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Essay

The Supreme Court, the Rules Enabling Act, and the Politicization of the Federal Rules: Constitutional and Statutory Implications

Martin H. Redish† and Uma M. Amuluru††

To a certain portion of the populace, the Federal Rules of Civil Procedure probably represent little more than highly technical and esoteric directives for the day-to-day operation of the federal litigation process—if, indeed, they represent anything at all. Even the average federal litigator may well think of the Rules primarily as either technical requirements that must be complied with or strategic devices employable to facilitate victory. In reality, however, many of the Federal Rules have a dramatic impact on fundamental socio-political and economic concerns: the allocation of governmental resources, the redistribution of private wealth, the effectiveness of legislatively imposed behavioral proscriptions, and concerns of fairness and equality. This is probably not what either the Congress that originally authorized them, the Advisory Committee that originally prepared them, or the Supreme Court Justices who originally promulgated them expected the Rules to do. Recognized at the time or not, however, the choices made by the drafters of the Rules have often had a significant impact on foundational moral, economic, and social choices made by society as a whole.

Over the last twenty-five years or so, the political stakes involved in shaping the Federal Rules of Civil Procedure have gradually risen to the surface, and those interest groups most affected have responded accordingly. During that time, the process by which the Rules are revised has been made consid-

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erably more open, and affected organizations and entities have significantly increased their efforts to influence the direction those revisions take.

It is all but inconceivable that it could have been any other way. With the benefit of 20/20 hindsight, at least, we can say with some assurance that it is impossible in most cases to completely separate the procedural from the substantive. Viewed from today's perspective, the notion that by confining the Rules to matters of "procedure," as the Rules Enabling Act of 1934 directed,[1] one could somehow prevent them from having important and controversial socio-economic and political consequences outside the courtroom is absurd. But formal recognition of the often-overlapping nature of the substantive-procedural interaction on a political level did not come until the Supreme Court's 1958 decision in *Byrd v. Blue Ridge Rural Electric Cooperative*,[2] a relatively late point in the development of the doctrine growing out of the Court's momentous decision in *Erie Railroad Co. v. Tompkins.*[3] Even then, the recognition did not come in a case concerning the scope of the Federal Rules. Because *Erie* had not even been decided at the time of the Enabling Act's passage in 1934, it is perhaps unreasonable anachronistically to superimpose on the congressional drafters a sophisticated understanding of how procedural choices may impact substantive policies.

Be that as it may, the political realties of today are clear, and respected commentators have acknowledged the potentially broad political impact of the Rules.[4] What is so puzzling, however, is that despite widespread recognition of these realities, no scholar has provided a thoughtful analysis of what implications, if any, this recognition should have on how we view the Rules Enabling Act's constitutionality.

Recognition of the inherently political nature of at least a portion of the Federal Rules of Civil Procedure raises funda-

1. *See* 28 U.S.C. § 2072(a) (2000) ("The Supreme Court shall have the power to prescribe general rules of practice and procedure . . . .").

2. *See* 356 U.S. 525, 549 (1958) (Whittaker, J., concurring in part and dissenting in part) ("The words 'substantive' and 'procedural' are mere conceptual labels and in no sense talismanic.").

3. *See* 304 U.S. 64, 91–92 (1938) (Reed, J., concurring) ("The line between procedural and substantive law is hazy . . . .").

4. *See, e.g.*, Stephen B. Burbank, *Procedure, Politics and Power: The Role of Congress*, 79 NOTRE DAME L. REV. 1677, 1705 (2004); Paul D. Carrington, *"Substance" and "Procedure" in the Rules Enabling Act*, 1989 DUKE L.J. 281, 290 (1989).

mental questions concerning the scope of our nation's constitutional democracy. The Supreme Court sits at the pinnacle of the one branch of the federal government formally insulated by the Constitution's Framers from majoritarian pressures.[5] While there were obvious and valid reasons for establishing such insulation, there were also recognized risks to a democratic system in doing so. To prevent the insulated judiciary from coopting the power of the representative and accountable branches, the Framers imposed significant restrictions on the scope of the judicial power. The Constitution grants to the judiciary no purely legislative authority. To the extent the Supreme Court may promulgate subconstitutional federal law, it must do so as an incident to the performance of the inherently judicial function of case resolution.[6] Yet the Rules Enabling Act invests in the Supreme Court lawmaking power untied to the judicial process. It was the statute's express insulation of the authority to abridge or modify a "substantive right" that was generally assumed to preserve Congress's legislative power.[7] The reasoning appears to have been that where the Court merely promulgates rules of "procedure," it is not overstepping its constitutionally limited bounds because procedure is, by definition, internal to the operation of the judiciary; it has no impact outside the four walls of the courthouse. We now know—and probably should have known at the time of the Act's passage—that this is political nonsense. In numerous instances, procedural choices inevitably—and often intentionally—impact the scope of substantive political choices. This recognition should logically raise a concern that the Act unconstitutionally vests in the Supreme Court power that is reserved, in a constitutional democracy, for those who are representative of and accountable to the electorate.

We of course do not mean to suggest that the constitutionality of the Rules Enabling Act—at least as a practical matter—is today in serious doubt. The Supreme Court has confidently asserted the Act's constitutionality on more than one occasion,[8] and there is absolutely no reason to imagine that this

5. *See* U.S. CONST. art. III.

6. *Id.* § 2, cl. 1 (granting federal judicial power to adjudication of cases and controversies).

7. *See* 28 U.S.C. § 2072(b) (2000) ("Such rules shall not abridge, enlarge or modify any substantive right.").

8. *See* Mistretta v. United States, 488 U.S. 361, 387 (1989) (discussing Sibbach v. Wilson & Co., 312 U.S. 1 (1941), and various other cases); Sibbach

attitude will change in the foreseeable future. Nevertheless, engaging in a constitutional inquiry at this point serves two important functions. First, purely as a matter of constitutional theory, there is legitimate intellectual interest in examining where the Court's rulemaking power fits within the framework of the nation's commitment to constitutional democracy.

Second, and of more immediate pragmatic concern, recognition of the serious constitutional difficulties to which the Rules Enabling Act inherently gives rise can and should have an important impact on construction of the Act's directives. As already noted, by its express terms the Act insulates authority to abridge, enlarge, or modify a "substantive right" from the Court's rulemaking power.[9] Considerable judicial effort has gone into determination of the appropriate interpretation of this phrase, without anything approaching total satisfaction.[10] Nor have scholars come to consensus on the subject.[11]

All concerned appear to have ignored that the Congress that drafted and passed the Act proceeded on a misguided assumption about the completeness of the substance-procedure dichotomy when it imposed the "substantive right" restriction on the Court's rulemaking power.[12] Its obvious goal was to preserve for the accountable and representative Congress fundamental normative choices of social policy, and Congress mistakenly believed it had achieved this goal by vesting in the Court solely the power to regulate "practice and procedure."[13] The question now arises, how do we enforce the language the Act's framers employed to restrict the Court's policy-making

v. Wilson & Co., 312 U.S. 1, 9–10 (1941) ("Congress has undoubted power to regulate the practice and procedure of federal courts, and may exercise that power by delegating to this or other federal courts authority to make rules not inconsistent with the statutes or [C]onstitution of the United States . . . .").

9. 28 U.S.C. § 2072(b).

10. *See, e.g.*, Bus. Guides, Inc. v. Chromatic Commc'ns Enters., Inc., 498 U.S. 533, 552 (1991); Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 391–93 (1990); Burlington N. R.R. Co. v. Woods, 480 U.S. 1, 8 (1987); Hanna v. Plumer, 380 U.S. 460, 472 (1965); *Sibbach*, 312 U.S. at 9–10.

11. *Compare* Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1085–97 (1982) (advocating a historical approach to interpreting the Rules Enabling Act and requiring the allocation of power between the Supreme Court and Congress, not between the federal government and state government), *with* John Hart Ely, *The Irrepressible Myth of* Erie, 87 HARV. L. REV. 693, 718–38 (1974) (arguing that the Rules Enabling Act subordinates the Federal Rules to state rules based on substantive policy).

12. *See supra* note 7 and accompanying text.

13. 28 U.S.C. § 2072(a).

function (consistent with the Constitution's democratic directives), when they proceeded on wholly fallacious practical and conceptual assumptions about the simplicity and totality of the substance-procedure dichotomy? The driving force behind recognition of this interpretive tension is the very democratic directive that underlies the constitutional difficulty we have described. In this sense, then, the issues of constitutional and statutory interpretation that surround the Rules Enabling Act are inextricably intertwined. This is so even if one begins analysis with the recognition that the constitutional issue is today far more theoretical than real.

