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A SEPARATION OF POWERS DEFENSE OF FEDERAL RULEMAKING POWER

BY MICHAEL BLASIE*

Fundamental to the structure of our federal government is the theory of the separation of powers;¹ yet the Federal Constitution contains no clause establishing such a structure. The most relevant text appears in the following phrases: “All legislative Powers herein granted shall be vested in a Congress of the United States,”² “The executive Power shall be vested in a President of the United States of America,”³ and “The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”⁴ These clauses, combined with portions of the Federalist Papers and our belief that the works of Locke and Montesquieu influenced the Founding Fathers, are the sources from which we derive the concept of the separation of powers.⁵ On its face the theory is simple: the three branches of the federal government exercise three corresponding functions. The legislative branch creates the law, the executive branch enforces the law, and the judicial branch interprets

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1. “This Court consistently has given voice to, and has reaffirmed, the central judgment of the Framers of the constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty.” *Mistretta v. United States*, 488 U.S. 361, 380 (1989).

2. U.S. CONST. art. I, § 1, cl. 1.

3. *Id.* art. II, § 1, cl. 1.

4. *Id.* art. III, § 1, cl. 1.

5. See *Morrison v. Olson*, 487 U.S. 654, 697–98 (1988) (Scalia, J., dissenting) (noting that separation of powers stems from three constitutional clauses and referencing Federalist 47); *Ex parte Grossman*, 267 U.S. 87, 119–20 (1925) (discussing constitutional basis for the separation of powers); Tom Clark, *Separation of Powers*, 11 WILLAMETTE L.J. 1, 2 (1974) (noting that Madison appealed to Montesquieu); JOHN LOCKE, *The Second Treatise of Government*, in TWO TREATISES OF GOVERNMENT §§ 143–48, at 382–84 (Peter Laslett ed., Cambridge Univ. Press 1960) (1690); CHARLES-LOUIS DE SECONDAT MONTESQUIEU, SPIRIT OF THE LAWS 151–52, 196–205 (Thomas Nugent trans. & ed., 1949); THE FEDERALIST No. 47, at 301 (James Madison) (New American Library ed., 1961).

the law.⁶ However, application of the theory has proven to be complicated.

There are two major competing theories of the separation of powers: functionalism and formalism.⁷ Under the functionalist approach, the branches of government are interdependent and share powers.⁸ Synonymous with pragmatism, functionalism assigns a power to the branch or branches best capable of exercising that power.⁹ In contrast, according to the formalist theory, each branch may exert only the powers allocated to it by the Constitution under a strict construction of the Constitution's first three articles.¹⁰ Underlying this theory is the idea that structure itself is an effective and necessary check on the massive power wielded by the federal government. The structural requirement of inter-branch consensus before government action, for example, safeguards individuals' constitutional rights. Case law has appealed to both theories, causing the Supreme Court to acknowledge that its "precedents in this area do not admit of easy synthesis."¹¹

Judicial rulemaking—the methods by which federal courts create federal procedural rules—represents a paradigmatic clash between the functionalist and formalist theories of the separation of powers. There exist compelling practical reasons to invest such power in the judiciary, yet the Constitution's text does not explicitly confer such power on any branch. Scholarship on the subject generally approves of the current process based on a classic functionalist separation of powers justification: the systemic benefits of the

6. The closely related principle of checks and balances allows branches to negate some of the functions allocated to other branches without permitting a usurping of such powers. For example, Congress can write laws but the President can veto them; the veto power, however, grants only the power to negate the law, not the power to write laws.

7. Linda S. Mullenix, *Unconstitutional Rulemaking: The Civil Justice Reform Act and Separation of Powers*, 77 MINN. L. REV. 1283, 1291–92 (1992) (referencing competing theories as formalist or functionalist).

8. *Id.* at 1292.

9. Often this view rests upon traditional assumptions about the benefits of each branch: the executive is efficient and specialized, the judiciary is insulated and familiar with the application of laws to cases, and the legislature is representative of the citizenry and capable of debate and compromise. See Bruce E. Peabody & John D. Nugent, *Toward a Unifying Theory of Separation of the Powers*, 53 AM. U. L. REV. 1, 22 (2003) (noting that positivist view relies in part upon distinctive qualities and functions associated with each branch or division of government).

10. Mullenix, *supra* note 7, at 1291.

11. *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 847 (1986); see also *Mistretta v. United States*, 488 U.S. 361, 380–83 (1989) (explaining recent separation of powers jurisprudence and concepts of encroachment and aggrandizement).

process outweigh the defects, partly because the judiciary is best equipped to make the rules that guide it.¹²

This Note comprehensively examines the separation of powers issues raised by the current federal rulemaking process under the formalist theory of the separation of powers in light of modern precedent. Part I details the current procedure for creating the federal rules, summarizes the relevant scholarship, and examines the few Supreme Court decisions on the constitutionality of portions of the process. Part II clarifies the process of creating the federal rules of procedure, concluding that, despite the substantive role played by rulemaking committees and Congress's influence over the process, the Supreme Court creates the rules. Part III describes the statutory and constitutional sources of power that federal courts have referenced in creating the rules and the viable constitutional bases for these sources. It draws conclusions about both the limits on Congress's regulation of federal court procedure and limits on a federal court's constitutional power to create procedure. Part IV examines why the Constitution permits Congress's delegation of such power despite potential conflicts with the non-delegation doctrine, the Case or Controversy Clause, and the Judicial Power Clause. Part V discusses potential constitutional challenges to Congress's "legislative veto" over rules promulgated by the Supreme Court and to the supersession clause of the Rules Enabling Act.¹³

12. See, e.g., JACK B. WEINSTEIN, REFORM OF COURT RULE-MAKING PROCEDURES 54 (1977) ("The rule-making power is one of the most important examples of practical necessity dictating that a twilight area be created where activities of the separate branches merge."); Roscoe Pound, *The Rule-Making Power of the Courts*, 12 A.B.A. J. 599, 601 (1926) (arguing that courts should have complete control over court procedure); cf. WEINSTEIN, *supra*, at 33 ("It appears, therefore, that no one of the three branches of Government is, by the theory of the Constitution or the character of the duty, so peculiarly fitted for this work that the other two must be excluded from consideration. In such a position, the guiding principle becomes one of expediency.") (citation omitted). What little mention there is of formalist separation of powers justification focuses on the need of the judiciary to control its own procedure to remain an independent branch of government: "Rule-making, in this view, is a crucial facet of an independent judiciary; to deprive the judiciary [of] rule-making authority is to mar its vital independence and impair its role as a guardian of due process." *Id.* at 21. Judge Weinstein later noted Hamilton's emphasis on an independent judiciary in the *Federalist Papers*. *Id.* at 75–82. However, one scholar argues that Congress will blame judges for problems with the judge-dominated Judicial Conference's rules, thereby hurting judicial independence. Stephen C. Yeazell, *Judicial Independence and Accountability: Judging Rules, Ruling Judges*, 61 LAW & CONTEMP. PROBS. 229, 241 (1998).

13. This Note will argue that what some commentators have referred to as a "legislative veto" is actually a simple notice requirement. See *infra* Part IV.

I. BACKGROUND

A. *Federal Rulemaking Process*

This section details the statutory authority and procedures for the creation of the federal rules of procedure. The Rules Enabling Act (REA)¹⁴ declares that the Supreme Court of the United States “shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases” in federal courts.¹⁵ However, these rules “shall not abridge, enlarge, or modify any substantive right.”¹⁶ Also noteworthy, the statute contains what is known as the supersession clause, which voids all laws conflicting with the rules promulgated under this statute.¹⁷ The federal rules of evidence, civil procedure, criminal procedure, and appellate procedure fall under the language of “general rules of practice and procedure and rules of evidence.”¹⁸ Congress later granted the Supreme Court near-identical authority to create bankruptcy rules.¹⁹

According to the REA, the Supreme Court must submit each rule promulgated under this act’s authority to Congress.²⁰ The proposed rules take effect only if Congress fails to veto them,²¹ with one exception: rules “creating, abolishing, or modifying” evidentiary privileges require an act of Congress.²²

Despite the language of the REA, most rules are developed not by the United States Supreme Court, but by a congressionally created body known as the Judicial Conference, whose mission is to develop rules and evaluate those currently in effect.²³ It is com-

14. 28 U.S.C. § 2072 (2006). *See generally* Edson R. Sunderland, *The Grant of Rule-Making Power to the Supreme Court of the United States*, 32 MICH. L. REV. 1116, 1117–19 (1933) (detailing history of passage of Rules Enabling Act).

15. 28 U.S.C. § 2072(a).

16. *Id.* This provision prompted the great substance versus procedure debate that led to the *Erie*, *York*, and *Hanna* line of cases; which rules are procedural and which are substantive is an ongoing debate amongst scholars and courts. *See* *Hanna v. Plumer*, 380 U.S. 460 (1965); *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945); *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

17. 28 U.S.C. § 2072(b)

18. *See* 30 F.R.D. 73, 101 (1962); WEINSTEIN, *supra* note 12, at 57–74, 100.

19. This Note, however, focuses primarily on the rules of practice, procedure, and evidence created under the REA.

20. 28 U.S.C. § 2074 (2006).

21. Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887, 893 (1999) (noting that vetoes are rarely used).

22. 28 U.S.C. § 2074 (2006).

23. *Id.* § 331.

posed of the Chief Justice of the United States, the chief judge of every federal circuit court, the Chief Judge of the Court of International Trade, and a district judge from each circuit.²⁴ The Chief Justice of the United States must submit an annual report to Congress on the Judicial Conference along with its recommendations for legislation.²⁵ The Conference may hold hearings, take testimony, and issue subpoenas,²⁶ and it may also create advisory committees to recommend and assist in the creation of rules.²⁷ After a proposal passes an advisory committee, the Conference's standing committee reviews the proposal.²⁸

These two types of committees generally include members of the bar, law professors, state chief justices, a Department of Justice representative, and federal judges, with a law professor serving as the reporter in the case of an advisory committee.²⁹ Notably, Congress required such committees to consist of members of the bar as well as both trial and appellate judges,³⁰ though the Chief Justice of the United States has the sole authority to make all committee appointments.³¹

The Conference tends to welcome outside participation in the process. For example, suggestions for rule amendments come from members of the Judicial Conference and its committees, judges at every level, organizations, attorneys, agencies, law professors, and the public.³² Also, committee meetings and minutes are usually

24. *Id.* For information on the predecessors to the Judicial Conference, see the U.S. Courts website, <http://www.uscourts.gov/FederalCourts/JudicialConference.aspx> (last visited January 17, 2010).

25. *Id.*

26. *Id.*

27. 28 U.S.C. § 2073(a)(2) (2006). The Conference may also place limits on membership. For information on the tenure of committee members see the U.S. Courts website, <http://www.uscourts.gov/FederalCourts/JudicialConference.aspx>.

28. The text of section 2073 suggests the Conference *must* create a standing committee, whereas the language in section 331 suggests that the Conference *may*, but is not required to, create such a committee. 28 U.S.C. § 331 (2008); 28 U.S.C. § 2073(b) (2006). Regardless, the Conference traditionally has had a standing committee.

29. *See also* WINIFRED R. BROWN, FEDERAL RULEMAKING: PROBLEMS AND POSSIBILITIES, FEDERAL JUDICIAL CENTER 9–12, 25–27 (1981) (discussing membership of advisory and standing committees); U.S. Courts website, <http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/RulemakingProcess.aspx> (containing links to lists of current committee members).

30. 28 U.S.C. § 2073(a)(2).

31. U.S. Courts website, <http://www.uscourts.gov/FederalCourts/JudicialConference.aspx> (last visited January 17, 2011); BROWN, *supra* note 29, at 13–15.

32. U.S. Courts website, <http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/RulemakingProcess.aspx> (last visited January 17, 2011); BROWN, *supra*

public.³³ Although not required by statute, advisory committees send their rule proposals to over ten thousand people and organizations for comment and provide the general public with six months to comment on their proposals.³⁴

The general process of drafting by an advisory committee, followed by approval from the standing committee, Judicial Conference, and the Supreme Court, with submission of the rules to Congress has been, with few exceptions, the procedure for decades.³⁵ There are several notable observations about this process. First, the REA grants the Supreme Court the power to create rules but does not require the Court to exert that power. Second, the REA does not require the Court to use the Judicial Conference to promulgate rules. Third, the Supreme Court need not follow the recommendations of the Judicial Conference. In the past, the Supreme Court has rejected,³⁶ modified,³⁷ and taken no action³⁸ on proposed rules.³⁹

note 29, at 9–11 (noting that suggestions for rule amendments come from variety of public and governmental sources).

33. U.S. Courts website, <http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/RulemakingProcess.aspx> (last visited January 17, 2011); *see also* BROWN, *supra* note 29, at 17–23.

34. U.S. Courts website, <http://www.uscourts.gov/FederalCourts/JudicialConference.aspx> (last visited January 17, 2011); *cf.* 5 U.S.C. § 553 (Administrative Procedure Act) (rule 12.3.2).

35. Congress has intervened only rarely in the rulemaking process. *See* Karen Nelson Moore, *The Supreme Court's Role in Interpreting the Federal Rules of Civil Procedure*, 44 HASTINGS L.J. 1039, 1054–1060 (1992) (tracing Congress's role in amending rules). For a general discussion of the history of proposed rules and Congress's reaction to them, *see* WEINSTEIN, *supra* note 12, at 57–74, 100.

36. WEINSTEIN, *supra* note 12, at 100 (noting that court rejected proposed work product rule because of pending case).

37. *See* BROWN, *supra* note 29, at 31; 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1004 (3d ed. 2008) (describing how Supreme Court made changes to first proposed set of the Federal Rules of Civil Procedure).

38. *See* WRIGHT & MILLER, *supra* note 37, at § 1006 (referencing 1955 rule proposals); Stephen B. Burbank, *Ignorance and Procedural Law Reform: A Call for a Moratorium*, 59 BROOK. L. REV. 841, 843 (1993) (noting that Court refused to transmit amendment implicating foreign relations).

39. There is a separate rulemaking process for, and separate bodies that develop and review, the creation of a federal court's local rules. *See* 28 U.S.C. § 331 (2008); 28 U.S.C. § 332 (2002); 28 U.S.C. § 2071 (1988); 28 U.S.C. § 2077(b) (1990). This Note focuses on the federal rules applicable to all federal courts, but its analysis likely applies with equal force to the local rules.

