Judicial Power and The Rules Enabling Act

Linda S. Mullenix
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by Linda S. Mullenix*

I.

Congress undermines and erodes judicial power when it imperially declares and exercises an exclusive right to enact federal procedural rules.¹ Thus, congressional intrusion into federal procedural rulemaking is the most significant contemporary issue of judicial independence.²


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The proper province of procedural rulemaking is no mere pointillist academic quibble, but rather an issue that runs to the core of judicial power. A judiciary that cannot create its own procedural rules is not an independent judiciary. Moreover, a judiciary that constitutionally and statutorily is entitled to create its own procedural rules, but must perform that function under a constant cloud of congressional meddling and supercession, is truly a subservient, non-independent branch.

While Professor Redish grounds his views of judicial independence in a theory of majoritarian constitutional theory, it is important to ask—with regard to procedural rulemaking—whether (and in what sense) the federal judiciary is constitutionally or statutorily subordinate to Congress, or, if not, whether the judicial rulemakers are nonetheless required to act as if they were an elected branch of government. There should be no quarrel with the proposition that Congress as the legislative branch ought to be responsive to majoritarian concerns in enacting substantive law, or that the federal courts in performing their judicial function may serve as a counter-majoritarian check on substantive overreaching. But it is a far cry from endorsing these propositions to imposing a majoritarian requirement on the judiciary itself in its procedural rulemaking role. To imply that constitutional government requires this seems a peculiar and dangerous distortion of constitutional theory.

For almost fifty years after the enactment of the Federal Rules of Civil Procedure, the allocation of procedural rulemaking authority was largely a somnambulant issue. No one questioned the federal judiciary's power or authority to promulgate and amend federal procedural rules, and the rare constitutional challenge to specific procedural rules merely asked whether the judiciary had exceeded its powers by enacting a substantive rule in the guise of a procedural one.


3. See generally FED. R. CIV. P.


In every single case in the *Erie-Sibbach-Hanna* line, the Supreme Court has never once found that the federal judiciary transgressed its rulemaking authority in promulgating or amending a federal civil rule. If nothing else, this famous case line stands as a jurisprudential monument to the conclusion that the judicial branch, at least, knows its place in the constitutional scheme. The *Erie-Sibbach-Hanna* case line also stands as testament to the proposition that the federal judiciary understands the difference between substantive and procedural rulemaking, in light of the limits set forth in the Rules Enabling Act. Moreover, throughout the entire *Erie-Sibbach-Hanna* era, no litigant has ever challenged the fundamental premise that the federal judiciary has procedural rulemaking power, but rather whether the specific exercise of that power contravened the Rules Enabling Act.

Judicial rulemaking was a truly soporific issue until the early 1980s, when Congress unexpectedly began to flex its legislative muscle in the procedural rulemaking arena. With the amendment of the Rules Enabling Act in 1988 and the public opening of judicial advisory committee meetings, the practical business of the judicial rulemaking bodies has changed significantly. What once had resembled a scholarly, deliberative enterprise now has many of the hallmarks of a congressional committee legislative mark-up. But apart from this new-fashioned...
rulemaking-in-the-political-trenches, these practical changes also have been accompanied by the emergence of a full-blown constitutional debate on rulemaking power.\textsuperscript{11}

The debate over rulemaking authority is important in light of what can only be charitably characterized as Congress's arrogant, heavy-handed usurpation of procedural rulemaking authority in the last decade.\textsuperscript{12} Congress has directly or indirectly asserted an increasingly active role in the procedural rulemaking process, consequently enfeebling federal courts in their ability to govern their internal affairs. This encroachment has advanced on two fronts.

First, the traditional rulemaking process of the Advisory Committee on Civil Rules basically has been converted into an open forum for public lobbying on rules changes.\textsuperscript{13} What once was a deliberative judicial


\textsuperscript{13} This is the result of an amendment to the Rules Enabling Act in 1988. See 28 U.S.C.A. §§ 2072-2074 (1989) and 28 U.S.C. § 2073(c)(1)-(2), (d). These subsections provide:

\begin{itemize}
  \item[(c)(1)] Each meeting for the transaction of business under this chapter by any committee appointed under this section shall be open to the public, except when the committee so meeting, in open session and with a majority present, determines that it is in the public interest that all or part of the remainder of the meeting on that day shall be closed to the public, and states the reason for so closing the meeting. Minutes of each meeting for the transaction of business under this chapter shall be maintained by the committee and made available to the public, except that any portion of such minutes, relating to a closed meeting and made available to the public, may contain such deletions as may be necessary to avoid frustrating the purposes of closing the meeting.
  
  \item[(2)] Any meeting for the transaction of business under this chapter, by a committee appointed under this section, shall be preceded by sufficient notice to enable all interested persons to attend.
\end{itemize}
function has been transformed into a mini-legislative process, inducing some judicial committee members to behave uncomfortably more like elected representatives than independent, life-tenured judges. Consequently, judicial advisory committees now work under the intimidation of having their recommendations substantially undone by disappointed suitors who either threaten to (or actually) take their rulemaking petitions to Congress.

