Debates about the common lawmaking power of the federal courts focus exclusively on substantive common law. But federal common law is not limited to matters of substance; it reaches matters of procedure as well. Federal law includes a robust body of what might be called “procedural common law”—common law primarily concerned with the regulation of internal court processes rather than substantive rights and obligations. This body of law includes many doctrines that are fixtures in the law of procedure and federal courts. For example, abstention, forum non conveniens, remittitur, stare decisis, and preclusion can all fairly be characterized as procedural common law. This body of law does not fit easily into the traditional account of federal common lawmaking power, because it generally lacks certain features thought characteristic of federal common law: It does not bind state courts, it falls outside of the recognized enclaves of federal common law, and it is not entirely subject to congressional abrogation.

This Article offers a tentative account of the power of the federal courts to make procedural common law. One explanation for this power is a variation on the theory advanced in the context of substantive common law: the constitutional structure preempts the state’s ability to regulate federal-court procedure, and, if Congress fails to specify procedural rules, federal courts must. This theory rings partly true insofar as it recognizes that federal-court procedure lies beyond state control. It is unsatisfying, however, insofar as it conceives of the procedural power of the federal courts as entirely derivative of and subservient to that of Congress. The Article thus considers an alternate theory: that procedural common lawmaking authority derives not from congressional default, but from Article III’s grant of judicial power. This theory has more force insofar as it accounts for the fact that the power of the courts sometimes, even if rarely, exceeds that of Congress in matters of procedure. It depends, however, on the widely assumed but largely untested proposition that federal courts possess inherent procedural authority. The Article canvasses Founding-era history to determine whether the Constitution can fairly be understood to confer this power, concluding that the historical evidence, while far from overwhelming, supports the claim that federal courts possess inherent procedural authority. Building from this notion of inherent procedural authority, the Article then sketches a theory to explain the power of the federal courts to make procedural common law.
There has been no shortage of efforts to justify the common lawmaking powers of the federal courts. In the course of these efforts, it is commonplace to underscore three features of the common law that federal court develop without congressional authorization. First, this law “is truly federal law in the sense that it is controlling in actions in state courts as well as in federal courts.”¹ Second, to the extent that the federal courts proceed without congressional authorization, federal common law is “specialized.”² It is confined, at least as a matter of doctrine, to several well-recognized enclaves, such as interstate disputes, international relations, admiralty, and proprietary transactions of the United States.³ Third, Congress can always abrogate it.

Despite the consistent emphasis on these supposedly defining characteristics of federal common law, a large body of federal common law exists that these characteristics do not capture. This body of law can be characterized as “procedural common law”—common law that is concerned primarily with the regulation of internal court processes rather than substantive rights and obligations. With few exceptions, this body of law falls almost entirely outside of the traditional definitions of federal common law. Procedural common law does not generally bind state courts;⁴ though developed without congressional authorization, it falls outside of the traditionally recognized enclaves of federal common law; and Congress’s ability to abrogate it is often called into question.⁵

While the sources of and limits upon the federal-court power to develop substantive common law have received serious and sustained scholarly attention, the sources of and limits upon federal-court power to develop procedural common law have been almost entirely overlooked.

This Article fills a significant gap in the federal courts literature by offering a theory to account for the federal common law of procedure. Part I introduces the

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⁴ See Michael Collins, Article III Cases, State Court Duties, and The Madisonian Compromise, 1995 WISCONSIN L. REV. 39, 178-81 (observing that state courts need not “mimic federal courts procedurally,” even when they heard cases involving federal law).
⁵ See infra notes 66-72 and accompanying text.
problem. After giving a brief account of the law and scholarship addressing the power of the federal courts to develop substantive common law, it draws attention to the existence of procedural common law by describing five representative doctrines: abstention, forum non conveniens, stare decisis, remittitur, and preclusion. While each of these doctrines is a familiar feature of federal law, Part I points out that the courts developing these doctrines have not addressed in any the question of their authority to do so.

Part II addresses that question. After concluding that no statute generally authorizes the federal courts to develop a common law of procedure, it explores potential constitutional justifications for that authority. It first develops a theory that would expand the traditional rubric of federal common law to include procedure. In other words, this Part considers whether procedure should be treated as an enclave so committed to federal control that federal courts have the authority to prescribe its content in the absence of legislation to the contrary. This theory (which I call the “enclave theory”) makes some sense, particularly because the Supreme Court has long emphasized that federal-court procedure is a matter lying wholly beyond the control of the states. This Part tentatively concludes, however, that the enclave theory is unsatisfying, or at least incomplete, because, taken alone, it fails to account for the fact that power might be distributed differently between the courts and Congress on matters of procedure than on matters of substance. In particular, it fails to account for the possibility that federal-court authority over procedure might sometimes, even if rarely, exceed that of Congress.

Part II then considers the possibility that Article III justifies a common law of procedure. Article III’s references to “courts” and “judicial power” have long been understood to carry with them certain powers incident to all courts. Authority to regulate procedure, at least in the course of adjudicating particular cases, is assumed to be one of those powers. To the extent that the power is addressed, however, it is addressed in the context of isolated procedural rules. Interestingly, neither courts nor scholars have identified inherent procedural authority as the basis for the courts’ general procedural common lawmaking power. Belief that such authority exists, however, offers obvious support for this insight. If federal courts indeed possess inherent authority over procedure, that authority presumably empowers federal courts to develop procedural common law. Rooting procedural common lawmaking power of the federal courts in their inherent authority is attractive, because it matches the widely felt intuition that federal courts possess some power over procedure in their own right.

That said, the “inherent authority” theory is not without its problems. Although both scholars and judges treat the proposition that federal courts possess inherent authority over procedure as self-evidently true, the soundness of this proposition is more complicated than it appears. The inherent authority of the federal courts has been most fully explored in connection with a court’s ability to sanction misbehavior and regulate those who serve it; federal courts have long asserted inherent authority to hold in contempt, impose sanctions, vacate judgments for fraud, dismiss cases for failure to prosecute, regulate the bar, and regulate jurors.6 The tradition of directly claiming inherent authority to prescribe procedural regulations, by contrast, is relatively weak, and

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6 See infra notes 108-111 and accompanying text.
it is doubtful whether the list of well-recognized inherent powers can be understood as recognizing a broad power to control any matter related to internal judicial administration.

In light of this uncertainty, Part III carefully examines the soundness of the proposition that federal courts possess inherent authority over procedure. Care with respect to this question is not only important because of the uncertainty surrounding it, but also because the stakes of treating procedural common law as an outgrowth of inherent authority are relatively high. That is so because the source of the courts’ authority to act determines the limits imposed upon it. While the enclave theory limits judicial power insofar as it treats procedural common law as entirely subject to congressional abrogation, the inherent authority theory imposes limits of its own. Many have argued that courts can assert inherent power only to the extent “necessary” to deciding cases; in addition, I have argued in prior work that any procedural authority conferred by Article III is entirely local, which would limit the reach of any common law procedure to the adopting jurisdiction. The choice between these two theories is not merely a prudential one based on the strengths and weaknesses of each. If federal courts indeed possess inherent authority over procedure, they are foreclosed from justifying procedural common law solely with reference to the enclave theory. Where a more specific constitutional provision applies (here, Article III’s grant of inherent procedural authority), courts cannot disregard that provision in favor of a more general principle that arguably confers greater power (here, the fact that the Constitution impliedly places federal-court procedure beyond state control). Because the constraints on the power depend upon the source, it is important to be precise in identifying the source.

Part III ultimately concludes that authority to prescribe procedure is fairly treated as a power incident to every court. Although they are often conflated in discussions of inherent judicial authority, two distinct constitutional arguments can be raised in support of such a claim. One might argue that Article III directly vests federal courts with power over procedure because such power is a component of “the judicial Power.” Alternatively, one might argue that Article III indirectly enables courts to exercise power over procedure because every express grant of constitutional power implies also the power to employ means of accomplishing it, and procedure is a means designed to accomplish the end of deciding cases. Both arguments turn on history. The former requires a showing that, at the time of the Founding, “the judicial Power” was widely understood to encompass power over procedure. The latter requires a showing that procedure is among the complement of powers that federal courts have traditionally asserted in the course of adjudicating cases. After carefully examining the historical record, focusing on the Founding era, Part III concludes that while the record is probably not strong enough to establish the power as one directly vested in federal courts as a component of judicial power, it is strong enough to show that procedural regulation is a tool that federal courts have traditionally employed. Because the Constitution can be

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8 “The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.” U.S. CONST. art. III, § 1.
understood to grant federal courts authority over procedure, it is the “inherent authority” theory, rather than the pure enclave theory, that properly serves as the theoretical basis for the procedural common lawmakers power of the federal courts.

Part IV turns to the question of the limits that the Constitution might impose on the inherent authority of federal courts over procedure, and thus on their authority to develop procedural common law. Scholars and courts have frequently insisted that federal courts possess only those inherent powers that are necessary to the exercise of judicial power; they have also claimed that if federal courts possess inherent authority over procedure, this “necessity” limit applies to their exercise of it. The necessity limit, at least as it is commonly understood, would render much federal procedural common law illegitimate, for even if procedure is necessary to the exercise of judicial power in the broad sense (courts could not decide cases without some procedures governing the assertion of claims and admission of evidence), much federal procedural common law goes far beyond what is actually necessary to the decision of cases. Part IV argues, however, that even if the necessity limit applies to some exercises of inherent power, it does not apply to the courts’ exercise of inherent procedural power.

One argument for a “necessity” limit derives from the so-called “horizontal effect” of the Sweeping Clause. Some have argued that while Article III empowers the federal courts to employ means directed toward the end of deciding cases, the Sweeping Clause severely limits the range of means that the courts are allowed to claim. Federal courts can claim those powers absolutely necessary to exercising the judicial power, the argument goes, but the presence of the Sweeping Clause in Article I, and the corresponding lack of any such clause in Article III, shows that Congress alone has the power to regulate the federal courts in ways that are merely helpful to carrying into execution “the judicial Power.” What this argument obscures, however, is that the Sweeping Clause enables Congress to regulate the judiciary in ways both beneficial and strictly necessary to the exercise of judicial power. If the Clause prohibited the federal courts from exercising any powers granted to Congress, it would presumably prohibit the federal courts from claiming “strictly necessary” powers as well as beneficial ones. In other words, if the Sweeping Clause truly had horizontal effect, it would deprive the judiciary of implied power altogether—a position that no one maintains. The Sweeping Clause, then, is best understood as a grant of legislative power that simply does not speak to powers that the judiciary and executive might possess.

A second argument for a “necessity” limit derives from a long doctrinal tradition asserting that inherent authority is limited to situations in which its exercise is necessary to deciding cases. Part IV points out that scholars relying on these cases to support a

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9 See infra note 211.
10 See generally 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 LAW & CONTEMP. PROBS. 102 (1976). The Sweeping Clause grants Congress the power “To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.” U.S. CONST. ART. I, § 8, cl. 18.
11 Van Alstyne, supra note 10, at 125.
broad limit on the judiciary’s power have overlooked an important feature of them. The Supreme Court did not first claim a necessity limit in a case generally examining the scope of the judiciary’s inherent power. It first asserted the necessity limit in the course of distinguishing power that it thought all courts must possess—the power to punish criminal contempt—from power that it expressly denied—the power to assume jurisdiction over common law crimes.\(^{12}\) In the context of punitive sanctions, the necessity limit preserves this limited core of judicial authority from falling within the general prohibition on adjudicating crimes without congressional authorization; it also prevents a court’s power to punish misbehavior from infringing too far upon Congress’s exclusive power to determine the reach of federal criminal jurisdiction. Neither concern applies in the context of procedural regulation. While the Court has never expressly confined the “necessity” limit to sanctioning cases, it is worth observing that all of the Court’s apparent deviations from the necessity rule have occurred outside the punitive context.

Rejection of the necessity limit, however, leaves open the question of what limit does apply. Part IV argues that for purposes of the Constitution, the limit on a federal court’s power over procedure is that its regulation really be “procedural.” This is admittedly a blurry limit, as the term “procedure” is notoriously difficult to define. For purposes of locating a constitutional limit, one cannot be much more precise than to say that a rule is “procedural” if it is primarily focused on regulating the litigation process rather than out-of-courtroom conduct. The difficulty of using this standard to resolve hard cases is somewhat mitigated both by the separation-of-powers principle and by the Rules of Decision Act. The separation-of-powers principle requires that doubts be resolved against the existence of inherent authority, because while judicial authority may be at its apex when a court proceeds pursuant to congressional authorization (as the Supreme Court does when it promulgates prospective court rules under the Rules Enabling Act), that authority is certainly reduced when it proceeds on inherent power alone.\(^{13}\) The Rules of Decision Act offers the federal courts a way of locating the limits of procedure, at least in diversity cases. That Act instructs federal courts, absent contrary instruction, to follow state “rules of decision,” but does not disturb any authority the federal courts otherwise possess to fashion rules of procedure. In diversity cases, federal courts distinguish between the substantive law they are bound to follow and the procedural rules they are free to create by asking whether application of what is ostensibly federal procedural common law would undermine the “twin aims” of Erie.\(^{14}\) It is less clear how courts go about distinguishing procedure from substance in federal question cases, but because the Act applies in that context too, it at a minimum reinforces the constitutional requirement that procedural common law truly be “procedural.”

\(^{13}\) Cf. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (asserting that the authority of the Executive is at its maximum when he acts pursuant to congressional authorization, reduced when he acts in the absence of a congressional grant or denial of such authority, and at its lowest ebb when he acts in a way incompatible with the expressed will of Congress).
In sum, this Article provides a theoretical foundation for an overlooked but relatively large segment of federal common law. It is worth emphasizing that this theory attempts to explain only procedural common law developed solely in reliance upon the inherent authority conferred by Article III. While no statute generally authorizes the creation of federal procedural common law, particular statutes sometimes do, and neither this theory nor its corresponding limits applies when the federal courts proceed pursuant to congressional authorization. Procedural common law developed in the absence of congressional authorization, however, has long played an important role in the operation of the federal courts, and so long as it continues to do so, it is important to attend to its source and limits.

I. Procedural and Substantive Common Law

Substantive common law is the lens through which the common law powers of the federal courts are generally viewed. This Part thus begins with a brief account of the power that federal courts possess to develop substantive common law. It then develops in more detail the proposition that procedural common law exists, and that it exists outside of the traditional account of common law. To that end, this Part introduces five doctrines representative of procedural common law: abstention, forum non conveniens, stare decisis, remittitur, and preclusion. As this Part explains, each of these doctrines is “procedural” insofar as it is concerned with regulating court processes, and each is “common law” insofar as it is judge-made rather than the product of textual interpretation. If federal courts are generally at pains to identify a justification for proceeding when they develop substantive common law, the opposite is true when they develop procedural common law. While all of the doctrines described below are rooted in the fabric of federal law, the basis of the court’s authority to develop them is almost entirely unexplored.

A. Substantive Common Law

Any discussion of federal common law begins with an obligatory reference to *Erie Railroad Co. v. Tompkins* and its famous holding that “[t]here is no federal general common law.”\(^{15}\) *Erie* marked a sea change in the way federal courts approached their common law powers. Before *Erie*, one might have described the common law powers of the federal courts as broad but shallow: federal courts freely articulated common law on a broad range of matters, but the principles they articulated applied only in federal courts. After *Erie*, one might describe the common law powers of the federal courts as narrow but deep: federal courts make common law in instances “few and restricted,”\(^{16}\) but the principles they articulate bind state as well as federal courts. *Erie* (and its progeny) thus gave something to both state and federal courts. On the one hand, state courts received the benefit of a general rule rendering state common law (or, more precisely, “the

\(^{15}\) 304 U.S. 64, 79 (1938).

unwritten law of the state as declared by its highest court")17 controlling even in federal courts. On the other hand, federal courts received the reciprocal benefit of that rule’s exception. Federal courts make common law only rarely, but when they do, it has preemptive bite.18 Indeed, this preemptive bite is so significant that it is commonplace to mark it as the defining characteristic of post-Erie federal common law.19

The Supreme Court has said that unless Congress authorizes it, “federal common law exists only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases.”20 The justification for common law made without statutory authorization is that certain enclaves of federal interest are “so committed by the Constitution and laws of the United States to federal control that state law is preempted and replaced, where necessary, by federal law of a content prescribed (absent explicit statutory directive) by the courts . . . .”21 In other words, the enclaves identified by the Court are areas in which the structure of our federal system prohibits state law from controlling.22 If a case or controversy arises in one of these areas and Congress fails to articulate a federal standard that would decide it, the federal courts must supply a federal standard in the form of a common law rule. As Alfred Hill puts it, “The silence of Congress [in an area committed to federal control], far from silencing the federal courts, is precisely what calls upon them to speak.”23 In doing so, however, the judiciary functions only as a placeholder for Congress. If Congress subsequently adopts conflicting regulation, federal common law must give way to federal statute.

17 See Erie, 302 U.S. at 71 (quoting Swift v. Tyson, 41 U.S. 1, 18 (1842)).
18 See Friendly, supra note 2, at 405 (“Erie led to the emergence of a federal decisional law in areas of national concern that is truly uniform because, under the supremacy clause, it is binding in every forum, and therefore is predictable and useful as its predecessor, more general in subject matter but limited to the federal courts, was not.”).
Federal common law exists, of course, outside of the above-described enclaves. As the Supreme Court’s doctrinal formulation suggests, federal common law also exists pursuant to congressional authorization. Federal statutes may explicitly or implicitly authorize the creation of federal common law, and, as one might imagine, determining whether a statute implicitly authorizes the creation of federal common law is frequently a difficult and contested question of statutory interpretation. It is also the case that it can be difficult to distinguish federal common law made in the shadows of federal statutes from interpretation of the statutory text itself. As a result, scholars frequently point out that when all is said and done, it can be hard to tell whether a given decision effects congressional intent or advances a judicial policy choice. This criticism is far more salient when federal common law is made in the interstices of federal statutes than when it is made in the enclaves of federal common law. When federal common law is made in the enclaves, there is no text giving the courts even a general sense of the direction in which they should go; hence, there is no real argument that courts are engaging in interpretation rather than common lawmaking. The enclaves of federal common law thus present federal common law in its starkest, most recognizable form. Doctrinally, they also present the most difficult question of federal-court power: Courts claiming the mantle of statutory authorization are on firmer ground than courts striking out on their own to articulate common law rules.

B. Contrasting Procedural Common Law

The standard account of federal common law described above neither acknowledges nor justifies the considerable amount of procedural common law articulated by the federal courts. “Procedure” is not included on the laundry list of enclaves in which federal common lawmaking is justified. While Congress’s ability to overrule substantive common law is widely recognized, its ability to overrule procedural common law is frequently questioned. And while the Constitution may impliedly preempt the ability of the states to regulate federal-court procedure, procedural common law, unlike substantive common law, does not replace contrary state law.

Before exploring these differences, however, it is necessary to answer a threshold question: what is “procedural common law?” This section highlights the existence of this overlooked body of law by briefly describing five doctrines representative of it: abstention, forum non conveniens, stare decisis, remittitur, and preclusion. Each of these doctrines is “procedural” insofar as it is primarily concerned with the regulation of court processes and in-courtroom conduct. Each is “common law” insofar as it is judge-

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25 Id.
26 See infra notes 66-72.
27 See infra Part II.B.
28 See infra note [61-64] and accompanying text.
29 Cf. Sara Sun Beale, Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts, 84 Colum. L. Rev. 1433, 1474-75 (1984) (defining substantive rules as those “concerned principally with policies extrinsic to litigation” and procedural rules as those designed “to enhance the fairness, reliability, or efficiency of the litigation process”). The status of
made; these five doctrines resemble those developed in the traditional enclaves of common law insofar as none pretends to interpret any provision of the enacted law. If interpretation and common lawmaking run along a spectrum, each of these doctrines falls squarely on the “common law” end of it. As a result, the common law I describe below, much like that developed in the traditional enclaves, presents the question of judicial authority with particular crispness. When a federal court proceeds without any pretense of interpreting the requirements of enacted law, the federal-court action forces to the forefront the question whether it possesses freestanding authority to develop a federal common law of procedure.

It is important to be clear that these five doctrines are an illustrative rather than exhaustive list of procedural common law. Moreover, in asserting that they qualify as both “procedural” and “common law,” I am not offering restrictive definitions of those terms. “Procedure” and “common law” are both difficult to define, and I do not here attempt a definition that conclusively determines whether marginal cases can be accurately described as either “procedural” or “common law.” The doctrines that I describe below are ones conventionally treated as “procedural” and that should qualify as “common law” under even the most grudging definition of the phrase.