B. Scholarship

Since the inception of the Judicial Conference, scholars have criticized and made suggestions to improve the rulemaking process. Almost all proposed modifications suggested more public access, more expansive membership in the Judicial Conference, debates on the role of the United States Supreme Court, or discussions about how active Congress should be in the process.⁴⁰ Aside from these practical critiques, the theoretical and constitutional critiques have focused on two issues. First, even with the limitation that rules cannot abridge or modify substantive rights, procedural rules, such as those concerning pleadings and class actions, have profound substantive implications for litigants.⁴¹ Therefore, issues of democratic process and accountability arise from the magnitude of procedural power and present themselves in criticisms of the membership of the Judicial Conference, public access to the process, the role of the legislature, and the degree of judicial scrutiny.⁴² Second, the role of federal judges, especially the United States Supreme Court and its Chief Justice, has caused concerns about the ability of courts to re-

40. See, e.g., 368 U.S. 1011, 1012–14 (1961) (Black, J., dissenting) (preferring that Congress amend Federal Rules of Civil Procedure directly); BROWN, *supra* note 29, at 79–86 (evaluating five different proposals); Yeazell, *supra* note 12, at 239–48 (supporting elimination of Supreme Court and Judicial Conference from process because neither provides meaningful judicial review, and encouraging greater transparency by increasing number and types of attorneys and judges consulted); cf. Linda S. Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C.L. REV. 795, 832–34, 838–42, 856 (1990) (describing benefits and costs of increased participation and concluding that opening rulemaking process to more participants risks influx of lobbying and loss of neutrality, but that keeping process closed risks abdicating power to Congress).

41. See CHARLES W. GRAU, JUDICIAL RULEMAKING: ADMINISTRATION, ACCESS AND ACCOUNTABILITY 11–13 (American Judicature Society 1978) (arguing that procedure inevitably effects substantive rights); Mullenix, *supra* note 40, at 835–56 (“Those few who observe judicial rulemaking are far more likely today to see social and economic consequences in what the Committee does than were earlier generations of observers . . .”).

42. See, e.g., Howard Lesnick, *The Federal Rule-Making Process: A Time for Re-Examination*, 61 A.B.A. J. 579, 579–83 (1975) (citing limited attorney and public participation, and criticizing lack of legislative control over process); GRAU, *supra* note 41, at 1–13 (noting simultaneous independence and unaccountability of rulemakers). But see Bone, *supra* note 22, at 890 (arguing that judiciary is better able to identify legal principles and trends and that legitimacy of rules stems from principled deliberation similar to common law reasoning rather than from public participation).

view the rules impartially and about their influence over the Judicial Conference.⁴³

Despite these concerns, the vast majority of scholars, courts, legislatures, and organizations approve of the Judicial Conference's role and procedures and, more generally, the creation of the rules by the judicial branch.⁴⁴ Indeed, the judiciary has had authority to author procedural rules for the vast majority of the history of the United States⁴⁵ and United Kingdom.⁴⁶ Inevitably, scholars conducting cost-benefit analyses have concluded that the judiciary makes "better" procedural rules than the legislature for at least two reasons.⁴⁷ First, the judiciary is well suited for this responsibility with its unique expertise in procedure from its daily experiences.⁴⁸ Second, it is more efficient for the courts to make such rules because the judiciary can add, amend, and delete rules more quickly

43. See, e.g., 374 U.S. 861, 865–70 (1963) (Black & Douglas, JJ., dissenting); WEINSTEIN, *supra* note 12, at x–xi, 5–11, 96–104 (noting lack of public comment and adversarial system in process; citing concern for impartiality and breadth of Court's interpretation of procedure, Congress injuring Court's prestige when it uses legislative veto, and Chief Justice's influence over committee choices). *But see* Charles E. Clark, *The Role of the Supreme Court in Federal Rule-Making*, 46 J. AM. JUD. SOC. 250, 256–58 (1962) (defending role of Supreme Court in rulemaking process).

44. BROWN, *supra* note 29, at 36 (“[M]ost imply little or no criticism of the way in which the rule makers have discharged their responsibility or of the way the rules have operated to regulate practice and procedure.”); GRAU, *supra* note 41, at 17 (reviewing proposals of scholars Pound, Wigmore, Leven, Amsterdam, Joiner, Miller, and Weinstein).

45. See also WEINSTEIN, *supra* note 12, at 57–74; Edson R. Sunderland, *Implementing the Rule-Making Power*, 25 N.Y.U. L. REV. 27, 29–32 (1950). Sunderland also discusses the history of rulemaking processes amongst states. *Id.* at 35–40.

46. WEINSTEIN, *supra* note 12, at 22–33; Abraham Gertner, *The Inherent Power of Courts to Make Rules*, 10 U. CIN. L. REV. 32, 32–38 (1936).

47. See, e.g., Geoffrey C. Hazard, *Undemocratic Legislation*, 87 YALE L.J. 1284, 1287–88, 1291–92 (1977) (defending current method against criticism).

48. WEINSTEIN, *supra* note 12, at 19–21 (concluding that courts are better positioned than legislatures to determine their own procedural and evidentiary needs); Bone, *supra* note 21, at 890, 920–27, 935–37, 949 (arguing that judiciary is better able to identify legal principles and trends and that legitimacy of rules stems from principled deliberation similar to common law reasoning rather than from public participation). *But see* Hazard, *supra* note 47, at 1293 (“[I]t seems fair to say that it is not the superior expertise of the judiciary in such matters but rather these political circumstances that have been the real impetus for removing procedural Rulemaking from the legislature.”). Those noting judicial expertise neglect, however, the fact that many Members of Congress lack daily experience with environmental, insurance, and criminal issues; yet Congress retains control over these arenas.

than the legislature,⁴⁹ which allows the legislature more time to spend on “bigger issues.”⁵⁰

In recent decades, discussions of the constitutionality of federal judicial rulemaking have come up rarely. One possible explanation for this is that many of the concerns about membership and public access have been addressed by congressional amendments and changes to the Judicial Conference’s procedure, negating the largest cause for criticism.⁵¹ Also, the federal rules have long been considered a success; by all indications the process works well, so there is little reason to exert resources advocating change.⁵² Third, with the rise of administrative agencies, the legal profession has become accustomed to functionalist reasoning, often emphasizing efficiency and the role of experts.⁵³ This view leaves unaddressed the issue of whether a formalist analysis can support the current federal rulemaking process.

C. Supreme Court Decisions

Debate about the validity of the rules rarely focuses on the separation of powers. Instead, the Supreme Court has focused on

49. Pound, *supra* note 12, at 602 (noting that judiciary can gradually and conservatively overhaul and reshape rules, that rules change with legal growth instead of waiting years for legislative intervention, and that rules are less rigid and can be tried and molded); *see also* Bone, *supra* note 21, at 927–30 (noting flexibility and discretion in rules versus strictness of statutes).

50. James Wm. Moore & Helen I. Bendix, *Congress, Evidence and Rulemaking*, 84 *YALE L.J.* 1, 38 (1974) (noting that Congress lacks staff and is unlikely to duplicate Judicial Conference committees because most members are unpaid and may be unwilling to work for Congress; and also noting that Judicial Conference affords premium time for scholarly examination of rules); Pound, *supra* note 12, at 602.

51. A. Leo Levin & Anthony G. Amsterdam, *Legislative Control Over Judicial Rule-Making: A Problem in Constitutional Revision*, 107 *U. PA. L. REV.* 1, 12–14 (1958) (claiming that concerns about courts not exercising rulemaking power, lack of public hearings and techniques, and concern about role of Supreme Court have all been quelled by history); Moore, *supra* note 35, at 1062–64 (1992) (discussing Judicial Improvements Act); Mullenix, *supra* note 40, at 832 (discussing impact of Judicial Improvements and Access to Justice Act).

52. Moore & Bendix, *supra* note 50, at 1, 11 (“As finally promulgated by the Court, the rules are well conceived and structured, neither radical nor conservative, and thoroughly professional.”); Hazard, *supra* note 47, at 1294 (“A quite undemocratic legislative process has proven capable of producing a very satisfactory product. Correlatively, the archetype of institutionalized democracy—the legislature—has mishandled the same work when it has gotten it.”); John H. Wigmore, *A Critique of the Federal Court Rules Draft—Three Larger Aspects of the Work Which Require Further Consideration*, 22 *A.B.A. J.* 811, 811–12 (1936) (discussing American Bar Association’s long-time advocacy of judiciary writing procedural rules).

53. *See generally* WEINSTEIN, *supra* note 12, at 12–21 (noting expansion of government and growing power of judiciary).

whether the federal rules were made within the authority granted by the REA.⁵⁴ In *Mississippi Publishing Corp. v. Murphree*,⁵⁵ the Supreme Court held that parties can contest the validity of rules made under the REA.⁵⁶ It later established a presumption of validity for all of the federal rules.⁵⁷ This analysis implies that the REA is constitutionally valid.⁵⁸

Other precedents discussing rulemaking power likely foreclose contests to the constitutionality of the bulk of the REA. In *Hanna v. Plumer*,⁵⁹ the Court referenced Congress's power to make rules of practice and pleading in federal courts.⁶⁰ In *Sibbach v. Wilson & Co.*,⁶¹ the Court held that Congress can regulate federal court procedure and can delegate this authority to federal courts.⁶² Later, in *Mistretta v. United States*,⁶³ the Court suggested in dicta that this delegation of power was constitutional and that Congress has the authority to create entities like the Judicial Conference.⁶⁴

Although these cases suggest that the REA's delegation of power is constitutional, no court has ever justified the process against all potential separation of powers challenges. To remain constitutional, the rules must survive more than a non-delegation challenge. Further, courts and scholars alike have overlooked rudi-

54. Ralph U. Whitten, *Separation of Powers Restrictions on Judicial Rulemaking: A Case Study of Federal Rule 4*, 40 ME. L. REV. 41, 44-45 (1988).

55. 326 U.S. 438 (1946).

56. *Id.* (contesting Federal Rule of Civil Procedure 4(f)); see also *Grand Bahama Petroleum Co., Ltd. v. Canadian Transp. Agencies, Ltd.*, 450 F. Supp. 447, 449-50 (W.D. Wash., 1978) (discussing constitutionality of Supplemental Rule B(1) of Federal Rules of Criminal Procedure).

57. *Burlington N. R.R. v. Woods*, 480 U.S. 1, 6-8 (1987) (noting that presumption stemmed from approval by advisory committee, Supreme Court, and review by Congress); see *Mississippi Pub. Corp. v. Murphree*, 326 U.S. 438, 446 (1946) (noting that meaning of rules given by Advisory Committee warrants special weight). But see *Hanna v. Plumer*, 380 U.S. 460, 476 (Harlan, J., concurring) (claiming that integrity of federal rules is absolute because of availability of review by advisory committee, judicial conference, and Court). There is, however, no indication that this presumption applies to local rules, which neither the Supreme Court nor Congress reviews.

58. For examples of cases challenging the constitutionality of local rules and not referencing a presumption of validity, see *Colgrove v. Battin*, 413 U.S. 149 (1973), *Chi. Council of Lawyers v. Bauer*, 522 F.2d 242 (7th Cir. 1975), and *United States v. Furey*, 514 F.2d 1098 (2d Cir. 1975).

59. 380 U.S. 460 (1965).

60. *Id.* at 471-72.

61. 312 U.S. 1 (1941).

62. *Id.* at 9-10.

63. 488 U.S. 361 (1989).

64. *Id.* at 387-89.

mentary decisions and classifications about who or what makes the federal rules and under what authority. The answers to these issues are prerequisites to a separation of powers analysis.

II. WHO MAKES THE RULES?

A. *Background*

Depending on who makes the rules and within which branch they operate, different constitutional restraints, requirements, and concerns apply. Thus, knowing which branch asserts rulemaking power is imperative to a separation of powers analysis. Although this Note agrees with virtually all other scholarship in determining that the judicial branch makes the rules,⁶⁵ it takes the extra step of exploring the basis for this conclusion. This Note concludes, based on an analysis of statutory text and Supreme Court opinions, that the power to make the federal rules lies with the Supreme Court, acting as the head the judicial branch.

The first question concerning the federal rules is whether the Judicial Conference or the Supreme Court makes the rules. Under the REA, the Supreme Court may promulgate rules of practice and procedure. This suggests that the power belongs to the Supreme Court; but the Court has suggested that, in practice, the Judicial Conference makes the rules.

The Court has repeatedly emphasized the central role the Judicial Conference plays in the rulemaking process. In *Murphree*,⁶⁶ the Court noted that although it promulgates the rules, lower courts should give substantial weight to the Advisory Committee's construction of the rules.⁶⁷ Bolstering the reasoning behind such a claim is the Chief Justice's cover letter to Congress in the 1993 transmission of suggested rule amendments: "While the Court is satisfied that the required procedures have been observed, this transmittal does not necessarily indicate that the Court itself would have proposed these amendments in the form submitted."⁶⁸ In the same message, Justice White, although noting that the Court reviews the proposed rules thoroughly and does not "rubber stamp"

65. Universally, scholars and courts assume that the judicial branch creates all of the federal rules, barring an explicit statute on point. *See infra* notes 72–75 and accompanying text.

66. 326 U.S. 438 (1946).

67. *Id.* at 444.

68. 146 F.R.D. 401, 403 (1993).

the proposals,⁶⁹ stated that Congress could not have intended the Supreme Court to be a full layer of review because it would take too much of the Court's time, and the Judicial Conference is far better equipped to make decisions about the rules.⁷⁰

Despite acknowledging the large role the Judicial Conference plays, the Court has consistently maintained that the rulemaking power resides with the Court. In *Sibbach*, the Court explained that "Congress has undoubted power to regulate the practice and procedure of federal courts, and may exercise that power by delegating to this or other federal courts authority to make rules"⁷¹ The *Mistretta* Court noted, "Pursuant to this power to delegate rulemaking authority to the Judicial Branch, Congress expressly has authorized this Court to establish rules"⁷² In both cases the Court established explicitly that the authority had been delegated to the Court.

Statutory language supports this position. In *Mistretta*, the Court affirmed its earlier holding that the REA "conferred upon the Judiciary the power to promulgate federal rules of civil procedure,"⁷³ citing to § 2072 (granting the Supreme Court rulemaking power) and not to §§ 2073–75 (discussing the process of rulemaking via the Judicial Conference). The statutory text supports the

69. Justice White cited some of the many dissents over history and one instance where the Court refused to transmit a proposal. *Id.* at 502, 505; *see also, e.g.*, 368 U.S. 1011, 1012–14 (1961) (Douglas, J., dissenting) (contesting one proposed rule as contrary to congressional policy); 383 U.S. 1029, 1032, 1034 (1966) (Black, J., dissenting) (arguing that some of the Federal Rules of Criminal Procedure border on being unconstitutional); 461 U.S. 1117, 1119 (1982) (O'Connor, J., dissenting) (disagreeing with ambiguous language of one rule). *But see* *Krugler v. Helfant*, 421 U.S. 1019, 1022 (1975) (Douglas, J., dissenting) (arguing that the court is acting as rubber stamp).