Apart from the impact of congressional intervention in the usual procedural rulemaking processes (either before, during, or after judicial rulemaking), Congress more significantly preempted judicial rulemaking in its enactment of the Civil Justice Reform Act of 1990 ("CJRA"), the most sweeping procedural rule reform since promulgation of the federal rules in 1938. As to congressional authority for this legislative venture into procedural rulemaking, the Act represents a highly sophisticated exercise in legislative double-speak, denoting itself as something other than what it actually is, in order to support a dubious constitutional claim to exclusive procedural rulemaking authority.

In support of this legislative venture, Congress asserted both an exclusive right to promulgate federal procedural rules while simulta-

(d) In making a recommendation under this section or under section 2072, the body making that recommendation shall provide a proposed rule, an explanatory note on the rule, and a written report explaining the body's action, including any minority or other separate views.

Id. See generally Mullenix, Hope Over Experience, supra note 3, at 799-800 (discussing the new open-forum provisions of the Rules Enabling Act) and Mullenix, Unconstitutional Rulemaking, supra note 1, at 1331-32 (discussing the 1988 amendments to the Rules Enabling Act).

14. See generally Pelham, Judges Make Quite a Discovery, supra note 10; Pelham, Panel Flips, supra note 10; Pelham, Forcing Litigants to Share, supra note 10; Samborn, Derailing the Rules, supra note 10; Samborn, New Discovery Rules, supra note 10.

15. Id.


neously maintaining that the Act was a legitimate exercise of its substantive and delegative lawmaking power.\textsuperscript{19} Whatever theory—and Congress was not especially fussy about which one applied—Congress was determined to foist its own vision of procedural reform on all ninety-four federal district courts. Hence, the CJRA actually was a congressional-procedural-rulemaking wolf in substantive-lawmaking sheep's clothes. And if the CJRA was not a disguised rulemaking wolf, then it was a rulemaking Trojan-horse. With enactment of the CJRA, Congress rolled this monumental legislation up to the gates of the federal judiciary and the judicial kingdom—suitably impressed—took this monstrosity within its walls (with varying degrees of caution or celebration).

With the CJRA Trojan-horse safely inside the judicial fortress, it may now be too late to salvage either the practical or theoretical consequences of this disturbing incursion on interbranch power. It seems a bit late to be debating the scope and limits of judicial power and independence when the federal judiciary has largely capitulated, with only muted objection,\textsuperscript{20} to Congress's conclusory fiat on rulemaking power. It is sad, indeed, if recent events have largely mooted the issue of rulemaking authority, or rendered this a mere academic issue.

II.

In this theoretical debate over the allocation of procedural rulemaking authority, Professor Redish surely cannot be faulted as a judicial apologist. With the exception of salary diminution, life-tenure, and "decisional" and "counter-majoritarian" independence,\textsuperscript{21} Professor


\textsuperscript{20} See Mullenix, The Counter-Reformation, supra note 1, at 411-18 (discussing the belated and subdued criticisms of the Judicial Conference on the then-pending Civil Justice Reform Act).

Redish endorses very little else as attributes of independent judicial power. As to issues concerning concurrent interbranch authority, such as procedural rulemaking (or what he labels more generally as "lawmaking authority"), Professor Redish consistently favors legislative power over judicial authority, based on his theory of the ascendancy of majoritarian principles.

The problem with Professor Redish's conclusions about the proper allocation of procedural rulemaking authority is that they only partially comport with constitutional and statutory law. Professor Redish makes scant reference to the actual historical experience of procedural rulemaking by the federal judiciary, and when he does he glosses over important distinctions between substantive lawmaking and procedural

(book review).

22. See Redish, supra note 21, at 699. Professor Redish defines judicial "lawmaking" independence as referring "to the ability of the federal courts to create either controlling substantive legal principles or governing generalize roles[sic] of procedure in the course of individualized adjudications, free from interference by the other branches of federal government." Id. This is a somewhat odd way of characterizing the judiciary's procedural rulemaking function and surely by this language Professor Redish does not mean to imply that the judiciary creates procedural rules "in" or "during" the course of individualized adjudications.

Professor Redish later defines judicial lawmaking independence as concerning "a judge's ability to fashion generalized substantive rules of decision or rules of procedure that are designed to govern not only the case before her but similarly situated cases as well." See Redish, supra note 21, at 707. But federal judges do not create ad hoc procedural rules for individual cases except as existing federal rules of civil procedure both permit and direct the court to do so. Thus, judges fashion procedural rules to govern the cases before them only under the authority of such federal rules as Rule 16(c)(12) (allowing the court to adopt special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems); or 16(e) (providing for judicial issuance of a pretrial order controlling "the subsequent course of the action"). Federal judges also may fashion the procedural conduct of an action pursuant to authority vested by local rule under Federal Rule of Civil Procedure 83.


23. See id.
Furthermore, his policy justifications for favoring congressional authority are largely based on conclusory assertions of Congress's "significant and legitimate interests," without any balanced vision of equally legitimate judicial-branch concerns. Finally, Professor Redish's analysis ignores or diminishes at least two crucial dimensions of the rulemaking debate: (1) the requirements of the Rules Enabling Act, and (2) the inherent powers of the federal courts.

Having said this, there certainly is much to commend in his analysis of judicial authority. The taxonomy of four conceptual categories of judicial independence is useful in organizing the domain of judicial power, especially since many federal courts, casebooks, and constitutional law treatises lack such organizational structure. Beyond supplying a useful analytical tool, Professor Redish's categorization helps distinguish among obvious, trivial, and vital questions of interbranch power.

