dural changes it approved. The Court could have, and should have, left the decision to implement heightened pleading in the hands of institutions equipped to make legislative-type policy judgments[79] — either the Judicial Conference or Congress, which has the ultimate authority to establish the rules of federal civil procedure.[80]

The Court may be correct that requiring plausibility of complaints is the solution to discovery's problems. But the Court had very little reason to be sure that it was applying the correct remedy to a perceived sickness in the civil justice system. *Twombly* demonstrates the dangers of uncautious, consequentialist judging. Perhaps a new set of reformers should rewrite the Federal Rules in light of what we now know about the failings of discovery. But the Court, which has a limited ability to rigorously consider the impact of procedural innovations, should stick to interpreting the Federal Rules using traditional methods of legal interpretation. If so, the Court will, at the very least, be sure it is not making things worse.

B. Jurisdictional Status of Rules

Statutory Time Limits to Appeal. — The longstanding practice of treating time limits to federal appeals as jurisdictional[1] had been unsettled by the Court's recent, and often unanimous, campaign to apply the "jurisdictional" label to similar limits with a newly sparing hand.[2] Last Term, a sharply divided Court halted that campaign in *Bowles v. Russell*.[3] The Court insisted that *statutory* time limits to appeal are necessarily jurisdictional, and therefore mandatory. The Court's recent campaign had lacked a limiting principle, and the attempt in *Bowles* to find one was a step forward. But by ruling that the mere

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[79] *See* Molot, *supra* note 75, at 1792–93.

[80] *See* 28 U.S.C. §§ 2074–2075 (2000).

[1] Jurisdictional limits are treated by the courts as external limits. The courts must apply such rules sua sponte, and the parties may neither waive nor forfeit their effect. *See, e.g.*, United States v. Scarfo, 263 F.3d 80, 87 (3d Cir. 2001). *See generally* 16A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3950.1 & nn.7–8 (3d ed. 1999 & Supp. 2007) (stating flatly that because time limits to appeal are considered jurisdictional, "[n]o excuses for a late filing are tolerated," and collecting cases).

[2] Notable cases in the campaign include *Scarborough v. Principi*, 541 U.S. 401 (2003) (7–2 decision); *Kontrick v. Ryan*, 540 U.S. 443 (2004) (unanimous); *Eberhart v. United States*, 126 S. Ct. 403 (2005) (per curiam and unanimous); and *Arbaugh v. Y & H Corp.*, 126 S. Ct. 1235 (2006) (unanimous). The category "claim processing rules" was created for limits formerly held jurisdictional. "Claim processing rules" are forfeitable, but not waivable, and more open to equitable alteration (much as statutes of limitations are subject to equitable tolling), though still "inflexible." *See, e.g*, *Eberhart*, 126 S. Ct. at 407; *Kontrick*, 540 U.S. at 456.

[3] 127 S. Ct. 2360 (2007). The decision was 5–4. The possibility of such a halt was manifest earlier in the Term. *See* Rockwell Int'l Corp. v. United States, 127 S. Ct. 1397, 1405–06, 1411 (2007) (holding certain statutory requirements for *qui tam* actions under the federal False Claims Act to be jurisdictional and therefore mandatory). Unlike *Bowles*, however, *Rockwell* made no direct change to the Court's underlying jurisdictionality doctrines.

presence of a limit in a statute made it jurisdictional, the Court failed to take statutory purposes and history seriously and created a rule only a step less obscuring and overbroad than the old treatment of jurisdictionality the Court had campaigned to reform.

In 2002, Keith Bowles filed a federal habeas petition to challenge his sentence of fifteen years to life for murder.[4] The United States District Court for the Northern District of Ohio denied his petition.[5] Bowles then moved for a new trial and to amend the judgment; denial of this motion by the district court on September 9, 2003, was a final, appealable order, leaving Bowles until October 9 to file a notice of appeal.[6] However, Bowles claimed never to have received notice of the district court's order. On that basis, he moved on December 12 to reopen the appeals period, pursuant to Appellate Rule 4(a)(6).[7]

On February 10, 2004, the district court granted his motion, citing Rule 4(a)(6) but miscalculating the resulting extension.[8] The order should have extended the time to appeal by fourteen days: to February 24.[9] Instead, the order stated: "Appeal to be filed by 2/27/04."[10] Bowles's counsel, in apparent reliance on this order, filed a notice of appeal with the Sixth Circuit on February 26 — within the time set by the district court but outside the time allowed by the rule.[11]

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[4] Bowles v. Russell, 432 F.3d 668, 669–70 (6th Cir. 2005).

