EQUITY AND THE POWER OF PROCEDURAL SUPERVISION

Disputes over procedure have long forced the federal courts to face the limits of their power. In 1825, Chief Justice Marshall wrote that federal control over federal court procedure was simply "one of those political axioms" whose explanation "would be a waste of argument."[1] A similar conclusory ethos pervades many cases about the ultimate sources of the federal courts' powers over procedural law.[2]

These procedural debates matter to litigants. From the capital sentencing of Boston Marathon bomber Dzhokhar Tsarnaev[3] to state tort law claims against fossil fuel companies,[4] procedure decides cases. At the district court level, modern-day federal courts derive their procedures from several sources of authority. They develop their own local rules. They apply the Federal Rules of Civil Procedure, Criminal Procedure, and Evidence. And they incorporate procedural rules dictated to them by either the Supreme Court or the relevant court of appeals.

This last form of procedural law — bestowed ad hoc on the lower courts by their appellate superiors — is a species of supervisory power that this Note calls "procedural supervision."[5] Courts exercise the power when they pronounce, on a case-by-case basis, new procedural rules that bind inferior courts. Traced to the 1943 case of *McNabb v. United States*,[6] the power soon proliferated beyond the criminal evidentiary context in which it arose. The Court has employed procedural supervision to instruct district courts in their jury selection practices in civil

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[1] Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 49 (1825).

[2] *See, e.g.*, Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 508 (2001) ("In short, federal common law governs the claim-preclusive effect of a dismissal by a federal court sitting in diversity."); Jay Tidmarsh & Brian J. Murray, *A Theory of Federal Common Law*, 100 NW. U. L. REV. 585, 612 (2006) ("[A]n *ipse dixit* quality hangs over *Semtek*.").

[3] *See* United States v. Tsarnaev, 142 S. Ct. 1024, 1035–36 (2022) (jury questioning).

[4] *See* BP P.L.C. v. Mayor of Balt., 141 S. Ct. 1532, 1543 (2021) (removal).

[5] Courts have used the slippery terms "supervisory power" and "supervisory authority" to refer alternately to a court's control over its own local procedures, *see, e.g.*, Carlisle v. United States, 517 U.S. 416, 425–26 (1996), the conduct of judicial officers before the court, *see, e.g.*, Young v. United States *ex rel.* Vuitton et Fils S.A., 481 U.S. 787, 808–09 (1987), and the procedures of inferior courts, *see, e.g.*, Dickerson v. United States, 530 U.S. 428, 437 (2000) ("This Court has supervisory authority over the federal courts, and we may use that authority to prescribe rules of evidence and procedure that are binding in those tribunals."). "Procedural supervision" refers to this last form of supervisory power, which then-Professor, now-Justice Barrett defined as the "authority to adopt, through adjudication, rules of procedure for inferior courts." Amy Coney Barrett, *The Supervisory Power of the Supreme Court*, 106 COLUM. L. REV. 324, 339 (2006). This Note accepts that definition, but generally uses the term "procedural supervision" to avoid some of the confusion that has attended disparate notions of the supervisory power.

[6] 318 U.S. 332 (1943); *see id.* at 344–45, 347 (creating procedural rule that required exclusion of confession obtained through lengthy detention and interrogation prior to arraignment).

cases[7] and the courts of appeals in their consideration of petitions for rehearing en banc.[8]

Despite its widespread use, procedural supervision suffers from persistent concerns about its legality. Seventy years have passed since Justice Jackson contested the Court's "vague supervisory powers."[9] Then, two Terms ago, Justices Barrett and Gorsuch invited the Court to revisit both its own authority and that of the courts of appeals to invoke this form of procedural control.[10] If their arguments take hold, the Court may soon curtail the use of procedural supervision in the federal appeals hierarchy.

Jurists and scholars who have carefully considered the possible constitutional and statutory sources of authority for procedural supervision in the federal courts tend to find them lacking.[11] The potential hooks in Article III, that the power accompanies the vesting of the "judicial Power"[12] or inheres in the designation of the Supreme Court as "supreme,"[13] largely fail to stand up to scrutiny.[14] The early Judiciary and Process Acts gave federal courts control over their own procedures[15] and granted the Supreme Court limited supervisory authority via rulemaking.[16] But none of the Acts' provisions explicitly sanctioned procedural supervision through case-by-case adjudication.

Yet early courts did exercise a form of procedural supervision. As Justice Barrett has described, the Founding-era Supreme Court often laid out, in its cases, procedural rules that the lower courts were expected to follow.[17] Unlike in its recent supervisory cases, the Court in the late eighteenth and early nineteenth centuries did not consider this

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7 Thiel v. S. Pac. Co., 328 U.S. 217, 225 (1946).

8 W. Pac. R.R. Corp. v. W. Pac. R.R. Co., 345 U.S. 247, 260–63 (1953).

9 *Id.* at 273 (Jackson, J., dissenting).

10 United States v. Tsarnaev, 142 S. Ct. 1024, 1042 (2022) (Barrett, J., concurring) ("[W]hatever the status of this Court's supervisory authority, it is difficult, if not impossible, to find any comparable constitutional hook for such power in the courts of appeals. Nor does any statute grant them this general authority."); *see also* United States v. Strothers, 77 F.3d 1389, 1397–99 (D.C. Cir. 1996) (Sentelle, J., concurring).

11 *See, e.g.*, Barrett, *supra* note 5. *But see* Sara Sun Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 COLUM. L. REV. 1433, 1468–73 (1984) (offering a partial defense). Student notes summarized doctrine or tackled adjacent supervisory power issues roughly once a decade in the 1960s through 1980s. *See* Note, *The Supervisory Power of the Federal Courts*, 76 HARV. L. REV. 1656, 1661 (1963); L. Douglas Harris, Note, *Supervisory Power in the United States Courts of Appeals*, 63 CORNELL L. REV. 642, 643 (1978); Matthew E. Brady, Note, *A Separation of Powers Approach to the Supervisory Power of the Federal Courts*, 34 STAN. L. REV. 427, 429–30 (1982).

12 U.S. CONST. art. III, § 1.

13 *Id.*

14 *Compare* Beale, *supra* note 11, at 1464, 1474–77 (arguing that a limited supervisory authority inheres in the judicial power), *with* Barrett, *supra* note 5, at 333–37, 344, 366–67 (using text and history to reject both constitutional arguments).

15 Judiciary Act of 1789, ch. 20, § 17, 1 Stat. 73, 83.

16 Process Act of 1792, ch. 36, § 2, 1 Stat. 275, 276.

17 *See* Barrett, *supra* note 5, at 376.

supervision to involve naked policy judgments.[18] Instead, the Court measured lower court procedures against an external metric drawn from general customary law.[19] After *Erie Railroad Co. v. Tompkins*[20] ended explicit reliance on general law in federal court,[21] the practice and language of the courts changed.[22] The phrases the Supreme Court has used in its post-*Erie* supervision cases — "the administration of justice,"[23] "considerations of justice"[24] — openly invoke the Court's policy discretion. So too does this language recall the headier days of broad federal common lawmaking, rather than the recent Court's more restrained approach.[25] None of this augurs well for the future of procedural supervision in a contemporary Court highly attentive to the presence (or lack) of positive sources of authority.

This Note adds a further consideration to the debate over procedural supervision: the scope of an appellate court's power over lower court procedure may depend on whether it acts in areas traditionally governed by law or equity. Procedural authority long diverged in law and equity before the Rules Enabling Act[26] and Federal Rules of Civil Procedure united the bench in the 1930s.[27] And while the Federal Rules created a unified civil action, procedural supervision exists outside the Rules' framework. Its legality hinges on whether courts can deploy it either as a form of procedural common law,[28] or by virtue of some other source of lawmaking authority that survived the new regime after *Erie*.[29] Two such sources may be found in areas of nonstatutory, subconstitutional

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[18] *See id.*

[19] *See id.* at 379–80.

