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JURISDICTION, MERITS, AND PROCEDURE: THOUGHTS ON DODSON'S TRICHOTOMY

Howard M. Wasserman[*]

In his outstanding article, *In Search of Removal Jurisdiction*,[1] Professor Scott Dodson delineates the appropriate boundaries between rules of subject matter jurisdiction and rules of judicial procedure in the context of removal time limits, and argues that we must develop a "broader understanding of the interrelationship and boundaries among the trichotomy of jurisdiction, procedure, and merits."[2] He also suggests that the strands of each pair in the triangle interact in distinct ways and require distinct rules for separating one from the other.[3] Having sought in recent work to define, clearly and cleanly, boundaries between subject matter jurisdiction and the substantive merits of federal claims of right,[4] I agree as to both points.

This Essay constitutes an initial move towards that understanding. It examines each pair in the conceptual trichotomy, considering the connections at each point in the triangle, when those connections come into play, and how and why to disentangle each pair.

I. JURISDICTION AND MERITS

The easiest pair to disentangle should be subject matter jurisdiction and substantive merits of federal claims of right. Although jurisdiction has been called a word of "many, too many, meanings,"[5] it can broadly be defined as the court's raw, baseline power and legitimate authority to hear and resolve the legal and factual issues in a class of cases.[6] Merits, by contrast, are de-

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[*] Visiting Associate Professor, Saint Louis University School of Law; Associate Professor, FIU College of Law.

[1] 102 NW. U. L. REV. 55 (2008).

[2] *Id.* at 89.

[3] *Id.* at 89–90.

[4] *See* Howard M. Wasserman, *Jurisdiction, Merits, and Non-Extant Rights*, 56 KANSAS L. REV. 227 (2008) [hereinafter Wasserman, *Non-Extant Rights*]; Howard M. Wasserman, *Jurisdiction, Merits, and Substantiality*, 42 TULSA L. REV. 579 (2007) [hereinafter Wasserman, *Substantiality*]; Howard M. Wasserman, *Jurisdiction and Merits*, 80 WASH. L. REV. 643 (2005) [hereinafter Wasserman, *Jurisdiction*].

[5] Arbaugh v. Y&H Corp., 546 U.S. 500, 510 (2006) (link) (quoting Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 90 (1998)).

[6] Perry Dane, *Jurisdictionality, Time, and the Legal Imagination*, 23 HOFSTRA L. REV. 1, 22 (1994); Evan Tsen Lee, *The Dubious Concept of Jurisdiction*, 54 HASTINGS L.J. 1613, 1620 (2003); Wasserman, *Jurisdiction*, *supra* note 4, at 650.

fined by who can sue whom, what real-world conduct can provide basis for a suit, and the legal consequences of a defendant's failure to conform that conduct to its legal duties.[7] The consequence of the jurisdictional label most frequently sounds in practical effects: jurisdictional issues are not subject to waiver by parties; the court bears an independent obligation to investigate and raise jurisdictional problems; and the court resolves any factual issues on which jurisdiction turns.[8] On the other hand, merits issues should be resolved at trial, typically with a jury serving as finder of any contested facts.[9] Most dramatically, courts tend, properly or otherwise, to construe jurisdictional rules "rigidly, literally, and mercilessly,"[10] in a way they do not with merits rules.

My basic argument has been that there should be no overlap in the definitions between jurisdiction and merits because statutory grants of federal jurisdiction focus on non-substantive questions, distinct from the source of the substantive right sued upon.[11] Jurisdictional rules ordinarily inquire about either the identity of the parties or the source of the legal right or liberty asserted;[12] neither inquiry depends on the success of the substantive claim asserted.[13] The Supreme Court recently recognized this in *Arbaugh v. Y&H Corp.*, holding that an element of the plaintiff's federal claim of right does not affect the court's jurisdiction; the plaintiff's success or failure in pleading and proving an element determines only whether the plaintiff prevails on the merits.[14] *Arbaugh* commands, and I have argued, that courts should consider a provision of positive law as jurisdictional only when its plain language is addressed to the court and speaks in terms of judicial power about the class of cases that courts can hear and resolve.[15]

Neither Congress nor the Court has maintained a sufficiently sharp distinction between jurisdiction and merits, and, unfortunately, *Arbaugh* did not resolve the matter with finality. Most problematically, *Arbaugh* kept alive the questionable doctrine of *Bell v. Hood*, under which a court lacks jurisdiction where a federal claim is insubstantial or wholly frivolous.[16] I

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[7] John Harrison, *Jurisdiction, Congressional Power, and Constitutional Remedies*, 86 GEO. L.J. 2513, 2515 (1998); Wasserman, *Non-Extant Rights*, *supra* note 4, at 236.

