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INTRODUCTION

THERE has been no shortage of efforts to justify the common lawmaking powers of the federal courts. In the course of these efforts, it is commonplace to underscore three features of the common law that federal courts develop without congressional authorization. First, this law "is truly federal law in the sense that it is controlling in . . . actions in state courts as well as in federal courts."[1] Second, to the extent that the federal courts proceed without congressional authorization, federal common law is "specialized."[2] It is confined, at least as a matter of doctrine, to several well-recognized enclaves, such as interstate disputes, international relations, admiralty, and proprietary transactions of the United States.[3] Third, Congress can always abrogate it.

Despite the consistent emphasis on these characteristics of federal common law, a large body of federal common law exists that does not embody them. This body of law can be characterized as "procedural common law"—common law that is concerned primarily with the regulation of internal court processes rather than sub-

[1] 19 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice & Procedure § 4505 (2d ed. 1996).

[2] Henry J. Friendly, In Praise of *Erie*—And of the New Federal Common Law, 39 N.Y.U. L. Rev. 383, 405 (1964).

[3] See, e.g., Texas Indus. v. Radcliff Materials, 451 U.S. 630, 641 (1981) (listing enclaves of federal common law).

stantive rights and obligations. With few exceptions, this body of law falls outside of the traditional definitions of federal common law. Procedural common law does not generally bind state courts;[4] though developed without congressional authorization, it falls outside of the traditionally recognized enclaves of federal common law; and Congress's ability to abrogate it is often called into question.[5] While the sources of and limits upon federal court power to develop substantive common law have received serious and sustained scholarly attention, the sources of and limits upon federal court power to develop procedural common law have been almost entirely overlooked.

This Article will offer an account of the federal common law of procedure. Part I will introduce the problem. After giving a brief account of the law and scholarship addressing the power of the federal courts to develop substantive common law, it will draw attention to the existence of procedural common law by describing five representative doctrines: abstention, forum non conveniens, stare decisis, remittitur, and preclusion. While each of these doctrines is a familiar piece of federal law, Part I will point out that the courts developing these doctrines have not addressed the question of their authority to do so.

Part II will address this question of authority. After concluding that no statute generally authorizes the federal courts to develop a common law of procedure, it will explore potential constitutional justifications for that authority. It will first develop a theory that tracks the conventional justification for federal common law to include procedure. Federal procedure, like the traditional enclaves addressed by substantive federal common law, is a matter that the constitutional structure places beyond the authority of the states. Both the Inferior Tribunals Clause and the Sweeping Clause grant Congress the authority to regulate the procedure of the federal courts. If Congress fails to exercise its authority over procedure, the federal courts can regulate procedure in common law fashion. They can only do so, however, until Congress steps in. If Congress

[4] See Michael G. Collins, Article III Cases, State Court Duties, and the Madisonian Compromise, 1995 Wis. L. Rev. 39, 178–81 (observing that state courts need not "mimic federal courts procedurally," even when they hear cases involving federal law).

[5] See infra notes 59–65 and accompanying text.

chooses to legislate, conflicting federal procedural common law must give way to federal statute.

This explanation has force, but it tells only part of the story. In treating the procedural common lawmaking authority of the federal courts as derivative of and subservient to that of Congress, it fails to account for the fact that power might be distributed differently between the courts and Congress on matters of procedure than on matters of substance. In particular, it fails to account for the possibility that federal court authority over procedure might sometimes, even if rarely, exceed that of Congress.

Part II will then explore a theory that would account for that possibility: the proposition that Article III empowers federal courts to adopt procedural rules in the course of adjudication. Article III's references to "courts" and "judicial power" have long been understood to carry with them certain powers incident to all courts. Authority to regulate procedure, at least in the form of judicial decisions rather than prospective court rules, is assumed to be one of those powers. If federal courts indeed possess inherent authority over procedure, that authority presumably empowers them to adopt procedural measures in common law fashion. This power is not exclusive; on the contrary, Congress has wide authority to regulate it. Nonetheless, there is likely some small core of inherent procedural authority that Congress cannot reach.

This explanation captures the widely felt intuition that federal courts possess some power over procedure in their own right, but it encounters a threshold difficulty. Although both scholars and judges treat the proposition that federal courts possess inherent authority over procedure as self-evidently true, close study of the cases casts some doubt upon it. The inherent authority of the federal courts has been most fully explored in connection with a court's ability to sanction misbehavior and regulate those who serve it; federal courts have long asserted inherent authority to hold in contempt, impose sanctions, vacate judgments for fraud, dismiss cases for failure to prosecute, regulate the bar, and regulate jurors.[6] The tradition of directly claiming inherent authority to prescribe procedural regulations, by contrast, is relatively weak, and it is doubtful whether the list of well-recognized inherent powers can

[6] See infra notes 95–98 and accompanying text.

be understood as recognizing a broad power to control any matter related to internal judicial administration.

Because courts treat the existence of inherent authority as turning on history, Part III will carefully examine the historical record, focusing on the period between 1789 and 1820. It will canvass the framing and ratification debates, the history surrounding the adoption of the early judiciary and process acts, the case law, and contemporary treatises, all with a view toward determining whether federal courts in this period understood themselves to possess inherent procedural authority. It will conclude that while the historical record is mixed, the record is strong enough to support the proposition that Article III itself authorizes courts to regulate procedure in the absence of congressional authorization.

Inherent procedural authority, while important, is limited. Part IV will point out that any procedural authority conferred by Article III is entirely local.[7] In other words, Article III empowers a court to regulate its own proceedings, but it does not empower a reviewing court to supervise the proceedings of a lower court by prescribing procedures that the lower court must follow. That is so because Article III vests "the judicial Power" in *each* Article III court. To the extent that "the judicial Power" carries with it the power to regulate procedure in the course of adjudicating cases, each court possesses that power in its own right. To be sure, an appellate court can set aside a rule adopted by a lower court on the ground that the rule exceeds the bounds of the lower court's authority. But, the content of any procedure adopted pursuant to inherent procedural authority lies fundamentally within the discretion of the adopting court. As a result, inherent procedural authority does not enable the development of procedural doctrines that are uniform across jurisdictions.

Standing alone, then, neither the traditional explanation for federal common law nor the argument from inherent authority fully explains the procedural common lawmaking powers of the federal courts. Taken together, however, they provide a fairly complete explanation for what federal courts actually do and have done since 1789. The inherent procedural authority of courts supple-

[7] See infra notes 203–04 and accompanying text. See generally Amy Coney Barrett, The Supervisory Power of the Supreme Court, 106 Colum. L. Rev. 324 (2006).

ments the common lawmaking authority that they can otherwise claim over procedure. The straightforward analogy to the substantive common lawmaking power of federal courts is right, so far as it goes. In the area of federal judicial procedure, as in the substantive areas of constitutional preemption, federal courts can develop uniform federal rules when Congress fails to do so. This procedural common law differs from substantive common law only in that it (like the old federal general common law) does not bind state courts. Federal court power over procedure, however, does not end there. In addition to this common law power to adopt uniform federal rules, each federal court possesses inherent authority to regulate its own proceedings. The resulting body of law is a mix of uniform doctrines largely drawn from general law (much like the law of admiralty or interstate relations) and narrower rules and discretionary measures associated with the inherent authority of individual courts.

These dual strands of judicially crafted procedural regulation are evident in both the early and modern cases. In the eighteenth and nineteenth centuries, uniform procedural doctrines were drawn from the general law, which courts understood themselves to apply rather than make. When there were matters that neither the enacted law nor general law governed, courts relied on inherent procedural authority to regulate the proceedings before them. Cases from the twentieth and twenty-first centuries contain the same two threads. The uniform procedural doctrines applied by modern courts are the descendants of the procedural doctrines of the old general common law. Preclusion and abstention, both of which have long historical roots, are good examples. These doctrines resemble the old general procedural common law in both their content—which has, in the main, stayed constant over time—and their development—which now, as then, is mediated by tradition and consensus. Even though modern, positivist federal courts understand themselves to make these doctrines, innovations in them (for example, the abandonment of preclusion's mutuality requirement) are not usually abrupt departures from traditional principles. Rather, they are usually responses to emergent consensus about the need for change. And when neither tradition, emergent consensus, nor the enacted law governs a particular procedural matter—in other words, when the content of the rule is entirely in the

discretion of the adopting court—modern federal courts, like their predecessors, typically treat any action they take as an exercise of inherent procedural authority. Such rules tend to address narrow, isolated topics. For example, the early Supreme Court relied upon its inherent procedural authority to adopt a rule setting forth the procedure for serving process;[8] more recently, the Supreme Court acknowledged the authority of a federal court to adopt a rule governing the time in which a case must be brought.[9]

These two strands of procedural common law hardly fall within watertight categories. On the contrary, they are sometimes independent and sometimes overlapping, and that renders this body of law complex. Nonetheless, they reflect a longstanding practice in the federal courts of permitting flexibility and creativity to stand alongside uniform doctrines mediated by tradition and consensus. Recognizing these two strands of authority not only sheds light on the different ways in which federal courts regulate procedure through the case law method, but it also clarifies the role of federal courts vis-à-vis Congress with respect to procedure. Claims of exclusive authority are rooted in inherent authority; thus, to the extent that there are any matters insulated from congressional control, they fall within the category of matters that each court has the authority to self-regulate. There can be no claim of exclusivity, by contrast, with respect to procedural doctrines that bind the judicial branch as a whole. Uniform federal procedural common law, like all federal common law, is wholly subject to congressional abrogation.

I. PROCEDURAL AND SUBSTANTIVE COMMON LAW

Substantive common law is the lens through which the common law powers of the federal courts are generally viewed. This Part thus begins with a brief account of the power that federal courts possess to develop substantive common law. It then develops in more detail the propositions that procedural common law exists and that it exists outside of the traditional account of common law. To that end, this Part introduces five doctrines representative of procedural common law: abstention, forum non conveniens, stare

[8] Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 480 (1793).
[9] Barker v. Wingo, 407 U.S. 514, 530 n.29 (1972).

decisis, remittitur, and preclusion. As this Part explains, each of these doctrines is "procedural" insofar as it is concerned with regulating court processes, and each is "common law" insofar as it is judge-made rather than the product of textual interpretation. If federal courts are generally at pains to identify a justification for proceeding when they develop substantive common law, the opposite is true when they develop procedural common law. While all of the doctrines described below are rooted in the fabric of federal law, the basis of the courts' authority to develop them is almost entirely unexplored.

A. Substantive Common Law

Discussions of federal common law typically begin with a reference to *Erie Railroad Co. v. Tompkins* and its famous holding that "[t]here is no federal general common law."[10] *Erie* marked a sea change in the way federal courts approached their common law powers. Before *Erie*, one might have described the common law powers of the federal courts as broad but shallow: federal courts freely articulated common law on a broad range of matters, but the principles they articulated applied only in federal courts. After *Erie*, one might describe the common law powers of the federal courts as narrow but deep: federal courts make common law in instances "few and restricted,"[11] but the principles they articulate bind state as well as federal courts. *Erie* (and its progeny) thus gave something to both state and federal courts. On the one hand, state courts received the benefit of a general rule rendering state common law (or, more precisely, "the unwritten law of the State as declared by its highest court"[12]) controlling even in federal courts. On the other hand, federal courts received the reciprocal benefit of that rule's exception. Federal courts make common law only rarely, but when they do, it has preemptive bite.[13]

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[10] 304 U.S. 64, 78 (1938).

[11] Wheeldin v. Wheeler, 373 U.S. 647, 651 (1963); see also Sosa v. Alvarez-Machain, 542 U.S. 692, 726 (2004) (noting that after *Erie*, federal courts dropped their claim of general common lawmaking competence and "withdrew to havens of specialty").

[12] *Erie*, 304 U.S. at 71.

[13] See Friendly, supra note 2, at 405 ("*Erie* led to the emergence of a federal decisional law in areas of national concern that is truly uniform because, under the supremacy clause, it is binding in every forum, and therefore is predictable and useful as

The Supreme Court has said that unless Congress authorizes it, "federal common law exists only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases."[14] The justification for common law made without statutory authorization is that certain enclaves of federal interest are "so committed by the Constitution and laws of the United States to federal control that state law is pre-empted and replaced, where necessary, by federal law of a content prescribed (absent explicit statutory directive) by the courts."[15] In other words, the enclaves identified by the Court are areas in which the structure of our federal system prohibits state law from controlling.[16] If a case or controversy arises in one of these areas and Congress fails to articulate a uniform federal standard that would decide it, the federal courts must supply a federal standard in the form of a common law rule. As Professor Alfred Hill put it, "[t]he silence of Congress [in an area committed to federal control], far from silencing the federal courts, is precisely what calls upon them to speak."[17] In doing so, however, the judiciary functions only as a placeholder for Congress. If Congress subsequently adopts conflicting regulation, federal common law must give way to federal statute.

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its predecessor, more general in subject matter but limited to the federal courts, was not."); see also Curtis A. Bradley, Jack L. Goldsmith & David H. Moore, *Sosa*, Customary International Law, and the Continuing Relevance of *Erie*, 120 Harv. L. Rev. 869, 878–79 (2007) (describing this preemptive bite as the "basic animating principle of post-*Erie* federal common law").

[14] Texas Indus. v. Radcliff Materials, 451 U.S. 630, 641 (1981).

[15] Boyle v. United Techs. 487 U.S. 500, 504 (1988); see also Alfred Hill, The Law-Making Power of the Federal Courts: Constitutional Preemption, 67 Colum. L. Rev. 1024, 1025 (1967) ("[T]here are areas of federal preemption, created by force of the Constitution, in which the federal courts formulate rules of decision without guidance from statutory or constitutional standards . . . .").

[16] To be sure, this explanation of federal common law is neither perfect, see Jay Tidmarsh & Brian J. Murray, A Theory of Federal Common Law, 100 Nw. U. L. Rev. 585, 623–27 (2006) (describing strengths and weaknesses of the preemption theory), nor uniformly accepted, see, e.g., Martin H. Redish, Federal Jurisdiction: Tensions in the Allocation of Judicial Power 119–48 (2d ed. 1990) (advocating a narrower view); Louise Weinberg, Federal Common Law, 83 Nw. U. L. Rev. 805, 805 (1989) (advocating a broader view). I do not here engage the debate regarding the proper justification for the federal courts' power to make substantive federal common law. For present purposes, I assume the correctness of the traditional explanation.

[17] Hill, supra note 15, at 1042.

Federal common law exists, of course, outside of the above-described enclaves. As the Supreme Court's doctrinal formulation suggests, federal common law also exists pursuant to congressional authorization. Federal statutes may explicitly or implicitly authorize the creation of federal common law, and, as one might imagine, determining whether a statute implicitly authorizes such creation is frequently a difficult and contested question of statutory interpretation. It is also the case that it can be difficult to distinguish federal common law made in the shadows of federal statutes from interpretation of the statutory text itself. As a result, scholars frequently point out that when all is said and done, it can be hard to tell whether a given decision effects congressional intent or advances a judicial policy choice.[18] This criticism is far more salient when federal common law is made in the interstices of federal statutes than when it is made in the enclaves of federal common law.[19] When federal common law is made in the enclaves, there is no text giving the courts even a general sense of the direction in which they should go; hence, there is no real argument that courts are engaging in interpretation rather than making common law. The enclaves of federal common law thus present federal common law in its starkest, most recognizable form. Doctrinally, they also present the most difficult question regarding the source of federal court power: courts claiming the mantle of statutory authorization are on firmer ground than courts striking out on their own to articulate common law rules.

B. Contrasting Procedural Common Law

The standard account of federal common law described above neither acknowledges nor justifies the considerable amount of procedural common law articulated by the federal courts. "Procedure" is not included on the laundry list of enclaves in which federal common lawmaking is justified. While Congress's ability to overrule substantive common law is widely recognized, its ability to overrule procedural common law is frequently questioned.[20] And

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[18] See Note, An Objection to *Sosa*—And to the New Federal Common Law, 119 Harv. L. Rev. 2077, 2083 (2006) (describing this phenomenon).

[19] Id.

[20] See infra notes 59–65.

procedural common law, unlike substantive common law, does not replace contrary state law.[21]

Before exploring the implications of these differences, however, it is necessary to answer a threshold question: what is "procedural common law"? This Section highlights the existence of this overlooked body of law by briefly describing five doctrines representative of it: abstention, forum non conveniens, stare decisis, remittitur, and preclusion. Each of these doctrines is "procedural" insofar as it is primarily concerned with the regulation of court processes and in-courtroom conduct.[22] Each is "common law" insofar as it is judge-made; these five doctrines resemble those developed in the traditional enclaves of common law insofar as none pretends to interpret any provision of the enacted law.[23] If interpretation and common lawmaking run along a spectrum, each of these doctrines falls squarely on the "common law" end of it. As a result, the common law I describe below, much like that developed in the traditional enclaves of federal common law, presents the question of judicial authority with particular crispness. When a federal court proceeds without any pretense of interpreting the requirements of enacted law, it forces to the forefront the question of whether federal courts possess freestanding authority to develop a federal common law of procedure.

It is important to be clear that these five doctrines are an illustrative rather than exhaustive list of procedural common law. Moreover, in asserting that they qualify as both "procedural" and

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[21] See infra notes 55–58 and accompanying text.

[22] Cf. Sara Sun Beale, Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts, 84 Colum. L. Rev. 1433, 1474–75 (1984) (defining substantive rules as those "concerned principally with policies extrinsic to litigation" and procedural rules as those designed "to enhance the fairness, reliability, or efficiency of the litigation process"). The status of these five doctrines as "procedural" can also be defended by the circular argument that procedural common law is the only kind of common law that does not bind the states, and none of these doctrines, as a rule, applies in state courts. While this argument does not conclusively establish that any of these doctrines is procedural, it does illustrate that both state and federal courts treat them as such.

[23] The fact that these doctrines are "judge made" does not mean that judges have made them up out of whole cloth. On the contrary, judges fashion much federal common law, including procedural common law, by drawing from norms generally accepted by the legal community. See generally Caleb Nelson, The Persistence of General Law, 106 Colum. L. Rev. 503 (2006).

"common law," I am not offering restrictive definitions of those terms. "Procedure" and "common law" are both difficult to define,[24] and I do not here attempt a definition that conclusively determines whether marginal cases can be accurately described as either "procedural" or "common law."[25] The doctrines that I describe below are ones conventionally treated as "procedural" and that should qualify as "common law" under even the most grudging definition of the phrase.

1. Abstention

One area in which the federal courts have developed a significant body of procedural common law is abstention. The abstention doctrines identify the circumstances in which federal courts deem it appropriate to refrain from adjudicating a case to permit some other body—typically a state court—to adjudicate it first. There are five doctrines that permit district courts to abstain from statu-

[24] On the difficulty of defining "procedure," see, for example, *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 559 (1949) (Rutledge, J., dissenting) ("Suffice it to say that actually in many situations procedure and substance are so interwoven that rational separation becomes well-nigh impossible."). For competing definitions of "common law," compare Hill, supra note 15, at 1026 (defining "common law" narrowly by excluding from its reach all rules traceable to some statutory or constitutional text, no matter how tangentially), with Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. Chi. L. Rev. 1, 5 (1985) (defining common law broadly to include any rule not appearing on the face of some constitutional or statutory provision, "whether or not that rule can be described as the product of 'interpretation' in either a conventional or an unconventional sense").

[25] There are many doctrines whose status as procedural common law is contestable. For example, people might agree that a rule excluding involuntary confessions is a common law rule, but disagree about whether that requirement is procedural or substantive. Compare McNabb v. United States, 318 U.S. 332, 340 (1943) (treating such a rule as procedural), with Beale, supra note 22, at 1475–76 (treating it as substantive). Similarly, people might agree that the well-pleaded complaint rule, see Louisville & Nashville R.R. v. Mottley, 211 U.S. 149, 152–53 (1908), is procedural, but disagree about whether it results from common lawmaking or statutory interpretation. Compare Richard A. Matasar & Gregory S. Bruch, Procedural Common Law, Federal Jurisdictional Policy, and Abandonment of the Adequate and Independent State Grounds Doctrine, 86 Colum. L. Rev. 1291, 1333 (1986) (treating rule as one of common law because the text of 28 U.S.C. § 1331 does not so restrict federal question jurisdiction), with Hill, supra note 15, at 1026 (adopting a narrower definition of common lawmaking under which the well-pleaded complaint rule would be treated as statutory interpretation).

torily granted jurisdiction—*Colorado River*, *Younger*, *Thibodaux*, *Burford*, and *Pullman* abstention.[26]

Because the abstention doctrines guide the litigation process rather than out-of-courtroom conduct, they are "procedural." Because they are prescribed by judicial decision rather than enacted law, they are a species of "common law."[27] Indeed, one might say that the common law status of the abstention doctrines is particularly clear because they exist not only in the absence of explicit regulation by the enacted law but in spite of explicit jurisdictional grants in the enacted law. It is, in fact, the tension between doctrines emanating from judicially developed guidelines and enacted law arguably charging federal courts to assume jurisdiction that has made the abstention doctrines particularly controversial.[28] Those who defend the abstention doctrines, however, do not do so on the ground that the doctrines are constitutionally or statutorily required. Those who defend abstention, like those who criticize it, treat abstention as a form of common law.[29] Neither those who defend it nor those who criticize it have focused on the source of the

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[26] See Colo. River v. United States, 424 U.S. 800, 817 (1976); Younger v. Harris, 401 U.S. 37, 43–44 (1971); La. Power & Light Co. v. Thibodaux, 360 U.S. 25, 27–29 (1959); Burford v. Sun Oil Co., 319 U.S. 315, 332–33 (1943); R.R. Comm'n v. Pullman Co., 312 U.S. 496, 500–01 (1941).