70. 146 F.R.D. 401, 505 (1993) ("Hence, as I have seen the Court's role over the years, it is to transmit the Judicial Conference's recommendations without change and without careful study, as long as there is no suggestion that the committee system has not operated with integrity."). Justice White also mentioned that on multiple occasions he had serious questions about the wisdom of some amendments, yet voted to pass them anyway. *Id.* at 505; *cf.* 383 U.S. 1029, 1032 (1966) (Black, J., dissenting) ("Whether by this transmittal the individual members of the Court who voted to transmit the rules intended to express approval of the varied policy decisions the rules embody I am not sure. I am reasonably certain, however, that the Court's transmittal does not carry with it a decision that the amended rules are all constitutional. For such a decision would be the equivalent of an advisory opinion which, I assume the Court would unanimously agree, we are without constitutional power to give.").

71. *Sibbach v. Wilson & Co.*, 312 U.S. 1, 24 (1941) (emphasis added) (citations omitted).

72. *Mistretta v. United States*, 488 U.S. 361, 387 (1989).

73. *Id.* at 383 (citing 28 U.S.C. § 2072).

Court's conclusion because the Judicial Conference can only "recommend" rules to the Supreme Court.⁷⁴ Further, there is no requirement that the Supreme Court must rely upon or obtain the consent of the Judicial Conference; it is an independent grant of rulemaking authority.⁷⁵

Thus, based on statutory text and precedent, the Judicial Conference is a tool Congress supplied to the Supreme Court to exercise the Court's powers under § 2072. History suggests that this was necessary; the Supreme Court often failed to act under its independent grant of rulemaking authority.⁷⁶ A body charged with continually evaluating the rules would likely prompt the Supreme Court to act.⁷⁷ Therefore, Justice White is likely correct that, in practice, the Judicial Conference, and particularly its committees, plays the most substantive role in the creation of the rules, but, as a matter of law, the power of federal rulemaking rests with the Supreme Court.⁷⁸

B. Fitting the Rule-Makers Into a Branch of Government

Having decided who makes the rules, the second inquiry requires determining within which branch the Supreme Court acts when it exerts its rulemaking power.⁷⁹ The rulemaking process does not permit a claim that the executive branch exerts rulemaking power.⁸⁰ Aside from the presidential power to appoint federal judges and the Justices of the Supreme Court, and the existence of Department of Justice representatives on the Judicial Conference, the executive branch has no control over the appointments and tenure of members of the Judicial Conference, nor any control over the content of proposals or their approval. At best, the executive has some influence, but certainly no actual control over the process.

One could more plausibly argue that the legislature exerts federal rulemaking power. An advocate of this stance would argue that

74. 28 U.S.C. § 2073 (1994).

75. See *supra* notes 67–69 and accompanying text (giving examples of Court being proactive or rejecting or modifying conference's recommendations).

76. See Eli J. Warach, Note, *The Rule-Making Power: Subject to Law?*, 5 RUTGERS L. REV. 376, 388–90 (1951).

77. *Id.*

78. 374 U.S. 861, 869–70 (1963) (Black, J. & Douglas, J., dissenting) (recommending giving power to Judicial Conference but acknowledging that currently the Supreme Court makes rules).

79. This Note assumes that, under the formalist view, power must rest with and be exerted by one branch.

80. Executive control over agencies and their internal operating procedure is beyond the scope of this Note.

the REA drafts the Justices and other members of the federal judiciary into a legislative agency or committee. As far-fetched as this may seem, there is support for the point. First, many non-Article III personnel sit on the rulemaking committees.⁸¹ Second, at least one court has described the Supreme Court as acting in an administrative, non-judicial capacity when it evaluates the proposed rules.⁸² Similarly, the Supreme Court has described a state supreme court as acting in a legislative capacity when prescribing a code of ethics.⁸³ Third, the Supreme Court has labeled its control over the federal rulemaking process as control of an “extrajudicial” activity.⁸⁴

These arguments, however, do not establish whether the legislature or the judiciary exerts authority. Rather, they prompt questions about whether Congress can delegate non-judicial responsibilities to the federal courts and whether it can create an independent agency, composed of Article III and non-Article III members, within the judiciary. The Court answered both of these questions in the affirmative.⁸⁵ Therefore, neither the exertion of non-judicial powers by federal judges and the Supreme Court, nor the mixed membership and independent agency status of the Judicial Conference, prohibits placement in the judiciary.⁸⁶

Ultimately, the argument that federal rulemaking authority rests with the legislative branch turns on the role of legislative inaction. The Supreme Court must present all of its proposed rules to Congress, which could intervene in the process and reject the rule.⁸⁷ But just as a president’s vetoing a bill rather than signing it

81. See BROWN, *supra* note 29, at 9–12; U.S. Courts, <http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/RulemakingProcess.aspx> (last visited January 17, 2011).

82. *Grand Bahama Petroleum Co. v. Canadian Transp. Agencies, Ltd.*, 450 F.Supp. 447, 449–50 (W.D. Wash., 1978).

83. *Supreme Court of Va. v. Consumers Union, Inc.*, 446 U.S. 719, 722–27, 734 (1980) (holding that members of Virginia Supreme Court had legislative immunity when acting in their legislative capacity by disciplining attorneys and prescribing code of ethics).

84. *Mistretta v. United States*, 488 U.S. 361, 389–90 (1989); see *infra* Part III.C.

85. *Mistretta*, 488 U.S. 361 (1989). The case concerned the constitutionality of the United States Sentencing Commission, a body composed of some federal judges and some non-Article III appointees of the President that Congress placed explicitly in the judicial branch. *Id.* at 368–69, 385–86.

86. See Stephen C. Garvito, *Separation of Powers and the Federal Rules of Evidence*, 26 HASTINGS L.J. 1059, 1078–79 (1974) (arguing that Judicial Conference can give advisory opinions because it is not a strictly judicial organ, is not sitting as a court of law, and is not a high court.).

87. 28 U.S.C. § 331 (2008).

does not mean he makes the law, Congress's authority to veto the proposed rules does not mean it makes the rules.

In the seminal *Sibbach* case, the Court was clear that Congress had delegated rulemaking authority to the judiciary: "Congress has undoubted power to regulate the practice and procedure of federal courts, and may exercise that power by delegating to this or other federal courts authority to make rules not inconsistent with the statutes or Constitution of the United States."⁸⁸ The Court continued: "That no adverse action was taken by Congress indicates, at least, that no transgression of legislative policy was found."⁸⁹ Thus, the majority placed emphasis on Congress' reaction, or lack thereof, to the rules. Years later, the Court reinforced this stance in *Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*,⁹⁰ stating that "[t]he Federal Rules of Civil Procedure are not enacted by Congress, but Congress participates in the rulemaking process."⁹¹ There, the Court also held that a rule passed through such a process will only fail if the advisory committee, the Supreme Court, and Congress erred, thus establishing a strong presumption of validity for most federal rules.⁹² Although Congress participates, as Justice Frankfurter noted in his *Sibbach* dissent, "Plainly, the Rules are not acts of Congress and cannot be treated as such."⁹³

Therefore, the specific language in *Sibbach* and *Business Guides* establishes unmistakably that the judicial branch exerts rulemaking power under the REA, whereas the language about Congress's role refers to whether or not the rule at issue conflicts with congressional policy.⁹⁴

88. 312 U.S. 1, 3 (1941).

89. *Id.* at 6.

90. 498 U.S. 533, 552 (1991) (holding that Rule 11 of Federal Rules of Civil Procedure is not fee-shifting statute).

91. *Id.* at 552 (citation omitted) (internal quotation marks omitted).

92. *Id.* at 552 (citation omitted); see *Burlington N. R.R. Co. v. Woods*, 480 U.S. 1, 6-8 (1987) (granting presumptive constitutional validity to all federal rules because advisory committee and Supreme Court approve them and Congress reviews them); *Hanna v. Plumer*, 380 U.S. 460, 476 (1965) (Harlan, J., concurring) ("Since the members of the Advisory Committee, the Judicial Conference, and this Court who formulated the Federal Rules are presumably reasonable men, it follows that the integrity of the Federal Rules is absolute.").

93. *Sibbach v. Wilson & Co.*, 312 U.S. 1, 6 (1941). Frankfurter continued, "Having due regard to the mechanics of legislation and the practical conditions surrounding the business of Congress when the rules were submitted, to draw any inference of tacit approval from non-action by Congress is to appeal to unreality." *Id.*

94. Nonetheless, the Court's repeated emphasis on the role of Congress in the process and the presumption of validity it correspondingly granted to the rules

III. UNDER WHAT AUTHORITY DOES THE JUDICIAL BRANCH MAKE THE RULES?

A. *Background*

Once it is established that the judiciary makes the rules, the next separation of powers inquiry seeks to determine under what authority the judicial branch makes rules. The text of the Constitution details the sources of authority for all branches of the federal government. Congress has four constitutional sources of power to regulate the federal courts. Congress may “establish . . . uniform Laws on the subject of Bankruptcies throughout the United States,”⁹⁵ “constitute Tribunals inferior to the supreme Court,”⁹⁶ and “make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers.”⁹⁷ The Constitution only creates one court, the United States Supreme Court.⁹⁸ Congress’s fourth power is the power to create every other federal court and control every detail about those courts, such as location, the number of judges, and the standard of review.⁹⁹ Congress controls the jurisdiction of these lower federal courts¹⁰⁰ and the appellate jurisdiction of the Supreme Court.¹⁰¹

In contrast, federal courts have little explicit constitutional power beyond the phrase, “The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”¹⁰² Furthermore, this judicial power only extends to cases or controver-

is reminiscent of Justice Jackson’s approach to separation of powers in *Youngstown*. See *Mistretta v. United States*, 488 U.S. 361, 386 (1989) (referencing 343 U.S. 549, 638–55 (1952) (Jackson, J., concurring)).

95. U.S. CONST. art I, § 8.

96. *Id.*

97. *Id.*

98. *Id.* art III, § 1.

99. Gary Lawson, *Controlling Precedent: Congressional Regulation of Judicial Decision-Making*, 18 CONST. COMMENT. 191, 200–201 (2001).

100. *Turner v. Bank of N. Am.*, 4 U.S. (4 Dall.) 8 (1799) (holding that Congress must grant jurisdiction for federal court to hear case).

101. See, e.g., *Ex parte McCordle*, 74 U.S. 506 (1868) (holding that Congress’s repealing of court jurisdiction over pending habeas case deprived court of jurisdiction to hear case).

102. U.S. CONST. art. III, § 1; see *N. Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 64 (1982) (holding that historical and constitutional reasoning allows some judicial power to be vested in legislative branch, thus allowing very limited types of Article I courts to have Article III judicial power).

sies,¹⁰³ which limits the judicial power of Article III courts to powers associated with the adversarial process.¹⁰⁴ There is thus a strong concern with advisory opinions in the current process of promulgating rules for two reasons. First, the Supreme Court approves the rules submitted via the Judicial Conference and thus potentially evaluates their constitutionality outside of a case or controversy. Second, during the rulemaking process federal courts make rules applicable to cases generally and not as applied to a specific conflict between particular parties.¹⁰⁵

B. Federal Courts Have Statutory Authority to Create Procedural Rules

The first premise of a statutory authority argument—the notion that Congress has delegated the power to make rules to the federal courts—is that Congress has the power to make the rules governing federal courts. This is because Congress cannot delegate to the judiciary power that it does not have.¹⁰⁶ The Court has consistently recognized this premise. In the oft-cited 1825 case of *Way-*

103. U.S. CONST. art III, § 2; *see* *Muskrat v. United States*, 219 U.S. 346, 356 (1911) (“As we have already seen, by the express terms of the Constitution, the exercise of the judicial power is limited to ‘cases’ and ‘controversies.’ Beyond this it does not extend, and unless it is asserted in a case or controversy within the meaning of the Constitution, the power to exercise it is nowhere conferred.”); *Flast v. Cohen*, 392 U.S. 83, 95–96, 99 (1967).

104. *See Flast*, 392 U.S. at 96 (“The oldest and most consistent thread in the federal law of justiciability is that the federal courts will not give advisory opinions.”). Even after deciding if a rule is valid constitutionally, there may be additional inquiries into whether or not it applies to a particular case, hence the *Erie* doctrine. *See* 19 ALLAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE, § 4501 (3d. ed. 2008). For explanations on the constitutional ban on advisory opinions, *see* WEINSTEIN, *supra* note 12, at 50–55; Garvito, *supra* note 86, at 1076.

105. “Whether by this transmittal the individual members of the Court who voted to transmit the rules intended to express approval of the varied policy decisions the rules embody I am not sure. I am reasonably certain, however, that the Court’s transmittal does not carry with it a decision that the amended rules are all constitutional. For such a decision would be the equivalent of an advisory opinion which, I assume the Court would unanimously agree, we are without constitutional power to give.” 383 U.S. 1029, 1032 (1966) (Black, J., dissenting); Jack B. Weinstein, *Rendering Advisory Opinions—Do We, Should We?*, 54 JUDICATURE 140, 140 (1970).

106. “The rulemaking power delegated by Congress to the Supreme Court is limited in scope to those powers that the Congress could have rightfully exercised.” *Grand Bahama Petroleum Co. v. Canadian Transp. Agencies, Ltd.*, 450 F.Supp. 447, 450 (W.D. Wash. 1978). *See also* Whitten, *supra* note 54, at 69 (arguing that Congress has control exclusively even if it does not act). Additionally, even if Congress has a power, there may be constitutional barriers to it delegating that power to another branch.

man v. Southard,¹⁰⁷ the Court established that Congress has the power to make laws regarding the execution of judgments by the judiciary, explaining “[t]hat a power to make laws for carrying into execution all the judgments which the judicial department has power to pronounce, is expressly conferred by [the Necessary and Proper Clause], seems to be one of those plain propositions which reasoning cannot render plainer.”¹⁰⁸ Ten years later in 1835, the Court reinforced the view that Congress has the power to regulate the jurisdictional and rulemaking authority of the federal courts by holding that Congress has the power to create inferior courts “[a]nd that the power to ordain and establish, carries with it the power to prescribe and regulate the modes of proceeding in such courts, admits of as little doubt.”¹⁰⁹ Thus, the power to create the courts includes the power to regulate their procedure. That same year, the Court upheld the delegation of procedural rulemaking authority to the federal courts and the Supreme Court by the Process Acts of 1789.¹¹⁰ Later, in *Sibbach*, the Court wrote that “Congress has the power to regulate federal practice and procedure, and may delegate to the courts power to make rules not inconsistent with the Constitution or acts of Congress.”¹¹¹ In 1992, the Court reaffirmed this position.¹¹² Neither the Supreme Court nor any federal court has challenged Congress’s authority over rulemaking or

107. 23 U.S. (10 Wheat.) 1 (1825). The Court continued, “The courts, for example, may make rules, directing the returning of writs and processes, the filing of declarations and other pleadings, and other things of the same description. It will not be contended that these things might not be done by the legislature, without the intervention of the courts; yet it is not alleged that the power may not be conferred on the judicial department.” *Id.* at 43.

