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THE DEMISE OF "DRIVE-BY JURISDICTIONAL RULINGS"

Howard M. Wasserman[*]

In an October 2009 Term marked by several significant constitutional rulings,[1] the Supreme Court quietly continued an important multi-term effort towards 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] These cases continue an almost uninterrupted retreat from the Court's admittedly "profligate" and "less than meticulous" use of the term.[3] The Court now rejects "drive-by jurisdictional rulings," in which a legal rule has been labeled as jurisdictional only through "unrefined" analysis, without rigorous consideration of the label's meaning or consequence.[4]

Jurisdiction essentially means "legitimate authority."[5] 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.[6] 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 par-

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[*] Associate Professor of Law, FIU College of Law.

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

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

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

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

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

[6] *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*] (link); Howard M. Wasserman, *Jurisdiction, Merits, and Non-Extant Rights*, 56 U. KAN. L. REV. 227, 261 (2008) [hereinafter Wasserman, *Non-Extant*] (link); Howard M. Wasserman, *Jurisdiction, Merits, and Procedure: Thoughts on a Trichotomy*, 102 NW. U. L. REV. 1547, 1547–48 (2008) [hereinafter Wasserman, *Trichotomy*] (link).

ticular transaction or occurrence;[7] 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.[8]

The doctrinal move to identify jurisdiction, to create and maintain clear, determinate lines between jurisdictional and non-jurisdictional rules, and to end rampant overuse and confusion of the concept of jurisdiction, is a welcome development for which I have argued for several years.[9]

This Essay examines and critiques the October 2009 Term's jurisdictionality rulings and offers some thoughts as to how the Court might continue to develop sharp lines between distinct concepts and 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 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.[10]

In *Morrison v. National Australia Bank*, Justice Scalia, writing for a unanimous Court, appears to have drawn just such a sharp line.[11] At issue was extraterritorial application of § 10(b) of the Securities and Exchange Act to misconduct by foreign defendants that harmed foreign plaintiffs in securities transactions on foreign exchanges.[12] Justice Scalia insisted (and the parties did not dispute) 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. As he put it, "to ask what conduct § 10(b) reaches is to ask

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[7] *See Arbaugh*, 546 U.S. at 511; Wasserman, *Non-Extant*, *supra* note 6, at 236; Wasserman, *Trichotomy*, *supra* note 6, at 1548.

[8] *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*] (link); 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*] (link).

[9] *See* Wasserman, *Jurisdiction*, *supra* note 6, at 662, 669; Howard M. Wasserman, *Jurisdiction, Merits, and Substantiality*, 42 TULSA L. REV. 579, 584 (2007) [hereinafter Wasserman, *Substantiality*] (link); Wasserman, *Non-Extant*, *supra* note 6, at 259; Wasserman, *Trichotomy*, *supra* note 6, at 1559.

[10] Wasserman, *Jurisdiction*, *supra* note 6, at 645; Wasserman, *Trichotomy*, *supra* note 6, at 1548.

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

[12] 15 U.S.C. § 78j(b) (2006) (link).

what conduct § 10(b) prohibits, which is a merits question."[13] The *Morrison* Court adopted Justice Scalia's reasoning from his 1993 dissent in *Hartford Fire Insurance Company v. California*.[14] Considering extraterritorial application of the Sherman Act, Scalia had insisted that extraterritoriality has nothing to do with the court's jurisdiction and everything to do with "whether, in enacting [the statute], Congress asserted regulatory power over the challenged conduct."[15]

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 has failed 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.

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.[16] They are grounded in unique structural policies of separation of powers, federalism, and limited federal government.[17] Moreover, as Perry Dane has argued, "[t]he convergence of jurisdictional and merits issues is . . . awkward for legal doctrine and the legal culture," particularly when that convergence arises too regularly.[18] Permitting jurisdiction/merits overlap 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.[19]

We might define the distinct concept of "merits" several ways, although all ultimately get at the same idea. The first approach is that of Justice Scalia in *Morrison*, who spoke of whether a provision of federal law "reaches"—and thereby regulates or prohibits—the defendant's conduct, entitling a plaintiff to relief for the harms caused by that conduct.[20] The

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

[14] 509 U.S. 764, 812 (1993) (Scalia, J., dissenting) (link).

