# MERITS STRIPPING

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## Abstract

This article examines the concept of "merits stripping." This occurs when Congress, the Executive, or the courts eliminates, limits, or diminishes enforceable substantive constitutional and statutory rights and the merits of claims brought to enforce those rights in court. Courts and commentators often conflate merits stripping with the controversial congressional attempts at jurisdiction stripping. In fact, however, the concepts are distinct, and understanding and respecting those distinctions is essential to understanding the operation of substantive federal law in federal courts. This article defines merits stripping and provides multiple examples of strips of constitutional and statutory rights, affected by all three branches of government. It then examines the doctrinal, normative, and theoretical differences between merits stripping and jurisdiction stripping.

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# MERITS STRIPPING

*Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, [it] stalks our. . . jurisprudence once again . . .*[**]

Justice Scalia spoke (in his own unique style) of the much-maligned Establishment Clause test of *Lemon v. Kurtzman*.[1] But we might say the same about the long-standing legal, political, and scholarly controversy that similarly never goes away over congressional jurisdiction stripping—Congress reducing or eliminating the power of the United States Supreme Court and the lower federal courts to hear and resolve particular classes of federal constitutional claims, usually involving controversial issues and precedents.[2]

Congressional threats against the jurisdiction of the courts date to the early days of the Union.[3] Never killed and buried,[4] the controversy remains amid congressional rumblings about reigning in the "out-of-control" judiciary.[5] No such bills have gone anywhere and none is likely

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[**] Lamb's Chapel v. Center Moriches Sch. Dist., 508 U.S. 384, 398 (1993) (Scalia, J., concurring in the judgment).

[1] 403 U.S. 602 (1971).

[2] *See* John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U.L. REV. 962, 986 (2002) ("[M]ost discussions of congressional regulation dwell on laws that deprive federal judges of power to hear a particular case or class of cases because of its controversial nature, or what has come to be known as 'jurisdiction stripping.'"); *see also* Akhil ReedAmar, The *Two-Tiered Structure of the Judiciary Act of 1789*, 138 U. PA. L. REV. 1499, 1499-1500 (1990) [hereinafter Amar, *Two-Tiered*] (identifying controversial issues at play in the jurisdiction-stripping controversy, such as abortion and flag burning); Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongong Debate*, 36 STAN. L. REV. 895, 895 (1984) (stating that most of the jurisdiction-stripping proposals of the early 1980s stem from dissatisfaction with Supreme Court decisions, especially those dealing with controversial social issues such as school prayer, abortion, and busing as a remedy in school desegregation); *see also* Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 980 (2000) [hereinafter Resnik, *Trial as Error*] ("Protesting federal jurisdiction can also be a way to object to an underlying legal norm . . .").

For present purposes, I focus on strips of particular, discreet constitutional claims from the grant of general federal question jurisdiction, apart from efforts to limit other forms of jurisdiction, notably habeas corpus. *See* Detainee Treatment Act of 2005, Pub. L. 109-148, § 1005(e), 119 Stat. 2739 (2005); Hamdan v. Rumsfeld 126 S. Ct. 2749, 2763-64 (2006) (holding that jurisdiction-stripping provision did not apply retroactively, in part to avoid "grave questions about Congress' authority to impinge upon this Court's appellate jurisdiction").

[3] *See* Amar, *Two-Tiered*, *supra* note ___, at 1500 ("From the First Judiciary Act on, this question has periodically occupied center stage in the high drama of national politics."); Gunther, *supra* note ___, at 896 ("Jurisdiction-stripping proposals have surfaced in Congress in virtually every period of controversial federal court decisions.").

[4] *See* Lawrence Gene Sager, *Forward: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 20 (1980) [hereinafter Sager, *Constitutional Limitations*] 20 ("In large measure, our failure to lay these questions to rest is the product of the mutual respect and self-restraint that have characterized the behavior of Congress and of the Supreme Court in their dealings with one another.").

[5] *See* Ferejohn & Kramer, *supra* note ___, at 984 ("When we turn to Congress, moreover, we find a wide array of tools available to rein in a rambunctious judiciary."); Caprice L. Roberts, *Jurisdiction in Three Acts: A Three-String Serenade*, 51 VILL. L. REV. 593, 631 (2006) (describing arguments that "Federal courts have run amok and tilted the balance of power among the three branches too far" and that "Congress had to act in order to stop the despotism of the federal judicial bench"); Sager, *Constitutional Limitations*, *supra* note ___, at 38 ("Perhaps Congress' power to

to do so.[6] But discussion of the issue continues. One of several recent examples is the Constitution Restoration Act of 2005, which would deprive federal courts of original and appellate jurisdiction to hear any claim against a government entity or officer for the "acknowledgement of God as the sovereign source of law, liberty, or government."[7]

The parameters of congressional power to jurisdiction-strip remains the great, heretofore unresolved, debate among courts, procedure, and constitutional law scholars.[8] But bracketed from that debate is a distinct approach to limiting the reach and impact of federal judicial power[9]--merits stripping.

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regulate jurisdiction ought to be understood as its final trump, as an appropriate way for the national legislature to curb a judiciary run amok.").

[6] *See* Ferejohn & Kramer, *supra* note ___, at 988 ("The chronic failure of these efforts to divest federal courts of jurisdiction easily could mislead one into believing that Congress cannot, as a practical matter, effectively control federal judges by regulating their jurisdiction."); Sager, *Constitutional Limitations*, *supra* note ___, at 20 (arguing that, although jurisdiction-stripping measures have been proposed, "Congress has almost always repudiated such efforts.").

[7] S.520, 109th Cong., §§ 101-102 (2005). Two other similar proposals are pending in the final months of the 109th Congress. One is Marriage Protection Act of 2005, which would deprive federal courts of original and appellate jurisdiction "to hear or decide any question pertaining to the interpretation of, or the validity under the Constitution of," the Defense of Marriage Act. Marriage Protection Act of 2005, H.R. 1100, 109th Cong., § 2(a) (2005). The Defense of Marriage Act, enacted in 1996, provides that states need not give full faith and credit to same-sex marriages valid in other states. 28 U.S.C. § 1738C. A third jurisdiction-stripping proposal is Pledge Protection Act of 2005, which would deprive the Supreme Court and lower federal courts of authority "to hear or decide any question pertaining to the interpretation of, or the validity under the Constitution of, the Pledge of Allegiance . . . or its recitation." Pledge Protection Act of 2005, S.1046, 109th Cong. (2005); Pledge Protection Act of 2005, H.R. 2389, 109th Cong. (2005). The House passed the bill in July 2006, but it was not expected to go far in the Senate.

[8] *See, e.g.*, MARTIN H. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF POWER 25 (2d ed. 1990) (describing "significant case law" indicating that Congress has significant power to prohibit the Supreme Court from taking jurisdiction over cases allocated to its appellate jurisdiction); *id.* at 29 (describing argument that, because Congress need not have created lower federal courts, it could create such courts, but limit their jurisdiction); Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205. 229-30 (1985) [hereinafter Amar, *Neo-Federalist*] (arguing that the federal judiciary, consisting of the Supreme Court and any lower federal courts, must have an original or appellate opportunity to hear any cases involving federal questions); Theodore Eisenberg, *Congressional Authority to Retrict Federal Court Jurisdiction*, 83 YALE L.J. 498, 504 (1974) (arguing hat "because of changing circumstances, the framers' aspirations for the national judiciary cannot be fulfilled today without lower federal courts"); Gunther, *supra* note ___, at 921 (arguing against such enactments "because they are unwise and violate the 'spirit' of the Constitution, even though they are . . . within the sheer legal authority of Congress"); Henry Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1365 (1953) (arguing that any exceptions to jurisdiction "must not be such as will destroy the essential role of the Supreme Court in the constitutional plan"); Sager, *Constitutional Limitations*, *supra* note ___, at 65 (arguing that limits on congressional power are crossed when Congress "attempts to divest the Supreme Court and all other federal courts of jurisdiction at least to review state court decisions on constitutional challenges to governmental behavior); *id.* at 76-77 ("When Congress manipulates jurisdiction in an effort to deny recognition and judicial enforcement of constitutional rights, it has deliberately set itself against the Constitution as the Court understands that document."); *see also* REDISH, *supra* note ___, at 42 ("To the extent, then, that Congress has limited federal court jurisdiction in a manner than deprives a litigant of an independent forum for the adjudication of constitutional rights, the exercise of that power could possibly be held unconstitutional, even though Congress' action was an otherwise wholly proper exercise of its Article III power.").

[9] *See* Louise Weinberg, *The Article III Box: The Power of "Congress" to Attack the "Jurisdiction" of "Federal Courts"*, 78 TEX. L. REV. 1405, 1407 (describing the question of jurisdiction-stripping as "somewhat unreal" because jurisdiction "is not necessarily the rigorously narrow technical concept that experts on the subject would have it"); *see also* Ferejohn & Kramer, *supra* note ___, at 1034 ("[I]t is far more typical for the Court to exercise jurisdiction while applying

With merits stripping, what is stripped, reduced, or diminished is not the adjudicative authority of the federal courts; rather, it is the scope, reach, and applicability of substantive federal constitutional and statutory rights. The plaintiff's ability to vindicate and enforce federal constitutional and statutory rights is stripped and her claim of right will fail on the merits. Merits strips narrow who can sue whom over what real-world conduct and for what remedy.[10] The rights stripped or diminished may be grounded in the Constitution or federal statute. The strip may be effected by Congress, the President and the Executive Branch, or the courts, acting individually or in some combination.

A merits strip occurs when new rules of positive law diminish the scope of substantive rights. That is, the new rule shrinks, below some baseline, the range of people protected by the right, the range of people subject to the corresponding duty to act or not act in a given way, and the amount of conduct protected or regulated. That baseline may be the scope of rights and duties under the preceding body of law. Or the baseline may be some normative standard as to the preferred or ideal scope of the rights. This means, of course, that whether a strip has occurred will be highly subjective, depending on what one views as the "proper" scope of constitutional, statutory, or common law rights.[11]

Merits strips and jurisdiction strips arguably produce the same result—imposing "door-closing and access-limiting rules"[12] or limiting "decisionmaking opportunities" for federal courts.[13] This explains why commentators[14] and courts[15] frequently confuse the two. And it perhaps makes Louise Weinberg correct to argue that laws and judicial decisions

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substantive legal tests that leave political actors free to choose their course of action without any realistic threat of judicial intercession.").

[10] John Harrison, *Jurisdiction, Congressional Power, and Constitutional Remedies*, 86 GEO. L.J. 2513, 2515 (1998); *see* James Leonard, *Ubi Remedium Ibi Jurs, Or, Where There's a Remedy, There's a Right: A Skeptic's Critique of* Ex Parte Young, 54 SYRACUSE L. REV. 215, 280 (2004) (arguing that Congress "may therefore choose who is entitled to enforce a claim in court, and, equally important, who may not").

[11] *See* LAWRENCE G. SAGER, JUSTICE IN PLAINCLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE 6 (2004) (arguing that the object of constitutional interpretation is "the project of bringing our political community into better conformity with fundamental requirements of political justice"); Lawrence G. Sager, *Justice in Plain Clothes: Reflections on the Thinness of Constitutional Law*, 88 NW. U. L. REV. 410, 421 (1993) [hereinafter Sager, *Justice*] ("[G]overnment is obliged to energetically pursue the effacement of injustice's entrenched consequences.").

[12] Weinberg, *supra* note ___, at 1408.

[13] Judith Resnik, *The Federal Courts and Congress: Additional Sources, Alternative Texts, and Altered Aspirations*, 86 GEO. L.J. 2589, 2593 (1998) [hereinafter Resnik, *Federal Courts*].

[14] *See* Judicial Conference of the United States, Long Range Plan for the Federal Courts, *reprinted in* 166 F.R.D. 49, 88-89 (1995) (describing dispute between "those who favor increased 'federalization' of the law against those who favor limiting federal court jurisdiction."); Resnik, *Federal Courts*, *supra* note ___, at 2615 (describing statute authorizing prosecution of particular crime as a "jurisdiction-conferring statute" and the Supreme Court decision striking it down as "arguing against federal jurisdiction for the statute"); Resnik, *Trial as Error, supra* note ___, at 979 ("As state and federal legislatures or courts come to be seen as friendly or hostile to certain groups or claims (pro-labor or anti-labor, pro-corporations or anti-corporations, pro-civil rights or anti-civil rights), granting or repealing federal jurisdiction provides a vehicle for advancing political goals about substantive reforms . . ."); Glen Staszewski, *Avoiding Absurdity*, 81 IND. L.J. 1001, 1035 (2006) [hereinafter Staszewski, *Avoiding Absurdity*] (arguing that recognizing certain "actionable federal constitutional claims would dramatically expand the jurisdiction of federal courts").

[15] *See* United Phosphorus Ltd. v. Angus Chem. Co., 322 F. 3d 942 (7th Cir. 2003) (en banc); *infra* notes ___ and accompanying text.

repealing or limiting substantive rights and causes of action—what I here describe as merits strips—may "loosely but realistically" be called limits on jurisdiction.[16]

But they are not the same and should not be conflated or discussed as if they are. First, there are essential differences between stripping the substantive merits of claims of right and stripping judicial jurisdiction, a subset of essential differences between substantive merits and subject matter jurisdiction generally.[17] The two concepts, even if producing seemingly similar results, must be kept distinct.

Second, and more importantly, the two concepts do not, in fact, produce similar results. The results look similar if the focus is on the size of federal dockets (the number of actions filed in federal court). Arguably, fewer plaintiffs will bring actions in federal court to vindicate federal rights knowing those rights have been stripped to some degree and that they are likely to lose on the claim.[18] But several dispositive distinctions emerge when we shift the focus to two other concerns: 1) real-world actors and their real-world conduct and 2) the litigation process itself.

One difference is textual, the linguistic direction of the stripping act. Jurisdiction strips target the subject matter jurisdiction of the courts, their raw adjudicative power to hear and resolve cases. Merits strips target substantive legal rules, rights, and duties that protect and control real-world actors and their real-world conduct.[19]

A second difference is what remains in the wake of the strip. Jurisdiction stripping merely pushes cases out of federal court and into state court, where litigants still may assert, and have vindicated, their claims of federal right.[20] Merits strips eliminate federal rights altogether; a merits strip means no federal positive law provision exists as law establishing a right that can be violated or enforced on the facts at issue, in any court.[21] A merits strip constitutes a far more direct and complete limitation on federal rights. It also is a more transparent limitation, signaling the public as to the true scope of substantive rights and better

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[16] *See* Weinberg, *supra* note ___, at 1407-08; *see also* Resnik, *Trial as Error*, *supra* note ___, at 1004 (discussing link between size of federal docket and extent to which Congress regulates under its powers).

[17] *Compare* Howard M. Wasserman, *Jurisdiction and Merits*, 80 WASH. L. REV. 643, 644-45 (2005) [hereinafter Wasserman, *Jurisdiction*] (arguing that courts often fail to maintain the necessary clear line between subject matter jurisdiction and substantive merits of federal claims of right) *with* Evan Tsen Lee, *The Dubious Concept of Jurisdiction*, 54 HASTINGS L.J. 1613, 1614 (2003) ("[T]here is no hard conceptual difference between jurisdiction and the merits . . . . [T]he line between jurisdictional issues and merits issues is always at some level arbitrary."); *see also* Arbaugh v. Y&H Corp., 126 S. Ct. 1235, 1238-39 (2006) (resolving split as to whether element of Title VII claims goes to jurisdiction of courts or merits of plaintiff's claim under the statute).

[18] *See infra* notes ___ and accompanying text.

[19] *See infra* Part II.B.1.

[20] *See* Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605, 628 (1981); Hart, *supra* note ___, at 1401; Sager, *Constitutional Limitations*, *supra* note ___, at 40.

[21] *See infra* Part II.B.2.

allowing the pubic to hold rule makers democratically accountable for unpopular limits on those rights.[22]

And a merits strip achieves a different result—a reduction not in judicial jurisdiction, but in real-world conduct regulated. Federal courts have jurisdiction over all civil actions "arising under" the Constitution, laws, and treaties of the United States.[23] They can hear and resolve any claims brought before them to vindicate rights established by federal law.[24] And the quantum of jurisdiction is undiminished by a merits strip; the courts remain open and clothed with the power to adjudicate cases asserting federal claims of right. The merits strip instead changes the quantum of extant substantive federal law and rights; it diminishes the amount of real-world actors and conduct subject to federal legal protection or constraint and the degree of judicial enforceability of those federal rights.[25]

The final difference is how the stripping enactment plays out in the litigation process. First, the characterization of a stripping act determines whether a particular legal rule applies to the case at hand. As the Court recently reaffirmed in *Hamdan v. Rumsfeld*,[26] a jurisdiction strip automatically applies retroactively to pending cases, while a merits strip may not apply to pre-enactment conduct or may raise constitutional concerns if it does.[27] Proper characterization will be necessary as a choice of law rule.

The characterization also affects the time and manner in which legal and factual issues underlying the stripping enactment establishing the legal rule will be resolved. A strip targeting jurisdiction will be resolved at one stage in the litigation process, while a strip targeting the merits will be resolved at another.[28] Importantly, facts underlying a merits stripping rule go, by definition, to the merits of the plaintiff's claim and thus, if in dispute, must be resolved at trial on the merits, with a jury functioning as factfinder.[29] Ultimately, the proper characterization of a stripping rule may be necessary to protect the constitutional right to have a jury as decision maker for disputed factual issues.[30]

Let me now pause to elaborate on two points about the framework underlying these arguments. First, the concept of merits stripping rests on a Hohfeldian understanding of rights and corresponding duties. If a

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[22] *See* Eisenberg, *supra* note ___, at 520-21 (describing spectrum of jurisdictional statutes, with the more problematic end including "blatant efforts" to alter or reduce the impact of judicial results); Martin H. Redish & Christopher R. Pudelski, *Legislative Deception, Separation of Powers, and the Democratic Process: Harnassing the Political Theory of* United States v. Klein, 100 NW. U. L. REV. 437, 450 (2006) (criticizing Congress for "political shell game" of manipulating procedure rather than directly altering rules of decision); *see infra* notes ___ and accompanying text.

[23] 28 U.S.C. § 1331.

[24] *See* Wasserman, *Jurisdiction*, *supra* note ___, at 697-98.

[25] *See infra* notes ___ and accompanying text.

[26] 126 S. Ct. 2749 (2006).

[27] *See id.* at 2764-65; *id.* at 2810 (Scalia, J., dissenting); *infra* notes ___ and accompanying text.

[28] *See* Wasserman, *Jurisdiction*, *supra* note ___, at 649-52 (arguing that jurisdictional issues and merits issues are resolved at different stages in the litigation process); *infra* notes ___ and accompanying text.

[29] *See* Wasserman, *Jurisdiction*, *supra* note ___, at 654-55

[30] *See* U.S. CONST. amend. VII; *infra* notes ___ and accompanying text.

positive constitutional or statutory provision (as written and/or interpreted) establishes a rule of law under which A can engage in some conduct free from interference from B, that provision grants to A a "right." If no such positive law enactment exists, A has "no right." If the rule of law grants a right to A by requiring B to act or refrain from acting in a certain way, then B is under a "duty." And if that rule of law does not exist, B is under "no duty" to act or refrain from acting.[31] As Corbin explains the framework, a right exists for A when legal rules require government to aid A by controlling B and B's conduct; if legal rules do not require government to aid A as against B, he has no right.[32]

Second, a word about terminology. What we are talking about might be better labeled "merits diminution"—a diminishing of the level or quantum of rights and the amount of existing rights-creating substantive law. I use the word "stripping" to maintain the parallel with its oft-conflated counterpart, jurisdiction stripping. And the word is accurate, capturing the notion of a diminution or reduction of something, here, real-world rights.

But I do not use stripping in the pejorative sense often associated with jurisdiction stripping.[33] Nor do I question the structural or constitutional legitimacy of merits stripping, of Congress or the courts diminishing substantive rights. There is intellectual controversy over the power and legitimacy of jurisdiction stripping,[34] a controversy as to which I remain agnostic for present purposes. The point is that there should be no such controversy over the core examples of merits stripping that I discuss. One may question the normative legal wisdom of a stripping rule and we may wish that rights were broader than they are. But that says nothing about the structural legitimacy of the stripping act.[35]

This article catalogues the concept of merits stripping. It first describes several of the forms that merits stripping can take and the many legal actors who can effect strips. I identify six ways that sub-constitutional (primarily statutory) rights can be stripped and multiple ways that constitutional rights can be stripped, by courts, Congress, or the executive, individually or in concert.[36] I next examine several key precepts forming the basis for the distinction between jurisdiction and merits generally, and the narrower distinction between jurisdiction stripping and merits stripping.[37] Finally, I detail four essential facial and

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[31] *See* Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 30 (1913); Arthur L. Corbin, *Jural Relations and their Classification*, 30 YALE L.J. 226, 229 (1921).

[32] *See* Corbin, *supra* note ___, at 229.

[33] *See*, Resnik, *Federal Courts*, *supra* note ___, at 2592-93 ("The issue has historically been posed as if Congress was a predator, taking jurisdiction and remedial power away from the Article III judiciary.").

[34] *See* Evan Caminker, *Allocating the Judicial Power in a "Unified Judiciary"*, 78 TEX. L. REV. 1513, 1513 n.1 (2000) (discussing "wide range" of answers that scholars have provided to the question of congressional control over judicial jurisdiction).

[35] *See infra* Part II.B.4.

[36] *See infra* Part I.

[37] *See infra* Part II.A.

functional distinctions between merits strips and true jurisdiction strips and show why the concepts must be kept distinct.[38]

## I. MERITS STRIPPING

Cass Sunstein recognizes that what "precedes any new legislative enactment is always some body of law, whether legislatively or judicially created."[39] There similarly is a preexisting body of law preceding any new judicial decision interpreting the Constitution or statute or any new executive regulation or enforcement decision.

The preexisting body of law establishes substantive legal rights in some and imposes corresponding legal duties in others.[40] When a substantive right is merits stripped, rights and duties established by preexisting positive-law rules are diminished or eliminated; so, too, is the amount of conduct from which the rights-bearer is protected and the amount of conduct which the duty-bearer must do or refrain from doing.

As previously stated, a merits strip occurs when new positive law—constitutional or statutory, established by legislature, executive, or judiciary—diminishes the scope of existing substantive rights. That is, a new rule of law shrinks, below some baseline, the range of people protected by a right, the range of people subject to a corresponding duty to act or not act in a given way, and the amount of conduct protected or regulated. That baseline may be the scope of rights and duties under the preexisting body of law. Or the baseline may be some (admittedly subjective) normative standard as to the preferred or ideal scope of rights. The defining feature is that the level of existing rights and duties rests below that line.

### *A. Statutory Merits Stripping: Six Forms*

#### *1. Failure to Enact Legislation*

Congress can merits strip by considering and taking significant steps to enact rights-creating or rights-expanding legislation, but ultimately declining or failing to enact it, thereby leaving in place lower, arguably insufficient preexisting levels of legal rights and duties.

One might resist defining failure to enact as a strip because non-enactment means that no rights ever were conferred (and no duties imposed), not that pre-existing rights and duties had been eliminated or diminished. No one can enforce anticipated rights not should one place much reliance on them. And, in fact, not every failure to enact a rights-creating bill should be understood as a strip. It is too easy for one of 535 members of Congress to introduce a bill to say that introduction, without more, created some baseline of rights and that the failure to enact

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[38] *See infra* Part II.B.
[39] Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 325 (2000).
[40] *See supra* notes ___ and accompanying text.

stripped rights below the baseline. And even a bill with broad support and a seemingly good chance of passage is as likely to fail in the end.

The merits-strip label applies only to particular legislative situations in which circumstances surrounding a proposal somehow create expectations within Congress, the public, or the class of would-be beneficiaries of rights. The anticipated new rights become part of the normative baseline of substantive rights—what we prefer the baseline be and, depending on how far the legislative machinery had progressed before failing, what we expected or hoped the new baseline to become. The question is when circumstances create reasonable enough anticipations of a new baseline that the extant status quo becomes a diminution.

### *a. Legislative Circumstances and Expectations*

One possible point is when an issue has made it onto the "legislative agenda" as one subject "to which government officials, and people outside of government closely associated with those officials, are paying some serious attention at any given time."[41] This takes the issue beyond a simple proposal and into a legal rule that the public and members of Congress consider significant enough that they can and should expect it to pass into law.[42]

The question then becomes when something makes it onto the legislative agenda. Political scientist Sarah Binder looked to the editorial pages of *The New York Times*, labeling any policy issue discussed in an editorial a "potential enactment" and using the number of editorials on an issue as a proxy for the significance of that issue and its potential for enactment.[43] Following this methodology, we might say that significant attention on some proposed rights-creating legislation in *The Times* creates expectations and a new baseline.

Another possible line is the level of presidential involvement with a particular bill; substantial executive involvement signals that the bill is a serious proposal under serious consideration. The modern President, through formal and informal powers,[44] "usually dominates the legislative

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[41] SARAH BINDER, STALEMATE: CAUSES AND CONSEQUENCES OF LEGISLATIVE GRIDLOCK 36 (2004); see *id.* (defining legislative agenda as "the range of policy ideas plausibly on the radar screens of policymaking elite and active electorates").

[42] *Cf.* Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2340-41 (discussing failure of divided government to pass potentially significant measures that make it onto the legislative agenda).

[43] BINDER, *supra* note ___, at 37. Binder explains that the editorial page in the nation's paper of record responds to issues under consideration in Washington and highlights public problems deserving of attention. *Id.*

[44] *See* U.S. CONST. art. I, § 7 (establishing legislative process, including presidential veto); *id.* art. II, § 3 (defining presidential power to recommend to Congress "such Measures as he shall judge necessary and expedient"); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952) (describing the President's lawmaking role as "the recommending of laws he thinks wise and the vetoing of laws he thinks bad"); Vasan Kesavan & J. Gregory Sidak, *The Legislator-in-Chief*, 44 WM. & MARY L. REV. 1, 4 (2002)("Americans today identify the President as the Legislator-in-Chief.").

process from start to finish."[45] Serious presidential involvement and support for some enactment, given the President's ability to focus legislative and national popular attention and support, often dictates the difference between enactment and non-enactment of rights-creating positive law.[46] For example, President Franklin Delano Roosevelt refused to push antilynching legislation in the 1930s for fear of alienating southern Democrats and destroying the rest of his New Deal agenda and such legislation never was enacted.[47] On the other hand, the historic Civil Rights Act of 1964 arguably passed as a result of a combination of President John F. Kennedy's rhetorical ability to convince the nation of the need for strong civil rights legislation and President Lyndon Johnson's political ability to push strong, meaningful legislation.[48] As unprecedented as the 1964 Act was,[49] had the bill failed something could be seen as having been taken away, as a result of that strong presidential support.

Third, we might define non-enactment as a strip where individual bills are part of a broader coordinated effort, inside and outside Congress, to establish legal rights. Such an effort creates expectations that, when no rights-creating legislation results, the movement's failure strips anticipated rights.

The paradigm might be the long push for federal protection from race discrimination from the 1930s until passage of the 1964 Act.[50] That movement featured a significant legislative component. Two-hundred fifty anti-discrimination bills were introduced between 1937 and 1950,

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[45] Robert J. Delahunty & John C. Yoo, *Thinking About Presidents*, 90 CORNELL L. REV. ___, ___ (2005) (manuscript at 118); Kesavan & Sidak, *supra* note ___, at 63 (arguing that the Constitution "envision[s] the President as an active participant in the embryonic stages of law making"); McNollGast, *Legislative Intent: The Use of Positive Political Theory in Statutory Interpretation*, 57 LAW & CONTEMP. PROB. 3, 18 (1984) (arguing that the President influences the content of legislation long before any bill is signed).

[46] Delahunty & Yoo, *supra* note ___, at 121 ("The President's ready access to the media . . . allows him to set the terms of the nation's political discourse and to focus it on the topics of particular interest to him. . . . [T]he President usually can succeed in implementing major parts of his program."); McNollGast, *supra* note ___, at 17 ("An examination of the president's role in the legislative process leads inexorably to the conclusion that the president is a member of most enacting coalitions.").

[47] CHARLES W. WHALEN & BARABAR WHALEN, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT xiv (1985).

[48] *See* ROBERT D. LOEVY, TO END ALL SEGREGATION: THE POLITICS OF THE PASSAGE OF THE CIVIL RIGHTS ACT OF 1964, 324 (199).

[49] *See id.* at 337 ("Clearly passage of the Civil Rights Act of 1964 was a great 'rush of action' following a 'deadlock' over civil rights for black Americans that had lasted for almost 100 years."); Daniel B. Rodriguez & Barry R. Weingast, *The Positive Poltical Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and its Interpretation*, 151 U. PA. L. REV. 1417, 1423 (2003) [hereinafter Rodriguez & Weingast, *New Perspectives*] ("[B]y any measure, this statute represents one of the landmark pieces of modern social legislation and a major effort b the national government to address racial injustice in twentieth-century America.").

[50] *See* Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation after* Morrison *and* Kimel, 110 YALE L.J. 441, 487-88 (2000) (arguing that the Act emerged from a "complex history" of social activism, judicial decisions, and legislative action); *see generally* MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004) (tracing history of the twentieth-century Civil Rights Movement).

including 72 during 1949 and 1950.[51] The number increased further beginning in the late 1940s and throughout the 50s.