We reach several conclusions on the basis of the serious democratic difficulty inherent in the Rules Enabling Act's vesting of rulemaking power in the Supreme Court's hands. First, while the constitutionality of the Act, in whole or in part, is beyond question purely as a matter of controlling precedent, careful examination of the Court's decisions so holding reveals the complete absence of supporting logic or reasoning. Second, if one were to constitutionally analyze the Act's insulation of important policy choices from any organ of government that is even remotely responsive to the electorate, at least in the first instance,[14] it is highly likely that the Act would fail. Finally, even if one were to take the Act's constitutionality as a doctrinal given, it is appropriate to employ parallel reasoning in construing the cryptic but nevertheless vital statutory insulation of substantive rights from the scope of the Court's rulemaking power. It is clear, after all, that the Act's drafters were attempting, albeit crudely, to achieve the same result: the preservation of important policy choices for the elected representatives of the people.

As we begin our inquiry, two overarching points need to be kept in mind. First, to suggest that the rulemaking process has become "politicized" is by no means to suggest that the process has become corrupted. To the contrary, those interest groups who have sought to contribute to the rulemaking process appear to have done so in a thoughtful, persuasive, and wholly above-board manner. Nor is it to suggest that those involved in the rulemaking process—the Advisory Committee, the Standing Committee, or the Supreme Court—have in any way performed their tasks improperly, unethically, or incompletely. In

14. Under the terms of the Enabling Act, Congress retains power, through legislative action, to reject Federal Rules submitted to it by the Supreme Court. *See id.* § 2074(b).

fact, the exact opposite appears to be true. The "corruption" of the system, if indeed that is the correct word, comes purely on the level of political process. In a democratic system, one does not judge political choices by the wisdom or good faith of the decision maker. *Any* individual or entity lacking the legitimacy of accountability and making subconstitutional policy choices is, at some level, inherently defective.[15]

I. THE RULES ENABLING ACT: STRUCTURE AND HISTORY

A. THE ROLE OF THE SUBSTANCE-PROCEDURE DICHOTOMY IN THE RULES ENABLING ACT

The Rules Enabling Act arose out of a period of dissatisfaction with an American civil procedure system that had become overly complicated and cumbersome. Reformers such as Roscoe Pound and Charles Clark believed that the judiciary needed to be more empowered and that judges should be afforded more discretion in shaping judicial procedure.[16] The Act was finally passed during the New Deal era and embodied the anti-formalistic, expertise-oriented spirit of the time.[17] As such, it is unsurprising that neither Congress nor subsequent rulemakers clearly elucidated the limitations on the Supreme Court's rulemaking power.

By the end of the nineteenth century, lawyers had become increasingly frustrated with the common law pleading system. Because the technical pleading requirements attempted to reduce cases to a single issue, the "system became rigid and rarefied."[18] Parties often lost their suits on procedural grounds

15. Note that when the issue is the interpretation of the countermajoritarian Constitution, concern about the responsiveness of the decision maker works in exactly the opposite manner. *See* MARTIN H. REDISH, THE FEDERAL COURTS IN THE POLITICAL ORDER 75–85 (1991) (explaining the nature of the countermajoritarian principle and the role of the unaccountable Supreme Court in enforcing the Constitution).

16. Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 944, 947, 964 (1987).

17. *See* Burbank, *supra* note 4, at 1706–08; *see also* Subrin, *supra* note 16, at 944, 946, 1000.

18. Subrin, *supra* note 16, at 917.

> Due to the countless pleading rules, a party could easily lose on technical grounds. Lawyers had to analogize to known writs and use "fictions" because of the rigidity of some forms of action. Lawyers also found other ways around the common law rigidities, such as asserting

rather than on the merits of their claims.[19] The reformers behind the Rules Enabling Act identified this as the primary problem with the legal system.[20]

It was within this legal climate at the dawn of the twentieth century that legal reformers began to advocate dramatic change. They called for a uniform, simplified system and the merger of law and equity courts. Charles Clark bemoaned the complexity of common law procedure, famously writing, "procedure should be the hand-maid and not the mistress of justice . . . [a]nd therefore rules of pleading or practice should at all times be but an aid to an end and not an end in themselves."[21] Clark looked to the equity system for guidance, embracing its simplicity and flexibility.[22] Thus began the twenty-five year battle to pass the Rules Enabling Act, legislation that would revolutionize federal procedure.[23]

The key to the movement was the adoption of simple procedural rules that would enable litigants to reach the merits of their claims with relative ease. Pound sought to give judges the power to make their own procedural rules because the task called for the exercise of professional expertise.[24] Flexible and uniform rules would provide judges with "discretion to overlook procedural mistakes and . . . a broader and more pliable litigation package."[25] The language of the Act, in relevant part, provided:

> The Supreme Court of the United States shall have the power to prescribe, by general rules, for the district courts of the United States and for the courts of the District of Columbia, the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law. Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant. They shall take effect six

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> the common count and general denials, which made a mockery of the common law's attempt to define, classify, and clarify.

Id. (citations omitted).

19. Charles E. Clark, *Fundamental Changes Effected by the New Federal Rules I*, 15 TENN. L. REV. 551, 560 (1939).

20. *See id.* at 551–52.

21. *Id.* at 551.

22. *See id.* at 560–62; *see also* Subrin, *supra* note 16, at 962–63; *cf. id.* at 922 (stating that the "underlying philosophy of, and procedural choices embodied in, the Federal Rules [of Civil Procedure] were almost universally drawn from equity rather than common law").

23. For a more thorough description of the battle to enact the Rules Enabling Act, see Burbank, *supra* note 11, at 1094–98.

24. Subrin, *supra* note 16, at 944–48.

25. *Id.* at 946.

> months after their promulgation, and thereafter all laws in conflict therewith shall be of no further force or effect.[26]
>
> The court may at any time unite the general rules prescribed by it for cases in equity with those in actions at law so as to secure one form of civil action and procedure for both: Provided, however, That in such union of rules the right of trial by jury as at common law and declared by the seventh amendment to the Constitution shall be preserved to the parties inviolate. Such united rules shall not take effect until they shall have been reported to Congress by the Attorney General at the beginning of a regular session thereof and until after the close of such session.[27]

Pursuant to the Act, the Supreme Court appointed an Advisory Committee, which was to draft the Rules and revise them as needed over time.[28] After review by the Standing Committee of the Judicial Conference, the Rules were to be reviewed by the Supreme Court and then submitted by the Court to Congress for review. Unless rejected by congressional act prior to a specified date, the Rules were to go into effect.[29] The first Advisory Committee was appointed and met shortly after the passage of the Act.[30] Charles Clark served as reporter and drafted the bulk of what were to become the Federal Rules of Civil Procedure.[31]

B. REACTIONS TO JUDICIAL RULEMAKING: THE EARLY MISCONCEPTIONS ABOUT THE SUBSTANCE-PROCEDURE DICHOTOMY

Given the breathtaking scope of power that the Rules Enabling Act allocated to the Supreme Court, it is surprising how few questions were raised as to its constitutionality at the time of its passage. Despite the presence of a few staunch resisters, neither the early reformers nor the first Advisory Committee

26. 28 U.S.C. § 723(b) (1934) (current version at 28 U.S.C. § 2072(a)–(b) (2000)).

27. *Id.* § 723(c) (emphasis omitted).

28. *See* Clark, *supra* note 19, at 555–56.

29. *See id.* at 557. The current version provides: "(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals. (b) Such rules shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(a)–(b) (2000).

30. *See* Clark, *supra* note 19, at 555–56.

31. *See generally* Michael E. Smith, *Judge Charles E. Clark and The Federal Rules of Civil Procedure*, 85 YALE L.J. 914 (1975) (providing a description of Clark's involvement in crafting the Federal Rules).

ever articulated a detailed defense of the Act's constitutionality.[32] This was probably due to the widespread, albeit fallacious, assumption about the mutual exclusivity between matters of procedure and matters of substance. History clearly shows that the drafters of the Act and the early Supreme Court opinions interpreting the Act operated under an unduly simplistic understanding of the substantive implications of procedure.[33] They seemed to have proceeded on the assumption that procedure and substantive law were mutually exclusive—a notion now universally recognized to be woefully unrealistic. The drafters did seem to intuit some of the potential problems of democratic theory to which the Act gave rise, though perhaps more as a strategic protection of congressional domain. Their problem, however, was their failure to recognize how the rule-making authority affected matters of social policy.

The idea for a uniform federal procedure bill was not well received by everyone. Senator Walsh of Montana, for example, stood fast as an opponent of the bill for over fifteen years.[34] Drawing on Walsh's objections to the reform movement,[35] in 1917 a majority of the Senate Judiciary Committee endorsed a report entitled "Views of the Minority" suggesting that Congress may not have constitutional authority to delegate the power to make supervisory rules of procedure.[36] However, due to the "long history of Congress's acquiescence in the Supreme Court's promulgation of Equity Rules,"[37] Walsh did not yet embrace the delegation controversy, but instead focused on the pragmatic interpretive problems and inconveniences the new system would create.[38] By 1926, Walsh expanded his criticisms

32. *See* Burbank, *supra* note 11, at 1114. Professor Burbank notes that the "individuals concerned about allocation standards were not primarily animated by constitutional considerations . . . . To the extent [they] referred to constitutional limitations, it was to fortify support for statutory limitations independently deemed appropriate, which Congress had the power to impose in the Act." *Id.* at 1114–15.

