Montana Law Review

Volume 70
Issue 1 *Winter 2009*

Article 6

1-2009

Bowles v. Russell: They Got Me on a Technicality

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NOTE

BOWLES V. RUSSELL:[1] THEY GOT ME ON A TECHNICALITY

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I. INTRODUCTION

What role should courts play in our lives? Should they be mere arbiters of disputes? Should they be clockwork microcosms of the ever-growing technocracy? Or should they support and promote justice? District court arbiters of justice make all sorts of technical decisions that affect defendants in every trial. Two days, for example, is nothing to most people, but it was everything to Keith Bowles. The decision in *Bowles v. Russell* prevented Bowles from exhausting judicial review of his petition for a writ of habeas corpus. The decision throws into sharp relief the harsh effect of arbitrary, mandatory deadlines, and it leaves the common legal practitioner with a serious question: Does the judicial system stand for justice?

Modern law is practiced in the shadow of what might be called the procedural enlightenment. In the last 50 years, the United States Supreme Court adopted the Rules of Civil Procedure,[2] the Rules of Evidence,[3] the Rules of Appellate Procedure,[4] and numerous other rules governing legal practice. Perhaps now is a good time to take an honest look to see if there

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1. *Bowles v. Russell*, 127 S. Ct. 2360 (2007) [hereinafter *Bowles III*].

2. The Federal Rules of Civil Procedure were originally enacted by Congress in 1938. Kevin M. Clermont, *Federal Rules of Civil Procedure* 6 (Found. Press 2006). There were "significant amendments to the Civil Rules" between 1961 and 1983. *Id.* at 7.

3. The Federal Rules of Evidence became effective on July 1, 1975. Pub. L. No. 93-595, § 1, 88 Stat. 1926 (1975).

4. The Federal Rules of Appellate Procedure became effective on July 1, 1968. Or. of the S. Ct. § 2 (Dec. 4, 1967).

are casualties to this mighty revolution. Keith Bowles may well be such a casualty. His lawyer relied on a district court order and filed a notice of appeal two days outside an arbitrary deadline for notice of appeal in the Rules of Appellate Procedure.[5] The United States Supreme Court denied Bowles his habeas appeal.[6]

In an attempt to streamline the administration of justice, the Supreme Court classifies many rules as jurisdictional. Without jurisdiction a court has no power to act. Classifying a rule as jurisdictional may determine whether someone will remain free or be jailed. Consequently, courts should be cautious in their classifications.

In light of policy concerns and precedent, this note assesses the *Bowles* decision to classify statutory time prescriptions as "jurisdictional." Section I presents the factual and procedural background of *Bowles*. Section II examines the rules at issue and highlights the Court's recent decision to redefine some jurisdictional rules as mere claim-processing rules. Section III explores how the *Bowles* decision departs from recent precedent. In Section IV, I argue that time prescriptions should not be classified as jurisdictional so that courts can provide equitable relief in cases of excusable neglect.

II. Factual and Procedural Background of *Bowles v. Russell*

While the outcome of *Bowles* depended on a procedural fact, one must remember that procedure is not the substance of law. The State accused a man of murder. Failing to recognize the significance of this charge may well be the reason the Court failed to provide justice in *Bowles*.

A. The Murder of Ollie T. Gipson

Keith Bowles was indicted for the murder of Ollie T. Gipson.[7] Gipson died after his skull was fractured by repeated blows to the head.[8] The coroner believed someone weighing between 220 and 240 pounds delivered the killing blow by jumping on Gipson's head.[9] Bowles did not jump on Gipson's head—Richard "Snoop" Hayden did.[10] Bowles threw a punch and likely kicked Gipson in the legs or stomach, but Bowles did not directly cause Gipson's death.[11]

5. *Bowles III*, 127 S. Ct. at 2362.
6. *Id.* at 2362–2363.
7. Br. of Petr. at 3, *Bowles v. Russell*, 432 F.3d 668 (6th Cir. 2005).
8. *Id.* at 4.
9. *Id.*
10. *Id.* at 5.
11. *Id.*

