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Civil Procedure: A Critique of Jurisdictionality

Scott Dodson

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A Critique of Jurisdictionality

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Introduction

Since recognizing, in 1998, that "jurisdiction . . . is a word of many, too many meanings,"[2] the Supreme Court has engaged in a deliberate effort to bring discipline to the process of characterizing a rule as either jurisdictional or nonjurisdictional.[3] That effort is to be applauded. Because parties and courts are prone to characterizing a rule as jurisdictional when they really mean emphatic, important, or mandatory, the Court's effort has brought more attention and care to the use of the jurisdictional label by courts and litigants. The Court's effort also has useful principles for resolving the characterization inquiry. Because questions of jurisdictionality arise frequently and because late-discovered jurisdictional transgressions waste significant judicial and litigant resources, the Court's effort appropriately seeks solutions for a pervasive and harmful problem.[4]

The result of this effort has culminated in the articulation of a tripartite framework for resolving jurisdictional characterizations, which the Court set out authoritatively in 2017 in *Hamer v. Neighborhood Housing Services of Chicago*.[5]

First, because "[o]nly Congress may determine a lower federal court's subject-matter jurisdiction," nonstatutory rules cannot be jurisdictional.[6] Thus, limits contained only in the Federal Rules of Civil Procedure, Federal Rules of Criminal Procedure, Federal Rules of Appellate Procedure, or Federal Rules of Bankruptcy Procedure, among others, are always

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[1] Excerpted and adapted from Scott Dodson, *A Critique of Jurisdictionality*, 39 REV. LITIG. 355 (2020).
[2] Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 90 (1998).
[3] Scott Dodson, *Jurisdiction and Its Effects*, 105 GEO. L.J. 619, 620–21 (2017).
[4] Scott Dodson, *Mandatory Rules*, 61 STAN. L. REV. 1, 2–3 (2008).
[5] 138 S. Ct. 13, 20 (2017).
[6] *Id.* at 17.

nonjurisdictional.[7] Analogously, because only Congress may define the jurisdiction of Article I agencies, adjudicatory rules set internally by agencies must also be nonjurisdictional.[8]

Second, a statutory deadline governing case transfer between Article III courts is jurisdictional.[9] This category seems quite small; to date, only statutory deadlines governing civil appeals and (perhaps) civil petitions for certiorari characterized as jurisdictional.[10] By definition, this category excludes both transfer deadlines that are nonstatutory[11] and statutory deadlines that do not involve the transfer of the case between Article III courts.[12]

Third, all other statutory limits are jurisdictional only if Congress clearly so states.[13] In adopting the clear-statement rule for this category, the Court has insisted that Congress need not "incant magic words."[14] Rather, "traditional tools of statutory construction," including text, context, and precedent, "must plainly show that Congress imbued a procedural bar with jurisdictional consequences."[15] This clear-statement rule has proven fatal to all proffered jurisdictional characterizations.[16]

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[7] *Id.* at 20.
[8] Union Pac. R. Co. v. Locomotive Eng'rs, 558 U.S. 67, 71 (2009).
[9] *Hamer*, 138 S. Ct. at 18.
[10] Bowles v. Russell, 551 U.S. 205 (2007); Missouri v. Jenkins, 495 U.S. 33, 45 (1990).
[11] *E.g.*, Schacht v. United States, 398 U.S. 58, 64 (1970) (holding the rule-based deadline for filing a criminal petition for certiorari to the Supreme Court to be nonjurisdictional).
[12] *E.g.*, Henderson v. Shinseki, 562 U.S. 428 (2011) (holding nonjurisdictional the statutory 120-day deadline for a losing veteran to file a notice of appeal with the Article I Veterans Court).
[13] *Hamer*, 138 S. Ct. at 20 n.9; *see also* Arbaugh v. Y & H Corp., 546 U.S. 500, 515–16 (2006).
[14] Sebelius v. Auburn Reg'l Med. Ctr., 568 U.S. 145, 153 (2013).
[15] United States v. Wong, 135 S. Ct. 1625, 1631–33 (2015).
[16] In one case, the Court held the Tucker Act's filing deadline to be a "more absolute" bar that requires *sua sponte* policing by the courts but very carefully avoided an express characterization of the deadline as jurisdictional. *See* John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 134, 139 (2008). *Bowles* held a statutory appellate deadline to be jurisdictional but primarily based on precedent, *Bowles*, 551 U.S. at 206, and *Hamer* subsequently classified *Bowles* as falling under the second factor of the framework, *Hamer*, 138 S. Ct. at 18.