[8] *Arbaugh*, 546 U.S. at 514; *but see* Perry Dane, *Sad Time: Thoughts on Jurisdictionality, The Legal Imagination, and* Bowles v. Russell, 102 NW. U. L. REV. COLLOQUY 164, 166 (2008), http://www.law.northwestern.edu/lawreview/Colloquy/2008/2/ (link) ("[J]urisdictionality is more than just a label for certain consequences.").

[9] Wasserman, *Jurisdiction*, *supra* note 4, at 663–64.

[10] Dane, *supra* note 6, at 5.

[11] *Id.* at 44.

[12] U.S. CONST. art. III, § 2 (link); 28 U.S.C. §§ 1331, 1332, 1337, 1346 (2000) (link).

[13] Wasserman, *Jurisdiction*, *supra* note 4, at 671–72.

[14] 546 U.S. 500, 516 (2006).

[15] *Id.* at 526; Wasserman, *Jurisdiction*, *supra* note 4, at 693–94.

[16] Arbaugh v. Y&H Corp., 546 U.S. 500, 513 n.10 (2006) (citing Bell v. Hood, 376 U.S. 678 (1946)).

criticize this failure elsewhere, arguing that *Bell* serves no purpose other than to create confusion and uncertainty in the jurisdiction/merits corner.[17]

Arbaugh also permitted Congress to define jurisdiction in terms of substantive merits—so long as it is clear in doing so.[18] The court's authority to resolve legal and factual issues going to a claim of right should not hinge on the ultimate, or even potential, success of that claim of right. Otherwise, there is no rational way for Congress and the courts, in writing and interpreting jurisdictional grants, to decide when to overlap and when not to. If the issues can overlap, then every dismissal or rejection of a claim potentially becomes a dismissal for lack of jurisdiction and no claim ever can be said to be defeated on the merits.[19] Alternatively, if only some jurisdictional grants are bound up with merits, there is no explanation or justification for why some merits issues should be jurisdictional and others not.

Courts thus continue to wrestle with statutory text and congressional intent at the sign of any apparent jurisdiction/merits overlap. This wrestling frequently occurs with respect to federal sovereign immunity, where Congress consents to suit for certain claims under certain conditions and grants federal jurisdiction to hear those suits.[20] But if the conditions for the waiver of sovereign immunity are not met, does the court lack jurisdiction over the action? Or does the plaintiff's claim against the government fail on the merits because the government is not subject to a judicially remediable substantive legal duty?

This divide formed the core of *John R. Sand & Gravel Co. v. United States*.[21] Under the Tucker Act, the United States can be sued for monetary claims—sounding in the Constitution, federal law, contract, quasi-contract, or non-tort liquidated damages—with exclusive jurisdiction vested in the United States Court of Claims.[22] A separate provision imposes a six-year statute of limitations for commencing actions in that court.[23] Statutes of limitations ordinarily are characterized as substantive; they are an affirmative defense to the merits of the claim.[24] But the claim of right against the United States exists only because Congress waived sovereign immunity; thus, the argument goes, the waiver was valid only under certain conditions, one of which was timely commencement of the action.[25] In short, the Court

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[17] Wasserman, *Substantiality*, *supra* note 4, at 582–84.

[18] *Arbaugh*, 546 U.S. at 514–15.

[19] Wasserman, *Jurisdiction*, *supra* note 4, at 672.

[20] Dane, *supra* note 6, at 45 & n.128.

[21] John R. Sand & Gravel Co. v. U.S, No. 06-1164 (U.S. Jan. 8, 2008), http://www.supremecourtus.gov/opinions/07pdf/06-1164.pdf (link), *aff'g* 457 F.3d 1345 (Fed. Cir. 2006) (en banc).

[22] 28 U.S.C. § 1491(a)(1) (2000) (link).

[23] 28 U.S.C. § 2501 (2000) (link).

[24] *See* Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1159–60 (1982); FED. R. CIV. P. 8(c).

