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INTRODUCTION

Federal civil procedure is dominated by rules. This is not particularly surprising. The introduction of a set of federal rules in 1938 was a landmark achievement, one which fundamentally altered the procedural landscape and which has shaped our discussion of procedural issues ever since. We are now conditioned to think of procedural requirements primarily in terms of the rules, and—as the question posed by this issue of the *Denver University Law Review* suggests—we also think of procedural reform in terms of amendments to those rules.

But important though they are, the rules do not tell the whole federal procedural story. There are other sources of procedural requirements that may be imposed in any given federal case, and that may displace or supplement those imposed by the federal rules. For example, federal statutes may—and in recent years increasingly do—contain procedural requirements that differ from those found in the generally applicable federal rules.[1] So it is, for example, that the pleading standards for a securities action are different from those imposed in Rule 8(a)(2).[2] This Essay focuses on yet another source of authority for procedural requirements that may be imposed in a federal civil case: inherent power. More specifically, my focus is on the use of inherent power to create and enforce procedural requirements in the context of a given case, or what Professor Burbank has referred to as "inherent power in the weak sense."[3] When inherent power is added to the mix, the menu of sources for procedural authority is expanded even further, such that a litigant may be sanctioned in

† Assistant Professor, Saint Louis University School of Law. I am grateful to Chad Flanders, Andy Hessick, Marcia McCormick, Karen Petroski, and Howard Wasserman for helpful conversations on this topic. Thanks also to Griffin O'Hanlon for excellent research assistance. I dedicate this Essay to the memory of my father, Samuel P. Jordan, Jr., who was a proud member of the Denver Law Class of 1971. He would have been thrilled to see his name finally appear within these pages.

1. *See* David Marcus, *The Past, Present, and Future of Trans-substantivity in Federal Civil Procedure*, 59 DEPAUL L. REV. (forthcoming 2010) (manuscript at 40–47), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1428992 (discussing legislative intervention in the domain of federal procedure).

2. *See* Private Securities Litigation Reform Act of 1995, 15 U.S.C. § 77z-1 (2006); Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 320–24 (2007) (interpreting the pleading standards under the PLSRA).

3. Stephen B. Burbank, *Procedure, Politics and Power: The Role of Congress*, 79 NOTRE DAME L. REV. 1677, 1686 (2004). This is to be contrasted with a strong notion of inherent power, which might be used to justify a court's right to fashion a prospective set of rules that could displace competing legislative rules. *See id.* (arguing that federal courts do not possess strong inherent authority).

the context of discovery by reference to a rule (Rule 37), a statute (28 U.S.C. § 1927), or inherent power.[4]

The use of inherent power in the procedural sphere has a long history, and its use has continued unabated in the seventy years since our embrace of a rules-based regime. Unfortunately, regular use has not translated to clarity about the precise nature of inherent power and its relationship to formal procedural authority.[5] Courts routinely acknowledge that the presence of rules and statutes has implications for the use of inherent power, but are frustratingly vague when it comes to articulating the contours of those implications. To make matters worse, judicial practice—as opposed to judicial rhetoric—related to inherent power demonstrates that the presence of the rules act as only a very weak restriction on the ability of courts to resort to inherent power.

My goal in this short Essay is to describe the way that inherent power is understood and applied within our procedural framework, and to suggest the need for a more robust account of the contemporary relationship between inherent power and formal procedural rules. Part I describes two roles—one legitimate and one not—that inherent power can play vis-à-vis the rules. Part II examines how those roles are often confused or manipulated, with the result that inherent power remains available to justify judicial action in an undesirably large class of cases. Finally, Part III explores ways to clarify the relationship between rules and inherent power. Although this clarification could be accomplished through a shift in judicial practice, a preferable approach would be to seek an amendment to the rules themselves that would better articulate

4. *See, e.g.*, Zubulake v. UBS Warburg LLC, 229 F.R.D. 422, 430 (S.D.N.Y. 2004) (citing rules and inherent power to justify the imposition of discovery sanctions).

5. This is not to say that courts have not made any efforts to consider the question of inherent power carefully; clearly some have. For example, the Third Circuit discussed the issue at length, and developed an analytical framework for assessing questions relating to the use of inherent power. *See* Eash v. Riggins Trucking Inc., 757 F.2d 557, 560–64 (3d Cir. 1985) (en banc). But the Supreme Court explicitly rejected that framework in *Chambers v. NASCO, Inc*., 501 U.S. 32, 47 n.12 (1991), and has never seemed inclined to develop a clear theory of inherent power.

