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COMMENT

# Jurisdictional Rules and Final Agency Action

When Congress creates a statutory cause of action, some required elements of that cause of action may be considered "jurisdictional," while others may not. The difference between jurisdictional and nonjurisdictional requirements is subtle but important. A jurisdictional element limits the power and authority of the courts. If a litigant fails to satisfy a jurisdictional element of a cause of action, the court lacks the statutory authority to hear the case and issue a decision on the merits.[1] By contrast, nonjurisdictional elements have no bearing on the authority of the courts. Even when a plaintiff fails to satisfy a nonjurisdictional requirement, the court can still decide the case on the merits. If the defendant decides not to address the plaintiff's failure to satisfy a nonjurisdictional requirement, the court cannot dismiss the case sua sponte on those grounds, so the plaintiff can still win the case.

The distinction between jurisdictional and nonjurisdictional requirements has received significant attention in recent years, as the Supreme Court has issued a series of rulings narrowing the scope of what courts can properly consider jurisdictional.[2] Nonetheless, despite the Court's recent decisions narrowing the set of rules that qualify as jurisdictional, a number of lower federal courts continue to embrace the jurisdictional label, even absent clear statutory authorization. This Comment explores that phenomenon by evaluating recent doctrinal developments with respect to one salient legal rule in particular: the final agency action requirement in administrative law. Final agency action is the unusual statutory requirement that affects judicial review across a wide range of substantive issues and cases. That requirement, codified in the Administrative Procedure Act (APA), plays an important role in administrative-law litigation.[3]

1. *See* Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154, 160-61, 170-71 (2010).

2. *See* Howard M. Wasserman, *The Demise of "Drive-By Jurisdictional Rulings,"* 105 NW. U. L. REV. 947, 947 (2011).

3. *See, e.g.*, 5 U.S.C. § 704 (2012) ("Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial

Part I of this Comment explores the importance of jurisdictional treatment for courts and litigants. Erroneous jurisdictional treatment can jeopardize litigants' access to the courts and tilt the playing field in the government's favor. Part II then argues that the lower courts' treatment of the final agency action requirement is out of sync with the Supreme Court's decisions clarifying the proper scope of the jurisdictional label. In some cases, the lower courts engage with the underlying statute and simply come to the wrong result as a matter of statutory interpretation; in other cases, the courts ignore the statute altogether, using jurisdictional treatment as a mechanism for managing their rising caseloads and preventing premature judicial intervention. Part III explores how courts and Congress might recalibrate their treatment of final agency action to resolve the existing doctrinal discord. The Comment concludes by explaining that the tension between the lower courts' application of the jurisdictional label and the Court's doctrine on jurisdictional treatment appears to extend far beyond final agency action.

## I. THE IMPORTANCE OF JURISDICTIONAL TREATMENT

In recent years, the Supreme Court has paid significant attention to the boundary between jurisdictional and nonjurisdictional rules. Arguably the most important decision in this line of cases is *Arbaugh v. Y & H Corp.*,[4] where the Court announced the doctrinal test that distinguishes jurisdictional from nonjurisdictional rules: Congress must "clearly state[] that a threshold limitation on a statute's scope shall count as jurisdictional" in order for courts to treat the limitation as such.[5] Since *Arbaugh*, the Court has applied this clear statement rule in a number of cases reversing lower-court decisions and narrowing the application of the jurisdictional label.[6] To be sure, the Court has acknowledged that Congress need not "incant magic words in order to speak clearly"[7] and that "context, including this Court's interpretation of similar provisions in many years past, is relevant" to whether Congress has spoken with sufficient clarity to warrant jurisdictional treatment.[8] As a result, the application of the clear statement rule sometimes can be more art than science.[9]

review."); Bell v. New Jersey, 461 U.S. 773, 778 (1983). The APA, however, is not a jurisdictional statute. *See infra* Section II.A.

4. 546 U.S. 500 (2006).

5. *Id.* at 515.

6. For a discussion of some of these cases, see Wasserman, *supra* note 2.

7. Sebelius v. Auburn Reg'l Med. Ctr., 133 S. Ct. 817, 824 (2013).

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

9. For an example of a statute that does speak clearly, see *infra* note 37 and accompanying text, which discuss 28 U.S.C. § 2342 (2012).