[15] *Id.* at 813; *see also* Wasserman, *Jurisdiction*, *supra* note 6, at 688–89 (arguing that the issue of what real-world conduct a statute shall apply is a merits question).

[16] *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 6, at 676.

[17] *See* Perry Dane, *Jurisdictionality, Time, and the Legal Imagination*, 23 HOFSTRA L. REV. 1, 36–37 (1994); Dodson, *Jurisdictionality*, *supra* note 8, at 47; Dodson, *Removal*, *supra* note 8, at 59.

[18] Dane, *supra* note 17, at 47.

[19] *See* Yazoo Cnty. Indus Dev. Corp. v. Suthoff, 454 U.S. 1157, 1160 (1982) (Rehnquist, J., dissenting from denial of certiorari) (link); Wasserman, *Jurisdiction*, *supra* note 6, at 662–63; Wasserman, *Substantiality*, *supra* note 9, at 597–98.

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

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."[21] 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 the conduct at issue and entitles her to the sought 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.[22] The merits of a claim asks 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.[23] 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.[24]

In *Morrison*, there plainly was jurisdiction in the district court. One provision of the Securities and 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.[25] In the main run of 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[26] or from the grant of jurisdiction over claims brought under or involving a particular statute or category of statutes.[27]

Although *Morrison* addressed extraterritorial application of § 10(b), the Court's recognition that merits are about who a federal legal rule reaches and what it prohibits should control the appropriate characterization of extraterritoriality of other federal laws. Consider the reach of federal anti-

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[21] John Harrison, *Jurisdiction, Congressional Power, and Constitutional Remedies*, 86 GEO. L.J. 2513, 2515 (1998); *see* Wasserman, *Non-Extant*, *supra* note 6, at 236.

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

[23] *See id.* at 32; Wasserman, *Non-Extant*, *supra* note 6, at 236.

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

[25] 15 U.S.C. § 78aa (2006) (link).

[26] 28 U.S.C. § 1331 (2006) (link).

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

trust law under the Foreign Trade Antitrust Improvements Act (FTAIA).[28] 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).[29] 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."[30]

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.[31] 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 "it has been the judgment 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."[32] *Morrison* makes 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—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.*[33] The Court there affirmed a jurisdictional dismissal when it held 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.[34] The Court rejected the argument that the statute's "broad jurisdictional language" indi-

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[28] 15 U.S.C. § 6a (2006) (link).

[29] *Id.*; F. Hoffmann-La Roche Ltd. v. Empagran S. A., 542 U.S. 155, 161–62 (2004) (link); Wasserman, *Non-Extant*, *supra* note 6, at 242.

[30] *U.SF. Hoffmann-La Roche*, 542 U.S. at. 155.

[31] *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) (link). 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), http://prawfsblawg.blogs.com/prawfsblawg/2008/08/why-do-courts-k.html (link).

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

[33] 499 U.S. 244 (1991) (link). The explicit holding in *Arabian American Oil*—that Title VII does not apply to extraterritorial conduct—was overridden by Congress in § 109 of the Civil Rights Act of 1991. Pub. L. No. 102-166, § 109, 105 Stat. 1071, 1078–79 (1991).

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

cated Congress's extraterritorial intent, citing several older extraterritoriality cases in which the Court had held there was "no jurisdiction under" a particular statute.[35]

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.[36] In other words, *Arabian American Oil* was written off as a drive-by jurisdictional ruling that was not entitled to precedential value.