[5] *Id.* at 670. The district court also denied Bowles a certificate of appealability. *Id.*

[6] *Id.*; *see* FED. R. APP. P. 4(a)(1)(A).

[7] *Bowles*, 432 F.3d at 670. The rule allows the district court to reopen the time to file an appeal for a period of fourteen days after the date its order to reopen is entered only if, among other conditions, the party was entitled to notice but did not receive it within twenty-one days after entry. FED. R. APP. P. 4(a)(6). Bowles based his motion on Rule 4(a)(6). Petitioner's Motion To Vacate and To Reopen Time To Appeal at 26, Bowles v. Russell, No. 1:02-cv-01520-DCN, 2006 WL 3954257, at *147 (N.D. Ohio July 10, 2003).

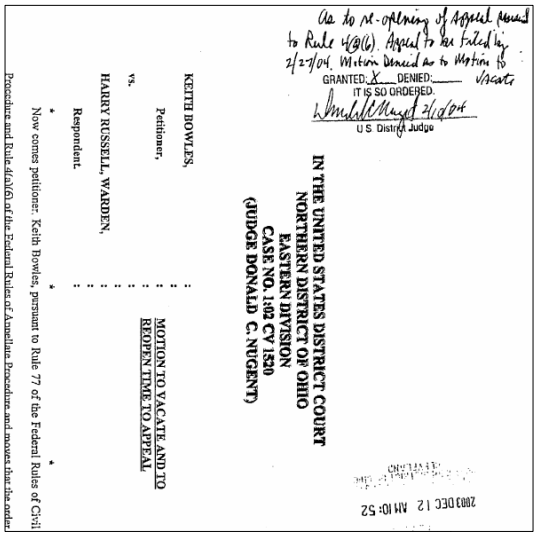
[8] Order Granting Re-Opening of Appeal Under Rule 4(a)(6) at 27, *Bowles*, No. 1:02-cv-01520-DCN, 2006 WL 3954257, at *151 [hereinafter Marginal Order]. There was no clear explanation for the district court's mistake. *See Bowles*, 127 S. Ct. at 2362.

[9] Weekends and holidays are excluded from the computation of time only when the prescribed period is less than eleven days. FED. R. APP. P. 26(a).

[10] Marginal Order, *supra* note 8.

[11] *Bowles*, 127 S. Ct. at 2362. Filing the notice of appeal "starts the clock" for submission of the record and brief, so a lawyer might rationally wait until the last (apparently) permissible day to file notice. *See id.* at 2372 n.9 (Souter, J., dissenting).

FIGURE 1. THE MARGINAL ORDER



IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION
CASE NO. 1:02 CV 1520
(JUDGE DONALD C. NUGENT)

KEITH BOWLES,
Petitioner,
vs.
HARRY RUSSELL, WARDEN,
Respondent.

MOTION TO VACATE AND TO REOPEN TIME TO APPEAL

Now comes petitioner, Keith Bowles, pursuant to Rule 77 of the Federal Rules of Civil Procedure and Rule 4(a)(6) of the Federal Rules of Appellate Procedure and moves that the order

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GRANTED: X DENIED:
IT IS SO ORDERED.
U.S. District Judge

The Sixth Circuit considered whether it had jurisdiction.[12] Writing for the court, Chief Judge Boggs cast its ruling as the inevitable outcome of jurisdictional absolutes: "This is a case about missed deadlines. At times they go unnoticed, but sometimes the lapse is fatal."[13] The court held it "incumbent upon this court to dismiss any action when it appears that the court lacks jurisdiction," regardless of arguments made or omitted by the parties.[14]

The Supreme Court affirmed.[15] Writing for the Court, Justice Thomas[16] ruled that because timely filing of a notice of appeal in a civil case[17] is a statutory requirement, it is mandatory and jurisdic-

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12 *Bowles*, 432 F.3d at 671–72.

13 *Id.* at 669.

14 *Id.* at 671 (applying FED. R. CIV. P. 12(h)(3)). The court also considered and rejected, as disfavored and not strictly applicable, the unique circumstances doctrine of *Thompson v. INS*, 375 U.S. 384 (1964), *overruled by Bowles*, 127 S. Ct. at 2366, and *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962) (per curiam), *overruled by Bowles*, 127 S. Ct. at 2366. *Bowles*, 432 F.3d at 673–76. The circuit's ruling turned on the same assumption later made by the Supreme Court: that Appellate Rule 4(a)(6) was based in statute and therefore an exercise of Congress's jurisdiction-setting power. The Sixth Circuit thereby distinguished the Supreme Court's recent decisions treating similar time limits as nonjurisdictional. *Id.* at 671 n.1 (distinguishing *Eberhart v. United States* and *Kontrick v. Ryan*). The Sixth Circuit also relied on precedents holding the overall 180-day limit to filing in Rule 4(a)(6) to be mandatory and jurisdictional to reason that the fourteen-day limit must also be jurisdictional. *Id.* at 673 (collecting cases).