33. *See, e.g.*, Sibbach v. Wilson, 312 U.S. 1, 6–16 (1941).

34. *See* Burbank, *supra* note 11, at 1063–95. Senator Walsh's opposition ended with his death in 1933, finally allowing the long-awaited passage of the bill in 1934. *Id.* at 1095.

35. *See id.* at 1064.

36. *See* S. REP. NO. 64-892, pt. 2, at 6–9 (1917); *see also* Burbank, *supra* note 11, at 1064 (observing that a majority of the committee signed the "Views of the Minority" section of the senate report).

37. Burbank, *supra* note 11, at 1064.

38. *See id.* at 1063–65.

and openly protested that the judiciary's rulemaking authority would usurp legislative power.[39]

In response to these protests, Senator Cummins redrafted the bill to add the somewhat cryptic sentence, "Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant."[40] Professor Burbank's historical research suggests that Cummins intended to quell the delegation objections with this addition.[41] In a letter to Chief Justice Taft regarding the addition, Cummins wrote, "Congress could not if it wanted to, confer upon the Supreme Court, legislative power," and therefore the additional sentence should "quiet the apprehensions of those who may be opposed to any measure of this sort."[42] Thus the language of the Rules Enabling Act codified the reformers' belief that as long as the judiciary limited its scope to "procedural" matters and not "substantive" ones, it would not encroach on legislative functions.

The substance-procedure dichotomy soon became the accepted response to separation of powers arguments asserted against the uniform procedure bill. Professor Burbank documents that in the face of numerous criticisms alleging that the bill was a judicial usurpation, the Senate Judiciary Committee simply reiterated that the judiciary would not have the power to affect substantive rights.[43] Puzzlingly, the committee also drew on the history of judicial rulemaking in England and the several states,[44] despite the quite obvious fact that constitutional restrictions do not bind those entities to the same extent that they restrain the United States Supreme Court.

Thus, the drafters of the Rules Enabling Act believed that historical practice and the enigmatic substance-procedure dichotomy immunized the Act from constitutional scrutiny as an

39. Senator Thomas J. Walsh, Reform of Federal Procedure, Address at a meeting of the Tri-State Bar Association (Apr. 23, 1926), *in* S. REP. NO. 69-1174, at 20, 33 (1926).

40. *See* Burbank, *supra* note 11, at 1072–73.

41. *See id.* at 1073.

42. *See id.* at 1073 n.260 (quoting the full text of the letter).

43. *See id.* at 1085–89. "The Senate Committee deemed the suggestion that the bill involved an unconstitutional delegation of legislative power to the Supreme Court one that could 'hardly be urged seriously' in light of the history of such delegations and the opinions of the Supreme Court discussing them." *Id.* at 1085 (quoting S. REP. NO. 69-1174, at 8 (report submitted by Mr. Cummins, member of Committee on the Judiciary)).

44. *See* S. REP. NO. 69-1174, at 9–10.

improper delegation of congressional legislative power. However, it soon became clear that neither the drafters nor the first Advisory Committee had much sense of what the terms "substance" and "procedure" meant in the context of the Rules Enabling Act. The Senate Committee, for its part, trusted the Supreme Court to check itself.[45] After the passage of the Rules Enabling Act, the Advisory Committee commissioned to draft the Rules of Civil Procedure in 1935 did not articulate any clear standard for differentiating between substance and procedure.[46] In fact, Professor Burbank's extensive historical research reveals that the Advisory Committee "had no coherent or consistent view of the limitations imposed by the Act's pro-

45. *See* Burbank, *supra* note 11, at 1137. In its report, the Senate Committee wrote:

> Any power in the Supreme Court to deal with such matters as those referred to must be rested solely upon the provision authorizing it to make rules relating to "practice and procedure in actions at law." In view of the express provision inhibiting the court from affecting "the substantive rights of any litigant," any court would be astute to avoid an interpretation which would attribute to the words "practice and procedure" an intention on the part of Congress to delegate a power to deal with such substantive rights or remedies. It would rather conclude that in using the words "practice and procedure" Congress only intended to confer the power to make such rules of practice and procedure as the court itself could make without enabling legislation, and they would not include matters of the kind referred to.
>
> . . . .
>
> Where a doubt exists as to the power of a court to make a rule, the doubt will surely be resolved by construing a statutory provision in such a way that it will not have the effect of an attempt to delegate to the courts what is in reality a legislative function. And it is inconceivable that any court will hold that rules which deprive a man of his liberty, as in the case of an order of arrest, or put an end to a good cause of action, as in the case of a limitation or abatement of an action, or determine what jurors shall try a case and how they shall be selected, are merely filling "up the details," even though they relate to remedial rights.

S. REP. NO. 69-1174, at 11.

46. *See* Burbank, *supra* note 11, at 1133 n.530. Clark himself articulated this uncertainty in a letter to Professor Carl Wheaton in 1935, stating:

> I cannot avoid the feeling that much of our procedural discussion gets really quite barren, that it is in effect word play, where we make words mean the definite things which they mean to us but which they have never meant to the code makers; and then, having gotten ourselves all tied up in words and achieved unlovely results, the only way out we can suggest is by remaking the code, a result utterly unrealistic and practically never to be expected.

Letter from Charles E. Clark to Professor Carl Wheaton (Feb. 16, 1935), *in* JUDGE CHARLES EDWARD CLARK 139, 139 (Peninah Petruck ed., 1991).

cedure/substance dichotomy."[47] He further notes that although members of the committee occasionally referred to the history of the passage of the Rules Enabling Act, "one leaves the published and unpublished sources with the impression that, although the committee may have recognized the basic purpose of the procedure/substance dichotomy, in formulating and applying the Act's limitations normative considerations took a back seat to practical possibilities."[48] Burbank's sources also reveal that the committee was satisfied "to rely largely on judgments informed by a sense of the professional and political climate and by the hope that the Supreme Court would preserve it from error."[49]

II. THE CONFLATION OF SUBSTANCE AND PROCEDURE: THE POLITICIZATION OF THE FEDERAL RULES

It is beyond controversy today that many Federal Rules of Civil Procedure implicate substantial policy issues, often going to the core of modern political and ideological debates. Indeed, the Court itself has noted that "rulemaking under the enabling Acts has been substantive and political in the sense that the rules of procedure have important effects on the substantive rights of litigants."[50] This fact is not earthshaking. Rules 11 (dealing with sanctions),[51] 23 (providing for class actions),[52] and 26 (concerning discovery)[53] are just a few of the Rules that directly implicate tort-reform issues and have therefore become the subject of debate and the object of lobbying efforts by interest groups such as consumer-advocacy organizations, large corporations, and trial lawyers associations.[54] Growing out of the

47. Burbank, *supra* note 11, at 1132.

48. *See id.* at 1133–35.

49. *Id.* at 1137.

50. Mistretta v. United States, 488 U.S. 361, 392 (1989). "Rule 23 . . . has inspired a controversy over the philosophical, social, and economic merits and demerits of class actions." *Id.* at 392 n.19.

51. FED. R. CIV. P. 11.

52. FED. R. CIV. P. 23.

53. FED. R. CIV. P. 26.

54. *See, e.g.*, Transcript of *Public Hearing on Proposed Amendments to the Federal Rules of Civil Procedure*, Dallas, Tex. (Jan. 28, 2005), http://www.uscourts.gov/rules/e-discovery/DallasHearing12805.pdf [hereinafter Dallas Hearing Transcript]. Among the various groups testifying at the Dallas hearing were the Texas Trial Lawyers Association, corporate counsel from Exxon Mobil Corporation, and consumer advocate groups. *See id.* at 3–19, 35–51, 68–101. Similarly, representatives from organizations such as the American Insurance Association, Defense Research Institute, National Association of Con-

heavily disputed belief that the U.S. court system is overburdened with frivolous civil lawsuits that harass corporate defendants and lead inexorably to higher prices for goods and services, the modern tort-reform movement includes proposals to impose damage caps, rewrite contributory negligence laws, and impose heavier sanctions on people bringing frivolous suits.[55] Underlying the tort-reform debate are more foundational disputes over ideology and normative political theory.[56] These issues implicate the value placed on such substantive policy concerns as civil rights and consumer protection, as well as fundamental questions about societal resource allocation, wealth transfer, and economic efficiency.[57] The inescapable implication is that how society structures its system of adjudication inevitably has a substantial impact on the protection of substantive rights and the foundations of substantive social policy.

The recent political focus on issues of tort reform has underscored the politicization of many of the Federal Rules.[58] The political nature of the Rules, however, is by no means a recent development, despite the failure of both the Enabling Act's drafters and the postenactment Supreme Court either to recognize or acknowledge this fact. To the contrary, from the outset many of the Rules possessed a distinctly political nature because the manner in which they are shaped inherently impacts the enforcement of society's substantive policy choices.

