

## JURISDICTIONAL IDEALISM AND POSITIVISM

JOHN F. PREIS\*

### ABSTRACT

*“If I should call a sheep’s tail a leg, how many legs would it have? Four, because calling a tail a leg would not make it so.” This old quip, often attributed to Abraham Lincoln, captures an issue at the heart of the modern law of subject matter jurisdiction. Some believe that there is a Platonic ideal of jurisdiction that cannot be changed by judicial or legislative fiat. Others take a positivist approach and assert that jurisdiction is nothing more than whatever a legislature says it is. Who is right?*

*Neither and both. Although neither idealism nor positivism is the best approach, a combination of both is. The law of jurisdiction in the United States, like all positive law, is a human creation and thus susceptible to modification by humans. If lawmakers want their jurisdictional sheep to have five legs, they are free to declare the tail a leg, and courts must heed that declaration. But lawmakers occasionally speak ambiguously. When courts encounter ambiguity—like a tail that may or may not be a leg—they should resolve the ambiguity in a way that affirms, rather than contradicts, the ideal.*

---

\* Professor, University of Richmond School of Law. Special thanks to Jud Campbell, Jessica Erickson, Kevin Walsh, Howard Wasserman, and participants at the Third Annual Civil Procedure Workshop at University of Arizona School of Law for their thoughts on different aspects of this Article. In addition, thank you to Jake Samuelson for expeditious research assistance.

## TABLE OF CONTENTS

INTRODUCTION . . . . .	1415
I. THE QUESTION OF JURISDICTION . . . . .	1419
<i>A. The Question and Why It Matters</i> . . . . .	1419
<i>B. The Current Approach</i> . . . . .	1422
II. IDEALISM OR POSITIVISM? . . . . .	1426
<i>A. Idealism and Its Flaws</i> . . . . .	1426
<i>B. Positivism and Its Flaws</i> . . . . .	1431
III. IDEALISM AND POSITIVISM . . . . .	1437
<i>A. The Approach Explained</i> . . . . .	1437
<i>B. The Approach Applied.</i> . . . . .	1440
CONCLUSION . . . . .	1446

## INTRODUCTION

On December 3, 2008, the Supreme Court gathered for oral argument in *Haywood v. Drown*.<sup>1</sup> A key issue in the case was whether a particular statute was “jurisdictional,” that is, whether it defined the jurisdiction of a court or rather provided substantive law to apply after the court had obtained jurisdiction.<sup>2</sup> About six minutes into the argument, Chief Justice John Roberts suggested that jurisdictionality can sometimes be discerned from the “look” of the statute. As he put it:

[A]t some point something starts to look jurisdictional, which is, look, we’re not going to hear your case at all. In other areas, even if they call it jurisdictional, it really doesn’t seem that way, such as, well, you’ve got to give this much notice or you’ve got to—you know, maybe those things aren’t really jurisdictional. But saying you can’t bring the case at all strikes me as really jurisdictional.<sup>3</sup>

But then, a bit later in the argument, Justice Samuel Alito suggested a different test for jurisdictionality: “Isn’t jurisdiction whatever the legislature says it is? Do you think there is some sort of—you know, a Platonic ideal of jurisdiction versus nonjurisdiction, and that’s what we apply here?”<sup>4</sup>

These two statements frame a current debate over subject matter jurisdiction in the federal courts. On one side are those we might call the “jurisdictional idealists.” The idealists believe that there is a “Platonic ideal” of jurisdiction such that some laws will “look jurisdictional” and others will not.<sup>5</sup> The idealist view is reminiscent of a quip often attributed to Abraham Lincoln: “If I should call a sheep’s tail a leg, how many legs would it have? Four, because calling a tail a leg would not make it so.”<sup>6</sup> Idealists can tell the

---

1. 556 U.S. 729 (2009).

2. *Id.* at 734-37.

3. Transcript of Oral Argument at 8, *Haywood*, 556 U.S. 729 (No. 07-10374).

4. *Id.* at 20-21.

5. See, e.g., Scott Dodson, *Jurisdiction and Its Effects*, 105 GEO. L.J. 619, 621-22 (2017).

6. See George W. Julian, *Lincoln and the Proclamation of Emancipation*, in REMINISCENCES OF ABRAHAM LINCOLN BY DISTINGUISHED MEN OF HIS TIME 227, 242 (Allen

difference between jurisdiction and nonjurisdiction, regardless of what you call it.<sup>7</sup>

Illustrative of the idealist approach is a new and provocative article by Professor Scott Dodson, a long-time scholar of federal jurisdiction.<sup>8</sup> In Dodson's view, jurisdiction has an "inherent identity"<sup>9</sup> that "[n]either Congress nor the courts can change."<sup>10</sup> The essence of jurisdiction is that it "determines forum in a multiforum legal system," and thus Congress may not declare rules jurisdictional if they do not pertain to forum.<sup>11</sup> Dodson's approach leads to some surprising conclusions, such as the law of standing being non-jurisdictional.<sup>12</sup> Though we have long called standing jurisdictional,<sup>13</sup> Dodson's article argues (as Lincoln might have) that calling it jurisdictional does not make it so.<sup>14</sup>

In contrast to the idealists are those we might call the "jurisdictional positivists."<sup>15</sup> The positivists believe that jurisdiction is

---

Thorndike Rice ed., Harper & Bros. new & rev. ed. 1909) (1886) ("[H]e used to liken the case to that of the boy who, when asked how many legs his calf would have if he called its tail a leg, replied, 'Five,' to which the prompt response was made that *calling* the tail a leg would not *make* it a leg.").

7. See Dodson, *supra* note 5, at 637.

8. See *id.*

9. See *id.* at 622.

10. *Id.* at 637.

11. *Id.* at 621-22. Dodson does allow Congress to control the *effects* of the jurisdictional label, such as whether jurisdiction is subject to equitable exceptions. See *id.* at 622, 646.

12. *Id.* at 646-48.

13. See, e.g., *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102 (1998); *United States v. Hays*, 515 U.S. 737, 742 (1995).

14. See Dodson, *supra* note 5, at 647-48 ("But characterizing standing as jurisdictional causes tensions with sister doctrines derived from Article III, including 'prudential' standing (which some deem a nonjurisdictional creation of the courts), ripeness (which can, at times, be waived by the parties), and mootness (which contains judicially created exceptions)." (footnotes omitted)).

15. This use of the term "positivist" is likely to strike legal philosophers as incorrect. In their world, "positive law" can issue from any legal institution (whether a legislature or otherwise) that society recognizes as authoritative. See H.L.A. HART, *THE CONCEPT OF LAW* 100 (2d ed. 1994) (discussing the rule of recognition). Nonetheless, perhaps for ease of reference, scholars studying the law of federal jurisdiction have adopted the "positivist" descriptor to describe jurisdictional law created by the legislature (as opposed to the courts). See Dodson, *supra* note 5, at 631-32 (using the term "positive law" to refer to legislatively created law); Evan Tsen Lee, *The Dubious Concept of Jurisdiction*, 54 *HASTINGS L.J.* 1613, 1629 (2003) (same); Howard M. Wasserman, *Jurisdiction and Merits*, 80 *WASH. L. REV.* 643, 691-93 (2005) (same). Thus, at the risk of annoying legal philosophers, but with the goal of addressing current scholarship in this area, this Article uses the term "positive law" to refer only to law enacted by Congress.

“whatever the legislature says it is.”<sup>16</sup> Congress has the power to create the lower federal courts, and if it wants to define their jurisdiction in odd ways, it is free to do so—just as all of us are free to call a tail a leg if it serves our purposes.<sup>17</sup>

The positivist approach is best illustrated by modern Supreme Court jurisprudence. At present, the Court will deem a statute jurisdictional if “Congress has ‘clearly state[d]’ that the rule is jurisdictional”—regardless of whether the statute has an inherent connection to forum.<sup>18</sup> If Congress has not made such a statement, however, “courts should treat the restriction as nonjurisdictional in character.”<sup>19</sup> Scholars have generally lauded the Court’s positivist stance,<sup>20</sup> though Professor Erin Morrow Hawley has recently criticized it as unnecessary.<sup>21</sup>

This Article critiques the idealist and positivist approaches. Although idealism properly recognizes that there is a widely shared understanding of jurisdiction,<sup>22</sup> it fails to acknowledge the congressional prerogative to depart from these widely shared understandings if it desires.<sup>23</sup> Today’s sheep, it is true, only have

---

16. Transcript of Oral Argument, *supra* note 3, at 20-21.

17. See *Palmoe v. United States*, 411 U.S. 389, 401 (1973) (“Nor, if inferior federal courts were created, was [Congress] required to invest them with all the jurisdiction it was authorized to bestow under Art. III.”); *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 449 (1850) (“Congress may withhold from any court of its creation jurisdiction of any of the enumerated controversies [in Article III].”).

18. See *Sebelius v. Auburn Reg’l Med. Ctr.*, 568 U.S. 145, 153 (2013) (alteration in original) (quoting *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515 (2006)); see also *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515-16 (2006) (“If the Legislature clearly states that a threshold limitation on a statute’s scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue.” (footnote omitted)).

19. *Arbaugh*, 546 U.S. at 516.

20. See, e.g., Stephen R. Brown, *Hearing Congress’s Jurisdictional Speech: Giving Meaning to the “Clearly-States” Test in Arbaugh v. Y & H Corp.*, 46 WILLAMETTE L. REV. 33, 51-52 (2009); Scott Dodson, *In Search of Removal Jurisdiction*, 102 NW. U. L. REV. 55, 66-67 (2008); Lee, *supra* note 15, at 1629, 1631; Howard M. Wasserman, *Jurisdiction, Merits, and Procedure: Thoughts on a Trichotomy*, 102 NW. U. L. REV. 1547, 1548 (2008).

