NOTES

CAVEAT EMPTOR: JURISDICTIONAL RULES, *BOWLES V. RUSSELL*, AND RELIANCE ON OUR JUDICIAL SYSTEM

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INTRODUCTION

Many scoff at the idea that cases involving important, substantive legal issues can turn on "technicalities" such as a filing deadline.[1] Filing deadlines, or time limits, concern the required timing of legal action. When litigants miss these deadlines, judges must determine how to respond, and the resulting decision is life or death for the litigant's claim.

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[1] *See, e.g.*, Smith v. Texas, 127 S. Ct. 1686, 1703 (2007) ("[T]he court may think that the parties and the public are more likely to be satisfied that justice has been done if the decision is based on the merits instead of what may be viewed as a legal technicality.").

Bowles v. Russell[2] addressed the problem of missed filing deadlines and when – and whether – courts can excuse them. In *Bowles*, the litigant filed a notice of appeal within the timeframe incorrectly authorized by the district court judge but outside the timeframe authorized by statute. Over a contentious dissent, the United States Supreme Court held that the statutory time limit, being "jurisdictional" in nature, was not subject to forfeiture, waiver, or any other kind of meritorious excuse.[3] Despite reliance on the judge's mistake, the litigant's late appeal stripped the court of the power to hear the case.[4] This characterization of a deadline as either "jurisdictional" or "nonjurisdictional" in nature forms the crux of the problem.

Under 28 U.S.C. § 2107, litigants in civil cases have thirty days after the entry of a judgment to file a notice of appeal.[5] Following a murder conviction, Keith Bowles filed a petition of habeas corpus in the United States District Court for the Northern District of Ohio.[6] Petitions for writs of habeas corpus, as civil proceedings,[7] are subject to the thirty-day civil appeal deadline. After Bowles missed the deadline, he moved pursuant to Rule 4(a)(6) of the Federal Rules of Appellate Procedure to reopen the filing period for filing a notice of appeal.[8] The district court granted the motion but "inexplicably" gave Bowles an additional seventeen days to file, rather than the fourteen days the rule and statute prescribed.[9] Bowles filed his motion on the sixteenth day – within the timeframe the judge gave him but outside the range allowed by rule and statute.[10] The Court of Appeals for the Sixth Circuit had to decide whether it could excuse Bowles's late appeal or whether the untimely appeal meant the court had to dismiss the case for want of jurisdiction, regardless of how harsh or rigid the result might be. The Sixth Circuit dismissed for want of jurisdiction.[11] The Supreme Court affirmed.[12]

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[2] 127 S. Ct. 2360 (2007).

[3] *Id.* at 2366.

[4] *Id.* at 2362.

[5] 28 U.S.C. § 2107(a) (2000); *see also* FED. R. APP. P. 4(a)(1)(A).

[6] Bowles v. Russell, No. 1:02CV1520, 2003 WL 25501341, at *1 (N.D. Ohio July 10, 2003), *rev'd*, 432 F.3d 668 (6th Cir. 2005), *aff'd*, 127 S. Ct. 2360 (2007).

[7] *See* 39 AM. JUR. 2D *Habeas Corpus and Postconviction Remedies* § 7 (2008) ("Habeas corpus proceedings are generally considered to be civil, rather than criminal, in nature, even when the writ is sought on behalf of one charged with, or convicted of, a crime." (citation omitted)).

[8] *Bowles*, 127 S. Ct. at 2362; *see also* 28 U.S.C. § 2107(c) ("[T]he district court may . . . reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal."); FED. R. APP. P. 4(a)(6).

[9] *Bowles*, 127 S. Ct. at 2362.

[10] *Id.*

[11] Bowles v. Russell, 432 F.3d 668, 677 (6th Cir. 2005), *aff'd*, 127 S. Ct. 2360 (2007).

[12] *Bowles*, 127 S. Ct. at 2363 (holding the deadline "'mandatory and jurisdictional'" and thus "not susceptible to equitable modification" (quoting Griggs v. Provident Consumer Disc. Co., 459 U.S. 56, 61 (1982) (per curiam))).

This Note argues that the unjust result in *Bowles* can be remedied by legislative action. Specifically, Congress should amend § 2107 to include the same "excusable neglect or good cause" language it already uses in § 2107(c) to allow a district court to reopen the filing period.[13] This would have the effect of giving the district court discretionary power to hear a late appeal both when a litigant erroneously relies upon a representation of the court and when other unforeseen circumstances dictate such a result.

Part I of this Note examines the history and background of the problem of jurisdictional rules. Part II examines *Bowles* itself in more detail, focusing specifically on how it has been the object of judicial handwringing and confusion in the courts of appeals. Part III examines the various proposals that have been suggested to deal with the problem, their potential positive and negative effects, and their possible effects on the incentives of litigants. Finally, this Note concludes that the interests of both litigants and the judicial system would be best served if Congress gave judges more flexibility in determining which cases warrant a decision on the merits and which do not.

I. JURISDICTIONAL DEADLINES IN CONTEXT

A. Robinson *and* Browder*: The Strict Understanding*

The Supreme Court's rigid treatment of the notice of appeal deadline over the past 150 years[14] has been criticized as "senseless formalism"[15] and "incoherent."[16] *Bowles* itself has been described as "brutal" and "disgraceful nonsense."[17] That something so technical is also so ideologically charged demonstrates the vital policy implications the problem raises.[18]

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[13] *See* 28 U.S.C. § 2107(c) ("The district court may, upon motion filed not later than 30 days after the expiration of the time otherwise set for bringing appeal, extend the time for appeal upon a showing of excusable neglect or good cause."). This differs from a unique circumstances regime because § 2107(c) requires a litigant to request an extension *before* the time to appeal has run, and the statute is of no aid if thirty days have already passed. *See infra* Part II.A for a discussion of the unique circumstances regime.

[14] The analysis of *United States v. Robinson* and *Browder v. Director, Department of Corrections* in this Part are meant only to be illustrative of the strict interpretation of time limits. For more extensive background reading on this issue, see Perry Dane, *Jurisdictionality, Time, and the Legal Imagination*, 23 HOFSTRA L. REV. 1 (1994); E. King Poor, *Jurisdictional Deadlines in the Wake of* Kontrick *and* Eberhart*: Harmonizing 160 Years of Precedent*, 40 CREIGHTON L. REV. 181 (2007).

[15] *See* Dane, *supra* note 14, at 9 & n.18 (noting that "[t]here is a long academic tradition of criticizing certain jurisdictional doctrines" as too formal and rigid).

[16] *See Bowles*, 127 S. Ct. at 2370 (Souter, J., dissenting).

[17] Paul D. Carrington, *A Critical Assessment of the Cultural and Institutional Roles of Appellate Courts*, 9 J. APP. PRAC. & PROCESS 231, 232-33 (2007) (book review).

[18] *See, e.g.*, Erwin Chemerinsky, *Turning Sharply to the Right*, 10 GREEN BAG 2D 423, 432 (2007) (arguing that *Bowles* conforms to a pattern of the Roberts Court "favoring the government over individuals"); Tony Mauro, *Low-Profile Supreme Court Case Offers*

The archetypal decision of *United States v. Robinson*[19] is, in many respects, the principal source of much of the confusion. Nearly every case that involves the jurisdictional nature of a deadline must contend with this precedent. Indeed, a "great many" cases holding deadlines to be jurisdictional "trace their origin to . . . *Robinson*."[20] *Robinson* dealt with a rule of criminal procedure requiring notices of appeal to be filed within ten days of the entry of judgment; the defendants filed it eleven days late due to a "misunderstanding."[21] The district court ordered that the record reflect the appeal's lateness was due to defendants' "excusable neglect" under Rule 45(b) of Criminal Procedure.[22] Yet, under Rule 45(b), this excuse was not available to "enlarge[]" the period for filing an appeal.[23] The case thus turned on the meaning of the word "enlarge." The court of appeals took the position that to "enlarge" the filing period was to grant an extension of time.[24] Thus, a court could not extend the time period ex ante but could, at its discretion, accept late appeals.[25] Relying on Rule 45(b)'s relationship to Rule 6(b) of Civil Procedure, the Supreme Court, in language that has been quoted with fervor by *Robinson*'s proponents and with disdain by its detractors, stated:

> It had consistently been held that Civil Rule 6(b) was *mandatory and jurisdictional* and could not be extended regardless of excuse. It must be presumed that [the drafters] were aware of the limiting language of Civil Rule 6(b) and of the judicial construction it had received when they prepared and adopted the Federal Rules of Criminal Procedure.[26]

Finally, in another oft-repeated argument, the Court exhorted that the business of creating these exceptions is within the province of Congress, not the judiciary.[27]

Despite the heady and sometimes academic arguments made by both sides, the core issue is actually a supremely practical one – district courts decide to hear motions on the merits despite late filings with surprising frequency. In

Glimpse of Sharp Divide, LAW.COM, June 15, 2007, http://www.law.com/jsp/article.jsp?id=1181811943722 (stating that *Bowles* provides a "glimpse . . . into the sharp conservative-liberal divide" of the Roberts Court).

[19] 361 U.S. 220 (1960).

[20] Poor, *supra* note 14, at 194.

[21] *Robinson*, 361 U.S. at 221 (explaining that the confusion apparently resulted from "a misunderstanding as to whether the notices were to be filed by respondents themselves or by their counsel").

[22] *Id.* at 222; *see also* FED. R. CRIM. P. 45(b).

[23] *See* Poor, *supra* note 14, at 195.

[24] *Robinson*, 361 U.S. at 223.

[25] *Id.*

[26] *Id.* at 229 (emphasis added).

