The Unconstitutional Assertion of Inherent Powers in Multidistrict Litigations

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“The rule of law applies in multidistrict litigation . . . just as it does in any individual case.”

– In re Nat’l Prescription Opiate Litig., 956 F.3d 838, 841 (6th Cir. 2020)

This Article examines the constitutional basis of the federal courts’ independent exercise of “inherent powers” (IPs) that Congress has not specifically authorized. Our analysis illuminates the grave constitutional problems raised by the freewheeling assertion of IPs in multidistrict litigations (MDLs), which comprise over half of all pending federal cases.

The Supreme Court has rhetorically acknowledged that the Constitution allows resort to IPs only when doing so is absolutely necessary to enable Article III courts to exercise their “judicial power,” but has then sustained virtually all exercises of IP, whether essential or not. The Court’s excessive deference has emboldened trial judges to claim an ever-expanding array of IPs. The Constitution, however, requires a sharp distinction between two kinds of IPs.

First, “indispensable” IPs are those without which courts could not properly exercise their “judicial power” – rendering a final judgment after interpreting the law and applying it to the facts. Such adjudication may require judges to fill gaps in written procedural rules; manage their cases reasonably and efficiently; maintain their authority by punishing

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litigation misconduct; and ensure that attorneys are competent and ethical. Article I authorizes Congress to facilitate, but not impair, such indispensable IPs.

Second, federal judges cannot legitimately claim IPs that are merely “beneficial” (i.e., helpful or convenient), but that do not affect their ability to function as independent courts. Rather, Article I empowers Congress alone to grant such IPs, regulate them, or withhold them. Moreover, courts can never assert IPs in a way that violates parties’ due process rights.

The proposed constitutional framework would clarify all IPs, but would be especially useful as applied to MDLs. In these complex cases, district courts have asserted an astonishing variety of IPs to regulate parties and their attorneys. Yet only one IP invoked in MDLs—the power to appoint liaison counsel to handle communications and coordinate litigation activities—is proper because it is indispensable and leaves parties’ substantive and procedural rights unchanged.

Other IPs asserted in MDLs should be foresworn because they are beneficial powers that Congress has not authorized. Examples include the practice of forcing parties’ retained lawyers to compensate court-appointed lead attorneys, caps on retained lawyers’ fees, sui sponte enforcement of state bar rules that govern matters unrelated to adjudication, and judicial review of settlements. Yet other IPs would exceed even Congress’s powers because, by asserting them, judges deny parties due process of law. Judicial appointments of lead attorneys who displace parties’ retained lawyers fall into this category by saddling plaintiffs with virtual representation (VR), which the Supreme Court has forbidden. Worse, because the success of MDLs as a means of eliminating repetition and conserving resources depends upon the use of VR, the procedure itself is constitutionally infirm.
INTRODUCTION

When managing multidistrict litigations (MDLs), which now encompass more than half of all pending federal cases, courts extensively use inherent powers (IPs)—those not conferred by Congress. Judges invoke IPs to put lead attorneys in charge of these proceedings, to require the parties’ retained lawyers to pay lead attorneys’ fees, to cap contingent fees, and to review settlements. The exercise of such IPs violates the Constitution—in particular, Article I, Article III, the Due Process Clause, and the fundamental principle of separation of powers.

The Supreme Court has long recognized that the Constitution uniquely limits the judicial branch. Article I authorizes Congress to determine the federal courts’ structure and jurisdiction and to make for them all governing laws, substantive and procedural. Moreover, Article III judges merely possess “judicial power”—rendering a final judgment after interpreting the law and applying it to the facts. Not surprisingly, the Court has always cautioned that IPs can be asserted only when they “cannot be dispensed with” because courts would be unable to function without them.

To be sure, IPs sometimes serve a valid purpose. They reflect the sensible idea that, in the absence of an applicable procedural rule, judges must have some independent power to (1) fill these legal gaps, (2) manage their cases fairly and efficiently, (3) maintain their authority by imposing sanctions for litigation misconduct, and (4) discipline attorneys for unethical behavior. Over time, the need to resort to IPs has lessened considerably. Congress gradually abandoned its historical approach of directing federal courts to borrow state adjective (i.e., non-substantive) law, with “discretion” to amend those rules when “deemed expedient,” and instead enacted extensive procedural statutes and authorized the promulgation of the Federal Rules of Civil Procedure, Criminal Procedure, and Evidence, as long as those rules did not alter substantive rights. Congress has also allowed each district court to publish “local” rules to regulate its practice in any manner consistent with federal law.

Despite this proliferation of federal adjective law, and contrary to the Court’s rhetoric that IPs should be severely circumscribed, it has repeatedly endorsed ever-expanding IPs that are not necessary to—indeed, that often undermine—the proper exercise of “judicial

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4. See infra notes 75, 97 and accompanying text.
7. Act of Sept. 29, 1789, ch. 21, § 2, 1 Stat. 93, 94 (regulating process in courts of the United States).
8. See infra notes 156–184 and accompanying text.
power.” Similarly, the Court has recited, but disregarded, the principle that an IP “cannot be contrary to any express grant of or limitation on the district court’s power contained in a rule or statute.” For instance, in its latest IP case, a majority of Justices warned that judges “should not think they are generally free to discover new inherent powers that are contrary to civil practice as recognized in the common law,” yet sustained a judge’s assertion of a novel IP to recall a discharged jury when he discovered an error in its verdict, despite the conflicting common law rule. The Court concluded that this IP was “a ‘reasonable response to the problems and needs’ confronting the court’s fair administration of justice.”

This supine deference has encouraged federal district judges to invoke established types of IPs aggressively and to invent new ones. MDLs provide a raft of troubling examples, for in these proceedings courts rely on IPs to ride roughshod over plaintiffs and their lawyers.

To promote efficiency and justice, Congress in 1968 authorized the Judicial Panel on Multidistrict Litigation to transfer related actions that are pending in different districts to a single judge for consolidated pretrial proceedings. MDLs typically aggregate mass tort suits and can combine thousands of claims that collectively request billions in damages. Once these pretrial proceedings have concluded, each action must be remanded to the original district court unless it has “been previously terminated.”

The same adjective law that applies to other civil actions also governs MDLs. But transferee judges want more power and flexibility than the Federal Rules of Civil Procedure (FRCP) confer, so they resort to IPs routinely. For example, these judges claim the

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10. See infra notes 185–275 and accompanying text.
13. Id. at 42–54.
14. Id. at 45 (quoting Degen v. United States, 517 U.S. 820, 823–24 (1996)).
15. 28 U.S.C. § 1407(a)–(b).
18. See infra Part II.
IP to deny plaintiffs representation by their chosen counsel and to appoint lead attorneys to act for them with binding effect.\textsuperscript{19} The judges then usually pressure parties into settling to avoid remanding any action for trial. Upon settlement, the judges then slash the retained lawyers’ fees and award the money that is saved, which often amounts to tens or hundreds of millions of dollars, to the lead attorneys. The IPs that supposedly authorize these actions have no legal basis.

By stripping plaintiffs of the lawyers they hire, MDL judges deny them due process as well.\textsuperscript{20} Virtual representation by court-appointed counsel is permitted only in class actions, which the FRCP regulate. But MDLs are not class suits and, in \textit{Taylor v. Sturgell},\textsuperscript{21} the Court forbade the creation of “a common-law kind of class action” that operates “shorn of the procedural protections prescribed in . . . Rule 23.” As currently managed, MDLs are patently unconstitutional.

MDLs provide an especially egregious, but hardly isolated, example of the misuse of IPs. The central problem is that the Court has declined to set forth concrete rules to govern the exercise of IPs generally and has instead considered each power piecemeal.\textsuperscript{22} This approach has enabled the Court to avoid explaining how its expansive approval of IPs can be reconciled with its jurisprudence holding that the Constitution strictly limits the judiciary—most significantly, by granting Congress plenary control over all federal adjective law. The Constitution’s text, structure, history, and pre-1937 precedent (both legislative and judicial) demonstrate that such

\textsuperscript{19} See Lynn A. Baker & Stephen J. Herman, \textit{Layers of Lawyers: Parsing the Complexities of Claimant Representations in Mass Tort MDLs}, 24 \textit{LEWIS & CLARK L. REV.} 469, 475 (2020) (“Neither the individual claimants nor their chosen [lawyers] will have selected or voluntarily consented to the addition of these counsel . . . .”).