21. Erin Morrow Hawley, *The Supreme Court’s Quiet Revolution: Redefining the Meaning of Jurisdiction*, 56 WM. & MARY L. REV. 2027, 2032 (2015) (“The Court is right to demand precision as to jurisdiction. But the clear statement rule is a clumsy, distracting, and ultimately unnecessary attempt to carry that mandate into effect.”). Professor Andy Hessick has also criticized the clear statement rule. See F. Andrew Hessick III, *The Common Law of Federal Question Jurisdiction*, 60 ALA. L. REV. 895, 926-29 (2009) (explaining why it is “difficult to defend” the clear statement rule).

22. Dodson, *supra* note 5, at 621-22.

23. See *supra* text accompanying note 18.

four legs, but the path of evolution may one day give them five. Our Platonic ideal of a sheep, as with jurisdiction, can never be permanent; it is always subject to change at the hands of a higher power.

The positivist approach is also flawed. Although it appropriately recognizes Congress's preeminent authority to define federal jurisdiction,<sup>24</sup> it fails to account for the fact that "[j]urisdiction ... is a word of many, too many, meanings."<sup>25</sup> Congress has used the word in a multitude of ways and contexts, many of which are almost certainly nonjurisdictional.<sup>26</sup> To declare that the word "jurisdiction" will always render a statute jurisdictional is like Noah Webster declaring that the word "bay" always refers to a body of water and never refers to horse's coloring.<sup>27</sup> A dictionary writer's job, much like that of the Supreme Court's, is to discern from the words spoken what is truly meant, not to declare by fiat what they shall mean henceforth.<sup>28</sup>

If neither idealism nor positivism is the answer, what is? In this Article, I argue that the answer is idealism *and* positivism. Under the combined approach I propose, a court would discern a statute's jurisdictionality by focusing on the statutory text (a positivist approach) in light of traditional conceptions of jurisdictionality (an idealist approach). For example, if Congress uses the word "jurisdiction" to define the remedial powers of district courts (for example, "district courts shall have jurisdiction to enjoin violations of this Act"), courts should not automatically conclude that the statute is jurisdictional simply because the j-word is present. Rather, courts should do what the clear statement rule currently prohibits them from doing: determine whether, in light of jurisdiction's traditional attributes, Congress was using the word in the traditional sense.<sup>29</sup> Of course, the downside of this approach is that it might deny Con-

---

24. Lee, *supra* note 15, at 1629.

25. *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)).

26. *Cf. Dodson*, *supra* note 5, at 657.

27. This example is borrowed from Justice Antonin Scalia. See ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 26 (1997).

28. This criticism of positivism is not overcome by simply arguing that textualism is a superior method of statutory interpretation, for textualists readily acknowledge that a word's meaning can and should be derived from context. Thus, as Justice Scalia explains, "If you tell me, 'I took the boat out on the bay,' I understand 'bay' to mean one thing; if you tell me, 'I put the saddle on the bay,' I understand it to mean something else." *Id.*

29. See *supra* text accompanying notes 18-19.

gress the opportunity to wield its jurisdictional powers in uncommon ways. This is possible, but not only are these instances likely to be rare, Congress can likely overcome this by making its jurisdictional choices more explicit than usual. In this sense, the solution to the current problem is not to abolish the clear statement rule, but to reform it.

This Article unfolds as follows. Part I provides a brief explanation of the current law, including the importance of the jurisdictional label and how federal courts determine whether to affix it to a particular statute. Part II presents the idealist and positivist approaches and explains why neither approach, on its own, is sufficient. Part III then offers a combined approach and explains why that approach, when used with a modified clear statement rule, is superior to the alternatives. Part III next applies that new approach to an issue currently splitting the circuits. A short conclusion follows.

## I. THE QUESTION OF JURISDICTION

Before one can assess the merits of jurisdictional idealism and positivism, one must first understand how this question arises, the stakes underlying it, and how the Supreme Court has answered it in recent years. This Part does that by first explaining the question of jurisdiction and its importance, and then explaining how the Supreme Court currently answers the question.

### *A. The Question and Why It Matters*

The following scenario arises frequently in federal courts: a plaintiff files a lawsuit and the defendant, at some point, points out a defect in the suit. The appropriate judicial response to the defendant's argument will depend on the nature of the defect. For instance, if the defect is *substantive* (for example, the plaintiff was contributorily negligent),<sup>30</sup> the court will ordinarily dismiss the suit with prejudice—but only if the defendant raised the defect at an appro-

---

30. See FED. R. CIV. P. 8(c)(1) (permitting a party to respond to a pleading with affirmative defenses).

appropriate time and in an appropriate way.<sup>31</sup> If the defendant failed to do so, the court will usually ignore the defect and allow the suit to proceed.<sup>32</sup>

If the defect is not substantive, it might be *procedural*—such as the plaintiff’s failure to file a document by a particular deadline.<sup>33</sup> When a defect is procedural, the court will usually impose some consequences on the plaintiff but not dismiss the suit.<sup>34</sup> Indeed, in these situations, federal courts generally have discretion to forgive such miscues altogether, provided the plaintiff has an innocent explanation for the error.<sup>35</sup> As with substantive defects, however, it is important that the defendant raise it at the appropriate time and in the appropriate manner. If the defendant fails to do this, he will have waived his right to challenge it.<sup>36</sup>

If a defect is not substantive or procedural, it might be *jurisdictional*. For instance, if the plaintiff is seeking relief solely under state law but is a citizen of the same state as the defendant, the federal court will probably lack subject matter jurisdiction.<sup>37</sup> The court’s treatment of jurisdictional defects, however, differs from its treatment of other defects in four ways. First, the defendant can raise the defect at any time during the litigation, even for the first time on appeal. Thus, jurisdictional defects are never waived or forfeited.<sup>38</sup> Second, even if the defendant *never* raises the defect, the

---

31. See FED. R. CIV. P. 12(b) (requiring that “[e]very defense to a claim for relief in any pleading must be asserted in the responsive pleading”).

32. See, e.g., FED. R. CIV. P. 12(h) (specifying circumstances in which a defending party will be deemed to waive an affirmative defense).

33. See, e.g., FED. R. CIV. P. 26(a) (stating deadlines for disclosing materials during discovery).

34. See, e.g., FED. R. CIV. P. 37(c)(1) (“If a party fails to provide information or identify a witness as required by Rule 26(a) ..., the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless.”).

35. See, e.g., FED. R. CIV. P. 60(b)(1) (permitting courts to relieve a party from the effect of a judgment or order due to the party’s “mistake, inadvertence, surprise, or excusable neglect”).

36. See, e.g., FED. R. CIV. P. 33(b)(4) (“Any ground not stated in a timely objection [to a discovery response] is waived unless the court, for good cause, excuses the failure.”).

37. 28 U.S.C. § 1331 (2012) (granting federal district courts jurisdiction of questions arising under federal law); *id.* § 1332 (granting federal district courts jurisdiction over claims between completely diverse parties when the amount in controversy exceeds \$75,000). Although these are the most common predicates for federal jurisdiction, other grounds for jurisdiction could potentially exist.

38. *United States v. Cotton*, 535 U.S. 625, 630 (2002) (“[S]ubject-matter jurisdiction,



court is obliged to affirmatively look for a defect on its own and, if the court finds one, dismiss the suit *sua sponte*.<sup>39</sup> Third, unlike procedural defects, the court can never overlook a jurisdictional defect, even if the plaintiff is blameless in the matter. Jurisdictional laws, the saying goes, are “inflexible” and must be strictly applied.<sup>40</sup> Fourth and finally, the court must dismiss the case without prejudice, thus allowing the plaintiff to refile the suit in a court with jurisdiction.<sup>41</sup>

These defects, and the different judicial responses thereto, are clear enough. What is far less clear is whether a particular defect is substantive, procedural, or jurisdictional. Statutory provisions rarely come with labels, and federal courts are thus left to discern, as best as they can, whether the law that was violated was jurisdictional. Sometimes the answer is easy: everyone knows that 28 U.S.C. § 1331 (the federal question statute) contains only jurisdictional law.<sup>42</sup> But sometimes the question is harder.

Consider the issue presented in *Arbaugh v. Y & H Corp.*<sup>43</sup> In that case, a plaintiff sued her former employer for workplace discrimination in violation of Title VII (a federal statute) and won a \$40,000 jury verdict.<sup>44</sup> Soon after trial, however, the employer discovered that, although Title VII prohibits employers from behaving as he did, a separate section of the statute defines “employer” as a com-

---

because it involves a court’s power to hear a case, can never be forfeited or waived.”).

39. See *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583 (1999) (“[S]ubject-matter delineations must be policed by the courts on their own initiative even at the highest level.”).

40. See *Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982) (“[T]he rule, springing from the nature and limits of the judicial power of the United States is inflexible and without exception, which requires this court, of its own motion, to deny its jurisdiction ... where such jurisdiction does not affirmatively appear in the record.” (quoting *Mansfield, Coldwater & Lake Mich. Ry. Co. v. Swan*, 111 U.S. 379, 382 (1884))).

41. See *FED. R. CIV. P.* 41(b); *Semtek Int’l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 505 (2001) (“The primary meaning of ‘dismissal without prejudice,’ we think, is dismissal without barring the plaintiff from returning later, to the same court [or in most cases, to] ... other courts.”); *S. Walk at Broadlands Homeowner’s Ass’n v. OpenBand at Broadlands, LLC*, 713 F.3d 175, 185 (4th Cir. 2013) (“A dismissal for lack of standing—or any other defect in subject matter jurisdiction—must be one without prejudice, because a court that lacks jurisdiction has no power to adjudicate and dispose of a claim on the merits.”).

