

RULE 60(b)(4): WHEN THE COURTS OF LIMITED JURISDICTION YIELD TO FINALITY

Stephen E. Ludovici\*

Abstract

It is basic hornbook law—affirmed by courts across time and space repeatedly and unequivocally—that subject-matter jurisdiction cannot be waived. However, in the context of a Rule 60(b)(4) motion seeking relief from a void final judgment after the time for appeal has expired, the onerous standard of review used by courts causes subject-matter jurisdiction to be practically—and frequently—waived in favor of the finality of the judgment. While an onerous standard is tolerable where the court issuing the judgment explicitly found subject-matter jurisdiction, an onerous standard is unacceptable where the court did not do so in light of the federal courts’ limited jurisdiction, and the normal standard for subject-matter jurisdiction used during litigation should be applied.

INTRODUCTION ..... 882
I. THE CONFUSING STANDARDS OF SUBJECT-MATTER JURISDICTION UNDER RULE 60(b)(4) ..... 884
A. What Little Guidance from the Supreme Court ..... 884
B. The Federal Courts of Appeals Mind the Gaps ..... 887
C. Commentator Disagreement ..... 892
II. THE ORDINARY STANDARDS REGARDING SUBJECT-MATTER JURISDICTION ..... 894
A. Rule 12(b)(1) and Subject-Matter Jurisdiction Generally ..... 894
B. Comparison ..... 897
C. The Constitutionality of Rule 60(b)(4) ..... 899
III. THE POLICIES UNDERLYING THE RULE ..... 900
IV. RECOMMENDATIONS ..... 902
A. The Policy ..... 903
B. The Law ..... 904

\* J.D., expected May 2014, University of Florida Levin College of Law. B.A., Mathematics & Sociology, May 2011, University of Florida. I would like to thank Professor Paul R. Gugliuzza for reading an earlier draft of this Note, as well as for his counsel throughout the writing process, and Professor Amy R. Mashburn for her counsel in understanding the Federal Rules of Civil Procedure. Finally, I would also like to thank Robin Lucas for being my note advisor and the members of the Florida Law Review for all their hard work.

C. Implementation .....	908
CONCLUSION.....	910

## INTRODUCTION

Rule 60(b)(4)—which provides for relief from a void judgment<sup>1</sup>—is a narrow exception to the general rule barring collateral attacks on subject-matter jurisdiction.<sup>2</sup> “Rule 60(b)(4) strikes a balance between the need for finality of judgments and the importance of ensuring that litigants have a full and fair opportunity to litigate a dispute.”<sup>3</sup> However, as Judge Posner once opined, void “lacks a settled or precise meaning,” and “[t]he standard formulas . . . are not helpful.”<sup>4</sup> Lacking guidance from the U.S. Supreme Court,<sup>5</sup> the federal courts of appeals have developed an onerous standard for the movant to overcome before a court grants a Rule 60(b)(4) motion,<sup>6</sup> apparently eschewing federal courts’ limited jurisdiction in favor of the finality of the judgment. This is unacceptable: federal courts’ limited jurisdiction should be given greater weight in considering whether to vacate a final judgment for lack of subject-matter jurisdiction. Accordingly, federal courts should not apply a higher standard to 60(b)(4) motions when there has been no explicit finding of subject-matter jurisdiction in the case that produced the judgment. Conversely, where there has been an explicit finding of subject-matter jurisdiction, the higher standard is arguably permissible.

Although Rule 60 as a whole appears to be commonly used,<sup>7</sup> use of Rule 60(b)(4),<sup>8</sup> providing for relief from a *void* judgment,<sup>9</sup> appears to be

1. FED. R. CIV. P. 60(b)(4) (“On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons: . . . (4) the judgment is void . . .”).

2. *United States v. Tittjung*, 235 F.3d 330, 335 (7th Cir. 2000). It should be noted that 60(b)(4) can also be used to vacate a judgment for lack of personal jurisdiction or lack of due process, but this Note limits its discussion to the use of the Rule to vacate a judgment for lack of subject-matter jurisdiction.

3. *United Student Aid Funds, Inc. v. Espinosa*, 130 S. Ct. 1367, 1380 (2010).

4. *In re Edwards*, 962 F.2d 641, 644 (7th Cir. 1992).

5. *See infra* Section I.A.

6. *See infra* Section I.B.

7. KeyCite for *Rule 60. Relief from a Judgment or Order*, WESTLAWNEXT, <http://next.westlaw.com> (subscription required; KeyCite “FED. R. CIV. P. 60”) (last visited Mar. 14, 2014) (noting over 108,000 citing references).

8. In 2007, Rule 60(b), along with the rest of the Federal Rules, underwent stylistic changes. FED. R. CIV. P. 60 advisory committee note to 2007 amendment (“The language of Rule 60 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.”). What is today considered Rule 60(b)(4) was at the time merely a small part of the rather long paragraph known as Rule 60(b). *See* FED. R. CIV. P.

relatively scarcer.<sup>10</sup> Use of the rule when the judgment is void for lack of subject-matter jurisdiction is, naturally, comparatively rarer.<sup>11</sup> As might be expected for such an obscure rule, the Supreme Court has provided little guidance on applying the Rule, and particularly little guidance on the standards to be used by the federal district courts in deciding a Rule 60(b)(4) motion for lack of subject-matter jurisdiction, as well as the standards by which federal appellate courts should review appeals from decisions on such motions. Accordingly, nearly all of the law on these issues has been developed by the federal courts of appeals. While the federal courts of appeals all appear to be attempting to articulate the proper rule to reach the same goals, their articulations differ significantly. The fact they have not all agreed on the same language suggests that their standards should be interpreted to have different meanings.

This Note begins in Part I by surveying the current state of the law regarding subject-matter jurisdiction under Rule 60(b)(4), especially noting where courts have disagreed the most. Part II compares how the standard for subject-matter jurisdiction differs between Rule 60(b)(4), which is invoked after judgment, and Rule 12(b)(1), which is invoked before judgment. Part III reviews the policies underlying Rule 60(b)(4) and how they are reflected in the standards under the rule. Part IV presents the author's recommendation on what the law for subject-matter jurisdiction under Rule 60(b)(4) should be and an analysis of the

---

60(b) (2006). Curiously, however, some courts before 2007 did refer to the rule as Rule 60(b)(4). *E.g.*, *Picco v. Global Marine Drilling Co.*, 900 F.2d 846, 849 (5th Cir. 1990).

9. FED. R. CIV. P. 60(b)(4).

10. *Compare* Search Results for FED. R. CIV. P. 60(b)(4), WESTLAWNEXT, <http://next.westlaw.com/> (subscription required; narrow jurisdiction to “All Federal” courts and search for: advanced: (60(b)(4) /s (Rule or R. or Fed.R.Civ.P.))) (revealing over 8,000 results—mostly cases, briefs, and trial court documents) (last visited Mar. 14, 2014), *with* KeyCite for *Rule 60. Relief from a Judgment or Order*, *supra* note 7.

11. Search Results for FED. R. CIV. P. 60(b)(4) and subject-matter jurisdiction, WESTLAWNEXT, <http://next.westlaw.com> (subscription required; narrow jurisdiction to “All Federal” courts and search for: advanced: (60(b)(4) /s (Rule or R. or Fed.R.Civ.P.) & “subject matter jurisdiction”) (revealing just over 3,100 results—mostly cases, briefs, and trial court documents) (last visited Mar. 14, 2014). Although not directly comparable, comparing the number of decisions with the number of trials and the number of case filings provides a sense of scale. For the federal courts' 2012 fiscal year, only 71 case opinions can be found on Westlaw on this subject, while the federal courts had 5,478 civil trials and 278,442 cases filed. *Id.* (narrow results to cases between Oct. 1, 2011 and Sept. 30, 2012); *Judicial Business of the United States Courts: U.S. District Courts (2012)*, U.S. COURTS, <http://www.uscourts.gov/Statistics/JudicialBusiness/2012/us-district-courts.aspx> (last visited Apr. 12, 2014). Similar searches on Westlaw reveal similarly low numbers each calendar year, with an average of 72 case opinions each year from 2007 through 2013. Curiously, this is about three times the average for the years 2000 through 2005. The author does not hazard a guess as to its cause, but, without further information on the Westlaw databases, cautions that it may be an artifact of an expansion on Westlaw.

most likely ways the law will be changed.

## I. THE CONFUSING STANDARDS OF SUBJECT-MATTER JURISDICTION UNDER RULE 60(b)(4)

This Part surveys the current state of the law regarding subject-matter jurisdiction under Rule 60(b)(4). Section A begins with a discussion of the only Supreme Court case on point,<sup>12</sup> and then turns to an older though analogous case,<sup>13</sup> which some courts have found persuasive.<sup>14</sup> Section B discusses the case law of the federal courts of appeals. Finally, Section C discusses the disagreement between commentators on the current status of the law.

### A. *What Little Guidance from the Supreme Court*

A common rule of statutory interpretation provides that interpretation begins with the text of the Rule.<sup>15</sup> Rule 60(b)(4) states: “On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons: . . . (4) the judgment is void . . . .”<sup>16</sup> Although Rule 60(b)(4) has been in effect for over seventy years, it appears that the Supreme Court has only once—in *United Student Aid Funds v. Espinosa*<sup>17</sup>—addressed the standard for applying the Rule to motions to void a judgment for lack of subject-matter jurisdiction.<sup>18</sup> This is particularly troublesome as case law appears to be the only source of the standard for evaluating Rule 60(b) motions.<sup>19</sup>

12. And yet, it hardly is on point. *See* *United Student Aid Funds, Inc. v. Espinosa*, 130 S. Ct. 1367, 1377 (2010) (“This case presents no occasion to . . . define the precise circumstances in which a jurisdictional error will render a judgment void because United does not argue that the Bankruptcy Court’s error was jurisdictional.” (citation omitted)).

13. *Stoll v. Gottlieb*, 305 U.S. 165, 168–69 (1938).

14. *See* cases cited *infra* note 37.

15. *E.g.*, *Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

16. FED. R. CIV. P. 60(b)(4). A final judgment is “[a] court’s last action that settles the rights of the parties and disposes of all issues in controversy, except for the award of costs (and, sometimes, attorney’s fees) and enforcement of the judgment.” BLACK’S LAW DICTIONARY 919 (9th ed. 2009). A final order is essentially the same, being “[a]n order that is dispositive of the entire case.” *Id.* at 1206 (referencing “final judgment”). It is not as clear what a final proceeding is, though it is likely similar. *See* 12 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE § 60.23 (3d ed. 2008) (mentioning final judgments, orders, and proceedings, but only discussing the first two).

17. 130 S. Ct. 1367 (2010).

18. *Id.* at 1377 (citing and quoting case law, all from lower courts, regarding the subject-matter jurisdiction standard under Rule 60(b)(4)).

19. *See* FED. R. CIV. P. 60 advisory committee note to 1946 amendment (“It should be noted that Rule 60(b) does not assume to define the substantive law as to the grounds for vacating judgments, but merely prescribes the practice in proceedings to obtain relief.”).

In *United Student Aid Funds, Inc. v. Espinosa*, a debtor had the accrued interest on his student loans discharged after he had repaid the principal.<sup>20</sup> Years later, the creditor sought to collect on the interest, and in doing so filed a Rule 60(b)(4) motion to vacate the bankruptcy court's order confirming the debtor's bankruptcy plan.<sup>21</sup> The Supreme Court began its analysis by noting that "[a] void judgment is a legal nullity."<sup>22</sup> Elaborating on this somewhat useless definition, the Court went on "to say that a void judgment is one so affected by a fundamental infirmity that the infirmity may be raised even after the judgment becomes final."<sup>23</sup> "A judgment is not void . . . simply because it is or may have been erroneous."<sup>24</sup> Rather, it must be "premised . . . on a *certain type* of jurisdictional error."<sup>25</sup> Further, "a motion under Rule 60(b)(4) is not a substitute for a timely appeal."<sup>26</sup>

---

20. *Espinosa*, 130 S. Ct. at 1373–74.

