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Federal Judicial Independence: Constitutional and Political Perspectives

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I. INTRODUCTION

Since the nation's beginning, the concept of federal judicial independence has been almost as confusing to political and constitutional theorists as it is fundamental to the successful operation of our form of constitutional democracy. On the one hand, the Constitution's framers consciously chose to insulate members of the federal judiciary from at least the most acute forms of potential political pressure by expressly providing for the protection of their salary and tenure.[1] On the other hand, the framers simultaneously provided the groundwork to facilitate the exercise of seemingly substantial congressional control of the jurisdiction of the federal courts, thereby potentially undermining the very independence expressly provided to the judges of those courts.[2]

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1. U.S. CONST. art. III, § 1. *See* discussion *infra* note 2.

2. Article III, section 1 provides that "[t]he judicial power shall be vested in one Supreme Court and in such inferior courts as Congress shall from time to time ordain and establish." Both this language and generally accepted constitutional history are widely deemed to establish that Congress need not have created lower federal courts. *See* MARTIN H. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 29-

While this apparent theoretical contradiction is largely consistent with the pragmatic balances found throughout the Constitution, it has often given rise both to theoretical[3] and doctrinal uncertainty.[4]

Additional questions might be raised concerning the extent to which constitutionally guaranteed judicial independence conflicts with congressional efforts either to exert control over the procedural operation of the federal courts[5] or to curb significantly the discretion of federal judges in imposing criminal sentences.[6] Further inquiry has been made concerning the extent of any constitutional obligation of Congress not to reduce the nonsalary support services that have already been supplied to the federal judiciary.[7] Therefore, the time now appears ripe for a wideranging reconsideration of the constitutional and political scope of federal judicial independence.[8]

Such a reexamination reveals that much of the present theoretical and doctrinal confusion results from the general failure to recognize that the concept of federal judicial independence can itself be sub-divided into four conceivable categories: "institutional" independence, "lawmaking" independence, "counter-majoritarian" independence, and "decisional" independence.[9] Institutional independence refers to the noncase specific protections of salary and tenure explicitly provided in Article III of the United States Constitution. They are described as "noncase specific" because they concern the broad independence protections of the federal

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44 (2d ed. 1990). The Supreme Court has reasoned that the power not to create the lower courts includes the power to abolish them, and that the power to abolish the lower courts subsumes the power to limit their jurisdiction. *See, e.g.*, Lockerty v. Phillips, 319 U.S. 182 (1943). While Article III mandates the creation of the Supreme Court, it narrowly confines its original jurisdiction and provides that its appellate jurisdiction is subject to regulations and exceptions made by Congress. U.S. CONST. art. III, § 2. *See* Redish, *supra* note 2, at 25-29.

3. *Compare* Lawrence Sager, *Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17 (1981) (salary and tenure protections limit congressional power to control federal jurisdiction) *with* Martin H. Redish, *Congressional Power to Control Federal Jurisdiction: A Reaction to Professor Sager*, 77 NW. U. L. REV. 143 (1982) (salary and tenure protections apply only to cases left within federal court jurisdiction).

4. *See* discussion *infra* parts II-V.

5. *See* discussion *infra* part V.

6. *Id.*

7. *See* discussion *infra* part II.

8. Note that this study excludes consideration of the constitutional standards for judicial tenure, a subject possessing a unique history. *See generally* Report of the National Commission on Judicial Discipline and Removal (1993); Peter M. Shane, *Who May Discipline or Remove Federal Judges? A Constitutional Analysis*, 142 U. PA. L. REV. 1 (1993).

9. *See* discussion *infra* parts II-V.

judiciary as an institution, untied to the adjudication of a specific case, group of cases, or substantive issue. Thus, a federal statute seeking to reduce the salaries of federal judges could presumably be held unconstitutional on its face, even though the reduction was not tied to the prospective adjudication of particular cases.[10] Lawmaking independence refers to the ability of the federal courts to create either controlling substantive legal principles or governing general rules of procedure in the course of individual adjudications, free from interference by the other branches of the federal government.[11] Counter-majoritarian independence describes the ability of the federal courts to interpret applicable provisions of the Constitution in the course of individual adjudications.[12] Finally, decisional independence concerns the ability of the federal courts to *interpret* and *apply*, rather than *create* substantive legal principles in the specific context of an individual adjudication, free from control or interference by the purely political branches of the federal government.[13]

While the scope and meaning of institutional independence are ascertained largely by resort to traditional methods of interpreting constitutional text,[14] one is forced to resort to alternative methodologies to ascertain the proper scope of the other sub-categories of judicial independence. Ultimately, examination of constitutional text alone proves unsatisfactory in performance of this task. Instead, one must guide interpretation of that ambiguous text with a proper understanding of the underlying principles of constitutional and political theory. While decisional and counter-majoritarian independence are essential as matters of both American political theory and constitutional directive,[15] the same cannot be said of lawmaking independence in either its substantive or procedural manifestations.[16] Indeed, recognition of this form of judicial independence would actually undermine the essence of American democratic theory—a theory that places the primary power to fashion sub-constitutional public policy in the hands of those who are representative of and accountable to the electorate.[17]

The first section of this Article explores the text, purposes, and conceivable interpretive models of the textually provided guarantee of

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10. *See* discussion *infra* part IV.
11. *See* discussion *infra* part III.
12. *Id.*
13. *See* discussion *infra* part IV.A.
14. *See* discussion *infra* part IV.A.1.
15. *Id.*
16. *See* discussion *infra* part IV.A.2.
17. *See generally* MARTIN H. REDISH, THE CONSTITUTION AS POLITICAL STRUCTURE (1995). *See also* discussion *infra* part IV.B., IV.C.

institutional independence, as well as the most significant doctrinal questions to which that provision gives rise. The second section contrasts the concepts of decisional and lawmaking independence from the perspective of both constitutional analysis and American political theory. The Article then considers the implications of that analysis for modern congressional efforts to constrict judicial decision making authority on both substantive and procedural fronts.

II. INSTITUTIONAL INDEPENDENCE: THE PROPER SCOPE OF THE COMPENSATION CLAUSE

Although the Constitution gives Congress discretion to create lower federal courts, it mandates the presence of certain attributes if inferior federal courts are created: "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office."[18] While controversy existed at the time of the Constitution's framing over whether a system of lower federal courts should be created, there was apparently no significant disagreement that if inferior federal courts were created they should be independent of the other branches of the federal government. The framers sought to protect this independence by the constitutional guarantee of salary and tenure.

At first glance, at least as to the issue of judicial salary, the Compensation Clause appears as straightforward as virtually any constitutional provision. Closer examination reveals, however, that interpretation of the Clause is fraught with potential confusion. For example, does the protection against salary reduction extend to auxiliary services the government provides, such as law clerks and secretaries? If not, does it prohibit congressional reductions in these services when such reductions are unambiguously imposed as retribution for a decision or series of decisions made by the federal courts? Does the clause require salary raises during periods of inflation, so that the judges' real income is not diminished? Does it authorize the imposition of newly created general nondiscriminatory taxes on judges that are applied to all citizens, or at least to all federal employees?

In answering these questions, it is important to ascertain both the likely purposes the framers sought to attain by the salary and tenure protections and the particular methodology the framers chose to attain those goals. The former may well be considerably more obvious than the latter. The drafters of Article III sought to insulate the federal judiciary

18. U.S. CONST. art. III, § 1.

from potential pressures, from either the representative branches of the federal government or the public, that might skew the decision making process or compromise the integrity or legitimacy of federal court decisions.

In light of this reasoning, one might assume that any congressional action that has the effect of threatening, or at least is intended to threaten, federal judicial independence should be deemed a violation of Article III. This conclusion is undermined, however, by recognizing the particular methodology the drafters utilized to accomplish their purpose. Basically, two conceivable modes of implementation were available, both of which may be analogized to the alternative methods for determining whether a suit is untimely when filed: a "statute of limitations" approach and a "laches" approach. Under a laches approach, like the doctrine of the same name, a court examines each case individually to determine whether, under the circumstances, the concerns that gave rise to the limitation are present.[19] Thus, in deciding whether a suit is untimely under a laches approach, a court would decide whether, in light of all the relevant circumstances, it would be unfair or unreasonable to allow the plaintiff to proceed.[20] By analogy, a court employing a case-by-case method to insure judicial independence would invalidate any congressional action that, under all of the relevant circumstances, presented a real threat to that independence.

By its terms, however, Article III rejects use of a case-by-case methodology, and with good reason. Both the difficulties in determining whether judicial independence has in fact been compromised in the individual instance and the political friction that could result from such an inquiry would be prohibitive. Instead, Article III clearly employs a statute of limitations approach whereby a rigid "line in the sand" is drawn and applied, regardless of the special needs of the individual situation. Thus, in enforcing a statute of limitations a court is not permitted, in an individual case, to conclude either that suit would be unfair even though filed a day before the expiration of the statutory period, or that suit would be fair despite the fact that it was filed a day after expiration. Therefore, in determining the timeliness of a lawsuit, a statute of limitations approach is employed for the very purpose of avoiding the uncertainty inherent in use of a case-by-case approach. Similarly, Article III imposes a rigid line disallowing reduction of federal judicial compensation. However, other than its guarantee against salary reduction, Article III imposes no further limitations on congressional

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19. *See generally* Gail L. Heriot, *A Study in the Choice of Form: Statutes of Limitations and the Doctrine of Laches*, 1992 B.Y.U. L. REV. 917.