108. *Id.* at 22.

109. *Livingston v. Story*, 34 U.S. (13 Pet.) 632, 656 (1835).

110. *Beers v. Haughton*, 34 U.S. (9 Pet.) 329, 360 (1835).

111. *Sibbach v. Wilson & Co.*, 312 U.S. 1, 9 (1941). Later, in *Hanna*, the Court wrote,

[T]he constitutional provision for the federal court system (augmented by the Necessary and Proper Clause) carries with it congressional power to make rules governing the practice and pleading in those courts, which in turn includes a power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either.

Hanna v. Plumer, 380 U.S. 460, 471–72 (1965).

112. See *Willy v. Coastal Corp.*, 503 U.S. 131, 136 (1992) (“Congress, acting pursuant to its authority to make all laws ‘necessary and proper’ to [the] establishment [of the lower federal courts], also may enact laws regulating the conduct of those courts and the means by which their judgments are enforced.”).

its power to modify this process,¹¹³ and at least one court has pointed to the delegation theory as the locus of power for Congress to give or rescind the authority of the courts to make the rules or override the rules by statute.¹¹⁴

The second premise of a statutory authority argument is that the Supreme Court has relied upon the congressional delegation via the REA as the source of its power to promulgate the rules. As the Court explained in *Hanna*,

Erie and its offspring cast no doubt on the long-recognized power of Congress to prescribe housekeeping rules for federal courts To hold that a Federal Rule of Civil Procedure must cease to function whenever it alters the mode of enforcing state-created rights would be to disembowel either the Constitution's grant of power over federal procedure or Congress' attempt to exercise that power in the Enabling Act.¹¹⁵

The unmistakable language of the Supreme Court's holdings throughout American history establishes that the Court has and does promulgate the federal rules under the authority delegated to it by the REA. Indeed, "the [notion that] Federal courts have power, or may be empowered, to make rules of procedure for the conduct of litigation has been settled for a century."¹¹⁶ Accordingly, as the preeminent treatise on civil procedure declares,

The whole history of federal judicial procedure, the submission of the Federal Rules of Civil Procedure and the amendments thereto to Congress in accordance with the Rules Enabling Act of 1934, and the decisions of the Supreme Court, all are premised on the authority of Congress to make procedural rules and to delegate that power to the Supreme Court.¹¹⁷

113. WEINSTEIN, *supra* note 12, at 104; *see also* Whitten, *supra* note 54, at 54–56 (arguing that text and history of Article III courts demonstrates that Congress, exclusively, has controlled makeup of federal courts); Richard S. Ka, *The Rule-Making Authority and Separation of Powers in Connecticut*, 8 CONN. L. REV. 1, 41 (1975) (critiquing Connecticut Supreme Court decision and favoring legislative power over judicial supremacy because the latter is unchecked power).

114. WEINSTEIN, *supra* note 12, at 134–35 (noting that Court did so with evidentiary privileges).

115. *Hanna*, 380 U.S. at 473–74; *see also* BROWN, *supra* note 29, at 39.

116. 30 F.R.D. 73, 101 (1962). Most scholars conclude that the judiciary creates the federal rules under the delegated authority of the REA. *See, e.g.*, Bone, *supra* note 21, at 889–97; Yeazell, *supra* note 12, at 232–35, 243–44.

117. WRIGHT & MILLER, *supra* note 37, at, § 1001. As one submission of proposed federal rules to Congress noted, "[T]he [notion that] Federal courts have power, or may be empowered, to make rules of procedure for the conduct of litiga-

C. Federal Courts Rely, in Part, on Inherent Authority to Create Rules

The statutory authority argument fails to address two crucial scenarios. First, it fails to account for court rules outside the bounds of, or filling the gaps of, the federal rules. Second, there may exist constitutional authority to make some or all of the rules, but courts have not had to address this issue because of the REA's wide grant of statutory authority¹¹⁸ and the doctrine of constitutional avoidance.¹¹⁹ Federal and state courts have asserted an "inherent authority" to create rules in both of these scenarios.¹²⁰ In fact, despite 28 U.S.C. § 2071(a) (1988), granting the Supreme Court and all federal courts authority to prescribe rules of conduct for themselves, federal courts have chosen, in select situations, to exert an alternative inherent power to make the rules.¹²¹

tion has been settled for a century." 30 F.R.D. 73, 101. One of the standing committee's preliminary reports on the issuance of the Federal Rules of Evidence asserted that the Supreme Court had power to promulgate those rules because it had authority under the REA, had rulemaking power for over one-hundred years, evidentiary rules are procedural and not substantive, and portions of the Federal Rules of Civil and Criminal Procedure that had already been passed concerned evidence. *Id.* at 100–03.

118. See Gertner, *supra* note 46, at 44–48 (discussing redundancy of some state enabling statutes with inherent power, but noting that it may function to stimulate court use of procedural power).

119. See *Business Guides, Inc. v. Chromatic Comms. Enters.*, 498 U.S. 533, 564–68 (1991) (Kennedy, J., dissenting) (holding that Rule 11 of Federal Rules of Civil Procedure is not fee-shifting statute) ("The rules we prescribe have a statutory authorization and need not always track the inherent authority of the federal courts. At the same time, the further our rules depart from our traditional practices, the more troubling the question of our rulemaking authority . . . Congress desired the courts to regulate 'practice and procedure' an area where we have expertise and some degree of inherent authority . . . the construction of Rule 11 adopted today extends our role far beyond its traditional and accepted boundaries."); see also *Bank of the U.S. v. Halstead*, 23 U.S. (10 Wheat) 51, 64 (1825) (holding that all courts need not rely on their inherent power to command officers to comply with their duty because statutory authority exists).

120. See *infra* note 162 and accompanying text; *Eash v. Riggins Trucking, Inc.*, 757 F.2d 557 (3d Cir. 1985); see also Arthur J. Goldberg, *The Supreme Court, Congress, and Rules of Evidence*, 5 SETON HALL L. REV. 667, 669 (1973) (describing how then-retired Justice Goldberg argued that portions of the rules of evidence were beyond Court's "inherent and delegated authority," thus acknowledging existence of inherent authority).

121. One explanation for this may be that the grant of authority to district courts under § 2071 applies to rules made by the entire district court and thus does not bestow any authority upon individual judges to create rules. Whether a district court can create a rule delegating such power to its judges is an interesting question. See 28 U.S.C. § 2071(a) (1988).

There are two absolutist positions on rulemaking authority. The first position asserts that courts have inherent authority to control all of their own procedure, and the legislature cannot interfere or override this prerogative.¹²² Dean Roscoe Pound, the main proponent of this position, based this conclusion on primarily historical criteria, noting the judicial control of procedure in the United Kingdom and colonies.¹²³ Others have cited the freedom the legislature and executive enjoy in shaping their own procedure.¹²⁴ For example, John Wigmore asserted that courts may regulate their own procedure because of the limited enumerated powers of Congress, the broad grant of authority to courts under the Judicial Power Clause, and the practical advantages of efficiency and neutrality that courts have over the legislature.¹²⁵ For similar reasons, many state courts have reached the same conclusion under their respective state constitutions.¹²⁶ Yet, regardless of its merits, no federal court has adopted this position.¹²⁷

The other absolutist position is that Congress can control every aspect of federal courts by virtue of both its authority to create the lower federal courts and its powers under the Necessary and Proper

122. Pound, *supra* note 12, at 600–01 (“In truth procedure of courts is something that belongs to the courts rather than to the legislature, whether we look at the subject analytically or historically. It is a misfortune that the courts ever gave it up.”).

123. *Id.* at 60. See also Goldberg, *supra* note 120, at 668–70. But see Whitten, *supra* note 54, at 53–54 (noting limitations on court power over procedure in the Judiciary and Process Acts and explaining why history is not conclusive); Dan Byron Dobbs, *Judicial Regulation of Procedure*, 9 ARK. L. REV. 146, 147–49 (1954) (arguing that inherent judicial power over procedure limited historically to trivial matters and subject to legislative override).

124. See Pound, *supra* note 12, at 601; Josiah Marvel, *The Rule-Making Power of the Courts*, 12 J. AM. JUD. SOC. 55, 55–57 (1928).

125. John H. Wigmore, Editorial Note, *All Legislative Rules For Judiciary Procedure are Void Constitutionally*, 23 ILL. L. REV. 276, 277–78 (1928).

126. See Gertner, *supra* note 46, at 37–41 (listing state court assertions of inherent power); Charles W. Joiner & Oscar J. Miller, *Rules of Practice and Procedure: A Study of Judicial Rule Making*, 55 MICH. L. REV. 623, 624–25 (1976) (surveying state enabling statutes and state court assertions of inherent authority); Levin & Amsterdam, *supra* note 51, at 5–6 (detailing state constitutional grants of rulemaking power to high courts); cf. Joiner & Miller, *supra*, at 626 (concluding that Michigan Supreme Court views inherent and express constitutional grants of powers over procedure as two different sources of power).

127. Its only textual basis is that the term “judicial power” encompasses all procedural rules. Originalists are free to debate its historical meaning, but no court has concluded as such and a historical analysis is beyond the scope of this Note.

Clause.¹²⁸ According to this view, Congress has the ability to control how courts administer the substantive rights and laws it creates.¹²⁹ Although Congress has some authority to regulate court procedure, this absolutist stance is wrong because the text of the Judicial Power Clause specifies that the Supreme Court and all inferior courts, even though created by Congress, have judicial power.¹³⁰ Thus, if judicial power covers some or all procedural rulemaking powers, then courts have a textual basis of rulemaking authority that Congress cannot strip away.

Courts have adopted neither of these two absolutist stances and instead have used the phrase “inherent authority” in multiple contexts.¹³¹ The term itself is, however, quite misleading because “[n]either Congress nor the federal courts can, under the guise of formulating rules of decision for federal courts, fashion rules which are not supported by a grant of federal authority contained in Article I or some other section of the constitution.”¹³² However, as will be explained below, there is a textual basis for the assertion of such inherent authority, suggesting that there is nothing inherent about it.

The Third Circuit thoroughly described the history of assertions of inherent powers by federal courts in *Eash v. Riggins Trucking, Inc.*¹³³ The *Eash* court explained that the scope and definition of inherent power is unclear because courts rarely assert it and thus rarely explain it.¹³⁴ Courts use it as a generic term for three differ-

128. See generally James S. Liebman & William F. Ryan, “Some Effectual Power”: the Quantity and Quality of Decisionmaking Required of Article III Courts, 98 COLUM. L. REV. 696, 714–19 (1998) (discussing Madisonian Compromise).

129. *N. Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 84 n.35 (1982) (“The interaction between the Legislative and Judicial Branches is at its height where courts are adjudicating rights wholly of Congress’ creation. Thus where Congress creates a substantive right, pursuant to one of its broad powers to make laws, Congress may have something to say about the proper manner of adjudicating that right.”).

130. U.S. CONST. art. III, §1 (“The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”).

131. See Tyrrell Williams, *The Source of Authority For Rules of Court Affecting Procedure*, 22 WASH. U.L.Q. 459, 473–74 (1937).

132. *Hanna v. Plumer*, 380 U.S. 460, 471 (1965); see also *Epstein v. State*, 128 N.E. 353 (Ind. 1920) (“This court is a constitutional court, and as such receives its essential and inherent powers, rights, and jurisdiction from the Constitution, and not from the legislature, and it has power to prescribe rules for its own direct government independent of legislative enactment.”).

133. 757 F.2d 557 (3d Cir. 1985).

134. *Id.*

ent types of power.¹³⁵ First, Congress's creation of a lower federal court immediately imbues it with Article III judicial power and authorizes courts to act in contradiction to legislative enactments:

This use of inherent power, which might be termed irreducible inherent authority, encompasses an extremely narrow range of authority involving activity so fundamental to the essence of a court as a constitutional tribunal that to divest the court of absolute command within this sphere is really to render practically meaningless the terms 'court' and 'judicial power.'¹³⁶

Although the boundaries of this power are unclear, the Court listed several examples, including control over the structure of court opinions, control over the docket, control over the implementation of a judgment, and the disqualification of judges.¹³⁷

The second type of inherent power is described as being either "implied from strict functional necessity" or "essential to the administration of justice."¹³⁸ The most common form of this power is the power to issue a contempt sanction.¹³⁹ Because it arises from necessity, even though it may be subject to congressional regulation, Congress can neither eliminate it nor render it inoperative.¹⁴⁰

The third form of inherent power is the ability of a court to equip itself with certain tools to adjudicate cases.¹⁴¹ Because these tools are useful but not necessary, the power exists only in the absence of contrary legislation.¹⁴² Examples of this power include the ability to appoint an auditor, to certify issues of state law to state courts, to grant bail in a situation not covered by statute, to dismiss a case under the doctrine of forum non conveniens, and a general power to dismiss cases.¹⁴³ The court distinguished rules formed under inherent power from local rules and upheld the constitutionality of inherent powers.¹⁴⁴

135. *Id.* at 561–62 (3d. Cir. 1985).

136. *Id.* at 562.

137. *Id.* at 562 n.7 (citing multiple state court cases).

138. *Id.* at 562–63; *see also* Dobbs, *supra* note 123, at 148–150 (arguing that inherent power includes what is necessary to administer courts).

139. *Eash*, 757 F.2d at 563.

140. *Id.*

141. The court noted that this power may stem from the equity powers of chancery courts. *Id.* at 563–64.

142. *Id.*

143. *Id.* at 564.

144. The court reached this conclusion despite counter-arguments referencing *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579 (1952), and the rarity of federal common law. *Eash*, 757 F.2d at 566, 568–69.

A careful review of case law proves that federal courts have never denied the existence of inherent authority: “That the Federal courts *have power, or may be empowered,* to make rules of procedure for the conduct of litigation has been settled for a century.”¹⁴⁵ The number of assertions of inherent power by federal courts led one scholar to note the following: “The only fair question is not whether inherent power exists at all, but rather, what is the scope of such power?”¹⁴⁶ Nonetheless, neither all assertions of inherent power, nor all the categories listed by the *Eash* court, survives a separation of powers analysis. This Note considers each of these three categories to determine if any have textual or precedential backing.

