INHERENT JUDICIAL AUTHORITY: A STUDY IN CREATIVE AMBIGUITY

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INTRODUCTION

> "Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates." These powers are "governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases."[1]

This principle, repeatedly declared by the United States Supreme Court since 1812, is a fundamental tenet of federal courts jurisprudence.[2] The existence of such powers is described as being virtually self-evident. Inherent powers are those "necessary to the exercise of all others"[3] and are said to derive from the "control necessarily vested in courts to manage their own affairs."[4]

Yet when courts seek to apply these necessary and self-evident powers to specific legal problems, their precise nature and scope turn out to be surprisingly mysterious. The inherent powers doctrine has been called the "murkiest, and most extensive" of the federal courts'

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1 Chambers v. NASCO, Inc., 501 U.S. 32, 43 (1991) (citations omitted) (first quoting Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 227 (1821); then citing *Ex parte* Robinson, 86 U.S. (19 Wall.) 505, 510 (1873); and then quoting Link v. Wabash R.R. Co., 370 U.S. 626, 630–31 (1962)).

2 Levine v. United States, 362 U.S. 610, 615 (1960) (citing United States v. Hudson, 11 U.S. (7 Cranch) 32, 34 (1812)).

3 Roadway Express, Inc. v. Piper, 447 U.S. 752, 764 (1980) (quoting *Hudson*, 11 U.S. at 34).

4 *Link*, 370 U.S. at 630.

sanctioning powers.[5] One civil procedure scholar describes it as a "pretty ill-defined" doctrine that has been used to justify a wide variety of judicial actions.[6] He notes that it "gets hauled out of the attic at unpredictable times to deal with odd-ball cases."[7] Another scholar states that the Supreme Court "has offered remarkably different interpretations of congressional authority over the judiciary's inherent powers, occasionally in the same opinion."[8] A third complains, "The Supreme Court's jurisprudence is schizophrenic: it sometimes states that inherent powers are available only when they are indispensable to the discharge of the judicial power, yet it often authorizes their use in less pressing situations."[9]

All these disparaging descriptions are, to a considerable degree, accurate. The scope of inherent judicial authority is frustratingly vague and its use in particular cases is frequently unpredictable. Moreover, the very source of the doctrine remains unclear. Is it grounded on constitutional principle, specifically the grant of judicial power in Article III of the Constitution, or is it simply a manifestation of the judiciary's traditional power to manage its own practices and procedures? Despite two hundred years of Supreme Court decisions invoking, describing, and applying the doctrine, it remains vague, ambiguous, and, yes, deeply schizophrenic.

Much recent scholarship has sought to remove that ambiguity with prescriptive solutions to make the doctrine more consistent and more normatively defensible.[10] This Article has a different goal. It views inherent judicial authority,[11] with all its contradictions, as an important concept central to the functioning of the federal courts. The ambiguity

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5 Gregory P. Joseph, *Rule 11 Is Only the Beginning*, A.B.A. J., May 1, 1988, at 62, 64.

6 John Gibeaut, *Mood-Altering Verdict*, A.B.A. J., Aug. 1996, at 18, 18 (quoting Professor Stephen C. Yeazell).

7 *Id.* (quoting Professor Stephen C. Yeazell).

8 Benjamin H. Barton, *An Article I Theory of the Inherent Powers of the Federal Courts*, 61 CATH. U. L. REV. 1, 2 (2011).

9 Joseph J. Anclien, *Broader Is Better: The Inherent Powers of Federal Courts*, 64 N.Y.U. ANN. SURV. AM. L. 37, 41 (2008). The boundaries of the doctrine have also been described as "shadowy" and "nebulous." Eash v. Riggins Trucking Inc., 757 F.2d 557, 561 (3d Cir. 1985).

10 Professors Van Alstyne and Barton, for example, are largely concerned with narrowing the scope of constitutional inherent authority. *See* William W. Van Alstyne, *The Role of Congress in Determining Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effect of the Sweeping Clause*, 40 L. & CONTEMP. PROBS. 102, 122–29 (1976); Barton, *supra* note 8, at 3–5. Professor Pushaw's primary normative concern is to inhibit further growth in procedural common law. Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735, 843–50 (2001).

11 Although in some contexts "power" and "authority" can refer to quite different attributes, the terms "inherent judicial power" and "inherent judicial authority" are used interchangeably by most judges and commentators and will be used similarly here.

of that doctrine is not a bug but a feature, one that has been recognized, preserved, and even implicitly approved by decisions of the United States Supreme Court. If such a doctrine remains confusing and contradictory, there are probably good institutional reasons for that. This Article seeks to explore and understand those reasons.[12]

One must begin by recognizing that inherent judicial authority is confusing because it encompasses two quite different concepts of judicial power derived from two different sources. First there is the judicial power conferred by Article III of the Constitution.[13] This includes both the core express constitutional power to adjudicate cases and controversies, and the related constitutionally based inherent powers that are essential to the proper functioning of a court and that federal judges have by virtue of their status as Article III judges.[14] The most frequently cited examples are a court's power to maintain respect and decorum and enforce its orders through sanctions such as contempt, as well as a court's power to determine its own practices and procedures.[15] Yet there are many other instances in which courts invoke inherent judicial authority in a rather different sense to authorize discretionary judicial conduct regarding procedural matters where such action is not expressly authorized by any statute or rule. These do not

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12 Mine is not the only attempt to view uncertainty in Supreme Court doctrine not as a flaw requiring correction but as a part of the Court's jurisprudence that may serve important institutional functions. Another notable recent example is Aziz Z. Huq & Jon D. Michaels, *The Cycles of Separation-of-Powers Jurisprudence*, 126 YALE L.J. 346, 349 (2016) (discussing the oscillation between rules and standards in the Supreme Court's separation of powers decisions).

13 As the reference to Article III suggests, this Article will deal almost exclusively with the inherent judicial authority of the federal courts. State courts have inherent judicial authority as well, but their structure and scope are derived from different sources, although they may be strongly influenced by developments in the federal courts. *See generally* A. Leo Levin & Anthony G. Amsterdam, *Legislative Control over Judicial Rulemaking: A Problem in Constitutional Revision*, 107 U. PA. L. REV. 1 (1958).

14 These powers are usually described as essential to the proper functioning of a court, whose existence is therefore implied or inherent in the Article III grant of judicial power. *See, e.g.*, Chambers v. NASCO, Inc., 501 U.S. 32, 43 (1991). They include the power to sanction litigation misconduct, including contempt, and to promulgate rules of practice and procedure. Such powers are said to be subject to legislative regulation but not abrogation. Michaelson v. United States, 266 U.S. 42, 65–66 (1924); *Eash*, 757 F.2d at 563.

15 The line between the core constitutional power of adjudication and constitutionally based inherent powers like punishing contempt is hard to define, even at a theoretical level. Both have their sources in Article III and are said to be "essential" powers necessary for the proper functioning of a court. Challenges to the core adjudicative power, however, appear to be limited to statutes or other government actions that interfere with a court's ability to actually decide the case before it. *See, e.g.*, United States v. Klein, 80 U.S. (13 Wall.) 128 (1871); N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982); Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995). Alternatively, constitutional challenges to inherent judicial authority deal with somewhat more ancillary matters like the power to sanction litigation misconduct, enforce judicial orders, and promulgate rules of practice and procedure.

refer to a constitutional power. Rather they invoke an inherent right to exercise interstitial decision-making authority over judicial processes in the absence of other controlling statutes or rules. Such power has been invoked to justify a wide variety of nonstatutory procedural innovations, from appointment of special masters to dismissal for forum non conveniens.[16] The sources of this power are most readily understood and justified, in contemporary terms, as applications of federal procedural common law.[17]

In order to understand the role that ambiguity plays in the Supreme Court's doctrine of inherent judicial power it is necessary to recognize three central facts. First, in the two hundred years since the Supreme Court first recognized the doctrine, the Court has never invalidated any federal statute on the ground that it unconstitutionally infringed the implied inherent judicial powers of the federal courts.[18] Second, during that same period, the Supreme Court affirmed a broad range of nonconstitutional powers in the federal district courts recognizing substantial judicial freedom to innovate in procedural matters, even where such innovation might be seen as inconsistent with applicable federal statutes and rules. Third, the Supreme Court's description of the doctrine of inherent judicial authority in these cases has been confusing and contradictory.[19] It has tended to treat all inherent judicial authority as a single continuum of power, while

16 One of the clearest and earliest statements of this multitier conception of inherent judicial authority is in *Eash*, 757 F.2d at 562–65. The Supreme Court has never expressly endorsed this multitier conception of inherent judicial authority. In fact, in *Chambers v. NASCO*, it expressly declined to classify the inherent judicial powers in this way. 501 U.S. at 47 n.12; *see infra* notes 61–63 and accompanying text. Most contemporary scholars, however, recognize some version of the multitier theory, at least to distinguish between constitutional and nonconstitutional forms of inherent judicial authority. Pushaw, *supra* note 10, at 843–50; Barton, *supra* note 8, at 4; James C. Francis IV & Eric P. Mandel, *Limits on Limiting Inherent Authority: Rule 37(e) and the Power to Sanction*, 17 SEDONA CONF. J. 613, 619–20 (2016); Anclien, *supra* note 9, at 42; Linda S. Mullenix, *Unconstitutional Rulemaking: The Civil Justice Reform Act and Separation of Powers*, 77 MINN. L. REV. 1283, 1320–22 (1993); Van Alstyne, *supra* note 10, at 122–29. The reasons why the Supreme Court has declined to make such distinctions are a fundamental part of the subject of this piece.

17 Amy Coney Barrett, *Procedural Common Law*, 94 VA. L. REV. 813, 814–15 (2008). In this context, the term also includes traditional equitable powers that often form the basis for nonstatutory rules of practice and procedure. *See infra* notes 210–20, 315–16 and accompanying text.

18 A small number of Supreme Court cases have arguably declared statutes invalid for unduly interfering with the express constitutional power of adjudication. *Klein*, 80 U.S. at 147; *N. Pipeline Constr.*, 458 U.S. at 87; *Plaut*, 514 U.S. at 217–18; *see infra* note 320 and accompanying text. But no Supreme Court case has ever declared a statute unconstitutional for unduly interfering with implied inherent judicial powers such as contempt or control of courtroom practices.

19 *See, e.g.*, *infra* notes 315–19 and accompanying text.

implying that some forms of inherent judicial power may be constitutionally required while others clearly are not.[20]

These three facts about the inherent-judicial-authority puzzle are closely related. Indeed, the third, the confused mashing of constitutional and nonconstitutional powers into a single continuum, largely explains and is responsible for the other two. By treating exercises of procedural common law decision-making as part of a continuum with implied constitutional inherent power, the Court can avoid deciding many difficult constitutional questions. By ambiguously justifying an exercise of district court power as "necessary" to the proper functioning of that court, the Supreme Court can avoid the need to state whether such necessity is created by constitutional separation-of-powers concerns or merely by Congress's failure to act. Conversely, if the issue is one in which a federal statute does seem to impinge on what might be a constitutional power of the judiciary, the effect of the statute can frequently be limited by reinterpretation so that it is seen as a mere regulation of the application of that power. Such regulations, if they do not abrogate the inherent judicial power itself, are mere applications of federal procedural common law. They are subject to congressional control and are not seen to raise serious constitutional issues.

Describing these common law procedural rulings as exercises of inherent judicial authority "necessary" to the proper functioning of the courts gives them added rhetorical dignity. The ambiguous but correct assertion that courts have broad power to exercise discretion and innovate procedurally whenever "necessary" for the proper functioning of the courts does not only justify the broad scope of procedural common law decision-making power asserted by the Court. It also validates interpretative strategies that the Supreme Court has used to permit judicial procedural innovation even where it is arguably constrained by federal statutes or rules.

The Supreme Court Justices are the ultimate arbiters of the constitutional separation of powers. They define the boundaries of the powers conferred on each of the three branches of government. However, those same Justices are also heads of the judicial branch with ultimate responsibility for the proper and efficient functioning of the federal courts. While this does not create a formal conflict of interest, it certainly creates tension between the Court's desire to act and be seen as a neutral and independent adjudicator of constitutional issues, and its presumed desire to also protect and preserve the ability of federal judges to function effectively and without undue interference from other governmental entities. This means that decision-making

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20 *See, e.g.*, *infra* notes 32–36, 253–57 and accompanying text.

regarding controversial separation-of-powers issues will reflect practical political as well as legal considerations.[21] The doctrine of inherent judicial authority, with all its confusing and contradictory aspects, plays an important role in mitigating these tensions. The complex institutional role of the Court, which seeks to avoid constitutional confrontation with the other branches while also protecting federal judicial independence and effectiveness, helps explain the unique and otherwise puzzling aspects of the doctrine.

This Article seeks to illustrate, understand, and to some extent justify the ambiguity in the prevailing doctrine of inherent judicial authority. The first Part introduces the theoretical framework for both the constitutional and common law–based conceptions of inherent judicial authority and examines their confusing conflation in actual case law. It does this primarily through an extended consideration of two rather different Supreme Court cases, both of which purport to apply the doctrine. It illustrates how the Court uses ambiguity to elide constitutional questions and enhance the protection of nonconstitutional judicial power. The next two Parts trace the development of the doctrine over time. Part II shows how the federal judicial power was left mostly undefined by the drafters of the Constitution, largely for prudential and political reasons. Fears of an expanded federal judicial power, unresponsive to local concerns, were a major argument of those who opposed the Constitution's ratification.[22] For similar reasons, the first Congress, in passing the legislation creating the lower federal courts, also included provisions designed to cabin their powers within the traditional limits of common law courts, again leaving those powers largely undefined.[23] Accordingly, the doctrine of inherent judicial authority has been developed largely through Supreme Court case law. Part III traces that development over the last two hundred years. It focuses particularly on inherent judicial power to sanction litigation misconduct and to develop practices and procedures for the courts not authorized by statute or rule.[24] By closely

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21 *See* Huq & Michaels, *supra* note 12, at 391–407 (describing the "thick political surround" under which separation-of-powers cases are decided).

22 *See infra* notes 85–97 and accompanying text.

23 *See infra* notes 109–19 and accompanying text.

24 In its broadest sense, "inherent judicial power" can refer to any exercise of judicial power not expressly authorized by a written constitution or statute. Accordingly, the term can and has been used to justify a wide variety of disparate judicial actions, including regulation of admissions to the bar and the practice of law and even mandating funding for the courts. Comment, *Control of the Unauthorized Practice of Law: Scope of Inherent Judicial Power*, 28 U. CHI. L. REV. 162, 162–63 (1960); Debra L. Thill, *The Inherent Powers Doctrine and Regulation of the Practice of Law: Will Minnesota Attorneys Practicing in Professional Corporations or Limited Liability*

analyzing the rulings and arguments of the Justices in specific cases, we can see how the doctrine has developed, how it reflects the political concerns of different eras, and how the Court's conflation of the multitier conception of inherent authority into a single continuum of power has played an important role in promoting judicial independence and flexibility.

In the final Part, this enhanced understanding of inherent judicial authority is applied to an important current legal issue, the scope and validity of Federal Rule of Civil Procedure 37(e)(2), which prohibits a federal court from ordering severe sanctions for loss of electronically stored information (ESI) unless it can be shown that the spoliator "acted with the intent to deprive another party of the information's use in the litigation."[25] This Rule is of great interest and importance to practicing litigators,[26] and concerns have been raised both regarding its validity and the extent to which it may restrict inherent judicial authority to sanction litigation misconduct. Utilizing the novel understanding of the doctrine set forth in this Article, I explain why Rule 37(e)(2) is likely to be interpreted narrowly to maintain substantial judicial discretion over sanctioning authority and the interpretive strategies judges are likely to use to retain flexibility to sanction misconduct regarding ESI preservation while avoiding a direct constitutional challenge to the Rule's validity.

I. A TALE OF TWO CASES (OF INHERENT JUDICIAL AUTHORITY)

We begin with two Supreme Court decisions that illustrate the complexity and ambiguity of inherent judicial authority. One is a clear example of procedural common law decision-making. The other involves powers close to those the Court has described as constitutionally required and essential to the role of the judge. Yet in both cases the Court's decisions conflate these two types of decision-making, treating them as a single continuum of judicial power.

Companies Be Denied the Benefit of Statutory Liability Shields?, 20 WM. MITCHELL L. REV. 1143, 1165 (1994); *see* GREG HURLEY, THE USE OF INHERENT POWERS TO OBTAIN COURT FUNDING 1 (2010), https://www.ncsc.org/__data/assets/pdf_file/0016/18151/inherent-powers-to-obtain-court-funding.pdf [https://perma.cc/PPU8-VGG7]. The focus of this Article, however, will be primarily on judicial sanctioning authority and power to promulgate rules of practice and procedure, which have been the two subjects of most concern in the federal context and in most of the Supreme Court cases.

25 FED. R. CIV. P. 37(e)(2).

26 *See* Thomas Y. Allman, *The 2015 Civil Rules Package as Transmitted to Congress*, 16 SEDONA CONF. J. 1, 3–4 (2015); Charles Yablon, *Byte Marks: Making Sense of New F.R.C.P. 37(e)*, 69 FLA. L. REV. 571, 572–74 (2017).

Together, they illustrate some of the ways that doctrinal ambiguity helps the Court preserve and expand the discretionary procedural authority of the district courts while avoiding difficult constitutional issues.

Dietz v. Bouldin[27] involved a negligence claim arising from an automobile accident. By the time the case went to trial, the only issue for the jury was whether to award damages in excess of a stipulated amount.[28] The jury found for the plaintiff but awarded zero dollars in damages.[29] The judge did not immediately realize this was a legally impermissible verdict and dismissed the jury. A few minutes later, the judge ordered the jurors recalled over the objection of defendant's counsel. After a subsequent jury instruction, the jury returned a verdict of fifteen thousand dollars.[30] The issue was whether the district judge had the "inherent power to rescind a jury discharge order and recall a jury for further deliberations after identifying an error in the jury's verdict."[31] Justice Sotomayor, in an opinion joined by six other Justices, held that the action of the district court was a valid exercise of inherent judicial power.[32]

The judicial power asserted in *Dietz* was clearly not constitutionally based or essential to the functioning of the court. It was an innovative procedural step taken by the judge without any authorization in existing federal statutes or rules. Nonetheless, it was upheld as a valid exercise of inherent judicial authority even though it was contrary to traditional judicial practice at common law, was arguably inconsistent with Federal Rule of Civil Procedure 51(b), and raised serious constitutional concerns regarding the maintenance of juror impartiality. It was also not in any sense "necessary" for proper functioning of the court. The district judge could have corrected the jury's erroneous verdict in a traditional but more costly and time-consuming manner by ordering a new trial.

Justice Sotomayor begins her legal discussion by quoting precedential language that "a district court possesses inherent powers that are 'governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly

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27 579 U.S. 40 (2016).

28 *Id.* at 43. Defendant had stipulated to liability and damages of $10,136 for medical expenses. *Id.*

29 *Id.*

30 *Id.* at 44.

31 *See id.* at 42.

32 *Id.* The Ninth Circuit opinion, which the Court affirmed, had not invoked inherent authority. It had treated the issue as an appeal from an order denying a mistrial, which was subject to appellate review under an abuse of discretion standard. Dietz v. Bouldin, 794 F.3d 1093, 1096 (9th Cir. 2015).

and expeditious disposition of cases.'"[33] The embedded quotation is from *Link v. Wabash Railroad Co.*,[34] which held that district courts have inherent power, notwithstanding the arguably contrary language of Federal Rule of Civil Procedure 41(b), to dismiss cases for want of prosecution sua sponte. As a precedent for reading federal rules narrowly to preserve a broad scope of procedural discretion for district judges, it is a very appropriate citation. As a statement of the doctrine of inherent judicial authority, it is quite ambiguous. Justice Sotomayor affirms that the doctrine is founded on necessity. Judges must have these powers to do their jobs. But she conflates two different senses of necessity. One sense refers to powers that district judges *need* to perform their core judicial functions at all. The other refers to powers that district judges *need* to manage their cases *in an optimal manner* in the absence of guidance from statutes or rules.[35]

The inherent judicial authority asserted in *Dietz* was not constitutionally based. However, by failing clearly to distinguish constitutional from nonconstitutional inherent judicial authority, Justice Sotomayor was able to present the district court's questionable procedural innovation as part of a well-established continuum of judicial decision-making power that is presumptively valid in the absence of strong countervailing considerations. The inherent power Justice Sotomayor describes is a right to judicial procedural innovation, unauthorized by any statute or rule but potentially justified by considerations of efficiency, convenience, and cost reduction. The power potentially extends to any actions taken by district courts "to manage their dockets and courtrooms with a view toward the efficient and expedient resolution of cases."[36] She describes the powers conferred on district courts by the doctrine as powerful and "poten[t]" and notes that there are only a few limitations on the exercise of such powers, primarily that the actions be "reasonable"[37] and not "contrary to any express grant of or limitation on the district court's power contained in a rule or statute."[38]

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33 *Dietz*, 579 U.S. at 45 (quoting Link v. Wabash R.R. Co., 370 U.S. 626, 630–31 (1962)).

34 370 U.S. 626. In *Link*, however, Justice Harlan was referring to a singular and rather specific "inherent power." *Id.* at 630–31. Justice Sotomayor makes this statement applicable to a broader panoply of unspecified "judicial powers." *Dietz*, 579 U.S. at 45–47.

35 Justice Sotomayor follows this quote with a "see also" citation to *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812). *Dietz*, 579 U.S. at 45. *Hudson* was the first Supreme Court case to discuss, in dicta, core constitutional inherent authority. *See id.* at 45–46.

36 *Dietz*, 579 U.S. at 47.

37 *Id.* at 45–46. Such "reasonableness" is reviewed under an abuse of discretion standard. *See id.* at 51.

38 *Id.* at 45.

Dietz was not an easy win for the appellee. There were serious arguments for reversing the actions of the district court, including contrary precedent,[39] potential conflicts with federal rules,[40] and serious potential to compromise juror impartiality.[41] Yet Justice Sotomayor argued that the "potency" of inherent judicial authority, reflecting the need for district judges to manage their courtroom practices efficiently, was strong enough to overcome these serious counterarguments. The language she quotes to demonstrate that potency was from *Chambers v. NASCO, Inc.*,[42] a case involving powers much closer to the court's core constitutional functions.[43]

Justice Sotomayor was well aware that the "potent" power recognized in *Dietz* was not constitutionally based.[44] She implies it is close even to the "outer boundaries" of the district court's procedural common law authority.[45] Yet by describing it as part of a broad continuum of judicial powers, some constitutionally based and all justified by a somewhat ambiguous appeal to "necessity,"[46] she is able to present it, by virtue of it being part of the district court's inherent authority, as an important judicial prerogative, one that should not

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39 There was substantial authority that no recall of the jury after discharge had been permitted at common law. This common law rule was the primary ground for the dissent by Justices Thomas and Kennedy. *See id.* at 54 (Thomas, J., dissenting). Justice Sotomayor questioned whether "the common-law tradition is as clear as Dietz contends." *Id.* at 52 (majority opinion).

40 While Justice Sotomayor acknowledged that the powers involved in *Dietz* were potentially limited by statute or rule, she failed to find any such "implicit limitation" in the language of the potentially applicable Rules. *See id.* at 47–48. The fact that Federal Rule of Civil Procedure 51(b)(3) states that a court "may instruct the jury at any time before the jury is discharged" was not to be interpreted as prohibiting such instructions *after* discharge and recall. *See id.* In so doing the Court was applying the interpretative principle previously stated in *Chambers v. NASCO* that one should not "lightly assume" that a statute or Rule was "intended to depart from established principles" regarding the scope of a court's inherent power. 501 U.S. 32, 47 (1991) (quoting Weinberger v. Romero-Barcelo, 456 U.S. 305, 313 (1982)).