[27] See Gene R. Shreve, Pragmatism Without Politics—A Half-Measure of Authority for Jurisdictional Common Law, 1991 BYU L. Rev. 767, 797 (1991) (dubbing the doctrines a kind of "jurisdictional common law"); see also *Colo. River*, 424 U.S. at 817 (grounding propriety of dismissal in "[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation") (citations omitted); *Younger*, 401 U.S. at 43 (grounding abstention from issuing injunctions against state criminal prosecutions in the policies reflected generally in certain statutes and in equitable tradition); *Thibodaux*, 360 U.S. at 28 (holding that concerns of comity justify abstention in certain circumstances even in suits at law, as opposed to suits at equity); *Burford*, 319 U.S. at 333 n.29 (grounding the power to abstain in the powers traditionally exercised by courts sitting in equity and the guidelines for its exercise in federalism); *Pullman*, 312 U.S. at 500–01 (justifying abstention with reference to both the traditional powers of equity courts and regard for the "harmonious relation between state and federal authority").

[28] See *Colo. River*, 424 U.S. at 825–26 (Stewart, J., dissenting); *Thibodaux*, 360 U.S. at 31–34 (Brennan, J., dissenting); *Burford*, 319 U.S. at 336, 347–48 (Frankfurter, J., dissenting); Martin H. Redish, Abstention, Separation of Powers, and the Limits of the Judicial Function, 94 Yale L.J. 71, 76–79 (1984).

[29] See Matasar & Bruch, supra note 25, at 1337–42 (1986); Redish, supra note 28, at 80–84; David L. Shapiro, Jurisdiction and Discretion, 60 N.Y.U. L. Rev. 543, 547–52, 574–75, 579–85 (1985); Shreve, supra note 27, at 769–72, 796–98.

federal courts' authority to develop a procedural common law of abstention.

2. Forum Non Conveniens

The doctrine of forum non conveniens, a close cousin of abstention, addresses a district court's power to dismiss a suit so that the suit may be adjudicated in a "more convenient" forum. In determining whether another forum is better suited to adjudicate a claim, the court considers factors of public interest, such as the chosen forum's interest in the controversy, as well as factors of private interest, such as the relative ease of access to proof, the relative availability of compulsory process, and the relative cost of obtaining the attendance of witnesses.[30] When the balance of factors strongly favors adjudicating the case elsewhere, the district court can override the plaintiff's choice of forum by dismissing the case.[31]

Insofar as forum non conveniens addresses the circumstances in which a federal court will adjudicate a suit, it is procedural. Insofar as it is judicially developed rather than the product of enacted law, it is common law.[32] In fact, as is the case with abstention, forum non conveniens might be said to exist not only in the absence of enacted law on point but in spite of it: forum non conveniens exists in spite of jurisdiction and venue statutes that arguably instruct a district court to adjudicate.[33]

While the courts have made clear that forum non conveniens is a common law doctrine, they have not made clear the source of their authority to develop it. For example, in *Gulf Oil v. Gilbert*, the case widely regarded as first sanctioning a federal doctrine of forum non conveniens, the Supreme Court did not point to any specific statu-

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[30] See Gulf Oil v. Gilbert, 330 U.S. 501, 508–09 (1947).

[31] Id. at 508. The doctrine only applies when the more convenient forum is foreign because 28 U.S.C. § 1404, enacted in 1948, governs transfers between United States district courts.

[32] See *Gulf Oil*, 330 U.S. at 507 (describing forum non conveniens as a common law doctrine); id. at 505 n.4 (asserting that "[t]he doctrine did not originate in federal but in state courts"); id. at 507 (observing that "[t]he federal law contains no . . . express criteria to guide the district court in exercising [the forum non conveniens] power" but that "the common law [has] worked out techniques and criteria for dealing with it").

[33] See id. at 513 (Black, J., dissenting) (protesting forum non conveniens on this ground).

tory or constitutional provision that granted federal courts the power to dismiss suits on this basis, nor did it identify the principle that generally empowered it to create procedural common law, of which forum non conveniens is but a part.[34] Since *Gulf Oil* was decided, judges and scholars have occasionally justified forum non conveniens with reference to the inherent authority of federal courts.[35] Even then, however, the fundamental proposition that federal courts possess inherent procedural authority is assumed rather than explored.

3. Stare Decisis

Stare decisis, a doctrine adopted by courts to govern their decisionmaking processes, has two forms: "horizontal" and "vertical." Horizontal stare decisis refers to the principle that a court will follow its own precedent, and vertical stare decisis refers to the principle that a court will follow the precedent set by a higher court. In what follows, I consider only the doctrine of horizontal stare decisis, which is a more nuanced doctrine and therefore a richer example of procedural common law.

Consider some of the rules comprising the doctrine of horizontal stare decisis. The fundamental rule of horizontal stare decisis is that holdings bind and dicta do not. Subsidiary rules, however, dictate the strength a holding carries in particular circumstances. Some holdings are virtually set in stone. For example, every court of appeals forbids one panel of the court from overturning decisions made by another.[36] Even those holdings open to reconsideration, however, such as those presented to a court of appeals sitting en banc or to the Supreme Court, vary in strength. The Supreme Court and many courts of appeals have adopted a three-tiered system in which constitutional cases carry the weakest precedential force, common law cases carry average precedential force, and

[34] Gulf Oil v. Gilbert, 330 U.S. 501 (1947).

[35] See, e.g., Chambers v. NASCO, 501 U.S. 32, 44 (1991) (including in a list of inherent judicial powers the power to dismiss a case on grounds of forum non conveniens); Elizabeth T. Lear, Congress, the Federal Courts, and Forum Non Conveniens: Friction on the Frontier of Inherent Power, 91 Iowa L. Rev. 1147 (2006) (treating forum non conveniens as an exercise of the judiciary's inherent power).

[36] See Amy Coney Barrett, Stare Decisis and Due Process, 74 U. Colo. L. Rev. 1011, 1017–18, 1018 n.20 (2003).

statutory cases carry particularly strong precedential force.[37] Before overruling a common law or constitutional case (statutory cases are rarely overruled), the Supreme Court and the courts of appeals balance reliance interests in the precedent against arguments that the precedent has become unworkable or has been undercut by intervening law.[38] None of these factors, however, is applicable in the district courts. District courts, in contrast to the Supreme Court and courts of appeals, generally do not observe horizontal stare decisis.[39]

Courts do not purport to interpret any statutory or constitutional text in the development of stare decisis doctrine. As both the rules of stare decisis and their variance in the district and appellate courts suggest, stare decisis is a doctrine comprised of judicial policy choices, and both courts and scholars characterize it as such.[40] Even though the doctrine is generally regarded as a species of common law, the question of the courts' authority to develop it is rarely raised. Scholars have sometimes analogized the federal courts' authority to develop the doctrine of stare decisis to their authority to develop other areas of federal common law, such as admiralty or interstate disputes.[41] Others have contended that the power to regulate decisionmaking by adopting doctrines like stare decisis is part of "the judicial Power" that Article III confers.[42] The

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[37] See Amy Coney Barrett, Statutory Stare Decisis in the Courts of Appeals, 73 Geo. Wash. L. Rev. 317, 319–21 (2005).

[38] See, e.g., Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854–69 (1992) (plurality opinion).

[39] Barrett, supra note 36, at 1015 & n.13.

[40] See, e.g., Agostini v. Felton, 521 U.S. 203, 235 (1997) ("[S]tare decisis is not an inexorable command, but instead reflects a policy judgment that in most matters it is more important that the applicable rule of law be settled than that it be settled right.") (citations and internal quotation marks omitted); Adarand Constructors v. Pena, 515 U.S. 200, 231–35 (1995) (opinion of O'Connor, J.) ("'[S]tare decisis is a principle of policy . . . .'" (quoting Helvering v. Hallock, 309 U.S. 106, 119 (1940)); see also John Harrison, The Power of Congress over the Rules of Precedent, 50 Duke L.J. 503, 525–29 (2000) (characterizing norms of precedent as "federal common law"); Gary Lawson, Controlling Precedent: Congressional Regulation of Judicial Decision-Making, 18 Const. Comment. 191, 212 (2001) (characterizing stare decisis as judicially determined); Michael Stokes Paulsen, Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of *Roe* and *Casey*?, 109 Yale L.J. 1535, 1548 (2000) ("The point is that stare decisis is a policy judgment, *not* a rule of law specified in the Constitution or clearly implicit in its provisions or overall structure.").

[41] See, e.g., Harrison, supra note 40, at 525–29.

[42] See, e.g., Lawson, supra note 40, at 202–04, 207.

question of the courts' authority to articulate rules of stare decisis, however, is tangential to the issues occupying scholars of the doctrine; there is, therefore, no settled consensus regarding the source of federal court power to develop these rules.

4. Remittitur

Wright & Miller's well-known treatise on federal practice and procedure describes remittitur practice as "[a]n excellent example of what might be called 'federal common law of procedure'—that is, judge-made rules of practice and procedure."[43] When a district court determines that a jury verdict is excessive, the court can either order a new trial or give the plaintiff the option of a remittitur—a denial of a motion for a new trial conditioned upon the plaintiff's acceptance of a reduced amount of damages.[44] While the grant of a new trial is governed by Federal Rule of Civil Procedure 59, the order of a remittitur is not governed by any federal rule or statute. The first case ordering a remittitur was decided by Justice Story in 1822,[45] and the federal courts have condoned the practice ever since.[46] They have also developed common law rules guiding its exercise. For example, in settling on the amount to be deducted from the verdict, the majority rule is that the district court can reduce the verdict only to the highest amount that the jury properly could have awarded.[47] I have been unable to find any case or academic work discussing the source of the federal courts' authority to develop a doctrine of remittitur.

5. Preclusion

Sometimes known by the traditional terminology "collateral estoppel" and "res judicata," preclusion doctrine is the body of rules

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[43] 19 Wright et al., supra note 1, § 4505 n.61.

[44] See Dimick v. Schiedt, 293 U.S. 474, 483 (1935).

[45] Blunt v. Little, 3 F. Cas. 760, 762 (C.C.D. Mass. 1822) (No. 1578) (ordering that the case be "submitted to another jury, unless the plaintiff is willing to remit $500 of his damages," though noting that in entering this order, "I believe that I go to the very limits of the law").

[46] See *Dimick*, 293 U.S. at 483 (noting longevity of practice and collecting cases).

[47] 11 Wright et al., supra note 1, § 2815. There are some courts, however, that reduce the award to the minimum amount the jury could have awarded, and still others that reduce the verdict to whatever amount the court thinks is fair. Id.

governing the relitigation of issues and claims. Under the rules of claim preclusion, the existence of a judgment that is "valid," "final," and "on the merits" extinguishes a claimant's ability to press any other claims arising out of the same transaction or occurrence.[48] Under the rules of issue preclusion, a party in a current suit cannot relitigate any issue already resolved in a prior suit to which she was a party, so long as resolution of that issue was "essential" to a judgment that is "valid," "final," and "on the merits."[49] Claim preclusion generally applies only to those asserting claims, not to those defending against them; issue preclusion, by contrast, applies to both those asserting claims and those defending against them. Claim preclusion reaches claims that could have been litigated in the first suit as well as claims that were actually litigated in the first suit; issue preclusion, by contrast, reaches only those issues that were actually litigated in the first suit. Both claim and issue preclusion extend the reach of a judgment to those "in privity" with a party bound by a judgment.

Preclusion's status as a common law doctrine is clear.[50] The rules of preclusion satisfy my definition of "procedural" rules because, in

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[48] See 18A Wright et. al., supra note 1, § 4406; see also id. §§ 4428–47.

[49] Id. § 4416. Note that the doctrine of offensive nonmutual issue preclusion provides a limited exception to this rule insofar as it limits the circumstances under which those who were not parties to a prior suit can assert issue preclusion against those who were. See Parklane Hosiery v. Shore, 439 U.S. 322, 331–32 (1979).

[50] See, e.g., Semtek Int'l v. Lockheed Martin, 531 U.S. 497, 508 (2001) (holding that "federal common law governs the claim-preclusive effect of a dismissal by a federal court sitting in diversity"); United States v. Stauffer Chem., 464 U.S. 165, 176 (1984) (White, J., concurring) (referring to the "flexible, judge-made doctrine" of collateral estoppel); United States v. Mendoza, 464 U.S. 154, 158 (1984) (referring to the "judicially developed doctrine of collateral estoppel"); Allen v. McCurry, 449 U.S. 90, 96 (1980) ("[F]ederal courts may look to the common law or to the policies supporting res judicata and collateral estoppel in assessing the preclusive effect of decisions of other federal courts."). With respect to preclusion's common law pedigree, it is also worth noting that the federal courts have not drawn the content of federal preclusion from any statutory or constitutional provision; rather, in fashioning preclusion law, the federal courts have drawn heavily from secondary sources and the practice of state courts. See, e.g., Montana v. United States, 440 U.S. 147, 153–55 (1979) (relying heavily on *Restatement (Second) of Judgments*, Moore's *Federal Practice*, and law review articles in identifying the fundamental precepts of preclusion); id. at 164 (Rehnquist, J., concurring) (recognizing influence of secondary sources on majority decision); Blonder-Tongue Labs. v. Univ. of Ill. Found., 402 U.S. 313, 322–27 (1971) (relying heavily on state cases and secondary sources in abandoning mutuality requirement for defensive issue preclusion).

determining the effect of federal judgments on later litigation, they are concerned with the regulation of court processes rather than out-of-courtroom conduct. That said, of the doctrines described in this Section, preclusion is the one whose status as "procedural" is most open to doubt. In *Semtek International v. Lockheed Martin*, a case dealing with the peculiar problem of interjurisdictional preclusion, the Supreme Court wavered between characterizing preclusion as procedural and characterizing it as substantive.[51] The Court's indecision is a reflection of the fact that preclusion, like so many ostensibly procedural doctrines, has substantive effects. Despite the uncertainty surrounding preclusion's procedural status, I have chosen to include it here for two reasons. First, preclusion is typically treated as procedural—witness the fact that it is a staple of the first-year Civil Procedure class.[52] Second, and more important, preclusion shares relevant characteristics with the other doctrines herein described: it falls outside of the traditionally recognized enclaves of federal common law, and it does not generally bind the states, which, outside of the context of interjurisdictional preclusion, are free to set their own rules governing the finality of judgments.

There has been almost no discussion in the cases of where courts derive the authority to develop a common law of preclusion.[53] In

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[51] 531 U.S. 497 (2001). In *Semtek*, the Supreme Court held that federal common law governs the preclusive effect given all federal judgments, including judgments rendered by federal courts sitting in diversity. Id. at 507–08. On the one hand, the Court suggested that preclusion is procedural. See, e.g., id. at 501 (positing that the Conformity Act, which required federal courts to follow state procedure, would have required federal courts to follow state preclusion law); id. at 509 (suggesting that federal preclusion law is shaped by "federal courts' interest in the integrity of their own processes"). On the other hand, the Court also suggested that preclusion is substantive. See id. at 503 (opining that if Fed. R. Civ. P. 41(b) governed the preclusive effect that state courts must give federal court judgments, it might violate the Rules Enabling Act prohibition on rules that "abridge, enlarge or modify any substantive right") (citations omitted).

[52] Cf. Stephen B. Burbank, Interjurisdictional Preclusion, Full Faith and Credit and Federal Common Law: A General Approach, 71 Cornell L. Rev. 733, 747–48 (1986) (describing—and criticizing—the traditional account, which treats preclusion as "largely a reflex of procedural law").

[53] There have, however, been academic efforts to justify preclusion in its interjurisdictional form. See, e.g., Burbank, supra note 52, at 764, 770 (arguing that interjurisdictional preclusion is a substantive doctrine justified by the need for uniform federal rules); Ronan E. Degnan, Federalized Res Judicata, 85 Yale L.J. 741, 769 (1976) (ar-

Semtek, the Supreme Court hinted that its power to formulate federal rules of preclusion rests on the same ground as its power to formulate substantive common law: the lack of congressional guidance in an area of clearly federal concern.[54] The Court did not develop this suggestion, however, and its other preclusion cases have said nothing about the source of its authority. As it stands, it is fair to say that the rules of preclusion are well understood, but the courts' authority to make them is not.

C. The Divergence Between Common Law Theory and Procedural Common Law

As these five doctrines illustrate, federal courts make common law in ways for which traditional common law theory does not account. Current theories of the common lawmaking powers of the federal courts are informed exclusively by substantive common law. But procedural common law exists, and it differs from substantive common law in at least two significant respects.

First is the fact that procedural common law, unlike substantive common law, is confined in its application to federal courts.[55] The states are not required to mimic, for example, the federal procedural common law of forum non conveniens or remittitur. Neither the rule that federal procedural common law is confined to federal courts nor the reason for it, however, is explicit in the case law.[56] Consequently, it is not clear whether the Supreme Court can impose rules of procedural common law upon the states if it so chooses[57] or whether the Constitution limits the procedural power

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guing that interjurisdictional preclusion is a procedural doctrine that federal courts have the inherent authority to adopt).

[54] *Semtek*, 531 U.S. at 507–08; see also Burbank, supra note 52, at 753–97.

[55] See Harris v. Rivera, 454 U.S. 339, 344–45 (1981) (per curiam) ("Federal judges . . . may not require the observance of any special procedures [in state courts] except when necessary to assure compliance with the dictates of the Federal Constitution."). But see supra note 51.

[56] It is probably rooted in the choice-of-law principle that the procedure of the forum generally controls. Restatement (First) of Conflict of Laws § 585 (1934) ("All matters of procedure are governed by the law of the forum.").

[57] The Supreme Court has occasionally displaced state procedure without explaining its deviation from the general rule that federal judges cannot control state procedure. For example, in *Semtek*, the Supreme Court held that federal rather than state law controls the preclusive effect that a state court must give a federal diversity judgment. 531 U.S. at 508. While this result may well be correct, in the course of reaching it, the

of the federal courts to the federal system.[58] While this is an important and difficult question, it is not one that this Article will explore.

A second difference between substantive and procedural common law lies in the degree to which Congress can abrogate it. No one doubts Congress's power to abrogate substantive common law.[59] Congress's power to abrogate procedural common law, by contrast, is open to doubt. There is substantial agreement that Congress possesses wide authority to regulate judicial procedure. But there is also substantial agreement that Congress's authority to regulate judicial procedure is subject to some limit. In other words, the disagreement centers less on the existence of a limit than on its boundaries. Some scholars have taken a fairly restrictive view of Congress's power to regulate procedure. For example, Professor Gary Lawson has argued that stare decisis, burdens of proof, and evidentiary rules, among other things, are matters within the exclu-

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Supreme Court did not identify, much less resolve, the tension between this holding and the general rule of non-displacement. Another example is the adequate and independent state grounds doctrine. The doctrine, which is typically characterized as procedural common law, see, e.g., Kermit Roosevelt III, Light from Dead Stars: The Procedural Adequate and Independent State Ground Reconsidered, 103 Colum. L. Rev. 1888, 1892–93 (2003), indirectly regulates state procedure insofar as it rejects some state procedures as inadequate. Again, the Supreme Court has not reconciled this doctrine with the general rule that federal procedural common law regulates only federal courts. Id. (describing the theoretical confusion surrounding the question whether the Court has the power to displace state judicial procedure).

[58] The Court's failure to identify the boundaries of federal procedural common law vis-à-vis the states is not unique; the Court has been equally unclear about the extent of Congress's authority to regulate state judicial procedure. See Anthony J. Bellia, Jr., Federal Regulation of State Court Procedures, 110 Yale L.J. 947, 949 (2001) ("The bounds of federal authority over the way state courts conduct their business have remained undefined for over 200 years."). In the context of congressional regulation of state judicial procedure, Professor Bellia has drawn from traditional conflict-of-laws principles to conclude that the Tenth Amendment reserves to the states exclusive control over judicial enforcement of state law. See id. at 972–73. If he is correct, the Tenth Amendment would not only limit the ability of Congress to regulate state judicial procedure, but it would also limit the ability of federal courts to regulate state judicial procedure. That is not to say, however, that judicial power to regulate state procedure would necessarily be coextensive with that of Congress.

[59] Cf. Martin H. Redish, Federal Judicial Independence: Constitutional and Political Perspectives, 46 Mercer L. Rev. 697, 708 (1995) ("[N]o one could seriously doubt that a legislature has the authority to supersede common law rules by appropriate legislative action.").

sive control of the judicial branch.[60] Similarly, Professor David Engdahl has argued that Congress lacks the power to "curtail or delimit judicial abstention"[61] and that the Rules Enabling Act is "subject to serious constitutional doubt" insofar as it permits Congress to postpone and even prohibit judicial rulemaking in certain areas.[62] Other scholars take a more expansive view of congressional power than do Professors Lawson and Engdahl. For example, both Professor John Harrison and Professor Michael Paulsen have claimed, contrary to Professor Lawson, that Congress possesses the authority to abrogate stare decisis.[63] Even scholars taking a more expansive view, however, stop short of characterizing Congress's power as unbounded. Professor Paulsen acknowledges that a congressional attempt to, say, forbid concurrences, dissents, or the citation of prior opinions may well transgress the limits of Congress's authority.[64] Similarly, the Supreme Court, while typically acquiescing in congressional regulation, has deliberately left open the question whether some procedural matters lie wholly within the judiciary's discretion.[65] Whatever the limits of congressional authority,

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[60] Lawson, supra note 40, at 212–14, 220.

[61] David E. Engdahl, Intrinsic Limits of Congress' Power Regarding the Judicial Branch, 1999 BYU L. Rev. 75, 168 (1999).

