
COMMENT

JURISDICTION AND THE FEDERAL RULES:
WHY THE TIME HAS COME TO REFORM
FINALITY BY INEQUITABLE DEADLINES

CHRISTOPHER W. ROBBINS[†]

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[†] J.D. Candidate, 2009, University of Pennsylvania Law School; B.A., 2006, Tufts University. I would like to thank Professor Catherine Struve for her valuable feedback on earlier drafts and Professor Stephen Burbank for his guidance in the early stages of this endeavor. I also would like to thank the members of the *University of Pennsylvania Law Review* for their diligent editing. Lastly, I would not have been able to complete this work without the support and patience of Stefany Tobel.

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Over seventy years ago, the creation of the Federal Rules of Civil Procedure represented the triumph of equity over the often-arbitrary distinctions created by the common law pleading and code pleading systems that predated them.¹ Despite equity’s expansion beyond pleading and into most areas of litigation, there still remains an area where the rules of procedure are inflexible and complex: the current system of post-trial motions and notices of appeal often creates “trap[s] for an unsuspecting litigant”² during the transfer of a case to the court of appeals from the district court. Limitations on the power of the district court to hear motions after the judgment have long

¹ See Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 973-74 (1987) (describing the proponents of the federal rules’ view that “[t]he New Deal required courts to resolve new types of complex cases, for which procedural lines would be an outdated impediment” while “[o]ther cases were so simple they did not need procedural lines and steps” so that “[i]f one eliminated definitional lines and procedural steps . . . one could have simple general rules for all cases”).

² See FED. R. APP. P. 4(a) advisory committee’s note to 1993 amendment (reporting that the previous version of the rule often deceived litigants into failing to file a proper notice of appeal by nullifying a notice that was prematurely filed before a post-trial motion or while the motion was pending). For a more complete listing of amendments to correct similar traps, see *infra* note 250.

been viewed as having “jurisdictional significance,”³ and courts view the deadlines as “mandatory and jurisdictional.”⁴ This use of the term “jurisdictional” prevents resort to equitable principles that could excuse noncompliance in certain cases where strict litigation deadlines create harsh results.⁵

Several examples show that the rejection of equity has seriously limited the ability of litigants to have a district court or court of appeals entertain challenges to a judgment through either a post-trial motion or appeal. The Supreme Court has denied a litigant the opportunity to appeal a judgment because the litigant relied on a date set incorrectly by a district court judge, resulting in an untimely appeal.⁶ The Court has also found jurisdiction lacking and dismissed an appeal when an appellant used “et al.” to designate the identity of those appealing under Appellate Rule 3, instead of listing all plaintiffs individually or using a clearer term like “all plaintiffs.”⁷ The lack of equity results in seemingly unfair and often-shocking sanctions for minor procedural defects, not because the results are “imposed by the legislature,” as the Court has stated, but because courts misuse the term “jurisdictional.”

The history and meaning of the term “jurisdictional” continue to create questions for courts and commentators with respect to procedural requirements at the crucial transfer of the case from the district court to the court of appeals.⁸ The history of the term’s use provides insight into its changing meaning, eventually expanding beyond “that imposed by the legislature.” The federal courts have incorrectly used the term “jurisdictional” to abstain from deciding how to address the

³ *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982).

⁴ *United States v. Robinson*, 361 U.S. 220, 224 (1960).

⁵ See Elizabeth Chamblee Burch, *Nonjurisdictionality or Inequity*, 102 NW. U. L. REV. COLLOQUY 64, 67 (2007), <http://www.law.northwestern.edu/lawreview/Colloquy/2007/24/LRColl2007n24Burch.pdf> (“The majority’s decision [in *Bowles v. Russell*, 127 S. Ct. 2360 (2007),] to label the judge’s miscalculation as jurisdictional means that equity cannot enter the equation at all.”).

⁶ See *Bowles*, 127 S. Ct. 2360.

⁷ See *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 318 (1988). The Court reached this result notwithstanding the fact that “et al.” is commonly used by courts and in trial pleadings. It argued that the result was “imposed by the legislature and not by the judicial process.” *Id.* (quoting *Schiavone v. Fortune*, 477 U.S. 21, 31 (1986)).

⁸ See E. King Poor, *Jurisdictional Deadlines in the Wake of Kontrick and Eberhart: Harmonizing 160 Years of Precedent*, 40 CREIGHTON L. REV. 181, 187-205 (2007) (finding that historical practice requires courts to find such deadlines jurisdictional); see also Mark A. Hall, *The Jurisdictional Nature of the Time to Appeal*, 21 GA. L. REV. 399, 400-18 (1986) (discussing the use of the term “jurisdictional” and deadlines for filing notice of appeal).

inequitable situations that arise from strictly enforced litigation rules. The courts, in essence, have confused doctrines of abstention with doctrines of jurisdiction to avoid expanding equity's reach into the area of post-trial motions and notices of appeal.⁹

The nature of time limits that restrict the federal courts' power to entertain certain matters lies at the source of the confusion of jurisdiction and abstention. These time limits generally include the deadlines for filing post-trial motions and notices of appeal.¹⁰ The purpose of these deadlines—helping to facilitate the transfer of the case from the trial court to the appellate court—tempts courts to deem them jurisdictional. This transfer of power cannot properly be the rationale for deeming requirements jurisdictional, however, because jurisdictional requirements are not Platonic forms awaiting discovery, but limitations expressly set by Congress on the courts' power to adjudicate claims.¹¹ The tension between the supposed "jurisdictional significance" of post-trial deadlines and the fact that the modern deadlines are fixed by rule rather than statute has forced courts to blur the definition of "jurisdictional." Despite the Court's attempts to clearly define the term,¹² it continues to be used to mask judicial policy decisions instead of representing congressional restrictions on, or grants of, power.

⁹ See Burch, *supra* note 5, at 67-69 (decrying the lack of equity in federal appellate practice).

¹⁰ The rules that courts most often deem "jurisdictional" are those with deadlines a court cannot extend under the timing provisions of Federal Rule of Civil Procedure 6 and its analogs in the other rules: Bankruptcy Rule 9006, Criminal Rule 45, and Appellate Rule 26. Appellate Rule 4 contains one of the most important of these deadlines: the deadline to file notices of appeal, which oust the lower court of jurisdiction over the case. See *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982) ("The filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal."). Other deadlines commonly termed "jurisdictional" are the deadlines applying to a renewed motion for judgment as a matter of law under Civil Rule 50(b) and (d), a motion for amending findings under Civil Rule 52(b), a motion for a new trial under Civil Rule 59(b) and (d), a motion to alter or amend a judgment under Civil Rule 59(e), and a motion for relief from judgment under Civil Rule 60(b) and (c). See, e.g., *Adams v. Trs. of N.J. Brewery Employees' Pension Trust Fund*, 29 F.3d 863, 870 (3d Cir. 1994) (deeming Civil Rule 59(e)'s deadline jurisdictional because, under Civil Rule 6, the deadline cannot be extended).

¹¹ See *Kontrick v. Ryan*, 540 U.S. 443, 452 (2004) (noting that only Congress can set the subject matter jurisdiction of the federal courts).

¹² See *Eberhart v. United States*, 546 U.S. 12, 16 (2005) (per curiam) (finding that the deadlines in Criminal Rule 45 are nonjurisdictional); *Kontrick*, 540 U.S. at 452-56 (declaring that the limitations on extending the deadlines in Bankruptcy Rule 9006 are nonjurisdictional).

The Supreme Court's recent foray into the use of the term "jurisdictional" for such post-trial deadlines¹³ comes much closer to a proper definition, but it fails to account for the role of rulemaking following the passage of the Rules Enabling Act.¹⁴ Most of the key provisions governing post-trial motions¹⁵ and notices of appeal¹⁶ are contained either entirely in the rules or in a mixture of rules and statutes.¹⁷ By using the term "jurisdictional" to describe both the post-trial and notice-of-appeal deadlines, the Supreme Court has at times removed key issues of finality from the ambit of both the courts and, arguably, the rules committees,¹⁸ creating a vacuum of authority and unnecessarily rigid requirements. Congress, having already delegated the power to promulgate rules of procedure to the rulemakers, has shown little interest in filling this gap and has not independently altered the post-trial-motion and notice-of-appeal requirements for civil actions since the passage of the Rules Enabling Act.¹⁹ The Court's efforts, however, have ignored this basic fact.

¹³ See *Bowles v. Russell*, 127 S. Ct. 2360 (2007). The Supreme Court recently avoided the issue of whether filing notices of appeal for a cross-appeal in a criminal case, which would be governed by Appellate Rule 4(b) and 18 U.S.C. § 3731, is jurisdictional by finding that the "cross-appeal rule" was "inveterate and certain" whatever its status. *Greenlaw v. United States*, 128 S. Ct. 2559, 2564 (2008).

¹⁴ Pub. L. No. 73-415, 48 Stat. 1064 (codified as amended at 28 U.S.C. §§ 2071–2077 (2006)).

¹⁵ The timing provisions for each post-trial motion are contained in the respective rules, with limitations on extensions contained in analogs to Civil Rule 6. See *supra* note 10.

¹⁶ See FED. R. APP. P. 4.

¹⁷ Specifically, some but not all parts of Federal Rule of Appellate Procedure 4(a) are codified in 28 U.S.C. § 2107. See *infra* Part III.A-B.

¹⁸ See *Bowles*, 127 S. Ct. at 2367 ("If 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."). The Civil Rules themselves make clear that they do not alter subject matter jurisdiction. See 12 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 3141 (2d ed. 1997) (discussing Civil Rule 82's limitation on altering subject matter jurisdiction). The rulemakers likely cannot alter the jurisdiction of the federal courts because such action would be beyond their power to promulgate only procedural rules and would violate the prohibition on abridging, enlarging, or modifying any substantive right. See 28 U.S.C. § 2072(a)–(b) (2006); *infra* text accompanying notes 210–225. The second limitation—on affecting substantive rights—is likely surplusage. See Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1107 (1982) ("In the opinion of the draftsman, as indicated in his correspondence, the second sentence served only to emphasize a restriction inherent in the use of the word 'procedure' in the first sentence.").

¹⁹ Congress codified part of the deadlines for filing notices of appeal in civil cases, see 28 U.S.C. § 2107, but it did so at the request of the Rules Committee. Congress did

This Comment argues that the Court has removed an important part of procedure from the control of both the rulemakers and courts by deeming certain litigation deadlines “jurisdictional.” In so doing, it has contradicted the intent of Congress in passing the Rules Enabling Act. The combination of a presumption that a requirement is non-jurisdictional with an extension of principles of equity into the area of post-trial motions and notices of appeal would allow for a more just procedure for challenging a judgment. Allowing equitable exceptions while still deferring to the rulemakers on broader issues of policy would restore the approach that the Supreme Court took following the passage of the Rules Enabling Act yet maintain some fairness for litigants.²⁰ Part I of this Comment contends that the term “jurisdictional” originated to refer only to grants of, or limitations on, the federal courts’ power to adjudicate claims passed by Congress. Part I.A summarizes the pre-Rules Enabling Act cases that defined the impact of labeling a requirement “jurisdictional.” Part I.B.1 examines the adoption and early amendment of the Civil Rules and finds that the rulemakers themselves did not have a clear definition of the limitations on their own power, particularly their ability to alter jurisdictional limitations. Part I.B.2 argues that the definition of the term “jurisdictional” became ambiguous as requirements traditionally set by statute were contained in rules and made subject to equitable exceptions. Part I.B.3 recounts the Court’s efforts to restore the definition of the term “jurisdictional” to a congressional limitation on federal courts’ adjudicatory power. Part I.B.4 contends that the recent case of *Bowles v. Russell*²¹ expresses a definition of “jurisdictional” that mirrors that of the pre-Rules Enabling Act cases but that applies the term to a system of court-created rules and corresponding statutes with unnecessarily harsh results for litigants.

Part II argues that although the Court now defines the term “jurisdictional” to correspond to the pre-Rules Enabling Act conception and provides analytical clarity to the term’s meaning, the Court erroneously applies a presumption that statutory time limits are jurisdictional. By adopting such a presumption, the Court limits the ability of the rulemakers and Congress to collaboratively develop rules of procedure. This Part also argues that between the Rules Enabling Act

act independently in creating the time limit to file notices of appeal by the government in criminal cases, however. See *infra* note 93.

²⁰ For example, in *United States v. Robinson*, 361 U.S. 220, 226-30 (1960), the Court labeled the deadline to file notices of appeal in a criminal matter “jurisdictional,” but it did so because it wanted to leave policy questions to rulemakers.

²¹ 127 S. Ct. 2360 (2007).

and *Bowles*, the Court properly recognized the collaborative origin of the post-trial deadlines but improperly labeled them jurisdictional.

Part III summarizes the current status of many post-trial or notice-of-appeal deadlines and describes the confusing and arbitrary distinctions that undercut the Court's attempt to clarify when a deadline is jurisdictional. It also argues that the Court's approach in *Bowles*, if taken to its logical conclusion, could result in invalidation of a provision in Appellate Rule 4(a) providing an extension of the deadline to cross-appeal in civil cases and a provision in Appellate Rule 5 governing permissive appeals because the provisions could violate the limitations of the Rules Enabling Act.

Part IV recommends solutions to clarify the status of post-trial and notice-of-appeal deadlines. The Court should find statutory deadlines nonjurisdictional by default unless Congress clearly intended otherwise, as it has for other statutory requirements. In addition, Congress should repeal a statute that merely codifies the provisions of Appellate Rule 4 because it creates confusion about the jurisdictional status of Rule 4 and about the possibility of altering the provisions through the rulemaking process.

In order to remedy the confusion, the rules committees should clarify the result of failing to meet the deadlines that are exempted from waiver by courts under Civil Rule 6 and its analogs in the other federal rules. The timing provisions of the federal rules should be amended to codify an important but limited equitable exception: the doctrine of unique circumstances, which excuses errors caused by reliance on a judge's statements. The rulemakers should adopt a version of the doctrine that allows litigants to rely on the statements of federal judges and allows judges the discretion needed to provide fairness to litigants.

I. HISTORICAL USE OF "JURISDICTIONAL": A CIRCULAR TRAVEL

The deadlines for notices of appeal and post-trial motions have historically, though often erroneously, been labeled "jurisdictional." Commentators have used this long unbroken practice as a justification for arguing that the failure to fulfill the requirements to file a notice of appeal limits the federal courts' jurisdiction.²² Commentators and

²² See Poor, *supra* note 8, at 187-205 (arguing that historical practice supports labeling the requirements of notices of appeal "jurisdictional"); see also Hall, *supra* note 8, at 400-18 (discussing the historical use of "jurisdictional" for notices of appeal and concluding that the requirements involve something akin to personal jurisdiction).

courts have failed, however, to recognize the effect that the Rules Enabling Act had in both altering the division of authority between the federal courts and Congress and in introducing greater equity and fairness to the procedural rules of the federal courts. The use of the term “jurisdictional” to describe requirements of post-trial motions and notices of appeal, and particularly deadlines for filing these, has been supported by different rationales over time—originally statutory codification, then abstention in favor of the rulemakers, and finally respecting deadlines contained in statutes. Only the Supreme Court’s pre-1934 rationale and its most recent decisions have properly used “jurisdictional” to refer to a congressional grant of or limitation on the power of the federal courts. Following the passage of the Rules Enabling Act, the Court used the term “jurisdictional” to emphasize the mandatory nature of the deadline at issue while abstaining from making policy decisions that it wanted to leave to the rulemaking process. In its most recent cases, however, the Court has fashioned a consistent definition of the term “jurisdictional” but misapplied the strict label to an area of the federal rules that requires flexible cooperation between the courts and Congress.

A. *Pre-Rules Enabling Act Jurisdictional Decisions*

Deadlines to file notices of appeal were first labeled “jurisdictional” during the Taney Court’s attempts to impose congressional supremacy over the jurisdiction of the federal courts.²³ The Court’s use of “jurisdictional” in *United States v. Curry*²⁴ presaged a larger movement to clarify that Article III did not grant the federal courts jurisdiction without a further congressional grant.²⁵ At issue in *Curry* was whether the United States took a timely appeal from the district court to the Supreme Court.²⁶ The district court erroneously looked to state

²³ Roger Taney was Chief Justice from 1836 to 1864, and his term is associated with furthering the idea that federal courts’ jurisdiction is subject to congressional regulation. See Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: Early Implementation of and Departures From the Constitutional Plan*, 86 COLUM. L. REV. 1515, 1589-93 (1986). There was, however, precedent requiring an affirmative jurisdictional grant from Congress for inferior federal courts and for allowing Congress to create exceptions to the Supreme Court’s appellate jurisdiction. See *Durousseau v. United States*, 10 U.S. (6 Cranch) 307, 313-14 (1810) (acknowledging that the Supreme Court’s jurisdiction is “limited and regulated by the judicial act”).

²⁴ 47 U.S. (6 How.) 106 (1848).

²⁵ See Clinton, *supra* note 23, at 1589-93 (examining the Taney Court’s withdrawal from the Court’s previous position of mandatory federal court jurisdiction).

²⁶ *Curry*, 47 U.S. (6 How.) at 110-12.

practice for taking an appeal instead of the specific congressional act governing the type of land claim at issue.²⁷ This error resulted in the lower court's authorizing the government to take the appeal beyond the one-year period allotted by Congress.²⁸

In keeping with that broader purpose of furthering legislative supremacy, the Court found that the statutory nature of the deadline prevented the district court from allowing an extension. Chief Justice Taney, writing for the Court, stated what would shape the effect of placing the "jurisdictional" label on a requirement:

The power to hear and determine a case like this is conferred upon the court by acts of Congress, and the same authority which gives the jurisdiction has pointed out the manner in which the case shall be brought before us; and we have no power to dispense with any of these provisions, nor to change or modify them.²⁹

Curry announced the principle, which would be echoed in later Supreme Court cases, that courts have no power to create equitable exceptions to jurisdictional requirements. The Court, however, provided little guidance on how to find that a statutory requirement limited the federal court's power to hear a case or on when a requirement allowed for equitable exception. In *Curry*, the limitation on taking an appeal was contained in an arguably jurisdictional provision that granted federal courts the power to hear that class of cases,³⁰ but later courts would not require that the requirement at issue be tied to a grant of jurisdiction, only that it be statutory.³¹

A line of cases after *Curry*, many stemming from the group of land-claims statutes at issue in that case, gave shape to the definition of the term "jurisdictional." The Court followed *Curry* by emphasizing that equitable principles do not allow courts to excuse a late appeal even if the lower court clearly caused the delay,³² that a party cannot waive or

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at 113.

³⁰ The same provision both authorized the appeal (thereby granting jurisdiction) and set a limit of one year on taking the appeal. *See id.* at 107 (noting, with added emphasis, the Act's requirement that "in all cases the party against whom the judgment or decree of said District Court may be finally given shall be entitled to an appeal, *within one year* from the time of its rendition, to the Supreme Court of the United States, the decision of which court shall be final and conclusive between the parties" (quoting Act of May 26, 1824, ch. 95, § 2, 42 Stat. 52, 53)).

³¹ *See, e.g.,* *Bowles v. Russell*, 127 S. Ct. 2360, 2368 (2007) (Souter, J., dissenting) ("Congress put no jurisdictional tag on the time limit here.").

³² *See* *Saltmarsh v. Tuthill*, 53 U.S. (12 How.) 387, 389 (1852) ("For this court has never deemed the tribunals of the United States authorized to dispense with the ex-

forfeit the issue of failure to meet a jurisdictional deadline,³³ and that the court must address its jurisdiction *sua sponte*.³⁴ The Court also deemed nondeadline requirements, such as a pre-appeal certification, to be jurisdictional.³⁵

The pre-Rules Enabling Act cases gave birth to the phrase that courts would repeat ad nauseam when describing post-trial deadlines and deadlines for notices of appeal: “mandatory and jurisdictional.”³⁶ The Court also first addressed the impact of court-made rules on post-trial motions and notice-of-appeal deadlines by allowing a court-made rule to toll the congressionally created jurisdictional time limit.³⁷ The rise of court rules, however, would limit the usefulness of the label “jurisdictional.” With the passage of the Rules Enabling Act and a shift in the requirements at issue from statutes to rules, *Curry*’s original concept that “jurisdictional” referred to the source of the requirement—i.e., Congress—became lost.

