

NONJURISDICTIONALITY OR INEQUITY

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In response to Professor Scott Dodson's essay, *Jurisdictionality and Bowles v. Russell*,¹ imagine this: "Go ahead, take a ten day vacation," says your boss. When you return on the tenth day, a pink-slip awaits. Per company policy, your boss fired you for being absent for more than eight days. This is what happened in *Bowles v. Russell*.² Except that it wasn't a job, a boss, or a company policy; it was a life prison sentence, a federal district court judge, and a court order.³ And what the order said was this: file your notice of appeal within seventeen days.⁴ Bowles filed within sixteen. Too late said the Supreme Court; regardless of the calculation error, the court of appeals had no jurisdiction after the fourteen-day deadline in Federal Rule of Appellate Procedure 4(a)(6).⁵

Jurisdictional limits hold the key to the courthouse door. The 5–4 majority opinion in *Bowles* reasoned that because Congress set the fourteen-day deadline in 28 U.S.C. § 2107(c), as opposed to a deadline created by rule only, Rule 4(a)(6) was "mandatory and jurisdictional"⁶ and could not be equitably extended.⁷ This decision departs from recent precedent designating deadlines as nonjurisdictional.⁸ Professor Dodson's essay navigates a path between Justice Thomas's majority opinion and Justice Souter's dissent by embracing Thomas's use of "mandatory" and Souter's argument for deeming appellate deadlines "nonjurisdictional."⁹ This alternative dovetails with the Court's recent precedent clarifying time lines as nonjurisdictional, but still allows Thomas to reach the same result. And it is more elegant,

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¹ Scott Dodson, *Jurisdictionality and Bowles v. Russell*, 102 NW. U. L. REV. COLLOQUY 42 (2007), <http://www.law.northwestern.edu/lawreview/colloquy/2007/21/> (link).

² 127 S. Ct. 2360 (2007) (link).

³ *Id.* at 2362 ("The jury sentenced Bowles to 15 years to life imprisonment.").

⁴ Apparently when Paul Mancino, Jr., Keith Bowles's attorney, asked the judge why he gave him an incorrect deadline, he replied that he was allowed to add three-day extensions for the mail rule in other cases, so he extended it here as well. Tony Mauro, *Opinion Shows High Court's Ideological Divide*, LEGAL INTELLIGENCER, June 18, 2007, at 4.

⁵ *Bowles*, 127 S. Ct. at 2363–66; FED. R. APP. P. 4(a); 28 U.S.C. § 2107(c).

⁶ *Bowles*, 127 S. Ct. at 2363.

⁷ *Id.* at 2366.

⁸ See, e.g., *Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006) (link).

⁹ Dodson, *supra* note 1, at 42–43.

perhaps sparing courts some of the burdens and confusion left by the majority opinion.

But the “mandatory” designation misses the point: we are still left holding the pink-slip and *Bowles* is still without an appeal. Dodson explains that, by depicting the time limit as mandatory, the litigant who “wishes to enforce it . . . need only speak up in a timely manner, and the court is obligated to enforce the limit even if it is inequitable to do so.”¹⁰ Consequently, “because Russell’s appellate brief to the Sixth Circuit invoked the untimeliness of *Bowles*’s notice of appeal, characterizing the rule as mandatory would preclude applicability of the ‘unique circumstances’ doctrine and result in the same outcome.”¹¹

This Colloquy Post begins by canvassing the nonjurisdictional proposal put forth by both Professor Dodson and Justice Souter. Considering the systemic, equitable policies underlying Rule 4(a)(6) and the prototypical examples distinguishing jurisdictional rules (those delineating classes of cases) from nonjurisdictional claim-processing rules, this nonjurisdictional alternative makes sense. It is the “mandatory” aspect of Professor Dodson’s proposal that concerns me; it leaves no room for equity absent the mercy of opposing counsel. Part II thus analyzes the inequitable consequences of labeling a rule either jurisdictional or mandatory. Finally, Part III concludes by commenting on Justice Thomas’s appeal to Congress for an equitable result.