(1) Abstention

One area in which the federal courts have developed a significant body of procedural common law is abstention. The abstention doctrines identify the

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

On the difficulty of defining “procedure,” see, for example, Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 559 (1949) (“Suffice it to say that actually in many situations procedure and substance are so interwoven that rational separation becomes well-nigh impossible.”). For competing definitions of “common law,” compare Hill, supra note 23, at 1026 (defining “common law” narrowly by excluding from its reach all rules traceable to some statutory or constitutional text, no matter how tangentially) with Thomas W. Merrill, The Common Law Powers of Federal Courts, 52 U. CHI. L. REV. 1, 5 (1985) (defining common law broadly to include any rule not appearing on the face of some constitutional or statutory provision, “whether or not that rule can be described as the product of ‘interpretation’ in either a conventional or an unconventional sense”).

There is any number of doctrines whose status as procedural common law is contestable. For example, people might agree that a rule excluding involuntary confessions is a common law rule, but disagree about whether that requirement is procedural or substantive. Compare McNabb v. United States, 318 U.S. 332, 340 (1943) (treating such a rule as procedural) with Beale, supra note 29, at 1475-76 (treating it as substantive). Similarly, people might agree that the well-pled complaint rule, see Louisville & N.R.R. v. Mottley, 211 U.S. 149, 152-53 (1908), is procedural, but disagree about whether it results from common lawmaking or statutory interpretation. Compare Matasar & Bruch supra note 29, at 1333 (treating rule as one of common law because the text of 28 U.S.C. § 1331 does not so restrict federal question jurisdiction with Hill, supra note 3, at 1026 (adopting a narrower definition of common lawmaking under which the well-pled complaint rule would be treated as statutory interpretation).
circumstances in which federal courts deem it appropriate to refrain from adjudicating a
case to permit some other body—typically a state court—to adjudicate it first. There are
five doctrines that permit district courts to abstain from statutorily granted jurisdiction—
Pullman, Burford, Younger, Colorado River, and Thibodaux abstention.33

Because the abstention doctrines guide the litigation process rather than out-of-
courtroom conduct, they are “procedural.” Because they are prescribed by judicial
decision rather than enacted law, they are a species of “common law.”34 Indeed, one
might say that the common law status of the abstention doctrines is particularly clear,
because these doctrines exist not only in the absence of explicit regulation by the enacted
law, but in spite of explicit jurisdictional grants in the enacted law. It is, in fact, the
tension between doctrines emanating from judicially developed guidelines and enacted
law arguably charging federal courts to assume jurisdiction that has made the abstention
doctrines particularly controversial.35 Those who defend the abstention doctrines,
however, do not do so on the ground that the doctrines are constitutionally or statutorily
required. Those who defend abstention, like those who criticize it, treat abstention as a
form of common law.36 Neither those who defend it nor those who criticize it have
focused on the source of the federal courts’ authority to develop a procedural common
law of abstention.

(2) Forum Non Conveniens

The doctrine of forum non conveniens, a close cousin of abstention, addresses a
district court’s power to dismiss a suit so that the suit may be adjudicated in a “more
convenient” forum. In determining whether another forum is better suited to adjudicate a
claim, the court considers factors of public interest such as the chosen forum’s interest in
the controversy, as well as factors of private interest such as the relative ease of access to

33 See Colo. River v. United States, 424 U.S. 800, 817 (1976); Younger v. Harris, 401 U.S. 37, 43-44
315, 332–33 (1943); R.R. Comm’n v. Pullman Co., 312 U.S. 496, 500-01 (1941).
34 See Gene R. Shreve, Pragmatism Without Politics—A Half-Measure of Authority for Jurisdictional
Common Law, 1991 BYU L. REV. 767, 797 (1991) (dubbing the doctrines a kind of “jurisdictional common
law”). See also Colo. River, 424 U.S. at 817 (grounding propriety of dismissal in “wise judicial
administration, giving regard to conservation of judicial resources and comprehensive disposition of
litigation”) (citations omitted); Younger, 401 U.S. at 43 (grounding abstention from issuing injunctions
against state criminal prosecutions in the policies reflected generally in certain statutes and in equitable
tradition); Thibodaux, 360 U.S. at 28 (holding that concerns of comity justify abstention in certain
circumstances even in suits at law, as opposed to suits at equity); Burford, 319 U.S. at 333 (grounding the
power to abstain in the powers traditionally exercised by courts sitting in equity and the guidelines for its
exercise in federalism); Pullman, 312 U.S. at 500-01 (justifying abstention with reference to both the
traditional powers of equity courts and regard for the “harmonious relation between state and federal
authority”).
35 See Colo. River, 424 U.S., at 825-26 (Stewart, J., dissenting); Thibodaux, 360 U.S., at 31-34 (Brennan, J.,
dissenting); Burford, 319 U.S. at 336, 347-48 (Frankfurter, J., dissenting); Martin H. Redish, Abstention,
36 See Richard A. Matasar & Gregory S. Bruch, Procedural Common Law, Federal Jurisdictional Policy,
and Abandonment of the Adequate and Independent State Grounds Doctrine, 86 COLUM. L. REV. 1291,
1337-42 (1986); Redish, supra note 35, at 80-84; David Shapiro, Jurisdiction and Discretion, 60 N.Y.U. L.
REV. 543, 547-52, 574-75, 579-85 (1985); Shreve, supra note 34, at 769-72, 796-98.
proof, the relative availability of compulsory process, the relative cost of obtaining the
attendance of witnesses, and the forum’s interest in the controversy. When the balance
of factors strongly favors adjudicating the case elsewhere, the district court can override
the plaintiff’s choice of forum by dismissing the case.

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

While the courts have made clear that forum non conveniens is a common law
doctrine, they have not made clear the source of their authority to develop it. For
example, in *Gulf Oil v. Gilbert*, the case widely regarded as first sanctioning a federal
doctrine of forum non conveniens, the Supreme Court did not point to any specific
statutory or constitutional provision that granted federal courts the power to dismiss suits
on the basis of forum non conveniens; nor did it identify the principle that generally
empowered it to create procedural common law, of which forum non conveniens is but a
part. Since *Gulf Oil* was decided, judges and scholars have occasionally justified forum
non conveniens with reference to the inherent authority of federal courts. Even then,
however, the fundamental proposition that federal courts possess inherent procedural
authority is assumed rather than explored.

(3) Stare Decisis

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

Consider some of the rules comprising the doctrine of horizontal stare decisis. The fundamental rule of horizontal stare decisis is that holdings bind and dicta do not. Subsidiary rules, however, dictate the strength a holding carries in particular circumstances. Some holdings are virtually set in stone: For example, every court of

38 *Id.* at 508. The doctrine only applies when the more convenient forum is foreign, because 28 U.S.C. §
1404, enacted in 1948, governs transfers between United States district courts.
39 See *Gulf Oil*, 330 U.S. at 507 (describing forum non conveniens as a common law doctrine).
40 See *id.* at 513 (Black, J., dissenting) (protesting forum non conveniens on this ground).
41 See, e.g., *Chambers v. NASCO*, 501 U.S. 32, 45 (1991) (including in a list of inherent judicial powers the
power to dismiss a case on grounds of forum non conveniens); Elizabeth T. Lear, *Congress, the Federal
Courts, and Forum Non Conveniens: Friction on the Frontier of Inherent Power*, 91 IOWA L. REV. 1147
appeals forbids one panel of the court from overturning decisions made by another. Even those holdings open to reconsideration, however, such as those presented to a court of appeals sitting en banc or to the Supreme Court, vary in strength. The Supreme Court and many courts of appeals have adopted a three-tiered system in which constitutional cases carry the weakest precedential force, common law cases carry average precedential force, and statutory cases carry “super-strong” precedential force. Before overruling a common law or constitutional case (statutory cases are rarely overruled), the Supreme Court and the courts of appeals balance reliance interests in the precedent against arguments that the precedent has become unworkable or has been undercut by intervening law. None of these factors, however, is applicable in the district courts, where all bets are off. District courts, in contrast to both the courts of appeals and the Supreme Court, do not observe horizontal stare decisis at all.

Courts do not purport to interpret any statutory or constitutional text in the development of stare decisis doctrine. As both the rules of stare decisis and their variance in the district and appellate courts suggest, stare decisis is a doctrine comprised of judicial policy choices, and both courts and scholars characterize it as such. Even though the doctrine is generally regarded as a species of common law, the question of the courts’ authority to develop it is rarely raised. Scholars have sometimes analogized the federal courts’ authority to develop the doctrine of stare decisis to their authority to develop other areas of federal common law, such as admiralty or interstate disputes. Others have contended that the power to regulate decisionmaking by adopting doctrines like stare decisis is part of “the judicial Power” that Article III confers. The question of the courts’ authority to articulate rules of stare decisis, however, is tangential to the issues occupying most scholars of the doctrine; thus, there is no settled consensus regarding the source of federal-court power to develop these rules.

(4) Remittitur

Wright & Miller’s treatise on Federal Practice & Procedure describes remittitur practice as “[a]n excellent example of what might be called ‘federal common law of

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45 Barrett, supra note 42, at 1015 & n.13.
47 See, e.g., Harrison, supra note 46, at 525-29.
48 See, e.g., Lawson, supra note 46, at 202-04, 207.
procedure’—that is, judge-made rules of practice and procedure.\textsuperscript{49} When a district court determines that a jury verdict is excessive, the court can either order a new trial or give the plaintiff the option of a remittitur—it can condition a denial of a motion for a new trial upon the plaintiff’s acceptance of a reduced amount of damages.\textsuperscript{50} While the granting of a new trial is governed by Federal Rule of Civil Procedure 59, the ordering of a remittitur is not governed by any federal rule or statute. The first case ordering a remittitur was decided by Justice Story in 1822,\textsuperscript{51} and the federal courts have condoned the practice ever since.\textsuperscript{52} They have also developed common law rules guiding its exercise. For example, in settling on the amount to be deducted from the verdict, the majority rule is that the district court can reduce the verdict only to the highest amount that the jury properly could have awarded.\textsuperscript{53} And the federal courts have held that a plaintiff cannot appeal from a remittitur order that she has accepted, regardless whether the plaintiff notes when accepting the order that she does so “under protest” in an attempt to preserve an appeal.\textsuperscript{54} I have been unable to find any case or academic work in which the source of the federal courts’ authority to develop a doctrine of remittitur has been discussed.

(5) Preclusion

Sometimes known by the traditional terminology “collateral estoppel” and “res judicata,” preclusion doctrine is the body of rules governing the relitigation of issues and claims. Under the rules of claim preclusion, the existence of a judgment that is “valid,” “final,” and “on the merits” extinguishes a claimant’s ability to press any other claims arising out of the same transaction or occurrence.\textsuperscript{55} Under the rules of issue preclusion, a party in a current suit cannot relitigate any issue already resolved in a prior suit to which she was a party, so long as resolution of that issue was “essential” to a judgment that is “valid,” “final,” and “on the merits.”\textsuperscript{56} Claim preclusion generally applies only to those asserting claims, not to those defending against them; issue preclusion, by contrast, applies to both those asserting claims and those defending against them. Claim preclusion reaches claims that could have been litigated in the first suit as well as claims that were actually litigated in the first suit; issue preclusion, by contrast, reaches only those issues that were actually litigated in the first suit. Both claim and issue preclusion extend the reach of a judgment to those “in privity” with a party bound by a judgment.

\textsuperscript{49} WRIGHT ET AL., supra note 1, § 4505, n.61.
\textsuperscript{50} See Dimick v. Schiedt, 293 U.S. 474, 483 (1935).
\textsuperscript{51} Blunt v. Little, 3 F. Cas. 760, 762 (C.C.D. Mass. 1822) (No. 1578) (ordering the case “submitted to another jury, unless the plaintiff is willing to remit $500 of his damages,” though noting that in entering this order, “I believe that I go to the very limits of the law”).
\textsuperscript{52} See Dimick, 293 U.S. at 483 (noting longevity of practice and collecting cases).
\textsuperscript{53} 11 WRIGHT ET AL., supra note 1, § 2815. There are some courts, however, that reduce the award to the minimum amount the jury could have awarded, and still others that reduce the verdict to whatever amount the court itself thinks fair. Id.
\textsuperscript{55} See generally 18A WRIGHT ET AL., supra note 1, §§ 4428-47.
\textsuperscript{56} Id. Note that the doctrine of offensive nonmutual issue preclusion provides a limited exception to this rule insofar as it limits the circumstances under which those not parties to a prior suit can assert issue preclusion against those who were. See Parklane Hosiery v. Shore, 439 U.S. 322, 331-32 (1979).
Preclusion’s status as a common law doctrine is clear. The rules of preclusion satisfy my definition of “procedural” rules because, in determining the effect of federal judgments on later litigation, they are concerned with the regulation of court processes rather than out-of-courtroom conduct. That said, of the doctrines described in this section, preclusion is the one whose status as “procedural” is most open to doubt. In *Semtek International v. Lockheed Martin*, a case dealing with the peculiar problem of interjurisdictional preclusion, the Supreme Court wavered between characterizing preclusion as procedural and characterizing it as substantive. The Court’s indecision is a reflection of the fact that preclusion, like so many ostensibly procedural doctrines, has substantive effects. Despite the uncertainty surrounding preclusion’s procedural status, I have chosen to include it here for two reasons. First, preclusion is typically treated as procedural—witness the fact that it is a staple of the first-year Civil Procedure class. Second, and more important, preclusion shares relevant characteristics with the other doctrines herein described: It falls outside of the traditionally recognized enclaves of federal common law, and it does not generally bind the states, which, outside of the context of interjurisdictional preclusion, are free to set their own rules governing the finality of judgments.

There has been almost no discussion in the cases of where courts derive the authority to develop a common law of preclusion. In *Semtek*, the Supreme Court hinted

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58 531 U.S. 497 (2001). In *Semtek*, the Supreme Court held that federal common law governs the preclusive effect given all federal judgments, including judgments rendered by federal courts sitting in diversity. *Id.* at 507-08. On the one hand, the Court suggested that preclusion is procedural, *see, e.g.*, *id.* at 501 (positing that Conformity Act, which required federal courts to follow state procedure, would have required federal courts to follow state preclusion law); *id.* at 509 (suggesting that federal preclusion law is shaped by “federal courts’ interest in the integrity of their own processes . . . .”). On the other hand, the Court also suggested that preclusion is substantive, *see id.* at 504 (opining that if FED. R. CIV. P. 41(b) governed the preclusive effect that state courts must give federal-court judgments, it might violate the Rules Enabling Act prohibition on rules that “abridge or enlarge any substantive right”) (citations omitted).


60 There have been academic efforts to justify preclusion in its interjurisdictional form. See Burbank, supra note 59, at 764, 770 (1986) (arguing that interjurisdictional preclusion is a substantive doctrine justified by the need for uniform federal rules) and Ronan E. Degnan, *Federalized Res Judicata*, 85 YALE L. J. 741, 769 (1976) (arguing that interjurisdictional preclusion is a procedural doctrine that federal courts have the inherent authority to adopt).
that its power to formulate federal rules of preclusion rests on the same ground as its power to formulate substantive common law: the lack of congressional guidance in an area of clearly federal concern.\textsuperscript{61} The Court did not develop this suggestion, however, and its other preclusion cases have said nothing about the source of its authority. As it stands, it is fair to say that the rules of preclusion are well understood, but the courts’ authority to make them is not.

C. \textbf{The Divergence Between Common Law Theory and Procedural Common Law}

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

One difference is the fact that procedural common law, unlike substantive common law, is confined in its application to federal courts.\textsuperscript{62} The states are not required to mimic, for example, the federal procedural common law of forum non conveniens or remittitur. Neither the rule that federal procedural common law is confined to federal courts nor the reason for it, however, is explicit in the case law.\textsuperscript{63} Consequently, it is not clear whether the Supreme Court can impose rules of procedural common law upon the states if it so chooses, or whether the Constitution limits the procedural power of the federal courts to the federal system.\textsuperscript{64} It seems important, though, to understand the extent of the federal judicial power over state procedure. If a defining characteristic of federal procedural common law is that it does not apply in state courts, one cannot adequately understand federal procedural common law without understanding why this is so. Moreover, the Supreme Court has occasionally regulated state procedure,\textsuperscript{65} and it is

\textsuperscript{61} Semtek, 531 U.S. at 507-08. See also Burbank, supra note 59 (similar).

\textsuperscript{62} See Harris v. Rivera, 454 U.S. 339, 344-45 (1981) (per curiam) (stating that “[f]ederal judges . . . may not require the observance of any special procedures” in state courts “except when necessary to assure compliance with the dictates of the Federal Constitution.”). \textit{But see supra note 58.}

\textsuperscript{63} It is probably rooted in the choice-of-law principle that the procedure of the forum generally controls. \textit{RESTATEMENT (FIRST) OF CONFLICTS} § 585 (1934) (“All matters of procedure are governed by the law of the forum.”).

\textsuperscript{64} The Court’s failure to identify the boundaries of federal procedural common law vis-à-vis the states is not unique; the Court has been equally unclear about the extent of Congress’s authority to regulate state judicial procedure. \textit{See Anthony Bellia, Federal Regulation of State Court Procedures, 110 YALE L.J.} 947, 949 (2001) (“The bounds of federal authority over the way state courts conduct their business have remained undefined for over 200 years.”). In the context of congressional regulation of state judicial procedure, Professor Bellia has drawn from traditional conflicts-of-laws principles to conclude that the Tenth Amendment reserves to the states exclusive control over judicial enforcement of state law. \textit{See id.} at 972-73, 976-92. If he is correct, the Tenth Amendment would not only limit the ability of Congress to regulate state judicial procedure, but it would also limit the ability of federal courts to regulate state judicial procedure. As I discuss below, Article III may well limit the ability of the federal courts to regulate state judicial procedure, whatever Tenth Amendment limits might also apply. \textit{See infra} note 201 and accompanying text.

\textsuperscript{65} One example is \textit{Semtek International v. Lockheed Martin}, 531 U.S. 497 (2001). In holding that federal rather than state law controls the preclusive effect that a state court must give a federal diversity judgment,
impossible to evaluate the legitimacy of these exceptions to the general rule without understanding the rule itself.

Another difference between substantive and procedural common law lies in the degree to which Congress can abrogate it. No one doubts Congress’s power to abrogate substantive common law. Congress’s power to abrogate procedural common law, by contrast, is open to doubt. There is substantial agreement that Congress possesses wide authority to regulate judicial procedure. But there is also substantial agreement that Congress’s authority to regulate judicial procedure is subject to some limit. In other words, the disagreement centers less on the existence of a limit than on its boundaries. Some scholars have taken a fairly restrictive view of Congress’s power to regulate procedure. For example, Gary Lawson has argued that stare decisis, burdens of proof, and evidentiary rules, among other things, are matters within the exclusive control of the judicial branch. Similarly, David Engdahl has argued that Congress lacks the power to “curtail or delimit judicial abstention” and that the Rules Enabling Act is “subject to serious constitutional doubt” insofar as it permits Congress to postpone and even prohibit judicial rulemaking in certain areas. Other scholars take a more expansive view of congressional power than do Professors Lawson and Engdahl. For example, both John Harrison and Michael Paulsen have argued, contrary to Professor Lawson, that Congress possesses the authority to abrogate stare decisis. Even scholars taking a more expansive view, however, stop short of characterizing Congress’s power as unbounded. Professor Paulsen acknowledges that a congressional attempt to, say, forbid concurrences, dissents, or the citation of prior opinions may well transgress the limits of Congress’s authority. Similarly, the Supreme Court, while typically acquiescing in congressional regulation, has deliberately left open the question whether some procedural matters lie wholly within the Supreme Court did not identify, much less resolve, the tension between this holding and the general rule that federal procedural common law does not bind the states. Another example is the adequate and independent state grounds doctrine. The doctrine, which is typically characterized as procedural common law, see, e.g., Kermit Roosevelt, Light from Dead Stars: The Procedural Adequate and Independent Ground Reconsidered, 103 COLUM. L. REV. 1888, 1891-93 (2003), indirectly regulates state procedure insofar as it rejects some state procedures as inadequate. Again, the Supreme Court has not reconciled this doctrine with the general rule that federal procedural common law regulates only federal courts. Id. (describing the theoretical confusion surrounding the question whether the Court has the power to displace state judicial procedure).

67 Lawson, supra note 46, at 212-14; 220.
69 Id. at 172-73. Cf. Michael Martin, Inherent Judicial Power: Flexibility Congress Did Not Write into the Federal Rules of Evidence, 57 TEX. L. REV. 167, 178-79, 182-84 (1979) (arguing that Congress can prescribe rules of evidence for the federal courts, but federal courts possess the power to supersede those rules if they prefer others). Engdahl also challenges Congress’s power to regulate prudential standing doctrine, supra note 68, at 165-66, the choice of appropriate relief, id. at 170-71, burdens of proof, id. at 173, and the time within which cases must be decided, id. at 173-74. Like Gary Lawson, Engdahl argues that the Anti-Injunction Act is unconstitutional. See supra note 68, at 169.
70 Harrison, supra note 46; Paulsen, supra note 46, at 1548.
71 Paulsen, supra note 46, at 1590.
Whatever the limits of congressional authority, the widely shared sense that some limit exists reflects an implicit judgment that judicial authority over procedure is different in kind than its authority over substance.