20. *Id.*

authority to regulate judicial benefits. Thus, as long as Congress has not reduced judicial salaries, the Compensation Clause is neutral toward congressional action, even when that action may actually undermine judicial independence.

Under this analysis, a reduction in judicial support services, such as law clerks and secretaries, would be unconstitutional only if we may properly define the constitutional term "salary" to encompass such services. If one were to employ an originalist approach to the definitional question,[21] the answer would almost certainly be no. There is no reason to believe that the framers ever contemplated the concept of support services. Even under a modern definitional model,[22] it is highly unlikely that such support services could properly be squeezed into the concept of "salary." Surely, the Internal Revenue Service today does not consider an employer's provision of secretaries or assistants to be part of an employee's taxable income.

It might be responded that such a narrow definitional approach to the interpretation of constitutional provisions is unduly grudging in light of the well-established flexible interpretive standards the Supreme Court of the United States traditionally employs in constitutional analysis. Pursuant to this argument, if the political and social purposes served by a particular constitutional provision are fostered by an extension of that provision's reach to distinct but analogous areas, such an extension is proper. How one resolves this interpretive debate turns on issues of constitutional theory that go well beyond the narrow issue of the Compensation Clause's construction. My position, however, has long been that unless at some outer boundary language imposes at least some constraints, the Constitution effectively becomes meaningless (in the literal sense of that term).[23] In any event, it is important to keep in mind that if one were willing to construe the Compensation Clause to extend to the provision of support services, the resulting limit on congressional power could not be confined to selective retaliatory cuts in support services. This is because of the methodology inherent in the structure of that clause: violations are determined exclusively in a manner that disclaims an inquiry into individualized social or political consequences. Thus, if the clause were construed to protect against cuts in non-salary benefits, it would have to extend as well to any such cut, regardless of Congress' purpose or motivation for imposing that cut.

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21. *See generally* Henry Monaghan, *Constitutional Adjudication and Democratic Theory*, 56 N.Y.U. L. REV. 259 (1981).

22. *See* REDISH, *supra* note 17, at 113-25.

23. *Id.*

If, on the other hand, one concludes (as I do) that by its terms the Compensation Clause does not extend to nonsalary support services under any circumstances, one would also have to conclude that the clause fails to prohibit even cuts in support services unambiguously designed as retaliation for a specific decision or series of decisions in the federal courts. Such a conclusion flows inexorably from the choice, inherent in Article III, in favor of an easily applied, unbending statute of limitations approach to judicial independence. In fashioning the Compensation Clause, the framers avoided reliance on a case-by-case analysis of the effect of congressional actions on judicial independence in favor of an easily applied, bright-line standard. As already noted, they did so probably in an attempt to avoid the very uncertainty and political friction that would plague an inquiry into the retributive nature of congressional action. Thus, congressional retaliation that does not actually reduce judicial salaries should not be deemed to violate Article III.

Theoretically, though highly unlikely as a practical matter, Congress could so drastically reduce judicial support services so as to render impossible performance of the judicial function. Determining at exactly what point that level is reached involves a factual question that would have to be answered in each individual situation. It should be noted, however, that once such a point is reached, the congressional action would be unconstitutional only to the extent that the Constitution requires *federal* judicial action. Because, under accepted constitutional standards, state courts may constitutionally be vested with final authority to resolve virtually all matters reached by the federal judicial power, the category of matters that actually require Article III federal judicial action is likely to be relatively small.

One might respond that while Congress may have the power to exclude Article III federal court jurisdiction completely, as long as Congress continues to vest jurisdiction in the federal courts, it has a constitutional obligation, under inherent principles of separation of powers, to enable federal courts to perform at a minimal level of effectiveness. Hence, Congress is more likely to exercise its generally accepted authority to curb federal court jurisdiction than to reduce federal judicial support services below minimally operative levels.

It is conceivable, however, that such congressional retributive action could violate due process in an individual litigation. That concept requires a neutral and independent adjudicator.[24] If judges are aware that Congress has denied them benefits or privileges specifically because

24. *See* discussion *infra* part III.

they have decided particular cases in a particular manner, it is arguable that they are rendered incapable of the requisite adjudicatory independence in future, similarly situated cases. Because Congress' retributive action would presumably have no effect on the outcome of the specific case to which Congress was reacting, the litigants in that case would have neither practical interest nor legal standing to challenge the congressional retributive action. Moreover, because such congressional action would not violate Article III, it is doubtful that Congress' action could be successfully challenged on its face. To the extent, however, one could establish that (a) Congress' reduction in nonsalary judicial benefits or privileges was in fact designed as retribution for past judicial decisions, and (b) the litigant in a subsequent case stands in an identical position to the successful litigants in the case or cases to which Congress was negatively reacting, the subsequent litigant could conceivably raise a successful due process challenge, not directly to the congressional action, but rather to adjudication of his case by a federal judge in light of that action. If state court adjudication were feasible under the circumstances, presumably a transfer to that forum could satisfy due process.

Pursuant to this reasoning, a congressional refusal to raise judicial salaries, even a refusal motivated by retaliatory concerns, does not violate Article III. It is true that during periods of inflation, if judges' salaries are not increased, their real incomes decline. By inaction, Congress could effectively reduce real income, posing a potentially serious constitutional problem, especially if the salaries of other federal officials are increased during the inflationary period.[25] Despite substantial inflation, the salaries of federal judges and a few other federal officials were not substantially increased between 1969 and 1975.[26] While the Supreme Court wisely held that congressional attempts to revoke vested cost-of-living increases for Article III judges violate the Compensation Clause,[27] Congress' failure to raise salaries to keep pace with inflation is not unconstitutional. The history of the enactment of the Compensation Clause indicates that the framers were well acquainted with the problems of inflation and the need to make periodic increases in the judges' salaries.[28] A proposal to provide that judges' salaries could not be increased during their term of office was defeated by arguments that such increases might be necessary to

25. *See* Keith Rosenn, *The Constitutional Guaranty Against Diminution of Judicial Compensation*, 24 U.C.L.A. L. REV. 308 (1976).

26. *Id.* at 310 n.9.

27. Will v. United States, 449 U.S. 200 (1980).

28. *See* Rosenn, *supra* note 25, at 314-15.

maintain the attractiveness of judicial service in light of changing economic conditions and judicial work loads.[29] The Constitution, however, seems to leave to Congress' discretion the determination of when such increases are warranted.

Acceptance of the bright line statute of limitations analogy as the governing interpretive model for the Compensation Clause has interesting implications for several other variations. If one concludes that even *retaliatory* measures that do not reduce judicial salaries are permissible under such a model, it would seem reasonable to conclude that even *nonretaliatory* congressional actions are unconstitutional when they do, in fact, reduce judicial salaries. After all, if the reason for adopting a bright line approach is presumably to avoid the difficulty, uncertainty, and political friction caused by a case-by-case inquiry into congressional purpose and effect, one should be unwilling to allow Congress to purify salary reductions by the assertion of nonretaliatory purposes. A bright line is, after all, a bright line.

This conclusion would apply to any legislative reduction aimed exclusively at judicial salaries.[30] It is, no doubt, equally true of a reduction imposed indirectly, as through a tax imposed exclusively on judicial salaries. More uncertain, both theoretically and doctrinally, is the constitutionality of nondiscriminatory reductions imposed on all federal employees when Article III judges are included. The Supreme Court has not adopted a clear position on the question. The issue first arose when Congress sought to apply the new federal income tax to sitting federal judges.[31] After initially ruling that the tax could not be imposed, even on judges appointed after the income tax was enacted,[32] the Supreme Court reversed itself and held that a general nondiscriminatory tax could be applied to federal judges appointed after the enactment of the tax.[33] The decision emphasized that the tax did not discriminate against judges and that judges, like all citizens, had a responsibility to pay their fair share of the cost of government.[34] The decision seems to be based on the view that the purpose of the Compensation Clause is to protect federal judges from legislative attempts to impinge on judicial independence.[35] A general income tax, applied to all wage earners, poses little risk of such interference. Yet use of the

29. 2 Max Farrand, Records of the Federal Convention 45 (1911).
30. *See* discussion *supra* part I.
31. Evans v. Gore, 253 U.S. 245 (1920).
32. Miles v. Graham, 268 U.S. 501 (1925).
33. O'Malley v. Woodrough, 307 U.S. 277, 282 (1939).
34. *Id.*
35. *Id.*

bright line interpretive model effectively precludes reliance on such reasoning.[36]

How one resolves the constitutionality of general salary reductions applied to judicial incomes depends on whether one adopts what could be described as the "antidiscrimination" interpretation of the Compensation Clause. One could interpret Article III, much as the Free Exercise Clause is currently construed,[37] to insulate judicial salaries merely from discriminatory treatment. When this approach is combined with the bright line model, the result is that if Congress singles out judicial salaries for reduction, that reduction is incapable of justification, for whatever reason.[38] However, if Congress reduces judicial salaries as part of a broader reduction in the salaries of all federal employees, the inclusion of judicial salaries is constitutional.