At the same time, civil rights advocates undertook a concerted campaign of constitutional litigation against race discrimination, culminating in the Supreme Court's 1954 decision holding unconstitutional "separate but equal" public school facilities in *Brown v. Board of Education*.[52] Congress, in turn, recognized these changes in the judicial understanding of the Fourteenth Amendment, which helped, ultimately, to spur further legislative action.[53] In the early 1960s, civil rights protesters also brought a series of judicial challenges to Jim Crow discrimination in places of public accommodation, with the protesters generally prevailing in unanimous, albeit narrow decisions.[54]

Advocates simultaneously undertook a campaign of direct action protests and demonstrations, most famously the 1957 Montgomery Bus Boycott and the Freedom Rides of the early 1960s, which called national public and political attention to the cause of racial desegregation.[55] The only civil rights measures enacted from Reconstruction until 1964—the Civil Rights Acts of 1957 and 1960—were congressional responses to this direct action.[56]

And civil rights advocates continued to take their case to the streets into the early 1960s (particularly through sit-ins and marches) and when met by southern law enforcement with excessive force in response (particularly in Birmingham, Alabama), captured on television and broadcast to a nation, they brought the moral dimensions of the problem to national public light.[57] This, in turn, placed the issue front-and-center on President Kennedy's, and thus Congress', legislative agenda.[58]

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[51] *See* Rebecca E. Zietlow, *To Secure These Rights: Congress, Courts and the 1964 Civil Rights Act*, 57 RUTGERS L. REV. 945, 959 (2005).

[52] 347 U.S. 383 (1954); *see also* KLARMAN, *supra* note ___, at 463 ("*Brown* plainly inspired blacks. To have the Court declare segregation to be unconstitutional was symbolically important, and it furthered the hope and the conviction that fundamental racial change was possible.").

[53] *See* KLARMAN, *supra* note ___, at 366 (arguing that the Civil Rights Act of 1957, the first since Reconstruction, was made possible by *Brown*); Zietlow, *supra* note ___, at 992-93 (describing members of Congress who saw Title VI of the 1964 Act as speeding up the enforcement of *Brown*'s mandate); *see also* KLARMAN, *supra* note ___, at 467 (arguing that *Brown* made Jim Crow seem vulnerable).

[54] *See* Joel K. Goldstein, *Constitutional Dialogue and the Civil Rights Act of 1964*, 49 ST. LOUIS U. L.J. 1095, 1097, 1099-1100 (2005); Post & Siegel, *supra* note ___, at 288 (arguing that the federal courts became clogged with thousands of suits by protesters challenging Jim Crow laws); *see, e.g.*, Avent v. North Carolina, 373 U.S. 375 (1963); Shuttlesworth v. City of Birmingham, 373 U.S. 262 (1963).

[55] *See* KLARMAN, *supra* note ___, at 467; LOEVY, *supra* note ____, at 21-23; WHALEN & WHALEN, *supra* note ___, at xvi; Post & Siegel, *supra* note ___, at 491-92; Zietlow, *supra* note ___, at 959-60. For a detailed discussion of the strategy and execution of the Montgomery Bus Boycott, see Christopher Coleman, Laurence D. Nee, Leonard S. Rubinowitz, *Social Moevments and Social-Change Litigation: Synergy in the Montgomery Bus Boycott*, 30 LAW & SOC. INQUIRY 663 (2005)

[56] *See* WHALEN & WHALEN, *supra* note ___, at xvi.

[57] *See* KLARMAN, *supra* note ___, at 428 (arguing that the violence that particular southern politicians and leaders "cultivated, condoned, or unintentionally fomented proved critical to transforming national opinion on race"); *id.* at

[58] ESKRIDGE, *supra* note ___, at 2-3; KLARMAN, *supra* note ___, at 435-36; LOEVY, *supra* note ___, at 11-17; WHALEN & WHALEN, *supra* note ___, at 232-33; Goldstein, *supra* note __, at 1101-02; *see also* Klarman, *supra* note ___, at 436 ("Birmingham changed everything."); Post & Siegel, *supra* note ___, at 508 ("[I]t was not until thousands of protests forced the federal hand that

The early unsuccessful or less successful legislative efforts, combined with continued direct action, set the stage for the more legislative serious run at civil rights in 1963-64. Enough people in Congress, the executive branch, and the public finally saw racial equality as an idea whose "time has come."[59] Had the Civil Rights Act of 1964 not been enacted or had it been watered down to a weak and ineffectual shell, as both the 1957 and 1960 Acts arguably had been,[60] it could be described as taking away the substantive federal rights that this broad campaign had sought to obtain.

### *b. Stripping by Non-Enactment*

If we define some legislative non-enactment as a merits strip, what is notable is that the legislative process itself effects the strip. The rules and structure of the legislative process dictate the content of resulting substantive law and the rights created (or not created) under that law.[61] Legislation must clear numerous "vetogates"—procedural hurdles that must be confronted and cleared and at which any piece of rights-creating legislation can be defeated or narrowed.[62] Legislative opponents may kill or drain the force from a proposal—strip the rights—through these processes.[63]

The most obvious of these hurdles is the constitutional command of bicameralism and presentment, requiring that three distinct entities—the House of Representatives, the Senate, and the Executive—approve the identical piece of legislation.[64] Rights-creating legislation may originate

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Congress was finally willing to enact the Civil Rights Act of 1964 to accomplish what the Framers of the Fourteenth Amendment through they had achieved.").

[59] LOEVY, *supra* note ___, at 282-83 (quoting statement by Everett Dirksen); Goldstein, *supra* note ___, at 1101 (quoting President Kennedy calling the moral issue "as old as scripture" and "as clear as the American Constitution").

[60] Thurgood Marshall famously denounced the 1960 Act as "not worth the paper it's written on." DANIEL M. BERMAN, A BILL BECOMES A LAW: THE CIVIL RIGHTS ACT OF 1960, 135 (1962); *see also* WILIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY, & ELIZABETH GARRET, LEGISLATION AND STATUTORY INTERPRETATION 4-5 (3d ed. 2001); LOEVY, *supra* note ___, at 24; WHALEN & WHALEN, *supra* note ___, at xvi.

[61] *See* McNollGast, *supra* note ___, at 18; Nicole L. Gueron, *An Idea Whose Time Has Come: A Comparative Procedural History of the Civil Rights Acts of 1960, 1964, and 1991*, 104 YALE L.J. 1201, 1201 (1995) (emphasizing the influence of "procedural mechanisms relied upon by members of Congress to transform a legislative aspiration into a binding law of the United States").

[62] *See* McNollGast, *supra* note ___, at 18 ("[A] bill must survive a gauntlet of veto gates in each chamber, each of which is supervised by members chosen by their peers to exercise gatekeeping authority.").

[63] *See* Rodriguez & Weingast, *New Perspectives*, *supra* note ___, at 1453 (arguing that "institutional details of Congress" aid opposition legislators); Glen Staszewski, *Rejecting the Myth of Popular Sovereignty and Applying an Agency Model to Direct Democracy*, 56 VAND. L. REV. 395, 462 (2003) [hereinafter Staszewski, *Rejecting*] (arguing that structural filters within the legislative process provide a variety of opportunities to defeat proposed legislation); *see also* Daniel B. Rodriguez & Barry R. Weingast, *The Paradox of Expansionist Statutory Interpretations* (manuscript at 19) [hereinafter Rodriguez & Weingast, *Paradox*] (arguing that these devices also can be seen "as structuring the process of legislative bargaining").

[64] U.S. Const. art. I, § 7; The Federalist No. 62, at 346 (James Madison) (Clinton Rossiter, ed. 1961) ("No law or resolution can now be passed without the concurrence, first, of a majority of the people, and then of a majority of the states"); Clinton v. New York, 524 U.S. 417, 438 (1998) (striking down statute that, in purpose and effect, allowed the President to amend a portion of congressional statutes by repealing particular provisions in each).

with any of the three actors.[65] Initial control over proposals to change existing public policy, as by creating new substantive rights is vested in Congress, but divided between the two houses; the President's power to veto any congressional proposal means the President must be a partner to the rights-creating bargain.[66] All three institutions must produce an outcome acceptable to the other two; conversely, an opponent within one actor can defeat rights by drafting in a way she knows will ensure defeat with another actor. One house may deliberately draft a bill in a way that its leaders know will be acceptable to the other house.[67] And both houses must draft in a way acceptable to the President, on threat of a veto subject to override only by a difficult-to-obtain 2/3 super-majorities in both houses.[68]

The second, and most notorious, procedural opportunity to strip is the Senate filibuster, which presently requires a 3/5 supermajority (60 out of 100 members) to end debate and bring a matter to floor vote.[69] The filibuster essentially imposes a supermajority requirement in at least one house for passage of any controversial or high-profile rights-creating legislation.[70] In other words, it allows a minority in the Senate to strip

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[65] *See* U.S. CONST. art. I; *id.* art. II, § 3; Kesavan & Sidak, *supra* note ___, at 52-53 (describing evolution of modern Presidents seizing legislative initiative and the view of some in Congress that its role is not to start from scratch, but to work over what the President drafts); *see, e.g.,* LOEVY, *supra* note ___, at 29-32 (describing process of drafting and lobbying for the initial Kennedy White House omnibus proposal for what became the Civil Rights Act of 1964); Gueron, *supra* note ___, at 1204 (describing competing, polar initial proposals by the Republican President and Democratic Congress in the debates over the Civil Rights Act of 1991).

[66] McNollGast, *supra* note ___, at 17.

[67] *See* ESKRIDGE, *supra* note ___, at 22; *see also id.* (describing support for Senate version of 1964 Act by House Democratic leaders, who knew that failure to adopt the Senate bill in full would require a House-Senate Conference, adding further delay); LOEVY, *supra* note ___, at 307 (stating that Senate amendments to the civil rights bill had been fully accepted by House leadership before the bill passed the Senate); Rodriguez & Weingast, *New Perspectives*, *supra* note ___, at 1471 (stating that Senate supporters of the Civil Rights Act of 1964 were careful to limit changes to those that would be acceptable to the House).

[68] *See* U.S. Const. art. I, § 7; Delahunty & Yoo, *supra* note ___, at 119 ("Because of the high transaction costs involved merely in securing majorities in each House of a bicameral legislature—let alone two-thirds supermajorities in each—the President's veto power enables him to wield enormous influence over the legislative process . . ."); Kesavan & Sidak, *supra* note ___, at 39 ("[T]he President's recommendation is a sort of veto-an embryonic veto warning Congress not to present the President with legislation that does not comport with the President's legislative agenda unless Congress can muster a requisite two-thirds supermajority in each House of Congress."); McNollGast, *supra* note ___, at 17 ("Unless Congress is sufficiently united to override a presidential veto, the threat of a veto constitutes an important check on the content of legislation. [It] induces members of Congress to take presidential preferences into consideration when writing legislation."); *see also* LOEVY, *supra* note ___, at 324 (discussing the differences in scope and strength of the civil rights bill that President Johnson obtained in 1964 as opposed to what President Kennedy might have obtained); *id.* at 322 (quoting MERLE MILLER, LYNDON: AN ORAL BIOGRAPHY 307 (1980)) ("Kennedy, faced with possible Senate opposition, would almost surely have compromised somewhere, . . . . Lyndon refused to delete, refused to compromise, anywhere.").

[69] *See* Standing Rules of the Senate, No. 108-15, Rule XXII (2005); ESKRIDGE, *supra* note ___, at 6 & n.c; Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181, 182 (1997).

[70] *See* Fisk & Chemerinsky, *supra* note ___, at 215 ("The widespread use of filibusters or threats of filibusters has effectively increased the number of votes it takes to enact legislation from fifty-one (or fifty plus the vice president's vote) to sixty."); Rodriguez & Weingast, *Paradox*, *supra* note ___, at 70 ("All major legislation addressing fundamental problems must overcome a filibuster; to be meaningful, this legislation must represent a major change in the status quo."); *see also* Rodriguez & Weingast, *New Perspectives*, *supra* note ___, at 1464 (arguing that a de facto supermajority often is needed in the House to avoid the block of a committee).

even a right favored by the President and smaller majorities in both houses.[71] The filibuster stripped, or substantially weakened, arguably the point of a strip, civil rights measures prior to 1964.[72] Most famous of these is Sen. Strom Thurmond's record 24-hour, 18-minute filibuster in 1957.[73] Much of the history of the 1964 Act focuses on the defeat of two Senate filibusters (one lasting 15 days, the other an unequaled 58 days), the first time a civil-rights filibuster had been defeated.[74]

Strips also may result from the efforts of the fourth actor in the legislative process: outside lobbying and interest groups.[75] One unique interest group in the process is the Judicial Conference of the United States, the voice of the federal judiciary advising Congress on legislative matters.[76] Because the federal judiciary provides the primary adjudicative forum for these newly created rights, its voice weighs on the initial decision to create rights, particularly with regard to the impact a new cause of action likely will have on the courts' docket and workload.[77] This lobbying tends to go in only one direction, however—towards a strip of the rights that Congress (or some in Congress) wants to establish. As Judith Resnik argues, the

> underlying assumption of the impact process is that increasing filings are at best a 'problem' to be mediated; the impact statements are not elaborations of the benefits generated by causes of action but rather of the bureaucratic difficulties that new legislation could pose for judges.[78]

The Judicial Conference's views about the scope of substantive federal law have evolved in the same direction as judicial doctrine.[79] The Conference supported both the public accommodations and equal

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[71] *See* Fisk & Chemerinsky, *supra* note ___, at 182.

[72] *See* LOEVY, *supra* note ___, at 7; Fisk & Chemerinsky, *supra* note ___, at 199; Zietlow, *supra* note ___, at 960-61; *supra* note ___.

[73] *See* NADINE COHODAS, STROM THURMOND AND THE POLITICS OF SOUTHERN CHANGE 294-300 (1993); LOEVY, *supra* note ___, at 130.

[74] *See* ESKRIDGE, *supra* note ___, at 17-22; LOEVY, *supra* note ___, at 182-85, 281-86; WHALEN & WHALEN, *supra* note ___, at 124-84; Fisk & Chemerinsky, *supra* note ___, at 199-200; Rodriguez & Weingast, *New Perspectives*, *supra* note ___, at 1423-24; *see also* LOEVY, *supra* note ___, at 286 (stating that this was the first time in Senate history that cloture had been invoked on a civil rights bill); WHALEN & WHALEN, *supra* note ___, at 148 (same).

[75] *See* Eskridge, *supra* note ___, at 359-60 ("Interest groups are important because they bring issues to the attention of Congress, and because they are capable of maintaining issues on the national agenda and blocking legislative initiatives.").

[76] *See* Resnik, *Federal Courts*, *supra* note ___, at 2616 ("The federal judiciary has had a long history of advising Congress on a variety of topics and specifically on what the boundaries of federal court jurisdiction should be."); *see also* Resnik, *Trial as Error*, *supra* note ___, at 978 ("While the idea that jurisdictional issues were 'basic policy . . . for Congress to decide' remained for som judges, the Conference proferred its views on some bills plainly concerned with such basic policy.").

[77] *See* Resnik, *Trial as Error*, *supra* note ___, at 978; Resnik, *Federal Courts*, *supra* note ___, at 2618.

[78] Resnik, *Federal Courts*, *supra* note ___, at 2618.

[79] *Id.* at 2621 (arguing that the federal judiciary first complained and argued against the federalization of crimes, then imposed the same limits as matters of constitutional law); *infra* notes ___ and accompanying text.

employment opportunity provisions of the Civil Rights Act of 1964, recognizing that more cases may be brought in federal court, but that it would not impose an unreasonable burden. Thirty years later, the Conference warned only of the negative workload impact of the Violence Against Women Act of 1994 ("VAWA").[80] VAWA created a right to be free from crimes of violence motivated by gender, enforceable by a private civil action in federal or state court by the injured person for damages and other relief. [81] The bill was under congressional consideration for several years, during which the federal judiciary provided substantial input, predicting a litigation explosion of more than 13,000 federal-court actions.[82] Then-Chief Justice Rehnquist came out against the new cause of action and the Judicial Conference initially opposed, then took no position, on the new right.[83]

The institutional lobbying on VAWA mirrors the judiciary's recent overall opposition to any new federal causes of action.[84] This was reflected in the 1995 Long Range Plan for the Federal Courts, which decried the loss of "judicial federalism" resulting from Congress "'federalizing' crimes previously prosecuted in state courts and creating new federal causes of action over matters previously resolved in state courts."[85] The Conference echoed the Chief Justice in urging Congress to "exercise restraint" in enacting legislation creating federal rights.[86]

*2. Legislating Narrowly*

A second, related way that Congress merits strips is by legislating more narrowly than the constitutional and political baseline would have allowed, creating rights and imposing duties, but narrower than they might have been. Oliver Wendell Holmes recognized that "the limits contemplated for the coverage of a statute are as significant a part of its purpose as is its affirmative thrust."[87] Those limits reflect the degree to which Congress has stripped the scope of the statutory right.

*a. Ex Ante Strips*

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[80] Pub. L. No. 103-322, Title IV, 108 Stat. 1941-42 (1994).

[81] 42 U.S.C. § 13981(b), (c), (e)(3).

[82] *See* Resnik, *Federal Courts*, *supra* note ___, at 2618-19; Resnik, *History*, *supra* note ___, at 224 n.194.

[83] *See* Resnik, *Federal Courts*, *supra* note ___, at 2618-19 & n.170; Resnik, *History*, *supra* note ___, at 224 n.194.

[84] Resnik, *Trial as Error*, *supra* note ___, at 1020 ("[A]s a lobbying organization, the federal judiciary has chosen to oppose the creation of new federal rights . . ."); *see* Resnik, *Federal Courts*, *supra* note ___, at 2618 (describing lobbying "against new (and unspecified) federal rights creation, accompanied by federal question jurisdiction").

[85] Judicial Conference of the United States, Long Range Plan for the Federal Courts, *reprinted in* 166 F.R.D. 49, 82 (1995); Resnik, *Federal Courts*, *supra* note ___, at 2620-21.

[86] *See Long Range Plan*, 166 F.R.D. at 88-89; 1991 Year End Report—138 Cong. Rec. S443-01 (1992); Resnik, *Federal Courts*, *supra* note ___, at 2620-21 ("The Plan counsels against the creation of new federal civil rights and raises the possibility of retreat from some of the jurisdictional grants already given.").

[87] Bator, *supra* note ___, at 633.

Congress can limit a statutory right ex ante, at the time of its creation. This often is a product of the legislative process, because one way around a veto-gate is to amend and compromise, narrowing the rights created to minimize objections.[88] Legislative opponents often seek not to defeat a measure at these hurdles, but to weaken it, perhaps enough to render any rights created meaningless.[89] This arguably is what happened with the Civil Rights Acts of 1957 and 1960.[90] What many argue made the 1964 Act unique as an example of rights-creating legislation was the refusal of civil rights activists and their supporters to compromise as to the scope of the new rights and their ultimate success in getting the legislation they wanted.[91]

But some of the rights created by the 1964 Act were stripped in this sense, notably in the employment-discrimination provisions of Title VII.[92] That provision prohibits discrimination in the terms and conditions of hiring and employment because of race, color, religion, sex, or national origin.[93] But the right protects only employees, not independent contractors.[94] It limits "employers" on whom the duty not to discriminate is imposed to any "person engaged in an industry affecting commerce who has fifteen employees for each working day" over a period of time.[95] It prohibits covered employers from discriminating on numerous bases, but not, for example, sexual orientation[96] or political affiliation.[97]

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[88] *See* Staszewski, *Rejecting*, *supra* note ___, at 462.

[89] *See* Rodriguez & Weingast, *Paradox*, *supra* note ___, at 19 (arguing that "compromise entails leaving controversial provisions out" or "specifically limiting the impact of the policy in ways that appease pivotal moderates").

[90] *See supra* notes ___ and accompanying text.

[91] *See* LOEVY, *supra* note ___, at 324-25 ("Any new law which would have satisfied the demands of black Americans and their committed white allies could not have been remotely acceptable to Southern whites. . . . Since no compromise was possible, a fight to the finish was the only possible outcome for the Civil Rights Act of 1964, and such a fight to the finish was what occurred."); *but see* Rodriguez & Weingast, *Paradox*, *supra* note ___, at 24 (arguing that this common view devalues the pivotal role played by Republican moderates, whose assent was essential to overcoming Senate filibuster); Rodriguez & Weingast, *New Perspectives*, *supra* note ___, at 1467 (arguing "it was the Republicans who forced a compromise on the moderate version of the bill, rather than the Democrats compelling Republicans to acquiesce in a stronger bill than they wanted").

[92] 42 U.S.C. § 2000e; *see also* LOEVY, *supra* note ___, at 65 (describing addition of fair employment practice provision in House subcommittee); Rodriguez & Weingast, *New Perspectives*, *supra* note ___, at 1467-68 (same).

[93] 42 U.S.C. § 2000e-2(a).

[94] *See* 42 U.S.C. § 2000e(f) ("The term 'employee' means an individual employed by an employer . . ."); Farlow v. Wachovia Bank of N.C., N.A., 259 F.3d 309, 316 (4th Cir. 2001) (affirming grant of summary judgment because plaintiff was independent contractor, thus not an employee protected by the statute).

[95] 42 U.S.C. § 2000e(b). This limitation came about in two steps. Congress set the threshold at 25 employees in 1964, then reduced it to 15 employees (in a merits expansion) in 1972. *See* Wasserman, *Jurisdiction*, *supra* note ___, at 644 n.2; *see also* Arbaugh v. Y&H Corp., 126 S. Ct. 1235, 1238-39 (2006) (holding that quantum-of-employee requirement is an element of the plaintiff's claim); Wasserman, *Jurisdiction*, *supra* note ___, at 703 (making same argument).

[96] *See* Bibby v. Coca-Cola Bottling Co., 260 F.3d 257, 265 (3d Cir. 2001) ("Because the evidence produced by [the plaintiff]—and indeed, his very claim—indicated only that he was being harassed on the basis of sexual orientation, rather than because of his sex, the District Court properly determined that there was no cause of action under Title VII."); *but see* Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 203 (1994) (arguing that stigmatization of gays functions as part of a larger system of social control based on gender).

These limitations all reflect discretionary congressional choices as to the breadth of the statutory right it created. Congress could, as a constitutional matter, have protected independent contractors and others who "work for" a company, even if not employers.[98] Congress could have prohibited discrimination on other bases, such as sexual orientation. It also constitutionally could have reached all persons engaged in industries affecting commerce, even those with fewer than twenty-five or fifteen employees.[99] Legislators imposed such limitations for a variety of policy reasons—to keep the federal government and federal law away from mom-and-pop operations in small communities or to avoid imposing new federal duties on small businesses less able to bear the costs of compliance.[100] The narrower right likely was necessary to retain support from moderate Republicans in Congress.[101]

*Ex ante* merits strips are similarly vulnerable to the criticism that there has been no strip because Congress has not actually taken anything away. It merely has declined to confer the full scope of rights that it constitutionally and politically might have, a decision at the heart of its institutional discretion. But recall that a merits strip occurs whenever substantive rights fall or remain below some normative (if subjective) baseline.[102] The rights established in Title VII were stripped (diminished) relative to the baseline of the reaches of Congress's constitutional powers.[103] And they perhaps were stripped relative to what the rights were expected or anticipated to become.

### *b. Ex Post Strips*

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[97] *See* Eugene Volokh, *Same-Sex Marriage and Slippery Slopes*, 33 HOFSTRA L. REV. 1155, 1188 (2005) (stating that government discrimination based on political affiliation is presumptively unconstitutional, but most states do not prohibit it as to private entities).

[98] *Cf.* 42 U.S.C. § 1981(a) (prohibiting race discrimination in the making and enforcing of contracts); Danco, Inc. v. Wal-Mart Stores, Inc., 178 F.3d 8, 13-14 (1st Cir. 1999) (holding that independent contractors could sue under § 1981 for discrimination in the contract of employment).

[99] *See* Wasserman, *Jurisdiction*, *supra* note ___, at 681-83, 690-91 (arguing that quantum-of-employees element in Title VII represents a legislative policy choice); *infra* notes ___ and accompanying text.

[100] *See* 110 Cong. Rec. 13092 (1964) (statement of Sen. Cotton) ("[I]f we desire violence, bitterness, and hatred among the races in this country, I suggest that we put the Federal Government with a club into the livelihood of every small businessman . . ."); *id.* (arguing that Title VII "would lead the Federal Government with all of its power, majesty and bureaucracy into the way of dealing with a small businessman who can ill-afford to protect himself."); *but see id.* at 13092 (statement of Sen. Morse) ("I know of no reason why we should set small businessmen aside and say, 'You can continue discrimination with immunity.'").

[101] *See id.* at 13088 (statement of Sen. Humphrey) (emphasizing narrow reach of bill that leaves 92 per cent of employers nationwide uncovered); Rodriguez & Weingast, *New Perspectives*, *supra* note ___, at 1472-73 (describing the need to make the bill more palatable to pivotal moderate Republicans, leading to amendments ameliorating impact of Title VII on American business).

[102] *See supra* notes ___ and accompanying text.

[103] We can look at limits on jurisdiction in much the same way. For example, Congress gave district courts diversity jurisdiction, but imposed (or left in place) complete diversity and amount-in-controversy requirements, neither of which is required by Article III. *See* 28 U.S.C. § 1331; Strawbridge v. Curtiss, 7 U.S. (3 Cranch.) 267 (1806). By granting less jurisdiction than it constitutionally might have, Congress and the courts affect a mild form of jurisdiction strip, a limitation on federal jurisdiction below what it might have been. *See* Ferejohn & Kramer, *supra* note ___, at 1016-17.

Congress also can merits strip ex post through subsequent amending legislation, after members have had an opportunity to see how courts have interpreted and applied the statute and how the right has played out in the real world.[104] Congress may strip rights in response to expansionist judicial interpretations, those that extend the act to cover more circumstances or actors or to require those covered by the act to do more than anticipated.[105] A subsequent Congress may have different policy preferences than the enacting Congress, to which interpreting courts have not paid sufficient heed.[106] Courts may have resolved ambiguities in the original statute, ambiguities that were necessary for the formation of the original enacting majority.[107] Congress may now want to resolve those ambiguities in a different direction.

Of course, it is difficult to determine the frequency or efficacy of such stripping in response to judicial opinions. Some commentators question whether Congress is capable of consistently monitoring and reacting to the vast number of statutory-interpretation decisions.[108] On the other hand, a study by William Eskridge found that from 1967-1990, Congress overrode an average of ten Supreme Court decisions per term, with increasing frequency beginning in the mid-1970s.[109] Importantly, it is not necessary that "Congress" as a whole be able to monitor judicial decisions;[110] two other groups in the legislative process are able to monitor and place overrides on the legislative agenda—outside interest

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[104] *See* Ferejohn & Kramer, *supra* note ___, at 1020 ("Congress is then implicitly invited to overrule or modify the courts' decisions if Congress decided that they are wrong."); Michael E. Solimine & James L. Walker, *The Next Word: Congressional Resonse to Supreme Court Statutory Decisions*, 65 TEMP. L. REV. 425, 425 (1992) ("Thus, when the United States Supreme Court interprets a federal statute in a manner repugnant to Congress, the latter may respond by legislatively modifying the statute in accordance with its intentions."); Donald H. Zeigler, *Rights, Rights of Action, and Remedies: An Integrated Approach*, 76 WASH. L. REV. 67, 121 (2001) ("[I]f Congress believes that the courts have made a serious error in interpreting a federal statute, Congress can amend it."); *see also* W. Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 115 (1991) (Stevens, J., dissenting) (citation omitted) ("In the domain of statutory interpretation, Congress is the master. It obviously has the power to correct our mistakes . . .").

[105] *See* Rodriguez & Weingast, *Paradox*, *supra* note ___, at 34; Amanda L. Tyler, *Continuity, Coherence, and the Canons*, 99 NW. U. L. REV. 1389, 1392 (2005) (emphasizing the interpretive importance of "legislative deal that brokered the statutory language as well as any background norms against which the language came into being").

[106] *See* William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 390 (1991) (arguing that the policy expectations of the current Congress and President may be more important to a court's interpretation than those of the enacting Congress).

[107] *See* Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2155 (2002) (arguing that statutory ambiguity may allow majorities to form, as members vote for the bill thinking it means different things, and all willing to take their chances in the courts).

[108] *See* Ferejohn & Kramer, *supra* note ___, at 974 n.25 ("Congress is often too busy worrying about new laws to spend its time supervising and revisiting judicial (mis)interpretations of the old ones."); Solimine & Walker, *supra* note ___, at 436 (describing as exaggerated the notion of a constant interplay and reversal between Congress and the courts as to statutory meaning); Tyler, *supra* note ___, at 1410 ("Congress is simply not equipped to react in the normal course to most statutory interpretation decisions and [its] track record suggests that its attention to statutory decisions is highly inconsistent.").

[109] Eskridge, *supra* note ___, at 338; *id.* (finding the rate of override of lower-court decisions increased to an average of thirty-four per term beginning in 1975); *see also* Solimine & Walker, *supra* note ___, at 451 & n.123 (finding that twenty-four statutory overrides occurred in the 1984-88 period).

