1994

Jurisdictionality, Time, and the Legal Imagination

Perry Dane

Follow this and additional works at: http://scholarlycommons.law.hofstra.edu/hlr

Part of the Law Commons

Recommended Citation
Available at: http://scholarlycommons.law.hofstra.edu/hlr/vol23/iss1/1

This document is brought to you for free and open access by Scholarly Commons at Hofstra Law. It has been accepted for inclusion in Hofstra Law Review by an authorized administrator of Scholarly Commons at Hofstra Law. For more information, please contact lawcls@hofstra.edu.
JURISDICTIONALITY, TIME, AND THE LEGAL IMAGINATION

Perry Dane

CONTENTS

I. INTRODUCTION ........................................ 3
   A. First Thoughts .................................... 3
   B. The Problem ...................................... 4

II. THE DOCTRINE OF JURISDICTIONAL TIME LIMITS .... 12

III. THE DOCTRINE AND THE IDEA OF JURISDICTION ..... 20
    A. The Idea of Jurisdiction ....................... 21
       1. Images ........................................ 23
       2. Doctrines ..................................... 30
          a. The Urgency of Power ...................... 31
          b. The Consequences of Powerlessness ...... 32
          c. Of Waiver .................................. 36

* Associate Professor of Law, Rutgers Law School—Camden. I am grateful to many colleagues at the Yale Law School and the Rutgers Law School—Camden, in particular Bruce Ackerman, Peter Schuck, and Allan Stein, for helpful comments on earlier drafts of this Article. I am also grateful to my research assistants, Bernard Roberts at Yale and Thomas Hower at Rutgers.
d. Of Discretion .................................. 37

 e. Jurisdiction and the Merits: Of Preclusion ...... 42

 f. Jurisdiction and the Merits: Of Overlap ....... 44

 g. Jurisdiction at the Threshold, and Beyond ... 47

 3. Alternatives ..................................... 50

 B. The Argument in Full .......................... 51

 1. A Semantic Prologue: Are “Jurisdictional
Time Limits” Necessarily Jurisdictional? ......... 51

 2. Ground Rules .................................... 60

 3. The Logic of Jurisdiction ........................ 61

 a. Discretion ....................................... 61

 b. Of Waiver and Estoppel ......................... 66

 c. The Specter of Bootstraps ........................ 68

 d. The Fear of the Abyss, and the
Fear of Judgment .................................. 71

 4. The Substance of Jurisdiction .................... 76

 a. Deference to the Common Law .................. 78

 b. Deference to the Legislature .................... 83

 5. The Jurisprudence of Jurisdiction ............... 86

 a. Of Positivism ................................... 86

 b. Of Residual Discretion .......................... 88

 6. A Functionalist Epilogue: Do “Jurisdictional
Time Limits” Have Something in
Common Besides Being Jurisdictional? ........... 93

 IV. THE DOCTRINE AND THE LEGAL IMAGINATION .... 95

 A. First Leads ...................................... 95

 1. Semantics Redux: Jurisdiction as Trope ........ 95

 2. Random Rules: Doctrine as Convention .......... 97

 B. Back to History ................................. 98

 1. The Mysterious Story of the Doctrine
of Jurisdictional Time Limits ..................... 99

 a. Strict and Liberal Construction ............... 99

 b. Jurisdictional and Non-Jurisdictional
Time Limits ...................................... 105

 c. The Road Not Taken ............................ 112

 2. The Fate of the Idea of Jurisdiction:
The Mystery Deepens ............................. 113

 C. The Loss of Faith ............................... 121

 1. Common Themes ................................. 121

 2. Equity, the Spirit of the Law, and Interpretation 122
I. INTRODUCTION

A. First Thoughts

Law is a world of words. Law also depends upon a singular confidence in the power of words. On that confidence rest many of the most cherished features of our civilization.

Two aspects stand out in the law’s faith in words. First, legal craft assumes that words can earn their keep, that they can impart principle and guide specific decisions. Legal texts might seem vague. But lawyers know how to try to render them precise. Legal texts might seem distant, or awkward, or stupid. But read as law, and not just as literary fragments, they demand to be relevant, coherent, and sensible. Legal texts might seem morally compromised. But interpretive charity, informed by the legal tradition as a whole, can find in them reflections of fairness and justice, or even wisdom.

A second aspect of the law’s special confidence in the power of words is its belief that legal ideas and categories are real things. All legal systems posit entities and attributes born of what Lord Coke called “the artificial reason of the law.” Most legal systems also embrace a set of images, metaphors, fictions, and even puns. Yet legal culture has the boldness to treat these linguistic creations as a species of reality, with real import and effect. That claim of reality is ontological, and normative. The upshot is that the legal imagination does not only believe that legal words have the power to convey coherent, sensible, and wise meaning (the first aspect of the law’s


faith in words). It also believes that they have the power to help create meaning—to settle what is coherent, sensible, and wise. This, of course, is a point of contention with legal skeptics, but it is really not so remarkable. All human activity uses words to help organize experience and in some sense create its own reality. Law is only more self-conscious about it.

The law's confidence in the power of words is finite, and rightly so. Legal craft can only do so much. Legal rules operate in the real world, understood by categories drawn from other aspects of experience. The artificial reason of the law always risks losing touch with those other realities and descending into silliness.

To be suitably cautious about the law's self-confidence is one thing, however. To lose that confidence—particularly at the behest of forms of skepticism dominant in the larger culture—is something else. When that happens, the result is rarely an explicit crisis of faith. Lawyers remain lawyers and judges remain judges. (Legal scholars are a different story.)° Rather, it often is a queer combination of self-indulgence and loss of nerve—a sour, dissociative turn to the law's special relationship with the language out of which it is built.

B. The Problem

This Article is about one such turn. It presses the themes sketched above, by way of a look at one specific corner of the law and a few specific legal words. The word that interests me most is "jurisdictional," although I also want to think about terms such as "thirty days" or "ninety days." The corner of the law is the doctrine of jurisdictional time limits.

In modern Anglo-American legal doctrine, legal issues are either "jurisdictional" or "non-jurisdictional." Jurisdictional issues go to the
power or authority of a tribunal. Non-jurisdictional issues do not. I will have more to say on this later.\(^5\) One context in which the division between jurisdictional and non-jurisdictional issues is drawn is that of time limits in the law. These time limits include statutes of limitations and limits on appeal. They also include limits on filing various motions, rules for filing petitions of certiorari in the United States Supreme Court and rules for beginning administrative actions or moving from administrative to judicial tribunals. Some time limits, such as most limits on appeal, are said to be jurisdictional. Others, such as most ordinary statutes of limitations, are not.\(^6\)

The doctrine of jurisdictional time limits, briefly stated, is this: if a time limit is jurisdictional, courts will interpret and apply it rigidly, literally, and mercilessly.\(^7\) A necessary pleading or motion or notice

*St. P. & P. R. Co., 294 U.S. 499, 510-11 (1935).*

In other contexts, formulations like “quasi-jurisdictional” or “almost jurisdictional” are used more generally, and sometimes to little more than rhetorical effect. See, e.g., League of United Latin Am. Citizens v. Clements, 986 F.2d 728, 769 n.28 (5th Cir. 1993) (finding that “although criminal venue [under Texas law] may be ‘quasi-jurisdictional’ in nature, venue can be acquired by ‘consent’ of the parties”), opinion on reh’g en banc, 999 F.2d 831 (5th Cir. 1993), cert. denied, 114 S. Ct. 878 (1994); Benning v. Board of Regents, 928 F.2d 775, 777 n.2 (7th Cir. 1991) (finding Eleventh Amendment issues to be “quasi-jurisdictional”); Young v. Herring, 917 F.2d 858, 862 n.1 (5th Cir. 1990), cert. denied, 117 L. Ed. 2d 627 (1992) (opining that rule announced in a Supreme Court case was “quasi-jurisdictional”); United States v. Rosen, 764 F.2d 763, 766 (11th Cir. 1985), cert. denied, 474 U.S. 1061 (1986):

In our judgment, however, there is a difference between a collateral attack on a particular sentence under Fed.R.Crim.P. [sic] 35 or 28 U.S.C.A. § 2255, and a direct appeal from multiple count convictions. With a collateral attack, only a specific count on a specific count is before the district court. The narrow scope of review on a collateral attack is almost jurisdictional in nature.

*Id.* at 766; *Flaiz v. Moore*, 359 S.W.2d 872, 875 (Tex. 1962) (reporting that some Texas courts have treated “the plea of forum non conveniens almost as jurisdictional”).

I leave to another day whether some or all of this type of language represents the same failure of legal imagination that I try to identify in this Article.

5. See *infra* text accompanying notes 55-58, 68-84.

6. As I explain later, I do not consider it part of my brief in this article to question whether particular time limits are, or are not, properly considered jurisdictional. See *infra* part III.B.2. Rather, I take those attributions for granted and consider their consequences.

7. For United States Supreme Court cases, see Missouri v. Jenkins, 495 U.S. 33, 45 (1990) (holding that the statutory requirement that petition for certiorari in civil case be filed within 90 days of entry of judgment in lower court is mandatory and jurisdictional and that the Court has no authority to extend filing period except as statute permits); Hallstrom v. Tillamook County, 493 U.S. 20, 31 (1989) (noting in dictum that the notice and 60-day delay requirement are mandatory conditions precedent to commencing suit under the statutory citizen suit provision); Bowen v. City of New York, 476 U.S. 467 (1986) (finding equitable tolling possible on a non-jurisdictional filing requirement); Zipes v. Trans World Airlines, 455 U.S. 385 (1982) (finding time limit at issue to be non-jurisdictional, and therefore subject to equitable tolling); Browder v. Department of Corrections, 434 U.S. 257, 271-72 (1978) (fail-
might arrive late at the courthouse because of a massive snowstorm,\(^8\) or chicanery or innocent error by the other side.\(^9\) A necessary act might be omitted due to the negligence of the court itself.\(^10\) But all

\[\text{\textit{In re Hanley's Estate, 142 P.2d 423 (Cal. 1943) (holding that courts may not extend jurisdictional limit even to relieve against mistake, inadvertence, accident, or misfortune; time limit would be strictly enforced even when failure to comply was due to misrepresentation by opposing counsel as to date from when time limit should be computed); East Lakewood Sanitation Dist. v. District Ct., 842 P.2d 233 (Colo. 1992) (holding 180-day notice requirement for actions filed under Governmental Immunity Act must be strictly complied with as jurisdictional prerequisite to action); Ecker v. Town of W. Hartford, 530 A.2d 1056 (Conn. 1987) (finding that period of limitation of action was a non-waivable jurisdictional prerequisite); Fredman Bros. Furniture Co. v. Dep't of Revenue, 486 N.E.2d 893 (Ill. 1985) (determining that "a significant distinction exists between statutes of limitation and statutes that both confer jurisdiction on a court and fix a time within which such jurisdiction may be exercised"); City of Devondale v. Stallings, 795 S.W.2d 954, 957 (Ky. 1990) (holding failure to file timely notice of appeal is a jurisdictional defect to which substantial compliance doctrine, otherwise governing all civil rules, does not apply); McVay v. McVay, 270 P.2d 393 (Mont. 1954) (accord); Daniel v. B. & J. Realty, 589 A.2d 998 (N.H. 1991) (holding that the rule regulating time of appeal to zoning board was jurisdictional and board was therefore required to apply it literally).\]


9. \textit{See, e.g., Pomper v. Thompson, 836 F.2d 131, 134 (3d Cir. 1987) (government sent an incorrect and misleading notice as to appeal rights); Zakem v. United States 78-2 TCM (CCH) P9584 (W.D. Wis. 1978) (plaintiff relied upon IRS District Director's incorrect letter setting forth the time for filing an appeal and was barred for late filing); In re Hanley's Estate, 142 P.2d 423 (Cal. 1943), discussed \textit{infra} note 207 and text accompanying notes 305-06.}

that simply is too bad. If the time limit is not jurisdictional, courts might still apply it rigidly, literally and mercilessly.11 But, they do leave themselves room for some flexibility.12

The doctrine of jurisdictional time is part of a broader notion that at least some jurisdictional requirements should be "strictly" interpreted. I will be referring to other instances of that principle at work, and much of my analysis has application beyond the context of jurisdictional time limits. My focus will be on time limits, however, for several reasons beyond the usual bid for focus and manageability.

First, courts apply the rule of strict construction with special vigor to time limits. The doctrine of jurisdictional time limits has its chinks.13 Some cases manage to bend it almost to the breaking

The Commission did not schedule a fact-finding conference until 5 days after expiration of the statutory deadline. The Illinois Supreme Court held that failure to comply with the time requirement deprived the Commission of jurisdiction.14

The United States Supreme Court reversed in Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) (holding that the Illinois Supreme Court's opinion violated Logan's due process rights); see id. at 436-37. The possibility of resorting to the Constitution as a deus ex machina, however, should be of small comfort to anyone interested in the underlying logic and implications for the legal culture of the state court's analysis.

11. See, e.g., Hallstrom v. Tillamook County, 493 U.S. 20, 31 (1989) (applying time limit literally on other grounds, and holding that there is therefore no need to determine if the time limit is also "jurisdictional"); Scholar v. Pacific Bell, 963 F.2d 264 (9th Cir. 1992), cert. denied, 113 S. Ct. 196 (1992); California v. Yuba Goldfields, Inc., 752 F.2d 393 (9th Cir. 1985), cert. denied, 474 U.S. 1005 (1985); School Dist. of Allentown v. Marshall, 657 F.2d 16 (3d Cir. 1981); Commonwealth v. Clinton, 374 N.E.2d 574, 575 (Mass. 1978) (holding that a statute requiring police officers to deposit requests for complaints in district court within three-day limit "must be strictly construed . . . [the] uncertainty that results from a literal reading of the statute is to be resolved in favor of the defendant") (citations omitted); In re Nomination Papers of Am. Labor Party, 44 A.2d 48, 50-51 (Pa. 1945) (finding that although court below had jurisdiction to hear the petition in question, it could not grant the requested relief because appellant failed to prove compliance with the mandatory provisions of the Election Code).

12. Cf. Scholar v. Pacific Bell, 963 F.2d 264 (9th Cir. 1992), cert. denied, 113 S. Ct. 196 (1992) ("Relief from strict construction of a statute of limitations is readily available in extreme cases and gives the court latitude in a case-by-case analysis. The equitable tolling doctrine has been applied by the Supreme Court in certain circumstances, but it has been applied sparingly . . . .") (citations omitted); Radich v. Fairbanks Builders, Inc., 399 P.2d 215, 217 (Alaska 1965) (finding that non-jurisdictional time limit can sometimes be relaxed when strict application would be unfair); Machules v. Department of Admin., 523 So. 2d 1132, 1133 n.2, 1134 (Fla. 1988) (holding that because time limit was not jurisdictional, doctrine of equitable tolling was applicable).

13. See, e.g., Vlaicu v. INS, 998 F.2d 758 (9th Cir. 1993) (finding that time limit for filing notice of appeal is mandatory and jurisdictional, but in "unique circumstances," if party is misled by court's conduct or words, appellate tribunal might have jurisdiction to hear an otherwise untimely appeal); Pinion v. Dow Chemical, 928 F.2d 1522 (11th Cir. 1991) (articulating "unique circumstances" exception to "strict," "jurisdictional" time limit, to be employed only when court has lulled a party into failing to file a timely appeal yet declining to apply.
The history of the doctrine, as I will emphasize here, is ambiguous. Nevertheless, in a legal age wary of absolutes, the doctrine of jurisdictional time limits comes close. Even when it is not absolute, its gravitational pull is weighty.

Second, courts apply the doctrine of jurisdictional time limits with special earnestness. The legal culture—in particular judicial culture—treats jurisdictional time limits with something approaching reverence. The proper construction of jurisdictional time limits might not be an inherently interesting topic. But to a student of the legal culture, that special reverence marks the doctrine as having the potential to reveal deeper truths.

Third, the doctrine of jurisdictional time limits is more than a rule of law. It is also a rule of protocol in judicial chambers, a part of the internal code of judges, law clerks, and court clerks. Both


See, e.g., Houston v. Lack, 487 U.S. 266 (1988) (holding that pro se prisoners’ notices of appeal are considered “filed” at the moment of delivery to prison authorities for forwarding to the district court); Edison Elec. Inst. v. EPA, 996 F.2d 326, 331 (D.C. Cir. 1993) (holding that time limit within which to appeal agency action is jurisdictional, but period for seeking judicial review can be made to run again if agency by a new promulgation creates opportunity for renewed objections); Illinois Cent. Gulf R.R. v. ICC, 720 F.2d 958 (7th Cir. 1983) (holding that even though time limit on review of agency action was jurisdictional, it would not, under “unusual circumstances” of this case, bar challenge to conditional agency action that was originally meant to be a temporary stop-gap, but which had lasted for more than two years, thus creating “greater reason” to call it into question); Torres v. Derwinski, 1 Vet. App. 15, 17 (1990) (holding that as the court’s address was not available at the time the appellant requested judicial review, “literal compliance with the statute was impossible”); Abrams v. Ohio Pac. Express, 819 S.W.2d 338, 342 (Mo. 1991) (finding that strict compliance with jurisdictional time limit is required only after ambiguities in statute are resolved, and those ambiguities, in certain contexts, can be resolved under rule of liberal construction).

I have no large stake in drawing a sharp distinction between the cases cited in this note and those cited supra note 13.

See infra part IV.B.1.

I can speak to some of this from personal experience. When I began my clerkship for Justice William Brennan at the United States Supreme Court, one of the first topics broached during our orientation was the distinction between jurisdictional and non-jurisdictional time limits. The other clerks and I were told, not only that violations of jurisdictional time limits could not be forgiven, but that it was the practice of the court clerk’s office to refrain
law and protocol treat the rigidity of jurisdictional time limits as a
dfact of nature before which judges feel genuinely and atypically pow-
erless. Indeed, the term "jurisdictional," regarding time limits, some-
times simply seems to mean "literal" or "strict" or "not admitting of
exceptions." Finally, time limits are deceptively simple and straight-
forward. That is exactly why they are so potentially revealing.

One of my goals in this Article is to argue that the doctrine of
jurisdictional time limits is misconceived, or at least a miscalculation.
It does not follow that, simply because a rule is jurisdictional it
should always be literally enforced.

This is not to say that jurisdictional time limits should be loosely
enforced. Maybe some should be. Maybe not. Maybe some non-juris-
dictional time limits should be enforced more strictly than they are.
But the jurisdictional or non-jurisdictional character of a particular
time limit is not the automatic key to deciphering its meaning or the
strictness of its application.

This analytic point will turn out to be manifest, or so I will
argue. The other interesting question, then, is why the law should
have so miscalculated. The expected answer might be that it sank into
senseless formalism, or that it created a fetish out of the word "ju-
risdiction." I believe that senseless formalism had something to do
from forwarding to the individual chambers petitions for certiorari that violated jurisdictional
time limits. This was taken as a matter of course, and almost as a fact of nature, by a Jus-
tice otherwise known for his judicial activism and expansive view of legal interpretation.

17. Cf infra part III.B.1 (discussing and rejecting possibility that the doctrine of juris-
dictional time limits is only a semantic usage); part IV.A.1 (discussing and rejecting the
possibility that the doctrine of jurisdictional time limits is only a linguistic subterfuge).

18. There is a long academic tradition of criticizing certain jurisdictional doctrines for
adhering too formalistically or rigidly or blindly to certain classical conceptions of
jurisdictionality, and ignoring "policy" concerns such as efficiency, fairness, or the integrity of
the political or judicial system. See generally 1 JAMES W. MOORE, ET AL., MOORE'S FEDER-
AL PRACTICE ¶ 0.60 (2d ed. 1948) [hereinafter MOORE ET AL.]; Hugh B. Cox, The Void
Order and the Duty to Obey, 16 U. CHI. L. REV. 86 (1948); Dan B. Dobbs, The Validation
of Void Judgments: The Bootstrap Principle (parts 1 & 2), 53 VA. L. REV. 1003, 1241
(1967) [hereinafter Dobbs, Validation of Void Judgments]; Dan B. Dobbs, Beyond Bootstrap:
Foreclosing the Issue of Subject-Matter Jurisdiction Before Final Judgment, 51 MINN. L.
REV. 491 (1967); Hall, supra note 7; Edward P. Krugman, Filling the Void: Judicial Power
and Jurisdictional Attacks on Judgments, 87 YALE L.J. 164 (1977) [hereinafter Krugman,
Filling the Void]; Note, Assuming Jurisdiction Arguendo: The Rationale and Limits of Hypo-
thetical Jurisdiction, 127 U. PA. L. REV. 712 (1979); see also RESTATEMENT (SECOND) OF
JUDGMENTS § 12 (1982).

This trend should, however, be sharply distinguished from the very different and, to
my mind, much more benign effort to import concerns of policy into the drawing of juris-
dictional lines themselves, or into deciding which issues are truly jurisdictional and which are
not.

19. See, e.g., 1 MOORE ET AL., supra note 18, ¶ 0.60(4) (describing as "fetish" the doc-
with the mistake. But so did a failure to understand and respect important formal distinctions.

More to the point, the problem with jurisdictional time limits is not that courts have treated jurisdiction as too important. It is that they have not treated it as important enough. Indeed, the doctrine of jurisdictional time limits co-exists with a steady general erosion of the integrity of the idea of jurisdiction, and I suggest that this is no coincidence.

Put in the terms with which I began this essay, the doctrine of jurisdictional time limits is an example of the law suffering from a form of neurosis arising out of a crisis of confidence. Automatic categorical literalism is not a symptom of legalism. It is, for all its pretensions to the contrary, a sign of a deep mistrust of legalism.

My approach in this Article, then, is not the usual skeptical impatience with doctrine, but an effort to recapture the nuances of doctrine. I will devote some attention to what I call the "Idea of Jurisdiction," and its implications. I agree with current doctrine that parties alone cannot simply waive jurisdictional time limits (unlike non-jurisdictional ones). I also agree that courts cannot simply excuse them as a matter of judicial discretion, if discretion is understood as akin to an act of grace. But there is a long distance, washed away in the development of the doctrine of jurisdictional time limits, between these narrow, specific restrictions and a more general rule of literal, strict, and merciless construction.

As stated, I will not argue in this Article that any particular jurisdictional time limits should be read less literally or more flexibly. Similarly, I do not want to weigh in, as such, on the endless debates about whether law works best with rigid norms or flexible norms,

trine that questions of subject matter jurisdiction can be raised at any time); AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 366 (1969) (discussing same proposition).

20. See infra part IV.C.


22. See infra part III.A.
All I will argue is that the categorical distinction that current doctrine draws between the way it reads jurisdictional time limits and the way it reads non-jurisdictional time limits is neither required nor justified.

I am interested, though, in why the legal culture ever reads a legal norm other than literally. What justifications or explanations does it offer?

I will argue that these justifications and explanations can take two very different forms. They can reflect faith in the integrity and potential of the law's interpretive project. Or they can reflect an abandonment of that faith, and a resort to norms that stand against the law rather than find their way into it. Often, these two visages stand by side in uneasy, even healthy, tension. But the doctrine of jurisdictional time limits marks a cleavage point, a test of assumptions and commitments. And the rigid, literal, interpretation of jurisdictional time limits—only because they are jurisdictional—is the sad, confused underside of a trend whose more usual manifestation is a flight away from legal words altogether.

Part II of this Article will describe the doctrine of jurisdictional time limits in its current form. Part III asks, in systematic fashion, whether there is any justification for the doctrine of jurisdictional time limits. It does in particular by reference to that classic Idea of Jurisdiction to which the doctrine claims obedience, but to which—it will turn out—it has only a tenuous connection.

Part IV shifts the analysis from an inquiry that is mainly con-


24. I will later refer to these two forms of argument as “Blackstonian” and “Aristotelian,” respectively. See infra part IV.C.2.
cerned with justification to one that is centered on explanation. In part IV, I ask why, if the doctrine of jurisdictional time limits is so flawed, the legal culture would nevertheless take it for granted. After chasing down some partial leads in search for an explanation, I look to the history of the doctrine, and also to the recent history of the Idea of Jurisdiction, to see where and why the law took the turns that it did. I then speculate about the deeper forces involved in shaping the doctrine and their implications for our ideas about law and legal interpretation.

II. THE DOCTRINE OF JURISDICTIONAL TIME LIMITS

Courts often interpret time limits, and for that matter other rules of law, strictly or literally. That in itself does not prove very much. However, the doctrine of jurisdictional time limits, in its most revealing form, always rests on an explicit contrast. The form of that contrast is simple: if a time limit is jurisdictional, the court will read it or treat it one way; if it is not jurisdictional, the court will read it or treat it another way. Thus, whether the time limit is jurisdictional can be crucial to whether a litigant can argue excusable neglect, estoppel, substantial compliance, or any other similar grounds to stretch the literal language of the time limit.

Some cases distinguish between jurisdictional time limits and "mere" statutes of limitations. The most well-known example in recent years is the Supreme Court opinion in Zipes v. Trans World Airlines. The time limit at issue in Zipes was that which governs the filing of claims with the Equal Employment Opportunity Commis-


The organization of this Article does not, to be sure, track this distinction perfectly. For example, the argumentative core of part III begins with a semantic analysis that is a matter of neither justification nor explanation, but rather clarification. See infra part III.B.1. It finishes with a functionalist discussion that, in the nature of such arguments, lies in an uneasy grey zone between justification and explanation. See infra part III.B.6.

26. See cases cited at supra note 7.

27. For cases specifically referring to "mere statutes of limitations," see, in addition to cases cited and discussed in this part and supra note 7, Guy v. Robbins & Myers, Inc., 525 F.2d 124, 127 (6th Cir. 1975); Simon v. United States, 244 F.2d 703, 705 (5th Cir. 1957); Barrett v. State, 560 N.Y.S.2d 302 (Sup. Ct. 1990); King v. L. M. Southern Real Estate & Improvement Co., 155 N.E. 797, 798 (Ohio 1927); see also United States ex rel. Louisville Cement Co. v. ICC, 246 U.S. 638, 642 (1918), which is discussed infra text accompanying notes 323-24.

The Court considered whether TWA could waive the time limit by failing to raise it at a sufficiently early stage in the proceedings. It held that the time limit was "not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling." 29

The basic inquiry in Zipes, and the distinction that it assumes, has been repeated in many other cases. For example, in Shendock v. Director of the Office of Workers' Compensation Programs, 30 a pro se black lung claimant believed that he was appealing an adverse ruling by the Department of Labor. Rather than file a petition for review with the Federal Court of Appeals, however, Shendock left a letter indicating his desire to appeal with the local black lungs complaint office. The letter was left within the sixty-day time limit on such appeals, but nothing was actually filed with the court until many months later.

The court decided that Congress intended the time limit to be "jurisdictional." 31 It went on to hold that "[e]quitable tolling or estoppel simply is not available when there are jurisdictional limitations." 32 The court also refused to entertain the possibility that Shendock's letter might constitute a filing under the statute. Quoting other precedent, it maintained that jurisdictional requirements demanded "punctilious, literal, and exact compliance," 33 and that if "the time limitation is jurisdictional in nature, thus going to the very power to adjudicate, the court must consider the delay sua sponte and apply the statute strictly." 34

The distinction between jurisdictional and non-jurisdictional time limits also appears in the Supreme Court's certiorari jurisprudence. For perhaps accidental reasons, the time limit for certiorari petitions in civil cases is contained in a statute, 35 while the time limit for cer-

---

29. Id. at 393.
30. 893 F.2d 1458 (3d Cir. 1990) (en banc).
31. Id. at 1466.
32. Id.
33. Id.
34. Id. (quoting LaVallee Northside Civic Ass'n v. Virgin Islands Coastal Zone Management Comm'n, 866 F.2d 616, 625 (3d Cir. 1989)) (citation omitted).
35. 28 U.S.C. § 2101(c) (1989), providing:
Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.
tiorari in criminal cases is the product of a rule of court.\(^\text{36}\) This alone seems a valid ground for distinction, since a court presumably has more leeway with its own rules than with a statute. But, for many years, the Court has framed the distinction in jurisdictional terms. The leading primer on Supreme Court practice captures both the case law and the routine of Supreme Court functionaries, stating:

\[\text{[The time limitations prescribed by Congress . . . make the untimely filing of a petition a jurisdictional defect. In such cases, the Court cannot waive the untimeliness or to entertain the petition. . . . This jurisdictional requirement of timeliness is strictly applied in civil cases. No exceptions or waivers are recognized; no matter how extenuating the circumstances, an untimely petition will not be entertained. See, e.g., Deal v. Cincinnati Board of Education, 402 U.S. 962 (airline lost all the papers); Teague v. Commissioner of Customs, 394 U.S. 977 (unforeseeable snowstorm created a postal delay) . . . .}

The Court is so firm in its holding that it lacks jurisdiction over a petition in a civil case filed beyond the time limits set by Congress that it has instructed the Clerk to reject such a petition without docketing or circulating it to the Court . . . .

A party’s only remedy [would then be] to file a motion asking the Court to order the Clerk to accept a petition which he has rejected, perhaps on the ground that the Clerk’s time calculations were wrong. No such motion has as yet been granted . . . .

But where the time limitation is established by rule of Court, . . . the Court has just as consistently held that an untimely filing is not a jurisdictional defect and that an untimely petition can be entertained and granted and the case reviewed if there are compelling reasons for overlooking the untimeliness and for granting review.\(^\text{37}\)

The doctrine of jurisdictional time limits is not absolutely airtight. A small number of recent cases have interpreted jurisdictional time limits to admit some form of tolling or estoppel.\(^\text{38}\) Other cases

---


\(^\text{37}\) Robert L. Stern & Eugene Gressman, Supreme Court Practice 278-79 (7th ed., 1993) [hereinafter Stern & Gressman] (footnote omitted). Cases reiterating this distinction include Johnson v. Florida, 391 U.S. 596, 598 n.* (1968) (criminal case) and Missouri v. Jenkins, 495 U.S. 33, 45 (1990) (but holding that petition for rehearing in Court of Appeals "tolls" running of certiorari limit because, until Court of Appeals disposes of rehearing petition, there is no "judgment" from that court).

\(^\text{38}\) E.g., People v. Thomas, 389 N.E.2d 1094 (N.Y. 1979) (prosecutor in criminal case negligently failed to bring to attention of court that defendant’s attorney had not filed an
have engaged in sometimes imaginative interpretations to avoid the literal effect of the statute.\textsuperscript{39} But these cases are in such a distinct minority that they only emphasize how entrenched the doctrine is otherwise. Moreover, even these exceptional cases demonstrate the gravitational pull of the doctrine, either by their tone of near-apology or by a hypertechnicalism that tries to obscure the real interpretive stakes at hand.

Expressions of the doctrine of jurisdictional time limits have also faced some academic criticism. However, these criticisms tend either to argue that a given time limit is not jurisdictional at all, or that courts have turned jurisdiction into a fetish.\textsuperscript{40}

\begin{quote}
We remain convinced that strict construction [of the time limit contained in the statute] is appropriate since the time limits within which appeals must be taken are jurisdictional in nature and courts lack inherent power to modify or extend them.

Nevertheless, because the omissions on the part of the prosecutor, though no doubt made more critical by assigned counsel’s less than assiduous performance, frustrated the good faith exercise of the defendant’s right to [appeal], . . . the People should be estopped from invoking the bar of the one-year limit . . . [particularly since] the defendant made diligent efforts to preserve his right to appeal . . . [and it cannot] be disputed that by [sic] for the cumulative effect of the prosecutor’s inaction, the defendant would have learned of his failure to file an effective notice of appeal early enough to make timely application for relief.
\end{quote}

\textit{Id.} at 1096 (citations omitted).

\textsuperscript{39} See cases cited \textit{supra} notes 13-14.

\textsuperscript{40} Most directly, see Hall, \textit{supra} note 7. Hall summarizes his argument as follows:

The federal courts have fundamentally misconceived the nature of limitations on the time to appeal. The appellate courts have made a fetish of their own authority by characterizing timing defects in notices of appeal as “jurisdictional” and dismissing untimely appeals late in the appellate process even though the parties entirely overlook the error. Properly conceived, appeals periods are like original jurisdiction limitation periods; they involve primarily the interests of the immediate parties, not fundamental societal interests. They should therefore be subject to waiver by the parties.

\begin{quote}
. . . . In sum, at all levels of analysis—precedent, analogy, statutes, rules, rudimentary logic, history, policy, and practicum—it is inescapable that appeal periods should not be imbued with the mystical “jurisdictional” aura that connotes an importance different in kind from other procedural rules.
\end{quote}

\textit{Id.} at 399-400, 427 (footnotes omitted).

In a sense, Hall’s argument is almost the exact converse of mine. Hall addresses most of his argument, not at the rule of strict construction that courts have applied to jurisdictional time limits, which he sometimes takes for granted, but at the notion that these rules, because they are jurisdictional, cannot be waived. I argue that genuinely jurisdictional time limits should\textit{ not} be waivable, but\textit{ should} be seen as being, at least potentially, capable of a more forgiving substantive construction than courts have generally been willing to give them.

For analysis similar to Hall’s see Paul D. Carrington, \textit{Toward a Federal Civil Interlocutory Appeals Act}, \textit{47 Law & Contemp. Probs.} 165 (1984):
To my mind, the most powerful criticism of the doctrine of jurisdictional time limits is found in a small dissenting opinion by Justice Hugo Black, in *Teague v. Commissioner of Customs*, the snowstorm case just cited. Justice Black, dissenting from a denial of certiorari, joined only by Justice William Douglas, argued as follows:

The statute governing the time for seeking certiorari in a civil case... provides that a petition for review of any judgment or decree "shall be taken or applied for within ninety days after the entry of such judgment or decree." It is suggested by the Solicitor General, on behalf of respondents here, that this statute is "jurisdictional," and that we must follow it. I agree, of course, that we should follow the statute. But we must first determine what the statute means. Commentators and this Court alike have often said that the statute is "jurisdictional," and no doubt this statement is true in certain senses of that term. But the statement certainly is not true if it is intended to suggest that the statute deprives this Court of all power to hear cases filed after the 90-day period, regardless of whether the delay was caused by snowstorms making the transportation of the mails impossible. Under no known principle of statutory construction can such an interpretation... be supported. Nor have I been able to find any case interpreting the statute in this way. Although many cases repeat the "jurisdictional" formula, none of them that I have found involved situations where the delay was wholly caused by circumstances entirely beyond the petitioner's control...

... [The Court's Draconian interpretation of the statute is not supported by our prior decisions. Nor does the language of the statute itself dictate the Court's result. The statute does not say explicitly that the time limitation may be inapplicable under certain extenuating circumstances, but it also does not say that the time limit must be ruthlessly applied in every conceivable situation, without regard to hardships involved or extenuating circumstances present. The Court therefore must decide what is the more sensible interpretation of the statute. I for one cannot think of any purpose Congress
might have had that could possibly be served by holding that a litigant can be defeated solely because of a delay that was entirely beyond his control. . . . It might be well to imagine for a moment what would have happened if some Senator or Representative had suggested an amendment to “clarify” the [time limit] . . . by stating that a petition filed after the 90-day period will not be out of time “when the delay is caused solely by an interruption of the mail service due to snowstorms.” It is conceivable that more than a few members of Congress would consider such an amendment an insult to this Court’s intelligence and would feel it unnecessary to lead this Court by the hand on such matters of elementary common sense. It is impossible, however, to believe that any of them would have regarded an amendment to the opposite effect as properly reflecting the purpose of the statute, and yet this opposite amendment, ruling a petition out of time under these circumstances, is precisely the amendment that the Court today tacitly engrafts . . . .

The most remarkable thing about this dissent is how unremarkable it is. I do not necessarily endorse Justice Black’s specific interpretation of the time limit under consideration. Nor do I necessarily endorse his particular mode of statutory construction, which uneasily combines intentionalist rhetoric with constructivist argument. But his general approach seems well in line with a long line of precedent suggesting that courts must sometimes go beyond the literal content of a statute in order to discover its true meaning, particularly when the result otherwise would be absurd. Moreover, any number of

42. Teague, 394 U.S. at 981-84 (Black, J., dissenting from denial of cert.).
43. Note that the Supreme Court has since created a rule that serves as a partial solution to the “snowstorm” problem. Time limits are now measured by postmark dates rather than by dates of receipt. Sup. Ct. R. 29.2 (1990). Interestingly though, this rule merely replaces one mercilessly applied bright line test with another. In that sense, it is both underresponsive and overresponsive to Justice Black’s concerns.
44. I do not suggest, however, that Justice Black’s method lacks any serious intellectual respectability. It is not unlike, for example, Richard Posner’s position in RICHARD A. POSNER, FEDERAL COURTS: CRISIS AND REFORM 286-87 (1985) which suggested that “the judge should try to put himself in the shoes of the enacting legislators and figure out how they would have wanted the statute applied to the case before him.” On the other hand, Judge Posner has since repudiated that approach. See RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 286-309 (1990).
45. See, e.g., Haggar Co. v. Helvering, 308 U.S. 389, 394 (1940) (IRS argued that literal reading of tax statute forbid even a timely amendment of corporation’s tax return that would change erroneously calculated declared value of corporation’s capital stock. The Court held that no purpose of the statute or interest of the Government would be thwarted by allowing such an amendment, declaring that “[a]ll statutes must be construed in the light of
their purpose. A literal reading of them which would lead to absurd results is to be avoided when they can be given a reasonable application consistent with their words and with the legislative purpose."); Sorrels v. United States, 287 U.S. 435 (1932) (disallowing criminal prosecution for offense caused by entrapment by government officials):

It is manifest that these arguments [in favor of allowing the prosecution] rest entirely upon the letter of the statute. They take no account of the fact that its application in the circumstances under consideration is foreign to its purpose; that such an application is so shocking to the sense of justice that it has been urged that it is the duty of the court to stop the prosecution in the interest of the Government itself, to protect it from the illegal conduct of its officers and to preserve the purity of its courts. But can an application of the statute having such an effect—creating a situation so contrary to the purpose of the law and so inconsistent with its proper enforcement as to invoke such a challenge—fairly be deemed to be within its intent?