For example, questions relating to "institutional" independence hardly seem worth belaboring, although fully one-third of Professor Redish's

24. See, e.g., Redish, supra note 21, at 699: "While decisional and counter-majoritarian independence are essential as matters of both American political theory and constitutional directive, the same cannot be said of lawmaking independence, in either its substantive or procedural manifestations." Id. In collapsing substantive and procedural rulemaking into his category of "lawmaking independence," Professor Redish then uses the commands of the Rules of Decision Act to essentially trump those of the Rules Enabling Act, and to draw arguable conclusions about the scope of independent judicial procedural rulemaking. Id.

25. See Redish, supra note 21 at, 725 and discussion infra at notes 58-60. It is somewhat interesting to compare Professor Redish's policy justifications for congressional rulemaking authority to those advanced by Congress in support of the Civil Justice Reform Act. See Mullenix, The Counter-Reformation, supra note 1, at 436-38.

26. See supra note 7 and Mullenix, The Counter-Reformation, supra note 1, at 382, 426-30; and Mullenix, Unconstitutional Rulemaking, supra note 1, at 1323-36.

27. See Mullenix, Unconstitutional Rulemaking, supra note 1, at 1316-23.

28. See, e.g., ERWIN CHEMERINSKY, FEDERAL JURISDICTION 1-8 (2d ed. 1994) (discussing Article III with typically standard reference to the power of Congress to create lower federal courts, institutional independence conferred by the life-tenure and compensation clause, and the implications of the "case and controversy" requirement); PETER W. LOW & JOHN CALVIN JEFFRIES, JR., FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS 1-158 (2d ed. 1989) (analyzing federal judicial power in terms of concepts of judicial review, the "case or controversy" requirement, the political question doctrine, and Article I courts); CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS 27-100 (5th ed. 1994) (variously analyzing the judicial power of federal courts in jurisdictional and "case or controversy" terms).

29. See, e.g., Redish, supra note 21, at 700. "At first glance, at least to the issue of judicial salary, the Compensation Clause appears to be as straightforward as virtually any constitutional provision. Closer examination reveals, however, that interpretation of the clause is fraught with potential confusion." Id. With due respect to Professor Redish, the four issues he uses to illustrate that the Compensation Clause is "fraught with potential
paper is engaged with parsing interpretive questions such as what the Founding Fathers might have meant by a judge's "salary." Can anyone doubt that judges who are subject to threats, intimidation, cajolery, bribes, political reprisal, or the like are not independent? Problems relating to judicial independence in this institutional sense are and ought to be the easiest to discern and resolve. It hardly seems necessary to construct an elaborate constitutional framework and interpretive methodology, complete with originalist overtones, to solve fundamental issues of Article III institutional independence.

Similarly, the basic tenets of "decisional" independence seem virtually beyond cavil, and therefore largely uninteresting in any contemporary debate over the nature and scope of independent judicial power. Professor Redish sets forth the basic propositions of judicial independence in two thoroughly indisputable sentences: (1) "The concept of decisional independence implies the ability of the judge in a particular case both to ascertain and interpret the governing legal principles and to apply them 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;" and (2) "Examination of both established constitutional principles and fundamental precepts of American political theory demonstrates that decisional

confusion" seem a gross caricature of constitutional nit-picking. Can anyone doubt that if Congress acts in some retaliatory way to reduce the salaries or support of federal judges this would not violate the Compensation Clause? Conversely, does anyone seriously believe that the Compensation Clause prohibits diminution of judicial salaries by inflation? Surely the Compensation Clause was not intended to deal with the global consequences of capitalism, and it would take a decidedly conspiratorial mind to make the case that the inflationary effects on judicial salaries were the result of an executive or legislative plot to impair judicial independence. Along these lines, are we then destined for a separation-of-powers case examining whether it is a violation of the life-tenure provision for members of Congress to smoke cigars in an enclosed room with judges?

30. See id. at 702.

31. See, e.g., Redish, supra note 21, at 700-02, 706 (suggesting an interpretive methodology analogizing from the concepts of laches and statutes of limitations and discussing an "anti-discrimination" interpretive model).

32. See, e.g., id. at 700 (referring to concept of independent federal judiciary at time of Constitution's framing); Id. at 700-01 (drafter's intent to insulate federal judiciary from potential pressures); Id. at 702 (suggesting founding fathers probably did not contemplate "support services" as part of judicial salaries); Id. at 704-05 (framers well acquainted with problems of inflation).

33. Questions of institutional independence simply might be resolved by resort to another less elaborate analogy, borrowed from sports: has (or will) the judge be induced to throw the case?

34. See Redish, supra note 21, at 707. See supra note 33, on my proposed sports analogy—which has application in the "decisional" sphere of judicial independence, as well.
independence is the *sine qua non* of the federal judiciary's operation.*

Hence, if a presidential aide were to sidle-up to a federal judge, or a legislator were to button-hole a federal judge, and subtly suggest that the judge decide a pending case in a certain way, this would violate "decisional independence."