[20] 304 U.S. 64 (1938).

[21] *See id.* at 78.

[22] On the complex implications of *Erie* across numerous areas of federal courts law, see Jack Goldsmith, Erie *and Contemporary Federal Courts Doctrine*, HARV. J.L. & PUB. POL'Y PER CURIAM, Spring 2023, art. 17, at 6, https://journals.law.harvard.edu/jlpp/erie-and-contemporary-federal-courts-doctrine-jack-goldsmith [https://perma.cc/BJZ7-J2ZH] (observing that in many contexts the Court "has argued, especially in recent decades, that the elimination of general common law in *Erie* means that it should defer to Congress in the creation, or not, of new federal law and new federal causes of action").

[23] Thiel v. S. Pac. Co., 328 U.S. 217, 225 (1946).

[24] McNabb v. United States, 318 U.S. 332, 341 (1943).

[25] *Compare* United States v. Standard Oil Co. of Cal., 332 U.S. 301, 310 (1947) (contending federal common law is "dependent upon a variety of considerations always relevant to the nature of the specific governmental interests . . . [that] include not only considerations of federal supremacy in the performance of federal functions, but of the need for uniformity"), *with* Rodriguez v. FDIC, 140 S. Ct. 713, 717 (2020) (contending federal common law plays a "necessarily modest role" under the Constitution and "strict conditions must be satisfied" before its use).

[26] Rules Enabling Act of 1934, ch. 651, 48 Stat. 1064.

[27] *See* FED. R. CIV. P. 2 ("There is one form of action — the civil action."). The 1938 version of Rule 2 read: "There shall be one form of action to be known as 'civil action.'" 5 U.S.C. § 723c (Supp. V 1939).

[28] *See generally* Amy Coney Barrett, *Procedural Common Law*, 94 VA. L. REV. 813 (2008).

[29] Unless this authority is enshrined in the Constitution, *see, e.g.*, Owen W. Gallogly, *Equity's Constitutional Source*, 132 YALE L.J. 1213, 1221 (2023) — a claim this Note does not make — any equitable power of procedural supervision would be subject to congressional control.

law with a long history and tradition of guiding the practice of the federal courts: equity[30] and admiralty.[31] This Note focuses on equity.

The Note proceeds in three parts. Part I provides a short history of procedural powers in the federal courts, focusing on the early Process Acts, *Wayman v. Southard*,[32] and the Supreme Court's nineteenth-century Federal Equity Rules. Part II places procedural supervision in its contemporary doctrinal context, and considers the relationship between substantive federal common law, procedural common law, and procedural supervision. Part III analyzes the special considerations at play in the procedural supervision of equity cases. The Note ultimately concludes that equity procedure can claim a distinct tradition of federal judicial lawmaking that neither *Erie* nor its progeny banished from the cognizance of the federal courts. Regardless of the wider fate of procedural supervision, a limited version of the power persists in equity.

I. Procedural Law at the Founding and in the Early Republic

Exercising its constitutional powers over the federal courts, the early Congress established a statutory framework for the courts' procedural law. The Supreme Court then operationalized both its statutory and constitutional sources of authority to make procedural rules, while often remaining vague about precisely which forms of power it invoked. This Part describes the early statutory framework governing the federal courts, the Supreme Court's efforts to interpret that framework, and the supervisory equity rules the Court adopted in the 1820s. It focuses on the statutes and rules, leaving most discussion of the nineteenth-century equity case law for Part III.

A. The Early Judiciary and Process Acts

Section 17 of the Judiciary Act of 1789[33] gave federal courts control over their own local procedures, provided that the courts limited such

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[30] Sources discussing equity's distinct tradition are now legion. For some recent examples, see generally Samuel L. Bray & Paul B. Miller, *Getting into Equity*, 97 Notre Dame L. Rev. 1763 (2022); Mila Sohoni, *Equity and the Sovereign*, 97 Notre Dame L. Rev. 2019 (2022); and Henry E. Smith, *Equity as Meta-Law*, 130 Yale L.J. 1050 (2021).

[31] Similar arguments to those made in this Note would likely apply to procedural supervision in admiralty. However, the merger effected in the Federal Rules of Civil Procedure had less impact on admiralty than equity, and admiralty retains its own set of supplemental procedural rules promulgated by the Supreme Court. *See* Fed. R. Civ. P. A–G (Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions). The case for independent federal court control over admiralty law is stronger than for equity, and Professor John Cross has cautioned that it would "be a serious blunder to conclude that the logic of the admiralty and maritime cases applies to equity." John T. Cross, *The* Erie *Doctrine in Equity*, 60 La. L. Rev. 173, 205–06 (1999). Suffice to say that while its doctrinal history overlaps with that of equity in significant ways, admiralty has followed a different course.

[32] 23 U.S. (10 Wheat.) 1 (1825).

[33] Ch. 20, § 17, 1 Stat. 73, 83.

procedural development to those "necessary rules for the orderly conducting business in the said courts."[34] Then, in a move with far-reaching implications, the Process Act of 1792[35] split the procedural powers of the federal courts in two: in suits at common law, a federal court would apply the procedural rules of the state in which the court sat, while procedures in causes of equity and admiralty would be "according to the principles, rules and usages which belong to courts of equity and to courts of admiralty respectively, as contradistinguished from courts of common law."[36] A bifurcated system thus emerged, with federal courts following state procedures in cases at law, and traditional practices of equity and admiralty in causes invoking those separate jurisdictions.

Simple in its broad principles, this procedural regime proved extraordinarily complex in practice. The 1792 Process Act codified three key exceptions to the split system described above. The Act subjected the framework to (1) supersession by explicit procedural authorizations in the Judiciary Act of 1789,[37] (2) "alterations and additions as the said courts respectively shall in their discretion deem expedient,"[38] and (3) "regulations as the supreme court of the United States shall think proper from time to time by rule to prescribe to any circuit or district court concerning the same."[39]

The first exception involved rules authorized in section 17 of the 1789 Judiciary Act as "necessary . . . for the orderly conducting business" in the court.[40] This authority comprised the creation of local rules, developed by a court to regulate its own proceedings. For purposes here, it suffices that section 17 contained a limited delegation of local procedural powers to the federal courts.

The second exception is more obscure. By "alterations and additions,"[41] Congress did not mean a wholesale discretion to ignore state procedures or the traditional practices of courts of equity. The exception was not to swallow the delineated framework. Rather, as Chief Justice Marshall noted in *Wayman v. Southard*, the provision must be construed as a response to the distinctive history of the federal system and the pressures on the state legislatures in the early Republic.[42] "A judicial system was to be prepared," the Chief Justice wrote in *Wayman*, "not for a consolidated people, but for distinct societies, already possessing distinct systems."[43] Under financial strain and political pressure, states had

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[34] *Id.*
[35] Ch. 36, § 2, 1 Stat. 275, 276 (current version at scattered sections of 28 U.S.C.).
[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] *Id.*
[40] Judiciary Act of 1789, ch. 20, § 17, 1 Stat. 73, 83.
[41] Process Act of 1792, ch. 36, § 2, 1 Stat. 275, 276.
[42] Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 46–47 (1825).
[43] *Id.* at 46.

changed their procedures to favor debtors — the Kentucky statute at issue in *Wayman* forced creditors to accept payment in Kentucky bank notes or else receive a replevin bond payable in two years.[44] These devices for the protection of debtors often arose through procedural law, such as the Kentucky regulations for the execution of judgments at issue in *Wayman*.

