Duke Law Journal Online

VOLUME 73 FEBRUARY 2024

"JUST THE FACTS, MA'AM"? A RESPONSE TO PROFESSORS BLOCHER AND GARRETT

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Fact Stripping is an article about how courts find facts. As the authors note, no storied jurist has ever said that it is "'emphatically the province and duty of the judicial department' to say what the facts are."[1] But perhaps that is because no "empha[sis]" is needed. Facts are the chief business of the judiciary.[2] In the mine run of cases, the law is settled, and the court's central function—performed by the jury, or sometimes by the judge—is finding facts and applying law to them.[3]

It is an unglamorous role, easily overlooked in a legal community that trains its collective eyes on the Supreme Court and its pronouncements of law.[4] Joseph Blocher and Brandon Garrett do not make this mistake. They bring creativity and a sense of high stakes to the factfinding enterprise. It is a privilege to respond.

Fact Stripping contends that Congress has the constitutional power to require appellate courts, including the Supreme Court, to defer to district court factfinding. And it concludes that there are sound

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1. *See* Joseph Blocher & Brandon L. Garrett, *Fact Stripping*, 73 DUKE L.J. 1, 64 (2023).

2. *See* Joshua Kleinfeld, *Skeptical Internationalism: A Study of Whether International Law is Law*, 78 FORDHAM L. REV. 2451, 2464–65 (2010).

3. *Id.* at 2464 & n.34.

4. Blocher & Garrett, *supra* note 1, at 15–16; *see, e.g.*, Thomas P. Schmidt, *Judicial Minimalism in the Lower Courts*, 108 VA. L. REV. 829, 832 (2022) (noting that literature concerning judicial minimalism has focused on the Supreme Court).

policy reasons for Congress to exercise that power more aggressively than it has done up to now.[5]

This Response asks a question about the terminology of *Fact Stripping*'s thesis: What are facts? As they acknowledge, Blocher and Garrett speak of facts in a way that captures propositions that may be more properly characterized as law.[6] The distinction matters because the Constitution uses "Fact" and "Law" distinctly, and "the considerations of sound judicial policy" Blocher and Garrett invoke to guide Congress' exercise of its power differ for fact and law, too. This Response seeks to explain the salience, and trace the contours, of the line between fact and law. Having done so, it confirms that the fact stripping Blocher and Garrett propose may include some law stripping, too. The Response concludes by reflecting on the viability of *Fact Stripping*'s thesis on the law side of the line. Law stripping raises serious constitutional questions and, constitutional or not, would be unwise.

I. THE REACH OF CONGRESS'S POWER TO STRIP

One could be excused for questioning the salience of the fact-law line when it comes to Congress's power to shape federal jurisdiction. Blocher and Garrett found Congress's power to require the Supreme Court to defer to lower-court factfinding in the Exceptions Clause,[7] which provides that "the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."[8] Although the Clause treats law and fact as distinct concepts, nothing on its face suggests that crossing the fact-law divide is consequential. Whatever Congress may do to the Supreme Court's jurisdiction "as to Law," the text suggests that it must also be able to do "as to . . . Fact," and vice versa.[9] This permissive view is consistent with the orthodox account of Congress's Exceptions Clause power as plenary (though subject to external constitutional limits).[10]

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5. Blocher & Garrett, *supra* note 1, at 64–65.

6. *See id.* at 63 & n.343.

7. *Id.* at 12–13.

8. U.S. CONST. art. III, § 2, cl. 2.

9. This inference is weakened if the Exceptions Clause does not confer power but instead merely recognizes power conferred by the Necessary and Proper Clause. *See* David E. Engdahl, *Intrinsic Limits of Congress' Power Regarding the Judicial Branch*, 1999 BYU L. REV. 75, 125–35.

10. *E.g.*, Martin H. Redish, *Congressional Power To Regulate Supreme Court Appellate Jurisdiction Under the Exceptions Clause: An Internal and External Examination*, 27 VILL. L. REV.

