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Scott Dodson
UC Hastings College of the Law, dodsons@uchastings.edu

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Recommended Citation
Scott Dodson, *A Critique of Jurisdictionality*, 39 *Rev. Litig.* 353 (2020).
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A Critique of Jurisdictionality

Scott Dodson†

ABSTRACT

Over the last two decades, and culminating in a quartet of cases decided in the last two terms, the Supreme Court has erected a framework for determining when a rule is "jurisdictional." This framework is important because questions of jurisdictionality routinely come up in federal litigation. Pressing the virtues of simplicity and clarity in jurisdictional rules to avoid the costs of mistaken assumptions of jurisdiction, the framework deploys clear-statement rules and formalistic, rule-based tests in an effort to be, in the Court's words, "easy to apply" and "readily administrable." In this article, I expose the weaknesses of the Court's framework and show that the framework is neither administrable nor easy to apply, creates incoherence, and relies on shaky internal foundations. I then offer a series of fixes to the Court's framework to shore up its foundations.

† Geoffrey C. Hazard Jr. Distinguished Professor of Law and Associate Dean for Research, UC Hastings College of the Law. I presented early versions of this article at the Seventh Circuit Bar Association Annual Meeting and the UC Hastings Law 10-10 Club Workshop, and I'm grateful for feedback from participants. Thank you also to Howard Wasserman, who commented on an early draft.

INTRODUCTION

Since recognizing in 1998 that "jurisdiction . . . is a word of many, too many meanings,"[1] the Supreme Court has engaged in a deliberate effort to bring discipline to the process of characterizing a rule as either jurisdictional or non-jurisdictional.[2] That effort is to be applauded for several reasons. First, 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.[3] Second, because Congress often drafts statutes without clearly indicating whether they address a court's jurisdiction, the Court's effort has advanced clearer principles for resolving the characterization inquiry.[4] Third, 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.[5]

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*.[6] The Court has declared this framework "readily administrable"[7] and "clear and easy to apply"[8]—virtues it regularly strives to achieve in jurisdictional doctrine.[9]

Yet despite the Court's positive efforts, a set of new complications and oddities in the Court's jurisprudence has arisen. These infirmities suggest that the Court's framework is not—and may never be—

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

2. *See* Scott Dodson, *Jurisdiction and Its Effects*, 105 GEO. L.J. 619, 620–21 (2017) (describing the effort).

3. *See* Howard M. Wasserman, *The Demise of "Drive-By" Jurisdictional Rulings*, 105 NW. U. L. REV. 947, 947–48 (2011) (detailing and commending the Court's decisions).

4. *See infra* notes 23–36 and accompanying text (describing such principles).

5. *See* Scott Dodson, *Mandatory Rules*, 61 STAN. L. REV. 1, 2–3 (2008) ("The Court is right to be attentive. Whether a rule is jurisdictional or not affects both litigants and the courts in important ways.").

6. 138 S. Ct. 13, 20 (2017).

7. Arbaugh v. Y & H Corp., 546 U.S. 500, 513–16 (2006).

8. *Hamer*, 138 S. Ct. at 20.

9. *See infra* text accompanying notes 40–41(describing features of the tripartite framework).

as clear, easy, or administrable as the Court has professed. As a result, the time has come to revisit the Court's jurisdictionality jurisprudence.

In this article I expose the weaknesses of the present doctrine and offer some perspectives for reforming that doctrine in ways that return to the good progress the Court has made. Part I sets out the foundation of jurisdictionality and describes the framework for determining a rule's jurisdictional character. Part II attends to the complications and oddities that affect the Court's framework. Part III then prescribes some fixes to the existing weaknesses of the framework.

I. THE FOUNDATION

For decades, federal courts bandied about the term "jurisdictional" without much care.[10] The Supreme Court greatly contributed to the carelessness in the 1960 criminal case *United States v. Robinson*, when it repeatedly characterized the deadline to file a notice of appeal as "mandatory and jurisdictional," which, in the criminal context, was prescribed only in the Federal Rules of Criminal Procedure.[11] The question presented by the facts, however, was *not* whether the deadline was "jurisdictional." As the Court itself stated:

> The single question presented is whether the filing of a notice of appeal in a criminal case after expiration of the time prescribed in Rule 37(a)(2) confers jurisdiction of the appeal upon the Court of Appeals if the District Court, proceeding under Rule 45(b), has found that the late filing of the notice of appeal was the result of excusable neglect.[12]

The question presented by the facts of the case, in other words, was whether the rule permitted late filings based on excusable neglect. That question could have been resolved by simply characterizing the deadline as "mandatory,"[13] which would directly answer the question of whether the rule permitted a court to excuse late filings. But instead, perhaps as a way to emphasize the rigidity of the mandatory nature of

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10. *See* Perry Dane, *Jurisdictionality, Time, and the Legal Imagination*, 23 HOFSTRA L. REV. 1, 39 n.102 (1994) (reporting "thousands of cases"); Mark A. Hall, *The Jurisdictional Nature of the Time to Appeal*, 21 GA. L. REV. 399, 399 n.2 (1986) (citing cases).

11. 361 U.S. 220, 224, 226, 229 (1960).

12. *Id.* at 222.

13. *See* Eberhart v. United States, 546 U.S. 12, 17 (2005) (per curiam) (explaining that a rule can be mandatory without being jurisdictional); Scott Dodson, *Appreciating Mandatory Rules: A Reply to Critics*, 102 NW. U. L. REV. COLLOQUY 228, 231–32, 231 n.22 (2008) (distinguishing between mandatory and jurisdictional rules).

the rule, *Robinson* added the characterization "jurisdictional," thereby spawning decades of unthinking and profligate use of that term in subsequent lower-court and Supreme Court decisions.[14]

The Court turned a corner in 2004 with *Kontrick v. Ryan*, when it characterized as non-jurisdictional Bankruptcy Rule 4004's deadline for a creditor to object to a debtor's discharge.[15] Signaling a change in a remarkable *mea culpa*, the unanimous Court wrote:

> Courts, including this Court, it is true, have been less than meticulous in this regard; they have more than occasionally used the term "jurisdictional" to describe emphatic time prescriptions in rules of court. . . . Clarity would be facilitated if courts and litigants used the label "jurisdictional" not for claim-processing rules, but only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority.[16]

And the Court quickly made clear that the unthinking, "drive-by jurisdictional" characterizations of *Robinson* and its progeny were not controlling.[17]

Over the next dozen or so years, the Court took *Kontrick*'s admonition to heart and decided approximately a case a year addressing myriad jurisdictional-characterization issues ranging from copyright-registration requirements[18] and labor-negotiation requirements[19] to filing deadlines,[20] and from statutory-coverage terminologies[21] to the required content of certificates of appealability.[22]

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14. *See, e.g.*, Browder v. Dir., Dep't of Corr. of Ill., 434 U.S. 257, 264 (1978) (quoting *Robinson* for the characterization of the statutory and Rule-4-based deadline for filing a notice of appeal as "mandatory and jurisdictional"); Griggs v. Provident Consumer Disc. Co., 459 U.S. 56, 61 (1982) (per curiam) (quoting *Browder* for the proposition that "the requirement of a timely notice of appeal is 'mandatory and jurisdictional'"); Torres v. Oakland Scavenger Co., 487 U.S. 312, 318 (1988) (relying in part on *Robinson* in construing Rule 3(c) of the Federal Rules of Appellate Procedure "as a jurisdictional prerequisite").

