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## Watching the Hen House: Judicial Rulemaking and Judicial Review

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# Watching the Hen House: Judicial Rulemaking and Judicial Review

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“Federal states distinguish between ordinary political action, which takes place within the existing framework of political institutions, and political action which changes that very framework.”<sup>1</sup>

## I. INTRODUCTION

Congress has historically delegated its procedural rulemaking authority to the courts.<sup>2</sup> As a result, part of federal judges’ responsibili-

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\* Carrie Leonetti is an Assistant Professor at the University of Oregon School of Law. She wishes to thank Robert Rainwater for his inspiration and Carl Bjerre for his thoughtful insights and encouragement, without either of which she never would have ventured to write this Article.

1. JOSEPH RAZ, *THE MORALITY OF FREEDOM* 259 (1986).

2. While Congress has the power to regulate federal practice and procedure, it can exercise that power by delegating it to the courts in the same way that it delegates its power to create other laws to executive branch agencies. *Compare* *Hanna v. Plummer*, 380 U.S. 460 (1965), and *Sibbach v. Wilson & Co.*, 312 U.S. 1 (1941) (upholding the courts’ power to adopt rules of procedure), *with* *United*

ties is to adopt internal administrative rules for the effective functioning of their courts. This delegation doctrine, however, says nothing about the allocation of rulemaking authority with reference to exercise of the delegation, particularly with reference to rule content. As a result, much has been written on the constitutionally permissible scope of this judicial rulemaking.

Much of this scholarly literature deals with either which entity (Congress or the courts) should have ultimate control over judicial practice and procedure<sup>3</sup> or how far courts may go in exercising non-

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States v. Grimaud, 220 US 506, 514–16 (1911), and *Crowell v. Benson*, 285 US 22, 36–37 (1932) (upholding administrative agencies' authority to exercise power delegated by Congress).

3. See FELIX F. STUMPF, *INHERENT POWERS OF THE COURTS: SWORD AND SHIELD OF THE JUDICIARY* 19 (1994) (citing a number of scholarly articles discussing the inter-branch conflict over the rulemaking power); CHARLES A. WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1001 (2d ed. 1987); Joseph R. Biden, Jr., *Congress and the Courts: Our Mutual Obligation*, 46 STAN. L. REV. 1285 (1994); Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887, 909 (1999) (arguing that judicial rulemaking is legitimate because deliberation is more important than public participation); Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1106 (1982) [hereinafter Burbank, *REA*] (“Nothing could be clearer from the pre-1934 history of the Rules Enabling Act than that the procedure/substance dichotomy in the first two sentences was intended to allocate lawmaking power between the Supreme Court as rulemaker and Congress.”); Jack H. Friedenthal, *The Rulemaking Power of the Supreme Court: A Contemporary Crisis*, 27 STAN. L. REV. 673 (1975); Gary Lawson, *Controlling Precedent: Congressional Regulation of Judicial Decision-Making*, 18 CONST. COMMENT. 191, 201–29 (2001) (arguing that Congress has limited power to regulate federal court procedure); A. Leo Levin & Anthony G. Amsterdam, *Legislative Control over Judicial Rule Making: A Problem in Constitutional Revision*, 107 U. PA. L. REV. 1, 3–5 (1958); Michael M. Martin, *Inherent Judicial Power: Flexibility Congress Did Not Write into the Federal Rules of Evidence*, 57 TEX. L. REV. 167, 192–93 (1979); Karen Nelson Moore, *The Supreme Court’s Role in Interpreting the Federal Rules of Civil Procedure*, 44 HASTINGS L.J. 1039, 1043 (1993) (noting that “commentators have placed recent emphasis on the relationship between Congress and the Court in the rulemaking process as the source of the restriction against affecting substantive rights”); Linda S. Mullenix, *The Counter-Reformation in Procedural Justice*, 77 MINN. L. REV. 375, 376 (1992) [hereinafter Mullenix, *Counter-Reformation*]; Linda S. Mullenix, *Unconstitutional Rulemaking: The Civil Justice Reform Act and Separation of Powers*, 77 MINN. L. REV. 1283 (1993) [hereinafter Mullenix, *Unconstitutional Rulemaking*] (arguing that the Civil Justice Reform Act of 1990 (CJRA) unconstitutionally usurped judicial branch authority by delegating rulemaking authority to local advisory committees and by “declaring procedural rules to be substantive law”); Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey?*, 109 YALE L.J. 1535, 1582–94 (2000) (arguing that Congress has broad power to regulate federal court procedure); Roscoe Pound, *The Rule-Making Power of the Courts*, 12 A.B.A. J. 599, 601 (1926) (insisting that “procedure . . . belongs to the courts rather than to the legislature”); Martin H. Redish & Umu M. Amuluru, *The Supreme Court, The Rules Enabling Act, and the Politicization of the Federal Rules: Constitutional and Statutory Im-*

traditional court functions, such as budgeting, under the doctrine of inherent powers.<sup>4</sup> Challenges to court-made rules typically have posed the question whether the judiciary, in promulgating a particular rule, has violated the Rules Enabling Act (REA).<sup>5</sup> On the topic of how much of practice and procedure may be considered to be within the inherent powers of the courts, there is a lack of uniformity and consistency in federal-court decisions, as well as a lack of literature that is national in scope.<sup>6</sup>

“[J]udicial interpretations dealing with the separation of powers and rulemaking provision are extremely varied.”<sup>7</sup> “[T]here is a dearth of controlling authority or guidance at the federal level.”<sup>8</sup> As Felix Stumpf has explained, despite the extensive exercise of putative inherent rulemaking powers by courts, “learned writers have described the concept as ‘shadowy’ and ‘nebulous,’ or as ‘a problem of definition that has eluded or bedeviled many courts and commentators for years.’”<sup>9</sup>

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*plications*, 90 MINN. L. REV. 1303, 1307–08, 1326 (2006) (arguing that current rulemaking oversteps constitutional bounds because the committee produces substantive rules and proposing that rules falling into a “non-housekeeping” category of procedural rules or that “are found to implicate significant economic, social, or political dispute[s]” should require congressional and presidential approval); John H. Wigmore, *All Legislative Rules for Judiciary Procedure Are Void Constitutionally*, 23 ILL. L. REV. 276 (1928) (asserting that rulemaking power belonged to the Court alone); Stephen C. Yeazell, *Judging Rules, Ruling Judges*, 61 LAW & CONTEMP. PROBS. 229, 229 (1998) (arguing that judicial rulemaking threatens both judicial independence and judicial accountability because a judicially dominated rulemaking process is more likely to produce rules that either are faulty or are perceived to be so).

4. Appropriation of sufficient resources to operate the courts is one area that has received much attention. See STUMPF, *supra* note 3, at 47–60, and cases cited therein; see, e.g., Howard B. Glaser, *Wachtler v. Cuomo: The Limits of Inherent Power*, 78 JUDICATURE 12 (1994); Jeffrey Jackson, *Judicial Independence, Adequate Court Funding and Inherent Judicial Powers*, 52 MD. L. REV. 217 (1993); Ted Z. Robertson & Christa Brown, *The Judiciary’s Inherent Power to Compel Funding: A Tale of Heating Stoves and Air Conditioners*, 20 ST. MARY’S L.J. 864 (1988). See generally WINIFRED R. BROWN, *FEDERAL RULEMAKING: PROBLEMS AND POSSIBILITIES* (1981) (discussing criticism that the Court has interpreted its rulemaking authority too broadly).
5. 28 U.S.C. §§ 2071–2077 (2006). See Mullenix, *Unconstitutional Rulemaking*, *supra* note 3, at 1288.
6. See James R. Wolf, *Inherent Rulemaking Authority of an Independent Judiciary*, 56 U. MIAMI L. REV. 507, 519 (2002). But see Stephen B. Burbank, *Procedure, Politics, and Power: The Role of Congress*, 79 NOTRE DAME L. REV. 1677, 1682 (2004) [hereinafter Burbank, *Procedure, Politics*] (questioning how “a power to promulgate prospective, legislation-like rules can be squared with the grant of judicial power in Article III”).
7. Wolf, *supra* note 6, at 520.
8. *Id.*
9. STUMPF, *supra* note 3, at 1.

A discussion of who decides these questions and how is almost entirely absent from the scholarly literature. The scholarly literature that does address even part of these subjects focuses on the promulgation of the nationwide *Federal Rules of Evidence*, *Civil Procedure*, and *Criminal Procedure* through the committee process that ultimately results in Supreme Court approval and presentment to Congress, not the local rules and general orders that are promulgated far less formally and vary between and among districts.<sup>10</sup> It is this morass into which this Article attempts to hurl itself.

Judicial rulemaking invokes many of the same concerns as administrative rulemaking. Article I was structured to discourage factional legislation.<sup>11</sup> The framers specifically designed the legislative process to include safeguards against factions, safeguards that judicial rulemaking lacks.<sup>12</sup> These safeguards protect not just community

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10. Local rules enacted pursuant to *Federal Rule of Civil Procedure* 83 came under scrutiny when the “Local Rules Project,” see *infra* note 47, discovered approximately 800 local rules inconsistent with the *Federal Rules of Civil Procedure* in use in federal courts around the country. See Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999, 2023 (1989). To the extent that the scholarly literature addresses local rulemaking, it is usually in the context of local rules that conflict with federal ones, not the appropriateness of judicial rulemaking on the subject of the particular rules in question. See, e.g., Lauren Robel, *Fractured Procedure: The Civil Justice Reform Act of 1990*, 46 STAN. L. REV. 1447 (1994).
  11. Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 247–49 (1986) (concluding that the Constitution was designed to impede interest groups from obtaining partisan advantage through political means).
  12. See David Schoenbrod, *Commentary: Separation of Powers and the Powers That Be: The Constitutional Purposes of the Delegation Doctrine*, 36 AM. U. L. REV. 355, 372 (1987) [hereinafter Schoenbrod, *Separation of Powers*]. The framers involved a Senate, a House, and the President in the legislative process as a check on factions. See THE FEDERALIST NO. 62, at 378 (James Madison) (Clinton Rossiter ed., 1961) (arguing that the Senate is an additional guard against ill-advised legislation); THE FEDERALIST NO. 73, at 443 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (describing the purpose of the presidential veto as a guard against factions). Defeat or inaction in any of these three different institutions would ordinarily stymie the faction. See Schoenbrod, *Separation of Powers*, *supra*, at 372. The exception is, of course, that presidential opposition can be overcome by supermajorities in the House and Senate. U.S. CONST. art. I, § 7. That each is elected for different tenures based upon different apportionments of voting power would make it harder for parochial interests to succeed in all three institutions. See THE FEDERALIST NO. 62, at 378–79 (James Madison) (Clinton Rossiter ed., 1961) (describing the number of senators and the duration of their tenure as a disincentive to factions); see also Harold H. Bruff, *Legislative Formality, Administrative Rationality*, 63 TEX. L. REV. 207, 218–20 (1984) (arguing that the structure of congressional decision-making and the presidential veto promote the stability of legislation and reduce the influence of factions). The framers vision was that the time elapsed in stalemate would allow for the public to learn of the issues at hand, thereby producing more mature and educated decisions. See H. PITKIN, *THE CONCEPT OF REPRESENTATION* 195–96 (1972) (discussing Madison’s

welfare, but also important constitutional values: electoral accountability and protection of the rights of those who are regulated (those whose liberty and property are affected by court rules).<sup>13</sup> Fundamentally, legislators, unlike federal judges, are accountable because their continuance in office depends upon reelection.<sup>14</sup>

In comparison, judicial rulemaking vests the power in one institution. It radically reduces the number of individuals involved in adopting procedural rules; none of those individuals (under Article III) are elected or accountable to elected officials for their decisions, and all of them are life tenured,<sup>15</sup> dramatically undercutting accountability.<sup>16</sup>

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belief that the political process would allow the community to prevail over selfish factional interests). The idea was that representatives would return home to explain to their constituents how parochial desires could not be achieved, bringing maturation. See Schoenbrod, *Separation of Powers*, *supra*, at 373. The framers believed that a republic with legislative bodies large enough to include representatives from many factions would hinder factions. See THE FEDERALIST NO. 10, at 81–84 (James Madison) (Clinton Rossiter ed., 1961) (discussing the advantages of large republics in guarding against factions); THE FEDERALIST NO. 51, at 325 (James Madison) (Clinton Rossiter ed., 1961) (concluding that the variety of interests embraced by the American republic would discourage oppression by factious majorities); THE FEDERALIST NO. 55, at 341–44 (James Madison) (Clinton Rossiter ed., 1961) (concluding that the size of the Senate and House would help to prevent the tyranny of a minority); THE FEDERALIST NO. 63, at 383 (James Madison) (Clinton Rossiter ed., 1961) (arguing that requiring the concurrence of a select and stable body would promote accountability for long-term consequences). The idea was that bringing many different factions together in one process would increase the chance that factions would frustrate each other. See Schoenbrod, *Separation of Powers*, *supra*, at 373–74. In sum, “Madisonian republicanism was intended, in part, to make a virtue of gridlock.” Adam M. Samaha, *Undue Process: Congressional Referral and Judicial Resistance in the Schiavo Controversy*, 22 CONST. COMMENT. 505, 519 (2005).

13. See Schoenbrod, *Separation of Powers*, *supra* note 12, at 372.
14. The legislative power is checked through popular election of legislators. See U.S. CONST. art. I, § 1; *Indus. Union Dept. v. Am. Petroleum Inst.*, 448 U.S. 607, 685 (1979) (Rehnquist, J., concurring) (describing Congress as “the branch of our Government most responsive to the popular will”); J. PENNOCK, *DEMOCRATIC POLITICAL THEORY* 310 (1979) (explaining that that elections are the best sanction for assuring representative behavior). It is also checked by bicameralism and the presidential veto power. See *INS v. Chadha*, 462 U.S. 919, 954 (1983).
15. On the wisdom of life tenure for federal judges, see, for example, 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 428–29 (Max Farrand ed., rev. ed. 1966).
16. Delegation to administrative agencies is often defended on the ground that agencies are as accountable to the public as legislators because the President, who appoints the agency officials exercising rulemaking authority, is elected. See *Chevron v. Natural Res. Def. Council*, 467 U.S. 837, 865–66 (1984) (“While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices resolving the competing interest which Congress itself inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in the light of everyday realities.”). See generally Richard Pierce, *Political Accountability and Delegated Power: A Re-*

Judges, as a group, are unrepresentative of the population.<sup>17</sup> They are insulated from much of the “real world.”<sup>18</sup> Unlike executive-branch agencies that must follow the rulemaking procedures of the Administrative Procedure Act of 1946 (APA),<sup>19</sup> judicial rulemaking is rarely subject to meaningful notice and comment.<sup>20</sup> As a result, only a few, if any, interests are heard prior to rule adoption. Often the only interests heard from will be from partisan, organized groups within the judicial system, such as law-enforcement agencies or prosecutors’ offices.<sup>21</sup> Even if citizen organizations become involved, those organizations have the resources to intervene in only a small fraction of all matters that affect their constituencies and likely would not address matters of importance to other citizens.<sup>22</sup> In this way, rather than reducing the power of factions by playing them off against one another, judicial rulemaking typically accentuates the power of factions because its processes render judge-rulemakers dependent upon a combination of vested special interest groups and recently graduated law clerks for information and input.<sup>23</sup> In sum, judicial rulemaking lacks

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*sponse To Professor Lowi*, 36 AM. U. L. REV. 391 (1987) (arguing that courts are institutionally incompetent to create and apply a workable delegation doctrine). Of course, such an argument cannot be made on behalf of Article III judges.

17. See Michael McConnell, *A Moral Realist Defense of Constitutional Democracy*, 64 CHI.-KENT L. REV. 89, 105 (1988). They are all lawyers and, on average, are older, richer, whiter, and more male than the general population of the United States. See *id.*
18. *Id.*
19. 5 U.S.C. §§ 551–559 (2006); see 5 U.S.C. § 553(a) (requiring agencies to follow adjudicatory procedures whenever Congress requires a hearing on the record); 5 U.S.C. § 554(a) (requiring an agency to follow the APA’s rulemaking procedures unless a limited set of exceptions apply). Congress enacted the APA as a “working compromise, in which broad delegations of discretion were tolerated as long as they were checked by extensive procedural safeguards.” Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1248 (1982).
20. See *infra* section III.B.
21. “[P]rocedure and the rulemaking process have become intensely political as special interest groups lobby rulemakers, seeking to tilt the litigation playing field for strategic advantage.” Glenn S. Koppel, *Reflections on the “Chimera” of a Uniform Code of State Civil Procedure: the Virtue of Vision in Procedural Reform*, 58 DEPAUL L. REV. 971, 984 (2009). Interest groups actively lobby advisory committees during the rulemaking process in favor of their preferred outcomes. See Paul J. Stancil, *Close Enough for Government Work: The Committee Rulemaking Game*, 96 VA. L. REV. 69, 120 n.50 (2010).
22. One of the stated purposes of the CJRA, Pub. L. No. 101-650, §§ 101–105, 104 Stat. 5089–98 (1990) (codified at 28 U.S.C. §§ 471–482 (2006)) (commanding local rulemaking advisory groups to formulate civil-justice-expense-and-delay reduction plans by the end of 1993), according to its legislative history, was to achieve justice from the “bottom up,” from the “users” of the system. See S. REP. NO. 101-416, at 14 (1990), reprinted in 1990 U.S.C.C.A.N. 6817.
23. See generally Russell R. Wheeler, *Broadening Participation in the Courts Through Rule-Making and Administration*, 62 JUDICATURE 280 (1979) (arguing

all of the structural features upon which the framers relied to protect against factions.<sup>24</sup> In addition, judicial rulemaking can be used to defy or dilute the substantive policy preferences of the legislative and executive branches.<sup>25</sup> Unlike when it reviews rulemaking performed by an administrative agency, Congress cannot always simply ratify or overrule judicial rulemaking by statute or foster informed dialogue by forcing the courts to articulate the basis for their rules, because not every exercise of rulemaking authority by a court is an exercise of delegated power.<sup>26</sup>

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that judicial rulemaking has become a vehicle through which a variety of interests groups may participate in court operations).

