

JURISDICTION AND “DEFINITIONAL LAW”

JOHN F. PREIS*

TABLE OF CONTENTS

INTRODUCTION	94
I. OUR DISAGREEMENT, BRIEFLY	94
II. THE PROBLEM WITH DODSON’S “DEFINITIONAL LAW”	98
III. A BRIEF NOTE ON THE NORMATIVE ISSUE.	102
CONCLUSION.	103

* Professor and Associate Dean for Academic Affairs, University of Richmond School of Law.

INTRODUCTION

Professor Scott Dodson and I agree that the law of federal jurisdiction needs improvement. We disagree, however, on Congress's power to make that happen. In an article published in 2017, Dodson argued that "jurisdiction" has an "inherent identity" that "[n]either Congress nor the courts can change."¹ In an article published the following year, I critiqued this claim.² There, I argued that Congress is not obliged to respect jurisdiction's inherent identity (to the extent it might have one).³ Rather, Congress need only respect the identity of jurisdiction contained in the United States Constitution.⁴

Professor Dodson recently published a rejoinder to my critique.⁵ In it, he argued the meaning of the word "jurisdiction" is "definitional law" that binds Congress just as other words with "settled" meanings bind Congress.⁶ In this brief response to his argument, I articulate our key area of disagreement and explain why I continue to believe his view is wrong.

I. OUR DISAGREEMENT, BRIEFLY

"Jurisdiction," as we all know, "is a word of many, too many, meanings."⁷ In response to this ambiguity, the Supreme Court has adopted what amounts to a clear statement rule.⁸ Under this rule, if "Congress has 'clearly state[d]' that the rule is jurisdictional," the rule should be treated as jurisdictional.⁹ Similarly, if Congress has

1. Scott Dodson, *Jurisdiction and Its Effects*, 105 GEO. L.J. 619, 622, 637 (2017).
2. See John F. Preis, *Jurisdictional Idealism and Positivism*, 59 WM. & MARY L. REV. 1413, 1416-17, 1426-31 (2018).
3. See *id.* at 1427-31.
4. See *id.*
5. See Scott Dodson, *Defending Jurisdiction*, 59 WM. & MARY L. REV. ONLINE 85 (2018).
6. *Id.* at 93-94.
7. *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)).
8. See *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515-16 (2006).
9. *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 153 (2013) (alteration in original) (quoting *Arbaugh*, 546 U.S. at 515-16).

not labeled a rule as jurisdictional, “courts should treat the restriction as nonjurisdictional in character.”¹⁰

In his 2017 article, *Jurisdiction and Its Effects*, Professor Dodson contends that this approach is wrong.¹¹ In Dodson’s view, a law is jurisdictional if it operates as a boundary that “determines forum in a multiform system.”¹² Thus, where a law operates as a boundary between forums, it is jurisdictional; where it does not operate in that way, it is not.¹³ This, Dodson argues, is jurisdiction’s “inherent identity,” an identity that “[n]either Congress nor the courts can change.”¹⁴

Dodson’s approach can be illustrated in the context of the familiar case of *Arbaugh v. Y & H Corp.*¹⁵ In that case, the Supreme Court considered whether the employee-numerosity requirement in Title VII suits was substantive or jurisdictional.¹⁶ The Court held that that Title VII’s “fifteen or more employees” requirement was not jurisdictional because Congress did not clearly state that it was.¹⁷ In Dodson’s view, the Court reached the right result but for the wrong reason.¹⁸ Instead of considering what Congress clearly stated, the Court should have considered whether the employee-numerosity requirement operated as a boundary between federal court and some other forum.¹⁹ Seeing nothing in the employee-numerosity provision or related provisions that looked boundary-ish, Dodson would have also declared the provision nonjurisdictional.²⁰ Dodson then took the point a step further. Not only was the provision nonjurisdictional, *it could never be made jurisdictional.*²¹ As he put it, “it is not true, as the Supreme Court presumed, that Congress could

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

11. Dodson, *supra* note 1, at 621-22.

12. *Id.* at 634.

13. *See id.* at 634-36.

14. *Id.* at 621-22, 637.

15. *Arbaugh*, 546 U.S. 500.

16. *See id.* at 503.

17. *Id.* at 503, 515-16.

18. *See* Dodson, *supra* note 1, at 654.

19. *See id.* at 626.

20. *See id.* at 637.

