JURISDICTIONALITY AND THE STATES

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ABSTRACT

Procedural rules govern every aspect of litigation, from filing times to its contents. Noncompliance with a rule is unwanted, but its effect is limited. The parties generally enforce it, subject to waiver or forfeiture. But noncompliance with a jurisdictional rule—a procedural rule that affects a court's subject matter jurisdiction—is a whole new ballgame. Such noncompliance may be raised at any time, and a court must address it on its own and dismiss the claim, regardless of the litigation's stage. Realizing the strategic opportunity, parties often argue belatedly that rules not complied with are jurisdictional. And federal courts have surprisingly played fast and loose with this label, accepting such arguments without much analysis.

In the past two decades, the U.S. Supreme Court has endeavored to ward off the over-labeling of rules as jurisdictional through narrowing the meaning of the term jurisdiction. But the Court's success is questionable, as the

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Court's repeated adjudication of the question reveals. Accordingly, scholars have attempted to assist the Court in reworking the term's meaning. Yet one source has been overlooked in this context: state courts. State courts repeatedly address the boundaries of the term jurisdiction, resolving thorny questions of timeliness and accurate filing that may have the same harsh consequences the Court laments if found jurisdictional.

This Article explores this uncharted territory. Drawing on a hand-collected database of 335 opinions from across the nation, this Article makes three contributions. First, it shows that most states reject or ignore the Court's jurisprudential shift. It then describes the state courts' alternative adjudicatory patterns. Second, it contemplates reasons why states have different approaches to the matter. Finally, this Article suggests lessons that the Supreme Court could gain from state courts.

INTRODUCTION

Procedural rules govern every aspect of litigation. This list of rules includes filing times, pre-conditions to filing, content requirements, and even conditions to

maintain a court case.[1] The parties are those who usually enforce compliance with procedural rules.[2] They must do so in a timely fashion, usually before trial on the merits.[3] Otherwise, a court would deem any objection waived or forfeited.[4]

But not all procedural rules are the same. If a procedural rule is part of a court's subject-matter jurisdiction, or in short—a jurisdictional rule—courts treat compliance with it differently. Subject-matter jurisdiction has a unique status in our legal system.[5] Courts cannot hear a case without subject-matter jurisdiction and must dismiss it. They lack the power and authority to adjudicate it.[6] And so, unlike other issues, arguments on subject-matter jurisdiction may be raised at any point,[7] they can never be waived or forfeited, and courts are obligated to raise them on their own motion if parties have not done so.[8]

Jenifer Arbaugh's case provides a good case study of what a suggestion that a procedural rule is jurisdictional could do to a case.[9] Arbaugh alleged that one of the owners of her employer, the Moonlight Café in New Orleans, Louisiana, sexually assaulted her and "precipitated her

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1 Perry Dane, *Sad Times: Thoughts on Jurisdictionality, the Legal Imagination, and Bowles v. Russell*, 102 NW. U. L. REV. COLLOQUY 164, 165 (2008); Ziv Schwartz, *Fixing a Jurisdictional Revolution*, 90 MISS. L.J. 729, 738–39 (2021).

2 *See* Henderson ex rel. Henderson v. Shinseki, 562 U.S. 428, 434-35 (2011).

3 RESTATEMENT (SECOND) OF JUDGEMENTS §11 cmt. e (1982)

4 Kontrick v. Ryan, 540 U.S. 443, 459 (2004).

5 Sebelius v. Auburn Reg'l Med. Ctr., 568 U.S. 145, 153 (2013).

6 Cf. Manrique v. United States, 137 S. Ct. 1266, 1271 (2017).

7 Fort Bend Cty. v. Davis, 139 S. Ct. 1843, 1848-49 (2019); Auburn, 568 U.S. at 153.

8 Gonzalez v. Thaler, 565 U.S. 134, 141 (2012).

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

constructive discharge."[10] A jury found in her favor,[11] a rarity in employment discrimination litigation.[12] But two weeks after her win, her employer, Y&H Corporation, filed a motion to dismiss for lack of jurisdiction because it claimed it did not employ 15 employees, meaning it was not considered an "employer" under the discrimination law.[13]

If Title VII's numerosity requirement—the rule that to be covered by the statute, an employer must employ 15 employees—was merely procedural, Y&H was too late and most likely forfeited its right to assert it.[14] But if it were a condition for the trial court's jurisdiction over the case, Arbaugh's rare win would be nullified after several years of litigation.

The question before Arbaugh's trial judge and in general is how to identify procedural rules that constrain a court's subject-matter jurisdiction. Without clear identification, it would be easy to classify many rules as jurisdictional and possibly disrupt the ordinary course of litigation. And indeed, for two centuries, the United States Supreme Court has routinely assigned a "mandatory and jurisdictional" label to procedural rules without much

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[10] Arbaugh brought claims under Title VII of the Civil Rights Act of 1964, 42 U. S. C. §2000e *et seq.*, and Louisiana law. *See* Arbaugh, 546 U.S. at 507.

[11] Arbaugh, 546 U.S. at 507.

[12] *See* Laura Beth Nielsen et al., *Individual Justice or Collective Legal Mobilization? Employment Discrimination Litigation in the Post Civil Rights United States*, 7 J. EMPIRICAL LEGAL STUD. 178, 187 (2010) (employees' win rate of 33% after a full-blown trial, which only few cases advance to).

[13] 42 U.S.C. § 2000e(b).

[14] During trial, Y&H did not list the numerosity requirement as a "contested issue[] of fact," nor did it raise it at any point. *See Arbaugh*, 546 U.S. at 507–08. As "forfeiture" is "the failure to make the timely assertion of a right," Kontrick v. Ryan, 540 U.S. 443, 458 n.13 (2004), it is the correct term to describe the situation.

analysis.[15] And following that approach, the trial court vacated its judgment in favor of Arbaugh and dismissed the case for lack of jurisdiction, with prejudice.[16] The court of appeals affirmed.[17]

But Arbaugh got somewhat lucky. In recent years, the Court felt this cursory and profligate assignment of jurisdictionally is unworkable because it spells consequences too "harsh" for litigants and courts.[18] Litigants may have their case dismissed late in the game without considering effort and resources.[19] Courts must circumvent adversarial norms and raise and decide a question the parties "either overlook or elect not to press."[20] And voiding Arbaugh's win may well be a textbook example.

The Court explained that labeling a rule "jurisdictional" meant that it affected subject matter jurisdiction. And so, for "[c]larity," courts and litigants should limit the jurisdictional label to rules that "deliniat[e] the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority."[21] Accordingly, the Court ventured on a path to "discipline the use" of the term.[22] In its attempt to "ward off" this pattern,[23] the Court coined a new term—"claim-processing rules"—meant to

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[15] *See*, *e.g.*, Eberhart v. United States, 546 U.S. 12, 17-19 (2005) (per curiam); Kontrick v. Ryan, 540 U.S. 443, 454-55 (2004) (detailing the practice); Schwartz, *supra* note 1, at 738–39.

[16] Arbaugh, 546 U.S. at 507.

[17] Arbaugh v. Y&H Corp., 380 F.3d 219, 224 (5th Cir. 2004).

[18] Auburn, 568 U.S. at 153; Henderson ex rel. Henderson v. Shinseki, 562 U.S. 428, 434-35 (2011).

[19] Henderson, 568 U.S. at 438.

[20] *Id.*

[21] Kontrick v. Ryan, 540 U.S. 443, 445559 (2004).

[22] Henderson, 568 U.S. at 435.

[23] Sebelius v. Auburn Reg'l Med. Ctr., 568 U.S. 145, 153 (2013).

encompass some subset of procedural rules that are not jurisdictional.[24]

The Court also gradually developed a test to help courts identify jurisdictional rules.[25] First, only Congress can prescribe jurisdictional rules. And so, procedural rules from other sources are not jurisdictional.[26] Second, statutory procedural rules are presumed non-jurisdictional[27] unless there is a congressional "clear statement" about their jurisdictional nature.[28] But the Court also held that "clear statement" does not have any specific characteristics and includes congressional silence in the face of a long line of Supreme Court precedent about a rule's jurisdictional nature.[29]

Returning to Arbaugh's case—in 2006, the Court found that the numerosity requirement is not jurisdictional and that Y&H forfeited its argument.[30] On May 24, 2006, four years after Y&H brought up the claim, the district court granted judgment in favor of Arbaugh.[31]

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[24] Kontrick, 540 U.S. at 455. A Lexis search for the term shows that *Kontrick* was the first time it appeared, and it now appears in over 2000 cases (last accessed March 2, 2022).

[25] Scott Dodson, A Critique of Jurisdictionality, 39 REV. LITIG. 353, 356-57; Schwartz, *supra* note 1, at 754-55.

[26] Nutraceutical Corp. v. Lambert, 139 S. Ct. 710, 714 (2019); Hamer v. Neighborhood Hous. Servs. of Chicago, 138 S. Ct. 13,17 (2017).

[27] United States v. Kwai Fun Wong, 135 S. Ct. 1625, 1631-32 (2015).

[28] *Id*. Dodson argues that *Hamer* held that statutory rules regarding time to file a notice of appeal between Article III courts are jurisdictional. See Dodson – Critique, *supra* note 25, at 357. But this is an expensive read of dicta in *Hamer*. The case dealt with a non-statutory procedural rule and whatever it said about statutory provisions was not repeated in later cases.

[29] Henderson ex rel. Henderson v. Shinseki, 562 U.S. 428, 436 (2011).

[30] Arbaugh v. Y&H Corp., 546 U.S. 500, 515 (2006).

[31] Doc. 77, Arbaugh v. Y&H Corp., Docket No. 2:01-cv-03376 (E.D. La. May 24, 2006).

Scholars have referred to the Court's move, spearheaded primarily by the late Justice Ginsburg, with many superlatives.[32] But despite the peppered compliments, and although Arbaugh got her judgment reinstated, it is uncertain that the Court's efforts have been fruitful.[33] First, The Court's framework is difficult to apply.[34] Second, the Court's own rulings stray from its framework,[35] and it has refused to overrule past rulings that contradict it.[36] Finally, the Court's new framework added questions about procedural rules which the Court left unanswered. These unanswered questions exacerbate the harsh consequences that the Court set out to mitigate.[37] These threads may be why other federal courts have been reluctant to follow the framework where a previous Court or circuit precedent exists.[38]

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[32] *See*, *e.g.*, Scott Dodson, Jurisdiction and Its Effects, 105 GEO. L.J. 619, 624 (2017) ("pathmarking"); Erin Morrow Hawley, The Equitable Anti-Injunction Act, 90 NOTRE DAME L. REV. 81, 88 (2014) ("revisionist"); Erin Morrow Hawley, The Supreme Court's Quiet Revolution: Redefining the Meaning of Jurisdiction, 56 WM. & MARY L. REV. 2027, 2030 (2015) ("momentous").

[33] *See*, e.g., Dane – Sad Times, *supra* note 1, 164, 174; Schwartz, *supra* note 1, at 755-778;.

[34] *See*, *e.g.*, Schwartz, *supra* note 1, 757–785.

[35] *See*, *e.g.*, Gonzalez v. Thaler, 565 U.S. 134, 139–40 (2012) (The Court drove-by two procedural rules, in dicta, designating one as jurisdictional without any meritorious discussion, relying on an unreasoned precedent, and the second one as non-jurisdictional because the parties stipulated so).

[36] *See*, *e.g.*, Gonzalez v. Thaler, 565 U.S. 134, 146 (2012) (refusing to overrule Torres v. Oakland Scavenger Co., 487 U.S. 312, 317-18 (1988)).

[37] Schwartz, *supra* note 1, at 768-75.

[38] *See*, *e.g.,* Luna v. Holder, 637 F.3d 85, 92 (2d Cir. 2011) (Second Circuit simply reciting litigation requirement and concluding, quoting from past precedent, that requirement is jurisdictional); Fedora v. Merit Sys. Prot. Bd., 848 F.3d 1013, 1015-16 (Fed. Cir. 2017) (Federal Circuit Court only discussing precedent to discern the jurisdictional nature of time-bar litigation requirement). There is also currently a circuit split regarding time bar litigation requirements for seeking review of an agency decision. Compare Fedora v. MSPB, 17-557, cert denied on January 16, 2018; Vocke v. MSPB, 17-544, cert denied on January 16, 2018; Musselman v. Department of the Army, 17-570, cert

This confusion in the wake of the Court's shift has called the attention of several scholars who offered various reforms and fixes for the project.[39] One plausible yet overlooked source of inspiration for reform is state courts.[40] Recently, there has been an uptick in scholarly work looking at state courts on various issues: from constitutional protections to civil procedure and non-delegation doctrine.[41] State courts offer a valuable lesson of what works in terms of procedure. Also, most civil litigation in the United States occurs in state courts.[42] They act as laboratories of procedure, and their experience could offer solutions that the Court may not have appreciated.

Some scholars dismiss the importance of state courts in this context, reasoning that federal jurisdiction

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denied on January 16, 2018; and Graviss v. Dep't. of Def., 18-1061, cert denied on May 20, 2019 (finding a sixty-day litigation requirement to seek review of an agency decision regarding employment in 5 U.S.C. §7703(b)(1)(A)—jurisdictional); with Clean Water Action Council of Ne. Wisc., Inc. v. EPA, 765 F.3d 749, 751-52 (7th Cir. 2014) and Herr v. United States Forest Serv., 803 F.3d 809, 813-14 (6th Cir. 2015).

[39] Dodson – Effects, *supra* note 32; Hawley – Quiet Revolution, *supra* note 32; Schwartz, *supra* note 1

[40] One notable recent exception is Alice B. Johnson, To Waive or Not to Waive? Filing Deadlines and Hearing Requests in Administrative Adjudications, 36 J. NAT'L ASS'N L. JUD. 66 (2016) (discussing different state courts' views on jurisdictionality of administrative exhaustion but focusing mainly on Maryland). Another formidable outlier is Perry Dane, Jurisdictionality, Time, and the Legal Imagination, 23 HOFSTRA L. REV. 1, 5-7, 12 (1994) who discusses the history of jurisdictionality waiving state courts to his federal discussion.

[41] *See*, *e.g.*, Zachary D. Clopton, Making State Civil Procedure, 104 CORNELL L. REV. 1 (2018) ("[S]tate courts and state procedure are notably absent from the scholarly discourse."); Zachary D. Clopton, Procedural Retrenchment and the States, 106 CAL. L. REV. 411, 415 (2018); Benjamin Silver, Nondelegation in the States, 75 VAND. L. REV. (forthcoming 2022); JEFFERY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW (2018); Daniel Wilf-Townsend, Assembly-Line Plaintiffs, 135 HARV. L. REV. (forthcoming 2022);

[42] Anna E. Carpenter, Jessica K. Steinberg, Colleen F. Shanahan, Alyx Mark, Studying the "New" Civil Judges, 2018 WIS. L. REV. 249, 252 (2018).

limitations are unique.[43] This position may be overstated State trial courts indeed retain general jurisdiction[44] but still have procedural rules, and state constitutions and legislatures may limit their jurisdiction in certain aspects.[45] Additionally, other state forums do not possess such unlimited authority.[46] They deal with questions of jurisdiction in varied contexts such as administrative agency adjudication,[47] appellate jurisdiction,[48] statutes of limitations,[49] and other statutory conditions to file claims. Like federal courts, state courts deal with the effect of labeling and over-labeling such rules as jurisdictional.[50]

This Article explores this uncharted territory. It does so by drawing on a hand-collected dataset of 335 state court cases that address and analyze the Supreme Court's newly established framework and additional state court cases that examine procedural rules' jurisdictionality without citing the Court's framework. In exploring the lay

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[43] RESTATEMENT (SECOND) OF JUDGEMENTS §11 (1982).

[44] The Minnesota supreme court explained long ago that the district court is "the one court of general jurisdiction" and that "when it has once tried a case according to law, it does not, like certain courts of limited jurisdiction, lose its power to render judgment by mere delay beyond a specified time." Vogle v. Grace, 5 Gil. 232, 233 (Minn. 1861).

[45] *See*, *e.g.*, in Ohio, the legislature limited jurisdiction of trial courts over certain juvenile offenses. It allowed it only if certain transfer conditions from juvenile court are met. Smith v. May, 148 N.E.3d 542 (Ohio 2020).

[46] *See*, *e.g.*, South Dakota holding that it had limited jurisdiction over administrative matters because the legislature granted it appellate instead of original jurisdiction. Hallberg v. S.D. Bd. of Regents, 937 N.W.2d 568 (N.D. 2019).

[47] *See*, *e.g.*, Mun. Health Ben. Fund v. Hendrix, 602 S.W.3d 101 (Ark. 2020); Baldwin v. D.C. Office of Emple. Appeals, 226 A.3d 1140 (D.C. 2020); Okla. Quarter Horse Racing Ass'n v. Okla. Horse Racing Comm'n, 469 P.3d 728 (Okla. 2020).

[48] *See*, *e.g.*, Stewart v. Emp't Sec. Dep't, 419 P.3d 838 (Wash. 2018); Deloatch v. Sessoms-Deloatch, 229 A.3d 486 (D.C. 2020) (time to appeal).

[49] *See*, *e.g.*, Hooper v. State, 838 N.W.2d 775 (Minn. 2013); Fausto v. Sanchez-Flores, 482 P.3d 677 (Nev. 2021).

[50] *See*, *e.g.*, DeShileds v. State, 123 P.3d 540 (Mont. 2006).

of the land in state courts, this Article covers the different approaches state courts take to addressing procedural rules' jurisdictionality. For example, state courts apply different statutory interpretation tools and rely on precedent to various degrees to find if a procedural rule constrains their subject-matter jurisdiction.

Because most state courts' frameworks differ from the Supreme Court's approach, this Article suggests several explanations for the differences. First, it details a lesser documented history of state courts' attempts to discipline their jurisdictionality assignment long before the Court's attempt.[51] Second, this Article focuses on how states view the term "jurisdiction" differently than the Court[52] and how they have created specific terminology different from the Court's, making its framework less appealing.

Additionally, although there are enough similarities between the systems to allow a symbiotic relationship, there are differences. For example, state courts act under different frameworks and employ policy considerations distinct from those that guide federal courts.[53]

It is important to note that this exploration does not lend itself to clear-cut conclusions due to its vast nature. The question of a court's jurisdiction to hear a case appears in many areas and contexts and does not always receive an in-depth analysis. But the reasons that lead state courts to

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[51] *See*, *e.g.*, Richardson v. Ruddy, 98 P. 842, 844 (Idaho 1908).

[52] Ex Parte BAC Home Loans Servicing, 159 So. 3d 31, 46 (Ala. 2013); Hulsey v. State, 196 So. 3d 342, 354 (Ala. Crim. App. 2015); Edwards v. Edwards, 357 S.W.3d 445, 448 (Ark. 2009). McCullough & Sons, Inc. v. City of Vadnais Heights, 883 N.W.2d 580 (Minn. 2016); Eathorne v. State Ethics Commission, 960 A.2d 206, 210 (Pa. Comlth. 2008).

[53] *See*, *e.g.*, the states' different views on sovereign immunity's jurisdictional label, in Section III.C.2 *infra*.

act differently provide insights into some of the issues with the Supreme Court's new framework. Based on state courts' collective experiences, jurisdictionality seems like a policy question rather than text, of nuance rather than one-fits-all innovation.[54] The Supreme Court should consider matching its framework to these principles.

The Article continues as follows. Section I covers the general idea of procedural rules' labeling and the federal courts' practice. Section II veers to the states, explaining why their analysis on this issue matters and how they treat Supreme Court precedent and analyze jurisdictionality. Section III suggests explanations for the state courts' jurisprudence. Finally, building on insights from Sections II and III, Section IV offers policy prescriptions for federal jurisprudence.

I. PROCEDURAL RULES AND THEIR "JURISDICTIONALITY"—THE FEDERAL EXPERIENCE

A. Jurisdictionality in the Context of Procedural Rules

American legal systems—federal and state— are full of rules requiring that certain matters be raised at a particular time, in a certain form, or include specific information.[55] Examples are a legion. A notice of appeal must be filed within a certain time frame.[56] A plaintiff who seeks to challenge the actions of government agencies is usually required first to exhaust administrative

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[54] For similar suggestions *see* Schwartz, *supra* note 1, 779–85 (arguing against the one-size-fits-all rule as the Court employes), 789–802 (offering an alternative); Dane – Jurisdictionality, *supra* note 40 (suggesting creative thinking may be a good solution for the problem of misuse of the jurisdictional label).

[55] Henderson ex rel. Henderson v. Shinseki, 562 U.S. 428, 434 (2011) ("our legal system is replete with rules requiring that certain matters be raised at particular times").

[56] Bowles v. Russell, 551 U.S. 205, 210-11 (2007).

proceedings within those agencies.[57] When filing a suit, rules require the plaintiff to comply with different requirements such as signatures and service before proceeding with their claim.[58]

A court's subject matter jurisdiction over a case sometimes depends on compliance with such procedural rules. This subset of procedural rules is usually referred to as "jurisdictional rules."[59] Understanding when a procedural rule is jurisdictional is important for two reasons. First, the two types of rules differ dramatically regarding the consequences of noncompliance with them.[60] Second, these differing consequences are also an oft-recurring question in appellate litigation.