To the extent that *Arabian American Oil* survived *Arbaugh*, it cannot survive *Morrison*. If extraterritoriality is a merits issue as to § 10(b), then it is 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.[37] 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 conduct sued upon is of the kind prohibited by the legal rule;[38] 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 did not mention or cite *Arbaugh*, the Court's most-recent, seemingly definitive, statement on the jurisdiction/merits divide.[39] *Arbaugh* unanimously held that whether a defendant fell within Title VII's definition of "employer" was an element of the claim and not jurisdictional.[40] The definition appeared in a separate provision from the applicable jurisdictional grants and did not speak to the court in jurisdictional terms.[41] Instead, this and other

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

[36] 546 U.S. 500, 512–13 (2006).

[37] *See* Morrison v. Nat'l Australia Bank Ltd., 130 S. Ct. 2869, 2877 (2010); *see also* Wasserman, *Non-Extant*, *supra* note 6, 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).

[38] *See* Wasserman, *Jurisdiction*, *supra* note 6, at 686–87.

[39] 546 U.S. 500.

[40] *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) (link).

[41] *Arbaugh*, 546 U.S. at 514–16; Wasserman, *Jurisdiction*, *supra* note 6, at 693–94 (arguing that provisions must speak to courts in express jurisdictional terms to be deemed jurisdictional).

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.[42] 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 this possibility, however. Nor did it examine § 10(b) for jurisdictional language. Of course, Justice Scalia would not have found such language even if had he looked. Section 10(b) is addressed only to real-world actors, describing a range of conduct that is unlawful for any person, directly or indirectly, to undertake.[43] *Morrison*'s conclusion of non-jurisdictionality thus would have remained unchanged. The point is that Justice Scalia found it unnecessary to look.

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 rational reason for treating some elements as adjudicative-jurisdictional and others as merits.[44]

The possibility of conflation also produces some category errors. A district court's adjudicative jurisdiction should not depend on the outcome of the litigation.[45] 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 the claim would deprive the court of jurisdiction.[46]

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, while the jury is the default fact-finder on facts that go to substantive merits, particularly in legal actions

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[42] *Arbaugh*, 546 U.S. at 514–16.

[43] 15 U.S.C. § 78j (2006).

[44] Wasserman, *Jurisdiction*, *supra* note 6, at 661, 678–79, 691; Wasserman, *Trichotomy*, *supra* note 6, at 1549.

[45] *See supra* note 24 and accompanying text.

[46] *See* Clermont, *supra* note 24, at 977; Wasserman, *Jurisdiction*, *supra* note 6, at 672.

seeking monetary damages.[47] If Congress truly is free to redefine any (or all) statutory elements as jurisdictional, it is free to shift fact-finding 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 (that is, who the statute regulates or protects and what the statute prohibits) always is a merits issue. Congress should never define as jurisdictional any issue of statutory application—i.e., any question of who can sue whom for what conduct—and a court never should make a congressional-intent inquiry. The merits characterization of extraterritoriality arises simply because extraterritoriality is about who 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 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,[48] although it is also of less procedural consequence.[49] This is particularly true for litigation preconditions, procedural steps that a plaintiff must satisfy before bringing and maintaining a claim.

Two preconditions are especially common—timely filing of the case in the appropriate court[50] and exhaustion of certain administrative steps prior to initiating litigation.[51] 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).[52] The problem is that courts too casually (and inappropriately) characterize failure to satisfy the precondition as depriving the trial court of adjudicative authority or power.

A. Three Precondition Cases in October Term 2009

The Court last term decided three precondition cases, concluding in each that the precondition was not jurisdictional. These decisions specifically demonstrate the Court's desire to halt "profligate" and "less than me-

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[47] *Arbaugh*, 546 U.S. at 501–02, 514; Clermont, *supra* note 24, at 990–91; Wasserman, *Jurisdiction*, *supra* note 6, at 662–65.

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

[49] *See* Dodson, *Removal*, *supra* note 8, at 69–70; Wasserman, *Trichotomy*, *supra* note 6, at 1553.