15 *Bowles*, 127 S. Ct. at 2367.

16 Chief Justice Roberts and Justices Scalia, Kennedy and Alito joined the opinion.

17 An appeal from denial of a habeas corpus petition is a civil matter. *See, e.g.*, Malone v. Avenenti, 850 F.2d 569, 571 (9th Cir. 1988).

tional. Bowles's untimely notice, although filed in reliance on the district court's order, therefore deprived the Sixth Circuit of jurisdiction over his appeal.[18] The Court reasoned that since Congress determines, within constitutional bounds, "whether federal courts can hear cases at all, it can also determine *when*, and under what conditions, federal courts can hear them."[19] Justice Thomas also emphasized stare decisis, stating that the Court had "long and repeatedly" affirmed the mandatory and jurisdictional status of such rules.[20] The Court announced the resulting rule clearly: a statutory time limit to appeal is jurisdictional and mandatory, neither waivable nor forfeitable, and invulnerable to equitable modification by the courts.[21]

The Court did not question the narrow holdings of those recent cases in which it had applied the jurisdictionality label to rules sparingly.[22] But the Court's reasoning in *Bowles* was contrary to what had been its motivating concern in those cases: that jurisdiction had become a word of too many meanings that should be restricted to subject matter jurisdiction, personal jurisdiction, and little else.[23] Instead, reworking its prior language of limitation to make its newly expansive point, the Court in *Bowles* stated that "'"subject-matter"' jurisdiction obviously extends to '"classes of cases . . . falling within a court's adjudicatory authority,"' but it is no less 'jurisdictional' when Congress

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[18] *Bowles*, 127 S. Ct. at 2366–67.

[19] *Id.* at 2365 (emphasis added).

[20] *Id.* at 2362.

[21] *Id.* at 2366 (citing United States v. Curry, 47 U.S. (6 How.) 106, 113 (1848)). Chief Justice Taney's closing paragraph in *Curry* rings with the same chords of judicial self-restraint struck in *Bowles*. Taney wrote:

> The power to hear . . . 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. And if the mode prescribed for removing cases by . . . appeal be too strict and technical, and likely to produce inconvenience or injustice, it is for Congress to provide a remedy by altering the existing laws; not for the court.

Curry, 47 U.S. at 113. The *Bowles* Court's use of *Curry* and similar nineteenth-century precedents took no account of the intervention of the Rules Enabling Act, 28 U.S.C. §§ 2071–2077 (2000), and the resulting shift of most court procedure rulemaking from Congress to the Judiciary.

[22] *Bowles*, 127 S. Ct. at 2364–65. In *Kontrick v. Ryan*, the Court held certain filing deadlines within the judicially created Bankruptcy Rules to be nonjurisdictional. 540 U.S. 443, 454 (2004). In *Eberhart v. United States*, the Court held deadlines to filing motions for a new trial pursuant to the judicially created Federal Rules of Criminal Procedure to be nonjurisdictional. 126 S. Ct. 403, 405 (2005) (per curiam). In *Arbaugh v. Y & H Corp.*, the Court held statutory limits on employers subject to Title VII claims to be nonjurisdictional. 126 S. Ct. 1235, 1244–45 (2006).

[23] *Compare Bowles*, 127 S. Ct. at 2365, 2367 (stating that treating statutory time limits as jurisdictional is clarifying and "makes good sense"), *with Kontrick*, 540 U.S. at 455 (2004) (stating that clarity would be served if procedural time limits were not treated as part of subject-matter jurisdiction, and that lumping them together can be "confounding").

forbids federal courts from adjudicating an otherwise legitimate 'class of cases' after a certain period has elapsed from final judgment."[24]

The Court in *Kontrick*, *Eberhart*, and *Arbaugh* had determined a rule's jurisdictionality by focusing on its *characteristics*.[25] *Bowles* abandoned this method, focusing instead on the rule's *source*.[26] But since *Bowles* left *Kontrick*, *Eberhart*, and *Arbaugh* intact,[27] the post-*Bowles* result, reflected in the following chart, is complex.[28]

TABLE 1. JURISDICTIONALITY OF LIMITS TO APPEAL

		Source of Rule	
		Congress	Judiciary
Character of Rule	Limits on Types of Cases[29]	The limit is mandatory and jurisdictional.[30]	The limit may be an abstention or avoidance.[31]
	Limits on Time and Manner of Appeal	The limit is mandatory and jurisdictional.[32]	The limit is a non-jurisdictional claim-processing rule.[33]

[24] 127 S. Ct. at 2365–66 (omission in original) (quoting *Eberhart*, 126 S. Ct. at 455).

