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## Appreciating Mandatory Rules: A Reply to Critics

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## APPRECIATING MANDATORY RULES: A REPLY TO CRITICS

Scott Dodson\*

It seems that few are pleased with the Court's recent decision in *Bowles v. Russell*, in which the Court held the time limit for filing a notice of appeal to be jurisdictional and therefore not susceptible to the unique circumstances doctrine.<sup>1</sup> As I wrote in my original Essay, I believe the Court disrupted prior precedent and missed a golden opportunity to develop, in a principled way, a framework for characterizing rules as jurisdictional or not,<sup>2</sup> and I adhere to those views.

Three have responded to my Essay. Professor Perry Dane criticizes *Bowles* for failing to appreciate that jurisdictional rules—assuming the deadline to file a notice of appeal is in fact jurisdictional—need not lead inexorably to a rigid application.<sup>3</sup> Mr. E. King Poor, Esq., defends *Bowles* as rightly decided and also as a good result.<sup>4</sup> And, Professor Beth Burch criticizes *Bowles* for some of the same reasons I do, but she goes further to suggest that the Court (and I) failed to give sufficient recognition to the equity appeal of the case.<sup>5</sup> It is appropriate for me to provide a brief reply to those who have joined me in this debate.

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\* Assistant Professor, University of Arkansas School of Law. I am indebted to Beth Burch, Perry Dane, King Poor, Philip Pucillo, and Howard Wasserman for reviewing and commenting on earlier drafts.

<sup>1</sup> 127 S. Ct. 2360 (2007) (link).

<sup>2</sup> Scott Dodson, *Jurisdictionality and Bowles v. Russell*, 102 NW. U. L. REV. COLLOQUY 42 (2007), <http://www.law.northwestern.edu/lawreview/colloquy/2007/21/> (link) [hereinafter Dodson, *Jurisdictionality*]; cf. Scott Dodson, *In Search of Removal Jurisdiction*, 102 NW. U. L. REV. (forthcoming 2008) [hereinafter Dodson, *Removal Jurisdiction*] (setting forth such a framework).

<sup>3</sup> Perry Dane, *Sad Time: Thoughts on Jurisdictionality, the Legal Imagination, and Bowles v. Russell*, 102 NW. U. L. REV. COLLOQUY 164, 167 (2008), <http://www.law.northwestern.edu/lawreview/Colloquy/2008/2/> (link).

<sup>4</sup> 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, 152 (2008), <http://www.law.northwestern.edu/lawreview/Colloquy/2008/1/> (link).

<sup>5</sup> Elizabeth Chamblee Burch, *Nonjurisdictionality or Inequity*, 102 NW. U. L. REV. COLLOQUY 64, 65 (2007), <http://www.law.northwestern.edu/lawreview/colloquy/2007/24/> (link).

## I. A REPLY TO PROFESSOR DANE

I am sympathetic to Professor Dane's argument that a jurisdictional rule need not necessarily be applied rigidly.<sup>6</sup> I would go further, however, and explore—in a very preliminary way—three different strands that, while not necessarily entirely distinct from each other, capture different aspects of the role flexibility may play in jurisdictionality.

First, a rule could be jurisdictional without implicating a court's subject-matter jurisdiction and therefore could lack some attributes of jurisdictionality even if subject-matter jurisdiction remains rigid and inviolate. Rules of personal jurisdiction, for example, can be waived,<sup>7</sup> as can the jurisdictional-in-nature doctrine of state sovereign immunity.<sup>8</sup> If the absoluteness of jurisdictionality may be relaxed in these jurisdictional rules through consent and waiver, perhaps it might also be relaxed in other ways or in other jurisdictional doctrines that do not implicate subject-matter jurisdiction.

Second, a jurisdictional rule could be applied inflexibly but the preconditions giving rise to the rule could not. Professor Dane alludes to one such example, the "final judgment rule," which precludes appellate jurisdiction absent a "final" judgment.<sup>9</sup> The rule is jurisdictional, but the existence of a final judgment is a precondition that may be susceptible to flexibility in its determination. An analogous example closer to home might be the requirement to file a notice of appeal before appellate jurisdiction will attach. A notice might be jurisdictionally required, but what constitutes such notice might be subject to some discretion by a court.<sup>10</sup>

Third, a rule could be jurisdictional yet also, as a result of drafter intent, allow for flexibility. In some respects, the time to appeal fits into this category. Section 2107(c) allows the court to extend the time to appeal retroactively for equitable reasons.<sup>11</sup> Professor Dane proposes another exam-

<sup>6</sup> Dane, *supra* note 3, at 167.