Nonetheless, these cases have a clear message: judges must train their focus, first and foremost, on the statutory text. Lower courts do not have discretion to apply the jurisdictional label without statutory authorization from Congress.

The distinction between jurisdictional and nonjurisdictional rules has captured the Court's attention in recent years partly because of the significant consequences jurisdictional treatment carries for litigants. First, when a particular statutory requirement is considered jurisdictional, neither party can waive or forfeit arguments about whether that requirement has been met.[10] Even when the defendant fails to argue in the trial court that a jurisdictional requirement was not satisfied, the courts can still consider that argument on appeal. By contrast, when the requirement is nonjurisdictional, litigants who fail to raise the issue in the court of first impression lose their opportunity to raise that challenge on appeal.[11] Second, when a statutory element is treated as jurisdictional, courts have "an independent obligation" to determine whether that element has been satisfied.[12] Even when the defendant concedes that the requirement has been met, the court is required to independently evaluate whether this is true. Courts are under no such obligation when the element is not considered jurisdictional.[13]

Given the consequences of jurisdictional treatment for litigants and courts, it is unsurprising that jurisdictional treatment sometimes can affect case outcomes. Consider, for example, the D.C. Circuit's recent decision in *Marcum v. Salazar*.[14] The plaintiffs challenged the government's decision to deny their applications for permits to import "elephant trophies" from a hunting trip. The government did not contest the existence of final agency action in district court, but it decided to do so on appeal.[15] The D.C. Circuit explained that the government was right: the plaintiffs' claim ordinarily would not have been actionable "for want of final agency action."[16] But as the court acknowledged, and as explained in Part II, final agency action is not a jurisdictional requirement in federal-question cases brought under 28 U.S.C. § 1331.[17] For that reason, the government had "forfeited the objection" by not raising it in district court.[18] Though the court recognized that the government's position

10. *Arbaugh*, 546 U.S. at 514.

11. *Id.*

12. *Id.*

13. *See id.* at 513-14.

14. 694 F.3d 123 (D.C. Cir. 2012).

15. *Id.* at 125-27.

16. *Id.* at 128.

17. *Id.*; *see infra* Section II.A.

18. *Marcum*, 694 F.3d at 128.

had merit, treating finality as nonjurisdictional meant that the court could not decide the case in the government's favor on finality grounds. If the requirement had instead been jurisdictional, the court would have been required to dispose of the case based on the lack of finality.[19]

Of course, jurisdictional treatment is not always outcome determinative. As long as the government contests the existence of final agency action in the court of first impression, the jurisdictional label likely will not affect case outcomes; the court can dismiss the case for failure to state a claim.[20] It is only where the government fails to raise the issue that the jurisdictional label matters. In these cases, erroneously treating final agency action as jurisdictional means that, even where the government technically has waived or forfeited the finality argument, the court can address finality sua sponte and dismiss the case on finality grounds without ever reaching the merits. This gives the government a free pass, and it deprives plaintiffs of the protection of traditional waiver and forfeiture rules, making a successful lawsuit against the government less likely. For that reason, erroneous jurisdictional treatment tilts the playing field in the government's favor, threatening to skew the relationship between the executive branch and citizens adversely affected by government policy.

## II. FINAL AGENCY ACTION AND JURISDICTION

Despite the Court's efforts to fashion a "readily administrable bright line" narrowing the scope of the jurisdictional label,[21] lower federal courts continue to treat the final agency action requirement as jurisdictional, even absent clear statutory authorization. As with any clear statement rule, reasonable jurists often disagree about whether a statute speaks clearly. For that reason, faulty jurisdictional treatment is sometimes simply the result of lower courts relying on a plausible but ultimately incorrect interpretation of a jurisdictional statute. But on other occasions, the lower courts diverge much more dramatically from the Court's clear statement rule. In this latter class of cases, lower courts ignore the text of the jurisdictional statute altogether, applying the jurisdictional label as a common-law mechanism for managing rising caseloads and shielding the executive branch from judicial review early on in the agency's process.