21. *Id.* at 1374. The creditor made two arguments supporting the 60(b)(4) motion: (1) that the creditor's due process rights were violated and (2) that the debtor's plan was inconsistent with both the Bankruptcy Code and the Bankruptcy Rules. *Id.* at 1374–75. Since the second argument does not fit within the argument that there was a lack of subject-matter jurisdiction, personal jurisdiction, or due process, it appears that the creditor and (as amicus) the federal government were arguing for an expansion of the meaning of the term "void" under Rule 60(b)(4). *Id.* at 1378.

22. *Id.* at 1377 (citing BLACK'S LAW DICTIONARY 1822 (3d ed. 1933) and BLACK'S LAW DICTIONARY 1709 (9th ed. 2009)). The circularity of this definition is particularly striking as the ninth edition defines nullity as "[s]omething that is legally void," or "[t]he fact of being legally void." BLACK'S LAW DICTIONARY 1173 (9th ed. 2009).

23. *Espinosa*, 130 S. Ct. at 1377 (citing RESTATEMENT (SECOND) OF JUDGMENTS 22 (1980) and *id.* § 12).

24. *Id.* (quoting *Hoult v. Hoult*, 57 F.3d 1, 6 (1st Cir. 1995)).

25. *Id.* (emphasis added) (citing *United States v. Boch Oldsmobile, Inc.*, 909 F.2d 657, 661 (1st Cir. 1990)). Rule 60(b)(4) would also be appropriate for "a violation of due process that deprives a party of notice or the opportunity to be heard." *Id.*

26. *Id.* (citing *Kocher v. Dow Chem. Co.*, 132 F.3d 1225, 1229 (8th Cir. 1997)). The meaning of this is not evident from its plain language, but the *Kocher* case explained it well: "In other words, if a party fails to appeal an adverse judgment and then files a Rule 60(b)(4) motion after the time permitted for an ordinary appeal has expired, the motion will not succeed merely because the same argument would have succeeded on appeal." *Kocher*, 132 F.3d at 1229 (citing *Kansas City S. Ry. v. Great Lakes Carbon Corp.*, 624 F.2d 822, 825 n.4 (8th Cir. 1980) (en banc)). Although the broader statement in *Kocher* may hold true, the facts in *Kansas City Southern* are instructive. In that case, the Rule 60(b)(4) movant argued that the district court erroneously determined that the case fell within the jurisdictional grant alleged (essentially an argument one would make in a 12(b)(1) motion, in a direct appeal, or at any other time during litigation, see *infra* Section II.A). *Kansas City S. Ry.*, 624 F.2d at 824. The Eighth Circuit held that such an argument could not succeed because of the "no substitute for appeal" rule. *Id.* at 825 & n.4. The holding is somewhat confusing because of the court's acknowledgment in the next paragraph that a successful argument under 60(b)(4) must be that there was a "total want of jurisdiction" as distinguished from "an error in the exercise of jurisdiction." See *id.* (quoting *Lubben v. Selective Serv. Sys. Local Bd. No. 27*, 453 F.2d 645, 649 (1st Cir. 1972)). It may be that the "no substitute for appeal" rule is a euphemism or restatement of the "total want of jurisdiction" rule.

The Court then noted that “[f]ederal courts considering Rule 60(b)(4) motions that assert a judgment is void because of a jurisdictional defect generally have reserved relief only for the exceptional case in which the court that rendered judgment lacked even an ‘arguable basis’ for jurisdiction.”<sup>27</sup> However, because the history of the case did not lend itself to a Rule 60(b)(4) analysis, the Court declined to “engage in such an ‘arguable basis’ inquiry or to define the precise circumstances in which a jurisdictional error will render a judgment void.”<sup>28</sup>

What, then, are we to make of the sparse direction the Supreme Court has provided us? It appears that relief under Rule 60(b)(4) premised on erroneous subject-matter jurisdiction is only appropriate where there was not even an “arguable basis” for jurisdiction.<sup>29</sup> How to interpret and apply this in practice is left to circuit court case law. Before considering that body of case law, however, this Note briefly discusses a favorably cited<sup>30</sup> and analogous, though not quite on point, Supreme Court decision.

In *Stoll v. Gottlieb*,<sup>31</sup> the Supreme Court, while acknowledging that federal courts do not have the power to *extend* their subject-matter jurisdiction,<sup>32</sup> noted that federal courts, as a practical matter, must have the power to *interpret and determine* whether they have subject-matter jurisdiction.<sup>33</sup> Additionally, such a determination, even if erroneous,

---

27. *Espinosa*, 130 S. Ct. at 1377 (emphasis added) (quoting *Nemaizer v. Baker*, 793 F.2d 58, 65 (2d Cir. 1986)) (citing *United States v. Boch Oldsmobile*, 909 F.2d 657, 661–62 (1st Cir. 1990)). The Supreme Court appears to have equated lacking an arguable basis for jurisdiction with “a clear usurpation of power,” as it parenthetically noted that the “clear usurpation” language used in *Boch* is an example of the lack of an arguable basis for jurisdiction. *See id.* (quoting *Boch Oldsmobile*, 909 F.2d at 661–62).

28. *Id.* If the case did not lend itself to a Rule 60(b)(4) subject-matter jurisdiction analysis and counsel did not argue it, *id.* at 1377–78, it is not clear why Justice Thomas addressed the issue at all.

29. *Id.*; accord *United States v. Zimmerman*, 491 F. App’x 341, 344 (3d Cir. 2012); *Dream Games of Ariz., Inc. v. PC Onsite*, 448 F. App’x 747, 748 (9th Cir. 2011); *Northridge Church v. Charter Twp. of Plymouth*, 647 F.3d 606, 611–12 (6th Cir. 2011). *But see* *Aurum Asset Managers, LLC v. Bradesco Companhia de Seguros*, 441 F. App’x 822, 824–25 (3d Cir. 2011) (limiting the “clear usurpation” (arguable basis) standard only to “circumstances in which the parties have had their day in court on the issue of jurisdiction such that re-litigation of the issue is barred by principles of *res judicata*”).

30. *Espinosa*, 130 S. Ct. at 1377 (citing *Stoll v. Gottlieb*, 305 U.S. 165, 171–72 (1938)).

31. 305 U.S. 165 (1938).

32. *Id.* at 171 (“A court does not have the power, by judicial fiat, to extend its jurisdiction over matters beyond the scope of the authority granted to it by its creators.”).

33. *Id.* (“There must be admitted, however, a power to interpret the language of the jurisdictional instrument and its application to an issue before the court. Where adversary parties appear, a court must have the power to determine whether or not it has jurisdiction . . .”); accord Kevin M. Clermont, *Sequencing the Issues for Judicial Decisionmaking: Limitations from Jurisdictional Primacy and Intrasuit Preclusion*, 63 FLA. L. REV. 301, 313 (2011) (noting

will be binding, unless the error is timely raised, because of the interest in finality.<sup>34</sup> Although the context of the *Stoll* case was res judicata and not Rule 60(b)(4),<sup>35</sup> the rules elucidated in that case are very similar to the rules used by courts in determining Rule 60(b)(4) motions<sup>36</sup> in their apparent disregard of subject-matter jurisdiction. In fact, many courts, including the Supreme Court, have recognized the similarities between the two.<sup>37</sup>

### B. *The Federal Courts of Appeals Mind the Gaps*

With the Supreme Court having failed to comprehensively lay down the standard for Rule 60(b)(4)—or even perform an analysis under 60(b)(4)<sup>38</sup>—we are left to consider the case law laid down by the United States courts of appeals. Although there is a great deal of agreement between the circuits on the proper standard, there are still some significant differences.

---

that the doctrine of jurisdiction-to-determine-jurisdiction may protect a judgment otherwise lacking subject-matter jurisdiction from attack).

34. *See Stoll*, 305 U.S. at 172 (“An erroneous affirmative conclusion as to the jurisdiction does not in any proper sense enlarge the jurisdiction of the court until passed upon by the court of last resort, and even then the jurisdiction becomes enlarged only from the necessity of having a judicial determination of the jurisdiction over the subject matter.”).

35. *Id.* at 170–71. A few more facts, though not necessary, may make the context of the Court’s statements clearer. The case began when a guarantor of a corporation in bankruptcy had his guaranty discharged under a plan confirmed, *id.* at 168, by the district court (this being before the establishment of the Bankruptcy Courts), Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, sec. 201(a), § 151, 92 Stat. 2549, 2657 (current version at 28 U.S.C. § 151 (2012)) (establishing the Bankruptcy Courts forty years after the *Stoll* decision). The creditor then began an action in state court to recover on the discharged guaranty, *Stoll*, 305 U.S. at 169, prevailed, and was affirmed by the state supreme court, *id.* at 170. On appeal from the state supreme court, the issue was whether the district court had subject-matter jurisdiction such that its order was res judicata upon the state courts (i.e., precluded the state courts from relitigating the same issue). *Id.* at 170–71. In deciding the case, the Supreme Court “express[ed] no opinion as to whether the District Court did or did not have jurisdiction of the subject matter,” *id.* at 171 n.8, but instead stated why the district court’s order was binding regardless of subject-matter jurisdiction, *id.* at 171–72. As this Note shows, the Supreme Court’s analysis in *Stoll* is similar to the analysis the lower federal courts have engaged in for a Rule 60(b)(4) motion attacking subject-matter jurisdiction.

36. Compare *supra* notes 31–34 and accompanying text, with *infra* Section I.B.

37. *See, e.g.,* *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 n.9 (1982) (citing *Stoll*, 305 U.S. at 171–72) (“It has long been the rule that principles of res judicata apply to jurisdictional determinations—both subject matter and personal.”); *Picco v. Global Marine Drilling Co.*, 900 F.2d 846, 850 (5th Cir. 1990) (agreeing with a number of other circuits in extending the principles of *Stoll* as reiterated in *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371, 376–77 (1940), to Rule 60(b)(4)); *Lubben v. Selective Serv. Sys. Local Bd. No. 27*, 453 F.2d 645, 649–50 (1st Cir. 1972) (citing, inter alia, *Stoll*, 305 U.S. at 171–72) (noting that the res judicata effect of a determination that there was jurisdiction protects a judgment from Rule 60(b)(4)).

38. *See supra* note 28 and accompanying text.

The first significant difference is how the federal courts of appeals have articulated the definition of “void” when discussing subject-matter jurisdiction and Rule 60(b)(4). All the courts have said that a judgment is void if a “court lacked jurisdiction.”<sup>39</sup> This is complicated, however, because courts have jurisdiction to determine their own jurisdiction.<sup>40</sup> Thus, some courts say there must be a “plain usurpation of power, when a court wrongfully extends its jurisdiction beyond the scope of its authority”;<sup>41</sup> others describe the requirement as a “total want of jurisdiction” as distinguished from ‘an error in the exercise of jurisdiction’;<sup>42</sup> or as when there is “no arguable basis on which [a court] could have rested a finding that it had jurisdiction”;<sup>43</sup> or as a

---

39. See *Hoult v. Hoult*, 57 F.3d 1, 6 (1st Cir. 1995); see also, e.g., *Johnson v. Arden*, 614 F.3d 785, 799 (8th Cir. 2010); *Oldfield v. Pueblo De Bahia Lora, S.A.*, 558 F.3d 1210, 1218 & n.21 (11th Cir. 2009); *Burrell v. Henderson*, 434 F.3d 826, 831 (6th Cir. 2006); *Grace v. Bank Leumi Trust Co. of N.Y.*, 443 F.3d 180, 193 (2d Cir. 2006); *Sasson v. Sokoloff (In re Sasson)*, 424 F.3d 864, 876 (9th Cir. 2005); *Wendt v. Leonard*, 431 F.3d 410, 412 (4th Cir. 2005); *Callon Petroleum Co. v. Frontier Ins. Co.*, 351 F.3d 204, 208 (5th Cir. 2003); *Robinson Eng’g Co. Pension Plan & Trust v. George*, 223 F.3d 445, 448 (7th Cir. 2000); *V.T.A., Inc. v. Airco, Inc.*, 597 F.2d 220, 224–25 (10th Cir. 1979); *Marshall v. Bd. of Educ., Bergenfield, N.J.*, 575 F.2d 417, 422 (3d Cir. 1978). But see *Wendt*, 431 F.3d at 413 (stating that “a lack of subject matter jurisdiction will not always render a final judgment ‘void’ [under Rule 60(b)(4)]” (alteration in original) (internal quotation marks omitted)); *Gschwind v. Cessna Aircraft Co.*, 232 F.3d 1342, 1346 (10th Cir. 2000) (“A judgment *may* in some instances be void for lack of subject matter jurisdiction.” (emphasis added)); *Kansas City S. Ry. v. Great Lakes Carbon Corp.*, 624 F.2d 822, 825 (8th Cir. 1980) (en banc) (“Absence of subject matter jurisdiction *may*, in certain cases, render a judgment void.”); *Lubben*, 453 F.2d at 649 (similar).