How was Bowles charged with murder? Bowles, Snoop, and two other friends went to see a rap concert at a bar called Hellbusters in Fairport Harbor, Ohio.[12] They left the bar and traveled a few miles along Lake Eerie to a town called Painesville for an after-hours party.[13] On the drive, they happened upon Snoop's injured cousin Marcus "Choc" Moore, as well as Mike Mann and Kenneth "Squeak" Taylor.[14] Mann and Squeak told Snoop that they had been jumped by Antonio "Stickman" Rymer and Kenneth "Dirty" Johnson.[15]

Seeking retribution, the troupe traveled to the Argonne Arms Apartment complex where they saw Stickman shooting at someone.[16] Ollie T. Gipson, the victim, was with Stickman. Gipson approached the car "in a menacing manner with his hand in his shirt." Gipson's body posture led the others to believe that he had a gun.[17] In response, Bowles threw a punch at Gipson but missed.[18] His companions knocked Gipson to the ground. Bowles kicked Gipson once and then returned to the car.[19] While Gipson was down Snoop stomped on his head three times.[20]

Soon afterward another man approached with a gun, but Snoop knocked the gun away.[21] Bowles then jumped out of the car to retrieve the gun and brought it back to the car.[22] Dirty came out to help Gipson and the man who brought the gun.[23] A shot was fired, and the action stopped.[24] Eventually the police arrived on the scene and directed Snoop and the others to leave.[25] After discarding the rifle in a nearby dumpster, Snoop, Bowles, and the others left.[26]

B. Bowles's Technical Misstep

Bowles was charged under an Ohio felony-murder statute.[27] Bowles was found guilty by a jury that he contends had a racial imbalance.[28] On

12. *State v. Bowles*, 2001 WL 502042 at *1 (Ohio App. 11th Dist. May 11, 2001) [hereinafter *Bowles I*].
13. *Id.*
14. Br. of Petr., *supra* n. 7, at 4.
15. *Id.*
16. *Id.*
17. *Id.* at 4–5.
18. *Id.* at 5.
19. *Id.*
20. Br. of Petr., *supra* n. 7, at 5.
21. *Id.*
22. *Id.* at 5–6.
23. *Id.* at 6.
24. *Id.*
25. *Id.*
26. Br. of Petr., *supra* n. 7, at 6.
27. Ohio Rev. Code Ann. § 2903.02(b) (West 1998).
28. *Bowles I*, 2001 WL 502042 at *2.

appeal, Bowles complains of thirteen errors.[29] The Ohio courts granted him no relief, and Bowles filed a petition for a writ of habeas corpus in federal court in the Northern District of Ohio.[30] A person seeking a writ of habeas corpus must allege that "he is in custody in violation of the Constitution or laws or treaties of the United States."[31] The district court, on the advice of a magistrate, rejected Bowles's habeas petition.[32]

Bowles had thirty days to file a notice of appeal.[33] He missed that deadline but moved the court to reopen the period in which he could file his notice of appeal.[34] The judge can reopen this period for fourteen days from the day the motion is granted.[35] "[I]nexplicably," the district court re-opened the period for seventeen days—three days beyond the time allotted by the rule.[36] Bowles filed his motion on day sixteen—two days late.[37]

The Sixth Circuit Court of Appeals rejected the appeal as untimely.[38] The court admonished, "[This] is a case about missed deadlines. At times, they go unnoticed, but sometimes the lapse is fatal. This case presents one of the fatal variety."[39] The United States Supreme Court granted certiorari to consider whether Rule 4 was jurisdictional and thus whether it would block Bowles's habeas appeal (and a claim-processing rule that allows for equitable exceptions).[40]

III. Appellate Rules Imposing Time Prescriptions: Jurisdictional or Merely Mandatory?

The time requirement involved in this case is not complicated. Federal Rule of Appellate Procedure 4(a)(6) provides:

> Reopening the Time to File an Appeal. The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied:
> (A) the motion is filed within 180 days after the judgment or order is entered or within 7 days after the moving party receives notice of the entry, whichever is earlier;

