra* note 7, at 676.

policies of separation of powers, federalism, and limited federal government.[18] And as Perry Dane has argued, "The convergence of jurisdictional and merits issues is . . . awkward for legal doctrine and the legal culture," particularly when that convergence arises too regularly.[19] Permitting overlap between jurisdiction and merits is generally inconsistent with the federal procedural system, which is premised on distinctions between them, particularly as they affect the timing and manner of their resolution.[20]

We might define the distinct concept of "merits" several ways although all ultimately get at the same idea. The first approach is Justice Scalia's in *Morrison*, which spoke of whether a provision of federal law "reaches"—that is, regulates or prohibits—the defendant's conduct, entitling a plaintiff to relief for the harms caused by that conduct.[21] The same idea may be framed as whether the statute applies to, binds, legally constrains, or controls some actor or conduct. A second approach holds that substantive law dictates "who is entitled to sue whom, for what, and for what remedy."[22] The success of a claim of right depends on how a court answers those questions under the applicable legal rule. A plaintiff prevails on her claim when applicable law permits her to sue this defendant for this conduct and entitles her to this remedy; she fails on her claim if applicable law does not permit suit against this defendant for this conduct or for this remedy. A third way phrases the concept in Hohfeldian terms.[23] The merits of a claim ask whether the legal rule sued under establishes a right in the plaintiff and imposes a duty on the defendant and whether the defendant's conduct was inconsistent with that duty, violating the plaintiff's rights and entitling her to some remedy.[24] A plaintiff prevails if she can show a violation of a right–duty combination on the facts at issue; a defendant prevails if the plaintiff cannot show that violation.

However merits are defined, the question of who should win under substantive law remains distinct from the court's adjudicative authority. A court's adjudicative jurisdiction should not depend on the ultimate outcome of the case.[25]

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[18] *See* Perry Dane, *Jurisdictionality, Time, and the Legal Imagination*, 23 HOFSTRA L. REV. 1, 36–37 (1994); Dodson, *Removal*, *supra* note 9, at 59; Dodson, *Jurisdictionality*, *supra* note 9, at 47.

[19] Dane, *supra* note 18, at 47.

[20] *See* Yazoo Cnty. Indus. Dev. Corp. v. Suthoff, 454 U.S. 1157, 1160 (1982) (Rehnquist, J., dissenting from denial of certiorari); Wasserman, *Jurisdiction*, *supra* note 7, at 662–63; Wasserman, *Substantiality*, *supra* note 10, at 597–98.

[21] Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2877 (2010).

[22] John Harrison, *Jurisdiction, Congressional Power, and Constitutional Remedies*, 86 GEO. L.J. 2513, 2515 (1998); *see* Wasserman, *Non-extant*, *supra* note 7, at 236.

[23] *See* Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 30 (1914).

[24] *See id.* at 32; Wasserman, *Non-extant*, *supra* note 7, at 236.

[25] Kevin M. Clermont, *Jurisdictional Fact*, 91 CORNELL L. REV. 973, 976 (2006); Paul J. Mishkin, *The Federal "Question" in the District Courts*, 53 COLUM. L. REV. 157, 166 (1953).

In *Morrison*, there plainly was jurisdiction in the district court. One provision of the Securities Exchange Act grants district courts exclusive original jurisdiction over violations of the Act and over all actions to enforce liability or duties created by the Act.[26] In most cases asserting federal claims of right, courts derive jurisdiction from statutes separate from the claim-creating provision—either from the grant of jurisdiction over all civil actions "arising under" federal law[27] or from grants of jurisdiction over claims brought under or involving a particular statute or category of statutes.[28]

Although *Morrison* addressed extraterritorial application of section 10(b), the Court recognized more broadly that merits are about who a federal legal rule reaches and what the rule prohibits, and this recognition should control the appropriate characterization of extraterritoriality for other federal laws. Consider the reach of federal antitrust law under the Foreign Trade Antitrust Improvements Act (FTAIA).[29] This 1982 amendment to the Sherman Act provides that antitrust laws "shall not apply to conduct involving trade or commerce . . . with foreign nations unless . . . such conduct has a direct, substantial, and reasonably foreseeable effect" on domestic trade or commerce and would otherwise violate the Act if committed purely domestically.[30] In *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, the Supreme Court repeatedly used merits language in discussing the FTAIA, speaking of the statute's "application" and "reach."[31]

But the Court never specified whether the issue was properly one of jurisdiction under Rule 12(b)(1) or merits under Rule 12(b)(6). And because *Empagran* did not expressly define extraterritoriality as a merits issue, appellate courts have not felt bound to a merits characterization. Instead, they have found it unnecessary to analyze or resolve the question in light of *Empagran*'s failure to do so, often simply accepting the posture on which the lower court had decided the question.[32] But judges continue to discuss extraterritoriality through what properly should be understood as merits language. Thus, Judge Noonan of the Ninth Circuit could concur in jurisdictional treatment of the FTAIA yet also say that "it has been the judgment

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[26] 15 U.S.C. § 78aa (2006).

[27] 28 U.S.C. § 1331 (2006).

[28] *See, e.g.*, 28 U.S.C. § 1338 (granting jurisdiction over claims involving patents, trademarks, and copyrights); 28 U.S.C. § 1343(a)(3) (granting jurisdiction over civil rights claims against state actors); 42 U.S.C. § 2000e-5(f)(3) (2006) (granting jurisdiction over Title VII claims).

[29] 15 U.S.C. § 6a (2006).

[30] *Id.*; F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 161–62 (2004); Wasserman, *Non-extant*, *supra* note 7, at 242.

[31] *Empagran*, 542 U.S. 155.