[25] *John R. Sand & Gravel*, 457 F.3d at 1354–55.

of Claims had jurisdiction over any claims in which sovereign immunity was waived, and sovereign immunity was waived only if the claim was timely filed. For the Federal Circuit, this rendered the statute of limitations jurisdictional and, for purposes of that case, not subject to waiver by the parties.

Viewing the limitations period as jurisdictional overlooks two discrete concerns. The first is the text of § 2501. Properly read, it addresses the time for bringing claims and not the jurisdiction of the Court of Claims. Section 2501 speaks of "every claim of which the United States Court of Federal Claims has jurisdiction," but that language is not addressed to the court; rather, it is addressed to the parties contemplating such cases. Since the jurisdiction of the Court of Claims extends no further than claims for monetary recovery against the United States, the quoted language means "every claim against the United States"; so understood, § 2501 is more clearly grounded in a merits determination of who can be sued for some conduct.

Second, on close examination, sovereign immunity makes better sense as a merits issue. By subjecting the United States to suit, Congress identifies an appropriate and available defendant in an action—itself. The United States places itself under a legal duty to adhere to substantive rules in its contracting and business conduct and attaches a judicially enforceable legal consequence—monetary liability—to its failure to adhere to its duties. Absent the waiver of sovereign immunity, no claim would lie against the United States because there would be no enforceable duty on the United States to behave in a particular way and no right to legal remedy from the United States. This is the essence of merits analysis—who can be sued for what conduct to recover what remedy.[26]

The "immunity" label and its treatment as a threshold litigation issue do not change that character. For example, government-official immunities (for example, absolute judicial immunity from constitutional claims) also are threshold defenses providing protection from suit (not merely liability), but courts nevertheless treat them as defenses to the merits.[27] Similarly, the Court of Claims remains open and empowered to hear claims against the United States; the different question is whether the conditions for waiver of immunity can be established in a given plaintiff's case.

The actual jurisdictional grant for the Court of Claims in § 1491(a)(1) identifies the appropriate forum for any lawsuit against the United States for the claims identified. That provision functions as a party-based jurisdictional grant, under which federal judicial power over an action turns on the

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[26] *But see* United States v. Mitchell, 463 U.S. 206, 212 (1983) (link) ("[T]he existence of consent is a prerequisite for jurisdiction.").

[27] *See, e.g.*, Rogers v. Montgomery, No. 4:07-1512-MBS, 2007 WL2152896, at *3 (D.S.C. July 25, 2007).

identity of the parties.[28] Compare this with basic diversity jurisdiction, under which federal district courts attain jurisdiction based on the citizenship of the parties.[29] The diversity statute disconnects jurisdiction and the substantive merits of the underlying claim.[30] Where the named defendant in a diversity action is not the proper or appropriate party because the conditions for its liability under substantive law have not been met, the plaintiff's case is lost on the merits, not for want of diversity jurisdiction. Section 1491(a)(1) should be understood in the same way. When the United States is not a proper defendant because the conditions for it to be sued and subject to liability on a contract or other monetary claim—such as the timeliness of the lawsuit—have not been met, the case against the United States is lost on the merits. The Court of Claims never loses its adjudicative jurisdiction—it simply has no valid claim to adjudicate against a potentially liable defendant.

The Supreme Court ultimately affirmed in *John R. Sand*, holding that the lower court was required to raise the limitations issue *sua sponte* and there was no waiver of the issue. Importantly, however, the Court seemed to purposefully avoid expanding the concept of jurisdiction. The Court never described the limitations period as jurisdictional, instead labeling it a "more absolute[] kind of limitations period."[31] In other words, § 2501 retains unique rigid characteristics akin to jurisdictional rules, but is not necessarily an actual jurisdictional rule because it is not tied to the court's raw structural authority to hear and resolve legal and factual issues in the case. The Court essentially disaggregated one prime consequence of jurisdictionality—non-waivability—from the jurisdictional label and read § 2501 as attaching those consequences to a non-jurisdictional, thus merits-related, limitations period.[32] Merits-based affirmative defenses ordinarily are subject to party waiver, but that need not be so. As the master of the scope and nature of the rights existing as federal substantive law, Congress could create a uniquely absolute, mandatory statute of limitations that nevertheless remains substantive-merits-based. It need only make clear the mandatory nature of the particular limitations defense.