One of the most visible illustrations of this phenomenon is Rule 11, which enables judges to sanction lawyers for filing

sumer Advocates, American Trial Lawyers Association, Lawyers for Civil Justice, and Alliance of American Insurers attended the class action amendment hearings. Other rules scrutinized in the context of tort reform are the notice pleading rule, FED. R. CIV. P. 8, and the summary judgment rule, FED. R. CIV. P. 56. *See, e.g.,* Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments*?, 78 N.Y.U. L. REV. 982, 1009–10, 1074–77 (2003).

55. *See* Miller, *supra* note 54 (discussing these contentions and concluding that the drive toward efficiency threatens to undermine the right to a trial by jury); *see also* Carl Hulse, *Bill To Require Sanctions on Lawyers Passes House*, N.Y. TIMES, Sept. 15, 2004, at A20 (describing legislation to amend the current version of Rule 11 to mandate sanctions for filing baseless lawsuits).

56. *See* Jeffrey W. Stempel, *Not-So-Peaceful Coexistence: Inherent Tensions in Addressing Tort Reform*, 4 NEV. L.J. 337, 363–68 (2003/2004).

57. *See id.* at 340.

58. *See, e.g.*, Hulse, *supra* note 55 (describing the political debate over Rule 11 in the context of tort reform).

pleadings or motions for dilatory or other improper purposes.[59] As revised in 1983, Rule 11 required certification that, among other things, the pleading or motion was "well grounded in fact."[60] This alteration was quite obviously (albeit indirectly) intended to constrain the sweeping scope of Rule 8(a),[61] which established the so-called "notice pleading" system. Under the framework of the system created by Judge Clark and the original Advisory Committee, all a litigant need do in a pleading is provide "a short and plain statement" of the claim[62]—an intentionally low burden.[63] The underlying goal of the system was to enable litigants to initiate use of the Rules' elaborate discovery process to facilitate the enforcement of substantive claims.[64] By effectively expanding the scope of the parties' burdens at the pleading stage, the 1983 version of Rule 11 dramatically impacted the ability of plaintiffs to enforce their substantive rights[65] and, not surprisingly, gave rise to significant political debate.

In contrast, the next revision of Rule 11 ten years later facilitated plaintiffs' enforcement of substantive claims by removing the requirement that the litigant certify that the assertions

59. FED. R. CIV. P. 11(b)–(c).

60. *See* FED. R. CIV. P. 11 (1983) (amended 1987, 1993).

61. *See* Stephen N. Subrin, *Teaching Civil Procedure While You Watch It Disintegrate*, 59 BROOK. L. REV. 1155, 1164 (1993) (observing that the two rules are "almost self-contradictory").

62. FED. R. CIV. P. 8(a) (1938) (amended 1966, 1987); *see also* FED. R. CIV. P. Form 9 (1938) (amended 1963) (providing a legally sufficient sample pleading).

63. *See* Mary Margaret Penrose & Dace A. Caldwell, *A Short and Plain Solution to the Medical Malpractice Crisis: Why Charles E. Clark Remains Prophetically Correct About Special Pleading and the Big Case*, 39 GA. L. REV. 971, 1007 (2005) (quoting Judge Charles Clark).

64. *See* Swierkiewicz v. Sorema N.A., 534 U.S. 506, 514 (2002) (rejecting heightened pleading requirements for employment discrimination claims); Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168 (1993) (rejecting heightened pleading requirements for claims under 42 U.S.C. § 1983); Conley v. Gibson, 355 U.S. 41, 47 (1957) ("[T]he Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.") (quoting FED. R. CIV. P. 8(a)(2)); *see also* Christopher M. Fairman, *Heightened Pleading*, 81 TEX. L. REV. 551, 556–57 (2002). *See generally* FED. R. CIV. P. 8(a) (2000) (describing claims for relief).

65. Note that Rule 11's expansion came indirectly, since the revisers in 1983 purported to leave the Rule 11 burden unchanged.

contained in her pleading are "well grounded in fact."[66] A central element of the tort-reform movement has therefore been an attempt to strengthen Rule 11 through congressional enactment.[67] In September 2004, the House of Representatives approved a measure amending the current (1993) version of Rule 11 to require sanctions on lawyers who file "frivolous" lawsuits.[68] Not surprisingly, the bill was politically polarizing; Republicans touted it as necessary "to end nuisance lawsuits that . . . were driving companies out of business and costing consumers," while Democrats said it "could make it harder for less-affluent Americans to retain legal counsel if lawyers were nervous about facing sanctions."[69]

Also illustrative of the extent to which the Rules may become intertwined with matters of important social policy is the recent amendment concerning electronic discovery.[70] The Advisory Committee hearings on the issue are replete with testi-

66. *See* FED. R. CIV. P. 11. Professor Miller wrote that the "strengthening of Rule 11 [in 1983] created a theoretically significant barrier to entering the judicial system. . . . [T]he 1983 Rule was criticized for having a disproportionate impact, particularly in areas of the law considered 'disfavored' by some . . . ." Miller, *supra* note 54, at 1007–08. Because of the Rule's sanctioning measure, it could "be used against a party who brings a frivolous pretrial disposition motion, and may serve to deter them." *Id.* at 1009. Professor Miller further noted that "[a]fter several years of extraordinary activity under the [1983] Rule, a comprehensive study by the Federal Judicial Center (FJC) revealed that Rule 11 motions were filed much more frequently by defendants, that defendants' motions were granted with greater frequency, and that Rule 11 motions were filed disproportionately more often in civil rights cases, although the grant rate was not necessarily higher." *Id*. See also Carl Tobias, *The 1993 Revision of Federal Rule 11*, 70 IND. L.J. 171, 176–78 (1994), for a description of the process of revising the 1983 version of Rule 11.

67. *See* H.R. 4571, 108th Cong. (2004).

68. Hulse, *supra* note 55.

69. *Id.* Democrats also commented that Republicans were "wasting time with frivolous legislation," and said the measure "represented a needless Congressional intrusion into local court matters." *Id.* Representative Sheila Jackson Lee stated that the House should "[g]ive the decision back to the courthouse, and let's have a fair judicial system for all." *Id.*

70. Rules 26 and 34, which regulate the production of evidence in litigation, are the critical rules governing the discovery of electronic information. *See* FED. R. CIV. P. 26, 34. On May 17, 2004, the Civil Rules Advisory Committee submitted to the Standing Committee on Rules of Practice and Procedure a comprehensive package of proposed amendments to the Federal Rules of Civil Procedure addressing discovery of electronically stored information, including revisions of Rules 16, 26, 33, 34, 37, and 45. *See* CIV. RULES ADVISORY COMM., REPORT TO THE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES (2004), http://www.uscourts.gov/rules/comment2005/CVAug04.pdf [hereinafter Advisory Comm. Report].

mony by trial lawyers associations, representatives of large global companies, and spokespersons for consumer groups.[71] Naturally, regulations of electronic discovery will have important and inescapable implications both for litigants' ability to enforce existing substantive law and for businesses of all sizes seeking to operate in an economically efficient manner.[72] Plaintiffs' lawyers and consumer advocacy groups favored rules that require litigants to preserve as much material as possible for as long as possible.[73] Large corporations and the defense bar, on the other hand, stressed the great expense of electronic-document storage, and favored more lenient provisions on mandatory disclosure and record preservation.[74] Such proposals could readily implicate fundamental policy debates. Plaintiffs often depend on electronic discovery to support their efforts to compel wealth transfer and enforce substantive restrictions on corporate behavior,[75] while the Rules' dictates may force corporate defendants to incur enormous expense in altering their record-keeping systems. The impact of electronic discovery on social and economic policy is thus significant.

Perhaps the rule that has generated the most intense political controversy in recent years is Rule 23, governing the procedures for class action suits. Although Rule 23 was part of the original Federal Rules of Civil Procedure, it was not until 1966 that sweeping revisions transformed class actions into a power-

71. *See, e.g.*, Dallas Hearing Transcript, *supra* note 54, at 3–19, 35–51, 68–101, 136–53. Similarly, the class action amendment hearings were attended by representatives from organizations such as the American Insurance Association, Defense Research Institute, National Association of Consumer Advocates, American Trial Lawyers Association, Lawyers for Civil Justice, and Alliance of American Insurers.

72. *See* Advisory Comm. Report, *supra* note 70, at 20.

73. *See* Dallas Hearing Transcript, *supra* note 54, at 17–19 (statement of Jim Wren, Counsel, Texas Trial Lawyer's Association); *id.* at 80–81 (statement of Paul Bland, Counsel, Trial Lawyers for Public Justice); *id.* at 146–49 (statement of Steve Morrison, Past President, Lawyers for Civil Justice).

74. *See id.* at 47 (statement of Charles Beach, Coordinator of Corporate Litigation, Exxon Mobil Corporation); *id.* at 58–61 (statement of Ann Kershaw, Founder of A. Kershaw, PC, Attorneys and Consultants, a litigation management firm that surveyed large companies and compiled findings on the burdens of electronic discovery).