42. See 28 U.S.C. § 1331 (“The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.”).

43. 546 U.S. 500 (2006).

44. *Id.* at 503-04.

pany having “fifteen or more employees.”<sup>45</sup> Because he had fewer than fifteen employees, he argued that the lower court never had jurisdiction over the suit and must vacate the judgment.<sup>46</sup> Of course, the employer at this point *had* to argue that the number of employees was a jurisdictional matter; if it pertained to the merits, he would have forfeited this argument by not raising it earlier.<sup>47</sup>

So what is a court to do in this situation? That is, how should the court determine whether Title VII’s employee-numerosity requirement defines the court’s jurisdiction or instead defines matters of substance or procedure? It is to that matter that this Part now turns.

### *B. The Current Approach*

The Supreme Court’s current approach to jurisdictionality stems from 2006. Before that time, the Court had been—by its own admission—“less than meticulous” in its use of the term “jurisdiction.”<sup>48</sup> It had sometimes used the term to refer to “claim-processing rules” (in other words, procedural rules), which are not “truly jurisdictional.”<sup>49</sup> Thus, the Court endeavored “to ‘bring some discipline’ to the use of the term ‘jurisdictional.’”<sup>50</sup>

The discipline came in the form of “a ‘readily administrable bright line’ for determining whether to classify a statutory limitation as jurisdictional.”<sup>51</sup> The “bright line” rule adopted at that time operates as follows:

If the Legislature clearly states that a threshold limitation on a statute’s scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue. But when Congress does not rank a statutory

---

45. *Id.* at 503-04 (quoting 42 U.S.C. § 2000e(b) (2000)).

46. *Id.* at 504.

47. See FED. R. CIV. P. 12(h) (stating that most affirmative defenses not raised in a responsive pleading are forfeited).

48. *Arbaugh*, 546 U.S. at 511.

49. *Gonzalez v. Thaler*, 565 U.S. 134, 141 (2012) (quoting *Kontrick v. Ryan*, 540 U.S. 443, 454-55 (2004)).

50. *Id.* (quoting *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 435 (2011)).

51. *Sebelius v. Auburn Reg’l Med. Ctr.*, 568 U.S. 145, 153 (2013) (quoting *Arbaugh*, 546 U.S. at 516)).

limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character.<sup>52</sup>

The Court's approach—often referred to as the “clear statement rule”—has been widely praised.<sup>53</sup> And perhaps with good reason, for who doesn't like clarity? Nonetheless, it is worth noting here an oddity about the rule that this Article will return to later: although the Court endeavored to discipline *itself*, it actually chose a rule that disciplines *Congress as well*. And it is not at all clear that the Court is entitled to discipline Congress in this way. As an interpreter of statutes, the federal judiciary's task is to discern the meaning of the words chosen by Congress—not to affirmatively dictate to Congress what its chosen words mean.<sup>54</sup>

The wisdom of the rule aside, the Court first applied its new approach in *Arbaugh v. Y & H Corp.*, the Title VII case mentioned above in which the defendant argued that the court did not have jurisdiction because he did not have “fifteen or more employees.”<sup>55</sup> Applying its clear statement test, the Court first observed that “Congress *could* make the employee-numerosity requirement ‘jurisdictional,’ just as it has made an amount-in-controversy threshold an ingredient of subject-matter jurisdiction ... under 28 U.S.C. § 1332.”<sup>56</sup> But tellingly, Congress *did not* declare the provision jurisdictional. Rather, “the 15-employee threshold appears in a [definitional section] that ‘does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts.’”<sup>57</sup> Given this, the Court concluded that the numerosity requirement “is an element of a plaintiff's claim for relief, not a jurisdictional issue.”<sup>58</sup>

Since adopting the clear statement rule in 2006, the Court has felt the need to soften it a bit. Thus, while the search for a clear statement (if any) is still the centerpiece of the analysis, the Court does not demand that Congress “incant magic words” to make its

---

52. *Arbaugh*, 546 U.S. at 515-16 (footnote omitted) (citation omitted).

53. See *supra* note 20 and accompanying text.

54. See *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (“[C]ourts must presume that [Congress] says in a statute what it means and means ... what it says.”).

55. 546 U.S. at 503 (quoting 42 U.S.C. § 2000e(b) (2000)).

56. *Id.* at 514-15 (emphasis added).

57. *Id.* at 515 (quoting *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 394 (1982)).

58. *Id.* at 516.

jurisdictional preferences known.<sup>59</sup> As the Court has explained, “context, including th[e] Court’s interpretation of similar provisions in many years past, is relevant.”<sup>60</sup> Thus, when a “long line” of cases “has treated a similar requirement as ‘jurisdictional,’” the Court presumes that “Congress intended to follow that course.”<sup>61</sup>

*Bowles v. Russell* illustrates this modified approach.<sup>62</sup> *Bowles* concerned a notice of appeal that the would-be appellant, Keith Bowles, filed two days late.<sup>63</sup> Bowles filed the notice late not because he was asleep at the switch, but because the district court erroneously gave him the wrong deadline.<sup>64</sup> Bowles thus sought, on equitable grounds, relief for the missed deadline.<sup>65</sup> Such relief is common in litigation generally,<sup>66</sup> but not if a deadline is jurisdictional. Jurisdictional requirements, as noted above, are strictly applied.<sup>67</sup> The question before the Court was thus whether the filing of a notice of appeal by the statutory deadline was jurisdictional.<sup>68</sup> The clear statement rule seemed to cut in Bowles’s favor, because the statute specifying the appeal deadlines in his case did not speak in jurisdictional terms.<sup>69</sup> But that did not affect the result. Rather, what mattered was that the “Court ha[d] long held that the taking of an appeal within the prescribed time is ‘mandatory and jurisdictional.’”<sup>70</sup> Put differently, even though that Court adopted a clear statement rule in *Arbaugh*, *Bowles* shows that the Court did

---

59. *Sebelius v. Auburn Reg’l Med. Ctr.*, 568 U.S. 145, 153 (2013).

60. *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 168 (2010).

61. *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 436 (2011) (first quoting *Union Pac. R.R. Co. v. Bhd. of Locomotive Eng’rs & Trainmen Gen. Comm. of Adjustment*, 558 U.S. 67, 82 (2009); and then quoting *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133-34, 139 (2008)); *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133-34, 136 (2008) (treating a statute of limitations provision as jurisdictional in suits against the United States, even though the provision did not use the word “jurisdiction”).

62. 551 U.S. 205 (2007).

63. *Id.* at 207.

64. *Id.*

65. *Id.* at 213-14.

66. *See, e.g.*, FED. R. CIV. P. 60(b)(1) (permitting a federal court to grant a party relief from judgment for “mistake, inadvertence, surprise, or excusable neglect”).

67. *See supra* note 40 and accompanying text.

68. *Bowles*, 551 U.S. at 206.

69. *Id.* at 208 (citing 28 U.S.C. § 2107(c) (2006)). The federal statute worked in tandem with Rule 4 of the Federal Rules of Appellate Procedure, *see id.* at 208-09, but Rule 4 did not speak in jurisdictional terms either.

70. *Id.* at 209 (quoting *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 61 (1982) (per curiam)).

mean to upset “long held” views that certain statutes are jurisdictional— even if they lack the term jurisdiction.

*Bowles* makes sense—to a degree. If the Court has long held that certain statutes are jurisdictional, it is fair to presume that Congress has tacitly approved of those decisions by acquiescence.<sup>71</sup> Thus, even statutes that are not jurisdictional by their language alone could still be jurisdictional under the *Arbaugh* test because congressional acquiescence—if long enough and consistent enough—could amount to a type of congressional “clear statement.”<sup>72</sup> Yet this approach only works when Congress, having *not* spoken in jurisdictional terms, acquiesces to the judicial use of the jurisdictional label. A more problematic use of this approach—and one the Court has not apparently contemplated—arises when Congress uses jurisdictional terms to describe a rule that the courts have long held is *not* jurisdictional. This might seem like an easy case; a court need only follow Congress’s “clear statement.”<sup>73</sup> As we shall see, however, the matter is not that simple.

In sum, the jurisdictional label has significant consequences. When a statute addresses subject matter jurisdiction, litigants can invoke the statute at any time, the court must evaluate its jurisdiction in the absence of a motion, apply the statute strictly, and dismiss the suit without prejudice. To discern whether a statute deserves the jurisdictional label, the Supreme Court has chosen a “clear statement rule” that closely tracks the statutory language while also allowing congressional acquiescence to precedent to sometimes amount to a clear statement in favor of jurisdiction.<sup>74</sup> With these matters explained, this Article now considers and critiques two different ways to assess jurisdiction: the idealist and positivist approaches.

---

71. See *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 349 (1984). To be sure, the Court did not take this approach with *Bowles*. Rather it ducked the implications of *Arbaugh* altogether. The analysis here is simply an attempt to justify *Bowles* in light of *Arbaugh*.

72. See *id.*

73. See *id.*

74. See *id.*

## II. IDEALISM OR POSITIVISM?

Whether a particular statute is jurisdictional depends on what jurisdiction actually *is*. To jurisdictional idealists, jurisdiction means one thing, while to jurisdictional positivists, it means another. In this Part, I explain the idealist and positivist approaches and also explain why each approach is ultimately flawed. The idealist approach, which holds that there is a fixed essence to jurisdiction, is flawed because it denies Congress the constitutional authority to control jurisdiction. A positivist approach, which holds that jurisdiction is whatever Congress clearly states that it is, is also flawed because it ignores the many different ways that Congress uses the term “jurisdiction.”