Academic commentators have gamely attempted to supply what the courts have left undefined, and articles explaining theories of inherent power are plentiful, if inconsistent. *See generally* 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 (1984); David E. Engdahl, *Intrinsic Limits of Congress' Power Regarding the Judicial Branch*, 1999 BYU L. REV. 75; A. Leo Levin & Anthony G. Amsterdam, *Legislative Control over Judicial Rulemaking: A Problem in Constitutional Revision*, 107 U. PA. L. REV. 1 (1958); Linda S. Mullenix, *Unconstitutional Rulemaking: The Civil Justice Reform Act and Separation of Powers*, 77 MINN. L. REV. 1283 (1993); Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735 (2001); William F. Ryan, *Rush to Judgment: A Constitutional Analysis of Time Limits on Judicial Decisions*, 77 B.U. L. REV. 761 (1997); William W. Van Alstyne, *The Role of Congress in Determining Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effect of the Sweeping Clause*, LAW & CONTEMP. PROBS., Spring 1976, at 102. These articles are primarily focused on the constitutional relationship between inherent power and rules, but they generally stop short of taking a functional view at the relationship between inherent power and formal rules. My goal in this Essay is to be mindful of constitutional considerations, but to approach the question primarily from a functional standpoint.

their intended scope. Such an amendment would make it easier for lawyers to predict the procedural requirements that may actually be imposed in a given case, and would ultimately further civil justice reform by making the rules—and thus the rulemaking process—more meaningful.

I. TWO ROLES OF INHERENT POWER

Although inherent power may be applied in a wide range of contexts, it is generally invoked to perform the role of gap-filler or escape-valve. This section describes both roles, and concludes that the first is defensible but largely unnecessary, while the second is constitutionally and functionally problematic.

A. Inherent Power as a Gap-Filler

By virtue of being constituted as a court and invested with judicial power, courts have long found that they have authority to impose procedural requirements in the context of deciding cases. As far back as 1812, the U.S. Supreme Court concluded that "[c]ertain implied powers must necessarily result to our Courts of justice from the nature of their institution."[6] Thus, even when a formalized and prospective set of procedural rules does not exist, courts may fulfill their judicial function by developing and enforcing case-specific procedural requirements.[7] It requires only a modest extension of that logic to conclude that these powers also permit courts to use their inherent power to fill gaps left by an existing but incomplete procedural framework.[8]

Many of the early cases drawing on inherent power to justify the imposition of procedural requirements can be described as gap-filler cases. Under the conformity regimes that governed federal procedural practice until 1934, federal courts were directed to apply the procedural rules of the states in which they sat.[9] But state procedural rules were not exhaustive, and situations unavoidably arose that fell outside their coverage. In those situations, federal courts often created and enforced proce-

6. United States v. Hudson, 11 U.S. 32, 34 (1812). These powers are "governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." Link v. Wabash R.R. Co. 370 U.S. 626, 630–31 (1962).

7. A thornier question is whether courts could create a generally enforceable set of rules in the absence of legislative action. For an argument that they could do so, at least "as a matter of common law development," see Martin H. Redish, *Federal Judicial Independence: Constitutional and Political Perspectives*, 46 MERCER L. REV. 697, 727–28 (1995).

8. Not all commentators have been willing to accept that extension, however modest. For a prominent criticism of the use of inherent power to fill gaps—however genuine—in a legislatively created set of procedural rules, see Van Alstyne, *supra* note 5.

9. The statute in force immediately prior to passage of the Rules Enabling Act was the Act of June 1, 1872, ch. 255, §§ 5–6, 17 Stat. 196, 197. Earlier variations on the conformity regime had been in place since 1789. *See* Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1037 (1982).

dural requirements that were justified by a reference to inherent power, and those requirements were routinely upheld.[10]

The invocation of inherent power as a gap-filler has persisted even after the conformity regime was displaced by the federal rules. Courts properly understand the rules not as an attempt to describe the universe of permissible procedures, but instead as an effort to formalize and unify the procedures that are to be applied in specific situations.[11] Thus, procedural gaps are still inevitable, and courts continue to rely on inherent power to create case-specific procedures to fill those gaps.[12] But while the continuing use of inherent power to address genuine gaps in the rules may be consistent with historical practice, it is also unnecessary in most cases because the rules themselves provide formal authority for that sort of judicial action. Specifically, Rule 83(b)—which permits judges to "regulate practice in any manner consistent with federal law, rules adopted under 28 U.S.C. §§ 2072 and 2075, and the district's local rules"[13]—supports the imposition of case-specific requirements when other sources of procedural authority are silent.[14] The use of inherent