29. *Id.* at *1–2.
30. *Bowles v. Russell*, 2003 WL 25501341 (N.D. Ohio July 10, 2003) [hereinafter *Bowles II*].
31. 28 U.S.C. § 2254(a) (2007).
32. *Bowles II*, 2003 WL 25501341, slip op. at 1.
33. Fed. R. App. P. 4(a)(1)(A); 28 U.S.C. § 2107(a).
34. *Bowles III*, 127 S. Ct. at 2362.
35. 28 U.S.C § 2107(c).
36. *Bowles III*, 127 S. Ct. at 2362.
37. *Id.*
38. *Bowles v. Russell*, 432 F.3d 668, 677 (6th Cir. 2005).
39. *Id.* at 669.
40. *Bowles III*, 127 S. Ct. at 2363.

> (B) the court finds that the moving party was entitled to notice of the entry of the judgment or order sought to be appealed but did not receive the notice from the district court or any party within 21 days after entry; and
> (C) the court finds that no party would be prejudiced.[41]

Also relevant to this case is Federal Rule of Appellate Procedure 2, which provides:

> Rule 2: Suspension of Rules
> On its own or a party's motion, a court of appeals may—to expedite its decision or for other good cause—suspend any provision of these rules in a particular case and order proceedings as it directs, except as otherwise provided in Rule 26(b).[42]

The exception provides:

> (b) Extending Time. For good cause, the court may extend the time prescribed by these rules or by its order to perform any act, or may permit an act to be done after that time expires. But the court may not extend the time to file:
> (1) a notice of appeal (except as authorized in Rule 4) or a petition for permission to appeal; or
> (2) a notice of appeal from or a petition to enjoin, set aside, suspend, modify, enforce, or otherwise review an order of an administrative agency, board, commission, or officer of the United States, unless specifically authorized by law.[43]

While these rules provide a general operating procedure, they do not specifically mention jurisdiction. To determine whether a rule is jurisdictional or not, a court generally turns to precedent, but the case law is not entirely clear because there are at least two lines of cases attempting to provide a general rule.

A. Rules of Court as Mandatory and Jurisdictional

Jurisdiction is the power of a court. Subject-matter jurisdiction is the power a court has over types or classes of cases, and personal jurisdiction is the power over individual parties.[44] If a court lacks jurisdiction, then it lacks the power to decide a legal question or to force a party to follow its decision.[45]

Congress controls the appellate jurisdiction of federal courts.[46] Therefore, any time Congress speaks on any subject that might change a court docket, it may also limit the jurisdiction of the courts. Some precedent suggests congressionally approved time limits should be enforced strictly.

41. Fed. R. App. P. 4(6)(a).
42. *Id.* at 2.
43. *Id.* at 26(b).
44. *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004).
45. *Id.*
46. *Id.* at 452; U.S. Const. art. III, § 1.

For example, the *Bowles* majority cites the 1883 case *Scarborough v. Pargoud*.[47] There, an attorney missed a deadline for a writ of error by one day.[48] The Court held, "[T]he writ of error was not brought within the time limited by law, and we have consequently no jurisdiction."[49]

The Court also considered time limits to be jurisdictional rules after the adoption of the Federal Rules of Criminal Procedure in *United States v. Robinson*.[50] In that case, the defendant and his attorney had a misunderstanding as to whom would file the notice of appeal.[51] There, the Court described the ten-day deadline in Rule 37(a)(2) of the Federal Rules of Criminal Procedure as "mandatory and jurisdictional."[52]

Similarly, the Court also said that a rule requiring notice to parties is "mandatory and jurisdictional."[53] In *Torres v. Oakland Scavenger Co.*, a legal secretary omitted one party's name on the notice of appeal.[54] The Court held that jurisdiction over the party could not be established despite the use of "et al." on the notice.[55] Although Justice Scalia concurred in the opinion, he claimed, "[By] definition all rules of procedure are technicalities; sanction for failure to comply with them always prevents the court from deciding where justice lies in a particular case."[56]