[50] John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 132 (2008) (timeliness of filing claim in Court of Federal Claims) (link); Bowles v. Russell, 551 U.S. 205, 207–08 (2007) (timing for filing notice of appeal) (link); Kontrick v. Ryan, 540 U.S. 443, 446–47 (2004) (time for filing objection to discharge order in bankruptcy) (link).

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

[52] *See supra* notes 20–24 and accompanying text.

ticulous'"[53] 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*, where the Court granted certiorari specifically on the jurisdictionality issue. *Reed Elsevier* involved a proposed settlement class of authors in a dispute over electronic publication.[54] The class consisted of both authors who had registered their copyrights and authors who had not.[55] Under federal law, a copyright holder may bring an action in federal court asserting infringement,[56] 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.[57] 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.[58]

Relying on *Arbaugh*'s plain-statement requirement, a largely unanimous Court concluded that § 411(a) was not jurisdictional, but simply an ordinary claim-processing rule.[59] 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 one granting jurisdiction specifically over copyright claims; neither conditioned adjudicative authority on preregistration.[60] Second, the Court 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, while true jurisdictional rules normally should not allow for such exceptions.[61] 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.[62]

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.[63] Specifically, the section provides that the Register of Copyrights may become a

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[53] Arbaugh v. Y&H Corp., 546 U.S. 500, 510–11 (2006).
[54] *Reed Elsevier*, 130 S. Ct. at 1242.
[55] *Id*.
[56] 17 U.S.C. § 501(b) (2006).
[57] 17 U.S.C. § 411(a) (2006).
[58] *Reed Elsevier*, 130 S. Ct. at 1241.
[59] *Id*. at 1241.
[60] *Id*. at 1245–46 (discussing 28 U.S.C. §§ 1331 and 1338).
[61] *Id*. at 1246.
[62] *Id*. at 1246–47 (discussing Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393, 395 (1982)).
[63] 17 U.S.C. § 411(a) (2006) (link).

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."[64] But this passing reference to jurisdiction did not convert § 411(a) into a jurisdictional statute. 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."[65] 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.

Proper characterization of litigation preconditions was a minor subissue in two other cases. First, *United Student Aid Funds v. Espinosa*[66] considered whether a bankruptcy court's order discharging certain student loan debt was a void judgment subject to reopening under Fed. R. Civ. P. 60(b)(4), where 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.[67] A 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."[68] 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.[69] Similarly, the requirement of an adversary proceeding, derived from the Bankruptcy Rules, was a procedural one that did not expand or limit the court's adjudicative authority.[70]

Second, in *Union Pacific Railroad Company v. Brotherhood of Locomotive Engineers and Trainmen*, the Court considered whether the National Railroad Adjustment Board, an administrative agency, had jurisdiction to arbitrate a minor labor dispute absent proof that the parties had attempted to resolve the dispute through a pre-arbitration conference.[71] The Court first insisted that the same principles of jurisdictionality for courts apply to administrative agencies empowered to adjudicate particular controversies.[72] Profligate and imprecise use of the jurisdictional label was equally inappropriate in either context. Thus, the requirement of a pre-arbitration conference was no more jurisdictional than Title VII's requirement of pre-suit

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[64] *Id.*
[65] *Reed Elsevier*, 130 S. Ct. at 1245.
[66] 130 S. Ct. 1367 (2010) (link).
[67] *Id.* at 1376–78; *see* FED. R. CIV. P. 60(b)(4) (link).
[68] *Espinosa*, 130 S. Ct. at 1377.
[69] *Id.* at 1377–78.
[70] *Id.*
[71] 130 S. Ct. 584, 590 (2009).
[72] *Id.*

resort to the EEOC.[73] Both are litigation preconditions that do not affect the court's root structural adjudicative authority.

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 (as in *Morrison* or *Arbaugh*) or with a precondition to initiating litigation (as in *Reed Elsevier*[74]).