Evan Tsen Lee argues that there is no hard conceptual difference between jurisdiction and merits, and that nothing categorically separates jurisdiction questions from merits questions other than legislative say-so. Thus,

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[28] Akhil Reed Amar, *The Two-Tiered Structure of the Judiciary Act of 1789*, 138 U. PA. L. REV. 1499, 1508 (1990); Edward 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, 2250 n.57 (1999).

[29] 28 U.S.C. § 1332(a) (2000) (link).

[30] Lee, *supra* note 6, at 1626; Wasserman, *Jurisdiction*, *supra* note 4, at 701.

[31] John R. Sand & Gravel Co. v. U.S, No. 06-1164, slip op. at 3 (U.S. Jan. 8, 2008).

[32] The Court actually undertook no new statutory analysis to get to this point, instead basing its decision largely on statutory stare decisis. *Id.* slip op. at 8.

nothing prevents the legislature from tying jurisdiction to the equities.[33] But, simply because Congress can define jurisdiction in merits terms does not mean it should. Any overlap is "awkward for legal doctrine and the legal culture" and unnecessarily complicates procedural matters.[34]

Whether or not it is possible to create a single framework for defining jurisdiction,[35] it is possible to eliminate unnecessary overlap by consciously avoiding it in the legislative and judicial lawmaking processes. As a practical matter, there is no reason for Congress to define jurisdiction by anything related to the merits or equities of a case; nothing is gained by linking them and a great deal is lost. Nor is there reason for the courts to affirmatively interpret Congress as having linked them. Mindful legislative drafting and similarly mindful judicial analysis should achieve the necessary clean and clear line between this pair. *John R. Sand* now gives Congress a new drafting option. It can make some merits rules "more absolute" without squeezing those rules into the jurisdictional box. This provides the systemic benefits of non-waivable requirements without muddying or over-expanding the concept of jurisdiction and without forcing courts to adopt strained statutory readings.

II. JURISDICTION AND PROCEDURE

Dodson's recent work analyzes two timing provisions: the time for removing cases to federal court and the time for filing a notice of appeal from the district court to the court of appeals.[36] Timing rules straddle the jurisdiction/procedure line. While jurisdictional rules define *whether* a court can exercise power to hear and resolve a case, procedural rules dictate *how* a court will do so.[37] Timing rules might fit logically in either category.

Dodson divides the concepts around three key normative concerns. The first is whether Congress has specifically designated a rule as jurisdictional, with a presumption of jurisdictionality applied when Congress speaks in jurisdictional terms about the class of cases a court can hear.[38] The second looks to the function of a provision and whether it determines the power of the courts or whether it controls the behavior of the parties in litigation.[39] This considers to whom a rule is directed: jurisdictional rules are directed at the court and its power, while procedural rules are directed to

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[33] Lee, *supra* note 6, at 1614, 1627, 1629.

[34] Dane, *supra* note 6, at 47; Wasserman, *Jurisdiction*, *supra* note 4, at 662.

[35] *Compare* Dodson, *supra* note 1, at 66 *with* Lee, *supra* note 6, at 1629.

[36] Dodson, *supra* note 1, at 56, 58; Scott Dodson, *Jurisdictionality and* Bowles v. Russell, 102 NW. U. L. REV. COLLOQUY 42, 48 (2007), http://colloquy.law.northwestern.edu/main/2007/08/jurisdictionali.html (link) [hereinafter Dodson, *Jurisdictionality*].

[37] Bowles v. Russell, 127 S. Ct. 2360, 2364 (2007) (link); Dodson, *supra* note 1, at 59–60, 71; Dodson, *Jurisdictionality*, *supra* note 36, at 44.

[38] Dodson, *supra* note 1, at 66; Dodson, *Jurisdictionality*, *supra* note 36, at 43.

[39] Dodson, *supra* note 1, at 71.

the parties and their rights and obligations within litigation.[40] Procedural rules go to the "fairness and efficiency of the truth-finding process," ultimately serving systemic values such as litigant autonomy, judicial efficiency, and cost-effectiveness.[41] The third concern looks to the effects and implications of characterizing a rule as one or the other.[42] Dodson's framework is sound and consistent with my suggestions for the jurisdiction/merits pairing, particularly in its focus on the language of the applicable legal rule and whether it speaks to the court about its structural power or to the parties about how to behave within the litigation process.