<sup>7</sup> See *Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702–03 (1982) (link); FED. R. CIV. P. 12(h)(1).

<sup>8</sup> See *Clark v. Barnard*, 108 U.S. 436, 447 (1883) (link); see also *Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 620 (2002) (link) (holding that a state's voluntary removal to federal court waives Eleventh Amendment immunity).

<sup>9</sup> Dane, *supra* note 3, at 167.

<sup>10</sup> Mark A. Hall, *The Jurisdictional Nature of the Time to Appeal*, 21 GA. L. REV. 399, 410 (1986) ("[N]otice of appeal timing limitations simply impose a mandatory precondition to acquiring appellate jurisdiction, no different in kind . . . from the precondition to original jurisdiction that the plaintiff file a technically correct complaint stating a cause of action within the statute of limitations."); cf. *United States v. Cos*, 498 F.3d 1115, 1123 (2007) (holding that although the time to appeal might be jurisdictional, the determination of when that time began to run is not); cf. also *Smith v. Barry*, 502 U.S. 244, 245 (1992) (link) (holding an appellate brief to constitute a notice of appeal for purpose of the timely notice of appeal requirement); *Haney v. Mizell Mem'l Hosp.*, 744 F.2d 1467, 1472 n.3 (11th Cir. 1984) (stating that Rule 4(a) is not itself jurisdictional but instead is a "mandatory prerequisite to the exercise of appellate jurisdiction").

<sup>11</sup> 28 U.S.C. § 2107(c) (2000) (link).

ple: Congress could not have intended the courts to enforce rigidly the time limit to file a petition for certiorari in the face of an unforeseen snowstorm that unreasonably delayed a petition.<sup>12</sup> In other words, Congress might make a rule jurisdictional yet also intend it to be subject to some flexibility in application.

It seems to me that Professor Dane focuses on the third category in critiquing *Bowles*, but I think the other categories might have something to offer as well. For example, perhaps appellate jurisdiction is not subject-matter jurisdiction at all but instead is a breed of jurisdiction—like personal jurisdiction—that need not be applied so rigidly. Or, perhaps appellate jurisdiction is subject-matter jurisdiction, but the precondition of a timely notice of appeal is a fact amenable to a degree of equity or flexibility.

My point is that I think Professor Dane is on to something, something that needs further thought and discussion. And therefore I join him in expressing sadness that the Court continues to miss opportunities to provide just that.<sup>13</sup>

## II. A REPLY TO MR. POOR

Professor Dane's position that a rule could be jurisdictional yet provide some flexibility undermines Mr. Poor's defense of *Bowles* even were Mr. Poor correct that the rule is properly characterized as jurisdictional. But because my original Essay took the nonjurisdictional path at the *Bowles* fork rather than the jurisdictional path, I will reply to Mr. Poor from that perspective.

Mr. Poor defends *Bowles* on two grounds. First, he agrees with the Court that the deadline to file a notice of appeal "has always been deemed to be 'jurisdictional.'"<sup>14</sup> Second, he suggests that a jurisdictional characterization promotes "greater stability and overall fairness."<sup>15</sup> I will comment on each.

First, the Supreme Court's historical treatment of the time to file a notice of appeal in a civil case has not been as clear or consistent as either *Bowles* or Mr. Poor makes it seem. *Bowles* relied on six cases as evidence of a "longstanding treatment" of the time to file an appeal as jurisdictional. But, two of those cases did not address the *time* to appeal and instead held appellate jurisdiction lacking when no notice of appeal had been filed *at*

<sup>12</sup> Dane, *supra* note 3, at 167–68 (discussing *Teague v. Comm'r of Customs*, 394 U.S. 977 (1969)).