But there is a nice question whether non-jurisdictional preconditions should be understood as procedural claim-processing rules or substantive merits rules. Procedural rules generally control how parties litigate and how a court processes a case. They are concerned with the fairness and efficiency of the truth-finding process, grounded in policies of litigant autonomy, fairness, judicial efficiency, and cost-effectiveness.[75] Like merits rules, procedural rules are addressed to the parties and to their rights and obligations.[76] But procedural rules are about rights and obligations within litigation, while merits rules are about real-world rights and duties outside the four walls of the courtroom.

Nevertheless, some preconditions could be framed as either one. For example, we might read the copyright laws as making actionable only infringement of *registered* copyrights. Registration becomes an element of a copyright claim that the plaintiff must plead and prove. And registration is something a copyright holder must do in the real world to protect his substantive legal rights. A plaintiff who sues for infringement of an unregistered copyright loses (barring some exception). Why? Because federal law does not reach a person who infringes an unregistered copyright and does not prohibit infringement of an unregistered copyright. Stated differently, the owner of an unregistered copyright cannot sue an infringer for infringement of an unregistered copyright. As a result, the non-registered 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. Again, the outcome is unchanged—§ 411(a) remains non-jurisdictional. But this

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[73] *Id.* at 596–97.

[74] Reed Elsevier, Inc. v. Muchnick, 130 S. Ct. 1237, 1245–46 (2010).

[75] Scott Dodson, *Mandatory Rules*, 61 STAN. L. REV. 1, 11–12 (2008) [hereinafter Dodson, *Mandatory Rules*] (link); Dodson, *Removal*, *supra* note 8, at 60, 71–72.

[76] Dodson, *Removal*, *supra* note 8, at 71–72.

different analysis better respects the divide between substantive merits and adjudicative jurisdiction.

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 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 oft-proffered line is that jurisdictional rules separate classes of cases and define *whether* a court can exercise power to resolve a class of cases, while procedural rules process claims and dictate *how* a court will adjudicate.[77] But that is not always helpful as to procedural rules such as litigation preconditions, because most could be framed as either one.

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.[78] 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 focus on individual values such as party autonomy, party control of litigation, efficiency, and fairness.[79]

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, rather than jury, serves as fact-finder on any underlying disputed issues for both jurisdictional and claim-processing rules.[80]

Given this connection, *Arbaugh*'s plain-statement approach is appropriate for 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.

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[77] *See Reed Elsevier*, 130 S. Ct. at 1243; Dodson, *Mandatory Rules*, *supra* note 75, at 11–12 ; Dodson, *Removal*, *supra* note 8, at 71–72.

[78] Dane, *supra* note 17, at 36–37; Dodson, *Removal*, *supra* note 8, at 59.

[79] Dodson, *Removal*, *supra* note 8, at 60; John Hart Ely, *The Irrepressible Myth of* Erie, 87 HARV. L. REV. 693, 724–25 (1974).

[80] Dodson, *Removal*, *supra* note 8, at 69–70; Wasserman, *Jurisdiction*, *supra* note 6, at 650–51; Wasserman, *Trichotomy*, *supra* note 6, at 1553.

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 nature. But that seems appropriate as to preconditions (certainly more appropriate than as to merits rules[81]), given Congress's control over both federal-court jurisdiction and federal judicial procedure, including the conditions that parties must satisfy to pursue claims under congressionally made legal rules.[82] Like courts, however, Congress must be meticulous, precise, and not unduly profligate in defining rules as jurisdictional. In other words, Congress must avoid enacting drive-by jurisdictional statutes—statutes relying on a careless or unrefined understanding of adjudicative authority.

Reed Elsevier involved such a drive-by statute. Under the original version of § 411(a), the plaintiff had to show registration to proceed with her infringement action. Registrability was a subissue—a copyright only could be registered (and thus sued upon) if it was the kind of creative work that could be copyrighted and registered under the applicable legal 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, it would be treated as a registered copyright 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.[83]

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."[84] 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.[85] 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 should have been registered 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.

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[81] *See supra* notes 18–24 and accompanying text.

[82] *See* U.S. CONST. art. III (link); Wasserman, *Trichotomy*, *supra* note 6, at 1554–55.