The third distinction worth highlighting is the fact that none of these doctrines satisfies the rule by which the legitimacy of federal common law is otherwise measured. The Supreme Court has insisted that “in the absence of congressional authorization, federal common law exists only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases.” If this principle exhausts the circumstances in which federal courts can make common law, then federal courts cannot make procedural common law in the absence of congressional authorization. If some other principle justifies procedural common lawmaking in the absence of congressional authorization, however, no one has clearly identified it. The basis for the courts’ authority to develop procedural common law is a question nearly unnoticed, much less examined, in the literature. The next Part takes up that question.

II. Three Possible Sources of Procedural Authority

This Part explores three potential justifications for the authority of the federal courts to develop procedural common law. It first considers whether any statute generally confers upon federal courts procedural common lawmaking authority. It then considers whether, in the absence of statutory authority, any constitutional justification exists for this form of common law. Two constitutional arguments might justify procedural common law. First, one might consider procedure, like other areas of federal common law, to be an enclave in which federal interests are so strong that common

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72 Because Congress has not generally imposed onerous procedural regulation on the judiciary, the courts have had little occasion to address the question whether particular regulations transgress Congress’s authority. It has repeatedly implied, however, that limits exist. See Miller v. French, 530 U.S. 327, 350 (2000) (reserving question whether “there could be a time constraint on judicial action that was so severe that it implicated . . . separation of powers concerns”); Herron v. S. Pac. Co., 283 U.S. 91, 94-95 (1931) (implying that Congress lacks the power to require federal courts to follow state statutes “which would interfere with the appropriate performance of [the function of a federal court],” such as regulations regarding what materials jurors can take into deliberations, whether a jury must answer a special verdict, and whether a judge has recourse to the device of a directed verdict); Indianapolis v. Horst, 93 U.S. (3 Otto) 291, 300 (1876) (noting that the question whether Congress could trench upon the powers of a judge in certain matters of judicial administration is “open to doubt”); McDonald v. Pless, 238 U.S. 264, 267 (1915) (questioning whether a statute like the Conformity Act could reach the power of the court to regulate the conduct of jurors); Nudd v. Burrows, 91 U.S. (1 Otto) 426, 441-42 (1875) (implying that a statute regulating “the personal administration of the judge of his duties while sitting upon the bench” would raise a constitutional question). See also United States v. Horn, 29 F.3d 754, 760 n.5 (1st Cir. 1994) (“It is not yet settled whether some residuum of the courts’ [inherent] power is so integral to the judicial function that it may not be regulated by Congress (or, alternatively, may only be regulated up to a certain point).”). State legislatures have gone farther than Congress in their attempts to regulate judicial procedure, and state courts have invalidated some of those attempts as beyond the legislative authority. See A. Leo Levin & Anthony G. Amsterdam, Legislative Control over Judicial Rulemaking: A Problem in Constitutional Revision, 107 U. PA. L. REV. 1, 30 (1958) (cataloguing examples).

lawmaking is justified in the absence of congressional regulation. In the alternative, one might treat Article III’s grant of “the judicial Power” as more specifically imbuing courts, either directly or indirectly, with authority to fashion rules of procedure.

A. Potential Statutory Justifications

A threshold question in analyzing the legitimacy of federal procedural common law is whether Congress has authorized its creation, for if it has, the question whether a constitutional justification exists recedes in importance. Part I explained that no specific statutory authorization exists for any of the five doctrines therein described; in other words, none of those doctrines elaborates a particular statute or proceeds from a specific statutory grant in the relevant area. It might be the case, however, that some general statutory authority exists, even if the courts articulating such doctrines do not invoke it.

The broadest grant of statutory rulemaking authority to the federal courts is found in 28 U.S.C. § 2071(a), which provides that “The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business.”74 One might be tempted to construe this language as giving federal courts the power to prescribe common law as well as prospective court rules. That temptation, however, is immediately dispelled by the direction in § 2071(b) that rules prescribed pursuant to this grant “shall be prescribed only after giving appropriate public notice and an opportunity to comment,” as well as § 2071(d)’s requirement that copies of such rules be distributed to various bodies. These directions clearly do not contemplate rules worked out on a common law basis. Thus, read in light of the subsections that follow it, § 2071(a)’s statutory grant clearly authorizes federal courts to “prescribe rules” through the process of rulemaking, not adjudication.

There are, to be sure, federal rules implementing 28 U.S.C. § 2071 that might be read to expand this statutory grant. Federal Rule of Civil Procedure 83 and Federal Rule of Appellate Procedure 47 detail the means by which district courts and courts of appeals, respectively, may promulgate local rules. At the end of each rule is a safety-valve provision, granting a district judge or court of appeals the power to adopt procedures in the absence of a federal statute, federal rule, or local rule on point. The language of these provisions is fairly broad. Federal Rule of Civil Procedure 83(b) provides that when there is no law controlling, “[a] judge may regulate practice in any manner consistent with federal law . . . .”75 In the same vein, Federal Rule of Appellate Procedure 47(b) provides that in the absence of controlling law, “[a] court of appeals may regulate practice in a particular case in any manner consistent with federal law . . . .”76 Thus, both of these rules might be read to grant the federal courts a power that 28 U.S.C. § 2071 does not: the power to regulate procedure by the development of common law.77

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75 Emphasis added.
76 Emphasis added.
77 See Burbank, supra note 59, at 773-74 & n.192 (assuming that these rules purport to confer upon federal courts the power to make procedural common law).
Despite the breadth of the language, it is not at all clear that either Federal Rule of Civil Procedure 83(b) or Federal Rule of Appellate Procedure 47(b) authorizes procedural common law in the sense of generally applicable rules worked out by judges on a case-by-case basis. Even assuming that they do, these rules fall under the weight of an objection raised by Stephen Burbank. To the extent that these rules themselves purport to confer common lawmaking power on federal judges, they are invalid. Congress can confer common lawmaking power on federal judges, but federal judges cannot confer such power on themselves. Neither Federal Rule of Appellate Procedure 47 nor Federal Rule of Civil Procedure 83 is a federal statute; both are products of the statutorily authorized rulemaking process supervised by the Supreme Court. Both Rules 47 and 83 implement the grant of local rulemaking authority conferred by 28 U.S.C. § 2071, but that grant, as discussed above, is not a grant of common law authority. The Federal Rules cannot give power that Congress has not. Thus, even assuming that Federal Rule of Appellate Procedure 47(b) and Federal Rule of Civil Procedure 83(b) refer to the development of procedural common law, they are best understood as provisions simply clarifying the judiciary’s view that neither these provisions authorizing local rulemaking nor the Enabling Act itself stamps out any common law power over procedure that the judiciary otherwise possesses.

B. Common Law in a Procedural Enclave

In the absence of statutory authority to develop procedural common law, it is necessary to consider whether some constitutional justification exists. One such justification is what I will call the “enclave theory.” This theory of procedural common law has not been explored in either the scholarship or cases, but fleshed out, it would track the enclave theories of substantive common law. As described in Part I, the standard account of the substantive common lawmaking powers of the federal courts maintains that there are certain enclaves in which the Constitution itself prohibits state law from controlling. In these enclaves, some federal law must govern. The prerogative

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

79 Burbank, supra note 59, at 773-74.

80 Richard Matasar and Gregory Bruch probably come the closest to offering an enclave theory of procedural common law. While they do not explicitly bring procedural common law into that rubric, they describe what they call “jurisdictional common law” without grounding it in the inherent authority of federal courts and by analogizing it to the substantive common law powers of the federal courts. See Matasar & Bruch, supra note 36. See also William F. Ryan, Rush to Judgment: A Constitutional Analysis of Time Limits on Judicial Decisions, 77 B.U. L. REV. 761, 778 (1997) (hypothesizing that procedural common law might be conceptualized as “specialized federal common law,” analogous to the other forms of federal common law that survived Erie). This is also appears to be the view expressed by the Supreme Court in Semtek, where the Court’s approach to the articulation of a common law rule—invocation of a federal interest—resembled the approach it takes when articulating rules within the enclaves of federal common law. See supra note 61 and accompanying text. See also Tidmarsh & Murray, supra note 22, at 594, 610-14 (opining that Semtek effectively added preclusion to the existing enclaves of federal common law).
to specify federal law belongs to Congress, but if Congress does not act, the federal courts must. One can see how this logic might apply to the area of procedure.

It is easy to treat federal procedure in the “enclave” rubric, for it is well established that the procedure observed by the federal courts is a matter that the Constitution commits exclusively to federal control. The first and most forceful statement of this principle appears in *Wayman v. Southard*:

That [the power to regulate federal-court procedure] has not an independent existence in the State legislatures, is, we think, one of those political axioms, an attempt to demonstrate which, would be a waste of argument not to be excused. The proposition has not been advanced by counsel in this case, and will, probably, never be advanced. Its utter inadmissibility will at once present itself to the mind, if we imagine an act of a State legislature for the direct and sole purpose of regulating proceedings in the Courts of the Union, or of their officers in executing their judgments. No gentleman, we believe, will be so extravagant as to maintain the efficacy of such an act.81

The *Wayman* Court went on to argue that the states could not do indirectly what they could not do directly, and thus that it was almost equally extravagant to maintain that state laws regulating the procedure of state courts somehow extended of their own force to federal courts as well.82 None of this is to say, of course, that Congress cannot direct the federal courts to observe state procedure, and Congress has done just that on a number of occasions.83 But in that situation, state procedure applies to federal courts by virtue of a federal law, much like the situation in which federal courts choose state law as the operative rule of federal common law.84 The Court has consistently rejected the notion that state law ever governs federal court procedure of its own force.

Given that federal procedure can fairly be treated as an enclave beyond the reach of state regulation, one might argue that a federal court’s power to articulate procedural common law arises in exactly the same fashion as a federal court’s power to articulate substantive common law. It arises, in effect, from the confluence of a legislative void and structural inference. Because state law cannot govern federal procedure—just as the Court has held that it cannot govern admiralty, interstate disputes, certain cases involving the rights and obligations of the federal government, and certain matters of foreign affairs—the federal courts must articulate governing procedural rules when Congress has

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81 23 U.S. 1, 49 (1825). The insistence that the federal government has exclusive control over the procedure of its own courts is presumably the flip side of the principle that each state has nearly exclusive control over its own judicial procedure. See supra note 64 and accompanying text.

82 Id. at 49-50. See also Fullerton v. Bank of the United States, 26 U.S. 604, 607 (1828) (asserting that state legislatures can have no control, direct or indirect, over federal-court process).

83 For example, the Process and Conformity Acts, described in Part III.B(2), both directed federal courts to apply state procedure.

84 Cf. Beers v. Haughton, 34 U.S. 329, 359 (1825) (“The whole efficacy of such laws in the courts of the United States, depends upon the enactments of congress. So far as they are adopted by congress they are obligatory. Beyond this, they have no controlling influence.”).
failed to do so. In other words, Congress’s very failure to act imbues federal courts with the ability to act. On this account, procedural common law would be the functional equivalent of substantive common law. To be sure, procedural common law would still differ from substantive common law in that it does not—and likely cannot—replace contrary state law. This difference, however, would be explained on this account by choice of law and federalism concerns inapplicable to the substantive federal common law. It would not be attributed to any difference in the source of the authority or in the nature of the law produced.

This account has much to recommend it, not least of which is the appeal of a unified approach to federal common law. That said, the enclave account is in tension with the much stronger current of case law and scholarship treating authority over procedure as an inherent authority of federal courts. In addition, it has the drawback of overlooking a potentially significant difference between procedural and substantive federal common law: the fact that power may be distributed differently between Congress and the federal courts on matters of procedure than on matters of substance. Congress’s power clearly dominates that of the federal courts in the traditional enclaves of federal common law. When federal courts make common law on matters of admiralty, international relations, interstate disputes, or the rights and obligations of the United States, they are not speaking on matters within their particular competence. They cannot claim expertise superior to that of Congress in any of these areas; nor can they claim that the Constitution grants them regulatory authority superior to that of Congress in any of these areas. On the contrary, within each of the traditional enclaves of federal common law, Congress is widely acknowledged to be the preferred regulator. This understanding is reflected in the posture that federal courts assume relative to Congress on matters of substantive common law. In making substantive common law, the federal courts effectively function as a mere placeholder for Congress. Their power exists only because Congress has left a statutory void, and if Congress subsequently chooses to fill

85 See supra note 23 and accompanying text.
86 See supra note 64.
87 If the authority over procedure derives from Article III, an additional limit on the reach of the authority would exist. Any inherent authority conferred by Article III is one of self-regulation; thus, the grant of authority itself would not extend beyond the federal court adopting the procedure. See infra notes 103-104 and accompanying text.
88 See infra notes 98-101 and accompanying text.
89 The accompanying text describes the conventional view regarding the balance of congressional and judicial authority in the enclaves of federal common law. RICHARD H. FALLON, DANIEL J. MELTZER, & DAVID L. SHAPIRO, HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM (5TH ED.) at 735 (“Federal statutes, of course, prevail over contrary federal common law.”). There have been, however, occasional suggestions that in the areas of admiralty and interstate disputes, the lawmaking authority of the federal courts might exceed that of Congress. See id. at 732-35 & n. 5 (noting this argument with respect to admiralty); id. at 738-39 n. 11 (noting this argument with respect to interstate disputes). The theory is that because the courts’ lawmaking authority in these two areas derives at least in part from jurisdictional grants in Article III, it might be slightly broader than that of Congress. Id. See also Note, From Judicial Grant to Legislative Power: The Admiralty Clause in the Nineteenth Century, 67 HARV. L. REV. 1214, 1230-35 (1954) (describing ultimately defeated arguments to this effect in the context of admiralty). If it is the case, there may be at least a narrow slice of the common law of admiralty and interstate disputes, respectively, that Congress cannot abrogate, and it would be therefore incorrect to describe all common lawmaking authority in the traditional enclaves as derivative of or subservient to that of Congress.
that void, judicial authority over it dissipates. Substantive common law is wholly subject to congressional override.

The assertion that Congress’s power dominates that of the federal courts in matters of procedure is far less certain. When federal courts make procedural common law, they are speaking on a matter within their particular competence—indeed, with respect to matters of procedure, federal courts can credibly claim that their expertise exceeds that of Congress. Even apart from expertise, which does not itself confer power, the federal courts have a stronger claim to constitutional authority in matters of procedure than in matters of substance. The precise limits of Congress’s authority to regulate federal-court procedure are a matter of dispute, but as discussed above, courts and scholars have repeatedly argued that there are some procedural matters that Congress cannot regulate. Whether or not any of these particular arguments is sound, the fact that they are often raised reflects an intuition that at least some aspects of federal-court procedure lie beyond congressional control. A significant problem in the enclave theory of procedural common law is that it fails to explain the source of judicial authority to act in those areas where Congress lacks the authority to regulate. In treating judicial power as arising from the confluence of a statutory void and a federal enclave, the enclave theory treats judicial power as deriving from Congress’s failure to regulate an area over which it possesses complete authority. If a federal court adopts procedures for itself that Congress could not impose upon it, however, the court’s power to do so necessarily derives from something more than structural inference and congressional inaction. In other words, the power would have to be something that the court possesses in its own right, rather than something that accrues to it only by default.

None of this is to say that authority over procedure is the exclusive province of the courts. It is simply to say that the relationship between Congress and the courts in the area of procedure is probably more complicated than the enclave theory suggests, at least insofar as the enclave theory treats federal-court authority as entirely derivative of congressional authority. Procedure appears to be an area in which Congress and the courts share authority; thus, the thesis that federal courts possess some independent procedural authority may well have more descriptive force. The next section explores whether the concept of inherent authority provides a firmer foundation for a theory of procedural common law.

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

91 See *supra* notes 66-72 and accompanying text.

92 Similarly, if one were to take the view that judicial power exceeds congressional power in the areas of admiralty and interstate disputes, see *supra* note ____, one would maintain that judicial power in these areas arises from a combination of structural inference and jurisdictional grant, rather than from structural inference alone.
C. Inherent Authority to Develop Procedural Common Law

Better-developed than the enclave theory is the notion that procedural common law is a product of the inherent authority that federal courts possess by virtue of Article III. A long and well-established tradition maintains that some powers are inherent in federal courts simply because Article III denominates them “courts” in possession of “the judicial power.” In other words, inherent powers are those so closely intertwined with a court’s identity and its business of deciding cases that a court possesses them in its own right, even in the absence of enabling legislation. The inherent powers of a federal court are not beyond congressional control; on the contrary, there is a large area of shared space in which the courts can act in the absence of enabling legislation but must acquiesce in the face of it. Nonetheless, there are limits to what Congress can do in regulating the courts’ inherent power. For example, Congress can impose some procedural requirements upon the exercise of the contempt power, which is an inherent power of every court. It cannot, however, wholly withdraw that power or, even short of that, impose regulations that would cripple courts in its exercise.

In a significant number of cases, the Supreme Court has identified procedure as a matter over which federal courts possess inherent authority. Almost all of the Court’s claims to inherent procedural authority occur in the context of the so-called “supervisory power” doctrine, which claims for federal courts the authority to supervise litigation before them. There are, however, a handful of cases in which the Court has claimed

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93 See, e.g., United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32, 34 (1812) (“Certain implied powers must necessarily result to our courts of justice, from the nature of their institution . . . To fine for contempt—imprison for contumacy—enforce 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.”).
95 Ex parte Robinson, 86 U.S. (19 Wall.) 505, 510 (1873).
96 Michaelson v. United States, 266 U.S. 42, 66 (1924) (acknowledging congressional power to regulate judicial contempt power, but asserting that “the attributes which inhere in that power and are inseparable from it may be neither abrogated nor rendered practically inoperative”).
97 As others have observed, see, e.g., Stephen Burbank, Procedure, Politics, and Power: The Role of Congress, 79 Notre Dame L. Rev. 1677, 1681 (2004), the cases and scholarship often fail to distinguish between initiating authority (the ability to act in the absence of congressional regulation) and exclusive authority (the ability to act in the face of contrary congressional direction); between authority that is local (empowering a court to regulate the proceedings before it) and authority that is supervisory (empowering a court to regulate the proceedings of a lower court); and between procedural regulation in the form of court rules and procedural regulation in the form of judicial decisions. In light of the uncertainty that often surrounds this issue, let me be clear here: both this section and the next Part are concerned with the question whether the judiciary possesses an initiating, local authority to regulate procedure in the form of adjudication.
98 See, e.g., Thomas v. Arn, 474 U.S. 140, 146 (1985) (“[C]ourts of appeals have supervisory powers that permit, at the least, the promulgation of procedural rules governing the management of litigation.”); United States v. Hastings, 461 U.S. 499, 505 (1983) (“[I]n the exercise of supervisory powers, federal courts may, within limits, formulate procedural rules not specifically required by the Constitution or the Congress.”). Courts asserting “supervisory power” sometimes use it to refer to a court’s authority over its own proceedings, and sometimes use it to refer to a court’s authority to supervise the proceedings of inferior courts. See Barrett, supra note 7, at 330 (describing varied use of term). The cases cited here use it in the former sense.
inherent procedural authority for federal courts even outside the context of the “supervisory power” doctrine. In some of these cases, the Court has explicitly asserted inherent authority to formulate rules of procedure in the course of adjudication. In others, the Court has asserted not so much the authority to prescribe procedural rules as to take actions related to the progress of a suit. Perhaps because of these cases and perhaps because the idea makes good sense, scholars have echoed these assertions.

In light of these cases, the argument grounding authority to make procedural common law in the inherent authority of the federal courts is straightforward: Federal courts have inherent authority to adopt procedures governing litigation before them; thus, they have the authority to develop procedural common law. Their inherent power over procedure authorizes them to act in the absence of enabling legislation, but if Congress acts, the courts must generally acquiesce in any procedural regulation imposed. There are, nonetheless limits to what Congress can do. It could not wholly withdraw the power, and there are some—albeit few—procedural matters that are entirely beyond congressional regulation.

Insofar as this argument straightforwardly connects the authority to develop procedural common law to the inherent authority of courts, it is not stated quite this way in either the cases or the scholarship. Neither courts nor scholars have taken the insight that federal courts possess inherent authority over procedure and developed it into a theory of the procedural common law powers of the federal courts. Nonetheless, the

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99 See, e.g., Hanna v. Plumer, 380 U.S. 460, 472-73 (1965) (identifying “matters which relate to the administration of legal proceedings, [as] an area in which federal courts have traditionally exerted strong inherent power, completely aside from the powers of Congress expressly conferred in the Rules”); Funk v. United States, 290 U.S. 371, 382 (1933) (asserting that a district court, “by right of its own powers,” can formulate a rule of evidence); In re Hien, 166 U.S. 432, 436-37 (1897) (“The general rule undoubtedly is that courts of justice possess the inherent power to make and frame reasonable rules not conflicting with express statute . . . .”); Kentucky v. Dennison, 65 U.S. (24 How.) 66, 98 (1861) (“[I]n all cases where original jurisdiction is given by the Constitution, this court has authority to exercise it without any further act of Congress to regulate its process . . . .”).