The 1792 Process Act thus spoke to fundamental questions of both the separation of powers and federalism. For Chief Justice Marshall, whose orientation toward federal power is the stuff of doctrinal lore, the state systems had to be respected, but also contained. *Wayman*'s dicta defy easy explanation, but imply that the "alterations and additions" considered in the Process Act meant only to allow the federal courts to return to the "ancient, permanent, and approved system"[45] of procedure from which the states had strayed. To be sure, the Court noted that a "general superintendence" over the execution of judgments was "properly within the judicial province."[46] But the law of executions is only a corner of the procedural universe, and arguably a unique one: it applies after a judgment has entered. Nowhere in *Wayman* does the Court endorse a sweeping delegation to the judiciary of adjudicatory control over procedure.

The third exception gave the Supreme Court procedural rulemaking authority. Embedded in section 2 of the 1792 Process Act is a kernel of the modern Rules Enabling Act's statutory scheme that undergirds the uniform Federal Rules of Civil Procedure.[47] By authorizing the Supreme Court to promulgate procedural regulations "by rule," which would be binding on the circuit and district courts,[48] the Process Act granted rulemaking rather than adjudicatory authority. When the Court engaged in procedural regulation pursuant to the 1792 Act, as it did to promulgate the first set of Federal Equity Rules in 1822,[49] it employed prospective rulemaking. Adjudicatory commands of binding lower court procedures — true procedural supervision — were largely outside the Act's framework if allowed at all.[50]

Three notable analytic distinctions emerge from this Founding-era framework. First, mirroring contemporary administrative law, procedural rules can derive from (a) prospective rulemakings or (b) case-by-case adjudications. Authority to employ one method may not extend to

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44 *Id.* at 2–3.

45 *Id.* at 47.

46 *Id.* at 45.

47 *Compare* Rules Enabling Act of 1934, ch. 651, § 2, 48 Stat. 1064, 1064, *with* Process Act of 1792, ch. 36, § 2, 1 Stat. 275, 276.

48 *See, e.g.*, Poultney v. City of La Fayette, 37 U.S. (12 Pet.) 472, 474 (1838) ("The rules of chancery practice . . . prescribed by this Court for the government of the courts of equity of the United States . . . are undoubtedly obligatory on the circuit courts.").

49 EQUITY R., 20 U.S. (7 Wheat.) v (1822) (superseded 1842).

50 *See* Barrett, *supra* note 5, at 369–70.

the other. Second, rules can apply to (a) the court's own local proceedings or (b) the workings of inferior courts. Under this Note's definition, only the latter are considered supervisory. Third, the power to adopt procedural rules can (a) inhere in a federal court as a constitutional matter or (b) stem from a statutory grant. The statutory grant may either reflect or extend the court's inherent constitutional authority but cannot efface it. These distinctions are not new to the literature on supervisory power but help crystallize the source-of-authority problem. Procedural supervision involves procedural control that is both adjudicatory and supervisory, but its relation to the constitutional and statutory framework remains unclear. As far as the statutes go, procedural supervision does not involve the kind of rulemaking power explicitly granted to the Supreme Court in the 1792 Process Act. Nor does it involve the kind of local procedural control granted to the federal courts in the 1789 Judiciary Act. As Justice Barrett and others have carefully described, the power seems to fall between the cracks of the early statutory scheme.[51]

B. The Supreme Court's Federal Equity Rules

When the Supreme Court first acted on its supervisory rulemaking authority under the 1792 Process Act, it acted only in equity. In 1822, and again throughout the nineteenth century and into the twentieth, the Court promulgated Rules of Practice for the Courts of Equity of the United States.[52] These rules, addressing matters ranging from service of process to partial demurrer, structured the equity procedures of the lower courts.[53] The circuit courts may not always have attended to their every particular — especial resistance centered in the civil law jurisdiction of Louisiana in the 1830s — but the equity rules bound these courts with the force of law.[54] Study of this first, robust exercise of the Supreme Court's rulemaking authority over lower court equity procedure clarifies the history and tradition of the practice.

The 1822 Supreme Court Equity Rules embodied both specificity and flexibility. On the one hand, they detailed the minutiae of deposition practice[55] and cost allocation.[56] On the other, they explicitly granted

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[51] *See id.* at 368–71; *see also* Beale, *supra* note 11, at 1464.

[52] *See, e.g.*, 20 U.S. (7 Wheat.) v (1822) (superseded 1842); 42 U.S. (3 How.) xli (1842) (superseded 1912).

[53] Under section 11 of the 1789 Judiciary Act, the courts in question would have been the early Republic's circuit courts. Ch. 20, § 11, 1 Stat. 73, 78–79.

[54] *See, e.g.*, Gaines v. Relf, 40 U.S. (15 Pet.) 9, 15 (1841). On the broader equity controversy in Louisiana, see Kristin A. Collins, *"A Considerable Surgical Operation": Article III, Equity, and Judge-Made Law in the Federal Courts*, 60 DUKE L.J. 249, 315–30 (2010).

[55] *See* EQUITY R. 26, 20 U.S. (7 Wheat.) v, xi (1822) (superseded 1842) ("[I]nterrogatories shall be filed in the clerk's office ten days previous to a rule day, after which the defendant shall be allowed five days to file his cross-interrogatories, unless he waives his right.").

[56] *See* EQUITY R. 16, 20 U.S. (7 Wheat.) v, ix (1822) (superseded 1842) ("Upon a second answer being adjudged insufficient, costs shall be doubled by the Court . . . .").

substantial discretion to the circuit courts. The penultimate catch-all Rule 32 allowed the circuit courts to "make further rules and regulations, not inconsistent with the rules hereby prescribed."[57] The rules then clarified the contours of that discretion in the final Rule 33, which provided that in "all cases where the rules prescribed by this Court, or by the Circuit Court, do not apply, the practice of the Circuit Courts shall be regulated by the practice of the High Court of Chancery in England."[58] Procedural silence was therefore to be filled by benchmarking practice to that of the English High Court of Chancery, rather than an unguided circuit court determination or recourse to state law.

A tripartite hierarchy thus emerged: (1) the Supreme Court supervisory rules, (2) any circuit court–promulgated local rules, and (3) the relevant practice of the High Court of Chancery in England. The rules struck a balance between exacting supervision and deference to the circuit courts, but ultimate supervisory authority ran to the Supreme Court via section 2 of the 1792 Process Act.

The Court's Equity Rules show two key aspects of nineteenth-century procedural power. First, the courts treated law and equity as subject to fundamentally different modes of proceeding. In cases at law, so-called "static" state procedure governed. Procedural law in the federal courts was according to state practice at the time of the Process Act's passage in 1792, or of its amendment for newly admitted states in 1828.[59] In equity, the federal courts developed an independent system that, on its face, drew nothing from state practice. Even when confronted with acknowledged gaps in the national framework, federal courts looked to the foreign law of England rather than to that of the state in which they sat. Second, the Supreme Court played an active role in superintending the development of federal equity law and particularly that of procedure.[60] The relatively uniform system of federal equity that coalesced in the early nineteenth century was not a spontaneous result of lower court convergence. Rather, the Court self-consciously managed lower court practices. This tradition, and the relationship between the Federal Equity Rules and the cases that supplemented them, have important implications for the contemporary scope of procedural supervision as a form of judicial lawmaking.[61]

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[57] EQUITY R. 32, 20 U.S. (7 Wheat.) v, xiii (1822) (superseded 1842).

[58] EQUITY R. 33, 20 U.S. (7 Wheat.) v, xiii (1822) (superseded 1842).