[27] *Id.* ("[This] policy question . . . must be resolved through the rulemaking process and not by judicial decision." (citing United States v. Isthmian S.S. Co., 359 U.S. 314, 323 (1959)).

Browder v. Director, Department of Corrections,[28] like *Bowles* a habeas corpus case, the Department of Corrections ("DOC") filed an untimely motion for an evidentiary hearing.[29] The district court allowed the evidentiary hearing, but it ultimately denied the DOC's request for a stay of execution of the writ of habeas corpus releasing the prisoner.[30] Significantly, a *timely* motion for an evidentiary hearing would have tolled the thirty days to appeal under § 2107, while an untimely appeal would not.[31] The timeline in this case was as follows. The court granted habeas corpus relief on October 21, 1975.[32] In order to file a timely motion for an evidentiary hearing, the DOC needed to file its motion by October 31, ten days after the judgment.[33] The DOC filed twenty-eight days after judgment, on November 18.[34] The district court, despite the late filing, "nevertheless entertained the motion [over Browder's objections], granted a stay of execution . . . [and] set a date for an evidentiary hearing," eventually finding habeas relief proper.[35] The DOC then immediately appealed both that judgment and the original October 21 judgment.[36] The problem is that the DOC would have had to appeal the October 21 judgment within thirty days – meaning the DOC had until November 20 to file its motion.[37] Although the DOC filed a motion for an evidentiary hearing before November 20, it never filed a motion to *appeal* before then. A *timely* motion for an evidentiary hearing would have tolled that period, but since the motion was untimely, the Supreme Court held it "could not toll the running of time to appeal under Rule 4(a)."[38] In other words, because the evidentiary hearing, requested late, was illegitimate, the original thirty-day appeal clock from October 21 kept ticking even as the district court conducted the evidentiary hearing. Had the evidentiary hearing been timely and proper, the thirty-day period would have been tolled as the hearing was in progress. As it stood, the appeal was late, and holding the deadline "mandatory and jurisdictional," the Supreme Court disallowed the appeal.[39]

[28] 434 U.S. 257 (1978).

[29] *Id.* at 261.

[30] *Id.* at 261-62.

[31] *See id.* at 264-65.

[32] *Id.* at 260.

[33] *See id.* at 261 n.5 (noting that although the DOC did not specify whether the motion it filed was "a motion for a new trial, a motion to amend or make additional findings, or a motion to alter or amend the judgment," all of the applicable rules had the same ten-day post-judgment filing deadline).

[34] *Id.* at 260-61.

[35] *Id.* at 261-62.

[36] *Id.* at 262.

[37] *See id.*; *see also* 28 U.S.C. § 2107 (2000) (requiring that appeals be filed within thirty days of the judgment); FED. R. APP. P. 4(a).

[38] *Browder*, 434 U.S. at 265.

[39] *Id.* at 271-72.

B. *Jurisdictional Deadlines Defined*

What does it mean for a deadline to be "mandatory and jurisdictional"? In general, "[j]urisdictional issues go to the power or authority of a tribunal."[40] Jurisdictional time limits in particular implicate the same themes:

> [I]f a time limit is jurisdictional, courts will interpret and apply it rigidly, literally, and mercilessly. A necessary pleading or motion or notice might arrive late at the courthouse because of a massive snowstorm, or chicanery or innocent error by the other side. A necessary act might be omitted due to the negligence of the court itself. But all that simply is too bad.[41]

Needless to say, the determination of whether a time limit is jurisdictional is of great importance to a litigant who has filed an untimely motion. Any characterization of a time limit as jurisdictional must therefore be done with great care. To this end, the Supreme Court has recently attempted "to clean up [its] language, and . . . avoid[] the erroneous jurisdictional conclusions that flow from indiscriminate use of the ambiguous word."[42] Even Justice Thomas, writing for the majority in *Bowles*, conceded that "several of our recent decisions have undertaken to clarify the distinction between claims-processing rules and jurisdictional rules."[43] The *Bowles* majority and dissent both refer to a recent trilogy of cases which, though concerning different time limits than the one found in *Bowles*, implicate the same issues and rely on most of the same precedent.[44]

C. *The "Clean-Up" Effort*

Acknowledging that "[c]ourts, including [the Supreme Court] . . . have been less than meticulous" in defining and applying the term "jurisdictional" to mere "rules of court," a unanimous Supreme Court began the clean-up effort in earnest in *Kontrick v. Ryan*.[45] *Kontrick* contemplated a rule of bankruptcy procedure rather than a federal statute or rule of civil procedure.[46] Kontrick contested the timeliness of Ryan's late amended complaint under Bankruptcy

[40] Dane, *supra* note 14, at 4-5.

[41] *Id.* at 5-7 (footnotes omitted).

[42] Bowles v. Russell, 127 S. Ct. 2360, 2367 (2007) (Souter, J., dissenting).

[43] *Id.* at 2364 (majority opinion).

[44] *See* Arbaugh v. Y & H Corp., 546 U.S. 500, 504 (2006) (holding that a statutory "numerical threshold does not circumscribe federal-court subject-matter jurisdiction"); Eberhart v. United States, 546 U.S. 12, 16 (2005) (per curiam) (holding that Federal Rule of Criminal Procedure 33 is a "claim-processing" rather than a jurisdictional rule); Kontrick v. Ryan, 540 U.S. 443, 447 (2004) (holding that Bankruptcy Rule 4004 is not a jurisdictional time limit and may not be used "to upset an adjudication on the merits").

[45] *Kontrick*, 540 U.S. at 454.

[46] *See id.* at 453-54.

Rule 4004 only after he lost on summary judgment.[47] The Court held, first, that the filing deadlines in question were "claim-processing rules that do not delineate what cases bankruptcy courts are competent to adjudicate."[48] The second and more extensive discussion concerned Kontrick's contention that, although the rules do not define the scope of subject-matter jurisdiction, they nevertheless "have the same import as provisions" that do.[49]

Responding to this argument, the Court attempted to circumscribe the meaning of "jurisdiction." "Clarity would be facilitated," remarked the Court, "if courts and litigants used the label 'jurisdictional' not for claim-processing rules, but only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority."[50] Here, the Supreme Court "coined a new term" in describing rules that do not affect or define the scope of adjudicatory authority as "claim-processing" rules.[51] Indeed, *Kontrick* was the first time the Supreme Court used the phrase "claim-processing" in this context.[52] A party can forfeit a "claim-processing" rule by failing to raise it early enough in the litigation.[53] Kontrick did just that by not objecting to the motion's untimeliness in a responsive pleading.[54]

The bankruptcy deadline in question, the Court explained, serves three goals: it (1) apprises the pleader of when he must file his complaint; (2) informs the court of "the limits of its discretion" to extend time limits; and (3) provides the opposing party an affirmative defense.[55] All three are important objectives crucial to any functioning and efficient legal system, but they do not implicate issues of jurisdictional magnitude. In addition, none of these goals is peculiar to the bankruptcy system, making it reasonable to interpret the opinion as an attempt to clarify the situation concerning all rule-based deadlines. This interpretation was borne out when the Court next took up the issue in *Eberhart v. United States*.[56]

In contrast to *Kontrick*, *Eberhart* concerned the Rules of Criminal Procedure. Eberhart filed his original motion for a new trial within the seven-

[47] *Id.* at 446, 450-51.

[48] *Id.* at 454.

[49] *Id.* at 455.

[50] *Id.*

[51] Poor, *supra* note 14, at 207.

[52] A LexisNexis search revealed no reported cases that used the phrase "claim-processing rules" in this context prior to *Kontrick*.

[53] *Kontrick*, 540 U.S. at 456.

[54] *See id.* at 460 ("No reasonable construction of complaint-processing rules . . . would allow a litigant situated as Kontrick is to defeat a claim, as filed too late, after the party has litigated and lost the case on the merits.").

[55] *Id.* at 456.

[56] 546 U.S. 12 (2005) (per curiam).

day time period required by Federal Rule of Criminal Procedure 33(b)(2).[57] Six months later, he "filed a 'supplemental memorandum'" providing additional grounds for which he believed a new trial was warranted.[58] The district court not only failed to contest the memorandum's timeliness, but it granted the motion.[59] The Seventh Circuit, relying on *Robinson*, reversed, finding the district court lacked jurisdiction to grant a new trial.[60] Yet the court nonetheless acknowledged that *Kontrick* might call for a different result and, not knowing how to reconcile that case with *Robinson*, called for the Supreme Court to clarify.[61] And clarify it did: the Supreme Court reversed, claiming it "implausible that the [Bankruptcy] Rules considered in *Kontrick* can be nonjurisdictional claim-processing rules, while virtually identical provisions of the Rules of Criminal Procedure can deprive federal courts of subject-matter jurisdiction. Nothing in Rules 33 or 45 or our cases requires such a dissonance."[62] The Court extended *Kontrick*'s call to facilitate clarity by using the word "jurisdictional" to describe only those rules that delineate a court's subject-matter or personal jurisdiction.[63]

In addition, the Court tried once again to distinguish *Robinson* and discern its actual holding. The Court said *Robinson* stands for the proposition that "district courts must observe the clear limits of the Rules of Criminal Procedure when they are *properly invoked*."[64] Thus, courts do not have the authority to bend the rules when a litigant invokes them in a timely and proper manner, but the party seeking the rules' protection may forfeit her claim by not invoking it in time.[65]

Lastly, although the nature of the limitation involved is distinct, *Arbaugh v. Y & H Corp.*[66] nevertheless also illustrated the shift towards a more lenient and results-based approach to the jurisdictional nature of rules.[67] In contrast to the temporal focus of *Kontrick* and *Eberhart*, *Arbaugh* dealt with the issue of whether a plaintiff's failure to prove an element of a claim deprived the court of jurisdiction, or merely meant the claim failed on its merits. Title VII of the Civil Rights Act of 1964, the statute under which the plaintiff sued, defined

[57] *Id.* at 13.