24. The scholarly literature has advanced arguments against judicial rulemaking, including: judicial resistance to change; judges' bias favoring their own preferences; judges being out of touch with the needs of litigants and members of the bar; the perception that the legislature better reflects the public will; and concern that judicial rulemaking will restrict or create substantive rights. See Bruce L. Dean, *Rule-Making in Texas: Clarifying the Judiciary's Power to Promulgate Rules of Civil Procedure*, 20 ST. MARY'S L.J. 139, 149–50 (1988); see also Kenneth S. Gallant, *Judicial Rule Making, Absent Legislative Review: The Limits of Separation of Powers*, 38 OKLA. L. REV. 447 (1985) (criticizing the theory that rulemaking can safely be entrusted to courts without fear that they will invade the legislative domain).

These concerns are all the more significant in light of the recent work of statistical analysis by Sunstein and Miles demonstrating that significant elements of judging can be explained in terms of the jurist's political world view, particularly since rulemaking is less likely than adjudication to turn on the specific facts of one case. See Cass R. Sunstein & Thomas J. Miles, *Depoliticizing Administrative Law*, 58 DUKE L.J. 2193 (2009) (indicating that judicial outcomes are affected by judges' political orientations, but that such effect is moderated when judges of differing political orientations sit together in panels).

This is not meant to suggest, naively, that legislatures and executive-branch agencies are immune to special-interest pressure or always act deliberately and in the common good, see, e.g., Samaha, *supra* note 12, at 528 (documenting the excessive congressional response to the controversy arising out of the *Schiavo* case, *Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1223 (11th Cir. 2005) (affirming the district court's denial of two parents' request for a temporary restraining order to reinsert their daughter's feeding tube) and concluding that "[t]here were probably few actors less likely to make a sound decision about the merits of the case than the United States Congress"); cf. THE FEDERALIST NO. 10 at 129–30 (James Madison) (Clinton Rossiter ed., 1961) ("Complaints are everywhere heard from our most considerate and virtuous citizens . . . that the public good is disregarded in the conflicts of rival parties, and that measures are too often decided, not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority."), but rather that the secretive and insulated procedures of judicial rulemaking may be worse. Cf. Sotirios Barber, *The Ninth Amendment: Inkblot or Another Hard Nut to Crack?*, 64 CHI.-KENT L. REV. 67 (1988) (arguing that the process of discovering the truth "is nothing other than giving and exchanging reasons in an open-minded and public-spirited way about what to believe and how to live").

25. See Stancil, *supra* note 21, at 99.

26. See *infra* section III.A (discussing the various sources of judicial rulemaking authority); cf. *Pac. States Box & Basket Co. v. White*, 296 U.S. 176, 185–86 (1935)

Two centuries ago, Jeremy Bentham argued that almost everything wrong with procedure could be attributed to “Judge and Company.”<sup>27</sup> In Bentham’s view, judicially created procedure, endemic to the common law, was also its bane, and he attributed all procedural evil to guild self-interest: Judges, former lawyers who consorted with lawyers and who derived income from fees, had created a system benefiting only judges and lawyers. In other words, Bentham viewed procedural rules as professional featherbedding and feared that procedural designers and procedural consumers were too closely joined.<sup>28</sup>

The thesis of this Article is a simple one: Courts regularly engage in rulemaking of questionable constitutionality, then exercise the exclusive jurisdiction of judicial review to rule on constitutional challenges to the rules that they themselves have promulgated, obfuscating the appearance of impartiality and accountability and preventing the unsophisticated from realizing that a benefit has been conferred on a more sophisticated faction. Although this Article focuses on the concerns arising from judicial review of judicial rulemaking, it includes some observations as to why, as a matter of policy, expansive judicial rulemaking authority itself is concerning. It, therefore, joins the extensive scholarly debate surrounding the relative fairness, competency, and efficiency of the respective branches of government to promulgate procedural rules.

Part II describes the increasing prevalence of quasi-legislative judicial rulemaking that has resulted from Congressional delegations of rulemaking authority to the courts in the past half century, the result of which is a multi-tiered system of consultation, review, and revision that depends heavily upon nonlegislative actors and a Balkanization of the rules of procedure between and among local districts.

Part III outlines the rulemaking authority of the federal courts, which emanates from the REA, the *Federal Rules of Criminal and Civil Procedure*, the U.S. Constitution, and the “inherent-authority” doctrine. It also traces the major limitations on this power: the prohibition against courts making rules affecting “substantive” matters, the Case and Controversy Clause of Article III, and the notice and comment requirements of the REA and the Due Process Clause.

Part IV describes a case study in local judicial rulemaking: courtroom-security rules, which are generally promulgated without an op-

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“Every exertion of the police power, either by the legislature or by an administrative body, is an exercise of delegated power. Where it is by statute, the legislature has acted under power delegated to it through the Constitution. Where the regulation is by an order of an administrative body, that body acts under a delegation from the legislature.”)

27. C.J.W. ALLEN, *THE LAW OF EVIDENCE IN VICTORIAN ENGLAND* 54 (1997).

28. *See id.* at 9–10.

portunity for public notice and comment. Part V describes the problem(s) that this Article seeks to address: the frequent promulgation of local rules governing subject matters that are arguably beyond the scope of judicial rulemaking authority, which are then reviewed by the very courts that issued them in the first instance, and the claims of actual bias, the appearance of partiality, or both that can result. It argues that it is improper for a judge who participated in promulgating a local rule to sit in judgment over the validity of that rule when it is challenged in a specific case after adoption because the process by which many of these local court rules are issued gives rise to a structural conflict of interest in having any judge of the promulgating district review a challenge to the promulgation and enforcement thereof. It also notes that there is little case law governing who has standing to challenge court rules or the scope or standard of a court's review of a court-created rule.

Part VI concludes that, in enacting arguably substantive local rules, federal courts are exercising powers constitutionally committed to Congress and, in doing so, impeding sufficient independent review of such exercises and creating a diffusion of rulemaking responsibility.

## II. THE INCREASING PREVALENCE OF JUDICIAL RULEMAKING<sup>29</sup>

Judicial rulemaking, whatever its source,<sup>30</sup> dominated the scene for most of the first century of the American judiciary, although state and federal courts alike relied heavily on the English system for their rules of practice and procedure.<sup>31</sup> The court-created system was characterized by common law writs, forms of actions, fact pleadings, and separate courts of law and equity and was criticized as being "cum-

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29. For a description of the rulemaking process, see generally *The Rule-Making Function and the Judicial Conference of the United States*, 21 F.R.D. 117 (1958); WINIFRED R. BROWN, FEDERAL RULEMAKING: PROBLEMS AND POSSIBILITIES 1-35 (1981); Howard Lesnick, *The Federal Rule-Making Process: A Time for Re-examination*, 61 A.B.A. J. 579 (1975); Albert B. Maris, *Federal Procedural Rulemaking: The Program of the Judicial Conference*, 47 A.B.A. J. 772 (1961); Linda S. Mullenix, *Hope over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795, 797-802, 830-43 (1991); Wheeler, *supra* note 23.

30. See *infra* Part III.

31. See Robert G. Lawson, *Modifying the Kentucky Rules of Evidence—A Separation of Powers Issue*, 88 Ky. L.J. 525, 539-40 (2000). "The history of English practice thus reveals a pattern of shared judicial-legislative regulation of practice and procedure. Under this pattern, the primary rulemaking initiative rested with the judiciary, subject to the superior general power of Parliament to control procedure as it saw fit." Ralph U. Whitten, *Separation of Powers Restrictions on Judicial Rulemaking: A Case Study of Federal Rule 4*, 40 ME. L. REV. 41, 49 (1988); see Pound, *supra* note 3; Charles Anthony Riedl, *To What Extent May Courts Under the Rule-making Power Prescribe Rules of Evidence?*, 26 A.B.A. J. 601 (1940).

brous, dilatory, expensive, [and] ultra-formal.”<sup>32</sup> Judges and lawyers resisted change, and the judiciary sparingly exercised its early rulemaking in pursuit of procedural reform.<sup>33</sup>

In the early part of the twentieth century, efforts were made to reform the practice and procedure of federal courts. The end results were the REA, the *Federal Rules of Civil Procedure*, and the beginning of the modern era of judicial rulemaking.<sup>34</sup>

Substantial changes in the structure and personnel of rulemaking have occurred in the sixty years since the *Federal Rules of Civil Procedure* were first promulgated.<sup>35</sup> Legislatures have responded by delegating to courts more and more authority over the field; most prominently, “Congress has accorded to the federal judiciary primary responsibility for its own effectiveness.”<sup>36</sup> Over the past half century, the judiciary has moved from its original role as arbiter of the ultimate fairness of proposed rules to that of initial drafters of the rules.<sup>37</sup> Since the passage of the first REA in 1934,<sup>38</sup> multiple additional layers of rulemaking have been added, and judicial participation in the drafting process has dramatically increased.<sup>39</sup> Judges have now replaced practicing attorneys as the dominant players in the rulemaking process.<sup>40</sup>

During the same time period, the rulemaking process has moved from a relatively flat process of proposal and promulgation to a multi-tiered system of consultation, review, and revision by multiple committees.<sup>41</sup> The rulemaking process depends heavily upon nonlegislative actors—area-specific advisory committees, the Standing Committee on Rules of Practice and Procedure, the Judicial Conference, and the Supreme Court—to develop, refine, and approve court rules.<sup>42</sup> The agendas for the semi-annual Judicial Conference meet-

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32. Pound, *supra* note 3, at 599.

33. See Lawson, *supra* note 31, at 540.

34. See *id.* at 541.

35. See Yeazell, *supra* note 3, at 229.

36. Paul D. Carrington, “Substance” and “Procedure” in the Rules Enabling Act, 1989 DUKE L.J. 281, 324 (1989).

37. See *id.*

38. Act of June 19, 1934, Pub. L. No. 73-415, 48 Stat. 1064 (codified as amended at 28 U.S.C. §§ 2071–2077 (2006)).

39. See Yeazell, *supra* note 3, at 232.

40. See *id.* at 237. No statute specifies the composition of the Rules Advisory Committee, but recent practice has seen a majority or near-majority of judges and a judge as chair. See *id.* at 243. Seven out of thirteen members of the Committee on Rules of Practice and Procedure, including the chair, are judges, comprising more than half of the membership. See Koppel, *supra* note 21, at 1008. Eight of the fifteen members of the Advisory Committee on Civil Rules are judges. See *id.* The Judicial Conference membership consists entirely of judges. See *id.*

41. See Yeazell, *supra* note 3, at 231.

42. See Stancil, *supra* note 21, at 72. In 1958, Congress enacted legislation transferring the major responsibility for the rulemaking function from the Supreme

ings include a disparate miscellany of items, ranging from air conditioning in courthouses to the assignment of visiting judges to judicial discipline.<sup>43</sup> Article III judges control every veto gate in this rulemaking process unless Congress intervenes.<sup>44</sup>

In 1990, Congress enacted the Judicial Improvements Act,<sup>45</sup> an omnibus bill that created ninety-four amateur rulemaking groups throughout the federal judicial system.<sup>46</sup> One result of this shift to a

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Court to the Judicial Conference of the United States. See Act of July 11, 1958, Pub. L. No. 85-513, 72 Stat. 356 (codified at 28 U.S.C. § 331 (2006)). The Conference was mandated to "carry on a continuous study of the operation and effect of the [federal] rules" and to recommend appropriate amendments in the rules. *Id.* The Supreme Court retained its statutory authority to promulgate the rules, but it would henceforth do so by acting on recommendations made by the Judicial Conference. See 28 U.S.C. §§ 2072-2073. Following enactment of the 1958 legislation, the Judicial Conference established a Standing Committee on Rules of Practice and Procedure and five advisory committees to amend or create the civil, criminal, bankruptcy, appellate, and admiralty rules. See JUDICIAL CONFERENCE OF THE U.S., REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 6-7 (1958). The Standing Committee's mission was to supervise the rulemaking process for the Conference and to coordinate and approve the work of the advisory committees. See *id.*; see also Maris, *supra* note 29, at 772 (explaining the authorization and role of the Standing Committee). Although changes have been made in operating procedures, the rulemaking structure today, having been codified in the REA, "is essentially the same as that established by the Judicial Conference following the 1958 legislation assigning it the central role in drafting and monitoring the federal rules." Peter G. McCabe, *Renewal of the Federal Rulemaking Process*, 44 AM. U. L. REV. 1655, 1664 & n.65 (1995). The Standing Committee "supervises the rulemaking process and recommends to the Conference such changes to the rules as it believes are necessary to maintain consistency and promote the interest of justice." *Id.* at 1664. Five advisory committees assist the Standing Committee, each of which is responsible for one set of federal rules (civil, criminal, appellate, bankruptcy, or evidence). See *id.* "The advisory committees conduct ongoing studies of the operation of their respective rules, prepare appropriate amendments and new rules, draft explanatory committee notes, conduct hearings, and submit proposed changes through the Standing Committee to the Judicial Conference." *Id.* "On most occasions, the Court has deferred to the Judicial Conference and has prescribed without change proposed rules amendments submitted by the Judicial Conference." *Id.* at 1674.

43. See Yeazell, *supra* note 3, at 246.

44. See Stancil, *supra* note 21, at 99. "Their control is direct in the case of the Supreme Court and the Judicial Conference, and the Chief Justice, acting as the chair of the Judicial Conference, appoints members of the Standing Committee and the various advisory committees (many of whom are Article III judges themselves)." *Id.* For a list of the handful of congressional interventions in the judicial rulemaking process from 1973 to 1985, see H.R. Rep. No. 99-422, at 8-9 n.20 (1984) (House Committee Report accompanying a precursor bill to the 1988 statute amending the REA). Most involved changes to the Rules of Evidence. See Stancil, *supra* note 21, at 78 n.36.

45. Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (codified as amended in scattered sections of 11 U.S.C. and 28 U.S.C.). See generally S. REP. NO. 101-416, at 13 (1990), reprinted in 1990 U.S.C.C.A.N. 6802, 6852; H.R. REP. NO. 101-732, at 11 (1990).

46. See Mullenix, *Counter-Reformation*, *supra* note 3, at 376.

multi-tiered system of rule promulgation has been a Balkanization of the rules of procedure. Each of the ninety-four trial districts and eleven federal circuits now has its own, separate set of local rules.<sup>47</sup> In addition to the local advisory groups and the local district and circuit rules, the Federal Advisory Committees on Civil and Criminal Rules remain in existence, continually drafting further revisions to the general federal rules, a task that parallels the work of the local advisory groups.<sup>48</sup> These rules govern court access, shape the structure of lawsuits, and significantly influence the course of pretrial proceedings.<sup>49</sup> There are now more than 5,000 local rules regulating civil procedure alone, not including standing orders and other local procedural requirements.<sup>50</sup>

In addition to increasing in complexity, judicial rulemaking has also become increasingly legislative in nature.<sup>51</sup> “Federal procedural

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47. *See id.* at 380. In 1984, the Judicial Conference authorized its Committee on Rules of Practice and Procedure to study and treat the problems that the local proliferation of rules causes. *See Robel, supra* note 10, at 1467 n.33. The following year, the Conference empowered the Reporter of the Committee to collect and organize all the district court rules, as well as other judicial commands that operate like rules, into one source. *See id.* The Reporter was also instructed to design a project to study the growing number of divergent local rules. This “Local Rules Project” discovered that the ninety-four federal court districts had an aggregate of almost 5,000 local rules, “not including many ‘sub-rules,’ standing orders and standard operating procedures.” COMM. ON RULES OF PRAC. AND PROC., JUDICIAL CONF. OF THE U.S., REPORT OF THE LOCAL RULES PROJECT: LOCAL RULES ON CIVIL PRACTICE 1 (1989). *See generally* Subrin, *supra* note 10 (discussing the history and current state of local rules and demonstrating that local rules may not be consistent with the general federal rules of procedure). *Cf.* A. Leo Levin, *Local Rules As Experiments: A Study in the Division of Power*, 139 U. PA. L. REV. 1567 (1991) (approving of *Federal Rule Civil Procedure* 83’s creation of “local laboratories” for new rules). As one commentator noted, “[t]he arguments for uniformity are strong and obvious,” Robel, *supra* note 10, at 1449, but not the focus of this Article.

48. *See Mullenix, Counter-Reformation, supra* note 3, at 381.

49. *See id.* at 381–82.

50. *See* JUDICIAL CONF. INFORM. ITEM: LOCAL DIST. COURT RULES PROJECT, *in* COMM. ON RULES OF PRAC. AND PROC., JUDICIAL CONF. OF THE U.S., LOCAL RULES PROJECT, at 1 (1988).

51. *See* MARTIN H. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 21 (2d ed. 1990) (noting that the federal rules “operate on all litigants, with the binding effect of law” and that “[t]he Court’s function in the process of promulgation of the Rules today virtually amounts to the adoption of legislation”); Bone, *supra* note 3, at 889 (“[C]ourt rulemaking has moved toward a legislative model and away from the traditional model based on reasoned deliberation and expertise.”); Stephen B. Burbank, *Ignorance and Procedural Law Reform: A Call for a Moratorium*, 59 BROOK. L. REV. 841, 849 (1993) (noting that the rulemaking process has “come to resemble the legislative process,” which is “an overtly political process”); *cf.* MELVIN ARON EISENBERG, THE NATURE OF THE COMMON LAW 4–7 (1988) (explaining that courts inevitably make law, not only as a by-product of adjudication but also to enrich the body of legal rules).

rulemaking has for the past fifty years been counter-majoritarian and predicated on a model of expertise.”<sup>52</sup>

### III. GOVERNING STANDARDS

Briefly summarized, the delegation doctrine dictates that Congress may not delegate any legislative power to an administrative agency that Article I of the U.S. Constitution assigns to the legislative process.<sup>53</sup> Critics of the delegation doctrine have argued that, when courts face petitions to review administrative lawmaking, they are inevitably tempted to make policy in the guise of judicial review.<sup>54</sup> What if the issue is not one of Congress delegating a particular rulemaking power, or courts reviewing that delegation by making rules of their own, however, but rather of the courts seizing the rulemaking power in the first instance?

#### A. The Rulemaking Authority of Federal Courts

The United States Constitution was adopted without a provision explicitly governing judicial rulemaking, but the Supreme Court “at an early date by rule of court considered that . . . it had the power to regulate its own procedure.”<sup>55</sup> Article III merely vests the “judicial Power” in the Supreme Court and such inferior courts as Congress may “ordain and establish”<sup>56</sup> and extends that power to a select list of “Cases” and “Controversies.”<sup>57</sup> Article III’s textual brevity, which provides little guidance as to the proper extent of judicial authority, poses a distinct problem for courts deciding separation of powers cases that involve the judiciary.<sup>58</sup> Unlike Articles I<sup>59</sup> and II, which extensively

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52. Mullenix, *Counter-Reformation*, *supra* note 3, at 439. See Carrington, *supra* note 36, at 310 (“The Rules Enabling Act was avowedly anti-democratic in the sense that it withdrew ‘procedural’ lawmaking from the political arena and made it the activity of professional technicians.”) (describing the original version of the REA and the philosophy of expertise that animated allocation of procedural rulemaking to the judicial branch).

