

**WAIVERS OF IMMUNITY AND CONGRESS’S POWER TO  
REGULATE FEDERAL JURISDICTION—  
FEDERAL-TORT FILING PERIODS AS A TESTING CASE**

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## I. INTRODUCTION

This article examines an infrequently considered question in the literature about federal jurisdiction: whether Congress is subject to any constitutional constraint when it consents to being sued in federal court. Even assuming that the sovereign's consent is a necessary condition to suit in federal court, this article argues that the waiver of immunity cannot confer jurisdiction in a manner or through a process that circumvents constitutional requirements. This question, narrow but important, has not received sustained attention in the otherwise voluminous literature on Congress's power to regulate the jurisdiction of the federal courts.<sup>1</sup> Most discussion engages with the problem of whether Congress can strip the courts of jurisdiction to hear particular kinds of claims or, having conferred jurisdiction, to withhold power to issue specific remedies.<sup>2</sup> A small sub-set of the literature distinguishes between jurisdictional regulation and waivers of immunity.<sup>3</sup> The current focus is on an immunity-waiver that confers jurisdiction to resolve tort claims against the United States, but then withholds jurisdiction and extinguishes such claims on unconstitutional grounds—a problem that implicates not only individual rights but also the decisional independence of the Article III courts.<sup>4</sup>

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<sup>1</sup> See Vicki C. Jackson, *Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence*, 35 GEO. WASH. INT'L L. REV. 521, 549 (2003) (referring to the “vast” debate about Congress's power to control Article III jurisdiction).

<sup>2</sup> See Gary Lawson, *Controlling Precedent: Congressional Regulation of Judicial Decision-Making*, 18 CONST. COMMENT. 191, 191–92 (2001) (distinguishing the literature about “jurisdiction-stripping” statutes from that concerning statutes regulating how federal courts exercise jurisdiction). Additionally, commentators consider whether Congress constitutionally may assign the adjudication of claims to non-Article III decision makers. See, e.g., Paul Bator, *The Constitution as Architecture: Legislative and Administrative Courts Under Article III*, 65 IND. L.J. 233 (1990) (discussing the constitutionality of Article I tribunals).

<sup>3</sup> See Gordon G. Young, *Congressional Regulation of Federal Courts' Jurisdiction and Processes: United States v. Klein Revisited*, 1981 WIS. L. REV. 1189, 1224–33 (1991) (discussing the scope of the waiver-immunity as distinct from a statute regulating federal jurisdiction); see also Sarah L. Brinton, *Three Dimensional Sovereign Immunity*, 54 SANTA CLARA L. REV. 239 (2014) (developing the position that Congress's Waiver Power is neither unilateral nor unreviewable and criticizing the notion of “exclusive congressional waiver”); Jason Wojciechowski, *Federalism Limits on Article III Jurisdiction*, 88 NEB. L. REV. 288 (2009) (“structural limitations on the extent of congressional power [with respect to state sovereign immunity] should be treated as limitations on the scope of the federal courts' jurisdiction”).

<sup>4</sup> Martin H. Redish, *Federal Judicial Independence: Constitutional and Political Perspectives*, 46 MERCER L. REV. 697, 699 (1995) (discussing the term “decisional independence”).

The jumping off point for the discussion is the 2014 decision of the Sixth Circuit Court of Appeals in *Jackson v. United States*,<sup>5</sup> which arose under the Federal Tort Claims Act (“FTCA”).<sup>6</sup> The FTCA waives the government’s sovereign immunity and confers jurisdiction on Article III courts to hear tort claims against the United States. The statute’s grant of jurisdiction does not provide immediate access to federal court. Instead, the potential plaintiff must first exhaust administrative remedies and attempt to settle her claim with the agency whose employees are implicated in the government’s alleged misconduct.<sup>7</sup> If the agency denies the claim, the tort victim may then file a federal action, and the suit must be commenced within six months of the agency’s denial.<sup>8</sup> In *Jackson*, the Sixth Circuit Court of Appeals held that the agency’s mailing of a denial letter was sufficient to trigger the filing period under the FTCA, despite the fact that the claimant never received any notice of the government’s decision because the letter, sent by certified mail to the claimant’s lawyer, was returned to the agency as undeliverable and the agency took no follow-up steps—even though the case file contained the claimant’s current mailing address and regulations authorize the agency to give notice of the denial directly to the claimant.<sup>9</sup> Because the plaintiff filed her federal complaint more than six months after the agency’s mailing of the denial letter, the court considered the suit to be untimely; moreover, the court treated the limitations period as a condition of the government’s

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<sup>5</sup> *Jackson v. United States*, 751 F.3d 712 (6th Cir. 2014), *rehearing denied*, No. 13-1243, 2014 U.S. App. LEXIS 13779 (6th Cir. July 2, 2014).

<sup>6</sup> Federal Tort Claims Act, ch. 753, Title IV, 60 Stat. 842 (1946) (current version codified in scattered sections of 28 U.S.C. § 1346(b) (2012) (jurisdiction conferred), § 2401(b) (jurisdiction exclusions), §§ 2671–2680 (administrative exhaustion)); 28 U.S.C. § 1346(b) (conferring “exclusive jurisdiction” on the federal district courts “for injury . . . caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred”); *see* Federal Employees Liability Reform and Tort Compensation Act of 1988, 102 Stat. 4563 (codified at 28 U.S.C. § 2679 (abrogating *Westfall v. Ervin*, 484 U.S. 292 (1988))).

<sup>7</sup> *See generally* George A. Bermann, *Federal Tort Claims at the Agency Level: The FTCA Administrative Process*, 35 CASE W. RES. L. REV. 509 (1985) (describing the administrative-exhaustion process under the 1966 amendment to the FTCA).

<sup>8</sup> *See* 28 U.S.C. § 2401(b).

<sup>9</sup> *See Jackson*, 751 F.3d at 717 (stating that “the FTCA does not require that the claimant receive the denial letter in order to commence the six-month limitation period”); 28 C.F.R. 14.9 (2014) (“Final denial of an administrative claim shall be in writing and sent to the claimant, his attorney, or legal representative by certified or registered mail.”).

waiver of immunity and so refused to permit equitable tolling.<sup>10</sup> Thus, the court dismissed the suit for lack of subject-matter jurisdiction, and the plaintiff was barred “forever” from securing judicial relief.<sup>11</sup>

The approach in *Jackson* is typical of many FTCA decisions: the appeals court started from the premise that because the jurisdiction of the district court depends upon the government’s waiving immunity to suit, the procedural conditions attached to that waiver are jurisdictional and require strict enforcement.<sup>12</sup> This interpretation of the FTCA developed before the Supreme Court attempted to clarify the distinction between jurisdictional and claim-processing rules.<sup>13</sup> It seems unlikely that the statute’s procedures governing administrative exhaustion are jurisdictional in the relevant sense given the location of the filing-period procedure in the statute’s text and its functional significance to an agency’s resolution of a claim.<sup>14</sup> The correct approach would be to treat the six-month filing period as an affirmative defense, and not as a jurisdictional condition.<sup>15</sup> Moreover, the court of appeals’ reliance on a strict-construction rule to enforce the filing-period seems at odds with the Supreme Court’s current view that strict construction extends only to the

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<sup>10</sup> *Jackson*, 751 F.3d at 717–18 (tolling not permitted because limitations period is jurisdictional).

<sup>11</sup> 28 U.S.C. § 2401(b) (providing that a tort claim shall be “forever barred”).

<sup>12</sup> See, e.g., *Vacek v. U.S. Postal Serv.*, 447 F.3d 1248 (9th Cir. 2006) (applying rule of strict construction to conditions of administrative exhaustion and dismissing suit as time-barred and jurisdictionally deficient); see Richard Parker, *Is the Doctrine of Equitable Tolling Applicable to the Limitations Periods in the Federal Tort Claims Act?*, 135 MIL. L. REV. 1 (1992).

<sup>13</sup> See *Gonzalez v. Thaler*, 132 S. Ct. 641, 648 (2012) (“This Court has endeavored in recent years to ‘bring some discipline’ to the use of the term ‘jurisdictional.’ Recognizing our ‘less than meticulous’ use of the term in the past, we have pressed a stricter distinction between truly jurisdictional rules, which govern ‘a court’s adjudicatory authority,’ and nonjurisdictional ‘claim-processing rules,’ which do not.”) (citations omitted). The Court has granted certiorari in a pair of FTCA cases concerning the availability of equitable tolling of the time periods to file administrative claims and to file federal lawsuits. See *June v. United States*, 550 F. App’x 505 (9th Cir. 2013) (administrative claims); *Wong v. Beebe*, 732 F.3d 1030 (9th Cir. 2013) (en banc) (lawsuits). The author’s position is that the time periods are classic claims-processing provisions and not jurisdictional, so equitable tolling ought to be available. See *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130 (2007). However, even if the Court treats the provision as jurisdictional, the government’s waiver of immunity would still be subject to constitutional constraints as argued in this article.

<sup>14</sup> Compare 28 U.S.C. § 1346 (2012) (“United States as defendant . . . [t]he district courts shall have original jurisdiction . . .”), with 28 U.S.C. § 2401 (“Time for commencing action against United States”).

<sup>15</sup> See, e.g., *Schmidt v. United States*, 933 F.2d 639 (8th Cir. 1991) (treating condition as affirmative defense and not as jurisdictional requirement).

“core” question of whether immunity is expressly waived.<sup>16</sup> As Justice Scalia explained in his 2012 book, entitled *Reading Law*, co-authored with Brian A. Garner:

It is one thing to regard government liability as exceptional enough to require clarity of creation as a matter of presumed legislative intent. It is quite something else to presume that a legislature that has clearly made the determination that government liability is in the interests of justice wants to accompany that determination with nit-picking technicalities that would not accompany other causes of action.

However, a conceptual error deeper even than the conflation of the merits with jurisdiction, or the misuse of the rule of strict construction, mars the analysis in *Jackson*: the court’s premise that the United States may waive its immunity to suit on any terms that it wishes, even if those terms violate the Constitution. In dismissing *Jackson* for lack of subject-matter jurisdiction because the filing was untimely under the so-called “mailbox rule,” the court of appeals failed to consider an important constitutional question: whether the equality and due-process provisions of the Fifth Amendment bar the government from conditioning its consent to suit upon a procedure that irrationally sorts claimants into those to whom the agency provides timely and adequate notice before they proceed to federal court, and those from whom the government withholds such notice.<sup>18</sup> Admittedly, only one Supreme Court decision has come even close to acknowledging that there are limits to the government’s authority to waive its sovereign immunity—the notoriously puzzling opinion in *United States v. Klein*.<sup>19</sup> However, since *Klein*, the Court has held in *Boumediene v. Bush* that Congress’s withdrawal of jurisdiction over *habeas corpus* relief must comport with

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<sup>16</sup> Gregory C. Sisk, *The Inevitability of Federal Sovereign Immunity*, 55 VILL. L. REV. 899, 923 (2010) (“Not unerringly or with consistent clarity, the Supreme Court appears to be drifting toward an approach that reserves strict construction and presumptions in favor of the government to core questions about whether sovereign immunity has been expressly waived and the basic scope of that waiver.”); see also Gregory C. Sisk, *A Primer on the Doctrine of Federal Sovereign Immunity*, 58 OKLA. L. REV. 439, 462 (2005) (noting “small cracks in the edifice of strict construction”); Gregory C. Sisk, *Twilight for the Strict Construction of Waivers of Federal Sovereign Immunity*, 92 N.C. L. REV. 1245, 1320 (2014) (“The period of strict construction of statutory waivers of federal sovereign immunity is closing.”).

<sup>17</sup> ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 285 (2012).

<sup>18</sup> U.S. CONST. amend. V.

<sup>19</sup> *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871); Gordon G. Young, *supra* note 3, at 1197 (“*Klein* holds that there are limits upon Congress’ power to invoke the sovereign immunity. Indeed, *Klein* is the only case in our constitutional history so to hold.”); see also Lawrence G. Sager, *Klein’s First Principle: A Proposed Solution*, 86 GEO. L.J. 2525, 2525 (1998) (referring to “the puzzle of *Klein*”).

the Constitution's Suspension Clause.<sup>20</sup> Moreover, in numerous decisions, the Court has recognized that questions about the scope of Congress's power to restrict the jurisdiction of the federal courts are of sufficient seriousness as to warrant efforts to interpret the challenged statute to avoid constitutional problems.<sup>21</sup> While accepting the contentious principle that "[t]he King cannot be sued without his consent," this article argues that when an immunity-waiver operates as the functional equivalent of a statute that regulates federal jurisdiction, the waiver ought to be subject to the structural and substantive limits that constrain a jurisdiction-regulating statute—limits that are narrow, but not nonexistent.<sup>22</sup> These constraints hold particular importance when, as in *Jackson*, the immunity-waiver not only extinguishes individual property interests, but also impairs the decisional independence of the federal courts.

Part II of this article locates *Jackson* and its messy procedural story within the FTCA's statutory and regulatory framework. Part III is the core of the article and explains why the approach of the Sixth Circuit Court of Appeals in *Jackson* is wrong—indeed, “dead wrong”—for it assumes that Congress can use its waiver authority to regulate federal jurisdiction in ways that circumvent constitutional limits.<sup>23</sup> Certainly Congress has broad power to regulate the jurisdiction of the federal courts.<sup>24</sup> But that power is not unfettered; although the limits are not well-defined, congressional power over federal jurisdiction is subject to

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<sup>20</sup> *Boumediene v. Bush*, 553 U.S. 723 (2008); *see* U.S. CONST. art. I, § 9, cl. 2 (Suspension Clause).

<sup>21</sup> *See, e.g.*, *Webster v. Doe*, 486 U.S. 592 (1988) (applying the doctrine of constitutional avoidance to a jurisdiction-regulating statute involving suit against the United States).