75. *See id.* at 71 ("In the consumer class action world a great deal of litigation can only be proven with respect to financial services companies, HMOs or whatnot, with databases, with documents that are never, ever put onto paper. The documents simply don't exist on paper.") (statement of Paul Bland, Counsel, Trial Lawyers for Public Justice).

ful tool for implementing socio-political change.[76] The modern class action arose out of a period of social and political revolution; in the wake of the civil rights movement and the social revolution of President Johnson's "Great Society" programs, the rulemakers saw a need for procedural devices that would legally empower otherwise unempowered groups.[77] Thus, in 1966, they transformed Rule 23,[78] and it has since become an important instrument for enforcement of legislative and common law proscriptions of business behavior.[79] On the other hand, because class actions may well threaten a company's very existence, class action suits may coerce corporate defendants into settling even nonmeritorious claims. Because the costs of these settlements will be passed on to consumers, unduly lax class-certification standards will inevitably lead to undue inflation and economic inefficiency. Regardless of their substantive views, both sides of the class action debate can agree that class action procedure lies at the core of fundamental political and ideological choices.

III. RECONSIDERING THE CONSTITUTIONALITY OF THE RULES ENABLING ACT

A. CONSTITUTIONAL THEORY AND THE RULES ENABLING ACT

It should by now be clear that the assumption of procedural-substantive mutual exclusivity that apparently underlay the thinking of both Congress and the Court in the early years is totally misguided. No one today could seriously doubt that procedural rulemaking involves the weighing of substantial policy interests and dynamically alters the development of the substantive law. Surely it is just such policy choices that our system of constitutional democracy contemplates will be made by those who are at some level responsive to the electorate, at

76. The original rule was complex and confusing and therefore underutilized. *See* FED. R. CIV. P. 23 (1938) (amended 1966, 1987, 1998, 2003); Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 380–86 (1967). Kaplan rewrote the rule to make it more coherent and easier to use. *See id.* at 386–94.

77. *See* Kaplan, *supra* note 76, at 380–86, 397–98.

78. *See id.* at 386–94.

79. *See, e.g.*, Al Meyerhoff, Op-Ed., *Legal Reform It's Not*, L.A. TIMES, Jan. 31, 2005, at B9.

least when those choices are made apart from the adjudication of cases or controversies.

What appears to remain unrecognized by anyone are the logical implications of this insight for the widespread assumption of the Rules Enabling Act's constitutionality. The foundational political and ideological debates that are often triggered by the framing of the Federal Rules are not resolved by any individual or entity even indirectly responsive to the public will. To the contrary, final choices are made by the one organ of the federal government that is constitutionally insulated from electoral pressures.[80] Intuitively, at least, this segregation of key political choices from responsive governmental organs appears highly problematic.

When one attempts to translate this intuitive uneasiness into hard constitutional law, one is naturally drawn to the nondelegation doctrine[81] and to the case-or-controversy requirement of Article III.[82] In relying on the nondelegation doctrine and the case-or-controversy requirement, we readily acknowledge that the instinctive reaction of most constitutional observers will be either a collective yawn or a feeling of constitutional déjà vu. It is true, after all, that the last time the nondelegation doctrine played an important role in constitutional law, Franklin Roosevelt was president.[83] Though the case-or-controversy requirement has continued to play a significant role in the shaping of modern justiciability doctrine,[84] the Court has been something less than rigid in enforcing its

80. *See* U.S. CONST. art. III, § 1 (providing members of the federal judiciary with protections of salary and tenure).

81. *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 529–30 (1935) ("Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested.").

82. *See* U.S. CONST. art. III, § 2.

83. *See Schechter Poultry*, 295 U.S. at 529–30; Pan. Ref. Co. v. Ryan, 293 U.S. 388, 432–33 (1935).

84. *See* Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, 454 U.S. 464, 471 (1982) ("The constitutional power of federal courts cannot be defined, and indeed has no substance, without reference to the necessity 'to adjudge the legal rights of litigants in actual controversies.'" (quoting Liverpool S.S. Co. v. Comm'rs of Emigration, 113 U.S. 33, 39 (1885)). The case-or-controversy requirement is the textual foundation for all of the prudential justiciability doctrines that forbid federal courts from adjudicating purely political questions, issuing advisory opinions, hearing moot issues, or hearing a case when a litigant lacks standing to maintain an action.

dictates where Congress has made clear that it wishes federal judges to perform nonadjudicatory tasks.[85]

Yet one may reasonably begin the constitutional analysis by reference to the following assumption: were Congress, hypothetically, to enact a law delegating to the Article III judiciary the authority to promulgate prospectively controlling "rules" of federal products liability or consumer protection law, the legislation would be held unconstitutional. No matter how much modern constitutional scholars mock structural doctrines of separation of powers, there is *some* point at which the Constitution would be found to prohibit the delegation of purely legislative authority to the Supreme Court. The inquiry, then, should concern where that constitutional line should be drawn, and on which side of that line the Rules Enabling Act falls.

The best way to assess the constitutionality of the Rules Enabling Act is to inquire exactly what it is about the hypothetical delegation statute that renders it so unambiguously unconstitutional; why is it that Congress may not constitutionally delegate to the Supreme Court the authority, independent of the adjudicatory function, to promulgate rules of federal consumer protection or products liability law? Textually, there is little doubt that if the Supreme Court could exercise such power, Article III's case-or-controversy limitation would be meaningless; the Court would be doing far more than adjudicating cases or controversies. Moreover, the Court would be exercising purely legislative authority, vested solely in Congress by Article I.[86]

It is important to note that this hypothetical statute would be unconstitutional, despite the fact that the Court has validated sweeping delegations of legislative authority to executive agencies.[87] The differences are twofold, and both derive ultimately from the Court's unique status in the American political system. Unlike any member of Congress or the President, Jus-

85. Mistretta v. United States, 488 U.S. 361, 374 (1989) (holding that "Congress' delegation of authority to the Sentencing Commission is sufficiently specific and detailed to meet constitutional requirements"); *see also* Morrison v. Olson, 487 U.S. 654, 695 (1988).

86. U.S. CONST. art. 1, § 1.

87. *See, e.g.*, Nat'l Broad. Co. v. United States, 319 U.S. 190, 225–26 (1943) (upholding largely standardless delegation of authority to the Federal Communications Commission pursuant to the Federal Communications Act of 1934, 47 U.S.C. § 305 (2000)).

tices are not elected.[88] Unlike any administrator, they sit for life and have special protection of their independence.[89] Professor Mashaw has argued that delegations of legislative authority to executive agencies are constitutional, because members of those agencies are accountable to the President, who is himself representative of and accountable to the electorate.[90] The same cannot be said of Supreme Court Justices. Thus, to the extent one key concern about congressional delegations of legislative authority is a dilution of decision-making accountability that is the *sine qua non* of a democratic system, the constitutional difficulty is significantly exacerbated by delegations to an unrepresentative and unaccountable Court.

One might respond that congressional delegation of law-making authority to the federal judiciary is a well-accepted practice. For example, Congress vested in the courts the power to fashion the law of restraint of trade,[91] or shape the federal law of labor contracts.[92] But the obvious difference is that the federal courts are vested with the power to do so only through performance of the adjudicatory function.[93] Courts must possess authority to fill gaps in controlling substantive law in this manner, if only as a means of facilitating the resolution of live disputes.[94] This is far different from the rulemaking of administrative agencies, which is untied to such dispute resolution.[95]

It is performance of the adjudicatory function that leads to the second constitutional problem with the hypothetical statu-

88. *See* U.S. CONST. art. II, § 2, cl. 2 (stating that the President shall have the power to nominate Supreme Court Justices).

89. U.S. CONST. art. III, § 1 (guaranteeing salary and tenure).

90. Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 95 (1985). So-called "independent" agencies are somewhat more problematic, because their members are not subject to total executive control. *See* Humphrey's Ex'r v. United States, 295 U.S. 602, 625 (1935). At the very least, however, members of such agencies do not sit for life, nor do they have constitutionally imposed protections of their salaries. Thus, they are far more responsive than are members of the federal judiciary, who are protected by Article III. *See* U.S. CONST. art. III, § 1 (providing that a judge's compensation may not decrease during his or her tenure).

91. *See* Sherman Act § 1, 15 U.S.C. § 1 (2000).

92. *See* Lincoln Mills v. Textile Workers Union of Am., 353 U.S. 448, 448 (1957).

93. *See* U.S. CONST. art. III, § 2.

94. *See* Marbury v. Madison, 5 U.S. 137, 170–72 (1803) (justifying judicial review as a necessary element of the resolution of live disputes).