Literal interpretation of statutes at the expense of the reason of the law and producing absurd consequences or flagrant injustice has frequently been condemned. Id. at 446 (citations omitted); United States v. Ryan, 284 U.S. 167 (1931), stating:

All laws are to be given a sensible construction. A literal application of a statute which would lead to absurd consequences is to be avoided whenever a reasonable application can be given which is consistent with the legislative purpose.

Notwithstanding the broad language of the section, we think it may be given a reasonable construction, and the one most consistent with its apparent purpose, by the application of the principle noscitur a sociis. Id. at 175-76 (citations omitted); United States v. Katz, 271 U.S. 354, (1926), stating “All laws are to be given a sensible construction; and a literal application of a statute, which would lead to absurd consequences, should be avoided whenever a reasonable application can be given to it, consistent with the legislative purpose.”. Id. at 356-57; Ozawa v. United States, 260 U.S. 178 (1922), stating:

It is the duty of this Court to give effect to the intent of Congress. Primarily this intent is ascertained by giving the words their natural significance, but if this leads to an unreasonable result plainly at variance with the policy of the legislation as a whole, we must examine the matter further. We may then look to the reason of the enactment and inquire into its antecedent history and give it effect in accordance with its design and purpose, sacrificing, if necessary, the literal meaning in order that the purpose may not fail.

Id. at 194 (citations omitted); Church of the Holy Trinity v. United States, 143 U.S. 457 (1892) (immigration statute made it unlawful for employers to “prepay the transportation, or in any way assist or encourage the importation or migration” of immigrant alien employees). This court held that although members of clergy were within literal reach of the statute:

[W]e cannot think Congress intended to denounce with penalties a transaction like that in the present case. It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers. This has been often asserted, and the reports are full of cases illustrating its application. This is not the substitution of the will of the judge for that of the legislator, for frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act.

Id. at 459.
contemporary theories of statutory construction—static and dynamic, intentionalist and constructivist, as well as purposive, pragmatic, or even linguistic—would support at least the outlines of Justice Black’s approach to the problem.47


For a more general discussion of “equitable construction,” see infra part IV.C.2.

46. For sources surveying the current debate on statutory construction, see infra notes 352-53.

47. Most legally literate readers will notice the irony that Justice Black himself was famous for holding, as a matter of principle, to absolutist, arguably “literal,” readings of many issues. See, e.g., Katz v. United States, 389 U.S. 347, 364 (1967) (Black, J., dissenting) (objecting to Court’s extension of Fourth Amendment to wiretapping); Griswold v. Connecticut, 381 U.S. 479, 507 (1965) (Black, J., dissenting) (objecting to Court’s invocation of unenumerated “right of privacy” to invalidate state restriction on use of contraceptives). Most notable was his interpretation of the free speech clause of the First Amendment. In Black’s view, the clause protected all speech absolutely from regulation on the basis of its content, without regard to balancing tests, considerations of clear and present danger, or exceptions such as obscenity or libel. See, e.g., New York Times Co. v. Sullivan, 376 U.S. 254, 293 (1964) (Black, J., concurring in the judgment) (libel); Kingsley Int’l. Pictures Corp. v. Regents, 360 U.S. 684, 690 (1959) (Black, J., concurring) (obscenity); Barenblatt v. United States, 360 U.S. 109, 134 (1959) (Black, J., dissenting) (balancing test); Yates v. United States, 354 U.S. 298, 339 (1957) (Black, J., concurring in part, dissenting in part) (clear and present danger test). By the same token, he was reluctant to extend the protection of the First Amendment to non-speech conduct that happened to be expressive. See, e.g., Street v. New York, 394 U.S. 576, 609 (1968) (Black, J., dissenting) (flag burning); Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949) (Black, J.) (picketing). And he was often more tolerant than the majority of the Court of time, place, and manner regulations that in his view were not directed to the content of speech. See, e.g., Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 515 (1969) (Black, J., dissenting) (wearing of black armbands by schoolchildren). But cf. Barenblatt, 360 U.S. at 142 (Black, J., dissenting) (supporting balancing test for regulation of conduct that indirectly affects ideas). For Justice Black’s own summary of his views, see HUGO BLACK, A CONSTITUTIONAL FAITH 43-63 (1969).

These views did reflect for Justice Black a general jurisprudence of textualism and literalism. See generally BLACK, supra, at 9-10; Guido Calabresi, The Supreme Court, 1990 Term: Foreword: Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores), 105 Harv. L. Rev. 80 (1991). But it would be a mistake to imagine that Black’s views on literalism were either unwavering and uncritical or unreflective. See Calabresi, supra, at 87 n.17. His Teague opinion demonstrates that. And so do other cases. For example, in Reid v. Covert, 354 U.S. 1 (1957), Justice Black quoted with approval the view that:

[Illegitimate and unconstitutional practices get their firstfooting ... by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction
Nevertheless, to most contemporary judges, Black's dissent, in its attitude toward jurisdictional time limits, would seem wilful, or misguided, or illogical, or all of these. The remainder of this article examines why that might be.

III. THE DOCTRINE AND THE IDEA OF JURISDICTION

As just stated, the most potent objection to the doctrine of jurisdictional time limits comes straight from Justice Black's argument in Teague. Granted, some time limits are jurisdictional. Jurisdictional time limits are important. Jurisdictional time limits are also mandatory. But that still leaves open an important interpretive question. What does the jurisdictional rule mean? What is its true content? Does it allow any room for flexibility, or tolling, or mitigation? The words of the rule, however categorical they seem, cannot a priori shut off that interpretive inquiry. To say that the rule is mandatory does not itself resolve anything about the meaning or nuances of the mandatory rule. Again, the point is not whether Justice Black was right about the time limit in Teague, or about any other specific time limit. I am defending his premise in Teague, not his conclusion. There are strong arguments for the strict reading of particular time limits, or even most or all time limits. Some of these arguments are instrumental. Strictly construed time limits create incentives for compliance. They encourage repose and advance finality. They reduce the burden on courts
of deciding when leniency is in order. Other arguments flow from
theories of statutory construction that resist deviations from literal
language. But none of these arguments explains the singularly literal,
singularly rigid, interpretation of jurisdictional time limits.

The question, then, is whether something in the "Idea of Juris-
diction" itself, in the jurisdictional character—the jurisdictionality—of
certain legal issues, warrants closing the interpretive door. Working
through that question will require a more careful account of just what
jurisdiction and jurisdictionality are.

A. The Idea of Jurisdiction

A good starting point is the classic, prosaic concept of jurisdic-
tion and jurisdictionality in Anglo-American law. I shall call this
concept the Idea of Jurisdiction.52 The Idea of Jurisdiction is a prom-
inent motif in Anglo-American legal culture. Like many other clas-
cical ideas in that culture,53 it was most fully and confidently defined
in the nineteenth century.54 It remains a major theme in the law,
sua sponte, and often collaterally, holding that a given time limit is jurisdictional can frustrate
finality in one respect while promoting it in another. Cf. In re Santos, 112 B.R. 1001, 1004
(9th Cir. 1990) (holding that time limits for filing dischargeability complaints and objections
to discharge in bankruptcy proceedings are not jurisdictional in part because "a determination
that the time limits are jurisdictional would allow a dischargeability judgment to be collateral-
ly attacked on the grounds of untimeliness at any time, a result clearly at odds with the
purpose of promoting finality and certainty of relief").

51. See, e.g., FRIEDRICH A. HAYEK, THE ROAD TO SERFDOM 78 (1944); Antonin Scalia,

52. What I have in mind bears some resemblance to the "axiom of jurisdiction" de-
scribed in Note, Assuming Jurisdiction Arguendo: The Rationale and Limits of Hypothetical

53. By "classical," I do not intend to suggest that these ideas are beyond time or
change. Professor Dobbs argued that many of the ideas we now associate with
jurisdictionality, including the notion that parties could not confer jurisdiction by waiver or
consent, realized fruition in the nineteenth century, after a slow process of development. Dan
should make of this history, however, is not pre-ordained. It might reflect the pure contingen-
cy of legal doctrine. Or it might reflect, as I put it later in this article, "a genuine maturing
of legal understanding." See infra text accompanying note 287.

54. For example, the last general treatise on jurisdiction and its meaning and conse-
quences appeared, to the best of my knowledge, in 1899. See WILLIAM F. BAILEY, THE LAW
OF JURISDICTION (1899).

More recently, concern with jurisdiction and jurisdictionality has tended either to be
lumped into more diffuse studies of procedure or sidetracked into the new analytic category
of federal jurisdiction, a subject that, with all due respect, often has no more to say about
the theory of jurisdiction than would a study of federal agents have to say about the theory
of agency. For accounts of the intellectual history of the development of federal jurisdiction
though compromised and diluted.

Described in its most robust form, the Idea of Jurisdiction has a simple core: jurisdictional issues implicate the power or legitimate authority of a court.\textsuperscript{55} Some legal rules are substantive. Others are procedural. Both substantive and procedural norms provide rules of decision for courts. In contrast, jurisdictional rules specify whether a given tribunal has the authority to decide those other issues, and to bind the rest of the world to its decision.\textsuperscript{56} One way of putting it is


It should be noted that one of the aims of this Article is to refocus scholarly attention on the notion of jurisdiction itself, apart from the special concerns, both substantive and jurisprudential, implicated in the study of federal jurisdiction.

\textsuperscript{55} See Binderup v. Pathe Exchange, Inc., 263 U.S. 291, 305 (1923) (noting that "jurisdiction is the power to decide a justiciable controversy"); Faunteroy v. Lum, 210 U.S. 230, 235 (1908) (stating that the distinction between jurisdictional and merits issues "is plain; [o]ne goes to the power, the other only to the duty, of the court"); The Resolute, 168 U.S. 437, 439, \textit{aff'd}, The William H. Hoag, 168 U.S. 443 (1897) (holding that "jurisdiction is the power to adjudicate a case upon the merits, and dispose of it as justice may require"); McNitt v. Turner, 83 U.S. 352, 366 (1872) ("[J]urisdiction is authority to hear and determine. It is an axiomatic proposition that when jurisdiction has attached, whatever errors may subsequently occur in its exercise, the proceeding being \textit{coram judice}, can be impeached collaterally only for fraud."); Titus v. Sullivan, 4 F.3d 590, 593 (8th Cir. 1993) (noting that "at issue in a factual [F.R.C.P.] 12(b)(1) motion is the trial court's jurisdiction—its very power to hear the case") (quoting Mortensen v. First Fed. Sav. & Loan Ass'n, 549 F.2d 884 (3d Cir. 1977)); Shea v. First Federal Savings & Loan Assn. of New Haven, 439 A.2d 997, 999 (Conn. 1981) (holding that "subject matter jurisdiction is the power of the court to hear and determine cases of the general class to which the proceedings in question belong"); Duval v. Duvall, 80 So. 2d 752 (Miss. 1955), stating:

\begin{quote}
[J]urisdiction should be distinguished from the exercise of jurisdiction. The authority to decide a case at all, and not the decision rendered therein, is what makes up jurisdiction, and when there is jurisdiction of the person and subject matter, the decision of all other questions arising in the case is but an exercise of that jurisdiction.
\end{quote}

\textit{Id.} at 754; State v. Pounds, 525 S.W.2d 547, 550 (Tex. Civ. App. 1975) (concluding that "jurisdiction is the power of the court to decide a controversy between parties and to render and enforce a judgment with respect thereto").

\textsuperscript{56} Cf. Byke v. City of Corpus Christi, 569 S.W.2d 927 (Tex. Civ. App. 1978), stating that:

Jurisdiction does not relate to the rights of multiple plaintiffs as between themselves; it is distinguished from procedure in that "jurisdiction" of the subject matter relates to the power of a court to entertain the suit, consider the merits and render a valid judgment, while "procedure" relates to the form or manner in conducting the suit.
this: a court with jurisdiction has the right to be wrong and still be authoritative.\textsuperscript{57} That is, in a sense, the essence of authority.\textsuperscript{58} A court without such authority, without jurisdiction, does not even have the right to be right.

Standing alone, this core notion might appear to be a thin proposition. But allied with this notion in the Idea of Jurisdiction are two other elements. The first is a set of images that emphasize the imaginative audacity of the Idea of Jurisdiction. The second is a set of doctrines that flesh out the results of that Idea.

1. Images

The most important image associated with the Idea of Jurisdiction is that of the judge who, or the court that, lacks jurisdiction. The Idea of Jurisdiction imagines that judge or court to be in essence, though obviously not in every detail, no different from any person on the street.\textsuperscript{59} He might hold the title and earn the salary of a judge.

\textit{Id.} at 931.

\textsuperscript{57} See, e.g., Pope v. United States, 323 U.S. 1, 14 (1944) (finding that “[j]urisdiction to decide is jurisdiction to make a wrong as well as a right decision”); Rooker v. Fidelity Trust Company, 263 U.S. 413 (1923), stating:

If the constitutional questions stated in the bill actually arose in the cause, it was the province and duty of the state courts to decide them; and their decision, whether right or wrong, was an exercise of jurisdiction. If the decision was wrong, that did not make the judgment void, but merely left it open to reversal or modification in an appropriate and timely appellate proceeding.

\textit{Id.} at 415; Lamar v. United States, 240 U.S. 60, 65 (1916) (determining that the District Court “acts equally within its jurisdiction whether it decides a man to be guilty or innocent under the criminal law, and whether its decision is right or wrong”); \textit{In re Edinger’s Estate}, 136 N.W.2d 114, 120 (N.D. 1965) (finding that “[j]urisdiction of the court does not depend upon whether its decision is right or wrong, correct or incorrect”); Garverick v. Hoffman, 262 N.E.2d 695, 699 (Ohio 1970) (holding that “[j]urisdiction is a matter of power and covers wrong as well as right decisions”); Chittenden Trust Co. v. MacPherson, 427 A.2d 356, 358 (Vt. 1981) (holding that probate court “has jurisdiction to make a wrong, as well as a right, decision”).


\textsuperscript{59} Among the classic formulations are the following:


“[W]here there is no jurisdiction at all, there is no Judge; the proceeding is as nothing.” Perkins v. Proctor, 95 Eng. Rep. 874, 875 (K.B. 1768); see \textit{State ex rel. Egan v. Wolever}, 26 N.E. 762, 763 (Ind. 1891) (“Where there is no jurisdiction at all there is no judge; the proceeding is as nothing.”); Lange v. Benedict, 73 N.Y. 12, 25 (1878) (same).

“[W]hen a judge acts, he must be clothed with jurisdiction; and acting without this, he is but an individual falsely assuming an authority he does not possess.” Hoppe v. Klapperich, 28
She might wear a robe and wield a gavel. None of that is irrelevant. But absent jurisdiction, it is all peripheral. The judge without jurisdiction might as well be an imposter. He or she might almost as well be you or I (judges in the company excluded).

N.W.2d 780, 788 (Minn. 1947) (quoting 2 THOMAS COOLEY, TORTS § 315 (4th ed. 1932); Broom v. Douglass, 57 So. 860 (Ala. 1912)).

"[W]hen they exceed their authority, they cease to be [judges], and act as private persons." Terry v. Huntington, 145 Eng. Rep. 557, 558 (Ex. 1680).

"When the judge acts illegally without the limits of his jurisdiction, he becomes a trespasser . . . ." Rammage v. Kendall, 181 S.W. 631, 634 (Ky. 1916).

Similarly, note that the acts and proceedings of a court acting outside its jurisdiction are said to be "coram non judice," which literally means "in presence of a person not a judge." BLACK'S LAW DICTIONARY 337 (6th ed. 1990). See generally Krugman, Filling the Void, supra note 18.

Ironically, much of the rhetoric I have quoted first arose in the context of cases defining the scope of judicial immunity from suit—a doctrine that, even in the heyday of the influence of the classic Idea of Jurisdiction, showed special, though by no means unlimited, deference to judges acting beyond their jurisdiction. See generally Bradley v. Fisher, 80 U.S. 338 (1871); BAILEY, supra note 54, §§ 896-910. Questions of personal liability, however, pose distinct problems that do not arise in other contexts, for the ability of judges—as people—to function in their jobs. Thus, an expansive doctrine of immunity does not pose the same challenge to the Idea of Jurisdiction, or to the balance between statism and the rule of law as do, for example, expansions of "jurisdiction to determine jurisdiction" or the contempt power. See infra part IV.B.2. (discussing aspects of twentieth-century erosion of the Idea of Jurisdiction). Nevertheless, it bears note that even judicial immunity doctrine has changed, and arguably grown more statist, in its most recent incarnations. See infra note 350 and accompanying text.

60. It can, for example, support a presumption that jurisdiction exists. See infra text accompanying notes 62-66, 82-84, 232, 244. It can also, even in the absence of actual jurisdiction, immunize the wearer of the robe from civil suit. See Mireles v. Waco, 112 S. Ct. 286 (1991); Stump v. Sparkman, 435 U.S. 349 (1978); Bradley v. Fisher, 80 U.S. 335 (1871).

61. The converse to the notion that judges without jurisdiction are akin to persons on the street is that judges with jurisdiction are something more than mere persons on the street. This is captured, as elegantly as anywhere, in the American practice, instituted by John Marshall, of producing, if possible, "Opinions of the Court," in which one judge or justice speaks for a majority, rather than the seriatim opinions of individual judges or justices, which is the practice in most other common-law jurisdictions. See GERALD GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 434 (12th ed. 1991) ("John Marshall persuaded his colleagues to abandon seriatim opinions"); Robert G. Seddig, John Marshall and the Origins of Supreme Court Leadership, 36 U. PITT. L. REV. 785, 796-97 (1975) (elimination of seriatim opinions in favor of single majority opinions on behalf of the Court was one of Marshall's procedural innovations). But cf. Herbert A. Johnson, Introduction: The Business of the Court, in 2 FOUNDATIONS OF POWER: JOHN MARSHALL, 1801-15, at 373, 381-83 (Paul A. Freund ed., 1981) (acknowledging Marshall's innovation, but also discussing possible antecedents).

Ironically, the one important instance in which the Court modified its usual style was Cooper v. Aaron, 338 U.S. 1 (1958), the landmark case upholding the Court's authority to order desegregation even against the substantive and jurisdictional resistance of Southern legislatures and officials. See infra note 72 (discussing jurisdictional arguments in Southern resis-
A corollary to this image of the court without jurisdiction is the image of the court with jurisdiction. In the classic model, the "courtness" of a court or other tribunal usually comes—so to speak—in chunks. That is to say, the authority of a court is a collection of jurisdictional heads. And the whole of its authority is only by the slimmest margin greater than the sum of those parts.\footnote{The weaselness of this formulation is meant to accommodate the limited inherent or residual jurisdiction sometimes asserted by courts to perform some necessary or appropriate function even in the absence of jurisdiction over a case, and for that matter even apart from what would be narrowly required for them to exercise their jurisdiction to determine their jurisdiction.}

In \textit{Cooper v. Aaron}, the Court styled its unanimous opinion, not as "Opinion of the Court by [one justice]" or even as "Per Curiam," but as "Opinion of the Court by THE CHIEF JUSTICE, MR. JUSTICE BLACK, MR. JUSTICE FRANKFURTER, MR. JUSTICE DOUGLAS, MR. JUSTICE BURTON, MR. JUSTICE CLARK, MR. JUSTICE HARLAN, MR. JUSTICE BRENNAN, and MR. JUSTICE WHITTAKER." \cite{Cooper} 358 U.S. at 4. The intent was to emphasize that all the Justices, including those who had joined the Court since Brown v. Board of Education, 347 U.S. 483 (1954), joined in the judgment. See \textit{Bernard Schwartz, Super Chief: Earl Warren and His Supreme Court—A Judicial Biography} 298-300 (1983). The effect, as several commentators have pointed out, was only to "personalize[] the institution, highlighting the fact that, after all, these were nine men speaking." Robert Burt, \textit{Constitutional Law and the Teaching of the Parables}, 93 \textit{Yale L.J.} 455, 476 (1984); accord Paul Gewirtz, \textit{Remedies and Resistance}, 92 \textit{Yale L.J.} 585, 628 n. 111 (1983); cf. infra note 70 (discussing Hildreth's Heirs v. M'Intire's Devisee, 24 Ky. (1 J.J. Marsh) 206 (1829)).

This tale is relevant here largely because it was Justice Felix Frankfurter who convinced his colleagues to adopt the unprecedented all-by-name caption. See \textit{Schwartz, supra}, at 298-300. It might be no coincidence that it was also Justice Frankfurter, both as academic and jurist, who helped give the most eloquent voice to the erosion of the Idea of Jurisdiction and its partial replacement by a much more statist, order-bound, conception of judicial authority, in such cases as United States v. United Mine Workers, 330 U.S. 258, 308-10 (1947); see infra text accompanying notes 342-44, 351 (discussing Frankfurter's concurrence in \textit{United Mine Workers}). It is certainly no coincidence, and also casts a shadow on \textit{Cooper v. Aaron}, that Justice Frankfurter, in his concurrence in that case, chose to rely on, and quote at length from, his concurrence in \textit{United Mine Workers}. Cooper, 358 U.S. at 23-24 (quoting \textit{United Mine Workers}, 330 U.S. at 307-09).

\footnote{It is certainly no coincidence, and also casts a shadow on \textit{Cooper v. Aaron}, that Justice Frankfurter, in his concurrence in that case, chose to rely on, and quote at length from, his concurrence in \textit{United Mine Workers}. Cooper, 358 U.S. at 23-24 (quoting \textit{United Mine Workers}, 330 U.S. at 307-09).}

Although without jurisdiction to hear the merits of the appeal, this Court, in the exercise of its appellate jurisdiction, has authority to give such directions as may be appropriate to enforce the limitations of § 266 [the three-judge court provi-
gaps between the chunks, a court is, as I said, akin to any person on the street.

The only major exception to this notion is the proverbial exception that proves the rule. It is the court of general jurisdiction—in the American context the typical, all-purpose state trial court—that sits in the judicial hierarchy of most states above more specialized courts and below a system of appeals courts. A court of general jurisdic-

sion], and to conform the procedure to its requirements. And we may frame our order in a way that will save to the appellants their proper remedies.

By mistakenly appealing directly to this Court appellants have lost their opportunity to have the decree below reviewed on its merits, as the time for appeal to the Circuit Court of Appeals has expired. We might now terminate the litigation by dismissing the appeal without more, and it would be proper to do so had the correct procedure under [the three-judge court provision] been more definitely settled at the time the appeal to this Court was attempted. But in the circumstances, it is appropriate that the decree below should be vacated and the cause remanded to the district court for further proceedings to be taken independently of § 266.

Id. at 392 (citations omitted). The cryptic formulation at the end of the quotation refers to the district court's power to enter a fresh decree so as to start the clock ticking anew for a proper appeal. In later cases, the Court abandoned even this circumlocution and just announced that it was "vacat[ing] the judgments and remand[ing] the causes to the court which heard each case so that they may enter a fresh decree from which appellants may, if they wish, perfect timely appeals to the respective Courts of Appeals." Moody v. Flowers, 387 U.S. 97, 104 (1967).

The point here is that the Supreme Court in such cases, though it recognized that its jurisdiction came in discrete chunks, also claimed the power to do what a non-court could not do. It sought to fix an injustice, to set right what was wrong by exercising its judicial power to mitigate the effects of a litigant's mistaken claim that his or her case belonged to one of those chunks.

But this power, in the classic Idea of Jurisdiction, is, as suggested in text, razor-thin, available in only the narrowest of circumstances.

63. One influential modern text puts it this way:

Within each state there are usually two or more kinds of trial courts. ... First, there are courts whose authority is confined to certain types of cases, defined in terms of the amount in controversy or the subject matter of the action. These are referred to generically as courts of limited, special, or "inferior" jurisdiction, and are denominated by such names as municipal court, district court, probate court, etc. ... Separate from these courts of limited jurisdiction are the trial courts of general jurisdiction, i.e., those whose authority is comprehensive so far as subject matter is concerned—or comprehensive except for all or certain matters within the jurisdiction of the courts of limited jurisdiction.


A more timeworn account, which has, however, the advantage of emphasizing some of the full jurisdictional implications of the institutional arrangements involved, appears in Ex Parte Roundtree, 51 Ala. 42, 44 (1874):

The division of courts, recognized at common law, was superior, or courts of general jurisdiction, and inferior, or courts of limited jurisdiction. Superior courts, derived much of their jurisdiction from the common law. Inferior courts derived
their whole existence and jurisdiction from the statutes constituting them. Hence, nothing was intended to be without the jurisdiction of a superior court, whether of appellate or original jurisdiction, except what appeared to be so; and every presumption, consistent with the record, was indulged in favor of the regularity and validity of their judgments; while of inferior courts, no intendment was made favorable to their jurisdiction, and a conformity to the law of their creation must have been disclosed by their records. Such was the only division of courts at common law—into superior and inferior. It followed from the character of jurisdiction the courts exercised, and not from the subjection of the court to the appellate power of another tribunal. [Only in the latter sense would] all courts of original jurisdiction [be] inferior to a court exercising over them appellate power.

See also Thomas v. Washington Gas Light Co., 448 U.S. 261 (1980) (discussing differences between courts of general jurisdiction and other tribunals); cf. Aldinger v. Howard, 427 U.S. 1, 15 (1976) (arguing that certain extensions of the doctrine of pendant jurisdiction would "run counter to the well-established principle that federal courts, as opposed to state trial courts of general jurisdiction, are courts of limited jurisdiction marked out by Congress").

The distinction between courts of general and limited jurisdiction also appears as an organizing principle in many state constitutional provisions establishing the judicial branch of government. See, e.g., ALA. CONST., art. VI, § 6.01(a) (Amend. No. 328, 1992):

Except as otherwise provided by this Constitution, the judicial power of the state shall be vested exclusively in a unified judicial system which shall consist of a supreme court, a court of criminal appeals, a court of civil appeals, a trial court of general jurisdiction known as the circuit court, a trial court of limited jurisdiction known as the district court, a probate court and such municipal courts as may be provided by law.

KY. CONST. art. 6, § 109:

The judicial power of the Commonwealth shall be vested exclusively in one Court of Justice which shall be divided into a Supreme Court, a Court of Appeals, a trial court of general jurisdiction known as the Circuit Court and a trial court of limited jurisdiction known as the District Court.

MICH. CONST. art. 6, § 1:

The judicial power of the state is vested exclusively in one court of justice which shall be divided into one supreme court, one court of appeals, one trial court of general jurisdiction known as the circuit court, one probate court, and courts of limited jurisdiction that the legislature may establish by a two-thirds vote of the members elected to and serving in each house.

64. See, e.g., Andrade v. Jackson, 401 A.2d 990, 992-93 (D.C. 1979), in which the court discussed the effect of the D.C. Court Reform Act:

[Al]s presently constituted, the Superior Court is no longer a court of limited jurisdiction, but a court of general jurisdiction with the power to adjudicate any civil action at law or in equity involving local law. Although Superior Court is separated into a number of divisions, these functional divisions do not delimit their power as tribunals of the Superior Court with general jurisdiction to adjudicate civil claims and disputes.

Id. at 992-93; Schlyen v. Schlyen, 273 P.2d 897 (Cal. 1954) (holding that when court has general jurisdiction, objection that issue should be heard by another court is deemed waived unless timely made); Olson v. England, 292 N.W.2d 48 (Neb. 1980) (holding that if judgment of foreign court appears on its face to have been entered by a court of general jurisdiction, its jurisdiction over the subject matter will be presumed unless disproved); People v.
jurisdiction of a court of general jurisdiction is not a set of discrete categories, but a single—if bounded—domain.\(^6\)

This, by the way, helps explain the origins of the view that time limits on appeal are usually jurisdictional while most statutes of limitations are not. Statutes of limitations historically applied most typically to trial courts of general jurisdiction. They were therefore only rules of decision for tribunals that were already masters—jurisdictionally—of all they surveyed.\(^6\) Courts of appeal, however, are not courts of general jurisdiction; time limits on appeal were often embedded in the set of rules that defined one or another chunk of whatever jurisdiction those courts had.\(^6\)

In the light of these images, the classic claim that a court without jurisdiction is a court “without power” suddenly looks more bold, less commonplace. Power here does not mean effective physical force. It does not even mean the ability to induce habitual obedience.\(^6\) It is, instead, a normative attribute. That normative attribute reflects a specific vision of legality and of the relationship of laws to institutions. It also reflects a potentially profound skepticism about the allegedly self-validating claims of exercises of state power.

The radical possibilities in the Idea of Jurisdiction are even more apparent in the world beyond the confined discourse of courts and judges. The Idea of Jurisdiction can provide one of the languages open to programs of political resistance.\(^6\) It is a language that avoids revolution, but defies reigning institutions.\(^7\) It is a form of

---

\(^6\) Darling, 50 A.D.2d 1038 (3d Dept. 1975) (finding that not even the circumstance that another court has been given jurisdiction can deprive New York Supreme Court of its general jurisdiction in law and equity).

\(^6\) But note that the term “court of general jurisdiction” is also sometimes used, confusingly, to refer to courts, for example probate courts in some states, that, though specialized, nevertheless have, within their domain, the full range of powers and presumptions normally associated with courts of general jurisdiction. See, e.g., Jones v. Jones, 523 P.2d 743 (Kan. 1974). But cf., e.g., In Re Estate of O’Dwyer, 605 A.2d 216 (N.H. 1992) (stating that a probate court is not a court of general jurisdiction).

\(^6\) See, e.g., Pritchard v. State, 788 P.2d 1178, 1181 (Ariz. 1990) (holding that a time limit for bringing a certain cause in state trial court was not jurisdictional; “[b]ecause the superior court is a court of general jurisdiction, a presumption exists in favor of retention of jurisdiction, and a divestiture of jurisdiction cannot be inferred but must be clearly and unambiguously found”).


\(^7\) An evocative example was the resistance in the 1820's to the so-called “New” state
resistance that looks to higher law, but without needing to resort to natural law.

In the American context, this language has often exploited, for good or bad, the paradox built into our system of federalism. The Federal Constitution is supreme. The Supreme Court is supreme. But the Supreme Court, unlike the most mundane state trial court, is also a court of limited rather than general jurisdiction. And in the real or argued gaps left over after its jurisdiction is defined can come resistance—as I said for good or bad—to its efforts to define the law of the land.

The Supreme Court established by a Kentucky Legislature upset with the rulings of the existing state supreme court. This resistance was ultimately vindicated by the eventually re-enshrined "old" court in Hildreth's Heirs v. M'Intire's Deviser, 24 Ky. (1 J. Marsh.) 206, 207 (1829) (holding the "New" court to have been unconstitutionally created, and without jurisdiction, and all its acts "totally null and void").

In a dazzling rhetorical move, Judge Robertson's opinion for the court in Hildreth's Heirs almost never referred to the "Old Court" in institutional terms. Instead, the opinion spoke of, for example, "the mandate of Messrs. Barry, & c., certified by F.P. Blair," or "[t]he gentlemen who directed the appeal in this case to be dismissed, and the one who certified the order," or "[t]he gentlemen who acted as judges of the legislative tribunal . . . ." Id. at 206, 208. Thus, Robertson gave as stark an example as any judicial utterance has produced of the proposition that judges without jurisdiction might as well be ordinary persons on the street. But cf. supra note 61 (discussing decision of United States Supreme Court in Cooper v. Aaron to list all the Justices of the Court by name in the caption to the opinion for the Court).


72. This was most powerfully, and painfully, evident in the efforts of some Southerners to fight against the United States Supreme Court's mandate of racial desegregation. In the wake of Brown v. Board of Education, 347 U.S. 483 (1954), many Southern legislatures, and groups of Southern members of the United States Congress, issued manifestos and resolutions decrying the opinion, and in some instances announcing their official resistance to its implementation. See generally 1 RACE RELATIONS L. REP. 435-447 (1956) (reprinting Congressional "Southern Manifesto" and state legislative enactments). These documents, which were only the official tip of a large iceberg, tended to mingle several forms of argument and rhetoric. To some extent, they were only overheated diatribes in favor of entrenched Southern practices. To some extent, they repeated the "interposition" arguments of the nineteenth century, which claimed a fundamental right in the States to override federal review of state action. See generally HERMAN V. AMES, STATE DOCUMENTS ON FEDERAL RELATIONS: THE STATES AND THE UNITED STATES (1970); Edward S. Corwin, National Power and State Interposition, 10 Mich. L. Rev. 535 (1912); Charles Warren, Legislative and Judicial Attacks on the Supreme Court of the United States—A History of the Twenty-Fifth Section of the Judiciary Act, 47 AM. L. REV. 1 (1913); cf. CAN. CONST. § 33(1) (providing for limited provincial override of certain human rights provisions of Canadian constitution). To some extent, they attacked the legal merits of the Supreme Court's decision in Brown, particularly its overruling of settled precedent and its reliance on psychological evidence.

But at least part of the argument of the Southern legislative documents of resistance relied explicitly on the rhetoric of jurisdiction, and on precise and technical, if flawed, claims
2. Doctrines

The formal doctrines historically associated with the Idea of Jurisdiction only rarely scrape the more radical implications of the Idea. But they are animated by the images I have just described, and would make no unified sense without them.

In the nineteenth century, this set of doctrines might have seemed in every single instance to follow inevitably from the core intuition of the Idea of Jurisdiction. I am less sure of that. But I do think that they are fair inferences from that core. I also suspect that they reflect its most mature embodiment. In general terms, these doctrines divide into at least the following claims.

about the Court's specific jurisdiction to decide Brown. For example, the Georgia House of Representatives, in its lengthy resolution of interposition and nullification, included this argument:

That the [Supreme] Court was without jurisdiction of said cases because (1) the jurisdiction of the Court granted by the Constitution is limited to judicial cases in law and equity, and said cases were not of a judicial nature and character, nor did they involve controversies in law or equity, but, on the contrary, the great subject of the controversy are of a legislative character, and not a judicial character, and are determinable only by the people themselves speaking through their legislative bodies; (2) the essential nature and effect of the proceedings relating exclusively to public schools operated by and under the authority of States, and pursuant to State laws and regulations, said cases were suits against the States, and the Supreme Court was without power or authority to try said cases, brought by individuals against States, because the Constitution forbids the Court to entertain suits by individuals against a State unless the State has consented to be sued.

The Supreme Court rejected the program of Southern legislative resistance in Cooper v. Aaron, 358 U.S. 1 (1958) and Bush v. Orleans Parish School Board, 364 U.S. 500 (1960); see also supra note 61. The Court's opinion in Cooper is famous for its reaffirmance of judicial review of state action and the supremacy of federal judicial power. It did not, however, specifically address the jurisdictional component in the rhetoric of Southern resistance. Had it done so, its arguments could not have relied so easily on the principle of judicial review or the specific doctrine of Marbury v. Madison, 5 U.S. 137 (1803), since neither of these in itself disposes of the jurisdictional challenge to the Court's authority. In the last analysis, the court might have had to rely on nothing more than its own unique "jurisdiction to determine its jurisdiction," which itself would have had to have been grounded in nothing more satisfactory than a general, legal-positivistic account of the Supreme Court as the ultimate law-speaking tribunal in the legal structure of the United States. See also supra note 61 (discussing Frankfurter's concurrence in Cooper v. Aaron). See generally infra part III.B.5.a (contrasting positivistic claims about judicial authority with doctrinal implications of Idea of Jurisdiction; conceding that courts have not extended the most radical implications of the Idea of Jurisdiction to the United States Supreme Court).

To say all this is not, however, to doubt the legal, moral, or historical necessity of Cooper v. Aaron.
a. The Urgency of Power

A court cannot do anything substantial in a case unless it has jurisdiction. The existence of jurisdiction is necessary even to a

73. See, e.g., Christianson v. Colt Indus. Operating Corp., 486 U.S. 800 (1988); Mansfield, Coldwater & Lake Michigan Ry. v. Swan, 111 U.S. 379, 382 (1884) (noting that "the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes"); The Mayor v. Cooper, 73 U.S. 247, 250 (1868) (holding that "[i]f there were no jurisdiction, there was no power to do anything but strike the case from the docket"); Petters v. Petters, 560 So. 2d 722 (Miss. 1990):

Jurisdiction precedes adjudication. Before a court may say anything worth listening to regarding the (de)merits of a party's claim, that court must have authority to speak. That court has such authority only when the claim is one within the court's subject matter jurisdiction and after the court has acquired personal jurisdiction of the parties. If the court is without jurisdiction—subject matter or personal—no one is bound by anything the court may say regarding the (de)merits of the case.

Id. at 723; Harp v. State Compensation Dep't, 427 P.2d 981, 983 (Or. 1968) (holding that a court without jurisdiction is "without power to hear the case or do anything about it except dismiss it").

See also BAILEY, supra note 54, § 1 ("The question of jurisdiction must be considered and decided before any court can move one step further in the cause, as any movement is necessarily the exercise of jurisdiction"); PAUL BATOR ET AL., THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1703 (3d ed. 1988).

Courts have, admittedly, sometimes applied this doctrine in absurd ways. For example, in Hoxie v. Payne, 41 Conn. 539 (1874), a plaintiff filing suit on December 11, 1873 inadvertently cited the defendant to appear "before the Court of Common Pleas . . . on the first Tuesday of February, A.D. 1873" rather than 1874. That is to say, the plaintiff (or his lawyer, or his lawyer's clerk) did what everybody has done occasionally around the turn of the year, which is reflexively to write down the old year rather than the new. The plaintiff then moved in the trial court to amend the writ to insert the correct date, while the defendant moved to dismiss for lack of jurisdiction. The trial court denied the motion to amend and granted the motion to dismiss. The Connecticut Supreme Court upheld. It admitted that the statute regarding amendments of pleadings "is indeed most liberal; and the courts, to promote justice, to prevent delay, and to save expense to litigants, have given it a liberal construction." Id. at 540. Nevertheless, the court held:

[T]he defect in this process was radical. It was not made returnable to the court which was asked to amend it, but to one which sat a year before. That this was done through inadvertence does not change the legal aspects of the question. The initial order, which the court was asked to make, would, if enforced, have given it cognizance of a cause which, on its face, was made returnable to another tribunal. That order was properly refused. When the power to hear and determine a cause is wanting, as in this case, there is no jurisdiction, and no court can pass an order creating jurisdiction for itself.

