Unconstitutional Rulemaking: The Civil Justice Reform Act and Separation of Powers

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Unconstitutional Rulemaking: The Civil Justice Reform Act and Separation of Powers

Linda S. Mullenix*

TABLE OF CONTENTS

Introduction ................................................ 1284
I. The Civil Justice Reform Act and the Separation-of-Powers Doctrine ........................................ 1289
   A. The Civil Justice Reform Act as an Idiosyncratic
      Separation-of-Powers Problem .................... 1289
      1. Some Preliminary Observations on Separation-
         of-Powers Interpretation ..................... 1290
         a. The Cases and Commentary: Lessons for a
            Separation-of-Powers Argument .......... 1290
         b. The Structure of a Possible Separation-of-
            Powers Argument Challenging the Civil
            Justice Reform Act ...................... 1295
      2. Paradigmatic Separation-of-Powers Problems
         and the Constitutional Validity of the Civil
         Justice Reform Act .......................... 1298
         a. Executive/Legislative Separation Problems. 1299
         b. Executive/Judicial Separation Problems .... 1302
         c. Legislative/Judicial Separation Problems ... 1307
   B. The Civil Justice Reform Act: The Argument for
      a Separation-of-Powers Violation .............. 1314
      1. Giving Content to Article III Powers ........ 1316
      2. The Inherent Powers of the Courts .......... 1319

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School of Law. Summer research support for this Article was provided by
funds from the Fred and Emily Wulff Centennial Chair in Law. The author
served as Co-Reporter and Legal Counsel to the Civil Justice Advisory Group
of the United States District Court for the Southern District of Texas. See
CIVIL JUSTICE REFORM ACT ADVISORY GROUP OF THE U.S. DIST. COURT FOR
THE S. DIST. OF TEX., REPORT AND PLAN (Oct. 18, 1991). The opinions ex-
pressed in this Article are the author's and do not reflect the views, opinions,
or conclusions of the Advisory Group, or the judges of the Southern District of
Texas.
INTRODUCTION

The continuing debate over civil justice reform, replete with colorful "lawyer-bashing," usually focuses on the purported explosion of civil litigation or the venality of American lawyers. Civil justice reform has proven to be such a popular political hobbyhorse that numerous office-holders and candidates made it a central theme of the 1992 electoral campaign. The incessant demands for reform of civil legal services have evolved into a civil justice reform movement characterized by


3. See, e.g., Kevin Sack, The 1992 Campaign: The Vice President; Quayle Says Letter Shows Lawyers 'Own' Clinton, N.Y. TIMES, Aug. 28, 1992, at A16. During the 1992 presidential campaign, the Republican candidates and their supporters advocated civil justice reform through the broadcast media as well. See, e.g., The 92 Vote: The Vice Presidential Debate (ABC television broadcast, Oct. 13, 1992), transcript available in LEXIS, Nexis Library, Script file (statement of Vice President Dan Quayle noting small businesspeople's desire for civil justice reform due to costs and delays).
the creation of advisory groups; the production of white papers, reports, and studies; and even executive orders for civil justice reform.

In 1990, Congress responded with the Civil Justice Reform Act. The Act created an advisory rulemaking group for each of the ninety-four federal district courts, and required each group to formulate an expense and delay reduction plan by the end of 1993.

This Article is the conclusion to a piece published earlier in


6. The executive branch has also entered the fray. See Exec. Order No. 12,778, 3 C.F.R. 359 (1992) (imposing civil justice reform measures on all executive branch departments and agencies).


this volume of the *Minnesota Law Review*. The earlier piece explained that the Civil Justice Reform Act effected a revolutionary redistribution of procedural rulemaking power from the federal judicial branch to the federal legislative branch. It focused on three aspects of the Act.

First, the Civil Justice Reform Act effectively overturns the Rules Enabling Act by the expedient of declaring procedural rules to be substantive law, thus stripping the judicial branch of the power to prescribe internal rules of procedure for the federal courts. Second, the Act violates the separation-of-powers doctrine by arrogating to Congress unprecedented authority over the internal affairs of the judiciary. With inadequate legal and empirical foundation, Congress stripped the judicial branch of its important rulemaking function. Third, the Act constitutes a vast experiment in local rulemaking that undermines the central procedural reformation effected by the promulgation of the Federal Rules of Civil Procedure in 1938. The 1938 procedural reformation embodied the aesthetic that the careful, informed study would lead to the adoption and amendment of simple, uniform procedural rules throughout the federal judicial system.

The reform the Civil Justice Reform Act mandates, however, is not conducive to careful, informed amendment of the Federal Rules of Civil Procedure. Moreover, it is doubtful that the ninety-four local advisory groups will recommend simple, much less uniform, rules. On the contrary, the Civil Justice Reform Act encourages, if not requires, a proliferation of local

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10. *Id.* at 379 (noting that Congress took power from judges and their expert advisors and delegated it to local lawyers and lay people). The earlier Article argues that the true significance of the Civil Justice Reform Act is not in the nuts and bolts of procedural innovation and reform that the ninety-four district advisory groups accomplish under the Act, and that most commentary, to date, focuses on these accomplishments under the legislation. *Id.* at 378-79. In June 1992, the Administrative Office of the United States Courts issued a progress report for the United States Judicial Conference on the pilot and early implementation district plans. *See Judicial Conference of the United States, Civil Justice Reform Act Report: Development and Implementation of Plans by Early Implementation Districts and Pilot Courts* (1992) [hereinafter *Civil Justice Reform Act Report*].
13. *Id.* at 382.
14. *Id.* at 380.
rules of increasing complexity and specificity. Hence, the Civil Justice Reform Act is actually a counter-reformation of procedural justice.

In sum, the earlier Article argued that the implications of the Civil Justice Reform Act are dramatic, revolutionary, and probably bad. Under the Act, grassroots, amateur local rulemaking groups will recommend problematic local rules, measures, and programs based not on considered contemplative study, but rather on ill-conceived social science, anecdote, and interest-group lobbying. More significantly, the Act will contribute to the increased balkanization of federal civil procedure and transform the reigning procedural aesthetic of simplicity and uniformity into one of increasing complexity and variation.

This Article examines the legal basis for the Civil Justice Reform Act. It concludes that the Act revokes the Rules Enabling Act sub silentio and authorizes unconstitutional rulemaking. Central to this thesis is the argument that the Civil Justice Reform Act violates the separation-of-powers doctrine by substantially impairing the federal courts' inherent Article III power to control their internal process and the conduct of civil litigation. Furthermore, Congress is wrong in declaring—as it does in the legislative history to the Act—that it has exclusive federal rulemaking power. Apart from these objections, the Civil Justice Reform Act ought to be condemned for the pragmatic reason that it will irretrievably politicize federal procedural rulemaking. Whatever legal arguments may be marshalled against the Civil Justice Reform Act, this legislation also embodies deceptively high-minded but nonetheless ill-conceived public policy.

Part I of this Article examines whether the Civil Justice Reform Act violates the separation-of-powers doctrine. It first briefly canvasses the separation-of-powers decisions that deal with executive/legislative and executive/judicial branch conflicts, and concludes that these cases are not particularly useful

15. Id.; see also CIVIL JUSTICE REFORM ACT REPORT, supra note 10 (summarizing the array of rulemaking efforts of the pilot and early implementation districts). Furthermore, the advisory groups created under the Civil Justice Reform Act pursue their reform agendas parallel to the federal Advisory Committee on Civil Rules, which continues to draft revisions to the Federal Rules of Civil Procedure—a situation I characterize as inducing incredible procedural babel. Mullenix, supra note 9, at 381.

16. See Mullenix, supra note 9, at 380.

17. Id. at 382.
for evaluating the legislative/judicial branch conflict presented by the Civil Justice Reform Act. This Part explains that the Act poses a boundary question regarding the concurrent exercise of rulemaking powers by two separate branches of our federal government. After determining the possible methodologies a federal court might use in construing the Act's constitutionality, Part I concludes that Congress, through the Civil Justice Reform Act, has violated the separation-of-powers doctrine by exercising authority that is beyond its Article I powers, consequently intruding on powers Article III assigns to the judiciary.

Part II evaluates whether the Civil Justice Reform Act contravenes the Rules Enabling Act. This Part first explores the allocation of rulemaking powers and discusses the historical and doctrinal underpinnings of the substantive/procedural rulemaking distinction embodied in the Rules Enabling Act. The case law construing the Rules Enabling Act provides an inapt analytical framework for considering the Civil Justice Reform Act because past Rules Enabling Act challenges to court-made rules typically have posed the question whether the judiciary, in promulgating a particular rule, has violated the Rules Enabling Act. The Civil Justice Reform Act, in contrast, poses the obverse issue: whether Congress, in enacting this legislation, has transgressed its own Rules Enabling Act. Part II also discusses the implications for procedural rulemaking of Congress's 1988 amendment to the Rules Enabling Act, and concludes that, notwithstanding Congress's requirement of a more open process, the Rules Enabling Act still allocates procedural rulemaking power to the judicial branch.

Finally, Part II argues that the Senate's interpretation of the Rules Enabling Act has inverted the usual understanding of that Act and has transformed it from enabling legislation to disabling legislation. In so doing, Congress has committed two dangerous offenses: it has stripped the courts of their traditional procedural rulemaking authority, and it has changed procedural rules into substantive provisions. Thus the Civil Justice Reform Act shifts the locus of rulemaking authority away from the federal courts, where it always has been exercised, and relocates it in Congress—a branch ill-suited to judicial rulemaking. The Article closes with the author's repeated refrain that procedural rulemaking ought not to be a matter of majoritarian legislative public policy.18

18. See id. at 384; see also Linda S. Mullenix, Hope Over Experience:
I. THE CIVIL JUSTICE REFORM ACT AND THE SEPARATION-OF-POWERS DOCTRINE

A. THE CIVIL JUSTICE REFORM ACT AS AN IDIOSYNCRATIC SEPARATION-OF-POWERS PROBLEM

The Civil Justice Reform Act presents a subtle, if not idiosyncratic, separation-of-powers problem. The Senate Judiciary Committee highlighted the peculiar nature of this problem by its repeated insistence that the Act presented no separation-of-powers problems.19 Rather, the Senate deflected the separation-of-powers concerns the American Bar Association and the Judicial Conference raised by characterizing them as challenges "most often cloaked in separation-of-powers terms."20 Although the Senate made some attempt to defend its rulemaking authority under the Rules Enabling Act,21 it perfunctorily dismissed all separation-of-powers challenges.

The Senate's failure to address the separation-of-powers issue that the Civil Justice Reform Act raises is important for three reasons. First, the Senate's minimal treatment of the separation-of-powers issue suggests its inability to distinguish between the statutory question posed by the Rules Enabling Act and the more fundamental problem posed by the Constitution's mandate of separate legislative and judicial functions. Second, the Senate's pejorative characterization of the challenge as merely a "cloak," rather than a "real" argument, represents a blatant reproach of the judiciary. The Senate's heavy-handed usurpation of rulemaking authority, coupled with its dismissive attitude towards power allocation, exemplifies the very tensions the Constitution sought to resolve through the separation of powers. Third, the Senate's refusal to even consider the separation-of-powers problem represents either covert ignorance or overt disregard.22 By failing to resolve this issue, Congress has ensured that the Civil Justice Reform Act will be vulnerable to constitutional attack.


20. Mullenix, supra note 9, at 435.

21. Id.

22. Id.
1. Some Preliminary Observations on Separation-of-Powers Interpretation

a. The Cases and Commentary: Lessons for a Separation-of-Powers Argument

Separation-of-powers cases, which have continued to command the attention of both the Supreme Court and the commentators, generally embody one of two approaches: a


"formalist" or a "functionalist" approach. Under the formalist approach, which stresses the independence of each branch, a court evaluates separation problems through a strict construction of the Constitution's first three articles, and finds a separation violation where a power specifically given to one branch is delegated to or exercised by another. Justices who favor...
strict constructionism and an originalist view of constitutional law also favor the formalist approach to separation questions. The functionalist approach, in contrast, posits that a complete separation of the three branches of government is impossible and that the Framers never intended such a separation. This approach is premised on the pragmatic view that contemporary American government is a system of highly interdependent branches and agencies that should not jealously guard power and prerogative, but rather share functions and tasks. Justices who favor a functionalist approach to separation-of-powers questions typically couch their analysis in terms of flexibility and pragmatism.

Although the separation-of-powers cases are factually and analytically varied, the Supreme Court's jurisprudence allows some generalizations. First, although the Court uses both the

27. See Olson, supra note 24, at 275-76 (analyzing the three 1991 Supreme Court cases dealing with separation of powers, and identifying and forecasting a five-four split among the Justices in favor of formalist separation-of-powers theory). Olson identifies Justices Kennedy, O'Connor, Scalia, Souter, and Thomas as supporting a formalist approach. Id.


29. See Olson, supra note 24, at 275-76 (analyzing the Court's three most recent separation-of-powers cases, and identifying Justices Blackmun, Rehnquist, Stevens, and White as supporting a functionalist approach).

