FIXING A FAILED JURISDICTIONAL REVOLUTION

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INTRODUCTION

Every filing in court must comply with various time and content requirements.[1] For two centuries, federal courts concluded that most of these requirements were part of their jurisdiction.[2] Noncompliance with them mostly resulted in dismissal, no matter when the noncompliance was discovered or what amount of resources were invested in the litigation.[3] This approach spelled harsh consequences for litigants and courts.[4] Most affected were criminal defendants and pro-se litigants who found themselves without a remedy for technical noncompliance raised in the late stages of their litigation. In 2004, this changed.[5] The Supreme Court, over several decisions, formulated a rule that limited the jurisdictional label of litigation requirements to instances where Congress made a clear statement about the requirement's

[1] This Article discusses many litigation requirements of different kinds and from different areas of law together to emphasize common themes related to the how courts characterize them and their effects.

[2] *See, e.g.*, United States v. Robinson, 361 U.S. 220, 229 (1960); Old Nick Williams Co. v. United States, 215 U.S. 541, 545 (1910); Wiscart v. Dauchy, 3 U.S. (3 Dall.) 321, 328 (1796).

[3] *See* Henderson *ex rel.* Henderson v. Shinseki, 562 U.S. 428, 434-35 (2011).

[4] *Id.*

[5] *See* discussion *infra* Part I.B.

jurisdictionality.[6] The Court identified the harsh consequences to litigants and courts as the motivation for the change.[7]

Despite the scholarly description of this move as "pathmarking,"[8] "revisionist,"[9] and "momentous,"[10] reading the case law suggests that it did not achieve its goal of mitigating the harsh consequences attached to jurisdictional litigation requirements. Although it helped some litigants, it left others worse off, especially weaker litigants most impacted by the old approach. The Court failed because of three main aspects of its newly adopted rule. First, the Court's rule structure and the Court's unfaithful application of it hinder the rule's ability to mitigate the jurisdictional label's harsh consequences, even after almost completely eradicating the jurisdictional label. Second, the Court did not guide lower courts on what effects non-jurisdictional litigation requirements have,[11] leaving the courts to engage with unprecedented issues that prolonged litigation and eventually retained harsh consequences for the same litigants. Third, the Court used one rule for different types of requirements, which merit different treatment due to their locus in the litigation.

This Article argues the Court needs to recalibrate its doctrine. First, the Court should limit assignment of jurisdictional labels for litigation requirements to instances where Congress used the word "jurisdiction" in the requirement or when the requirement is included in the jurisdictional section of a statute. Next, if the litigation requirement is non-jurisdictional, the Court should use context to analyze the non-jurisdictional effects of that requirement. The analysis should consider the characteristics of a prototypical noncompliant litigant and those of the specific noncompliant litigant in the case. It should also analyze the

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[6] The current rule originated in dicta in Arbaugh v. Y&H Corp., 546 U.S. 500, 515-16 (2006), but developed to its current version in *Henderson*, 562 U.S. at 435-36.

[7] *Henderson*, 562 U.S. at 435.

[8] Scott Dodson, *Jurisdiction and Its Effects*, 105 GEO. L.J. 619, 624 (2017).

[9] Erin Morrow Hawley, *The Equitable Anti-Injunction Act*, 90 NOTRE DAME L. REV. 81, 88 (2014).

[10] Erin Morrow Hawley, *The Supreme Court's Quiet Revolution: Redefining the Meaning of Jurisdiction*, 56 WM. & MARY L. REV. 2027, 2030 (2015).

[11] This has been noted by other scholars who attempted to offer their version of the proper effects of non-jurisdictional litigation requirements. *See, e.g.*, Scott Dodson, *Mandatory Rules*, 61 STAN. L. REV. 1, 4-6 (2008); Bradford C. Mank, *Is Prudential Standing Jurisdictional?*, 64 CASE W. RES. L. REV. 413, 430-31 (2013).

noncompliance in question and the chances of the case on the merits. This would mitigate the harsh consequences the Court addressed and would allow for more structure and guidance for lower courts adjudicating noncompliance with litigation requirements.

Part I.A. delves into the history of federal courts' treatment of litigation requirements and the development of the current Court's doctrine regarding them. Litigation requirements are a part of any court filing.[12] They include time constraints on filing an action or an appeal as well as content requirements that litigants need to perform or demonstrate before filing.[13] Federal courts have reflexively characterized litigation requirements as part of their jurisdiction since the early days of the union.[14] Courts have not explained why such requirements are part of their jurisdiction, and they have usually reached this characterization in a conclusory manner.[15] A jurisdictional label means that, upon noncompliance with a requirement, a court lacks authority or power to hear the underlying case.[16] It also means that a noncompliance could be

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[12] Perry Dane, *Jurisdictionality, Time, and the Legal Imagination*, 23 HOFSTRA L. REV. 1, 5-7 (1994); Catherine T. Struve, *Time and the Courts: What Deadlines and Their Treatment Tell Us About the Litigation System*, 59 DEPAUL L. REV. 601, 603 (2010).

[13] *See, e.g.*, Fort Bend Cty. v. Davis, 139 S. Ct. 1843, 1846-47 (2019) (exhausting administrative remedies before filing suit in court); Henderson *ex. rel.* Henderson v. Shinseki, 562 U.S. 428, 431 (2011) (time to file a notice of appeal in the United States Court of Appeals for Veteran Claims); Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154, 157-58 (2010) (requirement that a copyright will be registered before filing a suit); Union Pac. R.R. v. Bhd. of Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment,, 558 U.S. 67, 72-75 (2009) (requirement to mediate before filing a complaint with the NRAB); Bowles v. Russell, 551 U.S. 205, 208 (2007) (time to file a notice of appeal); Arbaugh v. Y&H Corp., 546 U.S. 500, 504-05 (2006) (an employer must employ fifteen employees to be covered by Title VII).

[14] *See, e.g.*, United States v. Robinson, 361 U.S. 220, 229 (1960); E. King Poor, *Jurisdictional Deadlines in the Wake of* Kontrick *and* Eberhart*: Harmonizing 160 Years of Precedent*, 40 CREIGHTON L. REV. 181, 182-83 (2007). But some legal scholars point to contrary cases where, even in the past, the Court has found non-jurisdictionality. *See, e.g.*, Dane, *supra* note 12, at 99-105 (doubting the historic account); Scott Dodson, *The Failure of* Bowles v. Russell, 43 TULSA L. REV. 631, 638-39 (2008). Hawley offers a more nuanced version of history, acknowledging that the majority of cases found litigation requirements jurisdictional but explaining that courts had a broader view of jurisdictionality than they have today. Hawley, *supra* note 10, at 2033-34.

[15] *See* Kontrick v. Ryan, 540 U.S. 443, 454-55 (2004).

[16] *Henderson*, 562 U.S. at 434; Carlisle v. United States, 517 U.S. 416, 434-35 (1996) (Ginsburg, J., concurring); Hawley, *supra* note 10, at 2080; Alex Lees, Note, *The Jurisdictional Label: Use and Misuse*, 58 STAN. L. REV. 1457, 1463 (2006). For the

raised at any stage of the litigation, whether on appeal or even at the Supreme Court.[17] The parties cannot waive or forfeit it because a court had an independent obligation to raise the issue sua sponte, no matter when it discovers it.[18] In most cases, noncompliance resulted in dismissal[19] without consideration of the efforts and resources a litigant invested or the magnitude or importance of the noncompliance.[20]

Part I.B. then focuses on the United States Supreme Court's change of course in 2004. The Court began formulating a rule to determine what makes a litigation requirement jurisdictional.[21]

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understanding of jurisdiction as a court's power or authority, see *Kontrick*, 540 U.S. at 454-55. *See also Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 514 (1868); Scott Dodson, *Hybridizing Jurisdiction*, 99 CALIF. L. REV. 1439, 1445 (2011); Scott Dodson, *In Search of Removal Jurisdiction*, 102 NW. U. L. REV. 55, 55-56 (2008) (making the argument and collecting cases).

[17] In *Kontrick*, the petitioner raised the jurisdictional issue only on appeal. *Kontrick*, 540 U.S. at 451. The same is true for the employer in *Arbaugh*. *Arbaugh*, 546 U.S. at 508. In *Gonzalez v. Thaler*, the State brought up the issue only in its brief in opposition to the certiorari petition at the U.S. Supreme Court. Gonzalez v. Thaler, 565 U.S. 134, 139 (2012). These claims were all addressed as the parties argued the court lacked jurisdiction to adjudicate the cases.

[18] In *Hamer*, the Seventh Circuit raised the issue of jurisdictionality despite neither party arguing it. Hamer v. Neighborhood Hous. Servs. of Chicago, 138 S. Ct. 13, 18 (2017); *see also Henderson*, 562 U.S. at 434 (explaining this mandatory obligation of courts).

[19] At times courts found exceptions of different kinds when they felt the jurisdictional result could not stand. But these cases were the minority and not the mainstream of cases. One such exceptional doctrine was the "unique circumstances doctrine" that the Court developed in the 1960s. Thompson v. INS, 375 U.S. 384, 386-87 (1964) (per curiam); Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc., 371 U.S. 215, 217 (1962) (per curiam). Much like its other jurisdictional opinions, the Court addressed this doctrine in a conclusory manner without any theoretical foundation. The Court overruled this doctrine in *Bowles*. Bowles v. Russell, 551 U.S. 205, 213-14 (2007).

[20] 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, 51-52 (2009).

[21] Most scholars maintain that the "revolution" started with Kontrick v. Ryan, 530 U.S. 443 (2004). *See*, *e.g.*, Dodson, *supra* note 11, at 2 (starting his analysis with *Kontrick*); Lees, *supra* note 16, at 1459 (referring to "the project the Court set out in *Kontrick*"); Poor, *supra* note 14, at 205 ("[T]he very foundation for [the jurisdictionality] jurisprudence was shaken by the Supreme Court's 2004 decision in *Kontrick v. Ryan*."). However, some trace it back to a 1998 case where the Court raised the problem with the misuse of jurisdiction as a label. *See* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 90-91 (1998). *See*, *e.g.*, Dodson, *supra* note 8, at 624 (noting that in *Steel Co.* "the Court explicitly recognized that overuse of the jurisdictional label had spawned 'drive-by jurisdictional rulings' that should be accorded no precedential weight" (quoting *Steel Co.*,

The Court explained this change by referring to the harsh consequences of attaching a jurisdictional label to a litigation requirement,[22] and the need to bring order to the undisciplined treatment of litigation requirements' characterization.[23] Although the shift did not attract much attention, it received praise from scholars who did note it,[24] who called it a "jurisprudential project,"[25] a "revolution,"[26] a "clean-up effort,"[27] a "refinement,"[28] and described it as "pathmarking,"[29] "sweeping,"[30] "revisionist,"[31] and "momentous."[32] But like other common law developments, this change did not happen overnight. The Court moved between different "tests" for jurisdictionality,[33] and at one point it even slid

523 U.S. at 90–91)); Hawley, *supra* note 10, at 2043 (noting that the revolution has "its foundations in" *Steel Co.*). Yet few others treat *Arbaugh* as the decision that moved the revolution. *See, e.g.*, Nathaniel E. Castellano, *After* Arbaugh*: Neither Claim Submission, Certification, Nor Timely Appeal Are Jurisdictional Prerequisites to Contract Disputes Act Litigation*, 47 PUB. CONT. L.J. 35, 36 (2017) (referring to *Arbaugh* as the beginning of the change); John F. Preis, *Jurisdictional Idealism and Positivism*, 59 WM. & MARY L. REV. 1413, 1422 (2018) ("The Supreme Court's current approach to jurisdictionality stems from 2006" (citing to *Arbaugh*)); As detailed below, this Article begins with *Kontrick* and details the development of the doctrine, as it finds that *Kontrick* is the first case to explicitly invoke the shift in treatment.

[22] *See, e.g.*, *Henderson*, 562 U.S. at 434-35; Jessica Berch, *Waiving Jurisdiction*, 36 PACE L. REV. 853, 875, 905 (2016); Lees, *supra* note 16, at 1458; Micah J. Revell, Comment, *Prudential Standing, the Zone of Interests, and the New Jurisprudence of Jurisdiction*, 63 EMORY L.J. 221, 239-40 (2013).

[23] *See, e.g.*, *Kontrick*, 540 U.S. at 454-55; Scott Dodson, *Defending Jurisdiction*, 59 WM. & MARY L. REV. ONLINE 85, 88 (2018).

[24] Preis, *supra* note 21, at 1417 & n.20, 1423.

[25] Howard M. Wasserman, *Prescriptive Jurisdiction, Adjudicative Jurisdiction, and the Ministerial Exemption*, 160 U. PA. L. REV. PENNUMBRA 289, 295 (2012).

[26] Hawley, *supra* note 10, at 2030; Stephen A. Cobb, *Jettisoning "Jurisdictional": Asserting the Substantive Nature of Supremacy Clause Immunity*, 103 VA. L. REV. 107, 111 (2017) ("a revolutionary line of decisions").

[27] David S. Kantrowitz, Note, *Caveat Emptor: Jurisdictional Rules,* Bowles v. Russell*, and Reliance on Our Judicial System*, 89 B.U. L. REV. 265, 270 (2009).

[28] William James Goodling, Comment, *Distinct Sources of Law and Distinct Doctrines: Federal Jurisdiction and Prudential Standing*, 88 WASH. L. REV. 1153, 1174 (2013).

[29] Dodson, *supra* note 8, at 624.

[30] Alan M. Trammell, *Jurisdictional Sequencing*, 47 GA. L. REV. 1099, 1101 (2013).

[31] Hawley, *supra* note 9, at 88.

[32] Hawley, *supra* note 10, at 2030.

[33] The Court first used a functional test based on *what* the requirement's aim was. *See* Eberhart v. United States, 546 U.S. 12, 15-16 (2005) (per curiam); Kontrick v. Ryan, 540 U.S. 443, 455-56 (2004); Scarborough v. Principi, 541 U.S. 401, 413-14 (2004). *But*

back to its former pattern of assigning jurisdictional labels without a thorough analysis.[34] Importantly, in 2006 the Court first used the central piece of today's test—a "clear statement" requirement from Congress declaring jurisdictionality of a litigation requirement.[35] Eventually,[36] the Court consolidated its different lines of precedent into a rule. The Court determined that there must be a "clear statement" from Congress. That statement did not need to include "magic words." A clear statement could also be achieved by congressional silence, when the Court treated a litigation requirement as jurisdictional for a long time.[37] Part I.C. details how that rule has been used by the Court and lower courts since its articulation.[38] It shows that the Court has not always followed the rule,[39] and tweaked it along the way.[40] Lower courts created various splits of authority, relying on different decisions of the Court and their circuit precedent. Part I.D. concludes by articulating the current test as it presents from the case law.

Part II argues that this revolution is largely a failure. Even though the Court's recent decisions have consistently found litigation requirements to be non-jurisdictional, any appearance of

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see Gonzalez v. Thaler, 565 U.S. 134, 169 n.9 (2012) (Scalia, J., dissenting) (arguing that this limitation was made in *dicta* in *Kontrick*) (citing *Kontrick*, 540 U.S. at 455).

[34] *See* John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 134-36 (2008); Bowles v. Russell, 551 U.S. 205, 212-13 (2007).

[35] Arbaugh v. Y&H Corp., 546 U.S. 500, 515-16 (2006). Although *Arbaugh* added another requirement of a clear statement, it was decided on functional grounds. *See id.* at 513–14 (resolving the case as turning on whether the requirement in question is jurisdiction or merit related, "mindful of the consequences" of the answer, before noting the clear statement rule). In other cases, it seems that the Court returned to its functional test. *See*, *e.g.*, Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 195 n.4 (2012).

[36] The Court attempted this consolidation in Dolan v. United States, 560 U.S. 605, 609-11 (2010); Reed Elsevier, Inc. v. Muchnik, 559 U.S. 154, 162-63 (2010); and Union Pac. R.R.Co. v. Bhd. of Locomotive Eng'rs & Trainmen Gen Comm. of Adjustment, 558 U.S. 67, 82 (2009).

[37] Henderson *ex rel* Henderson v. Shinseki, 562 U.S. 428, 436 (2011).

[38] The relevant decisions in this period are: Fort Bend Cty. v. Davis, 139 S. Ct. 1843, 1848-49 (2019); Nutraceutical Corp. v. Lambert, 139 S. Ct. 710, 714 (2019); Hamer v. Neighborhood Hous. Servs. of Chicago, 138 S. Ct. 13, 17 (2017); United States v. Kwai Fun Wong, 135 S. Ct. 1625, 1631-32 (2015); Sebelius v. Auburn Reg'l Med. Ctr., 568 U.S. 145, 153-55 (2013); *Gonzalez*, 565 U.S. at 141-43.

[39] At times, the Court returned to its drive-by jurisdictional decision making. *See e.g. Hosanna-Tabor*, 565 U.S. at 195 n.4; Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 256-58 (2010).

[40] *Compare Henderson*, 562 U.S. at 435, *with Wong*, 135 S. Ct. at 1633.

relief for beleaguered litigants is illusory. The harsh consequences persist for several reasons.

Part II.A explains how the rule's structure, and the Court's unfaithful application of it, hinder the rule's ability to mitigate the jurisdictional label's harsh consequences, even when the Court found most requirements non-jurisdictional. First, the Court held that Congress's silence, in the face of enduring precedent about the jurisdictionality of a litigation requirement, is a "clear statement." But this stare decisis "exception" is problematic when considering the purpose of a "clear statement" rule: reliance on statutory text. Additionally, the Court invoked this rule to *correct* its past decisions. Thus, relying on them makes little sense. Furthermore, the Court has been unclear about the exception's scope, generating authority splits in lower courts.

Second, the rule is premised on finding a clear statement about jurisdictionality. But the Court never identified what that clear statement could be. Instead, it only found examples of what is *not* a clear statement. As a result, lower courts lack clear guidance on statutory language meaning in this context.

Third, although the Court has pronounced a text-based rule, it has a latent pattern of deciding its cases. Instead of deciding by text as it asserts, it focuses on the type of the litigation requirement and its context. But the Court is not committed to this contextual analysis. Because the Court does not own up to it, lower courts find themselves confused, and as a result, they improperly assign jurisdictional labels to non-jurisdictional litigation requirements.

Part II.B then focuses on the fact that the Court neglected the results of its jurisdictional label evisceration. Although most litigation requirements have now turned non-jurisdictional, the Court never explained what effects non-jurisdictional litigation requirements have.[41] Before its jurisprudential shift, the Court described non-jurisdictional requirements as the inverse image of jurisdictional requirements.[42] Litigants could waive or forfeit them, courts were not obligated to raise them on their own, and in time-

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[41] *See* Dodson, *supra* note 11, at 4-6; Mank, *supra* note 11, at 430-31.

[42] *See* Day v. McDonough, 547 U.S. 198, 205 (2006); Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 94-96 (1990); Michael G. Collins, *Jurisdictional Exceptionalism*, 93 VA. L. REV. 1829, 1831 (2007). *See also* Dane, *supra* note 12, at 5-7, 12; Dodson, *supra* note 11, at 5-6.

related requirements, litigants could seek equitable tolling for their untimely filing.[43] After 2004, however, the Court refused to embrace that view, perhaps because it feared litigants would depreciate the role of these requirements.[44] Yet the Court did not replace this view with another. Instead, it made inconsistent statements about the effects of different non-jurisdictional requirements.[45] The result is that although the Court essentially stopped attaching a jurisdictional label to litigation requirements, it did not remedy the situation of many noncompliant litigants, who must go through several hurdles and miss some of them due to either lack of expertise, bad luck, or a judicial mistake.[46]

Finally, Part II.C. looks at the rule's premise—one rule to label all litigation requirements—and argues that is unattainable. The requirements can be divided into temporal and content requirements. They can also be divided by their source: statutory or non-statutory. Another impactful division is the area of law in which the requirement functions. These different types of requirements yield distinct implications to noncompliant litigants. The rule that the Court adopted eased litigation for litigants noncompliant with content requirements. The opposite occurred for noncompliance with time-related requirements.

Part III steps back and presents the Article's fix for the Court's failed jurisdictional revolution. First, the Court should narrow the scope of its clear statement rule. To designate a litigation requirement as jurisdictional, there must be a clear jurisdictional language, or the requirement must be included in the jurisdictional section of a statute. This straight-forward analysis will limit the possibility of improperly assigning a jurisdictional label to non-jurisdictional litigation requirements.

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[43] *See, e.g., Irwin*, 498 U.S. at 95-96; Dodson, *supra* note 11, at 5 n.18.

[44] *See* Nutraceutical Corp. v. Lambert, 139 S. Ct. 710, 715 (2019); *Wong*, 135 S. Ct. at 1633; *Henderson*, 562 U.S. at 435-36.

[45] The Court treated waiver as preclusive but held that a forfeiture or a neglect by parties, specifically the government, could allow the court to intervene sua sponte, upon its discretion. *See Day*, 547 U.S. at 209-11. Equitable tolling was treated inconsistently too. *Compare* Sebelius v. Auburn Reg'l Med. Ctr., 568 U.S. 145, 153-55 (2013), *with Wong*, 135 S. Ct. at 1632-33.