B. Rules of Court as Emphatic, but Not Jurisdictional

Not all jurists share the hard-line perspective for all procedural matters. For example, Justice Brennan dissents from the holding in *Torres*: "[The] Federal Rules . . . reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome."[57] He is bothered by the failure of the Court to look into the reality of the situation and to weigh the equity of unnecessary notice against simple misstep.[58] In support of his position he cites Rule 2 of the Federal Rules of Appellate Procedure, which permits "courts of appeals to forgive noncompliance."[59]

Recently, the Court seemed to move toward Justice Brennan's view of the procedural rules as applied to jurisdiction. For example, the Court

47. *Bowles III*, 127 S. Ct. at 2364; *Scarborough v. Pargoud*, 108 U.S. 567 (1883).
48. *Scarborough*, 108 U.S. at 567.
49. *Id.* at 568.
50. *U.S. v. Robinson*, 361 U.S. 220 (1960).
51. *Id.* at 221.
52. *Id.* at 224.
53. *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 315 (1988).
54. *Id.* at 313.
55. *Id.* at 317–318.
56. *Id.* at 319 (Scalia, J., concurring).
57. *Id.* at 319–320 (Brennan, J., dissenting).
58. *Id.* at 320.
59. *Torres*, 487 U.S. at 324.

granted certiorari in *Kontrick v. Ryan* to explore whether a bankruptcy rule's time restraint was jurisdictional.[60] Justice Ginsberg, in a unanimous decision, wrote that cases like *Robinson* have misused the term "jurisdiction" when referring to time prescriptions in rules of court.[61] She opined that "[jurisdiction] . . . is a word of many, too many, meanings."[62] The *Kontrick* Court preferred that the term "jurisdiction" refer to prescriptions of the subject-matter and personal jurisdiction only.[63]

The appellant in *Kontrick* conceded the rule in that case was not jurisdictional but argued that claim-processing rules are substantially the same and that they should be treated the same by the courts.[64] The Court rejected this equation because rules of court, liberally construed, should "account for the parties' litigation conduct."[65] A court applying the rule as essentially jurisdictional could not take litigation conduct into account.

One benefit of considering time prescriptions as non-jurisdictional is that it allows courts to weigh equities and consider honest mistakes. The *Kontrick* Court viewed an emphatic time limit as an affirmative defense.[66] The reasoning in *Kontrick* has allowed the Court to modify time prescriptions in cases of "excusable neglect."[67] For example, in *Harris Truck Lines v. Cherry Meat Packers*, a party missed a deadline because the attorney relied on a district court's time extension that was later withdrawn.[68] The Supreme Court excused the neglect because of "the obvious great hardship."[69] The Court reemphasized this holding two years later in *Thompson v. Immigration and Naturalization Service*, a case with similar procedural facts as *Bowles*.[70] There, a party relied on a district court order affirming an earlier mistake by the party.[71] This line of cases provides an exception for "unique circumstances" faced by parties in litigation.

60. *Kontrick*, 540 U.S. at 452. The bankruptcy rule at issue, Rule 4004, is explained earlier in the case. *See id.* at 448.

61. *Id.* at 454.

62. *Id.*

63. *Id.* at 455.

64. *Id.*

65. *Id.*

66. *Kontrick*, 540 U.S. at 456.

67. *Harris Truck Lines v. Cherry Meat Packers*, 371 U.S. 215, 217 (1962).

68. *Id.* at 216.

69. *Id.* at 217.

70. *Thompson v. Immig. & Naturalization Serv.*, 375 U.S. 384, 387 (1964).