[83] 17 U.S.C. § 411(a) (2006) (link); *Reed Elsevier*, 130 S. Ct. at 1245.

[84] 17 U.S.C. § 411(a).

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

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 use of the term "jurisdiction" in their decisions. Congress should follow suit in drafting legislation, avoiding the word unless it really means to further structural aims and limit judicial authority to adjudicate. In other words, the solution to drive-by jurisdictional rulings is a combination of better drafting and better judicial interpretation.

3. Jurisdiction and Mandatory Rules

If jurisdiction and procedure align in terms of timing and fact-finder, 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. There is admittedly not a great deal of content to this, beyond recognition that when we create distinct legal concepts (such as jurisdiction and procedure) by using different terms, it is awkward to fail to treat them distinctly or to have them converge too often.[86]

A different answer centers on the consequence of the characterization. Adjudicative jurisdictional rules are, by definition, non-waivable. 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.[87] And, as a general (although sharply contested) proposition, adjudicative jurisdictional rules are rigid and inflexible, not allowing for equitable exception or leniency.[88]

But consequentialism is not essentialism. Jurisdictional rules are always non-consentable and non-waivable; but not all mandatory, non-waivable, and rigid rules must be jurisdictional. Scott Dodson has argued that there is room for a class of rules, primarily procedural, that are mandatory but non-jurisdictional. They are grounded in procedural values such as party autonomy and the fairness and efficiency of the truth-finding process and they speak to the conduct of actors in the litigation process, but they possess characteristics associated with jurisdictional rules.[89] A paradigmatic mandatory procedural rule would be subject to consent, waiver, and for-

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[86] Dane, *supra* note 17, at 47; Wasserman, *Jurisdiction*, *supra* note 6, at 669.

[87] FED. R. CIV. P. 12(h)(3) (link); *Arbaugh*, 546 U.S. at 514; Wasserman, *Jurisdiction*, *supra* note 6, at 649–52.

[88] Perry Dane, *Sad Time: Thoughts on Jurisdictionality, the Legal Imagination, and* Bowles v. Russell, 102 NW. U. L. REV. COLLOQUY 164, 167 (2008) (link); Dodson, *Mandatory Rules*, *supra* note 75, at 5.

[89] Dodson, *Mandatory Rules*, *supra* note 75, at 9.

feiture by the party benefitted by the rule, and the court would not have an independent obligation to raise a defect under the rule. Once the benefitted party asserts the rule, however, the court is obligated to enforce it and has no equitable discretion.[90]

Once we recognize a category of mandatory non-jurisdictional rules, we further recognize that these rules need not be procedural. One could imagine a substantive merits rule—a 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 non-waivability. 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.[91] This broader immunity sounds like a merits-based limitation on the reach of congressionally enacted prohibitions.[92] For example, in *Board of Trustees v. Garrett*,[93] the Court held that states were not subject to private suit under the employment provisions of the Americans with Disabilities Act, because the ADA was not valid legislation within Congress's prescriptive authority under § 5 of the Fourteenth Amendment.[94] In other words, a constitutional limitation on Congress's legislative power produced a limit on the reach or application of the ADA (on the conduct prohibited and actors regulated by the ADA) and the statutory right/duty combinations it creates. As a result, a private individual could not sue a state, and the state could not 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.[95] Thus, even if it operates as merits-based and not a limit on adjudicative authority, state sovereign immunity properly possesses some "jurisdictional" characteristics—absence of equitable constraints and non-forfeitability[96]—that protect those underlying structural values.

The power to define a rule's characteristics (if not its fundamental nature) rests with the rulemaker, which is Congress as to federal statutory rules. This is significant to the project of limiting jurisdictional profligacy. Congress may have good reasons for making a particular rule non-waivable,

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[90] *Id.*

[91] *Compare* U.S. CONST. amend. XI (link), *with* Alden v. Maine, 527 U.S. 706, 736 (1999) (link); *see* Carlos Manuel Vazquez, *What Is Eleventh Amendment Immunity?*, 106 YALE L.J. 1683, 1690 (1997).