<sup>22</sup> Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 1 (1963); *see* Kathryn E. Kovacs, *Revealing Redundancy: The Tension Between Federal Sovereign Immunity and Nonstatutory Review*, 54 DRAKE L. REV. 77, 100 (2005) (“Of course, Congress’s control over jurisdiction has its limitations.”); *see also* John M. Maguire, *State Liability for Tort*, 30 HARV. L. REV. 20, 20 (1916) (“[T]he king can do no wrong . . . is pointless where there is no king.”).

<sup>23</sup> *See, e.g.*, *Am. Exp. Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2317 n.3 (2013) (“[t]he majority is dead wrong”) (Kagan, J., dissenting); *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2803 (2011) (“To hold that *Asahi* controls this case would, to put it bluntly, be dead wrong.”) (Ginsburg, J., dissenting); *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 409 (2010) (“I am perfectly willing to concede that if one of our precedents were dead wrong in its reasoning or irreconcilable with the rest of our doctrine, there would be a compelling basis for revisiting it.”) (Stevens, J., dissenting).

<sup>24</sup> For an early and canonical case, *see Sheldon v. Sill*, 49 U.S. (8 How.) 441, 449 (1850) (holding that statute withholding diversity jurisdiction from federal courts when diversity of citizenship was created by assignment was not “in conflict with the Constitution”).

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constraints that are both internal and external to Article III of the Constitution.<sup>25</sup> These constraints protect not only separation of powers, but also individual liberty.<sup>26</sup> As Justice O'Connor explained in *Commodities Futures Trading Commission v. Schor*, "Article III, § 1, serves both to protect 'the role of the independent judiciary within the constitutional scheme of tripartite government,' and to safeguard litigants' 'right to have claims decided before judges who are free from potential domination by other branches of government.'"<sup>27</sup> This Part explains why the government's conduct in *Jackson* ran afoul of the plaintiff's right to equal protection and due process. In addition, the immunity-waiver undermined judicial independence by conscripting the Article III courts "to speak a constitutional untruth"—the essence of the so-called *Klein* principle—by vesting jurisdiction in the court only to dismiss the complaint and so to validate the extinguishing of the plaintiff's claims despite constitutional violations.<sup>28</sup> Rather than dismissing the plaintiff's claim in *Jackson* for a procedural or jurisdictional defect, the court of appeals ought to have barred Congress from conditioning jurisdiction upon a procedure that violates the Fifth Amendment guarantee of equal treatment and due process.<sup>29</sup>

Finally, Part IV proposes a way to deal with the specific problem that motivated the discussion, namely, the FTCA's apparent use of a mailbox-rule to start the clock running for the filing of a lawsuit in federal court even when the claimant has received no notice and files suit late due to no fault of her own. When faced with a reading of a statute that

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<sup>25</sup> See, e.g., Richard H. Fallon, Jr., *Jurisdiction-Stripping Reconsidered*, 96 VA. L. REV. 1043, 1050 (2010) (referring to "understandings of Congress's power to control jurisdiction with non-originalist developments in substantive constitutional law"); see also Lawrence Gene Sager, *Constitutional Limitations on Congress' Power to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 22–26 (1981) (examining the source of constitutional limits upon congressional power to regulate the jurisdiction of the lower federal courts and of the Supreme Court to adjudicate constitutional claims).

<sup>26</sup> See Stephen I. Vladeck, Boumediene's *Quiet Theory: Access to Courts and the Separation of Powers*, 84 NOTRE DAME L. REV. 2107, 2138 (2009) (discussing "uncontested assertion that both individual rights and the separation of powers are impacted when Congress constrains Article III review").

<sup>27</sup> *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 848 (1986) (quoting *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 583 (1985) and *United States v. Will*, 449 U.S. 200, 218 (1980)).

<sup>28</sup> Daniel J. Meltzer, *Congress, Courts, and Constitutional Remedies*, 86 GEO. L.J. 2357, 2538, 2540 (1998) (defining the *Klein* principle).

<sup>29</sup> *Jackson v. United States*, No. 12-10124, 2013 WL 361010 at \*1 (E.D. Mich. Jan. 30, 2013).

would raise serious constitutional questions, the Court typically resorts to a canon of avoidance and seeks an interpretation that aligns the statutory text with congressional purpose and constitutional requirements.<sup>30</sup> Consistent with this approach, the article suggests a reading of the FTCA that is faithful to the statute's text and consistent with equality and due-process guarantees. Surely in enacting the FTCA Congress did not condition the government's waiver of immunity upon "nit-picking" technicalities of the sort that Justice Scalia has criticized.<sup>31</sup> At the very least, the argument presented ought to persuade the United States to rethink its litigation position with respect to the FTCA limitations-period to ensure that an agency does not insulate its employees' alleged wrongdoing by withholding timely and adequate notice, and in doing so, preventing the injured party from securing judicial redress.

## II. JACKSON V. UNITED STATES, ADMINISTRATIVE PROCEDURE, AND FEDERAL JURISDICTION

*Jackson* illustrates the thousands of tort claims annually filed against the United States; together these FTCA suits expose the government to liability that could amount to billions of dollars if the alleged injuries are proved.<sup>32</sup> The immunity of the United States is said to bar the federal court's disposition of these tort claims absent Congress's clear statement that the government has consented to suit.<sup>33</sup> The FTCA waives the government's immunity and confers jurisdiction upon the federal courts to hear such claims on the same terms as would apply to a private individual under the governing state law. Decisions both reported and unreported point to a broad range of plaintiffs: examples include a widow

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<sup>30</sup> See *Schor*, 478 U.S. at 841; *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 345–48 (1936) (describing techniques to avoid unnecessary constitutional decisions by the Supreme Court).

<sup>31</sup> SCALIA & GARNER, *supra* note 17, at 285.

<sup>32</sup> See U.S. DEP'T OF JUSTICE, CIVIL DIVISION, FY 2015 BUDGET AND PERFORMANCE PLANS, SUBMITTED TO THE CONGRESS OF THE UNITED STATES (Mar. 2014) (stating that the Civil Division annually "defeats billions of dollars in unmerited damages," but that estimate includes tort claims as well as contract and other financial claims).

<sup>33</sup> See Ugo Colella & Adam Bain, *The Burden of Proving Jurisdiction Under the Federal Tort Claims Act: A Uniform Approach to Allocation*, 67 FORDHAM L. REV. 2859, 2866 (1999) ("Consistent with 'waiver-of-sovereign-immunity' principles and general principles governing federal subject matter jurisdiction," the argument presented "begins with the presumption that a federal court does not have jurisdiction over a tort suit brought against the United States."). For a discussion of the historical bases of the traditional view that immunity bars such suit, see *Jackson*, *supra* note 1, at 522 (explaining that "sovereign immunity was a doctrine of limited effect in the early years of this republic").



whose spouse was mauled to death by a grizzly bear in a national forest, the widow of a veteran who died because of alleged medical malpractice in a hospital operated by the Veterans' Administration, and a prisoner who alleged rape by a prison guard.<sup>34</sup> Like *Jackson*, most of these lawsuits—around eighty percent—are dismissed for jurisdictional reasons or on the merits.<sup>35</sup>

A lawsuit filed under the FTCA may face a dismissal on jurisdictional grounds for one of two reasons. First, the FTCA excludes specific kinds of government actions from the grant of jurisdiction.<sup>36</sup> In addition, the Court has created another exception—the so-called *Feres* doctrine—which excludes claims by members of the Armed Forces for injuries suffered that are “incident to service.”<sup>37</sup> As a matter of jurisdiction, a court might dismiss a suit because it alleges a claim that falls outside the government’s consent to suit; on this basis, courts typically will dismiss a claim alleging rape of a prisoner as outside the immunity-waiver because the suit involves an intentional tort and the statute extends only to claims of negligence.<sup>38</sup> The jurisdictional

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<sup>34</sup> See, e.g., *Evert v. United States*, 535 F. App’x. 703 (10th Cir. 2013); *Warrum v. United States*, 427 F.3d 1048 (7th Cir. 2005); *Santillo v. United States*, 2011 WL 2729243 (S.D. Cal. 2011).

<sup>35</sup> See U.S. DEP’T OF JUSTICE, CIVIL DIVISION, *supra* note 32, at 22 (stating that the Justice Department defeats at least 85 percent of defensive claims, which include federal-tort and other suits); *id.* at 17 (setting forth the percentage of defensive cases resolved in government’s favor).

<sup>36</sup> See 28 U.S.C. § 2680 (a)–(n) (2012) (providing that the jurisdictional grant under 28 U.S.C. § 1346(b) “shall not apply” to the claims listed in § 2680, which include “a discretionary function . . . whether or not the discretion involved be abused”; “the loss, miscarriage, or negligent transmission of letters or postal matters”; “the assessment or collection of any tax or customs duty, or the detention of any goods” (subject to exceptions); “certain suits in admiralty”; certain acts related to portions of Title 50 of the United States Code related to war and defense; acts resulting from quarantine; acts resulting from “assault, battery, false imprisonment, false arrest, malicious prosecution, libel, slander, misrepresentation, deceit, or interference with contract rights” (however jurisdiction is extended for “acts or omissions of investigative or law enforcement officers of the United States Government” that result in claims arising “out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution”; “the fiscal operations of the Treasury or by the regulation of the monetary system”; combatant activities “during time of war”; and from activities in a foreign country, of the Tennessee Valley Authority, the Panama Canal Company, or a “Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives”).

<sup>37</sup> *Feres v. United States*, 340 U.S. 135, 146 (1950).

<sup>38</sup> See, e.g., *Lineberry v. United States*, No. 08-0597, 2009 WL 763052, \*7–8 (N.D. Tex. Mar. 23, 2009) (dismissing prisoner’s claim that guards retaliated against him by arranging for another prisoner to assault him as outside the government’s waiver as an intentional tort).

exclusions thus preserve government immunity for misconduct that otherwise would be actionable in a dispute involving two individuals—for example, an assault and battery or sexual abuse.<sup>39</sup>

A second possible defect reflects the imprecision that has attached to the term jurisdiction as distinct from questions going to the merits or involving mere procedure.<sup>40</sup> As in *Jackson*, many courts will dismiss a case when the plaintiff fails to meet an administrative rule governing the agency's investigation and denial of a claim.<sup>41</sup> For example, the FTCA requires that a claim first be presented to the agency and that the written statement set forth a "sum-certain" for damages.<sup>42</sup> Many courts treat this requirement as jurisdictional.<sup>43</sup> Under this approach, a plaintiff who has presented an agency with a claim for damages of "about" or "in excess" of a stated dollar amount, rather than for a specific dollar amount, will be treated as having failed to meet the procedural requirement of claim-presentation and the later-filed court action will be dismissed for lack of subject-matter jurisdiction—even though the agency already will have investigated the claim, in no way lacked notice of the claim, and never informed the claimant of this purported defect.<sup>44</sup> It seems unlikely that the procedures governing agency exhaustion are jurisdictional in the relevant sense under the Court's clarifying approach.<sup>45</sup> The procedures

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<sup>39</sup> See, e.g., *Doughty v. U.S. Postal Serv.*, 359 F. Supp. 2d 361, 367 (D.N.J. 2005) (dismissing Postal Service employee's claim of sexual assault by a co-worker because statute excludes claims for assault and battery).

<sup>40</sup> See Howard M. Wasserman, *Jurisdiction, Merits, and Substantiality*, 42 TULSA L. REV. 579, 579 (2007) (criticizing the frequency with which federal courts conflate jurisdiction "with the substantive merits of federal claims of right").

<sup>41</sup> *Jackson v. United States*, No. 12–10124, 2013 WL 361010 at \*1 (E.D. Mich. Jan. 30, 2013).

<sup>42</sup> 28 U.S.C. § 2675(b) (2012) ("Action under this section shall not be instituted for any sum in excess of the amount of the claim presented to the federal agency, except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim to the federal agency, or upon allegation and proof of intervening facts, relating to the amount of the claim."); *Kokotis v. U.S. Postal Serv.*, 223 F.3d 275, 277 (4th Cir. 2000) (failure to timely demand "sum certain" deprived a court of jurisdiction); see also 28 C.F.R. § 14.2(a) (2015).

<sup>43</sup> See, e.g., *Rispoli v. United States*, 576 F. Supp. 1398 (E.D.N.Y. 1983), *aff'd*, 779 F.2d 35 (2d Cir. 1985), *cert. denied*, 474 U.S. 1069 (1986).

<sup>44</sup> See, e.g., *Gladden v. United States*, 18 F. App'x 756 (10th Cir. 2001) (dismissing suit alleging that Bureau of Prisons employee committed suicide due to alleged improper training because damages sought were stated to be "in excess of \$100,000.00" and so did not meet the sum-certain requirement).

<sup>45</sup> See, e.g., *Henderson ex rel. Henderson v. Shinseki*, 131 S. Ct. 1197 (2011) (holding that 120-day deadline for filing appeals to veterans court was not jurisdictional); *Arbaugh v. Y. & H. Corp.* 546 U.S. 500 (2006) (holding that numerosity requirement under civil rights

appear in sections of the statute separate from those that confer or exclude jurisdiction, and the statute does not classify them as jurisdictional; instead, the statute treats them as classic rules for processing a claim, dealing with such matters as the content of a pleading.<sup>46</sup> Nevertheless, a suit marred by a single and even trivial deviation from the rules governing administrative review is at risk of being dismissed by the court as lacking subject-matter jurisdiction, and the claimant is “forever” barred from seeking legal recourse.<sup>47</sup>

Lawsuits falling into this second category—dismissed on what might be considered to be *faux* jurisdictional grounds—often turn, as in *Jackson*, on small and seemingly insignificant facts.<sup>48</sup> *Jackson* arose from a garden-variety car accident on January 13, 2009.<sup>49</sup> According to the Standard 95 Form submitted, the police reported that the plaintiff’s car was properly stopped at the intersection of Abbott and Third Street in Detroit, Michigan, when a car in the opposing lane crossed the centerline at full speed and hit the plaintiff’s car head-on.<sup>50</sup> The plaintiff suffered “multiple injuries, including damage to her head and spinal cord.”<sup>51</sup> What made the case a federal one—and subject to administrative exhaustion—was the status of the other driver: an Assistant Special Agent who worked at the Detroit Field Office of the United States Immigration and Customs Enforcement (“ICE”).<sup>52</sup> After the accident, the plaintiff hired a lawyer named Michael Shaffer who was associated with a Detroit firm known colloquially as “Michigan Autolaw.”<sup>53</sup> The FTCA requires that a

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statute was not jurisdictional). *But see* *Bowles v. Russell*, 551 U.S. 205 (2007) (holding that time period for filing notice of appeal was jurisdictional).