<sup>13</sup> The most recent example is *John R. Sand & Gravel Co. v. United States*, 128 S. Ct. 750 (2008) (link), in which the Court again neglected to take serious stock of its jurisdictionality jurisprudence and instead relied on *stare decisis* to characterize a statutory deadline, *id.* at 756, though elsewhere I have argued that the case may hold some silver lining on this issue. See Posting of Scott Dodson to Civil Procedure Prof Blog, <http://lawprofessors.typepad.com/civpro/2008/01/dodson-three-mu.html> (Jan. 8, 2008) (link).

<sup>14</sup> Poor, *supra* note 4, at 151.

<sup>15</sup> *Id.* at 151–52.

*all.*<sup>16</sup> A third dealt with an issue of Supreme Court jurisdiction—rather than appellate jurisdiction—and referenced the time to file a notice of appeal by way of analogy only.<sup>17</sup>

The other three cases did resolve the consequence of an untimely filing of a notice of appeal, but none of them recognized any justification for a *jurisdictional* characterization as opposed to a *mandatory* characterization. Indeed, two of the three dealt specifically with the ability of a court to excuse untimely filings for equitable reasons when the appellee properly raised the timeliness issue—a quintessential issue only relevant if the rule is mandatory rather than jurisdictional.<sup>18</sup> The last, *Scarborough v. Pargoud*,<sup>19</sup> resolves the issue summarily and without detailed explanation; it is unclear whether the appellee objected or timely moved to dismiss the appeal.<sup>20</sup> In addition, as a case that predated the creation of the courts of appeals (and, by necessity, 28 U.S.C. § 2107), it only addressed an appeal from a district court to the Supreme Court.

Mr. Poor adds six other cases that *Bowles* did not rely upon,<sup>21</sup> but these additions do not help his (or the Court's) case. Four of the six do not address the character of the deadline to file a notice of appeal in a civil case.<sup>22</sup> A fifth does mention the time to file a notice of appeal, but only in a passing footnote, and nothing in the case turned on the characterization.<sup>23</sup> Only one

<sup>16</sup> *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 314 (1988) (link) (holding that the failure to specify a party in the notice of appeal constitutes a failure of that party to appeal at all); *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 60–61 (1982) (link) (per curiam) (holding that the filing of a premature notice of appeal nullifies it and constitutes a failure to file any notice of appeal).

<sup>17</sup> *Hohn v. United States*, 524 U.S. 236, 246–47 (1998) (link).

<sup>18</sup> *United States v. Curry*, 47 U.S. (6 How.) 106, 109, 113 (1848) (link) (dismissing the appeal on the motion of the appellee notwithstanding the appellant's arguments for equitable leniency); *Browder v. Dep't of Corr. of Ill.*, 434 U.S. 257, 264 (1978) (link) (same).

<sup>19</sup> 108 U.S. 567 (1883) (link).

<sup>20</sup> *Id.* at 567–68 (summarily dismissing an appeal without elaborating why the rule was jurisdictional rather than mandatory).

<sup>21</sup> Poor, *supra* note 4, at 154 n.16.

<sup>22</sup> *Budinich v. Becton Dickinson & Co.* addressed when a judgment becomes final, not whether the time limit accruing after that event occurs is jurisdictional, and in any case, the appellee timely moved to dismiss the appeal on untimeliness grounds. 486 U.S. 196, 197, 199 (1988) (link). *Old Nick Williams Co. v. United States* addressed the characterization of an appeal from a criminal, not a civil, case, and in any case, the respondent timely moved to dismiss the writ of error based on the untimely appeal. 215 U.S. 541, 541–42 (1910) (link). Similarly, *United States v. Robinson*, which Mr. Poor repeatedly cites, *see* Poor, *supra* note 4, at 154 nn.16 & 18; *id.* at 155 n.24, characterized the time limit for filing a criminal (not a civil) appeal as “mandatory and jurisdictional,” 361 U.S. 220, 229 (1960) (link), but the narrow issue presented was whether the deadline was mandatory. Regardless, the Court's “mandatory and jurisdictional” characterization has since been corrected by a unanimous Supreme Court as mandatory but nonjurisdictional. *Eberhart v. United States*, 546 U.S. 12, 17–18 (2005) (link) (per curiam). Finally, *Edmonson v. Bloomshire* confronted an appeal that was timely filed and therefore valid; the defect at issue was the appellant's failure to transmit the record in a timely manner. 74 U.S. (7 Wall.) 306, 307, 311 (1868) (link).