100 See, e.g., Clinton v. Jones, 520 U.S. 681, 706 (1997) (“The District Court has broad discretion to stay proceedings as an incident to its power to control its own docket.”); Melkonian v. Sullivan, 501 U.S. 89, 101 (1991) (“[N]ormally courts have inherent power, among other things, to remand cases . . . .”); Luce v. United States, 469 U.S. 38, 41 n.4 (1984) (“Although the Federal Rules of Evidence do not explicitly authorize in limine rulings, the practice has developed pursuant to the district court's inherent authority to manage the course of trials.”); Landis v. N. Am. Co., 299 U.S. 248, 254 (1936) (“[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy.”); Enelow v. N.Y. Life Ins. Co., 293 U.S. 379, 381-82 (1935) (asserting that a federal court can stay proceedings “by virtue of its inherent power to control the progress of the cause so as to maintain the orderly processes of justice”); 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.”); Bowen v. Chase, 94 U.S. 812, 824 (1876) (acknowledging court's inherent power to consolidate actions arising out of a single controversy); Logan v. Patrick, 9 U.S. (5 Cranch) 288, 288-89 (1825) (recognizing equitable discretion to stay proceedings).

101 See, e.g., Barrett, supra note 7, at 334-35; Beale, supra note 29, at 1468-74 (asserting that federal courts have implied constitutional authority to regulate procedure); Engdahl, supra note 68, at 83-86 (arguing that Article III’s vesting of judicial power vests courts with power over, inter alia, procedure); Merrill, supra note 19, at 24 (asserting that courts have inherent authority to adopt procedures for themselves in the absence of congressional authorization).
authority that both courts and scholars claim for federal courts to take isolated procedural actions (such as dismissing a case) and to adopt new and procedural rules (such as a rule regulating the questions to be asked on voir dire) offers obvious support for the idea that we should think of thick procedural doctrines as an outgrowth of inherent authority. The difference between the authority to adopt an occasional stand-alone rule and the authority to weave procedural common law is one of degree rather than kind.

The “inherent authority” theory thus fits neatly with prevailing assumptions about federal court power, and it seems to account better than the enclave theory for the possibility that procedure, unlike substance, is an area in which federal courts can assert authority in their own right.102 That said, the “inherent authority” theory is not without its problems. For one thing, the “inherent authority” theory imposes limits on the exercise of judicial power that the “enclave” theory does not. The enclave theory treats courts as possessing power over procedure coextensive with that of Congress. So long as the question is one within the federal power—in other words, one with respect to which Congress could legislate—the federal courts can advance a rule if Congress has not. The shape of such rules, moreover, would mirror that of common law developed in other constitutional enclaves: the Supreme Court would have the ability to enforce a uniform body of federal common law applicable across all federal courts. The inherent authority theory, by contrast, treats judicial power as far more circumscribed. Though this feature is often overlooked, inherent power is local power, permitting each federal court to regulate only its own proceedings.103 This is so because Article III vests “the judicial Power” in each Article III court. To the extent that the judicial power carries with it the power to adopt procedures in the course of adjudicating cases, each court possesses that power in its own right. A reviewing court can set aside a rule on the ground that the inferior court abused its discretion in adopting it, but not on the ground that it thought a different rule a better one.104 Thus, Article III may well empower each federal court to

102 This is not to deny that the Constitution places the regulation of federal procedure beyond state control. But it is to say that the judiciary’s authority to regulate this area committed to federal control seems to derive from something more than just congressional default. Cf. supra note ___[interstate and admiralty FN] and accompanying text.
103 The Supreme Court has claimed itself to possess an inherent supervisory power to impose procedures upon inferior courts. See, e.g., Dickerson v. United States, 530 U.S. 428, 437 (2000) (“The law in this area is clear. This Court has supervisory authority over the federal courts, and we may use that authority to prescribe rules of evidence and procedure that are binding in those tribunals.”). As I have argued elsewhere, this claim is fundamentally flawed. See generally Barrett, supra note 7. The Court’s designation as “supreme” likely functions as a limitation on Congress’s power to design the federal judiciary rather than as a grant of power to the Supreme Court. Id. at 361-65. Moreover, even if it does function as a grant of power to the Court, there is no evidence that power over inferior-court procedure would be among the powers granted. Id. at 366-84. The basis of any inherent procedural authority granted the federal courts is Article III’s grant of judicial power, and, as explained in the accompanying text, that power is granted to each court individually.
104 See Daniel J. Meador, Inherent Judicial Authority in the Conduct of Civil Litigation, 73 TEX. L. REV. 1805, 1805 (1995) (explaining that the exercise of inherent authority “as with all matters of trial court discretion—is subject to appellate review for abuse”). See also Ex parte Burr, 22 U.S. (9 Wheat.) 529, 531 (1824) (holding the inherent authority to regulate the bar resides in the discretion of each court, and the Supreme Court will consequently review disbarments only for an abuse of discretion); Haw. Hous. Auth. v. Midkiff, 463 U.S. 1323, 1324 (1983) (Rehnquist, Circuit Justice) (“Although recalling a mandate is an
develop procedural common law governing the proceedings before it, but it does not permit the Supreme Court to prescribe a unified common law of procedure applicable throughout the federal courts. In addition, it is often maintained that federal courts can exercise inherent authority only to the extent it is strictly necessary to adjudicating the case before them. If procedural common law is subject to such a limit, much of it would fail constitutional challenge. Can it be said, for example, that remittitur is a necessary procedure, as opposed to a merely useful one?

The most significant difficulty, however, is a threshold one: despite the relative consensus on the point, it is not so clear that power over procedure can fairly be treated as an inherent power of federal courts. The proposition that federal courts possess inherent authority over procedure is treated as self-evident. Closer examination, however, reveals that the concept of inherent judicial authority has been almost entirely fleshed out in contexts other than procedural regulation. Inherent judicial authority has received the most sustained attention in the context in which it was first asserted: contempt.

In addition to the contempt power, courts have asserted inherent authority to vacate judgments for fraud, dismiss cases for failure to prosecute, and to impose other sorts of sanctions on undesirable behavior. They have also asserted inherent authority to regulate court personnel like jurors and lawyers. In short, the overwhelming number of cases dealing with inherent judicial authority are those asserting either a semi-punitive power or the power to control those who serve the court. By comparison, the cases in which the Supreme Court has recognized an inherent power to prescribe procedural rules or otherwise manage the process of litigation are relatively few. Thus, while modern
scholarship and case law support the proposition that federal courts possess inherent authority over procedure, that proposition is not as solid as it initially appears.

It is worth emphasizing the importance of testing the proposition that federal courts possess inherent authority over procedure. The limits applicable to the development of procedural common law depend upon its source, and as explained above, procedural common law is subject to different limits if justified exclusively by the “enclave” theory than it is if justified by the courts’ inherent authority. As described above, the enclave theory permits the development of a uniform body of procedural common law applicable throughout the federal courts, but it does not justify a federal court in adopting any self-regulation that Congress could not impose upon it. The inherent authority theory, on the other hand, acknowledges that a federal court possesses power over procedure in its own right, but it grants each federal court only local power. One might find either of these theories more or less attractive relative to the other, but if federal courts indeed possess inherent authority to develop procedural common law, one is foreclosed from resorting to the enclave theory, regardless of what one’s preferences might otherwise be. That is so because where a more specific constitutional provision applies (here, Article III’s grant of inherent authority over procedure), courts cannot disregard that provision in favor of a more general principle (here, the fact that the Constitution impliedly places federal-court procedure beyond state control). Thus, the conclusion that federal courts possess inherent authority over procedure would require courts to treat procedural common law as an outgrowth of their inherent authority.

With these consequences in mind, the next Part tests the frequently asserted but rarely developed proposition that federal courts possess some inherent authority over procedure.

III. Inherent Authority over Procedure

A. Constitutional Text and Structure

The Constitution does not, on its face, grant federal courts power over procedure. Nonetheless, it is a well-established principle of constitutional law that Congress, the Executive, and the judiciary each possess certain powers granted by, though not expressly mentioned in, the Constitution. Thus, for example, Congress is acknowledged to possess the power to punish contempts of its authority, even though no such power is expressly conferred by Article I.113 The Executive is acknowledged to possess the power to function as the country’s sole spokesperson in dealings with foreign nations, even though no such power is expressly conferred by Article II.114 And the judiciary is acknowledged to possess the power to regulate the bar practicing before it, even though no such power is expressly conferred by Article III.115

113 Anderson v. Dunn, 19 U.S. 204, 277 (1821).
114 Saikrishna Prakash & Michael Ramsey, The Executive Power over Foreign Affairs, 111 Yale L.J. 231, 243 (2002) (describing wide agreement on this point despite the lack of any explicit textual grant of the power).
115 See supra note 111 and accompanying text.
At least two kinds of textual and structural constitutional arguments are advanced in support of non-express constitutional power. One kind of argument focuses on the relevant vesting clause, asking what informed observers at the time of the Founding would have understood that grant of power to include. For example, SaiKrishna Prakash and Michael Ramsey have argued that Article II directly vests the President with the power to conduct foreign affairs because informed observers at the time of the Founding understood “the executive power” to encompass such authority.\(^{116}\) Or, in the context of Article III, Scott Idleman has maintained that “[m]ore than a mere synonym for jurisdiction, the ‘judicial Power’ encompasses those prerogatives and obligations that have customarily attended the judicial function, particularly the Anglo-American common law courts at the time of the framing, whether or not such attributes are elsewhere expressly conferred by the Constitution or affirmed by statute.”\(^{117}\) The term “inherent authority” is often used broadly, to refer to any power granted by, but not mentioned expressly in, the Constitution. When used in its narrowest sense, however, “inherent authority” refers specifically to the kind of authority claimed by this first kind of constitutional argument: power inhering in that expressly granted.\(^{118}\)

Another kind of argument is an instrumental one, focusing less on cataloguing specific powers implicitly contained within the primary grant than on the more general claim that the Constitution implicitly grants each branch the incidental authority it needs to get its job done.\(^{119}\) As James Madison wrote in Federalist No. 44: “No axiom is more clearly established in law, or in reason, than that wherever the end is required, the means are authorized; wherever a general power to do a thing is given, every particular power necessary for doing it, is included.”\(^{120}\) The classic judicial articulation of this principle appears in \textit{McCulloch v. Maryland}, which argued that each of Article I’s enumerated powers carries with it the incidental authority to take actions designed to facilitate its exercise.\(^{121}\) Like the term “inherent authority,” the term “implied authority” is sometimes used broadly, to refer to any power granted by, but not expressly mentioned in, the Constitution.\(^{122}\) When used in its narrowest sense, however, the term “implied authority”

\(^{116}\) Prakash & Ramsey, supra note 114, at 252-265.
\(^{118}\) See, e.g., Martin, supra note 69, at 179-82 (describing judicial power over some rules of evidence as “inherent” in the judicial power itself).
\(^{120}\) THE FEDERALIST NO. 44 (James Madison) (George W. Carey & James McLellan eds., 2001).
\(^{121}\) 17 U.S. (4 Wheat.) 316 (1819). \textit{McCulloch} itself did not ground Congress’s possession of implied powers exclusively in the Sweeping Clause, although some have argued that it should have done so. See, e.g., William Van Alstyne, \textit{Implied Powers}, in \textit{ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION} 964-65 (Leonard Levy et al. eds., 1986). Because \textit{McCulloch}’s argument does not depend upon the Sweeping Clause, its reasoning appears to extend to the executive and judicial branches, which, like Congress, impliedly possess the power to employ means directed toward achieving the ends with which they are charged.
\(^{122}\) See, e.g., Patricia L. Bellia, \textit{Executive Power in Youngstown’s Shadows}, 19 CONST. COMMENT. 87, 91 n.17 (2002) (using term broadly to refer to powers either implicit in specific constitutional grants or fairly inferred from the constitutional structure).
refers to the kind of power claimed by this second kind of constitutional argument: power impliedly conferred by the constitutional structure as instrumentally necessary, or even simply useful, to that expressly granted. 123

There is little or no overlap between these two arguments when the power at issue is more fairly characterized as an end in itself rather than as a means of executing an enumerated power. In this circumstance, the obviously better of these two arguments is that the relevant vesting clause directly—albeit implicitly—confers the power at issue. Because, for example, the foreign affairs power is more fairly characterized as an end in itself rather than a means of accomplishing an explicitly conferred power, Professors Prakash and Ramsey do not press the instrumental argument. Instead, they examine only whether informed observers at the time of the Founding would have understood “the executive power” to include the power to direct foreign affairs. 124

There can be significant overlap between these two arguments, however, when the power at issue is both instrumental and closely related to the expressly granted authority it supports. This overlap is evident in most, if not all, judicial claims to nonexpress power. For example, it is well established that courts possess the power to punish contempt even in the absence of enabling legislation. Does that power exist because Article III directly confers it—in other words, because informed observers at the time of the Founding understood it to be an attribute of “the judicial Power”? Or does the contempt power exist on an instrumental rationale—in other words, because it is a power courts need to adjudicate cases effectively? The judicial contempt power can be (and has been) justified on either rationale. 125 And not only can each of these rationales independently support the contempt power, but consider that the instrumental rationale can be put in the service of the argument that the contempt power is directly conferred by Article III as an inherent attribute of all courts. Those powers, which, like contempt, are thought “necessary” to functioning as a court and exercising judicial power are often those so closely associated with the terms “court” and “ judicial power” that they are understood to be part and parcel of them. 126 Thus, where a claimed power is both

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123 See, e.g., Beale, supra note 29, at 1468-73 (using term “implied” authority to refer only to the ancillary authority the Constitution affords each branch to employ means directed toward accomplishing the ends with which it is expressly charged).

124 See generally Prakash & Ramsey, supra note 114.

125 Some cases strongly imply that Article III directly vests the contempt power in every federal court, see, e.g., Ex parte Robinson, 86 U.S. 505, 510 (1873) (“The power to punish for contempts is inherent in all courts . . . . The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power.”). Others treat the power as instrumental, see, e.g., Eash v. Riggins Trucking, Inc. 757 F.2d 557, 561 (3d Cir. 1985) (characterizing the contempt power as one implied from strict functional necessity). Still others invoke both grounds. See infra note 126 and accompanying text.

126 See, e.g., United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32, 34 (1812) (“Certain implied powers must necessarily result to our courts of justice, from the nature of their institution . . . to fine for contempt—imprison for contumacy—enforce the observance of order, & c. are powers which cannot be dispensed with in a court, because they are necessary to the exercise of all others.”). It is important to emphasize, however, that powers thought “necessary” to the exercise of expressly granted power are not always closely associated with the power they support. For example, the Supreme Court has held that Congress possesses the power to punish contempt, but it has not done so on the ground that such power has long been considered an inherent attribute of any legislature worthy of the name. Instead, the Court has
supportive of and closely associated with expressly granted power, the instrumental rationale for implied power and the “direct vesting” rationale for inherent power can function either as different routes to the same end or complementary arguments along the same route.

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

The analytical confusion surrounding claims of nonexpress judicial authority, including authority over procedure, is unsatisfying, but it has persisted for so long that it would be difficult, if not impossible, to untangle. Consider, for example, the difficulty this confusion poses for the problem at hand. Determining whether Article III directly confers power over procedure requires analysis of whether the Founding generation perceived power over procedure to be an attribute of “judicial power” exercised by all courts. But Founding-era sources addressing any aspect of nonexpress judicial authority, much less procedural authority, tend to be as ambiguous as modern ones with respect to the question whether the power is directly or indirectly conferred. Thus, to the extent recognized a congressional contempt power on the purely instrumental rationale that in some situations, Congress can not accomplish its job without the ability to punish contempt. See Anderson v. Dunn, 19 U.S. 204, 225-26 (1821) (justifying congressional contempt power on the ground that every express grant of power in the Constitution “draw[s] after it others, not expressed, but vital to their exercise”).

See, e.g., Engdahl, supra note 68, at 81-89 (characterizing power over procedure, among other inherent powers, as directly vesting in federal courts by virtue of Article III); Idleman, supra note 117, at 4752 (strongly implying that inherent judicial power, including inherent power over procedure, derives directly from Article III’s grant of judicial power); Martin, supra note 69, at 179-86 (arguing that judicial power to develop at least some rules of evidence is directly conferred by Article III as an inherent attribute of judicial power); Meador, supra note 104, at 1805 (characterizing inherent judicial power, including inherent procedural power, as “that inher[ing] in the very nature of a judicial body”).

See, e.g., Beale, supra note 29, at 1466-73 (explicitly rejecting argument that Article III directly infuses federal courts with inherent procedural authority in favor of argument that authority is indirectly conferred as instrumentally useful to the discharge of the judicial function); Pushaw, supra note 119, at 846-47 & n. 576 (similar); Van Alstyne, supra note 10, at 107-11 (treating judicial authority over procedure as an incidental power implied by necessity without addressing the direct vesting argument).

The cases in which federal courts broadly claim “inherent authority” over procedure without specifying the constitutional argument supporting that claim are legion. For just a few examples, see Calderon v. Thompson, 523 U.S. 538, 549-50 (1998), United States v. Hastings, 461 U.S. 499, 505-06 (1983), and Hanna v. Plumer, 380 U.S. 460, 472-73 (1965). See also Lear, supra note 41, at 1159-1167 (using both the terms “inherent” and “implied” to describe the federal courts’ power to create procedural devices, and failing to specify whether power is directly or indirectly conferred); Ryan, supra note 80, at 776 (similar).

United States v. Hudson & Goodwin, the flagship case regarding inherent judicial authority, illustrates the point nicely. Because the case describes the federal courts’ contempt power arising from the “nature of their institution,” one might read the case as supporting the notion that Article III vests the contempt power
that any of these sources address nonexpress procedural authority, it is difficult to say which of the two constitutional arguments they support.

Fortunately, it is possible to evaluate the claim of nonexpress procedural authority without untangling these two arguments. At least insofar as nonexpress judicial power is concerned, the distinction between inherent and implied incidental authority seems relatively unimportant, because the distinction does not, at least in this context, give rise to a difference in methodology. As described above, the “Vesting Clause” argument requires a historical inquiry: the relevant question is whether the Founding generation would have perceived power over procedure as a part of the expressly granted power itself. Consider, though, that federal courts treat all their claims to nonexpress authority as dependent upon history. In other words, even to the extent a federal court appears to characterize power as incidental, it still will not claim it unless it is one traditionally asserted by courts. Thus, regardless whether one approaches procedural authority as a problem of inherent or incidental authority, it is necessary to determine whether history supports the claim.

directly in all federal courts simply by denominating them “courts” in possession of “judicial power.” 11 U.S. (7 Cranch) 32 (1812). On the other hand, Hudson also points out that contempt is a power “necessary to the exercise of all others.” Id. That observation might be read simply as support for the “direct vesting” argument, or it might be read as support for the argument that the judiciary, like the other two branches, can employ the means necessary to getting its job done.

131 See supra note 114 and accompanying text.

132 See Missouri v. Jenkins, 515 U.S. 70, 124 (1995) (Thomas, J., concurring) (stating that “[a]s with any inherent judicial power . . . we should exercise it in a manner consistent with our history and traditions”); Chambers v. Nasco, Inc. 501 U.S. 32, 58 (1991) (Scalia, J., dissenting) (explaining that once established, Article III courts have “the authority to do what courts have traditionally done in order to accomplish their assigned tasks”); Union Pacific R. Co. v. Botsford, 141 U.S. 250, 252-57 (1891) (rejecting claim that federal courts possessed inherent authority to order medical exams of plaintiffs on ground that such authority has never been claimed by common law courts); see also Idleman, supra note 117, at 49 (“The first criterion [in evaluating a claim to inherent authority] is whether a given power is one that courts, within the Anglo-American tradition, have historically possessed.”); Pushaw, supra note 119, at 741 (contending that the arsenal of instrumental powers is limited to those “rooted in Anglo-American practice”).

133 To be sure, one might want to see stronger historical evidence before concluding that power is implicitly contained within the grant of “the judicial Power” than one would before concluding that a power is one traditionally exercised by courts. In evaluating the historical evidence, Part III.C accounts for this.
B. Historical Arguments for Inherent Procedural Authority

This section investigates whether the historical record from the Founding period supports the claim that the Constitution, either by outright grant or implication, authorizes a federal court to articulate procedural rules in the context of adjudication and in the absence of enabling legislation. To that end, it canvasses the Framing and Ratification debates, the early congressional record, contemporary treatises, and early federal court opinions, all with a view to discerning whether informed observers in the Founding era understood federal courts to possess inherent authority to regulate procedure. In keeping with the tendency of the literature and cases, I will refer to the judiciary’s supposed power over procedure as “inherent,” without distinguishing between the distinct constitutional arguments that might support a claim to such authority.