53. See David Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 MICH. L. REV. 1223, 1249–74 (1985) (developing a proposed test of improper delegation).

54. See, e.g., RICHARD B. STEWART & JAMES E. KRIER, *ENVIRONMENTAL LAW AND POLICY* 673–32 (2d ed. 1978) (acknowledging judicial overreaching in light of the broad scope of judicial review); Richard Pierce, *The Role of Constitutional and Political Theory in Administrative Law*, 64 TEX. L. REV. 469, 485 (1985) (discussing the impact of judges’ personal political philosophies on statutory interpretation); Richard Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1809–10 (1975) (analyzing the scope of judicial review as a vehicle for judicial policymaking).

55. Riedl, *supra* note 31, at 601.

56. U.S. CONST. art. III, § 1.

57. U.S. CONST. art. III, § 2.

58. See Mullenix, *Unconstitutional Rulemaking*, *supra* note 3, at 1316.

delineate the powers of Congress and the Presidency, Article III merely vests “judicial power” in the federal courts.<sup>60</sup> Other than providing for life tenure and prohibiting salary diminution, Article III does not indicate what comprises this judicial power.<sup>61</sup>

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59. *See, e.g.*, U.S. CONST. art. I, § 8, cl. 18 (granting Congress the power “to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof”).

60. Section 1 of Article III provides:

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office.

U.S. CONST. art. III, § 1.

Many state constitutions, in contrast, specifically grant the judiciary the power to regulate practice and procedure within the court system. *See*, ALASKA CONST. art. IV, § 15 (requiring the courts to adopt rules); ARIZ. CONST. art. VI, § 5 (authorizing the courts to adopt rules relating to “procedural matters”); COLO. CONST. art. VI, § 21 (authorizing the courts to adopt rules relating to “practice and procedure”); FLA. CONST. art. V, § 2(a) (granting the supreme court exclusive power to “adopt rules for the practice and procedure in courts” but reserving for the state legislature the power of review and disapproval); MD. CONST. art. IV, § 18 (empowering Maryland courts to prescribe rules but reserving a power of review and disapproval for the Maryland General Assembly); MO. CONST. art. V, § 5 (granting specific rulemaking authority to the courts and providing for no express legislative oversight or restriction as to court rules); NEB. CONST. art. V, § 25 (authorizing the courts to adopt rules relating to “practice and procedure”); OHIO CONST. art. IV, § 5(B) (empowering the Ohio courts to prescribe rules but reserving for the state legislature a power of review and disapproval); PA. CONST. art. V, § 10(C) (granting the courts “the power to prescribe the general rules governing, practice, procedure and the conduct of all counts” as long as they do not abridge, enlarge, or modify substantive rights); UTAH CONST. art. VIII, § 4 (authorizing the courts to adopt rules of evidence); VT. CONST. ch. II, § 37 (requiring the courts to adopt rules). *See generally* Walstad v. State, 818 P.2d 695 (Alaska Ct. App. 1991) (construing the Alaska courts’ rulemaking authority to be exclusive); State v. Robinson, 735 P.2d 801 (Ariz. 1987) (construing the Arizona courts’ rulemaking authority to be exclusive); Winberry v. Salisbury, 74 A.2d 406, 414 (N.J. 1950) (invalidating legislation that extended the time for appeal beyond that permitted by court-made rules because the New Jersey Constitution vested the exclusive power to make rules of practice and procedure in the courts); *In re* Pa. C. S. 1703, 394 A.2d 444, 447 (Pa. 1978) (interpreting PA. CONST. art. V, § 10(C)); White v. Fisher, 689 P.2d 102, 103 (Wyo. 1984) (invalidating a statute regulating pleading in medical-malpractice cases because the Wyoming Constitution vested the exclusive power to make rules of practice and procedure in the courts).

61. *See* U.S. CONST. art. III, § 1; *see also* Dean Alfange, Jr., *The Supreme Court and The Separation of Powers: A Welcome Return To Normalcy?*, 58 GEO. WASH. L. REV. 668, 684 (1990) (discussing the Framers’ concern for guaranteeing the personal independence of judges). Presumably, enabling legislation is unnecessary and the inherent-powers would be redundant in these states.

The Supreme Court has recognized three general sources of judicial rulemaking power. First, Article III defines the exercise of judicial power to include deciding “cases” and “controversies.” Second, the Court recognizes that Article I gives Congress limited power to delegate to the judiciary powers beyond the Article III powers, so long as the delegation does not threaten “an independent and impartial adjudication by the federal judiciary of matters within the judicial power of the United States,”<sup>62</sup> assign “tasks that are more properly accomplished by [other] branches,”<sup>63</sup> or otherwise “impermissibly threaten[] the institutional integrity of the Judicial Branch.”<sup>64</sup> Third, the Court maintains that federal courts have “inherent” authority to exercise certain nonadjudicatory powers.<sup>65</sup>

The authority of the United States District Courts to adopt and promulgate local rules emanates from *Federal Rule of Criminal Procedure 57*<sup>66</sup> and *Federal Rule of Civil Procedure 83*, which the Supreme Court adopted pursuant to its authority under the REA and which authorize the creation of local rules. Congress also vested federal district and circuit courts with the independent authority to prescribe local rules of practice consistent with Acts of Congress and the rules of practice and procedure promulgated by the Supreme Court.<sup>67</sup>

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62. *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 848 (1986) (upholding Congress's grant of jurisdiction over common law counterclaims to the CFTC). See generally *Mistretta v. United States*, 488 U.S. 361, 362 (1989) (describing the test for permissible Congressional delegation as whether the delegated practice “prevents the Executive branch from accomplishing its constitutionally assigned functions”) (quoting *Nixon v. Adm'r of Gen. Serv.*, 433 U.S. 425, 443 (1977)); *Morrison v. Olson*, 487 U.S. 654, 683–84 (1988) (upholding the constitutionality of the 1978 Ethics in Government Act's independent-counsel provisions).

63. *Morrison*, 487 U.S. at 680–81.

64. *Mistretta*, 488 U.S. at 383 (quoting *Schor*, 478 U.S. at 851) (internal quotation marks omitted).

65. See, e.g., *Chambers v. NASCO, Inc.*, 501 U.S. 32, 46–49 (1991) (discussing the inherent power to sanction litigants for bad faith conduct); *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 793 (1987) (discussing the inherent power of the courts to initiate contempt proceedings and to appoint counsel to prosecute them); *In re Snyder*, 472 U.S. 634, 643 (1985) (discussing the inherent power of the courts to suspend or disbar attorneys).

66. Rule 57 of the *Federal Rules of Criminal Procedure* provides, in pertinent part: Each district court acting by a majority of its district judges may, after giving appropriate public notice and an opportunity to comment, make and amend rules governing its practice. A local rule must be consistent with—but not duplicative of—federal statutes and rules adopted under 28 U.S.C. § 2072 and must conform to any uniform numbering system prescribed by the Judicial Conference of the United States.

FED. R. CRIM. P. 57(a)(1).

67. See 28 U.S.C. § 2071(a) (2006) (“The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed under [the REA].”).

### 1. *The REA and the Federal Rules of Procedure*

Congress, through the REA, has delegated to the Supreme Court the authority to prescribe rules of practice and procedure for the federal courts.<sup>68</sup> The REA enables the judiciary to promulgate federal rules of practice and procedure, as long as those rules do “not abridge, enlarge, or modify any substantive right.”<sup>69</sup> In delegating its authority, Congress imposed an obligation on the Court to report its actions and fixed a deferred effective date for adopted rules to allow for congressional disapproval, if desired.<sup>70</sup> The result is that the REA embodies the constitutional separation of powers limitations on the respective allocation of rulemaking authority between Congress and

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68. See 28 U.S.C. § 2072(a) (2006). The first section of the REA provides that “the 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 (including proceedings before magistrates thereof) and courts of appeals.” *Id.*

The REA was not Congress’s first delegation of rule-promulgation power to the courts. It was merely the codification at the federal level of a long series of statutory delegations of procedural rulemaking authority to the courts. See JACK B. WEINSTEIN, REFORM OF COURT RULE-MAKING PROCEDURES 55–63 (1977) (providing a historical overview of rulemaking authority); Levin & Amsterdam, *supra* note 3, at 3–5; see also 28 U.S.C. § 2071 (providing rulemaking authority for local rules of court). See generally *The Rule-Making Function and The Judicial Conference of the United States*, 21 F.R.D. 117 (1957) (containing statements of various judges addressing a congressional proposal to authorize the Judicial Conference to make recommendations for revisions to the *Federal Rules of Civil Procedure*); Burbank, *REA*, *supra* note 3 (providing a history of the REA); Maris, *supra* note 29 (discussing the history of judicial rulemaking and the Judicial Conference). Once the Constitution was ratified, Congress empowered the federal courts to adopt rules for practice and procedure. Section 17 of the Judiciary Act of 1789 stated that the circuit courts, as well as other federal courts, had the authority “to make and establish all necessary rules for the orderly conducting business in the said courts, provided such rules are not repugnant to the laws of the United States.” Judiciary Act of 1789, ch. 20, 17, 1 Stat. 73, 83 (1789) (codified as amended in 28 U.S.C. § 2071). During the eighteenth and nineteenth centuries, the development of independent federal procedural rules was hampered by the Process Acts of 1789, Act of Sept. 29, 1789, ch. 21, 2, 1 Stat. 93, 93 (1789), and 1792, Act of May 8, 1792, ch. 36, 2, 1 Stat. 275, 276 (1792), and the Conformity Act of 1872, Act of June 1, 1872, ch. 255, 5, 6, 17 Stat. 196, 197 (1872), which required federal courts to follow state procedures in actions at law. See WEINSTEIN, *supra*, at 64–66. The undesirability of this arrangement ultimately led to the twentieth century reform movement for a uniform set of federal procedural rules, which culminated in the enactment of the REA in 1934, which granted the Supreme Court the power to make “general rules of practice and procedure.” Act of June 19, 1934, Pub. L. No. 73-415, 48 Stat. 1064 (codified as amended at 28 U.S.C. § 2072). See WEINSTEIN, *supra*, at 66–69.

The original REA spoke of only two layers of rulemaking: the Supreme Court, which promulgated the Rules, and Congress, which could override a Rule. See Act of June 19, 1934, Pub. L. No. 73-415, 48 Stat. 1064 (codified as amended at 28 U.S.C. §§ 2071–2077).

69. 28 U.S.C. § 2071(a)–(b).

70. See § 2074.

the courts.<sup>71</sup> The first provision of the REA was “a delegation of some federal law-making power created by Article III, which authorizes Congress to establish lower federal courts.”<sup>72</sup> In other words, “[t]he Rules Enabling Act is just that: a statute that ‘enables’ the Supreme Court to exercise its inherent procedural rulemaking function.”<sup>73</sup> Perhaps as a result, besides authorizing general rulemaking authority, the Act provides few details.<sup>74</sup> It does not require a particular rulemaking process or state what the new procedural rules should do.<sup>75</sup>

The statutory limitations allocate the *substantive* rulemaking power to the legislative branch, and the *procedural* rulemaking power to the courts.<sup>76</sup> However difficult this distinction between substantive and procedural has proven in theory and application,<sup>77</sup> it nonetheless has been the conceptual paradigm for defining each branch’s rulemaking authority.<sup>78</sup> The language of the REA and the cases construing it have always recognized this division of rulemaking authority.<sup>79</sup>

Rule 57 only authorizes the district courts to adopt local rules that are narrow in scope and regulate “matters of detail.”<sup>80</sup> Both *Federal Rule of Civil Procedure 83* and *Federal Rule of Criminal Procedure 57*

71. See Mullenix, *Unconstitutional Rulemaking*, *supra* note 3, at 1329.

72. Carrington, *supra* note 36, at 287.

73. Mullenix, *Unconstitutional Rulemaking*, *supra* note 3, at 1334.

74. See Brooke D. Coleman, *Recovering Access: Rethinking the Structure of Federal Civil Rulemaking*, 39 N.M. L. REV. 261, 274 (2009).

75. See *id.*

76. See U.S.C. § 2072(b) (2006); Mullenix, *Counter-Reformation*, *supra* note 3, at 427.

77. See *infra* subsection III.A.3.

78. See Mullenix, *Counter-Reformation*, *supra* note 3, at 429.

79. See, e.g., *Mistretta v. United States*, 488 U.S. 361, 384–97 (1989) (holding that Congress could constitute the United States Sentencing Commission as an independent agency and grant it the authority to bind federal judges to the sentencing ranges that it considered appropriate for various federal criminal offenses); *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 27 (1988); *Daily Income Fund, Inc. v. Fox*, 464 U.S. 523, 543–44 (1984) (Stevens, J., concurring); *Colgrove v. Battin*, 413 U.S. 149, 162–63 (1973); *Schlagenhauf v. Holder*, 379 U.S. 104, 112–14 (1964); *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 433–35 (1956); *Miss. Pub’g Corp. v. Murphree*, 326 U.S. 438, 445 (1946); *Sibbach v. Wilson & Co.*, 312 U.S. 1, 10, 14 (1941) (explaining that the REA “was purposely restricted in its operation to matters of pleading and court practice and procedure”).

80. See *Stern v. U.S. Dist. Court for the Dist. of Mass.*, 214 F.3d 4, 17 (1st Cir. 2000) (holding that the district court’s adoption of a rule constraining the issuance of subpoenas seeking client-related information from lawyers fell outside the permissible scope of rulemaking authority because it went beyond “matters of detail” appropriate for local rulemaking and worked a fundamental procedural change); *Baylson v. Disciplinary Bd. of the Sup. Ct. of Penn.*, 975 F.2d 102, 107 (3d Cir. 1992) (holding that the adoption and enforcement against federal prosecutors of a local rule that required prior judicial approval before service of a grand jury subpoena on an attorney in a criminal proceeding fell outside the rulemaking authority of the federal district court because it went beyond “matters of detail” appropriate for local rulemaking).

limit the scope of local rules promulgated under either authority to rules concerning “practice.” Court-created rules are not supposed to create or affect substantive rights.<sup>81</sup> If a court, in fashioning a rule, alters substantive rights by promulgating rules of general effect, it engages in unconstitutional lawmaking.<sup>82</sup> “Local rules that fail to comply with those requirements are nullities.”<sup>83</sup> In keeping with these principles, in *Frazier v. Heebe*, the Supreme Court struck down a local rule that it deemed “unnecessary and irrational.”<sup>84</sup>

*Federal Rule of Criminal Procedure* 57 authorizes a majority of district judges to adopt, make, and amend local rules governing its practice. Likewise, *Federal Rule of Civil Procedure* 83 authorizes district courts to promulgate local rules that are “not inconsistent” with the Federal Rules. Section 2071 of the REA specifically forbids the promulgation of local rules “other than under this section.”<sup>85</sup> The purpose of this exclusivity clause was to avoid the promulgation of the equivalent of local rules under various other rubrics, such as “standing orders.”<sup>86</sup>

## 2. *Inherent Rulemaking Authority*

The Supreme Court has, at times, recognized that the federal courts have certain inherent rulemaking powers, arising from the nature of the judicial process, to control their internal process and the

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81. See 18 U.S.C. § 2072(b) (2006); FED. R. CRIM. P. 57(b) (permitting the local regulation of practice only when it is done in a manner “consistent with federal law”); *Miner v. Atlass*, 363 U.S. 641, 651–52 (1960) (holding that a local admiralty rule authorizing oral discovery depositions exceeded the district court’s rulemaking authority and reasoning that the rule, “though concededly ‘procedural,’ may be of as great importance to litigants as many a ‘substantive’ doctrine,” and was therefore too basic to be effectuated through local rulemaking). The second provision of the REA dictates that the rules that the court-created rules that it authorizes “shall not abridge, enlarge or modify any substantive right.” § 2072(b). This provision of the REA codified the repeated provision in predecessor statutes that prohibited courts from promulgating any procedural rules that “were repugnant to the laws of the United States.” Act of Mar. 2, 1793, ch. 22, § 1 Stat. 333, 335.

82. See *Mullenix*, *Unconstitutional Rulemaking*, *supra* note 3, at 1328.

83. *Baylson*, 975 F.2d at 107; see *Frazier v. Heebe*, 482 U.S. 641, 646 (1986).

84. See *Frazier*, 482 U.S. at 646.

85. 28 U.S.C. § 2071(f) (2006).

86. See *Robel*, *supra* note 10, at 1468.

conduct of litigation.<sup>87</sup> The Supreme Court has defined these “inherent powers” as those necessary for a court to function.<sup>88</sup>

The inherent-authority theory posits that, once Congress creates federal courts and vests them with jurisdiction, it must also vest them with those powers necessary for them to administer justice<sup>89</sup> and to

87. See *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991). While the existence of inherent executive power is well established, see, e.g., *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 318–19 (1936) (stating that the unenumerated power of the federal government over foreign affairs rests principally with the President), that of inherent judicial power is much less so. See Mullenix, *Unconstitutional Rulemaking*, *supra* note 3, at 1320. Nonetheless, the concept that courts have certain powers directly resulting from their mere existence is not new. In 1928, the Supreme Court of Wisconsin explained: “[C]ertain powers have been conceded to courts, because they are courts. Such powers have been conceded, because without them they could neither maintain their dignity, transact their business, nor accomplish the purpose of their existence.” *State v. Cannon*, 221 N.W. 603, 603 (Wis. 1928).