I. NONJURISDICTIONAL CASTING

Justice Souter’s dissent maps a way out of the inequitable result in *Bowles* by labeling the appellate deadline nonjurisdictional without adding “mandatory” as a precursor.¹² He reasons in his opening, “It is intolerable for the judicial system to treat people this way, and there is not even a technical justification for condoning this bait and switch.”¹³ With one more vote, Souter’s nonjurisdictional classification would facilitate the intuitively correct result. It would also leave intact the Court’s recent efforts to clarify the “mandatory and jurisdictional” incantation.

Professor Dodson likewise laments the break from recent, uniform precedent characterizing time limits as nonjurisdictional. His criticism of Thomas’s use of “jurisdictional” is two-fold, targeting wasted judicial and litigant resources. First, he observes that a *sua sponte* obligation to investigate jurisdiction taxes judicial resources.¹⁴ Second, it permits a litigant two bites at the apple by rolling the dice—if she loses on the merits, she can

¹⁰ *Id.* at 47.

¹¹ Posting of Scott Dodson to Civil Procedure Prof Blog, <http://lawprofessors.typepad.com/civpro/> (July 9, 2007) (link).

¹² *Bowles*, 127 S. Ct. at 2367–69 (Souter, J., dissenting).

¹³ *Id.* at 2367.

¹⁴ Dodson, *supra* note 1, at 46.

then point out the jurisdictional defect.¹⁵ Of course, this is a double-edged sword. The danger is that the other litigant could play the same game, which counsels a cautious approach.

Dodson is right that Justice Thomas's jurisdictional construction has these perverse effects. But you might not recognize them from initially reading the majority opinion. Thomas makes the jurisdictional issue sound clear cut—black or white, jurisdictional or nonjurisdictional. But it is a rare case when a complex trope like jurisdiction is as easy as that. And *Bowles v. Russell* is no exception, despite Thomas's careful wording. His majority opinion glides over hard precedent, shoehorning statutory time limits into the “mandatory and jurisdictional” “classes of cases” box alongside subject matter jurisdiction.¹⁶

Neither statutory constructions nor, as Stephen Burbank observes, procedural rules are neutral, which makes it imperative to ferret out the rule's impact and to candidly describe its motivations and purposes.¹⁷ The same is true for a jurisdictional designation. Undertaking Professor Burbank's task of discerning Rule 4(a)(6)'s impact requires a hard look at the policies underlying the rule. Are these rules structural or systemic? Whether the appellate deadline invokes systemic or structural values helps categorize it as either a rule that defines a class of cases (which is typically jurisdictional) or a claim-processing rule (which is nonjurisdictional).¹⁸

On one hand, nonjurisdictional claim-processing statutes of limitation are,¹⁹ as Alex Lees argues, “designed to promote fairness. Equitable flexibility is needed to help those rules adapt to circumstances where blind application leads to unfairness.”²⁰ These policies resemble those underlying Rule 4(a)(6)'s deadline and hint at the importance of litigants' interests as opposed to structural interests. Moreover, this appellate deadline is not a jurisdictional sorting classes-of-cases type rule like subject matter jurisdiction. It doesn't appear to involve the same structural values that subject matter jurisdiction does. What is more, strictly applying both statutes of limitation and time limits is more inequitable than strictly applying subject matter jurisdiction. Litigants in the latter situation can simply refile in the proper court, whereas litigants in either of the former situations cannot initiate litigation anywhere. Thus, properly understood, appeal periods primarily concern the immediate litigants' interests, not fundamental societal

¹⁵ *Id.*

¹⁶ *Bowles*, 127 S. Ct. at 2365–66; Dodson, *supra* note 1, at 44.

¹⁷ Stephen B. Burbank, *Aggregation on the Couch: The Strategic Uses of Ambiguity and Hypocrisy*, 106 COLUM. L. REV. 1924, 1925 (2006) (link).

¹⁸ Dodson, *supra* note 1, at 44.

¹⁹ *See Day v. McDonough*, 547 U.S. 198, 205 (2006) (link) (finding that a statute of limitations defense is not jurisdictional).

²⁰ Alex Lees, Note, *The Jurisdictional Label: Use and Misuse*, 58 STAN. L. REV. 1457, 1492 (2006) (link).

interests or structural values. This approach counsels classifying the appellate deadline as a nonjurisdictional claim-processing rule.