41 While Justice Sotomayor was clearly concerned that recalling jurors after discharge could create serious problems in preserving juror impartiality, she rejected defendant's proposed bright-line rule of prohibition in favor of a multifactor test to be applied by the district judge. However, she expressly stated that this discretionary inherent power was limited to civil cases. *See Dietz*, 579 U.S. at 48–50.

42 501 U.S. at 44 ("Because of their very potency, inherent powers must be exercised with restraint and discretion.").

43 *See infra* notes 47–66 and accompanying text.

44 *See Dietz*, 579 U.S. at 48 (citing *NASCO*'s reference to the "potency" of inherent judicial authority).

45 *See id.* at 45.

46 The broad language invoked by the Court papers over two ambiguities that would distinguish constitutional from common law exercises of inherent judicial power. First, is the power "governed not by statute or rule" because it cannot be constitutionally, or simply because the relevant authorities have not acted? Similarly, is the power "necessarily" vested in courts by their creation as courts under Article III, or simply because the legislature has not acted?

lightly be set aside by countervailing considerations. In this way, a not unreasonable procedural innovation becomes rhetorically associated with and justified by the fundamental powers and structure of the judicial branch. The Court is able to preserve a broad power of judicial procedural freedom while still acknowledging theoretical legislative supremacy.

Unlike *Dietz*, *Chambers v. NASCO, Inc.*[47] is a landmark case, one of the most important inherent authority decisions of the last fifty years. It upholds a broad judicial power to award attorney's fees for all forms of bad faith litigation misconduct in civil actions, whether or not such conduct is also subject to sanctions under more specific statutes and rules.[48] If *Dietz* was a case near the "outer boundaries" of procedural common law, *NASCO* was located much closer to the realm of essential constitutional powers. The inherent judicial power to sanction litigation misconduct, which it recognizes, not only supplements but, in appropriate cases, can actually displace more limited rights under the Federal Rules. The opinions in the case strongly imply but never quite state that the right is grounded in constitutionally based inherent judicial power.

NASCO was a suit for specific performance of a contract for the sale of a television station in Lake Charles, Louisiana.[49] After the contract was signed but before the closing, the seller changed his mind.[50] He refused to file various papers necessary to consummate the sale, which led to the lawsuit.[51] Defendant then engaged in a complex series of actions designed to prevent performance of the contract as well as divest the court of its ability to enforce it.[52] After determining that neither Federal Rule of Civil Procedure 11 nor 28 U.S.C. § 1927 provided a sufficient basis for sanctioning all the misconduct involved in the case, the district court, relying on its inherent judicial authority,

47 501 U.S. 32.

48 *Id.*

49 *Id.* at 35.

50 *Id.* at 35–36.

51 *Id.* The federal district court's subject matter jurisdiction was based solely on diversity of citizenship.

52 In its decision awarding sanctions, the district court summarized the various types of misconduct alleged against defendants as follows: (1) attempting "to deprive this Court of jurisdiction by acts of fraud, nearly all of which were performed outside the confines of this Court," (2) filing "false and frivolous pleadings," and (3) attempting "by other tactics of delay, oppression, harassment and massive expense to reduce plaintiff to exhausted compliance." NASCO, Inc. v. Calcasieu Television & Radio, Inc., 124 F.R.D. 120, 138 (W.D. La. 1989).

imposed sanctions on defendant Chambers of $996,644.65, the entire amount of NASCO's litigation costs.[53]

Justice White, writing the majority opinion, stated that the issue was "whether the District Court, sitting in diversity, properly invoked its inherent power in assessing as a sanction for a party's bad-faith conduct attorney's fees and related expenses paid by the party's opponent to its attorneys."[54] The appellant had argued that the passage of 28 U.S.C. § 1927 and various federal rules "reflect a legislative intent to displace the inherent power," and that the only sanctions permitted were those authorized under those specific statutes and rules.[55]

Justice White's opinion not only argues that the federal district courts' inherent power to sanction bad faith litigation misconduct with an award of attorney's fees had not been displaced by legislative action, but it strongly suggests that it cannot constitutionally be so abrogated.[56] He begins by citing a string of earlier Supreme Court precedents that describe inherent judicial powers as those courts possess "necessarily" and that courts have "by their very creation," strongly implying that such powers are constitutionally based.[57] Most involve the power to sanction litigation misconduct.[58]

Yet while there were many precedents that stated, at least in dicta, that judicial power to sanction egregious litigation misconduct was essential and constitutionally based, Justice White was reluctant to hold that the power to award *attorney's fees* as a sanction was constitutionally protected. His concern seemed based on the unique status of the "American Rule" against fee shifting and his own prior decision in *Alyeska Pipeline Service Co. v. Wilderness Society*.[59] While that case had recognized three "judicially fashioned exceptions" to the rule, including

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53 *NASCO*, 501 U.S. at 41–42. This award included court costs, attorney's fees, and the litigation costs of a prior appeal that the Fifth Circuit Court of Appeals had deemed frivolous. *See NASCO*, 124 F.R.D. at 142–46.

54 *NASCO*, 501 U.S. at 35.

55 *Id.* at 42–43.

56 *Id.* at 46–47.

57 *Id.* at 43–44.

58 Among the powers he cites are "[t]he power to punish for contempts," as well as the power to sanction "disobedience to the orders of the Judiciary." *Id.* at 44 (alteration in original). He notes that the inherent power also "allows a federal court to vacate its own judgment upon proof that a fraud has been perpetrated upon the court." *Id.* He finds this power "[o]f particular relevance here." *Id.*

59 421 U.S. 240, 269–71 (1975) (refusing to recognize an equitable right to attorney's fees based on a "private attorneys general" rationale, holding that federal courts could not modify the "American Rule" against fee shifting without express legislative permission).

one for "bad faith" misconduct,[60] Justice White had stated that those exceptions were "unquestionably assertions of inherent power in the courts to allow attorneys' fees in particular situations, *unless forbidden by Congress*."[61] Having previously characterized this power as a defeasible exercise of procedural common law, not an inherent constitutional power, Justice White was unwilling to repudiate that position. He also expressly declined the opportunity to clearly distinguish between constitutionally based and nonconstitutionally based inherent powers, stating that "this Court has never so classified the inherent powers, and we have no need to do so now."[62]

Justice White felt he had no need to make such a distinction, because he held that the inherent power to sanction bad faith litigation misconduct through fee shifting had not been displaced by Rule 11 or any other federal rules or legislation.[63] Accordingly, exercise of such inherent power would exist on either constitutional or nonconstitutional grounds.[64] The Court does discuss, however, in somewhat theoretical terms, what would happen if there was a conflict

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60 *Id.* at 257–60. The three exceptions were equitable power to draw from a common fund, for willful disobedience to a court order, and for bad faith misconduct. *Id.* Justice White noted that all were well established in English and American practice before passage of the federal fee statutes and had not been repudiated in any subsequent congressional action.

61 *Id.* at 259–60 (emphasis added).

62 *NASCO*, 501 U.S. at 47 n.12 ("Chambers also asserts that all inherent powers are not created equal. Relying on *Eash v. Riggins Trucking Inc.*, he suggests that inherent powers fall into three tiers: (1) irreducible powers derived from Article III, which exist despite contrary legislative direction; (2) essential powers that arise from the nature of the court, which can be legislatively regulated but not abrogated; and (3) powers that are necessary only in the sense of being useful, which exist absent legislation to the contrary. Chambers acknowledges that this Court has never so classified the inherent powers, and we have no need to do so now. Even assuming, *arguendo*, that the power to shift fees falls into the bottom tier of this alleged hierarchy of inherent powers, Chambers' argument is unavailing, because we find no legislative intent to limit the scope of this power." (citations omitted)).

63 To reach this conclusion, Justice White does not rely on the language of those rules and statutes but on newly created interpretive principles and presumptions concerning the intent of the drafters. He states, "'[W]e do not lightly assume that Congress has intended to depart from established principles' such as the scope of a court's inherent power." *Id.* at 47 (quoting Weinberger v. Romero-Barcelo, 456 U.S. 305, 313 (1982)). In so doing, he takes a quote from *Weinberger v. Romero-Barcelo*, which involved the "established principles" of equitable injunctive practice, and applies the same strict interpretive standard to potential congressional attempts to limit inherent powers. *Weinberger*, 456 U.S. at 313. He then looks at the advisory committee note to Rule 11, quoting the committee's intention to "build[] upon and expand[] the equitable doctrine permitting the court to award expenses, including attorney's fees, to a litigant whose opponent acts in bad faith in instituting or conducting litigation." *NASCO*, 501 U.S. at 48 (quoting FED. R. CIV. P. 11 advisory committee's note to 1983 amendment). He concludes this was not an attempt to displace the preexisting inherent power, just to add to it. *Id.* at 48–49.

64 The constitutional issue did not have to be reached, and the majority opinion in *NASCO* does not expressly reach it. *See NASCO*, 501 U.S. at 55–58.

between the sanctions available under the Federal Rules and under inherent judicial authority. Justice White states:

> [W]hen there is bad-faith conduct in the course of litigation that could be adequately sanctioned under the Rules, the court ordinarily should rely on the Rules rather than the inherent power. But if in the informed discretion of the court, neither the statute nor the Rules are up to the task, the court may safely rely on its inherent power.[65]

While technically dicta, this also sounds like an instruction to district courts in future cases. It is not an interpretive principle but an allocation of decision-making authority. If a district judge concludes that the sanctions permitted or mandated under the rule are not "up to the task" of adequately sanctioning bad faith litigation misconduct, the inherent power to apply other sanctions, far from being displaced by the conflicting rule, remains available to the district court to use if it deems necessary. It is hard to see this as anything other than an affirmation of the constitutional right of federal judges to sanction bad faith litigation misconduct irrespective of any contrary federal rules or legislation.[66]

Why does the Court not clearly state whether the inherent judicial power being asserted in *NASCO* is based on constitutional power or procedural common law? While such a statement might not be necessary to decide the case, it would certainly clarify the law and be of great interest to lawyers and legal scholars. To some degree, the Court's reluctance reflects traditional avoidance of unnecessary constitutional issues. Yet the constitutional issue here is very close to the surface. Justice White prudently asserts that judges should use legislated sanctioning rules and statutes whenever they are "up to the task" while implicitly affirming the existence of additional judicial powers to act outside their authorization. Yet he never explains the precise source or

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65 *Id.* at 50.

66 To add to the ambiguity as to whether the power asserted in *NASCO* is constitutionally based, Justice Scalia observed in dissent that he agreed with the majority that

> Article III courts, as an independent and coequal Branch of Government, derive from the Constitution itself, once they have been created and their jurisdiction established, the authority to do what courts have traditionally done in order to accomplish their assigned tasks. Some elements of that inherent authority are so essential to "the judicial Power," that they are indefeasible, among which is a court's ability to enter orders protecting the integrity of its proceedings.

Id. at 58 (Scalia, J., dissenting) (quoting U.S. CONST. art. III, § 1). This could be read either as a statement that the powers actually exercised in *NASCO* were constitutionally based or merely a theoretical recognition that some sanctioning powers are so essential as to be "indefeasible." Justice Scalia also recognizes that fee shifting as a sanction raises special issues because of potential conflicts with the American Rule. He notes, however, that not "*all* sanctions imposed under the courts' inherent authority require a finding of bad faith." *Id.* at 59.

basis of those additional powers. By asserting constitutional authority in this ambiguous way, the Court gets some distinct benefits. It asserts the power of the federal courts to act, in appropriate cases, contrary to expressly legislated rules, yet does so in a way that does not directly challenge any existing statute or rule. Moreover, it enhances a general awareness among both judges and legislators that the judiciary has an independent sanctioning power that should not be restricted too tightly by rule or statute, lest they be deemed not "up to the task."

Together, these two cases illustrate the prevalence and usefulness of ambiguity in current Supreme Court jurisprudence regarding inherent judicial authority. By presenting it as a single source of judicial power, authorized in part by fundamental constitutional principle and in part by traditional judicial decision-making, all encapsulated under the ambiguous term "necessity," the Court reasserts and strengthens the existence of a broad and "potent" power of district courts to innovate procedurally while avoiding the need expressly to claim a constitutional source for such power.

In demonstrating the useful role that ambiguity plays in the Court's treatment of inherent judicial authority, I do not mean to imply that such ambiguity is the result of a conscious judicial strategy. Rather, as we shall see in the following Sections, it was more likely the result of a series of contingent historical events: the failure of the drafters of the Constitution to specify the powers of the judiciary; early political disputes over the appropriate laws and procedures to be applied in the federal courts; and a tendency of the Supreme Court, in response to that ongoing political and legal uncertainty, to make broad claims about the essential and necessary nature of judicial power in dicta, while actually applying such powers in a far more careful and limited way in accordance with legislative mandates. The result was a conceptual mashup of constitutional– and common law–based inherent powers which, while somewhat confusing and contradictory, have proven useful in avoiding confrontation with the political branches while leaving federal judges free to interpret procedural statutes and rules broadly and innovate when they deem it "necessary."

II. JUDICIAL POWER AND POLITICS IN THE EARLY REPUBLIC

A. *Ambiguity at the Founding*

The concept of inherent judicial authority long predates the United States Constitution.[67] Early English courts possessed significant authority to conduct their own affairs without express legislation or authorization from the sovereign. This included the power to punish various forms of disruptive conduct as contempt, to prescribe their own rules of practice and procedure, and to dismiss vexatious or frivolous litigation.[68] Although the concept of inherent judicial power was familiar in 1787, the drafting of the Constitution and the debates over ratification raised questions as to the scope and nature of the powers to be exercised by the still somewhat hypothetical federal courts.[69] The Constitution, with its checks and balances and implicit but far from complete separation of powers, also raised new questions concerning the source of federal inherent judicial authority and the extent to which such authority could be altered or abrogated by Congress.[70]

The Constitution vested "[t]he judicial Power of the United States" in "one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[71] The term "judicial power" is not defined,[72] and there is little in the records of the Constitutional Convention that sheds light on its precise meaning.[73] The concept of a

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67 Pushaw, *supra* note 10, at 799–816 (tracing the development of inherent authority in English courts); Daniel J. Meador, *Inherent Judicial Authority in the Conduct of Civil Litigation*, 73 TEX. L. REV. 1805, 1806 (1995).

68 Pushaw, *supra* note 10, at 812–13.

69 *See infra* notes 71–82 and accompanying text.

70 *See infra* notes 83–105 and accompanying text.

71 U.S. CONST. art. III, § 1.

72 *See* 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, 1017 (1924) (arguing that the lack of definition of judicial power means that the constitutional understanding of that term is not "static" but is "a process").

73 Of possible relevance are the changes to the language of Article III that occurred during the Constitutional Convention. The draft of the Constitution delivered to the Committee of the Whole on Monday, August 6, 1787, by the Committee of Detail contained a proposed Article XI that discussed the federal judiciary. James Madison, *Journal, Monday, August 6, 1787*, *in* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 177, 186–87 (Max Farrand ed., 1911).

Section 3 of that Article set forth a series of "cases" (similar to those now listed in Section 2 of Article III) to which "[t]he Jurisdiction of the Supreme Court shall extend." *Id.* at 186. The last sentence in that Section stated that "[t]he Legislature may assign any part of the jurisdiction above mentioned (except the trial of the President of the United States) in the manner, and under the limitations which it shall think proper, to such Inferior Courts, as it shall constitute from time

separate and independent "judicial power" of government, however, had its roots in a specific concept of separation of powers that can be traced to Montesquieu and Blackstone and that underlies much of the constitutional language.[74] It was Montesquieu who first emphasized the importance of an independent judicial power, which he referred to as "*la puissance de juger*," the power of judging.[75] This concept was adopted and enlarged by Blackstone as the "judicial power." Blackstone further affirmed the "necessity for an independent judicial power."[76] The express recognition of the judiciary as a separate department of government was a feature of many state constitutions at the time of the Founding.[77]

The federal judiciary envisioned in the Constitution is far from completely independent. It is subject to substantial legislative and executive control over its personnel, structure, and adjudicative authority. Article III grants to Congress the power to "ordain and establish" inferior federal courts.[78] Congress is also expressly given

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to time." *Id.* at 186–87. On August 27, 1787, that sentence was deleted by a unanimous vote. *Journal, Monday, August 27, 1787*, *in* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 73, at 422, 425. The Convention also unanimously voted to change "The jurisdiction of the Supreme Court" to "The Judicial Power." *Id.* A motion to add the sentence "In all the other cases before mentioned the judicial power shall be exercised in such manner as the Legislature shall direct" was defeated six to two. *Id.*

From these facts one might conclude that "judicial power" was seen as almost synonymous with the concept of jurisdiction, or perhaps a slightly broader "power of judging." There also appears to have been some reluctance to specify too precisely the degree of control that Congress could exercise over the judicial branch. *See infra* notes 83–105 and accompanying text.

74 *See* M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS (2d ed. 1998); John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1944 (2011) ("The idea of separated powers unmistakably lies behind the Constitution, but it was not adopted wholesale."); Jeremy Waldron, *Separation of Powers in Thought and Practice?*, 54 B.C. L. REV. 433, 435–36 (2013).

75 VILE, *supra* note 74, at 95–96, 95 n.49.

76 *Id.* at 113–15. Blackstone noted that in England powers of adjudication ultimately rested with the sovereign but stated that "our kings have delegated their whole judicial power to the judges of their several courts." 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 266 (1893).

77 *See* THE FEDERALIST NO. 47 (James Madison) (describing such provisions in the constitutions of New Hampshire, Massachusetts, Maryland, New Jersey, North Carolina, and Georgia).

78 U.S. CONST. art. III, § 1. On June 4, 1787, the provision regarding the federal judiciary was amended to mandate creation of "one supreme tribunal, and of one or more inferior tribunals." James Madison, *Journal, Monday, June 4, 1787*, *in* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 96, 104–05 (Max Farrand ed., 1911). The provision was amended the following day to permit, but not require, creation of inferior federal tribunals. James Madison, *Journal, Tuesday, June 5, 1787*, *in* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 78, at 119, 125. It appears that the main concern regarding creation of lower federal courts was potential

power to make "regulations" and "exceptions" to the Supreme Court's appellate jurisdiction.[79] The primary power given to the executive over the judicial branch is the power to appoint federal judges with the advice and consent of the Senate, but not the power to fire them.[80]

Scholars have noted the relative absence of details in the Constitution's provisions regarding the federal judiciary.[81] There is ambiguity built into the constitutional structure itself, notably between the concept of judicial independence that underlies Article III's grant of judicial power to the federal courts, and the extensive control the Constitution grants to the other branches over the courts' jurisdiction, structure, and staffing. This ambiguity and lack of detail have historically created substantial uncertainty with respect to some key questions in Article III jurisprudence. To what extent does Congress have plenary power over creation and jurisdiction of inferior federal courts, as well as Supreme Court appellate jurisdiction, and to what extent is such congressional power limited by Article III and separation-of-powers principles? This issue has been debated almost since the Founding by many prominent constitutional scholars. The issue not only remains unresolved but continues to reflect fundamental disagreements regarding issues of constitutional structure and power.[82]

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usurpation of the role of state courts. Charles Gardner Geyh & Emily Field Van Tassel, *The Independence of the Judicial Branch in the New Republic*, 74 CHI.-KENT L. REV. 31, 43–45 (1998).

A similar congressional power was recognized in Article I, which gives the legislature power to take other unspecified actions "necessary and proper for carrying into Execution the foregoing Powers." U.S. CONST. art. I, § 8, cl. 18. See James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of The United States*, 118 HARV. L. REV. 643, 673–75 (2004) for a defense of congressional power to create Article I courts based on the difference in the language of the two provisions.

79 U.S. CONST. art. III, § 2; *see* Leonard G. Ratner, *Congressional Power over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157 (1960).

80 U.S. CONST. art. II, § 2; *id.* art. III, § 1.

81 *See* Barton, *supra* note 8, at 19–21 (noting "the lack of explicit discussion of the nature and shape of the courts" at the Convention and the "much greater detail and clarity" given in the Constitution to the other two branches); *see also* Wythe Holt, *"To Establish Justice": Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts*, 1989 DUKE L.J. 1421, 1423 ("Why are the provisions for that court system in article III of the new fundamental law embodied in the Constitution so maddeningly terse, vague, and open-ended?"); Geyh & Van Tassel, *supra* note 78, at 45 ("[The Framers did not] appear to consider the possibility that congressional control over court practice, procedure, or administration might be exploited to compromise the judiciary's institutional integrity.").

82 An enormous amount of scholarly work has been devoted to these questions. A partial list of significant articles would include: Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205 (1985); Akhil Reed Amar, *Article III and the Judiciary Act of 1789: The Two-Tiered Structure of the Judiciary Act of 1789*, 138 U. PA. L. REV. 1499 (1990); Paul M. Bator, *Congressional Power over the Jurisdiction of the Federal Courts*, 27 VILL. L. REV. 1030 (1982); Steven G. Calabresi & Kevin H. Rhodes, *The*

An important related issue is how much power Congress has under the Constitution to regulate the judicial process itself. To what extent can it abrogate or alter judicial powers traditionally exercised and justified under the rubric of inherent judicial authority? Here, although there is still disagreement among scholars, a partial consensus has emerged that recognizes that congressional control over the powers of the federal judiciary is substantial but not unlimited, and that federal courts' inherent judicial authority derives from two separate sources: Article III and common law decision-making authority. It also recognizes that Supreme Court decisions fail to distinguish clearly between these two sources.[83]

It seems likely that the Constitution's ambiguity and lack of detail regarding judicial power and the degree of congressional control over the courts were intentional. In 1787, the concept of an independent federal judiciary was itself highly controversial. Many people, even those who favored a stronger federal government, saw no need for federal courts and feared the effect such courts might have on existing legal rights.[84] At the most concrete and substantive level, there was

Structural Constitution: Unitary Executive, Plural Judiciary, 105 HARV. L. REV. 1153 (1992); William R. Casto, *An Orthodox View of the Two-Tier Analysis of Congressional Control over Federal Jurisdiction*, 7 CONST. COMMENT. 89 (1990); Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. PA. L. REV. 741 (1984); Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: Early Implementation of and Departures from the Constitutional Plan*, 86 COLUM. L. REV. 1515 (1986); Theodore Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 YALE L.J. 498 (1974); Barry Friedman, *A Different Dialogue: The Supreme Court, Congress and Federal Jurisdiction*, 85 NW. U. L. REV. 1 (1990); Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895 (1984); Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953); Daniel J. Meltzer, *The History and Structure of Article III*, 138 U. PA. L. REV. 1569 (1990); Henry J. Merry, *Scope of the Supreme Court's Appellate Jurisdiction: Historical Basis*, 47 MINN. L. REV. 53 (1962); Ratner, *supra* note 79; Martin H. Redish & Curtis E. Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis*, 124 U. PA. L. REV. 45 (1975); Martin H. Redish, *Text, Structure, and Common Sense in the Interpretation of Article III*, 138 U. PA. L. REV. 1633 (1990); Lawrence Gene Sager, *Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17 (1981); Laurence H. Tribe, *Jurisdictional Gerrymandering: Zoning Disfavored Rights out of the Federal Courts*, 16 HARV. C.R.-C.L. L. REV. 129 (1981); Herbert Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001 (1965); Gordon G. Young, *A Critical Reassessment of the Case Law Bearing on Congress's Power to Restrict the Jurisdiction of the Lower Federal Courts*, 54 MD. L. REV. 132 (1995).

83 *See supra* notes 8–10 and accompanying text.