<sup>23</sup> *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 159 n.6 (2003) (link) (addressing a question of statutory interpretation under the Coal Act).

of the six cases, *Credit Co. v. Arkansas Central Railway Co.*,<sup>24</sup> actually appears to confront an untimely civil notice of appeal; but, like *Scarborough*, its reasoning is sparse, its procedural history is unclear, and it antedated the creation of the courts of appeals.<sup>25</sup>

In short, neither *Bowles* nor Mr. Poor has pointed to a single Supreme Court decision holding that the deadline to file a notice of appeal in a civil case must be enforced over the appellant's consent, waiver, or forfeiture.<sup>26</sup> In the cases cited, the Court's characterizations of the deadline as jurisdictional, as opposed to mandatory, are either *dicta* or products of a careless use of the term "jurisdictional."<sup>27</sup> They provide no rational reason to elevate the deadline's status above "mandatory" to "jurisdictional." And, unlike more recent cases, they give no serious thought to what jurisdiction means and how to determine it in a broader context. As a result, in my view, they deserve less deference than Mr. Poor would give them.<sup>28</sup>

In light of that, it would not have been out of line for *Bowles* to take the more cautious, and narrower, approach of characterizing the deadline as mandatory rather than jurisdictional. Indeed, in several previous instances, the Court has dispensed with long traditions of calling deadlines jurisdic-

<sup>24</sup> 128 U.S. 258 (1888) (link).

<sup>25</sup> *Id.* at 258.

<sup>26</sup> Mr. Poor alludes to "thousands" of lower federal court decisions holding the rule to be jurisdictional as well. Poor, *supra* note 4, at 154. I have not reviewed each case, so I cannot say whether any decision actually addressed the distinction between a mandatory characterization and a jurisdictional characterization in a thoughtful and reasoned way. But I doubt it. Lower courts take their cues from the Supreme Court, and if the Supreme Court used the term "jurisdictional," they are likely to follow it, even if the Supreme Court's use was careless and unthinking. Mr. Poor's own citation supports this. He finds over 1,300 cases that cited *United States v. Robinson*, 361 U.S. 220 (1960) (link), and mentioned the jurisdictional status of a deadline or time period. But *Robinson's* jurisdictional characterization of Rule 33 of the Federal Rules of Criminal Procedure has been disavowed by the Supreme Court. See *Eberhart*, 546 U.S. at 17–18. All that those 1,300 cases have done is compound *Robinson's* error.

<sup>27</sup> This careless use of the term has been recognized recently and repeatedly by the Court. See *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 127 S. Ct. 1184, 1193 (2007) (link) (admitting that phrases from prior precedent using the term "jurisdiction" were "less than 'feliculously' crafted"); *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 510 (2006) (link) (confessing that courts had "sometimes been profligate in [their] use of the term [jurisdictional]"); *Eberhart*, 546 U.S. at 19 (noting that the lower court's improper characterization of a federal rule as jurisdictional "is an error shared among the circuits, and that it was caused in large part by imprecision in our prior cases"); *Kontrick v. Ryan*, 540 U.S. 443, 454 (2004) (link) ("Courts, including this Court, it is true, have been less than meticulous . . . ; they have more than occasionally used the term 'jurisdictional' to describe emphatic time prescriptions in rules of court.").

<sup>28</sup> My original Essay did not "overlook[]" the historical treatment of the deadline to file a notice of appeal. Poor, *supra* note 4, at 153. Rather, I argued that adhering to that treatment in the face of recent precedent trending away from a jurisdictional characterization caused doctrinal inconsistency, particularly because *Bowles's* rationale for distinguishing the more recent precedent is weak. Dodson, *Jurisdictionality*, *supra* note 2, at 43–45. For a more comprehensive argument that *Bowles's* distinction between statutory rules and non-statutory rules is logically flawed, see Scott Dodson, *The Failure of Bowles v. Russell*, 43 TULSA L. REV. (forthcoming 2008) (manuscript on file with author), available at [http://works.bepress.com/scott\\_dodson/17/](http://works.bepress.com/scott_dodson/17/) (link).

tional when the cases forming that tradition did not turn on such a characterization.<sup>29</sup> In addition, the Court also has recognized the value of deciding the narrower issue of whether a rule is mandatory rather than the broader issue of whether the rule is also jurisdictional.<sup>30</sup> What all of this means is that *Bowles*'s heavy, even dispositive, reliance on a "longstanding tradition," without other reasons for characterizing the deadline as jurisdictional, was unwarranted.

