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THE SUPERVISORY POWER OF THE SUPREME COURT

Amy Coney Barrett*

Relying on something it calls “supervisory power” or “supervisory authority,” the Supreme Court regularly prescribes rules of procedure and evidence for inferior courts. Both scholars and the Court have treated the Court’s exercises of this authority as unexceptional exercises of the inherent authority that Article III grants every federal court to regulate procedure in the course of adjudication. Article III’s grant of inherent authority, however, is conventionally understood as permitting a federal court to regulate its own proceedings. When the Supreme Court exercises supervisory power, it regulates the proceedings of other federal courts. More than a reference to every court’s inherent authority, therefore, is required to justify the Court’s action. If the Supreme Court possesses a unique ability to regulate federal court procedure, it must be because of some unique attribute of the Supreme Court.

This Article explores a justification that may well animate the Court’s assertions of supervisory power: the notion that the Court possesses supervisory power by virtue of its constitutional supremacy. Analyzing this justification requires pursuit of two questions that are wholly unexplored in the literature and case law. Does Article III’s distinction between supreme and inferior courts operate only as a limit on the way that Congress can structure the judicial department, or does it also operate as a source of inherent authority for the Supreme Court? And assuming that the Court’s supremacy grants it inherent authority over inferior courts, is supervisory power over procedure part of the authority granted?

The law in this area is clear. This Court has supervisory authority over the federal courts, and we may use that authority to prescribe rules of evidence and procedure that are binding in those tribunals.

—*Dickerson v. United States*¹

INTRODUCTION

The Supreme Court’s relationship to inferior federal courts is not a matter on which the Court typically reflects in any depth. Nevertheless, the Court in *Dickerson* recently expressed great confidence in at least one aspect of that relationship: its authority over inferior federal court procedure, even outside the confines of the statutorily authorized federal rulemaking process. As *Dickerson* suggests, the idea that the Supreme

* Assistant Professor of Law, Notre Dame Law School. I received many helpful comments on previous drafts of this Article from participants in faculty workshops at the University of Illinois College of Law and the Notre Dame Law School. I am particularly grateful to Jesse Barrett, Joe Bauer, A.J. Bellia, Tricia Bellia, Steve Burbank, Brad Clark, Nicole Garnett, Ed Hartnett, Bill Kelley, John Nagle, Caleb Nelson, Jim Pfander, Jack Pratt, Bob Pushaw, Kevin Stack, Amanda Tyler, and Julian Velasco for reading and commenting on earlier drafts. Brian Foster and Jennifer Geelan provided excellent research assistance. Errors are mine.

1. 530 U.S. 428, 437 (2000).

Court possesses supervisory authority over inferior court procedure is well entrenched in its cases. The Court claimed such authority for the first time in 1943,² and since then, it has invoked that authority to announce, through adjudication, a wide range of procedures binding in inferior courts.

Contrary to the Court's assertion in *Dickerson*, however, the law in this area is not clear. The Supreme Court has never justified its claim to power over inferior court procedure. Both the Court and scholars studying it have assumed that the Court's assertions of supervisory authority are legitimate so long as they do not exceed the bounds of the inherent authority that every federal court possesses over procedure.³ But that inherent authority, which is incident to "the judicial Power" that Article III grants every federal court,⁴ has conventionally been understood as authorizing a federal court to regulate its *own* proceedings.⁵ In other words, both scholars and the Supreme Court—albeit without reflection on this point—have treated Article III's grant of inherent authority as a grant of authority over local procedure. In the supervisory power cases, however, the Supreme Court is neither regulating its own procedure nor reviewing an inferior court's regulation of its own procedure for consistency with statutory and constitutional limits. In these cases, the Supreme Court is directly regulating the proceedings of inferior courts. The legitimacy of this exercise, therefore, must be measured by more than the bounds of every federal court's inherent authority. There must be some reason to think that the Supreme Court has the power to make procedural choices for inferior federal courts.

This Article investigates whether the Court's supremacy grants it such power. It is possible that in designating the Court "supreme," Article III endows the Court with some inherent authority over its inferiors, including the authority to prescribe procedures for them. Whether Article III actually does so is an important question, not only for purposes of evaluating the legitimacy of the Court's claim to supervisory power, but also because its answer has implications for two ongoing scholarly debates.

Knowing whether the Supreme Court possesses inherent supervisory authority is relevant to the more general debate about the inherent authority of the federal courts. Scholars have long debated the extent of the federal courts' inherent authority over procedure, and the extent to which the federal courts share that power with Congress.⁶ These discus-

2. See *McNabb v. United States*, 318 U.S. 332, 340 (1943); see also *infra* notes 9–14 and accompanying text.

3. See *infra* notes 41–49 and accompanying text.

4. U.S. Const. art. III, § 1.

5. See *infra* notes 61–63 and accompanying text.

6. For recent articles addressing this topic, see, e.g., Gary Lawson, *Controlling Precedent: Congressional Regulation of Judicial Decision-Making*, 18 *Const. Comment.* 191, 201–29 (2001) (arguing that Congress has limited power to regulate federal court

sions, however, rarely attend to the difference between local and supervisory rulemaking. This Article benefits that debate by focusing on the nature of the inherent authority at stake. Rather than considering the inherent authority of the federal courts in a general sense, it would be worthwhile to focus on whether congressional regulation of procedure potentially infringes on the inherent authority of every federal court to regulate its own procedure, the inherent authority of the Supreme Court to establish procedure for the judicial branch, or both.

Knowing whether the Supreme Court possesses inherent supervisory authority also brings the relationship between the Supreme Court and inferior courts into sharper relief. Scholars have considered a range of ways—including appellate review and vertical stare decisis—in which the Court’s supremacy might entitle it to control inferior courts.⁷ Despite this scholarship, little agreement exists on either the constitutionally required structure of the judicial branch or the Supreme Court’s role within it. This Article’s textual and structural analysis of Article III’s distinction between supreme and inferior courts contributes to the debate about whether Article III establishes a hierarchical judicial branch—and specifically, one in which the Court’s “supremacy” operates not only as a limit on the way Congress may structure the judicial branch, but also as a source of inherent authority for the Supreme Court.

The Article proceeds as follows. Part I lays the foundation for the project by explaining how the Supreme Court uses its supervisory power over inferior courts. Existing cases and commentary entirely overlook the distinction between local and supervisory rulemaking in exercises of inherent authority over procedure. Because they obscure this distinction, they do not analyze the Supreme Court’s exercises of supervisory power any differently than they would analyze a federal court’s exercise of authority over its own procedure. The central aim of this Part is to clarify what existing cases and commentary miss. The Supreme Court is doing more in the supervisory power cases than simply exercising the authority implicit in every federal court’s possession of the judicial power. These cases are different, and a different analysis must apply to them. By carefully distinguishing between local and supervisory rulemaking in exercises of inherent authority, one can more easily see what the Supreme Court is doing, as well as whether there are grounds on which to justify it.

procedure); Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey?*, 109 *Yale L.J.* 1535, 1582–94 (2000) (arguing that Congress has broad power to regulate federal court procedure).

7. See, e.g., Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 *Stan. L. Rev.* 817, 828–37 (1994) [hereinafter Caminker, *Inferior Courts*] (arguing that Constitution’s distinction between supreme and inferior courts obligates inferior courts to follow Supreme Court precedents); James E. Pfander, *Jurisdiction-Stripping and the Supreme Court’s Power to Supervise Inferior Tribunals*, 78 *Tex. L. Rev.* 1433, 1500–12 (2000) [hereinafter Pfander, *Jurisdiction-Stripping*] (arguing that Court is not “supreme” vis-à-vis inferior courts absent some ability to review their judgments).

Parts II through IV analyze whether the Constitution grants the Supreme Court the inherent authority to engage in supervisory rulemaking. Part II begins the analysis with the words “supreme” and “inferior,” which turn out to be surprisingly ambiguous. As Part II explains, it is not at all clear, simply from the terms themselves, that Article III places the Supreme Court at the top of a judicial hierarchy. Founding-era evidence suggests that the terms “supreme” and “inferior” may well describe the differing geographic and subject matter jurisdiction of various courts rather than their respective places in a pyramid of authority. While the hierarchical reading is more appealing, Part II concludes that the text, standing alone, does not require it.

Given the facial textual ambiguity, Part III turns to the Constitution’s structure. Part III points out that the existence of supervisory power depends upon more than the conclusion that the terms “supreme” and “inferior” establish a judicial hierarchy. It depends also upon an issue that the literature has neglected to identify, much less explore: the structural effect of a hierarchy requirement. A requirement of hierarchy would certainly function as a limit on Congress, demanding that any congressional regulation of the judicial branch respect the Supreme Court’s position at the top of a judicial hierarchy. For the supervisory power to exist, however, Article III’s distinction between the Supreme Court and its inferiors must operate not only as a limit on Congress, but also as a source of inherent authority for the Supreme Court. Part III concludes that the structure of Article III, particularly when compared with Articles I and II, cuts against, though does not definitively rule out, the proposition that the word “supreme” in Article III grants the Supreme Court any unspecified power over inferior courts.

Part IV turns to history. Even assuming that the Court’s designation as “supreme” functions as a power grant rather than solely as a limitation on Congress, the Court’s claim to supervisory authority over procedure fails unless there is reason to believe that the power grant includes a grant of this particular authority. Thus, Part IV analyzes whether the authority to prescribe inferior court procedure historically has been understood as an inherent power of a “supreme” court. As Part IV explains, no evidence from English history, colonial history, or Founding-era history establishes an explicit link between a “supreme” court and superintendence of procedure. Despite the lack of discussion about a “supreme” court’s role in this regard, cases do exist from the Supreme Court’s early years in which the Court, without labeling its action as an exercise of supervisory authority, appears to lay down rules of procedure and evidence for inferior courts. History, therefore, appears to offer some support for the Court’s modern practice.

Part IV argues, however, that this support is illusory. The Supreme Court’s early, ostensible assertions of supervisory authority came at a time when courts understood the common law much differently than they do today. In the Founding era, courts decided common law cases by apply-

ing a body of customary law. Reflecting this approach, the Supreme Court reversed inferior courts for mistaking or misapplying established common law rules of procedure and evidence; it did not purport to displace the policy choices of inferior courts on these matters. Given the jurisprudential framework within which the early Supreme Court operated, Part IV argues that it is difficult to read these cases as endorsing the modern view that the Supreme Court possesses inherent power "to prescribe" procedural rules for inferior courts.

In the end, the Article concludes that the Constitution's text, structure, and history do not support the proposition that the Supreme Court possesses supervisory power over inferior courts by virtue of its constitutional "supremacy." Rather than reflecting a longstanding, constitutionally endorsed practice, the supervisory power doctrine more likely reflects modern assumptions about the Supreme Court's role in the federal judiciary. Congress can decide to give the Supreme Court such power through enabling legislation, but it seems exceedingly unlikely that the Constitution confers it.

I. THE SUPREME COURT'S CLAIM TO SUPERVISORY POWER

This Part lays the foundation for my project. After briefly describing how the Supreme Court's supervisory power cases work, this Part turns to the problem of identifying a source for the power. It discusses the source on which the Supreme Court's cases implicitly rely and which is explicitly advanced in the work of Professor Sara Sun Beale: the inherent authority over procedure that is attendant upon Article III's grant of "the judicial power."⁸ Against the prevailing account, this Part argues that the authority over procedure implicit in "the judicial power" is insufficient, standing alone, to justify the Supreme Court's claim to supervisory power. That grant is conventionally understood as vesting in every federal court the authority to regulate its *own* proceedings; for supervisory power to exist, the Supreme Court must possess the ability to control procedure in *other* courts. This Part concludes that if the Supreme Court possesses supervisory power over inferior court procedure, something more than a bare reference to every federal court's inherent Article III authority is necessary to justify it.

A. *The Supervisory Power Doctrine*

In 1943, in a case called *McNabb v. United States*, the Supreme Court asserted the power to supervise lower federal courts by devising procedures for them not otherwise required by the Constitution or a statute.⁹

8. See Sara Sun Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 Colum. L. Rev. 1433 (1984); see also *infra* Part I.B.

9. 318 U.S. 332 (1943). *McNabb* is widely identified as the first case to assert the Supreme Court's supervisory power over lower court procedure. See, e.g., Beale, *supra*

Before 1943, the Supreme Court had openly claimed such a direct power over inferior court procedure only when it promulgated court rules pursuant to congressional authorization—for example, when it promulgated the Federal Equity Rules, the Federal Admiralty Rules, and the Federal Rules of Civil Procedure. The *McNabb* rule, by contrast, was announced in the context of adjudication and without reference to any legislative or constitutional grant of the authority to impose it. *McNabb* is a striking case insofar as it is a self-conscious exercise of supervisory rulemaking in the context of adjudication rather than in the process of promulgating court rules. Insofar as it is the first self-conscious exercise of such power, it is an important case.

McNabb's holding is relatively straightforward. The Supreme Court held that a district court must exclude from evidence a voluntary confession that was the product of a prolonged detention.¹⁰ The basis for this holding, however, is less straightforward. No constitutional or statutory provision required the confession's exclusion.¹¹ Instead, *McNabb's* exclusion of a confession obtained in circumstances that the Court believed unreasonable, though not unconstitutional, rested on an evidentiary policy of the Court's own making.¹² The Court, moreover, did not rely on any particular statutory or constitutional provision to justify its authority to make such a policy and enforce it in the inferior courts. Rather, the Court asserted simply that "[j]udicial supervision of . . . criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence."¹³ The Court referred to this exercise of power as an exercise of its "supervisory authority."¹⁴

The Court in *McNabb* was not entirely clear about who or what it was supervising with this "supervisory authority." As a result, cases relying on *McNabb* are not entirely clear on this point either. Although cases and commentary tend to treat all post-*McNabb* assertions of "supervisory au-

note 8, at 1435. The Court also asserted its supervisory power, however, to adopt a procedural rule in a case decided roughly two weeks before *McNabb*. See *Johnson v. United States*, 318 U.S. 189, 199 (1943) (relying on supervisory power rather than Fifth Amendment to prohibit comment on defendant's refusal to testify). In keeping with the literature and cases, this Article will refer to *McNabb* as the source of the modern supervisory authority doctrine.

Because some might wonder, it is worth noting that the Supreme Court did not invoke supervisory power when it decided *Weeks v. United States*, 232 U.S. 383 (1914), the first exclusionary rule case. *Weeks* purported to ground the exclusion of illegally seized evidence in the Fourth Amendment itself. *Id.* at 398. It was not until after *McNabb* that some justices explained *Weeks* as an exercise of the Court's supervisory power. See, e.g., *Mapp v. Ohio*, 367 U.S. 643, 678 (1961) (Harlan, J., dissenting).

10. *McNabb*, 318 U.S. at 341–42; see also *Anderson v. United States*, 318 U.S. 350, 355–56 (1943) (applying *McNabb* rule to exclude confession in case decided on same day as *McNabb*).

11. See *McNabb*, 318 U.S. at 341, 343–45.

12. See *id.* at 346–47.

13. *Id.* at 340.

14. *Id.* at 341.

thority” interchangeably, close study of these cases reveals that federal courts relying on *McNabb* actually use the term “supervisory authority” in three different ways. In some instances, courts use the term “supervisory authority” to refer to the power of an appellate court to supervise lower courts by prescribing procedures for them above and beyond those required by statutory and constitutional provisions.¹⁵ In other instances, courts use the term “supervisory authority” to refer to a court’s power to supervise the litigation before it.¹⁶ In still other instances, courts use the term “supervisory authority” to refer to the power of a federal court to supervise law enforcement officials.¹⁷ This Article focuses on the Supreme Court’s invocations of “supervisory authority” only to the extent that the term is used in the first sense, as a power to supervise lower courts by prescribing procedures for them.

And indeed, *McNabb* is the first in a significant line of cases in which the Supreme Court has asserted supervisory authority in just this respect, as a power to prescribe procedures binding in the inferior courts. To understand how the supervisory power works, it is helpful to consider some of the cases in this line. *Thiel v. Southern Pacific Co.*¹⁸ is a frequently cited example. There, the Supreme Court relied on its supervisory authority to announce a rule governing the composition of federal juries.¹⁹ In that case, a district court in California decided to exempt all daily wage

15. See *infra* notes 18–36 and accompanying text.

16. See, e.g., *Carlisle v. United States*, 517 U.S. 416, 425–26 (1996) (recognizing limited “supervisory power” of district courts over litigation before them); *Ortega-Rodriguez v. United States*, 507 U.S. 234, 257 (1993) (recognizing “supervisory authority” of courts of appeals over litigation before them); *Thomas v. Arn*, 474 U.S. 140, 146–47 (1985) (acknowledging “supervisory powers” of courts of appeals). Despite the fact that these cases use the term “supervisory authority” or “supervisory power,” it is important to recognize that they are actually describing a court’s inherent authority over local procedure. For a description of a federal court’s inherent authority over procedure, see *infra* notes 44–46 and accompanying text. For a discussion of the difference between local rules, by which a federal court regulates its own procedure, and supervisory rules, by which a federal court regulates the procedure of a lower court, see *infra* Part I.C.

17. Most of the commentary addressing “supervisory power” addresses this use of the phrase. See, e.g., Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 *Iowa L. Rev.* 735, 779–82 (2001); Fred C. Zacharias & Bruce A. Green, *Federal Court Authority to Regulate Lawyers: A Practice in Search of a Theory*, 56 *Vand. L. Rev.* 1303, 1310 (2003); Matthew E. Brady, Note, *A Separation of Powers Approach to the Supervisory Power of the Federal Courts*, 34 *Stan. L. Rev.* 427, 437–40 (1982); Note, *The Supervisory Power of the Federal Courts*, 76 *Harv. L. Rev.* 1656, 1660–64 (1963) [hereinafter *Harvard Note*]. These articles are discussed more fully in Part I.B, *infra*.

An inferior court’s adoption of a procedure designed to supervise law enforcement does not implicate the kind of supervisory power addressed by this Article. Note, however, that when the Supreme Court requires inferior courts to follow an evidentiary rule aimed at controlling certain law enforcement activities, the Supreme Court may be described as supervising both law enforcement and inferior courts. Indeed, *McNabb* itself is an example of such overlap. See *supra* notes 10–14 and accompanying text.

18. 328 U.S. 217 (1946).

19. *Id.* at 225.

earners from jury service because of the financial hardship that such service imposed upon them.²⁰ Constitutional and statutory provisions did impose some limits on jury composition—for example, in reviewing the district court’s policy, the Supreme Court noted one federal statute prohibiting disqualification from jury service on the basis of “race, color, or previous condition of servitude”²¹ and another requiring that jurors be chosen “without reference to party affiliations.”²² But the Court did not claim that the exclusion of daily wage earners from federal juries, which the Court perceived as discrimination based on social class, violated the Constitution or any federal statute.²³ Instead, invoking the power claimed in *McNabb*, its “power of supervision over the administration of justice in the federal courts,”²⁴ the Supreme Court announced a rule to address what the Constitution and United States Code did not: It held that the “systematic and intentional exclusion” of daily wage earners from juries was prohibited in the federal courts.²⁵

Castro v. United States is another, more recent example of a case in which the Supreme Court invoked its supervisory power to prescribe inferior court procedure.²⁶ In *Castro*, a prisoner, proceeding pro se, attacked his conviction with a self-styled “Rule 33 motion for a new trial.”²⁷ The district court recharacterized the motion as one seeking habeas corpus relief from federal detention under 28 U.S.C. § 2255 without notifying the litigant about the consequences of the recharacterization,²⁸ which were significant: Recharacterization “subject[ed] any subsequent motion under § 2255 to the restrictive conditions that federal law imposes upon a ‘second or successive’ (but not upon a first) federal habeas motion.”²⁹ Predictably, the prisoner later filed what he thought was his first motion under § 2255, and the district court dismissed the claim for the prisoner’s failure to comply with applicable restrictions on “second or successive” claims.³⁰ The Eleventh Circuit affirmed the district court’s judgment, but the Supreme Court reversed.³¹ Section 2255 did not itself require district courts to warn litigants about recharacterization and its consequences; nor did the district court’s failure to warn violate any constitutional provision. Invoking its supervisory authority, however, the Supreme Court held that a district court must notify a pro se litigant about

20. *Id.* at 221–22.

21. *Id.* at 221 (quoting 28 U.S.C. § 415 (1940)).

22. *Id.* (quoting 28 U.S.C. § 412).

23. *Id.* at 220–21.

24. *Id.* at 225.

25. *Id.* at 220.

26. 540 U.S. 375 (2003).

27. *Id.* at 378.

28. *Id.* at 379.

29. *Id.* at 377.

30. *Id.* at 379.

31. *Id.* at 379, 384.

recharacterization and its consequences before actually recasting a prisoner's motion as one for habeas relief.³²

Thiel and *Castro* are two examples of the Supreme Court's exercise of supervisory power. Others exist. In *Young v. United States ex rel. Vuitton et Fils*, for example, the Court established a rule forbidding an inferior court to appoint an interested prosecutor in contempt proceedings.³³ In *Rosales-Lopez v. United States*, the Court established a rule requiring district courts to inquire into racial prejudice on voir dire when there is a possibility that racial prejudice could influence the jury.³⁴ In *McCarthy v. United States*, the Court established a rule entitling a defendant to plead anew if a district court accepts a guilty plea without observing Rule 11 of the Federal Rules of Criminal Procedure.³⁵ In *Western Pacific Railroad Corp. v. Western Pacific Railroad Co.*, the Supreme Court relied on its supervisory power to issue guidelines regulating the way the courts of appeals consider petitions for rehearing en banc.³⁶

The supervisory power cases share three important characteristics. First, they announce procedural rules not otherwise required by Congress or the Constitution.³⁷ In this respect, the cases are a kind of procedural common law.³⁸ Second, the Supreme Court typically employs the power,

32. *Id.* at 382–83.

33. 481 U.S. 787, 808–09 (1987).

34. 451 U.S. 182, 190–92 (1981); see also *Ristaino v. Ross*, 424 U.S. 589, 597 n.9 (1976) (foreshadowing *Rosales-Lopez*).

35. 394 U.S. 459, 463–64 (1969).

36. 345 U.S. 247, 260–68 (1953). For examples in addition to those described in the text, see *Intel Corp. v. Advanced Micro Devices, Inc.*, 124 S. Ct. 2466, 2483–84 (2004) (declining to use supervisory power to adopt rule barring domestic discovery for use in foreign proceedings, but indicating willingness to revisit issue in later case); *Jones v. United States*, 527 U.S. 373, 383–84 (1999) (declining to use supervisory power to require jury instruction on consequences of deadlock, but implying that power could be used to do so); *United States v. Valenzuela-Bernal*, 458 U.S. 858, 878–79 (1982) (O'Connor, J., concurring) (urging Court to use its supervisory power to impose standard on lower courts regarding detention of deportable aliens who are potential witnesses).