[46] Alexandra D. Lahav, *The Roles of Litigation in American Democracy*, 65 EMORY L.J. 1657, 1667-77 (2016); *see infra* Part II.A.

Second, the Court should adjust the meaning of non-jurisdictional litigation requirements according to factors related to them, and not only statutory language,[47] as it is malleable to varied interpretations, as the Court's decisions show. The Court should focus its exploration on the harsh consequences it wishes to mitigate. The analysis should consider two levels: First, the prototypical noncompliance with a certain litigation requirement and the characteristics of a prototypical noncompliant litigant. Second, the specific noncompliance in the case and the characteristics of the specific noncompliant litigant. Finally, the analysis should consider the merit chances of the specific case. These considerations would allow courts to mitigate the harsh consequences of jurisdictional labels and would allow for more structure and guidance for lower courts adjudicating noncompliance with litigation requirements.[48] To illustrate how the proposal could work, this Article concludes with analysis of four past cases according to its new analysis.

I. THE DEMISE OF THE JURISDICTIONAL LABEL FOR LITIGATION REQUIREMENTS

Litigants need to comply with litigation requirements in order to successfully get their day in court. Litigation requirements are found in rules and statutes and take many forms: time to file motions, statutes of limitations, requirements such as exhaustion, or specific content that a claim or motion must allege or contain.

For over two centuries, federal courts have not addressed in a principled manner what happens when a litigant does not comply

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[47] In other areas, scholars have noted that the Court takes into consideration factors that are outside of the statute interpreted. For example, the relative fault of parties to the litigation or their diligence. *See, e.g.*, Aziz Z. Huq, *Habeas and the Roberts Court*, 81 U. CHI. L. REV. 519, 528 (2014) (two paths of adjudication in habeas relief, based on the difference of blameworthiness between the inmate and the state); Lee Kovarsky, *The Habeas Optimist*, 81 U. CHI. L. REV. DIALOGUE 101, 120 (2014) (a diligent inmate will have a better opportunity to be heard on the merits at least once). "Equitable" considerations of this type were also identified in the Court's treatment of copyright law. *See* Shyamkrishna Balganesh & Gideon Parchomovsky, *Equity's Unstated Domain: The Role of Equity in Shaping Copyright Law*, 163 U. PA. L. REV. 1859, 1882-87 (2015).

[48] The notion of flexible jurisdictionality and non-jurisdictionality is not new. *See*, *e.g.*, Dodson, *supra* note 11, at 4-6; Dodson, *supra* note 16, at 1448-50; Mank, *supra* note 11, at 429-33. The novelty here is the inclusion of case-based factual factors in the analysis, rather than a sole reliance on the textual and contextual clues.

with a litigation requirement. Usually, courts addressed the noncompliance consequences in a conclusory and short manner, at times during the adjudication of another issue. These decisions were not grounded in any clear theory, and sometimes were devoid of reasoning altogether. However, results wise, courts usually found litigation requirements jurisdictional. That meant that noncompliance resulted in dismissal, no matter at what stage the noncompliance was uncovered. It also meant that courts had a duty to address the issue sua sponte if neither party raised it. Yet some of the noncompliance with jurisdictional requirements were overcome by exceptions, or by ignoring the issue altogether. In the 1990's, some justices intimated that jurisdiction means too many things and that it imposes harsh consequences on noncompliant litigants who got their case dismissed regardless of when a party brought up the noncompliance; in addition, these consequences also extended to courts that wasted valuable resources in the process.[49]

Attempting to mitigate these harsh consequences, the Court began in 2004 to actively look for a theory to explain why certain litigation requirements merit a jurisdictional label and why others do not. The Court first articulated a functional rule that looked at the requirement in question and its effects on the litigation, but soon added a clear statement analysis that looked for a Congressional statement about jurisdictionality. Since then, the Court also went back to its unprincipled ways of determining jurisdictionality, but eventually, in 2011, the Court settled on a rule. The Court's rule provides that to label a litigation requirement as jurisdictional, courts need to find a clear statement from Congress, which also includes silence when past Supreme Court decisions held that such requirement is jurisdictional. If a court does not find such a clear statement, the requirement is non-jurisdictional.[50] This rule is still in place today, but its implementation has been difficult and unclear—for the Court itself and lower courts.[51]

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[49] *See*, *e.g.*, Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 90, 93-96 (1998); Carlisle v. United States, 517 U.S. 416, 434-36 (1996) (Ginsburg, J., concurring).

[50] *See* Henderson *ex rel.* Henderson v. Shinseki, 562 U.S. 428, 434-36 (2011).

[51] *See infra* Part I.C.

A. Before 2004—No Clear Principle in the Jurisdictional Labeling of Litigation Requirements

Ever since the republic's early days, federal courts viewed some litigation requirements as part of their jurisdiction.[52] This logic dates back to 1796 when the Supreme Court addressed the requirement of a statement of facts in a writ of error[53] and held that "[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."[54] In this early era, the Supreme Court dismissed cases where litigants did not comply with litigation requirements based on statute. These requirements were both time-related and content-related. The Court regularly dismissed cases for lack of jurisdiction when litigants did not file timely[55] (even when it was not due to their fault[56]), Noncompliance with statutes of limitations,[57] or lacked different types of content pre-

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[52] Hawley, *supra* note 10, at 2030.

[53] Wiscart v. Dauchy, 3 U.S. (3 Dall.) 321, 330 (1796).

[54] *Id.* at 327.

[55] Credit Co. Ltd. v. Ark. C.R. Co., 128 U.S. 258, 261 (1888) ("When the time for taking an appeal has expired, it cannot be arrested or called back by a simple order of court. If it could be, the law which limits the time within which an appeal can be taken would be a dead letter."); Castro v. United States, 70 U.S. (3 Wall.) 46, 50-51 (1866) (although the relevant statute did not make any mention of the necessary timing for appeal filing or consequences flowing from it); United States v. Curry, 47 U.S. (6 How.) 106, 113 (1848) ("The power to hear and determine a case like this is conferred upon the court by acts of Congress, and the same authority which gives the jurisdiction has pointed out the manner in which the case shall be brought before us; and we have no power to dispense with any of these provisions, nor to change or modify them. And if the mode prescribed for removing cases by writ of error or appeal be too strict and technical, and likely to produce inconvenience or injustice, it is for Congress to provide a remedy by altering the existing laws; not for the court.").

[56] Old Nick Williams Co. v. United States, 215 U.S. 541, 545 (1910) (holding courts lack power to extend time to appeal beyond statutorily allowed time); Ins. Co. of Valley of Va. v. Mordecai, 62 U.S. (21 How.) 195, 199-201 (1859) (noting lower court misstated first day of Supreme Court term, although statute did not require lower court to mention the first day and acknowledging that a term is a whole unit).

[57] Scarborough v. Pargoud, 108 U.S. 567, 568 (1883) ("It follows that the writ of error in this case was not brought within the time limited by law, and we have consequently no jurisdiction."); Cummings v. Jones, 104 U.S. 419, 419 (1881). *But see* Brooks v. Norris, 52 U.S. (11 How.) 204, 207-08 (1851). Although the *Brooks* Court acknowledged that statutes of limitations are not a jurisdictional issue, and a court cannot raise them on its own motion; later the Court noted some statutes of limitations are jurisdictional. *See* John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 133-34 (2008).

conditions.[58] The early Supreme Court viewed these requirements as "the foundations of [its] jurisdiction, without which [the Court had] no right to revise the action of the inferior court."[59] Because of that, the Court found that it should raise the issue on its own motion if neither party did.[60] Lower courts similarly viewed litigation requirements as jurisdictional.[61] This general treatment of litigation requirements remained similar even throughout the twentieth century.[62]

Courts also viewed litigation requirements in rules of procedure—civil, criminal, appellate, and bankruptcy—as jurisdictional. Federal rules of procedure are a relatively modern creature. The Federal Rules of Civil Procedure were the first rules promulgated in 1938, after the passing of the Rules Enabling Act of 1934.[63] The goal behind their creation was to "expedite and simplify the administration of justice."[64] The federal rules of criminal, appellate, and bankruptcy procedure followed later, and are generally similar and in some instances refer back to the Federal Rules of Civil Procedure.[65] These procedural rules include litigation requirements, ordering certain timely filingsand specific content in

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[58] *See*, *e.g.*, Edmonson v. Bloomshire, 74 U.S. (7 Wall.) 306, 310 (1869) (transcript not provided); United States v. Gomez, 70 U.S. (3 Wall.) 752, 763 (1866) (writ not returned by end of next term; no authenticated transcript filed); Mesa v. United States, 67 U.S. (2 Black) 721, 722 (1863) (per curiam) (transcript not filed at "next succe[ssive] term after the appeal [was] taken"); Steamer Va. v. West, 60 U.S. (19 How.) 182, 182-83 (1857) (no timely filing of record); *Curry*, 47 U.S. at 113 (writ of error not returned to Court by end of next term); Villabolos v. United States, 47 U.S. (6 How.) 81, 90 (1848) (lack of signature of lower court judge on writ of error).

[59] *Edmonson*, 74 U.S. at 310.

[60] *See, e.g.*, *Credit Co. Ltd.*, 128 U.S. at 261; *Edmonson*, 74 U.S. at 310.

[61] *See* Poor, *supra* note 14, at 188-90.

[62] Hawley, *supra* note 10, at 2041; *see*, *e.g.*, EEOC v. Arabian American Oil Co., 499 U.S. 244, 248-49, 251 (1991) (referring to terms in Title VII, such as "employer" and "commerce," as jurisdictional); Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49, 55 (1987) (stating section 505(a) in the Clean Water Act allowing suits for past violations is jurisdictional).

[63] 28 U.S.C. § 2072; Poor, *supra* note 14, at 190.

[64] *Id.*

[65] The rules of appellate and criminal procedure refer to the Rules of Civil Procedure in several points. *See* Poor, *supra* note 14, at 194 (discussing the similarity of the rules about "time"). In *Eberhart v. United States*, 546 U.S. 12, 15 (2005) (per curiam), the Court noted that criminal rules of procedure "closely parallel" the bankruptcy rules of procedure.

filing.[66] And although the civil and bankruptcy rules stipulate that they do not affect jurisdiction,[67] courts nonetheless have treated them as constraining their jurisdiction, from their inception[68] until late in the twentieth century.[69]

The Supreme Court's understanding of jurisdiction in these times is essential to the evaluation of its decisions and the jurisprudential revolution that ensued in recent years, which is the

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[66] For time related rules: *see*, *e.g.*, FED. R. CIV. P. 6(b) (extending time); FED. R. CRIM. P. 45(b) (same); FED. R. APP. P. 26(b) (same); FED. R. BANKR. P. 9006(b). For rules mandating content requirements: *see*, *e.g.*, FED. R. CIV. P. 7 (dictating form of motions and other papers); FED. R. CRIM. P. 47 (explaining content requirements for motions).

[67] FED. R. CIV. P. 82 ("These rules do not extend or limit the jurisdiction of the district courts . . . ."); FED. R. BANKR. P. 9030 ("The rules shall not be construed to extend or limit the jurisdiction of the courts . . . .").

[68] Civil Procedure: Edwards v. Doctors Hosp., Inc., 242 F.2d 888, 891 (2d Cir. 1957) (holding court cannot extend time to appeal retroactively and such order is a "nullity"); Slater v. Peyser, 200 F.2d 360, 361(D.C. Cir. 1952) (holding court action or parties' agreement does not extend appeal rule-based time constraint because rule is jurisdictional). Bankruptcy Procedure: *In re* Topco, Inc., 894 F.2d 727, 733 n.7 (5th Cir. 1990) ("Rule 8002 of the Bankruptcy Rules' . . . ten day requirement [to file an appeal] is jurisdictional and cannot be waived"). See also in Criminal Procedure: United States v. Robinson, 361 U.S. 220, 229 (1960) (holding rule prescribing time to appeal in criminal cases is jurisdictional).

[69] Civil Procedure: Albright v. Virtue, 273 F.3d 564, 571 (3d Cir. 2001) (noting that Rule 59(e) is jurisdictional and cannot be extended in discretion of district court); United States v. Rashid, No. 95-7396, 2009 WL 723382, at *2 (E.D. Pa. Mar. 17, 2009) (same). Bankruptcy Procedure: Canyon Capital Advisors LLC v. PG&E Corp., No. 20-cv-04949-HSG, 2020 WL 7342683 (N.D. Cal. Dec. 14, 2020) (noting as recent as 2020 that it is "well settled that the deadlines imposed by Bankruptcy Rule 8002 are 'mandatory and jurisdictional'" (citation omitted)). See also in Criminal Procedure: United States v. Emuegbunam, 268 F.3d 377, 397-98 (6th Cir. 2001) (noting FED. R. CRIM. P. 29, 33, 34 and 35 are jurisdictional). Appellate Procedure: Torres v. Oakland Scavenger Co., 487 U.S. 312, 317-18 (1988) (A court "may not waive the jurisdictional requirements of Rules 3 and 4 . . . . We recognize that construing Rule 3(c) as a jurisdictional prerequisite leads to a harsh result in this case, but we are convinced that the harshness of our construction is "imposed by the legislature and not by the judicial process.'" (quoting Schiavone v. Fortune, 477 U.S. 21, 31 (1986)); Gochis v. Allstate Ins. Co., 16 F.3d 12, 16 (1st Cir. 1994) (holding FED. R. APP. P. 4(a)(1) is jurisdictional).

focus of this Article.[70] The Court viewed jurisdictionality broadly.[71] A litigation requirement's jurisdictional character did not mean that noncompliance led to a case's dismissal. Instead, the Court accepted substantial compliance.[72] In addition, the Court opined that in some cases, the dismissal would not prejudice the litigant, who will be allowed to "resort to a new writ or a new appeal."[73]

But not every litigation requirement was jurisdictional, especially in the late nineteenth-century. The Court clarified that some litigation requirements are meant only to serve "notice,"[74] or to keep "the regularity of the proceedings."[75] Understanding these requirements as not jurisdictional was "necessary for the furtherance of justice."[76] In addition to litigation requirements that were viewed non-jurisdictional, the Court created exceptions to jurisdictional litigation requirements in cases with extreme circumstances. One exception was fraud or improper behavior.[77]

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[70] In a close context, originalist analysis, it has been said that "reconstruction" of a constitutional provision in an original public meaning analysis "requires interpreters to be able to access the semantics and pragmatics available to a competent speaker of American English at the time each provision was framed and ratified." Lawrence B. Solum, *Triangulating Public Meaning: Corpus Linguistics, Immersion, and the Constitutional Record*, 2017 BYU. L. REV. 1621, 1650 (2017). This principle also affects the proper reading of judicial opinions. To truly extrapolate their meaning, a reader must understand their backdrop.

[71] Hawley, *supra* note 10, at 2042. *See also* Poor, *supra* note 14, at 224-25. This broad concept was still alive in 1998, when Justice Stevens explained in *Steel Co. v. Citizens for a Better Env't*, that "[r]ather 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.'" Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 117-18 (1998) (Stevens, J., concurring).

[72] *See, e.g.*, The San Pedro, 15 U.S. (2 Wheat.) 132, 142 (1817).

[73] Castro v. United States, 70 U.S. (3 Wall.) 46, 50 (1866).

[74] Hewitt v. Filbert, 116 U.S. 142, 144 (1885).

[75] Brown v. McConnell, 124 U.S. 489, 492 (1888) ("The security is required, however, in the due prosecution of the appeal, and if the case is docketed here in time it will not ordinarily be dismissed because of the neglect or omission of the justice or judge to require the security until the appellant has been afforded a reasonable opportunity of curing the defect. The taking of security is not jurisdictional in its character, and its omission affects only the regularity of the proceedings."). *But see* Catlett v. Brodie, 22 U.S. (9 Wheat.) 553, 554-55 (1824) (dismissing actions for lack of security payment according to chapter 20, section 22 of the Judiciary Act of 1789, although without mentioning lack of jurisdiction).

[76] *Hewitt*, 116 U.S. at 145; *see also Brown*, 124 U.S. at 492 ("[P]ermission to supply it here may properly be given in furtherance of justice.").

[77] United States v. Gomez, 70 U.S. (3 Wall.) 752, 763-64 (1866) ("Where the appellant, having seasonably procured the allowance of the appeal, is prevented from

Another was for "unique circumstances"—a judge-made doctrine meant to cure situations where a judicial officer gave a litigant a promise that resulted in the litigant's noncompliance with a litigation requirement.[78] In the second half of the twentieth century, the Court found that where Congress did not affirmatively deny equitable tolling in suits against the government, they are presumed as allowed, and therefore these litigation requirements were in effect non-jurisdictional.[79] By doing so, the Court skirted the question of jurisdictionality and instead focused on the effects of a requirement. These methods all show that historically the Court did not view the attachment of a jurisdictional label to a litigation requirement as an exorable limit on its ability to hear a claim brought by a litigant who has not complied with the requirement.

In sum, before 2004, the Court had long found many litigation requirements, of different types and from different sources, to be jurisdictional. However, the Court did not view jurisdiction deterministically and at times excused or waived the jurisdictional effects of a litigation requirement.

B. The Court's Development of a Framework to Determine Jurisdictionality

The Supreme Court and lower courts incessantly labeled litigation requirements as jurisdictional for more than a century. In the past, jurisdictional labels were viewed flexible enough to include exceptions. But in recent years, the Court changed

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obtaining the transcript by the fraud of the other party, or by the order of the court, or by the contumacy of the clerk, the rule does not apply, provided it appears that the appellant was guilty of no laches, or want of diligence, in his efforts to prosecute the appeal.").

[78] Thompson v. INS, 375 U.S. 384, 387 (1964); Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc., 371 U.S. 215, 217 (1962) (per curiam); United States v. Jones, 297 F. App'x. 203, 203 n.* (4th Cir. 2008) (allowing an appeal due to the court misleading a litigant, although at the time of this decision, the doctrine had been overruled in *Bowles v. Russell*, 551 U.S. 205, 214 (2007)); Newell v. O & K Steel Corp., 42 F. App'x. 830, 832 (7th Cir. 2002) (reliance on a district court's misleading ruling); United States v. Stewart, No. 78-5319, 1980 U.S. App. LEXIS 21764, at *9-10 (6th Cir. Dec. 17, 1980) (applying doctrine where judges in the Eastern District of Michigan changed a procedural rule but failed to publish it properly to attorneys).

[79] Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 95-96 (1990); Bowen v. City of New York, 476 U.S. 467, 478-80 (1986); Honda v. Clark, 386 U.S. 484, 501 (1967).

configuration to a more positivist and textualist approach. This meant that a jurisdictional label became a hard barrier for litigants, no matter how harsh the consequence was. The under-theorized decisions of the past and the harsh consequences worried several justices at the United States Supreme Court. The Court described its past decisions as "occasionally [using] the term 'jurisdictional' to describe emphatic time prescriptions in rules of court."[80] To the Court, the over-use of the jurisdictional label required courts to "alter[] the normal operation of [the] adversarial system" by inserting themselves into the proceeding sua sponte, "result[ing] in the waste of judicial resources" and may also "unfairly prejudice litigants."[81] These effects prompted the Court, or at least some of its members, to attempt to "bring some discipline" to its doctrine, as it phrased it,[82] or to radically change the way courts think of the jurisdictional label, as some scholars described it,[83] since 2004.

In a series of opinions, spanning over fifteen terms, the Court began articulating a new law of classifying the nature of litigation rules. The road was bumpy—it had three major stages. The first: initial formation of the rule. The second: unrest, when the Court casted aside its emerging new rule and followed older precedent. And third: reconciliation, where the Court attempted to merge its two contradicting lines of cases into one.

First Stage: Between 2004 and 2006, the Court issued four opinions that offered a bright-line rule to determine whether a requirement is jurisdictional or not.[84] The litigation requirements the Court addressed in these cases had nothing in common, except

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[80] Kontrick v. Ryan, 540 U.S. 443, 454 (2004).

[81] Henderson *ex rel.* Henderson v. Shinseki, 562 U.S. 428, 434 (2011). *See also* Carlisle v. United States, 517 U.S. 416, 434-36 (1996) (Ginsburg, J., concurring); Mank, *supra* note 11, at 442-49 (discussing idea that sua sponte action by courts is foreign to American legal system historically).

[82] *Henderson*, 562 U.S. at 435.

[83] *See, e.g.*, Hawley, *supra* note 10, at 2040-41. *See also* Karen Petroski, *Statutory Genres: Substance, Procedure, Jurisdiction*, 44 LOY. U. CHI. L.J. 189, 231 (2012); Preis, *supra* note 21, at 1423; Trammell, *supra* note 30, at 1101; Dodson, *supra* note 8, at 624.