19. The government won the case on other grounds, but it is easy to imagine a scenario in which the government's failure to contest finality would have been fatal to its case.

20. *Cf.* Util. Air Regulatory Grp. v. EPA, 744 F.3d 741, 751 (D.C. Cir. 2014) (Kavanaugh, J., concurring) ("Of course, the question of whether such a rule is jurisdictional matters only in those cases where the agency has waived or forfeited reliance on the rule, which is to say not often.").

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

### *A. Jurisdictional Treatment Through Faulty Statutory Interpretation*

The courts of appeals are divided over whether to treat final agency action as jurisdictional when an administrative law case is first brought in district court pursuant to 28 U.S.C. § 1331, the federal-question statute. Some federal circuits treat the requirement as jurisdictional in these circumstances,[22] while others do not.[23] The Fifth Circuit's 2014 decision in *Belle Co. v. United States Army Corps of Engineers* illustrates the intuitive appeal of jurisdictional treatment.[24] In *Belle*, the Fifth Circuit relied on the language of the APA, noting that section 704 of the statute "authorizes judicial review only of 'final agency action for which there is no other adequate remedy in a court.'"[25] From that seemingly obvious statutory language, the court concluded that "[i]f there is no final agency action, a court lacks subject-matter jurisdiction."[26]

Despite its surface-level appeal, however, the Fifth Circuit's position is likely incorrect as a matter of statutory interpretation. The D.C. Circuit's 2006 decision in *Trudeau v. FTC* illustrates why final agency action is actually nonjurisdictional in federal-question cases.[27] The *Trudeau* court emphasized the Supreme Court's decision in *Califano v. Sanders*, which held that the APA is not itself a grant of subject-matter jurisdiction.[28] As the Supreme Court has explained, this means that the "judicial review provisions of the APA"—where the final agency action requirement appears—"are not jurisdictional."[29] With *Califano* in mind, the D.C. Circuit then applied *Arbaugh*'s clear statement rule.[30] "Because Congress did not clearly state that the final agency action requirement of APA § 704 is jurisdictional,"[31] the final agency action

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

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

24. *Belle Co.*, 761 F.3d at 387-88.

25. *Id.* (quoting 5 U.S.C. § 704 (2012)).

26. *Id.* at 388.

27. 456 F.3d at 184.

28. *Id.* at 183 (citing Califano v. Sanders, 430 U.S. 99, 107 (1977)).

29. Air Courier Conference v. Am. Postal Workers Union, 498 U.S. 517, 523 n.3 (1991).

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

31. *Trudeau*, 456 F.3d at 184 n.7.

requirement could not deprive the court of jurisdiction.[32] This conclusion was underscored by the fact that nothing in the federal-question statute—the actual jurisdictional statute in the case—can be construed to require finality.[33]

The D.C. Circuit's reasoning suggests that a number of circuits have ignored *Califano* when evaluating the jurisdictional status of the APA's finality requirement in federal-question cases. In fact, upon recognizing this omission, at least three circuits that had previously treated final agency action as jurisdictional in at least some federal-question cases—the Second, Fourth, and Federal Circuits—have recently questioned the appropriateness of treating finality as jurisdictional under such circumstances.[34] But even as some courts begin to recognize the error in their interpretation of the APA's final agency action requirement, jurisdictional treatment in federal-question cases remains the prevailing view in several of the federal courts of appeals.[35] In light of the Supreme Court's decision in *Califano*, this is a view undergirded by a faulty interpretation of the APA.

### *B. Jurisdictional Treatment Through Judge-Made Common Law*

Even when lower courts adopt a second-best interpretation of a jurisdictional statute, they are at least following the Court's statute-focused approach to distinguishing jurisdictional from nonjurisdictional rules. But the lower courts do not always follow that approach. Sometimes, they ignore the statutory text altogether.

Consider how courts treat final agency action in direct-review cases. In these cases, litigants bring suit directly in the court of appeals under one of roughly one thousand direct-review statutes that allow litigants to bypass district courts.[36] In many direct-review statutes, jurisdictional treatment of final agency action makes sense, as Congress clearly indicates that finality should be jurisdictional. For example, Congress has given the courts of appeals direct-review jurisdiction to hear cases challenging "all *final* orders of the Federal Communications Commission" and "all *final* orders of the Secretary of Agriculture."[37] These statutes specifically indicate that the courts of appeals

32. *Id.* at 183-84.

