MAKING THE RULES OF THE RULES OF THE GAME: THE USE, MISUSE, AND DISUSE OF THE RULEMAKING GRANT IN THE ACT OF AUG. 23, 1842

INTRODUCTION

On August 23, 1842, Congress quietly and quickly conferred a broad grant of rulemaking authority on the Supreme Court. The Act of Aug. 23, 1842[1] supplemented the Judiciary Act of 1789[2] and Process Act of 1792[3] by providing: "[T]he Supreme Court shall have full power and authority, from time to time, to prescribe, and regulate, and alter, the forms of writs and other process . . . in suits at common law or in admiralty and in equity . . . and generally to regulate the whole practice of the said courts . . . ."[4]

The Supreme Court authored rules governing suits in equity and admiralty but engaged in little to no rulemaking concerning "suits at common law."[5] Instead, the Court continued to require federal courts to adopt state procedural practices from 1789 to regulate civil suits, creating a confusing patchwork of outdated procedural rules that varied by geographic region. The Court's puzzling selectivity poses a simple question: Why did it never use the 1842 grant to promulgate rules of civil procedure?

This Note argues that the Court's decision not to promulgate federal rules of civil procedure reflected considerations of federalism and administrative capacity. Part I discusses the historical backdrop to the debates about procedural reform and investigates the passage of the Act of Aug. 23, 1842. Part II discusses the implementation of the Act in admiralty, equity, and evidence, focusing on the Court's successful promulgation of admiralty rules, its revision to the Federal Equity Rules, and its lack of action on evidence rules. Part III analyzes the justifications for the Supreme Court's failure to promulgate federal rules of civil procedure for suits at common law, highlighting the considerations about federalism and financing that might account for the Court's hesitation.

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[1] Ch. 188, 5 Stat. 516.
[2] Ch. 20, 1 Stat. 73.
[3] Ch. 36, 1 Stat. 275.
[4] Act of Aug. 23, 1842 § 6.
[5] *Id.*

I. CONFORMITY, DISCRETION, & REFORM: PROCEDURE BETWEEN 1792 AND 1842

At the Founding, federal courts followed a system of "static conformity."[6] Under this system, the early federal courts operated under a bifurcated set of procedural rules that differentiated between suits at common law and suits in equity and admiralty. Between 1800 and 1840, the system's drawbacks — confusion, inefficiency, and errors — prompted serious efforts to replace static conformity with unified rules of federal civil procedure. The Act of Aug. 23, 1842 emerged from this reform movement.

A. Static Conformity: 1789–1828

Early federal courts applied state procedural law in civil cases. In 1789, Congress ratified section 34 of the Judiciary Act to require federal courts to adopt state law as the "rules of decision in trials at common law" for applicable cases not governed by the Constitution, federal statutes, or treaties.[7] Five days later, Congress enacted the Process Act[8] to mandate that federal courts follow the procedures "as are now used or allowed" in the highest court of the state in which they sat in suits at common law.[9] The Process Act carefully distinguished suits at common law from equity and admiralty, providing that "the forms and modes of proceedings"[10] of the latter categories "shall be according to the course of the civil law."[11] The Act ushered in a system of "static conformity": Federal courts followed state procedures from 1789 for suits at common law, even as state supreme courts altered their procedural rules.[12]

The Process Act was designed to be temporary.[13] The statute's conflicting provisions for common law, equity, and admiralty "reflected Congress's inability or unwillingness to agree on uniform rules for the operation of the federal courts."[14] In particular, the instruction that

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[6] Ralph U. Whitten, Erie *and the Federal Rules: A Review and Reappraisal After* Burlington Northern Railroad v. Woods, 21 CREIGHTON L. REV. 1, 3 n.13 (1987).

[7] Judiciary Act of 1789 § 34.

[8] Process Act of Sep. 29, 1789, ch. 21, 1 Stat. 93.

[9] *Id.* § 2. The phrase "supreme courts of the same" seems to have referred to the relevant state high court, even though trial courts of general jurisdiction occasionally used the same name. *See* David E. Engdahl, *What's in a Name? The Constitutionality of Multiple "Supreme" Courts*, 66 IND. L.J. 457, 469–72 (1991).

[10] Process Act of Sep. 29, 1789 § 2.

[11] *Id.*; *see also* Lamaster v. Keeler, 123 U.S. 376, 389–90 (1887) (analyzing the history of the phrases "*modes of process*," *id.* at 389, and "*forms and modes of proceeding*," *id.*, in the Process Acts of 1789 and 1792, *see id.* at 389–90).

[12] Whitten, *supra* note 6, at 3 n.13.

[13] *See* Process Act of Sep. 29, 1789 §§ 2–3 (enforcing the Act "until further provision shall be made," *id.* § 2, and limiting its duration "until the end of the next session of Congress, and no longer," *id.* § 3).

[14] 4 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, at 112 (Maeva Marcus et al. eds., 1992); *see* Process Act of Sep. 29, 1789 §§ 2–3.

"civil law" would provide the procedural rules for equity and admiralty proved untenable.[15] This provision resolved the obvious problem that states without equity courts lacked bodies of procedure for their federal counterparts to adopt. But the unpopularity of the civil law made it a short-term solution.[16] By 1790, both President George Washington and Attorney General Edmund Randolph had publicly criticized the Act's efforts to tie equity to civil law.[17] Within a year, instead of using civil law, equity practitioners adopted the rules of chancery or applied state equity practices.[18] Consequently, "while the first Process Act remained in effect, lower federal courts generally appear to have followed state forms and modes of proceeding in both actions at law and cases in equity."[19]

But when Congress revisited civil procedure in 1792, it opted for more of the same. The Process Act of 1792 reaffirmed that federal courts should follow state court procedures from 1789 for suits at common law.[20] But the Process Act of 1792 had a key difference from its 1789 counterpart: Now, federal courts would follow state law subject "to such alterations and additions as the said [federal] courts respectively shall in their discretion deem expedient, or to such regulations as the supreme court of the United States shall think proper from time to time by rule to prescribe to any circuit or district court."[21]

This "safety valve" clause clarified that federal courts could depart from state court procedure at their discretion. It confirmed that the Supreme Court possessed the broad authority to prescribe rules that were binding on lower federal courts.[22] Despite these clarifications, the clause was maddeningly silent about the circumstances that justified variances from state court procedure and the method by which the Court could promulgate regulations. The courts began to use their discretion liberally, departing from state court procedure when a different

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[15] *See* Roscoe Pound, *The Influence of the Civil Law in America*, 1 LA. L. REV. 1, 11 (1938) ("[T]he civil law had a general influence on American law in its formative era as a whole.").

[16] *See* JULIUS GOEBEL, JR., 1 HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801, at 492, 534 (Paul A. Freund & Stanley N. Katz eds., 1971).

[17] *See* EDMUND RANDOLPH, REPORT OF THE ATTORNEY-GENERAL TO THE HOUSE OF REPRESENTATIVES 9–10 (1790); H.R. JOURNAL, 1st Cong., 1st Sess. 332 (1790) (documenting a speech delivered by the President of the United States to Congress in which he urged Congress to improve federal judicial procedure by creating a uniform process of execution for sentences).

[18] *See* GOEBEL, *supra* note 16, at 580.

[19] Anthony J. Bellia Jr. & Bradford R. Clark, *The Original Source of the Cause of Action in Federal Courts: The Example of the Alien Tort Statute*, 101 VA. L. REV. 609, 651 (2015).

[20] Ch. 36, § 2, 1 Stat. 275, 276.