84 *See infra* notes 94–97 and accompanying text; *see also* Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 65 (1923) ("[M]any ardent pro-Constitutionalists" opposed the creation of inferior federal courts arguing that "the State Courts might well be entrusted with such power, subject to appeal to the Federal Supreme Court."). A

concern that the power of local courts to safeguard existing property rights would be impaired and that federal courts would tend to favor creditor banks and merchants over farmer-debtors.[85] There was also concern about the procedures that might be followed in federal courts, particularly whether federal courts, under their equitable authority, could curtail existing rights to jury trials.[86] More broadly, there was a recognition that the courts that had developed in the various states were quite different from those in England. American judges had less legal training and relied less on formal legal rules (often because authoritative legal materials were unavailable) and relied more on concepts of fairness and justice that reflected local conditions and concerns.[87] Federally appointed judges, in contrast, were seen as more likely to apply the formal letter of the law and to favor national over local interests. Of course, others favored the more uniform and impartial justice they believed would come from an active federal judiciary, as well as the more effective enforcement of contract and property claims.[88]

The omissions and lack of detail in Article III were not simply caused by a desire to avoid difficult issues. They were part of the process of compromise that characterized the drafting of the Constitution.[89] The widely divergent views of the Convention delegates regarding federal judicial power were seen as best handled, not by a contentious vote that created triumphant winners and disgruntled losers, but by a

strong contemporary statement of this view can be found in the antifederalist letters of "Brutus" (probably authored by Melancton Smith or Robert Yates). Letters X–XV from Brutus (Jan. 31, 1788 through Mar. 20, 1788), https://www.infoplease.com/primary-sources/government/anti-federalist-papers/part-ii-letters-brutus [https://perma.cc/P6FS-ZNQ7]; *see also* CHARLES WARREN, THE MAKING OF THE CONSTITUTION 325–27 (1928) (noting opposition to lower federal courts on the ground that they would "create unnecessary obstacles to [the States'] adoption of the new system").

85 *See* Holt, *supra* note 81, at 1459–78 (describing the drafting and ratification of the Constitution from the perspective of debtor-creditor conflict).

86 Under Article III, federal judicial power extends to cases both "in Law and Equity." U.S. CONST. art. III, § 2. There was great concern that federal equity power could lead to diminished use and importance of juries. *See* Letter XIV from Brutus, *supra* note 84; THE FEDERALIST NO. 83 (Alexander Hamilton).

87 *See generally* G. Edward White, *The Path of American Jurisprudence*, 124 U. PA. L. REV. 1212 (1976); Richard Baepler, *William E. Nelson, Americanization of the Common Law: The Impact of Legal Change on Massachusetts Society, 1760–1830*, 10 VAL. U. L. REV. 217 (1975) (book review).

88 The most famous exponent of this position, but far from the only one, was Alexander Hamilton. *See generally* William M. Treanor, *The Genius of Hamilton and the Birth of the Modern Theory of the Judiciary*, *in* THE CAMBRIDGE COMPANION TO THE FEDERALIST 464 (Jack N. Rakove & Colleen A. Sheehan eds., 2020).

89 *See* William E. Nelson, *Reason and Compromise in the Establishment of the Federal Constitution, 1787–1801*, 44 WM. & MARY Q. 458 (1987).

process of "instrumental reason"[90] that sought compromise through agreement on general principles and deferral of contentious issues with immediate political consequences.[91] Such deferrals were also seen as better constitutional craft, since constitutions were envisioned as declarations of broad general principle that should not get bogged down in details better handled through ordinary political processes.[92] Finally, as practical politicians, the Founders also knew that they needed to get the new Constitution ratified, and that the structure and powers of a federal judiciary were likely to be a major issue in the coming debates.[93] It was better to leave those subjects somewhat vague and unresolved than to specify one particular position that would create a clear target for antiratification sentiment.

The result was compromise through ambiguity, both with respect to the provisions actually included in the Constitution and in what was omitted. This lack of detail was certainly noted at the time.[94] Indeed, many of the objections to the Constitution as drafted in 1787 were to the lack of detail regarding the judicial powers and the possibilities it

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90 *See id.* at 472 (arguing that compromises regarding the federal judiciary were reflections of differences in "instrumental reasoning" rather than "interest-group politics").

91 There was extensive debate over whether to mandate, forbid, or leave to Congress the creation of inferior federal courts. Madison orchestrated the compromise in favor of the most ambiguous option. Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567, 1620 (2008). Similarly, a concern that federal appellate courts might review and reverse factual findings by juries was a major factor leading to adoption of the famously confounding "regulations and exceptions clause." *See* THE FEDERALIST NO. 81 (Alexander Hamilton). In both these cases, the compromise was to grant Congress power to legislate regarding these issues, but to fail to specify the extent of the power being granted. Moreover, in striking contrast to the specification of powers to be exercised by the executive and legislative branches in Articles I and II, Article III does not provide any details as to the scope of the "judicial power" it confers on the federal judiciary.

92 *See* Nelson, *supra* note 89, at 474 (describing one strategy of compromise as "adopt[ing] general constitutional language and leav[ing] to future legislators or judges the tasks of working out the details"); WARREN, *supra* note 84, at 331 (quoting Madison as describing the broad federal judicial power discussed at the Convention as "a mere sketch in which omitted details were to be supplied"); *see also* Akhil Reed Amar, *Architexture*, 77 IND. L.J. 671, 676 (2002).

93 Describing the debates over the Constitution as between "federalists" and "antifederalists" is now seen as an oversimplification. There were a wide variety of opinions both among those who favored and opposed ratification. Moreover, the term "antifederalist" appears to have been a term used mostly by Madisonians to describe their opponents. *See* Pauline Maier, *Narrative, Interpretation, and the Ratification of the Constitution*, 69 WM. & MARY Q. 382, 385–86 (2012).

94 Warren, *supra* note 84, at 54 ("It is well known that many of the chief objections to the Constitution were due to the broad scope of its provisions relative to the judicial power."). Warren also distinguished between "a Court's jurisdiction and a Court's power." WARREN, *supra* note 84, at 331. He argued that the "framers made no provision whatever as to the powers of the Court" but rather "assumed that the Court, having obtained jurisdiction, would exercise all functions and powers which Courts were at that time in the judicial habit of exercising." *Id.* at 331–32.

created for an "oppressive" federal judiciary.[95] Many of the calls for a Bill of Rights were to safeguard traditional judicial procedures in both criminal and civil trials.[96] The result was a widely held contemporary perception of ambiguity and confusion regarding the meaning and scope of the constitutional provisions relating to the federal judiciary.[97]

In the Federalist Papers, James Madison and Alexander Hamilton, while defending specific constitutional provisions regarding the judiciary, never claim that the Constitution actually defines the precise relationship between legislative and judicial power or details what "judicial power" it has granted to the judicial branch. In Federalist 47, Madison, citing Montesquieu, defends the general concepts of separation of powers and judicial independence. He states that there is a danger to liberty "if the power of judging be not separated from the legislative and executive powers."[98] Madison goes on to assure his audience that this danger is only posed when one branch of government is completely joined with or subservient to another. He presents many instances in the British and American state constitutions where the various branches of government interact, check, and balance one another. A critical aspect of such arrangements, he says, is that "[t]he entire legislature can perform no judiciary act."[99] He does not tell us what constitutes a "judiciary act," or what powers are included under the "power of judging."[100] He does not mention contemporary concerns

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95 Letter from Elbridge Gerry to the Massachusetts Legislature (Oct. 18, 1787), https://teachingamericanhistory.org/document/elbridge-gerrys-objections-letter-to-massachusetts-legislature [https://perma.cc/GUS2-6AKU]; *see also* Warren, *supra* note 84, at 54–55.

96 The principal Amendments which were regarded as necessary, relative to the Judiciary, were: (a) an express provision guaranteeing jury trials in civil as well as criminal cases; (b) the confinement of appellate power to questions of law, and not of fact; (c) the elimination of any Federal Courts of first instance, or, at all events, the restriction of such original Federal jurisdiction to a Supreme Court with very limited original jurisdiction; (d) the elimination of all jurisdiction based on diverse citizenship and status as a foreigner.

Warren, *supra* note 84, at 56. Note that four of the ten Amendments actually enacted deal with judicial procedure in some sense, although only the Seventh deals with civil procedure. *See* U.S. CONST. amends. V–VIII.

97 For "Brutus," the fact that the Constitution's grants of power were "conceived in general and indefinite terms, which are either equivocal, ambiguous, or which require long definitions to unfold the extent of their meaning," created a great danger that such federal powers would be improperly expanded by federal courts. *See* Letter XI from Brutus, *supra* note 84.

98 THE FEDERALIST NO. 47 (James Madison) (quoting Montesquieu).

99 *Id.*

100 Madison may have believed that maintaining uncertainty would enable the role of courts to change over time in accordance with popular perception. In 1788, in a letter commenting on Jefferson's "Draft of a Constitution for Virginia," Madison stated that "[m]uch detail ought to be

over jury trial rights, equitable powers, and appellate review of factual findings. Nor does he state whether the powers traditionally asserted as inherent judicial authority over court procedures, discipline, and sanctions are part of that federal power.

Hamilton, in Federalist 78, implicitly responds to the fears of an oppressive federal judiciary by making his famous argument that it is the "least dangerous branch" having neither the power of the sword, nor of the purse, nor even the power to enforce its own orders.[101] Having said that, however, he goes on to discuss the benefits that come from having a strong, independent judicial branch, primarily the constraint it can exercise on Congress to keep it from enacting unconstitutional laws. He talks about "[t]he complete independence of the courts of justice" as an essential element in safeguarding the limited powers granted to the federal government under the Constitution.[102] Yet when describing the provisions in the Constitution that ensure that complete independence, he cites only the one expressly stated: the lifetime tenure of federal judges during "good behavior."[103] No other express guarantees of judicial independence can be found in the Constitution, nor any other provisions designed to safeguard it.[104] While emphasizing its structural independence, Hamilton never explains how the "least dangerous branch" will be able to maintain its political independence against the more powerful legislative and executive, or even whether such political independence was necessary or desirable.[105] The actions of the newly created government would begin to provide some answers to these questions.

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avoided in the constitutional regulation of [the judiciary], that there may be room for changes which may be demanded by the progressive changes in the state of our population." Frankfurter & Landis, *supra* note 72, at 1017 (quoting 5 THE WRITINGS OF JAMES MADISON 290–91 (Gaillard Hunt ed., 1904)).

101 *See* Treanor, *supra* note 88, at 483–84 (explaining Hamilton's statement as a response to fears of an overpowerful and unconstrained federal judiciary).

102 THE FEDERALIST NO. 78 (Alexander Hamilton).

103 He asserts that "nothing will contribute so much as this to that independent spirit in the judges which must be essential to the faithful performance of so arduous a duty." *Id.* This is not to deny that life tenure was an important element in establishing judicial independence. The rights conferred in Article III were even more extensive than those of state judges and "had been a focus of Anti-Federalist criticism." *See* Treanor, *supra* note 88, at 469, 482–83.

104 Madison, as well other delegates to the Convention, had favored a provision giving the executive and federal judiciary a joint veto over legislative action. Madison thought "it would enable the Judiciary Department the better to defend itself against Legislative encroachments." WARREN, *supra* note 84, at 332–33.

105 Hamilton did seem to have some expectation that federal judges, having been "selected for their knowledge of the laws, acquired by long and laborious study," would decide cases in accordance with legal principles and not political considerations, and would therefore be somewhat insulated from "the pestilential breath of faction." THE FEDERALIST NO. 81 (Alexander Hamilton).

B. *The First Congress Clarifies Some Issues but Not Others*

The Federal Judiciary Act of 1789[106] was passed in the first session of Congress. It created the federal court system and set forth its initial structure, which included provisions for trial as well as inferior appellate courts.[107] The Act defined and limited the subject matter jurisdiction of the Supreme Court and lower federal courts. It also dealt extensively with the procedures and substantive law to be applied in the newly created courts.[108] Most significantly for our purposes, it contained provisions conferring on the federal courts powers that had traditionally been thought of as part of English courts' inherent judicial authority, including the power to punish contempts and to establish "all necessary rules" for the conduct of court business.[109]

Many of the provisions of the Act expressly preserved and protected traditional judicial practices like jury trials and limits on appellate review of factual findings.[110] While there were some procedural innovations, particularly with regard to evidentiary matters,[111] there was greater emphasis on limiting federal judicial power in areas such as subject matter jurisdiction and appellate review of factual findings and interference with jury rights. With respect to the power to punish contempts and establish court rules, the Act essentially

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106 Judiciary Act of 1789, ch. 20, 1 Stat. 73, *invalidated by* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

107 It set the number of Supreme Court Justices at six and also established federal district courts and circuit courts of appeal. Judiciary Act §§ 1, 3. Five of the ten members of the drafting committee for the Judiciary Act had also been delegates to the Convention. Warren, *supra* note 84, at 57.

108 Warren, *supra* note 84, at 51–52, 56; Holt, *supra* note 81.

109 Judiciary Act § 17 ("[A]ll the said courts of the United States shall have power . . . to punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before the same . . . and 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."). That section also gave federal courts power to grant new trials "for reasons for which new trials have usually been granted in the courts of law." *Id.*

110 *See* Warren, *supra* note 84, at 56, 75, 79–80, 94–101; Holt, *supra* note 81, at 1471, 1494–95, 1501–03.

111 Section 15 required parties in trials in actions at law to "produce books or writings in their possession or power, which contain evidence pertinent to the issue." Judiciary Act § 15. A stronger version of this section, which would have permitted courts to compel testimony by a defendant as to "his or her knowledge in the cause," was ultimately stricken from the bill. *See* Warren, *supra* note 84, at 95–96; Holt, *supra* note 81, at 1499–1500.

granted the federal courts power to keep doing what courts had traditionally done.[112]

Any legislative act is an implicit assertion of constitutional lawmaking power. In that sense, the Judiciary Act can be viewed as a broad assertion by Congress of constitutional power to regulate the judicial branch. Yet viewed politically with reference to its actual substantive provisions, the Act seems primarily designed to reassure the public, particularly those concerned about the potential powers of the newly created federal judiciary, that these courts would operate in pretty much the same way as the existing state courts, particularly with regard to property rights and debtor-creditor issues.[113] Congress was responding to widespread political concerns, raised during the ratification debates, that federal courts might usurp state court powers or abrogate traditional rights safeguarded by state courts. If the Constitution was a compromise that nonetheless moved the country decisively toward a stronger federal government, the Judiciary Act, also a compromise, primarily moved the new government in the opposite direction, toward greater limits and constraints on federal judicial power.[114]

While scholars have analyzed the provisions of the Act for evidence of constitutional meaning,[115] historical work suggests that constitutional concerns were not foremost on the minds of the drafters. They were responding to specific political pressures and concerns, particularly affecting the property rights of various constituents.[116] Indeed, the records of the congressional debates over the Judiciary Act reveal a willingness to skirt, if not actually defy, express constitutional

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112 Also, the Judiciary Act § 14 granted federal courts power to issue all writs "which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law." Under the common law pleading rules prevalent at that time, writs defined the remedies available at common law, and the remedies determined what causes of action courts could hear. *See* Anthony J. Bellia Jr., *Article III and the Cause of Action*, 89 IOWA L. REV. 777, 786–90 (2004). In essence, this was a broad grant of power to the federal courts to apply common law. Usually, pursuant to the Process Acts of 1789 and 1792, this would be the same "local law" applied in state courts. *See supra* notes 68, 109 and accompanying text; Anthony J. Bellia Jr. & Bradford R. Clark, *The Original Source of the Cause of Action in Federal Courts: The Example of the Alien Tort Statute*, 101 VA. L. REV. 609, 643–46 (2015).

113 *See* Warren, *supra* note 84, at 67–73, 79–80, 83–86, 94–105; Holt, *supra* note 81, at 1464.

114 *See* Warren, *supra* note 84, at 53 (noting that the Judiciary Act was a compromise whose "provisions completely satisfied no one, though they pleased the Anti-Federalists more than the Federalists"); Bellia & Clark, *supra* note 112, at 627–28; Holt, *supra* note 81, at 1479–82.

115 *See* Barton, *supra* note 8, at 26; Francis & Mandel, *supra* note 16, at 623 & n.22 ("The fact that Congress included the power to punish contempt in the Judiciary Act of 1789 could be taken as implying that Congress did not believe that the courts possessed such power as a matter of inherent authority.").

116 Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 226–27 (1821); *see supra* notes 84–88 and accompanying text.

provisions.[117] Certainly, Congress did not seem overly concerned with tailoring the new law to stay within the clear boundaries of constitutionality, nor to necessarily conform to the traditional powers exercised by English courts.[118] The Act does contain express grants of power to the lower federal courts with respect to contempt and rulemaking authority, but it is difficult to say how much constitutional authority may be implied from a law that grants an independent branch of government the power to do something that under traditional understandings of judicial power it already had the power to do. While it might be seen as an assertion of legislative control, it might also reflect a recognition by Congress that in these areas it was approaching a constitutional boundary, and that its power to change the status quo regarding contempt procedure or court rulemaking was limited by separation-of-powers concerns. Most likely, it simply reflected a political need to show both the courts and the public that Congress had no desire to change traditional practices in these areas.[119] The Supreme Court would declare, a few decades later, that whatever the purpose of the Act, it was not needed to confer powers the courts already possessed by virtue of their inherent authority.

Nonetheless, Section 17 of the Act reflected the fact that powers traditionally exercised by courts under their inherent authority were potential subjects of controversy between the legislative and judicial powers, controversies where conflicts and difficult constitutional issues could easily arise.

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117 Professor Warren cites two instances in which the language of the Act came close to unconstitutionality. It granted circuit courts jurisdiction over all civil suits where "an alien is a party." Judiciary Act § 11. This unconstitutional expansion of Article III jurisdiction was reinterpreted to conform to constitutional limits in *Hodgson v. Bowerbank*, 9 U.S. (5 Cranch) 303 (1809). *See also* Dennis J. Mahoney, *A Historical Note on* Hodgson v. Bowerbank, 49 U. CHI. L. REV. 725, 726–27 (1982). Congress also seriously considered language for Section 16 of the Act that would have expanded federal court equity beyond traditional common law boundaries. This would have been in clear conflict with the Seventh Amendment of the Bill of Rights, which was by then nearing ratification. *See* Warren, *supra* note 84, at 79–80, 96–97.

118 For example, with respect to the controversial question of federal court equity jurisdiction, there was sentiment in Congress both in favor of expanding such jurisdiction beyond traditional common law limits and severely limiting or abolishing it completely. *See* Warren, *supra* note 84, at 96–97. Both proposals raised serious constitutional questions and indicated a willingness to depart from traditional English concepts of inherent judicial powers.

119 This is perhaps most clearly seen in Section 34 of the Judiciary Act, which provides that state law is to be regarded as providing "rules of decision" for federal trial courts "in cases where they apply." Judiciary Act § 34. This provision was substantially limited in *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842) to allow federal courts to apply general federal common law. Some later academic work, however, has argued that *Swift* was an erroneous reading of Section 34. *See* Warren, *supra* note 84, at 85–89 (this interpretation remains controversial); Bellia & Clark, *supra* note 112, at 639–70 (same); Kristin A. Collins, *"A Considerable Surgical Operation": Article III, Equity, and Judge-Made Law in the Federal Courts*, 60 DUKE L.J. 249, 252–53 (2010).

III. INHERENT JUDICIAL AUTHORITY IN THE SUPREME COURT

A. *1790–1865: Declarations and Deference Regarding the Scope of Inherent Judicial Authority*

The Supreme Court held its first session in 1790. The Justices were undoubtedly aware that one important task before them was to define the proper role of federal courts both with respect to the other branches of the federal government and the states.[120] Some of the contradictions regarding inherent judicial authority can be seen developing in this early period. On constitutional issues, there is a dichotomy between the Court's rhetoric, which strongly asserts the existence of essential inherent judicial powers derived from the very creation of a federal judiciary, and the Court's holdings, which are uniformly deferential to and uphold legislation that seeks to limit or regulate judicial power. Another line of cases, based on a court's traditional common law and equitable powers, recognizes courts' authority to control their own practices and procedures, while acknowledging that such rules can be legislatively altered.

1. Contrasting Responses to Legislative Limits on Jurisdiction and Sanctioning Power

The early Supreme Court decisions draw a sharp distinction between the federal courts' subject matter jurisdiction, which they hold is under almost complete congressional control, and federal courts' sanctioning powers, which are declared to be "necessary" and "essential" to all courts, strongly implying that they are constitutionally required. The Court seems eager to make these broad assertions of inherent judicial authority, since it includes them as dicta in the cases that uphold legislative limitations on subject matter jurisdiction.

Turner v. Bank of North America[121] involved a constitutional challenge to Judiciary Act provisions that imposed limitations on

120 *See* Warren, *supra* note 84. Of the first ten Justices to serve in the Supreme Court, six—Jay, Wilson, Ellsworth, Paterson, Rutledge, and Blair—had been delegates to the Constitutional Convention. *See Justices*, OYEZ, https://www.oyez.org/justices [https://perma.cc/7S4L-SJ7S]. Ellsworth also played a major role in drafting the Judiciary Act. *See* Warren, *supra* note 84, at 50.

121 4 U.S. (4 Dall.) 8 (1799). *Turner* was a suit over a promissory note. *Id.* at 9. The plaintiff and assignee of the note were citizens of different states assigned to a bank, but the plaintiff failed to allege the citizenship of the assignor. *Id.* at 10. Such an allegation was expressly required under the Judiciary Act, probably to allay popular concern that creditors, by subsequent assignment of

federal subject matter jurisdiction not present in Article III itself. Justice Ellsworth rejected the argument that "federal [c]ourts derive their judicial power immediately from the constitution."[122] Justice Ellsworth described the lower federal courts as courts of limited jurisdiction entitled to no presumption in favor of their exercise of judicial power.[123] In a frequently quoted concurring statement, Justice Chase observed that "the political truth is, that the disposal of the judicial power, (except in a few specified instances) belongs to congress."[124] This characterization of plenary legislative power as a "political truth" suggests that the Court was aware of the institutional context[125] in which decisions regarding the power of federal courts were being made.[126]

In *United States v. Hudson & Goodwin*,[127] unlike *Turner*, no jurisdictional statute was involved. The question was whether common law criminal jurisdiction could be implied solely from Article III. The Court answered that question in the negative,[128] noting again that the jurisdiction of lower federal courts, like their creation, is subject to plenary congressional power.[129]

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such notes, could assure a federal forum for their claims. The plaintiff contended that since this was a suit between citizens of different states, the lower courts had jurisdiction directly conferred by Article III. *Id.* at 9.

122 *Id.* at 11; *id.* at 10 n.1 (Chase, J., concurring statement).

123 *Id.* at 11 (majority opinion). Justice Ellsworth contrasted this with courts of general jurisdiction, where the presumption is in favor of jurisdiction "unless the contrary appears." *Id.*

124 *Id.* at 10 n.1 (Chase, J., concurring statement). Justice Chase actually made this statement, which was included in the report of the case as a footnote by the reporter, during oral argument. *See also* Frankfurter & Landis, *supra* note 72, at 1014 (describing separation of powers as "a 'political doctrine,' and not a technical rule of law" (footnote omitted)).

125 *Turner*, 4 U.S. at 11. Another indication of the Justices' awareness of their institutional role was Ellsworth's comment that the federal circuit court, although an "*inferior* Court, in the language of the constitution, is not so in the language of the common law," and its proceedings were "entitled to as liberal intendments, or presumptions, in favour of their regularity, as those of any Supreme Court." *Id.*

126 Chase had good reason to be aware of the political consequences of judicial conduct. He was a controversial judge of strong Federalist leanings whose overbearing actions made him a "terror on the bench." He was impeached and tried by the Senate in 1804 but was acquitted. *See* Frank Thompson, Jr. & Daniel H. Pollitt, *Impeachment of Federal Judges: An Historical Overview*, 49 N.C. L. REV. 87, 97–99 (1970).

127 11 U.S. (7 Cranch) 32 (1812). *Hudson* involved a federal criminal prosecution for libel of the President and Congress. Defendants were said to have published a newspaper article "charging them with having in secret voted two millions of dollars as a present to Bonaparte for leave to make a treaty with Spain." *Id.* at 32.