[25] *See, e.g.*, *Kontrick*, 540 U.S. at 456 (stating that "[c]haracteristically, a court's subject-matter jurisdiction cannot be expanded to account for the parties' litigation conduct").

[26] *See Bowles*, 127 S. Ct. at 2365 (using the Court's certiorari rules to illustrate the "jurisdictional distinction between court-promulgated rules and limits enacted by Congress").

[27] The Court in *Bowles* did not question its prior characterization of *judicially created* time limits or statutory thresholds to claims *other* than time limits as nonjurisdictional. *Id.* at 2364–65.

[28] The Court held statutory time limits to be jurisdictionally analogous to subject matter limits set by Congress; that is, it set the content of the chart's shaded box by looking to the box *above* it. The dissent would have drawn the analogy with procedural time limits; that is, it would have set the content of the shaded box by looking to the box *beside* it.

[29] A weakness of the opinion of the Court in *Bowles* is latent in this row's necessarily oversimplifying description. The row's category comprises not only jurisdictional members (such as amount-in-controversy requirements), but also nonjurisdictional members (such as the Title VII employee-numerosity threshold analyzed in *Arbaugh v. Y & H Corp.*, 126 S. Ct. 1235, 1238 (2006)). Rather than properly draw its analogy by limiting itself to the jurisdictional subset of statutory limits, the Court merely distinguishes a *single member* of the nonjurisdictional subset (the *Arbaugh* numerosity limit), as if it were the only member of that subset. *Bowles*, 127 S. Ct. at 2365. Examining the statute at issue in *Bowles* shows that this subset has more than one member.

[30] *See, e.g.*, Finley v. United States, 490 U.S. 545, 547–48 (1989); Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 818 (1988); Palmore v. United States, 411 U.S. 389, 400–01 (1973).

[31] The Court in *Bowles* insisted it had "no authority to create equitable exceptions to jurisdictional requirements." *Bowles*, 127 S. Ct. at 2366. As a generality, this is both venerable and correct. *See* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821) ("We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution."). If it were so simple, nothing legitimate would belong in this element of the table. But in fact the judiciary itself limits what cases it will hear through an array of well-established doctrines of abstention and avoidance. *See generally* David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 547–74 (1985).

[32] This, of course, is the core holding of *Bowles*. 127 S. Ct. at 2366.

[33] *See, e.g.*, Eberhart v. United States, 126 S. Ct. 403, 405 (2005).

The Court applied the same reasoning to repudiate the "unique circumstances doctrine."[34] Describing the unique circumstances doctrine as "moribund," the Court explicitly "overrule[d]" it in *Bowles*, reasoning that "[b]ecause this Court has no authority to create equitable exceptions to jurisdictional requirements, use of the 'unique circumstances doctrine' is illegitimate."[35]

Justice Souter dissented,[36] characterizing the majority's opinion as a regression into stuffing "many, too many, meanings" into the word *jurisdictional* and emphasizing that the Court had, "until today" attempted to "clean up" its language.[37] He reasoned that the Court's recent rulings had taught that because time limits relate to the processing of the claim within the courts and not the substance of the dispute between the parties, filing limits such as Appellate Rule 4(a)(6) are never jurisdictional, whether or not set out in a statute, unless given a jurisdictional "tag" by Congress.[38] "By its refusal to come to grips with our considered statements of law," the minority complained, "the majority leaves the Court incoherent."[39]

Each opinion in *Bowles* leapt to bright-line rules.[40] Both majority and minority were preoccupied with applying their preferred, opposing precedents.[41] Neither carefully considered the statute. These flaws led

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[34] The Court had announced this doctrine in *Harris Truck Lines*, in which an incorrect order by a district judge had been held on appeal to deserve "great deference" because of the "obvious great hardship to a party who relies upon the trial judge's finding." *See* Harris Truck Lines, Inc. v. Cherry Meat Packers, 371 U.S. 215, 217 (1962) (per curiam), *overruled by Bowles*, 127 S. Ct. at 2366. Soon after, in a 5–4 ruling, the Court had applied this unique circumstances doctrine to a trial court's explicit acceptance of the timeliness of a motion filed after the statutory period for submission had elapsed. Thompson v. INS, 375 U.S. 384, 387 (1964) (per curiam), *overruled by Bowles*, 127 S. Ct. at 2366.