Whether this inherent power to promulgate rules exists has been described as a “purely academic” issue. Burbank, *REA*, *supra* note 3, at 1021 n.19. Most commentators at least agree that “courts possess a certain measure of inherent rule-making power.” Charles W. Joiner & Oscar J. Miller, *Rules of Practice and Procedure: A Study of Judicial Rule Making*, 55 MICH. L. REV. 623, 626 (1957). See Burbank, *REA*, *supra* note 3, at 1116 (agreeing with the basic theory of inherent rulemaking authority, but noting that “arguments [for the power] often reflect[] the passion of the reformer more than the detachment of the scholar”); Levin & Amsterdam, *supra* note 3, at 3 (conceding the existence of “an alleged inherent power to engage in rule-making”). Scholars do not agree, however, about the nature of the power, compare Wigmore, *supra* note 3, at 276 (arguing that rulemaking is so essential to the judicial power that it preempts the field and renders all legislative encroachment improper and unconstitutional), with Benjamin Kaplan & Warren J. Greene, *The Legislature’s Relation to Judicial Rule-Making: An Appraisal of Winberry v. Salisbury*, 65 HARV. L. REV. 234, 251 (1951) (observing that “Wigmore’s omnibus argument is better taken as the jeu d’esprit of a master than as a serious constitutional analysis”), and Levin & Amsterdam, *supra* note 3, at 3, or its scope, see, e.g., Joiner & Miller, *supra*, at 626.

Scholars generally divide these powers into negative and affirmative ones. See, e.g., Stumpf, *supra* note 3. The inherent negative power of the courts is their power to invalidate legislative intrusions into their rulemaking realm. See Wolf, *supra* note 6, at 518. The inherent affirmative power of the courts is the power to engage in judicial rulemaking. A great deal of scholarly literature has been devoted to the former, but it is the latter of these two types of powers that tends to be more controversial, see Wolf, *supra* note 6, at 521, and with which this Article is concerned.

88. See Mullenix, *Unconstitutional Rulemaking*, *supra* note 3, at 1320; cf. *Eichelberger v. Eichelberger*, 582 S.W.2d 395, 398 (Tex. 1979) (defining a court’s inherent powers as those that were necessary to exercise its jurisdiction, administer justice, and preserve its independence and integrity). The Texas Supreme Court explained: “The *inherent* judicial power of a court is not derived from legislative grant or specific constitutional provisions, but from the very fact that the court has been created and charged by the constitution with certain duties and responsibilities.” *Eichelberger*, 582 S.W.2d at 398.

89. See *Chambers*, 501 U.S. at 58 (Scalia, J., dissenting) (identifying Article III as the constitutional source of the Court’s power to protect “the integrity of its proceed-

preserve their status as part of an independent branch.<sup>90</sup> Federal courts have thus recognized a variety of powers as inherent, including the powers to control their own proceedings and dockets;<sup>91</sup> punish contempts;<sup>92</sup> impose sanctions on litigants;<sup>93</sup> provide for process

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ings”); Joiner & Miller, *supra* note 87, at 630 (arguing that courts have inherent, and supreme, authority to prescribe rules “for the establishment and maintenance of the machinery essential for the efficient administration of judicial business”); Levin & Amsterdam, *supra* note 3, at 30.

90. See Mullenix, *Unconstitutional Rulemaking*, *supra* note 3, at 1321. For the most part, this asserted inherent authority is consistent with a vision of separated powers that recognizes the courts’ need to be able to protect the integrity of their processes without undue reliance on the political branches. See, e.g., *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 793 (1987) (“The ability to punish disobedience to judicial orders is regarded as essential to ensuring that the Judiciary has a means to vindicate its own authority without complete dependence on other Branches.”).
91. See *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. North Am. Co.*, 299 U.S. 248, 254 (1936); *United States v. Correia*, 531 F.2d 1095, 1098 (1st Cir. 1976); *United States v. Inman*, 483 F.2d 738, 740 (4th Cir. 1973) (per curiam).
92. See *Young*, 481 U.S. at 795–96; *Michaelson v. United States ex rel. Chicago, St. P., M., & O. Ry.*, 266 U.S. 42, 65–66 (1924); *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 450 (1911) (explaining that “the power of courts to punish for contempts is a necessary and integral part of the independence of the judiciary, and is absolutely essential to the performance of the duties imposed on them by law”); *Ex parte Robinson*, 86 U.S. (19 Wall.) 505, 510 (1874) (“That the power to punish for contempts is inherent in all courts, has been many times decided and may be regarded as settled law. It is essential to the administration of justice. The courts of the United States, when called into existence and vested with jurisdiction over any subject, at once become possessed of the power.”); *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 227 (1821); *Ex parte Barnett*, 600 S.W.2d 252, 254 (Tex. 1980) (holding that courts had the inherent power to punish a party for refusing to obey a court order); see generally Felix Frankfurter & James M. Landis, *Power of Congress Over Procedure in Criminal Contempts in “Inferior” Federal Courts—A Study in Separation of Powers*, 37 HARV. L. REV. 1010 (1924) (finding no constitutional impediment when Congress confers contempt powers to courts). The power of contempt is vital to the judiciary in maintaining order, controlling the courtroom, and enforcing orders and final judgments. Therefore, other branches of government cannot pass regulations dictating to judges when and how to exercise their contempt powers. See *Murneigh v. Gainer*, 685 N.E.2d 1357 (Ill. 1997).
93. See, e.g., *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991) (holding that federal courts possessed the inherent power to issue attorney fee sanctions beyond that conferred by statute or *Federal Rule of Civil Procedure* 11). For discussions of the Court’s reliance on an inherent-powers theory in recognizing this authority, see generally Rebecca G. Moore, *Chambers v. NASCO, Inc.—Judicial Discipline Wields a Big Stick*, 37 LOY. L. REV. 1043 (1992); Bryan P. Vezey, *A Federal Court Has Inherent Power To Assess Attorney Fees as a Sanction for Bad-Faith Conduct, and in a Diversity Case May Employ that Power Without Regard to the Law of the Forum State: Chambers v. NASCO, Inc.*, 111 S. Ct. 2123 (1991), 33 S. TEX. L. REV. 647 (1992).

where none exists;<sup>94</sup> “impose silence, respect, and decorum, in their presence, and submission to their lawful mandates;”<sup>95</sup> “control admission to [their] bar[s] and to discipline attorneys who appear before [them];”<sup>96</sup> “vacate [their] own judgment[s] upon proof that a fraud has been perpetrated upon the court;”<sup>97</sup> “bar from the courtroom a criminal defendant who disrupts a trial;”<sup>98</sup> “dismiss an action on grounds of forum non conveniens;”<sup>99</sup> “act sua sponte to dismiss a suit for failure to prosecute;”<sup>100</sup> consolidate cases;<sup>101</sup> appoint auditors;<sup>102</sup> and promulgate internal procedural rules for the conduct of litigation in the federal courts.<sup>103</sup>

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94. *See* Att’y Gen. of Md. v. Waldron, 426 A.2d 929, 934 (Md. 1981) (quoting *State v. Cannon*, 221 N.W. 603, 603–04 (Wis. 1928)).

95. *Chambers*, 501 U.S. at 43 (quoting *Anderson v. Dunn*, 19 U.S. (6 Wheat) 204, 227 (1821)).

96. *Id. See, e.g.,* *United States v. Colo. Supreme Court et al.*, 988 F. Supp. 1368 (D. Colo. 1998) (noting that courts have the inherent power to discipline lawyers licensed by it or practicing before them).

97. *Chambers*, 501 U.S. at 44.

98. *Id.*

99. *Id. See also* *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507–09 (1947) (holding that the district court possessed the inherent authority to dismiss a suit on the ground of forum non conveniens), partially superseded by Act of June 25, 1948, ch. 646, 1, 62 Stat. 869, 937 (codified as amended at 28 U.S.C. § 1404 (2006)).

100. *Chambers*, 501 U.S. at 44. *See* *Link v. Wabash R.R. Co.*, 370 U.S. 626, 630–31 (1962).

101. *See* *Bowen v. Chase*, 94 U.S. 812, 824 (1876) (acknowledging the court’s inherent power to consolidate actions arising out of single controversy).

102. *See Ex parte Peterson*, 253 U.S. 300, 312 (1920) (holding that the district court had the inherent power to appoint an auditor to assist in performance of its judicial duties).

103. *See* Mullenix, *Unconstitutional Rulemaking*, *supra* note 3, at 1297. Congress endorsed this inherent power in the REA, by statutorily conferring authority on the federal courts to promulgate procedural rules. *See id.* Even scholars who argue for concurrent roles for the judiciary and the legislature in the area of procedural rulemaking recognize that there are certain powers and functions which must remain within the ultimate control of the court:

[T]here is a third realm of judicial activity, neither substantive nor adjective law, a realm of “proceedings which are so vital to the efficient functioning of a court as to be beyond legislative power.” This is the area of minimum functional integrity of the courts, “what is essential to the existence, dignity and functions of the court as a constitutional tribunal and from the very fact that it is a court.”

Levin & Amsterdam, *supra* note 3, at 31–32 (internal citations omitted).

Regarding the conduct of judges, see, for example, *Weinstock v. Holden*, 995 S.W.2d 408 (Mo. 1999) (determining that a statute governing the disqualification of judges violated the separation of powers provisions of the Missouri Constitution); *In re Kading*, 235 N.W.2d 409 (Wis. 1975) (holding that the Wisconsin Supreme Court had the inherent authority to adopt the Code of Judicial Conduct, including a specific rule requiring the filing of annual financial statements). Regarding the conduct of attorneys, see, e.g., *In re Edwards*, 266 P. 665 (Idaho 1928) (holding that the Idaho Supreme Court had the inherent power to adopt rules and regulations prescribing the qualifications of persons seeking to practice law);

There are “two primary theoretical basis for inherent judicial powers. The first is the separation-of-powers doctrine. The second is the power inherent in a court because of its sheer existence.”<sup>104</sup> The theories are not mutually exclusive, however, and courts have utilized both doctrines in upholding the judiciary’s exercise of a particular inherent power.<sup>105</sup>

Consistent with these principles, the Supreme Court has upheld the authority of district courts to promulgate local rules as long as (1) they do not conflict with an Act of Congress; (2) they do not conflict with the rules of procedure promulgated by the Supreme Court; (3) they are not constitutionally infirm; and (4) the subject matter governed by the rule is within the power of the district court to regulate.<sup>106</sup> Although the Constitution assigns to Congress the power to create inferior courts and confer on them jurisdiction, once created, these courts have the inherent power to promulgate rules of practice and procedure not in contravention of substantive law.<sup>107</sup> In other words, the inherent power of the courts, once called into existence by Article III, includes the powers to protect themselves, to administer justice, to promulgate rules for practice, and to provide process where none exists.<sup>108</sup> Thus, the judicial power permits the exercise of legislative-like authority if it is ancillary to existing judicial powers.<sup>109</sup>

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Turner v. Ky. Bar Ass’n., 980 S.W.2d 560 (Ky. 1998) (holding that a statute authorizing nonlawyers to represent parties in workers’-compensation proceedings violated the constitutional principles of separation of powers); Belmont v. Bd. of Law Exam’rs, 511 S.W.2d 461 (Tenn. 1974) (holding that the judicial branch had the inherent power to prescribe and administer rules for licensing and admitting lawyers); Peter F. Ruben, *Illinois Supreme Court’s Disciplinary Authority Exclusive at Last*, 83 Ill. B.J. 410 (1995).

104. STUMPF, *supra* note 3, at 6.

105. *See, e.g.*, State v. Clemente, 353 A.2d 723 (Conn. 1974).

106. *See* Frazier v. Heebe, 482 U.S. 641, 654, (1986) (Rehnquist, C.J., dissenting) (citing Colgrove v. Battin, 413 U.S. 149, 159–60, 162–64 (1964); Miner v. Atlas, 363 U.S. 641, 651–52, (1960); Story v. Livingston, 38 U.S. 359, 368 (1839)). Consistent with these principles, Stumpf has recognized that trial courts are uniformly found to have inherent powers “so that the adjudicative process can function” where rules and statutes are silent. *See* STUMPF, *supra* note 3, at 37.

107. *See* Mullenix, *Unconstitutional Rulemaking*, *supra* note 3, at 1334.

108. *See id.* at 1297.

109. *See* Mistretta v. United States, 488 U.S. 361, 417 (1989) (Scalia, J., dissenting) (citing Sibbach v. Wilson & Co., 312 U.S. 1 (1941); Standard Oil Co. of N.J. v. United States, 221 U.S. 1 (1911) (upholding judicial power to define what constitutes a “restraint of trade”); Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 45 (1825) (holding that Congress could properly delegate to the courts the power to prescribe the method in which officers execute judgments)); 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 (1984) (arguing that the courts’ power to make procedural rules is ancillary to Article III, analogous to the ancillary authority of the President under Article II). Courts’ inherent powers are not necessarily exclusive. Although some functions are within the core powers of the judicial branch upon which other branches may

The focus of most separation of powers cases has been on judicial independence as to decision-making rather than determining which powers are necessarily part of the court system.<sup>110</sup> What is clear is that the local rule making authority of federal courts is supposed to be limited.<sup>111</sup> Courts usually rely on specific statutory authority, rather than their “inherent powers,” for rulemaking out of a desire not to create unnecessary antagonism and confrontation with legislatures.<sup>112</sup> This traditional judicial restraint has also reflected the superior ability of legislatures to gather information within certain areas.<sup>113</sup>

### 3. Defining “Procedural”

“Procedure is substance.”<sup>114</sup>

Congressional rulemaking control has always been premised on concerns about the allocation of federal powers, and, in particular, on a concern that the legislature, not the courts, should engage in “policy choices with a predictable and identifiable impact on rights claimed under substantive law.”<sup>115</sup> By statute, federal procedural rules are initiated by the judicial branch,<sup>116</sup> subject to congressional approval,

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not intrude, *see* *Barland v. Eau Claire County*, 575 N.W.2d 691, 696 (Wis. 1998) (discussing the judiciary’s exclusive authority over supervision of judicial assistants), the vast majority fall in the great borderland of shared authority between the courts and legislatures. *See id.* In many situations, the power of legislatures and the courts overlap. *See* *Wolf*, *supra* note 6, at 517. Thus, the Court’s implied rulemaking authority, although generally recognized, is subservient to that of Congress unless the Court is exercising its rulemaking power in defense of judicial authority or integrity. *See* *Beale*, *supra*, at 1472; *Robel*, *supra* note 10, at 1480.

110. *See* *Wolf*, *supra* note 6, at 525; *see, e.g.,* *French v. Duckworth*, 178 F.3d 437, 448–53 (7th Cir. 1999) (Easterbrook, J., dissenting) (arguing that Article III establishes three safeguards of judicial independence: (1) tenure of office; (2) protection against financial penalties; and (3) the rule (an implication of establishing a “judicial power”) that final judgment must be carried out).

111. *See* *United States v. Horn*, 29 F.3d 754, 760 (1st Cir. 1994); *cf. Sibbach*, 312 U.S. at 9–10 (emphasizing that court rules are adopted under a limited congressional grant of legislative power).

112. *See* *Wolf*, *supra* note 6, at 523. This avoidance is particularly important in the federal system, where there has been a long-standing recognition that Congress has the power to prescribe rules of practice for the federal courts. *See* *Hanna v. Plummer*, 380 U.S. 460, 473 (1965); *Sibbach*, 312 U.S. at 19.

113. *See* *Wolf*, *supra* note 6, at 529.

114. *Stancil*, *supra* note 21, at 71.

115. Stephen B. Burbank, *Hold the Corks: A Comment on Paul Carrington’s “Substance” and “Procedure” in the Rules Enabling Act*, 1989 DUKE L.J. 1012, 1019–20 (1989) [hereinafter Burbank, *Hold the Corks*]. *See* Levin & Amsterdam, *supra* note 3, at 13–14 (arguing that courts are likely to impinge upon substantive rights in exercising rulemaking powers, “not because judges would make rules governing substantive law as such, but rather because procedure and substance are inextricably interwoven”).

116. *See* 28 U.S.C. §§ 2071–2073 (2006).

which can occur by way of inaction.<sup>117</sup> The now-familiar statutory allocation of power between Congress and the courts relies on the distinction between substance and procedure,<sup>118</sup> and disputes about the proper scope of judicial rulemaking have traditionally centered on discerning which matters are “substantive” and which are “procedural.”<sup>119</sup>

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117. See 28 U.S.C. § 2074 (2006). Pursuant to the 1988 REA amendments, rules proposed by the Court under § 2072 or § 2073 go into effect unless Congress acts to prevent their implementation within seven months after the Chief Justice reports the proposed rules to Congress. See § 2074(a).
118. See *Robel*, *supra* note 10, at 1473; see also *Joiner & Miller*, *supra* note 87, at 634 (“It is fundamental that court rules cannot . . . abrogate or modify substantive law.”); *Levin & Amsterdam*, *supra* note 3, at 14 (“Nothing could be clearer than the fact that courts in the exercise of the rule-making power have no competence to promulgate rules governing substantive law.”).
119. See, e.g., *Colgrove v. Battin*, 413 U.S. 149, 156–57 (1973); *Schlagenhauf v. Holder*, 379 U.S. 104, 113–14 (1964); *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 433 n.5 (1956); *Miss. Publ’g Corp. v. Murphree*, 326 U.S. 438, 445–46 (1946); *Sibbach v. Wilson*, 312 U.S. 1, 7–14 (1941). Almost immediately after enactment of the REA, the Court adopted the *Federal Rules of Civil Procedure* and set the stage for the first of its most influential opinions on the meaning of the words “practice and procedure.” *Sibbach*, 312 U.S. 1. *Sibbach* filed a diversity-jurisdiction personal-injury action in federal court. The district court ordered him to submit to a physical examination, as authorized by a newly adopted federal rule, but he refused, contending that adoption of the examination rule exceeded the Supreme Court’s authority under the REA because it abridged his substantive rights. The Court rejected this contention, upheld the examination rule, and provided the following definition of procedure: “The test must be whether a rule really regulates procedure,—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them.” *Id.* at 14.

The Court rendered its opinion in *Sibbach* only three years after its landmark decision in *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). The Court ostensibly rendered *Sibbach* as a decision on the rulemaking authority of the judiciary, but it subsequently became entangled in the choice-of-laws issues produced by *Erie*, in which the substance/procedure distinction is also important. See *Lawson*, *supra* note 3. For more than two decades, lower courts struggled with the relationship between the two decisions and with questions about the applicability in diversity cases of federal rules of procedure that contradicted provisions of state law. See, e.g., *Fontenot v. Roach*, 120 F. Supp. 788 (E.D. Tenn. 1954); *Occidental Life Ins. Co. of Cal. v. Kielhorn*, 98 F. Supp. 288 (W.D. Mich. 1951); *Jeub v. B/G Foods, Inc.*, 2 F.R.D. 238 (D. Minn. 1942); *Bohn v. Am. Exp. Lines*, 42 F. Supp. 228 (S.D.N.Y. 1941). The Supreme Court rendered a series of unsettling decisions on these subjects, see, e.g., *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949); *Ragan v. Merchs. Transfer & Warehouse Co.*, 337 U.S. 530 (1949); *Murphree*, 326 U.S. 438, before issuing its watershed opinion in *Hanna*, 380 U.S. 460.