10. For example, the Supreme Court in *In re Peterson* approved the appointment of an auditor to review factual issues in a federal case filed in New York, despite the fact that no such practice was specifically authorized either by the procedural code of that state or by a federal statute. 253 U.S. 300, 312–14 (1920). New York permitted the appointment of a referee in cases on long accounts, but Peterson was not such a case. *Id.* at 308–09. The absence of a federal statute was relevant because the Court had previously recognized that Congress could legislatively override the 1872 Conformity Act. *See Ex parte* Fisk, 113 U.S. 713, 721 (1885) ("[I]f congress has legislated on this subject and prescribed a definite role for the government of its own courts, it is to that extent exclusive of any legislation of the states in the same matter."). Given that the alternative sources of procedural authority were silent on the matter, Justice Brandeis had no hesitation finding the appointment within the inherent power of courts "to provide themselves with appropriate instruments required for the performance of their duties." *Peterson*, 253 U.S. at 312. But in describing the scope of this power, it is notable that Justice Brandeis included in quotations the caveat that the power exists "at least in the absence of legislation to the contrary." *Id.* For other examples of conformity-era invocations of inherent power, see Enelow v. N.Y. Life Ins. Co., 293 U.S. 379, 381–82 (1935); Bowen v. Chase, 94 U.S. 812, 824 (1876). But these cases can be misleading when it comes to the nature and scope of inherent power. In many instances, courts invoked the rhetoric of inherent power but simultaneously found that the power to create the requirements in question had been expressly conferred by statute. Burbank, *supra* note 3, at 1687 n.33.

11. Ryan, *supra* note 5, at 775–79 (discussing the non-exhaustive nature of the federal rules).

12. Of course, case-specific procedures issued pursuant to inherent authority are not the only way that procedural gaps may be filled. Local rules and standing orders created under the authority of Rule 83 also serve the same function, although they do so in a more formal and prospective way. *See* Ryan, *supra* note 5, at 777 n.66 (characterizing local rulemaking as a legislatively approved "gap filling function").

13. FED. R. CIV. P. 83(b). Rule 83(b) is most commonly relied on as the source for a judge's power to develop general standing orders. *See generally* Myron J. Bromberg & Jonathan M. Korn, *Individual Judges' Practices: An Inadvertent Subversion of the Federal Rules of Civil Procedure*, 68 ST. JOHN'S L. REV. 1 (1994).

14. Rule 83(b) may not completely exhaust the need to employ inherent authority to address procedural gaps, however. Inherent authority may be necessary to justify some actions—say, for the court to examine its own jurisdiction—that do not qualify as "regulat[ing] practice." *See* FED. R. CIV. P. 83(b).

power to deal with procedural gaps is therefore gratuitous under the current framework,[15] and indeed may occasionally be problematic.[16]

B. Inherent Power as an Escape Valve

Inherent power acts as an escape valve when it is used as an alternative source of authority in situations where a more formal procedure also applies. Suppose a rule directs that courts must wait twenty days before taking a particular action. If a court cites inherent power to take that same action after only ten days, then the power is being used not to address an unanticipated or unaddressed procedural question, but instead to circumvent the answer provided by a competing source of authority.[17]

This is a much more contestable use of inherent power. Indeed, with very limited exceptions, the use of inherent power in this manner has been properly criticized as inconsistent with basic principles of constitutional structure. Perhaps it would be enough to stop there, but in this section I also want to suggest that this use of inherent authority is problematic in two additional respects: first, that it frustrates the reasonable expectations of litigants and may even conflict with due process principles in some cases, and second, that it compromises the rulemaking process and undermines procedural reform efforts.

1. Constitutional Structure

Escape valve cases involve a direct inter-branch conflict.[18] This is not true of gap-filler cases, where by definition no applicable rule or statute—and thus no source of authority traceable to the legislative branch—is present. The only question in those cases is whether the judicial branch has the power to act without specific authorization. But the use of a judicially-sourced inherent power to bypass a legislatively-sourced rule is different, and raises a question of constitutional dimension. Now the question is whether the courts can disregard or override legislative action, and the answer to that turns on who is charged with the ultimate authority to define the procedural rules in the federal system.

15. This is not to say that inherent power is being used in gap-filling cases to go beyond Rule 83. To the contrary, in most cases, inherent power and Rule 83(b) provide alternative paths to the same procedural result. But in my view, it is worth being attentive and careful about the source of power, even where it will not affect the result in a formal sense.

16. The use of inherent power would be problematic if, for example, a district court attempted to introduce and enforce a procedural requirement without providing actual notice to the litigant in advance. Rule 83 limits the ability to regulate practice by imposing a notice requirement before procedures not found in a formal rule or statute are enforced. Enforcing a procedural requirement without actual notice would therefore conflict with Rule 83, and employing inherent authority to that end would properly be viewed as an example of inherent authority as an escape valve.

17. This is by design a very clear example, but I readily acknowledge that not all instances of inherent power as escape valve are so clear. *See infra* Part II.

18. There is a potential for intra-branch conflict, too, particularly where the competing source of procedural authority derives from a higher court's use of supervisory power. For a thoughtful discussion of supervisory power, see Amy Coney Barrett, *The Supervisory Power of the Supreme Court*, 106 COLUM. L. REV. 324 (2006).