37. It is worth noting, though, that the Supreme Court has occasionally elevated rules initially announced pursuant to the supervisory power to constitutional status. For example, in *Ballard v. United States*, the Supreme Court relied on its supervisory power to condemn the “purposeful and systematic exclusion of women” from a panel of grand and petit jurors in district court. 329 U.S. 187, 193, 195 (1946). Years later, the Court grounded the prohibition of gender discrimination in jury service in the Constitution itself. See *Taylor v. Louisiana*, 419 U.S. 522, 525–26 (1975) (holding that blanket exemption from jury service for women violated Sixth Amendment); see also *Dickerson v. United States*, 530 U.S. 428, 430–40 (2000) (holding that rule established by *Miranda v. Arizona*, 384 U.S. 436 (1966), initially presented as supervisory rule, was actually constitutional in nature).

38. I acknowledge that the line between textual interpretation and common lawmaking is not always clear. Cf. Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. Chi. L. Rev. 1, 4–5 (1985) (arguing that supposed distinctions between the two are often illusory). These cases, however, fit comfortably within the definition of common law, because in them, the Court does not even purport to interpret a constitutional or statutory text. See *id.* at 7 (defining “federal common law” even more

as it did in *McNabb*, *Thiel*, and *Castro*, to announce generally applicable rules rather than case-specific commands. Because these cases are applicable across the federal courts, the rules they announce resemble rules of constitutional procedure or rules promulgated under the Rules Enabling Act.³⁹ Third, the Supreme Court in these cases does not announce rules governing its own procedure; rather, it announces rules governing procedure in inferior courts. These cases, therefore, are instances of supervisory rather than local rulemaking.

The fact that these cases involve supervisory rather than local rulemaking is, for present purposes, their most important feature, and I will say more about it shortly.⁴⁰ To put the importance of this feature in context, however, it is first necessary to describe the justification that apparently underlies the Supreme Court's exercise of supervisory power. The next subpart turns to that task.

B. *The "Judicial Power" as a Justification for Supervisory Authority*

The Supreme Court has been remarkably vague about the source of its supervisory authority. After exhaustively studying the Supreme Court's cases, Professor Sara Sun Beale has offered what stands as the best-articulated justification for the doctrine.⁴¹ Professor Beale persuasively rejects

broadly to mean court-adopted rules not required by legal text, even if they purport to interpret one).

39. This is not to say that the regulation of procedure by adjudication and its regulation by prospective court rulemaking are alike in every relevant respect. Cf. Stephen B. Burbank, *Procedure, Politics, and Power: The Role of Congress*, 79 *Notre Dame L. Rev.* 1677, 1681 (2004) [hereinafter Burbank, *Procedure*] (insisting that distinction "between procedure fashioned (or applied as precedent) in decisional law and that provided prospectively in court rules" is critical in any discussion of inherent power over rulemaking). On the contrary, they differ in important respects, including in how they are initiated and who participates in them. The accompanying text aims only to highlight one respect in which procedures generated by adjudication and those generated by prospective rulemaking are similar: their effect. This is because of the federal courts' rigid approach to both horizontal and vertical *stare decisis*, which, as I have argued elsewhere, blurs the distinction between adjudication and legislation by treating case holdings like generally applicable rules. See Amy Coney Barrett, *Stare Decisis and Due Process*, 74 *U. Colo. L. Rev.* 1011, 1052–60 (2003). *Castro v. United States*, discussed *supra* in text accompanying notes 26–32, illustrates the point. The notice requirement that the Court adopted in that case has the same basic effect on future cases as if it had been adopted in the rulemaking process. Indeed, recognizing such similarity of effect, the Supreme Court has openly acknowledged on at least one occasion that it considers adjudication and rulemaking to be two means of accomplishing the same end. See *Hawkins v. United States*, 358 U.S. 74, 78 (1958) ("[T]his Court, by decision or under its rule-making power, can change or modify the [witness competency rules] where circumstances or further experience dictates." (emphasis added) (citation omitted)); see also Stephen B. Burbank, *Implementing Procedural Change: Who, How, Why, and When?*, 49 *Ala. L. Rev.* 221, 245 (1997) (noting that courts sometimes use "case-by-case adjudication to circumvent or preempt court rulemaking obstacles posed by the Enabling Act process").

40. See *infra* Part I.C.

41. Beale, *supra* note 8. The supervisory power doctrine has drawn a relatively modest amount of commentary, and apart from Professor Beale's work, none of it explores

the proposition that the supervisory authority has a statutory source.⁴² As she explains, the detailed scheme prescribed by the Rules Enabling Act makes it difficult, if not impossible, for the Supreme Court to construe more general statutes like the appellate review statutes as grants of supervisory procedural authority.⁴³ Instead, consistent with what she finds implicit in the cases, Beale identifies Article III's grant of "judicial power" as the source of supervisory authority.

As Beale explains, the Supreme Court has long understood Article III to grant federal courts the "inherent power" to accomplish, through adjudication, those tasks necessary to the execution of the "judicial power."⁴⁴ For example, because a federal court could not exercise its

the source of the Supreme Court's power. For the main articles addressing the supervisory power doctrine, see John Gleeson, *Supervising Criminal Investigations: The Proper Scope of the Supervisory Power of Federal Judges*, 5 J.L. & Pol'y 423 (1997) (arguing that supervisory power of federal courts does not extend to supervising federal prosecutors); Alfred Hill, *The Bill of Rights and the Supervisory Power*, 69 Colum. L. Rev. 181 (1969) (arguing that supervisory doctrine usefully permits Supreme Court to go beyond what Bill of Rights requires, but that supervisory power is limited by separation of powers principle); see also Brady, *supra* note 17 (arguing that Supreme Court has taken unduly narrow view of its supervisory power); Rebecca Ann Mitchells, *Case Note, Supervisory Power Meets the Harmless Error Rule in Federal Grand Jury Proceedings*, 79 J. Crim. L. & Criminology 1037 (1988) (arguing that Supreme Court has applied harmless error rule too aggressively in reviewing inferior court exercises of supervisory power); Harvard Note, *supra* note 17 (reviewing Supreme Court exercises of supervisory power and suggesting rationales for doctrine).

42. See Beale, *supra* note 8, at 1477–78.

43. *Id.* at 1477–80. On two occasions, the Supreme Court has asserted obliquely and in dicta that the supervisory power derives from the statutes giving it the authority to review the judgments of inferior federal courts. See *Nguyen v. United States*, 539 U.S. 69, 81 n.13 (2003) ("The authority which Congress has granted this Court to review judgments of the courts of appeals undoubtedly vests us not only with the authority to correct errors of substantive law, but to prescribe the method by which those courts go about deciding the cases before them." (internal quotation marks omitted) (quoting *Lehman Bros. v. Schein*, 416 U.S. 386, 393 (1974) (Rehnquist, J., concurring))); *Cupp v. Naughten*, 414 U.S. 141, 146 (1973) ("Within such a unitary jurisdictional framework the appellate court will, of course, require the trial court to conform to constitutional mandates, but it may likewise require it to follow procedures deemed desirable from the viewpoint of sound judicial practice although in no-wise commanded by statute or by the Constitution."). Because this Article focuses on the potential constitutional justification for the Supreme Court's supervisory power, I do not address the statutory justification. For a persuasive argument that no statutory authority exists, however, see Professor Beale's excellent analysis. See also *infra* note 78 (noting that Supreme Court's lack of supervisory authority over state courts casts doubt on proposition that supervisory authority is merely incident to appellate review).

44. Beale, *supra* note 8, at 1468–73. For cases supporting this proposition, see *Chambers v. NASCO*, 501 U.S. 32, 43 (1991) ("It has long been understood that '[c]ertain implied powers must necessarily result to our Courts of justice from the nature of their institution,' powers 'which cannot be dispensed with in a Court, because they are necessary to the exercise of all others.'" (quoting *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812))); *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936) (asserting that there is "power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants"); *Eash v. Riggins Trucking Inc.*,

core Article III power of adjudication without an accurate and relevant factual record, it must have the power to do those things necessary to develop an accurate and relevant factual record—including such things as managing discovery, compelling testimony, appointing experts, and excluding and admitting evidence.⁴⁵ Possession of “inherent authority” means that a federal court can engage in certain tasks necessary to the exercise of the judicial power even in the absence of a statute explicitly authorizing it to do so, and, absent a statute guiding a federal court in the performance of such tasks, the court can rely on its implied Article III authority to create judicial guidelines for their execution. While debate exists about the limits of a federal court’s inherent power, the basic proposition that some inherent power exists is uncontroversial.⁴⁶ And Beale concludes that this inherent authority “provides an ample basis for the Supreme Court’s formulation of procedural rules”—although she, like other scholars, questions whether this inherent authority justifies the broad range of rules that the Court has announced pursuant to it.⁴⁷ Beale argues that while the authority attendant upon Article III’s grant of “the judicial power” permits the Court to formulate procedural rules (like the one announced in *Thiel*), many of the Court’s supervisory rules govern matters of substance (like the one announced in *McNabb*).⁴⁸

Beale’s identification of “the judicial power” as the source of the Supreme Court’s supervisory authority makes explicit what is otherwise implicit in the supervisory power cases and commentary.⁴⁹ Both the Su-

757 F.2d 557, 561–64 (3d Cir. 1985) (categorizing exercises of inherent power into three categories: irreducible power, necessary power, and useful power); see also Pushaw, *supra* note 17, *passim* (describing scope of inherent authority).

45. Pushaw, *supra* note 17, at 742.

46. *Id.* at 788–92 (summarizing scholarship on inherent power, which reflects agreement on its existence, but disagreement about its scope and degree to which it may be displaced by legislation). I put aside here the question whether Article III grants federal courts the inherent power to regulate procedure not only by adjudication, but also by prospective court rules. The former is relatively uncontroversial, but the latter is not. See Burbank, Procedure, *supra* note 39, at 1682 (questioning how “a power to promulgate prospective, legislation-like rules can be squared with the grant of judicial power in Article III”). Thus, references in this Article to the inherent authority of the federal courts relate exclusively to their inherent authority to regulate procedure by adjudication.

47. Beale, *supra* note 8, at 1465, 1470.

48. *Id.* at 1473–77, 1490–91. Although she does not explain why, Beale asserts that only the Supreme Court possesses the authority to prescribe procedure for lower courts; in other words, she rejects the notion that the Constitution or any statute authorizes the courts of appeals to prescribe procedure for district courts. *Id.* Similarly, several circuit judges have expressed misgivings about the proposition that courts of appeals possess supervisory authority over district courts. Their view, like Professor Beale’s, is that supervisory authority belongs exclusively to the Supreme Court. See *United States v. Strothers*, 77 F.3d 1389, 1397–99 (D.C. Cir. 1996) (Sentelle, J., concurring) (questioning assertions by courts of appeals of supervisory authority over procedure in the district courts); *Burton v. United States*, 483 F.2d 1182, 1189–90 (9th Cir. 1973) (Byrne, J., dissenting) (same).

49. See Beale, *supra* note 8, at 1464 (“[M]ost courts and commentators have characterized supervisory power as an implied or inherent power.”).

preme Court and scholars studying it have assumed that so long as a matter falls within the inherent authority granted to every federal court by Article III, and so long as its regulation does not impinge upon the prerogatives of other branches, the Supreme Court may regulate it in the inferior courts. Their assumption in this regard is evident in the fact that the cases and commentary treat the Supreme Court's regulation of inferior court procedure as analytically indistinct from a federal court's regulation of the proceedings before it. They use the term "supervisory authority" to refer to both,⁵⁰ and they treat the Supreme Court's regulation of inferior court procedure, like a federal court's regulation of its own procedure, as posing primarily a separation of powers problem.⁵¹ Thus, most of the scholarship regarding the supervisory power doctrine is devoted to analyzing whether particular assertions of supervisory authority impinge on the prerogatives of the other branches. Insofar as the Supreme Court has adopted supervisory rules that attempt to regulate the out-of-court conduct of federal investigators and prosecutors, usually by excluding evidence, scholars have argued that the Court has impinged upon the Executive's law enforcement authority.⁵² Insofar as the Supreme Court has adopted supervisory rules that undermine existing statutory schemes, scholars have argued that the Court has impinged upon Congress's legislative power.⁵³

The supervisory power doctrine, however, does not only pose an interbranch problem; it also poses an intrabranched problem. Both scholars and the Supreme Court have paid inadequate attention to the premise on which the Supreme Court's claim to supervisory authority rests: that the Supreme Court has the inherent authority to regulate procedure and evidence in *other* federal courts. Occasionally, an individual Justice has questioned whether the Court in fact possesses such power over inferior

50. See *supra* notes 15–16 and accompanying text.

51. Cf. Pushaw, *supra* note 17, *passim* (extensively analyzing separation of powers problem inherent in any federal court's exercise of inherent authority over procedure).

52. See, e.g., Beale, *supra* note 8, at 1434 (arguing, *inter alia*, that use of supervisory power has "fostered the erroneous view that the federal courts exercise general supervision over federal prosecutors and investigators"); Hill, *supra* note 41, at 214 (arguing that exclusion of legally seized evidence is "unwarranted interference with executive prerogatives, in violation of the constitutional principle of separation of powers"); Zacharias & Green, *supra* note 17, at 1314 (noting that exercise of supervisory powers to indirectly regulate federal prosecutors raises separation of powers concerns); Brady, *supra* note 17, *passim* (analyzing supervisory power as problem of balancing executive and judicial power).

53. See, e.g., Beale, *supra* note 8, at 1503–05 (arguing that insofar as they purport to create nonstatutory remedies under rubric of supervisory power, Supreme Court's supervisory cases impinge on legislative power); Evan Caminker & Erwin Chemerinsky, The Lawless Execution of Robert Alton Harris, 102 Yale L.J. 225, 251 (1992) (arguing that Supreme Court's assertion of supervisory power in Harris's case was "de facto nullification of congressional directives"); see also *United States v. Nat'l City Lines, Inc.*, 334 U.S. 573, 589 (1948) (holding that supervisory power announced in *McNabb* "does not extend to disregarding a validly enacted and applicable statute or permitting departure from it").

courts, or at least whether its exercise in a particular case imprudently involves the Court in matters better left to those courts. Thus, Justices have lamented the Court's assertion of "vague supervisory powers over federal courts,"⁵⁴ and questioned "the basis for any direct authority to supervise lower courts."⁵⁵ They have argued that in the absence of a statutory, constitutional, or court rule on point, procedural choices are left to the discretion of the inferior courts.⁵⁶ Notwithstanding these occasional reservations, the Court has never developed a justification for its claim to the authority to supervise other federal courts.

As Professor Beale explains, it is generally recognized that Article III's grant of "judicial power" vests every Article III court with some degree of inherent authority permitting it to develop procedures necessary to adjudicate the cases before it. Pursuant to this grant, the Supreme Court surely has the power to develop procedures to help it dispose of cases on the Supreme Court's *own* docket.⁵⁷ It does not necessarily follow, however, that the Supreme Court has the power to prescribe procedures controlling the way that inferior courts dispose of the cases on *their* dockets. Using the inherent authority of every court over local procedure to justify the Supreme Court's prescription of inferior court procedure conflates the difference between local and supervisory rules.

54. *W. Pac. R.R. Corp. v. W. Pac. R.R. Co.*, 345 U.S. 247, 273 (1953) (Jackson, J., dissenting).

55. *Bank of N.S. v. United States*, 487 U.S. 250, 264 (1988) (Scalia, J., concurring) (cautioning that while Court has "authority to review lower courts' exercise of this supervisory authority, insofar as it affects the judgments brought before us, . . . I do not see the basis for any direct authority to supervise lower courts").

56. See, e.g., *Ballard v. United States*, 329 U.S. 187, 203 (1946) (Burton, J., dissenting) ("In the absence of a binding statutory or court rule then requiring such inclusion of women, the District Court was compelled to exercise its own discretion in including or excluding them [from jury service]."); *Thiel v. S. Pac. Co.*, 328 U.S. 217, 227-29 (1946) (Frankfurter, J., dissenting) (arguing that in absence of any statutory or constitutional requirement, Supreme Court should review district court's exercise of inherent authority for abuse of discretion rather than substituting its own discretion for that of district court); see also *Lehman Bros. v. Schein*, 416 U.S. 386, 392-95 (1974) (Rehnquist, J., concurring) (arguing that Court should exercise its supervisory power with due regard for discretion of inferior court); *Shenker v. Balt. & Ohio R.R. Co.*, 374 U.S. 1, 5 (1963) (refusing to second-guess Third Circuit's rule that majority of its active members, rather than majority of those voting on petition, was required to take case en banc, because to do so "would involve [the Court] unnecessarily in the internal administration of the Courts of Appeals"); *United States v. Am.-Foreign S.S. Corp.*, 363 U.S. 685, 695 (1960) (Harlan, J., dissenting) (arguing that decision whether circuit judge who retired during course of proceedings was "active" for purposes of participating in en banc hearing should be "left with the various Courts of Appeals, if indeed not to the conscience and good taste of the particular circuit judge concerned").

57. To be sure, the Supreme Court's inherent authority over its own procedure might permit it to dictate some inferior court procedures designed to facilitate the Supreme Court's own review of the inferior court record. But any power to engage in such indirect regulation is far more limited than the power that the Supreme Court has actually claimed: the power to supervise inferior courts directly, in ways unconnected to the Supreme Court's own proceedings.

C. *Local and Supervisory Rules*

As stated above, the fact that these cases involve supervisory rather than local rulemaking is, for present purposes, their most important feature. Yet it is also their most obscured feature. Discussions of the federal courts' inherent power to regulate procedure rarely attend to the distinction between local and supervisory rules,⁵⁸ and discussions of the supervisory power doctrine—despite its name—are no exception. Because of the importance of this distinction to my project, this subpart will explore this feature of the cases in greater depth.

Local rules are rules adopted by a court to regulate practice in that same court. Supervisory rules are rules adopted by a court to regulate practice in a lower court. The difference between the two is clear in the case of rules adopted pursuant to a court's authority under the Rules Enabling Act. For example, the Federal Rules of Civil Procedure, which are promulgated by the Supreme Court to regulate practice in district courts, are supervisory rules. The local rules of the Southern District of New York, which are promulgated by the District Court for the Southern District of New York and apply only in that court, are local rules.

This distinction, evident in the case of prospective court rules, exists in a more subtle and generally unrecognized way in the case of procedures adopted through adjudication pursuant to a federal court's inherent authority.⁵⁹ As explained in Part I.B, it is generally recognized that Article III vests every federal court with some degree of "inherent authority" to regulate procedure by adjudication.⁶⁰ Discussions of this inherent authority tend to focus on a federal court's inherent authority over the proceedings before it—that is, these discussions focus upon a federal court's inherent authority over local procedure. (Indeed, I am unaware of any discussion about the inherent authority to regulate procedure by adjudication focusing on a federal court's power over proceedings before an inferior court.) This focus on local procedure is evident in some of the cases typically invoked as illustrative of the federal courts' inherent authority. For example, in *Chambers v. NASCO, Inc.*, an iconic case in this line, the Supreme Court addressed the inherent authority of a district

58. But see Burbank, Procedure, *supra* note 39, at 1681 (asserting that critical distinction for purposes of analyzing judiciary's inherent rulemaking authority is between "local court rules (for the regulation of proceedings in the promulgating court) and supervisory court rules (for the regulation of proceedings in inferior courts)"); cf. Stephen B. Burbank, The Rules Enabling Act of 1934, 130 U. Pa. L. Rev. 1015, 1116 (1982) (observing that in run-up to enactment of Rules Enabling Act, arguments that Supreme Court possessed inherent power to regulate procedure often "ignor[ed] distinctions between local and supervisory rules of court").

59. For a discussion of the inherent authority of the federal courts, see *supra* notes 44–48 and accompanying text.

60. See *supra* notes 44–46 and accompanying text.

court to sanction a party and lawyer appearing before it.⁶¹ In *Link v. Wabash Railroad Co.*, the Supreme Court upheld the authority of a district court to dismiss a lawsuit sua sponte for failure to prosecute.⁶² And in *Hazel-Atlas Glass Co. v. Hartford Empire Co.*, the Supreme Court held that a court of appeals possessed the inherent authority to vacate a judgment for fraud on the court.⁶³

Discussions of the Supreme Court's "supervisory authority" doctrine continue this focus on local procedure. This Article uses the term "supervisory authority" to refer exclusively to the Supreme Court's authority to adopt, through adjudication, rules of procedure for inferior courts. As Part I.A explained, however, the Supreme Court has used the term "supervisory authority" to describe a broad range of rulemaking activity, some of it supervisory and some of it local.⁶⁴ Scholarly discussion of the Supreme Court's supervisory power has not distinguished the two.⁶⁵ Instead, scholars have treated the Supreme Court's assertions of "supervisory authority" as a synonym for or species of more generic "inherent authority"; and by "inherent authority," scholars typically mean inherent authority in the way it has been most fully explored in the cases and scholarship—inherent authority over local procedure.⁶⁶

The true "supervisory power" cases, however, work differently than those most commonly identified as illustrative of the federal courts' inherent authority. In the supervisory power cases, the Supreme Court does not simply review a procedure adopted by a lower court to ensure that the lower court acted within its inherent authority over local procedure. In the supervisory power cases, the Supreme Court displaces inferior court discretion by announcing its own rule. In other words, rather

61. 501 U.S. 32, 42–58 (1991); see also *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 767 (1980) (recognizing inherent power of federal court to assess attorney's fees against counsel).

62. 370 U.S. 626, 630–31 (1962).

63. 322 U.S. 238, 244 (1944). For examples other than those discussed in the text, see *Clinton v. Jones*, 520 U.S. 681, 706 (1997) ("The District Court has broad discretion to stay proceedings as an incident to its power to control its own docket."); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507–09 (1947) (holding that district court possessed inherent authority to dismiss suit on ground of forum non conveniens), partially superseded by Act of June 25, 1948, ch. 646, § 1, 62 Stat. 869, 937 (codified as amended at 28 U.S.C. § 1404 (2000)); *Ex parte Peterson*, 253 U.S. 300, 312 (1920) (holding that district court had inherent power to appoint auditor to assist in performance of its judicial duties); *Bowen v. Chase*, 94 U.S. 812, 824 (1876) (acknowledging court's inherent power to consolidate actions arising out of single controversy).

64. See *supra* notes 15–17 and accompanying text.

65. See *supra* notes 15–17 and accompanying text; see also Gleeson, *supra* note 41, at 459–66 (describing supervisory power without distinguishing between local and supervisory rulemaking in its exercise); Zacharias & Green, *supra* note 17, at 1310–11 (same); Brady, *supra* note 17, at 427 & n.2, 445–47 (same).

66. Cf. Pushaw, *supra* note 17, at 738 n.4 (observing that Supreme Court uses "inherent powers" (or 'inherent authority') as a term of art to describe incidental actions that federal judges take without a specific statutory grant as needed to exercise their primary 'judicial power' of deciding cases").

than measuring the inferior court's action by the bounds of the inferior court's authority, the Supreme Court measures the inferior court's action for consistency with the Supreme Court's newly announced standard.