[59] Act of May 19, 1828, ch. 68, § 1, 4 Stat. 278, 278–80. A special statute governed practice in Louisiana. *See* Act of May 26, 1824, ch. 181, § 1, 4 Stat. 62, 62–63.

[60] Justice Story likely played a key role in spearheading the Supreme Court's involvement in regulating federal equity procedure, and he almost certainly drafted the Court's first set of Equity Rules. *See* Collins, *supra* note 54, at 273.

[61] *See infra* Part III, pp. 1438–46.

II. JUDICIAL LAWMAKING POWER OVER PROCEDURE

When *Erie Railroad Co. v. Tompkins* withdrew the federal general common law from the learning of the federal courts, the Court nonetheless recognized that certain specialized forms of judicial lawmaking would persist. Judge Friendly famously rechristened this body of law the "new" federal common law.[62] It was a new name for an old practice. Courts had made — or found[63] — law in the absence of direct statutory or constitutional authorization since the Founding. But the doctrinal threads that have emerged since *Erie* now divide this law into three main camps: (1) limited enclaves such as admiralty or interstate disputes,[64] (2) rules "necessary to protect uniquely federal interests,"[65] and (3) procedural common law.[66] A broad power of procedural supervision, to the extent that it exists, would fall into the third camp.

This Part has two main aims. First, it tracks developments in the doctrine of substantive federal common law, as the Court's approach to substance influences its approach to procedure. Second, it fleshes out the justifications and scope of procedural common law, with particular attention to jurisdictional context and the distinctions between constitutional and statutory sources of authority. This discussion moves beyond the specific question of procedural supervision to situate that power within its larger doctrinal framework and establish necessary context for Part III's arguments about procedural supervision in equity.

A. Substantive Federal Common Law

Classic substantive federal common law has several key attributes. It is federal law under the Supremacy Clause[67] and draws its authority loosely from the Constitution or federal statute. But as a body of judge-made law, it is distinct from constitutional or statutory interpretation and instead fills acknowledged gaps in the governing law.[68] As such,

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[62] Henry J. Friendly, *In Praise of* Erie — *And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 421 (1964). *See generally* Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1 (1985); Barrett, *supra* note 28.

[63] *See* Stephen E. Sachs, *Finding Law*, 107 CALIF. L. REV. 527, 529 (2019) ("[U]nwritten law can be found, rather than made.").

[64] For instance, *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938), placed the law of interstate disputes under federal control because "neither the statutes nor the decisions of either State can be conclusive." *Id.* at 110. The admiralty case of *Chelentis v. Luckenbach Steamship Co.*, 247 U.S. 372 (1918), did so for admiralty because it "certainly could not have been the intention [of the Constitution] to place the rules and limits of maritime law under the disposal and regulation of the several States." *Id.* at 382 (quoting The Lottawanna, 88 U.S. (21 Wall.) 558, 575 (1875)).

[65] Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640 (1981) (quoting Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 426 (1964)).

[66] *See generally* Barrett, *supra* note 28.

[67] U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land.").

[68] For an excellent discussion of this distinction, and the difficulties that inhere in drawing it, see Merrill, *supra* note 62, at 1–7.

Congress can disapprove and supplant it.[69] The archetypical examples are admiralty law and the law of interstate disputes, but courts have applied the doctrine to an array of issues deemed to implicate "uniquely federal interests,"[70] including the rights and duties of the United States when it issues financial instruments.[71] A related line of cases develop what Professor Henry Monaghan has called "constitutional common law."[72] This form of federal common law draws "inspiration" from the Constitution but is not constitutionally compelled.[73] Congress can therefore abrogate it, too. The archetype here is the dormant commerce clause. Substantive federal common law is thus (1) supreme versus the states under the Supremacy Clause, (2) limited by doctrine to certain distinct areas, and (3) subject to congressional control.

Over the course of the twentieth century, federal courts expanded their use of federal common law. At first ostensibly limited to areas with an overriding federal interest at stake or a uniquely rich history of general law and jurisdictional authorization, the Court eventually stretched federal common law across many domains based on a loose tether to federal interests.[74] Several developments now threaten that approach. The rise of textualism has placed further emphasis on determinacy in constitutional and statutory text, leaving less jurisprudential room for unguided federal common law.[75] Skepticism of broad-based preemption doctrines, especially obstacle preemption,[76] has further eroded a primary rationale for the practice. The restriction of implied causes of action, both constitutional[77] and statutory,[78] and the emergence of clear statement rules across ever more bodies of law,[79] are in further methodological tension with broad federal common lawmaking.

The Supreme Court's most recent treatment of the issue, a unanimous ruling to reject a highly attenuated federal common law rule from

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69 *See id.* at 6.

70 *Tex. Indus.*, 451 U.S. at 640 (quoting *Sabbatino*, 376 U.S. at 426).

71 *See, e.g.*, Clearfield Tr. Co. v. United States, 318 U.S. 363, 367 (1943) (allowing the "federal courts to fashion the governing rule of law according to their own standards" in order to "protect a federal right" pertaining to government-issued checks).

72 Henry P. Monaghan, *The Supreme Court, 1974 Term — Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 3 (1975).

73 *Id.* at 2.

74 *See, e.g.*, *Clearfield*, 318 U.S. at 367; United States v. Standard Oil Co. of Cal., 332 U.S. 301, 305–10 (1947).

75 *See generally* John F. Manning, *Second-Generation Textualism*, 98 CALIF. L. REV. 1287 (2010).

76 Obstacle preemption is considered here to be a subspecies of conflict preemption, in which state law presents an obstacle to the purposes of a federal law. *See, e.g.*, BRYAN L. ADKINS ET AL., CONG. RSCH. SERV., R45825, FEDERAL PREEMPTION: A LEGAL PRIMER 25–28 (2023), https://sgp.fas.org/crs/misc/R45825.pdf [https://perma.cc/7LAP-8WK7].

77 *Compare* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971), *with* Egbert v. Boule, 142 S. Ct. 1793, 1800 (2022).

78 *See, e.g.*, Alexander v. Sandoval, 532 U.S. 275, 293 (2001).

79 *See, e.g.*, West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022).

the Ninth Circuit, hinted at the Court's new approach. In *Rodriguez v. FDIC*,[80] the Court emphasized that federal common law must play a "necessarily modest role" in a constitutional system that "vests the federal government's 'legislative Powers' in Congress and reserves most other regulatory authority to the States."[81] In such a system, "only limited areas exist in which federal judges may appropriately craft the rule of decision."[82] While it dutifully cited the case law on the looser "federal interests" standard, the Court nested that discussion within the broader principles laid out above. One must be careful not to read too much into the short, unanimous *Rodriguez* opinion, however, as the Court found that the Ninth Circuit's rule failed to implicate federal interests at all.[83] However, the new framework implicitly baked into *Rodriguez* would restrict federal common law more completely to areas where federal needs are paramount and where history and tradition establish a long record of federal court control.

B. Procedural Common Law

Federal procedural common law, as distinct from the substantive strands discussed above, has received much less doctrinal elaboration in the courts.[84] In her seminal article on the matter, then-Professor, now-Justice Barrett articulates "twin justifications" for its development.[85] First, because the Constitution carves out federal procedure as a matter of exclusive federal control, courts can develop procedural common law in the voids left by congressional silence.[86] Second, Article III impliedly grants the federal courts some form of inherent authority over local procedure.[87] The precise scope of this inherent authority remains difficult to define, but — together with the enclave theory — it helps explain most federal court exercises of procedural common lawmaking.[88]

The present status of procedural common law remains one of routine, yet largely unreflective, use in the federal courts. Procedural common law doctrines such as preclusion, abstention, and remittitur all remain key parts of the federal canon.[89] Some, such as the preclusion

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[80] 140 S. Ct. 713 (2020). The rule in question, called the *Bob Richards* rule, addressed the distribution of a federal tax refund between tax-affiliated corporations whose designated agent received a single refund. *See id.* at 716–17 (citing Bob Richards Chrysler-Plymouth Corp. v. England, 473 F.2d 262, 265 (1973)).