[32] *See, e.g.*, *In re* Dynamic Random Access Memory (DRAM) Antitrust Litig., 546 F.3d 981, 985–86 & n.3 (9th Cir. 2008) (citing cases). For one criticism of the failure to recognize the distinction, see Howard Wasserman, *Why Do Courts Keep Getting This Stuff Wrong?*, PRAWFSBLAWG (Aug. 28, 2008, 10:13 AM), http://prawfsblawg.blogs.com/prawfsblawg/2008/08/why-do-courts-k.html.

of Congress and the Supreme Court that the economic interests of consumers outside the United States are normally not something that American law is intended to protect."[33] *Morrison* made explicit what was implicit in *Empagran*. Which foreign harms American law is or is not intended to protect against—which foreign conduct American statutory law reaches or applies to—now is explicitly defined as a merits issue, and courts of appeals should follow that understanding.

Morrison also appears to have formally, if silently, overturned the reasoning in *EEOC v. Arabian American Oil Co*.[34] In *Arabian American Oil*, the Court affirmed a jurisdictional dismissal, holding that Title VII did not apply to overseas employment relations with domestic entities because Congress did not clearly express an intent that Title VII apply extraterritorially.[35] The Court rejected the argument that the statute's "broad jurisdictional language" indicated Congress's extraterritorial intent, citing several older extraterritoriality cases in which the Court had held there was "no jurisdiction under" a particular statute.[36]

Arabian American Oil did not appear to have much life in it anyway. In *Arbaugh v. Y & H Corp.*, the Court had refused to be bound by the jurisdictional characterization in *Arabian American Oil* because "the parties did not cross swords over it," and the Court had not been called upon to determine whether the dismissal was properly based on lack of jurisdiction as opposed to failure to state a claim.[37] In other words, *Arabian American Oil* was written off as a drive-by jurisdictional ruling that was not entitled to precedential effect.

To the extent that *Arabian American Oil* survived *Arbaugh*, it cannot survive *Morrison*. If extraterritoriality is a merits issue as to section 10(b), then it is also a merits issue as to Title VII. Indeed, any question of the reach of federal law—of whether Congress asserted regulatory authority to reach and prohibit the challenged conduct by the targeted actors—must be deemed a merits issue.[38] This includes issues such as whether the defendant falls within the statutory definition of persons regulated by the legal rule (persons on whom legal duties are imposed); whether the plaintiff falls within the statutory definition of a protected rights-claimant under the legal rule (persons on whom legal rights or liberties are bestowed); whether the

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[33] *In re DRAM*, 546 F.3d at 991 (Noonan, J., concurring).

[34] 499 U.S. 244 (1991). The explicit holding in *Arabian American Oil*, that Title VII does not apply to extraterritorial conduct, was overridden by Congress in the Civil Rights Act of 1991, Pub. L. No. 102-166, § 109, 105 Stat. 1071, 1078–79 (codified at 42 U.S.C. § 2000e(f) (2006)).

[35] *Arabian Am. Oil*, 499 U.S. at 250–51.

[36] *Id.* at 251–53 (discussing cases).

[37] 546 U.S. 500, 512–13 (2006).

[38] *See* Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2877 (2010); *see also* Wasserman, *Nonextant*, *supra* note 7, at 262 (arguing that what Congress does regulate in a statute must remain within the bounds of what Congress can constitutionally regulate, which is a matter of prescriptive jurisdiction).

defendant's conduct is of the kind prohibited by the legal rule;[39] and whether the plaintiff has suffered the type of harm to her rights that is made remediable by the applicable legal rule. The judgment in all cases focuses on whether the legal rule of decision was violated in the events at issue, and whether the defendant prevails and the plaintiff loses (or vice versa).

Notably, *Morrison*'s brief discussion of statutory-reach-as-merits[40] did not mention or cite *Arbaugh*, the Court's most recent, seemingly definitive, statement on the jurisdiction–merits divide.[41] *Arbaugh* unanimously held that whether a defendant fell within Title VII's definition of "employer" was an element of the claim and therefore not jurisdictional.[42] The definition appeared in a separate provision from the applicable jurisdictional grants and did not speak to the court in jurisdictional terms.[43] Instead, this and other statutory definitions were addressed to the parties and to their real-world conduct. The key, however, was that Congress had not defined "employer" as jurisdictional.[44] This left open the possibility that Congress could have made this (or any other) statutory element jurisdictional by clearly labeling it as such.

Morrison did not consider congressional intent, however. Nor did it examine section 10(b) for jurisdictional language. Of course, Justice Scalia would not have found such language even had he looked. Section 10(b) is addressed only to real-world actors, describing a range of primary conduct that is unlawful for any person, directly or indirectly, to undertake.[45] *Morrison*'s conclusion of nonjurisdictionality thus would have remained unchanged. The point is that Justice Scalia found it unnecessary even to make the inquiry.

This more absolute line between jurisdiction and merits is a welcome doctrinal development. *Arbaugh*'s plain-statement rule logically leaves it open to Congress to conflate jurisdiction and merits by making all statutory elements, and thus all merits questions, into adjudicative-jurisdiction questions simply by being explicit enough. And *Arbaugh* identifies no limit on legislative discretion to define something as jurisdictional. Of course, Congress presumably would exercise some prudence, defining only uniquely important issues as jurisdictional. But there is no rational way to divide "important" elements that should become adjudicative-jurisdictional issues from less important elements that should remain merits issues and no ra-

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[39] *See* Wasserman, *Jurisdiction*, *supra* note 7, at 686–87.

[40] *Morrison*, 130 S. Ct. at 2876–77.

[41] *Arbaugh*, 546 U.S. 500.

[42] *Id.* at 504. An "employer" is defined as an entity engaged in an industry affecting commerce having fifteen or more employees. 42 U.S.C. § 2000e(b) (2006).

[43] *Arbaugh*, 546 U.S. at 514–16; Wasserman, *Jurisdiction*, *supra* note 7, at 693–94 (arguing that provisions must speak to courts in express jurisdictional terms to be deemed jurisdictional).

[44] *Arbaugh*, 546 U.S. at 514–16.