While the antidiscrimination model appears difficult to reconcile with the seemingly absolute terms of the Compensation Clause, it might be defended as a relatively easily applied compromise that fulfills the core independence concerns underlying the clause. This model accomplishes this without either invoking a troublesome case-by-case approach or significantly undermining legitimate efforts at fiscal restraint. Whichever way one resolves this debate, it is important to note that the conclusion reached should control both direct and indirect salary reductions, for there exists no logical or practical basis on which to distinguish between the two.[39] Given this fact, practical considerations might well push a reasonable observer into acceptance of the antidiscrimination principle. Otherwise, one would be logically forced to reach the arguably impractical conclusion that Congress may not constitutionally apply general increases in the income tax to sitting federal judges.

III. DECISIONAL AND LAWMAKING INDEPENDENCE CONTRASTED

A. *Defining Terms*

When one moves analysis from the textually based guarantees of institutional independence to more substantive aspects of judicial independence, the nature of the inquiry shifts its focus from the words of the Constitution to the theoretical framework underlying the relevant constitutional provisions. Before exploring that framework, however, it

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36. *See* discussion *supra* part III.C.2, III.C.3.

37. *See* Smith v. Oregon, 494 U.S. 872 (1990).

38. *Cf.* Booth v. United States, 291 U.S. 339 (1934) (provision of federal statute specifically reducing pensions of federal judges held unconstitutional).

39. *See* discussion *supra* part III.C.2, III.C.3.

is necessary to understand the subtle but significant differences in the types of substantive judicial independence.

The concept of decisional independence implies the ability of the judge in a particular case to ascertain, interpret, and apply the governing legal principles to the facts of the case before her as she deems appropriate, free from external or extraneous influences and pressures that might reasonably be thought to affect a decision. The concept of lawmaking independence, on the other hand, concerns a judge's ability to fashion general substantive rules of decision or rules of procedure that are designed to govern not only the case before her but future similarly situated cases as well. Admittedly, this distinction is not one between day and night. It is, however, a distinction of fundamental importance. Examination of both established constitutional principles and fundamental precepts of American political theory demonstrates that decisional independence is the *sine qua non* of the federal judiciary's operation. Lawmaking independence, on the other hand, is not centrally important to performance of the judicial function and would often undermine the principles of democratic theory that underlie the American political system.

B. The Federal Judiciary's Role in American Constitutional Theory

In providing for the creation of the federal judiciary, the framers recognized the need for the federal courts to be insulated from the more representative political branches.[40] Article III therefore expressly guarantees to federal judges protections of both salary and tenure.[41] Such independence is necessary, so that the federal courts may effectively check the possible excesses of the majoritarian branches by enforcing the counter-majoritarian limits the Constitution imposes and maintaining the legitimacy of their decisions in the eyes of the public.[42]

At the same time, because of their insulation from majoritarian pressure and the resultant threat to the workings of the democratic process, the federal judiciary has been expressly confined to the exercise of the traditional judicial function of case adjudication.[43] Unless limited in this manner, the largely unrepresentative and unaccountable federal judiciary could threaten the fundamental principle of representa-

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40. *See, e.g.*, Federalist No. 78 (Hamilton).

41. U.S. CONST. art. III, § 1. *See* discussion *infra* part I.

42. I have discussed this theory in detail in MARTIN H. REDISH, THE FEDERAL COURTS IN THE POLITICAL ORDER: JUDICIAL JURISDICTION AND AMERICAN POLITICAL THEORY 4-7, 75-85 (1991).

43. *See* U.S. CONST. art. III, § 2; Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464 (1982).

tionalism by usurping the policymaking power the legislative and executive branches traditionally exercise.

To be sure, there exists a long Anglo-American tradition of substantive common law development by the judiciary. In the federal judicial system, however, the tradition is largely to the contrary. Since the early years of the nation's existence, Congress has, in the Rules of Decision Act,[44] prohibited the federal courts from fashioning common law rules of decision.[45] While the Supreme Court has on occasion recognized judge-made exceptions to this seemingly total statutory bar, the Court has always emphasized the narrow and limited nature of these exceptions.[46] In any event, even in those cases in which courts are authorized to fashion sub-constitutional rules of decision, no one could seriously doubt that a legislature has the authority to supersede common law rules by appropriate legislative action. Thus, lawmaking independence is not part of the independence the Constitution guarantees to the federal judiciary.

C. Constitutional Sources of Federal Decisional Independence

Two constitutional principles provide the legal foundation for the concept of the federal courts' decisional independence: due process and separation of powers.

1. Due Process. The argument from due process postulates that "[n]one of the core values of due process . . . can be fulfilled without the participation of an independent adjudicator."[47] The point, in other words, is that the procedural safeguards of notice, hearing, counsel, transcript, and the ability to call or cross-examine witnesses, all methods of assuring decisional accuracy and essential elements of fair procedure, are of little value if the decision maker bases his finding on factors other than his neutral assessment of the evidence.

The absence of a neutral adjudicator contravenes both the instrumental and noninstrumental values thought to underlie due process. To the extent decision is based on factors other than fair assessment of the

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44. 28 U.S.C. § 1652 (1988).

45. The statute precludes the fashioning by the federal courts of purely substantive common law, Erie R. Co. v. Tompkins, 304 U.S. 64 (1938), and certain rules that implicate both substantive and procedural concerns. *See generally* Martin H. Redish & Carter G. Phillips, *Erie and the Rules of Decision Act: In Search of the Appropriate Dilemma*, 91 HARV. L. REV. 356 (1977).

46. *See, e.g.*, Boyle v. United Technologies Corp., 487 U.S. 500, 506-08 (1988); Wallis v. Pan Am. Petroleum Corp., 384 U.S. 63, 69 (1966).

47. Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 476 (1986).

evidence, the instrumental goal of accurate decision making is of course undermined. To the extent one places a value on considerations that affect a litigant's individual self-worth and faith in and respect for the adjudicatory system, the absence of a neutral adjudicator is also a matter of grave concern.[48] At the very least, adjudicatory independence is therefore a necessary condition of truly fair procedure, which in turn, is the essence of procedural due process.

Due process is of only limited value as a protector of decisional independence, however, for two reasons. First, by its terms, the Fifth Amendment's Due Process Clause is triggered only when a cognizable life, liberty, or property interest is at stake,[49] concepts which have received appropriately limited construction.[50] Second, even when the clause is invoked, determination of exactly what constitutes an unconstitutional encroachment of decisional independence remains in a state of doctrinal uncertainty.[51]

2. Separation of Powers—Formalism. There exist several textual sources for the separation-of-powers' protections of federal decisional independence. First, Article III expressly vests "the judicial power" in the judicial branch,[52] and this directive, however ultimately defined, may be violated by attempts by other branches to usurp the judiciary's decisional authority. Under a so-called formalist model of separation of powers,[53] no branch may exercise authority not delegated to it by the Constitution. The key element of the formalist model is its rejection of

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48. *See id.* at 476-91.

49. U.S. CONST. amend. V. The same, of course, is true of the Fourteenth Amendment.

50. *See, e.g.*, Paul v. Davis, 424 U.S. 693 (1976).

51. *Compare* Tumey v. Ohio, 273 U.S. 510, 532 (1927) (mere possibility of financial temptation of adjudicator violates due process) *with* Withrow v. Larkin, 421 U.S. 35, 47 (1975) (in order to overcome presumption of honesty and integrity of administrative officials, a party must "convince the court that, under a realistic appraisal of psychological tendencies and human weakness[es]" a combination of investigatory with adjudicative functions poses undue risk of partiality.). *See also* Weiss v. United States, 114 S. Ct. 752 (1994) (lack of fixed term of office for military judges does not violate due process).

52. U.S. CONST. art. III, § 1.

53. The dictates of formalism in the separation-of-powers context have been described in the following manner:

> Any exercise of governmental power, and any governmental institution exercising that power, must either fit within one of the three formal categories [legislative, executive, or judicial] . . . or find explicit constitutional authorization for such deviation. The separation of powers principle is violated whenever the categorizations of the exercised power and the exercising institution do not match and the Constitution does not specifically permit such blending.