40. See, e.g., *United States v. United Mine Workers*, 330 U.S. 258, 291 (1947) (“But even if the Circuit Court had no jurisdiction to entertain Johnson’s petition, and if this court had no jurisdiction of the appeal, this court, and this court alone, could decide that such was the law. It and it alone necessarily had jurisdiction to decide whether the case was properly before it.” (quoting *United States v. Shipp*, 203 U.S. 563, 573 (1906)) (internal quotation marks omitted)).

41. *Kansas City S. Ry.*, 624 F.2d at 825; see also *Cent. Vt. Pub. Serv. Corp. v. Herbert*, 341 F.3d 186, 190 (2d Cir. 2003) (holding that “a judgment may be declared void for want of jurisdiction when the court ‘plainly usurped jurisdiction’” (citations omitted)); *Coal. of Black Leadership v. Cianci*, 570 F.2d 12, 15 (1st Cir. 1978) (using the phrase “clear usurpation of power”); *Ben Sager Chems. Int’l, Inc. v. E. Targosz & Co.*, 560 F.2d 805, 812 (7th Cir. 1977) (“A void judgment has been narrowly defined, therefore, to exist only where a court usurps power by rendering a judgment over matters beyond the scope of authority granted to it by its creators.”).

42. *Kansas City S. Ry.*, 624 F.2d at 825 (citations omitted) (quoting *Lubben*, 453 F.2d at 649) (noting also that this distinction derives from a court’s jurisdiction to determine jurisdiction); *accord Cent. Vt. Pub. Serv.*, 341 F.3d at 190.

43. *Cent. Vt. Pub. Serv.*, 341 F.3d at 190. The Supreme Court in *Espinosa* noted these first three phrasings as used by the lower courts. *United Student Aid Funds, Inc. v. Espinosa*, 130 S. Ct. 1367, 1377 (2010); see also *United States v. Boch Oldsmobile, Inc.*, 909 F.2d 657, 661–62 (1st Cir. 1990) (using both “total want of jurisdiction” and “clear usurpation of power” language).

situation where exercising jurisdiction was, simply, “egregious.”<sup>44</sup>

“A judgment is not void simply because it is or may have been erroneous”<sup>45</sup>—i.e., wrongly decided on the merits—nor is a judgment void because the district court erroneously decided that the particular case at bar fell within the subject-matter jurisdiction of the court.<sup>46</sup> Rather, the particular error made must result in the district court having “usurped power by exercising jurisdiction over a *class* of cases beyond the scope of its authority.”<sup>47</sup>

To prevent Rule 60(b)(4) from expanding so as to threaten finality,<sup>48</sup> “the concept of void judgments is narrowly construed.”<sup>49</sup> At least the Fourth Circuit has noted that narrow construction is also used lest litigants “use Rule 60(b)(4) to circumvent an appeal process they

44. *Wendt*, 431 F.3d at 413; *United States v. Tittjung*, 235 F.3d 330, 335 (7th Cir. 2000) (defining egregious as involving a “clear usurpation of judicial power”).

45. *Hoult v. Hoult*, 57 F.3d 1, 6 (1st Cir. 1995); *accord* *N.Y. Life Ins. Co. v. Brown*, 84 F.3d 137 (5th Cir. 1996); *V.T.A., Inc. v. Airco, Inc.*, 597 F.2d 220, 224 (10th Cir. 1979); *Marshall v. Bd. of Educ., Bergenfield, N.J.*, 575 F.2d 417, 422 (3d Cir. 1978); *cf.* *Chicot Cnty. Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 376 (1940) (“If the jurisdiction [is] not alleged in the proceedings, [the] judgments and decrees [of the federal district courts] are erroneous . . . [b]ut they are not absolute nullities.” (citations omitted)).

46. *See* *Hunter v. Underwood*, 362 F.3d 468, 476 (8th Cir. 2004) (“An error in interpreting jurisdiction or in assessing jurisdictional facts does not render the judgment a complete nullity or a plain usurpation of power for purposes of Rule 60(b)(4) . . .”); *Gschwind v. Cessna Aircraft Co.*, 232 F.3d 1342, 1346 (10th Cir. 2000) (“A court does not usurp power when it erroneously exercises jurisdiction.”); *Lubben*, 453 F.2d at 649 (“While absence of subject matter jurisdiction may make a judgment void, such total want of jurisdiction must be distinguished from *an error in the exercise of jurisdiction*. A court has the power to determine its own jurisdiction, and an error in that determination will not render the judgment void.” (emphasis added)). This appears to be an extension of the jurisdiction-to-determine-jurisdiction doctrine. *See* *Stoll v. Gottlieb*, 305 U.S. 165, 171–72 (1938).

47. *Ben Sager Chems. Int’l, Inc. v. E. Targosz & Co.*, 560 F.2d 805, 812 (7th Cir. 1977) (emphasis added); *see also* *Page v. Schweiker*, 786 F.2d 150, 159–60 (3d Cir. 1986) (Garth, J., concurring) (accepting as “hornbook law” that the proper standard is over a “class of cases”); *cf.* *Gschwind*, 232 F.3d at 1347 (acknowledging the “category of cases” approach, but deciding the case on other grounds).

48. That is, if the concept of void judgments were construed broadly, then litigants would face greater uncertainty as to the “final” status of a final judgment.

49. *Days Inns Worldwide, Inc. v. Patel*, 445 F.3d 899, 907 (6th Cir. 2006); *Carter v. Fenner*, 136 F.3d 1000, 1007 (5th Cir. 1998); *Hoult*, 57 F.3d at 6; *Raymark Indus., Inc. v. Lai*, 973 F.2d 1125, 1132 (3d Cir. 1992); *accord* *Wendt*, 431 F.3d at 412; *In re Whitney-Forbes, Inc.*, 770 F.2d 692, 696 (7th Cir. 1985); *Jones v. Giles*, 741 F.2d 245, 248 (9th Cir. 1984); *Kansas City S. Ry. v. Great Lakes Carbon Corp.*, 624 F.2d 822, 825 n.5 (8th Cir. 1980) (en banc) (“The concept of a void judgment is extremely limited . . . Professor Moore indicates the concept is so narrowly restricted that, although seemingly incongruous, a federal court judgment is almost never void because of lack of federal subject matter jurisdiction.” (citations omitted)); 7 JAMES WM. MOORE, MOORE’S FEDERAL PRACTICE ¶ 60.25[2] (2d ed. 1993) (“In the sound interest of finality, the concept of void judgment must be narrowly restricted. And it is.”).

elected not to follow.”<sup>50</sup>

On the other hand, courts have stated that Rule 60(b)<sup>51</sup> “should be broadly construed to do substantial justice, yet final judgments should not be lightly reopened.”<sup>52</sup> The language of some courts suggests there is an additional requirement that circumstances be “exceptional.”<sup>53</sup>

Unlike other circuits, the Fifth Circuit has explicitly adopted a factor-balancing test when considering Rule 60(b)(4) relief. The factors are:

- (1) final judgments should not be lightly disturbed;
- (2) a Rule 60(b) motion is not to be used as a substitute for appeal;
- (3) the rule should be liberally construed in order to achieve substantial justice;
- (4) whether the motion was filed within a reasonable time;
- (5) whether—if the judgment was a default or a dismissal in which there was no consideration of the merits—the interest in deciding cases on the merits outweighs, in the particular case, the interest in the finality of judgments, and there is merit in the movant’s claim or defense;
- (6) whether—if the judgment was rendered after a trial on the merits—the

50. *Wendt*, 431 F.3d at 412; *see also supra* note 26 and accompanying text (noting that 60(b)(4) is not an alternative to an appeal).

51. As would be expected, Rule 60(b) encompasses Rule 60(b)(4) and thus statements by courts on the application of Rule 60(b) will usually be applicable in applying Rule 60(b)(4). *But see infra* text accompanying notes 130–31 (discussing how the timeliness requirement of Rule 60 applies differently to 60(b)(4)). However, while Rule 60(b)(4) allows for relief from a void judgment, Rule 60(b) further provides:

- [T]he court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:
- (1) mistake, inadvertence, surprise, or excusable neglect;
  - (2) newly discovered evidence . . . ;
  - (3) fraud . . . , misrepresentation, or misconduct by an opposing party;
  - . . . .
  - (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
  - (6) any other reason that justifies relief.

FED. R. CIV. P. 60(b). It is thus not inconceivable that courts, in discussing Rule 60(b) generally, may have been overinclusive in their pronouncements and that such statements are *not* applicable to Rule 60(b)(4).

52. *Nemaizer v. Baker*, 793 F.2d 58, 61 (2d Cir. 1986) (citations omitted) (internal quotation marks omitted); *see also Griffin v. Swim-Tech Corp.*, 722 F.2d 677, 679–80 (11th Cir. 1984); *Seven Elves, Inc. v. Eskenazi*, 635 F.2d 396, 401 (5th Cir. 1981).

53. *Nemaizer*, 793 F.2d at 61 (“Since 60(b) allows extraordinary judicial relief, it is invoked only upon a showing of exceptional circumstances.”); *see also Ben Sager Chems. Int’l v. E. Targosz & Co.*, 560 F.2d 805, 809 (7th Cir. 1977); *Hoffman v. Celebrezze*, 405 F.2d 833, 835 (8th Cir. 1969); *Rinieri v. News Syndicate Co.*, 385 F.2d 818, 822 (2d Cir. 1967).

movant had a fair opportunity to present his claim or defense; (7) whether there are intervening equities that would make it inequitable to grant relief; and (8) any other factors relevant to the justice of the judgment under attack.<sup>54</sup>

These factors “are to be considered in the light of . . . the principle of . . . finality.”<sup>55</sup> Although some of these factors overlap somewhat with the rules articulated in other jurisdictions,<sup>56</sup> other factors seem to be unique.<sup>57</sup>

On appellate review, the federal courts of appeals disagree as to the proper standard of review for reviewing an order granting or denying a Rule 60(b)(4) motion. Some courts have said that the motion is committed to the sound discretion of the trial court,<sup>58</sup> while most others

---

54. *Crutcher v. Aetna Life Ins. Co.*, 746 F.2d 1076, 1082 (5th Cir. 1984) (citing *United States v. Gould*, 301 F.2d 353, 355–56 (5th Cir. 1962)).

55. *Id.*

56. *Compare, e.g., id.* (stating that “(1) final judgments should not be lightly disturbed [and] . . . (3) the rule should be liberally construed in order to achieve substantial justice”), *with Nemaizer*, 793 F.2d at 61 (“[Rule 60(b)] should be broadly construed to do substantial justice, yet final judgments should not be lightly reopened.” (citations omitted) (internal quotation marks omitted)).

57. *See, e.g., Crutcher*, 746 F.2d at 1082 (describing the fifth enumerated factor as “whether—if the judgment was a default or a dismissal in which there was no consideration of the merits—the interest in deciding cases on the merits outweighs, in the particular case, the interest in the finality of judgments, and there is merit in the movant’s claim or defense”).