Professor Dodson's approach is consistent with this one. Describing jurisdictional policies, he observes, "[j]urisdiction generally is founded on structural values such as federalism, separation of powers, and limited national government, not the litigant and systemic values of efficiency, cost-effectiveness, autonomy, predictability, and fairness."²¹ He concludes, "appeal periods involve primarily the interests of the litigants, not structural values."²² Thus, the values underlying Rule 4(a)(6)'s appellate deadline are litigant related and include fairness. Dodson, however, avoids the equitable policies flowing from that designation by invoking the "mandatory" nomenclature. This is, perhaps, where we part company.

II. EQUITY'S "SLUMBER"

The inequity in *Bowles* started innocently enough when the trial court transitioned to electronic filing. During the switch, the clerk sent Bowles neither the original order overruling his motion to alter or amend judgment nor an order for a new trial date.²³ Thus, Bowles did not know when his time for appeal started running. The court found as much when granting his motion to reopen the appeal period and giving him seventeen days to file his notice of appeal.²⁴ The judge's seventeen-day deadline mishap occurred on top of the clerk's original error, compounding the mistakes.

The majority's decision to label the judge's miscalculation as jurisdictional means that equity cannot enter the equation at all. So Keith Bowles's fate would also befall victims of other "unique circumstances" such as those in hurricane Katrina or the September 11 attacks.²⁵ In those situations, it is both equitable and pragmatic to extend deadlines. But the "jurisdictional" characterization does not, at least theoretically, give courts the flexibility to draw those lines. Although Justice Thomas "see[s] no compelling reason to resurrect the [unique circumstances] doctrine from its 40-year slumber,"²⁶ the need is real. The lesson resulting from *Bowles* seems to be that a stealthy, sloppy, or unfortunate court can rob litigants of an appeal.

For litigants, appellate process is inherently part of procedural justice.²⁷ Appeals correct errors and enhance accuracy; "appeals, like trials, are a search for truth."²⁸ The *Bowles* majority opinion short-circuits this search

²¹ Dodson, *supra* note 1, at 47.

²² *Id.*

²³ Transcript of Oral Argument at 12–13, *Bowles v. Russell*, 127 S. Ct. 2360 (2007).

²⁴ *Bowles*, 127 S. Ct. at 2362.

²⁵ This "unique circumstances" exception is discussed in *Bowles*. *Id.* at 2366.

²⁶ *Id.*

²⁷ See Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 244–45 (2004) (link).

²⁸ *United States v. Brown*, 50 F.R.D. 110, 112 (D.D.C.), *rev'd on other grounds*, 428 F.2d 1100 (D.C. Cir. 1970).

by wrongly assuming a version of John Rawls's pure procedural justice. In *A Theory of Justice*, Rawls aims to develop the idea of "justice as fairness"—a concept missing from *Bowles*.²⁹

Rawls's justice as fairness divides procedural justice into two components: substance-based procedural justice and pure procedural justice.³⁰ Substance-based procedural justice derives its meaning from substantive law and rests on an independent need for "distributive, corrective, restitutive, or retributive justice" to dictate just outcomes.³¹ Unlike justice dependent on substantively correct outcomes, pure procedural justice substitutes the fair outcome criterion for a fair procedure that assumes a correct outcome if properly implemented.³² Thus, pure procedural justice is unconcerned with the reality of substantively fair or unfair outcomes so long as a fair process is used.

Justice Thomas follows this latter theory. Strapping on the mantle of "mandatory and nonjurisdictional" assumes two things, both incorrect. First, it assumes that this trope is a fair procedure. Second, it assumes that our processing system is one based on pure procedural justice. It isn't. Thus, both propositions fail. If we had pure procedural justice there would be no need for appeals; the existence of that process concedes the reality of procedural imperfections. "Because the Federal Rules of Civil Procedure are reactionary—that is, they were enacted to chase and enforce substantive norms—they cannot (for fear of losing efficiency and affordability) hope to assure a perfect outcome."³³ Thus, our system is one of imperfect substantive-based procedural justice. Still, the judicial system's legitimacy hinges on procedural fairness and the truth-seeking mission of the appellate process, so our aim should be to eradicate imperfections as much as possible.³⁴ In the *Bowles* context, this means that heralding form over substance—eviscerating appellate process as Thomas does—undermines this goal.