Gary Lawson, *Territorial Governments, and the Limits of Formalism*, 78 CAL. L. REV. 853, 858 (1990) (footnote omitted).

any form of pragmatic or functionalist balancing test that could conceivably authorize exceptions to the Constitution's tripartite distribution of power when social circumstances are found to warrant.[54] Beyond that point, however, the sub-models of formalism differ in their definitional approach to branch power. What could be called classic formalism employs an originalistic[55] and/or rigidly syllogistic[56] approach to the definition of branch power. In this manifestation, formalism has been the subject of severe criticism by legal theorists.[57] However, formalism may also be utilized in a more pragmatic fashion, leading to what I have previously referred to as the "pragmatic formalist" model.[58] This version of formalism posits that "[i]n fashioning its definitions of branch power, the Court should look to a combination of policy, tradition, precedent, and linguistic analysis."[59]

Under a formalist model, Congress may, pursuant to Article I, exercise only the legislative power; pursuant to Article II the president may exercise only the executive power; and pursuant to Article III the judiciary exercises the judicial power. While other provisions of the Constitution on occasion delegate narrowly framed supplemental powers to the branches,[60] for the most part, according to the formalist model, branch authority is confined by the definitional scope of the authority granted to it in one of the first three Articles.

Under the formalist approach, the judiciary's power is protected by the simple fact that the judicial power has not been delegated to the other branches. However, it does not necessarily follow that the respective branch powers are hermetically insulated from each other. To the extent the powers of the other two branches might reasonably be defined to include activities that could also be appropriately characterized as judicial, a strict formalist model may not fully protect the judiciary's exercise of the judicial power. One might therefore supplement a strict

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54. *Id.*

55. *See* Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980); *Note, Mistretta v. United States: Mistreating the Separation of Powers Doctrine?*, 27 SAN DIEGO L. REV. 209 (1991).

56. Lee S. Liberman, *Morrison v. Olson: A Formalistic Perspective on Why the Court Was Wrong*, 38 AM. U. L. REV. 313, 343 (1989).

57. *See, e.g.*, Thomas O. Sargentich, *The Contemporary Debate About Legislative-Executive Separation of Powers*, 72 CORNELL L. REV. 430 (1987).

58. REDISH, *supra* note 42.

59. *Id.* at 455 (footnote omitted).

60. For example, the Appointments Clause of Article II, § 2 provides that Congress may vest the appointment of "inferior officers" in "the Courts of Law," even though performance of such a function does not implicate adjudication of a case or controversy. *See* Morrison v. Olson, 487 U.S. 654, 655 (1988).

formalist model with a form of functionalism to deal with situations in which the definitional approach of formalism is satisfied by a particular exercise of branch power; however, a significant threat to the values of branch integrity nevertheless results. A supplemental functionalist model therefore posits that while the definition of branch power provides a floor for separation of powers, even when a branch acts within the scope of its delegated powers such action may be unconstitutional if it is found to unduly interfere with the proper operation of another branch.

3. Separation of Powers—Functionalism. The primary theoretical alternative to the formalist model of separation of powers is the functionalist model. Use of a purely functionalist model could conceivably allow what are admittedly invasions of the judicial province by the other branches under certain circumstances. The unifying philosophy that underlies all of the variants of the functionalist model is a willingness to ignore definitional or conceptual constraints on branch power in light of the needs of the applicable social and political context.[61] Beyond that, the variants differ in the contextual factors they deem relevant. Under one sub-model, which might be labeled the internal functionalist approach, even when a branch's actions do not fall within the scope of its constitutionally authorized powers "the reviewing court invalidates branch usurpation only if it is found to reach some unspecified quantitative level of intensity—in other words, if it is found to undermine another branch's performance of its essential function or to acrete 'too much' power to the usurping branch."[62] This sub-model's focus is thus on the internal effect of the usurpation on the operation of branch power.

Under a second sub-model, which could be described either as an external functionalist or ad hoc balancing approach, "branch usurpation may be justified by a sufficiently strong competing social interest . . . ."[63] While the first sub-model is satisfied as long as no branch either gains or loses "too much" power, the second sub-model contrasts the intensity of the asserted social justification for the usurpation of one branch's power by another branch against the harmful effects thought to derive from that usurpation.

Under a functionalist model, it is conceivable that Congress could openly usurp the judicial power with impunity as long as a reviewing court concludes either that the judiciary's province has not been invaded unduly or that a competing social interest justifies such usurpation.

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61. Lawson, *supra* note 53, at 853.
62. REDISH, *supra* note 42, at 125.
63. *Id.*

Because of the inherently subjective and unpredictable nature of all variants of the functionalist model, it is simply impossible to predict a decision on the constitutionality of particular legislative or executive invasions of the judicial province when employing a functionalist standard.

Although some form of functionalism appears to dominate much recent Supreme Court precedent,[64] both of these sub-models are subject to severe criticism because they either "ultimately degenerate[] into little more than the statement of a wholly subjective conclusion"[65] or "undermine the key structural assumption of separation of powers theory—that it will be impossible (at least until it is too late) to determine whether or not a particular breach of branch separation will seriously threaten the core political values of accountability, diversity, and checking."[66]

IV. IMPLICATIONS OF THE DECISIONAL-LAWMAKING DISTINCTION, I: CONGRESSIONAL LIMITATION OF FEDERAL COURT POWER TO PRESCRIBE SUBSTANTIVE RULES OF DECISION

A. The Decisional-Lawmaking Distinction From the Perspectives of Constitutional and Political Theory

Application of accepted principles of American constitutional and political theory to the decisional-lawmaking distinction gives rise to four basic conclusions: (1) Congress may adopt constitutionally valid generalized rules of both decision and process, and require the federal courts to enforce them; (2) Congress may not dictate to the federal courts how to interpret the Constitution; (3) Congress may not constitutionally adopt a particular rule of decision yet indirectly require the federal courts to enforce a different or contrary rule of decision; (4) Congress may not directly dictate the result of a particular litigation.

Although by considerations of tradition, constitutional text, and political theory, Congress possesses substantial power to control the jurisdiction of the federal courts,[67] separation of powers principles may

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64. *See, e.g.*, Morrison v. Olson, 487 U.S. 654 (1988); Mistretta v. United States, 488 U.S. 361 (1989).

65. REDISH, *supra* note 42, at 125.

66. *Id.*

67. Article III, § 1 provides that the judicial power shall be vested in such inferior courts as Congress may from time to time ordain and establish. The Supreme Court has reasoned that since Congress need not have created lower federal courts it may also abolish them once created and that this greater power of abolition logically includes the lesser power of curbing jurisdiction. *See* Lockerty v. Phillips, 319 U.S. 182 (1943); Sheldon v. Sill,

nevertheless limit the scope of that power. Congress may often exclude completely the Article III courts from the adjudicatory process, as long as the due process requirement of an independent adjudicator is satisfied through alternative means.[68] However, severe limits exist on Congress' power to employ the Article III courts for interpretation or enforcement yet simultaneously restrict the scope of their decisional authority. Congress seriously threatens the concept of decisional independence by allowing the federal courts to adjudicate cases within their proper jurisdiction while simultaneously excluding from the scope of the judicial inquiry constitutional or legal issues that may arise in the course of the litigation, or by directing how part or all of a particular case is to be decided.

It is generally accepted that Congress has constitutional power to exclude completely the lower federal courts from adjudication of a particular category of cases, as long as the only consequence is to have the matters adjudicated in the state courts.[69] State courts have traditionally been deemed competent adjudicators and enforcers of federal rights[70] and bound by the Supremacy Clause[71] to give effect to controlling federal law.[72] However, when Congress does vest adjudicatory authority in the federal courts, separation-of-powers principles impose certain limits on congressional authority to control the outcome of the case, either by directing decision or excluding judicial power to resolve particular legal or factual questions that arise in the case.

The source and contours of this separation-of-powers limitation are somewhat murky, especially in light of the well established principle that, within constitutional bounds, Congress may provide the substantive rule of decision for a case falling within the federal court's federal question jurisdiction.[73] Surely, no one could doubt that the federal courts lack authority either to ignore or overrule congressionally dictated substantive rules of decision, as long as those rules are found to be

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49 U.S. (8 How.) 441 (1850). While not everyone has agreed that Congress' power should be construed this broadly as a doctrinal matter the existence of such power appears well established. *See, e.g.*, Akhil Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205 (1985).

68. *See, e.g.*, Bartlett v. Bowen, 816 F.2d 695 (D.C. Cir. 1987).

69. *See, e.g.*, Lockerty v. Phillips, 319 U.S. 182 (1943).

70. *See, e.g.*, Claflin v. Houseman, 93 U.S. 130 (1876).

71. U.S. CONST. art. VI, cl. 2.

72. Testa v. Katt, 330 U.S. 386, 391 (1947).

73. The Supreme Court made clear in Erie R. Co. v. Tompkins, 304 U.S. 64 (1938), however, that Congress lacks authority in diversity cases to vest purely substantive rulemaking power in the federal courts.

constitutionally valid.[74] Thus, one might question the basis for invalidating congressional attempts to limit federal judicial power to resolve the substantive outcome of cases.

1. Drawing a Constitutional/Sub-Constitutional Distinction: Counter-Majoritarian Independence. To understand the role of separation of powers in this area, the issue must be viewed from the perspective of established American political theory. First, one must distinguish between congressional attempts to prescribe constitutional rules of decision on the one hand and nonconstitutional rules of decision on the other. In vesting the federal courts with power to adjudicate a case, Congress may conceivably seek either to exclude judicial power to inquire into the constitutionality of the law that Congress is enforcing or to prescribe a particular outcome of the constitutional inquiry. These congressional attempts are unconstitutional, because they undermine the essence of the counter-majoritarian principle that underlies American political theory. That principle posits that the very majoritarian bodies intended to be limited by the counter-majoritarian Constitution may not sit as the final arbiter of the constitutionality of their own actions, lest the Constitution be effectively rendered a dead letter.[75] This conclusion, in short, describes what I refer to as the concept of counter-majoritarian independence.