[58] *Id.*

[59] *Id.* at 13-14.

[60] *Id.* at 14.

[61] United States v. Eberhart, 388 F.3d 1043, 1049 (7th Cir. 2004), *rev'd per curiam*, 546 U.S. 12 (2005).

[62] *Eberhart*, 546 U.S. at 16.

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

[64] *Id.* at 17 (emphasis added).

[65] *See id.* at 19 ("These claim-processing rules thus assure relief to a party properly raising them, but do not compel the same result if the party forfeits them.").

[66] 546 U.S. 500 (2006).

[67] *Id.* at 516 ("[W]hen Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character.").

covered "employers" as only those with "fifteen or more employees."[68] After a loss on the merits, Y & H asserted "[f]or the first time . . . that it had fewer than 15 employees" and thus could not be sued under the Act.[69] Clearly, such a claim would succeed only if the fifteen-employee requirement was a jurisdictional requirement, since motions to dismiss for lack of subject-matter jurisdiction may be raised at any time.[70] Otherwise, after a merits decision, the plaintiff would have forfeited such a claim.[71] Concluding Congress did not cast this minimum requirement "in jurisdictional terms or refer in any way to the jurisdiction of the district courts,"[72] the Court held that the requirement is merely an element of the plaintiff's claim and "not a jurisdictional issue."[73] By failing to raise it in a timely matter, Y & H forfeited the claim.

II. JURISDICTIONAL RULES AFTER *BOWLES*

Bowles came as a surprise not because it was unprecedented, but because it seemed so out of step with the Court's recent decisions that "backed away from the characterization of particular filing deadlines as 'jurisdictional.'"[74] After *Kontrick* and *Eberhart*, it was not immediately clear whether *any* rules were still "jurisdictional" in nature.[75] As recently as 2007, prior to the *Bowles* decision, E. King Poor, who argued on behalf of the petitioner in *Kontrick*, claimed the precedent that certain time limits were jurisdictional "may no longer be 'well-settled' and 'accepted fact.'"[76] Needless to say, *Bowles* obviated any doubt that jurisdictional time limits are alive and well. How far did *Bowles* go, and how did the Court distinguish it from other recent cases it did not seek to overrule?

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[68] *Id.* at 503; *see also* 42 U.S.C. § 2000e(b) (2000).

[69] *Arbaugh*, 546 U.S. at 504 (observing that Arbaugh waited until two weeks after judgment was entered to raise this issue).

[70] *See* FED. R. CIV. P. 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.").

[71] *See* Wilburn v. Robinson, 480 F.3d 1140, 1147 (D.C. Cir. 2007) (stating that, with respect to nonjurisdictional rules, failure to object before the court reaches a decision on the merits will "indisputably" constitute forfeiture).

[72] *Arbaugh*, 546 U.S. at 515 (quoting Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 394 (1982)).

[73] *Id.* at 515-16. The Court distinguished the fifteen-employee requirement from the $75,000 monetary floor of § 1332, which is appropriately jurisdictional. *Id.* In contrast, § 1332 explicitly states that "[t]he district courts *shall have* . . . jurisdiction" when certain requirements are met. 28 U.S.C. § 1332(a) (2000) (emphasis added).

[74] JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE § 2107.2[2] (3d ed. 2008).

[75] *See The Supreme Court, 2006 Term – Leading Cases*, 121 HARV. L. REV. 185, 315 (2007) (discussing how the Court's "recent campaign" to use the jurisdictional label cautiously "lacked a limiting principle").

[76] *See* Poor, *supra* note 14, at 183.

A. *What* Bowles *Changed*

The most significant reason the Court gave for its holding in *Bowles* was that the time limit at issue in the case was a *statutory*, rather than judicial, creation.[77] The *Bowles* time limit, originating in 28 U.S.C. § 2107 and given effect by Federal Rule of Appellate Procedure 4(a), gives a party thirty days to file a notice of appeal, but it also authorizes the district court to extend the filing period by fourteen days.[78] The Court called this distinction "[c]ritical" to the holding in *Kontrick*, which dealt with a rule of bankruptcy procedure that was not a statutory requirement.[79] Likewise, the requirement in *Arbaugh*, although statutory in nature, did not involve a filing deadline.[80]

Bowles tried to escape the conclusion that would naturally flow from this characterization of the time limit: that he was out of luck (and out of court) no matter why he failed to file the notice within the statutory time limit. Bowles attempted to extricate himself from this jurisdictional quicksand through reliance on the "unique circumstances" doctrine from *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*[81] It was a good strategy, considering that "[t]he equities . . . could hardly have been more favorable to" Bowles.[82] In *Harris Truck Lines*, the Supreme Court affirmed a district court's decision to extend a filing deadline by two weeks because of the "great hardship" that would result if a party could not rely on extensions granted by the trial judge.[83] The Court stated that even though it might have decided the case differently de novo, the party's reliance created "unique circumstances sufficient that the Court of Appeals ought not to have disturbed the motion judge's ruling."[84]

This unique circumstances doctrine also succeeded in *Thompson v. INS*,[85] a case that provided perhaps the strongest support for Bowles.[86] Thompson had

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[77] Bowles v. Russell, 127 S. Ct. 2360, 2364 (2007) ("Although several of our recent decisions have undertaken to clarify the distinction between claims-processing rules and jurisdictional rules, none of them calls into question our longstanding treatment of statutory time limits for taking an appeal as jurisdictional.").

[78] 28 U.S.C. § 2107(a), (c) (2000); FED. R. APP. P. 4(a)(1)(A).

[79] *Bowles*, 127 S. Ct. at 2364.

[80] *Id.* at 2365.

[81] 371 U.S. 215 (1962) (per curiam), *overruled by* Bowles v. Russell, 127 S. Ct. 2360 (2007).

[82] MOORE, *supra* note 74, § 2107.2[2].

[83] *Harris Truck Lines*, 371 U.S. at 217.

[84] *Id.*

[85] 375 U.S. 384 (1964) (per curiam), *overruled by* Bowles v. Russell, 127 S. Ct. 2360 (2007).

[86] Justice Souter, writing for the dissent in *Bowles*, thought *Thompson* ought to control. More specifically, Souter argued that Bowles's case was even stronger than Thompson's, since Thompson "introduced the error" by filing the motion late in the first instance, while in *Bowles*, the judge introduced the error. *See* Bowles v. Russell, 127 S. Ct. 2360, 2371 (2007) (Souter, J., dissenting).

sixty days to appeal a denial of his naturalization petition.[87] He filed motions to amend findings of fact and to request a new trial two days late, but the district court nevertheless said he filed the latter motion "in ample time."[88] If his motions were timely, it would have tolled the time to appeal, rendering his eventual notice of appeal timely; however, because the court later deemed the motions untimely, the motions did not toll the sixty-day deadline.[89] The Supreme Court, relying on *Harris Truck Lines*, nevertheless held it permissible:

> The instant cause fits squarely within the letter and spirit of *Harris*. Here, as there, petitioner did an act which, if properly done, postponed the deadline for the filing of his appeal. Here, as there, the District Court concluded that the act had been properly done. Here, as there, the petitioner relied on the statement of the District Court and filed the appeal within the assumedly new deadline but beyond the old deadline. . . . Accordingly, in view of these "unique circumstances," . . . petitioner's appeal may be heard on the merits.[90]

Instead of trying to distinguish Bowles's case on its facts, the *Bowles* Court called *Harris Truck Lines* and *Thompson* "illegitimate" and expressly overruled them.[91] The Court held that a civil appeal deadline "is a jurisdictional requirement" and remarked that it had "no authority to create equitable exceptions to jurisdictional requirements," unique circumstances or not.[92]

For some, the death knell for the unique circumstances doctrine was a long time coming. The First Circuit as recently as 2005 "questioned the continued viability of the *Thompson* doctrine."[93] Even when courts deemed the doctrine viable, they usually limited the doctrine to the narrow instances "where a court has affirmatively assured a party that its appeal will be timely."[94] Even under this restricted view of *Thompson*, Bowles's situation would have passed muster had the Court sought to uphold its precedent.

For others, most notably Justice Souter, *Thompson* should not only remain vital but "should control."[95] Less emphatically, the Seventh Circuit remarked in 2002 that even though it, "along with other circuits, ha[s] questioned the validity of the 'unique circumstances' doctrine," it nevertheless "remains good

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[87] *Thompson*, 375 U.S. at 384-85.

[88] *Id.* at 385-86.

[89] *Id.* at 386-87.

[90] *Id.* at 387 (citation omitted).

[91] *Bowles*, 127 S. Ct. at 2366.

[92] *Id.*

[93] Morris v. Unum Life Ins. Co., 430 F.3d 500, 502 (1st Cir. 2005).

[94] *Id.* (quoting United States v. Heller, 957 F.2d 26, 29 (1st Cir. 1992)).