\textsuperscript{20} Federal judges’ promiscuous use of IPs, in general and in MDLs, usually cannot be said to clearly violate “the law” articulated by the Court, which is so vague and inconsistent as to license a breathtaking array of IPs. Nonetheless, federal judges, particularly in MDLs, can be criticized for exercising their IPs in a manner that alters substantive legal rights, violates due process, or both. Ultimately, however, it is up to the Court to revise its IP jurisprudence to conform to Article III, the Due Process Clause, constitutional separation of powers, and the FRCP—and for Congress to step in if the Court fails to act. See infra Section II.2.I.


\textsuperscript{22} This analysis of IPs will be fleshed out in Part I, which in turn relies heavily on Robert J. Pushaw, Jr., \textit{The Inherent Powers of Federal Courts and the Structural Constitution}, 86 \textit{IOWA L. REV.} 735 (2001).
a schizophrenic result was never contemplated and makes little sense today. Rather, the Constitution distinguishes two kinds of IP, subject to different types of congressional regulation.

First, Article III grants independent federal “courts” the “judicial power,” which must by its very nature include the ability to imply auxiliary powers that are indispensable to adjudication, such as by protecting its judgments from political branch interference. Moreover, any true “court” must be able to maintain its authority and integrity, punish litigation misconduct, and administer its internal affairs. Congress can facilitate, but not impair, the exercise of such “implied indispensable powers.”

Second, federal judges cannot legitimately assert “inherent” powers that are merely “beneficial” (that is, convenient or helpful) to the decision-making process or that do not affect their ability to function as autonomous “courts.” Rather, Article I, particularly the Necessary and Proper Clause, entrusts Congress alone with discretion to bestow such beneficial powers in full, restrict them, or withhold them. Therefore, federal courts’ creation of a common law

23. Several peer reviewers have argued that Article III’s text and historical meaning are not relevant to modern litigation (including MDLs), which has developed in ways that no one could have contemplated. We have two responses. First, the Framers—most notably James Wilson, the Scottish emigre who was the primary drafter of Article III—were aware that special procedures might be necessary to handle multi-party litigation. See James Pfander, Cases Without Controversies 175, 179–81 (2020) (describing Scotland’s authorization of “popular actions” whereby any interested person could claim that defendants had violated legal rights held in common by many individuals, with procedural rules to limit duplicative litigation—a form of action adopted by many early American courts). Second, the Founders understood that concentrating too much power in one person (or a single government branch)—including a judge or court—inevitably led to corruption and oppression. That is why the Constitution granted Congress significant power to ensure that life-tenured judges would not exceed their proper “judicial” boundaries. That concern is as pertinent today as it was in 1789—indeed, even more so, as federal courts have aggressively asserted ever-expanding power over procedural, jurisdictional, and substantive law. See infra notes 185–275 and accompanying text.

to govern beneficial powers violates the Constitution’s separation-of-powers design.\textsuperscript{24}

Application of the foregoing framework would greatly improve MDLs.\textsuperscript{25} Initially, it would clarify that judges have only implied indispensable power to appoint so-called “liaison counsel,” who are “[c]harged with [handling] essentially administrative matters, such as communications between the court and other counsel (including receiving and distributing notices, orders, motions, and briefs on behalf of the group), convening meetings of counsel, advising parties of developments, and otherwise assisting in the coordination of activities and positions.”\textsuperscript{26} Congress authorized a single court to administer complex pretrial proceedings in order to streamline fact-finding and sharpen legal issues for decision, thereby facilitating the exercise of “judicial power.” A transferee judge’s duty cannot be discharged effectively without naming liaison counsel to coordinate with the many other lawyers involved.

But this appointment power has clear limits. Most importantly, liaison counsel cannot displace non-lead lawyers on substantive matters. Due process entitles all litigants to representation by attorneys who speak and act for them with their permission. Furthermore, MDL judges do not have IP to compel non-lead lawyers to compensate court-appointed attorneys. Proof that non-lead lawyer displacement and fee-shifting are unnecessary can be found in both the history of MDLs and the actions of state court judges, who have handled many large consolidations without exercising these powers. MDL judges also lack other IPs that they claim to possess. Because MDLs can be and have been managed without cutting non-lead lawyers’ fees, IP jurisprudence does not support this authority. For the same reason, courts lack IP to review MDL settlements.

In short, judges can manage MDLs effectively without exercising many of the IPs they routinely assert. Some IPs—appointing lead

\textsuperscript{24} Neither the Constitution nor any federal statute authorizes courts to develop a common law of beneficial powers, which are entrusted exclusively to Congress. Moreover, although the Court’s precedent governing implied indispensable powers might be characterized as federal common law, such rules are actually based on Article III of the Constitution and hence cannot be overridden by Congress—unlike true common law, which is always subject to legislative control. See Robert J. Pushaw, Jr., Partial-Birth Abortion and the Perils of Constitutional Common Law, 31 Harv. J.L. & Pub. Pol’y 519, 521–29, 577–91 (2008).

\textsuperscript{25} For elaboration of the following argument, see infra Part II.

\textsuperscript{26} Manual for Complex Litigation (Fourth) § 10.221 (2004) [hereinafter MANUAL].
attorneys who displace plaintiffs’ retained lawyers and forcing the latter to pay the former— are neither indispensable nor beneficial to the courts’ appropriate functioning, but rather pervert it. Hence, not even Congress could confer such powers.

The foregoing ideas will be developed in two stages. Part I will analyze IPs generally and recommend that the Court carefully distinguish between “implied indispensable” and “beneficial” powers. Part II will concretely demonstrate the value of that framework by applying it to MDLs.

I. A CONSTITUTIONAL ANALYSIS OF FEDERAL COURTS’ INHERENT POWERS

The Constitution’s language, structure, history, and political philosophy yield three main conclusions. First, Article III “courts” can independently assert an IP only when indispensably necessary to maintain their authority or to exercise their “judicial power” of deciding cases. Second, Congress can effectuate, but not eliminate or impair, these essential IPs. Third, Congress can determine which merely beneficial IPs to confer on federal judges.

Early congressional practice and Court precedent confirmed this understanding, which remained intact for about a century and a half. The modern Court has parroted the principle that IPs can be invoked only when indispensable, yet has approved IPs that are not merely unnecessary but that often transgress properly “judicial” boundaries, flout federal procedural statutes and rules, and violate due process. The Court should abandon this approach and instead reintroduce the genuine constitutional restraints it formerly imposed on IPs.

A. The Original Meaning

The Constitution’s drafters adapted longstanding English governmental theory and practice in light of the unique American experience. A simplified summary of complex historical developments illuminates the original understanding of the inherent powers of federal courts.27

27. The following sketch of English and American constitutional history, particularly as it bears on inherent powers, draws heavily on the analysis presented in Pushaw, supra note 22, at 740–41, 799–836. We will not repeat here the hundreds of supporting sources cited therein, but merely highlight a few of the most important ones and add new authority.
1. British Political and Legal Ideas and Institutions

The Norman Conquest of 1066 gave the King absolute power, which he wielded with assistance from select counselors.\textsuperscript{28} A Great Council of leading lords and clerics periodically helped with crucial governing decisions.\textsuperscript{29} A smaller group of ministers exercised routine “executive power,” which encompassed all law enforcement—both “executive” (administering it generally) and “judicial” (issuing a prudential judgment about the law in a particular case).\textsuperscript{30} The latter function was part of the Crown’s prerogative power to do justice.\textsuperscript{31}

The King delegated judicial duties to courts, which evolved when he possessed all governing authority and which therefore shared his vast discretion.\textsuperscript{32} As there was no adjective law and only sparse substantive legislation, judges usually had to develop their own rules.\textsuperscript{33} Three royal courts emerged. First, Common Pleas handled ordinary damages actions instituted through a writ such as trespass, from which the common law developed.\textsuperscript{34} Second, King’s Bench had jurisdiction over important cases implicating various “prerogative writs” like mandamus and prohibition.\textsuperscript{35} Third, when courts of law could not furnish a remedy, Chancery could do so in equity.\textsuperscript{36} Although all these courts were subordinate to the monarch, they had acquired a separate identity by the late

\textsuperscript{29} See PLUCKNETT, supra note 28, at 140–44, 155.
\textsuperscript{30} See Pushaw, supra note 22, at 800–10.
\textsuperscript{31} The King was “the fountain of justice” from which all of the courts’ judicial power flowed. 1 WILLIAM BLACKSTONE, COMMENTARIES *266–70; 3 id. at *23–24.
\textsuperscript{32} Judges served as the King’s personal representatives in exercising his prerogative power to administer justice. See MILSOM, supra note 28, at 28–39, 62, 75–77, 83.
\textsuperscript{33} See Pushaw, supra note 22, at 800–06, 810–12.
\textsuperscript{35} See BAKER, supra note 34, at 35, 46, 118, 123–29; 1 HOLDsworth, supra note 28, at 204–28; 9 id. at 104–25.
\textsuperscript{36} See BAKER, supra note 34, at 84–97, 101; 1 HOLDsworth, supra note 28, at 395–476; 5 id. at 284–87; 9 id. at 335–76; 11 id. at 522–25; 12 id. at 258–85; MILSOM, supra note 28, at 74–87.
fourteenth century. Gradually, they assumed a distinctly “judicial” role: rendering a final judgment after interpreting a fixed law and applying it to a set of facts.