[81] *Id.* at 717 (quoting U.S. CONST. art. 1, § 1) (citing U.S. CONST. amend. X).

[82] *Id.* (citing Sosa v. Alvarez-Machain, 542 U.S. 692, 729 (2004)).

[83] *Id.* at 717–18.

[84] *See, e.g.*, Carlisle v. United States, 517 U.S. 416, 425–26 (1996) (characterizing the power to develop procedural common law as unclear in scope); Dickerson v. United States, 530 U.S. 428, 437 (2000) (articulating doctrine but remaining vague on ultimate sources of authority).

[85] Barrett, *supra* note 28, at 888.

[86] *Id.*

[87] *Id.*

[88] *See id.* at 817–18.

[89] *See id.* at 819–20.

rules, have histories that long predate the United States.[90] But the doctrinal state of affairs remains largely as it was when Justice Barrett published her article in 2008: the rules themselves are "well understood, but the courts' authority to make them is not."[91]

As currently developed in the federal courts, procedural common law has many similarities to the constitutionally authorized enclaves of judicial common lawmaking. But, in contradistinction to substantive common law, procedural common law does not bind the states under the Supremacy Clause.[92] In this sense it is weaker than its substantive cousin. On the other hand, to the extent that any core procedural power inheres in Article III, it cannot be abrogated by Congress.[93] In that sense it is stronger, although the size of the core remains poorly defined. Procedural common law is therefore (1) not supreme over state law under the Supremacy Clause; (2) widely deployed across a range of procedural contexts; and (3) arguably not always subject to congressional control.

Most courts appear to assume that they can craft procedural common law because the Constitution allocates that power to the federal government and congressional inaction has left a void. In *United States v. Hudson & Goodwin*,[94] the Court referred to inherent procedural powers "not immediately derived from statute" but left unclear whether Congress could abrogate those powers.[95] Justice Barrett has made perhaps the strongest argument for some form of constitutionally derived procedural power, but no case has directly held that certain procedural powers remain beyond the reach of Congress. The possibility of a constitutionally protected heart of procedural power instead reflects the commonsensical notion that courts have more latitude to develop law in areas of procedure than substance. What that notion actually entails remains a mystery.

One answer involves distinguishing between local procedures, which are limited to a court's own proceedings, and uniform procedures, which are not so limited. Based on a meticulous reading of historical cases, Justice Barrett draws such a line. Local procedural power might inhere in Article III; uniform procedural law "is ultimately in the control of Congress."[96] This is so, Justice Barrett argues, because inherent procedural power is part of the "judicial Power" that the Constitution vests in each Article III court.[97] Thus endowed with some degree of local procedural authority, "each court possesses that power in its own right"

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90 *See* Alexandra Bursak, Note, *Preclusions*, 91 N.Y.U. L. REV. 1651, 1660–70 (2016).
91 Barrett, *supra* note 28, at 832.
92 *Id.* at 815.
93 *See id.* at 879.
94 11 U.S. (7 Cranch) 32 (1812).
95 *Id.* at 34.
96 Barrett, *supra* note 28, at 888.
97 *See id.* at 817.

and can resist congressional regulation.[98] Justice Barrett's quest to locate a source of inherent procedural authority in Article III was complicated, however, by the fact that early courts had at least three nonconstitutional sources of authority from which to draw: (1) section 17 of the Judiciary Act of 1789, which authorized local procedural development in the federal courts, (2) the 1792 Process Act, and (3) customary law. As such, even the early courts did not need to reach the ultimate constitutional question.

And, while the line between local and uniform procedural rules is cogent and helpful, it is only one of many distinctions that help carve up the federal courts' power over procedure. Take, for example, jurisdictional context. Federal courts have broad common lawmaking authority when they sit in admiralty,[99] and their inherent powers also likely increase in original jurisdiction cases.[100] Their lawmaking powers are weaker in diversity cases adjudicating state-created rights, where *Erie*'s Tenth Amendment holding applies with the most force.[101] The boundaries of federal common law, including procedural common law, must pull tighter in these cases to prevent federal courts from "invad[ing] rights which . . . are reserved by the Constitution to the several states."[102] In such a posture, the federal court approximates — though does not precisely adopt — a role as "only another court of the State."[103] Procedural powers depend on both the nature of the rule adopted and the jurisdictional context in which the power is exercised.

All these considerations make it exceptionally challenging to trace any inherent procedural powers all the way back to Article III. Perhaps, as Justice Barrett argues, the belief in inherent procedural power "is so deeply held that as a practical matter, rolling it back likely requires forceful evidence to the contrary."[104] But, whether or not any constitutionally protected core of procedural power inheres in the federal courts, such a power does not include that of procedural supervision. To the extent it is permissible, procedural supervision is a form of procedural

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[98] *Id.*

[99] *See* Chelentis v. Luckenbach S.S. Co., 247 U.S. 372, 383 (1918).

[100] *See* Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 431–34 (1793). Justice Barrett uses the competing opinions in *Chisholm* as key sources to explain the nature of procedural common law. *See* Barrett, *supra* note 28, at 870–74. But the inherent powers of the Supreme Court are likely near their peak in an original jurisdiction case such as *Chisholm*, *see* U.S. CONST. art. III, § 2, cl. 2, making it challenging to tease out broad principles of inherent procedural power from the case.

[101] Erie R.R. Co. v. Tompkins, 304 U.S. 64, 69, 80 (1938). While technically *Erie* applies based on the source of the right adjudicated, and not the ground for jurisdiction, it nonetheless has more precedential force in the diversity context in which the case arose.

[102] *Id.* at 80.

[103] Guar. Tr. Co. v. York, 326 U.S. 99, 108 (1945). *But see* Ann Woolhandler, *The Common Law Origins of Constitutionally Compelled Remedies*, 107 YALE L.J. 77, 80–81 (1997) (arguing that, in the years before Congress gave the federal courts general federal question jurisdiction in 1875, federal diversity courts "developed independent federal rights and remedies for constitutional violations," *id.* at 81).

[104] Barrett, *supra* note 28, at 878.

common law abrogable by Congress. It exists outside the framework of promulgated Federal Rules and at the margins of most accounts of procedural common law. To understand the origins and scope of procedural supervision as it remains after *Erie*, one must look again to the history of equity in the courts of the United States.

III. Procedural Supervision in Equity

Erie launched the federal courts into their uncertain new relationship with state law in 1938, the same year that the Federal Rules of Civil Procedure merged law and equity.[105] Both shifts were tectonic. The general law that *Erie* suppressed, and the divided bench that the Federal Rules united, had ruled in the federal courts for nearly a century and a half. The courts are still sorting out the consequences of their loss. One implication, fraught as it may be, is that the power of procedural supervision looks different in law and equity. This Part argues that the Supreme Court[106] can draw on specific sources of authority when it exerts procedural supervision over equity procedure that it cannot invoke should it seek to supervise rules sounding originally in law.

The reasons for this distinction center on the relationship between *Erie* and the Court's historical equity practice. Expressed most simply, the Supreme Court likely retains a limited power of supervision over equity procedure because the Court possessed the power well before *Erie*, and *Erie* and its progeny never took the power away.[107]

A. Early Nineteenth-Century Equity Procedure Cases

Equity procedure cases from the early Republic offer the best data on the original sources of the Court's authority. These cases largely grounded themselves in the most relevant congressional statute: the 1792 Process Act. Read together, federal equity cases from the first half of the nineteenth century show the interplay between the Court's rulemaking and adjudicatory powers, the role of recourse to English chancery practice, and the federal system of equitable procedure that emerged while procedures at law remained tethered to the states. This section analyzes the Court's treatment of equity procedure in its early cases as a predicate for the question of how *Erie* altered, or preserved, that system.