Since almost everyone from Montesquieu forward holds these propositions as virtually self-evident, Professor Redish's interesting approach is to ground the concept of decisional independence in constitutional due process and separation-of-powers doctrine. However, he then unhelpfully concludes that it is often difficult to discern whether a particular legislative or executive action violates decisional independence because of the "doctrinal uncertainty" surrounding judicial interpretations of due process and separation-of-powers theory.*

Moreover, nowhere in the midst of this lengthy theoretical exegesis does Professor Redish provide any hint as to what sort of executive or legislative action (apart from blatantly egregious behavior) might breach decisional independence and violate either due process or separation-of-powers doctrine.* And it is equally difficult to discern why Professor Redish cabins his due process and separation-of-powers arguments to his "decisional" realm, when it seems just as likely that the separation-of-powers doctrine, at least, would play an important role in any debate relating to the textual requirements of Article III, or federal courts in their "lawmaking" or "counter-majoritarian" roles.

Professor Redish's third conceptual category encompasses his "counter-majoritarian" principle, which in essence restates the fundamental principle of constitutional law in *Marbury v. Madison.* In truth, this category seems closely related to and overlaps with that of decisional independence, and the broad propositions Professor Redish discusses

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35. See Redish, *supra* note 21, at 707.

36. *Id.* With regard to the various paradigms of separation-of-powers, Professor Redish accurately describes the analytical models and correctly concludes that "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." *Id.* at 712. Cf. Mullenix, *Unconstitutional Rulemaking, supra* note 1, at 1289-1314. Obviously, it is not Professor Redish's fault that due process and separation-of-powers doctrine is in doctrinal disarray, but the bottom line is that it is difficult to extract useful constitutional guidelines from the doctrines since both ultimately are fairly malleable.

37. Apart from the arm-bending sort of behavior contemplated by his first proposition, the remainder of his discussion in this section does not seem directed at anything so obvious as direct coercive or interventionist acts.

38. 2 L. Ed. 60 (1803). See Redish, *supra* note 21, at 714: "That principle [the counter-majoritarian 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." *Id.*
seem fairly obvious and well-settled. Thus, it is manifestly evident that, in order to maintain "counter-majoritarian" judicial independence, Congress cannot "conscript[] the judiciary as an unwilling co-conspirator in what amounts to a legislative fraud on the public," "unduly truncate the courts' power to resolve a case before it," or prescribe a rule of decision in a case pending before the court. Or, more bluntly summarized, Congress cannot tell federal judges how to decide cases, nor restrain federal courts from holding congressional enactments unconstitutional.

In approximately two hundred years of constitutional history, egregious assaults on judicial power have been rare, although compelling in their constitutional drama. Hence, for contemporary debate, the more subtle issues involved in judicial "lawmaking independence" have taken center stage. And in attaching this categorical label to this dimension of judicial power, Professor Redish unfairly skews the theoretical debate.

III.

Professor Redish's rendition of the appropriate allocation of procedural rulemaking suffers from problems of mischaracterization,

39. See Redish, supra note 21, at 715.
40. See id. at 716.
42. See supra note 2, noting recent separation-of-powers cases. Probably the most interesting cases relating to judicial independence have been the rare, egregious frontal assaults on institutional independence in such classic decisions as Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (presidential steel seizure case); United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936) (presidential authority to restrict arms sales); and United States v. Nixon, 418 U.S. 683 (1974) (invocation of executive privilege to prevent disclosure of Nixon tapes). Although these cases are factually compelling, they are not doctrinally challenging. See Mullenix, Unconstitutional Rulemaking, supra note 1, at 1298-1302.
omission, and subtle but convenient distortions. Thus he often posits sweeping generalizations that are true, but omits other equally valid qualifications. For example, he states that one of the four basic conclusions of American constitutional and political theory is that "Congress may adopt constitutionally valid generalized rules of both decision and process, and require the federal courts to enforce them."\(^44\) While this is true, he neglects to indicate that the Rules Enabling Act confers a co-equal right of procedural rulemaking on the judiciary. Similarly, he states that "Congress has power under Article I to adopt laws that provide substantive rules of decision in federal courts,"\(^44\) allowing this declaration also to shoulder—by unstated implication—a procedural rulemaking power.\(^45\)

Likewise, in applying separation-of-powers theory to the ability of Congress to prescribe procedural rules for the federal courts, Professor Redish endorses this concept "as long as the rules prescribed are of general applicability and affect the behavior of citizens."\(^46\) This basically is the same definitional shell-game that Congress used in its legislative history justifying congressional procedural-rulemaking in the Civil Justice Reform Act.\(^47\) In playing this game, Congress merely declared procedural rules to be substantive in effect, thereby bringing procedural rules within the legitimate ambit of its Article I substantive lawmaking power. This same linguistic distortion permits Professor Redish again to simply disregard the Rules Enabling Act, as well as to magically transform procedural rules into substantive law.