A. *Idealism and Its Flaws*

Jurisdictional idealism, as this Article defines it, holds that there is a Platonic ideal of jurisdiction. An idealist would determine a law’s jurisdictionality by comparing it to jurisdiction’s Platonic ideal. If the two are similar, the law is jurisdictional; if they are different, the law is not jurisdictional. Left out of this analysis, of course, is Congress. If Congress tried to declare a law jurisdictional that did not fit within jurisdiction’s Platonic ideal, it would be ineffectual, much in the way that calling a sheep’s tail a leg “would not make it so.”<sup>75</sup>

Professor Scott Dodson recently expressed an idealist view in his article, *Jurisdiction and Its Effects*.<sup>76</sup> In Dodson’s view, a jurisdictional law is a “boundar[y]” that “determines forum in a multiforum legal system.”<sup>77</sup> Thus, where a law operates as a boundary between forums, it is jurisdictional; where it does not operate in that way, it is not. To see Dodson’s conception in practice, consider *Arbaugh v. Y & H Corp.*, the employment discrimination case discussed above.<sup>78</sup> In that case, the Court held that Title VII’s “fifteen or more employees” requirement was not jurisdictional because Congress did not

---

75. See Julian, *supra* note 6, at 242.

76. Dodson, *supra* note 5.

77. *Id.* at 621.

78. 546 U.S. 500 (2006); see *supra* text accompanying notes 43-47.

clearly state that it was.<sup>79</sup> In Dodson's view, the Court reached the right result but for the wrong reason.<sup>80</sup> Instead of considering what Congress clearly stated, the Court should have considered whether the employee-numerosity requirement operated as a boundary between federal courts and some other forum.<sup>81</sup> Seeing nothing in the employee-numerosity provision or related provisions that looked boundary-ish, Dodson would declare the provision nonjurisdictional.<sup>82</sup>

Casting jurisdiction as a system of boundaries is a useful framework, but Dodson does not offer it only as a framework; he offers it as a command.<sup>83</sup> That is, he is not just arguing that the law of federal jurisdiction is best understood as a law of boundaries.<sup>84</sup> Rather, he is arguing that jurisdiction's "inherent identity"<sup>85</sup> is one of boundaries—an identity that "[n]either Congress nor the courts can change."<sup>86</sup> Expressing the point in the context of *Arbaugh*, Dodson states that "it is not true, as the Supreme Court presumed, that Congress could make Title VII's employee-numerosity requirement jurisdictional simply by calling it so."<sup>87</sup>

Dodson's framework is a useful addition to the literature, but he falters when he declares it binding on the courts and Congress. The central flaw in jurisdictional idealism is that it overlooks Congress's long-standing power to define federal jurisdiction. Article I, Section 8 grants Congress the power to create the lower federal courts,<sup>88</sup> and, as the Supreme Court has recognized, the power to create these courts carries with it the power to define their jurisdiction.<sup>89</sup>

---

79. *Arbaugh*, 546 U.S. at 515-16.

80. See Dodson, *supra* note 5, at 654.

81. See *id.* ("[The Court in *Arbaugh* was] wrong to look to Congress to determine if a limit [was] jurisdictional.")

82. *Id.*

83. *Cf. id.* at 637.

84. *Cf. id.*

85. *Cf. id.* at 622.

86. *Id.* at 637.

87. *Id.* (citing *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514-16 (2006)).

88. U.S. CONST. art. I, § 8, cl. 9 (authorizing Congress "[t]o constitute tribunals inferior to the Supreme Court").

89. *Palmore v. United States*, 411 U.S. 389, 401 (1973) (noting that Congress "was not constitutionally required to create inferior Art. III courts," or, even upon creating them, "invest them with all the jurisdiction it was authorized to bestow under Art. III"); *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 449 (1850) ("Congress may withhold from any court of its creation jurisdiction of any of the enumerated controversies.").

Congress must, of course, obey other constitutional dictates in defining federal jurisdiction,<sup>90</sup> but these dictates still leave Congress extraordinary freedom in defining federal jurisdiction.

Take, for example, federal diversity jurisdiction. Article III, Section 2 permits federal courts to adjudicate “[c]ontroversies ... between Citizens of different states.”<sup>91</sup> The first Congress instilled the federal courts with jurisdiction over diverse parties, but importantly, also required the amount in controversy be greater than \$500.<sup>92</sup> No one then or today doubts that the amount in controversy requirement is jurisdictional, but Dodson’s approach seems to suggest that it is not—not because Congress did not attempt to make it jurisdictional, but that Congress *could not have* made it jurisdictional.<sup>93</sup> If Congress cannot make the number of employees in a Title VII case jurisdictional, the argument goes, then Congress presumably cannot make the number of dollars at stake jurisdictional either.

Dodson might respond that the amount in controversy requirement acts as a “boundary” because cases that do not meet the requirement are instead referred to state court for resolution. But the same thing can be said of the employee-numerosity requirement.<sup>94</sup> If that requirement is jurisdictional, then plaintiffs suing

---

90. Congress may not, for example, enact a jurisdictional statute that predicates jurisdiction on a plaintiff’s race. Such a statute would violate the equal protection rights contained in the Fifth Amendment. See Paul M. Bator, *Congressional Power over the Jurisdiction of the Federal Courts*, 27 VILL. L. REV. 1030, 1034 (1982).

91. U.S. CONST. art. III, § 2.

92. Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78 (granting federal trial courts jurisdiction over diverse parties “where the matter in dispute exceeds ... the sum or value of five hundred dollars”).

93. See Dodson, *supra* note 5, at 637.

94. Dodson seems to recognize this possibility, but thinks that a boundary between state and federal courts could only be created if Congress “created a cause of action against employers who did not meet the employee-numerosity requirement but required that such a claim be lodged exclusively in state court.” *Id.* at 637 n.107. However, this argument misperceives the vesting of state court jurisdiction. State courts ordinarily receive their jurisdiction from state legislatures (not Congress) and in nearly every instance are open to federal claims. See *Haywood v. Drown*, 556 U.S. 729, 734-35 (2009). Moreover, it is widely accepted that state courts have jurisdiction over diversity claims in which less than \$75,000 is in controversy, even though Congress has not affirmatively lodged such claims “exclusively in state court.” Dodson, *supra* note 5, at 637 n.107. The same could also be said of federal question jurisdiction when an amount in controversy requirement still attached to it. See Judiciary Act of 1875, ch. 137, § 1, 18 Stat. 470 (authorizing federal district courts to take jurisdiction over claims arising under federal law and when at least \$500 was at stake); Federal Question



employers with fewer than fifteen employees can simply take their cases to state courts. Put differently, just as Congress can decide that low-value diversity claims belong in state courts, it can also decide that low-employee Title VII claims belong in state courts as well. The core problem with Dodson's claim, therefore, is not necessarily that he has incorrectly defined jurisdiction as a "boundary," but that he fails to acknowledge that Congress has a wide-ranging power to draw boundaries.

An additional way to understand this point is to consider what a federal court would do if Congress explicitly declared the employee-numerosity requirement jurisdictional. That is, suppose that Congress, dissatisfied with the result in *Arbaugh*, amended Title VII to state that "federal district courts shall only have jurisdiction to consider claims under this Act if the employer accused of violating the Act has fifteen or more employees." If a court were to adopt Dodson's view, and find the numerosity requirement nonjurisdictional, how would it explain its holding? The court could not say that the statute is unconstitutional for, as noted above, the Constitution plainly does not prohibit such statutes.<sup>95</sup> Nor could the court declare that, as a matter of federal common law, the statute falters. Federal common law is subject to modification by Congress.<sup>96</sup> The only way to explain its decision would be to hold that, as a matter of *natural law*, such definitions of jurisdiction are impermissible. This is not the place to enter the debate between positivism and natural law, but it is enough to state here that, to the limited extent that natural law may have a role in our nation's largely positivist approach to law, the role is confined to circumstances in which widely held moral convictions are implicated. In the realm of subject matter jurisdiction, there are no such widely held moral convictions (excepting, perhaps, those held by the occasional, out-of-touch law professor).

Thus, the chief problem with idealism is its incompatibility with our fundamentally positivist system—a system that gives Congress

---

Jurisdictional Amendments Act of 1980, Pub. L. No. 96-486, Sec. 2(b), 94 Stat. 2369 (codified as amended at 28 U.S.C. § 1331 (2012)) (abolishing the amount in controversy requirement).

95. See *supra* notes 88-90 and accompanying text.

96. See *City of Milwaukee v. Illinois*, 451 U.S. 304, 313-14 (1981) ("We have always recognized that federal common law is 'subject to the paramount authority of Congress.'" (quoting *New Jersey v. New York*, 283 U.S. 336, 348 (1931))).

near plenary control over federal jurisdiction. Dodson might nonetheless counter that his approach still reserves a role for Congress. Though unable to define jurisdiction on its own, Congress, according to Dodson, can “exert some control over the *effects* of a particular jurisdictional law.”<sup>97</sup> Referring to *Bowles*,<sup>98</sup> the notice of appeal case discussed above,<sup>99</sup> Dodson explains that, even if Congress is stuck with the jurisdictional label there, it could nonetheless “make the deadline to file a notice of appeal, or even the notice of appeal itself, subject to the principles of equity.”<sup>100</sup> I agree that Congress could do this, just as it could also make jurisdictional laws subject to waiver or forfeiture, not subject to *sua sponte* inquiry, or impose any other effect commonly attached to jurisdictional laws.<sup>101</sup>

Dodson’s allowance for congressional control over jurisdictional effects addresses idealism’s incompatibility with congressional power, but in the process, it creates a new problem: it renders jurisdiction functionally irrelevant. Take for instance the common rule that jurisdictional objections can never be forfeited.<sup>102</sup> Dodson believes that Congress is free to change this; in other words, that it is free to make jurisdictional objections forfeitable if not raised at a particular time or in a particular way.<sup>103</sup> He is undoubtedly correct, but Congress’s power in this regard extends far beyond the realm of jurisdiction. If Congress decided to, for example, it could allow defendants to raise statute of limitations defenses for the first time on appeal.<sup>104</sup> But if Congress can apply a jurisdictional effect to a nonjurisdictional rule, what is the point of forbidding Congress from declaring something jurisdictional? Congress can get exactly what it wants simply by speaking in terms of effects, as long as it omits the magic word “jurisdictional.”