30. See supra notes 23, 26, 28.

31. Professor Brown has observed that application of the formalist approach nearly always results in a challenged measure being invalidated as a violation of separation-of-powers doctrine, while the functionalist approach almost always results in the Court's upholding the challenged measure. Brown, supra note 24, at 1528. The cases also routinely refer to the Federalist Paper roots of the separation-of-powers concept. See, e.g., INS v. Chadha, 462 U.S.
functionalist and the formalist approaches, it favors the former.\textsuperscript{32} With a few exceptions,\textsuperscript{33} the Court routinely asserts that the Constitution contemplates shared power among the three coordinate branches, and thus rejects the idea of a rigid separation of the branches and their respective powers.\textsuperscript{34} Thus, the Court generally views separation-of-powers theory as one of "accommodation and practicality,"\textsuperscript{35} requiring a "pragmatic, flexible approach" that focuses on the "proper balance between the coordinate branches."\textsuperscript{36} In addition, although each branch of government's initial interpretation of the Constitution is due great respect from the others, the Court emphasizes that it is the judiciary's province and duty to say what the law is.\textsuperscript{37} Therefore the federal courts are not bound to follow another branch's interpretation of the Constitution.\textsuperscript{38}

Furthermore, the Court often views separation-of-powers theory in relation to the doctrine of checks and balances, a perspective that often coincides with the functionalist view of interbranch relations.\textsuperscript{39} Thus, the Court has suggested that the separation-of-powers doctrine complements the notion of checks and balances by institutionalizing a "self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of another."\textsuperscript{40} Because the purpose of the system of checks and balances is to prevent one branch of government from dominating another, a court evaluating whether the separation-of-powers principle has been breached must consider whether one branch has prevented another from accomplishing its constitutionally assigned functions. When

\textsuperscript{919, 947-50 (1983) (citing THE FEDERALIST Nos. 22, 73 (Alexander Hamilton), Nos. 51, 62 (James Madison)).

32. Alfange, supra note 24, at 669-70 (discussing the development of the separation-of-powers doctrine).


35. Chadha, 462 U.S. at 999 (White, J., dissenting).


38. Id. (citing Powell v. McCormack, 395 U.S. 486, 549 (1969)).


there is potential for disruption, a court must then balance the interests involved in the allocation of power.\textsuperscript{41}

Notwithstanding the Court's regular reliance on stock generalizations concerning basic American government, the Court also has recognized the problems in its own doctrinal elaboration of separation-of-powers theory. Because the formalist and functionalist approaches are at odds, the Court's frequent recourse to both has created a body of case law that is justly criticized for being confused and incoherent. One of the few points about which the commentators uniformly agree is that the Court's separation-of-powers jurisprudence is thoroughly muddled.\textsuperscript{42}

Indeed, even some Justices have criticized the Court's separation-of-powers doctrine as "one of the most confusing and controversial areas of constitutional law."\textsuperscript{43}

Thus, while one may distill some broad set of fundamental principles from the Court's decisions relating to separation-of-powers theory, the overwhelming consensus of the critical acad-


\textsuperscript{42} See, e.g., Brown, supra note 24, at 1517 ("The Court's treatment of the constitutional separation of powers is an incoherent muddle."); Carter, \textit{Constitutional Improprieties}, supra note 24, at 358-65 (discussing lack of coherent theory in recent decisions); Carter, \textit{The Independent Counsel Mess}, supra note 24, at 127-28 (arguing that \textit{Morrison} was a reversal of the Court's development of a formalist theory); Carter, \textit{From Sick Chicken to Synar}, supra note 24, at 721 (stating that the Court has not been consistent in advocating either a formalist or a functionalist method); Chemerinsky, \textit{supra} note 24, at 1085-86 (arguing that the Burger Court applied inconsistent methods to analyze congressional and presidential actions in separation-of-powers cases); Elliott, \textit{supra} note 24, at 507 (arguing that the Court has failed to establish a coherent body of policy and theory regarding separation of powers); Redish & Cisar, \textit{supra} note 24, at 450 (noting Court's "split personality" in wavering from formalist enforcement to functionalist rationalization of inter-branch incursions); Strauss, \textit{Formal and Functional Approaches}, supra note 24, at 489-96 (describing confused state of recent decisions); Arthur C. Leahy, Note, \textit{Mistretta v. United States: Mistreating the Separation of Powers Doctrine?}, 27 SAN DIEGO L. REV. 209, 221-22 (1990) (arguing that \textit{Mistretta} indicates that \textit{Morrison} was not a fluke, and that a return to functionalist analysis is a mistake).

Professor Brown has argued that the Court has employed only an ad hoc approach that has avoided taking a stand on the structural values of the Constitution: "It has adopted no theory, embraced no doctrine, endorsed no philosophy, that would provide even a starting point for debate." Brown, \textit{supra} note 24, at 1531. \textit{But see} Alfange, \textit{supra} note 24, at 669-72 (arguing that cases like \textit{Bowsher} were a "passing phase"); Robert L. Stern, \textit{The Separation of Powers Cases: Not Really a Mess}, 31 ARIZ. L. REV. 461 (1989) (arguing in support of the doctrinal consistency in \textit{Morrison} and the functionalist approach to separation-of-powers theory that decision embodies).

emy is that the Court’s application of the doctrine amounts to little more than unpredictable ad hoc justice.\textsuperscript{44} Separation-of-powers doctrine suffers from the twin ills of indeterminacy and linguistic skepticism.\textsuperscript{45} Furthermore, the ad hoc nature of separation-of-powers decisions makes it unlikely that the Court will defer to the suggestion of some scholars that it ground its separation-of-powers opinions in some other principled basis, such as due process\textsuperscript{46} or ordered liberty.\textsuperscript{47} Given the Court’s doctrinal muddle and the split among the Justices in separation-of-powers cases,\textsuperscript{48} it seems unlikely that any aggregation of Justices will soon adopt a new analytical framework advanced by the Court’s academic critics.

b. \textit{The Structure of a Possible Separation-of-Powers Argument Challenging the Civil Justice Reform Act}

Because the case law and commentary provide little guidance in determining a separation-of-powers violation,\textsuperscript{49} potential litigants raising such a challenge to the Civil Justice Reform Act need to assay the strengths and weaknesses of their arguments under the competing analytical models. Moreover, because the formalist and functionalist approaches embody competing views of constitutional government,\textsuperscript{50} litigants

\begin{itemize}
  \item \textsuperscript{44} See supra notes 26 and 28 (discussing varying Supreme Court interpretations of separation of powers).
  \item \textsuperscript{45} See, e.g., Redish & Cisar, supra note 24, at 478-79 (noting that linguistic skepticism refers to the belief that there is not one sole meaning for terms like “executive” or “legislative,” and contending that while such words are capable of evolving new meanings over time, there are relatively stable, historically developed meanings that can be used to interpret the text of the Constitution).
  \item \textsuperscript{46} See, e.g., Verkuil, supra note 24, at 301 (arguing that due process should be used to analyze separation-of-powers cases). But see Pierce, supra note 24, at 365 (responding to and criticizing Verkuil’s due process analytical framework); Redish & Cisar, supra note 24, at 498-502 (same).
  \item \textsuperscript{47} See Brown, supra note 24, at 1540-65 (arguing that the concept of ordered liberty would provide guidance to courts in analyzing separation-of-powers cases). But see Redish & Cisar, supra note 24, at 502-05 (criticizing Brown’s ordered liberty analytical model).
  \item \textsuperscript{48} See supra note 27.
  \item \textsuperscript{49} Scholarly proposals also lack a principled basis to provide guidance. See, e.g., Brown, supra note 24, at 1530 (arguing that both the formalist and functionalist approaches fail to consider the purpose for separating the powers of government); Merrill, supra note 25, at 227 (noting that neither formalism nor functionalism provide a satisfactory account of separation-of-powers doctrine in practice, and advocating a “minimalist conception” of separation of powers).
  \item \textsuperscript{50} See, e.g., Carter, \textit{From Sick Chicken to Synar}, supra note 24, at 722-43 (discussing the views of government implicit in the development of formalist
will find it difficult to structure a persuasive challenge without knowing which approach the Court will apply.

This dilemma applies with great force to conflicts between the judiciary and either the executive or legislative branch. Because Article III is the briefest of the three foundational Articles, a formalist challenge based on alleged incursions into the judiciary's constitutional territory may be impossible, because such a challenge would necessarily rely on a theory of the federal courts' non-explicit, inherent powers. Thus, a litigant's most plausible challenge would have to be based on a functionalist view of interbranch relations.

The Civil Justice Reform Act presents an unusual separation-of-powers problem. Arguably the Act, including the assignment of rulemaking authority to advisory groups, bears all the hallmarks of a constitutionally permissible legislative action within prevailing constitutional delegation doctrine: the Act requires that each federal district court appoint the advisory group members and approve the proposed civil justice reform plans. To be successful, therefore, a separation-of-powers challenge to the Act must demonstrate that the provisions requiring judicial action are merely hollow gestures to the judicial branch's rulemaking authority, and that the procedural reforms that advisory groups recommend are congressionally-inspired, mandated, and enacted.

A separation-of-powers challenge to the Civil Justice Reform Act is likely to arise when some (disgruntled) litigant is subjected to a new rule, measure, or program that a Civil Justice Reform Act advisory group has recommended pursuant to its statutory mandates. The Civil Justice Reform Act basically requires all ninety-four federal district courts to draft civil justice expense-and-delay reduction plans. The types of rules,
measures, and programs that seem ripe for challenge include differentiated case tracking systems, discovery controls and limitations (especially mandatory disclosure programs), mandatory alternative dispute resolution referrals, and fee-shifting provisions. Such a challenge is especially likely in those districts where the courts have implemented new rules by applying those rules to a random (or selected) portion of the civil docket, thereby imposing an element of serendipity, not to mention fundamental unfairness on some litigants.

The separation-of-powers challenge to the Civil Justice Act may be simply stated:

(1) Article III assigns judicial power to the United States courts and this judicial power should be insulated from legislative or executive interference. The judicial power of the federal courts includes and has always included the power to prescribe internal procedural rules for the conduct of litigation in the federal courts. Procedural rulemaking is an inherent power of the courts. In addition, Congress itself endorsed this inherent power in the Rules Enabling Act, by statutorily conferring authority on the federal courts to promulgate procedural rules.

(2) In enacting the Civil Justice Reform Act, then, Congress impermissibly removed most, if not all of the essential attributes of rulemaking power from Article III judges and vested that power in non-Article III adjuncts to the court. Further, Congress, in enacting the Civil Justice Reform Act, raised

53. See Mullenix, supra note 9, at 395-96 nn.84-85 (describing required and recommended rules, measures, and programs of submitted plans). See generally CIVIL JUSTICE REFORM ACT REPORT, supra note 10, exhibits C and D (status of alternative dispute resolution rules and differentiated case management proposals in the reporting districts); id. app. I (summarizing rules, measures, and programs of 34 reporting federal districts).

54. See, e.g., CIVIL JUSTICE REFORM ACT ADVISORY GROUP OF THE U.S. DIST. COURT FOR THE S. DIST. OF TEX., COST AND DELAY REDUCTION PLAN UNDER THE CIVIL JUSTICE ACT OF 1990, at 5 (1991) (provision for voluntary disclosure on experimental basis to be applied to a minimum of 10 cases for each judge (20 in Houston) per year).

a danger that the Framers sought to avoid: that of the exercise of unchecked power by one branch over another. In delegating rulemaking power to civilian, non-expert advisory groups, and in statutorily requiring that these advisory groups consider and implement certain types of procedural reforms, Congress itself engaged in procedural rulemaking. This congressional exercise of a judicial function violates separation-of-power doctrine by impermissibly infringing on the power, prerogatives, and independence of the federal courts to promulgate procedural rules.

(3) The basic theme of the constitutional scheme of government is that the institutional independence of the Judiciary cannot be compromised by the actions of the other branches, and the Constitution commands that the independence of the judiciary be jealously guarded. The inherent powers of the courts, once called into existence by Article III, include the powers of the judiciary to protect itself, to administer justice, to promulgate rules for practice, and to provide process where none exists. The Civil Justice Reform Act represents a rare example of Congress involving itself deeply in the internal operations of the federal judiciary, including an implementation process controlled by forces other than the established decision-makers within the federal court system.