It is worth focusing carefully on the distinction between cases in which the Supreme Court reviews a lower court's exercise of inherent authority and cases in which the Supreme Court invokes its supervisory authority to prescribe a rule for lower courts.⁶⁷ In the former kind of case, the Supreme Court simply decides whether a lower court's rule falls within the broad range of the lower court's discretion. It will either hold that a particular rule was beyond the lower court's power (as defined by a statute or the Constitution),⁶⁸ or it will approve the lower court's rule while leaving room for other courts to choose a different approach.⁶⁹ When the Supreme Court exercises its supervisory authority to prescribe inferior court procedure, by contrast, it announces a rule not required by any statutory or constitutional provision and leaves no room for lower courts to choose a different approach in future cases. One could summarize the difference this way: In the former cases, the Supreme Court reviews an instance of local rulemaking by adjudication; in the latter cases, the Supreme Court engages in supervisory rulemaking by adjudication.

Consider, for example, *Thiel v. Southern Pacific Co.*, described above.⁷⁰ There, the Supreme Court did not simply ask whether the district court acted within the bounds of its authority in adopting a blanket exemption from jury service for daily wage earners—that is, the Court did not ask whether the exemption exceeded the district court's inherent authority under Article III, whether it was rational, or whether it ran afoul of any other constitutional or statutory provision. By that measure, the Supreme Court may well have had to leave the exemption undisturbed. Instead, the Supreme Court announced its own standard forbidding such exemptions as discriminatory and overrode the district court's practice as inconsistent with that standard.⁷¹ The same is true of *Castro v. United*

67. The Supreme Court makes that task difficult by using the term "supervisory authority" imprecisely. As stated in Part I.A, *supra*, the Court sometimes uses the term "supervisory authority" to refer to the inherent authority of a federal court to supervise the litigation before it. See *supra* note 16 and accompanying text. An invocation of "supervisory authority," therefore, does not necessarily mean that the Supreme Court is announcing a rule through adjudication. One must read the case carefully to see whether the Supreme Court decides to review the inferior court's rule or to adopt its own.

68. See, e.g., *Ortega-Rodriguez v. United States*, 507 U.S. 234, 244–52 (1993) (holding unreasonable Eleventh Circuit policy of dismissing appeals filed by former fugitives); *United States v. Payner*, 447 U.S. 727, 736–37 (1980) (reversing district court's decision to exclude evidence under its inherent authority over local procedure as exceeding limits on that authority).

69. See, e.g., *Thomas v. Arn*, 474 U.S. 140, 155 (1985) (holding that "a court of appeals *may* adopt a rule conditioning appeal" on filing of timely objections to a magistrate's report (emphasis added)).

70. 328 U.S. 217 (1946); see *supra* text accompanying notes 18–25.

71. *Id.* at 225.

States, also described above.⁷² There, the Supreme Court did not simply ask whether the district court acted within its authority in refusing to notify a pro se litigant of the consequences of its recharacterization of his motion as one for habeas relief. By that measure, the Supreme Court may well have had to leave the non-notification policy undisturbed. Instead, the Supreme Court announced its own standard requiring notification and struck the district court's practice as inconsistent with that standard.⁷³

This is not to say that the particular rules that the Supreme Court adopted in *Thiel* and *Castro* are poor policy choices or that the matters of jury composition and habeas practice do not benefit from uniform, rather than ad hoc, treatment. This is only to illustrate how rules generated pursuant to the Supreme Court's supervisory power work. They are not like the more familiar class of "inherent authority" cases in which a federal court adopts a rule governing practice before that same federal court. In the supervisory power cases, the Supreme Court adopts a rule governing practice in an inferior court. In the inherent authority cases, the Supreme Court reviews inferior court rules for abuse of discretion. In the supervisory power cases, the Supreme Court actually displaces inferior court discretion.⁷⁴

The basis for that displacement remains inadequately explained in the cases and commentary. The justification implicit in the cases is the one made explicit by Professor Beale: that the supervisory power derives from the inherent authority that the Supreme Court possesses by virtue of its possession of "the judicial power."⁷⁵ That conclusion, however, does not automatically follow from the grant of inherent authority that is implicit in Article III's grant of "the judicial power." Article III grants "the judicial power" to every federal court. If the Supreme Court possesses a unique ability to regulate procedure on behalf of other federal courts, it must be because of some unique attribute of the Supreme Court.

72. 540 U.S. 375 (2003); see *supra* text accompanying notes 26–32.

73. *Id.* at 383–84.

74. Thus, Evan Caminker and Erwin Chemerinsky are mistaken when they assert that the Supreme Court has only invoked an inherent authority to manage its own proceedings and the power to review the propriety of lower court exercises of inherent authority over their own proceedings, but not the power to otherwise supervise inferior courts. Caminker and Chemerinsky claim that the Supreme Court "has never held that by virtue of its position atop the judicial hierarchy, it enjoys a unique power to supervise the conduct of inferior federal courts beyond this traditional sense of reviewing the soundness of a lower court's exercise of the power to manage its own proceedings." Caminker & Chemerinsky, *supra* note 53, at 250. That kind of "unique power," however, is precisely the authority that the supervisory power cases assert.

75. See *supra* notes 41–48 and accompanying text.

II. THE CONSTITUTION'S DESIGNATION OF A "SUPREME" COURT AND "INFERIOR" COURTS

This Part identifies and begins to analyze a stronger constitutional basis for the supervisory power: the Constitution's designation of the Court as "supreme" and all other Article III courts as "inferior" to it.⁷⁶ Indeed, if the supervisory power over procedure has a constitutional source, this must be it, because the Constitution's distinction between "supreme" and "inferior" courts is the only constitutional language that arguably gives the Supreme Court any authority over its inferiors. In general terms, an argument for constitutionally based supervisory power would go like this: By virtue of its supremacy, the Supreme Court has the power to oversee the federal judiciary. As overseer, the Supreme Court is empowered (and, as departmental leader, arguably even obliged) to adopt procedural rules to ensure the smooth and uniform functioning of inferior federal courts.

Locating the supervisory power in this aspect of Article III has the benefit of explaining the contours of the doctrine. The Supreme Court has been emphatic in its insistence that its supervisory power does not extend to state courts,⁷⁷ although it has never explained why that is so. Article III's distinction between supreme and inferior courts offers an explanation. If rooted there, the supervisory power is not simply incident to the Court's appellate jurisdiction, which extends to both state and federal courts.⁷⁸ If rooted in the supreme/inferior distinction, the supervisory

76. See U.S. Const. art. I, § 8, cl. 9 (conferring power on Congress to "constitute Tribunals inferior to the supreme Court"); id. art. III, § 1 (vesting judicial power in "one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish"). Some commentators have located the Court's supervisory power in its constitutional supremacy, although none has fully developed the argument. See, e.g., James E. Pfander, *Marbury*, Original Jurisdiction, and the Supreme Court's Supervisory Powers, 101 Colum. L. Rev. 1515, 1602-03 (2001) [hereinafter Pfander, *Marbury*] (describing chores, including rulemaking, that fall to the Supreme Court in its capacity "as the constitutionally mandated leader of a hierarchical judicial department").

77. See, e.g., *Early v. Packer*, 537 U.S. 3, 10 (2002) (noting that rule announced pursuant to Supreme Court's supervisory power is inapplicable to state courts); *Dickerson v. United States*, 530 U.S. 428, 438 (2000) ("It is beyond dispute that we do not hold a supervisory power over the courts of the several States."); *Smith v. Phillips*, 455 U.S. 209, 221 (1982) ("Federal courts hold no supervisory authority over state judicial proceedings and may intervene only to correct wrongs of constitutional dimension.").

78. Indeed, the fact that the Court's supervisory authority does not extend to state courts is good evidence that the Court has not thought carefully about its occasional assertions that the supervisory power derives from the appellate review statutes. See *supra* note 43. It would be quite remarkable for the Supreme Court to claim vis-à-vis state courts, as it has vis-à-vis inferior federal courts, that "[t]he authority which Congress has granted this Court to review judgments of the courts of appeals undoubtedly vests us not only with the authority to correct errors of substantive law, but to prescribe the method by which those courts go about deciding the cases before them." *Nguyen v. United States*, 539 U.S. 69, 81 n.13 (2003) (quoting *Lehman Bros. v. Schein*, 416 U.S. 386, 393 (1974) (Rehnquist, J., concurring)).

power is a feature of the constitutional relationship between the Supreme Court and the courts inferior to it.

Evaluating the strength of a claim to supervisory authority based on the supreme/inferior distinction necessitates an evaluation of the kind of relationship that Article III contemplates for the Supreme Court and its inferiors. Determining the constitutionally required structure of the federal judicial department, however, is more complicated than one might expect, and there is surprisingly little scholarly guidance in the area. The constitutional analysis raises three questions. The first has engendered scholarly disagreement, and the remaining two are wholly unexplored in the literature.

First is the threshold question of whether the constitutional distinction between “supreme” and “inferior” courts establishes a judicial hierarchy. The terms “supreme” and “inferior” are capable of two constructions: They might render inferior courts “subordinate to” the Supreme Court, or they might refer simply to the relative jurisdictional reach of the courts. A claim to constitutionally based supervisory power is viable only if the terms “supreme” and “inferior” establish a judicial hierarchy by rendering inferior courts subordinate to the Supreme Court. Scholars have explored these competing constructions of the supreme/inferior distinction at some length, but no consensus exists as to which is correct.

Second, if one decides that the supreme/inferior distinction does render inferior courts subordinate to the Supreme Court, one must determine the structural effect of this subordination requirement. Does it operate only as a limit on Congress’s ability to structure the federal court system, or does it also act as a source of inherent authority for the Supreme Court vis-à-vis its inferiors?⁷⁹ Thus far, scholars have devoted textual and structural analysis only to ways in which the supreme/inferior distinction might limit Congress’s ability to structure the federal court system.⁸⁰ Nearly every scholar who has studied the impact of the su-

79. There might also be another possibility, which could coexist with either or both possibilities mentioned in the text: The distinction might operate as a source of obligation for the inferior federal courts. Evan Caminker appears to take this view in his study of whether the distinction makes vertical stare decisis a constitutional requirement. See Caminker, *Inferior Courts*, supra note 7. Caminker argues that it is a constitutional obligation of “inferior” courts to follow the decisions of their judicial superior, the “Supreme” Court. *Id.* at 832–34. On Caminker’s account, the force of this obligation emanates from the Constitution itself; it apparently would exist even if the Supreme Court had never required it of the inferior courts. See, e.g., *id.* at 834 (arguing that Article III’s distinction between a “supreme” court and “inferior” courts makes vertical stare decisis a constitutional requirement); *id.* at 867–69 (arguing that inferior courts must follow Supreme Court precedent even if Congress strips Supreme Court of its appellate jurisdiction).

80. James Pfander argues that the Court’s supremacy operates as a source of inherent power, but his argument is historical rather than structural. Professor Pfander argues that the power to issue discretionary writs is a historically accepted function of a “supreme” court, but he does not consider whether the Constitution’s structure supports his construction of the Court’s supremacy as a source of inherent authority rather than as a

preme/inferior distinction has done so in the course of considering whether that distinction limits Congress's ability to deprive the Supreme Court of jurisdiction to review the judgments of inferior federal courts—the argument being that the Court might not be “supreme” in relation to inferior courts without the ability to review at least some of their judgments.⁸¹ A textual and structural study of whether the Court's supremacy imbues it with inherent power over inferior courts is absent in the scholarship.

Third, if the Court's supremacy does give it inherent authority over inferior courts, does that authority include the supervisory authority to prescribe procedures for them? Study of this question is also absent in the scholarship.

The next three Parts of this Article evaluate these questions with an analysis of the Constitution's text, structure, and history. This Part begins with the text. It defines the words “supreme” and “inferior,” with reference to both eighteenth- and twentieth-century dictionaries. According to dictionaries, the supreme/inferior distinction might mean that inferior courts have narrower geographic and subject matter jurisdiction than the Supreme Court; it might mean that inferior courts are subordinate to the Supreme Court; or it might mean both. Despite the counterintuitive nature of a definition referring exclusively to jurisdictional differences, scholars have advanced nonfrivolous historical arguments supporting the nonhierarchical reading of Article III. Given the ambiguity of the terms “supreme” and “inferior,” this Part considers whether their grammatical context or their use in other parts of the Constitution clarifies their meaning. After explaining that neither does, this Part concludes that the terms “supreme” and “inferior” do little, standing alone, to answer the question whether the Supreme Court possesses supervisory power over its inferiors.

A. Possible Definitions of “Supreme” and “Inferior”

The Constitution establishes a “supreme Court,” and gives Congress the power to establish courts inferior to the supreme.⁸² This distinction between a “supreme” Court and its “inferiors” is the only language in the Constitution that arguably demands a particular kind of relationship between the Supreme Court and any courts that Congress chooses to estab-

limit on Congress. Pfander, *Marbury*, supra note 76, at 1518–19; see also Pfander, *Jurisdiction-Stripping*, supra note 7, at 1442–64 (documenting historical connection between “supreme” courts and power to issue supervisory writs).

81. See infra note 152.

82. Professor Pfander observes that the term “supreme,” which appears with a lower case “s” in the Constitution, describes the function of the court rather than specifying its name. See Pfander, *Jurisdiction-Stripping*, supra note 7, at 1455 n.8. According to Pfander, the “Supreme Court” derives its name from the Judiciary Act of 1789, which names the one supreme court the “Supreme Court,” and names the inferior courts “Circuit Courts” and “District Courts.” See id.

lish.⁸³ This language relating to the courts appears in two places, Article III and Article I. Article III provides as follows:

The judicial Power of the United States, shall be vested in one *supreme* Court, and in such *inferior* Courts as the Congress may from time to time ordain and establish. The Judges, both of the *supreme* and *inferior* Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.⁸⁴

Article I grants Congress the power to “constitute Tribunals *inferior* to the *supreme* Court.”⁸⁵

The words “supreme” and “inferior” are the starting place for any discussion about the structure of the judicial branch, but their impact on that structure is unclear. When considering whether the Supreme Court possesses supervisory power over inferior court procedure, one is tempted to conclude that such power is naturally incident to the court heading the judicial department. But the terms “supreme” and “inferior” leave ambiguous even the most basic question of whether Article III establishes a hierarchical judicial department. In other words, it is not immediately clear, simply from the text itself, whether the Constitution establishes the Supreme Court as a departmental head with some degree of control over its inferiors.

Dictionaries suggest two possible interpretations of the distinction between “supreme” and “inferior,” only one of which necessarily subjects inferior courts to Supreme Court control. The 1755 edition of Samuel Johnson’s dictionary offers the following definitions of the word “inferior”: “1. Lower in place. 2. Lower in station or rank of life . . . 3. Lower in value or excellency. . . . 4. Subordinate.”⁸⁶ The same dictionary gives the following definitions for the word “supreme”: “1. Highest in dignity; highest in authority. . . . 2. Highest; most excellent.”⁸⁷ Modern dictionaries define the words similarly.⁸⁸ According to these definitions, Article

83. See Wilfred J. Ritz, *Rewriting the History of the Judiciary Act of 1789*, at 14 (Wythe Holt & L.H. LaRue eds., 1990) (“Only the first provision [of Article III], which mandates ‘one supreme Court,’ has major structural implications.”).

84. U.S. Const. art. III, § 1 (emphasis added).

85. Id. art. I, § 8, cl. 9 (emphasis added).

86. Samuel Johnson, *A Dictionary of the English Language* (7th ed. London, J.F. & C. Rivington 1785).

87. Id.

88. *Webster’s Third New International Dictionary* defines “supreme” as follows, in relevant part: “2 a: highest in rank or authority (as within the state or church): holding or exercising power that cannot be exceeded or overruled: dominant . . . 3 a: not exceeded by any other in degree, quality, or intensity: greatest possible . . . 4 a: ultimate, final . . . b: of utmost importance” *Webster’s Third New International Dictionary of the English Language Unabridged* 2299 (1993) [hereinafter *Webster’s*]. It defines “inferior” as follows, in relevant part: “1: situated lower down or nearer what is regarded as the bottom or base . . . 2 a: of lower degree or rank . . . 3 a: of less importance, value, or merit: of poorer quality” Id. at 1158.

III's distinction between "supreme" and "inferior" courts might imply a relationship of subordination, in which the Supreme Court controls inferior courts. Or the distinction might have nothing to do with control, referring merely to the relative rank or importance of courts.⁸⁹ Those who believe that Article III uses the terms in the latter sense generally maintain that for courts, the difference in rank or importance is manifested in jurisdictional scope, with a "supreme" court having wide jurisdictional and/or subject matter competence, and an "inferior" court having relatively narrower jurisdictional and/or subject matter competence.⁹⁰

Before proceeding any further, two cautions are in order. *First*, it is important to resist the temptation to make the choice between these two interpretations a strict either/or problem—in other words, to argue that the supreme/inferior distinction must refer *either* to a relationship of subordination *or* to relative rank. One ought to resist this temptation because it is not a particularly helpful way to frame the problem. Deciding that someone is "lesser in rank" to another does not exclude the possibility that the person is also "subordinate to" the other. In some instances, one is lesser in rank or importance but not "subordinate to" another, as an associate professor is "lesser in rank than" but not "subordinate to" a full professor. In other instances, however, subordination is a feature of lesser rank: A lieutenant is both "lesser in rank than" and "subordinate to" a colonel.⁹¹ As this example shows, concluding that the supreme/inferior distinction refers to relative rank does not rule out the possibility that it also refers to subordination.⁹² As what matters for present purposes is whether the distinction puts inferior courts within the Supreme Court's control, it is analytically more direct to frame the question this way: Regardless of whether the Constitution's distinction between "su-

89. Cf. Black's Law Dictionary 381 (8th ed. 2004) (defining "inferior court" as "[a]ny court . . . subordinate to the chief appellate tribunal [in the particular] judicial system" or "[a] court of special, limited, or statutory jurisdiction" (emphasis added)).

90. See *infra* Part II.B; see also Ashutosh Bhagwat, Separate but Equal?: The Supreme Court, the Lower Federal Courts, and the Nature of the "Judicial Power," 80 B.U. L. Rev. 967, 983–84 (2000) (arguing that words "supreme" and "inferior" more likely refer to jurisdictional differences than to relationship of subordination); Edward A. Hartnett, Not the King's Bench, 20 Const. Comment. 283, 314 (2003) (noting that supreme/inferior distinction does not necessarily refer to relationship of subordination, but may instead refer to "status, or breadth of geographic and subject matter jurisdiction").

91. Indeed, this is also the case for the federal courts, even if one considers it the consequence of statutory rather than constitutional design. A district judge is both "lower in rank than" and "subordinate to" a justice of the Supreme Court. She is lower in rank because her title is less prestigious and she gets paid less. She is "subordinate" because the Supreme Court can reverse her judgments.

92. Cf. Pfander, Jurisdiction-Stripping, *supra* note 7, at 1458–59 (asserting that supreme/inferior distinction refers both to difference in jurisdictional breadth and to relationship of subordination); William S. Dodge, Note, Congressional Control of Supreme Court Appellate Jurisdiction: Why the Original Jurisdiction Clause Suggests an "Essential Role," 100 Yale L.J. 1013, 1020–30 (1991) (arguing that supreme means "most important" for purposes of Article III, but that Supreme Court cannot maintain that status without some amount of appellate jurisdiction—i.e., control—over inferior courts).

preme" and "inferior" courts refers to rank, does it contemplate that any inferior courts Congress chooses to establish be "subordinate to" the Supreme Court? The fact that the supreme/inferior distinction can also refer to relative rank is important to the analysis only insofar as it permits one to answer this question "no" without depriving the terms of content.

Second, one must be careful to separate the familiar from the constitutionally required.⁹³ Numerous statutes treat inferior courts as subordinates of the Supreme Court. The Rules Enabling Act and statutes dealing with the Supreme Court's appellate jurisdiction are just two examples. It is important to keep in mind, however, the possibility that the scheme with which we are familiar may well be the result of congressional choice rather than constitutional mandate.

B. *Historical Support for the Nonhierarchical Definition*

Scholars—most notably, David Engdahl and Wilfred Ritz—have amassed considerable historical evidence suggesting that lawyers in the Founding period used the words "supreme" and "inferior" to describe the relative geographic and subject matter competence of courts rather than their respective positions in a judicial hierarchy.⁹⁴ Engdahl notes, for example, that in describing the English system, "Blackstone called courts 'inferior' and 'supreme' without reference to hierarchy."⁹⁵ For Black-

93. Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 *Stan. L. Rev.* 895, 905 (1984) (criticizing arguments about Supreme Court's role that "confuse[] the familiar with the necessary, the desirable with the constitutionally mandated").

94. See David E. Engdahl, *What's in a Name? The Constitutionality of Multiple "Supreme" Courts*, 66 *Ind. L.J.* 457 (1991); Ritz, *supra* note 83, at 35 ("[T]he basic court system structure in 1787–89 . . . was horizontal. There were different levels of courts, which by definition means that some were 'superior' and others were 'inferior.' *All were trial courts.*").

95. Engdahl, *supra* note 94, at 466; see also Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 *Harv. L. Rev.* 1153, 1180 n.139 (1992) ("[T]he words 'supreme' and 'inferior' were [probably] used in the same sense in the Constitution as in Blackstone's *Commentaries*: to distinguish between courts 'subject to narrow geographic and subject matter restraints' and courts not subject to such restraints." (quoting Dodge, *supra* note 92, at 1020–28)). While Blackstone largely does use the terms in the sense that these commentators describe, see *supra* note 94, in at least one place, Blackstone notes that "supreme courts . . . were . . . constituted to correct the errors of the inferior ones." 3 William Blackstone, *Commentaries* *31. Blackstone does refer to multiple "supreme courts," and he does go on to focus on the jurisdictional differences between supreme and inferior courts, both of which were primarily courts of original jurisdiction. *Id.* at *31–*32; see also *id.* at *32–*70 (describing in detail English courts of general civil jurisdiction). But it would be incorrect to claim that Blackstone did not conceive of supreme courts as possessing any sort of error-correcting function. Similarly, St. George Tucker praised Virginia's post-revolution judicial system for "[t]he establishment of superior courts which sit regularly in various parts of the country; and possess appellate jurisdiction in civil cases to a certain amount, [which] has already produced very beneficial effects in correcting the proceedings of the inferior courts . . ." 4 St. George Tucker, *Blackstone's Commentaries: With Notes of Reference to the Constitution and Laws of the Federal Government of the United States*

stone, an “inferior” court was one “subject to narrow geographic and subject matter restraints,” not one “low in the hierarchy of a pyramidal judicial system.”⁹⁶ According to Engdahl, this usage of the word “supreme” was carried over into the colonial courts, which often had multiple “supreme” courts,⁹⁷ and, ultimately, into the Constitution itself.⁹⁸ As a result, Engdahl’s understanding of the supreme/inferior distinction is radically nonhierarchical: It would permit Congress wholly to deprive the Supreme Court of its appellate jurisdiction and presumably even to submit the judgments of the Supreme Court to review by other federal courts.⁹⁹ In Engdahl’s view, the constitutional requirement that the Court be “supreme” would be satisfied so long as the Supreme Court remained the federal court with the widest geographic and subject matter

and of the Commonwealth of Virginia app. note A, at 4 (Philadelphia, Birch & Small 1803) [hereinafter Tucker, Blackstone’s Commentaries].