First, the different consequences. Under the current federal understanding of the term "jurisdiction,"[61] a jurisdictional rule goes to the subject matter of a court, or in other words, a court's ability to adjudicate the case before it. If a rule is jurisdictional, a failure to comply with it can never be waived or forfeited,[62] may be raised at any time,[63] and a court has an independent duty to verify compliance with it.[64] Moreover, if a court holds that a party has not complied with a jurisdictional rule, it must dismiss

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[57] Arbaugh v. Y&H Corp., 546 U.S. 500, 515-16 (2006).

[58] Becker v. Montgomery, 532 U.S. 757 (2001).

[59] Sebelius v. Auburn Reg'l Med. Ctr., 568 U.S. 145, 153 (2013). But some courts view "jurisdictional rules" to be a broader category than just rules that constrain subject-matter jurisdiction. *See* Section III.B.1. *infra*.

[60] Henderson ex rel. Henderson v. Shinseki, 562 U.S. 428, 434–35 (2011).

[61] The Supreme Court has held that in this context the term "jurisdiction" means constraining subject-matter jurisdiction. Sebelius v. Auburn Reg'l Med. Ctr., 568 U.S. 145, 153 (2013). As Sections II and III explain, this equation is not accurate in many state courts.

[62] Arbaugh v. Y&H Corp., 546 U.S. 500, 514 (2006).

[63] Kontrick v. Ryan, 540 U.S. 443, 455 (2004).

[64] Henderson ex rel. Henderson v. Shinseki, 562 U.S. 428, 435 (2011).

that party's filing or claim, regardless of the litigation stage or the efforts a party has made.[65] And so, a jurisdictional label carries with it burdens on litigants and courts.[66]

However, if a rule is not jurisdictional, the consequences of noncompliance may vary according to the rule, precedent about it, the reasons behind the noncompliance, and more.[67] Raising a noncompliance becomes a matter of timing, susceptible to waiver and forfeiture.[68] Even if properly raised, the noncompliance may be treated equitably, either through tolling the time to act or allowing for corrective filing.[69] Additionally, a court is not obligated to raise the noncompliance on its own if the parties neglect it.[70]

Rafael Gonzalez's case serves as a helpful illustration.[71] Gonzalez was convicted of murder in Texas. After unsuccessfully petitioning for state habeas relief, Gonzalez also lost his habeas petition in federal district court. But a court of appeals judge granted him a certificate of appealability, a requirement for his appeal to be heard by a panel.[72] Yet, the certificate was defective. The circuit judge did not "indicate which specific issue or issues satisfy" a substantial showing of a denial of a constitutional

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[65] Fed. Rule Civ. Proc. 12(h)(3) ("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.").

[66] Henderson, 562 U.S. at 435.

[67] Schwartz, *supra* note 1, at 768-75.

[68] Hamer v. Neighborhood Hous. Servs. of Chicago, 138 S. Ct. 13, 18 (2017).

[69] United States v. Kwai Fun Wong, 575 U.S. 402, 408 (2015).

[70] Henderson, 562 U.S. at 435-36. On one occasion the U.S. Supreme Court noted that raising a non-jurisdictional noncompliance sua sponte should be discouraged, *Day v. McDonough*, 547 U.S. 198, 205 (2006), But other courts do encourage trial judges to actively raise such noncompliance and address it, at least in some instances, see *Davis v. State*, 187 P.3d 654 (Mont. 2008).

[71] Gonzalez v. Thaler, 565 U.S. 134 (2012).

[72] *Id.*, at 138.

right, as required by 28 U.S.C. §2253(b)(3). But neither the State nor the court of appeals noticed this defect. Gonzalez still lost his appeal, but on a different ground. Only when Gonzalez petitioned for certiorari, the State, in response, noted the defect and argued "for the first time" that it was jurisdictional.[73]

If the State was right, it meant that the Court had to dismiss Gonzalez's certiorari petition for lack of jurisdiction for a mistake not his.[74] But if this was not a jurisdictional rule, as the Court held, then the State was late, and Gonzalez's petition regarding the ground he lost on can proceed.[75]

Second, the recurrence of the question in litigation. Determining what label attaches to procedural rules is not a rarity because noncompliance with them is not uncommon.[76] Nor is noncompliance limited to an area of the law or a particular type of court.[77] In fact, federal courts have been dealing with the consequences of noncompliant litigants from the republic's early days.[78] Policing a court's

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[73] *Id.*, at 139–140.

[74] *Id.*, at 148 ("the habeas petitioner who obtains a COA cannot control how that COA is drafted").

[75] *Id.*, at 141–48. It is important to note that Gonzalez lost on the actual grounds of his petition, which was also a procedural question. His claims regarding his conviction were never heard on the merits. *Id.* at 154.

[76] According to LexisNexis, one of the Supreme Court's key cases, Arbaugh v. Y&H Corp., 546 U.S. 500, 515-16 (2006), has been cited 8,869 times (last visited Feb. 27, 2022). Another key case, Henderson ex rel. Henderson v. Shinseki, 562 U.S. 428 (2011), has been cited 3,887 times (last visited Feb. 27, 2022).

[77] *See*, *e.g.*, Union Pac. R.R. Co. v. Bhd. of Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment, 558 U.S. 67, 71-72 (2009) (labor law); John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 132 (2008) (takings); Eberhart v. United States, 546 U.S. 12, 17-19 (2005) (per curiam) (criminal procedure); Kontrick v. Ryan, 540 U.S. 443, 454-55 (2004) (bankruptcy).

[78] *See*, *e.g.*, United States v. Robinson, 361 U.S. 220, 229 (1960); Old Nick Williams Co. v. United States, 215 U.S. 541, 545 (1910); Wiscart v. Dauchy, 3 U.S. (3 Dall.) 321, 328 (1796).

subject-matter jurisdiction and ensuring a court acts within its authority and capacity are prime concerns for courts, especially those with limited jurisdiction.[79] And so, courts routinely address the question of whether a procedural rule—of whatever source or form—is jurisdictional.

B. The Supreme Court's Jurisdictionality Revolution and the Birth of "Claim-Processing Rules"

Given the harsh consequences of assigning a jurisdictional label to a procedural rule, it may be surprising to learn that federal courts historically have given the matter cursory treatment,[80] resolving such questions without a clear doctrine.[81] In the past, the Court routinely made "drive-by jurisdictional" rulings,[82] relied on conclusory precedent, presumed jurisdictionality without elaboration,[83] or applied a jurisdictional label to reach issues it could not otherwise.[84]

This meant that many procedural rules were designated jurisdictional without much reasoning, generating dismissals even in late-stage litigation because of noncompliance with different ingredients in the process. The U.S. Supreme Court was hasty to pronounce jurisdictionality without much consideration of its effects

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[79] Henderson ex rel. Henderson v. Shinseki, 562 U.S. 428, 434–35 (2011).

[80] Hallstrom v. Tillamook County, 493 U.S. 20, 31 (1989) (addressing whether a procedural rule requiring exhaustion is "jurisdictional in the strict sense of the term"); Hawley – Quiet Revolution, supra note 32, at 2042; Schwartz, *supra* note 1, at 740–44.

[81] See, e.g., Kontrick v. Ryan, 540 U.S. 443, 454–55 (2004) (lamenting this phenomenon).

[82] *See* Arbaugh v. Y&H Corp., 546 U.S. 500, 511 (2006).

[83] *See*, *e.g.*, United States v. Robinson, 361 U.S. 220, 229 (1960);

[84] United States v. Cotton, 535 U.S. 625, 629-630 (2002) (explaining that the Court labeled defective indictments as jurisdictional in *In re Bain*, 121 U.S. 1 (1887) because otherwise, it couldn't review them under its authority at the time).

on litigants who were shown the way out of courts. Nor did the Court ponder the implications to other federal courts that were required to raise the question of rule compliance for an increasing number of procedural rules.[85]

This careless approach had its benefits. It left room for flexibility. When courts saw it appropriate, they were less strict with the noncompliance's consequences, even when they declared a rule to be jurisdictional.[86] In some cases, federal courts created exceptions to the absolute nature of jurisdictional rules.[87] In other cases, they sidestepped the jurisdictional question and discussed only the possibility of equitable remedies for noncompliance with a procedural rule.[88] Even a decision that a rule is jurisdictional was at times a show of flexibility. In one context, the Court asserted that a procedural rule is jurisdictional because otherwise, it could not review the error below.[89]

But this treatment of jurisdiction subsided as federal courts became more formalistic about their language usage. If in the nineteenth century and even in

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[85] For these effects explained *see* Henderson ex rel. Henderson v. Shinseki, 562 U.S. 428, 434–35 (2011).

[86] Hawley – Quiet Revolution, *supra* note 32, at 2042. This broad concept was still alive in 1998, when Justice Stevens explained in Steel Co. v. Citizens for a Better Env't, that "[r]ather than framing the question in terms of 'jurisdiction,' it is also possible to characterize the statutory issue in this case as whether respondent's complaint states a 'cause of action.'" Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 117-18 (1998) (Stevens, J., concurring).

[87] *See*, *e.g.*, Castro v. United States, 70 U.S. (3 Wall.) 46, 50 (1866).

[88] Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 95-96 (1990).

[89] *See* United States v. Cotton, 535 U.S. 625, 629-630 (2002) (explaining that a long-standing precedent—Ex Parte Bain, 121 U.S. 1 (1887)—found omissions from indictments jurisdictional because the "Court could examine constitutional errors in a criminal trial only on a writ of habeas corpus, and only then if it deemed the error 'jurisdictional'" and referring to such use of jurisdictionality as "elastic.").

the early twentieth century, it could be that "jurisdiction" was "a word of many meanings," by the nineteen-nineties it became a word of "too many" meanings, and some justices felt the need to limit its reach.[90] These justices, chief amongst them the late Justice Ginsburg,[91] saw how the courts' historic overzealous labeling of procedural rules as jurisdictional collided with the current formalistic understanding of jurisdiction and perhaps realized that the flexibility of the past is now gone, and all that remains is the label.[92]

And so, in 2004, the U.S. Supreme Court began a clean-up effort.[93] In *Kontrick v. Ryan*, the Court offered a limiting principle to the use of the jurisdictional label: jurisdictional rules are only those "prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority."[94]

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[90] *See* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 90 (1998) (quoting United States v. Vanness, 85 F.3d 661, 663 n.2 (D.C. Cir. 1996)); *see also* Schwartz, *supra* note 1, at 740–45 (collecting cases).

[91] *See* Carlisle v. United States, 517 U.S. 416, 434-35 (1996) (Ginsburg, J., concurring); United States v. Cotton, 535 U.S. 625, 630 (2002) (Renquist, C.J.); Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 90 (1998) (Scalia, J.). Justice Ginsburg wrote most of the Court's decisions addressing jurisdictional rules. *See* Fort Bend Cty. v. Davis, 139 S. Ct. 1843 (2019); Hamer v. Neighborhood Hous. Servs. of Chicago, 138 S. Ct. 13 (2017); Sebelius v. Auburn Reg'l Med. Ctr., 568 U.S. 145 (2013); Arbaugh v. Y&H Corp., 546 U.S. 500 (2006); Scarborough v. Principi, 541 U.S. 401 (2004); Kontrick v. Ryan, 540 U.S. 443 (2004).

[92] Tiller v. Atl. Coast Line R. Co., 318 U.S. 54, 63 (1943) ("A phrase begins life as a literary expression; its felicity leads to its lazy repetition; and repetition soon establishes it as a legal formula, undiscriminatingly used to express different and sometimes contradictory ideas").

[93] Gonzalez v. Thaler, 565 U.S. 134, 141 (2012) ("This Court has endeavored in recent years to 'bring some discipline' to the use of the term 'jurisdictional.'").

[94] Kontrick v. Ryan, 540 U.S. 443, 455 (2004).

The Court explained that federal courts have been "less than meticulous" when assigning labels to procedural rules.[95] As a result, courts found too many rules jurisdictional without proper reasoning. This had, in turn, harsh effects on litigants and put courts in an unnatural position, in which they had to intervene in litigation and address jurisdictionality *sua sponte*.[96] And because courts were quick to hold procedural rules jurisdictional, parties were encouraged to make late jurisdictional arguments, sometimes only at the Supreme Court,[97] resulting in a dismissal. Indeed, many of the Court's recent cases include litigants that argued jurisdictional defects late in the game.[98] And although the Court has not explicitly said that its jurisprudential shift was meant to limit strategizing in litigation, it hinted at it.[99]

Kontrick included only a "functional" test—based on what a rule controls (classes of cases and persons).[100] But in subsequent cases, the Court added a textual analysis aiming to discern if Congress intended a rule to effect courts' jurisdiction. Specifically, in *Arbaugh v. Y&H Corp.*, the Court held that "[i]f the Legislature clearly states that a threshold limitation on a statute's scope shall count as

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95 *Id.* at 454.

96 Henderson ex rel. Henderson v. Shinseki, 562 U.S. 428, 433 (2011); for the perils of *sua sponte, see* Ziv Schwartz, *Supplementing Supplemental Briefing*, 22 J. APP. PRAC. & PROC., 12–32 (forthcoming 2022).

97 *See*, *e.g.*, Gonzalez v. Thaler, 565 U.S. 134, 145 (2012) (Texas raised noncompliance with an alleged jurisdictional rule "for the first time in response to a petition for certiorari").

98 *Id.*; *see* also Arbaugh v. Y&H Corp., 546 U.S. 500, 511 (2006) (raising noncompliance with an alleged jurisdictional rule only on appeal).

99 Day v. McDonough, 547 U.S. 198, 210–11 (2006) (noting that nothing suggested that the State "strategically" withheld the defense or relinquished it).

100 Kontrick v. Ryan, 540 U.S. 443, 455 (2004).

jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue."[101]

Although noted initially in dicta, *Arbaugh*'s textual analysis eventually became the focal point of the Court's new framework.[102] The Court also coined a new term to describe non-jurisdictional rules: "Claim-Processing Rules."[103] According to the Court, claim-processing rules are meant to facilitate the process of litigation and do not affect a court's subject-matter jurisdiction.[104]

Since *Kontrick*, the Court ruled on at least sixteen additional cases concerning the labeling of procedural rules.[105] In these cases, the Court continued to craft and tweak its analysis of whether a rule is jurisdictional or a claim-processing rule. The current framework has two main parts. First, because Congress is the only branch that can limit federal courts' jurisdiction, any procedural rule *not* enacted by Congress (such as rules of procedure or agency regulations) is a *non-jurisdictional* claim-

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

[102] *Arbaugh* is the most cited of cases, and in its most recent decision, *Fort Bend Cty. v. Davis*, the Court explained that alongside *Kontrick*'s distinction, "Congress may make other prescriptions jurisdictional by incorporating them into a jurisdictional provision." 139 S. Ct. 1843, 1849 (2019).

[103] Kontrick, 540 U.S. at 454–56 (The "filing deadlines prescribed in Bankruptcy Rules 4004 and 9006(b)(3) are claim-processing rules that do not delineate what cases bankruptcy courts are competent to adjudicate. . . a claim-processing rule, on the other hand, even if unalterable on a party's application, can nonetheless be forfeited if the party asserting the rule waits too long to raise the point. ").

[104] Henderson ex rel. Henderson v. Shinseki, 562 U.S. 428, 435 (2011).

[105] For a detailed account of the cases see, e.g., Schwartz, *supra* note 1, at 745-53; the caveat "at least" refers to the fact that some additional Court decisions touch on the issue without it being the decision's main issue. *See*, *e.g.*, Musacchio v. United States, 577 U.S. 237, 239-40, 713 (2016); Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 195 n.4 (2012); Holland v. Florida, 560 U.S. 631, 636 (2010); Day v. McDonough, 547 U.S. 198, 205 (2006).

processing rule.[106] Second, Congress-made procedural rules are presumed non-jurisdictional unless Congress made a clear statement about their jurisdictional nature.[107] Such a clear statement may also be silence in the face of long-standing Supreme Court precedent.[108] Its most recent iterations are *Hamer* and *Fort Bend County*,[109] and this framework has been cited and repeated in thousands of federal trial and appeals courts' opinions.

Since establishing this new framework, the Court has been hard-pressed to find jurisdictional procedural rules. The Court applied its current framework to find a procedural rule jurisdictional once.[110] In that case, *Rockwell Int'l Corp. v. United States*,[111] later abrogated by statute,[112] the Court's work was easy. The procedural rule in question ordered that "no court shall have jurisdiction over an action" if the litigant does not comply with it.[113]

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[106] Hamer v. Neighborhood Hous. Servs. of Chicago, 138 S. Ct. 13, 18 (2017).

[107] United States v. Kwai Fun Wong, 575 U.S. 402, 409 (2015).

[108] Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154, 167 (2010).

[109] Hamer v. Neighborhood Hous. Servs. of Chicago, 138 S. Ct. 13, 18 (2017); Fort Bend Cty. v. Davis, 139 S. Ct. 1843, 1849 (2019)

[110] Other recent instances where the Court found procedural rules to be jurisdictional it ignored its framework. See Gonzalez v. Thaler, 565 U.S. 134, 139-40 (2012) (noting in dicta 28 U.S.C. § 2253(c)(1) as jurisdictional without any analysis because the parties agreed that it was); John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 134-36 (2008) (finding a statute of limitations jurisdictional based on unreasoned precedent); Bowles v. Russell, 551 U.S. 205, 208 (2007) (time to file a notice of appeal is jurisdictional based on unreasoned precedent).

[111] Rockwell Int'l Corp. v. United States, 549 U.S. 457, 468-69 (2007).

[112] Abbott v. BP Exploration & Prod., 851 F.3d 384, 387 n.2 (5th Cir. 2017) ("the language of the public disclosure bar had been changed by the Patient Protection and Affordable Care Act ('ACA') . . . the public disclosure bar is no longer jurisdictional.").

[113] 31 U.S.C. §3730(e)(4)(A); Rockwell, 549 U.S. at 467.

And the Court explained that "the jurisdictional nature of the [rule] is clear"[114] from the words themselves.[115]

In almost all other occasions the Court applied its framework, it found that the words Congress chose to describe the procedural rule were *not* jurisdictional.[116] For example, the Court held that when Congress noted a claim "forever barred" if not filed within a certain time, it was not jurisdictional.[117] Likewise, a command to courts that they "shall" dismiss a claim noncompliant with a rule was not deemed jurisdictional either.[118] Moreover, the Court also held that because the word "shall" does not have necessary jurisdictional attributes, the word "may" is likewise not jurisdictional.[119]

As a result of not finding any Congressional "clear statement" other than in *Rockwell*, the Court has yet to clarify what "clear statement" would suffice to label a procedural rule jurisdictional. The Court has an opportunity to address this question again, for the first time without Justice Ginsburg, in *Boechler, P.C. v. Commissioner of Internal Revenue*,[120] which was argued in January 2022.[121] In *Boechler*, the Court has to decide

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[114] Rockwell, 549 U.S. at 468 (using the Latin phrase: ex visceribus veborum).

[115] Ex Visceribus Veborum, BLACK'S LAW DICTIONARY (11th ed. 2019).

[116] One exception is Manrique v. United States, 137 S. Ct. 1266 (2017) where the Court did not resolve the question of jurisdictionality. Instead, the Court explained that even if non-jurisdictional, the government did not waive the noncompliance with the procedural rule and the outcome would be the same. *Id*. at 1270-71.

[117] United States v. Kawi Fun Wong, 575 U.S. 402, 410 (2015).

[118] Gonzalez v. Thaler, 565 U.S. 134, 146 (2012); Dolan v. United States, 560 U.S. 605, 611-12, 620 (2010).

[119] Sebelius v. Auburn Reg'l Med. Ctr., 568 U.S. 145, 154 (2013).

[120] Docket No. 20-1472 (argued Jan. 12, 2022).

[121] The Court also heard and decided a jurisdictional argument in Cameron v. EMW Woman's Surgical Center, P.S., No. 20-601 (Argued Oct. 12, 2021, Decided March 3, 2022). There, however, jurisdictionality was not the main issue and was assumed, like other

whether a statute that governs the time for filing a petition for review by a tax court and includes (in parentheses) a statement of jurisdiction is jurisdictional.[122] The question is whether Congress was clear enough with its parenthetical statement. The Court may find such clarity and hold the rule jurisdictional. In that case, the petitioner and many others may find themselves unable to petition for review of determinations regarding their taxes when

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cases noted in *supra* note 105. *Cameron* will not be added to the roster of the Court's framework cases.

In *Cameron*, the Kentucky Attorney General attempted to "intervene in a federal appellate proceeding for the purpose of defending the constitutionality of a state law" after the "Kentucky official who had been defending the law decided not to seek any further review" after the court of appeals found the statute unconstitutional. *Id.* slip op. at 1. The respondents argued that the time to file a notice of appeal is jurisdictional, citing to Bowles v. Russell, 551 U. S. 205, 209 (2007) and Torres v. Oakland Scavenger Co., 487 U. S. 312, 315 (1988).

The Court's opinion and most separate writings all assume the correctness of *Torres* which was decided without reasoning and conflicts with the Court's framework. *Id*. slip op. at 5; at 2 (Thomas, J., concurring); at 2 (Kagan, J., concurring in the judgment). Only Justice Sotomayor, dissenting, does not address the point.