The upshot of such an approach is that the law of jurisdiction will be replaced with the law of effects. There is nothing necessarily

---

97. Dodson, *supra* note 5, at 637 (emphasis added).

98. *Bowles v. Russell*, 551 U.S. 205 (2007).

99. See *supra* text accompanying notes 62-70.

100. Dodson, *supra* note 5, at 637; see also *id.* at 637 n.109, 639.

101. Dodson appears to hold this view as well. See *id.* at 637.

102. See *United States v. Cotton*, 535 U.S. 625, 630 (2002) (“[S]ubject-matter jurisdiction, because it involves a court’s power to hear a case, can never be forfeited or waived.”).

103. See Dodson, *supra* note 5, at 638.

104. See FED. R. CIV. P. 12(h) (specifying which defenses will be waived if not raised in a responsive pleading).

wrong with that as a normative matter (some scholars believe that is the proper course),<sup>105</sup> but it is contrary to Dodson’s overall argument—that the Court’s current positivist stance is “incoherent” because it “renders [jurisdiction] irrelevant except as a proxy for a defined set of effects.”<sup>106</sup> Put differently, although Dodson’s position will prevent Congress from redefining jurisdiction,<sup>107</sup> it will do nothing to prevent Congress from making jurisdiction irrelevant.

In sum, the idealist position advanced by Professor Dodson fails to account for Congress’s dominant role in defining federal subject matter jurisdiction without also rendering the concept of jurisdiction irrelevant. Idealist insights ought not to be jettisoned entirely, however, as illustrated by the discussion in Part III.A. For now, this Article turns to an assessment of jurisdictional positivism.

### *B. Positivism and Its Flaws*

Unlike idealists, jurisdictional positivists eschew any “essential concept of jurisdiction”<sup>108</sup> and instead believe that jurisdiction is “whatever the legislature says it is.”<sup>109</sup> The biggest star in the positivist universe is, at present, the Supreme Court. As noted above, the Supreme Court adheres to a “clear statement” approach that works as follows:

If the Legislature clearly states that a threshold limitation on a statute’s scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue. But when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character.<sup>110</sup>

Since adopting the clear statement rule in 2006, the Court has backed off of it a bit. In particular, it considers “context, including th[e] Court’s interpretation of similar provisions in many years

---

105. See, e.g., Lee, *supra* note 15, at 1614.

106. Dodson, *supra* note 5, at 631.

107. See *id.* at 622.

108. Lee, *supra* note 15, at 1631.

109. Transcript of Oral Argument, *supra* note 3, at 20-21.

110. *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515-16 (2006) (footnote omitted) (citation omitted).

past.”<sup>111</sup> Thus, when Congress has left undisturbed a “long line” of cases treating a particular “requirement as ‘jurisdictional,’” the Court “presume[s] that Congress intended to follow that course.”<sup>112</sup>

Given the discussion above describing Congress’s broad powers over federal jurisdiction, it would seem hard to challenge jurisdictional positivism.<sup>113</sup> If Congress clearly states that a particular requirement is jurisdictional, and the declaration is constitutional, on what ground could the Court ever ignore Congress’s declaration?

The problem with the Court’s approach arises from Congress’s varied use of the term “jurisdiction.” A search of Westlaw turns up 7022 instances in which Congress has used the word “jurisdiction.”<sup>114</sup> Some statutes predicate the district courts’ “jurisdiction” on whether a case “aris[es] under”<sup>115</sup> or is “brought under”<sup>116</sup> a particular statute, while other statutes predicate jurisdiction on whether the plaintiff is seeking an “injunction”<sup>117</sup> or instead seeking “appropriate relief.”<sup>118</sup> Still others appear to make jurisdiction contingent upon whether a claim is “founded upon” certain types of contracts,<sup>119</sup> or whether a plaintiff is seeking relief for an injury “caused by a vessel on navigable waters.”<sup>120</sup> And yet other statutes use “jurisdiction” to refer to a political unit (for example, “State or other local jurisdiction”<sup>121</sup>) or judicial power over a party (for example, “jurisdiction over such person”<sup>122</sup>). It is a curious rule that declares that seven thousand usages of the same word, spread out over hundreds of years, all undoubtedly mean the same thing.

---

111. *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 168 (2010).

112. *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 436 (2011) (first quoting *Union Pac. R.R. Co. v. Bhd. of Locomotive Eng’rs & Trainmen Gen. Comm. of Adjustment*, 558 U.S. 67, 82 (2009); and then quoting *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133-34, 139 (2008)).

113. See *supra* notes 88-90 and accompanying text.

114. Data on file with author.

115. See 15 U.S.C. § 3207(a)(1) (2012); 16 U.S.C. § 2440 (2012); 28 U.S.C. § 1331 (2012); 30 U.S.C. § 1467 (2012).

116. See 7 U.S.C. § 255(a) (2012); 15 U.S.C. § 3612; 18 U.S.C. § 2338 (2012); 42 U.S.C. § 9124(a) (2012).

117. See 29 U.S.C. § 101 (2012); 47 U.S.C. § 36 (2012).

118. See 15 U.S.C. § 3207(a)(2); 16 U.S.C. § 2633(b); 29 U.S.C. § 1855(b); 42 U.S.C. § 5405(a)(3).

119. See 28 U.S.C. § 1346(a)(2).

120. See 46 U.S.C. § 30101(a) (2012).

121. 42 U.S.C. § 3941.

122. 39 U.S.C. § 3016(b)(2) (2012).

For an example of Congress using the word “jurisdiction” in a nonjurisdictional sense, consider the Emergency Planning and Community Right-To-Know Act of 1986.<sup>123</sup> Section 11046(a) of the statute requires companies handling hazardous chemicals to inform the government of their activities so persons interacting with the companies may gauge their risk of harm.<sup>124</sup> In 1995, a group known as Citizens for a Better Environment learned that Steel Company, which was subject to the Act, had failed to submit its inventory forms for the past several years.<sup>125</sup> Realizing its mistake, Steel Company quickly filed the necessary forms.<sup>126</sup> Nonetheless, Citizens for a Better Environment brought suit, alleging that the company’s *prior* failure to submit the forms constituted a violation of § 11046(a).<sup>127</sup> Steel Company disagreed, arguing that, now that it had filed the appropriate forms, there was no violation upon which it could be sued.<sup>128</sup>

The issue for the Supreme Court in *Steel Co. v. Citizens for a Better Environment* was whether § 11046(a)—which the Court referred to as “subsection (a)” —permitted suits for prior, as opposed to ongoing, violations of the Act.<sup>129</sup> This would seem like a merits issue, but it actually came up in the context of subject matter jurisdiction because of the content of subsection (c), which stated: “The district court shall have jurisdiction in actions brought under subsection (a) ... to enforce [the Act] and to impose any civil penalty provided for [in the Act].”<sup>130</sup>

Subsection (c) quite plainly uses the word “jurisdiction,” and it plainly authorizes district courts to take jurisdiction over suits “brought under subsection (a).”<sup>131</sup> Thus, if the clear statement rule is to be taken seriously, a court’s jurisdiction will depend on an interpretation of subsection (a). If a suit is brought within the terms of subsection (a), the court has jurisdiction; if a suit is not brought

---

123. Pub. L. No. 99-499, 100 Stat. 1728 (1986) (codified as amended at 42 U.S.C. § 11001 (2012)).

124. 42 U.S.C. § 11046(a)(1)(A) (2012).

125. *See Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 87-88 (1998).

126. *Id.* at 88.

127. *Id.*

128. *Id.*

129. *Id.* at 86, 90.

130. *Id.* at 90 (quoting 42 U.S.C. § 11046(c) (1994)).

131. 42 U.S.C. § 11046(c) (2012).

within the terms of subsection (a), the court has no jurisdiction. To determine its jurisdiction, therefore, a court must determine what subsection (a) requires.<sup>132</sup>

Though the clear statement rule suggests that subsection (a) is jurisdictional, a more nuanced analysis would suggest otherwise. Subsection (a), by all accounts, imposes substantive obligations on companies.<sup>133</sup> To wit, the provision requires companies to report certain chemicals in certain circumstances, but allows them not to report other chemicals in other circumstances.<sup>134</sup> Thus, if subsection (a) is jurisdictional, two odd consequences would follow. First, federal courts would be required to conduct a *sua sponte* inquiry into the merits of the case, a task fundamentally at odds with the adversarial model of American litigation.<sup>135</sup> Second, if federal courts found the plaintiff's case to fail on the merits, it would be required to dismiss the suit for lack of jurisdiction—which, because it would be a dismissal without prejudice, would allow the plaintiff to refile in state court without any fear of *res judicata*.<sup>136</sup> Thus, if subsection (a) is treated as jurisdictional, plaintiffs will get two bites at the apple, one in state court and one in federal court. This makes little sense and is good reason to conclude that Congress did not intend to make subsection (a) jurisdictional.