[92] *See* Dodson, *Mandatory Rules*, *supra* note 75, at 21, 34 (arguing that state sovereign immunity "bestow[s] a right on a party rather than . . . limit[ing] the power of the courts").

[93] 531 U.S. 356 (2001) (link).

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

[95] Bradford R. Clark, *The Eleventh Amendment and the Nature of the Union*, 123 HARV. L. REV. 1817, 1908 (2010) (link); Vazquez, *supra* note 91, at 1690.

[96] Dodson, *Mandatory Rules*, *supra* note 75, at 32–34.

and there are systemic benefits to rigid and absolute rules.[97] Mandatory non-jurisdictional rules—whether procedural or merits-based—further systemic objectives without overexpanding or distorting the concept of adjudicative jurisdiction.[98]

The Court arguably took this course, at least implicitly, in *John R. Sand & Gravel Co. v. United States*,[99] which considered whether the United States forfeited its 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—with exclusive jurisdiction vested in the Court of Claims.[100] 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."[101] Although statutes of limitations typically should be (and are) treated as substantive-merits defenses,[102] the Court of Claims gave § 2501 a jurisdictional cast 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 Claims are available only because Congress waived sovereign immunity; that waiver was valid only under certain conditions, one of which was timely commencement of the action. Stated differently, the Court of Claims had 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*.[103] Importantly, however, the Court avoided explicitly labeling the limitations issue as jurisdictional, instead labeling it a "more absolute" limitations statute.[104] 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 raw structural authority and it is 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 non-jurisdictional, legal rules, although (unfortunately) without saying so.

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[97] *Id.* at 10.

[98] *See id.*

[99] John R. Sand & Gravel Co. v. United States, 552 U.S. 130 (2008) (link).

[100] 28 U.S.C. § 1491(a) (2006) (link).

[101] 28 U.S.C. § 2501 (2006) (link).

[102] Ely, *supra* note 79, at 725–27; *see, e.g.*, Paracelsus Healthcare Corp. v. Philips Med. Sys., Nederland, B.V., 384 F.3d 492, 495 (8th Cir. 2004) (link).

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

[104] *Id.* at 135.

III. WHITHER BOWLES?

The only remaining question is what to do about *Bowles v. Russell*,[105] the one recent Supreme Court case to characterize a timing rule as jurisdictional. *Bowles* concerned the jurisdictionality of the statutory 30-day time limit for an appeal from a district court judgment.[106] A divided Court held that the appeal in a habeas case was untimely when the notice of appeal was filed after the 30-day 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, judicial override, or other exception.[107] The keys, Justice Thomas insisted for a five-Justice majority, were that the appeals time limit appeared in a statute rather than a rule of procedure and that a long and venerable line of precedent, left undisturbed by Congress, had treated § 2107 as jurisdictional.[108]

Bowles has been controversial, within the Court and in scholarly commentary, for many of the reasons addressed in this essay. First, the rule-statute distinction seems a non sequitur; that a rule of procedure cannot affect jurisdiction does not necessarily mean that all statutes do affect jurisdiction.[109] 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 this was a mandatory but nonjurisdictional rule.[110] 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 rulings as controlling precedent.[111] That criticism is more relevant in light of every other case prior and subsequent to *Bowles*, which have uniformly held the rule at issue to be non-jurisdictional (or, as in *John R. Sand*, avoided labels altogether).[112]

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 Court, 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."[113] *Bowles* thus reflects a balance between *Arbaugh*'s plain-language approach and considerations of history and precedent.

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[105] 551 U.S. 205 (2007).

[106] *Bowles*, 551 U.S. at 208; *see* 28 U.S.C. § 2107(a) (2006) (link).

[107] *Bowles*, 551 U.S. at 213–14.

[108] *Id*. at 209–12.

[109] Wasserman, *Trichotomy*, *supra* note 6, at 1553.