Since the introduction of the federal rules regime, much has been written about the proper constitutional relationship between legislative and judicial rulemaking.[19] Although extreme positions have been staked out,[20] the dominant view seems to be very close to that recently articulated by Professor Burbank:

> If Congress chooses to exercise its power, it has the last word on matters of procedure, subject only to the specific limitations of the Constitution (i.e., in the Bill of Rights) and to a limitation that, although difficult to phrase precisely, prevents Congress, as a matter of separation of powers, from depriving the federal courts of powers that are necessary for them to act as such—to function as courts exercising judicial power under Article III—when deciding cases.[21]

Federal rules, of course, are not statutes, but they derive from congressional action[22] and are treated as statutory equivalents.[23] Because it reflects a congressional decision to exercise its power, the existence of an applicable rule must therefore be treated as "the last word," unless the court can articulate a constitutional reason for why the rule extends beyond the limits of congressional rulemaking authority. While the precise scope of those limits remains unclear,[24] the fundamental principle that the presence of rules can constrain judicial authority that otherwise might be implied in their absence is well settled. Indeed, courts themselves routinely acknowledge that principle, even though they do not always articulate its constitutional basis.[25]

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19. *See* sources cited *supra* note 5.

20. Compare Wigmore's assertion that only courts had rulemaking power, John H. Wigmore, *All Legislative Rules for Judiciary Procedure are Void Constitutionally*, 23 U. ILL. L. REV. 276 (1928), with Clark's contention that legislative supremacy in the realm of procedure was essentially limitless, Charles E. Clark, *The Proper Function of the Supreme Court's Federal Rules Committee*, 28 A.B.A. J. 521 (1942).

21. Burbank, *supra* note 3, at 1688.

22. 28 U.S.C. §§ 2071–2075 (2006).

23. Bank of Nova Scotia v. United States, 487 U.S. 250, 255 (1988) (noting that the Federal Rules are "as binding as any statute duly enacted by Congress, and federal courts have no more discretion to disregard the Rule[s'] mandate than they do to disregard constitutional or statutory provisions").

24. There is a vast academic literature concerning the existence and definition of "essential" or "irreducible" judicial power. For a sampling, see Ryan, *supra* note 5, at 785–87, and Pushaw, *supra* note 5, at 741–44. Within the sphere of essential judicial power, courts arguably have the constitutional authority to disregard any legislative attempt to control their behavior. Nothing in my argument turns on which conception of essential judicial power is correct, and so I take no view on that question here. It is enough to say that if a court concludes that a particular rule falls within the sphere of essential judicial power, however defined, it should say so explicitly. Absent any such claim, or some other claim of constitutional infirmity, a legislatively-sourced rule should be enforced.

25. *See, e.g.*, *In re* Atlantic Pipe Corp., 304 F.3d 135, 143 (1st Cir. 2002) ("[I]nherent powers cannot be exercised in a manner that contradicts an applicable statute or rule."); G. Heileman Brewing Co. v. Joseph Oat Corp., 871 F.2d 648, 652 (7th Cir. 1989) ("[T]he district court . . . may not exercise its inherent authority in a manner inconsistent with rule or statute."). But courts have not always interpreted this constraint to mean that when a rule is on point, the rule, rather than inherent power, must be the source of judicial action. Thus, even after acknowledging this principle in *Chambers v. NASCO, Inc.*, 501 U.S. 32, 47 (1991), the Supreme Court concluded that inherent power

2. Fairness

One of the advantages of rules is that they are easy to discover and knowable in advance. Before litigation begins, parties and lawyers can consult the rules and form a reasonable understanding of the procedural requirements that will govern their dispute. The existence of a uniform and stable set of rules thus reduces surprise and promotes fairness by allowing actors in the system to structure their behavior in ways that conform to procedural expectations.[26] Supplementation of the formal rules from a source that is undefined and unknowable in advance is destabilizing, and leads to results that are less uniform and less predictable.[27]

As with constitutional structure, escape valve cases differ from gap-filler cases when it comes to fairness considerations. When parties and litigants look to formal sources of authority and find nothing, they should not presume that there is simply no answer to the question. But when a rule speaks to an issue, those who encounter it are much more likely to conclude that what is contained there constitutes a complete and accurate description of the procedural requirements that may be imposed in the case with respect to that issue.[28]

Of course, at some level reasonable expectations are structured by what courts say about what is reasonable. That is, if courts routinely staked out the position that rules are subject to supplementation by inherent power, then at some point it would become unreasonable for those affected by the rules to assume otherwise. But this is not what courts say,[29] and thus even very attentive participants in litigation are likely to be misled when they encounter a rule that appears to address a particular issue. At some level, then, the fairness concern here is rooted not in some

existed even in the face of a rule addressed to the same issue. *Id.* at 49 ("The Court's prior cases have indicated that the inherent power of a court can be invoked even if procedural rules exist which sanction the same conduct."). In other words, courts may conclude that the exercise of inherent power is unconstrained either by finding that the rule simply does not address the issue, or that it addresses it in a way that does not displace the availability of inherent power as an alternative. *See infra* Part II.