[110] *See* Solimine & Walker, *supra* note ___, at 438 ("[T]he extent to which Congress as a whole is ignorant of Court decisions has probably been overstated.").

groups[111] and congressional committees with increased staffs.[112] At the very least, Eskridge suggests, Congress has strong incentives to monitor statutory decisions, particularly less controversial or high-profile decisions from lower courts.[113]

Consider the Foreign Trade Antitrust Improvements Act (FTAIA).[114] That statute was a deliberate congressional response to federal courts hearing and resolving claims under the Sherman Act[115] that involved entirely foreign conduct and injuries, with no domestic impact.[116] The amended statute reflected a congressional statement "to American exporters (and to firms doing business abroad) that the Sherman Act does not prevent them from entering into business arrangements . . . however anticompetitive, as long as those arrangements adversely affect only foreign markets."[117] The amendment responded to concerns among American business, one of the most successful organized interests when it comes to seeking legislative overrides of judicial decisions,[118] as to the lack of clarity as to what international and foreign conduct would be permitted under federal law.[119]

FTAIA merits strips, shrinking rights and duties imposed by the Sherman Antitrust Act that had been judicially expanded beyond congressional preferences. The stripping act sets a general rule that federal antitrust laws "shall not apply" to trade or commerce with foreign nations;[120] in other words, actors have no federal right to be free from restraints on foreign trade and there is no federal duty in foreign trade to refrain from conduct that constitutes such a restraint. The statute then excepts from the exception (in other words, leaves within the reach

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[111] *See* Eskridge, *supra* note ___, at 338 ("[O]rganized interest groups have proliferated, producing more monitoring of judicial decisions that are then brought to Congress' attention."); *id.* at 359-60 ("Interest groups are important because they bring issues to the attention of Congress, and because they are capable of maintaining issues on the national agenda and blocking legislative initiatives."); Solimine & Walker, *supra* note ___, at 452 ("For instance, interest groups are cognizant of many statutory decisions (as reflected by amicus activity) and their pressure drives some--though not all--responsive legislation."); *supra* notes ___ and accompanying text.

[112] *See* Eskridge, *supra* note ___, at 339 ("Because staffs are essential to monitoring judicial decisions (often through interest group communications), organizing congressional hearings (a virtual prerequisite for an override), and drafting committee reports and statutes, the dramatic increases in staff levels enable Congress to respond to statutory decisions by the federal judiciary more often."); Solimine & Walker, *supra* note ___, at 438 ("Both the House and Senate are decentralized institutions, and the actions of individual committees in both institutions may well have an impact on the interaction between Court and Congress under some circumstances. For example, the members and staffs of the House and Senate Judiciary Committees routinely monitor the statutory decisions of the Court."); *id.* at 451 (stating that a large number of override statutes emerge from the Judiciary and Labor committees, suggesting that both function as important legislative agenda-setters).

[113] Eskridge, *supra* note ___, at 415-16.

[114] 15 U.S.C. § 6a.

[115] 15 U.S.C. § 1.

[116] *See* United Phosporus, Ltd. v. Angus Chem. Co., 322 F. 3d 942, 946 (7th Cir. 2003) (en banc) ("[T]here has long been concern over over-reaching under our antitrust laws."); *see also* H.R. Rep. 97-686, 5-6, *reprinted in* 1982 U.S.C.C.A.N. 2487, 2490-91 (1982) (describing inconsistency among lower-courts as to quantum of domestic effects necessary for foreign business conduct to be subject to Sherman Act and the business uncertainty created by those inconsistencies).

[117] F. Hoffman-LaRoche Ltd. v. Empagran S.A., 542 U.S. 155, 160 (2005).

[118] *See* Eskridge, *supra* note ___, at 348 (finding that twenty-six percent of overrides in the survey were obtained by organized big business or labor interests); *id.* at

[119] H.R. 97-686, at ___, *reprinted in* 1982 U.S.C.C.A.N. at ___ (legislative history)

[120] 15 U.S.C. § 6a(A); *F.Hoffman-LaRoche*, 542 U.S. at 158.

of federal law) foreign conduct that would otherwise violate the Sherman Act that has a "direct, substantial, and reasonably foreseeable effect" on domestic (other-than-foreign) trade or commerce.[121] There thus remains a federal right to be free from restraints on trade in foreign trade (and a corresponding duty to refrain from such restraints), but that right is narrower than it was prior to the FTAIA stripping enactment.

*3. Stripping by Superseding Rights*

Congress may strip rights created by and existing under common law through superseding legislation. Common law rules exist at the sufferance of the legislature, lasting only as long as the legislature approves of the rules and the policy choices reflected in those rules.[122] Legislation in derogation of common law rights is disfavored, as reflected in courts' demand for a clear statement of legislative intent to repeal existing common law rules.[123] So long as that intent is clear, however, legislation altering, and stripping, the controlling rule is valid. And the power of Congress to preempt state common law through superseding federal statutory law lies at the heart of the Supremacy Clause and *Erie*.[124]

*a. Common Law Limits to Federal Rights*

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[121] 15 U.S.C. § 6a(B); *F. Hoffman-LaRoche*, 542 U.S. at 158. For a discussion of whether the FTAIA should be understood as merits strip or a jurisdiction strip, *see infra* notes ___ and accompanying text.

[122] *See* Christopher J. Peters, *Adjudicative Speech and the First Amendment*, 51 UCLA L. REV. 705, 709 (2004) (describing the "fairly obvious fact that the common law can be overridden by legislation" because the common law "reflects a de facto legislative policy to leave certain fields of the law unplowed by legislation"); *see also* Landgraf v. USI Film Prods., 511 U.S. 244, 272 (1994) ("In this country, legislation has come to supply the dominant means of legal ordering, and circumspection has given way to greater deference to legislative judgments."); GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 6 (1982) ("Courts, limited to honest interpretations of these statutes and committed to legislative supremacy, soon enough began to give them the authority they claimed for themselves.").

[123] *See, e.g.*, Norfolk Redevelopment and Housing Auth. v. Chesapeake and Potomac Telephone Co., 464 U.S. 30, 35-36 (1983) (quoting Fairfax's Devisee v. Hunter's Lessee, 11 U.S. (7 Cranch.) 603, 623 (1812)) ("It is a well-established principle of statutory construction that '[t]he common law . . . ought not to be deemed repealed, unless the language of a statute be clear and explicit for this purpose.'") (alteration in the original); Pierson v. Ray, 386 U.S. 547, 561 (1967) (requiring strict construction of statutes in derogation of common law); John F. Manning, *Continuity and the Legislative Design*, 79 NOTRE DAME L. REV. 1863, 1873 (2004) (arguing that "the canon explicitly directs courts to resolve doubts against changes in the legal status quo").

[124] U.S. Const. art. VI ("The Constitution, and the Laws of the United States which shall be made in Pursuance thereof, . . . shall be the supreme Law of the Land."); Erie R. Co. v. Tompkins, 304 U.S. 64, 78-79 (1938); *see* Siegel, *supra* note ___, at 1168 ("A striking number of the most significant preemption cases of the last decade involve claims that federal law expressly or impliedly preempts state common law causes of action . . ."). One prominent example of this is ERISA, which has been held to completely preempt state law claims related to the provision of health insurance. *See, e.g.*, Aetna Health, Inc. v. Davila, 542 U.S. 200 (2004); *see also* Andrew M. Siegel, *The Court Against the Courts: Hostility to Litigation as an Organizing Them in the Rehnquist Court's Jurisprudence*, 84 TEX. L. REV. 1097, 1168-69 (2006) (collecting examples of federal law preempting state law causes of action); *cf.* Catherine Sharkey, *Preemption by Preamble: Federal Agencies and the Federalization of Tort Reform*, ___ DEPAUL L. REV. ___, ___ (2007) (manuscript at 2-3) (describing practice of federal agencies using preambles in federal regulations to displace competing or conflicting state common law).

One way to merits strip is to leave in place common law defenses that limit the reach of newly created rights. For example, the range of potential defendants and conduct subject to suit and liability for constitutional damages under § 1983 has been limited by the Court's conclusion that common law immunities existing in 1871—absolute legislative, judicial, and prosecutorial, as well as qualified executive—survived passage of the Ku Klux Klan Act of 1871 (of which § 1983 was a part).[125] That conclusion rested on the general statutory language and congressional silence as to pre-existing immunities, leading to the conclusion that Congress did not intend, and thus did not, undo common law or eliminate those immunities.[126] Congress has made no move to override those decisions and, in fact, has extended judicial immunity, further narrowing legal rights and duties.[127]

A more recent and controversial example is the use of the common law State Secrets Privilege to preclude constitutional and statutory claims. That privilege generally functions as an "evidentiary rule that permits the United States to 'block discovery in a lawsuit of any information that, if disclosed, would adversely affect national security.'"[128] But it often functions as a complete defense, requiring dismissal of ordinary civil actions against the federal government and federal officials in which, even though the plaintiff might prove her case using non-privileged evidence, the very subject matter of the action is deemed a state secret.[129]

In *Edmonds*, a woman was fired from her position as an FBI translator after filing a series of complaints with supervisors and others about security breaches and misconduct.[130] She brought suit, alleging violations of her First and Fifth Amendment rights and a violation of her rights under the Privacy Act; the district court dismissed all her claims under the State Secrets Privilege, holding that the very nature of her

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[125] *See, e.g.*, Imbler v. Pachtman, 424 U.S. 409, 424 (1976) (concluding that common law prosecutorial immunity was well-settled and the same policy concerns justify applying that immunity to § 1983); Scheur v. Rhodes, 413 U.S. 232, 247 (1974) (applying qualified immunity to suits against state executive-branch officers); Pierson v. Ray, 386 U.S. 547, 553-54 (1967) (stating that "[f]ew doctrines were more solidly established at common law than the immunity of judges from liability for damages" and that this "settled principle of law" was not abolished by § 1983); Tenney v. Brandhove, 341 U.S. 367, 376 (1951) (rejecting the conclusion that "Congress-itself a staunch advocate of legislative freedom-would impinge on a tradition so well grounded in history and reason" through the general language of § 1983); *see also* Siegel, *supra* note ___, at 1133 ("The Court has, on a number of occasions expressly acknowledged that the immunity doctrines are judge-extrapolated exceptions to categorical statutory text.").

[126] *See Pierson*, 386 U.S. at 554-55 ("The immunity of judges for acts within the judicial role is equally well established, and we presume that Congress would have specifically so provided had it wished to abolish the doctrine."); *Tenney*, 341 U.S. at 376 (same as to legislative immunity); *see also* Siegel, *supra* note ___, at 1133 n.131 ("The complicated immunity doctrines that have emerged over the last quarter-century serve as common law caveats to statutory exclamations.").

[127] In 1996, Congress amended § 1983 to extend judicial immunity to prohibit injunctions against judges unless a declaratory judgment was obtained and violated first. *See* Pub. L. 104-317, § 309(c) (1996) *codified at* 42 U.S.C. § 1983 ("[E]xcept that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.").

[128] Edmonds v. United States Dept. of Justice, 323 F. Supp. 2d 65, 71 (D.D.C. 2004) (quoting Ellsberg v. Mitchell, 709 F.2d 51, 56 (D.C.Cir.1983)).

[129] *Id.* at 78 (quoting Kasza v. Browner, 133 F. 3d 1159, 1166-67 (9th Cir. 1998)).

[130] *Id.* at 68-69.

employment as an FBI translator and the events surrounding her termination themselves constitute state secrets and could not be proven or defended against without the use of privileged evidence.[131] Whatever constitutional or statutory rights plaintiff had in her job could not be vindicated not because of the narrow scope of the rights themselves, but because of the survival of that outside common law defense.[132]

*b. Statutory Limits on Common Law Claims*

From the other direction are situations in which Congress enacts a law that limits the reach of pre-existing common law rights, as by limiting the persons or circumstances to which common law applies. Consider two similar examples.

The first is the Protection of Lawful Commerce in Arms Act of 2005.[133] It prohibits civil actions, in state or federal court, against gun sellers, manufacturers, and trade associations for damages or other remedy for an injury resulting from a third person's criminal or unlawful use of a firearm.[134] The purpose of the law is to stop states, municipalities, and individuals from bringing tort claims against the handgun industry arguing that the industry's distribution of guns created the "public nuisance" of handgun violence.[135] The second is the Personal Responsibility in Food Consumption Act of 2005, colloquially, the "cheeseburger bill."[136] This bill, which passed the House in October 2005 and was pending in the Senate, accorded similar protections to the fast food industry from tort claims alleging that the high fat content in fast food made it an unsafe product or caused obesity and other health problems.[137] The bill was a response to several lawsuits alleging common law negligence and other torts against the food industry.[138]

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[131] *Id.* at 79 (discussing First Amendment claim); *id.* at 80 (discussing Fifth Amendment claim).

[132] The State Secrets Privilege has become an issue in a number of actions challenging the National Security Agency's warrantless surveillance program. *See* Hepting v. AT&T, ___ F. Supp. 2d ___, ___ (N.D. Cal. 2006) (slip op. at 35) (denying motion to dismiss action on grounds of state secrets privilege).

[133] Pub. L. No. 109-92, 119 Stat. 2095 (2005), *codified* at 15 U.S.C. § 7901 *et seq.*

[134] 15 U.S.C. §§ 7902, 7903(5)(A). The law leaves in place particular common law causes of action, such as negligent entrustment, products liability, and breach of contract or warranty. *Id.* § 7902(5)(A)(i)-(v).

[135] *See* David Kairys, *Legislative Usurpation: The Early Practice and Constitutional Repudiation of Legislative Intervention in Adjudication*, 73 UMKC L. REV. 945, 948-49 (2005); 15 U.S.C. § 7901(b)(1).

[136] Personal Responsibility in Food Consumption Act of 2005, H.R. 554, 109th Cong. (2005) (as passed by House of Representatives, October 19, 2005). The first-ever Cheeseburger Bill was introduced in the House in 2003, with a corresponding, and more complex, bill in the Senate. *See* Ausness, *supra* note ___, at 891-92. H.R. 554 mirrored the 2003 Senate bill.

[137] *See* H.R. 554, 109th Cong. §§ 3, 4(5)(A) (prohibiting actions in federal or state court "arising out of, or related to a person's accumulated acts of consumption of a [defined fast food] product and weight gain, obesity, or a health condition"). As with the handgun law, this bill leaves in place actions in which the plaintiff can show reliance and proximate cause. *Id.* § 4(5)(B).

[138] *See, e.g.*, Pelman v. McDonald's Corp., 396 F.3d 508 (2d Cir. 2005) (reversing dismissal of class action alleging violations of New York Consumer Protection Act and common law negligence); William HALTOM & MICHAEL MCCANN, DISTORTING THE LAW: POLITICS MEDIA, AND THE LITIGATION CRISIS179-80 (2004) (describing first, voluntarily dismissed lawsuit against fast food chains for failing to disclose high fat content in food); Richard C. Ausness, *Tell Me What You*

Both bills work identical merits strips of extant common law rights by interposing a substantive federal affirmative defense to the common law claim for certain actors in certain situations, a defense that destroys the plaintiff's claim. Both grow out of congressional disapproval of how real-world rights have been wielded in courts and a desire to limit the scope of those rights.[139] And both were explicitly made retroactive, applying to and requiring dismissal of pending actions in state and federal court.[140]

Several objections can be leveled against this sub-category of merits strip. One objection is that such strips constitute legislative adjudication of litigation disputes, violating constitutional separation of powers between the judiciary and the legislature.[141] According to David Kairys, such a law does not reform tort law or the rules of manufacturer liability, but "simply decide[s] pending cases" grounded in traditional tort principles.[142]

But neither of these laws changes the result in a decided case. Rather, they change the applicable law in future and pending cases, often requiring dismissal or a defense victory. But this is what legislatures do.[143] Although we do not know ab initio how a particular nuisance suit against Smith and Wesson or a negligence suit against McDonald's would turn out under pre-existing common law, such a suit obviously fails under the applicable new statutes. Nor is application to pending cases problematic. Congress may enact legislation that applies retroactively in civil actions (that is, to conduct that antedates the statute, including to cases filed prior to the statute's enactment), so long as it makes clear its intent to do so.[144] Indeed, a retroactive law must be applied in reviewing a judgment on appeal, even if that judgment initially was entered under preexisting law.[145] That being the case, there is no problem with having them apply to cases still in the trial court that had not yet proceeded to judgment.

A second constitutional concern is whether Congress possesses substantive legislative power to enact the stripping legislation. But

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*Eat, and I Will Tell You Whom to Sue: Big Problems Ahead for "Big Food"?*, 39 GA. L. REV. 839, 841-42 (2005) (same).

[139] *See* 15 U.S.C. § 7901(a)(7) (finding that lawsuits against the gun industry "are based on theories without foundation in hundreds of years of the common law and jurisprudence of the United States and do not represent a bona fide expansion of the common law. The possible sustaining of these actions by a maverick judicial officer or petit jury would expand civil liability in a manner never contemplated by the framers of the Constitution, by Congress, or by the legislatures of the several States."); H.R. 554, 109th Cong. § 2(a)(4) ("[L]awsuits seeking to blame individual food and beverage providers . . . are not only legally frivolous and economically damaging, but also harmful to a healthy America.").

[140] *See* 15 U.S.C. § 7902(b); H.R. 554, 109th Cong. § 3(b).

[141] *See* Kairys, *supra* note ___, at 948 (describing handgun law as having "the attributes of a classic legislation usurpation of adjudication"); *id.* at 947 (arguing that the Framers' repudiation of state legislative interference with adjudication informs our understanding of separation of powers).

[142] *Id.* at 948.

[143] *See* Ferejohn & Kramer, *supra* note ___, at 965 ("If the legislature changes the applicable law, for example, judicial decisions obviously ought to reflect this fact.").

[144] *See* Landgraf v. USI Film Prods., 511 U.S. 244, 270 (1994); *see also* Ferejohn & Kramer, *supra* note ___, at 974 n.25 (arguing that Congress can change substantive law in response to judicial decisions "even to the extent of making its changes retroactive").

[145] *See Plaut*, 514 U.S. at 226.

Congress took care in both bills to establish constitutional bases for the exercise of its power, highlighting the interstate commerce effects of such lawsuits, as well as the concerns for individual constitutional rights.[146] Congress also made effect on commerce an element of the statutory defense that the industry member must establish in order to defeat the tort claim.[147]

Ultimately, objections to this type of strip reflect distrust of legislatures. Kairys's argument boils down to the view that legislatures are at the mercy of powerful litigants who will ignore the litigation process and send lobbyists into legislative halls seeking exemption from legal rules that apply to everyone else and from which the less powerful cannot gain similar immunity.[148] The *Landgraf* Court recognized that legislative politics "pose[] a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals.[149] That unfairness is overcome by requiring the legislature to make its intent clear.[150] This rule ensures that Congress will be subject to any political repercussions should its legislative choice—exempting an industry from ordinary tort liability—prove unpopular.

Perhaps Kairys is right that the handgun law or the cheeseburger bill reflect unwise policy that "undercut[s] coherent and consistent rules and sacrifice[s] basic fairness for the expediency of the well-connected."[151] But that tells us nothing about Congress' power to merits strip, only whether the strip is wise as a matter of public policy.

*4. Interpreting and Applying Statutes*

Determinations of the scope and reach of a rights-creating statute, and thus the ability to strip that scope and reach, do not end with passage in Congress. Congress does not and cannot anticipate every real-world factual situation to which a statute will be applied in the future.[152]

Statutory meaning is a product of what William Eskridge calls the "Court/Congress/President game," in which each is part of a process by which statutory policy is created and the policy preferences of each

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[146] *See* 15 U.S.C. § 7901(a) (setting out concerns for harm to interstate commerce resulting from suits against handgun industry, as well as desire to protect individual Second Amendment rights and separation of powers); H.R. 554, 109th Cong. § 2(a) (describing interstate commerce role of food and beverage industries).

[147] *See* 15 U.S.C. § 7903 (defining terms such as seller, manufacturer, and qualified product by reference to interstate commerce); *see infra* notes ___ and accompanying text.

[148] *See* Kairys, *supra* note ___, at 946 (describing concerns for "the resulting race of litigants to the assemblies and unfairness to those who had little or no influence with the legislatures"); *id.* at 950 (expressing concern for floodgates opening for any industry able to muster legislative support to respond to lawsuits with immunity bills, rather than meeting the substance of the lawsuit).

[149] *See Landgraf*, 511 U.S. at 266.

[150] *Id.* at 268 ("[A] requirement that Congress first make its intention clear helps ensure that Congress itself has determined that the benefits of retroactivity outweigh the potential for disruption or unfairness."); *id.* at 272-73 ("Requiring clear intent assures that Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits.").

[151] Kairys, *supra* note ___, at 950.

[152] *See* Tyler, *supra* note ___, at 1404.

affect that policy.[153] A statute must not only be drafted, it also must be interpreted, implemented, and applied to real-world situations, a seamless process of making—broadly or narrowly—policy.[154] But this creates uncertainty as to the meaning of a provision, thus the opportunity for rights to be stripped at later points in the lengthy and ongoing process.

Sometimes this role for the other branches is deliberate and explicit.[155] Many statutes are drafted with the expectation that courts will fill gaps through judicial common law reasoning and decisionmaking.[156] Others expressly await action by the President, executive branch officers, or administrative agencies, through regulatory rulemaking and enforcement decisions.[157] Judicial and executive interpretations of a statute are deemed as much a part of the legal rule as the statutory text.[158]

### *a. Executive Interpretation*

The President must "take Care that the Laws be faithfully executed," to enforce the civil and criminal laws of the United States.[159] The various department and agency heads help the President carry out that function.[160] Exercise of this power necessarily demands executive

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[153] Eskridge, *supra* note ____, at 390; *see* Zeigler, *supra* note ___, at 120 ("All actors in this process, whether legislative, administrative, or judicial, must work together to help achieve the underlying goals of federal statutes.").

[154] *See* Rodriguez & Weingast, *Paradox, supra* note ___, at 27 ("Statutory interpretation represents a critical element in the process by which legislative policy takes shape."); Zeigler, *supra* note ___, at 120 (describing the "drafting, enactment, interpretation, and implementation of legislation as a single, ongoing process").

[155] *See* SAGER, *supra* note ___, at 32 (defining "foundational statutes" reflecting a legislative strategy of generality and incompleteness and relianced on the independent normative judgment of the judiciary); Rosenkranz, *supra* note ___, at 2128-29 (defining "dynamic interpretive statutes" as "those that hinge on the future actions of others to be given content")

[156] *See, e.g.*, Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 596 (1994) (Kenendy, J., concurring) ("The common-law method instated by the fair use provision of the copyright statute . . . presumes that rules will emerge from the course of decisions."); Nat'l Soc'y of Professional Engineers, 435 U.S. 679, 688 (1978) (stating that the legislative history of the Sherman Act "makes it perfectly clear that [Congress] expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition"); *see also* SAGER, *supra* note ___, at 31 (arguing that the federal courts have had to "create substantial bodies of law whose origins are the compact and somewhat gnomic congressional utterances").

[157] *See* Gonzales v. Oregon, 126 S. Ct. 904, 914 (2005) ("Executive actors often must interpret the enactments Congress has charged them with enforcing and implementing."); Chevron, U.S.A., Inc. v. Nat'l Resources Defense Council, Inc., 467 U.S. 837, 843-44 (1984) ("If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation."); Lawson & Moore, *supra* note ___, at 1286 ("If Congress passes a statute creating a regulatory scheme and delegating to the President authority to implement it, then the President must interpret the statutory framework in deciding how best to carry the law into effect.").

[158] *See* Alexander v. Sandoval, 532 U.S. 275, 284 (2001) (stating that one cannot separate enforcement of a statute from enforcement of administrative regulations that authoritatively construe the statute itself); Golden State Transit Corp. v. City of Los Angeles, 493 U.S. 103, 112 (1989) ("A rule of law that is the product of judicial interpretation of a vague, ambiguous, or incomplete statutory provision is no less binding than a rule that is based on the plain meaning of a statute.").

[159] U.S. CONST. art. II, § 3; Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1280 (1996).

[160] U.S. CONST. art. II, § 2; *compare* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2327 (2001) (arguing that delegations of power to executive branch officials, nominated

statutory interpretation and determination of legislative meaning.[161] For example, the Attorney General is empowered to bring a civil action for equitable relief or consent decree to halt a "pattern or practice of conduct" by state and local law enforcement violating federal constitutional rights.[162] Before bringing such an action, of course, the Attorney General must interpret § 14141, determining whether particular conduct constitutes a prohibited "pattern or practice" of unconstitutional conduct and what type of relief to seek. A narrow executive understanding of those terms, as in an administrative politically less committed to civil rights enforcement, would produce a reduction—a strip—in the scope of the substantive rights Congress sought to protect.[163]

The greater opportunity to strip comes through rulemaking and enforcement in executive agencies. That power is enhanced by *Chevron* deference, under which courts defer to reasonable agency interpretations of statutes that a particular agency or official is authorized to administer.[164] By narrowly interpreting its statutory mandate, an executive can strip the substantive rights created, and the duties imposed, to conform to the direction of her (as opposed to the enacting Congress') policy preferences.[165] But *Chevron* deference applies only where the agency or official has been delegated authority to make rules and the rules in question were promulgated in the exercise of that authority; otherwise, the executive interpretation is entitled to respect "only to only to the extent it has the 'power to persuade.'"[166]

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and removable by the President at will and subject to at least informal control, should be understood "in some necessary and obvious way" as delegations to the President) *with* Kevin M. Stack, *The President's Statutory Powers to Administer Laws*, 106 COLUM. L. REV. 263, 322 (2006) (arguing for a conception of an independent agency role when power is delegated to the agency head)..

[161] *See* Gonzales v. Oregon, 126 S. Ct. 904, 914 (2006) ("Executive actors often must interpret the enactments Congress has charged them with enforcing and implementing."); United States v. Mead Corp., 533 U.S. 218, 227 ("[A]gencies charged with applying a statute necessarily make all sorts of interpretive choices."); Lawson & Moore, *supra* note ___, at 1280 (arguing that the President's many powers, "require law interpretation and thus indirectly empower the President, in contexts involving the exercise of those power, to interpret the laws"); *id.* at 1286 ("The process of exercising the executive power often requires interpretation, as . . . the legislature . . . will [not] always provide sufficient specificity to render such interpretation unnecessary."); *see also Chevron*, 467 U.S. at 843 ("The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules . . .") (citation and internal quotation marks omitted; alterations in original).

[162] *See* 42 U.S.C. § 14141; *infra* Part II.A.6.

[163] *See* David Rudovsky, *Running in Place: The Paradox of Expanding Rights and Restricted Remedies*, 2005 U. ILL. L. REV. 1199, 1241 (2005) ("[P]olitical realities have muted the law's potential reach.").

[164] *Chevron*, 467 U.S. at 843; Rosenkranz, *supra* note ___, at 2129; *see also* Kagan, *supra* note ___, at 2373-74 ("The assignment of policymaking functions . . . appropriately tracks political accountability; and political accountability, within the gaps left by Congress, attaches to and resides in choice by the President.").

[165] *Chevron* itself arose from a "[g]overnment-wide reexamination of regulatory burdens and complexities" that President Reagan undertook upon taking office in 1981, with the goal of narrowing the federal obligations and legal duties imposed on business and industry, and correspondingly, narrowing the rights of those protected by certain regulations. *See Chevron*, 467 U.S. at 857 (quoting 46 Fed. Reg. 16281 (1981)); Kagan, *supra* note ___, at 2374.

[166] *See Gonzales*, 126 S. Ct. at 914-15 ("Otherwise, the interpretation is 'entitled to respect' only to the extent it has the 'power to persuade.') (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)).

The level of deference accorded executive interpretation may dictate whether an executive merits strip succeeds or fails. For example, in 1994 the state of Oregon legalized physician-assisted suicide.[167] In response, in 2001, Attorney General John Ashcroft issued an Interpretive Rule declaring that assisting suicide is not a legitimate medical purpose under the federal Controlled Substances Act[168] and regulations passed under the Act and that prescribing drugs for that purpose would violate federal law.[169] Such conduct would subject a physician to license suspension as a matter of federal law, notwithstanding state-law authorization for that administration of drugs.[170]

Oregon law affirmatively created a right in terminally ill patients to die with dignity by receiving lethal doses of prescription drugs; the law declared the right and granted physicians immunity from liability for prescribing or dispensing drugs for this purpose, enabling the legal exercise of the right.[171] The federal Interpretive Rule attempted to strip state-law rights by subjecting physicians to professional liability under federal law, thereby disabling individuals from exercising those state-created rights.[172]

The Supreme Court struck the Interpretive Rule, however, finding that the Attorney General lacked statutory authority "to make a rule declaring illegitimate a medical standard for care and treatment of patients that is specifically authorized under state law."[173] This ultimately is a question of which actor effects the strip and how. Clearly, Congress could pass a rights-stripping federal statute prohibiting the administration of drugs for purpose of assisting suicide, trumping state-created rights.[174] It also could delegate such power to the executive branch. But the statutory silence in the Controlled Substances Act did not permit the stripping interpretation that the executive unilaterally imposed.[175]

### *b. Judicial Interpretation*

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[167] *See Gonzales*, 126 S. Ct. at 912; Or. Rev. Stat. § 127.800 *et seq*.