128 *Id.* at 34. The Court justifies its result here in part by stating that it has "been long since settled in public opinion" and by "the general acquiescence of legal men" showing deference both to popular opinion and legal tradition. *Id.* at 32.

129 *Id.* at 33. While willing to accept legislative limits on their jurisdiction, the Justices resisted legislative attempts to expand their powers beyond those "of a judicial nature," citing

Justice Johnson ends the opinion, however, by asserting that certain other judicial powers may be implied—those that are "necessary to the exercise of all others."[130] The examples he gives are all sanctioning powers, and his description of them strongly indicates that they are of constitutional dimension.[131] We can see in *Hudson*, therefore, the beginning of the Court's studied ambiguity regarding inherent judicial power. The Justices seem eager to declare the existence of such powers, particularly those necessary to maintain decorum and order in their courts. Yet their assertion is purely theoretical, made in a case to which it is only marginally relevant. Moreover, while these powers appear to be derived from constitutionally granted power, the extent to which they may be limited or restricted by Congress is not discussed.[132]

Nine years later, *Anderson v. Dunn*[133] presented the Court with another opportunity to discuss judicial contempt power even though the case actually involved the validity of *congressional* power to punish nonmembers for contempt.[134] Since there was no statute or

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constitutional separation-of-powers principles. *Hayburn's Case*, 2 U.S. (2 Dall.) 408, 410 (1792), was a constitutional challenge to the Invalid Pensions Act of 1792. That Act permitted Revolutionary War veterans to submit pension claims to federal circuit courts, whose determinations would be subsequently reviewed by the Secretary of War and by Congress. In a letter to President Washington, Justices Wilson and Blair and District Judge Peters stated that the law was unconstitutional because it required courts to engage in business "not of a judicial nature" and because their determinations, which they characterized as "judgments," would be reviewed by the executive and legislative branches. *Id.* at 410. While *Hayburn's Case* is not technically a Supreme Court case, it is one of the earliest applications of separation-of-powers principles by Supreme Court Justices and has become an accepted part of the Court's separation-of-powers jurisprudence. *See* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 218–19 (1995).

130 *Hudson*, 11 U.S. at 34.

131 "To fine for contempt—imprison for contumacy—inforce the observance of order, &c. are powers which cannot be dispensed with in a Court, because they are necessary to the exercise of all others: and so far our Courts no doubt possess powers not immediately derived from statute." *Id.*

132 *See id.* at 32–34. Justice Marshall took a similar approach to issues of jurisdiction and inherent judicial authority in *Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 93–94 (1807). After stating that "this court deems it proper to declare that it disclaims all jurisdiction not given by the constitution, or by the laws of the United States," he exempted certain inherent judicial powers. *Id.* at 93. "This opinion is not to be considered as abridging the power of courts over their own officers, or to protect themselves, and their members, from being disturbed in the exercise of their functions." *Id.* at 94. He went on to interpret the Judiciary Act as giving federal courts broad powers to issue various forms of habeas corpus writs.

133 19 U.S. (6 Wheat.) 204 (1821).

134 Anderson was accused of having tried to bribe a member of Congress. A warrant was sworn out by the Speaker of the House for his arrest, and he was taken into custody by the Sergeant at Arms. *Id.* at 207–10. He was "conveyed . . . to the bar of the House, where he was heard in his defence, touching the matter of the said charge" and then detained "until he was finally adjudged to be guilty, and convicted of the charge aforesaid, and ordered to be forthwith brought to the bar, and reprimanded by the Speaker, and then discharged from custody." *Id.* at 213.

constitutional provision expressly conferring such power,[135] the question was whether it could be judicially implied.[136] The Court held that it could, based on the necessity for "public functionaries" to preserve "the safety of the people."[137] Justice Johnson then cited a similar concept of necessity to explain and justify the judicial contempt power:

> On this principle it is, that Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates, and, as a corollary to this proposition, to preserve themselves and their officers from the approach and insults of pollution.[138]

Having described these powers as universally acknowledged, Justice Johnson seeks to explain why Congress also expressly conferred those powers in the Judiciary Act. He does so somewhat tentatively, suggesting that the statutory provisions might be "an instance of abundant caution" or possibly "a legislative declaration, that the power of punishing for contempt shall not extend beyond its known and acknowledged limits of fine and imprisonment."[139] This suggests that Congress does have some ability to regulate judicial exercise of the contempt power, but also makes it clear that legislation was not needed to confer these powers.

After recognizing the implied power of Congress to punish contempt, Justice Johnson warns against too broad an exercise of such powers. He states that "the genius and spirit of our institutions are hostile to the exercise of implied powers,"[140] that an implied power "asserted on the plea of necessity" may be "too broad, and the result too indefinite," and that "[t]his is unquestionably an evil to be guarded against."[141] He concludes that the congressional power to punish

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135 There is a provision authorizing the House to punish *members* for "disorderly Behaviour." U.S. CONST. art. I, § 5, cl. 2.

136 In *McCulloch v. Maryland*, Justice Marshall, holding that Congress had the implied power to establish a federal bank, observed that "there is no phrase in the [Constitution] which, like the articles of confederation, excludes incidental or implied powers; and which requires that everything granted shall be expressly and minutely described." 17 U.S. (4 Wheat.) 316, 406 (1819).

137 *Anderson*, 19 U.S. at 226–27.

138 *Id.* at 227.

139 *Id.* at 227–28.

140 *Id.* at 225.

141 *Id.* at 228. He also warned that such power can become "tyrannical" and that arguments from "necessity" can be used to justify unrestricted power. *Id.* In *McCulloch v. Maryland*, the Court rejected an interpretation of the term "necessary" in the Necessary and Proper Clause to

contempt must be inherently limited to "the least possible power adequate to the end proposed."[142] *Anderson* thus introduced into the jurisprudence of inherent power the concept that such powers, while necessary, were potentially dangerous and required reasonable judicial or legislative restrictions on their use.

The constitutional limits of congressional power over contempt were to be tested by a new more restrictive law passed in 1831.[143] The precipitating cause was a controversial case in which an attorney was judicially punished for criticizing a judge in a letter to the local newspaper.[144] Within a year, Congress had passed a new law substantially limiting judicial use of the contempt power to punish actions taken outside the presence of the court.[145] The validity of that new law would not be considered by the Supreme Court for forty-five years.

2. Judge-Made Rules for the Conduct of Practice and Procedure

Like the contempt power, the power of courts to make rules to govern their own practice and procedure was a traditional inherent power of English courts.[146] It had also expressly been conferred on the lower federal courts by the Judiciary Act.[147] Early cases involving that

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mean "indispensable." 17 U.S. at 413–14. Rather, it meant "employing any means calculated to produce the end." *Id.*

142 19 U.S. at 230–31 (emphasis omitted). In *Anderson*, that was held to mean imprisonment until no longer than the end of the congressional term, as well as limits on the location of the actions that could trigger contempt sanctions. *Id.*

143 Act of 1831, ch. 99, § 2, 4 Stat. 487, 488.

144 Judge Peck of the Federal District Court of Missouri had the attorney arrested, summarily held in contempt, imprisoned for twenty-four hours, and disbarred for eighteen months. *See* Thompson & Pollitt, *supra* note 126, at 101–02; Frankfurter & Landis, *supra* note 72, at 1024–27. Judge Peck's order became something of a *cause celebre*. The House voted to impeach him, but he was acquitted by the Senate in a close vote. *See* Thompson & Pollitt, *supra* note 126, at 101–02; Frankfurter & Landis, *supra* note 72, at 1024–26.

145 The new act limited the federal courts' power "to issue attachments and inflict summary punishments for contempts" to cases involving "the misbehaviour of any person or persons in the presence of the said courts, or so near thereto as to obstruct the administration of justice" as well as misbehavior of court officers and "disobedience or resistance" of any person "to any lawful writ, process, order, rule, decree, or command of the said courts." Act of 1831 § 2. These provisions are now found in 18 U.S.C. § 401. The limits on summary contempt for actions taken outside the presence of the court was a departure from prior American and English practice at the time, but perhaps not from the traditional powers of English courts as recognized by common law. *See* John Charles Fox, *The Summary Process to Punish Contempt*, 25 L.Q. REV. 238 (1909); *see also* Frankfurter & Landis, *supra* note 72, at 1027–29, 1042–44; Ronald Goldfarb, *The History of the Contempt Power*, 1961 WASH. U. L.Q. 1.

146 *See supra* notes 67–68 and accompanying text.

147 *See supra* notes 106–19 and accompanying text.

power, however, arose in a very different context. Procedural rulemaking authority was seen as part of traditional judicial power to apply judge-made legal principles at common law and equity.[148] Such powers were subject to legislative revision and were exercised interstitially in the absence of, or pursuant to, express legislation. Most of the issues that arose in cases related to the continuing national controversy over whether federal courts should generally conform to state and local law or be able to develop a separate and uniform body of federal judge-made law.[149] Accordingly, these cases tend to involve choice-of-law and federalism issues rather than constitutional questions regarding separation of powers.

Matters were further complicated by the way lawyers at that time understood (and frequently blurred) the distinctions between substantive, procedural, and remedial law, and between common law and equity.[150] Broadly speaking, during this period the federal courts were obligated to apply state or local law[151] in most actions at common law, including state law rules of practice and procedure. Most of this structure was created by a series of frequently amended federal statutes,

148 Then-Professor Barrett notes that in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), the majority implicitly adopted the argument of the Attorney General that the Supreme Court possessed inherent authority to regulate its process in a suit by an individual against a state. Barrett, *supra* note 17, at 870–71. Justice Iredell, in dissent, expressly sought to refute the "Attorney General's doctrine." *Chisholm*, 2 U.S. at 433 (Iredell, J., dissenting) ("The authority contended for is certainly not one of those necessarily incident to all Courts merely as such."). This ruling does not appear to have had much influence on subsequent inherent authority decisions of the Supreme Court, perhaps because it related only to process in the Supreme Court and the jurisdiction invoked was essentially abolished by the Eleventh Amendment. *See supra* notes 44–63 and accompanying text.

149 *See supra* notes 44–63 and accompanying text.

150 *See* Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 914–17 (1987).

151 Local law, or *lex loci*, referred to the principle of requiring application of state law to matters of local concern, like real property claims. *See* Collins, *supra* note 119, at 263–64; Bellia & Clark, *supra* note 112, at 628–30.

notably the Judiciary Act[152] and various Process Acts.[153] With respect to equitable actions, the federal courts had greater leeway to develop uniform judge-made law, and after 1822, also applied uniform rules of equity practice promulgated by the Supreme Court.[154]

While the early Supreme Court cases upholding federal judicial authority to deviate from state law practice mostly rely on close reading of these statutes, one can also discern a recognition, perhaps even insistence, that in the conduct of judicial business there are some

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152 Many of the provisions of the Judiciary Act of 1789 were designed to prevent federal courts from adopting procedures that could undermine rights traditionally available in state courts. Most famously, Section 34 of the Judiciary Act stated that federal trial courts were to apply as rules of decision "[t]he laws of the several states . . . in cases where they apply." Bellia & Clark, *supra* note 112, at 684 (quoting 28 U.S.C. § 1652). Equally important was Section 14, which granted the federal courts power to issue all writs "which may be necessary for the exercise of their respective jurisdictions, agreeable to the principles and usages of law." *Id.* at 643 (quoting Judiciary Act § 14). For a discussion of how this provision limited the causes of action available to federal courts while also regulating some, but not all, "matters that we would describe today as 'procedure,'" see *id.* at 643–46. Section 17 also authorized federal courts to make "all necessary rules" for the conduct of their business, provided such rules were not "repugnant" to federal law. *Id.* at 645. Some members of the first Congress would have gone further. They submitted a bill that would have created uniform rules of practice and procedure for the federal courts, but it failed to pass. *See id.* at 646–47. The Judiciary Act of 1793, however, extended to lower federal courts the power to make their own rules of practice and procedure to prevent delays and for the "advancement of justice." Judiciary Act of 1793, ch. 22, § 7, 1 Stat. 333, 335. The previous year, the Permanent Process Act of 1792 had authorized the Supreme Court to promulgate additional rules for the federal courts so long as they were not "repugnant to the Laws of the United States." *See generally* 4 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, at 200–05 (Maeva Marcus ed., 1992).

153 The subsequent Process Acts sought to clarify choice-of-law issues regarding federal court practice. The Process Act of 1789 required that in suits at common law, lower federal courts were to follow the same "forms of writs and executions, except their style, and modes of process and rates of fees" as were applied in state court. Process Act of 1789, ch. 21, § 2, 1 Stat. 93, 93. This Act was intended to be temporary and was replaced by the Permanent Process Act of 1792, which provided that the form of writs, executions and "forms and modes of proceeding" required pursuant to the 1789 Process Act would continue to be followed. Permanent Process Act of 1792, ch. 36, § 2, 1 Stat. 275, 276. This created a rule of "static conformity" under which federal courts generally followed whatever state procedures were in effect in 1789. It also contained an important proviso permitting "alterations and additions" to the application of state law when deemed "expedient" by the federal courts. *Id.* It provided no guidance as to the law to be applied in states admitted after 1789. *Id.*; Bellia & Clark, *supra* note 112, at 653–54. The Process Act of 1828 directed federal courts in newly admitted states to follow state law procedure as of 1828. Collins, *supra* note 119, at 260–61.

154 The Judiciary Act of 1789 conferred equity powers on the lower federal courts but said nothing about choice of law. Collins, *supra* note 119, at 269–70. The Process Act of 1789, however, contained the confusing mandate that in equity, admiralty, and maritime cases, federal courts were to apply "the forms and modes of proceeding[] . . . of the civil law." Process Act of 1789 § 2. This was changed in the Permanent Process Act of 1792 to a requirement to follow "traditional English practice." Bellia & Clark, *supra* note 112, at 676. One thing that seems clear is that Congress sought to prescribe a uniform set of equitable principles to be applied throughout the federal courts. Collins, *supra* note 119, at 270–74.

matters that neither statutes nor uniform rules can control. In such matters, judicial rulemaking is permitted and may even be required. Although the scope of federal power to apply such judge-made rules has waxed and waned, this discretionary procedural rulemaking power has remained and eventually came to be seen as part of inherent judicial authority.

In *Wayman v. Southard*,[155] Justice Marshall sought to make sense of the confusing rules governing choice of law for common law claims in federal court. That case, one of many that grew out of the economic crisis generated by the Panic of 1819, involved the law to be followed in executing a judgment by a federal circuit court in Kentucky. Kentucky at that time had adopted debtor-friendly laws that provided for stays of executions of judgments and doubled the length of those stays if creditors demanded payment in hard currency rather than notes of the Bank of Kentucky. Plaintiffs had sought to quash the execution, which had been made under that Kentucky law, and sought execution of the judgment in accordance with federal law.[156]

After extensive analysis of the relevant federal statutes, Justice Marshall concludes that the actions of the court officers in executing the judgment were a "mode of proceeding" under the Permanent Process Act of 1792. He held that the Act only required adherence to state procedures in effect in 1789[157] and permitted the federal courts to make alterations and additions to such practices in any event. Accordingly, Kentucky federal courts had no obligation to apply current Kentucky law to the execution of the judgments.[158]

Marshall spends a great deal of the opinion analyzing and ultimately rejecting the defendants' argument that Congress could not

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155 23 U.S. (10 Wheat.) 1 (1825).

156 The judges of the circuit court had divided on the issue, which was then certified to the Supreme Court. *Id.* at 2. For a general discussion of the background of the case, see Collins, *supra* note 119, at 301–03.

157 He adopted the "static" interpretation of the Permanent Process Act, which held that it froze the procedural mandate to follow state law practice at the time of the Process Act of 1789, while permitting alterations by the federal courts when necessary. Bellia & Clark, *supra* note 112, at 653–54; Collins, *supra* note 119, at 260–61. The Kentucky statute governing executions had been enacted much later. The Permanent Process Act permitted federal courts to apply current state law under the "alterations" proviso, and many federal courts apparently did so. *See* Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1037–38 (1982). The Kentucky Circuit Court in *Wayman* did not.

158 Marshall also rejects the argument that Section 34 of the Judiciary Act created an obligation to apply state law. He holds that law only applies to "rule[s] of decision" utilized by courts in formulating judgments, not "merely ministerial" acts like executing judgments. *Wayman*, 23 U.S. at 24–25. He also dismissed the argument that the federal government had no power to regulate the conduct of its own officers in executing judgments, saying that that power was so obvious that "reasoning cannot render [it] plainer." *Id.* at 22.

constitutionally delegate to federal courts the power to alter modes of proceeding in suits at common law.[159] He notes that not all such delegations of legislative power are valid, and that much depends on the importance of the subject being regulated and the scope of the discretionary power granted.[160] He holds that the delegation of rulemaking power in the Process Act is permitted because it is directed at discretionary decisions regarding ministerial matters, within the broad directions of the statute.[161]

Marshall then shifts ground to defend the delegation on a slightly different basis. He acknowledges that whether to permit the execution sale for notes or specie is a "more important exercise of the power of regulating the conduct of the officer" but concludes that it is "of the same principle."[162] He also states that "[a] general superintendence over this subject seems to be properly within the judicial province, and has been always so considered."[163] He does not use the terms "inherent" or "implied" but describes it as a traditional power of common law courts. In short, delegation of rulemaking power was appropriate because courts already possessed that power, at least potentially.

Some of Marshall's arguments in favor of delegation seem to anticipate those later used to justify procedural common law. It is a discretionary power to "vary minor regulations," which enables the courts to respond to changed circumstances.[164] Moreover, it operates at the level of specificity where the legislative and judicial functions overlap.[165] Similar arguments would be used to justify an inherent

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159 He does this even while noting that the question is irrelevant to the defendants' appeal because even if the delegation was invalid, this would not provide any grounds for requiring federal courts to follow current state law execution practices. *Id.* at 47–50.

160 The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details.

Id. at 43.

161 "The power given to the Court to vary the mode of proceeding in this particular, is a power to vary minor regulations, which are within the great outlines marked out by the legislature in directing the execution." *Id.* at 45.

162 *Id.*

163 *Id.* Some have seen this statement as recognition of an inherent judicial power to make procedural rules. *See* David E. Engdahl, *Intrinsic Limits of Congress' Power Regarding the Judicial Branch*, 1999 BYU L. REV. 75, 91; *see also* Pushaw, *supra* note 10, at 840–41 n.552.

164 *Wayman*, 23 U.S. at 45–46.

165 But, in the mode of obeying the mandate of a writ issuing from a Court, so much of that which may be done by the judiciary, under the authority of the legislature, seems to be blended with that for which the legislature must expressly and directly provide, that there is some difficulty in discerning the exact limits within which the legislature may avail itself of the agency of its Courts.

Id. at 46.

power of courts to develop interstitial practice rules in the absence of legislation.

Bank of United States v. Halstead[166] was a companion to *Wayman* that also involved a federal execution challenged as inconsistent with Kentucky state law.[167] Justice Thompson, following *Wayman*, also asserted the validity of the Process Act's delegation of power to federal courts to alter state law modes of proceeding. He went on to note that power to control the execution of its judgments "is a power incident to every Court from which process issues."[168] He saw it as based on common law rather than constitutional power, however, since he also noted that if misused, such judge-made procedures could be readily corrected by legislation or rules made by the Supreme Court.[169]

3. *Cary v. Curtis*: The End of Inherent Judicial Authority?

The strange and obscure case of *Cary v. Curtis*[170] contains the most complete denial of inherent judicial authority found in any Supreme Court case, as well as dissents that contain some of its most ringing affirmations. It involved an 1839 statute requiring customs collectors to pay all taxes they collected into the Treasury, including those paid under protest.[171] The majority, applying private law principles, held that the statute was a bar to plaintiff's action against the New York customs collector for money paid under protest.[172] Because the federal

166 23 U.S. (10 Wheat.) 51 (1825).

167 The case involved a writ of *venditioni exponas*, which ordered sale of property to satisfy a federal judgment. *Id.* at 51. Defendants claimed the execution of the writ was limited by a Kentucky statute that prohibited such sales for less than three-quarters of its appraised value. *Id.* at 52–53. It was argued along with *Wayman* by the same counsel, although it was decided after. *Id.*

168 *Id.* at 64. Such express statements of implied or inherent judicial rulemaking power are rare at this time, because the same general power had been conferred by statute and was also seen as a subset of even broader common law powers. *See* Barrett, *supra* note 17, at 864–69 (surveying all federal cases from 1789 to 1820 involving procedural matters, finding a "multitude" of cases in which "federal courts advanced procedural rules without referencing any statutory authority" but due to the "broad, statutorily granted authority over procedure" concluding it was not possible to determine if those cases relied on inherent or statutory authority).

169 *Halstead*, 23 U.S. at 60. On Supreme Court power to make rules for federal courts, see *supra* sources cited note 152. The first set of equity rules was promulgated by the Court in 1822. *See* Robert E. Bunker, *The New Federal Equity Rules*, 11 MICH. L. REV. 435, 438 (1913).

170 44 U.S. (3 How.) 236 (1845).

171 *Id.* at 240–41. The law further provided that if the Secretary of the Treasury determined that there had been an overpayment, that amount should be refunded. *Id.*

172 Plaintiff claimed the payment was excessive because it was based on import of raw silk, when in fact the products he had imported were manufactured. *Id.* at 236. The Court, applying

government had sovereign immunity, it was unclear in light of this decision whether individuals retained any right to bring judicial actions for wrongful tax assessments, an issue the majority expressly refused to reach.[173]

The statute could therefore be seen as depriving courts of the core constitutional power of adjudication.[174] This was the conclusion reached by Justice Story, one of two dissenters, who attacked the majority's interpretation as unconstitutional. He stated: "[T]he judicial power, designed by the Constitution to be the final and appellate jurisdiction to interpret our laws, is superseded [by the majority's opinion] in its most vital and important functions."[175] Justice Daniel, for the majority, asserted that the "judicial power of the United States, although it has its origin in the Constitution, is (except in enumerated instances, applicable exclusively to this Court) dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress."[176]

If the majority's statement in *Cary v. Curtis* had become the dominant view, it is hard to see how any concept of a core constitutional adjudicative power inherent in the courts would have survived. However, the foreclosure of rights to judicial redress, which the dissenters feared, was never actually endorsed by the majority,[177] and the issue became moot when thirty-six days later, Congress passed additional legislation clarifying that the right to sue collectors for disputed customs duties had not been eliminated.[178]

The question remains, of course, why a majority of the Court had been willing to endorse such an absolute statement of legislative power over the judiciary. It is possible the majority truly believed that the Constitution gave Congress plenary power over all aspects of the federal judiciary, except for the small number of cases entrusted to the original jurisdiction of the Supreme Court. It is also possible that the Court was simply unwilling to challenge Congress on a matter so clearly affecting the relative powers of the legislative and judicial branches. Yet the

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general rules of assumpsit for monies had and received, held that the statute, by creating a mandatory obligation of payment to the Treasury, had negated any inconsistent obligation by the collector to pay plaintiff, and there was therefore no basis for a lawsuit. *Id.* at 251–52.

173 *Id.* at 250.

174 Unlike *Turner* and *Hudson*, where the "limited" jurisdiction of the federal courts left the state courts free to adjudicate the controversies, in *Cary v. Curtis*, a federal court was the only forum that could possibly have adjudicated claims against the federal government or its agents.

175 *Id.* at 253 (Story, J., dissenting).

176 *Id.* at 245 (majority opinion).