15. 540 U.S. 443, 446–47 (2004).

16. *Id.* at 454–55.

17. *See Eberhart*, 546 U.S. at 18 (criticizing overreliance on *Robinson* to hold a rule jurisdictional); *see also* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 90–91 (1998) (admonishing that "drive-by jurisdictional rulings" should be afforded little weight).

18. Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154, 157 (2010).

19. Union Pac. R. Co. v. Locomotive Eng'rs, 558 U.S. 67, 71 (2009).

20. Henderson v. Shinseki, 562 U.S. 428 (2011).

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

22. Gonzalez v. Thaler, 565 U.S. 134, 137 (2012).

Although the Court attempted to develop its new jurisdictionality doctrine within the confines of the precedent it was creating, the Court largely avoided synthesizing a sweeping jurisdictional-characterization framework until 2017, in *Hamer v. Neighborhood Housing Services of Chicago*.[23] *Hamer*'s self-described "clear and easy to apply"[24] framework contains three factors.

First, because "[o]nly Congress may determine a lower federal court's subject-matter jurisdiction," non-statutory rules cannot be jurisdictional.[25] 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 non-jurisdictional.[26] Analogously, because only Congress may define the jurisdiction of Article I agencies, adjudicatory rules set internally by agencies must also be non-jurisdictional.[27]

Second, a statutory deadline governing case transfer between Article III courts is jurisdictional. As *Hamer* put it: "If a time prescription governing the transfer of adjudicatory authority from one Article III court to another appears in a statute, the limitation is jurisdictional."[28] This category seems quite small; to date, only statutory deadlines governing civil appeals and (perhaps) civil petitions for certiorari have been held to be jurisdictional under this factor.[29] By definition,

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23. 138 S. Ct. 13 (2017).

24. *Id.* at 20.

25. *Id.* at 17 (quoting *Kontrick v. Ryan,* 540 U.S. 443, 452 (2004)).

26. *See, e.g.*, *id.* at 20 (characterizing as non-jurisdictional a time limit in Rule 4 of the Federal Rules of Appellate Procedure); *Kontrick,* 540 U.S. at 452 (categorizing as non-jurisdictional a time limit in Rule 4004 of the Federal Rules of Bankruptcy Procedure); Eberhart v. United States, 546 U.S. 12, 18 (2005) (per curiam) (characterizing as non-jurisdictional a time limit in Rule 37 of the Federal Rules of Criminal Procedure). *See also Owen Equip. & Erection Co. v. Kroger,* 437 U.S. 365, 370 (1978) ("It is axiomatic that the Federal Rules of Civil Procedure do not create or withdraw federal jurisdiction.").

27. *See* Union Pac. R. Co. v. Locomotive Eng'rs, 558 U.S. 67, 71 (2009) (reasoning that the NRAB's own rules could not be jurisdictional because only Congress may set the jurisdiction of the NRAB).

28. *Hamer*, 138 S. Ct. at 18.

29. *See* Bowles v. Russell, 551 U.S. 205 (2007) (holding the statutory deadline for filing a civil notice of appeal to be jurisdictional); Missouri v. Jenkins, 495 U.S. 33, 45 (1990) (holding the statutory deadline for filing a civil petition for certiorari to the Supreme Court to be jurisdictional). It's not entirely clear whether deadlines governing civil petitions for certiorari would qualify under this factor as a "transfer of adjudicatory authority" because such a case transfer technically might not occur until the Supreme Court *grants* the petition.

this category excludes both transfer deadlines that are non-statutory[30] and statutory deadlines that do not involve the transfer of the case between Article III courts.[31]

Third, all other statutory limits are jurisdictional only if Congress clearly so states. Again, as *Hamer* put it: "In cases not involving the timebound transfer of adjudicatory authority from one Article III court to another, we have additionally applied a clear-statement rule: 'A rule is jurisdictional "[i]f the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional."'"[32]

In adopting the clear-statement rule for this category, the Court has insisted that Congress need not "incant magic words."[33] Rather, "traditional tools of statutory construction," including text, context, and precedent, "must plainly show that Congress imbued a procedural bar with jurisdictional consequences."[34] Nevertheless, this clear-statement rule has proven fatal to all proffered jurisdictional characterizations. Using this factor, the Court has held several statutory limits to

30. *See, e.g.*, *Hamer*, 138 S. Ct. at 20 (holding a civil-appellate deadline not set by statute to be non-jurisdictional); 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 non-jurisdictional).

31. *See, e.g.*, Henderson v. Shinseki, 562 U.S. 428 (2011) (holding non-jurisdictional the statutory 120-day deadline for a losing veteran to file a notice of appeal with the Article I Veterans Court); Sebelius v. Auburn Reg'l Med. Ctr., 568 U.S. 145, 149 (2013) (holding non-jurisdictional the statutory 180-day deadline for a provider to file an administrative appeal to the PRRB).

32. 138 S. Ct. at 20 n.9; *see also* Arbaugh v. Y & H Corp., 546 U.S. 500, 515–16 (2006) ("If the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue. But when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character.").

33. *Auburn Reg'l Med. Ctr.*, 568 U.S. at 153.