71. *Id.*

IV. THE METHOD AND MADNESS OF THE *Bowles* Decision

A. *Majority*

Confronted with *Bowles*, a five-to-four majority affirmed the judgment of the Sixth Circuit and dismissed Bowles's habeas appeal for want of jurisdiction.[72] The United States Supreme Court asserts that it "consistently held that the requirement of filing a timely notice of appeal is 'mandatory and jurisdictional.'"[73] The Court rejects recent precedent that classified time-prescription rules as a claim-processing issue, rather than a jurisdictional issue. Instead, it cites a litany of case law classifying rules as either "mandatory and jurisdictional" or simply as "jurisdiction[al]."[74]

The Court then distinguishes *Bowles* from *Kontrick*. According to the Court, *Kontrick* relied on "the fact that '[n]o statute . . . specifies a time limit for filing a complaint objecting to the debtor's discharge'" under the bankruptcy rules.[75] The Court offers examples of claim-processing rules beyond *Kontrick*.[76] These examples include statutorily-imposed employee number requirements,[77] as well as a statutory restriction on the availability of attorney's fees.[78] By unanimous decision, both of these rules are claim-processing rules.[79] According to the Court, *Bowles* rests on a statute with a delineated time prescription that makes it more than a mere "claim-processing rule."[80]

Noting that Congress determines the scope of the federal courts' appellate jurisdiction, the *Bowles* majority reasons that treating a time prescription, like that in Rule 4, as jurisdictional "makes good sense."[81] Thus, when Congress lays down a mandatory time limit for appeals, it limits federal jurisdiction to cases filed before the deadline lapses.[82] This shifts the burden of inequity from the courts to Congress.[83]

Finally, the Court rejects Bowles's appeal for an equitable exception.[84] This holding flows necessarily from the determination that the rules are jurisdictional, but the Court goes further. It comments that an equitable

72. *Bowles III*, 127 S. Ct. at 2362.
73. *Id.*
74. *See id.* at 2363–2364.
75. *Id.* at 2364 (quoting *Kontrick*, 540 U.S. at 448).
76. *Id.* at 2364–2365.
77. *Arbaugh v. Y & H Corp.*, 540 U.S. 500, 505 (2006).
78. *Scarborough v. Principi*, 541 U.S. 401, 413 (2004).
79. *Bowles III*, 127 S. Ct. at 2367 (Souter, Stevens, Ginsberg & Breyer, JJ., dissenting).
80. *Id.* at 2366 (majority).
81. *Id.* at 2365.
82. *Id.* at 2365–2366.
83. *Id.* at 2367.
84. *Id.* at 2366.

exception like this would always be inappropriate because the Court is without legitimate authority to affect its subject-matter jurisdiction.[85] Thus the Court also overrules *Harris* and *Thompson*, seeing "no compelling reason to resurrect the 'unique circumstances' doctrine from its 40-year slumber."[86]

B. Dissent

To say that the dissent "disagrees" does not adequately capture the rancor in this four-member dissent. Justice Souter lambastes the majority, writing, "[It] is intolerable for the judicial system to treat people this way, and there is not even a technical justification for condoning this bait and switch."[87] He then argues that the Court's recent precedent was a unanimous repudiation of the *Robinson* decision, relied on by the majority.[88]

The dissent states the harsh impacts of treating mandatory time limits as jurisdictional to explain the pall over *Robinson*.[89] Treating the mandatory time prescriptions as claim-processing rules, on the other hand, allows courts to make equitable exceptions in cases like *Bowles*.[90]

The dissent advocates that Congress must specifically mark a statute as jurisdictional for it to carry that force.[91] In other words, the default position should be that the statutory requirement is non-jurisdictional. The dissent finds no significant mark of jurisdiction on Rule 4.[92] Moreover, the dissent argues that the majority disingenuously finds this "jurisdictional" tag by citing dicta in other cases, without considering later repudiations.[93]

The dissent would not overrule the "unique circumstances" doctrine employed by the *Harris* and *Thompson* Courts.[94] Rather, rules like this are analogous to statutes of limitations, notably non-jurisdictional time limits.[95] The dissent finds that the *Thompson* case requires the Court to create an equitable exception for Bowles. Perhaps Bowles has an even stronger argument for an equitable exception because, unlike *Thompson*, where the party

85. *Bowles III*, 127 S. Ct. at 2366.

86. *Id.*

87. *Id.* at 2367 (Souter, Stevens, Ginsberg & Breyer, JJ., dissenting).

88. *Id.*

89. *Id.* at 2368.

90. *Id.* at 2369.

91. *Bowles III*, 127 S. Ct. at 2368.

