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The Supreme Court's Quiet Revolution: Redefining the Meaning of Jurisdiction

Erin Morrow Hawley

THE SUPREME COURT'S QUIET REVOLUTION: REDEFINING THE MEANING OF JURISDICTION

ERIN MORROW HAWLEY*

ABSTRACT

Over the last three decades, the Rehnquist and Roberts Courts have carried out a quiet revolution in the nature and meaning of jurisdiction. Historically, federal courts generally treated procedural requirements, like filing deadlines and exhaustion prerequisites, as presumptively "jurisdictional." In case after case, the modern Court has reversed course. The result has been an unobtrusive but seminal redefinition of what jurisdiction means to begin with: the adjudicatory authority of the federal courts. This shift is momentous, but it has been obscured by the Court's erstwhile imposition of a clear statement requirement. For courts to find a statutory requirement jurisdictional, Congress must have clearly said so.

Scholars have applauded this new interpretive technique, yet even though the Court's more precise definition of jurisdiction is a welcome development, the Court's emphasis on the clear statement rule is a mistake. To begin, the Supreme Court's application of its clear statement rule is inconsistent. As a result, the Court's decisions are unpredictable, and Congress is left to guess how "clear" a clear statement must be. Second, the rule may not clarify dialogue between the courts and Congress because the Court has imposed it retroactively. Third, the Court has not tied its command to the protection of an important constitutional value, and there is a strong argument to

* Associate Professor of Law, University of Missouri. Clerk to Chief Justice John G. Roberts and J. Harvie Wilkinson III. I would like to thank Michael McConnell, James Pfander, Amy Coney Barrett, Carl H. Esbeck, Samuel L. Bray, Jeffrey A. Pojanowski, Randy Kozel, John D. Inazu, William Baude, Chad W. Flanders, and Joshua D. Hawley for their helpful comments on earlier drafts, and Montana Vinson for her excellent research help. Mistakes are mine.

be made that the rule unconstitutionally augments the Court's authority at the expense of Congress's unquestioned power over the scope of Article III jurisdiction.

Ultimately, the Court's turn to a clear statement rule is unnecessary. A close analysis of the Supreme Court's recent cases reveals it is the Court's quiet redefinition of jurisdiction that has been doing the work. The Court is right to demand precision as to jurisdiction. But the clear statement rule is a problematic and unnecessary attempt to carry that mandate into effect. This Article argues that the Court should jettison its clear statement requirement and focus on what it really wants to ask, and should have been asking all along: Did Congress intend this provision to oust the federal courts of their power to adjudicate this case?

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Terminology is destiny.
—Gonzalez v. Thaler[1]

INTRODUCTION

Over the last three decades, the Rehnquist and Roberts Courts have carried out a quiet revolution in the nature and meaning of jurisdiction. Historically, federal courts generally treated procedural requirements, like filing deadlines and exhaustion prerequisites, as "jurisdictional."[2] The early Court frequently used the term jurisdiction to refer not only to authority-conferring provisions, but also to procedural requirements.[3] Not anymore. In case after case, the modern Court has abandoned its treatment of procedural requirements as presumptively jurisdictional.[4] The result has been an unobtrusive but seminal redefinition of what jurisdiction means. In a word, the Court's cases have narrowed the definition of jurisdiction to mean only the courts' power to decide cases. Statutory requirements are jurisdictional only to the extent they are directed specifically at the adjudicatory authority of the federal courts.

This shift is momentous, as only a few scholars have realized.[5] Ironically, the principal reason so few have appreciated this revolution may be the Court itself. Even as they were rethinking jurisdiction, the Rehnquist and Roberts Courts chose to emphasize not their remodeled definition, but rather an interpretive technique for classifying statutory provisions as jurisdictional. To find a requirement jurisdictional, Congress must have clearly said so.[6] It is this

1. 132 S. Ct. 641, 664 (2012) (Scalia, J., dissenting).
2. *See infra* Part I.A.
3. *See infra* Part I.A.
4. *See infra* Part I.B.
5. *See, e.g.*, Scott Dodson, *In Search of Removal Jurisdiction*, 102 NW. U. L. REV. 55, 88-89 (2008) [hereinafter Dodson, *Removal Jurisdiction*]; Scott Dodson, *The Failure of* Bowles v. Russell, 43 TULSA L. REV. 631, 641-43 (2008) [hereinafter Dodson, *The Failure of* Bowles v. Russell] (celebrating the Court's clear statement rule); Howard M. Wasserman, *Jurisdiction and Merits*, 80 WASH. L. REV. 643, 643 (2005) [hereinafter Wasserman, *Jurisdiction and Merits*]; Howard M. Wasserman, *Jurisdiction, Merits, and Procedure: Thoughts on a Trichotomy*, 102 NW. U. L. REV. 1547, 1547 (2008) [hereinafter Wasserman, *Jurisdiction, Merits, and Procedure*]; Howard M. Wasserman, *The Demise of "Drive-By Jurisdictional Rulings,"* 105 NW. U. L. REV. 947, 953 (2011) [hereinafter Wasserman, *The Demise of "Drive-By Jurisdictional Rulings"*].
6. *See infra* Part I.B.

clear statement rule that the Court has made the focus of its recent jurisdictional cases.[7] And the innovation has been warmly met by the academy.[8]

Even though the Court's more precise definition of jurisdiction is a welcome development, the Court's emphasis on the clear statement rule is a major mistake for several reasons. To begin, the Supreme Court's application of its clear statement rule is inconsistent. The Court invokes it when it wants to, but ignores it in other circumstances, without much rhyme or reason. For example, stare decisis ordinarily does not matter when it comes to clear statement rules, but the Court has recently treated precedent as dispositive in several procedural requirements cases.[9] As a result, the Court's decisions are unpredictable, and Congress is left to guess how "clear" a clear statement must be.

Second, the best justifications for clear statement rules generally—that they are democracy enhancing because they facilitate and clarify dialogue between the courts and Congress—do not apply here. The Supreme Court has imposed its clear statement rule retroactively, upsetting, rather than facilitating, congressional dialogue.[10]

Third, the Court's use of the clear statement rule in the jurisdictional context is unique in that, unlike other clear statement rules, here the Supreme Court has not tied its "speak clearly when you mean jurisdiction" command to the protection of an important constitutional value. Indeed, to require a clear statement from Congress as to jurisdiction implicates separation of powers principles. There is a strong argument to be made that this jurisdictional "clarity tax" unconstitutionally augments the Court's authority at the expense of Congress's unquestioned power over the scope of Article III jurisdiction.

Ultimately, the Court's turn to a clear statement rule on jurisdiction is a blind alley precisely because it is unnecessary. A close

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7. *See infra* Part I.B.

8. *See* Stephen R. Brown, *Hearing Congress's Jurisdictional Speech: Giving Meaning to the "Clearly-States" Test in* Arbaugh v. Y & H Corp., 46 WILLAMETTE L. REV. 33, 64-66 (2009); Dodson, *Removal Jurisdiction*, *supra* note 5, at 88-90; Dodson, *The Failure of* Bowles v. Russell, *supra* note 5, at 643; Wasserman, *Jurisdiction, Merits, and Procedure*, *supra* note 5.

9. *See infra* Part II.B.

10. *See infra* Part II.C.

analysis of the Supreme Court's recent jurisdictional cases reveals that it is not in fact the clear statement rule that holds water. It is the Court's quiet redefinition of jurisdiction. Although many today equate the term "jurisdiction" with the judicial power to hear a case, the historical understanding of the term was much broader, encompassing procedural requirements.[11] The Court's recent cases reveal the tension between the old and new conceptions of jurisdiction coming to a head, and the Court choosing the narrower definition.[12] The Court is right to demand precision as to jurisdiction. But the clear statement rule is a clumsy, distracting, and ultimately unnecessary attempt to carry that mandate into effect. Once we jettison it, the true import of the Court's jurisdictional project comes into focus. What the contemporary Court really wants to ask, and should have been asking all along, is this: Did Congress intend this provision to oust the federal courts of their power to adjudicate this case?

To say that jurisdiction matters is a dramatic understatement. The power to hear cases—or not—goes to the very heart of what courts are and what they do. Courts are asked every day to determine whether statutory requirements are jurisdictional. Indeed, procedural requirements are at issue in every case—they include everything from filing deadlines, to exhaustion requirements, to litigating prerequisites such as copyright registration. Under today's understanding of jurisdiction, if a procedural requirement is jurisdictional, it is absolute.[13] Parties may not waive or forfeit such requirements and the federal courts may not create equitable exceptions—however meritorious the excuse.[14] In view of these consequences, it is time to recognize the contemporary Court's narrowing of the term jurisdiction for what it is: revolutionary.

Part I analyzes the development and contours of the Supreme Court's clear statement requirement for jurisdictional conditions. Part II concludes that the application of this approach has been

11. *See infra* Part I.A.

12. *See infra* Part I.B.

13. Dolan v. United States, 560 U.S. 605, 610 (2010) ("The parties cannot waive it, nor can a court extend that deadline for equitable reasons.").

14. Henderson *ex rel.* Henderson v. Shinseki, 131 S. Ct. 1197, 1202 (2011); *Dolan*, 560 U.S. at 610; Bowles v. Russell, 551 U.S. 205, 214 (2007); Arbaugh v. Y & H Corp., 546 U.S. 500, 514 (2006).

problematic. The Supreme Court's invocation of context is inconsistent with clear statement rules generally, and its occasional reliance on stare decisis creates significant tension with the clear statement rule and leads to unpredictable results. The clear statement requirement also is troublesome because it operates retroactively, reversing the historical, presumptively jurisdictional approach that the Marshall and Taney Courts had adopted. Finally, the undertheorized clear statement rule is a poor fit because it does not protect important constitutional values and may itself create constitutional tensions. Part III decodes the Supreme Court's procedural requirements cases and establishes that the key doctrinal shift is a narrowed definition of the term "jurisdiction," not the clear statement rule. It also suggests a way forward—a straight-forward application of the question whether Congress conditioned the adjudicatory power of the federal courts—and briefly sketches out key considerations under this new inquiry.

I. HISTORY AND ORIGINS OF THE CLEAR STATEMENT RULE

The Supreme Court's methodology for determining whether a procedural requirement is jurisdictional has fluctuated wildly. The Marshall Court held certain procedural requirements jurisdictional. The Taney Court took things further, adopting what amounted to a presumption that procedural requirements were jurisdictional. This presumption carried through in large measure to the more modern Supreme Court that has often endorsed a broad and imprecise view of the term jurisdiction. The past few decades, however, have seen a sea change in methodology. The Rehnquist and Roberts Courts have adopted the opposite presumption: as the Court now has it, a precondition is jurisdictional only when Congress clearly says so.[15]

Underlying this shift in approach has been the Court's changing conception of jurisdiction. Early courts routinely held various procedural requirements to be jurisdictional.[16] But the cases suggest

15. *See infra* Part I.B.

16. United States v. Curry, 47 U.S. (6 How.) 106, 113 (1848) (dismissing as out of time upon motion); Yeaton v. Lenox, 33 U.S. (8 Pet.) 123, 126-27 (1834) (dismissing for improperly joining claims in a bill); United States v. More, 7 U.S. (3 Cranch) 159, 173-74 (1805) (dismissing for want of jurisdiction); Bailiff v. Tipping, 6 U.S. (2 Cranch) 406, 406 (1805) (dismissing for want of jurisdiction—no indication as to whether upon party's motion); Lloyd

that the Court may not have had in mind the strict nonwaivable sort of jurisdiction that we think of today.[17] During the Civil War era, the Taney Court began to apply a more rigid definition of jurisdiction—one that defined the term as going to the Court's adjudicatory power—to various procedural requirements.[18] The more modern Court also often found procedural requirements to be jurisdictional.[19] This broad notion of what counted as jurisdictional, along with the Court's evolution to a strict interpretation of the consequences that attend a jurisdictional statute, pressured the Court to rethink how it defined jurisdiction. The Court's most recent cases reveal this tension and the Court's emphasis on a more narrow definition of jurisdiction.

A. Historical Approaches to Procedural Requirements

From its earliest years, the Supreme Court held certain procedural requirements jurisdictional. In 1796, Chief Justice Ellsworth

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v. Alexander, 5 U.S. (1 Cranch) 365, 366 (1803) (quashing writ for lack of citation without mentioning a motion); United States v. Hooe, 5 U.S. (1 Cranch) 318, 320 (1803) (dismissing for failure to include statement of facts upon request of the Attorney General).

17. *See* Mussina v. Cavazos, 73 U.S. (6 Wall.) 355, 358-59, 363 (1867) (refusing to dismiss for failure to attach writ of error because the original had been burned in a fire, and rejecting notion that "a rigid and literal fulfillment of every [condition on appeal] is an absolute and indispensable requisite to appellate jurisdiction"); United States v. Gomez, 70 U.S. (3 Wall.) 752, 763 (1865) (explaining that the "jurisdictional" rule has good-cause exceptions and such exceptions are "indispensable limitations to guard against fraud and circumvention, and to prevent a failure of justice"); Mesa v. United States, 67 U.S. (2 Black) 721, 722 (1862) (dismissing for failure to timely file transcript); United States v. Booth, 62 U.S. (21 How.) 506, 511-13, 526 (1859) (reversing for lack of jurisdiction a writ of habeas corpus issued by the Wisconsin Supreme Court for a man arrested under a federal warrant under the fugitive slave law); Steamer Va. v. West, 60 U.S. (19 How.) 182, 183 (1856) (dismissing upon motion, without describing consequences of term jurisdiction and noting that a new appeal might be filed); Villabolos v. United States, 47 U.S. (6 How.) 81, 87, 91 (1848) (dismissing upon motion; litigant's suggestion that waiver/abandonment by Attorney General of jurisdictional condition meant that the Court need not address the contention); Catlett v. Brodie, 22 U.S. (9 Wheat.) 553, 555 (1824) (dismissing case for failure to provide sufficient security unless within thirty days such security was provided); The San Pedro, 15 U.S. (2 Wheat.) 132, 142-43 (1817) (holding that provisions previously labeled jurisdictional must be "substantially observed"); Blackwell v. Patten, 11 U.S. (7 Cranch) 277, 278 (1812) (finding irregularity insufficient to quash); Course v. Stead, 4 U.S. (4 Dall.) 22, 25 (1800) (same); Mossman v. Higginson, 4 U.S. (4 Dall.) 12, 13-14 (1800) (holding a blank return date was nondismissable clerical error).

18. *See infra* text accompanying notes 37-66.

19. *See infra* text accompanying notes 67-85.

explained that Article III qualified the Supreme Court's appellate jurisdiction by "such exceptions, and under such regulations, as the Congress shall make."[20] As a result, "[i]f Congress has provided no rule to regulate our proceedings, we cannot exercise an appellate jurisdiction; and if the rule is provided, we cannot depart from it."[21] Because the Judiciary Act of 1789 required that a statement of facts accompany the transcript in chancery cases,[22] the Court held that it must dismiss a writ of error unless a statement of facts appeared on the record.[23]

A few years later, Chief Justice Marshall agreed: "as the jurisdiction of the [C]ourt has been described, it has been regulated by [C]ongress, and an affirmative description of its powers must be understood as a regulation, under the [C]onstitution, prohibiting the exercise of other powers than those described."[24] The Court, Chief Justice Marshall wrote, may only review judgments over which "a power to reexamine ... is expressly given by law."[25]

The Marshall Court routinely dismissed cases that failed to comply with statutory procedural requirements, often in the context of section 22 of the Judiciary Act of 1789. Section 22 authorized an appeal to the Supreme Court provided that certain requirements were met:

> [U]pon a writ of error, whereto shall be annexed and returned therewith at the day and place therein mentioned, an authenticated transcript of the record, an assignment of errors, and prayer for reversal, with a citation to the adverse party, signed by the judge of such district court, or a justice of the Supreme Court.[26]

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20. Wiscart v. D'Auchy, 3 U.S. (3 Dall.) 321, 327 (1796) (quoting U.S. CONST. art. III, § 2, cl. 2).

21. *Id.*

22. Act to Establish the Judicial Courts of the United States, ch. 20, § 19, 1 Stat. 73, 83 (1789).

23. *Wiscart*, 3 U.S. (3 Dall.) at 330; *see also* United States v. Hooe, 5 U.S. (1 Cranch) 318, 320 (1803).

24. United States v. More, 7 U.S. (3 Cranch) 159, 173 (1805).

25. *Id.*

26. Act of Sept. 24, 1789, ch. 20, § 22, 1 Stat. 84.

The Marshall Court dismissed appeals for lack of jurisdiction, and writs of error for want of a citation[27] and failure to comply with the five-year statute of limitations.[28]

Key to deciphering these cases is understanding what the Court meant by the term "jurisdiction." The Court's early cases suggest that it may have had in mind a less consequential view of the term. For example, the Court noted that substantial compliance could satisfy a "jurisdictional" provision and that jurisdictional requirements were potentially waivable.[29]

By the mid-nineteenth century, the Supreme Court had developed an unstated presumption viewing preconditions to suit as jurisdictional requirements.[30] The Taney Court gave jurisdictional effect to a broad swath of arguably ambiguous preconditions to suit. Interpreting section 22 of the Judiciary Act of 1789, it held that the Supreme Court lacked jurisdiction to review a writ of error or appeal[31] unless: (1) the writ of error be returned by the end of the next term,[32] (2) the writ of error be signed by the lower court judge,[33] (3) an authenticated transcript be filed the next succeeding term after the appeal is taken,[34] and (4) the appeal be brought within five years.[35] The Court could not ignore these requirements because they

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27. *See, e.g.*, Bailiff v. Tipping, 6 U.S. (2 Cranch) 406, 406 (1805); Lloyd v. Alexander, 5 U.S. (1 Cranch) 365, 366 (1803).

28. *See* Yeaton v. Lenox, 33 U.S. (8 Pet.) 123, 126-27 (1834); *see also* Catlett v. Brodie, 22 U.S. (9 Wheat.) 553, 554-55 (1824) (dismissing pending payment of sufficient bond under chapter 20, section 22 of the Judiciary Act of 1789, which requires the judge to take "good and sufficient security").

29. *See* The San Pedro, 15 U.S. (2 Wheat.) 132, 142 (1817).

30. *See* Mussina v. Cavazos, 73 U.S. (6 Wall.) 355, 358 (1867) ("[I]t is undoubtedly true that this [C]ourt has gone very far in requiring strict compliance with the acts of Congress under which cases are transferred from inferior tribunals to this [C]ourt.").

31. The Judiciary Act of 1803 provided that appeals from decrees issued in chancery were "subject to the same rules, regulations and restrictions as are prescribed in law in case of writs of error," that is, section 22 of the Judiciary Act of 1789. Act of Mar. 3, 1803, ch. 40, § 2, 2 Stat. 244, 244.

32. United States v. Gomez, 70 U.S. (3 Wall.) 752, 763 (1865); Mesa v. United States, 67 U.S. (2 Black) 721 (1862); Steamer Va. v. West, 60 U.S. (19 How.) 182, 182-83 (1856); United States v. Curry, 47 U.S. (6 How.) 106 (1848); Villabolos v. United States, 47 U.S. (6 How.) 81, 90 (1848).

33. *Villabolos*, 47 U.S. at 90; *The San Pedro*, 15 U.S. at 142.