We are thus left with a warped view of "pure" process. This much becomes clear when considering that the majority of habeas petitions are filed by pro se litigants.³⁵ Courts generally afford these petitioners great leniency

²⁹ JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

³⁰ *Id.* at 85–87. Rawls subdivides substance-based procedural justice into "perfect" and "imperfect" procedural justice. Perfect procedural justice, requires "an independent criterion of what is a fair division" and the ability "to devise a procedure that is sure to give that desired outcome." *Id.* at 85. Imperfect procedural justice contains the same first criterion—a need for fair outcomes—but does not ensure that outcome. Rawls observes in this regard, "it seems impossible to design the legal rules so that they always lead to the correct result." *Id.* at 85–86.

³¹ MICHEL ROSENFELD, *4 PHILOSOPHY, SOCIAL THEORY, AND THE RULE OF LAW* 67 (1998).

³² RAWLS, *supra* note 29, at 86. *See also* ROSENFELD, *supra* note 31, at 67; Solum, *supra* note 27, at 239–40.

³³ Elizabeth Chamblee Burch, *CAFA's Impact on Litigation as a Public Good* (manuscript at 16), available at <http://ssrn.com/abstract=1005021> (link).

³⁴ *See* Solum, *supra* note 27, at 245–46.

³⁵ *See* Brief of the National Ass'n of Criminal Defense Lawyers as Amici Curiae Supporting Petitioner, *Bowles v. Russell* at 7, 127 S. Ct. 2360 (2007) (No. 06-5306), 2007 WL 185936 ("Such reliance

by construing their pleadings to avoid prejudice.³⁶ Even the Supreme Court (during Justice Thomas's term) recommended that federal courts ignore legal labels used by pro se litigants to "avoid an unnecessary dismissal" or "to avoid inappropriately stringent application of formal labeling requirements."³⁷ The unforgiving stance in *Bowles* is therefore curious and disheartening. It is harsh to tell pro se litigants that they are wrong to rely on a federal judge's words. These litigants spend hours searching for the right incantation of magical legal jargon to unlock the door to process and their freedom. While they are generally the most unsympathetic sort—often convicted murderers like Keith Bowles—they are entitled to the same process as you and me.

III. CONCLUSION: WAITING FOR CONGRESS?

Those searching for a way around inequity might stumble upon an older use of Federal Rule of Civil Procedure 60(b)(6). Before Rule 4(a) was amended in 1991 to allow parties fourteen days to reopen the time for filing an appeal, some courts relied on Rule 60(b)(6) to avoid manifest injustice.³⁸ Rule 60(b)(6) relieves a party from a final judgment for "any other reason justifying relief from the operation of the judgment."³⁹ Thus, courts vacated and reentered judgments under this rule, restarting the appeals timeline. Still, any attempt to revive this practice to circumvent the result in *Bowles* would lead to further doctrinal confusion.

But it is difficult to let Justice Thomas's flat appeal to Congress suffice. He writes, "[i]f rigorous rules like the one applied today are thought to be inequitable, Congress may authorize courts to promulgate rules that excuse compliance with the statutory time limits."⁴⁰ But we may be waiting for nothing. Limiting *Bowles* to its facts and, as Professor Dodson recommends, relegating it to a corner within a broader jurisdictional framework may help. In the meantime, however, litigants should heed Justice Souter's warning: "Beware of the Judge."⁴¹

[on court orders] is particularly understandable in the context of habeas litigation, where the rules are complex and the vast majority of petitioners proceed pro se."). I should note that Mr. Bowles was represented by counsel.

³⁶ *E.g.*, *Kane v. Winn*, 319 F. Supp. 2d 162, 225 (D. Mass. 2004).

³⁷ *Castro v. United States*, 540 U.S. 375, 381 (2003) (link). Justice Thomas concurred with part of the opinion, including this quoted portion.

³⁸ *See, e.g.*, *Useden v. Acker*, 947 F.2d 1563, 1570 (11th Cir. 1991) ("Rule 60(b) is an appropriate escape valve when counsel has acted diligently and in reliance upon statements of the trial court.").

³⁹ FED. R. CIV. P. 60(b) (link).

⁴⁰ *Bowles*, 127 S. Ct. at 2367.

⁴¹ *Id.* at 2371.