96. Engdahl, *supra* note 94, at 466; cf. R.J. Walker & Richard Ward, Walker & Walker’s English Legal System 141 (7th ed. 1994) (“The nature of superior courts is that their jurisdiction is limited neither by the value of the subject matter of an action nor geographically. The jurisdiction of inferior courts is limited both geographically and according to the value of the subject matter of the dispute.”). Interestingly, *Webster’s Third New International Dictionary* defines “inferior court” the same way Blackstone apparently understood it: “having limited and specified rather than general jurisdiction.” Webster’s, *supra* note 88, at 1158; see also Black’s Law Dictionary, *supra* note 89, at 381 (giving similar definition).

97. Engdahl claims that in 1787, many of the states had multiple “supreme” courts and no state reserved the title “supreme” for the court at “the apex of a judicial pyramid.” Engdahl, *supra* note 94, at 470; see also Ritz, *supra* note 83, at 41–46 (making similar point). It is interesting to note that even when states had a pyramidal judicial system at the time of the Founding, they did not necessarily use the words “supreme” and “inferior” to capture that structure. New York, for example, named its court of last resort the “Court for the Trial of Impeachments and Corrections of Errors.” See N.Y. Const. of 1777, art. 32. Its “Supreme Court of Judicature” had some appellate jurisdiction and wide original jurisdiction, but was subject to review by the Court for the Trial of Impeachments and Corrections of Errors. *Id.*; see also N.Y. State Courts of Appeals & N.Y. State Archives and Records Admin., “Duelly and Constantly Kept”: A History of the New York Supreme Court, 1691–1847 and An Inventory of Its Records (Albany, Utica and Geneva Offices), 1797–1847, at 10 (1991), available at <http://www.courts.state.ny.us/history/elecbook/duelly/pgI.htm> (on file with the *Columbia Law Review*); cf. Richard H. Fallon, Jr. et al., Hart and Wechsler’s The Federal Courts and the Federal System 624 (5th ed. 2003) (noting that “Supreme Court of Pennsylvania” was not Pennsylvania’s highest court in 1805).

98. Engdahl, *supra* note 94, at 503–04 (asserting that history shows that our federal history did not begin with hierarchical judicial department, and that such hierarchy “is by no means what the text of the Constitution requires”). Among the evidence that Engdahl uses to support his argument is Virginia’s proposal that the federal Constitution provide for “one *or more* supreme tribunals.” *Id.* at 464 (quoting 1 The Records of the Federal Convention of 1787, at 21 (Max Farrand ed., rev. ed. 1966) [hereinafter Farrand’s Records]).

99. See *id.* at 491 (“[T]here are no impediments whatever to Congress’ discretion in deciding whether and how to fix lines of review.” (citation omitted)); *id.* at 504 (“The same legislative branch that pyramided the [federal] judiciary may refashion it however political wisdom directs, without doing violence to the Constitution.” (citations omitted)).

jurisdiction.¹⁰⁰ The current hierarchy, according to Engdahl, is entirely the result of congressional rather than constitutional choices.

I do not raise this scholarship to assert that the nonhierarchical account advanced by scholars like Engdahl and Ritz is necessarily correct.¹⁰¹ On the contrary, I have significant reservations about the nonhierarchical account.¹⁰² I do think, however, that these scholars amass enough credible evidence supporting the nonhierarchical definition that it cannot be dismissed out of hand. The next two subparts of this Part consider whether grammatical context or the use of the words in other parts of the Constitution resolves the problem.

C. *The Significance of the Preposition "to"*

Evan Caminker has argued that Article III's distinction between a "supreme" court and its "inferiors" is best understood as creating a relationship of subordination between the Supreme Court and its inferi-

100. See *id.* at 475 n.95 (asserting that "supreme" and "inferior" refer to relative subject matter or geographic competence); *id.* at 491 ("[T]he terms 'supreme' and 'inferior,' as used in the Constitution, bear no hierarchical meaning at all.").

101. In fact, Engdahl's reading of the historical record is a matter of scholarly debate. Some find it persuasive, see, e.g., Bhagwat, *supra* note 90, at 984 & n.101; Hartnett, *supra* note 90, at 291–92 & nn.29–30, but others disagree with it, in whole or in part, see, e.g., Steven G. Calabresi & Gary Lawson, *Equity and Hierarchy: Reflections on the Harris Execution*, 102 *Yale L.J.* 255, 273 n.90 (1992) (disagreeing with many of the conclusions of Engdahl's "superb" article); Caminker, *Inferior Courts*, *supra* note 7, at 830–32 (rejecting Engdahl's interpretation); Pfander, *Jurisdiction-Stripping*, *supra* note 7, at 1448–49, 1453 n.81 (asserting that while generally persuasive, Engdahl's account overlooks historical role of "supreme" courts in supervising inferior courts through prerogative writs, an area in which courts like King's Bench were "both supreme and final"). Similarly, Ritz's reading of the record differs in significant ways from that of other prominent historical accounts. See Ritz, *supra* note 83, at 41, 49–51 (describing his disagreement with Julius Goebel, Jr. about, *inter alia*, whether hierarchical judicial systems were well-established in states at time of Founding).

102. In the course of the narrower historical research that I undertook for Part IV, I encountered significant evidence that the Founding generation expected inferior courts to be subordinate. See, e.g., *Federal Farmer XV* (Jan. 18, 1788), in 2 *The Complete Anti-Federalist* 315, 316–17 (Herbert J. Storing ed., 1981) (assuming that Article III places Supreme Court atop hierarchical federal judiciary, and approving that design); *The Federalist No. 82*, at 427 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001) (arguing that Article III means that "the organs of the national judiciary should be one supreme Court, and as many *subordinate* courts, as congress should think proper to appoint" (emphasis added)); Letter from Chief Justice John Jay to George Washington (Sept. 15, 1790), reprinted in 3 *Joseph Story, Commentaries on the Constitution of the United States* 440 n.1 (Boston, Hilliard, Gray & Co. 1833) [hereinafter *Story, Commentaries*] (describing federal circuit courts as "inferior and subordinate"); see also *supra* note 95 (describing evidence that Blackstone and St. George Tucker expected hierarchical judiciaries). Because, however, I ultimately investigated a different and narrower historical question, see *infra* Part IV, I am not prepared to dismiss entirely the nonhierarchical account here. Given the conflicting historical evidence and the scholarly disagreement, evaluating the accuracy of the nonhierarchical account is a project in its own right.

ors.¹⁰³ Caminker acknowledges that the supreme/inferior distinction might mean that inferior courts are merely “lesser in rank” than the Supreme Court, or it might mean that they are “subordinate to” the Supreme Court.¹⁰⁴ He concludes that the second definition—subordination—is the more natural reading.¹⁰⁵ In reaching this conclusion, Caminker relies heavily on Article I. He emphasizes that in empowering Congress to create inferior courts, Article I describes Tribunals “‘inferior to’” the “supreme” Court rather than tribunals “‘inferior (or lesser) than’ . . . the ‘supreme’ Court.”¹⁰⁶ For Caminker, “[t]he use of ‘to’ clearly suggests a direct relationship of subordination, not a comparative description of the courts’ respective features.”¹⁰⁷

The weight that Caminker puts on Article I’s use of the preposition “to,” however, is misplaced. The word “inferior” can take the preposition “to” regardless whether the word is used to denote subordination or merely rank. Consider the following example sentences from the *Oxford English Dictionary*, all given to illustrate the “lower than, less than, not so good or great as, unequal to” meaning of the word “inferior”:

The noyse not *inferiour to* a cannon.¹⁰⁸

It had been nothing *inferiour to* them in beauty and profit.¹⁰⁹

I feel myself *inferiour to* the task.¹¹⁰

These examples are from the seventeenth and eighteenth centuries, but modern dictionaries similarly note that the word “inferior” often takes the preposition “to” without implying a subordinate relationship when used to denote a difference in value or rank.¹¹¹ For example, the 2001 *New Oxford American Dictionary* illustrates the “rank” definition of inferior with the phrase “schooling in inner-city areas was *inferior to* that in the rest of the country.”¹¹²

103. See Caminker, *Inferior Courts*, supra note 7, at 832.

104. *Id.* at 828 (internal quotation marks omitted).

105. *Id.* at 832.

106. *Id.*

107. *Id.*; see also James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 *Harv. L. Rev.* 643, 696 n.242 (2004) (agreeing with Caminker’s construction); Pfander, *Jurisdiction-Stripping*, supra note 7, at 1441 (same).

108. 7 *Oxford English Dictionary* 924 (2d ed. 1989) (emphasis added) (citing Thomas Herbert, *A Relation of Some Yeares Travaile Begunne Anno 1626, into Afrique and the Greater Asia* 20 (London, 2d ed. 1638)).

109. *Id.* (emphasis added) (citing Henry Maule, *The History of the Picts* I.8 (Edinburgh 1706)).

110. *Id.* (emphasis added) (citing James Boswell, *An Account of Corsica* 9 (London, 2d ed. 1768)).

111. See, e.g., *Random House Webster’s College Dictionary* 676 (2000) (“inferior . . . I. low or lower in station, rank, degree or grade (often fol. by *to*)”); *Webster’s New Universal Unabridged Dictionary* 938 (2d ed. 1983) (“inferior . . . 3. lower in quality or value than (with *to*)”).

112. *The New Oxford American Dictionary* 869 (Elizabeth J. Jewell & Frank Abate eds., 2001).

This is not to say, of course, that Articles I and III *necessarily* use the word “inferior” to denote a difference in rank rather than a relationship of subordination. It is only to say that contrary to Caminker’s argument, the use of the word “to” does not rule out the possibility that Articles I and III are using the word in this manner. No matter what the terms of the relationship it establishes—one of comparison or one of control—“inferior” is a relational word, capable of taking the preposition “to.” Contrary to Caminker’s argument, the grammatical structure of the phrase does not dispel its ambiguity.

D. “Inferior” in the Appointments Clause

The word “inferior” also appears in the Appointments Clause of Article II, where the Constitution distinguishes between the principal and “inferior” officers of the Executive Branch.¹¹³ If the word is clearly used to mean “subordinate” in that Clause, that would be good evidence that the word has the same meaning in Articles I and III.¹¹⁴ As it turns out, however, the word “inferior” in the Appointments Clause does little to dispel the ambiguity, for the use of “inferior” in the Appointments Clause presents the same interpretive dilemma that it does in Articles I and III. In the Appointments Clause, as in Articles I and III, one can read “inferior” to mean “subordinate” or merely “different in rank or authority.” Although the Supreme Court has never interpreted the word “inferior” (or, for that matter, the word “supreme”) for purposes of Articles I and III,¹¹⁵ it has done so for purposes of Article II. And, in that context, the

113. The text of the Appointments Clause reads:

[H]e shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. art. II, § 2, cl. 2; see also *Edmond v. United States*, 520 U.S. 651, 659–61 (1997) (describing distinction between principal and inferior officers in Appointments Clause).

114. Cf. Akhil Reed Amar, *Intratextualism*, 112 Harv. L. Rev. 747, 748–49 (1999) (arguing for interpretive approach that considers how a word is used throughout Constitution).

115. Although the Supreme Court has never addressed the question whether “inferior” courts must be subordinate to the supreme, it has addressed the meaning of the word “inferior” at least in passing in some old cases. Unfortunately, though, these cases do little to clear up the confusion about the meaning of the term. One characteristic of “inferior” courts at common law was that their judgments were presumed nullities. The Supreme Court’s primary concern in these cases was to make clear that while inferior federal courts, like inferior courts at common law, possess a limited jurisdictional scope, their judgments are entitled to a presumption of regularity. See *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 204–05 (1830); *Kempe’s Lessee v. Kennedy*, 9 U.S. (5 Cranch) 173, 185 (1809); *Turner v. Bank of N. Am.*, 4 U.S. (4 Dall.) 8, 10 (1799). These cases do not address the question whether inferior federal courts—in addition to any jurisdictional limitations attendant to their inferior status—are also subordinate to the Supreme Court.

Supreme Court interpreted the word “inferior” to mean a “difference in rank or authority” rather than “subordinate.” In *Morrison v. Olson*, the Supreme Court held that the independent counsel was an “inferior” officer in the Executive Branch even though she was not “subordinate to” the President.¹¹⁶ According to the *Morrison* Court, an officer can be “inferior” even if not subordinate, so long as her authority is more limited than that of more highly ranked principal officers.¹¹⁷

Morrison shows that it is possible to construe the word “inferior” in the Constitution to mean something other than subordinate, but it does not necessarily demonstrate that this is the best construction of the term. The majority reached its conclusion about the meaning of “inferior” over the vigorous dissent of Justice Scalia, who argued that it was implausible to interpret the word “inferior” in the Appointments Clause as meaning anything other than “subordinate.”¹¹⁸ “In a document dealing with the structure (the constitution) of a government,” Justice Scalia insisted, “it would be unpardonably careless to use the word [inferior] unless a relationship of subordination was intended.”¹¹⁹

There is some force to Justice Scalia’s point that “subordinate” is the more natural interpretation of the word “inferior.”¹²⁰ Given, however,

116. 487 U.S. 654, 671 (1988).

117. *Id.* at 671–73. In addition to noting that the independent counsel’s tenure, jurisdiction, and duties were more limited than that of the Attorney General, a “principal” officer for purposes of Article II, the Court also noted that “the fact that [the independent counsel] can be removed by the Attorney General indicates that she is to some degree ‘inferior’ in rank and authority.” *Id.* at 671. The majority acknowledged, however, that the removal provision did not render the independent counsel “subordinate to” either the Attorney General or the President. *Id.* This is presumably because, as Justice Scalia noted in dissent, the removal provision subjected the independent counsel to removal only for “good cause”—a limitation “specifically intended to ensure that she be *independent* of, not *subordinate* to, the President and the Attorney General.” *Id.* at 723 (Scalia, J., dissenting).

118. *Id.* at 719 (Scalia, J., dissenting). Nine years after *Morrison* was decided, Justice Scalia wrote the majority opinion in *Edmond v. United States*, and dicta in that opinion suggests that an “inferior” officer for purposes of Article II must be subject to some sort of supervision by a “principal” officer. 520 U.S. at 663. *Edmond*’s holding, however, is narrower than its dicta, and *Edmond* did not overrule *Morrison*. *Morrison* held that an independent but lesser ranked official could be “inferior”; *Edmond*, by contrast, held only that a subordinate official was necessarily “inferior.” Even after *Edmond*, therefore, the possibility remains that “inferior” in the Appointments Clause can mean something other than subordinate. *Morrison* is the case that enlivens that possibility.

119. *Morrison*, 487 U.S. at 719 (Scalia, J., dissenting). On this same reasoning, he asserted as an aside that Article III’s use of the word “inferior” renders inferior courts “subordinate to” the Supreme Court. *Id.* at 719–20; see also *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 227 (1995) (Scalia, J.) (asserting without analysis that Article III’s distinction between “supreme” and “inferior” courts implicitly creates “hierarchy” within judicial department).

120. For a sampling of those expressing views similar to Justice Scalia’s, see, e.g., Akhil Reed Amar, Some Opinions on the Opinion Clause, 82 Va. L. Rev. 647, 668–69 & n.92 (1996) (agreeing with Justice Scalia’s “forceful dissent” regarding interpretation of “inferior”); Caminker, *Inferior Courts*, supra note 7, at 828 n.46, 832 (implicitly agreeing with Justice Scalia); Frank H. Easterbrook, *Unitary Executive Interpretation: A Comment*,

the competing historical evidence, the ambiguity in the terms “supreme” and “inferior” ought to be taken seriously. By themselves, these terms do not answer the question whether Article III establishes a hierarchy headed by the Supreme Court. A careful structural analysis—and, if that yields no result, a study of the historical sources on which Engdahl, Ritz, and others rely—is necessary to answer that question.

III. SUPREME AND INFERIOR COURTS: THE CONSTITUTIONAL STRUCTURE

This Part explores whether the Constitution’s structure answers the question its text leaves open: Does Article III render inferior courts subordinate to the Supreme Court? It also introduces a new question: Assuming that Article III does render inferior courts subordinate to the Supreme Court, what is the structural function of that subordination requirement? Does it function only as a limit on how Congress structures the judicial branch, or does it also grant the Supreme Court some inherent authority to control its subordinates? Article III’s text, ambiguous on the first-order question of hierarchy, certainly does not answer the second-order question of whether a requirement of hierarchy functions as a constraint or as a power source. This Part pursues both questions by studying the structure of Article III itself, by comparing Article III to Articles I and II, and finally, by discussing the implications that one can draw from the analysis.

A. Article III

Article III is largely silent with respect to the structure of the judicial department. Apart from the language distinguishing between a “supreme” court and “inferior” courts, Article III says little about the relationship between the Supreme Court and its inferiors. On the one hand, certain aspects of Article III suggest that all federal judges are on equal footing—or, as some scholars put it, that they enjoy structural parity.¹²¹ All federal judges have life tenure and an irreducible salary, and all federal courts, both supreme and inferior, possess “the judicial power of the United States.”¹²² On the other hand, Article III does contain at least one provision other than the supreme/inferior distinction that is suggestive of hierarchy: It provides that “the supreme Court shall have appel-

15 Cardozo L. Rev. 313, 319 (1993) (“History and the structure of the Constitution reveal that ‘inferior officers’ and ‘inferior courts’ are *subordinate* institutions, not ‘unimportant’ ones.”).

121. See Akhil Reed Amar, A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction, 65 B.U. L. Rev. 205, 221 (1985) [hereinafter Amar, Neo-Federalist View] (arguing that all federal judges have “structural parity” because they all enjoy same structural protections); see also Lawrence Gene Sager, Foreword: Constitutional Limitations on Congress’ Authority to Regulate the Jurisdiction of the Federal Courts, 95 Harv. L. Rev. 17, 57, 60 (1981) (arguing that either Supreme Court or inferior federal courts can fulfill “essential function” of federal judiciary).

122. U.S. Const. art. III, § 1.

late Jurisdiction."¹²³ Insofar as this provision grants the Supreme Court appellate jurisdiction to review the judgments of inferior federal courts, it suggests that the Supreme Court sits above those courts in a judicial hierarchy.

The Appellate Jurisdiction Clause is good evidence that Article III envisions some sort of hierarchy. But the hierarchy that one can infer from that clause, standing alone, is fairly weak. The grant of appellate jurisdiction is immediately qualified by the Exceptions and Regulations Clause, which provides that the Court has appellate jurisdiction only subject to "such Exceptions, and under such Regulations, as the Congress shall make."¹²⁴ As others have observed, the Exceptions and Regulations Clause "plainly diminishes the extent to which the Supreme Court is hierarchically dominant over the inferior courts,"¹²⁵ because it permits Congress to insulate some—and arguably all—inferior federal court judgments from Supreme Court review. In fact, the threat that this clause poses to the Supreme Court's hierarchical dominance has prompted scholars to consider whether the Court's designation as "supreme" limits the exceptions that Congress can make to the Court's appellate jurisdiction over inferior federal courts.¹²⁶ Thus, study of Article III's structure circles the inquiry back to its starting point, a consideration of how the Court's supremacy affects the structure of the judicial branch. Because Article III itself says little about that question, it is worth comparing that Article with Articles I and II, which establish the other two branches of the federal government.

B. *A Comparison to Article II*

Article III's silence on matters of structure is particularly striking when Article III is compared to Articles I and II, which give a reasonable amount of detail regarding the composition of the other two branches.¹²⁷ Consider Article II. The claim that the Court's supremacy endows it with supervisory power requires one to view Article III as creating a hierarchy

123. *Id.* § 2, cl. 2. Two other aspects of Article III suggest that the Supreme Court occupies a special place in the Judicial Department: The Supreme Court is the only court created by the Constitution, and the only court with an irreducible core of original jurisdiction. See *id.* § 1 (creating Supreme Court but rendering inferior courts optional); *id.* § 2, cl. 2 (defining Supreme Court's original jurisdiction). These features, however, do not have a clear bearing on the Court's relationship to inferior courts.

124. *Id.* § 2, cl. 2.

125. Calabresi & Lawson, *supra* note 101, at 276; see also Amar, *Neo-Federalist View*, *supra* note 121, at 257 ("[T]he 'exceptions' clause gives Congress the power to structure the internal hierarchy of the federal judiciary by shifting the final power to decide various mandatory cases from the Supreme Court to other Article III judges." (emphasis omitted)).

126. See *infra* note 152 and accompanying text.

127. Cf. Ritz, *supra* note 83, at 14 ("Article III . . . is about one-half the length of Article II, which established the presidency, and it is about one-fifth the length of Article I, which established the Congress.").

headed by the Supreme Court. But Article II, which indisputably creates a hierarchy headed by the President,¹²⁸ does so far more explicitly.

To begin with, Article II gives the President significant ability to control executive branch membership. The President has the power to nominate (and, with the advice and consent of the Senate, to appoint) principal officers of the executive branch; thus, the President's first means of directing the executive branch is filling it with principal officers who are loyal to him.¹²⁹ Article III, by contrast, does not guarantee the Supreme Court any say in the selection of inferior judges.¹³⁰ Nor, of course, does Article III give the Supreme Court any say in their retention. While there is disagreement as to whether the President possesses an absolute or limited ability to remove those who exercise executive power, there is general agreement that the President must have *some* ability to remove such officials.¹³¹ The Supreme Court, by contrast, has no ability to remove

128. Even those who resist a strong "unitary executive" reading of Article II concede some hierarchy in Article II. See, e.g., Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 *Colum. L. Rev.* 1, 8 (1994) ("No one denies that in some sense the framers created a unitary executive; the question is in what sense."). Indeed, quite apart from any disputes about Article II's Vesting Clause, which is the focus of most debate about the structure of the executive department, it is undeniable that the text of Article II explicitly grants the President some control over other executive branch officials. In addition to the examples mentioned in the text, note that Article II, Section 2, Clause 1 renders the President "Commander in Chief of the Army and Navy of the United States."

129. I do not mean to suggest that the President necessarily controls those whom he appoints. After all, the President also appoints judges, and he does not control them. My point here is only that, at least at the upper echelon, the appointment power gives the executive branch a coherence that the judicial branch—staffed with judges who owe no particular allegiance to the Supreme Court or its Chief Justice—lacks.

130. Burke Shartel argued that Congress could vest the Chief Justice of the Supreme Court with the power to appoint inferior officers in the judicial branch. *Burke Shartel, Federal Judges—Appointment, Supervision, and Removal—Some Possibilities Under the Constitution*, 28 *Mich. L. Rev.* 485, 492 (1930). But see Theodore W. Ruger, *The Judicial Appointment Power of the Chief Justice*, 7 *U. Pa. J. Const. L.* 341, 369–70 (2004) (questioning whether judges on inferior courts qualify as "inferior officers" for purposes of Appointments Clause). Even if Congress could vest the Supreme Court or the Chief Justice with the power to appoint judges to staff the inferior courts, the point here is that the Constitution does not *guarantee* either the Supreme Court or the Chief Justice that opportunity. The President, by contrast, is constitutionally guaranteed the right to nominate at least the principal officers of the executive branch.