[95] *Bowles*, 127 S. Ct. at 2371 (Souter, J., dissenting).

law."[96] Indeed, it remained "good law" there not only in name, but also in practice: the Seventh Circuit invoked the doctrine in a 2002 case to excuse a late appeal.[97] Significantly, the court invoked *Thompson* to excuse not an appeal deemed late because of court-created rules ("claim-processing" rules) but an appeal that missed the same statutory thirty-day deadline for civil cases at issue in *Bowles*.[98] Also noteworthy is that the Seventh Circuit decided this case before the Supreme Court began to "clean up" its jurisprudence.[99] Prior to *Bowles*, the "steady stream" of cases finding filing rules nonjurisdictional would only bolster the point of view, expressed by the Seventh Circuit, that *Thompson* remained alive.[100]

At the very least, it is clear that *Bowles* attempted to circumscribe those situations in which it is not possible to excuse late filings and appeals – that is, where those time limits are derived from statute. Distinguishing *Bowles* from the Court's "steady stream"[101] of recent decisions, Justice Thomas wrote that "those decisions have . . . recognized the jurisdictional significance of the fact that a time limitation is set forth in a statute."[102] As explicitly as possible, the Court tried to "make clear that the timely filing of a notice of appeal in a civil case is a jurisdictional requirement."[103] Though crude, this measure has nevertheless been called "a step forward" from the recent line of cases that "lacked a limiting principle."[104] The Court's syllogistic reasoning – that a time limit ensconced in a statute is jurisdictional and thus not subject to equitable exceptions – has been heeded by the various courts of appeals in the surprisingly common scenario of contested timetables.

B. *Confusion and Resistance in the Courts of Appeals*

Since *Bowles*, several courts of appeals have been forced to dismiss late filings where they may have previously attempted to excuse such tardiness. In one case remarkably similar to *Bowles*, a litigant mistakenly relied not on a

[96] Newell v. O & K Steel Corp., 42 F. App'x 830, 832 (7th Cir. 2002).

[97] *See id.* The Seventh Circuit held that since Newell (1) filed a motion which, if properly filed, would have tolled the time for appeal; (2) relied on the district court's ruling that his motion was timely; and (3) filed his appeal "within the mistaken new deadline," he made a showing of "unique circumstances" as understood in *Thompson* such that his late appeal was excusable. *Id.* The Seventh Circuit nevertheless dismissed Newell's case on other jurisdictional grounds. *Id.* at 833.

[98] *See id.* at 831.

[99] *See supra* Part I.C.

[100] *See Bowles*, 127 S. Ct. at 2370 (Souter, J., dissenting).

[101] *Id.*

[102] *Id.* at 2364 (majority opinion).

[103] *Id.* at 2366.

[104] *See The Supreme Court, 2006 Term*, *supra* note 75, at 315.

judge's statement, but on a statement made by the judge's law clerk.[105] The district court entered its original judgment on October 12, 2006; two weeks later, on October 26, the court amended it to correct an incorrect date therein.[106] The clerk mistakenly believed the time to appeal ran not from the original judgment but from the corrected judgment.[107] Therefore, when the party filed its notice of appeal on November 27, it was well past the thirty-day deadline that ran from the October 12 judgment. The unique circumstances doctrine, having been "abrogated" by *Bowles*, was of no aid, and the appeal was dismissed.[108] At least in this scenario, the Second Circuit thought:

> The wisdom of *Bowles* is confirmed . . . by the mischief that would be spawned by excusing untimeliness on the basis of law clerk statements. Litigants should not seek legal advice from judges or judicial staff, and in any case, attorneys should know better than to rely on such advice. Moreover, ad hoc inquiries regarding purported advice are difficult to conduct, lead to uncertain results and meddle in the internal workings of judges' chambers.[109]

Not everyone shares the Second Circuit's enthusiasm for the rigidity of *Bowles*. In an even more startling fact pattern than *Bowles*, an error in *West v. City of Norfolk* resulted in the dismissal of a pro se litigant's appeal.[110] The district court purported to double the period of appeal by "erroneously" stating in the docket that West had sixty days to appeal – instead of the thirty days prescribed by statute and the Federal Rules of Appellate Procedure.[111] West appealed within the sixty- but outside the thirty-day period.[112] Because he believed he had ample time, West did not seek to extend the filing period.[113] Nevertheless, since the appeal was filed outside the thirty-day deadline required by rule and statute, the Fourth Circuit dismissed his appeal as untimely under *Bowles*.[114] "Unfortunately for West," the notably-conservative Fourth Circuit[115] lamented, "while we once could have considered excusing his untimely filing under the 'unique circumstances' doctrine, in the wake of *Bowles* we can no longer do so."[116] Thus, the court was "constrained to

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[105] Am. Safety Indem. Co. v. Official Comm. of Unsecured Creditors (*In re* Am. Safety Indem. Co.), 502 F.3d 70, 71 (2d Cir. 2007) (per curiam).

[106] *Id.*

[107] *Id.* at 72.

[108] *Id.* at 72-73.

[109] *Id.* at 73.

[110] *See* West v. City of Norfolk, 257 F. App'x 606, 607 (4th Cir. 2007) (per curiam).

[111] *Id.*; *see also* 28 U.S.C. § 2107 (2000); FED. R. APP. P. 4(a)(1)(A).

[112] *West*, 257 F. App'x at 607.

[113] *Id.*

[114] *Id.*

[115] Neal Sontag, *The Power of the Fourth*, N.Y. TIMES, Mar. 9, 2003, § 6 (Magazine), at 40.

[116] *West*, 257 F. App'x at 607.

dismiss" the case, despite the fact that West, proceeding pro se and in good faith, believed the filing period to be longer than it really was.[117]

Still, the lower courts remain unsure about the reach of *Bowles*. In deciding "what circumstances toll the one-year statute of limitations prescribed by the Anti-Terrorism and Effective Death Penalty Act of 1996," the Second Circuit felt it first had to discuss whether the equitable tolling doctrine was still available after *Bowles*.[118] The Second Circuit held *Bowles* did not affect the vitality of equitable tolling, since a statute of limitations, as a "defense, . . . has not been regarded as jurisdictional."[119] Further, the Second Circuit distinguished the appeal period in a criminal matter as distinct from the situation in *Bowles* because the criminal appeal period, which is governed by Federal Rule of Appellate Procedure 4(b), is not embodied in a statute.[120] The court explained that while the civil limit in Rule 4(a) – the rule at issue in *Bowles* – is derived from § 2107(a), the criminal limit in Rule 4(b) is not. Rather, it originated from Federal Rule of Criminal Procedure 37(a) and is now only embodied in its current iteration, Rule 4(b).[121]

The First Circuit, rather than attempting to grapple with the reach of *Bowles*, ducked the issue entirely. Dealing with two requirements for direct appeal from a bankruptcy court to the court of appeals – one rule-based and the other statutory – the court declined to reach the jurisdictional issue.[122] The court declared that whether the procedural requirements in question were jurisdictional was a matter of first impression and "not free from doubt."[123] Thus, rather than being a model of clarity, *Bowles* only served to complicate what would ordinarily be a rather routine procedural issue.

Finally, and perhaps most telling, some courts have gone to great lengths to distinguish *Bowles* and construe the relevant deadlines, even statutory ones, as nonjurisdictional. Since statutes of limitation do not confer or limit

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[117] *See id.*

[118] Diaz v. Kelly, 515 F.3d 149, 151, 153 (2d Cir. 2008); *see also* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified in scattered sections of 28 U.S.C.). Equitable tolling is an equitable doctrine that permits parties to sue after a statute of limitations has expired if "through no fault or lack of diligence . . . [the party] was unable to sue before." Singletary v. Cont'l Ill. Nat'l Bank & Trust Co. of Chi., 9 F.3d 1236, 1241 (7th Cir. 1993).

[119] *Diaz*, 515 F.3d at 153.

[120] United States v. Frias, 521 F.3d 229, 233 (2d Cir. 2008).

[121] *Id.* (listing recent cases from the Fifth, Ninth, and Tenth Circuits to demonstrate that holding Rule 4(b) to be nonjurisdictional was in accord with other circuits); *see also* 18 U.S.C. § 3732 (2000) (abrogating FED. R. CRIM. P. 37(a)). For more information about these recent cases, see United States v. Garduno, 506 F.3d 1287, 1290 (10th Cir. 2007); United States v. Martinez, 496 F.3d 387, 388 (5th Cir. 2007) (per curiam); United States v. Sadler, 480 F.3d 932, 936 (9th Cir. 2007).

[122] Weaver v. Harmon Law Offices (*In re* Weaver), 542 F.3d 257, 259 (1st Cir. 2008) (per curiam).

[123] *Id.*

jurisdiction,[124] many courts have begun to determine whether a statutory deadline, even if not technically a "statute of limitation," is somehow similar enough that it could also properly be characterized as nonjurisdictional. For instance, on its own motion, the court in *Engel v. 34 East Putnam Ave. Corp.*[125] examined whether the thirty-day deadline on a motion to remand contained in 28 U.S.C. § 1447(c) was jurisdictional or not.[126] The plaintiff missed that deadline by twenty-three days, and the defendant did not raise the issue.[127] In order to determine whether the defendant's silence meant he forfeited the rule's protection, or whether the deadline was jurisdictional such that objections may be lodged at any time, the court had to examine *Bowles*.[128]

The court, however, proceeded to sidestep *Bowles* in a way the Supreme Court surely could not have intended. Stating that, *Bowles* notwithstanding, "it would be inaccurate to conclude that all statutory time limits are jurisdictional," the court analogized the thirty-day rule to a statute of limitations that does not limit the court's jurisdiction.[129] Like a statute of limitations that "give[s] a defendant repose from a potentially stale claim," the thirty-day deadline to file a motion to remand "is designed to give the defendant the repose of knowing which forum it will be able to litigate in."[130] As such, the court concluded that Congress could not have intended the deadline to be jurisdictional, and the defendant had waived his right to object.[131]

Although *Engel*'s analysis might be sound from a normative perspective, it is problematic under the *Bowles* doctrine. The court justified its holding by stating, "it is difficult to conclude that Congress intended for the 30-day limit on remand motions to be jurisdictional."[132] Be that as it may, the touchstone of

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[124] *See* FED. R. CIV. P. 8(c) (stating that a statute of limitations is an affirmative defense that must be responded to in a pleading); *Diaz*, 515 F.3d at 153 (remarking that statutes of limitations, as "defense[s]," are not "regarded as jurisdictional" (citing Day v. McDonough, 547 U.S. 198, 205 (2006))).