B. *Post-Rules Enabling Act Cases: “Jurisdictional” Loses Its Meaning*

The Rules Enabling Act made it difficult for courts to determine which requirements that must be met once litigation has commenced.³⁸ Rules, instead of statutes, began to govern the transfer of cases from the district courts to the courts of appeals. As shown in *Curry*, courts viewed the requirements for an appeal as jurisdictional prior to the Rules Enabling Act. The requirements could not properly be jurisdictional under *Curry* following their replacement by court rules, however, because only Congress may set jurisdictional limita-

press provisions of the acts of Congress regulating appeals and writs of error, upon any equitable ground.”).

³³ See *United States v. Porche*, 53 U.S. (12 How.) 426, 432 (1852) (“But if he had, in express terms, waived it, and entered his waiver on the record, it would not have given jurisdiction to the court, when the act of Congress had not conferred it.”).

³⁴ See *Poor*, *supra* note 8, at 188 & nn.28-33 (citing *Credit Co. v. Ark. Cent. Ry. Co.*, 128 U.S. 258 (1888); *Edmonson v. Bloomshire*, 74 U.S. (7 Wall.) 306 (1869)).

³⁵ See *Hewitt v. Filbert*, 116 U.S. 142, 145 (1885) (finding that failure to obtain certification to file an appeal was jurisdictional, but allowing the requirement to be waived).

³⁶ See *Hall*, *supra* note 8, at 410 (citing *Vaughn v. Am. Ins. Co.*, 15 F.2d 526 (5th Cir. 1926)).

³⁷ See *Morse v. United States*, 270 U.S. 151, 153-54 (1926) (“There is no doubt under the decisions and practice in this court that where a motion for a new trial in a court of law, or a petition for a rehearing in a court of equity, is duly and seasonably filed, it suspends the running of the time for taking a writ of error or an appeal, and that the time within which the proceeding to review must be initiated begins from the date of the denial of either the motion or petition.”).

³⁸ For a discussion of the Rules Enabling Act in light of its legislative history, see generally *Burbank*, *supra* note 18.

tions.³⁹ Furthermore, the authority of the rulemakers to alter jurisdictional limits set by Congress remains questionable, because it could violate the Rules Enabling Act's requirement that the rulemakers promulgate only rules of procedure.⁴⁰ The early rulemakers appeared to have no set conception of the limitations on their power,⁴¹ creating confusion over whether the new rules for taking an appeal or challenging a judgment by post-trial motion were jurisdictional.

1. The Original Rulemakers Lacked a Clear Conception of the Term "Jurisdictional" and Its Impact on Their Authority

The two provisions of the Rules Enabling Act that are most relevant to determining the impact of the Act on the term "jurisdictional" for matters regulated by the federal rules are the grant of power to the Supreme Court to promulgate procedural rules⁴² and the supersession clause.⁴³ The delegation of power to the Supreme Court to promulgate rules of procedure allows for the creation of the modern requirements for post-trial motions and notices of appeal. It also, however, arguably prevents the rulemakers from altering the federal courts' jurisdiction.⁴⁴ The supersession clause allows the rulemakers to impose uniformity by clearing conflicting statutes,⁴⁵ implying that the rulemakers had the power to alter some existing statutory schemes. The fact that Congress allows supersession of statutes, however, is arguably in some tension with the Court's precedent declaring

³⁹ Congress, however, has explicitly delegated the power to alter the federal courts' jurisdiction beyond the delegation in the Rules Enabling Act in specific instances. *See, e.g.*, 28 U.S.C. § 1292(e) (2006) (allowing the rules to authorize interlocutory appeals).

⁴⁰ *See id.* § 2072(a); *see also infra* notes 193-208 and accompanying text (arguing that the Rules Enabling Act's delegation of power does not include altering jurisdictional statutes).

⁴¹ *See* Burbank, *supra* note 18, at 1132-37 (describing how the early rulemaking committees did not give much consideration to the meaning of the substance-procedure distinction).

⁴² 28 U.S.C. § 2072(a).

⁴³ *Id.* § 2072(b).

⁴⁴ *See* Bowles v. Russell, 127 S. Ct. 2360, 2367 (2007) ("If 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."). There was also some concern that amending the time limit for filing notices of appeal might be beyond the rulemakers' power. *See infra* text accompanying note 76.

⁴⁵ *See* Stephen B. Burbank, *Hold the Corks: A Comment on Paul Carrington's "Substance" and "Procedure" in the Rules Enabling Act*, 1989 DUKE L.J. 1012, 1043-45 (describing the supersession clause's purpose as facilitating "brush-clearing" of the numerous procedural statutes required before the federal rules).

that “the same authority which gives the jurisdiction has pointed out the manner in which the case shall be brought before us; and we have no power to dispense with any of these provisions, nor to change or modify them.”⁴⁶ Unfortunately, the original rulemakers did not squarely address whether they could alter or create jurisdictional limitations or supersede jurisdictional statutes.

The most important creation of the original civil rules for the purposes of determining the jurisdictional status of post-trial and notice-of-appeal deadlines was Civil Rule 6, which allowed for the relaxation of any deadline in the rules except those specified therein.⁴⁷ The original Civil Rule 6, formed at the creation of the Civil Rules, allowed for an extension of time by motion before a deadline had passed or for good cause after failing to meet a deadline, but it exempted any action under Civil Rule 59, which then included motions for a new trial and motions to alter or amend the judgment.⁴⁸ The rulemakers meant to replace the traditional notion that a court’s power over a case ended at the end of the term of court with a uniform time limit for all cases that could not be extended.⁴⁹ It was through this provision disallowing expansion of the time limits in Civil Rule 59 that the pre-Rules Enabling Act jurisdictional precedents crossed over to a litigation landscape shaped by a division of power different from the concept of legislative supremacy envisioned by the Taney Court.⁵⁰

⁴⁶ United States v. Curry, 47 U.S. (6 How.) 106, 113 (1848).

⁴⁷ Civil Rule 6 has been described as “[t]he Grandparent of Modern Jurisdictional Deadlines.” Poor, *supra* note 8, at 190. Former Civil Rule 73, which eventually set the deadline to file notices of appeal, did not alter the statutory deadline until the 1946 amendments. Compare FED. R. CIV. P. 73 (1938) (repealed 1968), H.R. DOC. NO. 75-460, at 87-90 (1938), with FED. R. CIV. P. 73 (1946) (repealed 1968), H.R. DOC. NO. 80-473, at 1 (1947).

⁴⁸ See ADVISORY COMM. ON RULES FOR CIVIL PROCEDURE, REPORT OF PROPOSED AMENDMENTS TO RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES 1, 78 (1946) [hereinafter 1946 REPORT] (giving the text of the original rules and the proposed changes that would become the 1946 amendments to the Civil Rules). The ability of courts to extend the time was based on the text of Equity Rule 8, which allowed a judge to extend the time for performance. See 4B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1161 n.3 (3d ed. 2002) (providing the relevant text of Equity Rule 8). The prohibition on extending specified periods, however, did not originate from any of the Equity Rules. See *id.* § 1161 (specifying other areas of Rule 6 that were based on the Equity Rules but not the prohibition on extending time for actions under Rule 59).

⁴⁹ See FED. R. CIV. P. 6 advisory committee’s note to 1946 amendment (“The amendment of Rule 6(b) now proposed is based on the view that there should be a definite point where it can be said a judgment is final . . .”).

⁵⁰ See Poor, *supra* note 8, at 191 (“Almost a century of precedent upholding jurisdictional deadlines readily crossed over to the deadlines identified by Rule 6(b).”).

The civil rulemakers themselves encouraged use of the term “jurisdictional” for noncongressionally created rules during the discussion of the 1946 amendments to the Civil Rules and corresponding Judicial Code and Judiciary Act of 1948⁵¹ by using Rule 6 to restrict the power of the district court to alter judgments. These changes were enacted in the Judicial Code and Judiciary Act of 1948⁵² and the 1946 amendments to the Federal Rules of Civil Procedure,⁵³ creating the modern “event of jurisdictional significance,”⁵⁴ the transfer of a case from the district court to the court of appeals. The requirements for this transfer have since beguiled courts seeking to determine why and how the event has jurisdictional significance. The 1946 amendments expanded the list of deadlines in Civil Rule 6 that could not be extended by the court by listing the time limits for several rules other than Civil Rule 59, most importantly the deadlines for filing a notice of appeal⁵⁵ in former Civil Rule 73.⁵⁶ Former Civil Rule 73 governed the method for taking an appeal but at first left the deadline as prescribed by Congress.⁵⁷ The 1946 amendments to former Civil Rule 73 created deadlines of thirty days to file notices of appeal in a civil action, unless federal law prescribed a shorter time to appeal, and sixty days if the federal government was a party, with an extension for failure to learn of the judgment by excusable neglect.⁵⁸ This was shorter than the period then set by Congress.

⁵¹ Pub. L. No. 80-773, 62 Stat. 869, 963.

⁵² Act of June 25, 1948, Pub. L. No. 80-773, 62 Stat. 869.

⁵³ H.R. DOC. NO. 80-473 (1947).

⁵⁴ *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982).

⁵⁵ The filing of the notice of appeal has several important consequences for the respective powers of the district court and court of appeals. It has been viewed as granting the court of appeals power to hear the case. *See id.*

⁵⁶ The deadlines then listed as inalterable by the courts were Civil Rules 25, 50(b), 52(b), 59(b), (d) and (e), 60(b), and 73(a) and (g). *See* 4B WRIGHT & MILLER, *supra* note 48, § 1161. The 1946 amendments to Rule 6 and the amendment to former Rule 73(a) adding a time limit were considered together, and both were listed as proposed amendments in 1946. *See* 1946 REPORT, *supra* note 48, at 1, 90.

⁵⁷ *See* FED. R. CIV. P. 73 (1938) (repealed 1968), H.R. DOC. NO. 75-460, at 87-90 (1938) (“When an appeal is permitted by law from a district court to a circuit court of appeals and within the time prescribed, a party may appeal from a judgment by filing with the district court a notice of appeal.”). The quoted language was removed in the 1946 amendment.

⁵⁸ *See* 12 WRIGHT, MILLER & MARCUS, *supra* note 18, § 3062 n.1 (providing the text of former Rule 73 after the 1946 amendments). Prior to the amendment, the time limit to appeal for many cases was within three months from entry of judgment. *See, e.g.*, Act of Feb. 13, 1925, Pub. L. No. 68-415, § 8(c), 43 Stat. 936, 940.

The motivation behind the 1946 amendments appears to have been the peculiar case of *Hill v. Hawes*.⁵⁹ In *Hill*, the Supreme Court addressed whether Rule 10 of the United States Court of Appeals for the D.C. Circuit allowed a district court judge to vacate a previous judgment and enter a new judgment in order to reopen the time to file an appeal.⁶⁰ Because Congress had not included the D.C. Circuit within the act that set the time to appeal at three months from the entry of judgment,⁶¹ a previous act of Congress allowed the D.C. Circuit to set the deadline by court rule.⁶² D.C. Circuit Rule 10 set the deadline at twenty days.⁶³ Hill missed the deadline to appeal because he had failed to receive notice of the judgment as required by then-Rule 77 of the Federal Rules of Civil Procedure.⁶⁴ The D.C. Circuit rejected the argument that failure to receive notice should allow the district court to vacate and reenter the judgment, but the Supreme Court reversed.⁶⁵

The Supreme Court's ruling disturbed the Advisory Committee. First, although stating that the district court could not extend the time under the Rule, the Supreme Court praised the "sound discretion" of the district court in reentering judgment so that notice could be given in compliance with the federal rules.⁶⁶ This statement contravened the Committee's specific decision to preserve the statutory requirement that the deadline for notice of appeal run from entry of judgment instead of receipt of notice of the judgment.⁶⁷ The Committee may have hesitated to alter the statutory scheme by changing the event that triggered the deadline from entry of judgment to receipt of notice because the statute that stated that the deadline started to run

⁵⁹ 320 U.S. 520 (1944). Following the decision, the Advisory Committee on Rules for Civil Procedure extensively discussed the opinion and questioned how to overrule several aspects of it through amendment of the Civil Rules. ADVISORY COMM. ON RULES FOR CIVIL PROCEDURE, 1 PROCEEDINGS 2-81 (1944) [hereinafter 1944 MINUTES], available at <http://www.uscourts.gov/rules/Minutes/1944-04-Civil-Minutes.pdf>.

⁶⁰ *Hill*, 320 U.S. at 520-23.

⁶¹ Act of Feb. 13, 1925 § 128.

⁶² See *Hill*, 320 U.S. at 522-23.

⁶³ *Id.* at 521.

⁶⁴ *Id.* at 521-22.

⁶⁵ *Id.* at 523.

⁶⁶ *Id.* at 524.

⁶⁷ The April 1944 meeting of the Advisory Committee on Rules for Civil Procedure involved the discussion of a letter from William Mitchell, Chairman of the Advisory Committee for both the creation of the Civil Rules and the 1946 amendments, to Chief Justice Stone asking the Court to grant rehearing of the *Hill* case because it gave this effect to then-Rule 77, which the rulemakers had meant to avoid. See 1944 MINUTES, *supra* note 59, at 61-71 (providing the text of the letter and Chief Justice Stone's response).

from entry of judgment⁶⁸ set the jurisdiction of the courts of appeals.⁶⁹ The method of reentering judgment to reopen the time to appeal also created concerns that the judgment never would become final if the district court could simply reenter judgment to avoid the limitation on its granting a late post-trial motion or allowing a late appeal.⁷⁰ This reentry of judgment frustrated the Committee's attempts to bring finality to judgments through a clear and uniform system of rules.

The Court also mentioned at the end of the opinion that because the term of court had not expired, "the judgment was still within control of the trial judge."⁷¹ This statement contradicted the Committee's continued attempts to replace the old system of providing finality, which relied on formal terms of court and gave the district court the power to order a new trial or otherwise affect the judgment only until the end of its term.⁷² The Committee created Civil Rule 6 to eliminate terms of court and to prevent courts from extending the period in which they could hear motions challenging the judgment, "lest judgments never can be said to be final."⁷³

The Advisory Committee's minutes indicate that the *Hill v. Hawes* decision led to two proposals, both of which became part of the 1946 amendments to the Civil Rules. The *Hill* decision made clear to the Committee that judgments would never properly be final without fur-

⁶⁸ Note that in *Hill*, however, the D.C. Circuit's rules set the time to appeal, so there would be no conflict between the federal rules and a statute. 320 U.S. at 521.

⁶⁹ According to Chairman Mitchell, the Advisory Committee had been wary of altering the statute that set the jurisdiction of the courts of appeals. 1944 MINUTES, *supra* note 59, at 62.

⁷⁰ *Id.* at 11-12. The Committee seemed worried that defeated litigants could appeal to judges' sympathies and that district court judges would easily grant reentry. *Id.* at 27.

⁷¹ *Hill*, 320 U.S. at 524; *see also* 1944 MINUTES, *supra* note 59, at 62.

⁷² *See* 1944 MINUTES, *supra* note 59, at 18. The Advisory Committee's note to the 1946 amendment of Civil Rule 6(b) explains why the old approach was disfavored:

The purpose of the amendment is to clarify the finality of judgments. Prior to the advent of the Federal Rules of Civil Procedure, the general rule that a court loses jurisdiction to disturb its judgments, upon the expiration of the term at which they were entered, had long been the classic device which (together with the statutory limits on the time for appeal) gave finality to judgments. . . . Rule 6(c) abrogates that limit on judicial power. That limit was open to many objections, one of them being inequality of operation because, under it, the time for vacating a judgment rendered early in a term was much longer than for a judgment rendered near the end of the term.

FED. R. CIV. P. 6 advisory committee's note to 1946 amendment.

⁷³ FED. R. CIV. P. 6(b) advisory committee's note to 1946 amendment.

ther guidance to courts from the Rules.⁷⁴ The new amendments further defined when a district court's power to alter a judgment ended by expanding the list of post-trial motions with deadlines that courts could not extend in Rule 6(b).⁷⁵

The other change was the 1946 amendment to former Rule 73 that reduced the time to appeal to thirty days from the entry of judgment, with an extension for failure to learn of the judgment because of excusable neglect. This reduction might have pushed beyond the rulemakers' power had they worked alone and not asked for conforming statutory changes from Congress.⁷⁶ In response to *Hill*, the Chairman of the Advisory Committee, William Mitchell, first proposed shortening the time to appeal to thirty days while having the time run from receipt of formal notice of the judgment, instead of entry of judgment.⁷⁷ The Committee appears to have rejected the idea of running the time to appeal from receipt of notice,⁷⁸ but several members complained about the overly long time to appeal that was available at that time.⁷⁹ The Rules Committee then set out to change the deadline to file notices of appeal.

⁷⁴ The text of the Advisory Committee's notes explains the reason for the 1946 amendments to Rule 6:

The amendment of Rule 6(b) now proposed is based on the view that there should be a definite point where it can be said a judgment is final; that the right method of dealing with the problem is to list in Rule 6(b) the various other rules whose time limits may not be set aside, and then, if the time limit in any of those other rules is too short, to amend that other rule to give a longer time. The further argument is that Rule 6(c) abolished the long standing device to produce finality in judgments through expiration of the term, and since that limitation on the jurisdiction of courts to set aside their own judgments has been removed by Rule 6(c), some other limitation must be substituted or judgments never can be said to be final.

Id.

⁷⁵ *See id.* (explaining why each addition to Rule 6(b) justified not allowing extension of time).

⁷⁶ Chairman Mitchell, while proposing the change, also questioned if the rulemakers had the power to alter the time to appeal through the rulemaking process. *See* 1944 MINUTES, *supra* note 59, at 4 ("The other alternative is to assume that the Court has the power to make rules affecting the *time* for appeal . . ."). The original rulemakers appear not to have had a clear conception of the limitations on their power. *See* Burbank, *supra* note 18, at 1132-37.

⁷⁷ *See* 1944 MINUTES, *supra* note 59, at 4. The Conference of Senior Circuit Judges had also proposed shortening the time. *See id.* at 71-72.

⁷⁸ The proposal adopted by the Committee and contained in the 1946 Report started the thirty-day limit for filing notice of appeal from entry of judgment. 1946 REPORT, *supra* note 48, at 90.

⁷⁹ *See* 1946 REPORT, *supra* note 48, at 90 (proposing that Rule 73 be amended to include a thirty-day limit); 1944 MINUTES, *supra* note 59, at 71-72 (noting that the Act-

The history clearly indicates that the rulemakers guided the revisions to the deadline to appeal, despite some coordination with Congress over the statutory changes. As early as June 24, 1946, the legislative history of the Judicial Code and Judiciary Act of 1948 indicates that the reduction of the time to appeal to thirty days⁸⁰ was done “in conformity with recommendations of members of the Judicial Conference of the United States and proposed amendment to rule 73.”⁸¹ The amended rules also took effect six months before § 2107 and the Judicial Code and Judiciary Act were effective.⁸² The rulemakers’ early drafts made no mention of a statutory change,⁸³ but the legislative history of the statute mentions that the rule amendments had already been proposed. The history supports the claim that the rulemakers were primarily responsible for shortening the time to file notice of appeal.

Although the rulemakers sought legislative changes, their actions are inconclusive regarding whether they thought they had the authority to make changes to jurisdictional requirements. Original Civil Rule 6(c) swept away the term-of-court system,⁸⁴ which the rulemakers themselves referred to as affecting a court’s jurisdiction.⁸⁵ The rule-

ing Chairman and the Conference of Senior Circuit Judges felt that three months was too long). There had been some objection by the Attorney General to shortening the time, and the objection may explain the longer time allowed when the United States is a party. *See id.* at 71-72. The possibility that the Attorney General’s objection spurred the extension of the time to appeal if the government is a party is supported by the notes to proposals contained in the 1946 report of the Committee. *See* 1946 REPORT, *supra* note 48, at 93-94 (detailing the reasons that the government requires additional time).