The Court has declared this tripartite framework "readily administrable"[17] and "clear and easy to apply,"[18] virtues it regularly strives to achieve in jurisdictional doctrine. Yet a set of new complications and oddities has arisen. These infirmities suggest that the Court's framework is not—and may never be—as clear, easy, or administrable as the Court has professed. In this Chapter, I expose the weaknesses of the present framework and offer some perspectives for reforming that doctrine in ways that return to the good progress the Court has made.

The Critique

The first factor—that only statutes can be jurisdictional—is actually false because court rules *can* be jurisdictional. Take, for example, the original jurisdiction of the Supreme Court. The Court has promulgated rules to govern such proceedings, and those rules could potentially be jurisdictional notwithstanding their nonstatutory basis.[19]

Even lower-court rules could be jurisdictional if Congress delegates the power to make jurisdictional rules to the Supreme Court. Congress already has done so in several instances, including by authorizing court-created rules "defin[ing] when a ruling of a district court is final for purposes of appeal"[20] and "provid[ing] for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for [by statute]."[21] The Supreme Court has accepted those delegations and promulgated rules under them,[22] rules that themselves could be jurisdictional despite the lack of any parallel statutory language. Rule 23(f), promulgated pursuant to that delegation, is a good

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[17] *Arbaugh*, 546 U.S. at 513–16.
[18] *Hamer*, 138 S. Ct. at 20.
[19] Supreme Court Rule 17, for example, states that the "initial pleading shall be preceded by a motion for leave to file," SUP. CT. R. 17(3), and it is at least arguable that the failure to file such a motion could be deemed a jurisdictional defect to any subsequent pleading.
[20] 28 U.S.C. § 2072(c).
[21] *Id.* § 1292(e).
[22] *See, e.g.*, FED. R. APP. P. 4(a)(4) (prescribing the tolling effect of post-judgment motions); *id.* 5(a) (providing for interlocutory appeals); FED. R. CIV. P. 23(f) (providing for interlocutory appeal of a class-certification decision).

example of a nonstatutory rule that could be characterized as jurisdictional because it sets the parameters by which a case moves from the authority of a district court to the authority of a circuit court. It's hard to imagine anything that would be *more* jurisdictional.

Nevertheless, in *Nutraceutical v. Lambert*, the Supreme Court characterized Rule 23(f) as nonjurisdictional under the first *Hamer* factor, saying perfunctorily, "because Rule 23(f)'s time limitation is found in a procedural rule, not a statute, it is properly classified as a nonjurisdictional claim-processing rule."[23] Whether Rule 23(f) is jurisdictional is debatable. But it cannot be nonjurisdictional simply because it is nonstatutory. Rule 23(f) is the product of a delegation from Congress to the Court of jurisdiction-setting authority. *Nutraceutical*'s reliance on the first *Hamer* factor was therefore misplaced.

The second factor in the *Hamer* framework—that statutory time prescriptions for the transfer of a case from one Article III court to another are always jurisdictional—causes some oddities. Venue transfer, for example, is a statutory mechanism of transferring adjudicatory authority from one Article III court to another. The general venue-transfer statutes do not have specified time prescriptions in them, but Congress certainly could so provide. And the MDL venue-transfer provision *does* have a time prescription: "Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred . . . ."[24] The second *Hamer* factor thus seems to make this time prescription for MDL venue transfer jurisdictional, such that the MDL transferee court *lacks jurisdiction* to entertain a transferred case after the conclusion of pretrial proceedings.[25]

Yet a jurisdictional characterization for a venue rule is more than a little awkward, for venue has long been deemed

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[23] 139 S. Ct. 710, 713 (2019).

[24] 28 U.S.C. § 1407(a).