[125] 552 F. Supp. 2d 291 (D. Conn. 2008).

[126] *Id.* at 292. The language in § 1447(c) is arguably even stronger than the language in § 2107, the statute in question in *Bowles*. *See* 28 U.S.C. § 1447(c) (2000) ("A motion to remand . . . *must* be made within 30 days after the filing of the notice of removal under section 1446(a)." (emphasis added)). By comparison, the language in § 2107 states only that "the district court *may* . . . reopen the time for appeal for a period of 14 days." 28 U.S.C. § 2107(c) (2000) (emphasis added).

[127] *Engel*, 552 F. Supp. 2d at 292-93.

[128] *See id.* at 293-94.

[129] *Id.*

[130] *Id.* at 294 (citing Pierpoint v. Barnes, 94 F.3d 813, 818 (2d Cir. 1996)). *Engel* cites *Pierpoint* for the proposition that § 1447(c) was designed "to prevent plaintiffs from sitting on a remand motion indefinitely," as they could otherwise delay to observe how the federal court litigation goes before deciding to file for remand. *Id.*

[131] *Id.*

[132] *Id.* at 294.

what makes a deadline jurisdictional is the deadline's origin as statutory, not congressional intent in creating the statute.[133] Conversely, *Engel*'s approach echoed Justice Souter's dissent in *Bowles*, which argued that deadlines can be jurisdictional not solely because they are set forth in a statute, but because Congress specifically intended them to be.[134] Viewed against this backdrop, *Engel* is at best in tension with and at worst in contravention of *Bowles*.

III. TOWARDS A MORE FLEXIBLE REGIME

A. *In Defense of the* Bowles *Bright-Line Rule*

In spite of this vehement opposition to *Bowles*, the strict rule has its advantages. The Second Circuit, in welcoming *Bowles*, espouses a "caveat emptor" approach to the legal system: "Litigants should not seek legal advice from judges or judicial staff, and in any case, attorneys should know better than to rely on such advice."[135] Whether *Bowles* was seeking some sort of "legal advice" by relying on the judge is debatable. Nevertheless, bright-line rules at least theoretically offer advantages in terms of clarity.[136] With the *Bowles* rule in place, every party therefore knows – or should know – that a court will not accept a late appeal in a civil case, no matter how good the excuse. This is not because the courts may not *want* to cut someone a break but, as *Bowles* holds, because they *cannot*.[137]

In addition to the clarity a bright-line rule ought to provide, proponents of the *Bowles* doctrine argue it conserves judicial resources. After all, rules of procedure are not state secrets. Anyone who is unsure of a filing deadline need only check the rules. Although the *Bowles* holding was not perched upon pedestrian considerations such as the conservation of judicial resources, the Court in dicta went on to state that court-created exceptions would give rise to hazardous, inefficient litigation that a congressionally-authorized exception would do little to mitigate.[138]

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[133] *See* Bowles v. Russell, 127 S. Ct. 2360, 2366 (2007) ("Because Congress specifically limited the amount of time by which district courts can extend the notice-of-appeal period in § 2107(c), that limitation is more than a simple 'claim-processing rule.'").

[134] *See id.* at 2368 (Souter, J., dissenting) (stating that "jurisdictional treatment [is not] automatic" just because "a time limit is statutory").

[135] Am. Safety Indem. Co. v. Official Comm. of Unsecured Creditors (*In re* Am. Safety Indem. Co.), 502 F.3d 70, 73 (2d Cir. 2007) (per curiam).

[136] *But see* Georgia v. Randolph, 547 U.S. 103, 125 (2006) (Breyer, J., concurring) (stating that the Fourth Amendment uses general language such as "unreasonable" because bright-line rules do not "capture the ever changing complexity of human life").

[137] *Bowles*, 127 S. Ct. at 2366 ("Because this Court has no authority to create equitable exceptions to jurisdictional requirements, use of the 'unique circumstances' doctrine is illegitimate.").

[138] *Id.* at 2367. However, the Court's predictions about such matters are not always accurate. *See, e.g.*, Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403

Another argument in favor of jurisdictional limits is that their overinclusiveness is necessary to protect the integrity of the court system. When courts are uncertain as to the reach of their jurisdictional power, the theory reasons, they should choose not to exercise it.[139] Perry Dane called this the "fear of the abyss" rationale.[140] Essentially, jurisdictional rules function as "device[s] for avoiding error," where the error of expanding jurisdiction beyond what the court actually possesses is a greater vice than refusing to exercise jurisdiction when the court actually does have it.[141] The *Bowles* majority explained its holding was necessary to protect the integrity of congressional power as well as judicial power: "Within constitutional bounds, Congress decides which cases the federal courts have jurisdiction to consider. Because Congress decides whether federal courts can hear cases at all, it can also determine when, and under what conditions, federal courts can hear them."[142]

There are several problems with this argument. First, although it is true that Congress decides which cases the federal courts have power to hear, whether § 2107 is actually doing the work of limiting jurisdiction is a question for the Court to decide. The Court begged the question when it accepted as true the conclusion that § 2107 limits the jurisdiction of the federal courts and used that as the reason for its powerlessness. Second, this particular argument is only salient if the law stays as it is, and Congress does not act to change it. The normative questions as to what kind of regime *should* be in place, and whether Congress *ought* to act, arguably depend on whether one wants more clarity at the expense of fairness or a little more fairness at the expense of clarity.

The above cases illustrate some of the harshness that results from such a bright-line rule. Of course, not every dismissed case implicates the same fairness concerns. As the *Bowles* doctrine becomes more integrated into the court system, the vast majority of dismissed appeals will probably be those which ought to be dismissed under any regime, whether the appeal's tardiness

U.S. 388, 430 (1971) (Blackmun, J., dissenting) (arguing that judicial recognition of a federal right of action against federal officers for constitutional violations will "open[] the door for another avalanche of new federal cases"). Justice Blackmun's doomsday scenario, however, has not been borne out in the nearly forty years since *Bivens* was decided. *See* MICHAEL L. WELLS, WILLIAM P. MARSHALL & LARRY W. YACKLE, CASES AND MATERIALS ON FEDERAL COURTS 149 (2007) ("[T]he dissenters' 'resources' objection seems to have been misplaced, as few *Bivens* suits are litigated.").

[139] *See* Dane, *supra* note 14, at 71-72 (analyzing why courts might want to "bend over backwards to interpret their own jurisdiction restrictively").

[140] *Id.*

[141] *See id.* (comparing the "fear of the abyss" to "the reasonable doubt standard in criminal law" in that "[a]voiding one type of error raises the risk of the opposite error, but the price is worth it").

[142] *Bowles*, 127 S. Ct. at 2365. *But see* LARRY W. YACKLE, FEDERAL COURTS 8 (2d ed. 2003) (questioning the argument that, since Congress has the power to create the lower federal courts, it necessarily has unbridled power to define the courts' jurisdiction).

is due to carelessness or simple neglect. However, it would be a mistake to view these cases as a rationale for making late filings completely inexcusable, since a more flexible doctrine would never say a court *must* hear a late appeal, but only that it *may*. To best examine what approach is more desirable, this Note proposes a more flexible regime, examines the kinds of cases where the outcome would actually be different under that regime, and determines if those are the kinds of cases that should have been heard on the merits rather than dismissed.

B. *More Flexible Approaches*

Any consideration of a more flexible approach must first contend with the inevitable threshold question of *who* ought to institute the change: the Supreme Court or Congress. At this juncture, the Supreme Court has already spoken, at least with regard to the notice of appeals in civil cases, with which *Bowles* dealt. Thus, we must heed the Court's assertion that it is up to "Congress [to] authorize courts to promulgate rules that excuse compliance with the statutory time limits."[143]

1. Return to a Unique Circumstances Regime

Since the Court's decision in *Bowles*, commentator Philip Pucillo has suggested that the unique circumstances doctrine, embodied in *Harris Truck Lines* and *Thompson*, be revived by congressional action.[144] This suggestion would essentially codify an exception for late appeals in situations like those of *Bowles*, such that an "official written communication[]" could effectively estop the courts from denying its validity.[145] The proposal would "provide that a court of appeals . . . must accept as true any representation of a district court upon which a litigant reasonably relies in foregoing an opportunity to initiate an indisputably timely appeal."[146]

There are a few operative words in that proposal: "representation," "reasonably," and "indisputably." All are open to interpretation. Pucillo wrote that "representations worthy of a reasonable reliance should include not just those of a judge, but those of a district clerk . . . when rendering official written

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[143] *Bowles*, 127 S. Ct. at 2367; *see also* United States v. Curry, 47 U.S. (6 How.) 106, 113 (1848) ("[I]f the mode prescribed for removing cases by writ of error or appeal be too strict and technical, and likely to produce inconvenience or injustice, it is for Congress to provide a remedy by altering the existing laws; not for the court."). Which body would be better situated to deal with the problem ex ante is a question worth discussing, but it is beyond the scope of this Note.

[144] Philip A. Pucillo, *Timeliness, Equity, and Federal Appellate Jurisdiction: Reclaiming the "Unique Circumstances" Doctrine*, 82 TUL. L. REV. 693, 728 (2007) (calling on Congress to amend 28 U.S.C. § 2107).