Indeed, this is exactly what the Supreme Court did—though not in so many words. Writing for the Court before adopting the clear statement rule in 2006, Justice Scalia explained that “[i]t is unreasonable to read [subsection (c)] as making all the elements of the cause of action under subsection (a) jurisdictional, rather than as merely specifying the remedial *powers* of the court, *viz.*, to enforce

---

132. Justice John Paul Stevens made this exact point in an opinion concurring in the judgment. *See Steel Co.*, 523 U.S. at 113 (Stevens, J., concurring in the judgment) (“[I]f [subsection (a)] authorizes citizen suits for wholly past violations, the district court has jurisdiction over these actions; if it does not, the court lacks jurisdiction.”).

133. *See* 42 U.S.C. § 11046(a).

134. *See id.*

135. *See Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583 (1999); *see also supra* note 39 and accompanying text.

136. *See Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 501-03 (2001). Some might argue that this conclusion contradicts *Bell v. Hood*, in which the Court observed that when a defect affects both jurisdiction and merits, “dismissal of the case would be on the merits, not for want of jurisdiction.” 327 U.S. 678, 682 (1946) (citing *Binderup v. Pathe Exch., Inc.*, 263 U.S. 291, 305-08 (1923); *Swafford v. Templeton*, 185 U.S. 487, 493-94 (1902)). *Bell*, however, involved an interpretation of the federal question statute. *See id.* at 684-85.

the [Act] and to impose civil penalties.”<sup>137</sup> Addressing the import of the word jurisdiction in subsection (c), Justice Scalia continued: “[j]urisdiction,’ it has been observed, ‘is a word of many, too many, meanings,’ and it is commonplace for the term to be used as it evidently was here,” in other words, to designate a remedy.<sup>138</sup> Thus, prior to the Court’s adoption of the clear statement rule in 2006, the Court was well aware that Congress often used the word jurisdiction to address matters that it did not intend to make jurisdictional.<sup>139</sup> By adopting the clear statement rule in 2006, however, the Court abruptly, and without explanation, cast off this prior observation.<sup>140</sup>

Defenders of positivism and the clear statement rule might nonetheless push back against this argument in two ways. First, defenders might argue that this attack on the clear statement rule is really just an attack on textualism as a form of statutory interpretation. Textualism, of course, will sometimes yield odd results, but the interpretive method is hardly proven deficient by these results alone.<sup>141</sup> One must also consider the benefits of such an approach—something that this Section has not done. This pushback would have some traction *if* this Section staked out an antitextualist position. But it has not.

Textualism focuses on the semantic meaning of statutory text, but it has never dismissed context as a tool for discerning that semantic meaning.<sup>142</sup> When a word is subject to multiple meanings, textualism does not advocate picking the most common meaning and applying that meaning to all uses of the word. Rather, textualism accepts that context may be used to help discern the meaning of a word.<sup>143</sup> As Justice Scalia illustrated the idea, “If you tell me, ‘I took the boat out on the bay,’ I understand ‘bay’ to mean one thing; if you tell me, ‘I put the saddle on the bay,’ I understand it to mean

---

137. *Steel Co.*, 523 U.S. at 90.

138. *Id.* (quoting *United States v. Vanness*, 85 F.3d 661, 663 n.2 (D.C. Cir. 1996)).

139. *See Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515-16 (2006).

140. *See id.*

141. *See, e.g.*, John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 93-94, 94 nn.90-91 (2006).

142. *See id.* at 79-80, 80 n.34.

143. *Id.* at 79 (“In contrast with their ancestors in the ‘plain meaning’ school of the late nineteenth and early twentieth centuries, modern textualists do not believe that it is possible to infer meaning from ‘within the four corners’ of a statute. Rather, they assert that language is intelligible only by virtue of a community’s shared conventions for understanding words in context.” (footnotes omitted)).

something else.”<sup>144</sup> Thus, the criticisms of the clear statement rule made here should resonate with textualists and purposivists alike. The criticisms are simply based on the observation that the context in which Congress uses the word “jurisdiction” contains useful information about Congress’s purpose in using that term.

A second response to these criticisms of the clear statement rule might be that it throws the baby out with the bathwater. That is, one need not jettison the entire rule simply to solve the problems that it might create in cases like *Steel Co.*<sup>145</sup> Just as the Court looked beyond the clear text in *Bowles* (in which a statute was held jurisdictional even though the statute did not contain the word “jurisdiction”),<sup>146</sup> the argument goes, the Court could also look beyond the clear text in cases like *Steel Co.* (in which a statute that contains the word “jurisdiction” could be held nonjurisdictional).<sup>147</sup> The problem with this argument, however, is that it effectively guts the positivist’s clear statement rule. If the absence of the word “jurisdiction” does not make something nonjurisdictional (as in *Bowles*),<sup>148</sup> and the presence of the word “jurisdiction” does not make something jurisdictional (as in *Steel Co.*),<sup>149</sup> what is the point of the clear statement rule? It is better to abandon the rule altogether—or, as we shall see next, reform it.

In sum, neither idealism nor positivism will lead to normatively desirable jurisdictional decisions. Idealism inappropriately diminishes Congress’s prerogative to control jurisdiction, and positivism inappropriately diminishes commonsense interpretive tools that could be useful in discerning jurisdiction. What is needed is an approach to jurisdiction that lies somewhere in between—an approach that is *both* idealist and positivist.

---

144. SCALIA, *supra* note 27, at 26; *see also id.* at 144 (acknowledging that the “semantic intention” of a legislature, in that, what the legislature thought a particular word meant when it used the word, is a proper inquiry for text-based forms of interpretation).

145. *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 86 (1998).

146. *Bowles v. Russell*, 551 U.S. 205, 208-10 (2007).

147. *Steel Co.*, 523 U.S. at 90.

148. *Bowles*, 551 U.S. at 208-10.

149. *Steel Co.*, 523 U.S. at 90.



### III. IDEALISM AND POSITIVISM

As with many either/or dilemmas, the best answer to the idealist/positivist dilemma is ... *both*. By combining the two approaches into one, the benefits of both can be harnessed without giving effect to any of their flaws. Section A below explains and defends the idealist-positivist approach, and Section B applies it to an issue currently splitting the circuit courts.

#### A. *The Approach Explained*

The best way to determine whether a particular statutory provision is jurisdictional is to evaluate Congress's chosen words (a positivist approach) in light of the traditional characteristics of jurisdiction (an idealist approach). This combined approach makes use of positivism's strong suit, namely its recognition that Congress has the prerogative to specify federal jurisdiction, as well as idealism's strong suit, namely its willingness to give weight to jurisdiction's traditional characteristics. At the same time, the combined approach also keeps in check the flaws of each individual approach. When idealism would tie Congress's hands in defining jurisdiction, positivism makes sure to give effect to congressional choices. Similarly, when the clear statement rule places dispositive weight on the word "jurisdiction," idealism requires courts to look more broadly at context to determine if jurisdiction makes any sense.

Part II.B, above, in its critique of the positivist approach, provided a partial illustration of this approach.<sup>150</sup> That Section used a statute containing the word "jurisdiction" to argue that Congress did not likely intend to make the statute jurisdictional and that, as a result, the clear statement rule would lead to incorrect results.<sup>151</sup> To show that Congress did not likely intend to make the rule jurisdictional, Part II.B invoked two common characteristics of subject matter jurisdiction, namely (1) the court's obligation to conduct a *sua sponte* inquiry into the existence of jurisdiction,<sup>152</sup> and (2) the

---

150. See *supra* notes 123-40 and accompanying text.

151. See *supra* notes 131-36 and accompanying text.

152. See *supra* note 135 and accompanying text.

obligation to dismiss suits lacking jurisdiction without prejudice.<sup>153</sup> If the statute there was treated as jurisdictional, it would have led to the extraordinarily odd circumstance of a court conducting its own *sua sponte* investigation of the merits of a lawsuit and, if the merits were deficient, allowing the plaintiff to retry the entire case in state court.<sup>154</sup> A far better interpretation of the statute, which is what the Court chose in the end, treated the word “jurisdiction” as an effort to “specify[] the remedial powers of the court.”<sup>155</sup>

This illustration, however, gives rise to a conundrum: What is Congress to do if it sincerely desires an unorthodox jurisdictional result? The combined approach would seem to put this option nearly off limits because every unorthodox attempt to make something jurisdictional would likely be reinterpreted to render it an orthodox jurisdictional rule. For this reason, the combined approach should contain a type of clear statement rule, but importantly, not a rule that operated like the one just criticized in Part II.B.

The clear statement rule proposed here would not hinge on the mere use of the word “jurisdiction.” After all, because “[j]urisdiction ... is a word of many, too many, meanings,”<sup>156</sup> the word itself will often fail to evince Congress’s jurisdictional desires. A better clear statement rule would—in cases in which jurisdiction would be unorthodox—look for various “jurisdictional indicators.” Consider, for example, the statute at issue in *Steel Co.*: “The district court shall have jurisdiction in actions brought under subsection (a) ... to enforce the [Act] and to impose any civil penalty provided for [in the Act].”<sup>157</sup>

As explained above, this provision should not be interpreted as jurisdictional because it would be quite odd for Congress to require courts to make a *sua sponte* inquiry into the merits of a claim and, if the merits were found lacking, to dismiss the suit without prejudice.<sup>158</sup> If, however, Congress truly desired that the statute be jurisdictional, it could address these factors by rewriting the statute as follows:

---

153. See *supra* note 136 and accompanying text.

154. See *supra* notes 133-36 and accompanying text.

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

156. *Id.* (quoting *United States v. Vanness*, 85 F.3d 661, 663 n.2 (D.C. Cir. 1996)).

157. *Id.* (quoting 42 U.S.C. § 11046(c) (1994)).

