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THE IRRELEVANCE OF JURISDICTIONALITY IN FORT BEND COUNTY V. DAVIS

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INTRODUCTION

For the last fifteen years or so, the Supreme Court has fixated on questions involving the characterization of rules and statutes as "jurisdictional." The quest began in *Steel Co. v. Citizens for a Better Environment*, when the Court noted that jurisdiction "is a word of many, too many, meanings."[1] Subsequent opinions have brought new attention and thinking to questions of jurisdiction.[2] The Court's focus has undoubtedly

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[1] 523 U.S. 83, 90 (1998) (quotation cleaned up).

[2] *See, e.g.*, Hamer v. Neighborhood Hous. Servs. of Chi., 138 S. Ct. 13 (2017); United States v. Wong, 135 S. Ct. 1625 (2015); Sebelius v. Auburn Reg'l Med. Ctr., 568 U.S. 145 (2013); Gonzalez v. Thaler, 565 U.S. 134 (2012); Henderson v. Shinseki, 562 U.S. 428 (2011); Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154 (2010); John R. Sand & Gravel Co. v. United States, 552 U.S. 130 (2008); Bowles v. Russell, 551 U.S. 205 (2007); Arbaugh v. Y & H Corp., 546 U.S. 500 (2006); Eberhart v. United States, 546 U.S. 12 (2005) (per curiam); Scarborough v. Principi, 541 U.S. 401 (2004); Kontrick v. Ryan, 540 U.S. 443 (2004).

had a salutary effect, especially in erecting a clearer framework for deciding such jurisdictional-characterization questions.[3]

This laser-like focus on jurisdictionality, however, has had the unfortunate, ancillary effect of distracting from important questions about the particular *effects* of a rule or statute.[4] In some cases, the question of effects is actually the real question of relevance to the case, while the jurisdictional-characterization question fades to irrelevancy. A recent case, *Fort Bend County v. Davis*, illustrates why.

I. *FORT BEND COUNTY* FACTS

Lois Davis worked for Fort Bend County, Texas.[5] She filed a complaint with the county's human-resources department alleging that the director of her department sexually harassed and assaulted her. Although the director resigned in the aftermath of the investigation, her direct supervisor, she alleged, who was the director's friend, began retaliating against her. One day, she informed her supervisor that she could not work on a particular Sunday because of a "previous religious commitment." When she did not show up that Sunday, she was fired.

Title VII requires prospective plaintiffs to exhaust their employment-discrimination claims with the EEOC or coordinate state agency prior to filing a lawsuit in federal court.[6] The exhaustion requirement is designed to trigger administrative investigation and conciliatory procedures with an eye toward non-judicial resolution.[7] Accordingly, Davis filed an intake questionnaire and a formal charge with the Texas Workforce Commission, which is the state agency charged with enforcing federal and state employment-discrimination laws.

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[3] *See* Scott Dodson, *Jurisdiction and Its Effects*, 105 GEO. L.J. 619, 621 (2017); Scott Dodson, *A Revolution in Jurisdiction*, *in* THE LEGACY OF RUTH BADER GINSBURG 137 (Scott Dodson ed. 2015).

[4] Elsewhere, I have argued that the Court's attempt to divine Congress's intent in characterizing a rule or statute as jurisdictional is itself misplaced because the term "jurisdictional" is definitional rather than positivist. *See* Scott Dodson, *Defending Jurisdiction*, 59 WM. & MARY L. REV. ONLINE 85, 90-94 (2018).

[5] The facts in this section come from the Court of Appeals' opinion in *Davis v. Fort Bend Cnty.*, 893 F.3d 300 (5th Cir. 2018).

[6] *See* 42 U.S.C. § 2000e-5(e)(1).

[7] *See* Pacheco v. Mineta, 448 F.3d 783, 788-89 (5th Cir. 2006).

In her charge and questionnaire, she alleged sexual harassment and retaliation based on the incidents with the director and her supervisor. While her charge was still pending, she amended her intake questionnaire to add the word "religion" in the box for "Employment Harms or Actions." She did not amend her formal charge. After investigation, the Commission issued her a right-to-sue letter.

Davis then filed suit in federal district court asserting claims of both retaliation and religious discrimination under Title VII. Fort Bend County filed an answer but did not assert any defense based on exhaustion or challenge exhaustion in any way. After discovery, Fort Bend County moved for summary judgment on the merits, without mentioning exhaustion, and the district court granted its motion. On appeal, Fort Bend County defended the district court's order solely on the ground that it was correct on the merits. The Fifth Circuit reversed as to the religious-discrimination claim and remanded for trial.

On remand, instead of proceeding to trial, Fort Bend County moved to dismiss for lack of subject-matter jurisdiction and argued, for the first time, that Davis failed to exhaust her religious-discrimination claim and that that failure was a jurisdictional defect that required dismissal. The district court agreed and dismissed.