⁸⁰ *See* 28 U.S.C. § 2107 (2006).

⁸¹ H.R. REP. NO. 80-308, at A174 (1947). Identical language was also included in a previous report, H.R. REP. NO. 79-2646, at A166 (1946), corresponding to a prior version of the Judicial Code and Judiciary Act. The Committee Report on the version of the Judicial Code and Judiciary Act that was passed contains no explanation of § 2107. *See* S. REP. NO. 80-1559 (1948).

⁸² The 1946 amendments were effective March 19, 1948, while the Judicial Code and Judiciary Act was not passed until June 25, 1948, and was effective September 1, 1948. *Amendments to Rules of Civil Procedure for the United States District Courts with Advisory Committee Notes*, 8 F.R.D. 591, 601 (1948).

⁸³ The proposed 1946 amendments make no mention of legislation in support of the change. *See* 1946 REPORT, *supra* note 48, at 90-98.

⁸⁴ Civil Rule 6(c) does not now contain the language of the original rule, eliminating terms of court, which can be viewed in the earlier reports of the Advisory Committee. *See id.* at 1 (providing the then-current text of Rule 6(c)).

⁸⁵ FED. R. CIV. P. 6(b) advisory committee’s note to 1946 amendment. This itself, however, may be a loose use of the term “jurisdictional” because the terms-of-court system was developed by the courts themselves. *See* *United States v. Mayer*, 235 U.S. 55, 67 (1914) (collecting cases supporting the view that “[i]n the absence of statute pro-

makers were unsure, however, if they could alter the time for filing notices of appeal, though not so unsure as to keep the rule from going into effect before the statute. Despite ambiguity over the rule-makers' authority, it was clearly the rulemakers, and not Congress, who drove the creation of a new system for providing finality to judgments and who directed how cases transitioned from the district court to the circuit court.⁸⁶ Unfortunately, the rulemakers, and later the courts, failed to examine their authority to create jurisdictional requirements.

2. Courts Attempt to Define the Impact of Rule 6 and Its Analogs by Blurring the Meaning of "Jurisdictional"

During the period between the enactment of the Rules Enabling Act and the Supreme Court's attempts to clarify the meaning of "jurisdictional" earlier this decade, federal courts used the term imprecisely by expanding it to include court-made rules and by allowing equitable exceptions.⁸⁷

viding otherwise, the general principle obtains that a court cannot set aside or alter its final judgment after the expiration of the term at which it was entered"). The rule-makers did not attempt to supersede the statutes that recognized the practice. See FED. R. CIV. P. 6(c) advisory committee's note ("Such statutes as [former 28 U.S.C. § 12] (Trials not discontinued by new term) are not affected."). Once again, the drafters do not appear to have had a clear conception of jurisdiction, and certainly not one as tied to legislative supremacy as the Taney Court's. See 1944 MINUTES, *supra* note 59, at 69 (providing postscript of letter where Chairman Mitchell described the D.C. Circuit rule at issue in *Hill* as setting the court's jurisdiction).

⁸⁶ However, counsel for the United States in *John R. Sand & Gravel v. United States* argued that § 2107 should not be viewed as merely a conforming statute because "once this matter was brought to its attention, Congress could have enacted whatever statute it wanted." Transcript of Oral Argument at 47, *John R. Sand & Gravel Co. v. United States*, 128 S. Ct. 750 (2008) (No. 06-1164), 2007 WL 3265512. Although the point clearly applies in determining that § 2107 deserves classification as a congressionally passed statute, the argument raises the more important question, discussed *infra* Part 4.B.1.a, of the evidence of congressional intent required to show that a statute is jurisdictional. If all statutes are jurisdictional by default, then the questions of congressional action and jurisdictional status are the same. If, however, more evidence of congressional intent is needed to find a statute jurisdictional, then Congress's failure to act on its own becomes highly relevant. "Despite Supreme Court rhetoric to the contrary, it would . . . be problematic to assign an intent to Congress with respect to Rules promulgated under the Enabling Act." Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. PA. L. REV. 1099, 1153 (2002). A codification based on a suggestion by the Rules Committee similarly does not provide strong indication of a legislative intent to create a jurisdictional limitation.

⁸⁷ See Hall, *supra* note 8, at 410 (arguing that the Court often used "jurisdictional" only to emphasize the mandatory nature of the deadline).

Having found the jurisdictional terms-of-court system replaced by the various rules, courts struggled to determine the nature of such limits. *United States v. Robinson*⁸⁸ represents one of the leading cases of the post-Rules Enabling Act era that holds a rule to be jurisdictional.⁸⁹ At issue in *Robinson* was whether confusion about who was supposed to file notice of appeal—counsel to the defendant or the defendant himself—excused the defendant’s untimely filing.⁹⁰ The Court relied on the unanimous conclusion of the courts of appeals that Civil Rule 6 was jurisdictional (because it could not be extended by the courts) to find its analog, Criminal Rule 45, jurisdictional as well.⁹¹ The *Robinson* Court labeled the deadline for filing notices of appeal in a criminal case “mandatory and jurisdictional,”⁹² preventing extension or excuse even though the deadline at issue was contained in a rule and not a statute.⁹³

The conception of “jurisdictional” embodied in *Robinson* differs significantly from that expressed in *Curry*. First, it expands the core purpose of the Taney Court’s creation of the modern outlines of the meaning of “jurisdiction”—legislative supremacy over the power of Article III courts—to include court-made rules. Second, the government in *Robinson* objected to the late appeal,⁹⁴ so the only issue was whether the rule was mandatory, preventing an equitable exception. The issue was not whether the rule was truly jurisdictional in the sense that the court would have an obligation to examine the deadline sua sponte.⁹⁵ Third, the Court provided a rationale different from that of legislative supremacy to support the use of “jurisdictional”: abstention to the

⁸⁸ 361 U.S. 220 (1960).

⁸⁹ See Poor, *supra* note 8, at 194 (“Of the myriad decisions holding various criminal, appellate, and bankruptcy decisions to be jurisdictional, a great many trace their origin to a 1960 decision of the Supreme Court, *United States v. Robinson*.”).

⁹⁰ 361 U.S. at 220-21.

⁹¹ *Id.* at 228-29.

⁹² *Id.* at 224.

⁹³ At the time of *Robinson*, Criminal Rule 37(a)(2) contained the deadline for filing notices of appeal in criminal cases. *Id.* The provision indicating which deadlines in the Criminal Rules could not be extended by the court was and still is contained in Criminal Rule 45, an analog of Civil Rule 6. See FED. R. CRIM. P. 45(b). Appellate Rule 4(b) currently contains the deadline and certain extensions for filing notices of appeal in criminal cases, and it has only been codified with respect to appeals by the United States. See 18 U.S.C. § 3731 (2006). For appeals by the defendant, there remains a cross-reference in the United States Code to the abrogated Criminal Rule 37. See 18 U.S.C. § 3732 (2006).

⁹⁴ *Robinson*, 361 U.S. at 221.

⁹⁵ Cf. Hall, *supra* note 8, at 410. “Mandatory” refers to the fact that the district court could not alter or waive the time limits, even if they were nonjurisdictional (provided a party objected), but the term does not necessarily require the court to take up the issue sua sponte.

rulemakers. The *Robinson* Court recognized that “powerful policy arguments may be made both for and against greater flexibility” and abstained from deciding the policy questions regarding finality because the rulemakers were better situated to outline comprehensively the boundaries of any exception.⁹⁶ The thrust of *Robinson* was not that the courts could not act,⁹⁷ but merely that it would be imprudent for them to do so.

Based on the Court’s rationale, and in light of the strict legislative-supremacy view of the Taney Court, *Robinson* only stands for an emphatic abstention by the Court to the rulemakers and a command to the lower court to abstain as well.⁹⁸ The *Robinson* Court’s rationale relied heavily on leaving issues of policy to the rulemakers out of pru-

⁹⁶ *Robinson*, 361 U.S. at 229-30.

⁹⁷ *Robinson* does state that “[w]hatever may be the proper resolution of the policy question involved, it was beyond the power of the Court of Appeals to resolve it.” *Id.* at 230. The Court could have been referring to “power” as meaning (1) jurisdiction, (2) that the rule did not allow any exceptions, or (3) that the courts of appeals lack the institutional capacity to determine the policy issues correctly. Given that the Court would allow equitable exceptions to the nonextendable federal rules three years later, the last reading is the most consistent with both the unique-circumstances and *Robinson* line of cases.

⁹⁸ The doctrine of abstention to state and federal administrative agencies are very similar. The doctrine of primary jurisdiction allows for the referral of important questions to a federal agency if Congress granted the agency authority over the issue, the agency’s specialization will help properly determine the issue, and referral will foster uniformity. See Bryson Santaguida, *The Primary Jurisdiction Two-Step*, 74 U. CHI. L. REV. 1517, 1521-25 (2007). However, the court does not lose jurisdiction over the case. *Id.* The *Burford* abstention doctrine for unclear state law involving administrative procedures allows a court to avoid disuniformity by dismissing in favor of determination by a state agency. In *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), the Court affirmed the district court’s use of abstention when faced with an issue involving Texas’s administrative regulation of oil wells. The Court wanted to avoid destroying the uniform state regulatory system. “As a practical matter, the federal courts can make small contribution to the well organized system of regulation and review which the Texas statutes provide.” *Id.* at 327.

Like *Burford* abstention, the use of “jurisdictional” left an administrative agency (or state court) as the only recourse to clarify the rule. See Gordon G. Young, *Federal Court Abstention and State Administrative Law from Buford to Ankenbrandt: Fifty Years of Judicial Federalism Under Buford v. Sun Oil Co. and Kindred Doctrines*, 42 DEPAUL L. REV. 859, 870 (1993) (“Unlike *Pullman* abstention, *Burford* abstention is generally understood to entail a federal court’s outright dismissal of the case before it . . .”). The use of “jurisdictional” for post-trial and notice-of-appeal deadlines, however, differs from abstention because it leaves the litigant with no avenue to have her claims heard, because a subsequent change in the federal rules could not rescue the litigant from dismissal. An abstention from creating exceptions to the federal rules may have been the motivating force behind the Court’s use of “jurisdictional.” See *Robinson*, 361 U.S. at 229-30 (finding the deadline to file notice of appeal jurisdictional because the rulemakers were better positioned to address the issues of policy involved).

dential concerns.⁹⁹ The lower federal courts and subsequent Supreme Court opinions, however, did not interpret *Robinson* as an abstention.

The *Robinson* Court shaped what would be the prevailing view until recent attempts to clean up the meaning of “jurisdictional.” Every circuit held that the deadlines of Civil Rule 6, Criminal Rule 45,¹⁰⁰ Appellate Rule 26,¹⁰¹ and Bankruptcy Rule 9006¹⁰² were “mandatory and jurisdictional.” Other than the time to appeal in a civil case in current Appellate Rule 4(a)¹⁰³ and the time for the government to appeal in a criminal case under Appellate Rule 4(b),¹⁰⁴ however, none of the jurisdictional deadlines was statutory.

The Court further diluted the meaning of “jurisdictional” by allowing certain equitable exceptions to these jurisdictional deadlines. In *Harris Truck Lines v. Cherry Meat Packers, Inc.*, the Court ruled that it could excuse the untimeliness of a notice of appeal because the appellant relied on the district court’s impermissible extension of the deadline to file notice of appeal.¹⁰⁵ The Court found that “unique circumstances” would excuse noncompliance, such as when the judge misled

⁹⁹ As the *Kontrick* Court explained,

Courts, including this Court, it is true, have been less than meticulous in this regard; they have more than occasionally used the term “jurisdictional” to describe emphatic time prescriptions in rules of court. . . . For example we have described Federal Rule of Civil Procedure 6(b), on time enlargement, and correspondingly Federal Rule of Criminal Procedure 45(b), on extending time, as “mandatory and jurisdictional.”

Kontrick v. Ryan, 540 U.S. 443, 454 (2004) (quoting *Robinson*, 361 U.S. at 228-29).

¹⁰⁰ See Poor, *supra* note 8, at 196 n.91 (collecting cases in which the courts have held that the deadlines established by Criminal Rule 45 are jurisdictional).

¹⁰¹ See *id.* at 198 n.108 (collecting cases in which the courts have held that deadlines established by Appellate Rule 26 are jurisdictional).

¹⁰² See *id.* at 199 n.113, 201 n.125 (collecting cases in which the courts have held that the deadlines established by Bankruptcy Rule 9006 are jurisdictional).

¹⁰³ The rulemakers moved the deadline to file notices of appeal from former Civil Rule 73 to Appellate Rule 4 with the creation of the Appellate Rules in 1966. See FED. R. APP. P. 4 advisory committee’s note to 1967 amendment (“This subdivision is derived from [Federal Rule of Civil Procedure] 73(a).”). The statute still partially corresponds to the current Rule. See 28 U.S.C. § 2107 (2006).

¹⁰⁴ This rule is now codified at 18 U.S.C. § 3731 (2006).

¹⁰⁵ 371 U.S. 215, 217 (1962) (per curiam), *overruled by* *Bowles v. Russell*, 127 S. Ct. 2360, 2366 (2007); see also *Thompson v. INS*, 375 U.S. 384, 387 (1964) (per curiam) (excusing late-filed notice of appeal and motions under Rule 52 and Rule 59 because, before the deadline had passed, the district court erroneously granted the litigant an extension for excusable neglect), *overruled by* *Bowles*, 127 S. Ct. at 2366; *Wolfsohn v. Hankin*, 376 U.S. 203, 203 (1964) (per curiam) (excusing the late filing of a Rule 59 motion and notice of appeal because the district court erroneously gave an extension based on excusable neglect), *rev’g* 321 F.2d 393 (D.C. Cir. 1963).

or confused litigants.¹⁰⁶ In *Harris Truck Lines*, the Court failed to notice that the doctrine of unique circumstances contrasts directly with *Curry*, where the Supreme Court did not allow a late appeal even though the litigants relied on an erroneous deadline set by the district court.¹⁰⁷ Until recently, the conflict created by allowing an equitable exception to a supposedly jurisdictional requirement escaped the Court's notice.¹⁰⁸

C. *Cleaning Up the Meaning by Reclaiming the Congressional Origins*

The definitional shift discussed above led the Court to try to clean up the meaning of "jurisdictional," starting with *Kontrick v. Ryan* in 2004. Noting that only Congress can set the subject matter jurisdiction of the federal courts,¹⁰⁹ the Court differentiated between "a rule governing subject matter jurisdiction and an inflexible claim-processing rule."¹¹⁰ Subject matter jurisdiction cannot be expanded by acts that the parties take during litigation, the Court explained, and it only refers to classes of cases falling within a court's authority.¹¹¹ In contrast, claim-processing rules, which are strictly enforced rules governing deadlines once litigation has commenced, could be forfeited by the parties.¹¹² The Court then applied this distinction to find that the time limitation in Bankruptcy Rule 4004, which governs time to file for discharge of debt, and Bankruptcy Rule 9006(b)(3), which prevents a court from extending Rule 4004's time limit except by the terms of the rule, were nonjurisdictional and that *Kontrick* had forfeited any timeliness objection to *Ryan*'s motion by not raising it earlier.¹¹³

In making the distinction between limits on subject matter jurisdiction and claim-processing rules, the Court appeared to define subject matter jurisdiction as only describing the appropriate classes of

¹⁰⁶ See generally Philip A. Pucillo, *Timeliness, Equity, and Federal Appellate Jurisdiction: Reclaiming the "Unique Circumstances" Doctrine*, 82 TUL. L. REV. 693, 701-09 (2007) (describing the history and status of the doctrine of unique circumstances before *Bowles*).

¹⁰⁷ See *United States v. Curry*, 47 U.S. (6 How.) 106, 110-13 (1848).

¹⁰⁸ Some lower court judges did notice, however, including then-Judge Alito. See *United States v. Eleven Vehicles*, 200 F.3d 203, 216 (3d Cir. 2000) (Alito, J., concurring) ("I would note that both the Supreme Court and this Court have recognized an equitable exception to Rule 59. This 'unique circumstances' exception . . . shows that Rule 59's strictures do not implicate Article III subject matter jurisdiction.").

¹⁰⁹ *Kontrick v. Ryan*, 540 U.S. 443, 452 (2004).

¹¹⁰ *Id.* at 456.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.* at 455-56.

cases that the federal courts could or could not hear. In dicta, however, the *Kontrick* Court differentiated the provision at issue in that case from express statutory deadlines.¹¹⁴ By so distinguishing the case, the Court allowed for a later move toward a conception of jurisdiction similar to that used by the Taney Court: that statutory requirements, particularly deadlines, are generally to be understood as jurisdictional, rather than only upon a clear statement of Congress.

Following *Kontrick*, the proper scope of the term “jurisdictional” remained an open question. The limitation on extending certain deadlines contained in Bankruptcy Rule 9006(b)(3) is substantially the same as other timing provisions of the federal rules based on Civil Rule 6.¹¹⁵ The Court’s definitional refinement threatened what lower courts readily accepted after the creation of the federal rules: that the rules’ limits on courts were jurisdictional.

The Court followed *Kontrick* with a unanimous opinion in *Eberhart v. United States* that further questioned the jurisdictional status of the federal rules.¹¹⁶ Noting that the Court’s “repetition of the phrase ‘mandatory and jurisdictional’ has understandably led the lower courts to err on the side of caution by giving the limitations in [Criminal] Rules 33 and 45 the force of subject-matter jurisdiction,” the Court held that the time limits, which cannot be extended under Criminal Rule 45, were nonjurisdictional claim-processing rules.¹¹⁷ The Court implied to the reticent courts of appeals that few if any of the federal rules were still to be considered jurisdictional by noting that “[Criminal] Rule 45(b)(2) has precisely the same effect on extensions of time under Rule 29 as it does under Rule 33, and as we noted in *Kontrick*, Federal Rule of Criminal Procedure 45(b) and Bankruptcy Rule 9006(b) are both ‘modeled on Federal Rule of Civil Procedure 6(b).’”¹¹⁸

Two other cases seemed to complete the transformation of the term “jurisdictional” that began with *Kontrick*. In *Scarborough v. Principi*, the Court ruled that the time limit to file for attorneys’ fees under the Equal Access to Justice Act¹¹⁹ did not concern the classes of cases

¹¹⁴ *Id.* at 453 & n.8. The *Kontrick* court expressly listed § 2107(a) as an example of a statutory deadline contained in a power-conferring statute. *Id.*

¹¹⁵ Bankruptcy Rule 9006 is an analog to Civil Rule 6, Criminal Rule 45 and Appellate Rule 26, all of which determine when the timing provisions of the prospective rules can be excused or altered by the court. *See supra* note 10 (identifying the types of rules that courts most often define as jurisdictional).

¹¹⁶ 546 U.S. 12 (2005) (per curiam).

¹¹⁷ *Id.* at 19.

¹¹⁸ *Id.* (quoting *Kontrick*, 540 U.S. at 456 n.10).

¹¹⁹ Pub. L. No. 96-481, 94 Stat. 2325 (1980).

that the lower court could hear, and thus could not be jurisdictional.¹²⁰ In a detailed opinion by Justice Ginsburg, the Court again visited the issue in *Arbaugh v. Y & H Corp.* in the context of whether an employee-numerosity requirement under Title VII was jurisdictional.¹²¹ In probably the most well-reasoned opinion since the Court first took up the issues in *Curry*, the Court in *Arbaugh* applied a default rule that statutory requirements were nonjurisdictional unless Congress clearly indicated otherwise because Congress did not place the numerosity requirement in the section authorizing courts to hear claims under Title VII.¹²²

D. Statutes Begin to Dominate the Rules

Despite the clarity of *Kontrick* and *Eberhart*, the Court's attempt to clean up the meaning of "jurisdictional" has taken a rather unexpected turn. In *Bowles v. Russell*,¹²³ the Court seized on the statutory-deadlines distinction of *Kontrick*, while differentiating statutory deadlines from nondeadline requirements such as the one at issue in *Arbaugh*. The Court applied a presumption of jurisdictionality for statutory deadlines instead of the presumption of nonjurisdictionality for nondeadline statutory requirements.¹²⁴

The Court's decision to apply such a presumption had rather harsh results. Keith Bowles failed to receive notice of the judgment

¹²⁰ 541 U.S. 401, 413-14 (2004).