[84] Some justices argued that they did not notice the change. *See* Bowles v. Russell, 551 U.S. 205, 210-11 (2007) (Justice Thomas, writing for the court, distinguishing recently decided cases regarding statutory time limits for appeals and noting that they did not change the long-standing view on jurisdictionality); Gonzalez v. Thaler, 565 U.S. 134, 169-70 n.9 (2012) (Scalia, J., dissenting) (arguing that *Kontrick* only set a new scheme for jurisdiction in dicta and confessing error in joining it).

that the litigant did not comply with them.[85] It held that a litigation requirement would be "jurisdictional" only if it delineates classes of cases (subject-matter jurisdiction) and persons (personal jurisdiction) falling within a court's adjudicatory authority.[86] If not, it was merely a "claim-processing" rule, meant only to advance the orderly sequence of litigation.[87] In one of the cases, *Arbaugh v. Y&H Corp.*, addressing a statutory based litigation requirement,[88] the Court added one more component to that rule—a recognition that the legislature can designate a litigation requirement as jurisdictional even when the Court's bright-line rule finds otherwise.[89] Applying its bright-line rule,[90] the Court found that all four requirements were not jurisdictional.[91] As the following stages of the rule's development show, it was *Arbaugh*'s language about congressional action that became the prominent test to identify jurisdictionality.[92]

Second Stage: The almost-complete unanimity the Court displayed in the first stage quickly disappeared.[93] In *Bowles v. Russell*, just a year after *Arbaugh*, the Court—in a split 5-4

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[85] Two of them (*Kontrick* and *Eberhart*) were procedural rules, and two (*Scarborough* and *Arbaugh*) were statutorily based. The two rule-based requirements were time bars, from the bankruptcy (*Kontrick*) and criminal (*Eberhart*) rules of procedure, respectively. The two statutory-based requirements were content bars, requiring litigants to comply with a declaration or certain condition to sustain their claim.

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

[87] *Id.*; *see Gonzalez,* 565 U.S. at 169-70 n.9 (Scalia, J., dissenting) (arguing that this limitation was made in *dicta*).

[88] Arbaugh v. Y&H Corp., 546 U.S. 500 (2006). *Arbaugh* dealt with the "numerosity" requirement, limiting Title VII of the Civil Rights Act of 1964 application to employers that have fifteen or more employees. *Id.* at 503. *See also* 42 U.S.C. § 2000e(b) (2020).

[89] *Arbaugh*, 546 U.S. at 515-16 ("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.")

[90] The Court also found that in the two cases involving rule-based litigation requirements, that litigation requirements not based in statute cannot determine jurisdiction. *See Kontrick*, 540 U.S. at 452 ("Only Congress may determine a lower federal court's subject-matter jurisdiction."); Eberhart v. United States, 546 U.S. 12, 15 (2005) (per curiam) (referring back and relying on *Kontrick*'s reasoning).

[91] *Arbaugh*, 546 U.S. at 516.

[92] Shepardizing both cases on LexisNexis shows that 1,626 decisions cite to *Kontrick* while 8,615 decisions cite to *Arbaugh* (last visited Oct. 19, 2021). Perhaps this has to do with *Arbaugh* dealing with a statute and not a rule.

[93] Three decisions were unanimous (*Kontrick*, *Eberhart* and *Arbaugh*), and one (*Scarborough*) was decided by a majority of seven justices.

decision—limited its bright-line rulings to their facts.[94] Instead, the Court followed older precedent and held that litigation requirements concerning the time to file an appeal "have been treated as jurisdictional in American law for well over a century,"[95] refusing to overrule that precedent. This shift yielded a scathing dissent that relied on the Court's more recent opinions and argued the litigation requirement in question—the time to file a notice of civil appeal—was not jurisdictional. The dissent argued that litigation requirements—time bars or not—are jurisdictional only if Congress says so.[96] Scholars harshly chastised both opinions. While they characterized the *Bowles* majority as incorrect, misrepresenting stare decisis, and causing disruption in the doctrine,[97] some also described the dissent as undisciplined.[98] The following term, the Court continued this trend, and held that a statute of limitations is jurisdictional based on past precedent.[99] But the Court's analysis was cursory. The Court only stated that

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[94] Bowles v. Russell, 551 U.S. 205, 210-11 (2007). The Court distinguished *Kontrick* because it was a rule-based, and not a statutory requirement, as in the case at hand. *Id.* The Court only cites to *Eberhart*. It seems that, like the Court of Appeals, the Court viewed both decisions emanating from the same principal. This makes sense, as *Eberhart* is a per curiam opinion implementing *Kontrick*. *Id.* Additionally, the Court added *Kontrick* determined that § 2107, the provision in question in *Bowles*, includes jurisdictional time constraints. *Bowles*, 551 U.S. at 210-11. The Court also distinguished *Arbaugh* because the requirement there was substantive and not temporal, and *Scarborough* because it concerned a relief "ancillary to the judgment of a court." *Id.* Petroski called it "disrupt[ing]" the Court's efforts. *See* Petroski, *supra* note 83, at 224.

[95] *Bowles*, 551 U.S. at 209.

[96] *Id.* at 217 (Souter, J., dissenting).

[97] *See*, *e.g.*, Elizabeth Chamblee Burch, *Nonjurisdictionality or Inequity*, 102 NW. U. L. REV. COLLOQUY 64, 65 (2007) (noting the majority opinion left "burdens and confusion"); Perry Dane, *Sad Time: Thoughts on Jurisdictionality, the Legal Imagination, and* Bowles v. Russell, 102 NW. U. L. REV. COLLOQUY 164, 164 (2008) (noting the majority opinion has "analytic defects and practical pitfalls"); *id.* at 170 (expanding on the analytical problems in the majority opinion); Dodson, *supra* note 16, at 55-58; Dodson, *supra* note 11, at 3; Scott Dodson, *Jurisdictionality and* Bowles v. Russell, 102 NW. U. L. REV. COLLOQUY 42, 44-45, 48 (2007); Vincent Paylish, Note, Bowels v. Russell*: They Got Me on a Technicality*, 70 MONT. L. REV. 147, 160 (2009).

[98] Dane, *supra* note 97, at 171-73 (detailing the issues with the dissent); Dodson, *supra* note 11, at 8; Dodson, *supra* note 97, at 48 n.34; Dodson, *supra* note 8, at 639; Paylish, *supra* note 97, at 157-58; E. King Poor, *The Jurisdictional Time Limit for An Appeal: The Worst Kind of Deadline—Except For All Others*, 102 NW. U. L. REV. COLLOQUY 151, 158 n.32 (2008). *See also* Joseph A. Valenti, *Statutory Procedural Deadlines Are Jurisdictional in Nature for All Civil Cases and Therefore Must Never Be Equitably Excused:* Bowles v. Russell, 46 DUQ. L. REV. 245, 261-62 (2008).

[99] John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 133-34 (2008).

the requirement was jurisdictional and did not engage in any analysis of its characterization.[100]

Third Stage: The Court soon found that its decision in *Bowles* had larger effects than perhaps those intended. The double contradiction it created confused lower courts and generated circuit splits that called the Court's attention. Mostly unanimously, the Court changed course.[101] It described the **first stage** cases as applying a "clear statement rule" as mentioned in *Arbaugh*.[102] Under that construction, the Court explained its **second stage** cases as standing for the notion that Congressional silence in response to the Court's past decisions is also a "clear statement" from Congress.[103] In *Henderson v. Shinseki*, The Court thus explained that when it evaluates the jurisdictionality of a litigation requirement it "look[s] to see if there is any 'clear' indication that Congress wanted the rule to be 'jurisdictional.'" Nevertheless, "Congress, of course, need not use magic words in order to speak clearly on this point . . . When 'a long line of [the Supreme] Court's decisions left undisturbed by Congress,' has treated a similar requirement as 'jurisdictional,' [a court will] presume that Congress intended to follow that course."[104]

Despite merging the two lines of contradicting cases, the Court remained sensitive to the problems that brought upon this jurisprudential change in the first place and to the rhetoric it

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[100] *Id.* This decision managed to garner seven votes, and not only five like in *Bowles*. Justice Breyer, that joined the dissent in *Bowles*, wrote the Court's opinion in *John R. Sand*. Justice Souter joined that opinion. Importantly, the Court almost ignored the jurisdictional issue and addressed it in a few sentences.

[101] *See* Dolan v. United States, 560 U.S. 605, 609-11 (2010), Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154, 162-63 (2010), and Union Pac. R.R. Co. v. Bhd. of Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment, 558 U.S. 67, 82 (2009).

[102] Arbaugh v. Y&H Corp., 546 U.S. 500, 515-16 (2006). In addition, the "clear statement" rule attracts votes and confidence from all aisles and became a favorite tool of justices in the Court, albeit criticism by scholars. *See* Nina A. Mendelson, *Change, Creation, and Unpredictability in Statutory Interpretation: Interpretive Canon Use in the Roberts Court's First Decade*, 117 MICH. L. REV. 73 (2018); Fred Smith, *Undemocratic Restraint*, 70 VAND. L. REV. 845 (2017).

[103] Henderson *ex rel.* Henderson v. Shinseki, 562 U.S. 428, 436 (2011).

[104] *Id.* at 436 (cleaned up). This statement came in a case that, like *Bowles*, addressed a time to file requirement. The Court was directly confronted with the breadth of *Bowles*. The difference was that while the petitioner in *Bowles* was a criminal defendant appealing a habeas relief denial, here it was a veteran that sought a review of a decision denying service-connected disability benefits. Although the Court made it clear the difference mattered, it also was clear about the generality of its announced rule.

employed in the **first stage**. It emphatically explained the problems with overusing the jurisdictional label. It emphasized that a jurisdictional litigation requirement obligates courts to meddle between the parties because of their "independent obligation to ensure that they do not exceed the scope of their jurisdiction."[105] It warned that overusing the jurisdictional label "may also result in the waste of judicial resources and may unfairly prejudice litigants."[106] The Court referred to its recent opinions in terms of policy, because of the "consequences that attach to the jurisdictional label may be so drastic."[107]

C. The Aftermath: Struggles in the Implementation of the Clear Statement Rule

The rule that the Court established in the **third stage** of its doctrinal development—requiring a clear statement from Congress to designate a litigation requirement as jurisdictional but yielding to precedent where Congress has not acted contrary to it—can be described as a culmination of a common law process, where the Court went back and forth between two threads of cases until it merged them into one. Since 2004, the Court tried to mitigate the harsh consequences of assigning a jurisdictional label to a litigation requirement, all while trying to theorize this decision-making and to discipline the characterization of litigation requirements.[108] But despite the rule, litigants and lower courts continued to struggle with its implementation,[109] as did the Supreme Court itself. These

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[105] *Id*. at 434.

[106] *Id.*

[107] *Id.* at 434-35.

[108] *See supra* Part I.B.

[109] For issue-specific examples of such confusion, *see*, Cobb, *supra* note 26, at 133 n.159 (supremacy clause); David L. Goodwin, *The Puzzle of Panel Processing: ERISA, Complete Preemption, and the Federal Jurisdiction Gap*, 64 DRAKE L. REV. 663, 721–23 (2016) (complete preemption); Kylie C. Kim, *The Case Against Prudential Standing: Examining the Courts' Use of Prudential Standing Before and After* Lexmark, 85 TENN. L. REV. 303, 310 n.12 (2017) (prudential standing); Robert Miller, *Nothing New: Consent, Forfeiture, and Bankruptcy Court Final Judgments*, 65 DRAKE L. REV. 89, 124–26 (2017) (bankruptcy); Victoria Hadfield Moshiashwili, *The Downfall of* Auer *Deference: Veterans Law at the Federal Circuit in 2014*, 64 AM. U. L. REV. 1007, 1062–70 (2015) (veteran claims); Lewis M. Wasserman, *Delineating Administrative Exhaustion Requirements and Establishing Federal Courts' Jurisdiction Under the Individuals with Disabilities*

difficulties stem mainly from consolidating past circuit precedent and the new jurisprudence from the Court.

Lower courts have been acting in various ways that circumvented the application of the Supreme Court's new precedent. First, they narrowed the Court's new opinions to their facts instead of reading them more broadly.[110] Second and closely related, lower courts preferred older Supreme Court precedent and old circuit precedent over more recent Supreme Court decisions if the former were on the same subject matter as the issue before them.[111] Third, lower courts broadly applied *Bowles* to any time related litigation requirement, despite the Court's clear post-*Bowles* rulings to the contrary,[112] and considered *Bowles*'s stare

Education Act: Lessons from the Case Law and Proposals for Congressional Action, 29 J. NAT'L ASS'N L. JUD. 349, 416 (2009) (IDEA exhaustion requirement).

[110] This issue came up in Fort Bend Cty. v. Davis, 139 S. Ct. 1843, 1850 (2019). The case dealt with Title VII's requirement to file a charge with the Equal Employment Opportunity Commission before litigation. *Id.* at 1846-47. The Fifth Circuit found that, among other considerations, the Court's decision in *Arbaugh* (that the numerosity requirement in Title VII is not jurisdictional) teaches that the requirement is also non-jurisdictional. *Id.* at 1848. Eight other circuits and the EEOC reached the same conclusion. *See* Petition for Writ of Certiorari at 14-15, *Fort Bend*, 139 S. Ct. 1843 (No. 18-525). However, three circuits and the Department of Justice, another agency that is entrusted to enforce Title VII, did not agree and viewed the exhaustion requirement jurisdictional because they read *Arbaugh* narrowly to apply only to requirements post-exhaustion. *Id.* at 10-17. This reading was based on past circuit precedent preceding *Arbaugh*. *See id*. (The Fourth Circuit followed a 1995 circuit precedent; the Ninth Circuit followed circuit precedents from 1994 and 2001; and the Eleventh circuit case law goes back to 1982). *See also* Lincoln v. BNSF Ry. Co., 900 F.3d 1166, 1180-86 (10th Cir. 2018) (providing an in-depth discussion about the weight a court should attribute to a Supreme Court precedent on a similar but not the same point, given an earlier on-point contrary circuit precedent).

[111] *See Fort Bend*, 139 S. Ct. at 1850; *see also* United States v. Hawkins, 298 F. App'x 275 (4th Cir. 2008) (*relying on* Hensley v. Chesapeake & Ohio Ry. Co., 651 F.2d 226, 228 (4th Cir. 1981) ("The time requirements of Rule 4(a) are both mandatory and jurisdictional. Timely filing of a notice of appeal deprives a district court of jurisdiction over a case, and so does expiration of the time to file.")).

[112] *See, e.g.*, Manrique v. United States, 137 S. Ct. 1266, 1274 (2017). The court of appeals found it did not have jurisdiction to entertain Manrique's challenge to his restitution amount because he did not file a notice of appeal. United States v. Manrique, 618 F. App'x 579, 583 (11th Cir. 2015). This result was contrary to most other courts of appeal. *See* Petition for Writ of Certiorari at 13–16, Manrique v. United States, 137 S. Ct. 1266 (2017) (No. 15-7250). For the argument that a proper reading of *Bowles* meant that the requirement is not jurisdictional, see Brief for the Petitioner at 33–35, *Manrique*, 137 S. Ct. 1266 (No. 15-7250). Justice Ginsburg, joined by Justice Sotomayor, dissented stating that there is no question about the requirement being non-jurisdictional, given the bounds put on *Bowles*. *See Manrique*, 137 S. Ct. at 1274

decisis analysis as a guiding principle despite clarifications from the Supreme Court that it is not a guiding precedent, and that its analysis should be only one consideration in the greater labeling analysis.[113] The confusion is so great that some litigation requirements have generated not only inter-circuit, but also intra-circuit splits.[114] In addition, despite the general terminology that

(Ginsburg, J., dissenting). In *Hamer v. Neighborhood Hous. Servs. of Chicago*, 138 S. Ct. 13, 17, 21 (2017), the Seventh Circuit Court of Appeals found that a rule-based time bar litigation requirement was jurisdictional according to *Bowles*. The *Hamer* Court reversed and explained that "[s]everal Courts of Appeals, including the Court of Appeals in Hamer's case, have tripped over our statement in *Bowles* that 'the taking of an appeal within the prescribed time is "'mandatory and jurisdictional."'" *Id.* at 21 (citation omitted).The Court emphasized, however, that *Bowles* limited its scope to congressionally imposed time requirements. *Id. See also* Friedzon v. OAO Lukoil, 644 F. App'x 52, 53 (2d Cir. 2016) ("[T]he Supreme Court made clear in *Bowles v. Russell*, the time limits for filing a notice of appeal are jurisdictional and not subject to judicially created equitable exceptions." (citation omitted)); Peters v. Williams, 353 F. App'x 136, 137 (10th Cir. 2009) ("The filing of a timely notice of appeal in a civil case is jurisdictional."); United States v. Kalb, 891 F.3d 455, 460 (3d Cir. 2018) (stating that the court is "guided in [its] inquiry by the Supreme Court's ruling in *Bowles* . . . ," where the government filed an untimely motion for reconsideration of a decision made in a criminal trial).

[113] *See, e.g.*, Luna v. Holder, 637 F.3d 85, 92 (2d Cir. 2011) (Second Circuit simply reciting litigation requirement and concluding, quoting from past precedent, that requirement is jurisdictional); Fedora v. Merit Sys. Prot. Bd., 848 F.3d 1013, 1015-16 (Fed. Cir. 2017) (Federal Circuit Court only discussing precedent to discern the jurisdictional nature of time-bar litigation requirement). There is also currently a circuit split regarding time bar litigation requirements for seeking review of an agency decision. *Compare* Fedora v. MSPB, 17-557, cert denied on January 16, 2018; Vocke v. MSPB, 17-544, cert denied on January 16, 2018; Musselman v. Department of the Army, 17-570, cert denied on January 16, 2018; and Graviss v. Dep't. of Def., 18-1061, cert denied on May 20, 2019 (finding a sixty-day litigation requirement to seek review of an agency decision regarding employment in 5 U.S.C. §7703(b)(1)(A)—jurisdictional); *with* Clean Water Action Council of Ne. Wisc., Inc. v. EPA, 765 F.3d 749, 751-52 (7th Cir. 2014) and Herr v. United States Forest Serv., 803 F.3d 809, 813-14 (6th Cir. 2015).

[114] Some circuits remain conflicted. The Fifth Circuit has an internal split about the proper analysis of jurisdictionality: *A.I.M. Controls, L.L.C. v. Comm'r of Internal Revenue*, 672 F.3d 390, 392-95 (5th Cir. 2012) offered a thorough analysis before finding a litigation requirement for agency action to be jurisdictional. On the other hand, in *Ramos-Lopez v. Lynch*, 823 F.3d 1024, 1027 (5th Cir. 2016) a different panel simply found a litigation requirement for agency action jurisdictional based on past precedent with no reasoning or analysis.

In the D.C. Circuit, the rule remains that such litigation requirements are jurisdictional. *See* Oklahoma Dep't of Envtl. Quality v. EPA, 740 F.3d 185, 191 (D.C. Cir. 2014) (noting 60 day filing rule is jurisdictional). However, it is criticized by some of the judges on that circuit. *See, e.g.*, Utility Air Regulatory Grp. v. EPA, 744 F.3d 741, 751 (D.C. Cir. 2014) (Kavanaugh, J., concurring) ("I note simply that the . . . [Clean Air Act] rule we describe today likely should not be considered jurisdictional under the Supreme Court's recent

the Supreme Court used, some lower courts have local rules that foreclose any option to apply the Court's new jurisprudence.[115]

The confusion is not exclusive to the lower courts. In its opinions, the Supreme Court called out its past assignments of the jurisdictional label as lacking in sound reasoning and referred to them as "drive-by" jurisdictional decisions.[116] Yet, even after *Henderson*, the Supreme Court continued making "drive-by" jurisdictional determinations.[117] At other times, the Court abandoned its new rule because the parties agreed on the label assignment for the litigation requirement. However, that label assignment, that had no judicial scrutiny except an approval, became a precedent.[118] Finally, the Court also did not remain

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cases that have tightened the definition of when a rule is considered jurisdictional."); Mendoza v. Perez, 754 F.3d 1002, 1018 & n.11 (D.C. Cir. 2014) (citing multiple additional cases; questioning "the continuing viability of" prior cases holding that the statute of limitations applicable to Administrative Procedure Act (APA) cases is jurisdictional "in light of recent Supreme Court decisions.").

[115] *See*, *e.g.*, United States v. Hyman, 880 F.3d 161, 163 (4th Cir. 2018) (Fourth Circuit local rule 27(f) allows a party to move to dismiss a claim (1) on procedural grounds, *and* (2) at any time. With that local rule in place, a party can object at any time to any noncompliance with a litigation requirement, even if it is found non-jurisdictional).

[116] *See* Arbaugh v. Y&H Corp., 546 U.S. 500, 511 (2006).