Id. Thus, the court implied, a more material, even prejudicial, amendment in the pleadings might have been allowed if the writ had been on its face returnable to the 1874 session of court. But a purely clerical, patently non-prejudicial amendment from "1873" to "1874" would not be so returnable.

What is absurd about this opinion is not that the court took the Idea of Jurisdiction too seriously, or treated jurisdiction as a fetish. Rather, the absurdity lies in the court's as-
holding against the party seeking relief.\textsuperscript{74} Consider, for example, a court facing a hard, complex, jurisdictional issue but very easy, obvious grounds for a non-jurisdictional dismissal. Following the classical logic, that court would have to proceed to decide the hard jurisdictional question and could not just dispose of the case on the simple, non-jurisdictional point, even when the practical difference between a jurisdictional and a non-jurisdictional dismissal would be nonexistent.

b. The Consequences of Powerlessness

If a court does not have jurisdiction, its actions do not bind. Consider, for example, contempt of court. Courts can hold persons in both civil and criminal contempt.\textsuperscript{75} Civil contempt spurs obedience to a judicial order, or compensates an innocent party for injuries due to the contemnor's disobedience. Criminal contempt punishes that disobedience. If an appeals court reverses a trial court on its underlying order, it also will likely revoke the citation for civil contempt.\textsuperscript{76} But


These cases also illustrate the difficulty in many instances of distinguishing between civil and criminal contempt. Note, also, that some observers have argued that the distinction is, at its root, neither useful nor sound. See, e.g., RONALD L. GOLDFARB, THE CONTEMPT POWER 49-67, 292-94 (1963); Earl C. Dudley, Jr., Getting Beyond the Civil/Criminal Distinction: A New Approach to the Regulation of Indirect Contempts, 79 VA. L. REV. 1025 (1993).

\textsuperscript{76} See United States v. United Mine Workers, 330 U.S. 258, 294-95: It does not follow, of course, that simply because a defendant may be punished for criminal contempt for disobedience of an order later set aside on appeal, that the plaintiff in the action may by way of a fine imposed in a simultaneous pro-
it will likely uphold the citation for criminal contempt, because people must obey even erroneous judicial orders.\textsuperscript{77}

If the trial court lacked jurisdiction, however, the classical view was that the appeals court would reverse the citation for criminal contempt.\textsuperscript{78} A court with jurisdiction has the right to be wrong, subject only to ordinary appellate review; a court without jurisdiction does not even have the right to be right.

A more important consequence of the doctrine that the actions of a court without jurisdiction do not bind is that the absence of jurisdiction can be raised in a collateral proceeding. It can be an answer, for example, to a claim of res judicata. Thus, the repose and certainty that normally follow an unappealed judicial decree are always tempered by the possibility that the issuing court was, for some reason, without jurisdiction.

The absence of jurisdiction could often also be grounds for spe-

ceeding for civil contempt based upon a violation of the same order. The right to remedial relief falls with an injunction which events prove was erroneously issued.  


\textbf{But cf.} e.g., Klett v. Pim, 965 F.2d 587, 590 (1992) (distinguishing between compensatory and coercive civil contempt, and holding that, though "a court cannot impose a coercive civil contempt sanction if the underlying injunction is no longer in effect . . . [i]f the underlying injunction abates for a reason that does not go to the jurisdiction of the issuing court, . . . a compensatory civil contempt may still be brought"); Masonite Corp. v. International Woodworkers, 206 So. 2d 171, 183 (Miss. 1968) (noting that "[t]he person who disobeys the order of a court of general jurisdiction does so at his peril").


78. See \textit{In re} Ayres, 123 U.S. 443 (1887); \textit{Ex Parte} Fisk, 113 U.S. 713 (1885); \textit{Ex Parte} Rowland, 104 U.S. 604 (1881); Tyler v. Connelly, 65 Cal. 28 (1884); Dudley v. McCord, 65 Iowa 671 (1885); \textit{In re} Pierce, 44 Wis. 411 (1878); BAILEY, supra note 54, § 304b ("when a court undertakes, by its process of contempt, to punish a man for refusing to comply with an order which the court had no authority to make, the order itself being without jurisdiction and void, that the order punishing for contempt was equally void . . . "); \textit{cf.} Walker v. Birmingham, 388 U.S. 307, 334 (1967) (Douglas, J., dissenting); United States v. United Mine Workers, 330 U.S. 258, 342 (1947) (Rutledge, J., dissenting).

This doctrine was radically modified in federal law by the majority opinion in \textit{United Mine Workers}. See infra notes 340-45 and accompanying text.
cial collateral relief in, for example, a petition for a writ of prohibition. One of the most well-known themes in English legal history is the battle over jurisdiction, as one court or court system seeks to check the pretensions of another. In nineteenth century America, and to an extent well into the twentieth century, the writ of habeas corpus was largely limited to the correction of jurisdictional errors. And since ordinary appeals in criminal cases were not always available, the effort to separate jurisdictional from ordinary issues took on extra importance. Today, much of British administrative law takes the form of courts policing the jurisdictional pretensions of inferior tribunals.

Classical doctrine did blunt the axiom that the acts of a court without jurisdiction do not bind. For example, it might require adverse parties to prove the lack of jurisdiction in a prior judgment. Or it might presume jurisdiction unless the record itself showed the contrary. Many of these rules varied with the type of court or other tribunal at issue.

Classical doctrine also admitted that courts had a certain “jurisdiction to determine jurisdiction.” That is to say, the acts of a court cannot bind unless it has jurisdiction, but a court does have

79. See, e.g., Fuller’s Case, 12 Co. Rep. 42, 77 Eng. Rep. 1323 (Ex. 1605) (“the determination of a thing, whether it belongs to Court Christian, doth appertain to the Judges of the common law”); cf. Mackonochie v. Lord Penzance, [1881] 6 Ap. Cas. 424, 447 (the “temporal Courts had carried on a long struggle, first, before the Reformation, with the Pope, and afterwards . . . with the Church and the Crown, and many of their decisions may be attributed to a jealousy which they had thus acquired of the Ecclesiastical Courts”) (Blackburn, L.J.). See generally WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW (1936). More specifically, the crucial development in the inter-judicial battles of English legal history were the claims of the King’s courts to police the jurisdiction of local, administrative, and ecclesiastical tribunals, rather than the other way around.


82. See, e.g., Texas & Pac. Ry. v. Gulf, C. & S. F. Ry., 270 U.S. 266, 274 (1925) (holding that “[e]very court of general jurisdiction has power to determine whether the conditions essential to its exercise exist”); Dowell v. Applegate, 152 U.S. 327, 340 (1894); Winemiller v. Laughlin, 38 N.E. 111, 113 (Ohio 1894); Ex parte Bushnell, 8 Ohio St. 599, 601 (1858); State v. Wenzel, 77 Ind. 428 (1881). See generally BAILEY, supra note 54, §§ 138-40, 173-77.
some power to decide whether it has jurisdiction, and its views on that question can bind. At least until the modern period, however, "jurisdiction to determine jurisdiction" was a limited power. For purposes of collateral review, the jurisdiction of a court to determine jurisdiction extended only to deciding questions of jurisdictional fact. It did not extend to the legal question of whether the court, assuming some given set of facts, had subject matter jurisdiction over a case. Thus, the doctrine of jurisdiction to determine jurisdiction only recognized that flowing from, or auxiliary to, each chunk of a court's subject matter jurisdiction was a necessary power to decide whether that jurisdiction came to bear in any particular instance. But it did not overwhelm the underlying notion that a court cannot act beyond its authority. Nor did it contradict the notion that the jurisdiction of a court was the sum of a set of discrete chunks.

83. See, e.g., Wright v. Douglass, 10 Barb. 97 (N.Y. App. Div. 1850): [I]n a court of general jurisdiction, it is to be presumed that the court had jurisdiction, till the contrary appears; but the want of jurisdiction may always be shown, by evidence, except . . . when the jurisdiction depends on a fact that is litigated in a suit, and is adjudged in favor of that party who avers jurisdiction, then the question of jurisdiction is judicially decided, and the judgment record is conclusive evidence of jurisdiction, until set aside or reversed by a direct proceeding by appeal or a writ of error. Id. at 111 (citations omitted); BAILEY, supra note 54, § 177 ("There is, however, a clear distinction between a finding upon evidence that certain facts exist essential to jurisdiction of the subject-matter which the court has jurisdiction to determine, and a mere decision of a court that it has jurisdiction when it has none.").

84. See supra note 83; see also Krugman, Filling the Void, supra note 18, at 165-71 (discussing the development off the voidness doctrine in England, and subsequently in the United States).

It was sometimes said that jurisdiction to determine jurisdiction only extended to "quasi-jurisdictional" facts. The classical expression of this formulation occurred in Reinach v. Atlantic & G.W.R., 58 F. 33 (1878):

There is a clear distinction between those facts which involve the jurisdiction of the court over the parties and the subject-matter and those quasi jurisdictional facts without allegation of which the court cannot be set in motion, and without proof of which a decree should not be pronounced. The judgment of a court having no jurisdiction of the subject-matter of the parties is null and void, and may be impeached in collateral proceedings, and the record of the court showing such jurisdiction may be contradicted by parol evidence.

But there are certain facts termed "quasi jurisdictional" which must be alleged and proved, but, when so proved, are res adjudicata and binding in collateral proceedings. Id. at 42 (citations omitted).
c. Of Waiver

Jurisdictional questions are not under the control of the parties. In this they differ deeply from most other legal rules in the common law tradition. Parties to a proceeding cannot stipulate the existence of jurisdiction. 85 They cannot, intentionally or not, waive jurisdictional objections. 86 Any party, including the party who claimed jurisdiction in the first place, 87 can challenge a court's jurisdiction at any time. 88 Courts are obligated to raise jurisdictional questions sua sponte, even if the parties have not raised them. 89 Even if they only notice those questions late into the proceeding, they must raise them and resolve them before they may continue. 90

Commentators sometimes say that parties cannot control jurisdictional issues because jurisdictional rules embody societal interests that go beyond the interests of the parties and that none of the parties might have an adequate incentive to advance. 91 For example, both

87. For a classic example, see American Fire & Casualty Co. v. Finn, 341 U.S. 6 (1951).
88. But cf. Di Frischia v. New York Cent. R.R., 279 F.2d 141, 144 (3d Cir. 1960) (The court held that a defendant in a diversity suit would be estopped from waiting until after statute of limitations had run to challenge existence of diversity and thus defeat jurisdiction. "A defendant may not play fast and loose with the judicial machinery and deceive the courts.").
89. The Di Frischia case attracted considerable attention in its day, but did not effectively change the law, and was superseded by numerous Supreme Court decisions. It has since been explicitly abandoned by the Third Circuit. Rubin v. Buckman, 727 F.2d 71, 73 (3d Cir. 1984).
91. See, e.g., CHARLES W. WRIGHT, FEDERAL COURTS 23 (1983) ("[H]arsh" rules that attach to jurisdictional requirements in federal courts "could hardly be defended as a sensible
parties to a lawsuit might prefer their case to be heard in a fast, efficient, clean federal court than in a slow, clumsy, dingy state court. But the larger social interest in federalism might dictate otherwise.

This functionalist gloss is all right, but it also might conceal as much as it reveals. To some extent, the legal culture treats laws as jurisdictional because they embody interests that go beyond the interests of the parties. But surely, to some extent, it also comes to perceive such interests in certain laws for no other reason than that they are, on independent grounds, jurisdictional.

d. Of Discretion

Jurisdictional requirements are—as must already be apparent—mandatory. In the classic idiom, “mandatory” laws are distinguished from both “permissive” and “directory” laws. 93 “Permissive” laws grant discretion. 94 “Directory” laws, strictly speaking, are not necessarily discretionary though the mandatory-permissive and mandatory-directory dichotomies are often conflated. 95

regulation of procedure, and can only be justified by the delicate problems of federal-state relations that are involved.”); Hall, supra note 7, at 419-20 (“If a procedural rule protects interests larger than those of the immediate parties, if there are greater societal concerns at stake, then waiver may not be appropriate.”).


94. See, e.g., Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1989) (discussing powers of a trustee); Selman v. United States, 941 F.2d 1060 (10th Cir. 1991) (discussing power of IRS Commissioner to abate interest); Godsey v. Houston, 584 So. 2d 389 (Miss. 1991) (discussing whether discharge of extraditable prisoner is mandatory or permissive if agent of demanding state does not appear in state to which prisoner has fled within time set out in statute).

95. As one court has put it, “[b]oth mandatory and directory provisions of the legislature are meant to be followed. It is only in the effect of non-compliance that a distinction arises.” Borough of Pleasant Hills v. Carroll, 125 A.2d 466, 469 (Pa. 1956); see also Chase v. United States, 256 U.S. 1, 8 (1921) (holding that “[a]ppellant’s contention is that the act is neither directory nor mandatory; it is permissive only”); People v. Mccue, 568 P.2d 382 (Cal. 1977) (distinguishing between “mandatory-permissive” dichotomy and “mandatory-directory” dichotomy; former refers to whether an act is required or discretionary, while latter refers to consequences of non-compliance); In re Property Seized From Richard Sopoci, 467 N.W.2d 799 (Iowa 1991) (same).

Rather, directory laws are norms whose disregard has no consequence.\textsuperscript{97} Or according to a variant definition, they are norms whose disregard, at the least, does not impair the efficacy of the act or proceeding to which the laws relate.\textsuperscript{98}

For example, in public contracts law, statutes requiring contracts to be in writing are usually treated as mandatory, thus rendering an oral contract void or unenforceable.\textsuperscript{99} On the other hand, rules pertaining to the specific form that a contract should take are often taken to be merely directory.\textsuperscript{100} Similar labels attach to procedural rules, including time limits. For example, time limits on tribunals and agencies (as opposed to parties) are generally held to be directory.\textsuperscript{101} Thus, if a statute requires that a tribunal hold a hearing "within ten days," it can very often still hold the hearing after ten days without

---


Even the standard texts, such as SINGER, supra note 93 and BLACK'S LAW DICTIONARY tend to make this error.


This formulation emphasizes that when a statute is "directory," it is not necessarily optional or discretionary.

\textsuperscript{99} See, e.g., Clark v. United States, 95 U.S. 539 (1877); United States v. American Renaissance Lines, Inc., 494 F.2d 1059 (D.C. Cir. 1974); County of St. Francois v. Brookshire, 302 S.W.2d 1 (Mo. 1957); Gordon v. Board of Directors, 347 A.2d 347 (Pa. Commw. Ct. 1975). \textit{But cf.} City of Cincinnati v. Cameron, 33 Ohio St. 336, 364 (1878) (noting that, although writing requirement might be mandatory, "it can not be made a rigid, unbending rule in every case which can by any possibility arise," particularly when the city had already received the benefit of the contract).

Note also however, that, as in private law, alternative remedies are sometimes available. See, e.g., Clark v. United States, 95 U.S. 539 (1877) (quantum meruit); Narva Harris Constr. Corp. v. United States, 574 F.2d 508 (Ct. Cl. 1978) (holding that enforceable contract can exist if, even after excluding evidence of express oral agreement, contract can be implied in fact from surrounding circumstances or ancillary documentation).

\textsuperscript{100} See, e.g., Board of Educ. v. Jennings, 651 P.2d 1037 (N.M. Ct. App. 1982) (noting that the requirement that a contract between a school board and its employee be on a specific form is merely directory).


much consequence.

Jurisdictional rules are mandatory in both the non-permissive and non-directory senses of the word. And the phrase "mandatory and jurisdictional"102 is one of those standard doublets ("null and void," "cease and desist") that so fill legal poetics.103 But there is less to this than one might think.

First, legal rules can be mandatory without being jurisdictional.104 The most obvious examples for present purposes are statutes of limitations. Second, the "mandatory" label assigned to a rule only describes the ontological nature of the rule. The label does not ad-

102. For a random selection of among the more recent of the thousands of cases in which this phrase appears, see Coleman v. Thompson, 111 S. Ct. 2546 (1991); Missouri v. Jenkins, 495 U.S. 33, 45 (1990); White v. INS, 6 F.3d 1312, 1318 (8th Cir. 1993); Rodick v. City of Schenectady, 1 F.3d 1341, 1346 (2d Cir. 1993); Guirguis v. INS, 993 F.2d 508, 509 (5th Cir. 1993); Bocksnick v. City of London, 825 S.W.2d 267, 268 (Ark. 1992); Washington Metro. Area Transit Auth. v. Brown, 619 A.2d 1188, 1189 n.2 (D.C. 1993); Wyoming Dep't of Employment v. Wyoming Restaurant Assocs., Inc., 859 P.2d 1281, 1287 (Wyo. 1993).

Examples from the earliest cases I have found that use the phrase, in more or less its present meaning include, Vermont Marble Co. v. National Surety Co., 213 F. 429, 433 (3d Cir. 1914); United States ex rel Van Clief v. Merrick, 215 F. 256, 257 (E.D.N.Y. 1914); Horn v. Martin, 87 P. 1073 (Colo. 1906); Clarke v. City of Chicago, 57 N.E. 15, 18 (Ill. 1900). The earliest apparent use of the precise phrase by the United States Supreme Court is found in United States v. Robinson, 361 U.S. 220, 224 (1960); see also Hall, supra note 7, at 407-18 (discussing the use of the phrase).

It is worth considering some of these dates in relation to the larger historical story that I recount in part IV.B, infra.


104. See, e.g., Logan v. United States, 144 U.S. 263 (1892):

The provision is not discretionary only, but mandatory to the government; and its purpose is to inform the defendant of the testimony which he will have to meet, and to enable him to prepare his defence. Being enacted for his benefit, he may doubtless waive it, if he pleases; but he has a right to insist upon it, and if he seasonably does so, the trial cannot lawfully proceed until the requirement has been complied with.

Id. at 304; Gorman v. Abbott Labs., 629 F. Supp. 1196 (D.R.I. 1986) (explaining that the time limit for removing action from state to federal court is not jurisdictional, in that waiver is possible under some circumstances, but it is mandatory, and must be strictly applied); In re Sexton, 418 N.E.2d 729 (Ill. 1981) (noting that a provision's mandatory rather than discretionary quality does not render it jurisdictional in the sense of not being waivable); Ex parte Henderson, 565 S.W.2d 50, 51 (Tex. Crim. App. 1978) (holding that "[w]hether Article 44.34 is mandatory or discretionary, petitioner may waive compliance with the provision"). But cf., e.g., Drainage Comm'tr. v. Giffin, 25 N.E. 995, 999 (Ill. 1890) (concluding that "[t]here can be no doubt that these provisions [as to notice] are mandatory, and therefore jurisdictional") (emphasis added).
dress further relevant questions about the content or meaning of the rule. This fancy verbiage only repeats Justice Black's basic observation: "I agree, of course, that we should follow the statute. But we must first determine what the statute means."105

The mandatory nature of jurisdictional rules does entail that courts cannot waive them as a matter of discretion, or put aside their consequences. It also entails that the existence of jurisdiction is not an issue that can be committed to judicial discretion.106 The law can give judges discretion whether they will exercise their jurisdiction.107 It can give them discretion to set, or postpone, the jurisdictional point of no return. Some statutes, including federal law, for example, explicitly give courts the power to grant extensions of time on limits on appeal.108 But courts cannot have discretion to decide whether they have jurisdiction. Crudely stated, if a court has discretion to decide whether it has jurisdiction, then, it must have jurisdiction.

This too, though, is of less moment than it might seem to be. Discretion in the doctrinal sense is a narrow idea. It comes into play only when the law by its own terms places a decision (within some range) outside legal argument and commits it instead to the wisdom or managerial authority of a given decision maker. Thus, federal law gives trial judges discretion in certain classes of cases to award "reasonable attorney's fees" to prevailing parties,109 or, as noted, to grant limited time extensions "upon a showing of excusable neglect or good cause."110

105. Teague, 394 U.S. at 982 (Black, J., dissenting).
106. Cf. Hale v. Ault, 367 N.E.2d 93, 95 (III. App. Ct. 1977) ("'Jurisdiction' when the term is used in the sense of describing the power of the court to render a judgment not subject to collateral attack does not depend upon an exercise of discretion by the court.").
107. Doctrines such as forum non conveniens and certain forms of abstention grant judges discretionary jurisdictional powers. For example, a perennial question in the theory and doctrine of federal court jurisdiction has been the extent to which federal courts can decline to hear cases. See generally David L. Shapiro, Jurisdiction and Discretion, 60 N.Y.U. L. Rev. 543 (1985) (discussing the role of reasoned judicial discretion in the exercise of jurisdiction, particularly to avoid undue interference with the state courts or other branches of the federal government).
108. See infra note 110.

The district court, upon a showing of excusable neglect or good cause, may extend
This sense of discretion is different from that at work in the critical or theoretical claim that legal rules are sometimes or always indeterminate and that legal interpretation is therefore to some degree an exercise of "discretion." One author has called these two senses of discretion "procedural" and "jurisprudential." I have, in a previous article, called them "affirmative discretion" and "residual discretion."

Affirmative discretion is specifically granted by law. Residual discretion does not exist at all, according to some theorists. If it does exist, it arises not by operation of law, but from a gap in the law. I will, later, say something about the relationship between residual discretion and the "Idea of Jurisdiction." For now, however, suffice it to say that the law's internal perspective knows little of residual discretion. All that is certain, at least so far, is that the jurisdictionality of a legal rule is inconsistent with the exercise of

the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by this Rule 4(a) [in civil cases]. Any such motion which is filed before expiration of the prescribed time may be ex parte unless the court otherwise requires. Notice of any such motion which is filed after expiration of the prescribed time shall be given to the other parties in accordance with local rules. No such extension shall exceed 30 days past such prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.

Id. at Rule 4(a)(5); see also, e.g., FED. R. CIV. P. 74(a) (1994) (regarding appeal from magistrate to district court, "[u]pon a showing of excusable neglect, the magistrate may extend the time for filing a notice of appeal upon motion filed not later than 20 days after the expiration of the time otherwise prescribed by this rule"); FED. R. CRIM. P. 45(b) (1991).

When an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice, order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done if the failure to act was the result of excusable neglect; but the court may not extend the time for taking any action under Rules 29, 33, 34, and 35, except to the extent and under the conditions stated in them.

Id.; FED. R. APP. P. 4(b) ("[u]pon a showing of excusable neglect, the district court may—before or after the time has expired, with or without motion and notice—extend the time for filing a notice of appeal [in a criminal case] for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision.").

111. See George P. Fletcher, Some Unwise Reflections About Discretion, 47 LAW & CONTEMP. PROBS. 269 (Autumn 1984).
114. See infra part III.B.5.b.
e. Jurisdiction and the Merits: Of Preclusion

Jurisdictional dismissals are not "on the merits." Dismissal of a case for jurisdictional reasons might preclude relitigation of those jurisdictional issues. But it does not keep the party who sought relief from trying again in a different court or in the same court on different jurisdictional grounds. This is not so because jurisdiction is usually a question of procedure rather than substance. To the contrary, as I will emphasize shortly, jurisdictional issues sometimes do touch matters of substance. Moreover, dismissals on procedural grounds, though in some circumstances not considered "on the merits" for purposes of claim preclusion, often are. This is particularly

115. I discuss the implications of this conclusion for the doctrine of jurisdictional time limits infra part III.B.3.a.

116. See Magnus Electronics, Inc. v. La Republica Argentina, 830 F.2d 1396, 1400 (7th Cir. 1987); Dozier v. Ford Motor Co., 702 F.2d 1189, 1195 (D.C. Cir. 1983) (Scalia, J.) (giving res judicata effect to previous dismissal for failure to satisfy jurisdictional amount requirement in federal diversity suits); Boone v. Kurtz, 617 F.2d 435, 436 (5th Cir. 1980); In re Courtin, 91 So. 2d 67, 68 (La. 1922) (dictum); In re Quinney's Estate, 283 N.W. 599, 602 (Mich. 1939); 5 MOORE, ET AL., supra note 18, ¶ 41.14(a), at 41-174. But cf. e.g., Mann v. Merrill Lynch, Pierce, Fenner and Smith, Inc., 488 F.2d 75, 76 (5th Cir. 1973) (allowing party who had not shown diversity of citizenship in earlier litigation to bring new diversity suit); Cassidy v. Board of Educ., 557 A.2d 227, 234-35 (Md. 1989) (holding that new suit was not barred by dismissal of earlier suit for failure to plead notice to defendant). As these cases suggest, this area of preclusion law is not entirely settled. A plausible, if not perfect, way to reconcile these two lines of cases might be to distinguish between a mere dismissal for failure to demonstrate jurisdiction, which might not be preclusive, and an affirmative finding that a jurisdictional prerequisite did not exist, which would be preclusive.


118. See infra part III.A.2.f.

119. The issue is complex, with significant historical and policy overtones and various shades of meaning, a full discussion of which is well beyond the scope of this paper. See generally Costello v. United States, 365 U.S. 265, 284-88 (1961); Fed. R. Civ. P. § 41; RESTATEMENT (SECOND) OF JUDGMENTS supra note 117, §§ 19-20; FLEMING JAMES, JR. & GEOFFREY C. HAZARD, JR., CIVIL PROCEDURE § 11.15 (3d ed. 1985); CHARLES A. WRIGHT, LAW OF FEDERAL COURTS § 100A (1983).


For my purposes, it is unimportant whether procedural dismissals are always "on the merits." There may be sound reasons in preclusion theory why they should not be. What is
true, and particularly relevant, for statutes of limitation. For example, consider a party who seeks relief in tort and is barred by a short statute of limitations. The general view is that such a party may not refashion his cause of action, forcing the same operative facts to fit a cause of action in contract and resubmit his complaint under the longer statute of limitations. Nor can he try again in another state that happens to have a longer statute of limitations applicable to tort claims.

The difference flows directly from the notion that a court without jurisdiction might almost as well be any person on the street. If a litigant were to come to, say, me and seek legal relief, and I told him to go away, that would not prevent him from going to a real court. But if he, from the start, seeks legal relief in a real court with real jurisdiction, he has arguably had his chance, even if his case stumbles, on procedural grounds, before the court hears the substance of his claim.

That jurisdictional dismissals are not on the merits reveals an even deeper principle. Most judicial acts, substantive or procedural, significant is that jurisdictional dismissals are, by nature, not dismissals "on the merits."

120. See Smith v. City of Chicago, 820 F.2d 916 (7th Cir. 1987) (holding a demoted city employee's civil rights action precluded by an earlier petition for a consent decree which was barred by the statute of limitations and laches; for purposes of res judicata, earlier dismissal was "on the merits"); DeVargas v. Montoya, 796 F.2d 1245, 1249-50 (10th Cir. 1986) (upholding state court dismissal of plaintiff's civil rights action in federal court on statute of limitations grounds because, under state law, dismissal on statute of limitations grounds would be on the merits for res judicata purposes, and the state court judgment was entitled to the same preclusive effect in federal court); Nathan v. Rowan, 651 F.2d 1223, 1226 (6th Cir. 1981) (stating that dismissal based upon statute of limitations is decision "on the merits" for res judicata purposes); Allie v. Ionata, 503 So. 2d 1237, 1241 (Fla. 1987) (same); Sankey Brothers, Inc. v. Guilliams, 504 N.E.2d 534, 538 (Ind. Ct. App. 1987) (same); Dennis v. Fiscal Court of Bullitt County, 784 S.W.2d 608, 609 (Ky. 1990) (holding that where discharged police officer sued to recover for breach of contract, violations of personnel policies, and state constitutional right of due process, that action was res judicata due to a federal court dismissal of similar federal civil rights action under statute of limitations); Nitz v. Nitz, 456 N.W.2d 450, 452-53 (Minn. Ct. App. 1990) (affirming dismissal of suit claiming negligent maintenance and inspection of birdfeeder where plaintiff was injured after post by which birdfeeder was attached to deck gave way, holding that dismissal on statute of limitations grounds of plaintiff's earlier action for negligent installation of birdfeeder had res judicata effect); Gillespie v. Johnson, 209 S.E.2d 143, 145 (W. Va. 1974).

In some contexts, the res judicata effect of statute of limitations dismissals rises to constitutional dimensions. See, e.g., Opinion of the Justices, 538 A.2d 454, 457-58 (N.H. 1989).

But cf., e.g., Henson v. Columbus Bank & Trust Co., 770 F.2d 1566, 1572 (11th Cir. 1985) (holding that earlier Georgia state court dismissal on statute of limitations grounds was not dismissal "on the merits" for res judicata purposes).
whether allowing or denying relief, are exercises of power. They carry with them the onus of that power. A court that is not part of the solution might well be part of the problem. Yet, in the legal imagination, dismissal for lack of jurisdiction is a genuine assertion of powerlessness. It carries no onus. A court without jurisdiction is, in some deep sense, pure.\textsuperscript{121}

f. Jurisdiction and the Merits: Of Overlap

Whether jurisdiction exists in a court is in principle not the same question as whether one or the other party should prevail on the merits. The jurisdictional question, that is to say, goes only to whether a particular court should hear a case, while the merits question goes to whether a particular party should prevail, regardless of the court hearing the case. Nevertheless, the two issues can overlap, or even become identical.\textsuperscript{122}

This can happen because resolution of an issue controlling a court’s jurisdiction is also relevant to, or dispositive of, the inquiry into the merits. For example, when a state court exercises long-arm jurisdiction based only upon the acts or omissions directly related to the suit itself,\textsuperscript{123} and decides, for example, that there was no con-

\begin{footnotesize}
\textsuperscript{121} With this statement, I explicitly challenge Robert Cover’s arguments about the “irony of jurisdiction.” See Robert Cover, \textit{The Supreme Court, 1982 Term—Foreword: Nomos and Narrative}, 97 HARV. L. REV. 4, 8, 53-60 (1983). To take seriously the idea of Jurisdiction as an element of the legal imagination, and to take seriously the possibility that courts are mere creatures of law, it seems to me, to take seriously the claim that those courts are sometimes genuinely and, without irony, powerless to act.

\textsuperscript{122} This basis for long-arm jurisdiction is usually referred to as “specific jurisdiction.” It

\textsuperscript{123} This basis for long-arm jurisdiction is usually referred to as “specific jurisdiction.” It
tract between the parties—an issue usually identified as going to the “merits”—it might incidently dispose of its jurisdiction. Similarly interesting configurations of jurisdictional and merits issues have occurred in, for example, administrative law, labor law, and worker’s compensation law.

Overlap between jurisdiction and the merits can also occur when some given element of a cause of action is, for one reason or another, elevated to jurisdictional status. A paradigm instance is federal sovereign immunity which, as usually formulated, is a question that relates both to jurisdiction and to the merits.

is distinguished from “general jurisdiction” which is grounded in contacts between the defendant and the state that are more substantial, but not necessarily related to the specific lawsuit. See generally Lea Brilmayer et al., A General Look at General Jurisdiction, 66 TEX. L. REV. 723 (1988); Mary Twitchell, The Myth of General Jurisdiction, 101 HARV. L. REV. 610 (1988).

This distinction between “general” and “specific” grounds for long-arm jurisdiction should not be confused with the distinction, drawn earlier between courts of “general” and “specific” jurisdiction. See supra text accompanying notes 63-67.

124. See, e.g., Roskelley & Co. v. Lerco, Inc., 610 P.2d 1307, 1309-10 (Utah 1980); cf. id. at 1313 (Stewart, J., dissenting) (“The majority decides the jurisdictional issue by, in effect, deciding the substantive issue of the existence of the alleged contract. I think it is inappropriate to decide the merits of a case on a motion to dismiss for lack of jurisdiction.”).

125. Often, statutory schemes in administrative law will give one or another court jurisdiction to review only agency action that falls under a certain rubric. And, sometimes, deciding whether the action fell under that rubric will involve the same inquiry as that involved in deciding whether the action was reversible on the merits. See, e.g., Alabama Tissue Ctr. of the Univ. of Alabama Health Serv. Found., P.C. v. Sullivan, 975 F.2d 373, 379 (7th Cir. 1992) (holding that a federal court of appeal had jurisdiction to review “regulations” of administrative agency issues, but not the agency’s “interpretations” of existing statutes or regulations; determining whether act in question was a “regulation” or an “interpretation” depended on merits-related inquiry, also dispositive of the merits, into whether it was consistent with prior agency enactments); Williams v. Department of Agric., 832 F.2d 1259, 1260 (Fed. Cir. 1987) (concluding that right of Merit Systems Protection Board to review federal worker’s job resignation depended on whether resignation was voluntary or involuntary, an issue that was “intricately intertwined” with the merits of the worker’s claim against the agency).

126. See, e.g., The Careau Group v. United Farm Workers of Am., 940 F.2d 1291, 1293 (9th Cir. 1991).


128. See, e.g., United States v. Testan, 424 U.S. 392, 399 (1975) (stating that when the United States consents to be sued, “the terms of its consent to be sued in any court define that court’s jurisdiction to entertain the suit.” (quoting United States v. Sherwood, 312 U.S. 584, 586 (1941)).

Immunity issues more generally illustrate the range of ways in which jurisdiction and the merits can be juxtaposed. Federal sovereign immunity, as noted, implicates both jurisdiction and the merits. State and foreign sovereign immunity questions, on the other hand, when considered by federal courts, usually raise only jurisdictional issues, without implicating the merits of the lawsuit in a foreign or state forum. At the other end of the spectrum, ordinary, non-sovereign forms of immunity, such as charitable immunity, generally raise only merits
Even when elements of the two questions are not identical, they can be related. The existence of federal question jurisdiction, for example, does not require that a federal cause of action exist, but it does require that there be at least a colorable claim to such a cause of action. Similarly, some state courts interpreting long-arm statutes grounding jurisdiction in a defendant's "tortious acts" have held that the exercise of jurisdiction does not depend on proving an actual tort, but only on a prima facie showing of one, or on showing an act or omission in the state that might colorably be a tort.

129. The classic case is Bell v. Hood, 327 U.S. 678 (1946):

Jurisdiction . . . is not defeated . . . by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover. For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction. . . . [But] a suit may sometimes be dismissed for want of jurisdiction where the alleged claim . . . clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous.

Id. at 682-83. But cf. id. at 683 (noting that "[t]he accuracy of calling these dismissals jurisdictional has been questioned"); Yazoo County Indus. Dev. Corp. v. Suthoff, 102 S.Ct. 1032, 1034-35 (1982) (Rehnquist, J., dissenting from denial of certiorari) (arguing that distinction drawn in Bell v. Hood is in tension with scheme contemplated by Fed. R. Civ. P. 12).


There are significant practical differences in this context between dismissal for lack of jurisdiction and dismissal for failure to state a cause of action. Most obviously, dismissal for want of jurisdiction will have fewer preclusive effects on subsequent claims. See generally supra part III.A.2.e. This might suggest that plaintiffs would favor jurisdictional to merits dismissals. But perhaps more importantly, if a federal court dismisses a particular federal claim on the merits, but not for want of jurisdiction, the court might still be able to hear "pendent" claims, based on state or other federal law, that would not alone provide the court with jurisdiction. See Bray, 113 S. Ct. at 768; Merrell Dow Pharm., Inc. v. Thompson, 478 U.S. 804, 817 n.15 (1986); Hagan v. Lavine, 415 U.S. 528, 545-64 (1974).


131. See, e.g., Nelson v. Miller, 143 N.E.2d 673 (Ill. 1957) (leading case):

The jurisdictional fact, in the language of [the statute], is "the commission of a tortious act within this State." The word "tortious" can, of course, be used to describe conduct that subjects the actor to tort liability. For its own purposes the Restatement so uses it. Restatement, Torts, § 6. It does not follow, however, that the word must have that meaning in a statute that is concerned with jurisdictional limits. To so hold would be to make the jurisdiction of the court depend upon the outcome of a trial on the merits. There is no indication that the General Assembly
The convergence of jurisdictional and merits issues is, in an important sense, awkward for legal doctrine and the legal culture. It can also raise complicated conceptual and procedural issues. Should, for example, factual issues relevant to both jurisdiction and the merits be decided by judge or jury? In a related vein, should factual findings made in the course of hearing a jurisdictional challenge be binding on the parties at trial? If such convergence were ordinary rather than extraordinary, it would be even more awkward, which is surely one reason for doctrines such as that I just described for federal question jurisdiction and state long-arm jurisdiction, which separate jurisdiction and the merits even as they acknowledge their relationship.