[45] 15 U.S.C. § 78j(b) (2006).

tional reason for treating some elements as adjudicative-jurisdictional and others as merits.[46]

The possibility of legislative conflation also produces some category errors. A district court's adjudicative jurisdiction should not depend on the outcome of the litigation.[47] But that is what would happen if certain elements were made jurisdictional. Any plaintiff victory—when a plaintiff carries her burden as to all the factual issues and shows entitlement to relief and remedy—will be on the merits, of course. But any defendant victory becomes a jurisdictional dismissal because Congress has labeled issues of statutory reach as jurisdictional. In such a case, the failure of some element of the claim would deprive the court of jurisdiction.[48]

Legislative discretion also has the potential to strip plaintiffs of their jury right. Courts generally resolve disputes of "jurisdictional fact," facts on which subject matter jurisdiction turns, whereas the jury is the default factfinder on facts that go to substantive merits, particularly in legal actions seeking monetary damages.[49] If Congress truly is free to redefine any (or all) statutory elements as jurisdictional, it is free to shift factfinding responsibility from the jury to the court.

The way out of this bind is to reject *Arbaugh*'s plain-statement rule as to statutory-reach issues in favor of *Morrison*'s absolute declaration that statutory reach—whom the statute regulates or protects and what the statute prohibits—is always a merits issue. Congress should never define as jurisdictional any issue of statutory application, and a court should never make a congressional-intent inquiry. The merits characterization of extraterritoriality arises simply because extraterritoriality is about whom and what a legal rule reaches, prohibits, or regulates, which per se has nothing to do with the court's adjudicative jurisdiction. The same is per se true for all other questions of a statute's regulatory scope.

II. JURISDICTION AND LITIGATION PRECONDITIONS

The line between jurisdiction and procedure is much fuzzier and softer in practice,[50] although it is also of less procedural consequence.[51] This is particularly true for litigation preconditions, procedural steps that a plaintiff must satisfy before bringing and maintaining a claim.

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46 Wasserman, *Jurisdiction*, *supra* note 7, at 661, 678–79, 691; Wasserman, *Trichotomy*, *supra* note 7, at 1549.

47 *See supra* note 25 and accompanying text.

48 *See* Clermont, *supra* note 25, at 977; Wasserman, *Jurisdiction*, *supra* note 7, at 672.

49 *Arbaugh*, 546 U.S. at 501–02, 514; Clermont, *supra* note 25, at 990–91; Wasserman, *Jurisdiction*, *supra* note 7, at 662–65.

50 *See* Reed Elsevier, Inc. v. Muchnick, 130 S. Ct. 1237, 1243 (2010) (noting that it "can be confusing" in practice).

51 *See* Dodson, *Removal*, *supra* note 9, at 69–70; Wasserman, *Trichotomy*, *supra* note 7, at 1553.

Two preconditions are especially common: timely filing of the case in the appropriate court[52] and exhaustion of certain administrative steps prior to initiating litigation.[53] A plaintiff's failure to satisfy the precondition prevents the court from resolving the case under applicable law—that is, from deciding based on full consideration of the merits, however defined.[54] The problem is that courts too casually, and inappropriately, characterize failure to satisfy the precondition as depriving the court of adjudicative authority or power.

A. Four Recent Preconditions Cases

In the October 2009 Term the Court decided three precondition cases, concluding in each that the precondition was not jurisdictional. These decisions specifically illustrate the Court's desire to halt "profligate" and "less than meticulous"[55] use of the term *jurisdiction* and the reality that fewer provisions will be found jurisdictional unless they are explicit grants of adjudicative authority to a court over a class of claims.

The most direct discussion was in *Reed Elsevier*, in which the Court granted certiorari specifically on the jurisdictionality issue. *Reed Elsevier* involved a proposed settlement class of authors in a dispute over electronic publication.[56] The class consisted of both authors who had registered their copyrights and authors who had not.[57] Under federal law, a copyright holder may bring an action in federal court asserting infringement,[58] subject to § 411(a), which prohibits any enforcement action "until preregistration or registration of the copyright claim has been made in accordance with" the copyright laws.[59] At issue was whether the district court had authority to approve the mixed-author class and the settlement, which in turn depended on whether the registration requirement was a jurisdictional rule.[60]

Relying on *Arbaugh*'s plain-statement requirement, an almost unanimous Court concluded that § 411(a) was not a jurisdictional but simply an or-

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[52] Henderson *ex rel.* Henderson v. Shinseki, 131 S. Ct. 1197, 1200 (2011) (discussing timeliness of filing claim in Court of Appeals for Veterans Claims); John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 132 (2008) (discussing timeliness of filing claim in Court of Federal Claims); Bowles v. Russell, 551 U.S. 205, 207–08 (2007) (discussing timing for filing notice of appeal); Kontrick v. Ryan, 540 U.S. 443, 446–47 (2004) (discussing time for filing objection to discharge order in bankruptcy).

[53] *Reed Elsevier*, 130 S. Ct. at 1241 (requiring administrative exhaustion); Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 392–93 (1982) (same).

[54] *See supra* notes 21–25 and accompanying text.

[55] Arbaugh v. Y & H Corp., 546 U.S. 500, 510–11 (2006).

[56] *Reed Elsevier*, 130 S. Ct. at 1242.

[57] *Id*.

[58] 17 U.S.C. § 501(b) (2006).

[59] 17 U.S.C. § 411(a).