26. *See Chambers*, 501 U.S. at 68 (Kennedy, J., dissenting) ("These definite standards give litigants notice of proscribed conduct and make possible meaningful review for misuse of discretion—review which focuses on the misapplication of legal standards."). Of course, this does not mean that the rules alone put litigants in a position to predict procedural requirements perfectly. After all, the rules themselves may be ambiguous, which makes them subject to interpretation, or they may confer discretion, which may be exercised in an unpredictable manner. *See* Robert G. Bone, *Who Decides? A Critical Look at Procedural Discretion*, 28 CARDOZO L. REV. 1961, 1970 (2007) (discussing interpretation and discretion as ways that judges influence the content of rules).

27. In part due to concerns about predictability, notice, and transparency, the Third Circuit, in *Eash v. Riggins Trucking Inc.*, expressed a preference for the use of local rules rather than inherent power to deal with gaps in the rules. 757 F.2d 557, 568–70 (3d Cir. 1985).

28. To some extent, these concerns may be mitigated by a requirement that parties be given notice of a procedural requirement justified by inherent power before that requirement may be enforced. But while courts often impose a notice requirement, they do not always do so. *See, e.g.*, Link v. Wabash R.R. Co., 370 U.S. 626, 632 (1962) (enforcing a *sua sponte* dismissal based on inherent authority despite the absence of notice).

29. *See* cases cited *supra* note 25.

unavoidable problem with the use of inherent authority to supplement written rules, but in the disconnect that presently exists between judicial rhetoric and judicial practice.[30]

3. Rulemaking

Finally, the use of inherent authority to bypass the requirements reflected in formal rules has the potential to affect rulemaking. Rules reflect choices, and those choices are the product of a statutorily-created process that is designed to involve input from a variety of sources. Invoking inherent power to avoid constraints imposed by rules is tantamount to permitting judges to substitute their individual choices for those reached through the formal rulemaking process.[31]

This substitution is troublesome because it exacerbates procedural disuniformity in the federal system. The shift from conformity to a regime of federal rules was motivated in large part by a desire to promote uniform procedural standards.[32] Uniformity in turn was expected to contribute to reduced barriers to national legal practice and increased equality in the outcomes reached across the federal system.[33] Allowing courts to invoke inherent authority to escape the uniform requirements imposed by the federal rules undermines those goals.[34]

A second cause for concern is that the excessive use of inherent power decreases the significance of the rulemaking process. If rules are truly binding, then the choices embedded in those rules have a great deal of importance. Judges have a role in the rulemaking process,[35] and the

30. *See infra* Part II.

31. United States v. Payner, 447 U.S. 727, 737 (1980) (rejecting the use of supervisory power when it "amounts to a substitution of individual judgment for the controlling decisions of this Court"); *see also* Bank of Nova Scotia v. United States, 487 U.S. 250, 255 (1988) ("The balance struck by the Rule between societal costs and the rights of the accused may not casually be overlooked 'because a court has elected to analyze the question under the supervisory power.'" (quoting *Payner*, 447 U.S. at 736)).

32. *See, e.g.*, Burbank, *supra* note 9, at 1043. This is not inconsistent with an acknowledgement that the rules do not fully describe the procedural universe. *See supra* Part I.A. Rather, the rules reflect a desire to impose uniform standards in certain procedural contexts, namely, those contexts to which a promulgated rule is directed.

33. *See* William B. Rubenstein, *The Concept of Equality in Civil Procedure*, 23 CARDOZO L. REV. 1865, 1893–97 (2002); David L. Shapiro, *Federal Rule 16: A Look at the Theory and Practice of Rulemaking*, 137 U. PA. L. REV. 1969, 1974 (1989).

34. *See* G. Heileman Brewing Co. v. Joseph Oat Corp., 871 F.2d 648, 666 (7th Cir. 1989) (Ripple, J., dissenting) ("Today's decision is indeed hard to reconcile with the underlying Congressional concern for uniformity of practice in the federal courts. Indeed, the majority encourages the individual district court to march to its own drummer."); *see also* Chambers v. NASCO, Inc., 501 U.S. 32, 69 (1991) (Kennedy, J., dissenting).

35. Only members of the Supreme Court and those selected for service on rulemaking committees have a direct role. But other judges may participate meaningfully if indirectly in a variety of ways, such as communicating with rulemaking committees or writing opinions that agitate for procedural modification. It is perhaps worth noting that judicial involvement in the process is not the result of entitlement, but of legislative design. *See generally* Martin H. Redish and Uma M. Amuluru, *The Supreme Court, the Rules Enabling Act, and the Politicization of the Federal Rules: Constitutional and Statutory Implications*, 90 MINN. L. REV. 1303 (2006) (discussing the implications of the Rules Enabling Act).

prospect that they will be meaningfully constrained provides them with an incentive to ensure that the choices made are optimal by participating fully in the rulemaking process. But if the rules are merely one source of authority among many, and are subject to supplementation or evasion by reference to inherent power, then the initial choices made through the rulemaking process are less significant, and the judicial incentives to invest in that process are reduced.[36] This is the problem that strikes closest to the heart of the question being considered by this law review issue. Reform through rulemaking is meaningful only if the rules themselves are meaningful. At the extreme, a broad understanding of inherent power makes the rules less meaningful, and makes changes to those rules less effective.