34. *Gomez*, 70 U.S. at 763; *Mesa*, 67 U.S. at 721; *Steamer Va.*, 60 U.S. at 182; *Curry*, 47 U.S. at 106; *Villabolos*, 47 U.S. at 90.

35. *Mesa*, 67 U.S. at 721; *Steamer Va.*, 60 U.S. at 182; *see also* Scarborough v. Pargoud, 108 U.S. 567, 568 (1883) ("[T]he writ of error in this case was not brought within the time

provided "the foundations" of the Court's jurisdiction, "without which [the Court] ha[d] no right to revise the action of the inferior court."[36]

That the Taney Court regarded preconditions as presumptively jurisdictional is evidenced in *Castro v. United States*.[37] In that case, the Supreme Court spliced jurisdictional requirements onto a statute that was silent on the issue.[38] The California Land Act of 1851 authorized district courts in California to settle private land claims.[39] Unlike other land-claim statutes,[40] the California Land Act did not condition appeal on compliance with the conditions of the Judiciary Act of 1789, but rather indicated that an appeal could be taken upon authorization of the district court.[41] Even though Congress had not specified any additional limitation on the Supreme Court's appellate jurisdiction, the Court concluded that Congress must have had the 1789 statute in mind when it provided for appeals under the Land Act.[42] The Court wrote that those appeals, then, "must be considered as having been made subject to those regulations, and must be dismissed for want of conformity to them."[43]

The *Castro* Court's interpretation of the California Land Act may be defensible given the context of prior land-claim statutes, but the Supreme Court pointed to no evidence that Congress meant to adopt prior procedures.[44] The Court instead limited a statutory grant of appellate jurisdiction that did not itself "impose any limitation."[45] Moreover, the Court overlooked the fact that, unlike other land-claim statutes, which authorized appeals as of right,[46] the California

limited by law, and we have consequently no jurisdiction.").

36. Edmonson v. Bloomshire, 74 U.S. (7 Wall.) 306, 310 (1868).

37. 70 U.S. (3 Wall.) 46 (1865).

38. *Id.* at 51.

39. Act of Mar. 3, 1851, ch. 41, 9 Stat. 633.

40. *See, e.g.*, Act of June 17, 1844, ch. 95, 5 Stat. 676; Act of May 23, 1828, ch. 70, 4 Stat. 284; Act of May 26, 1824, ch. 95, § 2, 4 Stat. 52.

41. *Castro*, 70 U.S. at 51. The Act "ma[de] no provision concerning returns to th[e Supreme Court], and none concerning citations; nor d[id] it impose any limitation of time within which appeals may be allowed." *Id.*

42. *Id.* Because Congress had proscribed regulations "for the most usual invocation of appellate jurisdiction," it "doubtless" had those "regulations in view" when it provided for appeals in the California Land Act of 1851. *Id.*

43. *Id.*

44. *See generally id.*

45. *See id.*

46. *See, e.g.*, Act of June 17, 1844, ch. 95, 5 Stat. 676; Act of May 23, 1828, ch. 70, 4 Stat.

Land Act granted appeal *only* upon authorization from the district court.[47] Given the administrative morass that the litigation of land claims had occasioned,[48] it is possible that Congress decided—in lieu of the usual conditions on appeal—to leave authorization to the court most familiar with the matter. In short, the Taney Court's insistence on reading the California Land Act jurisdictionally is quite remarkable.[49]

Insurance Co. of the Valley of Virginia v. Mordecai is another aggressive interpretation of a statute to which the jurisdictional label did not obviously apply.[50] *Mordecai* dismissed an appeal for want of jurisdiction when the lower court had misstated the first day of the Supreme Court's term on the writ of error.[51] Yet the statute at issue, the Act of May 8, 1792, did not by its terms require that the writ of error be made returnable on the first day of term—that requirement was a result of judicial gloss.[52] Further, although the Court interpreted the Act of May 8, 1792 to require that the return and transcript be filed on the first day of term, it further held that they could in fact be filed *any* day during the term because "for certain purposes of convenience or justice, the term is considered as but one period of time—as one day, and that day the first of the term."[53] The *Mordecai* Court nevertheless refused to apply the "one day" rule to the misstated return date, finding that the failure to properly identify the "legal return day" was fatal to jurisdiction.[54]

The Taney Court professed to disallow equitable exceptions, but its broad view of what counted as a jurisdictional condition, coupled with its changing conception of what the term jurisdiction meant, created pressure to forge exceptions, foreshadowing the Court's current change in approach. By 1866, the Court was of the view that jurisdiction could not be waived, but must be raised by a court sua

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284; Act of May 26, 1824, ch. 96, § 2, 4 Stat. 52.

47. *Castro*, 70 U.S. at 50-51.

48. *Id.* at 51.

49. *Id.*

50. 62 U.S. (21 How.) 195 (1858).

51. *Id.* at 199-200.

52. *Id.* at 196.

53. *Id.* at 201.

54. *Id.* at 200.

sponte.[55] If a condition was jurisdictional, no excuse, however meritorious, would merit review. The harshness of this result led to the eventual adoption of exceptions even to requirements the Taney Court had labeled "jurisdictional." The Supreme Court, for example, had long held jurisdictional the requirement that a certified transcript be docketed in the next term of Court.[56] Yet late in the Taney era, cases arose in which the litigant was powerless to obtain a certified record and the Court twice found a fraud exception to apply.[57]

Ableman v. Booth gave rise to the fraud exception.[58] In that politically charged case, the Wisconsin Supreme Court annulled a federal court conviction and granted state habeas relief to a citizen convicted of aiding the escape of a fugitive slave.[59] The Wisconsin Supreme Court also ordered its clerk "to disregard and refuse obedience" to the writ of error issued by the Supreme Court under section 22 of the Judiciary Act of 1789 and to refuse to certify a copy of the record.[60] Without expressly creating an exception to the requirements of section 22, the U.S. Supreme Court granted the Attorney General's motion to accept a certified copy of the record that the Attorney General, and not the state court clerk, had prepared, and proceeded to the merits of the case.[61]

A few years later, in *United States v. Gomez*, the Court referred to a "well-established" fraud exception but ultimately found it unnecessary to the disposition in that case.[62] In *Gomez*, a case fraught with local gamesmanship, the former district attorney had colluded with the plaintiff to receive part of the land claim at issue, and the district court had six times refused to certify a copy of the record to the Supreme Court.[63] The Supreme Court noted that the "fraud" exception established in *Ableman v. Booth* would apply and accepted a certified record transcribed by the new district attorney

55. Edmonson v. Bloomshire, 74 U.S. (7 Wall.) 306, 311 (1868).

56. Villabolos v. United States, 47 U.S. (6 How.) 81, 90 (1848).

57. *See, e.g.*, United States v. Gomez, 70 U.S. (3 Wall.) 752, 763-64 (1865); Ableman v. Booth, 62 U.S. (21 How.) 506 (1858).

58. 62 U.S. at 506.

59. *Id.* at 513-14.

60. *Id.* at 514.

61. *Id.* at 512.

62. 70 U.S. at 763.

63. *Id.* at 765.

(rather than the lower court clerk).[64] The Court made some effort to link the fraud exception to Congress's jurisdictional grant, stating that general jurisdictional rules apply unless the case fell within an exception "derived from the act of Congress allowing appeals."[65] Indeed in *Gomez*, the exception was unnecessary to the decision since Congress had provided that certain district attorneys might transcribe and certify records.[66]

In short, it is unclear how far the fraud exception endorsed by the post-Taney Court extended. *Booth* may be a one-off decision and the exception was unneeded in *Gomez*. Still, these two cases suggest that the Taney Court was occasionally sympathetic to the difficulties created by a broad view of what counts as a jurisdictional condition combined with a strict definition of jurisdiction.

In this vein, the post-Taney Court stopped short of holding that every requirement contained within section 22 of the 1789 Judiciary Act was jurisdictional, drawing back on the broad conception of jurisdiction endorsed in prior cases. In *Mussina v. Cavazos*, the Court rejected the argument that return of the original citation, which had been destroyed in a Civil War fire, was "essential" to the Court's jurisdiction.[67] In so doing, the Court noted that it had upheld jurisdiction over cases absent an assignment of errors[68] and prayer for reversal,[69] both seemingly required by section 22.[70] Contrary to the strict terms of section 22, Chief Justice Marshall had long-ago declared that when an "appeal is taken in the open court, during the term at which it was rendered, in the presence of the appellee, no citation is necessary, and that a general appearance in this court for defendant in error, or in appeal, waives the necessity of a citation."[71] Thus, it could not be said that "a rigid and literal fulfilment of

64. *Id.* at 757, 765.

65. *Id.* at 763.

66. *Id.* at 766. Congress had specifically provided by statute that California district attorneys might transcribe and certify records in land cases to the Supreme Court and that "records so certified ... shall be taken as true and valid transcripts, to the same intent and purpose as if certified by the clerk of the proper district." Act of Aug. 6, 1861, ch. 61, § 2, 12 Stat. 319, 320.

67. 73 U.S. (6 Wall.) 355, 359 (1867).

68. *See* Old Nick Williams Co. v. United States, 215 U.S. 541, 544 (1910); Farrar v. Churchill, 135 U.S. 609, 613-14 (1890).

69. *Mussina*, 73 U.S. at 359.

70. *Id.*

71. *Id.*

everything prescribed in [section 22], is an absolute and indispensable requisite to the appellate jurisdiction of this court."[72]

Although the post-Taney Court began to find some procedural requirements to be nonjurisdictional, the early to mid-twentieth-century Court largely continued the Taney Court's broad and imprecise view of jurisdiction and its predilection to find preconditions to suit jurisdictional. During this period, the Court used the term jurisdiction frequently, and even applied it to conditions more readily described as elements of a particular cause of action. In *EEOC v. Arabian American Oil Co.*, for example, the Court suggested that the definitional sections of Title VII of the Civil Rights Act of 1964—defining employer, employee, and the like—were jurisdictional.[73] The Court has since clarified that these definitions are part of the case a plaintiff must prove—not a limit on the federal court's subject matter jurisdiction.[74]

Arabian American Oil Co. was not an anomaly. In 1987, in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, the Court considered whether section 505(a) of the Clean Water Act allows suits for wholly past violations.[75] The Court unanimously characterized that question as a matter of "jurisdiction."[76] The lower courts also frequently used the term jurisdiction to refer to substantive elements.[77] As late as 1998, Justice Stevens wrote a passionate concurrence in *Steel Co. v. Citizens for a Better Environment* arguing that the statutory question in the case "can be viewed in one of two ways: whether [it] confers 'jurisdiction' over citizen suits for wholly

72. *Id.* The Judiciary Act of 1789 also required that "every justice or judge signing a citation on any writ of error as aforesaid, shall take good and sufficient security, that the plaintiff in error shall prosecute his writ to effect, and answer all damages and costs if he fail to make his plea good." Act of Sept. 24, 1789, ch. 20, § 22, 1 Stat. 84, 85. The Court held, however, that a bond was not an indispensable part of an appeal and where no bond had been filed, the Court would not dismiss, but permit bond to be filed in the Supreme Court. Seymour v. Freer, 72 U.S. (5 Wall.) 822, 823 (1866).

73. *See* 499 U.S. 244, 251 (1991) ("Petitioners' reliance on Title VII's jurisdictional provisions."); *id.* at 253 ("Thus petitioners' argument based on the jurisdictional language of Title VII fails.").

74. Arbaugh v. Y & H Corp., 546 U.S. 500, 515 (2006).

75. 484 U.S. 49 (1987).

76. *Id.* at 52 ("In this case, we must decide whether § 505(a) of the Clean Water Act, also known as the Federal Water Pollution Control Act, 33 U.S.C. § 1365(a), confers federal jurisdiction over citizen suits for wholly past violations.").

77. *See* JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 12.30[1] (3d ed. 2014) (describing the distinction between jurisdiction and claim elements).

past violations, or whether the statute creates such a 'cause of action.'"[78] The distinction between a jurisdictional provision and a cause of action made no difference to Justice Stevens: "Rather than framing the question in terms of 'jurisdiction,' it is also possible to characterize the statutory issue in this case as whether respondent's complaint states a 'cause of action.'"[79]

The Court's treatment of statutes of limitations is also instructive. From the late 1800s through the 1950s, statutes of limitations in suits against the government were considered "jurisdictional" statutes in the full sense of the term and thus not subject to waiver or equitable tolling.[80] That rule showed signs of weakening in 1967, and again in 1986, when the Court ignored it in *Honda v. Clark*[81] and *Bowen v. City of New York*.[82] In *Honda*, the Court concluded that Japanese nationals whose assets were seized during World War II were entitled to equitable tolling of a sixty-day statute of limitations—even though Congress had been silent on the issue.[83] In *Bowen*, the Court allowed equitable tolling of the sixty-day time limit on challenging the denial of Social Security Disability benefits—again based on the fact that Congress had not "eschewed" equitable tolling.[84] In 1990, in *Irwin v. Department of Veterans Affairs*, the Court went a step further, putting in place a rebuttable presumption that equitable tolling rules applied to suits against the United States.[85] This background interpretive rule effected a reversal in the historical approach.

Until very recently, the Court took an expansive and imprecise view of the term jurisdiction. The Taney Court in particular viewed procedural requirements as presumptively jurisdictional. It mattered little whether Congress intended a specific provision to constrain the authority of the federal courts. The mere existence of a procedural requirement was evidence that Congress meant for it to operate jurisdictionally. Moreover, the Court's broad and imprecise

78. 523 U.S. 83, 112-13 (1997) (Stevens, J., concuring).

79. *Id.* at 117-18.

80. Soriano v. United States, 352 U.S. 270, 276 (1957); Finn v. United States, 123 U.S. 227, 232-33 (1887); Kendall v. United States, 107 U.S. 123, 125-26 (1883).

81. 386 U.S. 484, 495-96 (1967).

82. 476 U.S. 467, 478 (1986).

83. *Honda*, 386 U.S. at 501.

84. *Bowen*, 476 U.S. at 479-80.

85. 498 U.S. 89, 95-96 (1990).

view of the term jurisdiction continued well into the twentieth century. This broad view of what counted as jurisdictional combined with the Court's turn to a more strict interpretation of the consequences of jurisdiction set the Court's cases on a collision course.

B. Origins of the Clear Statement Rule

How times have changed. The Supreme Court has diligently distinguished jurisdiction from the substantive elements of a claim and from procedural requirements. In so doing, the Court has imposed a clear statement requirement: a provision is jurisdictional only when Congress plainly says so.[86]

This rule has its foundations in *Steel Co. v. Citizens for a Better Environment*, a 1998 case in which the Supreme Court noted that the term "jurisdiction" had become "a word of many, too many, meanings."[87] In the Supreme Court's view, the federal courts had overused the term, referring to conditions that did not implicate the adjudicatory authority of the federal courts, and often without squarely considering the question. Going forward, the Court declared, these "drive-by jurisdictional rulings" would "have no precedential effect."[88]

A few years later, in *Arbaugh v. Y & H Corp.*, the Court laid down a bright-line clear statement rule.[89] *Arbaugh* involved a Title VII gender discrimination claim brought by an employee under 42 U.S.C. § 2000e-2(a)(1).[90] Title VII only applies to employers that have "fifteen or more employees."[91] Because Y & H Corporation had less than fifteen employees, the district court dismissed for lack of jurisdiction.[92] The Supreme Court reversed, holding that the employee-numerosity requirement was not a jurisdictional provision.[93]

86. The story of how the clear statement rule came to be is interesting in and of itself. It involves a number of different Justices emphasizing different factors, including formalism, notice, access to courts, efficiency, and fairness. The different coalitions and the evolution of the Court's jurisdictional jurisprudence is a worthwhile project for future consideration.

87. 523 U.S. 83, 90 (1998) (quoting United States v. Vanness, 85 F.3d 661, 663 n.2 (D.C. Cir. 1996)).

88. *Id.* at 91.

89. 546 U.S. 500, 516 (2006).

90. *Id.* at 503-04.

91. 42 U.S.C. § 2000e(b) (2012).

92. *Arbaugh*, 546 U.S. at 504.

93. *Id.*

In so doing, the Court announced the bright line of a clear statement:

> If the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue. But when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character.[94]

Because § 2000e-5(f)(3) did not "clearly state[ ]" that the employee-numerosity threshold was jurisdictional, the Court concluded that Congress had not intended the provision to divest the federal courts of jurisdiction.[95]

In a series of cases, the Supreme Court has elaborated upon the clear statement rule announced in *Arbaugh*. For example, *Kontrick v. Ryan* clarified the "jurisdiction" label by delineating between two types of procedural requirements: (1) claims-processing rules (not jurisdictional) and (2) jurisdictional rules.[96] "[J]urisdiction," the Court wrote, refers to "a court's adjudicatory authority."[97] Jurisdictional statutes speak to the power of the court, not the obligations of litigants.[98] In contrast, claims-processing rules "seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times."[99] Applying this distinction, the *Kontrick* Court held that several bankruptcy filing deadlines were claims-processing rules, rather than jurisdictional ones.[100]

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94. *Id.* at 515-16 (footnote and citation omitted).

95. *Id.* at 515 & n.11, 516.

96. 540 U.S. 443, 455 (2004).

97. *Id.*

98. Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154, 161 (2010); Landgraf v. USI Film Prods., 511 U.S. 244, 274 (1994); *see also Kontrick*, 540 U.S. at 455.

99. Henderson *ex rel.* Henderson v. Shinseki, 131 S. Ct. 1197, 1203 (2011); *see also Kontrick*, 540 U.S. at 455.

100. *Kontrick*, 540 U.S. at 455-56. Also important in *Kontrick* was the fact that the filing deadlines at issue were nonstatutory court rules. *Id.* Because "[o]nly Congress may determine a lower federal court's subject-matter jurisdiction," *id.* at 452, the Court found it "axiomatic" that the court-created bankruptcy rules "do not create or withdraw federal jurisdiction," *id.* at 453 (quoting Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 370 (1978)).

Two recent preconditions cases, *Gonzalez v. Thaler*[101] and *Sebelius v. Auburn Regional Medical Center*,[102] are good examples of the Court's solidifying jurisdictional jurisprudence. As these cases show, the Supreme Court now looks to text, structure, and context to distinguish between the jurisdictional and the nonjurisdictional.