[145] *See id.*

[146] *Id.*

communications to litigants."[147] Whether law clerks should be included within the ambit of the amendment is arguable.[148] Well before *Bowles*, when courts still employed the unique circumstances doctrine, the circuits were split on whether to extend it to misstatements by court employees who were not judges. While the Eleventh Circuit did extend the doctrine to cover reliance on court clerk misstatements if the reliance was "reasonabl[e] and in good faith,"[149] the Seventh Circuit, faced with a similar situation, held it could not:

> *Thompson* . . . does not . . . stand for the general proposition that jurisdictional time limitations can be waived in cases of hardship. If it did, there would be no such limitations; every deadline would be discretionary. The rule of the *Thompson* case is limited to the situation where the *district court* . . . assures a party that he has time to appeal, and the party relies and forgoes filing a timely appeal.[150]

Similarly, the First Circuit narrowly construed the unique circumstances doctrine even against a pro se litigant who relied on the clerk's office error.[151] Uncomfortable with the tension between the equitable nature of the doctrine and what the court conceded was a jurisdictional deadline, the First Circuit refused to extend the doctrine any further than necessary.[152]

Further, while requiring written proof of the clerk's misstated deadline would, as Pucillo notes, obviate some of the problems of proof that might arise,[153] it is probably also true that reliance on a law clerk's statement will almost always be less reasonable than reliance on a judge. To this extent, it is

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[147] *Id.*

[148] *See supra* note 105 and accompanying text.

[149] Willis v. Newsome, 747 F.2d 605, 607 (11th Cir. 1984) (per curiam) (remanding to determine whether the litigant "reasonably and in good faith relied" on the misstatement).

[150] Sonicraft, Inc. v. NLRB, 814 F.2d 385, 387 (7th Cir. 1987) (Posner, J.) (emphasis added).

[151] United States v. Heller, 957 F.2d 26, 31 (1st Cir. 1992) (per curiam) (limiting the unique circumstances doctrine to court action and holding "that reliance on the advice, statements, or actions of court employees cannot trigger the doctrine, whether appellant is or is not pro se").

[152] *See id.* ("The deadline for filing a notice of appeal is jurisdictional and therefore not waivable . . . . The unique circumstances doctrine, if it retains any vitality, 'jostles uneasily' with this principle, and must therefore be narrowly construed." (citation omitted) (quoting *Sonicraft*, 814 F.2d at 387)). What is interesting is that the court recognized the doctrine at all. While it is true the First Circuit questioned the doctrine, the court proceeded to recognize the doctrine's existence even though the case involved a "jurisdictional" deadline. The Court agreed with Judge Posner's characterization, extending the doctrine only to cover assurances from "the district court" and not from clerk's offices or clerks. *Id.* (citing *Sonicraft*, 814 F.2d at 387). The only explanations for this conundrum are that either the court thought the unique circumstances doctrine was wrong but lacked the power to change it, or the court interpreted "jurisdictional" differently, such that equitable doctrines ought to be construed narrowly, but can still exist.

[153] Pucillo, *supra* note 144, at 728-29.

a better idea to limit the unique circumstances exception to reliance upon the judge, both because such reliance is per se more reasonable and because this limitation seeks to circumscribe its protection only to victims of the most egregious errors.

a. *When Is Reliance Reasonable?*

Before adopting a "unique circumstances" approach, we must gauge when reliance is reasonable. One helpful heuristic may be to think about who is in the best position to avoid the error – that is, who could have avoided it most easily. If it is the judge, then deem the reliance reasonable; if it is the litigant, deem it unreasonable.

With *Bowles*, it is clear that the Court decided the litigant bears the burden of uncertainty even when the rules are unclear and the judge makes erroneous pronouncements. But that holding did not answer the normative question of who *should* bear this burden – the court or the litigant. One argument is that the party who is in the best position to avoid the error should bear that risk. Justice Souter, dissenting in *Bowles*, at least tacitly agreed with this proposition. Comparing the equities of disallowing Bowles's late appeal with the allowance of the litigant's appeal in *Thompson*, he asked: "Why should we have rewarded [the litigant in *Thompson*], who introduced the error, but now punish Bowles, who merely trusted the District Court's statement?"[154] Moreover, Justice Souter pointed out that Bowles's lawyer "could not have uncovered the court's error simply by counting off the days on a calendar"[155] because the date on the district court's order to reopen the filing period did not necessarily signify the date on which the order was entered and the clock started ticking.[156] Given that the original judgment in the case was not entered the same day it was signed, as Justice Souter pointed out, this concern was not entirely "theoretical."[157] If nothing else, Souter seemed to believe that the district court was in the best position to avoid this error. Indeed, all the judge had to do was give the correct information.

Perhaps a meticulous lawyer would have double-checked and filed the appeal in time, nullifying any effect of the judge's error. The vagaries of the case, however, made it reasonable, or at least not as negligent as it would have been in ordinary circumstances, to miss the deadline. Clearly, the four dissenters in *Bowles* did not believe the error was reckless:

> [Bowles's attorney] probably just trusted that the date given was correct, and there was nothing unreasonable in so trusting. The other side let the order pass without objection, either not caring enough to make a fuss or not even noticing the discrepancy; the mistake of a few days was probably not enough to ring the alarm bell to send either lawyer to his

[154] Bowles v. Russell, 127 S. Ct. 2360, 2371 (2007) (Souter, J., dissenting).

[155] *Id.*

[156] *Id.*

[157] *Id.*

> copy of the federal rules and then off to the courthouse to check the docket.[158]

Were the courts to adopt an approach of excusing late appeals when the filing party was not in the best position to avoid lateness, few appeals would likely qualify for such an exception. Common sense suggests that most of the time courts get it right; most late appeals result from simple neglect on the part of litigants' attorneys. The unique circumstances doctrine never meant that courts would accept late appeals as a matter of course. When a court offered "no affirmative assurance . . . that [an] appeal would be timely," and when a litigant was "advised . . . that he would need to seek an extension of time for filing a notice of appeal," this equitable doctrine "afford[ed] . . . no relief."[159] The unique circumstances doctrine required more than simple negligence, which would never qualify as "unique." Rather, the doctrine required great hardship and reliance,[160] both of which are not easily feigned and which are often themselves assurances of authenticity.

In fact, the unique circumstances doctrine may simply be an implicit application of the notion that the party who could most easily avoid the error should bear the risk of uncertainty. A review of the limited cases in which the unique circumstances doctrine has been invoked reveals this to be likely. For example, in *Pahuta v. Massey-Ferguson, Inc.*,[161] the plaintiff sought to file a Rule 59 motion for a new trial. Under Rule 59, the plaintiff had to file the motion within ten days of the date judgment was entered.[162] Well before judgment was entered on November 12, 1997, the plaintiff informed the judge that he planned to file such a motion.[163] The court directed the plaintiff to file the motion by December 10 – nearly thirty days after the judgment.[164] The defendant "raised no objections to the filing deadline set forth in the order."[165] When the plaintiff filed on December 10, however, the defendant objected to the motion as time-barred.[166] Following *Harris Truck Lines* and *Thompson*, the court allowed the motion because "[t]o hold otherwise would result in manifest unfairness and obvious great hardship to plaintiff."[167] The plaintiff's

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[158] *Id.* at 2732. Some commentators have agreed with this observation. *See, e.g.*, Carrington, *supra* note 17, at 232-33 (agreeing with the dissenters' position and arguing that "[e]ven a well-educated and reasonably careful lawyer could have forfeited his clients' rights in such circumstances").

[159] *See* Anderson v. Mouradick (*In re* Mouradick), 13 F.3d 326, 329 (9th Cir. 1994).

[160] *See* Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc., 371 U.S. 215, 217 (1962) (per curiam), *overruled by* Bowles v. Russell, 127 S. Ct. 2360 (2007).

[161] 997 F. Supp. 379 (W.D.N.Y. 1998).

[162] FED. R. CIV. P. 59(b).

[163] *Pahuta*, 997 F. Supp. at 381.

[164] *Id.*

[165] *Id.*

[166] *Id.* at 381-82.

[167] *Id.* at 383.

reliance on the court order was "understandable," the court declared, "particularly in light of his unfamiliarity with federal practice."[168]

Several interpretations of the court's approach seem possible. One could imagine the court was simply employing an impressionistic, "smell test" approach. Although it could not measure the degree of unfairness necessary to excuse a late appeal, it knew manifest injustice when it saw it. On the other hand, one could argue that what the court was really doing, consciously or not, was discerning who was in the best position to avoid the error. After all, the court called it "understandable" that the plaintiff relied on the erroneous deadline and cited the plaintiff's "unfamiliarity with federal practice" as an additional mitigating factor. It is not unreasonable to assume the court decided it was the judge, rather than the litigant, who was in the best position to avoid the mistake. Indeed, judges are typically in the best position to avoid these timeline errors. Theoretically, nobody knows the law of a jurisdiction better than the judges, and they probably do not trip up on timelines very often. Thus, at least in some cases, the "unique" in "unique circumstances" might mean *when the judge errs*. Typically, the litigant makes the silly mistakes. But when the judge is in the best position to avoid the error, the litigant's lateness ought to be excused.

While the unique circumstances doctrine was still viable, the Eleventh Circuit delineated the circumstances in which it ought to apply. The court's attempted distillation is consistent with *Pahuta*:

> Courts will permit an appellant to maintain an otherwise untimely appeal in unique circumstances in which the appellant reasonably and in good faith relied upon judicial action that indicated to the appellant that his assertion of his right to appeal would be timely, so long as the judicial action occurred prior to the expiration of the official time period such that the appellant could have given timely notice had he not been lulled into inactivity.[169]

If a litigant was "lulled into inactivity" by official judicial action, the litigant was probably not in the best position to avoid the mistake.