But, for our purposes, it bears emphasis that all this is a matter of nuance rather than absolutes, instinct as much as logic. There is nothing inherent in the idea of jurisdiction that requires jurisdictional issues to be formal, simple, or merits-independent.

g. Jurisdiction at the Threshold, and Beyond

Questions of jurisdiction usually come into play at the threshold of a proceeding. But not always. The typical jurisdictional question is whether a court has the power to hear a case. However, another proper jurisdictional question is whether a court that does have power to hear a case also has the power to do a particular thing in the case. Classic doctrine captured this issue under the rubric of "excess of jurisdiction." Thus, a city court whose jurisdiction only
extends to awards under $10,000 that issues a judgment for $20,000 might be acting beyond its jurisdiction. So might a court that hands down a criminal sentence not authorized by law. Thus, a judgment, however erroneous, cannot be collaterally assailed, is undoubtedly correct as a general proposition, but, like all general propositions, is subject to many qualifications in its application. All courts, even the highest, are more or less limited in their jurisdiction: they are limited to particular classes of actions, such as civil or criminal; or to particular modes of administering relief, such as legal or equitable; or to transactions of a special character, such as arise on navigable waters, or relate to the testamentary disposition of estates; or to the use of particular process in the enforcement of their judgments. Though the court may possess jurisdiction of a cause, of the subject-matter, and of the parties, it is still limited in its modes of procedure, and in the extent and character of its judgments. It must act judicially in all things, and cannot then transcend the power conferred by the law. If, for instance, the action be upon a money demand, the court, notwithstanding its complete jurisdiction over the subject and parties, has no power to pass judgment of imprisonment in the penitentiary upon the defendant. If the action be for a libel or personal tort, the court cannot order in the case a specific performance of a contract. If the action be for the possession of real property, the court is powerless to admit in the case the probate of a will. Instances of this kind show that the general doctrine stated by counsel is subject to many qualifications. The judgments mentioned, given in the cases supposed, would not be merely erroneous: they would be absolutely void; because the court in rendering them would transcend the limits of its authority in those cases.

Id. at 282 (citation omitted). See generally Bailey, supra note 54, §§ 22-29 (discussing excess of jurisdiction).

136. See, e.g., White v. Marine Transport Lines, Inc., 372 So. 2d 81 (Fla. 1979): [T]he test for jurisdiction [of the county court] is twofold. In the first instance, the good faith demand of the plaintiff at the time of instituting suit determines the ability of the particular court to entertain the action. However, notwithstanding the bona fides of the plaintiff's demand at the time of institution of suit, as a matter of judicial power the county court is precluded from entering a judgment for damages in excess of its mandated jurisdiction. Although appellant met the first test and his action was cognizable in county court, that same court was without judicial power to enter a judgment in excess of [its maximum jurisdictional amount].

Id. at 84; Louisville & N.R. Co. v. Sutton, 44 So. 946, 947 (Fla. 1907) ("[T]he jurisdiction of the county judge is determined by the actual demand made or the actual damages claimed. A judgment entered for an amount in excess of the amount over which the court has jurisdiction is void."); Zimmer v. Schindehette, 262 N.W. 379, 380 (Mich. 1935) (holding judgment rendered by justice of the peace in excess of statutory maximum held void in excess of jurisdiction). But cf., e.g., Johnson v. Washburn, 19 N.W.2d 563 (Neb. 1945) (stating that if amount claimed was within jurisdiction of county court at time action was brought, fact that interest accruing before final judgment increased amount to more than jurisdictional limit did not defeat jurisdiction).

137. See, e.g., In re Bonner, 151 U.S. 242 (1894); Horner v. Webb, 141 P.2d 151 (Wash. 1943). For a landmark case that both affirmed and finessed the relevance of the doctrine of excess jurisdiction to criminal sentences, see Ex parte Lange, 85 U.S. 163 (1873). As I explain in the next paragraph of the text, much of the concern for "excess of jurisdiction" in criminal law has been subsumed, in modern law, by the expansion of habeas corpus doctrine. Nevertheless, some contemporary doctrine does continue to employ the rubric of "excess
court with jurisdiction has the right to be wrong, but only while it continues to act within its jurisdiction.

I reported above that nineteenth century American habeas corpus law was usually couched in jurisdictional terms. I might have added that a favorite theme in that doctrine was excess of jurisdiction. As the doctrine evolved, it developed that almost any serious constitutional violation constituted a judicial act in excess of jurisdiction. Eventually, the courts dropped the jurisdictional rubric entirely.

Similarly, modern British administrative law often employs the pretense that whenever an administrative agency commits an error of law, it is exceeding its jurisdiction. But when appeals courts applied the same principle to control judicial behavior, the House of Lords squelched the effort, noting sheepishly that administrative agencies were simply different.

The lesson here is that, much like the occasional overlap between jurisdiction and the merits just discussed, the doctrine of excess of jurisdiction risks erasing any useful distinction between jurisdictional and other issues. The challenge, in making sense of the notion of excess of jurisdiction, is to draw sensible, intellectually respectable lines between abuses of jurisdiction and mere errors of law. But this task is no different, in principle, from the similarly difficult job of drawing sensible lines between jurisdictional and non-jurisdictional issues at the threshold of a case.

See, e.g., WASH. REV. CODE § 10.73.100 (1994) (statutory time limit on collateral attacks in criminal cases not applicable, inter alia, to defeat claim that "sentence imposed was in excess of the court's jurisdiction"); In re Harris, 855 P.2d 391, 407 (Cal. 1993):

The rule requiring a habeas corpus petitioner to justify any substantial delay in raising a claim, however, is inapplicable to a claim, as here, of sentencing error amounting to an excess of jurisdiction. An appellate court may "correct a sentence that is not authorized by law whenever the error comes to the attention of the court."

Id. at 407 (quoting In re Ricky H., 636 P.2d 13 (Cal. 1981)).

138. For general historical background information related to these developments, see supra note 80.


142. Nothing in the Idea of Jurisdiction, incidentally, implies that there is, or should be, a general abstract method or fundamental algorithm for identifying which issues are jurisdictional, and which are nonjurisdictional in the first instance. In fact, the line between jurisdictional and nonjurisdictional issues seems, at least partly, a product of specific doctrinal, historical, and political contingencies. I suggest that this does not, however, compromise either
3. Alternatives

In broad outline, this is the Idea of Jurisdiction. As should be expected, the actual course of the doctrine, even in the nineteenth century, was more complicated. Specifics varied over time and in different forums. The doctrine was sometimes open to considerations of degree. Like all doctrines, it also had its contradictions and inconsistencies. To some extent, courts manipulated it to achieve specific ends.

Nevertheless, the law’s understanding of jurisdiction and jurisdictionality remained bound to, and for that matter still speaks the language of, a powerful, unified conception. That conception runs counter, in its basic commitments, to any number of other paths open to the legal imagination.

A more managerial or bureaucratic account of jurisdictionality, for example, would emphasize not the grants of power that define individual courts, but their institutional connections in a unitary, pyramidal decision machine. This view, for example, would want to treat collateral attack as nothing more than a species of appeal. It would also deem at least incomplete the notion that the authority of a lowly state trial court is more “general” than that of the United States Supreme Court.

Similarly, a more behaviorist or “legal realist” account would want to treat “jurisdiction” as only a label attached to certain legal rules, carrying with it certain consequences, but not any deeper meaning. In this view, “actual” or operative jurisdiction, so to speak, would attach to judges, not by virtue of specific grants of power, but by virtue of their assigned role in society. And real judicial authority, as in Richard Posner’s recent formulation, would be “limited only by the diffuse outer bounds of professional propriety and moral

the integrity or the utility of the Idea of Jurisdiction as a picture of the consequences of drawing that line.

143. This view has become particularly influential in discussions of habeas corpus and similar remedies in criminal procedure. As Professor Kate Stith states the standard view: “In addition to direct appeal, state and federal collateral review is available to a defendant, for instance on a petition for a writ of habeas corpus. Collateral review operates similarly to direct appeal, in effect permitting additional stages of appellate review of criminal cases.” Kate Stith, The Risk of Legal Error in Criminal Cases: Some Consequences of the Asymmetry in the Right to Appeal, 57 U. CHI. L. REV. 1, 4 n.7 (1990) (citing JAMES LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE 386-88 (1988)); cf. supra text accompanying notes 138-39 (discussing development of habeas doctrine).
Finally, a more insistently statist view of jurisdiction would treat it as "simply ancillary to the authority of the sovereign and derivative from the very concept of sovereignty."  

These alternative imaginings of jurisdiction and jurisdictionality have, in either pure or diluted form, influenced much recent academic writing about jurisdiction. They have also made inroads into judicial doctrine, as I will discuss in more detail later. The question for the moment, however, is what the Idea of Jurisdiction, in all its original robust particularity, might entail for the construction of jurisdictional time limits. That is the issue to which I now want to turn.

B. The Argument in Full

Part of the answer is easy. Jurisdictional time limits should not be waivable by the parties. Nor should they be waivable at the (affirmative) discretion of the court. These are not trivial results. But neither do they amount to requiring that courts always interpret jurisdictional time limits rigidly and literally. Is there more?

The remainder of this part of the Article largely looks at whether there are subtler grounds for the modern doctrine of jurisdictional time limits. It asks whether the Idea of Jurisdiction, or some related legal or jurisprudential notion, justifies the doctrine. Some of the arguments discussed here are attractive. Some find support in bits of history. But I propose that, whether singly or as a group, they do not justify the present shape of the doctrine.


Before diving in, though, I need to consider one possibility that, if it proved correct, might make much of this problem disappear. Maybe the doctrine of jurisdictional time limits is not an analytic claim at all, but only a semantic usage. That is to say, maybe the word “jurisdictional” has more than one meaning. As used in the phrase “jurisdictional time limit,” the word might just mean "literal."
or “unqualified” or “peremptory” or some such thing. And that definition might be distinct from the sense of the word in the doctrines associated with the Idea of Jurisdiction. A time limit could be “jurisdictional” in the sense of being literal or peremptory whether or not it was jurisdictional in the general sense, and vice versa.\textsuperscript{148}

Of course, even if “jurisdictional” had two—or even more—distinct senses, that would not be the end of it. Surely, these two senses would not be strict homonyms—etymologically unrelated words that happen to look and sound the same, like \textit{cleave}, which means both “split or separate” and “adhere or cling.”\textsuperscript{149} At best, the senses of “jurisdictional” would be quasi-homonyms,\textsuperscript{150} like \textit{sanc tion}, whose distinct senses—“permission” and “penalty”—have a common, if archaic, connection.\textsuperscript{151} If that were true, though, it would still matter what that connection is, just as it matters, slightly, that the root idea of sanction-as-permission and sanction-as-penalty is \textit{sanctification}.\textsuperscript{152}

As likely, though, the various uses of “jurisdictional,” if there are various uses, would stand in an even more uneasy relation to each other. They are neither homonyms, nor even quasi-homonyms, but rather examples of polysemy—alternative, possibly competing, defini-

\begin{flushright}
\textsuperscript{148} Professor Moore has made at least a weak version of this claim in distinguishing between jurisdictional time limits and questions of subject-matter jurisdiction:

\begin{quote}
Mandatory preconditions to the exercise of jurisdiction are often spoken of as jurisdictional \ldots in the sense that absent compliance, the court can acquire no jurisdiction of the cause, though otherwise it is a case within its subject matter jurisdiction \ldots .

\ldots . In recent years the Supreme Court has been aware of the distinction between [subject matter] jurisdiction and the “jurisdictional” nature of [Federal] Rule [of Appellate Procedure] 4(a), placing quotation marks around the term in the latter usage. But the courts of appeals must obey the mandatory provisions of the rules whether they are referred to as jurisdictional, “mandatory and jurisdictional”, or merely mandatory. How punctilious they must be lies with the Supreme Court.
\end{quote}

\textsuperscript{149} “Cleave” as “split or separate” derives from the Old English “cleofan.” “Cleave” as “adhere” derives from the Old High German “chleben.” It is etymologically related to “clay.”

\textsuperscript{150} For an account of the distinction between strict homonyms and quasi-homonyms, see generally \textit{LOUISE ELLYSON, A DICTIONARY OF HOMONYMS} (rev. ed. 1981).

\textsuperscript{151} Both, nearly opposite, senses of the word derive from the Latin root “sancire”—to make holy. A “sanction” was originally an ecclesiastical decree.


\textsuperscript{152} See supra note 151.
\end{flushright}
tions of the same word. That, in turn, suggests a more serious set of concerns.

Consider the multiple definitions of terms like "substantive" and "procedural." In one definition, a rule of law is substantive if it is outcome-determinative. In another definition, it is substantive if it governs primary behavior rather than the mechanics of adjudication. These definitions overlap, but are not identical. Different le-

---

153. For the distinction between polysemy and homonymy, see generally DAVID CRYSTAL, CAMBRIDGE ENCYCLOPEDIA OF LANGUAGE 106 (1987); JOHN LYONS, LANGUAGE, MEANING, CONTEXT 45-47 (1981).

For a philosophical caveat against disposing of ambiguities too easily by such lexicographical expedients as the distinction between polysemy and homonymy, see WILLARD V. QUINE, WORD AND OBJECT § 27, at 129-30 (1960).

154. The discussion that follows here in text can only scratch the surface of deep and important issues in philosophy of language. For some classic sources, see MAX BLACK, LANGUAGE AND PHILOSOPHY (1949); C.K. ÖDEEN & I.A. RICHARDS, THE MEANING OF MEANING (1923); QUINE, supra note 153; LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS (G.E.M. Anscombe trans., 1958); Michael Moore, The Semantics of Judging, 54 S. Cal. L. Rev. 151 (1981).

I do not mean to suggest that true or quasi-homonyms raise no problems of their own. Quine cites the delicious ambiguity between the two homonymous forms of the word "bore" in the sentence "Our mothers bore us." QUINE, supra note 153, § 27, at 129. He also cites the ambiguity in the word "light," which can refer to weight, color, size, and many other things. The confusion created by "light," after its exploitation by the marketing industry, created the need for regulatory intervention:

"Low fat." "No cholesterol." "High in oat bran." "Light." And don't forget "lite."

Until now, many of these claims have been nothing more than advertising hype. The public has been misled with products like the "light" vegetable oil that was just light in color and the "lite" cheesecake that was just light in texture.

But with the publication of new food labeling regulations in January 1993, the Food and Drug Administration and the U.S. Department of Agriculture's Food Safety and Inspection Service (FSIS) address the problem of misleading nutrition claims and help reestablish the credibility of the food label. The regulations spell out which nutrient content claims are allowed and under what circumstances they can be used.

Dori Stehlin, A Little 'Lite' Reading, 27 FDA CONSUMER, June 1993, at 12.


157. In the classic formulation, substantive law creates or defines rights and duties in the world, and procedural law provides the judicial machinery by which the substantive law is determined, enforced, or made effective. See, e.g., State v. Birmingham, 392 P.2d 775, 776 (Ariz. 1964); State v. Garcia, 229 So. 2d 236 (Fla. 1969); Thorp v. Casey's General Stores, Inc., 446 N.W.2d 437 (Iowa 1989); Baldwin v. City of Waterloo, 372 N.W.2d 486, 491 (Iowa 1985); State ex rel. Turner v. Limbrecht, 246 N.W.2d 330, 332 (Iowa 1976); Bullington v. Angel, 16 S.E.2d 411, 412 (N.C. 1941); Petty v. Clark, 192 P.2d 589, 593-94
gal contexts use one or another of them. And courts and commentators now generally recognize that a rule of law can be substantive for certain purposes, such as choice of law, and procedural for other purposes, such as the *Erie* doctrine. That might suggest that the issue is only semantic. But the line between genuinely contestable meaning and pure semantics is notoriously fuzzy. So here. The distinct meanings of "substantive" and "procedural" come out of a history of real theoretical conflict or confusion. They still rest, in part, on different assumptions about the nature of law and legal rights. That these words are now conventionally used in different ways in different contexts is in part a semantic armistice to that conflict. But it does not mean that the conflict has gone away or been rendered purely semantic. It does not even mean that the conflict might not still be resolved. Something similar might be going on with the word "jurisdictional."

Thus, if it did turn out that "jurisdictional," like "substantive" or "procedural," had different meanings in different contexts, and that a rule of law could be jurisdictional in one sense but not in another, there would still be a problem and a puzzle to solve.

Nevertheless, such a conclusion would at least remove the urgency from this discussion. It would certainly remove the exasperation. And it might demand a very different article than the one I

---


159. See sources cited supra note 154; cf. Steven Winter, *Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stakes for Law*, 137 U. PA. L. REV. 1105, 1149 (1989) ("Where the relativist sees contextualism, the objectivist sees homonymy: 'different' words that sound the same but have disparate meanings. The experientialist, however, understands this to be polysemy: many usages for the same word that are related to each other by a common model or central case.").

160. See generally Risinger, supra note 155.

161. But cf. *Ogden & Richards*, supra note 154 (generally championing an extreme nominalism that would cast many fundamental disputes as merely semantic).

162. This might turn on whether the meaning of these terms is not only contestable, but "essentially contestable." See generally W.B. Gallie, *Essentially Contested Concepts*, 56 PROCEEDINGS OF THE ARISTOTELIAN SOCIETY 167 (Harrison & Sons Ltd., 1956).


There is a community of interest in this group that warrants treating it as a class for purposes of a class action. But the only characteristic this class shares is that
Unfortunately, though, the semantic usage hypothesis does not fit the facts. A handful of cases suggest that the word jurisdictional can just mean literal or peremptory, or that it can serve "as a policy label, marking off the indispensable from the dispensable," and that a rule of law can be jurisdictional in that sense without necessarily being jurisdictional in other senses. But only a handful.

of making a claim; this makes it a class within the meaning of that word as used in Rule 23 of the Federal Rules of Civil Procedure. It does not follow, however, that animus against such a group can be considered class-based. They share no other trait—racial, religious, ethnic, sexual, geographic, or economic.

The coincidence that the single word, "class", is used to describe both kinds of groups cannot justify converting a homonym into a legal identity of the different meanings.

Id. at 274.

164. See, e.g., Stelpflug v. Federal Land Bank, 790 F.2d 47, 49 n.1 (7th Cir. 1986) (noting that "[m]andatory preconditions to the exercise of jurisdiction are often spoken of as jurisdictional, however, in the sense that absent compliance, the court can acquire no jurisdiction of the cause...") (quoting 9 MOORE ET AL., supra note 18, ¶ 204.02[2], at 4-14); see also Gordon v. National Youth Work Alliance, 675 F.2d 356 (D.C. Cir. 1982):

Federal courts have frequently referred to Title VII's time limitations on litigation-initiation, whether done administratively or judicially, as "jurisdictional" prerequisites. This undoubtedly explains why both the movant and the District Court deemed untimeliness a default auguring jurisdictional consequences. Usually, however, the cases have left considerable uncertainty as to the precise meaning which in the particular context the court intended to ascribe to the oft-repeated word "jurisdictional," and any assimilation to subject-matter jurisdiction generally has been highly ambiguous at best. But seldom have Title VII's time limitations plainly been considered jurisdictional in the sense that nonobservance robs the court of authority to hear and resolve the plaintiff's claim. To the extent that our own "jurisdictional" characterizations of those limitations have been revealing at all, they are irreconcilable with the notion that subject-matter jurisdiction was affected in the least.

Id. at 364-65 (Robinson, C.J., concurring opinion) (footnotes omitted); Barnett v. Department of Employment Servs., 491 A.2d 1156, 1159 (D.C. 1985); Bailey v. SWCC, 296 S.E.2d 901, 904-05 (W. Va. 1982) (discussing in detail history of the characterization of time limits in Worker's Compensation Act as "jurisdictional."); cf. Sanchez v. Board of Regents, 625 F.2d 521, 522 n.1 (5th Cir. 1980) (describing a timeliness requirement as a "mandatory precondition to the exercise of jurisdiction").


166. See, e.g., Cross-Sound Ferry Servs., Inc. v. Interstate Commerce Comm'n, 934 F.2d 327, 340-41 (D.C. Cir. 1991) (Thomas, J., concurring in part) (dictum) ("The term 'jurisdiction,'... an 'all-purpose word denoting adjudicatory power'—bears different meanings in different contexts. Sometimes, for example, characterizing a provision as 'jurisdictional' implies that a court cannot temper the application of the provision through otherwise available equitable doctrines such as waiver, tolling, and estoppel.") (citations omitted); Goins v. Southern Pac. Co., 198 F. 432, 435 (N.D. Cal. 1912) (notice requirement can be "jurisdictional," in the sense of being a mandatory and unequivocal requirement, though not "jurisdictional" in the sense of not being waivable).
More common, admittedly, is a complicated ambivalence or confusion that might provide indirect support to the linguistic hypothesis. Not infrequently, for example, courts trying to make sense of time limits will put quotation marks around the word "jurisdictional," or otherwise mark their uneasiness.\textsuperscript{6} Sometimes, as noted earlier, they will treat it as one half of the legal doublet "mandatory and jurisdictional."

Moreover, at least some cases seem to assume that peremptory time limits are jurisdictional, rather than the other way around. Thus, for example, the \textit{Shendock} case discussed in part II began its analysis with this apparently definitional pronouncement:

When Congress intends the [time limit] to be a mandatory condition upon the availability of the judicial remedy of review, the statutory provisions relating to the time and place of filing are termed "jurisdictional." If, on the other hand, Congress intends to grant us discretion to consider the particular circumstances surrounding the efforts of the party seeking review to meet the statute's requirements, the provisions are treated as a statute of limitations

\textsuperscript{167} Other cases hold that the word "jurisdictional" can have several meanings, but not in a sense directly relevant to the discussion here. See, e.g., Szabo Food Serv., Inc. v. Canteen Corp., 823 F.2d 1073, 1077 (7th Cir. 1987); Martin v. Luther, 689 F.2d 109, 115-16 (7th Cir. 1982).

Note that the discussion here concerns the possibility that the \textit{word} jurisdiction might have more than one meaning or attach to more than one concept. A very different set of issues is raised by suggestions that the \textit{concept} of jurisdiction, though unitary, might be a matter of degree, or that an issue might be jurisdictional for some purposes and not for others. This possibility has arisen acutely, for example, in cases involving the doctrine of the Eleventh Amendment. See generally ERWIN CHEMERINSKY, FEDERAL JURISDICTION \S 7.3 (1989).

\textsuperscript{168} For discussions of this practice, see Bailey v. SWCC, 296 S.E.2d 901 (W. Va. 1982); 9 MOORE ET AL., supra note 18, \S 204.02[2]; Hall, supra note 7, at 409; see also infra note 177.

\textsuperscript{166} For discussions of this practice, see Bailey v. SWCC, 296 S.E.2d 901 (W. Va. 1982); 9 MOORE ET AL., supra note 18, \S 204.02[2]; Hall, supra note 7, at 409; see also infra note 177.
that can be tolled when principles of equity would make their rigid application unfair.169

Even more revealing, courts often focus their inquiry directly on whether the time limit at issue is best construed as literal and peremptory, rather than on whether it is "jurisdictional." Jurisdictionality enters as a label, but is not itself the object of analysis.

This can happen in the course of a single case. A recent Supreme Court opinion provides an extreme but telling example. The decision began by reporting a lower court holding that a given time limit "operates as an absolute jurisdictional limit."170 It then framed the issue as whether late-filed claims were "jurisdictionally barred."171 The Court concluded that the time bar was subject to tolling and not absolute. But it never thought it necessary to say, in so many words, that the time limit was not jurisdictional. In the course of the opinion, the question of jurisdictionality—even the language of jurisdictionality—evenually just dropped out.172

Something similar can happen across a line of cases. An early decision in the line will find, as a matter of ordinary textual construction, that a rule of law is peremptory. The case makes no mention of whether the time limit is "jurisdictional." Later cases in the line, however, will call the rule "jurisdictional" without more analysis. They will even report that to have been the holding of the earlier opinions.173

171. Id. at 457.
172. See id. at 456-57. The Court's actual holding was that when Congress has waived sovereign immunity, "the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States." Id. at 457; see also id. at 458-60 (White, J., concurring) (arguing that equitable tolling should not be available, but not resorting to language of jurisdictionality); id. at 460 (Stevens, J., dissenting).

Lower courts have interpreted Irwin in various lights. For example, compare Lyon v. Brown, No. 93-1982, 1994 U.S. App. LEXIS 6934 (7th Cir. 1994) (citing Irwin for the proposition that "statutory time limits in suits against the government are not jurisdictional") with Bath Iron Works Corp. v. United States, 20 F.3d 1567, 1572 n.2 (Fed. Cir. 1994) (dictum) (opining that "Irwin merely holds that those time limits, while jurisdictional, can be equitably tolled in certain circumstances"). For further particularly interesting discussions, see the debate between the concurring and dissenting opinions in Wood-Ivey Sys. Corp. v. United States, 4 F.3d 961 (Fed. Cir. 1993).
173. See infra text accompanying notes 298-306 (discussing aspects of historical development of doctrine of jurisdictional time limits).
Yet, in the end, none of this saves the day. Judicial language or behavior might sometimes seem to support the homonym hypothesis. But, with the few exceptions already noted, courts will, when they get down to it, treat jurisdictionality as a single idea.  

In Shendock, for example, the court concluded that the rule it was interpreting was "jurisdictional" rather than a mere statute of limitations because Congress chose to call it "jurisdictional." But if the term "jurisdictional" really had more than one distinct meaning, this would be no proof at all. Similarly, in Zipes, the Court concluded that the time limit with which it was dealing was not jurisdictional, in part because it did not appear in the section of the statute granting the district courts jurisdiction under Title VII and did not "speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts."  

Then there is the clincher, the most revealing piece of evidence against the homonymy or semantic hypothesis: Courts have, without much reluctance, extended the chain of inference out the other end, so to speak. They have concluded that because a rule of law is "jurisdictional" in the time-bar sense, it is also "jurisdictional" in other senses. Thus, for example, courts have held that dismissal on a mere statute of limitations is "on the merits" while dismissal on a "jurisdictional"—which is to say peremptory or literal—time limit is not.

174. They are also perfectly happy interpreting a time limit strictly or literally, but declining to go so far as to call it jurisdictional. See, e.g., Hallstrom v. Tillamook County, 493 U.S. 20 (1989) (applying time limit literally on other grounds, and holding that there is therefore no need to determine if the time limit is also "jurisdictional").

175. Shendock v. Office of Workers' Compensation Programs, 893 F.2d 1458, 1462-63 (3d Cir. 1990).


177. See, e.g., Nilsen v. City of Moss Point, 701 F.2d 556 (5th Cir. 1983). The language in the opinion is worth quoting, particularly for its brief flirtation with, and then rejection of, something like a homonymy analysis:

Dismissals for want of jurisdiction are not decisions on the merits, while those based on limitations are . . . .

. . . Based on [Zipes v. Trans World Airlines, Inc., 455 U.S. 385 (1982)], we hold that the timely filing requirements of Title VII are to be treated as limitations periods for all purposes. Zipes clearly holds that these requirements are not jurisdictional . . . . This leaves us only the choice between viewing them as either sui generis—subject to waiver and to equitable tolling, but nevertheless not merits adjudications for purposes for the preclusion doctrines. We see no reason to reach the second—as it seems to us—bizarre result, especially in view of Zipes' entire failure to envision it and its repeated analogizing of these provisions to "limitations periods." Perhaps the quotation marks there applied by the Court are meant as anchors to windward; if so, it is for the Court to navigate any narrow channel that
Similarly, courts have held that disobedience of "jurisdictional" time limits could not be waived,\(^7\) and would have to be raised by a court sua sponte,\(^8\) and was vulnerable to collateral attack.\(^9\) Even more intriguingly, they have declined to hold a time limit to be "jurisdictional"—in the sense of peremptory or literal—because that would then require them to bring to bear the full weight of the Idea of Jurisdiction.\(^1\)

In sum, the semantic angle to the doctrine of jurisdictional time limits is not a solution to the problem, but a symptom. If the word jurisdictional has more than one distinct sense, the legal culture is hopelessly confused in merging those senses. It is almost as if courts assumed that every sanction permission was also necessarily a sanction punishment. That might make for good tragedy. It would not make for sound law.

More to the point, the legal culture just sometimes treats the

---

\(^1\) Id. at 562 (citations omitted).  
\(^7\) See, e.g., James v. United States, 459 U.S. 1044 (1982) (Brennan, J., concurring in denial of cert.).  
\(^8\) See, e.g., Shendock, 893 F.2d at 1466 (quoting Lavallee Northside Civic Ass’n v. Coastal Zone Management Comm’n, 866 F.2d 616, 625 (3d Cir. 1989)); Brown v. Maine, 426 A.2d 880, 888 (Me. 1981); Hall, supra note 7, at 399 n.1 (citing numerous federal cases).

However, I find the District Court has no power or authority, or even discretion in the matter, to extend the time for appeal and that the statutory time specified is mandatory and jurisdictional and hence, if an appeal were allowed, any judgment rendered, in all probability, would be void and subject to collateral attack.

\(^1\) Id. at 99.  
\(^17\) See, e.g., In re Santos, 112 B.R. 1001, 1006 (Bankr. 9th Cir. 1990) (opining that “a determination that the time limits are jurisdictional would allow a dischargeability judgment to be collaterally attacked on the grounds of untimeliness at any time, a result clearly at odds with the purpose of promoting finality and certainty of relief”); cf. Dornfeld v. Julian, 472 N.E.2d 431 (Ill. 1984) (holding time limit contained in Paternity Act to be unconstitutional, but severable from the rest of the Act; relying for that conclusion on finding that time limit was not “jurisdictional,” which required overruling prior case that had held time limit to be “jurisdictional” in the peremptory/literal sense).
doctrine of jurisdictional time limits as if it were simultaneously a matter of mere semantics and a matter of high principle. Possibly, this is because it believes the doctrine so compelling analytically that it might as well be definitional. More likely, the legal culture is only obscuring its puzzlement with the doctrine by deploying it under a shield of quotation marks.

2. Ground Rules

The problem of the doctrine of jurisdictional time limits is, then, real and not just semantic. And it will take real and not just semantic arguments to justify it. As I turn now to those arguments, some points bear reemphasis.

First, remember I am not much interested here in the interpretation of specific time limits. Rather, I am interested in the principles that should guide their interpretation.

Second, I am not on the whole interested in whether specific time limits are or are not jurisdictional (in the general sense), or whether they pose jurisdictional obstacles. Usually, from here on in, I will assume that they are, and that they do.

Third, I intend to build on, not oppose, the world view of the Idea of Jurisdiction. The claim here is not that the doctrine of jurisdictional time limits is bad because the Idea of Jurisdiction is bad. Quite the contrary.

Fourth, the arguments here are not the usual arguments for or against literal interpretation, bright-line rules, or the like. We all know those arguments. I mentioned some of them earlier. The issue is whether there are special reasons for treating jurisdictional time limits different from other rules.

Finally, the goal here is not just to trot out a sundry set of contentions to shoot them down. What I am really getting at is the structure of the thing. One job of this normative analysis is to clear the way for part IV of the paper, which does try to tell a more satisfactory story about the doctrine of jurisdictional time limits. That story, however, as already noted, turns out to be not a justification, but at best an explanation. It is less about analysis than about sensibility, about a legal psyche containing both a certain unity and a good many contradictions and confusions.

The discussion in this part has four more pieces. The first considers some arguments inspired directly by the logic of the Idea of Jurisdiction. The second looks at arguments that build on the Idea of Jurisdiction, but combine it with other concerns and languages. The
third section considers possible jurisprudential implications of the Idea of Jurisdiction. The fourth dabbles in a bit of routine functionalism. Along the way, some themes will recur under different guises. I will try near the end to give some sense of why that might be.

3. The Logic of Jurisdiction

Courts, even when they do not resort to a semantic dodge, rarely try to justify the doctrine of jurisdictional time limits explicitly. When they do, their rhetoric draws directly from the Idea of Jurisdiction. They speak of power and powerlessness. Jurisdictional time limits, they say, are about power. Courts are powerless to do anything but apply them literally and rigidly. Excusing a failure to comply with a jurisdictional time limit is "possible only when judges are given the power to excuse. A lack of jurisdiction deprives them of the power."\(^{182}\) A lack of jurisdiction means "an inability to act, not merely in unappealing cases, but in compelling cases as well."\(^{183}\)

All this plainly begs the question. What is the content of the courts' powerlessness in these cases? I do not ask this question in a legal realist or critical legal sense, which would just mock such claims of powerlessness. I do believe, as I have said, that jurisdiction is genuinely about power and powerlessness. But why are courts powerless to interpret a jurisdictional statute any way other than rigidly and literally?

a. Discretion

One possibility, to which many cases allude, is that the answer turns on the notion that jurisdictional rules cannot be subject to (affirmative) judicial discretion. Maybe that principle can itself account for (at least most of) the doctrine of jurisdictional time limits. Or maybe the tempering principles that sometimes attach to non-jurisdictional time limits would necessarily have to be administered by way of judicial discretion.

This argument has some attraction. Rubrics such as "excusable neglect" do have the scent of discretion about them. Moreover, courts facing at least some of the non-jurisdictional limits on appeal discussed in part II do waive those limits simply as a matter of judicial discretion.

discretion. They could not do so if the limits were jurisdictional.\textsuperscript{184}

Courts should not treat jurisdictional time limits as they treat, for example, time limits for filing petitions for certiorari in criminal cases. But that is not the only or the best model. The better comparison would be to non-jurisdictional time limits that do not allow for merely discretionary waiver. The most obvious examples are ordinary statutes of limitations.

Statutes of limitations, going back to the Statute of James,\textsuperscript{185} usually include in their text certain exceptions or tolling rules.\textsuperscript{186} Partly for that reason, there is a venerable tradition of not lightly assuming the existence of other qualifications.\textsuperscript{187} (It would be hard to guess this from some of the cases contrasting jurisdictional time limits with "mere statutes of limitations.") There is also precedent to the contrary.\textsuperscript{188} In any event, when courts have, lightly or not, read

\textsuperscript{184} Nor would it help to posit that, in these cases, courts do not so much waive the non-jurisdictional time limits as read into them a power of discretionary extension. True, many rules setting time limits that are ultimately jurisdictional explicitly allow for discretionary judicial extensions. They might therefore implicitly allow for the same thing. But that is too easy. I am treating as given here that, whatever the terms of the rule at issue, the jurisdictional line is now drawn. Once that happens, the opportunity for the exercise of discretion has, by hypothesis, come to an end.

\textsuperscript{185} An Act for Limitation of Actions, and for Avoiding of Suits in Law, 1623, 21 Jam. ch. 16 (Eng.). The Statute of James was the first to limit personal actions to a period of years. See generally William D. Ferguson, The Statutes of Limitation Saving Statutes 7-8 (1978); William W. Blume & B.J. George, Jr., Limitations and the Federal Courts, 49 Mich. L. Rev. 937, 964 (1951); Donna A. Boswell, Comment, The Parameters of Federal Common Law: The Case of Time Limitations on Federal Causes of Action, 136 U. Pa. L. Rev. 1447, 1462 (1988). It was the basis for most of the early statutes of limitations adopted by the American States, and its general form and rubrics remain the dominant model for such statutes.


\textsuperscript{188} See, e.g., Welp v. Department of Revenue, 333 N.W.2d 481, 484 (Iowa 1983); Sprung v. Rasmussen, 180 N.W.2d 430 (Iowa 1970); Bain v. Wallace, 10 P.2d 226 (Wash. 1932).

Interestingly, such cases also often claim to be engaged in "strict construction," i.e., narrow construction of the scope of the limitation itself. See, e.g., United States v. St. Paul, Minneapolis & Manitoba R.R., 247 U.S. 310 (1918); Kittson County v. Wells, Denbrook & Assoc., 241 N.W.2d 799 (Minn. 1976); see also Van Diest v. Towlie, 179 P.2d 984, 989
additional or more broadly construed qualifications into statutes of limitations, they have not claimed to do so simply as a matter of discretion. Nor have they necessarily relied on discretion in deciding whether a given qualification, whether explicit or implicit, applies to a particular case. Their tools, besides basic factfinding, have been the standard methods of legal reasoning and statutory interpretation: language, logic, structure, purpose, consequences, and prior cases. This is not to warrant that their reasoning has always been good. But that is not the point.

Nor need we be put off because some provisos to statutes of limitations are termed “equitable.” The original role of the English chancellor might have been to inject extra-legal, discretionary “conscience” into the law. I will have more to say later about equity in its philosophical sense. But, as commentators long ago noticed, the institution of Anglo-American equity—even before the end of separate equity courts—eventually developed into a body of doctrine

(Colo. 1947) (stating that while statutes of limitations were “formerly looked upon with disfavor and strictly construed, the present judicial attitude is that of liberal construction”). For the exact opposite understanding of what “strict” construction of a statute of limitations involves, see Scholar v. Pacific Bell, 963 F.2d 264, 267 (9th Cir. 1992) (commenting that “[a] statute of limitations is subject to the doctrine of equitable tolling; therefore, relief from strict construction of a statute of limitations is readily available in extreme cases and gives the court latitude in a case-by-case analysis”); Former Employees of Terra Resources, Inc. v. United States, 713 F. Supp. 1433, 1435 (Ct. Int’l Trade 1989) (opining that “protection of the sovereign’s interests warrants strict construction of statutes of limitation” in favor of defendant United States); State v. White, 526 A.2d 869, 872 (Conn. 1987) (stating that the policies that statutes of limitations are significant enough to further their “strict construction” in favor of those invoking them); Wilkinson v. Harrington, 243 A.2d 745, 750 (R.I. 1968) (noting that “[i]n those jurisdictions which have pledged to follow the view of strict interpretation [of statutes of limitations], the courts, recognizing the harshness wrought by its application in medical malpractice cases, have carved out numerous exceptions to the rule”).

As I argue infra text accompanying notes 246-47, whether we call a particular plain statement rule one of strict construction or liberal construction might not matter very much.


190. But see, e.g., Kreges v. Associated Press, 3 F.3d. 656, 661 (2d Cir. 1993) (holding that decision whether to equitably toll a statute of limitations is left to the sound discretion of the district court). Note that, to the extent that some versions of statute of limitations doctrine do recognize elements of affirmative discretion in the tolling of time bars, I would not support granting courts the same power over jurisdictional time limits.

191. See generally CALVIN CORMAN, LIMITATIONS OF ACTIONS (1991); Recent Developments, Statute of Limitations, 63 HARV. L. REV. 1177 (1950).

192. See sources cited infra note 194.

193. See infra part IV.C.2.
that was, jurisprudentially, quite "legal." Equitable remedies are more likely than other remedies to be left to (affirmative) judicial discretion. But equity as a whole is by no means synonymous with that type of discretion.