In *Thaler*, the Court considered whether section 2253(c)(3) of the Antiterrorism and Effective Death Penalty Act (AEDPA) was jurisdictional.[103] Section 2253(c) provides that the certificate of appealability (COA) needed for a habeas appeal "shall indicate which specific issue" raised by the petitioner demonstrates a "substantial showing of the denial of a constitutional right."[104]

The Supreme Court first made clear that it meant what it said in *Arbaugh*: courts must apply the "clear-statement principle" to determine whether a procedural requirement is jurisdictional.[105] The Court reiterated that "[a] rule is jurisdictional '[i]f the Legislature *clearly states* that a threshold limitation on a statute's scope shall count as jurisdictional.'"[106] If no clear statement exists, "courts should treat the restriction as nonjurisdictional."[107]

Applying this principle, the Court found that "the only 'clear' jurisdictional language" in the statute appeared elsewhere, in section 2253(c)(1).[108] That text—"[u]nless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals"—was evidence that Congress knew how to speak in jurisdictional terms when it so chose.[109] In contrast, section 2253(c)(3) simply stated a threshold condition for a COA.[110] It did "not speak in jurisdictional terms."[111] The compulsory nature of the command—that the district court "shall indicate" the issue that raised a constitutional claim—did not satisfy the clear statement

101. 132 S. Ct. 641 (2012).
102. 133 S. Ct. 817 (2013).
103. *Thaler*, 132 S. Ct. at 647-48.
104. 28 U.S.C. § 2253(c)(2)-(3) (2012).
105. *Thaler*, 132 S. Ct. at 648-49.
106. *Id.* at 648 (alteration in original) (emphasis added) (quoting Arbaugh v. Y & H Corp., 546 U.S. 500, 515 (2006)).
107. *Id.* (quoting *Arbaugh*, 546 U.S. at 516).
108. *Id.* at 649.
109. *Id.* (quoting Miller-El v. Cockrell, 537 U.S. 322, 336 (2003)).
110. *Id.*
111. *Id.* (quoting *Arbaugh*, 546 U.S. at 515).

rule either.[112] The Court found that for clear statement purposes there was a difference between mandatory rules and jurisdictional rules.[113] Although jurisdictional rules are mandatory, not all mandatory prescriptions, "however emphatic," are jurisdictional.[114]

The structure of AEDPA did not clearly indicate that Congress had meant to deprive the federal courts of jurisdiction. First, the Court found it "telling" that the petitioner had no control over the drafting of the COA.[115] This "would only compound the 'unfai[r] prejudice' resulting from the *sua sponte* dismissals and remands that jurisdictional treatment would entail."[116] The Court also rejected the government's proximity argument—that the placement of section 2253(c)(3) in a jurisdictional section indicated that Congress intended to affect jurisdiction.[117] Text was the key: "Mere proximity will not turn a rule that speaks in *nonjurisdictional terms* into a jurisdictional hurdle."[118]

The context of the indication requirement did not satisfy the clear statement rule either. The Court rejected the government's attempt to analogize section 2253(c)(3)'s limitation to limitations on notices of appeal.[119] Cases interpreting the latter limitations to be jurisdictional had no bearing on a certificate of appealability.[120] The Court also looked to the statutory purpose as part of its context analysis. To treat section 2253(c)(3) as jurisdictional "would thwart Congress' intent" to eliminate delays in AEDPA.[121] A judge fulfills AEDPA's "gatekeeping function" by determining that a COA is warranted, and any additional screening "would not outweigh the costs of further delay from the extra layer of review."[122]

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112. *Id.* at 651; *see also* Dolan v. United States, 560 U.S. 605, 611-12 (2010) (noting that "shall" does not necessarily render a statutory deadline jurisdictional).

113. *Thaler*, 132 S. Ct. at 651.

114. *Id.* (quoting Henderson *ex rel.* Henderson v. Shinseki, 131 S. Ct. 1197, 1205 (2011)).

115. *Id.* at 649-50.

116. *Id.* at 650 (quoting *Henderson*, 131 S. Ct. at 1202). The Court also found it anomalous that a jurisdictional reading of the section would strip power from a panel of court of appeals judges based on a COA that Congress empowered one court of appeals judge to grant. *Id.*

117. *Id.* at 651.

118. *Id.* (emphasis added).

119. *Id.* at 651-52.

120. *Id.*

121. *Id.* at 650.

122. *Id.*

Sebelius v. Auburn Regional Medical Center reveals a Court that is increasingly reluctant to find that any procedural requirement comes with jurisdictional consequences.[123] *Auburn* unanimously held that the 180-day filing deadline for a healthcare provider to file a challenge to a reimbursement decision with the Provider Reimbursement Review Board was nonjurisdictional.[124] Once again, the Court relied on its clear statement approach: absent a "clear statement" from Congress, courts should treat procedural requirements as nonjurisdictional.[125] The language of the procedural requirement was not "'jurisdictional' in tone."[126] The Court noted that it had repeatedly held filing deadlines to be nonjurisdictional except where countermanded by "a century's worth of precedent and practice," treating the specific filing deadline as jurisdictional.[127] *Auburn* was not such a case.[128] *Auburn* also rejected two rather compelling statutory arguments: that the filing deadline was jurisdictional, first, because it was placed among other jurisdictional provisions, and second, because Congress elsewhere had indicated that beneficiary (but not provider) deadlines might be extended.[129]

Thaler and *Auburn* are the results of a three-decade effort to lend more precision to the term jurisdiction. The Court's methodology for determining whether a procedural requirement is jurisdictional is now well-established. First, the Court employs a clear statement principle[130] to determine whether the text "clearly states" that a procedural requirement is "jurisdictional."[131] The Court then considers whether the structure of the statute compels a jurisdictional

123. *See* 133 S. Ct. 817, 828-29 (2013).

124. *Id.* at 828.

125. *Id.* at 824.

126. *Id.*

127. *Id.* at 825 (quoting Bowles v. Russell, 551 U.S. 205, 209 n.2 (2007)).

128. *Id.* at 825-26.

129. *Id.* at 825-27. Congress expressly provided elsewhere that other time limits were not jurisdictional. When Medicare beneficiaries request the Secretary to reconsider a benefits determination, the statute gives them a time limit of 180 days or "such additional time as the Secretary may allow." 42 U.S.C. § 1395ff(b)(1)(D)(i) (2012); *see also id.* § 1395ff(b)(1)(D)(ii) (permitting a Medicare beneficiary to request a hearing by the Secretary within "time limits" the Secretary "shall establish in regulations").

130. *Auburn Reg'l Med. Ctr.*, 133 S. Ct. at 824.

131. Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154, 163 (2010) (quoting Arbaugh v. Y & H Corp., 546 U.S. 500, 515 (2006)).

conclusion.[132] In particular, the Court considers whether the requirement is located in the jurisdiction-granting provision, a finding that would support jurisdictional scope,[133] and whether there are any other structural statutory factors, such as congressional exceptions to the precondition, that would suggest the statute does not speak in jurisdictional terms.[134] Finally, the Court considers context, which can include past interpretations of the statute.[135] If a clear statement cannot be found in the text, structure, and context, the Court ordinarily concludes—with several key exceptions discussed below—that Congress did not intend for the provision to operate in a jurisdictional fashion.

II. PROBLEMS WITH THE CLEAR STATEMENT APPROACH

The Supreme Court's current requirement that Congress speak clearly when it intends for a procedural requirement to be jurisdictional is problematic. Jurisdiction is an area, like so many others, in which clarity is a virtue. Scholars have applauded the Supreme Court's requirement that Congress speak clearly if it intends for a provision to operate jurisdictionally.[136] These scholars are right to welcome the added clarity and precision found in the Court's new jurisdictional cases, but they fail to recognize the underlying definitional shift and that the current clear statement rule does not serve clarity's clarion call.

First, the Supreme Court's application of its clear statement rule has been unpredictable, leaving Congress without guidance as to what is required for a condition to be considered jurisdictional and leading to seemingly arbitrary results.[137] Indeed, the Supreme Court's description of the clear statement rule seems a contradiction in terms: Congress must clearly say that a provision is jurisdictional, but the Court may go on to consider context and past precedent. Second, the Supreme Court has imposed its clear statement

132. *Id.* at 163-64.

133. *Id.* at 164-65.

134. *Id.* at 165.

135. *See, e.g.*, Henderson *ex rel.* Henderson v. Shinseki, 131 S. Ct. 1197, 1203 (2011).

136. *See* Brown, *supra* note 8, at 51-52; Dodson, *Removal Jurisdiction*, *supra* note 5, at 67; Dodson, *The Failure of* Bowles v. Russell, *supra* note 5, at 642-43; Wasserman, *Jurisdiction, Merits, and Procedure*, *supra* note 5, at 1548.

137. *See infra* Part II.B.

rule retroactively, upsetting, rather than facilitating, congressional dialogue.[138] Third, the undertheorized clear statement rule is a poor fit because the Supreme Court has not linked it to any important constitutional value and because the rule itself implicates separation of powers concerns.[139]

A. The Scholarly Consensus

Scholars warmly approve of the Court's requirement that Congress speak clearly when it intends a statute to have jurisdictional effect. They view the clear statement rule as a valuable tool in implementing the Court's more precise definition of jurisdiction. Many would even go further than the contemporary Court, requiring more for a provision to be found jurisdictional.

Scott Dodson has written extensively and impressively about jurisdictional characterizations. Although in more recent years he has questioned whether clarity as to jurisdiction is practically possible,[140] Dodson nevertheless supports a "stringent clear statement rule" for jurisdictional requirements.[141] He argues that such a rule would facilitate clarity and ensure that Congress has considered the hardships that a jurisdictional bar might impose on litigants.[142] Dodson would employ a presumption of jurisdictionality "only if Congress makes the jurisdictional character ... *unmistakably clear*."[143] In addition to supporting a "stringent clear statement rule," Dodson would go much further than the current Court in some respects; even when Congress has been "unmistakably clear," his approach would permit courts nevertheless to override Congress and find a provision nonjurisdictional.[144]

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138. *See infra* Part II.C.

139. *See infra* Part II.D.

140. *See* Scott Dodson, *The Complexity of Jurisdictional Clarity*, 97 VA. L. REV. 1, 37-38 (2011).

141. Dodson, *Removal Jurisdiction*, *supra* note 5, at 66-67.

142. *See id.*

143. *Id.* (emphasis added); *see also* Dodson, *The Failure of* Bowles v. Russell, *supra* note 5, at 644.

144. Dodson, *Removal Jurisdiction*, *supra* note 5, at 66-67. This so-called "escape hatch" may turn out to be largely illusory. Dodson posits that it would apply when a jurisdictional limit is unconstitutional and when the Court has otherwise indicated that the provision is not jurisdictional. *Id.* at 67. The latter scenario should fail the clear statement rule in the first instance, and the proper response from a reviewing Court confronted by a clear statement is

Howard Wasserman is also persuaded that the Court's clear statement rule for jurisdiction is a good development, and he too would go further than the current Court.[145] Wasserman criticizes the *Arbaugh* decision for leaving "open the possibility that Congress" might make a "statutory element jurisdictional by clearly labeling it as such."[146] He advocates instead for an absolute rule that traditional merits issues—who the statute regulates or protects and what it prohibits—can *never* be jurisdictional.[147] With respect to procedural requirements, Wasserman finds that "*Arbaugh*'s plain-statement approach makes perfect sense .... Congress must be meticulous, precise, and not unduly profligate in characterizing rules as jurisdictional."[148]

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not to ignore the clear statement, but rather to strike down an unconstitutional statute. Dodson's approach would also allow courts to consider three considerations—functionality, effects, and consistency with precedent—when a clear statement is absent. *Id.* at 66. These additional factors somewhat diminish the importance of the clear statement rule, but because the factors either track or add to the Court's current approach, the approach would not provide additional clarity or predictability.

145. Wasserman, *Jurisdiction, Merits, and Procedure*, *supra* note 5 at 1548-49; Wasserman, *The Demise of "Drive-By Jurisdictional Rulings," supra* note 5; *see also* Brown, *supra* note 8, at 64-67 (supporting but proposing modifications to the clear statement rule).

146. Wasserman, *The Demise of "Drive-By Jurisdictional Rulings," supra* note 5, at 953.

147. *Id.* at 953-54. In Wasserman's view, this categorical distinction is warranted because jurisdiction and merits involve the exercise of different congressional powers: jurisdiction, the structural power of Congress to delineate federal courts' jurisdiction; and merits, constitutional powers (like the Commerce Clause) to create causes of action. Wasserman, *Jurisdiction, Merits, and Procedure*, *supra* note 5, at 646. But the Supreme Court was surely correct when it noted that Congress could have made the numerosity requirement jurisdictional. Arbaugh v. Y & H Corp., 546 U.S. 500, 514 (2006). That means that the categories of jurisdiction and merits are not exclusive, but rather may overlap, and thus Wasserman's categorical approach may yield the wrong outcome. *See* Kevin M. Clermont, *Jurisdictional Fact*, 91 CORNELL L. REV. 973, 1018-19 (2006); *cf.* Evan Tsen Lee, *The Dubious Concept of Jurisdiction*, 54 HASTINGS L.J. 1613, 1613-14, 1620 (2003) (suggesting that there is no real distinction between jurisdiction and merits because both deal with the legitimate authority of a court).

148. Wasserman, *The Demise of "Drive-By Jurisdictional Rulings*," *supra* note 5, at 960. In undertaking this analysis, courts are to "focus their analysis on whether Congress has defined a precondition as jurisdictional, whether it used jurisdictional language addressed to the courts and their adjudicative authority, and whether Congress is serving structural or individual values." *Id.* This tracks the Supreme Court's current practice.

Although Dodson and Wasserman are in favor of the clear statement rule, they propose various modifications. These approaches are categorically different from the approach I suggest because they take the clear statement rule as a starting point. As a result, these approaches do not address either the Court's inconsistent application or its undertheorization of the clear statement rule.

B. The Clear Statement Approach Is Unpredictable

In regard to jurisdiction, certainty has much to recommend it, but the Supreme Court's jurisdictional clear statement rule obscures the Court's recent emphasis on definitional precision and leads to unpredictable results. As Justice Scalia has explained:

> It is hard enough to provide a uniform, objective answer to the question whether a statute, on balance, more reasonably means one thing than another. But it is virtually impossible to expect uniformity and objectivity when there is added, on one or the other side of the balance, a thumb of indeterminate weight.[149]

The one clear thing about the Supreme Court's clear statement approach is that the thumb is of indeterminate weight.

1. Bowles*, and Stare Decisis*

Congress must speak clearly in the text of a statute to rebut the substantive presumption a clear statement rule enforces—here, that procedural requirements ordinarily are nonjurisdictional.[150] Yet the Court has repeatedly stated that past precedent might be probative and twice relied on prior precedent to conclude that a statute has jurisdictional effect.[151] This haphazard application of stare decisis is inconsistent with the Court's admonition that courts are

149. Antonin Scalia, *Common-Law Courts in a Civil Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION 28 (Amy Gutmann ed., 1997).

150. WILLIAM N. ESKRIDGE, JR. ET AL., CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 851 (4th ed. 2007) ("[C]lear statement rules ... are presumptions that can only be rebutted by clear language in the text of the statute."). This is not to say that clear statement rules are themselves inconsistent with prior precedent. *See generally* Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109 (2010) (describing the long historical roots of many commonly applied clear statement rules). Although the Supreme Court has on one occasion noted that a clear statement rule "does not prevail over ... *stare decisis* [when] applied to a longstanding statutory construction implicating important reliance interests," Hilton v. S.C. Pub. Rys. Comm'n, 502 U.S. 197, 206-07 (1991), the Court has not subsequently adhered to this ordering rule in jurisdictional (or other) cases. In all events, stare decisis principles themselves have not applied to the Court's cursory consideration of the question. *See infra* notes 182-86 and accompanying text.

151. *See* John R. Sand & Gravel Co. v. United States, 552 U.S. 130 (2008); Bowles v. Russell, 551 U.S. 205 (2007).

to carefully evaluate past jurisdictional precedent. It also suggests a Court that does not feel constrained by its own clear statement rule. As a result, the rule is anything but democracy reinforcing: Congress has no idea what sort of clarity will be required in any given case.

Two cases in particular demonstrate the unpredictability of the Supreme Court's clear statement approach. *Arbaugh* and its progeny ask whether Congress "clearly state[d]" that a precondition to suit is "jurisdictional."[152] *Bowles v. Russell* and *John R. Sand & Gravel Co. v. United States* take a different approach: stare decisis governed the surprising analysis in those cases.

In particular, *Bowles* involved 28 U.S.C. § 2107(a)'s requirement that a notice of appeal be filed within thirty days of a judgment.[153] However, § 2107(c) of the same statute gives district courts limited authority to grant a fourteen-day extension.[154] The question in *Bowles* was whether an appellant's reliance on the district court's improper award of a seventeen-day extension deprived the appellate court of jurisdiction.[155] With little textual analysis, and without acknowledging the rule that Congress must "clearly state" its jurisdictional intention, *Bowles* held that § 2107's time limits were jurisdictional.[156] The Court rested its decision on grounds that first, the time limits were statutory,[157] and second, the Court "has long held that the taking of an appeal within the prescribed time is 'mandatory and jurisdictional.'"[158] But to say a requirement is statutory says nothing about whether Congress intended it to operate jurisdictionally.[159] Thus, the Court's decision ultimately rests on precedent.[160]

John R. is another procedural requirements case decided on stare decisis grounds.[161] At issue was 28 U.S.C. § 2501, which provides

152. Arbaugh v. Y & H Corp., 546 U.S. 500, 515 (2006).

153. *Bowles*, 551 U.S. at 207.

154. *Id.*; *see* 28 U.S.C. § 2107(c) (2012).

155. *Id.* at 207-08.

156. *Id.* at 208-09, 214.

157. *Id.* at 210-11 (distinguishing rule-based cases).

158. *Id.* at 209 (quoting Griggs v. Provident Consumer Disc. Co., 459 U.S. 56, 61 (1982) (per curiam)).

159. *See id.* at 217 (Souter, J., dissenting).

160. *See id.* at 209-10 (majority opinion).

161. John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 134 (2008). Some commentators have explained *John R.* away by noting that it did not actually decide whether the

"[e]very claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues."[162] The government had waived its statute-of-limitations defense in the district court but nonetheless argued that the Court must address the question sua sponte because the limitations requirement was "jurisdictional."[163] As with *Bowles*, the *John R.* Court failed to engage with *Arbaugh*'s clear statement approach. Instead, the Court focused exclusively on prior precedent, noting that the petitioner could have succeeded only by convincing the Court that it "has overturned, or that it should now overturn ... earlier precedent."[164]

The *John R.* Court's failure to analyze the text of 28 U.S.C. § 2501 is particularly troubling, as the Supreme Court previously suggested that the statute was nonjurisdictional. In *Irwin v. Department of Veterans Affairs*, the Court held that the thirty-day filing deadline in Title VII of the Civil Rights Act of 1964 was subject to equitable tolling.[165] *Irwin* not only established a *presumption* of equitable tolling in suits against the federal government, but in so doing, remarked that the "phraseology" of the Title VII limitations statute was "very similar" to the statute at issue in *John R.*[166] And while the *Irwin* Court noted that the language in 28 U.S.C. § 2501 was arguably "more stringent,"[167] the *John R.* Court

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statute of limitations was jurisdictional, presumably because the Court used the term "jurisdictional" in quotes. *See* Dodson, *supra* note 140, at 37 (noting that the Court called it "more absolute" instead of "jurisdictional"); Wasserman, *Jurisdiction, Merits, and Procedure*, *supra* note 5, at 1551 (noting that the Court never said the word jurisdiction). But the cases that *John R.* relied upon used the term in its full sense and subsequent cases have recognized the relationship. *See* Henderson *ex rel.* Henderson v. Shinseki, 131 S. Ct. 197, 1203 (2011).

162. 28 U.S.C. § 2501 (2012).

163. *John R. Sand & Gravel Co.*, 552 U.S. at 132-33.

164. *Id.* at 136.

165. 498 U.S. 89, 94-96 (1990). The statute provides in relevant part:

> Within 90 days of receipt of notice of final action taken by ... the Equal Employment Opportunity Commission ... an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e-5 of this title.