[168] 21 U.S.C. § 801.

[169] 66 Fed. Reg. 56608 (2001); *see* 21 U.S.C. § 829(a); 21 C.F.R. § 1306.04(a).

[170] *Id.*

[171] *See* Ore. Rev. Stat. § 127.805(1) ("An adult who is capable, is a resident of Oregon, and has been determined by the attending physician and consulting physician to be suffering from a terminal disease, and who has voluntarily expressed his or her wish to die, may make a written request for medication for the purpose of ending his or her life in a humane and dignified manner."); *id.* § 127.885 (immunizing administering physicians from civil, criminal, and professional liability); *see also Gonzales*, 126 S. Ct. at 912-13 (describing statutory procedures under Oregon law).

[172] *See Gonzales*, 126 S. Ct. at 914 ("There is little dispute that the Interpretive Rule would substantially disrupt the [Oregon] regime.").

[173] *See Gonzales*, 126 S. Ct. at 916.

[174] *See* U.S. CONST. art. VI. Assuming, of course, that the statute is within Congress's legislative power. *See* Gonzales v. Raich, 125 S. Ct. 2195, 2198-99 (2005) (holding that federal Controlled Substances Act could constitutionally regulate purely local cultivation and use of marijuana for medicinal purposes, as permitted under state law); *infra* Part I.A.5.

[175] *See Gonzales*, 126 S. Ct. at 924 ("In the face of the CSA's silence on the practice of medicine generally and its recognition of state regulation of the medical profession it is difficult to defend the Attorney General's declaration that the statute impliedly criminalizes physician-assisted suicide."); *see also* Sunstein, *supra* note ___, at 316 (describing view that the executive branch "may not engage in certain activities unless and until Congress has expressly authorized them to do so.. The relevant choices must be made legislatively rather than bureaucratically.").

Courts often determine the meaning of legislative text through canons, maxims, and rules of textual construction, "vital tools for rendering statutory interpretation more determinative."[176] These are presumptions and clear-statement rules, effectively making one interpretation or application more likely than another, a result overcome only by a clear textual statement that the opposite should occur.[177] Clear-statement rules enable a judicial merits strip, by pushing a court to adopt a narrower interpretation of ambiguous rights-creating language.

We examined one example of this with respect to the survival of official immunities under § 1983, which the Court has based on Congress' failure explicitly to override pre-existing common law rules in enacting § 1983.[178] These decisions represent strips of substantive statutory and constitutional rights through the imposition of judicially formulated rules.[179]

Another example is the question of whether a State or State agency is a "person" under particular federal statutes.[180] In resolving that issue under several different statutes, the Court has relied on "the ordinary rule of statutory construction that if Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'"[181] Because the general word "person" does not provide a sufficiently clear signal, states and state agencies cannot be named as defendants or subject to liability.[182] The clear-statement canon pushed

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[176] Rosenkranz, *supra* note ___, at 2148; *see also* Philip P. Frickey, *Revisiting the Revival of Theory in Statutory Interpretation: A Lecture in Honor of Irving Younger*, 84 MINN. L. REV. 199, 206 (1999) ("The canons are rules of thumb about statutory interpretation, and some of them are based on judicially identified policies."); Rosenkranz, *supra* note ___, at 2108 (arguing that interpretive rules "go hand in hand with the substantive statutes of the legislatures"); Tyler, *supra* note ___, at 1419 ("Many of the canons go a long way toward achieving predictability and continuity in the statutory regime, and for this reason they hold an important place in our legal tradition.").

[177] *See* Rosenkranz, *supra* note ___, at 2149; *id.* at 2097 ("Clear-statement rules . . . function as default rules . . ., in the sense that Congress may avoid the effect of such rules and achieve the desired result with an appropriately clear statement ."); *see also* Tyler, *supra* note ___, at 1420-21 (arguing that Congress should be familiar with the canons, which will allow it to anticipate how its statutes will be interpreted and to cut that interpretation off ex ante).

[178] *See supra* notes ___ and accompanying text.

[179] *See* Ferejohn & Kramer, *supra* note ___, at 1002 (adopting that description of official immunity).

[180] One example is the False Claims Act. *See* 31 U.S.C. § 3729(a) (imposing civil liability upon "[a]ny person . . . who knowingly presents, or causes to be presented, to an officer of the United States Government . . . a false or fraudulent claim for payment or approval"); *id.* § 3730(b)(1) (permitting action by private persons "for the person and for the United States Government . . . in the name of the Government"); *see also* Vermont Agency of Natural Resources v. United States *ex rel* Stevens, 529 U.S. 765, 768-69 (2000). A second example is 42 U.S.C. § 1983, the statutory vehicle for enforcing constitutional rights. *See* 42 U.S.C. § 1983 (prohibiting conduct by "Every person").

[181] *See Stevens*, 529 U.S. at 787 (applying canon to False Claims Act); Will v. Michigan Dept. of State Police, 491 U.S. 58, 65 (1989) (applying canon to § 1983); *see also* Gregory v. Ashcroft, 501 U.S. 452, 460-61 (1991) (holding that federal age discrimination statute did not apply to states and state entities absent clear statement by Congress). A clear statement was particularly required where a federal statute imposes new obligations on States or interferes with their historical sovereignty. *See Stevens*, 529 U.S. at 780-81; *Gregory*, 501 U.S. at 461; *Will*, 491 U.S. at 65.

[182] *See Stevens*, 529 U.S. at 787 (holding that states not persons under False Claims Act); *Will*, 491 U.S. at 66 (holding that states are not persons under § 1983); *see also* Karlan, *supra* note ___, at

the Court into a merits strip—it compelled the narrow interpretation of statutory language, in turn reducing the number of actors subject to a statutory duty and the amount of conduct subject to the limitations of the respective statutes. Whoever else could be sued or held liable for conduct that violates the Constitution or the False Claims Act, states could not be.

Again, Congress retains final say over the scope and meaning of the law through its ability to amend the statute in response to a stripping interpretation.[183] Recent history suggests that Congress has not been inclined to broaden a statutory right in response to a judicial strip of those rights.[184] That makes the Civil Rights Act of 1991[185] so noteworthy. Congress amended several federal employment-discrimination statutes in order to re-expand statutory rights that had been stripped by a series of narrow, arguably cramped, Supreme Court statutory-interpretation decisions.[186]

*5. Constitutional Invalidation*

Courts can effect merits strips by invalidating statutes, and the rights established, as unconstitutional. This category is a product of judicial review and the unique judicial role in evaluating governmental conduct against the norms of the Constitution.[187] Such a strip occurs amid the ongoing debate about constitutional interpretation, judicial review, democracy, popular constitutionalism, and the supremacy of the

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194 ("[N]othing in *Will* suggested that Congress would have lacked the power to include states within § 1983's purely corrective ambit."); Rosenkranz, *supra* note ___, at 2122-23 (arguing that, if Congress in § 1983 had specifically defined person to include states, the result in *Will* might have been different); Howard M. Wasserman, *Civil Rights Plaintiffs and John Doe Defendants: A Student in Section 19983 Procedure*, 25 CARDOZO L. REV. 793, 837 (2003) (arguing that Congress could amend § 1983 to define persons as including States); *but see Stevens*, 529 U.S. at 788 (Ginsburg, J., concurring in the judgment) (agreeing that the absence of a clear statement that the statute reaches States allows the Court to avoid the constitutional issue of whether Congress could do so),

[183] *See supra* notes ___ and accompanying text.

[184] *See* Eskridge, *supra* note ___, at 386-87 (emphasizing fact that initial attempt to override restrictive Supreme Court decisions in 1990 was vetoed by President George H.W. Bush and that the decisions only were overridden in 1991 by a change in the political landscape and the President's abandonment of his opposition to the overriding legislation); Gueron, *supra* note ___, at 1232 ("[S]pecific political events in the autumn of 1991 helped to precipitate the Act's passage.").

[185] Pub. L. No. 102-166, 105 Stat. 1072 (1991).

[186] *See* Landgraf v. USI Film Prods., 511 U.S. 244, 250-51(1994) (discussing several Supreme Court decisions that 1991 Act intended to overturn); Eskridge, *supra* note ___, at 333 & n.4 (listing eleven Supreme Court decisions overridden by Act); *compare, e.g.*, Patterson v. McLean Credit Union, 491 U.S. 164 (1989) (holding that 42 U.S.C. § 1981 did not prohibit race discrimination during the performance of a contract) *with* 42 U.S.C. § 1981(a) (redefining discrmination in making and enforcing of contracts to prohibit discrimination in enforcement).

[187] *See* SAGER, *supra* note ___, at 75 ("The judiciary is in the rough position of a quality control inspector examining some product for defects."); Michael Kent Curtis, *Judicial Review and Populism*, 38 WAKE FOREST L. REV. 313, 316 (2003) ("Though *Marbury v. Madison* had its critics at the time, most did not criticize the Court's assertion of the power of judicial review."); *see also* 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."); THE FEDERALIST No. 78, at 435 (Alexander Hamilton) ("A constitution is, in fact, and must be regarded by the judges as, a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body.").

unelected judiciary.[188] Courts can strip statutory rights on two constitutional grounds—because the statute exceeds the internal constraints on the powers of Congress as a legislative body of limited and enumerated powers[189] or because it runs afoul of external limitations on permissible legislation, notably what Lawrence Sager calls "liberty-bearing provisions" of the Bill of Rights and the Fourteenth Amendment.[190]

### *a. Internal Limitations*

Federalism concerns underlie the objection that statutes exceed congressional power by regulating conduct that historically had been the subject of state and local regulatory authority.[191] There is scholarly debate over judicial federalism and how vigorously courts should protect federalism interests.[192] But the Supreme Court has narrowly construed

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[188] *See* LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 107 (2004) (describing how theories of constitutional review all come back to the presence of judicial veto over popular views of constitutional meaning); *id.* at 253 (advocating change in judicial attitudes about judicial review, under which Justices see themselves as "responsible for interpreting the Constitution according to their best judgment, but with an awareness that there is a higher authority out there with power to overturn their decisions"); SAGER, *supra* note ___, at 5 (arguing that courts and judges disagree about their role in determining constitutional meaning and that doctrine about the relationship between the courts and other constitutional actors "appears to be in the midst of a seismic shift"); Curtis, *supra* note ___, at 319 ("Skepticism about judicial supremacy has its virtues. So does skepticism about a plan to eliminate judicial review."); Lawson & Moore, *supra* note ___, at 81 ("[T]o say that federal courts have the power, or duty, to interpret the Constitution is not necessarily to say that they have the power to interpret it *independently* of the views of other governmental actors.") (emphasis in original); Weinberg, *supra* note ___, 1400 (arguing that longstanding and continuing controversy over judicial review is product of "our democratic and republican values, our respect for majorities, and the traditional supremacy of legislation at common law"); Keith E. Whittington, *Extrajudicial Constitutional Interpretation: Three Objections and Responses*, 80 N.C. L. REV. 773, 784 (2002) ("As a theoretical matter judicial review and judicial supremacy should be distinguished."); *id.* at 845 ("In contests between different conceptions of rights, there are principled reasons for favoring more rather than less democratic procedures for resolving the dispute.").

[189] *See* United States v. Morrison, 529 U.S. 598, 607 (2000) ("Every law enacted by Congress must be based on one or more of its powers enumerated in the Constitution. 'The powers of the legislature are defined and limited . . .'"); United States v. Lopez, 514 U.S. 549, 590 (1995) (Thomas, J., concurring) (describing the "well-known truth that the new Government would have only the limited and enumerated powers found in the Constitution"); *see also* THE FEDERALIST No. 52, at 297 (James Madison).

[190] *See* SAGER, *supra* note ___, at 3 (describing liberty-bearing provisions as those concerned with limits on government behavior); Matthew D. Adler, *Rights Against Rules: The Moral Structure of American Constitutional Law*, 97 MICH. L. REV. 1, 13 (1998) ("Constitutional rights in our own legal world are structured, not as shields *around* particular actions, but as shields *against* particular rules.") (emphasis in original); Curtis, *supra* note ___, at 315-16 (arguing that James Madison emphasized judicial enforcement and guardianship of rights as way to make the Bill of Rights effective); Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 288 & n.278 (2000) (noting judicial enforcement as a basis for both Thomas Jefferson and Madison to support a Bill of Rights); Weinberg, *supra* note ___, at 1404 (arguing that *Marbury* is about the establishment of judicial review of government misconduct).

[191] *See Morrison*, 529 U.S. at 615 (expressing concern that Congress' commerce power "completely obliterate the Constitution's distinction between national and local authority"); *id.* at 620 (stating that limitations on the scope of Congress' power under the Fourteenth Amendment "are necessary to prevent the Fourteenth Amendment from obliterating the Framers' carefully crafted balance of power between the States and the National Government").

[192] *Compare* Kramer, *supra* note ___, at 288 ("[T]here are areas in which the Court has historically exercised no or virtually no effective review, of which patrolling the limits of Congress's power vis-à-vis the states has been the foremost example throughout our history.") *and* Herbet Wechsler, *supra* note ___, at 558 ("[T]he national political process in the United States—

the scope of Congress' lawmaking power, particularly its power to create statutory civil rights and to impose duties on state and local governments, when acting pursuant to its powers under the Commerce Clause and § 5 of the Fourteenth Amendment.[193] These merits strips occur within, and are a product of, a federalist system of government.[194] They uphold a distinct vision of constitutional structure by stripping individual rights that Congress believed it had the power to preserve.[195] If such substantive rights are to exist, it is for the states to enact them.[196]

A paradigmatic example is VAWA, which created an enforceable statutory right to be free from "crimes of violence motivated by gender,"[197] which the Supreme Court invalidated in *United States v. Morrison*.[198] The case arose from a sexual assault on a state-university campus; when the university imposed no meaningful punishment against the alleged attacker, the victim brought a private action against him under VAWA.[199]

The Court first held that VAWA exceeded Congress' power under the Commerce Clause[200] because that power was focused on the regulation of "economic activity" and Congress could not legislate against the aggregate effects of entirely non-economic activity, such as

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especially the role of the states in the composition and selection of the central government—is intrinsically well adapted to retarding or restraining new intrusions by the center on the domain of the states.") *with* Baker, *supra* note ___, at 972 ("Substantive judicial review of federalism issues is necessary both to remind Congress of its own obligation to restrain itself, and to catch any particularly egregious examples of federal overreaching . . .") (citation omitted) *and* Baker & Young, *supra* note ___, at 134 ("A state's freedom from federal interference, like an individual's freedom from governmental restrictions on expression or private choices, is an essentially *negative* freedom.") (emphasis in original).

[193] *See* Kramer, *supra* note ___, at 288 ("[T]he Court has apparently made protecting the states from Congress one of its top priorities."); Post & Siegel, *supra* note ___, at 484 (arguing that federalism cases "present an account of our federal system in which there are large stretches of state and municipal law free from federal interference"); Siegel, *supra* note ___, at 1153 ("[T]he Court has shown its greatest sympathy for federalism doctrines that protect the states from litigation . . ."); *see also* Colker & Brudney, *supra* note ___, at 88 ("[T]he Court's aggressive incursions into federal legislative affairs often appeared improper in hindsight."); Curtis, *supra* note ___, at 352 (arguing that courts have failed in the exercise of judicial review by striking down legislation even though a strong argument could be made for its constitutionality); *see, e.g.*, United States v. Morrison, 529 U.S. 598 (2000) (striking down Violence Against Women Act as invalid under both provisions); City of Boerne v. Flores, 521 U.S. 507 (1997) (striking down Religious Freedom Restoration Act as invalid under § 5); United States v. Lopez, 514 U.S. 549 (1995); *but see* Gonzales v. Raich, 125 S. Ct. 2195, 2198-99 (2005) (holding that Congress could constitutionally regulate purely local cultivation and use of marijuana for medicinal purposes).

[194] *See* Resnik, *Trial as Error*, *supra* note ___, at 980 ("[J]urisdictional arguments can, in a federalist government, also be premised on an objection to the fact of federal—rather than state—enforcement of that norm.").

[195] *See* Post & Siegel, *supra* note ___, at 502 (arguing that the Court's vigorous protection of federalism ignores the fact that "Americans now believe that a core function of the federal government is to prohibit discrimination in the public and private sectors"); *id.* at 508 (arguing that courts "must distinguish federal antidiscrimination legislation that is compatible with the proper role of the federal government from that which is not").

[196] *See* Resnik, *Trial as Error*, *supra* note ___, at 1004 (describing arguments that "certain problems . . . belong to the states"); *see also* United States v. Morrison, 529 U.S. 598, 615 (2000) (expressing concern for Congress asserting authority to regulate "areas of traditional state regulation").

[197] 42 U.S.C. § 13981(b); *supra* notes ___ and accompanying text.

[198] 529 U.S. 598 (2000); *supra* notes ___ and accompanying text.

[199] *Morrison*, 529 U.S. at 601-02. The federal government initiated a separate criminal prosecution. *See id.*

[200] U.S. CONST. art. I, § 8, cl.3.

crimes of violence.[201] The Court also concluded that VAWA exceeded Congress' § 5 power to enforce the Fourteenth Amendment by "appropriate legislation,"[202] running afoul of the "time-honored principle that the Fourteenth Amendment, by its very terms, prohibits only state action."[203] By making directly liable private individuals who have committed violent criminal acts motivated by gender bias, VAWA went beyond Congress' power to halt discrimination and misconduct by state officials.[204] The statute made no effort to regulate states or state actors so as to fall within the § 5 power.[205] Federal law directly regulating purely private conduct lacks the "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end" required for a law to constitute "appropriate legislation" under § 5.[206]

### *b. External Limitations*

One obvious source of external limitations on congressional power is the First Amendment.[207] A right may be stripped by a judicial determination that the rights-creating statute violated the freedom of speech. Consider here *Bartnicki v. Vopper*.[208]

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[201] *Morrison*, 529 U.S. at 613, 617-18; *see also* Colker & Brudney, *supra* note ___, at 115 ("The Court rewrote the Commerce Clause test . . . by emphasizing that the economic aspect of the regulated activity was central to holdings in prior decisions . . ."). Congress retains a limited power to prohibit employment-related gender-motivated violence, which likely would constitute sexual harassment under Title VII, because details of employee relations are economic and thus within even the narrower Commerce Clause power. *See* Post & Siegel, *supra* note ___, at 449.

[202] *See* U.S. CONST. amend. XIV, § 5.

[203] *See Morrison*, 529 U.S. at 621; U.S. CONST. amend. XIV, § 1; *see also* Estreicher & Lemos, *supra* note ___, at 151 ("Rather than acting directly on state actors such as prosectors, judges, policement, and caseworkers, Congress devised a way to help women overcome the effects of state-sponsored bias by suing their attackers themselves."); Post & Siegel, *supra* note ___, at 502 ("The Court reaches back to the nineteenth century . . . for the view that it would threaten the 'balance of power between the States and the National Government' for Congress to regulate the conduct of private actors under the Fourteenth Amendment."). Valid legislation under § 5 must have "congruence and proportionality" between the constitutional injury to be remedied and the means adopted to that end. *See Morrison*, 529 U.S. at 625. A law directed at individuals rather than a State or state actor, the Court seemed to suggest, could not be congruent and proportional. *Id.*

[204] *See Morrison*, 529 U.S. at 625-26; *see also* Estreicher & Lemos, *supra* note ___, at 157 (arguing that the Court seized on the fact VAWA's penalties were directed against private individuals as the distinction that took it beyond the limits of § 5 power); Post & Siegel, *supra* note ___, at 475 (arguing that *Morrison* "intimate[s] that even properly 'remedial' Section 5 legislation cannot 'prohibit actions by private individuals'"); *id.* at 483 (arguing that *Morrison* presents a vision of federal-state relations "which seemingly would prevent Congress from employing Section 5 to regulate the conduct of private parties").

[205] *See Morrison*, 529 U.S. at 626 (emphasizing that VAWA imposed no liability or consequence on any state officials who may have acted improperly in the case).

[206] *Id.* at 625-26; *see also* City of Boerne v. Flores, 521 U.S. 507, 520 (1997) (establishing congruence and proportionality standard as test for § 5 legislation); Colker & Brudney, *supra* note ___, at 104.

[207] *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 105 (1980) ("Virtually everyone agrees that the courts should be heavily involved in reviewing impediments to free speech . . . ."); *id.* at 116 ("'[S]trict review' is always appropriate where free expression is in issue."); Wasserman, *First Amendment Lochnerism*, *supra* note ___, at ___ (arguing that there has been the least structural controversy over the institution of judicial review in the First Amendment context).

[208] 532 U.S. 514 (2001).

That case involved a civil action for actual, statutory, and punitive damages under a federal statute prohibiting the intentional disclosure of the contents of wire, oral, or electronic communications where the discloser knew or had reason to know the information was obtained through an unlawful interception.[209] The statute created a right, protecting an individual's interest in the privacy of her communications and providing a remedy for the violation of that right.[210]

During the course of a high-profile and contentious teachers' labor dispute, two union officials had a telephone conversation in which one said that if the school board failed to move from its hard-line position on salary increases, the union was "gonna have to go to their, their homes . . . To blow off their front porches, we'll have to do some work on some of those guys."[211] The call was intercepted by an unknown person and passed along anonymously to one individual who in turned passed it to several media outlets, which broadcast the contents of the conversation.[212]

The Supreme Court held that a statutory claim for damages against the second disseminator and the media was barred by the heightened protection accorded publication of truthful information, lawfully obtained, on a matter of public significance, which can be punished only to serve a governmental need of the "highest order."[213] Because neither defendant had been involved in the initial illegal interception, neither could be subject to damages for subsequent publication when the communication was passed to them.[214] While recognizing a strong government interest in protecting the privacy of the conversants, those

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[209] 18 U.S.C. §§ 2511(1)(c), 2520(c)(2).

[210] *See Bartnicki*, 532 U.S. at 526; *see also e.g.*, S. Rep. No. 1097, 90th Cong., 66 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2153 (describing statutory purpose as "protecting the privacy" of communication); *id.* at 67 ("Every spoken word relating to each man's personal marital, religious, political, or commercial concerns can be intercepted by an unseen auditor and turned against the speaker to the audience's advantages."); *Electronic Communications Privacy Act: Hearings before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice, Senate Committee on the Judiciary*, 99th Cong. 1-2 (1986) (statement of Sen. Leahy) (discussing the impact of new electronic communications "on our lives and our sense of privacy"); *cf.* Smolla, *supra* note ___, at 1103 ("There is indeed a whole lot a scannin' goin' [sic] on. People surreptitiously intercept, record, and disclose the usual suspects for the usual reasons, in the perpetual parade of human perfidy.").

[211] *Bartnicki*, 532 U.S. at 518; Smolla, *supra* note ___, at 1113; Wasserman, *First Amendment Lochnerism*, *supra* note ___, at 19; *see also* Smolla, *supra* note ___, at 1144 (describing *Sopranos talk* of getting "'dese guys").

[212] *Bartnicki*, 532 U.S. at 518; Smolla, *supra* note ___, at 1113; Wasserman, *First Amendment Lochnerism*, *supra* note ___, at 19-20.

[213] *Bartnicki*, 532 U.S. at 527-28 (citing Smith v. Daily Mail Publishing Co., 443 U.S. 97, 103 (1979)) ("[I]f a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need . . . of the highest order."); *id.* at 533-34 ("The enforcement of [the statute] implicates the core purposes of the First Amendment because it imposes sanctions on the public of truthful information of public concern."); *see also* Wasserman, *First Amendment Lochnerism*, *supra* note ___, at 20.

[214] *Bartnicki*, 532 U.S. at 529-30; *id.* at 535 ("[A] stranger's illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern."); Smolla, *supra* note ___, at 1116-17; Wasserman, *First Amendment Lochnerism*, *supra* note ___, at 20; *but see* Boehner v. McDermott, 441 F.3d 1010, 1015 (D.C. Cir. 2006) (holding that individual who knowingly receives a tape of an intercepted communication aids and abets or participates in the initial unlawful disclosure).

"concerns gave way when balanced against the interest in publishing matters of public importance," the truthful information on matters of public concern at the core of the freedom of speech.[215]

There is ambiguity in labeling a case such as *Bartnicki* a merits strip. The case involved competing rights emanating from distinct sources of positive law—the plaintiffs' statutory privacy rights in their electronic, wire, and oral communications against the defendants' constitutional free-speech right to publish truthful lawfully obtained information on a matter of public concern. The *Bartnicki* Court stripped the statutory right by enhancing the constitutional right through an expansive interpretation and application.[216]

The Hohfeldian framework provides a more specific way of understanding the case. The federal wiretap statute, a source of positive law, created in the plaintiffs a privacy right against interception of communications and imposed a corresponding duty in the defendants not to intercept or disclose the contents of those communications. But the First Amendment, a distinct source of positive law, created in the defendants the right to publish information on a matter of public concern that they lawfully obtained. The latter right, in turn, imposed a duty on the government (federal or state) not to burden the defendants' ability to publish. Government could not impose on the defendants a statutory duty to refrain from publishing or inflict legal punishment on them for doing so. It could not grant plaintiffs the privacy right by coming to their aid in the face of defendants' conduct in disclosing the recordings.[217]

### *c. Common Theme: Non-Existence as Law*

Regardless of the constitutional basis for stripping a rights-creating statute, a merits strip has occurred because of the effect of the Court's decision. We are in the same legal position as if the statute, and the substantive rights created and duties imposed by the statute, never existed—never had been brought into law. This follows from Matthew Adler and Michael Dorf's argument that most constitutional provisions state what they call "existence" conditions for federal legislation—some federal nonconstitutional law (such as a statute) exists as federal law only if it satisfies that particular provision.[218] If it is inconsistent with some constitutional rule, it does not exist as law.[219] This contrasts with "application" conditions, which limit the legal force of nonconstitutional

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[215] *See Bartnicki*, 532 U.S. at 533-34; Wasserman, *First Amendment Lochnerism*, *supra* note ___, at ___.

[216] *See* Wasserman, *First Amendment Lochnerism*, *supra* note ___, at 23 ("[A]lthough the Court continues to refuse to say categorically that truthful publication never can be punished, it has yet to find any government interest of a sufficiently high order to justify punishing publication of truthful, lawfully obtained information on a matter of public concern.").

[217] *See* Corbin, *supra* note ___, at 229; *supra* notes ___ and accompanying text.

[218] Matthew D. Adler & Michael C. Dorf, *Constitutional Existence Conditions and Judicial Review*, 89 VA. L. REV. 1105, 1119-20 (2003) ("A constitutional provision is an existence condition for that type of law if no proposition can be law of that type unless the provision is satisfied.").

[219] *See id.* at 1129 (describing the line as "the difference between law and nonlaw").

law as applied to some facts or circumstances, without invalidating the entire legal provision (that is, removing the provision from status as law).[220] With application conditions, the underlying statute is valid, but it cannot be enforced against certain conduct.

Adler and Dorf argue that Congress' enumerated powers and most provisions in the Bill of Rights, including the First Amendment, function as existence conditions.[221] An invalid law—one that runs afoul of any of these provisions—is not a law. For example, the question whether Congress acted within the scope of the Commerce Clause in enacting a statute depends on whether the law regulates classes of economic activities that, in the aggregate, substantially affect interstate commerce.[222] Because VAWA regulated private, non-employment-related acts of gender-motivated violence, something that could not be classified as economic activity, it did not and could not exist as federal law. Similarly, the question under § 5 is whether the statute satisfied the appropriate test for validity (by regulating state action), regardless of whether the particular plaintiff had suffered any actual discrimination.[223] Because VAWA was not constitutionally appropriate, it was not federal law.

This characterization is less clear as to the First Amendment. On one hand, individual rights function simply as "shields" that "deflect weak and medium strength justifications but succumb to very strong ones;" everyone wears a shield that knocks out all or many laws that infringe the right to engage in particular conduct.[224] On the other hand, individual rights protect against infringing legal rules; judicial protection of those rights entails judicial repeal or revision of constitutionally defective rules.[225] This is consistent with the Founders' understanding of "rights" as "expressing limits on the sorts of laws that Congress could enact."[226] Congress lacks the power to enact a law that infringes on First Amendment rights, thus any law that does is invalid—non-existent as law.

*Bartnicki* illustrates the difficulty of characterizing the freedom of speech. The Court at several points emphasized that its decision did not threaten the validity of the wiretap law or the ban on unlawfully intercepted communications, but only the propriety of the statute's application to the circumstances at issue—publication of truthful information on a matter of public concern by someone uninvolved in the

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[220] *See id.* at 1119;

[221] *Id.* at 1120, 1155.

[222] *See id.* at 1152; *id.* at 1153 (arguing that it is easier for courts to police the bounds of congressional power by looking to the predicate of regulation than attempting to characterize each particular act subject to regulation).

[223] *See id.* at 1154-55.

[224] *Id.* at 1161-62; *id.* at 1165 ("The First Amendment provides some (albeit weak) protection to particular speech-acts proscribed under content-neutral laws that may be valid in most circumstances.").

[225] *See id.* at 1165-66.