[62] Id. at 172–73. Cf. Michael M. Martin, Inherent Judicial Power: Flexibility Congress Did Not Write into the Federal Rules of Evidence, 57 Tex. L. Rev. 167, 178–79, 182–84 (1979) (arguing that Congress can prescribe rules of evidence for the federal courts, but federal courts possess the power to supersede those rules if they prefer others). Engdahl also challenges Congress's power to regulate prudential standing doctrine, supra note 61, at 165–66, the choice of appropriate relief, id. at 170–71, burdens of proof, id. at 173, and the time within which cases must be decided, id. at 173–74. Like Gary Lawson, Engdahl argues that the Anti-Injunction Act is unconstitutional. Id. at 169.

[63] See Harrison, supra note 40, at 504 ("Congress has substantial authority to legislate concerning the rules of precedent in federal court."); Paulsen, supra note 40 (arguing that Congress can abrogate stare decisis by statute).

[64] Paulsen, supra note 40, at 1590, 1591 n.154.

[65] Because Congress has not generally imposed onerous procedural regulation on the judiciary, the Supreme Court has had little occasion to address the question of whether particular regulations transgress Congress's authority. It has repeatedly implied, however, that limits exist. See Miller v. French, 530 U.S. 327, 350 (2000) (reserving the question of whether "there could be a time constraint on judicial action that was so severe that it implicated . . . separation of powers concerns"); Herron v. S. Pac. Co., 283 U.S. 91, 94–95 (1931) (implying that Congress lacks the power to require federal courts to follow state statutes "which would interfere with the appropriate performance of [the function of a federal court]," such as regulations regarding what materials jurors can take into deliberations, whether a jury must answer a special ver-

the widely shared sense that some limit exists reflects an implicit judgment that judicial authority over procedure is different in kind than its authority over substance. The next Part turns to the question of authority.

II. THREE POSSIBLE SOURCES OF PROCEDURAL AUTHORITY

This Part explores three potential justifications for the authority of the federal courts to develop procedural common law. It first considers whether any statute generally confers upon federal courts procedural common lawmaking authority. It then considers whether, in the absence of statutory authority, any constitutional justification exists for this form of common law. Two constitutional arguments might justify procedural common law. First, one might draw a straightforward analogy to the substantive common lawmaking powers of the federal courts by arguing that procedure, like other areas of federal common law, is an enclave in which federal interests are so strong that common lawmaking is justified in the absence of congressional regulation. Second, one might treat Article III's grant of "the judicial Power" as imbuing courts, either directly or indirectly, with authority to fashion rules of procedure.

A. Potential Statutory Justifications

A threshold question in analyzing the legitimacy of federal procedural common law is whether Congress has authorized its creation, for if it has, the question of whether a constitutional justifica-

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dict, and whether a judge has recourse to the device of a directed verdict); McDonald v. Pless, 238 U.S. 264, 266 (1915) (questioning whether a statute like the Conformity Act could reach the power of federal courts to regulate the conduct of jurors); Indianapolis & St. Louis R.R. v. Horst, 93 U.S. 291, 300 (1876) (noting that the question of whether Congress could trench upon the powers of a judge in certain matters of judicial administration is "open to doubt"); Nudd v. Burrows, 91 U.S. 426, 441–42 (1875) (implying that a statute regulating "[t]he personal administration by the judge of his duties while sitting upon the bench" would raise a constitutional question); see also United States v. Horn, 29 F.3d 754, 760 n.5 (1st Cir. 1994) ("It is not yet settled whether some residuum of the courts' [inherent] power is so integral to the judicial function that it may not be regulated by Congress (or, alternatively, may only be regulated up to a certain point)."). State legislatures have gone further than Congress in their attempts to regulate judicial procedure, and state courts have invalidated some of those attempts as beyond the legislative authority. See A. Leo Levin & Anthony G. Amsterdam, Legislative Control over Judicial Rulemaking: A Problem in Constitutional Revision, 107 U. Pa. L. Rev. 1, 30 (1958) (cataloguing examples).

tion exists recedes in importance. Part I explained that no specific statutory authorization exists for any of the five doctrines therein described; in other words, none of those doctrines elaborates a particular statute or proceeds from a specific statutory grant in the relevant area. It might be the case, however, that some general statutory authority exists, even if the courts articulating such doctrines do not invoke it.

The broadest grant of statutory rulemaking authority to the federal courts is found in 28 U.S.C. Section 2071(a), which provides, "The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business."[66] One might be tempted to construe this language as giving federal courts the power to prescribe common law as well as prospective court rules. That temptation, however, is immediately dispelled by the direction in Section 2071(b) that rules prescribed pursuant to this grant "shall be prescribed only after giving appropriate public notice and an opportunity to comment," as well as Section 2071(d)'s requirement that copies of such rules be distributed to various bodies.[67] These directions clearly do not contemplate rules worked out on a common law basis. Thus, read in light of the subsections that follow it, Section 2071(a)'s statutory grant clearly authorizes federal courts to "prescribe rules" through the process of rulemaking, not adjudication.

There are, to be sure, federal rules implementing 28 U.S.C. Section 2071 that might be read to expand this statutory grant. Federal Rule of Civil Procedure 83 and Federal Rule of Appellate Procedure 47 detail the means by which district courts and courts of appeals, respectively, may promulgate local rules. At the end of each rule is a safety-valve provision, granting a district judge or court of appeals the power to adopt procedures in the absence of a federal statute, federal rule, or local rule on point. The language of these provisions is fairly broad. Federal Rule of Civil Procedure 83(b) provides that when there is no law controlling, "[a] judge may regulate practice *in any manner* consistent with federal law."[68] In the same vein, Federal Rule of Appellate Procedure 47(b) provides

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[66] 28 U.S.C. § 2071(a) (2000).

[67] Id.

[68] Fed. R. Civ. P. 83(b) (emphasis added).

that in the absence of controlling law, "[a] court of appeals may regulate practice in a particular case *in any manner* consistent with federal law."[69] Thus, both of these rules might be read to grant the federal courts a power that 28 U.S.C. Section 2071 does not: the power to regulate procedure by the development of common law.[70]

Despite the breadth of the language, it is not at all clear that either Federal Rule of Civil Procedure 83(b) or Federal Rule of Appellate Procedure 47(b) authorizes procedural common law in the sense of generally applicable rules worked out by judges on a case-by-case basis.[71] Even assuming that they do, these rules fall under the weight of an objection raised by Professor Stephen Burbank. To the extent that these rules themselves purport to confer common lawmaking power on federal judges, they are invalid.[72] Congress can confer common lawmaking power on federal judges, but federal judges cannot confer such power on themselves. Neither Federal Rule of Appellate Procedure 47 nor Federal Rule of Civil Procedure 83 is a federal statute; both are products of the statutorily authorized rulemaking process supervised by the Supreme Court. Both Rules 47 and 83 implement the grant of local rulemaking authority conferred by 28 U.S.C. Section 2071, but that grant, as discussed above, is not a grant of common law authority. The Federal Rules cannot give power that Congress has not. Thus, even assuming that Federal Rule of Appellate Procedure 47(b) and Federal Rule of Civil Procedure 83(b) refer to the development of procedural common law, they are best understood as provisions simply clarifying the judiciary's view that neither these provisions authorizing local rulemaking nor the Enabling Act itself stamps out any common law power over procedure that the judiciary otherwise possesses.

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[69] Fed. R. App. P. 47(b) (emphasis added).

[70] See Burbank, supra note 52, at 773–74 & n.192 (assuming that these rules purport to confer upon federal courts the power to make procedural common law).

[71] The Advisory Committee Notes to Federal Rule of Civil Procedure 83(b) reveal that its drafters did not necessarily expect that regulation in a form other than local rules would be in the form of traditional common law doctrine. The Notes refer only to "internal operating procedures, standing orders, and other internal directives." Fed. R. Civ. P. 83.

[72] See Burbank, supra note 52, at 773–74.

B. Constitutional Preemption and Procedural Common Law

In the absence of statutory authority to develop procedural common law, it is necessary to consider whether some constitutional justification exists. It makes sense to begin with a theory that tracks the justification for federal substantive common law.[73] As described in Part I, the standard account of the substantive common lawmaking powers of the federal courts identifies certain enclaves in which the Constitution impliedly prohibits state law from controlling. In these enclaves, some federal law must govern. The prerogative to specify federal law belongs to Congress, but if Congress does not act, the theory goes, the federal courts must.[74] One can see how this logic might apply to the area of procedure.

It is well established that the procedure observed by the federal courts is a matter that the Constitution commits exclusively to federal control. The first and most forceful statement of this principle appeared in *Wayman v. Southard*:

> That [the power to regulate federal court procedure] has not an independent existence in the State legislatures, is, we think, one of those political axioms, an attempt to demonstrate which, would be a waste of argument not to be excused. The proposition has not been advanced by counsel in this case, and will, probably, never be advanced. Its utter inadmissibility will at once present itself to the mind, if we imagine an act of a State legislature for

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[73] This approach is suggested, though not fleshed out, in some of the literature and case law. See, e.g., Matasar & Bruch, supra note 25, at 1323–25 (drawing an analogy between the substantive and procedural common lawmaking powers of the federal courts); William F. Ryan, Rush to Judgment: A Constitutional Analysis of Time Limits on Judicial Decisions, 77 B.U. L. Rev. 761, 778 (1997) (hypothesizing that procedural common law might be conceptualized as "specialized federal common law," analogous to the other forms of federal common law that survived *Erie*). This also appears to be the view expressed by the Supreme Court in *Semtek*, where the Court's approach to the articulation of a common law rule—invocation of a federal interest—resembled the approach it takes when articulating rules within the enclaves of federal common law. See supra note 54 and accompanying text. See also Tidmarsh & Murray, supra note 16, at 594, 610–14 (opining that *Semtek* effectively added preclusion to the existing enclaves of federal common law).

[74] See City of Milwaukee v. Illinois, 451 U.S. 304, 313 (1981) ("When Congress has not spoken to a particular issue, however, and when there exists a 'significant conflict between some federal policy or interest and the use of state law,' the Court has found it necessary, in a 'few and restricted' instances, to develop federal common law.") (citations omitted).

> the direct and sole purpose of regulating proceedings in the Courts of the Union, or of their officers in executing their judgments. No gentleman, we believe, will be so extravagant as to maintain the efficacy of such an act.[75]

The *Wayman* Court went on to argue that the states could not do indirectly what they could not do directly, and thus that it was almost equally extravagant to maintain that state laws regulating the procedure of state courts somehow extended of their own force to federal courts as well.[76] The regulation of federal judicial procedure belongs to the federal government.

Given that federal judicial procedure is an area of constitutional preemption, one can analogize the federal courts' power to articulate procedural common law to their power to articulate substantive common law. State law cannot govern federal procedure—just as the Court has held that it cannot govern admiralty, interstate disputes, certain cases involving the rights and obligations of the federal government, and certain matters of foreign affairs. Congress possesses authority to regulate federal judicial procedure pursuant to both the Inferior Tribunals Clause and the Sweeping Clause.[77] If Congress has not exercised its power to regulate some

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[75] 23 U.S. (10 Wheat.) 1, 49 (1825). The insistence that the federal government has exclusive control over the procedure of its own courts is presumably the flip side of the principle that each state has nearly exclusive control over its own judicial procedure. See supra note 58 and accompanying text.

[76] 23 U.S. at 49–50. See also Fullerton v. Bank of the United States, 26 U.S. (1 Pet.) 604, 607 (1828) (asserting that state legislatures can have no control, direct or indirect, over federal court process). That is not to say, of course, that Congress cannot direct the federal courts to observe state procedure, and Congress has done just that on a number of occasions. For example, the Process and Conformity Acts, described infra Subsection III.B.2, both directed federal courts to apply state procedure. But in that situation, state procedure applies to federal courts by virtue of a federal law, much like the situation in which federal courts choose state law as the operative rule of federal common law. See Beers v. Haughton, 34 U.S. (9 Pet.) 329, 359 (1835) ("The whole efficacy of such laws in the courts of the United States, depends upon the enactments of congress. So far as they are adopted by congress they are obligatory. Beyond this, they have no controlling influence.").

[77] See Hanna v. Plumer, 380 U.S. 460, 472 (1964) ("[T]he constitutional provision for a 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 . . . ."). In addition to empowering Congress to make laws "necessary and proper" to the execution of Congress's own enumerated powers, the Sweeping Clause empowers Congress to make laws "necessary and proper for carrying into Execution . . . all other Powers vested by this Constitution in the Government of the United

aspect of federal court procedure, federal courts may develop common law rules to fill the void. In other words, as is the case with respect to substantive federal common law, Congress's failure to act in an area of exclusively federal concern effectively empowers federal courts to do so.[78]

But this account rings only partly true, because it fails to account for a potentially significant difference between procedural and substantive federal common law: the fact that power may be distributed differently between Congress and the federal courts on matters of procedure than on matters of substance. Congress's power clearly dominates that of the federal courts in the traditional enclaves of federal common law.[79] When federal courts make common law on matters of admiralty, international relations, interstate disputes, or the rights and obligations of the United States, they are not speaking on matters within their particular competence. They cannot claim expertise superior to that of Congress in any of these areas, nor can they claim that the Constitution grants them regulatory authority superior to that of Congress in any of these areas.[80]

States, or in any Department or Officer thereof." U.S. Const. art. I, § 8, cl. 18. By its terms, this portion of the Sweeping Clause enables Congress to make laws carrying into execution the judicial power.

[78] See supra note 17 and accompanying text. To be sure, procedural common law would still differ from substantive common law in that it does not—and likely cannot—replace contrary state law.

[79] The accompanying text describes the conventional view regarding the balance of congressional and judicial authority in the enclaves of federal common law. Richard H. Fallon, Jr. et al., Hart and Wechsler's The Federal Courts and The Federal System 735 (5th ed. 2003) ("Federal statutes, of course, prevail over contrary federal common law . . . ."). There have been, however, occasional suggestions that in the areas of admiralty and interstate disputes, the lawmaking authority of the federal courts might exceed that of Congress. See id. at 732–35 & n.5 (noting this argument with respect to admiralty); id. at 738–39 n.11 (noting this argument with respect to interstate disputes). The theory is that because the courts' lawmaking authority in these two areas derives at least in part from jurisdictional grants in Article III, it might be slightly broader than that of Congress. Id; see also Note, From Judicial Grant to Legislative Power: The Admiralty Clause in the Nineteenth Century, 67 Harv. L. Rev. 1214, 1230–35 (1954) (describing ultimately defeated arguments to this effect in the context of admiralty). If this is the case, there may be at least a narrow slice of the common law of admiralty and interstate disputes, respectively, that Congress cannot abrogate, and it would therefore be incorrect to describe all common lawmaking authority in the traditional enclaves as derivative of or subservient to that of Congress.

[80] See City of Milwaukee v. Illinois, 451 U.S. 304, 313 (1981) ("Nothing in this process [of common lawmaking] suggests that courts are better suited to develop national policy in areas governed by federal common law than they are in other areas, or that

On the contrary, within each of the traditional enclaves of federal common law, Congress is widely acknowledged to be the preferred regulator. This understanding is reflected in the deferential posture that federal courts assume relative to Congress on matters of substantive common law. In making substantive common law, the judiciary effectively functions as a placeholder for Congress. Judicial authority exists only because Congress has left a statutory void, and if Congress subsequently chooses to fill that void, judicial authority over it dissipates. Substantive common law is wholly subject to congressional override.

The assertion that Congress's power dominates that of the federal courts in matters of procedure is far less certain. When federal courts make procedural common law, they are speaking on a matter within their particular competence—indeed, with respect to matters of procedure, federal courts can credibly claim that their expertise exceeds that of Congress. Even apart from expertise, which does not itself confer power, the federal courts have a stronger claim to constitutional authority in matters of procedure than in matters of substance.[81] The precise limits of Congress's authority to regulate federal court procedure are a matter of dispute, but as discussed above, courts and scholars have repeatedly argued that there are some procedural matters that Congress cannot regulate.[82] Whether or not any of these particular arguments is sound, the fact that they are often raised reflects an intuition that at least some aspects of federal court procedure lie beyond congressional control. A complete theory of procedural common law must account for the source of judicial authority to act in those areas where Congress lacks the authority to regulate. If a federal court adopts procedures for itself that Congress could not impose upon it, the court's power to do so necessarily derives from something more than congressional inaction in an area of federal concern. In

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the usual and important concerns of an appropriate division of functions between the Congress and the federal judiciary are inapplicable.").

[81] Consider that in *Wayman v. Southard*, Chief Justice Marshall denied that Congress could delegate to the courts "powers which are strictly and exclusively legislative." 23 U.S. (10 Wheat.) 1, 42–43 (1825). Marshall went on, however, to uphold Congress's delegation to the courts of the authority to promulgate court rules; thus, he necessarily viewed authority over procedure as a matter over which Congress and the courts share authority. Id. at 43.

[82] See supra notes 59–65 and accompanying text.

other words, the power would have to be something that the court possesses in its own right, rather than something that accrues to it solely by default.[83]

None of this is to say that authority over procedure is the exclusive province of the courts. It is simply to say that the relationship between Congress and the courts in the area of procedure is probably more complicated than the relationship between Congress and the courts in matters of substance, and that in the area of procedure, there must be more to the story. The next Section explores whether Article III confers inherent procedural authority upon federal courts.

C. Inherent Authority over Procedure

A long and well-established tradition maintains that some powers are inherent in federal courts simply because Article III denominates them "courts" in possession of "the judicial power."[84] In other words, inherent powers are those so closely intertwined with a court's identity and its business of deciding cases that a court possesses them in its own right, even in the absence of enabling legislation. The inherent powers of a federal court are not beyond congressional control; on the contrary, there is a large area of shared space in which the courts can act in the absence of enabling legislation but must acquiesce in the face of it.[85] Nonetheless, there are limits to what Congress can do in regulating the courts' inherent power. For example, Congress can impose some procedural requirements upon the exercise of the contempt power, which is an inherent power of every court.[86] It cannot, however, wholly with-

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[83] Similarly, if one were to take the view that judicial power exceeds congressional power in the areas of admiralty and interstate disputes, see supra note 79, one would emphasize that judicial power in these areas arises from a combination of structural inference and jurisdictional grant, rather than from structural inference alone.

[84] See, e.g., United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32, 34 (1812) ("Certain implied powers must necessarily result to our Courts of justice from the nature of their institution. . . . To fine for contempt—imprison for contumacy—inforce the observance of order, &c. are powers which cannot be dispensed with in a Court, because they are necessary to the exercise of all others . . . .").

[85] See Thomas v. Arn, 474 U.S. 140, 148 (1985) (asserting that procedural rules adopted pursuant to inherent authority cannot conflict with statutory or constitutional provisions).

[86] Ex parte Robinson, 86 U.S. (19 Wall.) 505, 510 (1873).

draw that power or, even short of that, impose regulations that would cripple courts in its exercise.[87]

In a significant number of cases, the Supreme Court has identified procedure as a matter over which federal courts possess inherent authority.[88] Almost all of the Court's claims to inherent procedural authority occur in the context of the so-called "supervisory power" doctrine.[89] There are, however, a handful of cases in which the Court has claimed inherent procedural authority for federal courts even outside the context of that doctrine. In some of these

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[87] Michaelson v. United States, 266 U.S. 42, 65–66 (1924) (acknowledging congressional power to regulate judicial contempt power but asserting that "the attributes which inhere in that power and are inseparable from it can neither be abrogated nor rendered practically inoperative").

[88] As others have observed, see, e.g., Stephen B. Burbank, Procedure, Politics, and Power: The Role of Congress, 79 Notre Dame L. Rev. 1677, 1681 (2004), the cases and scholarship often fail to distinguish between initiating authority (the ability to act in the absence of congressional regulation) and exclusive authority (the ability to act in the face of contrary congressional direction); between authority that is local (empowering a court to regulate the proceedings before it) and authority that is supervisory (empowering a court to regulate the proceedings of a lower court); and between procedural regulation in the form of court rules and procedural regulation in the form of judicial decisions. In light of the uncertainty that often surrounds this issue, let me be clear here: both this Section and the next Part are concerned with the question of whether the judiciary possesses an initiating, local authority to regulate procedure in the form of judicial decisions.