Moreover, Professor Redish unreflectively buys wholesale the interpretation of \textit{Hanna v. Plumer} that endorses congressional authority to prescribe rules of procedure for the federal courts.\(^48\)

\begin{itemize}
\item \textbf{43.} See Redish, supra note 21, at 712.
\item \textbf{44.} See id. at 715, concluding that "[t]he unrepresentative, unaccountable federal judiciary has no authority to ignore or supplant these rules of decision, short of a finding of unconstitutionality." \textit{Id.}
\item \textbf{45.} See also id. at 725. Professor Redish characterizes judicial power as inherently characterized "by the adjudication of individualized, live disputes" whereas the "promulgation of free-standing rules of general applicability does not fit within this model." \textit{Id.} By defining terms in this fashion, Professor Redish gets to control the outcome of the debate, using a straw man that transforms procedural rulemaking into a substantive law function.
\item \textbf{46.} See id. at 723-24.
\item \textbf{47.} See Mullenix, \textit{Unconstitutional Rulemaking}, supra note 1, at 1333-34; see also Mullenix, \textit{The Counter-Reformation}, supra note 1, at 379-82, 432-34, 437.
\item \textbf{48.} 380 U.S. 460 (1965).
\item \textbf{49.} See Redish, supra note 21, at 723-24. He does support this rationale with the Article I enumerated power to create inferior federal courts and "auxiliary power under the Necessary and Proper Clause": two rather weak constitutional arguments.
\end{itemize}
Apparently Professor Redish also agrees with the cursory citation to *Hanna* in the legislative history of the Civil Justice Reform Act that Congress used to justify its enactment of a massive scheme of procedural rules. As indicated above, not only is this gloss on the *Erie-Sibbach-Hanna* case line irritating, but it fundamentally misses the point or is disingenuous. These cases are not a resounding affirmation of congressional procedural rulemaking authority, but rather of judicial rulemaking authority as it is properly exercised.

Professor Redish further distorts the rulemaking debate by arguing that the judicial branch cannot lay claim to an exclusive procedural rulemaking authority. This is a straw-man argument because no academic commentator or judicial member has yet made such a claim. On the contrary, only Congress has arrogantly asserted such exclusive right for itself. Yet, Professor Redish sets up this straw-man and then attacks it with vengeance. He inverts the allocation debate by casting the rulemaking issue in terms of the functionalist separation-of-powers model:

... 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 judicial function that the courts could not effectively exercise the "judicial power" without retaining exclusive authority over procedural rulemaking. It is difficult to see how such a conclusion could be reached, in light of the long and established history of congressional involvement in the rulemaking process.

Not only has no one asserted an exclusive rulemaking authority for the federal judiciary, but Professor Redish's invocation of the "long and established history of congressional involvement in the rulemaking process" compels a conclusion completely opposite from the one he intimates. Indeed, the fifty-year history of procedural rulemaking—as a practical matter—stands as a stunning monument to congressional


51. In so doing, Professor Redish seems to be engaging in projecting the sins of Congress onto the judiciary.

52. See Redish, *supra* note 21, at 724 (emphasis added). In the very next sentence Professor Redish cites *Hanna* for the proposition that "the Supreme Court's power to promulgate procedural rules has traditionally been rationalized as a congressional delegation of legislative power to the Court." *Id.* (citing *Hanna*, 380 U.S. at 471-72).

53. *Id.*
apathy, disinterest, and total non-involvement in the procedural rulemaking process. To convert this long, historical reality into some pattern of congressional involvement with the procedural rulemaking process is ludicrous, if not disingenuous. Only with the proposal of the Federal Rules of Evidence\textsuperscript{54} in 1972\textsuperscript{55} may one even find initial stirrings of congressional interest in judicial branch rulemaking. Moreover, this interest in procedural rulemaking would not be revived until Congress decided to meddle with federal process-serving in the early 1980s.\textsuperscript{56}

At least twice more, Professor Redish repetitively harps on the illegitimacy of judicial claims to an exclusive power over procedural rulemaking, without ever indicating who is making such a claim.\textsuperscript{57} Further attacking this straw-man, he uses a “functionalist” separation-of-powers argument to defend Congress’s “legitimate and significant interests in the procedures and operations of the federal courts.”\textsuperscript{58} This medley of justifications is a collection of pretty weak stuff. Professor Redish asks us to believe that the judiciary cannot have an exclusive right to procedural rulemaking because Congress’s substantive legislative programs are “inescapably intertwined with the procedural efficiency of the federal courts,”\textsuperscript{59} which in turn effects the federal budget. Thus, he grandly concludes that “the level of Congress’s legitimate interest in the choice of procedural rules that govern federal

\textsuperscript{54} See generally FED. R. EVID.

\textsuperscript{55} Congressional involvement in promulgation of the Federal Rules of Evidence was itself highly controversial, and the Senate legislative history to the Civil Justice Reform Act eliminated references to this “precedent” in support of congressional rulemaking authority. See Mullenix, Unconstitutional Rulemaking, supra note 1 at 431.

\textsuperscript{56} See Mullenix, Hope Over Experience, supra note 4, at 844-46. See also Mullenix, The Counter-Reformation, supra note 1, at 431 n.220.

\textsuperscript{57} See Redish, supra note 21, at 724-25. At the very least, Congress has always retained ultimate authority under the Rules Enabling Act to overrule specific rules promulgated by the Court. Such a power would of course be unacceptable if the judicial power over rulemaking were thought to be “exclusive.” No one either believes or claims that the judicial power over procedural rulemaking is exclusive, so Professor Redish’s hypothesized fear of a diminution of congressional authority is off-target. See also id. at 725. “Even if one were to conclude that procedural rulemaking does fall within the judicial province, that judicial authority is exclusive does not automatically follow.” Id. Professor Redish cites my article on Unconstitutional Rulemaking for the first half of this sentence, but he has no support at all for the second half. I most certainly have not made a claim for exclusive judicial authority over procedural rulemaking, nor do I know of anyone who has.

\textsuperscript{58} See id. at 725.