[35] *Bowles*, 127 S. Ct. at 2366. The repudiation of *Thompson* will be no surprise to the federal courts, which had questioned its continuing validity. *See, e.g.*, Morris v. Unum Life Ins. Co., 430 F.3d 500, 502 (5th Cir. 2005); Panhorst v. United States, 241 F.3d 367, 371 (4th Cir. 2001) (collecting cases); *see also* Kraus v. Consol. Rail Corp., 899 F.2d 1360, 1363–65 (3d Cir. 1990) (complaining that *Thompson*'s equitable exception had no place amidst a well-ordered scheme of timing rules).

[36] Justices Stevens, Ginsburg, and Breyer joined Justice Souter's dissent.

[37] *Bowles*, 127 S. Ct. at 2367 (Souter, J., dissenting) (quoting Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 90 (1998)) (internal quotation marks omitted).

[38] *Id.* at 2368.

[39] *Id.* at 2370. The minority also objected to the repudiation of the "unique circumstances" doctrine. *See id.* at 2369–70.

[40] The Court's rule is that statutory time limits are jurisdictional such that the courts have no power to make exceptions to them. *Id.* at 2365–67 (majority opinion). The dissent's rule would be that statutory time limits are subject to limited exceptions made by the courts *unless* designated "jurisdictional" by Congress. *Bowles*, 127 S. Ct. at 2368 (Souter, J., dissenting).

[41] The dissent preferred *Kontrick*, *Eberhart*, and *Arbaugh*. *See, e.g.*, *id.* at 2367–68 & n.1 (Souter, J., dissenting). The Court preferred decisions relying on *United States v. Robinson*, 361 U.S. 220 (1960), the decision much criticized by the Court in *Kontrick*, *Eberhart*, and *Arbaugh* for its broad use of the term "jurisdictional." *Bowles*, 127 S. Ct. at 2363 & n.2.

the Court to draw its rule incorrectly and weakened the dissent. Still, the majority's focus on a rule's source in determining its jurisdictionality was a positive development: one that, if deepened into careful examination of a rule's source and the purpose for its creation, can further the jurisdictional project embraced by the minority.

The Court's recent jurisdictionality jurisprudence had rightly begun to "clean up" the overbroad use of the jurisdictional label, which had led to reflexive and sometimes unfair dismissals.[42] But in determining whether a rule had jurisdictional status, the Court had struggled with its ultimately arbitrary approach, begun in *Kontrick* and preferred by the dissent, of dividing rules that were "properly"[43] or "[c]haracteristically"[44] jurisdictional from those that were merely "claim-processing rules."[45] The basis for this division was either unstated definitions[46] or intuition.[47] But the Court had over-explained: it

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[42] Professor Moore described this rigid approach to jurisdictionality as a "fetish." 1 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 0.60 (2d ed. 1948). Professors Wright and Miller describe it as "[u]nfortunate[]" lore based on "traditional mystique." 15A WRIGHT, MILLER & COOPER, *supra* note 1, § 3905, at 239, 241; *see also* Mark A. Hall, *The Jurisdictional Nature of the Time To Appeal*, 21 GA. L. REV. 399, 420 n.92 (1986) (collecting scholarly critiques). Nevertheless, within the courts, such dismissals are routine. *See* Hall, *supra*, at 399 & n.2 (collecting cases of sua sponte consideration of timing defects). Judicial questioning of mandatory and jurisdictional treatment of time limits had, until *Kontrick*, been very rare. *See* Kontrick v. Ryan, 540 U.S. 443, 452–56 (2004); Perry Dane, *Jurisdictionality, Time, and the Legal Imagination*, 23 HOFSTRA L. REV. 1, 14–15 (1994); Hall, *supra*, at 400 & n.4. One such critique is contained in Justice Black's dissent to denial of certiorari to a person whose petition arrived two days late due to a severe snowstorm that had disrupted the mails. Criticizing unreflective use of the "'jurisdictional' formula," Justice Black described this "Draconian" and "pointlessly harsh" application as unsupportable under any "known principle of statutory construction" and unlike the flexible treatment of otherwise similar statutes. Teague v. Reg'l Comm'r of Customs, 394 U.S. 977, 981–84 (1969) (Black, J., dissenting from denial of certiorari). Similarly, nine years ago, Justice Scalia denigrated reflexive jurisdictional dismissals as "drive-by jurisdictional rulings" that were owed "no precedential effect." Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 91 (1998).

[43] *Kontrick*, 540 U.S. at 455.

[44] *Id.* at 456.

[45] *Id.* at 455–56.