*D. Inherent Power to Ensure the Fair and Accurate
Adjudication of Cases*

Though the theory of separation of powers stems from three constitutional clauses, including the Judicial Power Clause, neither courts nor scholars have articulated extensively the meaning and scope of the phrase “judicial power.” Yet, if under the doctrine of separation of powers, the legislature writes the laws, the executive enforces the laws, and the judiciary applies the laws, then the Judicial Power Clause must include the power to adjudicate cases fairly and constitutionally.¹⁴⁷ If the judiciary cannot fairly and constitutionally apply the law, it cannot fulfill its function.

Because some procedural rules are necessary to adjudicate cases, the first form of inherent power is the power to make rules essential to the application of laws.¹⁴⁸ This power is “implied from strict functional necessity” and is “essential to the administration of justice.”¹⁴⁹ This Note contends that the adjudicatory power at the

145. 30 F.R.D. 73, 101 (1962) (emphasis added).

146. Joiner & Miller, *supra* note 126, at 626.

147. *See* *Muskrat v. United States*, 219 U.S. 346, 356 (1911) (“Judicial power . . . is the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision.”); *State v. Clemente*, 353 A.2d 723, 727–28 (Conn. 1974) (finding that core of judicial power is rendering judgment); Lawson, *supra* note 99, at 202–03 (noting that Founders did not give “judicial power” much debate, but that such power includes “the power to decide cases in accordance with governing law”).

148. This power is analogous to corporation law’s agency theory. The principal (Congress) has given its agent (federal courts) a duty (to adjudicate cases under the laws provided). The principal empowered the courts, as agents, to take all necessary steps to accomplish the duty until the principal changes or retracts the duty or specifies how to accomplish said duty. *See* RESTATEMENT (THIRD) AGENCY § 2.02 (2006) (defining agent’s authority).

149. *Eash*, 757 F.2d at 562–63; *see also* Mullenix, *supra* note 7, at 1320–21 (noting that inherent powers include those necessary to administer justice); *cf.* *United*

heart of the Judicial Power Clause grants an inherent power to create rules necessary for the fair and constitutional adjudication of cases.

The Supreme Court's first official act was procedural, not substantive in nature: it created its seal and established requirements for attorneys who could appear before it.¹⁵⁰ Without such power, the Court could not decide cases as no one could argue before it. But the Court still had a long way to go; the absence of other necessary procedural rules prohibited adjudication. Basic court procedure like the submission of briefs and the procedure for oral argument remained unspecified. Thus, in *Hayburn's Case*,¹⁵¹ the Court concluded by declaring that "[The Court] considers the practice of the courts of King's Bench and Chancery of England, as affording outlines for the practice of this court"¹⁵² These two examples, setting standards for attorneys arguing before the Court and adopting English procedure, demonstrate the necessity of procedure to adjudication.

Eventually, Congress delegated statutory authority to the Supreme Court, and later to all federal courts, to create their own procedure,¹⁵³ but the absence of pre-existing procedural rules continued to plague courts. For example, a court cannot apply the law to the facts if there is no reliable evidence to establish the facts.¹⁵⁴ Therefore, before the advent of codified federal evidentiary rules, if state rules did not apply then federal courts developed federal common law rules of evidence. In *Funk v. United States*,¹⁵⁵ the Court held that it and the other federal courts could articulate current common law rules on spousal testimony in the absence of congressional legislation.¹⁵⁶ Later, in *McNabb v. United States*,¹⁵⁷ the Court held a criminal confession inadmissible because of a court's inherent power over the creation and maintenance of "civilized stan-

States v. Curtiss-Wright Export Corp., 299 U.S. 304, 314 (1936) (discussing inherent executive power).

150. 2 U.S. (2 Dall.) 399 (1790).

151. 2 U.S. (2 Dall.) 408 (1792).

152. *Id.* at 413–14.

153. 28 U.S.C. § 2071(a) (1988).

154. *But see* Charles Anthony Riedl, *To What Extent May Courts Under the Rule-making Power Prescribe Rules of Evidence?*, 26 A.B.A. J. 601, 602 (1940) (arguing that evidence rules are non-essential to constitutional function of legislature and judiciary).

155. 290 U.S. 371 (1933).

156. *Id.* at 381–83. *See Doe ex dem. Patterson v. Winn*, 24 U.S. (11 Wheat.) 380, 384–85, 391 (1826) (upholding court-made evidence rule that did not conflict with statute).

157. 318 U.S. 332 (1943).

dards of procedure and evidence.”¹⁵⁸ Thus, despite the absence of a constitutional requirement or any controlling federal statute, the Court developed its own federal rules of evidence.¹⁵⁹

Even after the enactment of codified rules of procedure, the Court continued to fill in voids in the rules. It recognized the inherent power of courts to create procedural rules, writing that “[c]ertain implied powers must necessarily result to our Courts of justice from the nature of their institution.”¹⁶⁰ Such powers include the powers to fine for contempt or to imprison to preserve courtroom order, both of which “are powers which cannot be dispensed with in a Court, because they are necessary to the exercise of all others”¹⁶¹ Later, the Court re-emphasized that the power to punish for contempt is inherent in all courts because it is “essential to the administration of justice” that courts be able to vindicate their own authority without complete dependence on other branches.¹⁶² Without it, “what the Constitution now fittingly calls ‘the judicial power of the United States’ would be a mere mockery.”¹⁶³ Similarly, expanding the concept of “order” in *Link v. Wash Railway Co.*,¹⁶⁴ the Court held that

[t]he authority of a court to dismiss *sua sponte* for lack of prosecution has generally been considered an “inherent power,” governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.¹⁶⁵

158. *Id.* at 340–41.

159. See Amy Coney Barrett, *The Supervisory Power of the Supreme Court*, 106 COLUM. L. REV. 324, 370, 374–76, 379, 387 (2006) (noting Supreme Court rulings filling evidentiary gaps by appealing to common law).

160. *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812).

161. *Id.*

162. *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 795–96 (1987) (quoting *Michaelson v. United States ex rel. Chicago, St. P., M., & O. Ry. Co.*, 266 U.S. 42, 65 (1924)).

163. *Id.* at 796 (citing *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 450 (1911)); see *Willy v. Coastal Corp.*, 503 U.S. 131, 132 n.12 (1991) (acknowledging inherent power), *aff'd* 488 U.S. 361, 392 (1989); cf. *Supreme Court of Virginia v. Consumers Union of United States, Inc.*, 446 U.S. 719, 721–24 (1980) (recognizing state supreme court’s inherent and statutory authority to discipline attorneys and prescribe code of ethics).

164. 370 U.S. 626 (1962).

165. *Id.* at 630–31. Similarly, in *United States v. Furey*, 514 F.2d 1098, 1104 (2d Cir. 1975), the Second Circuit upheld the use of inherent power to create a local rule allowing dismissal with prejudice for inexcusable delay by the prosecution. See Frank H. Gibbes, III, Note, *The Judiciary and the Rule-Making Power*, 23 S.C. L. REV. 377, 386–87 (1971) (citing holdings that establish court power to control order of business as necessary to enforce rights and redress wrongs).

Thus, the Supreme Court has explicitly recognized an inherent power to create rules necessary for the adjudication of cases.

But the above examples are all conditioned on the absence of an already existing governing rule or law. Illustrating this limitation is the case of *Alyeska Pipeline Service Co. v. Wilderness Society*,¹⁶⁶ in which the Court held that without congressional authorization, federal courts cannot create an exception to the general rule barring attorney's fees.¹⁶⁷ In dicta, the Court explicitly referenced the inherent power to assess attorney's fees for some instances of willful disobedience or bad faith.¹⁶⁸ But Congress had issued exceptions to the general prohibition in statutes inapplicable to the case.¹⁶⁹ As a result of these exceptions, the Court concluded that to expand the exceptions would conflict with the congressional policy to carve out only limited exceptions.¹⁷⁰ This ruling limited a federal court's inherent power to issue fees to circumstances in which Congress has not established a policy.¹⁷¹ In sum, there is an inherent power to create procedural rules if 1) the rule is necessary to adjudication and 2) Congress, or a body delegated authority by Congress, has not provided a governing principle.

*E. Inherent Power to Protect the Independence and Integrity
of the Judiciary*

The Supreme Court has expounded the importance of an independent judiciary: “[O]ur Constitution unambiguously enunciates a fundamental principle—that the ‘judicial Power of the United States’ must be reposed in an independent Judiciary. It commands that the independence of the Judiciary be jealously guarded, and it provides clear institutional protections for that in-

166. 421 U.S. 240 (1975).

167. *Id.* at 269.

168. *Id.* at 259–60.

169. *Id.* at 259.

170. *Id.* at 269.

171. Similarly, in *Societe Internationale Pour Participants Industrielles et Commerciales v. Rogers*, 357 U.S. 197 (1958), the Court rejected claims of its inherent power to dismiss for noncompliance with a discovery order because a Federal Rule of Civil Procedure controlled. *Id.* at 207. See *Shane v. McNeil*, 41 N.W. 166, 168 (Iowa 1889) (finding that legislature enabled judicial conference to make laws; but noting that if conference fails to act, each court has common law power to make rules that do not conflict with laws or conference's rules); *Mills v. Bank of United States*, 24 U.S. (11 Wheat.) 431, 439–40 (1826) (upholding local rule designed to further justice and save costs in part because rule did not interfere with any rules of evidence).

dependence.”¹⁷² When procedural rules infringe on the independence of the judiciary, courts can assert an inherent power to protect their independence.¹⁷³ There are two constitutional bases for this inherent power. The first is that congressionally-created rules infringing on judicial independence are never “necessary and proper” to the “creation of inferior courts” and thus are always beyond legislative authority.¹⁷⁴ The second is that the fair administration of justice and fair adjudication of cases is at the core of the Judicial Power Clause and guarantees an independent judiciary such that all other constitutional clauses must be read to accord with this proposition.¹⁷⁵ Federal courts have referenced the historical use of their inherent power¹⁷⁶ but have never identified its constitutional source. Although the congressional authority theory is equally plausible, this Note will focus on the judicial independence theory because of its strong support in precedent.

Although rare, federal courts have sometimes asserted inherent authority on the grounds of judicial independence.¹⁷⁷ Congress may establish general laws, but not laws tailored specifically against

172. *N. Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 58–60 (1982) (citing *United States v. Will*, 449 U.S. 200, 217–18 (1980)).

173. In the words of the *Eash* court, it “might be termed irreducible inherent authority, [and] encompasses an extremely narrow range of authority involving activity so fundamental to the essence of a court as a constitutional tribunal that to divest the court of absolute command within this sphere is really to render practically meaningless the terms ‘court’ and ‘judicial power.’” *Eash v. Riggins Trucking, Inc.*, 757 F.2d 557, 562 (3d Cir. 1985). See also Lawson, *supra* note 99, at 205–07, 210–11 (stressing importance of independence, and arguing that judicial power includes power to reason to outcome of case); Robert J. Pushaw, *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735, 824 (2001) (“The Constitution does not prohibit all implied powers, however. Rather, the presumption against their existence can be rebutted by a showing that a certain power must be inferred because otherwise a department would be unable to perform its express constitutional functions.”); cf. *Carter v. Commonwealth*, 32 S.E. 780, 785 (Va. 1899) (“That in the courts created by the [Virginia State] Constitution there is an inherent power of self-defense and self-preservation; that this power may be regulated, but cannot be destroyed, or so far diminished as to be rendered ineffectual, by legislative enactment; that it is a power necessarily resident in, and to be exercised by the court itself.”).

174. Lawson, *supra* note 99, at 192, 198–200; see also Pushaw, *supra* note 173, at 742.

175. See *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 848 (1986) (stating that Article III Section 1 protects judiciary from other branches and protects litigant rights); *Stump v. Sparkman*, 435 U.S. 349, 368 (1978) (Powell, J., dissenting) (stating that judicial independence benefits litigants).

176. For examples of such cases, see the *Eash* court’s case citations *infra* Part II.F.

177. See *United States v. Klein*, 80 U.S. 128, 146–47 (1871).

individuals or classes of individuals.¹⁷⁸ For example, the Court held that Congress cannot declare a rule of decision in a specific case because then “Congress has inadvertently passed the limit which separates the legislative from the judicial power.”¹⁷⁹ A “rule of decision” renders the judicial process a mere formality. As Dean Pound wrote, “None of the coordinate and co-equal departments of our polity can do its work effectively if the minute details of its procedural operations, as distinct from the substantive law it applies or administers, are dictated by some other department.”¹⁸⁰ Courts adjudicate cases, and a rule of decision would prohibit any adjudicatory process, thereby stripping courts of their independence.¹⁸¹

The case of *Legal Services Corp. v. Velazquez*¹⁸² exemplifies how a court would determine whether a law infringed on its independence. In *Velazquez*, the Court struck down a federal law providing funds to attorneys of indigent clients on the condition that the attorneys not contest the validity of any statute.¹⁸³ Although deciding the case on First Amendment grounds, the decision’s reasoning rings of separation of powers logic. The Court wrote that “[t]he restriction distorts the legal system by altering the traditional role of the attorneys,”¹⁸⁴ and in so doing,

the statute here threatens severe impairment of the judicial function The courts and the public would come to question the adequacy and fairness of professional representations when the attorney, either consciously to comply with this statute or unconsciously to continue the representation despite the statute, avoided all reference to questions of statutory validity and constitutional authority. A scheme so inconsistent with accepted separation-of-powers principles is an insufficient basis to sustain or uphold the restriction on speech.¹⁸⁵

Here the separation of powers concern is judicial review. Depriving advocates of valid constitutional arguments strips courts of their check on the legislature. More broadly, any restrictions on

178. Lawson, *supra* note 99, at 201.

179. *Klein*, 80 U.S. at 146–47.

180. Pound, *supra* note 12, at 601 (1926).

181. See Dean Alfange, Jr., *The Supreme Court and the Separation of Powers: A Welcome Return to Normalcy?*, 58 GEO. WASH. L. REV. 668, 673–75 (1998) (explaining that mechanical application of laws and procedure is not check on legislature).

182. 531 U.S. 533 (2001).

183. *Id.* at 536–37.

184. *Id.* at 544.

185. *Id.* at 546. See *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 248, 259 (7th Cir. 1975) (striking local rules regulating attorney extrajudicial comments on First Amendment grounds and noting potential impact on fair trials).

making valid legal arguments undermines the adversarial process, thereby prohibiting courts from deciding cases accurately and completely.