*Hanna* was also a personal-injury case filed in federal court under diversity jurisdiction. The complaint filed by Plummer, the executor of the decedent’s estate, was served in accordance with the *Federal Rules of Civil Procedure*, which provide for delivery of process to a defendant’s residence, but not under a provision of the corresponding state limitations statute, which required personal service upon the defendant. See *id.* at 461. The district court concluded that state law governed service of process and granted summary judgment for *Hanna*, and

Of course, the devil with judicial rulemaking is in the detail of the distinction between procedural and substantive rules (the former courts being permitted to promulgate, the latter being forbidden).<sup>120</sup> Procedural rules almost inevitably influence the determination of substantive rights.<sup>121</sup> The problem in determining what is procedural versus substantive renders the process of identifying that part of the procedural functions that are inherent in the judiciary extremely difficult, and commentators have argued that procedural rulemaking, by necessity, also affects the substantive rights of the parties.<sup>122</sup> The classification of rules as either substantive or procedural is difficult

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the United States Court of Appeals for the First Circuit affirmed, describing the rules governing service of process as a “substantive rather than a procedural matter” and concluding that *Erie* dictated that the state statute governed the issue. *Hanna*, 380 U.S. at 463. The question on which the Supreme Court granted certiorari was whether “service of process [in a diversity case] shall be made in the manner prescribed by state law or that set forth in Rule 4(d)(1) of the *Federal Rules of Civil Procedure*.” *Hanna*, 380 U.S. at 461. The Court concluded that the Federal Rules controlled the service of process and reversed. *See Hanna*, 380 U.S. at 463–64.

The Court, for the first time, drew a sharp line between the two issues that had coalesced in earlier opinions: the authority of the Court to adopt rules of procedure and the obligation of federal courts to apply state law in diversity cases. The first, a separation of powers problem, was governed by the REA; the second, a federalism problem, was governed by *Erie* and its progeny. *See Hanna*, 380 U.S. at 471. More importantly for the purpose of this Article, with regard to court rulemaking powers, the Court reaffirmed its *Sibbach* definition of “procedure” and clarified the means by which to measure rules that may have both substantive and procedural components:

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

*Id.* at 472.

Justice Harlan suggested in his concurring opinion that this test, which he characterized as “arguably procedural,” was overly generous in its description of judicial rulemaking authority and did little to ease the difficulty of distinguishing between “substance” and “procedure.” *Id.* at 476 (Harlan, J., concurring). The Court has since attempted to qualify its position by clarifying that court-adopted rules may have an “incidental” effect on substantive rights without exceeding the rulemaking authority delegated by the REA. *See Burlington N. R.R. v. Woods*, 480 U.S. 1, 5 (1987); *see also Carrington*, *supra* note 36, at 299 (“Implied in *Burlington Northern* is a constraint on rules of court affecting substantive rights in ways that are more than ‘incidental.’”).

120. *See, e.g.*, Stephen B. Burbank, *Judicial Independence, Judicial Accountability, and Interbranch Relations*, 95 GEO. L. J. 909, 1006–07 (2007); Burbank, *Hold the Corks*, *supra* note 115; Carrington, *supra* note 36, at 301.
121. *See WEINSTEIN*, *supra* note 68, at 55; Bone, *supra* note 3, at 954 (conceding that “there is no clear normative divide between procedure and substance”); Robel, *supra* note 10, at 1477–78.
122. *See Wolf*, *supra* note 6, at 520, 524. The need for legislative review in these cases arises from the fact that these procedures are so intimately related with substan-

partly because substance and procedure are almost inextricably intertwined and partly because the two concepts remain imprecisely defined even after decades of doctrinal development.<sup>123</sup> As a result, the task of differentiating the substantive from the procedural has been an elusive one for many courts.<sup>124</sup>

The difficulty that courts have had in defining what is procedural has thwarted a uniform interpretation of inherent procedural pow-

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tive considerations that inherent in them is the potential of frustrating legislative policies. See Levin & Amsterdam, *supra* note 3, at 18.

123. See Lawson, *supra* note 3, at 551.

124. See Wolf, *supra* note 6, at 527. For example, during the Congressional hearings on the adoption of the *Federal Rules of Evidence*, former Supreme Court Justice Goldberg testified that the law of evidence is more substantive than procedural and falls within the domain of the legislature. See *Rules of Evidence: Hearings Before the Spec. Subcomm. on Reform of Fed. Crim. Laws of the H. Comm. on the Judiciary*, 93d Cong. 73, 142–46 (1973) (testimony of Hon. Arthur J. Goldberg). On the other hand, Judge Maris, who had been involved in the formulation of the rules, testified that the lawyers, judges, and scholars who had worked on the rules were “fully satisfied that rules of evidence are . . . basically procedural, and . . . within the rule-making power of the Court.” *Id.* at 76 (statement of Albert B. Maris). Legal scholars have written extensively on this substance-versus-procedure problem. See, e.g., Burbank, *REA*, *supra* note 3, at 1187–88 (“Everybody knows that ‘procedure’ and ‘substance’ are elusive words that must be approached in context, and that there can be no one, indeed any, bright line to mark off their respective preserves.”); Carrington, *supra* note 36, at 297–98 (characterizing *Hanna’s* “arguably procedural” test as a “false step” that had “led us off the trail with respect to the Court’s power to enact . . . law based on the broad penumbra of the substance-procedure distinction”); Earl C. Dudley, Jr., *Federalism and Federal Rule of Evidence 501: Privilege and Vertical Choice of Law*, 82 GEO. L.J. 1781, 1781, 1797 (1994) (placing the substance/procedure boundary between rules “designed to affect conduct outside the courtroom” and rules designed “to enhance the accuracy of the fact finding process”); John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693 (1974); Charles Joiner, *Uniform Rules of Evidence for Federal Courts*, 20 F.R.D. 429, 434 (1957) (arguing that court rules must “regulate the method of proving cases” and implicate “no other policy . . . involving matters other than the orderly dispatch of judicial business”); Joiner & Miller, *supra* note 87, at 629–30 (characterizing the procedure/substance distinction as “a twilight zone of indefiniteness” and proposing a standard for distinguishing between the two); Levin & Amsterdam, *supra* note 3, at 15 (describing the task of precisely locating the line between substance and procedure as “well-nigh impossible”); Edmund M. Morgan, *Rules of Evidence—Substantive or Procedural*, 10 VAND. L. REV. 467, 468 (1957) (proposing that “rules which determine the legal relations between the parties when all the facts are known or assumed are rules of substance”); Riedl, *supra* note 31, at 604 (arguing that “because of carelessness in the use of the terms . . . it is now impossible to determine what is meant by the terms ‘substantive law’ and ‘procedural law.’”); Olin Guy Welborn III, *The Federal Rules of Evidence and the Application of State Law in the Federal Courts*, 55 TEX. L. REV. 371, 404 (1977) (suggesting, in the context of the rules of evidence, that “a rule is substantive . . . (a) if it has a nonprocedural purpose, or (b) even if its purposes are entirely procedural, if it is calculated to affect behavior at the planning as distinguished from the disputative stage of activity”).

ers.<sup>125</sup> Of course, the inability to reach a consensus concerning what is procedural complicates the broader issue of *which* procedural powers are inherent to the courts. Ultimately, the substance/procedure divide that defines the outer limits of judicial rulemaking authority devolves into “a policy question where a series of arguments . . . must be weighed and balanced.”<sup>126</sup>

#### 4. *Cases and Controversies*

Article III of the United States Constitution gives the courts the power to pronounce the law only in a particular case or controversy. That power is “not merely to rule on cases, but to decide them, subject to review only by superior courts in the Article III hierarchy.”<sup>127</sup> “Beyond this [the judicial power] does not extend, and unless it is asserted in a case or controversy within the meaning of the Constitution, the power to exercise it is nowhere conferred.”<sup>128</sup>

The inherent powers of federal courts are strictly tied to their adjudicative functions.<sup>129</sup> While courts’ authority is not limited solely to adjudication, but includes certain ancillary functions incidental to the adjudicatory role, such as rulemaking and judicial administration that are essential if the courts are to carry out their constitutional mandate,<sup>130</sup> the courts “cannot make substantive rules by any means other than writing opinions in ‘cases or controversies,’ without taking leave of [their] role as defined by Article III.”<sup>131</sup>

Rulemaking is neither “part of the case adjudication process” nor “ancillary” to that process.<sup>132</sup> Thus, to use the REA to make substantive policy would violate Article III.<sup>133</sup> “[W]hen the Supreme Court makes law through supervisory court rules, it is engaged in an enterprise that, both practically and normatively, is different in important respects from the enterprise in which the Court, or any federal court, is engaged when it makes federal common law.”<sup>134</sup> If substance and

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125. See Wolf, *supra* note 6, at 527.

126. WEINSTEIN, *supra* note 68, at 54.

127. *Plaut v. Spendthrift Farm*, 514 U.S. 211, 218–19 (1995).

128. *Muskrat v. United States*, 219 U.S. 346, 356 (1911).

129. See Wolf, *supra* note 6, at 518.

130. See *O’Coin’s, Inc. v. Treasurer*, 287 N.E.2d 608, 611 (Mass. 1972).

131. Carrington, *supra* note 36, at 287. Judge Weinstein has argued that the ban on advisory opinions also might vitiate judicial rulemaking authority because rulemaking authority represents a similar infringement on legislative power. See WEINSTEIN, *supra* note 68, at 44–55.

132. See REDISH, *supra* note 51, at 21.

133. See Carrington, *supra* note 36, at 287.

134. Burbank, *Hold the Corks*, *supra* note 115, at 1021. Burbank elaborates upon this reading of the REA in Stephen B. Burbank, *Of Rules and Discretion: The Supreme Court, Federal Rules and Common Law*, 63 NOTRE DAME L. REV. 693, 700–10 (1988).

procedure are mutually exclusive,<sup>135</sup> designating the procedural function of the REA in the first sentence excludes any ability to make substantive rules. Therefore, by shielding substantive rights from abridgment and modification, the REA expresses constitutional principles that derive from the case and controversy limitation of Article III.<sup>136</sup>

Unlike state courts, federal courts are not common law courts.<sup>137</sup> This distinction is important because the tradition that the details of legal procedure “for the most part of Anglo-American legal history had been left to rules of court”<sup>138</sup> is a common law one.<sup>139</sup>

## B. Statutory and Due Process Requirements of Notice and Comment

The REA contemplates that committees of the Judicial Conference will propose rule changes to the Conference and that these proposals will be transmitted to the Supreme Court and then, if approved, to Congress.<sup>140</sup> Pursuant to two provisions added in 1988 with the intent to open the rulemaking process to public scrutiny,<sup>141</sup> the REA requires committees charged with rulemaking responsibility to hold their meetings in public—after public notice—to ensure that proposed rules are subject to comment before transmission.<sup>142</sup>

*Federal Rule of Criminal Procedure* 57(a) and *Federal Rule of Civil Procedure* 83 implement the statutory proscriptions of § 2071 of the REA. Section 2071 authorizes district courts “to prescript rules for the conduct of their business . . . only after giving appropriate public notice and an opportunity for comment.”<sup>143</sup> Rule 57 authorizes a majority of district judges to adopt, make, and amend local rules governing

135. See *supra* subsection III.A.3.

136. See Carrington, *supra* note 36, at 287. Carrington also argues that the REA’s supersession clause confirms the constitutional allocation of lawmaking and rulemaking authority to the legislative and judicial branches, respectively. See *id.* at 322–26.

137. See *United States v. Brainer*, 691 F.2d 691, 697 n.9 (4th Cir. 1982).

138. Roscoe Pound, *Procedure Under Rules of Court in New Jersey*, 66 HARV. L. REV. 28, 35 (1952).

139. See Wolf, *supra* note 6, at 525–26.

140. See 28 U.S.C. §§ 2073–2074 (2006).

141. The Judicial Improvements and Access to Justice Act of 1988 shortened 28 U.S.C. § 2072 and added §§ 2073–2074. See Pub. L. No. 100-702, 102 Stat. 4642, 4648–50 (1988).

142. See U.S.C. § 2073(c)(1)–(2). The other changes that the 1988 legislation imposed repeated the emphasis on openness and accountability in the rulemaking process. Congress repealed the former REA and replaced it with separate sections, U.S.C. §§ 2072–2074, which were designed to open national rulemaking to public scrutiny and to give Congress a longer time period during which it could interrupt the rulemaking process. See Robel, *supra* note 10, at 1468.

143. 28 U.S.C. § 2071(a)–(b) (2006).

its practice only “after giving appropriate public notice and an opportunity to comment.”<sup>144</sup>

The statute requires advance notice of advisory committee meetings, written minutes, and explanatory and dissenting statements regarding proposed rule revisions, as well as an opportunity for the public to attend committee meetings. It does not, however, incorporate an opportunity to be heard,<sup>145</sup> a traditional hallmark of procedural due process.<sup>146</sup> The result is that, unlike in the context of administrative rulemaking, stakeholders in the judicial rulemaking process lack hearing and appeal rights.

Any court rule affecting a deprivation of property or liberty should trigger, at a minimum, the core procedural due process requirements of reasonable predeprivation notice to parties in interest and a meaningful opportunity to be heard.<sup>147</sup> While the Advisory Committees, Standing Committees, and Judicial Conference<sup>148</sup> responsible in the first instance for the promulgation of the *Federal Rules of Evidence*, *Civil Procedure*, and *Criminal Procedure* follow these procedural requirements, district courts often do not follow them during the promulgation of their local rules and general orders, and, despite the relatively straightforward requirements laid out in the REA, there is

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144. FED. R. CRIM. P. 57(a)(1).

145. See U.S.C. § 2073.

146. See, e.g., *Fuentes v. Shevin*, 407 U.S. 67, 80–81 (1972); *Sniadach v. Family Fin. Corp.*, 395 U.S. 337, 339–42 (1969); *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313–14 (1950).

147. See *Dusenbery v. United States*, 534 U.S. 161, 167 (2002); *LaChance v. Erickson*, 522 U.S. 262, 266 (1998); *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 570 n.2 (1972); *Mullane*, 339 U.S. at 314; *United States v. Alisal Water Corp.*, 431 F.2d 643, 657 (9th Cir. 2005).

148. The United States Judicial Conference is made up of the Chief Justice and chief judges from each of the thirteen courts of appeal, the Chief Judge of the Court of International Trade, and twelve district judges chosen from each circuit by the judges of that circuit. See 28 U.S.C. § 331 (2006); *A Self-Study of Federal Judicial Rulemaking: A Report from the Subcommittee on Long Range Planning to the Committee on Rules of Practice, Procedure and Evidence of the Judicial Conference of the United States*, 168 F.R.D. 679, 687 (1995) [hereinafter *Self-Study*]. District judges are selected by the circuit and district judges within their circuit and serve terms of three-to-five years. See U.S.C. § 331. Among other things, the Judicial Conference is tasked with reviewing the business of the federal courts, including review of rules of practice and procedure. See *id.* The Conference meets twice a year to “consider the administrative problems and policy issues affecting the federal judiciary and to make recommendations to Congress concerning legislation affecting the federal judicial system.” *Self-Study, supra*, at 687. It is expressly authorized to propose rules to the Supreme Court, but, as a practical matter, its proposals are nearly always vetted through the Standing Committee and the relevant advisory committee before transmission to the Supreme Court. Stancil, *supra* note 21, at 77 n.25. To date, it has empanelled advisory committees in connection with the rules of Appellate Procedure, Bankruptcy, Civil Procedure, Criminal Procedure, and Evidence. *Id.* at 77 n.26.

little case law addressing when district courts must engage in notice and comment rulemaking in the promulgation of their local rules. One of the few cases addressing the issue is *United States v. Terry*.<sup>149</sup> In *Terry*, a single district judge had issued a general order regarding the procedures for filing declarations in support of certain criminal motions.<sup>150</sup> Terry filed a criminal motion in violation of that general order, but asserted that he had no notice (actual or constructive) of the order.<sup>151</sup> The United States Court of Appeals for the Ninth Circuit found that the general order in question was subject to the notice and comment provisions of Rule 57.<sup>152</sup> The court held:

While we do not doubt the district court's power to regulate its practice in criminal cases in a manner consistent with the Federal Rules of Criminal Procedure and Local Rules, we find the notice of G.O. 384 was inadequate. In *Wardlow*, we held that the district court properly denied a request for an evidentiary hearing on a motion to suppress evidence because *Wardlow* forfeited his right to an evidentiary hearing by not properly submitting a declaration pursuant to a local rule. However, *Wardlow* is distinguishable in that, in this case, the court relied on a General Order of which neither the defendant nor his attorney had notice. We recognize that, in promulgating local rules, a district court has "considerable latitude" in calibrating its public notice method to the individual needs of its jurisdiction. However, G.O. 384, which was used as a basis to deny Terry an evidentiary hearing, is a one-judge order posted on the courthouse bulletin board and published in a local legal newspaper. Terry and his attorney received no actual notice of G.O. 384. Therefore, the district court abused its discretion in denying the motion to suppress without allowing Terry an opportunity to present evidence.<sup>153</sup>

*Terry* appears at least to require some procedural due process protections when a district court promulgates a general order that concerns practice requirements.

In *Truesdale v. Moore*,<sup>154</sup> the United States Court of Appeals for the Fourth Circuit considered a challenge to an order adopted by its Judicial Council. That order, which governed death-penalty representation within the circuit, had several purposes, one of which was challenged in *Truesdale*:

Order No. 113 imposes on district courts and the circuit court a timetable for deciding petitions brought under 28 U.S.C. §§ 2254 and 2255 by defendants who are under sentence of death. District courts are instructed to render a decision and enter final judgment within 180 days of the date on which the petition is filed, subject to an extension of up to thirty days if the court determines that justice so requires. The court of appeals is directed to render a decision within 120 days of the date on which petitioner's reply brief is filed. The court of appeals is also to rule on any petition for rehearing or suggestion for rehearing en banc within thirty days of the date the petition or suggestion

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149. 11 F.3d 110 (9th Cir. 1993).

150. *Id.* at 111–12.

151. *Id.* at 113.

152. *Id.*

153. *Id.* at 113 (citation omitted).