95. For an argument seeking to distinguish administrative and adjudicatory delegations, see MARTIN H. REDISH, THE CONSTITUTION AS POLITICAL STRUCTURE 140–41 (1995).

tory delegation of lawmaking authority to the Supreme Court: the absence of any limitation of the judicial function to the resolution of live disputes. Once again, the concern finds its origins in the nation's foundational democratic commitment to lawmaking by representative and accountable decision makers. The case-or-controversy limitation clearly has the effect of restraining the one branch of government constitutionally insulated from political pressure. There are, of course, many valid reasons for the Framers' decision to include such insulation.[96] But in a nation whose founders fought to end taxation without representation, the establishment of a coordinate branch of government that is representative of, and accountable to, no one naturally gave rise to the concern that said branch might usurp the lawmaking authority vested in the more representative branches. The means for preventing this development, then, was the simultaneous restriction of the judiciary's power to the performance of its traditional function of dispute resolution. If the courts were to make law, it would have to be as an incident to the performance of this function.

The hypothetical authorization of freestanding judicial lawmaking quite clearly undermines this fundamental element of American political theory. The constitutional difficulty, then, goes far deeper than merely some formalist, textual focus on the words, "case" or "controversy," appearing in Article III.[97] Here, abandonment of the Constitution's case-or-controversy limitation would lead to the very result that the Framers were presumably seeking to avoid by imposing the limitation in the first place.

Before one can apply this constitutional analysis of the hypothetical legislative delegation of consumer protection or products liability lawmaking power to the Supreme Court in the Rules Enabling Act context, one must consider the opposite end of the constitutional spectrum. While Article III confines the judicial power to the adjudication of cases and controversies, there must be certain common sense qualifications on such a restriction. For example, the federal judiciary may hire law clerks and secretaries, even though neither activity, in and of

96. *See* THE FEDERALIST NO. 78, at 468–71 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (explaining the need for an independent judiciary); *see also* Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455 (1986) (exploring various rationales for judicial independence).

97. *See* U.S. CONST. art. III, § 2.

itself, constitutes adjudication of a case or controversy. Presumably, the federal judiciary could also hold conferences or plan an annual holiday party, despite the total absence of any adjudicatory element. The questions to ask are: (1) how, for constitutional purposes, do these situations differ from the hypothetical delegation of consumer protection lawmaking power?; and (2) to which of the two paradigms is the Rules Enabling Act closer?

The constitutional difference between the two extremes should not be difficult to discern. On the one hand, statutorily authorized lawmaking (what can be called "paradigm one") is simply a blatant circumvention of the case-or-controversy requirement and of the democratic purposes that requirement is designed to serve. The hiring, conferences, and party-planning hypotheticals ("paradigm two"), on the other hand, have no readily discernable impact on the lives of citizens beyond the four walls of the courthouse.

The drafters of the Rules Enabling Act erred in assuming that, by confining the Court's rulemaking authority to matters of "procedure," they were creating a "paradigm two" judicial power when, in reality, they were creating what, in all too many instances, is a "paradigm one" power. The assumption—absurdly simplistic when viewed from today's intellectual and pragmatic perspectives—appears to have been that matters of "procedure" necessarily have no impact on substantive rights. Thus, by only issuing rules of procedure, the Court would be doing nothing more than regulating matters whose impact would largely be confined within the courthouse's four walls.[98] However, many of the Rules either (a) give rise to significant political or ideological controversy; (b) have a significant impact on the enforcement of substantive rights;[99] (c) are intended to affect the substantive reallocation of private societal resources;[100] (d) have a significant impact on private prelitigation behavior;[101] (e) directly impact, if not control, subsequent litigation in

98. This also appears to have been the early Supreme Court's view. *See* Sibbach v. Wilson & Co., 312 U.S. 1, 9–10 (1941).

99. *See, e.g.*, FED. R. CIV. P. 8(a), 11 (addressing the level of detail expected from a party in the pleading filed at the outset of the suit); FED. R. CIV. P. 56 (concerning summary judgment).

100. *See* Kaplan, *supra* note 76, at 398 (explaining how the 1966 revision of Rule 23, expanding class action availability, was designed in part to facilitate enforcement of "Great Society" social measures of the 1960s).

101. An illustration is the new amendment concerning electronic discovery. *See* FED. R. CIV. P. 26(a)–(d).

other forums;[102] or (f) affect the burdens on, expense of, or delays in the federal courts, thereby impacting citizens well beyond the scope of the individual case.[103] Yet all of these rules are, in some reasonable sense, also capable of being classified as "procedural."

It is certainly true that not all of the Federal Rules will have such an impact. A number of them are readily classified among the "housekeeping" variety, at most affecting any interest beyond the confines of the instant case only remotely.[104] Thus, it is conceivable that some number of the Rules could properly be deemed closer to paradigm two than to paradigm one for purposes of constitutional analysis. But the nondelegation and case-or-controversy limits are normatively driven by the fundamental goal of preserving basic policy making for those who are in some sense representative of, and accountable to, the populace.[105] Acknowledgement of this fundamental precept of American political and constitutional theory renders the Rules Enabling Act, as implemented by the Advisory Committee and the Court, constitutionally suspect.

One might respond that Congress always possesses the power to trump the rules the Court promulgates pursuant to the Act, simply by enacting a statute doing so. Therefore the accountability value is still satisfied. While in a certain sense this is true, it would be just as true of the Court's authority to promulgate freestanding rules of federal consumer protection law (paradigm one): Congress could always enact legislation voiding a particular rule, just as it can for the Federal Rules of Civil Procedure. Yet, presumably, recognition of this legislative safety valve would not save the constitutionality of such legislative delegation to the Court.[106] This is because, by impacting

102. *See, e.g.*, FED. R. CIV. P. 13(a) (establishing a compulsory counterclaim rule having a preclusive effect on subsequent litigation).

103. For example, the level of detail demanded in pleading will inevitably impact the scope of postpleading discovery.

104. *See, e.g.*, FED. R. CIV. P. 10 (concerning captioning).

105. We should emphasize, once again, that we do not intend to refer to constitutional questions, though of course the case-or-controversy requirement should logically apply to the judicial resolution of those issues as well. Our point here, however, is merely that for policy choices not even arguably implicating the scope of a constitutional provision, the nation's commitment to foundational normative precepts of democratic theory, embodied in the Constitution, prohibits the unrepresentative judiciary from making them apart from as an incident to the resolution of live disputes.

106. *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 529–30 (1935).

the daily lives of citizens and stimulating political controversy, the judicially promulgated Rules alter the legal and behavioral status quo.[107] When Rules have issued, the inertia of the legal and political systems has been placed squarely in favor of the standards adopted in those Rules. Congress must overcome the serious (and intended) inertia against legislative action to alter or supplant the Rules' dictates.[108] Absent the Rules, in contrast, there would be no political inertia in favor of *any* alternative. With the Rules in place, congressional inaction effectively amounts to action; with no Rules promulgated, congressional inaction is just that.

To suggest that it might be unconstitutional for Congress to vest procedural rulemaking power in the Supreme Court is most certainly not to suggest that there could be no Federal Rules, or even that there could be no Advisory Committee. It would mean, simply, that the Rules (at least those not of the housekeeping variety) would ultimately have to come from Congress and be signed by the President. Presumably, the Advisory Committee could still make recommendations, but to Congress, rather than to the Court. Alternatively, our accountability critique could be applied in a more limited fashion, holding unconstitutional only those Rules that are found to implicate significant economic, social, or political dispute. Such an approach would leave a somewhat wider constitutional range of Supreme Court rulemaking authority.

The concern of many, no doubt, would be that if the ultimate power and obligation to promulgate the Rules of Procedure lay in Congress's hands, interest groups of all shapes and sizes would likely consume the legislative process. The concern is that having Congress make the decisions would be too "political." But the point is that many of these rules will be "political," whoever gets to shape them, because they may substantially affect the lives of the citizenry and implicate fundamental ideological choices about loss allocation and resource redistri-

107. *See* INS v. Chadha, 462 U.S. 919, 954–59 (1983) (characterizing a one-house veto as lawmaking).

108. *See* Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569, 592–93 ("The congressional legislative process is an arduous one that may entail a series of compromises from the time the bill is introduced until it is finally voted upon by the members of each house. Further, the process is lengthy, time-consuming, and replete with opportunities for delaying or killing a bill."); *see also id.* (citing sources).

bution. Taking the decision out of the hands of those who are representative of, and accountable to, the populace will mean, simply, that the one branch of government insulated from the populace will be making important political decisions in a manner never contemplated by the text, structure, or history of the Constitution.

B. THE CONSTITUTIONALITY OF THE RULES ENABLING ACT IN THE SUPREME COURT

To this point, we have demonstrated that were one to assume the position of a Martian observer, come to our planet to examine the constitutionality of the Rules Enabling Act as applied in the Federal Rules of Civil Procedure,[109] one should at the very least have serious difficulty with the question. Yet, mired in the history and practicalities of our own constitutional doctrine, it is generally understood today that the Act's constitutionality is beyond question. When one engages in more careful analysis of the Supreme Court decisions reaching this conclusion, however, it is striking how flimsy is the judicial house of cards doctrinally supporting the Act's constitutionality.