[89] See, e.g., *Thomas*, 474 U.S. at 146 ("[C]ourts of appeals have supervisory powers that permit, at the least, the promulgation of procedural rules governing the management of litigation."); United States v. Hasting, 461 U.S. 499, 505 (1983) ("[I]n the exercise of supervisory powers, federal courts may, within limits, formulate procedural rules not specifically required by the Constitution or the Congress."); Rosales-Lopez v. United States, 451 U.S. 182, 190 (1981) (asserting supervisory authority to adopt a rule requiring certain questions to be asked on voir dire); United States v. Nobles, 422 U.S. 225, 231 (1975) (acknowledging the judiciary's inherent power to adopt rules regarding discovery in criminal cases); Barker v. Wingo, 407 U.S. 514, 530 n.29 (1972) (acknowledging supervisory power of a federal court to adopt a rule governing the time in which cases must be brought); Thiel v. S. Pac. Co., 328 U.S. 217, 220 (1946) (asserting authority to prescribe a rule regulating qualifications for jury service in the absence of congressional or constitutional authorization); McNabb v. United States, 318 U.S. 332, 340–41 (1943) (holding that the Court has inherent supervisory power to fashion rules of evidence). Courts asserting "supervisory power" sometimes use it to refer to a court's authority over its own proceedings and sometimes use it to refer to a court's authority to supervise the proceedings of inferior courts. See Barrett, supra note 7, at 330 (describing varied use of term). The cases cited here are of both sorts. For present purposes, I am not concerned with whether a federal court adopts a rule for itself or a lower court but rather with the variety of topics that courts have claimed the inherent authority to regulate.

cases, the Court has explicitly asserted that federal courts possess inherent authority to formulate rules of procedure in the course of adjudication.[90] In others, the Court has addressed not so much the authority to prescribe procedural rules as the authority to take actions related to the progress of a suit.[91] Perhaps because of these cases, and perhaps because the idea makes good sense, scholars have echoed these assertions.[92]

In light of these cases, the argument grounding authority to make procedural common law in the inherent authority of the federal courts is straightforward: Federal courts have inherent author-

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[90] See, e.g., Hanna v. Plumer, 380 U.S. 460, 472–73 (1965) (identifying "'matters which relate to the administration of legal proceedings, [as] an area in which federal courts have traditionally exerted strong inherent power, completely aside from the powers Congress expressly conferred in the Rules'" (quoting Lumbermen's Mutual Casualty Co. v. Wright, 322 F.2d 759, 764 (5th Cir. 1963))); Funk v. United States, 290 U.S. 371, 382 (1933) (asserting that courts, "by right of their own powers," can formulate rules of evidence); In re Hien, 166 U.S. 432, 436–37 (1897) ("The general rule undoubtedly is that courts of justice possess the inherent power to make and frame reasonable rules not conflicting with express statute . . . ."); Mitchell v. Overman, 103 U.S. 62, 64 (1880) (referring to the "rules of practice which obtain in courts of justice in virtue of the inherent power they possess"); Kentucky v. Dennison, 65 U.S. (24 How.) 66, 98 (1861) ("[I]n all cases where original jurisdiction is given by the Constitution, this court has authority to exercise it without any further act of Congress to regulate its process . . . .").

[91] See, e.g., Clinton v. Jones, 520 U.S. 681, 706 (1997) ("The District Court has broad discretion to stay proceedings as an incident to its power to control its own docket."); Melkonyan v. Sullivan, 501 U.S. 89, 101 (1991) ("[N]ormally courts have inherent power, among other things, to remand cases . . . ."); Luce v. United States, 469 U.S. 38, 41 n.4 (1984) ("Although the Federal Rules of Evidence do not explicitly authorize *in limine* rulings, the practice has developed pursuant to the district court's inherent authority to manage the course of trials."); Landis v. N. Am. Co., 299 U.S. 248, 254 (1936) ("[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy . . . ."); Enelow v. N.Y. Life Ins. Co., 293 U.S. 379, 381–82 (1935) (asserting that a federal court can stay proceedings "by virtue of its inherent power to control the progress of the cause so as to maintain the orderly processes of justice"); Ex parte Peterson, 253 U.S. 300, 312 (1920) ("Courts have (at least in the absence of legislation to the contrary) inherent power to provide themselves with appropriate instruments required for the performance of their duties."); Logan v. Patrick, 9 U.S. (5 Cranch) 288, 288–89 (1809) (recognizing equitable discretion to stay proceedings).

[92] See, e.g., Barrett, supra note 7, at 334–35; Beale, supra note 22, at 1468–73 (asserting that federal courts have implied constitutional authority to regulate procedure); Engdahl, supra note 61, at 83–86 (arguing that Article III's vesting of judicial power vests courts with power over, inter alia, procedure); Merrill, supra note 24, at 24 (asserting that courts have inherent authority to adopt procedures for themselves in the absence of congressional authorization).

ity to adopt procedures governing litigation before them; thus, they have the authority to develop procedural common law. Their inherent power over procedure authorizes them to act in the absence of enabling legislation, but if Congress acts, the courts must generally give way. There are, nonetheless, limits to what Congress can do. It cannot wholly withdraw the courts' power over procedure, and there are some—albeit few—procedural matters that are entirely beyond congressional regulation. Article III, in sum, allocates to federal courts a special role in regulating this area committed to exclusive federal control.

This argument thus fits neatly with prevailing assumptions about federal court power insofar as it treats procedure, unlike substance, as an area in which federal courts can assert authority in their own right. That said, it encounters a threshold difficulty: despite the relative consensus on the point, it is not so clear that power over procedure can fairly be treated as an inherent power of federal courts. The proposition that federal courts possess inherent authority over procedure is treated as self-evident.[93] Closer examination, however, reveals that the concept of inherent judicial authority has been almost entirely fleshed out in contexts other than procedural regulation. Inherent judicial authority has received the most sustained attention in the context in which it was first asserted: contempt.[94] In addition to the contempt power, courts have asserted inherent authority to vacate judgments for fraud,[95] to dismiss cases for failure to prosecute,[96] and to impose other sorts of sanctions on undesirable behavior.[97] They have also asserted inherent authority

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[93] See, e.g., Barrett, supra note 7, at 335.

[94] The first case to recognize explicitly the inherent authority of federal courts is *United States v. Hudson & Goodwin*, which asserted in dicta that federal courts possess inherent authority to punish contempt. 11 U.S. (7 Cranch) 32, 34 (1812). The federal courts have consistently reasserted that authority. See Young v. United States ex rel. Vuitton et Fils S.A., 481 U.S. 787, 795 & n.7 (1987) (collecting cases recognizing inherent judicial authority to punish contempt).

[95] See, e.g., Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 244 (1944).

[96] See, e.g., Link v. Wabash R.R. Co., 370 U.S. 626, 629–31 (1962).

[97] See, e.g., Chambers v. NASCO, 501 U.S. 32, 46–51 (1991) (holding that federal courts possess inherent authority to shift attorneys' fees for bad-faith conduct); Roadway Express v. Piper, 447 U.S. 752, 766 (1980) (holding that a court has inherent power to shift attorney's fees as a sanction for failing to comply with discovery orders and a court-ordered briefing schedule).

to regulate court personnel like jurors and lawyers.[98] In short, the overwhelming majority of cases dealing with inherent judicial authority are those asserting either a semi-punitive power or the power to control those who serve the court. By comparison, the cases in which the Supreme Court has recognized an inherent power to prescribe procedural rules or otherwise manage the process of litigation are relatively few.[99] Thus, while modern scholarship and case law support the proposition that federal courts possess inherent authority over procedure, that proposition is not as solid as it initially appears. The next Part tests the frequently asserted but rarely developed proposition that federal courts possess some inherent authority over procedure.

III. INHERENT AUTHORITY OVER PROCEDURE

A. Constitutional Text and Structure

The Constitution does not, on its face, grant federal courts power over procedure. Nonetheless, it is a well-established principle of constitutional law that Congress, the Executive, and the judiciary each possess certain powers granted by, though not expressly mentioned in, the Constitution. Thus, for example, Congress is acknowledged to possess the power to punish contempts of its authority, even though no such power is expressly conferred by Article I.[100] The Executive is acknowledged to possess the power to function as the country's sole spokesperson in dealings with foreign nations, even though no such power is explicitly

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[98] For the regulation of jurors, see, for example, *McDonald v. Pless*, 238 U.S. 264, 266 (1915) (asserting inherent power of court "to inquire into the conduct of jurors"), and *Nudd v. Burrows*, 91 U.S. 426, 441–42 (1875) (asserting inherent authority to decide what materials jurors may take into deliberations). For the regulation of lawyers, see, for example, *In re Snyder*, 472 U.S. 634, 643 (1985) ("Courts have long recognized an inherent authority to suspend or disbar lawyers."), and *Ex parte Wall*, 107 U.S. 265, 273 (1883) ("It is laid down in all the books in which the subject is treated, that a court has power to exercise summary jurisdiction over its attorneys . . . .").

[99] The clearest assertions of the inherent authority to prescribe procedural regulations in the course of adjudication are also fairly recent. Most cases asserting inherent procedural authority occur in the context of the "supervisory power" doctrine, which dates to 1943. See McNabb v. United States, 318 U.S. 332 (1943) (first articulating the doctrine). There are few cases directly asserting inherent authority to prescribe procedure outside this line of authority.

[100] See Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 229 (1821).

conferred by Article II.[101] And the judiciary is acknowledged to possess the power to regulate the bar practicing before it, even though no such power is expressly conferred by Article III.[102]

At least two kinds of textual and structural constitutional arguments are advanced in support of nonexpress constitutional power. One kind of argument focuses on the relevant vesting clause, asking what informed observers at the time of the Founding would have understood that grant of power to include. For example, Professors Saikrishna Prakash and Michael Ramsey have argued that Article II directly vests the President with the power to conduct foreign affairs because informed observers at the time of the Founding understood "the executive power" to encompass such authority.[103] In the context of Article III, Professor Scott Idleman has maintained that,

> [m]ore than a mere synonym for jurisdiction, the 'judicial Power' encompasses those prerogatives and obligations that have customarily attended the judicial function, particularly the Anglo-American common law courts at the time of the framing, whether or not such attributes are elsewhere expressly conferred by the Constitution or affirmed by statute.[104]

The term "inherent authority" is often used broadly to refer to any power granted by, but not mentioned expressly in, the Constitution. When used in its narrowest sense, however, "inherent authority" refers specifically to the kind of authority claimed by this first kind of constitutional argument: power inhering in that expressly granted.[105]

Another kind of argument is an instrumental one, focusing less on cataloguing specific powers implicitly contained within the primary grant than on the more general claim that the Constitution implicitly grants each branch the incidental authority it needs to

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[101] Saikrishna B. Prakash & Michael D. Ramsey, The Executive Power over Foreign Affairs, 111 Yale L.J. 231, 243 (2002) (describing wide agreement on this point despite the lack of any explicit textual grant of the power).

[102] See supra note 98 and accompanying text.

[103] Prakash & Ramsey, supra note 101, at 252–65.

[104] Scott C. Idleman, The Emergence of Jurisdictional Resequencing in the Federal Courts, 87 Cornell L. Rev. 1, 47–48 (2001).

[105] See, e.g., Martin, supra note 62, at 179–82 (describing judicial power over some rules of evidence as "inherent" in the judicial power itself).

get its job done.[106] As James Madison wrote in Federalist No. 44, "No axiom is more clearly established in law, or in reason, than that wherever the end is required, the means are authorized; wherever a general power to do a thing is given, every particular power necessary for doing it is included."[107] The classic judicial articulation of this principle appears in *McCulloch v. Maryland*, which argued that each of Article I's enumerated powers carries with it the incidental authority to take actions designed to facilitate its exercise.[108] Like the term "inherent authority," the term "implied authority" is sometimes used broadly to refer to any power granted by, but not expressly mentioned in, the Constitution.[109] When used in its narrowest sense, however, the term "implied authority" refers to the kind of power claimed by this second kind of constitutional argument: power impliedly conferred by the constitutional structure as instrumentally necessary, or even simply useful, to that expressly granted.[110]

There is little or no overlap between these two arguments when the power at issue is more fairly characterized as an end in itself rather than as a means of executing an enumerated power. In this circumstance, the obviously better of these two arguments is that the relevant vesting clause directly—albeit implicitly—confers the power at issue. Because, for example, the foreign affairs power is more fairly characterized as an end in itself rather than a means of

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[106] Cf. Robert J. Pushaw, Jr., The Inherent Powers of Federal Courts and the Structural Constitution, 86 Iowa L. Rev. 735, 825 n.478 (2001) ("Implied constitutional powers must be distinguished from powers that are expressly granted in the Constitution, but not defined.").

[107] The Federalist No. 44, at 285 (James Madison) (Clinton Rossiter ed., 1961).

[108] 17 U.S. (4 Wheat.) 316, 421 (1819). *McCulloch* itself did not ground Congress's possession of implied powers exclusively in the Sweeping Clause, although some have argued that it should have done so. See, e.g., William W. Van Alstyne, Implied Powers, *in* 2 Encyclopedia of the American Constitution 964–65 (Leonard W. Levy et al. eds., 1986). Because *McCulloch*'s argument does not depend upon the Sweeping Clause, its reasoning appears to extend to the executive and judicial branches, which, like Congress, impliedly possess the power to employ means directed toward achieving the ends with which they are charged.

[109] See, e.g., Patricia L. Bellia, Executive Power in *Youngstown*'s Shadows, 19 Const. Comment. 87, 91 n.17 (2002) (using term broadly to refer to powers either implicit in specific constitutional grants or inferred from the constitutional structure).

[110] See, e.g., Beale, supra note 22, at 1468–73 (using term "implied authority" to refer only to the ancillary authority the Constitution affords each branch to employ means directed toward accomplishing the ends with which it is expressly charged).

accomplishing an explicitly conferred power, Professors Prakash and Ramsey do not press the instrumental argument. Instead, they examine only whether informed observers at the time of the Founding would have understood "the executive power" to include the power to direct foreign affairs.[111]

There can be significant overlap between these two arguments, however, when the power at issue is both instrumental and closely related to the expressly granted authority it supports. This overlap is evident in most, if not all, judicial claims to nonexpress power. For example, it is well established that courts possess the power to punish contempt even in the absence of enabling legislation. Does that power exist because Article III directly confers it—in other words, because informed observers at the time of the Founding understood it to be an attribute of "the judicial Power?" Or does the contempt power exist on an instrumental rationale—in other words, because it is a power courts need to adjudicate cases effectively? The judicial contempt power can be (and has been) justified on either rationale.[112] And not only can each of these rationales independently support the contempt power, but consider that the instrumental rationale can be put in the service of the argument that the contempt power is directly conferred by Article III as an inherent attribute of all courts. Those powers, which, like contempt, are thought "necessary" to functioning as a court and exercising judicial power, are often those so closely associated with the terms "court" and "judicial power" that they are understood to be part and parcel of them.[113] Thus, where a claimed power is both suppor-

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[111] See generally Prakash & Ramsey, supra note 101.

[112] Some cases strongly imply that Article III directly vests the contempt power in every federal court. See, e.g., Ex parte Robinson, 86 U.S. (19 Wall.) 505, 510 (1873) ("The power to punish for contempts is inherent in all courts .... The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power."). Others treat the power as instrumental. See, e.g., Eash v. Riggins Trucking, Inc., 757 F.2d 557, 562–63 (3d Cir. 1985) (suggesting that the contempt power is one implied from "strict functional necessity"). Still others invoke both grounds. See infra note 113 and accompanying text.

[113] See, e.g., United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32, 34 (1812) ("Certain implied powers must necessarily result to our Courts of justice from the nature of their institution.... To fine for contempt—imprison for contumacy—inforce the observance of order, &c. are powers which cannot be dispensed with in a Court, because they are necessary to the exercise of all others ...."). It is important to emphasize, however, that powers thought "necessary" to the exercise of expressly

tive of and closely associated with an expressly granted power, the instrumental rationale for implied power and the "direct vesting" rationale for inherent power can function either as different routes to the same end or complementary arguments along the same route.

The authority to articulate procedure in the course of adjudication is a case in point. It is, on the one hand, authority that arguably lies at the heart of the business of courts. It is, on the other hand, instrumental to deciding cases. It is, therefore, susceptible to the confusion that can result when arguments for "inherent" and "implied" authority overlap. This confusion is evident in the lack of consensus with respect to whether the Constitution directly or indirectly grants the courts procedural authority. Some scholars treat the power as directly conferred by Article III;[114] others treat it as inferred from the constitutional structure.[115] Most often, those as-

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granted power are not always closely associated with the power they support. For example, the Supreme Court has held that Congress possesses the power to punish contempt, but it has not done so on the ground that such power has long been considered an inherent attribute of any legislature worthy of the name. Instead, the Court has recognized a congressional contempt power on the purely instrumental rationale that in some situations Congress cannot accomplish its job without the ability to punish contempt. See Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 225–26 (1821) (justifying congressional contempt power on the ground that every express grant of power in the Constitution "draw[s] after it others, not expressed, but vital to their exercise").

[114] See, e.g., Engdahl, supra note 61, at 81–89 (characterizing power over procedure, among other inherent powers, as directly vested in federal courts by virtue of Article III); Idleman, supra note 104, at 47–52 (strongly implying that inherent judicial power, including inherent power over procedure, derives directly from Article III's grant of judicial power); Martin, supra note 62, at 179–86 (arguing that judicial power to develop at least some rules of evidence is directly conferred by Article III as an inherent attribute of judicial power); Daniel J. Meador, Inherent Judicial Authority in the Conduct of Civil Litigation, 73 Tex. L. Rev. 1805, 1805 (1995) (characterizing inherent judicial power, including inherent procedural power, as "that inher[ing] in the very nature of a judicial body").

[115] See, e.g., Beale, supra note 22, at 1466–73 (explicitly rejecting argument that Article III directly infuses federal courts with inherent procedural authority in favor of argument that authority is indirectly conferred as instrumentally useful to the discharge of the judicial function); Pushaw, supra note 106, at 846–47 & n.576 ("In my opinion, the function of deciding cases should be treated as the express 'judicial power' conferred by Article III. What the Court calls 'inherent powers' are the implied ones that flow from the exercise of judicial power."); William W. Van Alstyne, The Role of Congress in Determining Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effect of the Sweeping Clause, Law & Contemp. Probs., Spring 1976, at 102, 107–11 (treating judicial authority over proce-

serting the existence of nonexpress procedural authority simply fail to specify which constitutional argument supports the claim.[116]

The analytical confusion surrounding claims of nonexpress judicial authority, including authority over procedure, is unsatisfying, but it has persisted for so long that it would be difficult, if not impossible, to untangle. Consider, for example, the difficulty this confusion poses for the problem at hand. Determining whether Article III directly confers power over procedure requires analysis of whether the Founding generation perceived power over procedure to be an attribute of "judicial Power" exercised by all courts. But Founding-era sources addressing *any* aspect of nonexpress judicial authority, much less procedural authority, tend to be as ambiguous as modern ones with respect to the question of whether the power is directly or indirectly conferred.[117] Thus, to the extent that any of these sources address nonexpress procedural authority, it is difficult to say which of the two constitutional arguments they support.

Fortunately, it is possible to evaluate the claim of nonexpress procedural authority without untangling these two arguments. At least insofar as nonexpress *judicial* power is concerned, the distinction between inherent and implied incidental authority seems relatively unimportant because the distinction does not, at least in this context, give rise to a difference in methodology. As described

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dure as an incidental power implied by necessity without addressing the direct vesting argument).

[116] The cases in which federal courts broadly claim "inherent authority" over procedure without specifying the constitutional argument supporting that claim are legion. For just a few examples, see *Calderon v. Thompson*, 523 U.S. 538, 549–50 (1998), *United States v. Hasting*, 461 U.S. 499, 505–07 (1983), and *Hanna v. Plumer*, 380 U.S. 460, 472–73 (1965). See also Lear, supra note 35, at 1159–66 (using both the terms "inherent" and "implied" to describe the federal courts' power to create procedural devices and failing to specify whether power is directly or indirectly conferred); Ryan, supra note 73, at 776 (similar).

[117] *Hudson*, the flagship case regarding inherent judicial authority, illustrates the point nicely. Because the case describes the federal courts' contempt power as arising "from the nature of their institution," 11 U.S. (7 Cranch) at 34, one might read the case as supporting the notion that Article III vests the contempt power directly in all federal courts simply by denominating them "courts" in possession of "judicial Power." On the other hand, *Hudson* also points out that contempt is a power "necessary to the exercise of all others." Id. That observation might be read simply as support for the "direct vesting" argument, or it might be read as support for the argument that the judiciary, like the other two branches, can employ the means necessary to get its job done.

above, the argument for outright grant requires a historical inquiry: the relevant question is whether the Founding generation would have perceived power over procedure as a part of the expressly granted judicial power itself.[118] Consider, though, that federal courts treat *all* their claims to nonexpress authority as dependent upon history. In other words, even to the extent a federal court appears to characterize power as incidental, it still will not claim it unless it is one traditionally asserted by courts.[119] Thus, regardless of whether one approaches procedural authority as a problem of inherent or incidental authority, it is necessary to determine whether history supports the claim.[120]

B. Historical Arguments for Inherent Procedural Authority

This Section investigates whether the historical record from the late eighteenth and early nineteenth centuries supports the claim that the Constitution, either by outright grant or implication, authorizes a federal court to articulate procedural rules in the context of adjudication and in the absence of enabling legislation. To that end, it canvasses the Framing and Ratification debates, the early congressional record, contemporary treatises, and early federal court opinions, all with a view to discerning whether informed observers during this period understood federal courts to possess inherent authority to regulate procedure. In keeping with the ten-

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[118] See supra note 104 and accompanying text.

[119] See Missouri v. Jenkins, 515 U.S. 70, 124 (1995) (Thomas, J., concurring) ("As with any inherent judicial power . . . we should exercise [the Court's remedial powers] in a manner consistent with our history and traditions."); Chambers v. NASCO, 501 U.S. 32, 58 (1991) (Scalia, J., dissenting) (explaining that once established, Article III courts have "the authority to do what courts have traditionally done in order to accomplish their assigned tasks"); Union Pac. Ry. Co. v. Botsford, 141 U.S. 250, 252–57 (1891) (rejecting claim that federal courts possess inherent authority to order medical exams of plaintiffs on the ground that such authority has never been claimed by common law courts); see also Idleman, supra note 104, at 49 ("[T]he first criterion [in evaluating a claim to inherent authority] is whether a given power is one that courts, within the Anglo-American judicial tradition, have historically possessed."); Pushaw, supra note 106, at 741 (contending that the arsenal of implied judicial powers is limited to those "rooted in historical Anglo-American practice").

[120] To be sure, one might want to see stronger historical evidence before concluding that power is implicitly contained within the grant of "the judicial Power" than one would before concluding that a power is one traditionally exercised by courts. In evaluating the historical evidence, Section III.C accounts for this.

dency of the literature and cases, I will refer to the judiciary's supposed power over procedure as "inherent," without distinguishing between the distinct constitutional arguments that might support a claim to such authority.