¹²¹ 546 U.S. 500, 510-13 (2006).

¹²² See *id.* at 515-16 ("[W]hen Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character.").

¹²³ 127 S. Ct. 2360, 2364-65 (2007) (stating that while time limits are generally jurisdictional, neither time limits in a court's procedural rules nor employee-numerosity requirements are). For further discussion of the *Bowles* Court's reasoning and other implications of the decision, see *The Supreme Court, 2006 Term—Leading Cases*, 121 HARV. L. REV. 315, 315-25 (2007).

¹²⁴ The Court stated, "[j]urisdictional treatment of statutory time limits makes good sense. Within constitutional bounds, Congress decides what cases the federal courts have jurisdiction to consider." *Bowles*, 127 S. Ct. at 2365. Statutes of limitations, however, still have an opposite rebuttable presumption of nonjurisdictionality and availability of equitable tolling—although it may not apply in a specific case such as the statute of limitations in the Court of Claims statute. See *John R. Sand & Gravel Co. v. United States*, 128 S. Ct. 750, 755 (2008) (noting that the Court had replaced an ad hoc approach to determining whether statutes of limitations on claims against the government were jurisdictional with the rebuttable presumption of nonjurisdictionality used for claims between private parties); see also *Diaz v. Kelly*, 515 F.3d 149, 153-154 (2d Cir. 2008) (discussing *Bowles* and *John R. Sand & Gravel* and finding that the Antiterrorism and Effective Death Penalty Act's statute of limitations, 28 U.S.C. § 2244(d) (2006), is still subject to equitable exceptions).

against him in his habeas petition in federal district court.¹²⁵ He then moved to reopen the time to file notice of appeal for fourteen days pursuant to Appellate Rule 4(a)(6).¹²⁶ When reopening the time to file notice of appeal, however, the district court had erroneously given Bowles seventeen days instead of the fourteen days prescribed by rule, and Bowles filed his notice of appeal on the sixteenth day in reliance on the judge's order.¹²⁷

Despite the clear reliance on the judge's order, the Court refused to allow Bowles's appeal. The Court cited precedent, including *Curry*, to find that "taking an appeal within the prescribed time is 'mandatory and jurisdictional.'"¹²⁸ In breaking from the reduced use of "jurisdictional" for rules that started in *Kontrick* and *Eberhart*, the Court distinguished Rule 4(a) based on the existence of a corresponding statute, 28 U.S.C. § 2107.¹²⁹ The Court, however, ignored or was unaware of the fact that the rulemakers created the exact same deadlines before Congress passed a conforming statute.¹³⁰ The Court viewed

¹²⁵ *Bowles*, 127 S. Ct. at 2362.

¹²⁶ *Id.* Rule 4(a)(6) allows a party to move to reopen the time to appeal if she does so within 180 days of the judgment or within seven days of receiving notice, whichever is earlier. The provision was added in the 1991 amendment to Rule 4. See FED. R. APP. P. 4(a)(6) advisory committee's note & transmittal note to 1991 amendment (explaining the reason for the new provision and asking Congress to amend 28 U.S.C. § 2107 to conform to the changes). Congress did subsequently amend § 2107. See Act of Dec. 9, 1991, Pub. L. No. 102-198, § 12, 105 Stat. 1623, 1627. Congress adopted almost identical language for § 2107 to account both for the previous amendments to Rule 4(a)(5), which allows for an extension of time to appeal for excusable neglect or good cause, and the then-pending extension for failure to receive notice, Rule 4(a)(6). H.R. REP. NO. 102-322, at 10 (1991), reprinted in 1991 U.S.C.C.A.N. 1303, 1309-10. The amendment was meant to avoid socially wasteful litigation over whether the statute or rule would govern. *Id.* at 5-6, reprinted in 1991 U.S.C.C.A.N. at 1305-06.

¹²⁷ *Bowles*, 127 S. Ct. at 2362.

¹²⁸ *Id.* at 2363-64 (collecting cases).

¹²⁹ See *id.* at 2364.

¹³⁰ *Id.* at 2366. The Court appears to have relied heavily on the Solicitor General's brief for the conclusion that the statutory codification prevented the deadline for notice of appeal from being a claim-processing rule. See Brief for the United States as Amicus Curiae Supporting Respondent at 10-11, *Bowles*, 127 S. Ct. 2360 (No. 06-5306), 2007 WL 608162 (arguing that the Court has routinely held congressionally set deadlines for filing appeals to be jurisdictional). According to Justice Ginsburg, however, the Court failed to realize that § 2107 conformed to the rules, and that the timing requirements were originally not statute driven:

But, of course, *Bowles*—I mean the Court did miss something. Everyone on the Court did, and that is that the period to file your notice of appeal was originally not in any statute. It was in the rule, the FRAP rule. The opinions, both sides, assumed that the statute came first, and the rule was adopted to conform to the statute, but in fact it was just the opposite. It was a rule, a Fed-

§ 2107 as specifically limiting subject matter jurisdiction, similarly to how it views 28 U.S.C. § 2101, which limits the time for petitioning the Supreme Court for certiorari.¹³¹ The fact that the deadline was also contained in a statute was sufficient for the Court to find it jurisdictional, despite the lack of any indication that Congress intended the deadline to be jurisdictional.

After erroneously finding the statute to be jurisdictional based on *Curry*, the Court wisely rejected the idea that a truly jurisdictional limit could be subject to equitable exceptions based on the same case law.¹³² The Court overruled *Harris Truck Lines* and its progeny, which authorized the use of the doctrine of unique circumstances to the extent that it would allow equitable exceptions to jurisdictional limits.¹³³

After almost four decades of consistent holdings that contained an underlying doctrinal fuzziness, the Court made strides in clarifying the meaning of “jurisdictional” in *Kontrick*, *Eberhart*, and *Bowles*, despite some missteps in when to apply the term. Less than a year after *Bowles*, however, the Court has described that decision in a manner that appears to back away from the *Curry-Bowles* meaning and once again muddles the definition of the term.¹³⁴ Writing for the Court in *John R. Sand & Gravel Co.*, Justice Breyer, joined by Justice Souter—both dissenters in *Bowles*—described *Bowles*’s use of “jurisdictional” not as a principled stand but as “convenient shorthand.”¹³⁵ The Court stated that its use of the term was not meant to indicate a limitation set by Congress, but “to achieve a broader system-related goal” of “promoting judicial efficiency.”¹³⁶ Although the discussion of *Bowles* was limited, the Court’s revisionist treatment has again cast doubt on what was once a clear conception of “jurisdictional” as a congressional

eral Rule of Civil Procedure, which can’t affect jurisdiction. We know that. As Congress says[,] rules of procedure don’t affect jurisdiction.

Transcript of Oral Argument at 44, *John R. Sand & Gravel Co. v. United States*, 128 S. Ct. 750 (2008) (No. 06-1164), 2007 WL 3265512.

¹³¹ *Bowles*, 127 S. Ct. at 2365.

¹³² *Id.* at 2366.

¹³³ *Id.*

¹³⁴ This may have been because the deadline at issue in *Bowles* was not originally set by statute, as the Court seemed to assume. See *supra* notes 129-130. In backing off the original reasoning of *Bowles*, but not its holding, the Court risks further undoing the clarifying attempts of *Kontrick* and *Eberhart*. The Supreme Court recently furthered the revisionist history of *Bowles* by relying on “institutional interests” and other vague interests embodied in the federal rules. *Greenlaw v. United States*, 128 S. Ct. 2559, 2565, 2577 (2008).

¹³⁵ 128 S. Ct. 750, 753 (2008).

¹³⁶ *Id.*

limitation. In a limited discussion, *John R. Sand & Gravel* restored the logic of *Robinson*: jurisdictional limitations can include limitations based on courts' views of when to make or not make policy decisions.

The Court recently implied that it might give no more help in determining which of the many contradictory statements on "jurisdiction" lower courts should follow. In *Greenlaw v. United States*, the district court erroneously sentenced Greenlaw to less than the statutory mandatory minimum.¹³⁷ On appeal to the Eighth Circuit, Greenlaw argued that his sentence was unreasonably high.¹³⁸ The government noted in its brief that the district court erroneously set the sentence below the mandatory minimum, but it did not file a notice of cross-appeal to have the sentence enhanced.¹³⁹ The time for the government to file a cross-appeal is regulated by both the Appellate Rules and a statute.¹⁴⁰ The Supreme Court found that the requirement of filing a cross-notice of appeal to seek alteration of the judgment remained "inveterate and certain" and that federal courts should not correct unnoticed errors for the government, but the Court did not decide whether the requirement was jurisdictional in addition to being mandatory.¹⁴¹ The Court relied heavily on the fact that Congress had required that "high-ranking officials within the Department of Justice" authorize an appeal on behalf of the government but failed to address § 3731's requirements.¹⁴²

The Court's opinion, like *John R. Sand & Gravel*, echoes *Robinson*; the Court explained that "[t]he strict time limits on notices of appeal and cross-appeal would be undermined"¹⁴³ but failed to address the scope of the rules and the rulemakers' authority to determine if there was an actual conflict between the rule and the potential exception. If the Court erred in *Bowles* by not realizing that the rulemakers spurred the passage of the time limits for civil cases, the Court seems to have made an opposite mistake in *Greenlaw*. It cited the issue of finality with the rules, but the rules for appeals by the United States government in a criminal case originated from Congress through a statute; it

¹³⁷ *Greenlaw*, 128 S. Ct. at 2562-63.

¹³⁸ *Id.* at 2563.

¹³⁹ *Id.*

¹⁴⁰ The statute gives the government thirty days to file notices of appeal for certain sentencing errors. 18 U.S.C. §§ 3731, 3742 (2006). The rule mirrors the statute. FED. R. APP. P. 4(b). Neither mentions an extension for cross-appeals.

¹⁴¹ *Greenlaw*, 128 S. Ct. at 2564 (quoting *Morley Constr. Co. v. Md. Casualty Co.*, 300 U.S. 185, 191 (1937)).

¹⁴² *Id.* at 2565.

¹⁴³ *Id.* at 2569.

was not the rulemakers whose concerns of finality were the provision's motivation. Thus, the Court ascribed an intent to the rulemakers without considering the intent of Congress, which first created the provision.

The Court, having found the cross-appeal rule mandatory, "declined to decide 'the theoretical status' of the cross-appeal rule" while recognizing that past opinions "contain statements supporting both characterizations."¹⁴⁴ The status may not be simply theoretical, however, as it goes to the authority of the rulemakers, particularly when, as with § 3731 and Rule 4(b), a statute corresponds with the rule. If the cross-appeal rule is only mandatory, the rulemakers can alter it. If it is mandatory and jurisdictional, then only Congress can alter it.

Although the Court avoided deciding whether lower courts had jurisdiction by making the rule "inveterate and certain," the issue of the rulemakers' authority in the face of potential jurisdictional limitations is not merely "theoretical." The jurisdictional status of rules directly relates to the authority of the actors who help to create the rules of procedure in federal courts. Only Congress, and neither the rulemakers nor the federal courts, can create or modify jurisdictional requirements absent a specific delegation of that power from Congress. The Court's failure to address the issue, after *John R. Sand & Gravel* created confusion about *Bowles's* holding, leaves important questions open to debate. The *Greenlaw* decision itself fails to address the authority for its holding, invoking, without clearly relying on, tradition and historical practice, a statute requiring Department of Justice officials' consent, and the deadlines in the federal rules.¹⁴⁵ It remains unclear, however, who can change the requirement for a cross-appeal: only Congress, the rulemakers in addition to Congress, or the Court in its adjudicatory role? The Court appears to be determining how strictly to enforce the cross-appeal rule through its own authority, but it has failed to clarify this question despite several opinions in the last five years. Addressing this question requires that the system of providing finality to judgments be examined and reformed.

¹⁴⁴ *Id.* at 2565.

¹⁴⁵ *Id.* at 2565-66, 2568-69.

II. THE HISTORICAL TREATMENT CALLS INTO QUESTION WHETHER
POST-TRIAL-MOTION AND NOTICE-OF-APPEAL
REQUIREMENTS ARE TRULY JURISDICTIONAL

The Court struggled to determine the role of post-trial and notice-of-appeal deadlines after court rules became the primary means of guiding conduct during litigation because the reasoning of the traditional approach did not transfer to the post-Rules Enabling Act period. Each period brought with it clarification of the role of such deadlines, but also missteps in identifying the meaning of “jurisdictional” and the authority on which the Court’s decisions rested. An analysis of these cases should go beyond merely citing the unbroken line of decisions calling such requirements “jurisdictional”¹⁴⁶ because the conception of jurisdiction used in different periods clearly varies widely.

The original rulemakers likely viewed the system before the Rules Enabling Act as an inflexible jurisdictional system. They wanted to replace it with a more sensible but probably equally inflexible system.¹⁴⁷ The few statements of the rulemakers at the time, however, did not clearly define the exact form that finality should take, other than preventing a judge from allowing untimely motions merely out of sympathy.¹⁴⁸ The courts had to determine what the rulemakers meant to accomplish with the creation of Civil Rule 6.

The immediate post-Rules Enabling Act cases embodied by *Robinson* and its progeny clearly identified the federal rules as the source of authority over the system for filing post-trial motions and notices of appeal after the Rules Enabling Act. The Court also clearly thought that the rulemakers were better positioned than courts—which are limited to deciding individual cases—to make the policy choices involved in granting more flexibility when the exception could be commonly found. In repeatedly using the phrase “mandatory and jurisdictional,” the pre-*Kontrick* cases should be interpreted to mean only

¹⁴⁶ The history of using “jurisdictional” to label such requirements has often been cited to support the proposition that such requirements are clearly jurisdictional. See *Bowles v. Russell*, 127 S. Ct. 2360, 2363 (2007) (“This Court has long held that the taking of an appeal is ‘mandatory and jurisdictional.’”); *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 61 (1982) (“It is well settled that the requirement of a timely notice of appeal is ‘mandatory and jurisdictional.’”); Poor, *supra* note 8, at 182-86 (making a historical argument for continuing to find such requirements jurisdictional even in light of *Kontrick* and *Eberhart*).

¹⁴⁷ See *supra* text accompanying note 70.

¹⁴⁸ See *id.*

that the requirements are mandatory¹⁴⁹ and that courts should abstain from making policy choices better left to the rulemakers.¹⁵⁰ The Court's approach had little to do with the conception of jurisdiction before the Rules Enabling Act—that of legislative control. Most of the notable pre-*Bowles* cases do not cite to a statute as the source of the deadline for notice of appeal, even if one existed.¹⁵¹ The Court in this period also allowed equitable tolling of the time to appeal that went beyond the Court's previous holding in *Curry*, which focused on congressionally created restrictions.

The clarifying period after *Kontrick* partially erased the misstep of *Robinson* by returning to the Taney Court's definition—legislative enactment—and by restoring a concrete meaning to the term “jurisdictional.” The Court, however, confused the issue of authority by creating its own solution of “claim-processing rules” to determine the status of a late filing, rather than looking to the history of the rules' timing provisions and the rulemakers' intent.

The most recent attempt in *Bowles* relies heavily on the idea of legislative supremacy, embodied in *Curry* and *Kontrick*, which held that only Congress may alter the jurisdiction of the federal courts.¹⁵² The *Bowles* Court, however, relied on an idea of statutory supremacy over court opinions or rules that was developed before the Rules Enabling Act. It failed to question whether the use of such a hierarchy for deadlines created or altered through the rulemaking process remains true to the intent of Congress. Congress has largely delegated power to the rulemakers in this area, and it has generally only adopted corresponding legislation at the request of the rulemakers.¹⁵³

¹⁴⁹ See Hall, *supra* note 8, at 410 (arguing that the Court only means “mandatory” when it has called rules “mandatory and jurisdictional”).

¹⁵⁰ See *supra* note 98 and accompanying text (commenting that courts classify rules as jurisdictional in order to abstain from altering a rule).

¹⁵¹ See *Griggs*, 459 U.S. at 59-60 (citing Appellate Rule 4, and not 28 U.S.C. § 2107, for the deadline to file notices of appeal); see also *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 315-16 (1988) (citing only Appellate Rules 3 and 4). *But see* *Browder v. Dir., Dept. of Corr.*, 434 U.S. 257, 264 (1978) (mentioning § 2107 once in combination with Rule 4, but in the remainder of the opinion citing only Rule 4). A search on Lexis for cases citing Appellate Rule 4(a) after 1947 (the year before 28 U.S.C. § 2107 was passed) and before 2008 resulted in 2558 decisions, compared to only 303 citing 28 U.S.C. § 2107.

¹⁵² This is only true absent a specific delegation of the power. *Cf., e.g.*, 28 U.S.C. § 1292(e) (2006) (allowing the federal rules to authorize interlocutory appeals).

¹⁵³ This is not true for 18 U.S.C. § 3731 (2006), which sets the time for the United States to file notices of appeal in criminal cases. See *supra* note 93.

Through all periods after the Rules Enabling Act, the Court has in some fashion perpetuated the idea that some requirements are inherently jurisdictional, whether because they affect finality,¹⁵⁴ because of the transfer of the case between trial and appellate court,¹⁵⁵ or because timing deadlines are inherently more inflexible than other requirements.¹⁵⁶ However difficult to surmount, a sensible conception of jurisdiction must eliminate the Platonic form or Aristotelian logic¹⁵⁷ of jurisdictional requirements and focus solely on congressional intent.

III. CURRENT STATUS OF POST-TRIAL DEADLINES AND THE DEADLINE FOR NOTICES OF APPEAL

The Supreme Court's attempts to clarify the jurisdictional status of post-trial motions and notice-of-appeal deadlines have left the issue muddled. Although the practice of labeling all deadlines listed in Rule 6 and its analogs in other federal rules may have required a confused meaning of "jurisdictional,"¹⁵⁸ it did have the benefit of creating consistency across all deadlines involving finality. The currently similar requirements may or may not be jurisdictional based largely on historical accident—whether or not the rulemakers decided to ask for a corresponding statutory change—and the status of many requirements is still questionable.

Without further action by Congress and the rulemakers, the current issues will result in much socially wasteful litigation regarding the intent of Congress in passing legislation in areas where the Court, acting as rulemaker, also has rulemaking power. Additionally, there will be supersession clause issues and general confusion about the status of post-trial and appellate deadlines.

Based on current Supreme Court holdings, the deadlines contained in Bankruptcy Rule 9006¹⁵⁹ and Criminal Rule 45¹⁶⁰ are not ju-

¹⁵⁴ See *United States v. Robinson*, 361 U.S. 220, 228-30 (1960) (“[O]therwise, . . . many appeals might—almost surely would—be indefinitely delayed.”).

¹⁵⁵ *Griggs*, 459 U.S. at 59-60.

¹⁵⁶ Compare *Bowles v. Russell*, 127 S. Ct. 2360, 2364-65 (2007) (finding a deadline jurisdictional), with *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514-15 (2006) (finding a nondeadline requirement nonjurisdictional).

¹⁵⁷ See *Hall*, *supra* note 8, at 412.

¹⁵⁸ See *supra* text accompanying notes 94-97.

¹⁵⁹ See *Kontrick v. Ryan*, 540 U.S. 443, 455-56 (2004).

¹⁶⁰ See *Eberhart v. United States*, 546 U.S. 12, 16 (2005) (per curiam). There may, however, be an exception to the criminal rules' not being jurisdictional. The statute governing modification of a criminal sentence, 18 U.S.C. § 3582 (2006), incorporates Criminal Rule 35, which limits the district courts' ability to correct sentences. Two cir-

isdictional but rather claim-processing rules that may be untimely filed if the opposing party fails to object. Most deadlines for filing notices of appeal in civil cases and the exceptions for excusable neglect and failure to receive notice in Appellate Rule 4(a) are jurisdictional because they are codified in 28 U.S.C. § 2107.¹⁶¹ The Court, however, has left in doubt the jurisdictional status of the other deadlines of Appellate Rule 4 and the deadlines in Civil Rule 6(b).