There is a larger point here. I said just now that a notion like "excusable neglect" had the scent of discretion about it. But that is

---


The classic study of this development is contained in Frederick Pollock, The Transformation of Equity, in Essays in Legal History 286 (Paul Vinogradoff ed., 1913). Equity, Pollock says, when it falls into a regular course of official administration, loses its arbitrary character and gradually assumes all the features of scientific law, becoming, as Blackstone said a century and a half ago, an artificial system. In technical English terms, extraordinary jurisdiction ends by being ordinary. So gradual is the change that it is not altogether easy for the modern student to realize its extent or the discrepancy of the original points of view. Id. at 287.

Earlier, if partisan, statements of the "legal" character of "equity" are 1 Joseph Story, Commentaries on Equity Jurisprudence §§ 1-25 (5th ed. 1849); 3 Blackstone, Commentaries 432; Bond v. Hopkins, 1 Sh. & Lefr. R. 428, 429 (1792). There have been opposing voices on this issue, either arguing that Anglo-American "equity" has remained fundamentally different from Anglo-American law, or lamenting that it has not. See, e.g., Roscoe Pound, The Decadence of Equity, 5 Colum. L. Rev. 20 (1905).

For outlines of an argument that the retreat of "equity" back into "law" is both inevitable and salutary, see John Rawls, A Theory of Justice 237-38 (1971).

195. See generally Henry L. McClintock, Handbook of the Principles of Equity § 23 (2d ed. 1948); see also supra note 190.

196. There does remain the possibility that the law of equity admits of more "residual" discretion than the common law. (For what I mean by "residual" discretion, see supra text accompanying notes 113-15.) For example:

[the statement that equitable relief cannot be demanded as a matter of right, but is given in the discretion of the court, is still true with the qualification that the discretion is not the mere personal discretion of the chancellor or judge, but is a judicial discretion, which means that the judge consults precedents to find the principles, as distinguished from strict rules, which are applicable to a given situation, and then determines, from all of the facts in the case, what relief will best give effect to the various principles involved. McClintock, supra note 195, § 23 (footnotes omitted). Further, "[e]quitable discretion in this sense is distinguished from the discretion which a common-law, as well as an equity, trial judge has to make certain rulings on procedural questions which cannot be reviewed unless the discretion has been abused." Id. at 51 n.16; cf. Hoffer, supra note 194, at 18 (assimilating equitable discretion into "the 'gremlin' of interpretation").

To the extent that the "discretion" involved in equity jurisprudence, however, is residual rather than affirmative, that does not distinguish it fundamentally from common law. Also, residual discretion bears a fundamentally different relation to the Idea of Jurisdiction than affirmative discretion. See infra part III.B.5.b.
only a prejudice. Virtually any standard can be (affirmatively) discretionary or not, depending on how the law goes about understanding and implementing it. Take a notion like excusable neglect, treat it as subject to legal analysis and reasoning—work out some rules, principles, inferences, and analogies—and it will no longer have the scent of discretion about it.

Phrased another way, imagine a time limit that, while not allowing for discretionary extensions, did explicitly provide that it would not apply in the event of excusable neglect. Is there anything that would prevent the line so drawn from being jurisdictional? Admittedly, it would be a complicated, even difficult, jurisdictional line. But many jurisdictional lines are complicated and difficult. Think of the well-pleaded complaint rule in federal question jurisdiction. For that matter, think of the whole gamut of questions that make federal jurisdiction one of the most notoriously difficult courses in the law school curriculum. Or think of more generic jurisdictional conun-

197. This is not at all far-fetched. Cf. Rennie v. Garrett, 896 F.2d 1057, 1061 (7th Cir. 1990) (dictum) (explaining that the explicit exceptions to time limits in federal employment discrimination complaint procedure “would excuse late complaints under most of the same circumstances that such delay would be excused by waiver, estoppel, or tolling,” rendering “of limited practical significance” the question whether the time limit was actually “jurisdictional”), cert. denied, 114 S. Ct. 1054 (1990).

More generally, consider that in some states, criminal statutes of limitations are considered “jurisdictional,” but are also subject to statutory tolling if, for example, the defendant is a fugitive or is otherwise unavailable. See, e.g., Savage v. Hawkins, 391 S.W.2d 18 (Ark. 1965); People v. Abayhan, 207 Cal. Rptr. 607, 615 (Ct. App. 1984); State v. Ansell, 675 P.2d 614, 617 (Wash. Ct. App. 1984).

198. Taylor v. Anderson, 234 U.S. 74 (1914): "Whether a case is one arising under [federal law], in the sense of the jurisdictional statute, . . . must be determined from what necessarily appears in the plaintiff's statement of his own claim in the bill or declaration, unaided by anything alleged in anticipation of avoidance of defenses which it is thought the defendant may interpose."

Id. at 75-76; see also Louisville & Nashville R.R. v. Mottley, 211 U.S. 149 (1908) (determining grounds for federal question jurisdiction rested on plaintiff's complaint and not the defendant's anticipated defense).


drums, including the notion of "finality" in the law of appellate jurisdiction. 199 Despite their intricacies, none of these questions (to the extent they are jurisdictional) are thought of as merely discretionary. Need the law of jurisdictional time limits be any different? 200

b. Of Waiver and Estoppel

If the ban on discretion—judicial waiver—does not account for the breadth of the doctrine of jurisdictional time limits, maybe the ban on party waiver does. This possibility is less intuitively obvious, but a few cases cite it explicitly and it does have some historical and logical support.

One important rubric for avoiding the literal demands of statutes of limitations is estoppel. As originally understood, estoppel came into play when a court—whether an equity or law court—estopped, which is to say stopped, a defendant from claiming the benefit of the statute. For example, a party who lulled another into waiting to sue, or who fraudulently concealed the basis for a cause of action, would not be allowed in "good conscience"—not only the court's good conscience but his own—to argue the statute of limitations. 201

In this sense, estoppel is a form of waiver—an implied or forced waiver. It is implied in the sense that a party's own behavior deprives him of the benefit of a legal rule that would otherwise be to his benefit. 202 It is forced in the sense that the court effectively forbids


200. For an example of a statute that creates a jurisdictional time limit with exceptions, though not an exception for excusable neglect, see DEL. SUPER. CT. CRIM. R. 61(i)(1) (1991), which provides:

A motion for postconviction relief may not be filed more than three years after the judgment of conviction is final or, if it asserts a retroactively applicable right that is newly recognized after the judgment of conviction is final, more than three years after the right is first recognized by the Supreme Court of Delaware or by the United States Supreme Court.

Id. Obviously, this language raises potentially serious interpretive questions about whether any particular right is both "newly recognized" and "retroactively applicable." See Robinson v. State, 584 A.2d 1203 (Del. 1990).

201. The principle is that where one party has by his representations or his conduct induced the other party to a transaction to give him an advantage which it would be against equity and good conscience for him to assert, he would not in a court of justice be permitted to avail himself of that advantage.


the party from raising that legal rule.

There, though, is the rub. Jurisdictional time limits, unlike ordinary statutes of limitations, apply even if no party claims their benefit. And they cannot be waived. Therefore, estopping a party from claiming them—which is to say forcing him to waive them—would have no effect.

One problem with this argument, of course, is that the rubric of estoppel only accounts for one subset of the reasons courts have had for reading the requirements of statutes of limitations flexibly or non-literally. There are reasons other than fraud or concealment for relaxing or leniently construing a statute of limitations.

Another problem is that some courts have understood even fraud and concealment and the like, not under the rubric of estoppel, but more straightforwardly as elements built into the limitation itself. If, for example, the law reads a statute of limitations to begin running only on the discovery (not the occurrence) of a set of facts, the defendant's fraud need not be the basis for anything fancy like "estoppel." It can just be a reason for the statute beginning to run later rather than earlier. To the extent that received doctrine cuts off the possibility of interpreting jurisdictional time limits similarly, it is unnecessarily conflating the logic of estoppel with the logic of simple statutory construction.

This, though, raises a deeper issue. Maybe, just maybe, the two ways of dealing with fraud and similar contingencies—estoppel and

---

The doctrine of equitable estoppel, a judicially fashioned exception to the general rule which provides that statutes of limitation run without interruption . . . “is essentially a doctrine of waiver” which “serves to extend the applicable statute of limitations—by precluding the defendant from raising the bar of the statute.” Id. at 331 (citations omitted) (quoting Lumber Village, Inc. v. Siegler, 355 N.W.2d 654 (1984)).


204. There is at least a surface resemblance between the analysis here and the distinction drawn infra part IV.C.2 between “Blackstonian” and “Aristotelian” accounts of “equitable” statutory construction.
simple statutory construction—really amount to the same thing. That is, when a court estops a misbehaving party from claiming a statute of limitations, maybe it is saying, not that the party has “waived” his rights, but that the statute does not apply to the extent of the misbehavior. Functionally, the identification of estoppel with waiver is plainly shaky. But even in formal terms (and any friend of the legal imagination will admit that form is sometimes as important as function), the law’s sense of what is going on might not be what it might once have been. Estoppel, as the legal culture now experiences it, is not the act of a court of equity commanding a litigant not to claim his rights in a court of law. More important, estoppel is not the intrusion, against a statute of limitations kicking in opposition, of some extrinsic principle. The application of estoppel is wrapped up in the statute of limitations itself. It is thought to represent the statute’s best and fairest application to a given case. If this is right—even only sometimes or partly—then the doctrine of jurisdictional time limits is even more profoundly and misguided cutting off possible avenues of interpretation.

c. The Specter of Bootstraps

The logical nub of both the discretion argument and the estoppel argument is this: Relaxing the literal terms of a jurisdictional rule would require a court to use a device that it cannot licitly use unless it has jurisdiction in the first place. Only courts that have jurisdiction can exercise discretion. They cannot use discretion to get jurisdiction. Only courts that have jurisdiction can work an estoppel. They cannot work an estoppel to get jurisdiction.

This argument falls short, for reasons already stated, for discre-

205. The general notion of waiver is that, in Anglo-American law, the parties control the shape of litigation and the issues raised for judicial decision. Jurisdictional issues cannot be waived because they implicate the power or authority of the court, which is one aspect of the litigation that the parties do not control. The general notion of estoppel, however, understood functionally, is just that certain out-of-court behavior by parties can change a legal result. But there is nothing in the Idea of Jurisdiction that is inhospitable to this notion. For that matter, all sorts of jurisdictional rules are necessarily predicated on all sorts of out-of-court behavior by parties.

206. To repeat, the issue here is not just functionalist reductionism. A thoroughgoing reductionist would argue that estoppel never was what it purported to be. On the other hand, a defender of the legal imagination must be willing to say that, occasionally, form is as important as function. Here, though, the legal imagination itself no longer believes in the form. Equity is now more than the conscience of the chancellor, and equitable estoppel is more than an effort to control the conscience of a litigant.
tion and estoppel. But maybe it holds the answer in a more general, less technical, sense. The very effort at non-literal interpretation might involve some legal operation that is, by its nature, closed off to courts unless they have jurisdiction in the first place. Justice Black’s argument in Teague might contain some hidden step that amounts to an impermissible bootstrap.

Something like this claim does seem at work here and I will have to return to this issue later. For the present, it seems hard to pin down what this mysterious, impermissible legal operation would be. Whatever it is, the fact that it is less doctrinally crisp than discretion or estoppel is not the problem. The Idea of Jurisdiction is itself a combination of crisp doctrines and evocative images. The doctrine of jurisdictional time limits might also reflect some metaphor or conviction. The problem, though, is in figuring out what metaphor, or what conviction.

Courts sometimes plead that they are powerless to add anything to a jurisdictional provision, or to change it. That, however, assumes they know what the dam thing meant to begin with. Courts also sometimes suggest that to read a jurisdictional time limit in any way other than literally or less than absolutely is to engage in judicial legislation. But courts, whenever they refuse to interpret any statute non-literally or non-absolutely, tend to argue that to do so would be to engage in judicial legislation. And whenever courts—for whatever reason—do interpret a statute non-literally or non-absolutely, they just as vehemently deny that they are engaging in judicial legislation.

207. See, e.g., In re Hanley’s Estate, 142 P.2d 423, 424-25 (Cal. 1943). Also, recall the discussion of Hoxie, supra note 73.

208. The term “bootstrap,” in the jurisdictional context, originally arose to describe the Supreme Court’s expansion of the doctrine of “jurisdiction to determine jurisdiction.” The apparent first use of the term was in Note, Res Judicata and Jurisdiction: The Bootstrap Doctrine, 53 HARV. L. REV. 652 (1946). It was later taken up and canonized by Dan Dobbs, who was very much in favor of bootstraps, in a series of articles on this and related issues. See, e.g., Dobbs, Validation of Void Judgments, supra note 18, at 1027; cf. supra note 18 (discussing general trends in scholarship on jurisdiction).

209. See infra part IV.C.3.

210. See, e.g., United States v. Hocking, 841 F.2d 735 (7th Cir. 1988) (holding that “time limits define judicial power to act. Courts cannot enlarge their own powers in the name of equity, and parties who seek aid from the judicial branch must comply strictly with jurisdictional time limits”); Herrick v. Racine Warehouse & Dock Co., 43 Wis. 93 (Wis. 1877) (holding that a court has “no power to amend the statute by enlarging the time, . . . [i.e.,] a court cannot restore its own jurisdiction, lost by statutory limit”); see also Wood-Ivey Sys. Corp. v. United States, 4 F.3d 961, 965 (Fed. Cir. 1993) (“A court may not change a jurisdictional time period because the statute grants the court no power to act over the matter. This type of time period is mandatory and immutable.”) (Nies, J., dissenting).
Another possible explanation is that courts may not construe jurisdictional rules purposively. This argument is not question-begging or rhetorical as the others are, but it is unpersuasive. The claim is that jurisdictional rules, being about power, somehow transcend considerations of purpose. Does that mean that those rules do not have purposes? Or that we should ignore their purposes? Or that courts can only do purposive interpretation once they have jurisdiction? In any variation, the intuition fades out quickly.

Consider also that if purposive interpretation really were, out of principle or necessity, illicit for jurisdictional rules, it would have to be illicit across the board. This would have at least two results. First, it would bar purposive interpretation for all jurisdictional rules. Maybe time limits can be construed without mention of their purpose. But what about the substance of subject matter jurisdiction? Imagine deciding the scope of federal question jurisdiction, or bankruptcy jurisdiction, or state claims court jurisdiction, without any reference to the purpose for which such jurisdiction exists. For that matter, what about procedural notions such as the final judgment rule or the limits on personal jurisdiction?

Second, excluding purposive interpretation of jurisdictional time limits would not only exclude purposive reasons for reading exceptions or qualifications into such time limits, but it also would (at least in any specific instance) exclude purposive reasons for not doing so. As noted, courts rarely explicitly justify the doctrine of jurisdictional time limits. When they do, they often use the rhetoric of power and powerlessness. They also sometimes speak in more purposive, instrumental terms, reciting the usual litany of reasons for bright-line, inflexible rules—certainty, incentives, predictability, and so on. As I have said, these are sound arguments, though it is not clear how they differ for jurisdictional as against non-jurisdictional time limits. But, sound or not, these arguments for literalism would have no place in a

Those statutes and rules which fix the time within which procedural rights are to be asserted are intended to expedite the disposition of causes to the end that justice will not be denied by inexcusable and unnecessary delay. But, except as to those which are mandatory or jurisdictional, procedural regulations should not be so applied as to defeat their primary purpose, that is, the disposition of causes upon their substantial merits without delay or prejudice.

Id. at 563 (Bistline, J., specially concurring) (quoting Bunn v. Bunn, 587 P.2d 1245, 1246 (Idaho 1978)).

212. See supra text accompanying note 182.

213. See supra note 210.
regime of purely mechanical literalism.

Again, this is not to say that jurisdictional statutes must be interpreted purposively. Interpretation is complex work. The purpose of a legal rule makes its demands on the interpreter, but so do the words themselves. Juggling those two demands, and understanding their relation to each other, is a challenge. This is true for all legal rules, however, not just those that are jurisdictional.

d. The Fear of the Abyss, and the Fear of Judgment

I want to consider now a pair of arguments based on sheer anxiety. Recall that courts in the common law tradition are peculiarly charged with overseeing the jurisdiction of specialized tribunals such as administrative agencies.\(^1\) One reason is that tribunals acting outside their jurisdiction are acting ultra vires. But another reason is that any tribunal has an interest in its own power and much as a party should not be a judge in its own case, a tribunal should not be the judge—at least not the final judge—of its own power.

So much for special tribunals. But courts themselves are a party of sorts in any dispute about their own jurisdiction. Unlike other tribunals, they only have other courts—their co-defendants, so to speak—to look over their shoulders. In the absence of some other neutral arbiter of judicial power, this is inescapable.\(^2\) But maybe it is a reason for courts to bend over backwards to interpret their own jurisdiction restrictively.\(^3\) Maybe it is a reason for them to tilt their interpretive scales against themselves to counterbalance their natural tendency to enlarge their jurisdiction.

Another argument from anxiety, distinct from the first but leading to much the same conclusion, is this: A court without jurisdiction is a court without power. A court without power is in a normative void. It can work its will, but illegitimately. Worse yet, it may never be found out. To take seriously the Idea of Jurisdiction is to fear that abyss and to try to avoid the cliff that drops straight down on the wrong side of a court's jurisdictional grant.

Perhaps then, the doctrine of jurisdictional time limits is only a

---

214. See supra text accompanying notes 79, 81 and infra note 244 and accompanying text.
216. State ex rel. Ellis v. Board of Deputy State Supervisors, 71 N.E. 717, 719 (Ohio 1904) (Summer, J., dissenting) (opining that "the court being the exclusive judge of its own jurisdiction, ought not to exercise any not clearly possessed").
device for avoiding error. The edge of the cliff is the ideal, ontologically "true," jurisdictional line. It is precipitous, but it is also jagged and hard to make out in the epistemological fog. The doctrine of jurisdictional time limits is one way to step back from the cliff, to trace out a safer—and clearer—line away from the edge. By this light, the doctrine is like the reasonable doubt standard in criminal law or the breathing space notion in free speech law. We acquit some of the guilty to protect the innocent. We protect some speech that might otherwise not deserve protection so as not to endanger truly privileged speech. Similarly, this argument would posit, we reject expansive if colorable readings of jurisdictional rules to guard against exercising illegitimate authority. Avoiding one type of error raises the risk of the opposite error, but the price is worth it.

Each of these two arguments from anxiety—fear of judging and fear of the abyss—has its own defects. More material and interesting, though, are the defects they have in common.

First of all, the angst apparent in these arguments is simply

---


218. See, e.g., Broderick v. Oklahoma, 413 U.S. 601, 611-12 (1973) (noting that “[i]t has long been recognized that the First Amendment needs breathing space and that statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society”); NAACP v. Button, 371 U.S. 415, 433 (1963) (stating that “[b]ecause First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity”).

219. The classic statement is in Justice Harlan’s concurrence in In re Winship: “[I]t is far worse to convict an innocent man than to let a guilty man go free.” 397 U.S. 358, 372 (1970); see Underwood, supra note 217, at 1306-08; see also Addington v. Texas, 441 U.S. 418, 423 (1979) (opining that “[i]n a criminal case, . . . the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment”).

220. See, e.g., Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 52 (1988) (noting that “even though falsehoods have little value in and of themselves, they are 'nevertheless inevitable in a free debate,' . . . and a rule that would impose strict liability on a publisher for false factual assertions would have an undoubted 'chilling' effect on speech relating to public figures that does have constitutional value”); Gertz v. Robert Welch, Inc., 418 U.S. 323, 340-41 (1974) (“[T]here is no constitutional value in false statements of fact. . . . [N]evertheless, the First Amendment requires that we protect some falsehood in order to protect speech that matters.”); New York Times Co. v. Sullivan, 376 U.S. 254, 271-72 (1964) (“[A]uthoritative interpretations of the First Amendment . . . have consistently refused to recognize an exception for any test of truth. . . . [E]rroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive'.") (quoting NAACP v. Button, 371 U.S. 415, 433 (1963)).
missing in the traditional vocabulary of the Idea of Jurisdiction. If jurisdiction to determine jurisdiction means nothing else, it is that courts are obliged to reach the best judgment they can of the extent of their authority. The consequence of deciding wrongly might be that a court’s acts do not bind. But that does not change the nature of the obligation.

Nor should it be otherwise. Remember that true jurisdictional dismissals are assertions of powerlessness. They bear none of the onus of other judicial inaction. But to retreat from jurisdiction, or to redraw jurisdictional lines, even out of a fear of wielding wrongful authority, is not so innocent. It is an affirmative act. It deliberately sacrifices litigants to the cause of judicial anxiety.

The analogy to reasonable doubt or free speech tells the story. Those rules are conscious, direct exercises of legal power. The argument from anxiety, though, suggests ersatz powerlessness, the exercise of power camouflaged by the rhetoric of powerlessness. The legal skeptic will argue that this is nothing special, that claims of judicial powerlessness are invariably exertions of power. This is a difference between the world view embodied by the Idea of Jurisdiction and other accounts of law and legal authority. But to accept the argument from anxiety is to prove the skeptic right.

All this also suggests that the fear that courts are naturally greedy for more jurisdiction rests on a superficial psychology. Judges are happy getting rid of some cases. And saying “no” can be it-

221. See Cover, supra note 69, at 53-60 (discussing judicial use of jurisdictional holdings to separate judges from substantive legal interpretation and from the violence that their decisions permit). For my disagreement with Cover’s occasional suggestion that this not-so-innocent act of distancing is inherent in any hermeneutic of jurisdiction, see supra note 121.

222. Alan B. Morrison makes a similar observation, in a related context, in his discussion of separation of powers. Rejecting the view that delegation of the judicial power only poses a constitutional problem when judges oppose it, Morrison argues:

The proper question, therefore, ought to be whether a person with a dispute that is to be resolved in a federal forum is entitled to have that forum be presided over by a person with the protections of life tenure and a prohibition against salary reduction, which are the hallmarks of article III independence. The answer to that question has little or nothing to do with judicial preferences; in fact, many judges would be pleased to get rid of some types of cases and hand them off to magistrates, bankruptcy judges, or other non-article III adjudicators.


Cf., e.g., John D. Ayer, So Near To Cleveland, So Far From God: An Essay on the Ethnography of Bankruptcy, 61 U. Cin. L. Rev. 407, 442-43 n.137 (1992) (citing Amy Singer, Leon Silverman: $4.5 Million, His Clients $??, Am. Lawyer, Oct. 1990, at 1) (noting that the dominant theme in Manville bankruptcy reorganization was “the court’s desire to get
self a projection of authority, as satisfying to the appetite for power as saying "yes." Thus, the fear of judgment and the fear of the abyss can easily give way to a positive temptation—a judicial machismo that finds its kicks in saying no.

These problems might seem to put judges in a difficult fix. They should not exercise power they do not have, but they also should not resort to an ersatz powerlessness that betrays the Idea of Jurisdiction itself. This is all, however, just part of judging. Society pays judges to avoid temptation and to do their best. That is all judges can do. Any additional, systematic anxiety is not only unnecessary, but self-defeating.

The argument from anxiety has another, bigger flaw. Even if the argument sounds good, it lacks content. When the law says it will acquit the (factually) guilty to protect the innocent, it has an idea of rid of the case at almost any costs to aggrieved litigants”); Jonathan R. Siegel, Chilling Injuries as a Basis for Standing, 98 YALE L.J. 905, 921 (1989) (arguing that the Supreme Court sometimes uses standing doctrine “as a way to get rid of cases involving chilling claims instead of answering the difficult First Amendment questions such cases pose”) (citation omitted).

Judges themselves sometimes discuss their temptation to get rid of particularly difficult or otherwise vexatious cases, though usually in the context of congratulating themselves for resisting that temptation. See, e.g., Broadcasting Rights Int'l Corp. v. Societe Du Tour De France, S.A.R.L., 675 F. Supp. 1439, 1448 (S.D.N.Y. 1987) (noting that “while the plaintiff's choice of forum is significant, it is not controlling, even in this district where busy judges are said to be tempted to dispose of international litigation by granting dismissals on the grounds of forum non conveniens”); Brotherhood of Locomotive Firemen and Enginemen v. Detroit and Toledo Shore Line R.R., 294 F. Supp. 727, 730 (N.D. Ohio 1968) (“The final contention here is that ... this is a [dispute] over which this Court has no jurisdiction. In spite of the temptation for a busy court to adopt this contention, and thus get rid of a difficult case, a different conclusion must be reached.”).

More generally, any survey of the recent literature on judicial administration reveals a pervasive, even obsessive, concern with reducing dockets. For an important caution against the excesses of one aspect of this trend, see Owen M. Fiss, Against Settlement, 93 YALE L.J. 1073 (1984).

223. The relationship of parent and child, marked as it is by mutual invocations of the power to say no, is clearly the paradigm case. I make no explicit claim of its relevance to the relationship of judge and litigant.

224. Thus the phenomenon in its 1980’s heyday:

The usual Saturday-night crowd of trendy, punkettes and individuals in black leather swarmed outside Area, the “in” disco of the minute. To keep them at bay, a half-dozen taciturn and burly types stood inside a velvet rope on the Hudson Street sidewalk.

Once in a while, the crowd parted and the rope was lifted for those deemed suitable for entry by the guardians of exclusivity.

what (factual) guilt is.\textsuperscript{225} When it says it will protect otherwise low-value speech to give more breathing room to high-value speech, it has an idea of what high-value speech is.\textsuperscript{226}

But to tell courts to bend over backwards not to exercise authority, or to stay on the safe side of the jurisdictional cliff, is only a formal instruction. It says nothing about the content of a court’s ideal, ontologically “true” jurisdiction, or the real location of the jurisdictional cliff. To avoid error, even by tipping the scales, needs at least a rough sense of what non-error looks like. It needs some, even partial, account of what the weights are against which to tip the scales. If, for example, the law just assumed, routinely, that excusable neglect was a proviso to jurisdictional time limits, that would radically change what it meant to bend over backwards. It would give judges a very different cliff from which to step back.

\textsuperscript{225} See generally \textsc{Herbert Packer}, \textit{Limits of the Criminal Sanction} 166-67 (1968) (distinguishing factual guilt and legal guilt); Peter Arenella, \textit{Reforming the Federal Grand Jury and the State Preliminary Hearing to Prevent Conviction Without Adjudication}, \textsc{78 Mich. L. Rev.} 463, 465-66 n.6 (1980) (same).

Sociologists and historians similarly distinguish convicted offenses (or recorded crimes) from the “dark figure” of actual crime. See generally Albert D. Biderman & Albert J. Reiss, Jr., \textit{On Exploring the “Dark Figure” of Crime}, \textsc{374 Annals Am. Acad. Pol. & Soc. Sci.} 1 (1967); M.R. McClintock, \textit{The Dark Figure}, in \textsc{5 Collected Studies in Criminological Research} 9 (1970).


\begin{quote}
It is becoming a common device in the growth area of the history of crime, and one satisfying to cautious scholarly instincts, to speak of a “dark figure” for offenses, but there is a positivist assumption behind this concept of the “dark figure” which needs examining. In so far as a dark figure indicates a certain number of prosecutions for which the record has been lost, or a list of unsolved crimes which were identified at the time as crimes for which a villain was being sought, it is an acceptable convention. In so far as it refers to the number of times that the crime or crimes in question have been committed, this is quite another matter. It gives an objective status to the crime which it may not deserve, for acts are only crimes by virtue as having been defined as such by society. If society fails to define particular acts as belonging to a criminal category, their status must remain ambiguous.
\end{quote}

\textit{Id.} Note, however, that an analogy to something like Larner’s view would be of no help at all to friends of the doctrine of jurisdictional time limits. It would amount, instead, to the sort of legal realist, managerial-bureaucratic, account of jurisdiction, see \textit{supra} text accompanying notes 143-45, that would consider the type of anxiety I am describing here to be incoherent. See \textit{infra} text after note 383.

\textsuperscript{226} See cases cited \textit{supra} note 220. I do not mean to suggest that the line between speech protected for its own sake and speech protected to provide “breathing space” is uncontested. See generally Steven D. Smith, \textit{The Restoration of Tolerance}, \textsc{78 Calif. L. Rev.} 305 (1990). For purposes of my argument, however, it is enough only to observe that the subject is a matter of explicit debate.
The argument from anxiety is too abstract, too stripped of context. The next major category of analysis tries to fill that gap. It makes a stab at providing the content that more purely logical arguments lack. It treats the doctrine of jurisdictional time limits as a problem, not just in the logic of jurisdiction, but in the law of jurisdiction.

4. The Substance of Jurisdiction

So far, this discussion has gone on as if the doctrine of jurisdictional time limits were a unique thing in the law. In some ways, it is. Then again, the law is full of interpretive canons that guide the construction of legal materials. Maybe the doctrine of jurisdictional time limits is just one of those canons.

Classic texts on statutory construction lovingly set out which types of statutes should be strictly construed and which should be liberally construed. John Marshall’s famous maxim in *McCulloch v. Maryland* that “we must never forget, that it is a constitution we are expounding” was itself only a rhetorical flourish on a standard argument that the Constitution’s enumeration of congressional powers was one of those texts that should be construed liberally.

Strict construction is narrow construction, limited to the literal reach of the text. Liberal construction is broad construction, going beyond the literal and taking account of purpose and structure. A more useful way of putting it, though, is that both canons of strict and liberal construction are species of plain statement rules. The logical form of a plain statement rule is this: “The law is so-and-so unless the text plainly says otherwise.” In *McCulloch*, for example, the Court rejected a rule of strict construction that would have limited the powers of Congress to those “expressly conferred.” Instead, it adopted a rule of liberal construction that Congress could choose any means it wished to carry out its enumerated powers “unless the words imperiously require” a limitation on those means. That is to say, it chose one plain statement rule over another.

A plain statement rule, as *McCulloch* illustrates, is more than a guide to reading. It is itself an interpretation of law. The “so-and-so”

227. See, e.g., J.G. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION §§ 346-433 (1891) (discussing statutes subject to strict construction and liberal construction).
229. *Id.* at 409.
230. *Id.* at 408.
in the rule is, in its own right, a material proposition of law. It is an account of the fabric to which specific legal texts are sewn. It is a default state from which specific texts can diverge, but only if they do so unequivocally.

To call the doctrine of jurisdictional time limits a plain statement rule avoids both the problems inherent in the argument from anxiety. A plain statement rule is not just an effort to stay on the safe side of the law. Nor is it just a formal compass heading without any substantive landmarks. It is a positive view of what the law generally is, and how in particular instances it might be otherwise. That said, though, two difficult challenges remain: How to describe the plain statement rule that the doctrine of jurisdictional time limits allegedly represents. And how to justify it.

Description first. The doctrine of jurisdictional time limits might be reducible to a plain statement rule of this form: "Jurisdictional time limits do not admit of qualifications or exceptions unless the rule plainly says otherwise." But this would still be question-begging, too formal and empty. What is a qualification? What is an exception? A better formulation would be: "Jurisdictional time limits are not satisfied unless the text plainly says otherwise." Even this more resolute reading, though, does not really reveal the legal principle allegedly at stake. Maybe, then, the doctrine of jurisdictional time limits is only an instance of a very general, very material, proposition like: A court does not have jurisdiction unless some legal text plainly says otherwise. But this proposition is plainly overbroad. There are just too many instances in which the law entertains presumptions in favor of jurisdiction rather than against it.


232. The most obvious example is the presumption of general jurisdiction that attaches to state trial courts. See supra notes 63-65 and accompanying text.

For federal courts, the presumption is generally against jurisdiction, though only in the weak sense that a litigant or court claiming jurisdiction must spell out the ground for that jurisdiction. (This is, in some sense, akin to a burden of going forward, as against the much stronger notion of burden of persuasion). Within the ambit of this requirement, however, there are contexts in which federal courts recognize a presumption in favor of jurisdiction. For some examples in which this is particularly implicit, see Coleman v. Thompson, 501 U.S. 722 (1991) (reaffirming conclusive presumption, first announced in Michigan v. Long, 463 U.S. 1032 (1983), holding that when state court decision relied on both federal and state grounds, there was no independent and adequate state ground for the decision, and the United States Supreme Court therefore had jurisdiction to review state judgment); Block v. Community Nutrition Inst., 467 U.S. 340 (1984) (holding that a presumption exists in favor of juris-
The problem of description probably could be overcome. It is only a symptom, though, of the more serious problem of justification. Why should a jurisdictional time limit not be satisfied—why should a court not have jurisdiction—unless the text plainly says otherwise? Remember, we are not talking here about mere rules of reading, but about material propositions of law, landmarks in the legal map. Marshall's rule in *McCulloch* was grounded in a specific account of constitutional structure and federal sovereign prerogative. Does any equally robust account support the doctrine of jurisdictional time limits?

a. Deference to the Common Law

Looking to some of the early authority on jurisdictional time limits does suggest one possibility. It is the old, familiar, Anglo-American canon of construction that any rule or arrangement foreign to the common law be interpreted narrowly.\(^\text{233}\) The reason for that canon of construction was that the common law established the basic shape of legal doctrine and entitlements. Deviations from it were possible, but they were islands in the law, limited in their reach.\(^\text{234}\)


Jurisdictional time limits and similar restrictions often involve causes of action or procedures unknown to, or at least, as with appeals, not grounded in the common law. Furthermore:

all jurisdiction and authority derived from and dependent upon statute, [including statutory requirements for taking a case to an appellate court, as well as statutes authorizing new methods of proof or authorizing jurisdiction by courts over persons not found in the state] must be taken and accepted with all the limitations and restrictions the act creating it may impose. These restrictions and limitations the courts are bound to observe; they cannot be dispensed with, however much they may appear to embarrass or however unnecessary they may seem to be in the administration of justice in particular cases. The statute is in derogation of the common law, is an essential departure from the form and modes a court ordinarily pursues, and must be strictly construed.

This account makes some sense. It does explain some cases. But it also suffers from three serious defects.

First, jurisdictional time limits do not only attach to actions or tribunals foreign to the common law. They might do so in many instances; that is to say, a time limit is likely to be “jurisdictional” for the same reason that it is “in derogation of the common law.”

But the link is not absolute. Conversely, actions or tribunals that are foreign to the common law can be governed by non-jurisdictional time limits.

Indeed, many of the cases, particularly early cases, but recent ones as well, strictly construing time limits make no mention of whether those time limits are jurisdictional or not. The only point is that they are attached to a mode of action unknown to the common law.

235. Ordinary actions in ordinary courts of general jurisdiction are usually governed by ordinary, non-jurisdictional statutes of limitations.


237. For a recent case expressing such a view, see Ecker v. Town of W. Hartford, 530 A.2d 1056 (Conn. 1987):

Where, however, a specific time limitation is contained within a statute that creates a right of action that did not exist at common law, then the remedy exists only during the prescribed period and not thereafter. In such cases, the time limitation is not to be treated as an ordinary statute of limitation, but rather is a limitation on the liability itself, and not of the remedy alone. ... The courts of Connecticut have repeatedly held that, under such circumstances, the time limitation is a substantive and jurisdictional prerequisite, which may be raised at any time, even by the court sua sponte, and may not be waived.

*Id.* at 1062-63 (citations omitted).


239. See, e.g., Hartry v. Chicago Ry. Co., 124 N.E. 849 (Ill. 1919) (citing earlier cases);
The second problem is that deference to the common law is only one venerable canon of construction. There are others, and some of them yield quite contrary results. The classic canon did insist that new or unfamiliar grants of jurisdiction should be construed strictly, that is, against the claim of jurisdiction.\textsuperscript{2} Antipathy to changes in the status quo ran both ways, however, so those same texts also insisted that restrictions on existing jurisdiction should be construed "strictly," which now meant in favor of the claim of jurisdiction.\textsuperscript{241}

Whether a time limit was built into a grant of jurisdiction, or was a later restriction on some existing jurisdiction would, of course, depend on the history of that specific time limit.

Moreover, some jurisdictional time limits might feel the pull of more specific countervailing canons. There is at least an argument, for example, that the opportunity to appeal is part of the fabric of our law.\textsuperscript{242} There might be sound reasons, then, for imagining that any restrictions on the right to appeal, including time limits, and including jurisdictional time limits, should be construed "strictly" against the restriction, and in favor of the right.\textsuperscript{243}

---

\textsuperscript{2} Lapsley v. Public Serv. Corp., 68 A. 1113 (N.J. 1908). For modern examples, see Cadieux v. ITT, 593 F.2d 142 (1st Cir. 1979) (citing line of Rhode Island cases); Public Loan Co. v. Hyde, 390 N.Y.S.2d 971 (Sup. Ct. 1977) (citing New York cases).

But note that in the most venerable of this line of cases, The Harrisburg, 119 U.S. 199, 214 (1886), the Court assumed that, in principle, equitable relief might be available from the statute of limitations at issue.

\textsuperscript{240} See, e.g., Elgin v. Marshall, 106 U.S. 578, 580 (1882) (As the statute "draws the boundary line of jurisdiction, it is to be construed with strictness and rigor. As jurisdiction cannot be conferred by consent of parties, but must be given by the law, so it ought not to be extended by doubtful constructions.").

\textsuperscript{241} See SUTHERLAND, supra note 227, § 395 ("Jurisdiction cannot be created or taken away by implication, except where the implication is necessary from the language and purposes of the statute."); see also Hayes v. Todd, 15 So. 752 (Fla. 1894); Black v. Boyd, 33 N.E. 207, 209 (Ohio 1893) (citing 1 POM. EQ. JUR., §§ 182, 276-80); State ex rel. Dunbar v. Superior Ct., 297 P. 774 (Wash. 1931).

A particularly interesting case that explicitly makes this point is Woolridge v. McKenna, 8 F. 650 (W.D. Tenn. 1881) (analyzing time limits as they relate to removal of actions to federal court).