Use of this inherent power prompts a serious concern, justifying an assertion of inherent power with an argument based on independence carries grave consequences. In such cases, courts are not filling voids, but rather are voiding congressional laws and establishing exclusive control over a field. Only a constitutional amendment could overturn such a decision. Compounding this concern are the unclear boundaries of this inherent power. Hence, there is a concern that federal courts could assume too much power, with little chance of legislative recourse. As a result, federal courts have been reluctant to make such assertions.¹⁸⁶

In contrast, state courts have been active in asserting such inherent authority. Although most state constitutions have explicit separation of powers clauses,¹⁸⁷ and despite potential conflicts with substantive policies, many courts have protected their control of these arenas as necessary to their independence.¹⁸⁸ Among the areas state courts have held to be within the exclusive regulation of the judiciary and beyond legislative control are: aspects of pleadings,¹⁸⁹ control of the docket,¹⁹⁰ the structure of court opinions,¹⁹¹

186. For some examples, see *infra* note 261. See Silas A. Harris, *The Extent and Use of Rule-Making Authority*, 22 J. AM. JUD. SOC. 27, 29 (1938); Pushaw, *supra* note 173, at 738. For a discussion about concerns with rules made by courts because of the difficulty in changing them see Warach, *supra* note 76, at 386; Allan Ashman, *Measuring the Judicial Rule-Making Power*, 59 JUDICATURE 215, 218 (1975) (noting that Supreme Court rarely uses rulemaking power unless clear statutory or inherent power); W. Glenn Forrester, Note, *Substance and Procedure: The Scope of Judicial Rule Making Authority in Ohio*, 37 OHIO ST. L.J. 364, 384 (1976); Gertner, *supra* note 46, at 44 (noting that courts are reluctant to make rules unless they are certain such rules are within their power).

187. Gertner, *supra* note 46, at 5–6 (detailing state constitutional grants of rulemaking power to high courts).

188. Levin & Amsterdam, *supra* note 51, at 18–23, 30–36.

189. *Epstein v. State*, 128 N.E. 353, 353 (Ind. 1920) (striking law conflicting with court rule requiring concise statement in pleadings); *White v. Fisher*, 689 P.2d 102, 103, 107 (Wyo. 1984) (striking law regulating ad damnum clauses as infringing on court constitutional and inherent authority to control pleadings).

190. *Atchinson v. Long*, 251 P. 486, 489 (Okla. 1926) (recognizing legislature's power to control procedure but striking law prioritizing certain cases because of court's inherent authority to control court business, without which court would become "impotent and useless").

191. *Houston v. Williams*, 13 Cal. 24, 25–28 (1859) (striking law requiring courts to issue written opinions), *superseded by constitutional amendment*, CAL. CONST. art. VI, § 14 (requiring California Supreme Court and appellate courts to write down reasons and causes).

the space allocation within courthouses,¹⁹² control of courthouse facilities,¹⁹³ control over courthouse personnel,¹⁹⁴ the method of impaneling jurors,¹⁹⁵ correcting judgments based on fraud,¹⁹⁶ control of discovery,¹⁹⁷ the fixing of bail and release from custody,¹⁹⁸ dismissing a case when a party failed to appear,¹⁹⁹ control over certiorari petitions,²⁰⁰ and jury instructions.²⁰¹ These state court decisions provide a sense of the potentially large scope of this unchecked inherent power.²⁰²

The scope and use of this power depends on several factors, including (1) encroachments on the Article I legislative power of Congress; (2) the historical use and meaning of inherent power;²⁰³

192. *Dahnke v. People*, 48 N.E. 137, 139–141 (Ill. 1897) (recognizing inherent power to control space inside courtroom when county board ordered janitor to lock judge out of courtroom).

193. *Bd. of Comm'rs of Vigo County v. Stout*, 35 N.E. 683, 685–86 (Ind. 1893) (asserting constitutional and inherent authority over controlling elevators in courthouse as necessary to dignity, decorum, and convenience).

194. *See In re Janitor of the Supreme Court*, 36 Wis. 410, 410 (1874) (claiming constitutional and inherent authority to appoint janitors because they are necessary to administer justice and judges develop bonds of trust with them).

195. *People v. Brown*, 212 N.W. 968, 969 (Mich. 1927) (upholding process of choosing jurors by pulling names from box).

196. *See In re McDonald*, 164 N.E. 261, 263 (Ind. 1928) (per curiam) (finding inherent power to vacate judgment based on fraud).

197. *State v. Clemente*, 353 A.2d 723, 731 (Conn. 1974).

198. *State v. Smith*, 527 P.2d 674, 677 (Wash. 1974) (striking law conflicting with court rule regulating the setting of bail and finding that court's power is inherent and incidental from power to hold defendant).

199. *Agran v. Checker Taxi Co.*, 105 N.E.2d 713, 715–16 (Ill. 1952) (affirming dismissal for failure to appear despite law requiring party receive notice five days before dismissal).

200. *Fischer v. Bedminster*, 76 A.2d 673, 676 (N.J. 1950) (noting that state supreme court has exclusive power to decide certiorari petitions because if legislature could regulate them, then it could make some of its acts beyond judicial review).

201. *Newell v. State*, 308 So. 2d 71, 76 (Miss. 1975) (finding that judge has discretion about manner of presenting jury instructions, and noting that legislature can make rules as long as they coincide with fair and efficient administration of justice).

202. Scholars have speculated on other realms potentially within such inherent power, like administrative matters—such as a court's docket and record keeping—as well as arenas crucial to accurate fact-finding and judgments, like compelling testimony and appointing experts. Whitten, *supra* note 54, at 56; Pushaw, *supra* note 173, at 742.

203. *See, e.g., Miner v. Atlass*, 363 U.S. 641, 644 (1960) (finding that history did not support use of inherent power to partake in type of discovery at issue); *see Mistretta v. United States*, 488 U.S. 361, 392 (1989) (Supreme Court's function in promulgating procedural rules is central element of historically acknowledged mis-

(3) the practical impact on judicial independence and the ability to adjudicate cases accurately and constitutionally; and (4) a preference to exert inherent power as a last resort because federal courts are not accountable democratically and because of the difficulty for Congress to overturn the decision. The most difficult cases are likely to arise when congressional action to improve the integrity of the judicial branch conflicts with court tradition, such as if Congress passed a law prohibiting judges from dissenting without opinion, or if Congress required appellate courts to count the votes of each judge on an issue-by-issue basis instead of by each judge's view of the outcome of the case.²⁰⁴

F. There is No Inherent Power to Create Useful or Beneficial Laws that are Not Necessary to Adjudication or Independence

The *Eash* Court observed a third form of inherent power: the power of a court to equip itself with useful but not necessary tools in the absence of contrary legislation.²⁰⁵ Examples of this power included the ability to appoint an auditor,²⁰⁶ certify issues to state courts,²⁰⁷ grant bail in a situation not covered by statute,²⁰⁸ dismiss a case under the doctrine of *forum non conveniens*,²⁰⁹ and a general

sion of Judicial Branch). "The language of the Constitution cannot be interpreted safely except by reference to the common law and to British institutions as they were when the instrument was framed and adopted." *Ex parte Grossman*, 267 U.S. 87, 108–09 (1925); see also Pound, *supra* note 12, at 601 (advocating looking to colonial and English history to clarify powers of branches of government).

204. To illustrate, consider the following example: a criminal defendant claim seeks a new trial, alleging violations of the Fourth and Fifth Amendments. Four Justices conclude that neither amendment was violated and accordingly deny the request for a new trial. Three Justices conclude that both amendments were violated and would order a new trial. One Justice concludes that there was a Fourth Amendment violation but no Fifth Amendment violation and would thus order a new trial. The final Justice concludes that there was no Fourth Amendment violation, but that there was a Fifth Amendment violation and accordingly would order a new trial. If the Court counted its votes by each Justice's view of the ultimate outcome of the case, then the defendant would receive a new trial, as five Justices reached that conclusion. However, if the court counted its votes by issue, then the prosecution would win because on each issue five Justices concluded there was no violation. Lewis A. Kornhauser & Lawrence G. Sager, *The One and the Many: Adjudication in Collegial Courts*, 81 CAL. L. REV. 1, 11–17 (1993) (illustrating the different impacts that counting votes by issue as opposed to by outcome can have on a litigant).

205. *Eash v. Riggins Trucking, Inc.*, 757 F.2d 557, 563–64 (3d. Cir. 1985).

206. *Id.* at 563 (citing Supreme Court and circuit court decisions).

207. *Id.* at 564.

208. *Id.*

209. *Id.*

power to dismiss cases.²¹⁰ Although courts have asserted such inherent power, doing so is a breach of the separation of powers. Such power is limitless so long as there are no contrary federal laws and Congress has not preempted that field of procedure. More importantly, there is no constitutional basis for assertions of such authority. Still, one could argue that rules made under this justification, like *forum non conveniens*, are necessary to the fair adjudication of a case or that there is statutory authority for courts to make these rules, such as the general rulemaking power established by § 2071(a) or via federal rules, like Federal Rule of Civil Procedure 83.²¹¹

III. DELEGATION OF POWER

A. Introduction

The non-delegation doctrine restricts Congress's power to delegate authority to other bodies.²¹² On the whole the non-delegation doctrine raises three issues regarding federal rulemaking powers. First, the delegated power should be strictly and exclusively legislative in nature.²¹³ Second, the delegation of power should be accompanied by an intelligible principle to guide the body receiving such authority.²¹⁴ Third, the assertion of such authority cannot cause an exertion of nonjudicial powers by the courts that would violate the Judicial Power Clause or the Case or Controversy Clause.²¹⁵

210. *Id.*

211. When there is no controlling law or procedure, "A judge may regulate practice in any manner consistent with federal law, rules adopted under 28 U.S.C. §§ 2072 and 2075, and the district's local rules." FED. R. CIV. P. 83(b).

212. See Patrick M. Garry, *The Unannounced Revolution: How the Court Has Indirectly Effected a Shift in the Separation of Powers*, 57 ALA. L. REV. 689, 701-02 (2006).

213. See *Mistretta v. United States*, 488 U.S. 361, 385 (1989) (noting that delegation of power to Sentencing Commission is unconstitutional only if "Congress has vested in the Commission powers that are more appropriately performed by the other Branches or that undermine the integrity of the Judiciary").

214. See *FCC v. Fox TV Stations, Inc.*, 129 S. Ct. 1800, 1823 (2009) (Kennedy, J., concurring) ("Congress must 'lay down by legislative act an intelligible principle,' and the agency must follow it.") (citation omitted).

215. *Morrison v. Olson*, 487 U.S. 654, 677-78 (1988) ("'[E]xecutive and administrative duties of a nonjudicial nature may not be imposed on judges holding office under Art. III of the Constitution.' The purpose of this limitation is to help ensure the independence of the Judicial Branch and to prevent the Judiciary from encroaching into areas reserved for the other branches.") (quoting *Buckley v. Valeo*, 424 U.S. 1, 123 (1976)) (citations omitted); *Muskrat v. United States*, 219 U.S. 346, 352 (1911) ("That neither the legislative nor the executive branches can

Federal courts will likely reject challenges to the rulemaking process made under the non-delegation doctrine.²¹⁶ Dicta from *Mistretta* largely forecloses these claims.²¹⁷ In *Mistretta*, the Court explained: “[W]e specifically have upheld . . . Congress’s power to confer on the Judicial Branch the rulemaking authority contemplated in the various enabling Acts.”²¹⁸ Indeed, Supreme Court precedent has continually upheld such delegation throughout the nation’s history.²¹⁹ Although the Court’s language supports the conclusion that the REA would survive a non-delegation challenge, the topic deserves a more intricate analysis.

B. Non-Delegation Doctrine Analysis

The first issue introduced by the REA is whether Congress delegated uniquely legislative, as opposed to judicial, power to the courts. If uniquely legislative, then the non-delegation doctrine may have been violated because “[a]ll legislative powers herein granted [by the Constitution] shall be vested in a Congress.”²²⁰ The *Mistretta*

constitutionally assign to the judicial any duties but such as are properly judicial, and to be performed in a judicial manner.”).

216. *Mistretta*, 488 U.S. at 375 (noting that Court has only struck down two cases under non-delegation doctrine.).

217. Notably, *Mistretta* is persuasive evidence of how the Court would decide a challenge to the rulemaking process on the basis of the non-delegation doctrine. But *Mistretta* concerned the constitutionality of the United States Sentencing commission, thus all references to rulemaking are dicta.

218. *Mistretta*, 488 U.S. at 388 (referencing REA and Court’s decision in *Sibbach*); see also *id.* at 386–87 (citing *Sibbach v. Wilson & Co.*, 312 U.S. 1 (1941) and *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825)).

219. See *Wayman*, 23 U.S. (10 Wheat.) at 20, 22–23; *Bank of the United States v. Halstead*, 23 U.S. (10 Wheat.) 51, 61–62 (1825) (“Congress might regulate the whole practice of the Courts, if it was deemed expedient so to do but this power is vested in the Courts; and it never has occurred to any one that it was a delegation of legislative power . . . Partakes no more of legislative power, than that discretionary authority entrusted to every department of the government in a variety of cases.”). But see WEINSTEIN, *supra* note 12, at 3–4 (“Court rules have much the form and effect of legislative enactment. Until repealed or modified they control all litigation encompassed within their ambit. Like legislative enactments, they are subject to interpretation and to a declaration of invalidity when they are in conflict with legislation or constitutions.”).

220. U.S. CONST., art. I, § 1; *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 472 (2001) (“In a delegation challenge, the constitutional question is whether the statute has delegated legislative power to the agency. Article I, § 1, of the Constitution vests ‘all legislative Powers herein granted . . . in a Congress of the United States.’ This text permits no delegation of those powers . . .”). But see *FCC v. Fox TV Stations, Inc.*, 129 S. Ct. 1800, 1826 n.2 (2009) (“[T]he Framers vested ‘All legislative Powers’ in the Congress, Art. I, § 1, just as in Article II they vested the ‘executive Power’ in the President, Art. II, § 1. Those provisions do not purport to

Court described rulemaking as being neither inherently legislative nor judicial; instead, adopting a functionalist perspective stressing cooperation between the branches, the Court described it as being in a “twilight area” because it is either nonjudicial or not a function exclusively committed to another branch.²²¹ This description suggests it is not a delegation of uniquely legislative power.²²²

The second issue is whether the acts enabling the rulemaking process have an intelligible principle to guide the judiciary.²²³ All the authorizing procedural statutes at issue contain directives. For example, the REA’s delegation of power to the Supreme Court is to “prescribe general rules of practice and procedure” that “shall not abridge, enlarge or modify any substantive right.”²²⁴ Likewise, all of the entities that aid the Court in developing the rules have clear legislative mandates. Congress charged the Judicial Conference with promoting uniformity, expedience, “simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay,” as well as ensuring the federal rules are consistent with federal law.²²⁵ Congress directed the Judicial Conference’s standing committees to change and develop rules “necessary to maintain consistency and otherwise promote the interest of justice.”²²⁶ In reaching its decision, the *Mistretta* Court cited the language of the delegations to the Judicial Conference and its committees.²²⁷ This dicta, combined with the

limit the authority of either recipient of power to delegate authority to others.”) (citation omitted).