\textsuperscript{59} Id.
court operation is virtually as intense as that of the federal courts themselves.\(^6\)

This is somewhat silly, as the entire cost of the federal judiciary is a microscopic drop in the federal budgetary pail. With regard to the allocation of rulemaking power, Professor Redish fails to advance either his own coherent theory or to rebut existing argument. Rather, he tilts at windmills of his own creation. If Professor Redish has a strong constitutional or statutory argument relating to the relative allocation of procedural rulemaking authority that includes discussion of the Rules Enabling Act, then he should make it.

IV.

In a similar vein, Professor Redish's analysis of the constitutionality of the 1990 Civil Justice Reform Act is an amalgam of partial truths, selective omissions,\(^6\) and straw-men arguments. In essence, he advances three points: (1) that Congress has the right to impliedly repeal the Rules Enabling Act; (2) that the Civil Justice Reform Act does not "constrain the federal judiciary's discretion to fashion procedural rules in any meaningful way;" and (3) that Congress has a "preemptive" procedural rulemaking authority.\(^6\)

Professor Redish's implied repeal argument essentially is a red herring, because no one has asserted that Congress lacks the power to directly or impliedly repeal its own previous enactments.\(^6\) That Congress may exercise a repeal power is true, but not exactly the point. When a federal statute delineates interbranch power — such as the Rules Enabling Act — and the effect of a congressional repeal is to constitutionally diminish or eviscerate another branch's independence,

\(^{60}\) Id.

\(^{61}\) This section of Professor Redish discussion largely addresses my contention that Congress' enactment of this legislation represents a de facto overruling of the Rules Enabling Act, and therefore the CJRA arguably is unconstitutional. Further, as a policy matter, I have argued that this reallocation of procedural rulemaking to Congress or other amateur legislative bodies is disturbing and unwise. See Mullenix, \textit{The Counter-Reformation of Procedural Justice}, supra note 1, at 382-85, 432-34, and Mullenix, \textit{Unconstitutional Rulemaking}, supra note 1, at 1286-87, 1323-38.

\(^{62}\) See Redish, supra note 21, at 726.

\(^{63}\) Id.; cf. Mullenix, \textit{Unconstitutional Rulemaking}, supra note 1, at 1287; Mullenix, \textit{The Counter-Reformation}, supra note 1, at 389, 392. It is difficult, therefore, to refute his conclusion that "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." He repeats this conclusion again a couple of sentences later: "no legal or constitutional bar to such congressional action exists." Redish, supra note 21, at 726.
then Professor Redish (and the Congress for that matter) owes some better explanation than a hornbook rule. Stating that Congress can repeal whatever it wants without reference to the nature and content of the statute being repealed is simply too easy. Thus, the implied repeal of the Rules Enabling Act that was effectuated through enactment of the CJRA was no ordinary congressional repeal of a previously enacted substantive statute. In enacting the CJRA, Congress was not merely rethinking prior substantive law and replacing an ill-begotten substantive decision with a new majoritarian viewpoint. Rather, the CJRA represented Congress's tacit declaration that henceforth it can enact procedural rules whenever it feels like it, the Rules Enabling Act notwithstanding. Congress simply reallocated procedural rulemaking authority exclusively unto itself, a power that historically always has been shared with the judiciary.

Moreover, Professor Redish is somewhat equivocal about the particular implied repeal of the Rules Enabling Act that Congress accomplished with passage of the CJRA. Thus, he acknowledges that the Supreme Court "has held that 'implied repeals are to be heavily disfavored.'\textsuperscript{64} Having conceded this holding, he fails to elaborate which implied repeals are so objectionable as to not pass constitutional muster. If ever an auspicious candidate for "disfavored repeal" existed, surely it must be the Rules Enabling Act. One suspects Professor Redish believes this, because he then cryptically allows that "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."\textsuperscript{66} This concession, of course, is the nub of the matter. It seems dubious (and constitutionally dangerous) that Congress, in the interests of its own social policy agenda, may go around wresting interbranch power to accomplish its legislative ends.

Professor Redish's second defense of Congress's constitutional authority to enact the CJRA is based on his conclusion that the statute actually does not constrain the federal judiciary's ability to fashion procedural rules. Thus, he notes that under the CJRA the civilian advisory committees "d[id] not actually possess rulemaking power,"\textsuperscript{66} and that the district courts retained the final ability to accept or reject recommendations by those committees,\textsuperscript{67} as well as rulemaking authority under Federal Rule of Civil Procedure 83.\textsuperscript{68}

\textsuperscript{64} See Redish, supra note 21, at 726.
\textsuperscript{65} Id.
\textsuperscript{66} See id. at 726 n.140, 727.
\textsuperscript{67} Id. at 727.
\textsuperscript{68} Id.
While these assertions are literally true, they represent an unrealistic vision of the rulemaking process that actually occurred in implementing the CJRA. Professor Redish simply accepts Congress's brilliant legislative coup in the CJRA—and its simultaneous usurpation of procedural rulemaking—labeling this venture substantive lawmaking and then recasting it as an exercise of judicial procedural rulemaking prerogative. Thus, the crucial distinction lies in de facto and de jure power.