This is not to say that a longstanding historical treatment has no place in the characterization inquiry. Indeed, elsewhere, I have argued that it does have a place.<sup>31</sup> But it is only one factor in a more nuanced analysis of several important factors relevant to jurisdictional characterization issues. To be clear, I am not arguing that federal courts have not used, for many years, the term "jurisdictional" to describe the deadline to file a notice of appeal. Rather, my point is that this historical treatment, upon closer inspection, has holes and has been undermined by subsequent and more circumspect decisions on jurisdictional issues. As a result, I think the Court would have been wise to avoid characterizing the rule as jurisdictional solely because of its historical tradition. The more circumspect route would have been to address only the narrower issue before it—whether the rule was mandatory. At the very least, if forced to determine the jurisdictionality of the deadline, the Court should have considered a more nuanced approach than rote reliance on historical pedigree.

Second, the sole policy justification that Mr. Poor relies upon to support a jurisdictional characterization over a mandatory characterization—finality<sup>32</sup>—does not strongly support his case, and in any event, is outweighed by other factors.

Mr. Poor says that a nonjurisdictional characterization would transform the time limit into "nothing more than a 'helpful hint' that could be ignored when convenient."<sup>33</sup> He fears that "the parties could hold it in abeyance for

<sup>29</sup> See, e.g., *Arbaugh*, 546 U.S. at 512 (refusing to follow decisions characterizing Title VII's definitional section as jurisdictional because the "decision did not turn on that characterization, and the parties did not cross swords over it"); *Eberhart*, 546 U.S. at 17–18 (interpreting the phrase "mandatory and jurisdictional" as used in *United States v. Robinson*, 361 U.S. 220, 228–29 (1960) (link), as "emphatically mandatory"); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 91 (1998) (link) (declining to follow a decision characterizing a limit as jurisdictional because the case did not turn on it); *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 395 (1982) (link) (dispensing with a long line of cases treating the deadline for filing a Title VII suit as jurisdictional when the precise holdings of precedent did not turn on that characterization).

<sup>30</sup> *Hallstrom v. Tillamook County*, 493 U.S. 20, 31 (1989) (link); cf. *John R. Sand & Gravel Co. v. United States*, 128 S. Ct. 750, 753–54 (2008) (link) (declining to address the jurisdictionality of the limitations period of the Tucker Act and instead addressing the narrow issue presented by the facts, namely, whether a court of appeals could raise noncompliance sua sponte despite the government's waiver of the issue in the lower courts).

<sup>31</sup> See *Dodson, Removal Jurisdiction*, *supra* note 2, Part III(D)(1).

<sup>32</sup> *Poor*, *supra* note 4, at 156.

<sup>33</sup> *Id.* at 158.

months or even years, if for instance, they were discussing settlement.”<sup>34</sup> But what is wrong with that? Convenience and settlement seem like positive values to me. In addition, these features exist in countless other non-judicial deadlines and judicial limits, for which courts have long allowed waiver and consent despite their effects on finality.<sup>35</sup> Even statutes of limitations, a close analogue to the deadline to file a notice of appeal, are subject to waiver, even though they promote values (among others) unrelated to the interests of the parties.<sup>36</sup>

I concede that the ability of a party to waive or forfeit a timeliness objection may give rise to odd incidences of satellite litigation, as illustrated by Mr. Poor’s “Hypothetical 2.”<sup>37</sup> But these incidences should be rare indeed, for only the most incompetent attorney would unwittingly forfeit his objection to the timeliness of a notice of appeal.<sup>38</sup> The vast majority of failures to object would be intentional and strategic, and thus unlikely to give rise to satellite litigation. And even in the case of an unwitting forfeiture, the appellee may still prefer to litigate the merits rather than the satellite issue of timeliness. Finally, the likelihood of extensive satellite litigation is particularly low in these cases, for the end result is likely to be a swift and conclusive resolution by the appellate court, coupled with a published rebuke to the attorney for failing to heed the mandatory nature of the rule.<sup>39</sup>