[117] *See* Gonzalez v. Thaler, 565 U.S. 134, 139-40 (2012), where the Court drove-by a litigation requirement, in dicta, re-designating it as jurisdictional without any meritorious discussion. At issue was the need for a court of appeals to indicate what are the constitutional issues that satisfied a showing of denial of a constitutional right according to 28 U.S.C. § 2253(c)(3). *Id*. The Court was asked to determine whether the lack of such indication deprives the court of appeals of jurisdiction. *Id.* The Court started with a conclusory statement that "the only 'clear' jurisdictional language in § 2253(c) appears in § 2253(c)(1)." *Id.* at 142. In addition, the Court referred to a 2003 opinion that found the word "unless" denotes a jurisdictional meaning by Congress, mentioning that the parties agreed to that premise. *Id.* (citing Miller-El v. Cockrell, 537 U.S. 322, 336 (2003)). However, in *Miller-El*, the Court did not engage with the statute as the post-*Kontrick* and *Arbaugh* opinions do. Instead, all the Court said was "[t]his is a jurisdictional prerequisite because the COA statute mandates that 'unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals…." *Miller-El*, 537 U.S. at 336.

[118] For example, in *Gonzalez*, this consent led the court to hold, with no discussion, that § 2253(c)(2) is non-jurisdictional, because "[t]he parties . . . agree[d] that §2253(c)(1) is nonjurisdictional." *Gonzalez*, 565 U.S. at 142. The Court acceded to that consent, even though the United States, as amicus, argued that that requirement was jurisdictional. *See id.* at 143 n.4; *see also* United States v. Kwai Fun Wong, 575 U.S. 402, 408 n.1. In *Wong*, the Court explained that the parties stipulated that an administrative-related litigation requirement should be interpreted the same as a regular statute-based litigation requirement, despite having ruled the contrary in a similar case just two years

faithful to the rule as it described it.[119] In *Wong*, the Court tweaked the rule in two aspects. First, it required Congress to "do something special, beyond setting an exception-free deadline, to tag a statute of limitations as jurisdictional and so prohibit a court from tolling it."[120] In making this statement, the Court both heightened the clear statement requirement and implicitly linked non-jurisdictionality with equitable tolling, which it refused to do before.[121] Second, the Court limited the use of congressional silence in the face of precedent to the specific provision in question and refused to extend it to similarly phrased litigation requirements that were part of a different statute.[122]

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earlier in *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 158-59 (2013). But some scholars argue that a party's consent is relevant to the analysis. *See generally* Petroski, *supra* note 83, at 260; Dustin E. Beuhler, *Solving Jurisdiction's Social Cost*, 89 WASH. L. REV. 653 (2014).

[119] Another case in which the Court refused to follow its rule is *Manrique v. United States*, 137 S. Ct. 1266 (2017). There, the Court affirmed the Eleventh Circuit's decision that barred an appeal challenging a restitution order that was granted after the appeal was filed. *Id.* at 1274. The Eleventh Circuit, seemingly contrary to its own circuit decisions and several other circuits, held that a not separately appealing the post-judgment restitution order strips a court of jurisdiction to adjudicate the order. Brief for Petitioner at 24-5, *Manrique*, 137 S. Ct. 1266 (No. 15-7250). The Court affirmed on different grounds and did not reach the issue of the litigation requirement character. *Id.* at 1271-72. The Court held that even if non-jurisdictional, the government did not waive the matter, and the Court of Appeals was correct to dismiss. *Id.* at 1270-71. That decision brought uncertainty to the lower courts. The Fifth Circuit distinguished *Manrique* in one restitution case (United States v. Ruvalcava-Garza, 750 F. App'x. 353, 356 n.2 (5th Cir. 2018)). But in another the Fifth Circuit rejected an argument about a post-appeal-filing restitution order because it found it waived, without addressing whether the government raised an objection(United States v. Hesson, 746 F. App'x. 324, 337 (5th Cir. 2018)). In a third case, another Fifth Circuit panel simply dismissed the argument because of untimely notice, without addressing the reason for such dismissal. United States v. Williams, 733 F. App'x. 205, 205 (5th Cir. 2018). In a fourth case, the Fifth Circuit was closer to the Court's analysis. *See* United States v. Diaz, 941 F.3d 729, 741-43 (5th Cir. 2019). The Second Circuit left the question open, although unlike in *Manrique*, the government did not object to the noncompliance with the litigation requirement. United States v. Pinhasov, 762 F. App'x. 43, 45-46 (2d Cir. 2019). The Third Circuit viewed the decision as putting into doubt its jurisdiction over such cases*United States v. Cvjeticanin*, 704 F. App'x. 89, 93-94 (3d Cir. 2017).

[120] *Wong*, 575 U.S. at 410.

[121] The Court walked back that link to some extent in *Lambert*. Nutraceutical Corp. v. Lambert, 139 S. Ct. 710, 714 (2019) (noting that "[w]hether a rule precludes equitable tolling turns not on its jurisdictional character but rather on whether the text of the rule leaves room for such flexibility").

[122] *See Wong*, 575 U.S. at 417.

D. An Articulation of the Current Rule

Against this backdrop, it is important to articulate with as much clarity as possible, the rule as it stands. It is relevant to the assessment of the doctrine, and for the evaluation of this Article's proposed substitution for the rule.

To determine whether a litigation requirement is jurisdictional, a court should look at whether Congress made a "clear statement" about it.[123] Although Congress does not need to use "magic words,"[124] simply "emphatic language" does not suffice to rank a requirement jurisdictional.[125] Additionally, Supreme Court precedent about the jurisdictionality of *the same* requirement (but not a similar one) will be conclusive if Congress did not respond to it.[126] Importantly, litigation requirements not ordained by Congress cannot be jurisdictional.[127] And while not part of the rule, it is unescapable to observe that in over fifteen terms, the Court has found litigation requirements jurisdictional twice at most.[128]

The flip-side of this determination—the contours of non-jurisdictional requirements—matters too, but it has been less discussed in the Court's cases.[129] For example, it is unclear under what circumstances a court may raise noncompliance with a non-jurisdictional requirement sua sponte when parties may have

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[123] *See*, *e.g.*, Fort Bend Cty. v. Davis, 139 S. Ct. 1843, 1850 (2019); *Wong*, 575 U.S. at 409; *Gonzalez*, 565 U.S. at 141; Arbaugh v. Y&H Corp., 546 U.S. 500, 515–16 (2006).

[124] *See*, *e.g.*, *Fort Bend*, 139 S. Ct. at 1850; *Wong*, 575 U.S. at 410; Henderson *ex rel.* Henderson v. Shinseki, 562 U.S. 428, 436 (2011).

[125] *See*, *e.g.*, *Wong*, 575 U.S. at 403; *Gonzalez*, 565 U.S. at 146.

[126] *Cf. Wong*, 575 U.S. at 416-17.

[127] *See*, *e.g.*, *Lambert*, 139 S. Ct. at 714.

[128] The Court affirmatively found a litigation requirement jurisdictional only in *Bowles*. In *John R. Sand & Gravel Co.*, the Court assumed jurisdictionality, and in *Manrique*, the Court found it did not have to determine the nature of the requirement because the government had not waived its argument regarding the noncompliance. John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 134-36 (2008); Manrique v. United States, 137 S. Ct. 1266, 1271 (2016). In fact, because of this balance of outcomes, some scholars referred to the Courts decisions as a "quiet revolution," and argue that the presumption for jurisdictionality has flipped to one of non-jurisdictionality in the federal courts. *See*, *e.g.*, Hawley *supra* note 10, at 2059.

[129] For some discussion in the Court's cases, see for example *Wong*, 575 U.S. at 411-12. (equitable tolling); *Gonzalez*, 565 U.S. at 140-41 (discussing possible amendments and waiver). *But see Fort Bend*, 139 S. Ct. at 1849 n.5 (noting that the Court has not decided "whether mandatory claim-processing rules may [ever] be subject to equitable exceptions," despite allegedly deciding that question (at least in part) earlier *the same term* in *Nutraceutical Corp. v. Lambert*, 139 S. Ct. 710, 714 (2019).

waived or forfeited the issues.[130] Also undecided is the question under what circumstances equitable tolling, [131] or filing an amendment[132] are available for non-jurisdictional litigation requirements.

This articulation sets the ground for Part II, which addresses where the Court went wrong in its pursuit of discipline and less harsh consequences for litigants and courts.

II. DESPITE THE JURISDICTIONAL LABEL'S ALLEGED DEMISE FROM THE COURT'S PRECEDENT, ITS HARSH CONSEQUENCES LINGER ON

The Court's shift in jurisprudence had visible results. Litigation requirements are no longer almost automatically viewed as part of a court's jurisdiction. Allegedly, a noncompliant litigant with a litigation requirement is no longer at risk of almost instant dismissal of their case. But the Court began its jurisprudential revolution because it observed that its unprincipled labeling of litigation requirements as jurisdictional had harsh consequences on litigants and the courts. This part explains why despite the demise of the jurisdictional label, harsh consequences are still much at play.

This critique faults the Court for not creating a clear workable framework for lower courts to apply when adjudicating noncompliance with litigation requirements. All the issues described below contributed to the endurance of the consequences the Court was set to mitigate.

A. The Rule Itself Does Not Deliver

At its core, the Court's rule structure, and the Court's unfaithful application of it, hinder its ability to mitigate the jurisdictional label's harsh consequences, even after almost complete eradicating the jurisdictional label in its cases. There are

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[130] *See*, *e.g.*, Day v. McDonough, 547 U.S. 198, 205-06 (2006) (habeas statute of limitations).

[131] *See*, *e.g.*, *Wong*, 575 U.S. at 420-21; Kontrick v. Ryan, 540 U.S. 443, 457 (2004) (not deciding the question).

[132] *See*, *e.g.*, *Gonzalez*, 565 U.S. at 146 (suggesting that); Scarborough v. Principi, 541 U.S. 401, 423 (2004) (allowing that).

three issues with the Court's rule. First, the Court's reliance on stare decisis to identify "clear statement" from Congress. Second, the Court's inability to clearly define what clear statement ranks as jurisdictional, giving no guidance to lower courts. And finally, the Court's own analysis does not stay true to its pronounced rule and employs different, latent, categorical rules to determine jurisdictionality.

1. It Makes Little Sense to Find "Clear Statement" in Congress's Silence

The Court established a clear statement rule to designate a litigation requirement as jurisdictional. But the Court added that "[w]hen 'a long line of [the] Court's decisions left undisturbed by Congress,' has treated a similar requirement as 'jurisdictional,' [the Court] will presume that Congress intended to follow that course."[133] Later, the Court explained that stare decisis is a valuable guide only when the Court interpreted the *same* provision before.[134] The inclusion of stare decisis in the clear statement rule, and the unclarity about the scope of its influence raises three problems that make it harder for the Court's rule to mitigate the harsh consequences of the jurisdictional labeling of litigation requirements, by leaving open the possibility that lower courts may still improperly view non-jurisdictional litigation requirements as jurisdictional.

First, the inclusion of non-congressional-made elements in the analysis distorts the idea of a clear statement. The doctrine of clear statement is "[a] doctrine holding that a legal instrument . . . will not have some specified effect unless that result is unquestionably produced by the text."[135] Introducing court-made language generates the exact disorder that the clear statement rule is meant to prevent. Past precedent's text cannot "unquestionably" produce

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[133] Henderson *ex rel.* Henderson, 462 U.S. 428, 436 (2011) (citations omitted).

[134] *See Wong*, 575 U.S., at 416. (Justice Kagan explained that past rulings interpreting *the same text* in a different act that existed when Congress passed the legislation is not a relevant stare decisis. *Id.*). Needless to say, this view empties stare decisis of its content.

[135] ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 425 (2012).

an "effect." Neither can silence following such Court decision.[136] Allowing either of these options to substitute statutory text permits various arguments about the intentions of Congress, the meaning of past precedents, and their power.[137] This inclusion also assumes that Congress reads and analyzes the Court's vast volume of opinions and reacts to them regularly.[138] It also grants meaning to Congress's inaction that is not necessarily so clearly attributable to it. These two assumptions are problematic when the Court allegedly finds a "clear statement" in Congress's silence, like it did in *Bowles*.[139] Finding legal clarity should be limited to instances when "doing so advances legally recognized goals."[140] With litigation requirements, finding of clarity yields harsh consequences for litigants and courts, and to allow such results based on Congressional silence is at best contradictory to the Court's "recognized goals" of mitigating such harsh consequences.[141]

Second, the Court began its jurisprudential shift because it viewed its past case law as inconsistent and "less than meticulous."[142] The Court made many of the past jurisdictional label designations without any explanation or logical reasoning.[143] In other words, stare decisis is the reason the Court has engaged in revolutionizing its litigation requirement labeling. It is odd to turn

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[136] The Court's clarity doctrines have been criticized by many. *See*, *e.g.*, Richard M. Re, *Clarity Doctrines*, 86 U. CHI. L. REV. 1497, 1499–1500 (2019) (collecting such criticisms). Criticism aside, it is important to note that there is no one clarity standard, and the law of clarity depends on the doctrine at issue. *Id.* at 1501.

[137] This should not be understood as an attack on the Court's ability to use non-textual elements when discerning the meaning of a statutory text. Instead, the point is that simply asserting that silence in the face of precedent is evidence of a clear statement is a reliance on one piece of evidence that is far from being unquestionable.

[138] While there is such an assumption in the Court's case law, it usually refers to the congressional action (rather than inaction) pursuant to a court decision.

[139] Later cases describe *Bowles* as such instance. *See*, *e.g.*, Henderson *ex rel.* Henderson, 562 U.S. 428, 436 (2011); Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154, 173 (2010) (Ginsburg, J., concurring).

[140] *See Re*, *supra* note 136, at 1501.

[141] *Cf. Henderson*, 562 U.S. at 435.

[142] Kontrick v. Ryan, 540 U.S. 443, 454 (2004).

[143] *See supra* Part I.A.

around and rely on these decisions for future labeling of litigation requirements while trying to pave a path that overcomes them.[144]

Third, the Court has not articulated the extent that labeling determinations should rely on stare decisis, leaving lower courts in doubt about the power of past precedents. In *Henderson*, the Court unanimously held that if the Court's past opinions treated a *similar* litigation requirement as jurisdictional, and Congress has not acted upon it, it should be viewed as jurisdictional. *Henderson* also referred to the Court's opinion in *Bowles v. Russell* and explained that "*Bowles* did not [categorically hold] that every deadline for seeking judicial review in civil litigation is jurisdictional. Instead, *Bowles* concerned an appeal from one court to another court. The 'century's worth of precedent and practice in American courts' on which *Bowles* relied involved appeals of that type."[145] However, in the following term, when Justice Scalia used the same similarity rationale to find that "court-to-court" litigation requirements were always made jurisdictional in *Gonzalez v. Thaler*, he was not joined by any of his colleagues.[146] And in a later case, the Court limited the effect of stare decisis to the statute it analyzed.[147] This mixed treatment of stare decisis led lower courts to reach different

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[144] Recently the Court explained, as it routinely does, what it takes to overturn stare decisis. "The Court currently views *stare decisis* as a 'principle of policy' that balances several factors to decide whether the scales tip in favor of overruling precedent. Among these factors are the 'workability' of the standard, 'the antiquity of the precedent, the reliance interests at stake, and of course when the decision was well reasoned.'" Gamble v. United States, 139 S. Ct. 1960, 1981 (2019) (cleaned up). With this background, it seems that most of the past Court's decisions on jurisdictionality may merit reversal. The Court had stressed that the shared theme is the need for a "special reason over and above the belief that a prior case was wrongly decided" to overrule stare decisis. Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 864 (1992). Yet it seems that the Court's new principled approach is such a reason. The past cases simply speak in a different voice.

[145] Henderson *ex rel.* Henderson, 462 U.S. 428, 436 (2011).

[146] Gonzalez v. Thaler, 565 U.S. 134, 163 (Scalia, J., dissenting); *see* response of the majority, *id.* at 148 n.8; *but see also id.* at 149 (referring to case in which the Court affirmed that the requirement to appeal a denial of habeas relief is itself jurisdictional). *See also* Miller-Elv. Cockrell, 537 U.S. 322, 336 (2003). ("This is a jurisdictional prerequisite because the COA statute mandates that '[u]nless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals.'"). Under the current precedent, that explanation would not suffice, as the Court established that language by itself is not satisfactory requisite to determine jurisdictionality of a provision.

[147] United States v. Kawi Fun Wong, 575 U.S. 402, 416 (2015).

conclusions based on the commitment they had towards the Court's new framework.[148] Lower courts also have attributed vast meanings to the principles established in *Bowles*, although the Court limited *Bowles* in subsequent opinions.[149]

2. The Court Is Unclear What Language is Sufficiently Jurisdictional

The Court's rule requires it to discern a clear statement from Congress before it designates a litigation requirement as jurisdictional but has yet to find a clear jurisdictional statement by Congress.

In *Henderson*, the Court held that Congress does not need to use "magic words" to designate a litigation requirement as jurisdictional.[150] With this holding, the Court opened the door to the use of various words that plausibly mean that a requirement is jurisdictional. However, four years later in *Wong*, the Court held that "Congress must do something special, beyond setting an exception-free deadline, to tag a statute of limitations as jurisdictional," and that a text had to speak not only to a "claim's timeliness" but also "to a court's power."[151] This qualification seems aimed at narrowing the scope of the words that Congress may use to designate jurisdictionality. Specifically, it was used to conclude that a congressional designation of a claim as "forever barred" if not timely filed, was not jurisdictional.[152] After *Wong*, it is still unclear what words are enough to mean jurisdictionality.[153] Moreover, the Court made it clear that a word that was viewed jurisdictional in the past may be non-jurisdictional in the future.[154] The Court has not found a jurisdiction-designating word in the statutory language since 2004, except once in dicta.[155] This, much like the use of stare decisis, allows lower courts to improperly assign jurisdictional

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148 *See supra* Part I.C.

149 *Id.*

150 *Henderson*, 562 U.S. at 436.

151 United States v. Kawi Fun Wong, 575 U.S. 402, 410 (2015).

152 *Id.* at 413-14.

153 The only decisions where the Court found litigation requirements to be jurisdictional did not rely on the statutory language but on stare decisis.

154 *Wong*, 575 U.S. at 411.

155 *See infra* Part II.B.2.

labels to non-jurisdictional litigation requirements, thereby sustaining the harsh consequences of the jurisdictional label. To illustrate the Court's unclarity about what language is jurisdictional, it is useful to review its treatment of language that repeats in many litigation requirements—"shall," "forever barred," and "unless."

The Court repeatedly explained that a "statute's reference to 'shall' alone does not render [a] statutory deadline jurisdictional."[156] This stipulation relied on a case dealing with the government's failure to act in time in a criminal procedure and offered policy arguments to support that result.[157] However, this logic was extended beyond the government and criminal procedure to other types of litigation requirements, without any further reasoning except for stare decisis. Other courts interpret "shall" as jurisdiction mandating at times.[158] Moreover, the Court later used the result that "shall" means that a litigation requirement is non-jurisdictional to hold that "weaker" commands in legislation necessarily mean non-jurisdictionality. In *Auburn*, the litigation requirement language stated that a litigant "may obtain a hearing . . . if such [litigant] files a request for a hearing within 180 days after notice of . . . final determination."[159] The Court found that the provision "does not speak in jurisdictional terms. Indeed, it is less 'jurisdictional' in tone than the provision [the Court] held to be nonjurisdictional in *Henderson*," which used the word "shall."[160] That logic is faulty, as the Court repeatedly stated that words by

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[156] Gonzalez v. Thaler, 565 U.S. 134, 146 (2012) (citation omitted); Dolan v. United States, 560 U.S. 605, 611-12, 620 (2010).

[157] *See Dolan*, 560 U.S. at 612 (referring to United States v. Montalvo-Murillo, 495 U.S. 711, 717-18 (1990)).

[158] *See, e.g.*, Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1157-58 (10th Cir. 2013) (en banc) (Gorsuch, J., concurring) (Differentiating "the district courts shall not enjoin" as jurisdictional compared to "no suit shall be maintained" that has no reference, as non-jurisdictional, arguably on a similar ground to that offered in *Wong*—to what the language speaks to: a claim's timeliness, or a court's power).

[159] Sebelius v. Auburn Reg'l Med. Ctr., 568 U.S. 145, 154 (2013).

[160] *Id.* In *Manrique v. United States*, the relevant litigation requirement, 18 U.S.C. § 3742(a), also used "may," a weaker verb than "shall," yet the Court refused to decide the characterization of that requirement. Manrique v. United States, 137 S. Ct. 1266, 1271-72 (2017). Another wrinkle in this analysis is *Nutraceutical Corp. v. Lambert*, where the Court refused to accept that the analysis of equitable tolling and jurisdictionality can be the same. *See* Nutraceutical Corp. v. Lambert, 139 S. Ct. 710, 714 (2019); *Contra* Wong, 575 U.S. at 408.

themselves do not endow a provision with jurisdictional characteristics, and it is not clear why the inverse statement could be correct.[161]

On the other hand, the phrase "forever barred" has received mixed treatment. In *John R. Sand & Gravel Co.*, the plaintiff argued that a change in the language of the litigation requirement, from "forever barred" to "barred," meant that Congress changed the requirement from jurisdictional to non-jurisdictional.[162] The Court disagreed and found no relevant difference between the legislation's versions.[163] It found both versions jurisdictional on stare decisis grounds.[164] However, in *Wong*, when the Court addressed the "forever barred" language in the FTCA, the Court held that *John R. Sand & Gravel Co.*'s pronouncement only referred to the litigation requirement that it addressed specifically and "forever barred" in the FTCA was non-jurisdictional.[165] Moreover, the Court noted that the phrase was used in other litigation requirements and was never viewed as jurisdictional.[166]

The word "unless" is the only word that the Court has associated with jurisdictionality since 2004. Although not dispositive in the outcome, the litigation requirements in *Bowles* and *John R. Sand & Gravel Co.* included the word "unless."[167] The same is true about Section 2253(c)(1), which was found

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[161] *See*, *e.g.*, Gonzalez v. Thaler, 565 U.S. 134, 146 (2012).