131. Even those who accept congressional delegations of executive power to independent officials typically believe that the President must have the ability to fire such officials, if only for cause. See, e.g., *Morrison v. Olson*, 487 U.S. 654, 692, 695–96 (1988) (holding that statutory provisions regarding appointment of independent counsel did not violate Article II because, among other things, President could fire independent counsel for "good cause"); Lessig & Sunstein, *supra* note 128, at 117–18 (defending certain "good cause" limitations on President's removal power, but not total withdrawal of it). By contrast, those who believe that the President has the power to control all exercises of executive power typically accept fewer limits on his ability to remove those who wield it. See, e.g., *Morrison*, 487 U.S. at 723–24 & n.4 (Scalia, J., dissenting) (arguing that President possesses, at a minimum, unlimited ability to remove any officer performing "purely executive" function); Calabresi & Rhodes, *supra* note 95, at 1166 & n.57 ("The third and

inferior court judges, who enjoy the same guarantees of life tenure and undiminished salary as do Supreme Court justices.

Even through devices short of removal, Article II is clear about the fact that at least some executive officers report to the President in some respect. Article II expressly permits the President to "require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices."¹³² Article III, by contrast, does not expressly authorize the Supreme Court to make any demands of inferior courts. There is no Article III analogue to the Opinions Clause under which the Supreme Court could demand that inferior courts provide it with written opinions regarding the judgments they issue. Article III, unlike Article II, does not provide the Supreme Court with any specific means of controlling other members of the judicial department. Some have come to regard it as the Supreme Court's role to "take care that federal law is uniformly interpreted," much as the President must "take care that the laws be faithfully executed."¹³³ Article III, however, does not explicitly charge the Supreme Court with this function, much less endow it with the means to carry it out.

It is also worth comparing Article III's Vesting Clause with that of Article II. Article III vests the judicial power "in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."¹³⁴ Article II provides that "[t]he executive Power shall be vested in a President of the United States of America."¹³⁵ A vast literature exists debating whether Article II's Vesting Clause requires a "hierarchical, unified executive department under the direct control of the President,"¹³⁶ or whether the Clause permits a looser hierarchy in which some exercises of executive power can be placed beyond the President's direct

weakest model of the unitary executive contends that the President has unlimited power to remove at will any principal officers (and perhaps certain inferior officers) who exercise executive power.").

132. U.S. Const. art. II, § 2, cl. 1. I need not resolve here whether Article II's specification of the opinion power implies that the President lacks other, greater means of controlling executive branch officials. See generally Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. Ill. L. Rev. 701, 728-33 (describing and entering debate about effect of Opinions Clause on general claims about executive power). My point here is simply to contrast the Constitution's grant of this specific power with the lack of any comparable grant to the Supreme Court.

133. U.S. Const. art. II, § 3; cf. Leonard G. Ratner, *Congressional Power over the Appellate Jurisdiction of the Supreme Court*, 109 U. Pa. L. Rev. 157, 161 (1960) (arguing that Supreme Court's essential function is, inter alia, "to provide a tribunal for the ultimate resolution of inconsistent or conflicting interpretations of federal law by state and federal courts").

134. U.S. Const. art. III, § 1.

135. *Id.* art. II, § 1, cl. 1.

136. Calabresi & Rhodes, *supra* note 95, at 1165.

control.¹³⁷ Whichever position one ultimately takes in that debate, it is worth noting that while it is at least plausible to construe Article II's Vesting Clause as placing all executive power within the control of the President, a comparable construction of Article III's Vesting Clause is not plausible. Article III does not vest the judicial power exclusively in "a supreme Court," leaving open the possibility that inferior courts exercise the judicial power at the Supreme Court's pleasure. On the contrary, Article III makes clear that the judicial power vests directly in each Article III court. Inferior courts are capable of exercising judicial power wholly independently of the Supreme Court's direction. They do not depend on the Supreme Court to give them the power, and the Supreme Court cannot take it away.¹³⁸

In fact, rather than giving the Supreme Court grounds for claiming control of all exercises of judicial power, Article III's Vesting Clause arguably *limits* the degree of control that the Supreme Court can exert over inferior courts. The Supreme Court's control over inferior courts is already limited by the Good Behavior Clause, which gives judges intrabranch as well as interbranch protection from job loss and salary reduction.¹³⁹ But the Vesting Clause may also prevent the Supreme Court from controlling inferior courts through methods short of these more drastic measures. The Vesting Clause may prohibit the Supreme Court from regulating inferior courts in a way that cripples their ability to exercise "judicial power"; otherwise, the Supreme Court could effectively take away what Article III gives.¹⁴⁰ As Judge Tatel eloquently put it in the con-

137. For a sampling of the debate, compare *id.* at 1208 (arguing that Article II mandates unitary executive), and Prakash, *supra* note 132, at 763 (same), with A. Michael Froomkin, *The Imperial Presidency's New Vestments*, 88 *Nw. U. L. Rev.* 1346, 1373-74 (1994) (arguing that Article II permits looser hierarchy with independent agencies largely insulated from direct presidential control), and Lessig & Sunstein, *supra* note 128, at 108-10 (same).

138. Cf. *Lindh v. Murphy*, 96 F.3d 856, 869 (7th Cir. 1996) (en banc), *rev'd on other grounds*, 521 U.S. 320 (1997) (making point that Article III's Vesting Clause, in contrast to Article II's Vesting Clause, prohibits view that inferior courts are analogous to executive agencies, deriving power from Supreme Court); Geoffrey P. Miller, *Independent Agencies*, 1986 *Sup. Ct. Rev.* 41, 60 ("Inferior courts are granted judicial power through the Constitution itself; the power does not flow by delegation from the Supreme Court. In contrast, the Constitution . . . expressly vests the entire executive power in 'a President of the United States of America.'").

139. See *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 59 n.10 (1982) (asserting that constitutional "guarantee of life tenure insulates the individual judge from improper influences not only by other branches but by colleagues as well, and thus promotes judicial individualism"); see also *supra* notes 121-122 and accompanying text.

140. One could draw a rough analogy to congressional regulation of the courts. Congress is indisputably authorized to engage in some regulation of the federal courts. Its power in this respect, however, is not unlimited. Both courts and commentators have closely examined how Article III's grant of judicial power limits the amount of control that Congress is otherwise authorized to exert over the courts. See, e.g., *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218-19 (1995) (holding that judicial power granted by Article III

text of judicial discipline, “[T]he principle of judicial independence guarantees to individual Article III judges a degree of protection against interference with their exercise of judicial power, including interference by fellow judges.”¹⁴¹ The Supreme Court has expressed the same sentiment.¹⁴²

The Supreme Court’s treatment of an inferior court’s control of its bar membership is instructive in this regard. This is one of two areas (the other being judicial discipline) in which the Supreme Court has explored, even briefly, the degree to which federal courts can regulate other federal courts. From very early on, the Supreme Court has expressed “doubts . . . respecting the extent of its authority as to the conduct of the Circuit and District Courts towards their officers,” given that the power to discipline the bar is “incidental to all Courts.”¹⁴³ As the Second Circuit more recently put it, the authority to discipline attorneys practicing before it is “an inherent, self-contained power of any court, [thus] the power of an appellate court to review a lower court’s decision to sanction an attorney is not self-evident.”¹⁴⁴ In the end, federal appel-

includes power to conclusively resolve cases and that a congressional command to reopen final judgments violates this “fundamental principle”). Although vehement disagreement exists about where Article III draws the line, few would dispute that the federal courts possess some core of “judicial power” that Congress cannot reduce. One might similarly argue that all Article III courts must possess some core of “judicial power” that even the Supreme Court cannot reduce. Of course, the boundaries limiting intrabranched interference with judicial power would be drawn differently than those limiting interference by the other branches. Cf. Evan Caminker, *Allocating the Judicial Power in a “Unified Judiciary,”* 78 *Tex. L. Rev.* 1513, 1526 (2000) (“[C]ertain attributes of the judicial power mean one thing when threatened by actors external to the federal judiciary and quite another when threatened by actors inside the Article III hierarchy.”).

141. *McBryde v. Comm. to Review Circuit Council Conduct and Disability Orders of the Judicial Conference*, 264 F.3d 52, 77 (D.C. Cir. 2001) (Tatel, J., concurring).

142. See, e.g., *Chandler v. Judicial Council of the Tenth Circuit*, 398 U.S. 74, 84 (1970) (“There can, of course, be no disagreement among us as to the imperative need for total and absolute independence of judges in deciding cases or in any phase of the decisional function.”); *id.* at 137 (Douglas, J., dissenting) (arguing that Constitution does not authorize one group of judges to “censor or discipline any federal judge” or “declare him inefficient and strip him of his power to act as a judge”); *id.* at 141–42 (Black, J., dissenting) (declaring himself “unable to find in our Constitution or in any statute any authority whatever for judges to arrogate to themselves” the power to deprive another judge of “the full power of his office”); see also *In re Certain Complaints Under Investigation*, 783 F.2d 1488, 1507 (11th Cir. 1986) (acknowledging that Article III guarantees federal judges some degree of independence, but holding that Judicial Councils Reform and Judicial Conduct and Disability Act did not violate that guarantee).

143. *Ex parte Burr*, 22 U.S. (9 Wheat.) 529, 530–31 (1824).

144. *In re Jacobs*, 44 F.3d 84, 87–88 (2d Cir. 1994); see also *In re Morrissey*, 305 F.3d 211, 217 (4th Cir. 2002) (acknowledging that power to discipline bar, like contempt power, is inherent in every court and its exercise can be reviewed only for abuse of discretion); *McBryde*, 264 F.3d at 78–80 (Tatel, J., concurring) (arguing that “a judge’s authority to control the courtroom is essential to the . . . judicial power” and cannot be undermined, even by other judges).

late courts will review a lower court's decision to disbar an attorney, but only for an abuse of discretion.¹⁴⁵

Thus, unlike Article II's Vesting Clause, Article III's Vesting Clause does not strengthen the Supreme Court's claim to departmental dominance. Instead, Article III's Vesting Clause actually weakens that claim by making clear that the judicial power inheres in every federal court.

C. *A Comparison to Article I*

It is also worth comparing Article III with Article I. Unlike Article II, Article I does not create a pyramid of authority. Nonetheless, it still has more to say about departmental structure than does Article III.

The tone of Article I is one of self-governance, which is perhaps fitting for a department whose members hold the legislative power collectively. Article I's Vesting Clause stands in sharp contrast to the Vesting Clauses of Articles II and III. Article I makes clear that the members of Congress hold the legislative power together, as "a Congress of the United States."¹⁴⁶ Unlike the executive, no one member of Congress can plausibly launch an exclusive claim to the power of her department. Unlike any single Article III court, no one member of Congress can, acting alone, exercise the power of her department. Instead, members of Congress can exercise legislative power only when acting in concert with each other (and the President). Perhaps fittingly, members of Congress settle matters of branch governance through collective action as well.

Article I permits members of Congress to exercise a fair amount of control over one another. Indeed, one might say that it sets up a democracy of sorts within the most democratically selected branch. For example, Article I expressly authorizes each House to choose its own leader: The House of Representatives chooses its Speaker and the Senate chooses its President pro tempore.¹⁴⁷ Article III, by contrast, does not give members of the judiciary any comparable power; it does not, for example, guarantee the Supreme Court the right to select its own chief.¹⁴⁸ Article I also expressly authorizes members of Congress to discipline one another. Section 5 authorizes each House to "compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide," and to "punish its Members for disorderly Behavior, and, with

145. See, e.g., *Sacher v. Ass'n of Bar of N.Y.*, 347 U.S. 388, 388–89 (1954) (reversing judgment of disbarment on ground that District Court exceeded its discretion in permanently disbarring attorney).

146. U.S. Const. art. I, § 1.

147. *Id.* § 2, cl. 5 & § 3, cl. 5. Both Houses also have the power to select their "other Officers." *Id.*

148. Edward T. Swaine argues that Congress could grant the Supreme Court the power to select its own chief. Edward T. Swaine, *Hail, No: Changing the Chief Justice*, 154 U. Pa. L. Rev. (forthcoming June 2006). Whatever the merits of that argument, the point here is that the Constitution does not *guarantee* the Supreme Court the ability to do so. Cf. *supra* note 130 (making similar point with respect to selection of judges for inferior courts).

the Concurrence of two thirds, expel a Member."¹⁴⁹ By contrast, Article III does not expressly grant the judiciary any power to control or discipline its members. Currently existing means of judicial self-discipline are entirely statutory,¹⁵⁰ and, because of the Good Behavior Clause, they stop short of removal.

In short, just as Article II specifies some ways in which members of the executive branch must answer to the President, Article I specifies ways in which members of Congress must answer to one another. Article III, by contrast, not only fails to specify any ways in which inferior courts must answer to the Supreme Court, but it fails to specify any ways in which members of the judicial branch must answer to one another. Article III does not expressly authorize judges to promote or demote one another to or from positions of judicial branch leadership; nor does it expressly authorize judges to require any particular standard of behavior of one another. Whereas Article I's Vesting Clause emphasizes the interdependence of members of Congress, Article III's Vesting Clause emphasizes the independence of each Article III court.

D. *Conclusions from Constitutional Silence*

As the above discussion illustrates, Article III reflects neither the obvious hierarchy of Article II nor the self-governance of Article I. One could draw a number of different conclusions from this silence.

First, one might conclude that Article III's relative silence with respect to departmental structure is reason to adopt the nonhierarchical reading of the supreme/inferior distinction. In light of the explicit structural choices made by Articles I and II, one could understand Article III's silence on these matters to reflect deliberate agnosticism about the structure of the judicial branch. On this view, Congress could, consistently with Article III, create a nonhierarchical judicial department in which federal courts operate largely independently of one another. Or Congress could, consistently with Article III, create a hierarchical judicial department like the one it has in fact chosen to create. One taking this view would argue that Article III leaves the choice entirely in Congress's hands.¹⁵¹ A claim to constitutionally based supervisory power would fail on this account of Article III.

Second, one might interpret the supreme/inferior distinction to refer to a relationship of subordination, but still decide to attribute signifi-

149. U.S. Const. art. I, § 5, cls. 1, 2.

150. See, e.g., Judicial Discipline and Removal Reform Act of 1990, Pub. L. No. 101-650, 104 Stat. 5122 (codified as amended in scattered sections of 28 U.S.C. (2000)). It is important to emphasize that this Act authorizes means of judicial *self*-discipline. Congress's only means of directly disciplining federal judges lies in its power to impeach them. See U.S. Const. art II, § 4.

151. This is basically the conclusion that David Engdahl reaches, although he reaches it through a historical rather than a structural argument. See Engdahl, *supra* note 94, at 490-91, 503-04; *supra* Part II.B.

cance to Article III's silence about departmental structure. The interpretive task is not complete once one equates "inferior" with "subordinate"; one must still decide what structural function the supreme/inferior distinction performs. The distinction might operate exclusively as a limit on the way Congress can shape the judicial department—in other words, it might mean simply that Congress cannot create inferior courts that operate wholly outside of the Supreme Court's control.¹⁵² Or the distinction might operate as a source of inherent authority for the Supreme Court—in other words, it might directly equip the Supreme Court with some means of controlling inferior courts. One inclined to interpret the supreme/inferior distinction as referring to a relationship of subordination but reluctant to dismiss the significance of Article III's silence on matters of departmental structure would likely prefer the more restrained view of the distinction's structural function (limiting Congress) to the more expansive one (granting inherent power). The restrained view would consider Article III's silence regarding means by which the Supreme Court might control its inferiors (particularly in contrast to Article II) or means by which members of the judiciary might control one another (particularly in contrast to Article I) to counsel against implying any powers in that regard. The Supreme Court, on this view, could not claim simply by virtue of its title to have power over its subordinates that Congress did not expressly give. A claim to constitutionally based supervisory power, therefore, would also fail on this account of Article III.

Third, one could discount Article III's relative silence with respect to departmental structure and leave open the possibility that the supreme/

152. Consider that most of the reflection on the impact of the supreme/inferior distinction has occurred in the context of considering how that distinction might limit Congress's regulation of the judicial branch. In the debate regarding the extent of Congress's power under the Exceptions and Regulations Clause to strip the Supreme Court of its appellate jurisdiction, scholars have explored whether a court can be "supreme" vis-à-vis its inferiors without some amount of appellate jurisdiction over them. Some scholars argue that the Court's "supremacy" operates as a limit on Congress's jurisdiction-stripping power by requiring the Supreme Court to possess some core of appellate jurisdiction that Congress cannot reduce. See, e.g., Caminker, *Inferior Courts*, supra note 7, at 834–35 (arguing that the Court's "supremacy" requires it to have appellate jurisdiction over enough cases "to ensure that the Court lead[s] the nation in federal law interpretation"); Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 *Harv. L. Rev.* 1362, 1364–65 (1953) (arguing that Congress cannot make exceptions to Supreme Court's jurisdiction that will "destroy the essential role of the Supreme Court in the constitutional plan"); Ratner, supra note 133, at 161 (arguing that "essential functions" of the Supreme Court include ensuring the supremacy and uniformity of federal law); see also supra note 92. Others, however, argue that the Court's "supremacy" provides only a minimal limit on Congress's regulation of the judicial branch. See, e.g., Amar, *Neo-Federalist View*, supra note 121, at 221 n.60 (arguing that Supreme Court tops a pyramid only in that it can never be reversed by any other court in any case that is given to it); John Harrison, *The Power of Congress over the Rules of Precedent*, 50 *Duke L.J.* 503, 515 (2000) ("The Supreme Court is supreme in that it must be the court of last resort.").

inferior distinction vests the Court with inherent supervisory powers.¹⁵³ A limited view of the Supreme Court's constitutionally required position in the judicial department is not, after all, the only possible explanation for Article III's silence. The Madisonian compromise left the creation of inferior courts to Congress's discretion. The Framers may have intended that the "supreme" court would control its inferiors, but avoided spelling out any details of that control for fear of giving the impression that Congress was obliged or expected to create inferior courts. In addition, it may have seemed pointless to flesh out a relationship between the Supreme Court and courts that were, after all, merely hypothetical at that point. Stopping at the supreme/inferior distinction may have been prudent understatement rather than a choice to limit the Supreme Court's powers. It also may be that at the time the Constitution was written, a "supreme" court had some powers that were so commonly understood that it would have been unnecessary to spell them out.¹⁵⁴ Simply calling the court "supreme" effectively described at least a core of power, and the absence of more detail does not undercut the presence of that core. A claim to constitutionally based supervisory power might succeed on this account.

The Appellate Jurisdiction Clause does provide some limited evidence from which one can infer a hierarchy in Article III. That clause directly vests the Supreme Court with the jurisdiction to review the judgments of inferior federal courts (and state courts). It is true that Congress can limit this appellate jurisdiction, and perhaps even wholly withdraw it, pursuant to the Exceptions and Regulations Clause. Nevertheless, the Constitution's grant of appellate jurisdiction to the Supreme Court reflects at least a presumption that one of the Court's functions is correcting the errors of inferior federal courts. Consequently, the second and third options seem more plausible than the first.¹⁵⁵

153. This is the conclusion Professor Pfander reaches in his study of the Supreme Court's inherent authority to issue discretionary writs controlling inferior courts, although he reaches it from history rather than through a structural and textual analysis. See Pfander, *Jurisdiction-Stripping*, supra note 7, at 1441 ("[T]he Court's supremacy gives it authority to supervise the work of inferior federal tribunals through the exercise of its power to issue discretionary writs."); Pfander, *Marbury*, supra note 76, at 1568 (describing this supervisory power as an "inherent feature of the authority of supreme courts"). But see Julius Goebel, Jr., 1 *History of the Supreme Court of the United States: Antecedents and Beginnings to 1801*, at 784-92 (1971) (arguing that early Supreme Court did not recognize inherent power of superintendence); Hartnett, supra note 90, at 307-16 (disputing Pfander's claim that Court's supremacy gives it the "constitutional prerogative to supervise inferior federal courts" through issuance of discretionary writs).

154. Professor Pfander argues, for example, that the power to issue discretionary writs was one such feature. See supra note 153.

155. There is also historical evidence supporting this conclusion. In addition to the evidence noted earlier, supra notes 95 & 102, it is worth observing that from the very beginning, the statutes regulating the judiciary treated the Supreme Court as its head. See *infra* Part IV.B (describing supervisory rulemaking grants to Supreme Court).

As between the second and third options, however, the third seems less consistent with the Constitution's structure. If the words "supreme" and "inferior" establish a hierarchy, it seems far more likely that the requirement of hierarchy serves the more restrained function of limiting Congress than the more expansive one of granting power. This conclusion garners some support from the fact that Article III is the only one of the first three articles that fails to detail any particular control that the ostensible departmental head has over its inferiors, or even that individual members of the branch have over one another. Admittedly, though, that silence, as noted above, might be explained by the Madisonian compromise.

Cutting more strongly against the third option is the fact that when Article III speaks, as it does in the Vesting and Good Behavior Clauses, it points toward judicial independence rather than subservience, even within the judicial department. The Vesting Clause makes clear that each Article III court enjoys the judicial power in its own right, rather than as a Supreme Court delegatee. The Good Behavior Clause guarantees the independence of every Article III judge against other government actors—even other Article III judges. Together, these clauses insulate inferior courts from Supreme Court control. It goes exactly against that grain to argue that Article III implicitly subjects inferior courts to unspecified kinds of Supreme Court control, even if they must remain subordinate to the Supreme Court in any regulatory scheme.

While the focus of this Part is the Constitution's structure, it is worth noting that interpreting "supreme" to confer inherent authority also runs contrary to the way that the Supreme Court historically has interpreted the scope of its powers. In the Court's early years, litigants occasionally tried to persuade the Court that its designation as "supreme" brought inherent power with it. The Court rebuffed these arguments. For example, litigants occasionally argued that the Court's designation as "supreme" gave it the inherent authority to issue discretionary writs.¹⁵⁶ The Court dismissed this argument, instead treating its mandamus authority as deriving wholly from congressional grant.¹⁵⁷ In a related vein, litigants argued on at least two occasions that the Court's designation as "supreme" gave it the inherent authority to exercise appellate jurisdiction

156. See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 146 (1803) (argument of C. Lee) ("This is the *supreme* court, and by reason of its supremacy must have the superintendance [sic] of the inferior tribunals and officers, whether judicial or ministerial.")