154. 142 F.3d 749 (4th Cir. 1998).

is filed or the date a response thereto is filed, whichever is later. And if rehearing is granted, any hearing must be conducted and a final decision rendered within 120 days of the entry of the order granting rehearing. If a case is not timely decided the Circuit Executive may seek an explanation of the reasons why the court has not complied with the time limitations. One reasonable explanation, for example, would be that a court needed to hold a case for a critical decision of the Supreme Court or the Fourth Circuit.<sup>155</sup>

Truesdale argued that the Judicial Council of the Fourth Circuit had violated 28 U.S.C. § 332(d)(1), which contains a notice and comment provision similar to that contained in *Federal Rule of Criminal Procedure* 57 and *Federal Rule of Civil Procedure* 83. Specifically, § 332(d)(1) requires that any rule or order “relating to practice and procedure shall be made or amended only after giving appropriate public notice and opportunity for comment.”<sup>156</sup> The *Truesdale* court rejected the argument that Order No. 113 was invalid for failing to comply with the notice and comment requirement, reasoning:

In drafting and considering Order No. 113, the Judicial Council addressed a simple, internal problem: the delay within the Fourth Circuit in cases involving collateral review of capital sentences. The Council selected an internal solution to that problem and determined that no public notice and comment period were necessary. Order No. 113 imposes requirements on judges and courts within the Fourth Circuit. The order is not addressed to litigants or litigators, the usual focus of procedural rules. Nothing in the order alters any briefing or other deadlines placed on counsel. Nothing creates a right in any party to enforce the court’s internal deadlines. Thus Order No. 113 is not a rule of practice or procedure for which notice and comment are required.<sup>157</sup>

*Truesdale*, therefore, distinguished between purely internal, administrative rules and rules that “impact” upon litigants or litigators.

#### IV. CASE STUDY: COURTROOM SECURITY

On February 15, 2006, the judges of the United States District Court for the Eastern District of California (Eastern District) adopted General Order 441, which required, in pertinent part: “At initial appearances, all defendants will be fully shackled.”<sup>158</sup> General Order 441 was issued after having been adopted by an unidentified majority of the judges in the Eastern District.<sup>159</sup> The order was signed by Chief United States District Judge for the Eastern District, David F.

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155. *Id.* at 758.

156. 28 U.S.C. § 332(d)(1) (2006).

157. *Truesdale*, 142 F.3d. at 760.

158. General Order No. 411 at 2, *United States v. Evans*, 2006 U.S. Dist. LEXIS 56062 (E.D. Cal. 2006) (No. 1:06-CR-00131 OWW). The judges of the Eastern District promulgated General Order 441 in light of and in putative compliance with *United States v. Howard*, 429 F.3d 843, 846 (9th Cir. 2005) (reversing and vacating the district court’s order upholding the district-wide shackling policy of the United States Magistrate Court for the Central District of California). *See United States v. Evans*, No. 1:06-CR-00051 OWW 2006 U.S. Dist. LEXIS 56062, at \*35 (E. D. Cal. Aug. 10, 2006).

159. *Evans*, 2006 U.S. Dist. LEXIS 56062, at \*14.

Levi, “for the Court.” The order defined “fully shackled” as “leg shackles, waist chains, and handcuffs.”<sup>160</sup> In support of the policy, the judges of the Eastern District found that: (1) the United States Marshal for the Eastern District “recommend[ed] full shackling of all detained defendants at all proceedings in order to assure the safety of all persons in the courtroom, including the judge, lawyers, interpreters, court personnel, defendants, and the public”; (2) the Eastern District “ha[d] a heavy criminal caseload” that required “the movement of many detained prisoners in and out of the courtroom”; (3) “[m]ost criminal proceedings are brief such that the time in which a defendant [wa]s before the court fully shackled [wa]s minimal”; and (4) the alternatives to full shackling were not practical, would require greater numbers of deputy marshals with no significant increase in decorum or dignity for the defendant in a district in which the “resources of the Marshal service” were “finite” and “[u]nshackling all defendants for all proceedings would cause very considerable delays and would disrupt the operation . . . of the calendar court [and] potentially of all other courtrooms . . . to provide additional deputies necessary to assure security when defendants [we]re unshackled.”<sup>161</sup> Attached to General Order 441 was an “Open Letter to the Courts [of] the Eastern District of California” regarding “Restraint Issues concern[ing] prisoners in U.S. Courts” from Antonio C. Amador, United States Marshal, reflecting the belief of the United States Marshals Service (USMS) that “it [wa]s in the best interest to maintain the highest level of detainee security: such as, the uniform use of full restraints during all pretrial proceedings.”<sup>162</sup> General Order 441 did not provide for any individualized determinations regarding the appropriateness of full body shackling.<sup>163</sup>

General Order 441 was not adopted pursuant to notice and comment rulemaking.<sup>164</sup> It was promulgated without a public hearing or any hearing at which sworn testimony or other evidence was taken or subject to cross-examination, without an opportunity for the affected parties to offer counter-evidence, and without any other meaningful review of the asserted rationality of the USMS policy, solely on the basis of the “open letter” to the judges from Marshal Amador, who was neither under oath nor subject to confrontation by an adverse party, which would not itself have been admissible under the *Federal Rules of Evidence*.<sup>165</sup> Instead, prior to its adoption, representatives of the

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160. *Id.* at \*4.

161. *Id.* at \*3–4.

162. *Id.* at \*5.

163. *See* United States v. Brandau, 578 F.3d 1064, 1066 (9th Cir. 2009).

164. *Evans*, 2006 U.S. Dist. LEXIS 56062, at \*22.

165. *Federal Rule of Evidence* 101 dictates that the *Federal Rules of Evidence* govern proceedings in the courts of the United States and before the United States magistrate judges, to the extent and with the exceptions stated in Rule 1101. Rule

local Federal Defender's Office and the local United States Attorney's Office met with one magistrate judge and representatives of the local USMS, which ended in "an impasse on the [shackling] issue."<sup>166</sup> At no time did any affected pretrial arrestee have the opportunity to address the "evidence" offered by USMS or to offer additional evidence prior to the adoption of the policy.<sup>167</sup>

The Eastern District is not alone in using local rules, general orders, or both to issue regulations relating to courtroom security. Courts have used general orders, for instance, to authorize maximum security measures in high-publicity cases.<sup>168</sup>

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1101 dictates that the *Federal Rules of Evidence* apply generally to criminal cases and proceedings, with the exception of a few specifically delineated miscellaneous proceedings. Rule 102 dictates that the *Federal Rules of Evidence* should be construed to secure, *inter alia*, fairness in administration ascertainment of truth, and the just determination of proceedings.

166. *Evans*, 2006 U.S. Dist. LEXIS 56062, at \*22-23.

167. The subsequent rule-based history of shackling in the Eastern District is tortured. On a consolidated appeal by several defendants from the magistrates' shackling orders their cases, a judge of the Eastern District concluded that General Order No. 441 had not been promulgated with the appropriate public notice and comment rulemaking procedure. *See id.* at \*56-57. He referred the General Order to all of the judges of the Eastern District for repromulgation. *See Brandau*, 578 F.3d at 1066. The Eastern District judges then issued General Order No. 449, adopting *Local Rule Criminal* 43-401, which set out a "new" shackling policy for initial appearances in the Sacramento and Fresno courthouses, and directing a period of public notice and comment. *Id.* The judges then vacated that Order and adopted modified rules twice more. *Id.* The present rule, announced in the second modification, General Order No. 465, applies only to the Sacramento courthouse and requires that "[u]nless the Court determines otherwise, at the commencement of initial appearances, all in custody defendants shall be in leg restraints (including waist chains)." *Id.* (alteration in original). The rule is different from General Order No. 441 in certain key respects: the present rule allows for the possibility of individualized determinations, applies only to in-custody defendants, and establishes a general practice of leg and waist shackling but not of handcuffing. *Id.* The new rule, however, does not apply to the courthouses in Fresno and Yosemite National Park. *Id.* General Order No. 465 was accompanied by written findings, which noted "the exclusion of the Fresno division from this policy" and explained that "each judge in that division is responsible for, and committed to the safety and decorum of the proceedings, and makes shackling decisions *on individual cases* in consultation with counsel, parties and the United States Marshal." *Id.* at 1066-67. The findings further explain that General Order No. 465 does not apply at all to the courthouse in Yosemite "because of the type of facilities at [that] location[ ], and because the security in [that] location[ ] is provided by federal agencies other than the Marshal Service and whose primary functions do not include courtroom security." *Id.* at 1067 (alteration in original).

168. *See United States v. Jackson*, 549 F.2d 517, 526 (8th Cir. 1977) (reviewing a general order authorizing "the presence of five plain clothes United States Marshals in the courtroom, the posting of several Marshals outside the front doors of the courtroom and the use of an electronic metal detecting device on all spectators entering the courtroom"). *See also United States v. Edwards*, 235 F.3d 1173, 1175 (9th Cir. 2000) (reviewing a local court rule requiring that all exhibits be

## V. THE PROBLEM

A local rule must be constitutional and rational, and its subject matter must be within the ambit of the court's regulatory power.<sup>169</sup> For separation of powers purposes, the REA codifies Congress's legislative power to enact substantive laws and the federal judiciary's judicial power to enact rules of practice and procedure for proceedings in its courts.<sup>170</sup>

Unfortunately, many courts have erroneously viewed the Civil Justice Reform Act of 1990 as a charter for local court procedural independence, causing one commentator to note that the goal of uniformity "has often been honored in the breach in practice in the federal trial districts."<sup>171</sup> Restricting the use of local rules was one of the purposes of the 1988 amendments to the REA.<sup>172</sup> The amendments "set forth procedural requirements for courts to follow in adopting rules and provide an oversight mechanism to ensure their consistency with each other and with national rules."<sup>173</sup> Nonetheless, challenging local rules presents its own difficulties, particularly with the mechanisms presently available.<sup>174</sup>

With regard to the shackling case study, on the one hand, the oversight of persons who are part of the judicial process has generally been accepted to be within the realm of judicial control,<sup>175</sup> and the control of courtroom procedures is generally considered to be within the exclusive control of the courts.<sup>176</sup> Courts have thus determined that they have the inherent power to adopt rules of conduct for judges, lawyers, and other court personnel.<sup>177</sup> Some courts have gone so far as to say

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placed within the custody of the clerk for security reasons, except for weapons and other sensitive material).

169. See *Frazier v. Heebe*, 482 U.S. 640, 645–46 (1986).

170. See Mullenix, *Unconstitutional Rulemaking*, *supra* note 3, at 1333.

171. Robel, *supra* note 10, at 1447 n.3.

172. McCabe, *supra* note 42, at 1688.

173. *Id.*

174. See Levin, *supra* note 47, at 1576 (arguing that the traditional mechanisms are "inadequate"); David M. Roberts, *The Myth of Uniformity in Federal Civil Procedure: Federal Civil Rule 83 and District Court Local Rulemaking Powers*, 8 U. PUGET SOUND L. REV. 537, 553 (1985) ("The impact of the rules on individual litigants is usually too glancing to warrant appeal, and so they remain unchallenged.").

175. See Wolf, *supra* note 6, at 531.

176. See, e.g., *State v. LaFrance*, 471 A.2d 340, 344–46 (N.H. 1983) (holding that a statute authorizing law-enforcement officials to wear firearms inside courtrooms was an unconstitutional violation of the principles of separation of powers because trial judges had the exclusive, inherent power to control courtroom proceedings).

177. See *supra* note 103 and accompanying text (discussing courts' inherent powers to regulate judges and attorneys). Regarding the regulation of court personnel besides judges and attorneys, see, for example, *L.J.S. v. State Ethics Comm'n*, 744 A.2d 798 (Pa. 2000) (determining that it was a violation of the constitutional

that the judiciary has the inherent power to control all practice and procedure within the courtroom.<sup>178</sup> On the other hand, defendants are not judicial personnel. Statutes of limitation and speedy-trial rules are generally enacted by legislatures,<sup>179</sup> and legislative time limits for post-trial proceedings have been upheld as constitutional under the separation of powers doctrine.<sup>180</sup>

In sum, it is not clear how far the inherent judicial rulemaking powers extend or whether, for example, they authorize the Eastern District to promulgate its court security rules as local rules. It appears that the adoption of some of these court security rules may exceed the rulemaking authority over those “matters of detail” contemplated by the federal rules of procedure, and these rules are often promulgated without prior notice and an opportunity for all affected parties to be heard.<sup>181</sup> Local rules regarding the in-court shackling of defendants involve (or should involve) weighing a number of substantive policy considerations involving litigants and litigators as they appear in court, communicate, and conduct business concerning their rights and liberty and the demeanor, decorum, and appearance of fairness in the administration of criminal justice. While one would hope that the judges’ rulemaking decisions would reflect the various constituencies who use the courts, there is presently no requirement that they do so, and it is highly questionable whether local judicial rulemaking functions should include choosing between competing, and compelling, public values. The lack of the basic procedural protections of notice and comment rulemaking and the scope of the matters that these rules govern ought to render these local rules nullities and void for lack of due process,<sup>182</sup> requiring a reviewing court to

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principle of separation of powers for the state ethics commission to discipline a probation officer); *State ex rel. Frazier v. Meadows*, 454 S.E.2d 65 (W. Va. 1994) (holding that the judiciary had the inherent authority to control the conduct of bailiffs).

178. See *Ammerman v. Hubbard Broad., Inc.*, 551 P.2d 1354, 1358 (N.M. 1976).

179. See *Boyd v. Becker*, 627 So. 2d 481 (Fla. 1993).

180. See, e.g., *Le v. State*, 953 P.2d 52, 54 (Okla. Crim. App. 1998) (holding that the legislature could define the scope of available post-conviction relief without violating the separation of powers provisions of the U.S. Constitution).

181. *United States v. Evans*, No. 1:06-CR-00051 OWW, 2006 U.S. Dist. LEXIS 56062, at \*22 (E.D. Cal. Aug. 10, 2006) (“General Orders are, as a general rule, promulgated without any notice and comment procedure.”).

182. See, e.g., *Wolff v. McDonnell*, 418 U.S. 539, 562–63 (1974); *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 569–70 (1972); *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970); *Neal v. Shimoda*, 131 F.3d 818, 831 (9th Cir. 1997) (holding that Hawaii’s system for classifying and treating sex offenders violated Neal’s right to “minimum due process protections” because it resulted in his being labeled a “sex offender” when he never had prior notice and “an opportunity to formally challenge the imposition of the ‘sex offender’ label in an adversarial setting”). “When protected interests are implicated, the right to some kind of prior hearing is paramount.” *Roth*, 408 U.S. at 569–70 (footnote omitted). Notice must be “reasonably

order them rescinded.<sup>183</sup> Of course, these rules are standing orders applicable in all cases; they are not the result of individual adjudications and so do not fall under the courts' jurisdiction to resolve cases and controversies. On the contrary, they were promulgated in a way that avoided challenge in an individual case. In other words, a good argument could be made that these court-made regulations are more than merely procedural rulemaking, since they do not directly affect a core function of courts,<sup>184</sup> but rather affect the substantive rights of the parties.

There is already a body of scholarly literature critiquing the promulgation of local rules on the ground that they pose a threat to the goal of uniform, simple rules of federal practice, particularly when they are inconsistent with the national rules<sup>185</sup> or that they involve subject matter that is not appropriate for judicial rulemaking.<sup>186</sup> After all, it is well-known that "substance" often gets packaged as "procedure," in what commentators have described as "substantive considerations secreted in procedural interstices."<sup>187</sup> The problem that this Article addresses is a different one, essentially one of venue and standing: To whom does a litigant make the argument that a court-made rule is inappropriate, either in substance or procedure, and which litigants can? These questions are particularly acute in the case of courtroom security rules, since judges are not only the makers of the rules, but also their primary intended beneficiary. Nonetheless, cases and commentary are almost entirely devoid of answers to these questions.

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calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

183. *Cf.* *Guenther v. Comm'r*, 939 F.2d 758, 760 (9th Cir. 1991) (explaining that a party's due process rights would be infringed if they were "unfairly prejudiced" by *ex parte* communication).
184. The core functions of courts have been defined as: "(1) protection of constitutional rights; (2) determination of controversies between parties, including construing constitutional and statutory provisions; and (3) enforcement of final judgments." Wolf, *supra* note 6, at 534.
185. See H.R. REP. NO. 99-422 (1985), at 14–15; CHARLES ALLEN WRIGHT, *LAW OF FEDERAL COURTS* 431–32 (5th ed. 1994); Daniel R. Coquillette et al., *The Role of Local Rules*, 75 A.B.A. J. 62, 62 (1989); John P. Frank, *Local Rules*, 137 U. PA. L. REV. 2059, 2060 (1989); Subrin, *supra* note 10, at 2018–26. *But see* Steven Flanders, *Local Rules in Federal District Courts: Usurpation, Legislation, or Information?*, 14 LOY. L.A. L. REV. 213, 216 (1981) (arguing that local courts' rulemaking has been "well-reasoned and beneficial").
186. See Robert N. Clinton, *Rule 9 of the Federal Habeas Corpus Rules: A Case Study on the Need for Reform of the Rules Enabling Acts*, 63 IOWA L. REV. 15, 52 (1977) (arguing that some rule amendments have pushed "the rulemaking process into controversial, uncharted areas of law and thus have been affecting the rights of litigants in a fashion more likely to create the kind of pressure from the public and the legal profession that generates congressional response").
187. Levin & Amsterdam, *supra* note 3, at 19.

### A. Judicial Legislation Subject to Judicial Review

One of the problems with the statutory and constitutional allocation of rulemaking authority to the courts is that it is enforced by the judicial-review process, which is supposed to ensure that the rulemaking allocation is not transgressed when the courts exercise their rulemaking power.<sup>188</sup> Unlike administrative rulemaking,<sup>189</sup> however, judicial rulemaking is not subject to judicial review—at least not in the APA sense.<sup>190</sup>

An even more fundamental problem is that, to the extent that court-made rules are reviewed, they are reviewed by the same courts that have promulgated them in the first place.<sup>191</sup> Procedurally, the present system permits local rules regulating practice to be both adopted and reviewed by local judges, at least at the first instance, in their own courts. In other words, if a litigant challenges a local dis-

188. See Mullenix, *Unconstitutional Rulemaking*, *supra* note 3, at 1330.

189. The APA governs judicial review of administrative agency actions generally. Once primary authority for a matter has been placed in agency hands, the judicial role becomes one of oversight, and § 706(2) of the APA sets the general standards for performing that role. See 5 U.S.C. § 706 (2006):

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

190. See Laurens Walker, *A Comprehensive Reform for Federal Civil Rulemaking*, 61 GEO. WASH. L. REV. 455, 481 (1993) (arguing for a limit on the discretion of the judicial rules committees to be accomplished through a set of administrative-agency-like guidelines).