<sup>46</sup> *See Arbaugh*, 546 U.S. at 515 (2006) (providing that when Congress does not clearly state that a threshold limitation is jurisdictional, “courts should treat the restriction as nonjurisdictional in character”). *Compare* 28 U.S.C. § 1346(b) (2012) (conferring jurisdiction) *and* 28 U.S.C. § 2680 (2012) (exclusions from jurisdiction), *with* 28 U.S.C. § 2401(b) (2012) (time periods for suit) *and* 28 U.S.C. § 2675 (exhaustion required).

<sup>47</sup> 28 U.S.C. § 2401(b).

<sup>48</sup> *See Jackson v. United States*, No. 12-10124, 2013 WL 361010 at \*1–2 (E.D. Mich. Jan. 30, 2013).

<sup>49</sup> *Id.* at \*1.

<sup>50</sup> *Id.*; *see also* Exhibit 1, Defendant’s Motion to Dismiss at 36–37, *Jackson v. United States*, No. 12-10124, 2013 WL 361010 (E.D. Mich. Jan. 30, 2013) (providing the court with the Standard Form 95).

<sup>51</sup> *Jackson v. United States* 751 F.3d 712, 714 (6th Cir. 2014).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*; *see* MICHIGAN AUTOLAW, <http://www.michiganautolaw.com/> (last visited Feb. 18, 2015) (describing the law firm as “auto accident attorneys,” calling one partner an “auto law guru,” and not listing federal tort suits as within its expertise).

claimant submit her claim to the agency involved in the incident within two years of the accrual of the claim, even if the state statute of limitations is longer.<sup>54</sup> On March 5, 2009, within the two-year period and consistent with agency regulations, lawyer-Shaffer mailed ICE a written claim, listing the amount of damages sought, together with a letter documenting his authority to represent the plaintiff.<sup>55</sup> ICE received the claim “on or about June 17, 2009,” and a paralegal working at ICE named Toyya Azian mailed a letter addressed to “Claimant,” dated July 7, 2009, to lawyer-Shaffer acknowledging the claim’s receipt.<sup>56</sup> The FTCA requires agencies to investigate and then either to settle or to deny a claim within six months of receipt.<sup>57</sup> Regulations further require the agency to send a written denial of a claim to the claimant, her lawyer, or her representative.<sup>58</sup> The claimant has the option of filing a lawsuit if the agency does not take action within the six-month period.<sup>59</sup> On January 11, 2012, with the state limitations-period about to close and the claim neither denied nor settled by the agency, the plaintiff—through a second lawyer named Phillip Serafini, not associated with Michigan Autolaw—

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<sup>54</sup> See 28 U.S.C. § 2401(b) (2012).

<sup>55</sup> See Exhibit 1, Defendant’s Motion to Dismiss at 35–37, *Jackson*, No. 12-10124, 2013 WL 361010 (providing the court with a letter from Michael R. Shaffer to the U.S. Department of Homeland Security, dated March 5, 2009, and the Standard Form 95).

<sup>56</sup> *Jackson*, 2013 WL 361010, at \*1; Exhibit 2, Defendant’s Motion to Dismiss at 38, *Jackson*, No. 12-10124, 2013 WL 361010 (providing the court with a letter from Toyya Azian of ICE to Claimant, dated July 7, 2009). ICE is the investigative arm of the Department of Homeland Security. It is not immediately apparent from ICE’s website that for federal-tort purposes, ICE is treated as a separate agency from Homeland Security. See U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, <https://www.ice.gov/about> (last visited Feb. 18, 2015). Shaffer mailed the claim to the latter’s address. *Jackson*, 2013 WL 361010, at \*1. Technically the plaintiff’s claim was filed with the wrong agency—an error that is not unusual among FTCA claimants and others who sue federal agencies. See John S. Gannon, Note, *Federal Tort Claims Act—Seeking Redress Against the Sovereign: Balancing the Rights of Plaintiffs and the Government When Applying Federal Rule of Civil Procedure 15(c) to FTCA Claims*, 30 W. NEW ENG. L. REV. 223, 229–30 (2007) (discussing dismissal of FTCA suits for naming the wrong government agency and amendments to the federal rules attempting to obviate aspects of this problem). Federal regulations require transfer of the claim to the agency involved in the incident, which Homeland Security did two months after it had received the claim. See 28 C.F.R. § 14.2(b)(1) (2015).

<sup>57</sup> See 28 U.S.C. § 2675(a) (2012).

<sup>58</sup> See 28 C.F.R. § 14.9(a) (2015).

<sup>59</sup> See 28 U.S.C. § 2401(b); 28 U.S.C. § 2675(a); see also Ugo Colella, *The Case for Borrowing a Limitations Period for Deemed-Denial Suits Brought Pursuant to the Federal Tort Claims Act*, 35 SAN DIEGO L. REV. 391, 399–402 (1998) (discussing the legislative history to the deemed-denial provision of the FTCA).

filed two lawsuits: a federal suit under the FTCA against the United States and a state suit under state law against the ICE agent involved in the accident.<sup>60</sup> As provided by statute, the United States Attorney General removed the state action to federal court and substituted the United States for the federal employee; eventually, the court consolidated the removed action with the FTCA suit.<sup>61</sup> With both suits now in federal court, the government moved to dismiss the pair for lack of subject-matter jurisdiction on the ground that they were untimely because filed more than six months after ICE had mailed its notice of denial of the claim.<sup>62</sup> Only through that motion did the plaintiff learn that ICE had denied her claim; that it had sent a certified letter to that effect dated March 3, 2011, postmarked later, to lawyer-Shaffer; that the letter had been returned to ICE on March 23, 2011, stamped by the United States Postal Service as “Not Deliverable as Addressed, Unable to Forward”; and that ICE had taken no further steps to contact the plaintiff even though the case file contained her address as well as her lawyer’s telephone number and email address.<sup>63</sup>

What happened before ICE mailed the notice is disputed; the district court did not hold a hearing or order discovery and instead relied on the parties’ affidavits which set forth conflicting accounts.<sup>64</sup> On the plaintiff’s side, the lawyer named Shaffer averred that he had called ICE’s representative—the paralegal named Azian—about fifteen times trying to settle the claim, but the representative had returned only one of his calls and the matter had not resolved.<sup>65</sup> He acknowledged that Michigan Autolaw had moved in May 2010, but stated that its phone number and email address, already in the ICE file, had remained the same; that at the time of the office’s move, the firm had put in a forwarding order with the United States Postal Service; and that when the order expired, the firm used a “runner” to pick-up mail at the post office.<sup>66</sup> The second lawyer, named Serafini, also submitted an affidavit, averring that ICE’s

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<sup>60</sup> See *Jackson v. United States*, 751 F.3d 712, 715 (6th Cir. 2014).

<sup>61</sup> See 28 U.S.C. § 2679(d)(2) (2012); *Jackson*, 751 F.3d at 715; PAUL FIGLEY, A GUIDE TO THE FEDERAL TORT CLAIMS ACT 55 (2012) (discussing procedure governing substitution of the United States for the individual employee).

<sup>62</sup> *Jackson*, 751 F.3d at 715.

<sup>63</sup> *Id.* at 714–15.

<sup>64</sup> *Id.* at 715–16.

<sup>65</sup> *Id.* at 715.

<sup>66</sup> *Id.*

representative had called him on February 2, 2011, to request that he file a new demand letter and that he had notes of that phone call, which had been logged in the usual course into the firm's entry-system; that statement seems to be supported by an exhibit to the government's motion showing that someone at ICE, presumably the representative with whom the lawyer talked, had hand written Serafini's name and phone number at the bottom of the page of ICE's copy of Shaffer's earlier letter accompanying the claim.<sup>67</sup> On the defendant's side, ICE averred that it had received no written notice of the plaintiff's change of counsel and had no record of any phone call between its representative named Azian and Serafini. Moreover, ICE stated that it no longer employed the representative named Azian.<sup>68</sup>

The district court dismissed the suit as time-barred and lacking in subject-matter jurisdiction, and it refused to subject the limitations period to equitable tolling.<sup>69</sup> On appeal, the Sixth Circuit Court of Appeals reviewed the jurisdictional dismissal *de novo* and affirmed. The court explained that a suit against the United States will be dismissed unless it falls within the government's waiver of immunity; here, the plaintiff failed to meet the limitations period upon which the government's consent to suit was conditioned—that is, “a claimant may sue the United States pursuant to the FTCA six months after presenting a claim to an agency. . . . A claimant may no longer sue the United States six months after the time that an agency mails a denial letter.”<sup>70</sup> The appeals court rejected the argument that an “undelivered notice of denial” does not trigger the six-month limitation window,” pointing to the text of the statute which uses the word “mailing” of a denial, not receipt of a denial.<sup>71</sup> It further held that the district court did not abuse its discretion in not equitably tolling the claim, and it did not consider whether application of the mailbox-rule to extinguish the plaintiff's claim violated the Constitution and so ought to have affected the jurisdictional analysis.<sup>72</sup> The court denied a request for *en banc* review.<sup>73</sup>

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<sup>67</sup> *Id.*; Exhibit 1 Defendant's Motion to Dismiss at 35, Jackson v. United States, No. 12-10124, 2013 WL 361010 (E.D. Mich. Jan. 30, 2013).

<sup>68</sup> *Jackson*, 751 F.3d at 715.

<sup>69</sup> *Id.* at 716.

<sup>70</sup> *Id.* at 717 (internal citations omitted).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 719.

<sup>73</sup> *Id.* at 712.

### III. WAIVERS OF IMMUNITY AND CONGRESS'S POWER TO REGULATE FEDERAL JURISDICTION

The court of appeals in *Jackson* concentrated only on whether the plaintiff met the procedures for administrative exhaustion, procedures that the court characterized as jurisdictional because seen as conditions of the government's waiver of immunity to suit. The court of appeals did not consider whether those conditions comported with constitutional requirements. This Part argues that Congress ought not to be able to waive its immunity to suit on terms that circumvent the Fifth Amendment of the federal Constitution, as it did in *Jackson* when it withheld notice from the plaintiff and then effectively blocked her from securing relief on the merits. Congress may have unfettered control in deciding whether to waive its immunity or not. However, once it submits to suit, the United States cannot disregard the requirements of equal protection or due process.

#### A. *Sovereign Immunity and the Waiver Power*

Although no principle is more entrenched in American law than that of sovereign immunity, no principle is more contested and less grounded in history or text.<sup>74</sup> Because of sovereign immunity, the federal courts traditionally assumed that they were without power to grant relief against the United States for torts committed by its agents.<sup>75</sup> After many years of consideration—and weighed down by the private-bill system that doled out compensation in place of administrative and judicial relief—Congress enacted the FTCA, waiving its immunity to suit and conferring jurisdiction on the federal courts to hear claims that are cognizable under

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<sup>74</sup> See Diane P. Wood, *The Structure of Sovereignty*, 18 LEWIS & CLARK L. REV. 215, 219 (2014) (stating that the doctrine of sovereign immunity appears to be a structural constitutional doctrine that is inferred from the overall Constitution itself, just like separation of powers, rights of privacy, or incorporation of critical provisions of the Bill of Rights into the Fourteenth Amendment). Compare *Kawananakoa v. Polyblank*, 205 U.S. 349, 353 (1907) (“A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends.”) (Holmes, J.), with Erwin Chemerinsky, *Shifting the Balance of Power? The Supreme Court, Federalism, and State Sovereign Immunity: Against Sovereign Immunity*, 53 STAN. L. REV. 1201, 1202 (2001) (stating that “[t]he effect of sovereign immunity is to place the government above the law . . .”).

<sup>75</sup> See Alexander Holtzoff, *The Handling of Tort Claims Against the Federal Government*, 9 LAW & CONTEMP. PROBS. 311 (1942). But see *Jackson*, *supra* note 1, at 523–52 (presenting a critical account of the assumption about traditional practice).

the statute.<sup>76</sup> In an early case interpreting the FTCA, the Supreme Court rejected the government's argument that its waiver of immunity "must be strictly construed."<sup>77</sup> To the contrary, the Court emphasized that,

the congressional attitude in passing the Tort Claims Act is more accurately reflected by Judge Cardozo's statement . . . 'The exemption of the sovereign from suit involves hardship enough, where consent has been withheld. We are not to add to its rigor . . . where consent has been announced.'<sup>78</sup>

Nevertheless, for the last generation, courts have honored Justice Cardozo's statement in the breach. Decisions construing the FTCA generally have invoked what is known as the "sovereign immunity canon"—that a waiver will be "strictly construed in favor of the sovereign" without attending to other indications of Congressional intent or statutory text.<sup>79</sup> Moreover, the canon has been extended to procedures attached to the waiver, and not simply to whether immunity has been waived.<sup>80</sup> As in *Jackson*, the application of this canon almost inevitably results in the dismissal of a suit that fails to meet the procedural requirements of administrative exhaustion, however technical or trivial the plaintiff's deviation or omission.<sup>81</sup> The Supreme Court appears to have moved away from this approach.<sup>82</sup> However, lower courts have not consistently responded to the doctrinal shift.<sup>83</sup>

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<sup>76</sup> See generally Floyd D. Shimomura, *The History of Claims Against the United States: The Evolution from a Legislative Toward a Judicial Model of Payment*, 45 LA. L. REV. 625 (1985) (explaining the history of the move from private bills to legal claims).