157. *Id.* at 173–76; see Hartnett, *supra* note 90, at 293–94 (characterizing *Marbury's* holding as implicit endorsement of proposition that Supreme Court lacks inherent authority to issue mandamus); see also *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 622 (1838) (observing that Supreme Court's mandamus power was "not exercised, as in England, by the king's bench, as having a general supervising power over inferior courts," but within limits prescribed by Congress).

over inferior court judgments.¹⁵⁸ The Court ignored this argument each time it was raised, treating its appellate jurisdiction as deriving exclusively from the explicit grant in the Appellate Jurisdiction Clause and not from its supremacy.¹⁵⁹

To be sure, the Court's refusal to recognize an inherent power to issue discretionary writs or an inherent power to exercise appellate jurisdiction does not establish that the Court lacks the inherent power to prescribe procedure for inferior courts. The Court's refusal to recognize these other inherent powers, however, does reflect the Court's general hostility to the suggestion that the supreme/inferior distinction operates as a source of inherent authority. The Court has long been reticent to claim any kind of inherent authority over inferior courts, instead taking the position that any power it possesses over inferior courts depends upon an express constitutional grant or enabling legislation.¹⁶⁰

In sum, the structure of Article III is in significant tension with the proposition that the Court's "supremacy" grants it any inherent authority over inferior courts. It might press the argument too far, however, to argue that the structure of Article III definitively forecloses that interpretation. Fortunately, determining whether supervisory authority over inferior courts derives from the Court's designation as "supreme" does not ultimately demand that I resolve either the question of whether the supreme/inferior distinction refers to hierarchy or rank, or whether, assuming it refers to hierarchy, that hierarchy functions only as a restraint on congressional action or also as a source of inherent power. Conclud-

158. See *Durousseau v. United States*, 10 U.S. (6 Cranch) 307, 311 (1810) (argument of E. Livingston) ("This court has jurisdiction in consequence of its being the *supreme* court, and the other an *inferior* court. The terms *supreme* and *inferior* are correlative, and imply a power of revision in the superior court."); *Clarke v. Bazadone*, 5 U.S. (1 Cranch) 212, 212 (1803) (argument of G. Mason) ("[T]his court possesses a general superintending power over all the other courts of the United States, resulting from the nature of a *supreme* court, independent of any express provisions of the constitution or laws of the United States.").

159. The Supreme Court did not address the arguments related to its inherent authority as a "supreme" court in either *Clarke* or *Durousseau*. The Court's opinion in *Clarke* consists of a brief assertion that, because Congress had not granted it jurisdiction to review the judgments of the general court of the Northwestern Territory, the Court "could not take cognizance of the case." *Clarke*, 5 U.S. at 214. Similarly, in *Durousseau*, the Court ignored the argument grounded in its supremacy, and discussed only an argument made by Charles Lee related to Article III's Appellate Jurisdiction Clause. Lee argued that Article III vested the Court directly with appellate jurisdiction unless Congress exercised its power to make exceptions to or regulations of that jurisdiction; as Congress had not explicitly excepted this case from the Court's appellate jurisdiction, it had authority to hear it. *Durousseau*, 10 U.S. at 313-14. The Court rejected Lee's argument; it construed Congress's regulation of its jurisdiction as an implicit denial of appellate jurisdiction in all other circumstances. *Id.* The effect of this holding is that the Supreme Court lacks appellate jurisdiction unless Congress explicitly confers it. See also *United States v. More*, 7 U.S. (3 Cranch) 159, 173 (1805) (holding same).

160. Cf. Goebel, *supra* note 153, at 791 ("From the beginning, [the Supreme Court] recognized how dependent its operation was upon enabling legislation . . .").

ing that the supreme/inferior distinction establishes a judicial hierarchy, and that the Court's supremacy endows it with inherent power, are necessary but insufficient conditions for determining that the supervisory power exists. Even assuming that the supreme/inferior distinction refers to a judicial hierarchy, and even assuming that the word "supreme" is a source of inherent power rather than merely a restraint on congressional action, there must be some basis for claiming that such inherent authority extends to the prescription of inferior court procedure. The fact that *some* inherent authority exists—for example, the inherent authority to control inferior courts through the issuance of discretionary writs—does not establish the existence of *this* inherent authority—a supervisory power over inferior court procedure.

This problem might be described as determining the scope of the subordination, and it is a problem that would arise no matter which of the two structural functions a requirement of hierarchy serves. One entity can be subordinate to another without being subordinate in every respect. For example, the Constitution renders the states subordinate to Congress insofar as it makes federal law "the supreme" law of the land.¹⁶¹ State law is not, however, subordinate to federal law in every respect. It must yield to federal law only when Congress legislates on a matter that Article I puts within congressional control; all matters outside of congressional control are reserved to the states.¹⁶² The very nature of our federal system is that the states are subordinate in some respects and independent in others. The relationship is a blend of subordination and independence.

Similarly, assuming that inferior courts are subordinate to the Supreme Court, their relationship to the Supreme Court is necessarily a blend of subordination and independence rather than across-the-board subordination. There are some matters, like salary and life tenure, over which the Supreme Court indisputably has no control. Even putting salary and life tenure aside, however, the position that the Constitution requires across-the-board subordination of inferior courts is unsustainable. To state an immediate objection to that position, interpreting the supreme/inferior distinction to require total subordination would require that the Supreme Court have the option of reviewing every case decided by an inferior court—a position in direct opposition to the Exceptions and Regulations Clause.¹⁶³

Application of the subordination requirement, then, is more nuanced than a claim that because the Court is supreme, it must be supreme in every respect. Here, application of that requirement demands

161. U.S. Const. art. VI, cl. 2.

162. *Id.* amend. X.

163. Cf. Hartnett, *supra* note 90, at 314 n.143 (noting that within a judicial hierarchy, "if there are situations in which A can reverse the judgments of B, and B can never reverse the judgments of A, then B is inferior to A, even if there are many situations in which A cannot reverse the judgments of B").

an analysis of whether the particular area of inferior court procedure is an area placed within the Supreme Court's control, even in the absence of enabling legislation.

Article III's text and structure, relatively ambiguous on the questions of hierarchy and conferral of inherent power over subordinates, obviously do not answer the more specific question of whether the Court's supremacy grants it supervisory procedural authority. Consequently, a viable claim to supervisory authority over the specific area of inferior court procedure would have to be rooted in history. If supreme courts traditionally exercised the "authority to prescribe rules of evidence and procedure that are binding in [inferior] tribunals,"¹⁶⁴ one might argue that a reasonable reader of Article III at the time of the Founding would have understood the court's designation as "supreme" implicitly to confer that same power on the Supreme Court of the United States. If no such tradition exists, however, it is difficult, if not impossible, to make the case that such power is part and parcel of the Court's constitutional supremacy. The next Part therefore turns to history to determine whether or not tradition gives the Court's claim to supervisory power constitutional grounding.

IV. THE HISTORY OF SUPERVISORY POWER

Because the Constitution does not clearly confer such a power on the Supreme Court, the success of a claim to inherent supervisory authority over inferior court procedure based on the Court's "supremacy" depends on the existence of extraconstitutional evidence supporting it. In an effort to find such support, this Part of the Article turns to the historical record. This Part aims to determine whether the power to announce supervisory rules for inferior courts was so integral to the role of a supreme court at the time of the Founding that the mere designation of the Court as "supreme" and other Article III courts as "inferior" would have been understood to vest the Supreme Court with supervisory power over inferior court procedure.

The influence of the English and colonial experience on the Founding generation means that any consideration of Founding-era attitudes must take English and colonial sources into account. I found no evidence, however, that either English or colonial legal systems treated supervisory power over inferior court procedure as a necessary feature of a court designated "supreme."¹⁶⁵ In the absence of any well-settled English

164. *Dickerson v. United States*, 530 U.S. 428, 437 (2000).

165. I consulted the following sources on the English system: *Henrici de Bracton, On the Laws and Customs of England* (George E. Woodbine ed., Samuel E. Thorne trans., Harvard Univ. Press 1968) (1569), available at <http://hsl.law.harvard.edu/bracton>; *Joseph Chitty, A Treatise on the Parties to Actions, the Forms of Actions, and on Pleading* (Philadelphia, Carey, Lea & Carey 1828); *W.S. Holdsworth, A History of English Law*, vols. 1, 4, 5, 9, & 10 (1922-1938); *John Reeves, Reeves' History of the English Law* (W.F. Finlason ed., Philadelphia, M. Murphy 1880); *Henry John Stephen, A Treatise on the*

or colonial practice, this Part begins its more detailed discussion of the historical record with the Founding. The first two subparts address the framing of Article III and the enactment of early legislation regarding the judicial branch. As these subparts explain, none of the records surrounding these events reflects any discussion about any inherent supervisory authority of the Supreme Court. The third subpart of this Part describes the results of my search through Founding-era treatises, Supreme Court arguments, and Supreme Court cases. References to supervisory authority are also absent in these sources. Neither treatise writers, advocates before the Court, nor the Supreme Court itself addressed the possibility that the Supreme Court possesses the inherent authority to prescribe inferior court procedure.

There are some early cases, though, in which the Supreme Court, without explicit discussion about what it was doing, appears to lay down rules of procedure and evidence governing inferior courts. At first blush, these cases seem to support the notion that the Supreme Court possesses supervisory authority over inferior court procedure. The final subparts of this Part argue, however, that this support is illusory. In the early cases, the Supreme Court was not prescribing procedure for inferior courts; it was reviewing the decisions of inferior courts for consistency with settled common law rules. Reading these cases as support for the supervisory authority would ignore their historical context. The claim to supervisory authority is not a claim that the early Supreme Court was making.

A. *Constitution: Convention and Ratification*

If the Framers of the Constitution thought that a “supreme” court possessed inherent power over inferior court procedure, they did not say so in the course of drafting Article III.¹⁶⁶ Nor did the topic arise in the state ratification debates or the public commentary of the Federalists and Anti-Federalists on the proposed Constitution.¹⁶⁷ This is not surprising, however, for the drafting and ratification of Article III focused on broader-brush issues of judicial branch structure. Dominating the discussion of Article III were issues such as the wisdom of life tenure for federal

Principles of Pleading in Civil Actions (London, Joseph Butterworth & Son 1824); Tucker, *Blackstone’s Commentaries*, supra note 95. On the colonial system I consulted the following sources: Mary Sarah Bilder, *The Transatlantic Constitution* (2004); Peter Charles Hoffer, *Law and People in Colonial America* (rev. ed. 1998); 1 Story, *Commentaries*, supra note 102 (detailing colonial legal systems); 2 id. (detailing judicial system under Articles of Confederation).

166. See generally Farrand’s *Records*, supra note 98; Supplement to Max Farrand’s *The Records of the Federal Convention of 1787* (James H. Hutson ed., 1987).

167. See generally *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* (Jonathan Elliot ed., 2d ed., Philadelphia, J.B. Lippincott & Co. 1861); *The Complete Anti-Federalist*, supra note 102; *The Federalist*, supra note 102.

judges and the necessity of inferior federal courts.¹⁶⁸ The details of judicial branch administration simply did not arise. Thus, the absence of any discussion of inherent supervisory power in the convention and ratification debates does not necessarily undermine the claim that the Constitution confers such power on the Supreme Court.

B. *Early Congressional Regulation of the Judicial Branch*

There were four pieces of early legislation that significantly affected the structure of the federal judiciary and the procedures it followed: the Judiciary Act of 1789, the Process Act of 1789, a 1792 amendment to the Process Act, and a 1793 amendment to the Judiciary Act. The drafting and enactment of these statutes would have been a more natural time than the drafting and ratification of Article III for the supervisory power to at least receive mention. The Judiciary and Process Acts did focus on the details of judicial branch administration, and, importantly for present purposes, they provided between them a fairly comprehensive scheme for the regulation of federal court procedure.¹⁶⁹ If the First Congress and its observers had perceived the Court's designation as "supreme" to imbue the Supreme Court with inherent supervisory power over procedure, it presumably would have been natural for someone to mention that power at least in passing as Congress drafted an initial set of federal court procedures. The same is true for the Second and Third Congresses, which enacted the first amendments to these statutes. I have found, however, no evidence in the Acts, their drafting history, or contemporary commentary upon them suggesting that anyone believed the Supreme Court to possess any inherent power to formulate inferior court procedure, in the course of adjudication or otherwise.¹⁷⁰

168. On the wisdom of life tenure for federal judges, see, for example, 2 Farrand's Records, *supra* note 98, at 428–29. On the necessity and desirability of inferior courts, see, for example, 1 *id.* at 124–25; 2 *id.* at 45–46.

169. Numerous provisions in these Acts dealt with procedure. For just a few examples, see Judiciary Act of 1789, ch. 20, § 15, 1 Stat. 73, 82 (granting all federal courts power to "require the parties to produce books or writings in their possession or power, which contain [pertinent] evidence"); *id.* § 17 (granting all federal courts "power to grant new trials"); *id.* § 30 (authorizing depositions "*de bene esse*"); Process Act of 1789, ch. 21, § 1, 1 Stat. 93, 93 (providing that all writs and process issuing from federal courts "shall be under the seal of the court from whence they issue"); *id.* § 2 (requiring the circuit and district courts, in suits at common law, to follow the procedures of the supreme court of the state in which they sat).

170. The first three volumes of the Annals of Congress cover the enactment of all four of these statutes. A review of those volumes revealed no discussion about the Supreme Court's supervisory authority (or lack thereof) over inferior court procedure. Nor did the Supreme Court's supervisory authority (or lack thereof) appear to be a topic of debate among informed onlookers of the time. See generally 4 The Documentary History of the Supreme Court of the United States, 1789–1800 (Maeva Marcus & James R. Perry eds., 1985) [hereinafter 4 Documentary History] (collecting letters, diary and journal entries, newspaper items, and notes of speeches and debates that cast light upon enactment of Judiciary and Process Acts of 1789); Goebel, *supra* note 153, at 457–551 (describing history of Judiciary and Process Acts of 1789). It must be acknowledged, however, that proving a

There are a few places in the historical record where the silence is worth comment. One such place is the silence regarding the enactment of section 17 of the Judiciary Act of 1789. Section 17 granted each federal court local rulemaking authority,¹⁷¹ but neither the Judiciary Act of 1789 nor the Process Act of 1789 granted the Supreme Court supervisory rulemaking authority. I found no discussion of any inherent supervisory power surrounding the enactment of section 17, even though one believing the Court to possess such power might have perceived some tension in a grant of local rulemaking authority to each federal court with no grant of supervisory rulemaking authority to the Supreme Court.¹⁷² One believing the Court to possess such power presumably would prefer a scheme of court rulemaking controlled by the Supreme Court.

There was also no discussion of inherent supervisory authority when Congress first authorized the Supreme Court to promulgate supervisory court rules. In 1792, Congress amended the Process Act to make a federal court's general obligation to follow state procedure subject to "such alterations and additions as the said 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 concerning the same."¹⁷³ The historical record contains no discussion of the potential relationship between this statutory grant and any constitutionally based supervisory power that the Supreme Court might possess, even though this statutory grant could relate to constitutional power in a number of ways. The statutory grant might have reiterated the Court's inherent supervisory power, insofar as it might simply have made explicit what is implicit in Article III. It might have extended inherent supervisory power, insofar as the Court's inherent power may extend only to adjudication, and this grant authorized, in addition, the promulgation of court rules. Or it might have curtailed inherent supervisory power, insofar as it might have extinguished the

negative here (i.e., that the inherent supervisory power was *not* discussed) is complicated by the fact that the records from this period, particularly of debates in the Senate, are not complete. The Annals of Congress were reconstructed in the 1820s–40s based on contemporary newspaper accounts of House proceedings. Because the Senate did not allow reporters to observe its proceedings until February 20, 1794, the only record of its proceedings in the first two Congresses, and part of the third, is the official journal (which consisted of roll calls and parliamentary entries), and individual senators' notes. Thus, as a general matter, the lack of discussion regarding the inherent supervisory power in the House during this period is more meaningful than the similar silence in the Senate.

171. Judiciary Act of 1789 § 17, 1 Stat. at 83.

172. To be sure, the Judiciary Act gave the federal courts the power to prescribe local court rules, and this Article focuses on the regulation of procedure through adjudication. The two are nonetheless related, and the consideration of one provides an occasion to consider the other. It is also worth noting that just as I found no discussion of the Supreme Court's inherent authority to regulate inferior court procedure by adjudication, I found no discussion of any inherent authority on the part of the Supreme Court to promulgate supervisory court rules.

173. Process Act, ch. 36, § 2, 1 Stat. 275, 276 (1792).

Court's ability to proceed by adjudication and required the Court to proceed by promulgating court rules. The fact that neither members of Congress nor congressional observers discussed the relationship between the statutory grant and the inherent supervisory power is at least some evidence that neither believed the Supreme Court to possess inherent supervisory power.

The silence surrounding a House proposal to amend the Judiciary Act the next year is also noteworthy. In 1793, the House proposed amending the rulemaking grant in the Judiciary Act to withdraw the grant of local rulemaking authority to all federal courts and replace it with an exclusive grant of supervisory rulemaking authority to the Supreme Court.¹⁷⁴ The Senate rejected that proposal.¹⁷⁵ In his description of the event, Julius Goebel observes, "Clearly the House meant that the regulation of practice was in the future to be committed to the Supreme Court alone," but "[t]he Senate was not prepared to embark on the drastic change in policy charted by the House."¹⁷⁶ There was no discussion of inherent supervisory authority surrounding either the proposal or its rejection, even though the existence of inherent supervisory authority seems pertinent to congressional choices about how to structure statutory grants of court rulemaking authority.

While the historical record yields no references to the Supreme Court's inherent supervisory authority, it does sometimes refer to a federal court's inherent authority over its own procedure. For example, in his report to Congress on the Judiciary Act of 1789, Attorney General Edmund Randolph observed, "Rules of practice belong to the authority of every court, and their other incidental powers add to that authority."¹⁷⁷ Interestingly, Randolph's comment in this regard is part of an explanation for his never-acted-upon proposal for legislation granting the Supreme Court authority to promulgate national rules of procedure.¹⁷⁸ He justified his proposed grant of supervisory rulemaking authority by

174. Goebel, *supra* note 153, at 550 & n.186.

175. *Id.* at 550-51.

176. *Id.* at 550.

177. Edmund Randolph, Report of the Attorney-General to the House of Representatives (Dec. 27, 1790), in 4 Documentary History, *supra* note 170, at 127, 166 [hereinafter Randolph Report]. For an early case referencing a federal court's inherent authority over local procedure, see *United States v. Hill*, 26 F. Cas. 315, 317 (Marshall, Circuit Justice, C.C.D. Va. 1809) (No. 15,364) (holding that federal circuit courts had power to summon grand jury even though no statute explicitly gave them this power, because circuit courts could not give effect to statutes granting them criminal jurisdiction in absence of such power).

178. Randolph Report, *supra* note 177, at 153 (section 32 of proposed bill). Interestingly, Randolph was not the only one who thought it desirable to have the Supreme Court design uniform procedure for the federal courts. On January 29, 1790, Congressman William Loughton Smith of South Carolina introduced a resolution "that the Judges of the Supreme Court be directed to report to the House a plan for regulating the Processes in the Federal Courts." 1 Annals of Cong. 1143 (Joseph Gales ed., 1790), available at <http://memory.loc.gov/cgi-bin/ampage?collId=llac&fileName=001/llac001.db>

reference to the inherent authority of every court over local procedure rather than by reference to any inherent supervisory power of the Supreme Court.¹⁷⁹ The latter would have been a stronger justification, had Randolph believed the Supreme Court to possess it.

To be sure, the silence in the history of the Judiciary and Process Acts of 1789, and the early amendments to those Acts, does not *disprove* the existence of inherent supervisory power in the Supreme Court. But unlike the silence on this score in the convention and ratification debates, it does cast at least some doubt on the claim that contemporary observers would have widely understood the Court's designation as "supreme" and other Article III courts as "inferior" to vest the Court with inherent supervisory power over inferior court procedure. Where references to inherent supervisory authority would have been natural, the historical record is silent.

C. *Cases and Contemporary Treatises*

As the above subparts explain, neither Article III's drafting and ratification nor its implementation in early legislation offers historical support for the claim that supervisory power is an inherent feature of the Court's supremacy. But it may be that the acid test for historical support lies in the Supreme Court's own cases. If the Supreme Court and its bar assumed from the very beginning that the Court possessed supervisory power over inferior court procedure, that would be good evidence that Article III indeed confers such a power. Thus, this subpart looks at what the Supreme Court was doing in its early years.

On the one hand, it may seem odd to look to the Supreme Court's early history for assertions of supervisory power. As Part I explains, *McNabb* is widely treated in the cases and commentary as the seminal "supervisory power" case. And apart from an overlooked case decided a few weeks before it,¹⁸⁰ *McNabb* is the first case in which the Supreme Court openly asserted something called "supervisory authority" or "supervisory power" over the procedures employed by inferior courts. Before *McNabb*, courts employing the terms "supervisory authority" or "supervisory power" were referring to something else, like a court's "supervisory authority" over a jury verdict,¹⁸¹ or its "supervisory power" to issue discre-

&recNum=572 (on file with the *Columbia Law Review*). The resolution was laid on the table and never acted upon. *Id.*

179. Randolph Report, *supra* note 177, at 166.

180. See *supra* note 9 (discussing *Johnson v. United States*, 318 U.S. 189 (1943)).

181. See, e.g., *Ulman v. Clark*, 100 F. 180, 196 (C.C.D. W. Va. 1900) (referring to court's "'supervisory power'" over jury verdict (quoting *People v. Knutte*, 44 P. 166, 166 (Cal. 1896))); *United States v. Polhamus*, 27 F. Cas. 585, 587 (C.C.S.D.N.Y. 1875) (No. 16,062) (referring to same); *Lombard v. Chicago*, 15 F. Cas. 796, 798 (C.C.N.D. Ill. 1865) (No. 8,470) (same).

tionary writs.¹⁸² The Supreme Court did not openly claim to possess “supervisory authority” over inferior court procedure until *McNabb* was decided in 1943.

On the other hand, there is good reason to hesitate before conclusively identifying *McNabb* as the doctrine’s genesis. Even post-*McNabb*, the Supreme Court sometimes announces procedures for inferior courts without explicitly invoking its “supervisory authority.”¹⁸³ If the Supreme Court has asserted supervisory authority implicitly in the years since *McNabb* was decided, it may have done so before *McNabb* was decided as well. Indeed, the *McNabb* Court asserted that history supported its claim to supervisory power, at least with respect to formulating rules of evidence for criminal proceedings.¹⁸⁴ The Court claimed that “this Court has, from the very beginning of its history, formulated rules of evidence to be applied in federal criminal prosecutions.”¹⁸⁵

The question, then, is not necessarily whether the Supreme Court has, from the beginning, asserted something called “supervisory power,” but whether it has, from the beginning, formulated rules of procedure and evidence for inferior federal courts in the course of adjudication. In other words, it is important to consider what the Supreme Court has actually been doing, regardless of what the Court has been calling it.

1. *Method.* — Before discussing the results of my historical study of the Supreme Court’s early practice, I will briefly describe its parameters. *First*, its substantive scope: As Part I described, since *McNabb* was decided, the Supreme Court has relied on its supervisory power to establish a broad range of rules, including both those that would conventionally be called “evidentiary” and those that would conventionally be called “procedural.” In studying the Supreme Court’s early practice, I took a similarly broad approach, considering anything arguably “procedural” or “eviden-

182. See, e.g., *Ex parte Crane*, 30 U.S. (5 Pet.) 190, 193–94 (1831) (asserting that Judiciary Act of 1789 gives Supreme Court power to superintend inferior tribunals through writ of mandamus).