[226] Adler & Dorf, *supra* note ___, at 1168-69 ("[T]hey viewed the recitation of rights and the enumeration of powers as mutually reinforcing checks that served the interest of limiting the reach of government.").

initial illegal interception.[227] That sounds like the First Amendment functioning as a condition for proper application of the statute to the instant defendants.

But existence conditions operate by functionally revising a statute. The First Amendment essentially, if implicitly, redefined the anti-disclosure rule to impose the *Daily Mail* principle as a stripping statutory element.[228] The redrafted statutory ban prohibited the knowing disclosure of unlawfully intercepted information, except where that information is truthful lawfully obtained information on a matter of public concern. Thus stated, the defendants' conduct in publishing the recorded conversationwas not subject to a statutory ban because no such ban existed or, in light of the First Amendment, constitutionally could exist. Neither could the privacy rights established by that statute.

Finally, even if legislatively created rights are not at odds with constitutionally created rights, necessitating a strip of one by the other, the existence of rights from one source of positive law may produce a strip of rights from another source. Pressure for the Civil Rights Act of 1964 peaked because, by 1963, the Court reached an impasse on the central constitutional issue of whether the Fourteenth Amendment prohibited purely private discrimination in employment and public accommodations.[229] Unable to fully establish equality rights through the courts, advocates pushed the issue into a different lawmaking forum--Congress.[230]

In turn, as Robert Post and Reva Siegel argue, the enactment of substantial civil rights legislation in the 1960s prohibiting discrimination by non-state actors reduced the pressure on the Court to liberalize the state-action requirement.[231] Because there was an alternative source of law creating equality rights, the Court could (and did) narrow the scope of constitutional rights (such as the Equal Protection Clause), "secure in

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[227] *See* Bartnicki v. Vopper, 532 U.S. 514, 524-25 (2001) ("The constitutional question before us concerns the validity of the statute as applied to the specific facts of these cases. . . . The only question is whether the applications of these statutes in such circumstances violated the First Amendment."); *id.* at 533 ("[T]he outcome of these cases does not turn on whether [the statute] can be enforced with respect to most violations of the statute without offending the First Amendment.").

[228] *Id.* at 527-28; *supra* notes ___ and accompanying text. The First Amendment strips tort law in a similar manner. For example, the "actual malice" standard of *New York Times* redefines defamation by constitutionally imposing a state-of-mind requirement that the plaintiff must prove in order to prevail on her claim. *See* New York Times v. Sullivan, 376 U.S. 254, 279-80 (1964) (imposing "federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'-that is, with knowledge that it was false or with reckless disregard of whether it was false or not"); Paul A. LeBel, *Defamation and the First Amendment: The End of the Affair*, 25 WM. & MARY L. REV. 779, 783 (1984) (arguing that "defamation is the first tort in which, as a federal constitutional matter, wrongful conduct by the defendant has been made an essential element of the plaintiff's prima facie case").

[229] *See* Post & Siegel, *supra* note ___, at 497-98 ("Through out the 1960s the Court was under intense pressure to relax the state action requirement for judicial enforcement of Section 1."); *see also* Goldstein, *supra* note ___, at 1100-01 (describing views of Justices as to reach of Fourteenth Amendment).

[230] Goldstein, *supra* note ___, at 1097 (arguing that, at the same time the Court reached a constitutional impasse, the political branches commenced a "constitutional dialogue" that resulted in a political resolution of the question); Post & Siegel, *supra* note ___, at 498 & n. 267.

[231] *See* Post & Siegel, *supra* note ___, at 517-18.

the belief that congressional legislation would provide relatively full implementation of antidiscrimination norms."[232]

*6. Limiting enforcement processes*

The scope and nature of substantive rights depend not only on the content of the right, but also on the means and manner of enforcing it.[233] Merits can be stripped when the formal right remains in place, but the remedial machinery is constricted in a way that limits enforcement and vindicationthereby diluting the value, of the right.[234]

Substantive rights generally are enforced through some or all of three processes. First, the rights holder may initiate litigation, but only if provided with a cause of action for damages, injunctions, or some other relief—"something that says, in effect, 'If someone violates your legal right you can sue him for relief.'"[235] Doctrine distinguishes rights, causes of action, and remedies as independent elements.[236] All three are necessary for an individual to vindicate a right through litigation.[237] Second, government can protect rights by initiating its own litigation, both criminal prosecution and actions for civil remedy.[238] Such

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[232] *Id.* at 518; *see, e.g.*, Washington v. Davis, 426 U.S. 229, 239 (1976) (holding that Fourteenth Amendment prohibits only intentional discrimination); Jackson v. Metropolitan Edison Co., 419 U.S. 345, 350 (1974) (holding that privately owned and operated utility company, although subject to pervasive state regulation, was not a state actor bound by the Fourteenth Amendment).

[233] *See* Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 858 (1999) ("Rights are dependent on remedies not just for their application to the real world, but for their scope, shape, and very existence."); Zeigler, *supra* note ___, at 107 ("[T]he type of remedy a person may obtain defines both the scope and meaning of the right.").

[234] *See* Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U. ILL. L. REV. 183, 185 (2003) (labeling this a "more insidious" way to strip civil rights); Rudovsky, *supra* note ___, at 1212 ("[T]he Court and Congress have effected a significant cutback in civil rights at the operational level while avoiding the controversy that would be provoked by the direct abrogation of . . . statutory rights.").

[235] Zeigler, *supra* note ___, at 108; *see also* William B. Rubenstein, *On What a "Private Attorney General" Is—and Why it Matters*, 57 VAND. L. REV. 2129, 2146-47 (2004) [hereinafter Rubenstein, *Private Attorney General*] (stating that Congress has included provisions for citizen suits in most environmental statutes); *see, e.g.*, 42 U.S.C. § 2000e-5(g) (cause of action under Title VII); 42 U.S.C. § 13981 (cause of action under VAWA); 42 U.S.C. § 1983 (cause of action against person acting "under color" of state law for conduct depriving a plaintiff of rights, privileges, or immunities secured by the Constitution and laws of the United States).

[236] *See* Davis v. Passman, 442 U.S. 228, 239 n.18 (1979) (distinguishing cause of action, determining whether a plaintiff can invoke the power of the court, from remedy granted for any violation); Zeigler, *supra* note ___, at 83-84.

[237] *See* Zeigler, *supra* note ___, at 108 ("Plainly if you have no cause of action, you have no right and no remedy."); *see also* Levinson, *supra* note ___, at 884 (""[T]he right may be shaped by the nature of the remedy that will follow if the right is violated."); Tracy A. Thomas, *Congress' Section 5 Power and Remedial Rights*, 34 U.C. DAVIS. L. REV. 673, 688 (2001) ("[T]he remedy is not just closely connected with the right, but rather, is an intrinsic part of the right itself."); Zeigler, *supra* note ___, at 678 ("Unless a duty can be enforced, it is not really a duty; it is only a voluntary obligation that a person can fulfill or not at his whim.").

[238] *See, e.g.*, 18 U.S.C. § 242 (permitting initiation of criminal prosecution against persons acting under color of state law who deprive individuals of rights, privileges, or immunities secured by the Constitution and laws of the United States); 28 U.S.C. § 14141 (empowering federal government to initiate civil action for injunctive relief or consent decree against state and local governments for patterns or practices violating constitutional rights); 42 U.S.C. § 1997a (same as to 'egregious or flagrant conditions" in prisons and penal institutions); *see also* Karlan, *supra* note ___, at 186 ("For the most part, the Court has left the political branches' power to regulate relatively unconstrained. That is, the Court assumes that Congress and the Executive can prohibit various forms of primary conduct."); *see also, e.g.*, Bd. of Trustees of the Univ. of Ala.. v. Garrett, 531 U.S.

centralized enforcement allows the government to bring the full weight of its power and resources to bear in the most serious and important cases.[239] Third, executive officials and agencies enforce federal laws (and the rights created by those laws) through agency investigation and adjudication processes.[240] Congress recently has enforced Spending Clause enactments by empowering agencies to withhold federal funds from a public or private recipient whose conduct violates statutory requirements.[241]

As to statutory rights, choices as to manner of enforcement generally rest with Congress and whether it wants the statutory right that it creates enforced through private litigation.[242] Sometimes it is clear from the law's text whether enforcement will be by private action, government litigation, or some form of administrative enforcement.[243] Other times, courts infer the existence of a private cause of action from statutory language, structure, and history.[244] Other times, § 1983 provides a cause of action vehicle through which another federal statute may be enforced.[245] Much depends on whether the statute can be said to create a "right" in the individuals bringing the private action.[246]

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356, 374 n.9 (2001) (emphasizing the power of the federal government to bring actions for damages on behalf of injured individuals).

[239] *See* Alden v. Maine, 527 U.S. 706, 759-60 (1999) (emphasizing significance of Federal Government expending its own resources as "implicat[ing] a rule that the National government must itself deem the case of sufficient importance to take action"); *but see* Karlan, *supra* note ___, at 194 (criticizing the equation of centralized federal enforcement with the importance of a case).

[240] *See*, *e.g.*, 29 U.S.C. § ___ (empowering National Labor Relations Board to investigate violations of statutory labor rights);

[241] *See* Gonzaga Univ. v. Doe, 536 U.S. 273, 280 (2002) (quoting Pennhurst State Sch. and Hosp. v. Halderman, 451 U.S. 1, 28 (1981)) ("[T]he typical remedy for state noncompliance with federally imposed condition is . . . action by the Federal Government to terminate funds to the State."); *see also, e.g.*, 20 U.S.C. § 1232g(g) (providing, under Family Educational Rights and Privacy Act, for agency investigation and adjudication of statutory violations); *id.* § 1232g(f) (providing for termination of funds upon a determination that recipient "is failing to comply substantially with any requirement" and such compliance "cannot be secured by voluntary means"); 20 U.S.C. § 1682 (providing, under Title IX of Education Amendments of 1972, for termination of federal funding to educational institutions for failure to comply with requirements of equal funding of men's and women's programs); 42 U.S.C. § 2000d-1 (providing, under Title VI of Civil Rights Act of 1964, for enforcement of prohibition on race discrimination through termination of funding to particular program or portion of program); *see also* Karlan, *supra* note ___, at 199-200 (discussing connection between "novel administrative remedy" of withholding federal funds in egregious cases and private enforceability of rights).

[242] *See* Alexander v. Sandoval, 532 U.S. 278, 286 (2001) ("Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress."); *id.* at 286-87 (stating that unless Congress provides it, a cause of action does not exist); *see also* Harrison, *supra* note ___, at 2515 ("If Congress takes some injury that formerly entitled the victim to no legal remedy and makes it legally actionable, disputes will come into court . . ."); Thomas, *supra* note ___, at 704 (recognizing that Congress has authority to dictate remedies for statutory rights, a power derived from its authority to define the substantive statutory guarantee); *see infra* notes ___ and accompanying text.

[243] *See, e.g.*, 5 U.S.C. § 2302 (b)(8) (providing protection for federal employees who expose wrongdoing); *id.* § 1221 (providing employee with right of action before Merit Systems Protection Board, not federal court).

[244] *See Alexander*, 532 U.S. at 288 & n.7 (beginning and ending analysis with text and structure of statute).

[245] City of Rancho Palos Verde v. Abrams, 125 S. Ct. 1453, 1458 (2005) (citing Maine v. Thiboutot, 448 U.S. 1, 4 (1980)) (stating that § 1983 authorizes suits to enforce individual rights under federal statutes); *Gonzaga*, 536 U.S. at 284 ("[P]laintiffs suing under § 1983 do not have the burden of showing an intent to create a private remedy because § 1983 generally supplies a remedy for the vindication of rights secured by federal statutes."); *see also* 42 U.S.C. § 1983 (providing

Logically, more enforcement opportunities means greater enforcement and protection of substantive rights and fewer enforcement opportunities means less enforcement and protection of those rights.[247] Legislative or judicial elimination of one enforcement mechanism strips the underlying right.[248] Even if alternative enforcement mechanisms are expressly available and can be substituted,[249] the amount and quality of enforcement will not necessarily be the same. To say nothing of the possibility that no substitutes are available or those substitutes are not as effective as the private judicial remedy.[250]

Many commentators hold particular solicitude for private civil litigation as the most important and necessary enforcement mechanism, particularly with respect to civil rights laws.[251] Executive-branch enforcement may be less frequent, thus less effective, limited by staff and resources, expertise in the substantive areas, and political will.[252] Enforcement also is limited by the executive's inherent enforcement

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cause of action where action under color of law deprives an individual of rights secured by "the Constitution and laws" of the United States).

[246] *See Rancho Palos Verde*, 125 S. Ct. at 1458 ("[T]he plaintiff must demonstrate that the federal statute creates an individually enforceable right in the class of beneficiaries to which he belongs."); *Gonzaga*, 536 U.S. at 284 (quoting Cannon v. Univ. of Chicago, 441 U.S. 677, 692 n.13 (1979) ("For a statute to create such private rights, its text must be 'phrased in terms of the persons benefited."); *Alexander*, 532 U.S. at 288 (emphasizing the need for "rights-creating language" in the statute); *see also* Karlan, *supra* note ___, at 198; *compare* 42 U.S.C. § 2000d ("No person . . . shall . . . be subjected to discrimination.") *with id.* § 2000d-1 (providing that "[e]ach Federal department and agency . . . is authorized and directed to effectuate" particular statutory provisions).

[247] *Cf.* Erwin Chemerinsky, *Parity Reconsidered; Defining a Role for the Federal Judiciary*, 36 UCLA L. REV. 233, 310 (1988) (arguing that giving litigants choice of forums for vindicating rights offers a chance for maximizing rights by creating a competition between forums).

[248] *See* Weinberg, *supra* note ___, at 1417 (arguing that Congress may close courthouse doors by eliminating private cause of action and choosing to enforce national policy through criminal prosecutions or injunction suits by the Attorney General); *see also* Rudovsky, *supra* note ___, at 1212 ("Not every remedy must be available in each case . . ., but the absence of any remedy . . . in a significant number of cases will operate to deprive individuals of redress for injuries suffered . . .").

[249] *See Alexander*, 532 U.S. at 290 ("The express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others."); Zeigler, *supra* note ___, at 119 (describing view that "when a statute contains a comprehensive remedial scheme including an integrated set of enforcement mechanisms, a court should presume that Congress deliberately omitted any additional remedies").

[250] *See* Rudovsky, *supra* note ____, at 1254 ("Remedies have been restricted on the theory that other remedies would be available, but in too many cases the Court has failed to adjust the remedial scheme to ensure the viability of the substitution process."); Weinberg, *supra* note ___, at 1428 (criticizing cases in which the alternative remedy is illusory).

[251] *See* Allen v. State Bd. of Elections, 393 U.S. 544, 556 (1969) ("It is consistent with the broad purpose of the [Voting Rights] Act to allow the individual citizen standing to insure that his city or county government complies . . ."); Karlan, *supra* note ___, at 186 ("Congress can vindicate important public policy goals by empowering private individuals to bring suit."); Siegel, *supra* note ___, at 1139 (arguing that "Congress appears to have made a concerted effort to develop private civil rights litigation as an important mechanism for enforcing communal norms and making real our commitment to civic equality").

[252] *See Allen*, 393 U.S. at 556 ("The Attorney General has a limited staff and often might be unable to uncover quickly new regulations and enactments passed at the varying levels of state government."); Rubenstein, *Private Attorney General*, *supra* note ___, at 2149-50 (arguing that public attorneys may be fewer in number, underfunded, less skilled, or prone to political pressures); Rudovsky, *supra* note ___, at 1239 ("[E]ven where the administration is sympathetic to the goals of [civil rights] statutes, scarcity of enforcement resources will lead to undeenforcement; where there is hostility to the sttautes, enforcement can be almost nonexistent."); *id.* at 1241 (arguing that political realities have muted the potential reach of law empowering federal government to seek equitable relief against state and local governments for violations of federal law).

discretion.[253] And it likely will be confined, legally or practically, to the most egregious violations, leaving less egregious or less systemic violations unremedied.[254]

We thus might characterize as a merits strip the Court's recent, rigid doctrine demanding greater congressional clarity and specificity before finding a private right of action in a statute or before allowing private enforcement of a statute via § 1983.[255] We also might find a strip from recent Eleventh Amendment/state sovereign immunity jurisprudence, which requires "congruence and proportionality" between the constitutional violation to be remedied and the statutory remedy in order for a state to be subject to private civil actions under civil rights laws enacted under Congress' § 5 power.[256] This narrows the circumstances in which Congress can provide an individual statutory action for damages against states and state entities for their misconduct.[257] Both place enforcement of federal rights entirely in the hands of the executive branch, with the presumptive corresponding diminution in the amount and scope of rights enforcement.[258]

Exclusive governmental enforcement also may run against a President who, convinced of the unconstitutionality of some rights-creating provision, unilaterally declines to enforce (and orders the executive department to decline to enforce) that right.[259] The President's power of routine nonenforcement of federal law based on independent

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[253] *See* Dawn Johnsen, *Presidential Non-Enforcement of Constitutionally Objectionable Statutes*, 63 LAW & CONTEMP. PROB. 7, 9 (2000).

[254] *See* Rudovsky, *supra* note ___, at 1254-55 (criticizing process that "addresses the most egregious of . . . violations, but which denies compensatory damages in a significant portion of cases").

[255] *See* Gonzaga University v. Doe, 536 U.S. 273, 290 (2002) (holding that Federal Educational Rights and Privacy Act not enforceable under § 1983 because the act contains no rights-creating language); Alexander v. Sandoval, 532 U.S. 275, 293 (2001) (holding that no private right of action exists to enforce disparate-impact regulations under Title VI of Civil Rights Act of 1964); *see also* Siegel, *supra* note ___, at 1121-22 (discussing cases addressing the "basic question of whether a party who has suffered an acknowledged or assumed injury to a defined legal interest may obtain relief under a particular cause of action" and the Court imposing roadblocks, strictures, and limitations on the ability to retain relief); Weinberg, *supra* note ___, at 1408 (arguing that the Supreme Court limits federal litigation when it fashions new limits to federal causes of action); Zeigler, *supra* note ___, at 116 (arguing that "requiring clear evidence of congressional intent to create a private right of action ensures that few will be found").

[256] Bd. of Trustees of the Univ. of Ala. v. Garrett, 531 U.S. 356, 365 (2001); Alden v. Maine, 527 U.S. 706, 730-31 (1999) ("Congress may subject the States to private suits . . . . only if there is 'compelling evidence' that the States were required to surrender this power to Congress pursuant to the constitutional design."); *see supra* notes ___ and accompanying text.

[257] *See* Karlan, *supra* note ___, at 195 (arguing that the Eleventh Amendment erects a formalistic barrier to enforcing federal rights, but "if the Amendment has any bite, that bite cuts deep into the heart" of private civil rights enforcement); Siegel, *supra* note ___, at 1153 ("[T]he Court has reinvigorated the states' immunity from lawsuits by private citizens in a myriad of ways."); *see, e.g.*, Bd. of Trustees of the Univ. of Ala.. v. Garrett, 531 U.S. 356 (2001) (holding no proper abrogation under Americans With Disabilities Act); Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000) (same as to Age Discrimination in Employment Act).

[258] *See* Karlan, *supra* note ___, at 200 (arguing that the "major effect of permitting only federally initiated lawsuits is to decrease the total amount of enforcement of valid congressional regulation").

[259] *See* Lawson & Moore, *supra* note ___, at 1310 ("Nonenforcement by definition extends beyond the ordinary executive prerogative of prosecutorial discretion and constitutes a deliberate, unfaithful failure to execute."); *see also* U.S. CONST. art. II, § 3 ("[H]e shall take Care that the Laws be faithfully executed . . .").

constitutional interpretation is itself the subject of some debate.[260] But the result (combined with the non-existence of a private right of action) is the absence of any enforcement of, or remedy for violation of, a federal right.

For example, the McCain Amendment to the Detainee Treatment Act of 2005 prohibits the "cruel, degrading, and inhumane" treatment or punishment of detainees in United States custody or control.[261] This is a rights-creating statute—it grants detainees the statutory right to certain minimal levels of treatment and imposes on the United States a corresponding duty to accord (at least) that minimal level of treatment and not to engage in cruel, degrading, and inhumane punishment. In signing the DTA (including the McCain Amendment) into law, President George W. Bush issued a Presidential Signing Statement describing his construction of the Act as not interfering with the President's inherent Article II powers as Executive and Commander in Chief.[262]

This statement indicated an intent to strip the merits of the rights created through nonenforcement , at least to the extent the President, as Commander in Chief, believed certain treatment of some detainees was necessary.[263] And no other enforcement mechanism exists. The Act confers no express private right of and the Court in its present

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[260] *Compare* Lawson & Moore, *supra* note ___, at 1303 (arguing that a President has an independent power to interpret the Constitution and to decline to enforce a statute that she determines is unconstitutional, even though Congress, the courts, and prior presidents all determined that it was constitutional) *with* Johnsen, *supra* note ___, at 14 (stating that "one approach to presidential non-enforcement interprets the Constitution as requiring the President to execute acts of Congress, unless directed otherwise by a court of law, even when the President believes a law violates the Constitution") *with id.* at 44 (arguing for "non-enforcement policy under which the President would decline to enforce a law only when he is specially situated to provide a needed check on an unconstitutional law and he can do so without threatening the constitutionally prescribed lawmaking process") *with* Presidential Authority To Decline To Execute Unconstitutional Statutes, 18 Op. Off. Legal Counsel 199, ___ (1994) (memorandum of Assistant Attorney General Walter Dellinger) ("As a general matter, if the President believes that the Court would sustain a particular provision as constitutional, the President should execute the statute, notwithstanding his own beliefs about the constitutional issue. If, however, the President, exercising his independent judgment, determines both that a provision would violate the Constitution and that it is probable that the Court would agree with him, the President has the authority to decline to execute the statute.") *with* Report of the American Bar Association Task Force on Presidential Signing Statements and the Separation of Powers Doctrine 1, *available at* http://www.abanet.org/op/signingstatements/aba_final_signing_statements_recommendation-report_7-24-06.pdf [hereinafter *Report*] (concluding that if the President believes part of a law is unconstitutional, he should communicate such concerns to Congress prior to enactment and veto the entire legislation); *see also* Lawrence G. Sager, *Courting Disaster*, 73 FORDHAM L. REV. 1361, 1366-68 (2005) [hereinafter Sager, *Courting Disaster*] (arguing that historical examples of presidential constitutional nonenforcement in conflict with judicial constitutional interpretation reflect "Beta" disputes, in which the Court found some practice constitutionally permissible and the President disagrees).

[261] Pub. L. 109-148, 119 Stat. 2739, § 1003 (2005), *codified* at 42 U.S.C. § 20000dd(a).

[262] *See President's Statement on Signing of H.R. 2863, the "Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006"*, Dec. 30, 2005, *available at http://www.whitehouse.gov/news/releases/2005/12/20051230-8.html* [hereinafter *President's Statement*] (stating that the executive branch would interpret the provision "relating to detainees, in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief and consistent with the constitutional limitations on the judicial power").

[263] *Cf.* Dellinger Memorandum, *supra* note ___, at ___(" Where the President believes that an enactment unconstitutionally limits his powers, he has the authority to defend his office and decline to abide by it, unless he is convinced that the Court would disagree with his assessment.").

jurisprudence is unlikely to infer one, there being no legislative statements indicating an intent for private enforcement.[264] The McCain Amendment becomes little more than a hortatory statement that the United States should not engage in cruel, inhumane, or degrading treatment, subject to the whim of executive enforcement decisions. It exists as a substantive right, but has been stripped through the unlikelihood of meaningful enforcement.[265]

### *B. Stripping Constitutional Rights*

A second positive source of substantive federal rights is the Constitution, notably the liberty-bearing provisions of the Bill of Rights and the Reconstruction Amendments.[266] The language of these provisions is sparse and quite broad—what exactly does "the freedom of speech" or "equal protection of laws" mean?[267] Determining meaning demands interpretation of and expounding on the bare clauses by someone—whether the courts,[268] the popular branches of government,[269] or the People themselves.[270] In so expounding, they determine the scope of the protection accorded. And they can, at times, strip these rights through interpretations that narrow rights below the baseline.

#### *a. Judicial Constitutional Interpretation*

The courts most frequently and most directly strip constitutional rights in the course of resolving civil actions seeking legal and equitable

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[264] *Cf. President's Statement*, *supra* note ___ (stating that the executive branch would interpret McCain Amendment as not creating a private right of action, in light of *Alexander v. Sandoval*); *supra* notes ___ and accompanying text.

[265] *See* Zeigler, *supra* note ___, at 105 ("[A] right without a remedy is not a legal right; it is merely a hope or a wish. . . . Unless a duty can be enforced, it is not really a duty; it is only a voluntary obligation that a person can fulfill or not at his whim.") (alteration in original).

[266] *See* SAGER, *supra* note ___, at 3.

[267] *See id.* at 36 (calling these "very general ideas, ideas whose basic thrust and practical extension have been the source of much disagreement"); *see also* David A. Strauss, *Freedom of Speech and the Common-Law Constitution*, *in* ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA 33, 40 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002) ("[I]t is not obvious what constitutes 'the freedom of speech.'"); Staszewski, *Avoiding Absurdity*, *supra* note ___, at 1029 ("While there is obviously no consensus on the meaning of 'the equal protection of the law,' it has long been recognized that the Equal Protection Clause embodies a principle that similarly situated people should be treated alike and differently situated people should be treated differently.").

[268] SAGER, *supra* note ___, at 71.

[269] *See* Lawson & Moore, *supra* note ___, at 1268 ("It is emphatically the province and duty of the President to say what the law is, including the law embodied in the Federal Constitution."); Sager, *Courting Disaster*, *supra* note ___, at 1365 ("It is all but impossible to imagine a world where nonjudicial actors like Congress were deprived of independent constitutional authority and/or absolved of independent constitutional responsibility, or even a world in which Congress were, as a practical matter, largely unconcerned with matters of constitutional substance."); Whittington, *supra* note ___, at 781.

[270] *See* KRAMER, *supra* note ___, at 107 ("In a world of popular constitutionalism, government officials are the regulat*ed*, not the regulat*ors*, and final interpretive authority rests with the people themselves.") (emphasis in original); Curtis, *supra* note ___, at 358 (arguing that First Amendment ideas "have a long career in American history, but outside rather than inside the courts").

relief for violations of those rights.[271] This is not to suggest that a strip occurs whenever the rights-holder loses on a constitutional claim.[272] But judicial opinions often define the broad meaning of a constitutional provision, which meaning will be applied to future conduct.[273] If that meaning falls below a baseline (wherever that admittedly subjective baseline may be), the court has affected a strip. Consider decisions imposing a heightened state of mind requirement on a constitutional right[274] or declaring that a particular class of expression per se falls outside the protection of the First Amendment,[275] or declaring that homosexual conduct receives no protection from Fourteenth Amendment due process.[276]

Moreover, we might label it a merits strip where a rights-creating statute survives review against a rights-creating constitutional provision. In the contest between rights-creating positive-law provisions, the enhancing of one right necessarily means the stripping of the other. For example, had the dissenters prevailed in *Bartnicki v. Vopper*,[277] a statute designed to create privacy rights in personal communications would have prevailed, enhancing those federal rights.[278] At the same time, such a decision would have necessitated a narrower interpretation of the First Amendment, stripping those rights. Upholding the statute still would have served constitutional values, albeit different values.[279]

Finally, constitutional rights may be stripped pursuant to Lawrence Sager's "underenforcement thesis," which holds that, given the judiciary's institutional limitations, most constitutional provisions are left unenforced or less than fully enforced by the judicial branch.[280] Recognizing the complex policy choices necessary to vindicate some

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[271] *See* 42 U.S.C. § 1983; Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971) (recognizing private right of action for damages for constitutional violations by federal officers); Ex Parte Young, 209 U.S. 123 (1908).

[272] *See* Bator, *supra* note ___, at 633 ("Even in the sphere of individual rights, it is misleading to suppose that the rejection of a particular constitutional claim imports less fidelity to constitutional values than its vindication.").

[273] *See* Karlan, *supra* note ___, at 185.

[274] *See, e.g.*, City of Mobile v. Bolden, 446 U.S. 55, 62 (1980) (holding that Fifteenth Amendment violated only by actions motivated by discriminatory purpose); Washington v. Davis, 426 U.S. 229, 239 (1976) (same as to Fourteenth Amendment Equal Protection).

[275] *See, e.g.*, Garcetti v. Ceballos, 126 S. Ct. 1951, 1960 (2006) (holding that public employees spealing pursuant to their official duties are not protected from employment discipline by the First Amendment; Miller v. California, 413 U.S. 15, 23 (1973) (affirming that obscene material unprotected by First Amendment).

[276] *See* Bowers v. Hardwick, 478 U.S. 186, ___ (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003); *see also* William B. Rubenstein, *The Myth of Superiority*, 16 CONST. COMMENT. 599, 607 (1999) [hereinafter Rubenstein, *Superiority*] (describing how *Bowers*, having eliminated federal rights, forced gay-rights litigators to rely on state constitutional law, with some success).

[277] 532 U.S. 514 (2001).