(1) Framing and Ratification

The record of the debates surrounding the Constitution’s drafting and ratification neither directly refutes nor directly supports the proposition that federal courts possess inherent authority to make rules of procedure and evidence in the absence of enabling legislation.134 At least two procedural issues surfaced repeatedly during the debates surrounding the Constitution’s drafting and ratification. One was the fear that the Supreme Court’s appellate jurisdiction “both as to Law and Fact” would permit the Court to retry cases on review, both undercutting the jury right and requiring citizens to travel to the Court itself to litigate their cases.135 The other was the concern that the Constitution, by not explicitly requiring jury trials in civil cases, impliedly abolished them.136 Particularly in the course of debating these two issues, although occasionally in other contexts as well, participants in these debates acknowledged the power of Congress to regulate federal court procedure.137 The power of the federal judiciary to generate procedures of its own, by contrast, was neither acknowledged nor denied.138


135 See, e.g., James Wilson, Speech in the Pennsylvania Ratifying Convention (Dec. 7, 1787), in 2 ELLIOT’S DEBATES, supra note 134, at 518-19 (identifying issue as contentious); Thomas M’Kean, Speech in the Pennsylvania Ratifying Convention (Dec. 11, 1787), in id. at 539-40 (defending provision); Edmund Pendleton, Speech in the Virginia Ratifying Convention (Dec. 11, 1787), in id. at 539-40 (defending provision); Edmund Pendleton, Speech in the Virginia Ratifying Convention (June 18, 1788) 3 id. at 519-20 (reflecting concern in Virginia legislature about appellate review as to law and fact); “The Impartial Examiner,” Essay I, Virginia Independent Examiner, Feb. 27, 1788 (“Or what is an appeal to enquire into facts after a solemn adjudication in any court below, but a trial de novo?”).

136 See, e.g., THE FEDERALIST NO. 83 (Alexander Hamilton), supra note 120, at 430 (identifying this objection to the Constitution as the one “which has met with most success in [New York], and perhaps in several of the other States”); “The Impartial Examiner,” supra note 135 (“[C]onsider whether you will not be in danger of losing this inestimable mode of trial in all those cases, wherein the constitution does not provide for its security.”).

137 For example, in addressing fears that the proposed Constitution abolished trial by jury in civil cases, James Wilson assured the citizens of Philadelphia that “no danger could possibly ensue” despite the Constitution’s silence on the question, “since the proceedings of the Supreme Court are to be regulated by the Congress . . . .” James Wilson, Speech on the Federal Constitution, delivered in Philadelphia (October 6, 1787), in PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES, PUBLISHED DURING ITS
This recognition of congressional authority over procedure and the lack of any corresponding recognition of judicial authority does cut slightly against the conclusion that informed observers believed the latter authority to exist. It is difficult, however, to make this inference do too much work. To the extent that they focused on judicial procedure at all, participants in these debates were largely arguing about whether Congress would protect or undermine the practice of employing juries in civil cases. This focus on Congress’s role in regulating procedure (or at least this aspect of it) reflects an assumption that any uniform regulation in this regard would come from Congress; it also reflects an assumption that Congress would have the last word on at least this aspect of federal-court procedure. But it does not say much about the inherent power of the federal courts to regulate the use of juries or any other procedural device in the absence of congressional action. To be sure, the lack of focus on the role of the federal courts in regulating procedure likely reflects a belief that the federal courts would play an insignificant role relative to Congress in regulating procedure—a belief that has proven true over the succeeding two centuries. But belief in an insignificant role does not translate to a belief in no role; nor does it address the question whether some small core of procedural issues lies beyond congressional control.

DISCUSSION BY THE PEOPLE, 1787-1788, at 157 (Paul Leicester Ford ed., Brooklyn, NY 1888). See also Abraham Holmes, Speech in the Massachusetts Ratifying Convention (Jan. 30, 1788), in 2 ELLIOT’S DEBATES, supra note 134, at 111 (lamenting that the Constitution, in failing to specify certain rules of procedure and evidence in criminal cases, left Congress virtually unchecked power to prescribe such rules); James Madison, Speech in the Virginia Ratifying Convention (June 20, 1788), in 3 id. at 534 (referring to Congress’s power to “prescribe such a mode as will preserve the right of jury trial); Patrick Henry, Speeches in the Virginia Ratifying Convention (June 20, 1788; June 23, 1788), in id. at 544-45, 577-78 (asserting that in civil cases, it would be up to Congress to decide whether a jury trial was guaranteed); William Maclaine, Speech in the North Carolina Ratifying Convention (July 29, 1788), in 4 id. at 175-76 (referring to Congress’s power to prescribe the mode of proceeding in inferior federal courts, including the mode by which trial by jury in civil cases would be had); THE FEDERALIST NO. 83 (Alexander Hamilton), supra note Error! Bookmark not defined., at 431 (asserting that Congress possessed “power to prescribe the mode of trial,” and that consequently, the constitutional silence with respect to juries in civil cases left Congress “at liberty either to adopt that institution or let it alone”).

138 Robert Pushaw has asserted that Edmund Pendleton made remarks during the ratification debates reflecting the belief that federal courts possessed some inherent authority over procedure. See Pushaw, supra note 41, at 833 n.518. The basis for this suggestion is Pendleton’s observation that inferior courts would decide questions regarding the admissibility of evidence and the competency of witnesses. See 3 ELLIOT’S DEBATES, supra note 94, at 519-20. In my judgment, these remarks do not bear on any belief Pendleton may have had regarding the inherent authority of courts. Pendleton made these comments in the course of allaying fears that the Supreme Court’s jurisdiction both “as to law and to fact” would permit the Supreme Court to retry cases at the appellate level, thereby forcing citizens to travel, often great distances, to litigate in the Supreme Court itself. See id. at 517-21. His assertion that inferior courts would decide whether to admit evidence was intended to underscore that inferior courts, rather than reviewing courts, made such determinations, and that this well-established division of authority, combined with Congress’s power to make exceptions and regulations to the Supreme Court’s appellate jurisdiction, would render “appeals, as to law and fact, proper, and perfectly inoffensive.” Id. at 520. Pendleton did not indicate what standards inferior courts would apply in making these evidentiary determinations, and his remarks are as consistent with a belief that inferior courts would make these evidentiary determinations according to the common law or legislation as they are with a belief that inferior courts would make these evidentiary determinations according to standards established pursuant to their own inherent authority.
On the whole, then, the debates surrounding the Constitution’s drafting and ratification are relatively unhelpful in determining whether Article III courts in possession of judicial power possess inherent authority to regulate litigation before them.

(2) Early Judiciary and Process Acts

There were four pieces of legislation passed by the First and Second Congresses that significantly affected the structure of the federal judiciary and the procedures it followed: The Judiciary Act of 1789, The Process Act of 1789, a 1792 amendment to the Process Act, and a 1793 amendment to the Judiciary Act. These statutes provided numerous and detailed procedural regulations. Most relevant for present purposes are two. Section 17(b) of the Judiciary Act of 1789 provided that “all the said courts of the United States shall have power . . . to make and establish all necessary rules for the orderly conducting of business in the said court . . . .” Section 2 of the Process Act of 1789 directed federal courts to follow the modes of proceeding prescribed by the civil law in equity and admiralty suits; in common law suits, federal courts were to follow, inter alia, the “modes of process” used in the supreme court of the state in which the federal court sat. A 1792 replacement of the Process Act and a 1793 amendment to the Judiciary and Process Acts changed these statutes slightly but did not alter them in substance. Between them, the Judiciary and Process Acts provided a fairly complete procedural system for courts in the United States, at least in civil cases: federal courts were generally to observe state or civil law procedure, and, if there were procedural matters that state or civil law did not address, federal courts could regulate them pursuant

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

140 The phrase “modes of process” could have been interpreted to oblige federal courts to mimic only the form of the processes issuing from the court. From the start, however, federal courts interpreted the Process Act to oblige them to mimic state courts not only in the form of the processes they issued, but also in the procedures they employed. See JULIUS GOEBEL, JR., HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801, at 514, 575 (1971). In 1792, Congress amended the Process Act to make this understanding explicit: the 1792 amendment to that Act substituted the phrase “modes of proceeding” for the arguably narrower phrase “modes of process.”

141 The 1793 amendment to § 17(b) of the original Judiciary Act made the grant of rulemaking authority more detailed, thereby arguably strengthening it. The amendment granted federal courts the power “to make rules and orders for their respective courts directing the returning of writs and processes, the filing of declarations and other pleadings, the taking of rules, the entering and making up of judgments by default, and other matters in the vacation and otherwise in a manner not repugnant to the laws of the United States, to regulate the practice of the said courts respectively, as shall be fit and necessary for the advancement of justice . . . .” Judiciary Act of 1793, ch. 22, § 7, 1 Stat. 333. The 1792 Process Act repealed the Process Act of 1789, which had been temporary, and replaced it with a substantially similar, but permanent, statute. The new act deleted the original Process Act’s reference to the civil law and directed federal courts to follow the “principles, rules, and usages which belong to courts of equity and admiralty, respectively,” and it rendered all of the Act’s instructions “subject however to such alterations and additions as the said courts respectively shall in their discretion deem expedient . . . .” Process Act of 1792, ch. 36, § 2, 1 Stat. 275. It is not clear whether the latter proviso simply extended the scope of the federal courts’ authority to adopt rules under § 17, or whether it functions itself as a rulemaking grant.
to the power granted in the Judiciary Act’s § 17. With respect to criminal cases, the law regulating procedure was more open-ended. While federal courts construed § 17(b) of the Judiciary Act as permitting rulemaking in both criminal and civil cases, they construed the Process Act as inapplicable to criminal cases. Except in the relatively rare instances in which Congress prescribed a specific criminal procedure to the contrary, the federal courts followed common law rules of criminal procedure, rather than the variations to those rules made by any particular state.\textsuperscript{142}

The debate surrounding these provisions does not reveal any discussion about whether, in the absence of this legislation, federal courts would have possessed inherent authority to govern their own procedure.\textsuperscript{144} For example, the enactment of the Process Act apparently generated no discussion—or at least, no recorded discussion—about what federal courts would have done in the absence of an instruction about the procedure they were to follow. Similarly, the enactment of the rulemaking grant contained in § 17 of the Judiciary Act apparently generated no discussion as to whether this provision affirmed a power that otherwise existed, or whether it granted a new power that courts did not otherwise possess. That said, it is worth observation that the other powers granted by § 17—the powers to grant new trials, administer oaths or affirmations, and punish contempt—were powers that Founding-era lawyers apparently treated as inherent in all courts.\textsuperscript{145} The inclusion of procedural rulemaking on that list might be thought evidence

\textsuperscript{142} Julius Goebel notes that the first Congress gave the federal courts “only a few directions relating to [criminal procedure]”; he observes that the first federal criminal statute “was drawn on the assumption that common law methods of trial would be followed . . . .” \textsc{Julius Goebel, Jr., History of the Supreme Court of the United States: Antecedents and Beginnings to 1801}, at 609 (1971).

\textsuperscript{144} The same was true with respect to rules of evidence in criminal cases. The Supreme Court construed the Rules of Decision Act as inapplicable to criminal cases, and for over sixty years, federal courts observed common law rules of evidence rather than modifications to the common law adopted by any particular state. In 1851, the Supreme Court changed this practice by construing the successor to the Judiciary Act as implicitly requiring, in criminal cases, adherence to state law of evidence, as that law existed on the date of the state’s admission to the Union. \textit{United States v. Reid}, 53 U.S. (12 How.) 361 (1851).

\textsuperscript{145} The contempt power was clearly treated as one inherent in all courts. \textit{See infra} note 166 and accompanying text. There is less evidence regarding the power to grant new trials and the power to administer oaths, but state cases offer reason to believe that both of these powers were thought to be inherent as well. \textit{See infra} note 176 (new trials). \textit{See also} Montgomery v. Snodgrass, 2 Yeates 230 (Pa. 1797) (“[W]e disclaim all affinity whatever to that [Board of Property]; they are no court in any sense of
that power over procedure also falls in that category. On the whole, though, the record regarding the adoption of the Judiciary and Process Acts, like the record surrounding the Constitution’s drafting and ratification, reflects both a belief in extensive congressional authority and a lack of concern with any inherent judicial authority to adopt procedures in areas the legislature left open.\footnote{It is worth noting that the congressional record surrounding the adoption of the Judiciary and Process Acts was silent not only with respect to inherent judicial authority over procedure; legislators never discussed inherent judicial authority of any sort, including well-established inherent authority like the authority to punish contempt of court.}

Failed congressional proposals from this period reveal similarly little about whether federal courts were perceived to possess inherent authority—even authority generally subordinate to congressional authority—over procedure. In the drafting of the Process Act of 1789, the first Judiciary Committee proposed a bill aimed toward establishing a largely uniform procedure for the new federal courts; the Process Act as ultimately enacted represented a rejection of this proposal in favor of having each federal court follow the procedure of the state in which it sat.\footnote{\textit{See Goebel, supra} note 142, at 510-537 (describing Judiciary Committee’s proposal to regulate federal procedure in detail and Senate’s rejection of it). As the struggle between those who favored uniform federal procedure and those who favored state procedure suggests, it was the interests of the states relative to the federal government, rather than the interests of federal courts relative to Congress, that occupied legislative attention. \textit{Id. at} 510-11, 539-40 (arguing that the legislative history of the Process Act reveals a struggle between those who favored a consolidated national government and those who favored resting more control with the states).} Roughly two years later, on January 29, 1790, Congressman Smith of South Carolina introduced a resolution to direct the Supreme Court to report to the House “a plan for regulating the processes in the federal courts and the fees to the Clerks of the same.”\footnote{1 \textsc{Annals of Cong.} 1143 (Joseph Gales ed., 1834).} That resolution was tabled and never discussed. And in 1793, the House of Representatives proposed an amendment to the rulemaking grant in the Judiciary Act that would have withdrawn the grant of local rulemaking authority to all federal courts and replaced it with an exclusive grant of supervisory rulemaking authority to the Supreme Court.\footnote{GOEBEL, \textit{supra} note 142, at 550-51 \& n.186. The Senate rejected that proposal.} There was no discussion of inherent local authority surrounding either the proposal or its rejection, even though one might expect to see some discussion on the question whether withdrawing the local rulemaking authority of the federal courts infringed upon or even entirely removed procedural authority they would otherwise possess. In any event, the record of failed proposals, like that of enacted legislation, ultimately reveals more about Congress’s estimation of its own authority than about its views about the authority of the federal courts.

The single exception to this silence in the early congressional record lies in a report submitted to the House of Representatives on December 31, 1790 by Edmund
Randolph, then Attorney General of the United States. The House had commissioned Randolph to identify and propose remedies for any deficiencies he perceived in the federal judicial system. Randolph’s response to the House, in addition to addressing various other perceived weaknesses in the Judiciary and Process Acts, proposed that Congress replace reliance on the procedure of the various states with a uniform code of federal procedure. He argued that Congress should grant the Supreme Court authority to prescribe supervisory rules binding throughout the federal courts. In defending the propriety of such a grant, Randolph wrote as follows:

Rules of practice belong to the authority of every court, and their other incidental powers add to that authority. The transition from these to the superintending of the whole course of proceedings, will not therefore be considered as too great.

The House did not consider the report after receiving it.

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

(3) Treatises

At least two treatises reflecting the practice of the Founding period address, if only implicitly, the question whether power over procedure is incident to every court. TIDD’S PRACTICE, a treatise on English practice widely consulted by the early American bench and bar, implicitly affirms such power; STORY’S COMMENTARIES ON THE

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150 4 DOCUMENTARY HISTORY, supra note 144, at 124; Randolph Report, in id., at 127.
151 4 DOCUMENTARY HISTORY, supra note 144, at 122.
152 Randolph Report, supra note 150, at 152-53, 166.
153 Id.
154 Id. at 166.
155 Id. at 122.
156 WILLIAM TIDD, THE PRACTICE OF THE COURT OF KING’S BENCH IN PERSONAL ACTIONS: WITH REFERENCES TO CASES OF PRACTICE IN THE COURT OF COMMON PLEAS (London, Jaques and Co. for J. Butterworth, 3d ed. 1803). The first edition of Tidd’s treatise was published in parts, with the first part appearing in 1790, the second in 1794, and the last in 1798. The Oxford Dictionary of National Biography observes that “[f]or a long period Tidd’s treatise was almost the sole authority for common law practice, going through nine editions by 1828. The work was also extensively used in America, where one edition with notes by Asa I. Fish appeared as late as 1856.” E.I. Carlyle & Jonathan Harris, William Tidd, in OXFORD DICTIONARY OF NATIONAL BIOGRAPHY (2004), available at http://www.oxforddnb.com/view/article/27434.
CONSTITUTION implicitly denies it. The apparent conflict between these two treatises, combined with the silence of so many other treatises on the subject, render the treatises of the period a relatively unilluminating source of information for this study. A brief discussion of the treatment of power over procedure in the works of both William Tidd and Joseph Story follows below.

TIDD’S PRACTICE does not explicitly address the question whether authority to regulate procedure inheres in every court. In discussing the sources of procedural rules, however, Tidd strongly implies that such authority exists. In the introduction to his lengthy summary of the procedures controlling various suits in the Courts of King’s Bench and Common Pleas, Tidd identifies the sources of procedural regulation. Throughout, he emphasizes that the courts themselves, through both orders and judicial decisions, are an important source of procedural regulation. For example, Tidd writes:

The practice of the court, by which the proceedings in an action are governed, is founded on ancient and immemorial usage, (which may not be improperly termed the common law of practice), regulated from time to time by rules and orders, acts of parliament, and judicial decisions.

To be sure, Tidd does not explicitly identify the inherent authority of the court as the justification for the rules and judicial decisions that regulate the practice in each court. Because, however, Parliament did not confer general rulemaking authority upon English courts until 1833, courts regulating procedure before then necessarily did so on their own authority rather than in reliance on legislative warrant.

159 1 TIDD, supra note 156, at lxxi.
160 The Civil Procedure Act of 1833 contained the first parliamentary grant of rulemaking power to judges. R.J. WALKER & M.G. WALKER, THE ENGLISH LEGAL SYSTEM 26 (1970). Walker notes that “[b]efore the nineteenth century each court regulated its own internal procedure with very little intervention by
Joseph Story’s renowned Commentaries on the Constitution of the United States can be read as taking a contrary view on the question, and, as an American treatise, it is entitled to more weight. Story writes as follows:

[1]n all cases, where the judicial power of the United States is to be exercised, it is for congress alone to furnish the rules of proceeding, to direct the process, to declare the nature and effect of the process, and the mode, in which the judgments, consequent thereon, shall be executed.\textsuperscript{161}

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

[W]hile the jurisdiction of the courts of the United States is almost wholly under the control of the regulating power of congress, there are certain incidental powers, which are supposed to attach to them, in common with all other courts, when duly organized, without any positive enactment of the legislature. Such are the power of the courts over their own officers, and the power to protect them and their members from being disturbed in the exercise of their functions.\textsuperscript{162}

Story’s description of inherent powers is consistent with that found in the cases described below: It emphasizes the court’s inherent ability to control those who serve it and to punish behavior disruptive to the judicial process. To be sure, the use of the phrase “such are” indicates that the list is not exhaustive, and there is reason to believe, based on Story’s judicial opinions, that he believed that the common law vested courts with some procedural powers not conferred by statute.\textsuperscript{163} Even if, however, Story’s Commentaries do not entirely foreclose the notion that Story viewed courts to

\textsuperscript{161} Story, supra note 157, § 1752 (emphasis added).
\textsuperscript{162} § 1768. See also Sergeant, supra note 158, at 29 (similarly identifying a court’s power over its own officers and its power to punish contempt as incidental powers of courts and similarly failing to include power over procedure on the list).
\textsuperscript{163} See, e.g., Sears v. United States, 21 F Cas. 938 (C.C.D. Mass. 1812) (No. 12,592) (Story, Circuit Justice) (relying on common law to establish the authority of the court to amend a variance).
possess inherent authority to regulate procedure, the treatise surely casts significant doubt upon it.

(4) Cases

As described in the preceding sections, the question whether federal courts possess inherent procedural authority apparently did not occupy either treatise writers or those who debated the Constitution and the legislative output of the first and second Congresses. One might expect this question to have occupied those with which it is most concerned: the federal courts themselves. To discern whether early federal courts believed themselves to possess inherent procedural authority, I surveyed all of the Supreme Court, circuit court, and district court cases from the period between 1789 and 1820 that dealt with either the concept of inherent authority or any matter of procedure, which I defined as including civil procedure, criminal procedure, and evidence.\textsuperscript{164} This section describes the results of this research.