Some scholars, however, have questioned the extent of Congress's power to alter the Supreme Court's jurisdiction in a way that interferes with its ability to make final and unifying pronouncements of law.[11] Henry Hart concluded that Congress may not prevent the Court from performing its "essential role" "in the constitutional plan,"[12] which Henry Monaghan describes as "the settlement and coordination function."[13] Perhaps most consequentially for *Fact Stripping*, some have argued that, in order to preserve this function, Congress ought only to be able to limit the Supreme Court's review of facts, not law.[14]

Blocher and Garret put these concerns to one side; their proposal, after all, is directed at facts, not law. Yet they also abjure tracing the "fuzzy line between law and fact."[15] The matter bears scrutiny: Congress might rightly hesitate to enter that foggy borderland if a constitutional trip wire lies shrouded therein.

The fuzziness of the line between fact and law results from the practice of using functional considerations to draw it.[16] This functional approach relies on practical judgments about decision-making procedures to define the categories of "law" and "fact."[17] To label something "fact" is to make a practical judgment that it is best decided according to the procedures designed for questions of fact (e.g., the jury should decide it).[18] Conversely, a question best decided according to the procedures designed for questions of law (e.g., the judge should decide it) is one of "law."[19]

Others have rightly criticized this approach to defining fact and law because written procedural rules—constitutional, statutory,

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900, 902–03 (1982); Tara Leigh Grove, *The Origins (and Fragility) of Judicial Independence*, 71 VAND. L. REV. 465, 518–36 (2018).

11. Blocher & Garrett, *supra* note 1, at 30.

12. Henry M. Hart, Jr., *The Power of Congress To Limit the Jurisdiction of the Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1365 (1953) ("*The Dialogue*").

13. Henry Monaghan, *Jurisdiction Stripping Circa 2020*, 69 DUKE L.J. 1, 11 (2019) [hereinafter Monaghan, *Jurisdiction Stripping*]; *e.g.*, Leonard Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157, 161 (1960); *see generally* Redish, *supra* note 10, at 906–13 (summarizing essential functions thesis).

14. Redish, *supra* note 10, at 913–15 (summarizing this theory).

15. Blocher & Garrett, *supra* note 1, at 17–18.

16. Henry Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 234–35 (1985) [hereinafter Monaghan, *Constitutional Fact Review*] (identifying and criticizing this tradition); *see also* Ronald J. Allen & Michael S. Pardo, *The Myth of the Law-Fact Distinction*, 97 NW. U. L. REV. 1769, 1770 (2002) (identifying "functional considerations" driving the distinction).

17. Miller v. Fenton, 474 U.S. 104, 114 (1985).

18. *See, e.g.*, U.S. Bank v. Village at Lake Ridge, 583 U.S. 387, 397–98 (2018).

19. *See, e.g.*, Guerrero-Lasprilla v. Barr, 140 S. Ct. 1062, 1073 (2020).

legislatively enabled—use the words "fact" and "law" to constrain procedural choices.[20] To say that a decision is not one of "fact" because, for instance, it makes sense to reexamine the decision on appeal is to displace the People's judgment that some set of decisions ought to be guarded from reexamination even when reexamination seems to make sense.[21] If one is to be faithful to these rules, then one must keep the classification distinct from procedural choices.[22]

Blocher and Garrett neither endorse nor correct the functional approach, but their proposal coexists uneasily with it. *Fact Stripping* offers a criticism that makes sense only if "fact" and "law" are categories that exist independent of procedural choices. It points out that in constitutional cases, courts use inconsistent procedures for a common set of inquiries that the authors characterize as "factual." Sometimes, courts defer.[23] Sometimes, they do not. Sometimes, they justify plenary review on the ground that the facts are constitutional facts;[24] sometimes, it is on the ground that they're legislative facts;[25] sometimes, it is on the ground that they're mixed questions.[26] Often there's no explanation.[27] To say these approaches ought to be evaluated (and possibly revised) as a group requires some firmer definitional footing.