A. Notice of Appeal in Criminal Cases

Under Supreme Court precedent, Criminal Rule 4(b), governing time for defendants to file notices of appeal in criminal cases, likely is not jurisdictional. The deadlines in Rule 4(b) for the United States in a criminal case, in contrast, do have a corresponding statute and so likely would be found jurisdictional.

The Court has questioned the holding of *Robinson*, which found the prohibition on extending the deadline for defendants to file notices of appeal in criminal cases to be jurisdictional.¹⁶² The Court has also praised *Schact v. United States*, which found the Supreme Court rule limiting the time to file petitions for certiorari in a criminal case to be nonjurisdictional.¹⁶³ If the Supreme Court were to consider the jurisdictionality of Appellate Rule 4(b), based on its current precedent, it should conclude that the deadline for defendants to file notices of appeal in criminal cases does not affect a court's jurisdiction, but is instead a claim-processing rule.¹⁶⁴ Because the Supreme Court has not expressly overruled *Robinson*, however, the circuit courts will

circuits have found Rule 35 jurisdictional. See *United States v. Griffin*, 524 F.3d 71, 82-85 (1st Cir. 2008); *United States v. Higgs*, 504 F.3d 456, 464 (3d Cir. 2007).

¹⁶¹ See *Bowles*, 127 S. Ct. at 2364-65 (holding that statutory time limits are jurisdictional). As discussed above, the rationale of *Bowles* has been weakened by subsequent cases, so even its clear holding is in jeopardy. See *supra* text accompanying notes 134-136.

¹⁶² See *supra* note 99; see also *Eberhart*, 546 U.S. at 17 (“*Robinson* is correct not because the District Court lacked *subject-matter jurisdiction*, but because district courts must observe the clear limits of the Rules of Criminal Procedure when they are properly invoked.”).

¹⁶³ 398 U.S. at 63-64; see also *Bowles*, 127 S. Ct. at 2365; *Kontrick*, 540 U.S. at 454.

¹⁶⁴ See Philip A. Pucillo, *Jurisdictional Prescriptions, Nonjurisdictional Processing Rules, and Federal Appellate Practice: The Implications of Kontrick, Eberhart, & Bowles*, 59 RUTGERS L. REV. 847, 869-71 (2007) (concluding that the ten-day limit for defendants to file a notice of appeal was not jurisdictional). But see Poor, *supra* note 8, at 215-17 (arguing that Appellate Rule 4 and Civil Rule 6(b) are still jurisdictional following *Kontrick* and *Eberhart*).

likely be somewhat reluctant to find the deadlines to be nonjurisdictional claim-processing rules.¹⁶⁵

In contrast to the time to appeal for criminal defendants, the thirty-day time limit on filing notices of appeal for the United States is codified in 18 U.S.C. § 3731. If one applies the *Bowles* default of finding statutory deadlines to be jurisdictional, § 3731 should require that courts treat the deadline as jurisdictional for the United States¹⁶⁶ even though nothing in the legislative history necessarily supports such a finding.¹⁶⁷

B. *Notice of Appeal in Civil Cases and Post-Trial Motions that Toll the Deadline*

Two issues remaining unclear after *Bowles* arise out of inconsistencies between Rule 4(a) and § 2107. First, § 2107 does not contain a provision tolling the time to appeal for certain timely post-trial motions.¹⁶⁸ This discrepancy necessarily raises the question whether the deadlines for the motions that toll the time to file notices of appeal are themselves jurisdictional. Second, Appellate Rule 4(a)(3) allows an extra fourteen days to file notices of appeal if another party has

¹⁶⁵ At least four circuits have relied on *Bowles* to determine that Rule 4(b) as applied to criminal defendants is a nonjurisdictional claim-processing rule. See *United States v. Byfield*, 522 F.3d 400, 403 n.2 (D.C. Cir. 2008); *United States v. Frias*, 521 F.3d 229, 231-34 (2d Cir. 2008); *United States v. Garduno*, 506 F.3d 1287, 1290-91 (10th Cir. 2007); *United States v. Martinez*, 496 F.3d 387, 388-89 (5th Cir. 2007). One circuit has found that Rule 4(b) is nonjurisdictional based on *Eberhart*. See *United States v. Sadler*, 480 F.3d 932, 941-42 (9th Cir. 2007). Other circuits have questioned whether Rule 4(b) remains jurisdictional after *Kontrick* and *Eberhart* but have not been willing to overrule long-held precedent. See *Poor*, *supra* note 8, at 218 n.243 (collecting cases).

¹⁶⁶ In finding Rule 4(b) to be a claim-processing rule, the Tenth Circuit specifically limited its holding to appeals from the defendant in criminal trials. *Garduno*, 506 F.3d at 1290-91.

¹⁶⁷ See *Pucillo*, *supra* note 164, at 868 n.152 (“[N]othing in the legislative history suggests that the rule was meant to be jurisdictional in nature.”). The fact that long-standing practice requires statutory authorization for the government to appeal and that § 3731 provides such authorization, however, supports its being jurisdictional. See, e.g., *United States v. Stanton*, 501 F.3d 1093, 1097-99 (9th Cir. 2007) (finding that Congress meant to eliminate all statutory bars on the government’s ability to appeal in criminal cases in § 3731 and thus that the statute should be read as granting a court jurisdiction to hear a broad range of government appeals). Even without *Bowles*’s presumption of jurisdictionality, § 3731 may still be jurisdictional based on the context in which it was passed.

¹⁶⁸ Compare 28 U.S.C. § 2107 (2006) with FED. R. APP. P. 4(a). Post-trial motions for which there is no provision in § 2107 tolling the time for appeal are Civil Rules 50(b), 52(b), 59(b) and (d), 60(b) and (c) (if filed within ten days), and a motion for attorneys’ fees under Rule 54, if the court extends the time to appeal under Rule 58. FED. R. APP. P. 4(a)(4).

filed notice, but § 2107 does not contain a similar provision.¹⁶⁹ This implicates the limits on making procedural rules and the supersession clause of the Rules Enabling Act.¹⁷⁰

Court rules that toll the time to appeal for post-trial motions predate the Rules Enabling Act and § 2107,¹⁷¹ and so the absence of the provision in § 2107 likely does not implicate the supersession clause of the Rules Enabling Act or the rulemakers' questionable authority to supersede a jurisdictional statute.¹⁷² This was the prevailing practice at the time of § 2107's passage with respect to earlier statutory limits on notice of appeal, and Congress's failure to repudiate the practice could be seen as acceptance of the practice.¹⁷³ In addition, because post-trial motions listed in Appellate Rule 4(a)(4) disturb finality, tolling the time to appeal should, as with other rules defining finality, be viewed not as jurisdictional but merely as affecting a prerequisite to appellate jurisdiction: finality of judgment.¹⁷⁴

¹⁶⁹ Compare § 2107 with FED. R. APP. P. 4(a)(3).

¹⁷⁰ 28 U.S.C. § 2072 (2006).

¹⁷¹ *Morse v. United States* provides a clear example:

There is no doubt under the decisions and practice in this court that where a motion for a new trial in a court of law, or a petition for a rehearing in a court of equity, is duly and seasonably filed, it suspends the running of the time for taking a writ of error or an appeal, and that the time within which the proceeding to review must be initiated begins from the date of the denial of either the motion or petition.

270 U.S. 151, 153 (1926); see also *Leishman v. Associated Wholesale Elec. Co.*, 318 U.S. 203, 205 (1943) (finding that court rules tolled the time to appeal).

¹⁷² This Comment uses the term "tolling" to designate the restarting of the time to file notices of appeal, which runs from the entry of the last post-trial motion listed in Rule 4(a)(4)—popularly referred to as a tolling provision. See, e.g., *Wilburn v. Robinson*, 480 F.3d 1140, 1146 n.11 (D.C. Cir. 2007) (describing Rule 4(a)(4) as concerning "appellate tolling"). It is not properly a tolling provision, however, in that the period before the motion does not count, which will impact the effect of "claim-processing rules" combined with the provision. If a post-trial motion is timely for purposes of Rule 4, then it would completely restart the time to file notices of appeal and not merely toll the time to file such notices.

¹⁷³ At least one circuit has had to determine whether part of the tolling provision was jurisdictional. See *Wilburn*, 480 F.3d at 1146 n.11 (ruling, before *Bowles*, that even if § 2107 was jurisdictional, the tolling provision that applies to Civil Rule 60(b) motions, FED. R. APP. P. 4(a)(4)(A)(vi), was a claim-processing rule).

¹⁷⁴ For example, the requirement of entry of a final judgment as a separate document in the docket, which starts the time to appeal, is nonjurisdictional despite its impacting the timeliness of a notice of appeal. See *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 383 (1978) ("We conclude that the Court of Appeals for the Second Circuit was correct in deciding that it had jurisdiction in this case despite the absence of a separate judgment.").

There is a counterargument, however, that the tolling provision and deadlines for post-trial motions listed in Appellate Rule 4(a)(4) are jurisdictional. The timeliness of such motions often determines whether notice of appeal is timely under Appellate Rule 4(a) and § 2107. This close relationship could show that the deadlines in the respective rules should also be jurisdictional. At the very least, if the opposing counsel fails to object to an untimely post-trial motion, making it timely because the deadlines for such motions are claim-processing rules, it does not necessarily follow that the motion should also toll the time to file notice of appeal. At least some litigants and judges have already put forth an argument that, even if a post-trial motion's untimeliness can be excused in hearing the motion, the excusal does not make that motion timely for purposes of tolling in Rule 4(a).¹⁷⁵ As with the Rule 4(b) issue, courts are split on whether the precedent prior to *Bowles* remains valid.¹⁷⁶ Confusion remains over whether deadlines for motions that toll the time to appeal are jurisdictional or, even if the deadlines are nonjurisdictional, whether valid but technically untimely motions can still toll the time to file notice of appeal.

C. *Supersession of § 2107 or Invalidity of Appellate Rule 4(a)(3)*

The jurisdictional status of Appellate Rule 4(a)(3), governing cross-appeals in civil cases, presents a much more troubling situa-

¹⁷⁵ See *Nat'l Ecological Found. v. Alexander*, 496 F.3d 466, 476 (6th Cir. 2007) (rejecting the argument); *Wilburn*, 480 F.3d at 1146 n.11 (rejecting the argument as raised by the dissent); see also Pucillo, *supra* note 164, at 870-73 (arguing that deadlines for post-trial motions in Civil Rule 6(b) are nonjurisdictional).

¹⁷⁶ The Sixth and Eighth Circuits have found that the deadlines contained in Civil Rule 6(b) are nonjurisdictional claim-processing rules. *Dill v. Gen. Am. Life Ins. Co.*, 525 F.3d 612, 618-19 (8th Cir. 2008); *Alexander*, 496 F.3d at 475-76. Before *Bowles*, the Ninth Circuit had similarly concluded that the deadline for a Rule 59 motion for a new trial is not jurisdictional. *In re Onecast Media, Inc.*, 439 F.3d 558, 562 (9th Cir. 2006). In light of *Bowles*, the Ninth Circuit held that although untimely motions may be entertained, they will not toll the time to appeal, as the tolling provision of Rule 4(a)(1) is jurisdictional, and not a claim-processing rule. *United States v. Comprehensive Drug Testing, Inc.*, 513 F.3d 1085, 1100-01 (9th Cir. 2008). The Ninth Circuit appears to have taken a similar view by finding jurisdictional Rule 4(a)(7)(A)(ii), which extends the time to appeal when judgment has not been entered as a separate document, even though it is not contained in § 2107. See *Comedy Club, Inc. v. Improv W. Assocs.*, 514 F.3d 833, 841-42 (9th Cir. 2007). Other circuits have not changed their *Pre-Kontrick* holdings that motions governed by Civil Rule 6(b) are jurisdictional. See Poor, *supra* note 8, at 220 n.254 (collecting cases holding that Rule 59 is jurisdictional).

tion.¹⁷⁷ Because Congress has not codified Rule 4(a)(3), it should not properly be considered jurisdictional under *Bowles*.¹⁷⁸ Unlike that of other deadlines, however, the issue of Rule 4(a)(3) is not whether there are equitable exceptions to the provision of the rule, but whether the provision itself is valid.

The circuits are currently split over whether the first notice of appeal provides jurisdiction to hear a cross-appeal¹⁷⁹ and over whether notice of a cross-appeal represents a nonjurisdictional procedural requirement or a jurisdictional requirement that must be complete before the court has the power to hear the cross-appeal.¹⁸⁰ If the first-filed notice of appeal provides jurisdiction for later cross-appeals,¹⁸¹ then there is no issue, as Rule 4(a)(3) merely acts as a claim-

¹⁷⁷ Rule 4(a)(3) provides a fourteen-day extension from the filing of the first notice of appeal to file a notice of cross-appeal.

¹⁷⁸ The courts of appeals have yet to reach this issue after *Bowles*. See, e.g., *Amidon v. Student Ass'n of the State Univ. of N.Y. at Albany*, 508 F.3d 94, 106 (2d Cir. 2007) (refusing to reach the issue of whether the fourteen-day deadline for cross-appeals is jurisdictional because the opposing party's objection was untimely).

¹⁷⁹ A separate notice of appeal is generally required from any party wishing to alter the judgment. See 15A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3904 (2d ed. 1992) ("Many cases state the general rule that a cross-appeal is required to support modification of the judgment, but that arguments that support the judgment as entered can be made without a cross-appeal."). The three dissenting Justices who reached the issue of jurisdiction in *Greenlaw*, however, would have found the requirement of a cross-appeal to be non-jurisdictional. See *Greenlaw v. United States*, 128 S. Ct. 2559, 2571-72 (2008) (Alito, J., dissenting) ("[T]he cross-appeal rule [is] a rule of appellate practice.").

¹⁸⁰ The First, Third, Sixth, Seventh, and Federal Circuits have held that the first notice of appeal does not confer jurisdiction on the appellate court to hear cross-appeals, but the Second, Ninth, and D.C. Circuits have held that it does. See *Zapata Indus., Inc. v. W.R. Grace & Co.-Conn.*, 34 F. App'x 688, 690 n.* (Fed. Cir. 2002) (collecting cases); *Mendocino Envtl. Ctr. v. Mendocino County*, 192 F.3d 1283, 1298 nn.26-28 (9th Cir. 1999) (collecting cases); 15A WRIGHT, MILLER & COOPER, *supra* note 179, § 3904 n.32 (collecting cases). The Eleventh Circuit has found, in a nonprecedential opinion, that the failure to file a notice of a cross-appeal deprives the court of jurisdiction to hear the cross-appeal. See *Barrington v. Lockheed Martin, U.A.W. Local 788*, 257 F. App'x 153, 155 n.1 (11th Cir. 2007). The Fourth Circuit, in a nonprecedential opinion, stated that the notice of cross-appeal is not a jurisdictional requirement. See *Babb v. U.S. DEA*, 146 F. App'x 614, 621 (4th Cir. 2005).

¹⁸¹ The Court has determined that notice of appeal by the government in criminal cases is required before a court can hear a cross-appeal. *Greenlaw*, 128 S. Ct. at 2564-66. The Court, however, declined to determine if the notice was a jurisdictional requirement. *Id.* *Greenlaw's* holding may not apply outside cross-appeals by the government in criminal cases. First, such appeals are governed by statute, 18 U.S.C. § 3731 (2006), and the Court relied on the fact that the government must receive approval by senior Justice Department officials before it can take an appeal. *Greenlaw*, 128 S. Ct. at 2565. Neither of these would necessarily apply to cross-appeals in civil cases, or cross-appeals by criminal defendants.

processing rule that does not conflict with § 2107. If the first-filed notice of appeal does not confer jurisdiction, then filing notice of cross-appeal provides jurisdiction and would act as an extension of the deadline for notice of appeal contained in § 2107. This result calls into question whether Appellate Rule 4(a)(3) represents a valid exercise of rulemaking authority and supersedes § 2107.

The “procedure” limitation of the Rules Enabling Act likely prevents the rulemakers from altering the jurisdiction of the federal courts without further delegation from Congress.¹⁸² In *Bowles*, the Court mentioned in passing that Congress would have to authorize the rulemakers to change a jurisdictional statute like § 2107.¹⁸³ If, as a majority of the circuits have held, a court’s jurisdiction requires a separate notice of appeal, Rule 4(a)(3) may very well violate the “procedure” limitation on rulemaking power and be invalid.

Before *Bowles*, the sloppy use of the term “jurisdictional” for rules had not led courts and commentators to question whether the conflict between a then-jurisdictional rule and a jurisdictional statute meant that the rulemakers had exceeded their authority.¹⁸⁴ If a cross-appeal requires separate notices of appeal for the court to have jurisdiction, § 2107 directly conflicts with Rule 4(a)(3) because it purports to extend the jurisdiction of the federal courts.¹⁸⁵ Because only Congress

¹⁸² See *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 370 (1978) (“[I]t is axiomatic that the Federal Rules of Civil Procedure do not create or withdraw federal jurisdiction.”).

¹⁸³ See *Bowles v. Russell*, 127 S. Ct. 2360, 2367 (2007) (“If 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.”).

¹⁸⁴ Appellate Rule 4(a) has been found to supersede statutes setting a different time to appeal than does the rule, including § 2107. See COMM. ON THE RULES OF PRACTICE AND PROCEDURE, SUMMARY OF THE REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON THE RULES OF PRACTICE AND PROCEDURE 2 (1990) (recommending that Congress amend § 2107 because the provision allowing ninety days to appeal in admiralty cases conflicted with Rule 4(a)(1), although case law indicated that the rule superseded § 2107); see also *Cederbaums v. Harris*, 484 F. Supp. 125, 127-28 (S.D.N.Y. 1980) (finding that because § 2107 lacked the excusable-neglect provisions of Rule 4, Rule 4 superseded § 2107); Hall, *supra* note 8, at 412 n.60 (arguing that Rule 4 supersedes § 2107 because § 2107 lacks the tolling provision of Rule 4). However, Professor Hall’s suggestion based on the tolling provision fails to recognize both that the statute and rule may not conflict on this point, and that the tolling provision came before the statute’s passage, preventing invocation of the supersession clause.

¹⁸⁵ Assuming that notice of cross-appeal was a jurisdictional prerequisite, there would remain questions whether § 2107 abrogated Rule 4(a)(3) or whether Rule 4(a)(3) was valid when created. The rulemakers added the fourteen-day time extension to former Civil Rule 73(a) for multiple or cross-appeals in 1966, and the addition was transferred to Appellate Rule 4(a) with the creation of the Appellate Rules. See 12 WRIGHT & MILLER, *supra* note 18, § 3062 n.2 (providing the text of former Rule 73 af-

can determine the subject matter jurisdiction of the federal courts,¹⁸⁶ Rule 4(a)(3) would be invalid because it goes beyond the rulemakers' authority. The lack of any mention of cross-appeals in the 1991 amendments to § 2107 could be read as an implicit adoption of the provision, but it also could be read as a rejection of the proposal by failing to adopt the provision while revising § 2107 to conform to other provisions of Rule 4(a).¹⁸⁷ Congress, like the courts, probably did not recognize any conflict because the meaning of the term "jurisdictional" remained vague at the time of the amendment. Because § 2107 is jurisdictional and Rule 4(a)(3) purports to extend the time limit of § 2107, however, an argument could be made that Rule 4(a)(3) is not a valid exercise of the rulemakers' authority.