1. Framing and Ratification

The record of the debates surrounding the Constitution's drafting and ratification neither directly refutes nor directly supports the proposition that federal courts possess inherent authority to make rules of procedure and evidence in the absence of enabling legislation.[121] At least two procedural issues surfaced repeatedly during the debates. One was the fear that the Supreme Court's appellate jurisdiction "both as to Law and Fact" would permit the Court to retry cases on review, thereby undercutting the jury right and requiring citizens to travel to the Court itself to litigate their cases.[122] The other was the concern that the Constitution, by not explicitly requiring jury trials in civil cases, impliedly abolished them.[123] Particularly in the course of debating these two issues, although occasionally in other contexts as well, participants in these debates acknowledged the power of Congress to regulate federal

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[121] I reached this conclusion after reviewing *The Records of the Federal Convention of 1787* (Max Farrand ed., 1911), *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* (Jonathan Elliot ed., 1836) [hereinafter Elliot's Debates], *The Federalist Papers*, supra note 107, and *The Complete Anti-Federalist* (Herbert J. Storing ed., 1981).

[122] See, e.g., Thomas M'Kean, Speech in the Pennsylvania Ratifying Convention (Dec. 11, 1787), *in* 2 Elliot's Debates, supra note 121, at 539–40 (defending provision); James Wilson, Speech in the Pennsylvania Ratifying Convention (Dec. 11, 1787), *in* 2 Elliot's Debates, supra note 121, at 518–19 (identifying issue as contentious); Edmund Pendleton, Speech in the Virginia Ratifying Convention (June 18, 1788), *in* 3 Elliot's Debates, supra note 121, at 519–20 (reflecting concern in Virginia legislature about appellate review as to law and fact); Editorial, The Impartial Examiner, Va. Indep. Exam'r (Richmond), Feb. 27, 1788 ("Or what is an appeal to enquire into facts after a solemn adjudication in any court below, but a trial *de novo*?").

[123] See, e.g., The Federalist No. 83 (Alexander Hamilton), supra note 107, at 495 (identifying this objection to the Constitution as the one "which has met with most success in [New York], and perhaps in several of the other States"); The Impartial Examiner, supra note 122 ("[C]onsider whether you will not be in danger of losing this inestimable mode of trial in all those cases, wherein the constitution does not provide for its security.").

court procedure.[124] The power of the federal judiciary to generate procedures of its own, by contrast, was neither acknowledged nor denied.[125]

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[124] For example, in addressing fears that the proposed Constitution abolished trial by jury in civil cases, James Wilson assured the citizens of Philadelphia that "no danger could possibly ensue," despite the Constitution's silence on the question, "since the proceedings of the supreme court are to be regulated by the congress." James Wilson, Speech on the Federal Constitution, Delivered in Philadelphia (Oct. 6, 1787), *in* Pamphlets on the Constitution of the United States, Published During Its Discussion by the People, 1787–1788, at 157 (Paul Leicester Ford ed., 1888); see also Abraham Holmes, Speech in the Massachusetts Ratifying Convention (Jan. 30, 1788), *in* 2 Elliot's Debates, supra note 121, at 111 (lamenting that the Constitution, in failing to specify certain rules of procedure and evidence in criminal cases, left Congress virtually unchecked power to prescribe such rules); James Madison, Speech in the Virginia Ratifying Convention (June 20, 1788), *in* 3 Elliot's Debates, supra note 121, at 534 (referring to Congress's power to "prescribe such a mode as will secure the privilege of jury trial"); Patrick Henry, Speeches in the Virginia Ratifying Convention (June 20, 1788; June 23, 1788), *in* 3 Elliot's Debates, supra note 121, at 544–45, 577–78 (asserting that in civil cases, it would be up to Congress to decide whether a jury trial was guaranteed); William Maclaine, Speech in the North Carolina Ratifying Convention (July 29, 1788), *in* 4 Elliot's Debates, supra note 121, at 175–76 (referring to Congress's power to prescribe the mode of proceeding in inferior federal courts, including the mode by which trial by jury in civil cases would be had); The Federalist No. 83 (Alexander Hamilton), supra note 107, at 496 (asserting that Congress possessed "a power to prescribe the mode of trial," and that consequently the constitutional silence with respect to juries in civil cases left Congress "at liberty either to adopt that institution or to let it alone").

[125] Professor Robert Pushaw has asserted that Edmund Pendleton made remarks during the ratification debates reflecting the belief that federal courts possessed some inherent authority over procedure. Pushaw, supra note 106, at 833 n.518. The basis for this suggestion is Pendleton's observation that inferior courts would decide questions regarding the admissibility of evidence and the competency of witnesses. See Edmund Pendleton, Speech in the Virginia Ratifying Convention (June 18, 1788), *in* 3 Elliot's Debates, supra note 121, at 519–20. In my judgment, these remarks do not bear on any belief Pendleton may have had regarding the inherent procedural authority of courts. Pendleton made these comments in the course of allaying fears that the Supreme Court's jurisdiction both "as to law and to fact" would permit the Supreme Court to retry cases at the appellate level, thereby forcing citizens to travel, often great distances, to litigate in the Supreme Court itself. See id. at 517–21. His assertion that inferior courts would decide whether to admit evidence was intended to underscore that inferior courts, rather than reviewing courts, made such determinations and that this well-established division of authority, combined with Congress's power to make exceptions and regulations to the Supreme Court's appellate jurisdiction, would render "appeals, as to law and fact, proper, and perfectly inoffensive." Id. at 520. Pendleton did not indicate what standards inferior courts would apply in making these evidentiary determinations, and his remarks are as consistent with a belief that inferior courts would make these evidentiary determinations according to the common law or legislation as they are with a belief that inferior courts would make these

This recognition of congressional authority over procedure and the lack of any corresponding recognition of judicial authority does cut slightly against the conclusion that informed observers believed the latter authority to exist. It is difficult, however, to make this inference do too much work. To the extent that they focused on judicial procedure at all, participants in these debates were largely arguing about whether Congress would protect or undermine the practice of employing juries in civil cases. This focus on Congress's role in regulating procedure (or at least this aspect of it) reflects an assumption that any uniform regulation in this regard would come from Congress; it also reflects an assumption that Congress would have the last word on at least this aspect of federal court procedure. But it does not say much about the inherent power of the federal courts to regulate the use of juries or any other procedural device in the absence of congressional action. To be sure, the lack of focus on the role of the federal courts in regulating procedure likely reflects a belief that the federal courts would play an insignificant role relative to Congress in regulating procedure—a belief that has proven true over the succeeding two centuries. But belief in an insignificant role does not translate to a belief in no role, nor does it address the question of whether some small core of procedural issues lies beyond congressional control.

On the whole, then, the debates surrounding the Constitution's drafting and ratification are relatively unhelpful in determining whether Article III courts possess inherent authority to regulate litigation before them.

2. Early Judiciary and Process Acts

There were four pieces of legislation passed by the First and Second Congresses that significantly affected the structure of the federal judiciary and the procedures it followed: the Judiciary Act of 1789,[126] the Process Act of 1789,[127] a 1792 amendment to the Process Act,[128] and a 1793 amendment to the Judiciary Act.[129] These

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evidentiary determinations according to standards established pursuant to their own inherent authority.

[126] Judiciary Act of 1789, ch. 20, 1 Stat. 73.

[127] Process Act of 1789, ch. 21, 1 Stat. 93.

[128] Process Act of 1792, ch. 36, 1 Stat. 275.

[129] Judiciary Act of 1793, ch. 22, 2 Stat. 333.

statutes provided numerous and detailed procedural regulations. Most relevant for present purposes are two.[130] Section 17 of the Judiciary Act of 1789 provided that "all the said courts of the United States shall have power . . . to make and establish all necessary rules for the orderly conducting business in the said courts."[131] Section 2 of the Process Act of 1789 directed federal courts to follow the modes of proceeding prescribed by the civil law in equity and admiralty suits; in common law suits, federal courts were to follow, inter alia, the "modes of process" used in the supreme court of the state in which the federal court sat.[132] A 1792 replacement of the Process Act and a 1793 amendment to the Judiciary and Process Acts changed these statutes slightly but did not alter them in substance.[133] Between them, the Judiciary and Process Acts provided a

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[130] In addition to the two provisions discussed in the text, there were numerous other provisions that regulated federal court procedure. For just a few examples, see Judiciary Act of 1789, ch. 20, § 15, 1 Stat. 73, 82 (granting all federal courts the power "to require the parties to produce books or writings in their possession or power, which contain [pertinent] evidence"); § 30, 1 Stat. at 88 (authorizing depositions "de bene esse"); Process Act of 1789, ch. 21, § 1, 1 Stat. 93, 93 (providing that all writs and process issuing from a federal court "shall be under the seal of the court from whence they issue").

[131] Judiciary Act of 1789, ch. 20, § 17, 1 Stat. 73, 83.

[132] Process Act of 1789, ch. 21, § 2, 1 Stat. 93, 93–94. The phrase "modes of process" could have been interpreted to oblige federal courts to mimic only the form of the processes issuing from the court. From the start, however, federal courts interpreted the Process Act to oblige them to mimic state courts not only in the form of the processes they issued but also in the procedures they employed. See Julius Goebel, Jr., Antecedents and Beginnings to 1801, at 514, 575 (1971). In 1792, Congress amended the Process Act to make this understanding explicit: the 1792 amendment to that Act substituted the phrase "modes of proceeding" for the arguably narrower phrase "modes of process." See Process Act of 1792, ch. 36, 1 Stat. 275, 276.

[133] The 1793 amendment to § 17 of the original Judiciary Act made the grant of rulemaking authority more detailed, thereby arguably strengthening it. The amendment granted federal courts the power

> to make rules and orders for their respective courts directing the returning of writs and processes, the filing of declarations and other pleadings, the taking of rules, the entering and making up judgments by default, and other matters in the vacation and otherwise in a manner not repugnant to the laws of the United States, to regulate the practice of the said courts respectively, as shall be fit and necessary for the advancement of justice.

Judiciary Act of 1793, ch. 22, § 7, 2 Stat. 333, 335. The 1792 Process Act repealed the Process Act of 1789, which had been temporary, and replaced it with a substantially similar, but permanent, statute. The new act deleted the original Process Act's reference to the civil law and directed federal courts to follow the "principles, rules and usages which belong to courts of equity and to courts of admiralty respectively," and

fairly complete procedural system for courts in the United States, at least in civil cases: federal courts were generally to observe the procedure required by either state or civil law, and, if there were procedural matters that state or civil law did not address, federal courts could regulate them pursuant to the power granted in Section 17 of the Judiciary Act. With respect to criminal cases, the law regulating procedure was more open ended. While federal courts construed Section 17(b) of the Judiciary Act as permitting rulemaking in both criminal and civil cases, they construed the Process Act as inapplicable to criminal cases. Except in the relatively rare instances in which Congress prescribed a specific criminal procedure to the contrary,[134] the federal courts followed common law rules of criminal procedure, rather than the variations to those rules made by any particular state.[135]

The debate surrounding these provisions does not reveal any discussion about whether, in the absence of this legislation, federal courts would have possessed inherent authority to govern their own procedure.[136] For example, the enactment of the Process Act

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it rendered all of the Act's instructions "subject however to such alterations and additions as the said courts respectively shall in their discretion deem expedient." Process Act of 1792, ch. 36, § 2, 1 Stat. 275, 276. It is not clear whether the latter proviso simply extended the scope of the federal courts' authority to adopt rules under § 17 or whether it functions itself as a rulemaking grant.

[134] Professor Julius Goebel notes that the first Congress gave the federal courts "only a few directions relating to [criminal] procedure"; he observes that the first federal criminal statute "was drawn on the assumption that common law methods of trial would be followed." Goebel, supra note 132, at 609.

[135] The same was true with respect to rules of evidence in criminal cases. The Supreme Court construed the Rules of Decision Act as inapplicable to criminal cases, and for over sixty years, federal courts observed common law rules of evidence rather than modifications to the common law adopted by any particular state. See Barrett, supra note 7, at 375 & n.197. In 1851, the Supreme Court changed this practice by construing the Judiciary Act of 1789 as implicitly requiring, in criminal cases, adherence to state evidence law, as that law existed on the date of the state's admission to the Union. Id.

[136] The first three volumes of the Annals of Congress cover the enactment of all four of these statutes. A review of those volumes revealed no discussion about the inherent authority of the federal courts (or lack thereof). Nor did the inherent authority (or lack thereof) of federal courts over procedure appear to be a topic of debate among informed onlookers of the time. See generally 4 The Documentary History of the Supreme Court of the United States, 1789-1800 (Maeva Marcus ed., 1992) [hereinafter Documentary History] (collecting letters, diary and journal entries, newspaper items, and notes of speeches and debates that cast light upon the enactment of the Judiciary and Process Acts of 1789); Goebel, supra note 132, at 457–551 (describing history of

apparently generated no discussion—or at least no recorded discussion—about what federal courts would have done in the absence of an instruction about the procedure they were to follow. Similarly, the enactment of the rulemaking grant contained in Section 17 of the Judiciary Act apparently generated no discussion as to whether this provision affirmed a power that otherwise existed or whether it granted a new power that courts did not otherwise possess. That said, it is worth observing that the other powers granted by Section 17—the powers to grant new trials, administer oaths or affirmations, and punish contempt—were powers that Founding-era lawyers apparently treated as inherent in all courts.[137] The inclusion of procedural rulemaking on that list might be thought evidence that power over procedure also falls in that category. On the whole, though, the record regarding the adoption of the Judiciary and Process Acts, like the record surrounding the Constitution's drafting and ratification, reflects both a belief in extensive congressional authority and a lack of concern with any inherent judicial authority to adopt procedures in areas the legislature left open.[138]

Judiciary and Process Acts of 1789). It must be acknowledged, however, that claiming a negative here (that is, that the inherent power was *not* discussed) is complicated by the fact that the records from this period, particularly of debates in the Senate, are not complete. The Annals of Congress were reconstructed in the 1820s–40s based on contemporary newspaper accounts of coverage of the House. Because the Senate did not allow reporters to observe its proceedings until February 20, 1794, the only records of its proceedings in the first two Congresses and part of the third are the official journal (which consists of roll calls and parliamentary entries) and individual Senators' notes. Thus, as a general matter, the lack of discussion regarding inherent power in the House during this period is more meaningful than the similar silence in the Senate.

[137] The contempt power was clearly treated as one inherent in all courts. See infra note 158 and accompanying text. There is less evidence regarding the powers to grant new trials and to administer oaths, but state cases offer reason to believe that both of these powers were thought to be inherent as well. See infra note 169 (new trials); see also Prentiss v. Gray, 4 H. & J. 192, 197 (Md. 1816) ("Courts of justice have essentially, and as appertaining to their very nature, authority to administer oaths in all cases of which they have jurisdiction."); Montgomery v. Snodgrass, 2 Yeates 230, 231–32 (Pa. 1797) ("[W]e disclaim all affinity whatever to that [Board of Property]; they are no court in any sense of the word; they are not vested with *the powers essentially necessary to such a tribunal*; they can neither *administer an oath*, enforce the attendance of witnesses, nor punish contempts . . . .") (emphasis added).

[138] It is worth noting that the congressional record surrounding the adoption of the Judiciary and Process Acts is silent with respect to more than just inherent judicial authority over procedure. Legislators never discussed inherent judicial authority of

Failed congressional proposals from this period reveal similarly little about whether federal courts were perceived to possess inherent authority—even authority generally subordinate to congressional authority—over procedure. In the drafting of the Process Act of 1789, the first Senate Judiciary Committee proposed a bill aimed toward establishing a largely uniform procedure for the new federal courts; the Process Act as ultimately enacted represented a rejection of this proposal in favor of having each federal court follow the procedure of the state in which it sat.[139] Roughly two years later, on January 29, 1790, Congressman Smith of South Carolina introduced a resolution to direct the Supreme Court to report to the House "a plan for regulating the Processes in the Federal Courts, and the fees to the Clerks of the same."[140] That resolution was tabled and never discussed. In 1793, the House of Representatives proposed an amendment to the rulemaking grant in the Judiciary Act that would have withdrawn the grant of local rulemaking authority to all federal courts and replaced it with an exclusive grant of supervisory rulemaking authority to the Supreme Court.[141] There was no discussion of inherent local authority surrounding either the proposal or its rejection, even though one might expect to see some discussion on the question of whether withdrawing the local rulemaking authority of the federal courts infringed upon or even entirely removed procedural authority they would otherwise possess. In any event, the record of failed proposals, like that of enacted legislation, ultimately reveals more about Congress's estimation of its own authority than about its views on the authority of the federal courts.

The single exception to this silence in the early congressional record lies in a report submitted to the House of Representatives on

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any sort, including well-established inherent authority like the authority to punish contempt of court.

[139] See Goebel, supra note 132, at 510–37 (describing Judiciary Committee's proposal to regulate federal procedure in detail and Senate's rejection of it). As the struggle between those who favored uniform federal procedure and those who favored state procedure suggests, it was the interests of the states relative to the federal government, rather than the interests of federal courts relative to Congress, that occupied legislative attention. Id. at 510–11, 539–40 (arguing that the legislative history of the Process Act reveals a struggle between those who favored a consolidated national government and those who favored resting more control with the states).

[140] 1 Annals of Cong. 1141–43 (Joseph Gales ed., 1834).

[141] Goebel, supra note 132, at 549–51. The Senate rejected the proposal.

December 31, 1790, by Edmund Randolph, then Attorney General of the United States.[142] The House had commissioned Randolph to identify and propose remedies for any deficiencies he perceived in the federal judicial system.[143] Randolph's response to the House, in addition to addressing various other perceived weaknesses in the Judiciary and Process Acts, proposed that Congress replace reliance on the procedure of the various states with a uniform code of federal procedure.[144] He argued that Congress should grant the Supreme Court authority to prescribe supervisory rules binding throughout the federal courts.[145] In defending the propriety of such a grant, Randolph wrote as follows: "Rules of practice belong to the authority of every court, and their other incidental powers add to that authority. The transition from these to the superintending of the whole course of proceedings, will not therefore be considered as too great."[146] The House did not consider the report after receiving it.[147]

Randolph's report gives some small indication that the power to develop rules of practice was one considered inherent in every court. Randolph apparently believed, and assumed his audience to believe, that every court possessed this power. In evaluating the significance of Randolph's belief, it is worth noting that he had been a member of the Constitutional Convention's Committee of Detail; he had also presented the Virginia Resolutions to the Constitutional Convention in his capacity as Virginia's then-governor. Randolph was, therefore, a particularly well-informed observer of the Constitution's drafting and implementation. Nonetheless, the fact that his is the sole suggestion of inherent procedural authority appearing in the early congressional record renders it evidence of limited weight.

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[142] Edmund Randolph, Report of the Attorney-General to the House of Representatives (Dec. 27, 1790), *in* 4 Documentary History, supra note 136, at 127–67.

[143] Id. at 122.

[144] Id. at 151–53, 166.

[145] Id. at 151.

[146] Id. at 166.

[147] Id. at 122.

3. Treatises

At least two treatises reflecting the practice of the period address, if only implicitly, the question whether power over procedure is incident to every court. Tidd's *Practice*, a treatise on English practice widely consulted by the early American bench and bar, implicitly affirms such power;[148] Story's *Commentaries on the Constitution* implicitly denies it.[149] The apparent conflict between these two treatises, combined with the silence of so many other treatises on the subject,[150] renders the treatises of the period a relatively unilluminating source of information for this study. A brief discussion of the treatment of power over procedure in the works of both William Tidd and Joseph Story follows below.

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[148] 1 William Tidd, The Practice of the Court of King's Bench in Personal Actions, at xi–xii (London, E. Brooke et al., 2d ed. 1799). The first edition of Tidd's treatise was published in two parts, with the first part appearing in 1790 and the second in 1794. The *Oxford Dictionary of National Biography* observes that "[f]or a long period it was almost the sole authority for common-law practice, going through nine editions by 1828.... The work was also extensively used in America, where one edition with notes by Asa I. Fish appeared as late as 1856." E.I. Carlyle & Jonathan Harris, Tidd, William, *in* 54 Oxford Dictionary of National Biography 763 (H.C.G. Matthew & Brian Harrison eds., 2004).

[149] 3 Joseph Story, Commentaries on the Constitution of the United States § 1752 (Boston, Hilliard, Gray, & Company 1833).

[150] In addition to Tidd's *Practice* and Story's *Commentaries*, I reviewed the following treatises, all of which were silent on the question whether federal courts possess inherent authority to regulate procedure: Alfred Conkling, A Treatise on the Organization, Jurisdiction and Practice of the Courts of the United States (Albany, Wm. & A. Gould & Co. 1831); 6 Nathan Dane, A General Abridgment and Digest of American Law (Boston, Cummings, Hilliard & Co. 1823); Peter S. Du Ponceau, A Dissertation on the Nature and Extent of the Jurisdiction of the Courts of the United States (Phila., Abraham Small 1824); David Hoffman, A Course of Legal Study (Balt., Coale & Maxwell 1817); 1 James Kent, Commentaries on American Law (N.Y., O. Halsted 1826); Thomas Sergeant, Constitutional Law (Phila., P.H. Nicklin & T. Johnson, 2d ed. 1830); 1 Blackstone's Commentaries: With Notes of Reference to the Constitution and Laws of the Federal Government of the United States; and of the Commonwealth of Virginia (St. George Tucker ed., Phila., William Young Birch & Abraham Small 1803); 1 James Wilson, The Works of the Honourable James Wilson (Phila., Lorenzo Press 1804). I also consulted the following secondary sources: Goebel, supra note 132; 2 George Lee Haskins & Herbert A. Johnson, Foundations of Power: John Marshall, 1801–15 (1981); Robert Wyness Millar, Civil Procedure of the Trial Court in Historical Perspective (1952); William E. Nelson, Americanization of the Common Law, 1760–1830 (1975); Mary K. Bonsteel Tachau, Federal Courts in the Early Republic: Kentucky 1789–1816 (1978); 3–4 G. Edward White, The Marshall Court and Cultural Change, 1815–35 (1988).