One objection to this approach is that it is incomplete; in some cases, there is no detrimental reliance, but other circumstances simply make it impossible for the plaintiff to make it to court in time. In the snowstorm case,[170] a discussion about who could have avoided the "error" is unhelpful. Nobody made an error – unless one considers waiting until the last minute an error – and there is simply no way to figure out what a "proper" result should have been. Alternatively, if waiting until the last minute *is* an error, then the litigant was in the best position to avoid it by filing earlier, and the litigant loses.

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[168] *Id.*

[169] Willis v. Newsome, 747 F.2d 605, 606 (11th Cir. 1984) (per curiam).

[170] Teague v. Reg'l Comm'r of Customs, Region II, 394 U.S. 977, 981 (1969) (Black, J., dissenting from denial of cert.), *denying cert. to* 404 F.2d 441 (2d Cir. 1968).

Nevertheless, such a heuristic may help one consider not only *if*, but also *why* we should excuse missed deadlines.

b. *What Would Such Legislation Encompass?*

In addition to discerning when reliance is considered reasonable, another question that arises with the proposal to codify the "unique circumstances" doctrine is whether it ought to be applied exclusively to reliance on judges' errors or also to more general instances of hardship. For instance, what would happen to the litigant who cannot get his notice of appeal to the courthouse on time because of a massive snowstorm?[171] If the doctrine is exclusive, only those in the unfortunate situation of Keith Bowles would be covered.

The corollary to this, of course, is whether we *want* to cover persons whose circumstances are exceptional but do not implicate a judge's error. One concern may be that a general provision, allowing courts to excuse late filings in exceptional or "unique" circumstances, would apply to a larger class of litigants. How large that class would be is unclear. From *Harris Truck Lines* to its eventual demise in *Bowles*, the unique circumstances doctrine had rarely been invoked.[172] However, the number of times litigants have invoked the doctrine may be misleading for two reasons. First, courts may have excused late appeals on this theory implicitly, but without the express language of "unique circumstances," *Harris Truck Lines*, or *Thompson*, rendering it difficult to track. Second, the fact that parties used the doctrine infrequently in the past[173] does not necessarily indicate that it would continue to be used infrequently in the future.[174] While codification of the doctrine could increase the frequency with which it is invoked, however, any such effect is likely to be short-lived, especially if litigants realize judges will only excuse tardiness in the most exceptional of cases.

[171] Forty years ago, because of a massive snowstorm's effect on mail service, a litigant's petition for certiorari arrived at the Court two days after the ninety-day period expired. *Id.* Justice Black, dissenting from the denial of certiorari, argued that although 28 U.S.C. § 2101, the certiorari statute, was "jurisdictional" in nature, "[u]nder no known principle of statutory construction can [such a strict interpretation] . . . be supported." *Id.* at 982.

[172] A LexisNexis search reveals *Harris Truck Lines* has been "followed" a paltry ten times since 1962. *Thompson* does not fare much better with eighteen "followed" citations.

[173] In overruling the doctrine, the *Bowles* majority explained it saw "no compelling reason to resurrect the doctrine from its 40-year slumber." Bowles v. Russell, 127 S. Ct. 2360, 2366 (2007).

[174] *See generally* Christian Zapf & Eben Moglen, *Linguistic Indeterminacy and the Rule of Law: On the Perils of Misunderstanding Wittgenstein*, 84 GEO. L.J. 485, 493 n.36 (1996) ("The problem of induction . . . is simply that inductive generalizations cannot guarantee that the future will be like the past.").

2. Adopt a "Presumption" Approach

One step the Court (as opposed to Congress) could take to clarify jurisdictional rules on a prospective basis would be to adopt presumptions. Vikram David Amar wrote that the court should "adopt[] presumptions . . . to encourage Congress to be clear about its wishes."[175] On the surface, *Bowles* appeared to declare categorically that all time limits embodied in statutes are necessarily jurisdictional.[176] This declaration has been criticized as an "unfairly overinclusive bright-line rule" that "emphasized the existence of the statute, but ignored its origins."[177] Significantly, "Congress added the time limit in § 2107(c) to conform that *statute* to the *judicially created rule*,"[178] rather than vice versa. There are two possible responses to this. First, one could argue that, regardless of whether the rule or statute came first, what matters is that the rule is now in the statute. Second, one could argue that only by understanding where the time limit came from, and why it is there, can one determine whether Congress meant to apply the limit flexibly, treating the deadline like an affirmative defense, or strictly, limiting the court's power to hear a case.[179] The former response has the benefit of clarity; the latter, arguably, of fairness. Underlying the latter argument is the assumption that we *can* discern Congress's intent in enacting the statute.

Trying to figure out what Congress intended in each individual statute is burdensome and controversial. Justice Souter wrote in his *Bowles* dissent that "limits on the reach of federal statutes . . . are only jurisdictional if Congress says so: 'when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character.'"[180] Indeed, *Bowles* seemed to reverse course on which presumption governs,[181] choosing "jurisdictional unless Congress says it is not," in place of "not jurisdictional unless Congress says so," further confusing the landscape. *Arbaugh*, as Justice Souter duly noted, cast the exact opposite presumption,

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[175] Vikram David Amar, *How an Upcoming Supreme Court Case Illustrates and Continues the Court's Current Interest in "Jurisdictional" Questions*, FINDLAW, Sept. 14, 2007, http://writ.lp.findlaw.com/amar/20070914.html.

[176] *Bowles*, 127 S. Ct. at 2364 (claiming that the Court's recent opinions do not "call[] into question our longstanding treatment of statutory time limits for taking an appeal as jurisdictional").

[177] *The Supreme Court, 2006 Term*, *supra* note 75, at 324.

[178] *Id.* at 322.

[179] *See generally* Alex Lees, Note, *The Jurisdictional Label: Use and Misuse*, 58 STAN. L. REV. 1457 (2006) (discussing the properties a rule should have in order for it to be jurisdictional and rigid).

[180] *Bowles*, 127 S. Ct. at 2368 (Souter, J., dissenting) (quoting Arbaugh v. Y & H Corp., 546 U.S. 500, 516 (2006)).

[181] Scott Dodson, *Jurisdictionality and* Bowles v. Russell, 102 NW. U. L. REV. 42, 45 (2007) ("*Bowles* reverses a presumption of nonjurisdictionality imposed in prior cases . . . .").

"leav[ing] the ball in Congress' court" and insisting Congress be explicit when it wants a requirement to limit the jurisdiction of the federal courts.[182]

Some criticize *Bowles*'s contrary presumption as "bad business" because it wastes judicial resources.[183] According to Scott Dodson, it encourages litigants to take "two bites at the apple," since the losing party, even if it is the same party who failed to meet the deadline, has the opportunity "to vacate an unfavorable result" by raising the jurisdictional issue on appeal.[184] Although Dodson is correct that a litigant might get "two bites" that way, it is difficult to see how that is any different from any other question of subject matter jurisdiction. Indeed, it is hornbook law that objections to subject matter jurisdiction may be raised at any time.[185] Moreover, "the other litigant [is free to] play the same game," since even if the party who files late wins on the merits, he still faces the risk the other party will object.[186]

At the very least, it is clear *Bowles* employed a presumptive approach to some degree. Whether the presumption the Court cast is optimal is a matter for debate. Although a reverse presumption – that deadlines do not limit the courts' jurisdiction unless Congress expressly says so – may eradicate some unfairness, it does not finish the job. Such a presumption would dictate to the courts that they need not dismiss cases out of hand. However, it would not explicitly give the courts the same kind of green light to hear late appeals that a revived unique circumstances doctrine might. In light of this, many courts would probably still be reluctant to exercise their judicial power in the absence of a statutory directive to do so.

3. "Mandatory-but-Not-Jurisdictional" Rules

Somewhere between rigid jurisdictional rules and rules that may be excused with a showing of good cause or exceptional hardship lie mandatory-but-not-jurisdictional rules. These "place[] control of [the rule's] enforcement in the hands of the litigant whom it would benefit."[187] Dodson's proposal of

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[182] *Bowles*, 127 S. Ct. at 2368 (Souter, J., dissenting) (quoting *Arbaugh*, 546 U.S. at 516). For instance, the Court cites diversity jurisdiction as a clear example of when Congress ranks a statutory restriction as jurisdictional in nature. *Arbaugh*, 546 U.S. at 514-15.

[183] Dodson, *supra* note 181, at 46.

[184] *Id.* With regard to nonjurisdictional rules, one must object *before* a merits decision is reached to avoid forfeiture. *See* Wilburn v. Robinson, 480 F.3d 1140, 1147 (D.C. Cir. 2007).

[185] *See* 2 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 12.30[1] (3d ed. 2008) ("Lack of subject matter jurisdiction may be raised at any time. . . . Although some other defenses and objections are waived if not asserted in an initial Rule 12 motion or in a responsive pleading, lack of subject matter jurisdiction challenges the court's statutory or constitutional power to adjudicate the case, and it may not be waived." (footnote omitted)).

[186] Elizabeth Chamblee Burch, *Nonjurisdictionality or Inequity*, 102 NW. U. L. REV. 64, 66 (2007).