Unfortunately, the Court last term in *Bowles v. Russell* ignored Dodson's framework—as well as any other meaningful framework. Instead, it simply declared that the time requirement for filing a notice of appeal was jurisdictional and thus not subject to any exception, even when the reason for the untimely filing was a party's reliance on a judicial order that incorrectly stated the time for filing the appeal.[43] The Court's only explanation was that the timing requirement appeared in a statute that was enacted by both houses of Congress and signed by the President, rather than in a court-promulgated rule.[44] Dodson accurately criticizes *Bowles* in this space, taking the majority to task for failing to adopt any coherent guidelines beyond the distinction between statutory or rule sources.[45] This is a meaningless justification because there is nothing inherently jurisdictional about a statute, particularly one that that neither speaks to the court nor mentions jurisdiction.

Dodson is correct that the demarcation between jurisdiction and procedure may be less urgent than between jurisdiction and merits, because the timing and manner of adjudicating issues does not diverge with this pair as it does with jurisdiction and merits. Jurisdiction is one of several procedural preliminaries that courts consider mainly at the outset of litigation, with the court acting as finder of fact for all of them.[46] The only difference between them lies in the unique elements of jurisdiction—non-waivability and the independent judicial obligation to investigate.[47] Jurisdictional rules also are generally understood to admit no equitable leniency or flexibility, an understanding Professor Dane labels an unfortunate mistake.[48]

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[40] *Id.*

[41] John Hart Ely, *The Irrepressible Myth of* Erie, 87 HARV. L. REV. 693, 725 (1974); Dodson, *supra* note 1, at 71; Dodson, *Jurisdictionality*, *supra* note 36, at 46.

[42] Dodson, *supra* note 1, at 77.

[43] Bowles v. Russell, 127 S. Ct. 2360, 2365 (2007).

[44] *Id.* at 2364–66; *see* 28 U.S.C. § 2107(c) (2000) (link); FED. R. APP. P. 4(a)(6).

[45] Dodson, *Jurisdictionality*, *supra* note 36, at 45.

[46] *See* Dodson, *supra* note 1, at 69–70; Wasserman, *Jurisdiction*, *supra* note 4, at 649–50.

[47] Dodson, *supra* note 1, at 60.

[48] Dane, *supra* note 8, at 167–68.

But, just as the *John R. Sand* Court read a merits rule to possess jurisdictional characteristics,[49] Congress similarly could define a procedural rule to possess some or all jurisdictional characteristics and consequences. Dodson argues that the outcome in *Bowles*—that the time for filing an appeal is not subject to equitable exception and thus that appeal was untimely—was correct.[50] The timing rule could be understood as "mandatory but nonjurisdictional"; the rule governs the parties' conduct in court and does not go to the basic structural values that define jurisdiction, but the court possesses no discretion to deviate from the rule on equitable grounds.[51] As the Court did in *John R. Sand*, Dodson disaggregates the consequences of jurisdiction from the core definition of the term. This produces the expected benefits of the rigidity that accompanies jurisdictionality, when intended by the rule maker, "without doing violence to the nature of jurisdiction."[52] In fact, the discussion of *Bowles* in *John R. Sand* suggests the Court has retroactively recast the earlier decision to make the appeals-timing rule absolute for purposes of efficiency, but not necessarily jurisdictional.[53]

Note that the middle road proposed by Dodson and implicitly approved of in *John R. Sand* may serve to further cloud the line between jurisdiction and procedure. If Congress can assign a jurisdictional characteristic to a procedural rule, any practical distinctions between jurisdictional rules and procedural rules seems lost. Nothing else defines the practical divide between these two strands, since the court serves as fact-finder for both issues. Characterizing a rule in this pair as one or the other thus must focus on the policies and values underlying the rule—structural values that define jurisdictional rules as opposed to litigant- and efficiency-based values that define procedural rules.[54] It also forces courts to find the formalist core of what it means for a rule to be "jurisdictional," something the courts heretofore have been reluctant to attempt.[55]

Procedure and jurisdiction do align and divide over the question of congressional power over each. On one hand, the extent of congressional control over federal-court jurisdiction has been an ongoing topic of textual, theoretical, and policy debate and dispute,[56] with a number of commentators arguing that the text of Article III limits Congress' ability to cut into the ju-

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[49] *Supra* notes 31–32.