[162] John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 135-36 (2008).

[163] *Id.* at 136.

[164] *Id.* at 135-36.

[165] *See Wong*, 575 U.S. at 414-17. *But see Wong*, 575 U.S. at 423-29, 430 n.3 (Alito, J., dissenting).

[166] *Wong*, 575 U.S. at 414 n.8. Notably, the cases the Court relied on did not refer to the language as non-jurisdictional but rather susceptible to equitable tolling. *See*, *e.g.*, General Electric Co. v. San Antonio, 334 F.2d 480, 484-85 (5th Cir. 1964). This relates to the point within this article about the flexible history of jurisdictional rules, and the use of equitable tolling as a valve against harsh consequences of requirements labeled as jurisdictional.

[167] Bowles v. Russell, 551 U.S. 205 (2007) addressed 28 U.S.C. § 2107(a) that stipulates that "no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree." John R. Sand & Gravel Co. v. United States, 552 U.S. 130 (2008) addressed 28 U.S.C. § 2501 which provided that "[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."

jurisdictional in dicta in *Gonzalez*.[168] Although the Court designated this word as jurisdictional three times, it has not assessed it through its clear statement rule. Given the incoherent use of stare decisis by the Court, it is unclear if a future case concerning a litigation requirement that includes the word "unless" will be designated jurisdictional.

3. The Court is Not Upfront About Its Categorization of Litigation Requirements

The Court's "clear statement" rule says that Congress "need not use magic words in order" to clearly state jurisdictionality.[169] Because of that, the Court explained that it considers "context, including this Court's interpretations of similar provisions in many years past,' as probative of whether Congress intended a particular provision to rank as jurisdictional."[170] But these "considerations" to unearth Congressional intent are the true story of the Court's analysis,[171] and the text—unlike what the Court portrays—seems irrelevant.[172] The Court pronounces a textualist analysis, but then turns to contextual analysis without articulating it as part of its ratio decidendi. Indeed, the justices do not simply ask "[d]id Congress intend this provision to oust the federal courts of their power to adjudicate this case?"[173] Nor are they interested in the functional limits in the Court's earlier opinions like *Kontrick v. Ryan*, that confine jurisdictionality to requirements that classify cases or persons.[174] Closer review of the Court's case law reveals that latent patterns—the type of the litigation requirement and its context—control the Court's analysis. Because the Court uses these

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[168] Gonzalez v. Thaler, 565 U.S. 134, 142 (2012) *(relying on* Miller-El v. Cockrell, 537 U.S. 322, 336 (2003)).

[169] Henderson *ex rel.* Henderson v. Shinseki, 562 U.S. 428, 436 (2011).

[170] Sebelius v. Auburn Reg'l Med. Ctr., 568 U.S. 145, 153-54 (2013) (quoting Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154, 168 (2010)).

[171] *See*, *e.g.*, Musacchio v. United States, 577 U.S. 237, 246-48 (2016) (discussing context and history after concluding there was no clear statement from Congress).

[172] This irrelevancy is clearly shown in Part II.A.2, which discusses the Court's inability to consistently interpret what language is "jurisdictional." *See infra* Part II.A.2.

[173] Hawley, *supra* note 10, at 2032.

[174] Although *Fort Bend* recently pointed to this distinction as the "real" jurisdictional classification. *See* Fort Bend Cty. v. Davis, 139 S. Ct. 1843, 1848 (2019).

patterns without properly identifying them as part of its analysis, the Court itself is not bound by them, and lower courts have no clear path to follow.[175] Instead, they are left with individualized decisions about the non-jurisdictional effect of certain words. The result is mayhem, and harsh consequences for litigants and the judiciary.[176]

First, the Court latently categorizes litigation requirements by what they ask a litigant to do and their source. It then treats them differently according to this categorization.[177] A simple analysis of the cases the Court has heard since 2004 shows that the Court has always found certain types of litigation requirements *unanimously* non-jurisdictional. Those are non-statutory litigation requirements.[178] Later on, the Court explicitly declared all rule-

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[175] A recent article argues that clarity varies from context to context, and critiques of clarity doctrines fail to account these contextual differences. *See* Ryan D. Doerfler, Going "Clear," 24 (Aug. 28, 2019) (unpublished manuscript), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3326550 [https://perma.cc/R9QU-UEEF] (last visited Sept. 28, 2020). This Article does not go against this premise. However, from the reading of lower courts cases, *see supra* Part I.D., it is evident that much like the critiques of clarity doctrine, lower courts also neglect this nuance and do not perform the same analysis the Court latently performs.

[176] *See, e.g.*, Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1158 (10th Cir. 2013) (Gorsuch, J., concurring) (Differentiating "[t]he district courts shall not enjoin" as jurisdictional compared to "no suit . . . shall be maintained" that has no reference, as non-jurisdictional, seemingly in accordance with Justice Alito's dissenting position in *Wong*).

[177] The willingness of several members of the Court to create these types of categories was displayed at oral argument recently. In the October 2018 term, several justices asked the parties in *Fort Bend* if they were suggesting a clear categorization of rules and offered relevant hypothetical questions. *See* Transcript of Oral Argument at 17-18 (Sotomayor, J.), 28 (Kavanaugh, J.), Fort Bend Cty. v. Davis, 139 S. Ct. 1843 (2019) (No. 18-525). But examples exist even before. *Compare*, *e.g.*, *Dolan*, 560 U.S. at 611 (creating a new separate category of litigation requirements which present "a time-related directive that is legally enforceable but does not deprive a judge or other public official of the power to take the action to which the deadline applies to if the deadline is missed."), *and* Gonzalez v. Thaler, 565 U.S. 134, 143-45 (2012) (differentiating between litigation requirements by how they addressed the applicant and the consequences of not complying with them), *with Wong*, 575 U.S. at 411 n.4 (rejecting Justice Alito's dissent's proposed category, *id.* at 429-30, by which any requirement that does not mention the claimants should be viewed as jurisdictional).

[178] *See* Nutraceutical Corp. v. Lambert, 139 S. Ct. 710, 714 (2019); Hamer v. Neighborhood Hous. Servs. of Chicago, 138 S. Ct. 13, 17 (2017); Eberhart v. United States, 546 U.S. 12, 13 (2005) (per curiam); Kontrick v. Ryan, 540 U.S. 443, 455 (2004); *see also* Dodson, *supra* note 14, at 640 (pointing out that "a "nonstatutory rule has a difficult row to hoe before it can be called jurisdictional" because even the rules themselves point out that they cannot extend or limit a court's jurisdiction).

based requirements non-jurisdictional because,[179] as the Court explained, "[o]nly Congress 'may determine a lower federal court's subject-matter jurisdiction.'"[180] Similarly, Court members are in much agreement about the non-jurisdictional nature of statutory-based content litigation requirements. Title VII limitations including exhaustion,[181] registration requirement in copyright infringement,[182] pre-arbitration conferences under the NRAB statute,[183] and certification requirement to file an appeal from a denial of habeas relief,[184] have all been viewed as non-jurisdictional, despite the mandatory statutory language in many of them. One of the main differences that is easily observable is the Court's decisions in the content litigation requirement cases is inclusion of references to past precedents, even before 2004, that support the idea that noncompliance with these requirements does not necessarily affect jurisdiction.[185]

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[179] *But see* Gonzalez v. Thaler, 565 U.S. 134, 147 (2012) (leaving open the question about rule-based content requirements).

[180] *Kontrick*, 540 U.S. at 452. However, as Part I.A. shows, in the past, courts treated rule-based requirements as jurisdictional. Court cases issued after 2004 made the same point, but only about the individual litigation requirement. *See, e.g.*, *Eberhart*, 546 U.S. at 16 ("It is implausible that the Rules considered in *Kontrick* can be nonjurisdictional claim-processing rules, while virtually identical provisions of the Rules of Criminal Procedure can deprive federal courts of subject-matter jurisdiction."). Although *Bowles*'s categorization of time to appeal as jurisdictional was disavowed before *Hamer*, the opinion uses its language to ground its categorization. In *Bowles*, Justice Thomas distinguished between statutory and rule-based litigation requirement to explain why notice of appeal in § 2107 should be treated differently than the time bar litigation requirements in *Kontrick* and *Eberhart*, and to avoid the need to weigh past precedent against these decisions. Bowles v. Russell, 551 U.S. 205, 210-11 (2007). As detailed above, the lower courts took *Bowles* to create a general rule about the jurisdictional nature of any appeal time bar, no matter whether there was a statutory basis. *See*, *e.g.*, *Hamer*, 138 S. Ct. at 22, n.10 (list of cases). That is even though in his opinion in *Bowles*, Justice Thomas differentiated between the two situations, to emphasize that a time limitation set in statute is jurisdictional. *Bowles*, 551 U.S. at 210-11.

[181] *Fort Bend*, 139 S. Ct. at 1851; Arbaugh v. Y&H Corp., 546 U.S. 500, 515-16 (2006).

[182] Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154, 170-71 (2010).

[183] Union Pac. R.R. Co. v. Bhd. of Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment, 558 U.S. 67, 83 (2009).

[184] *Gonzalez*, 565 U.S. at 143.

[185] In Scarborough v. Principi, 541 U.S. 401, 416 (2004), Justice Ginsburg, writing for the Court, quoted from Becker v. Montgomery, 532 U.S. 757 (2001) that in turn cited to Smith v. Barry, 502 U.S. 244, 245, 248-249 (1992) and Foman v. Davis, 371 U.S. 178, 181 (1962).

On the other hand, statutory-based time requirements are more contentious, and about many of them the justices split and disagree.[186] In all these cases but one,[187] the Court found the time to file to be non-jurisdictional. However, both the majority and the dissent in these cases, after pronouncing the textual rule analysis, focus on the litigation requirement's context and category, rather than its language. The path to those decisions was not easy. The Court first declared in *Bowles*, based on stare decisis, that timing to file a notice of appeal was categorically a jurisdictional litigation requirement.[188] But soon after, the Court disavowed this categorization,[189] and declared that "filing deadlines . . . are quintessential claim-processing rules,"[190] although it qualified it with the need to determine Congress's express contrary will.[191] Despite this qualification, some justices used it as a clear

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[186] Manrique v. United States, 137 S. Ct. 1266, 1274-75 (2017); United States v. Kwai Fun Wong, 575 U.S. 402, 421-432 (2015); Dolan v. United States, 560 U.S. 605, 621-30 (2010); *Bowles*, 551 U.S. at 215-23; *Scarborough*, 541 U.S at 423-27 (case regarding content litigation requirement that resulted in an arguably untimely proper filing); so do the courts of appeals, as detailed in Part I.C. *But see* Henderson *ex rel.* Henderson v. Shinseki, 562 U.S. 428, 430 (2011), which was unanimous, presumably because it was a veteran benefit case.

[187] *Bowles*, 551 U.S. at 214. John R. Sand & Gravel Co. v. United States, 552 U.S. 130 (2008), is not classified as a jurisdiction analysis case because it did not have an analysis in it. In *Manrique*, 137 S. Ct. at 1271-72, the Court punted the question.

[188] *Bowles*, 551 U.S. at 209-10. This was adopted broadly by lower courts. *See supra* Part I.C.

[189] *See* Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154, 167 (2010) (*Bowles* did not stand for the proposition that "any statutory condition devoid of an express jurisdictional label should be treated as jurisdictional simply because courts have long treated it as such."); *Henderson*, 562 U.S. at 436 (*Bowles* did not hold "categorically that every deadline for seeking judicial review in civil litigation is jurisdictional."). Since, the Court has been continuously not receptive to other categorizations of rules as jurisdictional. The Court refused twice, despite being implored by the dissent, to mark rules without consequences as jurisdictional. *See Dolan*, 560 U.S. at 621 (Roberts, C.J., dissenting); *Gonzalez*, 565 U.S. at 158 (Scalia, J., dissenting). The Court also refused to acknowledge a category of Article III court-to-court appeals should be labeled jurisdictional. *See id*. at 163.

[190] *Henderson*, 562 U.S. at 435. The Court never fully explained the difference between claim-processing rules and non-jurisdictional litigation requirements. However, Dodson had pointed out that this non-distinction is problematic. Dodson, *supra* note 11, at 5-6.

[191] Using the word "unfortunately." *S*ee *Henderson*, 562 U.S. at 435.

categorization in following cases.[192] Yet, the issue is still very much in dispute.[193]

Second, the context of the litigation requirement helps to explain the different opinions the justices—in majority and dissent—proffer about similarly situated litigation requirements.[194] Context plays different roles. In some cases, the Court explicitly referred to the area of law or the role that the requirement plays in the litigation when adjudicating jurisdictionality. In other cases, where the Court was split in its decisions, the area of law could explain the tension in decision-making.

The area of law plays an explicit role at times—although never rhetorically over-shadowing the text. In *Union Pacific Railroad Co.*, the parties did not comply with a negotiation requirement that was a regulatory precondition to adjudication by a labor dispute resolution agency (NARB). The agency was formed to adjudicate grievances and promote peaceful resolution in the employment context.[195] The Court held the NARB could not decide to divest itself out of jurisdiction because the parties did not comply with its regulations, given the role it played in the employment context. Only Congress can make that determination, and therefore the requirement was non-jurisdictional.[196] Similarly, *Henderson* dealt with the requirement to file a notice of appeal with the Veterans Court from a denied claim for federal benefits for service-connected disabilities.[197] The Court referred extensively to Congress's unique

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[192] *See, e.g.*, Sebelius v. Auburn Reg'l Med Ctr., 568 U.S. 145, 154 (2013); United States v. Kwai Fun Wong, 575 U.S. 402, 410 (2015).

[193] *See*, *e.g.*, *Wong*, 575 U.S. at 427-28 (Alito, J., dissenting) (vigorously defending against that point).

[194] Dodson, *supra* note 8, at 624. Some scholars have viewed the Court's decisions as area specific. *See*, *e.g.*, Phillip A. Pucillo, *Jurisdictional Prescriptions, Nonjurisdictional Processing Rules, and Federal Appellate Practice: The Implications of* Kontrick*,* Eberhart & Bowles, 59 RUTGERS L. REV. 847, 847-48 (2007) (arguing that each case is limited to criminal cases or appeal of right and post judgment motions). In more general context, another scholar argued that it makes much sense that the same statutory language can have "multiple meanings," and that despite "[t]he case for singular statutory meaning" being "simple and intuitive," it is also "fundamentally mistaken." Ryan D. Doerfler, *Can a Statute Have More Than One Meaning?*, 94 N.Y.U. L. REV. 213, 228 (2019).

[195] Union Pac. R.R. Co. v. Bhd. of Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment*,* 558 U.S. 67, 71-72 (2009).

[196] *Id.* at 86.

[197] Henderson *ex rel.* Henderson v. Shinseki, 562 U.S. 428, 431 (2011).

treatment of veterans, the informality of the procedure discussed, and the efforts to favor the veteran claimant,[198] and explained that "the VA is not an ordinary agency."[199] On the other hand, neither criminal law[200] nor administrative procedure[201] are contexts that the Court has articulated as unique.

The area of law also has an implicit role, in that it can explain the Court's narrow 5-4 majority decisions. The three 5-4 cases—*Bowles*, *Dolan,* and *Wong*—represent two contentious issues. *Bowles* and *Dolan* dealt with criminal justice, and *Wong* dealt with suits against the government. In all of these cases, the outcome arguably played a bigger role than the textual analysis. In *Bowles,* the petitioner followed a misleading judicial instruction, and belatedly filed an appeal from a denial of habeas relief. In *Dolan*, a judge added restitution to a defendant's sentence despite the statutory time for doing so had passed. In *Wong*, one petitioner did not timely amend her suit to include some related claims because of a belated judicial decision. Another plaintiff argued that she filed suit late because the government concealed its involvement in the accident that was the suit's cause. These cases all raised issues of government or judicial mistake or misconduct, rather than misconduct by the litigant that suffered the consequences of jurisdictional labeling.[202] In these cases, the opinions centered around policy arguments or held onto stare decisis to support their position, instead of the statutory text.[203]

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[198] *See id.*at 440-441.

[199] *Id.* at 437.

[200] *See, e.g.*, Dolan v. United States, 560 U.S. 605, 626 (2010) (Roberts, C.J., dissenting) (criticizing the majority for ignoring the fact that criminal defendants' "procedural protections are of heightened importance").

[201] This point is not completely resolved. In *Wong,* the court discussed litigation requirements for administrative procedure and a court procedure together, without any differentiation, because the United States stipulated in its brief that "[n]othing in the text or relevant legislative history . . . suggests that the respective time bars should be interpreted differently with respect to whether they are jurisdictional or subject to equitable tolling." United States v. Kwai Fun Wong, 575 U.S. 402, 407 n.1 (2015) (citation omitted). But this contradicted the tone in *Auburn*, that distinguished administrative procedure. *See* Sebelius v. Auburn Reg'l Med Ctr., 568 U.S. 145, 154-55 (2013); *but see* Justice Sotomayor's concurrence in *Auburn* rejecting that notion. *Id.* at 161-64 (Sotomayor, J., concurring).

[202] In contrast, in *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 132 (2008), the noncompliant litigants were at fault for their noncompliance.

[203] *See, e.g.*, *Wong*, 575 U.S. at 410-11; *Dolan*, 560 U.S. at 610-11.

B. Not Defining Non-Jurisdictionality Preserved Harsh Consequences for Litigants and the Judiciary

Prior to 2004 the Court did not articulate jurisdiction in the narrow and precise way it does nowadays. Jurisdiction was not simply what Congress authorized that a court could adjudicate, but rather any bar that a litigant had to comply with before bringing a case to court.[204] Hence, jurisdiction was "a word of many, too many, meanings" and included issues that the Court today marks as non-jurisdictional.[205] Even though jurisdictionality had a broader meaning, the Court generally treated it as an absolute bar[206]—if a litigant did not comply with such a requirement, the noncompliance could not be waived or forfeited by the opposing party. The noncompliant litigant was also not entitled to equitable tolling, regardless of the circumstances of the noncompliance. In addition, the noncompliance could be raised by the opposing party at any stage of the litigation. Courts, on their part, had to address such noncompliance on their own, if the parties did not.[207] And before 2004, in the few times that the Court found a litigation requirement non-jurisdictional, it described its effects as the inverse image of a jurisdictional requirement.[208] That meant that every non-jurisdictional litigation requirement *was* subject to waiver, forfeiture, and equitable tolling, as well as error correction.[209]

The jurisprudential shift of 2004 brought a major change to the labeling of litigation requirements. This change originated, at

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[204] Hawley, *supra* note 10, at 2042-43; Poor, *supra* note 14, at 224-25. This broad concept was still alive in 1998, when Justice Stevens explained in *Steel Co. v. Citizens for a Better Environment*, that "[r]ather 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.'" Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, at 117-18 (1998) (Stevens, J., concurring in the judgment).

[205] *Steel Co.*, 523 U.S. at 90 (quoting United States v. Vanness, 85 F.3d 661, 663 n.2 (D.C. Cir. 1996)).

[206] As Part I.A. details, there were some exceptions to that treatment.

[207] *See*, *e.g.*, Henderson *ex rel.* Henderson v. Shinseki, 562 U.S. 428, 434-35 (2011).

[208] *See, e.g.*, Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 95 (1990); Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393 (1982).

[209] *Cf. Zipes*, 455 U.S. at 393 (1982); *Irwin*, 498 U.S. at 95 (1990). For the idea of non-jurisdictional litigation requirements being amenable to amendments, see *Gonzalez v. Thaler*, 565 U.S. 134, 146 (2012) (suggesting that "[i]f a party timely raises the COA's failure to indicate a constitutional issue, the court of appeals panel must address the defect by considering an amendment to the COA or remanding to the district judge for specification of the issues").

least in part, from the Court's recognition of the harsh consequences that the overuse of the jurisdictional label brought.[210] The jurisprudential shift described in Part I.B. caused the growth in number of non-jurisdictional litigation requirements which became the majority of litigation requirements.[211] Non-jurisdictional litigation requirements now included mandatory litigation requirements that were formerly labeled "mandatory and jurisdictional,"[212] which in the past, courts found noncompliance with them was detrimental to their ability to hear a case.[213] At first, the Court did not address the conflict between requirements being mandatory and allegedly allowing parties to waive them due to their non-jurisdictionality.[214] In its early opinions reformulating the treatment of litigation requirements, the Court ignored the implications of the line of cases finding some litigation requirements non-jurisdictional or exceptions to jurisdictionality, other than the ability to waive or forfeit them.[215] In response, scholars pointed out that if a litigation requirement is mandatory, it cannot be subject to equitable tolling.[216] It was also unclear whether a mandatory litigation requirement could be subject to waiver or forfeiture by opposing party,[217] or can a court raise the matter sua sponte.[218] Despite scholars' calls on the Court to clearly address the issue,[219] and lower courts diverging treatment of it, the Court did not do so for several years, as this Article shows below in

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[210] *See* Kontrick v. Ryan, 540 U.S. 443, 454-55 (2004).