[21] *Id.*

[22] Though the grant clarified the ambiguous reference to "civil law" in the first Process Act, it required further interpretation by the Supreme Court to confirm that it did not apply to criminal law. *See* United States v. Reid, 53 U.S. (12 How.) 361, 363 (1852).

rule not only improved the ease of litigation but also achieved a desirable substantive outcome.[23]

Federalism provided the animating rationale for the "species of continuity" adopted in the Process Acts.[24] In *Wayman v. Southard*,[25] Chief Justice Marshall noted that federal civil procedure was a result of federalism's compromises.[26] As he remarked, the First Congress was tasked with preparing "[a] judicial system . . . not for a consolidated people, but for distinct societies, already possessing distinct systems, and accustomed to laws, which, though originating in the same great principles, had been variously modified."[27] That the federal court system should pull from established local legal culture was embedded in its very structure, and procedural rules were no exception.[28]

This "peculiar situation"[29] led to a dual problem. On one hand, Congress was reluctant to dictate process to the courts. As one congressman asserted, the interests of the people would be most "secure under the legal paths of their ancestors; under their modes of trial, and known methods of decision,"[30] not under a procedural rule prescribed by legislators.[31] But, on the other, Congress was unwilling to delegate procedure to the state courts and state legislators. At the time, the states were rapidly adopting procedural rules concerning debt, credit, and property that served the interests of each state's residents.[32] The self-serving variance between the systems — states with creditors adopting harsh repayment measures, and those with borrowers favoring lenient ones — would have magnified the perplexity of federal law by encouraging state legislators to engage in gamesmanship to benefit their state's residents.[33] In this light, static conformity made sense both as a prophylactic measure against forum shopping and as a guarantor of federalism.

If static conformity was confusing in theory, it proved equally so in practice. For starters, it created a puzzling patchwork of procedural rules that varied widely between federal courts in different states.[34] At

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[23] *See, e.g.*, United States v. Knight, 39 U.S. (14 Pet.) 301, 314–15 (1840); *Reid*, 53 U.S. (12 How.) at 363, 366.

[24] Bellia & Clark, *supra* note 19, at 614 (quoting GOEBEL, *supra* note 16, at 458).

[25] 23 U.S. (10 Wheat.) 1 (1825).

[26] *See id.* at 45–47.

[27] *Id.* at 46.

[28] *Cf.* Joshua Glick, Comment, *On the Road: The Supreme Court and the History of Circuit Riding*, 24 CARDOZO L. REV. 1753, 1779, 1782 (2003) (detailing the local obligations of federal judges, including circuit riding and residency).

[29] *Wayman*, 23 U.S. (10 Wheat.) at 46.

[30] 1 ANNALS OF CONG. 833 (1789) (Joseph Gales ed., 1834) (statement of Rep. James Jackson).

[31] Bank of the U.S. v. Halstead, 23 U.S. (10 Wheat.) 51, 58–59 (1825); *see* Bellia & Clark, *supra* note 19, at 613–14, 614 n.23.

[32] *See* Claire Priest, *Creating an American Property Law: Alienability and Its Limits in American History*, 120 HARV. L. REV. 385, 396–97 (2006).

[33] *Id.*; *see* Bellia & Clark, *supra* note 19, at 613–14.

[34] *See* Paul V. Niemeyer, Lecture, *Revisiting the 1938 Rules Experiment*, 71 WASH. & LEE L. REV. 2157, 2159–60 (2014).

the same time, this divergence created parallel and inconsistent legal systems within the same geographic area.[35] Compounding the confusion, state law in 1789 was often underdeveloped, unclear, or highly specialized.[36] But as state law evolved, federal courts were forced to apply the outdated rules that the states themselves had abandoned. Worse still, as time passed, the attorneys and judges applying these outdated rules became less familiar with their intricacies.[37] Rounding out the problems, the spare text of the Process Acts failed to differentiate between process and substance, necessitating further legislative intervention and clarification by the Supreme Court.[38]

These issues only grew in size and complexity as more states were added to the Union. In 1828, Congress was forced to ratify a third act on judicial process — the Process Act of May 19, 1828[39] ("1828 Act") — to fix a date for uniformity for newly admitted states. Paralleling the Process Act of 1792, the 1828 Act provided that "the forms and modes of proceeding" in new states would track the process of their state supreme courts for suits at common law as of 1828.[40] The 1828 Act thus formalized a multitrack static system: Former colonies followed common law practice from 1789, while newly admitted states followed their processes as of 1828.[41] The 1828 Act replicated the Process Act of 1792's grant of discretion, noting federal courts' adherence to state practice would be "subject . . . to such alterations and additions" as they "in their discretion, deem[ed] expedient" or to regulations that the Supreme Court "th[ought] proper."[42] Thus, under the 1828 Act, inferior federal courts could deviate from state practice and the Supreme Court could prescribe standardized federal procedure rules.

B. The Passage of the Act of Aug. 23, 1842

By 1842, judicial reform was swirling in the air. In January, Justice Story, writing for the unanimous Supreme Court, authored *Swift v. Tyson*,[43] which held that federal courts deciding matters not specifically addressed by state law had the authority to develop federal common law.[44] *Swift* became an important articulation of the federal general common law — though, at the time, it was simply a routine statement

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35 *See id.*

36 *See, e.g.*, United States v. Knight, 39 U.S. (14 Pet.) 301, 314–15 (1840) (acknowledging practical difficulties in applying state procedures from 1789).

37 *See, e.g.*, *id.*

38 *See, e.g.*, Act of May 30, 1794, ch. 34, 1 Stat. 370; Act of May 28, 1796, ch. 38, 1 Stat. 482; Act of Jan. 6, 1800, ch. 4, 2 Stat. 4; *see also* United States v. Reid, 53 U.S. (12 How.) 361, 363 (1852) (determining whether a state statute was procedural or substantive).

39 Ch. 68, 4 Stat. 278.

40 *Id.* § 1.

41 *Id.* § 3 (exempting Louisiana, *id.* § 4).

42 *Id.* § 1.

43 41 U.S. (16 Pet.) 1 (1842).

44 *Id.* at 22.

of existing practice.[45] The Court's pronouncements on the substance of general law matched its focus on the process of the development of civil law. Two months after *Swift*, the Court presided over the promulgation of an updated set of ninety-two federal rules of equity, slated to go into effect that August.[46]

Like the Court, Congress was focused on procedural reform — but Congress's target was state courts and, indirectly, the power of the states themselves. During the first session, Congress reformed the Bankruptcy Act of 1841[47] to provide a dual set of procedures for state bankruptcy.[48] The next August, Congress passed the Habeas Corpus Act of 1842,[49] which allowed federal courts to review the legality of state court detention of some foreign nationals.[50] The Act highlighted the increasingly supervisory posture of federal courts over their state counterparts.[51] Most of that year's debates were focused on the Apportionment Act of 1842,[52] which contracted the number of members of the House and adopted a uniform system for the election of representatives from each state.[53] In the context of simmering tensions between the North and South, the Act appeared to limit the power of state legislatures to control the selection of representatives.[54] All three reforms shared one common thread: The 27th Congress was interested in reducing the power of the states — as fast as possible, in as many domains as possible.

Congress turned its focus to the federal courts in the spring of 1842. On March 19, Congress ratified a bill to investigate the judiciary's use of federal funds.[55] Congress was concerned about the sharp rise in judicial spending. As it noted, "the judicial expenses of the Government

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[45] *See generally* Robert H. Jackson, *The Rise and Fall of* Swift v. Tyson, 24 A.B.A. J. 609 (1938) (explaining that *Swift*'s doctrinal breadth "was uncalled for by the case itself" and that the "consideration [of conformity] did not seem to be of controlling weight," *id.* at 610); Erle A. Kightlinger, Swift v. Tyson *Overruled*, 13 IND. L.J. 564 (1938) (describing *Swift* as a "mine run case involving simple questions . . . [that] provide[d] the vehicle for the expression of far reaching judicial doctrine," *id.* at 564). It remains unclear whether *Swift* was discussing authority to develop federal general common law or the judiciary's ability to make independent judgments about general common law. *See* Stephen E. Sachs, *Finding Law*, 107 CALIF. L. REV. 527, 559 (2019).