2. Paradigmatic Separation-of-Powers Problems and the Constitutional Validity of the Civil Justice Reform Act

Separation-of-powers cases generally reflect three institutional conflicts among the branches. First, power struggles between the executive and legislative branches, which typically have been grounded in national crises or foreign relations issues, have yielded landmark executive-legislative separation cases.56 Second, struggles between the executive and judicial branches often have centered on the bounds of presidential prerogative, as dramatized in the struggle over the Nixon Watergate tapes.57 Both of these conflicts are often rooted in distinct constitutional delineations of power, and thus seem doctrinally

56. See, e.g., Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (addressing authority of the President to seize steel mills during the Korean War and in time of economic crisis); United States v. Curtiss-Wright Corp., 299 U.S. 304 (1936) (addressing authority of the President, based on congressional delegation, to restrict arms sales to two warring countries); see also INS v. Chadha, 462 U.S. 919 (1983) (addressing Congress's ability to use one-House veto to overrule Attorney General's decision not to deport alien).

clear. The third category of decisions centers on the tension between the legislative and judicial branches. These cases tend to be more factually complicated and doctrinally elusive than those involving the executive branch. The Civil Justice Reform Act implicates this separation-of-powers scenario. Separation-of-powers cases centering on any of the three paradigmatic models, however, offer problematic guidance for assessing the Act's separation-of-powers problem. They do suggest, at least, that a federal court construing the Act is likely to adopt a functionalist approach to the interbranch problem the Act's legislative delegation of judicial rulemaking authority raises.

a. Executive/Legislative Separation Problems

The Supreme Court has used both the formalist and functionalist approaches in separation-of-powers cases involving disputes between the executive and legislative branches, but it is virtually impossible to predict which analytical model the Court will apply in any given case. The cases decided under the formalist approach tend to concern easily defined problems, thus giving rise to equally easily defined solutions. In contrast, the cases decided using the functionalist approach tend to raise fuzzier issues of inherent powers, and thus encourage courts to apply balancing tests. Although neither set of paradigmatic cases is especially useful for evaluating a separation-of-powers challenge to the Civil Justice Reform Act, the functionalist cases, especially those concerning inherent powers, provide a better basis for analyzing the Civil Justice Reform Act.

Most of the core separation-of-powers cases involving executive/legislative disputes—Bowsher v. Synar, INS v. Chadha, and Youngstown Sheet & Tube Co. v. Sawyer—hew to the formalist model of constitutional interpretation and are usually anchored in the express provisions of Articles I and II. When

60. See Merrill, supra note 25, at 225-27.
63. 343 U.S. 579 (1952).
64. Bowsher, 478 U.S. at 727-34; Chadha, 462 U.S. at 944-59; Northern Pipeline, 458 U.S. at 57-87; Buckley v. Valeo, 424 U.S. 1, 120-43 (1976) (per curiam);
Article II executive powers are clearly delineated, the Court tends to render decisions that support a strong and unitary executive branch. When the Court, however, cannot find an express grant of executive branch power either in Article II, or, as a delegated power, in Article I, the Court tends to favor Congress's legislative authority.

The Court's formalist approach in executive/legislative cases, relying on textual support for determining separation-of-powers issues, supplies more in the way of rhetorical flourish than analytical vigor. Although the Court can easily apply the formalist approach to simple cases, such as those where it can rely on specific constitutional provisions to resolve a chal-


See, e.g., Bowers, 478 U.S. at 721-34; see also Brown, supra note 24, at 1525-27 (noting that formalists also favor a strong executive branch through a 'unitary' theory of executive power).

See, e.g., Youngstown Sheet & Tube Co., 343 U.S. at 585-89.

Typical of the Court's rhetoric in formalist cases are pronouncements such as "[t]he Constitution sought to divide the delegated powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial." Chadha, 462 U.S. at 951. The Court in Chadha went on to note that the Constitution not only separated the three branches of government, but sought

to assure as nearly as possible, that each branch of government would confine itself to its assigned responsibility. The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted.

Although not "hermetically" sealed from one another, the powers delegated in the three branches are functionally identifiable.

Id. (citations omitted).

The Court has also stated

[that this system of division and separation of powers produces conflicts, confusion, and discordance at times is inherent, but it was deliberately so structured to assure full, vigorous, and open debate on the great issues affecting the people and to provide avenues for the operation of checks on the exercise of governmental power.

Bowers, 478 U.S. at 722. The Court in Bowers not only relied heavily on the Court's earlier formalist approach in Chadha, but also invoked Justice Sutherland's boilerplate statement in Humphrey's Executor:

The fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others, has often been stressed and is hardly open to serious question. So much is implied in the very fact of the separation of the powers of these departments by the Constitution; and in the rule which recognizes their essential co-

Bowers, 478 U.S. at 725 (quoting Humphrey's Ex'r v. United States, 295 U.S. 602, 629-30 (1935)).
lenged allocation of power, the analytical shallowness of the formalist method fails to provide for interbranch disputes that rely on assertions of implied or inherent powers. Obviously, the rhetorical language that characterizes many executive/legislative separation cases fails to envision or encompass interbranch problems involving the "boundary questions" of the new administrative state, and what Justice Jackson called the "zone of twilight" in which the President and Congress may have concurrent authority. In disputes centered on theories of concurrent or inherent power, such as would be involved in a challenge to the Civil Justice Reform Act, a federal court therefore is more likely to resort to the flexible and pragmatic functionalist approach.

In *Nixon v. Administrator of General Services,* the Court applied such a functionalist approach to an executive/legislative branch conflict. In *Nixon,* the executive branch claimed that the Presidential Recordings and Materials Preservation Act unconstitutionally encroached upon the executive branch's inherent power to "control internal operations of the Presidential office." In rejecting this vague argument, the Court articulated the prototypical functionalist standard for determining separation-of-powers issues:

"[I]n determining whether the Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions. Only where the potential for disruption is present must we then determine whether that impact is

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68. See Sargentich, *supra* note 24, at 444 (defining "boundary questions" as "those concerning the constitutional status of an actor or action as legislative or executive," because "a principal element of doubt attaches to the nature of the boundary between the legislative and executive branches in the particular circumstances").

69. *Youngstown Sheet & Tube Co.*, 343 U.S. at 637 (Jackson, J., concurring); see also Chemerinsky, *supra* note 58, at 869-70 (criticizing Justice Jackson's concurring opinion for not supplying analytical guidance for cases involving inherent powers such as executive agreements, executive privilege, impoundment, rescission of treaties, and removal of executive officials from office).

70. See, e.g., *Dames & Moore v. Regan,* 453 U.S. 654 (1981) (upholding President Carter's executive agreement with Iran against a separation-of-powers challenge that the Constitution did not authorize such agreements). Professor Brown argues that the Court used a functionalist approach in deciding *Dames & Moore* but that it would have reached a different conclusion under the formalist approach. See Brown, *supra* note 24, at 1527 n.55.


73. 433 U.S. at 439-40.
justified by an overriding need to promote objectives within the constitutional authority of Congress.\textsuperscript{74}

In general, the executive/legislative separation-of-powers cases decided under a formalist approach are not very helpful in determining whether the Civil Justice Reform Act violates separation-of-powers doctrine, because the Act does not transgress any delineated Article III power. Rather, the provisions of the Civil Justice Reform Act represent a kind of "boundary question" falling into Justice Jackson's "twilight zone" of separation-of-powers problems. The Civil Justice Reform Act entails the exercise of concurrent rulemaking authority by Congress and the judiciary, and thus its constitutionality is better assessed in the context of a theory of shared powers.

b. Executive/Judicial Separation Problems

The paradigmatic separation-of-powers case involving a dispute between the executive and judicial branches, \textit{United States v. Nixon},\textsuperscript{75} is instructive not for what it teaches about separation of powers, but rather for Chief Justice Burger's dissenting opinion it inspired three years later in \textit{Nixon v. Administrator of General Services}.\textsuperscript{76} Indeed, \textit{United States v. Nixon}, the famous Watergate tapes case, was hardly a separation-of-powers case; the decision turned more on an alleged obstruction of criminal process,\textsuperscript{77} namely, the executive's refusal to respond to a subpoena.

Nonetheless, in \textit{United States v. Nixon} Justice Burger appeared to ground his argument in formalist terms, invoking core Article III functions of the judiciary. Three years later in \textit{Nixon v. Administrator of General Services}, however, Justice Brennan curiously transformed Justice Burger's decision into the archetypal functionalist approach to separation questions. Although Chief Justice Burger arguably intended to ground the Court's opinion in \textit{United States v. Nixon} in a formalist inter-

\textsuperscript{74} Id. at 443 (citations omitted) (citing United States v. Nixon, 418 U.S. 683, 711-12 (1974)). Justice Brennan also agreed with the district court that the President's argument rested on an "'archaic view of the separation of powers as requiring three airtight departments of government.'" Id. (quoting Nixon v. Administrator of Gen. Servs., 408 F. Supp. 321, 342 (D.D.C. 1976)).

\textsuperscript{75} 418 U.S. 683 (1974).

\textsuperscript{76} 433 U.S. 425 (1977).

\textsuperscript{77} Chemerinsky, \textit{supra} note 24, at 1083-84 (noting that \textit{United States v. Nixon} is the only separation-of-powers case in which the Burger Court voted against the President). \textit{See generally} Peter E. Quint, \textit{The Separation of Powers Under Nixon: Reflections on Constitutional Liberties and The Rule of Law}, 1981 DUKE L.J. 1, 31-34.
interpretation of the separation-of-powers doctrine, his opinion waf-
fled hopelessly between the formalist and functionalist
perspectives. This ambiguous analysis opened the door for
Justice Brennan’s creative usurpation in the second Nixon case of
Burger’s opinion in the first.

The conflict among the Nixon opinions, then, exposes the
philosophical tensions between the formalist and functionalist
approaches and the differing outcomes under each. Justice
Brennan’s adaptation in the second Nixon case of Chief Justice
Burger’s analysis in the first caused the Chief Justice to refine
his view of judicial independence, thus supplying concepts that
are useful for thinking about the Civil Justice Reform Act.

The first Nixon opinion is somewhat useful for further ex-
egesis on separation-of-powers doctrine. Writing for a unani-
mous Court, Chief Justice Burger rejected President Nixon’s
claim of an unqualified executive privilege against a subpoena
for tape recordings and documents.\(^7\) The Court rejected the
assertion that separation-of-powers doctrine itself precluded ju-
dicial review of the President’s claim to executive privilege,\(^9\)
reaffirming the principle first enunciated in Marbury v.
Madison that federal courts were assigned the task of inter-
preting the laws and the Constitution,\(^8\) even when that inter-
pretation might vary from another branch’s view.\(^1\) Using
formalist terms,\(^2\) the Chief Justice rejected the notion that the

79. Id. at 703.
80. Id. at 703-05; see also Chemerinsky, supra note 24, at 1094-96 (noting
the Burger Court’s inconsistent approach to the availability of judicial review
in separation-of-powers cases depending on whether the separation challenge
was to executive or legislative action); Chemerinsky, supra note 58, at 895-900
(analyzing the availability of judicial review of inherent presidential power
claims).
81. United States v. Nixon, 418 U.S. at 703-04 (citing Powell v. McCormack,
82. Id. at 707. The Chief Justice wrote: “The impediment that an abso-
lute, unqualified privilege would place in the way of the primary constitutional
duty of the Judicial Branch to do justice in criminal prosecutions would
plainly conflict with the function of the courts under Art. III.” Id. As is true
for other portions of his opinion, Chief Justice Burger’s basic formalist ap-
proach then slipped into a quintessentially functionalist perspective of inter-
branch relations: “In designing the structure of our Government and dividing
and allocating the sovereign power among three co-equal branches, the fram-
ers of the Constitution sought to provide a comprehensive system, but the sep-
arate powers were not intended to operate with absolute independence.” Id.
(citing Justice Jackson’s concurring statement in Youngstown Sheet & Tube
Co. v. Sawyer, 343 U.S. 579, 635 (1952), regarding the interdependence of the
three branches).
separation-of-powers doctrine could protect an unqualified presidential immunity from judicial process under all circumstances. For Chief Justice Burger, to construe the Article II powers as absolutely shielding the executive branch from criminal process was an interpretation that would "gravely impair the role of the courts under Art. III." 84

Had the Chief Justice stopped there, his opinion would have followed the formalist approach strictly. Instead, Chief Justice Burger offered a method to assess the degree of impairment to the respective branches caused by either overriding a claim of executive privilege or contravening judicial process. In so doing, he opened the door for judges to balance competing branch interests—an essentially functionalist approach to determining separation-of-powers questions. Thus, although Chief Justice Burger intended his opinion to reflect the formalist approach, he instead produced a functionalist statement of interbranch relations.

This doctrinal confusion was not lost on Justice Brennan. In the second *Nixon* case, involving a dispute between the executive and legislative branches over the control of Nixon's presidential papers, Justice Brennan capitalized on Chief Justice Burger's earlier confused opinion to support the use of a balancing test. In response, Chief Justice Burger noted the changed factual context and strongly protested Justice Brennan's use of his opinion in the Watergate tapes case to support a functionalist rejection of executive branch control over presidential papers.