[211] At least within the cases adjudicated after 2004. Despite the Court's stated distaste of "drive-by" determinations of jurisdictionality, some cases still present rather conclusory analysis of the jurisdictionality question. *See, e.g.*, Musacchio v. United States, 577 U.S. 237, 245-49 (2016).

[212] *See, e.g.*, Eberhart v. United States, 546 U.S. 12, 17-19 (2005) (per curiam).

[213] *See, e.g.*, Henderson *ex. rel.* Henderson v. Shinseki, 562 U.S. 428, 434-35 (2011).

[214] For detailed review, see Dodson, *supra* note 11, at 5-6.

[215] *See, e.g.*, *Kontrick*, 540 U.S. at 452-56.

[216] *See, e.g.*, Dodson, *supra* note 11, at 5-6.

[217] *See, e.g.*, Day v. McDonough, 547 U.S. 198, 205 (2006); Util. Air Regulatory Grp. v. EPA, 744 F.3d 741, 751 (D.C. Cir. 2014) (Kavanaugh, J., concurring). For the argument that now even traditionally jurisdictional rules may be waivable, see Jessica Berch, *Waving Goodbye to Non-Waivability: The Case for Permitting Waiver of Statutory Subject-Matter Jurisdiction Defects*, 45 MCGEORGE L. REV. 635 (2014).

[218] *See, e.g.*, *Day*, 547 U.S. at 202-06 (pointing out that "ordinarily" it would be an "abuse of discretion" for a court to act sua sponte upon a party's waiver or forfeiture of noncompliance with statute of limitations but concluding that is not so in the habeas litigation context).

[219] *See* Dodson, *supra* note 11, at 4-6; Berch, *supra* note 217, at 693.

the context of waiver and forfeiture, sua sponte action, and equitable tolling.

Waiver and forfeiture of claims are both mechanisms by which a party gives up their objection to a claim raised by an opposing party. The difference between the two is the relevant party's state of mind. A waiver is an active action of letting go of an objection and manifests clearly. Conversely, forfeiture is inaction that with the passing of time signifies the party's decision not to pursue an objection.[220] In general, many of the jurisdictional label cases that the Court adjudicated involved a party waiving or forfeiting their objection to noncompliance with a litigation requirement.[221] The Court explained that in all these cases, the now-objecting litigant did not raise their objection timely—but it did not explain when does such untimeliness become detrimental to a litigant's claim against noncompliance. In addition, the Court refused to accept a waiver of noncompliance with requirements that may affect third parties, even if the requirements were non-jurisdictional.[222] Finally, in some cases, the Court seemed to not care if a party had not waived their objection when it was not prejudiced by the noncompliance.[223]

Scholars, however, began viewing the ability to use either mechanism as integral to the characterization of non-jurisdictional

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[220] *Kontrick*, 540 U.S. at 458 n.13.

[221] *See, e.g.*, Fort Bend Cty. v. Davis, 139 S. Ct. 1843, 1848 (2019); Hamer v. Neighborhood Hous. Sers. of Chicago, 138 S. Ct. 13 (2017); Gonzalez v. Thaler, 565 U.S. 134, 138-40 (2012); Dolan v. United States, 560 U.S. 605, 609 (2010); Union Pac. R.R. Co. v. Bhd. of Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment, 558 U.S. 67, 76-77 (2009); John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 132-33 (2008); *Day*, 547 U.S. 198, 203-05; Arbaugh v. Y&H Corp., 546 U.S. 500, 504 (2006); Eberhart v. United States, 546 U.S. 12, 13-15 (2005) (per curiam); *Kontrick*, 540 U.S. at 448-52.

[222] *See, e.g.*, *Kontrick*, 540 U.S. at 457 n.12.

[223] *See, e.g.*, Scarborough v. Principi, 541 U.S. 401, 405-06, 416-17 (2004) (holding a failure to raise a mandatory allegation in a post-trial attorney fee pleading was not jurisdictional and could be overcome although the government did not waive its objection, because the "[g]overnment [was] aware, from the moment a fee application [was] filed, that to defeat the application on the merits, it [would] have to prove its position 'was substantially justified.'"); Edelman v. Lynchburg Coll., 535 U.S. 106, 118-19 (2002) (holding an amendment to a Title VII charge beyond the deadline for a timely charge does not deprive jurisdiction of a court later adjudicating the matter because it did not prejudice the other party); Becker v. Montgomery, 532 U.S. 757, 765, 767-68 (2001) (holding a timely filed appeal that lacked a signature did not prejudice the opposing party, even though they did not waive their objection, because there was no doubt about who are the parties to the appeal).

litigation requirements, and to some extent the only path to avoid a dismissal.[224] The Court signaled agreement in some cases, explaining that if the opposing party did not waive the requirement's compliance, a court must dismiss the filing for noncompliance.[225] Yet in other cases, the Court did not see a lack of waiver as an unpassable bar to a noncompliant litigant's day in court.[226] The result of this inconsistent treatment is that noncompliant litigants with a more sophisticated opposition that timely objected to the noncompliance were more likely to find themselves in the same situation as before 2004, with their claim dismissed—no matter why the noncompliance occurred. But, in general, litigants had some ways out. The difference was that all litigants now spent more time litigating the question of the objection's timeliness, and the ability to override it even if it was timely. Usually, these cases involved employers and the government as the opposing litigants.[227] Noncompliant litigants were usually pro se litigants or those who are poorly represented, or with noncompliance occurring not because to their actions.

A court's ability to sua sponte raise noncompliance with a non-jurisdictional litigation requirement is another important element of non-jurisdictional litigation requirements. The Court has repeatedly described sua sponte dismissal due to non-compliance with *jurisdictional* litigation requirements as obligating courts to unnaturally intervene in the adversarial process.[228] The move to non-jurisdictional requirements does not seem to avoid a court's intrusion, but rather allows courts the discretion of whether to intervene. Despite the concerns the Court has raised about the use of sua sponte action, courts continue to raise noncompliance with litigation requirement sua sponte, even when the requirement is non-jurisdictional, and the opposing party has not raised the issue.[229] The Court treated these occurrences in different ways,

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[224] *See, e.g.*, Dodson, *supra* note 11, at 5-6.

[225] *Cf.* Manrique v. United States, 137 S. Ct. 1266, 1271 (2017).

[226] *See, e.g.*, United States v. Kwai Fun Wong, 575 U.S. 402, 420-21 (2015).

[227] Usually, criminal procedure and employment litigation include a more intricate set of litigation requirements with which litigants must comply.

[228] *See, e.g.*, Henderson *ex rel.* Henderson v. Shinseki, 562 U.S. 428, 434 (2011).

[229] *See, e.g.*, United States v. Gaytan-Garza, 652 F.3d 680 (6th Cir. 2011) (holding that while a court is "not required to dismiss as a jurisdictional matter, this holding does not preclude sua sponte dismissal of late-filed criminal appeals"); United States v.

without providing a theory or explanation for its differing conclusions, ranging from rejection of such ability when it is used by a tribunal,[230] to allowing it, over an explicit waiver from the opposing party.[231] Following some of the Court's precedent, lower courts have used their authority to raise issues sua sponte and dismiss litigation based on standing, even though the opposing party waived the issue.[232] The current status quo offers courts a broad discretion without transparency. Lower courts seem to use sua sponte dismissals where state entities have failed to act properly given policy considerations. This tendency hurts less capable litigants, especially those who are not represented. These litigants usually encounter more dismissals, typically through summary orders and unpublished opinions.[233] Habeas petitioners seem to particularly suffer from this discretion. The habeas

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Mitchell, 518 F.3d 740, 743-51 (10th Cir. 2008). By doing this, these courts ignore a long-standing tradition of the Court to avoid such interference. *See* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821) ("We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution."). *See also* Day v. McDonough, 547 U.S. 198, 202 (2006) (pointing out that "ordinarily" it would be an "abuse of discretion" for a court to act sua sponte upon a party's waiver or forfeiture of noncompliance with statute of limitations).

[230] Union Pac. R.R. Co. v. Bhd. of Locomotive Eng'rs & Trainmen Gen. Comm., 558 U.S. 67, 80 (2009) (holding an agency tribunal cannot raise the noncompliance sua sponte when parties waived it; noting attempt to limit the agency's jurisdiction sua sponte brought the tribunal to fail "to conform, or confine itself, to matters within the scope of its jurisdiction.") (citation omitted).

[231] *See, e.g.*, *Day*, 547 U.S. at 205-06 (habeas statute of limitations); Arizona v. California, 530 U.S. 392, 412-13 (2000) (res judicata defense); Hallstrom v. Tillamook Cty., 493 U.S. 20, 26, 31 (1989) (Resource Conservation and Recovery Act of 1976 notice provision).

[232] Although *Day* may be limited to its facts, or to habeas cases, it still is a confusing precedent on the issue, as the dissent pointed out. *Day*, 547 U.S. at 212-17 (Scalia, J., dissenting). Some scholars argue that courts raising noncompliance sua sponte despite government waiver, interferes with the government's attempt to remedy the high demands of the litigation requirements. *See, e.g.*, Leah M. Litman & Luke C. Beasley, *Jurisdiction and Resentencing: How Prosecutorial Waiver Can Offer Remedies Congress Has Denied*, 101 CORNELL L. REV. ONLINE 91, 99-100 (2016). Other scholars called for the ability of courts to raise non-jurisdictional issues sua sponte due to their discretional nature. *See, e.g.*, William James Goodling, *Distinct Sources of Law and Distinct Doctrines: Federal Jurisdiction and Prudential Standing*, 89 WASH. L. REV. 1153, 1183-86 (2013).

[233] *See, e.g.*, RICHARD POSNER, REFORMING THE FEDERAL JUDICIARY: MY FORMER COURT NEEDS TO OVERHAUL ITS STAFF ATTORNEY PROGRAM AND BEGIN TELEVISING ITS ORAL ARGUMENTS 71 (2017).

statutory framework aims to ensure finality and limit repeat litigation. In keeping with that policy, courts step in where the government waived a missed litigation requirement to avoid opening the doors for other similarly situated litigants to pursue actions that were otherwise foreclosed due to noncompliance.[234]

Finally, with some litigation requirements, the ability to equitably toll a non-jurisdictional requirement is the material way in which a noncompliant litigant can pursue their claim or motion despite the noncompliance. Arguably, for those litigation requirements—mainly temporal ones—the ability to equitably toll the time is the "money question."[235] In 1990, the Court held that every non-jurisdictional litigation requirement in a statute governing lawsuits against the government is presumptively subject to equitable tolling.[236] The Court noted that it was simply replicating the status quo that existed for all other litigants.[237] However, in reality, the decision was contrary to many cases that barred equitable tolling for various litigation requirements,[238] not only ones connected to governmental waiver of immunity.[239] The Court clarified that such presumption is only one stage in the

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[234] *See cf. Day*, 547 U.S. at 205-06; Katherine A. Macfarlane, *Adversarial No More: How Sua Sponte Assertion of Affirmative Defenses to Habeas Wreaks Havoc on the Rules of Civil Procedure*, 91 OR. L. REV. 177 (2012).

[235] A similar issue arises with other litigation requirements that are not temporal: exhaustion, registration, and missing details in motion. The issue is whether a court will allow the noncompliant litigant to amend its filing or accept an amendment already made. The Court has not addressed this issue coherently. In early cases, some prior to the "revolution," the Court found that where no prejudice attached from the amendment, it could be allowed. *See, e.g.*, Scarborough v. Principi, 541 U.S. 401, 422-23 (2004). But more recently the Court has not engaged with this issue, except mentioning in one case that "[i]f a party timely raises the COA's failure to indicate a constitutional issue" it does not mean automatic dismissal, but an obligation (a court "must") to "address the defect by considering an amendment . . . or remanding." Gonzalez v. Thaler, 565 U.S. 134, 146 (2012).

[236] Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 95-96 (1990).

[237] *Id.*

[238] To support its argument, the *Irwin* Court stated that "the running of such statutes is traditionally "subject to 'equitable tolling.'" *Id.* (citing Hallstrom v. Tillamook Cty., 493 U.S. 20, 27 (1989)). *Hallstrom*'s rationale was limited to statutes of limitations. *Id.* ("The running of [statutes of limitations] is traditionally subject to equitable tolling"). In fact, other cases involving statutes of limitations usually found those jurisdictional. *See* Poor, *supra* note 14, at 204-05.

[239] *See*, *e.g.*, Soriano v. United States, 352 U.S. 270, 275-76 (1957); Finn v. United States, 123 U.S. 227, 229 (1887); Kendall v. United States, 107 U.S. 123, 124 (1883).

equitable tolling question, and a party seeking to equitably toll time has to show proof of diligent attempts to comply timely with the litigation requirement.[240] Between 1990 and 2004, the Court found that presumption rebutted several times, or non-existent where in the past the litigation requirement was found jurisdictional.[241]

Since 2004, the Court's application of the presumption of equitable tolling in non-jurisdictional litigation requirements has not been consistent, and the Court refused to reaffirm its precedent or determine the contours of equitable tolling for non-jurisdictional litigation requirements.[242] Some cases remanded the issue without addressing it.[243] Other cases addressing the matter went in different ways, ranging between applying the presumption,[244] distinguishing its application,[245] and holding it cannot apply.[246] Much like in other aspects of non-jurisdictional litigation requirements characteristics, this ambivalence created more

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[240] *See Irwin*, 498 U.S. at 96.

[241] *Cf.* United States v. Brockamp, 519 U.S. 347, 354 (1997).

[242] *See* Fort Bend Cty. v. Davis, 139 S. Ct. 1843, 1849 n.5 (2019) (explaining it had not determinatively decided the matter).

[243] *Cf.* Henderson *ex rel.* Henderson v. Shinseki, 562 U.S. 428, 437 (2016); Hamer v. Neighborhood Hous. Servs. of Chicago, 138 S. Ct. 13, 22 (2017).

[244] *See*, *e.g.*, United States v. Kwai Fun Wong, 575 U.S. 402, 415-16 (2015) (following the *Irwin* framework although the non-jurisdictional litigation requirement was of the variety that in the past was viewed as jurisdictional and similar language to it was concluded to not be subject to equitable tolling). The Court then offered a circular test to determine a rebuttal to the presumption. If the litigation requirement is jurisdictional then, the presumption of equitable tolling is rebutted. However, what the Court missed is that following its new opinions, the inverse is not self-evident, and therefore fails this test. *Id. See also* John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 133-34 (2007).

[245] Sebelius v. Auburn Reg'l Med. Ctr., 568 U.S. 145, 157-58 (2013) (explaining that Congress vested in the HHS Secretary rulemaking authority which the agency subsequently used to toll time-period for up to three years). The Court held that while the statutory time period is subject to equitable tolling, courts must yield deference to the Secretary's position that three years is the appropriate maximum extension. *Id.* The Court distinguished the *Irwin* presumption because it only addressed time bars for appeal in federal courts. *Id.* at 158. *Auburn*, on the other hand, concerned an agency's internal appeal deadline. This holding makes little sense if equitable tolling is meant to be a measure of the relevant party's diligence. In addition, although this is not a jurisdictional setting, the Court allowed the executive to limit its ability to assist diligent litigants who did not file timely.

[246] Nutraceutical Corp. v. Lambert, 139 S. Ct. 710, 715 (2019) (finding rule in question not subject to tolling without addressing the *Irwin* framework that presupposes tolling to be a default).

litigation and erected barriers for litigants that have lesser quality representation or none at all.

C. One Size Rule Does Not Fit All Litigation Requirements

Even assuming there were no issues the Court's new rule, its premise—that one rule can encompass all litigation requirements—is unattainable. This is because having one rule ignores that litigation requirements are not all the same. There are two main types of litigation requirements—time requirements and content requirements. These types also vary by their promulgation source—statute or rule. Another relevant metric is the area of the law that the requirement is functioning in. These different types of requirements yield distinct implications to noncompliant litigants. The rule that the Court adopted eased litigation for noncompliant litigants regarding content requirements. The opposite occurred for litigants noncompliant with time-related requirements.

Temporal litigation requirements exist in any litigation. Time litigation requirements limit the ability of a litigant to file a claim, a motion, or an appeal in different venues and different stages of the litigation. In some cases, the timing of filing is a complex web of deadlines connected to the type of claim that a litigant brings and the basis for it. Another type of time bar is statute of limitations that limits how long after a claim accrued can a party file suit.[247] Sophisticated litigants can thread between different time bars and statutes of limitations, and benefit from this calculation. However, less-sophisticated litigants, unrepresented or poorly represented, are much more likely to not comply with this intricate web and miss their day in court because of its complexity.

The process of determining the consequence of noncompliance with a temporal requirement is complex. On an occasion of noncompliance with a time litigation requirement, a court must determine its jurisdictionality. If a requirement is jurisdictional, the noncompliant litigant is out of luck. But even if the requirement is held non-jurisdictional, the court must then decide whether the opposing party waived or forfeited the noncompliance.[248] And even if such waiver or forfeiture occurred, the court may have discretion

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[247] There are general and specific statutes of limitations.

[248] *Cf.* Henderson *ex rel.* Henderson v. Shinseki, 562 U.S. 428, 442 n.4 (2016).

to dismiss a claim sua sponte, for policy considerations, due to the noncompliance.[249] Finally, even if a noncompliant litigant passes these hurdles, a court needs to evaluate whether the temporal requirement allows for equitable tolling,[250] and if the noncompliant litigant efforts to comply merit equitable tolling.[251]

In contrast, content litigation requirements are easier barriers to overcome. Content requirements are usually attached clearly to a specific type of claim. They include requirements such as exhaustion of remedies,[252] public registration,[253] mediation,[254] or certain content that must appear in a filing.[255] If a court finds the requirement non-jurisdictional after a litigant did not comply with it, the court needs to address the question of waiver and forfeiture, and whether to dismiss the case sua sponte. In some cases, the court will need to decide whether to allow amendment or remand of the claim to correct the noncompliance.[256] But these decisions are nowhere close to the litany of demands temporal requirements impose. Moreover, many times litigants can immediately correct the missing piece in their claim upon notification, and the Supreme Court has largely accepted this ability.[257] Content litigation requirements are also intrinsically connected to the substance of

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[249] *See* Day v. McDonough, 547 U.S. 198, 205 (2006).

[250] *See*, *e.g.*, Sebelius v. Auburn Reg'l Med. Ctr., 568 U.S. 145, 161 (2013) (finding that a statute could not be equitably tolled where an administrative authority already extended it).

[251] *See*, *e.g.*, United States v. Kwai Fun Wong, 575 U.S. 402, 421 (2015) (remanding one of the cases to the court of appeals to determine if petitioner "is entitled to equitable tolling").

[252] Fort Bend Cty. v. Davis, 139 S. Ct. 1843, 1851 (2019).

[253] Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154, 157 (2010).

[254] Union Pac. R.R. Co. v. Bhd. of Locomotive Eng'rs & Trainmen Gen. Comm., 558 U.S. 67, 73 (2009).

[255] *See*, *e.g.*, Torres v. Oakland Scavenger Co., 487 U.S. 312, 318 (1988) (identification of appellee); Becker v. Montgomery, 532 U.S. 757, 763 (2001) (signature).

[256] *See*, *e.g.*, Gonzalez v. Thaler, 565 U.S. 134, 146 (2012) (discussing that possibility); Scarborough v. Principi, 541 U.S. 401, 411 (2004) (allowing it).

[257] *Cf.* Edelman v. Lynchburg Coll., 535 U.S. 106, 115-17, 115 n.9 (2002) (an amendment to a Title VII charge beyond the deadline for a timely charge does not deprive jurisdiction of a court later adjudicating the matter because it did not prejudice the other party); Becker v. Montgomery, 532 U.S. 757, 767-68 (2001) (timely filed appeal that lacked signature did not prejudice opposing party, even though it did not waive its objection, because there was no doubt about who were parties to the appeal.).

the claim and arise when a court addresses its merits.[258] Dismissal in such a stage involves much more wasted resources, and its correction would be more favored.

In short, the burden imposed on the noncomplying litigant with content requirements is much less burdensome than that connected to temporal litigation requirements. The inquiry the court needs to engage in is much simpler, and arguably ends with the determination that a requirement is non-jurisdictional. Considering that the first case the Court employed the "clear statement" rule was *Arbaugh*, a case about a content litigation requirement,[259] and its uniform application, it is clear why the court did not develop a richer understanding of non-jurisdictional rules. It was simply not needed.