42 U.S.C. § 2000e-16(c) (2012).

166. *Irwin*, 498 U.S. at 94-95; *see also John R. Sand & Gravel Co.*, 552 U.S. at 137 (comparing statutes and noting that the *Irwin* Court had found them to be "linguistically similar").

167. *Irwin*, 498 U.S. at 95.

did not rely on this (or any other) textual difference.[168] Acknowledging the statutes were textually similar, the Court distinguished them because of "[b]asic principles of *stare decisis*."[169] The limitations statutes were different "*in the key respect* that the Court had not previously provided a definitive interpretation."[170] Even if the government had not relied on prior cases, and the justifications for stare decisis were therefore at their weakest, the Court concluded that it was "more important that the applicable rule of law be settled than that it be settled right."[171]

The precedent-based rationale in *Bowles* and *John R.* creates significant tension with the Court's requirement that "the Legislature *clearly state*[ ] that a threshold limitation on a statute's scope shall count as jurisdictional."[172] Indeed, the failure of the *Bowles* and *John R.* opinions to consult congressional text gives the impression that the recent clear statement cases addressing the proper meaning of jurisdiction do not exist. Yet the whole point of the clear statement cases was that the Court had been "less than meticulous,"[173] even "profligate,"[174] in its use of the term "jurisdiction," and reviewing courts were therefore required to reexamine and to "bring some discipline" to cases in which preconditions to suit had been called "jurisdictional."[175] The Court's ad hoc approach to stare decisis in the jurisdictional context—sometimes prior precedent is

168. *See John R. Sand & Gravel Co.*, 552 U.S. at 137. Nor did the Court deal with the *Irwin* Court's conclusion that any "difference between [two statutes of limitations]" did not "manifest a different congressional intent with respect to the availability of equitable tolling"—a conclusion that would support a nonjurisdictional reading for both statutes. *See Irwin*, 498 U.S. at 95.

169. *John R. Sand & Gravel Co.*, 552 U.S. at 139.

170. *Id.* at 137 (emphasis added).

171. *Id.* at 139 (quoting Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting)).

172. Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154, 161 (2010) (emphasis added) (quoting Arbaugh v. Y & H Corp., 546 U.S. 500, 515 (2006)); *see also id.* at 171 (Ginsburg, J., concurring) (recognizing "undeniable tension" between *Bowles* and *Arbaugh*); Dodson, *The Failure of* Bowles v. Russell, *supra* note 5, at 643 (same).

173. Kontrick v. Ryan, 540 U.S. 443, 454 (2004).

174. Union Pac. R.R. v. Bhd. of Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment, Cent. Region, 558 U.S. 67, 81 (2009).

175. Henderson *ex rel.* Henderson v. Shinseki, 131 S. Ct. 1197, 1202-03 (2011); *see also* Arbaugh v. Y & H Corp., 546 U.S. at 507; Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 89 (1998).

"key"[176] and sometimes it is "not dispositive"[177]—leads to unpredictable results.

Recognizing this tension, the Court has recently sought to reconcile *Bowles* and *John R.* with the rest of its jurisdictional jurisprudence, but those attempts have not resulted in a coherent interpretive approach.[178] In *Henderson ex rel. Henderson v. Shinseki*, the Court read *John R.*'s stare decisis holding in light of congressional intent.[179] "Congress," the Court wrote, "need not use magic words" to speak clearly as to jurisdictionality: context, including prior Supreme Court decisions, was important.[180] Thus, "[w]hen 'a long line of this Court's decisions left undisturbed by Congress,' has treated a similar requirement as 'jurisdictional,' we will presume that Congress intended to follow that course."[181] In *Union Pacific Railroad v. Brotherhood of Locomotive Engineers & Trainmen General Committee of Adjustment, Central Region*, the Supreme Court similarly sought to cabin *Bowles*'s stare decisis rationale, reinterpreting that case as one "relying on a long line of this Court's decisions left undisturbed by Congress."[182]

These post hoc rationalizations are in tension with other decisions. In *Reed Elsevier, Inc. v. Muchnick*, for example, the Court concluded that 17 U.S.C. § 411(a)'s registration requirement for copyrights was "nonjurisdictional, notwithstanding its prior jurisdictional treatment."[183]

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176. *John R. Sand & Gravel Co.*, 552 U.S. at 137.

177. *Reed Elsevier, Inc.*, 559 U.S. at 169.

178. Although the Supreme Court has occasionally noted that the clear statement rule does not prevail over stare decisis when "applied to a longstanding statutory construction implicating important reliance interests," Hilton v. S.C. Pub. Rys. Comm'n, 502 U.S. 197, 206-07 (1991), stare decisis principles themselves do not apply to the Court's cursory consideration of the question. The Court has not sought to reconcile its decisions in *Bowles* or *John R.* on that ground, protesting instead that they are compatible with a clear statement approach.

179. *See Henderson*, 131 S. Ct. at 1203.

180. *Id.*

181. *Id.* (citation omitted).

182. 558 U.S. 67, 82 (2009) (citing Bowles v. Russell, 551 U.S. 205, 209-11 (2007)); *see also Reed Elsevier, Inc.*, 559 U.S. at 173 (Ginsburg, J., concurring) (reconciling decisions based on congressional acquiescence).

183. *Reed Elsevier, Inc.*, 559 U.S. at 169; *see also* Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 109 (2002) (interpreting 42 U.S.C. § 2000e-5(e)(1) (2012) as a "charge filing provision" rather than a jurisdictional element); Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393 (1982) (concluding that an EEOC filing requirement was nonjurisdictional, even though Supreme Court decisions had characterized it as such).

More fundamentally, the Supreme Court's invocation of what appears to be congressional acquiescence does not make its jurisdictional jurisprudence any more consistent. At the outset, congressional acquiescence is a shaky interpretive theory grounded in the idea that Congress's failure to reverse a judicial decision through legislation indicates Congress's approval of the Court's interpretation.[184] But Congress may fail to enact legislation for any number of political and parliamentary reasons that have nothing to do with a substantive endorsement of a Court decision.[185] Congressional acquiescence also is difficult to square with the idea that it is the intent of the enacting Congress that matters.[186] Even among scholars sympathetic to congressional acquiescence, the theory would not justify the reasoning in *Bowles* and *John R.* because neither case involved specific legislative consideration and rejection of a proposal.[187] In the

184. *See* Lawrence C. Marshall, *"Let Congress Do It": The Case for an Absolute Rule of Statutory Stare Decisis*, 88 MICH. L. REV. 177, 184-86 (1989).

185. *Id.* at 186. Legislation is an effort to package competing ideals and compromises, and the Constitution's "complicated check on legislation"—bicameral agreement and an executive signature—makes it difficult to determine the reason that Congress has not acted to reverse a judicial decision. Johnson v. Transp. Agency, 480 U.S. 616, 672 (1987) (Scalia, J., dissenting) (quoting THE FEDERALIST NO. 62, at 378 (James Madison) (Clinton Rossiter ed., 1961)).

186. Mackey v. Lanier Collections Agency & Serv., Inc., 486 U.S. 825, 840 (1988) ("It is the intent of the Congress that enacted [the statute in question] that controls." (quoting Teamsters v. United States, 431 U.S. 324, 354 n.39 (1977))). Congressional acquiescence treats a later Congress's silence "as the functional equivalent of an affirmative congressional enactment endorsing the [C]ourt's earlier (now recognized as erroneous) decision." Marshall, *supra* note 184, at 188. Scholars have suggested a more dynamic theory of statutory interpretation that "rejects the assumption of a canonical moment at which a statute is born and has all and only the meaning it will ever have." RONALD DWORKIN, LAW'S EMPIRE 348 (1986). *See generally* William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67 (1988). The Court, however, has remained faithful to the requirement that the enacting Congress is the one that matters.

187. Eskridge, Jr., *supra* note 186, at 69 (noting that when the Court finds meaning in congressional inaction, it usually "points to specific legislative consideration of the issue and, either implicitly or explicitly, indicates that Congress' failure to act bespeaks a probable intent to reject the alternative(s)"); *see also* Girouard v. United States, 328 U.S. 61, 69 (1946) ("It is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law."); Helvering v. Hallock, 309 U.S. 106, 119 (1940) ("It would require very persuasive circumstances enveloping Congressional silence to debar this Court from reexamining its own doctrines."). Professor Marshall similarly notes, "the great majority of cases invoking a strong rule of statutory *stare decisis* have either pointed to actual evidence that members of Congress were aware of the earlier decision, or have presumed that the matter decided was so newsworthy that it is inconceivable that Congress was unaware of it." Marshall, *supra* note 184, at 185 (footnotes omitted).

face of congressional silence, the Court instead assumed acquiescence.[188]

Although judicial decisions may form part of the backdrop against which Congress legislates,[189] the Supreme Court has not sought to reconcile its decisions in *Bowles* and *John R.* based on such a rationale, but rather on the (discredited) idea that congressional intent can be gleaned from silence.[190] Moreover, the Supreme Court has been willing to overturn prior precedents, precedents which also form the background against which Congress legislated. Under the Court's current clear statement rule, it is difficult to predict when the Court might exalt precedent over the clear statement rule.

Statutory stare decisis is sometimes defended on institutional competence or separation of powers grounds rather than congressional acquiescence.[191] This more compelling rationale posits that policy making is the province of the legislature, and because statutory interpretation requires the resolution of statutory ambiguity, some degree of policy making is inherent in judicial interpretation.[192] As a result, stare decisis should govern once a court has interpreted a statute because Congress is the appropriate branch to alter such an interpretation.[193] The separation of powers rationale has much to recommend it,[194] yet there is little to indicate that the

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188. Henderson *ex rel.* Henderson v. Shinseki, 131 S. Ct. 1197, 1203 (2001) ("When 'a long line of this Court's decisions left undisturbed by Congress,' has treated a similar requirement as 'jurisdictional,' *we will presume* that Congress intended to follow that course." (emphasis added) (citation omitted)).

189. *See* Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104, 108-09 (1991) (explaining the presumption that Congress intends for well-established common law principles to apply to its legislation).

190. *See Henderson*, 131 S. Ct. at 1203.

191. *See generally* Amy Coney Barrett, *Statutory Stare Decisis in the Courts of Appeals*, 73 GEO. WASH. L. REV. 317 (2005). As Professor Barrett explains, the Supreme Court has suggested two reasons why Congress is the better institution to change a statutory precedent: resource allocation and constitutional structure. *Id.* at 324-27. The former is "unsatisfying," as Congress may not be the more efficient actor and because efficiency seems a weak ground on which to rest interpretive power. *Id.* at 324-25.

192. *Id.* at 325-27 (describing the arguments made by Justice Hugo Black and Professor Lawrence Marshall); *see also* Marshall, *supra* note 184, at 201-07.

193. Barrett, *supra* note 191, at 325-27; *see also* Boys Mkts., Inc. v. Retail Clerks Union, Local 700, 398 U.S. 236, 256-57 (1970) (Black, J., dissenting) (noting that adhering to statutory precedent "avoid[s] encroaching on the power of Congress to determine policies and make laws to carry them out").

194. *See* Barrett, *supra* note 191, at 325-27.

Supreme Court meant to rely on this rationale instead of on inferences from congressional silence.[195]

Ultimately, the Court's invocation of statutory stare decisis (on any grounds) is unwarranted in *Bowles* and *John R.* because those cases lie at the heart of an exception to stare decisis principles. When a precedent does not reflect considered deliberation, stare decisis—much less stare decisis based on congressional silence—does not ordinarily preclude a court from thoroughly considering the issue for the first time.[196] The Supreme Court's decisions on jurisdiction have not always been carefully considered.[197] In *Steel Co. v. Citizens for a Better Environment*, the Court expressly recognized that many of its jurisdictional decisions were not entitled to precedential effect because they were not products of thorough deliberation.[198] In sum, *Bowles* and *John R.* are outliers in which the Court chose not to invoke its new clear statement rule but to rely instead on prior precedent.

Bowles also illustrates that the Court's application of its claims-processing distinction has led to arbitrary results. The Court has defined claims-processing rules as "rules that seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times."[199] Yet even though the rule that appeals must be filed within thirty days of a judgment fits that definition precisely—it is a rule that requires parties to "take certain procedural steps at certain specified times" and thus promotes "the orderly progress of litigation"[200]—the *Bowles*

195. *See Henderson*, 131 S. Ct. at 1203 (looking for indicators of congressional intent). To the extent the Court has cited authority for the principle of congressional acquiescence in its recent opinions, the Court has hewn closely to the language of *Henderson*. *See* Union Pac. R.R. v. Bhd. of Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment, Cent. Region, 558 U.S. 67, 82 (2009) (citing Bowles v. Russell, 551 U.S. 205, 209-11 (2007)); *see also* Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154, 173-74 (2010) (Ginsburg, J., concurring) (reconciling decisions based on congressional acquiescence).

196. William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1369 (1988) ("The willingness of the Supreme Court to reconsider statutory precedents depends upon: (1) the thoroughness of the Court's consideration of the issue in the precedent; (2) the degree to which Congress has left development of the statutory scheme to the courts; and (3) the degree to which the precedent has generated public and private reliance.").

197. *See, e.g.*, Arbaugh v. Y & H Corp., 546 U.S. 500, 510-11 (2006).

198. 523 U.S. 83, 91 (1998).

199. *Henderson*, 131 S. Ct. at 1203.

200. *Id.*

Court held that the filing of a notice of appeal is a jurisdictional limitation.[201] Acknowledging that filing deadlines are "quintessential claim-processing rules" that "ordinarily are not jurisdictional,"[202] the Supreme Court has sought to distinguish *Bowles* as an "exceptional one" in which past precedent and practice "rank [the] time limit as jurisdictional."[203] Whether past precedent and practice is sufficient to overcome the Court's presumption in favor of jurisdiction, however, is anyone's guess as the Court has at other times been very willing to overturn past jurisdictional precedents.

C. The Clear Statement Approach Is Retroactive

Clear statement rules often are justified on grounds that they promote dialogue between the legislative and judicial branches.[204] However, the Supreme Court's clear statement rule for jurisdiction does not promote this sort of clarity because it often applies retroactively, thereby compromising "the reliability of background expectations that are essential to effective communication between Congress and the judiciary."[205]

From the Marshall Court through at least the mid-nineteenth century, courts were likely to view procedural requirements as jurisdictional.[206] Beginning in the late 1990s, the Supreme Court narrowed its definition of jurisdiction, and in so doing, reversed that presumption. *Arbaugh*'s clear statement principle now enforces a more limited view of the term jurisdiction. The Court presumes that Congress intended a condition to suit to operate nonjurisdictionally, unless Congress clearly says otherwise.[207] The Court has held all sorts of preexisting procedural requirements to be nonjurisdictional, even those previously labeled "jurisdictional."[208] In fact, the Court's

201. *See* Bowles v. Russell, 551 U.S. 205, 212 (2007).

202. Sebelius v. Auburn Reg'l Med. Ctr., 133 S. Ct. 817, 819 (2013) (quoting *Henderson*, 131 S. Ct. at 1203).

203. *Id.* at 825.

204. *See, e.g.*, John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 401 (2010).

205. RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 287-303 (6th ed. 2009) [hereinafter HART & WECHSLER] (describing the Court's shifting approach in dealing with implied private rights of action).

206. *See* Castro v. United States, 70 U.S. (3 Wall.) 46, 49 (1865).

207. Gonzalez v. Thaler, 132 S. Ct. 641, 648-49 (2012).

208. *Id.* at 648.

narrowing of the scope of the term jurisdiction has been so disruptive to prior precedent that Justice Scalia (the author of *Steel Co.* and its mandate to bring some discipline to jurisdictional cases) remarked that the Supreme Court's new presumption "shows signs of becoming a libertine, liberating romp through [the Court's] established jurisprudence."[209]

There is no question that the Court's methodological approach has changed dramatically from the Marshall Court to the Taney Court to the current Court. But can the different approaches be explained by the different consequences that attached to a jurisdictional statute at different times in our history? The Supreme Court has used the term jurisdiction to mean different things at different times. For example, the federal courts did not generally treat jurisdiction rigidly until around 1900,[210] and Michael Collins argues that "certain of the qualities commonly associated with" limited subject matter jurisdiction "remained less than fully settled throughout much of the nation's history."[211]

Although the Supreme Court's changing conception of jurisdiction may blunt the effects of its clear statement rule, the rule often operates retroactively because it is only in the last few decades that the Court retreated from the view that procedural requirements are often jurisdictional. Yet the consequences we ordinarily associate with jurisdiction, namely nonwaivability, attended jurisdictional statutes well before the Court's clear statement rule.

In the 1868 case of *Edmonson v. Bloomshire*, the plaintiffs had failed to timely file the record with the Supreme Court.[212] The jurisdictional objection was first raised at oral argument.[213] The Supreme Court dismissed despite the fact that both parties had fully argued the case on the merits and counsel never objected to the regularity of the appeal.[214] The Court rejected the argument that a motion to dismiss was required before the case proceeded to a

209. *Id.* at 663 (Scalia, J., dissenting).

210. Perry Dane, *Jurisdictionality, Time, and the Legal Imagination*, 23 HOFSTRA L. REV. 1, 99-105 (1994); Scott Dodson, *Hybridizing Jurisdiction*, 99 CALIF. L. REV. 1439, 1452 (2011).

211. Michael G. Collins, *Jurisdictional Exceptionalism*, 93 VA. L. REV. 1829, 1831 (2007); *see also* William Baude, *The Judgment Power*, 96 GEO. L.J. 1807 (2008).

212. 74 U.S. (7 Wall.) 306, 311 (1868).

213. *Id.* at 308.

214. *Id.*

hearing.[215] The reason, the Court wrote, "is, that the writ of error and the appeal are the foundations of our jurisdiction, without which we have no right to revise the action of the inferior court."[216] The Court "ha[d] never hesitated" to dismiss a case on such grounds "although no motion to dismiss was made by either party."[217] "In fact, treating it as a matter involving the jurisdiction of the court, we cannot do otherwise."[218]

The retroactivity of the clear statement approach is confirmed by prior case law rejecting the efficiency rationale that currently animates that approach. Despite the serious consequences that attended a jurisdictional ruling by at least 1868, the mid-nineteenth-century Court did not view inconvenience, a waste of time and effort on the part of litigants or courts, or even unfairness to blameless litigants, as grounds upon which to conclude that a statutory precondition to suit was nonjurisdictional. As the *Edmonson* Court put it: "it is better, if the rule is deemed unwise or inconvenient, to resort to the legislature for its correction."[219]

Even as early as 1848, the Court dismissed concerns over inconvenience or unfairness as irrelevant to a jurisdictional question.[220] In *United States v. Curry*, Thomas Curry had been awarded land under a statute enabling land claimants within the new state of Louisiana to institute proceedings in federal district court to prove the validity of their colonial land claims.[221] The statute provided that an appeal to the Supreme Court must be brought within one year of the district court decision.[222] But the district court, in

215. *Id.* at 310.

216. *Id.*

217. *Id.*; *see also* Credit Co. v. Ark. Cent. Ry. Co., 128 U.S. 258, 261 (1888) (dismissing untimely appeal sua sponte).

218. *Edmonson*, 74 U.S. at 310.