58. *Seven Elves, Inc. v. Eskenazi*, 635 F.2d 396, 402 (5th Cir. 1981) (“Motions under Rule 60(b) are directed to the sound discretion of the district court, and its denial of relief upon such motion will be set aside on appeal only for abuse of that discretion.”); *see also Nemaizer*, 793 F.2d at 61–62, 65 (noting generally the abuse of discretion standard is correct and deciding that relief under 60(b)(4) was inappropriate because the district court’s finding was “reasonable”). The statement in *Seven Elves* and other cases should be interpreted as an overstatement of the rule, or the statement of the general rule without mentioning the exception for 60(b)(4), and thus consistent with the circuits that review 60(b)(4) determinations de novo. *See Jackson v. FIE Corp.*, 302 F.3d 515, 521 (5th Cir. 2002) (noting that the proper standard is de novo, not abuse of discretion). On the other hand, *Nemaizer* clearly states that 60(b)(4) determinations are reviewed for an abuse of discretion. However, the Second Circuit may have an intracircuit split as it appears to have both moved away from and back towards *Nemaizer*. *Compare Cent. Vt. Pub. Serv. Corp. v. Herbert*, 341 F.3d 186, 189 (2d Cir. 2003) (noting the general rule for 60(b) as abuse of discretion, but noting that 60(b)(4) is reviewed de novo if “‘there are no disputes over the subsidiary facts pertaining to [the] issue’ of jurisdiction” (alteration in original) (quoting *United States v. Forma*, 42 F.3d 759, 762 (2d Cir. 1994))), *with Grace v. Bank Leumi Trust Co. of N.Y.*, 443 F.3d 180, 187 n.7 (2d Cir. 2006) (noting *Central Vermont* and attempting to distinguish it by limiting it to situations where district courts *refuse* to find a judgment void). Under the literal language of *Grace* then, a granted Rule 60(b)(4) motion is reviewed for an abuse of discretion, while a denied Rule 60(b)(4) motion is reviewed de novo. This is most curious.

say that it is reviewed de novo.<sup>59</sup> The Seventh Circuit, *inter alia*, has struck an odd theoretical stance, where a Rule 60(b)(4) motion—like other Rule 60(b) motions—is reviewed under an abuse of discretion standard, but “[i]f the underlying judgment is void, it is a *per se* abuse of discretion for a district court to deny a movant’s motion to vacate the judgment under Rule 60(b)(4).”<sup>60</sup> Other Seventh Circuit opinions, however, have stuck with the simpler articulation (i.e., a de novo standard of review).<sup>61</sup> Other circuits have suggested that review of a motion under Rule 60(b)(4) is reviewed de novo, as opposed to a more forgiving standard, because even under the abuse of discretion standard used for the other Rule 60(b) motions, it would be a “*per se* abuse of discretion for a district court to deny a movant’s motion to vacate the judgment” if the judgment is void for lack of jurisdiction.<sup>62</sup> It is unclear though whether this is because of the weighty policy issues that arise out of allowing a void judgment to stand or because judgments are “either void or . . . not,”<sup>63</sup> and thus no discretion exists in deciding whether a judgment is void.

However, the apparent lack of deference to federal district courts by the courts of appeals is tempered by the rule, mentioned above, that a judgment is void only when a court lacks subject-matter jurisdiction over an entire category of cases, and not merely when the court erroneously decides that the case at bar falls within its subject-matter jurisdiction.<sup>64</sup> Finally, in those circuits where 60(b)(4) determinations are reviewed de novo, if a district court determines that relief under 60(b)(4) is appropriate, the district court *must* grant relief.<sup>65</sup>

### C. Commentator Disagreement

Although the appellate court cases seem to mostly agree on the standard and the general goals of Rule 60(b)(4), commentators on the standard for the rule—most prominently the federal practice treatises by the late James William Moore, and the late Charles Alan Wright and

---

59. *City of New York v. Mickalis Pawn Shop, LLC*, 645 F.3d 114, 138 (2d Cir. 2011); *Fafel v. Dipaola*, 399 F.3d 403, 409–10 (1st Cir. 2005); *see Chambers v. Armontrout*, 16 F.3d 257, 260 (8th Cir. 1994) (“[R]elief from void judgments is not discretionary.”); *V.T.A., Inc. v. Airco, Inc.*, 597 F.2d 220, 224 n.8 (10th Cir. 1979) (noting that if a judgment is void, then a Rule 60(b)(4) motion must be granted).

60. *E.g.*, *Robinson Eng’g Co. Pension Plan & Trust v. George*, 223 F.3d 445, 448 (7th Cir. 2000) (alteration in original) (internal quotation marks omitted).

61. *E.g.*, *United States v. Tittjung*, 235 F.3d 330, 335 (7th Cir. 2000). Practically, there is probably no difference between the two articulations.

62. *E.g.*, *Mickalis Pawn Shop*, 645 F.3d at 138.

63. *See id.*; *Cent. Vt. Pub. Serv.*, 341 F.3d at 189; *Recreational Props., Inc. v. Sw. Mortg. Serv. Corp.*, 804 F.2d 311, 314 (5th Cir. 1986).

64. *See supra* note 46–47 and accompanying text.

65. *See supra* notes 59 and accompanying text.

Arthur R. Miller<sup>66</sup>—disagree on its application. On the one hand, in Moore’s treatise, the commentators argue that dictum in the *Espinosa* case<sup>67</sup> strongly suggests that the “category of cases” approach—that is, relief is available under 60(b)(4) only if the district court “exercis[ed] jurisdiction over a class of cases beyond the scope of its authority<sup>68</sup>—is the proper one.<sup>69</sup> However, the commentators’ reading of that dictum<sup>70</sup> is by no means clear and is not the only possible reading: alternatively, the dictum could be understood as merely refusing to decide an issue inadequately presented to the Court. Of course, that passage remains dictum, although the Court’s earlier emphasis on applying 60(b)(4) only to “a *certain type* of jurisdictional error”<sup>71</sup> is consistent with the category of cases approach.

On the other hand, the Wright and Miller treatise makes no mention of the “category of cases” approach<sup>72</sup> or the similar “class of cases” used by an earlier edition of Moore’s.<sup>73</sup> Rather, the Wright and Miller treatise notes only in passing that the standard is more onerous under Rule 60(b)(4).<sup>74</sup> The treatise seems to suggest that a Rule 60(b)(4) motion on subject-matter jurisdiction would be granted only if the movant was absent from the litigation and the court did not explicitly

---

66. 12 MOORE ET AL., *supra* note 16, § 60.44[2]; 11 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2862 (3d ed. 2012).

67. *See* *United Student Aid Funds, Inc. v. Espinosa*, 130 S. Ct. 1367, 1377–78 (2010).

68. *Supra* note 47 and accompanying text.

69. 12 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE § 60.44[2][a] & n.13.2 (3d ed. 2014) (LexisNexis).

70. In full, the dictum reads:

This case presents no occasion to engage in such an “arguable basis” inquiry or to define the precise circumstances in which a jurisdictional error will render a judgment void because [the movant] does not argue that the Bankruptcy Court’s error was jurisdictional. Such an argument would fail in any event. First, § 523(a)(8)’s statutory requirement that a bankruptcy court find undue hardship before discharging a student loan debt is a precondition to obtaining a discharge order, not a limitation on the bankruptcy court’s jurisdiction. Second, the requirement that a bankruptcy court make this finding in an adversary proceeding derives from the Bankruptcy Rules, which are “procedural rules adopted by the Court for the orderly transaction of its business” that are “not jurisdictional.”

*Espinosa*, 130 S. Ct. at 1377–78 (citations omitted).

71. *Id.* at 1377 (emphasis added). To the extent that the Court’s language is ambiguous, it should be emphasized that the “certain type of jurisdictional error” refers to “void,” not Rule 60(b)(4).

72. *See* 11 WRIGHT ET AL., *supra* note 66, § 2862.

73. 7 MOORE ET AL., *supra* note 49, ¶ 60.25[2].

74. *See* 11 WRIGHT ET AL., *supra* note 66, § 2862.

find that it had subject-matter jurisdiction over the absent movant.<sup>75</sup> Thus, the treatise implies that only a small portion of the set of cases lacking subject-matter jurisdiction qualify for relief under Rule 60(b)(4).

## II. THE ORDINARY STANDARDS REGARDING SUBJECT-MATTER JURISDICTION

While Rule 60(b)(4) is one way to challenge subject-matter jurisdiction, it is not the most common way. Rather, it is far more common for a litigant to challenge subject-matter jurisdiction during the litigation under Rule 12(b)(1).<sup>76</sup> Section A of this Part provides a brief review of Rule 12(b)(1) before turning to compare Rules 12(b)(1) and 60(b)(4) in Section B. Section C briefly addresses the tangential question of whether 60(b)(4) is unconstitutional.

### A. *Rule 12(b)(1) and Subject-Matter Jurisdiction Generally*

“Subject-matter jurisdiction . . . refers to a tribunal’s power to hear a case,”<sup>77</sup> specifically “the extent to which a court can rule on the conduct of persons or the status of things.”<sup>78</sup> Although the primordial source of subject-matter jurisdiction for the federal courts is the Constitution itself,<sup>79</sup> that portion of the Constitution is not self-executing, and

75. *Id.* (“By the same token, a court’s determination that it has jurisdiction of the subject matter is binding on that issue, if the jurisdictional question actually was litigated and decided, or if a party had an opportunity to contest subject-matter jurisdiction and failed to do so.” (footnotes omitted)).

76. Other rules in the Federal Rules of Civil Procedure, *e.g.*, FED. R. CIV. P. 12(c), may also be used to challenge subject-matter jurisdiction depending on the procedural posture of the litigation at the time of the motion. *See* 5B WRIGHT ET AL., *supra* note 66, § 1350. However, in practice, it is likely that judges are unconcerned about the form of a motion attacking subject-matter jurisdiction, and more concerned about its substance. *See, e.g., id.* (characterizing courts’ treatment of a Rule 56 motion challenging subject-matter jurisdiction, technically incorrect, “as a ‘suggestion’ [to the court] of lack of subject matter jurisdiction” as the “more fruitful approach”). Further, the standard regarding subject-matter jurisdiction—*e.g.*, is there diversity of citizenship?—remains the same regardless of under which rule a motion attacking subject-matter jurisdiction is made. Accordingly, this Note does not address any other rules under which motions attacking subject-matter jurisdiction may be made during litigation.

77. *Morrison v. Nat’l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2877 (2010) (citations omitted) (internal quotation marks omitted).

78. *Carlsbad Tech., Inc. v. HIF Bio, Inc.*, 556 U.S. 635, 639 (2009) (quoting BLACK’S LAW DICTIONARY 870 (8th ed. 2004)) (internal quotation marks omitted).

79. The Constitution provides that:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to

Congress must make an affirmative grant of jurisdiction to the federal courts.<sup>80</sup> Subject-matter jurisdiction is most commonly dealt with in the federal courts through a Rule 12(b)(1) motion,<sup>81</sup> but courts have been liberal in construing other motions as raising issues of subject-matter jurisdiction.<sup>82</sup>

As courts of limited jurisdiction,<sup>83</sup> the federal courts are *required* to police their own jurisdiction<sup>84</sup>: to make a decision without jurisdiction is *unconstitutional*.<sup>85</sup> Accordingly, subject-matter jurisdiction is often said

---

Controversies between two or more States;—between a State and Citizens of another state;—between Citizens of different States;—between citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. CONST. art. III, § 2.

80. *E.g.*, *Hertz Corp. v. Friend*, 130 S. Ct. 1181, 1187–88 (2010) (“This language, however, does not automatically confer diversity jurisdiction upon the federal courts. Rather, it authorizes Congress to do so and, in doing so, to determine the scope of the federal courts’ jurisdiction within constitutional limits.”). Arguably, however, Article III, Section 2, clause 2 of the Constitution—which grants original jurisdiction and appellate jurisdiction to the Supreme Court—is self-executing, though the Court has not explicitly addressed the question. *See* ERWIN CHERMERINSKY, *FEDERAL JURISDICTION* 666–67 (5th ed. 2007).