34. United States v. Kwai Fun Wong, 575 U.S. 402, 410 (2015).

be non-jurisdictional[35] and has never expressly held a statutory limit to be jurisdictional.[36]

One assumption and one pre-commitment have driven this tripartite framework. The assumption is that jurisdictional rules have an immutable set of effects—namely, that they are not subject to equitable exceptions or party conduct like waiver or forfeiture[37]—while non-jurisdictional rules generally have the opposite set of effects.[38] This assumption has contributed to the features of the framework that

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35. *See, e.g.*, Fort Bend Cnty. v. Davis, 139 S. Ct. 1843 (2019) (Title VII's exhaustion requirement); *Kwai Fun Wong*, 575 U.S. at 409–10 (a limitations period for filing a claim under the Federal Tort Claims Act); Gonzalez v. Thaler, 565 U.S. 134, 137 (2012) (the statutory requirement for certain content in a petition for a certificate of appealability in a habeas case); *Henderson*, 562 U.S. at 430 (the statutory 120-day deadline for a losing veteran to file a notice of appeal with the Article I Veterans Court), *Auburn Reg'l Med. Ctr.*, 568 U.S. at 149 (the statutory 180-day deadline for a provider to file an administrative appeal to the PRRB); Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154, 157 (2010) (the registration condition for copyright-infringement claims); *Arbaugh*, 546 U.S. at 515–16 (Title VII's employee-numerosity requirement). Cases applying a similar test before this factor was fully developed include *Scarborough v. Principi*, 541 U.S. 401 (2004), *Irwin v. Dep't of Veteran's Affairs*, 498 U.S. 89 (1990), and *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982).

36. In *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130 (2008), the Court held the Tucker Act's filing deadline to be a "more absolute" bar that requires *sua sponte* policing by the courts, *id.* at 134, 139, but the Court very carefully avoided an express characterization of the deadline as jurisdictional, *see* Dodson, *supra* note 13, at 233. *Bowles* held a statutory appellate deadline to be jurisdictional, but primarily based on precedent. *Bowles*, 551 U.S. at 205–06. And the Court in *Hamer* subsequently classified *Bowles* as falling under the second factor of the framework. *Hamer*, 138 S. Ct. at 18.

37. *See, e.g.*, *Auburn Reg'l Med. Ctr.*, 568 U.S. at 153 ("Characterizing a rule as jurisdictional renders it unique in our adversarial system."); *Henderson*, 562 U.S. at 434 ("Branding a rule as going to a court's subject-matter jurisdiction alters the normal operation of our adversarial system."); *Kontrick*, 540 U.S. at 456 ("Characteristically, a court's subject-matter jurisdiction cannot be expanded to account for the parties' litigation conduct; a claim-processing rule, on the other hand, even if unalterable on a party's application, can nonetheless be forfeited if the party asserting the rule waits too long to raise the point.").

38. *See, e.g.*, Day v. McDonough, 547 U.S. 198, 205 (2006) ("A statute of limitations defense . . . is not 'jurisdictional,' hence courts are under no *obligation* to raise the time bar *sua sponte*."); *id.* at 213 (Scalia, J., dissenting) ("We have repeatedly stated that the enactment of time-limitation periods such as that in § 2244(d), without further elaboration, produces defenses that are nonjurisdictional and thus subject to waiver and forfeiture."). In fairness, some recent cases have appeared to acknowledge that some non-jurisdictional rules might exhibit the same kind of mandatory nature—at least regarding their insusceptibility to equitable exceptions—as jurisdictional rules. *E.g.*, *Hamer*, 138 S. Ct. at 17.

minimize jurisdictional characterizations, such as the bar on court rules and the clear-statement rule for statutes, to avoid the waste caused by a late determination of a rule as jurisdictional.[39] The pre-commitment is to a perceived need for clarity and simplicity in jurisdictional inquiries.[40] This pre-commitment has shaped the development of a framework based on rules that are ostensibly straightforward and easy to understand and apply rather than on standards.[41]

II. COMPLICATIONS AND ODDITIES

Though the Court has declared its framework to be clear and simple, the framework has generated a number of complications and oddities that the Court has tended to ignore or gloss over. This part exposes those infirmities.

A. The First Factor

The first factor—that only statutes can be jurisdictional—is actually false in three ways. The first falsity is the supposed exclusivity

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39. *See, e.g.*, *Kwai Fun Wong*, 575 U.S. at 409 ("Given those harsh consequences [of categorizing a limit as jurisdictional], the Government must clear a high bar to establish that a statute of limitations is jurisdictional."); *Gonzalez*, 565 U.S. at 141 ("Courts, we have said, should not lightly attach those 'drastic' consequences to limits Congress has enacted."); *Henderson*, 562 U.S. at 435 ("Because the consequences that attach to the jurisdictional label may be so drastic, we have tried in recent cases to bring some discipline to the use of this term."); *Arbaugh*, 546 U.S. at 514–16 (relying on the cost of jurisdictional characterizations to justify a clear-statement presumption against them).

40. *See, e.g.*, Abbott v. Perez, 138 S. Ct. 2305, 2342 (2018) (Sotomayor, J., dissenting) (calling "axiomatic" the virtue of clarity in jurisdictional statutes); Hertz Corp. v. Friend, 559 U.S. 77, 94 (2010) ("[A]dministrative simplicity is a major virtue in a jurisdictional statute . . . . [C]ourts benefit from straightforward rules under which they can readily assure themselves of their power to hear a case.") (internal citations omitted); *Kontrick*, 540 U.S. at 455 ("Clarity would be facilitated if courts and litigants used the label 'jurisdictional' not for claim-processing rules, but only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority."); *see also* Scott Dodson, *The Complexity of Jurisdictional Clarity*, 97 VA. L. REV. 1, 10–11, 10 n.27 (2011) (offering other examples).

41. *Hamer*, 138 S. Ct. at 20 ("The rule of decision our precedent shapes is both clear and easy to apply."); *Auburn Reg'l Med. Ctr.*, 568 U.S. at 153 ("To ward off profligate use of the term 'jurisdiction,' we have adopted a 'readily administrable bright line' for determining whether to classify a statutory limitation as jurisdictional."); *Arbaugh*, 546 U.S. at 513–16 (justifying the clear-statement presumption as a "readily administrable bright line").

of the first factor. While the Constitution does give Congress power to control the appellate jurisdiction of the Supreme Court and the original jurisdiction of the lower federal courts,[42] it does not purport to give Congress the *exclusive* power to do so. Indeed, long ago, in *Wayman v. Southard* in 1825, the Court suggested that court rulemaking—including jurisdictional rulemaking—is a power shared by Congress and the courts.[43] *Wayman*'s intimation is borne out in practice. For many years, in the tradition of English chancery courts, federal courts exerted some control over their own subject-matter jurisdiction.[44] Even today, federal courts exercise their own jurisdictional control through a host of judicially created doctrines. Common examples include resequencing, which allows a federal court to dismiss on non-jurisdictional procedural grounds even though subject-matter jurisdiction may be lacking;[45] prudential standing, which is considered jurisdictional despite lacking a statutory or constitutional basis;[46] the old pendent-party and ancillary jurisdiction, which provided for supplemental jurisdiction prior to the enactment of the supplemental-jurisdiction statute;[47]

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42. U.S. CONST. art. III, § 1 ("The judicial [p]ower of the United States, shall be vested in . . . such inferior [c]ourts as the Congress may from time to time ordain and establish."); U.S. CONST. art. III, § 2, cl. 2 ("[T]he [S]upreme Court shall have appellate [j]urisdiction, both as to [l]aw and [f]act, with such [e]xceptions, and under such [r]egulations as the Congress shall make.").