177 The Court expressly refused to rule on that question. *Id.* at 250.

178 *See* Act of Feb. 26, 1845, ch. 22, 5 Stat. 727; HAROLD DUBROFF & BRANT J. HELLWIG, THE UNITED STATES TAX COURT: AN HISTORICAL ANALYSIS 30–31 (2d ed. 2014).

subsequent history of the cases suggests a third intriguing alternative—that the Court's seeming acquiescence in congressional supremacy may have been strategic. By noting the ambiguities raised by the Act, but by refusing to hold even the most extreme interpretation unconstitutional, the Court placed full responsibility on Congress for potentially depriving citizens of any right of redress against corrupt or incompetent customs inspectors. The alacrity with which the statute was clarified indicates that this political judgment was likely correct.

It also suggests a reason beyond mere temerity why, in cases like *Hudson* and *Anderson*, the Court asserts the existence of an essential, constitutionally based inherent power that it never actually exercises. If, by such repeated assertions, it can convince members of Congress and the public that there are such constitutionally based powers, but their scope is uncertain and Congress has primary responsibility for defining and keeping them within reasonable limits, that may actually provide greater safeguards for judicial independence than a more strident and possibly unenforceable assertion of judicial power. In any event, *Cary v. Curtis* represents one instance of extreme reluctance to assert constitutionally based inherent judicial power.

B. *1865–1918: The Court Expands Inherent Authority in Problematic Ways*

The post–Civil War period saw a growing trend toward professionalization and codification of the law as legal "science."[179] Judges saw themselves as possessing unique technical expertise derived from the accumulated wisdom of the common law. It is not surprising that during this period the Supreme Court also sought to assert greater power and independence on behalf of the lower federal courts. Such growing assertiveness wielded by primarily conservative judges in a nation undergoing rapid political and economic change led to broad and controversial decisions. Some of these were based on far-reaching constitutional principles like substantive due process;[180] others relied primarily on interpretive principles and narrow reading of statutes that

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179 *See, e.g.*, Merchs.' Bank v. State Bank, 77 U.S. (10 Wall.) 604, 637 (1870) (justifying use of a directed verdict in a jury trial because "it gives the certainty of applied science to the results of judicial investigation"); Mathias Reimann, *Nineteenth Century German Legal Science*, 31 B.C. L. REV. 837 (1990); Subrin, *supra* note 150, at 934–35.

180 The most notorious such case was *Lochner v. New York*, 198 U.S. 45 (1905), which gave its name to an era of Supreme Court jurisprudence.

left more room for judicial autonomy and application of judge-made equity and common law.[181]

The tendency to interpret common law principles broadly and statutes narrowly can be seen in many of the cases from this period involving inherent judicial power. The limits on contempt power in the 1831 statute were held constitutional, but later cases nevertheless expanded that power to virtually any public statements judges found insulting or obstructive.[182] With respect to procedural rulemaking, the Conformity Act of 1872 theoretically mandated federal adherence to state court practice, but the statute was so vaguely written and subject to so many exceptions that it seems to have actually encouraged development of separate federal procedures. Many judge-made procedural rules, even some directly contrary to state statutes, were justified as applications of traditional common law, equity, or inherent powers.[183] By the end of this period there were increasing calls for judicial reform, including new rules to govern federal procedure.

1. Contempt and Other Sanctions

Ex parte Robinson[184] upheld the constitutionality of the 1831 statute, limiting judicial power to punish contempt, but still managed to expand the federal courts' inherent sanctioning authority. Robinson, an attorney, had been held in contempt and "disbarred from further practice in the court."[185] Robinson argued that disbarment was not a permitted punishment for contempt under the 1831 statute.

Justice Field, writing for the majority, made two contradictory statements about the contempt power (or perhaps a single ambiguous one). He reaffirmed its "essential" and indefeasible nature,[186] yet stated that since Congress has plenary power over the jurisdiction of lower federal courts, their "powers and duties" were wholly dependent on

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181 *See supra* note 119 and accompanying text; *see also* Swift v. Tyson, 41 U.S. (16 Pet.) 1, 18–19 (1842) (expressly recognizing federal judicial power to apply general common law in the absence of statutory authority).

182 *See infra* notes 192–205 and accompanying text.

183 *See infra* notes 206–20 and accompanying text.

184 86 U.S. (19 Wall.) 505 (1873).

185 *Id.* at 508. Robinson had allegedly failed to respond to judicial orders and had spoken to the court in a "grossly and intentionally disrespectful" tone. *Id.* at 507.

186 "The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power." *Id.* at 510.

legislative action.[187] The juxtaposition of these two statements is confusing but may be seen as dicta since the statute did not completely abrogate this essential power but merely sought to limit its use to certain specific situations. Justice Field had no difficulty affirming the validity of the statute and the limits it set as constitutionally permitted regulation of contempt proceedings. However, he went on to hold that even though disbarment was not a punishment for contempt under the statute, it could nonetheless be imposed under the court's inherent authority, thereby effectively undercutting the restrictive purpose of the legislation.[188]

In *Ex parte Robinson*, the Court accepted legislative limitations on sanctioning powers it had just described as necessary and essential to all courts. It followed that by declaring that another power, disbarment, was also inherent and available to courts without any statutory authorization. It did not state whether the power to admit and disbar attorneys was "essential" or constitutionally required. The overall effect was to expand judicial independence and sanctioning power, but not in a particularly clear or coherent way.

Other cases further developed the legal standards applicable to proceedings for contempt and disbarment. Some dealt with the question of whether disbarment, if imposed without all the protections of a criminal trial, satisfied due process.[189] Others considered the types of orders that, if violated, could justify punishment by contempt.[190] Still,

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187 "These courts were created by act of Congress. Their powers and duties depend upon the act calling them into existence, or subsequent acts extending or limiting their jurisdiction." *Id.* at 511.

188 Disbarment was an inherent power "possessed by all courts which have authority to admit attorneys to practice." *Id.* at 512. However, the Court held it should not have been imposed without notice and other due process protections. *Id.* (citing *Ex parte* Garland, 71 U.S. (4 Wall.) 333, 378 (1866)).

189 In *Ex parte Wall*, 107 U.S. 265, 271 (1883), the disbarment of an attorney who had participated in (and possibly fomented) the lynching of a criminal defendant awaiting trial was upheld. Although the disbarment proceeding was summary, it did provide the attorney with notice and an opportunity to be heard. Justice Field dissented, citing *Robinson*, arguing that the disbarment proceeding improperly extended beyond the question of professional misconduct and therefore required a criminal indictment and trial. *Id.* at 303–07; *see also* Randall v. Brigham, 74 U.S. (7 Wall.) 523, 540 (1868) (upholding disbarment order by highest court in Massachusetts despite "informality" of procedure).

190 In *Ex parte Fisk*, 113 U.S. 713, 722–25 (1885), the Court reversed a contempt order that was based on the defendant's failure to provide deposition testimony pursuant to New York law. The lower federal court had issued the order under the Conformity Act, ch. 255, § 6, 17 Stat. 196, 197 (1872), but the Court held that New York law was inapplicable because it was in conflict with various federal statutes on procedures for taking evidence. In *Kilbourn v. Thompson*, 103 U.S. 168, 193–95 (1880), a congressional contempt order was held invalid on the ground that the investigation itself was of an improper "judicial" character. The Court rejected any implication

others construed the contempt statute itself to determine whether various forms of conduct fell within its scope.[191]

In two controversial cases decided toward the end of this period, the Court set forth an even broader interpretation of its sanctioning powers. *Marshall v. Gordon*[192] involved a congressional contempt order issued against the U.S. Attorney for the Southern District of New York.[193] The issue was whether the order was within Congress's "ancillary and implied" power to summarily punish contempt.[194] The Court held that the contempt power was based "upon [a] right of self-preservation" and could only be used to deter or remedy conduct that interfered with essential legislative functions.[195]

This concept of contempt orders based on "self-preservation" was dramatically expanded in *Toledo Newspaper Co. v. United States*.[196] The *Toledo Newspaper* case involved a judicial contempt order against an Ohio newspaper that had published material critical of the judge's actions in a pending case.[197] The newspaper appealed on the ground that its allegedly contemptuous conduct did not take place in or near a courtroom.[198] The 1831 statute prohibited summary punishment for contempt cases "except the misbehavior of any person in [the court's]

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from *Anderson v. Dunn* that congressional determination of its own contempt power was conclusive, holding that the constitutionality of such congressional acts was subject to review by the Court. *Id.* at 199–205 (citing Anderson v. Dunn, 19 U.S. 204 (1821)); *see also* Interstate Com. Comm'n v. Brimson, 154 U.S. 447, 490 (1894) (upholding the constitutionality of the Interstate Commerce Act, which authorized the circuit courts of the United States to use their process in aid of inquiries before the Commission).

191 *Ex parte* Terry, 128 U.S. 289, 311, 313–14 (1888) (holding that the Court had power to summarily punish petitioner for contempt even though he was not in the courtroom at the time, when the judge had observed petitioner draw a knife on a U.S. marshal in the courtroom, and petitioner had been removed to another room).

192 243 U.S. 521 (1917).

193 The U.S. Attorney had written a letter and leaked it to the newspapers. *Id.* at 531–32. Congress found the content of the letter to be "defamatory and insulting." *Id.* at 532. The U.S. Attorney was upset over a House subcommittee investigation he considered improper interference with his own grand jury's investigation. *Id.* at 530–32.

194 *Id.* at 548. In *In re Chapman*, 166 U.S. 661, 672 (1897), the Court upheld the constitutionality of a federal statute that made it a crime to violate a congressional subpoena to testify. The Court in *Marshall*, relying on *Chapman*, sought to distinguish between conduct that could be directly sanctioned by the contempt power and conduct that could be made subject to criminal process through legislation. *Marshall*, 243 U.S. at 542–43.

195 *Marshall*, 243 U.S. at 542. The Court held the order invalid, finding no impact on legislative functions, and that Congress had simply objected to its insulting and defamatory nature. *Id.* at 546.

196 247 U.S. 402 (1918).

197 The Court held that publication, which included a cartoon disparaging the judge, "manifestly tended to interfere with and obstruct the court in the discharge of its dut[ies]." *Id.* at 414.

198 *Id.* at 413–15, 419.

presence, or so near thereto as to obstruct the administration of justice."[199]

Chief Justice White, writing for the majority, held the statute to be merely declarative of the court's preexisting inherent authority.[200] Relying on the concept of self-preservation expounded in *Marshall*, he concluded, "The test, therefore, is the character of the act done and its direct tendency to prevent and obstruct the discharge of judicial duty."[201] Finding the evidence sufficient to demonstrate such obstruction, the majority affirmed the contempt order.[202] Justice Holmes wrote a famous dissent, which relied both on the language of the statute and the need for judges to show some "firmness of character" in the face of criticism.[203]

In *Toledo Newspaper*, the Supreme Court's tendency to construe federal statutes narrowly to provide room for judicial discretion was taken to a troubling extreme. The words of the statute were virtually ignored in favor of a hypothetical, broad, and probably fictitious common law power of contempt.[204] The case was controversial and severely criticized for creating a new doctrine of contempt by publication.[205]

2. Power over Practice and Procedure

By the mid-nineteenth century, some states had moved away from common law pleading and adopted new "codes" that merged common law and equity practices.[206] The federal courts, however, maintained

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199 *Id.* at 418 (quoting Judicial Code, ch. 231, § 268, 36 Stat. 1067, 1163 (1911) (current version at 18 U.S.C. § 401)).

200 "[T]he authority thus recognized [to summarily punish contempt] automatically inhered in the government created by the Constitution . . . ." *Id.* at 417. "[T]here can be no doubt that the provision [in the statute] conferred no power not already granted and imposed no limitations not already existing." *Id.* at 418.

201 *Id.* at 419.

202 *Id.* at 422.

203 [A] judge of the United States is expected to be a man of ordinary firmness of character, and I find it impossible to believe that such a judge could have found in anything that was printed even a tendency to prevent his performing his sworn duty. I am not considering whether there was a technical contempt at common law but whether what was done falls within the words of an act intended and admitted to limit the power of the Courts.

Id. at 424 (Holmes, J., dissenting).

204 On the existence of common law power to punish as contempt statements made outside the courtroom, see *supra* notes 196–203 and accompanying text.

205 *See infra* notes 246–49 and accompanying text.

206 *See* Subrin, *supra* note 150, at 938–39.

separate forms of action for law and equity. In 1872, Congress passed the Conformity Act,[207] which substituted a "dynamic" principle of conformity to state practices for the older "static" rule embodied in the Process Acts. But the conformity required was a loose one, subject to broad and easily invoked exceptions. State practices themselves were frequently unclear or variable.[208] Moreover, expansion of general federal common law and the tendency to view procedure as a technical subject of primary interest to the legal profession gave federal judges substantial freedom to develop and apply their own preferred procedures.[209]

Nudd v. Burrows[210] illustrates the Supreme Court's receptivity to such judicial procedural freedom. The federal judge in a jury trial had commented on the evidence and refused to allow the jury to take his written instructions and evidence into the jury room. Both of these actions violated express provisions of the Illinois Practice Act, and therefore, the appellant argued, required reversal under the Conformity Act. The Supreme Court disagreed. Justice Swayne explained that with the advent of code pleading, substantial disparities were created between the procedural rules in many states, and common law pleading should still be followed in the federal courts. The Conformity Act, in his view, was designed for the benefit of lawyers, who would otherwise have the burden "of studying two distinct systems of remedial law, and of practising according to the wholly dissimilar requirements of both."[211] The "personal administration" of a judge's duties on the bench were not intended to be affected by the Act, and if they were, the "powers of the judge" under the common law would be "largely trenched upon."[212] He concluded that the "personal conduct and administration of the judge" was neither a "*practice, pleading*, nor *a form* nor *mode of proceeding*" under the Act, and it did not have to conform to state law.[213]

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207 Conformity Act, ch. 255, 17 Stat. 196 (1872). It stated, inter alia, that the

> practice, pleadings, and forms and modes of proceeding . . . causes in the circuit and district courts of the United States shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such circuit or district courts are held.

Id. § 5. It did not apply to equity or admiralty cases and did not alter "rules of evidence under the laws of the United States." *Id.*

208 *See* Burbank, *supra* note 157, at 1041–43.

209 *See infra* notes 210–20 and accompanying text.

210 91 U.S. 426 (1875).

211 *Id.* at 441.

212 *Id.* at 441–42.

213 *Id.* at 442.

Nudd interpreted the Conformity Act narrowly to provide substantial freedom for federal judges to follow their own courtroom procedures. The Court employed the same interpretive strategy that would be used in later years to justify procedural innovations that were seemingly inconsistent with existing statutes or general rules.[214] One other notable feature of *Nudd* is the Court's assertion about the purpose of the Conformity Act, which illustrates the tendency to view matters of procedure as primarily of interest to the legal profession.

Indianapolis & St. Louis Railroad Co. v. Horst[215] used the *Nudd* precedent to justify a federal trial court's refusal to submit special interrogatories to the jury. Justice Swayne noted with approval the "indefiniteness" of the Conformity Act, which he held permitted federal courts to reject cumbersome state court practices.[216] Similar federal judicial authority based on traditional common law or equity practice—or on implied, incidental, or inherent power—was found with respect to power to grant directed verdicts,[217] referrals to arbitrators or special masters,[218] appointments of auditors,[219] and methods of taking appeals.[220]

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214 In all these cases, a judge-made procedure (frequently based on common law practice) is challenged as inconsistent with a statute. The Court, finding some generality, vagueness, or ambiguity in the statute, and noting that it must be strictly construed, held that the statute does not limit courts' inherent authority to apply their own procedure. *Compare id.*, *with* Link v. Wabash R.R. Co., 370 U.S. 626 (1962), *and* Dietz v. Bouldin, 579 U.S. 40 (2016).

215 93 U.S. 291 (1876).

216 *Id.* at 300–01. Another issue was whether a new trial should have been granted. Justice Swayne stated such motions were discretionary in federal trial courts and that this was "a rule of law established by this court, and not a mere matter of proceeding or practice in the Circuit and District Courts." *Id.* at 301. He held in *Newcomb v. Wood* that the Conformity Act did not "abrogate this salutary rule." 97 U.S. 581, 584 (1878).

217 Bowditch v. City of Boston, 101 U.S. 16, 18 (1879) ("[I]t is the right and duty of the judge . . . ."); *see also* Merchs.' Bank v. State Bank, 77 U.S. (10 Wall.) 604, 637 (1870) (elaborating on "settled practice in the courts of the United States").

218 *Newcomb*, 97 U.S. at 583 ("The power . . . is incident to all judicial administration . . . ."); Kimberly v. Arms, 129 U.S. 512, 525 (1889) ("The power is incident to all courts of superior jurisdiction.").

219 *In re* Peterson, 253 U.S. 300, 312 (1920) ("Courts have (at least in the absence of legislation to the contrary) inherent power to provide themselves with appropriate instruments required for the performance of their duties.").

220 *In re* Chateaugay Ore & Iron Co., 128 U.S. 544, 555 (1888) ("The manner or the time of taking [an appeal] by a writ of error . . . is a matter to be regulated exclusively by acts of congress, or, when they are silent, by methods derived from the common law, from ancient English statutes, or from the rules and practice of the courts of the United States.").

3. Legislative Restrictions on Adjudicative Power

No Supreme Court case has ever declared a federal statute unconstitutional on the grounds that it unduly interferes with the exercise of inherent judicial power, but two cases from the mid-nineteenth century did invalidate statutes that were perceived as infringing the courts' fundamental power of adjudication.

The California Supreme Court made such a ruling in *Houston v. Williams*[221] as a matter of California constitutional law. A California statute required that all appellate courts give reasons for their decisions in writing. A motion to enforce the law in the California Supreme Court was denied by Justice Stephen Field, unsurprisingly, without a written opinion. A concurrence explained that the statute was an unconstitutional "encroachment upon the independence of this department," which had complete discretion to decide whether to issue written opinions in any particular case.[222] While obviously distinguishable from federal separation-of-powers cases,[223] it nonetheless demonstrated willingness by nineteenth-century judges to assert their independence and control over the adjudicative process.[224]

United States v. Klein[225] is one of the most puzzling cases ever decided by the Supreme Court; it declared a federal statute invalid for exceeding congressional power but did so under unique circumstances that have made its proper interpretation a subject of continuing legal and academic dispute. In 1863, President Lincoln, acting pursuant to a federal statute, issued a proclamation offering a pardon and restoration of property (except slaves) to formerly disloyal citizens who were willing to take and abide by a loyalty oath.[226] A subsequent law, passed in 1870, declared that such pardons could not be admitted as evidence in any action against the government in the U.S. Court of Claims, that such pardons would be conclusive proof of participation in the

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221 13 Cal. 24 (1859).

222 *Id.* at 25 (Terry, C.J., concurring). "The Legislature can no more require this Court to state the reasons of its decisions, than this Court can require, for the validity of the statutes, that the Legislature shall accompany them with the reasons for their enactment." *Id.*

223 The California courts had a stronger claim for independent constitutional status than lower federal courts: the basic structure of the California court system was set forth in the California Constitution, not left to the discretion of the legislature.

224 Shortly after this case was decided, Justice Field was appointed to the United States Supreme Court and became one of its longest serving Justices. He should not be confused with his brother, David Dudley Field, who drafted New York's "Field Code" of Civil Procedure.

225 80 U.S. (13 Wall.) 128 (1871).

226 *Id.* at 139–41.

rebellion, and that the Supreme Court would have no jurisdiction to affirm property awards based on such pardons.[227]

Chief Justice Chase acknowledged that the U.S. Court of Claims was an inferior federal court, and thus "the legislature has complete control over the organization and existence of that court."[228] Yet he held that by prescribing how the federal courts must treat certain evidence and decide certain claims, "Congress has inadvertently passed the limit which separates the legislative from the judicial power."[229] This certainly sounds like a finding that the statute interferes with the core constitutional power of adjudication, but the precise reason it does so remains unclear. Chief Justice Chase said the denial of jurisdiction is problematic because it was "founded solely on the application of a rule of decision."[230] But Congress surely has power to pass laws that become "rules of decision" for the courts, as well as power to prescribe rules of evidence.

Two other features of this case provide narrower bases for understanding the Court's ruling. By requiring dismissal of particular claims against the United States government in the Supreme Court, Congress was effectively mandating the outcome of cases brought against itself. Chief Justice Chase seemed to have found this a troubling interference with judicial neutrality.[231] Second, by removing all effects of the presidential pardon, and treating it, to the contrary, as evidence of rebellion, the statute also seriously infringes on the powers of the executive.[232]

Klein has had an interesting afterlife. Subsequent Supreme Court cases have tended to construe it narrowly,[233] but the case has become a subject of renewed scholarly interest and is seen as raising important questions about the constitutional limits of legislative power over the adjudicative process.[234] It also illustrates, as the Court in *Klein* itself

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227 *Id.* at 131–34, 145–46.

228 *Id.* at 135, 145–47. He also recognized congressional power over Supreme Court appellate jurisdiction.

229 *Id.* at 147.

230 *Id.* at 146.

231 He described this as "allowing one party to the controversy to decide it in its own favor." *Id.*

232 "Now it is clear that the legislature cannot change the effect of such a pardon any more than the executive can change a law. Yet this is attempted by the provision under consideration." *Id.* at 148.

233 *See* Robertson v. Seattle Audubon Soc'y, 503 U.S. 429, 441 (1992); Bank Markazi v. Peterson, 578 U.S. 212, 226 (2016).

234 *See* Gordon G. Young, United States v. Klein*, Then and Now*, 44 LOY. U. CHI. L.J. 265, 268 n.4, 269 nn.5–6 (2012). Professor Young has been a major factor in the revival of interest in the

noted, the thin line between legislation and adjudication. Just as judges can legislate through development of common law rules, the legislature may effectively adjudicate if a law it enacts is too specifically aimed at achieving a particular legal result.

C. *1918–1938: Reaction and Calls for Reform*

Expansion of judicial authority ultimately led to reaction and calls for reform, powered largely by ideas from the Progressive Movement. Many lawyers, academics, and even some court decisions sought to roll back the more expansive constitutional claims of the Lochner Era to leave room for state and federal legislative reforms. With respect to inherent judicial authority, curbs on the contempt power in the newly enacted Clayton Act were accepted by the Court, although in a grudging and obscure opinion.[235]

There were also increased calls for procedural reform. Prominent academics and leaders of the bar expressed increasing dissatisfaction with the litigation process.[236] It was felt that code pleading had proved inadequate,[237] the hodge-podge of federal procedure under the Conformity Act was worse, and too much time was spent litigating unnecessarily complex procedural matters.[238] Reformers called for clear, simplified, and uniform rules of practice and argued that judges rather than legislatures should be given primary responsibility for producing them.[239]

This last point is significant because it illustrates that reformers did not seek to curb judicial power, but rather to redirect it toward what they viewed as more socially beneficial ends. Indeed, inherent judicial

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constitutional significance of *Klein*. *See* Young, *supra* note 82; Gordon G. Young, *Congressional Regulation of Federal Courts' Jurisdiction and Processes:* United States v. Klein *Revisited*, 1981 WIS. L. REV. 1189, 1215–24.

235 *See infra* notes 250–59 and accompanying text. The general purpose and effect of the Court's Lochner Era decisions remain a source of considerable controversy. *See, e.g.*, Claudio J. Katz, *Protective Labor Legislation in the Courts: Substantive Due Process and Fairness in the Progressive Era*, 31 L. & HIST. REV. 275 (2013).

236 The most famous expression of this view is Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 10 CRIME & DELINQUENCY 355 (1964), a speech originally presented at the American Bar Association Convention in 1906 where it "precipitated a furor" and led to appointment of a special committee to address the issues raised. Burbank, *supra* note 157, at 1045.

237 Subrin, *supra* note 150, at 943–56.

238 *See* Pound, *supra* note 236, at 368–70 (describing the waste of judicial power caused "by consuming the time of courts with points of pure practice, when they ought to be investigating substantial controversies").