158. See *supra* notes 135-36 and accompanying text.

(c) The district court shall have subject matter jurisdiction in actions brought under subsection (a) only if the court determines, on its own inquiry or upon the presentation of any party, that each and every element of subsection (a) is satisfied. If the court finds an element of subsection (a) unproven, it shall dismiss the suit without prejudice.

This rewritten statute better communicates Congress's jurisdictional desires (to the extent it might have any). To be clear, this version of the clear statement rule does not require Congress to always speak with such clarity; it only requires Congress to do so when it wishes to make unorthodox jurisdictional choices.

There are two criticisms one might lodge against this reformed version of the clear statement rule. First, one might argue that requiring extra indicators of jurisdiction reeks of irony. Earlier, this Article argued that the clear statement rule is unworkable.<sup>159</sup> But now it is arguing that that rule should be replaced with, in effect, the *really clear* clear statement rule. But the irony here is not nearly as rich as it might seem. Because “[j]urisdiction ... is a word of many, too many, meanings,” a rule that focuses on the word jurisdiction alone was hardly designed to promote clarity.<sup>160</sup> Thus, the rule proposed here is not an ironic replacement for the Court's clear statement rule, but rather, it is the first clear statement rule that actually promotes clarity.

Second, one might argue that requiring Congress to add extra “jurisdictional indicators” for unorthodox jurisdictional choices may, over time, create a new baseline against which the Court will measure jurisdiction. For example, one could imagine litigants contesting the jurisdictionality of a plainly jurisdictional statute like 28 U.S.C. § 1331 by arguing that it contains no extra “jurisdictional indicators”—indicators that Congress knows how to use if it wants to.<sup>161</sup> This criticism falters for two reasons. First, a court's search for extra indicators of jurisdiction should be limited to those cases in which jurisdiction would be unorthodox. These situations, by definition, will be uncommon. Second, inasmuch as a new baseline

---

159. See *supra* Part II.B.

160. *Steel Co.*, 523 U.S. at 90 (quoting *Vanness*, 85 F.3d at 663 n.2).

161. See 28 U.S.C. § 1331 (2012).

develops, it will be the natural—and preferable—result of acknowledging that the word “jurisdiction,” on its own, retains ambiguity. When a word is susceptible to many meanings, all who encounter the word will necessarily look for extra information indicating which meaning the speaker has attached to the word.<sup>162</sup> To the extent these many meanings persist, people will frequently search for indicators of meaning—so frequently that a new baseline for discerning meaning will develop. Thus, in the unlikely circumstance that a new baseline develops with regard to jurisdictional statements, it will likely be because a new baseline was necessary.<sup>163</sup>

With the hope that the combined approach has been adequately explained and defended, the Article now illustrates the approach.

### *B. The Approach Applied*

As explained in Section A of this Part, the best way to measure the jurisdictionality of a statute is to evaluate Congress’s chosen words (a positivist approach) in light of the traditional characteristics of jurisdiction (an idealist approach). This Section applies that approach to a circuit split involving the jurisdictionality of the “final agency action” requirement<sup>164</sup> in the Administrative Procedure Act (APA).<sup>165</sup>

---

162. See *supra* note 143 and accompanying text.

163. There is one other challenge that might be lodged against the version of the clear statement rule proposed here, which Professors Hawley and Hessick have separately leveled at the Court’s current iteration of the clear statement rule. See Hawley, *supra* note 21, at 2064-70; Hessick, *supra* note 21, at 926-29. Both Hawley and Hessick criticize the Court’s clear statement rule because courts do not invoke it to further an underlying constitutional value—which is a generally accepted purpose of such rules. Although that may be a valid criticism of the Court’s clear statement rule, it is not a valid criticism of the clear statement rule proposed here. The rule proposed here is designed to address the ambiguity flowing from the many different uses of the word “jurisdiction.” An interpretive approach that does not give talismanic weight to a single word but looks instead for other indicators of statutory meaning hardly needs a constitutional value underlying it to make it worthwhile.

164. 5 U.S.C. § 704 (2012).

165. In the spring of 2017, after this Article was in the process of publication, the Supreme Court decided a case that could also be used to illustrate the approach advocated here. *Bolivarian Republic of Venezuela v. Helmerich & Payne International Drilling Co.* involved a foreign government’s claim to sovereign immunity in federal court. 137 S. Ct. 1312, 1317 (2017). Such immunity, however, falls away when the suit involves “property taken in violation of international law.” *Id.* at 1316 (quoting 28 U.S.C. § 1605(a)(3) (2012)). The

To understand the split, it is first necessary to understand the APA and its potential intersection with federal jurisdiction. The APA does many things but chief among them is waive the federal government's sovereign immunity.<sup>166</sup> The federal government, like state governments, is immune from suit unless it consents to suit by waiving its immunity.<sup>167</sup> Importantly, sovereign immunity is jurisdictional—meaning that when a sovereign is immune, the federal court must dismiss the suit for lack of jurisdiction, not on the merits.<sup>168</sup> Although courts have long considered sovereign immunity jurisdictional, it is telling that statutes addressing immunity (in other words, statutes that enable federal jurisdiction) do not always contain the word “jurisdiction.” Instead, these statutory waivers often simply contain an authorization to bring suit.<sup>169</sup>

Given sovereign immunity's jurisdictional nature, but the usual absence of the word “jurisdiction” in statutory waivers, one can

---

question for the Court was whether a plaintiff could overcome a foreign government's sovereign immunity by merely *pleading* that her “property [was] taken in violation of international law,” or must the plaintiff instead *prove* that her “property [was] taken in violation of international law.” *Id.* The Court held that the plaintiff must prove the violation, a conclusion that is correct under the approach advocated above. *Id.* at 1324; *see supra* Part III.A. The statute spoke in explicit jurisdictional terms, *see* 28 U.S.C. 1605(a)(3) (“A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case ... in which rights in property taken in violation of international law are in issue.”), and the use of jurisdiction in this context was entirely consistent with traditional understandings of jurisdiction. For better or worse, courts have long considered sovereign immunity jurisdictional. *See* *FDIC v. Meyer*, 510 U.S. 471, 475 (1994) (“Sovereign immunity is jurisdictional in nature.”). Finally, the common rule that a good faith allegation is sufficient to establish jurisdiction was not appropriate because that rule is applied in suits in which jurisdiction is based on allegations “arising under” or “brought” under a particular law. *See* *Bell v. Hood*, 327 U.S. 678, 681-82 (1946); John F. Preis, *How the Federal Cause of Action Relates to Rights, Remedies, and Jurisdiction*, 67 FLA. L. REV. 849, 889-90 (2015). The statute in this case contained no such language.

166. 5 U.S.C. § 702.

167. *See* *Lane v. Pena*, 518 U.S. 187, 192 (1996).

168. *Meyer*, 510 U.S. at 475 (“Sovereign immunity is jurisdictional in nature.”).

169. *See, e.g.,* *United States v. Georgia*, 546 U.S. 151, 159 (2006) (holding that “insofar as Title II [of the Americans with Disabilities Act] creates a private cause of action for damages against the States for conduct that *actually* violates the Fourteenth Amendment, Title II validly abrogates state sovereign immunity”); *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001) (dismissing the suit because a congressionally created cause of action did not validly abrogate state sovereign immunity); *Emps. of Dep’t of Pub. Health & Welfare of Mo. v. Dep’t of Pub. Health & Welfare of Mo.*, 411 U.S. 279, 284-85 (1973) (holding that a cause of action to enforce the Fair Labor Standards Act did not validly abrogate state sovereign immunity).

already see the trouble with a clear statement rule. Under its original iteration, the Court's clear statement rule would declare these waivers nonjurisdictional because they do not contain a clear statement of jurisdictionality.<sup>170</sup> This, however, would upset long-standing precedent.<sup>171</sup> Seeing problems like this, the Court (as we have seen) reformed its clear statement rule somewhat in *Bowles v. Russell*.<sup>172</sup> There, the Court limited the effect of *Arbaugh* (albeit without specifically acknowledging problems created by *Arbaugh*) by declaring where a "long line" of cases "has treated a similar requirement as 'jurisdictional,'" a court should continue to treat the statute as jurisdictional.<sup>173</sup> *Bowles* was a step in the right direction, but it falls short of solving the problem. For example, what should a court do when there is no "long line of cases"<sup>174</sup> pointing it in the right direction—such as where there is a split among the circuits?

This dilemma brings us to the circuit split over the APA's final agency action requirement. The requirement is contained in 5 U.S.C. § 704: "Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review."<sup>175</sup> The purpose of the requirement is to ensure that the federal courts do not evaluate agency action until the agency has completed its decision-making process—in other words, until it has reached a "final" decision.<sup>176</sup> The statute is clear on its face that suits challenging nonfinal agency action may not proceed, but what is not clear is whether such suits should be dismissed for lack of jurisdiction or dismissed on the merits. At

---

170. See *supra* notes 55-58 and accompanying text.

171. *United States v. Mottaz*, 476 U.S. 834, 841 (1986) ("When the United States consents to be sued, the terms of its waiver of sovereign immunity define the extent of the court's jurisdiction.").

172. See *supra* notes 59-70 and accompanying text.

173. *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 436 (2011) (first quoting *Union Pac. R.R. Co. v. Bhd. of Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment*, 558 U.S. 67, 82 (2009); and then quoting *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133-34, 139 (2008)).

174. *Henderson*, 562 U.S. at 436.

175. 5 U.S.C. § 704 (2012).