43. 23 U.S. (10 Wheat.) 1, 43 (1825).

44. *See* Laura S. Fitzgerald, *Is Jurisdiction Jurisdictional?*, 95 NW. U. L. REV. 1207, 1253 (2001) ("So, too, courts of equity defined their own subject matter jurisdiction by developing unique substantive defenses to the enforcement of rights created at common law."); *see also* Michael G. Collins, *Jurisdictional Exceptionalism*, 93 VA. L. REV. 1829, 1831–32 (2007) (recounting the treatment of jurisdiction as determined by court rules and pleading practices).

45. *See* Sinochem Int'l Co. v. Malay. Int'l Shipping Corp., 549 U.S. 422, 431 (2007) (explaining that a court need not address subject-matter jurisdiction when declining to address the merits some other way). For a discussion of resequencing in the context of its effects on jurisdictionality jurisprudence, *see* Scott Dodson, *Hybridizing Jurisdiction*, 99 CALIF. L. REV. 1439, 1455–56 (2011).

46. *See* Warth v. Seldin, 422 U.S. 490, 499 (1975) (identifying situations that do not warrant an exercise of jurisdiction despite otherwise presenting a valid case or controversy). Recent cases have (properly, in my view) recharacterized some species of prudential standing as merits issues. *See, e.g.*, Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 129 (2014).

47. *See* United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966) (permitting federal courts to exercise jurisdiction over state claims that arise from common facts with federal claims); *cf.* Finley v. United States, 490 U.S. 545, 548–49 (1989) (pointing out the lack of statutory authorization for *Gibbs*).

the eponymic doctrine of jurisdiction to determine jurisdiction;[48] and doctrines that are jurisdictional in everything but name, like *forum non conveniens*.[49] That Congress has power to control the jurisdiction of the lower courts does not mean that it has exclusive power to do so.

The second falsity of the first *Hamer* factor relates to the original jurisdiction of the Supreme Court. The Constitution sets the scope of the Court's original jurisdiction but makes no delegation to Congress of power to set jurisdictional conditions or restrictions, such as timing rules and other mechanisms, for invoking the Court's original jurisdiction.[50] The Court itself has asserted an inherent power to manage its original jurisdiction by promulgating rules to govern such proceedings, and those rules could potentially be jurisdictional notwithstanding their non-statutory basis.[51]

The third falsity stems from the failure to appreciate the fact that Congress may delegate its power to make jurisdictional rules for the lower courts to the Supreme Court. Congress already has delegated that authority in several instances, including by authorizing court-created rules "defin[ing] when a ruling of a district court is final for the purposes of appeal under section 1291"[52] and "provid[ing] for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for [by statute]."[53] The Supreme Court has accepted those delegations and promulgated rules under them—[54] rules that themselves should be jurisdictional despite the lack of any parallel statutory language. Indeed, Rule 1 of the Federal Rules of Appellate

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48. *See* Tex. & Pac. Ry. Co. v. Gulf, Colo. & Santa. Fe. Ry. Co., 270 U.S. 266, 274 (1926) ("Every court of general jurisdiction has power to determine whether the conditions essential to its exercise exist.").

49. *See generally* Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981).

50. U.S. CONST. art. III, § 2, cl. 2 ("In all [c]ases affecting [a]mbassadors, other public [m]inisters and [c]onsuls, and those in which a [s]tate shall be [p]arty, the [S]upreme Court shall have original [j]urisdiction.").

51. Although the Court's rules regarding its original jurisdiction do not strike me as characteristically jurisdictional, arguments could be made. Supreme Court Rule 17, for example, states that "[t]he 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.

52. 28 U.S.C. § 2072(c) (2012).

53. *Id.* § 1292(e) (2012). *See also* Swint v. Chambers Cty. Comm'n, 514 U.S. 35, 48 (1995) ("Congress thus has empowered this Court to clarify when a decision qualifies as 'final' for appellate review purposes, and to expand the list of orders appealable on an interlocutory basis.").

54. *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).

Procedure used to provide that the appellate rules "shall not be construed to extend or limit the jurisdiction of the courts of appeals,"[55] but that language was promptly removed after passage of the congressional delegations because, in the words of the Appellate Rules Advisory Committee, "as soon as FRAP is amended to define finality for purposes of the former or to authorize interlocutory appeals not provided for by the latter, FRAP will 'extend or limit the jurisdiction of the courts of appeals.'"[56]

Rule 23(f), promulgated pursuant to that delegation,[57] is a good example of a non-statutory rule that could be characterized as jurisdictional. The rule provides for interlocutory appeals of class-certification decisions: "A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule . . . [if] a petition for permission to appeal [is filed] with the circuit clerk within 14 days after the order is entered."[58] Rule 23(f) thus sets the parameters by which a case moves from the authority of a district court to the authority of a circuit court. It is hard to imagine anything that would be *more* jurisdictional.

Nevertheless, in *Nutraceutical v. Lambert*, the Supreme Court characterized Rule 23(f) as non-jurisdictional under the first *Hamer* factor, saying perfunctorily, "[b]ecause 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."[59] Whether Rule 23(f) is jurisdictional is debatable. But it cannot be non-jurisdictional simply because it is non-statutory. 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.

In addition to its falsities, the first *Hamer* factor has created tension with precedent by appearing to silently overrule *Torres v. Oakland Scavenger Co.*[60] *Torres* characterized as jurisdictional the requirement in Rule 3 of the Federal Rules of Appellate Procedure that the notice of a civil appeal must specify the parties taking the appeal.[61]

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55. FED. R. APP. P. 1(b).

56. FED. R. APP. P. 1, 2002 advisory committee note.

57. *See* Agenda Book of the Civil Rules Advisory Committee at 65–67 (1997), http://www.uscourts.gov/sites/default/files/fr_import/CV1997-05.pdf__(confirming that Rule 23(f) was adopted pursuant to 28 U.S.C. § 1292(e)).

58. FED. R. CIV. P. 23(f).

59. 139 S. Ct. 710, 713 (2019).

60. 487 U.S. 312 (1988).

61. *Id.* at 315; *see also* Smith v. Barry, 502 U.S. 244, 248 (1992) ("Rule 3's dictates are jurisdictional in nature.").