183. Cf. Beale, *supra* note 8, at 1448 n.100 (“The dividing line between supervisory power rulings and other cases is not always clear.”). For examples of post-*McNabb* cases in which the Supreme Court formulates rules of evidence or procedure for inferior federal courts without explicitly invoking “supervisory authority,” see *Jencks v. United States*, 353 U.S. 657, 672 (1957) (holding that criminal action must be dismissed when government fails to comply with production order on grounds of privilege); *Roviaro v. United States*, 353 U.S. 53, 65 (1957) (finding prejudicial error when trial court allowed government to withhold identity of undercover employee in spite of accused’s demands for disclosure).

184. *McNabb v. United States*, 318 U.S. 332, 341 (1943).

185. *Id.* As support for this proposition, the Supreme Court cited the following examples: *Wolfe v. United States*, 291 U.S. 7 (1934); *Funk v. United States*, 290 U.S. 371 (1933); *United States v. Murphy*, 41 U.S. (16 Pet.) 203 (1842); *United States v. Wood*, 39 U.S. (14 Pet.) 430 (1840); *United States v. Gooding*, 25 U.S. (12 Wheat.) 460, 468–70 (1827); *United States v. Furlong*, 18 U.S. (5 Wheat.) 184, 199 (1820); *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 643–44 (1818); *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 130–31 (1807). Of these cases, only the latter four are arguably close enough to 1789 to be considered reflective of Founding-era perceptions of the role of the Supreme Court.

tiary.” And because the Supreme Court has asserted supervisory authority in both civil and criminal cases, I considered the early Court’s practice in both civil and criminal cases.

Second, the sources I consulted: I set out to determine whether supervisory power over rulemaking was viewed as an inherent feature of the Court’s supremacy by either the Court itself or informed observers of the early federal courts. In light of that objective, I considered Supreme Court opinions, published accounts of oral arguments before the Supreme Court, early inferior court opinions, and contemporary treatises.¹⁸⁶

Finally, my method: The breadth of the search’s substantive parameters—everything falling within a broad definition of “procedure”—made it difficult to formulate search terms that would capture all the relevant material. Thus, I read the first ten volumes of the United States Reports (1789–1810) in their entirety, flagging all cases in which the Supreme Court addressed questions that could be even arguably categorized as procedural or evidentiary. For representative cases decided after 1810, I relied on searches and citations gleaned from secondary sources.

2. *Results*. — Neither the Supreme Court, in its early cases, nor the authors of contemporary treatises ever discussed the question whether the Court possessed inherent power to adopt, in the course of adjudication, procedures for inferior courts that are not required by the Constitution or statute. Nor did any advocate before the Supreme Court press the Court to recognize an inherent power to announce procedural rules for inferior courts. Advocates pressed the Supreme Court to recognize other powers as inherent in its supremacy—for example, to recognize an inherent power to review inferior court proceedings and an inherent power to

186. I reviewed the following contemporary treatises: Alfred Conkling, *A Treatise on the Organization, Jurisdiction and Practice of the Courts of the United States* (Albany, Wm. & A. Gould & Co. 1831); Nathan Dane, *A General Abridgment and Digest of American Law* (Boston, Cummings, Hilliard & Co. 1823–1824); Peter S. Du Ponceau, *A Dissertation on the Nature and Extent of the Jurisdiction of the Courts of the United States* (Philadelphia, Small 1824); James Gould, *A Treatise on the Principles of Pleading in Civil Actions* (Boston, Lilly & Wait 1832); James Kent, *Commentaries on American Law* (O.W. Holmes, Jr. ed., Boston, Little, Brown, & Co. 12th ed. 1873); Thomas Starkie, *A Practical Treatise on the Law of Evidence* (Boston, Wells & Lilly 2d ed. 1828); 3 Story, *Commentaries*, supra note 102; Joseph Story, *A Selection of Pleadings in Civil Actions* (Boston, Carter & Hendee 2d ed. 1829); Zephaniah Swift, *A Digest of the Law of Evidence, in Civil and Criminal Cases* (Hartford, Oliver D. Cooke 1810); Tucker, *Blackstone’s Commentaries*, supra note 95; Henry St. George Tucker, *Commentaries on the Laws of Virginia* (Richmond, Shepherd & Colin 3d ed. 1846); 2 James Wilson, *The Works of James Wilson* (Robert Green McCloskey ed., 1967). While not contemporary treatises, the following were helpful sources: Goebel, supra note 153; Robert Wyness Millar, *Civil Procedure of the Trial Court in Historical Perspective* (1952); Erwin C. Surrency, *History of the Federal Courts* (1987); 1 Charles Warren, *The Supreme Court in United States History* (rev. ed. 1926); G. Edward White, 3–4 *History of the Supreme Court of the United States: The Marshall Court and Cultural Change, 1815–35* (1988).

issue discretionary writs to inferior courts.¹⁸⁷ But no advocate ever pressed the Court to recognize this particular inherent power.

Despite this absence of explicit discussion about the Supreme Court's authority to prescribe procedure for inferior courts, there are a number of occasions on which, at least at first blush, the Court appears to be doing just that. Consider the following evidentiary rulings in civil cases.¹⁸⁸ In *Church v. Hubbard*, the Supreme Court held that a circuit court had improperly admitted evidence of Portuguese laws and a Portuguese judgment in a civil case.¹⁸⁹ In so holding, the Court specified rules for the authentication of foreign laws and judgments,¹⁹⁰ and the rules that the Court specified derived neither from a statute nor from the Constitution. Similarly, in *Croudson v. Leonard*, the Court held a foreign judgment to be conclusive evidence of the matter adjudicated.¹⁹¹ In *Smith v. Carrington*, the Court reversed a circuit court for admitting a copy of a letter into evidence in violation of the nonstatutory, nonconstitutional principle that a copy is inadmissible unless its truth is established and "sufficient reasons for the non-production of the original [are] shown."¹⁹²

Consider also cases in which the Supreme Court apparently announced common law rules of civil procedure. In *Cooke v. Graham's Administrator*, the Supreme Court held that a special demurrer entered by a

187. See *supra* notes 156–160 and accompanying text (describing Supreme Court's rejection of these arguments for inherent power).

188. For examples of civil evidentiary rulings other than those described in the text, see *Queen v. Hepburn*, 11 U.S. (7 Cranch) 290, 296–97 (1813) (refusing to recognize hearsay exception that would admit certain hearsay on petition by slave for freedom); *Field v. Holland*, 10 U.S. (6 Cranch) 8, 24 (1810) (agreeing with circuit court that answer of one defendant binds other defendants claiming through him); *Bingham v. Cabbot*, 3 U.S. (3 Dall.) 19, 39–42 (1795) (holding that circuit court was incorrect to exclude certain items of evidence).

189. 6 U.S. (2 Cranch) 187, 237–38 (1804). In 1831, the Court held that the Rules of Decision Act makes state evidentiary law binding in federal courts in civil cases. *Hinde v. Vattier's Lessee*, 30 U.S. (5 Pet.) 398, 401 (1831). But in civil cases decided before 1831, the Supreme Court typically applied federal general common law without addressing the choice-of-law problem. Indeed, in *Queen v. Hepburn*, the Court deliberately applied general common law rather than Maryland law, which recognized the hearsay exception advanced by the plaintiff. 11 U.S. (7 Cranch) at 298 (Duvall, J., dissenting).

190. The Court held that to be admissible, the laws of foreign nations must be authenticated by the oath of someone with the authority to swear to their authenticity. 6 U.S. (2 Cranch) at 237–38. For foreign judgments to be admissible, they must be authenticated as follows: "1. By an exemplification under the great seal. 2. By a copy proved to be a true copy. 3. By the certificate of an officer authorised by law, which certificate must itself be properly authenticated." *Id.* at 238; see also *Yeaton v. Fry*, 9 U.S. (5 Cranch) 335, 343 (1809) (holding that seals of courts of admiralty, in cases arising under law of nations, are self-authenticating).

191. 8 U.S. (4 Cranch) 434, 436 (1808) (Johnson, J.); *id.* at 442–43 (Washington, J.).

192. 8 U.S. (4 Cranch) 62, 70 (1807); see also *Cooke v. Woodrow*, 9 U.S. (5 Cranch) 13, 14 (1809) (clarifying, because circuit court "had some difficulty upon the point," that "[t]he general rule of evidence is, that the best evidence must be produced which the nature of the case admits, and which is in the power of the party").

plaintiff put his own pleadings at issue, and any variance between the plaintiff's pleadings and his evidence was fatal to his case.¹⁹³ In *Pawling v. United States*, again dealing with standards applicable on demurrer, the Court asserted that "[t]he party demurring admits the truth of the testimony to which he demurs, and also those conclusions of fact which a jury may fairly draw from that testimony."¹⁹⁴ The Supreme Court was particularly active in the field of equity procedure. In addition to the Equity Rules that it promulgated in 1822 pursuant to a statutory grant,¹⁹⁵ the Court dealt with equity procedure on a case-by-case basis. In *Mallow v. Hinde*, for example, the Supreme Court held that a circuit court sitting in equity must dismiss the plaintiff's bill if parties necessary and indispensable to the resolution of the dispute were not before the court.¹⁹⁶

The Supreme Court also regulated evidence and procedure in criminal cases, although the early Supreme Court's limited appellate jurisdiction in criminal cases meant that the criminal cases were more limited in number. In *United States v. Gooding*, the Supreme Court held that the testimony of one participant in a conspiracy can be introduced against another,¹⁹⁷ and in *United States v. Palmer*, the Supreme Court decided that

193. 7 U.S. (3 Cranch) 229, 235 (1805) (reversing circuit court for violation of this rule). *Cooke* was decided by the Circuit Court of Alexandria; thus, under the Process Act, Virginia's law of procedure should have governed this suit. See Process Act, ch. 36, § 2, 1 Stat. 275, 276 (1792). Neither the parties nor the Supreme Court mention this fact, however, and the Court does not specify whether it is applying general common law principles or Virginia's particular exposition of the same. Perhaps Virginia law and the general common law did not differ on the procedural question at issue.

194. 8 U.S. (4 Cranch) 219, 221–22, 224 (1808) (reversing district court for district of Kentucky for violating this rule). In *United States v. Arthur*, another Kentucky case, the Court held that "[t]he want of oyer is a fatal defect in the plea of the defendants," and that judgment on demurrer must be entered "against the party who committed the first error in pleading." 9 U.S. (5 Cranch) 257, 261 (1809). It may be that the Supreme Court applied general common law principles of pleading in these two cases because it believed then, as it later held in *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 47–50 (1825), that the Process Act did not technically require a federal court sitting in Kentucky at that time to apply Kentucky procedure. In *Wayman*, the Supreme Court held that the Process Act of 1789 and its 1792 amendment required federal courts to follow the procedures effective in 1789 in the state in which they sat. *Id.* Kentucky, however, was not admitted to the Union until 1792. The Process Act was not amended to apply to federal courts sitting in later-admitted states like Kentucky until 1828. Act of May 19, 1828, ch. 68, 4 Stat. 278. Thus, in cases decided before 1828, Kentucky procedure did not necessarily control.

195. See *supra* note 173 and accompanying text (describing 1792 amendment to Process Act, which conferred supervisory rulemaking authority on Supreme Court).

196. 25 U.S. (12 Wheat.) 193, 196–98 (1827); see also *Elmendorf v. Taylor*, 23 U.S. (10 Wheat.) 152, 166–68 (1825) (recognizing same rule).

197. 25 U.S. (12 Wheat.) 460, 470 (1827); see also *Am. Fur Co. v. United States*, 27 U.S. (2 Pet.) 358, 364–65 (1829) (holding same). In 1851, the Court held that in making evidentiary determinations in criminal cases, the Judiciary Act required a federal court to observe the law of the state in which it sat, as that state law stood in 1789. *United States v. Reid*, 53 U.S. (12 How.) 361, 363 (1851). For later-admitted states, the law of evidence governing the state on its date of admission controlled. See *Logan v. United States*, 144 U.S. 263, 302–03 (1892). Before the Court interpreted the Judiciary Act to impose that requirement, however, it did not treat state law as controlling the determination of

the seal of a newly established government is not self-authenticating.¹⁹⁸ An example of the Supreme Court announcing a rule of criminal procedure can be found in *United States v. Marchant & Colson*, where the Court held that a criminal defendant has no right to demand to be tried separately from his codefendant.¹⁹⁹

Thus, there are cases from the late eighteenth and early nineteenth centuries in which the Supreme Court exerted control over the procedures employed by inferior federal courts. In each of these cases, the Supreme Court appears to lay down a procedural rule that will govern inferior federal courts in future cases, and these rules govern matters ranging from the standards applicable on a demurrer to the coconspirator exception to the hearsay rule. Because these cases appear to embody Supreme Court policy judgments that inferior courts must follow, they bear some resemblance to the modern supervisory power cases. Indeed, the *McNabb* Court relied on at least some of these cases in claiming historical support for the supervisory power.²⁰⁰

D. *Founding-Era and Modern Views of the Common Law*

The Supreme Court's early cases, then, are the strongest historical evidence supporting the notion that the Court possesses an inherent power over procedure in inferior courts. Upon close study, however, the resemblance between the modern and early cases recedes, and an important distinction emerges: The early and modern cases differ significantly in the way the Supreme Court perceives its own activity. In modern supervisory power cases, the Supreme Court does not purport to measure the inferior court's policy choice against an external standard; instead, the Court self-consciously formulates its own standard. In the early cases, by contrast, the Supreme Court purports to apply rather than formulate standards. The difference is not merely rhetorical; rather, the early and modern cases differ in their basic jurisprudential underpinnings. Because an understanding of these underpinnings is vital to putting the

evidentiary questions in criminal cases. See, e.g., *Gooding*, 25 U.S. (12 Wheat.) at 470. Instead, it resolved evidentiary questions with reference to general common law principles. For a fuller discussion of the relationship between common law principles and the Supreme Court's early evidentiary and procedural jurisprudence, see *infra* notes 211–234 and accompanying text.

198. 16 U.S. (3 Wheat.) 610, 635 (1818). For examples of early evidentiary discussions in criminal cases other than those described in the text, see *United States v. Furlong*, 18 U.S. (5 Wheat.) 184, 199 (1820) (rejecting, in dictum, argument that national character of ship can be proved only through its register); *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 130–31 (1807) (noting division on Court with respect to admissibility of particular affidavit and resolving case on another ground).

199. 25 U.S. (12 Wheat.) 480, 485 (1827). Rather than a right, the Supreme Court held severance to be “a matter of sound discretion, to be exercised by the Court with all due regard and tenderness to prisoners, according to the known humanity of our criminal jurisprudence.” *Id.*

200. See *supra* note 185.

early, ostensible assertions of supervisory power in their proper context, this subpart will briefly describe the differences between the Founding-era and modern views of the common law. It will then analyze what these differences mean for evaluating the Supreme Court's early, ostensible assertions of supervisory power.

1. *Founding-Era View of the Common Law.* — Modern lawyers understand any particular common law decision as the policy choice of the court that issued it. In the modern view, “the common law” and “judicial decisions” are one and the same; the common law does not exist apart from judicial decisions, which create it. Lawyers of the eighteenth and early nineteenth centuries, however, perceived matters quite differently. “The common law” and “judicial decisions” were not one and the same; the common law existed independently of judicial decisions, which merely described it.²⁰¹ The difference between the Founding-era and modern views might be roughly summarized this way: Founding-era lawyers perceived the judicial role in common law cases as an exercise in law declaration; modern lawyers perceive it as one of law creation.

It is difficult for the modern lawyer to understand the judicial role in common law cases as anything other than deliberate policymaking.²⁰² A particular stumbling block to that enterprise is identifying what it was that Founding-era judges thought they were declaring. The declaratory view maintained that judicial decisions were evidence of the common law, not the common law itself.²⁰³ Of what, then, did the common law consist? It is tempting to conclude, along with Justice Holmes, that the common law was an empty vessel, and that judges trying to elucidate it were channeling a “brooding omnipresence in the sky.”²⁰⁴ Modern scholars have carefully demonstrated, however, that the common law was more than a “brooding omnipresence”: It was an identifiable body of rules and customs that courts applied in the absence of a sovereign command to the contrary.²⁰⁵ This body of rules and customs was not “law” in the modern

201. See, e.g., 1 Blackstone, *supra* note 95, at *71 (stating that “*the law*, and the *opinion of the judge*, are not always convertible terms,” but “we may take it as a general rule, ‘that the decisions of courts of justice are the evidence of what is common law’” (quoting Code Just. 1.14.12 (Justinian 474))); 1 Kent, *supra* note 186, at 473 (“The best evidence of the common law is to be found in the decisions of the courts of justice . . .”).

202. As the legal historian G. Edward White observed:

It may be easier to fathom judges riding in stagecoaches, or communicating to each other in handwritten letters with eighteenth-century calligraphy, or wearing knee breeches beneath their robes, or holding conferences in a boarding-house, than to imagine their seeing their declarations of legal rules and principles as anything other than creative lawmaking.

White, *supra* note 186, at 974–75.

203. See *supra* note 201 and accompanying text.

204. *S. Pac. Co. v. Jenson*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

205. See, e.g., Randall Bridwell & Ralph U. Whitten, *The Constitution and the Common Law* 6 (1977) (explaining Justice Story's view that “the common law included both rules and a process of application, [which] had to contain a degree of certainty”); Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. Pa. L.

sense of the word, because it was not the product of sovereign command. Rather than emanating from a particular sovereign, the common law grew out of the customs and practices of particular groups of actors. The relevant actors in the development of custom depended upon the type of common law at issue.²⁰⁶ For example, the law merchant, an important branch of the common law, was based upon the customs and practices of merchants.²⁰⁷ The law of nations, another important branch of the common law, represented “the amorphous but considerable body of usage and agreement” that existed among European states over hundreds of years.²⁰⁸

Much could be said about the declaratory view of the common law, but for present purposes, I want to focus on a particular aspect of it: the fact that these customary rules served a discretion-limiting function. Today, it is commonly understood that common law cases provide an occasion for judicial lawmaking. When a common law case falls within a court’s jurisdiction, and no statutory or constitutional provision controls, the court has the discretion to choose a sound policy. In the early years of their existence, however, the federal courts did not perceive common law questions as wholly open to judicial answers. As Bradford Clark has explained, the customary rules of the common law “provide[d] the judiciary with substantial guidance, and thus [did] not leave courts free to formulate rules of decision according to their own standards.”²⁰⁹ Because courts resolving common law cases in the Founding era were “attempting to discern a preexisting body of law, they were not engaged in unrestrained judicial lawmaking.”²¹⁰

That Founding-era judges were largely discerning and applying customary law, rather than engaging in unrestrained policymaking, has been well documented in substantive areas like commercial law and maritime law.²¹¹ Though unexplored, the same phenomenon is evident in proce-

Rev. 1245, 1279–90 (1996) (describing “identifiable body of rules and customs” that comprised law of nations or general common law); William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 Harv. L. Rev. 1513, 1517–21 (1984) (describing how general common law was perceived in Founding era).

206. Fletcher, *supra* note 205, at 1517.

207. *Id.*; see also Bridwell & Whitten, *supra* note 205, at 96 (noting that commercial law “had not originated from any sovereign, but in the behavior over centuries of parties to commercial transactions”); Michael Conant, *The Commerce Clause, the Supremacy Clause and the Law Merchant: Swift v. Tyson and the Unity of Commercial Law*, 15 J. Mar. L. & Com. 153, 156 (1984) (“[T]he merchants created the patterns of customary behavior that were most efficient in marketing goods and facilitating payment, and the courts adopted rules to enforce these customs.”).

208. Edwin D. Dickinson, *The Law of Nations as Part of the National Law of the United States*, 101 U. Pa. L. Rev. 26, 29 (1952).

209. Clark, *supra* note 205, at 1276.

210. *Id.* at 1287.

211. See Bridwell & Whitten, *supra* note 205, at 61–97 (commercial law); Fletcher, *supra* note 205, at 1555–58 (maritime law); see also Clark, *supra* note 205, at 1276–92

dural cases. Today, when a question of procedure lacking a statutory or constitutional answer arises in the course of adjudication, it is commonly understood that a federal court has the discretion to fill that gap.²¹² But when early federal courts faced such gaps in federal court procedure, they turned first to the common law—and not to their own discretion—to fill them. Thus, in *United States v. Marchant & Colson*, the Supreme Court, analyzing a point of criminal procedure, observed that “[t]he subject is not provided for by any act of Congress; and, therefore, if the right can be maintained at all, it must be as a right derived from the common law, which the Courts of the United States are bound to recognise [sic] and enforce.”²¹³ In *United States v. Burr*, Chief Justice Marshall similarly asserted that in devising process, courts are bound by “that generally recognized and long established law, which forms the substratum of the laws of every state.”²¹⁴

2. *The Common Law and Supervisory Power.* — This general principle, applicable across early cases elucidating procedural common law, is evident in the early, ostensible assertions of supervisory power described in this Part. While the rhetoric of the modern supervisory power cases makes clear that the Supreme Court is self-consciously displacing the discretion of the inferior courts by making policy choices for them, the rhetoric of the early cases is strikingly different. The rhetoric of the early

(describing generally federal court application of law of nations, of which maritime and commercial law were branches); Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 Vand. L. Rev. 819, 832 (1989) (same).

212. See *supra* notes 44–46 and accompanying text.

213. 25 U.S. (12 Wheat.) 480, 480 (1827) (turning to common law to decide whether criminal defendant correctly claimed right to severance); cf. Du Ponceau, *supra* note 186, at xiv–xv (insisting that common law does not operate as “source of power” for federal courts, but as “means for its exercise”).