Dissenting in the second *Nixon* case, Chief Justice Burger attempted to articulate a firmer version of the formalist doctrine. He argued that separation-of-powers principles required

83. *Id.* at 706-07.
84. *Id.* at 707.
85. See *id.* at 707-13. The Chief Justice stated: "Since we conclude that the legitimate needs of the judicial process may outweigh Presidential privilege, it is necessary to resolve those competing interests in a manner that preserves the essential functions of each branch." *Id.* at 707.
86. See *id.* at 707-13. Chief Justice Burger formulated the balancing test, in the context of the Watergate tapes dispute, as follows: "In this case we must weigh the importance of the general privilege of confidentiality of Presidential communications in performance of the President's responsibilities against the inroads of such a privilege on the fair administration of criminal justice." *Id.* at 711-12.
87. *Id.* at 707-13.
89. *Id.* at 504-45 (Burger, C.J., dissenting).
each branch “to be free from the coercive influence of the other branches,” and that the Presidential Recordings and Material Preservation Act was “an unprecedented departure from the constitutional tradition of noncompulsion.” He was also disturbed that Justice Brennan’s majority opinion had used a functionalist approach to convert “separation-of-powers principles into a simplistic rule which requires a ‘potential for disruption’ or an ‘unduly disruptive’ intrusion before a measure will be held to trench on Presidential powers.” Moreover, Chief Justice Burger believed that the Act violated the separation-of-powers doctrine “because it exercise[d] a coercive influence by another branch over the Presidency.” He argued that the critical issue was not who had acted to seize control of the papers (executive department employees), but rather who had commanded those persons to act (Congress).

Chief Justice Burger also believed that the Act violated the separation-of-powers doctrine for another reason: it trenched on the inherent executive branch power to control presidential papers. This portion of his dissent is emblematic of his wa-

90. Id. at 508-09 (citing Humphrey’s Ex’r v. United States, 295 U.S. 602, 629-30 (1935); O’Donoghue v. United States, 289 U.S. 516, 530 (1933); Massachusetts v. Mellon, 262 U.S. 447, 488 (1923)). Ironically, Chief Justice Burger began his discussion of the problem with the blanket statement: “Separation of powers is in no sense a formalism.” Id. at 507. Indicative of his analytical confusion, he then proceeded to discuss separation-of-powers doctrine in highly formalist terms. See id. at 507-18.

91. Id. at 511. Chief Justice Burger noted: “The statute commands the head of a legislatively created department to take and maintain custody of the appellant’s Presidential papers . . . .” Id. The same argument applies to the Civil Justice Reform Act: the statute commands a legislatively created advisory group—albeit “appointed” by the district court—to recommend and promulgate new local procedural rules and measures. See supra notes 7-8 and accompanying text.

92. 433 U.S. at 511-12 (noting that in Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam), a unanimous Court had found a separation-of-powers violation without any showing of “undue disruption”).

93. Id.
94. Id. at 514.
95. Id. at 513. Chief Justice Burger stated:
Separation-of-powers principles are no less eroded simply because Congress goes through a “minuet” of directing Executive Department employees, rather than the Secretary of the Senate or the Doorkeeper of the House, to possess and control Presidential papers. Whether there has been a violation of separation-of-powers principles depends, not on the identity of the custodians, but upon which branch has commanded the custodians to act. Here, Congress has given the command.

Id.

96. Id. at 514-15. Chief Justice Burger argued that “[c]ontrol of Presiden-
Although the various majority and dissenting *Nixon* opinions muddle the differences between the formalist and functionalist approaches and often contradict one another, portions of these decisions are particularly relevant to a separation-of-powers challenge to the Civil Justice Reform Act. The first *Nixon* decision supports the judiciary's right to interpret the constitutionality of the Civil Justice Reform Act as a possible incursion on third branch powers; indeed, it stands as an example of the Court upholding judicial review against a challenge of another branch's prerogative. In addition, Chief Justice Burger's majority opinion recognized that core Article III functions may be impaired by competing branch exercises of power. In the Watergate tapes case, that core Article III function was the court's subpoena power, and the ability of court officers to marshal evidence in a criminal prosecution.

More significant for construing the Civil Justice Reform Act, however, may be Chief Justice Burger's analysis in the second *Nixon* case where he hardened his separation-of-powers theory into familiar formalist terms of tripartite branches "'limited to the exercise of the powers appropriate to [their] own department and no other.'" Significantly, he also recognized the idea of implied, inherent powers. But perhaps Chief Justice Burger's most important insight was reflected in his statement that separation-of-powers issues should not be measured against who acted, but with reference to who commanded those persons to act. Applying this analysis to the Civil Justice Reform Act, Congress's delegation of procedural rulemaking authority to third branch factotums should render the Act constitutionally suspect. Under Chief Justice Burger's non-compulsion view of the separation-of-powers doctrine, if the important issue is which branch commands another to act, then arguably Congress has violated the separation of powers.

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97. *See id.* at 514-16.
98. *See supra* note 80 and accompanying text.
100. *Id.* at 515.
101. *See supra* note 95 and accompanying text.
tion-of-powers doctrine by creating advisory groups and command-ning them to exercise procedural rulemaking authority.

c. Legislative/Judicial Separation Problems

The cluster of cases involving separation-of-powers issues between the legislative and judicial branches—*Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*,¹⁰² *Commodity Futures Trading Commission v. Schor*,¹⁰³ *Morrison v. Olson*,¹⁰⁴ and *Mistretta v. United States*¹⁰⁵—share a common institutional approach to the inquiry whether a particular congressional enactment has impermissibly violated Article III.¹⁰⁶ These cases, which are the closest analogues to that of the Civil Justice Reform Act, typically use a functional approach when assessing challenges to Article III power.¹⁰⁷ Only in *Northern Pipeline* did the Supreme Court find that a congressional enactment violated the separation-of-powers doctrine by unreasonably invading Article III prerogatives.¹⁰⁸ Consequently, if provisions of the Civil Justice Reform Act violate the separation-of-powers doctrine, then it will be to the extent this legislation suffers constitutional defects as severe as the Bankruptcy Act of 1978¹⁰⁹ provisions invalidated in *Northern Pipeline*.

In *Northern Pipeline*, the Court held that Article III barred Congress from establishing legislative courts to exercise

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¹⁰⁶. *See* Brown, *supra* note 24, at 1540-46 (discussing the Court's functionalist and institutionalist approach in *Schor*, *Morrison*, and *Mistretta*).
¹⁰⁷. Professor Brown seeks to recast the Court's functionalist approach in these cases as one truly grounded in a concern for due process. Thus, she views *Schor* as a case illustrating "how principles of due process can work their way into opinions addressing the constraints of article III," and the Court's resolution of *Morrison* as presenting "a classic due-process concern: the assurance of an impartial decisionmaker for the persons directly affected by the statutory scheme." *Id.* at 1542-43.
jurisdiction over bankruptcy matters.\textsuperscript{110} It relied on two fundamental points: that the Constitution established an independent judicial branch,\textsuperscript{111} and that the delegation doctrine did not support Congress's assignment of adjudicative functions to legislative courts.\textsuperscript{112} Since the Civil Justice Reform Act's legitimacy is based in large part on permissible Article I delegation doctrine, \textit{Northern Pipeline}'s analysis of that doctrine is especially significant.

The Court's opinion in \textit{Northern Pipeline} employed a functionalist perspective. Justice Brennan's majority decision explained that tripartite government is maintained by a system of checks and balances that serves "'as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of another.'"\textsuperscript{113} Thus, intrusion into third branch prerogatives is a benchmark for unconstitutionality. Furthermore, the Court stated, the Framers intended an independent judiciary that would serve as the bulwark of the checks and balances system and guarantee an impartial adjudicatory process.\textsuperscript{114}

Although the \textit{Northern Pipeline} Court tacitly acknowledged that the Framers constitutionally assigned Congress the responsibility to decide the role of the lower federal courts,\textsuperscript{115} it explained that the right to create or eliminate lower federal courts was itself circumscribed.\textsuperscript{116} Thus, Justice Brennan wrote that "the Framers did not leave it to Congress to define the character of those courts—they were to be independent of the political branches and presided over by judges with guaranteed salary and life tenure."\textsuperscript{117} Furthermore, Justice Brennan reasoned that where Article III applies, all legislative powers delineated in Article I are subject to it,\textsuperscript{118} for any other conclusion would fail "to provide any real protection against the ero-

\textsuperscript{111}  See id. at 57-76.
\textsuperscript{112}  Id. at 58-87.
\textsuperscript{113}  Id. at 57-58.
\textsuperscript{114}  Id. at 58 ("As an inseparable element of the constitutional system of checks and balances, and as a guarantee of judicial impartiality, Art. III both defines the power and protects the independence of the Judicial branch.").
\textsuperscript{115}  Id. at 64 n.15.
\textsuperscript{116}  Id. at 64-76.
\textsuperscript{117}  Id. at 64 n.15.
\textsuperscript{118}  Id. at 73.
sion of Art. III jurisdiction by the unilateral action of the political Branches.”

Thus, the first crucial analytical basis for the Court's decision in *Northern Pipeline* was the protection of an independent judiciary against intrusion or interference from the political branches.

The Court's second basis for its decision was its rejection of the suggestion that Congress's delegation power permitted it to vest adjudicatory functions in non-Article III courts it created. The Court distinguished permissible extensions of legislative power, such as the authority to create court adjuncts such as magistrates and assign them adjudicatory functions, from impermissible incursions into judicial power by explaining that when Congress creates a statutory right, it clearly has the discretion, in defining that right, to create presumptions, or assign burdens of proof, or prescribe remedies; it may also provide that persons seeking to vindicate the right must do so before a particularized tribunal created to perform the specialized adjudicative tasks related to that right. Such provisions do, in a sense, affect the exercise of judicial power, but they are also incidental to Congress' power to define the right it created. No comparative justification exists, however, when the right being adjudicated is not of Congressional creation. *In such a situation, substantial inroads into functions that have traditionally been performed by the Judiciary cannot be characterized merely as incidental extensions of Congress' power to define rights it has created. Rather, such inroads suggest unwarranted encroachments upon the judicial power of the United States, which our Constitution reserves for Art. III courts.*

Thus valid congressional actions do not violate the separation-of-powers doctrine so long as they leave “‘the essential attributes of the judicial power’” in the Article III courts, and link Congress's assignment “to its legislative power to define substantive rights.”

Under this analysis, the Civil Justice Reform Act is consti-
tionally defective. The Act creates no substantive rights at all. In the absence of such substantive content, Congress cannot extend its legislative powers so as to vest court adjuncts with procedural rulemaking authority. Furthermore, under *Northern Pipeline*, a congressional delegation of procedural rulemaking authority such as that required by the Act represents a "substantial [inroad] into [a] function that [has] traditionally been performed by the Judiciary."125

The major cases involving legislative/judicial separation-of-powers issues the Supreme Court has decided since *Northern Pipeline*—*Schor*, *Morrison*, and *Mistretta*—have relied on *Northern Pipeline*’s functionalist framework. The issue in each case was whether the particular congressional enactment constituted an "encroachment" or "agrandizement" by one branch at the expense of the other and whether it impaired the judiciary’s status as impartial and independent.126 In each case, the Court upheld the congressional delegation of authority as neither unduly intruding on the province of the judiciary127 nor compromising the judiciary’s independent role as pervasively as did the Bankruptcy Act of 1978.128

Of these cases, *Mistretta* clearly is the most important precedent for assessing a challenge to the constitutionality of the Civil Justice Reform Act because the Sentencing Reform Act129 at issue in *Mistretta* presents, in two major respects, the closest statutory analog to the Civil Justice Reform Act. Similar to the Civil Justice Reform Act’s creation of the court-appointed advisory groups, the Sentencing Reform Act created the United States Sentencing Commission, an independent body located in the judicial branch.130 In addition, Congress’s delegation of au-

125. *Id.* at 84.


127. *See supra* note 108.

128. *See, e.g., Mistretta*, 488 U.S. at 382 (citing *Northern Pipeline* as example of Court invalidation of congressional attempt to confer Article III power on Article I judges); *Schor*, 478 U.S. at 852 (distinguishing the powers of the CFTC from the overreaching powers delegated in the Bankruptcy Act provisions).