[46] *See* Equity R., 42 U.S. (1 How.) xli (1842), *reprinted in* RULES OF PRACTICE FOR THE COURTS OF EQUITY 41 (Francis Hopkinson ed., Phila., John Young 1842) [hereinafter 1842 Equity Rules] (publishing equity rules).

[47] Ch. 9, 5 Stat. 440 (repealed 1843).

[48] *See id.* § 1; DAVID A. SKEEL, JR., DEBT'S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA 25–27 (2001).

[49] Ch. 257, 5 Stat. 539 (codified as amended at 28 U.S.C. § 2241(c)(4)).

[50] *See id.*

[51] *See id.*; Jake Karr, *Federalism, Foreign Affairs, and State Courts: The Habeas Corpus Act of 1842 and the Permanent Debate over the Status of International Law*, 50 N.M. L. REV. 320, 325 (2020).

[52] Ch. 47, 5 Stat. 491; *see* Michele Rosa-Clot, *The Apportionment Act of 1842: "An Odious Use of Authority*," 31 PARLIAMENTS, ESTS. & REPRESENTATION 33, 43–45 (2011).

[53] *See* Apportionment Act of 1842, Ch. 47, 5 Stat. 491.

[54] *See* Rosa-Clot, *supra* note 52, at 43–45.

[55] JUDICIAL EXPENSES OF THE GOVERNMENT OF THE UNITED STATES, H.R. DOC. NO. 27-25, at 1–2 (1842) [hereinafter PENROSE REPORT].

have of late years been greatly augmented," rising from $200,900 in 1824 to $471,000 in 1840.[56] In 1842, Congress ordered "an investigation of the subject, carefully conducted, [which] would lead to a detection of . . . abuses in its exercise [of funds]," [57] and appointed a Treasury official to audit the judiciary.[58] That December, the official reported that the spending was largely routine, attributing the increase to population growth, new circuit courts, and the volume of litigation.[59]

But he also observed that the linkage between state and federal procedure had resulted in a shortfall in fees.[60] Under the Process Acts, federal courts were required to charge the same fees as their state counterparts, despite the fact that they handled a higher volume of traffic and more complex caseload with additional expenses for travel.[61] This "practical defect"[62] — the requirement that federal courts match state court fees — prevented federal courts from adopting self-sustaining fee structures.[63]

As Treasury officials grilled law clerks on their travel habits, Congress took up the question of federal civil procedure. In August of 1842, the Senate Judiciary Committee drafted text for a bill that would confer additional discretion on the Supreme Court to author procedural rules for federal courts.[64] Section 6 of the bill proposed that:

> [T]he Supreme Court shall have full power and authority, from time to time, to prescribe, and regulate, and alter, the forms of writs and other process to be used and issued in the district and circuit courts of the United States, and the forms and modes of framing and filing libels, bills, answers, and other proceedings and pleadings, in suits at common law or in admiralty and in equity . . . and also the forms and modes of taking and obtaining evidence, and of obtaining discovery, and generally the forms and modes of proceeding to obtain relief . . . , and generally to regulate the whole practice of the said courts, so as to prevent delays, and to promote brevity and succinctness in all pleadings and proceedings therein, and to abolish all unnecessary costs and expenses in any suit therein.[65]

Section 7 expanded on this theme, focusing on the courts' fee structure: "[F]or the purpose of further diminishing the costs and expenses . . . the Supreme Court shall have full power and authority . . . to make and

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[56] *Id.* at 1.
[57] *Id.*
[58] *Id.* at 2.
[59] *See id.* at 6.
[60] *See id.* at 13–16.
[61] *See id.*
[62] *Id.* at 13; *see id.* at 15.
[63] *See id.* at 15.
[64] Act of Aug. 23, 1842, ch. 188, §§ 6–7, 5 Stat. 516, 518; *see also* S. 259, 27th Cong. (as reported by S. Comm. on the Judiciary, May 17, 1842).
[65] Act of Aug. 23, 1842 § 6.

prescribe regulations to the said district and circuit courts, as to the taxation and payment of costs in all suits and proceedings therein . . . ."[66]

In the context of the Acts of 1789, 1792, and 1828, the text is nothing short of remarkable.

First, the Act conferred unfettered discretion to regulate process on the Supreme Court. The Act granted "full power and authority" to the Supreme Court to regulate "the whole practice" of the courts, including pleadings and proceedings "in suits at common law or in admiralty and in equity."[67] Though the Act did not repeal the system of static conformity, it made no mention of the Process Acts' requirement that the "modes of proceeding" for "suits at common law" match those used in state high courts.[68] Instead, it broadened the discretion afforded to the Supreme Court to depart from state court process into a rule of Court-led regulation. After the Act, the degree of reliance on state court process would have depended solely on the Court's appetite to regulate procedure — though, as it transpired, the Court had little interest in doing so.[69]

Second, the Act broadened the categories of procedure that the Supreme Court controlled. The Act conferred authority on the Court to regulate procedure for equity and admiralty,[70] dispensing with the Process Acts' reference to "civil law."[71] It additionally empowered the Court to promulgate rules regulating the "forms and modes" of evidence, discovery, and remedies.[72] In short, it conferred total authority on the Court over the categories of procedure that earlier Acts had carefully withheld.

Third, the definition of "modes of proceeding" appears more expansive than that of previous Acts, now encompassing "the whole practice of the [federal] courts."[73] Where earlier Acts carefully exempted the "style, and modes of process and rates of fees" of "forms of writs and executions,"[74] this Act suggested that the Court had discretion over all components of "writs and other process," including the "framing and filing" of "libels, bills, answers, and other proceedings and pleadings."[75] The early drafts of the Act seem to confer on the Supreme Court the ability to pass regulations concerning the day-to-day practice — not just the procedure — of lower courts.[76] Had the language passed, the

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[66] *Id.* § 7.

[67] *Id.* § 6.

[68] *Id.*; *see* Process Act of Sep. 29, 1789, ch. 21, § 2, 1 Stat. 93, 93; Process Act of May 8, 1792, ch. 36, § 2, 1 Stat. 275, 276.

[69] *See infra* Part III, pp. 1178–83.

[70] Act of Aug. 23, 1842 § 6.

[71] Process Act of Sep. 29, 1789 § 2; *see* Process Act of May 8, 1792 § 2.

[72] Act of Aug. 23, 1842 § 6.

[73] *Id.*

[74] Process Act of Sep. 29, 1789 § 2; *see* Process Act of May 8, 1792 § 2.

[75] Act of Aug. 23, 1842 § 6.

[76] *See* CONG. GLOBE, 27th Cong., 2d Sess. 723 (1842).