II. BRINGING THE LINE INTO FOCUS

As I argue elsewhere, a foothold may be found in the formal distinction between law declaration and law application.[28] At the law declaration stage, a court articulates a rule of decision: for example, certain penalties attach if a defendant used a firearm in any manner to facilitate drug trafficking.[29] At the law application stage, the court

20. *See* Monaghan, *Constitutional Fact Review*, *supra* note 16, at 233–34.

21. *See* U.S. CONST. amend. VII. *Cf.* District of Columbia v. Heller, 554 U.S. 570, 634–35 (2008) (declining to engage in interest-balancing in applying constitutional rules that are the "*product* of interest balancing by the people"); John Harrison, *The Power of Congress over the Rules of Precedent*, 50 DUKE L.J. 503, 513 (2000) (one characteristic of authoritative legal rules is that "sometimes the rule operates where its rationale does not").

22. *See* Monaghan, *Constitutional Fact Review*, *supra* note 16, at 234.

23. Blocher & Garrett, *supra* note 1, at 18–19.

24. *See id.* at 21–22.

25. *Id.* at 8–9.

26. *Id.* at 10, 38.

27. *Id.* at 21–22.

28. Haley Proctor, *Rethinking Legislative Facts*, 99 NOTRE DAME L. REV. 3, 27 (forthcoming 2024); *see also* Monaghan, *Constitutional Fact Review*, *supra* note 16, at 235.

29. *See* Smith v. United States, 508 U.S. 223, 227 (1993).

applies that rule of decision to the circumstances of the party before it: for example, a defendant who traded a gun for drugs used a firearm to facilitate drug trafficking.[30]

Functional judgments about who should decide may inform the allocation of law declaration, law application, and the factfinding that supports them.[31] And functional judgments may even drive the decision to treat a question as one of law declaration or law application.[32] But these judgments overlay the ribbing of judges' commission to decide disputes according to the law. Ultimately, where the law to be declared ends, application of law to fact must begin.[33]

Treating the line between declaration and application as the focal point yields the following definitions: A "fact" is a determination to which courts apply a rule of decision.[34] (For example, the defendant offered his MAC-10 in exchange for two ounces of cocaine.[35]) "Law," by distinction, encompasses the rule of decision and any determination courts make to declare it.[36] (For example, the ordinary meaning of the verb "use," even when its object is a tool, encompasses uses beyond the tool's intended purpose.[37]) Call the line between the two the judicial fact-law divide.

This definition of "fact" departs from dictionary definitions of "fact"—e.g., "something that actually exists"[38]—because propositions that satisfy the dictionary definitions fall on both sides of the judicial fact-law divide. When a court articulates a rule of decision, it is asserting "something that actually exists"—a legal rule—but it is making a statement of law according to legal conventions.[39] A court

30. *See id.* at 241.

31. *See id.* at 240–41.

32. *See id.*

33. *See id.* at 241 (declaring 18 U.S.C. § 924(c)(1)'s penalties against a criminal who uses a firearm in a drug trafficking offense to apply to one who trades his firearm for drugs and holding that, as a result, the law applied to the petitioner).

34. *See id.* at 226, 241 (applying the holding that one who trades his firearm for drugs "uses" it under 18 U.S.C. § 924(c)(1) to the factual finding that the petitioner traded his gun for cocaine).

35. *Id.* at 226.

36. *See, e.g.*, *id.* at 241 (holding that "a criminal who trades his firearm for drugs "uses" it during and in relation to a drug trafficking offense within the meaning of" the statute at issue). In the language of *Against Legislative Facts*, "fact" is a "non-premise fact." Proctor, *Rethinking Legislative Facts*, *supra* note 28, at 3.

37. *Smith*, 508 U.S. at 230.

38. *Fact*, BLACK'S LAW DICTIONARY (11th ed. 2019).