130. *See Mistretta*, 488 U.S. at 388. The Commission was established "‘as an independent commission in the judicial branch of the United States’" consisting of seven voting members appointed by the President with the advice and consent of the Senate. *Id.* (quoting 28 U.S.C. § 991(a) (1988)). At least
authority to the Sentencing Commission to promulgate sentencing guidelines is similar to its delegation of authority to the advisory groups to promulgate procedural rules and measures.\textsuperscript{131}

The \textit{Mistretta} Court rejected the challenge\textsuperscript{132} that the Sentencing Reform Act constituted an impermissible delegation of legislative power,\textsuperscript{133} relying on the full rhetorical panoply of functional analysis.\textsuperscript{134} After reviewing the role of the Sentencing Commission and the historical precedents for congressional delegation of rulemaking authority to the judiciary, the Court concluded that the Act did not violate the separation-of-powers doctrine because "in placing the Commission in the Judicial Branch, Congress cannot be said to have aggrandized the au-

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  \item three members are federal judges selected from a list recommended by the Judicial Conference; the Attorney General or his designate sits as an \textit{ex officio}, non-voting member. \textit{Id.} Voting members hold six-year, staggered terms, and may be removed by the President for neglect of duty, malfeasance, or good cause. \textit{Id.} See generally Ackerman, \textit{supra} note 24, at 993 (providing analytical framework for construing separation-of-powers challenges to various presidential commissions).
  \item See \textit{Mistretta}, 488 U.S. at 369 (discussing the Sentencing Commission's responsibility to review and revise sentencing guidelines).
  \item \textit{Mistretta}, 488 U.S. at 371-79 (upholding Congress's delegation of authority to the Sentencing Commission as sufficiently specific and detailed to withstand challenge of impermissible delegation); \textit{Id.} at 379-84 (upholding placement of Sentencing Commission in the judicial branch and assignment of rulemaking authority as not violative of separation-of-powers doctrine).
  \item \textit{Id.} at 381-83. The Court discussed the system of coordinate branches, the need for a "pragmatic, flexible view of differentiated governmental power," and the system of checks and balances. \textit{Id.} at 381. Further, the Court invoked the standards of aggrandizement of power, encroachment on prerogatives, as well as institutional integrity. \textit{Id.} at 383.
\end{itemize}
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authority of that Branch or to have deprived the Executive Branch of a power it once possessed." Moreover, the Court held that Congress had not unconstitutionally delegated or diminished its authority.\(^{136}\)

At first blush, the Court's decision in *Mistretta* would appear to validate the Civil Justice Reform Act's delegation of similar rulemaking authority. In reality, however, *Mistretta* is an inapt precedent for determining the constitutionality of that Act. Indeed, *Mistretta*'s separation-of-powers problem is the mirror-image of that presented by the Civil Justice Reform Act.

In *Mistretta*, the Sentencing Reform Act was challenged as an unconstitutional congressional delegation of substantive sentencing decisionmaking authority to the judicial branch.\(^{137}\) Congress was accused of impermissibly delegating its substantive legislative authority to an independent body located in the judicial branch.\(^{138}\) The Civil Justice Reform Act, in contrast, raises the issue of Congress's removal of procedural rulemaking authority from the third branch. Whatever finely-honed historical arguments the *Mistretta* majority marshals in support of the power of congressionally-delegated substantive rulemaking authority,\(^{139}\) the Court in *Mistretta* nowhere acknowledges the central prohibitive feature of the Rules Enabling Act: that Congress may enact substantive laws, but that the judicial branch promulgates procedural rules.\(^{140}\) Thus, the failure of

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135. *Id.* at 395.
136. *Id.*
137. *Id.* at 371.
138. *Id.*
139. *Id.* at 392-95.
140. The majority opinion instead even noted the weakness of its own argument based on the rulemaking analogy:

> We agree with petitioner that the nature of the Commission's rulemaking power is not strictly analogous to this Court's rulemaking power under the enabling Acts. [sic] Although we are loathe to enter the logical morass of distinguishing between substantive and procedural rules, and although we have recognized that the Federal Rules of Civil Procedure regulate matters "falling within the uncertain area between substance and procedure, [and] are rationally capable of classification as either," we recognize that the task of promulgating rules regulating practice and pleading before federal courts does not involve the degree of political judgment integral to the Commission's formulation of sentencing guidelines.

*Id.* at 392 (citations omitted). The Court's admission that the Sentencing Commission was in effect making substantive rules involving a "degree of political judgment" is important, because it distinguishes *Mistretta*'s factual context from the role of the advisory groups under the Civil Justice Reform Act, where they are not.
the *Mistretta* majority to recognize this distinguishes *Mistretta* as problematic precedent for evaluating the legitimacy of the Civil Justice Reform Act.

Justice Scalia, dissenting in *Mistretta*, recognized that the nub of the separation issue turned on whether Congress was delegating substantive law-making authority to the third branch.\(^1\) In Justice Scalia's view, such congressional delegation is constitutional only when Congress vests the judiciary with law-making authority that is ancillary to its exercise of judicial power—such as to adopt rules of procedure (his example).\(^2\) For Justice Scalia, the law-making power of the Sentencing Commission was "not ancillary but quite naked."\(^3\) Thus, the power that was vested in the Sentencing Commission to create sentencing guidelines was a clear violation of separation-of-powers doctrine: "The only governmental power the Commission possesses is the power to make law; and it is not the Congress."\(^4\)

Prophetically, Justice Scalia's criticism of the *Mistretta* majority opinion anticipated congressional enactment of the Civil Justice Reform Act, the creation of the advisory groups within the judiciary, and the delegation of procedural rulemaking authority to these bodies:

> By reason of today's decision, I anticipate that Congress will find delegation of its lawmaking powers much more attractive in the future. If rulemaking can be entirely unrelated to the exercise of judicial or executive powers, I foresee all manner of 'expert bodies,' insulated from the political process, to which Congress will delegate various portions of its lawmaking responsibility.\(^5\)

Justice Scalia also perceived the *Mistretta* decision would lead to a consequence even more deleterious than that of substantive law-making delegations. Justice Scalia believed that *Mistretta* would encourage Congress to delegate rulemaking au-

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141. *Id.* at 422-27 (Scalia, J., dissenting).
142. *Id.* at 425 (citing other examples).
143. *Id.* at 421.
144. *Id.* at 422.
145. *Id.* Carrying his point further, Justice Scalia suggested:

> How tempting to create an expert Medical Commission (mostly M.D.'s, with perhaps a few Ph.D.'s in moral philosophy) to dispose of such thorny, "no-win" political issues as the withholding of life-support systems in federally funded hospitals, or the use of fetal tissue for research. This is an undemocratic precedent that we set — not because of the scope of the delegated power, but because its recipient is not one of the three Branches of Government.

*Id.*
authority it did not even possess, but that until Mistretta had been within the true province of the judiciary:

If an "independent agency" such as this can be given the power to fix sentences previously exercised by district courts, I must assume that a similar agency can be given the powers to adopt rules of procedure and rules of evidence previously exercised by this Court. The bases for distinction would be thin indeed.\textsuperscript{146}

The Civil Justice Reform Act of 1990, enacted one year after Mistretta, fulfills Justice Scalia's prophecy. The Act creates Justice Scalia's feared "expert bodies"—the advisory groups—lodged within the judiciary, and authorizes these groups to promulgate rules of federal civil procedure. As Justice Scalia suggested, these civilian advisory groups are indeed insulated from the political process. Contrary to Justice Scalia's initial prediction, these advisory groups are not even exercising a substantive law-making function. In the Civil Justice Reform Act, Congress has exceeded the permissible law-making delegation legitimated in Mistretta, and stripped a core judicial function traditionally assigned to the courts. In Mistretta, the Supreme Court said that Congress did not violate the separation-of-powers doctrine by delegating substantive law-making authority to an independent commission lodged in the third branch.\textsuperscript{147} Mistretta did not say, however, that it was permissible for Congress to strip the judiciary of one of its core functions—procedural rulemaking—and lodge this in a congressionally created, politically insulated, independent body.

B. THE CIVIL JUSTICE REFORM ACT: THE ARGUMENT FOR A SEPARATION-OF-POWERS VIOLATION

The Supreme Court's case law confirms the critical consensus that its separation-of-powers jurisprudence is inconsistent, waffling between the formalist and functional views of constitutional government, sometimes even within a single decision. The most important cases for construing the legality of the Civil Justice Reform Act, those involving challenges to an independent judiciary, suggest that the Court favors a functional resolution of such disputes. Yet they also demonstrate that the Act is most likely to be sustained under a functional analysis, while the view most likely hostile to this legislation—as embodied in Justice Scalia's dissenting opinion in Mistretta—proceeds from a highly formalistic model.

\textsuperscript{146} Id. at 425-26.

\textsuperscript{147} Id. at 371.
The essential difficulty in evaluating separation-of-powers issues is the absence of a coherent methodology. To fill this analytical vacuum, Professor Erwin Chemerinsky suggests the Court focus on three inquiries: whether one branch is exercising powers constitutionally committed to another; whether one branch is preventing another from performing its functions or duties; and whether one branch of government is acting in a manner that prevents sufficient review or control by another. The first inquiry "requires the Court to analyze and decide what powers are committed to which branches of government and under what circumstances a branch unconstitutionally assumes the power of another." Under the second inquiry, the Court must determine the functions of each branch and what constitutes an impairment of these functions. The third inquiry would have the Court "analyze the opportunities for checks and review and determine what is a sufficient form of control."

Professor Chemerinsky's approach to separation-of-powers cases offers a useful analytical framework that acknowledges both formal and functional concerns. Eschewing originalism as a legitimate basis for determining separation issues, his proposed approach has the same analytical power and authoritative claim as Professor Redish's proposed model of "pragmatic formalism." The primary rationale for this framework "is the

148. Chemerinsky, supra note 24, at 1109.
149. Id. at 1110-11.
150. Id. at 1110.
151. Id.
152. Id. at 1111.
153. Id. at 1105-09; see also id. at 1098-1101 (discussing originalist and non-originalist approaches to separation-of-powers questions, and proponents and critics); Redish & Cisar, supra note 24, at 494-97 (discussing and rejecting rigid originalist methodology for separation-of-powers cases).
154. Redish & Cisar, supra note 24, at 454-55 (defining concept of "pragmatic formalism"); id. at 474-78 (defending model of pragmatic formalism). Redish and Cisar's model of pragmatic formalism eschews the balancing test used in most functional approaches to separation-of-powers issues. Id. at 454. Their "street-smart" mode of interpretation rejects "rigid, abstract interpretational formulas derived from an originalistic perspective." Id. Instead of functional balancing, they would analyze the constitutionality of a branch's action by "definitonal analysis":

[The Court's role in separation of powers cases should be limited to determining whether the challenged branch action falls within the definition of that branch's constitutionally derived powers — executive, legislative, or judicial. If the answer is yes, the branch's action is constitutional; if the answer is no, the action is unconstitutional. No other questions are to be asked; no other countervailing factors are to be considered.

1993] UNCONSTITUTIONAL RULEMAKING 1315
relative inadequacy of every conceivable doctrinal alternative as a means of ensuring the effectiveness of separation of powers."155

The Civil Justice Reform Act arguably violates the separation-of-powers doctrine in that Congress has impermissibly exercised procedural rulemaking authority constitutionally committed to the judiciary by Article III; that Congress is interfering with federal courts' inherent power and impairing the courts' ability to impartially adjudicate cases; and that Congress has provided insufficient judicial control or review of this improper rulemaking delegation. It remains, therefore, to supply content to each of Professor Chemerinsky's inquiries.

1. Giving Content to Article III Powers

Article III's textual brevity, which provides little guidance for Court literalists as to the proper extent of judicial authority,156 poses a distinct problem to courts deciding separation-of-powers cases that involve the judiciary. Unlike Articles I and II, which extensively delineate the powers of Congress and the Presidency, Article III merely vests "judicial power" in the federal courts.157 Other than providing for life tenure and prohibiting salary diminution, Article III does not indicate what constitutes this judicial power.158

Separation-of-power disputes relating to a definition of judicial power have instead centered on the Article III, section 2 "case or controversy" requirement.159 These disputes typically take two forms: instances where Congress has delegated non-

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155. Id. at 454-55. While the Redish-Cisar approach has the virtues of simplicity and clarity, it nonetheless begs the question of defining branch power, which in most separation cases is the nub of the dispute. This is especially true in cases involving invocation of non-explicit, inherent branch powers.

156. See, e.g., Brown, supra note 24, at 1543, 1545; Redish & Cisar, supra note 24, at 484.

157. Section 1 of Article III provides:

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

U.S. CONST. art. III, § 1.

158. See id.; see also Alfange, supra note 24, at 684 (discussing the Framers' concern for guaranteeing the personal independence of judges).

j) judicial functions to the judiciary, and instances where Congress has attempted to modify the jurisdiction of the federal courts. With regard to the first category, although the Court initially was reluctant to accept non-judicial functions, it now generally affirms congressional delegations of various rulemaking functions to the courts. Thus, the judicial power permits delegations of legislative-like authority if it is ancillary to existing judicial powers.