Supreme Court would likely have obtained the type of direct supervisory power never explicitly granted in the Constitution.[77]

Finally, the Act's text reveals an unusual self-awareness about its purpose. Section 6 provided the Supreme Court with regulatory authority "to prevent delays, and to promote brevity and succinctness in all pleadings and proceedings therein, and to abolish all unnecessary costs and expenses in any suit therein."[78] Section 7 hammered home the point, granting the Supreme Court the authority to dictate a schedule for fees and costs to the circuit courts.[79] In the context of Congress's audit, section 7 seemed to forestall the concern that the forced symmetry between state and federal fees had left the judiciary underfunded.[80] At a minimum, the centralization of financial control over the courts would streamline oversight, allowing the Court to report financial figures directly to Congress.[81]

The significance of the Act of Aug. 23, 1842 was not lost on Congress. The Act passed the Senate Judiciary Committee by a narrow margin, with Whigs supporting and Democrats opposing the Act.[82] This breakdown reflected concerns about state courts' judicial autonomy posed by the delegation of open-ended procedural rulemaking authority to the Supreme Court.[83] The Democrats were additionally suspicious of the growth of federal courts that could accompany a delegation of financial control to the Supreme Court.[84] This fault line found purchase in the alterations to the draft proposal: The Judiciary Committee engaged in heated debate about the provisions on judicial funding, then altered a section on maritime crimes that were traditionally set by judges.[85]

Senator Berrien, the Chair of the Senate Judiciary Committee, championed the Act.[86] A Georgia Whig, Senator Berrien had been the Attorney General under President Jackson, and had served as a state trial judge and a justice on the Georgia Supreme Court.[87] In Congress, he was regarded as a staunch supporter of states' rights, especially during

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77 *See* Amy Coney Barrett, *The Supervisory Power of the Supreme Court*, 106 COLUM. L. REV. 324, 325 (2006) ("The Supreme Court has never justified its claim to power over inferior court procedure.").

78 Act of Aug. 23, 1842 § 6.

79 *See id.* § 7.

80 *See* PENROSE REPORT, *supra* note 55, at 16; Ward v. Chamberlain, 67 U.S. (2 Black) 430, 442–43 (1863).

81 *See* PENROSE REPORT, *supra* note 55, at 15.

82 *See* CONG. GLOBE, 27th Cong., 2d Sess. 723 (1842) (recording eighteen yea and fifteen nay votes).

83 *See id.*

84 *See id.*

85 *See id.*

86 *See id.*

87 Charles L. Ruffin, *Georgia Legal Legend: U.S. Attorney General John Berrien*, GA. BAR J., Aug. 2013, at 4, 4–5.

the nullification crisis, and an outspoken advocate for slavery.[88] At first glance, Senator Berrien should have opposed a bill that threatened to reduce the importance of the procedural rules of state supreme courts and federalize rulemaking power. But Senator Berrien's awareness of the practical difficulties of applying state high court rules could have heightened his interest in creating a unified federal system. Similarly, Senator Berrien might have viewed efforts to outsource Congress's power over procedural rules favorably, especially at a time when Congress was divided on the question of slavery.[89]

Senator Silas Wright of New York — a darling of the Democratic Party — spearheaded the opposition.[90] Before entering professional politics, Senator Wright had cut his teeth as a criminal lawyer in the rough-and-tumble state courts of rural New York.[91] He was thus an expected opponent of the Act: He likely respected the state procedural rules that had launched his career,[92] and he may have been aware that New York was poised to be a trailblazer in modernizing its rules of civil procedure.[93] Suspicious of the federal government and supportive of state courts, he likely viewed the Act as an unwise centralization of procedural authority in the Supreme Court.

The exchanges between Senator Berrien and Senator Wright underscored the primary fault line that divided Congress: The legislature was concerned about the transfer of its power to the courts. As Senator Wright explained, he objected to the Act "on account of its transfer of the legislative power of Congress to the Supreme Court, in relation to the regulation of the district courts, with regard to the forms of writs and process, &c."[94] Senator Buchanan echoed this criticism: The Act's "tendency was to give the control of legislation to the Supreme Court. It was establishing a principle of transferring the legislative power of Congress to the Supreme Court . . . ."[95] In modern parlance, the discussion of the "transfer[of] legislative power"[96] encompasses the same

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[88] *Id.* at 5; *see* Thomas P. Govan, *John M. Berrien and the Administration of Andrew Jackson*, 5 J.S. HIST. 447, 464–65 (1939); M. Philip Lucas, *Berrien, John Macpherson*, *in* 2 AMERICAN NATIONAL BIOGRAPHY 683, 684 (John A. Garraty & Mark C. Carnes eds., 1999).

[89] Ruffin, *supra* note 87, at 5.

[90] *See* JOHN S. JENKINS, LIVES OF THE GOVERNORS OF THE STATE OF NEW YORK 726–50 (Auburn, Derby & Miller 1851); CONG. GLOBE, 27th Cong., 2d Sess. 723 (1842).

[91] *See* JENKINS, *supra* note 90, at 732.

[92] *See id.* at 728, 732.

[93] *See* COMM. ON THE N.Y. STATE CONST., N.Y. STATE BAR ASS'N, THE JUDICIARY ARTICLE OF THE NEW YORK STATE CONSTITUTION — OPPORTUNITIES TO RESTRUCTURE AND MODERNIZE THE NEW YORK COURTS 13–14 (2017); Kellen R. Funk, *Equity Without Chancery, The Fusion of Law and Equity in the Field Code of Civil Procedure, New York, 1846–76*, 36 J. LEGAL HIST. 152, 152 (2015).

[94] CONG. GLOBE, 27th Cong., 2d Sess. 723 (1842) (statement of Sen. Wright).

[95] *Id.* (statement of Sen. Buchanan).

[96] *Id.*

concerns underlying the nondelegation doctrine, which bars each branch from authorizing another to use its exclusive powers.[97]

The focus on the constitutionality and advisability of the "transfer[of] legislative power" was particularly unusual for the time. By the 1820s, Congress and the Supreme Court agreed that the delegation of rulemaking authority from Congress to the courts posed few separation-of-powers concerns. As Chief Justice Marshall had already observed in *Wayman v. Southard*[98]: "That the legislature may transfer this discretion to the [c]ourts, and enable them to make rules for its regulation, will not, we presume, be questioned."[99] Congress acted on this understanding in the Process Act of May 19, 1828, which enabled circuit courts to make "alterations and additions" to state court procedures "in their discretion" and permitted the Supreme Court to promulgate "regulations" whenever it "shall think [them] proper."[100] The legislative notes to the 1828 Act reference *Wayman* by name, reading the case to confirm that:

> Congress has, by the [C]onstitution, exclusive authority to regulate proceedings in the courts of the United States; and the states have no authority to control those proceedings; except so far as the state process acts are adopted by Congress, *or by the courts of the United States, under the authority of Congress*.[101]

The 1828 Act thus seemed to put the concerns about "transfer" to rest: Congress retained exclusive authority over judicial process, even when it permitted the courts to "control those proceedings . . . under [its] authority."[102]

The debates around legislative transfer in the 1842 Act may reflect a renewed interest in Founding-era separation-of-powers debates and popular awareness about principles of nondelegation. One source of inspiration might have been John Locke's *Second Treatise*,[103] which many of the individuals serving in the 27th Congress likely grew up reading in the republican period immediately following the

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97 Alexander Volokh, *Judicial Non-Delegation, the Inherent-Powers Corollary, and Federal Common Law*, 66 EMORY L.J. 1391, 1411 (2017); Keith E. Whittington & Jason Iuliano, *The Myth of the Nondelegation Doctrine*, 165 U. PA. L. REV. 379, 390–91 (2017).

98 23 U.S. (10 Wheat.) 1 (1825)

99 *Id.* at 44–45; *see also id.* at 49 (treating federal control over federal court procedures as "one of those political axioms" whose explanation "would be a waste of argument"); Note, *Equity and the Power of Procedural Supervision*, 137 HARV. L. REV. 1425, 1428–33 (2024) (discussing "Section 17 of the Judiciary Act of 1789[, which] gave federal courts control over their own local procedures," *id.* at 1428 (footnote omitted)).

100 Process Act of May 19, 1828, ch. 68, § 1, 4 Stat. 278, 281.

101 *Id.* n.(a) (emphasis added).

102 *Id.* n.(a).