239 *See* Subrin, *supra* note 150, at 931–41; Burbank, *supra* note 157, at 1045–99.

authority played an important role in procedural reform proposals. The fact that courts had traditionally exercised independent power to promulgate rules of practice and procedure and that Congress and the Supreme Court had repeatedly recognized such powers gave reformers strong grounds to argue that a broad delegation of power to the judiciary would raise no serious constitutional problems.[240] Some even argued that because of inherent authority, no legislative action was needed.[241]

The advent of legal realism also provided a new and powerful reconception of the judicial role. Judges were seen as lawmakers, not mere interpreters of some "brooding omnipresence" of common law principles.[242] Such insights would ultimately contribute to the *Erie* decision and a new perspective on judicial decision-making.[243] The realists did not dislike judges but disliked a certain style of mechanical and formalistic judging. They favored judicial creativity, discretion, and intuition.[244] They sought to craft legal rules that were simple, flexible, and responsive to social needs. Some of this thinking would ultimately find its way into the Federal Rules of Civil Procedure.[245]

1. The Contempt Power

The *Toledo Newspaper* decision remained a source of substantial controversy. Some judges welcomed the opportunity to sanction journalistic criticism they viewed as scurrilous and obstructive of justice.[246] Contempt orders similar to the one issued in *Toledo Newspaper* were issued in at least five other federal cases,[247] and they

240 *See infra* notes 261–65 and accompanying text.

241 *See* Daniel A. Panter, *The Inherent Power of Court to Formulate Rules of Practice*, 29 ILL. L. REV. 911 (1935).

242 S. Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting); *see also supra* notes 235–37 and accompanying text.

243 Charles E. Clark, *State Law in the Federal Courts: The Brooding Omnipresence of* Erie v. Tompkins, 55 YALE L.J. 267, 274–75 (1946).

244 Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 CORNELL L.Q. 274 (1929). *See generally* Charles M. Yablon, *Justifying the Judge's Hunch: An Essay on Discretion*, 41 HASTINGS L.J. 231 (1990).

245 *See* Subrin, *supra* note 150, at 922.

246 *See* Walter Nelles & Carol Weiss King, *Contempt by Publication in the United States: Since the Federal Contempt Statute*, 28 COLUM. L. REV. 525 (1928) [hereinafter Nelles & King, *Since the Statute*]; *see also* Walter Nelles & Carol Weiss King, *Contempt by Publication in the United States: To the Federal Contempt Statute*, 28 COLUM. L. REV. 401 (1928).

247 Nelles & King, *Since the Statute*, *supra* note 246, at 541–42. The most notable involved a letter critical of a district court judge written and made public by the New York City Comptroller.

were emulated by state courts in seventeen states.[248] Progressives critiqued the decision as both bad law and bad history.[249]

In 1924, Professors Frankfurter and Landis published one of the first scholarly analyses of the constitutional bases of inherent judicial authority. They strongly argued that *Toledo Newspaper* had not only misconstrued the 1831 contempt statute but also had misunderstood earlier English law.[250] More broadly, it argued that separation of powers was consistent with extensive legislative regulation of the inherent contempt power. The article was also a defense of the constitutionality of a section of the new Clayton Act, which provided that disobedience of court orders issued under that Act was not subject to summary proceedings.[251] The Seventh Circuit had already held that, to the extent the statute prohibited summary contempt proceedings, it was unconstitutional.[252]

The subsequent decision by the Supreme Court, *Michaelson v. United States*,[253] was at best a partial victory for those seeking to justify legislation constraining the judicial federal contempt power. The Seventh Circuit decision was reversed, and the constitutionality of the Act's provisions were upheld, but only after the Court had narrowly construed the scope of the Act. Justice Sutherland began by noting the Court's obligation to construe statutes in such a manner as to avoid raising doubts as to their constitutionality.[254] He then removed a "grave constitutional question" by interpreting the Clayton Act to apply only

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United States v. Craig, 266 F. 230 (S.D.N.Y. 1920), *rev'd sub nom. Ex parte* Craig, 282 F. 138 (2d Cir. 1922), *aff'd sub nom.* Craig v. Hecht, 263 U.S. 255 (1923).

248 Nelles & King, *Since the Statute*, *supra* note 246, at 542.

249 *See* Frankfurter & Landis, *supra* note 72, at 1029–38; Nelles & King, *Since the Statute*, *supra* note 246, at 540–41.

250 Frankfurter & Landis, *supra* note 72, at 1023–29, 1031–38, 1046–48. They argued that traditional English law did not permit summary contempt proceedings for actions taken outside the courtroom. The expansive view relied on in *Toledo Newspaper* was based on an undelivered opinion in a single case from 1765, *King v. Almon*, which itself misstated prior English law and had "bedevilled the law of contempt . . . ever since." *Id.* at 1046–47. Charles Fox had recently published work that substantially discredited that opinion. John Charles Fox, The King v. Almon, 24 L.Q. REV. 184 (1908).

251 Clayton Act, ch. 323, §§ 21, 22, 38 Stat. 730, 738–39 (1914) (current version at 18 U.S.C. § 402). The Act expressly exempted "contempts committed in the presence of the court" as well as some others. 18 U.S.C. § 402.

252 Michaelson v. United States, 291 F. 940, 945–47 (7th Cir. 1923). The court held that the power to execute its decree through the contempt proceeding was "an inherent power of the equity court" and could not be eliminated by legislation. *Id.* at 947.

253 Michaelson v. United States, 266 U.S. 42 (1924).

254 *Id.* at 64.

to criminal contempt.[255] While reaffirming the contempt power as an inherent power of all federal courts that "can neither be abrogated nor rendered practically inoperative," he acknowledged "[t]hat it may be regulated within limits not precisely defined."[256]

The *Michaelson* decision again demonstrates the costs and benefits of the Court's schizophrenic approach to inherent judicial power. Once again, the Court asserted the existence of constitutional inherent judicial power, but avoided a direct confrontation with Congress by interpreting its statute as an inoffensive regulation of that power, which raised no serious constitutional problem. To do this, Justice Sutherland treated the right to summarily punish obstructive disobedience as nonessential, in a constitutional sense, while also severely narrowing the scope and effect of the statute. A studied ambiguity regarding which aspects of the inherent contempt power are essential was seen as useful in situations like this, as the Court implicitly recognized.[257]

Yet *Michaelson* was also the beginning of a line of cases in which the Supreme Court increasingly distinguished between civil and criminal contempt actions, limiting summary proceedings in the former and requiring more constitutional protections for the latter.[258] In accepting and justifying legislative imposition of certain procedural limitations on its inherent authority as reasonable, *Michaelson* may have made the Court more receptive to reconsidering and imposing further constitutional limitations on its traditional inherent power.[259]

2. Inherent Judicial Rulemaking Authority

The early 1900s marked the "birth of serious and widespread interest in reform" of judicial administration and court procedures,

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255 *Id.* at 64–65. The Court was much less concerned about the constitutionality of a statute that mandated a jury trial in an independent criminal proceeding than one that might have been construed to mandate a jury trial in a court of equity. *See id.*

256 *Id.* at 66. The requirements imposed by the Clayton Act were held to be sufficiently narrow and nonintrusive to meet this standard.

257 *See supra* notes 252–56 and accompanying text. The expansive (and erroneous) interpretation of the contempt statute set forth in *Toledo Newspaper* was ultimately repudiated by the Court in *Nye v. United States*, 313 U.S. 33, 48–52 (1941).

258 *See* Cooke v. United States, 267 U.S. 517, 538 (1925); *Nye*, 313 U.S. at 53; *In re* Oliver, 333 U.S. 257, 264–66 (1948); Bloom v. Illinois, 391 U.S. 194, 201–02, 209–11 (1968).

259 *Bloom*, 391 U.S. at 203–08; *see also* Louis S. Raveson, *Advocacy and Contempt: Constitutional Limitations on the Judicial Contempt Power. Part One: The Conflict Between Advocacy and Contempt*, 65 WASH. L. REV. 477, 489–525 (1990).

much of it led by the American Bar Association.[260] In the following decades, as proposals for a new uniform code of civil procedure were assessed and debated, two issues arose that implicated inherent judicial rulemaking authority.

The first was constitutional power. The early reform proposals envisioned a relatively short statute setting forth some general principles and delegating power to the Supreme Court (with an advisory committee) to draft the actual rules.[261] The basic constitutionality of such delegation seems to have been uncontroversial, largely due to the long history of legislative delegation and judicial assertions of courts' inherent rulemaking authority.[262] Regulation of subject matter jurisdiction[263] and substantive law[264] were seen as raising more serious constitutional problems and were not included in the delegation. Questions also arose as to whether power could be constitutionally delegated to the Supreme Court to make rules that would supersede existing federal legislation.[265]

As time went on and the legislation seemed stalled in the Senate, some commentators argued that there was sufficient authority in the judicial branch to promulgate rules of practice and procedure without any legislative authorization whatsoever.[266] An even more extreme position, set forth in a piece by Dean Wigmore, argued that it was unconstitutional for the legislature to make any procedural rules.[267]

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260 *See* Burbank, *supra* note 157, at 1024, 1045–88; Subrin, *supra* note 150, at 943–61; Edson R. Sunderland, *The Grant of Rule-Making Power to the Supreme Court of the United States*, 32 MICH. L. REV. 1116 (1934). The history of the development of the Federal Rules of Civil Procedure has been extensively analyzed and recounted. This Section will focus specifically on the role inherent judicial authority played in that development.

261 *E.g.*, Frank W. Grinnel, *The Rule-Making Power*, 13 A.B.A. J. 9, 10–11 (1927) (discussing President Coolidge's idea of an advisory clearing house of federal judges and lawyers).

262 Burbank, *supra* note 157, at 1053; Edmund M. Morgan, *Judicial Regulation of Court Procedure*, 2 MINN. L. REV. 81, 86–87, 92–94 (1918) ("[Based on this history,] there can be no constitutional objection to vesting such power in the judiciary by legislative enactment."). An influential 1915 report by the New York Board of Statutory Consolidation concluded, based in part on prior Supreme Court precedent, that "courts possessed inherent power to promulgate rules, subject to legislative override." Burbank, *supra* note 157, at 1060.

263 Roscoe Pound, *Regulation of Judicial Procedure by Rules of Court*, 10 ILL. L. REV. 163, 176 (1916); Burbank, *supra* note 157, at 1065–66.

264 Burbank, *supra* note 157, at 1073.

265 This question was resolved by making the superseding effect of the Rules explicit in the statute. *Id.* at 1052–53.

266 Roscoe Pound, *The Rule-Making Power of the Courts*, 12 A.B.A. J. 599 (1926); Panter, *supra* note 241, at 912; Note, *How Far May Legislatures Regulate Judicial Procedure*, 34 HARV. L. REV. 424, 424 (1921).

267 John H. Wigmore, *All Legislative Rules for Judiciary Procedure Are Void Constitutionally*, 23 ILL. L. REV. 276 (1928). This short comment may have been written in jest, but it generated a

The second issue was the level of specificity at which the new rules would be drafted, and whether they would leave room for discretionary judicial rulemaking by individual judges. The reformers sought an end to common law procedural complexity. They wanted simple, flexible rules that would leave judges free to do justice in accordance with the facts.[268] The use of federal equity as the basis for the new procedural rules seemed obvious.[269] Equity-based rules would provide individual judges with a great deal of discretion in structuring and deciding cases.[270] Yet rules are still rules, and one of the justifications for delegating rulemaking to judges was that their greater familiarity with the courts would enable them to create more effective, detailed rules.[271] Would the new rules leave any room for inherent judicial rulemaking or would the new rules become a binding code? A 1935 article coauthored by Charles Clark, primary drafter of the new Federal Rules, provides some insight into this question.[272] He noted approvingly that prior Supreme Court precedent had placed the "personal conduct and administration of the judge" outside the scope of matters regulated by the Conformity Act.[273] He also recognized federal common law procedural rules.[274] Of course, none of that insured that judges would retain an independent inherent right to develop and apply practices independent from, if not inconsistent with, the new Federal Rules.[275]

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long and serious response that considered whether Wigmore's position was justified based on inherent judicial rulemaking power. Harry Hibschman, *The Power to Regulate Court Procedure: Is It a Legislative or a Judicial Function?*, 71 U.S. L. REV. 618 (1937). A case frequently cited at the time was *Kolkman v. People*, 89 Colo. 8, 33–34 (1931), in which the Colorado Supreme Court had held that under the Colorado Constitution, its courts had the inherent and exclusive power to promulgate rules of procedure.

268 Subrin, *supra* note 150, at 951–61.

269 *Id.*

270 *Id.*

271 *See generally* Roscoe Pound, *Regulating Procedural Details by Rules of Court*, 13 A.B.A. J. 12 (1927).

272 Charles E. Clark & James Wm. Moore, *A New Federal Civil Procedure*, 44 YALE L.J. 387 (1935).

273 Nudd v. Burrows, 91 U.S. 426, 442 (1875); Clark & Moore, *supra* note 272, at 402.

274 Professor Clark also writes approvingly of the judge's traditional broad discretion to grant new trials, a power recognized in the Judiciary Act and by the Supreme Court, Newcomb v. Wood, 97 U.S. 581 (1878), and preserved in FED. R. CIV. P. 59. Clark & Moore, *supra* note 272, at 404.

275 FED. R. CIV. P. 83, a continuation of Equity Rule 79, permitted district courts to promulgate court-wide local rules. The power of individual federal judges to "regulate [their own] practice in any manner consistent with federal law" was not recognized in that rule until 1995. FED. R. CIV. P. 83(b) & advisory committee's note to 1995 amendment.

D. *1938–Present: Procedural Disruption and Innovation*

As every law student knows, 1938 was the year federal civil procedure was turned upside down. The newly promulgated Federal Rules merged law and equity and provided relatively clear and flexible procedures for the federal courts. In that same year, *Erie Railroad Co. v. Tompkins*[276] repudiated the concept of general federal common law and replaced it with a new, constitutionally derived obligation to apply substantive state law in all cases except those governed by federal statutory or constitutional law. Since 1938, a great deal of effort by lawyers, judges, and academics has gone into exploring the meaning and implications of those two momentous developments.

The Rules covered some matters, like sanctions for litigation misconduct, that had previously been seen as within the inherent authority of courts. Did the power granted under the Rules preempt that authority? The same question could be raised about inherent judicial authority to make rules governing practice and procedure. *Erie* had abolished general federal common law but left federal courts free to apply their own rules of practice and procedure. Accordingly, determining the appropriate boundaries between substance and procedure became extremely important and, in some cases, surprisingly difficult. Would *Erie* concerns and the Federal Rules limit, or perhaps even eliminate, the ability of federal courts to innovate procedurally, to develop new practices and procedures not expressly authorized by the Federal Rules but still comfortably within the scope of "procedure" for *Erie* purposes?

Eighty years later it is quite clear that the answer has been a resounding "no." Far from eliminating procedural innovation, the period following 1938 has been a golden age of sorts for the development of federal procedural common law, most of it justified either explicitly or implicitly as exercises of inherent judicial authority. Moreover, the constitutional core of inherent judicial authority has also made a comeback of sorts, as judges and academics confront constitutional questions regarding separation of powers that require them to inquire deeply into the nature of the indefeasible powers granted to the federal judiciary under Article III.

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276 304 U.S. 64 (1938).

1. Sanctions for Litigation Misconduct

The new Federal Rules of Civil Procedure authorized sanctions for a wide variety of litigation misconduct. Rule 37(b) listed a series of increasingly severe sanctions that could be issued for noncompliance with discovery orders, including default judgment or dismissal of the litigation.[277] It also provided that "refusals" to comply with discovery orders could be considered contempt resulting in arrest.[278] Other potential sanctions for litigation misconduct could be found in Rule 41(b) and Rule 11.[279] It was unclear whether these Rules provided alternatives to sanctions under inherent judicial authority, were a preferred method to be used whenever applicable, or were intended to replace the use of inherent judicial sanctioning authority.[280] Also, the Rules provided little guidance as to when particular sanctions could or should be imposed.[281]

Societe Internationale v. Rogers was one of the first Supreme Court cases to consider these issues.[282] Petitioner, a Swiss holding company, had failed to provide banking records ordered pursuant to Rule 34. It claimed it was barred from making such production by Swiss law. Moreover, the Swiss Federal Attorney had constructively "seized" the records, prohibiting their transmission to third persons.[283] A special master had found "no proof, or any evidence at all of collusion" with Swiss authorities and that petitioner "ha[d] shown good faith in its efforts (to comply with the production order)."[284] The district court, while accepting the findings of the special master, dismissed Societe Internationale's lawsuit for failure to comply with the court's document production orders. The judge justified that dismissal on the basis of

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277 FED. R. CIV. P. 37(b) (1937) (amended 1970). No substantive changes in this Rule were made until 1970. *Id.* (1970) advisory committee's note to 1970 amendment.

278 *Id.* (1937).

279 FED. R. CIV. P. 41(b) (1937) (amended 1991); FED. R. CIV. P. 11 (1937) (amended 1983).

280 *See infra* notes 282–312 and accompanying text.

281 *See infra* notes 282–312 and accompanying text.

282 Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197 (1958). In *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14–16 (1941), the Court had held that Rules 35 and 37 were valid regulation of matters of procedure under the Rules Enabling Act, and that contempt sanctions were not available for refusal to submit to a Rule 35 examination. That, however, was an application of a restriction expressly stated in the Rules.

283 The case represented an effort by plaintiff, a Swiss company, to obtain assets seized by the United States during the war. It was alleged in defense that plaintiff was under the control of I.G. Farbenindustrie, a German enemy corporation. *Rogers*, 357 U.S. at 198–99; *see* Societe International Pour Participations Industrielles et Commerciales, S.A. v. McGranery, 14 F.R.D. 44, 46–47 (D.D.C. 1953).

284 A special master had been appointed because of concern the seizure might have been the result of collusion between petitioner and Swiss authorities. *Rogers*, 357 U.S. at 201.

Rule 37, which he held provided for sanctions even in the absence of "willful" disobedience of court orders.[285] He also invoked the court's "inherent power to dismiss a suit, stay a trial or impose other limitations on the right to proceed."[286]

Justice Harlan held that the district court's power to dismiss with prejudice for noncompliance with the production order depended "exclusively" on Rule 37 and that reliance on inherent judicial authority "can only obscure analysis of the problem before us."[287] He interpreted the sanctioning authority conferred by Rule 37 with reference to the constitutional limitations of due process and concluded that prior cases[288] "leave open the question whether Fifth Amendment due process is violated by the striking of a complaint because of a plaintiff's inability, despite good-faith efforts, to comply with a pretrial production order."[289] He held that in light of due process concerns, "Rule 37 should not be construed to authorize dismissal[s]" when noncompliance is due to "inability, and not to willfulness, bad faith, or any fault of petitioner."[290]

After *Rogers*, it would have been reasonable to conclude that inherent judicial authority was no longer available to federal courts for sanctioning litigation misconduct, at least with respect to procedures regulated under the Federal Rules. This perception would be changed

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285 As initially promulgated, different subsections of Rule 37 used the words "refusal" and "failure" somewhat interchangeably to describe noncompliance. FED. R. CIV. P. 37 (1938) (amended 1970). For example, the Rule referred to a "refusal to make discovery" and a "*failure* of party to attend or serve answers." *Id.* (emphasis added). Defendant had argued that the word "refus[al]" implied a requirement of willful noncompliance, but the Court rejected that argument as turning on "too fine a literalism" and viewing the language of the Rule, taken as a whole, as ambiguous. *Rogers*, 357 U.S. at 207–08. The Rule was revised in 1970 to substitute "failure" for "refusal" throughout. FED. R. CIV. P. 37 advisory committee's note to 1970 amendment.

286 *McGranery*, 14 F.R.D. at 55–56. The affirmance by the court of appeals also relied in part on inherent judicial authority. Societe Internationale Pour Participations Industrielles et Commerciales S.A. v. Brownell, 225 F.2d 532, 538 (D.C. Cir. 1955).

287 *Rogers*, 357 U.S. at 207. The Court referenced a recent law review article, Maurice Rosenberg, *Sanctions to Effectuate Pretrial Discovery*, 58 COLUM. L. REV. 480 (1958). Professor Rosenberg had criticized using the "shadowy concept" of inherent authority to justify sanctions, saying it "can only cause trouble." *Id.* at 485–86.

288 He focused on two earlier Supreme Court decisions that had considered due process issues in connection with dismissals for failure to obey court orders, which had been cited in the advisory committee notes to Rule 37, *Hovey v. Elliott*, 167 U.S. 409 (1897), and *Hammond Packing Co. v. Arkansas*, 212 U.S. 322 (1909). The Court ultimately stated that "[t]hese two decisions leave open the question whether Fifth Amendment due process is violated by the striking of a complaint because of a plaintiff's inability, despite good-faith efforts, to comply with a pretrial production order." *Rogers*, 357 U.S. at 209–10. The Court did not decide that constitutional issue, but such concerns likely influenced its interpretation of Rule 37.

289 *Rogers*, 357 U.S. at 210.

290 *Id.* at 212.

dramatically just four years later with the decision in *Link v. Wabash Railroad Co*.[291] In *Link*, the plaintiff's attorney, in a case that had been pending in the district court for six years, failed to attend a scheduled pretrial conference. Two hours after the conference, the district judge, finding that the plaintiff's attorney had failed to give a "reasonable reason" for not appearing, dismissed the case with prejudice.[292] The dismissal order stated that it was an exercise of the court's inherent power and was based on the "failure of the plaintiff's counsel to appear at the pretrial, for failure to prosecute this action."[293] The court of appeals affirmed based on the "inherent powers" of courts to dismiss as a sanction for "disregard by parties of orders, rules or settings."[294]

The Supreme Court affirmed, but Justice Harlan justified the dismissal not for failure to appear at the pretrial conference but for failure to prosecute.[295] He stated that authority to make such dismissals sua sponte was an "inherent power" of "ancient origin."[296] Although Rule 41(b) expressly provided that dismissals for failure to prosecute were to be made by motion, he rejected any implication that the Rule should be read as abrogating that inherent power.[297]

In *Link*, Justice Harlan was not only willing to accept inherent judicial authority as providing an alternative sanctioning power to that provided under the Federal Rule, but he also applied an interpretative strategy familiar from earlier cases. Declaring the dismissal power to be a common law rule of ancient origin, he invoked the principle that laws purporting to abrogate such rules should be interpreted narrowly.[298]

It is impossible to know why Harlan's views on inherent sanctioning power and its relationship to the Federal Rules appear to have changed so much, yet the difference in the way he presented the issues in the two cases is striking. *Rogers* focused on the constitutional due process rights of litigants whose motives for failure to comply with discovery may range from nefarious to wholly innocent.[299] The *Link* opinion, in contrast, was largely concerned with matters of judicial

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291 370 U.S. 626 (1962).

292 *Id.* at 628–29.

293 *Id.*

294 Link v. Wabash R.R. Co., 291 F.2d 542, 544–46 (7th Cir. 1961). Notice of the pretrial conference had been sent to counsel pursuant to a local court rule.

295 *Link*, 370 U.S. at 629–31.

296 *Id.*

297 "It would require a much clearer expression of purpose than Rule 41(b) provides for us to assume that it was intended to abrogate so well-acknowledged a proposition." *Id.* at 631–32.

298 *Id.* at 629–32.