With regard to congressional modification of federal court jurisdiction, the legal bounds of propriety are equally fuzzy. The relationship of Congress to the judiciary rests uneasily in Article III's provision for "one supreme Court, and such inferior Courts as the Congress may from time to time ordain and establish." Congress, therefore, can constitutionally deter-

160. See Alfange, supra note 24, at 680-81.
161. Id. at 681-94.
162. Id. at 680 (citing Musk rat v. United States, 219 U.S. 346, 352-56 (1911), as supplying a brief history of federal court reluctance to accept non-judicial functions).
163. Id. (citing Mistretta, Morrison, and Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 41-50 (1825), as examples of judicial acceptance of administrative responsibilities).
164. See Mistretta v. United States, 488 U.S. 361, 417 (1989) (Scalia, J., dissenting). Justice Scalia's view is that Congress can determine the extent of delegated law-making, but the Court will approve such delegations only when the law-making authority is ancillary to existing exercises of judicial power. See id. (citing Sibbach v. Wilson & Co., 312 U.S. 1, 22 (1941) (power to adopt rules of procedure); Standard Oil Co. of New Jersey v. United States, 221 U.S. 1 (1911) (power to define what constitutes a "restraint of trade"); Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 45 (1825) (power to prescribe method in which officers execute judgments)).
165. U.S. CONST. art. III, § 1. There is a significant line of decisions dealing with problems of the scope of Article III case-and-controversy judicial power, which Justice Brennan attempted to categorize in Northern Pipeline. See Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 63-76 (1982) (discussing judicial power in terms of the types of cases and controversies the Framers assigned to an independent Article III branch, and the three situations where Article III does not bar creation of legislative courts or delegations to administrative agencies). Justice Brennan's attempt to analytically unify Article III judicial power in terms of the case-or-controversy requirement was largely unsuccessful, and criticized by the dissenters in that case, and shifting coalitions of Justices in subsequent separation cases. See Alfange, supra note 24, at 687-94 (discussing Justice Brennan's analytical model and its criticism by the dissenters and in subsequent cases).

These cases typically involve an issue concerning congressional delegation to a legislative court or administrative agency that allegedly transgresses the scope of Article III jurisdiction by conferring judicial powers on persons lacking Article III independence. See Northern Pipeline, 458 U.S. at 64-70. These cases provide problematic analogies for construing the Civil Justice Reform Act, which does not create a legislative court nor delegate power to an admin-
mine the size and structure of the federal court system, and this congressional power conventionally has been interpreted to include the authority to determine the jurisdiction of the lower federal courts. That Congress can withdraw entire categories of federal jurisdiction is also a well-established tenet of constitutional law. Article III, however, does not expressly limit congressional power over judicial jurisdiction.

United States v. Klein, which arose from the Civil War presidential pardons, is the key separation-of-powers decision that limits Congress's power over federal jurisdiction. The Klein Court struck down an 1870 congressional proviso that essentially prescribed the judicial effect to be given to executive pardons or declarations of amnesty. The Court concluded that Congress may not enact a substantive rule of decision that alters original federal court jurisdiction already conferred in a pending case; to do so would breach the separation-of-powers doctrine by rendering vulnerable the institutional independence of the courts. The central problem with Congress's enactment was that it did not withdraw jurisdiction over an entire category of cases, but rather only over particular cases where Congress anticipated an unfavorable outcome.

A broad reading of Klein suggests a separation-of-powers violation where Congress, without repealing or amending the underlying statute, withdraws federal court jurisdiction in an attempt to affect the outcome of a pending case. During the
legislative hearings on the Civil Justice Reform Act, the judges and the American Bar Association representative who appeared before the Senate Judiciary subcommittee cited *Klein* as the major doctrinal support for their proposition that the Act presented separation-of-powers problems as an unusual incursion on third branch power.175

*Klein*, however, offers only an oblique challenge to the Civil Justice Reform Act's legitimacy. Although the Act does affect pending and future litigation in the sense that it withdraws from federal courts their authority over procedural rulemaking, it does not literally supply any substantive rules that anticipate or would reverse a disfavored outcome in pending litigation. Rather, *Klein* is important because it articulates a principled limit on congressional interference with judicial power, thus demonstrating that congressional action may indeed constitute an assault on the courts' institutional independence. Congress's wholesale withdrawal from the courts of control over their own internal procedure in the Civil Justice Reform Act is arguably a greater congressional compromise of judicial independence than that at issue in *Klein*.

2. The Inherent Powers of the Courts

One will have difficulty grounding a separation-of-powers argument against the Civil Justice Reform Act on an explicit assignment of judicial power in Article III. Article III does not speak to the federal courts' rulemaking authority, and the cases dealing with congressional delegations of power and modification of federal court jurisdiction are largely unavailing in resolving the issue of the Act's legitimacy.176 The Act deals with neither the substantive jurisdiction of the federal courts nor a delegation of substantive authority to a legislative court or an administrative agency. Rather, it involves the converse problem of Congress removing a power from the judicial branch and then improperly delegating it to a non-judicial body lodged within the judicial branch.

Although the Civil Justice Reform Act does not implicate an incursion into explicit judicial authority, it raises the issue of

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175. For a general overview of commentary critical of the bill given in congressional hearings, see Mullenix, *supra* note 9, at 411-24.
176. See *supra* note 165 (discussing relevant cases).
interference with functions that are a part of the judiciary’s “inherent power.” Any constitutional challenge to the Act must rest on the theory that Article III judicial powers include inherent, non-explicit powers that Congress has taken from the judiciary in violation of the separation-of-powers doctrine. While the existence of inherent executive power is well established, that of inherent judicial power is much less so. Nonetheless, a doctrine of inherent judicial power exists, and courts have made recourse to it when deciding separation-of-powers cases.

The Supreme Court has defined judicial “inherent powers” as those necessary for a court to function. The theory posits

177. See, e.g., United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318-19 (1936) (stating that the unenumerated power of the federal government over foreign affairs rests principally with the President). See generally Chemerinsky, supra note 58, at 857-80 (reviewing cases and discussing critical commentary).

Commentators have debated the scope of these powers. See, e.g., Chemerinsky, supra note 58, at 910 (asserting that the Supreme Court’s ad hoc, unprincipled approach to inherent presidential power has contributed to the creation of an “Imperial Presidency”); Redish & Cisar, supra note 24, at 483-85 (rejecting theory of inherent executive power based on language of vestiture clause).


179. See Young, 481 U.S. at 819-20 (Scalia, J., concurring) (discussing and limiting the scope of Hudson’s dicta on inherent court powers); United States v. Hudson, 11 U.S. (7 Cranch) 32, 34 (1812) (holding that criminal jurisdiction over common-law crimes requires statutory authorization because it is not within implied judicial power). In Hudson, however, the Supreme Court observed broadly:

Certain implied powers must necessarily result to our Courts of justice from the nature of their institution. . . . To fine for contempt —
that once Congress creates federal courts and vests them with jurisdiction, it must also vest them with those powers necessary for them to administer justice and to preserve their status as part of an independent branch. Federal courts have thus recognized a variety of powers as inherent, including the power to regulate the practice of law, to control their own proceedings and dockets, to protect themselves through contempt orders from abuse or insult, to impose sanctions on litigants, to provide for process where none exists, and to promulgate rules of practice.

imprison for contumacy — 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: and so far our Courts no doubt possess powers not immediately derived from statute.

Id.


182. Id. at 633 (citing Attorney Gen. of Maryland v. Waldron, 426 A.2d 929, 934 (Md. 1981)).


The unifying theme of these inherent judicial powers, which generally provide for administrative autonomy, is their necessity for the maintenance of judicial independence. In separation-of-powers terms, this dictates that the legislative branch not exercise control over the administration of judicial functions. Thus, some inherent judicial powers are so fundamental that to divest the courts of them "is to make meaningless the very phrase judicial power." The power to prescribe adjective law is just such an inherent judicial power. Although Congress legitimately possesses a constitutional and statutory role in rulemaking, the theory of inherent court power nonetheless requires that congressional involvement in rulemaking acknowledge the "significance of a certain degree of judicial autonomy" over internal court rules of practice and procedure. Thus, pursuant to the rulemaking allocation set forth in the Rules Enabling Act, "[t]he Congressional rulemaking power is validly exercised in such a way as to avoid undue interference with the execution of judicial power, thereby preserving the integrity of the doctrine of separation of powers."

Thus, by delegating procedural rulemaking authority to a non-Article III advisory group lodged within the judicial branch, Congress has transgressed the Rules Enabling Act, intruded on the inherent power of the judiciary in its rulemaking function, and violated the separation-of-powers doctrine.


188. See Levin & Amsterdam, supra note 180, at 31-32 (context of state legislative and judicial relations).
189. See id. at 30.
190. Brainer, 515 F. Supp. at 634.
191. Id.
II. THE CIVIL JUSTICE REFORM ACT AND THE RULES ENABLING ACT

A. THE ALLOCATION OF POWER EMBODIED IN THE RULES ENABLING ACT

1. The Doctrinal and Historical Basis of the Substance/Procedure Distinction

The first section of the Rules Enabling Act provides that "[t]he Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals."\(^{192}\) The Act does not represent, however, Congress's first delegation of rule promulgation power to the courts. The Act was merely the codification at the federal level of a long series of statutory delegations of procedural rulemaking authority to the courts,\(^{193}\) both here and in Britain.

British courts traditionally have possessed rulemaking authority.\(^{194}\) Nineteenth-century British legal reforms anticipated the shared legislative/judicial rulemaking authority that

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192. 28 U.S.C. § 2072(a) (1988). Before it was amended in 1988, the Rules Enabling Act had provided in part:

The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions, including admiralty and maritime cases, and appeals therein, and the practice and procedure in proceedings for the review by the courts of appeals of decisions of the Tax Court of the United States and for the judicial review or enforcement of orders of administrative agencies, boards, commissions, and officers.


the American Rules Enabling Act embodies. Between 1825 and 1875, Parliament took the lead in judicial reform by enacting a series of acts affecting rulemaking, the most significant of which were the Judicature Acts of 1873 and 1875. 195

In America, the tradition of judicial procedural rulemaking began in the era of the Framers, and extends throughout American history. 196 During the colonial period the separation of judicial and legislative functions was "imperfect," but nonetheless most colonial courts modified practice and procedure "on a case-by-case basis without legislative intervention." 197 During the constitutional period, and especially in the Federalist Papers, the value of an independent judiciary emerged, but the federalist debates are unilluminating on the problem of the allocation of rulemaking authority in separation-of-powers terms. 198 Once the Constitution was ratified, Congress empowered the federal courts to adopt rules for practice and procedure. Thus, section 17 of the Judiciary Act of 1789 stated that the Circuit courts, as well as other federal courts, had the authority "to make and establish all necessary rules for the orderly conducting business in the said courts, provided such rules are not repugnant to the laws of the United States." 199

Similarly, through the Process Acts of 1789 and 1792, Congress gave rulemaking authority to the Supreme Court in proceedings at common law, 200 equity, and admiralty. 201 The scope

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195. Weinstein, supra note 193, at 25. As Judge Weinstein has described: What evolved was a cooperative scheme for rule-making with legislative control over the overall procedural design and with authority over the details left to the courts. The Civil Procedure Act of 1833, for example, placed power in the courts to formulate procedural rules, which led to the Hilary Rules of 1834. Section 17 of the Judicature Act of 1875 authorized the judges of the Supreme Court to make rules governing procedure, and together with subsequent acts, vested this power in a committee of judges.

196. Id. at 36-44 (reviewing the debates at the constitutional convention relating to an independent judiciary, and the state ratification debates, The Federalist Nos. 75-82 (Alexander Hamilton)). Judge Weinstein makes the interesting argument that the ban on advisory opinions also might vitiate judicial rulemaking authority because rulemaking authority represents a similar infringement on legislative power. Id. at 44-55. He concludes, however, only that "[i]n the end the question of whether the legislature or the courts or both should possess the rule-making power comes down to a policy question where a series of arguments . . . must be weighed and balanced." Id. at 54. 197

198. See The Federalist Nos. 75-82 (Alexander Hamilton).

199. Act of Sept. 24, 1789, ch. 20, § 17, 1 Stat. 73, 83.

200. Act of Sept. 29, 1789, ch. 21, § 2, 1 Stat. 93, 93.

201. Act of May 8, 1792, ch. 36, § 2, 1 Stat. 275, 276.
of this authority was "subject . . . to such alterations and additions as the [federal] courts respectively shall in their discretion deem expedient, or to such regulations as the supreme court of the United States shall think proper from time to time by rule to prescribe to any circuit or district court concerning the same." In 1793, Congress reconsidered the Process Act and placed rulemaking power in the "several Courts of the United States" and supplemented greatly the original rulemaking provisions of section 17 of the Judiciary Act of 1789 and the Process Act of 1792.

Congress "sweepingly reaffirmed" the power of federal courts to promulgate rules of practice and procedure in 1842. The judicial rulemaking authority recognized in this statute again demonstrates that, for more than two-hundred years, Congress has long acceded to the practical authority of the courts to formulate their own procedural rules.

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202. Id.
203. Act of March 2, 1793, ch. 22, § 7, 1 Stat. 333, 335. In this enhanced version of rulemaking delegation, the Act provided:
   it shall be lawful for the several courts of the United States, from time to time, as occasion may require, to make rules and orders for their respective courts directing the returning of writs and processes, the filing of declarations and other pleadings, the taking of rules, the entering and making up judgments by default, and other matters in the vacation and otherwise in a manner not repugnant to the laws of the United States, to regulate the practice of the said courts respectively, as shall be fit and necessary for the advancement of justice, and especially to that end to prevent delays in proceedings.

