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Civil Procedure: Jurisdiction and Its Effects

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The Problem of Jurisdiction

Lamenting that "[j]urisdiction . . . is a word of many, too many, meanings,"[2] the Supreme Court recently has pressed a deliberate agenda to bring sense to the term by circumscribing its application and by calling for care and thoughtfulness in using it.[3] Yet this approach, which started as a productive effort to call attention to and reduce profligate and unthinking use of the term jurisdiction,[4] has re-created its originating problem. Jurisdiction now has three identities: (1) the "power" of a federal court,[5] (2) a label for a defined set of effects,[6] and (3) a creature of positive law that Congress can deploy at its whim.[7]

These identities are unsustainable and at war with each other. Jurisdiction cannot mean "power," for a federal court physically can enter a judgment without jurisdiction, and that judgment can become binding, enforceable, and unassailable.[8] A more watered-down definition might be "authority" to enter judgment, but a federal court has legal authority to enter a binding judgment on procedural grounds even while questioning its own jurisdiction.[9] Further, the formulation of jurisdiction as authority renders it conceptually indistinguishable from the many nonjurisdictional elements—ranging from the egregious (fraud on the court, suborned perjury, bribed judges, a trillion-dollar judgment for punitive damages) to the banal (finding Title VII liability for baldness discrimination)—that also inform legitimate authority in character and

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1. Excerpted and adapted from Scott Dodson, *Jurisdiction and Its Effects*, 105 GEO. L.J. 619 (2017).

2. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 90 (1998).

3. *See, e.g.*, Hamer v. Neighborhood Housing Servs. of Chi., 138 S. Ct. 13 (2017); Kontrick v. Ryan, 540 U.S. 443 (2004).

4. Scott Dodson, *A Revolution in Jurisdiction*, *in* THE LEGACY OF RUTH BADER GINSBURG 137, 148 (Scott Dodson ed. 2015).

5. United States v. Wong, 135 S. Ct. 1625, 1623-33 (2015).

6. United States v. Cotton, 535 U.S. 625, 630 (2002).

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

8. Durfee v. Duke, 375 U.S. 106, 111 (1963).

9. Sinochem Int'l Co. v. Malay. Int'l Shipping Corp., 549 U.S. 422 (2007).

degree indistinguishable from whether, say, the amount in controversy exceeds a jurisdictional threshold.[10]

Nor is jurisdiction merely a label for a defined set of effects. It has become rote that a jurisdictional requirement can be raised by any party or the court sua sponte any time before final judgment; is nonwaivable, nonconsentable, and nonforfeitable; and cannot be excused by judicial discretion or application of principles of equity.[11] But, in truth, jurisdictional rules can have fewer, even none, of these effects.[12] Take, for instance, the appellate-jurisdiction requirement of filing a timely notice of appeal in a civil case, which the Court has held to be jurisdictional.[13] The statute governing the requirement allows a court to extend the filing deadline for good cause and even allows a court to reopen the time period for certain equitable reasons.[14] Further, the jurisdictional requirement that the notice be "filed"[15] is subject to a judicial exception.[16] Finally, extensions of the deadline can depend upon party conduct.[17] The takeaway is that these equitable, discretionary, and party-conduct effects do not necessarily render the appellate requirements nonjurisdictional. Rather, the jurisdictional line simply incorporates the contours created by principles of equity, discretion, and party conduct. In short, a line need not be straight or rigid to be jurisdictional.

Finally, jurisdiction cannot be a mere positivist label that Congress deploys at its whim. Such deployment does no real definitional work and has no independent meaning other than to prescribe what effects flow from it, and as explained above, the jurisdiction-as-effects identity is itself incoherent.[18] Further, a positivist identity of jurisdiction offers no explanation for nonstatutory doctrines, such as Article III standing,

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10. *See, e.g.*, *In re* Courtright, No. 05-21672REF, at 4 (Bankr. E.D. Pa. Sept. 27, 2006) (mem.) (noting the defendant's argument that the judge "lacked jurisdiction to award punitive damages").

11. Scott Dodson, *Mandatory Rules*, 61 STAN. L. REV. 1, 3 (2008).

12. Scott Dodson, *Hybridizing Jurisdiction*, 99 CALIF. L. REV. 1439, 1457 (2011).

13. Bowles v. Russell, 551 U.S. 205, 213 (2007).

14. 28 U.S.C. § 2107(c).