219. *Id.* at 311; *see also* Ins. Co. of the Valley of Va. v. Mordecai, 62 U.S. (21 How.) 195, 202 (1858). In *Mordecai*, the Court "dismissed for want of jurisdiction" a case in which petitioner had committed no error. *Mordecai*, 62 U.S. at 202. The lower court clerk, through no fault of the appealing party, had used an outdated writ of error that misstated the date of the first day of the Supreme Court's term. *Id.* at 196-97. Because the "legal return day" was a jurisdictional requirement fixed by statute, the Court dismissed the case without considering fairness or the waste of time and effort on the part of the litigant. *Id.* at 200.

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

221. *Id.* at 106.

222. *Id.* at 107 ("[I]n 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." (quoting Act of May 26,

accordance with local Louisiana law, granted an extension of time in which to file an appeal.[223] The government perfected its appeal to the Supreme Court within the time granted by the extension, but beyond the one-year limitation.[224] The Supreme Court found that the government's reliance on the district court order was irrelevant to the jurisdictional question because the appeal had not been prosecuted "in the manner directed, within the time limited by the acts of Congress, it must be dismissed for want of jurisdiction."[225] As for the government's argument that application of the limitations statute would work an "inconvenience or injustice," Congress alone determined the manner in which a case must be brought before the Court and thus only Congress could provide relief.[226]

In sum, the Supreme Court's clear statement rule has changed the way the Court analyzes whether a procedural requirement is jurisdictional. This change in approach means that the clear statement rule often may operate contrary to congressional expectations. The point here is not that statutes necessarily should be interpreted according to the principles in place at the time of their enactment,[227] but the narrower observation that the Supreme Court's new clear statement rule for jurisdictional provisions is not democracy enforcing. Thus, although clear statement rules are often justified because they facilitate legislative and judicial communication, the Court's clear statement rule for jurisdiction cannot be defended upon clarity grounds because it often applies retroactively, compromising the background expectations necessary for effective communication between Congress and the judiciary.[228]

1824, ch. 95, § 2, 4 Stat. 52, 53)).

223. *Id.* at 110-11.

224. *Id.* at 113.

225. *Id.*

226. *Id.*

227. The Court often interprets statutes according to then-existing principles of interpretation. *See, e.g.*, HART & WECHSLER, *supra* note 205, at 705-08 (discussing the Supreme Court's rejection of prior case law liberally inferring private rights of action). The tension between stare decisis and new interpretive approaches deserves further research, but is beyond the scope of this Article, except to the extent this tension discredits the notion that this particular clear statement rule promotes clarity.

228. *Id.* at 707.

D. Separation of Powers Concerns

The clear statement rule for jurisdiction is undertheorized. Such a rule is a powerful tool in the statutory interpretation arsenal; it alters the usual mode of statutory interpretation and should not be imposed without serious consideration. This Section first briefly discusses how clear statement rules operate and then demonstrates that even a forward-looking rule that is consistently applied will be problematic for two reasons: (1) the Court has not tied it to a specific constitutional interest and (2) the rule itself implicates separation of powers concerns.

1. Clear Statement Background

As Professor Eskridge explains, clear statement rules are the strongest form of interpretive presumption employed by the courts.[229] They are a type of "substantive canon" that commands a particular statutory meaning unless Congress has clearly rejected that meaning in the text of the statute.[230] Clear statement rules require a court to depart from ordinary judicial review. For a statute to reach a certain result, it is not enough that the best reading of the statute provide for such result.[231] Rather, a particular substantive interpretation is commanded unless Congress "unequivocally express[ed]" a contrary intention in the text of the statute.[232]

Supporters argue that clear statement rules are democracy enforcing.[233] Such rules permit the Court to police constitutional boundaries without taking the extraordinary step of invalidating a federal statute.[234] Because clear statement rules are procedural, rather than a judgment regarding the substantive legitimacy of a

229. ESKRIDGE, JR. ET AL., *supra* note 150, at 884.

230. *Id.*

231. Dan T. Coenen, *The Rehnquist Court, Structural Due Process, and Semisubstantive Constitutional Review*, 75 S. CAL. L. REV. 1281, 1283 (2002); *see also* Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985).

232. *Scanlon*, 473 U.S. at 242.

233. *See, e.g.*, William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 631 (1992) ("[U]ltimately such rules may even be democracy-enhancing.").

234. Manning, *supra* note 204, at 402.

congressional act, they are reversible.[235] Congress may override the Supreme Court's clear statement decisions if it speaks clearly. This override authority requires Congress to "focus[ ] the political process on the values enshrined in the Constitution" and tempers the Court's dialogue with the political branches, leaving lawmaking authority with the democratic branches.[236]

Clear statement rules are not without their critics.[237] Yet even assuming the validity of clear statement rules in general, they are an aberration from ordinary principles of judicial review. Such a departure is not warranted when the clear statement rule at issue does not protect a sufficiently specific constitutional interest, and engenders constitutional concerns of its own.

2. The Court Has Not Invoked a Specific Constitutional Value

Since clear statement rules direct courts to something other than the most reasonable reading of a statute,[238] they are usually reserved for constitutional values.[239] Clear statement rules crop up in a variety of contexts, but they operate primarily to preserve constitutional principles. As John Manning puts it, clear statement rules "share the defining feature of trying to safeguard constitutional values."[240]

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235. Coenen, *supra* note 231, at 1287.

236. Eskridge, Jr. & Frickey, *supra* note 233.

237. In addition to being countermajoritarian, Professor Manning argues that clear statement rules also trench upon the authority of the democratically elected branches because they extend constitutional limitations beyond constitutional bounds. Manning, *supra* note 204, at 402. Clear statement rules do not require the Court to find that Congress actually acted outside its constitutional powers; the rules apply to patently constitutional statutes. In other words, clear statement rules enforce a "judge-made penumbra" around constitutional values—limiting otherwise constitutional exercises of congressional authority. *Id.* at 402, 417. As such, these "quasi-constitutional rules" pose serious questions about the authority of courts to rewrite democratically accountable legislation on the basis of a constitutional emanation. Eskridge, Jr. & Frickey, *supra* note 233, at 637. Critics argue also that clear statement rules emphasize certain structural values more than those grounded in individual rights. ESKRIDGE, JR. ET AL., *supra* note 150, at 804; Manning, *supra* note 204, at 402.

238. Manning, *supra* note 204, at 402; *see* ESKRIDGE, JR. ET AL., *supra* note 150, at 638.

239. Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104, 108-09 (1991); ESKRIDGE, JR. ET AL., *supra* note 150, at 884; *see* William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1019 (1989).

240. Manning, *supra* note 204, at 402.

Structural federalism, for example, has inspired the Supreme Court to require Congress to "unequivocally express" its intention when it acts to abrogate state sovereign immunity.[241] Because the Constitution did not contemplate federal jurisdiction over citizen suits against nonconsenting States,[242] the federal courts must be certain of Congress's intent to override the guarantees of the Eleventh Amendment.[243] And while a State may waive its own sovereign immunity, the "test for determining whether a State has waived its immunity from federal-court jurisdiction is a stringent one."[244] Consent to suit must be "unequivocally expressed,"[245] and "will be strictly construed, in terms of its scope, in favor of the sovereign."[246]

This pursuit is not without its ambiguities. The Supreme Court has indicated that something less than a constitutional value might give rise to a clear statement rule, and constitutional justifications for various substantive canons are often attenuated and offered after the fact.[247] Further, as Professor Amy Barrett points out, other substantive canons, like *Charming Betsy* and the avoidance canon, may function like clear statement rules by permitting courts to adopt less plausible statutory meanings based on nonconstitutional values.[248]

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241. Pennhurst State Sch. & Hosp. v. Halderman (*Pennhurst II*), 465 U.S. 89, 99 (1984).

242. Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 751 (2002); Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 54 (1996); *see also* Sossamon v. Texas, 131 S. Ct. 1651, 1657 (2011).

243. Gregory v. Ashcroft, 501 U.S. 452, 460-61 (1991) ("[I]f Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute." (quoting Will v. Mich. Dept. of State Police, 491 U.S. 58, 65 (1989)) (internal quotation marks omitted)); *Pennhurst II*, 465 U.S. at 121. The Eleventh Amendment clear statement rule applies equally to congressional dictates applied pursuant to Section 5 of the Fourteenth Amendment, Nev. Dept. of Human Res. v. Hibbs, 538 U.S. 721, 726 (2003), and to Spending Clause legislation, Pennhurst State Sch. & Hosp. v. Halderman (*Pennhurst I*), 451 U.S. 1, 17, 24-25 (1981).

244. College Sav. Bank v. Fla. Prepaid Postsecondary Ed. Expense Bd., 527 U.S. 666, 675 (1999) (quoting Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 241 (1985)).

245. *Pennhurst II*, 465 U.S. at 99.

246. Lane v. Pena, 518 U.S. 187, 192 (1996); *see also Sossamon*, 131 S. Ct. at 1657-58.

247. For example, the Supreme Court referenced clear statement rules that operated for nonconstitutional values ("constitutional or otherwise"), such an application traces to a question of a statute's extraterritorial effect, a question of some constitutional dimension. *See* Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104, 108-09 (1991) (citations omitted).

248. Barrett, *supra* note 150, at 167 (discussing Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64 (1804)).

Still, the Supreme Court has by and large adhered to the notion that clear statement rules ordinarily operate to preserve constitutional values. And for good reason. As Professor Barrett notes, "insofar as any canon permits a departure from a text's most natural meaning, that departure must be reconciled with the constitutional structure."[249] When a canon is constitutionally derived, it is more easily harmonized with the understanding that courts are to be the faithful agents of Congress. If a conflict between a statute and the Constitution exists, courts must side with the Constitution.[250] Further, although statutory alterations made on the basis of undifferentiated social values risk undoing the legislative bargain in unanticipated ways, these concerns are lessened when a substantive canon draws on a specific constitutional value.[251]

The constitutional origin of a clear statement rule has value even for dynamic statutory interpreters who may be less bothered by the use of substantive canons to express policies different from those embodied in a statute. Instead of pursuing an undefined set of social values, constitutionally derived canons draw from an identifiable set of norms.[252] The constitutional origin of such canons thus leads to more predictable judicial decisions.

In creating a clear statement requirement for jurisdictional statutes, the Supreme Court has not invoked any constitutional interest, but rather concerns over the time and expense of litigation.[253] Because jurisdictional defects may be raised at any time during a lawsuit, a late-breaking jurisdictional issue may mean that "months of work on the part of the attorneys and the court may be wasted."[254] Because jurisdiction may require dismissal of a case after great expense and effort,[255] the Supreme Court has cautioned that courts

249. *Id.* at 111.

250. *Id.* at 181-82.

251. *Id.* at 168.

252. *Id.*

253. Gonzalez v. Thaler, 132 S. Ct. 641, 648 (2012); *see also* Sebelius v. Auburn Reg'l Med. Ctr., 133 S. Ct. 817, 824 (2013) (exemplifying how clear statement jurisdictional rules can prevent the waste of adjudicatory resources); Henderson *ex rel.* Henderson v. Shinseki, 131 S. Ct. 1197, 1201 (2011) ("Jurisdictional rules may ... result in the waste of judicial resources and may unfairly prejudice litigants.").

254. *Thaler*, 132 S. Ct. at 648 (quoting *Henderson*, 131 S. Ct. at 1202).

255. *Henderson*, 131 S. Ct. at 1202 (citing Arbaugh v. Y & H Corp., 546 U.S. 500, 508 (2006)).

should not lightly attach "drastic" jurisdictional consequences to preconditions to suit.[256]

Judicial economy, however important, seems a strange ground on which to rest a clear statement rule for jurisdiction. Time and expense are not constitutional principles[257] or the sort of "weighty and constant values" that have been used to validate substantive preferences in statutory interpretation.[258] The Supreme Court has long held that "neither the convenience of the litigants nor considerations of judicial economy" warrants an expansive interpretation of Article III jurisdiction.[259] For example, in *United States v. Curry*, the government relied upon an erroneous lower court order to dismiss the appeal.[260] Even still, the Supreme Court expressly rejected the government's argument that application of a limitations statute would work an "inconvenience or injustice."[261] Only Congress could provide relief from a jurisdictional requirement.[262]

Although the Supreme Court has not identified any ground other than economy for its jurisdictional clarity rule, scholars will point to an important interest in access to the federal courts. In this vein, it is worth noting that the Court has adopted a number of presumptions in favor of judicial review. First, the Supreme Court presumes that judicial review of final agency action "will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress."[263] Thus, even before passage of the Administrative

256. *Thaler*, 132 S. Ct. at 648 (citing *Henderson*, 131 S. Ct. at 1202).

257. *See* Manning, *supra* note 204, at 403 (specifying separation of powers and federalism as the types of constitutional principles clear statement rules are intended to protect).

258. Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104, 108 (1991).

259. Finley v. United States, 490 U.S. 545, 552 (1989) (quoting Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 377 (1978)); *see also* Christianson v. Colt Indus. Operating Co., 486 U.S. 800, 818 (1988); Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 379 (1981); Kline v. Burke Constr. Co., 260 U.S. 226, 233-34 (1922); Case of the Sewing Mach. Cos., 85 U.S. (18 Wall.) 553, 577-78, 586-87 (1874); Sheldon v. Sill, 49 U.S. (8 How.) 441, 449 (1850); Cary v. Curtis, 44 U.S. (3 How.) 236, 245 (1845); McIntire v. Wood, 11 U.S. (7 Cranch) 504, 506 (1813).

260. 47 U.S. (6 How.) 106, 112-13 (1848).

261. *Id.* at 113.

262. *See, e.g.*, *Finley*, 490 U.S. at 556; *Christianson*, 486 U.S. at 814; *Firestone Tire & Rubber Co.*, 449 U.S. at 378; *Kline*, 260 U.S. at 234; *Case of the Sewing Mach. Cos.*, 85 U.S. at 559-60; *Sheldon*, 49 U.S. at 442; *Cary*, 44 U.S. at 245; *McIntire*, 11 U.S. at 506.

263. Bowen v. Mich. Acad. of Family Physicians, 476 U.S. 667, 670 (1986) (quoting Abbott Labs. v. Gardner, 387 U.S. 136, 140 (1967), *abrogated by* Califano v. Sanders, 430 U.S. 99 (1977)); *see also* Demore v. Kim, 538 U.S. 510, 517 (2003); INS v. St. Cyr, 533 U.S. 289, 298 (2001); McNary v. Haitian Refugee Ctr., Inc., 498 U.S. 479, 496 (1991); Eskridge, Jr. &

Procedure Act,[264] the Court insisted that Congress clearly indicate a desire to omit judicial review of agency action.[265] Second, because Article III vests the whole of the "judicial Power" in the Supreme Court and in the lower courts Congress creates, the Supreme Court has held that Congress may withdraw traditional equitable powers only by making that desire plain.[266] Third, the Supreme Court presumes that Congress will not preclude all judicial review of constitutional questions.[267]

These judicial review presumptions reveal an overarching policy in favor of judicial review, and some might argue that a thumb on the scale is necessary to protect the jurisdiction of the federal courts. After all, it is a hallmark of the American judicial system that a litigant ordinarily is entitled to her day in court.

Yet differences exist between the various presumptions in favor of judicial review and the Court's recent clear statement rule. To be sure, both presumptions and clear statement rules may deviate from a faithful agency norm by substituting a plausible interpretation of a statute for the most natural one.[268] But presumptions place a lighter hand on the interpretive scale at least in the sense that they may be rebutted by any indicator of congressional intent—such as text, structure, context, purpose, and legislative history.[269] On the other hand, clear statement rules ordinarily foreclose extrinsic

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Frickey, *supra* note 233, at 601.

264. Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

265. *See Gardner*, 387 U.S. at 140.

266. Eskridge, Jr. & Frickey, *supra* note 233, at 605 (quoting Hecht Co. v. Bowles, 321 U.S. 321, 330 (1944) ("[I]f Congress desired to make such an abrupt departure from traditional equity practice ... it would have made its desire plain.")); *see* Weinberger v. Romero-Barcelo, 456 U.S. 305, 319 (1982).

267. ESKRIDGE, JR. ET AL., *supra* note 150, at 883. As *Webster v. Doe*, 486 U.S. 592, 603 (1988), taught, "where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear." *See also* Weinberger v. Salfi, 422 U.S. 749, 767 (1975). The Court imposes this "heightened showing in part to avoid the 'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." *Webster*, 486 U.S. at 603 (quoting *Bowen*, 476 U.S. at 681 n.12).

268. *See* Barrett, *supra* note 150, at 167.

269. ESKRIDGE, JR. ET AL., *supra* note 150, at 884 ("[A]ny potential evidence of statutory meaning (e.g., statutory text, legislative history, statutory purposes, policy arguments, and so on) [may be used] to rebut the presumption."); *see* Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104, 108-09 (1991) (contrasting clear statement and presumptions).

guides to interpretation[270] and compel a particular substantive interpretation unless Congress has issued a clear statement in the text of a statute.[271]

Second, and more critically, each of the judicial review presumptions serves to protect a specific constitutional value. The presumption in favor of judicial review of final agency action stems from a concern over Article I adjudication.[272] The presumption in favor of the exercise of all facets of the "judicial Power" is derived from Article III's vesting clause.[273] The presumption in favor of judicial review of constitutional questions enforces separation of powers concerns over congressional jurisdiction stripping.[274]

Although access to courts is of undoubted value in our legal system,[275] and one might be able to make an attenuated constitutional connection—for example, that Congress may neither take away all access nor every avenue of appellate review[276]—a broad and general interest in federal court access is not a very specific constitutional value upon which to hang a clear statement clarity tax. Other specific constitutional guarantees, like the Due Process Clause, exist to protect many of the values one might associate with court access. It is thus no surprise that, for centuries, procedural requirements, like statutes of limitations or filing deadlines, have not generally been viewed to effectuate the sort of denial to court access that the Constitution might prohibit.[277]

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270. EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 262-63 (1991) (Marshall, J., dissenting), *superseded by statute*, 42 U.S.C. § 2000e (2012), *as recognized in* Arbaugh v. Y & H Corp., 546 U.S. 500 (2006).

271. ESKRIDGE, JR. ET AL., *supra* note 150, at 884.

272. *See* Nicholas Bagley, *The Puzzling Presumption of Reviewability*, 127 HARV. L. REV. 1285, 1287 (2014).

273. *See, e.g.*, Evan Caminker, *Allocating the Judicial Power in a "Unified Judiciary,"* 75 TEX. L. REV. 1513, 1515 (2000).

274. *See, e.g.*, Martin H. Redish, *Same-Sex Marriage, the Constitution, and Congressional Power to Control Federal Jurisdiction: Be Careful What You Wish For*, 9 LEWIS & CLARK L. REV. 363, 369 (2005).

275. Tennessee v. Lane, 541 U.S. 509, 533-34 (2004) (describing the fundamental right of access to courts).

276. *See, e.g.*, Felker v. Turpin, 518 U.S. 651 (1996); *Ex parte* Yerger, 75 U.S. (8 Wall.) 85 (1869).

277. *See* Barrett, *supra* note 150, at 167. As Barrett argues, a deviation from the norm of faithful agency cannot be justified simply because a substantive canon can somehow be connected to a constitutional value; courts must carefully consider the specificity of the value stake. *Id.* at 181-82.

Perhaps for these reasons, the Supreme Court has made no effort to tie its novel clear statement rule to anything more than judicial economy. That justification has never been enough to expand the jurisdiction of the federal courts—it falls short of the sort of weighty and important consideration that the Court generally has required of its clear statement rules.