204. Id.
206. Thus, the 1842 statute provided that:
the Supreme Court shall have full power and authority, from time to time, to prescribe and regulate, and alter, the forms of writs and other process to be used and issued in the district and circuit courts of the United States, and the forms and modes of framing and filing libels, bills, answers, and other proceedings and pleadings, in suits at common law or in admiralty and in equity pending in the said courts, and also the forms and modes of taking and obtaining evidence, and of obtaining discovery, and generally the forms and modes of proceeding to obtain relief, and the forms and modes of drawing up, entering, and enrolling decrees, and the forms and modes of proceeding before trustees appointed by the court, and generally to regulate the whole
During the eighteenth and nineteenth centuries, the development of an independent federal procedure was hampered by other provisions of the Process Acts of 1789 and 1792, and the Conformity Act of 1872, which required federal courts to follow state procedures in actions at law. The undesirability of this arrangement ultimately led to the twentieth-century reform movement for a uniform set of federal procedural rules, which culminated in the enactment of the Rules Enabling Act in 1934. Thus a long history vesting procedural rulemaking authority in the courts culminated in the Rules Enabling Act's designation of procedural rulemaking authority in judges. As Professor Paul Carrington has noted, it was the British Parliament that first embraced the idea of transferring responsibility for civil procedure to the judges themselves, and the Rules Enabling Act of 1934 is really "an imitation of the English Judicature Act of 1875" that had been imitated already by many states.

Thus, the Senate Judiciary subcommittee's claim in the legislative history to the Civil Justice Reform Act that Congress has exclusive rulemaking power is nonsense. This assertion blatantly ignores the British historical antecedents to American procedural reform, the federalists' concern with ensuring institutionally the existence of an independent judiciary, and over two hundred years of practical experience with judicial rulemaking. Our constitutional history demonstrates that from the earliest days of the republic, while Congress has exercised consistently its legislative authority under Article III to constitute the inferior federal courts, and to confer on them procedural rulemaking authority, it has not engaged in procedural rulemaking itself and can hardly lay claim to an exclusive constitutional claim to do so. Indeed, aside from only two

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207. See supra notes 199-202 and accompanying text.
208. Act of June 1, 1872, ch. 255, §§ 5, 6, 17 Stat. 196, 197; see Weinstein, supra note 193, at 64-66. It is important to keep in mind that even though federal courts were required to follow state procedural rules, those rules were themselves the product of judicially promulgated, rather than legislatively promulgated, rulemaking authority.
anomalous, unfortunate exceptions in the last decade,\textsuperscript{212} Congress has never exercised its so-called exclusive rulemaking power. Only in the Civil Justice Reform Act has Congress attempted to create and invoke this exclusive power.

Yet the notion that Congress has the authority to establish rules of procedure is commonly accepted.\textsuperscript{213} This blanket assertion, asserted most recently by Congress in the legislative history to the Civil Justice Reform Act,\textsuperscript{214} is the unfortunate consequence of rote repetition, by advocates of congressional rulemaking authority, of \textit{dicta} in two Supreme Court cases construing the Rules Enabling Act—\textit{Sibbach v. Wilson \\& Co.}\textsuperscript{215} and \textit{Hanna v. Plumer}.\textsuperscript{216}

The selective use of two sentences of dicta from \textit{Sibbach} and \textit{Hanna} to support Congress’s claim of exclusive rulemaking authority, however, ignores the significance of the entire line of cases construing the second provision of the Rules Enabling Act

\begin{itemize}
  \item \textsuperscript{212} See Mullenix, \textit{supra} note 18, at 844-48 (discussing congressional revisions to Fed. R. Civ. P. 4 and 35); \textit{see also} Carrington, \textit{supra} note 210, at 320 (suggesting that Congress’s 1982 adoption of Rule 4 as a statute eliminated any separation-of-powers problem).
  \item \textsuperscript{213} This wisdom is found in constitutional law treatises. \textit{See}, \textit{e.g.}, TRIBE, \textit{supra} note 169, at 50 (citing Hanna v. Plumer, 380 U.S. 460, 471-72 (1965), for the proposition that “[c]onsistent with constitutional limitations, Congress clearly has authority to fix the rules of procedure, including the rules of evidence, which article III courts must apply”). It is also found in standard commentary on the rulemaking process. \textit{See}, \textit{e.g.}, WEINSTEIN, \textit{supra} note 193, at 90 (citing Sibbach v. Wilson \\& Co., 312 U.S. 1, 9-10 (1941), for the proposition that “Congress’s position as possessor and delegator of the rule-making power is now assumed without question by the courts”). For a discussion of the roots of this misconception, see \textit{infra} notes 215-16.
  \item \textsuperscript{214} See Mullenix, \textit{supra} note 9, at 424-32 (discussing Senate legislative history to the Civil Justice Reform Act).
  \item \textsuperscript{215} 312 U.S. 1 (1941). In \textit{Sibbach}, the Court declared that: “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 the United States . . . .” \textit{Id.} at 9-10 (footnote omitted). This famous declaration has been quoted routinely by subsequent courts. \textit{See}, \textit{e.g.}, Mistretta v. United States, 488 U.S. 361, 387 (1989); \textit{see also} Hanna v. Plumer, 380 U.S. 400, 471-72 (1965) (relying on \textit{Sibbach dictum}).
  \item \textsuperscript{216} 380 U.S. 460 (1965). In \textit{Hanna}, the Court made a pronouncement similar to that in \textit{Sibbach}:

\begin{quote}
[T]he constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) carries with it congressional power to make rules governing the practice and pleadings in those courts, which in turn includes a power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either.
\end{quote}

\textit{Id.} at 472. Proponents of congressional authority also invoke the pronouncement. \textit{See}, \textit{e.g.}, Mistretta, 488 U.S. at 387-88.
\end{itemize}
that "[s]uch rules shall not abridge, enlarge or modify any substantive right."217 These cases center on the inquiry whether a particular Court-promulgated Federal Rule of Civil Procedure has violated that prohibition.218 If the Court in fashioning a rule alters substantive rights by promulgating rules of general effect, it is engaged in unconstitutional lawmaking. This provision of the Rules Enabling Act codified the repeated provision in predecessor statutes that prohibited courts from promulgating any procedural rules that "were repugnant to the laws of the United States."219 Thus, the Sibbach line of cases demonstrates only judicial efforts to clarify the distinction between substantive law and procedural rules. The body of decisional law beginning with Sibbach reflects a fifty-year judicial effort to clarify a meaningful distinction between substantive law and procedural rules, accompanied by a large body of academic disputation pointing out the difficulty and futility of that exercise.220

Since the enactment of the Rules Enabling Act, the Court has never once found a Court-promulgated rule to transgress the Enabling Act’s prohibition against the exercise of substan-


tive lawmakers. Indeed, the Rules Enabling Act cases do not at all deal with the fundamental separation-of-powers issue implicit in every challenge to a Court-promulgated rule. Except for the dicta in Sibbach and Hanna, these cases have not addressed the constitutional allocation of rulemaking authority. Rather, they have been preoccupied with locating where along a fuzzy substance/procedure continuum a particular judicial exercise of rulemaking authority fits. Thus, a constitutional challenge to the Civil Justice Reform Act cannot be resolved by recourse to the Sibbach line of cases, because each decision has been accomplished with reference to a judicial interpretation of the substance/procedure distinction embodied in the second provision of the Rules Enabling Act.

The Civil Justice Reform Act presents a challenge to the Rules Enabling Act's vesting of procedural rulemaking in the Supreme Court and its pre-1988 provision vesting a supervisory review role in the Congress. These provisions embodied the constitutional separation-of-powers limitations on the respective allocation of rulemaking authority. As Professor Carrington has suggested, the first provision of the Rules Enabling Act was "a delegation of some federal law-making power created by Article III, which authorizes Congress to establish lower federal courts." The Act's second provision, in this view, was unnecessary, because "the Court cannot make substantive rules by any means other than writing opinions in 'cases or controversies,' without taking leave of its role as defined by Article III." As Professor Carrington has concluded, "[b]y shielding substantive rights from abridgment and modification, the first sentence of the Act expresses constitutional principles that derive from Article III."

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221. See cases cited supra note 218.
222. See Business Guides, 111 S. Ct. at 933-34; Colgrove, 413 U.S. at 156-57; Hanna, 380 U.S. at 463-68; Schlagenhauf, 379 U.S. at 113-14; Mackey, 351 U.S. at 433 n.5; Murphee, 326 U.S. at 445-46; Sibbach, 312 U.S. at 7-14.
224. Prior to being amended in 1988, § 2072 had provided: "Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported." 28 U.S.C.A. § 2072 (West 1982) (repealed 1988).
225. Carrington, supra note 210, at 286.
226. Id. at 287.
227. Id. Professor Carrington makes the additional argument that the Rules Enabling Act supersession clause further confirms the constitutional al-
Although Congress, in the Civil Justice Reform Act, has claimed an exclusive rulemaking authority, there are both constitutional and statutory limitations on Congress's role in the rulemaking process. Indeed, for separation-of-powers purposes one may view the Rules Enabling Act as a codification of the constitutional limits. The constitutional limitation prevents Congress from compromising the constitutional independence of the judiciary by invading the inherent power of the judiciary to create rules of practice and procedure for the courts. The statutory limitation allocates the substantive law-making function to the legislative branch, and the procedural rule-making function to the courts.\(^{228}\) Congress, under the Rules Enabling Act, possesses a supervisory role of reviewing court-promulgated rules prior to their becoming law to ensure that such rules do not trench on Congress's substantive law-making function.\(^{229}\) This allocation of authority is reinforced by the judicial review process, which also ensures that the rulemaking allocation is not transgressed when the courts exercise their rulemaking power.

Whatever else may be said about the Civil Justice Reform Act, its various and detailed prescriptions to the advisory groups do not constitute substantive law-making by Congress. The provisions of the Act clearly represent a lengthy series of procedural rules. And although Sibbach and its progeny provide an inapt analytical framework for construing the constitutional or statutory legitimacy of the Civil Justice Reform Act, even under the most liberal view of the substance/procedure distinction these cases embody, it cannot be contended that the provisions of the Act are anything other than congressionally-commanded procedural rulemaking. In enacting this statute, then, Congress has interfered with the constitutionally-required and historically-based allocation of rulemaking authority embodied in the Rules Enabling Act.

Perhaps the best view of rulemaking authority is that it is a constitutionally- and statutorily-shared power, to be exercised in coordination by the legislative and judicial branches.\(^ {230} \) This perspective certainly comports with a contemporary, function-

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\(^{230}\) See, e.g., WEINSTEIN, supra note 193, at 92 (arguing that for decades, if not centuries, control over practice and procedure has been the subject of concurrent jurisdiction); Levin & Amsterdam, supra note 180, at 3 (same); Martin,
alist view of the separation-of-powers doctrine, under which neither branch may reasonably make an exclusive institutional claim to rulemaking authority.\textsuperscript{231} Yet when an interbranch conflict arises, as with the Civil Justice Reform Act, the most appropriate conflict-resolving principle consistent with separation-of-powers doctrine is that "the branch to which the power has been delegated or is inherent prevails."\textsuperscript{232} The separation-of-powers doctrine requires inherent branch power to prevail over coordinate branch delegative authority.\textsuperscript{233} Thus, if the promulgation of procedural rules is an indispensable inherent attribute of judicial power, the exercise of that power by another branch is impermissible under the separation-of-powers doctrine.\textsuperscript{234}

2. The 1988 Amendment to the Rules Enabling Act and Its Implications for the Civil Justice Reform Act

In 1988, Congress amended the Rules Enabling Act. The amended Act stated more succinctly the power of the Supreme Court to prescribe general rules of practice and procedure for the district courts,\textsuperscript{235} removed the provision relating to congressional approval of judicially promulgated rules,\textsuperscript{236} and recast the supersession clause.\textsuperscript{237} None of the 1988 amendments, however, altered the constitutional allocation of rulemaking authority between the legislative and judicial branches. Congress retained intact the basic principle that the Supreme Court promulgates procedural rules for the federal courts. Significantly, Congress deleted all references to congressional oversight of the judicial rulemaking process.\textsuperscript{238} More importantly,

\textit{supra} note 178, at 176-202 (discussing the view that both the Congress and the courts have authority to prescribe rules of evidence).

\textsuperscript{231} See \textit{supra} notes 103-22 and accompanying text (discussing separation problems between the legislative and judicial branches).

\textsuperscript{232} Martin, \textit{supra} note 178, at 185.

\textsuperscript{233} Id. at 184.

\textsuperscript{234} Id. at 184-85.


\textsuperscript{236} See \textit{id}.