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[105] Diane P. Wood, *Back to the Basics of* Erie, 18 Lewis & Clark L. Rev. 673, 679 (2014).

[106] This Note concentrates on procedural supervision as exercised by the Supreme Court. A similar methodology could be applied to the courts of appeals, but the scope of the appellate courts' equity powers may differ based on their place in the constitutional scheme and their more recent provenance. *See* Judiciary Act of 1891 (Evarts Act), ch. 517, § 2, 26 Stat. 826, 826–27 (current version at scattered sections of 28 U.S.C.) (creating the federal courts of appeals).

[107] More specifically, for procedural supervision in equity to be viable, two conditions must be satisfied: (1) the original sources of the Court's authority must have been legitimate before *Erie*, and (2) those sources must still be legitimate after *Erie*.

As early as 1796, the Court asserted an adjudicatory power over its own equity procedure. *Grayson v. Virginia*[108] established the processes by which a subpoena must be served on the defendant "in any suit in Equity" before the Court.[109] *Grayson* specifically invoked the Court's statutory authority in the 1789 Judiciary Act and 1792 Process Act, a power both to adopt traditional equity practice and to "adapt the process and rules of the Court to the peculiar circumstances of this country, subject to the interposition, alteration, and controul, of the Legislature."[110] The equity procedures from *Grayson* were adjudicatory, local, and abrogable by Congress.

When the Court promulgated its first set of Equity Rules for the lower courts in 1822, it again drew explicit authorization from the 1792 Process Act.[111] Cases invoking the rules noted the same statutory source. In *Poultney v. City of La Fayette*,[112] the Court referred to the Equity Rules as those "prescribed by this Court for the government of the courts of equity of the United States, under the act of congress of May 8, 1792."[113] The result of a statutory delegation from Congress, the rules were "undoubtedly obligatory on the circuit courts."[114] Certain residual flexibility inhered in courts of equity,[115] but it was the Supreme Court's prerogative to lay out a rules-based architecture and ensure that any lower court alterations still conformed to equitable principles. The Court viewed its development of prospective equity rules as permitted by the Constitution, authorized by statute, and binding on the lower courts.

But the Court also engaged in procedural supervision beyond the scope of the Equity Rules. For instance, in the 1827 case of *Mallow v. Hinde*,[116] the Court developed, via adjudication, a rule in equity that the absence of indispensable parties required dismissal of a plaintiff's

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[108] 3 U.S. (3 Dall.) 320 (1796).

[109] *Id.* at 321.

[110] *Id.* at 320.

[111] EQUITY R. pmbl., 20 U.S. (7 Wheat.) v, v (1822) (superseded 1842) ("Under the authority given to this Court, by the Act of May 8th, 1792, c. 137. s. 2., the following Rules were ordered by the Court . . . .").

[112] 37 U.S. (12 Pet.) 472 (1838).

[113] *Id.* at 474.

[114] *Id.*

[115] The *Poultney* Court noted that: "Every court of equity possesses the power to mould its rules in relation to the time and manner of appearing and answering, so as to prevent the rule from working injustice." *Id.* at 475. While at first glance paradoxical in the context of "obligatory" rules, *id.* at 474, this flexibility was only a recognition that the Equity Rules did not supersede the "well known and necessary power" of an equity court to make small adjustments in the interests of fairness, *id.* at 475, and did not mean that the Supreme Court's supervisory power could be ignored.

[116] 25 U.S. (12 Wheat.) 193 (1827). Justice Barrett discusses this case in her work on the supervisory power, *see* Barrett, *supra* note 5, at 375, but does not return to its significance when making her *Erie* arguments.

bill.[117] No court of equity, the Court held, can "adjudicate directly upon a person's right, without the party being either actually or constructively before the Court."[118] Such a rule "must equally apply to all Courts of equity."[119] And in *Livingston v. Story*,[120] the Court laid out equitable rules for demurrer drawn from the "ordinary mode of proceeding in courts of equity" and proper for use in the federal circuit courts.[121]

Decided in the years after the Court issued its Equity Rules, cases like *Mallow* and *Livingston* illustrate a symbiotic relationship between rules-based and adjudicatory procedural supervision in early equity practice. The Court's Equity Rules would set forth rules of procedure binding on the circuit courts, and a means of gap-filling through circuit court rulemaking or recourse to English chancery practice.[122] But these rules, and the Process Act's statutory scheme that allowed them, did not crowd out the Court's powers of adjudicatory supervision.

The exercise of this power shared much with early courts' recourse to the "general law,"[123] but it remained distinct in key respects. Like general law, equity rules traced their origins beyond the United States' sovereign power, often invoked universal-sounding principles, and were

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[117] *Mallow*, 25 U.S. (12 Wheat.) at 196–98. In *Elmendorf v. Taylor*, 23 U.S. (10 Wheat.) 152 (1825), Chief Justice Marshall wrote for the Court that a rule as to the necessary parties to a bill in equity "does not affect the jurisdiction; but addresses itself to the policy of the Court." *Id.* at 166. The equitable rule, Chief Justice Marshall emphasized, "is framed by the Court itself, and is subject to its discretion." *Id.* at 166–67. *Mallow* then helped clarify the distinction between areas of equitable discretion and areas where the Court would announce a rule for all federal equity courts. *See* 25 U.S. (12 Wheat.) at 198.

[118] *Mallow*, 25 U.S. (12 Wheat.) at 198.

[119] *Id.*

[120] 34 U.S. (9 Pet.) 632 (1835).

[121] *Id.* at 658.

[122] *See* EQUITY R. 32–33, 20 U.S. (7 Wheat.) v, xiii (1822) (superseded 1842).

[123] The precise contours of the "general law" are complex, *see generally* Caleb Nelson, *The Persistence of General Law*, 106 COLUM. L. REV. 503 (2006), but the term refers to a body of quasi-universal rules and customs that, while not linked to a specific sovereign, were common across Western nations. In simplified form, the general law comprised three categories: (1) the law merchant, (2) the law maritime, and (3) the law of relations between states. *See* Anthony J. Bellia Jr. & Bradford R. Clark, *General Law in Federal Court*, 54 WM. & MARY L. REV. 655, 660 (2013). *See generally* William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513 (1984). Some scholars consider equity to be part of the old general law. *See, e.g.*, John Harrison, *Ex Parte* Young, 60 STAN. L. REV. 989, 1014 n.103 (2008) (noting that federal courts in the early twentieth century "administered their own version of equity jurisprudence" and that "equity was part of the general law, like the general commercial law"); Michael T. Morley, *The Federal Equity Power*, 59 B.C. L. REV. 217, 241 (2018) ("[F]ederal courts effectively applied the equitable equivalent of general law, rather than state law, for all remedial issues in equity cases."). Despite their similarities, however, the analogy between equity and general law is not perfect. *See* Collins, *supra* note 54, at 290 ("It is tempting to understand the uniform nonstate equity principles applied in federal court as a direct analogue to the general common law . . . . But it is important to recognize the significant differences between the general common law and the uniform equity principles applied by federal courts."). These differences in the relationship between state and federal law in equity versus those in general law mean that *Erie*'s effects on equity procedure cannot be said to follow directly from its effects on the "general common law."

not true federal law under the Supremacy Clause.[124] But federal equity was not merely a branch of the general law, and had a different place in the federal system. In a pioneering article on early nineteenth-century general law, then-Professor, now-Judge Fletcher articulated the common project of the state and federal courts as a "joint endeavor of deciding cases under a general common law."[125] Both state and federal courts viewed the elucidation of general law rules as within their province, and "agreed that they were administering a general law."[126] Things were different in equity. The state courts did not purport to apply federal equity, and the federal courts developed a "uniform corpus of federal and English equity principles" that was "federal rather than general in character."[127] Differences between state and federal courts in matters of general law were initially disagreements about the content of that law. Differences in matters of equity were part of the system's design. Early federal courts had a robust equity practice that was independent of state law; distinct from the general law; and, once authorized, largely unpoliced by Congress.