[50] Dodson, *Jurisdictionality*, *supra* note 36, at 46.

[51] *Id.* at 46–47; *but see* Dane, *supra* note 8, at 164 ("[T]ime limits can also be jurisdictional without being interpreted literally and peremptorily . . . .").

[52] Dodson, *Jurisdictionality*, *supra* note 36, at 46.

[53] Posting of Scott Dodson on Civil Procedure Prof. Blog, http://lawprofessors.typepad.com/civpro/2008/01/dodson-three-mu.html (Jan. 8, 2008) (link).

[54] Dodson, *Jurisdictionality*, *supra* note 36, at 46–47.

[55] Dane, *supra* note 8, at 175 (criticizing courts' failure to "draw connections and to investigate the roots of legal ideas"); Dane, *Jurisdictionality*, *supra* note 6, at 135.

[56] Wasserman, *Non-Extant Rights*, *supra* note 4, at 227–29, 269–71.

risdiction of the federal judiciary.[57] On the other hand, there generally has been far less debate over congressional power over judicial procedure; courts and commentators long have accepted that Congress can dictate federal procedure through prospective rules, whether by delegating that power to the judiciary, as under the Rules Enabling Act, or by making procedural rules itself.[58] Thus, faced with a congressionally enacted rule that somehow limits judicial power, its definition as jurisdictional or procedural may be essential to understanding the validity of the particular rule.

III. PROCEDURE AND MERITS

This pair has the longest history together. The distinction between procedure and substance is famously at the federalist heart of the modern *Erie-Hanna* Doctrine, dictating the choice between federal and state law in diversity cases in federal court.[59] Procedure focuses on rules going to the fairness and efficiency of the truth-finding process and substance goes to everything else.[60] Courts apply a functional approach, looking to whether the policy underlying the rule "pertains to the operation of the federal courts" and is integrated into a system generally applicable to all civil actions and designed to achieve just, speedy, and inexpensive resolution.[61]

The split is tenuous, given that procedural rules necessarily affect substantive results.[62] But overlapping effects are not a problem; after all, the goal of modern federal procedure is to enable resolution of cases on their merits.[63] The point is defining and understanding the two concepts, and here the Court arguably has drawn a "serviceable line between state 'substantive' law that binds federal courts and 'procedural' law governed by federal rules."[64]

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[57] Amar, *supra* note 28, at 1507–08; James E. Pfander, *Federal Supremacy, State Court Inferiority, and the Constitutionality of Jurisdiction-Stripping Legislation*, 101 NW. U. L. REV. 191, 237–38 (2007) (link).

[58] *See* Hanna v. Plumer, 380 U.S. 460, 471–72 (1965) (link); Stephen B. Burbank, *Procedure, Politics and Power: The Role of Congress*, 79 NOTRE DAME L. REV. 1677, 1681–82 (2004) [hereinafter Burbank, *Procedure*]; Burbank, *Rules Enabling Act*, *supra* note 24, at 1115–16. *But see* Linda S. Mullenix, *The Counter-Reformation in Procedural Justice*, 77 MINN. L. REV. 375, 382 (1992).

[59] Gasperini v. Center for Humanities, Inc., 518 U.S. 415, 427 (1996) (link); Thomas D. Rowe, Jr., *Not Bad for Government Work: Does Anyone Else Think the Supreme Court is Doing a Halfway Decent Job in its* Erie-Hanna *Jurisprudence?*, 73 NOTRE DAME L. REV. 963, 966 (1998).

[60] Ely, *supra* note 41, at 725.

[61] Paul D. Carrington, *"Substance" and "Procedure" in the Rules Enabling Act*, 1989 DUKE L.J. 281, 308.

[62] Burbank, *Procedure*, *supra* note 58, at 1710; Martin H. Redish & Christopher R. Pudelski, *Legislative Deception, Separation of Powers, and the Democratic Process: Harnessing the Political Theory of United States v. Klein*, 100 NW. U. L. REV. 437, 460 (2006) (link).

[63] FED. R. CIV. P. 1; Richard L. Marcus, *The Revival of Fact Pleading under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 439 (1986).

[64] Craig Green, *Repressing* Erie*'s Myth*, 95 CAL. L. REV. (forthcoming 2008) (manuscript at 21), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1009992 (link).