Tidd's *Practice* does not explicitly address the question whether authority to regulate procedure inheres in every court. In discussing the sources of procedural rules, however, Tidd strongly implies that such authority exists. In the introduction to his lengthy summary of the procedures controlling various suits in the Courts of King's Bench and Common Pleas, Tidd identifies the sources of procedural regulation. Throughout, he emphasizes that the courts themselves, through both orders and judicial decisions, are an important source of procedural regulation. For example, Tidd writes: "The practice of the court, by which the proceedings in an action are governed, is founded on ancient and immemorial usage, regulated from time to time by rules and orders, acts of parliament, and judicial decisions."[151] To be sure, Tidd does not explicitly identify the inherent authority of the court as the justification for the rules and judicial decisions that regulate the practice in each court. Because, however, Parliament did not confer general rulemaking authority upon English courts until 1833, courts regulating procedure before then necessarily did so on their own authority rather than in reliance on legislative warrant.[152]

Joseph Story's renowned *Commentaries* can be read as taking a contrary view on the question, and, as an American treatise, it is entitled to more weight. Story writes as follows:

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[151] 1 Tidd, supra note 148, at xi; see also id. at xii ("[A]s questions arise respecting the regularity of the proceedings, the courts are called upon to settle, by judicial decisions, the course of their own practice, or to fix the construction of the rules or acts of parliament which have been made respecting it.").

[152] The Civil Procedure Act of 1833 contained the first parliamentary grant of rulemaking power to judges. R.J. Walker & M.G. Walker, The English Legal System 26 (2d ed. 1970). Walker and Walker note that "[b]efore the nineteenth century each court regulated its own internal procedure with very little intervention by Parliament." Id. at 60. See also Millar, supra note 150, at 27 (asserting that English procedure historically derived from the courts rather than from any legislative source); Samuel Rosenbaum, The Rule-Making Authority in the English Supreme Court 4 & n.8 (1917) (describing English civil procedure as entirely judge-made until the Civil Procedure Act of 1833). The same, incidentally, is true of English criminal procedure, which judges developed with very little parliamentary oversight until the mid-nineteenth century. See David Bentley, English Criminal Justice in the Nineteenth Century 1, 19, 22, 297 (1998) (noting that the "overwhelming majority" of criminal defendants were tried summarily and that procedure upon such prosecutions was wholly at the magistrate's discretion until at least 1848); Patrick Devlin, The Criminal Prosecution in England 11–13, 28, 38, 42–45 (1958) (describing English criminal procedure as developed entirely at the instigation of courts themselves).

> [I]n all cases, where the judicial power of the United States is to be exercised, it is for *congress alone* to furnish the rules of proceeding, to direct the process, to declare the nature and effect of the process, and the mode, in which the judgments, consequent thereon, shall be executed.[153]

Insofar as Story describes power over procedure as belonging to "congress alone," this passage denies that any other body, including federal courts, shares in that power. The conclusion that Story viewed authority over procedure as exclusively legislative is reinforced by a later passage in which Story acknowledges the inherent authority of the federal courts but does not explicitly include power over procedure on the list. He writes:

> [W]hile the jurisdiction of the courts of the United States is almost wholly under the control of the regulating power of congress, there are certain incidental powers, which are supposed to attach to them, in common with all other courts, when duly organized, without any positive enactment of the legislature. Such are the power of the courts over their own officers, and the power to protect them and their members from being disturbed in the exercise of their functions.[154]

Story's description of inherent powers is consistent with that found in the cases described below: it emphasizes the court's inherent ability to control those who serve it and to punish behavior disruptive to the judicial process. To be sure, the use of the phrase "such are" indicates that the list is not exhaustive; further, there is reason to believe, based on Story's judicial opinions, that he believed that the common law vested courts with some procedural powers not conferred by statute.[155] Even if, however, Story's *Commentaries* do not entirely foreclose the notion that Story perceived courts to possess inherent authority to regulate procedure, the treatise surely casts significant doubt upon it.

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[153] 3 Story, supra note 149, § 1752 (emphasis added).

[154] Id. § 1768; see also Sergeant, supra note 150, at 29 (similarly identifying a court's power over its own officers and its power to punish contempt as incidental powers, and similarly failing to include power over procedure on the list).

[155] See, e.g., Sears v. United States, 21 F. Cas. 938, 938–39 (Story, Circuit Justice, C.C.D. Mass. 1812) (No. 12,592) (relying on common law to establish the authority of the court to amend a variance).

4. Cases

As described in the preceding Sections, the question of whether federal courts possess inherent procedural authority apparently did not occupy either treatise writers or those who debated the Constitution and the legislative output of the first and second Congresses. One might expect this question to have occupied those it most concerned: the federal courts themselves. To discern whether early federal courts believed themselves to possess inherent procedural authority, I surveyed all Supreme Court, circuit court, and district court cases from the period between 1789 and 1820 that dealt with either the concept of inherent authority or any matter of procedure, which I defined as including civil procedure, criminal procedure, and evidence.[156] This Section describes the results of this research.

It is clear, both in the arguments of counsel and the reports of early judicial opinions, that federal courts and the lawyers who practiced before them believed federal courts to possess certain inherent powers.[157] Unfortunately, however, federal courts and counsel only rarely addressed the question of whether courts possessed inherent authority over procedure. A review of federal cases de-

[156] I employed the following method of gathering the relevant cases. My research assistant culled all the cases from the Federal Cases reporter that satisfied the criteria; I did the same for the Supreme Court reporter. We then categorized the cases into the following categories: admiralty, equity, civil procedure, criminal procedure, and evidence. I read all of the cases in each of these categories to determine how the early federal courts treated the regulation of procedure, particularly in the absence of legislative guidance. In addition to reading the cases reported in the Supreme Court reporter, I also reviewed *The Documentary History of the Supreme Court of the United States, 1789–1800*, an eight-volume set collecting documents regarding the business of the Supreme Court, as well as its justices riding circuit, in that period. 1 Documentary History, supra note 136, at xli–xlii.

[157] See, e.g., Forrest v. Hanson, 9 F. Cas. 455, 455 (C.C.D.C. 1801) (No. 4942) (suggesting that the powers of courts can derive from either statutes or from "principle[s] of the common law, extending, generally, to all judicial bodies"). Of course, early federal courts did not only address the authority they claimed. They also addressed an inherent authority they ultimately—and famously—disclaimed: inherent jurisdictional authority. See, e.g., United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32, 34 (1812) (denying that the exercise of criminal jurisdiction is within the powers implied in all courts "from the nature of their institution"); Ex parte Bollman, 8 U.S. (4 Cranch) 75, 93–94 (1807) (denying that the authority to issue writs of habeas corpus is inherent in every court). Contra id. at 79–80 (argument of counsel) (asserting that federal courts do possess inherent authority to issue writs of habeas corpus).

cided between 1789 and 1820 reveals that in large part, early discussions of inherent authority track their modern counterparts: then, as now, most explicit discussions of inherent authority occur in the contexts of contempt,[158] regulation of the bar,[159] and regulation of jurors.[160] Explicit discussions of inherent authority over procedure occur in only a handful of older cases.

In theory, analyzing whether early federal courts believed themselves to possess inherent authority over procedure need not depend only on whether they explicitly embraced or disclaimed it. Regardless of what federal courts *said* about inherent authority over procedure, one ought to be able to glean information by studying what they *did*. If federal courts adopted procedural rules in the course of adjudication and in the absence of statutory authorization, that would be circumstantial evidence that federal courts believed themselves to possess inherent authority over pro-

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[158] See, e.g., *Hudson*, 11 U.S. (7 Cranch) at 34; United States v. Duane, 25 F. Cas. 920, 922 (C.C.D. Pa. 1801) (No. 14,997) (claiming that, in holding defendant in contempt, "[w]e confine ourselves within the ancient limits of the law, recently retraced by legislative provisions and judicial decisions"); Hollingsworth v. Duane, 12 F. Cas. 359, 363–64 (C.C.D. Pa. 1801) (No. 6616) (argument of counsel). State courts similarly asserted inherent authority to punish contempt. See, e.g., State v. Johnson, 3 S.C.L. (1 Brev.) 155, 158 (S.C. 1802) (per curiam) ("Justices of peace have a power derived from the common law, and necessarily attached to their offices, of committing and confining for gross misbehaviour in their presence . . . .").

[159] See, e.g., King of Spain v. Oliver, 14 F. Cas. 577, 578 (C.C.D. Pa. 1810) (No. 7814) (characterizing the right to inquire by what authority an attorney acted on his purported client's behalf as one "inherent in all courts," but acknowledging that this inherent power "may be taken away, or qualified by express statute; or additional cautions may be superadded"). State courts similarly asserted authority over court personnel. See, e.g., Yates v. New York, 6 Johns. 337, 372–73 (N.Y. 1810) (argument of counsel) (asserting that courts, including chancery courts, possess inherent authority to direct and control court officers, including clerks, in the discharge of their functions); Mockey v. Grey, 2 Johns. 192, 192 (N.Y. 1807) ("The power of appointing a guardian, *ad litem*, is incident to every court . . . .").

[160] See, e.g., United States v. Perez, 22 U.S. (9 Wheat.) 579, 580 (1824) (explaining that "the law has invested Courts of justice with the authority to discharge a jury from giving any verdict" when justice requires it); United States v. Coolidge, 25 F. Cas. 622, 623 (Story, Circuit Justice, C.C.D. Mass. 1815) (No. 14,858) (asserting the power to withdraw a juror if, while a party is on trial before a jury, something occurs that "will occasion a total failure of justice if the trial proceed"); Offutt v. Parrott, 18 F. Cas. 606, 607 (C.C.D.C. 1803) (No. 10,453) (fining jurors who escaped from the jury room out the window). State courts asserted similar authority. See, e.g., Commonwealth v. Bowden, 9 Mass. (9 Tyng) 494, 495 (1813) (recognizing inherent authority of a court to withdraw a juror); Alexander v. Jameson, 5 Binn. 238, 242–43 (Pa. 1812) (asserting inherent authority of a court to regulate what jurors take into the jury room).

cedure. Conversely, if they did not adopt procedural rules without statutory authorization, that would be circumstantial evidence that federal courts did not believe that any such authority existed. Because there is a multitude of cases between 1789 and 1820 in which federal courts advanced procedural rules without referencing any statutory authority, the body of relevant case law at first impression offers substantial support for the proposition that early federal courts believed themselves to possess inherent procedural authority.

In fact, however, this body of case law sheds very little light on the question of inherent authority because the study of it is complicated by two factors. First, "common law" in the late eighteenth and early nineteenth centuries had a different meaning than does "common law" today. Today, we understand common law as law created by judges. In the late eighteenth and early nineteenth centuries, however, lawyers and judges did not conceive of common law as something judges fashioned; for the most part, they understood it as something judges applied. As I have discussed in detail elsewhere, federal procedural common law, like most common law, was understood to apply in federal courts of its own force unless Congress prescribed a different rule.[161] Thus, Alfred Conkling, in his 1831 treatise on the federal courts, could decline to discuss federal cases related to the execution of judgments on the ground that "they are only declarative of the general common law principles recognized in all courts of common law jurisdiction, or of the laws of the respective states."[162] Similarly, St. George Tucker, in his American edition of *Blackstone's Commentaries*, could instruct

[161] See Barrett, supra note 7, at 376–84.

[162] Conkling, supra note 150, at 317; accord id. at 233 (explaining that his treatise would not detail the formal parts of the declaration because "[t]he common rules of pleading, except where they have been changed by the laws of the states or by rules of court are in general strictly applicable to proceedings in the national courts," and the rules of common law pleading are adequately explained in other treatises). Professor Mary Tachau's study of the Kentucky federal courts from 1789–1816 led her to conclude that "[t]he most distinctive aspect" of the procedures observed by Kentucky federal courts in this period "was their rigorous adherence to the antiquated technicalities of English law." Tachau, supra note 150, at 77. Throughout, Tachau details examples of this phenomenon. See, e.g., id. at 84 (relating district judge's admonishment that "[t]he Latitude contended for by Mr. Attorney goes at once to destroy that System of Good pleading which has stood the test for Ages past and which I hope will continue to be strictly attended to by Judges").

that the "maxims and rules of proceeding[s] [of the English common law] are to be adhered to, whenever the written law is silent."[163] Early nineteenth-century cases from the Supreme, circuit, and district courts reflect the same understanding.[164] Cases, therefore, in which courts articulate procedural rules in the absence of statutory authorization or direction cannot necessarily be interpreted as assertions of inherent judicial authority. One must carefully discern whether, in any given case, the court perceived itself to be exercising discretion or simply applying a settled common rule.

The second and more serious factor complicating an effort to determine whether early federal courts implicitly asserted inherent authority over procedure is that they possessed broad, statutorily granted authority over procedure. Section 17 of the Judiciary Act of 1789 gave each federal court the authority "to make and establish all necessary rules for the orderly conducting business in the said courts."[165] Despite that provision's reference to "rules," the Supreme Court interpreted it to permit the regulation of procedure

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[163] 1 Blackstone's Commentaries, supra note 150, app. at 429; see also 1 Kent, supra note 150, at 320 ("If congress should by law authorize the district or circuit courts to take cognizance of attempts to bribe an officer of the government . . . and should make no further provision, the courts would, of course, in the description, definition, prosecution, and punishment of the offence, be bound to follow those general principles and usages, which are not repugnant to the constitution and laws of the United States, and which constitute the common law of the land, and form the basis of all American jurisprudence.").

[164] See, e.g., Tatum v. Lofton, 23 F. Cas. 723, 723–24 (C.C.D. Tenn. 1812) (No. 13,766) (treating common law as controlling the question of whether a witness who voluntarily gained an interest in litigation can rely on that interest as grounds for refusing to testify); Livingston v. Jefferson, 15 F. Cas. 660, 664–65 (Marshall, Circuit Justice, C.C.D. Va. 1811) (No. 8411) (asserting that the common law, including procedural common law, applies in federal courts unless Congress says otherwise); United States v. Johns, 4 U.S. (4 Dall.) 412, 414, 26 F. Cas. 616, 617 (Washington, Circuit Justice, C.C.D. Pa. 1806) (No. 15,481) (holding that in the absence of contrary instruction from Congress, the number of peremptory challenges permitted in a capital case was a matter governed by the common law, which permitted thirty-five); Owens v. Adams, 18 F. Cas. 926, 926 (Marshall, Circuit Justice, C.C.D. Va. 1803) (No. 10,633) (holding that in the absence of any legislative provision, "the rules of the common law" controlled questions regarding the admissibility of evidence, despite the court's disagreement with the application of the rule in this instance).

[165] Judiciary Act of 1789, ch. 20, § 17, 1 Stat. 73, 83.

through either formal court rules or case-by-case adjudication.[166] This interpretation of Section 17 means that one cannot identify exercises of inherent authority simply by identifying cases that avoid the first complication—in other words, by identifying cases in which courts are advancing their own procedural rules rather than applying settled common law principles. Because such cases could as easily represent an exercise of the court's statutory authority as its inherent authority, it is only possible to distinguish one from the other if the deciding court does, and courts rarely did so. Most of the time, courts simply adopted rules in the course of adjudication without addressing the issue of their power at all.[167] Other times, they explicitly proclaimed themselves to possess power to regulate

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[166] In *Fullerton v. Bank of the United States*, the Supreme Court rejected a challenge to establishing rules through adjudication. 26 U.S. (1 Pet.) 604, 613–15 (1828). It noted:

> Written rules are unquestionably to be preferred, because their commencement, and their action, and their meaning, are most conveniently determined; but what want of certainty can there be, where a Court by long acquiescence has established it to be the law of that Court, that the state practice shall be their practice . . . .

Id. at 613; accord Duncan's Heirs v. United States, 32 U.S. (7 Pet.) 435, 451 (1833) ("It is not essential that any court in establishing or changing its practice should do so by the adoption of written rules. Its practice may be established by a uniform mode of proceeding, for a series of years . . . ."). Although neither *Fullerton* nor *Duncan's Heirs* explicitly invoked § 17 of the Judiciary Act in holding that court rules can be established by the common law method, it seems fairly clear in context that the Court was referring to that provision. Even if it was not, however, its failure to draw a sharp distinction in these cases between procedural regulation by court rule and procedural regulation by adjudication makes it less likely that federal courts drew such a distinction for purposes of § 17. See, e.g., Arnold v. Jones, 1 F. Cas. 1180, 1180 (D.S.C. 1798) (No. 559) (explicitly invoking § 17 power to establish a rule, in the course of adjudicating a case, that a motion for a new trial does not suspend judgment after a verdict).

[167] See, e.g., Sulivan v. Browne, 23 F. Cas. 348, 348–49 (C.C.D. Pa. 1808) (No. 13,593) (referring both to a previously established "rule of this court" and to an innovation to that rule allowed in the present case, without any reference to the court's authority to adopt either the initial rule or its temporary suspension); United States v. Burr, 25 F. Cas. 55, 77 (Marshall, Circuit Justice, C.C.D. Va. 1807) (No. 14,693) (establishing both the questions to be asked and the grounds to be accepted in determining whether to excuse jurors for cause); United States v. Burr, 25 F. Cas. 38, 40–41 (Marshall, Circuit Justice, C.C.D. Va. 1807) (No. 14,692e) (laying down a rule with respect to the questioning of witnesses); United States v. Stewart, 27 F. Cas. 1338, 1339 (C.C.D. Pa. 1795) (No. 16,401) (adopting "a rule in this case, and in all other cases of a similar nature" regarding the time allowed criminal defendants to secure the presence of witnesses for trial); Thompson v. Haight, 23 F. Cas. 1039, 1040 (S.D.N.Y. 1820) (No. 13,956) (laying down rules regarding affidavits in certain patent cases).

procedure but did not identify the source of that power—leaving open the question of whether they perceived it to be constitutionally or statutorily granted.[168] It is not, then, that the early case law is silent with respect to federal court authority over procedure. To the contrary, there are hundreds of cases in which federal courts explicitly or implicitly assert such authority. But the cumulative effect of the Supreme Court's broad interpretation of Section 17 and the courts' general failure to identify whether or not they were relying on Section 17 in adopting any particular rule renders the lion's share of these cases useless for purposes of this study. In most, it is impossible to tell whether courts regulating procedure were asserting constitutional or statutory authority.[169]

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[168] See, e.g., Patton v. Blackwell, 18 F. Cas. 1336, 1336 (C.C.D. Tenn. 1809) (No. 10,831) (adopting a rule regarding the imposition of costs in the event of continuance and asserting, without citation, that "[t]his court has the power to establish such rules of practice"); Anonymous, 1 F. Cas. 993, 993 (C.C.D. Conn. 1809) (No. 434) (asserting that "this court was perfectly free to establish a better practice" than the English practice regarding particular affidavits but not identifying the source from which this freedom derived).

[169] The courts' failure to distinguish between inherent authority and statutory authority derived from the Judiciary Act causes confusion about the source of several procedural powers. For example, there is evidence that early federal courts believed themselves to possess inherent authority to permit amendments to pleadings. See Sears v. United States, 21 F. Cas. 938, 939 (Story, Circuit Justice, C.C.D. Mass. 1812) (No. 12,592) (relying on common law to establish the authority of the court to amend a variance); Calloway v. Dobson, 4 F. Cas. 1082, 1083 (Marshall, Circuit Justice, C.C.D. Va. 1807) (No. 2325) (asserting that courts possessed power, both at equity and at common law, to permit amendments of pleadings). But because § 32 of the Judiciary Act gave federal courts statutory authority to do so and because the courts rarely identified the source of their authority, one cannot treat bare amendments as assertions of inherent, as opposed to statutorily granted, authority. See, e.g., Smith v. Barker, 22 F. Cas. 454, 455–56 (C.C.D. Conn. 1809) (No. 13,013) (asserting discretion of the court to permit the plaintiff to amend at any time before the case is actually committed to the jury); Wigfield v. Dyer, 29 F. Cas. 1156, 1156 (C.C.D.C. 1807) (No. 17,622) (adopting a rule with respect to conditions upon amendment). Another example is the power of the court to grant new trials. One can make a good case that early courts believed themselves to possess inherent authority to grant new trials. See, e.g., Bird v. Bird, 2 Root 411, 413 (Conn. 1796) (asserting that "it is incident to every court, who are authorized to try causes by a jury, to set aside their verdicts for just cause"); Inhabitants of Durham v. Inhabitants of Lewiston, 4 Me. 140, 142 (1826) (argument of counsel) (asserting "the inherent power of this court to grant new trials at common law"); Charles Edwards, The Juryman's Guide Throughout the State of New York 184 (N.Y., O. Halsted 1831) ("Perhaps the power to grant new trials, for certain just causes . . . is necessarily incident to every court that has power to try."); see also Judiciary Act of 1789, ch. 20, § 17, 1 Stat. 73, 83 (authorizing federal courts to grant new trials "for reasons for which new trials have usually been granted in the courts of

Given the way that both the court's understanding of procedural common law and the procedural grant in Section 17 cloud the evidence, an assessment of the attitudes of the pre-1820 bench and bar to the question of inherent authority over procedure can fairly rely only upon the following kinds of cases: (a) cases that explicitly discuss inherent procedural authority; (b) cases that do not address the concept of "inherent authority" in those terms but nonetheless explicitly address the claim that courts possess a non-statutorily derived authority over procedure; and (c) cases that neither directly nor indirectly address the question of inherent authority but in which federal courts assert a procedural power *not* granted by Section 17 or any other provision in the early Judiciary and Process Acts (for example, the power to grant a continuance). These restrictions dramatically narrow the pool of relevant evidence.

a. Cases that Explicitly Discuss Inherent Authority over Procedure

Chisholm v. Georgia is the only federal case that directly addresses the question of whether a federal court possesses the inherent authority to prescribe modes of process in the absence of controlling legislation. In *Chisholm*, federal statutes were silent with respect to three important procedural matters: the mode of executing a judgment against a state, the mode of serving process on a state, and the steps for compelling an appearance by the state.[170] Attorney General Edmund Randolph argued that, in the absence of statutory prescription, the Supreme Court possessed inherent authority to regulate its process in all three respects.[171] With respect to writs of execution, Randolph asked, "[W]hy may not executions even spring from the will of the Supreme Court, as [writs

law"). But because § 17 of the Judiciary Act gave federal courts statutory authority to do so and courts rarely identified the source of their authority, grants of new trials cannot be treated as assertions of inherent authority. See, e.g., Kohne v. Ins. Co. of N. Am., 14 F. Cas. 838, 838–39 (Washington, Circuit Justice, C.C.D. Pa. 1804) (No. 7921) (claiming authority to grant a new trial without identifying its source). Thus, while many cases dealing with amendments and new trials appear at first blush to be assertions of inherent authority, the existence of statutory grants destabilizes that conclusion.