[278] *Id.* at 542 (Rehnquist, C.J., dissenting) (describing Congress' concern for privacy as "inseparably bound up with the desire that personal conversations be frank and uninhibited, not cramped by fears of clandestine surveillance and purposeful"); *see supra* notes ___ and accompanying text.

[279] *See* Bator, *supra* note ___, at 633 (arguing that separation of powers and federalism values, themselves having constitutional status, are vindicated when a court upholds a criminal statute against a First Amendment challenge); *see also* Smolla, *supra* note ___, at 1175 ("[B]alanced measures are called for, and sometimes there is room in our constitutional system for a measure of balance.").

[280] *See* SAGER, *supra* note ___, at 86-87, 94; Sager, *Justice*, *supra* note ___, at 430.

rights and their institutional limitations, courts decline to recognize and enforce those rights as a constitutional matter.[281] By not vigorously enforcing rights against most legislation and government conduct, courts leave those rights functionally narrower than they might be.[282]

Underenforcement shifts the locus, and arguably the duty, of fuller enforcement of constitutional rights to the political branches.[283] Unfortunately, recent § 5 doctrine has entrenched the underenforcement strip by narrowing the scope of congressional power to regulate certain actors and conduct[284] and its ability to subject states and state agencies to private suit to enforce and vindicate otherwise valid federal rights.[285] Congress was expected to bear primary responsibility for enforcing Fourteenth Amendment rights.[286] By constricting the enforcement power, the Court strips those rights by constricting their congressional enforcement.[287]

*b. Political-Branch Constitutional Interpretation*

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[281] *See* SAGER, *supra* note ___, at 83 ("The idea that the Constitution is and should be judicially underenforced depends on institutional differences that favor popular political processes, in important part on democratic grounds."); Sager, *Justice*, *supra* note ___, at 420 ("[J]udicial enforcement of the right to minimum welfare contemplated here is by a great order of magnitude more ambitious, more exhaustive of choices that belong in the sphere of popular politics.").

[282] *See* Ferejohn & Kramer, *supra* note ___, at 1035 (arguing that, rather than use the Equal Protection clause ambitiously, the Justice have allocated the vast majority of what government does into rational-basis review, which means leaving the conduct undisturbed); Sager, *Justice*, *supra* note ___, at 410 ("Our constitutional jurisprudence singles out comparatively few encounters between the state and its citizens as matters of serious judicial concern."); *id.* (arguing that beyond protection for speech, religion, privacy, and some discrimination, "the attention of the constitutional judiciary rapidly falls off"); Staszewski, *Avoiding Absurdity*, *supra* note ___, at 1028 ("[T]he rational basis test is a judicially created doctrine that underenforces the relevant constitutional norms of equal treatment and fundamental fairness based primarily on institutional concerns.").

[283] SAGER, *supra* note ___, at 102 ("[I]t follows that we should encourage and welcome the assistance of other governmental actors in realizing more fully the Constitution's aims."); Sager, *Justice*, *supra* note ___, at 421 (arguing that "government is obliged to energetically pursue the effacement of injustice's entrenched consequences"); *see* William W. Forbath, *The New Deal Constitution in Exile*, 51 DUKE LJ. 165, 176 (2001) (describing New Deal arguments that "citizens had fundamental economic and social rights under the Constitution . . . and Congress, therefore, had a *duty* to exercise its power to govern economic and social life in way that sought to secure those rights").

[284] *See* United States v. Morrison, 529 U.S. 598 (invalidating federal statute prohibiting private, non-employment-related gender-motivated violence); *supra* notes ___ and accompanying text.

[285] *See* Bd. of Trustees of the Univ. of Alabama v. Garrett, 531 U.S. 356 (2001); *supra* notes ___ and accompanying text.

[286] *See* Colker & Brudney, *supra* note ___, at 130 ("[T]he historical evidence suggests that the framers of Section 5 did not intend to limit the scope of Congress's powers to situations that the judiciary had already declared a violation of Section 1."); Harrison, *supra* note ___, at 2522-23 ("These Amendments were designed to deal with situations in which recalcitrant state-level majorities defy the national consensus; therefore they give to the political representative of the national consensus the task of deciding how much additional enforcement is need."); Post & Siegel, *supra* note ___, at 504 ("No one at the time had the slightest doubt but that the antidiscrimination statutes enacted by Congress during the 1960s were implementing the equality norms of Section 1 of the Fourteenth Amendment.").

[287] *See* Colker & Brudney, *supra* note ___, at 131 ("The effect of the Court's recent Section 5 jurisprudence, however, may be to eradicate Congress's distinctive Section 5 role . . ."); Post & Siegel, *supra* note ___, at 508 (arguing that analysis must distinguish between federal antidiscrimination legislation that is compatible with the proper role of the federal government from legislation which is not).

If judicial underenforcement of constitutional rights shifts the locus of enforcement to the political branches, it also shifts to them power to strip. But constitutional merits stripping plays differently in the popular branches. Their constitutional views are addressed through sub-constitutional processes, dictating legislative and executive decisions whether or not to enact, veto, or enforce subconstitutional law, such as statutes.[288] Several examples of statutory stripping can be explained as products of narrow constitutional interpretations by the political branches.

Most obviously, Congress should decline to enact (and the President to sign) a rights-creating statute if its membership believes it lacks constitutional power to enact that law or to regulate the conduct at issue.[289] This includes an understanding of the specific power on which it enacts legislation and the scope of conduct regulable pursuant to that power. Consider again the Civil Rights Act of 1964, which is widely regarded as the paradigm of Congress taking an independent constitutional lead.[290] Opponents of the bill cited federalism arguments as to the proper reach of the federal government into private business.[291] And Congress debated whether, in preventing race discrimination in privately owned businesses and private business interactions, it was regulating interstate commerce under Article I or enforcing the terms of the Fourteenth Amendment under § 5, a choice that affected the understanding of the statute and of the underlying constitutional issues.[292] The Kennedy Administration weighed in with its own

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[288] *See* Sager, *Courting Disaster*, *supra* note ___, at 1365 (arguing that Congress and the President use the federal Constitution for justification for their statutory decisions); *see also* Johnsen, *supra* note ___, at 33 ("When presented with a free-standing provision that the President interprets to be unconstitutional, the President's oath of office is best interpreted as requiring a veto. There is no constitutional justification for the President to sign the bill and then refuse to enforce it."); Lawson & Moore, *supra* note ___, at 1302-04 (arguing that the President's constitutional views can be used to justify vetoes and enforcement decisions); Whittington, *supra* note ___, at 781 ("Congress . . . can be regarded as implicitly asserting an interpretation of its own constitutional authority every time that it passes legislation.").

[289] *See supra* note ___ and accompanying text.

[290] *See* Goldstein, *supra* note ___, at 1145-46 ("Ultimately, the Civil Rights Act of 1964 represented the culmination of a constitutional dialogue involving all three branches. . . . As the Court divided regarding the propriety of recognizing a constitutional right to service in places of public accommodation, Congress assessed and used its constitutional tools to confer such a right.").

[291] *See* LOEVY, *supra* note ___, at 160 (describing arguments by Southern congressmen that the bill constituted "an unwarranted invasion by the United States Government of the property rights of those Americans who owned restaurants, motels, and swimming pools and who ought to be allowed to serve whomever they pleased" and "gave the United States government too much power to interfere in state and local affairs"); Post & Siegel, *supra* note ___, at 490-91 ("The logic of federalism . . . was thoroughly imbued with this concern about protecting the freedom to discriminate in racial associations."); *see also, e.g.*, **Debate** (statement of Rep. Willis) (arguing that the public accommodations provision "undertakes to order that from here on the 14th Amendment shall mean that the private owner of a place of business, such as a restaurant and many others, cannot choose his customers"); *id.* **Debate** (statement of Rep. Abernethy) ("An owner of property should not be compelled to serve or entertain or otherwise accommodate anybody that he, the owner, does not want to accommodate.").

[292] *See* Post & Siegel, *supra* note ___, at 494-95 (arguing that, although Congress relied on both the Commerce Clause and § 5, and the Court ultimately upheld the law under the former, the "substance of the controversy inhered in disputes about the norms and commitments that inhabit the Equal Protection Clause"); *see also* Forbath, *supra* note ___, at 220 (arguing that New Dealers rested the "fundamental rights" of the National Labor Relations Act on the Commerce Clause to avoid conflict with the Court's interpretations of the Thirteenth and Fourteenth Amendments).

constitutional views as to the scope of the powers on which Congress wished to rely.[293] The President, as a legislative actor in this process, engages in similar constitutional analysis at this point and should (perhaps must) veto the bill if she believes it unconstitutional.[294]

Second, Congress often includes in its statutes, recently at the Court's insistence, "jurisdictional elements." These are facts that must be pled and proven by the plaintiff in each case, functioning as a nexus between a piece of legislation and the specific constitutional power under which Congress enacted that legislation and regulated the conduct at issue.[295] The jurisdictional element affects a strip by narrowing the statutory rights and duties created.[296] But Congress strips in deference to recognized constitutional limitations on its own power.

For example, Congress could not legislate under the Commerce Clause against conduct that does not affect, in some way, commerce.[297] By including effect on commerce as an element of the statutory claim,[298] Congress ensures that the statute, by its terms, cannot be applied to conduct that does not affect commerce. In other words, the statute cannot and will not be applied to conduct or actors that Congress could not constitutionally regulate. This adds a constitutional dimension to stripping-by-legislating narrowly. The Constitution is, in a sense, "enforced" by narrowing the scope of the statute.[299]

Consider Title VII, which prohibits discrimination by "employers," then defines employer, in part, as a person engaged in "an industry affecting commerce."[300] That limitation narrows the statute—the federal right to be free from race discrimination in employment only extends to those who are employed by companies engaged in industries affecting commerce and the corresponding duty to refrain from discrimination only binds entities engaged in industries affecting commerce. But it ensures that Title VII, by its terms, will not reach conduct (for example, instances of race discrimination in employment in non-commerce-

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[293] *See* LOEVY, *supra* note ___, at 49-51 (describing constitutional arguments by Attorney General Robert Kennedy as to congressional power under both the Commerce Clause and § 5); Goldstein, *supra* note ___, at 1106 (same).

[294] *See* Johnsen, *supra* note ___, at 30 ("The lawmaking process allows the President significant, uncontroversial methods of promoting the constitutionality of the laws. The President may, and should, evaluate proposed legislation for constitutionality, work with Congress to cure any defects, veto bills when Congress has been unresponsive, and even after enactment, urge Congress to repeal unconstitutional provisions."); Lawson & Moore, *supra* note ___, at 1289 ("[M]odern scholars wonder whether the President *must* veto bills that contain provisions he deems unconstitutional, but no one argues that the President is *forbidden* from issuing vetoes on constitutional grounds.") (emphasis in original; footnote omitted).

[295] *See* Adler & Dorf, *supra* note ___, at 1153 ("Congress sometimes chooses to include in its statutes a 'jurisdictional nexus'—that is, a requirement that the government prove that the acts to which a statute is applied in a given case themselves affect interstate commerce.").

[296] *See supra* Part I.A.1.a.

[297] *See* United States v. Lopez, 514 U.S. 549, 559-60 (1995).

[298] *See, e.g.*, 15 U.S.C. § 1 (prohibiting contracts "in restraint of trade or commerce among the several States"); 42 U.S.C. §§ 2000e(b), 2000e-2(a) (prohibiting discrimination in employment by employers engaged in a business affecting commerce); 15 U.S.C. § 7903 (defining statutory terms of handgun-manufacturer defense in terms of engagement of person, seller, business, manufacturer, and product by reference to interstate or foreign commerce).

[299] *See* Adler & Dorf, *supra* note ___, at 1122.

[300] 42 U.S.C. § 2000e(b).

effecting industries, to the extent there is such a thing anymore) that Congress could not constitutionally regulate.[301]

## II. JURISDICTION, MERITS, AND STRIPS

Jurisdiction stripping and merits stripping both are means of constraining the reach and scope of federal judicial activity and influence.[302] Both produce the apparently same effect—fewer successful civil actions will be brought to vindicate federal individual rights, arguably depriving courts of the opportunity to perform their central role of protecting federal rights.[303] There is a symbiotic relationship between the two. Expansion of substantive rights carries with it an expansion of judicial competence, while contraction of substantive rights means the contraction of judicial competence.[304] It is arguable that the various legal rules identified as merits strips can, as Louise Weinberg suggests, "loosely but realistically" be described as limits on judicial jurisdiction.[305]

It makes no difference, the argument goes, whether we speak of limits on causes of action or restrictions on jurisdiction.[306] True enough, if our focus is solely on effects on the federal docket. If the diminished substantive right dissuades individuals from filing civil actions in the first instance, knowing they cannot prevail on claims of a stripped right, the federal docket shrinks.

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[301] *See* Adler & Dorf, *supra* note ___, at 1153 ("Whether the nexus is satisfied in particular circumstances is a distinct question about the statute's scope . . .").

[302] *See* Resnik, *Federal Courts*, *supra* note ___, at 2613 ("Jurisdictional grants, restrictions, and decisional rules (be they case in terms of causes of action, removing categories of cases from Article III oversight, . . . are the next template on which to examine court-Congress relations.").

[303] *See* REDISH, *supra* note ___, at 96 ("[T]oday the primary function of the federal courts is generally thought to be the adjudication and protection of federal rights . . ."); Paul Mishkin, *The Federal "Question" in the District Courts*, 53 COLUM. L. REV. 157, 157 (1953) (arguing that, with the expansion of federal legislation in the 1960s, the exercise of power over federal claims "constitutes one of the major purposes of a full independent system of national trial courts"); Judith Resnik, *History, Jurisdiction, and the Federal Courts: Changing Contexts, Selective Memories, and Limited Imaginations*, 98 W. VA. L. REV. 171, 226-27 (1995) (describing federal claims as "the very kind of jurisdiction that many today assume to be the quintessential federal moment"); Siegel, *supra* note ___, at 1123 (criticizing Rehnquist Court decisions that "ignore[] or downplay[] . . . the historic role of the federal courts in insuring that remedial schemes are sufficient to protect federal rights").

[304] *See* Weinberg, *supra* note ___, at 1409-10 (arguing that the dockets of the federal courts "swell whenever Congress enacts yet another new law giving rise to new federal rights"); *see also* Resnik, *Federal Courts*, *supra* note ___, at 2593 (arguing that limitations on decision making by Article III judges come, in part, from "cases not often characterized as 'about' Article III but denominated as 'about' congressional commerce clause powers").

[305] Weinberg, *supra* note ___, at 1407; *see* Resnik, *Federal Courts*, *supra* note ___, at 2593 (describing range of enactments limiting "decision making opportunities" for federal courts).

[306] *See* Resnik, *Federal Courts*, *supra* note ___, at 2593, 2613; Resnik, *Trial as Error*, *supra* note ___, at 979 (describing objections to new causes of action through arguments about special character and import of federal courts); Weinberg, *supra* note ___, at 1407-08; *see also* Ferejohn & Kramer, *supra* note ___, at 1034 ("[I]t is far more typical for the Court to exercise jurisdiction while applying substantive legal tests that leave political actors free to choose their course of action without any realistic threat of judicial intercession."); Siegel, *supra* note ___, at 1115 (discussing Rehnquist Court's hostility to litigation that "comes across as an overt inclination to close the courts to particular kinds of claims or claimants, at other times as skepticism about doctrinal innovations that might have the immediate or second-order consequence of facilitating litigation").

But the understanding changes when we shift our focus to two distinct points. One is the effect that a strip has on real-world actors and conduct, how individuals behave in light of narrower legal rights and duties. A second is the effect on the litigation process, on how claims, if they are brought to federal courts, will be resolved under the new legal rules. With that change in focus, meaningful facial, practical, and procedural differences emerge between merits stripping and jurisdiction stripping. These differences demand that we avoid conflating the concepts or using terms loosely.

The conflation of jurisdiction stripping and merits stripping is a subset of the broader problematic conflation of federal subject-matter jurisdiction and substantive merits in federal actions.[307] Something different occurs—conceptually, analytically, and procedurally—when Congress or other legal rule makers create enforceable substantive rights (and impose enforceable substantive duties) as opposed to granting subject matter jurisdiction.[308] It follows that something different occurs when the strip is of the merits of substantive claims of right as opposed to subject matter jurisdiction.

### *A. Common Principles*

In distinguishing and separating merits stripping from jurisdiction stripping, as with separating merits and jurisdiction, several common principles guide our analysis.

#### *1. Power Sources and Legal Pronouncements*

Stripping, whether of jurisdiction or merits, represents an exercise of legal rulemaking by some branch of government. But, at least with strips of statutory rights, Congress tends to be the prime mover.

Most efforts at jurisdiction stripping originate with Congress in the course of legislating the jurisdiction of the courts and the debate is the extent to which the power to grant jurisdiction includes the power to strip power over certain classes of cases.[309] In addition, federal courts often strip their own jurisdiction specifically to keep Congress from attempting to exercise that power.[310] Similarly, most efforts at merits stripping originate with Congress or are affected by one of the other branches in the course of reviewing, interpreting, and applying congressional legislation.[311]

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[307] *See generally* Wasserman, *Jurisdiction*, *supra* note ___, at 662-64.

[308] *Id.* at 669-70.

[309] *See* sources cited *supra* note ___.

[310] *See* Ferejohn & Kramer, *supra* note ___, at 1001 ("[T]he federal judiciary has also devised an assortment of doctrinal principles that reduce the likelihood of politically judicial entanglement in broad categories of cases."); *id.* at 995 ("[T]he judiciary has acted in such a way that Congress and the executive have seldom felt the need to [jurisdiction strip]."); *see also* Weinberg, *supra* note ___, at 1408 ("[A]t least since the demise of the Warren Court, the Supreme Court has been a veritable fount of door-closing and access-limiting rules.").

[311] *See supra* Part I.

Classifying a stripping act thus begins with a proper understanding of the act of Congress that affects the strip or that the other branches are responding to in affecting the strip.

The first step is to apply a proper framework of congressional power, as suggested by John Harrison. He divides congressional power into four categories, two structural and two substantive. Through its structural powers, Congress determines the class of cases that the federal courts are empowered to hear, including establishing subject matter jurisdiction.[312] Through its substantive powers, Congress creates, declines to create, or limits causes of action, determining "who is entitled to sue whom for what, and for what remedy."[313] Thus, to the extent it can, Congress jurisdiction strips as an exercise of its structural powers; it merits strips as an exercise of its substantive powers.

We can, in turn, characterize the stripping conduct of the executive and judiciary according to the power source of the congressional enactment to which either is responding. A narrow judicial interpretation of a structural enactment (for example, the judicial gloss on general federal question jurisdiction requiring that the plaintiff's claim be based on federal law as established in the "well-pleaded complaint"[314]) affects a jurisdiction strip.[315] A narrow judicial interpretation of a substantive enactment affects a merits strip.[316]

The second step is to recognize distinct enactments produced by distinct legislative powers, through a plain-language approach. A jurisdiction-granting provision contains jurisdictional language; it is addressed directly to the courts and speaks in jurisdictional terms about the classes of cases that the federal courts are empowered to hear.[317] A substantive rights-granting provision contains language directed to real-world actors, speaking in terms of who is protected by the right, who is subject to a duty, and the conduct that is permitted or restrained by the provision.[318]

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[312] *See* Harrison, *supra* note ___, at 2514.

[313] *Id.* at 2515; *see* Leonard, *supra* note ___, at 280 (describing Congress's substantive authority to legislate within its constitutional ambit, including the power to create or not creates causes of action and to choose who may or may not enforce claims in court).

[314] 28 U.S.C. § 1331; Gully v. First Nat'l Bank, 299 U.S. 109, 113 (1936); Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149, 152 (1908).

[315] *See* Ferejohn & Kramer, *supra* note ___, at 1019 (describing this as the "most prominent judicially crafted limitation on federal question jurisdiction).

[316] *See supra* Part I.A.4.

[317] *See* Arbaugh v. Y&H Corp., 126 S. Ct. 1235, 1245 (2006) ("If the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue.") (footnote omitted); Zipes v. Trans World Airways, Inc., 455 U.S. 385, 394 (1982) (holding that provision is not jurisdiction where it "does not speak in jurisdictional terms or refer in any way to the jurisdiction of the courts"); Lindh v. Murphy, 521 U.S. 320, 344 (1997) (Rehnquist, C.J., dissenting) (calling jurisdictional language "most salient characteristic"); United Phosphorus, Ltd. v. Angus Chem. Co., 322 F.3d 942, 954 (7th Cir. 2003) (Wood, D., J., dissenting) (arguing that statute is not jurisdictional grant when it does not speak in jurisdictional terms or even mention jurisdiction); *see also* Scott C. Idleman, *The Demise of Hypothetical Jurisdiction in the Federal Courts*, 42 VAND. L. REV. 235, 324 n.366 (1999); Wasserman, *Jurisdiction*, *supra* note ___, at 676.

[318] *See* Harrison, *supra* note ___, at 2521 (arguing that a right is violated when conduct occurs that is "inconsistent with a duty resting on the defendant"); Leonard, *supra* note ___, at 280; Wasserman, *Jurisdiction*, *supra* note __, at 674-75; *see also* Hartford Ins. Co. v. California, 509

The same distinctions that separate grants of jurisdiction from grants of substantive rights separate strips of jurisdiction from strips of substantive rights. We look to the same plain language markers to decide whether a provision reduces judicial jurisdiction or real-world rights. We also look to the same language to characterize an interpretation of that provision by the courts or the executive.

Importantly, Congress' substantive powers are broader and more frequently exercised than its structural powers.[319] Our default must be that an enactment (or interpretation or application of an enactment) is jurisdictional only if Congress provides a clear statement to that effect, usually through jurisdictional language; otherwise, the provision should be characterized as substantive and tied to the merits of a claim. The Supreme Court adopted such an approach as to a statutory stripping provision in *Arbaugh v. Y&H Corp.*[320] In holding that the limitation on Title VII to employees with 15 or more employees was substantive and not jurisdictional, the Court stated:

> If the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue. . . . But when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character.[321]

The imperative for a clear statement is even stronger where stripping is involved, given the ongoing constitutional, structural, and policy controversy over jurisdiction stripping.[322] Absent clear, jurisdiction-stripping language to the contrary, the default should be that what was stripped was substantive rights, the merits, simply to avoid the nice constitutional issue of the existence and scope of Congress' jurisdiction-stripping power.

*2. Jurisdiction, Litigation, and Adjudication*

Underlying the distinction between jurisdiction stripping and merits stripping is a necessary distinction among three ideas: subject matter jurisdiction, litigation, and adjudication.

Subject matter jurisdiction is the raw adjudicative power of the courts, the authority to hear, decide, and resolve legal and factual disputes brought before them in favor of one party or the other.[323] It is, in

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U.S. 764, 813 (1993) (Scalia, J., dissenting) (arguing that questions of substantive law turn on whether Congress asserted regulatory power over challenged conduct).

[319] *See* Harrison, *supra* note ___, at 2514 ("Congress has considerably more discretion when exercising substantive rather than structural power.").

[320] 126 S. Ct. 1235 (2005).

[321] *Id.* at 1245; *see* Wasserman, *Jurisdiction*, *supra* note ___, at 693.

[322] *See* sources cited *supra* note ___.

[323] *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 714(2004) (defining jurisdiction as "addressing the power of the courts to entertain cases concerned with a certain subject"); Davis v.

Lawrence Sager's words, the "motive force of a court, the root power to adjudicate a specified set of controversies."[324]

Litigation is the broad process of judicial dispute resolution. The concept includes within it decisions by particular individuals or groups to resolve problems and to seek redress through formal application to the courts, as well as a complex of individuals, institutions, and practices through which such disputes are resolved.[325] Litigation is a three-stage process, with procedural issues such as subject matter jurisdiction resolved at the first stage and merits issues resolved in stages two and three; the identity of the decision maker and the manner of decision making vary among the issues and stages.[326] The end goal of litigation is a trial, frequently with a jury acting as factfinder for any disputes of fact going to the merits (even if most cases are, in fact, resolved or settled long before trial).[327]

Adjudication is the method of decision making as to all legal and factual issues in the litigation process, whether merits, jurisdictional, or procedural, and at any stage of the litigation process.[328] Adjudication is characterized by party participation, the opportunity to present proofs, and reasoned and explained decisions.[329]

By diminishing the scope of real-world rights and duties and the ability to enforce those rights and impose those duties, merits strips reduce the amount of federal litigation (or, from the plaintiff's standpoint, the amount of successful litigation). But a change in the amount of litigation does not equate to a change in the amount of federal jurisdiction, of raw adjudicative authority.

District courts assert adjudicative power over most federal claims under the grant of general federal-question jurisdiction over claims "arising under" the Constitution, laws, and treaties of the United States.[330] Arising under, for statutory purposes, generally means that the

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Passman, 442 U.S. 228, 239 n.18 (1979) (defining jurisdiction as "a question of whether a federal court has the power, under the Constitution or laws of the United States, to hear a case . . ."); Hagans v. Levine, 415 U.S. 528, 538 (1974) (defining jurisdiction as "essentially the authority conferred by Congress to decide a given type of case one way or the other"); Lee, *supra* note ___, at 1620 (defining jurisdiction as "legitimate authority").

[324] Sager, *Constitutional Limitations*, *supra* note ___, at 22.

[325] Siegel, *supra* note ___, at 1114.

[326] *See* Wasserman, *Jurisdiction*, *supra* note ___, at 649-55.

[327] *Id.* at 648, 654-55.

[328] *See* Resnik, *Trial as Error*, *supra* note ___, at 928 (defining adjudication as "decisionmaking by a judge"); Wasserman, *Jurisdiction*, *supra* note ___, at 649 (arguing that adjudication requires a certain process be followed in deciding whatever issues are in dispute between the parties).

[329] *See* Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 369 (1978); Owen M. Fiss, *Forward: The Forms of Justice*, 93 HARV. L. REV. 1, 13 (1979); Chad M. Oldfather, *Defining Judicial Inactivism: Models of Adjudication and the Duty to Decide*, 94 GEO. L.J. 121,153 (2005) (arguing that party participation is a crucial feature of all models of adjudication); H. Jefferson Powell, *The Three Independences*, 38 U. RICH. L. REV. 603, 611 (2004) (arguing that adjudication entails judgments proceeding from different premises and operating within different constraints).

[330] 28 U.S.C. § 1331; *see also* Leonard, *supra* note ___, at 277 (arguing that § 1331 provides the jurisdictional basis for most federal statutory and constitutional claims). There also may be statute-specific jurisdictional grants, *see, e.g.*, 28 U.S.C. § 1337 (commerce); 28 U.S.C. § 1338 (patent, copyright, and trademark); 28 U.S.C. § 1343(a)(3) (civil rights); 42 U.S.C. § 2000d (Title VII), although they generally are regarded as supplements to § 1331. *See* Arbaugh v. Y&H Corp.,

plaintiff's claim of right was created by or founded directly on or made possible by federal law, where federal law creates a cause of action and substantive right to a remedy for violation of that national rule.[331] That standard plainly is met when a plaintiff seeks civil relief for a claimed violation of rights established by federal statute or constitutional provision.[332]

The significance of this jurisdictional structure is that a rights-holder can attempt to vindicate a federal right, once created, in federal court without Congress having to do or say anything more about judicial jurisdiction. The court possesses raw power to hear and resolve substantive legal and factual issues brought before it; it merely awaits the bringing of those claims by rights-holders. And the courts continue to await those claims, with power to adjudicate them, unless and until Congress affirmatively divests them of some portion of that jurisdiction by carving out particular claims or issues.

What changes with a merits strip is the quantum of extant substantive federal law and rights, the amount of real-world actors and conduct subject to federal legal protection or constraint and the degree of judicial enforceability of those rights. Merits strips reduce the number of rights-holders, the number of duty-bound actors, or the amount of conduct subject to legal constraint and suit. But they do not reduce that quantum of judicial authority to hear whatever claims are or might become possible, depending on the development of federal substantive law.[333]

General federal question jurisdiction is akin to potential energy—it exists as power, waiting to be released when acted upon by an outside force. For the federal courts, that outside force is parties bringing civil actions alleging injury and seeking relief under substantive federal law. To the extent fewer parties are able to do so because of reductions in the quantum of enforceable federal rights-creating law, the courts may face a reduced caseload. Or courts may simply enter fewer judgments on the merits in favor of plaintiffs, as their claims of right cannot succeed under

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126 U.S. 1235, 1239-40 (2005) (stating that the specific jurisdictional grant for Title VII underscores congressional desire to provide a federal forum for claims).

[331] *See* Wasserman, *Jurisdiction*, *supra* note ___, at 694-97 (compiling various definitions offered by courts and commentators); *see also, e.g.* Jones v. R.R. Donnelley & Sons Co., 541 U.S. 369, 377 (2004) (describing requirement that claim be "made possible" by an applicable federal statute); Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 89 (1998) (stating that a claim arises under federal law where the plaintiff wins under one conceivable construction of federal law and loses under another); Am. Well Works Co. v. Layne & Bowler Co., 241 U.S. 257, 260 (1916) (Holmes, J.) (arguing that a suit arises under federal law where that "law creates the cause of action"); Donald L. Doernberg, *There's No Reason for it; it's Just Our Policy: Why the Well-Pleaded Complaint Rule Sabotages the Purposes of Federal Question Jurisdiction*, 38 HASTINGS L.J. 597, 656-57 (1987) (emphasizing the presence of federal issues "whose decision one way will necessarily cause a result in the case and whose decision the other way will tend to prevent it"); Mishkin, *supra* note ___, at 165 (describing requirement that claim be "founded 'directly' upon national law").