[60] *Reed Elsevier*, 130 S. Ct. at 1241.

dinary claim-processing rule.[61] First, Congress did not clearly label the provision as jurisdictional. Jurisdiction was conferred on the district court by two separate provisions: one granting authority over all claims arising under federal law and another granting jurisdiction specifically over copyright claims;—neither conditioned adjudicative authority on preregistration.[62] Second, the majority argued that the registration requirement was subject to some exceptions, meaning a court could adjudicate claims even where a plaintiff failed to satisfy the registration precondition whereas true jurisdictional rules ordinarily should not allow for such exceptions.[63] Third, the Court pointed to *Zipes v. Trans World Airlines*, on which *Arbaugh* had relied, which held that Title VII's requirement that discrimination claimants file charges with the EEOC prior to filing suit was a prerequisite to suit but not a jurisdictional prerequisite.[64]

The confusion in *Reed Elsevier* derived from the final sentence of § 411(a), which provides that if the Copyright Office refuses to register a copyright, a copyright holder still can bring an infringement claim.[65] Specifically, it states that the Register of Copyrights may become a party to the action on the issue of copyright registrability although "the Register's failure to become a party shall not deprive the court of jurisdiction to determine that issue."[66] But this passing reference to jurisdiction did not convert § 411(a) into a jurisdictional provision. The sentence simply clarified that "a federal court can determine 'the issue of registrability of the copyright claim' even if the Register does not appear in the infringement suit."[67] Properly framed, the question under § 411(a) was whether registrability was before the court as one legal and factual issue to be adjudicated and resolved; it was not about the court's power to adjudicate legal and factual issues.

Proper characterization of litigation preconditions was a minor subissue in two other cases. First, *United Student Aid Funds, Inc. v. Espinosa*[68] considered whether a bankruptcy court's order discharging certain student loan debt was a void judgment subject to reopening under Federal Rule of Civil Procedure 60(b)(4) when the discharge occurred without a judicial finding of undue hardship and without an adversary proceeding as required by the bankruptcy laws and the Federal Rules of Civil Procedure.[69] A

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[61] *Id.* Justice Thomas authored an opinion in full for a five-Justice majority; Justice Ginsburg wrote an opinion concurring in part and concurring in the judgment for three Justices; and Justice Sotomayor did not participate in the case. *Id.* at 1240.

[62] *Id*. at 1245–46 (discussing 28 U.S.C. §§ 1331, 1338).

[63] *Id.* at 1246.

[64] *Id*. at 1246–47 (discussing Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393, 395 (1982)).

[65] 17 U.S.C. § 411(a) (2006).

[66] *Id.*

[67] *Reed Elsevier*, 130 S. Ct. at 1245 (quoting § 411(a)).

[68] 130 S. Ct. 1367 (2010).

[69] *Id.* at 1376–78; *see* FED. R. CIV. P. 60(b)(4).

judgment may be void due to an underlying jurisdictional defect in the "exceptional case in which the court that rendered judgment lacked even an 'arguable basis' for jurisdiction."[70] If the requirements of an adversary proceeding and a finding of undue hardship were jurisdictional, the judgment becomes at least arguably void. But the Court held that the undue hardship requirement was merely a precondition to a party obtaining a discharge order and did not limit the court's jurisdiction.[71] Similarly, the requirement of an adversary proceeding, derived from the Federal Rules of Bankruptcy Procedure, was a procedural one that did not expand or limit the court's adjudicative authority.[72]

Second, in *Union Pacific Railroad Co. v. Brotherhood of Locomotive Engineers & Trainmen*, the Court considered whether the National Railroad Adjustment Board, an administrative agency, had jurisdiction to arbitrate a minor labor dispute without proof that the parties had attempted to resolve the dispute through a pre-arbitration conference.[73] The Court first insisted that the same principles of jurisdictionality for courts apply to administrative agencies empowered to adjudicate particular controversies.[74] Profligate and imprecise use of the jurisdictional label was equally inappropriate in either context. The requirement of a pre-arbitration conference was no more jurisdictional than Title VII's requirement of presuit resort to the EEOC.[75] Both are litigation preconditions that do not affect the court's root structural adjudicative authority.

The Court continued this trend in the October 2010 Term, unanimously defining as nonjurisdictional the 120-day time limit for appealing a decision from the Board of Veterans Appeals to the United States Court of Appeals for Veterans Claims (both Article I tribunals).[76] The Court again used *Arbaugh* and congressional intent as its sole touchstone, citing a number of factors demonstrating the legislative desire to treat the time limit as nonjurisdictional, including the absence of jurisdictional language or any reference to the court's power; the Veterans Court's status as an Article I, rather than Article III, tribunal; the unified character of the administrative scheme for veterans' claims; and the special nature of veterans' claims and the applicable procedures, which uniquely tilt in a claiming veteran's favor.[77]

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[70] *Espinosa*, 130 S. Ct. at 1377 (quoting Nemaizer v. Baker, 793 F.2d 58, 65 (2d Cir. 1986)).
[71] *Id.* at 1377–78.
[72] *Id*.
[73] 130 S. Ct. 584, 590 (2009).
[74] *Id*.
[75] *Id.* at 596–97.
[76] Henderson *ex rel.* Henderson v. Shinseki, 131 S. Ct. 1197, 1200 (2011).
[77] *Id.* at 1204–06.

B. Jurisdiction, Merits, Procedure, and Mandatory Procedure

1. Preconditions as Merits.—Courts must take care not to overextend jurisdictionality, regardless of whether the potential conflation is with an element of a claim[78] or with a precondition to initiating litigation.[79] But there is still the question of whether nonjurisdictional preconditions should be understood as procedural claim-processing rules or substantive merits rules.

Procedural rules generally control how parties litigate and how courts process cases. They are concerned with the fairness and efficiency of the truth-finding process and are grounded in policies of litigant autonomy, fairness, judicial efficiency, and cost-effectiveness.[80] Like merits rules, procedural rules are addressed to the parties and to their rights and obligations.[81] But procedural rules are about rights and obligations within the courtroom and within litigation, whereas merits rules are about real-world rights and duties outside the four walls of the courtroom.