The fact that Congress presumably has power under Article III to exclude federal jurisdiction completely does not alter this conclusion. The postulate that "the greater includes the lesser" is inapplicable in this context, because the congressional power to exclude federal adjudicatory power proceeds on the assumption that in such an event the state courts will be in a position to exercise the full judicial power.[76] When Congress leaves enforcement power in a federal court but denies to that court the power to review the constitutionality of the law it is enforcing, the hypothetical availability of the state courts fails to provide a safety valve, even though those courts could themselves have constitutionally been vested with full adjudicatory power. This type of congressional action undermines the quid pro quo philosophy implicit in the structure of Article III: If Congress wishes to enlist the special legitimacy traditionally associated with the decision of an Article III

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74. For this reason, it appears clear that apart from nondelegation questions, resolved in *Mistretta* the congressional provision of sentences does not unconstitutionally invade the judicial province.

75. *See* discussion *supra* part III.

76. *See, e.g.*, Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953).

court, Congress must allow that court to decide the case freely. The textual basis of this principle of separation- of-powers derives from the precept that an inherent element of the judicial power textually described in Article III is the power of the court to assure that its actions are consistent with the Constitution that the judges are sworn to enforce.

When the issue concerns the power of Congress to limit federal judicial power to find sub-constitutional rules of decision, however, the attacks on congressional authority become considerably more problematic. Congress has power under Article I to adopt laws that provide substantive rules of decision in the federal courts. The unrepresentative, unaccountable federal judiciary has no authority to ignore or supplant these rules of decision, short of a finding of unconstitutionality.

2. Procedural Limitations on Judicial Power to Apply Substantive Law. The preceding reasoning supports the conclusion that the federal courts are denied *lawmaking* independence. The principle of *decisional* independence, however, places important limitations on congressional power. One of those limitations occurs in situations in which Congress has provided a general rule of decision but has simultaneously imposed procedural or evidentiary rules that effectively prohibit the federal courts from accurately applying that rule of decision in a particular situation. In this context, one should note the important distinction between congressional power to create general exceptions to a generalized substantive rule of decision on the one hand, and congressional power to prohibit the federal courts from finding that the standards of a general rule of decision have been either met or violated in a particular case, on the other. In the former situation, Congress is simply exercising its legislative power to establish general rules of behavior, and, assuming no equal protection problems, the creation of such exceptions should pass constitutional muster. In the latter context, Congress is interfering with the proper performance of the judicial function by effectively conscripting the judiciary as an unwilling coconspirator in what amounts to the imposition of a legislative fraud on the public.

From the perspective of American political theory, such congressional behavior is unacceptable. For example, in formally adopting "standard A" as a general rule of decision, while simultaneously requiring the federal courts to reach decisions that effectively amount to adoption of "standard B" or "standard 'not A,'" Congress has substantially subverted the representational democratic process. Congress has done so by undermining the ability of the electorate to judge members of Congress

through those members' votes on legislation embodying particular normative social policy choices.[77]

This congressional action is invalid, even if one assumes that Congress could constitutionally have chosen to adopt either "standard B" or "standard 'not A'" as the controlling substantive rule of decision in the first place. Under separation-of-powers principles, this congressional action is defective, because it effectively enlists the federal judiciary in a scheme to bring about voter confusion. In so doing, Congress undermines the political commitment principle. This concept is central to even a diluted form of democratic theory, which dictates that in voting on proposed legislation elected representatives must make a sufficiently clear commitment to assist the electorate in making future governing choices.[78] Hence, by undermining the political commitment principle Congress both undermines the legitimacy of the federal adjudicatory process and unduly truncates the judicial power to resolve a case before it. This action should therefore be found to breach Article III's vestiture of the judicial power in the federal courts.

Under certain circumstances, this action could also violate the procedural due process rights of a litigant to a full and fair adjudication of his claim. Though Congress may have power to prescribe a different or even contradictory rule of decision, unless and until it does so a litigant has a right to be fairly heard on his claim that the standard of the existing rule of decision has been met in his individual case (at least to the extent that liberty or property interests are sufficiently implicated to trigger the due process requirement).

For these reasons, Justice Scalia was incorrect in rejecting a procedural due process challenge in *Michael H. v. Gerald D.*[79] The case (which primarily concerned questions over the scope of substantive due process rights) involved a constitutional challenge to the denial of parental rights of a man claiming to be the biological father of a marrried woman's child. His procedural due process objection concerned section 621 of the California Evidence Code,[80] which provides that a child born to a married woman living with her husband, who is neither impotent nor sterile, is presumed to be a child of the marriage.[81] The presumption may be rebutted only by the husband or wife, and even then only in limited circumstances.[82]

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77. *See* REDISH, *supra* note 42, at 136.
78. I examine this principle in detail in REDISH, *supra* note 42, at 154-58.
79. 491 U.S. 110 (1989).
80. CAL. EVID. CODE § 621 (West 1966 & Supp. 1994).
81. *Id.*
82. *Id.*

Justice Scalia, speaking for a majority of the Court, rejected the challenge, because

> This claim derives from a fundamental misconception of the nature of the California statute. While section 621 is phrased in terms of a presumption, that rule of evidence is the implementation of a substantive rule of law. California declares it to be, except in limited circumstances, irrelevant for paternity purposes whether a child conceived during, and born into, an existing marriage was begotten by someone other than the husband . . . .
>
> Of course the conclusive presumption not only expresses the State's substantive policy but also furthers it, excluding inquiries into the child's paternity that would be destructive of family integrity and privacy.[83]

Justice Scalia conceded that "[a] conclusive presumption does, of course, foreclose the person against whom it is invoked from demonstrating, in a particularized proceeding, that applying the presumption to him will in fact not further the lawful governmental policy the presumption is designed to effectuate."[84] He responded, however, that "the same can be said of any legal rule that establishes general classifications, whether framed in terms of a presumption or not."[85]

In this analysis, Justice Scalia missed the key point underlying the concept of decisional independence. To be sure, assuming no violation of relevant substantive constitutional rights, California may adopt the rule that a biological father has no rights in his child when the mother is married to another man. But California did not adopt such a rule. Instead, it adopted a law that purports to have rights turn on the factual issue of who the natural father is, yet, through evidentiary manipulation indirectly effects a very different public policy.[86] If government wishes to attain a particular public policy, our constitutional democratic theory dictates that government do so openly, to assure that the choice is subject to the scrutiny, and ultimate judgment, of the electorate.

For reasons of both separation of powers and due process, then, the deceptively simple logical principle that "the greater includes the lesser"[87] does not work in this context. The mere fact that a legislature constitutionally *could* have chosen a particular substantive legal standard should not be taken to imply that it constitutionally may purport to establish a different substantive standard yet effectively

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83. 491 U.S. at 119-20.
84. *Id.* at 120.
85. *Id.*
86. CAL. EVID. CODE § 621.
87. *See, e.g.*, Lockerty v. Phillips, 319 U.S. 182 (1943) (discussed in *supra* note 2).

achieve the alternative standard by resort to procedural and evidentiary manipulation. One may draw an analogy to an aspect of modern public choice theory: An interpreting court should not construe a legislative enactment framed in terms of public purposes to achieve some surreptitious private-regarding purpose, even if the interpreting court is convinced that such a private purpose actually does underlie the statute.[88] If the legislature wishes to attain its private-regarding purpose, it should be required to provide explicitly, lest public policies effectively be developed in disguise.

3. Legislative or Executive Resolution of Individual Litigation. A second limitation on congressional authority the principle of decisional independence imposes is that Congress may not, through legislation, dictate the resolution of an individual litigation. Of course, Congress may, through enactment of general substantive legislation, effectively dictate the result in individual cases, because the federal courts are bound to apply constitutionally valid congressional legislation in the course of individual litigations. But if the principle of separation-of-powers dictated by the Constitution's allocation of distinct authority to the several branches means anything, the principle means that one branch may not totally usurp another branch's function.[89] When Congress does nothing more than dictate resolution of an individual litigation, much as when it enacts a constitutionally prohibited bill of attainder,[90] Congress exceeds its constitutional authority.

B. Placing United States v. Klein in Perspective

Acceptance of this theory may render more coherent the doctrine that has evolved from the Supreme Court's decision in *United States v. Klein*.[91] Congress had provided that persons whose property had been seized during the Civil War could recover the property or the proceeds from its sale upon proof that they had not given aid or comfort to the enemy during the War.[92] The Supreme Court had previously held that a presidential pardon for activities during the War constituted proof that the person had not given aid or comfort to the enemy.[93] The Court's theory was that the constitutional effect of the pardon, unless specifically

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88. *See* Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223 (1986).

89. *See* discussion *supra* part III.