[332] *See* Wasserman, *Jurisdiction*, *supra* note ___, at 697-98.

[333] *See id.* at 676-77 (arguing that Congress establishes jurisdiction "on an understanding that extant or future statutes enacted under its substantive powers . . . provide a cause of action that federal courts now are empowered to hear"); *see also Sosa*, 542 U.S. at 724 (stating that Alien Tort Statute provided courts with jurisdiction to adjudicate whatever rights were established by federal Common Law).

stripped substantive rules of law. But courts have not lost any of their raw power to hear and resolve legal and factual issues. They merely are exercising that power less frequently.

Much has been written about the federal "litigation explosion" that began in the 1970s.[334] But the trigger for that explosion was not the broad grant of general federal question jurisdiction, which occurred 100 years earlier.[335] Rather, the trigger was the expansion of substantive federal law, particularly the enactment and interpretation of statutes governing civil rights, labor and employment, and the environment.[336] In other words, changing jurisdiction alone did nothing to change the amount of litigation; it was only after substantive law expanded that the amount of litigation expanded, even while federal question jurisdiction remained largely unchanged.[337] It follows that the amount of litigation will be reduced by strips in substantive rights and in the enforceability of substantive rights.[338]

This sharp distinction between federal jurisdiction and federal litigation gets lost in discussions of stripping and the role of the courts. The Long Range Plan provides a clear example. It describes the dispute between "those who favor increased 'federalization' of the law against those who favor limiting federal court jurisdiction."[339] Other

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[334] *See* Marc Galanter, *The Turn Against Law: The Recoil Against Expanding Accounability*, 81 TEX. L. REV. 285, 292-93 (200) (discussing origins of fears of "litigation explosion" during 1970s); Marc Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3, 5 (1986) (describing the "litigation explosion" or "hyperlexis" reading of modern American life, under which more litigation is filed in American courts); *see also* Siegel, *supra* note ___, at 1114 (arguing that Rehnquist Court jurisprudence can be understood as reflecting a hostility to, and an effort to limit, private litigation).

[335] *See* REDISH, *supra* note ___, at 96 (stating that Congress established general federal-question jurisdiction in 1875); Mishkin, *supra* note ___, at 157 (same).

[336] *See* Mishkin, *supra* note ___, at 157 (describing the "expanding scope of federal legislation" and its connection to the power of federal courts); Resnik, *Trial as Error*, *supra* note ___, at 1004 (arguing that, post-New Deal, "the Supreme Court generally found that Congress had the power to make an array of issues 'federal,' thus enabling growth of the federal courts' docket"); *see also, e.g.*, Civil Rights Act of 1964, 42 U.S.C. 2000e, *et seq*; Age Discrimination in Employment Act of 1968, 29 U.S.C. 651; Americans with Disabilities Act of 1990, 42 U.S.C. § 12182; Voting Rights Act of 1965, 42 U.S.C. § 1973; Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566 (1977); Maine v. Thiboudot, 448 U.S. 1, 4 (1980) (holding that § 1983 supports claims for violations of federal statutes); Monell v. Dept. of Social Servs. of New York, 436 U.S. 658, 690 (1978) (holding that municipalities are "persons" for purposes of § 1983); Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971) (holding that Title VII prohibited employment programs having racially discriminatory effect); Monroe v. Pape, 365 U.S. 167, 183 (1961) (establishing expansive definition of "under color of state law" to permit claims against state government officials who violate state law).

[337] An amount-in-controversy requirement in § 1331 was eliminated in 1980, marking a slight expansion in the scope of jurisdiction under the general federal question grant. *See Arbaugh*, 126 S. Ct. at 1239-40. But most of the new statutes contained their own jurisdictional grants, giving the courts power to hear cases "brought under" those statutes, without an amount-in-controversy limitation. *See, e.g.* 42 U.S.C.§ 2000e-5(f)(3) (granting federal jurisdiction over claims "brought under" substantive provisions of Title VII); 42 U.S.C. § 1343 (a)(3) (granting federal jurisdiction over claims brought under § 1983). Thus, it is unlikely that federal courts were able to hear cases after the amendment to § 1331 in 1980 that they otherwise could not have heard. *But cf. Thiboudot*, 448 U.S. at 8 n.6 (accepting, under old version of § 1331, that there are some statutory claims that could have been brought under § 1983 cause of action, but for which there would have been no federal jurisdiction unless the amount-in-controversy requirement of § 1331 were satisfied).

[338] *See* Siegel, *supra* note ___, at 1117-18 (describing ways in which judicial narrowing of private rights and causes of action reflects hostility to the institution of litigation).

[339] *Long Range Plan*, 166 F.R.D. at 88-89; *see also* Resnik, *Trial as Error*, *supra* note ___, at 980 ("Federal jurisdictional discussions thus became a means by which to enact conflict about legal

commentators similarly speak of the problem that recognizing particular constitutional claims "would dramatically expand the jurisdiction of federal courts."[340]

But increasing "federalization" of the law or recognizing new constitutional claims sounds in an expansion of substantive law. It is not the antithesis of limiting jurisdiction. Federalizing law and expanding jurisdiction are necessarily distinct concepts, sometimes (although not always) producing similar, not identical, results. So, too, is de-federalizing law (which strips litigation) and stripping jurisdiction. Congress could decline to expand or increase substantive law without narrowing the general federal question jurisdiction of the courts over claims "arising under" federal law. Similarly, Congress could expand the scope and range of conduct and actors regulated by federal law, but at the same time limit the jurisdiction of the courts, as by creating rights enforceable only in state court.

*3. Legislative Jurisdiction v. Judicial Jurisdiction*

Jurisdiction means "something like legitimate authority."[341] But any governmental body, not only courts, can wield "legitimate authority." The question is legitimate authority to do what?

This raises the critical distinction between judicial jurisdiction of the federal courts and legislative (or prescriptive) jurisdiction of Congress. The latter is the constitutional authority to legislate, to regulate particular real-world actors and conduct by prescribing prospective legal rules of general applicability.[342] The former is the statutory and constitutional authority of courts to adjudicate, to hear and resolve legal and factual issues presented to them by parties.[343] Stated differently, legislative jurisdiction is power to prescribe primary legal rules creating rights and imposing duties, while judicial jurisdiction is power to provide the adjudicative forum when those duties have been ignored and rights violated. Courts and commentators too easily confuse the two.[344]

In discussing substantive legal norms and rules in the context of "granting or repealing federal jurisdiction,"[345] commentators such as Judith Resnik should be understood as referring to granting or repealing federal legislative or prescriptive jurisdiction—the constitutional power

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rules."); Resnik, *Federal Courts*, *supra* note ___, at 2619-20 (describing Plan's criticism of Congress and calls for "restraint" in creating new federal causes of action on issues previously resolved in state courts).

[340] *See* Staszewski, *Avoiding Absurdity*, *supra* note ___, at 1035.

[341] *See* Lee, *supra* note ___, at 1620.

[342] *See* Hartford Fire Ins. Co. v. California, 509 U.S. 764, 813 (1993) (Scalia, J., dissenting) (arguing that "'legislative jurisdiction' . . . refers to 'the authority of a state to make its law applicable to persons or activities"); United Phosphorus Ltd. v. Angus Chem. Co., 322 F.3d 942, 953 (7th Cir. 2003) (en banc) (Wood, D., J., dissenting) (describing "jurisdiction to prescribe a rule of law"); Kulick v. Pocono Downs Racing Ass'n, 816 F.2d 895, 898 (3d Cir. 1987) (describing Congress's "constitutional authority to act"); Leonard, *supra* note ___, at 280.

[343] *See supra* notes ___ and accompanying text.

[344] *Hartford Fire Ins.*, 509 U.S. at 813 (Scalia, J., dissenting); *United Phosphorus*, 322 F.3d at 953 (Wood, D., J., dissenting).

[345] Resnik, *Trial as Error*, *supra* note ___, at 979.

(and wisdom) of Congress enacting rights-creating legislation and enforcing particular norms as matters of federal law.[346] Resnik is, at times, more precise, describing Congress pulling issues "into the federal net" by wielding its authority to make "an array of issues 'federal' and to "regulate a broad range of activities and behaviors."[347] Here she plainly (and quite properly) is talking about prescriptive jurisdiction, what Harrison labels substantive powers, to regulate real-world actors and conduct. The debate is about how much real-world conduct Congress can or should regulate; it only incidentally is about increasing the federal courts' docket,[348] and then only because § 1331 empowers the courts to hear whatever federal law Congress enacts.[349]

Conversely, the argument that Congress should not regulate some conduct because "certain problems should not become federal cases but belong to the states"[350] does not necessarily exclude such issues entirely from the adjudicative authority of the federal courts. Some subset of cases under state law still may come to federal court under a different grant of judicial jurisdiction, most notably diversity.[351]

Even after the *Morrison* Court's rejection of VAWA, a woman still could sue her rapist for damages in federal court, at least in those few cases in which victim and attacker are from different states and the action is for more than $75,000. The federal court would apply state law (assault or some other tort) in that case.[352]

But that simply drives home the point that the central issue is which government (federal or state) will assert the legitimate authority to prescribe applicable substantive rules of law creating rights and imposing duties—in other words, who can or will assert prescriptive jurisdiction—not whether federal courts provide the adjudicative forum.

The distinction between judicial jurisdiction and legislative/prescriptive jurisdiction is essential to understanding need for and role of statutory jurisdictional elements.[353] Jurisdictional elements relate solely to legislative/prescriptive jurisdiction. They function as a nexus between the statute and the substantive constitutional authority pursuant to which Congress enacted the statute; by requiring the plaintiff to plead and prove that element, courts ensure that federal rules are not and cannot be applied beyond the limits of congressional prescriptive regulatory power.[354] The statute by its terms does not and will not

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[346] *Id.* at 979-80; *see also* Resnik, *Federal Courts*, *supra* note ___, at 2620.

[347] Resnik, *Trial as Error*, *supra* note ___, at 1004-06 & n.323.

[348] *See id.* at 1004.

[349] *See* Wasserman, *Jurisdiction*, *supra* note ___, at 677-78; *supra* notes ___ and accompanying text.

[350] Resnik, *Trial as Error*, *supra* note ___, at 1004 (discussing Long Range Plan); *see* United States v. Morrison, 529 U.S. 598, 615 (2000) (seeking to protect against congressional regulation of "family law and other areas of traditional state regulation").

[351] *See* 28 U.S.C. § 1332(a) (granting district courts original jurisdiction over civil actions, *inter alia*, between citizens of different states where the amount in controversy exceeds $ 75,000). Another jurisdictional source might be where the defendant is a federal officer. *See* 28 U.S.C. 1442 (permitting removal to federal court of civil and criminal actions in which defendant is federal officer).

[352] *See* Erie R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).

[353] *See supra* notes ___ and accompanying text.

[354] *See* Adler & Dorf, *supra* note ___, at 1153.

regulate actors or conduct that Congress constitutionally could not regulate.

But none of this says anything about the court's authority to hear and resolve a plaintiff's claim of right under the statute. It speaks only to the scope of the statute, a merits issue of who can sue whom for what conduct and the outcome of the action when and if it is brought in any court.[355] A plaintiff cannot prevail if she does not plead and prove the jurisdictional element, whether because the nexus is not included in the statute or because she has failed to prove that element.[356] But that is a failure of her substantive claim only, not a failure of adjudicative authority.

*4. Jurisdiction as Party-Neutral*

Jurisdiction must be party-neutral. A grant of subject matter jurisdiction empowers the court to consider the entire merits of the case and to enter judgment on the merits in favor of either party and against either party.[357] Jurisdiction cannot depend on the outcome of the merits or on the specifics of the case at hand; we cannot understand a court to lack jurisdiction if the factfinder finds in favor of the defendant, but to have jurisdiction if the factfinder finds in favor of the plaintiff.[358]

Imagine, for example, a constitutional claim in which there is no dispute as to what either party did in the real-world incident. The only question is the legal one about the scope of the constitutional right at issue and whether the conduct was, in fact, unconstitutional; the plaintiff wins on an expansive constitutional interpretation and the defendant wins on a narrow (stripping) interpretation. The district court obtains jurisdiction over this claim under the general federal question jurisdiction statute as a civil action "arising under" the Constitution of the United States.

Having been granted jurisdiction, the court must have authority to make either interpretation and to render judgment on the merits accordingly. But either interpretation, and resulting judgment, must be

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[355] *See* Wasserman, *Jurisdiction*, *supra* note ___, at 687 (arguing that the effects of non-satisfaction of any element are the same—the plaintiff's claim must fail).

[356] For example, state action functions as a jurisdictional element for legislation enacted under § 5 of the Fourteenth Amendment. *See* United States v. Morrison, 529 U.S. 598, 621 (2000); Wasserman, *Jurisdiction*, *supra* note ___, at 684. A failure of a jurisdictional element may result because Congress neglected to include the element, as in *Morrison*, or because the plaintiff fails to prove it, as in a case in which a plaintiff sues a non-state-actor for constitutional violations under § 1983. *See infra* notes ___ and accompanying text.

[357] *See* Laura S. Fitzgerald, *Is Jurisdiction Jurisdictional?*, 95 NW. U. L. REV. 1207, 1216 (2001) (arguing that jurisdiction means the court is "clothed with entire power to do justice according to law, or according to equity"); Mishkin, *supra* note ___, at 166 (arguing that a court with jurisdiction has power to enter judgment on the merits for defendant as well as plaintiff).

[358] *See* Bell v. Hood, 327 U.S. 678, 682 (1946) ("Jurisdiction . . . is not defeated . . . by the possibility that the averments might fail to state a cause of action on which [plaintiffs] could actually recover."); Edward A. Hartnett, *The Standing of the United States; How Criminal Prosecutions Show that Standing Doctrine is Looking for Answers in All the Wrong Places*, 97 MICH. L. REV. 2239, 2252 n.64 (1999) ("If a plaintiff fails to state a cause of action (or, under the Federal Rules of Civil Procedure, a claim upon which relief can be granted), the dismissal is on the merits, not for lack of jurisdiction."); Mishkin, *supra* note ___, at 166 ("The power of the court to hear and decide a case could hardly be made to depend upon the jury's verdict.").

understood as a determination of real-world rights and duties and of whether rights were violated or duties ignored on the facts at hand. The unacceptable alternative is that the broad interpretation of the Constitution is a decision on the merits of the plaintiff's constitutional claim, while the stripping interpretation becomes not a decision as to the meaning of the Constitution, but as to the meaning of the court's adjudicative authority.

*5. Non-Existence as Law*

The unifying concept of merits stripping is that it results in non-existence of any applicable rule of constitutional or statutory law protecting or regulating the parties and conduct involved in the occurrences at issue.[359] No federal rule exists as law granting the plaintiffs a right to be free from the particular conduct about which they have sued; no existing federal rule exists as law imposing on the defendants a duty to perform or refrain from performing the particular conduct over which they have been sued. There is no right in existence to be violated, enforced, or vindicated in court by one person against another over particular real-world events.

The difference among the categories is how we arrived at this state of non-existence. Consider several examples of merits strips.

1) Plaintiff sues his employer under the Safe Workplaces Act, a federal statute creating a right to work in a safe environment and providing for damages from an employer for work-related injuries. Unfortunately for the plaintiff, although Congress passed this measure (which was the result of long-term union lobbying efforts), the President vetoed it and Congress was unable to override the veto; the statute thus never was enacted it into law according to constitutional processes.[360]

2) Plaintiff sues the man who sexually assaulted her under the Violence Against Women Act, the federal statute creating a right to be free from private, non-employment-related gender-motivated violence; the court dismisses the claim, striking VAWA down as exceeding Congress' legislative authority under the Commerce Clause and § 5.[361]

3) Plaintiff sues a small-town Mom-and-Pop convenience store with five employees, for which she performed accounting services as an independent contractor, alleging she was fired because of her sex and sexual orientation. She asserts a Title VII claim, although Title VII does not reach entities with fewer than fifteen employees, does not protect independent contractors, and does not prohibit discrimination based on sexual orientation.[362]

4) Plaintiff, an obese young adult with health problems, who has been eating McDonald's every day for ten years, sues the company in federal court (on diversity jurisdiction) for state-law fraud and products

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[359] *See* Adler & Dorf, *supra* note ___, at 1119; *supra* notes ___ and accompanying text.
[360] *See* Adler & Dorf, *supra* note ___, at 1117-18; *supra* Part I.A.1.
[361] *See* United States v. Morrison, 529 U.S. 598, 13, 617-18 (2000); *supra* Part I.A.5.
[362] *See supra* notes ___ and accompanying text.

liability, claiming that the company used unreasonably unhealthy products in making its food and failed to disclose the negative health effects. She seeks to recover medical expenses related to her obesity. While the action is pending, the Senate passes, and the President signs, the cheeseburger bill.[363] McDonald's adds a defense under § 3(b) of the bill, which requires dismissal of certain pending actions; McDonald's produces evidence that it is a manufacturer of a qualified food product and that plaintiff's claim seeks damages relating to obesity and other health problems.[364]

5) Plaintiff, a spokesperson for the state Attorney General who criticized her boss during a press conference, is fired and sues the State and the Office of the Attorney General for damages under § 1983, claiming a violation of the First Amendment. But states and state agencies are not "persons" subject to suit within the meaning of § 1983.[365] Moreover, the plaintiff's speech, being part of her job, is not constitutionally protected.[366]

6) Plaintiff brings a § 1983 claim alleging a First Amendment violation against a Major League Baseball team, a private entity, because she was kicked out of the team's privately owned ballpark for wearing a t-shirt declaring that the opposing team "sucks."[367] Such a private entity cannot violate the First Amendment and cannot be sued under § 1983 because it does not act "under color" of state or local law.[368]

7) An individual held by the U.S. military at Guantanamo Bay, Cuba, brings a civil action for damages, alleging that he was subject to cruel, inhumane, and degrading treatment while in custody, in violation of the McCain Amendment of the Detainee Treatment Act of 2005.[369] But no private right of action exists to enforce that provision.

It is obvious that, as a descriptive matter, every plaintiff should and will lose on each of these claims and none will be afforded relief in federal court, because the legal rule that each seeks to enforce does not exist as law. Non-existence in Example 1 is obvious—the rights-creating legislation never was enacted into what is understood as federal law under the Constitution, so the rights that would have been created have not been.[370] Non-existence in Example 2 follows from Adler and Dorf's argument that constitutional provisions establish conditions for

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[363] Personal Responsibility in Food Consumption Act of 2005, H.R.554, 109th Cong. (2005).

[364] H.R. 554, §§ 3(b), 4; *supra* notes ___ and accompanying text.

[365] *See* Will v. Michigan Dept. of State Police, 491 U.S. 58, 65 (1989); *supra* Part I.A.4.

[366] *See* Garcetti v. Ceballos, 126 S. Ct. 1951, 1960 (2006).

[367] *See* Howard M. Wasserman, *Fans, Free Expression, and the Wide World of Sports*, 67 U. PITT. L. REV. 525, 568-69 (2006) [hereinafter Wasserman, *Fans*].

[368] *See* Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 295 (2001); Julian N. Eule & Jonathan D. Varat, Transporting First Amendment Norms to the Private Sector: With Every Wish There Comes a Curse, 45 UCLA L. REV. 1537, 1544 (1998); Wasserman, *Fans*, *supra* note ___, at 538; *see also* Lugar v. Edmondson Oil Co., 457 U.S. 922, 936 (1982) ("As a matter of substantive constitutional law the state-action requirement reflects judicial recognition of the fact that 'most rights secured by the Constitution are protected only against infringement by governments.'" (quoting Flagg Bros. Inc. v. Brooks, 436 U.S. 149, 156 (1978))).

[369] 42 U.S.C. § 20000dd; *supra* notes ___ and accompanying text.

[370] *See* Adler & Dorf, *supra* note ___, at 1129 (arguing that Article I, § 7 is intuitively understood as constituting the difference between law and nonlaw).

the existence of federal law; a law that is invalid as against any constitutional limitation does not exist as federal law.[371]

Examples 3 through 7 reflect non-existence on a different level. In Example 7, although a legal rule exists creating the right to be free from cruel, inhumane, and degrading punishment, no extant legal rule provides for private enforcement of the right. Stated differently, no *enforceable* right exists as law, meaning the right that does exist is narrower than it otherwise might have been.[372]

As for Examples 3-6, we might say that the constitutional or statutory legal norm exists but was not violated in the conduct, transaction, or occurrence to which it is being applied, because the actors and conduct do not fall within terms of the legal rule—that is, the extant rule was not violated by the actors or conduct at hand.[373] But it is equally accurate to describe this as non-existence of these rights as law. No existing legal rule establishes rights and imposes duties on these actors for the acts and events at issue. No legal norm exists to be violated by these actors and in these events because law stopped short of establishing that norm. Since we are dealing with stripping—one-way diminution, narrowing, or limiting—of rights and duties, this seems a more appropriate description of the outcome.

We might further separate Example, in that the "under color" of state law limitation in § 1983 is a jurisdictional element, necessary to the exercise of § 5 power that produced the stature; § 1983 arguably would be invalid if the element were absent and Congress sought to regulate non-state action.[374] By contrast, the striping elements in Example 3 are products of basic policy choices as to legislative reach and scope; the statute would be constitutionally valid regardless of the presence or breadth of those limitations. But all elements dictate what the plaintiff must plead and prove to prevail on her claim of right (or the defendant on her defense); there is no difference for these purposes between policy elements and jurisdictional elements.[375]

The essence of the merits of legal claims of right is the answer to who can sue whom over what conduct.[376] Merits look to whether a legal norm creates rights in some, imposes duties in others, and whether that norm has been violated by events in the real world.[377] In all seven

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[371] *See id.* at 1130.

[372] *See* Zeigler, *supra* note ___, at 107 (arguing that the ability to enforce a right defines its scope and nature); *see supra* notes ___ and accompanying text.

[373] This is how I previously described, for example, attempts to bring a Title VII action against companies with fewer than fifteen employees. *See* Wasserman, *Jurisdiction*, *supra* note ___, at 687, 698.

[374] *See* Kulick v. Pocono Downs Racing Ass'n, 816 F.2d 895, 898 (3d Cir. 1987) ("[T]he state action requirement of a § 1983 claim constitutes a basis for Congress to regulate conduct pursuant to § 5 of the Fourteenth Amendment."); *see also* United States v. Morrison, 529 U.S. 598, 621 (2000) (emphasizing that Congress' ability to enforce Fourteenth Amendment is limited by fact that Amendment only prohibits state action); Wasserman, *Jurisdiction*, *supra* note ___, at 680; *supra* notes ___ and accompanying text.

[375] *See* Wasserman, *Jurisdiction*, *supra* note ___, at 687 (arguing that the treatment of every element of a claim, jurisdictional or otherwise, should be the same).

[376] Harrison, *supra* note ___, at 2515.

[377] *See* Davis v. Passman, 442 U.S. 228, 237 (1979) (defining substance cause of action as going to the "alleged invasion of 'recognized legal rights' upon which a litigants bases his claim for

examples, no legal norm exists to be violated or remedied in the events at hand, given the narrowness of those norms. Each of the plaintiffs has sought to recover on a claim of right that has been stripped and thus does not exist, and each will lose. And that loss will be tied to the merits.

But the federal courts do remain open for business, possessing authority to hear and resolve any claims of existing rights that may be brought before them. What has changed is that, as a result of some type of merits strip, those claims will not succeed because no rules exist to create or enforce rights to be violated in the conduct, transaction, or occurrence at issue.

It might be tempting to argue that a claim does not "arise under" federal law for § 1331 purposes if no federal rule exists making unlawful the conduct at issue. But if Adler and Dorf are correct, every federal claim fails because no legal rule exists proscribing the conduct or creating rights and duties for the actors at issue. If every failed federal claim is understood as reflecting the non-existence of a legal rule governing the actors, conduct, and events at issue, then every failed claim would deprive the court of jurisdiction. This forces the unworkable conclusion that whenever the plaintiff wins it is on the merits, while whenever the defendant wins it is because the court lacks jurisdiction.[378]

### *B. Facial and Functional Distinctions Between Stripping Acts*

We turn now to the facial and functional differences between merits strips and jurisdiction strips and how and why it is important to properly characterize the enactment at issue.

#### *1. Content of the Strip*

The first is where the stripping act, be it legislative, executive, or judicial, is directed. This stems from the plain language of the particular enactment and the requirement from *Arbaugh* that Congress clearly establish a provision as jurisdictional for it to be applied as jurisdictional, otherwise it is understood as merits-related.[379]

As with a jurisdiction grant, a jurisdiction strip is an exercise of Congress' structural powers. It is directed to Article III courts; it speaks in jurisdictional terms about particular classes of cases that courts no longer may hear and decide, although they would have had the power to

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relief."); Harrison, *supra* note ___, at 2520-21 (arguing that the merits demand from the plaintiff allegations and proof that "the defendant's conduct was wrongful (inconsistent with a duty resting on the defendant) and that the plaintiff is within the category of persons entitled to judicial relief because of the wrongful conduct"); Zeigler, *supra* note ___, at 105 ("A legal right imposes a correlative duty on another to act or to refrain from acting for the benefit of the person holding the right.").

[378] *See supra* notes ___ and accompanying text.

[379] Arbaugh v. Y&H Corp., 126 S. Ct. 1235, 1245 (2005) ("[W]hen Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character."); Wasserman, *Jurisdiction*, *supra* note ___, at 693 (arguing for plain-language approach to identifying what provisions are jurisdictional and what go to merits).

hear but for the stripping enactment.[380] A jurisdiction strip reduces the quantum of judicial authority to adjudicate particular legal and factual issues. For example, if a jurisdiction strip such as the Constitution Restoration Act of 2005 passes, federal courts would possess jurisdiction over all civil actions arising under the Constitution, laws, and treaties, as they do under § 1331, unless the civil action (as indicated by the pleadings) involves a challenge to government's acknowledgement of God as the sovereign source of law, liberty, or government.[381]

On the other hand, a merits strip is an exercise of substantive congressional power or a judicial or executive interpretation and application of a statute passed as an exercise of substantive congressional power.[382] The stripping rule is directed at real-world actors, speaking in terms of rights, duties, and regulated conduct. A merits strip eliminates rights and corresponding duties under federal law, removing any protections for or constraints on real-world actors and their conduct. There are no federal rights to be vindicated and no one to initiate successful claims of the right. This perhaps affects the judicial workload, to the extent the narrower rules dissuade rights-holders from bringing claims; otherwise, it merely dictates which party will prevail on those claims.

The distinction further implicates the limits of Congress' structural powers. Congress can control the jurisdiction of federal courts, at least to some degree.[383] Congress also can control the jurisdiction of state courts over federal claims and issues,[384] at least if it is clear in doing so.[385] Congress also can dictate the content and enforceability of federal substantive law.[386] But it is far less clear, and far more controversial,

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[380] *See* Sager, *Constitutional Limitations*, *supra* note ___, at 27 (discussing effect of statutory grants of jurisdiction that existed prior to congressional strip).

[381] Constitution Restoration Act of 2005, S.520 109th Cong. (2005); *supra* notes ___ and accompanying text.

[382] *See supra* notes ___ and accompanying text.

[383] *See* Eisenberg, *supra* note ___, at 514 ("While Congress does not have unfettered control over lower court jurisdiction such that it could in effect abolish the courts by obliterating their jurisdiction, it is also clear that some degree of congressional control, consistent with the Constitution, is valid."); *see* sources cited *supra* note ___.

[384] *See* REDISH, *supra* note ___, at 149; Anthony J. Bellia, Jr., *Congressional Power and State Court Jurisdiction*, 94 GEO. L.J. 949, 975 (2006) ("Hamilton understood the power that the Constitution conferred on Congress to constitute inferior tribunals to be a power to constitute them with exclusive jurisdiction over any and all Article III cases and controversies."); *cf.* Hart, *supra* note ___, at 1401 (arguing that while Congress can regulate jurisdiction of state courts in federal matters, it cannot do so unconstitutionally); *infra* note

[385] *See* Yellow Freight Sys., Inc. v. Donnelly, 494 U.S. 820, ___ (1990) (emphasizing the requirement of a clear statement in order to vest exclusive, rather than concurrent, federal jurisdiction); THE FEDERALIST No. 82, at 461 (Alexander Hamilton) ("[T]he inference seems to be conclusive that the State courts would have a concurrent jurisdiction in all cases arising under the laws of the Union where it was not expressly prohibited."); *see also* REDISH, *supra* note ___, at 150 (describing the general rule that "when a federal statute is silent on the question of state court jurisdiction, it should be presumed that state courts will have concurrent jurisdiction over federal causes of action"); Bellia, *supra* note ___, at 976 ("Under general principles of law, so long as an Article III case or controversy was transitory (or even local to a state), a state could exercise jurisdiction over it."); Resnik, *Trial as Error*, *supra* note ___, at 1007 ("Congress should have a presumption in favor of jurisdictional grants vesting concurrently in state and federal courts so as to avoid essentializing either jurisdiction . . .").