39. Gary Lawson, *Proving the Law*, 86 NW. U. L. REV. 859, 863 (1992); Allen & Pardo, *supra* note 16, at 1792–94; James B. Thayer, *"Law and Fact" in Jury Trials*, 4 HARV. L. REV. 147, 152 (1890).

also operates on the "law" side of the judicial fact-law divide when it resolves "matters of fact that are merely premises to a rule of law."[40]

When Blocher and Garrett speak of "fact," they include propositions that satisfy the dictionary definition of fact but fall on the law side of the judicial fact-law divide. In particular, the authors raise the possibility that Congress may be able to regulate the "historical factfinding" required under the Supreme Court's recent decision in *New York State Rifle & Pistol Association v. Bruen*.[41] In *Bruen*, the Court held that the "Nation's historical tradition of firearm regulation" defines the contours of the Second Amendment's otherwise "unqualified command."[42] Propositions about that historical tradition—for example, that there is a tradition of regulating the manner of carrying firearms[43]—are factual in the sense that they describe "something that actually exist[ed]." But under this Response's definition, those historical propositions would be "law" because they give content to the rule of decision enacted by the Second and Fourteenth Amendments to the Constitution.[44] Requiring an appellate court to defer to a lower court's finding on that historical practice, then, would shape the appellate court's interpretation of the Constitution.

III. LAW STRIPPING?

All of which is to say that *Fact Stripping* might involve some law stripping, too. So, it is worth considering whether, and to what extent, Congress may require the Supreme Court to defer to lower courts on questions of law. Space does not permit a comprehensive exploration of this question, but here are some reflections on the constitutional support for this broad version of *Fact Stripping*'s thesis.

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40. Prentis v. Atl. Coast Line Co., 211 U.S. 210, 227 (1908).

41. Blocher & Garrett, *supra* note 1, at 63 (citing N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1 (2022)).

42. *Bruen*, 597 U.S. at 17 (2022) (quoting Konigsberg v. State Bar of Cal., 366 U.S. 36, 50 n.10 (1961)).

43. *See* William Baude & Robert Leider, *The General Law Right To Bear Arms*, 99 NOTRE DAME L. REV. (forthcoming 2024) (manuscript at 7), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4618350 [https://perma.cc/H6ND-HCKE].

44. *See* Haley Proctor, *"Will the Meaning of the Second Amendment Change . . . ?,"* N.Y.U. LAW. REV. ONLINE 462 (2023); *see also* Baude & Leider, *supra* note 43 (manuscript at 22) (describing the common-law process of "extrapolat[ing] from the historical data points"). *Cf.* Stuart Minor Benjamin, *Stepping into the Same River Twice: Rapidly Changing Facts and the Appellate Process*, 78 TEX. L. REV. 269, 343 (1999) (treating similar inquiries as factual, though they support propositions about the meaning of law).

It may be tempting to think of law stripping as a lesser form of jurisdiction stripping. True, unlike the seemingly more modest fact stripping,[45] law stripping directly targets the law-declaring function that some restrictive accounts of the Exceptions Clause strive to preserve.[46] Constrained to the factual premises reasonably found by the lower court, the Supreme Court would presumably limit its pronouncements on questions of law to those factual premises, leaving broader legal questions unresolved.[47] Still, limiting review may seem less extreme than keeping the case out of the Court altogether.[48]

For example, Steven Calabresi and Gary Lawson have argued that Congress lacks the power to deprive the Supreme Court of jurisdiction over the "cases" enumerated in Article III because Article III vests the full "judicial power" in that court, and Congress may not make "Exceptions" to that vesting.[49] But merely "Regulat[ing]" the standard

45. There is some dissonance in the notion that Congress has greater leeway to regulate review of fact. *Cf.* Axon Enterprise, Inc. v. F.T.C., 598 U.S. 175, 198 (2023) (Thomas, J., concurring) (expressing concern about law depriving parties of independent Article III review of factual determinations in a private-rights dispute). After all, the only provision of the Constitution that directly addresses the standard of review on appeal—the Reexamination Clause—limits Congress's power as to facts, not law. U.S. CONST. amend. VII, § 3, cl. 1. This suggests that concerns about the strength of review were *less* pronounced on the "law" side of the line. Nevertheless, the Reexamination Clause undoubtedly permits fact stripping. It's *de novo* review that it prohibits.