103 *See generally* JOHN LOCKE, TWO TREATISES OF GOVERNMENT (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

Revolutionary War.[104] The Founders may have provided a second source of inspiration. In 1840, Madison's *Notes on the Debates in the Federal Convention* were published and widely read by members of Congress, helpfully accompanied by a popular reprinting of the *Federalist Papers*.[105] Both sources reflect the Founders' preoccupation with building a government with "complete separation of the judicial from the legislative power."[106]

Prudential concerns about the maze of federal rules outweighed the theoretical concerns about nondelegation. After lengthy debate, Senator Berrien and the Whigs carried the day. On August 23, 1842, the Act narrowly passed along a party-line vote — and the story of the rules of the rules of the game entered a new chapter.[107]

II. THE IMPLEMENTATION OF THE ACT OF AUG. 23, 1842 IN ADMIRALTY, EQUITY, AND EVIDENCE

The heated debate over the Act of Aug. 23, 1842 implied that Congress expected the Supreme Court to immediately begin centralizing procedural rulemaking authority and promulgating rules in equity, admiralty, evidence, and civil procedure. But the Act's passage was met with inaction from the Justices, who scarcely acknowledged its existence. The Court promulgated a set of admiralty rules in 1845, revised the existing equity rules using its grant from 1792, made no move to regulate procedure for suits at common law, and never acknowledged the existence of the grant to make rules concerning evidence and discovery.

A. Admiralty

The Federal Rules of Admiralty are the only successful exercise of the rulemaking grant of 1842.

At the Founding, Congress granted the Supreme Court the authority to establish rules governing equity and admiralty in the 1792 Process Act.[108] The Act mandated that proceedings in equity and admiralty would follow the practices of the English Court of Chancery, "subject however to such alterations and additions" as the federal courts would

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[104] *See* BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 27–30 (50th anniversary ed. 2017); ALAN GIBSON, INTERPRETING THE FOUNDING 13–14 (2d ed. 2009); CLAIRE RYDELL ARCENAS, AMERICA'S PHILOSOPHER: JOHN LOCKE IN AMERICAN INTELLECTUAL LIFE 60 (2022).

[105] Martin H. Quitt, *Congressional (Partisan) Constitutionalism: The Apportionment Act Debates of 1842 and 1844*, 28 J. EARLY REPUBLIC 627, 627 (2008). *See generally* JAMES MADISON, THE PAPERS OF JAMES MADISON (Henry D. Gilpin ed., N.Y., J. & H.G. Langley 1841) (the original publication).

[106] *E.g.*, THE FEDERALIST NO. 79, at 472 (Alexander Hamilton) (Clinton Rossiter ed., 2003).

[107] Act of Aug. 23, 1842, ch. 188, § 6, 5 Stat. 516, 518.

[108] Process Act of May 8, 1792, ch. 36, § 2, 1 Stat. 275, 276.

"deem expedient" and regulations that the Supreme Court could prescribe at its discretion by rule.[109]

But the Supreme Court never used its rulemaking authority under the Process Act of 1792 to prescribe rules in admiralty.[110] It waited to receive reassurance of its authority in 1842, then published *Rules of Practice of the Courts of the United States in Causes of Admiralty and Maritime Jurisdiction on the Instance Side of the Court* three years later.[111] The 1845 admiralty rules proved flexible enough to weather the expansions in maritime trading volumes over the nineteenth century, remaining largely unchanged until the turn of the twentieth century.[112]

Though the federal rules remained popular, the Act of Aug. 23, 1842 ultimately became an enemy of the admiralty bar. By the early 1900s, a network of federal statutes governing maritime conduct had complicated the application of conflicting federal admiralty rules. In civil and criminal procedure, Congress had addressed conflicts between federal rules and outdated statutes by granting the Court the ability to supersede conflicting statutes.[113] Admiralty reformers now demanded the same: "[U]nless and until [the 1842 Act's] limitation upon the Court's rule-making power is broadened"[114] to allow the Court to "trench upon those features of practice which are expressly regulated by an Act of Congress,"[115] reformers predicted that "the admiralty practice will necessarily remain different from the civil practice in the federal courts."[116] Congress responded to this concern by granting the Supreme Court the ability to "supersede statutes in regulating the practice in admiralty and maritime cases."[117] This reform aligned the Court's power over federal admiralty statutes with its power over civil and criminal ones.[118]

While the Court occasionally superseded conflicting statutes, it did little to modernize the rules themselves. Without altering the 1845 provisions, the Court recompiled and promulgated the rules under two new editions in the 1920s and 1950s and modestly revised the rules to accommodate relevant provisions of the Federal Rules of Civil Procedure.[119]

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109 *Id.*

110 *See* Robert E. Bunker, *The New Federal Equity Rules*, 11 MICH. L. REV. 435, 436 (1913); *Rules: Pre-1934 Rulemaking*, FED. JUD. CTR., https://www.fjc.gov/history/work-courts/rules-pre-1934-rulemaking [https://perma.cc/3V6W-XVG7].

111 *See* 44 U.S. (3 How.) v–xiv (1845); *Rules: Pre-1934 Rulemaking*, *supra* note 110.

112 *Rules: Pre-1934 Rulemaking*, *supra* note 110.

113 28 U.S.C. § 2072 (civil); Act of June 29, 1940, ch. 445, § 1, 54 Stat. 688, 688 (criminal).

114 Brainerd Currie, *Unification of the Civil and Admiralty Rules: Why and How*, 17 ME. L. REV. 1, 5 (1965) (quoting 2 ERASTUS C. BENEDICT, THE LAW OF AMERICAN ADMIRALTY iii–iv (Arnold Whitman Knauth ed., 6th ed. 1940)).

115 *Id.* at 4–5 (quoting BENEDICT, *supra* note 114, at iii–iv).

116 *Id.* at 5 (quoting BENEDICT, *supra* note 114, at iii–iv).

117 *Id.* (citing, inter alia, 28 U.S.C. § 2073 (1964)); *see* JAMES W. MOORE, COMMENTARY ON THE U.S. JUDICIAL CODE 633–37 (1949).

118 *See* § 2073 (codifying the framework set out in the Judicial Code of 1948).

119 *See* Currie, *supra* note 114, at 4–5.

Consequently, even today, admiralty rules' "core is still the set of rules drafted by Mr. Justice Story in 1845."[120]

B. Equity

If the failures of the federal admiralty rules were attributed to the Act of Aug. 23, 1842, the successes of the equity rules are misattributed to it.

The Supreme Court first exercised its authority under the Judicial Process Acts to regulate equity practice in 1822, when it issued thirty-three rules to govern suits in equity.[121] Though the rules were published in the Supreme Court reporter, the preface to the Equity Rules of 1912 indicates that the circulation and uptake of the 1822 version of the equity rules may have been limited and informal.[122] Yet, due to its lengthy historical relationship to English law, equity practice remained relatively clear and standardized throughout the early nineteenth century.[123]

Twenty years later, on March 2, 1842, the Court promulgated a new, expanded set of equity rules scheduled to take effect on August 1 of that year.[124] Rule 92 — a rule of practice later removed from the numbering of the rules with force and effect[125] — encouraged circuit courts to "in [their] discretion" adopt these rules at any time before their summer implementation.[126] The 1842 Rules have an even more uncertain distribution than the 1922 Rules[127]: Historians disagree about whether they were published in 17 Peters, 1 Howard, or another official reporter.[128]

It is tempting to assume that the second set of Federal Equity Rules represents an immediate exercise of the rulemaking authority conferred in the Act. But Congress passed the Act on August 23 of that year[129] — five months *after* the Supreme Court's March circulation of the equity rules and over three weeks *after* the rules were fully adopted and implemented. The relationship between the 1842 Rules and the 1842 Act remains uncertain. The revision may have accommodated the growing body of general law, considered by Justice Story in February of 1842 in *Swift*.[130] It may have been a decades-long process that coincidentally culminated the same year as Congress debated the Act in 1842. Or, perhaps, it was one of the impetuses for Congress's consideration of the

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120 *Id.* at 4.