Compared to the relatively low costs of allowing waiver and forfeiture, the benefits are far greater. Most waivers and forfeitures would inure to the benefit of the parties and the judicial system. Perhaps the parties wish to have uninterrupted time to settle yet be able to preserve their right to appeal (something to be encouraged, in my view).<sup>40</sup> Perhaps the appellee agrees to an extension in exchange for some concession by the appellant that helps streamline the appeal or litigation as a whole. Perhaps the appellant is a

<sup>34</sup> *Id.*

<sup>35</sup> See, e.g., *Eberhart*, 546 U.S. at 19 (“Rule 33, like Rule 29 and Bankruptcy Rule 4004, is a claim-processing rule—one that is admittedly inflexible because of Rule 45(b)’s insistent demand for a definite end to proceedings. These claim-processing rules thus assure relief to a party properly raising them, but do not compel the same result if the party forfeits them.”).

<sup>36</sup> See *Day v. McDonough*, 547 U.S. 198, 205 (2006) (link).

<sup>37</sup> Poor, *supra* note 4, at 159.

<sup>38</sup> Mr. Poor’s own examples seem particularly implausible. *Id.* at 159–160. The failure to obtain written consent from an adversary before intentionally missing a deadline, as in Hypothetical 2, and the failure to assert a known right when directly asked to assert it, as in Hypothetical 5, are omissions that verge on malpractice.

<sup>39</sup> Cf. *Caterpillar, Inc. v. Lewis*, 519 U.S. 61, 77–78 (1996) (link) (“The well-advised defendant, we are satisfied, will foresee the likely outcome of an unwarranted removal—a swift and nonreviewable remand order, see 28 U.S.C. §§ 1447(c), (d) (link), attended by the displeasure of a district court whose authority has been improperly invoked. The odds against any gain from a wrongful removal, in sum, render improbable Lewis’ projection of increased resort to the maneuver.”).

<sup>40</sup> Mr. Poor actually makes this point himself, though he appears to find it an unwelcome development. Poor, *supra* note 4, at 158 n.34 (citing *Endicott Johnson Corp. v. Liberty Mut. Ins. Co.*, 116 F.3d 53, 55–58 (2d Cir. 1997)).

few days late but both parties would prefer to litigate the merits of the appeal rather than the timeliness issue. It seems to me far more likely that the benefits of a mandatory characterization outweigh the slight risk of satellite litigation.

And, as I argued in my original Essay, Mr. Poor's jurisdictional characterization is not without its warts. It obligates every circuit judge in every appeal to monitor and raise any questions about timeliness. If a timeliness issue slips through the cracks, the entire appeal could be dismissed after full briefing and argument on the merits, even if neither party or the affected third parties wish for such a result. And, finally, if one party does recognize the defect but the other party does not, the party that recognizes it (even if she is the tardy appellant!) can hold that ace up her sleeve and either win on the merits and never play it, or lose on the merits and play it on a motion for rehearing, essentially gaining two bites at the apple.<sup>41</sup>

Therefore, I am skeptical of Mr. Poor's assertion that "experience has taught that [a nonjurisdictional characterization] would, over the long term, engender far more instability, expense, delay, and ultimately unfairness."<sup>42</sup> Empirical evidence may prove me wrong, but it is hard to see how a jurisdictional characterization is more stable, less costly, and fairer than a mandatory characterization.

### III. A REPLY TO PROFESSOR BURCH

Professor Burch agrees that the deadline is nonjurisdictional but fears that a mandatory characterization of the rule is too harsh and too insensitive to the needs of equity in this case.<sup>43</sup> She argues that the deadline must take equity into consideration as a matter of procedural justice in appeals.<sup>44</sup>

I do not disagree that procedural justice should be an important consideration for a judge confronted with a characterization issue. And I am sympathetic to the inequities of Mr. Bowles's difficult position. After all, the point of my original Essay was not to suggest that a mandatory characterization was correct; rather, it was to point out that a mandatory characterization, as opposed to a jurisdictional characterization, had the salutary benefits of better conserving litigant and judicial resources and of being more compatible with precedent.