II. RULE INTERPRETATION AND ROLE CONFUSION

Inherent power may be used legitimately (if unnecessarily) to fill gaps in formal procedural rules or illegitimately to avoid constraints imposed by those rules. As a conceptual matter, the distinction between these two roles is straightforward. But the distinction is much harder in practice because it depends on a determination of whether formal rules address a particular situation and whether the exercise of inherent power is consistent with those rules. Put differently, the distinction turns on a judicial interpretation of the scope and effect of the federal rules. Through this interpretive act, courts have the flexibility to refashion potential escape valves as gap-fillers, and thus to sustain the exercise of inherent power as legitimate.

To see this interpretive flexibility at work, consider *G. Heileman Brewing v. Joseph Oat Corp*.[37] In *Heileman*, the en banc Seventh Circuit addressed the question of whether a district judge could compel the attendance of a corporate representative at a pre-trial settlement conference.[38] Rule 16(a)(5) provided authority to compel the attendance of attorneys and unrepresented parties, but the order in question fell outside the scope of that formal authority because the corporation was represented.[39] Thus, the question was whether the order could instead be sustained by reference to inherent power. Rule 16(a)(5) might sensibly be read to delineate the permissible range of parties who may be com-

36. *See Chambers*, 501 U.S. at 67 (Kennedy, J., dissenting) ("Disregard of applicable Rules also circumvents the rulemaking procedures in 28 U.S.C. 2071 *et seq.*, which Congress designed to assure that procedural innovations like those announced today 'shall be introduced only after mature consideration of informed opinion from all relevant quarters, with all the opportunities for comprehensive and integrated treatment which such consideration affords.'" (quoting Miner v. Atlass, 363 U.S. 641, 650 (1960))); Strandell v. Jackson County, Ill., 838 F.2d 884, 886–87 (7th Cir. 1988) ("[I]n those areas of trial practice where the Supreme Court and the Congress, acting together, have addressed the appropriate balance between the needs for judicial efficiency and the rights of the individual litigant, innovation by the individual judicial officer must conform to that balance.").

37. 871 F.2d 648 (7th Cir. 1989) (en banc).

38. *Id.* at 652.

39. *Id.* at 651.

pelled to attend a conference, and indeed that interpretation was urged by several judges in dissent.[40] Viewed this way, any attempt to compel a party not listed in the rule—like the represented party at issue in the case—would constitute an exercise of inherent power as an escape valve. To avoid that result, the majority instead interpreted the scope of Rule 16(a)(5) narrowly: it provided specific authority to compel certain attendees, and nothing more.[41] As to those not mentioned, the rule was silent.[42] Thus, the question at issue fell into a procedural gap, and inherent power could properly be employed to fill it.[43]

Many cases involving questions of inherent power are similar to *Heileman* in the sense that they are capable of classification as either a gap-filler or an escape valve.[44] And as in *Heileman*, courts seem willing to use the process of interpretation to sustain the exercise of inherent power by viewing the scope of a potentially applicable rule narrowly. This approach formally respects the principle that inherent power cannot act as an escape valve.[45] But it simultaneously minimizes the impact of that principle by limiting escape valve cases to those "where the rules directly mandate a specific procedure *to the exclusion of others*."[46] In all other cases, courts remain free to interpret formal rules either as inap-

40. *See id.* at 658 (Coffey, J., dissenting); *id.* at 666–67 (Manion, J., dissenting).

41. *Id.* at 654 (majority opinion).

42. *Id.* at 653 (concluding that represented parties were "not proscribed or specifically addressed" by Rule 16(a)(5)).

43. *Id.* at 656.

44. Natural Gas Pipeline Co. of America v. Energy Gathering, Inc., 2 F.3d 1397 (5th Cir. 1993), is another example. The question at issue there concerned the ability of a district court to compel production of tax returns from a non-party during post-judgment discovery. Rule 69 permits discovery "in the aid of the judgment . . . in the manner provided in these rules or in the manner provided by the practice of the state in which the district court is held." FED. R. CIV. P. 69(a). The Fifth Circuit considered Texas practice, but concluded that it did not fully authorize the district court's action. *Natural Gas*, 2 F.3d at 1406. As for the federal rules, Rules 34 and 45 authorize discovery from non-parties. But those rules likewise did not authorize the district court's action because no subpoena was issued, and because any subpoena issued by the district court would not have been issued by "the court for the district in which the production or inspection is to be made." FED. R. CIV. P. 45(A)(2). Despite this, the Fifth Circuit found that the district court had inherent authority to act, although it found some fault with the specific action taken. *Natural Gas*, 2 F.3d at 1411. At first blush, the existence of a rule clearly addressed to the question of when post-judgment discovery may be ordered makes *Natural Gas Pipeline* look like a clear example of inherent power being used as an escape valve. But as in *Heileman*, the court took pains to avoid that characterization, instead focusing on the permissive language contained in the rules and concluding that "Rule 69(a) and Rule 34(c) do not purport to define the sole means of obtaining post-judgment document discovery or production from a non-party." *Id.* at 1408.