21. *See id.* at 637 & n.107.

make Title VII's employee-numerosity requirement jurisdictional simply by calling it so.... Jurisdiction has its own definition."²²

This assertion struck me as plainly incorrect. In *Jurisdictional Idealism and Positivism*, I argued that Dodson's position "overlooks Congress's long-standing power to define federal jurisdiction."²³ Assuming it operates within constitutional bounds, Congress has near plenary power to make anything it wants jurisdictional.²⁴ Just as Congress decided to make the amount-in-controversy jurisdictional in diversity cases, it quite plainly has the power to make the number of employees jurisdictional in Title VII cases.²⁵ To illustrate this point, I imagined how a court would be required to interpret a hypothetical Title VII statute under Dodson's approach.²⁶ If Congress declared 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," Dodson would apparently have the court ignore the word "jurisdiction" and treat the statute as nonjurisdictional.²⁷ The only way to justify that

22. *Id.* at 637. As this quote reveals, Dodson appears to believe that his boundary-based definition is *currently* in force and thus *currently* binds Congress. *See, e.g., id.*; Dodson, *supra* note 5, at 89. Indeed, he goes so far as to claim that his definition is "inherent and immutable," as though no other definition is even possible. *See* Dodson, *supra* note 5, at 89. At the same time, he repeatedly claims that the concept of jurisdiction is in the midst of an "identity crisis," and that "we do not know what jurisdiction means." Dodson, *supra* note 1, at 620, 623. In keeping with this claim, he offers his definition as a "recalibration of jurisdiction's identity," Dodson, *supra* note 5, at 87, that will "resuscitate[] some lines of precedent and require[] reconsideration of others." Dodson, *supra* note 1, at 653. But if his definition of jurisdiction will change "jurisdiction's identity," that would seem to prove that "jurisdiction's identity" is not "inherent and immutable." Dodson, *supra* note 5, at 87, 89. His definition of jurisdiction may be normatively desirable, but by his own admission, it is not regarded as the *current* definition. *See id.* at 89.

23. Preis, *supra* note 2, at 1427.

24. *See id.* at 1429-30.

25. *See id.* at 1423.

26. *See id.* at 1428-29.

27. *Id.* at 1429. Dodson argues that my assumption that he would treat this as nonjurisdictional is not merited because my hypothetical statute is not sufficiently clear. Dodson, *supra* note 5, at 92-93. I acknowledge that it lacks sufficient facts to apply his boundary-based definition of jurisdiction. But, of course, that was not my objective. My objective was simply to show that Dodson's approach would apparently require a court to ignore the word jurisdiction in the statute—a point he concedes in his response. *Id.* at 93 (stating that if the employee-numerosity requirement in my hypothetical statute does not

holding, I contended, would be by invoking some sort of natural law of jurisdiction.²⁸

Professor Dodson recently responded to this argument in a short piece titled *Defending Jurisdiction*.²⁹ Professor Dodson defends his claims as follows:

Professor Preis mischaracterizes the source of authority for my approach as a “Platonic ideal” of jurisdiction that must manifest itself as some kind of natural law. But I do not purport to derive some “brooding omnipresence” of jurisdiction from natural law. Rather, jurisdiction is *definitional*. It is no different in kind from other definitional terms in our legal lexicon that have static meaning, such as “agency,” “relief,” “remedy,” “appeal,” “adjudication,” and a host of others found throughout the pages of *Black’s Law Dictionary*. A sheep is not a sheep because of natural law. A sheep is a sheep because that is what we have chosen to call that kind of animal, and, once chosen, its meaning is static. Likewise, *some* terminology must describe a law that determines forum in a multiforum system. The appropriate term is *jurisdiction*. And, once that is settled, jurisdiction’s definition is as static as “sheep,” not because of natural law, but as a matter of definitional law.³⁰

Put in the context of the employee-numerosity requirement, Dodson is thus arguing that Congress may not “make Title VII’s employee-numerosity requirement jurisdictional simply by calling it so”³¹ because “definitional law” only permits Congress to use the word “jurisdiction” to “determine forum in a multiforum system.”³² As explained in the following Part, Dodson’s claim is incorrect because there is no such thing in our legal system as “definitional law.”³³

affect forum, then “Congress’s misuse of the term ‘jurisdiction’ should be ignored”).

28. Preis, *supra* note 2, at 1429.

29. Dodson, *supra* note 5, at 87-88.

30. *Id.* at 93-94 (footnotes omitted).