<sup>77</sup> *United States v. Aetna Cas. & Sur. Co.*, 338 U.S. 366, 383 (1949).

<sup>78</sup> *Id.* (quoting *Anderson v. Hayes Constr. Co.*, 153 N.E. 28, 29–30 (1926)).

<sup>79</sup> *Lane v. Pena*, 518 U.S. 187 (1996). See generally Alex Kardon, *Damages Under the Privacy Act: Sovereign Immunity and a Call for Legislative Reform*, 34 HARV. J.L. & PUB. POL'Y 705 (2011).

<sup>80</sup> See Aaron Tang, *Double Immunity*, 65 STAN. L. REV. 279 (2013) (using the term "double immunity" to refer to the requirement that a sovereign must expressly waive immunity from suit and for monetary relief).

<sup>81</sup> E.g., Tasha Hill, *Inmates' Need for Federally Funded Lawyers: How the Prison Litigation Reform Act, Casey, and Iqbal Combine with Implicit Bias to Eviscerate Inmate Civil Rights*, 62 UCLA L. REV. 176, 199–201 (2015) ("[m]inor technical errors filling out any forms also bar meritorious claims").

<sup>82</sup> See, e.g., *Jones v. Bock*, 549 U.S. 199, 234–224 (2007) (criticizing the doctrine of "total exhaustion" under the Prison Litigation Reform Act).

<sup>83</sup> *Dolan v. United States Postal Serv.*, 546 U.S. 481, 492 (2006) (internal quotation omitted). See generally Sisk, *Twilight for the Strict Construction of Waivers of Federal Sovereign Immunity*, *supra* note 16, at 1245 (arguing that the Court no longer strictly construes waivers of sovereign immunity).



*B. Congressional Regulation of Jurisdiction*

The court of appeals in *Jackson* closely examined whether the plaintiff filed her lawsuit on time, but it failed to consider whether the procedures used by the government to trigger the filing period impermissibly circumvented constitutional requirements. Rather, the court operated on the premise that Congress is free to condition its consent to suit in federal court on any terms that it wishes, even when the waiver is treated as the functional equivalent of a grant of jurisdiction. This article challenges that assumption, and the ease with which the court eliminated the possibility of judicial review. Traditionally, scholars have assigned immunity-waivers and jurisdictional grants to separate and different doctrinal categories, while commentary acknowledges that it is not easy to draw the boundary between a waiver of immunity and a grant of jurisdiction.<sup>84</sup> What Henry M. Hart called “the bearing of sovereign immunity” figured awkwardly into his canonical Dialogue on “the power of Congress to limit the jurisdiction of federal courts.”<sup>85</sup> Professor Hart put to the side the question of “what constitutes such a suit” once the government has given its consent.<sup>86</sup> Section 1346(b) has been construed to be both a waiver of immunity and a grant of jurisdiction.<sup>87</sup> Not all statutes involving suits against the United States share this hybrid quality. A waiver of immunity does not always involve a conferral of jurisdiction over claims to which the government has given its consent.<sup>88</sup> Likewise, a

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<sup>84</sup> See *Jackson*, *supra* note 1, at 571 (“Sorting out the independent effect of ‘sovereign immunity’ apart from the question of congressional control of the federal courts’ jurisdiction is difficult.”).

<sup>85</sup> Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1370 (1953); see also Stephen I. Vladeck, *Why Klein (Still) Matters: Congressional Deception and the War on Terrorism*, 5 J. NAT’L SECURITY L. & POL’Y 251, 253 (2011) (referring to the Dialogue and the difficulty of subjecting congressional control of federal jurisdiction to any limit in the face of sovereign immunity).

<sup>86</sup> Hart, *supra* note 85.

<sup>87</sup> 28 U.S.C. § 1346(b)(1) (2012) provides in pertinent part: that the federal district courts “shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.”

<sup>88</sup> See, e.g., *Jaimes v. Lucas Metro. Hous. Auth.*, 833 F.2d 1203 (6th Cir. 1987) (waiver of immunity under the National Housing Act does not confer jurisdiction on the federal courts).

conferral of jurisdiction does not always lift the government's immunity from suit despite the court's power to hear claims should the United States give its consent.<sup>89</sup> Sometimes, however, a waiver and a grant of jurisdiction do go hand-in-hand; as the Supreme Court explained with respect to the Tucker Act, involving subsection (a) of Section 1346:

It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction. The terminology employed in some of our prior decisions has unfortunately generated some confusion as to whether the Tucker Act constitutes a waiver of sovereign immunity. The time has come to resolve this confusion. . . . [B]y giving the Court of Claims jurisdiction over specified types of claims against the United States, the Tucker Act constitutes a waiver of sovereign immunity with respect to those claims.

Suggesting that the FTCA's waiver ought to be treated as the functional equivalent of a grant of jurisdiction, and so subject to the same scrutiny as a grant of jurisdiction, is not to say that a waiver and grant of jurisdiction are equivalent in every way. Conceptually, there exists the unanswered question whether sovereign immunity is properly treated as jurisdictional.<sup>91</sup> No provision of the Constitution explicitly withholds jurisdiction from suits involving the United States, unlike the specific exclusion of suits involving the states under the Eleventh Amendment.<sup>92</sup>

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<sup>89</sup> Thus, for example, it is settled doctrine that 28 U.S.C. § 1331 does not confer jurisdiction upon the federal courts to hear suits against the United States absent the government's waiver of its immunity. *See Whittle v. United States*, 7 F.3d 1259, 1262 (6th Cir. 1993) ("The federal question jurisdictional statute is not a general waiver of sovereign immunity; it merely establishes a subject matter that is within the competence of federal courts to entertain."); *Army & Air Force Exch. Serv. v. Sheehan*, 456 U.S. 728 (1982) (28 U.S.C. § 1331 confers jurisdiction upon the district courts but does not the immunity of the United States).

<sup>90</sup> *United States v. Mitchell*, 463 U.S. 206, 212 (1983); *see* 28 U.S.C. § 1346(a)(2) (2012) (conferring original jurisdiction and waiving immunity).

<sup>91</sup> *See* Scott C. Idleman, *The Emergence of Jurisdictional Resequencing in the Federal Courts*, 87 CORNELL L. REV. 1, 87–89 (2001) (discussing the extent to which sovereign immunity poses a genuine restriction on the issue of subject-matter jurisdiction); *see also* Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 HARV. L. REV. 1559 (2002) (arguing that sovereign immunity is a doctrine of personal jurisdiction, not subject-matter jurisdiction, and thus can be waived, forfeited, or subject to consent).

<sup>92</sup> *See* U.S. CONST. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."); *see also* *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996) ("Although the text of the Amendment would appear to restrict only the Article III diversity jurisdiction of the federal courts, 'we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms.'") (citing *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779 (1991)); Erwin Chemerinsky, *Against Sovereign Immunity*, 53

Moreover, although immunity blocks the court from exercising jurisdiction unless the government consents to suit, jurisdictional rules conventionally do not recognize consent or waiver as a basis of competence.<sup>93</sup> Descriptively, the immunity-waiver in *Jackson* enlarges jurisdiction by conferring jurisdiction over claims to which Congress has manifested the government's consent. The jurisdiction-regulating statutes that usually draw academic attention withhold power from the federal court over discrete claims or remedies.<sup>94</sup> The FTCA also sets forth procedures, some of which limit the court's jurisdiction and some of which pertain to the claim. Statutes regulating jurisdiction also may impose conditions on the court's power.<sup>95</sup> Courts have sometimes conflated these jurisdictional conditions with claims-processing rules that ought not to be treated as jurisdictional. At the least, the interrelationship between the FTCA's waiver and its grant of jurisdiction raises questions about the scope of Congress's power—questions that the court of appeals in *Jackson* entirely ignored.

### C. Constitutional Limits on Congressional Authority to Waive Immunity

Unlike most statutes that purport to regulate the jurisdiction of the Article III courts, the immunity-waiver in *Jackson* does not on the surface deprive the federal court of jurisdiction; to the contrary, it confers jurisdiction, allowing the court to exercise power over law suits that are timely filed by litigants after they have received notice that the agency

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STAN. L. REV. 1201, 1202 (2001) (“Nowhere does the . . . [Constitution] mention or even imply that governments have complete immunity to suit.”).

<sup>93</sup> See *Alden v. Maine*, 527 U.S. 706, 710 (1999) (“sovereign immunity bars suits [against a state] only in the absence of consent”); *The Siren*, 74 U.S. 152, 154 (1868) (“[The United States] cannot be subjected to legal proceedings at law or in equity without their consent, and whoever institutes such proceedings must bring his case within the authority of some act of Congress.”); Dustin E. Buehler, *Solving Jurisdiction's Social Cost*, 89 WASH. L. REV. 653, 654 (2014) (“[T]he parties cannot consent to or waive jurisdictional requirements.”).

<sup>94</sup> See, e.g., Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895 (1984). The Class Action Fairness Act of 2005, codified at 38 U.S.C. §§ 1332(d), 1453, and 1711–15, provides a counter-example to this generalization. See Adam N. Steinman, *Sausage-Making, Pigs' Ears, and Congressional Expansions of Federal Jurisdiction: Exxon Mobil v. Allapattah and Its Lessons for the Class Action Fairness Act*, 81 WASH. L. REV. 279 (2006).

<sup>95</sup> See Lawson, *supra* note 2, at 191 (distinguishing between wholesale jurisdiction-stripping and the regulation of how federal courts exercise their jurisdiction); see also Fallon, Jr., *supra* note 25 (discussing jurisdiction-stripping provisions and the withdrawal of effective remedies).

has denied their claims. As interpreted by the court in *Jackson*, the immunity-waiver also withholds power over lawsuits that are not timely filed even if the agency did not actually notify the plaintiff that the claim had been denied and the plaintiff had no other way to learn that the limitations-period for filing suit was running. The question posed in this Part is whether the Constitution forbids Congress from affecting a waiver on these terms.

Certainly Article III would bar Congress from conferring jurisdiction that goes beyond the enumerated categories of cases and controversies set forth in Section 2.<sup>96</sup> This is the basic teaching of *Marbury v. Madison*: Congress cannot add to the jurisdiction of the federal courts.<sup>97</sup> Moreover, the *Marbury*-limit also seems to apply to the notion of judicial power set forth in Section 1—for example, Congress’s power to confer standing is constrained by some notion of justiciability that is distinct from Section 2.<sup>98</sup> Looking at the FTCA, surely Congress could not waive its immunity on the condition that tort suits filed against it be heard only as an original matter in the Supreme Court of the United States, for the Constitution by its terms provides for no such jurisdiction.<sup>99</sup> Similarly, under current doctrine, Congress presumably could not waive its immunity through the FTCA and confer jurisdiction on citizen-suits by individuals who suspect agency misconduct but lack injury proximately caused by a federal employee’s alleged negligence—the waiver would not meet the injury-in-fact requirement that the Court associates with Article III standing and the unaffected bystander would face a dismissal of the action for lack of subject-matter jurisdiction.<sup>100</sup>

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<sup>96</sup> U.S. CONST. art. III, § 2 (setting forth enumerated categories of cases or controversies that are within the judicial power).

<sup>97</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176–80 (1803).

<sup>98</sup> See generally Heather Elliott, *Congress’s Inability to Solve Standing Problems*, 91 B.U. L. REV. 159 (2011).

<sup>99</sup> The original jurisdiction of the Supreme Court is limited to “Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party.” U.S. CONST. art. III, § 2; see *Marbury*, 5 U.S. at 176–80; Akhil Reed Amar, *Marbury, Section 13, and the Original Jurisdiction of the Supreme Court*, 56 U. CHI. L. REV. 443, 452 (1989) (“Yet *Marbury* emphatically forecloses such an argument, for the Court holds not only that original jurisdiction need not be expanded when appellate jurisdiction is contracted, but indeed that original jurisdiction may never be expanded.”). But see Laura S. Fitzgerald, *Is Jurisdiction Jurisdictional?*, 95 NW. U. L. REV. 1207, 1208 (2001) (“[A] competing tradition . . . dispenses federal judicial power based on how important the Court considers the federal interest at stake, on the merits[.]”).

<sup>100</sup> See *Lexmark Intern., Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1390

The waiver in *Jackson* presents a different kind of problem: it specifies the manner in which jurisdiction is to be determined, allowing power to be exercised over timely filed claims, and uses the agency's mailing of a denial letter as the starting point for the limitations-period even when the agency and the court know that the claimant received no notice. This Part argues that even if the government cannot be compelled to waive its immunity to suit, it may not condition jurisdiction on processes that are so arbitrary and irrational as to circumvent the equality and due-process requirements of the Fifth Amendment.<sup>101</sup> As the doctrine of unconstitutional conditions makes clear, the Constitution constrains to

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(2014) (stating that the usual rule is to construe a federal cause of action "to incorporate a requirement of proximate causation"). Alternative theories of tort law and causation could provide a basis that would meet Article III requirements. *See, e.g.*, John Gardner, *What is Tort Law For? Part 1: The Place of Corrective Justice*, 30 *LAW & PHIL.* 1, 11 (2011) ("[B]e it corrective or be it distributive, an injustice perpetrated by anyone is in principle everyone's business, and anyone at all has reason to help in securing its avoidance[.]"). *See also* Cass Sunstein, *What's Standing after Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 *MICH. L. REV.* 163, 214 (1992) ("Neither English nor American practice supports the view that stranger suits are unconstitutionally impermissible.").