90. U.S. CONST. art. I, § 9, cl. 3.

91. 80 U.S. (13 Wall.) 128 (1871).

92. *Id.* at 139.

93. *See id.* at 131.

limited by the president, is that the pardoned person is treated as if he had not committed the pardoned acts.[94]

Klein, representing a pardoned decedent, sued in the Court of Claims to recover the proceeds of seized property. Adhering to Supreme Court precedent, the Court of Claims granted relief.[95] The government appealed, and while the case was pending in the Supreme Court, Congress enacted legislation providing that federal courts should treat a pardon as proof that a person had been disloyal and that the Supreme Court should dismiss the case for want of jurisdiction.[96]

Despite the explicit constitutional directive empowering Congress to create exceptions to the Supreme Court's appellate jurisdiction,[97] the Court found both this limitation on its jurisdiction and the congressional direction to treat pardons as proof of disloyalty to be unconstitutional.[98] The Court's explanation for its decision is arguably subject to a broad interpretation, one that recognizes substantial limits on Congress' ability to prescribe rules of decision for the federal judiciary.[99] As the Supreme Court has described the *Klein* rationale in a modern decision, the congressional proviso was unconstitutional in part because "it prescribed a rule of decision in a case pending before the courts, and did so in a manner that required the courts to decide a controversy in the Government's favor."[100] However, to the extent that Congress has done nothing more than enact a general rule of decision to be employed in relevant litigation, the constitutional problem is difficult to comprehend. Enacting general rules is what Congress always does in the exercise of its legislative power and, assuming no other constitutional violation, the fact that Congress prescribes a rule of decision favorable to the government would seem to give rise to no separation-of-powers difficulty. Nor does it appear constitutionally problematic that Congress adopts a new general rule of decision while a case is pending on appeal. In this event, the court's obligation is generally to apply the relevant substantive law as it exists at the time of decision.[101]

The true constitutional difficulties raised on the facts of *Klein*, then, must concern something other than a mere congressional revision of a general, substantive rule of decision. Those difficulties appear to be

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94. *Id.* at 147.
95. *Id.* at 128.
96. *Id.*
97. U.S. CONST. art. III, § 2, cl. 2.
98. 80 U.S. (13 Wall.) at 141-42.
99. *See id.* at 146.
100. United States v. Sioux Nation of Indians, 448 U.S. 371, 404 (1980).
101. *See* discussion *supra* part IV.A.2.

threefold. The most significant problem was that Congress was effectively telling the Court how to determine the ramifications of the president's exercise of his constitutionally delegated pardon power. In so doing, Congress was violating the fundamental separation-of-powers precept, embodied in the principle of counter-majoritarian independence,[102] that Congress may not tell an Article III court how to interpret the Constitution. A second possible difficulty was that rather than enacting a general rule of decision, Congress was arguably doing nothing more than dictating the decision in a specific litigation. In so doing, Congress is simultaneously performing a purely judicial function (in violation of a formalist model of separation-of-powers) and seriously interfering with the judiciary's performance of its proper function (in violation of a supplemental functionalist model of separation-of-powers).[103]

It was largely on the basis of this reasoning that the United States Court of Appeals for the Ninth Circuit, in *Seattle Audubon Society v. Robertson*,[104] invalidated congressional legislation. The legislation appeared to create special exceptions to otherwise generally applicable laws for the purpose of affecting the resolution of particular litigation.[105] Although the Supreme Court reversed,[106] it did so only on the grounds that, contrary to the Ninth Circuit's perception, the challenged laws actually did alter preexisting general law.[107] Puzzlingly, the Court expressly left untouched the implications of *Klein*[108] for a situation similar to the one the Ninth Circuit perceived to have existed in *Robertson*.[109] The Court would have been better advised to reiterate, or at least not cast doubt upon, what every observer should reasonably be expected to understand: that Congress may not adjudicate individual litigations.

Whether the legislation struck down in *Klein* actually constituted the resolution of a particular litigation, rather than the adoption of a generally applicable rule of decision is debatable. One might reasonably view the challenged legislation in that case as merely a generally phrased enactment having an impact in individual litigation, even though when enacted the legislation was quite obviously directed to the

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102. *See* discussion *supra* part III.
103. *See* REDISH, *supra* note 17, at 119-20.
104. 914 F.2d 1311 (9th Cir. 1990), *rev'd*, 112 S. Ct. 1407 (1992).
105. 914 F.2d at 1317.
106. Robertson v. Seattle Audubon Soc'y, 112 S. Ct. 1407, 1413 (1992).
107. *Id.* at 1414.
108. *Id.*
109. *Id.*

resolution of that litigation. However, that congressional proviso was also problematic because, to the extent it actually represented adoption of a generally applicable rule, that rule did not alter the applicable substantive rule of decision. Rather, the rule imposed on the Court an obligation to treat probative evidence differently from the way the Court would otherwise have chosen to treat it, with the goal of effectively altering the substantive rule of decision without legally doing so. For reasons already discussed,[110] these legislative attempts to manipulate the judicial process should be deemed unconstitutional.

It does not automatically follow from this conclusion that Congress, for this reason alone, would necessarily be prevented from adopting rules of evidence that are to apply in federal litigation. As long as those evidentiary rules are substantively agnostic (not tied to a particular substantive rule of decision or clearly designed indirectly to bring about a specific substantive outcome) and the specific evidentiary rules adopted do not substantially interfere either with the factfinder's ability to find facts or with the court's ability to perform its judicial function of fairly and freely applying the law to the facts of the case, such rules do not violate the principles of *Klein*.

C. *Congressional Reopening of Final Judgments*

One possible application of the *Klein* doctrine concerns the constitutionality of congressional efforts simultaneously to alter substantive law and reopen final judgments of the federal courts in order to revise them in accordance with those alterations. Section 27A(b) of the Securities and Exchange Act of 1934,[111] a provision added to the Act by amendment in 1991, presents this issue most clearly. The amendment came in response to a Supreme Court decision construing the 1934 Act to establish a uniform rule that "[l]itigation instituted pursuant to section 10(b) . . . must be commenced within one year after the discovery of the facts constituting the violation and within three years after such violation . . . ."[112] In a separate decision made the same day, the Court held that this statute of limitations was to be applied to pending claims brought under section 10(b).[113] As a result, various district courts dismissed pending suits. In response, Congress enacted section 27A, which provides:

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110. *See* discussion *supra* part IV.A.2.

111. Securities Exchange Act of 1934, § 27A (amended by Pub. L. No. 102-242, Dec. 19, 1991, codified at 15 U.S.C. § 78aa-1).

112. Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350, 364 (1991).

113. James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 544 (1991).

> (a) Effect on Pending Causes of Action—The limitation period for any private civil action implied under section 78j (b) of this title that was commenced on or before June 19, 1991, shall be the limitation period provided by the laws applicable in the jurisdiction, including principles of retro-activity, as such laws existed on June 19, 1991.
>
> (b) Effect on Dismissed Causes of Action—Any private civil action implied under section 78j (b) of this title that was commenced on or before June 19, 1991 —
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> (1) which was dismissed as time barred subsequent to June 19, 1991, and
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> (2) which would have been timely filed under the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991.
>
> shall be reinstated on motion by the plaintiff not later than 60 days after December 19, 1991.[114]

In *Pacific Mutual Life Insurance Co. v. First Republicbank Corp.*,[115] a decision subsequently affirmed by an equally divided Supreme Court, the United States Court of Appeals for the Fifth Circuit rejected a challenge to section 27A(b) as a violation of Article III.[116] The Fifth Circuit reasoned that section 27A(b) respects the principle of *Klein*, because the provision actually changed the governing general substantive law.[117] The *Pacific Mutual* Court assured that "[i]f we understood a statute's purpose to be the reversal of results in particular controversies between private individuals, we would strike the statute as violative of our authority to decide cases."[118]

While most courts of appeals that have considered the issue have reached a similar conclusion,[119] the United States Court of Appeals for the Sixth Circuit, in *Plaut v. Spendthrift Farm, Inc.*,[120] found section 27A(b) to be an unconstitutional interference with the performance of

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114. Securities Exchange Act of 1934, § 27A (amended by Pub. L. No. 102-242, Dec. 19, 1991, codified at 15 U.S.C. § 78aa-1).

115. 997 F.2d 39 (5th Cir. 1993), *aff'd*, 114 S. Ct. 1827 (1994).

116. 997 F.2d at 52-54.

117. *Id.* at 53.

118. *Id.*

119. *See generally* Axel Johnson, Inc. v. Arthur Andersen & Co., 6 F.3d 78 (2d Cir. 1993); Freeman v. Laventhol & Horwath, 34 F.3d 333 (6th Cir. 1994); Anixter v. Home-Stake Prod. Co., 977 F.2d 1533 (10th Cir. 1992).