This confusion could be avoided if courts began to interpret § 2107 to require only the first notice of appeal to grant jurisdiction over any subsequent cross-appeals, but this reversal of case law in many circuits would merely use interpretation to allow the rules to effectively amend a jurisdictional statute. The later addition of a notice-of-cross-appeal provision in the federal rules cannot alter the intent of Congress in passing an earlier statute. The statute was either jurisdictional or not at its creation, and the rulemakers do not have the au-

ter the 1966 amendments); *see also* FED. R. APP. P. 4(a) advisory committee's note to 1967 amendment ("This subdivision is derived from FRCP 73(a) without any change of substance."). The sequence of amendments to Rule 4 and § 2107 presents a question whether nonsubstantive amendments or amendments to other subsections should determine which comes last in time for purposes of supersession. Because the Rule 4(a)(3) provision came after the initial passage of § 2107, it could abrogate § 2107 under the supersession clause, *if* it were a valid rule. The amendment of § 2107 in 1991 that failed to include the provision could be considered the last in time, however. The sequence is further complicated by the fact that Rule 4(a)(3) was amended in 1993, though "no substantive change was intended." FED. R. APP. P. 4(a)(3) advisory committee's note to 1993 amendment. In most circuits, the last substantive amendment, which was made in 1966, would likely govern if it was valid. *See* Edward A. Hartnett, *Against (Mere) Restyling*, 82 NOTRE DAME L. REV. 155, 171-75 (2006). Under the Sixth Circuit's approach to the supersession clause, however, the intent of the Committee would be irrelevant and Rule 4 would still be the last in time. *See id.* (commenting on the Sixth Circuit's strict last-in-time approach). The difference is likely merely semantic because a rule that would supersede a jurisdictional statute is likely invalid in the first place, as it goes beyond the rulemakers' authority.

¹⁸⁶ This limitation is true absent a more specific delegation, such as the delegation of the ability to authorize certain interlocutory appeals. *See* 28 U.S.C. § 1292(e) (2006).

¹⁸⁷ This failure to adopt Rule 4(a)(3) in the § 2107 amendments highlights the difficulty of interpreting inaction by Congress. *See* William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 90-103 (1988) (stating that courts have allowed incorporation of existing precedent when a statute does not clearly overrule it, but also that courts have found significance in the rejection of a specific proposal). Assuming that legislative action can tell us about legislative intent is questionable, however. *Id.* at 94.

thority to alter the statute's jurisdictional status after its passage. Redefining the jurisdictionality of the cross-appeal rule to validate the rulemakers' later acts allows them to effectively amend a statute that would otherwise be jurisdictional.

D. *Permissive Appeals and Rule 5*

The effect of *Bowles* on permissive appeals under Appellate Rule 5 remains unclear. If a party must request permission from the court of appeals to file an appeal, then Rule 5 applies. The rule directs that if the statute or rule authorizing the appeal does not specify a time to file the petition to appeal, then Rule 4's deadlines apply to the request for certification to appeal.¹⁸⁸ This rule, however, creates a conflict with *Bowles*. By the statute's terms, § 2107's "jurisdictional" deadline applies to all appeals by the statute's terms and requires that notice of appeal be filed within thirty days from the entry of the judgment.¹⁸⁹ In addition, Rule 5 also purports to allow the district court to amend orders when it must make specific findings, as when such findings are needed to permit an interlocutory appeal.¹⁹⁰ Arguably, *Bowles* and § 2107 require that notice of appeal, and not simply request for permission to appeal, be filed within thirty days from judgment, but permission to appeal may not even be granted within thirty days. Like Rule 4(a)(3), Rule 5 purports to extend the "jurisdictional" deadline for filing notices of appeal, and this extension would violate the Rules Enabling Act.

A similarly confusing question arises in the context of appeals from orders granting or denying class certification. Civil Rule 23(f) authorizes permissive appeal of class-certification orders under a congressional grant of authority to the rulemakers to define which orders can be appealed interlocutorily.¹⁹¹ Under Rule 23(f), a party has ten days to petition for permission to file an appeal.¹⁹² Rule 23(f) presents yet another area where congressional control of jurisdiction and the limited authority of the rulemakers meet.

Rule 23(f) uses congressional authorization to allow permissive appeals from these orders. Civil Rule 6(b), however, fails to include

¹⁸⁸ FED. R. APP. P. 5(a)(2).

¹⁸⁹ 28 U.S.C. § 2107(a) (2006).

¹⁹⁰ FED. R. APP. P. 5(a)(3).

¹⁹¹ 28 U.S.C. § 1292(e); FED. R. CIV. P. 23(f).

¹⁹² FED. R. CIV. P. 23(f).

Rule 23(f).¹⁹³ By the terms of Civil Rule 6(a), therefore, a court should be able to extend the deadline to petition for permission to appeal for excusable neglect or good cause, but not the actual deadline to file notice of appeal, which would arguably still be the thirty days provided for in § 2107.

Courts are split on whether the ten-day deadline to file a notice of appeal in Rule 23(f) is jurisdictional.¹⁹⁴ The rule only speaks to permission to appeal, and not to the actual deadline to file a notice of appeal, creating a tension between a jurisdictional rule and a jurisdictional statute. This language may not present an issue regarding the authority of the rulemakers because Congress has specifically delegated the authority to allow interlocutory appeals.¹⁹⁵ One could read the authorization of interlocutory appeals, however, to not extend to authorizing supersession of a jurisdictional statute directing how such appeals are to be taken.

The difficulty in applying the term “jurisdictional” to permissive appeals shows the limits of *Bowles*’s elevation of statutes above court rules. Much of what the rulemakers have done since 1948 to the requirements for filing notice of appeal could be viewed as beyond their authority because a statute passed in 1948 at the request of the rulemakers has been incorrectly interpreted as a strict jurisdictional bar.

E. *Status of the Doctrine of Unique Circumstances*

The doctrine of unique circumstances could survive despite being, as the Court has said, in a “40-year slumber.”¹⁹⁶ The Court only eliminated the doctrine to the “extent [it] purport[s] to authorize an exception to a jurisdictional rule.”¹⁹⁷ If circuit courts continue to reverse their precedent that post-trial motions and notices of appeal for criminal defendants are “mandatory and jurisdictional,” then the doctrine

¹⁹³ FED. R. CIV. P. 6(b).

¹⁹⁴ See *Gutierrez v. Johnson & Johnson*, 523 F.3d 187, 198 & n.9 (3d Cir. 2008) (finding Rule 23(f) nonjurisdictional but recognizing that other circuits have called it jurisdictional).

¹⁹⁵ 28 U.S.C. § 1292(e) (2006). One could argue that Congress should be unable to delegate the important constitutional function of shaping the federal courts’ jurisdiction. See, e.g., Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 498 (1989) (arguing that a court’s *Chevron* deference to an administrative agency over which it has jurisdiction violates nondelegation principles).

¹⁹⁶ *Bowles v. Russell*, 127 S. Ct. 2360, 2366 (2007).

¹⁹⁷ *Id.*

may have some life.¹⁹⁸ Courts may use the doctrine to determine when reliance on a district court's extension of time to file post-trial motions tolls the time to appeal.

For example, the Sixth Circuit found that failure to object to an untimely post-trial motion makes the motion "timely" for purposes of Appellate Rule 4(a)(4) because the timeliness requirement of the tolling provision was a forfeitable claim-processing rule.¹⁹⁹ The Sixth Circuit did not mention the doctrine but essentially adopted it by allowing a notice of appeal filed after thirty days because the district court deemed a motion to alter or amend the judgment timely. It reached this conclusion even though the motion to amend was filed more than ten days after judgment.²⁰⁰ Filing a timely post-trial motion listed in Appellate Rule 4(a)(4), if properly done, would postpone the deadline for filing an appeal.²⁰¹ If the other side fails to object, granting an unopposed motion or extension to file such a motion outside the time limit would be an assurance by a judicial officer that the post-trial motion was properly done because it would be valid under the claim-processing rule. Thus the litigant could claim the definition of the doctrine in *Osterneck v. Ernst & Whinney* was met: "a party has performed an act which, if properly done, would postpone the deadline for filing his appeal and has received specific assurance by a judicial officer that this act has been properly done."²⁰²

¹⁹⁸ Circuit courts continue to question the doctrine's existence and apply it narrowly. See, e.g., *Gutierrez*, 523 F.3d at 198-99 (questioning whether the doctrine applied to nonjurisdictional claim-processing rules but finding that, even if it did, the appellant did not receive the required specific assurance).

¹⁹⁹ See *Nat'l Ecological Found. v. Alexander*, 496 F.3d 466, 476 (6th Cir. 2007) (finding a motion to alter or amend the judgment timely because opposing counsel failed to object to it as late when the district court granted an extension to file the motion).

²⁰⁰ *Id.* But see *Dill v. Gen. Am. Life Ins. Co.*, 525 F.3d 612, 619-20 & n.10 (8th Cir. 2008) (rejecting the argument that the party opposing a motion forfeited an objection by raising the timeliness issue in its merits brief instead of objecting when the extension was granted).

²⁰¹ The rule includes motions under Civil Rules 50(b), 52(b), 59(b) and (d), 60(b) and (c) (if filed within ten days), and a motion for attorneys' fees under Rule 54, if the court extends the time to appeal under Rule 58. FED. R. APP. P. 4(a)(4).

²⁰² See 489 U.S. 169, 179 (1989) (differentiating a court's merely hearing arguments on a late post-trial motion from the judge's providing specific assurance of timeliness). The fact that such motions are likely no longer governed by jurisdictional deadlines may change the stringency with which courts apply the doctrine of unique circumstances—if it is applied at all. Some case law, however, holds that extensions for post-trial motions are not within the doctrine. See, e.g., *Weitz v. Lovelace Health Sys., Inc.*, 214 F.3d 1175, 1179 (10th Cir. 2000) (refusing to find that an extension for a motion for a new trial would provide assurance that a subsequent notice of appeal would be timely).

Although *Kontrick* and *Eberhart* dictated many of the changes in jurisdictional status, it appears that *Bowles*, by using an if-statutory-then-jurisdictional formulation for deadlines, acted much like a limiting instruction calling attention not to what was jurisdictional but rather to what was not. The importance of *Bowles* may not be in what it labeled as jurisdictional, which lower courts continued to treat as jurisdictional despite the *Kontrick* line of cases, but rather that the framework allows courts to exclude rules from what is jurisdictional.²⁰³ The unique-circumstances doctrine could still be applied to this growing subset of deadlines.

IV. DIVORCING “JURISDICTIONAL” FROM THE FEDERAL RULES: REFORMING THE SYSTEM OF PROVIDING FINALITY

The Court should work with Congress, through the rulemaking process, to fashion a way to treat post-trial and notice-of-appeal requirements that clearly identifies both who has authority to amend the requirements and the consequences of failing to meet the requirements.

The current status of the law in many ways resembles that of the pre-Rules Enabling Act procedural landscape on issues of finality. The original rulemakers rejected the unfairness of the term-of-court system because it arbitrarily left litigants with cases at the end of the term less time to challenge the judgment.²⁰⁴ However, courts still sometimes treat litigants in similar positions differently. Even if the circuits resolved their splits, deadlines would still be jurisdictional for notice of appeal in civil cases and for the government in criminal cases, but not for cross-appeals (possibly) or for criminal defendants. Post-trial motions are not jurisdictional, even though courts have treated them similarly to notices of appeal for more than forty years. The current situation calls for more than the piecemeal reform that the Court has provided by addressing the issue on a case-by-case basis.

²⁰³ The Second, Fifth, Sixth, Eighth, and Tenth Circuits reversed longstanding precedent holding rule-based deadlines jurisdictional after *Bowles*. See sources cited *supra* notes 165, 176. Only the Ninth Circuit did so after *Kontrick* and *Eberhart*. See sources cited *supra* notes 165, 176; see also Poor, *supra* note 8, at 219-21. The D.C. Circuit did so for part of the Appellate Rules but had the advantage of citing the *Bowles* lower-court opinions. See *Wilburn v. Robinson*, 480 F.3d 1140, 1146 n.11 (D.C. Cir. 2007) (finding part of the tolling provision of Appellate Rule 4(a)(4)(A) to be a claim-processing rule).

²⁰⁴ See FED. R. CIV. P. 6 advisory committee’s note to 1946 amendment (explaining reasons for the rejection of the terms of court).

The solution must acknowledge the fact that the creation of the federal rules represented a triumph of equity.²⁰⁵ The recent rise of claim-processing rules further introduced flexibility and approached an introduction of equity to the area of finality.²⁰⁶ Any reform of the current system must keep in mind that equity led to the success of the original rules, as stated by Judge William Chesnut of the United States District Court for the District of Maryland and recounted to the early Rules Committee:

My own comment from experience is that in five years of observation of the rules and their operation in a large metropolitan area, I have yet to note an instance in which they have been found lacking. Particularly it should be impressive to lawyers that no case has come under my notice in which any lawyer or client has suffered ultimate disadvantage from default or ignorance. There are literally no pitfalls or traps from which they cannot be extricated by the reasonable discretion of the judge, where the parties and their counsel have exercised good faith and the most ordinary diligence. The reason for this remarkable result is the flexibility of the rules in giving large discretion to the judge to relieve against inadvertent mistakes, and the simplicity and clarity of the rules.²⁰⁷

Judge Chesnut, however, spoke before the rules governed notice-of-appeal deadlines and expanded the number of motions that had unextendable deadlines.²⁰⁸ Unfortunately, the past sixty years of practice in labeling post-trial motions “jurisdictional” has had its fair share of pitfalls and traps.²⁰⁹

²⁰⁵ See Subrin, *supra* note 1, at 973-74.

²⁰⁶ Claim-processing rules themselves, however, are inflexible once a litigant invokes the relevant deadline in the rule. See *Kontrick v. Ryan*, 540 U.S. 443, 456 (2004) (“[A] claim-processing rule . . . even if unalterable on a party’s application, can nonetheless be forfeited if the party asserting the rule waits too long to raise the point.”). The Court did not reach the issue of whether equitable considerations can apply to claim-processing rules. *Id.* at 457. In determining when claim-processing rules that involve “judicial interests beyond those of the parties” are forfeited, the Tenth Circuit has ruled that judges can impose restrictions *sua sponte* if there is “indication that efficiency of judicial administration or finality are implicated.” *United States v. Mitchell*, 518 F.3d 740, 751 (10th Cir. 2008). This more flexible approach echoes the equity-based approach of *Harris Truck Lines*, provided that the opposition has failed to object.

²⁰⁷ 1944 MINUTES, *supra* note 59, at 43-44.

²⁰⁸ The original rules did not contain a limitation on the time to appeal (which was set by statute) and only prevented the period for filing a motion for a new trial from being extended. The time periods for other motions were made nonextendable and a deadline for filing notice of appeal added in the 1946 amendments. See *supra* Part I.B.1.

²⁰⁹ For example, the Advisory Committee had to fix a “trap for an unsuspecting litigant” created by the 1979 amendment to Appellate Rule 4 that had been used to nullify a notice of appeal filed before a post-trial motion or while a post-trial motion was pending. FED. R. APP. P. 4(a)(4) advisory committee’s note to 1993 amendment. Allowing judges to exercise some discretion would mitigate the draconian results

Any reform to the current system of post-trial motions and notices of appeal must clarify the authority of the rulemakers to enact such rules, identify a process—the Court acting through its rulemaking power, as opposed to an unclear mixture of rulemaking and legislation—by which shortcomings can be addressed, and allow judges some discretion to make reasonable decisions regarding implementation of the rules, all while still preserving finality.

A. *Authority of the Rulemakers to Reform the Deadlines*

Determining the authority of the rulemakers to reform the current system requires an examination of the authority of the rulemakers to act in the face of a jurisdictional statute and the ability of the rulemakers to disturb the finality of judgments.

The principle that “[o]nly Congress may determine a lower federal court’s subject matter jurisdiction”²¹⁰ implies that the rules cannot alter subject matter jurisdiction because congressional action in the rulemaking process is indirect compared to most grants or limitations of subject matter jurisdiction. Most grants of jurisdiction are “considered and enacted exclusively by Congress, the body in which Article III of the Constitution vests the authority to regulate federal court jurisdiction.”²¹¹ The Court implied as much in *Bowles*,²¹² and beginning with the adoption of Civil Rule 82, the rules have stated that they do not affect the jurisdiction of the district courts, with jurisdiction referring to subject matter jurisdiction. In addition, Congress has specifically authorized the rulemakers to alter the appellate jurisdiction of the courts of appeals in certain ways,²¹³ implying that the original grant does not authorize altering subject matter jurisdiction.

sometimes created by unclear rules. See Nana Quay-Smith, *Post Trial Motions & Notice of Appeal: Avoiding the Trap for the Unwary*, 37 RES GESTAE 130 (1993) (summarizing problems caused by the unclear distinction between motions that toll the time to appeal under Rule 4(a)(4) and motions that do not).

²¹⁰ *Kontrick*, 540 U.S. at 452.

²¹¹ 14 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE § 82.02 (3d ed. 1997).

²¹² See *Bowles v. Russell*, 127 S. Ct. 2360, 2367 (2007) (“If 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.”); see also *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 370 (1978) (“[I]t is axiomatic that the Federal Rules of Civil Procedure do not create or withdraw federal jurisdiction.”).

²¹³ See 28 U.S.C. § 1292(e) (2006) (allowing rules to authorize interlocutory appeals); *id.* § 2072(c) (allowing rules to define when a ruling is final for purposes of determining appellate jurisdiction).

Section 2107, governing the time to file notices of appeal in civil cases, affects the courts' subject matter jurisdiction,²¹⁴ as § 3731 likely does for the time that the government has to file notice of appeal in a criminal case.²¹⁵ Although the prior cases finding notice of appeal mandatory and jurisdictional were unclear as to whether the requirements codified in § 2107 invoked the *subject matter* jurisdiction of the federal courts,²¹⁶ *Bowles* makes clear that they do.²¹⁷ There is no applicable statutory delegation of power under which the rulemakers could alter the subject matter jurisdiction of the federal courts in this respect; the rulemakers likely do not have authority to alter the requirements of § 2107 or § 3731, even though they have previously amended Appellate Rule 4(a) to expand the ability to appeal beyond what is allowed under § 2107.

The ability of the rulemakers to authorize or limit the transfer of a case to the courts of appeals by filing notices of appeal remains problematic under the Rules Enabling Act. However, any problems are likely to coincide with the issue of whether the rulemakers' actions contradict a statute setting the subject matter jurisdiction of the courts of appeals. As the Court has clarified in the line of cases running from *Kontrick* to *Bowles*, only Congress can determine the subject matter jurisdiction of the federal courts in the absence of a specific delegation of that power. Two statutory provisions already provide general grants of appellate jurisdiction.²¹⁸ If § 2107 and § 3731 did not exist, the appellate and civil rules could be seen as only directing the method of such a transfer given a separate statutory grant of jurisdiction, and therefore not affecting courts' jurisdiction.

If a relevant jurisdictional statute does not pose an issue, the issues of finality tied to post-trial motions are likely on the procedural side of the procedure-substance distinction. However, some thought must be given to whether finality of judgment represents a substantive right or, assuming that the second sentence of the Rules Enabling Act is sur-

²¹⁴ See *supra* Part I.D.

²¹⁵ See *supra* Part III.A.

²¹⁶ See Hall, *supra* note 8, at 400-18 (discussing the historical use of "jurisdictional" for notices of appeal and concluding that the requirements involve something more like personal than subject matter jurisdiction).

²¹⁷ *Bowles v. Russell*, 127 S. Ct. 2360, 2365-66 (2007).

²¹⁸ See 28 U.S.C. § 1291 (2006) (granting jurisdiction on appeals from final judgments); *id.* § 1292 (granting jurisdiction over interlocutory orders).

plusage,²¹⁹ whether it falls on the substantive side of the procedure-substance distinction.

Like limitation or abatement of actions,²²⁰ finality of judgment necessarily entails a determination of when rights are extinguished.²²¹ Unlike statutes of limitations or abatement of actions, the deadlines for filing post-trial motions and notices of appeal extinguish procedural rights created by the rules themselves—the avenue and manner of challenging a judgment. The rulemakers replaced the system for determining finality—the terms of court—without having to supersede statutes.²²² Many of the issues regarding finality, however, like the original term-of-court system, rested on federal decisional law, which the legislative history of the Rules Enabling Act’s limitations failed to address when discussing the extent of the rulemakers’ authority.²²³ Yet given the historical practice of the rulemakers acting in the area²²⁴ and the procedural nature of the rights involved, the rulemakers likely have the authority to determine when judgments are final.²²⁵

With respect to the authority of rulemakers to make changes to post-trial motions and notices of appeal, the various deadlines and requirements fall into two different categories. In the first, the rulemakers have the authority to alter the content of Civil Rule 6(b) and its analogs and notice-of-appeal requirements for criminal defendants under Rule 4(b). In the second, based on current Supreme Court precedent, the rulemakers arguably do not have the authority to alter the requirements of Appellate Rule 4(a) regarding deadlines for

²¹⁹ See Burbank, *supra* note 18, at 1107-08 (arguing that the Supreme Court was right to not give the second sentence independent meaning).