15. *Id.* § 2107(a).

16. Houston v. Lack, 487 U.S. 266, 268 (1988) (allowing prisoners to "file" by delivering to prison authorities).

17. 28 U.S.C. § 2107(c) (allowing an extension if, and only if, a party timely files a motion).

18. *See* Scott Dodson, *Defending Jurisdiction*, 59 WM. & MARY L. REV. ONLINE 85 (2018).

personal jurisdiction, sovereign immunity, the independent-and-adequate-state-grounds doctrine, and the like.

Jurisdiction's Identity

I offer a different, simpler, and uniform definition: jurisdiction determines forum in a multiforum legal system. It is a descriptive and functional concept that helps allocate cases, define boundaries, and maintain relationships among competing forums. Importantly, jurisdiction does not speak to the authority of a single court in isolation, like a statute of limitations or standing doctrine might. Rather, jurisdiction defines both where a dispute belongs *and* where it does not. It is inherently a *relational* concept, an organizing force that either resolves or encourages territorial disputes within a community of forums. Jurisdiction provides answers to the following questions: When can a case be filed in federal or state court? (Original subject-matter jurisdiction.) When does a case move from district to appellate court? (Appellate jurisdiction.) Which states' courts can hear a case and which cannot? (Personal jurisdiction.) Which federal districts within a state can hear the case? (Venue.[19]) Jurisdiction erects both the fences that separate forums and the gates that cases may pass through.

Crucially, jurisdictionality does not depend on the mere existence of alternate forums. Otherwise, every judicial limit would be jurisdictional. Rather, jurisdiction itself must group or divide the forum possibilities. This key feature distinguishes, for example, statutes of limitations (which limit one court's authority independent of the availability or unavailability of other forums) from the doctrine of forum non conveniens (which limits a court's authority *because of* the availability of more convenient forums).

Congress cannot alter this definition of jurisdiction. It is part of jurisdiction's inherent nature. A sheep is a sheep, even if Congress tries to call it a wolf. If a limit determines forum in a multiforum legal system, it is jurisdictional. If it does not, it is not. Jurisdiction is definitional law, not positive law.

The *effects* of a particular jurisdictional limit, however, are a different matter. Those are products of positive law. Whether a jurisdictional line can be influenced by party preference, judicial discretion, or equitable considerations ought to be considered part of

19. Yes, venue is definitionally jurisdictional. I explain why in more detail below. For now, note that venue is a case-allocation doctrine of the same ilk as personal jurisdiction and subject-matter jurisdiction.

lawmakers' arsenal for maintaining workability and fairness in the legal landscape. Indeed, Congress has made the deadline to file a notice of appeal, despite its jurisdictional character, subject to principles of equity and to the preferences of the parties. In other circumstances, Congress could decide that a particular jurisdictional line is too important for systemic reasons to leave to the influence of the parties or the courts, and thus it might make the line nonwaivable, nondiscretionary, and even subject to sua sponte policing by the courts. The point is that positive law prescribes the effects for a particular jurisdictional line.

Categorizing Jurisdictional Doctrines

Any law that determines forum in a multiforum system, then, is properly typed "jurisdictional." Some doctrines customarily considered jurisdictional, such as diversity and federal-question jurisdiction, easily fit this definition, but others customarily considered nonjurisdictional fit too. Exhaustion requirements, for example, determine forum by diverting a dispute from one forum into another. Thus, obtaining a right-to-sue letter from the Equal Employment Opportunity Commission before suing under Title VII is jurisdictional because it demarcates the line of authority between an executive agency and a court.[20] Similarly, the requirement that an appellant file a notice of appeal is a jurisdictional requirement because filing divides authority between the district and appellate courts. Jurisdictional doctrines include the following:

- Federal-question jurisdiction;
- Diversity jurisdiction;
- Supplemental jurisdiction;
- Removal and remand;
- Appellate jurisdiction;
- Personal jurisdiction;
- Venue;
- Forum non conveniens;
- Exhaustion;
- Abstention; and
- The Federal Arbitration Act.

20. 42 U.S.C. §§ 2000e-5(f)(1)-(3).

These doctrines all share a common feature: They determine forum in a multiforum system. They therefore are properly described as jurisdictional.