But because no statute codifies Rule 3, Rule 3 cannot be jurisdictional under *Hamer*, and thus *Torres* seems inconsistent with the first *Hamer* factor.

The Court could simply reject *Torres*'s jurisdictional characterization as a mistaken "drive-by jurisdictional" product of the *Robinson* era. But instead, the Court has largely avoided *Torres* and the tension it creates. The most glaring example of this treatment is in *Hamer* itself—the opinion most directly in conflict with *Torres*; the Court neither cited nor acknowledged *Torres* in *Hamer*, much less attempted to reconcile *Torres* with its decision.[62]

Yet the Court is obviously aware of *Torres*, for the respondent's brief in *Hamer* relied heavily upon it.[63] Further, a key framework case, *Gonzalez v. Thaler*,[64] essentially reaffirmed *Torres* based on the language of Rules 3 and 4, the history of treating time limits (including, apparently, non-statutory time limits) to appeal as jurisdictional, and the Advisory Committee's conclusion that Rules 3 and 4 are jurisdictional.[65] This discussion and reaffirmation of *Torres*, just six years prior to *Hamer*, makes *Hamer*'s silence on *Torres* even more perplexing, especially in light of the obvious tension between them, and has left *Torres*'s fate unclear and uncertain.

The first *Hamer* factor thus suffers from three falsities and has caused unresolved tension with recent precedent.

B. The Second Factor

The second factor—that statutory time prescriptions for the transfer of a case from one Article III court to another are always jurisdictional[66]—causes some odd anomalies. To date, the only such time prescriptions that the Court has identified are those governing civil appeals from district court to appellate court, and those governing civil certiorari petitions from a court of appeals to the Supreme Court.[67] But other time prescriptions might fit this rule, albeit

62. *Hamer*, 138 S. Ct. at 13.

63. Resp't Br., *Hamer*, 138 S. Ct. at 13, *passim*.

64. 565 U.S. 134 (2012).

65. *Id.* at 147.

66. *Hamer*, 138 S. Ct. at 16 ("If a time prescription governing the transfer of adjudicatory authority from one Article III court to another appears in a statute, the limitation is jurisdictional; otherwise, the time specification fits within the claim-processing category.").

67. *See supra* text accompanying note 29. Presumably, the time prescriptions applicable to direct appeals from district court to the Supreme Court would also be jurisdictional under this factor. *See* 28 U.S.C. §§ 2101(a)–(b) (2012) (describing

uncomfortably. Venue transfer, for example, is a statutory mechanism for transferring adjudicatory authority from one Article III court to another.[68] 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 . . . ."[69] 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, and that lack of jurisdiction cannot be cured by the consent or waiver of the parties.[70]

Yet a jurisdictional characterization for a venue rule is more than a little awkward, for venue has long been deemed non-jurisdictional by the Court,[71] and the civil venue statute expressly disavows that it is jurisdictional.[72] Further, the Supreme Court, in *Lexecon Inc.*

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such time restrictions). Other statutory prescriptions might also fit into this category. *See, e.g.*, United States v. Kalb, 891 F.3d 455 (3d Cir. 2018) (holding as jurisdictional the thirty-day deadline in 18 U.S.C. § 3731 (2012) for the government to file interlocutory appeals of district court orders suppressing or excluding evidence).

68. *See* 28 U.S.C. § 1404 (2012) (establishing when one forum may transfer venue to another).

69. *Id.* § 1407(a) (2012).

70. Other specialized venue-transfer statutes have similar timing provisions. *See, e.g.*, 18 U.S.C. § 3237(b) (2012) (providing for transfer of a criminal case for certain tax code violations from the district where the defendant currently resides to the district where the offense occurred if the defendant files a motion "within twenty days after arraignment").

71. *See* Neirbo Co. v. Bethlehem Shipbuilding Corp., 308 U.S. 165, 167–68 (1939) ("The jurisdiction of the federal courts—their power to adjudicate—is a grant of authority to them by Congress and thus beyond the scope of litigants to confer. But the locality of a law suit—the place where judicial authority may be exercised—though defined by legislation[,] relates to the convenience of litigants and as such is subject to their disposition. This basic difference between the court's power and the litigant's convenience is historic in the federal courts."); *see also* 15 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3801 (4th ed. 2018) (distinguishing venue from jurisdiction). *But see* Dodson, *supra* note 2, at 636 (making the case that venue *is* jurisdictional); 18 U.S.C. § 3241 (2012) (using a venue-like provision to give the District Court of the Virgin Islands "jurisdiction" over certain offenses committed upon the high seas); *id.* § 3244 (using a venue-like provision to set out "jurisdiction" for specific district courts overseeing proceedings related to transferred offenders).

72. *See* 28 U.S.C. § 1390(a) (2012) (stating that venue "does not refer to any grant or restriction of subject-matter jurisdiction providing for a civil action to be adjudicated only by the district court for a particular district or districts"); *id.*

v. Milberg Weiss Bershad Hynes & Lerach, has suggested that while the MDL-transfer time prescription is mandatory,[73] it might also be waivable by the parties and thus not jurisdictional[74]—a conclusion that major treatises and a majority of lower courts support.[75] One leading treatise even calls the "Lexecon waiver" an "emerging term" in MDL practice.[76] How surprised MDL practitioners and courts must be to find that *Hamer* invalidates such waivers because the MDL-transfer time prescription is jurisdictional!

Another infirmity is that some deadlines that must be jurisdictional under the second *Hamer* factor have non-jurisdiction-like exceptions. The two deadlines that the Court has held to be jurisdictional under this second *Hamer* factor are the deadline to file a civil certiorari petition and the deadline to file a civil notice of appeal. Yet the deadline to file a civil petition can be extended by the Court "for good cause shown."[77] And the deadline to file a civil notice of appeal may be extended "upon a showing of excusable neglect or good cause" and may even be reopened after expiration if the district court finds that a party did not receive timely notice.[78] Now, these exceptions are specified in the statute, and perhaps Congress can do what it wishes, including creating exceptions to jurisdictional statutes that make them operate a lot like non-jurisdictional statutes. But that makes for a very odd arrangement under current jurisdictional dogma.

C. The Third Factor

The third factor—the clear-statement rule against jurisdiction—suffers from the most complexity. That is peculiar because a

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§ 1406(b) ("Nothing in this chapter shall impair the jurisdiction of a district court of any matter involving a party who does not interpose timely and sufficient objection to the venue.").

73. 523 U.S. 26, 35 (1998).

74. *Id.* at 36 n.1 (leaving open the question whether "a party may waive the § 1407 remand requirement by failing to request remand from the transferor court").