It is clear, both in the arguments of counsel and the reports of early judicial opinions, that both federal courts and the lawyers who practiced before them believed federal courts to possess certain inherent powers.\textsuperscript{165} Unfortunately, however, federal courts and counsel only rarely addressed the question whether courts possessed inherent authority over procedure. A review of federal cases decided between 1789 and 1820 reveals that in large part, Founding-era discussions of inherent authority track their modern counterparts: Then, as now, most explicit discussions of inherent authority occur in the context of contempt,\textsuperscript{166} regulation of the bar,\textsuperscript{167} and regulation of jurors.\textsuperscript{168}

\textsuperscript{164} I employed the following method of gathering the relevant cases. My research assistant culled all the cases from the Federal Cases reporter that satisfied the criteria; I did the same for the Supreme Court reporter. We then categorized the cases into the following categories: admiralty, equity, civil procedure, criminal procedure, and evidence. I read all of the cases in each of these categories to determine how the early federal courts treated the regulation of procedure, particularly in the absence of legislative guidance. In addition to reading the cases reported in the Supreme Court reporter, I also reviewed The Documentary History of the Supreme Court of the United States, see Marcus, supra note 144, an eight-volume set collecting documents regarding the business of the Supreme Court, as well as its justices riding circuit, between 1787 and 1800.

\textsuperscript{165} See, e.g., Forrest v. Hanson, 9 F. Cas. 455 (C.C.D.C. 1801) (No. 4942) (asserting that the powers of courts can derive from either statutes or from “principle[s] of the common law, extending, generally, to all judicial bodies”). Of course, early federal courts did not only address the authority they claimed. They also addressed an inherent authority they ultimately—and famously—disclaimed: inherent jurisdictional authority. See, e.g., United States v. Hudson & Goodwin, 11 U.S. 32, 34 (1812) (denying that the exercise of criminal jurisdiction is within the powers implied in all courts “from the nature of their institution”); Ex parte Bollman, 8 U.S. 75, 94 (1807) (denying that that the authority to issue writs of habeas corpus is inherent in every court; cf. id. at 79-80 (contrary argument of counsel).


\textsuperscript{167} See, e.g., King of Spain v. Oliver, 14 F. Cas. 577, 578 (C.C.D. Pa. 1810) (No. 7814) (characterizing the right to inquire by what authority an attorney acted on his purported client’s behalf as one “inherent in all
Explicit discussions of inherent authority over procedure occur in only a handful of older cases.

In theory, analyzing whether early federal courts believed themselves to possess inherent authority over procedure need not depend only on whether they explicitly embraced or disclaimed it. Regardless of what federal courts said about inherent authority over procedure, one ought to be able to glean information by studying what federal courts did. If federal courts adopted procedural rules in the course of adjudication in the absence of statutory authorization, that would be circumstantial evidence that federal courts believed themselves to possess inherent authority over procedure. Conversely, if they did not adopt procedural rules without statutory authorization, that would be circumstantial evidence that federal courts did not believe any such authority to exist. Because there is a multitude of cases between 1789 and 1820 in which federal courts advance procedural rules without referencing any statutory authority, the body of relevant case law at first impression offers substantial support for the proposition that early federal courts believed themselves to possess inherent procedural authority.

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

courts,” but acknowledging that this inherent power “may be taken away, or qualified by express statute; or additional cautions may be superadded”). State courts similarly asserted authority over court personnel. See, e.g., Mockey v. Grey, 2 Johns. 192 (N.Y. 1807) (“The power of appointing a guardian, ad litem, is incident to every court . . . .”); Yates v. New York, 6 Johns 337 (N.Y. 1810) (asserting that courts, including chancery courts, possess inherent authority to direct and control court officers, including clerks, in the discharge of their functions).

168 See, e.g., Perez v. United States, 22 U.S. (9 Wheat.) 579 (1824) (explaining that “the law has invested Courts of Justice with the authority to discharge a jury from giving any verdict” when justice requires it); Offutt v. Parrott, 18 F. Cas. 606 (C.C.D.D.C. 1803) (No. 10,453) (fining jurors who escaped from the jury room out the window because “there was a great deal of warmth among them”); United States v. Coolidge, 25 F. Cas. 622 (C.C.D. Mass. 1815) (No. 14,858) (asserting the power to withdraw a juror if, while a party is on trial before a jury, something occurs that “will occasion a total failure of justice if the trial proceed”). State courts asserted similar authority. See, e.g., Alexander v. Jameson, 5 Binn. 238 (Pa. 1812) (opinions of Tilghman, J. and Yeates, J.) (asserting inherent authority of court to regulate what jurors take into the jury room); Commonwealth v. Bowden, 9 Mass. 494 (1813) (recognizing inherent authority of court to withdraw a juror).

169 See Barrett, supra note 7, at 376-84.

170 CONKLING, supra note 158, at 317. See also id. at 233 (explaining that his treatise would not detail the formal parts of the declaration because “[t]he common rules of pleading, except where they have been
Tucker, in his American edition of Blackstone’s Commentaries, could instruct that “the maxims and rules of proceedings [of the English common law] are to be adhered to, whenever the written law is silent . . . .” Founding-era cases from the Supreme, circuit, and district courts reflect the same understanding. Cases, therefore, in which courts articulate procedural rules in the absence of statutory authorization or direction cannot necessarily be interpreted as assertions of inherent judicial authority. One must carefully discern whether, in any given case, the court perceived itself to be exercising discretion or simply applying a settled common rule.

The second and more serious factor complicating an effort to determine whether early federal courts implicitly asserted inherent authority over procedure is that they possessed broad, statutorily granted authority over procedure. Section 17 of the Judiciary Act of 1789 gave each federal court the authority “to make and establish all necessary rules for the orderly conducting of business in the said court . . . .” Despite that provision’s reference to “rules,” the Supreme Court interpreted it to permit the regulation of procedure through either formal court rules or case-by-case adjudication. This changed by the laws of the states or by rules of court are in general strictly applicable to the proceedings in the national courts,” and the rules of common law pleading are adequately explained in other treatises). Mary Tachau’s study of the Kentucky federal courts from 1789-1816 led her to conclude that “the most distinctive aspect” of the procedures observed by Kentucky federal courts in this period was “their rigorous adherence to the antiquated technicalities of English law.” TACHAU, supra note 158, at 77. Throughout, Tachau details examples of this phenomenon. See also id. at 84 (relating district judge in Kentucky’s admonishment that “The Latitude contended for by Mr. Attorney goes at once to destroy that System of good pleading which has stood the test for Ages past and which I hope will continue to be strictly attended to by Judges.”).

171 1 BLACKSTONE’S COMMENTARIES, supra note 158, at app. 429-30. See also 1 KENT, supra note 158, at *341 (“If Congress should, by law, authorize the district or circuit courts to take cognizance of attempt to bribe an officer of the government . . . . and should make no further provision, the courts would, of course, in the description, definition, and prosecution of the offence, be bound to follow those general principles and usages which are not repugnant to the Constitution and laws of the United States, and which constitute the common law of the land, and form the basis of all American jurisprudence.”). 172 See, e.g., United States v. Johns, 4 U.S. 412, 414 (1806) (holding that in the absence of contrary instruction from Congress, the number of peremptory challenges permitted in a capital case was a matter governed by the common law, which permitted thirty-five); Owens v. Adams, 18 F. Cas. 926 (C.C.D. Va. 1803) (No. 10,633) (Marshall, Circuit Justice) (holding that in the absence of any legislative provision, “the rules of the common law” controlled questions regarding the admissibility of evidence, despite court’s disagreement with the application of the rule in this instance); Tatum v. Lofton, 23 F. Cas. 723 (C.C.D. Tenn. 1812) (No. 13,766) (treating common law as controlling question whether witness who become voluntarily interested in litigation can rely on his interest as grounds for refusing to testify); Livingston v. Jefferson, 15 F. Cas. 660, 663 (C.C.D. Va. 1811) (No. 8411) (Marshall, Circuit Justice) (asserting that the common law, including procedural common law, applies in federal courts unless Congress says otherwise). 173 In Fullerton v. Bank of the United States, 26 U.S. 604 (1828), the Supreme Court rejected a challenge to establishing rules through adjudication. It noted: “Written rules are unquestionably to be preferred, because their commencement, and their action, and their meaning, are most conveniently determined; but what want of certainty can there be, where a Court by long acquiescence has established it to be the law of that Court, that the state practice shall be their practice . . . .” Id. at 613. See also Duncan’s Heirs v. United States, 32 U.S. 425 (1833) (“It is not essential, that any court, in establishing or changing its practice should do so by the adoption of written rules. Its practice may be established by a uniform mode of proceeding, for a series of years . . . .”). Although neither Fullerton nor Duncan’s Heirs explicitly invoked § 17 of the Judiciary Act in holding that court rules can be established by the common law method, it seems fairly clear in context that the Court was referring to that provision. Even if it was not, however, its failure to
interpretation of § 17 means that one cannot identify exercises of inherent authority simply by identifying cases that avoid the first complication—in other words, by identifying cases in which courts are advancing their own procedural rules rather than applying settled common law principles. Because such cases could as easily represent an exercise of the court’s statutory authority as its inherent authority, it is only possible to distinguish one from the other if the deciding court does, and courts rarely did so. Most of the time, courts simply adopted rules in the course of adjudication without addressing the issue of their power at all. Other times, they explicitly proclaimed themselves to possess power to regulate procedure, but without identifying the source of that power—leaving open the question whether they perceived it to be constitutionally or statutorily granted. It is not, then, that the Founding-era case law is silent with respect to federal-court authority over procedure: There are hundreds of Founding-era cases in which federal courts explicitly or implicitly asserted such authority. But the cumulative effect of the Supreme Court’s broad interpretation of § 17 and the courts’ general failure to identify whether or not they were relying on § 17 in adopting any particular rule renders the lion’s share of these cases useless for purposes of this study, because in most, it is impossible to tell whether courts regulating procedure were asserting constitutional or statutory authority.

draw a sharp distinction in these cases between procedural regulation by court rule and procedural regulation by adjudication makes it less likely that federal courts drew such a distinction for purposes of § 17. See, e.g., Arnold v. Jones, 1 F. Cas. 1180 (D.S.C. 1798) (No. 559) (Bee, J.) (explicitly invoking § 17 power to establish a rule, in the course of adjudicating a case, that a motion for a new trial does not suspend judgment after a verdict).

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

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

The courts’ failure to identify the source of their authority also combines with other provisions of the Judiciary Act to cloud identification of assertions of inherent authority. For example, there is evidence that early federal courts believed themselves to possess inherent authority to permit amendments to pleadings. See Sears v. United States, 21 F. Cas. 938 (C.C.D. Mass. 1812) (No. 12,592) (Story, Circuit Justice) (relying on common law to establish the authority of the court to amend a variance); Calloway v. Dobson, 4 F. Cas. 1082, 1083 (C.C.D. Va. 1807) (No. 2325) (Marshall, Circuit Justice) (asserting that courts possessed power, both at equity and at common law, to permit amendments of pleadings). But because § 32 of the Judiciary Act gave federal courts statutory authority to do so, and because the courts rarely identified the source of their authority, one cannot treat bare amendments as assertions of inherent, as opposed to statutorily granted, authority. See, e.g., Smith v. Barker, 22 F. Cas. 454, 455-56 (C.C.D. Conn. 1809) (No. 13,013) (asserting discretion of the court to permit the plaintiff to amend at any time before the case is actually committed to the jury); Wigfield v. Dyer, 29 F. Cas. 1156 (C.C.D.C. 1807) (No. 17,622)
Given the way that both the court’s understanding of procedural common law and the procedural grant in § 17 cloud the evidence, an assessment of the attitudes of the Founding-era bench and bar to the question of inherent authority over procedure can fairly rely only upon the following kinds of cases: (a) cases that explicitly discuss inherent procedural authority; (b) cases that do not address the concept of “inherent authority” in those terms, but nonetheless explicitly address the claim that courts possess a non-statutorily derived authority over procedure; and (c) cases that neither directly or indirectly address the question of inherent authority, but in which federal courts assert a procedural power not granted by § 17 or any other provision in the early Judiciary and Process Acts (e.g., the power to grant a continuance). These restrictions dramatically narrow the pool of relevant evidence.

(a) Cases in which inherent authority over procedure is explicitly discussed

Chisholm v. Georgia is the only federal case directly addressing the question whether a federal court possesses the inherent authority to prescribe modes of process in the absence of controlling legislation. In Chisholm, federal statutes were silent with respect to three important procedural matters: the mode of executing judgment against a state, the mode of serving process on a state, and the steps for compelling an appearance by the state.177 Attorney General Edmund Randolph argued that in the absence of statutory prescription, the Supreme Court possessed inherent authority to regulate its process in all three respects.178 With respect to writs of execution, Randolph asked, “Why may not executions even spring from the will of the Supreme Court, as [writs enforcing judgments] were originally the creation of Courts?”179 Drawing an analogy to the courts’ inherent power to punish contempt, he asserted that the “incidental authority” to formulate a writ of execution “is not of a higher tone than that of fine and imprisonment, which belongs to every Court of record, without a particular grant of it.”180

(adopting a rule with respect to conditions upon amendment). Another example is the power of the court to grant new trials. One can make a good case that early courts believed themselves to possess inherent authority to grant new trials. See, e.g., Inhabitants of Durham v. Inhabitants of Lewiston, 4 Me. 140 (1826) (asserting “the inherent power of this court to grant new trials at common law”) (argument of counsel); Bird v. Bird, 2 Root 411 (Conn. 1796) (asserting that “it is incident to every court who are authorized to try causes by a jury, to set aside their verdicts for just cause.”); CHARLES EDWARDS, THE JURYMAN’S GUIDE THROUGHOUT THE STATE OF NEW YORK 184 (New York, O. Halsted 1831) (“Perhaps the power to grant new trials, for certain just causes . . is necessarily incident to every court that has power to try.”); see also Judiciary Act of 1789, ch. 20, § 17, 1 Stat. 73 (authorizing federal courts to grant new trials “for reasons for which new trials have been granted at common law”). But because § 17 of the Judiciary Act gave federal courts statutory authority to do so, and because courts rarely identified the source of their authority, grants of new trials cannot be treated as assertions of inherent authority. See, e.g., Kohne v. Ins. Co. of N. Am., 14 F. Cas. 838 (C.C.D. Pa. 1804) (No. 7921) (Washington, Circuit Justice) (claiming authority to grant a new trial without identifying its source). Thus, while many cases dealing with amendments and new trials appear at first blush to be assertions of inherent authority, the existence of statutory grants destabilizes that conclusion.

177 2 U.S. 419 (1793).
178 Randolph’s arguments in this regard were not met by opposing counsel, as Georgia’s lawyers had, per her instructions, declined to argue the case. Id. at 419.
179 Id. at 426-27 (arguing that statutory authority existed, but that even if it did not, inherent authority did).
180 Id. at 427.
Randolph made a similar argument with respect to the Supreme Court’s authority to devise a mode for serving process and the steps for compelling an appearance: “[I]f it be not otherwise prescribed by law, or long usage, [the mode] is in the discretion of the Court . . . .”181 In other words, Randolph made a claim similar to the one advanced by both the Supreme Court and scholars today: Federal courts possess inherent authority to fill gaps left open in otherwise controlling procedural law. The difference between Randolph’s claim and the modern one lies only in the fact that Randolph treats procedural common law, rather than enacted law alone, as a source of law deemed controlling.

The Chisholm majority did not explicitly address Randolph’s argument regarding its inherent authority. But insofar as the Court’s order in the case provided both a method of serving process and steps for compelling an appearance, the majority appeared to accept it implicitly.182 It accepted that argument, moreover, over the lone dissent of Justice Iredell, who protested that the authority to devise modes of proceeding is “not one of those necessarily incident to all Courts merely as such,”183 and that courts receive “all their authority, as to the manner of their proceeding, from the Legislature only.”184 His belief in exclusive legislative control was so firm, in fact, that he argued that judges simply could not exercise judicial power in the absence of legislative direction regarding the procedures to be observed.185 Once Chisholm was decided, echoes of Justice Iredell’s argument appeared in the press.186

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181 Id. at 428 (describing Court’s authority to devise service of process). See also id. at 429 (“As to the steps, proper for compelling an appearance; these too, not being dictated by law, are in the breast of the Court.”).
182 Id. at 479. In contrast to the Court’s approach to service of process and the steps for compelling an appearance, the Court’s view with respect to its inherent authority to issue a writ of execution is unclear. With respect to the latter, Randolph’s claim of inherent authority was made in the alternative. Id. at 426. His primary argument was that the Judiciary Act of 1789 implicitly clothed the Supreme Court with the authority to issue such a writ. Id. Thus, the Supreme Court’s issuance of a writ of execution cannot be taken as an implicit endorsement of the proposition that the Court thought itself to possess inherent authority to do it.
183 Id. at 433.
184 Id. at 432. Interestingly, Justice Iredell grounded his argument in favor of exclusive legislative control in the same constitutional provision relied upon by modern proponents of exclusive legislative control: The Sweeping Clause. See infra Part IV.A.(1) and accompanying text.
185 Id. (“This appears to me to be one of those cases, with many others, in which an article of the Constitution cannot be effectuated without the intervention of the Legislative authority.”). Justice Iredell’s views in Chisholm were presaged by the notes that he took while Oswald v. New York, a case between New York and the citizen of another state, was pending before the Court. In reflecting on the case, Iredell denied that Article III empowered the Court to devise “any new mode of proceeding” and emphasized that the power to devise new modes of trial belonged entirely to Congress. Justice Iredell’s Observations on State Suability in 5 DOCUMENTARY HISTORY, supra note 144, at 76, 84-85. Oswald v. New York was tried by jury before the Supreme Court, and no formal opinion was issued in the case. Id. at 59-67 (describing background of the case).
186 See, e.g., “The True Federalist” to Edmund Randolph, Independent Chronicle, March 20, 1794 in 5 DOCUMENTARY HISTORY, supra note 144, at 270-71 (heatedly arguing that the power concerning the mode of exercising judicial power, including the mode of proceeding, belongs exclusively to Congress); Hampden, Independent Chronicle, July 25, 1793 in id. at 399, 401 (making same argument when Supreme Court when, in reliance on Chisholm, a private citizen filed suit against Massachusetts a suit that the Court ultimately did not decide).
Chisholm thus provides some evidence that informed observers in the Founding era believed federal courts to possess inherent authority over procedure. At the same time, Justice Iredell’s dissent provides some evidence that this view was not universally held. And while Chisholm’s explicit discussions of inherent authority separate it from other cases of the period in which rules were made and authority unaddressed, it is the case even here that the existence of the Judiciary Act’s § 17 casts doubt on the question whether the Court was relying on inherent rather than statutorily granted authority. It bears emphasis, however, that both Randolph’s argument (at least with respect to the authority to devise steps for serving process and compelling an appearance) and Iredell’s dissent focus exclusively on inherent authority. That fact makes it unlikely that the majority, in siding with Randolph, thought that § 17 settled the issue. It seems far more likely that the Court believed, as Justice Johnson stated on circuit explicitly several years later, that if Congress gave a court jurisdiction without prescribing any procedure, “would it not follow that the court must itself adopt a mode of proceeding adapted to the exigency of each case?”

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

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

188 Consider that in at least two later original jurisdiction cases, the Court devised forms of process and rules of proceeding in explicit reliance on statutory authority and with no reference to inherent authority. See, e.g., New Jersey v. New York, 30 U.S. 284 (1831) (relying only on § 17); Grayson v. Virginia, 3 U.S. 320 (1796) (relying on Judiciary Act’s § 14). But see Kentucky v. Dennison, 65 U.S. 66, 98 (1861), overruled in other respects by Puerto Rico v. Branstad, 483 U.S. 219 (1987) (explicitly asserting inherent authority to devise process and rules of proceeding).

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

190 In contrast to the method I pursued with respect to the federal cases, see supra note 164 and accompanying text, I did not read all of the relevant state cases decided between 1789 and 1820. For this portion of the study, I instead relied on searches in electronic databases.