These judges also asserted four types of auxiliary power. First, they necessarily had to craft rules of procedure and evidence. Second, judges managed litigation details such as calendaring, granting stays, and appointing experts. Third, a court could maintain its authority by (1) dismissing cases for abuse of its process, and (2) fining or jailing for contempt (i.e., misconduct in its presence or by its officers, as well as defiance of its orders). Fourth, a court could regulate its main officers, lawyers, by ascertaining their fitness to practice and disciplining them for litigation misbehavior.

Only royal courts had such inherent powers, which flowed from the Crown; inferior tribunals created by statute did not. For instance, contempt against a royal court was treated as an offense

See PLUCKNETT, supra note 28, at 16–20, 27–29, 35–38, 44, 142–43, 147–52, 155–59, 173, 178–81, 188–96, 209, 232–38, 353–58, 394–95, 679–81, 688–89, 695–706. Because courts were so closely associated with the Crown, and because they each developed on a separate track, it is impossible to pinpoint when they came to be regarded as discrete institutions. Moreover, even after this individuation had occurred, it took several centuries for courts to achieve independence from the King. See infra notes 53–56 and accompanying text.

This modern conception of the appropriate “judicial” function began to take shape in the 1500s and became entrenched by the mid-eighteenth century. See BAKER, supra note 34, at 69–74, 89; PLUCKNETT, supra note 28, at 18–20, 46–47, 342–50, 381–82; M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 87–88 (1967).


See supra notes 33–38 and accompanying text. These rules, which dated back to the fourteenth century, were eventually compiled systematically in WILLIAM TIDD, THE PRACTICE OF THE COURTS OF KING'S BENCH AND COMMON PLEAS (1974) [hereinafter TIDD’S PRACTICE].

See Jacob, supra note 39, at 35–39; Pushaw, supra note 22, at 812.

See Jacob, supra note 39, at 26–29, 40–50; Pushaw, supra note 22, at 812–15. Royal courts could punish contempt because they represented the sovereign King and hence could defend his authority. American courts assumed this sanctioning power even though their government rested on the sovereignty of the People. See RONALD GOLDFARB, THE CONTEMPT POWER 1–45, 104–05 (1963).

See BLEWETT LEE, The Constitutional Power of Courts Over Admission to the Bar, 13 HARV. L. REV. 233, 238–40 (1899) (showing that English courts claimed power to regulate attorneys beginning in the thirteenth century). In 1605, Parliament set forth basic qualifications for bar admission, which courts then supplemented. See TIDD’S PRACTICE, supra note 40, at 60.

See 6 HOLDSWORTH, supra note 28, at 234–43 (making this point). This English framework might suggest that “inferior” Article III courts, which must be established by Congress, possess only such powers as the legislature grants. See infra notes 79, 86, 92–96 and accompanying text.
against the King and thus could be punished severely. To take an extreme example, a criminal defendant once threw a stone object at a judge, who summarily ordered that the man’s hand be chopped off and that he be hanged in the courtroom.

Over the centuries, however, the Crown’s powers diminished. Correspondingly, courts enjoyed increasing autonomy as adjudicators of a neutral “law.” Meanwhile, the Great Council evolved into a House of Lords and combined with an elected House of Commons to form a Parliament, which eventually gained enough independence to challenge the King in the sixteenth century. After protracted conflict, the Glorious Revolution of 1689 formally established the sovereignty of Parliament, which consisted of Lords, Commons, and a King with an absolute veto. Parliament had all “legislative power”: to enact, amend, or repeal laws. The Crown retained the “executive power” of administering and enforcing the laws, including the prerogative of doing justice. Separating “legislative” from “executive” power, and entrusting each to an independent institution, were deemed critical to any government’s legitimacy.

Relatedly, courts were now viewed as servants of the law, not the King (or Parliament). For example, their judgments could not be revised by political officials. In 1701, Parliament formalized this transformation by granting judges tenure during

45. See supra note 42.
46. See Davis’s Case, 2 Dyer 188b (1631), reprinted in 73 Eng. Reps. 415–16.
48. See Pushaw, supra note 22, at 800, 806.
49. See id. at 806–07. Parliament combined the one (the King), the few (Lords), and the many (Commons). See 1 WILLIAM BLACKSTONE, COMMENTARIES *44–52, *147–55, *160–62, *185–86, *260–69. In a vestige of its original role as a council helping the King discharge his major responsibilities, the House of Lords retained the ability to reconstitute itself as a “High Court” to decide cases of unusual importance. See 1 HOLDSWORTH, supra note 28, at 361–79, 390, 644; PLUCKNETT, supra note 28, at 200–01.
50. See Pushaw, supra note 22, at 806, 808, 815.
51. See id. at 807–10.
53. See supra note 47 and accompanying text.
“good behavior” and guaranteeing their compensation. Accordingly, although in theory courts still acted as the King’s agents in vindicating his “executive” power, in reality they independently exercised the uniquely “judicial” function of adjudication. As a result of these changes, certain powers originally founded in the royal prerogative were re-characterized as simply inhering in courts.

Moreover, even though Parliament now had sovereign power to make all laws, it generally did not legislate on IPs, including adjective lawmaking. Courts had become established as distinct organs—and had developed and refined their own rules of procedure and evidence—centuries before Parliament emerged as supreme, and legislators had no incentive to tamper with a system that had proven to be fair and workable.

All of the foregoing historical developments contributed to the idea that there was a fundamental “Constitution” that everyone had to respect. It consisted of (1) a few foundational documents such as Magna Carta (1215) and the Declaration of Rights (1689); (2) certain monumental Acts of Parliament—for instance, the law guaranteeing

57. See 4 WILLIAM BLACKSTONE, COMMENTARIES *282–85; see generally Pushaw, supra note 22, at 806–10, 814–16.
58. Pushaw, supra note 22, at 812, 814–15. Courts created adjective rules for administrative convenience, and such laws never had the binding force of statutes. See Jacob, supra note 39, at 33, 37.
59. Pushaw, supra note 22, at 815 (citing 3 WILLIAM BLACKSTONE, COMMENTARIES *267). English courts, which began to take shape in the 1100s and were well established by the 1300s, made rules of practice, procedure, and evidence to govern their proceedings. See supra notes 32–43 and accompanying text. This adjective law had become entrenched by the time Parliament emerged as the undisputed sovereign in 1689. And even if Parliament had wanted to change adjective law, the King might have wielded his veto to protect his prerogative of doing justice through courts. Pushaw, supra note 22, at 815–16. This English practice contrasted sharply with the system under America’s Constitution, which created a legislature (Congress) that had (1) complete discretion over the establishment of lower federal courts; (2) substantial control over the Supreme Court’s size and jurisdiction; and (3) power to make adjective law for all federal courts. See infra notes 80–83, 85–88, 93–96, 116–153 and accompanying text.
60. Pushaw, supra note 22, at 806–08.
61. See PLUCKNETT, supra note 28, at 23–26, 59–61, 337.
unlawfully detained citizens the writ of habeas corpus;\textsuperscript{62} and (3) hallowed unwritten concepts and customs such as separation of powers, the rule of law, and due process (that is, prior notice about laws and their application by an impartial decision-maker).\textsuperscript{63}

England extended its political and legal framework to the American colonies but did not make modifications to reflect changes in the mother country, such as guaranteeing judges’ independence.\textsuperscript{64} Royal officials’ abuses and disregard of English constitutional norms (e.g., jury trials) eventually caused a Revolution.\textsuperscript{65}

2. Limited Inherent Powers Under America’s Constitution

The tyranny of British executive and judicial officials persuaded Americans to grant sovereignty to state legislatures and establish a weak national government, the Articles of Confederation, which similarly vested almost all powers in a “Congress.”\textsuperscript{67} The Articles did not provide for an independent President or judiciary, so no “judicial power” (inherent or otherwise) existed.\textsuperscript{68} The resulting

\textsuperscript{62}. Habeas Corpus Act of 1679, 31 Cha. 2, ch. 2. Parliament recognized, and slightly expanded, a writ that the royal courts had been issuing since the fourteenth century. See BAKER, supra note 34, at 126–28.