81. *See* *Valentin v. Hosp. Bella Vista*, 254 F.3d 358, 362 (1st Cir. 2001) (“The proper vehicle for challenging a court’s subject-matter jurisdiction is Federal Rule of Civil Procedure 12(b)(1).”).

82. *5B WRIGHT ET AL.*, *supra* note 66, § 1350 (noting that the defense of lack of subject-matter jurisdiction has been successfully presented under Rules 12(c) and 12(f), in the answer or “in the form of a suggestion to the court prior to final judgment”).

83. *Nw. Airlines, Inc. v. Transp. Workers Union*, 451 U.S. 77, 95 (1981) (“[F]ederal courts, unlike their state counterparts, are courts of limited jurisdiction that have not been vested with open-ended lawmaking powers.”).

84. *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583 (1999) (“[S]ubject-matter delineations must be policed by the courts on their own initiative even at the highest level.”). Or, as one district court colorfully put it, courts “must always be suspicious of [their] subject-matter jurisdiction.” *Martin v. Wal-Mart Stores, Inc.*, 709 F. Supp. 2d 345, 346 (D.N.J. 2010). Also, because federal judges take an oath to uphold the Constitution—U.S. CONST. art. VI, cl. 3; *see also* 28 U.S.C. § 453 (2012) (setting forth the actual oath to be taken)—they are seriously concerned with not exercising their powers where the courts lack subject-matter jurisdiction.

85. *Martin*, 709 F. Supp. 2d at 346 (quoting 13 CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 3522 (3d ed. 2010) (Westlaw)) (“A federal court’s entertaining a case that is not within its subject-matter jurisdiction is no mere technical violation; it is nothing less than an unconstitutional usurpation of state judicial power.”); *F. Elliott Quinn IV, A Real Class Act: The Class Action Fairness Act of 2005’s Amount in Controversy Requirement, Removal, and the Preponderance of the Evidence Standard*, 78 DEF. COUNS. J. 85, 96 (2011) (“If a federal court exercises jurisdiction beyond the bounds of federal jurisdiction, the court is intruding on state jurisdiction, and thus state sovereignty.” (footnote omitted)); *cf.* *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 93–95 (1998) (rejecting the doctrine of hypothetical jurisdiction, which allowed a court to decide the merits of a case before deciding whether it had jurisdiction over it).

to be unwaivable.<sup>86</sup> Even if not argued at the trial court level in a 12(b)(1) or other motion, subject-matter jurisdiction—both of the lower courts and the appellate courts<sup>87</sup>—may be raised for the first time on appeal,<sup>88</sup> unlike many other arguments.<sup>89</sup> It may even be raised by the party seeking to invoke federal jurisdiction—who has the burden of overcoming the presumption that there is no subject-matter jurisdiction<sup>90</sup>—on appeal after losing in the trial court!<sup>91</sup>

Having considered the general statements raised by parties in a 12(b)(1) motion, the court may look beyond the pleadings to determine whether subject-matter jurisdiction exists in the case.<sup>92</sup> As noted above, the burden of proof of subject-matter jurisdiction is upon the party

---

86. *Gonzalez v. Thaler*, 132 S. Ct. 641, 648 (2012); *Ruhrgas*, 526 U.S. at 583; *see also* FED. R. CIV. P. 12(h)(3) (providing that lack of subject-matter jurisdiction may be raised “at any time”).

87. *Steel Co.*, 523 U.S. at 95 (“[E]very federal appellate court has a special obligation to satisfy itself not only of its own jurisdiction but also that of the lower courts in a cause under review . . . .” (first alteration in original) (internal quotation marks omitted)).

88. *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004) (“A litigant generally may raise a court’s lack of subject-matter jurisdiction at any time in the same civil action, even initially at the highest appellate instance.”).

89. *E.g.*, FED. R. CIV. P. 12(h)(1) (noting ways in which a party can waive defenses listed in Rule 12(b)(2)–(5)); *Walker v. Jones*, 10 F.3d 1569, 1572 (11th Cir. 1994) (“[A]n issue not raised in the district court and raised for the first time in an appeal will not be considered by this court.” (quoting *Depree v. Thomas*, 946 F.2d 784, 793 (11th Cir. 1991))); *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 29 (1983) (“Ordinarily, we would not expect the Court of Appeals to pass on issues not decided in the District Court.”).

90. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (“It is to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction.” (citation omitted)).

91. Thus, this would allow the party a “retrial” in another court. *E.g.*, *Capron v. Van Noorden*, 6 U.S. (2 Cranch) 126, 126–27 (1804); *Am. Fire & Cas. Co. v. Finn*, 341 U.S. 6, 7, 18–19 (1951).

92. *Indianapolis v. Chase Nat’l Bank*, 314 U.S. 63, 69 (1941); *see also* *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006) (noting that a trial judge “may be authorized to review the evidence and resolve the dispute on her own” unless the jurisdictional fact is also an element of the claim and thus left to the fact-finding jury); *Valentin v. Hosp. Bella Vista*, 254 F.3d 358, 363 (1st Cir. 2001) (“In conducting this inquiry, the court enjoys broad authority to order discovery, consider extrinsic evidence, and hold evidentiary hearings in order to determine its own jurisdiction.”). Of course, this assumes that the challenge to subject-matter jurisdiction is “factual”—the movant is attacking the “accuracy (rather than the sufficiency) of the jurisdictional facts asserted by the plaintiff and proffering materials of evidentiary quality in support of that position,” *id.* at 363—rather than “facial”—attacking whether the non-movant has sufficiently pleaded jurisdictional facts to establish subject-matter jurisdiction, *see id.* Determining whether the plaintiff’s complaint is sufficient to establish subject-matter jurisdiction has become much more difficult in recent years due to the Supreme Court’s decisions in *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal*. *Twombly*, 550 U.S. 544, 554–55 (2007) (raising the pleading standard in antitrust cases); *Iqbal*, 129 S. Ct. 1937, 1949 (2009) (extending *Twombly*’s heightened pleading standard to all federal cases).

asserting jurisdiction.<sup>93</sup> If the court determines subject-matter jurisdiction does not exist, “the court *must* dismiss the complaint in its entirety.”<sup>94</sup> On appellate review, a 12(b)(1) motion is reviewed de novo.<sup>95</sup>

### B. Comparison

To begin, it is not entirely clear where the dividing line is between the normal standard for determining subject-matter jurisdiction during litigation and the onerous standard under Rule 60(b)(4).<sup>96</sup> One suggestion, made by Judge Posner, is that the dividing line is at the point where the case is complete, and the appeals are complete or exhausted, or the time for appeals has expired.<sup>97</sup> But there appears to be no other commentary on the issue.

Although under the normal standard, subject-matter jurisdiction is said to be unwaivable and may be raised at any time,<sup>98</sup> this is not true for motions under Rule 60(b)(4). Although subject-matter jurisdiction is not strictly waived if the case is complete, and the appeals are complete or exhausted or the time for appeals has expired, it is effectively waived due to the onerous standard of Rule 60(b)(4).<sup>99</sup>

Under both standards, the court determines whether there is subject-matter jurisdiction. However, while under the normal standard the court determines whether there is subject-matter jurisdiction in *that particular case*,<sup>100</sup> under the onerous standard of 60(b)(4), the court’s determination of subject-matter jurisdiction is general.<sup>101</sup> Thus, with a motion under Rule 60(b)(4), a court may determine that the court rendering judgment lacked subject-matter jurisdiction, but not so mistakenly that the judgment should be vacated.<sup>102</sup> Taking a number of

---

93. See *supra* note 90.

94. *Arbaugh*, 546 U.S. at 514 (emphasis added).

95. *E.g.*, *New Orleans & Gulf Coast Ry. v. Barrois*, 533 F.3d 321, 327 (5th Cir. 2008) (“We review a district court’s determination of subject matter jurisdiction de novo.”). However, if the determination of subject-matter jurisdiction is dependent on any factual findings by the court, the appellate court will review those factual findings for clear error. *Aurecchione v. Schoolman Transp. Sys., Inc.*, 426 F.3d 635, 638 (2d Cir. 2005).

96. For simplicity, the remainder of this Note refers to the standard of review for motions under Rule 12(b)(1), described in Section II.A, as the “normal standard” and the standard for reviewing motions under Rule 60(b)(4), described in Part I, as the “onerous standard.”

97. See *In re Edwards*, 962 F.2d 641, 644 (7th Cir. 1992).

98. *E.g.*, *Gonzalez v. Thaler*, 132 S. Ct. 641, 648 (2012); *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583–84 (1999).

99. *In re Edwards*, 962 F.2d at 644; see *supra* Part I.

100. See *supra* note 92 and accompanying text.

101. See *supra* notes 39–44, 46–47 and accompanying text.

102. By way of illustration, consider the facts of *Gschwind v. Cessna Aircraft Co.*, 232 F.3d 1342 (10th Cir. 2000). There, the plaintiff, a Belgian citizen, brought suit against defendants, citizens of Canada, Ohio, and Kansas. *Id.* at 1344. After having her case dismissed

statements by courts and commentators at face value, certain determinations under Rule 60(b)(4) would appear to be unconstitutional.<sup>103</sup>

Under both standards, if the district court determines that granting the respective motion is appropriate, the district court must grant the motion.<sup>104</sup> However, in the Second Circuit, it *may be* that—in addition to the discretion noted above—there is a second insulating level of discretion protecting judgments from attack under 60(b)(4). This is because the standard of appellate review in the Second Circuit may be abuse of discretion, and thus, a district court is not required to grant relief under 60(b)(4) even if it determines that relief would be appropriate.<sup>105</sup> However, the majority rule remains that relief is mandatory if relief is appropriate.<sup>106</sup>

On appeal, in most circuits, the circuit court reviews *de novo* a determination of subject-matter jurisdiction during litigation or after final judgment under Rule 60(b)(4).<sup>107</sup> However, as noted, it may be that the standard of appellate review for a 60(b)(4) motion in the Second Circuit is abuse of discretion,<sup>108</sup> while the standard of appellate review for a determination of subject-matter jurisdiction during litigation in the Second Circuit is *de novo*.<sup>109</sup>

---

on forum non conveniens grounds, the plaintiff brought a 60(b)(4) motion to vacate the judgment dismissing her case, arguing that the district court did not have subject-matter jurisdiction (i.e., diversity jurisdiction) to enter such a judgment. *Id.* In affirming the district court's denial of the 60(b)(4) motion, the Tenth Circuit noted that the district court had erroneously interpreted the diversity jurisdiction statute to grant jurisdiction where there are foreign parties on both sides and a U.S. citizen on one side. *Id.* at 1346. However, the judgment was not accordingly void because the district court assumed jurisdiction under the diversity jurisdiction statute (albeit erroneously). *Id.*

103. *See supra* note 85; *cf.* Evan Tsen Lee, *The Dubious Concept of Jurisdiction*, 54 HASTINGS L.J. 1613, 1619–20 (2003) (drawing attention to the apparent ability of courts to aggrandize their own power to issue valid judgments).

104. *See supra* notes 59 & 94 and accompanying text.

105. *See supra* note 58 (discussing a possible intracircuit split in the Second Circuit on the proper standard of appellate review). *Contra* Lee, *supra* note 103, at 1619 (“The case law clearly states that a federal court has no discretion to deny a motion for relief from a judgment unsupported by either personal or subject matter jurisdiction.”).

106. *See supra* notes 59 & 94 and accompanying text.

107. *See supra* note 59 and accompanying text; *see also, e.g.*, Chaney v. Tenn. Valley Auth., 264 F.3d 1325, 1326 (11th Cir. 2001) (“We review *de novo* a district court's order granting a motion to dismiss for lack of subject matter jurisdiction . . .”).

108. *See supra* note 58.