Nevertheless, some preconditions could be framed as either procedural or merits-based. For example, we might read the copyright laws as making actionable only infringement of *registered* copyrights. Registration would then become something a copyright holder must do in the real world to protect his substantive legal rights and an element of a copyright claim that the plaintiff must plead and prove. Thus, a plaintiff who sues for infringement of an unregistered copyright loses unless she meets some enumerated exception. Why? Because federal law does not prohibit infringement of an unregistered copyright and does not reach a person who infringes an unregistered copyright.[82] Stated differently, the owner of an unregistered copyright cannot sue an infringer for infringement of an unregistered copyright. As a result, the nonregistered copyright holder loses on the substantive merits of his claim.

On this understanding, the Court in *Reed Elsevier* might have adopted the more absolute approach of *Morrison* rather than *Arbaugh*'s limited focus on congressional intent. Registration now is solely about the reach of federal copyright law—whether the statute prohibits the defendant's infringing conduct, which turns on whether the copyright has been registered, a pure merits issue not affecting subject matter jurisdiction. The outcome is unchanged: § 411(a) remains nonjurisdictional. But this different analysis better respects the divide between substantive merits and adjudicative jurisdiction.

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[78] *E.g.* Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2876–77 (2010); Arbaugh v. Y & H Corp., 546 U.S. 500, 510–11 (2006).

[79] *E.g.*, Reed Elsevier, Inc. v. Muchnick, 130 S. Ct. 1237, 1245–46 (2010).

[80] Dodson, *Removal*, *supra* note 9, at 60, 71–72; Scott Dodson, *Mandatory Rules*, 61 STAN. L. REV. 1, 11–12 (2008) [hereinafter Dodson, *Mandatory Rules*].

[81] Dodson, *Removal*, *supra* note 9, at 71–72.

[82] 17 U.S.C. § 411(a) (2006).

2. Arbaugh*, Congress, and Procedure.*—On the other hand, most litigation preconditions, including § 411(a) or the pre-arbitration conference requirement in *Union Pacific*, look and function procedurally. They control how parties and courts behave in litigation, not in the real world beyond the four walls of the courtroom, and dictate steps that a rights-claimant must take to successfully litigate her rights, including prior to initiating litigation.

Again, the line between adjudicative jurisdiction and pure procedure is notoriously soft and confusing in practice—certainly softer and more confusing than the line between a court's adjudicative authority and the success of the plaintiff's substantive claim of right. The common refrain is that jurisdictional rules separate classes of cases and define *whether* a court can exercise power to resolve a class of cases whereas procedural rules process claims and dictate *how* a court will adjudicate.[83] But that distinction is not always helpful because many rules could be framed as either procedural or jurisdictional.

For example, the Court last Term reaffirmed that, to challenge the sufficiency of the evidence on appeal, a party must first present that argument on a postverdict motion in the district court.[84] During oral argument, Justice Alito pushed petitioner's counsel on whether Rule 50(b) could be a jurisdictional rule in light of the Court's recent cases treating procedural claim-processing rules as nonjurisdictional.[85] Counsel tried to distinguish between jurisdiction and power, to which Justice Ginsburg correctly insisted that "jurisdiction is power, power to proceed in a case."[86]

The opinion in *Ortiz* did not pursue the characterization issue, implicitly leaving it as a nonjurisdictional procedural claim-processing rule, which seems both normatively correct and consistent with the doctrinal trend. The rule constrains parties, not courts and their adjudicative authority. The rule means a party cannot raise sufficiency of the evidence on appeal if she did not make a Rule 50(b) motion during the trial. The rule does not mean the appellate court lacks adjudicative power to hear the issue, but rather that the litigant lacks the procedural right to raise and present the issue to the court. This limits not the court's power but its opportunity to exercise that power in reaction to a party's strategic and legal decisions.[87] Of course, this arguably is simply a matter of whose perspective we adopt in examining a rule. From the court's standpoint, there may be no functional difference between

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[83] *See Reed Elsevier*, 130 S. Ct. at 1243; Dodson, *Removal*, *supra* note 9, at 71–72; Dodson, *Mandatory Rules*, *supra* note 80, at 11–12.

[84] Ortiz v. Jordan, 131 S. Ct. 884, 892–93 & n.6 (2011); Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc., 546 U.S. 394, 401–02 (2006) (discussing FED. R. CIV. P. 50(b) and 59(a)).

[85] Transcript of Oral Argument at 8–12, *Ortiz*, 131 S. Ct. 884 (No. 09-737), 2010 WL 4280961.

[86] *Id.* at 11–12.

[87] Howard Wasserman, *Jurisdictional Confusion in Unexpected Places*, PRAWFSBLAWG (Nov. 8, 2010, 8:17 AM), http://prawfsblawg.blogs.com/prawfsblawg/2010/11/jurisdictional-confusion-in-unexpected-places-1.html.

a court lacking power to hear the issue and a court lacking the opportunity to wield that power: either way, it is unable to adjudicate the issue.[88]

A better distinction focuses on underlying values and policy goals. Adjudicative-jurisdiction rules are grounded in public structural values such as federalism, separation of powers, and limited federal government.[89] Procedural rules are concerned with the fairness and efficiency of the truth-finding process and a party's opportunity to present his side of the story; they therefore focus on individual values such as party autonomy, party control of litigation, efficiency, and fairness.[90]

In any event, a sharp demarcation between jurisdiction and procedure is less necessary because the pair so closely align. There is no difference in the timing or manner of deciding procedure and jurisdiction as there is between merits and jurisdiction. Jurisdiction is one of several procedural preliminaries that courts ideally consider at the outset of litigation. The judge, not the jury, serves as factfinder on any underlying disputed issues for both jurisdictional rules and claim-processing rules.[91]

Given this connection, *Arbaugh*'s plain-statement approach makes perfect sense as the line separating procedural preconditions from jurisdictional rules and should be our analytical starting point. Courts should focus their analysis on whether Congress has defined a precondition as jurisdictional, whether it used jurisdictional language addressed to the courts and their adjudicative authority, and whether Congress is serving structural or individual values. If Congress understands its rule as serving the former rather than the latter, that understanding carries some persuasive force.