\textsuperscript{237} Section 2072(b) now provides that “[s]uch rules shall not abridge, enlarge, or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.” 28 U.S.C. § 2072(b) (1988).

the 1988 amendments revised the implementation section of the Rules Enabling Act to open public access to the rulemaking process.\textsuperscript{239}

Both the Senate Judiciary subcommittee\textsuperscript{240} and the Judicial Conference\textsuperscript{241} exploited the 1988 amendments to the Rules Enabling Act in support of their respective views of the allocation of rulemaking authority between the legislative and judicial branches. The Senate Judiciary subcommittee interpreted the 1988 amendments to support its claim to exclusive rulemaking authority,\textsuperscript{242} while the Judicial Conference tactically construed these revisions as a congressional reaffirmation of the basic allocation of procedural rulemaking authority in the judicial branch.\textsuperscript{243} The Judicial Conference view is probably better, because the 1988 amendments to 28 U.S.C. § 2073 cannot be read as changing the fundamental allocation of rulemaking authority embodied in § 2072. Significantly, not only did Congress amend § 2072 without declaring itself the exclusive rulemaking authority, it also eliminated altogether any reference to its role in the rulemaking process. The 1988 amendments to § 2073 were basically political concessions to enhance democratic participation in the procedural rulemaking process, and simply cannot support a bootstrap argument for exclusive congressional authority over the procedural rulemaking process.\textsuperscript{244}


\textsuperscript{240} See Mullenix, \textit{supra} note 9, at 428-29.

\textsuperscript{241} Id. at 416-17.

\textsuperscript{242} Id. at 428-29.

\textsuperscript{243} Id. at 416-17.

\textsuperscript{244} Even so viewed, these provisions are rather meager gestures to the requirements of due process. The 1988 amendments have enhanced the judicial...
B. THE CIVIL JUSTICE REFORM ACT AND THE RULES ENABLING ACT

1. The Inversion of Rulemaking Authority Embodied in the Civil Justice Reform Act

The Civil Justice Reform Act represents a peculiar and disturbing inversion of the usual allocation of rulemaking authority. In separation-of-powers terms, the Rules Enabling Act codifies Congress's legislative power to enact substantive laws and the federal judiciary's judicial power to enact rules of practice and procedure for proceedings in its courts. The language of the Rules Enabling Act and the cases construing it have at a minimum always recognized this division of lawmaking and rulemaking authority. The only dispute has centered on discerning which matters are "substantive" and which are "procedural." But even in instances of rulemaking at the margins of the substance/procedure divide, as well as instances of clearly procedural rulemaking, the judicial branch has always retained and exercised the power over procedural rulemaking. In the Civil Justice Reform Act, in contrast, Congress has mandated purely procedural rules. The Act's various and detailed provisions do not in any way implicate Congress's substantive lawmaking powers, and it would clearly distort the Act to even suggest that it is substantive law.

The Act has, in fact, accomplished an "end run" around the usual rulemaking process. But the implications of the Civil
Justice Reform Act are even more extreme than that. Without repealing, modifying, or amending the Rules Enabling Act, Congress simply has ignored both the constitutional and the statutory allocation of rulemaking authority, and has arrogated to itself the exclusive authority to do whatever it wants, including creating procedural rules for courts. Furthermore, Congress has accomplished this feat by simply declaring all procedural rules to be of "substantive effect," a declaration that suggests Congress at least understood the need to couch its usurpation of a traditionally judicial function in terms of a legislative prerogative. If Congress is correct in its bald assertion—and it is not—then we are at the end the age of procedure, for there can be no procedural rules when all are of "substantive effect."

The Rules Enabling Act exists to preserve the independence of judicial rulemaking from the political process. In the Civil Justice Reform Act, Congress has invaded the judicial function and infused the procedural rulemaking process with partisan politics. The Rules Enabling Act is just that: a statute that "enables" the Supreme Court to exercise its inherent procedural rulemaking function. Although the Constitution assigns Congress the power to create inferior courts and confer on them jurisdiction, once created these courts have inherent power to promulgate rules of practice and procedure not in contravention of substantive law. If the Rules Enabling Act did not exist, courts would still have this power. The Senate's legislative history to the Civil Justice Reform Act, however, ignores separation-of-powers doctrine and distorts the interpretation of the Rules Enabling Act to divest the federal judiciary of its long-standing procedural rulemaking authority.

2. Rulemaking as a Matter of Public Policy

The Senate Judiciary subcommittee's legislative history cites to *Sibbach, Hanna*, and a sentence from Judge Jack Weinstein's book on procedural rulemaking for its assertion of exclusive rulemaking authority. In truth, Judge Weinstein recognized that neither branch can lay exclusive claim to

*Id.* He then cites as the best example of this phenomenon the then-proposed Civil Justice Reform Act. *Id.* at 333 n.58. He speculates that the bill offers a scenario that is a "worst [case] example that might not be imaginable by the judges." *Id.*

249. See Mullenix, *supra* note 9, at 379, 432-34, 437.

250. *Id.* at 379-82.

251. See *id.* at 426.
rulemaking authority, and that in the end this concurrent power devolved into "a policy question where a series of arguments . . . must be weighed and balanced."252

Judge Weinstein's outline of these countervailing policy arguments is a good one, and it provides a durable framework for thinking about the rulemaking process as a policy question. The arguments he recognized are these: first, "[t]he federal judiciary has an unprecedented history of judicial independence from the other branches,"253 an independence that is based on the judiciary's power to formulate procedural rules. Further, "[f]or courts to surrender this power to the legislature is to give up a crucial aspect of their duty to fairly determine cases and controversies."254 Second, the "[c]ourts have an intimate knowledge of the need for particular rules to govern court processes not possessed by the legislative branch."255 Third, the legislature has the authority to issue general rules, and procedural "[r]ule-making must inevitably be classed as such a legislative prerogative [because] it is far closer to the people's wishes than the courts."256 Thus, to allow the judiciary to make procedural rules would be to invite court abuses. Fourth, only the legislature is sufficiently detached from the fine details of judicial procedures to evaluate objectively the need to alter such procedures.257 And fifth, procedural rules "inevitably affect practical substantive rights, including those adopted by Congress."258 As such, the legislature must protect the substantive rights it provides.

Judge Weinstein does not assess the merits of his arguments, although he clearly favors more participatory process in judicial rulemaking, a position forged through his experiences in the 1970s serving on various advisory committees.259 Yet Judge Weinstein's majoritarian preference may be viewed as a peculiar consequence of the political climate of that time, for his policy arguments fail to consider other concerns that are relevant to the rulemaking process in the 1990s. Judge Wein-

252. WEINSTEIN, supra note 193, at 54.
253. Id.
254. Id.
255. Id.
256. Id.
257. Id. at 55.
258. Id. Needless to say, Judge Weinstein's actual account of the relative allocation of rulemaking authority between the two branches is more highly nuanced than the legislative history to the Civil Justice Reform Act indicates.
259. See id. at 8-11.
stein's first two arguments are based in a separation theory of judicial independence and a model of expertise, while his last two are based in a separation theory of legislative prerogative and a model of majoritarian rule. His third argument expresses his hypothesized fear of anti-majoritarian rulemaking, summoning dreaded judicial abuses of another era.260

Judge Weinstein's arguments are incomplete, however, because they fail to recognize another hypothesized fear of legislated (as opposed to judicially-promulgated) procedural rules: the fear of interest group lobbying.261 Judge Weinstein fears the creation of procedural rules by insulated judges acting on their own prejudices,262 but others equally fear the creation of procedural rules by political actors operating pursuant to the dictates of partisan interests. In the end, the policy question relating to rulemaking allocation is not a debate between models of expertise and non-expertise, but a policy question relating to majoritarian rule.

The ultimate question is whether it is desirable to have majoritarian procedural rules. The answer to this question must be no. The judicial branch is not a majoritarian branch. It seems absurd to suggest that the populace ought to vote on, for example, summary judgment procedure, pretrial practice, or judgments notwithstanding the verdict. The constitutional role of the judiciary in deciding cases and controversies was intended to be insulated from political pressure, yet the Civil Justice Reform Act strips the judiciary of its rulemaking function and infuses partisan politics into the process of determining the

260. Id. (citing the "abuses that arose in early nineteenth-century England").

261. See, e.g., Baker, supra note 248, at 337 (providing the address of the Secretary of the Committee on Rules of Practice and Procedure and urging readers to write in their suggestions and recommendations on any of the federal rules); Carrington, The New Order, supra note 239, at 161-67; Carrington, supra note 210, at 301-02, 326-27 (arguing that the withdrawal of procedural rulemaking from the political arena has allowed for the advancement of the interests of persons with less political power); Carrington, Making Rules To Dispose of Manifestly Unfounded Assertions, supra note 239, at 2074-79 (discussing the influence of interest group politics on proposed amendments to Rule 68); Geoffrey C. Hazard, Undemocratic Legislation, 87 YALE L.J. 1284 (1978) (reviewing JACK B. WEINSTEIN, REFORM OF COURT RULE-MAKING PROCEDURES (1977), and contending that lawyer-legislators have inordinate influence on the few procedural rules that do emanate from Congress); Mullenix, supra note 18, at 801-02, 834-44, 855-57 (arguing that partisan law reformers have abandoned the judicial arena as the forum for achieving social changes, and instead are focusing legal reform efforts on the rules and rulemaking process, with worrisome consequences).

262. WEINSTEIN, supra note 193, at 8-11, 54-55.
procedural rules that govern the conduct of cases. The Act represents, then, a usurpation by the majoritarian branch of a power intended to be insulated from majoritarian politics.

This is dangerous, not only as a matter of constitutional law, but also as a matter of public policy, because the Civil Justice Reform Act is a monumental step in the further politicization of the rulemaking process. Whatever may have been the failings of judicial branch rulemaking,263 the deleterious effects of majoritarian rulemaking will be tenfold. Judges, for all their Realist infirmities,264 at a minimum were guided in their rulemaking efforts by a commonly-shared philosophy of procedural rules.265 The new populist rulemakers, one fears, will be guided solely by differing self-interests and special interests.

CONCLUSION

This two-part Article has attempted to describe the Civil Justice Reform Act of 1990, the political climate in which it was conceived and enacted, and the danger it presents to the constitutional allocation of authority in our government. The Civil Justice Reform Act was enacted to address an assumed but unsubstantiated crisis in civil litigation in this country. Couched in high-minded rhetoric concerning reform from "the bottom up" by "users" of the system, the legislation purports to

263. See generally Winifred R. Brown, Federal Rulemaking: Problems and Possibilities (1981) (discussing criticism that the Court has interpreted its rulemaking authority too broadly); Jack H. Friedenthal, The Rulemaking Power of the Supreme Court: A Contemporary Crisis, 27 Stan. L. Rev. 673 (1975) (arguing that the shortcomings of the 1970 work product rule probably would have been prevented if the Court had properly attended to its rulemaking functions); Howard Lesnick, The Federal Rulemaking Process: A Time For Re-Examination, 61 A.B.A. J. 579 (1975) (arguing that the current judicial rulemaking process should be reformed to be more open and representative, and that a workable mode of congressional review be devised); Russell R. Wheeler, Broadening Participation in the Courts Through Rule-Making and Administration, 62 Judicature 280 (1979) (arguing that judicial rulemaking has become a vehicle through which a variety of interests groups may participate in court operations); Charles A. Wright, Procedural Reform: Its Limitations and Its Future, 1 Ga. L. Rev. 563 (1967) (discussing limitations characteristic of judicial rules reform).

264. See Carrington, supra note 210, at 287.

265. See, e.g., Carrington, Making Rules To Dispose of Manifestly Unfounded Assertions, supra note 239, at 2079-85 (discussing the general applicability of procedural rules); Carrington, supra note 210, at 301-07 (describing a philosophy of procedural rulemaking characterized by the values of substantive and political neutrality, generalism, flexibility, forgiveness, integrality, and judicial professionalism).
achieve, through extensive procedural rulemaking reform, reductions in the cost and delay of civil litigation.

In truth, however, the Civil Justice Reform Act is a highly political piece of legislation, a cynical attempt by Congress not only to wrest procedural rulemaking authority from the judiciary, but also to achieve substantive legal change in a disguised, politically palatable fashion. The Act is not about civil justice reform at all; instead, it has effectuated a late-twentieth-century counter-reformation in procedural justice, totally undermining the progressive reforms accomplished since the promulgation in 1938 of the Federal Rules of Civil Procedure.

In wrongly declaring for itself an exclusive rulemaking authority, Congress has acted brazenly and arrogantly. In denying that any separation-of-powers issues were presented by the legislation, it has exerted a total legislative prerogative to the enduring impairment of an independent judiciary. In distorting the purpose and history of the Rules Enabling Act to justify its right to promulgate procedural rules, Congress has repealed the Rules Enabling Act sub silentio.

If the Civil Justice Reform Act is not declared unconstitutional, there will be no end to the continuing politicization of the judicial branch. There will be no counter-majoritarian branch, and no checks against majoritarian whim or interest group demands. All branches of government will be political, and the judicial process, too, will become subject to the loudest and most effective voices. Even the fiction of judicial impartiality in construing the law cannot possibly prevail when the process of judicial procedure is itself infused with political concerns.