92. *Id.*

93. *Id.* at n. 3.

94. *Id.* at 2370.

95. *Id.* at 2369; *Day v. McDonough*, 547 U.S. 198, 205 (2006); *Irwin v. Dept. of Vets. Affairs*, 498 U.S. 89, 95–96 (1990).

independently erred, Bowles relied on an incorrect date given by the district court judge.[96]

V. ANALYSIS

A. *Policy Considerations*

While policy seems to drive the arguments in *Bowles*, neither the majority nor the dissent weigh the policy openly. However, the Court variably identifies two competing policies: deference to Congress and fundamental fairness.

Deference to Congress is and should be the paramount value in this case. The majority rightly recognizes that Congress is charged with controlling the appellate jurisdiction of the courts.[97] However, as the dissent points out, Congress is not always controlling the appellate jurisdiction of the courts when it approves a mandatory time limit.[98] The majority never answers how one should know when Congress intends to make a rule jurisdictional. This question is important because deference to Congress also requires the Court to exercise equitable discretion when a rule is not jurisdictional. Knowing Congress's intent makes all of the difference.

In contrast, the dissent invokes basic fairness as the greater goal.[99] Striving for fairness seems particularly appropriate when a party's habeas-corpus appeal fails because the party relied on a judge's error. However, fairness can only be a goal if the question is not one of jurisdiction: whether a court has the power to decide a legal question requires a different inquiry. If the Supreme Court reached its decision on equitable grounds, it is hard to imagine that Bowles would have been punished for the failures of the district court. Sometimes the Court will punish a client for the failures of his or her lawyer, but in a habeas case, where a defendant's freedom is on the line, the stakes are too high for tough love.

B. *Divining Jurisdiction: Why Rule 4 Should Not Be Construed as Jurisdictional*

Rules of procedure should be interpreted liberally to facilitate the resolution of legitimate cases, rather than stunt the flow of the judicial process.[100] The move toward standardized rules was specifically designed to

96. *Bowles III*, 127 S. Ct. at 2370–2371; *Thompson*, 375 U.S. at 385.

97. *Bowles III*, 127 S. Ct. at 2364 (majority).

98. *Id.* at 2368 (Souter, Stevens, Ginsberg & Breyer, JJ., dissenting).

99. *Id.* at 2370.

100. *See* 28 U.S.C.A. § 2072(b) (West 2007). "[Rules of procedure and evidence] shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect." *Id.*

remove the element of flim-flam from the old code pleading system.[101] The new rule systems changed law practice in two relevant ways. Rules became relatively uniform, and liberal construction and escape valves like Rule 2 allowed judges leeway to act equitably.

Though not currently federal law, the better interpretation recognizes procedural rules as, by default, non-jurisdictional, and a requirement only becomes jurisdictional if Congress specifically demarcates a rule as jurisdictional.[102] In fact, the Supreme Court sometimes applies exacting scrutiny in procedural cases to ensure that a decision is faithful to the substance of a case and not just to the words written on the various legal documents.[103] No less should be demanded of the Court when it establishes jurisdiction.

Justice Scalia supports the bright-line rule that all "strict" congressional edicts should be construed as jurisdictional because "a permissive construction is wrong."[104] This all-or-nothing approach is akin to using a jackhammer to break crème brûlèe. Sure, it will get the job done, leaving no indecision or confusion, but a thoughtful practitioner will likely be left thinking that there is a less caustic, fairer way. It is doubtful that Congress, even enraged with some bloodlust, would set aside fair habeas petitions for mistakes made by judges and based on arbitrary technicalities. Quite the contrary, Congress is as equally fond of calling judges lazy or foolish as the Supreme Court sometimes is of admonishing Congress. Regardless, the jackhammer method seems to be the approach adopted by the *Bowles* majority for all statutory requirements.[105]

The dissent gives a different answer to the question of procedural rigidity, but their answer, too, seems insufficient. Their answer relies on *stare decisis*.[106] While this is enough in this case because *Thompson* and *Cherry* are fairly close to the facts of *Bowles*, it does not give the practitioner any reasonable guide as to how truly novel cases will be decided. Still, the dissent offers a better directive than the majority. The majority position may as well require that lawyers hire a divination expert to guess when Congress has blessed a statute with the mantle of jurisdiction.