[386] *See* Ferejohn & Kramer, *supra* note ___, at 965 ("If the legislature changes the applicable law, for example, judicial decisions obviously ought to reflect this fact.").

whether Congress has the power to strip state courts of jurisdiction over state law claims, particularly claims arising under that state's own laws.[387]

This affects how we characterize laws such as the cheeseburger or handgun acts, both of which purport to control state-law claims brought in state court.[388] To call these jurisdiction strips confronts directly the controversy of whether Congress can control state-court jurisdiction over its own claims. Rather, both laws are better understood as limiting the reach of state substantive tort by interposing a federal defense for some actors against liability for some conduct under state law. This understanding avoids potential constitutional problems as to the limits of structural congressional power.[389]

*2. Stripping Remainders*

A second difference is what remains after the stripping rule. This distinction focuses on those real-world actors to whom rights have been given, on whom duties have been imposed, and from whom those rights have been stripped.

In the wake of a true jurisdiction strip, federal rights remain in place and enforceable, just not in federal court. But, for example, even if federal courts are stripped of the power to adjudicate challenges to government acknowledgement of God as the sovereign source of law, liberty, or government,[390] there nevertheless remains a right, grounded in the First Amendment's Establishment Clause, not to be confronted or coerced by government displays or acts that have the purpose or effect of endorsing religion.[391].[392] This jurisdiction strip only incidentally affects holders of federal rights by depriving them of one forum (albeit the

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[387] *See* Bellia, *supra* note ___, at 1001 ("There is no historical record specifically addressing what power Congress has to provide jurisdictional rules for state courts in purely state law cases."); *id.* at 1009 (arguing that the Founders "recognized that the courts of a sovereign have jurisdiction, at a minimum, over the legal relations of its citizens or persons present within its territory. For Congress to divest state courts of jurisdiction over such cases would conflict with this general principle"); Siegel, *supra* note ___, at 1171 (arguing that recent federal legislation mandating and prohibiting certain procedures in state courts constitutes "a relatively new development that arguably undermines a tacit understanding about the appropriate exercise of federal power"); *see also* THE FEDERALIST No. 80, at 446 (Alexander Hamilton) (arguing that it is "a just principle that every government *ought to possess the means of executing its own provisions by its own authority*") (emphasis in original). Henry Hart emphasized, for example, that when Congress sought to deprive both state and federal courts of jurisdiction over particular claims under the Fair Labor Standards Act, it simultaneously extinguished the substantive statutory liability. *See* Hart, *supra* note ___, at 1383.

[388] *See supra* Part I.A.3.

[389] *Cf.* Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2763-64 (2006) (slip op. at 10) (describing "grave questions" about the scope of congressional control over jurisdiction).

[390] *See* Constitution Restoration Act of 2005, S.520, 109th Cong. (2005).

[391] *See* County of Allegheny v. ACLU of Greater Pittsburgh, 492 U.S. 573, 601 (1989) ("[B]y prohibiting government endorsement of religion, the Establishment Clause prohibits precisely what occurred here: the government's lending its support to the communication of a religious organization's religious message."); *see also* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000) (striking down school district program of student-led prayer prior to football games); *County of Allegheny*, 492 U.S. at ___ (considering constitutionality of religious displays in county building).

[392]

historically best forum) in which to vindicate those rights; but other forums, namely state courts, remain.[393]

Whether that is a positive development presents the question of adjudicative parity between federal and state courts in interpreting and applying federal law and protecting federal rights. Parity refers to the belief that "state courts are to be deemed fungible with the federal courts as interpreters and enforcers of federal law."[394] Whether it exists has been a subject of seemingly unresolvable scholarly debate, ranging from the view that state courts are less likely to enforce federal rights[395] to the view that the assumption is unwarranted[396] to the view that neither position is provable or definable.[397]

The concept of parity actually stands in sharp tension with the power to jurisdiction strip. Most jurisdiction-stripping proposals are grounded, explicitly or implicitly, on the belief (and likely the hope) that state courts will be less likely to follow controversial Supreme Court precedent or to uphold controversial or unpopular claims of right.[398]

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[393] *See* Bator, *supra* note ___, at 628-29 ("The state courts do constitute an ultimate protection against tyrannous government."); Gunther, *supra* note ___, at 920 ("Congress merely relies on the state courts to enforce federal rights, part of their tradition, originally contemplated role . . ."); Hart, *supra* note ___, at 1364 (arguing that the "consequence is merely to force proceedings to be brought, if at all, in a state court"); Sager, *Constitutional Limitations*, *supra* note ___, at 41 (arguing that manipulating jurisdiction to check federal courts "offers no control over the state courts," which continue to be bound by existing Supreme Court precedent); Weinberg, *supra* note ___, at 1415 ("[A]s long as there is access to state courts for enforcement of law, the question [of jurisdiction-stripping] cannot have much bite.").

[394] Martin H. Redish & Steven G. Sklaver, *Federal Power to Commandeer State Courts: Implications for the Theory of Judicial Federalism*, 32 IND. L. REV. 71, 92 (1998); *see* Bator, *supra* note ___, at 627 (arguing for assumption that "in the long run, the state courts will be respected and equal partners with the lower federal courts in the enterprise of formulating and enforcing of federal constitutional principles").

[395] *See* Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1120 (1977) (describing three reasons that federal trial courts provide an institutionally preferable forum for vindicating federal rights); Redish & Sklaver, *supra* note ___, at 99 ("The fact that the framers vested state courts with authority to interpret and enforce federal law does not necessarily imply solicitousness for state judges or necessarily reflect the belief that state courts are the equal of the federal courts as interpreters of federal law."); Sager, *Constitutional Limitations*, *supra* note ___, at 64 ("Congress should be similarly limited in its ability to relegate article III cases to the state courts, whose judges do not and cannot enjoy article III security.").

[396] *See* Bator, *supra* note ___, at 633 ("[T]he claim that cases should be channeled to the federal courts because of the special receptivity of federal judges to constitutional values may embody a narrow and partisan vision of what constitutional values are."); *id.* at 630 ("State supreme court justices as a group are well paid and have as much prestige as federal judges."); Gunther, *supra* note ___, at 918 ("The underlying assumption that relegation of a federal claim to the state court system invariably produces less vigorous enforcement of the federal right . . . is itself suspect."); Michael E. Solimine, *The Future of Parity*, 46 WM. & MARY L. REV. 1457, 1464 (2005) (describing arguments that state courts have improved procedurally and institutionally and no longer function as in the Jim Crow/civil rights era)

[397] *See* Chemerinsky, *supra* note ___, at 235 ("[N]either side advances the debate past an intuitive judgment as to whether state courts are equal to federal courts in their willingness and ability to protect federal rights."); Rubenstein, *Superiority*, *supra* note ___, at 605 (agreeing that anecdotal empirical evidence sheds little light on forum allocation decisions).

[398] *See* Gunther, *supra* note ___, at 919 (describing the "obvious motivation of the members of Congress who introduce jurisdiction-stripping proposals: the 'get at' the Supreme Court, to express hostility to Supreme Court decisions, to provide a less interventionist forum for the adjudication of federal claims"); Neuborne, *supra* note ___, at 1105-06 (discussing concern of "pretext for funneling federal constitutional decisionmaking into state courts precisely because they are less likely to be receptive to vigorous enforcement of federal constitutional doctrine"); Sager, *Constitutional Limitations*, *supra* note ___, at 74 ("The motive behind the current jurisdictional proposals is transparent. Congress' goal is avowedly that of displacing disfavored federal judicial

Congress also likely hopes that the act of stripping jurisdiction and pushing federal claims into state court will signal to the state courts what Congress would prefer the law to be and whether it wants individual claimants to win.[399]

Parity assumes that state courts will take seriously their obligations faithfully to apply federal law and to vindicate federal rights, even unpopular rights asserted by unpopular rights-holders and grounded on unpopular or controversial Supreme Court decisions.[400] Jurisdiction stripping thus may not achieve the desired result of restraining "out-of-control judges" because it leaves state courts free to act, including free to follow unpopular Supreme Court constitutional precedent.[401] For the same reason, it may not achieve the desired result of stripping substantive federal rights. Merits strips, attacking as they do the enforceable federal right, are more certain and direct in achieving the congressional goal of narrowing federal law.

They also are more transparent. To affect a merits strip, the relevant legal actor must make obvious in its legal pronouncement that substantive rights are being diminished and what the scope of those rights will be.[402] If the goal and result is diminishment or nonenforcement of some rights, the legal rule maker must say so.[403] It cannot play what some commentators call a "political shell game"—deceiving the public as to the actual state of substantive law by manipulating process to achieve a result rather than dictating the result by changing substantive rules of decision.[404] The transparency of merits

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precedent . . ."); *id.* at 68 ("Congress betrays its hope and expectation that the state courts will dishonor federal precedent and refuse to recognize the disfavored rights."); *see also* Resnik, *Trial as Error*, *supra* note ___, at 980 ("Protesting federal jurisdiction can also be a way to object to an underlying legal norm . . .").

[399] Sager, *Constitutional Limitations*, *supra* note ___, at 40-41; *id.* at 69 (arguing that state courts are particularly vulnerable as adjudicative forums in the face of the "obvious desire of Congress that disfavored claims be repudiated").

[400] *See* Bator, *supra* note ___, at 624 ("[N]o matter where we draw the line, it is virtually inevitable that the state courts will in fact continue to be asked to play a substantial role in the formulation and application of federal constitutional principles . . ."); Redish & Sklaver, *supra* note ___, at 92 (arguing that the principle of parity derives from the point that state courts are "just as competent to adjudicate and enforce federal laws as are federal courts"); *see also* Chemerinsky, *supra* note ___, at 304 (arguing that "individuals alleging constitutional violations should have a chance to be heard in the forum, state court or federal court, that they perceive to be most sympathetic.").

[401] *See* Sager, *Constitutional Limitations*, *supra* note ___, at 42 (arguing that jurisdiction stripping "in the end offers Congress only the mean solace of pushing cases from one judicial bailiwick into another"); *see also* Constitution Restoration Act of 2005, S.520, 109th Cong. § 301 (2005) (providing that federal court decisions regarding government acknowledgement of God are not binding precedent in state courts). In fact, as to some of the areas that Congress has tried to push into state courts, such as gay rights, state courts have been more protective in their interpretations of state law than the federal courts had been. *See* Rubenstein, *Superiority*, *supra* note ___, at 607 (stating that several state courts interpreted state constitutional provisions to invalidate sodomy laws); Goodridge v. Dept. of Public Health, 798 N.E.2d 941, 968 (Mass. 2003) (holding that prohibiting same-sex couples from marrying violated state constitution).

[402] The exception is the category of strip that merely tinkers with causes of action or remedies, but not the rights themselves. *See supra* Part I.A.6. That is why Pamela Karlan labels that category insidious: it lacks the transparency from which political accountability flows. *See* Karlan, *supra* note ___, at 185; *supra* notes ___ and accompanying text.

[403] *See* Eisenberg, *supra* note ___, at 521 (describing suspicion of jurisdictional statutes that attempt to control judicial results rather than dockets).

[404] Redish & Pudelski, *supra* note ___, at 450.

strips enhances democratic accountability; the public better understands what has been done to substantive law and can hold the stripper (at least if it is Congress or the President) to answer for unpopular limits on rights.[405] This contrasts with hidden limitations on rights effected by jurisdiction strips. For example, the Detainee Treatment Act contains one provision that sweepingly creates a right for military detainees to receive certain minimum levels of humane treatment and to be free from torture, while a separate provision strips federal courts of jurisdiction to hear any claims that those rights have been violated.[406]

Merits strips do more than shift cases among judicial forums; they eliminate cases (or at least successful cases) altogether.[407] A merits strip means no federal real-world right exists as law to be vindicated and no federal real-world duty exists as law to be enforced in any court, federal or state. The result of *Morrison* is that there is no (and can be no) federal right (as opposed to a right created by some other sovereign) to be free from private, non-employment-related gender-motivated violence and no federal duty (as opposed to a duty imposed by some other sovereign) to refrain from such violence. The result of Title VII's limitations on the definition of employer means there is no federal right to be free from race or sex discrimination in employment if one works for a company with fewer than 15 employees; and, conversely, there is no federal duty to refrain from such discrimination imposed on a company with fewer than 15 employees. The handgun and cheeseburger laws both narrow the reach of state common law negligence (and the rights and duties established), whether in state court or federal court (as on diversity jurisdiction).

*3. Non-Existence and the Litigation Process*

A stripping enactment (regardless of its source) is itself a rule of law, albeit a narrow(er) one. A plaintiff's claim, asserting one of those stripped rights, still requires resolution of legal and factual issues via adjudicative decision making within the litigation process. Having defined the many categories of merits strips, the question becomes what litigation of stripping enactment looks like. Ultimately, the line between jurisdiction and merits is about two components of the litigation process itself: determining controlling legal rules and determining the time and manner in which legal and factual issues underlying those rules are resolved.

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[405] *See id.* at 454-55 ("When Congress simultaneously alters the essence of a substantive law through procedural or evidentiary means, the legislators' vote on the substantive portion of the law is effectively a sham.").

[406] *Compare* 28 U.S.C. § 2241(e) (stripping federal courts of jurisdiction over habeas or other claims against the United States by or on behalf of individual detained at Guantanamo Bay) *with* 42 U.S.C. § 2000dd(a) ("No individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment."); *see supra* notes ___ and accompanying text.

[407] *See* Siegel, *supra* note ___, at 1175 (arguing that only stripping a party of a right to bring a civil action can ensure that a plaintiff will be unable to find a judicial forum favorable to her claim).

No matter how "realistic" it may be to conflate or merge the concepts, therefore, we must keep true jurisdiction stripping distinct from merits stripping.

*a. Retroactivity of Stripping Enactments*

The first litigation consequence is the possible retroactive application of an enactment—its application to cases pending at the time the strip is enacted or based on conduct occurring prior to the strip. The characterization dictates which of two opposite rules controls in the absence of express legislative statement. If the new legal rule strips substantive rights, the presumption is against application of the stripping act.[408] On the other hand, if the new legal rule strips judicial jurisdiction, the absent an express reservation the presumption favors application of the stripping act, because courts "have regularly applied intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed."[409]

The reasoning behind this difference was the source of disagreement between Justice Stevens' majority opinion and Justice Scalia's dissent in *Hamdan v. Rumsfeld*.[410] Justice Stevens views the presumption of retroactivity of jurisdictional statutes not as an independent rule, but as the nonapplication of the general presumption against retroactivity.[411] This follows from Justice Stevens' overall approach to the concept of retroactivity. Retroactivity problems arise not simply from the application of a new statute to a pending action or to pre-enactment conduct, but from "retroactive effect," where the new rule would "impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed."[412] But a jurisdiction-stripping rule has no retroactive effect because it "'takes away no substantive right but simply changes the tribunal that is to hear the case.'"[413] The presumption against retroactivity therefore is not applicable to jurisdiction-stripping rules because the underlying policy concerns are not implicated.

Justice Scalia proceeds more directly, from a sharper distinction between jurisdiction strips and merits strips. As to the former, absent a clear and explicit reservation by Congress, the strip applies to pending cases (requiring dismissal for lack of subject matter jurisdiction).[414] This

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[408] Landgraf v. USI Film Prods., 511 U.S. 244, 280 (1994) ("If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.");; *see* Bruner v. United States, 343 U.S. 112, 117 (1952) (describing general rule that "statute is not to be given retroactive effect unless such construction is required by explicit language or by necessary implication").

[409] *Landgraf*, 511 U.S. at 274; *see Bruner*, 343 U.S. at 115 (holding that absent an express reservation of jurisdiction, an intervening jurisdiction strip deprived district court of jurisdiction).

[410] 126 S. Ct. 2749 (2006).

[411] *Id.* at 2764.

[412] *Landgraf*, 511 U.S. at 280; *id.* at 269-70 ("[T]he court must ask whether the new provision attaches new legal consequences to events completed before its enactment.").

[413] *Hamdan*, 126 S. Ct. at 2765 (citing Hallowell v. Commons, 239 U.S. 506, 508 (1916)).

[414] *Hamdan*, 126 S. Ct. at 2810 (Scalia, J., dissenting) ("An ancient and unbroken line of authority attests that statutes ousting jurisdiction unambiguously apply to cases pending at their

is not a judicial canon or presumption, he argues, but "simple recognition of the reality that the *plain import* of a statute repealing jurisdiction is to eliminate the power to consider and render judgment—in an already pending case no less than in a case yet to be filed."[415] Implicitly, a merits stripping provision, not going to judicial structure in the same way, lacks similar plain import.

For our purposes, the difference between these approaches is of no moment. Either recognizes a difference between jurisdiction strips and merits strips requiring different treatment. Either requires proper characterization to determine, in cases pending at the time of a new enactment or based on pre-enactment conduct, whether to apply the prior legal rules or the new, stripped legal rules.

### *b. Process and Fact-finding*

A court in federal question cases ordinarily measures its jurisdiction at the first stage of the litigation process. The court reviews the face of the plaintiff's well-pleaded complaint and predicts whether her claim "arises under" the Constitution; that is, whether her claim of right is created or made by possible by federal constitutional or statutory law.[416] A true jurisdiction-stripping enactment (consider, again, the Constitution Restoration Act) narrows the preexisting grant of general "arising under" jurisdiction in § 1331. The court must consider this additional jurisdictional rule in conjunction with § 1331 in measuring its jurisdiction.[417] The prediction, still based on the well-pleaded complaint, is whether the claim arises under the First Amendment for § 1331 purposes and whether, even if it does, it is a claim predicated on a governmental entity's acknowledgement of God as the sovereign source of law, liberty, and government.[418]

Claims of stripped rights, going as they do to who can sue whom over what conduct, are adjudicated at different times and in a different manner in the process. First, the court will preview the merits of the plaintiff's claims and any defenses to determine—based solely on the four corners of the plaintiff's complaint[419] or all pleadings,[420] or on a

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effective date."); *id.* at 2811 (Scalia, J., dissenting) ("To alter this plain meaning, our cases have required an explicit reservation of pending cases in the jurisdiction-repealing statute.").

[415] *Id.* at 2810-11 (Scalia, J., dissenting); *id.* at 2811-12 (Scalia, J., dissenting) (arguing that the rule is "simply the acknowledgement of the unambiguous meaning of such provisions"); *see also see also* Fed. R. Civ. P. 12(h)(3) (requiring dismissal "whenever it appears" that the court lacks subject matter jurisdiction).

[416] *See supra* notes ___ and accompanying text.

[417] *Cf.* Sager, *Constitutional Limitations*, *supra* note ___, at 27-28 (considering relation between preexisting grants of general federal question jurisdiction and new strip of a portion of that jurisdiction).

[418] *See* Constitution Restoration Act of 2005, S.520, §§ 101-102 109th Cong. (2005).

[419] *See* Fed. R. Civ. P. 12(b)(6) (permitting dismissal of a complaint for "failure to state a claim upon which relief can be granted"); Conley v. Gibson, 355 U.S. 41, 45-46 (1957) (looking to whether it "appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitled him to relief"); Wasserman, *Jurisdiction*, *supra* note ___, at 653, 663.

[420] *See* Fed. R. Civ. P. 12(c).

summary judgment preview of evidence uncovered in discovery[421]--whether there are any disputes of historical fact requiring trial and whether the plaintiff's claim is worthy of plenary consideration at trial or instead can be resolved pretrial.[422]

The question is whether, in light of the narrowness of substantive federal law resulting from the merits strip (that is, in light of the substantive federal law that exists), it is obvious that the plaintiff cannot succeed on her claim because she has no right and the defendant no duty in the conduct, transaction, or occurrence at issue. It may be obvious from the complaint that plaintiff seeks to recover in tort for health problems related to consumption of fast food, a claim that fails in the face of the federal defense created by the cheeseburger bill. Perhaps it is obvious from a preview of the evidence that the plaintiff cannot prove a particular element whose presence strips the scope of the legal rule—that the defendant acted under color of state law or that it met the statutory definition of employer under Title VII. Or it may be that there is no dispute as to the defendant's conduct, but only a legal question whether the federal statutory rule granting the plaintiff a right to be free from that conduct is constitutionally valid and thus whether it exists as law.

To the extent any material facts are in dispute as to the real-world actors and conduct, the case only can be resolved at the third-stage of the process—trial on the merits. Disputes of fact will be resolved, inferences from facts drawn, and controlling substantive law applied to facts to determine whether the defendant breached a duty and violated the plaintiff's federal rights. In the hypothetical cases discussed, all of which seek money damages, the plaintiff would have the option of having a jury as the finder of fact and any appellate review of those findings would be limited and highly deferential.[423]

This, then, is the vital procedural difference between merits strips and jurisdiction strips. Material factual issues underlying jurisdiction-stripping statutes are resolved by the judge, not the jury.[424] At stake in characterizing an enactment is the right to a trial on the merits by a jury, which may be lost if courts mischaracterize a merits strip as a jurisdiction strip.

And that is the problem in a case such as *United Phosphorus, Ltd. v. Angus Chemical Co*.[425] A sharply Seventh Circuit considered the

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[421] *See* Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Wasserman, *Jurisdiction*, *supra* note ___, at 653-54, 663.

[422] *See* Paul D. Carrington, *Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-Transsubstantive Rules of Civil Procedure*, 137 U. PA. L. REV. 2067, 2087 (1989); Richard L. Marcus, *The Revival of Fact pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 455 (1986); Wasserman, *Jurisdiction*, *supra* note ___, at 652

[423] *See* U.S. CONST. amend. VII (stating that jury right in actions "at common law" shall be "preserved" and limiting reconsideration of facts found by jury); City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 709 (1999) (holding that constitutional claims for damages under § 1983 are actions at law to which Seventh Amendment attaches); Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 432 (1996) (discussing limits on judicial reconsideration of jury-found facts); Dairy Queen, Inc. v. Wood, 369 U.S. 469, 473 & n.8 (1962) (holding that legal issues for which jury trial demanded must be submitted to jury); *see also* Wasserman, *Jurisdiction*, *supra* note ___, at 663-64.

[424] *See* Idleman, *supra* note ___, at 60-61; Wasserman, *Jurisdiction*, *supra* note ___, at 651.

[425] 322 F.3d 942 (7th Cir. 2003) (en banc).

FTAIA, the law narrowing the range of foreign conduct to which the Sherman Act shall apply.[426] FTAIA stripped something; the question is what.

In characterizing the law as a jurisdiction strip, the majority made every mistake common in the conflation of the concepts. It ignored the plain language of the FTAIA, which speaks of the real-world conduct to which the law applies and says nothing about judicial jurisdiction.[427] It considered the legislative history that spoke of limiting federal extraterritorial jurisdiction in Sherman Act cases.[428] But the court, and Congress in the legislative history cited, conflated judicial and legislative jurisdiction.[429] Concerns over the limits of extraterritorial application of substantive law are questions of legislative jurisdiction to prescribe legal rules regulating foreign conduct and actors.[430] The references to "antitrust jurisdiction" in the FTAIA history are better understood as referring to the application of United States substantive antitrust law to foreign conduct and to the exercise of congressional legislative/prescriptive jurisdiction over foreign conduct.

The direct result of the majority opinion in *United Phosphorus* was the deprivation of the plaintiff's jury right. The district court had made findings that, on the facts at issue, defendant's conduct had no direct, substantial, and foreseeable effect on domestic interstate commerce and the court of appeals concluded that those findings were not clearly erroneous.[431] But if the FTAIA is properly understood as a merits strip, a narrowing of substantive antitrust rights and duties, then such judicial fact-finding was improper. Any dispute as to these facts should have been for trial and resolution by the jury.[432] That difference in the identity of the factfinder is potentially significant to the outcome of the action.[433] Such procedural consequences are essential to the merits/jurisdiction divide and thus must be taken into account in properly characterizing distinct forms of stripping.[434]

*4. Structural Legitimacy*

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[426] 15 U.S.C. § 6A (providing that the Sherman Act "shall not apply to conduct involving trade or commerce . . . with foreign nations" unless the conduct has a "direct, substantial, and reasonably foreseeable effect" on non-foreign interstate commerce); *supra* notes ___ and accompanying text.

[427] *See United Phosphorus*, 322 F.3d at 220 (Wood, D., J., dissenting); Wasserman, *Jurisdiction*, *supra* note ___, at 688-89.

[428] *United Phosphorus*, 322 F.3d at 951-52.

[429] *See* H.R. Rep. No. 97-686, at 11, *reprinted in* 1982 U.S.C.C.A.N. 2487, 2496 (discussing FTAIA as establishing "predicate for antitrust jurisdiction" and "standards necessary for assertion of United States Antitrust jurisdiction."); *United Phosphorus*, 322 F.3d at 952 (discussing legislative history).

[430] *See* Hartford Fire Ins. Co. v. California, 509 U.S. 764, 813-14 (1993) (Scalia, J., dissenting); Wasserman, *Jurisdiction*, *supra* note ___, at 689.

[431] *United Phosphorus*, 322 F. 3d at 953; *see also* Fed. R. Civ. P. 52(b) (establishing "clear error" as standard of review of judicially found facts).

[432] *See* Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 504 (1959) (holding that jury right applies to treble-damages claims under antitrust act).

[433] *See* Lynn M. LoPucki & Walter O. Weyrauch, *A Theory of Legal Strategy*, 49 DUKE L.J. 1405, 1463 (2000).

[434] See Wasserman, *Jurisdiction*, *supra* note ___, at 662 ("Confusing whether a fact issue goes to jurisdiction or merits produces uncertainty as to when the issue should be resolved, by whom, and under what standard, along with confusion as to the meaning of that resolution.").

The final difference goes to the basic understanding of constitutional structure and what legal rule makers are empowered to do. There is longstanding doctrinal and theoretical controversy over jurisdiction stripping. Objections to congressional jurisdiction-stripping threats are grounded in the text and structure of the Constitution,[435] separation of powers,[436] judicial independence,[437] due process,[438] and the practicalities of modern American constitutional society.[439]

Regardless of how that debate resolves itself doctrinally and theoretically, no similar structural objections attach to merits stripping. The various categories all are products of the exercise of unquestioned power in some decision maker to establish substantive legal rules. Congress clearly is the master of whether to exercise its lawmaking powers and the scope of resulting legislation.[440] The executive and judicial departments properly exercise authority to interpret and apply congressional enactments, subject to congressional correction.[441] And the courts properly wield authority to interpret the scope and meaning of constitutional provisions, particularly rights-granting provisions.[442]

One can, of course, disagree with the resulting scope of rights—the fact that the level of rights and duties has fallen below the preferred normative baseline.[443] And one can disagree with constitutional doctrine that produces particular outcomes and particular understandings of federal constitutional law.[444]

But that is the only legitimate objection to merits stripping. There should be no structural objections, no arguments asserting a lack of legitimate authority in the relevant actor to affect the merits strip. The only disagreement is with the state of existing law (and rights and duties) post-strip, a distinct conversation about legal rights that is worth

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[435] *See, e.g.*, Amar, *Neo-Federalist*, *supra* note ___, at 229-30 (synthesizing requirements of Article III into requirement that some Article III court must have the power to resolve finally federal questions and admiralty issues).

[436] *See* Eisenberg, *supra* note ___, at 498 (describing struggle over congressional jurisdiction as "recurrent example" of separation of powers generating inter-branch conflict).

[437] *See* Ferejohn & Kramer, *supra* note ___, at 977 (""[I]ndividual judges may be subject to *indirect* pressure through threats to deprive their court of resources or to curtail its jurisdiction."); Sager, *Jurisdiction*, *supra* note ___, at 67 (arguing that judicial independence requirements of Article III require some effective form of Article III federal judicial review for claims of constitutional right).

[438] *See* REDISH, *supra* note ___, at 42 (arguing that due process requires that litigants have an independent forum for the adjudication of constitutional rights).

[439] *See* Eisenberg, *supra* note ___, at 504 (arguing that "changing circumstances" and "other constitutional realities" compel the existence of lower federal courts with jurisdiction to perform "critical functions" in resolving federal issues).

[440] *See supra* Parts I.A.1-2.

[441] *See supra* Parts I.A.3-4.

[442] *See supra* Part A.B.

[443] *See* Sager, *Justice*, *supra* note ___, at 421 ("[G]overnment is obliged to energetically pursue the effacement of injustice's entrenched consequences.").

[444] *See, e.g.*, Post & Siegel, *supra* note ___, at 524 (criticizing Court's decision in *Morrison* for its "refusal to entertain the possibility of systemice constitutional wrong"); Smolla, *supra* note ___, at 1145 (arguing that there was "a lameness to the assertion [in *Bartnicki*] that anytime an otherwise private conversation implicates matters of public concern, freedom of speech must trump the right to privacy").

having.[445] But it is a conversation that does not affect the essential power to merits strip.[446]

[445] *Cf.* Wasserman, *First Amendment Lochnerism*, *supra* note ___, at ___ (arguing that it is worth having a conversation about the proper balance between the freedom of speech and privacy).

[446] *Cf.* Gunther, *supra* note ___, at 921 (arguing that jurisdiction-stripping proposal should be rejected "because they are unwise and violate the 'spirit' of the Constitution, even if they are . . . within the sheer legal authority of Congress")