[25] Other specialized venue-transfer statutes have similar timing provisions. *E.g.*, 18 U.S.C. § 3237(b) (allowing inter-district transfer of a criminal tax case if the defendant files a motion "within twenty days after arraignment").

nonjurisdictional by the Court,[26] and the civil venue statute expressly disavows that it is jurisdictional.[27] Further, the Supreme Court has suggested that while the MDL-transfer time prescription might be waivable by the parties and thus not jurisdictional,[28] a conclusion that major treatises and a majority of lower courts support.[29] How surprised MDL practitioners and courts must be to find that *Hamer* invalidates such waivers because the MDL-transfer time prescription is jurisdictional!

The third *Hamer* factor—the clear-statement rule against jurisdiction—suffers from the most complexity. That is peculiar because a clear-statement rule is supposed to make things easy: if the provision does not "speak in jurisdictional terms or refer in any way to the jurisdiction of the court,"[30] the provision should be nonjurisdictional, end of inquiry. But the Court has been faint-hearted about rigid adherence to the clear-statement rule. Instead, the Court has declared repeatedly that Congress need not "incant magic words."[31] Rather, "traditional tools of statutory construction," including text, context, and precedent, "must plainly show that Congress imbued a procedural bar with jurisdictional consequences."[32]

The result is clearly *not* a clear-statement rule, at least not one that has recognizable analogues in other areas. Clear-statement rules typically do not require consideration of the messiness of precedent or statutory purpose. After all, the very purpose of having a clear-statement rule in the first place is to avoid the messiness of ordinary statutory interpretation. Yet the Court has, under the third factor's "clear-statement rule," engaged in substantial interrogations of context, precedent, and statutory purpose.[33]

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[26] Neirbo Co. v. Bethlehem Shipping Corp., 308 U.S. 165, 167–68 (1939).
[27] 28 U.S.C. § 1390(a); *id.* § 1406(b).
[28] Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 35, 36 n.1 (1998).
[29] *E.g.*, MANUAL FOR COMPLEX LITIGATION § 20.132 (4th ed. 2002).
[30] Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 394 (1982).
[31] Hamer v. Neighborhood Hous. Servs. of Chi., 138 S. Ct. 13, 21 n.9 (2017).
[32] United States v. Wong, 135 S. Ct. 1625, 1631–33 (2015).
[33] *E.g.*, Henderson v. Shinseki, 562 U.S. 428, 440–41 (2011); Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154, 168 (2010).

In *United States v. Wong*, for example, the Court considered whether the Federal Tort Claims Act provision stating that an untimely action shall be "forever barred" is jurisdictional. The five-justice majority characterized the language to not speak in jurisdictional terms or address the power of the courts.[34] The four-justice dissent, reading the same language, disagreed, characterizing the language as "absolute" and with "no exceptions."[35] To the justices, the clear-statement rule appeared to point in opposite directions.

The Court split again on a third-factor case in *Patchak v. Zinke*,[36] which called for the interpretation of a statute stating that a certain kind of action "shall not be filed or maintained in a Federal court and shall be promptly dismissed."[37] A plurality of four justices would have held the statute jurisdictional because it "uses jurisdictional language" by directing that an action shall not be filed or maintained but shall be dismissed.[38] According to the plurality, the statute "completely prohibits actions" and thus "is best read as a jurisdiction-stripping statute."[39] Two justices concurred without reaching the jurisdictionality issue, but the three dissenting justices disagreed that the statute was jurisdictional. In their eyes, the statute "does not clearly state that it imposes a jurisdictional restriction."[40] Again, the clear-statement rule was of little use.

If each *Hamer* factor on its own generates uncertainty and confusion, then consider the anomalies created by the interplay of the factors.