46. Blocher & Garrett, *supra* note 1, at 30.

47. In a similar fashion, appellate courts limit their holdings when party presentation prevents (or relieves a court from the duty to engage it) a fulsome inquiry into a question of law. *See, e.g.*, Kamen v. Kemper Fin. Servs., Inc., 500 U.S. 90, 100, n.5 (1991) ("[I]f a court undertakes to sanction a litigant by deciding an effectively raised claim according to a truncated body of law, the court should refrain from issuing an opinion that could reasonably be understood by lower courts and nonparties to establish binding circuit precedent on the issue decided."); Simon v. Rep. of Hungary, 77 F.4th 1077, 1098 (D.C. Cir. 2023) (declining to take a position because, while not persuaded by the appellants' argument, the court did "not foreclose the possibility that such support exists in sources of international law not before us in this case or based on arguments not advanced here"). The difference between the party presentation situation and law-stripping, however, is that in the latter scenario, the Court would have no choice but to limit its holding. *See* Amanda Frost, *The Limits of Advocacy*, 59 DUKE L.J. 477, 492–93 (2009) (discussing courts' power to disregard party omissions on legal arguments).

48. For similar greater-includes-the-lesser treatment of Congress's jurisdiction regulating powers, *cf.* Patchak v. Zinke, 583 U.S. 244, 252 (2018) ("Congress' greater power to create lower federal courts includes its lesser power to 'limit the jurisdiction of those Courts.'" (quoting United States v. Hudson, 11 U.S. 32, 33 (1812))); Bowles v. Russell, 551 U.S. 205, 212–13 (2007) ("Because Congress decides whether federal courts can hear cases at all, it can also determine . . . under what conditions[] federal courts can hear them.").

49. Steven G. Calabresi & Gary S. Lawson, *The Unitary Executive, Jurisdiction Stripping, and the Hamdan Opinions: A Textualist Response to Justice Scalia*, 107 COLUM. L. REV. 1002, 1008, 1014 (2007).

of review allows the full complement of cases and controversies to which the judicial power extends to reach the Court.[50]

On the other hand, a law that shapes the exercise of judicial power may raise concerns not implicated by a law that merely prevents its exercise, even to one who does not subscribe to the essential functions thesis. Regardless of whether the Court's duty "to say what the law is" requires Congress to send the Court cases to begin with, the duty unquestionably kicks in once the case arrives.[51] One relevant question, then, is whether the discharge of that duty—the exercise of judicial power—requires independent judgment about the meaning of the law at every stage of decision and review.[52]

James Pfander argues that Article I's authorization to establish only tribunals "*inferior* to the *supreme* Court"[53] limits Congress's power to deprive the Supreme Court of supervisory authority over the tribunals so established.[54] The common-law writs were traditional vehicles for that authority and did not require plenary review.[55] Thus, Pfander's theory may stop Congress from stripping the Court's jurisdiction to correct clear error in inferior courts' pronouncements of law but may permit a law requiring something resembling deference.

The difference is that, in declining to issue a supervisory writ, the Court would not be adopting the lower court's interpretation of the law.[56] But other doctrines require a judge to say that the law is something other than what the judge independently thinks it is, or at least to apply that second-best version of the law in the case at bar. Precedent, law of the case, forfeiture, and *Chevron* and *Auer* deference all come to mind.[57]

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50. *See* U.S. CONST. art. III, § 2, cl. 2.