33. 28 U.S.C. § 1331 (2012).

34. Automated Merch. Sys., Inc. v. Lee, 782 F.3d 1376, 1379 (Fed. Cir. 2015); Sharkey v. Quarantillo, 541 F.3d 75, 87 (2d Cir. 2008); Long Term Care Partners, LLC v. United States, 516 F.3d 225, 231-32 (4th Cir. 2008).

35. *See* cases cited *supra* note 22.

36. *See* Joseph W. Mead & Nicholas A. Fromherz, *Choosing a Court To Review the Executive*, 67 ADMIN. L. REV. 1, 15 (2015).

37. 28 U.S.C. § 2342(1)-(2) (emphasis added).

only have direct-review jurisdiction over "final orders." In other words, finality is a prerequisite to jurisdiction.

While many direct-review statutes clearly indicate that finality is jurisdictional, not all do. For example, the direct-review provision of the Resource Conservation and Recovery Act (RCRA) specifies that "a petition for review of action of the [EPA] Administrator in promulgating any regulation[] or requirement . . . may be filed only" in the D.C. Circuit.[38] The judicial review provision never mentions finality, nor does it provide any kind of clear signal—at least not the type of clear signal found in other direct-review statutes—that finality is a prerequisite to exercising jurisdiction. Other jurisdiction-conferring statutes, such as those relating to Federal Energy Regulatory Commission and Federal Aviation Administration decisions, also do not mention finality in their judicial review provisions.[39]

Even though these direct-review statutes do not mention finality, several courts of appeals have indicated that the final agency action requirement should be considered jurisdictional under these statutes.[40] These decisions do not explain why the statutory text compels jurisdictional treatment of the finality requirement.[41] In fact, some of these decisions have explicitly acknowledged the disconnect between their holdings and the statutory text.[42]

Why do courts impose a jurisdictional finality requirement without statutory authorization? In turning away from the statutory text, courts have offered two prudential justifications. First, some courts contend that jurisdictional finality prevents judges from prematurely intruding into the agency decision-making process. As one court explained, by denying courts the ability to hear cases until the agency has made a final decision, a jurisdictional finality requirement "ensure[s] there will be no interference with the administrative process."[43] Second, some courts argue that making finality jurisdictional prevents courts from "squander[ing] judicial resources" while litigants still have the "opportunity to convince the agency to change its

38. 42 U.S.C. § 6976(a)(1) (2012).

39. *See* 16 U.S.C. § 825*l*(b) (2012); 49 U.S.C. § 46110(a) (2012).

40. *See, e.g.*, Gen. Motors Corp. v. EPA, 363 F.3d 442, 448 (D.C. Cir. 2004) (citing Molycorp, Inc. v. EPA, 197 F.3d 543, 545 (D.C. Cir. 1999)); Cal. Dep't of Water Res. v. Fed. Energy Regulatory Comm'n (FERC), 341 F.3d 906, 909 (9th Cir. 2003) (citing Steamboaters v. FERC, 759 F.2d 1382, 1387-88 (9th Cir. 1985)).

41. *See, e.g.*, *Gen. Motors Corp.*, 363 F.3d at 448; *Cal. Dep't of Water Res.*, 341 F.3d at 909.

42. *See, e.g.*, *Cal. Dep't of Water Res.*, 341 F.3d at 909; Papago Tribal Util. Auth. v. FERC, 628 F.2d 235, 238 (D.C. Cir. 1980); Niagara Mohawk Power Corp. v. Fed. Power Comm'n, 538 F.2d 966, 969 (2d Cir. 1976).