[46] *See, e.g.*, Arbaugh v. Y & H Corp., 126 S. Ct. 1235, 1242 (2006) (setting out the project of narrowing the use of a word with "too many" meanings but not proposing a correct definition). Unfortunately for the definitional approach, "[a]ny rule can be read to describe the classes of cases courts can hear." Alex Lees, Note, *The Jurisdictional Label: Use and Misuse*, 58 STAN. L. REV. 1457, 1467 (2006).

[47] *See, e.g.*, Eberhart v. United States, 126 S. Ct. 403, 405 (2005) (treating "prescriptions delineating the classes of cases (subject-matter jurisdiction) . . . falling within a court's adjudicatory authority" as sufficiently indicative of a set of properly jurisdictional limits (quoting *Kontrick*, 540 U.S. at 455) (internal quotation mark omitted)). The dissent in *Bowles* manifested these previously deployed intuitions, as well as their limitations. Intuitions of "proper" or "characteristic" categorization resurfaced as question-begging assertions that the time limits at issue were "far from defining the set of cases that may be adjudicated." *Bowles*, 127 S. Ct. at 2369 (Souter, J., dissenting). Intuitions of fairness resurfaced on every page of the dissent. *See id.* at 2367–72 (noting, inter alia, that "[i]t is intolerable for the judicial system to treat people this way" and that even when the Court had "thoughtlessly called time limits jurisdictional" it had not "shrugg[ed] at the inequity of penalizing a party for relying on what a federal judge had said to him"). These

made clear that Congress could give a rule jurisdictional status simply by labeling it so.[48] Therefore, even had the Court stated a working *definition* of jurisdictionality, it would have had to reconcile this with Congress's conceded power, within constitutional limits, to make limits jurisdictional *regardless* of that definition.

Justice Thomas's opinion in *Bowles* served the Court's overall project of clarifying jurisdictionality by abandoning this unpromising definitional approach, and instead focusing directly on a rule's *source*.[49] But the Court in *Bowles* stopped short of a sufficient analysis when it treated as dispositive the mere fact that the time limit existed in a statute. That fact, alone, is not properly dispositive: the category "statutes" contains too much variation in relevant import to justify a uniform, bright-line ruling based on nothing more than a limit's membership in that broad category.[50] Instead, the Court should have persisted down its own path by following its statutory focus past the mere fact of statutory statement into an examination of legislative purpose and a particular statute's place within larger statutory schemes.[51] The statute at issue in *Bowles* illustrates this clearly.

The Court's ruling repeatedly states that the time limit affecting Bowles's appeal is statutory; specifically, that Appellate Rule 4(a)(6) is based in 28 U.S.C. § 2107(c).[52] That is false. The reverse is true: Congress added the time limit in § 2107(c) to conform that *statute* to the *judicially created rule*. The Supreme Court prescribed the revised

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intuitions required development rather than mere emphasis and repetition if they were to succeed in altering the longstanding doctrine that equitable arguments are unavailing against jurisdictional limits. *See, e.g.*, Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 818 (1988) (observing that "[t]he age-old rule that a court may not in any case, even in the interest of justice, extend its jurisdiction where none exists has always worked injustice in particular cases" but stating this "inhere[s] in the very nature of jurisdictional lines, for . . . few jurisdictional lines can be so finely drawn as to leave no room for disagreement on close cases").

[48] *See Kontrick*, 540 U.S. at 447–48. This second, statutory rationale had done much of the dispositive work in *Kontrick* and *Eberhart*, a fact the majority in *Bowles* correctly emphasized. *Bowles*, 127 S. Ct. at 2364.

[49] *Bowles*, 127 S. Ct. at 2365–66.

[50] The range of statutes setting time limits on filing includes some that courts clearly treat as nonjurisdictional, statutes of limitations being the ordinary example. *See id.* at 2369 (Souter, J., dissenting); *see also* Hall, *supra* note 42, at 415 (noting that statute of limitation defenses are ordinarily subject to waiver and thus not jurisdictional). Also, the range of avowedly jurisdictional and statutory limits includes some that *are* waivable by the benefiting party, such as personal jurisdiction. *See* Hall, *supra* note 42, at 418.

[51] The Court has taken this better approach to determining whether statutory time limits are mandatory and jurisdictional at least once before. *See* Barnhart v. Peabody Coal Co., 537 U.S. 149, 159–60 n.6 (2003) (stating that in distinguishing those statutory time limits that are mandatory and jurisdictional from those that are not, "[f]ormalistic rules do not account for the difference, which is explained by contextual and historical indications of what Congress meant to accomplish," and determining the jurisdictionality of a statute on that basis).