121 *See* Equity R., 20 U.S. (7 Wheat.) v (1822).

122 Equity R., 226 U.S. 627, 629 (1912) (effective Feb. 1, 1913); *see also* Law & Equity Act of 1915, ch. 90, 38 Stat. 956 (1915).

123 *See generally* Thomson v. Wooster, 114 U.S. 104, 112 n.* (1885) (clarifying the application of British practice in American courts).

124 1842 Equity Rules, *supra* note 46, at xli.

125 Bunker, *supra* note 110, at 439 n.10.

126 1842 Equity Rules, *supra* note 46, at xli (Rule 92).

127 *See* Bunker, *supra* note 110, at 438–39 n.9.

128 *Id.*

129 Act of Aug. 23, 1842, ch. 188, 188, 5 Stat. 516, 516.

130 *See* Swift v. Tyson, 41 U.S. (16 Pet.) 1, 8 (1842).

value of standardized rules. Whether causal, coincidental, or predictive, the Equity Rules were promulgated as an adjunct to the Supreme Court's rulemaking authority under the Process Acts, not the Act of Aug. 23, 1842.

If the role of the Act of Aug. 23, 1842 in standardizing equity practice should not be overstated, neither should the Supreme Court's. Both the 1822 and 1842 Equity Rules defaulted to English Chancery practice. The 1822 version directed that in instances when the prescribed rules did not apply, "the practice of the Circuit Courts shall be regulated by the practice of the High Court of Chancery in England."[131] The 1842 Rules replicated this provision but developed the circumstances for departure from English tradition, recommending British practice only "so far as [it] may reasonably be applied consistently with the local circumstances and local convenience of the district, where the court is held, not as positive rules, but as furnishing just analogies to regulate the practice."[132] The rule suggested that British practice was persuasive but not binding where it conflicted with local rules or appeared unreasonable. But the Court provided little additional guidance on the determination of "reasonableness" or the degree of conflict with local rules necessary to justify deviations.[133] Equity practice, therefore, remained shaped by British law and local law, with the Court's regulations serving as a general framework.

The 1842 Rules governed equity practice in federal courts for over seventy years. The Court amended the 1842 Rules periodically, diagnosing defects and omissions based on practice and importing new revisions to the English Chancery rules.[134] Despite growing recognition of the Rules' shortcomings, the legal community's natural inclination toward precedent and established procedure delayed more radical reform.[135] As the ranks of dissatisfied equity practitioners swelled, the Court in 1912 replaced the "archaic"[136] 1842 Equity Rules with a modernized and extended version that remains in effect today.[137]

C. Evidence

The Court ignored Congress's grant of rulemaking power over "the forms and modes of taking and obtaining evidence, and of obtaining

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131 *See* Equity R., 20 U.S. (7 Wheat.) xiii (1822) (Rule 33).

132 1842 Equity Rules, *supra* note 46, at 40 (Rule 90).

133 *See* Thomson v. Wooster, 114 U.S. 104, 112 n.* (1885) (examining the "present practice" of the chancery courts and cataloguing "the most authoritative work[s]" (quoting 1842 Equity Rules, *supra* note 46, at 40 (Rule 90))).

134 *See* Bunker, *supra* note 110, at 441.

135 *Id.*

136 RICHARD H. FALLON, JR., ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 561 (7th ed. 2015).

137 *See* Equity R., 226 U.S. 627, 629 (1912) (effective Feb. 1, 1913); *see also* Law and Equity Act of 1915, ch. 90, 38 Stat. 956 (codified as amended in scattered sections of 28 U.S.C.).

discovery, and generally the forms and modes of proceeding to obtain relief."[138] Despite the 1842 grant, the Court did not promulgate federal evidence rules until the late twentieth century. When it did so, the rules' statutory basis became a topic of heated academic debate.[139] In that context, the Supreme Court's ongoing failure to acknowledge Congress's grant of procedural authority in 1842 is perplexing.

Congress long treated evidence as a special category of procedural rules. In 1872, Congress ordered lower courts to "conform" evidence practice in federal courts to existing state practices for civil cases — but, crucially, did not "alter the rules of evidence under the laws of the United States, and as practiced in the courts thereof."[140] This deliberate exclusion reflected evidence's status as "an area [of law] that so often implicates matters of substantive state law and the constitutional right to the jury."[141]

That changed in the late twentieth century. In 1972, the Supreme Court used the famous rulemaking grant from the 1934 Rules Enabling Act[142] to promulgate the Federal Rules of Evidence (FRE).[143] The forty-year gap between the Enabling Act and FRE suggests that the Court may have harbored constitutional and practical doubts about the value of a unified federal evidence regime.[144] The main source of doubt was statutory: The Enabling Act never granted the Court the explicit power to promulgate evidence rules.[145] In light of the Act of 1872,[146] which carved out evidence for special treatment, the Court likely suspected that the omission was deliberate.[147]

But the Act of Aug. 23, 1842 neatly addressed these issues. The Act confirmed that Congress viewed evidence and discovery as equally procedural as pleading and motions practice, referencing civil and evidentiary matters in the same extended list.[148] And it provided an explicit statutory basis for the promulgation of evidence rules, all but directing the Court to do so.[149] The failure to mention the Act during debates

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138 Act of Aug. 23, 1842, ch. 188, § 6, 5 Stat. 516, 518.

139 *See* Stuart M. Lockman, *Congressional Discretion in Dealing with the Federal Rules of Evidence*, 6 U. MICH. J.L. REFORM 798, 798 & n.4, 816 (1973).

140 Act of June 1, 1872, ch. 255, § 5, 17 Stat. 196, 197.

141 Ethan J. Leib, *Are the Federal Rules of Evidence Unconstitutional?*, 71 AM. U. L. REV. 911, 916–17 (2022).

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

143 Timothy P. Glynn, *Federalizing Privilege*, 52 AM. U. L. REV. 59, 87 (2002).

144 *See* Daniel J. Capra & Liesa L. Richter, *Long Live the Federal Rules of Evidence!*, 31 GEO. MASON L. REV. 1, 14–15 (2024).

145 *See id.* at 16.

146 Act of June 1, 1872, ch. 255, 17 Stat. 196.

147 *See* Order of Nov. 20, 1972, 409 U.S. 1132, 1132–33 (1972) (Douglas, J., dissenting) ("I doubt if rules of evidence are within the purview of the [Rules Enabling Act] . . . . The words 'practice and procedure' in the setting of the Act seem to me to exclude rules of evidence.").

148 *See* Act of Aug. 23, 1842, ch. 188, § 6, 5 Stat. 516, 518 (describing evidence and discovery rules alongside civil pleadings).

149 *Id.*

about the legitimacy of the Court's rulemaking authority suggests that the Act had been forgotten — or, perhaps, discredited by lack of use.[150] At minimum, the extensive discussion about the basis for the FRE calls for further examination of the untapped supply of discretion provided by the 1842 Act.

III. JUSTIFICATIONS FOR THE ABSENCE OF RULES OF CIVIL PROCEDURE

While the Supreme Court developed and modified rules for equity proceedings, it declined to exercise similar authority for suits at common law. The Court's reluctance to extend its rulemaking authority to common law cases reflects considerations rooted in both principle and practicality.

A. Federalism Concerns in the Age of Jackson

The Court's decision not to promulgate common law rules should be understood within the broader context of federalism's evolution during the first half of the nineteenth century. The early decades of the Republic were marked by an ongoing tug-of-war between federal authority and state sovereignty that profoundly influenced judicial policy. This tension translated into several landmark Marshall Court opinions that expanded the power of federal courts while acknowledging their limits.