31. Dodson, *supra* note 1, at 637.

32. Dodson, *supra* note 5, at 94.

33. *Id.* In addition to his point about definitional law, Dodson also claims that I make two other mistakes about his argument. First, he claims that, contrary to my argument, he *does* acknowledge “Congress’s constitutional prerogative to limit the authority of the federal

II. THE PROBLEM WITH DODSON'S "DEFINITIONAL LAW"

The simplest way to see the problem with Dodson's conception of "definitional law" is to use an example from his response. In his response, he argues that Congress could not "call a sheep a wolf. A sheep is a sheep."³⁴ The problem with this is that Congress, as well as any legislature for that matter, can quite plainly call a sheep a wolf.³⁵ Calling a sheep a wolf in a statute, of course, does not *actually turn* an animal commonly referred to as a sheep into an animal commonly referred to as a wolf.³⁶ It simply tells the reader that, when she encounters the symbols W, O, L, and F together, and in that order, she should understand the writer to be referring to a woolly animal that has customarily been referred to as a sheep. Thus, if a statute declares that "the word 'wolf,' as used in this statute, refers to a sheep," and further declares that "no one may keep a wolf in his abode," it will be plain that persons may not keep sheep in their abodes.³⁷

courts." *Id.* at 90-91, 91 n.25 (quoting Dodson, *supra* note 1, at 631). Dodson's point seems to be that he acknowledged Congress's power to adjust jurisdictional lines—but only if the line in question, under his conception of "definitional law," is susceptible to the jurisdictional label. *See id.* at 90-94. Because I do not recognize definitional law (and, in any event, did not encounter the concept anywhere in Professor Dodson's original paper), I stand by my claim that his approach deprives Congress of its constitutional power to control federal jurisdiction. *See* Preis, *supra* note 2, at 1427. Second, Dodson also claims that my criticism of his approach is based on a "fundamental misunderstanding" of the employee-numerosity requirement. Dodson, *supra* note 5, at 92. Quoting me (but omitting a crucial qualifying phrase), Dodson states "Professor Preis is wrong to say that 'plaintiffs suing employers with fewer than fifteen employees can simply take their cases to state courts.'" *Id.* (quoting Preis, *supra* note 2, at 1428-29). This is because, in his view, the employee-numerosity requirement applies "irrespective of the forum." *Id.* But I never argued that the employee-numerosity requirement *is in fact* jurisdictional and thus allows plaintiffs to sue in state court. Instead, I argued "[i]f [the employee numerosity] requirement is jurisdictional, then plaintiffs suing employers with fewer than fifteen employees can simply take their cases to state courts." Preis, *supra* note 2, at 1428-29 (emphasis added). Dodson's claim that I misunderstand the employee numerosity requirement is thus based on a misreading, and misquoting, of my paper.

34. Dodson, *supra* note 5, at 89.

35. *See, e.g.*, Preis, *supra* note 2, at 1416-18.

36. *See, e.g., id.* at 1415.

37. *See, e.g., id.* at 1416-18.

If Dodson is correct that “definitional law” binds Congress, then it will be nearly impossible to explain the existence of “definition” sections in statutes.³⁸ These sections are not only ubiquitous, but also ubiquitously—and assiduously—applied by the courts.³⁹ Indeed, if courts are bound to apply “definitional law,” and must *ignore* statutory language that is inconsistent with this *law*,⁴⁰ the congressional creation and judicial application of definition sections become nearly inexplicable. Consider for example the definition of “employer” from Title VII’s definition section,⁴¹ which was at issue in *Arbaugh v. Y & H Corp.*:⁴²

§ 2000e. Definitions

For the purposes of this subchapter—...

(b) The term “employer” means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of title 5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.⁴³

38. *See, e.g.*, 42 U.S.C. § 2000e (2012) (outlining the “Definitions” section under Title VII of the Civil Rights Act of 1964).

39. *Stenberg v. Carhart*, 530 U.S. 914, 942 (2000) (“When a statute includes an explicit definition, we must follow that definition, even if it varies from that term’s ordinary meaning.”); *Meese v. Keene*, 481 U.S. 465, 484 (1987) (“It is axiomatic that the statutory definition of the term excludes unstated meanings of that term.”); *Colautti v. Franklin*, 439 U.S. 379, 392 n.10 (1979) (“As a rule, [a] definition which declares what a term ‘means’ ... excludes any meaning that is not stated.” (quoting 2A C. SANDS, STATUTES AND STATUTORY CONSTRUCTION § 47.07 (4th ed. Supp. 1978))).