<sup>101</sup> *See* U.S. CONST. amend. V; *Bolling v. Sharpe*, 347 U.S. 497 (1954) (holding that the federal government is bound to follow the same Equal Protection Clause as the states). There is no consensus on whether constitutional provisions other than Article III—and, after *Boumediene v. Bush*, 553 U.S. 723 (2008), the Suspension Clause—limit Congress's power to regulate federal jurisdiction. *See* Fallon, Jr., *supra* note 25, at 1053 ("Because *Boumediene's* ruling rested wholly on the Suspension Clause, it has no necessary bearing on jurisdiction-stripping proposals outside the scope of that provision."). Nevertheless, a few arguments recur in the literature and give credibility to the view that congressional authority is subject to constitutional constraint under provisions that are external to Article III. Justice Scalia, for example, has argued that Congress's power to regulate federal jurisdiction is subject to the structural provisions of Article II; the Constitution's commitment to Presidential authority thus constrains Congress from establishing citizen-suit procedures that delegate the Executive's "take care" power to a private party, and an enforcement action brought under such suit lacks subject-matter jurisdiction unless the individual has suffered her own concrete injury. *See* U.S. CONST. art. II, § 3, cl. 4 ("[The President] shall take Care that the Laws be faithfully executed."); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 577 (1992) ("To permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an 'individual right' vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to take care that the Laws be faithfully executed.") (internal quotation marks omitted); *see also* Michael E. Solimine, *Congress, Separation of Powers, and Standing*, 59 *CASE W. RES. L. REV.* 1023, 1049 (2009) ("Supreme Court doctrine on the scope of congressional power to influence standing in federal court is not a model of clarity. No Justice has suggested that Congress lacks *any* power in this regard, and even cases like *Lujan* suggest that Congress may statutorily bless injuries to provide standing where those injuries would not have been recognized at common law. But beyond those generalities, the level of congressional authority to authorize departures from the private rights model is not clear.") (citation omitted).

some extent even those government acts that the government is not required to take, for example, “whenever government conditions a benefit it is not obligated to provide on waiver of a constitutional right.”<sup>102</sup>

i. Equal Protection

Turning first to equal protection, no doubt it is unusual to argue that a statute regulating federal jurisdiction raises equality concerns. *Jackson* involves no claim of invidious motive and implicates no suspect class; an equality challenge to its classification of claimants may seem like an uphill battle. The American doctrine of equality is notoriously thin, permitting the government to draw statutory classifications that are rational, with the core inquiry focused on whether the categories are sufficiently consistent as “to treat like cases alike.”<sup>103</sup> Indeed, the government’s interest in administrative convenience can justify classifications that might otherwise fail under higher forms of scrutiny.<sup>104</sup> Waiving immunity to permit tort suits only by Sabbath observers would seem to be impermissible; waiving immunity in suits challenging

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<sup>102</sup> Mitchell N. Berman, *Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 GEO. L.J. 1, 8 (2001). The unconstitutional conditions doctrine is a murky area of law. See Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415 (1989) (referring to “confusion” in the application of the doctrine); cf. Adam B. Cox & Adam M. Samaha, *Unconstitutional Conditions Questions Everywhere: The Implications of Exit and Sorting for Constitutional Law and Theory*, 5 J. LEGAL ANALYSIS 61, 65 (2013) (“[A]n amusing aspect of the unconstitutional conditions doctrine is that there is no doctrine. At least there is no snappy and established test for analyzing unconstitutional conditions questions.”). See generally Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1304 (1984) (observing that the unconstitutional-conditions cases can manifest an inconsistency so “marked to make a legal realist of almost any reader”).

<sup>103</sup> *Engquist v. Or. Dep’t of Agric.*, 553 U.S. 591, 601 (2008) (“Our equal protection jurisprudence has typically been concerned with governmental classifications that ‘affect some groups of citizens differently than others.’”) (citing *McGowan v. Maryland*, 366 U.S. 420, 425 (1961)); *South v. South Carolina*, 474 U.S. 888, 890 (1985) (Blackmun, J., dissenting) (“This Court’s refusal to treat like cases alike can only add to the unconstitutionally arbitrary nature of the death penalty.”). For a discussion of the substantive content, if any, of American equality doctrine, see Christopher J. Peters, *Equality Revisited*, 110 HARV. L. REV. 1210, 1212 (1997) (arguing for prescriptive equal protection that is nontautological and has substantive logical content); Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982); see also Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 751 (2011) (making the “descriptive claim that the Court has shut doors in its equality jurisprudence in the name of pluralism anxiety and opened doors in its liberty jurisprudence to compensate”).

<sup>104</sup> See, e.g., *Heckler v. Mathews*, 465 U.S. 728 (1984) (upholding gender classification for administrative reasons).

restrictions on Sabbath observance to permit only injunctive relief could be permissible.<sup>105</sup> But claims of equality are not limited to members of suspect classes; although the circumstance is unusual, the Supreme Court has held that “[t]he clause protects class-of-one plaintiffs victimized by the ‘wholly arbitrary act.’”<sup>106</sup> Moreover, despite the infrequent nature of an equality challenge to an immunity-waiver, the argument carries a distinguished pedigree. One significant reading of *United States v. Klein*—the only case in constitutional history in which the Court both invalidated Congress’s regulation of jurisdiction and also recognized that an immunity-waiver is subject to some constitutional constraint—associates the decision with a principle of non-discrimination that goes to the core of equal protection.<sup>107</sup> Under this principle, Congress may not open the courthouse doors to one class of litigants and close it to those who are similarly situated.<sup>108</sup> As William W. Van Alstyne has explained, “Even a privilege, benefit, opportunity, or public advantage may not be granted to some but withheld from others where the basis of classification and difference in treatment is arbitrary.”<sup>109</sup>

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<sup>105</sup> See Fallon, *supra* note 25, at 1067 (discussing the applicability of suspect-class analysis to jurisdiction-stripping statutes); see also Lloyd C. Anderson, *Congressional Control over the Jurisdiction of the Federal Courts: A New Threat to James Madison’s Compromise*, 39 BRANDEIS L.J. 417 (2000–2001) (discussing congressional control over jurisdiction and remedies). For a discussion of the power of federal courts to remedy jurisdiction statutes that exclude claims or litigants, see Ruth Bader Ginsburg, *Some Thoughts on Judicial Authority to Repair Unconstitutional Legislation*, 28 CLEVE. ST. L. REV. 301 (1979) (discussing judicial power to extend under-inclusive statutes) and Mark V. Tushnet & Jennifer Jaff, *Why the Debate over Congress’ Power to Restrict the Jurisdiction of the Federal Courts Is Unending*, 72 GEO. L.J. 11, 1322 (1984) (stating that Congress “has plenary authority to structure remedies”).

<sup>106</sup> *Ind. Teachers Ass’n v. Bd. of Sch. Comm’rs*, 101 F.3d 1179, 1181–82 (7th Cir. 1996). But see *Engquist v. Or. Dep’t of Agric.*, 553 U.S. 591, 598 (2008) (exempting public personnel decisions from class-of-one equality challenges under the Fourteenth Amendment).

<sup>107</sup> Meltzer, *supra* note 28, at 2549 (“*Klein* should not be discarded as a badly-reasoned relic with no contemporary significance. For the Court’s decision continues to stand for something general and important—that whatever the breadth of Congress’s power to regulate federal court jurisdiction, it may not exercise that power in a way that requires a federal court to act unconstitutionally.”); Gordon G. Young, *supra* note 3, at 1230 (suggesting that *Klein* took “an antidiscrimination position on sovereign immunity”).

<sup>108</sup> *Ind. Teachers Ass’n*, 101 F.3d at 1181–82. But see *Engquist*, 553 U.S. at 598 (exempting public personnel decisions from class-of-one equality challenges under the Fourteenth Amendment).

<sup>109</sup> See William W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1454 (1968).

The facts of *Klein* are well known and need not be rehearsed in detail.<sup>110</sup> *Klein* involved efforts under the Abandoned and Captured Property Act of 1863 to recover proceeds from the sale of property that had been seized by Union soldiers during the Civil War.<sup>111</sup> Only those who were loyal to the Union could recover property, and the question was how to distinguish rebels from those who merely resided or did business within the states of the Confederacy.<sup>112</sup> The Court had held in *United States v. Padelford* that a presidential pardon was proof of loyalty to the Union.<sup>113</sup> In response, Congress, by the Act of July 12, 1870, conferred original jurisdiction on the claims court and appellate jurisdiction on the Supreme Court, authorizing the judiciary to dismiss any claim or to reverse any judgment when proof of loyalty was based upon a presidential pardon.<sup>114</sup> The Court in *Klein* held that the statute was unconstitutional.<sup>115</sup>

The precise grounds of the *Klein* decision have been called everything from “enigmatic” to “deeply puzzling.”<sup>116</sup> In one of the narrower readings of the decision, commentary focuses on the statute’s disregard of equal protection: Congress erected an arbitrary distinction between persons who sought to recover property—as Gordon G. Young explains it—“open[ing] the courts to truly innocent plaintiffs while closing them to those whose innocence comes by way of a pardon.”<sup>117</sup> Applying this reading to *Jackson*, we might argue that having consented to suit in federal court, the government is not free to open the courts to injured persons to whom the government chooses to give notice and to

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<sup>110</sup> See Amanda L. Tyler, *The Story of Klein: The Scope of Congress’s Authority to Shape the Jurisdiction of the Federal Courts*, FEDERAL COURTS STORIES 87 (Vicki C. Jackson & Judith Resnik eds., 2010).

<sup>111</sup> The Abandoned and Captured Property Collection Act, ch. 120, § 3, 12 Stat. 820 (1863).

<sup>112</sup> See Gordon G. Young, *supra* note 3, at 1198 (stating that under the Act, those who had never given aid or comfort to the rebellion could recover).

<sup>113</sup> *United States v. Padelford*, 76 U.S. (9 Wall.) 531 (1869).

<sup>114</sup> Act of July 12, 1870, ch. 251, 18 Stat. 230 (1870).

<sup>115</sup> *United States v. Klein*, 80 U.S. (13 Wall.) 128, 148, (1871).

<sup>116</sup> See Vladeck, *Why Klein (Still) Matters*, *supra* note 85, at 251 (calling *Klein* “enigmatic” and “intriguing”); Howard M. Wasserman, *The Irrepressible Myth of Klein*, 79 U. CIN. L. REV. 53, 53–55 (2010) (reporting that *Klein* has been called “deeply puzzling,” “disjointed,” “delphic,” and “generally difficult to follow”).

<sup>117</sup> Gordon G. Young, *supra* note 3, at 1230.



close the courts to those to whom it does not so choose.

The FTCA requires the agency to send notice to all claimants that a claim has been denied; that notice announces to the claimant that the time for filing a federal lawsuit to challenge the denial has started to run. To achieve the statutory goal, the agency must send the denial-letter by certified or registered mail, which provides evidence of receipt, and regulations state that the notice may go to the claimant, her attorney, or her representative.<sup>118</sup> In *Jackson*, the agency sent the denial by certified mail to the claimant's lawyer, and when that letter was returned as undeliverable, took no steps to notify the claimant of the denial despite the fact that her name and contact information were in the file.<sup>119</sup> By effect, the government irrationally constructed two categories of claimants: those claimants who received notice of their denial, and those claimants who are known by the agency not to have received notice, even though their contact information is in the file, and on this basis are blocked from filing their federal lawsuits on time. Although the litigants are similarly situated, those in the second group are cut-off at the starting gate from obtaining judicial relief on the merits of their claims.<sup>120</sup>

Described in this way, the classification results from the agency's own conduct—its failure to provide a required notice—and carries a family resemblance to the classification invalidated in *Logan v. Zimmerman Brush*.<sup>121</sup> *Logan* involved the question of whether the Fourteenth Amendment barred a state agency from dismissing an administrative claim as out-of-time and so without jurisdiction when the agency had failed to schedule an essential conference within the

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<sup>118</sup> See 28 U.S.C. § 2401 (2012) (referring to the agency's mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented); 28 C.F.R. § 14.9 (2015) (mailing of notice to the claimant, counsel, or representative).

<sup>119</sup> The government argued that it would be an ethical violation to contact a claimant who was known to have representation. *Jackson v. United States*, 751 F.3d 712, 718 n.3 (2014) (citing Def. Br. at 22 n.1). *But see* Ann McGuire, *The Quality of Mercy is Not Strained: Interpreting the Notice Requirement of the Federal Tort Claims Act*, 97 MICH. L. REV. 1034, 1048 (1999) (rejecting this argument on the ground that ethical rules permit for direct contact with represented parties when permitted by law).

<sup>120</sup> Even assuming the problem in *Jackson* is anomalous, and it is not, the Supreme Court has recognized the possibility—admittedly controversial—of a “class-of-one” theory for equal protection analysis. See *Vill. of Willowbrook v. Olech*, 528 U.S. 562 (2000). *But see* William D. Araiza, *Flunking the Class-of-One/Failing Equal Protection*, 55 WM. & MARY L. REV. 435, 438 (2013) (stating that the Court [in *Olech*] appeared to think the matter was uncontroversial).