109. Aurecchione v. Schoolman Transp. Sys., Inc., 426 F.3d 635, 638 (2d Cir. 2005) (“Where a district court grants a defendant's Rule 12(b)(1) motion to dismiss, an appellate court will review the district court's factual findings for clear error and its legal conclusions *de novo*.”).

### C. *The Constitutionality of Rule 60(b)(4)*

The concern then is that the standard of 60(b)(4) may allow federal courts to unconstitutionally exercise subject-matter jurisdiction not granted by Congress.<sup>110</sup> However, there is a counterargument that Congress implicitly approved allowing federal courts' limited jurisdiction to yield to the interest in finality in situations that arise under 60(b)(4). The argument runs as follows.

Under the Rules Enabling Act,<sup>111</sup> Congress delegated to the Supreme Court the power to prescribe rules of procedure for the federal court system,<sup>112</sup> much like an administrative agency.<sup>113</sup> These rules, when promulgated, are forwarded to Congress a certain minimum amount of time<sup>114</sup> before they come into effect, so that Congress has the opportunity "to reject, modify, or defer the rules."<sup>115</sup> Thus, Rule 60(b)(4) was promulgated pursuant to Congress's delegation of its legislative power and implicitly approved by Congress. By not intervening to define the term "void," Congress has left the meaning of void for the courts to decide<sup>116</sup> and approved of the Supreme Court's rule<sup>117</sup> that courts have the power to determine their own jurisdiction.<sup>118</sup>

There is however at least one unresolved issue with the above argument (which is beyond the scope of this Note): the Rules Enabling Act prohibits the Court from making rules that "abridge, enlarge or modify any substantive rights."<sup>119</sup> Thus, the above argument would only hold if subject-matter jurisdiction were a procedural issue for the courts to determine. Otherwise, even if Congress failed to prevent a rule purportedly increasing the federal courts' subject-matter jurisdiction,

---

110. See *supra* note 103 and accompanying text; see also *supra* note 85.

111. 28 U.S.C. §§ 2071–77 (2012).

112. See *Overview for the Bench, Bar, and Public*, U.S. COURTS, <http://www.uscourts.gov/RulesAndPolicies/rules/about-rulemaking/how-rulemaking-process-works/overview-bench-bar-public.aspx> (last visited Apr. 12, 2014). More accurately, the Supreme Court is the most prominent and the last institution that must approve rules before they go into effect. *Id.*

113. Lumen N. Mulligan & Glen Staszewski, *The Supreme Court's Regulation of Civil Procedure: Lessons from Administrative Law*, 59 UCLA L. REV. 1188, 1190 (2012).

114. Seven months. *Overview for the Bench, Bar, and Public*, *supra* note 112.

115. See *id.*

116. Thus, courts have held that courts have jurisdiction to determine their own jurisdiction. See *supra* note 40 and accompanying text. Additionally, it is inherently the province of the courts to interpret the law. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.").

117. See *Stoll v. Gottlieb*, 305 U.S. 165, 171–72 (1938).

118. See *supra* note 40 and accompanying text.

119. See 28 U.S.C. § 2072 (2012) ("The Supreme Court shall have the power to prescribe general rules of practice and procedure . . . in the United States district courts . . . and courts of appeals. Such rules shall not abridge, enlarge or modify any substantive rights.").

the rule would still be unconstitutional, or at least violate the Rules Enabling Act. While this issue is beyond the scope of this Note, it is worth noting that commentators come down on both sides: one article defines jurisdiction as “the power or authority of a court to issue legitimate, binding, and enforceable orders” while “[p]rocedure is the regulation of that power or authority once obtained,”<sup>120</sup> whereas another article argues that the two are “analytically indistinguishable.”<sup>121</sup>

### III. THE POLICIES UNDERLYING THE RULE

The Supreme Court has suggested that Rule 60(b) is inherently meant to allow courts to “accomplish justice.”<sup>122</sup> However, the Court has also noted—if they have lent nothing else to our understanding of Rule 60(b)(4)—that “Rule 60(b)(4) strikes a balance between the need for finality of judgments and the importance of ensuring that litigants have a full and fair opportunity to litigate a dispute.”<sup>123</sup> Notably—though its absence is probably not binding on the lower courts<sup>124</sup>—the *Espinosa* opinion does not mention the interest in justice as an important consideration under 60(b)(4).<sup>125</sup>

However, in promulgating the onerous standard by which to decide a motion under Rule 60(b)(4)—or motions under Rule 60(b) generally—the federal courts of appeals and at least one prominent commentator have noted other important policies. For example, the Second Circuit has noted, “Rule 60(b) strikes a balance between serving the ends of justice and preserving the finality of judgments.”<sup>126</sup> The Eighth Circuit,

---

120. Scott Dodson, *In Search of Removal Jurisdiction*, 102 NW. U. L. REV. 55, 59 (2008).

121. Lee, *supra* note 103, at 1614–15. The phrase “analytically indistinguishable” comes from Dodson, *supra* note 120, at 59.

122. See *Klapprott v. United States*, 335 U.S. 601, 614–15 (1949) (“In simple English, the language of the ‘other reason’ clause, for all reasons except the five particularly specified, vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice.”); *Griffin v. Swim-Tech Corp.*, 722 F.2d 677, 680 (11th Cir. 1984) (“Rule 60(b) has vested the district courts with the power ‘to vacate judgments whenever such action is appropriate to accomplish justice.’” (quoting *Klapprott*, 335 U.S. at 615)).

123. *United Student Aid Funds, Inc. v. Espinosa*, 130 S. Ct. 1367, 1380 (2010); cf. *Stoll v. Gottlieb*, 305 U.S. 165, 171–72, 175 (1938) (“Where adversary parties appear, a court must have the power to determine whether or not it has jurisdiction . . . . After a party has his day in court, . . . [such a] determination [by the Court] [is] conclusive upon the parties before it . . . .”).

124. This is because of the way the Court disposed of that issue. See *supra* note 28 and accompanying text.

125. See *Espinosa*, 130 S. Ct. at 1367.

126. *Nemaizer v. Baker*, 793 F.2d 58, 61 (2d Cir. 1986); see also *Griffin*, 722 F.2d at 680 (11th Cir. 1984) (“The provisions of this rule must be carefully interpreted to preserve the delicate balance between the sanctity of final judgments and the incessant command of the court’s conscience that justice be done in light of *all* the facts.” (quoting *Bankers Mortg. Co. v. United States*, 423 F.2d 73, 77 (5th Cir. 1970)) (internal quotation marks omitted)); Seven

while also emphasizing finality, preferred to consider finality in counterbalance to “limits on federal jurisdiction” when specifically considering the Rule 60(b)(4) context.<sup>127</sup> Professor Moore, on the other hand, considered the tension in Rule 60(b) to result from a conflict between the courts’ interest in justice and the desire that litigation “terminate within a reasonable time.”<sup>128</sup>

As the federal courts of appeals have promulgated standards for deciding Rule 60(b)(4) motions, these policy reasons have been very important to the courts, clearly apparent in the language of these standards. For example, Rule 60(c)(1) requires motions under Rule 60(b) to “be made within a reasonable time,”<sup>129</sup> but many federal courts of appeals have interpreted this standard within the context of voidness—with its corresponding emphasis on the limited jurisdiction of the federal courts—to mean that a Rule 60(b)(4) motion “may be brought *at any time*.”<sup>130</sup> Thus, for a Rule 60(b)(4) motion, a reasonable time appears to be indefinite.

Similarly, the policy of finality in judgments clearly shines through the surface of one of the most common phrasings of the standard for evaluating motions under 60(b)(4). Bear in mind that finality is “[o]ne of the basic tenets of our [judicial] system” because it “is essential to ensure consistency and certainty in the law.”<sup>131</sup> Not only does finality preserve the stability of case law,<sup>132</sup> finality also ensures the stability of judgments upon which people might rely. Accordingly, the First Circuit has stated—in often quoted language—that: “In the interests of finality, the concept of void judgments is narrowly construed.”<sup>133</sup>

---

Elves, Inc. v. Eskenazi, 635 F.2d 396, 401 (5th Cir. 1981) (quoting similar language from *Bankers Mortg. Co.*, 423 F.2d at 77).

127. *Kansas City S. Ry. v. Great Lakes Carbon Corp.*, 624 F.2d 822, 826 (8th Cir. 1980) (en banc) (“Competing policies are at stake in setting aside a federal court judgment as void for lack of subject matter jurisdiction: observation of limits on federal jurisdiction and need for judgments that are final.”). The First Circuit has also recognized the tension. *Fafel v. Dipaola*, 399 F.3d 403, 410 (1st Cir. 2005) (“Weighing against this seemingly ‘inflexible’ jurisdictional requirement, however, is a strong interest in the finality of judgments.” (citations omitted)).

128. James Wm. Moore & Elizabeth B.A. Rogers, *Federal Relief from Civil Judgments*, 55 *YALE L.J.* 623, 623 (1946).

129. FED. R. CIV. P. 60(c).

130. *Cent. Vt. Pub. Serv. Corp. v. Herbert*, 341 F.3d 186, 189 (2d Cir. 2003) (emphasis added) (quoting *Beller & Keller v. Tyler*, 120 F.3d 21, 24 (2d Cir. 1997)); *see also* *Gschwind v. Cessna Aircraft Co.*, 232 F.3d 1342, 1345 (10th Cir. 2000) (“Rule 60(b)(4) . . . is not subject to any time limitation.” (citations omitted) (internal quotation marks omitted)); *Crosby v. Bradstreet Co.*, 312 F.2d 483, 485 (2d Cir. 1963) (ordering the district court to grant relief under Rule 60(b)(4) for a thirty-year-old judgment).

131. *United States v. Boch Oldsmobile, Inc.*, 909 F.2d 657, 660 (1st Cir. 1990).

132. Case law is already not entirely stable since it can be overruled at some later time. Case law would be even more unstable if not only the holdings of earlier cases could be overruled but also the earlier cases themselves could be attacked.

133. *Lubben v. Selective Serv. Sys. Local Bd. No. 27*, 453 F.2d 645, 649 (1st Cir. 1972);

The policies that litigants should have their day in court, but not have more than one bite at the apple, are reflected generally in Rule 60(b)(4). While 60(b)(4) does allow litigants to challenge subject-matter jurisdiction, their challenges will be most effective if they did not litigate the issue originally or did not have an opportunity to do so.<sup>134</sup> That is, such motions seem likely to fail because of the deference that the onerous standard gives to the court that issued the judgment.<sup>135</sup>

One commentator has noted that “[n]otwithstanding all the slogans about subject-matter jurisdiction’s fundamental importance,” the threat to the judicial system from violating subject-matter jurisdiction “is not great enough *always* to warrant relief from judgment.”<sup>136</sup> This is in accord with a number of statements recognizing a decision without jurisdiction as unconstitutional,<sup>137</sup> and yet the onerous standard under 60(b)(4) allows (and likely promotes) earlier decisions without subject-matter jurisdiction to stand because of our interest in finality, and, to a lesser extent, our interests in justice, speedy decision-making, and providing every litigant his day in court. Further, of the courts that have explicitly recognized the policies underlying 60(b)(4), the Supreme Court did not note the limits on federal jurisdiction as an important policy,<sup>138</sup> while only the First and Eighth Circuits appear to have done so.<sup>139</sup>

#### IV. RECOMMENDATIONS

This area of law, although rarely trod upon,<sup>140</sup> is ripe for reform. It is time for the Supreme Court to settle the law in this area,<sup>141</sup> as—even with the assistance of commentators—the opinions of the federal courts of appeals are certainly confusing.<sup>142</sup> The Supreme Court has decided

*e.g.*, *Boch Oldsmobile*, 909 F.2d at 661; *Wendt v. Leonard*, 431 F.3d 410, 412 (4th Cir. 2005); *Jones v. Giles*, 741 F.2d 245, 248 (9th Cir. 1984).

134. 11 WRIGHT ET AL., *supra* note 66, § 2862 & nn.16–17.

135. *See supra* notes 39–44, 46–47 and accompanying text (describing the onerous standard).