299 *See supra* notes 287–90 and accompanying text.

administration.[300] Harlan expressly noted that loss of the sua sponte dismissal right would make it difficult for district courts to maintain blanket rules for dismissal of "stale cases."[301]

Rogers did not quite impose a "bad faith" requirement for dispositive sanctions under Rule 37(b),[302] although some later cases seemed to do so.[303] An independent line of Supreme Court cases had also recognized a bad faith exception to the American Rule against awarding attorney's fees as costs.[304] This was said to be an inherent power of courts derived from equity practice.[305]

Accordingly, by the time *Chambers v. NASCO*[306] was being decided, there was little doubt that bad faith litigation misconduct was sufficient to justify a massive award of attorney's fees. The question was whether inherent judicial authority could be used to justify that sanction when a substantial amount of the misconduct was also subject to sanctions under specific Federal Rules.[307] Although *Link* had shown that inherent authority was available to provide supplemental procedures not stated in the Rules,[308] the order in *NASCO* seemed like a displacement of such authority rather than a supplement. Justice White asserts a right to use inherent authority when the court, exercising its "informed discretion," concludes that the statute or

300 "The power to invoke this sanction is necessary in order to prevent undue delays in the disposition of pending cases and to avoid congestion in the calendars of the District Courts." *Link*, 370 U.S. at 629–30.

301 *Id.* at 630–31, 631 n.7.

302 *See supra* notes 287–90 and accompanying text.

303 Nat'l Hockey League v. Metro. Hockey Club, 427 U.S. 639, 643 (1976) (dismissal based on district court finding of "flagrant bad faith"); Roadway Express, Inc. v. Piper, 447 U.S. 752, 766 (1980); *see also* Marx v. Gen. Revenue Corp., 568 U.S. 371 (2013); State Farm Fire & Cas. Co. v. United States *ex rel.* Rigsby, 137 S. Ct. 436 (2016).

304 Vaughan v. Atkinson, 369 U.S. 527, 530–31 (1962); Hall v. Cole, 412 U.S. 1, 5 (1973) (providing that counsel fees may be awarded against a litigant who acts "in bad faith, vexatiously, wantonly, or for oppressive reasons"); F.D. Rich Co. v. United States *ex rel.* Indus. Lumber Co., 417 U.S. 116, 129 (1974); Hutto v. Finney, 437 U.S. 678, 691 (1978).

305 *See* Sprague v. Ticonic Nat'l Bank, 307 U.S. 161, 164–65 (1939); *Hutto*, 437 U.S. at 691 (awarding attorney's fees for bad faith misconduct "served the same purpose as a remedial fine imposed for civil contempt").

306 501 U.S. 32 (1991).

307 Petitioner argued that inherent authority was not available as a sanction due to the "comprehensive system of sanction[s]" set forth in the recently amended Federal Rules, which "should be viewed not only as a displacement of the vague and nebulous 'inherent powers' that might have previously existed, but also as a circumscription of those powers." Brief of Petitioner on the Merits at 23–24, *NASCO*, 501 U.S. 32 (No. 90-256), 1990 WL 505597, at *23–24.

308 Link v. Wabash R.R. Co., 370 U.S. 626, 629–31 (1962). Commentators had endorsed the position that inherent authority was available to fill gaps in the coverage of the Federal Rules. Charles B. Renfrew, *Discovery Sanctions: A Judicial Perspective*, 67 CALIF. L. REV. 264, 268 (1979).

authority is not "up to the task."[309] This is an assertion not just of inherent authority to supplement gaps in the Rules, but to make judgments as to their adequacy, and to substitute other more effective sanctions. Prior to asserting this power, the Court cited a long string of inherent authority precedents, ambiguously mixing constitutional and nonconstitutional descriptions of the power, and expressly finding "no need" to distinguish between those powers.[310] Indeed, as we have seen, the power being asserted in *NASCO* itself is ambiguous.[311] Through this ambiguity, the Court avoids a direct challenge to the legitimacy of federal rulemaking yet preserves a wide judicial freedom of action at a time of growing concerns over court delays and discovery abuse.

Since *NASCO*, inherent authority has become an established basis for awarding counsel fees as damages in cases involving pervasive litigation misconduct.[312]

2. Inherent Authority to Regulate Practice and Procedure

Erie prohibited federal courts from applying substantive general common law but left them free to make decisions on procedural matters as part of their inherent authority. This seems to have worked a subtle change in the Court's approach to reviewing and justifying such exercises of procedural common law. In previous periods, a judicial practice not expressly authorized by statute was often justified as part of traditional common law powers.[313] The post-*Erie* Court was more likely to cite efficiency and reasonableness as grounds to justify procedural practices not authorized by statute or rule.[314] The merger of

309 *See supra* notes 63–66 and accompanying text.

310 *See supra* notes 62–64 and accompanying text.

311 *See* discussion *supra* Part I.

312 Goodyear Tire & Rubber Co. v. Haeger, 137 S. Ct. 1178 (2017). The Court has made it clear that such attorney's fee awards, if imposed pursuant to civil procedures, must be purely compensatory in nature. *See* Int'l Union, United Mine Workers of Am. v. Bagwell, 512 U.S. 821, 829 (1994); Fox v. Vice, 563 U.S. 826, 840–41 (2011); *see also* Clinton v. Jones, 520 U.S. 681, 709 n.42 (1997).

313 *See supra* notes 148–69, 206–20 and accompanying text.

314 Among the inherent powers announced or elucidated in Court opinions are the power to reopen a judgment obtained by fraud, Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 248–50 (1944); to dismiss for forum non conveniens, Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 512 (1947); to grant reargument and reopen trial under various circumstances, Marconi Wireless Tel. Co. v. United States, 320 U.S. 1, 47–48 (1943); Zenith Radio Corp. v. Hazeltine Rsch., Inc., 401 U.S. 321, 331 (1971); Dietz v. Bouldin, 579 U.S. 40, 42 (2016); to stay proceedings, *Clinton*, 520 U.S. at 706; and to appoint private attorneys to initiate contempt proceedings, Young v. United States *ex rel.* Vuitton et Fils S.A., 481 U.S. 787, 793 (1987). It has been recently observed

law and equity also gave federal courts discretion to apply equitable doctrines widely, which effectively expanded their inherent powers.[315] While many instances of procedural common lawmaking were expressly described as based on inherent power, there were other instances of judicial lawmaking where the source of the courts' power remains somewhat mysterious.[316]

In this period, the Supreme Court also decided a considerable number of cases under what it called its "supervisory authority."[317] Academic commentary has generally viewed this as a particular kind of inherent judicial authority over the administration of criminal justice in the lower federal courts.[318] It distinguishes between different kinds of inherent authority that might justify different forms of rulemaking, most notably the difference between procedural innovation in adjudicating individual cases and in promulgating rules of practice and procedure.[319]

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that inherent power is broad enough to give courts "ample means and methods to administer their dockets and to ensure that any additional filings proceed in an orderly fashion." Cal. Pub. Emps.' Ret. Sys. v. ANZ Sec., Inc., 137 S. Ct. 2042, 2054 (2017).

315 *Hazel-Atlas Glass*, 322 U.S. at 248 (equitable relief against fraudulent judgments); Young v. United States, 535 U.S. 43 (2002); Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538, 558 (1974) (equitable tolling); *see* ITT Cmty. Dev. Corp. v. Barton, 569 F.2d 1351, 1359 (5th Cir. 1978) ("The inherent powers doctrine . . . is rooted in the notion that a federal court, sitting in equity, possesses all of the common law equity tools of a Chancery Court (subject, of course, to congressional limitation) . . . .").

316 *See* Hickman v. Taylor, 329 U.S. 495, 501–02 (1947); *see also* Michael A. Blasie, *The Uncertain Foundation of Work Product*, 67 DEPAUL L. REV. 35, 64 (2017) (ascribing the work product doctrine to the "inherent power" of the federal courts to make rules). Another mysterious power, cited by Justice Scalia in *Kokkonen v. Guardian Life Insurance Co. of America*, 511 U.S. 375, 380 (1994), is the exercise of ancillary jurisdiction over proceedings necessary "to enable a court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees." He cited *NASCO* as an example. Then-Professor Barrett cites the doctrines of preemption, stare decisis, remittitur, and preclusion as examples of procedural common law that have no statutory authorization and must therefore reflect inherent authority granted to courts under Article III. Barrett, *supra* note 17, at 815–17. Cases applying those doctrines frequently rely on precedents derived from equity practice or common law procedure. *See id.* at 824–25, 829–32.

317 *See, e.g.*, McNabb v. United States, 318 U.S. 332, 341 (1943); Thiel v. S. Pac. Co., 328 U.S. 217, 225 (1946); Thomas v. Arn, 474 U.S. 140, 146–47 (1985); Ortega-Rodriguez v. United States, 507 U.S. 234, 252 (1993) (Rehnquist, J., dissenting).

318 *See* 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, 1477–78 (1984); Amy Coney Barrett, *The Supervisory Power of the Supreme Court*, 106 COLUM. L. REV. 324, 333–36 (2006).

319 *See* Barrett, *supra* note 318, at 330, 333, 338–40. In general, the inherent authority of judges to make rules governing their own courts is noncontroversial and is also authorized, to a considerable degree, by the Federal Rules. *See* FED. R. CIV. P. 83. Scholars and judges have, however, questioned the authority of the Supreme Court and other appellate courts to make rules

Finally, inherent authority has been invoked in a number of constitutional challenges to statutes on separation-of-powers grounds. The only successful such challenges have involved delegations of core adjudicatory power to decisionmakers other than Article III judges.[320] There have been other cases, however, in which arguably inherent rulemaking powers were delegated to nonjudicial actors. *Mistretta v. United States*[321] was a constitutional challenge to the law establishing a commission composed of both judges and other criminal law experts to promulgate sentencing guidelines.[322] Justice Blackmun, writing for the majority, rejected a number of arguments based on separation of powers. While acknowledging that separation-of-powers principles would invalidate any law that "impermissibly threatens the institutional integrity of the Judicial Branch," he found no such threat in that case.[323] He held that the powers granted under the statute were within the judiciary's inherent rulemaking authority, and, in that case, could be constitutionally shared with nonjudicial actors.[324] Similar separation-of-powers concerns have been the basis for serious academic consideration of whether other statutes, notably the Civil Justice Reform Act, were invalid for impermissibly interfering with the inherent rulemaking powers of the federal judiciary.[325] In short,

of practice for inferior courts. *See* Barrett, *supra* note 318, at 336–37. There are also cases that raise questions of whether courts of appeal have supervisory authority over district courts. United States v. Strothers, 77 F.3d 1389, 1397–99 (D.C. Cir. 1996) (Sentelle, J., concurring); Burton v. United States, 483 F.2d 1182, 1189–90 (9th Cir. 1973) (Byrne, J., dissenting).

320 In *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), the Court declared the 1978 Bankruptcy Act, which gave non–Article III judges power to adjudicate a wide variety of matters arising in bankruptcy proceedings, to be unconstitutional. Justice Brennan held that such judges could not constitutionally adjudicate matters that "inherently or necessarily" required judicial determination. *Id.* at 69. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218–19 (1995), declared unconstitutional an amendment to the Securities Exchange Act that permitted retroactive reinstatement of certain cases that had been dismissed as time-barred following the Court's decision in *Lampf v. Gilbertson*, 501 U.S. 350 (1991). Justice Scalia held that the statute violated the judicial power to render dispositive judgments. *Plaut*, 514 U.S. at 218–19. In both these cases the majority viewed the legislation as interfering with the core judicial power of adjudication. *See also* Miller v. French, 530 U.S. 327, 343–47 (2000).

321 488 U.S. 361 (1989).

322 The commission was to consist of seven members, of whom at least three would be federal judges. *Id.* at 368.

323 *Id.* at 383 (quoting Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 851 (1986)).

324 *Id.* at 383, 389–90, 393. In Justice Scalia's dissent, he argued that the lawmaking power conferred by the statute exceeded the inherent rulemaking powers of the judicial branch. *Id.* at 417 (Scalia, J., dissenting); *see also* Morrison v. Olson, 487 U.S. 654 (1988); *Schor*, 478 U.S. 833.

325 Linda S. Mullenix, *The Counter-Reformation in Procedural Justice*, 77 MINN. L. REV. 375, 427 (1992); Mullenix, *supra* note 16, at 1290–95, 1307–23; Martin H. Redish, *Federal Judicial Independence: Constitutional and Political Perspectives*, 46 MERCER L. REV. 697 (1995); Linda S.

inherent judicial power remains a potential grounds for invalidating legislation on separation-of-powers grounds, despite the fact that there has never been a successful constitutional challenge on that basis.

E. *Preliminary Conclusion*

The preceding history has demonstrated how the conflation of constitutional inherent judicial authority with procedural common lawmaking has helped maintain substantial independence and procedural discretion for the federal judiciary. By asserting a unified judicial power, conferred (at least in part) by the Constitution and based on "essential" and "necessary" aspects of the judicial role, the Court has been able, simultaneously, to assert the judiciary's independence while retaining sufficient flexibility to accommodate political concerns and congressional mandates.[326]

Moreover, treating all procedural rulemaking not expressly authorized by statute as part of that same inherent judicial authority has allowed the federal courts to exercise wide discretion not only over individual ministerial practices, but over important, potentially dispositive matters often verging on the substantive.[327] It has enabled the federal courts to transition seamlessly from deciding such matters under general common law to deciding them under an alternative rulemaking power largely independent of the requirements of the Federal Rules.[328] And, it has helped keep the concept of an inherent indefeasible constitutional power of adjudication a central feature of both judicial and academic discussions of separation of powers and judicial independence.

It is not all that surprising, therefore, that we have also seen the Court occasionally note with some approval the confusing and flexible scope of the doctrine,[329] and to expressly decline the opportunity to clarify it in the case law.[330]

We may conclude that the ambiguity of inherent judicial authority is not just an inadvertent doctrinal result, but a useful tool in

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Mullenix, *Judicial Power and the Rules Enabling Act*, 46 MERCER L. REV. 733, 734 (1995); Stephen B. Burbank, *Procedure, Politics and Power: The Role of Congress*, 79 NOTRE DAME L. REV. 1677, 1682–84 (2004).

326 This can be seen most clearly in the long line of Supreme Court cases dealing with the contempt power and the various statutes and rules that sought to regulate it. *See supra* notes 129–45, 184–205, 246–59, 277–312 and accompanying text.

327 *See, e.g.*, *supra* notes 27–46, 155–69, 313–19 and accompanying text.

328 *See supra* notes 27–66, 313–19 and accompanying text.

329 *See supra* notes 252–58 and accompanying text.

330 *See supra* notes 42, 47–58, 62–66 and accompanying text.

maintaining the independence and efficiency of the judicial branch. It creates a hierarchy of sorts in judicial approaches to statutes or rules that potentially infringe on judicial power to control their own practice and procedure. First, if possible, interpret the statute or rule as sufficiently narrow that it does not interfere with procedural common law rulemaking. If that is not possible, interpret the statute or rule as a limited restriction that modifies, but does not abrogate, an essential and necessary exercise of inherent judicial power. Only if neither of these options is available should the courts consider declaring the statute or rule unconstitutional as abrogating inherent judicial authority. In the final Part, we will see how a similar strategy is being applied by lower federal courts to a controversial new Federal Rule that seeks to limit their inherent authority.

IV. DOES FEDERAL RULE 37(E)(2) SUPPLANT INHERENT AUTHORITY TO SANCTION LITIGATION MISCONDUCT?

Some of the most interesting discussions of inherent judicial authority have been written to attack or defend controversial laws that are claimed to infringe such authority.[331] An active public controversy adds urgency and a political dimension to an otherwise abstract theoretical issue.[332] The hottest contemporary issue regarding inherent judicial power involves Federal Rule 37(e)(2). That Rule, effective as of December 1, 2015, was intended to reduce the costs of "over-preservation," the frequently expressed concern of corporate defendants[333] that existing discovery rules required them to spend millions to prevent the inadvertent destruction of marginally relevant

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331 *See generally* Frankfurter & Landis, *supra* note 72; Mullenix, *supra* note 16; Francis & Mandel, *supra* note 16.

332 Proponents of a broad interpretation of inherent judicial authority have at times been aligned with conservative political views and at others with more progressive ones. *Compare supra* notes 250–59 and accompanying text (debates over Clayton Act restrictions on contempt power), *with supra* note 325 and accompanying text (disputes over validity of the Civil Justice Reform Act).

333 *See, e.g.*, Letter from Bruce Kuhlik, Exec. Vice President & Gen. Couns., Merck & Co., to Advisory Committee on Civil Rules (Feb. 11, 2014), https://www.regulations.gov/comment/USC-RULES-CV-2013-0002-1073 [https://perma.cc/XQ37-K6TY]; Letter from Lawyers for Civil Justice to Advisory Committee on Civil Rules (Aug. 30, 2013), https://www.regulations.gov/comment/USC-RULES-CV-2013-0002-0267 [https://perma.cc/U7ES-6P9M]; *see also* Lawyers for Civil Justice, *The Proposed Rules: Light at the End of the E-Discovery Tunnel*, METRO. CORP. COUNS. (Sept. 26, 2013, 9:24 AM), https://www.metrocorpcounsel.com/articles/25558/proposed-rules-light-end-e-discovery-tunnel [https://perma.cc/HZ9S-AQXR] (statement of Robert Levy, ExxonMobil).

ESI.[334] It sought to legislatively overrule a line of cases in which courts, exercising inherent judicial power, had ordered adverse inference jury instructions as a sanction for negligent or grossly negligent ESI destruction.[335]

Rule 37(e)(2) prohibits a court from ordering such severe sanctions for ESI loss unless the party responsible "acted with the intent to deprive another party of the information's use in the litigation."[336] If there were ever a procedural rule designed to mandate compliance and prevent supplementation or evasion through use of inherent judicial authority, Rule 37(e)(2) would appear to be it. Unlike *Link* or *Dietz*, where the Rules set forth one procedure for obtaining a particular result but did not expressly foreclose others,[337] Rule 37(e)(2) expressly forbids courts from imposing the most severe sanctions for discovery abuse on any other basis than the one set forth in the Rule. The advisory committee note states that the Rule "forecloses reliance on inherent authority."[338]

The question is how federal courts will respond to a rule that expressly seeks to deprive them of a small but significant part of their inherent sanctioning authority. Yet serious questions remain as to whether Rule 37(e)(2) has actually foreclosed courts from exercising inherent sanctioning authority, even for ESI loss. Some judges and commentators have already questioned whether a Federal Rule can displace inherent judicial authority to sanction litigation misconduct, particularly when that displacement is only expressly stated in an

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334 *See* FED. R. CIV. P. 37(e) advisory committee's note to 2015 amendment; Memorandum from Judge David G. Campbell, Chair, Advisory Comm. on Fed. Rules of Civ. Proc., to Judge Jeffrey Sutton, Chair, Standing Comm. on Rules of Prac. and Proc., app. B at B-17 to -18 (June 14, 2014) [hereinafter Campbell Memo], https://www.uscourts.gov/sites/default/files/fr_import/ST09-2014.pdf [https://perma.cc/7A77-4UM4]; Yablon, *supra* note 26, at 572–77.

335 *See* Residential Funding Corp. v. DeGeorge Fin. Corp., 306 F.3d 99, 106–08 (2d Cir. 2002); Grosdidier v. Broad. Bd. of Governors, 709 F.3d 19, 27–28 (D.C. Cir. 2013), *cert. denied*, 571 U.S. 1125 (2014). The new Rule was highly controversial. *See* Yablon, *supra* note 26, at 572–77; Thought Leadership Team, *Part II—FRCP Amendments: The Long and Winding Road*, KLDISCOVERY: THE EDISCOVERY BLOG (July 9, 2014), https://www.kldiscovery.com/blog/part-ii-frcp-amendments-long-winding-road [https://perma.cc/Q8KT-BCGS]. It was strongly opposed by plaintiffs' lawyers, environmental groups, and others. It was revised many times during the drafting process, including a dramatic "last minute rewrite" just before release of the final proposed Rule. TOM ALLMAN, ASSESSING THE 2015 AMENDMENTS 2 (Nov. 30, 2014), https://www.lfcj.com/uploads/3/8/0/5/38050985/allmanassessingthe2015amendmentsnov30.pdf [https://perma.cc/JW9S-LWD3].

336 ALLMAN, *supra* note 335, at 11. Earlier drafts of the Rule had required only that the ESI loss be willful or in "bad faith." *Id.*

337 *See supra* notes 27–66 and accompanying text.

338 FED. R. CIV. P. 37(e) advisory committee's note to 2015 amendment.

advisory committee note.[339] Yet the actual decisions of the lower courts thus far bear a striking similarity to the Supreme Court's approach to prior statutes, which sought to restrict inherent judicial authority. They have interpreted the Rule narrowly to maintain maximum judicial freedom in borderline cases. They have also construed the Rule as consistent with most prior case law decided under the federal judiciary's inherent authority. With respect to the constitutional issue itself, however, there is the same disparity we noted in other contexts between judicial rhetoric and judicial rulings. While declaring their inherent power to sanction all forms of litigation misconduct, the lower federal courts have generally avoided issuing any orders directly contrary to the mandate of the Rule that would set up a constitutional challenge to the Rule's validity. The following discussion looks at recent case law and potential additional strategies by which courts may seek to retain flexibility and discretion in sanctioning authority in light of Rule 37(e).

A. *Reading Rule 37(e)(2) Narrowly*

Courts have narrowly construed the prohibitions of Rule 37(e)(2) because it is, in fact, quite narrowly drafted.[340] Since its enactment, federal courts have continued to exercise inherent power to sanction discovery misconduct involving physical evidence[341] and discovery misconduct involving ESI that does not result in actual "loss."[342] Rule

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339 *See* Hugler v. Sw. Fuel Mgmt., Inc., No. 16 CV 4547, 2017 WL 8941163, at *8 (C.D. Cal. May 2, 2017) ("It is an irrefutable principle of law that the Supreme Court's authority cannot be limited by a body such as the Advisory Committee."); DVComm, LLC v. Hotwire Commc'ns, LLC, No. 14-5543, 2016 WL 6246824, at *7 (E.D. Pa. Feb. 3, 2016) ("Without limitation, litigation misconduct may also be otherwise sanctioned by the inherent power of the court."); Francis & Mandel, *supra* note 16, at 643–47.

340 *See* Allman, *supra* note 26, at 39 (describing revised rule as a "rifle shot" aimed solely at rejecting prior case law that permitted the imposition of severe sanctions for negligently lost ESI).

341 *See, e.g.*, *Best Payphones, Inc. v. City of New York*, No. 1-CV-3924, 2016 WL 792396, at *3 (E.D.N.Y. Feb. 26, 2016) ("Thus as the law currently exists in the Second Circuit, there are separate legal analyses governing the spoliation of tangible evidence versus electronic evidence."); Coale v. Metro-N. R.R. Co., No. 08-cv-01307, 2016 WL 1441790, at *5 (D. Conn. Apr. 11, 2016) (applying *Residential Funding* standard to spoliation of physical evidence). *See generally* Meritage Homeowners' Ass'n v. Bank of N.Y. Mellon, No. 16-cv-00300, 2017 WL 9471669 (D. Or. Dec. 3, 2017).

342 In *CrossFit, Inc. v. National Strength & Conditioning Ass'n*, No. 14-cv-1191, 2017 WL 2298473, at *5–6 (S.D. Cal. May 26, 2017), the court found willful and bad faith discovery misconduct, but no actual destruction of evidence. It held the conduct was sufficient to justify terminating sanctions under both Rule 37(b)(2) and inherent judicial power, but it ultimately ordered adverse inference instructions. *Id.* at *5–7; *see also* CAT3, LLC v. Black Lineage, Inc., 164 F. Supp. 3d 488, 496–97 (S.D.N.Y. 2016) (finding inherent sanctioning power available if ESI had

37 has also been held inapplicable when the preservation obligation arises from something other than "anticipation or conduct of litigation."[343] And, the courts remain free to use their inherent powers to order "measures"[344] to deal with ESI loss other than the ones specifically limited by Rule 37(e)(2).[345]

Some courts have gone further however and excluded application of Rule 37(e)(2) to borderline cases. For example, courts have exercised greater sanctioning discretion when, even though ESI loss had occurred, it was not the *only* litigation misconduct involved. Sanctions in those cases were held to also be available under Rule 37(b) and the court's inherent authority.[346] In effect, the courts seem to be applying

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been altered but not destroyed); Kortright Cap. Partners LP v. Investcorp Inv. Advisers Ltd., 330 F.R.D. 134, 138 (S.D.N.Y. 2019) (finding Rule 37(e)(2) would not bar adverse inference instruction for negligent delay of ESI production); Francis & Mandel, *supra* note 16, at 653–60 (finding the rule would not apply to attempted spoliation or alteration, or for actions that make ESI, including metadata, more costly or difficult to retrieve).