The Court held that the Attorney General's intervention does not fall within the jurisdictional bar, *Id.* slip op. at 5–6, and if respondents argue for a "mandatory claim-processing rule" enforcement, they have not raised it below and it is not persuasive in the context. *Id*. at 6–7.

In its first jurisdictional decision since Justice Ginsburg's passing the Court already slipped in its use of the terminology she engineered. As Justice Kagan's concurrence notes, the Court's use of the claim-processing terminology is "misplaced and distracting" because there is no question that the rule in question is jurisdictional, and "[t]here is not a claims-processing rule in sight." *Id.* at 2 (Kagan, J., concurring in the judgment).

A route that the Court could have taken, but did not, in rejecting respondents' claim, is to overrule *Torres* as incompatible with the Court's framework and instead find that its requirements are non-jurisdictional. The Attorney General did not ask the Court to do it, and the Court and separate writings do not even address this option.

[122] 26 U.S.C. § 6330(d)(1) ("The person may, within 30 days of a determination under this section, petition the Tax Court for review of such determination (and the Tax Court shall have jurisdiction with respect to such matter).").

unexpected circumstances prevent them from filing a timely petition.[123]

C. The Court's Revolution: Open Questions and Problems

At first glance, the framework that the Supreme established in *Kontrick* and *Arbaugh* and further articulated in subsequent opinions such as *Henderson* and *Hamer* seems "clear." It has been repeatedly lauded,[124] including by the Court itself,[125] as providing a "bright-line rule."[126] But as several scholars have noted, and the description of *Boechler* in the previous section shows, it is far from it.[127] The Court's framework is difficult to apply.[128]

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[123] Brief of amici curiae of The Center for Taxpayer Rights, et al., Boechler, P.C. v. Commissioner of Internal Revenue, No. 20-1472, at 3–4 (Nov. 22, 2021).

[124] William James Goodling, Comment, *Distinct Sources of Law and Distinct Doctrines: Federal Jurisdiction and Prudential Standing*, 88 WASH. L. REV. 1153, 1174 (2013).; John F. Preis, *Jurisdictional Idealism and Positivism*, 59 WM. & MARY L. REV. 1413, 1417, 1417 n.20, 1423 (2018); Alan M. Trammell, *Jurisdictional Sequencing*, 47 GA. L. REV. 1099, 1101 (2013).

[125] *See*, *e.g.*, Gonzalez v. Thaler, 565 U.S. 134, 141 (2012) ("Recognizing our 'less than meticulous' use of the term in the past, we have pressed a stricter distinction between truly jurisdictional rules, which govern 'a court's adjudicatory authority,' and nonjurisdictional 'claim processing rules,' which do not.")(quoting Kontrick v. Ryan, 562 U.S. 428, 435 (2004)).

[126] *See*, *e.g.*, Jeffery S. Sutton, Ruth Bader Ginsburg, The Great Proceduralist, 81 Ohio St. L. J. 605, 606 (2020).

[127] *See*, *e.g.*, Dodson – Critique, *supra* note 25; Dodson – Effects, *supra* note 32; Hawley – Quiet Revolution, *supra* note 32; Schwartz, *supra* note 1. Another proof of the Court's confusion with its own terminology is the Court's "misplaced and distracting" use of the term "claim-processing rules" (as noted by Kagan, J., concurring in the judgment, Cameron v. EMW Woman's Surgical Center, P.S., No. 20-601, *2 (Decided March 3, 2022)), as the court referred to a party's attempt to invoke a jurisdictional rule as an attempt to actually invoke a "mandatory claim-processing rule," *Id*. Alito, J., at 6–7, when "[t]here [was] not a claims-processing rule in sight." *Id.* at 2 (Kagan, J., concurring in the judgment).

[128] *See*, *e.g.*, Schwartz, *supra* note 1, 757–785.

Even the Court's rulings stray from it,[129] and the Court refused to overrule past rulings that contradict it.[130] Finally, the Court's new framework added questions about procedural rules which the Court left unanswered. These unanswered questions exacerbate the harsh consequences that the Court set out to mitigate.[131]

First, the Court's framework is difficult to apply.[132] Take, for example, the "clear statement" rule. The Court has said that a clear statement also includes Congressional silence in the face of a Court's long-lasting precedent.[133] But this inclusion goes against the notion of a "clear" statement that focuses on text.[134] Reliance on precedent

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[129] *See*, *e.g.*, Gonzalez v. Thaler, 565 U.S. 134, 139–40 (2012) (The Court drove-by two procedural rules, in dicta, designating one as jurisdictional without any meritorious discussion, relying on an unreasoned precedent, and the second one as non-jurisdictional because the parties stipulated so).

[130] *See*, *e.g.*, Gonzalez v. Thaler, 565 U.S. 134, 146 (2012) (refusing to overrule Torres v. Oakland Scavenger Co., 487 U.S. 312, 317-18 (1988)).

[131] Schwartz, *supra* note 1, at 768-75.

[132] Some members of the Court seem to understand that. At the oral argument in *Boechler, P.C. v. Commissioner of Internal Revenue*, No. 20-1472 (argued Jan 12, 2022), Justice Kagan asked the Government the following:

> I have more than a suspicion that Congress has no idea what we're talking about in this area, that we keep on saying these words and presuming that Congress understands them, and I don't see any evidence that Congress really does. And if I think that's so, I mean, I guess you can argue with me, because you can -- you've talked a lot about Congress signaling this and Congress saying that. But, I mean, my gut is that Congress has never read any of our cases in this area.

at 63.

[133] Fort Bend Cty. v. Davis, 139 S. Ct. 1843, 1849 (2019); Henderson ex rel. Henderson, 462 U.S. 428, 436 (2011).

[134] Schwartz, *supra* note 1, at 756–57 (The doctrine of clear statement is '[a] doctrine holding that a legal instrument . . . will not have some specified effect unless that result is unquestionably produced by the text.' Introducing court-made language generates the exact disorder that the clear statement rule is meant to prevent. Past

means that the Court must continue using past decisions that may have unsound reasoning if any reasoning at all. In fact, the Court has said that its new framework is required precisely because of such precedent and its ills.[135] The Court also explained that Congress need not use "magic words" to designate a rule jurisdictional.[136] Yet other than where Congress clearly said that a court "lacks jurisdiction" upon noncompliance with a procedural rule,[137] the Court has not held any language used in procedural rules to be jurisdictional.

Second, the Court itself has strayed from its framework and followed past contradicting decisions. Take, for example, the notion that only a Congressionally-made procedural rule could be jurisdictional.[138] Despite repeating this "bright-line" several times, the Court has not overruled past contradictory cases that hold that some

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precedent's text cannot 'unquestionably' produce an 'effect.' Neither can silence following such Court decision." (citation omitted).

[135] *Id.* at 757 ("stare decisis is the reason the Court has engaged in revolutionizing its litigation requirement labeling").

[136] Henderson, 462 U.S. at 436; but see United States v. Kawi Fun Wong, 575 U.S. 402, 410 (2015) ("Congress must do something special, beyond setting an exception-free deadline, to tag a statute of limitations as jurisdictional").

[137] Rockwell Int'l Corp. v. United States, 549 U.S. 457, 468-69 (2007). At oral argument in *Boechler, P.C. v. Commissioner of Internal Revenue*, No. 20-1472 (argued Jan 12, 2022), some justices expressed different sentiments about how much clarity is required from congress. *See*, *e.g.*, at 26-28 (Roberts, C.J.) ("'such matter,' yes, it is not the clearest thing," but noting that a parenthetical by itself is not "enough" to say the statement is not clear); at 42 (Kavanaugh, J.) ("Because there has to be a clear statement, we have said, and we've been increasingly strict about that, and the fact that there's a reasonable debate about how to read the parenthetical . . . doesn't that just end it?"; at 57–58 (Barrett, J.) ("Let's say that I think the government's interpretation is maybe a little bit more plausible but not a slam dunk. . . . how clear does it have to be? . . . that sounds like you're saying that what we do in ordinary interpretation, which is just conclude what the most plausible interpretation of the ordinary language would be. But a clear statement rule requires a little bit more than that, doesn't it?").

[138] Hamer v. Neighborhood Hous. Servs. of Chicago, 138 S. Ct. 13, 18 (2017).

rules of procedure—not enacted by Congress—are jurisdictional.[139] Additionally, some procedural rules may affect a Court's jurisdiction, as the Federal Appellate Rules recognize[140] and the Court itself has suggested recently.[141]

Finally, the Court's new framework raised new questions that the Court has not addressed. Before the Court's attempts to redefine jurisdictionality, it was clear that any non-jurisdictional rule had the opposite effects of jurisdictional rules—it could be waived, equitably tolled, and courts did not have to raise the matter on their own motion.[142] But the Court's new framework changed that assumption. The Court's newly created category, "claim-processing rules," has no clearly defined effects.[143] It is still an open question what effects rules in that category have upon noncompliance. The Court refused to answer these questions on several occasions and offered partial

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[139] *See*, *e.g.*, Torres v. Oakland Scavenger Co., 487 U.S. 312, 317-18 (1988) (the Court reaffirmed *Torres* again in *Cameron v. EMW Woman's Surgical Center, P.S.*, No. 20-601 (Decided March 3, 2022); United States v. Robinson, 361 U.S. 220, 229 (1960). In general, the Rules Enabling Act authorizes the U.S. Supreme Court to make Federal Rules of Procedure. *See* 28 U.S.C. §§ 2071–2077. *See also* Clopton – Retrenchment, *supra* note 41, at 8.

[140] *See* Dodson – Critique, *supra* note 25, at 362-63; Fed. R. App. P. 1, 2002 advisory committee note.

[141] *See* Gonzalez v. Thaler, 565 U.S. 134, 146 (2012) (noting that a procedural rule creates the jurisdictional requirement of a notice of appeal in federal court).

[142] *See* Day v. McDonough, 547 U.S. 198, 205 (2006); Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 94-96 (1990); Michael G. Collins, Jurisdictional Exceptionalism, 93 VA. L. REV. 1829, 1831 (2007). Perry Dane, Jurisdictionality, Time, and the Legal Imagination, 23 HOFSTRA L. REV. 1, 5-7, 12 (1994); Scott Dodson, Mandatory Rules, 61 STAN. L. REV. 1, 5-6 (2008); Schwartz, *supra* note 1, at 765–71.

[143] In *Kontrick v. Ryan* the Court added the adjective "inflexible" to claim-processing rules when it held that such rule is "unalterable on a party's application." 540 U.S. 443, 456 (2004). But in *United States v. Kwai Fun Wong,* the Court allowed equitable tolling on a late filing although the Government—the opposing party—raised the late filing timely.575 U.S. 402, 406 (2015).

explanations in particular circumstances,[144] leaving parties to litigate these issues repeatedly and without uniformity.[145]

These three threads may explain why the Court's new framework received a cold shoulder from many federal courts. Trial and appellate federal courts distinguish the Court's recent cases. They continue to rely on older precedent from the Court and their own circuit precedent and find various procedural rules jurisdictional,[146] at times ignoring the Court's new framework altogether.[147] They do so despite clear indications that such rules should be appropriately labeled non-jurisdictional or claim-processing rules. In some cases, even when the Court specifically found rules to be non-jurisdictional, federal courts continue to rely on circuit precedent to the contrary.[148]

Several scholars offered reforms to the Court's framework following up on these issues. These reforms include clearly articulating and detailingthe analysis of jurisdictionality;[149] adjustments to the different presumptions that the Court applies;[150] limiting the scope

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[144] In *Fort Bend*, the Court explicitly stated that it had not decided whether all types of non-jurisdictional rules may be tolled. Fort Bend Cty. v. Davis, 139 S. Ct. 1843, 1849 n.5 (2019).

[145] Schwartz, *supra* note 1, at 768-75.

[146] *See*, *e.g.*, Kohlbeck v. Wyndham Vacation Resorts, Inc., 20-1815, slip op. at 4 (8th Cir. Aug. 3, 2021); Powell v. IRS, 2016 WL 7473446 n.1 (E.D. Mich. 2016); Schwartz, *supra* note 1, at 750–55.

[147] *See*, *e.g.*, Ramos-Lopez v. Lynch, 823 F.3d 1024, 1027 (5th Cir. 2016) (holding a litigation requirement for agency action jurisdictional based on past precedent with no reasoning or analysis).

[148] *See*, *e.g.*, Murphy v. Zapple, 2021 WL 2668805 *5 (E.D.N.C. June 29, 2021) (holding title VII exhaustion jurisdictional based on Jones v. Calvert Group, Ltd., 551 F.3d 297, 300 (2009) despite its conclusion being directly addressed and rejected in Fort Bend Cty. v. Davis, 139 S. Ct. 1843, 1848, 1850 (2019)).

[149] Hawley – Quiet Revolution, *supra* note 32; Schwartz, *supra* note 1.

[150] *See* Dodson – Critique, *supra* note 25.

of the doctrine to rules enacted after the Court's jurisprudential shift;[151] better articulating the effects of non-jurisdictional rules;[152] and even a more ambitious reconfiguration of the concept of jurisdiction and its effects.[153] The Court has yet to follow any of these recommendations.[154]

II. THE STATES AND THE SUPREME COURT'S REVOLUTION

One avenue of reform that scholars have largely ignored when suggesting fixes to the Court's "revolutionary" new framework[155] is learning from state courts and their analysis of procedural rules' jurisdictionality. This Article follows this unexplored path. First, it explains why state courts' analysis is relevant here and how it could also be helpful to reform federal jurisprudence. Then, it addresses how state courts responded to the Court's new framework. Finally, it shows how states differ from the Court and each other regarding procedural rules' jurisdictional analysis.

A. The Relevancy of State Courts' Jurisdictionality Jurisprudence

The body of literature addressing state court procedural law and litigation has grown in recent years.[156]

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[151] *Id*.

[152] Schwartz, *supra* note 1.

[153] Dodson – Effects, supra note 32.

[154] The Court heard another case on this issue this January (Boechler, P.C. v. Commissioner of Internal Revenue, No. 20-1472, argued Jan. 12, 2022) and perhaps its decision—for the first time without Justice Ginsburg, who has been the catalyst of the framework—follows up on scholarly suggestions. *But see supra* note 121.

[155] Stephen A. Cobb, *Jettisoning "Jurisdictional": Asserting the Substantive Nature of Supremacy Clause Immunity*, 103 VA. L. REV. 107, 111 (2017) ("a revolutionary line of decisions").

[156] *See*, *e.g.*, Ethan J. Leib, *Localist Statutory Interpretation*, 161 U. PA. L. REV. 897, 899 (2013); Justin Weinstein-Tull, *The Structures*

State courts' procedure handling merits attention because most litigation occurs in state courts.[157] Yet, they have been overlooked and under-analyzed for many years.[158] In general, there is a growing recognition that state courts are important avenues for developing the law[159] and may offer valuable insight into issues federal courts adjudicate.[160]

Specifically in procedural law, state courts have been viewed as a counterforce to the federal courts' retrenchment.[161] Scholars often describe them as more plaintiff-friendly, noting that they often reject U.S. Supreme Court's procedural rulings, viewed as more defendant-friendly.[162] Some scholars have argued that normatively, state courts should not follow federal procedural path at all.[163] But unlike other procedural questions, the Court's jurisdictionality revolution, at least on its surface, does not extend its procedural retrenchment and may actually benefit plaintiffs on some occasions, like it did in *Arbaugh*. Therefore, theoretically, it may yield different results from state courts.

Yet jurisdictionality in the states, and how and if they responded to the Supreme Court's jurisprudential shift, has not been explored.[164] A possible reason is the idea

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of Local Courts, 106 U. VA. L. REV. 101, 173 (2020); Wilf-Townsend, *supra* note 41.

157 Wilf-Townsend, *supra* note 41, at 11.

158 *Id*.

159 *Id*., at 8-9.

160 Silver, *supra* note 41 (non-delegation).

161 Clopton – Retrenchment, *supra* note 41.

162 *Id*. at 415. Clopton – Making Procedure, *supra* note 41; Thomas B. Bennett, State Rejection of Federal Law, 97 NOTREDAME L. REV. (forthcoming 2022).

163 Stephen N. Subrin & Thomas O. Main, Breaking the Rules: Why State Courts Should Not Replicate Amendments to the Federal Rules of Civil Procedure, 67 CASE W. RES. L. REV. 501 (2016)

164 One recent exception is Johnson, *supra* note 40 (discussing and canvasing different state courts' views on jurisdictionality of administrative exhaustion but offering a deeper dive on Maryland).

that federal jurisdiction is inherently different from state jurisdiction.[165] As one court explained, "because they are courts of limited jurisdiction, federal courts presume jurisdiction is lacking absent an adequate showing by the party invoking it."[166]

The unique limited nature of federal jurisdiction is indeed a common refrain.[167] While it is true that federal courts' jurisdiction is limited, so is the jurisdiction of many state courts. In some states, legislatures may limit a trial court of general jurisdiction from hearing certain matters and under certain conditions.[168] In addition, appellate courts have limited jurisdiction in different types of

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Another one is Dane – Jurisdictionality, *supra* note 40, discussing state courts' jurisdictionality practices before the Court's new framework.

[165] RESTATEMENT (SECOND) OF JUDGEMENTS §11 (1982) ("All courts and tribunals in the federal system are of restricted jurisdiction, in that they have subject matter jurisdiction only of such proceedings as are expressly or impliedly consigned to them. In contrast, the principal trial court in state court systems is a court of general jurisdiction, i.e., it has authority to adjudicate any justiciable controversy that is not exclusively consigned to some other tribunal.")

[166] Reeds v. Walker, 157 P.3d 100, 108 (Okla. 2006) (citation omitted).

[167] *See*, *e.g.*, Davis v. State, 187 P.3d 654, 660 (Mont. 2008) (Rice, J., dissenting) explaining that:

> 'Claim processing rules' are a creation of the federal courts and arise from unique federal experience: the jurisdiction of Article III courts is determined by Congress. To distinguish judicially promulgated process rules from congressional jurisdictional mandates, the federal courts have designated the former as 'claim processing rules' which are not jurisdictional. As appropriate as this notion may be for the federal courts, to import it wholesale into our law overlooks the peculiar basis for such rules, which does not exist in Montana law.

[168] *See*, *e.g.*, Citibank, N.A. v. S.D. Dep't of Revenue, 868 N.W.2d 381 (S.D. 2015) (explaining that SDCL 2-14-2.1, South Dakota definitional statute, states "shall" has jurisdictional meaning that limits courts' jurisdiction); Christensen v. Utah State Tax Comm'n, 469 P.3d 962, 969 n.9 (Utah 2020).

cases.[169] And so, even if trial courts around the nation are courts of general jurisdiction, there are many contexts that procedural rules' jurisdictionality comes into play in state courts.

Federal and state analysis of procedural rules regarding employment discrimination portrays how similar the systems can be in resolving the question of jurisdictionality. For example, the U.S. Supreme Court held in *Arbaugh v. Y&H Corp.* that the numerosity requirement in Title VII—i.e., the requirement that an employer covered under the statute must employ 15 employees—is an ingredient of a claim for relief and not a jurisdictional rule.[170] The Court explained that it is because the Court's subject-matter jurisdiction to hear an employment discrimination suit comes from it being a federal question, not from Title VII itself. Therefore, the Title VII requirements are not part of its subject-matter jurisdiction.[171] For Jenifer Arbaugh, this ruling meant that her trial win, a rarity in employment discrimination suits, ultimately was not spoiled by a belated argument by her previous employer that it did not actually employ 15 employees and thus is not covered by the statute.[172]

Many states have statutes like Title VII prohibiting discrimination on various grounds. When met with the same situation as in *Arbaugh*—defendants belatedly arguing that they fall outside of the courts' jurisdiction because of noncompliance with a rule—many states followed *Arbaugh*'s analysis despite differences in their

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[169] *See*, *e.g.*, Stewart v. Emp't Sec. Dep't, 419 P.3d 838 (Wash. 2018).

[170] Arbaugh v. Y&H, 546 U.S. 500, 510–11 (2006); for a longer discussion about the case, *see* INTRODUCTION *supra* by notes 9–31.

[171] *Id.*

[172] *Id.* at 507–09, 516.

statutory framework. The Iowa supreme court, for example, held that *Arbaugh*'s analysis is persuasive and found the equivalent Iowa procedural rule non-jurisdictional.[173] It also cited several past Iowa opinions that sided with the same interpretive approach as the Court.[174] Louisiana,[175] New York,[176] and Texas[177] have acted similarly.[178]

In many instances, federal law has a gravitational force over state courts that draws these courts to respond to its decision-making.[179] Besides Title VII, another illuminating example of the phenomenon in the jurisdictionality context is the question of whether a defective indictment deprives a court of subject matter jurisdiction. For well over a century, the U.S. Supreme Court said it does.[180] Many states followed suit.[181] But the

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[173] Simon Seeding & Sod, Inc. v. Dubuque Human Rights Comm'n, 895 N.W.2d 446 (Iowa 2017), interpreting Iowa Code § 216.2(7).

[174] *Id.*

[175] Brooks v. Popeye's, Inc., 101 So. 3d 59 (La. Ct. App. 2012).

[176] Jones v. Bellerose Terrace Fire Dist., 2012 NY Slip Op 30329(U) (N.Y. Sup. Ct. 2012).