75. *See, e.g.*, DAVID F. HERR, ANNOTATED MANUAL FOR COMPLEX LITIGATION § 20.132 (4th ed. 2002) (suggesting that plaintiffs may "consent to remain in the transferee district for trial"); 15 WRIGHT, *supra* note 71 at § 3866.2 ("The better view is that Lexecon does not affect the parties' ability to consent to trial in the transferee court. After all, Section 1407 is not a jurisdictional provision."); *id.* § 3866.2 n.29 (collecting cases approving of party waiver of the remand provision).

76. 15 WRIGHT, *supra* note 71, at § 3866.2 (citing In re Fosamx Prods. Liab. Litig., 815 F. Supp. 2d 649, 654 (S.D.N.Y. 2011).

77. 28 U.S.C. § 2101(c) (2012).

78. *Id.* § 2107(c).

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 . . . courts,"[79] the provision should be non-jurisdictional, end of inquiry.

But the Court has been faint-hearted about rigid adherence to the clear-statement rule.[80] Instead, the Court has declared repeatedly that Congress need not "incant magic words."[81] Rather, "traditional tools of statutory construction," including text, context, and precedent, "must plainly show that Congress imbued a procedural bar with jurisdictional consequences."[82]

The result is clearly *not* a clear-statement rule, at least not one that has recognizable analogues in other areas.[83] Clear-statement rules typically do not require consideration of the messiness of precedent or statutory purpose.[84] 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.[85]

Worse, these inquiries have resulted in outcomes that are difficult to reconcile. *Bowles*, for example, treated longstanding precedent as nearly dispositive, while *Reed Elsevier* overcame precedent with other considerations.[86] *Bowles* also considered precedent on both the statute at issue and on the broader *type* of consideration the statute

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79. Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 394 (1982).

80. For a critique, *see* Erin Morrow Hawley, *The Supreme Court's Quiet Revolution: Defining the Meaning of Jurisdiction*, 56 WM. & MARY L. REV. 2027, 2051–58 (2015) (critiquing the Court's treatment of the clear-statement rule).

81. Hamer v. Neighborhood Hous. Servs. of Chi., 138 S. Ct. 13, 21 n.9 (2017); Sebelius v. Auburn Reg'l Med. Ctr., 568 U.S. 145, 153 (2013).

82. United States v. Kwai Fun Wong, 575 US. 402, 408–11 (2015).

83. *See generally* William N. Eskridge & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593 (1992) (cataloguing and analyzing the range of clear-statement rules).

84. Hawley, *supra* note 80, at 2031 ("[S]tare decisis ordinarily does not matter when it comes to clear statement rules, but the Court has recently treated precedent as dispositive.").

85. Bowles v. Russell, 551 U.S. 205, 209–10 (2007) (using precedent); Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154, 168 (2010) (interpreting *Bowles*); Henderson v. Shinseki, 562 U.S. 428, 440–41 (2011) (using statutory purpose).

86. *Compare Bowles*, 551 U.S. at 209–10, 210 n.2, *with Reed Elsevier*, 559 U.S. at 168.

addressed,[87] while *Wong* refused to consider precedential treatment of similar-category statutes.[88]

Even the Court's treatment of text has not been consistent under the clear-statement rule. In *Wong*, 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 held the language to be "mundane statute-of-limitations language" and "an utterly unremarkable phrase"[89] that did not speak in jurisdictional terms or address the power of the courts.[90] The four-justice dissent, reading the same language, disagreed,[91] characterizing the language as "absolute" and with "no exceptions."[92] To the justices, the clear-statement rule appeared to point in opposite directions.

Further, *Wong*'s result creates tension with *John R. Sand & Gravel Co. v. United States*, a similar *Hamer*-third-category case. Each case involved a statutory filing deadline for an initial claim against the United States in a federal court, and so both cases were decided ostensibly under the "clear statement" factor of the Court's framework.

The language of the statutory deadline in both cases was similar: the FTCA—at issue in *Wong*—made untimely tort claims against the United States "forever barred," while the Tucker Act—at issue in *John R. Sand*—made other untimely claims against the United States in the Court of Federal Claims "forever barred" until 1948 and just "barred" after that.[93] The history of the two deadlines was also similar and intertwined.[94] The only real distinction between the cases was the

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87. *Bowles*, 551 U.S. at 209–10, 210 n.2; *see also Reed Elsevier*, 559 U.S. at 168 ("*Bowles* emphasized that this Court had long treated such conditions as jurisdictional, including in statutes *other* than [that the one issue]. . . . *Bowles* therefore demonstrates that the relevant question here is not . . . whether [the provision] itself has long been labeled jurisdictional, but whether the type of limitation that [it] imposes is one that is properly ranked as jurisdictional absent an express designation.").

88. *See* United States v. Kwai Fun Wong, 575 U.S. 402, 423–28 (2015) (Alito, J., dissenting) (pointing out prior cases that held similar language in other statutes to be jurisdictional).

89. *Id.* at 413.

90. *Id.* at 411.

91. *Id.* at 423 (Alito, J., dissenting) ("The FTCA's filing deadlines are jurisdictional.").

92. *Id.*

93. *Compare* 28 U.S.C. § 2401(b) (2012) (FTCA) *with id.* § 2501 (1948) (Tucker Act) *and with id.* § 2501 (2018) (Tucker Act as amended).

94. *See Kwai Fun Wong*, 575 U.S. at 425 (Alito, J., dissenting) ("When Congress crafted the FTCA as a tort-based analogue to the Tucker Act, it consciously borrowed the well-known wording of the Tucker Act's filing deadline.").

longstanding treatment of the Tucker Act's deadline as jurisdictional, coupled with the absence of precedent on the FTCA deadline. Indeed, the Court in *Wong* relied entirely on that past treatment to distinguish the two cases.[95] As the dissent pointed out, however, the Tucker Act precedent would seem at least relevant to the interpretation of the similarly worded and historically intertwined FTCA.[96] Further, the Court has looked to similar kinds of statutes held to be jurisdictional when determining whether the statute at hand should be characterized as jurisdictional.[97] In light of *Wong*, one wonders how a longstanding jurisdictional characterization could ever be established for a particular statute going forward.