The 1820s and 1830s witnessed intense conflicts over the treatment of federal law in the states — the so-called nullification crisis.[151] The crisis over state enforcement of federal law hardened into an enduring fissure in American federalism with the admission of new states. Newly admitted common law states had not followed America's post-ratification approach to equity and admiralty;[152] frontier states clung to their distinctive property rights and land use jurisprudence;[153] and Louisiana stubbornly retained its French civil law system.[154] Divergence between the states' home-grown legal systems therefore threatened the

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[150] *Cf.* John Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, LAW & CONTEMP. PROBS., Winter 1984, at 9, 22 n.88 (noting how "the Court did not use [the] authority" under the Act of Aug. 23, 1842 to regulate attorney fees); Dowling v. Isthmian S.S. Corp., 184 F.2d 758, 764 (3d Cir. 1950) (noting how power under the Act of Aug. 23, 1842 to prescribe discovery and evidence practice in admiralty "ha[d] not been exercised").

[151] *See* WILLIAM W. FREEHLING, PRELUDE TO CIVIL WAR: THE NULLIFICATION CONTROVERSY IN SOUTH CAROLINA, 1816–1836, at 1–2 (1966).

[152] *See supra* notes 39–41 and accompanying text (discussing the Act of 1828's conformity date for newly admitted states).

[153] *See* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 135 (4th ed. 2019) (arguing the "general attitudes" of "frontier life" informed frontier states' approach to law (quoting William Wirt Blume & Elizabeth Gaspar Brown, *Territorial Courts and Law: Unifying Factors in the Development of American Legal Institutions* (pt.2), 61 MICH. L. REV. 467, 535 (1963))).

[154] *See supra* note 41 and accompanying text.

uniformity of enforcement of federal law, as well as the predictability of federal procedure.[155]

This historical context explains the Court's reluctance to impose a uniform system of procedure on courts operating in states with substantially different legal cultures and political sensibilities. By the early 1840s, the Court had waded into several disputes that required it to pronounce on the relationship and allocation of power between the state and federal governments. In *McCulloch v. Maryland*,[156] a case that largely affirmed the power of the federal government,[157] Chief Justice Marshall carefully framed the federal government as "limited in its powers" but "supreme within its sphere of action."[158] The Court also balanced this tension in *Martin v. Hunter's Lessee*[159] and *Cohens v. Virginia*,[160] affirming federal courts' authority to review state court decisions while acknowledging that federal courts must respect state judicial processes.[161] The Court walked a similar line in *Gibbons v. Ogden*,[162] weighing federal authority over interstate commerce against inherent limitations on that power.[163]

These cases dragged the Court into the tinderbox politics of the period and forced the Justices to spend precious political capital. Against this backdrop, "[t]here seems to have been a recognition of the danger of providing for conformity with . . . unknown and unknowable state legislation."[164] As Chief Justice Marshall explicitly acknowledged, the federal structure of the courts created the "peculiar situation" where overlapping court systems governed a diverse people with "distinct societies, already possessing distinct systems, and accustomed to laws, which, though originating in the same great principles, had been variously modified."[165] The Supreme Court may have been loath to entrench itself deeper in the political infighting about the balance of state and federal control that characterized the period.

These federalism concerns may have influenced the Supreme Court's selective implementation of the rulemaking authority granted by the Act in 1842. The Court's imposition of a uniform set of procedural rules for common law cases would have represented a significant federal intrusion into an area traditionally left to state determination. While equity

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155 *See* FRIEDMAN, *supra* note 153, at 127–45 (surveying legal traditions).

156 17 U.S. (4 Wheat.) 316 (1819).

157 *Id.* at 436.

158 *Id.* at 405.

159 14 U.S. (1 Wheat.) 304 (1816).

160 19 U.S. (6 Wheat.) 264 (1821).

161 *See id.* at 447.

162 22 U.S. (9 Wheat.) 1 (1824).

163 *See id.* at 187, 189–91.

164 Edgar B. Tolman, *The Origin of the Conformity Idea, Its Development, the Failure of the Experiment, the Evils Which Resulted Therefrom, and the Cure for Those Evils*, 23 A.B.A. J. 971, 972 (1937).

165 Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 46 (1825).

rules had always retained a federal character due to their English Chancery roots, and the rules of admiralty had become a specialized field, common law procedure was deeply intertwined with local legal cultures.[166] Sensitive to the fragile compromise the legislation represented, the Court may have recognized that reforms to common law procedure might provoke further opposition from states' rights advocates, who had already expressed serious reservations about centralizing procedural authority.

The Court's restraint demonstrates institutional wisdom in navigating the complexities of the era. By limiting their procedural reforms to equity, the Justices acknowledged that the United States remained "not . . . a consolidated people, but . . . distinct societies"[167] with diverse legal traditions that deserved recognition and accommodation. The price of this pragmatism was static conformity, condemning the federal courts to apply conflicting and outdated state procedural rules for another three decades.

B. Practical Constraints on Procedural Reform

In addition to the political and theoretical concerns about federalism, practical considerations likely played an even more significant role in the Court's decision. Designing a comprehensive code of civil procedure for common law cases would have been an expensive, time-consuming, and technically challenging undertaking — one that may have seemed virtually impossible to the Court given its limited resources.

The legislative history surrounding the Act of Aug. 23, 1842 reveals that Congress was reluctant to provide the courts with additional funds for administrative expenses. Indeed, the final Act granted the Court the authority to set fees and costs, but only within the narrow bounds of Congress's existing appropriations.[168] As a token of generosity, the Act permitted the Court to hire secretaries to transcribe and modernize the Federal Equity Rules — but allocated the budget for only one.[169] But until then the Court apparently lacked the budget necessary to print thirty-three equity rules, much less research and compile an entirely new procedure for suits at common law.

The magnitude of comprehensive procedural reform is best illustrated by the cost of New York's Field Code, the first successful code of civil procedure in the United States.[170] When the New York Constitutional Convention of 1846 mandated procedural reform, few believed

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166 *See* Bunker, *supra* note 110, at 438.

167 *Wayman*, 23 U.S. (10 Wheat.) at 46.

168 Act of Aug. 23, 1842, ch. 188, § 7, 5 Stat. 516, 518.

169 *See* Equity Rules of 1912, *supra* note 122, at xi.

170 *See generally* Robert W. Gordon, *The American Codification Movement, A Study of Antebellum Legal Reform*, 36 VAND. L. REV. 431 (1983) (reviewing CHARLES M. COOK, THE AMERICAN CODIFICATION MOVEMENT, A STUDY OF ANTEBELLUM LEGAL REFORM (1981)) (discussing the successes and failures of the movement for procedural codification).

that a comprehensive solution was possible for even a single state.[171] New York convened a Commission in 1847 — spearheaded by David Dudley Field II — to recommend methods to merge common law and equity rules and standardize procedural rules.[172] The Commission was tasked with balancing an impossible mandate: radically modernizing procedure in a way that would be acceptable to both progressive reformers and traditional legal practitioners.[173] The New York legal community met its formation with skepticism instead of optimism.[174]

The scale of the undertaking is evident in the Commission's scope. Field and his fellow Commissioners, as well as clerical staff, dedicated thousands of hours to reviewing New York's procedural statutes — a volume of material measured not in pages or books but in libraries.[175] Their expenses included publication costs for distributing the new code to the state judiciary and bar, as well as implementation training across New York's court system.[176] But over the next few decades, the Code proved so successful at streamlining litigation that twenty-five states adopted the Field Code in whole or in part by the end of the century, treating New York's procedures as a template that each state could customize to create a state-specific code.[177] This unprecedented success demonstrated the feasibility of comprehensive procedural reform and eventually provided a model for the Federal Rules of Civil Procedure.