B. Erie *and* York

Erie changed this system, but left open precisely how. The Court's opinion in *Guaranty Trust Co. v. York*[128] offered an early answer. Although it rejected any clean division between "substance" and "procedure," *York* distinguished equity's substantive, procedural, and remedial law.[129] It confirmed that *Erie* applied to substantive equity.[130] Equity procedure, on the other hand, would remain beyond *Erie*'s reach.[131] Therefore, a diversity court could enforce "State-created substantive rights" while employing procedural law "consonant with the

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[124] *See, e.g.*, Collins, *supra* note 54, at 290.

[125] Fletcher, *supra* note 123, at 1515.

[126] *Id.* at 1576.

[127] Collins, *supra* note 54, at 290. "Federal" here does not mean supreme under Article VI, but rather refers to the fact that federal courts developed an equity practice independent of the states in two important respects: (1) state equity procedures were not used in federal court, and (2) federal equity was, conversely, largely outside the purview of state courts. *See id.* at 290–91; *see also* Gordon v. Hobart, 10 F. Cas. 795, 796 (Story, Circuit Justice, C.C.D. Me. 1836) (No. 5,609) (noting that a statutory state equity rule was "wholly inapplicable to the general equity jurisdiction of the courts of the United States"); Robert von Moschzisker, *Equity Jurisdiction in the Federal Courts*, 75 U. PA. L. REV. 287, 294 (1927). The Court encapsulated this broad view of the federal equity power in *United States v. Howland & Allen*, 17 U.S. (4 Wheat.) 115 (1819): "[A]s the Courts of the Union have a Chancery jurisdiction in every state, and the judiciary act confers the same Chancery powers on all, and gives the same rule of decision, its jurisdiction in [one State] must be the same as in other States." *Id.* at 115.

[128] 326 U.S. 99 (1945).

[129] *Id.* at 108. The lines between substance, procedure, and remedy are indeed difficult to draw. Nonetheless, many rules are unmistakably procedural, courts and commentators treat them as such, and they are the focus of this Note's arguments.

[130] *Id.* at 106–08, 107 n.4.

[131] *Id.* at 104–05.

traditional body of equitable . . . procedure."[132] The old system of federal equity procedure would stand. Certain aspects of *York* are confused or obsolete,[133] but its language on equity procedure continues to structure the interpretation of *Erie* in equity cases because the Court has remained so vague about the nature of its authority over procedural equity outside the framework of the Federal Rules.[134] The key points are (1) that the persistence of federal equity procedure must be analyzed separately from the other branches of equity,[135] and (2) that procedural equity remained largely intact after *Erie* and *York*.

These distinctions matter because, distilled to their core, the leading arguments against procedural supervision rely heavily on *Erie*.[136] As Justice Barrett puts it, Founding-era courts viewed supervision not as lawmaking, but as "measuring inferior court action against settled customary rules."[137] Once courts no longer viewed custom as a limit on their discretion, the cat was out of the bag and the *McNabb* line of policy-based "administration of justice"[138] cases took shape. Justice Barrett relied on this *Erie* rationale because she found numerous examples of the Supreme Court exercising procedural supervision in her Founding-era sources.[139] What ultimately differentiated these cases from the modern "supervisory power" cases was the loss of customary

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[132] *Id.* at 106.

[133] For instance, *York*'s inconsistent treatment of equitable remedies has faced criticism, *see, e.g.*, Morley, *supra* note 123, at 247–49, and the "twin aims" of *Erie* from *Hanna v. Plumer*, 380 U.S. 460, 468 (1965), have largely displaced *York*'s "outcome-determinative" principle as the test for when to apply state law in an unguided *Erie* choice, *id.*

[134] *Cf.* Samuel L. Bray, *The Supreme Court and the New Equity*, 68 VAND. L. REV. 997, 1000 (2015) ("The Court has shown no appetite, however, for reviving old distinctions between legal and equitable courts or procedures."). The Court has indeed said little about the scope of its power over equity procedure. The procedural case Professor Bray cites in this context, however, held only that Rule 54(d)(1) of the Federal Rules of Civil Procedure applied and superseded historical equity practice on the particular question of how to allocate costs. *Id.* n.6 (citing Marx v. Gen. Revenue Corp., 568 U.S. 371, 377 & n.3 (2013)). It said nothing of powers, like that of procedural supervision, which operate beyond the Federal Rules.

[135] For a good delineation of the branches of equity, see Morley, *supra* note 123, at 236–41. Much academic discussion has centered on the Court's approach to equitable remedies, and the source and scope of its authority to draw from traditional principles of remedial equity. *See generally* Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417 (2017); Mila Sohoni, *The Lost History of the "Universal" Injunction*, 133 HARV. L. REV. 920 (2020); James E. Pfander & Jacob P. Wentzel, *The Common Law Origins of* Ex parte Young, 72 STAN. L. REV. 1269 (2020); Harrison, *supra* note 123. This Note focuses instead on equity procedure as a distinct area of law with distinct sources of authority for its use.

[136] *See, e.g.*, Barrett, *supra* note 5, at 385.

[137] *Id.* at 384.

[138] Thiel v. S. Pac. Co., 328 U.S. 217, 225 (1946).

[139] Barrett, *supra* note 5, at 379–84.

law as a constraining referent.[140] The problem with *McNabb* and its progeny was *Erie*'s new "way of looking at law."[141]

Yet careful attention to the system that regulated equity procedure prior to *Erie*, and the preservation of procedural control effectuated in *York*, counsels in favor of the Court's retained power over equitable procedures as a form of procedural common law.[142] Once the central objection to procedural supervision — that its grounding in customary law no longer computes after *Erie* — is overcome, it becomes possible to carve space for its persistence in equity proceedings. The law of chancery procedure never became *damnatio memoriae* as did the broader general law.

In the context of procedural supervision, these principles from *York* indicate that even after the demise of the Process Act, a residual lawmaking power remains in equity procedure. Federal equity procedure can claim (1) a foundation in a jurisdictional grant that traces to the 1789 Judiciary Act,[143] (2) a long history of nonstatutory, subconstitutional law that *Erie* left intact, and (3) a distinct tradition of federal court control.[144] While these factors do not form a checklist, they do help establish the certain je ne sais quoi that characterizes a genuine enclave of judicial lawmaking power. There are no straightforward answers in this area. But the burden seems to fall on those who would argue that the Court's long-standing control over equitable procedure — including through procedural supervision — has somehow been extinguished.

C. The Rules Enabling Act and Statutory Displacement

Congressional abrogation could swiftly displace all that remains of procedural supervision in equity. The last question is therefore whether the legislature has done so.

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[140] *See id.* at 384 ("[T]he disintegration of procedural custom, and concomitant rise in judicial discretion to develop procedure, distinguishes the modern cases from the early ones in a way that undermines the Supreme Court's claim to supervisory power.").

[141] Guar. Tr. Co. v. York, 326 U.S. 99, 101 (1945).