I do, however, believe that considerations of fairness cannot be the only—or even necessarily the most important—factor for courts confronted with characterization issues. Just as considerations of a "longstanding treatment" cannot be taken alone, so notions of fairness must be balanced

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<sup>41</sup> Dodson, *Jurisdictionality*, *supra* note 2, at 46.

<sup>42</sup> Poor, *supra* note 4, at 162.

<sup>43</sup> Burch, *supra* note 5, at 65 ("[T]his nonjurisdictional alternative makes sense. It is the 'mandatory' aspect of Professor Dodson's proposal that concerns me; it leaves no room for equity absent the mercy of opposing counsel.").

<sup>44</sup> *Id.* at 67–69.

against other important considerations—efficiency, cost-effectiveness, litigant autonomy, and predictability are but a few<sup>45</sup>—that do not necessarily require the availability of equity, and, in some cases, might counsel against it. In short, the possibility of unfair and inequitable results from a rigid application of the rule is a consideration in determining whether to characterize the rule as mandatory, but it is not the only consideration and it may be outweighed by other factors. Professor Burch’s focus on equity is understandable, is important, and ultimately may be convincing. But operating in isolation, a focus on equity frustrates the larger project of making difficult characterization determinations more principled and holistic.

Professor Burch kindly does not (though it would be appropriate for her to) criticize me for failing to explain what that larger project might look like. After all, if I am going to suggest that fairness and equity might not control in this case, I ought at least to explain why.

So let me, in a preliminary manner, sketch out what I view as the strongest arguments supporting a mandatory characterization. These should be weighed against the benefits of the availability of equity.

First, the text of the statute provides strong countervailing reasons against Professor Burch’s view. Congress used the words “no appeal shall [be brought] . . . unless notice of appeal is [timely] filed.”<sup>46</sup> The word “shall” may not be so mandatory as the phrase “without exception,” particularly in light of the interpretative canon that Congress presumptively legislates against a backdrop of equity,<sup>47</sup> but most courts nevertheless have construed “shall” to mean mandatory.<sup>48</sup> In addition, Congress expressly provided specific and detailed exceptions and a strict time limit for raising excusable neglect or good cause.<sup>49</sup> Congress’s deliberate choices here sug-

<sup>45</sup> Dodson, *Jurisdictionality*, *supra* note 2, at 47.

<sup>46</sup> 28 U.S.C. § 2107(a) (2000) (link).

<sup>47</sup> See *Irwin v. Dep’t of Veterans Affairs*, 498 U.S. 89, 95 (1990) (link) (“Time requirements in lawsuits between private litigants are customarily subject to ‘equitable tolling.’”); *Day v. McDonough*, 547 U.S. 198, 213 (2006) (Scalia, J., dissenting) (“By imposing an unqualified ‘period of limitation’ against the background understanding that a defense of ‘limitations’ must be raised in the answer, the statute implies that the usual forfeiture rule is applicable.”).

<sup>48</sup> See, e.g., *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) (link) (stating that “the mandatory ‘shall’ . . . normally creates an obligation impervious to judicial discretion”). Of course, there are cases suggesting the opposite as well. See, e.g., *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 432–33 n.9 (1995) (link) (“Though ‘shall’ generally means ‘must,’ legal writers sometimes use, or misuse, ‘shall’ to mean ‘should,’ ‘will,’ or even ‘may.’”); *Nat’l Ass’n of Home Builders v. Defenders of Wildlife*, 127 S. Ct. 2518, 2548 & n.12 (2007) (link) (Stevens, J., dissenting) (“[O]ur analysis should not end simply because a statute uses the word ‘shall.’ Instead, we must look more closely at its listed criteria to determine whether they allow for discretion, despite the use of ‘shall.’ After all, . . . a federal statute using the word ‘shall’ will sometimes allow room for discretion.”); *United Hosp. Ctr. v. Richardson*, 757 F.2d 1445, 1453 (4th Cir. 1985) (stating that “in a proper case ‘shall’ may properly be construed as permissive”); B. GARNER, *DICTIONARY OF MODERN LEGAL USAGE* 939 (2d ed. 1995) (“[C]ourts in virtually every English-speaking jurisdiction have held—by necessity—that *shall* means *may* in some contexts, and vice versa.”).