1. *Sibbach v. Wilson & Co.*

No decision appears to have adjudicated a direct, serious constitutional challenge to the Rules Enabling Act, either on its face or applied. The decision in *Sibbach v. Wilson & Co.*, generally assumed to have held the Act constitutional, actually dealt only with the validity of Rules 35 and 37.[110] It is true that, in the course of upholding those Rules under the Act, the Court indicated in dictum that the Act is constitutional.[111] But it is interesting to note how devoid of supportive reasoning this conclusion is. "Congress has undoubted power to regulate the practice and procedure of federal courts, and may exercise that power by delegating to this or other federal courts authority to make rules not inconsistent with the statutes or constitution of

109. *Cf.* Martin H. Redish, *Reassessing the Allocation of Judicial Business Between State and Federal Courts: Federal Jurisdiction and "The Martian Chronicles"*, 78 VA. L. REV. 1769, 1769 (1992) (employing the construct of a Martian observer to test the wisdom and logic of long-standing doctrines of federal jurisdiction).

110. *See* 312 U.S. 1, 6 (1941) ("This case calls for decision as to the validity of Rules 35 and 37 of the Rules of Civil Procedure for [d]istrict [c]ourts of the United States.") (citation omitted).

111. *See id.* at 13–14.

the United States . . . ."[112] Decided at the height of the New Deal, *Sibbach*'s conclusory dismissal of structural constitutional concerns such as the nondelegation doctrine and the case-or-controversy requirement is perhaps not surprising. But what may be most telling about the decision is language that reveals—in a manner reminiscent of the flawed assumptions of the Act's drafters[113]—the Court's fatally simplistic understanding of the substance-procedure distinction. Congress, said the Court, "has never essayed to declare the substantive state law, or to abolish or nullify a right recognized by the substantive law of the state where the cause of action arose, save where a right or duty is imposed in a field committed to Congress by the Constitution."[114] Rather, "the Act . . . was purposely restricted in its operation to matters of pleading and court practice and procedure."[115] Noting that "the petitioner admits, and, we think, correctly, that Rules 35 and 37 are rules of procedure,"[116] the Court upheld the rules because "[t]he test must be whether a rule really regulates procedure,—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them."[117]

Like the Act's drafters who inserted the restriction on the Rules' ability to modify, enlarge, or abridge substantive rights, the Court seems—implicitly, at least—to assume a mutual exclusivity of procedure and substance.[118] A strict construction of the case-or-controversy requirement might still be problematic for the federal courts' power to issue freestanding rules of even

112. *Id.* at 9–10 (citation omitted).

113. *See* discussion *supra* Part I.B.

114. *Sibbach*, 312 U.S. at 10. While the Court spoke only of substantive rights created by state law, Professor Burbank has correctly noted that the Act's exemption of substantive rights applies equally to federal- and state-created substantive rights. *See* Burbank, *supra* note 11, at 1122 (noting that while "Professor Ely has invigorated the second sentence [of the Act] so as more effectively to protect substantive state policy reflected in state law in an area covered by a Federal Rule," history starkly contradicts this notion, as the protection of state law is a probable effect rather than the primary purpose of the allocation scheme established by the Act). Indeed, at the time the Act was passed in 1934, the Supreme Court had not even decided *Erie Railroad Co. v. Tompkins,* 304 U.S. 64 (1938), invalidating general federal common law, *id.* at 78.

115. *Sibbach*, 312 U.S. at 10.

116. *Id.* at 11.

117. *Id.* at 14.

118. *See id.* at 9–14.

pure procedure, since the Court promulgates them in a manner untied to conduct of the adjudicatory process. However, when viewed from the perspective of the democratic rationale for this constitutional requirement,[119] the concern would not be nearly as great were the Supreme Court's rulemaking power actually confined to procedural concerns that did not extend beyond the walls of the courthouse. We know today, however, that it is absurd to assume such a mutual exclusivity for all but the most mundane of housekeeping rules. Procedural rules often have dramatic impact on the citizenry's planning of their primary behavior,[120] and often involve issues of significant concern to policy makers and those whom they represent. Rarely, then, does the concept of totally insulated procedural rules, assumed by the Court in *Sibbach*, actually exist.

2. *Mistretta v. United States*

While in *Hanna v. Plumer* the Court assumed the constitutionality of the Rules Enabling Act,[121] the only decision other than *Sibbach* in which the Court expended any effort to discuss the Act's constitutionality—albeit purely as dictum—was *Mistretta v. United States*.[122] The issue in *Mistretta* concerned the constitutionality of Congress's location of the Sentencing Commission in the judicial branch and the required inclusion of members of the Article III judiciary on that Commission.[123] A challenge had been made to the Act on the grounds that it violated the case-or-controversy requirement of Article III.[124] In rejecting that challenge, the Court noted that in past decisions it had "recognized the constitutionality of a 'twilight area' in which the activities of the separate [b]ranches merge."[125] Specifically, the Court relied on *Sibbach* for recognition of Congress's "undoubted power" to delegate procedural rulemaking power to the Court.[126] This reference, of course, is no less conclusory than was the Court's original statement to the same ef-

119. *See* discussion *supra* Part III.A.
120. *See* Hanna v. Plumer, 380 U.S. 460, 475 (1965) (Harlan, J., concurring) (referring to "those primary decisions respecting human conduct which our constitutional system leaves to state regulation").
121. 380 U.S. 460, 464–66 (1965).
122. 488 U.S. 361, 387–90 (1989).
123. *Id.* at 362.
124. *Id.* at 385.
125. *Id.* at 386.
126. *Id.* at 387 (quoting Sibbach v. Wilson & Co., 312 U.S. 1, 9–10 (1941)).

fect in *Sibbach*.[127] To the extent the Court provided any supporting reasoning at all, it was in its assertion that "consistent with the separation of powers, Congress may delegate to the [j]udicial [b]ranch nonadjudicatory functions that do not trench upon the prerogatives of another [b]ranch and that are appropriate to the central mission of the Judiciary."[128] The point, apparently, is that the case-or-controversy requirement is there solely to protect the authority of the other branches of the federal government.[129] This analysis, of course, ignores the vitally important democratic rationale supporting the constitutional restriction of the authority of the one unrepresentative branch to the adjudication of cases or controversies.[130] Even assuming that the Court's assessment of the Rules Enabling Act was correct, it would still not mean that judicial rulemaking constitutes adjudication of a case or controversy, which the Constitution's text seems unambiguously to require, though concededly this point is probably of concern only to constitutional formalists.[131] More importantly, the Court's reasoning in no way responds to the fundamental concern over the accountability, direct or indirect, of the nation's policy makers.

One might suspect that the underlying, if unstated, assumption of the Court was that because the Federal Rules concern only "the appropriate mission of the Judiciary," they are of purely procedural importance and therefore do not encroach on the authority of the policy-making branches of the federal government.[132] We now know, of course, that such an assumption is nonsense.[133] But the most puzzling aspect of the *Mistretta* Court's discussion of the Rules Enabling Act's constitutionality is that it apparently *did* understand that the Federal Rules are not created in a procedural vacuum. Indeed, the opinion explicitly acknowledged that "this Court's rulemaking under the enabling Acts has been substantive and political in the sense

127. 312 U.S. at 9–10.

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

129. *See id.* at 388–91.

130. *See* U.S. CONST. art. III, § 2.

131. *See, e.g.*, *Mistretta*, 488 U.S. at 422–26 (Scalia, J., dissenting).

132. We do not intend to suggest that at no point does the federal judiciary engage in policy making. The point, rather, is that under the constitutional scheme such policy making is authorized only to the extent it is incident to the resolution of live disputes. *See* discussion *supra* Part III.A.

133. *See* discussion *supra* Part III.A.

that the rules of procedure have important effects on the substantive rights of litigants."[134] In an accompanying footnote, the Court pointed to Rule 23, providing for the use of class actions, which "has inspired a controversy over the philosophical, social, and economic merits and demerits of class actions."[135] But if this is so, then why does the Rules Enabling Act not do the very thing that the *Mistretta* Court had stated that a delegation to the judicial branch *may not* do: interfere with the authority of the representative branches of the federal government?[136] It is as if the Court, by relying on *Sibbach*, first validates the Rules Enabling Act by implicitly invoking that decision's faulty premise of procedural-substantive mutual exclusivity (if only as a matter of Supreme Court precedent),[137] and, having thus found the Act constitutional,[138] readily acknowledges the faultiness of this essential premise. It is almost as if an acquitted criminal defendant, knowing he is protected by the constitutional prohibition on double jeopardy, openly admits his crime.

The doctrinal support for the Rules Enabling Act's constitutionality, then, is readily exposed as a house of cards. To be sure, legitimate or not, the holding of the Act's constitutionality is not likely to change in the foreseeable future.[139] However, we believe our skeptical constitutional analysis is valuable for two reasons. First, it is valuable simply as an intellectual study in constitutional theory. Second, on a more practical level it may have an important spillover impact on determination of the most appropriate construction of the Act's "substantive right" limitation. It is therefore to a discussion of this issue of statutory interpretation that we now turn.