[177] Roy v. Alkusari, L.L.C., 619 S.W.3d 385 (Tex. Ct. App. 2021); Hocevar v. Molecular Health, Inc., 593 S.W.3d 764 (Tex. Ct. App. 2019) (applying this jurisprudence to the rule that all employment must be in Texas); *But see* Yeh v. Chesloff, 483 S.W.3d 108 (Tex. Ct. App. 2015) (holding that amendment cannot relate back to a questionnaire that disavowed it); In re Centerpoint Energy Houston Elec., LLC, 64 Tex. Sup. J. 1625 (Tex. 2021) (exhaustion in other contexts does not follow Title VII rulings)

[178] *But see* the Illinois appellate court's holding that the federal statute is different. Instead, the court preferred instead unreasoned precedent from Illinois courts finding the provision jurisdictional. Bryant v. Levantina United States, Inc., 2013 IL App (1st) 120815-U (Ill. App. Ct. 2013).

[179] Bennett, *supra* note 162, at 15 ("In formal terms, federal law sets the agenda for state actors and forces them to take an up-or-down vote."); Scott Dodson, The Gravitational Force of Federal Law, 164 U. PA. L. REV. 704 (2016).

[180] Ex Parte Bain, 121 U.S. 1 (1887). In *Bain*, the U.S. Supreme Court held an omission in an indictment to be a jurisdictional defect.

[181] Ash v. State, 843 So. 2d 213, 216 (Ala. 2002); Kyser v. State, 117 So. 157 (Ala. 1928); Butler v. State, 30 So. 338 (1901); Smith v.

Court's jurisprudence was not truly tethered to subject matter jurisdiction. Instead, it stemmed from a procedural problem that the states did not have. Without a jurisdictional defect, the U.S. Supreme Court did not have a jurisdictional hook to review courts' erroneous decisions.[182] And after the Court acknowledged that point and overruled its precedent, several states followed.[183]

Another example is states that followed the Supreme Court's "unique circumstances" doctrine and its overruling. In 1962, the Court held that a court action causing a party's noncompliance with a jurisdictional bar yields a unique circumstance that requires a court to allow such noncompliance despite the jurisdictionality.[184] Several states followed this case law and referred to it by its Supreme Court given name,[185] even though there was nothing particularly new with it, as other courts around the nation have allowed such equitable solutions for over a

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May, 148 N.E.3d 542 (Ohio 2020); State v. Gentry, 610 S.E.2d 494, 498-99 (S.C. 2005).

[182] United States v. Cotton, 535 U.S. 625, 629-630 (2002).

[183] Ex Parte Seymour, 946 So.2d 536, 537–38 (Ala. 2006) (overturning a century of precedent that held that a "valid indictment is the source of the subject matter jurisdiction to try a contested criminal case"); But see State v. Parkhurst, 845 S.W.2d 31 (Mo. 1993) (Missouri overruling "the confusing statement of law found in a number of cases that if an indictment is insufficient, the trial court acquires no jurisdiction of the subject matter," before the Supreme Court did so).

[184] Harris Truck Lines v. Cherry Meat Packers, 371 U.S. 215, 217 (1962) (per curiam). *See also* Thompson v. INS, 375 U.S. 384 (1964) (per curiam).

[185] Colorado: P.H. v. People in Interest of S.H., 814 P.2d 909, 911-12 (Colo. 1991); Converse v. Zinke, 635 P.2d 882, 886 (Colo. 1981); In Interest of C.A.B.L., 221 P.3d 433, 439 (Colo. App. 2009); People in Interest of A.J.H., 134 P.3d 528, 531-33 (Colo. App. 2006); Kansas: Slayden v. Sixta, 30-31, 825 P.2d 119 (1992); Johnson v. American Cyanamid Co., 243 Kan. 291, 758 P.2d 206 (1988); Schroeder v. Urban, 750 P.2d 405 (1988). Texas: Walker v. State, 594 S.W.3d 330 (Tex. Ct. Crim. App. 2020) (explaining that the court followed the jurisdictional analysis until in 1985 the legislature amended a statute to prevent that interpretation). *But see Miller v. Murdock*, 788 P.2d 614, 616 (Wyo. 1990) refusing to extend the doctrine to Wyoming cases.

century.[186] But in 2007, as the Court narrowed its understanding of jurisdiction, including the inability to forfeit it, it overruled the long-standing doctrine.[187] Yet again, several states that followed the Court's initial move followed its rescindment.[188]

But like in other non-constitutional issues, state courts are not bound by the Supreme Court's understanding of federal subject matter jurisdiction and jurisdictionality at large.[189] They are and have been free to

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[186] In 1896, a Tennessee chancery appellate court applied equitable principles to protect the original intent of a testator when a county clerk negligently failed to transcribe a full will that has been given to its custody. *McNeely v. Pearson*, 42 S.W. 165, 46 S.W. 1016 (Tenn. Ct. Chancery App. 1896). Similar cases can be found in Kentucky. *See* Wood v. Wood, 65 S.W.2d 969 (Ky. 1933) (former clerk testified he had received and filed original will, suggesting next clerk was negligent in not locating it; new trial was justified); In re Lane's Will, 32 Ky. (2 Dana) 106 (1834) (will filed with county clerk was lost, the court held: "Accidents ought not to destroy the rights of parties. It does not appear to be the fault of the executors, or of the clerk, that the original is not produced.").

[187] Bowles v. Russell, 551 U.S. 205, 214 (2007).

[188] Estate of Ray v. Oroke, 445 P.3d 742 (Kan. 2019). Kansas limited the doctrine after 2011 to non-jurisdictional rules. *See* Bd. of County Comm'rs v. City of Park City, 260 P.3d 387, 393–94 (Kan. 2011). Additionally, at least in one case, Ohio seems to have used the same rationale: State v. Calise, 2012-Ohio-4797 (Ohio Ct. App. 2012). And so does West Virginia. See State ex rel. J.C. v. Mazzone, 772 S.E.2d 336 (W.Va. 2015).

Like in other examples there are states that did not follow the Court's lead. Colorado, for example, has yet to overrule the doctrine, and even after *Bowles* its supreme court affirmed the doctrine in a 2009 decision. In re Interest of C.A.B.L, 221 P.3d 433, 439–40 (Colo. 2009). Still, it's appellate court did not apply the doctrine in a 2016 case, *Heotis v. Colo. Dep't of Educ*., 375 P.3d 1232, 1237–38 (Colo. Ct. App. 2016).

Hawaii notably continues to apply the doctrine to jurisdictional rules. In 2012, the court held that a jurisdictional rule that allowed some extension of time by motion, also allows for unique circumstances tolling. Estate of Kaikala v. State (In re Cabral), 277 P.3d 269 (Haw. 2012). In the intermediate court of appeals, a dissent went further and approvingly cited the *Bowles* dissent and its rationales. *See* Cabral v. State, 267 P.3d 676, 682–83 (Haw. App. Ct. 2011) (Nakamura, J., dissenting).

[189] For example, states are "not bound by the limitations of a case or controversy or other federal rules of justiciability". ASARCO, Inc. v.

mold their own approaches.[190] And there is compelling evidence, recently articulated by Thomas Bennet, that some states walk their own paths, even in defiance of obligatory federal precedent, whether by court decisions or other means, such as legislative action.[191] Moreover, in the context of jurisdictionality, some states, such as Connecticut,[192] and Delaware,[193] have explicitly rejected federal rules' application[194] even before the Court's current revolution.

This Article proceeds based on the understanding that state courts have something to say about the issue of procedural rules' jurisdictional labels and the ability to respond and craft their own frameworks to deal with the issue. The interplay between the federal and state jurisprudence here provides another interesting case study about the relationship between the two systems, and although it is mainly procedural, it touches upon courts'

Kadish, 490 U.S. 605, 617 (1989). *See* also Bennett, *supra* note 162, at 9-10; Lovato v. State, 901 P.2d 408, 411 (Wyo. 1995) ("[W]e will consider relevant federal precedent when Wyoming's rules of procedure are similar to the federal rules. We are not however bound by those decisions." (citation omitted)).

190 *See*, *e.g.*, State v. Sharafeldin, 854 A.2d 1208, 1218 (Md. 2004) ("We are not bound . . . by any of these Federal decisions. . . Their only relevance is how they might impact our view of the legislative intent.").

191 Bennett, *supra* note 162.

192 A Better Way Wholesale Autos, Inc. v. Paul, 258 A.3d 1244 (Conn. 2019).

193 Williams v. Singleton, 160 A.2d 376, 378 (Del. 1960).

194 Even without explicit rejection, some state courts feel at ease to ignore the Court's decision-making completely when it is not on point or has not overruled its prior decisions. *See*, *e.g.*, Church of God in Christ, Inc. v. L. M. Haley Ministries, Inc., 531 S.W.3d 146 (2017) ("No language in Hosanna-Tabor alters the well-established principle stated in Watson that civil courts have no jurisdiction over matters purely ecclesiastical in character. In the absence of any express language overruling Watson, and given that Hosanna-Tabor cites Watson with approval, we decline to interpret Hosanna-Tabor as abrogating Watson's characterization of the ecclesiastical abstention doctrine as a subject matter jurisdictional bar."); El Paso County v. Navarrete, 194 S.W.3d 677 (Tex. Ct. App. 2006).

most essential features, their ability to hear cases, and goes to the heart of the judicial system

B. State Courts and the Supreme Court's "Revolution"

The Supreme Court quietly changed how it analyzes the jurisdictionality of procedural rules. Scott Dodson argues that federal law has a gravitational force from which states cannot get free in a close context,[195] and the new framework's ability to help some plaintiffs could also mean that states may be more likely to adopt it. This section tracks how state courts have reacted and used the Supreme Court's new framework following these arguments. It analyzes 335 opinions that cite and address one or more of the Supreme Court's jurisdictionality cases since 2004. In short, it reveals the opposite results to what can be expected.

Before discussing the results, an explanation about the case collection method. Since 2004, the U.S. Supreme Court has issued at least seventeen decisions that utilize, expand and explain its new framework for designating procedural rules as jurisdictional.[196] The dataset includes

[195] Dodson – Gravitational Force, *supra* note 179.

[196] These decisions are: Fort Bend Cty. v. Davis, 139 S. Ct. 1843, 1846-47 (2019) (exhausting administrative remedies before filing suit in court); Nutraceutical Corp. v. Lambert, 139 S. Ct. 710, 715 (2019) (time for filing an interlocutory appeal in class action); Hamer v. Neighborhood Hous. Servs. of Chicago, 138 S. Ct. 13, 18 (2017) (extension of time to file an appeal); Manrique v. United States, 137 S. Ct. 1266, 1274-75 (2017) (extension of time to file an appeal); United States v. Kwai Fun Wong, 575 U.S. 402, 421-432 (2015) (FTCA time to file rules); Sebelius v. Auburn Reg'l Med. Ctr., 568 U.S. 145, 153-55 (2013) (time to file Medicade provider claims); Gonzalez v. Thaler, 565 U.S. 134, 139 (2012) (requirement that a certificate of appealability issued by a circuit judge includes certain contents); Henderson *ex. rel.* Henderson v. Shinseki, 562 U.S. 428, 431 (2011) (time to file a notice of appeal in the United States Court of Appeals for Veteran Claims); Dolan v. United States, 560 U.S. 605, 621-30 (2010) (restitution order deadline); Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154, 157-58 (2010) (requirement that a copyright will be registered before filing a suit); Union Pac. R.R. v. Bhd. of Locomotive Eng'rs & Trainmen Gen. Comm.

all state cases found when shepardizing each of the seventeen decisions and codes them.[197] In total, the dataset includes 771 entries. Some of the entries were identical, meaning that some state court opinions referenced more than one of the abovementioned U.S. Supreme Court opinions.[198] Additionally, there were entries not relevant to the issue.[199]

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of Adjustment, 558 U.S. 67, 72-75 (2009) (requirement to mediate before filing a complaint with the NRAB); John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 134-36 (2008) (time to file a takings claim); Bowles v. Russell, 551 U.S. 205, 208 (2007) (time to file a notice of appeal); Arbaugh v. Y&H Corp., 546 U.S. 500, 504-05 (2006) (an employer must employ fifteen employees to be covered by Title VII); Eberhart v. United States, 546 U.S. 12, 15-16 (2005) (per curiam) (time to file a motion for new trial); Scarborough v. Principi, 541 U.S. 401, 413-14 (2004) (case regarding content litigation requirement that resulted in an arguably untimely proper filing); Kontrick v. Ryan, 540 U.S. 443, 454-55 (2004) (bankruptcy filing time rule). Other decisions addressed the issue less comprehensively. *See supra* note 105.

[197] Each dataset entry is coded for the case's name, citation, year, court, which Court decision was shepardized, which type of procedural rule was in question (content or time, rule or statute), which opinion in the decision used the Court case, relevant case facts, how the Court's case was used, the type of rule the entry discussed and its citation, the ruling on the bar, the reasoning for the ruling, and the case's outcome. The entire dataset is available for viewing here: https://docs.google.com/spreadsheets/d/17nNfc6ur4QOR5C45hgSp3O7IYwUU_e6dxKrHqTHwyr4/edit?usp=sharing.

[198] *See*, *e.g.*, Chelf v. State, 263 P.3d 852 (Kan. Ct. App. 2011) (Citing to three cases: Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154 (2010); Union Pac. R.R. v. Bhd. of Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment, 558 U.S. 67 (2009); and Arbaugh v. Y&H Corp., 546 U.S. 500 (2006).) While *Chelf* appeared three times in the dataset, I counted it as one case.

[199] 227 entries were not relevant. They either addressed a different topic and cited one of the cases for another section or reason unrelated to jurisdictionality. *See*, *e.g.*, Marsh United States, Inc. v. Marsh & McLennan Companies, Inc., 354 S.W.3d 764 (Tex. 2011) (Citing to John R. Sand & Gravel Co. v. United States, 552 U.S. 130 (2008) for its discussion about stare decisis). Others cited relevant sections of the opinions but still addressed other issues. *See*, *e.g.*, Hartnett v. San Diego Cty. Bd. of Educ., 2012 WL 1899655 (Cal. Ct. App. 2012) (citing to Union Pac. R.R. v. Bhd. of Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment, 558 U.S. 67 (2009) for its discussion about subject matter jurisdiction being not-waivable but addresses concurrent jurisdiction issues).

The dataset includes opinions from forty-six states,[200] the District of Columbia, and four territories: Guam, the Northern Mariana Islands, the U.S. Virgin Islands, and Puerto Rico.[201] Not all states have cited the Court's decisions in a similar intensity.[202] The median number of cases per state is four, and the average is 6.09 cases. The dataset is supplemented with additional research into the states, including applying the terms "jurisdictional rule" and "claim-processing rule." In some states, this yielded other relevant, sometimes older cases.

With its structure detailed, onwards to the results. Only Minnesota,[203] Montana,[204] the District of Columbia,[205] Guam,[206] and the Northern Mariana Islands[207] have fully adopted the Supreme Court's framework.[208] Fully embracing the Supreme Court

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[200] Missouri, New Mexico, North Dakota, and Rhode Island never cited the Court's opinions in this context. All four states have cases that cite to the Court's opinions for irrelevant propositions.

[201] Guam: 10 cases; Northern Mariana Islands: 3 cases; U.S. Virgin Islands: 43 cases; Puerto Rico: 2 cases. Subtracting the territorial and D.C. cases, the count for state cases is 251. Lexis's database does not seem to include American Samoa's courts.

[202] It was difficult to get significant information from the dataset about several states. In addition to the four mentioned above, I could not get a clear picture of the law in this context in Louisiana, Nebraska, Nevada, New Jersey, South Carolina, Vermont, West Virginia, and Puerto Rico. Some information from these states appears in the article when it is relevant.

[203] *See*, *e.g.*, McCullough & Sons, Inc. v. City of Vadnais Heights, 883 N.W.2d 580 (Minn. 2016); But it is notable that even in Minnesota the courts find ways around "inflexible" or "mandatory" non-jurisdictional rules. See State v. DeLaCruz, 884 N.W.2d 878, 886–88 (Minn. Ct. App. 2016).

[204] *See*, *e.g.*, Davis v. State, 187 P.3d 654 (Mont. 2008); Miller v. Eighteenth Judicial Dist. Court, 162 P.3d 121 (Mont. 2007).

[205] *See*, *e.g.*, Sium v. Office of the State Superintendent of Educ., 218 A.3d 228 (D.C. 2019).

[206] *See*, *e.g.*, DFS Guam L.P. v. A.B. Won Pat Int'l Airport Auth., 2020 WL 7344689 (Guam 2020).

[207] *See*, *e.g.*, Norita v. Commonwealth, 2020 MP 12 (N.M.I. 2020); Commonwealth v. Borja, 2015 MP 8 (N.M.I. 2015).

[208] There have been calls in other states for such a sweeping change. Arkansas: Mun. Health Ben. Fund v. Hendrix, 602 S.W.3d 101,

framework includes overruling or repudiating past case law that analyzed procedural rules differently. It also means these courts follow the Court's jurisprudential path. They established a clear statement rule and did not longer merely assume a procedural rule is jurisdictional.

The Minnesota supreme court noted in 2013 that the U.S. Supreme Court's framework was not premised "on any peculiarities of federal law, and [that it] see[s] no reason to adopt a different rule under Minnesota law."[209] But the Minnesota supreme court also went further than the U.S. Supreme Court and held that because the statute in question in the case before it—a rule governing the time to file a postconviction petition—had exceptions to it, then it must be non-jurisdictional.[210] Moreover, during its implementation of the Court's framework, Minnesota courts admitted they, too, played fast and loose with jurisdictional terminology.[211] And even before "formally" adopting the Court's framework, courts in Minnesota relied on the Court's case law and distinctions in their attempt to

113–14 (Ark. 2020) (Wood, J., concurring in part and dissenting in part, Joined by Hart and Womack, JJ.); Nevada: Clark Cty. Deputy Marshals Ass'n v. Clark Cty., 425 P.3d 381 (Nev. 2018) (Cherry, J., dissenting) ("perhaps the majority would like to revisit this holding in light of the United States Supreme Court's decision" in Hamer v. Neighborhood Hous. Servs. of Chicago, 138 S. Ct. 13 (2017); Washington: In re Estate of Jepsen, 358 P.3d 403, 406-08 (Wash. 2015) (Stephens, J., dissenting) (analyzing the procedural rule according to the Supreme Court's framework).

[209] Hooper v. State, 838 N.W.2d 775, 781 (Minn. 2013); State v. DeLaCruz, 884 N.W.2d 878 (Minn. Ct. App. 2016); McCullough & Sons, Inc. v. City of Vadnais Heights, 868 N.W.2d 721 (Minn. Ct. App. 2015).

[210] *Id.*; For a similar suggestion, *see* Dodson - Critique, supra note 25, at 366.

[211] *See*, *e.g.*, In re Civ. Commitment of Giem, 742 N.W.2d 422 (Minn. 2007).

clarify the difference between jurisdictional and non-jurisdictional rules.[212]

The Montana supreme court noted that while it is not bound by federal interpretation, its reasoning is more compelling than prior Montana decisions.[213] Much like the U.S. Supreme Court, the Montana supreme court had to deal with the results of its elastic use of the jurisdictional label.[214] In *State v. Lenihan*, Montana adopted a rule by which it "accepts certain sentences for appellate review."[215] But parties began calling the rule "Lenihan Jurisdiction,"[216] which gave the rule a jurisdictional significance. In a 2006 opinion, the court noted that the term "echoes [its] own frequent misuse of the term" and while it "recognize[d] that terms such as '*Lenihan* jurisdiction' are commonly used to refer generally to a body of law or jurisprudence, [] the better practice is to avoid such uses so that clarity of the actual meaning of 'jurisdiction' can be promoted."[217]

Lastly, the District of Columbia presents the most robust adoption of the Court's framework. In the past, the D.C. court of appeals routinely held that almost all

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[212] See, e.g., Rubey v. Vannett, 714 N.W.2d 417 (Minn. 2006); Save Our Creeks v. City of Brooklyn Park, 682 N.W.2d 639 (Minn. Ct. App. 2004).

[213] Davis v. State, 187 P.3d 654, 657–59 (Mont. 2008) ("This Court's decisions . . ., in contrast to the federal and other state authority cited above, lack compelling reasoning or support for the proposition"). Unlike the U.S. Supreme Court, the Montana supreme court explicitly overruled several past decisions that held that the procedural rule it adjudicated was jurisdictional. *Id.* at 659.

[214] *Compare* United States v. Cotton, 535 U.S. 625, 629-630 (2002) *with* State v. Garrymore, 145 P.3d 946, 948 n.1 (Mont. 2006).

[215] 602 P.2d 997 (Mont. 1979).

[216] *Garrymore*, 145 P.3d at 948 n.1.

[217] *Id.*

procedural rules were jurisdictional.[218] But beginning in 2009, the Court started to reconsider some of its decisions because of "intervening Supreme Court precedents [that] substantially undermined [its] prior holdings."[219] Then, in 2015, the court went further and abrogated some past decisions that contradicted the Court's framework.[220] The rule in the District moving forward became that any procedural rule codified in a rule, as opposed to a statute, must be non-jurisdictional.[221] Interestingly, the D.C. court of appeals developed its own tests to apply equitable tolling and waiver without Supreme Court guidance.[222]

Although only a few states have fully adopted the Court's framework, several others adopted it partially: Kansas,[223] Maine,[224] Mississippi,[225] New York,[226]

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[218] *See*, *e.g.*, Fisher v. District of Columbia, 803 A.2d 962, 965 (D.C. 2002) (stating that the Rule 1 time limitation is "mandatory and jurisdictional," in a case where no statutory deadline applied).