\textsuperscript{243} Sutherland's classic treatise says as much explicitly:

Statutes limiting the right to bring actions to particular periods are restrictive and will not be extended to any other than the cases expressly provided for; and the exceptions are allowed a liberal effect, thought not so liberal as to embrace cases within the reason when not within the letter of them.

SUTHERLAND, supra note 227, § 368 (footnotes omitted). Sutherland further states:

Provisions which limit in point of time the right to move for a new trial, or to
Similarly, the same outlook that defended the common law against legislative encroachments also insisted on the duty of common law courts to police non-common law tribunals. Thus, if a jurisdictional time limit is attached to a provision relating to judicial review of agency action, there are sound, traditional reasons, for construing the restriction "strictly," which is to say favoring exceptions and qualifications.

More generally, a jurisdictional time limit might occur in a substantive context that, for its own reasons, calls for a canon of liberal or permissive construction. Thus, for example, in a recent Missouri worker's compensation case, the court held that, although a time limit was jurisdictional and therefore to be "strictly" applied, strict application could only happen once ambiguities in the time limitation had been resolved. To resolve those ambiguities, the court called on

---

take an appeal, are construed with strictness in favor of the party desiring a review, when the time is to be computed from notice of the judgment to be given by the opposite party. The right of appeal is general and positive, and as statutes of limitation are in restraint of that right they are, as already said, to be construed strictly.

*Id.* at § 369; cf., e.g., Fry v. Bennett, 16 How. Pr. 385 (N.Y. Super. Ct. 1858) (Hoffman, J., dissenting) (opining that "all restrictions upon the right of appeal are to be strictly construed . . . [and] any relaxation of such restrictions is to be liberally construed") Sutherland does state elsewhere that modes of taking a case on appeal should be construed strictly against allowing the appeal. *See supra* text accompanying note 236. But that only confirms that we are faced with a classic battle of canons, and not a pre-ordained, pre-interpretive imperative to construe limits on appeal one way or the other. For a modern California case, that picks up on these issues, see Hollister Convalescent Hosp. v. Rico, 542 P.2d 1349 (Cal. 1975):

What we have said [regarding the inapplicability of notions of estoppel to jurisdictional time limits] in no way conflicts with the well-established policy, based upon the remedial character of the right of appeal, of according that right in doubtful cases "when such can be accomplished without doing violence to applicable rules." (Sławinski v. Mocettini 403 P.2d 143, 144 (Cal. 1965)). As we have indicated, there are many cases in which this policy, implemented in accordance with "applicable rules," will lead to a determination, based on construction and interpretation, that timely and proper notice of appeal must be deemed in law to have been filed within the jurisdictional period.

*Id.* at 1359.

244. To this day, English courts have a habit of reading almost out of existence many a legislative effort to limit judicial review of administrative action. *See*, e.g., *Re Gilmore's Application*, [1957] 1 All E.R. 796.

American courts are less aggressive in defending their jurisdiction, but they also assume that such restrictions are disfavored. *See*, e.g., *Block v. Community Nutrition Inst.*, 467 U.S. 340 (1984) (holding that, in the absence of reliable legislative history or specific language, a presumption exists in favor of jurisdiction by federal courts over the actions of administrative agencies).

canons of liberal construction peculiar to worker’s compensation. Justice Black, or at least the Justice Black of Teague, would have been proud.

There is a deeper point here. I stated above that strict and liberal construction could both be understood as species of plain statement rules. It turns out that whether we call a particular plain statement rule one of strict construction or liberal construction might not matter much. Thus, the McCulloch rule is equally well understood either as a liberal construction of congressional power, or as a strict construction of the constitutional constraints on that power. Closer to the present topic, courts, in speaking of “strict construction” with regard to statutes of limitations have, depending on the context, used that phrase either to mean that they would not read an exception into the statute unless the language plainly required it, or that they would not read the limitation to apply in the first place unless the language so required.

The yet deeper point is that “strict construction,” at least when it takes the form of a plain statement rule, is not any more primal or pre-interpretive than liberal construction. On the contrary, it is a sophisticated, specific, interpretive commitment.

The final objection to explaining the doctrine of jurisdictional time limits by way of deference to the common law is that such deference is now, after all, for better or worse, anachronistic. In this age of statutes, all sorts of rights and institutions unknown to the common law are read expansively. In fact, the very idea that the

246. For a dramatic example, in the context of the interpretation of statutes of limitations, see supra note 188.
247. See supra note 188.
A particularly instructive recent case is Central States, S.E. S.W. Areas Pension Fund v. NAVCO, 3 F.3d 167 (7th Cir. 1993), in which the Court of Appeals refused to find a statute of limitations to be jurisdictional merely because it applied to a cause of action “unknown to the common law.” "To the contrary," it wrote, "periods of limitations in federal statutes—almost all of which establish rights 'unknown to the common law'—are universally regarded as non-jurisdictional." Id. at 173. The argument of this Article suggests, of course,
common law embodies the fundamental principles of the legal order is now suspect.²⁵⁰

Note also that modern cases, at least, treat the doctrine of jurisdictional time limits as arising from principles peculiar to the logic of jurisdiction. Yet the rule of deference to the common law is not limited to matters of jurisdiction. One might think that if courts had before them a legal arrangement alien to the common law, they would not only construe their jurisdiction strictly, but would also, for the same reasons, construe the substance of the arrangements strictly. But the modern cases do not make that link. If, then, the doctrine of jurisdictional time limits still has anything to do with deference to the common law, it is at best a cultural survival.²⁵¹ That is to say, it is one of those habits—like knocking on wood—that was once part of a larger, coherent set of practices, but is now only a stray superstition, mysterious to those who practice it and more rigid than it ever was when it was truly understood.²⁵²

b. Deference to the Legislature

Defrence to the common law, as a reason for the doctrine of jurisdictional time limits, is under and overinclusive, and anachronistic. Is there a more focused, modern substitute? Most of the candidates do not come close to giving a complete explanation.²⁵³ If there


²⁵² Some contemporary functionalist anthropologists argue that many apparent cultural survivals can still play a functional role, even if they have lost their original ideological or practical meaning. See, e.g., MARVIN HARRIS, CULTURE, PEOPLE, NATURE: AN INTRODUCTION TO GENERAL ANTHROPOLOGY (2d ed. 1975):

Among the favorite candidates for a truly useless, vestigial survival are the sleeve buttons on a man's jacket suit, which were formerly used to keep shirt ruffles out of the inkwell. Even here, however, four extra buttons per jacket are not exactly useless from the point of view of the button manufacturer.

²⁵³ Federalism, for example, might support a rule of strict construction for the jurisdic-
is one idea worth exploring, it is a notion that, ironically, is the op-
posite of the old idea of deference to the common law. This is some
special, or specially construed, deference to the legislature.

What would this special deference look like, and what would be
its reason? If deference to the legislature just means deference to law,
the idea is of no help. Liberal construction is not inherently
undeferential. The issue, then, must be real, flesh and blood legisla-
tures, and their relationship to courts.

Maybe, because jurisdiction is about judicial power, legislatures
should be assumed to take a special interest in writing jurisdictional
restrictions carefully and parsimoniously. So if the literal language
does not yield a way out, there is no way out. But this is surely not
right. Legislatures do not necessarily take a special interest in juris-
dictional issues. If anything, the law of jurisdiction, particularly on
matters as arcane as time limits, is quintessential “lawyer’s law,”
loved by judges but provoking legislatures to a collective yawn.

Maybe, though, because jurisdiction is about judicial power,
courts should assume that legislatures, whatever their intent about
specific statutes, are unusually sensitive to the prospect of judicial
overreaching. Again, though, it is hard to see any reality behind the
rhetoric. Legislatures are sensitive to lots of things courts do. That
jurisdiction, and jurisdictional time limits, hold a special place in the
list is just not credible.

To see the silliness of such rhetoric, consider Smith v. Mitch-
ell, a minor dissent from denial of certiorari by then Justice
Rehnquist. The issue in Smith was not a time limit, but the lack of a
certificate of probable cause in a habeas corpus review. Yet the prin-
ciple is the same. Rehnquist complained that the petitions for certiora-
ri should not have been denied, but dismissed, since, without those
certificates, the Court had no jurisdiction. Rehnquist seemed to

255. At stake were several cases involving state criminal defendants who had filed habeas
corpus petitions in federal district courts. The district courts had denied relief, and also re-
fused to issue certificates of probable cause, which are a prerequisite to any further appeal.
(The certificate can be issued by the district judge, or by a circuit justice or judge.) The
admit there was no practical difference between denial and dismissal.\textsuperscript{256} As best as I can tell, he had no hidden agenda. The debate between him and Justice Stevens's concurrence in denial was subtle and technical.\textsuperscript{257} Nevertheless, Rehnquist threw in this flourish:

\begin{quote}
[A]n even more important consequence of the disregard of congressional provisions as to our jurisdiction is a tendency to weaken the authority of this Court when it can demonstrate in a principled manner that it has either the constitutional or statutory authority to decide a particular issue. The necessary concomitant of our tripartite system of government that the other two branches of government obey judgments rendered within our jurisdiction is sapped whenever we decline for any reason other than the exercise of our own constitutional duties to similarly follow the mandates of Congress and the Executive within their spheres of authority.\textsuperscript{258}
\end{quote}

Surely, the Justice's regard for judicial legitimacy was on target. That it matters whether a court denies or dismisses, even if no practical consequences follow, and even if sorting out the cases is a nuisance, is a conviction born straight out of the Idea of Jurisdiction. But the notion that Congress itself would care, or that the Court's prisoners unsuccessfully sought relief in the courts of appeals anyway, and then turned to the Supreme Court for relief.


\begin{quote}
The failure to observe the congressional mandate as to this Court's jurisdiction of a petition for certiorari to a Court of Appeals in the absence of a certificate of probable cause in no way bars consideration of the merits of a petition which any Member of this Court believes to be deserving of a certificate of probable cause. \textit{Id.} at 918 (Rehnquist, J., dissenting from denial of cert.).
\end{quote}

\textsuperscript{257} That Justice Stevens chose to file an opinion concurring in a denial of certiorari was itself extraordinary, though not entirely unprecedented. He made three arguments: First, he believed that the Court had jurisdiction over the petitions under the All-Writs Act, 28 U.S.C. § 1651. \textit{Id.} at 912. Second, he argued that, because a Circuit Justice or the Court had the authority to issue a certificate of probable cause, "it is part of our responsibility in processing these petitions to determine whether they have arguable merit notwithstanding the failure of a district or circuit judge to authorize an appeal to the Court of Appeals." \textit{Id.} at 913. Therefore, he concluded:

\begin{quote}
[a] complete explanation of the Court's conclusion that these cases have insufficient merit to warrant the exercise of its jurisdiction should therefore include three elements: (1) the petitioner has incorrectly invoked our jurisdiction under 28 U.S.C. § 1254 because no certificate of probable cause was issued; (2) the Court has decided not to exercise its jurisdiction under 28 U.S.C. § 1651; and (3) neither the Circuit Justice nor the Court has decided to issue a certificate of probable cause. Instead of entering detailed orders of this kind in all of these cases, the Court wisely has adopted the practice of entering simple denials. \textit{Id.} at 914 (footnotes omitted).
\end{quote}

\textsuperscript{258} \textit{Id.} at 919 (Rehnquist, J., dissenting from denial of cert.).
sloppiness would "sap" its ability to work its will elsewhere, is a serious misimpression. Even as a general claim, it is politically and psychologically dubious. Apparently uneasy arguing only lawyerly principle, Rehnquist turned to instrumentalist rhetoric. The result was ersatz instrumentalism, the mirror image of the ersatz powerlessness I discussed earlier. Similarly, to ground the doctrine of jurisdictional time limits, not in deference to law, but in some special obeisance to the legislature, is either empty rant or ersatz instrumentalism camouflaging empty rant.

Even more striking is how analytically and rhetorically meager this argument looks compared to the argument from deference to the common law. Deference to the common law might not justify the doctrine of jurisdictional time limits, but it is a coherent and robust idea, grounded in a distinct vision of law and legal imagination. If nothing today can similarly organize the task of interpretation, that might itself be a sign of the larger problem that this paper is trying to address.

5. The Jurisprudence of Jurisdiction

The path of jurisdictional logic came up short as a defense of the doctrine of jurisdictional time limits. But the less formal, more specific, language of interpretive canons was no help either. Maybe the answer is to go in the other direction, to a higher rather than a lower level of abstraction. The Idea of Jurisdiction has jurisprudential bite. Maybe something in the jurisprudence of jurisdiction—the critical counterpoint to the law's own Idea of Jurisdiction—will do the trick.

I want to look here at two such possibilities. The first concerns the implications of legal positivism. The second concerns an issue raised, but bracketed, earlier: the effect of "residual" or "jurisprudential" discretion. Both approaches are, in some respects, only more rigorous, or at least more urbane, versions of arguments already raised in earlier conversations, but they also provoke distinct concerns, and distinct responses.

a. Of Positivism

Legal theory sometimes identifies the law of jurisdiction with what H.L.A. Hart has called "rules of recognition."259 Rules of rec-

259. HART, supra note 68, at 92-93.
ognition are the rules in any mature legal system that identify valid or authoritative statements of law. Legal positivism takes particular interest in rules of recognition because they are material to its claim that the validity of legal rules and utterances bears no necessary relation to morality or natural law.

Legal positivism takes many forms. Some forms of positivism allow that a legal system could test the validity of law by reference to substantive criteria, including morality. Other forms of positivism, however, can be read to make much more restrictive claims about the character of rules of recognition. To wit: Rules of recognition are formal, or they look only to the pedigree and not the content of legal utterances, or legal validity, at least as to everyday issues in stable legal regimes, is a "hard fact," an obvious, descriptively uncontroversial, social phenomenon. Taking this type of positivism seriously might suggest that the law of jurisdiction should also be formal, or obvious, or the like. And that might be reason enough for something like the doctrine of jurisdictional time limits.

This argument runs up against the same obstacle as cognate arguments earlier: the reality of the law of jurisdiction. As I noted in first describing the Idea of Jurisdiction, jurisdictional rules can be substantive, and not merely procedural. They can be complicated and murky. They can arise either at the threshold of a case, or later.

All this might suggest that the forms of positivism I have described are just wrong, but there is no need to go this far. Maybe all

---


264. Cf. Z. CHAFFEE, SOME PROBLEMS OF EQUITY 296-363 (1950) (arguing that many legal issues that pass as jurisdictional really are not; seeking to limit jurisdictionality to (1) bright-line boundaries between judicial power and nullity, and (2) issues that can be determined preliminarily).
that needs revision is the strict identification of rules of recognition with the law of jurisdiction. Put another way, maybe the positivist’s notion of “jurisdiction” differs from the law’s own. As emphasized earlier, the social scientist, the bureaucratic analyst, and the legal realist, can each tell his own story of a court’s “actual” or operative jurisdiction, which might differ from the law’s story. The same can be said for the legal positivist.

Alternatively, the positivist can keep the identification of rules of recognition with the law of jurisdiction, but he can apply his strictures only to the ultimate rule of recognition in a legal system. If, for example, the authority of United States Supreme Court pronouncements is clear, and content-independent, and so on, that should be enough to satisfy the positivist. And the positivist does win some points here. As also noted earlier, legal doctrine itself has never embraced the most radical implications of the Idea of Jurisdiction. What it says of other courts it does not always say of the Supreme Court. When the Supreme Court speaks, its decisions, at least insofar as the law’s own discourse is concerned, cannot be void for lack of jurisdiction and they are not subject to collateral attack.

But none of this entails the doctrine of jurisdictional time limits. Even if ultimate rules of recognitions must be formal, or obvious, or clear, that does not constrain the character of more mundane rules of jurisdiction, even rules of Supreme Court jurisdiction. This particular jurisprudential lens just does not have the power to resolve issues at that level of detail.

b. Of Residual Discretion

The next argument I want to address is also broadly jurisprudential. Its inspiration is the current conversation about the character of legal interpretation.

I distinguished earlier between affirmative and residual discretion. Affirmative discretion is granted by law. Residual discretion is the interpretive room left by indeterminacies or gaps in the law. I ar-

gued that a court, by definition, cannot have affirmative discretion to decide whether jurisdiction exists or to waive jurisdictional requirements. "If a court had discretion to decide whether it had jurisdiction, then, of necessity, it would have jurisdiction."

I also claimed that this is a minor, trivial constraint. I put off discussing the relevance of any of this to residual discretion.

But maybe what was said about affirmative discretion does have implications for residual discretion and jurisdiction. Consider a jurisdictional rule whose interpretation leaves legitimate room for residual discretion. Arguably, the jurisdiction of a court subject to that rule extends, until interpreted otherwise, to the outer bounds of that zone of discretion. Residual and affirmative discretion differ. But the same logic plausibly applies to both: If a court has discretion to decide whether it has jurisdiction, then, of necessity, it has jurisdiction.

Note the exact point at issue. This is not, or need not be, just another claim that courts have an "actual" or operative jurisdiction different from the law's own account of jurisdiction. This is more than a political claim about effective power, more than a bureaucratic claim about finality, more than a legal realist claim that the law is what the judges say it is, and more than a positivist claim about ultimate rules of recognition. Those types of notions would have no currency here.

The real punch is the idea that, if there is a zone of discretion surrounding a legal text, a court is legally entitled to reach any conclusion within that zone. Indeed, precisely this strong notion of legal entitlement—and not any naivete about effective power or epistemic clarity—leads some legal theorists, Ronald Dworkin most notably, to argue that there is no such thing as residual discretion at all.

But say Dworkin is wrong. Arguably, the effect of residual discretion is to fray the Idea of Jurisdiction, at least in the space between a court's interpreted jurisdiction and the outer bounds of its plausible jurisdiction. In that space, at least, the claim that the court is "powerless," and all that follows from that claim, would be suspect. In that space, at least, the specter of ersatz powerlessness would

---

267. See supra text accompanying notes 108-09.
268. For a particularly clear argument to this effect, see BARAK, supra note 266.
269. Dworkin articulates this "right answer" hypothesis most insistently in DWORKIN, supra note 262.
necessarily loom.

Thus, the argument is that residual discretion might be inescapable but its scope can be wide or narrow. Because of the severe tension between jurisdictionality and discretion, jurisdictional rules should be read to allow for as little residual discretion as possible. This is not always easy. But time limits are one context in which the zone of discretion can be made almost to disappear if we only just accept a doctrine of literal, unqualified, strictly defined enforcement.

A slick answer to this argument might be that there is no such easy escape from discretion—that embracing the doctrine of jurisdictional time limits is itself an act of residual discretion. But this would not be so if the doctrine were thought to rest on an imperative built into the jurisprudence of jurisdictionality from the start. The real problem with the argument is different.

Note first one important practical difference between affirmative and residual discretion. The existence of affirmative discretion usually implies some deference to the official charged with that discretion. A higher tribunal will reverse for abuse of discretion, but not otherwise. The existence of residual discretion does not necessarily imply such deference. An appellate court reading an indeterminate text will (usually) come to its own conclusion regardless of what the lower court had to say. This is all the more true with respect to jurisdictional issues. A higher court will not affirm a lower court’s exercise of jurisdiction just because the lower court’s interpretation of its jurisdiction was reasonable. Even when deference is shown, as in judicial review of statutory interpretations by administrative agencies, deference with regard to the scope of the agency’s own jurisdiction raises the most troubling issues.270

To Dworkin and others, this might all be evidence against the notion of residual discretion. At the very least, though, it suggests that indeterminacy itself does not create or expand authority. It is only a tool, when all other tools of interpretation run out, for deciding what authority exists.

The deeper point is this: Residual discretion is a response to indeterminacy or gaps in the law. A jurisdictional rule that is indeterminate neither grants nor withholds power within the range of the indeterminacy. It is just silent.

270. See Adams Fruit Co. v. Barrett, 494 U.S. 638, 650 (1990). This is not to say that such deference is never shown. For a full airing of these questions, see Mississippi Power & Light Co. v. Mississippi ex rel Moore, 487 U.S. 354 (1988).
In criticizing ersatz powerlessness, I imagined a court that knew, or suspected, that it was claiming for itself less jurisdiction than it truly had. But a court honestly exercising residual discretion knows or suspects no such thing. The true extent of its jurisdiction is, by hypothesis, not only unclear, but unknowable. The exercise of discretion finds meaning where there is no meaning. It is an interpretive stab in the dark. To argue that the court's "true" legal jurisdiction, before the act of interpretation, extended to the outer bounds of its zone of residual discretion is to flinch before the actual implications of indeterminacy.  

A court that claims jurisdiction to a point short of the outer bounds of its residual discretion does not have less jurisdiction after the interpretation than before. Instead, before the act of interpretation, its jurisdiction was indeterminate. After the act of interpretation, it has whatever jurisdiction its legitimate use of residual discretion has fixed for itself.

Accounts of residual judicial discretion oppose a purely declaratory view of legal meaning. According to the declaratory view, legal reality is always out there, waiting to be found. But to say that an indeterminate jurisdictional rule "really" grants jurisdiction to the outer bounds of its indeterminacy is to let the declaratory view back in by the side door.

An analogy from physics will help make the point. Quantum theory posits that certain processes are radically indeterminate. Their result cannot, even in principle, be predicted in advance, except in probabilities. More important and profound, only observing the result can collapse the indeterminacy. (Herein the rough analogy to the interpretation of indeterminate texts).

In one noted thought experiment, a cat is put in a closed, opaque box. 272 Inside the box is a device that, obeying quantum laws of

271. It is also to commit what some philosophers refer to as a category-mistake. See GILBERT RYLE, THE CONCEPT OF MIND 16 (1949).


This thought experiment seeks to manifest, at the macroscopic level, problems in the philosophical implications of quantum theory that are usually only clear at the level of sub-
probability, has an equal chance of either killing the cat or leaving it unharmed. The scientist can only know which it is when, sometime later, she opens the box.\textsuperscript{273} Theorists debate what we should think about the condition of the cat before the scientist opens the box. In one view, the cat is \textit{neither} dead nor alive, but is only a probability function.\textsuperscript{274} In another view, the cat is \textit{both} dead and alive, in parallel universes, only one of which turns out to be the scientist's own.\textsuperscript{275} In yet another view, it really is \textit{either} dead or alive before the scientist opens the box.\textsuperscript{276} This last view might deny radical indeterminacy.\textsuperscript{277} Or it might posit a notion of backward causation, or possibly imagine the cat itself being the quantum observer of its own state. Or it might suggest that there was a flaw in this particular thought experiment.\textsuperscript{278} But nobody imagines that the cat is \textit{necessarily alive} during those fateful moments, waiting for a fifty-percent chance of being killed when the scientist takes a look at it. For that matter, nobody imagines that the cat is \textit{necessarily dead}, waiting for a fifty-percent chance of being resurrected.

Radical indeterminacy poses profound paradoxes for physics. And for cats. It also poses profound problems for law. But to assume that atomic particles.

\textsuperscript{273} This is, of course, the consequence of quantum indeterminacy, which suggests that the state of a system depends in part on (and might have no determinate existence apart from) the process by which that state is measured. See RAЕ, supra note 272, at 107.

\textsuperscript{274} This is the so-called Copenhagen interpretation of quantum theory. It is also, for what it is worth, the standard or "official" view of most physicists. See DAVIES, supra note 272, at 136; DAVIES & BROWN, supra note 272, at 11; GRIFFIN, supra note 272, at 121.

\textsuperscript{275} This is the many-universes or many-worlds interpretation of quantum theory. This view was first posited by Hugh Everett in 1957, and more recently modified by David Deutsch and others, as one alternative to the Copenhagen interpretation. Many of the original papers in the many-worlds tradition are collected in THE MANY-WORLDS INTERPRETATION OF QUANTUM MECHANICS (Bryce S. Dewitt & Neill Graham eds., 1973).

\textsuperscript{276} This is sometimes referred to as the "hidden variable" view, which argues that just as classical, deterministic physics gave way to quantum physics, quantum physics will eventually give way to a more complete theory in which determinism returns by way of a new set of variables. A leading exponent of this view has been David Bohm. DAVID BOHM, WHOLNESS AND THE IMPLICATE ORDER (1980).

\textsuperscript{277} \textit{Id.}; cf. ABRAHAM PAIS, 'SUBTLE IS THE LORD . . . \&': THE SCIENCE AND THE LIFE OF ALBERT EINSTEIN 443 (1982) (The author quotes Einstein's famous denial of radical indeterminacy: "Quantum mechanics is very impressive. But an inner voice tells me that it is not yet the real thing. The theory produces a good deal but hardly brings us closer to the secret of the Old One. I am at all events convinced that He does not play dice.").

\textsuperscript{278} This is the view of Fritz Rohrlich in his discussion of Schroedinger's Cat. FRITZ ROHRLICH, FROM PARADOX TO REALITY: OUR BASIC CONCEPTS OF THE PHYSICAL WORLD 166-69 (1987).
they pose special jurisprudential problems for jurisdictional issues is
to misunderstand both jurisdiction and indeterminacy.

6. A Functionalist Epilogue: Do “Jurisdictional Time Limits”
Have Something in Common Besides Being Jurisdictional?

At least some of the arguments I have just surveyed in favor of
the doctrine of jurisdictional time limits can be read as a survey of
contemporary legal obsessions. Notice, for example, the recurrence,
under various guises, of the problem of discretion. And yet, it proba-
bly should not be surprising that these themes were not of much help.
If this discussion is any evidence, those obsessions of our current
legal thinking might not have much to do with the real work of law.

You will notice, though, that I saved particular scorn in this
discussion for the arguments I labeled ersatz powerlessness and ersatz
instrumentalism. Both of these are variations on a legal process
theme, attempts to articulate a meta-functionalism of law. The prob-
lem with these arguments is not that they are functionalist. I am not
even sure that they are. It is, rather, that they neither resonate with
the law’s own language nor do they really—precisely because they
are so reified—manage to make any functional or instrumental point
worth making. And again, I suspect that the lesson here has broader
implications.

Before concluding here, I do need to consider one more straight-
forward, and possibly more respectable, functionalist hypothesis. That
hypothesis would take the following form:

Nothing in the mere fact that jurisdictional time limits are juris-
dictional would itself require that they be interpreted literally, merci-
lessly, or unqualifiedly. But time limits that happen to be jurisdiction-
al might also just happen, on the whole, and for independent reasons,
to be the sort of time limits that it would make good sense to in-
terpret strictly or literally. For example, there might be—despite what
I said earlier to the contrary—sound reasons for interpreting limits on
appeal strictly, and the doctrine of jurisdictional time limits might
only be an indirect way of achieving that result.

A few comments are in order here. First, this sort of instrumen-
tal explanation, though it seems to resemble some of the canon-of-
construction arguments I canvassed earlier, differs from them because
it is not really a normative argument for the doctrine of jurisdictional
time limits, as such. Rather, it is a normative rationalization, an ac-
count of an alleged underlying rule rather than an account of the
surface rule we have been talking about all along. In that sense, it is
a bridge of sorts between the justificatory analysis in this part of the Article and the explanatory, descriptive, analysis that will follow in part IV.

In common with much functionalist analysis, then, this hypothesis can only rationalize the *results* of the doctrine of jurisdictional time limits. It does not justify the doctrine’s affect, the way judges think about it or talk about it, or its hold on the legal culture. In that sense, it resembles, for example, efforts to use agricultural economics to explain the Hindu aversion to slaughtering cows.\(^279\) Even if these explanations make sense, they still fall flat. They never quite click with the inner texture of the phenomena themselves.\(^280\) (Note that this is not true of those forms of functionalist analysis that do try to justify a rule in its own terms, only of those that do not).

The adequacy of functionalist rationalization as a form of both justification and explanation is a major issue that social scientists, legal scholars, and philosophers of knowledge have debated for decades.\(^281\) That debate includes some important voices who argue that it makes no difference to the adequacy of a functionalist rationalization of a rule or practice whether it can capture the subjective attitudes of the persons who adhere to that rule or practice. Suffice it to say here, though, that I am in good company in finding such a strategy at best the beginning of the story, and not its end.

Putting all this to one side, however, the particular hypothesis at issue here does not work very well even in its own terms. For the hypothesis to succeed, there would have to be some functionally significant common denominator to jurisdictional time limits, other than their jurisdictionality. But there is not. Many jurisdictional time limits, for example, are not limits on appeal, and many limits on appeal are not jurisdictional. There might, of course, be some other...

---


280. Cf. Mark Tushnet, Corporations and Free Speech, in The Politics of Law: A Progressive Critique 260 (David Kairys ed., 1982) (arguing that instrumental explanations for the power of certain legal metaphors can be inadequate, and “must be augmented by emphasizing the sense of naturalness that the significant metaphors have”).

factor at work, but it is hard to see what it is.

Arguably, the doctrine of jurisdictional time limits would make functional sense even if jurisdictionality were only an approximate, or statistically significant, proxy for some other, deeper, criterion. But this suggests another problem: Why, both normatively and descriptively, should the law use jurisdictionality as a proxy for something else when it could just as easily latch unto that other characteristic directly? That is to say, if there were, for example, a good argument for interpreting limits on appeal strictly, would it not make good sense just to say so?

Proxies make sense when inquiring directly into the more fundamental variable would be too costly, in intellectual or administrative effort. But deciding, for example, which time limits are limits on appeal is actually easier than deciding which time limits are jurisdictional.

IV. THE DOCTRINE AND THE LEGAL IMAGINATION

The doctrine of jurisdictional time limits does not survive Justice Black’s critique. Nor does it survive a more sustained normative analysis. But that cannot be the end of it. The doctrine is too entrenched in the judicial psyche to be dismissed as a simple mistake. The task now is to try to make sense of the doctrine despite its implausibility.

A. First Leads

It will be worth beginning the discussion by canvassing two tempting possibilities. Both are incomplete and, as I will argue, possibly just wrong, but they do help point the way to a more satisfactory resolution.

1. Semantics Redux: Jurisdiction as Trope

The first possibility is that jurisdictional language, for all the weight that I have put on it, is really, in the hands of judges, only a trope. The language is a hook that judges use when they want to achieve certain ends, like construing a rule strictly and literally, or raising a legal issue *sua sponte*, or engaging in collateral review of

---

282. But cf. Hall, *supra* note 7, at 399-400, 427 (arguing that there are few important policy distinctions between limits on appeal and original statute of limitations).

283. See *supra* text accompanying note 42.
another court's judgment.

This thesis resembles, slightly, the semantic hypothesis I discussed earlier in the paper.\footnote{284} However, it is actually very different. The point here is not that the word "jurisdictional" has two or more distinct connotations. It is, rather, that any sense of the word, as judges use it, is only a conclusory label for a judicial refusal to act.

The notion of "jurisdiction as trope" also resembles the functionalist hypothesis.\footnote{285} Yet, it differs from the functionalist hypothesis because it makes no effort at normative rationalization. The thesis of "jurisdiction as trope" is purely descriptive.

The "trope" thesis rejects precisely that view of jurisdiction and jurisdictional language on which this paper has been built. It is just one particular slant on the legal realist account of the relation between the law of jurisdiction and "actual" or operative jurisdiction. But that, in itself, is no reason to reject the thesis once it is understood as mere description.

To some extent, indeed, the trope thesis must be right. Surely, once the doctrine of jurisdictional time limits is in place, courts will be tempted to use the label of jurisdictionality only to achieve desirable results. This result orientation is true for all of jurisdictional doctrine, and for that matter, for all law. One would be naive to think otherwise.

That does leave the question which has been debated since the dawn of legal realism: Is such manipulation the rule?\footnote{286} My sense is

\footnote{284. See supra part III.B.1.}
\footnote{285. See supra part III.B.6.}

that judges do, often enough to make a difference, feel themselves the 
servants of legal doctrine and not just its masters. That is not, howev-
er, a debate we can resolve here.

But even if jurisdictionality were just a trope, another puzzle 
would remain. Why this trope? Why would courts that were looking 
for a doctrinal fig-leaf for enforcing a time limit literally think that 
they were getting anything across by calling the time limit "jurisdic-
tional"? To assume that this is just the way of things is to assume 
the doctrine of jurisdictional time limits. But that is the very question 
at issue here. The trope of jurisdictionality can serve many purposes, 
including—as in nineteenth century habeas corpus—legitimating the 
judicial correction of certain injustices. Thus, even if jurisdictionality 
was an empty vessel that courts only invoked when they felt like it, 
such a conclusion would only revise and not resolve the explanatory 
challenge of this part of the paper. The basic issue would remain the 
same: Why assume that jurisdictional time limits must be interpreted 
literally and mercilessly? One possible answer follows.

2. Random Rules: Doctrine as Convention

Earlier, I supposed that the doctrine of jurisdictional time limits 
might only be a matter of homonymy. That did not prove out. Just 
now, I supposed that it might be a trope. That ended up being a 
question-begger. But maybe the doctrine is still only a convention, 
though of a different sort than either of these. Maybe it is not a lin-
guistic convention, but a doctrinal convention.

The Idea of Jurisdiction has about it a constellation of doctrines. 
I surveyed many of them at the beginning of part III. Some of those 
doctrines are more controversial than others. I happen to think that 
many of those doctrines are more compelling than their critics allow. 
I also think that the historical development of much of jurisdictional 
doctrine in its classic age reflected a genuine maturing of legal under-
standing.287 But the connection between the core Idea and any par-
ticular doctrine can never be analytically airtight; we know better than 
to imagine that it could be.

What is true of any particular doctrine is even more true of the 
whole package. What I have called the Idea of Jurisdiction is also a 
Story of Jurisdiction. Tradition can sometimes fill even large gaps in 
reasoning. The law's evolution can itself redefine the argument,

287. See supra notes 53-54 and accompanying text.
changing premises at the same time as it reaches new conclusions.

A radical nominalist might deny that the story necessarily has any center at all. This is wrong. But any body of law as elaborate as that around the Idea of Jurisdiction must have about it elements of habit, expedience, and half argument, which is to say, elements of convention. It would do the shaping power of the legal imagination no favor to say that it could be otherwise.

Maybe the doctrine of jurisdictional time limits is a convention in that sense. The arguments for it do not add up, but some are better than others. And some of those arguments can justify some applications of the doctrine.

From the spillover of these arguments, the legal culture might have seen fit to fashion a simple, even if simplistic, conventional generalization. This would not necessarily have been for the better, as a functionalist account of the sort I discussed earlier would imply. Nevertheless, it is possible.

In one sense, again, something like this must be true. It is also trivial, though not entirely so if it says something about the workings of the legal mind. Moreover, speaking of the doctrine of jurisdictional time limits as a convention does suggest, even as a normative matter, that abandoning it might not be so easy. Conventions are valuable. If legislatures include the doctrine, for better or worse, in their own understanding of jurisdictional time limits, than any appraisal of legislative intent must take that into account.

Whatever its virtues, though, the convention story is also misleading. It suggests a certain serendipity to the whole thing. Doctrines appear and disappear, and everything is convention. But the full story might be more subtle, and more interesting. The puzzle of the doctrine of jurisdictional time limits is not solved by calling it a convention. We still need to know in some more detail how and when this convention, if that is what it is, came into being.

B. Back to History

To try to figure out what forces in the psyche of the legal culture might have created the doctrine of jurisdictional time limits will require a historical account more detailed than what I have provided so far.

1. The Mysterious Story of the Doctrine of Jurisdictional Time Limits

The history of the doctrine of jurisdictional time limits in nineteenth and twentieth century United States law is really many stories, in many places and many courts. A few common themes emerge, however. The doctrine of jurisdictional time limits, as we know it now, can be traced back to two sets of doctrines whose import was really very different. The first set of doctrines identified time limits that were subject to strict construction, but for all sorts of reasons not necessarily having anything to do with whether or not they were jurisdictional. The second set of doctrines did distinguish, sometimes sharply, between jurisdictional and non-jurisdictional time limits, but in all sorts of ways not necessarily having anything to do with a general rule of strict construction.

a. Strict and Liberal Construction

American courts have long interpreted some time limits strictly, with little room for excuse or qualification. Limits on appeal, for example, have traditionally been applied rigidly, although the details vary from one jurisdiction to another, and there are also precedents suggesting some leeway for excusable neglect and the like. What is striking, though, about the cases involving the strict

289. See, e.g., Credit Co. Ltd. v. Arkansas Cent. R.R., 128 U.S. 258, 261 (1888); Adams v. Law, 57 U.S. 144, 148 (1850); Stark v. Jenkins, 1 Wash. Terr. 421 (1874); Herrick v. Racine Warehouse & Dock, 43 Wis. 93 (1877).

290. Sometimes there was significant variation even within a single jurisdiction. In New York State, for example, the cases were incredibly confused and mutually contradictory for most of the first two-thirds of the nineteenth century. For a summary of the earlier cases, see Sail v. Butler, 27 How. Prac. 133 (1863).

291. See, e.g., Rector v. Fitzgerald, 59 F. 808 (8th Cir. 1894):
It is a well-settled rule of procedure that, unless some special reasons exist to excuse the delay, which have not been shown in the present case, a bill of review must be exhibited within the same time allowed for taking an appeal, which by the federal statute at the time of these occurrences was limited to two years after the entry of a final decree.

Id. at 812-13; Sams v. Creager, 22 S.W. 399 (Tex. 1893):
If it had been shown that the failure to file the motion within the time prescribed by law resulted from accident or cause other than neglect of applicant, this court might consider the application, notwithstanding that the court of civil appeals had not acted on the motion for a rehearing; but as no such facts are shown, the rule which requires persons to file and have acted upon motions for rehearing before coming to this court for relief must be enforced, and for its nonobservance the application for writ of error will be dismissed without consideration of the ques-
construction of time limits, including limits on appeal, until more or less the turn of this century, is how sporadically jurisdictionality plays a role. Often, the jurisdictionality of a statute is not even discussed. When it is, it rarely seems the deciding factor.