40. *See, e.g.*, Dodson, *supra* note 5, at 92-94.

41. 42 U.S.C. § 2000e(b).

42. *See Arbaugh v. Y & H Corp.*, 546 U.S. 500, 503 (2006).

43. 42 U.S.C. § 2000e(b).

Under Dodson's view, when Congress states "[t]he term 'employer' means," Congress is obliged to define "employer"⁴⁴ in a way that is consistent with "definitional law."⁴⁵ If Congress does not do so, then courts are not only free to, but *obliged to*, "ignore[]" Congress's chosen definition.⁴⁶ Thus, when Congress declares in subsection (b) that an "Indian tribe" does not count as an "employer,"⁴⁷ that assertion must be "ignored" because Indian tribes quite plainly employ persons.⁴⁸ An employer is an employer, just as "[a] sheep is a sheep."⁴⁹ Black's Law Dictionary, a source of definitional law Dodson points to,⁵⁰ defines an employer as "[a] person, company, or organization for whom someone works; esp., one who controls and directs a worker under an express or implied contract of hire and who pays the worker's salary or wages."⁵¹ Thus, because Congress has declared that an "employer" "does not include" an employer (for example, "an Indian Tribe"),⁵² it has violated the "definitional law" of "employer," and courts must apply Title VII to Indian tribes.⁵³ This position, obviously, is fundamentally untenable.

None of this is to say that the common understanding of a term is irrelevant to the judicial task of interpretation. As I explained in my article, the common understanding of "jurisdiction" should in fact play a significant role in jurisdictional doctrine—but *only where Congress has not made itself clear*.⁵⁴ Professor Dodson and I disagree about what the common understanding of jurisdiction is, but I think we both agree that the common understanding *may* play a role in interpretation.⁵⁵ Where we disagree further, however, is whether

44. *Id.*

45. *See* Dodson, *supra* note 5, at 93-94.

46. *Id.* at 93.

47. 42 U.S.C. § 2000e(b).

48. *See* Dodson, *supra* note 5, at 89-93; *see also, e.g., About the Nation*, CHEROKEE NATION, <https://cherokee.org/About-The-Nation> [<https://perma.cc/LD6E-ZZBV>] (stating that the Cherokee Nation employs "over 11,000 employees").

49. *See* Dodson, *supra* note 5, at 93-94.

50. *See id.* at 93.

51. *Employer*, BLACK'S LAW DICTIONARY (10th ed. 2014).

52. 42 U.S.C. § 2000e(b).

53. *See, e.g.,* Dodson, *supra* note 5.

54. Preis, *supra* note 2, at 1437-38.

55. *See, e.g.,* Dodson, *supra* note 5, at 87-94; Pries, *supra* note 2, at 1423-24, 1427-29.

the common understanding can trump Congress’s clearly stated preferences.⁵⁶

In my article, *Jurisdictional Idealism and Positivism*, I tried to offer an example of a statute that clearly labeled a particular requirement as jurisdictional.⁵⁷ Professor Dodson thought that statute less than clear,⁵⁸ so let me try again. Suppose that Congress, in response to the Court’s holding in *Arbaugh*,⁵⁹ amended Title VII so that it read as follows:

§ 1 Findings⁶⁰

Congress finds the following:

The United States Supreme Court held in *Arbaugh v. Y & H Corp.* that “[i]f 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”,⁶¹ and

Congress desires to duly instruct courts and litigants that the employee-numerosity requirement in Title VII should operate as a “threshold limitation” on Title VII’s scope.⁶²

§ 2 Jurisdiction

Federal district courts shall only have jurisdiction to adjudicate claims under Title VII if the employer accused of violating Title VII has “fifteen or more employees.”⁶³

In my opinion, a court would be bound by this provision to treat the employee-numerosity requirement as jurisdictional.⁶⁴ I cannot

56. Compare Dodson, *supra* note 5, at 87, 89-94, with Preis, *supra* note 2, at 1423-24, 1427-29.

57. See Preis, *supra* note 2, at 1429.

58. See Dodson, *supra* note 5, at 92-93.

59. *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 502 (2006).

60. For an example of a statute that uses “findings” to refer to the relevance of a Supreme Court case, see Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (codified as amended at 42 U.S.C. § 2000e-5(1) (2012)) (“Congress finds the following: ... The Supreme Court in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), significantly impairs statutory protections.”).

61. *Arbaugh*, 546 U.S. at 502.