[219] Smith v. United States, 984 A.2d 196, 200 (D.C. 2009). But some later decisions still kept with the broad assertion of jurisdictionality. *See* Capitol Hill Restoration Soc'y v. D.C. Mayor's Agent for Historic Preservation, 44 A.3d 271 (D.C. 2012); Patterson v. District of Columbia, 995 A.2d 167 (D.C. 2010).

[220] Mathis v. District of Columbia Housing Authority, 124 A.3d 1089, 1102-03 (D.C. 2015).

[221] Brewer v. D.C. Office of Emple. Appeals, 163 A.3d 799 (D.C. 2017).

[222] See, *e.g.*, Neill v. D.C. Pub. Emple Rels. Bd., 234 A.3d 177 (D.C. 2020). In general, these rules have been harsh and routinely view non-jurisdictional rules as "mandatory" if timely raised. See, e.g., United States v. Ayers, 2020 D.C. Super. LEXIS 38 (D.C. Sup. Ct. 2020).

[223] Chelf v. State, 263 P.3d 852 (Kan. App. 2011); *but see* Bd. of County Comm'rs v. City of Park City, 260 P.3d 387, 393 (Kan. 2011).

[224] *See*, *e.g.*, In re Adoption of M.A., 2007 ME 123, 930 A.2d 1088, 1091 (Me. 2007); Landmark Realty v. Leasure, 853 A.2d 749 (Me. 2004).

[225] Carter v. Carter, 204 So. 3d 747 (Miss. 2016); Brown v. Blue Cane Cowart Tippo Water Ass'n, 309 So. 3d 478 (Miss. Ct. App. 2019).

[226] Matter of Mabel R. v. Rayshawn D., 933 N.Y.S.2d 529 (N.Y. Fam. Ct. 2011).

Pennsylvania,[227] Texas,[228] and the U.S. Virgin Islands.[229] These states and territories either adopted part of the framework,[230] or only some courts in the state have adopted it.[231]

Take Pennsylvania. Panels at the state's intermediate appellate court disagree about applying the Supreme Court's precedent. For example, a 2019 panel was split on the jurisdictionality of a filing deadline. The majority held that the deadline was jurisdictional but that there could be exceptions to compliance with it.[232] But one judge dissented, calling to adopt the U.S. Supreme Court's framework.[233] Two years later, a different panel in that court, headed by the same dissenting judge, used the U.S. Supreme Court's framework on a similar procedural rule and found it non-jurisdictional.[234] Yet the same year, the

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[227] *Compare* FREMCO Assocs., LLC v. Dep't of Revenue of Pa. Unemployment Comp. Audit Div., 257 A.3d 794, 801-02 (Pa. Commw. Ct. 2021) *with* Domus, Inc. v. Signature Bldg. Sys. of PA, LLC, 252 A.3d 628, 638-39 (Pa. 2021).

[228] In re United Servs. Auto. Ass'n, 307 S.W.3d 299 (Tex. 2010).

[229] *Compare* Ottley v. Estate of Bell, 61 V.I. 480 (V.I. 2014) *with* Brady v. Cintron, 55 V.I. 802 (V.I. 2011) and First Am. Dev. Group/Carib, LLC v. WestLB AG, 55 V.I. 594 (V.I. 2011); see also Jean-Baptiste v. Virgin Islands Taxicab Commission, 64 V.I. 235 (V.I. Sup. Ct. 2016) (noting the Supreme Court expressed two approaches but finds the notion that all time statutes are jurisdictional more compeling and prominent). The

[230] Maine, Mississippi, Texas.

[231] Kansas, New York, Pennsylvania, U.S. Virgin Islands.

[232] Best Courier v. Dep't of Labor & Indus., 220 A.3d 696, 701 (Pa. Commw. Ct. 2019).

[233] *Id.* at 705 n.3 (Leavitt, P.J., dissenting).

[234] FREMCO Assocs., LLC v. Dep't of Revenue of Pa. Unemployment Comp. Audit Div., 257 A.3d 794, 801-02 (Pa. Commw. Ct. 2021); *see also* Bisher v. Lehigh Valley Health Network, Inc., 265 A.3d 383, 400 n.10 (Pa. 2021) ("By stating that both Pennsylvania and the United States Supreme Court view subject-matter jurisdiction by reference to a trial court's competency to entertain the controversy at all, we do not intend to say that we follow federal courts in lockstep. We make these observations merely to highlight that both this Court and federal courts view subject-matter jurisdiction narrowly.")In re Petition for Enf't of Subpoenas Issued by the Hearing Exam'r in a

state's supreme court found a different procedural rule non-jurisdictional, without relying on the U.S. Supreme Court's framework at all.[235]

Kansas courts follow the Court's framework when addressing procedural rules regarding content requirements. For example, the state's court of appeals used the Court's cases to reconcile conflicting Kansas precedent and curated its version of their meaning.[236] In *Chelf v. State*, the court of appeals established a framework that it continued relying on.[237] But when it comes to statute-based procedural rules, Kansas courts follow the *Bowles v. Russell* analysis—strictly construing statutory rules as jurisdictional.[238]

Several other states have not reconsidered their jurisprudence following the Court's new framework but still cite the Court's cases with agreement while discussing their own case law and frameworks.

Take Massachusetts, for example. Although the state's intermediate appellate court cited Supreme Court's cases about the consequences of jurisdictionality favorably,[239] it refused to adopt its clear statement analysis.[240] Instead, it relied on past state court pronouncements.[241] And when discussing a rule being an

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Proceeding Before the Bd. of Med. (Appeal of M.R.), 214 A.3d 660, 672–75 (Pa. 2019) (Saylor, C.J., dissenting).

[235] Domus, Inc. v. Signature Bldg. Sys. of PA, LLC, 252 A.3d 628, 638-39 (Pa. 2021).

[236] Chelf v. State, 263 P.3d 852 (Kan. App. 2011).

[237] In re Appeal of Picanso, 339 P.3d 412 (Kan. App. 2014); Sleeth v. Sedan City Hosp., 268 P.3d 506 (Kan. App. 2012).

[238] Bd. of County Comm'rs v. City of Park City, 260 P.3d 387, 393 (Kan. 2011). This is despite *Bowles*'s rationale being limited in subsequent opinions. *See* Henderson ex rel. Henderson v. Shinseki, 562 U.S. 428, 434-35 (2011).

[239] V.M. v. R.B., 114 N.E.3d 1015, 1020 (Mass. Ct. App. 2018).

[240] *Id.* at 1020 n.5.

[241] *Id.* at 1019-21.

"element of a claim" rather than jurisdictional, the same court relied on its cases rather than Supreme Court precedent—*Arbaugh v. Y&H Corp.*—making the same distinction.[242]

Similarly, while Idaho courts have been carefully analyzing jurisdictionality for over a century,[243] they have added references to various U.S. Supreme Court opinions to show how federal courts apply similar rules in adjudicating the jurisdictionality of procedural rules.[244] Some other states, like Kentucky, cite one of the Court's decisions as part of their general discussion about jurisdictionality of a particular procedural rule while not adhering to the approach the Court adopted in these decisions.[245] Interestingly, some states engage with the Court's framework even though they explicitly do not follow it. In one case, South Dakota addressed equitable tolling according to *Kwai Fun Wong* in a statute the state court held jurisdictional.[246]

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[242] *Id.* at 1020.

[243] *See*, *e.g.*, State v. Rogers, 91 P.3d 1127, 1131–32 (Idaho 2004); Richardson v. Ruddy, 98 P. 842, 844 (Idaho 1908). For a more detailed account *see* Section III.A *infra*.

[244] See, e.g., Ware v. City of Kendrick, 487 P.3d 730 (Idaho 2021) (citing United States v. Kwai Fun Wong, 575 U.S. 402 (2015)).

[245] Kentucky: Adams-Smyrichinsky v. Smyrichinsky, 467 S.W.3d 767 (Ky. 2015) (citing to Reed Elsevier, Inc. v. Muchnik, 559 U.S. 154 (2010)).

[246] Citibank, N.A. v. S.D. Dep't of Revenue, 868 N.W.2d 381 (S.D. 2015). Same is true for Virginia. *See*, *e.g.*, Smith v. Commonwealth, 693 S.E.2d 765 (Va. Ct. App 2010); Sears Roebuck & Co. v. Cruse, 2010 Va. App. LEXIS 51 (Va. Ct. App. 2010); Hitt Constr. v. Pratt, 672 S.E.2d 904 (Va. Ct. App. 2009).

Finally, three states—Arkansas,[247] Washington,[248] and Utah[249]—have flatly rejected the Court's jurisprudence as incompatible with their state court's analysis of procedural rules' jurisdictionality.

C. State Courts Jurisdictionality Analysis

Even though most states have not addressed or relied on the U.S. Supreme Court's jurisprudence, state courts routinely handle procedural rules and the impact of noncompliance with them on their courts' jurisdiction. They have a variety of approaches to the question. Below are themes and trends that emerge from the dataset and other cases.

1. Statutory Construction

[247] Ark. Dep't of Human Services v. Ledgerwood, 530 S.W.3d 336, 345–46 (Ark. 2017). It is worth noting that there are dissenting voices in Arkansas. *See* Mun. Health Ben. Fund v. Hendrix, 602 S.W.3d 101, 113–14 (Ark. 2020) (Wood, J., concurring in part and dissenting in part, Joined by Hart and Womack, JJ.).

[248] Jepsen, 358 P.3d at 405 n.5 (Wash. 2015)(refusing to inject confusion by using the Supreme Court's framework). But the Washington court of appeals signaled in earlier cases that the state has already a confused understanding of the term. See In re Marriage of McDermott, 307 P.3d 717 (Wash. Ct. App. 2013); Cole v. Harveyland, LLC, 258 P.3d 70 (Wash. Ct. App. 2011). *See also* In re Estate of Jepsen, 358 P.3d 403, 406-08 (Wash. 2015) (Stephens, J., dissenting) (analyzing the procedural rule according to the Supreme Court's framework).

[249] At least implicitly by refusing to heed to analysis driven by the Supreme Court's framework in State v. Rettig, 416 P.3d 520 (Utah 2017) (as was offered by Durham, J., concurring). In Christensen v. Utah State Tax Comm'n, 469 P.3d 962 (Utah 2020) the supreme court noted it does not follow the Court's framework, but even if it did, it did not apply to the facts of the case; State v. Poole. 359 P.3d 667 (Utah Ct. App. 2015) (the court of appeals rejecting the application of *Dolan v. United States*).

Generally applicable principles of construction and statutory interpretation play a major role in state courts' decisions on procedural rules' jurisdictionality.[250]

a. Strict or Non-Strict Construction

Courts can be generally divided into strict and non-strict constructionists when interpreting procedural rules. Some state courts typically construe procedural rules strictly. Although strict compliance does not mean jurisdictionality,[251] the strict-compliance approach means that priority is given to enforcing procedural rules, regardless of jurisdictional status.[252] Thus leaving the distinction between the two categories mainly theoretical.

Noncompliant litigants in strict-construction courts should not expect flexibility, even if the opposing party has not raised a noncompliance with a rule.[253] Some appellate courts not only allow but encourage trial courts to routinely raise procedural noncompliance *sua sponte*.[254] Thus, even

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[250] *See*, *e.g.*, People v. Lown, 793 N.W.2d 9, 16–19 (Mich. 2011).

[251] S.C.H. v. L.A., 2020 WL 7086172 (Ala. Civ. App. 2020) ("The requirement that the probate court strictly comply with the adoption statutes does not necessarily render any error made by the probate court in applying those statutes a jurisdictional defect.").

[252] Cavallaro 556 Valley St. Corp. v. Div. of Alcoholic Beverage Control, 796 A.2d 938, 940–41 (N.J. Super. Ct. App. Div. 2002) (If "statutory time frame is mandatory, then modification or relaxation may be granted only by the Legislature" whereas if a "particular statutory deadline is only directory … then the agency [in that case] would have authority to excuse the untimeliness.").

[253] *See*, *e.g.*, McAninch v. State of Rhode Island Department of Training & Labor, 64 A.3d 84, 88 (R.I. 2013) ("statutes prescribing the time and procedure to be followed by a litigant attempting to secure appellate review are to be strictly construed").

[254] *See*, *e.g.*, Homeward Residential, Inc. v. Gregor, 122 A.3d 947 (Me. 2015); T.C. v. State (In re Adoption of L-MHB), 431 P.3d 560 (Wy. 2018) (suggesting that courts should raise noncompliance on their own motion even with non-jurisdictional procedural rules). Montana has a more nuanced approach, allowing courts to raise noncompliance sua sponte so long as the court takes due process precautions, including fair notice and providing an opportunity for the parties to present their positions. See BNSF Ry. Co. v. Cringle, 247 P.3d 706 (Mont. 2010). But

noncompliance with a non-jurisdictional procedural rule may result in dismissal without any party raising the issue. In these states, the jurisdictional label has a limited effect.[255] It matters only in cases where a court is not interested in raising noncompliance on its own, and it was not raised timely.[256] Utah courts, for example, repeatedly explain that "strict compliance" is required with various types of procedural rules.[257]

But not all states interpret procedural rules strictly. In these other states, a non-jurisdictional label may produce a result more favorable for a noncompliant litigant, and clarity in labeling procedural rules matters.[258]

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see Hughley v. Government of the Virgin Islands, 61 V.I. 323 (V.I. 2014) (noting that not all noncompliance "claim-processing rules" can be raised *sua sponte*).

[255] S.R.R. v. C.M.H, 486 P.3d 772, 780 (Or. 2021) (Recognizing this limited effect but also noting that "the lack of clarity in judicial opinions complicates the task for parties and lower courts that seek to derive principles of subject matter jurisdiction from those judicial opinions.").

[256] *See*, *e.g.*, V.I. Narcotics Strike Force v. Gov't of the Virgin Islands Pub. Emples. Rels. Bd., 2013 WL 6236555, *19 (V.I. 2013) ("Since the [appellants] promptly brought the untimeliness of [defendant]'s filing to the Superior Court's attention in this case, we decline to decide, as part of this appeal, whether [3 V.I.C. §]530a(a) codifies a jurisdictional requirement or claims-processing rule, since under the facts of this case, the result would be the same.").

[257] Baby E.Z. v. T.I.Z, 266 P.3d 702 (Utah 2011); When we turn away an untimely filed appeal because we do not have jurisdiction to hear it, we are not denying that the Utah Constitution gives us jurisdiction over appeals, rather "we are granting jurisdictional effect to our own rules of procedure." *Utah v. Boyden*, 441 P.3d 737 (Utah 2019) (citation omitted) (internal quotation marks omitted). We know that this "jurisdictional principle is not of constitutional origin" but is "subject to overrides or exceptions set forth in our case law and in our rules of procedure." *Id.* (citation omitted) (internal quotation marks omitted). *See also* Haynes v. Bd. of Parole & Post-Prison Supervision, 403 P.3d 394, 399–400 (Or. 2017) (Noting that the legislature "can and does create exceptions to the timeliness it sets for obtaining review" and refusing to construe the statute to include an exception beyond that); Stewart v. Emp't Sec. Dep't, 419 P.3d 838 (Wash. 2018); In re Estate of Jepsen, 358 P.3d 403 (Wash. 2015).

[258] *See*, *e.g.*, Williams v. Comm'n on Human Rights & Opportunities, 777 A.2d 645, 651, 661 (Conn. 2001) (detailing policy considerations).

Courts in these states use textual analysis to determine a procedural rule's label.[259] But not all follow a "clear statement rule" like the Supreme Court.[260]

b. Legislative Intent

Even without a clear statement requirement, discerning legislative intent is the central feature of the states' analysis. Connecticut courts, for example, follow their legislature actions closely when labeling procedural rules.[261] In a recent case, the state appellate court explained that when the legislature created "a cause of action that did not exist at common law," and "acquiesced to the court's description of the statute of limitations contained therein as a limit on the court's subject matter jurisdiction, it would continue to treat it as such."[262]

Kansas courts also follow a similar model. A procedural rule is jurisdictional only when the legislature clearly restricts a court's authority to act upon noncompliance with said rule.[263] For example, a

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[259] Connecticut has adopted a clear statement rule even before the Supreme Court. See Williams v. Comm'n on Human Rights & Opportunities, 777 A.2d 645, 651, 661 (Conn. 2001) (requiring already in 2001 "a strong showing of legislative intent that such a time limit is jurisdictional"); Guam looks for explicit identification of jurisdictionality in the statute. *See* Hemlani v. Hemlani, 2015 Guam 16 (Guam 2015).

[260] V.M. v. R.B., 114 N.E.3d 1015, 1020 n.5 (Mass. Ct. App. 2018) (noting that the court has not adopted the United States Supreme Court's clear statement requirement as explained in Sebelius v. Auburn Reg'l Med. Ctr., 568 U.S. 145, 153–54 (2013)); *but see* Monico's Case, 213 N.E.2d 865, 866 (Mass. 1966) (requiring that the legislature makes "an express declaration" about jurisdictionality); Allen v. Dallas County Bd. of Review, 843 N.W.2d 89 (Iowa 2014) (looking for explicit jurisdictionality too).

[261] Connecticut is not alone. See New Jersey: Cavallaro 556 Valley St. Corp. v. Div. of Alcoholic Beverage Control, 796 A.2d 938, 941–44 (N.J. Super. Ct. App. Div. 2002).

[262] A Better Way Wholesale Autos, Inc. v. Paul, 217 A.3d 996, 1005 n.7 (Conn. App. Ct. 2019). This is similar to the rationale in Bowles.

[263] Chalmers v. Burrough, 494 P.3d 128, 134 (Kan. 2021).

verification requirement for a petition is not a condition on the court's activity. And so, a Kansas court of appeals found it does not "deprive the district court of jurisdiction."[264]

Alaska's treatment of the jurisdictionality of its notice of appeal is another illuminating example, although it discusses the Court's rulemaking. Alaska Supreme Court Rule 52 states that all rules "are designed to facilitate business and advance justice, and that they may be relaxed or dispensed with where a strict application would be unfair."[265] Based on this text, the Alaska Supreme Court reasoned back in 1960 that "the question of jurisdiction is not involved" in applying the rule regarding notice of appeal.[266]

c. Interpretive Guiding Principles

The U.S. Supreme Court has refrained from providing any rules of thumb or guiding principles, beyond the clear statement rule, about what type of legislative language or construction may be presumptively jurisdictional or not.[267] But states do use additional interpretive guiding principles.

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[264] Taylor v. McKune, 962 P.2d 566, 570 (Kan. App. 1998); see also *In re Linda D.*, 3 Cal. App. 3d 567, 83 Cal. Rptr. 544, 546 (1970) ("It is the rule that failure to verify a petition . . . is a defect in the pleading which does not go to the court's jurisdiction and must be raised prior to the hearing or it is waived."); Monroe Contract Corp. v. Harrison Square, Inc., 405 A.2d 954, 959 n.5 (Pa. Super 1979) (Pa. Super. 1979) ("[W]e view the verification as necessary to the protection of the party, not to the jurisdiction of the court."). Other courts agree with the point regarding verification without spelling out this reasoning. See, e.g., Nevada: Miles v. State, 91 P.3d 588, 590 (Nev. 2004); Oklahoma: Concannon v. Hampton, 584 P.2d 218, 220-221 (Okla. 1978) (referring to the same element as "authentication").

[265] Bridges v. Alaska Hous. Autho., 349 P.2d 149, 155 (Ala. 1960).

[266] *See id.*; Vogt v. Winbauer, 376 P.2d 1007, 1010 (Ala. 1962).

[267] For the argument that the Court does so latently, *see* Schwartz, *supra* note 1, at 763, 763 n.177.

One example of such a principle is whether the rule itself allows modifications. Many courts find that when the rule includes modifications, it is not jurisdictional.[268] However, the same distinction can yield an opposite conclusion. Namely, any modification or excuse noted in the text is the only one and is not relevant to the question of jurisdictionality.[269]

Several state courts find that the lack of consequence or enforcement for noncompliance with a rule also implies it is non-jurisdictional.[270] One court noted that when the legislature has failed to set an enforcement mechanism, courts can focus upon the statute's goals and whether the party seeking relief has shown prejudice as a result of the statutory violation to determine the proper enforcement mechanism.[271]

d. Conceptual Boundaries

A few states determine whether a procedural rule constrains a court's subject matter jurisdiction by articulating what such rule is meant to govern or what its boundaries are.

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[268] *See*, *e.g.*, State v. One Love Ministries, 416 P.3d 918 (Haw. Ct. App. 2018).

[269] *See*, *e.g.*, Haynes v. Bd. of Parole & Post-Prison Supervision, 403 P.3d 394, 399–400 (Or. 2017)

[270] Massachusetts: Anzalone v. Admin. Office of the Trial Court, 932 N.E.2d 774 (Mass. 2010); New Hampshire: In re D.O., 237 A.3d 256 (N.H. 2020); New York: Matter of State of New York v. Keith F., 149 A.D.3d 671 (N.Y. App. Div. 2017); Ohio: City of Cincinnati v. Fourth Nat'l Realty, L.L.C., 170 N.E.3d 832 (Ohio 2020).; Texas: In re United Servs. Auto. Ass'n, 307 S.W.3d 299 (Tex. 2010); Hocevar v. Molecular Health, Inc., 593 S.W.3d 764 (Tex. Ct. App. 2019); Vermont: State v. Singer, 749 A.2d 614, 616 (Vt. 2000) (citing In re Mullestein, 531 A.2d, 890, 892 (Vt. 1987)).