Davis again appealed, and the Fifth Circuit reversed. The Fifth Circuit held that the exhaustion requirement was *not* jurisdictional and that Fort Bend County had forfeited the opportunity to raise it. Accordingly, the Fifth Circuit remanded for trial.[8] Fort Bend County sought certiorari on the question whether the exhaustion requirement is jurisdictional, and the Supreme Court granted certiorari on that question. In the Court, all parties and all amici (save one) focused on the jurisdictional-characterization question.

II. THE IRRELEVANCE OF JURISDICTIONALITY

Unfortunately, resolving this jurisdictional issue will not necessarily resolve the issue confronting the parties. The precise issue confronting the parties is whether the district court erred in dismissing Davis's claim for failure to exhaust when Fort Bend County did not timely assert an

[8] *Davis*, 893 F.3d at 306-08.

exhaustion defense. That issue can and should be resolved directly by resort to statutory construction, common-law traditions, and administrative policy. As I explain below, that issue should not—and perhaps cannot—be resolved by determining the exhaustion requirement's jurisdictional character.

In some of the Court's jurisdictional-characterization cases, the Court has taken a jurisdiction-first approach of deciding the jurisdictional character of a rule in order to define its effects. In *Bowles v. Russell*, for example, the Court held that the deadline to file a notice of appeal in a civil case is jurisdictional and therefore not subject to equitable exceptions.[9] The Court engaged no separate analysis of the deadline's effects; the jurisdictional holding automatically led to the determination that equitable exceptions were not allowed.

This jurisdiction-first approach assumes that jurisdictional rules have immutable and defined characteristics, namely, that they are not subject to principles of equity, discretion, estoppel, forfeiture, consent, or waiver, and courts must police them sua sponte at all times prior to final judgment. The jurisdiction-first approach also assumes that nonjurisdictional rules have (at least presumptively) the inverse effects of jurisdiction.[10] These assumptions underlying the jurisdiction-first approach are flawed. In truth, the jurisdictional characterization of a rule does not inexorably define its effects.

The flaw is easier to appreciate with nonjurisdictional rules. Nonjurisdictional rules can have effects typically associated with jurisdictional rules, such as being nonwaivable or unsusceptible to equitable exceptions.[11] Indeed, although exhaustion requirements are often treated as nonjurisdictional preconditions to suit, those exhaustion requirements nevertheless often exhibit jurisdiction-like effects.[12] The point is that

[9] *Bowles*, 551 U.S. at 212-14.

[10] *See, e.g.*, Day v. McDonough, 547 U.S. 198, 205 (2006) ("A statute of limitations defense . . . is not 'jurisdictional,' hence courts are under no *obligation* to raise the time bar sua sponte.") (original emphasis); *id.* at 213 (Scalia, J., dissenting) (stating that ordinary time-bar defenses "are nonjurisdictional and thus subject to waiver and forfeiture").

[11] *See* Scott Dodson, *Mandatory Rules*, 61 STAN. L. REV. 1, 6 (2008).

[12] *See, e.g.*, Strickland v. Washington, 466 U.S. 668, 684 (1984) ("We agree with the Court of Appeals that the [habeas] exhaustion rule requiring dismissal of mixed petitions, though to be strictly enforced, is not jurisdictional."); Granberry v. Greer, 481 U.S. 129, 133 (1987) (holding that appellate courts have discretion to consider a habeas petitioner's

nonjurisdictional rules—including nonjurisdictional exhaustion requirements—can have jurisdiction-like effects that might make them nonforfeitable or mandatory.[13]

Although harder to appreciate, the flip side is true as well: jurisdictional rules can have nonjurisdictional effects, in myriad ways.[14] Most pertinent to *Fort Bend County* is the species of "jurisdictional preconditions," in which an event or action is required to confer jurisdiction. Though such a precondition is a predicate to jurisdiction, the precondition itself need not be unwaivable or incurable or inexcusable.[15] For example, while appellate jurisdiction in a civil case requires a timely notice of appeal,[16] what constitutes an effective "notice" is subject to judicial discretion.[17] Similarly, while appellate jurisdiction in a habeas case requires the issuance of a certificate of appealability,[18] certain defects in the certificate can be cured or forfeited.[19]

As for exhaustion requirements, the Court has characterized some as prerequisites to jurisdiction, but not always with all of the usual attributes of jurisdictionality. For example, the statutory requirement that social-security claimants receive a final decision from the Social Security Commissioner before filing a claim in federal court[20] is a "jurisdictional prerequisite" that contains "a waivable element [that] the administrative

failure to exhaust even if the State did not assert the defense); 28 U.S.C. § 2254(b)(3) (providing that the habeas exhaustion requirement cannot be forfeited by the State); Jones v. Bock, 549 U.S. 199, 211-16 (2007) (holding the PLRA's exhaustion requirement to be mandatory but an affirmative defense that must be asserted in the answer).

[13] *E.g.*, Nutraceutical Corp. v. Lambert, No. 17-1094, slip op. at 4 (2019) ("Whether a rule precludes equitable tolling turns not on its jurisdictional character but rather on whether the text of the rule leaves room for such flexibility.").