51. Marbury v. Madison 5 U.S. (1 Cranch) 137, 177 (1803) ("Those who apply the rule to particular cases, must of necessity expound and interpret that rule."); *see* Henry P. Monaghan, *"Marbury" and the Administrative State*, 83 COLUM. L. REV. 1, 11 (1983) [hereinafter Monaghan, *"Marbury"*]; *see also* Benjamin B. Johnson, *The Origins of Supreme Court Question Selection*, 122 COLUM. L. REV. 793, 858 (2022).

52. Calabresi & Lawson, *supra* note 49, at 1023 (leaving open the "precise character of the superior/subordinate relationships laid out in" Article III).

53. U.S. CONST. art. I, § 8, cl. 9.

54. James E. Pfander, *Jurisdiction-Stripping and the Supreme Court's Power to Supervise Inferior Tribunals*, 78 TEX. L. REV. 1433, 1436 (2000).

55. *Id.* at 1505–08.

56. *See* Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 947–58 (2017).

57. *See* Blocher & Garrett, *supra* note 1, at 30–31 (considering administrative analogues for fact stripping).

Deference to lower court decisions on questions of law compares favorably to agency deference because, unlike *Chevron* and *Auer* deference, it does not deprive the parties of an Article III judge exercising "independent judgment in interpreting and expounding upon the laws."[58] In this way, law stripping would respect the view, developed by Justice Story and forcefully advocated by Akhil Amar, that the Supreme Court need not have jurisdiction over the "cases" enumerated in Article III, so long as some federal court does.[59]

The comparison between precedent and deference to lower court law determinations may be less favorable to law stripping, at least from the perspective of the essential functions thesis. Inasmuch as the only legal pronouncements to which *stare decisis* requires the Supreme Court to defer issue from the Supreme Court, precedent poses less of a threat to the Court's settlement and coordination function and may be more consistent with the Court's supremacy.[60] On the other hand, deference to lower-court law finding has some due process advantages over *stare decisis*, inasmuch as it presumably would kick in only after a party has had an opportunity to litigate its position on the meaning of the law in the court below.[61]

Even if law stripping breaches no constitutional limits, constitutionality does not mean wisdom. *Fact Stripping* identifies an underutilized power but takes no position on how precisely Congress should use it, especially when it comes to the factual premises of law declaration.[62] The structural concerns voiced by jurisdiction-stripping skeptics may yet militate against a statute stripping the Supreme Court of authority to review lower court legal pronouncements—or the

58. Perez v. Mortgage Bankers Ass'n, 575 U.S. 92, 119 (2015) (Thomas, J., concurring); *see also* St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 84 (1936) (Brandeis, J., concurring) ("The supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied. . . ."); Monaghan, *"Marbury"*, *supra* note 51, at 20–22 (summarizing Hart's rejection of "deference to administrative law-interpretation" on essential function grounds); Harrison, *supra* note 21, at 513 (noting that the Constitution vests the judicial power in the inferior and supreme courts alike).

59. Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 230 (1985). *But see* Calabresi & Lawson, *supra* note 49, at 1014 (disputing this conclusion).

60. *See* Calabresi & Lawson, *supra* note 49, at 1023. Like jurisdiction stripping, though, law stripping would "lock in" precedents, making correction more difficult. *See* Redish, *supra* note 10, at 925.

61. *See generally* Amy Coney Barrett, *Stare Decisis and Due Process*, 74 U. COLO. L. REV. 1011 (2003) (arguing that federal courts' "inflexible approach to stare decisis" raises due process concerns).

62. *See* Blocher & Garrett, *supra* note 1, at 63–64.

factual premises upon which they rest—*de novo*.[63] In following *Fact Stripping*'s proposal, Congress would be wise to consider whether the facts it strips are, in fact, law.

63. *Cf.* Daniel Epps & Alan M. Trammell, *The False Promise of Jurisdiction Stripping*, 123 COLUM. L. REV. 2077, 2078–79 (2023) (focusing on the practical dimension of jurisdiction stripping).