[142] The question still remains as to where *York* itself locates the source of authority for a federal law of equitable procedure. The case is somewhat obscure on this point, but appears to ground the power in section 11 of the 1789 Judiciary Act, *see id.* at 105, which gave the circuit courts "cognizance" of suits "in equity," ch. 20, § 11, 1 Stat. 73, 78. The *York* Court construed the equity provisions of the 1792 Process Act as merely confirming the courts' authority over equity procedure already derived from the Judiciary Act. The 1792 Act "gave the federal courts no power" that section 11 of the Judiciary Act did not already provide. *York*, 326 U.S. at 105. Regardless of this argument's merit — it would seem to take more to yoke procedural lawmaking power to the jurisdictional grant in the 1789 Act — *York* left room for procedural supervision in equity to develop as procedural common law.

[143] Judiciary Act of 1789, § 11, 1 Stat. 73, 78.

[144] *See, e.g.*, EQUITY R., 20 U.S. (7 Wheat.) v (1822) (superseded 1842) (rulemaking); Mallow v. Hinde, 25 U.S. (12 Wheat.) 193, 196–98 (1827) (adjudication).

The primary candidate for such statutory displacement is the Rules Enabling Act.[145] By prescribing a specific mechanism by which the Supreme Court can regulate lower court procedures — the promulgation of prospective rules — Congress might have precluded the Court from developing procedural law outside that framework.[146]

While plausible, it is unlikely that the Rules Enabling Act displaces the adjudicatory formulation of procedural rules in equity cases. The rulemaking delegation in the Rules Enabling Act tracks closely with that of the 1792 Process Act, which was not read to preclude procedural supervision in equity. The Process Act provided that procedural law in the federal courts would be subject to "such regulations as the supreme court of the United States shall think proper from time to time by rule to prescribe to any circuit or district court concerning the same."[147] The 1934 Rules Enabling Act gave the Supreme Court virtually the same power: "to prescribe, by general rules, for the district courts of the United States . . . the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law."[148] The 1792 Process Act lurked behind the Court's early exercises of procedural supervision just as the Rules Enabling Act does today. When the Court formulated uniform equitable procedures in the early nineteenth century, it did so notwithstanding both its own promulgation of equity rules and the Process Act's roadmap for prospective rulemaking. Neither was seen to displace the Court's independent lawmaking power.

That being said, the Process Act also included specific equity language that the Rules Enabling Act lacks. In its 1792 formulation, the Process Act provided that federal courts sitting in equity were to follow the "principles, rules, and usages which belong to courts of equity."[149] The Revised Statutes of the 1870s clarified that this language applied to the circuit and district courts rather than the Supreme Court,[150] but the equity provision itself remained law until the mid-twentieth century. Then, as part of the revision and enactment of the new judicial code in 1948, the revisers struck the provision from the statute books.[151] It was an unceremonious end for language that had remained law since 1792, but the episode illustrates the profound change embodied in the Federal Rules of Civil Procedure. The prevailing sense was that the Rules had cleared away the antiquated system of procedure that came before, and

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145 Rules Enabling Act of 1934, ch. 651, 48 Stat. 1064.

146 *See id.* § 2, 48 Stat. at 1064.

147 Process Act of 1792, ch. 36, § 2, 1 Stat. 275, 276.

148 Rules Enabling Act of 1934, § 1, 48 Stat. at 1064.

149 Process Act of 1792 § 2, 1 Stat. at 276.

150 13 Rev. Stat. § 913 (1875).

151 Act of June 25, 1948, ch. 646, § 2071, 62 Stat. 869, 961 (codified as amended at 28 U.S.C. § 2071); *id.* § 2073, 62 Stat. at 961 (repealed 1966); *see also* H.R. REP. NO. 80-308, at A227 tbl.2 (1947) (tabulating revisions to Title 28 of the United States Code and indicating that the section containing the 1792 Process Act's equity language would be replaced by §§ 2071 and 2073 of the revised code).

the vestiges of the Process Act were part of those statutory cobwebs.[152] Both the equity language from the 1792 Act and the Court's equity rules themselves seemed incompatible with the merger effected in the Federal Rules.

But, while the new regime did displace the Court's promulgated equity rules, the Rules Enabling Act says little about the status of the federal courts' residual equity powers. In areas beyond the Rules' scope, courts must look to other sources of law. A far clearer statement from Congress than the Rules Enabling Act would seem necessary to upend those federal procedural practices beyond the Rules, practices that trace to the early Republic and remain alive in contemporary judicial doctrine. On these matters, the Rules Enabling Act is essentially silent.

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The Supreme Court likely retains a limited power of supervision over equity procedures for three distinct but interrelated reasons. First, the Court's early practice of rules-based and adjudicatory procedural superintendence over equity establishes equity procedure as a legitimate referent analogous to an enclave of federal common law. The mixture of a long-standing jurisdictional grant; a rich history of nonstatutory, subconstitutional law; and the display of its use in the early Republic all militate in favor of equity-based procedural supervision. Second, *Erie* and its progeny preserved the federal courts' relationship with equity procedure in a manner distinct from that of the general customary law. Procedural equity has remained a viable source of law in the federal courts long after *Erie* condemned the federal general common law. Third, adjudicatory supervision in equity coexisted with rules-based supervision from the beginning of the Court's promulgation of the Equity Rules. Statutory rulemaking authority in the Rules Enabling Act is unlikely to have displaced an adjudicatory power of procedural supervision.

These arguments provide both authorization and a limiting principle. The Court has supervisory power over lower court procedures only when it invokes a specific source of authority that survived *Erie*. Equity is one such source of procedural law. Admiralty is likely another. Broader procedural supervision outside these domains — to the extent it is grounded in policy concerns or merely the "administration of justice"[153] — cannot stand unless the Court identifies an alternate, preexisting, and enduring source of law. This doctrinal route is not the simplest, but it is the path most faithful to the history and tradition of Supreme Court practice, and the constitutional and statutory

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[152] *See generally* Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909 (1987).

[153] Thiel v. S. Pac. Co., 328 U.S. 217, 225 (1946).

architectures that support it. The full extent of federal court engagement with equity practice in the early years of the Republic disappeared from the doctrine in part through Justice Frankfurter's strategic effacement of federal equity's history in his opinion for the Court in *York*.[154] Through recourse to equity in the procedural supervision context, the contemporary Court can reclaim more of that law.

CONCLUSION

This Note argues that procedural supervision plays only a limited role in the Supreme Court's arsenal of constitutionally authorized powers. As an exercise of procedural common law, the power exists only in those areas of law that exist outside the formal constitutional and statutory structure but remain largely undisturbed by *Erie*. Equity procedure meets these requirements. Admiralty procedure likely does as well. In such domains, the Court may direct lower court procedures without explicit statutory authorization and beyond the scope of the Federal Rules. Outside these domains, where the only tethers are "considerations of justice,"[155] the Court should restrain its use of procedural supervision. These changes would alter current doctrine, but only because they recognize limits and sources of authority that have inhered in the system all along. For the practicing lawyer, the taxonomy this Note proposes will require the exacting work of exhuming antique bodies of law. It may help or hinder litigants in unforeseen ways. But preservation of the Court's power to supervise equity procedure is the doctrinal path most faithful to our constitutional structure and the regime of complex law under which the nation and its people live.

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[154] *See* Collins, *supra* note 54, at 339 (describing notes from a 1945 telephone conversation between Justice Frankfurter and Chief Justice Stone, in which the Chief Justice praised Justice Frankfurter's opinion in *York* for its "considerable surgical operation . . . to clear away" historical material on federal equity practice).

[155] McNabb v. United States, 318 U.S. 332, 341 (1943).