214. 25 F. Cas. 187, 188 (Marshall, Circuit Justice, C.C.D. Va. 1807) (No. 14,694); see also *Jennings v. Carson*, 8 U.S. (4 Cranch) 2, 24 (1807) (“It must be supposed that a court of admiralty . . . not having its practice precisely regulated by law, would conform to those principles which usually govern courts proceeding *in rem*, and which seem necessarily to belong to the proper exercise of their functions.”); *United States v. Craig*, 25 F. Cas. 682, 683 (Washington, Circuit Justice, C.C.E.D. Pa. 1827) (No. 14,883) (deciding, on question of admissibility of evidence, to “govern myself by what I consider the general rule settled in England,” despite disagreement with that rule); *United States v. Coolidge*, 25 F. Cas. 619, 620 (Story, Circuit Justice, C.C.D. Mass. 1816) (No. 14,857), *rev’d on other grounds*, 14 U.S. (1 Wheat.) 415 (1816) (holding that in absence of positive law governing “process, pleadings, or the principles of adjudication,” federal courts must be “governed exclusively by the common law”); *United States v. Johns*, 4 U.S. (4 Dall.) 412, 414 (Washington, Circuit Justice, C.C.D. Pa. 1806) (No. 15,481) (holding that when Congress fails to prescribe rule of criminal procedure, “the common law rule must be pursued,” and deciding that in that case, common law guaranteed thirty-five peremptory challenges); cf. Richard A. Matasar & Gregory S. Bruch, *Procedural Common Law, Federal Jurisdictional Policy, and Abandonment of the Adequate and Independent State Grounds Doctrine*, 86 Colum. L. Rev. 1291, 1330 (1986) (“During most of the period prior to the Civil War, the Court regularly made law, both procedural and substantive, without considering the legitimacy of its actions. The Court’s lawmaking reflected its natural law perspective: it was not legislating; it was merely discovering true answers to unclear problems before it.”).

cases makes clear that the Supreme Court did not perceive itself to be displacing inferior court discretion—in large part because, as discussed above, neither the Supreme Court nor the inferior courts thought that judicial discretion was involved. Both the inferior courts and the Supreme Court considered themselves bound by customary law in elucidating procedure for the federal courts. Inferior courts applied the common law, and the Supreme Court measured their judgments against that standard, much as the Court might measure their judgments against the text of a statutory or constitutional provision.²¹⁵ Thus it is that in the early cases described above, the Supreme Court never presents its holdings as new supervisory rules, but rather as articulations of “known and familiar,”²¹⁶ “well understood,”²¹⁷ and “usual”²¹⁸ procedural principles.²¹⁹ The discussion of federal court procedure in treatises of the time similarly reflects the understanding that federal courts were applying common law principles, not creating their own.²²⁰

The category of customary law to which the Supreme Court turned in these early, ostensible assertions of supervisory power depended upon the case. The cases discussed in this Part, while all cases that a modern lawyer would classify as “procedural” or “evidentiary,” in fact cut across a number of common law categories. Some, like those dealing with the means of proving foreign judgments, laws, and government seals, drew

215. Of course, the application of customary rules may involve “norm elaboration at the margins.” Clark, *supra* note 205, at 1287. That is true, however, of the application of statutory and constitutional provisions as well. While it is hard to identify the place where the interpretation and application of law cross over into lawmaking, there must be some difference between the two if legislation and adjudication are to remain distinct. *Id.* at 1289.

216. *United States v. Gooding*, 25 U.S. (12 Wheat.) 460, 469–70 (1827) (calling coconspirator exception to hearsay rule “the known and familiar principle of criminal jurisprudence” and supporting its assertion that principle is well-settled with reference to *Starkie on Evidence*); see also *Queen v. Hepburn*, 11 U.S. (7 Cranch) 290, 296 (1813) (affirming circuit court’s refusal to recognize new hearsay exception on ground that circuit court correctly perceived that common law recognized no such exception).

217. *Church v. Hubbart*, 6 U.S. (2 Cranch) 187, 236 (1804) (“Foreign laws are well understood to be facts which must, like other facts, be proved to exist before they can be received in a court of justice.”).

218. *Id.* at 238. The Court called its rules regarding the authentication of judgments “the usual” and “the most proper, if not the only modes of verifying foreign judgments.” *Id.*

219. In addition to those cited above, consider also *United States v. Palmer*, where, in arguing in favor of the position that the Court ultimately adopted, counsel for the United States presented his position regarding authentication of a government seal as reflecting “[t]he established rules of evidence” rather than an occasion for the Court to adopt a supervisory rule. 16 U.S. (3 Wheat.) 610, 624 (1818).

220. See, e.g., Conkling, *supra* note 186, at 317 (“A considerable number of decisions have taken place in the national courts [regarding executions], but as they are only declarative of the general common law principles recognized in all courts . . . it does not fall within the design of this work to notice them.”).

from the law of nations.²²¹ Others, like those dealing with civil pleading and evidence admissible in criminal cases, drew from what might be described as American common law.²²² Still others, like those dealing with necessary and indispensable parties, drew from equity, which, while distinct from the tradition of common law, had its own set of customary rules.²²³ The particular branch of customary law at issue, however, is not as important as the fact that no matter which branch was at issue, the Supreme Court treated custom as controlling. The customary law applied in these cases, therefore, served a discretion-limiting function.

Of course, emphasizing that customary law served a discretion-limiting function does not mean that either discretion or change was absent from the application of common law principles to procedural questions. On the contrary, the federal courts openly acknowledged the presence of both. As for discretion, federal courts had it because the common law did not supply a rule to govern every procedural detail. There were some matters that the common law did not address, or addressed by leaving them to the court's discretion.²²⁴ For example, in 1795, the Circuit Court of Pennsylvania had to decide how many jurors to be summoned

221. See, e.g., *United States v. Furlong*, 18 U.S. (5 Wheat.) 184, 187 (1820); *Palmer*, 16 U.S. (3 Wheat.) at 620; *Church*, 6 U.S. (2 Cranch) at 187; see also *Croudson v. Leonard*, 8 U.S. (4 Cranch) 434, 442 (1808) (holding that foreign judgment was conclusive evidence of matter adjudicated, in particularly good example of Court applying law of nations). The effect of foreign judgments was a politically contentious issue throughout the Napoleonic wars, because "[t]here was substantial suspicion that the English and French admiralty courts were prone to find falsely that captured American vessels were not neutral and thus to condemn the vessels as lawful prizes when they were legally entitled to go free." Fletcher, *supra* note 205, at 1540. Despite that suspicion, the *Croudson* Court adhered to the rule established in the law of nations. Justice Washington explained:

If the injustice of the belligerent powers, and of their courts, should render this rule oppressive to the citizens of neutral nations, I can only say with the judges who decided the case of *Hughes v. Cornelius*, let the government in its wisdom adopt the proper means to remedy the mischief. I hold the rules of law, when once firmly established, to be beyond the controul [sic] of those who are merely to pronounce what the law is, and if from any circumstance it has become impolitic, in a national point of view, it is for the nation to annul or to modify it.

Croudson, 8 U.S. (4 Cranch) at 442–43 (Washington, J.).

222. See, e.g., *United States v. Marchant & Colson*, 25 U.S. (12 Wheat.) 480, 480, 482 (1827) (common law criminal procedure); *United States v. Gooding*, 25 U.S. (12 Wheat.) 460, 468–79 (1827) (common law evidence); *Pawling v. United States*, 8 U.S. (4 Cranch) 219, 221–22 (1808) (common law civil procedure); *Cooke v. Graham's Adm'r*, 7 U.S. (3 Cranch) 229, 235 (1805) (common law civil procedure).

223. See, e.g., *Mallow v. Hinde*, 25 U.S. (12 Wheat.) 193, 196–98 (1827); *Elmendorf v. Taylor*, 23 U.S. (10 Wheat.) 152, 166–68 (1825). As for the relationship between equity and customary rules: Blackstone treated equity as a branch of common law, precisely because, like the customs comprising the common law, the customs of equity practice "have been admitted and received by immemorial usage and custom in some particular cases, and some particular courts." 1 Blackstone, *supra* note 95, at *80.

224. See, e.g., *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 452, 469 (1793) (ruling, in absence of governing common law, on validity of service of process against defendant state).

for a venire.²²⁵ The common law did not fix the number; thus the court, finding that the common law left the matter to its discretion, let the marshal decide how many veniremen to call.²²⁶ There are many examples of this variety—incidental matters of procedure on which the federal courts had to exercise their own judgment.²²⁷

As for change, the common law, while an identifiable body of customs and rules, was not a static body of customs and rules. New customs developed to meet new situations. In keeping with this principle, James Kent explained that while settlers had taken the English common law with them to America, it was retained only “*so far* as it was adapted to our institutions and circumstances.”²²⁸ Americans took pride in the modifications they made to English common law, including those made to procedural common law.²²⁹ Thus Peter Du Ponceau, an early and prominent member of the Supreme Court bar, boasted that simplified civil procedure in America meant that “[t]he costs of a law suit are comparatively

225. *United States v. Insurgents of Pa.*, 2 U.S. (2 Dall.) 335, 341–42 (1795) (Patterson, J.) (“Since, therefore, the act of Congress does not itself fix the number of jurors . . . it is a necessary consequence that the subject must depend on the common law; and . . . the Court may direct any number of jurors to be summoned . . .”).

226. *Id.*

227. See, e.g., *Wright v. Hollingsworth’s Lessee*, 26 U.S. (1 Pet.) 165, 168 (1828) (holding that decision to allow or refuse amendment of pleadings is, like other “incidental orders,” so “peculiarly addressed to the sound discretion of the Courts of original jurisdiction, as to be fit for their decision only, under their own rules and modes of practice”); *United States v. Perez*, 22 U.S. (9 Wheat.) 579, 580 (1824) (holding that federal courts have discretion to decide when to discharge jury from giving verdict); *United States v. Evans*, 9 U.S. (5 Cranch) 280, 281 (1809) (holding that Supreme Court would not interfere with district court’s refusal to reinstate cause after nonsuit); *Marine Ins. Co. v. Young*, 9 U.S. (5 Cranch) 187, 190–91 (1809) (holding that decision whether to grant new trial is within discretion of inferior court and Supreme Court will not interfere on writ of error); *Mandeville v. Wilson*, 9 U.S. (5 Cranch) 15, 17–18 (1809) (holding same as *Wright*); *Henderson v. Moore*, 9 U.S. (5 Cranch) 11, 12–13 (1809) (holding same as *Marine Insurance Co.*); *Woods v. Young*, 8 U.S. (4 Cranch) 237, 238 (1808) (holding that decision whether to grant continuance is within discretion of federal court, and Supreme Court will not look into merits of its exercise). The federal courts also used the rulemaking power granted them by section 17 of the Judiciary Act of 1789 to promulgate court rules, at least some of which presumably addressed matters that were unregulated by the common law. See, e.g., N.D.N.Y. R. 5 (1831), reprinted in Conkling, *supra* note 186, at 466 (“When the attorneys . . . of the adverse party [sic] do not reside within forty miles of each other, service may be made on the agent [residing in Utica, New York].”).

228. Kent, *supra* note 186, at 343.

229. See Du Ponceau, *supra* note 186, at xxiv (“[T]he common law appears more and more dignified with *American features*. . . . Thus, the law in this country, as every other science, tends to improvement.”); *id.* at 107 (asserting that common law “has received its greatest improvement and perfection in this country, where it shines with greater lustre than has ever illumined the island of Great Britain”); *id.* at 112, 117 (further praising improvements made on common law); Book Review, 17 N. Am. Rev. 69, 72 (1823) (“[W]e may pride ourselves upon the improvements, which we have made in this country [upon the English common law]”); see also Swift, *supra* note 186, at x (“Though sundry valuable Treatises have been written upon Evidence in England, yet they contain many things of little use here, and are not perfectly well adapted to our Country.”).

trifling, and the law is accessible, to the poor as well as to the rich.”²³⁰ Of course, not all changes to ancient common law procedure were appreciated, and, in addition to extolling progress in some areas, courts and commentators also spent some energy advocating a retreat from changes that they regarded as aberrations.²³¹

Given that the common law was neither comprehensive nor immune to change, it would have been theoretically possible, even in the system of common law that prevailed in the Founding era, for the Supreme Court to exert “supervisory authority” in the modern, policymaking sense of the term. If the Supreme Court in the Founding era believed itself to possess supervisory authority over inferior court procedure, we might expect to see that authority exercised over matters that the common law left open—like the number of veniremen to call—or over aspects of the common law that the Supreme Court thought ripe for change. Importantly, however, I have found no case in which the Supreme Court claimed the authority either to adopt a rule for the federal judiciary in a space the common law left open or to effect unilaterally a change in procedural common law. On the contrary, if a matter openly required the exercise of judicial discretion, the Supreme Court left the matter to the inferior court’s discretion.²³² And the Court on at least one occasion expressly *disclaimed* the power unilaterally to make changes in procedural common law. In *Marine Insurance Co. of Alexandria v. Hodgson*, the Court observed that “[h]owever desirable it may be” to change a particular rule of evidence, “this court does not know that it possesses the power of changing the law of pleading, or to admit of evidence inconsistent with the forms

230. Du Ponceau, *supra* note 186, at 115. Du Ponceau went on to acknowledge that “a loose practice, it is true, has succeeded in our Courts to the strict forms of pleading, but it appears to work well to all practical purposes.” *Id.* at 115–16.

231. For example, the Supreme Court viewed the grant of local rulemaking power in the Process Act as a tool that federal courts could use to undo unwise changes made by state legislatures to the common law. The Process Act obligated a federal court to follow the state law of procedure in effect in 1789 in the state in which the federal court sat. Process Act, ch. 36, § 2, 1 Stat. 275, 276 (1792). In *Wayman v. Southard*, the Supreme Court argued that to the extent that state legislatures in 1789, under pressures of the moment, had varied unwisely from the “ancient, permanent, and approved system” of common law procedure, the Process Act’s grant of rulemaking power was designed to permit federal courts to return federal practice to that approved system. 23 U.S. (10 Wheat.) 1, 47 (1825); cf. *Brown v. Van Braam*, 3 U.S. (3 Dall.) 344, 346 (1797) (Chase, J., concurring) (insisting that if state judicial opinions construing common law, rather than common law itself, were permitted to control procedural questions in federal courts, federal courts would become enmeshed “in an endless labyrinth of false constructions, and idle forms”).

232. See, e.g., *supra* notes 224–227 and accompanying text. In *Philadelphia & Trenton Rail Co. v. Stimpson*, the Court held:

The mode of conducting trials, the order of introducing evidence, and the times when it is to be introduced, are, properly, matters belonging to the practice of the Circuit Courts, with which this Court ought not to interfere; unless it shall choose to prescribe some fixed, general rules on the subject, under the authority of the act of Congress.

39 U.S. (14 Pet.) 448, 463 (1840).

which [the law of pleading] has prescribed.”²³³ When it came to change, the Court seemed to view itself as a participant in the development of procedural custom, not the dictator of procedural rules.²³⁴

In the end, the Supreme Court’s early procedural cases offer only illusory support for the notion that the Court has historically enjoyed the power to prescribe procedure for inferior courts. Randall Bridwell and Ralph Whitten have criticized legal scholars’ “constant insistence that the language of the cases of the period and the writings about its jurisprudence *actually* means what one thinks it should mean by modern standards, rather than what it seems to mean as practiced by people of the period.”²³⁵ That caution resonates here. People of the Founding period would not have understood the Supreme Court in these cases to be “prescribing” procedure for inferior courts. They would have understood the Supreme Court to be measuring inferior court action against settled customary rules. History, therefore, fails to support the proposition that Founding-era lawyers would have perceived the Court’s “supremacy” as endowing it with the power to directly supervise inferior court procedure.

3. *The Common Law and Supervisory Power: An Alternate Account.* — Admittedly, one could agree that the early and modern cases reveal a shift in the Court’s perception of its role but disagree with the conclusion I draw from the shift. I argue that the disintegration of procedural custom, and concomitant rise in judicial discretion to develop procedure, distinguishes the modern cases from the early ones in a way that undermines the Supreme Court’s claim to supervisory power. Others, however, might draw a different conclusion from this jurisprudential shift. Given that the Supreme Court has long played a role in the maintenance of procedural common law, one might argue that these very same factors—the disintegration of the common law and concomitant rise in judicial discretion—make the supervisory power doctrine a fitting, even necessary, response to change. At least in theory, the federal general common law of procedure was uniform throughout the federal courts. The loss of that law would have left each federal court to its own devices, the argument might go, unless the Supreme Court articulated standards to replace it. Indeed, one might say that the very scope of the supervisory power underscores its status as the successor of the customary law: Procedures announced pursuant to the Supreme Court’s supervisory power, like the Supreme Court’s early holdings on matters of federal general

233. 10 U.S. (6 Cranch) 206, 219 (1810). Justices riding circuit were similarly reluctant to effect change in longstanding procedural custom. In *Livingston v. Jefferson*, Chief Justice Marshall, riding circuit, asserted that “if judges have determined to carry their innovation on the old rule, no further; if, for a long course of time, . . . they have determined this to be the limit of their fiction, it would require a hardihood which I do not possess, to pass this limit.” 15 F. Cas. 660, 664 (C.C.D. Va. 1811) (No. 8,411).

234. Given the reluctance of any one court, including the Supreme Court, to effect procedural change, it would be interesting to trace how procedural change crept into the common law. Tracing that development, however, is beyond this Article’s scope.

235. Bridwell & Whitten, *supra* note 205, at 97.

common law, bind only the federal courts.²³⁶ One subscribing to this way of thinking might cast the supervisory power doctrine as the modern face of the Supreme Court's longstanding practice of encouraging a uniform federal common law of procedure. And as a continuation of that longstanding practice, the argument might go, the supervisory power doctrine has a historical pedigree that gives it constitutional legitimacy.

While not without appeal, this account has several problems. As an initial matter, it ignores the structural predicate to the question of supervisory power: the question whether the Court's supremacy grants it any inherent supervisory authority or simply restricts the way Congress can structure the judicial branch. Even if the Supreme Court's early cases can be read to extend any authority granted by Article III to the realm of procedure, they cannot, by themselves, establish the proposition that Article III grants the Court any inherent supervisory authority. One seeking to establish that proposition must still confront the structural arguments raised in Part III. And the Supreme Court's early cases do not push those arguments one way or the other, because they simply do not address the question whether the Court possesses inherent supervisory authority over inferior courts.

Even assuming that the structural hurdle is cleared, however, this account also overstates the extent to which the loss of customary law gave rise to a need for a doctrine like the supervisory power. Just before *Erie Railroad Co. v. Tompkins* laid the federal general common law to rest,²³⁷ Congress passed the Rules Enabling Act, which statutorily authorizes the Supreme Court to promulgate supervisory court rules.²³⁸ The Rules Enabling Act is a far better answer to the loss of customary procedure than is the doctrine of supervisory power. The Act aims to provide uniform rules of procedure and evidence throughout the federal courts. The process it prescribes for doing so takes the views of many constituencies—including appellate judges, trial judges, academics, practitioners, and the public—into account.²³⁹ Exercises of supervisory power not only lack the discipline of traditional common lawmaking, in which custom limits judicial

236. I am indebted to Jim Pfander for drawing my attention to this point.

237. 304 U.S. 64 (1938).

238. Act of June 19, 1934, ch. 651, §§ 1–2, 48 Stat. 1064, 1064 (current version at 28 U.S.C. § 2072 (2000)). Interestingly, the Supreme Court promulgated the first set of rules under the Act, the Federal Rules of Civil Procedure, in 1938, the same year that it decided *Erie*. See generally Mary Kay Kane, *The Golden Wedding Year: Erie Railroad Company v. Tompkins and the Federal Rules*, 63 *Notre Dame L. Rev.* 671 (1988) (discussing confluence of these two events).

239. In that sense, rules promulgated under the Act, like the customs comprising the common law, are based on the experiences of the community that will be governed by them. See *supra* notes 205–208 and accompanying text (describing participants in formation of customary law).

discretion; they also lack the inclusiveness and transparency that the Enabling Act demands of the modern court rulemaking process.²⁴⁰

In any event, the history described in this Part has an important consequence even for those who read the Supreme Court's early procedural cases as some support for the supervisory power. At most, history makes the case for what Stephen Burbank has described as inherent power "in the weak sense."²⁴¹ As Professor Burbank has explained, it is important to distinguish "between inherent power in the weak sense (the power to act in the absence of congressional authorization) and inherent power in the strong sense (the power to act in contravention of congressional prescription)."²⁴² Even assuming that Article III grants the Supreme Court supervisory power, the history described in this Part compels the conclusion that this supervisory power is not inherent power in the strong sense. For supervisory power to exist in the strong sense, the prescription of inferior court procedure by adjudication would have to be a core function of the Supreme Court, such that, if Congress withdrew it, the Court would no longer be "supreme."²⁴³ Given that the Court did not claim to possess supervisory power until 1943, one would be hard pressed to cast that power as so central to the role of the Supreme Court that it is beyond congressional regulation—even if the Constitution permits the supervisory power to exist in the absence of a congressional command to the contrary.²⁴⁴ And while it is beyond the scope of this Article to pursue this question, one believing the Court to possess supervisory power must ulti-

240. I owe this point to Steve Burbank. See also Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. Pa. L. Rev. 1099, 1136–41 (2002) (arguing that federal rulemaking process produces better procedures than does Supreme Court, acting alone).

241. Burbank, *Procedure*, supra note 39, at 1681.

242. *Id.*

243. See *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812) (describing inalienable inherent powers of a federal court as those "necessary to the exercise of all others"); *Eash v. Riggins Trucking Inc.*, 757 F.2d 557, 562 (3d Cir. 1985) (describing "irreducible inherent authority" as "an extremely narrow range of authority involving activity so fundamental to the essence of a court as a constitutional tribunal that to divest the court of absolute command within this sphere is really to render practically meaningless the terms 'court' and 'judicial power'"). These descriptions refer to inherent local authority. Because inherent supervisory authority would derive from the Court's constitutional supremacy, the relevant inquiry is not whether supervisory authority is fundamental to the essence of a court, but, as stated in the accompanying text, whether it is fundamental to the essence of a supreme court vis-à-vis its inferiors.

244. This conclusion is consistent with Professor Burbank's persuasive argument that the power to promulgate prospective local and supervisory court rules of procedure cannot be inherent power in the strong sense. Burbank, *Procedure*, supra note 39, at 1687–88. It is also consistent with the Court's own position. While the Court has never distinguished between inherent supervisory authority and inherent local authority in discussing the degree to which Congress can regulate procedure, the Court has always insisted that, as a general matter, Congress retains ultimate authority over procedure in the federal courts. See, e.g., *Dickerson v. United States*, 530 U.S. 428, 437 (2000) ("Congress retains the ultimate authority to modify or set aside any judicially created rules of evidence and procedure that are not required by the Constitution.").

mately decide whether the Rules Enabling Act is a congressional command to the contrary. Even if the Court possesses supervisory power in the weak sense, it may well be that the detailed scheme of supervisory rulemaking prescribed by the Rules Enabling Act extinguishes the Court's ability to act outside that process.

CONCLUSION

This Article has argued that the Constitution's structure cuts against, and history rules out, the proposition that the Supreme Court possesses inherent supervisory power over inferior court procedure. If such authority exists, it derives from the Constitution's distinction between supreme and inferior courts. Part III claimed that it is more consistent with the Constitution's structure to interpret the Court's "supremacy" vis-à-vis inferior federal courts as a limit on the way Congress can structure the judicial branch than to interpret it as a source of inherent authority for the Supreme Court. Even assuming, however, that the Court's "supremacy" functions as a grant of power to the Supreme Court, the conclusion that the Supreme Court possesses supervisory power over procedure depends upon the conclusion that this particular power is part of that grant. Part IV argued that history fails to support that conclusion. It was not until the twentieth century, when the Court rejected the notion of federal general common law, that it claimed the right to prescribe procedure for inferior federal courts. Given the recent vintage of this claim, history does not support the notion that the power to prescribe inferior court procedure is inherent in any court designated "supreme."

The implications of this conclusion are potentially far-reaching. For example, if it lacks inherent supervisory power over inferior federal courts, does the Supreme Court have the authority to prescribe, through adjudication, rules of statutory interpretation that all federal courts must observe? Rules of issue and claim preclusion? Rules of stare decisis? Resolving these questions is a problem for another day. For now, it is enough to observe that, unless the Supreme Court acts through the federal rulemaking process, inferior federal courts may have more independence on these matters than is commonly assumed.