Why, then, would courts read time limits strictly? For all the usual reasons, good and bad. Often, what seems to be at work is sheer formalistic rigidity. But it is the same sort of formalistic rigidity often applied to other areas of the law. For that matter, although there were diverse and changing traditions about the interpretation of what "mere" (non-jurisdictional) statutes of limitations, \(^{292}\) those cases that did construe such statutes strictly do not necessarily look much different from cases that construed limits on appeal strictly.

But there were also more reasoned accounts. Some courts spoke in mildly functional terms about the value of adhering to time limits. Others feared that the time limit would become a dead letter if exceptions were read in. \(^{293}\) Many courts used the argument, to which I have already alluded, that certain proceedings were purely statutory creations and that any right created under the statute had to be taken

tions involved in the case.

Id.; see also Small v. Bischelberger, 4 P. 1195, 1196-97 (Colo. 1884) (holding that "petitioner's neglect to take his appeal within the time allowed by law is excusable; for if the judgment against him was wrongfully and fraudulently obtained, and he had no knowledge thereof, he cannot be held negligent for not taking an appeal in the ordinary way"); Smythe v. Boswell, 20 N.E. 263, 264 (Ind. 1889) (invoking, in dictum, "inherent right of every superior court to maintain its dignity and independence and to control its process and maintain its inherent jurisdiction" in the face of fraud by appellee); Dobson v. Dobson, 7 Neb. 296, 299-300 (1878) ("where a party has been prevented from complying with the legal requirements to obtain an appeal by the conduct or default of the justice, the appeal may be made after the expiration of the time required by the statute . . ."); Harmon v. Hart, 53 S.W. 310, 313 (Tenn. Ct. App. 1899); cf. Reconstruction Fin. Corp. v. Prudence Sec. Advisory Group, 311 U.S. 579, (1941):

In this case the effect of the procedural irregularity was not substantial. The scope of review was not altered. There was no question of the good faith of petitioners, of dilatory tactics, or of frivolous appeals. Hence it would be extremely harsh to hold that petitioners were deprived of their right to apply for an appeal by virtue of their erroneous reliance on the mistaken view of legal requirements. The failure to comply with statutory requirements is not necessarily a jurisdictional defect.

Id. at 582-83.

292. For an account of the state of the doctrine in the early to mid-nineteenth century, see Hanger v. Abbott, 73 U.S. 532, 536-39, 541-42 (1867). See generally CORMAN, supra note 191, § 1.2.

293. E.g., Credit Co. Ltd. v. Arkansas Cent. Ry., 128 U.S. 258, 261 (1888) ("When the time for taking an appeal has expired, it cannot be arrested or called back by a simple order of court. If it could be, the law which limits the time within which an appeal can be taken would be a dead letter."); cf. Green v. Elbert, 137 U.S. 615 (1891).
with all its attendant qualifications. Other courts engaged in detailed exegesis of the specific piece of statutory text in front of them.

But if, as I have insisted all along, the doctrine of jurisdictional time limits can only be identified clearly when the law establishes an explicit contrast between jurisdictional and non-jurisdictional time limits, that is what is hard to find in the early cases. When courts in that early period did draw explicit contrasts in their manner of enforcing various time limits, those contrasts were usually along other lines. The most common, perhaps, again, was between proceedings that were purely statutory and proceedings grounded in the common law. Another distinction, which is at the root of the doctrine at issue in *Teague*, was between statutory time limits and court-created time limits. But this distinction was generally grounded, not in the

---

294. The classic case is *The Harrisburg*, 119 U.S. 199 (1886). *See also supra* notes 234-39 and accompanying text.

295. *See supra* note 239 and accompanying text. See also, for example, *Haley v. Elliot* 37 P. 27 (Colo. 1894) (distinguishing between an appeal and a writ of error).


It must be admitted, that, as to the matter of filing papers and the entry of rules under the practice of the court, such modifications may be made as may facilitate the progress of the court and the convenience of parties; and, indeed, the court may, under peculiar circumstances, avoid an act of injustice by the suspension of its rules; but this can only be done where the discretion of the court may fairly be exercised.

Where an entry is required by statute, on a condition expressed, the court is bound by the statute. . . . If there be no saving in a statute, the court cannot add one on equitable grounds.

*Id.* at 292-93; *Moot v. Parkhurst*, 2 Hill 372 (N.Y. Sup. Ct. 1842) ("[W]here an act is required to be done by statute within a given number of days, the courts have no dispensing power, and cannot enlarge it; though it is otherwise in respect to time as depending on the mere rules or practice of the court."); *cf. Hilleman v. Beale*, 5 N.E. 108, 109 (Ill. 1858) (discussing bond requirement: "The right to an appeal is strictly statutory, and a party, to avail himself of this privilege, must conform to the order of the court which the statute authorizes it to prescribe."). *But cf.* e.g., *R.F.C. v. Prudence Group*, 311 U.S. 579, 582-83 (1941) (excusing failure to seek an allowance of appeal within statutory limit, when due to certainty about whether such an allowance was necessary; failure to comply with statutory requirements "is not necessarily a jurisdictional defect"); *United Public Workers v. Mitchell*, 330 U.S. 75, 84-85 (1946) (holding that Congress intended a particular statutory time limit to be subject to same allowances as judicial rules on which it was modeled).

For a more subtle variation on the theme, see *Collins v. Millen*, 48 N.E. 1097 (Ohio 1897):

The right of appeal is statutory, and we must look to the statutes to ascertain if it has been lawfully exercised. The party who seeks to exercise this right must comply with whatever terms the statutes of the state impose upon him as conditions to its enjoyment. The right, doubtless, is remedial in its nature. It is a proceeding in a civil action, given by our Code of Civil Procedure, and falls within the letter and spirit of section 4948, Rev. St., which commands a liberal construction of the
"jurisdictional" character of the statutory time limits, but in the inher-
ent power of courts to excuse or ignore their own non-statutory
rules.\textsuperscript{297}

As I said, things began to change around the turn of the century.
Cases that relied on specific statutory construction, or on one of the
theories discussed above, were read in later cases as holding simply
that a time limit was "jurisdictional" or "mandatory and jurisdiction-
al."\textsuperscript{298} Precedents that alluded to jurisdictionality, but did not rest on
it, were read to do so. The process of re-reading did not take place
all at once, or everywhere at the same time. But it did give birth to
one of the streams of cases that are now the source of the doctrine of
jurisdictional time limits.

To see this at work, consider this holding from \textit{Bornheimer v.
Baldwin}, an 1871 California Supreme Court opinion: "The statute
regulating appeals from final judgments as such, requires them to be

provisions of our Civil Code. This court has heretofore recognized these liberal
principles in a number of cases respecting steps necessary to perfect an appeal, and
has been especially liberal in sanctioning amendments made to cure defects in the
methods that parties have pursued in exercising this right of appeal.

We bring with us to the consideration of the question involved in the case
before the court the same liberal views that our predecessors held and announced
in the foregoing as well as other similar cases touching the question of perfecting
appeals, that, by inadvertence, had been irregularly taken. We recognize, however,
that the courts can dispense with no condition prescribed by statute as necessary to
perfect an appeal and that the only field open to the display of liberality in this
connection is in the construction of the statutes that prescribe these conditions.
\textit{Id.} at 1098 (citations omitted); \textit{see also} Smythe v. Boswell, 20 N.E. 263 (Ind.
1889):

\textit{If} an appeal within the time limited by law should be prevented by the fraud of
an appellee or his counsel, the court might, notwithstanding the statutory limitation,
grant an appeal upon a proper application. This power, to put the doctrine in a
somewhat different form, exists not by virtue of legislation, but by virtue of the
inherent right of every superior court to maintain its dignity and independence and
to control its process and maintain its inherent jurisdiction.
\textit{Id.} at 263-64. Nevertheless, when no such reasons exist, the appeal must be dismissed. "This
is not a case of failure to comply with a rule of court, but is a case of failure to obey a
mandatory statute. It is not a mere technical right that the appellees insist upon, for they
base their claim on a statutory command." \textit{Id.} at 264; \textit{cf.} United Pub. Workers v. Mitchell,
330 U.S. 75, 84-85 (1946) (holding the Congress intended a particular statutory time limit to
be subject to same allowances as the judicial rules on which it was modeled).

\textsuperscript{297} \textit{But cf. e.g.}, Morris v. Brush, 17 F. Cas. 810, 813 (W.D. Tex. 1876) (The court
concluded that the rule of court setting a time limit for appeal did not preclude the court
from exercising discretion to hear the case. "As all the requirements of the statute were com-
plied with in this case, the court has jurisdiction of the appeal."). Even here, however, the
distinction is not drawn with the same crispness and resonance as that attempted in the mod-
ern cases.

\textsuperscript{298} For a nice example of a court taking explicit and intelligent notice of precisely this
sort of development, see Bailey v. SWCC, 296 S.E.2d 901 (W. Va. 1982).
brought, if at all, within one year. This limitation is peremptory. Neither the pendency of an appeal from an order denying a new trial, nor any other circumstance, can operate to prolong it.”

“Peremptory” in 1871 meant more or less what it means today: imperative, absolute, unqualified, and arbitrary. It did not mean “jurisdictional.” (More technical uses of the word, as in “peremptory writ” or “peremptory jury instruction,” do not suggest otherwise).

In Henry v. Merguire, an 1896 case in which the appellant claimed that the time limit for taking an appeal did not apply because of the pendency of a lower court order granting a new trial, the court cited Bornheimer: “[T]he period fixed by the statute is an express and peremptory limitation within which the right given must be exercised, and is not a flexible rule to be varied by extrinsic circumstances.”

Again, nothing was said about jurisdictionality, although the language did come closer.

In 1900, the court decided Williams v. Long. In Williams, the defendant sought to appeal from the judgment below. But eighteen days before the end of the six months allowed for the appeal, the plaintiff died, leaving no one on whom to serve the notice of appeal. Six months later, an administrator was appointed for the plaintiff’s estate, whom the defendant served. Nevertheless, the court held that the law did not suspend the time limit from the time of the plaintiff’s death to the appointment of the administrator. The court relied in part on case law directly on point, and further stated:

The statutes limiting the time of appeal are jurisdictional and mandatory. [Henry v. Merguire]. . . . In the absence of an express authorization in the statute itself, a court has no power to extend the time for taking an appeal, or to relieve an appellant from the effects of misfortune, accident, surprise, or mistake. No such authorization is found in the statutes of this state.

Series of cases like this one plainly support the semantic explanation for the doctrine of jurisdictional time limits. For reasons I have already discussed, that explanation would save us all a lot of trouble if it were not confounded by the bulk of the evidence. These

299. 42 Cal. 27, 31-32 (1871).
300. 43 P. 387 (Cal. 1896).
301. Id. at 387.
302. 62 P. 264 (Cal. 1900).
303. Id. at 264.
304. See supra text accompanying notes 163.
cases also support the view of some commentators that limits on appeal are not jurisdictional at all, and that courts have latched on to jurisdictionality as a formalistic fetish. But, for reasons I have also discussed, my own approach is to grant, for the sake of argument, that these time limits really are jurisdictional, in the "power or authority" sense of the word, and then ask why that should require that they always be read literally and without qualification.

Interestingly, variations on both these arguments appear in a dissenting opinion in *In re Hanley's Estate,* a 1943 California Supreme Court case. In this case, one lawyer had actually deceived the other as to when the order being appeal from had been filed. By the time the appellant's lawyer discovered he had been lied to, the time within which to file a notice of appeal had lapsed. The dissenting opinion, in the course of suggesting several connected arguments for allowing the appeal, cited *Bornheimer* and *Henry* for the proposition that the time limit was not necessarily "jurisdictional." And he cited *Williams* for the proposition that the California courts had in any event never adequately explained what they meant by "jurisdictional." But the majority held otherwise:

In examining the appellant's position, it is immaterial whether the misrepresentations concerning the date upon which the order was filed were wilful or inadvertent, whether the reliance thereon was reasonable or unreasonable, or whether the parties seeking to dismiss are acting in good faith or not. It may be assumed that the appellant has presented grounds for relief which would be sufficient if relief could be granted. But the requirement as to the time for taking an appeal is mandatory, and the court is without jurisdiction to consider one which has been taken subsequent to the expiration of the statutory period.

In the absence of statutory authorization, neither the trial nor appellate courts may extend or shorten the time for appeal, even to relieve against mistake, inadvertence, accident, or misfortune. Nor can jurisdiction be conferred upon the appellate court by the consent or stipulation of the parties, estoppel, or waiver. If it appears that the appeal was not taken within the 60-day period, the court has no discretion but must dismiss the appeal of its own motion even if no objection is made.

In strictly adhering to the statutory time for filing a notice of appeal, the courts are not arbitrarily penalizing procedural missteps. Relief may be given for excusable delay in complying with many

305. 142 P.2d 423 (Cal. 1943).
provisions in the statutes and rules on appeal, such as those governing the time within which the record and briefs must be prepared and filed. These procedural time provisions, however, become effective after the appeal is taken. The first step, taking of the appeal, is not merely a procedural one; it vests jurisdiction in the appellate court and terminates the jurisdiction of the lower court. 306

None of this adds up to a convincing argument. But it does demonstrate two things about the state of judicial culture by 1943: First, the court assumed that this time limit was jurisdictional in the full sense of the word. Second, it had convinced itself that its refusal to read an excuse for fraud into the statute was entailed by a broader theory of the consequences of that jurisdictionality.

b. Jurisdictional and Non-Jurisdictional Time Limits

One complication in the story I have just told is that, until around the turn of the century, a fair number of cases paid little explicit attention in any event to whether particular time limits were or were not jurisdictional as such, which might indicate that the shift to jurisdictional language might represent a change of focus rather than a corruption of doctrine. But enough cases did pay such attention. Those cases reveal a serious effort to map the implications of the distinction between jurisdictional and non-jurisdictional time limits. The map was often, though by no means always, precise and fine-tuned, and directly tied to the central themes of the Idea of Jurisdiction. 307

306. Id. at 424-25 (citations omitted). Not surprisingly, the court then tacked on a more instrumentalist explanation: "And of particular importance is the fact that the security of rights of contract, titles to property, and the status of persons rest upon certainty in the finality of judgments occasioned by the lapse of the statutory time for the taking of an appeal." Id. The problem with this argument, of course, is that it would apply just as well, if not better, to non-jurisdictional statutes of limitations.

The majority also suggested that relief might still be had through a separate suit for fraud. But the dissent pointed out serious problems with that avenue. Id. at 427-28 (Carter, J., dissenting).

307. To be sure, there was some ambiguity and confusion, and some of that anticipates today's issues. For example, in Fellows v. Burnap, 8 F. Cas. 1131 (S.D.N.Y. 1876), the court faced a requirement that an appeal be filed in the circuit court within ten days of a notice of appeal being filed in the district court. There was some confusion as to the date of the district court filing. The court held that, whether or not the appeal was filed ten days or twelve days after the notice of appeal, was:

not vital to the rights of the appellant. If there was a failure, it was not in a matter going to the jurisdiction of the court. The party, beyond all question, intended to proceed in time, and supposed himself to be in time. . . . [S]uch a slip, if it be a slip, will, of course, be corrected. The excuse is sufficient to warrant relief,
Some of the distinctions between jurisdictional and non-jurisdictional time limits were obvious. Jurisdictional time limits were not waivable by the parties. They were not subject to the discretion of the courts. Courts were obligated to raise them sua sponte.

Id. at 1132. What is not clear is whether the court is saying that the filing requirement was not "jurisdictional," or—to the contrary—that, though the time limit was jurisdictional, the failure here did not deprive the court of its jurisdiction. The first reading would be consistent with today's view of the difference between jurisdictional and non-jurisdictional time limits. The second reading would support my account of the general trend of nineteenth-century thinking.

For another example, consider Herrick v. Racine Warehouse & Dock Co., 43 Wis. 93 (1877), a case clearly employing jurisdictional theory and language:

Section 9 of the appeal act limits the time of appeal from judgment to two years. And this court has no power to amend the statute by enlarging the time. If we had any discretion, we should assuredly exercise it in a case like this, where the right of appeal appears to have been lost by mere inadvertence. . . . It appears to follow that if a court cannot restore its own jurisdiction, lost by statutory limit, the parties cannot restore it by consent. For it is not jurisdiction of the person, but of the proceeding. And we are unable to comprehend how that could be done by the implied consent of waiver, which cannot by express consent.

Id. at 95 (citation omitted). In one sense, the holding and argument in Herrick comes powerfully close to the contemporary doctrine of jurisdictional time limits. If nothing else, it illustrates that the contemporary doctrine did not just come out of thin air. On the other hand, a closer reading of Herrick reveals that the court focuses principally on two notions that unproblematically flow from the idea of jurisdiction, and which I have supported in this essay: that courts cannot create jurisdiction as an act of naked discretion, and that parties cannot create jurisdiction by consent or waiver.

308. See, e.g., Stevens v. Clark, 62 F. 321, 324 (7th Cir. 1894) (Holding that the failure to issue any writ of error at all cannot be excused by implied waiver of the parties; "[t]he issuing of the writ within the prescribed time is a jurisdictional fact, and neither consent nor anything else can take the place of it, at the option of the parties."); Peabody v. Thatcher, 3 Colo. 275 (1877) ("It is true the defendant below has joined in error, and so has consented to the appeal. The doctrine, . . . however, is that such consent is ineffectual to confer jurisdiction. We are unable to follow those courts which announce a contrary doctrine.").

A particularly interesting discussion occurs in King v. Penn, 1 N.E. 84 (Ohio 1885), in which an appellant deposited a petition in error with the clerk of court, but the petition was not formally filed and endorsed. Both parties proceeded with their appellate briefs and arguments, until the appellee discovered the clerk's omission and moved to dismiss the appeal for lack of jurisdiction. The court insisted that "parties may not, by private agreement or consent, nor by voluntary appearance, confer upon this court power to hear and determine a proceeding in error commenced after the time expressly limited therefor." Id. at 86. But estoppel was a different matter. "The circumstances of this proceeding call upon us to say that the defendant in error should now be estopped from availing himself of his supposed discovery . . . that this court was without jurisdiction to proceed further." Id. at 87.

309. See, e.g., Herrick, 43 Wis. 93:

If we had any discretion, we should assuredly exercise it in a case like this, where the right of appeal appears to have been lost by mere inadvertence. But, to give this court jurisdiction of an appeal, the return of the court below must show an
And so on.

Other distinctions were less obvious. One line of cases, for example, examined the effects when the legislature shortened an existing time limit. According to these cases, a change in an ordinary statute of limitations might not apply retroactively if that left parties without a reasonable opportunity to secure their rights. But a change in a jurisdictional time limit would apply regardless, because jurisdictional time limits defined the court's power, and created no vested rights. However harsh this doctrine was, though, it did not rely on any general notion of strict construction, but on a more specific—whether or not convincing—analytic claim about the character of the two sorts of rules.

Slowly, though, all these specific doctrines began to overflow into a more general, loosely defined notion of literal and strict application. And so arose another stream in the evolution of the doctrine of jurisdictional time limits.

To see this transformation at work, and to see some of the subtleties embedded in the story, consider in some detail a sequence of

---

appeal perfected within the time and in the manner prescribed by the statute.

Id. at 95. This case is among those that comes closest to the contemporary doctrine of jurisdictional time limits. Consider also Olimie v. Odell, 20 Mich. 12 (1870):

[When a statute fixes absolutely the time within which an appeal must be taken, the appellate Court has no power to enlarge it; and its jurisdiction to entertain the appeal depends upon a compliance with the statute. But when, as in this instance, the statute gives the appellate Court power, under certain circumstances, to authorize the appeal, the parties may, by stipulation, agree to extend the time beyond the period fixed by the statute.

Id. at 13. Otherwise stated, if the statute allows for discretion, it must not be jurisdictional, and will therefore also be read to allow waiver.

For a related case involving appeal bond requirements, see Oliver v. Pray, 4 Ohio 175 (1829):

The party has his right of appeal, upon complying with the conditions annexed by the statute. His right is lost, by omitting or neglecting to perform any of the conditions, and the appellate jurisdiction of this court altogether ceases over the cause. With regard to notice and filing the bond, within thirty days after the rising of the court, the decisions have been uniform, that the omission, in either case, ousts this court of its jurisdiction. It is undoubtedly within the powers of the legislature to attach all reasonable conditions to the right of appeal, and thus place a limitation upon the appellate jurisdiction of this court. The cause is not appealed without [sic] the party performs the conditions required by statute, and when he neglects to do so, to entertain jurisdiction would be mere usurpation of power. But the objection comes too late, to the correctness of the decision, in dismissing the appeal.

Id. at 191-92.

federal cases, most of them from the Supreme Court. The sequence begins in 1879 with United States v. Lippitt.\footnote{311}

Lippitt concerned the construction of the time limit regulating entry of claims to the Court of Claims. An army officer had a claim dating back to 1863 and 1864 for “commutation of fuel and quarters while awaiting further orders at San Francisco.”\footnote{312} Rather than bringing his claim directly to the Court of Claims, which he could have done, he filed it with the War Department in 1865. The Department, with military efficiency, sat on the matter until 1878. In 1878, it passed the dispute to the Court of Claims under a statute allowing any executive departments, under certain conditions, to transmit a claim “to the Court of Claims, to be there proceeded in as if originally commenced by the voluntary action of the claimant.”\footnote{313}

That same referral statute, however, “accompanied this enlargement of the jurisdiction of the Court of Claims with the restriction that no case should be referred to it . . . unless it belonged to one of the several classes of cases to which, by reason of the subject-matter and character, the court could, under the then existing laws, take jurisdiction on the voluntary action of the claimant.”\footnote{314} And the statute governing the Court of Claims provided:

that every claim against the United States, cognizable by the Court of Claims, shall be for ever barred, unless the petition setting forth a statement of the claim be filed in the court, or transmitted to it under the provisions of [that] act, within six years after the claim first accrues . . . .\footnote{315}

The government argued that the “express words” of the Court of Claims time limitation required dismissal of the case. The Supreme Court disagreed. “Such a construction would work an injustice which we cannot suppose Congress intended should be done to the citizen having a demand against the government. . . . It should not be sustained, unless we are required to do so by some absolute, unbending rule of construction.”\footnote{316} Instead, the Court held that the time limit would be satisfied as long as a claim was filed in an appropriate executive department within six years, even if it did not reach the

\footnotesize{311. 100 U.S. 663 (1879).}
\footnotesize{312. Id. at 665.}
\footnotesize{313. Id. at 666 (citing Act of June 25, 1868, ch. 71, §7, 15 Stat. 76 (1868)).}
\footnotesize{314. Id.}
\footnotesize{315. Id. at 665 (citing Act of March 3, 1863, ch. 92, § 10, 12 Stat. 767 (1863)).}
\footnotesize{316. Id. at 667 (emphasis added).}
Court of Claims until many years later.\textsuperscript{317} Put another way (though the Court did not), it held that the limitation was tolled by the executive's delay in administratively resolving the claim.

The \textit{Lippitt} decision reserved the question whether the six-year time limitation was one that the Court of Claims itself would be obligated to raise. That is to say, the Court reserved the question (though again it did not use the word) whether the limitation was jurisdictional. That is interesting in itself, since a court today might think that issue crucial to whether the statute should be read according to "some absolute, unbending rule of construction."\textsuperscript{318}

However, in \textit{Finn v. United States},\textsuperscript{319} an 1887 case, the plaintiff filed his administrative claim some eleven years after it accrued. The claim was decided adversely and was subsequently disallowed. After newly discovered evidence was produced by the claimant, the executive ordered the case reopened and referred it to the Court of Claims twelve years after the original filing. The government did not raise the statute of limitations in its original pleadings. The Supreme Court held, however, that:

\begin{quote}
[the duty of the court, . . . whether limitation was pleaded or not, was to dismiss the petition; for the statute, in our opinion, makes it a condition or qualification of the right to a judgment against the United States that—except where the claimant labors under some one of the disabilities specified in the statute—the claim must be put in suit by the voluntary action of the claimant, or be presented to the proper department for settlement, within six years after suit could be commenced thereon against the Government. Under the appellant's theory of the case, the [executive] could open the case twenty years hence, and, upon the claim being transmitted . . . to the Court of Claims, that court could give judgment upon it against the United States. We do not assent to any such interpretation of the statutes defining the power of that court.

The general rule that limitation does not operate by its own force as a bar, but is a defence, . . . has no application to suits in the Court of Claims against the United States. . . . [T]he Government has not expressly or by implication conferred authority upon any of its officers to waive the limitation imposed by statute upon suits against the United States in the Court of Claims.\textsuperscript{320}
\end{quote}

\textsuperscript{317} \textit{Id.} at 668.
\textsuperscript{318} \textit{Id.} at 667.
\textsuperscript{319} \textit{123 U.S.} 227 (1887).
\textsuperscript{320} \textit{Id.} at 232-33 (emphasis added).
Not atypically, the Court was again not crystal clear whether it was holding that the time limitation was jurisdictional as such, or only that government lawyers could not waive government rights. I do not want to make the same mistake that I accuse others of making, of reading jurisdictional ideas back into cases that do not support them. Nevertheless, I incline to the first view, particularly because so many sovereign immunity cases of the period do speak in explicitly jurisdictional terms, and this one comes close. In any event, that was the reading adopted by an 1898 case, United States v. Wardwell,\textsuperscript{321} which held, citing Finn, that the time limitation "is not merely a statute of limitations, but also jurisdictional in its nature, and limiting the cases of which the Court of Claims can take cognizance."\textsuperscript{322}

Wardwell, however, drew no particular conclusions from the jurisdictional character of the time limit. On the contrary, the claim there was for payment of three checks issued by the Army in 1869 and lost or destroyed, while in the possession of the payee, in 1872. The request for payment, however, was made in 1890, and suit was not filed until 1896. The Court held that the six-year limitation began to run, not in 1869, but when the Treasury refused payment in 1890. Although on its face a construction of substantive law, and not the time limit itself, the decision is still notable for its unapologetic liberality.

The fourth case in my sequence is Louisville Cement Co. v. ICC, decided in 1923.\textsuperscript{323} The cement company asked the Interstate Commerce Commission for an order authorizing a certain railroad company to issue a refund on incorrectly published tariffs. The Commission rejected part of the petition for failure to comply with a two-year statutory limitation. The cement company sought a writ of mandamus in the lower courts, which denied the writ because the Commission was acting within its statutory discretion. The Supreme Court, however, saw it differently:

\textquoteleft\textquoteleft\textit{The two-year provision of the act is not a mere statute of limitations but is jurisdictional,—is a limit set to the power of the Commission as distinguished from a rule of law for the guidance of it in reaching its conclusion} \ldots \textit{[This view] conforms in principle to the holdings of the court with respect to a similar limitation, but for...} \textquotepright

\textsuperscript{321}. 172 U.S. 48 (1898).
\textsuperscript{322}. Id. at 52 (citing Finn, 123 U.S. at 231-33).
\textsuperscript{323}. 246 U.S. 638 (1923).
six years, on the jurisdiction of the Court of Claims. . . .

[The court], in a proper case, has power to direct the Commission by mandamus to entertain and proceed to adjudicate a cause which it has erroneously declared to be not within its jurisdiction. . . .324

This time, the jurisdictionality of the rule did matter. But it mattered because it allowed a form of review that would otherwise be closed off. Moreover, when the Court actually interpreted the import of the limitation, it held against the Commission, and adopted, again without apology, a reading that, if not "liberal" as such, was also not "strict" or formalistic or unpurposive.

The point is brought home again in Louisville & Nashville Railroad v. Sloss-Sheffield Steel & Iron Co.,325 a 1925 Supreme Court opinion:

The argument is that a petition before the Commission for reparation must give not only the names of the parties complainant and of the carrier against which the claim is asserted, but also a detailed description of the specific claims arising out of the several shipments involved; that this detail is indispensable . . . and that a later specification of the claims is of no avail, because the filing of such a definite description of the claim with the Commission within the two years is a jurisdictional requirement. It is true that the two-year requirement is jurisdictional. . . . But no statute or rule imposes upon the Commission procedure so exacting as to make fatal mere failure to present within the period of limitation the detail of a statement which under the procedure prevailing in courts of law may ordinarily be supplied by amendment or a bill of particulars.326

The simple lesson of these cases is that jurisdictionality matters. But it matters in analytically precise ways. And the jurisdictionality of a legal rule and its construction are, all other things being equal, two distinct issues.

What happens next? Not surprisingly, beginning as early as the 1920s, state and federal courts, citing cases like Louisville Cement, have increasingly used the sort of language now familiar as the core of the doctrine of jurisdictional time limits.327

324. Id. at 642-43.
325. 269 U.S. 217 (1925).
326. Id. at 226-27.
327. See, e.g., Wisconsin Bridge & Iron Co. v. Illinois Terminal Co., 88 F.2d 459 (7th
is more than a mere statute of limitations. It is jurisdictional and strictly limits the power of the court to assume jurisdiction.\textsuperscript{328}

c. The Road Not Taken

Things could have turned out otherwise. Precedent existed, on top of that already cited, for steering the case law in a different direction. More than an occasional earlier case, for example, held that delays not the fault of a party could excuse a jurisdictional time limit. Consider, for example, this pithy holding from an 1893 Nebraska case: "The time fixed by section 675 of the Civil Code for perfecting appeals in equity cases is jurisdictional; and this court cannot extend it unless it clearly appears that the failure to perfect the appeal is in nowise attributable to the laches of appellants."\textsuperscript{329} This sort of doctrine of excuse did not make the time limit any less jurisdictional, nor was it applied as a matter of grace. To that extent, the modern doctrine of jurisdictional time limits is on target. Yet this doctrine of excuse did emphasize that the application of even jurisdictional time limits to specific situations was, in principle, a subject of legitimate interpretive inquiry.

On the question of construction more generally, forgive this lengthy quotation from Cohen v. Cohen, a 1919 Illinois case:

Section 7 of the chapter of our statute on wills authorizes "any person interested," within one year after the probate of a will, to file a bill in chancery to contest its validity, "but if no such person shall appear within the time aforesaid, the probate shall be forever binding and conclusive on all of the parties concerned, saving to infants or non compos mentis the like period after the removal of their respective disabilities." It is contended by appellees . . . that a minor heir is required to file a bill to contest a will within one year after its admission to probate or wait until becoming of age and file his bill within one year after that period arrives.

It is not controverted that statutes of limitation containing similar provisions to section 7 are construed to authorize an action to be commenced by a minor during the period of minority . . . but appellees insist that rule is not applicable to will contests, because section 7 is not a limitation statute, but is a statute conferring

\textsuperscript{328} Nitkey, 151 F.2d at 643 (citing Louisville Cement Co., 246 U.S. at 642).

\textsuperscript{329} Fitzgerald v. Brandt, 54 N.W. 992 (Neb. 1893) (emphasis added).
jurisdiction to entertain a bill to contest a will. It is claimed that, so construed and giving their ordinary meaning to the words of the statute, the probate of a will is binding and conclusive against a minor after the lapse of one year from the probate until the minor has attained his majority.

It has been often and uniformly held by this court that section 7 is not a statute of limitation, but is a statute conferring jurisdiction. Cases, therefore, involving the construction of statutes of limitation, are not necessarily conclusive of the question here involved, if the language of section 7, the purpose of its enactment, and the rules of construction require a different interpretation. There would seem to be no valid basis in reason and justice for the distinction in construction contended for between a statute of limitation and section 7 of the Wills Act.

Considering the language used and the subject and purpose of the enactment we cannot attribute to the Legislature an intention to provide that if a minor, or some one on his behalf, did not file a bill to contest a will within one year after its admission to probate, he should be precluded from contesting the will until he attained his majority.

The object sought to be accomplished exercises a potent influence in determining the intent and meaning of a statute. "Statutes must be interpreted according to the intent and meaning, and not always according to the letter. A thing within the intention is within the statute, though not within the letter; and a thing within the letter is not within the statute, unless within the intention." 330

This holding is not obvious. There would have been reasons apart from sheer literalism for deciding the other way. But it is also, as an exercise of legal craft and reasoned judgment, not extraordinary, or revolutionary, or strange. It might only seem so in the light of the doctrine of jurisdictional time limits.

2. The Fate of the Idea of Jurisdiction: The Mystery Deepens

As noted, some critics have argued that the problem with the doctrine of jurisdictional time limits is that it treats jurisdiction, and jurisdictionality, as a fetish. The real mystery, then, is that during more or less the same era that courts were patching together the doctrine of jurisdictional time limits, they were also eroding the Idea of Jurisdiction.

330. 122 N.E. 543, 544-45 (Ill. 1919) (citations omitted).
The most important symptom of this erosion has been the expansion of jurisdiction to determine jurisdiction. As discussed earlier, jurisdiction to determine jurisdiction was, in traditional doctrine, a modest power. It arose, if at all, from specific grants of subject matter jurisdiction, or from presumptions attaching to courts of general jurisdiction. It extended mainly to the determination of jurisdictional facts. This century, however, saw a progressive expansion of jurisdiction to determine jurisdiction, culminating in Stoll v. Gottlieb, a 1938 United States Supreme Court opinion. Stoll held that, at least when the issue was fully and fairly litigated, a court's determination that governing law gives it subject matter jurisdiction over a case is not subject to collateral attack.

The Stoll Court implied that it was only taking the old doctrine of jurisdiction to determine jurisdiction to its logical conclusion. But the difference is clear. Jurisdiction to determine jurisdictional facts can be said to arise from particular chunks of subject-matter jurisdiction. But the only source of jurisdiction to determine jurisdictional law must be some general ascription of authority to the court-as-court. And it is precisely that ascription that the idea of Jurisdiction, in its classic form, was usually successful in avoiding.

The Court in Stoll wrote this:

A court does not have the power, by judicial fiat, to extend its jurisdiction over matter beyond the scope of the authority granted to it by its creators. There must be admitted, however, a power to interpret the language of the jurisdictional instrument and its application to an issue before the court. . . .

Courts to determine the rights of parties are an integral part of our system of government. It is just as important that there should be a place to end as that there should be a place to begin litigation.

Implicit here is the influence of views of jurisdiction that I have described as bureaucratic, managerial, behavioralist, legal realist. As in those views, judicial authority rests, not only on specific grants of jurisdiction, but on the "integral part" that courts play in our "system of government." And the notion that a court without jurisdiction was very much like you or I, suddenly looks romantic and impractical,

---

331. See supra notes 82-84, 267 and accompanying text.
332. 305 U.S. 165 (1938).
333. Id. at 171.
334. Id. at 171-72.
and maybe dangerous.

Even Stoll's expansion of jurisdiction to determine jurisdiction must have some limits. Courts have been working to define those limits. The Second Restatement of Judgments argues that the question of subject matter jurisdiction in a contested action should not be subject to collateral attack except if:

1. The subject matter of the action was so plainly beyond the court's jurisdiction that its entertaining the action was a manifest abuse of authority; or
2. Allowing the judgment to stand would substantially infringe the authority of another tribunal or agency of government; or
3. The judgment was rendered by a court lacking capability to make an adequately informed determination of a question concerning its own jurisdiction and as a matter of procedural fairness the party seeking to avoid the judgment should have opportunity belatedly to attack the court's subject matter jurisdiction.

Apparent here again is an attitude to jurisdiction different from that which animated the classic Idea of Jurisdiction. "Actual" lack of jurisdiction, so to speak, is defined by the "hard fact" of a "manifest abuse of authority." Or it is defined by the need of the judicial decision machine, taken as a whole, to maintain its own internal discipline (the second clause) or its decisional reliability (the third clause).

According to the Restatement's Official Comment, the problem of jurisdiction to determine jurisdiction poses a "sharp conflict of basic policies" between "finality and validity." "The essential problem is therefore one of selecting which of the two principles is to be given greater emphasis." Validity is not the essence of law-

---

337. Id. § 12, cmt. a.
338. Id., providing:

The problem poses a sharp conflict of basic policies. The principle of finality has its strongest justification where the parties have had full opportunity to litigate a controversy, especially if they have actually contested both the tribunal's jurisdiction and issues concerning the merits. Yet the principle of finality rests on the premise that the proceeding had the sanction of law, expressed in the rules of subject matter jurisdiction. As long as the possibility exists of making error in a determination of the question of subject matter jurisdiction, the principles of finality and validity cannot be perfectly accommodated. Questions of subject matter jurisdiction must be justiciable if the legal rules governing competency are to be given
ful power, but a "policy" that can be weighed against other policies. Jurisdictionality itself turns into a label, a token of certain consequences. Under traditional doctrine, according to the Restatement, "[t]he classification of a matter as one of jurisdiction is . . . a pathway of escape from the rigors of the rules of res judicata."339

...effect; some tribunal must determine them, either the court in which the action is commenced or some other court of referral. If the question is decided erroneously, and a judgment is allowed to stand in the face of the fact that the court lacked subject matter jurisdiction, then the principle of validity is compromised. On the other hand, if the judgment remains indefinitely subject to attack for a defect of jurisdiction, then the principle of finality is compromised.

The essential problem is therefore one of selecting which of the two principles is to be given greater emphasis. Traditional doctrine gave greater emphasis to the principle of validity, at least when judgments of tribunals of limited jurisdiction were concerned, asserting that a judgment of a court lacking subject matter jurisdiction was "void" and forever subject to attack. That doctrine was, however, limited by several concessions to the principle of finality. These concessions were expressed in the rules that a judgment of a court of general jurisdiction imported its own validity; that a judgment was presumed valid if valid on its face; and that a judgment not void on its face was avoidable only by suit in equity, wherein relief might be denied—and the judgment thus accorded finality—if the applicant unduly delayed in seeking relief or if there were intervening equities.

The difficulties with traditional doctrine were twofold. First, it was internally contradictory both in tenor and detail, asserting the principle of validity in unqualified terms but admitting the qualifications suggested above. Second, it resolved the problem of primacy between validity and finality in terms that did not, at least overtly, refer to other interests that might determine which of the two principles was given greater effect in a specific situation. If the principles of finality and validity are recognized as both being fundamental, then the only sensible way of choosing between them would appear to be in terms of such other interests.