191 Barry v. Randolph, 3 Binn. 277 (Pa. 1810) (Tilghman, J.). See also Vanatta v. Anderson, 3 Binn. 417 (Pa. 1811) (noting that despite the absence of a legislative grant, “it is not denied that [the Court of Common Pleas] have [sic] from the nature of their constitution, to make rules for the regulation of their practice.”); (“[T]he Court can alter the practice, and institute any rules in an action of ejectment, which they may deem beneficial, or for the furtherance of justice, without legislative aid.”); Boas v. Nagle, 3 Serg. & Rawle 250 (Pa. 1817) (implicitly recognizing inherent power of court to regulate its practice).
to any act of the legislature on the subject.” 192 Indeed, the court was quite clear that every court “necessarily possesses the incidental power of establishing rules for the regulation of its practice, independently of [a statutory grant].” 193 The spotty case reporting in states other than Pennsylvania during this period makes it difficult to discern whether other state courts espoused this belief. Both the Court of Appeals of Kentucky, and the Supreme Court of New York, however, appear to have shared Pennsylvania’s sentiment. 194

(b) Cases that assert non-statutorily derived authority over procedure

There are a few cases in which federal courts indirectly claim to possess inherent authority over procedure. In these cases, the courts do not claim inherent authority _per se_; they instead claim that the common law has vested courts with discretion to decide certain procedural matters. Thus, in _United States v. Insurgents_, no statute governed how many persons should be summoned for a venire; the circuit court held that the common law vested the court itself with the discretion to choose the number. 195 In _Sears v. United States_, Justice Story, riding circuit, invoked the common law to establish the authority of the court to amend a variance. 196 And in _Calloway v. Dobson_, Chief Justice Marshall, riding circuit, asserted that courts possessed power, both at equity and at common law, to permit amendments of pleadings. 197 The significance of each of these cases lies in the fact that in each, the court assumed itself to possess the powers traditionally possessed by common law courts.

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192 _Id._ (Yeates, J.).
194 _Kennedy’s Heirs v. Meredith_, 6 Ky. 465 (1814) (“Courts may adopt rules for the regulation of practice upon points not provided for by law . . . .”). Because I was unable to find any statutory grant of procedural authority on the books at this time, I treat this statement as a reference to the court’s inherent authority rather than authority legislatively granted. See also Yates v. People, 6 Johns 337 (N.Y. 1810) (referring in dicta to “the general powers incident to every court of record, of regulating its own practice, and prescribing rules in regard to the form of conducting its proceedings”). There is some evidence that the Virginia courts established rules in the absence of legislative authority from 1784 to 1787, see Pushaw, _supra_ note 119, at 821 & n.461. There is also some evidence that colonial courts exercised inherent authority over procedure. See MARYL L. GEIGER, THE ADMINISTRATION OF JUSTICE IN COLONIAL MARYLAND 1632-1689, at 14, 233 (1987) (noting that Maryland colonial courts adopted their own procedures when the Assembly was silent); PAUL M. McCAIN, THE COUNTY COURT IN NORTH CAROLINA BEFORE 1750, at 39 (1954) (claiming that “without a law to specify a definite procedure for the county court, the justices generally arranged matters to suit themselves and the people in attendance”).
195 26 F. Cas. 499, 500 (C.C.D. Pa. 1795) (No. 15,443); see also United States v. Fries, 9 F. Cas. 826 (C.C.D. Pa. 1799) (No. 5126) (similar).
196 21 F. Cas. 938 (C.C.D. Mass. 1812) (No. 12,592) (Story, Circuit Justice). Section 32 of the Judiciary Act of 1789 authorized courts to amend a variance that was merely a matter of form. Even if the variance at issue in _Sears_ was within the purview of § 32, the significant point for present purposes is that Justice Story explicitly invoked the authority the common law granted all courts of error rather than § 32 in establishing his authority to act.
197 4 F. Cas. 1082, 1083 (C.C.D. Va. 1807) (No. 2325) (Marshall, Circuit Justice). Again, § 32 of the Judiciary Act authorized the court to permit amendments to pleading. The significant point for present purposes is that Justice Marshall did not rely on the statutory grant, but instead explicitly invoked the powers possessed by courts of common law and equity.
(c) Cases in which courts assert procedural power not granted by the Judiciary and Process Acts

Finally, there are a handful of cases in which federal courts failed to invoke either inherent authority or the authority traditionally possessed by common law courts, but nonetheless asserted the discretion to take actions not expressly authorized by statute. The most prominent example in this regard is the fact that federal courts commonly asserted the right to grant continuances. In addition to granting continuances, federal courts did things like delineating the kind of affidavits they would accept and allocating the expenses associated with the attendance of witnesses. I found no case in which a federal court addressed the source of its authority to do any of these things, but because no statute empowered federal courts to take these procedural measures, those who did necessarily acted on the belief that they possessed procedural powers other than those statutorily granted.

C. Inherent Authority as the Firmest Foundation

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

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

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198 See, e.g., Hurst v. Hurst, 12 F. Cas. 1028 (C.C.D. Pa. 1799) (No. 6929); Symes v. Irvine, 23 F. Cas. 591 (C.C.D. Pa. 1797) (No. 13,714); United States v. Frink, 25 F. Cas. 1220 (C.C.D. Conn. 1810) (No. 15,171) (denying continuance for absent witness when the witness refused to attend); King of Spain v. Oliver, 14 F. Cas. 571 (C.C.D. Pa. 1816) (No. 7812) (Washington, Circuit Justice) (denying continuance when party knew that witness was about to depart and made no effort to procure his deposition). There is some later authority from a state court explicitly casting the right to grant or refuse a continuance as one “inherent in all courts.” Buriss v. Wide & Hand, 2 Ark. 33 (1839); Wilson v. Phillips, 5 Ark. 183 (1843) (same). It is worth noting that the federal courts briefly possessed a statutorily granted power to grant continuances. Among other things, section 15 of the Judiciary Act of 1801 empowered federal courts “to grant continuances upon the motion of either party.” That Act was repealed in its entirety almost exactly one year later, on March 8, 1802.

199 See, e.g., Norwood v. Sutton, 18 F. Cas. 458 (C.C.D.C. 1806) (No. 10,365) (refusing to receive a supplemental affidavit on the ground that it was a practice leading to perjury); Ex parte Johnson, 13 F. Cas. 719 (C.C.D. Pa. 1803) (No. 7367) (Washington, Circuit Justice) (requiring United States, rather than the defendant, to pay for attendance of defense witness when the United States was the one to call him).
steps related to the progress of a suit, and there are those cases in which the courts implicitly claim inherent authority by taking certain procedural steps in the absence of enabling legislation. There are, in addition, few contradictions of the proposition that federal courts possess inherent procedural authority. Justice Iredell’s dissent in Chisholm does cast procedural regulation as the exclusive province of Congress, but that dissent is, by definition, a minority view; it is also somewhat inconsistent with Iredell’s own practice on the bench. STORY’S COMMENTARIES does leave procedural authority off of the list of inherent judicial powers, but, at the same time, Story’s own practice on the bench is somewhat inconsistent with that belief.

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

Thus, as matters stand, the historical record offers some support for the proposition that federal courts possess inherent procedural authority, but the support it offers is undeniably modest. It is so modest, in fact, that if one were pursuing only the argument that the Founding generation understood power over procedure to be directly conferred by Article III, this evidence is probably not strong enough to support the conclusion that inherent procedural authority exists. Reaching that conclusion presumably requires evidence that “the judicial Power” was widely understood to encompass power over procedure, and it is doubtful that this evidence reflects widespread belief about the content of judicial power. But the historical evidence necessary to support a claim that procedural authority is a legitimate instrumental power of every federal court is surely less than the historical evidence necessary to support a claim that authority over procedure directly vests in federal courts as a component of judicial power. The former argument requires a showing that the power asserted was one traditionally used, and the history described in this part seems to make that showing. Whatever gaps exist in the historical record, it does show that the claim of judicial power over procedure is not novel; it has historical antecedents. Thus, even though the historical evidence falls short of establishing that power over procedure directly vests in federal courts, it seems sufficient to show that federal courts have long treated it as a means legitimately employed toward the end of deciding cases. This conclusion is strengthened by the fact that the claim that federal courts possess initiating authority over procedure has persisted over time. While the claim of such procedural authority has never been as vigorous or uniformly accepted as claims of inherent authority to punish contempt and control court
personnel, a consistent thread of cases making this claim stretches from the Founding era to today. 200

That said, even if the historical record supports the conclusion that Article III implicitly grants federal courts power over procedure, it is hard to argue that it compels that conclusion. The evidence is weak enough that one preferring to treat procedure exclusively pursuant to the enclave theory could reject it as aberrational or at least exceptional. One doing so, however, must be prepared to embrace the enclave authority in its entirety—in particular, in its treatment of judicial procedural authority as entirely derivative of Congress’s authority. This is not an untenable position, but it does take a far more restrictive view of judicial authority than is characteristic of any of the modern scholarship or case law. Indeed, the assumption that federal courts possess inherent authority over procedure is so deeply held that, as a practical matter, rolling it back likely requires forceful evidence to the contrary. Such evidence does not exist here. Thus, given that the historical record puts the modern claim of inherent procedural authority on firmer ground, and given that the modern claim reflects a sensible approach to interbranch balance in matters of procedure, the best way of thinking about the judiciary’s authority over procedure is to treat it as inherent authority implied by Article III.

If the authority to regulate procedure is incident to the judicial power possessed by Article III courts, then the “inherent authority” account of procedural common law is sound, and procedural common law ought to be understood pursuant to it. This theory is a double-edged sword. On the one hand, it clearly explains the contours of procedural common law. It explains why some procedural rules may lie beyond Congress’s general power, yet still lie within the power of the judiciary. It offers a clean explanation as to why federal procedural common law does not bind state courts: rules developed to facilitate the exercise of Article III judicial power are necessarily confined in their operation to Article III courts. 201 On the other hand, the “inherent authority” theory would work a significant change in the way federal courts currently develop procedural common law. Because inherent authority is local authority, permitting a court to regulate only its own proceedings, procedures developed in case law are necessarily restricted in

200 Section III.B.(4) considered only those cases decided between 1789 and 1820. For examples of later 19th century cases asserting a claim of inherent procedural authority, see, for example, United States v. Marchant, 25 U.S. (12 Wheat.) 480 (1827) (concluding that the common law granted a trial court the discretion to determine whether defendants ought to be tried separately or together); Kentucky v. Dennison, 65 U.S. (24 How.) 66 (1861); Bowen v. Chase, 94 U.S. (4 Otto) 812 (1876); Mitchell v. Overman, In re Hein, Funk v. United States, 290 U.S. 371 (1933). More recent cases making this claim are discussed supra note 98-100 and accompanying text.

201 This is not to say that other factors do not also limit the reach of federal procedural common law: as discussed above, the Tenth Amendment may well render general choice-of-law principles a constitutional constraint on federal regulation of state court procedure, no matter whether that regulation derives from Congress or the courts. See supra note 64. If, however, the “inherent authority” theory is sound, it identifies a constitutional constraint uniquely applicable to the federal courts in the regulation of state-court procedure. Federal courts may regulate state-court procedure pursuant to valid constitutional or congressional delegations of the authority to do so. But so long as the federal courts proceed pursuant to their general Article III authority in developing procedural common law, those rules are necessarily confined in their application to the federal courts.
operation to the adopting court.\textsuperscript{202} If the “inherent authority” theory holds, therefore, procedural common law cannot serve as a vehicle for developing a set of uniform common law rules binding throughout the federal courts.

This is a somewhat peculiar consequence for doctrines like preclusion, which have existed as uniform doctrines throughout history.\textsuperscript{203} Consider that during the eighteenth and much of the nineteenth century, procedures found in the case law, as opposed to procedures expressed in court rules, proceeded along two tracks. There were the traditional common law rules, like rules of preclusion and remittitur, which courts understood themselves to apply rather than make.\textsuperscript{204} There were also the discretionary procedural rules, like the service-of-process rules announced by the Supreme Court in \textit{Chisholm}.\textsuperscript{205} The “inherent authority” theory effectively collapses these tracks into one, treating all procedures articulated through case law as exercises of judicial discretion. There is no doubt, therefore, that characterizing all procedural common law as an exercise of inherent judicial authority re-rationalizes some pre-	extit{Erie} common law into a post-	extit{Erie} framework. But \textit{Erie}’s approach to federal common law appears to demand some such translation, not only in matters of substantive common law, but in matters of procedure as well. Once common law is treated as the product of judicial discretion, it becomes necessary to articulate a justification for its making. For procedural common law, the strongest justification is one that already existed: the notion that Article III impliedly authorizes federal courts to take procedural measures that facilitate the decision of cases.

While this is an awkward result insofar as it decentralizes the development of procedural common law, one ought to recall that just before \textit{Erie} was decided, Congress gave the federal courts a vehicle for developing uniform rules: the Rules Enabling Act.\textsuperscript{206} In fact, the resulting federal rules of civil procedure, criminal procedure, and evidence themselves largely translated pre-	extit{Erie} procedural common law into uniform court rules—sometimes wholesale and sometimes with significant modifications.\textsuperscript{207} Seen in this light, doctrines that have lingered in common law form may be anomalies insofar

\textsuperscript{202} See supra note 103 and accompanying text.
\textsuperscript{203} This theory produces a less awkward for result for doctrines like forum non conveniens, which are relatively recent, see supra note 37, and for doctrines like stare decisis, which already differ from federal court to federal court, see supra notes 42-45 and accompanying text. It is also important not to overstate the degree to which any pre-	extit{Erie} procedural common law was uniform. The fact that state and federal courts of the period drew from a common set of procedural traditions did give some degree of uniformity to the procedures observed. Jurisdictional variations to traditional procedures, however, inevitably cropped up. See \textit{Goebel}, supra note 142, at 579.
\textsuperscript{204} See supra 169-172 and accompanying text.
\textsuperscript{205} See supra Part III.B.(4)(a)-(c).
\textsuperscript{206} The Rules Enabling Act was passed in 1934. The first rules promulgated pursuant to that Act, the Federal Rules of Civil Procedure, took effect in 1938, the very year that \textit{Erie} was decided.
\textsuperscript{207} Consider that the Federal Rules of Civil Procedure continued, with minor changes, many procedural mechanisms long employed by the common law system. For example, motions to dismiss (previously known as demurrers), motions for new trials, and even class actions are procedural devices long employed by courts of common law and equity. At the same time, it made significant changes to the common law by, for example, replacing common law with notice pleading. The Federal Rules of Evidence are similarly modeled upon many longstanding common law doctrines. For example, both the hearsay and character rules largely codify the common law.
as they attempt uniform regulation of federal procedure outside of the statutorily provided framework.

It must also be recognized that the press for procedural uniformity is itself a relatively recent phenomenon. From 1789 to 1934, there was a significant amount of discord in the federal courts, as the Process Act and then the Conformity Act instructed each federal court to follow the procedures observed by the state in which it sat.\(^{208}\) Consider too that the forebears of American courts, the English courts, treated inherent authority as local authority. In his renowned treatise, William Tidd explains that “general rules are confined in their operation to the court in which they are made . . . . Hence we find, that acts of parliament are sometimes necessary, to introduce regulations extending to all courts . . . .”\(^{209}\) With respect to American practice, G. Edward White observes that the animating feature of the Marshall Court’s approach to the development of federal procedure was “autonomy for the federal courts to develop their own procedures and deference to the lower courts when they developed them.”\(^{210}\) Thus, jurisdictional autonomy over procedural regulation is far from a new approach.

### IV. Limits on the Judiciary’s Inherent Procedural Authority

Having supported the claim that federal courts possess inherent procedural authority, this Part considers what constitutional limits might cabin its exercise. The scholarship and cases identify two potential limits on inherent procedural authority. The first is a necessity limit, which would limit any exercise of inherent judicial authority, including inherent procedural authority, to only those situations in which it is necessary for the resolution of a case. The second is a “procedure” limit, which would permit the judiciary to initiate any regulation that fairly qualifies as “procedural”—in other words, one limited to the regulation of internal court processes as opposed to out-of-courtroom conduct. In what follows, I adopt a limit grounded in procedure, rather than necessity, although I do so for reasons different than those identified in previous scholarship.

#### A. Necessity

The case law and scholarship repeatedly insist that courts possess inherent authority only to the extent that it is necessary to the primary exercise of judicial power: deciding cases.\(^{211}\) The “necessity” limit is touted as a way of ensuring the judiciary’s

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\(^{208}\) For a description of the Process Act, see supra note 139 and accompanying text. The Conformity Act of 1872 differed from the Process Act insofar as it instructed federal courts to follow the contemporary procedures of the state in which it sat instead of the procedures applicable in the state on the date of its admission to the union. Act of June 1, 1872, ch. 255, §5, 17 Stat. 196, 197.

\(^{209}\) TIDD, supra note 156, at lxxi-lxxii.

\(^{210}\) WHITE, supra note 158, at 857.

\(^{211}\) See, e.g., United States v. Degen, 517 U.S. 820, 829 (1996) (“A court’s inherent power is limited by the necessity giving rise to its exercise.”); Roadway Express, Inc. v. Piper, 447 U.S. 752, 765-66 (1980) (“The inherent powers of federal courts are those which ‘are necessary to the exercise of all others.’”) (quoting United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32, 33 (1812)). See also Pushaw, supra note 41, at 741-43, 847-49 (arguing that the judiciary possesses only those instrumental powers that are strictly necessary to the exercise of judicial power, as opposed to those that are merely useful to it); Van Alstyne, supra note 10, at 111 (“Neither the executive nor the judiciary possess any powers not essential (as opposed
ability to protect its own power, while simultaneously cabining that power out of respect for the Constitution’s distribution of authority. Any exercise of authority not expressly granted by Article III risks trampling upon the prerogatives that properly belong to the other branches of government.

If applicable, the necessity limit would significantly undercut the ability of the federal courts to make procedural common law. That is so because the Rules Enabling Act, along with the various sets of Federal Rules that have resulted from it, largely eliminate the need for federal courts to act on a case-by-case basis. In addition, it is hard to argue that many of the common law rules that federal courts have adopted are necessary, as opposed to merely useful, to the disposition of cases. Of the procedural common law described in this article, the basic rules of claim preclusion, issue preclusion, and stare decisis have the strongest claim to necessity. But are abstention, forum non conveniens, and remittitur necessary, as opposed to useful, to deciding cases? Because so few procedural rules are truly necessary to the exercise of judicial power, a “necessity” limit would severely limit the ability of federal courts to regulate procedure in the course of adjudication in reliance upon their inherent authority.

Two primary arguments are pressed in favor of a necessity limit on the judiciary’s inherent authority. The first argues that the Constitution’s Sweeping Clause vests Congress with the exclusive authority to regulate both the judicial and executive branches in ways that are merely “beneficial” to the exercise of their expressly granted powers. The second relies on tradition, pointing out that in a series of cases reaching as far back as the Founding era, the Supreme Court itself has suggested that a necessity limit applies. I discuss each of these arguments in turn.

(1) The Sweeping Clause

William Van Alstyne has advanced a “highly tentative” but nonetheless influential argument about the “horizontal effect” of the Sweeping Clause, which vests in Congress the authority “[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers . . . .” According to his argument, the Sweeping Clause limits any implied powers possessed by the judiciary and the executive to those that are “indispensable, rather than merely appropriate, or helpful, to the performance of their express duties” by giving Congress the exclusive authority to determine whether to give the executive and the judiciary powers that are merely

to those that may be merely helpful or appropriate) to the performance of its enumerated duties as an original matter . . .”).

212 Cf. Degen, 517 U.S. at 823-24 (“The extent of these [inherent] powers must be delineated with care, for there is a danger of overreaching when one branch of the Government, without benefit of cooperation or correction from others, undertakes to define its own authority.”).

213 See Pushaw, supra note 119 at 851 (“Any claim of ‘necessity’ is further weakened by the fact that Congress has delegated to judges a prominent role in drafting adjective laws.”).

214 See Lear, supra note 41, at 1160 (“Few modern forum non conveniens dismissals are necessary for the courts to function.”); Pushaw, supra note 119, at 855 (similar); Ryan, supra note 80, at 777 n.70 (similar).

helpful.\textsuperscript{216} Although the federal courts have not embraced this argument,\textsuperscript{217} it has attracted scholarly support.\textsuperscript{218}

Van Alstyne’s widely cited argument is attractive insofar as it offers a determinate limit to inherent authority, but the argument is an awkward reading of the constitutional text. As Van Alstyne points out, the Clause surely gives Congress the authority to pass laws beneficial to the exercise of the powers expressly granted the other two branches.\textsuperscript{219} But so too does it give Congress the power to pass laws absolutely necessary to the exercise of the powers expressly granted the other two branches. None of the scholars who embrace the supposed “horizontal effect” of the Sweeping Clause contends that the Clause deprives either the executive or the judiciary of those inherent powers absolutely necessary to the exercise of their respective powers; on the contrary, both Van Alstyne and those who subscribe to his argument acknowledge that the executive and the judiciary retain such powers despite the Clause.\textsuperscript{220} Given, however, that the Clause authorizes Congress to regulate both the necessary and the beneficial, it is difficult to understand why one should read the Clause to foreclose the other branches from acting in the latter case but not the former.\textsuperscript{221} When the Clause is read in conjunction with the understanding that both the executive and the judiciary impliedly possess those powers necessary to the execution of their constitutional duties, the better interpretation of the Sweeping Clause is that it has no horizontal effect at all. It is a description of Congress’s power that does not itself define what implied powers the other branches might possess. Because the Clause is not inconsistent with the proposition that power can exist between Congress and the other branches concurrently, any constitutional limit on the implied powers of the executive and judiciary must derive from elsewhere.