\textsuperscript{63}. See Pushaw, supra note 22, at 806–08.

\textsuperscript{64}. See id. at 816–17; see also GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, at 296–97 (1969) (recognizing England’s transplantation of its basic governmental framework, but noting that each colony made certain legal, political, and economic adjustments based on its unique circumstances).

\textsuperscript{65}. WOOD, supra note 64, at 159–60; Pushaw, supra note 22, at 816–19.


\textsuperscript{67}. See id. at 132–61, 305, 352–63, 373–74, 393–429, 436, 452–54, 463–67, 475–83, 549–56. State legislatures typically controlled governors and judges, who could not check abuses such as debtor forgiveness statutes that destroyed credit markets and violated treaty obligations. See id. at 300–04, 354–63, 393–429, 452–54, 463–67, 475–83; Pushaw, supra note 22, at 819–21. The Confederation, a loose alliance of sovereign states, could not compel them or their citizens to obey federal laws. See THE FEDERALIST NOS. 21, at 129–33 (Hamilton); NO. 38, at 247 (Madison).

\textsuperscript{68}. Under Article IX, Congress could appoint temporary tribunals to (1) decide cases concerning piracies, captures, and prizes, and (2) make preliminary determinations in interstate disputes, subject to Congress’s final appellate jurisdiction. The lack of a permanent judiciary stymied impartial justice. See THE FEDERALIST NO. 38, at 247 (Madison).
political and economic chaos demonstrated the value of England’s strong central government that separated powers.\textsuperscript{69} America could not, however, replicate Britain’s constitutional traditions—particularly its hereditary upper legislative chamber and chief executive (with courts in that department). The Founders therefore ingeniously accommodated English political principles to distinctively American ideas and conditions.\textsuperscript{70}

The Federalists’ key innovation was relocating sovereignty from the legislature to “We the People,” who retained all powers not granted in their written Constitution.\textsuperscript{71} The People vested three types of power (legislative, executive, and judicial) in three government branches and enumerated the subjects to which each power extended.\textsuperscript{72} Voters would indirectly select the nation’s upper lawmaking body (the Senate) and Chief Executive (the President).\textsuperscript{73} But instead of endowing the President with vast prerogatives, Article II conferred the basic “executive power” (executing the law) and a few other defined powers.\textsuperscript{74}

Furthermore, the “executive power” no longer subsumed the judicial. Rather, Article III gave independent courts a distinct “judicial power”—rendering a final judgment in a case after interpreting the law and applying it to the facts.\textsuperscript{75}

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\item \textsuperscript{69} See, e.g., \textit{The Federalist} No. 48, at 335 (Madison).
\item \textsuperscript{70} For a detailed analysis of this accommodation, see Robert J. Pushaw, Jr., \textit{Justiciability and Separation of Powers: A Neo-Federalist Approach}, 81 Cornell L. Rev. 393, 399–452 (1996).
\item \textsuperscript{71} James Wilson was the earliest proponent of this link between popular sovereignty and a written Constitution that delegated and limited government powers. See \textit{The Works of James Wilson} 20–25, 73, 77–79, 293, 303–04, 310–17, 401–02, 414, 497, 764 (Robert Green McCloskey ed., 1967) [hereinafter \textit{Wilson’s Works}]. Other Federalists emphasized this theme: See, e.g., \textit{The Federalist} Nos. 39, 46–49, 51 & 55 (Madison); \textit{The Federalist} Nos. 56, 60 & 84 (Hamilton).
\item \textsuperscript{72} See U.S. Const. arts. I, II, and III.
\item \textsuperscript{73} For these two entities, the democratic process was not direct (as in the House) but rather filtered. See U.S. Const. art. I, § 3, cl. 1 (providing that each state’s elected legislature would choose its two Senators); U.S. Const. art. II, § 1, cl. 2–3 (authorizing each state’s legislature to direct the manner of appointing electors who would select the President).
\item \textsuperscript{74} See U.S. Const. art. II. Moreover, most of those other powers (e.g., over appointments, military matters, and foreign affairs) could not be exercised absent Congress’s approval.
\item \textsuperscript{75} The leading Federalists frequently articulated this standard definition of “judicial power.” See, e.g., 1 \textit{Records of the Federal Convention of 1787} 233–34 (Max Farrand ed., 1911) (Madison); \textit{The Federalist} No. 78, at 523–24, 529 (Hamilton); \textit{Wilson’s Works}, supra note 71, at 296. Thus, We the People decided that their executive and judicial representatives would exercise distinct powers in independent departments. See, e.g., \textit{The Federalist} No. 39, at 251–52 (Madison); \textit{The Federalist} No. 64, at 436 (Jay); \textit{The Federalist} No. 68, at 458–
\end{itemize}
\end{footnotesize}
meant that federal judges, unlike their English counterparts, had no derivative executive powers or prerogatives—for example, to fashion a procedural code, issue writs, or punish contempt in the name of the Chief Executive.  

The foregoing changes seemingly left little room for “inherent” authority, as the Constitution specified the government’s powers. Nonetheless, because the Framers sought to create a workable system, federal officials could exercise implied powers that were “indispensably necessary . . . [but] not expressly granted,” as Madison put it. This “strict necessity” restraint would honor the constitutional principle of limited and enumerated federal powers. And Articles I and III, read in light of the Constitution’s structure and underlying political theory, revealed that the federal courts’ implied or “inherent” authority would be especially narrow compared to that of the other branches.

61 (Hamilton); THE FEDERALIST NO. 70, at 471–80 (Hamilton); THE FEDERALIST NO. 78, at 522–23 (Hamilton); WILSON’S WORKS, supra note 71, at 293–98, 310–19.

76. See supra notes 32, 37, 44–45, 51, 56 and accompanying text (discussing these assertions by British judges of derivative executive power and discretion). The Supreme Court later confirmed that the Constitution authorized Congress to enact adjective law, confer writ power, and regulate contempt. See infra notes 124–148 and accompanying text. The Constitution also required the executive branch to execute legal judgments. See THE FEDERALIST NO. 78, at 522–23 (Hamilton).

77. See Pushaw, supra note 22, at 741, 744, 823–24.

78. THE FEDERALIST NO. 44, at 303–04. Madison clearly argued that the Constitution authorized Congress to grant such “indispensably necessary” implied powers to all three branches, but never directly stated that executive and judicial officials could assert such powers on their own. See infra notes 79, 82–83, 89 and accompanying text. However, Madison’s other writings, and the logic of the Constitution, reflect his assumption (shared by other Founders) that all federal officials could imply essential auxiliary powers, subject to reasonable congressional regulation. See infra notes 79, 89 and accompanying text.

79. The Convention and Ratification records contain no explicit references to inherent judicial powers. Thus, their nature and scope must be determined by examining the Constitution’s text; its animating structural and theoretical principles like popular sovereignty, separation of powers, and limited and enumerated federal powers; and early practice and precedent. Pushaw, supra note 22, at 822–36. The only arguably relevant public comments were by Madison. One suggested that federal officials (including judges) could imply indispensably necessary powers. See supra note 78. The other was that, in the executive department, “much greater latitude is left to opinion and discretion than in the administration of the [courts].” See 2 RECORDS, supra note 75, at 34; see also THE FEDERALIST NO. 78, at 522–23 (Hamilton) (dubbing the judiciary “the least dangerous” branch because it could exercise “merely judgment,” whereas Congress made rules governing all citizens and “the executive not only dispenses the honors but holds the sword”). The Founders believed that legislative power, by its nature, was far broader than executive or judicial power. See infra notes 80–83 and accompanying text. The logical conclusion—that the courts’ discretion
Article I created a Congress with “[a]ll legislative Powers”\textsuperscript{80}; passing laws that reflected the majority’s desired policies.\textsuperscript{81} The Founders thought that legislative power dwarfed executive and judicial authority in both magnitude\textsuperscript{82} and breadth of discretion.\textsuperscript{83} Federal judges could not create law, but could only expound existing law, unless there was a legal gap that had to be filled to process a case.\textsuperscript{84} Article I did not, however, grant Congress general legislative authority \textit{a la} Parliament, but rather extended such power to the subjects “herein granted”\textsuperscript{85}: those listed in Section 8. The most obviously relevant provision authorized Congress to “constitute Tribunals inferior to the [S]upreme Court.”\textsuperscript{86}