176. See, e.g., *Cal. Dep't of Water Res. v. FERC*, 341 F.3d 906, 909 (9th Cir. 2003) (noting that judicial review should be "limited to final orders to ensure there will be no interference with the administrative process" (citing *The Steamboaters v. FERC*, 759 F.2d 1382, 1387-88 (9th Cir. 1985))).

present, five circuits treat the requirement as jurisdictional<sup>177</sup> and five do not.<sup>178</sup> Under the Supreme Court's current approach, the requirement would be classified as nonjurisdictional because (1) Congress did not clearly state that the provision was jurisdictional and (2) there does not exist a "long line" of cases "treat[ing] a similar requirement as 'jurisdictional.'"<sup>179</sup>

A much better analysis would look at the text in light of common understandings of jurisdiction. The first thing one notices about the text is that, even though § 704 does not contain the word jurisdiction, it arguably operates as an authorization for suit by stating that final agency action is "subject to judicial review."<sup>180</sup> Waivers of sovereign immunity, as noted above, often take the form of authorizations to bring suit and, because sovereign immunity is jurisdictional, such authorizations would have jurisdictional implications as well.<sup>181</sup>

However, this is not the only permissible interpretation. Two arguments could be mounted to the contrary. First, a nearby provision, 5 U.S.C. § 702, also seems to contain an authorization to sue. Indeed, the text of § 702 might be a better candidate for a statutory waiver: "A person suffering legal wrong because of agency action ... is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages ... shall not be dismissed ... on the ground that it is against the United States."<sup>182</sup>

This section not only appears to authorize suit, it also contains uncommon but revealing language addressing sovereign immunity.

---

177. See *Kobach v. U.S. Election Assistance Comm'n*, 772 F.3d 1183, 1189 (10th Cir. 2014); *Belle Co., L.L.C. v. U.S. Army Corps of Eng'rs*, 761 F.3d 383, 387-88 (5th Cir. 2014); *Fairbanks N. Star Borough v. U.S. Army Corps of Eng'rs*, 543 F.3d 586, 591 (9th Cir. 2008); *Home Builders Ass'n of Greater Chi. v. U.S. Army Corps of Eng'rs*, 335 F.3d 607, 614 (7th Cir. 2003); *Nat'l Parks Conservation Ass'n v. Norton*, 324 F.3d 1229, 1236 (11th Cir. 2003).

178. *Jama v. Dep't of Homeland Sec.*, 760 F.3d 490, 494 n.4 (6th Cir. 2014); *Iowa League of Cities v. EPA*, 711 F.3d 844, 863 n.12 (8th Cir. 2013); *Chehazeh v. Att'y Gen. of U.S.*, 666 F.3d 118, 125 n.11 (3d Cir. 2012); *Nkihtaqmik v. Impson*, 503 F.3d 18, 33 (1st Cir. 2007); *Trudeau v. FTC*, 456 F.3d 178, 184 (D.C. Cir. 2006).

179. *Henderson*, 562 U.S. at 436 (first quoting *Union Pac. R.R. Co. v. Bhd. of Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment*, 558 U.S. 67, 82 (2009); and then quoting *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133-34, 139 (2008)).

180. 5 U.S.C. § 704.

181. See *supra* notes 166-69 and accompanying text.

182. 5 U.S.C. § 702.

The second sentence of that provision, by stating that a suit “shall not be dismissed ... on the ground that it is against the United States” is the best candidate yet for evidence of statutory waiver.<sup>183</sup> This language is in a different section than the “final agency action” requirement—which would suggest that the requirement is not jurisdictional. But focusing on how the provisions are in different statutory sections may be misguided. For one, both sections—because they both focus on “agency action”—may be interlocking.<sup>184</sup> For another, in the field of sovereign immunity, criteria far removed from the statutory waiver can be deemed part of the waiver itself, and thus jurisdictional.<sup>185</sup> Thus, this counterargument, though reasonable, is not so strong as to carry the day.

A second counterargument would involve the jurisdictional holding in *Califano v. Sanders*.<sup>186</sup> *Califano* answered the question of whether the APA (of which § 702 and § 704 are a part) “is an independent grant to district courts of subject-matter jurisdiction.”<sup>187</sup> The Court held that those provisions were not independent grants of jurisdiction and that the federal question statute—28 U.S.C. § 1331—served as the jurisdictional grant for review of agency actions.<sup>188</sup> On its face, *Califano* would seem to easily resolve the circuit split on whether final agency action is jurisdictional. Given that the APA is not an independent grant of jurisdiction, then the final agency action requirement in § 704 obviously cannot be jurisdictional.<sup>189</sup> This analysis is a bit too facile, however. To say that § 1331, not the APA, provides a *grant* of subject matter jurisdiction is not to say that the APA cannot claw back or otherwise impact jurisdiction.<sup>190</sup> The APA clearly attempts to waive sovereign

---

183. *Id.*

184. *See id.* §§ 702, 704.

185. For example, in *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130 (2008), the Supreme Court held that the Tucker Act’s six-year statute of limitations for suits against the United States (located at 28 U.S.C. § 1491) was jurisdictional, even though the waiver of sovereign immunity which permitted those suits (and which was jurisdictional) was located at 28 U.S.C. § 2501.

186. 430 U.S. 99 (1977).

187. *Id.* at 100-01.

188. *See id.* at 106.

189. Indeed, this is the approach the D.C. Circuit has taken in resolving this issue. *See Trudeau v. FTC*, 456 F.3d 178, 183-84 (D.C. Cir. 2006) (relying on *Califano*).

190. For instance, § 1331 is not the exclusive means of conveying subject matter jurisdiction. *See, e.g.*, 28 U.S.C. § 1332 (2012) (conveying subject matter jurisdiction in



immunity and sovereign immunity is, as noted above, jurisdictional.<sup>191</sup> It is possible to conclude that, although § 1331 authorizes district courts to take jurisdiction, it does not accomplish the separate and essential jurisdictional task of waiving sovereign immunity. Indeed, even if the Court concluded that the APA does not touch on jurisdiction in any way, it would have to walk back its many other statements that a statutory authorization to sue a government accomplishes a waiver or abrogation of sovereign immunity—and thus has jurisdictional implications.<sup>192</sup> This counterargument, like the one before it, is not so strong that it wins the day.

Given these inconclusive arguments concerning the text of the APA, a further exploration of traditional characteristics of jurisdiction can help considerably. One characteristic that would appear especially relevant here is that jurisdictional dismissals are dismissals without prejudice.<sup>193</sup> Given this, the question becomes whether a plaintiff who brings suit before an agency has reached its final decision should be able to come back when the decision is final, or should be forever barred from suit. If one believes that Congress wanted the plaintiff to have a chance to return, that would militate in favor of jurisdictionality.

On this issue, there are two reasons to think that a nonprejudicial dismissal, and thus a jurisdictional label, makes sense. First, when a suit is filed prior to final agency action, the suit is in a similar posture to an unripe suit. The ripeness requirement, like the final agency action requirement, ensures that the suit is fit for judicial review and relief.<sup>194</sup> Importantly, ripeness is jurisdictional; it allows plaintiffs to return to court once their suit is fit for resolution.<sup>195</sup> Second, a suit filed prior to final agency action also mimics a suit filed before exhaustion of administrative remedies. The exhaustion of such remedies is not always jurisdictional,<sup>196</sup> but importantly, the Supreme Court has held it jurisdictional in tort suits filed against

---

diversity suits).

191. 5 U.S.C. § 702 (2012); *see also supra* notes 167-69 and accompanying text.

192. *See supra* note 168 and accompanying text.

193. *See supra* note 41 and accompanying text.

194. *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 57-58 (1993).

195. *See id.*

196. *Ziembra v. Wezner*, 366 F.3d 161, 163 (2d Cir. 2004) (per curiam) (finding exhaustion under the Prison Litigation Reform Act to be nonjurisdictional).

the federal government—suits that also predicate a waiver of sovereign immunity on whether a demand for relief has been “‘finally denied’ by th[e] agency.”<sup>197</sup> In light of these two considerations, a jurisdictional characterization would seem appropriate.

Another common characteristic of subject matter jurisdiction—its strict application—also seems to point toward a jurisdictional label here.<sup>198</sup> The strict application prevents federal courts from expanding their power by loosely interpreting and applying jurisdictional rules.<sup>199</sup> A strict application of the final agency action requirement makes sense because it prevents courts from invading the province of a coordinate branch. Were courts able to develop equitable exceptions to the final agency action requirement (as they routinely do with nonjurisdictional rules),<sup>200</sup> agencies would be subject to judicial review while in the midst trying to render their own decisions.

In light of these common jurisdictional characteristics—nonjurisdictional dismissals and strict application of jurisdictional rules—a jurisdictional label is likely appropriate. This conclusion, though contrary to the dictates of the Court’s current clear statement rule, is sensible because it recognizes that “jurisdiction” is more than a word in a vacuum. It is a word used in the context of widely recognized jurisdictional characteristics and the statute’s connection with sovereign immunity.

## CONCLUSION

Congress controls federal jurisdiction but, because it does not have to live with the ambiguity its statutes create, may be less than precise in its use of the term “jurisdiction.” Scholars and the Supreme Court are understandably interested in sorting out the problems that arise from congressional imprecision, but the proper solution here is not to search for an ideal form of jurisdiction or adopt magic-word requirements. Idealist jurisdiction would deny Congress its constitutional authority, and a positivist magic-word approach would ignore the way Congress actually uses the word “jurisdiction.” Instead, the solution is to *listen* to Congress. Like all

---

197. *McNeil v. United States*, 508 U.S. 106, 111-12 (1993).

198. *See* FED. R. CIV. P. 12(h)(3).

199. *See supra* note 40 and accompanying text.

200. *See supra* notes 33-36 and accompanying text.

speakers, Congress speaks in a particular *context*, and context is an essential piece of all interpretive regimes. The context that is particularly relevant here consists of the commonly accepted characteristics of jurisdiction, and by keeping these in mind, courts are far more likely to reach the appropriate jurisdictional result.