It is true that these doctrines further varied goals. Abstention and exhaustion typically further systemic goals like federalism, judicial competence, and docket control; meanwhile, personal jurisdiction and venue further, at least in part, litigant goals of economy and convenience. These differences perhaps suggest that the doctrines should have varied effects to implement their respective goals effectively.

Happily, the effects are governed by positive law, which allows each doctrine to correctly be typed jurisdictional while still exhibiting a tailored constellation of effects that best suits it. Perhaps the system-centric abstention or exhaustion doctrines, for example, should be less amenable to party waiver than should the more litigant-centric doctrines of personal jurisdiction and venue or the Federal Arbitration Act. Likewise, some doctrines might be subject to equitable exceptions or discretion while others might not. I do not mean to try to attach the right set of effects to each doctrine here. Rather, my point is that these doctrines are all jurisdictional, even if they may have different sets of effects.

Categorizing Nonjurisdictional Doctrines

Any law that does not determine forum in a multiforum system cannot be jurisdictional. Statutes of limitations, for example, do not determine forum in a multiforum system. These instead speak to the viability of recovery in a particular court. Likewise, issues of statutory coverage—like the employee-numerosity requirement of Title VII—are claim requirements, not forum determinants. These speak to whether a particular case can be heard but not to case allocation among forums. A sample of nonjurisdictional rules includes the following:

- Remedy limits, like caps on damages or injunctive relief;
- Limitations periods;
- Requirements for fee shifting;
- Statutory-coverage issues, including extraterritoriality;
- Official immunity;
- Nonretroactivity;
- Service of process;
- Standards of review; and
- Standing, ripeness, and mootness.

These are nonjurisdictional because they address the competency of a court to adjudicate a particular dispute in isolation from that court's relationship with other adjudicative forums.

These groupings make for some odd doctrinal bedfellows. Standing, for example, is akin to a limitations period. But this is odd primarily because we have tended to think of jurisdiction in terms of its effects rather than as a structural principle about organizing forums. Standing somehow seems more jurisdictional than a limitations period because it is a constitutional limit that cannot be satisfied by judicial discretion or party consent.

But when freed from effects-based definitions, categorizing standing as nonjurisdictional becomes much easier, and more sensible.[21] Standing does not determine forum in a multiforum system because it speaks only to the limitations of the forum court to grant requested relief, just as a statute of limitations or a damages cap does. That makes them both nonjurisdictional. If Article III limits differ from limitations periods in terms of relative importance, then they can exhibit different effects. Article III standing can have all the typical jurisdictional effects (despite being nonjurisdictional), mootness can admit judicial exceptions (as it does[22]), ripeness can be waivable in certain circumstances (as it appears to be[23]), and limitations periods can be subject to all sorts of party-conduct and equitable exceptions. They are all nonjurisdictional because they do not determine forum in a multiforum system, but they can exhibit different effects to accommodate their doctrinal differences.

Other Implications

One surprising implication of this redefinition of jurisdiction is the resuscitation of the phrase "mandatory and jurisdictional," once used widely in appellate-requirement cases[24] but more recently derided as a "drive-by" jurisdictional phrase.[25] But my proposal gives independent meaning to both terms. "Jurisdictional" is descriptively accurate because the appellate requirements define whether a case is in district court or

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21. It also helps explain the Court's recent recharacterization of "prudential standing" doctrines as merits questions. *See* Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377 (2014).

22. Fed. Election Comm'n v. Wis. Right to Life, Inc., 551 U.S. 449, 462 (2007); City of Erie v. Pap's A.M., 529 U.S. 277, 288 (2000).

23. Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 670 n.2 (2010).

24. Robinson v. United States, 361 U.S. 220 (1960).

25. Eberhart v. United States, 546 U.S. 12, 16 (2005) (per curiam).

appellate court. Meanwhile, "mandatory" speaks to the particular effect of the limit at issue in the cases. A statement of the mandatory effect is independently necessary because the descriptive term "jurisdictional" does not inexorably have mandatory effect on the parties and the court. Thus, the phrase "mandatory and jurisdictional" addresses both the significance of the appellate requirement to the structural relationship between the district and appellate courts ("jurisdictional") and the effect of the requirement in a way that resolves the case ("mandatory").