<sup>121</sup> *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 438–39 (1982).

allowable time.<sup>122</sup> Claims filed within the statutory period were given “full consideration on the merits,” but the plaintiff’s claim—filed late because of the agency’s error—was “unceremoniously, and finally, terminated.”<sup>123</sup> The state appeals court rejected the federal equal-protection and due-process challenges, and refused to permit a second filing, on the view that deviating from the legislative procedures would “frustrate the public interest in an expeditious resolution of disputes;” the Supreme Court reversed, finding a violation of due process and not reaching the equality claim.<sup>124</sup> Justice Powell, concurring in the judgment, and joined by Justice Rehnquist, addressed the equal-protection claim, and held that even under the weakest form of scrutiny, the state impermissibly had created two classifications of claimants: those with claims that were timely scheduled by the agency, and those that were not, with the former being accorded full consideration on the merits and the latter summarily dismissed.<sup>125</sup> “Under this classification,” the concurrence explained, “claimants with identical claims, despite equal diligence in presenting them, would be treated differently.”<sup>126</sup> The concurring opinion found that the classification did not promote the state’s interest “in the timely disposition of claims,” and that it would be “unfair and irrational” to punish the claimant; Justice Powell urged the common sense solution of administrative tolling for this “isolated example of bureaucratic oversight.”<sup>127</sup> A plurality opinion by Justice Blackmun, joined by Justices Brennan, Marshall, and O’Connor, also found an equal-protection problem, and while acknowledging that the challenged classification was “an unconventional one,” characterized it as “the very essence of arbitrary state action:” “the State converts similarly situated claims into dissimilarly situated ones, and then uses this distinction as the basis for its classification.”<sup>128</sup>

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<sup>122</sup> See U.S. CONST. amend. XIV; *Logan*, 455 U.S. at 424 (“The issue in this case is whether a State may terminate a complainant’s cause of action because a state official, for reasons beyond the complainant’s control, failed to comply with a statutorily mandated procedure.”).

<sup>123</sup> *Logan*, 455 U.S. at 438–39.

<sup>124</sup> *Id.* at 428.

<sup>125</sup> *Id.* at 443.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 443–44.

<sup>128</sup> *Id.* at 438–42.

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## WAIVERS OF IMMUNITY

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So in *Jackson*, the agency withheld notice from the plaintiff, knowing how to contact her and fully aware that notice to her lawyer had been returned by the mail service as undeliverable. It then used that disparate treatment as the basis for the federal court's dismissal of the plaintiff's belated claim, even though the plaintiff had no way of knowing that the agency had denied her claim and that the filing period had begun to run. Admittedly, the statute has an escape-hatch permitting claimants to file suit when the agency has unjustifiably delayed in resolving the claim; but that procedure does not excuse the government's failure to provide notice at the required time.<sup>129</sup> It would run counter to the goals of administrative exhaustion to require litigants to file suit before they know whether they are even dissatisfied with the agency's resolution; invoking judicial resources involves both private and public costs. Moreover, as demonstrated by *Jackson*'s situation, the claimant cannot accurately predict whether her filing meets the statutory deadline. To the extent that administrative exhaustion is intended to encourage expeditious resolution of claims without judicial involvement, the classification at play in *Jackson* cannot be said to promote a plausible government interest. Congress could not directly sort claimants by withholding notice from some, but not from others; similarly it may not indirectly rely on so arbitrary a process by attaching it as a condition to an immunity-waiver.

## ii. Due Process

The lack of notice in *Jackson* raises the additional question of whether the government's conduct satisfied due process.<sup>130</sup> As the Supreme Court explained over a hundred years ago, due process "is a restraint on the legislative as well as the executive and judicial powers of the government, and cannot be construed to leave congress free to make 'any due process of law,' by its mere will."<sup>131</sup> Congress cannot consent to jurisdiction on condition that a party must forfeit her rights to procedural protection or that the court ignore the requirements of the Due Process Clause. That due process applies to the challenged action under the Fifth Amendment cannot seriously be disputed. Due process protects property, although it does not create property, and the Court has

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<sup>129</sup> See 28 U.S.C. § 2675(a) (2012).

<sup>130</sup> See ERWIN CHEMERINSKY, FEDERAL JURISDICTION 210 (6th ed. 2012) ("[C]ongress cannot restrict jurisdiction in a manner that would deny due process of law").

<sup>131</sup> *Murray v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 276 (1856).

recognized that a cause of action is a “species of property protected by the Fourteenth Amendment’s Due Process Clause,” with the same rule applicable to the Fifth Amendment.<sup>132</sup> Justice Blackmun explained in *Logan*:

This conclusion is hardly a novel one. The Court traditionally has held that the Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances. In *Societe Internationale v. Rogers*, 357 U.S. 197, 78 S.Ct. 1087, 2 L.Ed.2d 1255 (1958), for example—where a plaintiff’s claim had been dismissed for failure to comply with a trial court’s order—the Court read the ‘property’ component of the Fifth Amendment’s Due Process Clause to impose ‘constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause.’<sup>133</sup>

As in *Logan*, the plaintiff’s right to access federal relief was “more than an abstract desire or interest in redressing . . . [a] grievance,” but rather, was established by the federal statute.<sup>134</sup> The fact that the claim in *Jackson* was asserted under the FTCA does not change the property analysis; although there is a species of public right that Congress may alter at will, the FTCA does not create causes of action; rather it extends jurisdiction over causes of action that exist at common law and would expose the United States to liability, but for the cloak of sovereign immunity.<sup>135</sup>

The question then is what process is due. In *Jackson*, the government triggered a jurisdictional time-period by sending a notice of denial by certified mail to the claimant’s counsel with no follow-up when the letter was returned as undeliverable even though the case file contained the claimant’s address (as well as the lawyer’s phone number and email).<sup>136</sup> Due process does not require perfect procedures; the

<sup>132</sup> See *Logan*, 455 U.S. at 428; Timothy P. Terrell, *Causes of Action as Property: Logan v. Zimmerman Brush Co. and the “Government-as-Monopolist” Theory of the Due Process Clause*, 31 EMORY L.J. 491, 508 (1982) (arguing a tort cause of action is property for constitutional purposes even in “the absence of transferability”); see also *Buckley v. Valeo*, 424 U.S. 1, 93 (1976) (“Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment[.]”).

<sup>133</sup> *Logan*, 455 U.S. at 429.

<sup>134</sup> *Id.* at 431.

<sup>135</sup> See 28 U.S.C. § 1346(b) (2012); Richard E. Levy & Sidney A. Shapiro, *Government Benefits and the Rule of Law: Toward a Standards-based Theory of Judicial Review*, 58 ADMIN. L. REV. 499, 507 (2006) (“[S]ince the federal government may not be sued without its consent, a litigant is entitled to sue in federal court claiming rights created by an act of Congress only if that or another law consents to such suit”) (quoting RICHARD J. PIERCE, JR., SIDNEY A. SHAPIRO & PAUL R. VERKUIL, *ADMINISTRATIVE LAW AND PROCESS* 75 (3d ed. 1999)).

<sup>136</sup> At a minimum, *Logan* would suggest that it is impermissible to trigger a limitations

standard is flexible and context-specific.<sup>137</sup> However, the Court has repeatedly emphasized the importance of the government's providing adequate and timely notice before depriving an individual of her property, and if the individual's whereabouts are known, such notice must be actual and not constructive.<sup>138</sup> Above all, as explained in *Mullane v. Central Hanover Bank & Trust Co.*, the method of providing notice must be "such as one desirous of actually informing . . . might reasonably adopt to accomplish it."<sup>139</sup>

In its 2006 decision in *Jones v. Flowers*, the Court addressed an analogous situation in which a state agency sent a notice by certified mail to a delinquent taxpayer advising of an upcoming tax sale, the agency took no follow-up steps when the letter was returned as undeliverable, the property was sold at a sheriff's auction, and the taxpayer sued to recover his property.<sup>140</sup> The Court held that the state had violated the Due Process Clause of the Fourteenth Amendment, even though the state did not know the taxpayer's current address because the taxpayer had failed to update his file. Chief Justice Roberts emphasized that the government's failure to try to contact the taxpayer a second time violated even the flexible standard announced by *Mullane*:

We do not think that a person who actually desired to inform a real property owner of an impending tax sale of a house he owns would do nothing when a certified letter sent to the owner is returned unclaimed. If the Commissioner prepared a stack of letters to mail to delinquent taxpayers, handed them to the

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period based on an act that the government did not take—in *Jackson*, actually notifying the claimant that the claim had been denied. *Logan*, 455 U.S. at 434–35 (“A system or procedure that deprives persons of their claims in a random manner . . . necessarily presents an unjustifiably high risk that meritorious claims will be terminated. And the State’s interest in refusing Logan’s procedural request is, on this record, insubstantial.”). Numerous courts of appeal have held that an administrative forfeiture proceeding is void when the party with an interest in the forfeited property “failed to receive constitutionally adequate notice.” *See, e.g.*, *Kandonsky v. United States*, 216 F.3d 499, 503 (5th Cir. 2000). In some circuits, the claimant’s remedy for inadequate notice is restoration of the right “to seek a hearing in the district court.” *Boero v. Drug Enforcement Admin.*, 111 F.3d 301, 304–07 (2d Cir. 1997); *see also United States v. Dusenbery*, 201 F.3d 763, 768 (6th Cir. 2000), *aff’d on other grounds*, 534 U.S. 161 (2002) (stating that “inadequate notices should be treated as voidable, not void, and that the proper remedy is simply to restore the right . . . to judicially contest the forfeiture).

<sup>137</sup> *See Mathews v. Eldridge*, 429 U.S. 319 (1976) (setting forth a balancing test that is context specific).

<sup>138</sup> *See Tulsa Prof’l Collection Servs., Inc. v. Pope*, 485 U.S. 478, 484 (1988) (“[S]tate action affecting property must generally be accompanied by notification of that action[.]”)

<sup>139</sup> *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 315 (1950) (interpreting the Fourteenth Amendment).

<sup>140</sup> *Jones v. Flowers*, 547 U.S. 220, 229 (2006).

postman, and then watched as the departing postman accidentally dropped the letters down a storm drain, one would certainly expect the Commissioner's office to prepare a new stack of letters and send them again. No one "desirous of actually informing" the owners would simply shrug his shoulders as the letters disappeared and say "I tried." Failure to follow up would be unreasonable, despite the fact that the letters were reasonably calculated to reach their intended recipients when delivered to the postman.<sup>141</sup>

Likewise, in *Jackson*, when the agency saw that its certified letter to the claimant's counsel was returned as undeliverable, its employees could not constitutionally "simply shrug" their shoulders and take no further action, when follow-up contact information was easily available from the case file.<sup>142</sup> Chief Justice Roberts specifically rejected the view, set forth in Justice Thomas' dissent, that due process takes account only information that the government has "before it calculated how best to provide notice," and not after; although "the failure of notice in a specific case does not establish the inadequacy of the attempted notice," knowledge that notice provided in the usual course turned out to be ineffective "was one of the 'practicalities and peculiarities of the case'" that could trigger "an obligation on the government's part to take additional steps to effect notice."<sup>143</sup>

In *Jackson*, the "practicalities" of the case highlight the arbitrary quality of the agency's failure. The FTCA requires the agency to provide notice by certified or registered mail; that method of notice ensures that the agency receives confirmation that the claimant or her proxy actually has received the notice that was mailed. The requirement of certified or registered mail is not simply a technical formality that leaves the agency free to do nothing when a letter is returned.<sup>144</sup> Moreover, in *Jackson*, the agency did not even need to search a phone book to locate the claimant—her address was in the case file, yet the court of appeals assumed that having the agency take any additional steps would be an undue administrative burden.<sup>145</sup> In addition, regulations specify that the agency

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<sup>141</sup> *Id.*

<sup>142</sup> *Jackson v. United States*, 751 F.3d 712, 717 (6th Cir. 2014).

<sup>143</sup> *Jones*, 547 U.S. at 230–31 (citing *Mullane*, 339 U.S. at 314–15).

<sup>144</sup> See Bermann, *supra* note 7, at 579 ("One reason the potential for misunderstanding and confusion concerning the final denial has not materialized is that the FTCA requires agencies to issue final denials in the form of certified or registered mail. Justice Department regulations additionally require an express warning to dissatisfied claimants that they must bring suit, if at all, within six months of the date of mailing. Until claimants receive such a communication, they can safely assume that their claim has not been finally denied and that the statute of limitations has not yet begun to run.") (citations omitted).

<sup>145</sup> *Jackson*, 751 F.3d at 718.

may give notice to the claimant or her counsel or representative. Presumably if notice cannot be given to counsel, notice can be attempted directly to the claimant, an argument that the court of appeals considered but rejected without raising or addressing any due-process concerns.<sup>146</sup>

Instead, the court of appeals sidestepped the constitutional question, and—insisting that the immunity-waiver must be strictly enforced—suggested that the absence of notice resulted from the failure of the plaintiff and her lawyer to notify the agency of the lawyer’s change in address and of the substitution of counsel.<sup>147</sup> Even if this account fairly reflected the record—and it does not—the legal argument has no constitutional significance.<sup>148</sup> In *Jones*, Chief Justice Roberts rejected the argument that a claimant who fails to up-date his address “forfeits his right to constitutionally sufficient notice.”<sup>149</sup> To the contrary, the majority emphasized that the claimant’s action does not excuse the government’s constitutional failure or “alter the unreasonableness of the . . . position that . . . [the agency] must do nothing more when the notice is promptly returned ‘unclaimed.’”<sup>150</sup>

Finally, it might be argued that the source of the agency’s obligation in *Jones v. Flowers* to take follow-up steps was derived from the Arkansas statute, governing the sale or forfeiture of real property to be sold for taxes, and not the requirements of due process.<sup>151</sup> That statute specifically provides:

If the notice by certified mail is returned undelivered for any other reason, the Commissioner of State Lands shall send a second notice to the owner or interested party at any additional address reasonably identifiable through the examination of the real property records properly filed and recorded in the office of the county

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<sup>146</sup> See *id.* at 718; 28 C.F.R. § 14.9 (2015).

<sup>147</sup> *Jackson*, 753 F.3d at 717–18.

<sup>148</sup> The claimant’s representative, a lawyer associated with a well-regarded law firm, took the reasonable step of informing the United States Postal Services of a change of address, and when the forwarding order expired, used “runners” to pick up mail from the post office. Runners apparently were necessitated by systemic problems in the mail-delivery service in Detroit. See Chris Christoff, *Abandoned Dogs Roam Detroit*, BLOOMBERG NEWS (Aug. 21, 2013), <http://www.bloomberg.com/news/2013-08-21/abandoned-dogs-roam-detroit-in-packs-as-humans-dwindle.html> (reporting mail delivery halted in some Detroit neighborhoods); Lisa M. Collins, *Delivery in Doubt*, METRO TIMES (Feb. 12, 2003), <http://www.metrotimes.com/detroit/delivery-in-doubt/Content?oid=2175537> (reporting systemic problems of mail delivery).