136. *Clermont*, *supra* note 33, at 313 (emphasis added).

137. *See supra* note 85 and accompanying text; *see also supra* notes 83–91 and accompanying text.

138. *See* *United Student Aid Funds, Inc. v. Espinosa*, 130 S. Ct. 1367, 1376–80 (2010); *see also supra* notes 122–125 and accompanying text.

139. *See supra* note 127 and accompanying text.

140. *See supra* note 11 and accompanying text.

141. On the other hand, “[t]he law is unsettled in many areas,” and this area may not be the most pressing. *Garfias-Rodriguez v. Holder*, 702 F.3d 504, 529 (9th Cir. 2012) (Kozinski, C.J., disagreeing with everyone).

142. Jurists generally agree that confusing law is bad law. *See, e.g., id.* at 532 (“By the time lawyers in this circuit get through reading all of our opinions, they’ll be thoroughly confused.”). Because the Rule tugs at two of the most fundamental precepts of the federal court system, any suggestion is subject to be wholly a terrible idea, regardless of whether one views this as

remarkably little law in this area,<sup>143</sup> and the circuit courts and commentators are split (though not widely) on the substantive standards for applying Rule 60(b)(4).<sup>144</sup> Within this Part, Section A discusses which policies should be most important in informing the law of Rule 60(b)(4), while Section B discusses what the law should be. Finally, Section C addresses the most likely way this reform will be implemented.

### A. *The Policy*

As discussed above, courts have noted many policies underlying the law of Rule 60(b)(4), including finality, the limited jurisdiction of federal courts, justice, quick litigation,<sup>145</sup> and providing every litigant her day in court, but not a second bite at the apple. However, these policies are in tension with each other,<sup>146</sup> and no set of rules can pay full homage to each of them.<sup>147</sup> Finality should be a more important policy than the other policies. However, the limited jurisdiction of the federal courts should weigh just as much as finality in light of the Supreme Court's predisposition toward preventing the jurisdiction of the federal courts from expanding—especially by judicial fiat<sup>148</sup>—as evidenced when the Supreme Court struck the doctrine of hypothetical jurisdiction.<sup>149</sup> Nor should the Supreme Court's failure to discuss limited jurisdiction in *Espinosa* diminish the importance of that policy: the Court's treatment of the policy and law of Rule 60(b)(4) in that case was brief as the Court sidestepped deciding the case on the merits of that issue.<sup>150</sup> Thus, two policies—finality and limited jurisdiction—should be considered more important, while the other three—justice, quick litigation, and the litigant's day in court—should be considered less important.

---

difficult or trivial. *Burnham v. Superior Court*, 495 U.S. 604, 640 n.\* (1990) (Stevens, J., concurring in the judgment) (“Perhaps the adage about hard cases making bad law should be revised to cover easy cases.”).

143. *See supra* Section I.A.

144. *See supra* Sections I.B–C.

145. Or at least litigation that is not unreasonably prolonged. *See supra* note 128 and accompanying text.

146. Most notably there is tension between finality and the limited jurisdiction of the federal courts, two threads that run deeply within our federal court system.

147. *See Kansas City S. Ry. v. Great Lakes Carbon Corp.*, 624 F.2d 822, 826 (8th Cir. 1980) (en banc) (“Competing policies are at stake in setting aside a federal court judgment as void for lack of subject matter jurisdiction . . .”).

148. *Stoll v. Gottlieb*, 305 U.S. 165, 171 (1938) (“A court does not have the power, by judicial fiat, to extend its jurisdiction over matters beyond the scope of the authority granted to it by its creators.”).

149. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 93–94 (1998) (noting that the Court's rejection of a judicial doctrine that extended federal courts' jurisdiction “should come as no surprise, since it is reflected in a long and venerable line of our cases”).

150. *See supra* note 28 and accompanying text.

## B. *The Law*

The first recommendation is a procedural change: the courts need to be more explicit regarding when a 60(b)(4) motion is appropriate and need to clearly define the standard for such motions. It is clear from the plain language of Rule 60(b)(4) that the rule is to be used to vacate a judgment.<sup>151</sup> Thus, 60(b)(4) can be used only after a judgment has been entered. However, it is not clear that an onerous standard<sup>152</sup> should be used for all 60(b)(4) motions. Instead, this Note recommends following Judge Posner's commentary that the dividing line is at the point where the case is complete, and the appeals are complete or exhausted, or the time for appeal has expired.<sup>153</sup> Thus, after a judgment has been entered but before the appeals are complete or exhausted, or the time for appeal has expired,<sup>154</sup> a 60(b)(4) motion should be decided using the normal standard articulated in Section II.A. On the other hand, after the appeals are complete or exhausted, and the time for appeal has expired,<sup>155</sup> a 60(b)(4) motion should be decided using an onerous standard.<sup>156</sup>

The second recommendation is that the law in this area should be uniform.<sup>157</sup> While the federal courts of appeals<sup>158</sup> have largely done a good job elucidating the 60(b)(4) standard under what Professor Moore called the "category of cases" approach,<sup>159</sup> they have disagreed on how to articulate the test.<sup>160</sup> Such disagreement in phrasing may suggest that the standard for determining a Rule 60(b)(4) motion differs,<sup>161</sup> and thus

---

151. "On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons: . . . (4) the judgment is void." FED. R. CIV. P. 60(b)(4).

152. Such as the one described *supra* Part I.

153. *In re Edwards*, 962 F.2d 641, 644 (7th Cir. 1992).

154. These are times when the policy reasons underlying subject-matter jurisdiction and 12(b)(1) motions, *see supra* Section II.A, dominate, while the policy reasons underlying 60(b)(4), *see supra* Part III, have not yet manifested themselves.

155. Conversely, these are times when the policy reasons underlying 60(b)(4), *see supra* Part III, have fully manifested themselves.

156. To be clear, this first recommendation would apply generally to various onerous standards. Thus, while this Note articulates a *particular* onerous standard in the next paragraph, other onerous standards—such as the standards described *supra* Part I, or some other onerous standard not discussed in this Note—will be mostly satisfactory under this first recommendation.

157. Whether the uniformity of procedural law is more important than the uniformity of substantive law in the federal court systems is beyond the scope of this Note.

158. With perhaps the exception of the Fifth Circuit with its balancing test. *See supra* notes 54–55 and accompanying text.

159. *See supra* note 69 and accompanying text; *see also supra* note 47.

160. *See supra* notes 39–44, 46–47 and accompanying text.

161. *See* LINDA D. JELLUM, *MASTERING STATUTORY INTERPRETATION* 102 (2008) (describing the presumption of meaningful variation as presuming that a variation in choice of words indicates that a different meaning was intended).

such differences should be eliminated. Other deviations, such as the Fifth Circuit's factor-balancing test<sup>162</sup> and an additional requirement of exceptional circumstances,<sup>163</sup> should also be eliminated for the sake of uniformity throughout the federal court system. Thus, the standard could be phrased:

A judgment is void if a court lacked jurisdiction over the class of cases that the court purported to exercise jurisdiction over when it issued the judgment. A judgment is not void because it was wrongly decided on the merits. A judgment is not void if the court erroneously decided the case at bar fell within the subject matter jurisdiction of the court. Rule 60(b)(4) should not be used in lieu of a timely appeal from the judgment. However, a 60(b)(4) motion may be brought at any time. Courts should bear in mind the caveat that final judgments should not be lightly reopened. However, if a court determines the judgment is void, the court must grant relief. Finally, on appellate review, the grant or denial of a 60(b)(4) motion is reviewed de novo.

The third recommendation is that the timing of when the normal standard or the onerous standard should apply should better reflect the important but currently underappreciated policy of ensuring the limited jurisdiction of the federal courts.<sup>164</sup> There are two factors that could potentially affect whether the normal standard or the onerous standard should apply: whether the case is still pending<sup>165</sup> and whether the court issuing the judgment made an explicit finding of subject-matter jurisdiction. Thus, there are four possible scenarios. This Note recommends that the onerous standard for deciding Rule 60(b)(4) motions should be limited to only one of these scenarios, in contrast to the two scenarios in which the onerous standard currently applies. Consider the four scenarios in turn:

In the first scenario, the case is still pending and the court has explicitly found it has subject-matter jurisdiction. In this scenario, where a movant asks for relief from judgment under Rule 60(b)(4) for lack of subject-matter jurisdiction, the movant is essentially asking the court to reexamine its earlier conclusion that it had subject-matter jurisdiction. Although it is true that a litigant can raise subject-matter jurisdiction at any time during litigation, in this case the court has

---

162. *See supra* notes 54–55 and accompanying text.

163. *See supra* note 53 and accompanying text.

164. *See supra* Section IV.A.

165. Namely, whether the appeals are complete or exhausted, or the time for appeal has expired.

already decided the issue and is “bound” by the law of the case.<sup>166</sup> Thus, the court would nominally decide the issue under the normal standard, but the court will be hard to persuade as it had already decided the issue earlier.

In the second scenario, the case is still pending, but the court did not explicitly find it had subject-matter jurisdiction. In this scenario, where the movant asks for relief from judgment under Rule 60(b)(4) for lack of subject-matter jurisdiction, the court is confronted with the novel (for the case) issue of whether it has subject-matter jurisdiction and the case is not yet fully terminated. Because of this, the policy of ensuring limited federal court jurisdiction is strongly implicated, while the policy of finality is comparatively weak. Thus, the court should decide the motion under the normal standard.

In the third scenario, the case is no longer pending, and the court did not explicitly find it had subject-matter jurisdiction. In this case, because of the strong interest in the limited jurisdiction of the federal courts—which has largely given way to the policy of finality under current Rule 60(b)(4) jurisprudence—the law should be that the court deciding the 60(b)(4) motion should use the normal standard and not the onerous standard. It is arguably unconstitutional for a federal court to decide a case without jurisdiction granted to it by Congress. Nor should we be content with the Supreme Court’s soothing words that all courts *implicitly*—if not explicitly—determine their subject-matter jurisdiction.<sup>167</sup> Accordingly, it seems a small price to pay that we should continue to require the federal courts to explicitly find they have jurisdiction; and when they do not, allow the litigants the full opportunity to challenge subject-matter jurisdiction without the deference under which 60(b)(4) motions are decided today.<sup>168</sup> In doing so, the issue of subject-matter jurisdiction will come closer to the unwaivable ideal.<sup>169</sup>

---

166. “Law of the case” refers to a doctrine where courts should strongly avoid revisiting rulings already made in the case. Those earlier rulings become the law specific to and “binding” on the case. However, this doctrine is discretionary. 18B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4478 (2d ed. 2012) (Westlaw); *cf.* 11 WRIGHT ET AL., *supra* note 66, § 2862 (“By the same token, a court’s determination that it has jurisdiction of the subject matter is binding on that issue, if the jurisdictional question actually was litigated and decided, or if a party had an opportunity to contest subject-matter jurisdiction and failed to do so.”).

167. *Stoll v. Gottlieb*, 305 U.S. 165, 171–72 (1938) (“Every court in rendering a judgment tacitly, if not expressly, determines its jurisdiction over . . . the subject matter.”).

168. While requiring federal courts to explicitly find subject-matter jurisdiction is a small price to pay, the cost to the parties of granting a Rule 60(b)(4) motion could potentially be massive, especially if the judgment has already been executed. Further, in the scenario where the judgment is very old, the court may have difficulty deciding the issue. While the normal standard usually presumes that there is no jurisdiction, it may be prudent in this scenario to flip that presumption.

169. *See supra* note 86 and accompanying text.