[110] Dodson, *Jurisdictionality*, *supra* note 8, at 46.

[111] *Bowles*, 551 U.S. at 215–16 (Souter, J., dissenting).

[112] *See* cases cited *supra* notes 2–4.

[113] Reed Elsevier, Inc. v. Muchnick, 130 S. Ct. 1237, 1247–48 (2010).

But in a concurring opinion, Justice Ginsburg sought to reconcile the "undeniable tension" between *Arbaugh* and *Bowles*.[114] *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 lower courts and most of these were "'drive-by jurisdictional rulings' that should be accorded 'no precedential effect'".[115]

Unfortunately, Justice Ginsburg's distinction—an effort to retain *Bowles* in the face of contrary doctrine—is untenable. Congress is as aware of lower-court statutory interpretations, is just as able to overturn them or leave them undisturbed, and in recent years has been very willing to respond to them.[116] Indeed, the confusion in *Reed Elsevier* itself was triggered by a statutory amendment—the final sentence of § 411(a)—that was enacted to overturn a series of lower-court rulings.[117] There is no basis for treating lower-court decisions as providing less of a historical trail than Supreme Court decisions. Congress can respond (or not) to either group equally well. And if lower court decisions can be derogated as drive-by rulings not entitled to precedential effect, so can Supreme Court decisions.

At the end of the day, *Bowles* simply may 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, writing for a unanimous Court (including Justice Thomas) in *Union Pacific*, describing *Bowles* as "relying on a long line of this Court's decisions left undisturbed by Congress."[118]

CONCLUSION

October Term 2009 was a good one for commentators, such as me, who want the federal courts to be more precise and accurate in speaking of jurisdiction. The Court rejected a jurisdictional characterization in every case, always doing so unanimously. And the Court not only reached the right result, but it used correct analysis to get there, particularly in adopting Justice Scalia's definitive divide between merits and jurisdiction in *Morrison*.

The Court apparently is not finished undoing profligate and non-meticulous use of the concept of jurisdiction, moving towards a sharper dis-

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[114] *Id.* at 1250 (Ginsburg, J., concurring in part and concurring in the judgment).

[115] *Id.* at 1251 (quoting Arbaugh v. Y & H Corp., 546 U.S. 500, 511 (2006)).

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

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

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

tinction between judicial adjudicative authority on the one hand and merits or procedure on the other.

For example, in November oral arguments in *Ortiz v. Jordan*,[119] the colloquy detoured into the jurisdictional nature of the rule that challenges to the sufficiency of the evidence cannot be raised on appeal if not presented first on a postverdict motion in the district court.[120] Justice Alito pushed counsel on whether Rule 50(b) could be a jurisdictional rule in light of recent cases defining procedural claim-processing rules as non-jurisdictional; counsel tried to distinguish between jurisdiction and power, to which Justice Ginsburg correctly insisted that "jurisdiction is power, power to proceed in a case."[121]

More directly, the Court will hear *Henderson v. Shinseki*,[122] considering the jurisdictionality of the 120-day period for seeking judicial review of an agency decision regarding a claim for veterans' benefits. The lower court found the period jurisdictional, relying on *Bowles*. Perhaps *Henderson* will determine the future and continued vitality of the lone outlier decision in the Court's otherwise consistent and welcome move to end drive-by jurisdictional rulings.

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[119] 316 F. App'x 449 (6th Cir. 2009), *cert granted* 130 S. Ct. 2371 (2010).

[120] 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)) (link).

[121] Transcript of Oral Argument at 8–12, *Ortiz v. Jordan*, No. 09-737; Howard Wasserman, *Jurisdictional Confusion In Unexpected Places*, PRAWFSBLAWG (Nov. 10, 2010), http://prawfsblawg.blogs.com/prawfsblawg/2010/11/jurisdictional-confusion-in-unexpected-places-1.html (link).

[122] 589 F.3d 1201 (Fed. Cir. 2009), *cert. granted* 130 S. Ct. 3502 (2010) (link).