(2) Tradition

In the very first case in which the Supreme Court discussed the inherent power of the federal courts, it interpreted that power narrowly. In \textit{United States v. Hudson & Goodwin}, the Supreme Court wrote language that has been repeated frequently ever since:

\textsuperscript{216} Van Alstyne, \textit{supra} note 10, at 107.
\textsuperscript{217} Indeed, the Supreme Court impliedly rejected it in \textit{Chisholm v. Georgia}, 2 U.S. 419 (1793). \textit{See supra} note 184. Even apart from this rejection of the Sweeping Clause argument, the Supreme Court has interpreted the implied powers of both the Executive and the judiciary far more broadly than Van Alstyne’s proposal would permit. \textit{See infra} note 223 and accompanying text.
\textsuperscript{218} \textit{See supra} notes 213-214. Sara Sun Beale, by contrast, has rejected the “necessity” limit, at least as applied to the Supreme Court’s implied powers, as inconsistent with the case law, \textit{see supra} note 29, at 1470-73. She also points out that the lack of a comparable “Sweeping Clause” in Articles II and III can be explained by the broader grants of executive and judicial in those articles, in comparison to the enumerated powers listed in Article I. \textit{Id.} at 1471-73.
\textsuperscript{219} \textit{See McCulloch v. Maryland}, 17 U.S. 316, 415 (1819).
\textsuperscript{220} \textit{See, e.g.}, Van Alstyne, \textit{supra} note 10, at 111.
\textsuperscript{221} It also bears emphasis that to the extent that the Clause vests Congress with exclusive power, that power is to “make laws.” \textit{Cf. Youngstown Sheet & Tube Co. v. Sawyer}, 343 U.S. 579, 588-89 (1952) (holding that presidential order, which resembled a statute, infringed upon Congress’s power under the Sweeping Clause to make laws). It is doubtful that rules prescribed in the course of common law adjudication infringe upon Congress’s power to prescribe prospective, generally applicable laws.
Certain implied powers must necessarily result to our Courts of justice from the nature of their institution . . . To fine for contempt . . inforce [sic] 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.\textsuperscript{222}

The cases and scholarship reflect uncertainty about what to make of \textit{Hudson} and its progeny. On the one hand, many interpret \textit{Hudson} to stand for the proposition that Article III’s express grant of judicial power impliedly authorizes the judiciary to employ only a narrow set of instrumental powers: those absolutely necessary to accomplishing the end of deciding cases. Interpreting Article III to authorize not only those instrumental powers that are strictly necessary, but also those that are merely beneficial, the argument goes, disrespects the Constitution’s separation of powers. On the other hand, \textit{Hudson}’s necessity limit is ignored as often as it is invoked, and indeed, the mine-run of cases defining the judiciary’s inherent powers do not observe it.\textsuperscript{223}

Sorting out the confusion surrounding the impact of \textit{Hudson} and its progeny requires analysis of the following question: Should these cases be understood as holding that Article III clothes the judiciary with only those powers that are indispensable to deciding cases? The answer to that question is no. While the broad-ranging interpretation of \textit{Hudson} has greatly influenced the debate about the scope of the judiciary’s implied powers, reading the case as a general limit on the judiciary’s implied powers overlooks its context. \textit{Hudson} is not a case generally addressing the scope of federal judicial power; it is a case specifically addressing the question whether federal courts possess jurisdiction over common law crimes. In asserting that federal courts possess inherent power to punish contempt, the Court was attempting to distinguish the contempt power—a power it claimed—from the inherent power to adjudicate common law crimes—an ostensibly similar power that it denied.\textsuperscript{224}

Consider the relationship between the contempt power and an inherent power to assert jurisdiction over common law crimes. The contempt power, which enables a court to punish disobedience of its orders with imprisonment and fines, is a criminal power. It is also, however, a power that courts have long claimed to possess even in the absence of statutory authorization. As such, the contempt power might be thought to justify federal jurisdiction over common law crimes (on the rationale that if a federal court can punish contempt without statutory authorization, so too can it punish other crimes without statutory authorization). Conversely, a holding that a federal court lacks power to punish common law crimes might be thought to deny that it possesses power to punish contempt in the absence of statutory authorization (on the rationale that if all crimes require legislative definition, so does contempt). To avoid either result, the \textit{Hudson} Court had to

\textsuperscript{222} 11 U.S. 32, 34 (1812) (emphasis added).
\textsuperscript{223} See Ryan, supra note 80, at 777 (making this point).
\textsuperscript{224} That the Court was attempting to distinguish the two is clear from the text of the opinion. Immediately after the Court asserted inherent authority over contempt, see supra note 222 and accompanying text, it asserted that “all exercise of criminal jurisdiction in common law cases we are of opinion is not within their implied powers.” 11 U.S. at 34.
distinguish a court’s assertion of jurisdiction over contempt from its assertion of jurisdiction over common law crimes.\textsuperscript{225}

The “necessity” limit provides that distinction. Federal courts can punish contempt because the ability to do so is necessary to the discharge of the judicial function, but they cannot claim a more general authority to punish crimes that do not inhibit a court’s ability to decide a case. Necessity, therefore, creates a very limited exception to the general rule that only the legislature can criminalize conduct. It is notable in this regard that those cases invoking \textit{Hudson}’s “necessity” test similarly involve the imposition of punitive or semi-punitive sanctions by the judiciary.\textsuperscript{226} Given the context of \textit{Hudson}, and the state of the law since, there is no reason to treat the case law as confining \textit{any} exercise of implied judicial power to only those circumstances in which it is indispensable. The necessity test is best understood as connected only to the issue that spawned it: the judiciary’s ability to sanction misbehavior that Congress has not criminalized. So understood, the “necessity” test preserves a limited core of judicial authority from falling within the general prohibition on adjudicating crimes without congressional authorization, while at the same time preventing a court’s power to punish misbehavior from infringing too far on Congress’s exclusive power to determine the reach of federal criminal jurisdiction.

This interpretation of the “necessity” limit not only explains \textit{Hudson} and its progeny, but it is consistent with the way that the powers implied by the Constitution are otherwise understood. Recall that in \textit{McCulloch}, the Court described the Constitution’s express grants of power as carrying with them not only those powers indispensable to their execution, but also those powers that would facilitate their execution.\textsuperscript{227} The Court

\textsuperscript{225} In drawing this distinction, the Court was not responding to an argument made by counsel, as both the Attorney General and counsel for the defendants declined to argue the case. Nonetheless, the indictment rendered against Hudson and Goodwin, which was one of the few items in the record before the Supreme Court, gave the Court reason to distinguish between contempt of court, which it could punish without statutory authorization, and “contempt of the government of the United States,” which it could not. \textit{See Hudson} indictment (denouncing defendants for “offending a contempt of the government of the United States against the Peace and dignity of the United States and in violation of the laws thereof”); \textit{see id.} at 230-31 (holding that Congress could claim a “punishing power” on the ground of self-preservation only if the power claimed is “the least possible power adequate to the end proposed”). Because it deals with Congress, rather than the courts, \textit{Anderson} cannot be understood to distinguish contempt from the particular question of common law criminal jurisdiction. It is, however, analogous to \textit{Hudson} insofar as it sets narrow boundaries on the ability of any branch to impose criminal sanction without the cooperation of the other branches. Indeed, the special considerations relating to criminal punishment may well be what distinguishes \textit{Anderson}’s limited view of Congress’s implied authority from \textit{McCulloch}’s expansive one.

\textsuperscript{226} \textit{See}, e.g., \textit{Degen v. United States}, 517 U.S. 820, 829 (1996) (holding that district court exceeded the limit of necessity when it struck a defendant’s pleadings in a civil forfeiture case on the ground that he remained a fugitive in a related criminal case); \textit{Chambers v. NASCO, Inc.}, 501 U.S. 32, 43-46 (1991) (emphasizing necessity in the context of inherent power to sanction misconduct); \textit{Roadway Express, Inc. v. Piper}, 447 U.S. 752, 766 (1980) (emphasizing necessity limit in context of recognizing inherent authority of court to shift attorneys’ fees as a sanction for misconduct). The Court also invoked a necessity test in \textit{Anderson v. Dunn}, 19 U.S. 204 (1821), where it recognized Congress’s power to punish contempt. \textit{See id.} at 230-31 (holding that Congress could claim a “punishing power” on the ground of self-preservation only if the power claimed is “the least possible power adequate to the end proposed”). Because it deals with Congress, rather than the courts, \textit{Anderson} cannot be understood to distinguish contempt from the particular question of common law criminal jurisdiction. It is, however, analogous to \textit{Hudson} insofar as it sets narrow boundaries on the ability of any branch to impose criminal sanction without the cooperation of the other branches. Indeed, the special considerations relating to criminal punishment may well be what distinguishes \textit{Anderson}’s limited view of Congress’s implied authority from \textit{McCulloch}’s expansive one.

\textsuperscript{227} 17 U.S. 316, 409 (1819) (“It is not denied, that the powers given to the government imply the ordinary means of execution.”); \textit{see also id.} at 407-11 (1819).
has not confined this understanding of implied power to congressional power; rather, it has brought it to bear in the contexts of executive and judicial power as well.\textsuperscript{228} Particularly relevant for present purposes, the Court has never mentioned, much less imposed, a necessity test on those occasions on which it has asserted inherent procedural authority.\textsuperscript{229} When addressing the inherent procedural authority of the federal courts, the Court has taken the same approach pursued in \textit{McCulloch}: it has claimed power over procedure on the ground that it is useful to the exercise of judicial power, not on the ground that it is indispensable to it. While exercise of power over procedure is surely cabined to a large degree by the enacted law, confining it to those instances in which it is indispensable would unduly cramp a federal court’s ability to get its job done.

\section*{B. “Procedure” as a Limit}

Rejection of “necessity” as a limit on a federal court’s inherent procedural authority leaves open the question what other limit might apply. The best, if somewhat unsatisfying, answer is that the federal courts possess inherent authority to adopt rules governing litigation so long as they are truly “procedural.” “Procedure” is a term difficult to define, and I cannot offer a definition any better than that proposed by others: “[P]rocedural law has its focus in the way a lawsuit progresses, not on the substantive claims the parties make.”\textsuperscript{230} This definition, to be sure, suffers the same flaw present in any definition of procedure: It does not resolve the hard questions that inevitably arise in the effort to draw a line between rules that are truly procedural and those that are substantive. Notwithstanding this difficulty, both the Constitution and relevant statutes offer some guidance in resolving hard cases.

The Constitution gives every reason to resolve doubts against the existence of inherent power. The fact that a “necessity” limit is inapplicable here does not mean that separation-of-powers concerns are entirely absent. Just as any judicial imposition of punishment must be mindful of Congress’s generally exclusive power to determine the reach of federal criminal jurisdiction, any judicial adoption of procedure must be mindful of Congress’s generally exclusive power to determine substantive rights. Statutory

\textsuperscript{228} See, e.g., \textit{Youngstown Sheet & Tube Co. v. Sawyer}, 343 U.S. 579, 641 (1952) (Jackson, J., concurring) (giving the President’s “enumerated powers the scope and elasticity afforded by what seem to be reasonable practical implications instead of the rigidity dictated by a doctrinaire textualism”).

\textsuperscript{229} The Court has not invoked a necessity standard when describing the inherent authority of a federal court to take docket-control measures. \textit{See, e.g.}, Clinton v. Jones, 520 U.S. 681, 706 (1997) (“The District Court has broad discretion to stay proceedings as an incident to its power to control its own docket.”); Landis v. N. Am. Co., 299 U.S. 248, 254 (1936) (asserting that district court has inherent power to stay proceedings for the sake of “economy of time and effort for itself, for counsel, and for litigants”); Bowen v. Chase, 94 U.S. (4 Otto) 812, 824 (1876) (describing power of courts to consolidate cases “to prevent any practical inconvenience”). Nor has it invoked a necessity standard when describing its power to frame procedural rules in the course of adjudication. \textit{See, e.g.}, Thomas v. Arn, 474 U.S. 140, 146 (1985) (claiming that the courts of appeals possess inherent authority to adopt “procedures deemed \textit{desirable} from the viewpoint of sound judicial practice”) (emphasis added); United States v. Hasting, 461 U.S. 499, 505 (1983) (claiming that federal courts possess inherent authority to adopt procedures “guided by considerations of justice”) (quoting McNabb v. United States, 318 U.S. 332, 341 (1943)); \textit{In re Hien}, 166 U.S. 432, 436-37 (1897) (explaining that “courts of justice possess the inherent power to make and frame reasonable rules”).

\textsuperscript{230} Matasar & Bruch, \textit{supra} note 36, at 1325.
authorization might justify the Supreme Court in adopting an expansive definition of “procedure.” For example, in the context of the Rules Enabling Act, which authorizes procedural but not substantive prospective court rules, the Supreme Court has adopted a broad definition of procedure, interpreting it to include any matter “which, though falling within the uncertain area between substance and procedure, [is] rationally capable of classification as either.” Whether or not such a broad interpretation of “procedure” is appropriate in the context of the Rules Enabling Act, it is surely inappropriate in the context of determining the reach of the power implied by Article III. In the latter context, where the courts proceed without congressional authorization, respect for the constitutional separation of powers militates strongly in favor of construing “procedure” narrowly. Rather than resolving close questions in favor of the existence of authority, as they do in the context of the Rules Enabling Act, federal courts proceeding only on the strength of inherent authority ought to resolve close questions against the existence of authority. Such an approach would respect the separation-of-powers principle by ensuring that the judiciary’s inherent procedural authority does not tread upon power committed exclusively to Congress.

It is also worth considering the way that federal statutes affect the inherent power of the federal courts to develop procedural common law. No federal statute appears to withdraw this power. The Rules of Decision Act, however, defines the range within which federal courts can exercise it, and the Act reinforces the “procedural” limit that the Constitution otherwise imposes. The Act instructs federal courts to apply state law “rules of decision” unless federal law “otherwise requires or provides.” Loosely understood, this phrase instructs federal courts (absent contrary instruction) to apply state

231 Cf. Youngstown, 343 U.S. at 635 (Jackson, J., concurring) (“When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.”). See also Sibbach v. Wilson 312 U.S. 1, 14 (1941) (claiming that the power to order medical exams is within the procedural authority conferred by the Rules Enabling Act but not within the procedural authority that a court possesses in its own right.).


233 Hanna v. Plumer, 380 U.S. 460, 472 (1965) (holding that Congress’s power to regulate procedure under the Sweeping Clause is so broad, and that it delegated that power to the Court in the Rules Enabling Act). See also id. at 476 (Harlan, J., concurring) (“So long as a reasonable man could characterize any duly adopted federal rule as ‘procedural,’ the Court would have it apply no matter how seriously it frustrated the State’s substantive regulation of primary conduct . . . .”).

234 Id. at 471 (“The line between ‘substance’ and ‘procedure’ shifts as the legal context changes.”).

235 Accord Beale, supra note 29, at 1476-77.

236 The Rules Enabling Act is the most likely candidate, and it is highly doubtful that it withdraws the power. Courts generally presume that Congress does not intend to withdraw their inherent authority unless it explicitly says otherwise, see, e.g., Link v. Wabash R.R. Co., 370 U.S. 626, 629-33 (1962), and the Rules Enabling Act does not contain a clear statement to that effect. Even if the Act required that result, it is not clear that it would be constitutional. A good argument could be made that wholly withdrawing the court’s ability to regulate procedure in the process of adjudication would impede rather than facilitate the execution of judicial power, and that doing so would thus lie beyond Congress’s authority. See Engdahl, supra note 68, at 162-63 (arguing that the Sweeping Clause only authorizes Congress to pass procedural laws that facilitate, rather than impede, the exercise of the judicial power).

237 Cf. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 72 (1938) (claiming that the Rules of Decision Act is “merely declarative of the rule which would exist in the absence of the statute”).

In diversity cases, courts identify state “rules of decision,” the state substantive law they are bound to follow, by asking whether refusal to follow the relevant state rule would undermine the “twin aims of *Erie*”—namely, “discouragement of forum shopping and avoiding inequitable application of the law.” If it would not, then the court can consider the matter a procedural one that the court is free to regulate. Thus, at least in diversity cases, the “twin aims” gloss on the Rules of Decision Act offers a concrete way for federal courts to determine the bounds of their procedural common lawmaking authority.

The Rules of Decision Act’s impact on federal question cases is less clear. While the Rules of Decision Act ostensibly applies to both diversity and federal question cases, courts rarely apply it—or, indeed, even discuss it—in the latter context. As a practical matter, it may be that in federal question cases, the applicable federal law, either by preemption or express delegation, is often thought to require the development of federal procedural rules rather than application of state law. But where this is not the case, the cases and commentary offer little insight into how a federal court should go about identifying the line between the state substantive law they are bound to follow and the procedural law they are free to create. On the one hand, in a federal question case, where the federalism concerns animating *Erie* are absent, federal courts might consider the “twin aims” test inapposite and pursue some other (as yet undefined) way of distinguishing procedure from substance. On the other hand, because most federal question cases can be filed in either state or federal court, and because there is something to be said for construing “rules of decision” consistently in federal question and diversity cases, asking whether application of a particular federal procedural common law rule would encourage forum shopping or inequitable administration of the law might be a useful way of identifying state “rules of decision” even in a federal question case. Regardless how federal courts choose to apply the Rules of Decision Act in federal question cases, the Act reinforces the proposition that the procedural common lawmaking authority of the federal courts does not extend beyond matters that are truly procedural.

**Conclusion**

Existing theories of federal common law do not account for the federal common law of procedure. This body of law exists, however, and this Article has offered a framework for understanding it. It has argued that unlike federal substantive common law, which is grounded in enclaves committed to exclusive federal control, federal procedural common law is primarily grounded in the authority that Article III impliedly grants each federal court to regulate its procedure in the course of adjudicating cases.

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239 See Merrill, *supra* note 31, at 32.
240 See Campbell v. City of Haverhill, 155 U.S. 610, 615-16 (1895) (holding that the Rules of Decision Act applies and requires application of state rules of decision even in a case over which federal courts possess exclusive jurisdiction); see also Burbank, *supra* note 59, at 760 (arguing that the Act applies to both diversity and federal question cases); Merrill, *supra* note 31, at 31 n.138 (same). *but see* DelCostello v. Int’l Bhd. of Teamsters, 462 U.S. 151, 159 n.13 (1983) (implying that the Act does not apply to federal question cases).
In some respects, the theory advanced in this Article offers a way of understanding features of federal procedural common law that are recognized but unexplained. It accounts for the different posture of the federal courts vis-à-vis Congress in matters of procedure, as opposed to matters of substance. Rooting procedural common law in the inherent authority of courts explains why federal courts can regulate themselves even in those rare instances in which Congress lacks the power to do so. It accounts for the different posture of the federal courts vis-à-vis the states in matters of procedure, as opposed to substance. When a federal court fashions procedural common law to facilitate the exercise of the judicial power granted by Article III, that common law, by its own terms, does not extend to non-Article III courts. And finally, it accounts for why federal courts do not apply a “necessity” limit in formulating procedural common law, despite frequent claims that such a limit applies. The “necessity” limit balances the federal court’s ability to preserve its authority against Congress’s exclusive authority to define federal crimes. In the context of procedure, where this concern is absent, the Constitution requires only that federal courts confine their lawmaking to matters that are truly “procedural.”

At the same time, the theory advanced in this Article upsets a deeply held assumption about federal procedural common law: that federal procedural common law, like federal substantive common law, applies uniformly throughout the federal courts. Procedural common law would only mirror substantive common law in that respect if it, like substantive common law, existed solely on the rationale of constitutional preemption. With Article III as its basis, it is treated differently. Inherent authority is local authority, permitting a court to regulate its own proceedings subject to abuse-of-discretion review. The “inherent authority” theory does not envision a uniform federal common law of procedure, but rather one that can vary from jurisdiction to jurisdiction.

The theory developed in this Article thus both explains and challenges the status quo. It does so, however, in ways that I hope advance our understanding of federal-court power. In failing to attend to the problem of procedural common law, modern federal courts theory holds a set of incomplete and conflicting assumptions. It sometimes treats procedural common law as if it were, like substantive common law, justified solely by constitutional preemption, but insists that Congress cannot always abrogate it. It assumes that federal courts possess inherent procedural authority, but does not examine the basis for that assumption. It accepts inherent authority as local, but assumes, without reflection, that procedural authority is an exception to that rule. It assumes that federal courts possess inherent procedural authority, but does not treat federal procedural common law as an outgrowth of it. While some might resist the way that I resolve these problems, this Article underscores the need to address them.