Of course, this leaves Congress broad discretion to dictate a rule's jurisdictional character.[92] But that seems appropriate for preconditions (certainly more than for merits rules[93]), given that Congress controls both federal-court jurisdiction and federal judicial procedure, including the conditions that parties must satisfy to pursue claims under congressionally made legal rules.[94] Like courts, however, Congress must be meticulous, precise, and not unduly profligate in characterizing rules as jurisdictional. In other words, Congress must avoid enacting drive-by jurisdictional statutes that rely on a careless, undisciplined, or unrefined understanding of adjudicative authority.

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[88] *Id.*

[89] Dane, *supra* note 18, at 36–37; Dodson, *Removal*, *supra* note 9, at 59.

[90] Dodson, *Removal*, *supra* note 9, at 60; John Hart Ely, *The Irrepressible Myth of* Erie, 87 HARV. L. REV. 693, 724–25 (1974).

[91] Dodson, *Removal*, *supra* note 9, at 69–70; Wasserman, *Jurisdiction*, *supra* note 7, at 650–51; Wasserman, *Trichotomy*, *supra* note 7, at 1553.

[92] Henderson *ex rel.* Henderson v. Shinseki, 131 S. Ct. 1197, 1203 (2011).

[93] *See supra* notes 17–25, 40–50 and accompanying text.

[94] *See* U.S. CONST. art. III; Wasserman, *Trichotomy*, *supra* note 7, at 1554–55.

Reed Elsevier involved such a drive-by statute. Under the original version of § 411(a), a plaintiff had to show registration to proceed with her infringement action. Registrability was a subissue: a copyright only could be registered and therefore sued upon if it was the kind of creative work that could be copyrighted and registered under the applicable rules. The remainder of § 411(a) established procedural requirements surrounding registrability. The Register of Copyrights made the initial determination of registrability. An author whose copyright had been denied registration then could sue on the unregistered copyright and raise registrability as an issue for the court. If the court decided the copyright was registrable, the copyright would be treated as registered, one on which the author could sue and recover for infringement. The statue also granted the Register of Copyrights a procedural right to intervene in that action to defend its determination of nonregistrability.[95]

In 1976, Congress added the last clause to § 411(a), providing that "the Register's failure to become a party shall not deprive the court of jurisdiction to determine that issue."[96] The amendment responded to a series of lower court rulings, although Congress did not seem to consider the effect of using the word "jurisdiction" in the statute.[97] The addition means, in effect, that even if the Register elects not to exercise her statutory right to intervene, the author still can argue to the court that the copyright was registrable, and the court still can find that it should have been registered and treat it as if it had been. Section 411(a) thus does not address jurisdiction at all. It addresses facts that an author can and must prove to bring an infringement claim and the procedural rules under which he proves them.

The problem was that Congress used "jurisdiction" in that added clause, which apparently confused the lower courts as well as many litigants. Fortunately, the *Reed Elsevier* Court saw through the confusion, partly because the Justices have made such a jurisprudential point of limiting careless and loose use of the word in their decisions. Congress should follow suit in drafting legislation, avoiding the word unless it really means to further structural aims and limit root judicial authority to adjudicate. In other words, the solution to drive-by jurisdictional rulings demands better statutory drafting as well as better statutory interpretation.

3. Jurisdiction and Mandatory Rules.—If jurisdiction and procedure align in terms of timing and factfinder, the question becomes, "Why is it worth separating the jurisdictional from the merely procedural?"

One answer is simple formalism. We should isolate what it means for a rule to truly address a court's root structural constitutional and statutory authority to adjudicate. Admittedly, there is not a great deal of content to

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[95] 17 U.S.C. § 411(a) (2006); Reed Elsevier, Inc. v. Muchnick, 130 S. Ct. 1237, 1245 (2010).

[96] 17 U.S.C. § 411(a).

[97] *Reed Elsevier*, 130 S. Ct. at 1245.

this objection beyond recognition that, when we create distinct legal concepts like jurisdiction and procedure by using different terms, it is awkward to fail to treat them distinctly or to have them converge too often.[98]

A different answer centers on the consequence of the characterization. Adjudicative-jurisdictional rules are, by definition, nonwaivable. The parties cannot consent to subject matter jurisdiction in federal court or waive an objection to it. Judges at every level have an independent obligation to raise subject matter jurisdiction sua sponte, and the court or a party can raise jurisdiction at any time throughout the litigation process.[99] And as a general though sharply contested proposition, adjudicative jurisdictional rules are rigid and inflexible, and they do not allow for equitable exception or leniency.[100]

But consequentialism is not essentialism. Jurisdictional rules are always nonconsentable and nonwaivable, but not all mandatory, nonwaivable, rigid rules must be jurisdictional. Scott Dodson has argued that there is room for a class of rules, primarily procedural, that are mandatory but nonjurisdictional. These rules serve procedural values like party autonomy and the fairness and efficiency of the truth-finding process and they speak to the conduct of actors in the litigation process, even though they possess characteristics associated with jurisdictional rules.[101] A mandatory procedural rule would be subject to consent, waiver, and forfeiture by the party benefited by the rule, and the court would not have an independent obligation to raise a defect under the rule. Once the benefited party asserts the rule, however, the court is obligated to enforce it and has no equitable discretion.[102]

But mandatory nonjurisdictional rules need not be procedural. One can imagine a substantive-merits rule, tied to the reach of a legal prohibition that determines who can sue whom for what real-world conduct, that nevertheless is endowed with characteristics such as mandatoriness or nonwaivability. Consider state sovereign immunity under the Eleventh Amendment. Although the Amendment is written as a limitation on the adjudicative jurisdiction granted in Article III, the Court has recognized a broader state immunity from liability to individuals under federal law.[103] This broader

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[98] Dane, *supra* note 18, at 47; Wasserman, *Jurisdiction*, *supra* note 7, at 669.