191. See Coleman, *supra* note 74, at 287 n.167 (“[I]n thinking of judicial review, it would be odd for the Court to review its own originally drafted rules and amendments.”); Yeazell, *supra* note 3, at 250–51 (noting that one advantage to taking judges out of the rulemaking process would be that the Supreme Court could more legitimately give the rules “judicial review” because it would no longer hesitate to act for or against a rule because of the pressure that comes with the rule having been created by its “brethren”).

strict court rule as being beyond the scope of the court's power to promulgate, a judge on that same court would ordinarily review that challenge. The Supreme Court has the ultimate responsibility of deciding whether a rule, on its face or as applied, violates the REA and its prohibition against rules that "abridge, enlarge or modify any substantive right."<sup>192</sup> As other commentators have noted, however, the Supreme Court has never held any Rule to violate the REA.<sup>193</sup>

Substantively, rulemaking also involves policy decisions. The current system permits these policy decisions to be made in the first instance and presumably reviewed in the second by unelected federal judges. In other words, courts are tasked with determining whether their own rules are the result of reasoned decision making. The result is that this judicial review of judicial rulemaking entirely removes both the substance and the procedure of the rules being promulgated (i.e., "justice") from the domain of politics and the public discussion.<sup>194</sup> This self-review problem is then compounded by the doctrine of precedent, which complicates error correction at a later stage of review.<sup>195</sup> As one commentator has explained: "Constitutional democracy is based in no small part on the insistence that no one can be trusted with unrestrained power."<sup>196</sup>

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192. 28 U.S.C. § 2072(b) (2006).

193. See *Hanna v. Plummer*, 380 U.S. 460, 477–78 (1965) (Harlan, J., concurring); Yeazell, *supra* note 3, at 246.

194. This is not to suggest that Congress has no power to engage in its own review of court-promulgated rules, see, e.g., *Dickerson v. United States*, 530 U.S. 428, 437 (2000) ("Congress retains the ultimate authority to modify or set aside any judicially created rules of evidence and procedure that are not required by the Constitution."), although the scope of that power is the subject of a great deal of scholarly debate. For the purpose of this Article, it suffices to say that, historically, Congress has not exercised its powers of review and intervention over court rules often, see *Burbank, REA, supra* note 3, at 1018 (describing the "long-enduring pattern of congressional acquiescence" to rules adopted by the Court), and it is impractical to expect that it would do so in the context of any objectionable local district court rule, particularly one that does involve a high-profile issue. See *Pound, supra* note 3, at 602 ("Legislatures today are so busy, the pressure of work is so heavy, the demands of legislation in matters of state finance, of economic and social legislation, and of provision for the needs of a new urban and industrial society are so multifarious, that it is idle to expect legislatures to take a real interest in anything so remote from newspaper interest, so technical, and so recondite as legal procedure.").

195. See *McConnell, supra* note 17, at 105–06. In this context, the practice of following precedent can have drawbacks, if it prevents courts from adjusting rules to meet new conditions. The relative advantages and disadvantages of a doctrine of precedent, however, are beyond the scope of this Article.

196. *Id.* at 91.

## B. Bias, the Appearance of Partiality, and Recusal

As other commentators have noted, when judges rather than lawyers frame the rules of court, they open themselves to the perception of partiality, in light of their self-interest in the substantive outcome of such rules.<sup>197</sup> Frederick Schauer has argued, in the context of adjudicatory rules, that the courts' need to resolve concrete disputes generates cognitive biases that distort judicial development of legal rules.<sup>198</sup> These concerns are even more prescient in the context of codified rule promulgation, which is not bound by precedent<sup>199</sup> or ana-

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197. Yeazell, *supra* note 3, at 240; see also Jonathan R. Macey, *Judicial Preferences, Public Choice, and the Rules of Procedure*, 23 J. LEGAL STUD. 627, 627, 631–32 (1994) (arguing that the possibility that judges seek to maximize self-interest is “particularly valid in the context of a discussion about procedural rules” because they are “promulgated under the direction of judges”). But see Janet Cooper Alexander, *Judges' Self-Interest and Procedural Rules: Comment on Macey*, 23 J. LEGAL STUD. 647 (1994) (disputing many of Macey's contentions about judicial self-interest).

198. See Frederick Schauer, *Do Cases Make Bad Law?*, 73 U. CHI. L. REV. 883 (2006).

199. By “bound by precedent,” this Article refers to the practice of conforming current decisions to rules established in prior cases. On the subject of precedent, see generally LARRY ALEXANDER & EMILY SHERWIN, *THE RULE OF RULES: MORALITY, RULES, AND THE DILEMMAS OF LAW* 132–56 (2001) (noting the problem of cognitive bias, evaluating natural, rule, and result models of precedent, and adopting a model that “instructs the present judge to discover and conform to the intentions of past judges, who occupy for this purpose the position of Lex”); EISENBERG, *supra* note 51, at 50–76 (analyzing the ways courts determine the meaning of precedent and what it means to be bound by precedent); K. N. LLEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* 64–69 (1960) (discussing the “two-headed” nature of precedent); JOSEPH RAZ, *THE AUTHORITY OF LAW* 183–89 (1979) (describing the practice of “distinguishing” precedent); FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE BASED DECISION-MAKING IN LAW AND LIFE* 181–87 (1991) (analyzing the relationship between reasoning from rules and reasoning from precedent); Larry Alexander, *Constrained by Precedent*, 63 S. CAL. L. REV. 1 (1989) (evaluating natural, rule, and result models of precedent and advocating a rule model of precedent); Barbara Baum Levenbook, *The Meaning of a Precedent*, 6 LEGAL THEORY 185 app. at 233–38 (2000) (discussing coherence theories of precedent meaning); Robert S. Summers, *Precedent in the United States (New York State)*, in *INTERPRETING PRECEDENTS: A COMPARATIVE STUDY* 355, 378–94, 401–04 (D. Neil MacCormick & Robert S. Summers eds., 1997) (introducing a case study of the role of precedent in New York).

Whether courts are, in fact, constrained by precedent rules is a subject of much debate. See SCHAUER, *supra*, at 185–87 (discussing precedent rules implicit in judicial opinions); Frederick Schauer, *Prescriptions in Three Dimensions*, 82 IOWA L. REV. 911, 916–18 (1997) (suggesting that rules need not be canonical in order to be determinate). Most notably, legal realists are known for their skepticism about the ability of rules to constrain decisionmaking. See, e.g., LLEWELLYN, *supra*, at 66–69 (discussing the malleability of precedent rules); see also Brian Leiter, *American Legal Realism*, in *THE BLACKWELL GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY* 50, 50–53 (Martin P. Golding & William A. Edmundson eds., 2005) (identifying skepticism about the constraint of rules as part of the legal realism school). For counterarguments in favor of the capacity of rules to carry determinate meaning, see SCHAUER, *supra*, at 53–62 (defending a theory of

logical reasoning.<sup>200</sup> Judicial domination of court rulemaking presents a significant risk of self-dealing because “judges face at least some incentive to pursue rules that . . . may be contrary to congressional intent, but attractive to the judiciary for other reasons.”<sup>201</sup> One

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semantic autonomy); Jules L. Coleman & Brian Leiter, *Determinacy, Objectivity, and Authority*, 142 U. PA. L. REV. 549, 568–70, 607–21 (1993) (defending certain qualified understandings of the objectivity of law). This is not an issue that this Article seeks to resolve. For the purposes of this Article, it suffices simply to say that courts generally view themselves as bound to follow precedents in adjudication of disputes and, consequently, that they regularly study prior opinions in search of applicable rules, and that this attention to precedent can help correct bias at the time judges first consider and announce rules because judges who believe that they must take precedent into account will feel obliged to review prior opinions with care before deciding a case and preparing an explanatory opinion. See Emily Sherwin, *Judges as Rulemakers*, 73 U. CHI. L. REV. 919, 925–26 (2006).

200. “Analogy is a method of decision when no precedent rule applies (or perhaps when a judge wishes to avoid a seemingly applicable rule by narrowing its scope).” Sherwin, *supra* note 199, at 927. The analogical practitioner studies an array of intuitively related cases and “abduces” criteria that make them relevantly similar or different. See Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, 109 HARV. L. REV. 925, 962–63 (1996) (describing the process of drawing an “analogy-warranting rule” from the facts of prior cases as “abduction”). The practitioner “then decides the case at hand in a manner that conforms to the outcomes of prior cases classed as similar.” Sherwin, *supra* note 199, at 927. One effect of the practice of analogical reasoning is to narrow the scope of judicial lawmaking. See *id.* at 929. “The rules and reasons courts cite in support of analogies tend to operate at a low level of generality.” *Id.* “Thus, the perceived obligation to draw analogies helps to keep judicial lawmaking incremental. Of course, incremental rulemaking does not in itself counteract situational biases; in fact, it may exacerbate the bias by narrowing the scope of the court’s inquiry.” *Id.* But it can minimize the harm done when bias distorts judicial reasoning. See SCHAUER, *supra* note 199, at 186 (noting that, even without authoritative precedent, judges who search for analogies remain constrained by the “existing linguistic and conceptual structure”). For more on the subject of analogical reasoning, see ALEXANDER & SHERWIN, *supra* note 199, at 128–35 (assessing the advantages and disadvantages of analogical reasoning and concluding that it can only be justified on “second-best” grounds); STEVEN J. BURTON, AN INTRODUCTION TO LAW AND LEGAL REASONING 27–41 (2d ed. 1995) (discussing the three steps of analogical reasoning: identifying an authoritative precedent, assessing factual similarities and differences from the precedent case, and judging whether the similarities or differences are more important); EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 1–6 (1949) (explaining that legal reasoning primarily consists of “reasoning by example” on a case-by-case basis); CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT 62–100 (1996) (arguing that courts are drawn to analogical reasoning largely because analogies do not require completely theorized agreements); Larry Alexander, *Bad Beginnings*, 145 U. PA. L. REV. 57, 80–86 (1996) (arguing that analogical reasoning entrenches the erroneous outcomes of past decisions); Brewer, *supra*, at 925–29, 962–63 (delineating a three-step model of analogical reasoning and claiming that analogical reasoning can produce results with rational force).

201. Stancil, *supra* note 21, at 100.

concern that has been expressed is that the result of this will be the creation of procedural rules by insulated judges acting on their own prejudices.<sup>202</sup>

This Article is concerned with a related but different question: Whether it is improper for a judge who participated in promulgating a local rule to sit in judgment over the validity of that rule when it is challenged in a specific case after adoption. As Judge Weinstein has noted: "One matter of some concern [is] the ability of any court to remain impartial in its consideration of a rule when an attack was made upon the rule's wisdom or constitutionality, since the same body that promulgated the rule was passing upon it."<sup>203</sup>

28 U.S.C. § 47 (2006) provides: "No judge shall hear or determine an appeal from the decision of a case or issue tried by him."<sup>204</sup> While the Supreme Court has not had the opportunity to construe § 47, it has strictly construed its predecessor, the Judiciary Act of 1891. In *Rexford v. Brunswick-Balke-Collender Co.*,<sup>205</sup> the Court held:

The terms of the statute . . . are both direct and comprehensive. Its manifest purpose is to require that the circuit court of appeals be composed in every hearing of judges none of whom will be in the attitude of passing upon the propriety, scope, or effect of any ruling of his own made in the progress of the cause in the court of first instance, and to this end the disqualification is made to arise, not only when the judge has tried or heard the whole cause in the court below, but also when he has tried or heard any question therein which it is the duty of the circuit court of appeals to consider and pass upon.<sup>206</sup>

In *Moran v. Dillingham*,<sup>207</sup> the Court explained:

The intention of congress in enacting that no judge before whom "a cause or question may have been tried or heard" in a district or circuit court, "shall sit on the trial or hearing of such cause or question" in the circuit court of appeals, manifestly, was to require that court to be constituted of judges uncommitted and uninfluenced by having expressed or formed an opinion in the court of first instance. . . .

The enactment, alike by its language and by its purpose, is not restricted to the case of a judge's sitting on a direct appeal from his own decree upon a

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202. WEINSTEIN, *supra* note 68, at 8–11, 54–55.

203. *Id.* at 8. See Charles W. Grau, *Who Rules the Courts?: The Issue of Access to the Rulemaking Process*, 62 JUDICATURE 428, 430 (1979) ("The combination of rulemaking and rule applying roles renders the deciding judges unable to impartially decide the validity of their own rules.")

204. See, e.g., *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 431 F.2d 135 (4th Cir. 1970) (Craven, J.) (disqualifying himself as a member of the United States Court of Appeals for the Fourth Circuit in the hearing and disposition of an appeal of desegregation orders issued by the United States District Court for the Western District of North Carolina because, as a district judge in the same district, he had heard and determined a case involving the same parties and ultimate question relating to the sufficiency of the school board's actions in complying with the constitutional requirements of desegregation).

205. 228 U.S. 339 (1913).

206. *Id.* at 343–44 (citations omitted).

207. 174 U.S. 153 (1899).

whole cause, or upon a single question. . . . [A] judge who has once heard the cause upon its merits in the court of first instance is certainly disqualified from sitting in the circuit court of appeals on the hearing and decision of any question in the same cause which involves in any degree matter upon which he had occasion to pass in the lower court.<sup>208</sup>

28 U.S.C. § 455 (2006) provides, in pertinent part:

- (a) Any justice, judge, or magistrate judge shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
- (b) He shall also disqualify himself in the following circumstances:
  - (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
  - (2) Where . . . the judge . . . has been a material witness concerning [the matter in controversy];
  - (3) Where he has served in governmental employment and in such capacity has participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;
  - (4) He knows that he . . . has . . . any . . . interest that could be substantially affected by the outcome of the proceeding . . . .
- (d) For the purposes of this section, . . . “proceeding” includes pretrial, trial, appellate review, or other stages of litigation . . . .

“The statute imposes a self-enforcing duty on the judge.”<sup>209</sup> Under § 455(a), a judge “does not have to be *subjectively* biased or prejudiced, so long as he *appears* to be so.”<sup>210</sup> Section 455 requires not only that judges be subjectively confident of their ability to be even-handed, but

208. *Id.* at 156–57 (quoting Judiciary Act of 1891, ch. 517, 26 Stat. 826, 827).

209. *United States v. Conforte*, 624 F.2d 869, 880 (9th Cir. 1980).

210. *Liteky v. United States*, 510 U.S. 540, 553 n.2 (1994). The “extrajudicial-source” doctrine, which the Supreme Court explored in great detail in *Liteky*, finds its origins in earlier recusal cases, including *United States v. Grinnell Corp.*, 384 U.S. 563, (1966), which involved 28 U.S.C. § 144 (2006) (requiring recusal of a judge, upon motion, for bias or prejudice). *Grinnell* held that “[t]he alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case.” *Id.* at 583. *See United States v. \$292,888.04 in U.S. Currency*, 54 F.3d 564, 566 (9th Cir. 1995) (holding that “[r]ecusal is required ‘only if the bias or prejudice stems from an extrajudicial source and not from conduct or rulings made during the course of proceedings.’” (quoting *Pau v. Yosemite Park & Curry Co.*, 928 F.2d 880, 885 (9th Cir. 1991))).

*Liteky* applied the extrajudicial-source doctrine to § 455, but clarified that the existence of an “extrajudicial source” was neither a necessary nor a sufficient condition for “bias or prejudice” recusal. The presence of an extrajudicial source is not sufficient on its own, because “some opinions acquired outside the context of judicial proceedings (for example, the judge’s view of the law acquired in scholarly reading) will not warrant recusal.” *Liteky*, 510 U.S. at 554. Neither *Liteky* nor any other case further distinguishes between the types of extrajudicial information that would demand recusal and those that would not.

The presence of information from an extrajudicial source is not a necessary condition for recusal because bias could also exist “in the rarest of circumstances” where no extrajudicial source is involved if the judge displayed “deep-seated and unequivocal antagonism that would render fair judgment impossible.” *Id.* at 556.

also that an informed, rational, objective observer would not doubt the judges' impartiality.<sup>211</sup> That is true because § 455(a) concerns not only fairness to individual litigants, but also the public's confidence in the federal judiciary, which may be irreparably harmed if a case is allowed to proceed before a judge who appears to be tainted.<sup>212</sup> "[T]he test under either subsection (a) or (b) is the same, namely, whether or not given all the facts of the case there are reasonable grounds for finding that the judge could not try the case fairly, either because of the appearance or the fact of bias or prejudice."<sup>213</sup>

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211. *Bernard v. Coyne*, 31 F.3d 842, 844 (9th Cir. 1994).
212. *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 859–60 (1988); *see also In re Murchison*, 349 U.S. 133, 136 (1955) (holding that the right to trial by an impartial judge “is a basic requirement of due process”); *Offutt v. United States*, 348 U.S. 11, 14 (1954) (explaining that the Court must guard against district judges “sitting themselves in judgment upon misconduct of counsel where the contempt charged is entangled with the judge’s personal feeling against the lawyer”).
213. *Conforte*, 624 F.2d at 881. *See In re Kensington Int’l Ltd.*, 368 F.3d 289 (3d Cir. 2004) (holding that a federal judge hearing consolidated bankruptcy cases was irreversibly tainted, warranting disqualification from some of the cases, by a structural conflict of interest arising from the judge’s extensive ex parte discussions with two neutral advisors that covered all of the major issues in the consolidated cases, including one advisor’s drafting of legal opinions, and from extensive and substantive ex parte meetings with the parties, which added to the appearance of partiality); *Clemmons v. Wolfe*, 377 F.3d 322 (3d Cir. 2004) (holding that a federal district judge should have recused himself, sua sponte, from presiding over the adjudication of a habeas corpus petition challenging a state-court trial and conviction over which he presided in his former capacity as a state-court judge); *In re Brooks*, 383 F.3d 1036 (D.C. Cir. 2004) (holding that a special master, who had been appointed in connection with underlying litigation relating to mismanagement of Indian trust accounts, should have been recused from contempt proceedings brought against various government employees because the special master’s tasks in the underlying litigation resulted in numerous ex parte communications with witnesses and third parties, the special master’s tasks in the contempt proceedings were adjudicative in nature, and the nature and extent of the special master’s ex parte contacts would have caused an informed observer reasonably to question his impartiality); *Cobell v. Norton*, 334 F.3d 1128 (D.C. Cir. 2003) (holding that the district court clearly erred in appointing a Court Monitor as a Special Master-Monitor where his numerous ex parte communications and his significant prior knowledge obtained as Court Monitor, on the basis of which he had formed and expressed opinions of continuing relevance to the litigation, cast doubt on his impartiality); *Edgar v. K.L.*, 93 F.3d 256 (7th Cir. 1996) (per curiam) (holding that a judge’s actions in meeting, ex parte, with a panel of experts that he had appointed to investigate Illinois’s mental-health institutions and programs, in order to receive a preview of the panel’s conclusions, was grounds for disqualification and that prohibiting opposing counsel from discovering what was said in the meetings resulted in unauthorized private investigation by the judge raising concerns about the judge’s impartiality); *United States v. Arnpriester*, 37 F.3d 466 (9th Cir. 1994) (holding that a district judge could not adjudicate a case since, while serving as an Assistant United States Attorney, he had been responsible for the investigation leading to the defendant’s indictment); *United States v. Winston*, 613 F.2d 221, 222 (9th Cir. 1980) (holding

The common gravamen of the cases interpreting § 47 and § 455 is that, when a court has been privy to *ex parte* communications and deliberations that affected a prior decision, that court is disqualified from ruling on the same issue(s) when it is raised in a subsequent proceeding. This is because such a ruling would constitute a determination of “an appeal from the decision of a case or issue tried by” that court, in violation of § 47, because the court’s “impartiality might reasonably be questioned” in the subsequent proceeding, in violation of § 455(a), or because the prior *ex parte* communication would imbue the court with “personal knowledge of disputed evidentiary facts concerning the proceeding,” render the court “a material witness concerning” the matter in controversy, or provide the court with an “interest that could be substantially affected by the outcome of the [subsequent] proceeding,” in violation of § 455(b).