Another implication is the need to reconsider several of the Court's recent jurisdictionality cases. Although these cases use the wrong approach, some nevertheless do reach the correct result. *Arbaugh v. Y&H Corp.*, for example, was correct in typing the employee-numerosity requirement of Title VII to be nonjurisdictional because that requirement does not attempt to draw boundary lines between institutions but rather imposes a limitation on the court's authorization to grant relief.[26] *Arbaugh* was wrong, however, in stating, in dictum, that Congress could have made the employee-numerosity requirement jurisdictional if it had wished.[27] To the contrary, the employee-numerosity requirement cannot be jurisdictional, no matter what Congress says, because it does not determine forum in a multiforum system.

Other decisions, however, reach the wrong result. *Union Pacific Railroad Co. v. Brotherhood of Locomotive Engineers & Trainmen*, for example, is incorrect in holding that the settlement-conference precondition to labor-dispute arbitration is nonjurisdictional.[28] Instead, the requirement is jurisdictional because it defines when the dispute must be negotiated in a settlement conference and when it may go to arbitration. Similarly, *Henderson v. Shinseki*, which held nonjurisdictional the deadline to appeal the denial of veterans' benefits to the U.S. Court of Appeals for Veterans Claims,[29] was incorrect because

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26. Arbaugh v. Y & H Corp., 546 U.S. 500, 513–14 (2006). Other correct results include *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010) (holding nonjurisdictional a statute's limits in extraterritorial application); *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010) (holding nonjurisdictional the Copyright Act's registration precondition to filing a claim); *Eberhart* (characterizing as nonjurisdictional the deadline for filing a motion for a new trial in a criminal case); *Kontrick v. Ryan*, 540 U.S. 443 (2004) (holding nonjurisdictional the deadline for filing objections to a bankruptcy debtor's discharge); *Scarborough v. Principi*, 541 U.S. 401 (2004) (holding nonjurisdictional a requirement for eligibility for attorney's fees against the federal government); and *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982) (holding nonjurisdictional the deadline to file an initial Title VII charge with the EEOC).

27. *Arbaugh*, 546 U.S. at 514.

28. 558 U.S. 67, 83 (2009).

29. 562 U.S. 428, 441 (2011).

the deadline marks the transition of the case from the Veterans' Board to the Veterans' Court. And, finally, *Hamer v. Neighborhood Housing Services of Chicago*, decided last Term, was incorrect in holding an appellate deadline nonjurisdictional simply because it was nonstatutory.[30] The jurisdictional definition is inherent; it is not dependent upon the source of the lawmaking authority.

Still others correctly label the law but fail to appreciate the disconnect between the law's label and its effects. *Bowles v. Russell*, for example, is correct in its jurisdictional characterization of the deadline to file a civil notice of appeal but not in its reasoning that the jurisdictional status necessarily precludes equitable exceptions.[31] Whether the appellate deadline allows equitable exceptions is a question of positive law—a routine question of statutory interpretation—not a product of its jurisdictional character, as *Bowles* suggested.[32]

Conclusion

The time has come, once again, to focus on jurisdiction. Jurisdiction determines forum in a multiforum system. That definition is inherent and static; it cannot be changed by Congress. But Congress can set the effects of jurisdictional boundaries; jurisdiction is not irrevocably tied to a defined set of effects. This conceptualization leads to a more coherent categorization of various doctrines, resolves many doctrinal inconsistencies, and enables tailored application of effects. A few hard cases remain—the political-question doctrine and sovereign immunity come to mind—but my conceptualization offers a framework for resolving even those.[33]

The challenge will be in implementation, but small steps forward are immediately attainable and can lead to greater change over time. Courts, Congress, commentators, and even litigants should reserve use of the term for those occasions when the law makes determinations among multiple forums and not use the term when the law speaks to a single forum in isolation. They should stop treating jurisdiction as something sacred, as "power," or as tied to immutable effects, and instead focus on what the effects of a particular law are or should be. With thoughtfulness and attention, we might finally find coherence in jurisdiction.

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30. 138 S. Ct. 13 (2017).
31. 551 U.S. 205, 212-14 (2007).
32. *Id.* at 214.
33. *See* Scott Dodson, *Jurisdiction and Its Effects*, 105 GEO. L.J. 619 (2017).