The modern rule on conclusiveness of determinations of subject matter jurisdiction gives finality substantially greater weight than validity.

Id. (citations omitted).

339. Id. § 12, cmt. b, stating:

The peculiar procedural treatment accorded the issue of subject matter jurisdiction has at least two important consequences. One is to create pressure in favor of classifying as questions of "jurisdiction" various issues that could equally be regarded as "merely" procedural. This is because so classifying an issue transforms it into one that may be raised belatedly, and thus permits its assertion by a litigant who failed to raise it at an earlier stage in the litigation. The classification of a matter as one of jurisdiction is thus a pathway of escape from the rigors of the rules of res judicata. By the same token it opens the way to making judgments vulnerable to delayed attack for a variety of irregularities that perhaps better ought to be sealed in a judgment.

The special treatment of the issue of subject matter jurisdiction is also an obstacle to a rational theory as to when the right to litigate the issue should finally terminate. If the issue can be raised for the first time on appeal, it requires little more to say that it may also be raised by collateral attack at any time. If it can be raised for the first time by collateral attack, it requires little more to say that the issue may also be raised in collateral attack even if it was raised and
A very similar development took place in the doctrine of contempt. In *United States v. United Mine Workers*, the Supreme Court in 1947 upset settled doctrine by holding that it would, in general, sustain the power of a lower court to hold persons in criminal contempt for disobeying the court's orders, even if the court turns out to have had no jurisdiction to issue those orders.

The Justices were aware of the deeper stakes involved. Justice Frankfurter, concurring, wrote that the Constitution set apart a body of men, who were to be the depositories of law. No one can be judge in his own case. That is what courts are for. And no type of controversy is more peculiarly fit for judicial determination than a controversy that calls into question the power of a court to decide.

Short of an indisputable want of authority on the part of a court, the very existence of a court presupposes its power to entertain a controversy, if only to decide, after deliberation, that it has no power over the particular controversy. Whether a defendant may be brought to the bar of justice is not for the defendant himself to decide.

Here, then, the profound if muted challenge to statism implicit in the decision in the original proceeding. That is, if the issue does not become res judicata under the usual rules, it is difficult to see why the issue should ever become res judicata until it has been decided by another court having jurisdiction to determine the jurisdiction of the court in which the judgment was rendered.

---

341. *Id.* at 289-95. The underlying jurisdictional issue was the applicability of the Norris-LaGuardia Act, 47 Stat. 70, or the Clayton Act, 38 Stat. 738, to deprive a federal district court of jurisdiction to enjoin a union and its officers from waging a nation-wide strike when the mines were being operated by the Government pursuant to an emergency presidential order. The court held, in the first instance, that there was no jurisdictional bar to an injunction, since the Norris-LaGuardia and Clayton Acts did not apply to disputes between the Government and its employees. *Id.* at 269-89. Its ruling on the district court’s power to hold the union and its officers in contempt even in the absence of jurisdiction was an alternative holding.


342. Frankfurter actually dissented from the Court’s holding on the underlying jurisdictional issue. *United Mine Workers*, 330 U.S. at 312-28 (Frankfurter, J., concurring). In that sense, he had to face, more starkly than the majority, the implications of his view of the contempt question.

343. *Id.* at 308-10 (Frankfurter, J., concurring).
classic Idea of Jurisdiction is dissolved away. By contrast, Justice Rutledge wrote in dissent that:

No right is absolute. Nor is any power, governmental or other, in our system. . . . [U]nder "a government of laws and not of men" such as we possess, power must be exercised according to law; and government, including the courts, as well as the governed, must move within its limitations.

On a lesser front, courts have retreated from the proposition...
that they must always decide jurisdictional issues before reaching the merits.\textsuperscript{347} The reasons offered center on some unsurprising considerations—such as judicial efficiency—and some more ironic ones—such as “restraint.”\textsuperscript{348} And courts have relaxed the tie, already compli-

\textsuperscript{347} For examples of federal cases, see Norton v. Mathews, 427 U.S. 524, 530-31 (1976) (Because holding against appellant on the merits would have same effect as dismissing appeal on jurisdictional grounds; “[i]t follows that there is no need to decide the theoretical question of jurisdiction.”); McClucas v. De Champlain, 421 U.S. 21, 32 (1975) (doubting whether the District Court had jurisdiction, but nevertheless deciding case on the merits); Cross-Sound Ferry Servs. v. ICC, 934 F.2d 327, 333 (D.C. Cir. 1991); Browning-Ferris Indus. v. Muszynski, 899 F.2d 151, 154-160 (2d Cir. 1990); Foster v. County of Santa Barbara, 896 F.2d 1146 (9th Cir. 1990) (unresolved factual dispute as to whether appellant filed timely notice of appeal; court chose to ignore jurisdictional question and resolve case on merits); Edwards v. Carter, 380 F.2d 1055, 1056-57 (D.C. Cir. 1978), cert. denied, 436 U.S. 907 (1978) (jurisdictional issues in separation of powers case were complex; court assumed the existence of jurisdiction, in part because the merits were clearly against the party seeking jurisdiction).

For examples of state cases, see People v. Steinbrook, 149 Cal. Rptr. 479 (1978); Food Basket, Inc. v. Amalgamated Meat Cutters & Butcher Workmen of N.A., 293 S.W.2d 861 (Ky. 1956):

Proceeding on the assumption, arguendo, that jurisdiction of a cause of action for damages in conjunction with a suit for injunctive relief remains in the state court after the National Labor Relations Board has assumed jurisdiction of the issue of unfair labor practices, we come to the question of whether the allegations of the complaint state a cause of action for damages.

Id. at 862.

For particularly complete discussions of the topic, citing cases, see Browning-Ferris Indus., 899 F.2d 151. The principal scholarly discussion is Comment, \textit{Assuming Jurisdiction Arguendo: The Rationale and Limits of Hypothetical Jurisdiction}, 127 U. PA. L. REV. 712 (1979).

A handful of judges have severely criticized the so-called doctrine of “hypothetical jurisdiction.” \textit{See, e.g.}, Clow v. U.S. Dept. of Housing and Urban Development, 948 F.2d 614, 619 (9th Cir. 1991) (Scanlon, J., dissenting); \textit{Cross-Sound Ferry Servs.}, 934 F.2d at 342-45 (Thomas, J., dissenting).

The doctrine of “hypothetical jurisdiction” should, however, be sharply distinguished, as some have failed to do, from the more complex, but also more benign, challenge posed by cases in which jurisdictional and merits issues overlap, \textit{see supra} part III.A.2.f., or in which a court assumes one jurisdictional result, but then dismisses on another, \textit{also jurisdictional}, ground. Then-Judge Clarence Thomas’s dissent in \textit{Cross-Sound Ferry Servs.}, 934 F.2d 327, argued, though not completely convincingly, that Supreme Court cases like Norton v. Matthews, \textit{supra}, can be distinguished on these or other grounds.

\textsuperscript{348} \textit{See Browning-Ferris Indus.}, 899 F.2d at 158-59; \textit{Comment, Assuming Jurisdiction, supra} note 347, at 730. The restraint arguments center on the imperatives to avoid difficult constitutional questions (when jurisdictional issues take that form) and to avoid deciding difficult questions in the absence of hard-edged controversies.

Courts and commentators have emphasized that “hypothetical jurisdiction” should only be assumed rarely, when the jurisdictional questions are particularly difficult, the merits issue particularly easy, and the consequences for the parties (of reaching the same conclusion on merits rather than jurisdictional grounds) particularly minimal. \textit{See, e.g.}, \textit{Clow}, 948 F.2d at 616-19; \textit{Comment, Assuming Jurisdiction, supra} note 347, at 753.
cated even in the heyday of the influence of the Idea of Jurisdiction, between judicial immunity and the presence of jurisdiction.

For all that has happened to the Idea of Jurisdiction, though (and a longer litany is possible), it would be a mistake to imagine that it is dead. Justice Frankfurter himself in United Mine Workers invoked the central metaphor of the Idea of Jurisdiction when he wrote that a judge whose claim to jurisdiction was frivolous "would not be acting as a court. He would be a pretender to, not a wielder of, judicial power."

More generally, the judicial attitude to jurisdiction retains both the rhetoric and the psychology of power and powerlessness. And most of the specific doctrines surrounding the Idea of Jurisdiction remain more or less intact. What is evident in the erosion that has

349. See generally supra note 59.
351. United States v. United Mine Workers, 330 U.S. 258, 310 (1947) (Frankfurter, J., concurring). The surrounding passage is worth quoting more extensively:

Short of an indisputable want of authority on the part of a court, the very existence of a court presupposes its power to entertain a controversy, if only to decide, after deliberation, that it has no power over the particular controversy. Whether a defendant may be brought to the bar of justice is not for the defendant himself to decide.

To be sure, an obvious limitation upon a court cannot be circumvented by a frivolous inquiry into the existence of a power that has unquestionably been withheld. Thus, the explicit withdrawal from federal district courts of the power to issue injunctions in an ordinary labor dispute between a private employer and his employees cannot be defeated, and an existing right to strike thereby impaired, by pretending to entertain a suit for such an injunction in order to decide whether the court has jurisdiction. In such a case, a judge would not be acting as a court. He would be a pretender to, not a wielder of, judicial power.

That is not this case. It required extended arguments, lengthy briefs, study and reflection preliminary to adequate discussion in conference, before final conclusions could be reached regarding the proper interpretation of the legislation controlling this case. A majority of my brethren find that neither the Norris-LaGuardia Act nor the War Labor Disputes Act limited the power of the district court to issue the orders under review. I have come to the contrary view. But to suggest that the right to determine so complicated and novel an issue could not be brought within the cognizance of the district court, and eventually of this Court, is to deny the place of the judiciary in our scheme of government. And if the district court had power to decide whether this case was properly before it, it could make appropriate orders so as to afford the necessary time for fair consideration and decision while existing conditions were preserved. To say that the authority of the court may be flouted during the time necessary to decide is to reject the requirements of the judicial process.

Id. at 310-11.
occurred, though, is a battle of perspectives. And what is even more evident is serious skepticism about the ability of legal words to define their own reality, and carve out their own categories.

Jurisdictionality, to the modern court, is real. It is not illusory as some might have it. But its reality is most secure when moored to something beyond the legal imagination itself, be it a theory of judicial management, substantive imperative, or hard social fact.

C. The Loss of Faith

The sum of the story, then, is this. The doctrine of jurisdictional time limits is not entirely new or surprising. Some of its early inspirations are typical examples of standard unreflective literalism. But over the course of this century, not generally known for its legal literal-mindedness, courts have perpetuated the doctrine. More than that, they have expanded and entrenched it. As often as not, they have based it on a misreading of precedents that were grounded in more limited, more specific, often more sensible, doctrines. And they allowed tendencies that might have led in a different direction to atrophy.

Meanwhile, the Idea of Jurisdiction, the putative source for the doctrine of jurisdictional time limits, has in other regards been eroding. Some of its most important doctrines are in doubt. Others are in explicit retreat.

On its face, this looks like a contradiction. In insisting on the rigid interpretation of jurisdictional time limits, the courts are trying to take jurisdiction more seriously. They want to treat the jurisdictionality of legal rules as something important, and real. But in eroding other doctrines, the courts are taking jurisdictionality less seriously. They are treating jurisdictionality as something less important, less real.

1. Common Themes

But this might not be a contradiction at all. As the Idea of Jurisdiction loses some of its vigor, courts might feel driven to invest jurisdictionality with some meaning—any meaning. The doctrine of jurisdictional time limits serves that use, if no other. At least part of the confusion over whether the term “jurisdictional” has one meaning or many—the homonymy question—might be the product of such groping and fumbling.

Of course, this does not explain why courts would choose this meaning, and not another. Nor does it explain the apparent opposite
movements toward and away from formalism. That will require some
more work, and some more speculation.

Note that the erosion of the Idea of Jurisdiction and the rise of
the doctrine of jurisdictional time limits are both variations on the
theme that jurisdiction is a "hard fact." The extension of jurisdiction
to determine jurisdiction, and other doctrinal changes, imply an empir-
ic model of jurisdiction. In that model, "actual" or operative juris-
diction is not a legal construct but an unmediated social reality, the
hard fact of effective power.

The doctrine of jurisdictional time limits presses the theme from
the other end. It seeks, as suggested earlier, to shape legal rules
themselves into hard facts. Indeed, its goal is not just to construe
jurisdiction as a social fact, but also as something even harder—a fact
of nature. Like a fact of nature, a jurisdictional time limit is immune
to the play of language. It admits of no construction, no role for
human, legal cunning.

Another explanation might be this: The most serious, sustained,
doctrinal inroads into the Idea of Jurisdiction are deeply, insistently,
statist. Their role is to vindicate the exercise of official power, even
against the constraints of law. Particularly in defending a broadened
jurisdiction to determine jurisdiction, for example, courts speak, re-
peatedly, of the importance of "finality." That is to say, precisely
where the Idea of Jurisdiction flirted with skepticism about state
power, modern teaching has come to the rescue.

The doctrine of jurisdictional time limits is also profoundly
statist. Its defenders also invoke "finality." More than that, it is a
tribute to bureaucratic order, the exercise of power through the rheto-
ic of powerlessness.

Another convincing account might be this: On its face, the con-
solidation of the doctrine of jurisdictional time limits looks like a
triumph of formalism. The changes in other jurisdictional doctrines
look like blows to formalism. Yet, more than anything, both move-
ments really represent a flattening of formal distinctions, a flattening
of doctrine.

2. Equity, the Spirit of the Law, and Interpretation

These explanations go some way to dissolving the apparent con-
tradiction. But underneath that resolution of contradiction lurk even
deeper tensions and ambiguities, forces at work in the mood of the
legal culture.

The cracks in the constellation of legal rules surrounding the
Idea of Jurisdiction do not—I said this before—mean a complete disavowal of that Idea, or an embrace of either a managerial or a legal realist vision of law. Too much legal talk and deed, including the talk and deed of the law of jurisdiction, point the other way. But these cracks do embody the influence of movements such as legal realism. More to the point, they reveal a declining faith in the ability of the legal imagination to fashion its own truths, to establish a normative framework not easily reducible to other frames of reference.

The doctrine of jurisdictional time limits is, I think, born of a similar loss of faith. To see why, consider for a moment this significant jurisprudential puzzle: Why should a court ever apply a statute against its literal, apparently unambiguous, meaning? I discussed this question briefly in considering Justice Black's opinion in Teague, but I want now to take a different cut at the problem. The question represents only the extreme case in a much larger set of issues in the theory and practice of statutory construction, which I do not want to rehash here. Yet, thinking about that extreme case might illuminate the larger problem, and will at least contribute some vocabulary, of a self-consciously old-fashioned sort, to its consideration.

Literalism, particularly in the apparent absence of ambiguity, has its place in legal interpretation. The pendulum of legal history has also swung back and forth on the legal culture's attitude to literalism. But an 1826 Supreme Court opinion said this about why it might deviate from the literal sense of a statute: "[E]quity, as applied to the construction of statutes by an eminent writer, means, 'the correction of that wherein the law, by reason of its universality, is deficient'; or, as another defines it, 'interpreting statutes by the reason of them.'" 353

Consider the two accounts the Court cites: (1) "[t]he correction of that wherein the law, by reason of its universality, is deficient"; and (2) "[i]nterpreting statutes by the reason of them." Read carefully, they seem to say two different things.


353. Shelby v. Guy, 24 U.S. 361, 368-69 (1826). This attitude to statutory interpretation has had a(111,804),(141,843) mixed, and varying, reception from the courts. For very general accounts, see Reed Dickerson, The Interpretation and Application of Statutes 213-16 (1975); Singer, supra note 93, at ch. 54.
The Court almost certainly took the first formula from Aristotle, probably by way of Grotius. It reflects the famous Aristotelian or "philosophical" notion of equity, distinct from, though related to, the more technical notion of equity jurisprudence in Anglo-American legal tradition, addressed earlier. Human language and human foresight are imperfect. Though general laws are necessary, so is concern for specific justice, and, by extension, justice in any class of cases not adequately dealt with by the received text. Aristotle believed that even good laws, by virtue of the necessity of drafting them in general terms, could sometimes conflict with justice.


355. Most directly, as discussed infra text accompanying note 372, the court probably took the idea from Blackstone. See WILLIAM BLACKSTONE, I COMMENTARIES ON THE LAW OF ENGLAND *62 (1765) (citing HUGO GROTIUS, DE JURIS POHII § 3).


358. See supra text accompanying notes 192-96.

359. ARISTOTLE, Nicomachean Ethics, supra note 354:

What creates the problem is that the equitable is just, but not the legally just but a correction of legal justice. The reason is that all law is universal but about some things it is not possible to make a universal statement which shall be correct... Hence the equitable is just, and better than one kind of justice—not better than absolute justice but better than the error that arises from the absoluteness of the statement. And this is the nature of the equitable, a correction of law where it is defective owing to its universality. In fact, this is the reason why all things are not determined by law, viz. that about some things it is impossible to lay down a law, so that a decree is needed.

Id. at 1137b.

Plato expressed a similar idea in his Statesman, though his view of the role of equity was much more imperious than Aristotle's:

[The best thing of all is not that the law should rule, but that a man should rule, supposing him to have wisdom and royal power... because the law cannot comprehend exactly what is the noblest or most just, or at once ordain what is best for all. The differences of men and actions, and the endless irregular movements of human beings, do not admit of any universal or simple rule. No art can lay down any rule which will last forever... but this the law seeks to accomplish; like an obstinate and ignorant tyrant.

And he believed—more or less—that in such cases, it might be up to the enforcer of the law to make an exception and set aside the law in favor of those principles of justice.

Under this view, equity or "equitable construction"\(^{360}\) is not a form of interpretation. It is what courts sometimes do when interpretation has served them badly. The "equitable," states Aristotle, "is just, but not the legally just but a correction of legal justice. . . . In fact, this is the reason why all things are not determined by law, viz. that about some things it is impossible to lay down a law, so that an equitable decree is needed."\(^{361}\)

The Court probably adopted the second formulation from Blackstone:

But, lastly, the most universal and effectual way of discovering the true meaning of a law, when the words are dubious, is by considering the reason and spirit of it; or the cause which moved the legislator to enact it. . . . From this method of interpreting laws, by the reason of them, arises what we call equity.\(^{362}\)

In this account, which finds echoes in the Roman legal thought of Cicero\(^{363}\) (and the more contemporaneous English accounts of, among others, St. German\(^ {364}\) and Plowden\(^ {365}\)) particular justice is not a thing apart from general law. It is the "true meaning" of the law itself. To get a non-literal reading, the court does not set aside the law, but plumbs it. Judges have many tools for reading statutes. This is one of them. As in the Aristotelian view, the imperatives of apparently unambiguous language must sometimes give way to the imperatives of principle. Here, though, the balance is internal to the process of interpretation.

Many sources of our interpretive tradition employ, even more clearly than Blackstone, the metaphor of body and soul. A law's words are its body; its "sense and reason" is its soul.\(^ {366}\) Body and

\(^{360}\) See generally Singer, supra note 93, at ch. 54.

\(^{361}\) Aristotle, Nicomachean Ethics, supra note 354, at 1137b.

\(^{362}\) Blackstone, supra note 355, at *61.

\(^{363}\) See Sharon K. Dobbins, Equity: The Court of Conscience or the King's Command, The Dialogues of St. German and Hobbes Compared, 9 J.L. & REL. 113, 117 (1991) [hereinafter Dobbins, Equity] ("Aequitas," for Cicero, "is the spirit of justice which interprets the law according to right reason, rather than to the words alone.").

\(^{364}\) See id.

\(^{365}\) See infra notes 366, 371 and accompanying text.

\(^{366}\) Eyston v. Studd, 75 Eng. Rep. 688 (P. 1574);

From this judgment and the cause of it, the reader may observe that it is not the...
soul are distinct, but they are also part of a whole. I happen to find this metaphor, with its antinomian theological resonances, unsat-

words of the law, but the eternal sense of it that makes the law, and our law (like all others) consists of two parts, viz. body and soul, the letter of the law is the body of the law, and the sense and reason of the law is the soul of the law, quia ratio legis est anima legis.

Id. at 695-99 (quoting Plowden's comments).

For American judicial opinions explicitly using this metaphor, see, e.g., Civil Rights Cases, 109 U.S. 3 (1883):
The opinion in these cases proceeds, as it seems to me, upon grounds entirely too narrow and artificial. The substance and spirit of the recent amendments of the constitution have been sacrificed by a subtle and ingenious verbal criticism. "It is not the words of the law but the internal sense of it that makes the law. The letter of the law is the body; the sense and reason of the law is the soul." Constitutional provisions, adopted in the interest of liberty, and for the purpose of securing, through national legislation, if need be, rights inhering in a state of freedom, and belonging to American citizenship, have been so construed as to defeat the ends the people desired to accomplish, which they attempted to accomplish, and which they supposed they had accomplished by changes in their fundamental law. By this I do not mean that the determination of these cases should have been materially controlled by considerations of mere expediency or policy. I mean only, in this form, to express an earnest conviction that the court has departed from the familiar rule requiring, in the interpretation of constitutional provisions, that full effect be given to the intent with which they were adopted.


367. In its famous formulation: "for the letter killeth, but the spirit giveth life." 2 Corinthians 3:6 (King James). The passage in context, in a more modern translation, reads: "[O]ur sufficiency is from God, who has qualified us to be ministers of a new covenant, not in a written code but in the Spirit; for the written code kills, but the Spirit gives life." 2 Corinthians 3:5-6 (Revised Standard).

At least some cases and other legal sources, in employing the image of "letter" and "spirit," have explicitly made the link to Paul's more pointed theological claim. See, e.g., Hust v. Moore-McCormack Lines, 328 U.S. 707, 724 (1946) (holding that respondent's argument could not be justified "unless by inversion of that wisdom which teaches that 'the letter killeth, but the spirit giveth life'"); United States ex rel. Marcus v. Hess, 317 U.S. 537 (1943):

I am sure it was never in the mind of Congress to authorize this misuse of the statute. If ever there was a case where the letter killeth but the spirit giveth life, it is this. Construed to the letter as the Court does, it becomes an instrument of abuse and corruption which can only be stopped by the timely intervention of Congress.

Id. at 559 (Jackson, J., dissenting); Riggs Nat'l Bank v. District of Columbia, 581 A.2d 1229 (D.C. 1990):

We were admonished of old, according to Judge Alexander Holtzoff, that "[t]he letter killeth but the spirit giveth life." On the question [at bar], we conclude that
is satisfactory. But it does make the point.

Yet another metaphor—still inept to my mind but yet more vivid—is:

The law may be resembled to a nut which has a shell and a kernel within; the letter of the law represents the shell, and the sense of it the kernel. As you will be no better for the nut if you make use only of the shell, so you will receive no benefit by the law if you rely only upon the letter.

Interpretation is the task of breaking open the shell and, without discarding it, finding the truth inside.

There are, then, two ways of understanding anti-literalism in the law. It is either what courts do after they have interpreted a text, and come up short. (The “Aristotelian” view.) Or it is one of many tools at the heart of interpretation itself. (The “Blackstonian” view.) It is either an apology for the exercise of official power over and against law. Or it is a self-confident account of law’s dominion itself.
Having made this distinction, though, I need to emphasize three things about it.

First, one’s view of what it is that courts are doing when they reject literalism does not determine whether or how often they should do so. An “Aristotelian” might think the need for particularized justice crucial and pervasive. Or he might think it a dangerous, often illegitimate, device of last resort. A “Blackstonian” might think that the spirit of a law almost always follows its letter. Or she might not.

Second, the distinction between what I have for my own arbitrary purposes called “Aristotelian” and “Blackstonian” accounts of non-literal construction is not the same distinction as that embedded in the jurisprudential controversy about what I have called residual discretion. The two debates do resonate. To some extent, H.L.A. Hart sounds like Aristotle, and Ronald Dworkin sounds like Blackstone. But note that Aristotelian equity, unlike residual discretion, is not just a matter of gap-filling. To the contrary, it can be a response to laws that are all too clear, all too gapless. Conversely, someone who understands interpretation as reaching to the innards of a law need not believe, with Dworkin, that there is, in principle, only one “right answer” to that search. Residual discretion might, in such a person’s understanding, itself be part of, and not apart from, the interpretive process.

Indeed, I would contend that the difference in views I am trying to identify here is more important than the often sterile bickering over the determinacy of laws. It is important, and profound, because it gets to what we think the law is. And it captures a crucial debate about how much of the job of perfecting justice we think law, and legal conversation, can do.

Finally, and most importantly, our—this bears emphasis—legal culture has traditionally finessed exactly the distinction I have so carefully drawn. The very authors who speak of the “true meaning” or “soul” or “kernel” of the law also cite Aristotle. Even my quo-

371. This is apparent, for example, in the many sides of the debate on “unenumerated rights” in Constitutional law.

372. Consider, for example, Plowden, who, directly after invoking the “shell” and “kernel” metaphor, continued:

And it often happens that when you know the letter, you know not the sense, for sometimes the sense is more confined and contracted than the letter, and sometimes it is more large and extensive. And equity, which in Latin is called equitas, enlarges or diminishes the letter according to its discretion. . . . The sages of our
tation of Blackstone was a cheat. Had I not stopped where I did, it would have yielded this: "From this method of interpreting laws, by the reason of them, arises what we call equity; which is thus defined by Grotius, 'the correction of that, wherein the law (by reason of its universality) is deficient.'" And if the truth be told, Aristotle himself might arguably be read to finesse the very same question.

law, who have had the exposition of our Acts of Parliament, have in these and many other cases, almost infinitely restrained the generality of the letter of the law by equity, which seems to be a necessary ingredient in the exposition of all laws. For (as Aristotle says), cum de toto genere lex dicit, atque aliquid iis in rebus contra generalem legis comprehendere existit, tum percommode accidit up qua parte scriptor missum sit corrigatur, quod etiam legislator, si adesset, admoneret, etiamsi jam legem tulisset. And experience shows us that no law-makers can foresee all things which may happen, and therefore it is fit that if there is any defect in the law, it should be reformed, by equity, which is no part of the law, but a moral virtue which corrects the law.


The discussion then takes yet another turn, to an intentionalist account of statutory meaning very similar to the one Justice Black employed in Teague:

And in order to form a right judgment when the letter of a statute is restrained, and when enlarged, by equity, it is a good way, when you peruse a statute, to suppose that the law-maker is present, and that you have asked him the question you want to know touching the equity, then you must give yourself such an answer as you imagine he would have done, if he had been present . . . And therefore when such cases happen which are within the letter, or out of the letter, of a statute, and yet don't directly fall within the plain and natural purport of the letter, but are in some measure to be conceived in a different idea from that which the text seems to express, it is a good way to put questions and give answers to yourself thereupon, in the same manner as if you were actually conversing with the maker of such laws, and by this means you will easily find out what is the equity in those cases. And if the law-maker would have followed the equity, notwithstanding the words of the law (as Aristotle says he would, for he says, quod etiam legislator, si adesset, admoneret, etiamsi jam legal talisset) you may safely do the like, for while you do no more than the law-maker would have done, you do not act contrary to the law, but in conformity with it.

Id.; cf. infra note 373 (discussing and quoting Aristotle).

373. BLACKSTONE, supra note 355, at *62.

374. Aristotle does write, as I have already quoted, of the "correction" of "defective" law. But he also insists that the "error" for which equity is a cure is not in the law nor in the legislator but in the nature of the thing, since the matter of practical affairs is of this kind from the start. When the law speaks universally, then, and a case arises on it which is not covered by the universal statement, then it is right, where the legislator fails us and has erred by over-simplicity, to correct the omission—to say what the legislator himself would have said had he been present . . . For when the thing is indefinite the rule also is indifinite.

ARISTOTLE, Nicomachean Ethics, supra note 354 at 1137b. At least to an intentionalist view of statutory interpretation, and possibly to some other views as well, this set of passages would sound more like a call for finding enforcing the "true meaning" of a law than for
This does not render the distinction bogus. It does imply, though, that one attribute of the legal imagination is the willingness to eclipse the distinction, to bring into the law and into legal texts that which might otherwise remain outside.

Surely, a pure "Aristotelian" account of the relation of law to justice is sometimes right. To assume otherwise would be to ascribe to secular law a perfection that no human artifact deserves. But the legal imagination seeks, as it creates a distinctly legal order of things, to put off as long as possible any need to declare failure and abandon that intra-legal, interpretive conversation.

3. A Narrative of Literalism and Anxiety

Here, then, is the connection to the perhaps otherwise mundane topic of jurisdictional time limits. Consider the following to be a tentative, partial, but I think more satisfactory explanation of what is going on, something between serious historical analysis and homiletic reconstruction:

Recall the argument that a court could not relax the literal terms of a jurisdictional time limit unless it had jurisdiction in the first place, and it could have no jurisdiction in the first place unless the literal terms of the time limit so allowed. This argument sounded silly, or just murky, at the time. But now it begins to fall into place.

Assume a modern judicial culture that believes in infusing justice or right results into the work of applying statutes or constitutions or other legal texts. Assume also that this culture has lost much of its trust in the special power of legal words and the special potential of legal imagination. It therefore takes what I have called an "Aristotelian" as against a "Blackstonian" view of the task of doing justice or seeking right results. Moreover, this judicial culture expands that view, probably beyond any meaning Aristotle himself meant to give to it, to take into account its own difficulties with language. Thus, the judicial culture believes that words can be either too clear for com-
fort, or too ambiguous to be helpful, and that in either event, it must rise from the text, rather than dig under it, to do its job. It also supposes sometimes that this is itself the legal task, and not, as Aristotle would say, a useful antidote to law. The judicial culture might not articulate this; it might not even fully understand it. But at some level, this is what the culture believes, at least some of the time. And this is what friend and foe alike would call judicial "activism."

Assume also, however, that this belief has an undercurrent of anxiety to it. For such judges are also concerned about their legitimacy, and are not entirely comfortable with what they think they are doing. Also, they identify jurisdiction as essential to legitimacy. A court with jurisdiction can play the Aristotelian game; a court without jurisdiction must think twice.

Here, then, is the problem: If a jurisdictional statute appears clear and unforgiving, then a court has no room to play its activist role. Many jurisdictional statutes are not clear. But jurisdictional time limits—and similar such rules—are different. They seem to leave no room. And if the court doubts the lawyerly faith in the power of words to go beyond themselves, that ends the matter. Hence, we see the worry over discretion, both affirmative and residual. Therefore, we have the concern over resorting to doctrines like equitable estoppel, which, for all their differences, still sound too much like reflections of the philosopher's equity. Therefore, we experience the generalized anxiety that I tried to deflate earlier, from what I can now say was a "Blackstonian" perspective on both the duty and the promise of interpretation. Thus also, the thematic tie exists that might, in part, connect some of the speculations stated earlier: the "hard facts" view of jurisdiction, the statism of current doctrine, the flattening of the texture of legal analysis.

But how could judges believe this if they have also been eroding the Idea of Jurisdiction? Because, as I have emphasized, they still believe in the essence of the Idea. They have only lost faith in the power of the legal imagination to stand by its own account of jurisdiction.

Put another way, our judicial culture, and our larger legal cul-

377. See supra parts III.B.3.a, III.B.5.b.
378. See supra part III.B.3.b.
379. See supra part III.B.3.d.
380. See supra text accompanying notes 336-37 and part IV.C.1.
381. See supra text accompanying notes 340-51 and part IV.C.1.
382. See supra part IV.C.1.
ture, might not fully appreciate what jurisdiction is, or how it is a product of a distinctly legal discourse. But they do know it is important.

A more cynical take: Courts might be willing to entertain an escape from law, even in jurisdictional matters, when the stakes are large and systemic. In those instances, activism will override anxiety. But when the stakes are smaller, less systemic and more individualized, anxiety overrides activism. So the very pettiness of the issue of jurisdictional time limits assures its importance to an understanding of the legal culture.

4. A Neurotic Turn

In reality, this really reveals deep tensions in modern legal culture. The legal culture’s anxiety over its own legitimacy has many layers which are difficult to peel. What I have called the “Aristotelian” account of judicial activism, though it finds support in some currents of legal theory, also runs counter to the legal culture’s conventional account of the sources of its own legitimacy. Strangely enough, while it conforms to those strains in modern thought that suggest that law is just politics or that legal language is hopelessly indeterminate, it also runs counter to the equally modern, and not entirely contradictory, emphasis on the complexity and contingency of all language, particularly legal language, and the centrality of the interpretive enterprise to making sense both of law and of politics.

The legal psyche in conflict, then, perhaps wants, on the whole, to think it is proceeding in “Blackstonian” terms, plumbing the law for its inner meaning. But its crisis of confidence in the power of the legal imagination—the power to construct a legal language and find in it depth and breath—leads it to find solace in a more “Aristotelian” account. But, that account, as to both its pretensions and its limitations, is also the source of much of the legal culture’s anxiety. The doctrine of jurisdictional time limits, I would submit, is just one symptom of this turmoil.

I earlier compared the doctrine of jurisdictional time limits to a superstition, like knocking on wood. A superstition can also be what psychiatrists and psychologists call obsessive-compulsive behavior; 383

383. See E.M. COLES, CLINICAL PSYCHOPATHOLOGY; AN INTRODUCTION (1982): “Obsessive-compulsive” refers to an extreme conscious preoccupation with an idea or group of ideas (obsession) and/or the inability to prevent certain actions (compulsion). It may be experienced as a strong urge or impulse to perform meaning-
a form of neurosis. I do not want to push the psychiatric analogy too far. I take it as a casual metaphor, nothing more. But the resemblance is uncanny.

The irony of the story is this: An altogether legal realist or political and managerial account of law would probably have little patience with the doctrine of jurisdictional time limits. It would treat jurisdictionality as nothing more than a functional label, serving probably several specific purposes, and would be skeptical of the claim that jurisdictional time limits rendered courts "powerless" to act.

At the same time, an account of law that unapologetically embraced the richness of legal hermeneutics would also be skeptical of the doctrine of jurisdictional time limits. It could never stop itself from asking the same questions that Justice Black asked in his dissent in *Teague*. The doctrine of jurisdictional time limits is not the product of a legal culture serene in either one of these commitments. It is the product of a legal culture caught between world views, anxiously trying to find its way.

5. Last Thoughts

So what is this "legal imagination"? If a time limit restricts action to "ten days" or "thirty days," is there any legitimate way to avoid the import of those words? In other words, is there any way except by sinking to nihilism, or rising to a standard of justice external to the legal conversation?

Additionally, what is the relationship between the two aspects of the law’s trust in the power of words, and in the legal imagination? The first aspect is the power of legal words to impart principle, to guide specific decisions, to find in themselves reflections of fairness and justice. The second aspect is the power of legal words to create their own reality, to build a discourse not reducible to any other. What do these two strands have to do with each other, and how does

---

384. "According to the psychoanalytic conception of a neurosis, the over abnormal behavior is a defense mechanism, an indication or symptom of an underlying conflict which serves to protect the individual from being overwhelmed by the anxiety that is associated with that conflict." *Id.* at 364 (citations omitted).

confidence (or loss of confidence) in one strand interact with the level of confidence in the other?

These questions can be answered together. Earlier, I called the body and soul metaphor for legal interpretation unsatisfactory. Its dualism too easily leads to reductionism. The metaphor of a nut and its kernel is better, but still not good enough.

The truth, I think, comes closer to this: When we break through the shell of words, what we find, or should find, are—more words. That is to say, a legal text is not just the stage curtain for the real drama underneath. But every legal text holds a network of connections to other texts, and to the principles in those texts.

Recall the argument that canons of strict and liberal construction are both species of plain statement rule, and can often be two ways of describing the same plain statement rule. Part of the point was that any interpretive canon—strict or liberal—is an effort to connect one legal text to its surrounding context. And it is that effort at making connections, setting text into context, with or without specific canons, that constitutes going to the “soul” or “kernel” of a piece of law.

How, except by way of either nihilism or extrinsic, “Aristotelian,” standards of justice, could we ever read a jurisdictional time limit other than literally? By noticing that even the apparently clearest legal language loses some of that certainty when the reader’s field of vision expands to take in all the other relevant texts, whether statutory or not, that the law has collected.

What is the deeper connection between the two aspects of the legal imagination? Just this: To believe in a distinctive legal reality is to posit a world of words, a field of vision—a web of truth—that can stand up to other forms of truth. To believe in the power of words to impart principle and guide decisions is to posit that the legal web is also of a piece, that it can support and inform each of its parts. It is to believe that, strengthened by those internal connections, legal truth can, in its own way, assimilate standards of justice and rationality that are embedded in the wider human conversation.

386. See supra text accompanying notes 366-68.
387. See supra text accompanying note 369.
388. Supra text accompanying notes 246-47.
389. What I have in mind is not altogether different from Guido Calabresi’s idea of a “legal landscape.” See GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 6, 163, 165 (1982). It is also related, if with substantial caveats, to Dworkin’s account of legal reading. See, e.g., DWORKIN, supra note 262; DWORKIN, supra note 266.
The problem with the doctrine of jurisdictional time limits is not, I have said repeatedly, that it construes some time limits strictly. Law is not always warm and fuzzy; sometimes it must enforce its rules mercilessly. The problem with the doctrine of jurisdictional time limits is the pretense that a distinctive legal idea—jurisdiction—whose real import is that it subordinates state institutions to law rather than the other way around, would yield a result that cuts legal language off from the deepest resources that law can provide to fix its own meaning. This in itself is not a tragedy. But it might be a symptom of one.

390. "Fix" means both "determine" and "repair." The pun, which I hope captures some of the creative tension between what I have called the "Blackstonian" and the "Aristotelian" accounts of non-literal interpretation, is intended.