[271] In re D.O., 237 A.3d 256 (N.H. 2020).

One boundary is that issues relevant to how parties present their claims are not jurisdictional[272] because subject matter jurisdiction "involves the authority of a court to adjudicate the *type* of controversy presented by the action before it,"[273] and not the plaintiff's right "to go forward with [their] suit" or whether they "satisfied the requisites of a particular statute." Instead, those pertain "to the right of the plaintiff to relief rather than to the [subject-matter] jurisdiction of the court to afford it."[274] In other words, a party's inability to do as it wishes does not always mean that the court loses its jurisdiction.[275]

The difference between statutory and common law rights also plays a role in some courts. For example, one Illinois court explained that a time limitation is jurisdictional "if the right being asserted is one unknown to the common law" because "the time limitation is an inherent element of the right and of the power of the

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[272] Idaho: State v. Rogers, 91 P.3d 1127, 1131–32 (Idaho 2004) ("subject matter jurisdiction does not depend on the particular parties in the case or on the manner in which they have stated their claims, nor does it depend on the correctness of any decision made by the court. Also, the location of a transaction or controversy usually does not determine subject matter jurisdiction.").

[273] Amodio v. Amodio, 724 A.2d 1084, 1086 (Conn. 1999); *see also* similar statements in New Hampshire. Appeal of Town of Brookline, 91 A.3d 629 (N.H. 2014); Bank of Am., N.A. v. Kuchta, 21 N.E.3d 1040 ("A court's subject-matter jurisdiction is determined without regard to the rights of the individual parties involved in a particular case.").

[274] Dubai Petroleum Co. v. Kazi, 12 S.W.3d 71, 76-77 (Tex. 2000); *see* also Matter of Mabel R. v. Rayshawn D., 933 N.Y.S.2d 529 (N.Y. Fam. Ct. 2011) (There is "a clear distinction between a court's competence to entertain an action and its power to render a judgment on the merits in a particular case" and while the "[a]bsence of competence to entertain an action deprives the court of 'subject matter jurisdiction'; absence of power to reach the merits does not."

[275] O.R. v. K.G., 16 N.E.3d 965 (Ind. 2014); Ultimate Title, LLC v. Ladd, 2018 WL 3388407 (Md. Ct. Special App. 2018) (real party in interest requirement is for the benefit of the parties and not the court); but see Vanco I LLC v. City of Grand Rapids, 2014 Mich. App. LEXIS 2222 (Mich. Ct. App. 2014) (holding real party in interest requirement is part of subject matter jurisdiction).

tribunal to hear the matter."[276] On the flip side, courts consider common law rights within their domain, and therefore procedural bars regarding them are viewed non-jurisdictional in many states.[277]

Finally, state courts also apply distinctions similar to points the U.S. Supreme Court made in some of its cases without referencing them as sources. Like in *Arbaugh*,[278] state courts ask if a procedural rule in question is an element of a claim or not,[279] holding that an element of a claim is not a jurisdictional rule. Like in *Kontrick*,[280] state courts try to limit the scope of the jurisdictional label to rules that govern "classes of cases." [281]

e. Recognizable Categories

Procedural rules appear in many shapes and forms, but some state courts group them into recognizable categories to ease their jurisdictionality analysis.

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[276] Charleston Cmty. Unit Sch. Dist. No. 1 v. Ill. Educ. Labor Relations Bd., 561 N.E.2d 331, 333 (Ill. App. Ct. 1990).

[277] *See* Illinois: People v. Keegan, 779 N.E.2d 904, 906 (Ill. App. Ct. 2002); Maryland: Higginbotham v. Pub. Serv. Comm'n, 985 A.2d 1183, 1198 (Md. 2009) (Harrell, J., concurring and dissenting) ("Where a statute containing a limitation period creates both the right and the remedy, the limitation period constitutes a condition precedent to maintaining suit, not merely a statute of limitations subject to waiver if not raised by the defendant as an affirmative defense."); Minnesota: Ariola v. City of Stillwater, 889 N.W.2d 340 (Minn. Ct. App. 2017); Oregon: Haynes v. Bd. of Parole & Post-Prison Supervision, 403 P.3d 394 (Or. 2017).

[278] Arbaugh v. Y&H Corp., 546 U.S. 500, 511 (2006).

[279] Permalab-Metalab Equip. Corp. v. Mayland Casualty Co., 25 Cal. App. 3d 465 (Ct. App. 1972) (citing 1 WITKIN, CAL. PROCEDURE, JURISDICTION § 71 (2d ed. 1970)); V.M. v. R.B., 114 N.E.3d 1015, 1020 (Mass. Ct. App. 2018); In re Welfare of Child of T.T.B., 710 N.W.2d 799 (Minn. Ct. App. 2006).

[280] Kontrick v. Ryan, 540 U.S. 443, 455 (2004).

[281] *See* In re Expungement of Arrest Records Related to Brown v. State, 226 S.W.3d 147, 150 (Mo. 2007).

Some rules are easily labeled as jurisdiction or merit-related.[282] Legislatures clearly designate others as statutes of limitations or affirmative defenses. Courts focus on other—not so easy to label—rules of time and content and designate them as statutes of limitations or affirmative defenses. They do so because these two categories are recognized in many states as waivable and thus not subject-matter jurisdiction related. Thus, liking other procedural rules to them attaches specific effects automatically.

In most states, statutes of limitations are time limits to file suit that courts consider waivable.[283] Opposing parties, usually defendants, have to raise noncompliance with a statute of limitations timely.[284] Illinois and Indiana courts, for example, liken procedural rules to statutes of limitations when they explain the effects of noncompliance with a non-jurisdictional rule.[285] Interestingly, even the U.S. Supreme Court has invoked this distinction in the past—before developing its framework—to explain instances where a procedural rule was not jurisdictional.[286]

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[282] RESTATEMENT (SECOND) OF JUDGEMENTS §11 cmt. e (1982).

[283] *See*, *e.g.*, State v. Kerby, 156 P.3d 704, 707–10 (N.M. 2007).

[284] But some states hold some statutes of limitations not waivable, like Alabama. *See* Hulsey v. State, 196 So. 3d 342, 354 (Ala. Crim. App. 2015). Minnesota also has noted that some statutes of limitations, on statutory rights, may be jurisdictional. See Ariola v. City of Stillwater, 889 N.W.2d 340 (Minn. Ct. App. 2017).

[285] People v. Keegan, 779 N.E.2d 904, 906 (Ill. App. Ct. 2002); Packard v. Shoopman, 852 N.E.2d 927, 932 (Ind. 2006). *See* also Hooper v. State, 838 N.W.2d 775 (Minn. 2013); State v. Cormack, 248 P.3d 784 (Kan Ct. App. 2011) (holding that the statute of limitations in a criminal case is a non-jurisdictional affirmative defense that is waived if not raised in the trial court)

[286] *See*, *e.g.*, Hallstrom v. Tillamook County, 493 U.S. 20, 27 (1989) (explaining that *Zipes* [v. v. Trans World Airlines, Inc., 455 U.S. 385 (1982)] was not-jurisdictional because "the filing period [in question] operated as a statute of limitations").

Similarly, other state courts have categorized non-jurisdictional procedural rules in additional known categories[287] like affirmative defenses and venue arguments. So, for instance, when the Tennessee supreme court decided whether ecclesiastical abstention doctrine is jurisdictional, it contrasted the jurisdictionality definition with how it defines affirmative defense bars.[288]

2. Precedents—Conclusory vs. Well-Reasoned

Beyond statutory construction, like in any other judicial decision-making, courts do not write on a blank slate. They have precedent to build on. So, it is not surprising that deciding whether a procedural rule is jurisdictional is also based on precedent.[289] What kind of precedent is the main question.

Recall that the backdrop to the U.S. Supreme Court's revolution is its past opinions' tendency to decide the question of jurisdictionality without much reasoning if any.[290] And as many courts across the nation admit, the U.S. Supreme Court is not the only one to issue "drive-by" jurisdictional rulings.[291] And yet, many courts continue to

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[287] Sierra Life Ins. Co. v. Granata, 586 P.2d 1068, 1070–71 (Idaho 1978) (warning lower courts from "the considerable mischief to confuse lack of jurisdiction over the subject matter with questions of venue, other aspects of jurisdiction, or defenses which may bar relief or render it improper or inappropriate for a court to proceed with a case even though it has jurisdiction over the subject matter."); State v. Smith, 211 So.3d 176, 199 (Fla. Dist. Ct. App. 2016) (Emas, J., concurring).

[288] Church of God in Christ, Inc. v. L. M. Haley Ministries, Inc., 531 S.W.3d 146 (2017). *See also* BNSF Ry. Co. v. Cringle, 247 P.3d 706 (Mont. 2010) (same).

[289] This is also true for federal courts. *See* Fort Bend Cty. v. Davis, 139 S. Ct. 1843, 1849 (2019) (while not the only factor, precedent plays a role in the analysis).

[290] *See* Arbaugh v. Y&H Corp., 546 U.S. 500, 511 (2006).

[291] *See*, *e.g.*, Carlton v. State, 816 N.W.2d 590, 602 n.2 (Minn. 2012); Ohio High Sch. Ath. Ass'n v. Ruehlman, 136 N.E.3d 436, 440 (Ohio 2019); Adams v. Vill. of Enon, 2012 Ohio-6178 (Ohio Ct. App. 2012); Castino v. G.C. Corp., 2010 WL 797291, *9–10 (Guam 2010);

rely reflexively on unreasoned precedent holding different procedural rules jurisdictional.[292] These courts repeatedly cite to precedent—at times in a string cite—and explain a jurisdictional label based on past decisions without giving any additional explanation.[293]

Colorado provides an illustrative example. In 2017, a district court held that the time to bring action asking to review a quasi-judicial decision of a local government body[294] "is considered jurisdictional and cannot be tolled or waived."[295] The court cited a 2015 Colorado appeals court opinion to support its holding.[296] But a review of the cases that the 2015 appellate opinion relies on reveals that this decision has never been justified and has been only a repeated conclusory statement.[297]

But it is not only jurisdictionality that finds support in conclusory case law. At least on one occasion, the Georgia supreme court similarly fell into the trap of citing precedent devoid of reasoning for the proposition that a

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[292] Mun. Health Ben. Fund v. Hendrix, 602 S.W.3d 101, 113–14 (Ark. 2020) (Wood, J., concurring in part and dissenting in part) ("the opinion [declaring exhaustion as jurisdictional] presents no other detail and otherwise fails to explain if the label "jurisdiction" was deliberate. This misnomer has since been quoted in subsequent cases without further development.").

[293] *See*, *e.g.*, Stewart v. Emp't Sec. Dep't, 419 P.3d 838 (Wash. 2018). The settled practice itself may be a reason to leave precedent alone, but that reason diminishes in power when the settled practice has no sound jurisprudential basis.

[294] Colorado Rule of Civil Procedure 106(A)(4).

[295] Benson v. Eagle Cty. 2017 Colo. Dist. LEXIS 1364, *13–14 (May 26, 2017).

[296] Slaughter v. Cnty. Court, 712 P.2d 1105, 1106 (Colo. App. 2015).

[297] The earliest citation to this proposition is in Hidden Lake Dev. Co. v. District Court, 515 P.2d 632, 635 (Colo. 1973). There, the state supreme court simply held that the "new complaint was filed too late, and the respondent court was without jurisdiction to proceed against the petitioner."

notice of intent to apply for certiorari, filed in the state's court of appeals, is non-jurisdictional.[298]

On the other hand, some precedent that state courts rely on is thorough and detailed when it holds a rule jurisdictional or non-jurisdictional. Even before the U.S. Supreme Court, some states have recognized that their jurisdictional analysis of procedural rules has been "less than meticulous"[299] and changed course. These decisions have played a central role in the analysis in several states that have already established some framework of their own.[300]

In California, Abelleira v. District Court of Appeal provides such compelling precedent.[301] In *Abelleira*, a 1941 case, the state supreme court determined that a trial court had no jurisdiction to act before administrative action was complete.[302] However, the court did more than that and analyzed the differences between various types of jurisdictional and non-jurisdictional rules[303] before

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[298] Stubbs v. Hall, 840 S.E.2d 407, 415 (Ga. 2020) (noting this without any reasoning and citing to McCoy v. State, 814 S.E.2d 319, 321 n.1 (2018), that similarly supplies no reasoning for the proposition).

[299] A phrase in *Kontrick v. Ryan*, 540 U.S. 443, 454 (2004). For states making a similar point, See, e.g., *Buczkowski v. Buczkowski*, 88 N.W.2d 416, 419 (Mich. 1958) ("The loose practice has grown up, even in some opinions, of saying that a court had no 'jurisdiction' to take certain legal action when what is actually meant is that the court had no legal 'right' to take the action, that it was in error."); K.S. v. State, 849 N.E.2d 538, 541 (Ind. 2006).

[300] *See*, *e.g.*, Richardson v. Ruddy, 98 P. 842 (Idaho 1908) (cited 37 times including in the last three years); Jackson City Bank & Trust Co v Fredrick, 260 N.W. 908 (1935) (cited 94 times including in the last three years).

[301] 109 P.2d 942,947–51 (Cal. 1941).

[302] *Id.*, at 946 ("The theory upon which the writ of prohibition was sought is that the District Court of Appeal had no jurisdiction to issue the writ of mandate prior to completion of the administrative proceedings").

[303] *Id.* at 947–51.

concluding that the requirement before it—exhaustion of administrative remedies—was jurisdictional.[304]

III. EXPLAINING STATES' JURISDICTIONALITY ANALYSES

Most state courts have not followed the Supreme Court's new framework. Some cited it; others ignored it. This Section offers reasons for why states reacted the way they did.

A. History

Scholars have called the U.S. Supreme Court's framework "pathmarking"[305] and "revisionist."[306] But reading through state courts' opinions shows that the Court was offering nothing new to some states. States have been setting clear boundaries between jurisdictional and non-jurisdictional procedural rules for decades.[307] So perhaps the Court has taken some initial inspiration from the states?

Idaho is a chief example of such history. Idaho courts have been carefully analyzing jurisdictionality since at least 1908.[308] For example, in *Richardson v. Ruddy*, a trial court ordered a referee to handle a real property partition.

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[304] This outcome is especially important because this is not a result-driven inquiry. Indeed, well-reasoned decisions do not all reach the same outcome. In some states also can provide the basis of a more expensive use of the term "jurisdiction." *See also* Utah: *State v. Rettig*, 416 P.3d 520, 526–28 (Utah 2017) offering a broad concept of jurisdiction, beyond subject-matter jurisdiction, following a deep-dive analysis of the state case law.

[305] Dodson – Effects, *supra* note 32, at 624.

[306] Hawley – Anti Injunction, *supra* note 32, at 88.

[307] In the context of criminal statutes of limitations the New Mexico supreme court summed up this move from a jurisdictional to a non-jurisdictional approach in the 1990s. See State v. Kerby, 156 P.3d 704, 708–710 (N.M. 2007); see also in general in Tennessee: Church of God in Christ, Inc. v. L. M. Haley Ministries, Inc., 531 S.W.3d 146 (2017).

[308] State v. Rogers, 91 P.3d 1127, 1131–32 (Idaho 2004); Richardson v. Ruddy, 98 P. 842, 844 (Idaho 1908).

Some parties argued that such an appointment violated a federal statute, and thus the trial court lacked jurisdiction to render judgment following the referee report.[309] If the court had accepted their argument, a litigation older than five years would have been voided.[310] The Idaho supreme court rejected it, setting a clear boundary between jurisdictional and non-jurisdictional rules. The former represents "the abstract power to try a case of the kind or character of the one pending."[311] Jurisdictional rules, the court explained, do not involve "whether the particular case is one that presents a cause of action, or under the particular facts is triable."[312] And so, using a referee to determine parties' rights may have been an error of exercising jurisdiction, but not a negation of the "power to act at all."[313] Idaho has kept with this precedent since and built on it.[314]

Idaho is not alone. The Michigan supreme court has been distinguishing between jurisdictional and non-jurisdictional rules since the nineteenth century. In 1847, the state supreme court dealt with a case where a probate court appointed a guardian to a child over the age of fourteen—an age not eligible for such an appointment.[315] The court explained that this error is not jurisdictional because by "issuing and serving a citation upon the minor, the probate court would have acquired jurisdiction over the subject matter," and this error is an error of "exercise of that jurisdiction" and would not render it void.[316]

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309 Richardson, 98 P. at 843.
310 *Id.* at 842.
311 *Id.* at 844 (quoting Brown on Jurisdiction, Sec. 1a).
312 *Id.*
313 *Id.* at 845.
314 See, e.g., Troupis v. Summer, 218 P.3d 1138, 1140–41 (Idaho 2009); Freeman v. State, 783 P.2d 324, 325 (Idaho Ct. App. 1989).
315 Palmer v. Oakley, 2 Doug. 434, 475–76 (Mich. 1847).
316 Id.

The same court also recognized back in 1935 that the term jurisdiction had been used casually at times. It noted that "[t]here is a wide difference between a want of jurisdiction, in which case the court has no power to adjudicate at all, and a mistake in the exercise of undoubted jurisdiction, in which case the action of the trial court is not void although it may be subject to direct attack on appeal. This fundamental distinction runs through all the cases."[317] In 1958, the state supreme court noted this casual use of the term jurisdiction again. It asserted that "[t]he loose practice has grown up, even in some opinions, of saying that a court had no 'jurisdiction' to take certain legal action when what is actually meant is that the court had no legal 'right' to take the action, that it was in error."[318]

Texas is one of the states that have more recently revamped its analysis of procedural rules' jurisdictional nature. In 2000,[319] the Texas supreme court abandoned a long-held strict compliance approach favoring a laxer non-jurisdictional approach.[320] And although the state legislature made some procedural rules jurisdictional in response,[321] the court did not change course in general and held on to its new approach.[322]

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[317] Jackson City Bank & Trust Co v Fredrick, 260 N.W. 908 (1935).

[318] Buczkowski v Buczkowski, 351 Mich 216, 222; 88 NW2d 416 (1958).

[319] Dubai Petroleum Co. v. Kazi, 12 S.W.3d 71, 76-77 (Tex. 2000).

[320] Prairie View A&M Univ. v. Chatha. 381 S.W.2d 500 (Tex. 2012); In re United Servs. Auto. Ass'n, 307 S.W.3d 299 (Tex. 2010); Igal v. Brightstar Info. Tech. Group, Inc., 250 S.W.3d 78 (Tex. 2008).

[321] Roy v. Alkusari, L.L.C., 619 S.W.3d 385 (Tex. Ct. App. 2021); Tex. Gov't Code § 311.034 (providing that "statutory prerequisites to a suit, including the provision of notice, are jurisdictional requirements in all suits against a governmental entity").

[322] City of DeSoto v. White, 288 S.W.3d 389, 393 (Tex. 2009) (observing that since *Kazi*, the supreme court has "been reluctant to conclude that a [statutory] provision is jurisdictional, absent clear legislative intent to that effect").

California courts have historically established a different dichotomy. First, the courts distinguish between mandatory and directory rules.[323] Then, they have held that filing a timely notice of appeal is jurisdictional,[324] while all other rules are not unless the legislator says so.[325] Finally, over time, the state's courts have developed tests to rebut the presumption of non-jurisdictionality.[326]

Lastly, in contrast, Arizona courts have viewed many doctrines, ranging from exhaustion to mootness, ripeness, and standing, to be "long-settled" rules of "judicial administration,"[327] which "courts have established to limit the cases of which they take jurisdiction."[328] This means that as "a general matter, any litigant, even the State, can waive by conduct its right to object to an adverse party's failure to comply with statutory, constitutional, contractual, and procedural requirements."[329] That is because "[l]anguage, mandatory in form, may be deemed directory when the legislative purpose can best be carried out by such construction."[330] It is noteworthy that this lax approach does not affect the implications of a procedural rule once properly raised. For example, in the context of exhaustion, the Arizona supreme

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[323] Kabran v. Sharp Memorial Hospital, 386 P.3d 1159, 1165 (Cal. 2017).

[324] Abelleira v. District Court of Appeal, 109 P.2d 942 (Cal. 1941)

[325] Sameer v. Khera, 2020 WL 595472 (Cal. Ct. App. 2020); 1130 Hope St. Inv. Assocs., LLC v. Haiem, 2015 Cal. App. Unpub. Lexis 2996 (Cal. App. 2015).

[326] *Id*.

[327] Medina v. Arizona DOT, 916 P.2d 1130, 1133 (Ariz. App. Ct. 1995).

[328] Campbell v. Chatwin, 428 P.2d 108, 114 (Ariz. 1967).

[329] State ex rel. Horne v. Campos, 250 P.3d 201, 206–07 (Ariz. App. Ct. 2011) (Combing through authorities in different contexts).