Barely a year ago, the Court split again on a third-factor case in *Patchak v. Zinke*,[98] which called for the interpretation of a statute stating that "an action . . . relating to [specified land held in trust by the United States] shall not be filed or maintained in a Federal court and shall be promptly dismissed."[99] 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.[100] According to the plurality, the statute "completely prohibits actions" and thus "is best read as a jurisdiction-stripping statute."[101] The three dissenting justices[102] disagreed that the statute was jurisdictional. In their eyes, the statute "does not clearly state

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95. *Id.* at 416 (explaining that the distinction between *John R. Sand* and *Irwin* "came down to two words: *stare decisis*"); *id.* ("The Tucker Act's bar was different because it had been the subject of 'a definitive earlier interpretation.' . . . What is special about the Tucker Act's deadline, *John R. Sand* recognized, comes merely from this Court's prior rulings, not from Congress's choice of wording.").

96. *Id.* at 425–27 (Alito, J., dissenting).

97. *See* Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154, 168 (2010) ("*Bowles* emphasized that this Court had long treated such conditions as jurisdictional, including in statutes *other* than [that the one issue]. . . . *Bowles* therefore demonstrates that the relevant question here is not . . . whether [the provision] itself has long been labeled jurisdictional, but whether the type of limitation that [it] imposes is one that is properly ranked as jurisdictional absent an express designation.").

98. 138 S. Ct. 897 (2018).

99. *Id.* at 904 (Thomas, J.).

100. *Id.* at 905 (Thomas, J.).

101. *Id.* at 906 (Thomas, J.).

102. Two justices concurred on grounds that the statute reinstated federal sovereign immunity and thus did not reach the jurisdictionality issue, *id.* at 912 (Ginsburg, J., concurring), though one of those concurring justices did indicate specifically said that the statute "should not be read to strip the federal courts of jurisdiction," *id.* at 913 (Sotomayor, J., concurring).

that it imposes a jurisdictional restriction."[103] Again, the clear-statement rule was of little use.

These opinions and outcomes suggest that the Court's clear-statement rule is not particularly effective at streamlining and simplifying the inquiry or producing consistent results.[104]

D. The Factors Combined

If each 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.[105] As a result, the statutory civil deadline is jurisdictional (at least after *Bowles*), but the non-statutory criminal deadline cannot be.[106] 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 non-jurisdictional because it is set out only in a court rule.[107] It is difficult to fathom a compelling reason—and the Court has not attempted to offer one—why the civil versions of the

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103. *Id.* at 918–19 (Roberts, C.J., dissenting).

104. The lower courts routinely suffer similar difficulties applying the clear-statement rule. *See, e.g.*, Myers v. Comm'r of IRS, 928 F.3d 1025 (D.C. Cir. 2019) (split-panel decision on whether the 30-day deadline in 26 U.S.C. § 7623(b)(4) (2012) to file an appeal of an IRS determination with the Tax Court is jurisdictional); Fed. Educ. Ass'n – Stateside Reg. v. Dep't of Def., 898 F.3d 1222 (Fed. Cir. 2018) (split panel holding jurisdictional the 60-day deadline under 5 U.S.C. § 7703(b)(1) (2012) to file a petition for review of a MSPB decision with the Federal Circuit), *reh'g denied*, 909 F.3d 1141 (Fed. Cir. 2018) (opinions of four judges dissenting from denial of rehearing).

105. *Compare* 28 U.S.C. § 2107 (providing a deadline for civil appeals) *with* FED. R. APP. P. 4 (providing a deadline for all appeals). A statutory deadline applies to appeals of certain criminal matters by the United States government. *See* 18 U.S.C. § 3731.

106. *See* Hamer v. Neighborhood Hous. Servs. of Chi., 138 S. Ct. 13, 21 (2017) (holding non-statutory deadlines cannot be jurisdictional).

107. *Compare* 28 U.S.C. § 2101(c) (establishing the deadline for civil certiorari petitions), *and* Missouri v. Jenkins, 495 U.S. 33, 45 (1990) (holding the civil certiorari deadline jurisdictional), *with* SUP. CT. R. 13.1 (setting out the same deadline for criminal certiorari petitions), *and* Johnson v. Florida, 391 U.S. 596, at 598 (1968) (categorizing the criminal deadline non-jurisdictional), *and with* ROBERT L. STERN ET AL., SUPREME COURT PRACTICE 278–80 (7th ed. 1993) (explaining that the Court has long held the civil certiorari deadline to be jurisdictional but the criminal certiorari deadline to be non-jurisdictional).

certiorari deadlines should be categorized as jurisdictional and the criminal versions should not.

More oddities lurk. The statutory civil certiorari deadline applies regardless of whether the reviewed court is a federal court or a state court.[108] When certiorari is from an 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,[109] 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.[110] The Court's framework thus subjects the same statutory provision to different analyses depending upon the circumstances, perhaps resulting in the peculiar conclusion that the civil certiorari deadline is jurisdictional for some petitions but non-jurisdictional for others.[111]

Similarly, Congress has provided for appellate jurisdiction of bankruptcy orders in 28 U.S.C. § 158. Bankruptcy courts are non-Article III courts, but they are the front line for bankruptcy proceedings. Initial appeals of decisions of bankruptcy courts can be to either a United States district court (an Article III court) or to a bankruptcy appellate court (a non-Article III court).[112] The statute further provides that second appeals of those initial appellate decisions may be filed in a United States court of appeals, but, for certain appeals, only if the

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108. *See* 28 U.S.C. § 2101(c) (setting the deadline for "[a]ny other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action").

109. *See, e.g.*, 28 U.S.C. § 1259 (providing for Supreme Court certiorari review of the Court of Appeals for the Armed Forces). *See also* Ortiz v. United States, 138 S. Ct. 2165, 2173 (2018) (holding certiorari jurisdiction from a decision of the Court of Appeals for the Armed Forces to be constitutional); United States v. Coe, 155 U.S. 76, 86 (1894) (upholding Supreme Court appellate jurisdiction over Article IV territorial courts); Palmore v. United States, 411 U.S. 389, 407–10 (1973) (allowing Supreme Court appellate jurisdiction over Article I District of Columbia courts).

110. *But see* Cox Broad. v. Cohn, 420 U.S. 469, 512 (1975) (Rehnquist, J., dissenting) (stating, without engaging any presumption, that the deadline "restricts this Court's jurisdiction over state civil cases to those in which review is sought within 90 days").

111. If the Court were to modify its framework to include in the second factor transfers between state and federal courts, then it would run up against the removal statute, 28 U.S.C. §§ 1441–47, which includes many timing prescriptions involving such transfers, which the lower federal courts have roundly declared non-jurisdictional. *See* Scott Dodson, *In Search of Removal Jurisdiction*, 102 NW. U. L. REV. 55, 64–65 (2008) (noting uncertainty in the lower courts about whether the removal statutes are jurisdictional or procedural in character).