²²⁰ See *id.* at 1121 (“Limitation or abatement of actions is included in this category [of matters involving substantive legal and remedial rights] because the decision when to bar or abate a claim limits whatever rights have been conferred on the claimant by the substantive law.”).

²²¹ See James Wm. Moore & Elizabeth B.A. Rodgers, *Federal Relief From Civil Judgments*, 55 YALE L.J. 623, 629 (1946) (“Historically, the term[-of-court] rule can be adequately explained as a rule of repose (somewhat analogous to a statute of limitations), which the common law and equity courts invoked to give finality to their judgments.”).

²²² See FED. R. CIV. P. 6(c) advisory committee’s note (“Such statutes as [former 28 U.S.C. § 12] (Trials not discontinued by new term) are not affected.”).

²²³ See Burbank, *supra* note 18, at 1112 n.447, 1125 n.501 (noting that Congress did not indicate whether the supersession clause or procedural limitation prevented the rulemakers from altering federal decisional law).

²²⁴ See FED. R. CIV. P. 6 advisory committee’s note to 1946 amendment (commenting on the removal of the traditional means of determining finality, the terms-of-court system); FED. R. CIV. P. 60(b) (providing various methods of upsetting the finality of judgments).

²²⁵ The Rules Enabling Act currently allows the rules to determine finality. See 28 U.S.C. § 2072(c) (2006).

criminal appeals; because they are codified in § 2107 and § 3731, they fall outside the rulemakers' grant of authority.

B. *Introducing Equity into Civil Rule 6 and Its Analogs*

At the end of the *Bowles* opinion, the Court suggests one possible solution to the inequities caused by strict deadlines: a congressional grant of power to the rulemakers to alter jurisdictional deadlines.²²⁶ However, this solution has disadvantages. First, it is an overly broad solution to a problem that affects only a handful of statutes.²²⁷ Congress may hesitate to empower the Court to set the contours of the federal courts' jurisdiction.²²⁸ Second, such a solution would involve use of the supersession clause, potentially leading to needless litigation²²⁹ at a time when the usefulness of the clause may still be in doubt.²³⁰

Unless the Court can be convinced to reverse its holding that § 2107 is a jurisdictional limitation on the federal courts,²³¹ the rule-

²²⁶ *Bowles v. Russell*, 127 S. Ct. 2360, 2367 (2007).

²²⁷ *See, e.g.*, 18 U.S.C. § 3731 (2006); 28 U.S.C. § 2107 (2006). There are likely numerous statutes for appealing an agency order that involve "jurisdictional" deadlines based on *Bowles*'s jurisdictionality default or normal statutory interpretation. *See, e.g.*, *Bah v. Mukasey*, 521 F.3d 857, 859 (10th Cir. 2008) (finding an exhaustion requirement governing appeals from decisions of the Bureau of Immigration Appeals to be jurisdictional under *Bowles*); *see also* Poor, *supra* note 8, at 204 (listing statutes that have been deemed jurisdictional). Such statutes are outside the scope of this Comment's recommendations, however. The inequitable results and confusion from having "jurisdictional" deadlines in such contexts may not occur as frequently as with transfers from district courts to circuit courts. Such reviews initiate those cases in federal courts and may involve issues similar to statutes of limitations, which might implicate substantive rights, making reform by rule inappropriate. In addition, Rule 4 and several other provisions do not apply to review of agency decisions or tax court decisions. *See* FED. R. APP. P. 14 (providing that Rule 4 does not apply to the review of a Tax Court decision); FED. R. APP. P. 15 (describing procedure for the review of agency orders).

²²⁸ Congress, however, has delegated this power in similar situations. *See* 28 U.S.C. § 2072(c) (2006) (allowing the rulemakers to determine what constitutes a final judgment).

²²⁹ *See* H.R. REP. NO. 102-322, at 5-6 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1303, 1305-06 (commenting on the need to avoid the "wastefully expensive litigation and inadvertent loss of rights of appeal in a procedural snarl" that a controversy over the supersession clause would cause).

²³⁰ In 1988, the House of Representatives attempted to eliminate the supersession clause, finding it "unnecessary and of dubious constitutionality." *Id.* at 6, *reprinted at* 1991 U.S.C.C.A.N. at 1306. The clause remained, however, partially because Chief Justice Rehnquist assured Congress that if it remained, the "judicial branch would not supersede statutes without giving Congress every opportunity to examine the proposals." *Id.* *See generally* Burbank, *supra* note 45, at 1030-46 (summarizing the controversy).

²³¹ The possibility of such a reversal may not be unreasonable given Justice Ginsburg's statement and the attempts to recast the holding in *John R. Sand & Gravel Co.* *See supra* note 130.

makers will need Congress to act affirmatively to regain control over the requirements of Appellate Rule 4. Rather than hope that the Court reverses the problematic holding of *Bowles*, the Court, Judicial Conference, and other actors in the federal rulemaking process (including Congress) should work to revise the system of deadlines for post-trial motions and notices of appeal in light of the Court's recent attempts to clean up the use of the word "jurisdictional," starting with a repeal of § 2107.²³² Other than allowing equitable exceptions to the time to file notices of appeal, which would arguably alter the possibly jurisdictional statutes, the rulemakers can make some changes within their current authority. In addition, the rulemakers should ask Congress to repeal § 2107 in order to allow them to continue promulgating rules that create a uniform system for procedure that governs the transfer of a case from the district court to the court of appeals.

1. Responsibilities of the Court as an Adjudicatory Body

With the removal of the "jurisdictional" label from the post-trial and notice-of-appeal deadlines, courts should be willing to interpret the rules more flexibly and to restore equitable exceptions to correct injustices that may arise from the complicated requirements of filing post-trial motions and notices of appeal. There are two steps that the Court could take through adjudication, as opposed to through rulemaking. The first would be to overrule *Bowles* to the extent that it finds statutory deadlines jurisdictional by default. The default finding contradicts the Court's approach for nondeadline statutory requirements, which are generally viewed as being nonjurisdictional by default.²³³

²³² Professor Phillip Pucillo has suggested that Congress directly codify the doctrine of unique circumstance into § 2107. See Pucillo, *supra* note 106, at 728-29. This approach has several drawbacks, however. First, it would not correct the problem of the rulemakers' inability to alter Rule 4(a) in other ways without congressional action. Second, it would not correct the questionable validity of the doctrine for post-trial motions. See *infra* notes 253-258 and accompanying text. Third, by allowing the rulemakers to control the amendment instead of Congress, it would allow for greater refinement and accountability, as the rulemaking process is more responsive and specialized than the legislative process. See Struve, *supra* note 86, at 1133-36 ("Nor do the rulemakers display legislative inertia: in the sixty-three years since the adoption of the Rules, the rulemaking process has produced some twenty-four packages of revisions to the Rules, including—since the 1988 amendments to the Enabling Act—eight packages of amendments affecting thirty-five different Rules.").

²³³ See *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 510-16 (2006) (applying a default of nonjurisdictionality to find an employee-numerosity requirement nonjurisdictional).

The second step that the federal courts could take is to reexamine *Robinson* and *Harris Truck Lines*, not for their doctrinal holdings regarding jurisdiction, which the Court has rightly questioned, but as a guide to interpreting the federal rules to provide procedural justice.

a. *A Default of Nonjurisdictionality*

The Court itself could help reform the use of “jurisdictional” by partially overruling its holding in *Bowles*. Although much of the reasoning in *Bowles* comports with a stronger understanding of jurisdictional limitations—limitations set by Congress that cannot be altered by the courts in any manner, including rulemaking—the application of that definition remains questionable. In finding that statutory deadlines are presumptively jurisdictional, the Court parted from the approach used for nondeadline requirements²³⁴ and statutes of limitations.²³⁵ Instead of finding deadlines jurisdictional by default, the Court should have used the opposite rule,²³⁶ particularly when labeling a statute “jurisdictional” would remove the issue from the ambit of the rulemakers, thereby reducing the congressional delegation of power.

Whether or not deadlines set before litigation commences should be found jurisdictional by default, courts should hesitate to deem deadlines after the commencement of litigation, such as the deadline provided in § 2107, to be jurisdictional. A default finding of nonjurisdictionality for limits within the rulemakers’ authority would comport with the framework that Congress enacted before recent attempts to clarify the meaning of “jurisdictional.”²³⁷

The text of a statute governing conduct during litigation cannot clearly answer the question whether the statute is jurisdictional in

²³⁴ *Id.*

²³⁵ *John R. Sand & Gravel Co. v. United States*, 128 S. Ct. 750, 755 (2008) (noting that *Irwin v. Dep’t of Veteran Affairs*, 498 U.S. 89 (1990), establishes a “rebuttable presumption” that statutes of limitations are subject to equitable tolling).

²³⁶ See Scott Dodson, *Jurisdictionality and Bowles v. Russell*, 102 NW. U. L. REV. COLLOQUOY 42, 46-48 (2007), <http://www.law.northwestern.edu/lawreview/Colloquy/2007/21/LRColl2007n21Dodson.pdf> (arguing that the presumption should be that statutory requirements are mandatory, but not jurisdictional).

²³⁷ This approach would divorce the issues of the jurisdictionality of time limits during litigation from those prelitigation issues like statutes of limitations, which present much different issues of the rulemakers’ power and congressional intent. See *John R. Sand & Gravel Co.*, 128 S. Ct. at 755-57 (discussing the issues of interpretation presented in finding statutes of limitations jurisdictional). The three dissenters in *Greenlaw* who reached the jurisdictional issue found the statute nonjurisdictional because it was silent on the issue. *Greenlaw v. United States*, 128 S. Ct. 2559, 2571-72 (2008) (Alito, J., dissenting). This finding would conflict with *Bowles*’s reasoning.

many cases, as the word “jurisdictional” has had very little meaning in the context of deadlines after the commencement of litigation.²³⁸ Similarly, the history of a statute suffers the same problem unless it can be shown that Congress had a clear conception of the term or wanted to remove the issue from the rulemakers’ authority. The word “jurisdiction” has been “a word of many, too many, meanings”²³⁹ that has prevented the Court from clearly appreciating the conflict between jurisdictional deadlines and the authority of the rulemakers. Such confusion has likely also prevented Congress from appreciating the effect that passing legislation would have on the rulemaking process. Given that Congress has acted to remove some issues from the rulemakers’ power during the period between the passage of the Rules Enabling Act²⁴⁰ and the clarification of the word “jurisdictional,” attempts to determine whether a requirement is “jurisdictional” should consider whether Congress intended to remove the issue from the scope of the rulemakers’ power.

Using a default finding of nonjurisdictionality, § 2107 cannot be characterized as a jurisdictional limitation on the federal courts, even though its predecessor was likely jurisdictional. The statute governing time to appeal prior to the creation of § 2107 represented a jurisdictional limitation on the courts.²⁴¹ It was contained in an act of Congress specifically meant to “define the jurisdiction of the circuit courts of appeals and of the Supreme Court.”²⁴² The rulemakers themselves were hesitant to supersede the deadline to appeal.²⁴³ Despite the status of § 2107’s predecessor, the current statute is a nonjurisdictional statute meant to repeal a formerly jurisdictional requirement.

The history of § 2107 shows that Congress originally meant for it to conform to the rules and later amended it for the same reason.²⁴⁴

²³⁸ See *supra* Part II.

²³⁹ *Kontrick v. Ryan*, 540 U.S. 443, 454 (2004) (quoting *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 90 (1998)).

²⁴⁰ For example, Congress withheld the ability to pass certain rules of evidence without affirmative congressional action. See Act of Mar. 30, 1973, Pub. L. No. 93-12, 87 Stat. 9 (codified at 28 U.S.C. § 2074 note (2006)). The issues with the Federal Rules of Evidence, however, primarily involved federalism, and not jurisdictional or separation-of-powers issues. See John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 694 (1974) (“Most of the objections were directed at the provisions refusing, even in diversity cases, to recognize the privileges created by state law and substituting a set of privileges defined by the Rules themselves.”).

²⁴¹ See 28 U.S.C. § 230 (1946) (repealed 1948).

²⁴² Act of Feb. 13, 1925, 68 Pub. L. No. 415, 43 Stat. 936, 936.

²⁴³ See *supra* note 76.

²⁴⁴ See *supra* note 81 and accompanying text, note 126.

Congress meant to enable, and not to restrain, the rulemakers. In addition, the legislative history of the 1991 amendments suggests that Congress merely wished to avoid litigation over supersession,²⁴⁵ and not that Congress wished to amend a jurisdictional statute that the federal rules could not supersede. Congress was aware that some lower federal courts had found that Rule 4 superseded § 2107,²⁴⁶ yet it made no clear statement that § 2107 was a jurisdictional statute that the rules could not supersede.

The reasons for codifying Rule 4 instead of repealing contrary statutes are unclear,²⁴⁷ but the twice-welcoming response to the rulemakers' suggestions about amendments shows that Congress did not give much thought to whether it was preserving control over the jurisdiction of the courts of appeals. Even in light of the "jurisdictional" history of filing notices of appeal, § 2107's ambiguous purpose would not provide enough justification to overcome a default finding of non-jurisdictionality based on the dominance of the rulemakers in the process and lack of independent congressional indication that the statute was jurisdictional.

The ambiguous use of "jurisdictional" supports a default finding of nonjurisdictionality as in *Arbaugh*, with the presumption being rebutted if Congress clearly understood the term at the time of passage or intended to prevent the courts and rulemakers from altering the requirement.²⁴⁸ The text, history, and evolution of § 2107 do not rebut that presumption. Despite the use of "jurisdictional" for the requirements for filing notice of appeal since *Robinson*, Congress cannot have intended to adopt a meaning of "jurisdictional" that was not fully clarified until *Kontrick*, *Eberhart*, and *Bowles*. Such a reversal of the Court's misstep in *Bowles*, however, likely will not come swiftly. A bet-

²⁴⁵ See H.R. REP. NO. 102-322, at 5-6 (1991), reprinted in 1991 U.S.C.C.A.N. 1303, 1305-06 ("If the rule change take [sic] effect, without modifications to the statutory text, questions may arise about which of the different provisions is controlling. The result will breed mindless litigation.").

²⁴⁶ In fact, the Rules Committee's report to Congress stated that the rule had already been found to supersede § 2107. See COMM. ON THE RULES OF PRACTICE AND PROCEDURE, REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON THE RULES OF PRACTICE AND PROCEDURE 2 (1990) (noting that previous conflicts between statutes listing time to appeal had been resolved in favor of the rule).

²⁴⁷ See Hall, *supra* note 8, at 412 n.60 ("For reasons no one has adequately explained, Congress, rather than repealing the longer appeal period then provided by statute, later amended the statutory codification to conform to the rule."). But see William Barron, *The Judicial Code: 1948 Revision*, 8 F.R.D. 439 (1948) (explaining that the reason for the codification was that it "applie[d] to civil proceedings excluded from operation of the rules" at the time).

²⁴⁸ See *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 510-13 (2006).

ter approach simply would be to ask Congress to clarify the matter by repealing § 2107.

b. *Interpretation of the Federal Rules Regarding Finality*

The fact that a specialized body continually updates the rules supports sticking to a plain-meaning model of interpretation, as the rule-makers can simply adjust the rules when courts fail to interpret them as intended.²⁴⁹ Even an active body, however, cannot foresee all circumstances, and allowing equitable considerations to affect the application of the rules has support both in the Court's former approach to interpreting the deadlines for post-trial motions and notices of appeal and in the increased procedural fairness provided by such an approach.

The rulemakers have consistently reacted to overly harsh or technical requirements for post-trial motions and notices of appeal.²⁵⁰ When viewing the history of rulemaking for post-trial motions and notices of appeal as a whole,²⁵¹ two themes become evident. First, the

²⁴⁹ See Struve, *supra* note 86, at 1133-36 ("There is little need for courts to speculate how past rulemakers would have dealt with present circumstances because . . . the Committee exist[s] expressly to 'carry on a continuous study of the [Rules'] operation and effect.'" (quoting 28 U.S.C. 331 § (1994)).

²⁵⁰ Appellate Rule 4(a)(5), allowing for extension of time to file notices of appeal due to excusable neglect, was clarified because some courts held that they could only extend the time within thirty days of judgment, or that the motion had to be filed within thirty days. FED. R. APP. P. 4(a)(5) advisory committee's note to 1979 amendment. The provision for a premature notice of appeal to be effective if filed after judgment had been announced, but before a post-trial motion had disturbed finality, was added. FED. R. APP. P. 4(a)(2), 4(a)(4) advisory committee's note to 1993 amendment. A provision for an extension of time in the event a party failed to receive notice of the judgment was also added. See FED. R. APP. P. 4(a)(6) advisory committee's note to 1991 amendment. It had to be amended later to clarify what type of notice could preclude a party from appealing. See FED. R. APP. P. 4(a)(6) advisory committee's note to 2005 amendment. The rulemakers rejected a technical reading of Rule 4(a)(5) that made extensions for good cause available only before the time to file notice of appeal expired, while excusable neglect extensions were available both before and after. FED. R. APP. P. 4(a)(5) advisory committee's note to 1979 amendment. Appellate Rule 4(b) added a good cause provision similar to the one for notices of appeal in civil cases. FED. R. APP. P. 4(b)(4) advisory committee's note to 1998 amendment. Civil Rule 50 was amended to permit any motion for judgment as a matter of law to be renewed instead of only motions at the close of evidence, which despite being longstanding doctrine had confused attorneys. FED. R. CIV. P. 50 advisory committee's note to 2006 amendment. Civil Rule 59 was amended to reverse findings that even though it allows for a court to order a new trial sua sponte and for litigants to move for a new trial, the trial court did not have the power to grant a new trial if a litigant had moved for the trial on other grounds. FED. R. CIV. P. 59 advisory committee's note to 1966 amendment.

²⁵¹ See *supra* Part I.

rulemakers clearly intend to provide finality. They also, however, clearly mean to ameliorate the effects of unbending rules for abnormal cases and occurrences. This supports a legislative history contrary to that focused solely on unbending deadlines, as in *Bowles*, because the rulemakers have acted to provide several exceptions. Many unreasonable results would have occurred had courts not already read some flexibility into the deadlines. For example, in *Harris Truck Lines*, the availability of an extension to the deadline for filing notice of appeal under Appellate Rule 4(a)(5) would not have been much help to litigants if the Court had not fashioned the doctrine of unique circumstances to allow the litigant to rely on the extension, even if improvidently granted.²⁵²

The Court could provide a great service by relying on its precedent in clarifying the approach that courts should follow when faced with issues of finality and the proper flexibility of the rules. When one views *Robinson* as a case relying on abstention instead of jurisdiction and considers the decision in *Harris Truck Lines*, it appears that the Court's approach between the Rules Enabling Act and *Bowles* was to decide issues in a way that enabled the rulemakers to act while avoiding judicial reinterpretation of the rules in normal circumstances. *Robinson* clearly represented an abstention of the rulemakers on large-scale policy issues.

The Court in *Harris Truck Lines*, however, did not abstain when the rules provided some guidance or the policy choice involved a "unique circumstance." *Harris Truck Lines* and *Thompson* both represent the Court's excusal of noncompliance with a strict reading of the rules, as such a reading would result in injustice in those particular circumstances. Unlike in *Robinson*, the circumstances in these cases were so peculiar that a rare exception would not implicate "powerful policy arguments" regarding finality.

The federal courts could rely on these opinions not for the doctrinal holdings, but for developing a proper approach when facing questions about the operation of the rules. *Robinson* represents deference to the rulemakers on issues of large-scale policy, whereas *Harris Truck Lines* and its progeny acknowledge that the rulemakers are not omniscient and that "unique circumstances" require some interpretation of the rules and excusal of inadvertent de minimis violations of the rules' deadlines.