More subtly, Congress could “make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”\textsuperscript{87} Articles II and III lacked such language. Therefore, Congress alone could enact statutes it deemed “necessary and proper” to effectuate its own powers and those of the executive and judicial branches.\textsuperscript{88} The only ambiguity concerned the meaning of “necessary.” Madison argued that this word restricted Congress to

\textsuperscript{80} U.S. CONST. art. I, § 1.
\textsuperscript{81} See Pushaw, supra note 22, at 739, 741, 744–46, 799, 829–30.
\textsuperscript{82} “In republican government the legislative authority, necessarily, predominates.” \textsc{the Federalist} No. 51, at 559 (Madison). Congress’s constitutional powers were “more extensive and less susceptible of precise limits” than those of the President or the courts. \textsc{the Federalist} No. 48, at 334 (Madison).
\textsuperscript{83} \textsc{the Federalist} No. 48, at 334 (Madison). Legislatures controlled their agenda and could decide which laws they would pass. By contrast, if a legislature enacted a statute, the executive and judicial departments did not have discretion to decline to apply it. \textit{Id}. The Constitution incorporated this dynamic, in which Congress had the most power and discretion—and the judiciary the least. See \textsc{the Federalist} No. 78, at 523 (Hamilton); see also Saikrishna Bangalore Prakash, \textit{Congress as Elephant}, 104 Va. L. Rev. 797, 798–802, 806–42 (2018) (demonstrating the original understanding of Congress’s dominant position and describing its multiple roles, including being the “chief facilitator” of the executive and judicial branches).
\textsuperscript{85} U.S. CONST. art. I, § 1; see also \textsc{Wilson’s Works}, supra note 71, at 764.
\textsuperscript{86} See U.S. CONST. art. I, § 8, cl. 9.
\textsuperscript{87} See U.S. CONST. art. I, § 8, cl. 18.
laws that were indispensable to carrying out the government’s express powers. By contrast, Randolph maintained that this Clause gave Congress “supplementary power,” albeit not “unlimited discretion,” to provide each department with even nonessential means that would best effectuate their enumerated powers.

Critically, the Founders’ debate centered on whether Congress could grant executive and judicial officials incidental powers that were merely helpful, convenient, or useful. No one said that those officials could claim such “beneficial” powers on their own.

89. Initially, he noted that the Framers had rejected the provision in the Articles of Confederation that prohibited Congress from exercising any powers not “expressly” delegated, thereby allowing the new government to imply powers that were “indispensably necessary . . . [b]ut not expressly granted.” The Federalist No. 44, at 303–04. Therefore, “all the particular powers, requisite as means of executing the general powers, . . . resulted to the government, by unavoidable implication . . . . [W]herever the end is required, the means are authorized; wherever a general power to do a thing is given, every particular power necessary for doing it, is included.” Id. at 304–05. The Necessary and Proper Clause simply made this implicit principle explicit: Congress could provide all three departments with means that were essential and appropriate to effectuate their enumerated powers (or, if the executive or judiciary had asserted such powers independently, to reasonably regulate their exercise). See id. at 303–05. If Congress misconstrued this Clause, such a usurpation of power would be checked by the other two branches or, ultimately, by the voters. Id. at 305. Similarly, Hamilton contended that the Clause merely spelled out the “unavoidable implication from the very act of constituting a Federal Government, and vesting it with certain specified powers.” The Federalist No. 33, at 204–05. He elaborated that this Clause was inserted as a “precaution” to remove any doubt that Article I’s grant of “legislative power” to Congress included giving each branch the means to effectively exercise their granted powers. Id. “[I]n relation to all other powers declared in the [C]onstitution . . . [] it is expressly to execute these powers, that the sweeping clause . . . authorizes the national legislature to pass all necessary and proper laws.” Id. at 205. Congress had “to judge of the necessity and propriety of the laws to be passed for executing the powers of the Union” and would be politically accountable for its decisions. Id. at 206. Whereas Madison defined “necessary” as “indispensable,” Hamilton did not say whether that word might also include powers that were merely helpful, useful, or convenient. In the 1789–1790 debates over whether Congress had Article I power to establish a national bank, Hamilton embraced this broad definition, whereas Madison reaffirmed his narrower view. See infra notes 102–103 and accompanying text.

90. See 3 Jonathan Elliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution 463–64 (1901). Randolph’s interpretation is more persuasive, especially as it comports with the structural precept that “legislative power” was far more expansive and discretionary than the other two powers. See supra notes 82–83 and accompanying text. He later reversed course and endorsed Madison’s interpretation. See infra note 102.

91. See William W. Van Alstyne, The Role of Congress in Determining Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effects of the Sweeping Clause, 40 L. & Contemp. Probs. 102, 107–34 (1976) (demonstrating that this Clause, as originally understood, empowered Congress alone to determine what nonessential “incidental” powers executive and judicial officials should be given, and that therefore these officials cannot assert such powers on their own).
And even assuming some Framers or Ratifiers silently accepted this possibility, the Necessary and Proper Clause allowed Congress to approve, modify, or eliminate such powers, which were not required for courts to fulfill their constitutional role.92

In short, Article I confers broad legislative authority to shape the judiciary, which Article III reinforces. For example, Congress could determine the structure of the lower federal courts and the number of Supreme Court Justices;93 delineate their jurisdiction;94 and set forth the substantive and procedural rules those courts had to apply.95 As to that last item, many Founders stated, without challenge, that Congress could regulate the judiciary’s adjective law.96 Nonetheless, Article I powers could not be exercised in a manner that subverted the judiciary’s independence and constitutional functions. Consequently, once Congress established a “court,” its judges would be immune from political interference in exercising

92. Id.
93. Article III, Section 1 of the Constitution provides that “[t]he judicial Power . . . shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.” Congress determines the number of Justices and has total control over the lower federal courts’ size and structure. See Prakash, supra note 83, at 800–01, 826–27, 829–30.
94. Congress’s power to establish inferior federal courts has always been interpreted as carrying with it complete discretion to set forth their jurisdiction. See, e.g., United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32, 33 (1812). Congress can also make “Exceptions” to, and “Regulations” of, the Supreme Court’s appellate jurisdiction. See U.S. CONST. art. III, § 2, cl. 2; see also Ex parte McCordtle, 74 U.S. (7 Wall.) 506, 514 (1868) (holding that this power is plenary). The only express limit on Congress is that it must give the Court “original Jurisdiction” in “all Cases” affecting foreign ministers and “those in which a State shall be a Party.” See U.S. CONST. art. III, § 2, cl. 2; see also Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174–75 (1803) (describing this lone restriction on Congress).
96. Three constitutional provisions supplied this authority. First, “[a] power to constitute [inferior] courts, is a power to prescribe the mode of trial.” The Federalist No. 83, at 559 (Hamilton). Second, Congress could “regul[e]” the Supreme Court’s appellate jurisdiction, which included procedural rulemaking. See 2 Elliot, supra note 90, at 534 (Madison). Third, Congress could make adjective law as it deemed “necessary and proper” for courts to operate effectively. See 2 Elliot, supra note 90, at 488 (Wilson); The Federalist No. 80, at 535 (Hamilton) (emphasizing that Congress could regulate the judiciary and thereby limit or eliminate any possible “inconveniences” presented by these new courts). Congressmen would have a political incentive to please their constituents by enacting fair and efficient rules on matters such as jury trial. See, e.g., 2 Elliot, supra note 90, at 415, 488, 517–18 (Wilson); 3 id. at 68–69, 203–04 (Randolph); 3 id. at 517, 520 (Pendleton); 3 id. at 534, 537 (Madison); 3 id. at 555, 561 (Marshall); 4 id. at 144–45, 152, 165–66 (Iredell); 4 id. at 308 (Pinckney). Finally, many Founders noted Congress’s power to enact rules of criminal procedure and evidence. See Pushaw, supra note 22, at 832–33 nn.517–518 (citing sources).
their “judicial power” — finding the facts, construing the applicable law, and rendering a final judgment. Moreover, Article III’s express grants logically included implied powers without which courts could not operate: administering their internal affairs and managing their cases; preserving their authority and integrity; and sanctioning litigation-related misconduct. Even as to those indispensable inherent powers, however, Congress under the Necessary and Proper Clause could enact legislation that would facilitate—but not hinder—their exercise, such as by ensuring their reasonable and uniform application.