Under the CJRA, each federal district court did retain the de jure power to approve or disapprove advisory committee programs, plans, or rules. This provision helped conform the CJRA to usual judicial rulemaking process. In practice, however, the local advisory committees engaged in de facto procedural rulemaking. Moreover, Congress was the real de facto procedural rulemaker in that it essentially instructed the advisory committees exactly how to structure CJRA reports and plans. Congress mandated that the advisory groups institute procedural reform and detailed exactly what that procedural reform should entail.

CJRA advisory committee members did not sit like Rawlsian solons, drafting new local procedural rules from behind a veil of ignorance or from some consensual original position. Nor did the members divine new procedural rules from the jurisprudential ether. Rather, the advisory groups obediently carried out a textually-elaborate scheme of procedural reforms that Congress wanted, focusing extensively on an array of pre-trial procedures, including discovery, alternative dispute resolution, and case management techniques. Ninety-four federal district courts did not produce Civil Justice Reform plans that mimic one another in highly similar sets of lock-step reforms by coincidence.

The district courts' power to approve or disapprove the CJRA plans amounted to a formalism insulating the Act from blatant unconstitutionality. While some district courts may have tinkered with proposed advisory committee recommendations, most district courts signed onto the plans without effectively engaging in the procedural rulemaking process. In essence, most district courts were simply presented with a civil justice reform plan feta accompli carrying the inertia of such labor-intensive collaborative efforts.

Furthermore, one does not have “to assume that the creation of the advisory committees somehow [as a practical matter] confine[ed] or inhibit[ed] district court rulemaking power” to support a finding of unconstitutionality, as Professor Redish suggests. The CJRA did not “confine” or “inhibit” district court rulemaking in the formal sense;

69. Id.
rather, the Act simply cut the judges out of the usual rulemaking process altogether. The CJRA conferred on the federal courts a de jure wand with which to beknight the efforts of congressionally created and directed amateur rulemaking groups.

Professor Redish's third argument is predicated on a congressional "pre-emptive" power to apparently do whatever it wants.70 Thus, he completely deflects the rather inconvenient problem of Congress' unilateral declaration of an exclusive procedural rulemaking authority, recasting the allocation problem entirely.71 Several problems exist with this improbable defense of the CJRA. To begin, the fact that Congress has declared an exclusive procedural rulemaking authority does not miss the point: it is the point. Professor Redish should not avoid this embarrassing declaration. He should deal with it directly and inform us whether he believes Congress was right in so declaring.

Second, Professor Redish sets forth a completely novel principle of interbranch relations—legislative preemption—for which he has no support and no citations. Preemption doctrine in its most usual sense applies to problems of federalism, the relationship of the federal government to the states. Here Professor Redish imports some notion of preemption theory to bolster his views of congressional procedural rulemaking authority. This preemption doctrine is odd indeed, given that it permits one co-equal federal branch to usurp the prerogatives of another.

Further, under Professor's Redish view, while the federal courts may fashion procedural rules "as a matter of common law development,"72 he seriously questions "the [constitutional] power of an Article III court

70. See id. at 727-28. Redish suggests that even assuming the advisory groups were impermissibly delegated formal rulemaking power, "the conclusion that the Act breached separation of powers by unduly invading the judicial province would be most tenuous." Id. at 727.

71. See id. at 727-28:

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, to fashion 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 . . . such congressional action . . . 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.

Id.

72. Id.
to promulgate generalized rules of procedure.\textsuperscript{73} This claim is extraordinary in light of the Rules Enabling Act and more than fifty years of judicial rulemaking, none of which has been accomplished as a matter of common law development, but rather through statutory prerogative. Moreover, Congress' so-called preemptive right to promulgate procedural rules, under its Article I legislative power, similarly ignores the rulemaking allocation in the Rules Enabling Act, conveniently collapsing the notion of procedural rulemaking into substantive lawmakers.

V.

Professor Redish's final foray into defending the CJRA is to examine whether it violates the non-delegation doctrine. Here his discussion again seems unrealistic and muddled.

He makes two simple points. First, he suggests that the non-delegation doctrine might be violated by a congressional delegation to an advisory body pertaining to the internal operation of the judiciary, absent "more detailed standards of direction in the delegation."\textsuperscript{74} One can only view this statement with extreme irony, since the major problem with the CJRA was not an absence of direction to the advisory groups, but rather an excess of such detail. The advisory groups most certainly were not unguided discretionary missiles. Thus, in the same fashion that the CJRA seems constitutionally irreproachable because of the courts' ultimate de jure power over CJRA plans, the Act seems virtually unassailable on delegation grounds.

Second, Professor Redish asserts an unfathomable syllogism to support his notion that the CJRA may raise a non-delegation challenge.\textsuperscript{75} No one disputes that federal courts may not fashion substantive law under the Rules of Decision Act\textsuperscript{76} or that they must follow state substantive law under the dictates of \textit{Erie}.\textsuperscript{76} But the conclusion that the CJRA

\textsuperscript{73.} Id. at 727 n.151.
\textsuperscript{74.} Id. at 728.
\textsuperscript{75.} See id. at 729.
\textsuperscript{76.} See generally, 28 U.S.C. 1652.
violates the non-delegation doctrine does not flow from this syllogism, unless one believes that procedural rules are substantive.\textsuperscript{78}

VI.