120. 1 F.3d 1487 (6th Cir. 1993). As this Article went to press, the Supreme Court affirmed the Sixth Circuit's decision in *Plaut*, holding that separation-of-powers principles prevent Congress from reopening final decisions of the federal judiciary. Plaut v. Spendthrift Farm, Inc., 63 U.S.L.W. 4243 (April 18, 1995). It should be noted that the analysis that follows differs from the Court's holding.

the judicial function.[121] Relying on the early Supreme Court decision in *Hayburn's Case*,[122] the Sixth Circuit concluded that "the Supreme Court has from the beginning maintained the rule that Congress may not retroactively disturb final judgments of the Federal courts . . . ."[123] The court's reliance on *Hayburn's Case*, however, was misplaced. Indeed, by contrasting the situation in *Plaut* with that in *Hayburn's Case*, we can better understand the limits of the concept of decisional independence. In *Hayburn* the Court invalidated, on separation-of-powers grounds, a congressional directive authorizing the Secretary of War to review decisions of the federal courts accepting or rejecting applications by Revolutionary War veterans for disability pensions.[124] The Secretary could deny pensions where he suspected imposition or mistake.[125]

The *Plaut* court cited *Hayburn* "to illustrate that the Supreme Court has from the beginning maintained the rule that Congress may not retroactively disturb final judgments of the Federal courts . . . ."[126] But *Hayburn* really establishes no such thing. Instead, it rightly establishes that Congress may not authorize an executive officer to review and reverse *specific, individual federal court decisions.* Section 27A, in contrast, alters *the general governing law* of the statute of limitations in securities fraud cases and directs that the new law be imposed with total retroactivity, even to the point of reopening previously final judgments. Assuming no controlling due process rights of litigants in those judgments,[127] such legislative action constitutes no breach of constitutionally protected judicial independence. Decisional independence prohibits review and reversal by the legislative or executive branches of the result of a particular litigation; decisional independence does not prohibit congressional alteration of controlling substantive law that has the effect of altering a class of federal court decisions.

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121. *Id.* at 1493.
122. 2 U.S. (2 Dall.) 408 (1792).
123. 1 F.3d at 1493.
124. 2 U.S. (2 Dall.) at 410.
125. *Id.*
126. 1 F.3d at 1493.
127. This issue is beyond the scope of the present inquiry.

V. IMPLICATIONS OF THE DECISIONAL-LAWMAKING DISTINCTION, II: CONGRESS' POWER TO PRESCRIBE PROCEDURAL RULES FOR THE FEDERAL COURTS

A. Applying Separation-of-Powers Theory to Congressional Prescription of Procedural Rules

Deciding whether congressional prescription of procedural rules for the federal courts violates the constitutional protection of separation-of-powers necessarily requires one to recall the various models of separation-of-powers theory.[128] From a formalist perspective, the constitutional inquiry is limited to the questions whether such action falls within the concept of legislative power, and if so whether the action falls within the scope of the powers the Constitution provides to Congress. As to the first question, the definitional requirements of the exercise of legislative power have been met as long as the rules prescribed are of general applicability and affect the behavior of citizens. As to the second inquiry, the Supreme Court made clear in *Hanna v. Plumer*[129] that Congress' enumerated power to create inferior federal courts,[130] combined with its auxiliary power under the Necessary and Proper Clause,[131] provides Congress with the authority to prescribe procedural rules for the federal courts.[132]

If one were to shift the focus to functionalism, either in its supplemental, external, or internal manifestations,[133] one would inquire whether an otherwise legitimate exercise of the legislative power should be invalidated because it unduly invades the province of a coordinate branch. The only way this question could be answered in the affirmative is by concluding that the task of promulgating rules of procedure is so intimately bound up in the performance of the judicial function that the courts could not effectively exercise the judicial power without retaining exclusive authority over procedural rulemaking. Reaching this conclusion appears difficult in light of the long and established history of congressional involvement in the rulemaking process. Indeed, the Supreme Court's power to promulgate procedural rules has traditionally been rationalized as a congressional delegation of *legislative* power to the

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128. *See* discussion *supra* part III.C.2, III.C.3.
129. 380 U.S. 460 (1965).
130. U.S. CONST. art. I, § 8, cl. 9.
131. U.S. CONST. art. I, § 8, cl. 18.
132. 380 U.S. at 471-72.
133. *See* discussion *supra* part III.C.2, III.C.3.

Court.[134] At the very least, Congress has always retained ultimate authority under the Rules Enabling Act to overrule specific rules promulgated by the Court. This power would of course be unacceptable if the judicial power over rulemaking were thought to be exclusive.

On a comparative basis, the power to promulgate general rules of procedure in some senses is easier to conceptualize as a legislative action than as a judicial one. Exercise of the judicial power is inherently characterized by the adjudication of individualized, live disputes.[135] Promulgation of free-standing rules of general applicability does not fit within this model, even when those rules deal with matters that are intimately intertwined with performance of the adjudicatory function.

Even if one were to conclude that procedural rulemaking does fall within the judicial province,[136] that judicial authority is exclusive does not automatically follow. From a purely functionalist perspective, Congress retains a legitimate and significant interest in the procedures and operations of the federal courts, for a number of reasons. First, the success of the substantive federal legislative programs enforced in the federal courts is inescapably intertwined with the procedural efficiency of those courts. Second, the federal budget is invariably affected by the procedural efficiency levels achieved in the federal courts. Thus, on the basis of a type of functionalist interest analysis, the level of Congress' legitimate interest in the choice of procedural rules that govern federal court operation is virtually as intense as that of the federal courts themselves.

The fact that congressional prescription of procedural rules is not, as an abstract matter, invalid does not necessarily imply that all rules that Congress could potentially adopt would pass constitutional muster under a separation-of-powers standard. Conceivably, for example, a specific procedural rule could so interfere with the courts' performance of the judicial function, the full and fair performance of the adjudicatory process of finding facts[137] and/or interpreting applicable law and applying it to the facts,[138] as to invade the courts' "judicial power" under Article III. However, this conclusion could be reached only in the context of a consideration of challenges to particular rules.

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134. *See* Hanna v. Plumer, 380 U.S. at 471-72.

135. *See, e.g.*, Valley Forge Christian College v. Americans United for Separation of Church & State, Inc. 454 U.S. 464 (1982); Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 882 (1983).

136. *See* Linda S. Mullenix, *Unconstitutional Rulemaking: The Civil Justice Reform Act and Separation of Powers*, 77 MINN. L. REV. 1283, 1288 (1993).

137. This power is, of course, subject to the Seventh Amendment's requirement of jury trial in certain cases. U.S. CONST. amend. VII.

138. *See* discussion *supra* part IV.A.2.

B. Constitutionality of the Civil Justice Reform Act of 1990

1. Judging the Act from the Perspective of the Decisional-Lawmaking Dichotomy. In the Civil Justice Reform Act of 1990,[139] Congress mandated the appointment, in each federal district, of an advisory committee, to be composed largely of private attorneys who practice in the district.[140] In consultation with the advisory committee, each district court was directed to formulate and adopt civil justice expense and delay reduction plans.[141] In the words of one commentator, in this Act "Congress served notice that it was going to have civil justice reform and have it immediately."[142]

While the idea has been suggested that the Civil Justice Reform Act improperly undermines the Rules Enabling Act,[143] surely the Act is within Congress' power to enact a statute that repeals or modifies a previously enacted statute. The Supreme Court has held that implied repeals are to be heavily disfavored.[144] However, if implementation of a statute's unambiguous directives necessarily requires abandonment of a directive contained in a prior statute, a conclusion of implied repeal is inescapable; otherwise, the newly enacted statute could not be enforced. Thus, at least as a constitutional matter the possibility that the subsequently enacted Civil Justice Reform Act of 1990 may undermine the dictates of the Rules Enabling Act is of no real significance. No reason in either constitutional text or governing political theory exists to prevent Congress from enacting a statute that either explicitly or implicitly modifies, repeals, or creates an exception to a prior statute. Arguably, the fact that the Civil Justice Reform Act undermines so venerable an enactment as the Rules Enabling Act simply adds to the problems of social policy to which the former act is thought to give rise. However, no legal or constitutional bar to such congressional action exists.

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139. Civil Justice Reform Act of 1990, Pub. L. No. 101-650, 104 Stat. 5090 (codified at 28 U.S.C. §§ 471-82 (Supp. IV 1992)).

140. *See* 28 U.S.C. § 478 (Supp. IV 1992). According to one commentator, "[t]he Act mandates local, grassroots rulemaking by civilian advisory groups . . . ." Linda S. Mullenix, *The Counter-Reformation in Procedural Justice*, 77 MINN. L. REV. 375, 377 (1992). At least as a technical matter, however, the committees do not actually possess rulemaking power.

141. 28 U.S.C. § 472 (Supp. IV 1992).

142. Mullenix, *supra* note 140, at 377.

143. *Id.* at 426-29.

144. *See, e.g.*, Allen v. McCurry, 449 U.S. 90 (1980).