221. “That judicial rulemaking, at least with respect to some subjects, falls within this twilight area is no longer an issue for dispute. None of our cases indicate that rulemaking *per se* is a function that may not be performed by an entity within the Judicial Branch, either because rulemaking is inherently nonjudicial or because it is a function exclusively committed to the Executive Branch.” *Mistretta*, 488 U.S. at 386–87, 407–08.

222. *See id.* This holding may be weaker in the context of rulemaking for bankruptcy cases because Article I, Section 8 grants Congress the authority to make “uniform laws on the subject of bankruptcy.” But the courts could likely limit this phrase to substantive powers thereby not restricting the current delegation of rulemaking powers.

223. *See Whitman*, 531 U.S. at 472 (citing *J. W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)). For examples of impermissible delegations of power, see *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935), and *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

224. 28 U.S.C. § 2072(a), (b) (1990).

225. 28 U.S.C. § 331 (2008).

226. 28 U.S.C. § 2073(b) (1994).

227. *Mistretta*, 488 U.S. at 388–89 (citing *Chandler v. Judicial Council*, 398 U.S. 74, 86, n. 7 (1970) (“Though not the subject of constitutional challenge, by established practice we have recognized Congress’ power to create the Judicial

instructions contained in each statute, suggests there is an intelligible principle in each of the enabling acts.

The final contention concerns the Judicial Power and Case or Controversy Clauses.²²⁸ The *Mistretta* Court explained that while, as a general rule, Congress cannot require Article III judges to execute nonjudicial and administrative duties, there are significant exceptions.²²⁹ Elaborating, the Court said, “[C]onsistent with the separation of powers, Congress may delegate to the Judicial Branch nonadjudicatory functions that do not trench upon the prerogatives of another Branch and that are appropriate to the central mission of the Judiciary.”²³⁰ Under this test the Court suggested it would uphold the statutes authorizing the Judicial Conference of the United States, the rules advisory committees, and other rulemaking and administrative entities.²³¹

The Court conceded that these rulemaking bodies made political decisions with substantive implications and authored standards of general application divorced from individual fact scenarios.²³² Acknowledging that the Judicial Conference does not decide issues that arise within either a case or controversy, the Court observed that it contributes to the fair and efficient adjudication of cases. The Court has never disavowed the delegation of such nonjudicial power.²³³ For example, federal courts have accepted the powers to

Conference of the United States, the Rules Advisory Committees that it oversees”). Most scholars agree with the Court on this point. *See, e.g., Moore, supra* note 35, at 1047. *But see Yeazell, supra* note 12, at 243–44 (suggesting that because judges make and interpret rules proscribed via the REA, it suffers from same concerns present in *Schechter Poultry* and *Panama Refining*).

228. *Mistretta*, 488 U.S. at 361–62 (“According to express provision of Article III, the judicial power of the United States is limited to ‘Cases’ and ‘Controversies.’ . . . These doctrines help to ensure the independence of the Judicial Branch by precluding debilitating entanglements between the Judiciary and the two political Branches, and prevent the Judiciary from encroaching into areas reserved for the other Branches by extending judicial power to matters beyond those disputes ‘traditionally thought to be capable of resolution through the judicial process.’ As a general principle, we stated as recently as last Term that ‘executive or administrative duties of a nonjudicial nature may not be imposed on judges holding office under Art. III of the Constitution.’”) (citations omitted).

229. *Id.* at 385–86; *see Mullenix, supra* note 7, at 1317; Alfange, *supra* note 181, at 674–81.

230. *Mistretta*, 488 U.S. at 388.

231. *Id.* at 388–89 (citing *Chandler v. Judicial Council*, 398 U.S. 74, 86, n.7 (1970)).

232. *Id.* at 392.

233. *Id.* at 389–90 (“‘These entities, some of which are comprised of judges, others of judges and nonjudges, still others of nonjudges only, do not exercise judicial power in the constitutional sense of deciding cases and controversies, but

oversee the administrative and personnel matters of courts, study judicial administration, make appointments, supervise grand juries, and review search warrant and wiretap applications.²³⁴ Thus, the judiciary's acceptance of nonjudicial powers lays a strong foundation in defense of the rulemaking delegation despite the text of Article III.

Additional reasoning in *Mistretta*, however, suggests there may not be a clear answer. The Court distinguished the delegation of power to the Sentencing Commission on the grounds that the Commission was not a court and that it was accountable to Congress, which could revoke or amend all of its decisions.²³⁵ Furthermore, the Court treated it as an independent agency, despite having some federal judges as members, because it was controlled in part by the President—who determined membership—and because its rulemaking had a notice and comment procedure per the Administrative Procedure Act.²³⁶

In contrast, the federal rulemaking process does not share these features. A court, the Supreme Court, creates procedural rules. Congress did not delegate the Judicial Conference power to make rules as it did with the Sentencing Commission to make guidelines. Rather, it delegated to the Conference the power to research and propose rules, but the Supreme Court has the power to “promulgate” the rules. Also, although Congress can amend or withdraw the power of the Court to create rules under the REA, it is unclear whether Congress can override a federal rule of procedure by statute.²³⁷ Furthermore, the Supreme Court is part of the judi-

they share the common purpose of providing for the fair and efficient fulfillment of responsibilities that are properly the province of the Judiciary. Thus, although the judicial power of the United States is limited by express provision of Article III to ‘Cases’ and ‘Controversies,’ we have never held, and have clearly disavowed in practice, that the Constitution prohibits Congress from assigning to courts or auxiliary bodies within the Judicial Branch administrative or rulemaking duties that, in the words of Chief Justice Marshall, are “necessary and proper . . . for carrying into execution all the judgments which the judicial department has power to pronounce.” Because of their close relation to the central mission of the Judicial Branch, such extrajudicial activities are consonant with the integrity of the Branch and are not more appropriate for another Branch.” (internal citations omitted).

234. *Id.* at 390–92 & n.16; see also WEINSTEIN, *supra* note 12, at 142 (noting that “strict separation of powers has really never existed in its country; it is one of the strengths of our pragmatic system that there is a certain leakage from one branch to the other that seems to lubricate the entire system”).

235. *Mistretta*, 488 U.S. at 393–94.

236. *Id.*

237. For example, Congress withdrew from the Supreme Court the power to create rules concerning evidentiary privileges. But if Congress passed a law con-

cial branch, has membership composed entirely of federal judges, is appointed by the President with heavily restricted removal power vested in the Senate, and has no notice and comment requirements.²³⁸

These facts, however, do not raise red flags because, although the Supreme Court promulgates the rules, the federal system entertains a fiction that it is not the Supreme Court, in an Article III sense, making these rules. As elaborated below, the *Mistretta* Court held that the federal judges on the Sentencing Commission acted in a purely administrative non-Article III capacity.²³⁹ Similarly, in the rulemaking process, the Justices act as part of an independent agency within the judicial branch but outside the bounds of the Supreme Court and their status as Justices. This fiction allows parties to contest the validity of the rules, avoids the prohibition on advisory opinions, and allows the Justices and members of the Judicial Conference to later rule on these issues impartially.²⁴⁰

A related issue is the Chief Justice's influence over the Judicial Conference in the drafting process. Congress outlined most of the membership requirements for the Conference, but the text is silent on the selection of practitioners and academics for the committees of the Judicial Conference.²⁴¹ Traditionally, the Chief Justice, as chair of the Conference, appointed them.²⁴² This structure caused concern that the Chief Justice could disproportionately influence the policy decisions of the Conference and the future of the federal rules.²⁴³ Further, because the Conference knows the Supreme

flicting with a current federal rule of procedure, the supersession clause could be construed to invalidate the rule. *See infra* Part IV.B (discussing supersession clause).

238. The current federal rulemaking structure closely parallels the notice and comment requirements of the Administrative Procedure Act, although there is no statutory compulsion to do so. Whether this is a requirement under the non-delegation doctrine or the Due Process Clause has never been decided. *See* U.S. Courts website, <http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/Overview.aspx> (describing notice and comment process); *cf.* Bone, *supra* note 21, at 908 (comparing judicial rulemaking to administrative rulemaking and to Sentencing Commission).

239. *Supra* notes 245–47; *see* Garvito, *supra* note 86, at 1078–79 (noting that judicial conference is not a strictly judicial organ and does not sit as a court).

240. *See* *Mississippi Pub. Corp. v. Murphree*, 326 U.S. 438, 446 (1946).

241. 28 U.S.C. § 331 (2008).

242. *See* U.S. Courts website, <http://www.uscourts.gov/FederalCourts/JudicialConference.aspx> (last visited January 17, 2011); BROWN, *supra* note 29, at 13–15.

243. Former committee reporter Judge Weinstein remarked that “it was a disquieting moment” when the Chief Justice commanded the committee to defend an old version of a rule despite the committee’s support of a proposed Congress-

Court must approve the rules, it may cater its proposals to a majority of the Court.²⁴⁴ However, viewing the entire process as an independent agency with multiple subcommittees obviates any delegation problems with the head of an agency (the Supreme Court) having some control over the lower echelon. Indeed, the heads of all administrative agencies exert at least some control over the hiring of their employees. Moreover, as an agency designed by Congress, the Conference is free to establish its own hierarchy and procedures. One would expect the head of an agency to direct his employees and serve as the final evaluator of their work.

Mistretta further distinguished the Sentencing Commission from Article III courts in that the Commission's technical placement in the judiciary did not increase the branch's authority.²⁴⁵ The Court noted that prior to the passage of the act, courts had the power to decide sentences; also, Congress did not unconstitutionally delegate its own authority or diminish its or the executive branch's power.²⁴⁶ In a footnote, the Court noted that the "constitutional calculus" is different for considering non-judicial activities delegated to courts, in part because of the constitutionally required autonomy of courts.²⁴⁷

This same reasoning supports the delegation of rulemaking authority to the judiciary. The federal judiciary's rulemaking power has existed for two hundred years and Congress retains, and has periodically asserted, the power to modify such grants of authority.²⁴⁸ Further, the undefined "constitutional calculus" does not apply to the Supreme Court under the theory that it acts as part of an independent agency.²⁴⁹ Moreover, even if a more rigid calculus did

sional amendment. WEINSTEIN, *supra* note 12, at 102; see Alan B. Morrison & D. Scott Stenhouse, *The Chief Justice of the United States: More Than Just the Highest Ranking Judge*, 1 CONST. COMM. 57, 65 (1994) (noting that publications of academics allow Chief Justice to choose ones that will advance his/her desired policies).

244. WEINSTEIN, *supra* note 12, at 8–9 (expressing concern that Chief Justice will not select ideologically diverse group).

245. *Mistretta v. United States*, 488 U.S. 361, 395–97 (1989).

246. Notably, Congress could repeal the act creating the Sentencing Commission and the Executive never had the powers given to the Commission. *Id.*

247. *Id.* at 394 n.20.

248. WEINSTEIN, *supra* note 12, at 57–74; Edgard Bronson Tolman, *Historical Beginnings of Procedural Reform Movement in This Country—Principles to be Observed in Making Rules*, 22 A.B.A. J. 783, 785–86 (1936); Edson R. Sunderland, *Implementing the Rule-Making Power*, 25 N.Y.U. L. REV. 27, 29–32 (1950).

249. See *Mistretta*, 488 U.S. at 394 (“[B]ecause Congress vested the power to promulgate sentencing guidelines in an independent agency, not a court, there can be no serious argument that Congress combined legislative and judicial power within the Judicial Branch.”).

apply, Congress's control over the scope and structure of the authority, the courts' history in having such power, and the "twilight zone" status of rulemaking suggests that the judiciary has not gained power, nor has any other branch lost power, by the delegation.

C. The Effect of the Delegation of Rulemaking Power on the Integrity of the Judicial Branch

Although not a per se aspect of the non-delegation doctrine, delegation can sometimes raise the issue of whether an act will undermine the integrity and independence of the judicial branch. Both the delegation of sentencing power in *Mistretta* and the delegation of rulemaking authority present similar concerns on this point. Decades of case law, history, and the Article III protections of federal judges reinforce the importance of an independent federal judiciary.²⁵⁰ Equally important is the legitimacy of the Judicial Branch, which depends on public confidence and the appearance of impartiality.²⁵¹ The *Mistretta* opinion provides compelling support for the position that the current delegation of rulemaking power does not threaten these essential characteristics.

Mistretta provides a solid foundation for upholding the role of federal judges in the rulemaking process. As the Court concluded, "The text of the Constitution contains no prohibition against the service of active federal judges on independent commissions."²⁵² The Court also cited rejected proposals made at the Constitutional Convention and during the first Congress, and a long history of allowing Article III judges to assume extrajudicial responsibilities in government; examples included federal judges serving as ambassadors, cabinet members, and members of executive and cultural commissions.²⁵³ Crucially, the Court labeled such roles "extrajudicial service," establishing clearly that while in these roles federal judges were not acting pursuant to Article III authority but rather

250. *See* *N. Pipeline Constr. Co. v. Marathon Pipeline Co.*, 480 U.S. 50, 59–60 (1982).

251. *Mistretta*, 488 U.S. at 407–08 (noting that "legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship").

252. *Id.* at 397.

253. *Id.* at 398–404. *See* Morrison & Stenhouse, *supra* note 243, at 57–68 (detailing nonjudicial powers of Chief Justice of the United States, including control over federal court procedure, appointment power, and participation in legislative process).

in an administrative capacity.²⁵⁴ Viewing the actions of the Supreme Court and the judges on the Judicial Conference as administrative in nature, the rulemaking process is consistent with this reasoning.