[187] Dodson, *supra* note 181, at 47.

mandatory-but-not-jurisdictional rules allows forfeiture but not waiver. Thus, if a party files late, the other party may object. If the objection is timely, the appeal must be disallowed. If the opposing party fails to object in a timely fashion, however, he loses that right and may not do so later.[188] Almost like a common law laches rule, this scheme would conserve resources while avoiding some of the more unjust results that flow from jurisdictional characterizations.[189]

This approach is not entirely foreign. The Supreme Court has employed it with regard to standard, nonjurisdictional claim-processing rules, which "assure relief to a party properly raising them."[190] The difference is that Dodson's approach favors the mandatory-but-not-jurisdictional framework universally, not just with regard to claim-processing rules.[191]

Under Dodson's framework, the deadlines would still be mandatory to the extent that equitable considerations fail to excuse non-compliance. The only difference would be that if a party did not object in a timely fashion, he would forfeit that right. Bowles would therefore still be out of luck.[192] Dodson's proposal thus raises the question of what class of cases would turn out differently than under the Court's current "mandatory and jurisdictional" regime. The answer is that Dodson's regime would change only those instances in which a party, regardless of fault, missed the deadline, and the other party failed to object in a timely manner. This proposal would indeed cure some instances of faultless hardship, but it would neglect those in which a litigant has been lulled into error, as Bowles was.[193]

To the extent one finds the result in *Bowles* troubling, a mandatory-but-not-jurisdictional framework does not get the job done. There still needs to be a working regime of "unique circumstances" that could, in egregious cases of reliance on official communications as well as other unforeseen circumstances, excuse compliance with mandatory-but-not-jurisdictional rules.

C. *Which Cases Would Turn Out Differently?*

Under any of the foregoing responses – a codified unique circumstances doctrine, a presumption approach, or a mandatory-but-not-jurisdictional scheme – it remains unlikely that very many cases would qualify for the

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[188] *See id.*

[189] *See id.*

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

[191] *See* Dodson, *supra* note 181, at 46-48.

[192] *See id.* at 47 ("In *Bowles*, the Court could have construed the limit in § 2107(c) as merely mandatory. That characterization would have precluded Mr. Bowles' equitable 'unique circumstances' excuse for his failure to meet the statutory time limit. Even if inequitable, a court has no discretion to deviate from a properly invoked mandatory rule.").

[193] *See* Burch, *supra* note 186, at 64-65 (arguing that Dodson's approach, while a step in the right direction, still "leaves no room for equity absent the mercy of opposing counsel").

equitable exception. Indeed, the very point of "unique" circumstances is that the circumstances must be unique, not routine, and this is the way it should be.

A useful glimpse into what a codified unique circumstances regime might look like, then, is accomplished by examining what courts have done, either pre- or post-*Bowles*, with nonjurisdictional deadlines. For instance, the doctrine of equitable tolling allows courts some flexibility when a litigant is, for reasons outside his or her control, unable to perform an act within the statute of limitations period.[194] For example, when a plaintiff is injured but despite exercising all reasonable diligence cannot ascertain a party to sue, equitable tolling may be proper.[195] In any case, the plaintiff who seeks to invoke its protection must have acted with "reasonable diligence."[196] Equitable tolling is thus useful when determining how the system might operate if a congressionally-enacted unique circumstances doctrine were in place. Interestingly, rather than opening the floodgates of litigation, as the *Bowles* majority warned a unique circumstances analogue might, equitable tolling has actually been applied "sparingly" and conservatively.[197] Equitable tolling simply does not reach "garden variety claims of excusable neglect."[198] Because the doctrine is infrequently invoked, it does not jeopardize the legitimate policy reasons for statutes of limitations.[199]

There is no reason to believe the same could not be true if Congress codified the unique circumstances doctrine and courts applied it with the same rigor with which they apply equitable tolling, by refusing to apply the doctrine to cases of "garden variety neglect" that would not be excused on equitable tolling grounds. For example, in *Maynard v. District of Columbia*,[200] when deciding whether to accept a complaint filed on the ninety-second day of a ninety-day limitations period, the court avoided deciding the *Bowles* issue and

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[194] *See, e.g.*, Singletary v. Cont'l Ill. Nat'l Bank & Trust Co. of Chi., 9 F.3d 1236, 1241 (7th Cir. 1993).

[195] *See id.*

[196] *Id.* at 1243.

[197] *See, e.g.*, Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 96 (1990) (explaining that although equitable relief is sometimes proper in cases of deception or other exceptional circumstances, courts are "much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights"); Johnson v. Quarterman, 483 F.3d 278, 279 (5th Cir. 2007) (stating that equitable tolling may only be invoked in "rare and exceptional circumstances"); Rebecca S. Engrav, *Relation Back of Amendments Naming Previously Unnamed Defendants Under Federal Rule of Civil Procedure 15(c)*, 89 CAL. L. REV. 1549, 1582 n.222 (2001) (noting that courts only "rarely" apply equitable tolling).

[198] Rouse v. Lee, 339 F.3d 238, 246 (4th Cir. 2003) (citing *Irwin*, 498 U.S. at 96).

[199] *See* United States v. Kubrick, 444 U.S. 111, 117 (1979) ("Statutes of limitations . . . represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time. . . . [T]hey protect defendants . . . from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence . . . .").

[200] 579 F. Supp. 2d 137 (D.D.C. 2008).

instead rested its decision on equitable tolling grounds.[201] Since the waters had already been "muddled"[202] as to the jurisdictional nature of the ninety-day limitations period in the Individuals with Disabilities Education Act,[203] the court declined to grapple with *Bowles*. Instead, the court held that, even if the limitations period was not jurisdictional, equitable tolling would not be available to the plaintiff because the plaintiff had "not provided adequate justification for the Court to do so."[204]

Similarly, in *Gutierrez v. Johnson & Johnson*,[205] the Third Circuit declined to invoke the unique circumstances doctrine[206] though it was available to excuse a *nonjurisdictional* missed deadline for a Rule 23(f) petition.[207] The court cited the inflexibility of the rule and the culpability of the petitioners, whose lateness was due to their own misunderstanding of the rules, as justifications for not invoking the doctrine.[208] In a request for more time to file a motion to reconsider, the petitioners had written they "understood" that the motion would toll the time to petition.[209] The district court did not correct their misinterpretation, and it was under no obligation to do so.[210] The court held that the rule, although not jurisdictional under *Bowles*, was nevertheless "strict and mandatory."[211]

Thus, courts are generally loath to excuse noncompliance with strict deadlines. Furthermore, a more flexible regime would hardly provide undue incentives for parties to try to swindle the system. By filing late, parties have a lot to lose and little to gain. No competent attorney would choose to file late, solely on the off-chance the lateness could be excused. In any event, a litigant who intentionally filed late would lack the exceptional hardship that is the hallmark of a finding of unique circumstances.[212] Judges are accustomed to

[201] *Id.* at 143.

[202] Smith v. District of Columbia, 496 F. Supp. 2d 125, 128 (D.D.C. 2007).

[203] 20 U.S.C. § 1415(i)(2)(B) (2004).

[204] *Maynard*, 579 F. Supp. 2d at 142.

[205] 523 F.3d 187 (3d Cir. 2008).

[206] *Id.* at 199.

[207] FED. R. CIV. P. 23(f) (giving a party ten days to file a petition for permission to appeal an order granting or denying class action status).

[208] *Gutierrez*, 523 F.3d at 198-99.

[209] *Id.* at 198.

[210] *See id.* (stating that the court "made no affirmative statements" that petitioners' appeal would be timely).

[211] *Id.* at 198-99. The court also stated that although it was not sure whether the unique circumstances doctrine could excuse noncompliance with nonjurisdictional rules, it did not need to decide that question because "the doctrine [was] inapplicable in this case." *Id.* at 198 n.10.

[212] *See, e.g.*, Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc., 371 U.S. 215, 217 (1962) (per curiam), *overruled by* Bowles v. Russell, 127 S. Ct. 2360 (2007) (discussing the "great hardship to a party who relies upon [a] trial judge's finding . . . and then suffers reversal of the finding").

making these sorts of veracity determinations every day, and there is no reason to think they would not be able to distinguish a case of feigned misfortune from a case of bona fide hardship.[213]

CONCLUSION

Bowles paints with too broad a brush by holding that the linchpin of a rule's jurisdictional status depends solely on its presence or absence within a statute.[214] Its crude reasoning deprives a significant number of litigants of their day in court. To remedy this injustice, Congress should codify a "unique circumstances" doctrine such that a late filing, even under rules ensconced in a congressionally-enacted statute, *may* be heard on its merits if the court decides the circumstances warrant it. History reveals that judges are more than competent to effectuate this task, and doing so will neither usurp judicial resources nor provide a haven for sloppy litigants. Indeed, similar equitable doctrines rooted in the common law are frequently invoked, but infrequently successful. For instance, the equitable tolling doctrine is alive and well, and it in no way jeopardizes the legitimate interests that statutes of limitations are meant to protect. Instead, it forges a balance between hypertechnical adherence to doctrine and notions of fairness, which is successful precisely because it does not require invocation on a regular basis.

Similarly, the very point of a unique circumstances regime is that the circumstances must be unique and not routine, exceptional and not ordinary. Like equitable tolling, litigants invoking the unique circumstances doctrine rarely succeeded, even when the doctrine was still legitimate. With this in mind, there is little reason to fear the federal scheme will somehow be thrown out of balance simply because judges would enjoy a little more discretion. Indeed, the so-called "bright line" *Bowles* was meant to provide has thus far proved to be just as muddy as the one that came before. A new unique circumstances regime will ensure that those who have matters worth hearing will have that opportunity. Under almost any standard, Keith Bowles, a convicted murderer challenging his state court conviction through habeas corpus, had a case worth hearing. A codified unique circumstances doctrine will avoid the kind of unjust bait-and-switch seen in *Bowles*, while still allowing ordinary negligent representation to go on unfettered and unaided. Our judicial system owes us at least this much.

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[213] *See, e.g.*, FED. R. APP. P. 4(a)(5) (giving the district judge discretion to grant an extension of the time to appeal under Rule 4(a)(1) upon a showing of "excusable neglect or good cause").

[214] Bowles v. Russell, 127 S. Ct. 2360, 2366 (2007).