<sup>149</sup> *Jones v. Flowers*, 547 U.S. 220, 232 (2006).

<sup>150</sup> *Id.* at 232.

<sup>151</sup> *Id.*

recorder where the property is located . . . .<sup>152</sup>

By contrast, the FTCA does not prescribe a second-notice requirement, so arguably an FTCA claimant's procedural rights are limited to those set forth in the statute. This view informed the court of appeals' conclusion that an FTCA claimant has a right only to the procedures attached to the government's immunity-waiver.<sup>153</sup> The court ignored the federal agency's regulation that contemplated the possibility of notice to the claimant or to the lawyer, and likewise did not consider the functional significance of requiring the agency to use certified or registered mail as the method of notification. More importantly, the appeals court assumed, incorrectly, that Congress may create a substantive interest but subject it to fewer procedural protections than the Fifth Amendment requires.<sup>154</sup> As the Supreme Court explained in *Logan*,

While the legislature may elect not to confer a property interest . . . it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguard . . . . [T]he adequacy of statutory procedures for deprivation of a<sub>155</sub> statutorily created property interest must be analyzed in constitutional terms.

When a substantive right—such as a cause of action or federal jurisdiction—is “inextricably intertwined” with a statute's procedural protections, a litigant cannot be compelled “to take the bitter with the sweet.”<sup>156</sup> Congress may be free to withhold jurisdiction over tort claims against the United States, but once it waives immunity, it cannot condition access to a court on procedures that violate due process, for the validity of the procedure is determined by the Constitution, not by legislative grace. Justice White has explained:

[I]t is settled that the ‘bitter with the sweet’ approach misconceives the constitutional guarantee. If a clearer holding is needed, we provide it today. The point is straightforward: the Due Process Clause provides that certain substantive rights—life, liberty, and property—cannot be deprived except pursuant to constitutionally adequate procedures. The categories of substance and procedure are distinct. Were the rule otherwise, the Clause would be reduced to a mere tautology. “Property” cannot be defined by the procedures provided for its

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<sup>152</sup> ARK. CODE ANN. § 26-37-301(a)(4) (2011).

<sup>153</sup> *Jackson v. United States*, 751 F.3d 712, 717–18 (6th Cir. 2014) (sending a notice would have been the “preferred” course, but was not the “required” course, and the government's waiver must be read strictly in favor of the United States).

<sup>154</sup> *Id.*

<sup>155</sup> *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432 (1982) (alteration in original; quotation marks omitted) (citing *Vitek v. Jones*, 445 U.S. 480, 490–491 (1980)) (quoting *Arnett v. Kennedy*, 416 U.S. 134, 167 (1974) (opinion concurring in part)).

<sup>156</sup> *Arnett*, 416 U.S. at 152–154 (explaining the “bitter with the sweet” argument, set out in the plurality that was specifically rejected by the other six Justices).



deprivation any more than can life or liberty. The right to due process “is conferred, not by legislative grace, but by constitutional guarantee. While the legislature may elect not to confer a property interest . . . it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards.”<sup>157</sup>

The Due Process Clause does not protect against every deprivation of property. In particular, certain unintended losses that are caused by negligent acts by government employees fall outside its scope.<sup>158</sup> But the plaintiff in *Jackson* was not subject to a random act, akin to “leaving a pillow on the prison stairs, or mislaying an inmate’s property”; to the contrary, the agency made the deliberate decision not to take follow-up steps even though it knew that its earlier notice had been returned.<sup>159</sup> In just this circumstance, the Due Process Clause is intended to provide “procedural safeguards” that protect an individual not only against the loss of property, but also from what Dean Edward L. Rubin has called “bureaucratic oppression”—“action by administrative agents that impose unnecessary and harmful burdens on private parties.”<sup>160</sup> That these actions are associated with a waiver of sovereign immunity ought not to shield them from judicial review.

### iii. Judicial Independence

So far the discussion has examined the constitutionality of the government’s practice from the perspective of the individual litigant. But the problem in *Jackson* goes beyond infringing the rights of the individual litigant. The government did not simply use an unfair or arbitrary process to extinguish the claimant’s cause of action; rather, the government used such a process to foreclose relief, and then conscripted the federal court to ratify the validity of that result. In effect, the court in *Jackson* could take jurisdiction in the plaintiff’s suit only to dismiss her claim, thereby allowing the government to extinguish a property interest despite the absence of notice and in circumvention of constitutional limits. Even more, by invoking the immunity-waiver as the grounds for the decision,

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<sup>157</sup> *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1984) (citing *Arnett*, 416 U.S. at 167) (White, J., concurring in part and dissenting in part).

<sup>158</sup> *The Supreme Court, 1985 Term—Leading Cases: Negligent Deprivation*, 100 HARV. L. REV. 144, 150 (1986) (“The due process clause is meant to address deliberate state decisions.”).

<sup>159</sup> *Daniels v. Williams*, 474 U.S. 327, 332 (1986).

<sup>160</sup> Edward L. Rubin, *Bureaucratic Oppression: Its Causes and Cures*, 90 WASH. U. L. REV. 291, 299 (2012).

Congress was able to make it seem as if its treatment of the plaintiff was permissible, even though it was impermissible under the Fifth Amendment. To borrow from Lawrence G. Sager, the government's action violated the first principle of *Klein*: the United States "direct[ed] the court to be instrumental to [an impermissible] end," using its immunity-waiver to validate claimant's loss of property rights despite the absence of fair and equal process.<sup>161</sup>

Professor Martin H. Redish and Christopher R. Pudelski have argued that the *Klein* principle is violated whenever Congress enlists the court in what the authors call legislative "micro deception."<sup>162</sup> Micro deception occurs when Congress "leaves the generalized substantive law intact, but legislatively directs that a particular litigation (or a group of litigations) arising under that law be resolved in a manner inconsistent with the dictates of that pre-existing generalized law."<sup>163</sup> Other commentators link the *Klein* principle with the related requirement of decisional independence, postulating that Congress cannot use the vesting of jurisdiction or an immunity-waiver to compel the Article III courts to "speak a constitutional untruth."<sup>164</sup> In other words, an Article III problem is presented whenever Congress uses its waiver of sovereign immunity to obscure a "micro deception" that makes it seem that the government is committed to a legal rule when in fact it is relying on the court's exercise of federal jurisdiction to camouflage that it is not. As Howard M. Wasserman discusses, drawing from the Redish and Pudelski approach, "Congress cannot cook procedural and evidentiary rules to achieve desired substantive outcomes without fully changing and

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<sup>161</sup> *United States v. Klein*, 80 U.S. (13 Wall.) 128, 148 (1871); see Samuel Estreicher & Margaret H. Lemos, *The Section 5 Mystique, Morrison, and the Future of Federal Antidiscrimination Law*, 2000 SUP. CT. REV. 109, 128 (2000); Sager, *Klein's First Principle: A Proposed Solution*, *supra* note 19, at 2531 (*Klein's* first principle is that "the judiciary will resist efforts to make it seem to support and regularize that with which it in fact disagrees.").

<sup>162</sup> *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871).

<sup>163</sup> 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, 439 (2006).

<sup>164</sup> Meltzer, *supra* note 28, at 2540; see Sager, *Klein's First Principle: A Proposed Solution*, *supra* note 19, at 2529 ("This is how we should understand the first principle of *United States v. Klein*: The judiciary will not allow itself to be made to speak and act against its own best judgment on matters within its competence which have great consequence for our political community. The judiciary will not permit its articulate authority to be subverted to serve ends antagonistic to its actual judgment; the judiciary will resist efforts to make it seem to support and regularize that with which it in fact disagrees.").

publicly acknowledging the state of substantive law.”<sup>165</sup>

The situation in *Jackson* presents a variant on that theme. The FTCA creates a legal rule that commits the United States to the principle of government accountability and to the goal of providing fair compensation for individuals who are injured by the negligent actions of federal agencies and officers. However, the no-notice procedure used in *Jackson* suggests that the government’s commitment is a sham – a “micro deception.”<sup>166</sup> The United States has made it seem as if the FTCA lifts its immunity, when in fact the government remains cloaked in immunity because the agency blocks the claimant’s filing of a lawsuit by withholding timely notice of the agency’s denial of its claim. As in *Klein*, the United States in *Jackson* conscripted the federal court in this deception; the court believed it was compelled to dismiss even legitimate claims for reasons unrelated to the merits. It is just this sort of “micro deception”—requiring individual cases to be resolved “in a manner that is inconsistent with controlling law”—that forms the core of the Article III problem.<sup>167</sup>

Saying that a waiver of immunity must respect judicial independence to decide a case does not require a broad understanding of Article III or of the federal court’s role as expositor of constitutional meaning; nor does the argument assume that a federal court must actively search a pending case for constitutional problems, even in the absence of jurisdiction.<sup>168</sup> Rather, the argument builds on the basic obligation of a court to determine whether it has jurisdiction.<sup>169</sup> The appeals court in *Jackson* clearly recognized this obligation when it undertook *de novo* review of the district court’s decision regarding jurisdiction, and so examined plaintiff’s compliance with the requirement of timely filing, which the court treated as a jurisdictional component of the immunity-waiver.<sup>170</sup> However, the court failed to consider whether the conditions

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<sup>165</sup> Wasserman, *The Irrepressible Myth of Klein*, 79 U. CIN. L. REV. 53, 90 (2010).

<sup>166</sup> *Id.*

<sup>167</sup> Redish & Pudelski, *supra* note 163, at 439.

<sup>168</sup> *Cf.* Fallon, *supra* note 25, at 1062 (offering but questioning a reading of *Boumediene v. Bush* in which the Court treats “the judicial branch’s function of saying what the law is as a ground for holding that the Constitution mandates federal jurisdiction”).

<sup>169</sup> *Capron v. Van Noorden*, 6 U.S. (2 Cranch) 126, 127 (1804) (“Here it was the duty of the Court to see that they had jurisdiction, for the consent of parties could not give it.”).

<sup>170</sup> See Jonathan Remy Nash, *On the Efficient Deployment of Rules and Standards to Define Federal Jurisdiction*, 65 VAND. L. REV. 509, 530 (2012) (stating that “district court decisions regarding subject matter jurisdiction are reviewed *de novo*”).

attached to that waiver were themselves constitutionally suspect, a question clearly within the appellate court's reviewing power.<sup>171</sup> Although the boundaries of the doctrine are not clear, courts have some residuum of jurisdiction to determine whether they have jurisdiction.<sup>172</sup> Thus, even if the plaintiff in *Jackson* had not raised a jurisdictional objection in the proceedings below, the appeals court had the power and a duty to raise the issue *sua sponte*; an entailment of the jurisdictional inquiry concerns whether Congress may bar federal jurisdiction through a procedure that infringes on constitutional guarantees.<sup>173</sup>

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<sup>171</sup> See Michael T. Morley, *Avoiding Adversarial Adjudication*, 41 FL. STATE U.L. REV. 291, 299 (2014) (“Courts generally are not required to consider waived or forfeited arguments, unless they concern the court’s subject-matter jurisdiction or the justiciability of the case.”) (citations omitted). Moreover, plaintiff argued below that an undelivered letter did not trigger the jurisdictional time-period, and so the issue, even if it were not jurisdictional, was not forfeited. See *Jackson v. United States*, 751 F.3d 712, 717–18 (6th Cir. 2014).

<sup>172</sup> See *Battaglia v. Gen. Motors Corp.*, 169 F.2d 254, 257 (2d Cir. 1948), *cert. denied*, 335 U.S. 887 (1948) (jurisdiction-stripping provision did not block court from determining whether statute deprived rights in violation of the Fifth Amendment); see also *United States v. California*, 932 F.2d 1346, 1347–48 (9th Cir. 1991), *aff’d on other grounds*, 507 U.S. 746 (1993) (“[A]n appellate court may review an issue “neglected below if the issue is purely one of law and the pertinent record has been fully developed, . . . [or] when there are significant questions of general impact”). See generally Kevin M. Clermont, *Sequencing the Issues for Judicial Decisionmaking: Limitations from Jurisdictional Primacy and Intrasuit Preclusion*, 63 FLA. L. REV. 301, 316–18 (2011) (citing Dan B. Dobbs, *Beyond Bootstrap: Foreclosing the Issue of Subject-Matter Jurisdiction Before Final Judgment*, 51 MINN. L. REV. 491, 494–99 (1967)) (observing that doctrine accepts as a bootstrap principle the rule that a court without jurisdiction has power to determine whether it has jurisdiction).

<sup>173</sup> Although the argument has fallen out of favor, an analogy might be drawn to the constitutional-fact doctrine developed in *Crowell v. Benson*, 285 U.S. 22 (1932), which requires an Article III court to review *de novo* findings of fact as well as conclusions of law that pertain to constitutional rights. The alternative, the Supreme Court explained, would be “to sap the judicial power as it exists under the federal Constitution, and to establish a government of a bureaucratic character alien to our system, wherever fundamental rights depend, as not infrequently they do depend, upon the facts, and finality as to facts becomes in effect finality in law.” *Id.* at 57; see Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 258 (1985) (stating that “I would be startled to see the Court decide that a litigant pressing a bona fide constitutional claim could be denied access to the independent judgment of a judicial forum. Nevertheless, I confess considerable uncertainty over whether the Constitution generally mandates any specific level of independent judicial factfinding”).