However, not every kind of extrajudicial service necessarily accords with the Constitution; the test remains whether it undermines the integrity of the judicial branch.²⁵⁵ Accordingly, the *Mistretta* Court evaluated claims that judicial involvement with the Sentencing Commission threatened the integrity, independence, and impartiality of the judicial branch as a whole.²⁵⁶ The petitioners cited the required service by at least three federal judges, but the Court rejected the argument because each judge presumably consented to appointment by the President.²⁵⁷ The Court also noted that service on the Commission did not prevent federal judges from fulfilling their Article III duties, nor did it result in substantial numbers of recusals that hindered the judicial branch, because federal courts are free to assess the validity of federal procedural rules.²⁵⁸

In contrast, the REA requires chief judges, justices, and unspecified district court judges to sit on the Judicial Conference.²⁵⁹ Nonetheless, the Court cited these aspects of the rulemaking process approvingly, explaining that it has “given at least tacit approval to this degree of congressionally mandated judicial service on

254. “The judges serve on the Sentencing Commission not pursuant to their status and authority as Article III judges, but solely because of their appointment by the President as the Act directs. Such power as these judges wield as Commissioners is not judicial power; it is administrative power derived from the enabling legislation . . . In other words, the Constitution, at least as a *per se* matter, does not forbid judges to wear two hats; it merely forbids them to wear both hats at the same time.” *Mistretta*, 488 U.S. at 404; *accord* Garvito, *supra* note 86, 1078–79 (noting that judicial conference is not a strictly judicial organ and does not sit as a court).

255. “This is not to suggest, of course, that every kind of extrajudicial service under every circumstance necessarily accords with the Constitution. That the Constitution does not absolutely prohibit a federal judge from assuming extrajudicial duties does not mean that every extrajudicial service would be compatible with, or appropriate to, continuing service on the bench; nor does it mean that Congress may require a federal judge to assume extrajudicial duties as long as the judge is assigned those duties in an individual, not judicial, capacity. The ultimate inquiry remains whether a particular extrajudicial assignment undermines the integrity of the Judicial Branch.” *Mistretta*, 488 U.S. at 404.

256. “While the problem of individual bias is usually cured through recusal, no such mechanism can overcome the appearance of institutional partiality that may arise from judiciary involvement in the making of policy. The legitimacy of the Judicial Branch ultimately depends on its reputation.” *Id.* at 407.

257. *Id.*

258. *See id.* at 406–07.

259. *Id.* (citing REA).

nonadjudicatory bodies.”²⁶⁰ Moreover, there is no indication that service on the Judicial Conference leads to widespread recusals that inhibit the judicial branch. Although the responsibility of reviewing rule proposals could burden an overworked Supreme Court, the few indications we have from the Justices suggest that rule proposals receive a cursory review.²⁶¹ Barring a sworn statement by the Justices, contentions that the Court’s role in the rulemaking process undermines its integrity are unlikely to receive much support from the Court.

Lastly, the *Mistretta* Court exhibited concern with the potential loss of public faith in the integrity of the branch as a whole given its involvement in the Commission. Ultimately, however, the Court concluded that there was no reputational loss, stressing the judicial nature of the Commission’s function, the expertise of the judiciary, the practical value of federal judges sitting on the Commission, and Justice Jackson’s *Youngstown* concept of reciprocity.²⁶² The widespread support for the current rulemaking process mirrors these same traits.²⁶³ The analogous structure and power of the Sentencing Commission and the discussion from *Mistretta* strongly suggest that the federal rulemaking scheme undermines neither the independence nor the integrity of the Judicial Branch.

D. Proper Delegation But Improper Execution

Even if the delegation itself does not undermine judicial independence and integrity, some exercises of this delegated power could do so. Although such an issue has never arisen concerning rules passed under the REA, it has arisen in other contexts. For example, internal circuit court rules prohibiting district court judges from handling cases²⁶⁴ or permitting the investigation of alleged improper conduct by a judge²⁶⁵ have raised concerns about their affect on judicial independence. These concerns would apply

260. *Id.* at 406 n.29 (citing *Chandler v. Judicial Council*, 398 U.S. 74 (1970)).

261. *See, e.g.*, 146 F.R.D. 401, 504–05 (1993); Stephen B. Burbank, *Ignorance and Procedural Law Reform: A Call for a Moratorium*, 59 BROOK. L. REV. 841, 842 (1993); Karen Nelson Moore, *The Supreme Court’s Role in Interpreting the Federal Rules of Civil Procedure*, 44 HASTINGS L.J. 1039, 1072 (1992).

262. *Mistretta*, 488 U.S. at 407–08.

263. *See supra* notes 68–75, 77.

264. *See Chandler v. Judicial Council*, 398 U.S. 74, 130–38, 143 (1970) (Black, J., dissenting) (concluding that rule undermined judicial independence by punishing and regulating idiosyncrasies of judges).

265. *See In re Certain Complaints Under Investigation*, 783 F.2d 1488, 1505 (11th Cir. 1986) (upholding statute authorizing judicial council to investigate improper conduct by federal judge).

with equal force to rules passed under the REA that have similar effects. Thus, although the Court has found the process to be permissible, constitutional challenges to the implementation and execution of such power remain viable.

IV. CONSTITUTIONAL CHALLENGES TO THE PROCESS

Having defended the delegation, placement, and use of federal rulemaking power by federal courts, the only challenges that remain are to specific statutory provisions. Two potential challenges to the rulemaking process warrant discussion. The first is the constitutionality of Congress's "legislative veto" over proposed federal rules. The second is the validity of the supersession clause.

A. *Is the "Legislative Veto" Valid?*

One issue engendered by Congress's role in promulgating federal rules is the constitutionality of its ability to invalidate proposals. In *I.N.S. v. Chadha*,²⁶⁶ the Supreme Court invalidated legislative vetoes.²⁶⁷ At issue in *Chadha* was a statute authorizing either house of Congress to overturn the Attorney General's decision to suspend the deportation of an illegal alien residing within the country.²⁶⁸ The practical advantages of the legislative veto could not stand in light of the constitutionally imposed requirements of bicameralism and presentment to pass a law.²⁶⁹

The REA is distinguishable from the statute at issue in *Chadha*. Crucially, Congress's role in the federal rulemaking process differs from the legislative veto because if and when it acts, Congress does so before the proposed rules take effect.²⁷⁰ Thus, Congress intervenes in the process of creating a rule and not in the application of the rule; it is merely preventing a proposed rule from becoming

266. 462 U.S. 919 (1983).

267. *Id.* at 959.

268. *Id.* at 924–25.

269. "Its wisdom is not the concern of the courts; if a challenged action does not violate the Constitution, it must be sustained By the same token, the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution." *Id.* at 944, 946, 947–48, 950–51.

270. The Supreme Court must submit each rule promulgated under this act's authority to Congress by May 1, and the rules may not take effect until at least December 1 of the year submitted. 28 U.S.C. § 2074 (1988). Absent congressional action during this time period, the rule becomes law. U.S. Courts, <http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/Overview.aspx>.

effective. Moreover, when Congress intervenes it often does so after having satisfied the bicameralism and presentment requirements. For example, when Congress disagreed with portions of the proposed Federal Rules of Evidence, it passed a law, approved by both houses and signed by the President, to prevent the proposal from taking effect.²⁷¹ Later, having made modifications to the proposal, Congress passed its version of the rules of evidence as a bill that went through both houses and was signed by the President into law.²⁷² Similarly, when Congress amends pre-existing federal rules, it does so by passing a law.²⁷³ Furthermore, the REA does not discuss a legislative veto. All it requires is that the Supreme Court transmit the proposed rules to Congress by May 1 and that they take effect no earlier than December 1 of that same year.²⁷⁴ This provision can be understood as a simple notice requirement. Congress need not act nor be in session for the rules to take effect; the required time interval does nothing more than give Congress time to decide if it wishes to intervene in the rulemaking process of an independent agency. In effect, Congress has decided that the affirmative action of one of its houses is enough to halt the rulemaking process of the agency it created.²⁷⁵ Congress ordering an independent agency to stop its process does not seem to be a “law” and thus does not require bicameralism and presentment.²⁷⁶

B. Is the Supersession Clause Valid?

The second constitutional issue concerning the process of making the federal rules is the REA’s supersession clause, which specifies that “[a]ll laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.”²⁷⁷ The clause raises two potential constitutional issues. The first is whether a rule can functionally nullify a law without violating the bicameralism and presentment requirements. The second issue is whether

271. Pub. L. No. 93-12, 87 Stat. 9 (1973).

272. Pub. L. No. 93-595, 88 Stat. 1926 (1976).

273. *See, e.g.*, Federal Rules of Civil Procedure Amendments Act of 1982, Pub. L. No. 97-462, 96 Stat. 2527 (1983) (amending Federal Rule of Civil Procedure 4).

274. 28 U.S.C. § 2074.

275. By analogy, there does not appear to be a constitutional barrier to Congress requiring the EPA to give it advanced notice of its proposed laws and allow Congress the opportunity to reject them before they take effect. Congress created these agencies and created their procedure.

276. Of course, any rejection of rules codifying the inherent powers of courts would reject the codification but not the courts’ constitutional authority to exert such inherent power.

277. 28 U.S.C. § 2072(b) (1990).

this would constitute a core legislative act that Congress cannot delegate.

Case law on the supersession clause is rare and only partially illuminating. The *Sibbach* Court held that Congress may delegate rulemaking powers to the federal courts “to make rules not inconsistent with the statutes or Constitution of the United States.”²⁷⁸ This phrase suggests that the supersession clause is invalid. But only a few federal cases have ever considered the supersession clause, and no court has held it invalid.²⁷⁹ In *Jackson v. Stinnett*,²⁸⁰ the Fifth Circuit attempted to reconcile the clause with *Chadha*.²⁸¹ The Court explained that the clause has never been held to invalidate all conflicting federal statutes; rather, it only applies to statutes existing before the rule’s passage and therefore does not apply to any subsequent statutes.²⁸² In other words, the *Jackson* court held that because Congress passed the statute after the rule had been in effect, the statute repealed the rule.²⁸³

The *Jackson* court’s emphasis on the retrospective, rather than prospective, power of rules has some formalist support. Courts technically do not have the power to repeal laws. For example, when a court holds a statute unconstitutional, the statute remains law; the holding is a directive to courts to not enforce that law. Only Congress may act to withdraw the text of the law.²⁸⁴ For the same reason, when a district court holds a statute unconstitutional and the circuit court reverses this decision, Congress need not re-pass the statute because it never ceased to exist; the district court’s holding prevented the application of the statute but never repealed it. This

278. *Sibbach v. Wilson & Co.*, 312 U.S. 1, 3 (1941).

279. In the same year, the Second Circuit handled two such cases. In one it held that a rule of appellate procedure regulating the taxable costs for brief filing superseded a conflicting federal statute; the opinion was brief and decided the issue solely upon the supersession clause without any discussion of the separation of powers. *See Albatross Tanker Corp. v. SS. Amoco Delaware*, 418 F.2d 248, 248 (2d Cir. 1969) (per curiam). The second case, in the same brief manner, held that two rules of appellate procedure regulating the costs of printing briefs and docket fees trumped conflicting federal statutes, again citing the supersession clause dispositively but with no discussion of its validity. *See Waterman S.S. Corp. v. Cottons*, 419 F.2d 372, 374 (2d Cir. 1969).

280. 102 F.3d 132 (5th Cir. 1996).

281. *Id.* at 134 n.3.

282. *Id.* at 135 & n.3.

283. *Id.* at 136.

284. For example, after the Supreme Court declared Section 3 of the National Industrial Recovery Act unconstitutional, the statute remained in the United States Code until Congress repealed it shortly after the decision. *See Goldwater v. Carter*, 617 F.2d 697, 729 (D.C. Cir. 1979).

logic supports the *Jackson* court's reasoning because the supersession clause would only strip prior statutes of their force but would not repeal them. Therefore, if a new rule conflicts with a pre-existing statute, that statute becomes ineffective but continues to exist. If that new rule is then repealed, the statute's power is revived. As the *Jackson* court concluded, this seems to circumvent *Chadha* concerns because although the supersession clause may nullify a statute's effectiveness, it does not repeal it; thus, bicameralism and presentment are not required.²⁸⁵

This logic, however, does not quell concerns that rendering a statute functionally invalid, even if only temporarily, is a legislative act that only Congress can perform. Some scholars argue that the supersession clause means Congress made the decision that laws it passes in the procedural realm are only temporary and that Congress has elected not to retain exclusive jurisdiction over that realm of law.²⁸⁶ This may be so, but in the hierarchy of sources of law, laws should trump rules because of their democratic origins. Further, in *Chadha*, the Court noted that not all actions taken by the legislature are legislative; one must examine the character and effects of the action to determine if it is legislative in nature.²⁸⁷ Rendering a law functionally void seems legislative in nature.

The only way to circumvent the Article I issue is to view the supersession clause as a congressional instruction to courts on how to handle a conflict between a law and a rule. Per the *Jackson* court, the instruction is that chronology is dispositive. The degree to which Congress can regulate how the judiciary interprets laws is a question fraught with concerns about the separation of powers and judicial independence. The lack of federal court discussion of the supersession clause and the Judicial Conference's reluctance to pass rules conflicting with pre-existing laws suggests there is no clear answer to the constitutional question of the supersession clause's validity.

285. *But see* Moore, *supra* note 35, 1051 (suggesting that clause violates *Chadha*, noting failed amendment to REA attempting to repeal clause, and citing Chief Justice Rehnquist's statement that Judicial Conference will avoid producing rules that conflict with laws); *cf.* Whitten, *supra* note 54, at 63–66 (noting that scope of supersession clause may depend on level of Congressional action in procedural area at issue).

286. *See, e.g.*, Whitten, *supra* note 54, at 61–62.

287. *INS v. Chadha*, 462 U.S. 919, 952 (1983).

V. CONCLUSION

This Note's separation of powers analysis sheds light on several relevant issues for courts and practitioners, and identifies the constitutional boundaries of federal court rulemaking power.

Although other bodies may do the actual drafting, according to case law and the statutory language, the Supreme Court has the power to create the federal rules. When exerting this rulemaking power, the Court acts within the judicial branch. Despite the Court's reliance on statutory power to create procedural rules, federal courts possess two forms of inherent power to do so. Inherent power exists because Congress cannot stop courts from performing their constitutional function of adjudicating cases nor infringe on their independence. If courts cannot remain independent and fairly adjudicate cases, then their function as a co-equal branch of government is compromised.

Nonetheless, the Court can constitutionally create rules under its statutory authority. The REA does not violate the two requirements of the non-delegation doctrine: Congress did not delegate legislative power, and it did provide an intelligible principle. Moreover, viewing the rulemaking process as occurring within an independent agency within the judicial branch rather than in the federal courts' Article III capacity alleviates constitutional concerns about the powers of the judiciary. Further, the process does not undermine the integrity of the judicial branch to an unconstitutional degree. Finally, this Note both justifies Congress's role in the process, by dispelling the perception that the REA confers a legislative veto, and provides a defense of the supersession clause. The current federal procedural rulemaking process is largely defensible under a formalist separation of powers analysis. The above analysis outlines the proper steps to determine if future rules passed under, or modifications made to, the process comply with the separation of powers.