43. *Cal. Dep't of Water Res.*, 341 F.3d at 909 (citing *Steamboaters*, 759 F.2d at 1387-88).

mind."[44] Applying the jurisdictional label makes it less likely that courts will have to engage in piecemeal review prior to the completion of the agency's process. On this view, jurisdictional treatment allows courts to avoid addressing the merits in litigation that would otherwise unnecessarily burden their dockets.[45]

While much of the most forceful prudential reasoning predates *Arbaugh*, these prudential arguments still continue to influence the courts even after the Court's recent efforts to narrow the use of the jurisdictional label.[46] Some courts have even explicitly acknowledged that they issue jurisdictional dismissals for want of final agency action "for the sake of judicial economy."[47] These justifications are untethered from the statutory text and are in tension with the Court's approach to identifying jurisdictional rules. They are a product of exactly the kind of judge-made common law the Court has sought to eliminate in this area.

## III. RECALIBRATING THE DOCTRINE IN THE LOWER COURTS

The foregoing discussion suggests that the doctrine in the lower courts is in need of recalibration. Many courts incorrectly treat finality as jurisdictional in federal-question cases because they have misinterpreted the underlying jurisdictional statute.[48] In these cases, the lower courts must acknowledge that the APA is not a jurisdictional statute.[49] Where a court takes jurisdiction pursuant to the federal-question statute, final agency action should not be considered jurisdictional. Instead, it is a nonjurisdictional element of an APA cause of action.

**44.** Reliable Automatic Sprinkler Co. v. Consumer Prod. Safety Comm'n, 324 F.3d 726, 732 (D.C. Cir. 2003) (quoting Ciba-Geigy Corp. v. EPA, 801 F.2d 430, 436 (D.C. Cir. 1986)).

**45.** Note, however, that this prudential justification is in tension with the Supreme Court's recent assertion that "[j]urisdictional rules may also result in the waste of judicial resources." Henderson *ex rel.* Henderson v. Shinseki, 562 U.S. 428, 434 (2011). The Court has suggested that jurisdictional requirements can be wasteful because they subvert our legal system's "rules requiring that certain matters be raised at particular times." *Id.*

**46.** *See, e.g.*, Columbia Riverkeeper v. U.S. Coast Guard, 761 F.3d 1084, 1092 (9th Cir. 2014) (noting that the scope of the court's jurisdiction should not be construed "to 'afford[] opportunity for constant delays in the course of the administrative proceeding,' such as would arise if courts could review every interim agency order or action" (quoting Fed. Power Comm'n v. Metro. Edison Co., 304 U.S. 375, 383 (1938))); TC Ravenswood, LLC v. FERC, 565 F. App'x 1, 3 (D.C. Cir. 2014) (relying on *Papago Tribal Util. Auth.*, 628 F.2d at 239).

**47.** ExxonMobil Gas & Power Mktg. Co. v. FERC, 442 F. App'x 563, 564 (D.C. Cir. 2011).

**48.** *See supra* Section II.A.

**49.** *See* Califano v. Sanders, 430 U.S. 99, 107 (1977) ("[T]he APA does not afford an implied grant of subject-matter jurisdiction permitting federal judicial review of agency action.").

In other cases, the lower courts base their jurisdictional determinations on prudential considerations entirely external to the jurisdictional statutes adopted by Congress. This kind of judge-made common law is out of step with the *Arbaugh* clear statement rule, which requires courts to train their focus primarily on the text of the jurisdictional statute.[50] To bring their doctrine into line with the Court's precedent, the lower courts should pay attention first and foremost to the text of the jurisdictional statute. In many direct-review cases, this will still mean that finality should be jurisdictional. But in some cases, such as those brought under RCRA's direct-review provision, the courts should treat finality as nonjurisdictional because the direct-review statute does not speak with the requisite level of clarity to warrant jurisdictional treatment.[51]

Nonetheless, any attempt to bring long-term stability to the jurisdictional doctrine on final agency action—particularly in direct-review cases—may not ultimately succeed without Congress's help. The lower courts' prudential justifications for viewing finality as jurisdictional hint at some of the institutional incentives that might push the lower courts toward jurisdictional treatment. As some scholars have explained, lower federal courts face a "crisis of volume."[52] Rising caseloads have stretched judicial resources thin.[53] By treating statutory requirements as jurisdictional, the lower federal courts may be able to constrict the scope of their own jurisdiction and thereby reduce the number of cases they must address on the merits. Indeed, this logic seems to undergird the prudential arguments that courts sometimes use to justify jurisdictional treatment.[54]