[330] Dep't of Revenue v. S. Union Gas Co., 582 P.2d 158, 160 (Ariz. 1978).

court has held that when the issue is invoked timely, "the trial court may not exercise jurisdiction of the action."[331]

These clear and long-standing precedents may explain why these states did not need a "clean-up effort" like the one the U.S. Supreme Court has embarked on[332] and have not particularly followed it or cited to it.[333]

Additional states also arrived much earlier at conclusions that the Court uttered only recently. For example, Alaska's supreme court noted already in 1960 that because a notice of appeal rule " is regulated by a rule of this court, and not by statute," it does not involve the "question of jurisdiction."[334] That is a distinction the U.S. Supreme Court had ignored the same year when deciding *United States v. Robinson* and holding a court-made rule "mandatory and jurisdictional,"[335] and had adopted only much later in its recent cases.[336]

Additionally, at least several state courts understood well before the U.S. Supreme Court that a procedural rule with the word "shall" is not necessarily jurisdictional.[337] For instance, in 1994, the Arizona appeals court interpreted a restitution act that stipulated under the heading "jurisdiction" that a court "shall" enter restitution at "the time the defendant completes his period

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[331] Campbell, 418 P.2d at 115.

[332] David S. Kantrowitz, Note, Caveat Emptor: Jurisdictional Rules, Bowles v. Russell, and Reliance on Our Judicial System, 89 B.U. L. Rev. 265, 270 (2009).

[333] While courts in all four states cited the Court's framework cases, they have done so to reinforce their own existing precedent and have not directly followed them.

[334] Bridges v. Alaska Hous. Autho., 349 P.2d 149, 155 (Ala. 1960).

[335] United States v. Robinson, 361 U.S. 220, 229 (1960).

[336] Hamer v. Neighborhood Hous. Servs. of Chicago, 138 S. Ct. 13, 18 (2017).

[337] Matter of State of New York v. Keith F., 149 A.D.3d 671 (N.Y. App. Div. 2017) (citing past cases).

of probation or his sentence."[338] The court held that these words "are not jurisdictional, but merely advisory as to when the trial court is to act"[339] and that a trial court may act "within a reasonable time after the period" is completed.[340] While a later Arizona appeals court panel had the benefit of the U.S. Supreme Court's opinion in *Dolan v. United States* addressing the same issue,[341] its citation to it was to bolster its points based on Arizona case law and not to follow its lead.[342] The same is true for the jurisdictionality of exhaustion in the state.[343]

Finally, some states have long held that timely filings in the criminal context are not jurisdictional.[344] For example, a Colorado held in 1977 that an untimely motion for a new trial under Colorado criminal procedure rule 33 does not deprive a court of the authority to adjudicate the subject matter.[345] And the same is true for the untimely filings of briefs.[346] However, these are conclusions the U.S. Supreme Court only reached in 2005.[347]

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[338] A.R.S. 13-805(A) (1992).

[339] State v. Pinto, 880 P.2d 1139, 1142 (Ariz. App. Ct. 1994).

[340] *Id.*; see also State v. Unkefer, 239 P.3d 749, 754–55 (Ariz. App. Ct. 2010) (explaining the Pinto reasonableness standard and remanding to the trial court to decide if a 12-year delay was reasonable in the case's circumstances).

[341] 560 U.S. 605 (2010).

[342] Unkefer, 239 P.3d at 755.

[343] *See* State ex. rel. Horne v. Campos, 250 P.3d 201 (Ariz. App. Ct. 2011) (citing a federal district court case that relies on Arbaugh for the proposition that "federal civil forfeiture statute does not explicitly state its exhaustion requirements are jurisdictional so they are treated as non-jurisdictional").

[344] *See* overview in State v. Kerby, 156 P.3d 704, 707–10 (N.M 2007).

[345] People v. Moore, 562 P.2d 749 (Colo. 1977).

[346] People v. Chapman, 557 P.2d 1211 (Colo. 1977).

[347] Eberhart v. United States, 546 U.S. 12, 17-19 (2005) (per curiam).

B. Terminology is Destiny[348]

Some states have no need for the Court's revolution because they have gone through a "refinement"[349] of their own. But others do not need the Court's "jurisprudential project"[350] as its premise is antithetical to their jurisprudence—whether because they view the term "jurisdiction" differently than the Court or have other terminology they have grown accustomed to using.

1. Jurisdiction's Scope

The U.S. Supreme Court endeavored to solve the overuse of the jurisdictional label by narrowing the scope of the term "jurisdiction." The Court repeatedly lamented the term's "too many" meanings. In its new framework, the Court accordingly aims to create a world where labeling a procedural rule as "jurisdictional" would mean it relates only to a court's subject-matter jurisdiction.[351]

But this narrow terminology is not accepted in many other state courts. These state courts are not profoundly

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[348] Gonzalez v. Thaler, 565 U.S. 134, 169 (2012) (Scalia, J., dissenting).

[349] William James Goodling, Comment, *Distinct Sources of Law and Distinct Doctrines: Federal Jurisdiction and Prudential Standing*, 88 WASH. L. REV. 1153, 1174 (2013).

[350] Howard M. Wasserman, *Prescriptive Jurisdiction, Adjudicative Jurisdiction, and the Ministerial Exemption*, 160 U. PA. L. REV. PENNUMBRA 289, 295 (2012).

[351] Sebelius v. Auburn Reg'l Med. Ctr., 568 U.S. 145, 153 (2013). Some states have followed a similar mode of operation. *See, e.g.*, Richardson v. Ruddy, 98 P. 842, 844 (Idaho 1908) ("Jurisdiction over the subject-matter is the right of the court to exercise judicial power over that class of cases, not the particular case before it, but rather the abstract power to try a case of the kind or character of the one pending; and not whether the particular case is one that presents a cause of action, or under the particular facts is triable before the court in which it is pending, because of some inherent facts which exist and may be developed during the trial."). Others have adopted the Court's vision. *See*, *e.g.*, Rubey v. Vannett, 714 N.W.2d 417 (Minn. 2006); Bisher v. Lehigh Valley Health Network, Inc., 265 A.3d 383, 400 n.10 (Pa. 2021).

uncomfortable with jurisdiction's "many meanings."[352] For them, the many meanings are not "too many," and a jurisdictional label does not necessarily constrain a court's subject-matter jurisdiction.[353]

Take Arkansas as an example. As recent as 2020, the state's supreme court held that "a circuit court lacks jurisdiction over a suit"[354] without administrative exhaustion of remedies. But the court also held that the "doctrine [of administrative exhaustion] is subject to numerous objections."[355] Yet, according to U.S. Supreme Court precedent, subject-matter jurisdiction can never be excused, like a dissenting opinion at the Arkansas supreme court explained.[356]

Although the Arkansas approach seems flatly contradicting U.S. Supreme Court's precedent, in reality, this conclusion is not so clear-cut. The majority opinion

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[352] *See*, *e.g.*, Commonwealth v. Steadman, 411 S.W.3d 717, 724 (Ky. 2013) ("[T]he questions Steadman has raised do not go to subject-matter jurisdiction and instead concern only whether the trial court had particular-case jurisdiction"); Board of Supervisors of Fairfax County v. Board of Zoning Appeals of Fairfax County, 626 S.E.2d 374, 381 (Va. 2006) (Holding that a filing time procedural rule was an "other jurisdictional element" subject to waiver);

[353] Ark. Dep't of Human Services v. Ledgerwood, 530 S.W.3d 336, 345–46 (Ark. 2017).

[354] Mun. Health Ben. Fund v. Hendrix, 602 S.W.3d 101, 111 (Ark. 2020).

[355] *Id.*

[356] *Id.*, at 113 (Wood, J., concurring in part and dissenting in part); In any case, Arkansas is not alone in holding that jurisdictional rules may be excused. *See*, *e.g.*, Sims v. State, 998 So. 2d 494, 498–99 (Fla. 2008); Gable v. State, 720 S.E.2d 170 (Ga. 2011); Estate of Ehringer v. Director, Div. of Taxation, 24 N.J. Tax 599 (N.J. Tax Ct. 2009) ("Equitable relaxation of a limitations period for a tax refund claim "is unavailable except in the most extraordinary circumstances"); M.J. Ocean, Inc. v. Director, Div. of Taxation, 23 N.J. Tax 646 (N.J. Tax Ct. 2008) (analyzing waiver and tolling despite addressing the time to file as jurisdictional); State v. Romero-Perez, 2020 WL 1472361 (Tex. Ct. App. 2020); Williams v. Government of the Virgin Islands, 51 V.I. 57 (V.I. 2009) (Analyzing equitable tolling upon noncompliance with a jurisdictional rule).

cited above never utters the term "subject-matter jurisdiction." Instead, it only uses the term "jurisdiction," equating it with a party not being "entitled to judicial relief."[357] While the dissent assumes, as the U.S. Supreme Court does, that by using the term jurisdictional, the majority means subject matter jurisdiction, other states' more explicit doctrine explicates that the "jurisdiction" the Arkansas supreme court speaks of is "authority" rather than "subject-matter."[358] Moreover, the Arkansas supreme court said so explicitly itself on past occasions.[359]

This difference also appears in several other Arkansas cases where Justice Wood, the dissenting justice mentioned above, authored dissents too. For example, in *Bradley v. State*,[360] all the majority held was that a rule requires dismissal upon noncompliance.[361] But the dissent assumed that because the court dismissed the case *sua*

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[357] Hendrix, 602 S.W.3d at 111.

[358] *See*, *e.g.*, Cunningham v. Standard Guar. Ins. Co., 630 So. 2d 179, 181 (Fla. 1994) (holding that subject matter jurisdiction in contrast to "jurisdiction," is simply "the power to adjudge concerning the general question involved, and is not dependent upon the state of facts which may appear in a particular case."); Commonwealth v. Steadman, 411 S.W.3d 717, 724 (Ky. 2013) (explaining the term "particular-case jurisdiction" "more precisely, as 'challenges to [the trial court's] subsequent rulings and judgment,'" and as incident to the exercise of jurisdiction rather than to the existence of jurisdiction" and noting that "particular-case jurisdiction is subject to waiver."); Petition of Dare, 370 P.2d 846, 850–51 (Okla. 1962) (recognizing that the term "jurisdiction" includes, in addition to subject-matter and personal jurisdiction, "the authority under law to pronounce the particular judgment and sentence herein rendered."); In re Marriage of Major, 859 P.2d 1262 (Wash. 1993) ("The term 'subject matter jurisdiction' is often confused with a court's 'authority' to rule in a particular manner. This has led to improvident and inconsistent use of the term." (footnote omitted)).

[359] Holley v. Holley, 568 S.W.2d 487, 489 (Ark. 1978) ("A failure to strictly comply with the [authentication] requirements of s 29-803 as to subsequent entries did not totally deprive the trial court of jurisdiction of the subject matter in this case where appellee was personally served and responded.").

[360] 459 S.W.3d 302 (Ark. 2015).

[361] *Id.*, at 305.

sponte, it must be since it saw the issue as jurisdictional, which, according to Justice Wood, it is not.[362] But this assumption ignores how courts act *sua sponte* even when they generally proclaim they disfavor the practice.[363] In another similar instance, again, the majority sent signals that its use of "jurisdiction" is not in the subject-matter sense of the term by allowing substantial compliance with a jurisdictional provision.[364] And yet, Justice Wood, dissenting again, made the same assumption she made in *Bradley*.[365]

Alabama and Utah present two additional, similar case studies. Courts in both states understand the term "jurisdictional" to mean "not being subject to the ordinary rules of preservation and waiver."[366] For Utah, that means that "jurisdictional" also relates to justiciability concerns like mootness, ripeness, and standing.[367] Similarly, in Alabama, the state supreme court has been using the term "jurisdiction" broadly since at least 1911."[368]

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[362] *Id.*, at 305–06 (Wood, J., dissenting); see also the same move in Mann v. Pierce, 505 S.W.3d 150 (Ark. 2016) (Wood, J., dissenting).

[363] Schwartz – Supplementing, *supra* note 96, at 40 n.172 (citing another Arkansas case doing the same thing—Moore v. Moore, 486 S.W.3d 766, 777 (Ark. 2016)).

[364] Mann, 505 S.W.3d at 152.

[365] *Id.*, at 158 (Wood, J., concurring in part and dissenting in part).

[366] *See*, *e.g.*, Hulsey v. State, 196 So. 3d 342, 354 (Ala. Crim. App. 2015); State v. Rettig, 416 P.3d 520 (Utah 2017). The case is similar to Maryland in the context of state sovereign immunity: "we need not complicate the issue by addressing it in terms of whether the defense is 'jurisdictional' in nature . . . . The relevant focus is on whether the time limitation for bringing an action for breach of contract is a non-waivable, non-tollable condition to the waiver of immunity. If it is and the condition is not met, an action against the State must be dismissed because the State remains immune from suit, not because the court is without jurisdiction." State v. Sharafeldin, 854 A.2d 1208, 1215 n.5 (Md. 2004).

[367] E.T. v. R.K.B. (In re B.B.), 417 P.3d 1 (Utah 2017); *Carlton v. Brown*, 323 P.3d 571 (Utah 2014); *Atwood v. Cox*, 55 P.2d 377, 381 (Utah 1936) ("Jurisdiction is the power to decide a justiciable controversy . . . ." (citation omitted)).

[368] Wolff v. McGaugh, 57 So. 754, 755 (Ala. 1911).

Finally, understanding jurisdiction as a multi-layered term means that in some states, different meanings of jurisdiction have distinct effects—hence jurisdictional defects would not always mean immediate dismissal and at times may be waived.[369] For example, Indiana courts have held that noncompliance with a rule requiring corporations to retain counsel when appearing before a court renders a court without "jurisdiction."[370] But they also held that such defect is "curable,"[371] and "the corporate litigant must be given a fair opportunity to correct its error and retain competent counsel before dismissal would be appropriate."[372]

Jurisdiction may well be a "weasel word of the law."[373] But the comfort that some states have with the

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[369] *See*, *e.g.*, Mun. Health Ben. Fund v. Hendrix, 602 S.W.3d 101, 111 (Ark. 2020); Sims v. State, 998 So. 2d 494, 498–99 (Fla. 2008); Gable v. State, 720 S.E.2d 170 (Ga. 2011); Buck v. Buck, 340 P.3d 546 (Mont. 2014) (holding that although residency for a divorce petition is jurisdictional, a move after the initial filing is a sufficient amendment that restores the court's jurisdiction); Estate of Ehringer v. Director, Div. of Taxation, 24 N.J. Tax 599 (N.J. Tax Ct. 2009) ("Equitable relaxation of a limitations period for a tax refund claim "is unavailable except in the most extraordinary circumstances"); M.J. Ocean, Inc. v. Director, Div. of Taxation, 23 N.J. Tax 646 (N.J. Tax Ct. 2008) (analyzing waiver and tolling despite addressing the time to file as jurisdictional); State v. Romero-Perez, 2020 WL 1472361 (Tex. Ct. App. 2020); Williams v. Government of the Virgin Islands, 51 V.I. 57 (V.I. 2009) (Analyzing equitable tolling upon noncompliance with a jurisdictional rule).

[370] State ex rel. W. Parks, Inc. v. Bartholomew Cty. Ct., 383 N.E.2d 290, 293 (Ind. 1978).

[371] Wireless Advocates, LLC v. Ind. Dep't of State Revenue, 973 N.E.2d 111, 112 (Ind. T.C. 2012).

[372] Christian Business Phone Book, Inc. v. Indianapolis Jewish Community Relations Council, 576 N.E.2d 1276, 1277 (Ind. Ct. App. 1991).

[373] O'Keefe v. Dep't of Revenue, 488 P.2d 754, 755 (Wash. 1971) (explaining the term as "an epithet of sorts coined perhaps by a sometime legal philosopher with a naturalist bent. It appears from time to time in comment critical of legislative draftsmen or perhaps more often critical of judicial decision makers for attributing or distilling distinct and different nuances, meanings, and results from the same word on slightly different occasions, or in slightly different contexts.").

many meanings of jurisdiction may explain why they are not more receptive to the Court's move. The move, which included reconceptualizing and narrowing the term "jurisdiction," may prevent "abuse"[374] and "ward off profligate use of the term."[375] Still, it could also uproot years of nuanced precedent that a state's courts have developed.

2. Using New Terminology

The Supreme Court's framework introduced a new term to the procedural rule jurisdictionality analysis: "claim-processing rules."[376] The court did so without any fanfare and has never acknowledged that it created a new term, but a search for the term "claim-processing rule" on legal databases traces its first appearance to the Court's 2004 *Kontrick* opinion.[377]

Some courts adopted the "claim-processing rules" terminology,[378] yet others have adopted different terminology even before the Court's revolution. California courts, for example, adopted the term "fundamental jurisdiction" to describe procedural rules which affect a court's subject-matter jurisdiction.[379] They did so because they have long recognized that the phrase "lack of

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[374] *Id.*

[375] Sebelius v. Auburn Reg'l Med. Ctr., 568 U.S. 145, 153 (2013).

[376] Kontrick v. Ryan, 540 U.S. 443, 454 (2004).

[377] On Lexis it appears as the first result out of 2,015 cases (last accessed March 2, 2022). On Westlaw, providing 3,177 results for the term there are two earlier entries, both using the term in the insurance and regulation contexts (last accessed March 2, 2022). *See* Chapman v. Safeco Ins. Co. of America, 722 F. Supp 285 (N.D. Miss. 1989); Goodrich v. General Telephone Co. of California, 241 Cal. Rptr. 640 (Cal. Ct. App. 1987). None of the briefs in *Kontrick* mentioned the term.

[378] *See*, *e.g.*, Ohio: State v. Short, 2020 WL 6255261 (Ohio Ct. App. 2020); Pennsylvania: Muma v. Pa. Dep't of Health, 223 A.3d 742 (Pa. Commw. Ct. 2019). Virgin Islands: Ottley v. Estate of Bell, 61 V.I. 480 (V.I. 2014).

[379] Kabran v. Sharp Memorial Hospital, 386 P.3d 1159, 1165 (Cal. 2017).

jurisdiction" has two meanings, and the distinction between them is hazy.[380] Moreover, California courts have recognized that even when courts have subject-matter jurisdiction, they use the term "jurisdiction" to describe being constrained by the "Constitution, a statute, or relevant case law" to "act only in a particular manner, or subject to certain limitations."[381] So instead of creating an entirely different term, the California courts found that by explicitly articulating one meaning and explaining its contours, courts may better understand when it appears.[382]

In 1965, the Iowa supreme court recognized "delayed appeals," an exception to jurisdictional rules in criminal cases.[383] It explained that the exception is needed where noncompliance with a procedural rule was in good faith and due to technical irregularities.[384] Additionally, the court admitted that it previously addressed those appeals on the merits despite holding it lacks jurisdiction and reasoned that this would be a better way to solve such situations.[385] The court later held that this exception is appropriate only in those instances where "a valid due process argument might be advanced should the right of appeal be denied."[386] In 2021, the court extended this

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[380] People v. Mendez, 234 Cal. App. 3d 1773, 1781 (1991).

[381] Kabran v. Sharp Memorial Hospital, 386 P.3d 1159, 1166 (Cal. 2017).

[382] *Id.*

[383] Ford v. State, 138 N.W.2d 116, 119 (Iowa 1965). Iowa is not alone. See Maryland for a similar category named "belated appeals," granted as a remedy for ineffective assistance of counsel. Garrison v. State, 711 A.2d 170 (Md. 1998). These categories are somewhat similar to the now-overruled federal "unique circumstances" doctrine. *See* by *supra* notes 184 – 188.

[384] Cleesen v. State, 258 N.W.2d 330, 332 (Iowa 1977).

[385] Ford v. State, 138 N.W.2d 116, 119 (Iowa 1965) (quoting State v. Van Andel, 270 N.W. 420, 421 (Iowa 1936) that held that the delay in appeal rendered it without jurisdiction but because it was "a criminal case," it still "examined the record carefully and [was] satisfied from the evidence that the defendant is guilty.").

[386] Swanson v. State, 406 N.W.2d 792, 793 (Iowa 1987).

exception to parental rights cases under similar circumstances.[387]

Finally, Maryland courts use the term "condition precedent" to describe a procedural rule that "cannot be waived under the common law and a failure to satisfy it can be raised at any time because the action itself is fatally flawed if the condition is not satisfied."[388]

And so, terminology can make a difference, so long as it is precise and useful. Otherwise, a court may find itself like Montana courts which have called procedural time bars so many names, such as "rigid, categorical time prescription[s],"[389] "categorical, but nonjurisdictional, time prescription[s]," [390] "'time limit,' 'statute of limitation,' 'time bar,' 'procedural bar,' 'rigid statutory prescription,' 'period of limitation,' 'notice requirement,' or 'procedural requirement.'" [391] And still, none of these terms captured the essence of the non-jurisdictional rules' effects: subject to waiver and forfeiture, would be enforced if timely raised by opposing party, but still "remain subject to constitutional review and equitable principles."[392]

C. Other Considerations

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[387] In re Interest of A.B., 957 N.W.2d 280 (Iowa 2021).