The procedure/merits line also rides on strong separation-of-powers concerns, dividing the respective lawmaking capacities of Congress and the courts. The Rules Enabling Act delegates to the Supreme Court, and in turn to a standing advisory committee, power to make general rules of procedure.[65] It further prohibits the Court from making any rules that "abridge[], enlarge[] or modif[y] any substantive right."[66] Stephen Burbank grounds the latter limitation on allocation of federal rulemaking powers between Congress and the Court, with Congress delegating only control over procedural rules, while retaining power to make substantive rules.[67] Congress reserves to itself the power to make rules governing real-world, primary conduct and defining rights, duties, and obligations beyond the four walls of the courthouse, while the Supreme Court under the REA is limited only to making rules governing conduct within the four walls of the courthouse.[68]

One example of the legislative/judicial divide and the problem of separation of powers is the extent to which Congress can limit judicial enforcement and remediation of federal constitutional rights. Central to that debate is whether remedies properly are viewed as substantive, and thus tied to the merits, or as procedural. No one doubts congressional power to define remedies where it creates the underlying substantive right.[69] And the consensus is that Congress retains power to establish procedural rules through its ordinary legislative powers.[70] But Congress cannot define the meaning of an underlying substantive constitutional right.[71] Thus, the propriety of legislative limitations on judicial constitutional remedies depends on how we characterize remedies.

On one end, John Harrison espouses the traditional view of remedies as procedural, subject to fairly plenary control through Congress' structural legislative powers.[72] Harrison argues that Congress takes the substantive legal rules, such as the meaning of constitutional provisions and rights, as given, then wields its structural authority to choose the means to implement and enforce those rights.[73] Daryl Levinson labels this traditional view "rights essentialism." The constitutional right exists as the ideal, as an ultimate value judgment about what the Constitution means and what it protects; remedies—the rules for implementing constitutional rights and protecting against their future violation—exist in the realm of the concrete. The sharp distinction between rights and remedies produces a "division of

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[65] 28 U.S.C. §§ 2072(a), 2073 (2000) (link).

[66] 28 U.S.C. § 2072(b) (link).

[67] Burbank, *Rules Enabling Act*, *supra* note 24, at 1113.

[68] *Id.* at 1113–14.

[69] Tracy A. Thomas, *Congress' Section 5 Power and Remedial Rights*, 34 U.C. DAVIS L. REV. 673, 696 (2001) (link).

[70] *Supra* note 56–58.

[71] City of Boerne v. Flores, 521 U.S. 507, 519 (1997) (link).

[72] Harrison, *supra* note 7, at 2514.

[73] *Id.* at 2514–15.

institutional labor between courts and Congress," under which courts are uniquely well-qualified to deal with idealized and abstract constitutional judgments about principles and values. At the same time, however, courts should defer to Congress' close legislative control over the process of applying those constitutional values and principles to the real world by defining expansive or narrow remedies.[74]

On the other end is Tracy Thomas's theory of the unified right, under which the remedy is "the intrinsic, operative component activating the descriptive component of all unified substantive rights."[75] A unified right has both a descriptive component that sets forth a legal guarantee, duty, or moral assertion grounded in the Constitution, and a remedial component that imposes an active requirement as a consequence of a violation of the descriptive duty. Rights and remedies are inseparable, the former meaningless without the latter. The remedial power is derivative of the substantive power over the definitional right; the institutional actor that defines the core right has the power to dictate remedies for that right.[76] Because Congress does not and cannot define the meaning of the descriptive constitutional right, it does not have the power to dictate corresponding constitutional remedies.[77] Only the courts possess this power, as an aspect of defining the descriptive constitutional right.

The procedure/merits corner also reveals that the long-standing academic obsession with "jurisdiction stripping" misses the larger point. Remedial limitations, understood as procedural rules distinct from and collateral to substantive rights, arguably pose a greater threat to the ability of federal courts to vindicate substantive rights, than straight-forward strips of subject-matter jurisdiction.[78]

But questions remain as to the degree to which Congress might engage in "procedure stripping"—using procedural rules and schemes to limit the most vigorous judicial enforcement of substantive rights. For example, Congress often creates and entwines merits and procedure in a single statutory scheme. Consider the prohibitions on employment discrimination in Title VII of the Civil Rights Act of 1964. Congress established real-world rights to be free from adverse employment action based on certain impermissible motivations (such as an employee's race or sex) and imposed on employers a duty to refrain from discriminatory activities against employees. Congress also tied these rights to a specific and detailed remedial procedural scheme requiring: prompt initial submission, in a narrow time

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[74] Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 861, 865–66 (1999).