#### IV. NIT-PICKING TECHNICALITIES, CONSTITUTIONAL AVOIDANCE, AND STATUTORY HOUSEKEEPING

It could be that *Jackson* is what Justice Powell might call—as he did in *Logan*—“an isolated example of bureaucratic oversight”—precisely the “sort of negligence . . . to toll the statutory period” for filing suit.<sup>174</sup> Or it could be that many letters of denial are returned, and the administrative system for reviewing tort claims requires serious revision and overhaul. The Sixth Circuit Court of Appeals did not engage that question, and the United States does not publish statistics about the number of FTCA denial-letters returned to the investigating agencies as undeliverable. By reading the timely filing requirement as mandatory and jurisdictional, the appeals court declined to take the sensible approach of equitably tolling plaintiff’s claim and instead cast procedural blame on the plaintiff and her lawyers. This Part makes two additional points: (1) in future litigation, the United States ought to interpret its waiver of immunity as requiring actual and timely notice to claimants; and (2) in the spirit of “statutory housekeeping,” Congress ought to clarify the terms of the FTCA waiver to prevent the recurrence of the arbitrary injustice of the *Jackson* case.<sup>175</sup> This Part addresses each of these points in turn.

##### A. Constitutional Avoidance

The doctrine of constitutional avoidance holds that “where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.”<sup>176</sup> The doctrine traditionally has been defended as a principle of constitutional restraint that enables the judiciary to avoid unnecessary friction with the political branches, recognizing the exceptional nature of judicial review in a system that depends on majoritarian decision-

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<sup>174</sup> *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 443 (1982) (Powell, J., concurring).

<sup>175</sup> See Ruth Bader Ginsburg & Peter W. Huber, *The Intercircuit Committee*, 100 HARV. L. REV. 1417, 1421 (1987) (recommending “statutory housekeeping” to resolve problems and conflicts in statutory interpretation).

<sup>176</sup> *Edward J. DeBartolo Corp. v. Fla. Gulf Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (citation omitted); see also *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring) (“[W]hen the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided”).

making.<sup>177</sup> Critics question whether the doctrine in fact promotes judicial restraint; in practice, the canon may enable courts to displace legislative policies with judicial preferences in cases that are not constitutionally warranted.<sup>178</sup> Others see the doctrine's normative value in terms of a "resistance norm," that is—"a rule designed to push interpretation in directions that reflect enduring public values," and those values stem from constitutional provisions including Article III and the Due Process Clause.<sup>179</sup> The avoidance doctrine ought not to apply when it would produce "a futile result, or an unreasonable result inconsistent with the purpose of the statute."<sup>180</sup>

Here, the FTCA comfortably supports a reading that the time period for filing suit cannot commence until the certified or registered receipt confirming that the claimant actually received the denial-notice has been returned to the agency. Otherwise the use of certified or registered mail is mere surplusage and makes no sense—use of regular postal service would have been sufficient if mailing, without an assurance of the claimant's receipt, is all that Congress required. This reading of the statute avoids a constitutional difficulty for it aligns congressional intent with the requirements of due process. Congress enacted the FTCA to provide a waiver of immunity of the most "sweeping" sort; the decision to amend the statute in 1966 and to mandate administrative exhaustion was intended to obviate the need for litigation by ensuring an early and informal process that could investigate and attempt to settle the claim, not to curtail access to federal courts.<sup>181</sup> It was recognized that delay of payment, which litigation inevitably involved, could be harmful to individuals who had already suffered because of the government's negligent misconduct. At the same time, Congress made clear that those who were dissatisfied with the agency's disposition—in many cases, claimants who believed that discovery would enable them to make a better case for damages—could proceed to federal court in an orderly

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<sup>177</sup> See *Almendarez-Torres v. United States*, 523 U.S. 224, 238 (1998) (explaining that the canon "seeks to minimize disagreement between the branches by preserving congressional enactments that might otherwise founder on constitutional objections").

<sup>178</sup> Frederick Schauer, *Ashwander Revisited*, 1995 SUP. CT. REV. 71, 74 (1995).

<sup>179</sup> Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1551 (2000).

<sup>180</sup> William M. Wiecek, *The Debut of Modern Constitutional Procedure*, 26 REV. LITIG. 641, 653 (2007).

<sup>181</sup> Robert E. Lewis, *Litigation under the Federal Tort Claims Act*, 27 TEX. L. REV. 807, 807 (1949).

way, and were to be given notice of their procedural rights.<sup>182</sup> The administrative procedures that Congress set out, and the Office of the Attorney General elaborated upon in its regulations, were designed to facilitate an easy disposition of claims, not to create “snarls” or proverbial traps for the unwary.<sup>183</sup>

Over the years, a misplaced focus on strictly construing the government’s waiver has transformed these claims-processing rules into “nit-picking” jurisdictional requirements, so that deviation from the prescribed rules now forms the basis for dismissing a claim. Although some commentators criticize the avoidance doctrine as being subversive of legislative prerogative, its application here would promote, not undermine, congressional intent; it would serve as a variant of the “resistance norm” described by Ernest A. Young—“rules that raise obstacles to particular governmental actions without barring those actions entirely”—by screening out unconstitutional glosses that have been imposed on the statute notwithstanding congressional purpose.<sup>184</sup> At the same time, use of the avoidance doctrine would promote judicial independence by preventing the courts from being conscripted into ratifying unconstitutional acts of the other branches.<sup>185</sup>

It is not unusual for courts to use an avoidance principle when assessing the constitutionality of statutes regulating federal jurisdiction. A classic example is *Webster v. Doe*, a suit by a former CIA employee challenging his termination. The government moved to dismiss for lack of subject-matter jurisdiction on the ground that judicial review was barred by the authorizing statute.<sup>186</sup> The Court read the statute to ensure access to at least one judicial forum for constitutional claims, even if jurisdiction did not exist under the statute for non-constitutional claims.<sup>187</sup>

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<sup>182</sup> See generally Bermann, *supra* note 7, at 579 (describing 1966 amendments).

<sup>183</sup> *The Federal Tort Claims Act*, 56 YALE L.J. 534, 540 (1947) (discussing aspects of the FTCA that could potentially entangle unwary claimants in intricate legal snarls).

<sup>184</sup> See Ernest A. Young, *supra* note 179, at 1551; see also Gilliam E. Metzger & Trevor W. Morrison, *The Presumption of Constitutionality and the Individual Mandate*, 81 FORDHAM L. REV. 1715, 1719 (2013) (“[T]he modern avoidance canon is a tool of both statutory construction and constitutional implementation. Indeed, it renders statutory construction a mode of constitutional implementation.”).

<sup>185</sup> See generally Lisa A. Kloppenberg, *Does Avoiding Constitutional Questions Promote Judicial Independence?*, 56 CASE W. RES. L. REV. 1031 (2006) (discussing the relationship between avoidance techniques and judicial independence).

<sup>186</sup> *Webster v. Doe*, 486 U.S. 592 (1988).

<sup>187</sup> *Id.*

*Webster* reflects a typical application of the avoidance doctrine when a congressional statute purports to oust the courts of jurisdiction to hear constitutional claims. In many of these cases, the argument that Article III or the Due Process Clause mandates a federal forum faces “formidable objection,” yet there is sufficient constitutional uncertainty to warrant avoidance of the constitutional question or to counsel in favor of protecting a constitutional norm through statutory interpretation.<sup>188</sup> The constitutional defect in withholding timely notice is straightforward. By acknowledging that the FTCA requires meaningful, and not meaningless, notice, the doctrine of constitutional avoidance would support the norm of equality and due process while opening up a pathway for the judicial resolution of tort claims on their merits. This article invites the United States to embrace this reading of the statute in its future defensive litigation.

### B. *Statutory Housekeeping*

Finally, this article urges Congress and the Office of the Attorney General to undertake what Justice Ginsburg has characterized in an analogous context as “statutory housekeeping,” and to clarify that the claims-processing rules of the FTCA are not jurisdictional.<sup>189</sup> The FTCA currently is codified in scattered provisions of the Part 28 of the United States Code, and although the jurisdictional provisions are segregated from those dealing with the administrative process, it appears that additional clarification is needed to underscore that these latter provisions are not freighted with jurisdictional significance but rather are affirmative defenses that go to the merits and may be waived or equitably tolled.<sup>190</sup> A generation ago, the Governance Institute aimed to increase communication between Congress and the courts to improve statutory drafting; the aim was to establish a mechanism for informing law makers “about how appellate courts interpret the legislative product,” so that technical defects, such as errors in grammar, infelicitous phrasing, or verbal gaps and “glitches,” did not produce unintended and unfortunate

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<sup>188</sup> Ernest A. Young, *supra* note 179, at 1585–89.

<sup>189</sup> Ginsburg & Huber, *supra* note 175, at 1428; *see also* Henry J. Friendly, *The Gap in Lawmaking—Judges Who Can’t and Legislators Who Won’t*, 63 COL. L. REV. 787, 794 (1963) (discussing problems of legislative drafting).

<sup>190</sup> *See* Federal Tort Claims Act, ch. 753, Title IV, 60 Stat. 842 (1946) (current version codified in scattered sections of 28 U.S.C. §1346(b) (jurisdiction conferred); § 2401(b) (jurisdiction exclusions); & §§ 2671–2680 (administrative exhaustion)).



legal consequences.<sup>191</sup> Conceptually, the project’s goal was to “promote understanding” among the different branches of government, again with the practical aim of enhancing the judiciary’s ability to interpret legislation and leading to more effective governance.<sup>192</sup> The project involved a feedback mechanism: appellate courts would “transmit opinions that point out possible technical problems in statutes to Congress for its information and for whatever action it wishes to take.”<sup>193</sup> The proposal eventually acquired institutional form, attracted the participation of many appeals courts, and drew praise from legislators for invigorating inter-branch communication.<sup>194</sup>

In a similar spirit, in previous writing I have urged that Congress look to dismissed FTCA cases as a source of information about agency performance and the possible need for regulatory reforms.<sup>195</sup> *Jackson* provides Congress with important feedback on how agencies process federal-tort claims and offers insight about how claims-processors apprehend their statutory and constitutional role—reflecting a serious misunderstanding of the duty to provide meaningful notice when a claim is denied.<sup>196</sup> Further, *Jackson* underscores the importance of having Congress review statutory language in the light of judicial canons, so that courts can faithfully apply our nation’s laws consistent with congressional goals.<sup>197</sup>

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<sup>191</sup> Robert A. Katzmann & Russell R. Wheeler, *A Mechanism for “Statutory Housekeeping”*: *Appellate Courts Working with Congress*, 9 J. APP. PRAC. & PROCESS 131, 131 (2007); see Robert A. Katzmann & Russell R. Wheeler, *Interbranch Communication: A Note on “Article III En Banc,”* 117 YALE L.J. POCKET PART 110, 112 (2007).

<sup>192</sup> See Robert A. Katzmann, *Statutes*, 87 N.Y.U. L. REV. 637, 682–83 (2012).

<sup>193</sup> Katzmann & Wheeler, *Interbranch Communication: A Note on “Article III En Banc,”*, *supra* note 191, at 111; see also Frank Burk, *Statutory Housekeeping: A Senate Perspective*, 85 GEO. L.J. 2217, 2218 (1997) (discussing the voluntary nature of congressional-committee participation).

<sup>194</sup> Katzmann, *supra* note 191, at 687–93 (discussing the “virtues” of the project and its positive effects on governance).

<sup>195</sup> See Helen Hershkoff, *Early Warnings, Thirteenth Chimes: Dismissed Federal-Tort Suits, Public Accountability, and Congressional Oversight*, 2015 MICH. ST. L. REV. 1 (forthcoming Winter 2015).

<sup>196</sup> *Jackson v. United States*, 751 F.3d 712 (6th Cir. 2014).

<sup>197</sup> Thirty years ago, the Administrative Conference of the United States examined agency procedure under the FTCA and suggested a package of reforms that it believed would protect against unreasonable interpretation and application of rules, promote efficient claim-processing, and encourage fairness to claimants. Some of those reforms were never implemented, and it is timely to do so. Drawing from the work of the Administrative Conference, George M. Bermann identified specific changes to the claims-processing rules

## V. CONCLUSION

Commentators invoke the word “dysfunction” to describe a great deal of current government activity, although the causes and cures of that dysfunction are contested.<sup>198</sup> Mark A. Graber writes, “Constitutional dysfunctions occur when constitutional purposes, constitutional institutions, and the constitutional culture are misaligned or disharmonic.”<sup>199</sup> *Jackson* offers a small window into the large problem of dysfunction: the misalignment of the ancient principle of sovereign immunity, if there even was such an ancient principle, with the democratic principle of government accountability. No one entrusted with power should think it reasonable to treat a letter returned to an agency as affording the meaningful and timely notice that an individual needs to enforce rights against the government; the fact that the conditions are attached to a waiver of immunity—intended to secure accountability—exacerbates rather than blunts the problem.<sup>200</sup> If this article motivates Congress, the courts, and government lawyers to rethink their approach in FTCA cases, then it will have succeeded in modestly realigning constitutional values with public action.

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that warrant fresh consideration. See Bermann, *supra* note 7, at 579.

<sup>198</sup> See Sotorios A. Barber, *On Political and Constitutional Dysfunction*, 94 B.U. L. REV. 603, 609 (2014) (“[C]onstitutional reform is remotely likely in the United States, at least not until some calamity forces it upon the nation”); Nancy L. Rosenblum, *Governing Beyond Imagination: The “World Historical” Sources of Democratic Dysfunction*, 94 B.U. L. REV. 649, 649 (2014) (“Democratic dysfunction is no illusion.”).

<sup>199</sup> Mark A. Graber, *Belling the Partisan Cats: Preliminary Thoughts on Identifying and Mending a Dysfunctional Constitutional Order*, 94 B.U. L. REV. 611, 620 (2014).

<sup>200</sup> See Lawson, *supra* note 2, at 206 (arguing that certain forms of jurisdiction-regulation, unless subject to constitutional limit, would allow Congress to dictate the outcome of the case and would permit Congress to be the judge in its own cause).