[170] Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 420 (1793) (argument of counsel).

[171] Id. at 426–29. Randolph's arguments in this regard were not met by opposing counsel, as Georgia's lawyers had, per her instructions, declined to argue the case. Id. at 419.

enforcing judgments] were originally the creation of Courts?"[172] Drawing an analogy to the courts' inherent power to punish contempt, he asserted that the "incidental authority" to formulate a writ of execution "is not of a higher tone than that of fine and imprisonment, which belongs to every Court of record, without a particular grant of it."[173] Randolph made a similar argument with respect to the Supreme Court's authority to devise a mode for serving process and the steps for compelling an appearance: "if it be not otherwise prescribed by law, or long usage, [the mode] is in the discretion of the Court . . . ."[174] In other words, Randolph made a claim similar to the one advanced by both the Supreme Court and scholars today: federal courts possess inherent authority to fill gaps left open in otherwise controlling procedural law. The difference between Randolph's claim and the modern one lies only in the fact that Randolph treats procedural common law, rather than enacted law alone, as a source of law deemed controlling.

The *Chisholm* majority did not explicitly address Randolph's argument regarding its inherent authority. But insofar as the Court's order in the case provided both a method of serving process and steps for compelling an appearance, the majority appeared to accept it implicitly.[175] It accepted that argument, moreover, over the lone dissent of Justice Iredell, who protested that the authority to devise modes of proceeding is "not one of those necessarily incident to all Courts merely as such,"[176] and that courts receive "all their authority, as to the manner of their proceeding, from the Leg-

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[172] Id. at 427.

[173] Id.

[174] Id. at 428 (describing the Court's authority to devise service of process); see also id. at 429 ("As to the steps, proper for compelling an appearance; these too, not being dictated by law, are in the breast of the Court.").

[175] Id. at 480. In contrast to the Court's approach to service of process and the steps for compelling an appearance, the Court's view with respect to its inherent authority to issue a writ of execution is unclear. With respect to the latter, Randolph's claim of inherent authority was made in the alternative. Id. at 426. His primary argument was that the Judiciary Act of 1789 implicitly clothed the Supreme Court with the authority to issue such a writ. Id. Thus, the Supreme Court's issuance of a writ of execution cannot be taken as an implicit endorsement of the proposition that the Court thought itself to possess inherent authority to do it.

[176] Id. at 433 (Iredell, J., dissenting).

islature only."[177] His belief in exclusive legislative control was so firm, in fact, that he argued that judges simply could not exercise judicial power in the absence of legislative direction regarding the procedures to be observed.[178] Once *Chisholm* was decided, echoes of Justice Iredell's argument appeared in the press.[179]

Chisholm thus provides some evidence that informed observers in the Founding era believed federal courts to possess inherent authority over procedure. At the same time, Justice Iredell's dissent provides some evidence that this view was not universally held.[180] And while *Chisholm*'s explicit discussions of inherent authority separate it from other cases of the period in which rules were made and authority unaddressed, it is the case even here that the existence of the Judiciary Act's Section 17 casts doubt on whether the Court was relying on inherent rather than statutorily granted authority.[181] It bears emphasis, however, that both Randolph's argu-

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[177] Id. at 432. Interestingly, Justice Iredell grounded his argument in favor of exclusive legislative control in the same constitutional provision relied upon by some modern proponents of exclusive legislative control: the Sweeping Clause. See infra note 197.

[178] *Chisholm*, 2 U.S. at 432 (Iredell, J., dissenting) ("This appears to me to be one of those cases, with many others, in which an article of the Constitution cannot be effectuated without the intervention of the Legislative authority."). Justice Iredell's views in *Chisholm* were presaged by the notes that he took while *Oswald v. New York*, 2 U.S. (2 Dall.) 401 (1792), a case between New York and a citizen of another state, was pending before the Court. In reflecting on the case, Iredell denied that Article III empowered the Court to devise "any new mode of proceeding" and emphasized that the power to devise new modes of trial belonged entirely to Congress. James Iredell, Observations on State Suability, *in* 5 Documentary History, supra note 136, at 76, 84–85. *Oswald v. New York* was tried by jury before the Supreme Court, and no formal opinion was issued in the case. Oswald v. New York, *in* 5 Documentary History, supra note 136, at 57, 59–67 (describing background of the case).

[179] See, e.g., Hampden, Indep. Chron. (Boston), July 25, 1793, *reprinted in* 5 Documentary History, supra note 136, at 399, 401 (heatedly arguing that the authority to determine the mode of exercising the judicial power, including the mode of proceeding, belongs exclusively to Congress); The True Federalist to Edmund Randolph, Number V, Indep. Chron. (Boston), Mar. 20, 1794, *reprinted in* 5 Documentary History, supra note 136, 270–71 (making same argument).

[180] It is worth noting that Justice Iredell himself was not entirely consistent in his view about inherent procedural authority. In several cases, he granted continuances even in the absence of statutory authorization to do so. See, e.g., Hurst v. Hurst, 3 U.S. (3 Dall.) 512, 512, 12 F. Cas. 1028, 1028 (Iredell, Circuit Justice, C.C.D. Pa. 1799) (No. 6929); Symes v. Irvine, 2 U.S. (2 Dall.) 383, 384, 23 F. Cas. 591, 592 (Iredell, Circuit Justice, C.C.D. Pa. 1797) (No. 13,714).

[181] Consider that in at least two later original jurisdiction cases, the Court devised forms of process and rules of proceeding in explicit reliance on statutory authority

ment (at least with respect to the authority to devise steps for serving process and compelling an appearance) and Iredell's dissent focus exclusively on inherent authority. That fact makes it unlikely that the majority, in siding with Randolph, thought that Section 17 settled the issue. It seems far more likely that the Court believed, as Justice Johnson explicitly stated on circuit several years later, that if Congress gave a court jurisdiction without prescribing any procedure, "would it not follow that the court must itself adopt a mode of proceeding adapted to the exigency of each case?"[182]

It is significant that, even if the federal courts were vague with respect to the question whether federal courts possess inherent authority to regulate procedure, at least some state courts were not. Because so many of the federal cases were practically useless, I expanded my search to include state cases decided between 1789 and 1820.[183] This search yielded few cases, but the ones it did yield were clear on the question of inherent procedural authority. The Supreme Court of Pennsylvania repeatedly held that "[e]very court of record has an inherent power to make rules for the transaction of its business, provided such rules are not contradictory to the law of the land."[184] The court emphasized the existence of this inherent

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and with no reference to inherent authority. See, e.g., New Jersey v. New York, 30 U.S. (5 Pet.) 284, 287–88 (1831) (relying only on statutory authority); Grayson v. Virginia, 3 U.S. (3 Dall.) 320, 320 (1796) (relying on the Judiciary Act's § 14). But see Kentucky v. Dennison, 65 U.S. (24 How.) 66, 98 (1861) (explicitly asserting inherent authority to devise process and rules of proceeding), overruled in other respects by Puerto Rico v. Branstad, 483 U.S. 219 (1987).

[182] Gilchrist v. Collector of Charleston, 10 F. Cas. 355, 362 (Johnson, Circuit Justice, C.C.D.S.C. 1808) (No. 5420). He went on to argue that the power to issue a writ of mandamus is a "mode of proceeding" rather than a distinct branch of jurisdiction, and that the power therefore exists even in the absence of a statutory grant. Id. at 363.

[183] In contrast to the method I pursued with respect to the federal cases, see supra note 156 and accompanying text, I did not read all of the relevant state cases decided between 1789 and 1820. For this portion of the study, I instead relied on searches in electronic databases.

[184] Barry v. Randolph, 3 Binn. 277, 278 (Pa. 1810) (Tilghman, C.J.); accord Boas v. Nagle, 3 Serg. & Rawle 250, 253 (Pa. 1817) (implicitly recognizing inherent power of court to regulate its practice); Vanatta v. Anderson, 3 Binn. 417, 423 (Pa. 1811) (noting that despite the absence of a legislative grant, "it is not denied that [the Courts of Common Pleas] have power from the nature of their constitution, to make rules for the regulation of their practice"); Boyd's Lessee v. Cowan, 4 U.S. (4 Dall.) 138, 140 (Pa. 1794) ("[T]he Court can alter the *practice*, and institute any rules in an action of ejectment, which they may deem beneficial, or for the furtherance of justice, without legislative aid.").

power, moreover, in the face of a Pennsylvania statute explicitly granting it. It insisted that "[c]ourts possess[] these powers antecedently to any act of the legislature on the subject."[185] Indeed, the court was quite clear that every court "necessarily possesse[s] the incidental power of establishing rules for the regulation of its practice, independently of [a statutory grant]."[186] The spotty case reporting in states other than Pennsylvania during this period makes it difficult to discern whether other state courts espoused this belief. Both the Court of Appeals of Kentucky and the Supreme Court of New York, however, appear to have shared Pennsylvania's sentiment.[187]

b. Cases that Assert Non-Statutorily Derived Authority over Procedure

There are a few cases in which federal courts indirectly claimed to possess inherent authority over procedure. In these cases, the courts did not claim inherent authority per se; they instead claimed that the common law vested courts with discretion to decide certain procedural matters. In *United States v. Insurgents*, no statute governed how many persons should be summoned for a venire; the circuit court held that the common law vested the court itself with

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[185] *Barry*, 3 Binn. at 279 (Yeates, J.).

[186] Dubois v. Turner, 4 Yeates 361, 362 (Pa. 1807) (Tilghman, C.J.).

[187] See Kennedy's heirs v. Meredith, 6 Ky. (3 Bibb) 465, 466 (1814) ("[C]ourts may adopt rules for the regulation of the practice upon points not provided for by law . . . ."). Because I was unable to find any statutory grant of procedural authority on the books at this time, I treat this statement as a reference to the court's inherent authority rather than authority legislatively granted. See also Yates v. People, 6 Johns. 337, 372 (N.Y. 1810) (referring in dicta to "the general powers incident to every court of record of regulating its own practice, and prescribing rules in regard to the form of conducting its proceedings"). There is some evidence that the Virginia courts established rules in the absence of legislative authority from 1784 to 1787. See Pushaw, supra note 106, at 821 & n.461. There is also some evidence that colonial courts exercised inherent authority over procedure. See Marilyn L. Geiger, The Administration of Justice in Colonial Maryland, 1632–1689, at 14, 233 (1987) (noting that Maryland colonial courts adopted their own procedures when the Assembly was silent); Paul M. McCain, The County Court in North Carolina Before 1750, at 39 (1954) ("Without a law to specify a definite procedure for the county court the justices generally arranged matters to suit themselves and the people in attendance.").

the discretion to choose the number.[188] In *Sears v. United States*, Justice Story, riding circuit, invoked the common law to establish the authority of the court to amend a variance.[189] And in *Calloway v. Dobson*, Chief Justice Marshall, riding circuit, asserted that courts possessed power, both at equity and at common law, to permit amendments of pleadings.[190] These cases are significant because in each, the court assumed itself to possess the powers traditionally possessed by common law courts.

c. Cases that Assert Procedural Power not Granted by the Judiciary and Process Acts

Finally, there are a handful of cases in which federal courts failed to invoke either inherent authority or the authority traditionally possessed by common law courts, but nonetheless asserted the discretion to take actions not expressly authorized by statute. The most prominent example is the right to grant continuances.[191] In

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[188] 2 U.S. (2 Dall.) 335, 341–42, 26 F. Cas. 499, 514 (C.C.D. Pa. 1795) (No. 15,443); see also United States v. Fries, 3 U.S. (3 Dall.) 515, 516, 9 F. Cas. 826, 918 (C.C.D. Pa. 1799) (No. 5126) (argument of counsel).

[189] 21 F. Cas. 938, 939 (Story, Circuit Justice, C.C.D. Mass. 1812) (No. 12,592). Section 32 of the Judiciary Act of 1789 authorized courts to amend a variance that was merely a matter of form. Even if the variance at issue in *Sears* was within the purview of § 32, the significant point for present purposes is that in establishing his authority to act, Justice Story explicitly invoked the authority that the common law granted to all courts of error rather than § 32.

[190] 4 F. Cas. 1082, 1083 (Marshall, Circuit Justice, C.C.D. Va. 1807) (No. 2325). Again, § 32 of the Judiciary Act authorized the court to permit amendments to pleading. The significant point for present purposes is that Justice Marshall did not rely on the statutory grant but instead explicitly invoked the powers possessed by courts of common law and equity.

[191] See, e.g., King of Spain v. Oliver, 14 F. Cas. 571, 572 (Washington, Circuit Justice, C.C.D. Pa. 1816) (No. 7812) (denying continuance when party knew that witness was about to depart and made no effort to procure his deposition); United States v. Frink, 25 F. Cas. 1220, 1221 (C.C.D. Conn. 1810) (No. 15,171) (denying continuance for absent witness when the witness refused to attend); Hurst v. Hurst, 3 U.S. (3 Dall.) 512, 12 F. Cas. 1028 (Iredell, Circuit Justice, C.C.D. Pa. 1799) (No. 6929) (granting continuance when the adverse party refused to answer a bill for discovery); Symes's Lessee v. Irvine, 2 U.S. (2 Dall.) 383, 384, 23 F. Cas. 591, 592 (Iredell, Circuit Justice, C.C.D. Pa. 1797) (No. 13,714) (granting continuance when witness broke promise to a party to attend the trial). There is some later authority from a state court explicitly casting the right to grant or refuse a continuance as one "inherent in all courts." See Wilson v. Phillips, 5 Ark. 183, 185 (1843); Burriss v. Wise & Hind, 2 Ark. 33, 41 (1839). It is worth noting that the federal courts briefly possessed a statutorily granted power to grant continuances. Among other things, § 15 of the Judiciary Act of 1801

addition to granting continuances, federal courts did things like delineating the kind of affidavits they would accept and allocating the expenses associated with the attendance of witnesses.[192] I found no case in which a federal court addressed the source of its authority to do any of these things, but because no statute empowered federal courts to take these procedural measures, those who did necessarily acted on the belief that they possessed procedural powers other than those statutorily granted.

C. Interpreting the Evidence

Federal courts can properly claim to possess an initiating authority to adopt procedural rules if such authority is either conveyed as part of "the judicial Power" itself or justified as a means supporting the exercise of judicial power. In either event, the legitimacy of the claim turns largely on historical practice. The former claim turns on whether informed observers in the Founding era understood "the judicial Power" to include authority to regulate procedure in the course of adjudication. The latter turns on whether procedure is a matter over which courts have historically exercised power.

As described in this Part, there is some historical support, albeit far from overwhelming, for the argument that federal courts possess this initiating procedural authority. There is Edmund Randolph's claim of inherent authority in his proposed bill regulating the business of the judicial branch, and there is the Supreme Court's implicit acceptance of Randolph's argument regarding its inherent authority in *Chisholm*. There are the clear assertions of inherent procedural authority by state courts in Pennsylvania, Kentucky, and New York. There is the explicit recognition by federal courts of situations in which the common law vests all courts with the discretion to take certain procedural steps related to the pro-

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empowered federal courts "to grant continuances on the motion of either party." Judiciary Act of 1801, ch. 4, § 15, 2 Stat. 89, 94. That Act was repealed in its entirety almost exactly one year later on March 8, 1802.

[192] See, e.g., Norwood v. Sutton, 18 F. Cas. 458, 458 (C.C.D.C. 1806) (No. 10,365) (refusing to receive a supplemental affidavit on the ground that it was a practice leading to perjury); Ex parte Johnson, 13 F. Cas. 719, 719 (Washington, Circuit Justice, C.C.D. Pa. 1803) (No. 7366) (requiring United States, rather than the defendant, to pay for attendance of defense witness when the United States was the one to call him).

gress of a suit, and there are those cases in which the courts implicitly claim inherent authority by taking certain procedural steps in the absence of enabling legislation. There are, in addition, few contradictions of the proposition that federal courts possess inherent procedural authority. Justice Iredell's dissent in *Chisholm* does cast procedural regulation as the exclusive province of Congress, but that dissent is, by definition, a minority view; it is also somewhat inconsistent with Iredell's own practice on the bench. Story's *Commentaries* does leave procedural authority off the list of inherent judicial powers, but, at the same time, Story's own practice on the bench is somewhat inconsistent with that belief.

It is worth specifically addressing how, if at all, the *absence* of evidence, particularly in the cases, affects the historical analysis. If lawyers and judges in the late eighteenth and early nineteenth centuries believed courts to possess inherent procedural authority, one would expect to find the most vigorous assertions of inherent procedural authority in the case law, but such assertions appear in only a handful of federal cases. In the normal course, one might view lack of case support as evidence on the other side of the ledger—in other words, as evidence that federal courts were not widely perceived to possess such authority. In this situation, however, the evidence does not easily lend itself to that interpretation. Cases abound in which federal courts assert authority over procedure. The problem is not that procedural authority was never discussed, but instead that the evidentiary value of such discussion is marred by the existence of Section 17 of the Judiciary Act. Just as this ambiguous evidence cannot be used to support a claim of inherent procedural authority, neither can it be used to undercut it.

Thus, as matters stand, the historical record offers some support for the proposition that federal courts possess inherent procedural authority, but the support it offers is undeniably modest. It is so modest, in fact, that if one were pursuing only the argument that the Founding generation understood power over procedure to be directly conferred by Article III, this evidence would probably not be strong enough to support the conclusion that inherent procedural authority exists. Reaching that conclusion presumably requires evidence that "the judicial Power" was widely understood to encompass power over procedure, and it is doubtful that this evidence reflects widespread belief about the content of judicial

power. But the historical evidence necessary to support a claim that procedural authority is a legitimate instrumental power of every federal court is surely less. This argument requires a showing that the power asserted was one traditionally used, and the history described in this Part seems to make that showing. Whatever gaps exist in the historical record, it does show that the claim of judicial power over procedure is not novel; it has historical antecedents. Thus, even though the historical evidence falls short of establishing that power over procedure directly vests in federal courts, it seems sufficient to show that federal courts have long treated it as a means legitimately employed toward the end of deciding cases. This conclusion is strengthened by the persistence of the claim that federal courts possess initiating authority over procedure. While the claim of such procedural authority has never been as vigorous or uniformly accepted as claims of inherent authority to punish contempt and control court personnel, a consistent thread of cases making this claim stretches from the Founding era to today.[193]

That said, even if the historical record supports the conclusion that Article III implicitly grants federal courts power over procedure, it is hard to argue that it compels that conclusion. The evidence is weak enough that one could reject it as aberrational or at least exceptional. One doing so, however, must be prepared to treat judicial procedural authority as entirely derivative of Congress's authority, existing only because Congress has not spoken to an issue.[194] This is not an untenable position, but it does take a far more restrictive view of judicial authority than is characteristic of any of the modern scholarship or case law. Indeed, the assumption that federal courts possess inherent authority over procedure is so deeply held that, as a practical matter, rolling it back likely requires forceful evidence to the contrary. Such evidence does not exist here. Thus, given that the historical record puts the modern claim of inherent procedural authority on reasonably firm ground, and given that the modern claim reflects a sensible approach to interbranch balance in matters of procedure, Article III is best construed as implicitly granting federal courts procedural authority.

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[193] Subsection III.B.4 considered only those cases decided between 1789 and 1820. For examples of later cases asserting inherent procedural authority, see supra notes 89–91 and accompanying text.

[194] See supra notes 81–83 and accompanying text.

IV. COMMON LAW POWER AND INHERENT AUTHORITY

The preceding Parts explore two justifications for the ability of federal courts to develop procedural common law in the absence of congressional authorization. The first draws a straightforward analogy to the power of the federal courts to make federal substantive common law: when Congress fails to regulate federal court procedure, an area that the Constitution impliedly commits to exclusive federal control, federal courts may develop federal procedural common law to fill the void. This argument treats judicial authority over procedure, like judicial authority over substance, as entirely derivative of and subservient to that of Congress. The second justification offers a refinement: within this area committed to exclusive federal control, Article III allocates some regulatory power to federal courts by granting them an initiating authority to regulate procedure through judicial decisions. This authority is not exclusive; it must generally give way to contrary congressional regulation. But it is something that a court possesses in its own right rather than something that accrues to it merely by default.