3. The Article I Problem

A clear statement rule mandating that courts construe statutes broadly in favor of their own jurisdiction implicates separation of powers problems. As the Supreme Court has explained, statutory limits on jurisdiction "are an essential ingredient of separation and equilibration of powers."[278] Although there is robust academic debate over what limits the Constitution places on congressional control of federal court jurisdiction,[279] there is little doubt that, so

278. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 101 (1998) (citing United States v. Richardson, 418 U.S. 166, 179 (1974)); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 227 (1974).

279. *See* HART & WECHSLER, *supra* note 205, at 287-303 (describing the contending positions); *see, e.g.*, Paul M. Bator, *Congressional Power over the Jurisdiction of the Federal Courts*, 27 VILL. L. REV. 1030, 1034, 1038 (1982) (explaining that Congress has plenary power over lower federal courts and appellate jurisdiction of the Supreme Court); Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction*, 36 STAN. L. REV. 895, 899-900 (1984) (same); John Harrison, *The Power of Congress to Limit the Jurisdiction of the Federal Courts and the Text of Article III*, 64 U. CHI. L. REV. 203, 209 (1997) (same); Martin H. Redish, *Constitutional Limitations on Congressional Power to Control Federal Jurisdiction*, 77 NW. U. L. REV. 143, 145 (1982) (explaining why Congress may limit jurisdiction of lower federal courts); Herbert Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1004-05 (1965) (explaining that Congress may define the jurisdiction of the lower courts and the appellate jurisdiction of the Supreme Court); *see also* Peter J. Smith, *Textualism and Jurisdiction*, 108 COLUM. L. REV. 1883, 1885-86 (2008) (describing the academic debate); *cf.* Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction*, 132 U. PA. L. REV. 741, 748-49 (1984) (arguing Congress must grant federal jurisdiction over every type of case in Article III); Theodore Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 YALE L.J. 498, 504 (1974) (contending Congress may not abolish lower federal courts); James E. Pfander, *Federal Supremacy, State Court Inferiority, and the Constitutionality of Jurisdiction Stripping Legislation*, 101 NW. U. L. REV. 191, 238 (2007) (contending the Supreme Court must be granted authority to review state court judgments when the state court acts as a federal tribunal); Leonard G. Ratner, *Majoritarian Constraints on Judicial Review: Congressional Control of Supreme Court Jurisdiction*, 27 VILL. L. REV. 929, 956-57 (1982) (arguing that the Supreme Court must control uniformity of federal law); Lawrence Gene Sager, *The Supreme Court, 1980 Term—Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17,

long as a jurisdiction-limiting provision does not violate an independent provision of the Constitution, Congress may exercise significant control over the jurisdiction of Article III courts. The Court's clear statement rule conflicts with the Court's obligation of faithful agency, manifest here in deference to Congress's authority to determine federal jurisdiction.

Article III, Section 1, of the United States Constitution provided: "the judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[280] Section 2 adds that Congress may grant the Supreme Court appellate jurisdiction "with such Exceptions, and under such Regulations as the Congress shall make."[281] As the Supreme Court has held,[282] and commentators noted, these provisions "vest[ ] Congress both with virtually plenary power over lower federal court jurisdiction ... and with substantial power over Supreme Court jurisdiction and remedial authority."[283]

The lower federal courts almost did not survive the Constitutional Convention. Edmund Randolph originally proposed as part of the Virginia Plan that the judicial branch "consist of One supreme tribunal, and of one or more inferior tribunals."[284] Yet the delegates voted to delete the provision providing for "inferior tribunals."[285] Madison then offered a compromise resolution, which provided: "The National Legislature [should] be empowered" to "institute inferior tribunals."[286] According to Madison, there was a distinction "between establishing such tribunals absolutely, and giving a discre-

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21-22 (1981) (same).

280. U.S. CONST. art. III, § 1.

281. *Id.* § 2, cl. 2.

282. *See* Sheldon v. Sill, 49 U.S. (8 How.) 441, 449 (1850) ("[H]aving a right to prescribe [jurisdiction], Congress may withhold from any court of its creation jurisdiction of any of the enumerated controversies."); *see also* Kontrick v. Ryan, 540 U.S. 443, 452 (2004) ("Only Congress may determine a lower federal court's subject-matter jurisdiction.") (citing U.S. CONST. art. III, § 1); *Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 512-13 (1868) (upholding sweeping congressional exceptions to the appellate jurisdiction of the Supreme Court).

283. Eskridge, Jr. & Frickey, *supra* note 233, at 605; Manning, *supra* note 204, at 436 ("Article III ... expresses a basic value of substantial congressional control over the available jurisdiction of the federal courts.").

284. MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 95 (1911).

285. *Id.* at 118.

286. *Id.*

tion to the Legislature to establish or not establish them."[287] The Madisonian Compromise encountered resistance from state delegates concerned about preserving the authority of the state courts but ultimately was accepted by the Committee of the Whole.[288] The Committee of Detail then reported out a draft providing that the judicial power "shall be vested in one Supreme Court and in such inferior Court as shall, when necessary, from time to time, be constituted by the Legislature of the United States."[289]

The Ratification Debates again focused on the potential for lower federal courts to encroach on traditional state prerogatives. Among the most popular amendments were those to eliminate all lower federal courts of first instance and to restrict original federal jurisdiction to a Supreme Court with little original jurisdiction.[290] The eventual acceptance of the Madisonian Compromise is generally understood to permit Congress to create lower federal courts with limited jurisdiction.[291] The actions of the First Congress bear this understanding out. The Judiciary Act of 1789 fell far short of vesting the federal courts with the full breadth of jurisdiction authorized by the Constitution.[292] For example, Congress provided no general federal question jurisdiction in the lower federal courts until 1875.[293]

Article III's limitation on the appellate jurisdiction of the Supreme Court—"with such Exceptions, and under such Regulations as the Congress shall make"[294]—is also understood to grant Congress wide berth. The provision emerged for the first time in the report of the Committee of Detail and was accepted without discussion.[295] The First Congress took the Exceptions and Regulations Clause seriously. The Judiciary Act of 1789 gave the Supreme Court

287. *Id.* at 125.

288. *Id.* at 124-25; Martin H. Redish & Curtis E. Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis*, 124 U. PA. L. REV. 45, 54 (1975).

289. The Committee of Style altered the language to its current form. *See* JULIUS GOEBEL, JR., ANTECEDENTS AND BEGINNINGS TO 1801, at 246 (1971).

290. Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 56 (1923).

291. HART & WECHSLER, *supra* note 205, at 275; FARRAND, *supra* note 284, at 124-28.

292. Act of Sept. 24, 1789, ch. 20, 1 Stat. 73.

293. HART & WECHSLER, *supra* note 205, at 276. Congress did briefly enact federal question jurisdiction but rescinded it in 1801. *See* Judiciary Act of 1801, ch. 4, 2 Stat. 89.

294. U.S. CONST. art. III, § 2, cl. 2.

295. HART & WECHSLER, *supra* note 205, at 287-303 (describing the contending positions).

appellate jurisdiction over federal question cases arising from the state courts only when those courts had denied the federal right.[296] The appellate jurisdiction of the Supreme Court did not initially extend to cases in which the federal claim had been upheld.[297] Further, it was not until 1891 that the Supreme Court possessed appellate authority to review the majority of federal court decisions in criminal cases.[298]

In short, the convention and ratification debates confirm that the text of the Constitution vests Congress with broad authority to regulate the jurisdiction of the lower federal courts and the appellate jurisdiction of the Supreme Court. The Court's clear statement rule for procedural requirements is suspect because it interferes with the Court's obligation to faithfully interpret legislation, imposing instead a substantive canon that tilts the balance in favor of judicial review.

The Court's newest interpretive rule is of a piece with the Court's long history of aggressively interpreting jurisdictional statutes in the service of values like judicial economy. An overburdened Court has sometimes narrowly interpreted jurisdictional grants to contract its jurisdiction. Other times the Court has broadly interpreted jurisdictional grants to expand its jurisdiction. From staples like the well-pleaded complaint rule[299] to the complete diversity rule[300]—neither of which appear on the face of the statutory text—to the various abstention doctrines,[301] the Supreme Court has often contracted jurisdiction to manage its docket or promote federalism.[302]

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296. *Id.* at 276-77.

297. *Id.* at 277.

298. *Id.* The Supreme Court exercised much of the same supervisory authority through its habeas power. *See generally* James S. Liebman, *Apocalypse Next Time?: The Anachronistic Attack on Habeas Corpus/Direct Review Parity*, 92 COLUM. L. REV. 1997, 2062 (1992).

299. Richard A. Matasar & Gregory S. Bruch, *Procedural Common Law, Federal Jurisdictional Policy, and Abandonment of the Adequate and Independent State Grounds Doctrine*, 86 COLUM. L. REV. 1291, 1332-37 (1986) (arguing that the language and history of statutory and constitutional arising under jurisdiction language suggest that the rule is founded solely on court-made jurisdictional policies of federalism and docket pressures).

300. *Id.* at 1300 n.30.

301. *Id.* at 1337-42 (arguing that the abstention doctrines allow courts to refuse or defer cases within their statutory jurisdiction on grounds of judicial economy and federalism).

302. *See* Debra Lyn Bassett, *Statutory Interpretation in the Context of Federal Jurisdiction*, 76 GEO. WASH. L. REV. 52, 56-59 (2007); *see also* F. Andrew Hessick III, *The Common Law of Federal Question Jurisdiction*, 60 ALA. L. REV. 895, 895 (2009) (describing the Court's expansion and contraction of federal jurisdiction without regard to congressional intent);

As Matasar and Bruch ably explain, the adequate and independent state grounds doctrine, for example, is not required by the Constitution or any current statute.[303] It arises only from the Court's self-restraint,[304] as do a number of the Court's rules that limit its jurisdiction.

The Supreme Court's clear statement rule for procedural requirements is not unique in expansively interpreting a jurisdictional grant. Pre-*Finley* the Court was willing to infer that Congress had conferred jurisdiction because it was not precluded by statute.[305]

The Court's aggressive interpretation of the statutes governing its jurisdiction raises distinct interpretive issues. In interpreting these statutes, the federal courts are deciding the bounds of their own power, implicating fundamental separation of powers issues. It is well established that in the absence of a congressional grant of jurisdiction, an Article III court has no constitutional authority—any action is ultra vires.[306] This requirement "spring[s] from the nature and limits of the judicial power of the United States."[307] As Charles Black puts it, congressional control over an unelected judiciary is "the rock on which rests the legitimacy of the judicial work in a democracy."[308] To allow a court to assume jurisdiction, and to bind parties, when the best reading of a statutory provision suggests that the Court does not in fact have jurisdiction is antithetical to these principles.

In 1805, Chief Justice Marshall rejected the similar argument that the Court should presume that jurisdiction exists "unless there

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Peter J. Smith, *Textualism and Jurisdiction*, 108 COLUM. L. REV. 1883, 1883 (2008) (arguing that textualist judges have not always followed the faithful agency norm in interpreting jurisdictional statutes).

303. Matasar & Bruch, *supra* note 299, at 1322-23.

304. *Id.*

305. *See, e.g.*, Durousseau v. United States, 10 U.S. (6 Cranch) 307 (1810); *Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 93 (1807).

306. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 101-02 (1997).

307. *Id.* at 94-95 (quoting Mansfield, C. & L.M. Ry. Co. v. Swan, 111 U.S. 379, 382 (1884)).

308. Charles L. Black, Jr., *The Presidency and Congress*, 32 WASH. & LEE L. REV. 841, 846 (1975); *see also* Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 415 (1989) ("According to the most prominent conception of the role of courts in statutory construction, judges are agents or servants of the legislature."); Nicholas S. Zeppos, *Legislative History and the Interpretation of Statutes: Towards a Fact-Finding Model of Statutory Interpretation*, 76 VA. L. REV. 1295, 1313 (1990) ("Traditional democratic theory suggests that the court interpreting a statute must act as the faithful agent of the legislature's intent.").

should be some exception or regulation made by [C]ongress."[309] Because Congress also regulated the jurisdiction it gave to the Supreme Court, "an affirmative description of [the Supreme Court's] powers must be understood as a regulation, under the [C]onstitution, prohibiting the exercise of other powers than those described."[310] The Court may only review judgments over which "a power to reexamine ... is expressly given by law."[311] A few years later, in 1807, Chief Justice Marshall again wrote on the issue: "courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction."[312]

The Taney Court's strict interpretation of congressional preconditions to suit also flowed from separation of powers concerns. "The appellate jurisdiction of [the Supreme Court] is, indeed, derived from the Constitution; but by the express terms of the constitutional grant, it is subjected to such exceptions and to such regulations as Congress may make."[313] Because jurisdiction was conferred by Congress in the first instance, Congress might direct the manner in which such jurisdiction was exercised; the Taney Court believed itself powerless to dispense with or modify any requirement.[314] The Court viewed itself to "have no power to receive an appeal in any other mode than that provided by law."[315] A case that had not been prosecuted "in the manner directed [by Congress] ... must be dismissed for want of jurisdiction."[316]

Even in its modern procedural-requirement cases, the Court has sometimes recognized these principles. In *Kontrick v. Ryan*, the Court held that several bankruptcy filing deadlines were claims-processing rules, rather than jurisdictional ones.[317] This conclusion

309. United States v. More, 7 U.S. (3 Cranch) 159, 173 (1805).

310. *Id.*

311. *Id.*

312. *Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 93 (1807).

313. Castro v. United States, 70 U.S. (3 Wall.) 46, 49 (1865).

314. *Id.* When "the same authority which gives the jurisdiction has pointed out the manner in which the case shall be brought before us," the Court is powerless to dispense with or modify any requirement. United States v. Curry, 47 U.S. (6 How.) 106, 113 (1848); *see also Castro*, 70 U.S. at 49 (explaining that when Congress provided for the exercise of appellate jurisdiction, the Court "has always felt itself bound to give effect to the regulations by which Congress has prescribed the manner of its exercise").

315. Villabolos v. United States, 47 U.S. (6 How.) 81, 90 (1848).

316. *Curry*, 47 U.S. at 113.

317. Kontrick v. Ryan, 540 U.S. 443, 455 (2004).

was based in part on the fact that "[n]o statute ... specifies a time limit for filing a complaint objecting to the debtor's discharge."[318] Because "[o]nly Congress may determine a lower federal court's subject-matter jurisdiction," it was improper to use the term "jurisdictional" to refer to court-ordained filing rules.[319] It is difficult to see why court-ordained canons like a clear statement rule can suffice to determine whether a provision is jurisdictional when court-ordained filing rules are insufficient.

As Professors Eskridge and Frickey explain, from its early days the Supreme Court has drawn from Article III's allocation of authority "the canon that statutes conferring jurisdiction upon federal courts should *be narrowly construed* to assure that Congress and not the courts make decisions about the extent of jurisdiction."[320] The Supreme Court employed this canon in early cases involving both federal question[321] and diversity jurisdiction.[322]

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318. *Id.* at 448. The federal rules can neither expand nor contract jurisdiction. *Id.*

319. *Id.* at 452; *see also* Eberhart v. United States, 546 U.S. 12, 13 (2005) (per curiam).

320. Eskridge, Jr. & Frickey, *supra* note 233, at 605 (emphasis added); *see* Louisville & Nashville R.R. v. Mottley, 211 U.S. 149, 149-50 (1908) (addressing federal question jurisdiction); Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267, 267-68 (1806) (addressing diversity jurisdiction).

321. In *Mottley*, the well-pleaded complaint case, the Court narrowly construed the federal question statute. *Mottley*, 211 U.S. at 152. Congress had granted then, as it has now, jurisdiction to the federal courts in "suit[s] ... arising under the Constitution or laws of the United States." *Id.* (quoting Act of August 13, 1888, ch. 866, 25 Stat. 434). The assertion of a constitutional defense in *Mottley* made it "very likely" that "a question under the Constitution would arise," *id.*, thus satisfying the Constitutional minima of a federal ingredient, United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 722-23 (1966); Osborn v. Bank of the U.S., 22 U.S. (9 Wheat.) 738, 819 (1824). However, the Court held that "a suit arises under the Constitution and laws of the United States only when the plaintiff's statement of his own cause of action shows that it is based upon those laws or that Constitution." *Mottley*, 211 U.S. at 152.

322. The early Supreme Court strictly interpreted both the citizenship and amount in controversy requirements. In *Strawbridge*, Chief Justice Marshall construed the diversity requirement narrowly, concluding that the statutory phrase "where ... the suit is between a citizen of a state where the suit is brought, and a citizen of another state" required that every plaintiff be diverse from every defendant. *Strawbridge*, 7 U.S. at 267. In a series of cases, the Court also construed strictly the amount in controversy requirement. The early Court repeatedly held that the requirement prohibited jurisdiction in cases that involved fundamental rights because such rights were incapable of being reduced to a monetary value. *See, e.g.*, Sparrow v. Strong, 70 U.S. (3 Wall.) 97, 101-02 (1865); Pratt v. Fitzhugh, 66 U.S. (1 Black) 271, 273 (1861); Barry v. Mercein, 46 U.S. (5 How.) 103, 106 (1847); Lee v. Lee, 33 U.S. (8 Pet.) 44, 48 (1834). Then, in *Town of Elgin v. Marshall*, the Court made the strict construction rule explicit. 106 U.S. 578, 582 (1883). Since jurisdiction was governed by Congress and because of federalism concerns, "it ought not to be extended by doubtful

Modern courts have also applied the canon of strict construction to jurisdictional statutes. In *Aldinger v. Howard*, for example, the Supreme Court noted that before a court can conclude that jurisdiction exists it "must satisfy itself not only that Art. III permits it, but that Congress in the statutes conferring jurisdiction has not expressly *or by implication* negated its existence."[323]

The Supreme Court's clear statement approach to procedural requirements is undertheorized. The efficiency and fairness concerns that a late dismissal raise are important considerations, but the Court has not explained why these concerns justify a clear statement approach.[324] Nor has it explained how the clear statement rule fits in with Congress's undoubted authority over the scope of Article III. The Court's reticence is part and parcel of its haphazard application of the clear statement rule, and it obscures the Court's larger project of confining jurisdiction to its proper bounds and demanding precision in its interpretation. This undertheorization may help explain both the Court's inconsistent application, and as detailed in Part III, the fact that the clear statement rule does not make much hay.

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constructions." *Id.* at 580; *see also* Healy v. Ratta, 292 U.S. 263, 270 (1934); Matthews v. Rodgers, 284 U.S. 521, 525 (1932); Kline v. Burke Constr. Co., 260 U.S. 226, 23-34 (1922). Thus, because the amount in controversy requirement "draws the boundary line of jurisdiction, it is to be construed with strictness and rigor." *Marshall*, 106 U.S. at 580. In *Snyder v. Harris*, the Court strictly construed the diversity statute in the class action context. "It is linguistically possible, of course," the Court wrote, "to interpret the old congressional phrase 'matter in controversy' as including all claims that can be joined or brought in a single suit through the class action device." 394 U.S. 332, 338 (1969). Yet, the Court declined to do so on grounds that "[t]he policy of the [diversity] statute calls for ... strict construction." *Id.* at 340 (quoting *Healy*, 292 U.S. at 270). Federalism values required that federal courts "scrupulously confine their own jurisdiction to the precise limits which the statute has defined." *Id.* (quoting *Healy*, 292 U.S. at 270); *see also* Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 372 (1978) ("Constitutional power is merely the first hurdle that must be overcome in determining that a federal court has jurisdiction over a particular controversy. For the jurisdiction of the federal courts is limited not only by the provisions of Art. III of the Constitution, but also by Acts of Congress.") (citations omitted)).