50. Note that Article III's prudential ripeness doctrines do not give courts license to make a *statutory* finality requirement jurisdictional without congressional approval. Article III ripeness and the statutory final agency action requirement entail separate legal inquiries, and the Court has recognized this distinction. *See, e.g.*, Abbott Labs. v. Gardner, 387 U.S. 136, 148-50 (1967) (applying a different analysis for ripeness than for final agency action under the APA). Accordingly, while in some cases it may be legitimate for courts to look at prudential considerations in evaluating whether a case is ripe for review under Article III, those prudential considerations should have no bearing on the jurisdictional status of the statutory final agency action requirement.

51. Additionally, while a long history of the Supreme Court interpreting "similar provisions in many years past" as jurisdictional "is relevant to whether a statute ranks a requirement as jurisdictional," Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154, 168 (2010), there is no such history in the case of RCRA.

52. Bert I. Huang, *Lightened Scrutiny*, 124 HARV. L. REV. 1109, 1112 (2011).

53. *See, e.g.*, WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, INJUSTICE ON APPEAL: THE UNITED STATES COURTS OF APPEALS IN CRISIS 3-8 (2013).

54. *See, e.g.*, cases cited *supra* notes 42-47.

Without congressional action to address the institutional incentives that drive jurisdictional treatment, some lower courts might continue to ignore the *Arbaugh* clear statement rule and treat finality as jurisdictional, even without clear statutory authorization. Scholars have offered a laundry list of possible solutions to reduce the burdens facing the federal courts, and I do not intend to recapitulate that list here.[55] The point is simply that Congress might be able to bring more stability to the doctrine by alleviating some of the existing pressures on the federal courts.

## CONCLUSION

While this Comment has focused specifically on the final agency action requirement, the tension between the Supreme Court's doctrine on jurisdictional rules and the lower courts' implementation of that doctrine is one that extends beyond final agency action. This tension is perhaps best captured by the fact that the Court recently has granted certiorari in a surprisingly high number of cases in which the lower courts have treated statutory requirements as jurisdictional.[56] In many of these cases, the Court has unanimously reversed the lower courts.[57]

This Comment sheds light on *why* this tension has emerged. It is hardly surprising that matters of statutory interpretation sometimes divide the courts. More surprising, however, is that lower courts sometimes ignore the Court's clear statement rule altogether, choosing instead to impose jurisdictional treatment as a common-law mechanism for managing their caseloads and narrowing the scope of judicial review. Indeed, this kind of prudential reasoning also appears in other lower-court cases outside the final agency action context.[58] Resolving the tension between the lower courts and the Supreme Court thus may require more than just a concerted effort by the lower

**55**. For some examples of works recommending possible solutions, see RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM (1985); Henry J. Friendly, *Averting the Flood by Lessening the Flow*, 59 CORNELL L. REV. 634 (1974); and Marin K. Levy, *The Mechanics of Federal Appeals: Uniformity and Case Management in the Circuit Courts*, 61 DUKE L.J. 315 (2011).

**56**. *See, e.g.*, Sebelius v. Auburn Reg'l Med. Ctr., 133 S. Ct. 817 (2013); Henderson *ex rel.* Henderson v. Shinseki, 562 U.S. 428 (2011); Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247 (2010); *Reed Elsevier, Inc.*, 559 U.S. 154.

**57**. *See* cases cited *supra* note 56.

**58**. *Compare, e.g.*, Marley v. United States, 567 F.3d 1030, 1036 (9th Cir. 2009) (treating a statute of limitations provision in the Federal Tort Claims Act as jurisdictional for prudential reasons), *with* Keller v. United States, No. 11-02345, 2012 WL 2929504, at *3 (D. Ariz. July 18, 2012) (recognizing the tension between the Ninth Circuit's approach in *Marley v. United States* and the Supreme Court's doctrine).

courts to adhere to the Court's doctrine. It may also require congressional action to address the underlying institutional incentives that push the lower courts toward jurisdictional treatment.

SUNDEEP IYER[*]

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