The refinement offered by Article III is crucial to understanding the procedural common lawmaking authority of the federal courts because the existence of inherent procedural authority leaves open the possibility that federal courts possess some core of procedural authority that Congress cannot abrogate. At the same time, Article III plays a limited role in the overall development of judicially crafted procedural regulation, because the inherent procedural authority conferred by Article III is limited. In accepting the existence of inherent procedural authority, it is important not to lose sight of the constraints within which that authority operates.

First, it is necessary to dismiss a phantom constraint. Some scholars and courts have claimed that another limit applies to the inherent authority of federal courts: they have argued that federal courts possess inherent authority, including inherent procedural authority, only to the extent it is strictly necessary to the exercise of judicial power.[195] Such a limit, if applicable, would severely limit the

[195] See, e.g., Degen v. United States, 517 U.S. 820, 829 (1996) ("A court's inherent power is limited by the necessity giving rise to its exercise."); Roadway Express v. Piper, 447 U.S. 752, 764 (1980) ("The inherent powers of federal courts are those which 'are necessary to the exercise of all others.'" (quoting United States v. Hudson

ability of federal courts to fashion procedure in reliance on inherent authority.[196] At least with respect to procedure, however, the argument for a necessity limit does not hold. The strongest argument in favor of such a limit is a long line of cases, beginning with *United States v. Hudson & Goodwin*, in which federal courts have described the exercise of inherent authority as limited by necessity.[197] In *Hudson*, the Court asserted:

> Certain implied powers must necessarily result to our Courts of justice from the nature of their institution.... To fine for contempt... inforce the observance of order, &c. are powers which *cannot be dispensed with* in a Court, because they are *necessary* to the exercise of all others....[198]

Some treat *Hudson* and its progeny as imposing a necessity limit on all exercises of inherent authority, including inherent procedural authority.[199] That, however, is an overreading of these cases, all of which have arisen in the context of the courts' inherent power to punish contempt and otherwise impose sanctions. Understood in context, the "necessity" limit is designed to preserve a lim-

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& Goodwin, 11 U.S. (7 Cranch) 32, 34 (1812))); see also Pushaw, supra note 106, at 741–43, 847–49 (arguing that the judiciary possesses only those instrumental powers that are strictly necessary to the exercise of judicial power, as opposed to those that are merely useful to it); Van Alstyne, supra note 115, at 111 ("Neither the executive nor the judiciary possess any powers *not essential* (as distinct from those that may be merely helpful or appropriate) to the performance of its enumerated duties as an original matter....").

[196] See Pushaw, supra note 106, at 851 ("Any claim of 'necessity' [to exercise inherent procedural authority] is further weakened by the fact that Congress has delegated to judges a prominent role in drafting adjective laws."); see also Lear, supra note 35, at 1160 ("Few modern forum non conveniens dismissals are necessary for the courts to function.").

[197] Independent of *Hudson* and its progeny, Professor William Van Alstyne has argued that the Sweeping Clause gives Congress the exclusive power to give the executive and the judiciary those powers that are merely beneficial to the exercise of executive and judicial power, thereby limiting any implied powers possessed by the judiciary and the executive to those that are indispensable. See Van Alstyne, supra note 115. Professor Sara Sun Beale has persuasively refuted that argument. See Beale, supra note 22, at 1471–72. In addition, the Supreme Court implicitly rejected a similar argument made by the dissent in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 432–33 (1793). See supra note 177 and accompanying text.

[198] 11 U.S. (7 Cranch) 32, 34 (1812) (emphasis added); accord *Degen*, 517 U.S. at 829 (asserting that inherent power exists only to the extent necessary); *Roadway Express*, 447 U.S. at 764–65 (similar).

[199] See, e.g., Pushaw, supra note 106.

ited core of judicial authority from falling within the general prohibition on adjudicating common law crimes, while at the same time preventing a court's power to punish misbehavior from infringing too far on Congress's exclusive power to define federal criminal jurisdiction.[200] In other words, the "necessity" limit provides a very limited exception to the rule that only Congress can criminalize conduct. While the Court has never expressly confined the "necessity" limit to cases involving inherent judicial authority to punish misbehavior, it has applied the limit in only that context.[201] Of par-

[200] In distinguishing the Court's inherent power to punish contempt, an authority it claimed, from the inherent authority to punish common law crimes, an authority it disclaimed, the Court was not responding to an argument of counsel, as both the Attorney General and counsel for the defendants declined to argue the case. Nonetheless, the indictment rendered against Hudson and Goodwin invited that distinction. See Indictment, *Hudson*, 11 U.S. (7 Cranch) 32 (denouncing defendants for "offending a *contempt* of the government of the United States against the Peace and dignity of the United States and in violation of the laws thereof" (emphasis added)); see also id. (denouncing defendants for inciting in citizens "hatred, *contempt*, and indignation against the President of the United States and the Congress of the United States" (emphasis added)). The Court's contempt power might have been thought to justify federal jurisdiction over common law crimes on the rationale that if a federal court can punish contempt without statutory authorization, so too can it punish other crimes without statutory authorization. Conversely, a holding that a federal court lacks power to punish common law crimes might have been thought to deny that it possesses power to punish contempt. The "necessity" limit advanced by the Court avoided either result.

[201] See, e.g., *Degen*, 517 U.S. at 829 (holding that district court exceeded the limit of necessity when it struck a defendant's pleadings in a civil forfeiture case on the ground that he remained a fugitive in a related criminal case); Chambers v. NASCO, 501 U.S. 32, 43–46 (1991) (emphasizing necessity in the context of inherent power to sanction misconduct); Young v. United States ex rel. Vuitton et Fils S.A., 481 U.S. 787, 821 (1987) (Scalia, J., concurring) (recognizing, in the context of contempt, the "narrow principle of necessity" that empowers each branch to protect itself); *Roadway Express*, 447 U.S. at 766 (emphasizing necessity limit in context of recognizing inherent authority of court to shift attorneys' fees as a sanction for misconduct); Ex parte Robinson, 86 U.S. (19 Wall.) 505, 510 (1873) ("The power to punish for contempts is inherent in all courts; its existence is *essential* to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders, and writs of the courts . . . ." (emphasis added)). The Court also invoked a necessity test in *Anderson v. Dunn*, where it recognized Congress's power to punish contempt. 19 U.S. (6 Wheat.) 204, 230–31 (1821) (holding that Congress could claim a "punishing power" on the ground of self-preservation only if the power claimed is "the least possible power adequate to the end proposed"). Because it deals with Congress, rather than the courts, *Anderson* cannot be understood to distinguish contempt from the particular question of common law criminal jurisdiction. It is, however, analogous to *Hudson* insofar as it sets narrow boundaries on the ability of any branch to impose criminal sanctions without the cooperation of the other branches. Indeed, the special consid-

ticular relevance for present purposes, it has never mentioned, much less applied, the limit in the context of inherent procedural authority, and the procedures it has approved as falling within that authority go far beyond what is strictly necessary to the decision of cases.[202] To the extent that federal courts possess inherent procedural authority, no necessity limit applies to it.

While inherent authority is not limited to those occasions on which its exercise is absolutely necessary, it is nonetheless circumscribed. It must be recognized that inherent authority is local authority, permitting each federal court to regulate only its own proceedings.[203] Article III vests "the judicial Power" in each Article III

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erations surrounding criminal punishment may well be what distinguish *Anderson*'s limited view of Congress's implied authority from *McCulloch*'s expansive one.

[202] The Court has not invoked a necessity standard when describing the inherent authority of a federal court to take docket-control measures. See, e.g., Clinton v. Jones, 520 U.S. 681, 706 (1997) ("The District Court has broad discretion to stay proceedings as an incident to its power to control its own docket."); Landis v. N. Am. Co., 299 U.S. 248, 254 (1936) (asserting that district court has inherent power to stay proceedings for the sake of "economy of time and effort for itself, for counsel, and for litigants"); Bowen v. Chase, 94 U.S. 812, 824 (1876) (describing power of courts to consolidate cases "to prevent any practical inconvenience"). Nor has it invoked a necessity standard when describing its power to frame procedural rules in the course of adjudication. See, e.g., Thomas v. Arn, 474 U.S. 140, 146 (1985) (claiming that the courts of appeals possess inherent authority to adopt "'procedures deemed *desirable* from the viewpoint of sound judicial practice'" (quoting Cupp v. Naughten, 414 U.S. 141, 146 (1973)) (emphasis added)); United States v. Hasting, 461 U.S. 499, 505 (1983) (claiming that federal courts possess inherent authority to adopt procedures "'guided by considerations of justice'" (quoting McNabb v. United States, 318 U.S. 332, 341 (1943))); Hanna v. Plumer, 380 U.S. 460, 472–73 (1965) (describing federal courts' inherent procedural authority as "strong"); Funk v. United States, 290 U.S. 371, 383 (1933) (claiming that federal courts possess inherent authority to update common law rules of evidence so as to make them more "useful"); In re Hien, 166 U.S. 432, 436 (1897) (explaining that "courts of justice possess the inherent power to make and frame reasonable rules"); Kentucky v. Dennison, 65 U.S. (24 How.) 66, 98 (1861) (arguing that the Supreme Court "may regulate and mould the process it uses in such manner as in its judgment will best promote the purposes of justice").

[203] The Supreme Court has claimed to possess an inherent supervisory power to impose procedures upon inferior federal courts. See, e.g., Dickerson v. United States, 530 U.S. 428, 437 (2000) ("The law in this area is clear. This Court has supervisory authority over the federal courts, and we may use that authority to prescribe rules of evidence and procedure that are binding in those tribunals."). I have argued that this claim is fundamentally flawed. See Barrett, supra note 7, at 325. The Court's designation as "supreme" likely functions as a limitation on Congress's power to design the federal judiciary rather than as a grant of power to the Supreme Court. Id. at 361–65. Moreover, even if it does function as a grant of power to the Court, there is no evidence that power over inferior court procedure would be among the powers granted.

court; thus, to the extent that the judicial power carries with it the power to adopt procedures in the course of adjudicating cases, each court possesses that power in its own right. A reviewing court can set aside a rule on the ground that the inferior court abused its discretion in adopting it but not on the ground that it thought a different rule a better one.[204] Thus, Article III may well empower each federal court to develop procedural common law governing the proceedings before it, but it does not permit the Supreme Court to prescribe a unified common law of procedure applicable throughout the federal courts. The implications of this limitation can be illustrated with reference to one of the well-known doctrines discussed in Part I. Were inherent procedural authority the only justification for the authority of federal courts in this area, the Supreme Court could not purport to announce uniform rules of issue and claim preclusion. The content of those doctrines—for example, the decision whether to permit nonmutual issue preclusion—would be left to the discretion of each court.

In fact, however, inherent procedural authority is not the only justification for the authority of federal courts in this area. As Part II explained, federal courts can exercise a common law authority over procedure analogous to their common law authority over substance. In the realm of federal judicial procedure, as in the substantive realms of constitutional preemption, federal courts can develop uniform rules when Congress fails to do so. Inherent procedural authority serves as a supplement to this broader common lawmaking authority. In addition to participating in the development of a uniform procedural common law, each federal court can exercise inherent authority to regulate its own proceedings. The body of law resulting from these dual strands of authority

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Id. at 366–84. The basis of any inherent procedural authority granted to the federal courts is Article III's grant of judicial power, and, as explained in the accompanying text, that power is granted to each court individually.

[204] See Meador, supra note 114, at 1805 (explaining that the exercise of inherent authority, "as with all matters of trial court discretion—is subject to appellate review for abuse"); see also Haw. Hous. Auth. v. Midkiff, 463 U.S. 1323, 1324 (1983) (Rehnquist, J., in chambers) ("Although recalling a mandate is an extraordinary remedy, I think it probably lies within the inherent power of the Court of Appeals and is reviewable only for abuse of discretion."); Ex parte Burr, 22 U.S. (9 Wheat.) 529, 531 (1824) (holding that the inherent authority to regulate the bar resides in the discretion of each court and the Supreme Court will consequently review disbarments only for an abuse of discretion).

is a collection of uniform doctrines largely drawn from general law (much like the law of admiralty or interstate relations) and narrower rules and discretionary measures associated with the inherent authority of individual courts.

Each of these strands of procedural common law is evident in the eighteenth and early nineteenth century cases described in Part III. There were the common law doctrines of procedure, like preclusion and abstention, which courts understood themselves to apply rather than make.[205] These doctrines were drawn from the general law, which had an identifiable content of rules settled by tradition or emergent consensus. Then there were the discretionary rules, like those governing service of process in *Chisholm*, which courts understood themselves to make in reliance upon inherent authority.[206] These rules addressed narrower questions that neither the general nor enacted law governed. They were also invariably local. All of the historical claims to inherent procedural authority discussed in Part III treated that authority as a mechanism by which a federal court regulated its own proceedings.[207]

The same two strands of procedure are evident in the modern cases. There are the descendants of the general common law rules, like preclusion and abstention, which take the form of uniform doctrine applicable throughout the federal courts.[208] Then there are the more discretionary procedural choices, like a rule governing

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[205] See supra notes 161–64 and accompanying text.

[206] See supra notes 170–82 and accompanying text.

[207] This evidence supports the proposition, explained above and defended elsewhere, that the inherent authority conferred by Article III is local. See supra notes 203–04 and accompanying text. For further historical evidence in support of this proposition, see Tidd, supra note 148, at xii ("[G]eneral rules are confined in their operation to the court in which they are made .... Hence we find, that acts of parliament are frequently necessary, to introduce regulations extending to all the courts ....").

[208] Modern abstention has its roots in a doctrine traditionally employed by courts of equity. See supra note 27. Preclusion is a longstanding principle of general procedural common law. See, e.g., Stevelie v. Read, 22 F. Cas. 1336, 1337 (Washington, Circuit Justice, C.C.D. Pa. 1808) (No. 13,389) ("The rule of law is clear, that a judgment is inadmissible in evidence, except between the same parties, or those in privity with them ...."); Hurst v. McNeil, 12 F. Cas. 1039, 1041 (Washington, Circuit Justice, C.C.D. Pa. 1804) (No. 6936) (identifying rule of mutuality in preclusion as "a point completely settled, and at rest").

the time in which a case must be brought,[209] that are best characterized as exercises of inherent procedural authority. It is worthy of note that all of the procedures adopted by modern federal courts in explicit reliance on inherent procedural authority address relatively narrow questions governed by neither the general nor enacted law.[210] These recent iterations of inherent authority differ from their forebears only in the Supreme Court's occasional (and mistaken) deviance from the principle that inherent authority is local.[211]

To be sure, these strands of procedural common law are sometimes intertwined. For example, forum non conveniens is often described as an exercise of a federal court's inherent authority,[212] and insofar as it is an action that courts take related to the progress of a suit, that characterization fits. On the other hand, the standards that the Supreme Court has adopted to guide its exercise emerged from a general consensus reached over time in the state courts, lower federal courts, and scholarly community,[213] and in that respect, forum non conveniens resembles the general procedural law that courts applied throughout the eighteenth and nineteenth centuries. The same is true of remittitur. A grant of remittitur appears to be an exercise of inherent authority, but the rules governing the exercise of that authority comprise a settled and uniform doctrine.[214] Stare decisis similarly cuts across categories.[215] It is an old and widely observed doctrine, which makes it resemble general law; at the same time, it is not uniform. Stare decisis varies from

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[209] See, e.g., Barker v. Wingo, 407 U.S. 514, 530 n.29 (1972) (observing that a court may rely on its inherent authority to "establish[] a fixed time period within which cases must normally be brought").

[210] See supra notes 89 (collecting examples of rules adopted in case law in reliance on inherent authority), 91 (collecting examples of managerial measures courts may take in reliance on inherent procedural authority).

[211] See generally Barrett, supra note 7.

[212] See supra note 35.

[213] See supra note 32.

[214] See supra notes 46–47 and accompanying text.

[215] Compare Harrison, supra note 40, at 525–30 (treating stare decisis as general law), with Lawson, supra note 40, at 212 (treating stare decisis as a doctrine developed pursuant to inherent authority). It is the hybrid nature of stare decisis that makes Congress's power over it a hard question. Were stare decisis only a doctrine of general law, there could be little doubt about Congress's authority to abrogate it. It is the relationship of stare decisis to the inherent authority of each court that makes the question much harder.

court to court, with each determining for itself the strength of its precedent,[216] and this feature is more characteristic of inherent authority.

The variety of this law renders it undeniably complex. Yet the fact that its dual strands span the history of the federal courts reflects a longstanding if implicit judgment that there is value in distinguishing between the widely accepted procedures that every federal court should observe and the discretionary choices that each federal court has authority to make. In this regard, it is noteworthy that even in the twentieth and twenty-first centuries, tradition and consensus have mediated the growth of uniform federal procedural common law. Doctrines like preclusion and abstention do not resemble the traditional doctrines of general procedural common law only in their content; they resemble the general law in their development. To the extent that courts have changed these doctrines, the changes have not been unilateral and abrupt departures from tradition. Rather, they have been responses to emerging consensus about the need for a new approach. For example, in abandoning the mutuality requirement for preclusion, the Supreme Court followed the lead of state courts.[217] Similarly, in introducing a federal forum non conveniens doctrine, the Supreme Court imported a doctrine that had become well rooted in state practice.[218] This is not to say that either tradition or consensus invariably guides the development of procedural common law. But it is to say that much procedural common law reflects the same pattern that Professor Caleb Nelson has observed with respect to substantive common law: general law has persisted.[219] Judges developing uniform procedural common law, like judges developing common law in the substantive enclaves of constitutional preemption, do not, in the main, develop rules through the raw exercise of discretion. Instead, they take account of the consensus reflected in secondary sources and judicial opinions. To the extent that a court understands itself to be exercising raw discretion, its action is better

[216] See supra notes 37–39 and accompanying text.

[217] See Blonder-Tongue Lab. v. Univ. of Ill. Found., 402 U.S. 313, 322–24 (1971) (recounting rejection of mutuality rule for defensive collateral estoppel by the California Supreme Court, numerous federal and state courts, and commentators).

[218] See supra note 32.

[219] See Nelson, supra note 23.

treated as an exercise of inherent authority. As Edmund Randolph put it in *Chisholm*, "[I]f it be not otherwise prescribed by law, or long usage, [the procedure in question] is in the discretion of the Court."[220]

I would be remiss if I failed to point out that while federal procedural common law has its place, congressional intervention has reduced its importance. The statutory authority of each federal court to adopt local, prospective court rules has always reduced the need to rely on inherent procedural authority to regulate local procedure.[221] And since it was passed in 1934, the Rules Enabling Act, not the common law method, has been the primary vehicle for the development of uniform procedure in the federal courts. That Act provides that "[t]he Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts . . . and courts of appeals."[222] Consider that the federal rules of civil procedure, criminal procedure, and evidence adopted pursuant to the Act largely replaced the old doctrines of general procedural common law by translating them into uniform court rules—sometimes wholesale and sometimes with significant modifications.[223] In an important respect, therefore, the doctrines that have lingered on in common law form are anomalies insofar as they attempt uniform regulation of federal procedure outside of the statutorily provided framework. That is probably a good thing. Even though tradition and consensus mediate the development of these doctrines, there is

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[220] Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 428 (1793); see supra note 175 and accompanying text.

[221] Section 17 of the Judiciary Act of 1789 authorized every federal court to adopt local court rules. See supra note 131 and accompanying text. Today, 28 U.S.C. § 2071(a) confers the same power. See supra note 66 and accompanying text.

[222] 28 U.S.C. § 2072(a) (2000). It is worth noting that federal rules adopted pursuant to the Act narrow the range of procedural matters left open to the exercise of inherent authority. See 28 U.S.C. § 2072(b) (2000) ("All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.").

[223] The Federal Rules of Civil Procedure continued, with minor changes, many procedural mechanisms long employed by the common law system. For example, motions to dismiss (previously known as demurrers), motions for new trials, and even class actions are procedural devices long employed by courts of common law and equity. At the same time, it made significant changes to the common law by, for example, replacing common law with notice pleading. The Federal Rules of Evidence are similarly modeled upon many longstanding common law doctrines. For example, both the hearsay and character rules largely codify the common law.

reason to think that those involved in the rulemaking process, which solicits the views of the legal community at large, are better equipped than federal judges to gauge whether consensus exists with respect to any particular procedural innovation.[224]

CONCLUSION

Federal procedural common law is supported by the twin justifications that federal courts can develop uniform common law rules in enclaves of constitutional preemption and that Article III impliedly grants each federal court power to regulate its procedure in the course of adjudicating cases. These two strands of authority, sometimes distinct and sometimes overlapping, have yielded a body of judicially developed procedure that is a combination of uniform procedural doctrines representing general consensus and isolated procedural rules representing the discretionary choice of the adopting court.

Recognizing that procedural common law derives from two sources clarifies the posture of federal courts vis-à-vis Congress in the regulation of procedure. Congress is free to abrogate or change uniform procedural doctrines, just as it has always been free to modify the content of federal common law. Congress is also free to regulate most matters that federal courts would otherwise regulate themselves in reliance upon their inherent authority. To the extent that there are any matters insulated from congressional control, they are matters of the latter sort. Claims of exclusive judicial authority are rooted in inherent authority; hence, they are claims of local authority. Uniform procedural regulation is ultimately in the control of Congress.

[224] Cf. Richard L. Marcus, Reform Through Rulemaking? 80 Wash. U. L.Q. 901, 923–25 (2002) (arguing that federal rulemaking process, rather than procedural common law, is the best vehicle for introducing innovative changes, because the rulemaking process solicits input from the larger legal community).