323. 427 U.S. 1, 18 (1976) (emphasis added), *superseded by statute*, 28 U.S.C. § 1343(3) (2012), *as recognized in* Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 555 (2005); *see also* Finley v. United States, 490 U.S. 545 (1989); *Kroger*, 437 U.S. at 365; *Palmore*, 411 U.S. at 396 ("[W]e are particularly prone to accord 'strict construction of statutes authorizing appeals' to this Court." (quoting Fornaris v. Ridge Tool Co., 400 U.S. 41, 42 n.1 (1970))).

324. Sebelius v. Auburn Reg'l Med. Ctr., 133 S. Ct. 817, 824 (2013) (explaining that the clear statement rule prevents "a waste of adjudicatory resources").

III. DECIPHERING THE COURT'S JURISDICTIONAL JURISPRUDENCE

There are at least three problems with the Court's clear statement requirement for procedural requirements: (1) the rule is applied inconsistently, (2) it operates retroactively, and (3) it implicates separation of powers concerns. Each suggests that the clear statement rule is a poor fit for determining whether a statute is jurisdictional. Moreover, a close analysis of the Court's cases reveals something surprising: the problem-generating clear statement rule does not appear to be doing much work. The Court has been after something much bigger; its procedural requirements cases have quietly narrowed, formalized, and redefined the term jurisdiction. The clear statement rule is only a means to effect this larger project.

The key insight from the last three decades of cases turns out not to be the clear statement rule, but rather the Court's urgent efforts to redefine the term jurisdiction. Whereas jurisdiction once included everything from the elements of a cause of action, to the various procedural steps litigants were required to fulfill, the modern Court has sought to narrow the term.[325] The Court's effort to "bring some discipline"[326] to the term jurisdiction has resulted in the Court formalizing and redefining that term—without it saying so. What *does* the modern Court mean when it says "jurisdiction"?

"Jurisdiction," we are told, refers to "a court's adjudicatory authority."[327] It "speak[s] to the power of the court."[328] Jurisdiction generally deals with "classes of cases"[329] and is not concerned with "the rights or obligations of the parties."[330] These rules make sense given the policies underlying subject matter jurisdiction: "protection of federal rights and interests, comity and federalism, allocation of

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325. *See supra* Part I.

326. Henderson *ex rel.* Henderson v. Shinseki, 131 S. Ct. 1197, 1202 (2011).

327. Kontrick v. Ryan, 540 U.S. 443, 455 (2004); *see also* Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154, 160-61 (2010).

328. Landgraf v. USI Film Prods., 511 U.S. 244, 274 (1994) (quoting Republic Nat'l Bank of Miami v. United States, 506 U.S. 80, 100 (1992) (Thomas, J., concurring)); *see also* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 89 (1998) (stating that "subject-matter jurisdiction" refers to "the courts' statutory or constitutional power to adjudicate the case").

329. *Kontrick*, 540 U.S. at 455.

330. *Landgraf*, 511 U.S. at 274 (quoting *Republic Nat'l Bank of Miami*, 506 U.S. at 100 (Thomas, J., concurring)).

judicial resources and docket control, and uniformity."[331] These values focus primarily on societal considerations, rather than litigant considerations.[332]

As a result, the Court is suspicious of requirements that resemble claims-processing rules—rules that "seek to promote the orderly progress of litigation by requiring that parties take certain procedural steps at certain specified times."[333] These rules address litigant considerations, not the broader concerns implicated by federal court authority. In contrast to rules affecting party obligations, jurisdiction refers to "the courts' statutory or constitutional power to adjudicate the case."[334]

The Court is also careful to distinguish between subject matter jurisdiction and the substantive elements of a claim. The elements of a claim generally involve the conduct prohibited or protected and potential parties to a lawsuit.[335] The Court has acknowledged that Congress may (and occasionally does) make the elements of a cause of action jurisdictional, but this is the rare exception rather than the rule.[336] The substance of a claim generally does not implicate the "courts' statutory or constitutional power to adjudicate the case."[337] Similarly, limits that affect the "mode of relief ... ancillary to the judgment of a court that [already] has plenary jurisdiction" are not usually jurisdictional.[338]

Although the Supreme Court has at times recited the mantra that jurisdiction goes to the Court's power,[339] the Court's recent precision is something new. From the Marshall Court, to the Taney Court, and to the more modern Court, the term jurisdiction was used frequently to describe everything from filing deadlines, to the elements of a particular cause of action, regardless of whether Congress had directed the provision at the adjudicatory authority of the federal

331. Dodson, *supra* note 140, at 7; *see* Barry Friedman, *A Revisionist Theory of Abstention*, 88 MICH. L. REV. 530, 550-54 (1989).

332. Dodson, *supra* note 140, at 7.

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

334. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 89 (1997).

335. Wasserman, *Jurisdiction, Merits, and Procedure*, *supra* note 5, at 1550-51.

336. Arbaugh v. Y & H Corp., 546 U.S. 500, 516 (2006).

337. *Steel Co.*, 523 U.S. at 89.

338. Scarborough v. Principi, 541 U.S. 401, 413 (2004).

339. *See, e.g.*, McDonald v. Mabee, 243 U.S. 90, 91 (1915) ("The foundation of jurisdiction is physical power."); *Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 513-14 (1869).

courts.[340] The lower federal courts were in disarray as they too struggled with the distinction between jurisdiction, substance, and procedure.[341] As late as 1987, a unanimous Court characterized the merits-seeming inquiry of whether section 505(a) of the Clean Water Act allows suits for wholly past violations as a question of jurisdiction.[342] Furthermore, in 1998, Justice Stevens argued that there is no difference between a jurisdictional provision and an element of a cause of action.[343]

Since its 1988 decision in *Steel Co.*, the Court has required more precision of courts undertaking a jurisdictional inquiry. Reviewing courts must ask whether a statutory provision is truly jurisdictional; in other words, whether it speaks to the power of the federal courts. This pointed inquiry, not a clear statement thumb on the scales, has been the key behind the Court's reining in of an overbroad and imprecise view of jurisdiction. And it does so without a distortive application of a clear statement rule. As scholars note, the Court's formalized definition of jurisdiction is a welcome step in the right direction.[344] Given the drastic consequences that attach to a jurisdictional provision, precision as to jurisdiction is critically important. The Court's focus on whether a provision addresses the power of the

340. *See supra* Part I.A; *see also* United States v. Cotton, 535 U.S. 625, 630 (2002) ("*Bain*'s elastic concept of jurisdiction is not what the term 'jurisdiction' means today, *i.e.*, 'the courts' statutory or constitutional *power* to adjudicate the case.'" (quoting *Steel Co.*, 523 U.S. at 89)).

341. *See* MOORE ET AL., *supra* note 77 (describing confusion between jurisdiction and the merits); Dane, *supra* note 210, at 105-07; Mark A. Hall, *The Jurisdictional Nature of the Time to Appeal*, 21 GA. L. REV. 399, 399-401 (1986) (discussing time to appeal); Philip A. Pucillo, *Rescuing Rule 3(c) from the 800-Pound Gorilla: The Case for a No-Nonsense Approach to Defective Notices of Appeal*, 59 OKLA. L. REV. 271, 271-72 (2006) (considering notice of appeal); Wasserman, *Jurisdiction, Merits, and Procedure*, *supra* note 5, at 1549 (addressing jurisdiction and merits); Alex Lees, Note, *The Jurisdictional Label: Use and Misuse*, 58 STAN. L. REV. 1457, 1461 (2006) (exploring confusion generally).

342. Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49, 52 (1987); *see also* EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 251 (1991) (suggesting that the definitional sections of Title VII of the Civil Rights Act of 1964—defining employer, employee, and the like—are jurisdictional).

343. *Steel Co.*, 523 U.S. at 112-13 (Stevens, J., concurring) (suggesting that the statutory question "can be viewed in one of two ways: whether [it] confers 'jurisdiction' over citizen suits for wholly past violations, or whether the statute creates such a 'cause of action'"); *id.* at 117-18 ("Rather than framing the question in terms of 'jurisdiction,' it is also possible to characterize the statutory issue in this case as whether respondent's complaint states a 'cause of action.'").

344. *See supra* Part II.A.

Court to hear a case is a much needed return to a more precise definition of jurisdiction.

Still, this important definitional revolution is too often obscured by the Court's clear statement rhetoric. This Part demonstrates that, once one asks the right question regarding jurisdiction, the problem-creating clear statement rule is unnecessary. It then sketches out factors that will be important in answering the question whether a provision is jurisdictional under the Court's redefined concept of jurisdiction.

A. The Clear Statement Rule Is Unnecessary

The Supreme Court's current clear statement rule does not matter in the mine run of cases. As this Section demonstrates, the Court's more precise definition of jurisdiction is enough to decide the Court's cases.

To begin, *Arbaugh v. Y & H Corp.*, the case that gave rise to the Court's bright-line clear statement rule, did not depend upon that rule for its resolution.[345] A close look at *Arbaugh* instead reveals the Court's continuation of its larger mission to redefine and narrow the term jurisdiction. The case began with the reminder that "[j]urisdiction" has become "a word of many, too many, meanings."[346] "This Court," the Court continued, "no less than other courts, has sometimes been profligate in its use of the term."[347] This profligate overuse led to the question presented in *Arbaugh*: whether the numerical qualification of fifteen employees affected federal court jurisdiction or was simply an element of a Title VII claim for relief.[348]

The Supreme Court began by describing the lower court's conflation of two concepts—jurisdiction and the elements of a claim—and in its rejection of this elision the Court's narrowed definition of jurisdiction becomes apparent.[349] The Court observed that judicial decisions "often obscure the issue by stating that the court is dismissing 'for lack of jurisdiction' when some threshold fact has not been established, without explicitly considering whether the

345. 546 U.S. 500, 516 (2006).
346. *Id.* at 510 (quoting *Steel Co.*, 523 U.S. at 90).
347. *Id.*
348. *Id.* at 503.
349. *Id.*

dismissal should be for lack of subject matter jurisdiction or for failure to state a claim."[350] The Court explained the error in this approach. Jurisdiction had a formal meaning: it described only requirements "involv[ing] a court's *power* to hear a case."[351] The real question was "whether the federal court had *authority* to adjudicate the claim in suit."[352] Moreover, prior cases that had failed to apply this more precise definition of jurisdiction were "drive-by jurisdictional rulings" that should be accorded "no precedential effect."[353]

The employee-numerosity requirement found in Title VII did not meet the Court's narrowed definition of jurisdiction.[354] It appeared in a section entitled "Definitions," and the Court found that nothing in the text of the requirement[355] suggested that Congress intended the provision to have jurisdictional consequences, like sua sponte consideration.[356] The federal courts already had *power* to hear the case under the general jurisdictional grant of 28 U.S.C. § 1331.[357] As a result, the Court concluded that the fifteen-employee threshold "does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts."[358] It was simply an element of a claim that a Title VII plaintiff must prove.[359]

Although the *Arbaugh* Court went on to create out of whole cloth the clear statement requirement, its new rule was not necessary to its disposition. It was only *after* the Court concluded that the numerosity requirement failed to satisfy its new definition of jurisdiction that the Court conjured up the clear statement rule. Citing "fairness" and the potential "waste of judicial resources" that a

350. *Id.* at 511 (quoting Da Silva v. Kinsho Int'l Corp., 229 F.3d 358, 361 (2d Cir. 2000)).

351. *Id.* at 514 (emphasis added) (quoting United States v. Cotton, 535 U.S. 625, 630 (2002)).

352. *Id.* at 511 (emphasis added) (citing Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 91 (1998)).

353. *Id.* (citing *Steel Co.*, 523 U.S. at 91).

354. *Id.* at 515.

355. 42 U.S.C. § 2000e(b) (2012) ("The term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day.").

356. *Arbaugh*, 546 U.S. at 506-07.

357. *Id.* at 507.

358. *Id.* at 515 (quoting Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 394 (1982)).

359. *Id.* at 515-16. Although Title VII does have its own jurisdictional provision, 42 U.S.C. § 2000e-5(f)(3), that provision does not suggest that everything contained within Title VII is jurisdictional. Rather, the provision was intended to expand jurisdiction beyond the general federal question jurisdiction provided by 28 U.S.C. § 1331 and its $10,000 amount-in-controversy minimum. *See* 28 U.S.C. § 1331(a) (2012).

jurisdictional requirement would entail, the Court found it "the sounder course ... to leave the ball in Congress's court."[360]

Even the clear statement rule itself depends upon the Court's narrowed definition of the term jurisdiction. From *Arbaugh*, we get the test:

> If the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue. But when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character.[361]

But this bright-line rule depends upon the definition of "jurisdictional"—a term that has been understood to mean different things at different times. It was the Court's more precise definition of jurisdiction, not the requirement that Congress speak clearly, that was the deciding factor in *Arbaugh*.[362]

What made the case close was prior precedent. The Supreme Court had to clear away the underbrush of two previous decisions in which it had suggested that the definitional section of Title VII might be jurisdictional.[363] But even here the clear statement rule was unnecessary. In *Hishon v. King & Spalding*, the Supreme Court reversed the lower court's finding that Title VII did not apply to the selection of law firm partners.[364] The Court suggested that the district court should have dismissed on jurisdictional grounds instead of dismissing for failure to state a claim.[365] *EEOC v. Arabian American Oil Co.* went further.[366] In that case, the Court held that Title VII did not apply to a suit by a U.S. employee working abroad for a U.S. employer.[367] Both the district court and court of appeals had dismissed for lack of subject matter jurisdiction.[368] In its opinion, the

360. *Arbaugh*, 546 U.S. at 515 & n.11, 516.
361. *Id.* at 515-16 (citation and footnote omitted).
362. *Id.* at 513-14.
363. *Id.* at 513-15.
364. 467 U.S. 69, 78 (1984).
365. *Id.* at 73 n.2.
366. 499 U.S. 244 (1991).
367. *Id.*
368. *Id.* at 246-47.

Court repeatedly referred to Title VII's definitional section, 42 U.S.C. § 2000e, as "jurisdictional."[369]

Yet the Court was not required to treat either case as precedential. The Court's disposition in *Hishon* made it "unnecessary" to consider whether the definitional provision was actually jurisdictional.[370] Similarly, the jurisdictional characterization was unnecessary to the decision in *Arabian American Oil Co.*, and the parties had not argued the point.[371] Under *Steel Co.*, the *Arbaugh* Court was not compelled to follow decisions labeling a provision jurisdictional because nothing "*turned upon* whether [the provision] was technically jurisdictional."[372]

Kontrick v. Ryan (a case decided before *Arbaugh*'s formal invocation of a clear statement rule) is another example in which the Court's formalized definition of jurisdiction (and not the clear statement rule) is dispositive.[373] As in *Arbaugh*, the *Kontrick* Court began with the reminder that courts "have been less than meticulous" in defining jurisdiction.[374] "Jurisdiction," the Court again observed, "is a word of many, too many, meanings," and courts have incorrectly used it to refer to time prescriptions.[375]

In explaining why various bankruptcy filing deadlines are not jurisdictional, the *Kontrick* Court further expanded upon the Court's new definition of jurisdiction.[376] The Court found that under *Steel Co.*, jurisdiction speaks to the power of the courts.[377] The Court wrote, "Clarity would be facilitated if courts and litigants used the label 'jurisdictional' not for claim-processing rules, but only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority."[378] Claims-processing rules are ones that

369. *See id.* at 251 ("Petitioners' reliance on Title VII's jurisdictional provisions."); *id.* at 253 ("Thus petitioners' argument based on the jurisdictional language of Title VII fails.").

370. 467 U.S. at 73 n.2.

371. *See* Arbaugh v. Y & H Corp., 546 U.S. 500, 514 (2006).

372. *See* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 91 (1998).

373. 540 U.S. 443 (2004).

374. *Id.* at 454.

375. *Id.* (quoting *Steel Co.*, 523 U.S. at 90).

376. *Id.* at 455.

377. *Id.*

378. *Id.* This definition of jurisdiction could be quite narrow, excluding all procedural requirements as claims processing rules, but the Court has not adhered to the strict distinction.

"seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times."[379] They are not directed at the power of the federal courts, but rather describe the obligations of litigants. This claims-processing distinction has come to animate many of the Supreme Court's procedural requirements cases and operates independently of the clear statement rule.

Additionally, the Court relied on the fact that the bankruptcy filing deadlines at issue in *Kontrick* were court-created rules.[380] "Only Congress," the Court wrote, might "determine a lower federal court's subject-matter jurisdiction."[381] This factor also operates independently of the clear statement rule.

Although the Supreme Court relied more heavily on the clear statement rule in *Gonzalez v. Thaler*—noting that the "clear-statement principle makes particular sense" as applied to AEDPA[382]—it is not clear that the eight-to-one outcome would be different without the rule. In *Thaler*, the Court considered whether the requirement that a certificate of appealability (COA) indicate the issue on which an appellant had shown the denial of a constitutional right was jurisdictional.[383]

Even in its phrasing of the question presented, the Court invoked its new, narrowed definition of jurisdiction. "The question before us is whether th[e failure of the COA to indicate the constitutional issue] deprived the Court of Appeals of the *power to adjudicate* Gonzalez's appeal."[384] The Court explained its revisionist view of jurisdiction: "This Court has endeavored in recent years to 'bring some discipline' to the use of the term 'jurisdictional.'"[385] Because courts had overused the term in the past, the Court had "pressed a stricter distinction between truly jurisdictional rules, which govern 'a court's adjudicatory authority,' and nonjurisdictional 'claim-processing rules,' which do not."[386]

379. Henderson *ex rel.* Henderson v. Shinseki, 131 S. Ct. 1197, 1203 (2011).
380. Kontrick v. Ryan, 540 U.S. 443, 452 (2004).
381. *Id.* (citing U.S. CONST. art. III, § 1).
382. 132 S. Ct. 641, 649 (2012); *id.* at 648-49 (applying the "clear-statement principle").
383. *Id.* at 646. Certificates of Appeal are issued pursuant to 28 U.S.C. § 2253(c)(1) (2012).
384. *Id.* at 648 (emphasis added).
385. *Id.* (quoting Henderson *ex rel.* Henderson v. Shinseki, 131 S. Ct. 1197, 1202 (2011)).
386. *Id.* (citing *Kontrick*, 540 U.S. at 454-55).

The indication requirement did not satisfy this narrowed definition of jurisdiction.[387] Regarding the text of 28 U.S.C. § 2253(c)(3), the Court found that it "does not speak in jurisdictional terms or refer in any way to the jurisdiction of the [appeals] courts."[388] Moreover, invoking ordinary canons of statutory construction, the Court found that "clear" jurisdictional language elsewhere in the statute indicated that "Congress would have spoken in clearer terms if it intended § 2253(c)(3) to have similar jurisdictional force."[389] It is not obvious that the absence of a clear statement rule would have changed this statutory interpretation.