[52] *Bowles*, 127 S. Ct. at 2363 (stating that "Rule 4 of the Federal Rules of Appellate Procedure carries § 2107 into practice"). The dissent does not question this erroneous assumption.

Appellate Rules that first introduced Rule 4(a)(6) in April of 1991.[53] Together with notice of adoption, the Court sent a "Transmittal Note" to the Congress from the Judicial Conference's Committee on Rules and Practice, which read: "Upon transmittal of this rule to Congress, the Advisory Committee recommends that the attention of Congress be called to the fact that language in the fourth paragraph of 28 U.S.C. § 2107 might appropriately be revised in light of this proposed rule."[54] Congress accepted this recommendation and, in consultation with the Judicial Conference, amended 28 U.S.C. § 2107 in December of 1991 by quoting the judiciary's new rule under the telling heading "Conformity with Rules of Appellate Procedure."[55] Thus, even if the intent and effect of enacting the law were to prevent supersession of the previous version by the Court's promulgation of new rules,[56] the resulting statutory language should not be supposed to have *jurisdictional* status different from the judicial rule from which it was derived.

Congress's actions in this case speak even louder because they exist within the larger statutory scheme of the Rules Enabling Act[57] (REA). The Court's reasoning, which it announced as too obvious for elaboration, rested on the seemingly commonsense statement that statutes have more force than judicially created rules when a power of the Congress (such as setting jurisdiction) is at play.[58] However intuitive, this generality is not safely applicable where an act of Congress *subordinates* a statute to judicial rulemaking.[59] The Court in *Bowles* did

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[53] Order Prescribing Amendments to the Federal Rules of Appellate Procedure, 500 U.S. 1009, 1009, 1011 (1991).

[54] Transmittal Note from the Judicial Conference's Committee on Rules and Practice to Congress, 134 F.R.D. 725, 745 (1991) (accompanying transmission by the Chief Justice to Congress of amended Federal Rules of Appellate Procedure).

[55] Act of Dec. 9, 1991, Pub. L. No. 102-198, § 12, 105 Stat. 1623, 1627; *see also* 137 CONG. REC. 32,905–06 (1991) ("mak[ing] certain technical corrections in the Judicial Improvements Act of 1990 and other provisions of law relating to the courts"). The bill was wholly uncontroversial. *See* 137 CONG. REC. 32,905–06 (1991).

[56] *See* H.R. REP. NO. 102-322, at 5–6 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1303, 1305–06 (describing the benefits of avoiding a supersession controversy in this instance). *See generally* 28 U.S.C. § 2072(b) (2000) (providing that judicially promulgated rules may supersede older congressional enactments).

[57] 28 U.S.C. §§ 2071–2077 (2000).

[58] *See Bowles*, 127 S. Ct. at 2364.

[59] *Moore's Federal Practice* applies this generality to the specific rule and statute at issue in *Bowles* in the plainest terms: "Insofar as § 2107 may conflict with Appellate Rule 4, it is ineffective, because under the Rules Enabling Act, all laws in conflict with the Appellate Rules are of no 'force and effect.'" 20 MOORE ET AL., *supra* note 42, § 304.03[8] (3d ed. 2007) (citing 28 U.S.C. § 2072(b)). The Court might have argued that § 2107, despite its heading, provenance, and purpose, was not procedural but jurisdictional, and thus that the Rules Enabling Act did not apply to it. But that would simply be an appeal to a supposed intrinsically jurisdictional nature of time limits, regardless of source, precisely the sort of reasoning for which the Court castigates the minority and forecloses in its own analysis based on source. At any rate, neither the Court nor the dissent mentions the issue.

not consider the implications of Congress's grant, embodied in the REA, of rulemaking authority to the Court.[60] Probably the Court assumed the REA did not apply because the "power" that act grants the Supreme Court is limited to rules of "procedure" that "shall not abridge, enlarge or modify any substantive right."[61] But since § 2107(c) was based *entirely* on the new Appellate Rule 4(a)(6), promulgated under the REA (with no objection by Congress), the statute must *itself* be procedural, not affecting substantive rights: it could not be of jurisdictional status.

The error of the Court was that it stopped short: it emphasized the existence of the statute, but ignored its origins. Had the Court or minority examined this statute, it would have been clear that a filing limit's presence in a statute does not itself determine Congress's intent. This error results in an unfairly overinclusive bright-line rule. Procedural limits should not be applied with the reflexive strictness proper to truly jurisdictional limits. But the Court's reasoning is also underinclusive. Lower courts have already read *Bowles* together with the recent jurisdictionality-clarifying precedents it coyly leaves intact to teach that judicial rules with *no* statutory basis are *not* jurisdictional.[62] Yet some judicial rules are not directly required by statute — such as those implementing the complete diversity requirement[63] — but instead are glosses on principles of limited judicial power. That subset of non-statutory limits is properly considered jurisdictional.