Professor Redish is unconvincing not because he clearly misstates the law, but because he evades grappling with the central statutory source for the allocation of rulemaking authority, the Rules Enabling Act. While he is willing to suggest what that legislation permits to Congress, he never once indicates what that legislation also grants to the judiciary. He simply ignores a congressionally enacted statute that allocates a shared rulemaking power and clearly delineates substantive lawmaking to Congress and procedural rulemaking to the judiciary. Thus, he diverts attention from the centrality of the Rules Enabling Act in the rulemaking debate and needlessly confuses the issue with recourse to the Rules of Decision Act.

The Rules of Decision Act is not at all concerned with the proper allocation of procedural rulemaking authority, as demonstrated in \textit{Erie}. \textit{Erie} turned in large part on the Supreme Court's interpretation of the significance of the Rules of Decision Act in a federalist system of government.\textsuperscript{79} \textit{Hanna v. Plumer} drew its justification not from the Rules of Decision Act, but instead from the Rules Enabling Act.\textsuperscript{80} Thus, \textit{Erie} doctrine has two distinct branches: a Rules of Decision Act branch that instructs what substantive law federal courts must apply and a Rules Enabling Act branch that helps determine what procedural rules federal courts legitimately may promulgate and apply.\textsuperscript{81} Professor Redish ignores the import of the \textit{Hanna} branch of \textit{Erie} jurisprudence, (narrowly interpreting Rules of Decision Act as limiting judicial lawmaking function) and Martin H. Redish, \textit{Federal Common Law and American Political Theory: A Response to Professor Weinberg}, 83 NW. U. L. REV. 853 (1989).

\textsuperscript{78} In essence, Professor Redish's concluding paragraph embodies the following illogical syllogism: (1) The judiciary cannot fashion substantive common law principles. (2) The CJRA vests, by delegation, procedural rulemaking authority in advisory committees. (3) Therefore, the CJRA is subject to a non-delegation challenge.

\textsuperscript{79} \textit{See Erie}, 304 U.S. at 71.

\textsuperscript{80} \textit{Hanna}, 380 U.S. at 463-64.

\textsuperscript{81} \textit{See, e.g., John Hart Ely, The Irrepressible Myth of Erie}, \textit{87 HARV. L. REV.} 683, 698 (1974): Thus, where there is no relevant Federal Rule of Civil Procedure or other Rule promulgated pursuant to the Enabling Act and the federal rule in issue is therefore wholly judge-made, whether state or federal law should be applied is controlled by the Rules of Decision Act, the statute construed in \textit{Erie} and \textit{York}. Where the matter in issue is covered by a Federal Rule, however, the Enabling Act—and not the Rules of Decision Act itself or the line of cases construing it—constitutes the relevant standard.
choosing instead to caricature that decision as validating congressional rulemaking authority.

Moreover, with regard to judicial power, Professor Redish completely omits any discussion of inherent power of the courts, because he does not recognize the doctrine of inherent power as it applies to the federal courts. Although Professor Redish does not like this doctrine, it nonetheless exists and enjoys a substantial tradition in the federal courts, recently endorsed by the Supreme Court as a legitimate basis for the sanctioning power of federal judges.


The Supreme Court seems to think that some concept of inherent power of the federal courts exists, without which the federal courts would cease to exist as courts. While the focus of Professor Redish's paper concentrates on the concept of judicial independence, an equally valid approach is to reframe the question and ask what attributes constitute the essence of judicial power. Certainly Professor Redish's concepts of institutional and decisional independence are attributes of judicial power. But judicial power also includes the ability to compel people to appear, to sanction for contempt, and to conduct internal affairs of the judiciary through procedural rulemaking.

The Hanna line of cases certainly recognizes the concept of procedural "housekeeping" rules that, pursuant to the Rules Enabling Act, are appropriately within the purview of judicial rulemaking precisely because they may be fairly characterized as non-substantive and address the internal judicial processing of federal cases. That portion of the Rules Enabling Act, endorsed in Hanna, which approves judicial procedural rulemaking essentially is a statutory recognition of the inherent power of federal courts to promulgate internal rules of procedure as an attribute of judicial power.

VII.

As to the policy issues that underlie the rulemaking debate, apparently the only way to justify "majoritarian" procedural rulemaking is to declare procedural rules to be substantive. This conclusion would indeed justify Professor Redish's majoritarian preferences.

But if there is an independent concept of procedural rules, then it is unclear why procedural rulemaking should—as a policy matter—be allocated to the legislative branch, and there are good reasons why it should not. If a central normative value of an independent judiciary is neutrality, then neutrality ought to be guarded not only in the courts'...
decisional function, but in the procedural rulemaking process as well. Indeed, the judiciary's decisional neutrality may be fatally impaired to the extent that procedural rulemaking preceding decision-making is itself non-neutral.

To the extent that the judicial rulemaking process is transformed into a legislative one, so-called "majoritarian preferences" (meaning interest group preferences) will embellish the Federal Rules of Civil Procedure. The aesthetic underlying enactment of the 1938 Federal Rules of Civil Procedure was imbued, in part, with an ethos of neutral-rulemaking. While Professor Redish still believes in the norm of neutral judging (derived from the concept of due process), his theory of judicial independence abandons the norm of judicial rulemaking.

Professor Redish recognizes a counter-majoritarian role for the judiciary in decision-making, yet ironically he does not recognize a counter-majoritarian role for the judiciary in procedural rulemaking. In the end one must ask: of what avail is neutral decision-making in the absence of neutral rulemaking?