<sup>49</sup> 28 U.S.C. § 2107(c) (link).

gest that it meant to restrict judicial discretion outside of these particular parameters.<sup>50</sup>

Second, cases interpreting time limits for filing notices of appeal consistently have held them to be mandatory.<sup>51</sup> There is good reason to question *Bowles*'s characterization of the precedent as supporting a jurisdictional characterization, but the precedent is far firmer as to the rule's mandatory character. Allowing equitable excuses at this stage risks doing even more violence to existing precedent than the jurisdictional characterization of *Bowles* does.

Third, the values of fairness and equity must be considered in light of competing values such as efficiency, predictability, and finality. For example, the deadline to appeal, by discouraging old and stale appeals, ensures some modicum of finality to both the litigants and the courts and encourages the parties to pursue appeals with alacrity.<sup>52</sup> I question whether these values outweigh the strong equitable appeal of Keith *Bowles*'s case, but, at the very least, they mitigate it.

I will not evaluate these arguments against the need for equity here—ultimately, Professor Burch's position may have the better of it.<sup>53</sup> I mean only to show that arguments for equity must overcome more than just the need for it.

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<sup>50</sup> See, e.g., *United States v. Beggerly*, 524 U.S. 38, 48–49 (1998) (link) (internal citations omitted) (“Equitable tolling is not permissible where it is inconsistent with the text of the relevant statute. Here, the QTA, by providing that the statute of limitations will not begin to run until the plaintiff ‘knew or should have known of the claim of the United States,’ has already effectively allowed for equitable tolling . . . . Given this fact, and the unusually generous nature of the QTA’s limitations time period, extension of the statutory period by additional equitable tolling would be unwarranted.”); *United States v. Brockamp*, 519 U.S. 347, 352 (1997) (link) (“Section 6511’s detail, its technical language, the iteration of the limitations in both procedural and substantive forms, and the explicit listing of exceptions, taken together, indicate to us that Congress did not intend courts to read other unmentioned, open-ended, ‘equitable’ exceptions into the statute that it wrote.”); *Carlisle v. United States*, 517 U.S. 416, 421 (1996) (link) (“There is simply no room in the text of Rules 29 and 45(b) for the granting of an untimely post-verdict motion for judgment of acquittal, regardless of whether the motion is accompanied by a claim of legal innocence, is filed before sentencing, or was filed [one day] late because of attorney error.”); *Bank of Ala. v. Dalton*, 50 U.S. 522 (1850) (link) (interpreting a statute of limitations that includes specified exceptions to exclude others).

<sup>51</sup> See *Bowles v. Russell*, 127 S. Ct. 2360, 2365 (2007) (link) (citing precedent). The precedent usually calls the deadline “mandatory and jurisdictional,” but, as I have argued above, the best interpretation of that phrase is that the cases held the deadline to be “emphatically mandatory.” *Supra* text accompanying notes 26–28.

<sup>52</sup> Cf. *Taylor v. Freeland & Kronz*, 503 U.S. 638, 644 (1992) (link) (“Deadlines may lead to unwelcome results, but they prompt parties to act and they produce finality.”).

<sup>53</sup> It is possible that the need for equity is greater in the habeas context than in other run-of-the-mill civil cases. Cf. *Harris v. Nelson*, 394 U.S. 286, 293–94 (1969) (link) (noting the need for some recognition of the differences between habeas and other civil procedures).

## IV. CONCLUSION

By my generalized appraisal of the comments, Professor Burch and Mr. Poor are on opposite ends, with Professor Dane and I staking out middle roads that are, in some respects, mirror images of each other. Whatever one thinks of the relative merits of each position, it strikes me that these varied approaches suggest that I was right about at least one thing: *Bowles* is a sleeper case<sup>54</sup> that deserves more thought and attention. I look forward to continuing the conversation.

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<sup>54</sup> Dodson, *Jurisdictionality*, *supra* note 2, at 48.