Finally, the Constitution divided powers between the states and the federal government, and separated the powers of the latter, to create a system of checks and balances that would expose officials’ unlawful or arbitrary actions and thereby promote individual liberty. The Bill of Rights, particularly the Fifth Amendment Due Process Clause, confirmed this purpose. Among other things, that Clause prohibits courts from creating and applying IPs without notice during litigation, which deprives parties of their rights set forth in written laws.

The preceding analysis explains how the Framers and Ratifiers thought that inherent judicial powers would fit within the constitutional structure. That understanding informed the actions of the statesmen who implemented the Constitution.

98. Id. at 822–36.
99. See id. at 799, 833–34. For example, Congress could not eliminate or hamper federal courts’ indispensable IP to punish contempt, but could limit such power to its traditional categories (courtroom misbehavior, disobedience of judicial orders, and misconduct by court officers) and penalties (fine or imprisonment). See infra notes 118, 142–147 and accompanying text.
101. Professor Yablon has maintained that the Framers deliberately declined to define the precise scope of Article III “judicial power” and the extent of Congress’s control over federal courts to avoid battles during Ratification, thereby deferring the details to the political process. Charles M. Yablon, Inherent Judicial Authority: A Study in Creative Ambiguity, 43 CARDOZO L. REV. 1035, 1051–58 (2022). Admittedly, contemporaneous records do not disclose any direct discussion of the interaction between Congress and the judiciary. See supra note 79. Nonetheless, the Constitution’s structure and text (particularly the Necessary and Proper Clause) reflected a shared understanding that Article III courts (1) had a core “judicial power” (adjudication) immune from legislative interference; (2) could assert auxiliary powers indispensably necessary to perform that function (which Congress could regulate but not hamper); and (3) could exercise nonessential powers only pursuant to a statutory grant.
B. Early Congressional and Supreme Court Precedent on Inherent Powers

Federal officials confirmed three basic principles. First, the Necessary and Proper Clause granted Congress sweeping power to determine the federal government’s structure and operations. Second, Articles I and III authorized Congress to broadly regulate federal courts. Third, the only exception to this legislative control was an inviolate core of indispensable judicial IPs.

1. The Necessary & Proper Clause and the National Bank

The debates in 1790 over the proposed Bank of the United States revealed sharply differing interpretations of the Necessary and Proper Clause. Madison and Jefferson argued that this Clause permitted Congress to enact only laws that were essential to enable it and the other two branches to carry out their enumerated powers—and that the Bank did not meet that strict test.102 Nationalists led by Treasury Secretary Hamilton responded that Congress could provide any means (such as the Bank) that it determined were most useful or conducive to attaining the ends of the express powers.103 Hamilton’s view persuaded Congress (which passed the bill), President Washington (who signed it),104 and the Marshall Court in McCulloch v. Maryland105 (which upheld it):

[T]he sound construction of the [C]onstitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. . . . [Establishing the Bank] must be within the discretion of Congress, if it be an appropriate means of executing the powers of government.107

102. See LEGISLATIVE AND DOCUMENTARY HISTORY OF THE BANK OF THE UNITED STATES 40–44, 82–83 (Madison) (M. St. Clair & D.A. Hall eds. 1832) [hereinafter BANK HISTORY]; id. at 91–94 (Jefferson). They were joined by Randolph, id. at 86–89, who abandoned the position he had taken during Ratification. See supra note 90.
103. See BANK HISTORY, supra note 102, at 95–110.
104. See id. at 35–36, 85.
106. Id. at 400–25.
107. Id. at 421–22.
Chief Justice Marshall reasoned that We the People, in granting Congress various great powers (e.g., over war, revenue, and commerce), must have entrusted it with the choice of the best means “to facilitate [their] execution.” The Court then held that the Necessary and Proper Clause “remove[d] all doubts” about Congress’s “right to legislate on th[e] vast mass of incidental powers” and was not limited to laws of “absolute physical necessity...[that were] indispensable, and without which the [express] powers would be nugatory.” Rather, the Clause “enlarge[d] [Congress’s] discretion...to exercise its best judgment in the selection of measures” that would be most “beneficial,” “convenient,” “useful,” or “conducive” to accomplishing the objectives of the express powers.

Although McCulloch upheld an Act of Congress that facilitated the exercise of its own powers, it could make similar policy judgments as to the auxiliary powers of executive officials or judges. For example, the Chief Justice noted that Congress had exclusive authority to criminalize conduct as a means of ensuring the beneficial exercise of [an express] power, but not indispensably necessary to its existence...[P]unishment of the crimes of stealing or falsifying a record or process of a Court of the United States, or of perjury...is certainly conducive to the due administration of justice. But courts may exist, and may decide causes brought before them, though such crimes escape punishment.

108. See id. at 402–11; id. at 408 (quoted phrase).
109. See id. at 420–21.
110. See id. at 413.
111. See id. at 420.
112. See id. at 409–10, 413–17, 422–24. “The subject is the execution of those great powers on which the welfare of a nation essentially depends. It must have been the intention of those who gave these powers...to insure...their beneficial execution. This could not be done by confining the choice of means to such narrow limits as not to leave it in the power of Congress to adopt any which might be appropriate, and which were conducive to the end...To have declared that the best means shall not be used, but those alone without which the power given would be nugatory, would have been to deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances.” Id. at 415–16. See Grant S. Nelson & Robert J. Pushaw, Jr., Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control over Social Issues, 85 IOWA L. REV. 1, 56–57 (1999) (discussing McCulloch).
114. Id. at 417.
This passage reflects a very narrow conception of judges’ implied indispensable powers, as arguably a court would not be able to perform its key fact-finding function if it could not penalize those who lied under oath or falsified records. Indeed, that constricted view helps explain why the Court interpreted the Necessary and Proper Clause as authorizing Congress to grant beneficial powers: Because federal judges (and executive officials) could not imply such powers on their own, depriving Congress of this discretion would have hamstrung those departments from operating effectively in light of changing circumstances.\(^{115}\)

In short, *McCulloch* captured the original understanding. As this case focused on Congress’s right to effectuate its own powers, one might discount Chief Justice Marshall’s more general statements as dicta that have limited applicability to the judicial department. But early federal statutes and cases that directly concerned federal courts always recognized the fundamental difference between Congress’s expansive authority and the judges’ limited discretion to assert implied or “inherent” powers.

2. **Congress’s Regulation of the Judiciary**

The seminal Judiciary Act of 1789 had three pertinent provisions.\(^ {116}\) First, federal judges could issue various writs, such as habeas corpus, mandamus, and prohibition.\(^ {117}\) Second, judges had “discretion” to punish “by fine or imprisonment . . . all contempts of authority in any cause or hearing before the [court.]”\(^ {118}\) Third, Congress set forth a few procedural rules (e.g., concerning jury trials, process in district courts, production of writings, and certain depositions),\(^ {119}\) but otherwise entrusted judges to make “all

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\(^{116}\) See Act of Sept. 24, 1789, ch. 20, 1 Stat. 73; see also Pushaw, *supra* note 22, at 747–51 (discussing this law, related procedural statutes, and cases interpreting such legislation). The Act also (1) fixed the Supreme Court’s size at six and prescribed its jurisdiction; (2) established district courts and granted them admiralty and diverse-party jurisdiction; and (3) provided that state law would supply the substantive rules of decision, absent a contrary federal constitutional, statutory, or treaty provision. See Act of Sept. 24, 1789, ch. 20, §§ 1–5, 9, 11, 13, 34, 1 Stat. at 73–81.


\(^{118}\) *Id.* § 17.

\(^{119}\) *Id.* §§ 9, 11, 15, 26, 30; see also *id.* § 12 (removal, attachment, and discovery in land ownership controversies); §§ 22, 25 (appeals); § 29 (venue for capital crimes); § 33 (bail).
necessary rules” to conduct their business (including standards for granting new trials and punishing contempt). Congress quickly reconsidered this near-total delegation of power and passed the Process Act, which instructed each federal court to apply the rules of procedure of the forum state, with “discretion” to amend those rules as the court “deemed expedient” based on prevailing legal norms.

This framework left federal judges with leeway to flesh out laws of practice and procedure as necessary to exercise “judicial power” properly. As the political and legal system matured, Congress gradually filled many of these gaps, including by delegating to the Supreme Court power to promulgate uniform rules of practice in equity and admiralty.