62. See *id.* at 515-16.

63. 42 U.S.C. § 2000e(b) (2012).

64. See Preis, *supra* note 2, at 1417.

see any ambiguity here, but even if one were able to squeeze some into it, it would not change the ultimate point. Everyone must agree that, *at some point*, a statue could be constructed so clearly that it unambiguously evinces Congress's desire that a particular provision be treated as jurisdictional.⁶⁵ When presented with *that* statute, Dodson would require courts to *ignore* the jurisdictional label if it contradicts *his* definition of jurisdiction—a definition that, he admits, “upend[s] current doctrine” and has not been accepted by the federal courts or Congress.⁶⁶

I am not aware of any method of statutory interpretation or principle of judicial power that would authorize courts to ignore the plain meaning of Congress's chosen words in this way.⁶⁷ Congress frequently defines words as it sees fit, and courts are obliged to (and do in fact) apply those definitions as written.⁶⁸ Without any evidence to the contrary, Dodson's invocation of “definitional law” must fail.

III. A BRIEF NOTE ON THE NORMATIVE ISSUE

My critique of Dodson's approach to jurisdiction focused on his claim that Congress is bound by a definition of jurisdiction not embodied in the Constitution.⁶⁹ In his response to my critique, however, he offers numerous *normative* defenses of his approach. For example, he argues that his approach “better aligns like doctrines and separates unlike doctrines,” avoids difficult interpretative decisions, provides a “useful organizing principle,” recognizes courts' “relational” nature, and will promote “effective and productive communication” when using the term jurisdiction.⁷⁰ Holding these attributes in

65. See, e.g., Dodson, *supra* note 5, at 90-91, 93.

66. *Id.* at 90.

67. The absurdity doctrine is the only doctrine that one could possibly apply in this situation, but the doctrine is narrow in scope and simply another way of carrying out legislative intent. See *Pub. Citizen v. U.S. Dep't of Just.*, 491 U.S. 440, 454 (1989) (holding that courts may ignore clear text when its literal application would produce “absurd results” that “make[] it unreasonable to believe that the legislator intended” the particular result (quoting *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459 (1892))). With legislative intent so clearly manifested in this statute, the absurdity doctrine could not be applied.

68. See *supra* note 39 and accompanying text.

69. See Dodson, *supra* note 5, at 88-90, 92-95, 98.

70. *Id.* at 94-97.

high esteem, Dodson then argues that my approach lacks them: “Professor Preis’s [version of] jurisdiction has neither inherent meaning nor a defined set of effects; it is simply whatever Congress says it is at the particular time and place. It offers no definitional, doctrinal, relational, linguistic, functional or legal relevance. What is the point?”⁷¹

The point, most simply, is that I value judicial adherence to Congress’s clearly stated preferences more than I value optimal coherence in the law of jurisdiction. I am no fan of legal incoherence, but I am even less of a fan of something as amorphous as “definitional law” trumping Congress’s constitutionally guaranteed power.⁷² It may be tempting to sharpen Congress’s imprecision when dealing with the term “jurisdiction,” but doing so only opens the door to sharpening other terms, such as “partial birth abortion.”⁷³ Thus, whatever else my approach may lack, it does not lack adherence to bedrock constitutional values.

Dodson’s proposal could be easily salvaged if he were to back off of his claim that “definitional law” binds Congress.⁷⁴ It would be perfectly sensible to argue that the Supreme Court should adopt his boundary-based conception of jurisdiction and, *where ambiguity exists*, push doctrine in that direction. Over time, doctrine would move closer and closer to Dodson’s conception of jurisdiction, and Congress might well hew, on average, to that conception as well. This approach would take time, of course, but it would at least be consistent with fundamental differences between congressional and judicial power.

CONCLUSION

As I noted in my original article, Dodson’s attempt to organize jurisdiction around the concept of boundaries is “a useful addition

71. *Id.* at 98.

72. *See supra* notes 23-24 and accompanying text.

73. *See Sternberg v. Carhart*, 530 U.S. 914, 942 (2000) (rejecting the definition of “partial birth abortion” that “conflict[ed] with the statutory” definition).

74. *See supra* note 6 and accompanying text.

to the literature.”⁷⁵ Members of Congress would do well to read his paper. But should they disagree with his understanding of jurisdiction, they should know they are free to chart a different course. Nothing in the Constitution requires otherwise.⁷⁶

75. See Preis, *supra* note 2, at 1427.

76. See *supra* notes 23-24, 33, 56, 68 and accompanying text.