Furthermore, the lack of a clear statement rule would not have changed the Court's analysis of the statute's purpose or of its policy considerations. In the Court's opinion, to construe the indication provision jurisdictionally would thwart Congress's purpose of eliminating AEDPA delays.[390] Once the judge had made the determination that a COA was warranted, the gatekeeping function of AEDPA was satisfied, and any further screening based on a defective COA would be unhelpful.[391] Moreover, the Court worried that a petitioner "has no control over how the judge drafts the COA."[392] This fact would "compound the 'unfai[r] prejudice' resulting from the *sua sponte* dismissals and remands that jurisdictional treatment would entail."[393]

The Court dispensed with the State's four arguments in favor of finding the indication requirement to be jurisdictional without referencing the clear statement rule. Each could be dealt with under the new definition of jurisdiction. The State first argued that the indication requirement was jurisdictional because it cross-referenced a jurisdictional provision.[394] The problem was "that the statute provides no such thing."[395] Congress placed the requirements "in distinct paragraphs and, rather than mirroring their terms,

387. *Id.* at 656.
388. *Id.* at 644 (quoting Arbaugh v. Y & H Corp., 546 U.S. 500, 515 (2006)).
389. *Id.* at 649.
390. *Id.* at 650.
391. *Id.*
392. *Id.*
393. *Id.* (quoting Henderson *ex rel.* Henderson v. Shinseki, 131 S. Ct. 1197, 1202 (2011)).
394. *Id.* at 651.
395. *Id.*

excluded the jurisdictional terms in one from the other."[396] The State next argued that the word "shall" in § 2253(c)(3) indicated jurisdictional status. The Court disagreed, finding that not "all mandatory prescriptions, however emphatic, are ... jurisdictional."[397] Nothing in the statute "establishes that an omitted indication should remain an open issue [as would be true of a jurisdictional statute] throughout the case."[398] Third, the Court rejected the argument that "the placement of § 2253(c)(3) in a section containing jurisdictional provisions signals that it too is jurisdictional."[399] "Mere proximity will not turn a rule that speaks in nonjurisdictional terms into a jurisdictional hurdle," the Court wrote.[400] Finally, the Court rejected the argument that a COA was like the appellate filing deadline held jurisdictional in *Bowles*, finding that the two deadlines were not analogous.[401] Even though the clear statement rule makes *Thaler* an easier case, it seems unlikely that the absence of the rule would have changed the Court's mind that the indication requirement was nonjurisdictional.[402]

This was also the case for *Sebelius v. Auburn Regional Medical Center*.[403] Although the unanimous Court recited the clear statement rule, the rule was not critical to its rationale or outcome.[404] *Auburn* held that the 180-day filing deadline for a healthcare provider to file a challenge to a reimbursement decision with the Provider Reimbursement Review Board was nonjurisdictional.[405] The Court began with its prior efforts to "'bring some discipline to the use' of the term 'jurisdiction.'"[406] In pursuit of this goal the Court had adopted the clear statement rule as a "readily administrable bright line" for determining whether to classify a statutory

396. *Id.*
397. *Id.* (quoting *Henderson*, 131 S. Ct. at 1205).
398. *Id.*
399. *Id.*
400. *Id.*
401. *Id.* at 651-52.
402. *See id.*
403. 133 S. Ct. 817 (2013).
404. *See id.* at 824.
405. *Id.*
406. *Id.* (quoting Henderson *ex rel.* Henderson v. Shinseki, 131 S. Ct. 1197, 1202 (2011)); *see id.* ("[J]urisdiction has been a 'word of many, too many, meanings.'" (quoting Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 90 (1998))).

limitation as jurisdictional.[407] But that rule did not change the result in *Auburn*.

Engaging in ordinary statutory interpretation, the Court concluded that the provision did not meet its definition of jurisdiction—it "does not speak in jurisdictional terms."[408] Nor was the 180-day filing deadline "'jurisdictional' in tone."[409] The Court explained that language Congress used did not reveal a design to oust the federal courts of power every time the condition went unmet.[410] Moreover, the Court's recent cases applying the more narrow view of jurisdiction supported this result. The Court's recent and repeated decisions holding filing deadlines nonjurisdictional under the Court's new definition of jurisdiction were key to the decision in *Auburn*.[411]

Auburn rejected the statutory arguments that the filing deadline was jurisdictional: (1) because of its placement among other jurisdictional provisions and (2) because Congress elsewhere had indicated that beneficiary (but not provider) deadlines might be extended.[412] These arguments appeared to have some merit, and yet, the Court rejected them without resort to the clear statement principle.[413] With respect to proximity, the Court wrote, "A requirement we would otherwise classify as nonjurisdictional, does not become jurisdictional simply because it is placed in a section of a statute that also contains jurisdictional provisions."[414]

The Court also dispatched with ease the argument that the 180-day time limit should be viewed as jurisdictional because Congress could have expressly made the provision nonjurisdictional—as it had done for other time limits in the Medicare Act.[415] The Court recognized that ordinarily "Congress's use of 'certain language in one part of the statute and different language in another' can indicate that 'different meanings were intended.'"[416] But once again the Court used ordinary tools of construction to dispatch the claim:

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407. *Id.* (citing Arbaugh v. Y & H Corp., 546 U.S. 500, 516 (2006)).
408. *Id.* (quoting Zipes v. Trans World Airlines, 455 U.S. 385, 394 (1982)).
409. *Id.*
410. *Id.*
411. *See id.* at 825.
412. *Id.* at 825-26.
413. *Id.*
414. *Id.* at 825.
415. *Id.*
416. *Id.* (quoting Sosa v. Alvarez-Machain, 542 U.S. 692, 711 n.9 (2004)).

"the interpretive guide just identified, is 'no more than [a] rul[e] of thumb' that can tip the scales when a statute could be read in multiple ways."[417] The Court was "persuaded that the time limitation ... is most sensibly characterized as a nonjurisdictional prescription."[418] This sensible characterization depended upon the Court's narrowed definition of jurisdiction, not the clear statement rule.[419]

The last three decades of procedural requirements cases show a Court engaged in an important project: the modern Court has formalized and made more precise the term jurisdiction. The term now refers only to authority-conferring provisions. This important project has been obscured by the Court's invocation of a clear statement rule,[420] but that rule is secondary at best—its application depends entirely upon the Court's definition of jurisdiction—and often makes no difference to the outcome of a case. In light of the application problems the clear statement approach engenders, the Court should abandon the clear statement rule and focus on the key definitional inquiry it has laid out. The next Section sketches out how the Court should go about analyzing whether a provision meets the Court's more precise definition of jurisdiction—without the clear statement rule.

B. Jurisdiction Sans the Clear Statement Rule

What will jurisdictional questions look like without the clear statement rule? Once one focuses on the inquiry driving the Court's cases—whether a statute limits the power of the federal courts to adjudicate a case—it becomes relatively easy to identify factors important to this inquiry. One can get to the "right" answer and without the distortive effects of a clear statement rule.

At the outset, *Arbaugh*'s clear statement rule is unhelpful in deciding whether a provision is jurisdictional—unless one knows what the Court means when it says "jurisdiction." From *Arbaugh*, we learn that "[i]f the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to

417. *Id.* at 825-26 (quoting Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253 (1992)).
418. *Id.* at 826.
419. *Id.* at 825-26.
420. *See supra* Part II.B-D.

wrestle with the issue."[421] But we have no idea what "jurisdictional" means. The clear statement rule turns on a term that has been understood to mean different things at different times.

Although it is easy to miss amongst the clear statement rhetoric, the Court's cases quietly redefine jurisdiction to mean something quite specific: a limitation on the power of the federal courts to adjudicate cases.[422] Jurisdiction "speak[s] to the power of the court;"[423] jurisdiction is not ordinarily concerned with the "rights or obligations of the parties,"[424] or with provisions that define a substantive cause of action.[425] These principles begin to develop a framework for analyzing cases under the Supreme Court's more precise definition of jurisdiction.

First, the text. Textual interpretation turns on whether Congress has conditioned the power of the federal courts to hear a case upon compliance with a procedural requirement.[426] Procedural requirements may be phrased in language that plainly limits the power of the federal courts.[427] For example, the Tax Injunction Act provides: "The *district courts shall not* enjoin, suspend or restrain the assessment, levy or collection of any tax under State law."[428] But under traditional tools of statutory interpretation, Congress need not say jurisdiction in so many words. The question is whether the words Congress used embody a limitation on the authority of the federal courts to hear cases or whether they are instead merely elements of a cause of action or conditions that litigants must fulfill. This latter inquiry focuses on *whom* Congress is constraining—the federal courts or litigants.

Second, the specific context of the procedural requirement. Several context factors are relevant to whether Congress meant to limit the power of the federal courts to hear cases. A key indicator is

421. Arbaugh v. Y & H Corp., 546 U.S. 500, 515-16 (2006).

422. *See, e.g.*, Kontrick v. Ryan, 540 U.S. 443, 452-53 (2004).

423. Landgraf v. USI Film Prods., 511 U.S. 244, 274 (1994) (quoting Republic Nat'l Bank of Miami v. United States, 506 U.S. 80, 100 (1992) (Thomas, J., concurring)); *see also* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 89 (1998) ("[S]ubject-matter jurisdiction" refers to "the courts' statutory or constitutional power to adjudicate the case.").

424. *Landgraf*, 511 U.S. at 274.

425. *Arbaugh*, 546 U.S. at 515-16.

426. *See, e.g.*, *Kontrick*, 540 U.S. at 452-53.

427. *See, e.g.*, 28 U.S.C. § 1341 (2012).

428. *Id.* (emphasis added).

whether the precondition is part and parcel of a legislative enactment that governs the jurisdiction of the federal courts in some way. For example, the condition may be part of a grant of jurisdiction over a particular category of cases in certain circumstances.[429] Such a statutory enactment suggests that Congress was concerned about the power of courts to hear certain cases when it promulgated the requirement; the placement of a precondition in a jurisdictional provision "is likely to be a realistic assessment of legislative intent."[430] Thus a procedural requirement promulgated as part of a jurisdictional grant may indicate that Congress meant to condition jurisdiction upon compliance with the procedural requirement. On the other hand, if Congress has already provided for jurisdiction,[431] it is far less likely that Congress meant to cut off access to federal courts when it imposed a particular precondition to suit.[432]

Likewise, a key consideration is whether Congress has provided exceptions to the procedural requirement—suggesting that the federal courts may still have power to hear a case notwithstanding noncompliance with a procedural condition.[433] Such exceptions indicate that Congress intended to require something of litigants, not limit the power of the federal courts.[434] Finally, the Court's interpretation of related statutes may provide relevant benchmarks as to whether Congress intended to limit the adjudicative authority of federal courts.[435]

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429. *See, e.g.*, *id.* § 1331.

430. Sebelius v. Auburn Reg'l Med. Ctr., 133 S. Ct. 817, 827 (2013) (quoting Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 95 (1990)).

431. *See, e.g.*, 28 U.S.C. §§ 1331-1332.

432. It is not the placement in the United States Code that is important per se, but rather the enactment of a requirement as part of a jurisdictional provision. Focusing on placement alone has allowed the Supreme Court to routinely reject proximity-based arguments. *Auburn*, 133 S. Ct. at 825; Henderson *ex rel.* Henderson v. Shinseki, 131 S. Ct. 1197, 1205 (2011). When Congress enacts a requirement as part of a jurisdictional grant, however, it is not mere proximity that is important but that Congress had jurisdiction in view when it enacted the procedural requirement.

433. Reed Elsevier, Inc. v. Muchnick, 559 U.S. 159, 163-64 (2010).

434. *Id.* at 164.

435. *Id.*

Third, the broader context of the statute as a whole. The overall statutory scheme may provide "telling" evidence of whether Congress intended for a procedural requirement to constrain the adjudicatory purview of the federal courts.[436] One example in which broad context matters is procedural time limits.[437] With respect to jurisdictionality, statutes of limitations generally fall into two categories: statutes of limitations in suits against nongovernmental actors and statutes of limitations in suits against the government.[438] Courts have long considered limitations statutes in suits against nongovernmental actors as nonjurisdictional.[439] Suits against the government, however, have a more nuanced history. Courts customarily considered these statutes to be "jurisdictional" on the theory that judges must strictly construe requirements attached to a waiver of sovereign immunity.[440] More recently, the Court has inconsistently dealt with the effect of time limits in suits against the government.[441] Regarding statutes of limitations, then, two general rules can be drawn. Statutes of limitations against private defendants are likely nonjurisdictional. Statutes of limitations that protect a government defendant, however, can go either way and require further analysis.

Finally, past interpretations of a provision are relevant for determining whether a requirement circumscribes the power of the federal courts. But reliance on past precedent in the jurisdictional context is complex. The Court has time and again pointed out that it has been "less than meticulous" with its use of the phrase

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436. *Henderson*, 131 S. Ct. at 1205.

437. *See, e.g.*, Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 94-95 (1990).

438. *Compare Irwin*, 498 U.S. at 94, *with* Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 395 (1982).

439. For suits against private defendants, there is a rebuttable presumption that equitable tolling rules apply, and courts will likely find any limitation as nonjurisdictional. *See Irwin*, 498 U.S. at 95-96.

440. Soriano v. United States, 352 U.S. 270, 276 (1957); *see also* Finn v. United States, 123 U.S. 227, 232-33 (1887); Kendall v. United States, 107 U.S. 123, 125-26 (1883).

441. *Irwin*, 498 U.S. at 94. The rule that limitations statutes must be strictly construed in suits against the government was not applied in two twentieth-century cases, and in *Irwin* the Court announced a "principle of interpretation" and held that the rebuttable presumption that equitable tolling rules "applicable to suits against private defendants should also apply to suits against the United States." *Id.* at 95-96. However, the Court did not apply this "general rule" in the more recent case of *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 137 (2008).

"jurisdiction"—thus an exception to stare decisis principles may apply.[442] Reviewing courts need not attach jurisdictional consequences to a precondition to suit based merely upon past use of the phrase. Rather, courts should analyze the legal substance of each prior case to determine whether the Supreme Court has treated the provision jurisdictionally or simply labeled it so.

The new approach to procedural requirements does much to reconcile the Supreme Court's approach (though perhaps not as easily its decisions) in *Bowles* and *John R.* In both cases, the Court seemingly discarded its clear statement approach in favor of stare decisis principles.[443] Further, although the Court has been at pains to reconcile *Bowles* and *John R.* with its clear statement approach by invoking congressional acquiescence, those efforts have fallen short. An approach that asks the right question—whether Congress limited the power of the federal courts—would permit recourse to past precedent, thus reconciling in large measure the approach taken in *Bowles* and *John R.* Nevertheless, because an exception to stare decisis exists when the prior decision has not been well-considered, courts must use stare decisis principles carefully when considering the jurisdictionality of a statute. Both *Bowles* and *John R.* represent difficult cases, even accounting for stare decisis.[444]

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442. Arbaugh v. Y & H Corp., 546 U.S. 500, 511 (2006).

443. The *Bowles* Court relied on the fact that the Court "has long held that the taking of an appeal within the prescribed time is 'mandatory and jurisdictional.'" Bowles v. Russell, 551 U.S. 205, 209 (2007). In *John R.*, the departure from a clear statement approach was even more apparent. The Court relied exclusively on "basic principles of stare decisis." *John R. Sand & Gravel Co.*, 552 U.S. at 137.

444. The text in *Bowles* is ambiguous as to whether Congress intended to condition the power of the federal courts to hear cases. The mandatory language—that "no appeal shall" be taken unless a notice of appeal is filed within 30 days unless "[t]he district court may [in certain circumstances] reopen the time for appeal for a period of 14 days"—is plausibly read as placing a requirement on litigants, not courts. 28 U.S.C. § 2107(c) (2012). The provision is not part of a jurisdictional provision, which leans against jurisdictional treatment. The specific context—a notice of appeal—suggests jurisdictional treatment because the Court has always treated *appellate* filing deadlines as jurisdictional. *Bowles*, 551 U.S. at 214. The precedent, however, is complicated. The Court has held that filing deadlines for notices of appeal are jurisdictional. *See, e.g.*, Hohn v. United States, 524 U.S. 236, 247 (1998) ("mandatory and jurisdictional"); Griggs v. Provident Consumer Disc. Co., 459 U.S. 56, 60 (1982) (same); Browder v. Dir., Dep't of Corr. of Ill., 434 U.S. 257, 264 (1978) (same); United States v. Robinson, 361 U.S. 220, 229 (1960) (same); *see also* Scarborough v. Pargoud, 108 U.S. 567, 568 (1883) ("[T]he writ of error in this case was not brought within the time limited by law, and we have consequently no jurisdiction."); United States v. Curry, 47 U.S. (6 How.) 106, 113 (1848) ("[A]s this appeal has not been prosecuted in the manner directed, within the time

Asking the right question—whether Congress has limited the power of the federal courts—will also allow judges, who are otherwise so inclined, to resort to additional interpretive aids like the purpose of a statute and to consult legislative history. This inquiry is more straightforward than the Court's current approach. Reviewing courts will not need to worry about the evidentiary limitations of the clear statement approach and will simply inquire whether Congress deprived the federal courts of the power to hear a case when a certain condition went unmet.

CONCLUSION

The question of whether a federal court has jurisdiction makes or breaks the lawsuit. How the Supreme Court goes about determining the answer to this question is critically important. The modern Court has revolutionized the way federal courts look at the question of jurisdiction. It has required Congress to speak clearly in order for a court to find a procedural requirement jurisdictional. This reverses centuries of precedent that viewed procedural requirements as presumptively jurisdictional. It also makes a muddle of the case law as the Court deals with unintended consequences of its clear statement rule. The outcome is inconsistent results and arbitrary justice. But when one decodes the Supreme Court's cases, another doctrinal shift becomes apparent. The Court has sought to formalize and redefine the definition of jurisdiction. It has directed

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limited by the acts of Congress, it must be dismissed for want of jurisdiction."). But this precedent is not as ironclad as the Court suggested. *See* Dodson, *The Failure of* Bowles v. Russell, *supra* note 5, at 635-39 (explaining that in some cases the jurisdictional conclusion was not necessary to the outcome and identifying other cases that are in tension with a jurisdictional rule). Further, the Court more recently suggested that time prescriptions in general "are not properly typed 'jurisdictional.'" *Arbaugh*, 546 U.S. at 510.

In *John R.*, the statutory text is once again ambiguous: "Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues." 28 U.S.C. § 2501. The mandatory language, "shall be barred," is strict, but plausible if interpreted as a mandatory condition imposed on litigants rather than a power-limiting provision imposed on courts. *Id.* In addition, the precedent is complicated. The Court has historically considered statutes of limitation for suits against the government jurisdictional. *See Soriano*, 352 U.S. at 276 (limitations in suits against the government "must be strictly observed and exceptions thereto are not to be implied"); *Finn*, 123 U.S. at 232-33; *Kendall*, 107 U.S. at 125-26. More recently, the Supreme Court has adopted a rebuttable presumption that equitable tolling applies to suits against the government. *Irwin*, 498 U.S. at 95-96.

lower courts to use the term jurisdiction only when the provision directly points to the power of the federal courts. This quiet changing of definitions, not the clear statement rule, has revolutionized the way federal courts look at jurisdiction. And it is this new definition, *sans* the clear statement rule, that deserves close analysis.