[75] Thomas, *supra* note 69, at 694.

[76] *Id.* at 689, 696, 701–02.

[77] *Id.* at 704.

[78] Louise Weinberg, *The Article III Box: The Power of "Congress" to Attack the "Jurisdiction" of "Federal Courts,"* 78 TEX. L. REV. 1405, 1407–08 (2000).

frame, of claims to the Equal Employment Opportunity Commission for conciliation and non-adversarial resolution; exhaustion of non-litigation efforts; and prompt internal reporting of claims prior to any official complaint and efforts at internal employer dispute resolution.[79]

The result, according to Deborah Brake and Joanna Grossman, is that Title VII often does not function as a meaningful "right-claiming scheme," because compliance with the extensive right-specific procedural requirements effectively makes it difficult or impossible for plaintiffs to vindicate those rights.[80] Scott Moss implicates the Court in this problem, arguing that it has acted to further two irreconcilable procedural policies—first, that plaintiffs should wait to initiate litigation in favor of internal, informal, non-adversary, administrative resolution, and second, that plaintiffs should file immediately—to render Title VII incoherent and impossible to navigate.[81] It is the relatively rare plaintiff who can steer and clear these conflicting hurdles to gain meaningful access to the promised substantive rights. The result is that the substantive protections purported to derive from the statute remain largely elusive and illusory.

Martin Redish derives one potential limit on congressional procedure stripping from constitutional democratic theory. In the name of democratic accountability, he argues, a legislature cannot deceive the public as to the state of their substantive primary rights, liberties, and duties by manipulating the attendant procedures.[82] Accountability concerns prevent Congress from defining a general rule of real-world behavior—which the public believes entitles it to engage in some conduct or to be free from some conduct by others (such as discrimination in employment because of race or sex)—while simultaneously imposing procedural hurdles that prevent courts from appropriately applying that rule, effectively transforming the nature of the substantive right.[83] To do so is to engage in a "political shell game," achieving substantive policy outcomes by hiding the true state of that policy from the public.[84] This, in turn, undermines the public's ability to judge representatives' performance by their votes on normative social policy choices.[85]

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[79] 42 U.S.C. 2000e(e)(5) (2000) (link); Ledbetter v. Goodyear Tire & Rubber Co., 127 S. Ct. 2162, 2170–71 (2007) (link); Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 392–93 (1982) (link); Deborah L. Brake & Joanna L. Grossman, *The Failure of Title VII as a Rights-Claiming System*, 86 N.C. L. REV. (forthcoming 2008) (manuscript at 7, 14), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1010181 (link).

[80] Brake and Grossman, *supra* note 79 (manuscript at 3, 59).

[81] Scott A. Moss, *Fighting Discrimination While Fighting Litigation: A Tale of Two Supreme Courts*, 76 FORDHAM L. REV. 981, 984 (2007) (link).

[82] Martin H. Redish, *Federal Judicial Independence: Constitutional and Political Perspectives*, 46 MERCER L. REV. 697, 715–16 (1995).

[83] Redish & Pudelski, *supra* note 62, at 460; Redish, *supra* note 82, at 715.

[84] Redish & Pudelski, *supra* note 62, at 450, 460.

[85] *Id.* at 459; Redish, *supra* note 82, at 715–16.

If Grossman and Brake are correct that Title VII has failed as a source of substantive rights because those rights have been overwhelmed by its procedural scheme, perhaps Title VII becomes an example of the very political shell game that Redish condemns. Certainly Redish's argument suggests some undefined limits on Congress' ability to bury substantive rights within non-navigable procedural layers—at least without making it clear that it is doing so and that it intends to do so.

CONCLUSION

Scott Dodson invited a conversation about the trichotomy of merits, jurisdiction, and procedure, and I hope this Essay serves as a workable opening statement. Whether we can formally disentangle the three concepts or each of the three pairs perhaps is a matter of dispute. But by thinking in terms of the overlap and the interactions among them, perhaps we can remember how important it is to keep them separate from one another in the course of creating and applying legal rules. And perhaps in time we might find a middle ground among the strands, in which they might share characteristics and consequences while retaining distinct conceptual identities and definitions.