[14] *See* Scott Dodson, *Hybridizing Jurisdiction*, 99 CALIF. L. REV. 1437 (2011).

[15] *Id.* at 1463-65.

[16] *See* Bowles v. Russell, 551 U.S. 205, 214 (2007).

[17] *See* Becker v. Montgomery, 532 U.S. 757, 765 (2001) (allowing an appellant to correct a defective notice of appeal); Smith v. Barry, 502 U.S. 244, 245 (1992) (treating an appellate brief as a notice of appeal); Foman v. Davis, 371 U.S. 178, 181 (1962) (deeming a notice of appeal from the denial of a motion to vacate to be a notice of appeal from the underlying judgment).

[18] *See* Miller-El v. Cockrell, 537 U.S. 322, 336 (2003).

[19] *See* Gonzalez v. Thaler, 565 U.S. 134, 143-45 (2012) ("A defective COA is not equivalent to the lack of any COA.").

[20] *See* 42 U.S.C. § 405(g).

remedies provided by the [Commissioner] be exhausted."[21] A claimant's failure to comply with this waivable part of the exhaustion requirement is also excusable by the courts even absent the Commissioner's waiver.[22]

The teaching of these cases is that the jurisdictional characterization of an exhaustion requirement does not conclusively determine whether an exhaustion defect can be cured by a party, forfeited by the other party, or enforced by a district court despite party forfeiture.

For that reason, resolving the jurisdictional character of Title VII's exhaustion requirement in *Fort Bend County* cannot itself resolve whether the district court correctly dismissed Davis's unexhausted claim. If the exhaustion requirement is a jurisdictional precondition, it might still be forfeitable or excusable or curable. If the exhaustion requirement is nonjurisdictional, it might still be mandatory or enforceable despite the circumstances. Resolving the jurisdictional issue simply does not answer the real question confronting the parties: whether the district court was correct to dismiss for failure to exhaust.

III. A BETTER WAY FORWARD

Rather than take a jurisdiction-first approach, the Court should take an effects-based approach that avoids the jurisdictional issue and instead construes the effects of the rule directly. The Court has taken such an approach before. In *Hallstrom v. Tillamook County*,[23] the Court was presented with the question of whether RCRA's 60-day notice requirement was a limit on federal subject-matter jurisdiction. However, the Court declined to answer that question and instead answered the narrow question presented by the facts of the case: whether the requirement was amenable to equitable exceptions.[24] The Court answered that question directly without addressing the jurisdictional character of the notice requirement.

Likewise, the petition for certiorari in *John R. Sand* asked this Court to decide "[w]hether the statute of limitations in 28 U.S.C. § 2501 limits the

[21] *See* Matthews v. Eldridge, 424 U.S. 319, 327-30 (1976); *see also* Heckler v. Day, 467 U.S. 104, 110 n.14 (1984) ("The jurisdictional requirement that administrative remedies be exhausted is waivable.").

[22] *See* Bowen v. City of New York, 476 U.S. 467, 484-86 (1986).

[23] 493 U.S. 20 (1989).

[24] *Id.* at 31.

subject matter jurisdiction of the Court of Federal Claims."[25] The precise issue in that case, however, was whether a court must enforce the limitations period even if the United States, as a party-defendant, waives the issue. In its opinion, the Court rephrased the question presented to reflect these terms and resolved that issue alone.[26] In the process, this Court carefully avoided characterizing the limitations period as jurisdictional or nonjurisdictional.[27]

The Court should take the approach of *Hallstrom* and *John R. Sand* in deciding *Fort Bend County*. That effects-based approach, unlike a jurisdiction-first approach, will answer the narrow and precise question actually at hand: did the district court err in dismissing Davis's complaint for lack of exhaustion despite Fort Bend County's failure to timely raise the exhaustion issue?

I do not urge a particular answer to that question. Perhaps the importance of Title VII exhaustion justifies the district court's dismissal despite Fort Bend County's forfeiture or any considerations of equity. Perhaps the preference for party autonomy means that Fort Bend County's forfeiture disables the district court from dismissing for lack of exhaustion. Perhaps Davis's exhaustion of her related sexual-harassment and retaliation claims should, under the circumstances, be deemed effective exhaustion of her religious-discrimination claim. Perhaps the district court should have exercised discretion to stay the case to allow Davis an opportunity to exhaust the religious-discrimination claim.

The right answer will depend upon ordinary principles of statutory construction, common-law traditions, and administrative policy. It need not—should not—depend upon jurisdictional characterization.

[25] Pet. Br. at i, John R. Sand & Gravel Co. v. United States, No. 06-1164, 2007 WL 2236607 (Aug. 3, 2017).

[26] John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 132 (2008).

[27] *Id.* at 133-35 (characterizing the time bar as a "more absolute" bar that justifies departure from usual waiver rules); *cf. id.* at 134 (suggesting that prior cases' use of the term "jurisdictional" was "[a]s convenient shorthand").