45. In *Heileman*, as in most cases involving inherent power, the court paid lip service to the idea that inherent power may not conflict with formal procedural authority. *Heileman*, 871 F.2d at 652 ("Obviously, the district court, in devising means to control cases before it, may not exercise its inherent authority in a manner inconsistent with rule or statute.").

46. *Id.* (internal quotation marks omitted) (quoting Landau & Cleary, Ltd. v. Hribar Trucking, Inc., 867 F.2d 996, 1002 (7th Cir. 1989)). The Supreme Court has followed suit. *See* Chambers v. NASCO, Inc., 501 U.S. 32, 47 (1991) ("'[W]e do not lightly assume that Congress has intended to depart from established principles' such as the scope of a court's inherent power." (quoting Weinberger v. Romero-Barcelo, 456 U.S. 305, 313 (1982))).

plicable, or as applicable but nevertheless consistent with the supplementary use of inherent power.[47]

There is a similarity in all of this to the interpretive contortions that may be observed in the judicial application of the *Erie* doctrine.[48] Since *Hanna v. Plumer*,[49] federal courts have been instructed to determine whether there is a federal directive on point. To do so, courts must define the scope of the rule, and the results have been frustratingly unclear and inconsistent.[50] In the *Erie* context, observers have long suspected that at least some of the confusion stems from a judicial resistance to conclude that a directive is on point in cases where that conclusion would necessitate a subsequent finding that the federal directive is constitutionally defective. To avoid that result, courts instead interpret the rule narrowly, even if that narrow interpretation is cramped and unnatural.

A similar phenomenon may be at play in the context of inherent power. Suppose that courts are interested in protecting the broad exercise of inherent power. Interpreting the rule narrowly serves that goal by permitting the exercise to be characterized as a gap-filler. A broader interpretation would require the courts either to limit the domain of inherent authority, or to conclude that the rule in question is constitutionally suspect because it infringes on the "essential judicial power."[51] Thus, the tendency toward narrow interpretation may reflect a simultaneous desire to preserve judicial power and avoid a constitutional showdown. Whatever the reason, there seems to be some resistance to finding a conflict between a formal rule and inherent power, and that resistance has given rise to something resembling a clear statement regime: absent an explicit and unambiguous statement to the contrary, formal rules should be interpreted to permit the exercise of inherent power.[52]

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47. Alternatively, courts sometimes find that the use of inherent power is not in conflict with the rule, even if not technically consistent with it, because it is compatible with the spirit of the rule. *Heileman* itself is an example. *See Heileman*, 871 F.2d at 652 (noting that "[the] spirit, intent, and purpose [of Rule 16] is . . . broadly remedial" (alterations in original) (internal quotation marks omitted) (quoting *In re* Baker, 744 F.2d 1438, 1440 (10th Cir. 1984) (en banc))). Another example is *Chambers*. 501 U.S. at 50–51. Not surprisingly, the response to these efforts is to emphasize the relevance of language. *See id.* at 69 (Kennedy, J., dissenting) ("We are bound, however, by the Rules themselves, not their 'aim' . . . ."); *see also Heileman*, 871 F.2d at 666 (Manion, J., dissenting) (rejecting reliance on a rule's "'broadly remedial' 'spirit,'" and noting that the broad goal of Rule 16 "is not an excuse for us to ignore the words the drafters used to pursue that goal").

48. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).

49. 380 U.S. 460 (1965).

50. For a sampling of the extensive litany of complaints directed at this inconsistency, see Donald L. Doernberg, *The Unseen Track of Erie Railroad: Why History and Jurisprudence Suggest a More Straightforward Form of Erie Analysis*, 109 W. VA. L. REV. 611 (2007), and Joseph P. Bauer, *The Erie Doctrine Revisited: How a Conflicts Perspective Can Aid the Analysis*, 74 NOTRE DAME L. REV. 1235, 1244 (1999).

51. *See infra* Part I.B.1.

52. For a general discussion of clear statement rules, see William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 595–98 (1992). This general approach has received some academic support, even if not

III. CLARIFYING THE RELATIONSHIP

When discussing the relationship between inherent power and the rules, courts routinely recognize the power of the latter to act as a constraint on the exercise of the former. But a finding that such a constraint is actually present is much less common. The explanation for this result is that courts implicitly or explicitly employ a norm of construction that views rules narrowly. Unless an existing rule contains a clear and affirmative statement that creates an unavoidable conflict, inherent power is deemed to be available as an alternative source of judicial power to justify the imposition of procedural requirements in a given case. This results in a role for inherent power that is both unpredictable and excessively broad. This section explores a number of ways that the relationship between inherent power and the rules might be clarified and improved.