If the publication of a unified code for a single state seemed laughable in 1842, the creation of a nationwide code would have seemed absurd. Without a successful model to follow, the Supreme Court likely considered creating a uniform federal procedure for common law cases to be prohibitively complex and expensive, especially for a Court operating with limited administrative resources. Three primary constraints likely forestalled the project:

First, the Court lacked the budget to complete the project, and Congress seemed unlikely to allocate additional funds for a thought experiment in federal civil procedure. The Court's annual expenses of

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171 *See* COMM. ON THE N.Y. STATE CONST., *supra* note 93, at 13–14 (describing the difficulties of procedural modernization in New York); Funk, *supra* note 93, at 14–15.

172 *See* Irving Browne, *David Dudley Field*, 3 GREEN BAG 49, 50–51 (1891).

173 *See* Stephen N. Subrin, *David Dudley Field and the Field Code: A Historical Analysis of an Earlier Procedural Vision*, 6 LAW & HIST. REV. 311, 316–19 (1988); FIRST REPORT OF THE COMMISSIONERS ON PRACTICE AND PLEADINGS 6 (Albany, Charles Van Benthuysen 1848) [hereinafter FIRST REPORT].

174 *Cf.* FIRST REPORT, *supra* note 173, at iv.

175 *See* Funk, *supra* note 93, at 9–11 ("One practitioner in 1846 observed that a minimally adequate library should contain 800 to 1,000 volumes; a good library would have upwards of 3,000 volumes. . . . '[T]he lawyer's library had become a collection of books from the Old World and the new, reports of all the courts in England and in all our States . . . .'" *Id.* at 9 (footnote omitted) (quoting David Dudley Field, *Reform in the Legal Profession and the Laws*, *in* 1 SPEECHES, ARGUMENTS, AND MISCELLANEOUS PAPERS OF DAVID DUDLEY FIELD 494, 507 (A.P. Sprague ed., N.Y.C., D. Appleton & Co. 1884))); Subrin, *supra* note 173, at 316.

176 *See* Funk, *supra* note 93, at 9–10.

177 *See id.* at 2 n.10.

$471,000 were insufficient for the federal courts to manage their dockets, much less for the Court to pay staff to analyze and compile state statutes into one unified code.[178] The intense scrutiny of the Court's finances in 1842 — the March bill opening an investigation, the August bill recommending uniform fees, and the December report outlining the use of funds — would have magnified the costs of delay or failure.[179] Had the Court embarked on a project to standardize procedure and failed to produce a viable code within a short period, it would likely have been accused of waste, fraud, and abuse.

Second, in addition to the inherent complexity of procedural reform, the Supreme Court faced significant institutional constraints that further limited its ability to undertake such an ambitious project.[180] The Court of the 1840s lacked the administrative infrastructure that would later develop to support federal judicial policymaking. It had no Judicial Conference, Administrative Office, or standing committees to assist with rulemaking responsibilities.[181] Instead, the Justices themselves would have had to shoulder the burden of drafting, reviewing, and implementing any new procedural system.

Third, the above limitations were compounded by the Justices' overwhelming workload. During the period when the 27th Congress debated procedural reform, Justices and judges serving the western states were actively complaining about the time and travel burdens of their circuit duties.[182] Circuit riding required the Justices to spend months traveling throughout their assigned regions, hearing cases in different states under different procedural systems.[183] The Justices repeatedly petitioned Congress to abolish the practice, vocally supporting numerous failed bills to end the practice in the 1840s.[184] The Justices' direct exposure to diverse state practices may have reinforced their sense that imposing uniformity would be impractical, while simultaneously depriving them of the time needed to develop such a system.

Given these existing demands on the Court's limited time and resources, undertaking the development of comprehensive federal procedural rules for common law cases would have been extraordinarily difficult, if not impossible, in the pre–Field Code era. These combined factors — respect for federalism principles, budget limitations, lack of procedural models, and time constraints — justify the Supreme Court's

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178 *See* PENROSE REPORT, *supra* note 55, at 1, 6.

179 *See supra* notes 57–62 and accompanying text.

180 *See* PENROSE REPORT, *supra* note 55, at 8–10.

181 The judicial conferences were established to supervise the federal courts in 1948. *See* Act of June 25, 1948, ch. 646, § 331, 62 Stat. 869, 902; *see also* Act of Sep. 14, 1922, ch. 306, § 2, 42 Stat. 837, 838–39 (establishing annual conferences of senior circuit judges).

182 *See* Glick, *supra* note 28, at 1769–71, 1798.

183 *See id.* at 1753.

184 *Id.* at 1769–70, 1807–09.

decision to ignore the grant of rulemaking authority for suits at common law in the Act.

CONCLUSION

The Supreme Court's decision not to exercise its common law rulemaking authority under the Act of Aug. 23, 1842 represents a critical juncture in the development of federal procedure — a road not taken that delayed procedural uniformity for nearly a century.

The Court's inaction on federal civil procedure in the 1840s allowed cracks in the judicial system to widen. Even as state courts became increasingly transparent and standardized, static conformity increased cost burdens on litigants in federal courts and magnified the uncertainty of judicial decisionmaking. As the question of slavery stretched Congress's political bandwidth to the breaking point, it shifted procedural reform for federal courts to the backburner. Finally, in 1872, Congress passed the Conformity Act[185] to reduce the variance between the state and federal systems. But, by 1895, the Act's failure to promote uniformity had led to a legion of complaints.[186]

The lengthy movement for reform culminated in the ratification of the Rules Enabling Act of 1934.[187] The Rules Enabling Act addressed the logistical and timing problems that had resulted in the abandonment of the 1842 grant. Unlike its 1842 predecessor, the Enabling Act not only delegated rulemaking authority to the Supreme Court but also created an institutional framework that overcame concerns about resources and federalism that had previously hindered procedural unification.

Against that backdrop, the use and disuse of the Act of Aug. 23, 1842 offer several insights for contemporary procedural scholarship: First, it cautions against viewing procedural development as an inevitable march toward centralization and uniformity. Despite possessing formal authority to promulgate common law rules, political prudence and practical necessity encouraged the Supreme Court to exercise restraint. Second, it demonstrates how procedural design reflects broader institutional and constitutional values, including concerns about federalism, separation of powers, and efficient administration of justice.

More subtly, this history reveals the contingent nature of our procedural regime. Had the Supreme Court chosen to exercise its authority under the Act of Aug. 23, 1842, it might have forestalled decades of

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185 Ch. 255, 17 Stat. 196 (1872).

186 *See* Charles E. Clark, *The Challenge of a New Federal Civil Procedure*, 20 CORN. L.Q. 443, 444 (1935); *see also* Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1094 (1982). *See generally* Roscoe Pound, The Causes of Popular Dissatisfaction with the Administration of Justice, Address Before the Am. Bar Ass'n (Aug. 29, 1906), *in* 29 ANN. REP. A.B.A. 395 (1906) (providing a searing critique of federal civil procedure before hundreds of lawyers at an American Bar Association conference).

187 *See generally* Burbank, *supra* note 186 (summarizing the enactment and implementation of the Rules Enabling Act).

confusion under both static and dynamic conformity. Alternatively, a premature and poorly executed attempt at standardization might have provoked backlash against federal procedural authority altogether. The Court's selective implementation of its rulemaking power — promulgating equity and admiralty rules while declining to address common law procedure — demonstrates a nuanced institutional response to competing demands.

The journey from the Process Acts to the Rules Enabling Act reveals that the evolution of the Court's control over "the rules of the rules of the game" was neither linear nor inevitable. The forgotten history of the passage of the Act of Aug. 23, 1842 showcases the significance of intermediate stages on the road to standardization. From its fraught passage to its lackluster implementation and rapid abandonment, the Act's history underscores that procedural rules are products of the constraints and compromises of their historical moment.