3. The Supreme Court’s Treatment of Adjective Law and Inherent Powers

The Court upheld all such federal statutes. It reasoned that, although federal judges had inherent authority to take any actions indispensably necessary to process, manage, and decide cases, the Constitution authorized Congress to regulate such powers, to control merely beneficial powers, and to prescribe all

120. Id. § 17.
adjective law.\textsuperscript{124} \textit{Ex parte Bollman}\textsuperscript{125} illustrates this interplay between judicial and legislative power. \textit{Bollman} involved treason—a federal concern. Hence, state law was inapposite, but Congress had not supplied rules concerning the validity of affidavits and depositions.\textsuperscript{126} Because such rules were crucial to deciding the case, the Marshall Court had to make them.\textsuperscript{127} By contrast, Chief Justice Marshall dismissed the argument that “issuing writs of habeas corpus . . . is one of those inherent powers . . . incidental to [a court’s] nature”\textsuperscript{128} and concluded that writ power could only be bestowed by statute, as Congress had done.\textsuperscript{129}

Reinforcing that latter holding, the Court in \textit{Wayman v. Southard}\textsuperscript{130} recognized that Article I authorized Congress “to regulate all the proceedings of the court[s]”\textsuperscript{131} as necessary and proper for them to effectually exercise their Article III powers.\textsuperscript{132} In fact, Congress had a “duty” to provide such procedural rules, which it had fulfilled in the Process Act by directing federal judges to apply state rules but with discretion to alter minor details as the judges deemed expedient—a permissible delegation

\textsuperscript{124} For example, Congress did not set forth procedures to govern the Supreme Court’s original jurisdiction, which included state-party controversies to which the law of the states involved could not sensibly be applied. Therefore, the Court concluded it had no choice but to make such procedural rules—including those concerning service of process and compelling appearances—yet acknowledged Congress’s authority to override such rules. See Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 428–29 (1793); \textit{but see} id. at 432–34 (Iredell, J., dissenting) (agreeing that federal courts had inherent power to fashion procedural rules when strictly necessary, but finding that standards for service and appearances did not fall into that category and thus were within Congress’s exclusive discretion to prescribe). The Court often asserted similar discretion. See, e.g., Mandeville v. Wilson, 9 U.S. (5 Cranch) 15, 17–18 (1809) (crafting rules on amending pleadings).

\textsuperscript{125} \textit{Ex parte Bollman}, 8 U.S. (4 Cranch) 75 (1807).

\textsuperscript{126} \textit{Id.} at 130–31.

\textsuperscript{127} \textit{See id.; see also} \textit{id.} at 94 (noting that judges had independent power to protect themselves and all court participants from disruptions to their functions).

\textsuperscript{128} \textit{Id.} at 80.

\textsuperscript{129} \textit{Id.} at 93–101. \textit{But see} \textit{id.} at 105 (Johnson, J., dissenting) (contending that federal courts had inherent power to issue such writs). Johnson’s argument is sensible, given that the writ of habeas corpus is one of the few rights identified in the original Constitution, which reflects its ancient pedigree as a safeguard against government deprivations of liberty without due process. \textit{See supra} notes 62–63 and accompanying text. Yet the Marshall Court did not agree that issuing the writ was an IP, again revealing its narrow conception of such powers.


\textsuperscript{131} \textit{Id.} at 29.

\textsuperscript{132} \textit{Id.} at 21–22, 43.
of legislative power. Consequently, the Court sustained the provision of the 1789 federal statute mandating that execution of judgments conform to state law, but with the mode of execution subject to change by federal courts. The Court reached a similar conclusion in two seminal opinions discussing contempt.

First, *United States v. Hudson & Goodwin* held that Congress alone could define federal criminal jurisdiction, and that therefore Article III judges lacked inherent authority to assert such jurisdiction based on traditional common law. Chief Justice Marshall declared:

> Certain implied powers must necessarily result to our courts of justice, from the nature of their institution.... To fine for contempt—imprison for contumacy—enforce the observance of order, &c. are powers which cannot be dispensed with in a court, because they are necessary to the exercise of all the others: and so far our courts no doubt possess powers not immediately derived from statute; but all exercise of criminal jurisdiction in common law cases... is not within their implied powers.

The Court flagged, but had no need to resolve, the thorny question of when an assertion of inherent authority might be incompatible with “the peculiar character of our [Constitution].”

Second, in *Anderson v. Dunn*, the Court reiterated that the Constitution was “hostile to the exercise of implied powers” and that accordingly federal officials should exercise “the least possible power adequate to the end proposed”—that is, only those “auxiliary and subordinate [powers]...”

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133. *Id.* at 42–50.

134. *Id.* at 43–46. This delegation of discretion over the form of the execution of judgments was especially proper because rendering judgments was the essence of “judicial power,” and therefore courts had always supervised this procedure. *See id.; see also Bank of United States v. Halstead,* 23 U.S. (10 Wheat.) 51, 51–62 (1825) (reaffirming that Article I’s express powers to establish inferior federal tribunals and to make “necessary and proper” laws for them authorized Congress to regulate their procedures, including execution of judgments and writs).


136. *Id.* at 33–34 (dismissing a common law action against Congress and the President for criminal libel).

137. *Id.* at 34.

138. *Id.* at 32–34. Although the Court did not elaborate, it must have been alluding to our novel written Constitution in which the People enumerated and limited the federal government’s powers. *See supra notes 71–76 and accompanying text.*

to the attainment of [that] end.”¹⁴⁰ For example, courts were “universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates, and as a corollary . . . to preserve themselves and their officers from the approach and insults of pollution.”¹⁴¹ The Court interpreted the 1789 Act as simply recognizing this inherent judicial power, along with “its known and acknowledged limits of fine and imprisonment.”¹⁴²

Federal courts sometimes ignored such restraints. For instance, Congress confined contempt to matters “before the court.”¹⁴³ Nonetheless, in 1826 a district judge relied on his IP to disbar an attorney for comments made after the court no longer had jurisdiction of the case.¹⁴⁴ Congress responded in 1831 by cabining contempt to its three traditional Anglo-American categories: (1) “direct contempt” — misconduct in the court’s presence or so close that it “obstruct[s] the administration of justice;” (2) “disobedience or resistance to . . . a writ, process, order, rule, decree, or command;” and (3) misbehavior by court officers “in their official transactions.”¹⁴⁵ The Court upheld the constitutionality of this statute, as well as the 1789 Act’s limitation on penalties to fine and imprisonment, as reasonable regulations of IPs.¹⁴⁶

The contempt statute codified one aspect of the IP to regulate lawyers as officers of the court: policing their abusive litigation conduct.¹⁴⁷ This IP also included determining whether an

¹⁴⁰. Id. at 225–26, 231. The Court elsewhere repeatedly cautioned that the Constitution restricted implied powers to those that were essential to effectuate express ones. See id. at 225–26, 228, 233. While upholding Congress’s assertion of inherent contempt power, the Court warned that this sanction could be used tyrannically and thus limited it to punishing offenders who had actually disrupted legislative proceedings. Id. at 225–28.

¹⁴¹. See id. at 227–28. This analysis of judicial contempt power was dicta because the case involved Congress’s use of that sanction.

¹⁴². See id. at 228; see also Cary v. Curtis, 44 U.S. (3 How.) 236, 245 (1845) (“[A]lthough [judicial power] has its origin in the Constitution, [it] is . . . dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress . . . .”)

¹⁴³. Act of Sept. 24, 1789, ch. 20, § 17, 1 Stat. 73, 83.


¹⁴⁶. See Ex parte Robinson, 86 U.S. (1 Wall.) 505, 510–12 (1874). Consequently, the Court again rejected a judge’s attempt to disbar an attorney for contempt. Id.

¹⁴⁷. Such disciplining was “incidental to all Courts, and . . . necessary for the preservation of decorum . . . .” See Ex parte Burr, 22 U.S. (9 Wheat.) 529, 531 (1824); see also Ex
attorney was competent and fit to practice law (again, subject to congressional oversight). 148

Overall, early federal legislators and Justices correctly implemented the Constitution’s intended design. On the one hand, Article III courts legitimately asserted inherent powers that were indispensable to processing, managing, and deciding cases. 149 On the other hand, Congress regulated such powers and determined the content of beneficial IPs. 150 Relatedly, Congress

parte Secombe, 60 U.S. (19 How.) 9, 13–14 (1856) (citing an 1829 case recognizing this “well settled” IP).