The structure of the United States Code indicates that this particular rule might not be a jurisdictional concern. For example, the regulation does not appear in the "jurisdiction" section of the Code.[107] This is not disposi-

101. *Torres*, 487 U.S. at 319–320 (Brennan, J., dissenting).

102. *Bowles III*, 127 S. Ct. at 2368 (Souter, Stevens, Ginsberg & Breyer, JJ., dissenting).

103. *See Browder v. Dir.*, 434 U.S. 257, 262 (1977).

104. *Torres*, 487 U.S. at 319 (Scalia, J., concurring).

105. *Bowles III*, 127 S. Ct. at 2364 (majority).

106. *Id.* at 2370 (Souter, Stevens, Ginsberg & Breyer, JJ., dissenting).

107. *See* 28 U.S.C. §§ 1291–1631.

tive on the issue of Congress's intent. Rather, the title of the section and absence of Rule 4 buttresses the view that this is not necessarily a jurisdictional requirement.

On the other hand, Rule 4 is specifically separated by Congress as mandatory and unchangeable. Rule 2—which allows the Court leeway—explicitly excludes Rule 4 by reference to Rule 26(b).[108] Oddly, neither the majority nor the dissent mentions this relationship despite the fact that the separation tends to show that Congress intended this section to operate specially.

Liberal construction of the rules supports the view that time prescriptions, like Rule 4, are non-jurisdictional. There is no plain indication from Congress that Rule 4 should be treated as a jurisdictional rule. Since the application of the rule may signify the end of the line for litigants with serious concerns, the Court should not overreach and turn away good claims. In fact, the policy of following Congress's directives dutifully should nudge the Court to consider rules jurisdictional only when Congress designates them so.

Finally, the majority rejects recent precedent. The majority and the dissent rely on precedent rather than looking at the text or history of the rules to determine congressional intent. Since the justices came to opposite conclusions, it is hard to say that Congress's intent is clear. On the other hand, Supreme Court precedent must mean something. Following the precedent chronologically lends credence to the view adopted by the dissent because recent cases unanimously rejected the reasoning in *Robinson*.[109]

C. The "Unique Circumstances" Exception

The *Thompson* decision requires a court to forgive Bowles's untimely filing because the circumstances are unique and require a special policy consideration. In *Thompson*, the error was committed when a judge validated an invalid action by the party.[110] The parties relied on the judge, and the judge was in error, but the original error was made by the party.[111] The factual scenario in *Bowles* is different because the original erring party was the judge, not the attorney for Keith Bowles. Thus the special circumstance of reliance on the district court should have played a role in the Supreme Court's determination of this case.

However, the Court in *Cherry* and *Thompson* did not give a guide as to what "unique circumstances" qualify for equitable leniency. The dissent in

108. *See* Fed. R. App. P. 2, 4, 26(b).
109. *Bowles III*, 127 S. Ct. at 2367.
110. *Thompson*, 375 U.S. at 385.
111. *Id.*

Bowles focuses on the petitioner's reliance on a court order as reasonable.[112] This seems fair, but the room for equitable leniency should be broader. Rather than overruling reasonable precedent like *Cherry* and *Thompson*, the Court should have overruled *Torres*. Forcing jurisdictional error in a case where a secretary has made a minor clerical error is antithetical to justice.[113] Justice Brennan's dissent in *Torres* offers the most thoughtful test of how equity should fit into the Court's analysis.[114] He says that a timely appeal should go forward even if a party has been left off of the appeal if the "party's intention to . . . appeal is clear to all and prejudicial to none."[115] Justice Brennan distinguishes this from the timeliness issue because it was not presented in *Torres* and because the rule specifically sets timely notice apart.[116] However, a liberal interpretation of the rules that govern the notice of appeal should be fundamentally aimed at exactly what Justice Brennan argued for in that case. Thus appeals should not be hindered when a party's intention to appeal was clear to all and prejudicial to none.