The promulgation source of the litigation requirement is another difference that matters to the analysis. Take rule-based litigation requirements. Before 2004, the Court and lower courts found rule-based litigation requirements to be jurisdictional most times.[260] After 2004, but before *Arbaugh* declared the clear statement rule, the Court held under a functional test, that some rule-based litigation requirements were not jurisdictional.[261] Once the clear statement rule was in motion, the Court had only one option. It had to declare *all* rule-based litigation requirements non-jurisdictional, as it did.[262] This is because the Court's rule requires Congressional statement, which does not exist in rule-promulgated litigation requirements.[263] On the other hand, litigants who are not compliant with statutory time requirements are in a more

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[258] For example, the numerosity requirement in Title VII is intertwined with the case itself, as is the exhaustion requirement. *See* Arbaugh v. Y&H Corp., 546 U.S. 500, 515-16 (2006); Fort Bend Cty. v. Davis, 139 S. Ct. 1843, 1850-51 (2019).

[259] *Arbaugh*, 546 U.S. at 515-16.

[260] *See supra* Part I.A.

[261] Kontrick v. Ryan, 540 U.S. 443, 454 (2004); Eberhart v. United States, 546 U.S. 12, 15 (2005) (per curiam).

[262] Nutraceutical Corp. v. Lambert, 139 S. Ct. 710, 714 (2019); Hamer v. Neighborhood Hous. Servs. of Chicago, 138 S. Ct. 13, 17 (2017).

[263] *Kontrick*, 540 U.S. at 452 ("Only Congress may determine a lower federal court's subject-matter jurisdiction."); *But see* Scott Dodson, *A Critique of Jurisdictionality*, 39 REV. LITIG. 353, 360-364 (2020) (arguing that such clear-cut determination is false in several ways). Despite this statement, past precedent still holds some rule-based requirement jurisdictional and has not been expressly overruled. *See* Torres v. Oakland Scavenger Co., 487 U.S. 312, 315 (1988) (finding Rule 3 notice of appeal requirements jurisdictional because they are connected to Rule 4).

complicated situation, because some cases intimated these requirement may be jurisdictional.[264] Before 2004, courts found ways to mitigate harsh consequences of jurisdictional litigation requirements for some litigants. They did it through the unique circumstances exception[265] or by skipping the jurisdictional question and allowing for equitable tolling.[266] This flexibility disappeared with the new rule.[267] Moreover, even the few non-jurisdictional litigation requirements that existed before 2004 lost their "inverse" character and now are construed more narrowly and require additional litigation.[268]

Finally, the area of the law in which a litigation requirement functions is another material factor that requires different treatment. Criminal law, labor law, and administrative law pose many intricate processes for litigants attempting to vindicate their rights. In addition, these areas have a significant gap in ability between the private plaintiff and the opposing party—an employer or the government. These complex statutes, together with the parties' power gap, mean that simply classifying a requirement as non-jurisdictional does not mitigate the harsh consequence of jurisdictionality. The cases the Supreme Court adjudicated show this difficulty. Six out of seventeen cases were criminal cases.[269] Three others were cases involving workplace discrimination or sexual harassment.[270] The government was the opposing party in three other cases.[271] In most of these cases, the litigation requirement being non-jurisdictional did not mean the case was not ultimately dismissed. Most litigants lost on other procedural

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[264] Bowles v. Russell, 551 U.S. 205, 214 (2007); John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 139 (2008).

[265] Thompson v. INS, 375 U.S. 384, 386-87 (1964) (per curiam); Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc., 371 U.S. 215, 217 (1962) (per curiam).

[266] *See, e.g.*, Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 95 (1990).

[267] *See, e.g.*, Henderson *ex rel.* Henderson v. Shinseki, 562 U.S. 428, 434 (2011).

[268] In *Fort Bend*, the Court explicitly stated that it had not decided the issue. Fort Bend Cty. v. Davis, 139 S. Ct. 1843, 1849 n.5 (2019).

[269] *See* Manrique v. United States, 137 S. Ct. 1266, 1270 (2017); Musacchio v. United States, 577 U.S. 237, 239-40, 713 (2016); Gonzalez v. Thaler, 565 U.S. 134, 138 (2012); Dolan v. United States, 560 U.S. 605, 608 (2010); Bowles v. Russell, 551 U.S. 205, 207 (2007); Eberhart v. United States, 546 U.S. 12, 13 (2005) (per curiam).

[270] *Fort Bend*, 139 S. Ct. at 1847; Hamer v. Neighborhood Hous. Sers. of Chicago, 138 S. Ct. 13, 18 (2017); Arbaugh v. Y&H Corp., 546 U.S. 500, 503-04 (2006).

[271] *Wong*, 575 U.S. at 405; *Henderson*, 562 U.S. at 431; Scarborough v. Principi, 541 U.S. 401, 406 (2004).

grounds, or their case became moot.[272] The case outcomes are an indication that while the new rule changed the requirement's label, it did not change the harsh consequences for some of these litigants due to their noncompliance.

III. THE COURT NEEDS TO NARROW THE CLEAR STATEMENT RULE AND ADDRESS NON-JURISDICTIONAL EFFECTS IN CONTEXT

The Court's jurisdictional labeling revolution has missed the mark in solving the underlying harsh consequences of the jurisdictional label for several reasons. The Court's solution did not properly guide lower courts on what jurisdictionality looks like, allowing for improper assignment of jurisdictional labels to non-jurisdictional litigation requirements. The Court's solution also only referred to one part of the problem, jurisdictional rules, and left non-jurisdictional rules undefined. And lastly, the Court's solution's premise—one rule for all requirements—is unworkable because of the inherent material differences between requirements, which merits differing treatments. But not all is lost. The Court can still mitigate the harsh consequences of its past jurisprudence if it changes the focus of its decision making. In essence, this Article calls for the Court to admit to what it has been doing behind the scenes, in order to allow lower courts and litigants to apply its doctrine properly.

First, the Court should be more precise when searching for congressional statements of jurisdictionality. To designate a litigation requirement as jurisdictional, there must be clear jurisdictional language. Alternatively, the requirement has to be a part of the jurisdictional section of a statute. This straightforward analysis will limit the possibility of lower courts improperly assigning jurisdictional labels to non-jurisdictional litigation requirements.

Second, the Court should adjust the meaning of non-jurisdictional litigation requirements according to factors related to them, and not only statutory language, as it is malleable to varied interpretations, as the Court's decisions show. The Court should

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[272] For example, the petitioner in *Gonzalez* lost on another procedural hurdle regarding the timeliness of his habeas filing. *Gonzalez,* 565 U.S. at 153.

focus its exploration on the harsh consequences it wishes to mitigate. The analysis should consider two levels: first, the prototypical noncompliance with a certain litigation requirement and the characteristics of prototypical noncompliant litigants. Second, the specific noncompliance in the case, the characteristics of the specific noncompliant litigant, and the merit chances of the specific case. These considerations will affect the ability of litigants to survive noncompliance with a non-jurisdictional litigation requirement, where they did not cause the noncompliance or where their ability to prevent it was significantly low,and will allow for more structure and guidance for lower courts adjudicating these instances of noncompliance.

A. The Court Needs to Precisely Define Jurisdictionality

The first step towards successful mitigation of the jurisdictional label's harsh consequences is minimizing the uncertainty in its scope. The Court should do it through limiting the ability to declare a litigation requirement jurisdictional to when the word jurisdiction appears in the text or when the requirement is in the jurisdictional section of a statute.

The Court announced that an over-use of the jurisdictional label is the reason for the harsh consequences that litigants and courts endure upon noncompliance with litigation requirements.[273] Since 2004, the Court sought different paths to limit this over-use. Part I describes the moves the Court made before finally settling on a clear statement rule. The clear statement rule provides that a court should:

> look to see if there is any "clear" indication that Congress wanted the rule to be "jurisdictional." . . . Congress, of course, need not use magic words in order to speak clearly on this point. . . . When "a long line of [Supreme Court] decisions left undisturbed by Congress" has treated a similar requirement as "jurisdictional," [a court should] presume that Congress intended to follow that course.[274]

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[273] *Henderson*, 562 U.S. at 434-35.

[274] *Id.* at 436 (citation omitted).

The current rule is hard to follow and is susceptible to manipulation.[275] The Court claims that all it does is "leave the ball in Congress' court,"[276] but since 2008, it had consistently refused to accept any language as jurisdictional,[277] even when the government argued that Congress followed the Court's own rationale of what is jurisdictional.[278] In that context, some scholars have criticized the Court for not having a clear understanding of how Congress designates jurisdictional litigation requirements.[279] Additionally, because of the broad terminology the Court used in its rule definition, and insertion of stare decisis exception, there is much room for disagreement about the designation of litigation requirements.[280] This disagreement manifests itself in vigorous dissents, and in lower courts repeated holding of litigation requirements as jurisdictional, even in the face of the Court's contrary opinions.[281]

To consolidate the lower courts' decision making, the Court needs to establish a clearer bright-line rule that cannot be easily manipulated. This clear, bright-line rule should allow a court to designate a litigation requirement as jurisdictional only when Congress clearly states it is.[282] That means only when Congress

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[275] At the very least, the Court's current rule is a "normatively grounded" one rather than an "empirical fact" like the court presents it to be. Re, *supra* note 136, at 1505. As such, it is hard to follow without fault, as normative evaluations are not constant.

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

[277] The Court did find litigation requirements in two cases to be jurisdictional but not by using the clear statement rule. *See* Bowles v. Russell, 551 U.S. 205, 214 (2007); John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 139 (2008). The Court also refused to determine the question in *Manrique v. United States*, 137 S. Ct. 1266, 1271 (2017).

[278] *Cf.* United States v. Kwai Fun Wong, 575 U.S. 402, 415(2015).

[279] Hawley, *supra* note 9, at 2051-59. Hawley argues against the rule completely, but she misses that without it the Court is left without any principled guidance for lower courts. As explained throughout this Article, the mere invocation of redefining the scope of jurisdiction is not enough for that purpose.

[280] Which is visible in the lower courts (*see supra* Part I.C.) and in Supreme Court cases which yielded dissents.

[281] *See supra* Part I.C.

[282] Arguably, rules can indicate that a requirement is "jurisdictional," but that cannot mean anything for the analysis, at least in the civil procedure context, because the "rules [of civil procedure] do not extend or limit the jurisdiction of the district courts." FED. R. CIV. P. 82. A question beyond the scope of this article is whether that statement stands as strong for other types of rules. In addition, where a rule mirrors a federal statute that uses the term "jurisdiction" then it is, in effect, jurisdictional. *See* Hamer v.

uses the word "jurisdiction" in connection with that requirement or when the litigation requirement is in the jurisdictional section of the relevant statute.

This formulation of the rule alleviates several concerns about the current way the Court handles the labeling of litigation requirements. First, it sends a clear message to Congress about what it should do to ensure litigation requirements' jurisdictional labels. Some scholars argue that the Court retroactively assesses requirements for clear statements, without allowing Congress to designate them properly.[283] It is fair to argue that asking Congress to use a certain language interferes with its legislative authority, but since Congress has not actively changed its language following the Court's decisions since 2004, it is arguably not a major concern.[284] Second, limiting a clear statement to a subset of language narrows the ability of lower courts to extrapolate that a litigation requirement could be jurisdictional from the language the Court has already found to be not jurisdictional. Third, this narrower definition of clear statement is more fitting to the narrow use of the jurisdictional label that the Court adopted. The Court opted out of its past broad concept of jurisdictional litigation requirements and preferred to confine jurisdictional labels only to subject-matter jurisdiction and personal jurisdiction related litigation requirements.[285] By limiting the scope of clear statements to those using the word "jurisdiction," or located in a jurisdictional section of a statute, the Court will match its application of labeling with the doctrine in its basis, and will avoid inserting confusing normative evaluations when engaging with its own jurisdiction.[286]

Neighborhood Hous. Servs. of Chicago, 138 S. Ct. 13, 17-19 (2017); Dodson, *supra* note 263, at 360-64.

[283] Hawley, *supra* note 9, at 2059-63; Dodson, *supra* note 263, at 373-74.

[284] And most recently, the Court tried to make this more explicit by announcing that "Congress may make other prescriptions jurisdictional by incorporating them into a jurisdictional provision." Fort Bend Cty. v. Davis, 139 S. Ct. 1843, 1849 (2019).

[285] This was the underlying principle in the Court's early opinions between 2004 and 2006. *See supra* Part I.B. The Court has recently pushed that concept again, perhaps sensing the confusion that the clear statement rule has created. *See Fort Bend*, 139 S. Ct. at 1848 ("[T]he word 'jurisdictional' is generally reserved for prescriptions delineating the classes of cases a court may entertain (subject-matter jurisdiction) and the persons over whom the court may exercise adjudicatory authority (personal jurisdiction).") (citation omitted).

[286] Re, *supra* note 136, at 1505.

This clear-cut rule will not change the *outcomes* of cases heard by the Supreme Court. The Court has already unanimously acknowledged a presumption of non-jurisdictionality in *Hamer* and *Lambert* regarding rule-based litigation requirements.[287] In *Henderson,* it almost did it for all temporal litigation requirements, stating that "[f]iling deadlines . . . are quintessential claim-processing rules," and therefore not jurisdictional, but explained that Congress may still designate those deadlines jurisdictional if it so desired.[288] However, three cases that have either dodged the question or found litigation requirements jurisdictional[289] have made "waves" with the lower courts. They create confusion as to the applicable standards to adjudicate the labeling of litigation requirements. Changing and clarifying the scope of the clear statement that courts should look for will help diminish the effect of these contrary cases on *lower courts' adjudication* and will perhaps diminish *dissents* and *varied rationales for decision* at the Supreme Court.

B. Non-Jurisdictionality's Effects Need to be Determined Contextually

Following the jurisprudential shift after 2004, the Court arguably moved from a presumption of jurisdictionality to a presumption of non-jurisdictionality.[290] The clarification for the meaning of clear statement, proposed in Part III.A., will make it easier for courts to find whether a litigation requirement is jurisdictional or not. But as Part II explains, it is not enough to get to that conclusion if the goal is to mitigate the harsh consequences of the jurisdictional label. The Court needs to engage with the effects of non-jurisdictionality. This part of the Article suggests how courts could do that with the mitigation of harsh consequences in mind.

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[287] Nutraceutical Corp. v. Lambert, 139 S. Ct. 710, 714 (2019); Hamer v. Neighborhood Hous. Servs. of Chicago, 138 S. Ct. 13,17 (2017). *But see* Dodson, *supra* note 263, at 373 (suggesting scraping that acknowledgment).

[288] Henderson *ex rel.* Henderson v. Shinseki, 562 U.S. 428, 435-36 (2011).

[289] The Court found litigation requirements to be jurisdictional in *Bowles v. Russell*, 551 U.S. 205, 214 (2007) and *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 139 (2008). The Court also declined to determine the question in *Manrique v. United States*, 137 S. Ct. 1266, 1274 (2017).

[290] *See generally* Hawley, *supra* note 11.

Part II.B. explains that in the past, the term non-jurisdictionality meant the inverse of jurisdictionality. However, after 2004, the Court grew more reluctant to use the same dichotomy between the two concepts. Yet the Court did not explain with the scope of non-jurisdictional litigation requirements' effects. It is unclear whether opposing litigants can waive or forfeit raising the noncompliance, whether the noncompliant litigant can ask for equitable tolling, or whether a court can or should sua sponte raise and adjudicate such noncompliance. In some cases, the Court offered partial answers, but these left much room for speculation.

This progression is arguably typical of new case law development in a common law system. But the Court shifted its jurisprudence because jurisdictional labeling generated harsh consequences for litigants and courts in a noncompliance scenario, and the declaration that a litigation requirement is non-jurisdictional does not suffice to mitigate these consequences. The Court must define the effects of non-jurisdictionality.[291] That means deciding whether non-jurisdictionality of a specific provision includes waiver, forfeiture, and equitable tolling and whether a

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[291] Scott Dodson argues that jurisdiction is used as a tool and proxy for its effects, but that causes misuse. Instead, he posits that the Court should embrace a different definition of jurisdiction— applicable only when a litigation requirement sets a litigation boundary between courts, and not otherwise. In general, he argues, non-jurisdictional and jurisdictional rules may exhibit effects that are currently associated with the opposite category. *See generally*, Dodson, *supra* note 11, at 6; Dodson, *supra* note 16, at1463-65. Dodson presented this idea to the Court in several amicus curiae briefs. *See, e.g.*, Brief for Professor Scott Dodson as Amicus Curiae in Support of Neither Party, Fort Bend Cty. v. Davis, 139 S. Ct. 1843 (2019) (No. 18-525);Brief for Professor Scott Dodson as Amicus Curiae in Support of Neither Party, *Hamer*, 138 S. Ct. 13 (No. 16-658). Other scholars referred to the Court's new non-jurisdictional rules as "quasi-jurisdictional." *See, e.g.,* Szonja Ludvig, *Is the Clean Water Act's Diligent Prosecution Bar Jurisdictional? A Journey into Discovering Congressional Intent*, 2013 B.Y.U. L. REV 1395, 1398 (2013); Kevin M. Clermont, *Sequencing the Issues for Judicial Decisionmaking: Limitations from Jurisdictional Primacy and Intrasuit Preclusion*, 63 FLA. L. REV. 301, 315 n.59 (2011); Scott C. Idleman, *The Emergence of Jurisdictional Resequencing in the Federal Courts*, 87 CORNELL L. REV. 1, 96 & n.532 (2001). Dodson's proposal is incomplete. First, it goes against how the Court treated jurisdiction for decades and requires a revisit of the recent decisions of the Court that found boundary-setting litigation requirements to be non-jurisdictional. Second, his mandatory classification does not answer the Court's more important goal, which is the mitigation of the jurisdictional label's harsh results. In fact, this classification creates even harsher consequences for litigants that are the worst off. However, he does point out that under his view, jurisdictionality is less rigid and may be subject to equitable tolling, and therefore could be more lenient.

court can raise noncompliance sua sponte.[292] The focus of this examination should be the context of (1) the prototypical and specific noncompliance with the litigation requirement, its causes, and the actor best positioned to remedy the noncompliance;[293] (2) the prototypical and specific noncompliant litigant; and, (3) the specific case chances.

It is important to note that this proposal's contextual evaluation of non-jurisdictionality is different than the one the Court currently applies latently. The Court looks to context to illuminate whether a litigation requirement is jurisdictional. It does so in a limited scope. As Part II.A.3 shows, the Court looks (but does not commit to it as part of its analysis) at context closely related to the text of the statute, such as what the requirement asks a litigant to do and its source of enactment, or the area of law in which the requirement appears. The contextual inquiry here, in contrast, addresses the effects of a non-jurisdictional requirement,[294] and looks at broader considerations which are more

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[292] The idea that not all non-jurisdictional requirements have the same character is not new. *See*, *e.g.*, Dodson, *supra* note 11, at 5-7; Mank, *supra* note 11, at 432-33; Dodson, *supra* note 16, at 1448-50. The novelty here is the inclusion of case-based factual factors in the analysis, rather than a sole reliance on the text of the litigation requirement.

[293] See Struve, *supra* note 12, at 631, for the proposition that litigation requirements should not be evaluated in a vacuum; a rebuttal argument is that the relevant unit of analysis is the litigation requirement is text-based. Therefore, the textual objection is concerned with the move from text-based interpretation to interpretation of statutes without connection to the text. Instead, text-favoring scholars might call to reform the clear statement use and correct it, instead of abandoning it. There are two answers to this criticism. First, the treatment of the jurisdictionality issue in this Article's proposal is strictly textual, and that is a change from a rule that announced textualism but de facto engaged in contextual analysis. However, the non-jurisdictionality scope is not text-based in the exact sense. In addition, while Congress controls jurisdiction, it does not necessarily control non-jurisdictional scope. Second, the relevant unit of analysis is not the litigation requirement but the noncompliance with it. That has been the situation for decades at the Court. The ultimate consequence of the noncompliance is determined by its context, including waiver or forfeiture by the opposing party, and not only by the litigation requirement text.

[294] Another justification for such contextual review could be an analogy to the plain meaning rule. This rule says that "otherwise-relevant information about statutory meaning is forbidden when the statutory text is plain or unambiguous." William Baude & Ryan D. Doerfler, *The (Not So) Plain Meaning Rule*, 84 U. CHI. L. REV. 539, 541 (2017). Here, to reach non-jurisdictionality, the statute has to not point plainly or unambiguously to jurisdictionality. Hence, other relevant information, like policy considerations or practice, may apply. *Id.* at 543-44. Even those who challenge the logic

practical and less textual: the noncompliance itself, the litigants' characteristics, and the merits of the underlying case.[295]

Taking into consideration these factors may answer the issues with the current case-law discussed *supra* in Part II. It offers a comprehensive understanding of what a non-jurisdictional litigation requirement means for the noncompliant litigant; litigation requirements will not be treated as if they are all the same and the Court's pronouncements and its actions would be better aligned. This could better help mitigate harsh consequences and provide more guidance to lower courts.

1. The Noncompliant Litigant

A significant factor in determining the scope of non-jurisdictional effects is the noncompliant litigant, and their relative power compared to their opposing party in the litigation. This factor is also well correlated with the type of case that is being adjudicated. When taking into consideration this factor, a court should examine the prototypical noncompliant litigant and the noncompliant litigant before them, to determine the effects relevant given these two data points.