As a starting point, courts might simply adopt a norm of construction that is more respectful of the status of the rules. More specifically, courts should abandon the requirement of a clear statement before finding that a rule restricts the availability of inherent power. Indeed, the presumption should run the other way, such that the presence of a rule is suggestive of intent to substitute a formal rule-based procedural framework in place of inherent power. The adoption of a federal rules regime was rooted in legislative desire for a formal set of uniform rules applicable throughout the federal system. If the rulemaking process produces a rule that addresses a certain issue, courts should approach the task of interpretation with that preference for uniformity in mind and refrain from disrupting the balance struck by the rule. To be sure, even a strong presumption in favor of rule supremacy does not completely solve the problem of determining scope and coverage. But the practical effect of a shift in interpretive norms would be to increase the frequency of escape valve cases, strengthen the effect of formal rules, and decrease the availability of inherent power.

Of course, courts are self-interested, and may resist an interpretive norm that has the practical effect of reducing their autonomy to fashion procedural requirements. For that reason, it may be preferable to work within the clear statement framework by inserting a definition of intended scope on a rule-by-rule basis. If a clear statement of intent to constrain the exercise of inherent power is desired, then the rules could be systematically amended to provide those statements. For example, Rule

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phrased precisely in terms of a clear statement rule. For example, Professor Meador has noted with approval that "[p]re-existing inherent authority can remain available to supplement the rules *if the rules are interpreted . . . not to prohibit* the particular exercise of inherent authority." Daniel J. Meador, *Inherent Judicial Authority in the Conduct of Civil Litigation*, 73 TEX. L. REV. 1805, 1817 (1995) (emphasis added). This suggestion not only recognizes the role of interpretation in defining the status of a given case, but also embodies an eagerness to exploit that role to permit the broad exercise of inherent power wherever possible.

37 might be amended to specify that it delineates the scope of judicial authority to impose sanctions in the context of discovery.[53]

Alternatively, of course, the rules might be amended to make clear that inherent power still remains available to supplement the requirements described in a particular rule. So Rule 37 might instead be amended to state clearly that it is merely one possible source of sanctioning power, and that it is not intended to limit the availability of sanctions based on other sources of authority. Judges would thus be authorized to invoke inherent power as an escape valve from the rule, and would not be forced to use a strained interpretation to characterize the case as a gap-filler. My own view is that the former option is preferable to the latter, at least in the context of Rule 37 if not as a general matter. But either would be an improvement. A clear specification of the relationship between the written rules and inherent power would have the salutary effect of requiring rule-makers to consider the nature of that relationship explicitly, and would provide much clearer guidance to those affected by the rules.

But a rule-by-rule approach would render the rules even more unwieldy than they already are. A more elegant solution would be to add a rule that establishes the general status of the rules and provides interpretive guidance. Indeed, we already have such a rule: Rule 1 instructs judges to interpret the rules "to secure the just, speedy, and inexpensive determination of every action and proceeding,"[54] and courts routinely cite to that rule as an interpretive aid.[55] Rule 1 might easily be amended to specify that where rules are present, they are intended to define the permissible scope of behavior by litigants and judges, and are subject to supplementation only where explicitly provided for.[56] Such a statement would act much like an express preemption of inherent power, and while it would not avoid all issues related to coverage, it would strengthen the status of the rules and helpfully structure the interpretive enterprise.

CONCLUSION

Discussions about procedural reform often start from the premise that amendments to the rules will produce meaningful change in the procedural requirements that are enforced on the ground. That is undoubted-

53. A caveat would be necessary to account for other statutory sources of sanctioning power, which could not be overridden by a rule.

54. FED. R. CIV. P. 1.

55. *See, e.g.*, Wood v. GCC Bend, LLC, 422 F.3d 873, 882–83 (9th Cir. 2005) (denying a Rule 54(b) certification request in light of Rule 1's mandate); *In re* Beverly Hills Bancorp, 752 F.2d 1334, 1338 (9th Cir. 1984) (holding that to permit amendment of pleadings after losing appeal would not further Rule 1's directive).

56. In the face of such a statement, judges may still be able to resort to inherent power. But to do so, they would need to make an explicit finding that the power that they are exerting is part of the "essential judicial power" that as a constitutional matter is not subject to interference by legislative action.

ly true to some extent; rules do matter, and their influence on procedure is significant. But the impact of rules may not be as great as we sometimes assume. Other sources of authority compete with formal rules, and an excessively broad understanding of those other sources weakens the practical force of the rulemaking process. In my view, the understanding of when inherent authority may be exercised in the face of the rules is excessively broad, at least as it is reflected in judicial practice. Accordingly, a careful reconsideration of how the rules affect and interact with inherent power is in order.