Bowles thus ensures, for the time being, that unwarranted windfalls and unfair refusals will occasionally fall to parties on each side of any of the array of federal appellate proceedings.[64] Worse, the ruling will sometimes close the door to redressing inequities as glaring as those in Keith Bowles's case. The dissent in *Bowles* thus understandably lamented that the Court's ruling was unfair and left the

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[60] This was particularly egregious in an opinion concluding that the Court "lack[s] present authority" to make rules, and that Congress could have, but had not, "authorized rulemaking." *Bowles*, 127 S. Ct. at 2367.

[61] 28 U.S.C. § 2072(b).

[62] *See, e.g.*, United States v. Martinez, No. 06-41065, 2007 WL 2285324, at *1 (5th Cir. Aug. 9, 2007) (reading *Bowles* to stand for the proposition that time limits to appeal not based in statute are therefore not jurisdictional); Nat'l Ecological Found. v. Alexander, No. 06-5700, 2007 WL 2213278, at *6 (6th Cir. Aug. 3, 2007) (same); Jones v. Zenk, 495 F. Supp. 2d 1289, 1298–300 (N.D. Ga. 2007) (same, but drawing its conclusions more carefully with respect to a judicially imposed exhaustion requirement).

[63] *See* Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267, 267 (1806). *See generally* 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-5, at 282 (3d ed. 2000).

[64] Justice Souter observed that he "would . . . rest better knowing that . . . innocent errors will not jeopardize anyone's rights unless absolutely necessary." *Bowles*, 127 S. Ct. at 2370 n.7 (Souter, J., dissenting).

Court's jurisdictionality jurisprudence incoherent.[65] While this observation may be true for the moment, it is not because the recent cases preferred by the dissent should have carried the day (since they had not equipped the Court with the jurisdictionality-determining tools to decide Bowles's case). Nor is it because the majority in *Bowles* refused to grapple with the precedents the dissent preferred (although the Court should have engaged more fully with these precedents, the Court's too-easy statutory reasoning was latent in precisely those decisions). Instead, the lamented incoherence is — or can be — that of a mid-point in doctrinal development. The project of limiting jurisdictional treatment to rules serving jurisdictional ends has been engaged, but satisfactory boundaries, based on institutional capacity, constitutional powers, and the need for finality, have not yet been drawn.[66] The challenge for the Court, and particularly for the dissenters in *Bowles*, is to recognize the Court's ruling, however flawed and insufficient, as a developmental step in establishing the grounds and limits of its still-forming jurisdictionality jurisprudence.

C. Standing

Taxpayer Standing — Establishment Clause Violations. — The Supreme Court has tried throughout its history to uphold the Founders' vision of three branches of government that each have a distinct purpose. In undertaking the difficult task of policing the relationship between Congress and the Executive,[1] the Court has deployed a variety of nondelegation canons that regulate congressional delegation of legislative authority to the Executive.[2] Congress thus makes the tough policy choices, and thereby mitigates factional power, ensures accountability, and promotes caution.[3] Last Term, in *Hein v. Freedom from Religion Foundation, Inc.*,[4] the Supreme Court denied standing to

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[65] *Id.* at 2370. To be sure, had the Court determined the rule was *not* jurisdictional, it might still have found that, nevertheless, it was an inflexible rule. This was the approach of the opinion for the Court in *Eberhart*. United States v. Eberhart, 126 S. Ct. 403, 407 (2006) (per curiam) (holding a rule inflexible because of its "insistent demand for a definite end to proceedings"). Such a ruling would have been consistent with the dissent's reasoning, but done nothing about the "intolerable" treatment it deplores. *See Bowles*, 127 S. Ct. at 2367 (Souter, J., dissenting).

[66] *Cf.* Lees, *supra* note 46, at 1487–91 (urging an understanding of jurisdictionality based on preservation of institutional identity).

[1] *See, e.g.*, Whitman v. Am. Trucking Ass'ns, 531 U.S. 457 (2001) (debating the permissible breadth of the delegation of power by Congress to the Environmental Protection Agency); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (discussing the appropriate breadth of executive and congressional action).

[2] *See* Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 317 (2000) (discussing the importance of congressional limits on executive power exercised under delegations).

[3] *See* John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223, 239–40 (discussing these consequences of legislative control over policymaking).

[4] 127 S. Ct. 2553 (2007).