The power dynamic between the parties and the representation of the noncompliant litigant should have a significant meaning on the effects of a non-jurisdictional litigation requirement. In many cases, the noncompliant litigant is suing the government or their employer. In other times, that noncompliant litigant is a criminal defendant, many of whom are not represented in court. These circumstances lead to an imbalance of power. It is most likely that the opposing litigants, the government or employers, will not waive or forfeit noncompliance with litigation requirements, even when there are justified reasons to show flexibility. Moreover, the noncompliant litigants usually will not

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behind the plain meaning rule, find some relevant justifications for using context in statutory interpretation, such as predictability and consistency. *See id.* at 549, 558-62.

[295] For a similar proposition, by which "[c]ourts must also appeal to context even when Congress uses sentences that are prima facie context-insensitive", see Ryan D. Doerfler, *Who Cares How Congress Really Works?*, 66 DUKE L.J. 979, 993 (2017).

have the proper knowledge or ability to avoid noncompliance.[296] At other times, their attempts at avoiding noncompliance may be unsuccessful.[297] These noncompliant litigants should benefit from broader non-jurisdictionality effects to remedy this power gap. On the other hand, some litigants should not benefit from these factors. Sophisticated noncompliant litigants that should be able to avoid the noncompliance, such as when the government wants to file an interlocutory appeal in a criminal case, should not be afforded a broad non-jurisdictional reading of a litigation requirement.[298]

The area of law and type of case to which the litigation requirement pertains often correlate with the type of noncompliant litigant. There are several types of cases that the Court frequently addresses: criminal cases, suits against the government, discrimination cases, and civil cases. The effects of non-jurisdictionality should be broad in criminal-law-related litigation requirements because of the difficulty in appealing in general, the multitude of litigation requirements imposed on litigants in criminal cases, and the many unrepresented litigants, especially in minor offenses, bail issues, and post-conviction proceedings. Accordingly, a court should not be allowed to raise noncompliance sua sponte when the government waived or forfeited it, and equitable tolling should be allowed under proper circumstances.[299]

Suits against the government create a more nuanced consideration, given the different types of possible litigation. The Court said in *Wong* that the waiver of sovereign immunity in the form of granting the ability to sue the government in certain matters does not mean that litigation requirements in connection to it are jurisdictional.[300] However, the Court was split 5-4 and went beyond what past unanimous opinions have articulated in this

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[296] *See* Hamer v. Neighborhood Hous. Servs. of Chicago, 138 S. Ct. 13, 18 (2017) (a pro se noncompliant litigant that did not know the judicial order that gave her thirty more days to file her appeal was beyond the time that the rule allowed for extension).

[297] *See* Holland v. Florida, 560 U.S. 631, 636 (2010) (litigant trying to avoid noncompliance but his appointed attorney did not follow his instructions).

[298] *See* Sebelius v. Auburn Reg'l Med. Ctr., 568 U.S. 145, 151-52 (2013) (sophisticated hospitals as noncompliant litigants).

[299] This presumption may overrule *Day v. McDonough*, 547 U.S. 198, 209 (2006), which authorized courts to act sua sponte in habeas petitions. Although habeas is a civil matter, it is criminal law related.

[300] United States v. Kwai Fun Wong, 575 U.S. 402, 412 (2015).

context. Given the different circumstances that affect this type of case, the effects' scope should be broad. Sua sponte action when the government waives or forfeits the noncompliance should not be allowed.[301]

Discrimination suits and civil cases by themselves do not counsel strongly on scope questions. They usually have a power dynamic gap between the parties. However, there are other types of cases that, by their nature, receive different treatment from the Court. *Henderson* and *Union Pacific Railroad Co.* are two examples. *Henderson* dealt with veteran claims, and the Court explained that this type of litigation merits a different treatment, laxer and more permissive, due to the preferential non-adversarial treatment given to veteran plaintiffs in claiming their benefits. *Union Pacific Railroad Co.* addressed an NRAB mediation requirement. The mediators decided sua sponte that the parties did not go through with a requirement, and therefore they lacked jurisdiction. The Court explained that in doing so, the agency acted against the rationale of their part in the process, to facilitate disputes, and not to add more rules to the process. Other special legal structures may receive similar treatment, and they each counsel in a different way when it comes to the scope of non-jurisdictional requirements.

2. The Noncompliance

Understanding the prototypical noncompliance, its causes, and who is best positioned to remedy it is important to the question of non-jurisdictionality effects. If a prototypical noncompliance relates to a misunderstanding of complex time-bars or caused by a judicial decision, a litigant—especially a self-represented litigant—is not the best positioned actor to avoid or remedy it. Instead, these types of prototypical noncompliance are more appropriately avoided by judicial action or remedied through broad effects of non-jurisdictionality.

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[301] So far, the Court's cases go the other way and note that sua sponte action is most appropriate in cases like these. *See, e.g., Day*, 547 U.S. at 209; Util. Air Regulatory Grp. V. EPA, 744 F.3d 741, 751 (D.C. Cir. 2014) (Kavanaugh, J., concurring). For the argument that now even traditionally jurisdictional rules may be waivable, see Berch, *supra* note 217, at 693.

Courts should also consider what caused the noncompliance in the specific case before them. The causes behind the noncompliance with litigation requirements have been a continuous point of friction in the Court.[302] Some instances of noncompliance that reached the Court were only partially due to the noncompliant litigant's behavior. The Court dealt with litigant-induced noncompliance,[303] attorney noncompliance,[304] and judicial mistakes.[305] When the noncompliance is not caused by the noncompliant litigant but affects them negatively, it should be a consideration for a broader scope of non-jurisdictionality effects and the ability for the noncompliant litigant to get their day in court.[306]

3. The Case Chances

Case chances should also factor into the determination of how broad a non-jurisdictional litigation requirement's effects should be, but it should be only a tie-breaker factor to consider, allowing courts discretion in tough cases. This consideration may feel foreign to a procedural determination about the authority of a court to allow a remedy despite noncompliance. But it is similar to the concept of prejudice when evaluating errors in criminal procedure,[307] although it should not be a determinative factor as it is there. Considering the strength of the noncompliant litigant's

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[302] For example, in *Bowles* the dissent discussed at length the identity of who made the mistake that brought the party to not to meet the relevant bar, thus differentiating between mistakes originating with a court and those originating with the party. Bowles v. Russell, 551 U.S. 205, 219-20 (2007) (Souter, J., dissenting).

[303] *See*, *e.g.*, Arbaugh v. Y&H Corp., 546 U.S. 500, 504, 515-16 (2006) (defendant arguing it was not covered by Title VII only after losing at trial).

[304] *See*, *e.g.*, Holland v. Florida, 560 U.S. 631, 652 (2010); Scarborough v. Principi, 541 U.S. 401, 409 (2004).

[305] *See*, *e.g.*, *Bowles*, 551 U.S. at 214.

[306] However, when it affects them positively, it should probably lead to narrower effects of non-jurisdictionality. This was the case in *Dolan v. United States*, 560 U.S. 605 (2015), where viewing the judicially made noncompliance as non-jurisdictional and eligible for tolling essentially, put the litigant worse off than he was before. That was also the case in Musacchio v. United States, 577 U.S. 237, 245-49 (2016) where defendant did not present a statute of limitations defense at trial, and since it was found non-jurisdictional, he was not allowed to present it on appeal.

[307] *See*, *e.g.*, Strickland v. Washington, 466 U.S. 668, 694 (1984); United States v. Honken, 541 F.3d 1146, 1160 (8th Cir. 2008); United States v. Lloyd, 269 F.3d 228, 241 (3d Cir. 2001).

case has merit.[308] Such consideration has more value in criminal than in civil cases because an intervention of this kind in civil cases might affect settlement chances. However, considering the probability of success on the merits should not be out of the question, especially in cases where the court needs to make a close call between broadening the scope of non-jurisdictionality effects to include equitable tolling or finds that there are no good reasons to avoid invocation of sua sponte decision-making regarding the noncompliance, despite the parties having waived the issue.

C. Implementing the Proposal on Past Cases

To give life to the proposal, explain how it should operate, and in what sense its outcomes will provide better guidance to lower courts, this part implements the comprehensive analysis detailed above on some of the cases the Court has adjudicated. The *Bowles* decision would come out differently, allowing the noncompliant litigant his day in court. The *John R. Sand & Gravel Co.* result would not change effectively, but the court would have reached the result in other means—finding the requirement non-jurisdictional, but the noncompliant litigants not entitled to equitable tolling. In *Union Pacific Railroad Co.,* the proposal would leave the result intact but prevent the agency from sanctioning the parties. Finally, in *Hamer*, under the proposal, the Court would provide lower courts with guidance in the analysis of the non-jurisdictional character of

[308] This is a known approach by courts in connection to some non-jurisdictional litigation requirements. *See, e.g.*, Tiedeman v. Benson, 122 F.3d 518, 522 (8th Cir. 1997) ("The present case, however, has been fully briefed, and we have heard oral argument on all issues, including the merits. Thus, we are fully informed about the merits, and it would make no sense to go through the unnecessary step of remanding to the District Court with the request that an issue or issues be specified, when we already know, having fully considered the case, what we think the result ought to be."); Szuchon v. Lehman, 273 F.3d 299, 311-12 n.5 (3rd Cir. 2001) ("Ordinarily, when a District Court grants a certificate of appealability but fails to specify the issues for appeal, we would remand the matter for a clarification of the order granting the certificate. We have elected not to follow that course here, as the parties had fully briefed this matter by the time it was brought to our attention that the certificate of appealability was inadequate. Moreover, given that 20 years have now passed since Szuchon's trial, we are reluctant to delay the resolution of this matter with a remand. We, therefore, will view the District Court's certificate as a nullity given its nonconformity to § 2253(c)(3), and we construe Szuchon's timely filed notice of appeal as a request for this Court to issue a certificate of appealability.") (citations omitted).

the requirement in question. By using this proposal, the Court's adjudication of one case could be translated to future cases, with a clear structure for analysis.

1. *Bowles*. Bowles was convicted of murder in a state jury trial in Ohio.[309] His direct appeal was unsuccessful.[310] Later, a district court denied his habeas petition.[311] After not comply with the original timing to file an appeal, he filed a motion to allow him to reopen the period to file an appeal.[312] The district court granted his motion, but for an unexplained reason gave Bowles seventeen days to file an appeal instead of the fourteen days provided for in the statute.[313] Bowles filed his notice of appeal after sixteen days.[314] The State argued on appeal that Bowles filed his notice untimely.[315] The Court of Appeals for the Sixth Circuit agreed, based on stare decisis and circuit precedent.[316] The Court affirmed, also based on stare decisis.[317]

Under the proposal, the litigation requirement is non-jurisdictional because the statutory text does not invoke jurisdiction or located in a jurisdictional section in the statute. As for the scope of non-jurisdictionality effects, the prototypical habeas noncompliant litigant is self-represented. The power-dynamic positions the litigant against the government, after they were already convicted. The prototypical noncompliance is usually attributable to the litigant, due to the many complicated time limitations that post-conviction statutes pose. However, the judge here made a mistake by ordering Bowles to file his appeal beyond the time allotted in statute. In these circumstances, Bowles could have perhaps checked the statute himself, but he relied on a judicial order. This mistake is most easily remedied by the trial judge, either by a new order or time extension. Because the cause of this mistake was not the noncompliant litigant, the (low) case chances should not make a difference. Evaluating all the factors, under this

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309 *Bowles*, 551 U.S. at 207.
310 *Id.*
311 *Id.*
312 *Id.*
313 *Id.*
314 *Id.*
315 *Id.*
316 Bowles v. Russell, 432 F.3d 668, 673 (6th Cir. 2005).
317 *Bowles*, 551 U.S. at 209-10.

Article's proposal, Bowles would have been able to argue his case on the merits on appeal.[318]

2. John R. Sand & Gravel Co. Petitioner filed a complaint against federal agency action on their leased property, a mine, that they argued was an unconstitutional taking of their rights.[319] The relevant statute of limitations was six years, but the petitioner did not file its complaint within that time period.[320] The government argued against the merits of the case, and "effectively waived" its argument that the complaint was untimely.[321] The government won the case on the merits, and petitioner appealed.[322] On appeal, however, the Court of Appeals found that timely filing was a jurisdictional litigation requirement and reversed.[323] The Court affirmed.[324]

Under the proposal, the affirmance would not be on the same grounds. The starting point would be a non-jurisdictional time limitation because there is no clear statutory statement of jurisdictionality. Cases concerning statutes of limitations and takings by the government are not all similar. The typical noncompliant litigant in a takings case owns a property, and usually, a noncompliance with a statute of limitations (unlike a time bar to file an appeal) is a matter best known to the noncompliant litigant. Many times, statutes of limitations begin running because of knowledge of an event and not an external verification. The same was true here. The petitioner knew when it became aware of the governmental action. The petitioner, a corporate entity, was late because of its mistaken interpretation of the proper timing. Throughout that time, it was represented, and although its opponent was the government, it could not be said that the difference in power was so great as to necessitate broad non-jurisdictional effects. If the government would have continuously asserted the untimeliness, it could be a clear case of a narrow non-jurisdictional label that does not include equitable tolling. However,

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[318] Even though the State objected to the untimeliness of the filing because it did not object to it at the district court.

[319] John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 132 (2007).

[320] *Id.* at 132-33.

[321] *Id.*

[322] *Id.* at 132.

[323] *Id.*

[324] *Id.* at 139.

the government waived its arguments of untimeliness. This counsels against the narrow construction. But given the low chances of the case, the petitioners should not be allowed to toll the statute of limitations.

3. Union Pacific Railroad Co. The NRAB, an agency mandated with settling labor disputes,[325] decided sua sponte that it could not hear several cases because, according to the evidence presented, the parties did not comply with a preliminary conferencing requirement.[326] The NRAB decided that such noncompliance stripped it of jurisdiction to adjudicate the disputes.[327] The district court affirmed the decision, but the Court of Appeals reversed, finding that the decision was incompatible with due process.[328] The Supreme Court held that the requirement to confer before adjudication was non-jurisdictional.[329] Applying the principles laid in *Arbaugh*, the Court decided that since that requirement was not written into the section attributing jurisdiction to the board, noncompliance does not strip it of jurisdiction.[330] The Court added that the agency is still allowed to prescribe sanctions for violations of its regulations.[331]

In this case, the litigation requirement was the requirement to mediate before reaching the board. Although the parties did not do so, they did not comply in agreement, which means the noncompliance was minimal in severity; it is a labor law case, where the adjudication is between two not-so-far-removed parties—employers and an employee union; the litigation requirement addressed the parties and was supposed to help them facilitate their dispute, it did not affect the tribunal. The scope of non-jurisdictionality should be very broad. The Court noted that the board could sanction the parties, but this does not make sense when adopting a broad view of jurisdictionality. As the litigation

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[325] 45 U.S.C. § 153(h).

[326] Union Pac. R.R. Co. v. Bhd. of Locomotive Eng'rs & Trainmen Gen. Comm., 558 U.S. 67, 77 (2009).

[327] The parties did not stipulate if conferencing was a disputed matter. *See id.* at 76-78.

[328] Bhd. of Locomotive Eng'rs & Trainmen Gen. Comm. v. Union Pac. R.R. Co., 522 F.3d 746, 750, 757-58 (7th Cir. 2008).

[329] *Union Pac.*, 558 U.S. at 83-84, 86.

[330] *Id.*

[331] *Id.*at 83-84.

requirement did not affect the tribunal's power to adjudicate, and the equally positioned parties agreed to waive it, no sanctions should be allowed.

4. Hamer. The case addressed Federal Rule of Appellate Procedure 4(a)(5)(C) that governs extension of period to file notices of appeal, limiting the extension to thirty days.[332] The petitioner filed a suit for employment discrimination under Title VII in federal court and lost on summary judgment.[333] After she lost, but before the end of the period to file a notice of appeal, petitioner's lawyers moved to withdraw.[334] They also asked for a two-month extension for Hamer to file a notice of appeal if she so desired.[335] The district court granted both motions despite the thirty day limit in the rule.[336] The respondents did not complain about the additional time given to Hamer.[337] When Hamer finally filed a pro se notice of appeal, timely under the extension she was granted, the respondents again did not dispute the timeliness of the filing.[338] Yet, the Court of Appeals questioned the appeal's timeliness sua sponte.[339] Only then did the respondents assert that plaintiff filed the notice of appeal untimely, and that the rule is jurisdictional.[340] The Court of Appeals agreed and dismissed the appeal for want of jurisdiction.[341] The Court vacated the judgment and remanded.[342] The Court found that the limit on specific time extension that Hamer got did not have a statutory basis and hence was non-jurisdictional.[343] Because the Court of Appeals did not address anything beyond the jurisdictional question, the Court remanded

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[332] Hamer v. Neighborhood Hous. Servs. of Chicago, 138 S. Ct. 13, 18 (2017).

[333] *Id.*

[334] *Id.*

[335] *Id.*

[336] *Id.*

[337] *Id.*

[338] *Id.*

[339] *Id.*

[340] *Id.*

[341] Hamer v. Neighborhood Hous. Servs. of Chicago, 835 F.3d 761, 762-63 (7th Cir. 2016).

[342] *Hamer*, 138 S. Ct. at 22.

[343] *Id.* at 21-22.

the case without deciding whether the respondents raised the issue timely or whether equitable tolling applied.[344]

Under this Article's proposal, the Court would have assumed non-jurisdictionality, as it did, but would not simply remand it to the lower courts. Instead, it would assess the context of the noncompliance with the litigation requirement, at least at the level of the prototypical litigant and noncompliance, as these are not fact-intensive inquiries: (1) the case is an employment discrimination case where the power dynamic between the parties is skewed in favor of the defendants; (2) the noncompliant litigant was not responsible for the noncompliance; (3) the litigant's formert attorneys' responsibility for the noncompliance; (4) the judge that did not notice the proposed noncompliance; and, (5) the plaintiff followed the instructions the judge had given her and filed her appeal pro se. All these factors lean towards the conclusion that to the requirement in this case merits broader non-jurisdictional effects that foreclose any sua sponte court action and allow for equitable tolling.[345] On the other hand, statistically, employment discrimination claims that are filed by petitioners without the EEOC have a meager success rate.[346] In addition, here, the plaintiff failed on the merits at the lower court. That could counter-weigh against the other factors, but only if they were not so determinatively one-sided. In this instance, it seems improper for case chances to triumph over the other issues. If the Court had made this determination, it would allow the lower courts to deal with the issues on remand and not address more procedural claims that could lead to denial of the plaintiff's chances of their day in court.

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[344] *Id.* at 22. On remand, the Court of Appeals decided that the respondents waived their right regarding the extension and did not reach the question of equitable tolling. Hamer v. Neighborhood Hous. Servs., 897 F.3d 835, 840 (7th Cir. 2018). The Court of Appeals also reached the merits of the case and affirmed the district court's judgment, which granted the defendants' summary judgment motion. *See id.*

[345] Although this would not have helped *Hamer* herself (*see supra* note 344), it would have allowed future courts a complete analysis of a noncompliance and avoid future wrongful dismissals.

[346] *Cf.* Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 429, 440 (2004).

CONCLUSION

In 2004, the Supreme Court broke off with a long line of cases that found litigation requirements to be part of a court's jurisdiction. The past cases reached that conclusion without much theory or discussion. The Court's new cases attempted to offer a theory to explain why a requirement is part of a court's jurisdiction. The theory that emerged requires a clear statement from Congress before labeling a litigation requirement as jurisdictional. The Court asserted that change is needed because the jurisdictional label had harsh consequences for litigants and the courts.

This Article argues that even though the Court's recent decisions have consistently found litigation requirements to be non-jurisdictional, any appearance of relief for beleaguered litigants is illusory. The harsh consequences remain in force. There are three reasons for this failure. First, the Court's rule structure, and the Court's unfaithful application of it, hinder its ability to mitigate the jurisdictional label's harsh consequences, even after the almost complete eradication of the jurisdictional label. Second, the Court did not guide lower courts on what effects non-jurisdictional litigation requirements have, leaving the courts to engage with unprecedented issues that prolonged litigation and retained harsh consequences for the same weaker litigants. Third, the Court applied the same rule to different types of requirements which merit different treatment due to their locus in the litigation.

This Article then offers a path to recalibrate the Court's doctrine. First, the Court should limit assignment of jurisdictional labels for litigation requirements to instances where Congress used the word "jurisdiction" in connection to the requirement or when the requirement is part of a jurisdictional part of a statute. Next, if the litigation requirement is non-jurisdictional, the Court should use context to analyze its effects. The analysis should consider the characteristics of the prototypical noncompliant litigant and those of the litigant who was noncompliant in that case. It should similarly analyze the noncompliance in question, and the chances of the case on the merits. This would enable results that are more compatible with the Court's aim to limit harsh consequences and would allow for more structure and guidance for lower courts adjudicating noncompliance with litigation requirements.