Bowles's appeal was clearly intentional and not prejudicial. The appellees knew Bowles appealed because the court granted a filing extension. Besides, the appellees suffered no harm in the two days between the mandatory end of the extension and the day that the actual notice was filed.

D. Court Interpretations of Bowles

Since the *Bowles* decision, courts of appeals have bent over backward to show that their "unique circumstances" doctrine does not fall in *Bowles*'s wake. In *Kahn v. United States Department of Justice*, a notice of appeal was filed one day late according to an administrative regulation.[117] The filing arrived late because of a FedEx error during the Christmas season.[118] The Second Circuit distinguished *Bowles* because the notice of appeal regulation was an administrative regulation and not a direct edict from Congress.[119] This conclusion smacks of acrobatics considering that Congress generally approves rules of the Court without revision—much akin to the way that Congress deals with administrative agencies.

Similarly, in *National Ecological Foundation v. Alexander*, the Sixth Circuit held that Federal Rule of Civil Procedure 59(e) was different from

112. *Bowles III*, 127 S. Ct. 2371.
113. *Torres*, 487 U.S. at 324–325 (Brennan, J., dissenting).
114. *Id.* at 321.
115. *Id.*
116. *Id.* at 320.
117. *Kahn v. U.S. Dept. of Just.*, 494 F.3d 255, 257 (2d Cir. 2007).
118. *Id.*
119. *Id.* at 258.

Rule 4 because Rule 59(e) "was promulgated by the Supreme Court."[120] This circuit court then compares Rule 59(e) to the rule in *Kontrick* and concludes that it is a claim-processing rule and not subject to the *Bowles* holding.[121] Other courts have displayed similar acrobatics to evade *Bowles*.[122]

These courts are unwilling to recognize the depth of the gouge that *Bowles* has left. This decision focuses on the authority to set rules in stone. In the *Bowles* case, that authority rested with Congress, while in other cases it may well rest with an agency under the authority of congressional aegis or of a more local government. *Bowles*'s holding follows Scalia's concurrence in *Torres* and makes deadlines absolute. It is just that simple. It is just that unfair.

VI. CONCLUSION

Is the law really this unyielding to basic fairness? The majority responds that the law is what Congress makes it.[123] Therefore, it does not have to be so unyielding. Congress should change this rule. The fact that a habeas petitioner was denied an appeal because of a judge's mistake should move Congress to make rules more explicit regarding a court's power to forgive honest mistakes.

The decision in *Bowles* is unfair. The legal community must help Congress, as well as state and local governments, to make our judicial system just. The client bears the brunt of justice dispensed to make a procedural point. Decisions like *Bowles* require lawyers to take a more active role in the political process. Legislators will listen to lawyers who offer advice on how to develop a more just system.

This case should frighten all lawyers. If relying on a district court order can lead to a dismissal of a habeas appeal without a hearing on the merits, then the entire system is in trouble. Lawyers have a great responsibility to engage the people and the legislature to create fair laws. This means that lawyers also bear the responsibility to maintain a system that cannot be unjustly sidestepped or explained away.

120. *Nat. Ecological Found. v. Alexander*, 496 F.3d 466, 475 (6th Cir. 2007).

121. *Id.* at 475–476.

122. *See U.S. v. Cos*, 498 F.3d 1115, 1123 (10th Cir. 2007) (the court frames the question to focus on the questionable starting date for the filing period). The dissent illustrates this point a little more easily. *Id.* at 1136 (Gorsuch, J., dissenting). *See also Bilbruck v. BNSF R.R.*, 243 Fed. Appx. 293, 295 (9th Cir. 2007) (unpublished) (distinguishing local rules from those passed on by Congress); *U.S. v. Garduno*, 506 F.3d 1287, 1290 (10th Cir. 2007) (distinguishing the time for filing criminal appeals from civil appeals, despite the fact that they are both located in Rule 4).

123. *Bowles III*, 127 S. Ct. at 2360, 2365.