112. *Compare* 28 U.S.C. § 158(a) (providing for appeal to the district court), *with id.* §§ 158(b)–(c) (providing, upon consent of all the parties, for appeal to a bankruptcy appellate court).

initial appellate body issues a certificate of appealability.[113] One of the ways the initial appellate body (either the district court or the bankruptcy appellate court) can issue a certificate is if a majority of the appellate parties request it, but only if the request is "made not later than 60 days after the entry of the judgment, order, or decree."[114] This timing deadline for requesting a certificate of appealability is statutory but, depending upon the circumstances, could be the predicate for an appeal from an Article III court (in which case it would be jurisdictional under the second factor) or a non-Article III court (in which case it would only be jurisdictional if it overcomes the clear-statement presumption in the third factor). Like the civil certiorari deadline, this bankruptcy-appeal deadline thus could be jurisdictional for some appeals but non-jurisdictional for others.

A similar peculiarity applies to Rule 4(a) of the Federal Rules of Appellate Procedure. Rule 4(a) sets the deadline to file a notice of appeal in a civil case, which the Court has held to be jurisdictional because the deadline is also codified in 28 U.S.C. § 2107(a).[115] But certain circumstances require a putative appellant to seek *permission* to appeal rather than filing a notice of appeal. The habeas corpus statute, for example, denies certain habeas petitioners from appealing a district court's denial of the petition for a writ of habeas corpus unless the court of appeals first issues a certificate of appealability.[116] No statute prescribes a deadline for petitioning for permission to appeal, but Appellate Rule 5 states that the petition must be filed "within the time provided by Rule 4(a) for filing a notice of appeal."[117] Thus, for habeas appellants, Rule 4(a) sets a non-statutory deadline to seek permission to appeal, meaning that Rule 4(a)'s appellate deadline cannot be jurisdictional for habeas appellants but must be jurisdictional for non-habeas appellants.

III. FIXING THE FRAMEWORK

These complications and oddities of the *Hamer* factors undermine the Court's attestation of a clear and simple jurisdictional framework. The best option would be to rethink the foundations of the

113. *Id.* § 158(d).
114. *Id.* § 158(d)(2)(E).
115. *See* Hamer v. Neighborhood Hous. Servs. of Chi., 138 S. Ct. 13, 16 (2017) (stating that "an appeal filing deadline prescribed by statute will be regarded as jurisdictional").
116. 28 U.S.C. § 2253(c).
117. FED. R. APP. P. 5(a)(2).

framework, but the Court seems intent on adhering to it.[118] Accordingly, I offer three modest fixes to the Court's existing framework. These fixes would leave some inconsistencies but improve the framework going forward.

The first fix would change the first factor to exempt non-statutory 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 non-statutory rules might be jurisdictional, such as the Supreme Court's own rules or rules promulgated under jurisdiction-delegating statutes.[119]

The second fix would be to change the third factor to follow a more traditionally rigid clear-statement approach in cases calling for the interpretation of a statute passed or amended after 2006, when *Arbaugh* first articulated the jurisdictional framework's clear-statement rule. This fix has a number of advantages. For one, it reflects the realities of the conversation with Congress that the clear-statement rule is predicated on. Only for new statutes or newly amended statutes is Congress fairly on notice that, absent a clear use of jurisdictional language, the Court will construe the statute to be non-jurisdictional, notwithstanding prior precedent or purpose.[120] For another, the prospective nature of the fix preserves the Court's cases deploying the more convoluted version of the clear-statement rule when construing statutes passed or last amended prior to 2006. In those instances, a less rigid adherence to the clear-statement rule is warranted, so no cases would need to be overruled.[121]

The third fix would be to avoid the Court's framework altogether in hard cases, such as those in which a statute was passed or last amended prior to 2006 and whose jurisdictional status is unclear. Avoidance is possible—perhaps even preferable—because courts can bypass the jurisdictional determination if dismissal is appropriate on other non-merits grounds, such as defects in venue.[122] Avoidance is

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118. *See* Fort Bend Cty. v. Davis, 139 S. Ct. 1843, 1848–52 (2019) (reaffirming commitment to the *Hamer* framework).

119. *See supra* Part II(A).

120. *Cf.* William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 688 (1990) (arguing, for this reason, that clear-statement rules should be applied only prospectively).

121. *Patchak*, perhaps fortuitously, lacks a controlling rationale.

122. *See* Sinochem Int'l Co. v. Malay. Int'l Shipping Co., 549 U.S. 422, 431 (2007) (recognizing that courts have "leeway 'to choose among threshold grounds for denying audience to a case on the merits'").

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.[123] Looking to other grounds to resolve the case—such as non-merits grounds or the particular effects of the rule—can enable courts to avoid hard questions of jurisdictional characterization.[124]

CONCLUSION

The Court's jurisdictionality doctrine is showing signs of wear. My primary aim has been to call attention to these 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.

There is, however, a deeper, if often overlooked, problem. The quest for "clear" and "simple" jurisdictional tests is neither necessarily noble nor realistically achievable.[125] Complexity—even uncertainty—in jurisdictional tests reflects the doctrinal norm and has its own benefits of improving accuracy and facilitating productive inter-jurisdictional dialogue.[126] If the Court's experiment in crafting a test for jurisdictional characterizations fails to live up to the promise of being "readily administrable" and "clear and easy," it need not be scrapped

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123. Indeed, resolving the narrower effects question addresses the real issue at stake for the parties, while resolving the jurisdictionality question will either over-decide or under-decide the case by leaving the effects unresolved. *See* Dodson, *supra* note 5, at 6–8 (explaining how deciding the jurisdictional question "risks either over- or under-deciding the case").

124. The Court has taken this approach on occasion. *See, e.g.*, Manrique v. United States, 137 S. Ct. 1266, 1271–72 (2017) (avoiding the question whether a timely notice of appeal from an amended criminal judgment imposing restitution is a jurisdictional requirement and instead holding it a mandatory rule that, because the appellee properly invoked the requirement, must be enforced). Courts of appeals have taken this approach as well. *See, e.g.*, Cunningham v. Comm'r of Internal Revenue, 716 F. App'x 182 (4th Cir. 2018) (declining to decide the jurisdictional character of the statutory deadline to file a claim in the U.S. Tax Court because the dispute could be resolved by finding that the deadline was not subject to equitable tolling).

125. *See* Dodson, *supra* note 40, at 13–14, 50–52 (recognizing the uncertainty and complexity in most jurisdictional doctrines and discussing the costs associated with "clear and simple" jurisdictional rules).

126. *See id.* at 52–55 (describing the potential benefits of complexity and jurisdictional uncertainty).

for that reason alone. If workable despite its complexity, the test would sit comfortably within a long tradition of such jurisdictional tests.