The process by which many of these local court rules are issued, as well as the practice of courts reviewing the local rules that they have issued, gives rise to a structural conflict of interest in having any district judge of the promulgating district review a challenge to the promulgation and enforcement thereof. The result of the typical judicial rulemaking process is that each of the district judges possess two types of extrajudicial information that warrant their recusal: (1) knowledge of the procedural history of the promulgation of the local rule; and (2) knowledge of the substantive necessity of the rule beyond that set forth in the written record of adjudication.

Unfortunately, there is very little case law addressing this type of extrajudicial-source bias in the context of the promulgation of local court rules that are subsequently challenged. In a typical recusal case, the recused judge was previously involved in the individualized application of the law to a particular party. An analogous, although not entirely parallel, situation to a district judge evaluating the legality of a local district rule would be if a legislator voted for a piece of legislation and was then appointed to a court hearing challenges to

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that the district judge was not required to recuse himself merely because he had received a psychiatric report of a codefendant and had found the codefendant incompetent to stand trial). *Edgar* relied upon two additional cases that are informative: *In re School Asbestos Litigation*, 977 F.2d 764 (3d Cir. 1992) and *Hathcock v. Navistar International Transportation Corp.*, 53 F.3d 36, 41 & n.4 (4th Cir. 1995). The judge in *School Asbestos Litigation* had attended a partisan workshop covering material that was the subject of a key merits issue in an ongoing case, 977 F.2d at 770, while the judge in *Hathcock* made a speech to a Trial Lawyer’s Association seminar containing remarks that were “pointedly hostile toward defendants” while a jury trial on the issue of damages was pending before him. *Hathcock*, 53 F.3d at 39. Even though the seminar and the speech were not directly connected with the ongoing litigation, the events were open to the public, and evidence could be taken about the proceedings, they were still grounds for mandatory recusal as they indicated the judges’ bias or inclination for or against a particular party on substantive legal issues.

the constitutionality of that same statute. The problem, however, is that there is no case law squarely deciding that such former legislator could not rule on the constitutionality of such legislation.

Nonetheless, many of the circumstances found problematic in cases like *Edgar v. K.L.*, *In re Kensington*, *In re School Asbestos Litigation*, and *Hathcock v. Navistar* are present in the context of judicial review of judicially created rules.<sup>214</sup> If nothing else, all of the judges who participated in the promulgation of these rules were likely privy to *ex parte* communications regarding their necessity. The United States Court of Appeals for the Ninth Circuit concluded that recusal was warranted on appeal of the Eastern District's court-promulgated shackling policy:

On remand, the consolidated case—which challenges the constitutionality of a rule promulgated by the judges of the Eastern District, as well as their very authority to promulgate it—shall be assigned to an out-of-district judge. Although we do not suggest that there is any actual bias on the part of the judges, our ethics rules require recusal where a judge's impartiality "might reasonably be questioned." Here, the circumstances surrounding adoption of these orders suggest that an objective observer might reasonably question the impartiality of the judges.<sup>215</sup>

What is noteworthy about the Ninth Circuit's remand order in *Brandau*, however, is not its analysis, which is insightful, but its anomalousness. In finding that a judge of the district that promulgated a local rule could not adjudicate the constitutionality of that rule, much less that all of the judges of the district should be treated as parties in any subsequent proceedings, the Ninth Circuit cited no apposite precedent, either controlling or persuasive, for its holding, and the author of this Article could find none.

### C. Standing, Scope, and Standard of Review

In the context of administrative rulemaking, the Supreme Court has clearly interpreted constitutional and statutory standing requirements, enabling a wide variety of stakeholders to seek judicial review of agency rules.<sup>216</sup> By contrast, there is little case law governing who

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214. See *supra*, note 213 and accompanying text.

215. *United States v. Brandau*, 578 F.3d 1064, 1070 (9th Cir. 2009) (citations omitted) (quoting 28 U.S.C. § 455(a) (2006)). In remanding the case for further proceedings, the court of appeals suggested that the district judges who had promulgated the local rule in question could "retain separate [from the United States Attorney's Office] counsel to represent their interests at that proceeding" so that they could "intervene in the proceedings" or "file an amicus brief." *Id.*

216. See, e.g., *Ass'n of Data Processing Orgs. v. Camp*, 397 U.S. 150, 152–53 (1970) (holding that a plaintiff could satisfy the Article III case or controversy requirement by alleging that the "challenged action caused him injury in fact, economic or otherwise" or by seeking to protect an interest that was "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question").

has standing to challenge court rules—for example, what injury an individual must suffer as a result of a judicially created rule to give rise to a case or controversy that a reviewing court could decide. In the *Brandau* case, the Government sought, albeit unsuccessfully, to dismiss Brandau's challenge to the shackling rule at issue on the ground that he lacked standing to challenge it.<sup>217</sup>

The same lack of governing case law exists for the scope and standard of a court's review of a court-created rule—for example, if a court refused to adopt a rule, whether such action would be reviewable at all and, if so, how much deference the reviewing court would be required to give either to a court-created rule or to the lack thereof. In the context of administrative rulemaking, courts generally answer these rules by interpreting the legislative intent of Congress in delegating the rulemaking power in the first instance.<sup>218</sup> Because the text of the REA is silent on this issue and neither the legislative history nor the statutory structure gives any suggestion of the answer to these questions,<sup>219</sup> however, courts have not answered these questions in the context of judicial rulemaking. While courts' review of agency rulemaking roughly follows the same general approach as they have followed for judicial review of adjudication,<sup>220</sup> they have not addressed the question of whether this framework should also apply to the review of court-made rules or how much deference they should give to the decisions of judicial rulemakers. The purpose of judicial review of agency rules is to allow courts to determine whether they are consistent with the legislative intent behind the statute enabling them.<sup>221</sup> The purpose of judicial review of judicial rules is unclear, most importantly the question of how much deference a reviewing court should give to a promulgating court's rulemaking (particularly when that promulgation might have been its own).

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217. See *Brandau*, 378 F.3d at 1067–69.

218. See *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984) (announcing the two-part test for judicial review of administrative agency rulemaking delegated by Congress through enabling statutes). When courts review agency adjudication, if Congress's intent is clear, the issue is a question of law that is reviewed de novo. See *Packard Motor Car Co. v. NLRB*, 330 U.S. 485 (1947) (upholding judicial enforcement of an NLRB order requiring Packard to bargain with a union); see also *NLRB v. Highland Park Mfg. Co.*, 341 U.S. 322 (1951) (finding that the definition of a “union” was a question of law reviewable de novo by the courts). When Congress's intent is unclear, the issue becomes a mixed question of law and fact, and courts must defer to the agency's decision-making. See *NLRB v. Hearst Publ'ns, Inc.*, 322 U.S. 111 (1944).

219. This is likely because the statute seeks largely to codify the vague mandate of Article III and the inherent rulemaking powers that courts had at common law.

220. See Sidney A. Shapiro & Robert L. Glicksman, *Congress, the Supreme Court, and the Quiet Revolution in Administrative Law*, 1988 DUKE L. J. 819, 858 (1988).

221. See *id.* at 864–65 (proposing that judicial review should be thought of as a way to compensate for limitations in the performance of other branches of government).

## VI. CONCLUSION

When reorganizing government just before the Revolution, the predominant concern of Americans had been freeing legislative and judicial power from executive control. The judiciary was not yet clearly conceptualized as a distinct branch of government. Rather, the administration of justice was commonly conflated with the executive power. The power of adjudication implicated the Crown fully because colonial judges served at the King's pleasure and the Privy Council was the court of last resort for the colonists. When the colonies turned to creating the first wave of new constitutions, their focus was on curbing the magistracy and establishing the broad scope of legislative power. Judges were freed from the power of the governor, but subjected in substantial measure to legislative supervision.<sup>222</sup>

Historically, the Supreme Court has been more willing to assert its inherent rulemaking authority in the context of the promulgation of rules governing criminal, rather than civil, proceedings,<sup>223</sup> asserting a "supervisory authority over the administration of criminal justice in the federal courts."<sup>224</sup> There is no reason for this greater willingness in Article III, the REA, or logic.

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222. Peter M. Shane, *Interbranch Accountability in State Government and the Constitutional Requirements of Judicial Independence*, 61 LAW & CONTEMP. PROBS. 21, 27–28 (1998) (footnotes omitted). For a contrary position, see *Agran v. Checker Taxi Co.*, 105 N.E.2d 713, 715 (Ill. 1952) ("Prior to the adoption of the United States Constitution, courts exercised complete power in the control of their own procedure. . . . That system became modified in this country by the adoption of statutes, whereby the legislature usurped a part of this rulemaking function.").
223. *Robel*, *supra* note 10, at 1478; see *Castro v. United States*, 540 U.S. 375, 382–83 (2003) (exercising inherent supervisory authority to establish a procedural rule requiring a district court to notify a pro se litigant about the consequences of re-characterizing a prisoner's post-trial motion as a petition for writ of habeas corpus before doing so); *United States v. Valenzuela-Bernal*, 458 U.S. 858, 878–79 (1982) (O'Connor, J., concurring) (urging the Court to exercise its inherent authority to impose a standard regarding the detention of deportable aliens who are material witnesses in criminal cases); *Rosales-Lopez v. United States*, 451 U.S. 182, 190–92 (1981) (exercising inherent authority to establish a procedural rule requiring district courts to inquire into racial prejudice during voir dire when there is a possibility that racial prejudice could influence the jury); *McCarthy v. United States*, 394 U.S. 459, 463–64 (1969) (exercising inherent authority to establish a procedural rule entitling a defendant to vacate a guilty plea if the district court accepted it in violation of *Federal Rule of Criminal Procedure* 11); *Johnson v. United States*, 318 U.S. 189, 199 (1943) (exercising inherent authority to prohibit comment on a criminal defendant's refusal to testify). *But see* *Thiel v. S. Pacific Co.*, 328 U.S. 217, 225 (1946) (requiring, under the Court's "power of supervision over the administration of justice in the federal courts," that federal civil juries be chosen from a cross-section of the community in order to preserve the integrity of the federal courts' processes).
224. *McNabb v. United States*, 318 U.S. 332, 341 (1943) (asserting the power to supervise lower federal courts by devising procedures for them not otherwise required by the Constitution or statute and ordering the suppression of *McNabb's* confession in his federal murder trial because it resulted from a coercive delay in presenting him before a magistrate judge after his arrest). Adjudicative supervisory authority and the authority to promulgate codified rules are, or should be, distinct concepts. See Amy Coney Barrett, *The Supervisory Power of the Supreme*

The framers saw the separation of powers as a protection of civil rights. In arguing against amending the Constitution to include enumerated rights, Alexander Hamilton wrote that the Constitution without a bill of rights is “in every rational sense, and to every useful purpose, A BILL OF RIGHTS.”<sup>225</sup> Under the separation of powers doctrine, any regulation is permissible unless it is prohibited by proper legal action. The Constitution authorizes the government to regulate only in one way—“through a legislative process structured to minimize prohibitions for factional purposes.”<sup>226</sup>

Judicial rulemaking sacrifices many of the protections of the full legislative process, particularly the requirement of action by three distinct institutions. Rather than the typical separation of powers ques-

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*Court*, 106 COLUM. L. REV. 324 (2006); Amy Coney Barrett, *Stare Decisis and Due Process*, 74 U. COLO. L. REV. 1011, 1052–60 (2003) (arguing that the federal courts’ rigid approach to stare decisis blurs the distinction between adjudication and legislation by treating case holdings like generally applicable rules); Burbank, *Procedure, Politics*, *supra* note 6, at 1681 (insisting that the distinction “between procedure fashioned (or applied as precedent) in decisional law and that provided prospectively in court rules” is critical in any discussion of the court’s inherent power over rulemaking). Cf. A.W.B. Simpson, *The Common Law and Legal Theory*, in OXFORD ESSAYS IN JURISPRUDENCE 77, 84–86 (A.W.B. Simpson ed., 2d Series 1973) (explaining that “to express an authoritative opinion is not the same thing as to legislate”). In reaching its holding in *McNabb*, the Court conflated its supervisory authority and authority to promulgate codified rules, reasoning that “[j]udicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence.” *McNabb*, 318 U.S. at 340. On at least one occasion, the Supreme Court has explicitly acknowledged that it considers adjudication and rulemaking to be two means of accomplishing the same end. See *Hawkins v. United States*, 358 U.S. 74, 78 (1958) (citation omitted) (“[T]his Court, by decision or under its rule-making power, can change or modify the [witness-competency rules] where circumstances or further experience dictates.”); see also Stephen B. Burbank, *Procedural Change: Who, How, Why, and When?*, 49 ALA. L. REV. 221, 245 (1997) (noting that courts sometimes use “case-by-case adjudication to circumvent or preempt court rulemaking obstacles posed by the Enabling Act process”). At the same time, the line between the Court’s supervisory-power rulings and other cases is not always clear. Beale, *supra* note 109, at 1448 n.100. It can be hard to identify the point at which the interpretation and application of the law cross over into lawmaking, but there must be some difference between the two if legislation and adjudication are to remain distinct. See Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1289 (1996). For examples of post-*McNabb* cases in which the Supreme Court has formulated rules of evidence or procedure for inferior federal courts without explicitly invoking its “supervisory authority,” see *Jencks v. United States*, 353 U.S. 657, 672 (1957) (holding that a criminal action had to be dismissed when the Government failed to comply with a discovery-production order); *Roviaro v. United States*, 353 U.S. 53, 65 (1957) (finding prejudicial error in the trial court’s denial of Roviaro’s request to compel the Government to disclose the identity of an undercover informant).

225. THE FEDERALIST NO. 84, at 515 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

226. Schoenbrod, *Separation of Powers*, *supra* note 12, at 381.

tion of *delegation*, however, judicial rulemaking gives rise to the opposite question of *usurpation*. Article III does not speak to the federal courts' rulemaking authority, and the cases dealing with congressional delegations of power and modification of federal court jurisdiction are largely unavailing in resolving the issue of judicial usurpation of rulemaking power.<sup>227</sup>

In enacting substantive local rules, federal courts are exercising powers constitutionally committed to Congress and thereby impeding sufficient independent review of such exercises.<sup>228</sup> The result is a diffusion of responsibility: "Because so many people and so many layers are involved in rulemaking, in a broader sense, no one is in charge."<sup>229</sup> As Stephen Carter has aptly explained: "The entire point of a constitution that governs structure is to enable government to function while restraining the ability of government to restructure itself."<sup>230</sup>

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227. There is a significant line of decisions dealing with problems of the scope of Article III case and controversy judicial power. See *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 63–76 (1982) (discussing judicial power in terms of the types of cases and controversies the Framers assigned to an independent Article III branch and the three situations where Article III does not bar creation of legislative courts or delegations to administrative agencies). These cases typically involve an issue concerning congressional delegation to a legislative court or administrative agency that allegedly transgresses the scope of Article III jurisdiction by conferring judicial powers on persons lacking Article III independence. See *id.* at 64–70. In *Northern Pipeline*, for example, supporters of the Bankruptcy Act argued that, since Article I empowered Congress to create legislative courts, it could have thus "constituted" the bankruptcy courts as their equivalents. *Id.* at 63. The Court, however, rejected this assertion. It viewed situations allowing Article III creation of legislative courts as "exceptional" and grounded in constitutional text or in historical consensus. *Id.* at 68–70. "The Court has never considered rulemaking authority per se to be an attribute of the judicial power under Article III." Robel, *supra* note 10, at 1481 n.221. These cases, therefore, provide problematic analogies for construing judicial rulemaking beyond the scope of explicitly delegated powers, which does not create a legislative court nor delegate power to an administrative agency.

228. Cf. Erwin Chemerinsky, *A Paradox Without a Principle: A Comment on the Burger Court's Jurisprudence in Separation of Powers Cases*, 60 S. CAL. L. REV. 1083, 1110–11 (1987) (suggesting that the Court focus on three inquiries in evaluating separation of powers issues: whether one branch is exercising powers constitutionally committed to another, preventing another from performing its functions or duties, or acting in a manner that prevents sufficient review or control by another, or both). "Of course, if Congress cares enough about a given procedural change, it can always act directly to amend the relevant rules by statute." Stancil, *supra* note 21, at 128 n.167. This Article leaves for others the explanation of why relying on Congress to undo ill-advised court rules is an inadequate remedy.

229. Yeazell, *supra* note 3, at 231.

230. Stephen L. Carter, *Constitutional Improprieties: Reflections on Mistretta, Morrison, and Administrative Government*, 57 U. CHI. L. REV. 357, 366 (1990).