[99] FED. R. CIV. P. 12(h)(3); Arbaugh v. Y & H Corp., 546 U.S. 500, 514 (2006); Wasserman, *Jurisdiction*, *supra* note 7, at 649–52.

[100] Dodson, *Mandatory Rules*, *supra* note 80, at 5; Perry Dane, *Sad Time: Thoughts on Jurisdictionality, the Legal Imagination, and* Bowles v. Russell, 102 NW. U. L. REV. COLLOQUY 164, 167 (2008), http://www.law.northwestern.edu/lawreview/colloquy/2008/2/LRColl2008n2Dane.pdf.

[101] Dodson, *Mandatory Rules*, *supra* note 80, at 9.

[102] *Id.*

[103] *Compare* U.S. CONST. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."), *with* Alden v. Maine, 527 U.S. 706, 736 (1999) ("[T]he bare text of the [Eleventh] Amendment is not an exhaustive description of the States' constitutional immunity from suit."). For a more general discussion of immunity from

immunity functions like a merits-based limitation on the reach of congressionally enacted prohibitions.[104] For example, in *Board of Trustees v. Garrett*,[105] the Court held that states are not subject to private suit under the employment provisions of the Americans with Disabilities Act (ADA) because the ADA was not valid legislation within Congress's prescriptive authority under Section Five of the Fourteenth Amendment.[106] In other words, a constitutional limitation on Congress's legislative power narrowed the reach or application of the ADA; that is, it limited the conduct prohibited and actors regulated by the ADA and the statutory right–duty combinations it creates. In merits terms, a private individual cannot sue a state and the state cannot be liable to an individual for disability discrimination in employment.

Immunity from liability serves important structural values of federalism and respect for the dignity of states as sovereigns entitled to control their own affairs.[107] Thus, even if it operates as merits-based and not a limit on adjudicative authority, state sovereign immunity nevertheless may properly enjoy some "jurisdictional" characteristics, such as absence of equitable constraints and nonforfeitability, to protect those underlying structural values.[108]

The power to define a rule's characteristics, if not its fundamental nature, rests with the rulemaker, and Congress is the rulemaker for federal statutory rules. This is significant to the project of limiting jurisdictional profligacy. Congress may have good reasons for making a particular rule nonwaivable, and there are systemic benefits to rigid and absolute rules.[109] The point is to not unnecessarily label them as jurisdictional. Allowing for mandatory nonjurisdictional rules, whether procedural or merits-based, furthers systemic objectives without overexpanding or distorting the concept of adjudicative jurisdiction.[110]

The Court took this course, at least implicitly, in *John R. Sand & Gravel Co. v. United States*,[111] in which it considered whether the United States forfeited a statute of limitations defense. The United States can be sued for monetary claims sounding in the Constitution, federal law, contract, quasi-contract, or non-tort liquidated damages, and the U.S. Court of Federal

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suit under the Eleventh Amendment, see Carlos Manuel Vazquez, *What Is Eleventh Amendment Immunity?*, 106 YALE L.J. 1683, 1690 (1997).

[104] *See* Dodson, *Mandatory Rules*, *supra* note 80, at 21, 34 (arguing that state sovereign immunity "bestow[s] a right upon a party rather than . . . limit[ing] the power of the courts").

[105] 531 U.S. 356 (2001).

[106] *Id.* at 360, 374.

[107] Bradford R. Clark, *The Eleventh Amendment and the Nature of the Union*, 123 HARV. L. REV. 1817, 1908 (2010); Vazquez, *supra* note 103, at 1690.

[108] Dodson, *Mandatory Rules*, *supra* note 80, at 32–34.

[109] *Id.* at 10.

[110] *See id.*

[111] 552 U.S. 130 (2008).

Claims is vested with exclusive jurisdiction of the claims.[112] Such claims are subject to a statute of limitations: "Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues."[113] Although statutes of limitations are typically treated as substantive-merits defenses,[114] the Court of Federal Claims characterized § 2501 as a jurisdictional limitation because of its connection to federal sovereign immunity and the need to preserve the underlying value of sovereign dignity. Actions against the United States in the Court of Federal Claims are available only because Congress waived sovereign immunity, but only under certain conditions, one of which is timely commencement of the action. Stated differently, the Court of Federal Claims has jurisdiction only if sovereign immunity was waived and the waiver of sovereign immunity was limited only to timely filed claims.

The Supreme Court affirmed, holding that the United States had not waived the limitations defense and that the lower court was obligated to raise timeliness sua sponte.[115] Importantly, however, the Court avoided explicitly labeling the limitations issue as jurisdictional, instead calling it a "more absolute" limitations statute.[116] In other words, § 2501's limitations period possesses a jurisdictional characteristic but is not truly a jurisdictional rule because it is not tied to the court's structural authority and not grounded in structural constitutional concerns and values. This holds true whether we call the limitations defense procedural or merits-based. *John R. Sand* recognized and applied Dodson's category of special, absolute, mandatory but still nonjurisdictional legal rules. Unfortunately, it did not acknowledge that is what it did.

III. WHITHER *BOWLES*?

The only remaining question is what to do about *Bowles v. Russell*,[117] the one recent Supreme Court case to characterize any rule as jurisdictional. *Bowles* concerned the jurisdictionality of the statutory thirty-day time limit for an appeal from a district court judgment.[118] A divided Court held that the appeal in a habeas case was untimely when the notice of appeal was filed after the thirty-day statutory period had expired even though the appellant had filed within the time set by the district court order. Because the time period was jurisdictional, it was not subject to equitable tolling, judi-

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[112] 28 U.S.C. § 1491(a) (2006).

[113] 28 U.S.C. § 2501 (2006).