[388] Kearney v. Berger, 7 A.3d 593, 610 (Md. 2010); State v. Sharafeldin, 854 A.2d 1208, 1215 n.5 (Md. 2004). Nebraska uses the same terminology. Weeder v. Cent. Cmty. Coll., 269 Neb. 114, 691 N.W.2d 508, 513 (Neb. 2005) ("This court has held that the filing of a tort claim, rather than being jurisdictional in nature, is a condition precedent to instituting a suit against a political subdivision."); Keller v. Tavarone, 262 Neb. 2, 628 N.W.2d 222, 230 (Neb. 2001) ("While not a jurisdictional prerequisite, the filing or presentment of a claim to the appropriate political subdivision is a condition precedent to commencement of a suit under the ... Act.").

[389] Davis v. State, 187 P.3d 654, 659 (Mont. 2008)

[390] Miller v. Eighteenth Judicial Dist. Court, 162 P.3d 121, 131 (Mont. 2007).

[391] BNSF Ry. Co. v. Cringle, 247 P.3d 706 (Mont. 2010).

[392] *Id.*

Although state and federal courts must tend to their jurisdictional limits, they are not the same. They differ in their structure and policy considerations, and these have an impact on whether a state court adopts a federal procedural reform.[393]

1. Sources of Authority and Jurisprudential Rules

This Article discusses many procedural rules located in court rules and not statutes. Federal rules of procedure are enacted through rulemaking governed by the Rules Enabling Act.[394] But that is not the source of state rules of procedure. States make rules in various manners and under different sources of authority.[395] The source of procedure-making matters when deciding whether a rule is jurisdictional.[396]

The U.S. Supreme Court repeatedly held that if a rule "is found in a procedural rule, not a statute, it is properly classified as a nonjurisdictional claim-processing rule." [397] That is because the Court views Congress as the

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[393] See, *e.g.*, Texas, where courts noted that their system is full of procedural hurdles, *In re United Servs. Auto. Ass'n*, 307 S.W.3d 299 (Tex. 2010), and complexities that the federal courts are not aware of, *see* State v. Moore, 225 S.W.3d 556 (Tex. Ct. Crim. App. 2007) (Noting that unlike the federal binary choice of jurisdictional and non-jurisdictional, Texas has "(1) absolute requirements and prohibitions; (2) rights of litigants which must be implemented by the system unless expressly waived; and (3) rights of the litigants which are to be implemented upon request") But that might be also an oversimplification of the federal world, especially today, that includes many varieties of consequences for its non-jurisdictional rules.).

[394] *See* 28 U.S.C. §§ 2071–2077. *See also* Clopton – Retrenchment, supra note 41, at 8.

[395] In general, *see* Clopton – Making Procedure, supra note 41, at 9–11, 46–70 (a table detailing all state procedure making procedures).

[396] Kontrick v. Ryan, 540 U.S. 443, 452 (2004) ("Only Congress may determine a lower federal court's subject-matter jurisdiction"); Sibbach v. Wilson & Co., 312 U. S. 1, 10, 61 S. Ct. 422, 85 L. Ed. 479 (1941) (noting "the inability of a court, by rule, to extend or restrict the jurisdiction conferred by a statute").

[397] Nutraceutical Corp. v. Lambert, 139 S. Ct. 710, 714 (2019).

only one that can change a federal court's subject-matter jurisdiction.[398]

But states do not always agree or retain the same authority structure.[399] The Illinois appeals court, for instance, held that when a court draws its adjudicatory power from the state constitution, no procedural rule can be jurisdictional.[400] But when the court is of limited jurisdiction, as an administrative agency, "the time limitation is an inherent element of the right and of the power of the tribunal to hear the matter."[401] And so, taken to its logical end, if federal courts followed Illinois precedent, it might mean that all federal procedural rules would be jurisdictional, as federal courts' jurisdiction is inherently limited.[402]

Even following the Court's logic may lead to different results according to states and territories' constitutional structure. For example, in the Northern Mariana Islands, the legislature cannot limit the supreme court's jurisdiction derived from the constitution.[403] And so,

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[398] Hamer v. Neighborhood Hous. Servs. of Chicago, 138 S. Ct. 13, 17 (2017).

[399] Some states follow the Supreme Court model by which "a rule of the court cannot convey or limit jurisdiction." Smith v. Commonwealth, 693 S.E.2d 765 (Va. Ct. App. 2010); *see also* Rosales v. State, 206 A.3d 916, 923–24 (Md. 2019) (noting a shift in the label following the belated realization that the issue is governed by a rule and not a statute); Deloatch v. Sessmos-Deloatch, 229 A.3d 486 (D.C. 2020); Mathis v. D.C. Hous. Auth., 124 A.3d 1089 (D.C. 2015); Bryan v. Gov't of the Virgin Islands, 56 V.I. 451 (V.I. 2012).

[400] People v. Keegan, 779 N.E.2d 904, 906 (Ill. App. Ct. 2002).

[401] Charleston Cmty. Unit Sch. Dist. No. 1 v. Ill. Educ. Labor Relations Bd., 561 N.E.2d 331, 333 (Ill. App. Ct. 1990).

[402] Iowa uses a similar rationale. See Cooper v. Kirkwood Cmty. Coll., 782 N.W.2d 160, 164 n.1 (Iowa Ct. App. 2010) ("On a petition for judicial review of an administrative agency decision 'the district court does not exercise original jurisdiction vested in it by the constitution. It exercises appellate jurisdiction conferred upon it by statute.'" (citation omitted))

[403] Norita v. Commonwealth, 2020 MP 12 (N.M.I. 2020).

there are no jurisdictional rules imposed in statute or court rules.[404] Although this holding contrasts with the Court's case law, it is a newly established conclusion based on its application in the territory.[405] And in Utah, among other states, the state constitution and not the legislature gives the supreme court the power to make rules of procedure.[406] And perhaps because of that difference, courts in these states hold that their rules are "jurisdictional."[407]

Jurisprudential rules can also make a difference in interpreting procedural rules. For instance, state courts differ from federal courts regarding the possibility of collaterally attacking jurisdictional defects. The U.S. Supreme Court has held that "[e]ven subject matter . . . may not be attacked collaterally." [408] It held so relying on The Second Restatement on Judgments. But although the Restatement acknowledged that it is the federal case law, it also noted that attacking jurisdiction on appeal or collaterally made little difference. If one is allowed, it makes little sense to forbid the other.[409] The Court is not alone in this conclusion. Some states likewise prohibit jurisdictional challenges on collateral review.[410] Yet many states allow such late attacks, making the question of

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[404] Commonwealth v. Borja, 2015 MP 8 (N.M.I. 2015).

[405] *Id.*; Commonwealth v. Laniyo, 2012 MP 1 (N.M.I 2012),

[406] Utah Const. art. VIII, § 4.

[407] Although in a broader sense. *See* State v. Rettig, 416 P.3d 520, 526–28 (Utah 2017). *But see* Alabama where although the state constitution gives the supreme court the authority to promulgate rules, the court still found these not jurisdictional because the constitution limits its ability "abridge, enlarge or modify the substantive right of any party nor affect the jurisdiction of circuit and district courts." Ex Parte Clemons, 55 So. 3d 348, 353–56 (Ala. 2007) (quoting Ala. Const. 1901, Art. VI, § 150).

[408] Kontrick v. Ryan, 540 U.S. 443, 455 n.9 (2004).

[409] RESTATEMENT (SECOND) OF JUDGEMENTS §12 (1982).

[410] Peidlow v. Williams, 459 P.3d 1136 (Alaska 2020); Abercrombie v. Abercrombie, 282 So.3d 763 (Miss. 2019); State v. Filiaggi, 714 N.E.2d 867 (Ohio 1999).

jurisdictionality even more meaningful and potentially disruptive.[411]

2. Policy

The U.S. Supreme Court and many state courts discuss jurisdictionality as a textual, statutory matter.[412] But it is also, as shown by the opinions of different courts, including the U.S. Supreme Court, a policy matter. Various kinds of policy considerations play a significant role in how courts distinguish between procedural and jurisdictional rules. These range from broad and vague considerations to ones in specific law areas.[413]

When the Connecticut supreme court explained its "presumption in favor of subject matter jurisdiction" in 2001,[414] it justified it with a litany of policy reasons, such as the actual function of courts and agencies,[415] the fact that the parties "may not be fully aware of the necessity of filing within the statutory time periods, and may even fail to do so because of justifiable, equitable factors."[416] Indeed, some courts have described changes in procedural rules' interpretive guides as a "modern direction of policy." [417] And that is the terminology the Second Restatement of Judgments used in 1982 when it explained changes in the

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[411] *See*, *e.g.*, Kogel v. Kogel, 786 S.E.2d 518 (Ga. Ct. App. 2016);. Bosse v. State, 484 P.3d 286 (Okla. Ct. Crim. App. 2021); Palmer v. Oakley, 2 Doug. 434, 476 (Mich. 1847).

[412] Fort Bend Cty. v. Davis, 139 S. Ct. 1843, 1848-49 (2019); Sea Hawk Seafoods v. State, 215 P.3d 333 (Alaska 2009).

[413] *Compare* Schmidt v. True (In re Will of True), 220 So. 3d 276 (Miss. Ct. App. 2017) *with*

[414] Williams v. Comm'n on Human Rights & Opportunities, 777 A.2d 645, 651 (Conn. 2001)

[415] Id.

[416] Williams v. Comm'n on Human Rights & Opportunities, 777 A.2d 645, 661 (Conn. 2001).

[417] Reid v. SSB Holdings, Inc., 506 S.W.3d 140 (Tex. Ct. App. 2016) (describing Dubai Petroleum Co. v. Kazi, 12 S.W.3d 71, 76-77 (Tex. 2000).

states' jurisprudence regarding jurisdictionality of procedural rules, noting that "the modern direction of policy is to reduce the vulnerability of final judgments to attack on the ground that the tribunal lacked subject matter jurisdiction."[418]

Maryland's high court explained its caution of applying the U.S. Supreme Court's new interpretive principles retroactively through a policy argument too. It held that only if the "statute [analyzed] had been enacted after [the time of the relevant U.S. Supreme Court decision], [the court] might embrace the fiction that the Legislature was aware of the Supreme Court's analysis."[419]

Policy considerations seep in even after a rule is found non-jurisdictional.[420] The U.S. Virgin Islands supreme court has weighed policy considerations when deciding the effects of claim-processing rules. It held that such rules may be non-waivable when "the rule implicates judicial interests beyond those of the parties."[421] It also held that raising a non-jurisdictional court-made rule *sua sponte* and enforcing it may be proper when it promotes "society's legitimate interest in the finality of a judgment … perfected by the expiration of the time allowed for direct review."[422]

The examples of Maryland and the U.S. Virgin Islands are also two iterations of an underlying policy

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[418] RESTATEMENT (SECOND) OF JUDGEMENTS §11(e) (1982).

[419] State v. Sharafeldin, 854 A.2d 1208, 1218 (Md. 2004); see also Dodson – Critique, *supra* note 25, at 373–374 (offering fixes to the Supreme Court's framework in that spirit).

[420] Ottley v. Estate of Bell, 61 V.I. 480 (V.I. 2014); *see also* Schwartz, *supra* note 1, at 792–96 (Suggesting that courts should take into account the type of rule, noncompliance, and litigant into consideration when attaching effects to a non-jurisdictional rule).

[421] Mustafa v. Camacho, 59 V.I. 566, 571 n.2 (V.I. 2013) (internal quotation marks and citation omitted).

[422] Peters v. People, 60 V.I. 479, 484 (V.I. 2014) (citation omitted).

concern. State courts see much more litigation compared to federal courts.[423] Given the vast number of cases, it is arguably more challenging to transform the analysis bars into new categories and change long-held practices overnight.

Two areas of law emerge when drilling down to specific policy concerns: sovereign immunity and criminal law. Sovereign immunity is an example of a bar well-connected to policy considerations. Many courts have found it to be non-jurisdictional.[424] Yet even when non-jurisdictional, courts "refrain[] from exercising its existing jurisdiction"[425] based on policy. For example, the Alaska supreme court has held that while the state's sovereign immunity is not jurisdictional, tribal sovereign immunity is jurisdictional and has explained it on policy arguments.[426]

As for criminal law, the jurisdictional label's effects play a significant role in that context. Across states, courts seem relatively unanimous in holding that trial courts do not lose subject matter jurisdiction over defendants after final judgment for the purpose of restitution or further confinement.[427] The Supreme Court has echoed this

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[423] Wilf-Townsend, *supra* note 41, at 12 (noting 16.4 million cases in 2018 in state courts compared to 277,000 cases in federal district courts).

[424] Yet some refuse to do so. *See, e.g.*, Maryland: Ferguson v. Loder, 975 A.2d 284 (Md. Ct. Sp. App. 2009).

[425] State v. Zia, Inc., 556 P.2d 1257, 1263 (Alaska 1976).

[426] Douglas Indian Ass'n v. Cent. Council of Tlingit & Haida Indian Tribes of Alaska, 403 P.3d 1172 (Alaska 2017).

[427] Alaska: State v. W.P., 349 P.3d 181 (Alaska Ct. App. 2015); Colorado: People v. Harman, 97 P.3d 290, 293 (Colo. Ct. App. 2004); Maryland: Gilmore v. State, 2019 WL 2121137 (Md. Ct. Special App. 2019) (extending conditional release term); Michigan: People v. Lown, 793 N.W.2d 9 (Mich. 2011) (commencement of charges within 180 days); Montana: In re E.G., 326 P.3d 1092 (Mont. 2014); Ohio: In re R.B., 165 N.E.3d 288 (Ohio 2020); Oklahoma: Swanson v. State, 2021

trend.[428] These decisions may well be connected to the fact that rules about restitution go only "to the time of performance of a duty by a public officer and does not go to the essence of the thing to be done."[429] Alternatively, this might be a policy decision to avoid more process and injustice to victims or the public.[430] Regardless, these types of rules have long been viewed, at least in some states as a "regulation for the orderly and convenient conduct of public business and not a condition precedent to the validity of the act done."[431] Or, in U.S Supreme Court terms, non-jurisdictional.

IV. LESSONS FROM THE STATES

Jurisdiction is a challenging term to work with. Its history is mighty and complicated, and courts have become accustomed to using it in many contexts.[432] What is clear is that the Supreme Court's revolution, trying to bring

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OK CR 2 (Okla. Ct. Crim. App. 2021); Wyoming: In re DSB, 2008 WY 15, 176 P.3d 633, 638 (Wyo. 2008) (child neglect hearing).

But see California: People v. Allen, 164 P.3d 557 (Cal. 2007) (holding the conditions to allow commitment "mandatory" and do not provide for waiver or good cause exception); Michigan: People v. Gaston (In re Forfeiture of Bail Bond), 852 N.W.2d 747 (Mich. 2014) (finding the rule mandatory, though without discussing jurisdictionality); Nevada: Witter v. State, 452 P.3d 406 (Nev. 2019) (restitution must be set at conviction); Utah: State v. Poole, 359 P.3d 667 (Utah Ct. App. 2015) (holding that the district court "lacked authority to order restitution" after the statutory period).

[428] Dolan v. United States, 560 U.S. 605 (2010).

[429] Cheney v. Coughlin, 87 N.E. 744, 747 (Mass. 1909); *see also ASC Utah, Inc. v. Wolf Mountain Resorts, L.C.*, 245 P.3d 184 (Utah 2010) (alteration in original) (citation omitted) (a statute clearly expresses the "intention to limit jurisdiction" when the statute imposes a prerequisite to an action that is "of the essence of the thing to be done," and not "given with a view merely to the proper, orderly and prompt conduct of . . . business, and by the failure to obey no prejudice will occur to those whose rights are protected by the statute.").

[430] *Dolan*, 560 U.S. at 620.

[431] Cheney v. Coughlin, 87 N.E. 744, 747 (Mass. 1909); *see also* a similar statement in In re Davis, 705 N.E.2d 1219, 1221–22 (Ohio 1999).

[432] Dane, *supra* note 33, at 165.

discipline to the use of the term jurisdiction, is not making the much-needed change the Court aspired it to make. Sections II and III tell a different story about state courts' jurisdictionality doctrine. While it is unclear if state courts have gotten it all figured out,[433] many of them provide more clarity and nuance when compared with the Supreme Court. Below are four ideas the Court could take from the states to make its efforts more effective.

First, clarity over generality. The Court instituted a "clear statement rule" as a condition for jurisdictionality.[434] But even sixteen years after its pronouncement, members of the Court ask, "how clear is clear?" in this context.[435] Instead of following one vague standard, the Court should learn from the states and contemplate actively adopting guiding principles, such as whether the procedural rule includes modifications[436] or states consequences for noncompliance,[437] and adjudicate jurisdictionality with their help.[438] Adding these guiding principles, or others the Court may find helpful, may better align the Court with

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[433] *See*, *e.g.*, Gossman v. Gossman, 847 N.W.2d 718 (Minn. Ct. App. 2014) (the court holds that if parties agreed that a court cannot amend their divorce decree then a trial court divested of jurisdiction, and the parties cannot later agree to give it jurisdiction to amend); State ex rel. Ogle v. Hocking Cty. Common Pleas Court, 2021-Ohio-4453 (Ohio 2021) (The dissent claims the majority "propagates the confusion we have recently sought to dispel between the existence of subject-matter jurisdiction (which involves only whether the court has the constitutional and statutory power to hear a specific type of case) and errors in the exercise of that subject-matter jurisdiction (which render the judgment voidable on appeal, not void ab initio), such as denying an accused the assistance of counsel."); S.R.R. v. C.M.H, 486 P.3d 772 (Or. 2021) (explaining the misuse by the juvenile court).

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

[435] Transcript of Oral Argument at 73–74 (Kavanaugh, J.), Boechler, P.C. v. Commissioner of Internal Revenue, No. 20-1472 (argued Jan 12, 2022); *see also* Section I.C *supra*.

[436] *See*, *e.g.*, State v. One Love Ministries, 416 P.3d 918 (Haw. Ct. App. 2018).

[437] *See*, *e.g.*, City of Cincinnati v. Fourth Nat'l Realty, L.L.C., 170 N.E.3d 832 (Ohio 2020).

[438] *See* Section II.C.1.d *supra*.

Congressional intent, which it might not fully grasp at this point.

Second, nuance over innovation. The Court adopted a new terminology—"claim-processing rules"—out of whole cloth to describe non-jurisdictional rules.[439] But it gave the term no concrete substance, so much that even eighteen years later, the Court's use of it is called "misplaced and distracting."[440] Instead, the Court should consider following states like California that have clarified the meaning of the term jurisdiction instead of inventing terms that are foreign to that concept.[441] But even without looking at other states for terminology inspiration, the Court should focus on giving substance and content to its non-jurisdictional analysis.

Third, the Court should clearly acknowledge policy considerations. In *Henderson v. Shinseki*, the Court noted several policy considerations that initiated its revolution—aiming to limit the jurisdictional label.[442] But since then, the Court has focused on textual analysis rather than policy. As the analysis of state courts' jurisdictionality doctrines show, policy—of different sorts—is a valuable consideration when deciding if a rule is jurisdictional and what effects attach to a non-jurisdictional rule.[443] If the Court details the different policy factors, it might make it easier for other federal courts to apply the Court's recent case law into more procedural rules.

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[439] *See* Section III.B.2 *supra*.

[440] Cameron v. EMW Woman's Surgical Center, P.S., No. 20-601, *2 (Decided March 3, 2022) (Kagan, J., concurring in the judgment).

[441] *See*, *e.g.*, Kabran v. Sharp Memorial Hospital, 386 P.3d 1159, 1165 (Cal. 2017).

[442] Henderson ex rel. Henderson v. Shinseki, 562 U.S. 428, 434-35 (2011).

[443] *See* Section III.C.2 *supra*.

Finally, the "radical" prescription—rethinking the doctrine and accepting the many meanings of jurisdiction. In a sense, there is nothing radical in this prescription, as many states do it regularly. It asks the Court to develop a more robust understanding of the term "jurisdiction," recognizing its complexities. Scott Dodson has offered similar big-picture changes in several articles[444] but recently noted that the "Court seems intent on adhering to" its new framework.[445] Perhaps Dodson is correct. Yet maybe seeing how the states manage the task will invigorate the Court to take on the mantle.

CONCLUSION

Noncompliance with a jurisdictional rule is a death blow to one's case. It took the U.S. Supreme Court almost two centuries of "sloppy and profligate use of the term 'jurisdiction,'"[446] to understand these harsh consequences, change course and begin curtailing its "loose talk about jurisdiction."[447]

But for several reasons, the Court's move does not seem to be working out. Scholars have been offering various fixes while largely ignoring the nation's biggest repository of ideas: the states. This Article fills this gap, offering a read on how state courts address jurisdictionality and the Court's new framework for deciding it. Based on a hand-collected dataset, this Article also suggests why states stay away from the Court's innovation despite

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[444] *See*, *e.g.*, Dodson – Effects, supra note 32 (calling to recalibrate the notion of subject matter jurisdiction and its effects).

[445] Dodson – Critique, *supra* note 25, at 372.

[446] Grocery Mfrs. Ass'n v. EPA, 693 F.3d 169, 183-84 (D.C. Cir. 2012) (Kavanaugh, J., dissenting), cited with approval in Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 128 n.4 (2014).

[447] City of Yonkers v. United States, 320 U.S. 685, 695 (1944) (Frankfurter, J., dissenting).

federal law's general gravitational force. It illuminates a rich history of jurisdictionality analysis in some states and significant terminology differences in others.

This Article ends with offering the Court to pay attention to the states and reframe its analysis based on nuance and not innovation; on clarity, and not vague textual rules.