One anomaly concerns criminal and civil appellate deadlines. The time to file a notice of appeal is prescribed by statute for civil cases but only by rule for certain criminal cases.[41] As a result, the statutory civil deadline is jurisdictional, but the nonstatutory

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[34] *Wong*, 135 S. Ct. at 1633.
[35] *Id.* at 1640 (Alito, J., dissenting) ("The FTCA's filing deadlines are jurisdictional.").
[36] 138 S. Ct. 897 (2018).
[37] *Id.* at 904 (Thomas, J.).
[38] *Id.* at 905 (Thomas, J.).
[39] *Id.* at 906 (Thomas, J.).
[40] *Id.* at 918–19 (Roberts, C.J., dissenting).
[41] 28 U.S.C. § 2107 (civil); FED. R. APP. P. 4 (criminal). A statutory deadline applies to appeals of certain criminal matters by the United States government. *See* 18 U.S.C. § 3731.

criminal deadline cannot be. The same anomaly inheres in the deadline to file a petition for certiorari to the U.S. Supreme Court: the civil deadline is jurisdictional because it is in a statute, yet the criminal deadline is nonjurisdictional because it is set out only in a court rule.[42] It is difficult to fathom a compelling reason—and the Court has not attempted to offer one—why the civil versions of the certiorari deadlines should be typed jurisdictional, and the criminal versions should not.

Deeper anomalies lurk. The statutory civil certiorari deadline applies regardless of whether the reviewed court is a federal court or a state court.[43] When certiorari is from a federal, Article III court, then the second factor of the framework makes that statutory deadline automatically jurisdictional. But when certiorari is from a state court or an Article I court, then that same statutory deadline falls outside of the second factor and instead must be evaluated according to the third factor's presumption *against* jurisdictionality. The Court's framework thus subjects the same statutory provision to varying jurisdictional analyses depending upon the circumstances, perhaps resulting in the peculiar conclusion that the civil certiorari deadline is jurisdictional for some petitions but nonjurisdictional for others.[44] The same peculiarity inheres in the statutory conditions for U.S. Courts of Appeals to hear bankruptcy appeals directly from either U.S. District Courts or Article I bankruptcy courts.[45]

The Solutions

These complications, oddities, and anomalies of the *Hamer* factors undermine the Court's attestation of a clear and simple jurisdictional framework. Two modest fixes and one strategic ploy could dramatically improve it going forward.

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[42] 28 U.S.C. § 2101(c) (civil); SUP. CT. R. 13.1 (criminal).
[43] 28 U.S.C. § 2101(c).
[44] If the Court were to modify its framework to include in the second factor transfers between state and federal courts, then it will run up against the removal statute, which includes many timing prescriptions that the lower federal courts have roundly declared nonjurisdictional. *See* Scott Dodson, *In Search of Removal Jurisdiction*, 102 NW. U. L. REV. 55, 65–70 (2008).
[45] 28 U.S.C. § 158.

The first fix would change the first factor to exempt nonstatutory rules from the jurisdictional characterization *unless Congress either lacks the jurisdictional-control authority in the first place or has lawfully delegated that authority to the rulemaker*. This change would recognize the fact that some nonstatutory rules might be jurisdictional, such as the Supreme Court's own rules or rules promulgated under jurisdiction-delegating statutes.

The second fix would eliminate the second factor and change the third factor to follow a more traditionally rigid clear-statement approach. This change would preserve the nonjurisdictional status of venue statutes and would simplify the application of the clear-statement rule going forward.

The strategic ploy is to avoid, whenever possible in hard cases, the jurisdictional question altogether. Avoidance is possible—perhaps even preferable—if dismissal is appropriate on other nonmerits grounds.[46] Avoidance is also possible if the rule must be enforced whether or not jurisdictional. In other words, if the real question in the case is whether the rule at issue is subject to equitable exceptions or to party waiver, then the court can answer that question directly in the negative without needing to reach the jurisdictional question. Looking to other grounds to resolve the case—such as nonmerits grounds or the particular effects of the rule—can enable courts to avoid hard questions of jurisdictional characterization left unsolved by the *Hamer* framework.[47]

Conclusion

The Court's jurisdictionality doctrine is showing signs of wear. My primary aim has been to call attention to its fissures and instabilities so that they can be corrected—through rebuilding or repair—before they cause collapse. Perhaps the Court will take up this challenge.

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[46] Sinochem Int'l Co. v. Malay Int'l Shipping Co., 549 U.S. 422, 431 (2007).

[47] The Court has taken this approach on occasion. *E.g.*, Manrique v. United States, 137 S. Ct. 1266, 1271–72 (2017).