343 United States *ex rel.* Scutellaro v. Capitol Supply, Inc., No. 10-1094, 2017 WL 1422364, at *10 (D.D.C. Apr. 19, 2017).

344 Rule 37(e)(1) provides that with respect to all losses of ESI, the courts' response should be limited to "measures no greater than necessary to cure the prejudice." FED. R. CIV. P. 37(e)(1). This is consistent with much prior case law cautioning restraint in the exercise of inherent sanctioning powers. *See, e.g.*, *supra* notes 140–42, 253–59 and accompanying text.

345 *See, e.g.*, Borum v. Brentwood Vill., LLC, 332 F.R.D. 38, 49 (D.D.C. 2019); Spencer v. Lunada Bay Boys, No. CV 16-02129, 2017 U.S. Dist. LEXIS 217424, at *36 (C.D. Cal. Dec. 13, 2017); Fashion Exch. LLC v. Hybrid Promotions, LLC, No. 14-CV-1254, 2019 U.S. Dist. LEXIS 218286, at *21–22 (S.D.N.Y. Dec. 16, 2019).

346 In *OmniGen Research, LLC v. Wang*, 321 F.R.D. 367, 371, 377 (D. Or. 2017), a motion to dismiss for intentional spoliation of ESI was granted pursuant to Rules 37(b)(2), 37(e) and "the Court's inherent authority to sanction abusive litigation practices." Dismissal was based on a pre-2015 Ninth Circuit standard permitting dismissal for intentional discovery misconduct that threatens the "orderly administration of justice." *Id.* at 371 (quoting Leon v. IDX Sys. Corp., 464 F.3d 951, 958 (9th Cir. 2006)). In *Blumenthal Distributing, Inc. v. Herman Miller, Inc.*, No. ED CV 14-1926, 2016 WL 6609208 (C.D. Cal. July 12, 2016), the court found numerous instances of discovery misconduct, only some of which involved ESI loss. It imposed adverse jury instructions under its inherent authority without discussing Rule 37(e)(2). In *Nutrition Distribution LLC v. PEP Research, LLC*, No. 16-CV-2328, 2018 WL 3769162, at *13 (S.D. Cal. Aug. 9, 2018), there were various types of discovery misconduct, including ESI loss. The court asserted the right under Rule 37(b)(2) to impose any sanction except dismissal without a requirement of willfulness, fault, or bad faith. *Id.*; *see also* Coyne v. Los Alamos Nat'l Sec., LLC, No. 15-cv-54, 2017 WL 3225466, at *5 (D.N.M. May 1, 2017) (applying the same legal standard to dismissal sanctions under 37(b)(2), 37(c), and 37(e)(2)); Quetel Corp. v. Abbas, No. 17-cv-0471, 2017 WL 11380134, at *8 (E.D. Va. Oct. 27, 2017) (ordering adverse jury instruction under 37(b)(2) for violation of discovery orders involving ESI loss and stating that "sanctions authorized by Rules 37(b)(2)(A) and 37(e) are effectively the same"). *But see* Karsch v. Blink Health Ltd., No. 17-CV-3880, 2019 WL 2708125, at *13 (S.D.N.Y. June 20, 2019) (barring the most severe sanctions if there was a failure to find an "intent to deprive" where there were both violations of discovery orders and ESI destruction).

interpretive principles to Rule 37(e) similar to those the Supreme Court had applied to prior legislation.[347]

B. *Interpreting Rule 37(e)(2) as Consistent with Prior Case Law*

Many courts that did not adopt the *Residential Funding* standard have construed Rule 37(e)(2) as making no change at all in the relevant law. Some courts (primarily in the Second Circuit) interpret the Rule as imposing a new, more stringent and precise "intent to deprive" requirement for the imposition of severe sanctions.[348] Many others, however, have continued to apply culpability standards based on their pre-2015 cases, asserting that Rule 37(e)(2) has not changed those standards.[349] Neither the language of the Rule nor the advisory committee report that accompanied it is sufficiently clear to resolve this issue.[350]

Many courts have interpreted the Rule to minimize its limitations on inherent judicial power. Some have described it as simply a restatement of the "willfulness" or "bad faith" requirement.[351] Others

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347 *E.g.*, Chambers v. NASCO, Inc., 501 U.S. 32, 47 (1991) ("'[The courts] do not lightly assume that Congress has intended to depart from established principles' such as the scope of a court's inherent power." (quoting Weinberger v. Romero-Barcelo, 456 U.S. 305, 313 (1982))); *see also* Link v. Wabash R.R. Co., 370 U.S. 626, 631–32 (1962). Moreover, the same action may justify a more severe judicial response when it is part of a larger pattern of litigation misconduct. In *Link*, dismissal for failure to obey a discovery order was upheld by the Court as part of a broader pattern showing want of prosecution. *Id.* at 629–31.

348 *E.g.*, Leidig v. Buzzfeed, Inc., No. 16 Civ. 542, 2017 WL 6512353, at *11 (S.D.N.Y. Dec. 19, 2017) (holding that although plaintiff intended to "disable his websites" and delete certain email files, he did not do so for the purpose of depriving defendants of the use of the ESI in litigation and therefore could not be sanctioned under Rule 37(e)(2)); *Karsch*, 2019 WL 2708125, at *25 (requiring "specific intent to deprive").

349 Living Color Enters., Inc. v. New Era Aquaculture, Ltd., No. 14-cv-62216, 2016 WL 1105297, at *6 n.6 (S.D. Fla. Mar. 22, 2016) ("It appears to this Court that the 'intent to deprive' standard in Rule 37(e)(2) may very well be harmonious with the 'bad faith' standard previously established by the Eleventh Circuit."); *OmniGen Rsch.*, 321 F.R.D. at 371, 377; *Quetel Corp.*, 2017 WL 11380134, at *8.

350 The advisory committee report states that the Rule's intent requirement "is akin to bad faith, but is defined even more precisely." Campbell Memo, *supra* note 334, at B-17. Given the well-established use of the bad faith standard for sanctioning many forms of litigation misconduct, it is certainly plausible to argue the ambiguous language of the Rule was not intended to significantly alter it.

351 *See, e.g.*, GN Netcom, Inc. v. Plantronics, Inc., No. 12-1318, 2016 WL 3792833, at *7 (D. Del. July 12, 2016); Brown Jordan Int'l, Inc. v. Carmicle, No. 14-CV-60629, 2016 WL 815827, at *1, *33–37 (S.D. Fla. Mar. 2, 2016); Ottoson v. SMBC Leasing & Fin., Inc., 268 F. Supp. 3d 570, 584 (S.D.N.Y. 2017) (permitting adverse jury instruction when "a spoliating party has acted willfully or in bad faith"); Mfg. Automation & Software Sys., Inc. v. Hughes, No. CV 16-8962,

have permitted the requisite showing of "intent to deprive" based solely on circumstantial evidence that a party intentionally allowed potentially relevant evidence to be destroyed.[352] The sufficiency of such evidence to justify severe sanctions often depends on whether the court applies a "clear and convincing" or "preponderance" standard to the issue of intent, another issue left unresolved by the Rule itself.[353]

2018 WL 5914238, at *13 (C.D. Cal. Aug. 20, 2018) (permitting dismissal as an available sanction when a party has engaged in conduct that "deliberately undermine[s] the integrity of judicial proceedings" (alteration in original)); *Living Color Enters.*, 2016 WL 1105297.

352 HP Tuners, LLC v. Sykes-Bonnett, No. 17-cv-05760, 2019 WL 5069088, at *4 (W.D. Wash. Sept. 16, 2019); Moody v. CSX Transp., Inc., 271 F. Supp. 3d 410, 431 (W.D.N.Y. 2017); Ala. Aircraft Indus., Inc. v. Boeing Co., 319 F.R.D. 730, 746 (N.D. Ala. 2017); O'Berry v. Turner, No. 15-CV-00064, 2016 WL 1700403, at *4 (M.D. Ga. Apr. 27, 2016); Colonies Partners, L.P. v. County of San Bernardino, No. 18-cv-00420, 2020 WL 1496444, at *9 (C.D. Cal. Feb. 27, 2020). Ironically, many of these cases apply a standard derived from *Residential Funding*, that an adverse jury instruction is appropriate when

> (1) . . . the party having control over the evidence had an obligation to preserve it at the time it was destroyed; (2) . . . the records were destroyed "with a culpable state of mind"; and (3) . . . the evidence was "relevant" to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense.

Apple Inc. v. Samsung Elecs. Co., 888 F. Supp. 2d 976, 989–90 (N.D. Cal. 2012) (quoting Residential Funding Corp. v. DeGeorge Fin. Corp., 306 F.3d 99, 107 (2d Cir. 2002)). However, the "culpable state of mind" in these cases was an intentional act.

353 There appears to be an emerging circuit split. Courts in the First, Second, and Fourth Circuits usually apply the clear and convincing standard, at least for potentially dispositive sanctions like dismissal or default judgment. CAT3, LLC v. Black Lineage, Inc., 164 F. Supp. 3d 488, 499 (S.D.N.Y. 2016); Resnik v. Coulson, No. 17-CV-676, 2019 U.S. Dist. LEXIS 92159, at *17 (E.D.N.Y. Jan. 4, 2019), *enforced*, No. 17-CV-676, 2019 U.S. Dist. LEXIS 55199, at *21 (E.D.N.Y. Mar. 30, 2019); Lokai Holdings LLC v. Twin Tiger USA LLC, No. 15-cv-9363, 2018 U.S. Dist. LEXIS 46578, at *27 (S.D.N.Y. Mar. 12, 2018); Brittney Gobble Photography, LLC v. Sinclair Broad. Grp., Inc., No. 18-3403, 2020 U.S. Dist. LEXIS 62708, at *15 (D. Md. Apr. 9, 2020) (quoting Steves & Sons, Inc. v. Jeld-Wen, Inc., 327 F.R.D. 96, 104 (E.D. Va. 2018)); Postle v. SilkRoad Tech., Inc., No. 18-cv-224, 2019 U.S. Dist. LEXIS 25961, at *4 (D.N.H. Feb. 19, 2019); Wai Feng Trading Co. v. Quick Fitting, Inc., No. 13-33, 2019 U.S. Dist. LEXIS 4113, at *24 (D.R.I. Jan. 7, 2019). Ninth and Third Circuit courts, however, generally apply the preponderance of the evidence standard. *See, e.g.*, Weride Corp. v. Kun Huang, No. 18-cv-07233, 2020 U.S. Dist. LEXIS 72738, at *32 (N.D. Cal. Apr. 24, 2020); CrossFit, Inc. v. Nat'l Strength & Conditioning Ass'n, No. 14-CV-1191, 2019 U.S. Dist. LEXIS 209319, at *28 (S.D. Cal. Dec. 4, 2019); *OmniGen Rsch.*, 321 F.R.D. at 372; DVComm, LLC v. Hotwire Commc'ns, LLC, No. 14-5543, 2016 U.S. Dist. LEXIS 13661, at *16–17 (E.D. Pa. Feb. 3, 2016); *see also* N.M. Oncology & Hematology Consultants, Ltd. v. Presbyterian Healthcare Servs., No. 12-cv-00526, 2017 WL 3535293, at *1 n.2 (D.N.M. Aug. 16, 2017). Some courts in the Eleventh Circuit apply the clear and convincing standard when considering "punitive sanctions" like dismissal or default judgments, but also monetary sanctions and contempt, while the preponderance standard is applied to adverse inference and other "issue-related" sanctions. EEOC v. GMRI, Inc., No. 15-20561, 2017 WL 5068372, at *25 (S.D. Fla. Nov. 1, 2017). In determining which standard to apply, many of these courts rely on pre-2015 sanctions cases decided under inherent judicial authority.

C. *Implying Inherent Power to Apply Severe Sanctions Under "Exceptional Circumstances"*

Some courts have asserted, albeit in dicta, that Rule 37(e)(2) has no effect whatsoever on their inherent judicial authority and that they retain the power to severely sanction all forms of culpable litigation misconduct, including ESI loss.[354] These statements are a powerful indication of the high value federal judges place on the doctrine, and they are reminiscent of the Supreme Court's rhetorical defense of judicial sanctioning powers. Yet the fact that there have been no lower court cases actually challenging the legality of the Rule suggests that these courts are also following Supreme Court examples in not seeking to provoke a direct constitutional confrontation.

Rather, if courts do refuse to obey the limits of the Rule in individual cases, it is likely they will do so not by declaring the Rule invalid, but by finding potential exceptions not explicitly stated in the Rule.[355] Rule 37(f), the predecessor of 37(e)(2), stated that it was inapplicable under "exceptional circumstances."[356] The 2006 advisory committee described the exception as a recognition that "in some circumstances a court should provide remedies to protect an entirely

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354 *See* cases cited *supra* notes 342–43, 346. No post-2015 court has actually ordered such sanctions under its inherent authority under circumstances where they would be prohibited under the Rule. Thomas Allman has noted, however, that there are some recent cases where the basis for the courts' sanction order is difficult to discern. *See* Benefield v. MStreet Ent., LLC, No. 13-cv-1000, 2016 WL 374568, at *6 (M.D. Tenn. Feb. 1, 2016) (giving a "spoliation instruction" to the jury without reference to Rule 37(e)(2)); Bordegaray v. County of Santa Barbara, No. 14-cv-8610, 2016 WL 7260920, at *6 (C.D. Cal. Dec. 13, 2016) (granting adverse inference instruction for spoliation without discussion of Rule or finding of bad faith); Brice v. Auto-Owners Ins. Co., No. 13-CV-339, 2016 WL 1633025 (E.D. Tenn. Apr. 21, 2016) (ordering adverse inference instruction without discussion of Rule or finding of bad faith). *See generally* Thomas Y. Allman, *Amended Rule 37(e): Case Summaries*, LAWS. FOR CIV. JUST. (May 31, 2018), https://www.lfcj.com/uploads/1/1/2/0/112061707/2018rule37_e_todaycasesummaries_2018.pdf [https://perma.cc/6CMB-6PRL].

355 Adverse inference instructions are the prohibited sanctions courts would most likely seek to order. They are viewed as less severe than default judgement or dismissal and, prior to Rule 37(e)(2), usually did not require a showing of bad faith or intentional misconduct. *See supra* notes 342, 354 and accompanying text; *see also* GN Netcom, Inc. v. Plantronics, Inc., 930 F.3d 76, 82–83 (3d Cir. 2019); Blumenthal Distributing, Inc. v. Herman Miller, Inc., No. ED CV 14-1926, 2016 WL 6609208, at *24 (C.D. Cal. July 12, 2016). Instructions that inform the jury of the lost ESI but do not mention any presumption that the lost ESI was unfavorable may be ordered under Rule 37(e)(1). *See* Soulé v. P.F. Chang's China Bistro, Inc., No. 18-cv-02239, 2020 WL 959245 (D. Nev. Feb. 26, 2020).

356 Rule 37(f) provided a "safe harbor" against sanctions for ESI lost due to good faith operation of an electronic information system. The exception, allowing such sanctions under "exceptional circumstances," was added after the draft Rule was changed slightly. FED. R. CIV. P. 37(f) advisory committee's note to 2006 amendment.

innocent party requesting discovery against serious prejudice arising from the loss of potentially important information."[357] This can be read as a reaffirmation of the courts' traditional equitable powers both under the Rules and their inherent authority.[358] It is unlikely that the drafters of Rule 37(e)(2) intended to deprive courts of the power to make such exceptions when equitable considerations strongly required it.[359]

A second approach would be to rely on the Supreme Court's statement in *NASCO* and assert that inherent authority to issue adverse inference instructions is still available when fairness and effective administration of justice require it and when the Rules "are not up to the task."[360] This does not require an assertion that Rule 37(e)(2) is

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357 Court Rules, 234 F.R.D. 219, 244 (2006).

358 *See* Ungar v. City of New York, 329 F.R.D. 8, 15 (E.D.N.Y. 2018) ("Even where the spoliator has acted with mere negligence, it is well-established that, as between a negligent party and an innocent party, the former has no right to retain the fruits of their misconduct."). In the Ninth Circuit, the existence of "extraordinary circumstances" is a factor that can justify default judgment or dismissal for discovery misconduct under the courts' inherent power as well as Rule 37(b)(2). Halaco Eng'g Co. v. Costle, 843 F.2d 376, 379–80 (9th Cir. 1988); Advantacare Health Partners, LP v. Access IV, No. C 03-04496, 2004 WL 1837997 (N.D. Cal. Aug. 17, 2004).

359 More likely, the specific reference to "exceptional circumstances" was omitted because the more limited scope of the new Rule made it seem less important and because the exception was simply a recognition of the courts' inherent sanctioning authority. Rule 26(f) only provides a safe harbor against sanctions imposed "under these rules" and "does not affect other sources of authority to impose sanctions." FED. R. CIV. P. 37(f) advisory committee's note to 2006 amendment. The "exceptional circumstances" exception could therefore be seen as an express acknowledgement of powers the courts already possessed, something common in such legislation going back to the first Judiciary Act. *See supra* notes 114–19 and accompanying text. In 2015, in contrast, the drafters of Rule 37(e)(2) were focused on the evidentiary problem of issuing an adverse inference jury instruction when the facts regarding the ESI loss frequently did not justify such an instruction as an evidentiary matter. While this gave the drafters a good reason to abrogate the rule of *Residential Funding*, there is no indication the drafters intended to abrogate the courts' broader equitable power to issue adverse inference instructions under exceptional circumstances when fairness required it. *See* Thomas Y. Allman, *Applying Amended Rule 37(e): A Rule-Based Spoliation Doctrine for ESI*, LAWS. FOR CIV. JUST. 4, 17 (Apr. 21, 2016), http://www.lfcj.com/uploads/3/8/0/5/38050985/2016rule37_e_today_4_25_16.pdf [https://perma.cc/SZ72-FJJ4] (arguing that a "better result" would have been for the rule to apply to document loss as well as ESI loss, with a possible exception for circumstances when the rule is not "up to the task").

360 *See supra* notes 63–66, 306–11 and accompanying text. There is no indication that Rule 37(e)(2) was meant to limit the scope of inherent power asserted in *Link* and *NASCO*. Although the advisory committee note states that the Rule is designed to "foreclose reliance" by the courts on inherent authority when taking "certain measures," that statement itself can be read broadly or narrowly. The narrower and more plausible interpretation is that the Rule is only designed to preclude reliance on inherent authority in cases like *Residential Funding* where it was used to justify severe sanctions for conduct involving negligent or grossly negligent loss of evidence. The note specifically speaks about displacing inherent power only with regard to negligent or grossly negligent ESI loss, and *Residential Funding* is the sole example of the kind of case the Rule seeks to displace. Moreover, the note expressly leaves undisturbed the federal court's common law

unconstitutional. Rather, as in *NASCO* itself, exercise of such power can remain constitutionally ambiguous but nonetheless appropriate when the specific situation has shown the Rules to be inadequate and therefore functionally inapplicable.[361] As in *NASCO* itself, recognizing such a limited exception would reassert the validity of the Rule and its applicability in most cases while avoiding knotty issues about the precise constitutional limits of the court's inherent powers.[362] As a plausible interpretation of the Rule, it is certainly no more of a stretch than the holding in *Michaelson* that the Clayton Act applied only to criminal contempt, or that the jury recall in *Dietz* was permitted only in civil cases.[363]

Recognition of such an exception would permit courts to provide a remedy when the Rule's prohibition on adverse jury instructions for nonintentional ESI loss creates unfairness to an innocent party. Consider a case in which all relevant ESI regarding plaintiff's claim has been lost as a result of defendant's negligent conduct. Although the Rule permits judges to inform the jury of the lost ESI, it does not permit them to instruct the jury that they may draw an adverse inference from such loss. Without such a presumption, the jury, lacking evidence, is unlikely to return a verdict for plaintiff, and the judge might even feel obligated to dismiss the case. In the 2006 advisory committee note, judicial intervention was seen as appropriate when an "entirely innocent party" was injured by an opposing party's "routine, good-faith operation of an electronic information system."[364] Similar scenarios under Rule 37(e)(2) are even more compelling since the same innocent party may be injured by negligent or grossly negligent conduct of the opponent. Retaining

power to determine when there is a duty to preserve ESI. Finally, the narrow scope of the Rule itself make it highly unlikely it was meant to limit or displace the broad and well-established sanctioning authority set out in prior Supreme Court cases.

361 "Where exercise of inherent power is necessary to remedy abuse of the judicial process, it matters not whether there might be another source of authority that could address the same issue." CAT3, LLC v. Black Lineage, Inc., 164 F. Supp. 3d 488, 498 (S.D.N.Y. 2016). The Rules Committee, not surprisingly, thought the new Rule would be "up to the task" of dealing with ESI loss, and would therefore make judicial reliance on inherent authority "unnecessary." *See* Allman, *supra* note 359, at 17. Saying that use of something is "unnecessary" is not the same as saying it is prohibited or unavailable, and it leaves open the possibility that a court might disagree with the Rules Committee in some exceptional cases.

362 In *Blumenthal Distributing, Inc. v. Herman Miller, Inc.*, No. ED CV 14-1926, 2016 WL 6609208, at *17 (C.D. Cal. July 12, 2016), a magistrate judge, finding willful violations of discovery orders as well as loss of ESI, ordered mandatory adverse inference instructions pursuant to the court's inherent judicial power, citing *NASCO*. The court did not discuss whether the 37(e)(2) standard had been met.

363 *See supra* notes 41, 255 and accompanying text.

364 FED. R. CIV. P. 37(f) advisory committee's note to 2006 amendment.

such an exception would conform to prior case law and would not be inconsistent with the scope and intent of the Rule.[365]

FINAL THOUGHTS

Ambiguity and confusion in law are understudied phenomena. This is curious since so much of law is ambiguous and confusing. A serious study of legal ambiguity would go beyond mere condemnation and even beyond the more nuanced distinctions of rules and standards. An examination of the different ways that legal ambiguity can arise, from boundary problems to linguistic imprecision to contradictory purposes, can provide greater insight into the nature of some intractable legal questions and a means of achieving greater understanding of the law.

The puzzle of inherent judicial authority presents a unique and interesting form of legal ambiguity. It could be described as a mere boundary problem, a failure of courts to adequately distinguish between core constitutional powers that federal courts possess under Article III and institutional powers to create federal procedural common law, but this study has shown that it is more than that. The confused mashing together of these two conceptually distinct powers is a technique that enables courts to treat them as a single concept. This has proven useful in maintaining the independence and procedural flexibility of the judicial branch. Linking procedural common lawmaking power with "necessary" and "essential" constitutional powers gives them added rhetorical strength and potency, enough to justify favorable treatment of particular statutory interpretations and questionable procedural innovations. The same linkage also allows the courts to avoid many conflicts with the political branches by accepting as mere "regulation" attempts to limit and guide their sanctioning and rulemaking powers. The explanation for the puzzle of inherent judicial authority may be that its conceptual confusion continues to be outweighed by its political usefulness.

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365 While there do not appear to be any cases yet which expressly invoke an "exceptional circumstances" exception to 37(e)(2), there are a few which apply 37(e)(2) sanctions where the equitable considerations are strong even though the showing of "intent to deprive" is weak. *See, e.g.*, Goldrich v. City of Jersey City, No. 15-885, 2018 WL 4492931 (D.N.J. July 25, 2018).