²⁵² *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.* 371 U.S. 215 (1962) (per curiam), *overruled by* *Bowles v. Russell*, 127 S. Ct. 2360, 2366 (2007).

A strong argument could be made that *Harris Truck Lines* and the doctrine of unique circumstances lack a doctrinal or logical foundation, even when the issue of allowing equitable exceptions to jurisdictional requirements is set aside. Equitable exceptions are generally not allowed if a statute provides for a limited set of exceptions: "Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent."²⁵³ This restriction on applying equitable exceptions when others are listed likely applies with as much force in interpreting the federal rules.

An argument could also be made that judges should interpret the federal rules even more strictly than they do statutes. Professor Catherine Struve has argued that "[t]he structure of the Enabling Act delegation and the reality of the rulemaking process together suggest that courts should have, if anything, less latitude to interpret the Rules than they do to interpret statutes."²⁵⁴ This argument supports strict interpretation of the deadlines for other rules listed in Civil Rule 6 and its analogs as having no equitable exceptions. Civil Rule 6, like its analogs, commands that "[a] court must not extend the time to act under [specified rules] except as those rules allow."²⁵⁵ For example, Appellate Rule 4(a)'s deadlines, which cannot be extended except by the provisions of Rule 4 under Appellate Rule 26, has specific extensions for "excusable neglect or good cause,"²⁵⁶ and failure to receive notice of the judgment under Civil Rule 77.²⁵⁷ These specific exceptions imply that new ones should not be created.

The strength of the doctrinal argument against finding unique circumstances highlights the questionable status of the doctrine after *Osterneck* and *Bowles*. It also reinforces the strict interpretation shown

²⁵³ *TRW Inc. v. Andrews*, 534 U.S. 19, 28 (2001) (quoting *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980)).

²⁵⁴ Struve, *supra* note 86, at 1120. Professor Struve, however, was writing in contrast to earlier scholarship arguing that the rulemaking process gives the Court greater justification to freely interpret rules:

Affording the Court flexibility in considering policy is particularly important when the issue in a case concerns matters unanticipated at the time of the framing of the Rule. Of course, this factor is important in statutory construction as well, but again the Court's dual roles as promulgator and interpreter make flexibility at the interpretation stage especially appropriate.

Karen Nelson Moore, *The Supreme Court's Role in Interpreting the Federal Rules of Civil Procedure*, 44 *HASTINGS L.J.* 1039, 1094-95 (1993).

²⁵⁵ FED. R. CIV. P. 6(b)(2).

²⁵⁶ FED. R. APP. P. 4(a)(5)(A)(ii).

²⁵⁷ FED. R. APP. P. 4(a)(6).

in *Robinson*. The Court twice recognized, in *Harris Truck Lines* and *Thompson*, however, “the obvious great hardship to a party who relies upon the trial judge’s finding” and then defaults because of that reliance.²⁵⁸ In addition, the Court—not the rulemakers—acted to restrict the doctrine, implying that the doctrine at the very least was not such an affront to finality that it should prompt amendments as *Hill* did. The unfairness that can arise in exceptional circumstances provides a justification for adopting equity by codifying the doctrine of unique circumstances in the federal rules and reinstating the approach of the *Robinson* and *Harris Truck Line* lines of cases.

2. Repeal of § 2107

Section 2107 serves little purpose aside from being a jurisdictional bar that prevents courts from allowing equitable exceptions and barring rulemakers from amending their own creation of Rule 4. Congress only meant to codify the rule. Thus, repealing § 2107 has several benefits. First, repeal allows rulemakers to control the entire system of post-trial motions and notices of appeal, except for appeals by the government in criminal cases.²⁵⁹ This would allow the rulemakers to address something to which they did not give much thought in the early rulemaking period: what, if any, equitable exceptions there should be to the deadlines contained in Rule 6(b) and its analogs, including the deadline to filing a notice of appeal.

Congress seems to wish to avoid the further litigation and political battles over the supersession clause that retaining § 2107 will invite. Avoidance of supersession litigation spurred the 1991 amendment of § 2107,²⁶⁰ and a full repeal would better serve that purpose. Because of the different pace of the rulemaking process and congressional legislative activity, the 1991 amendment to § 2107 occurred after new rules had gone into effect and still does not exactly correspond with the rules.

In addition, asking Congress to repeal § 2107 will clearly define the authority of the rulemakers with regard to notices of appeal and other rules involved in moving cases from the district court to the

²⁵⁸ *Thompson v. INS*, 375 U.S. 384, 386 (1964) (per curiam) (quoting *Harris Truck Lines, Inc., v. Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962)), *overruled by Bowles v. Russell*, 127 S. Ct. 2360, 2366 (2007).

²⁵⁹ See 18 U.S.C. § 3731 (2006) (containing the exceptions for appeals by the government).

²⁶⁰ See H.R. REP. NO. 102-322, at 5-6 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1303, 1305-06 (noting the benefits of avoiding supersession litigation).

court of appeals. If Congress repeals the statute, then the rulemakers' authority would no longer be questioned based on the Court's holding in *Bowles*. If Congress fails to repeal § 2107, it could indicate that the rulemakers do not have such authority,²⁶¹ but more importantly, questions of the validity of amendments to Appellate Rule 4(a) would remain due to the Court's holding in *Bowles*.

The statute governing notices of appeal for the United States in criminal cases has a similar effect. The Court has not reached a conclusion on the jurisdictionality of § 3731 after the Court's recent foray into cleaning up the meaning of "jurisdictional," even though *Bowles* arguably calls for finding it jurisdictional by default.²⁶²

There are, however, reasons for not seeking the repeal of the pertinent sections of § 3731. First, Congress appears to have meant § 3731 to allow appeals by the United States to the full extent allowed by the Double Jeopardy Clause.²⁶³ This contrasts with § 2107, which merely codified the rulemakers' suggestions. Instead, the thirty-day limit in Rule 4(b) was added to the rules to conform to statutory changes.²⁶⁴ Second, the risks of inequitable results from a stricter deadline are lessened because § 3731 only applies to appeals by the United States. These appeals are taken by a discrete group of government lawyers who would be familiar with the case law on how to take such an appeal. The United States also has a longer period to take an appeal than the defendant does,²⁶⁵ which mitigates any unfairness to the prosecutor in having stricter consequences for failing to

²⁶¹ The significance of legislative inaction is debatable. The current Congress's views on § 2107 expressed through legislative inaction would shed little light on what Congress thought of § 2107 at its creation and amendment. See Eskridge, *supra* note 187, at 96 ("If subsequent legislative *statements* directly supporting a statutory interpretation are not valid evidence, how can subsequent legislative *silence*, usually just indirectly supporting a statutory interpretation, be considered any more authoritative?").

²⁶² This part of *Bowles*, however, may be on weaker ground after the court revised the rationale to be one of judicial efficiency rather than the fact that the requirement was statutory. *John R. Sand & Gravel Co. v. United States*, 128 S. Ct. 750, 753 (2008).

²⁶³ U.S. CONST. amend. V; see also *United States v. Wilson*, 420 U.S. 332, 337 (1975) (explaining that, with § 3731, "Congress intended to remove all statutory barriers to Government appeals and to allow appeals whenever the Constitution would permit"); *United States v. Stanton*, 501 F.3d 1093, 1097-99 (9th Cir. 2007) (discussing the legislative history of § 3731 before finding that the district court's judgment of acquittal was appealable without double jeopardy concern).

²⁶⁴ See *Stanton*, 501 F.3d at 1097 (stating that appeals by the government must be authorized by Congressional enactment, as in § 3731). Section 3731 predated the creation of the provisions governing notices of appeal for the government in Rule 4(b), which adopted the section's thirty-day period. Compare Act of June 25, 1948, 80 Pub. L. No. 773, § 2107, 62 Stat. 844, 963 (1948) with FED. R. APP. P. 4(b)(1).

²⁶⁵ FED. R. APP. P. 4(b)(1).

meet the deadline. In addition, § 3731 raises serious policy issues concerning double jeopardy and the right to a speedy trial, even though the statute limits appeals to those allowed under the Double Jeopardy Clause. These issues may best be left to Congress, which has shown an interest in legislating in the area.

3. Retaining Claim-Processing Rules with Some Modification

The concept of claim-processing rules provided a stopgap to deal with the effects of clarifying the meaning of “jurisdictional” and the implications of late filings that the label invokes. Because the term “jurisdictional” had so often been used as shorthand for a *sua sponte* nonextendable deadline, the Court had to fashion something to fill its place. However, the current definition of claim-processing rules has some drawbacks.

Claim-processing rules may give greater discretion to litigants than to the trial judge.²⁶⁶ Although the early rulemakers’ discussions provide some support for putting the power to alter deadlines in the hands of the opposing litigant because the rulemakers were concerned about overly sympathetic judges giving losing litigants another chance,²⁶⁷ they did not consider the situation when the judge inadvertently misleads a litigant.²⁶⁸ If, as in *Bowles*, the inequity results from reliance on the trial judge, the court has limited power to relieve the litigant of the burden that the court has placed on her, because of the questionable status of the unique-circumstances doctrine.²⁶⁹ On the other hand, silence by opposing counsel can extend the time, possibly even if it would be inequitable to do so.²⁷⁰

The rulemakers could simply repudiate the idea of claim-processing rules and adopt language in Rule 6(b) and its analogs stating that the listed rules are nonextendable, must be raised by the court *sua sponte*, and have no equitable exceptions.²⁷¹ This would re-

²⁶⁶ See Burch, *supra* note 5, at 65 (expressing dissatisfaction with the mandatory aspect of claim-processing rules because “it leaves no room for equity absent the mercy of opposing counsel”).

²⁶⁷ See 1944 MINUTES, *supra* note 59, at 27.

²⁶⁸ See *id.* at 1-87 (failing to mention such a situation).

²⁶⁹ The questionable status is discussed *supra* Part III.E.

²⁷⁰ The circuit that first addressed these issues rejected the claim that the timeliness of a notice of appeal in a criminal case could never be raised *sua sponte*. *United States v. Mitchell*, 518 F.3d 740, 750 (10th Cir. 2008).

²⁷¹ There does not appear to be any limitation to the rulemakers’ ability to do this, so long as they make clear that they are not making jurisdictional rules, but mandatory rules with the same consequences as jurisdictional limitations. Adding a *sua sponte*

pudiate two recent unanimous Supreme Court decisions supporting claim-processing rules as well as the remains of the doctrine of unique circumstances.²⁷² It would also represent a step backward in giving courts the ability to correct defaults created by their own misleading actions.

A better answer would be to adopt the solution proposed by a unanimous Court, but modified slightly to limit the ability of litigants to affect interests aside from their own. The *Kontrick* Court recognized this to a degree in limiting forfeiture that would substantially affect the rights of others with a recognizable interest in the suit.²⁷³ On a similar note, the rulemakers should not adopt the claim-processing rule for notices of appeal. Concerns about judicial efficiency²⁷⁴ and the large caseload of the circuit courts²⁷⁵ require a different approach for notices of appeal than for post-trial motions. Unlike cases where the doctrine of unique circumstances may apply and procedural fairness counterbalances judicial efficiency, when a party has failed to object, there is no countervailing private interest to overcome the interest of judicial efficiency. A failure to object simply implies that there is no private interest on the other side. Accordingly, the claim-processing rules should only extend to motions in the district and bankruptcy courts.

Assuming that Congress repeals § 2107, the rulemakers can include a provision in Rule 4 that allows the courts of appeals to dismiss any late appeal sua sponte, even if the opposing party has not objected. This approach would retain the historic ability of the courts of appeals

provision would not be new either, as district courts can already grant a new trial on their own initiative. See FED. R. CIV. P. 59(d).

²⁷² *Eberhart v. United States*, 546 U.S. 12, 16 (2005) (per curiam) (“We break no new ground in firmly classifying Rules 33 and 45 as claim-processing rules . . .”); *Kontrick v. Ryan*, 540 U.S. 443 (2004) (“[T]he filing deadlines prescribed in Bankruptcy Rules 4004 and 9006(b)(3) are claim-processing rules . . .”).

²⁷³ See *Kontrick*, 540 U.S. at 457 n.12 (“Nor should anything in this opinion be read to suggest that a debtor and creditor may stipulate to the assertion of time-barred claims when such an accommodation would operate to the detriment of other creditors.”). At least one circuit, in determining whether such requirements can be taken up sua sponte, recognized that claim-processing rules could involve interests of judicial administration. *Mitchell*, 518 F.3d at 750.

²⁷⁴ See *John R. Sand & Gravel Co. v. United States*, 128 S. Ct. 750, 753 (2008) (citing *Bowles* as an example of strict deadlines motivated by judicial efficiency).

²⁷⁵ See Stefanie A. Lindquist, *Bureaucratization and Balkanization: The Origins and Effects of Decision-Making Norms in the Federal Appellate Courts*, 41 U. RICH. L. REV. 659, 661-63 (2007) (commenting on the increased caseload of the appellate court and its effect on how cases are decided).

to control their own caseload and offset any increase in caseload due to the reinstatement of the doctrine of unique circumstances.

4. Awakening the Slumbering Doctrine of Unique Circumstances

The cases applying the doctrine of unique circumstances, like the Court's jurisdictional doctrine, have been mixed and often contradictory.²⁷⁶ Having a clear limit on the power of the district court to extend deadlines both provides finality and reduces the docket of the appellate court. A strict limit with no exceptions, however, also can put litigants in a precarious position. Litigants would be unable to rely on deadlines set by the district court, as in *Bowles*, and would, out of caution, still file a notice of appeal even if a district court judge expressly stated that a post-trial motion was timely and tolled the time to appeal or otherwise extended the deadlines.²⁷⁷

This situation results in wasted effort by courts and litigants, because either the litigant files an unnecessary notice of appeal or the litigant prosecutes an invalid motion in the district court. Allowing the litigant to rely on the district court would reduce the waste of judicial and litigant time and resources caused by these futile actions. In addition, it would provide a common-sense and fair solution to litigants who do nothing other than rely on the district courts' statements or the import of the lower courts' actions.

The degree to which the doctrine can excuse a late notice of appeal will be important in balancing the needs for control of appellate caseloads and finality with the need for fair procedural rules and reliance on judicial statements. The doctrine of unique circumstances, in its current form, would only cover a district court's affirmative statement that a litigant timely filed a post-trial motion. Cases in which the district court either sets an erroneous deadline for notice of appeal or extends the deadline would not be covered because such extensions of time could theoretically never be done properly because the rules prevent extension.

²⁷⁶ See generally Pucillo, *supra* note 106, at 713-15 (describing the flaws of, and confusion stemming from, the *Osterneck* conception of the doctrine of unique circumstances).

²⁷⁷ Without the doctrine, litigants should be wary of relying on an extension for good cause under Appellate Rule 4(a)(5) because the unique-circumstances doctrine was created to allow reliance on the extensions, even if the district court had erroneously found good cause to grant them. See, e.g., *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215, 217 (1962) (per curiam) (applying the doctrine of unique circumstances to an "extension" of the deadline for filing notice of appeal), *overruled by* *Bowles v. Russell*, 127 S. Ct. 2360, 2366 (2007).

The rulemakers could provide a mechanism for balancing finality with the interests of fairness and equity by adopting the current formulation of the doctrine with some minor changes or using committee notes to relax interpretation. By placing the doctrine within Civil Rule 6 and its analogs, the rulemakers would provide the doctrine validity for all deadlines contained in the rules. Thus, current doctrine should be changed to excuse late filing “where a party [or court] has performed an act which, if [valid], would postpone the deadline for filing his appeal and [if the act was done by a party] has received specific assurance by a judicial officer that this act has been properly done.”²⁷⁸ The addition of “or court” would apply the doctrine to cases where the court has confused the litigant without fault by a party, as in *Bowles*.²⁷⁹ The notes could make clear that an act includes actions that could never be considered properly done, such as requesting an extension for a notice of appeal. In addition, the definition of “specific assurance” must be loosened,²⁸⁰ because granting a post-trial motion on the merits or ordering a hearing could give a litigant the impression that the time to file a notice of appeal was tolled.

The doctrine should be loosened enough to provide litigants assurance that a plain interpretation of the district court’s actions will not result in the loss of their rights. This depends greatly on whether or not the presumption favors the litigant who relies on the district court’s action. The current version of the doctrine of unique circumstances, besides relying on the litigant having done an improper act, also suffers from a presumption against finding that the district court misled the litigant. In order to overcome the presumption, the litigant must show that the court clearly and specifically stated to the litigant that the action was timely; the litigant cannot rely solely on the district court’s actions having the normal import.²⁸¹ For example, the litigant cannot rely on the district court’s extension of the time to file

²⁷⁸ This is the current formulation of the doctrine with proposed changes in brackets. See *Osterneck v. Ernst & Whinney*, 489 U.S. 169, 179 (1989), for the formulation that is the basis of the proposal.

²⁷⁹ In fact, by retaining the claim-processing-rule framework, a party’s improper action will likely face objection for untimeliness by the opposition, because the opposition’s failure to object would render the motion valid. See *Kontrick v. Ryan*, 540 U.S. 443, 459-60 (2004). The primary source of confusion and error will be the court itself, either by improperly overruling a timeliness objection by the opposition or by merely miscalculating time when setting a deadline.

²⁸⁰ The doctrine currently requires a specific verbal assertion by the court to the party that the act was proper. *Osterneck*, 489 U.S. at 178-79.

²⁸¹ *Id.* at 178.

a post-trial motion as tolling the time to appeal, even though that reliance is the natural import of such an action.²⁸²

An argument could be made that allowing such reliance assumes that the litigant knows the rules regarding tolling but not the rules regarding calculating times or deadlines. The district court, however, causes the problem with calculating time, not the litigant. The true problem is that the district court, even if abetted by the litigant filing an untimely motion, has acted contrary to the rules and forced the litigant to choose between relying on the judge and relying on her own interpretation of the rules. Denying the litigant the ability to appeal because of reliance on a judicial proclamation or the natural import of such a proclamation represents the height of institutional unfairness, especially for a pro se litigant.

CONCLUSION

The proposed changes have benefits in three areas over the current system as it appears to be developing: First, they would separate issues of finality from issues of jurisdiction, clarifying the future jurisprudence of both. Second, they would increase transparency and identify who has authority to make any further amendments. Third, they would increase the ability of federal judges to equitably decide issues involving post-trial motions and notices of appeal.

As history shows, the nature of post-trial motions and notices of appeal have confounded courts. The label of “jurisdictional” transferred too easily from the previous statutory regime to the rules. In large part, this can be explained by the somewhat shaky authority of the rulemakers in trying to supersede the previous system, while at the same time not clarifying the exact consequences of failure to meet the deadlines. The Court was thus left to fill the void with its contradictory and unsettled jurisdictional decisions. Conversely, the Court’s removal of the concept of jurisdiction from a place it should never have been applied—that is, to court-promulgated rules—would improve the jurisprudence of jurisdiction.

Currently, there are questions concerning the ability of the rulemakers to independently amend their own ideas embodied in § 2107 and Appellate Rule 4(a). Repealing § 2107 or reversing *Bowles* would

²⁸² See, e.g., *Weitz v. Lovelace Health Sys., Inc.*, 214 F.3d 1175, 1179 (10th Cir. 2000) (refusing to recognize as timely a litigant’s notice of appeal after the district court improperly granted the litigant’s request for an extension of time to file a motion for a new trial).

clarify the position of the rulemakers and allow a single entity with expertise in the area to control almost all issues of finality and transfer of the case to the appellate level.

The addition of equity to the current rules governing timing and notices of appeal would improve the fairness of the federal judicial system. Litigants would not be led astray by federal judges erroneously setting deadlines or improperly overruling objections based on timeliness. This exception would be narrow enough to not greatly increase the federal workload or reduce the deadlines in the federal rules to mere guidelines. It would also provide possible ways to ameliorate errors in drafting or confusing edicts that arise from amendments to the rules. Most importantly, the system of providing finality would provide a fair method of resolving issues with the rules and would clearly identify the actor responsible for the outcome.