In the final scenario, the case is no longer pending, but the court issuing the judgment explicitly found that it had subject-matter jurisdiction. In this case, because the policy of enforcing the limited jurisdiction of the federal courts has already been satisfied by the court explicitly finding subject-matter jurisdiction, the policy of finality stands alone in determining what standard should be applied to a 60(b)(4) motion. The litigants have already had their opportunity to argue subject-matter jurisdiction once during litigation and now seek to reopen that issue. In this case, the courts should be hesitant to allow the finality of the judgment to be threatened, except in the most extraordinarily wrong determinations—where the court asserted jurisdiction over a subject-matter over which it had no jurisdiction. Thus, the onerous standard should apply in this scenario.<sup>170</sup>

As for appellate review of an order granting or denying a Rule 60(b)(4) motion, the circuit court should review the order *de novo* for several reasons. First, generally speaking, subject-matter jurisdiction is a question of law<sup>171</sup> and, obviously, subject-matter jurisdiction underlies the Rule 60(b)(4) motions attacking the judgment for lack of subject-matter jurisdiction. Second, *de novo* is the standard historically used to review Rule 60(b)(4) motions.<sup>172</sup> Third, the appellate court does not need access to the specific facts of a case or to evidence in the case in order to decide the issue.<sup>173</sup> As to the applicable standard—the normal standard or the onerous standard—the circuit court should apply whatever rule the district court should have applied in its determination of the 60(b)(4) motion.

Thus, this Note's recommendation limits the application of the onerous standard to the scenario where the case is no longer pending and subject-matter jurisdiction was explicitly decided, in order to limit the number of judgments where the issuing court lacked subject-matter jurisdiction.<sup>174</sup> This recommendation adequately addresses the policy of finality by preventing judgments from being challenged where subject-matter jurisdiction has already been decided. However, to prevent

---

170. This is essentially the standard today, but this Note's recommendation narrows it to those cases where the case is no longer pending and subject-matter jurisdiction was explicitly decided. *See infra* Table 1.

171. *E.g.*, *Kent v. Sec'y of Labor*, 148 F.3d 1264, 1265 (11th Cir. 1998).

172. *E.g.*, *Physicians Reliance Ass'n v. Meredith (In re Physicians Reliance Ass'n)*, 415 F. App'x 140, 141 (11th Cir. 2011) (noting *de novo* as the proper standard of review for 60(b)(4)); *see also Pierce v. Underwood*, 487 U.S. 552, 558 (1988) ("For some few trial court determinations, the question of what is the standard of appellate review is answered by relatively explicit statutory command . . . . For most others, the answer is provided by a long history of appellate practice." (citation omitted)).

173. The appellate court would, of course, need to know some basic facts, usually procedural, in order to determine the motion.

174. *See infra* Table 1.

finality from being eviscerated, this recommendation should be applied only prospectively, lest old cases be resurrected. This recommendation also appreciates the importance of the federal courts' limited jurisdiction more than the current standard by only allowing a judgment's subject-matter jurisdiction to remain unchallenged where the subject-matter jurisdiction *was actually decided*.

Table 1

Current law	Case pending	Case not pending	Recommendation	Case pending	Case not pending
SMJ decided	<u>Normal standard</u>	<i>Onerous standard</i>	SMJ decided	<u>Normal standard</u>	<i>Onerous standard</i>
SMJ not decided	<u>Normal standard</u>	<i>Onerous standard</i>	SMJ not decided	<u>Normal standard</u>	<u>Normal standard</u>

### C. Implementation

Of course, any recommendation for a change in the law is useless if it is neither implemented nor implementable.<sup>175</sup> There are three potential avenues where the suggested change in law could be implemented: Congress, the Supreme Court by adjudication, or the Supreme Court through its rulemaking power.

Of course, Congress could pass a statute changing the substantive law underlying Rule 60(b)(4) subject-matter jurisdiction motions. While this may appear doubtful given Congress's difficulty with passing any

---

175. Cf. Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession: A Postscript*, 91 MICH. L. REV. 2191, 2218–19 (1993) (noting the importance of practical scholarship); Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 35 (1992) (“The ‘impractical’ scholar . . . produces abstract scholarship that has little relevance to concrete issues, or addresses concrete issues in a wholly theoretical manner. As a consequence, it is my impression that judges, administrators, legislators, and practitioners have little use for much of the scholarship that is now produced by members of the academy.”); Chief Justice John Roberts, Discussion at the 77th Annual Fourth Circuit Court of Appeals Conference (June 25, 2011), *available at* <http://www.c-span.org/video/?300203-1/conversation-chief-justice-roberts> (stating that he [Justice Roberts] is on the same page as Judge Harry T. Edwards, specifically: “Pick up a copy of any law review that you see, and the first article is likely to be, you know, the influence of Immanuel Kant on evidentiary approaches in eighteenth century Bulgaria, or something, which I’m sure was of great interest to the academic that wrote it, but isn’t of much help to the bar.”); *see also* Law Prof. Ifill Challenges Chief Justice Roberts’ Take on Academic Scholarship, ACSBLOG (July 5, 2011), <http://www.acslaw.org/acsblog/law-prof-ifill-challenges-chief-justice-roberts%E2%80%99-take-on-academic-scholarship> (noting the same).

substantive legislation,<sup>176</sup> Congress has seen fit to alter, for better or worse, federal court jurisdiction in the recent past.<sup>177</sup> That said, Rule 60(b)(4) is not a pressing issue on Capitol Hill, nor does there appear to be any interest group that would press legislators for the passage of reform.

On the other hand, as the standard for Rule 60(b)(4) is federal common law, the Supreme Court could reform it by adjudicating a case.<sup>178</sup> There are a number of problems, however, with waiting for the Supreme Court to act in this area. First, because Rule 60(b)(4) motions on subject-matter jurisdiction are so comparatively rare,<sup>179</sup> it may be quite a while before the Court acts.<sup>180</sup> Second, unlike where a party is seeking to create a change in the substantive law, a party would likely only be willing to press such a procedural issue all the way to the Supreme Court if that was the best way for that party to win—an unlikely event.<sup>181</sup> Third, the Supreme Court has noted it prefers to avoid

---

176. *E.g.*, Amanda Terkel, *112th Congress Set to Become Most Unproductive Since 1940s*, HUFFINGTON POST (Dec. 28, 2012, 8:00 AM), [http://www.huffingtonpost.com/2012/12/28/congress-unproductive\\_n\\_2371387.html](http://www.huffingtonpost.com/2012/12/28/congress-unproductive_n_2371387.html) (“The 112th Congress has done far less than the 80th Congress . . . which President Harry Truman infamously dubbed the ‘Do Nothing Congress.’”); Janet Hook, Corey Boles & Siobhan Hughes, *Congress Passes Cliff Deal*, WALL ST. J. (Jan. 2, 2013, 1:42 PM), <http://online.wsj.com/news/articles/SB10001424127887323320404578215373352793876> (subscription required) (noting that Congress passed a bill *avoiding* the “fiscal cliff” after the “fiscal cliff” had begun); *cf.* *Open Letter*, XKCD (Oct. 7, 2013), <http://xkcd.com/1274> (“To . . . everyone . . . who secretly controls the U.S. government: Can you please get your shit together?”).

177. *E.g.*, Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified at 28 U.S.C. §§ 1453, 1711–15 (2012)) (expanding the jurisdiction of federal courts to allow class actions in which the total amount in controversy exceeds \$5 million, provided there is minimal diversity); Leahy-Smith America Invents Act, Pub. L. No. 112-29, sec. 19(b), 125 Stat. 284 (2011) (partially overruling the well-pleaded complaint rule for patent cases); Paul R. Gugliuzza, *Pluralism on Appeal*, 100 GEO. L.J. ONLINE 36, 40 (noting Congress’s penchant for “grappl[ing] with issues of Federal Circuit jurisdiction”).

178. Of course, some suggestions, such as unifying the standard across the federal courts of appeals, could also be implemented by the circuit courts creating new case law.

179. *See supra* note 11 and accompanying text.

180. When to expect the Supreme Court to act on this issue can be modeled by the geometric distribution. RICHARD L. SCHEAFFER & LINDA J. YOUNG, INTRODUCTION TO PROBABILITY AND ITS APPLICATIONS 137 (3d ed. 2010) (describing the geometric distribution as modeling “the number of failures prior to . . . the first success[.]”). Although such modeling is beyond the scope of this Note, it seems clear that it would reveal that we may need to wait a very long time before the Supreme Court acts on this admittedly obscure area of civil procedure. For background information on the geometric distributions, see generally *id.* at 137–44.

181. *Cf.* Adam Liptak, *Carefully Plotted Course Propels Gun Case to Top*, N.Y. TIMES (Dec. 3, 2007), <http://www.nytimes.com/2007/12/03/us/03bar.html> (“If you were paying market rates for a case that has been around almost five years, you’d be getting up to half a million bucks . . .”); Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L.J. 1487, 1518–19 (2008) (“A cert petition can easily cost one \$100,000 . . .”).

creating more law than necessary to decide a case under the doctrine of judicial restraint.<sup>182</sup> Finally, some scholars argue that the Supreme Court should resolve issues related to the Federal Rules of Civil Procedure not by adjudication, but by its rulemaking powers.<sup>183</sup>

Third, the law of Rule 60(b)(4) could be modified by the rulemaking power invested in the Supreme Court (and delegated to the Federal Conference on the Judiciary). This approach also has some troubles. First, the Rules Enabling Act only authorizes the Supreme Court to promulgate rules of *procedure*.<sup>184</sup> “Such rules shall not abridge, enlarge or modify any substantive right.”<sup>185</sup> Some commentators have said the plain language is evident that the Rules cannot alter substantive law,<sup>186</sup> while others have advocated for the Supreme Court to create the substantive law of the Rules through rulemaking rather than adjudication.<sup>187</sup> Second, and related, most standards used in applying the Rules are found in case law.<sup>188</sup> Accordingly, although the suggestions in this Note may be implemented, the odds seem unfavorable.

#### CONCLUSION

While the federal courts of appeal have largely agreed on the standard (an onerous one) by which to vacate a judgment for lack of subject-matter jurisdiction under Rule 60(b)(4), some deviations remain. However, the federal courts have not given enough weight to their limited jurisdiction, instead favoring finality in deciding when the

---

182. *Cf., e.g.,* *Jean v. Nelson*, 472 U.S. 846, 854 (1985) (noting that a “fundamental rule of judicial restraint” is refraining from deciding an issue on constitutional grounds where nonconstitutional grounds suffice).

183. Lumen Mulligan & Glen Staszewski, *Scholarship Highlight: Who Should Resolve Issues Relating to the Federal Rules of Civil Procedure?*, SCOTUSBLOG (Oct. 17, 2012, 10:41 AM), <http://www.scotusblog.com/2012/10/scholarship-highlight-who-should-resolve-issues-relating-to-the-federal-rules-of-civil-procedure>.

184. 28 U.S.C. § 2072(a) (2012) (“The Supreme Court shall have the power to prescribe general rules of practice and procedure . . .”).

185. *Id.* § 2072(b).

186. Paul D. Carrington & Derek P. Apanovitch, *The Constitutional Limits of Judicial Rulemaking: The Illegitimacy of Mass-Tort Settlements Negotiated Under Federal Rule 23*, 39 ARIZ. L. REV. 461, 461 (1997).

187. Mulligan & Staszewski, *supra* note 113, at 1228 (“In our view, if the Court is resolving a civil procedure issue based on its interpretation of what the Rules already require, then it is issuing the functional equivalent of an interpretive rule, and the issue may appropriately be resolved pursuant to the less cumbersome process of adjudication. Conversely, if the Court is, in effect, promulgating a new substantive Rule, then it is adopting the functional equivalent of a legislative rule, and it should refer the underlying issues for resolution pursuant to the court rulemaking process.” (footnote omitted)).

188. *E.g.,* *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009) (setting, in part, the standard for Federal Rule of Civil Procedure 8).

onerous standard applies, in lieu of the normal standard commonly seen, *inter alia*, in a motion to dismiss for lack of subject-matter jurisdiction under Rule 12(b)(1). Accordingly, federal courts should only use the onerous standard when the case is no longer pending and the court issuing the judgment explicitly made a finding of subject-matter jurisdiction. Where a court did not make such a finding, federal courts should use the normal standard in deciding whether to vacate the judgment. Such a practice better conforms with the constitutionally limited jurisdiction of the federal courts than the current law.