The suggestion has also been made that this Act violates separation of powers principles, "by substantially impairing the federal courts' inherent Article III power to control their internal process and the conduct of civil litigation."[145] Initially, serious doubt exists that the Act actually constrains the federal judiciary's discretion to fashion procedural rules in any meaningful way. The advisory committees mandated by the Act are given no formalized rulemaking power.[146] Instead, the district court takes final action itself, and nothing in the Act precludes the court from rejecting any recommendation made by the committee.[147] Moreover, nothing in the Act appears in any way to affect the preexisting authority of a district court, pursuant to Rule 83 of the Federal Rules of Civil Procedure,[148] to promulgate local rules, so the Act apparently does not prohibit a court from promulgating specific rules the advisory committee has not approved. Hence, a separation-of-powers issue only arises if one assumes that the creation of the advisory committees somehow will, as a practical matter, confine or inhibit district court rulemaking power[149]—surely a most difficult position on which to base a finding of unconstitutionality.

Even if one were to proceed on the assumption that the advisory committees had in fact been delegated formal rulemaking power, the conclusion that the Act breached separation of powers by unduly invading the judicial province would be most tenuous. The separation-of-powers challenge is premised on the view that "Congress is wrong in declaring—as it does in the legislative history to the Act—that it has exclusive federal rulemaking power."[150] But such reasoning misses the point. The question is not whether congressional rulemaking power is *exclusive*, but rather whether it is *preemptive*. Absent preemptive congressional legislation, it is not only appropriate but essential for federal courts, as a matter of common law development,[151] to fashion

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145. Mullenix, *supra* note 136, at 1287.

146. *See* 28 U.S.C. § 478 (Supp. IV 1992).

147. *Id.*

148. FED. R. CIV. P. 83.

149. Professor Mullenix, who believes the Act does violate separation of powers principles, acknowledges that "[t]o be successful . . . 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." Mullenix, *supra* note 136, at 1296.

150. *Id.* at 1287 (footnote omitted).

151. Serious constitutional questions may be raised concerning the power of an Article III court to promulgate generalized rules of procedure, not tied to individual case adjudication. See Martin H. Redish, *Separation of Powers, Judicial Authority, and the Scope of Article III: The Troubling Cases of Morrison and Mistretta*, 39 DEPAUL L. REV.

procedural principles to govern their internal operation. It no way logically follows, however, that Congress lacks constitutional authority to enact generally applicable procedural rules that take precedence over such judicially developed common law rules. For reasons already discussed, such congressional action—at least in the abstract—falls within both the constitutional restriction of congressional authority to the exercise of legislative power and the substantive scope of Congress' powers under Article I.[152] Hence, difficultly is created when trying to understand how the Civil Justice Reform Act can be thought in any way to represent an undue accretion of congressional power.

2. Inquiring Whether the Act Breaches the Non-Delegation Doctrine. The mere fact that Congress may itself preempt, through legislation, judicial rulemaking power does not automatically imply that Congress may delegate that authority to an unaccountable body. The inability to delegate rule making power is especially true when as little guidance exists as the Civil Justice Reform Act provides to the advisory committees.[153] Modern Supreme Court decisions have all but abandoned the nondelegation doctrine.[154] This development is unfortunate, in light of the important values of representationalism that the doctrine may foster.[155] Arguably, however, when Congress delegates authority to control the internal operation of the judiciary, this delegation should be deemed impermissible. At the very least, more detailed standards of direction in the delegation should be demanded. This argument is premised on the view that the strongest protection against unnecessary and intrusive congressional limitations on judicial authority—especially when those limitations are constitutionally valid—is the political check on Congress provided by the electorate. In other words, the concern of the voters will restrain Congress from interfering with the judicial province.

In the area of congressional-judicial relations, politically valuable judicial independence is often protected primarily through this political check, as the failure of the Roosevelt Court-packing plan arguably illustrates. To allow virtually unlimited delegations in this area, then, could threaten the politically-based wing of the separation-of-powers protections. These are concerns not present in the normal delegation context. As the United States Court of Appeals for the Seventh Circuit

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299, 314-19 (1990).

152. *See* discussion *supra* part IV.A.2.

153. *See* Mullenix, *supra* note 136, at 1322.

154. *See supra* note 60.

155. *See generally* REDISH, *supra* note 17, at 135-61.

stated in *United States v. Mitchell*,[156] "one can readily distinguish between Congress' ability to delegate its commerce power over price controls during wartime . . . and its ability to delegate a power as sensitive and central to our Anglo-American legal tradition as shaping a federal court's jurisdiction."[157] The Seventh Circuit expressed serious concern that "Congress [would be able] to delegate such a core legislative function as its control over federal court jurisdiction to any agency or commission."[158] Moreover, delegations to independent contractors,[159] such as the private citizens who make up the advisory committees, are even more suspect, because these delegations vest important policymaking authority in individuals who are even more removed from political responsiveness.

The concerns over the impact of delegation on congressional-judicial relations is at its strongest when the congressional delegation involves the procedural rulemaking power. Delegations of the power to make substantive rules of decision do not give rise to such problems, because even absent congressional action the federal courts lack power under the Rules of Decision Act[160] to fashion purely substantive common law principles. Thus, if the Civil Justice Reform Act were construed to vest rulemaking power in the advisory committees,[161] a nondelegation challenge might be made.

VI. CONCLUSION

Although Congress possesses broad constitutional authority to regulate federal court jurisdiction, it would be both inaccurate and dangerous to believe that the federal courts possess no meaningful independence from the representative branches of the federal government. These institutional independence guarantees expressly provided for in the Compensation Clause of Article III provide a basic prophylactic floor of independence. Moreover, the established constitutional principles of due process and separation-of-powers, embodying fundamental principles of American constitutional and political theory, guarantee to the federal courts, or at least to the judiciary as a whole,[162] both counter-majori-

156. 18 F.3d 1355 (7th Cir. 1994).

157. *Id.* at 1360.

158. *Id.* at 1360 n.7.

159. The Act describes the advisory committees in this manner. *See* 28 U.S.C. § 478(f) (Supp. IV 1992).

160. 28 U.S.C. § 1652 (1988).

161. *But see* discussion *supra* part III.C.3.

162. It should be recalled that Congress is widely thought to possess power to remove even constitutional cases from the lower federal courts. *See supra* note 67. However, this

tarian and decisional independence. These guarantees ensure judicial authorities the power to interpret the Constitution and apply the law to individual cases free from pressure or control of the representative branches.

An equally inaccurate suggestion, however, is that the constitutional principle of judicial independence somehow consumes the democratic integrity of our governmental system, by authorizing the federal courts to promulgate generalized rules of decision or procedure that are insulated from alteration or preemption by the representative branches. Like most aspects of the American political system, judicial independence reflects a delicate balance of both democratic theory, concerned with principles of representationalism and accountability, and republican precepts, focused upon the need to curb democratic excesses. Such a balancing process may be properly performed only by recognition of the subtle variations in the framework of federal judicial independence.

In her reply to this article,[163] Professor Linda Mullenix evinces an inability or unwillingness to comprehend several fundamental precepts that underly the operation of the American governmental system. The first of these precepts is the distinction between a legislative-legislative conflict and a legislative-constitutional conflict. For example, she puzzlingly persists in her assertion that the Civil Justice Reform Act is defective because of its claimed inconsistency with the Rules Enabling Act.[164] But to the extent two federal statutes are inescapably in conflict, the statute that is later in time always takes precedence.[165] The conclusion is as simple as that, because Congress may repeal or modify its previously enacted statutes. It is only because she fails to understand so basic a lesson in American Civics that Professor Mullenix can persist in her truly absurd suggestion that a federal statute is somehow invalidated because of its inconsistency with a previously enacted statute.

Professor Mullenix's reply also evinces a total misunderstanding of the *Erie* doctrine's[166] central tenets. In discussing the *Erie* line of cases,[167] Professor Mullenix suggests that the doctrine is "not a resound-

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power is premised on the assumed availability of the state courts as adequate judicial forums to enforce federal constitutional rights. *See* Hart, *supra* note 76. A denial of any independent forum for the adjudication of constitutional rights would almost certainly violate due process. *See* Bartlett v. Bowen, 816 F.2d 695 (D.C. Cir. 1987).

163. Linda S. Mullenix, *Judicial Power and The Rules Enabling Act*, 46 MERCER L. REV. 733 (1995).

164. *Id.* at 747-51.

165. *Id.*

166. *See generally* Erie R. Co. v. Tompkins, 304 U.S. 64 (1938).

167. Mullenix, *supra* note 163, at 745.

ing affirmation of *Congressional* procedural rulemaking authority, but rather of *judicial rulemaking authority as it is properly exercised.*" But the *Erie* line of cases does no such thing. Rather, it affirms that while the Constitution places limits on congressional authority to delegate purely substantive lawmaking authority to the federal judiciary, as to matters that are arguably procedural the issue is solely a matter of congressional intent.

Finally, Professor Mullenix's reply fails to recognize the vital distinction between constitutional problems with a statute on the one hand and pure policy concerns about that statute, on the other. Indeed, her comment reflects an obviously intense disagreement with the normative policy judgments embodied in the Civil Justice Reform Act. At no point, however, does her analysis reflect the slightest grounding of her concerns in the Constitution. Absent such a grounding, her problem would seem to be simply a matter of political disagreement, hardly a sound basis, in a democratic society, on which to invalidate properly enacted federal legislation.