IV. CONSTRUING THE RULES ENABLING ACT: IMPLICATIONS OF THE ACCOUNTABILITY CRITIQUE

One highly respected commentator has suggested that the question of whether a Federal Rule is "substantive" or "procedural" for purposes of the Rules Enabling Act is "inherently un-

134. *Mistretta*, 488 U.S. at 392.
135. *Id.* at 392 n.19.
136. *See id.* at 385.
137. *See. id.* at 386–88.
138. *Id.* at 412.
139. *See* Burbank, *supra* note 11, at 1034–35.

resolvable."[140] The Supreme Court has never invalidated a Federal Rule for violation of the Act's "substantive right" limitation. Nevertheless, there has been a good deal of controversy, both within the Court[141] and without, on this issue of statutory interpretation.[142] We have already conceded the pragmatic futility of today seeking to raise serious questions about the Act's constitutionality. It is conceivable, however, that a parallel subconstitutional concern about the need for accountable policy makers should guide construction of the cryptic substance-procedure distinction imposed by the Act itself.

The greatest problem with any attempt to construe the Act's substance-procedure distinction in a manner designed to consider this democratic concern is that the drafters were driven by two goals that are potentially in tension—a fact of which the drafters appear to have been blissfully unaware, for reasons previously discussed.[143] In addition to the desire to preserve legislative authority over issues extending beyond the courthouse walls, the drafters were simultaneously driven by the goal of establishing a uniform system of federal procedure.[144] The more that the statute's interpretation is designed to achieve the first goal, the more it is likely to undermine the second goal: because so many Rules impact important socio-political concerns, many Rules would fail under the accountability critique we have described.

There appear to be three interpretive options available in construing the Act's substance-procedure distinction in order to take into account our democratic accountability critique. First, the Act could be confined to those few Rules that are largely of the housekeeping variety. Under this approach, the Act would authorize only those Rules that were likely to have no more than a remote impact beyond the courthouse walls. The obvious problem with this approach—at least as a matter of statutory

140. Linda S. Mullenix, *The Constitutionality of the Proposed Rule 23 Class Action Amendments,* 39 ARIZ. L. REV. 615, 618 (1997).

141. *See, e.g.*, Bus. Guides, Inc. v. Chromatic Commc'ns Enters., Inc., 498 U.S. 533, 540–64 (1991).

142. *Compare* Carrington, *supra* note 4, at 297–326 (suggesting a functional analysis and interpretation of the Rules Enabling Act), *with* Ely, *supra* note 11, at 724–28 (proposing alternative interpretations of the "substantive rights" exception to the Rules Enabling Act).

143. *See* discussion *supra* Part I.B.

144. *See* Burbank, *supra* note 11, at 1023–24, 1065–68.

construction[145]—is that it would seriously undermine attainment of the additional statutory goal of establishing a uniform system of federal procedure.

A second option would be to exclude from the Court's rule-making authority only those Rules that undeniably give rise to widespread political concern. This second alternative would leave to the Court a large body of Rules, but would likely exclude Rules such as those dealing with pleading burdens,[146] class actions,[147] and electronic discovery.[148] The obvious problem with this interpretive alternative is its political fluidity and difficulty in application. However, it at least represents an effort to reconcile the competing goals of the Act, by attempting to leave in the Court's rulemaking power the majority of the current Rules.

The final alternative is similar to the standard the Court itself seems to have adopted, though without any supporting reasoning grounded in political theory.[149] It is to confine the Rules to those whose impact is predominantly designed to affect nonprocedural interests.[150] Recognizing that the Rules will often have incidental impacts on substantive concerns, the Court has confined the Act's substantive right limitation to exclude from its reach primarily procedural rules whose impact beyond the courthouse walls is merely incidental.[151] This is so, even if that incidental and unintended substantive impact is substantial.

It is difficult to choose among these alternatives, because they all possess significant flaws. However, from the perspective of our concern about truly accountable policy making, the second alternative seems to be the least of three evils.

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145. Note, however, that such an approach would, in fact, likely result from acceptance of our constitutional attack. *See* discussion *supra* Part III.B.

146. FED. R. CIV. P. 8, 11.

147. FED. R. CIV. P. 23.

148. FED. R. CIV. P. 26(a)–(d). More debatable would be rules such as those dealing with summary judgment, FED. R. CIV. P. 56, and judgment as a matter of law, FED. R. CIV. P. 50, where although there has been relatively little political controversy, the scope of the Rules could have a significant impact on the nature of the enforcement of substantive rights. *See* Martin H. Redish, *Summary Judgment and the Vanishing Trial: Implications of the Litigation Matrix,* 57 STAN. L. REV. 1329, 1340–41 (2005).

149. Burlington N. R.R. Co. v. Woods, 480 U.S. 1, 8 (1986) (holding that procedural rules that incidentally affect substantive rights are permissible under the second sentence of the Rules Enabling Act).

150. *Id.* at 5.

151. *Id.*

CONCLUSION

One often hears the term "politicization" used in a pejorative sense.[152] To "politicize" something is usually to demean a process by removing it from the lofty heights of dispassionate analysis and thrusting it into the jungle of interest-group struggles. But when one employs the term in the context of a discussion of American political theory, it refers simply to returning foundational normative choices of social policy to those who are representative of and accountable to the electorate.[153] In a system committed to the values of representative government, then, politicization is by no means an inherently negative development.

To be sure, there are certain issues that our political structure has sought to insulate from the democratic process. For example, we have wisely deemed questions of constitutional interpretation to be reserved for the one branch of government purposely insulated from the democratic process—the judiciary. However, the same has never been true for subconstitutional issues of social policy.

The fact that the Federal Rules of Civil Procedure concern processes employed within the federal courts does not automatically imply that they are free from matters of serious concern to the polity. Indeed, it is this fatally simplistic assumption that has historically guided both Congress and the Supreme Court in the drafting and early construction of the Rules Enabling Act of 1934.[154] It was also this flawed assumption that led the Court early on to assume the constitutionality of the Act's delegation of lawmaking power to the Supreme Court. Today, all of those concerned recognize the inherent intersection of substance and procedure.[155] However, none has sought to go back in time to reconsider the modern constitutional and statutory implications of this all too facile assumption.

In this Essay, we have dared to think the unthinkable: the possibility that the Rules Enabling Act—at least as currently implemented—should be found unconstitutional. While delegations of federal legislative power to executive agencies are to-

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152. *See, e.g.*, Carrington, *supra* note 4, at 301–02.

153. *See* Mistretta v. United States, 488 U.S. 361, 419–22 (1989) (Scalia, J., dissenting).

154. *See* discussion *supra* Part I.B.

155. *See* Carrington, *supra* note 4, at 284.

day commonplace,[156] comparable delegations to an unaccountable, coordinate branch of government—when that delegated authority is exercised in a nonadjudicatory manner—give rise to an entirely different set of political and constitutional difficulties.[157] Because of its intentional insulation from democratic processes, the federal judiciary's lawmaking authority was constitutionally confined to the traditional adjudicatory process. By delegating important policy-making authority to the Supreme Court outside of the adjudication of cases or controversies, Congress in the Rules Enabling Act has violated the essence of the separation of powers, and in so doing has undermined the essence of the democratic process.

It is true, of course, that Congress always retains authority to legislatively reject or overrule a particular exercise of the Court's rulemaking power. But this fact would surely not validate a delegation of power to the Court to promulgate freestanding rules of consumer protection or products liability law; nor should it save the otherwise unconstitutional delegation embodied in the Enabling Act. Once the Court promulgates a rule, that rule becomes law. It has altered the legal status quo and reversed the inertia inherent in the legislative process. Absent the rule's existence, Congress would have to act, in one direction or the other, or choose to let judicial procedure develop incrementally as an incident to the adjudicatory process.[158] In contrast, with the rule in place Congress's failure to act is effectively transformed into legislative action, in direct contravention of the bicameralism and presentment requirements provided for in the Constitution.

Holding that much of the rulemaking power must constitutionally rest in congressional hands does not necessarily imply that the Court could have no influence in the process. By making their expertise available to Congress, those presently involved in the rulemaking process could still play an important role. However, the ultimate choice would remain where a constitutional democracy intends it to be: in the hands of the representative branches of government.

In the highly likely event that our reconsideration of the Act's constitutionality falls on deaf ears, it is conceivable that our accountability critique could still play a role in the inter-

156. *See Mistretta*, 488 U.S. at 370–74 (majority opinion).
157. *See id.* at 416–22 (Scalia, J., dissenting).
158. *See* Burbank, *supra* note 11, at 1027–28.

pretation of the Act's cryptic "substantive right" qualification. More than seventy years after the Act's passage, the meaning of that provision remains the subject of vigorous and widespread debate. We suggest that the provision be construed in the very manner apparently intended by the Act's drafters: to preserve to the representative branches fundamental choices of social policy. Now that we recognize that many of the Rules are inherently intertwined with such policy issues, it is appropriate to redefine the phrase in a far more aggressive manner than it has been to date.