[114] Ely, *supra* note 90, at 725–27; *see, e.g.*, Paracelsus Healthcare Corp. v. Philips Med. Sys., Nederland, B.V., 384 F.3d 492, 495 (8th Cir. 2004).

[115] *John R. Sand*, 552 U.S. at 132.

[116] *Id.* at 135.

[117] 551 U.S. 205 (2007).

[118] *Id.* at 208; *see* 28 U.S.C. § 2107(a) (2006).

cial override, or other exception.[119] The key factors, Justice Thomas insisted for a five-Justice majority, were that the appeals time limit appeared in a statute rather than in a rule of procedure and that a long and venerable line of precedent, left undisturbed by Congress, had treated § 2107 as jurisdictional.[120]

Bowles has been controversial for many of the reasons addressed in this Essay, both within the Court and in scholarly commentary. First, the rule–statute distinction seems a non sequitur. Although a rule of procedure cannot affect jurisdiction, it is not necessarily the case that all statutes do affect jurisdiction.[121] There must be separate analysis of whether, because of its text, structure, and underlying policy goals, a statute should be deemed jurisdictional. Second, the Court ignored the possibility that § 2107 was a mandatory but nonjurisdictional rule.[122] Third, as Justice Souter argued in dissent, the majority disregarded the Court's inexorable march away from profligate jurisdictional rulings, inappropriately relying on earlier drive-by jurisdictional rulings as controlling precedent.[123] That criticism has become more powerful because every other recent case, before and after *Bowles*, has held the rule at issue to be nonjurisdictional or, as in *John R. Sand*, avoided labels altogether.[124]

But *Bowles* must somehow fit within the otherwise opposite doctrinal pull, a question over which Justices Thomas and Ginsburg tangled in *Reed Elsevier*. Writing for the five-Justice majority, Justice Thomas insisted that "*Bowles* stands for the proposition that context, including this Court's interpretation of similar provisions in many years past, is relevant to whether a statute ranks a requirement as jurisdictional."[125] *Bowles* thus reflects a balance between *Arbaugh*'s plain-language approach and considerations of history and precedent.

In her opinion concurring in part and concurring in the judgment, Justice Ginsburg sought to reconcile the "undeniable tension" between *Arbaugh* and *Bowles*.[126] *Bowles*, she insisted, was a stare decisis case in that the Court relied on a long line of Supreme Court decisions treating the time for appeal as jurisdictional. On the other hand, the long history of cases treating § 411(a) as jurisdictional, which the Court ignored, all came from

[119] *Bowles*, 551 U.S. at 213–14.
[120] *Id.* at 209–12.
[121] Wasserman, *Trichotomy*, *supra* note 7, at 1553.
[122] Dodson, *Jurisdictionality*, *supra* note 9, at 46.
[123] *Bowles*, 551 U.S. at 215–16 (Souter, J., dissenting).
[124] *See* cases cited *supra* notes 2–5.
[125] Reed Elsevier, Inc. v. Muchnick, 130 S. Ct. 1237, 1247–48 (2010).
[126] *Id.* at 1250 (Ginsburg, J., concurring in part and concurring in the judgment).

lower courts and most of these were "'drive-by jurisdictional rulings' that should be accorded 'no precedential effect.'"[127]

Unfortunately, Justice Ginsburg's distinction—an effort to retain *Bowles* in the face of contrary doctrine—is untenable. Congress is aware of lower-court statutory interpretations, is able to overturn them or leave them undisturbed, and in recent years has been very willing to respond to them.[128] Indeed, the confusion in *Reed Elsevier* itself was triggered by a statutory amendment that was enacted to overturn a series of drive-by jurisdictional rulings in lower courts.[129] There is no basis for treating lower court decisions as providing less of a historical trail than Supreme Court decisions. Congress can respond to or ignore either group equally well. And if lower court decisions can be derogated as drive-by rulings that are not entitled to precedential effect, so can Supreme Court decisions.

In the long run, *Bowles* may simply remain an outlier, justified only by stare decisis and the historical pedigree of the Court's precedent. In fact, that view is arguably confirmed by Justice Ginsburg's opinion in *Union Pacific*, written for a unanimous Court, which described *Bowles* as "relying on a long line of this Court's decisions left undisturbed by Congress."[130] At the very least, *Bowles* will not grow in jurisprudential stature. In *Henderson*, the Government argued that *Bowles* establishes a categorical rule that all deadlines for seeking review in civil litigation are jurisdictional, whether from one court to a higher court or between adjudicative bodies within an administrative scheme, an argument the Court sharply rejected.[131] *Bowles* thus remains precedent, but its force is properly limited.

CONCLUSION

The last two Supreme Court Terms have been good for commentators, such as me, who want the federal courts to be more precise and accurate when speaking of jurisdiction and to understand that concept narrowly. The Court rejected a jurisdictional characterization of the particular rule in every case, always unanimously or near-unanimously. And not only has the Court reached the right result in these cases, but it is beginning to find the proper analysis to get there, particularly in adopting Justice Scalia's definitive divide between merits and jurisdiction in *Morrison*.

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[127] *Id.* at 1251 (quoting Arbaugh v. Y & H Corp., 546 U.S. 500, 511 (2006) (internal quotation marks omitted)).

[128] William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 337–38 (1991); Deborah A. Widiss, *Shadow Precedents and the Separation of Powers: Statutory Interpretation of Congressional Overrides*, 84 NOTRE DAME L. REV. 511, 525–26 (2009).

[129] *Reed Elsevier*, 130 S. Ct. at 1245.

[130] Union Pac. R.R. Co. v. Bhd. of Locomotive Eng'rs & Trainmen, 130 S. Ct. 584, 597 (2009).

[131] Henderson *ex rel.* Henderson v. Shinseki, 131 S. Ct. 1197, 1203 (2011).

The Court appears firmly committed to eliminating drive-by jurisdictional rulings and to making clear that lower courts should do the same. The demise of such rulings is a welcome and necessary development.