148. See Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 226 (1821); see also Ex parte Garland, 71 U.S. (4 Wall.) 333, 379–81 (1866) (confirming that Congress could prescribe qualifications for attorneys practicing in federal courts). The IP to regulate attorneys, which had ancient roots in England, became an accepted part of American judicial practice. Lee, supra note 43, at 238–40. Cf. Robinson, 86 U.S. (1 Wall.) at 512–13 (noting that this IP included the power to disbar attorneys who later proved unfit or incompetent, but only after affording them an adequate opportunity to defend themselves).

149. See supra notes 135–142, 146, 148 and accompanying text (discussing Hudson, Anderson, and Robinson). Most notably, judges retained the prerogative of managing litigation details. See, e.g., Nudd v. Burrows, 91 U.S. 426, 441–42 (1875) (holding that the 1872 federal statute requiring Article III courts to conform to current state adjective law did not apply to the “personal conduct and administration of the judge” in matters such as jury instructions, which fell within his “inherent” powers).

150. Several scholars have maintained that Article III’s grant of “judicial power” to “courts” has always included discretion to independently assert both indispensable and beneficial powers, subject to reasonable congressional regulation. 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, 1470–72 (1984); David E. Engdahl, Intrinsic Limits of Congress’s Power Regulating the Judicial Branch, 1999 BYU L. REV. 75, 158–59; William F. Ryan, Rush to Judgment: A Constitutional Analysis of Time Limits on Judicial Decisions, 77 B.U. L. REV. 761, 776–78 (1997); Joseph J. Anclien, Broader is Better: The Inherent Powers of Federal Courts, 64 N.Y.U. ANN. SURV. AM. L. 37, 42–73 (2008). This argument rests primarily on statements by Hamilton, Marshall, and others about the National Bank recognizing that the Constitution’s grant of express powers to the federal government necessarily included certain implied powers. See supra notes 103–115 and accompanying text. Yet those remarks occurred in the context of upholding Congress’s expansive Article I “legislative power,” confirmed by the Necessary and Proper Clause, to choose any means (whether indispensable or beneficial) that Congress determined would best carry into effect its enumerated powers. See supra notes 103, 106–115 and accompanying text. The Court in McCulloch suggested that Congress had similarly broad discretion to effectuate the express powers of the executive and judicial branches—and made that point explicitly and repeatedly as to the judiciary in cases like Bollman, Wayman, Hudson, and Anderson. See supra notes 107–115, 125–142 and accompanying text. Indeed, the same Chief Justice Marshall who endorsed Congress’s vast discretion in McCulloch carefully limited the federal courts’ IPs to instances of indispensable necessity in Hudson and other opinions—and even then acknowledged Congress’s authority to regulate and limit such powers. These cases make little sense if federal judges could independently invoke any powers they pleased.

1896
enacted adjective laws that federal courts had a duty to apply. Some of those statutes directed judges to use state rules of procedure and evidence, which produced a lack of uniformity that led to calls for reform starting in the early twentieth century.

C. The Court’s Modern Approach to Inherent Powers: Limited in Theory, Unlimited in Practice

The patchwork of adjective laws could not survive the New Deal (1933-39), which massively increased the volume and complexity of federal litigation. Since then, federal statutory, regulatory, and constitutional laws have continued to proliferate. Congress has responded to this expansion by amending or adding to the rules of procedure and evidence, with substantial input from Article III judges. Such published rules emerge from a deliberative process and ensure uniformity, unlike IPs.

These comprehensive laws should have decreased resort to inherent powers. Nonetheless, federal courts have invoked IPs with ever-increasing aggressiveness and have rarely been checked, for two reasons. First, appellate review has been sporadic and based on a blindly deferential “abuse of discretion” standard. Second, the Court, on the few occasions when it has considered the assertion of IPs, has typically upheld their use by creatively interpreting—and sometimes ignoring—written adjective laws.

Summarizing the key statutes and cases helps to illuminate the need for a fresh approach.

151. See Ryan, supra note 150, at 765–98 (arguing that the Constitution, as originally understood, authorized Congress to enact procedural laws, which federal courts had to apply unless a rule impaired their core power of deciding cases).

152. See supra notes 121, 133 and accompanying text.

153. See Pushaw, supra note 22, at 754–55 (summarizing these critiques).

154. Meaningful appellate review of a trial judge’s assertion of IP under this standard is nearly impossible because (1) existing law does not set bounds on the judge’s discretion by identifying the range of outcomes that are permissible, and (2) judges often use IPs informally and do not write a reasoned opinion that can be examined. See Sarah M.R. Cravens, Judging Discretion: Contexts for Understanding the Role of Judgment, 64 U. MIAMI L. REV. 947, 948–59, 984–87 (2010); see also id. at 987–94 (recommending that a judge’s exercise of IPs should be assessed not by appellate review of possible abuse in one isolated case, but rather through attorney performance evaluations or judicial disciplinary proceedings that consider multiple cases to discern patterns of discretionary actions that fall outside of established norms).

155. See infra notes 185–275 and accompanying text.
1. The Explosion of Federal Adjective Law

The Rules Enabling Act of 1934 (REA) authorized the Supreme Court to (1) evaluate rules drafted by a committee of expert judges, scholars, and lawyers; (2) promulgate the Federal Rules of Civil Procedure (FRCP), provided they did “not abridge, enlarge nor modify the substantive rights of any party;” and (3) seek Congress’s approval. The FRCP were finalized in 1938, and the Court upheld them as a valid exercise of Congress’s power. The FRCP, as well as local rules issued under Rule 83, covered pleadings, motions, joinder of parties and claims, discovery, trials, appeals, sanctions, and sundry administrative details.

Of course, procedural rules were not frozen in 1938. Rather, new federal statutes and FRCP amendments have addressed four major changes in civil litigation. First, the Warren Court (1954-1969) revolutionized constitutional rights. Second, starting in 1964, Congress enacted sweeping civil rights, social welfare, and environmental legislation. Third, diversity jurisdiction increased during the 1960s as states began to adopt the theory of strict products liability, which often involved claims by hundreds or

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158. 28 U.S.C. § 2071 (2018) (authorizing such local administrative rules, as long as they are consistent with federal statutes and the FRCP). As each federal district court can formalize a valid IP in a local rule, an individual judge should not bypass this process by either (1) issuing standing orders that apply to all litigation before that judge, or (2) creating and applying an IP in a particular case.

159. Here we provide a bare-bones summary of the REA and FRCP. Several scholars have thoroughly analyzed the history of federal procedural rulemaking, the political and legal developments that culminated in the REA, its purposes, the process of drafting and promulgating the FRCP, its many provisions, and its benefits and disadvantages. See, e.g., Steven N. Subrin, How Equity Conquered the Common Law: The Federal Rules of Civil Procedure in Historical Perspective, 135 U. Pa. L. Rev. 909 (1987), Stephen B. Burbank, The Rules Enabling Act of 1934, 130 U. Pa. L. Rev. 1015 (1982).


161. See generally G. CALVIN MACKENZIE & ROBERT WEISBROT, THE LIBERAL HOUR: WASHINGTON AND THE POLITICS OF CHANGE IN THE 1960S (2008). Courts often enforced these new federal constitutional and statutory rights by administering long-term injunctions that restructured large state institutions such as schools. See William A. Fletcher, The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy, 91 Yale L.J. 635 (1982) (arguing that district courts’ exercise of massive discretion in such suits is political in nature and thus presumptively illegitimate, rebuttable only where government officials are defaulting on their constitutional obligations).
Uncalculable numbers of people. Fourth, during the same decade, antitrust suits mushroomed.

These four developments overloaded federal dockets and induced many district courts to rethink their function. Instead of waiting for adversarial parties to litigate and then deciding the case, judges asserted IP to actively manage litigation with the goal of settlement. Congress addressed the foregoing trends with major reforms. Two concerned multi-party suits. First, amendments to Rule 23 in 1966 ushered in the modern class action, later amended by the Class Action Fairness Act of 2005. Second, Congress allowed multidistrict litigation in 1969. Other laws codified powers that many courts had already begun to exercise in managing cases.

Most importantly, amendments to Rule 16 in 1983 and 1993 authorized judges to schedule mandatory pretrial conferences to establish “early and continuing control” and “facilitat[e] . . . the just, speedy, and inexpensive disposition of the action.” Matters for consideration included (1) controlling discovery and formulating a plan to streamline the presentation of evidence; (2) simplifying the issues so they could either be adjudicated summarily or resolved cleanly at trial; (3) disposing of motions; and (4) “settling the case and using special procedures to assist in
resolving the dispute when authorized by statute or local rule.” 172 Judges could also adopt “special procedures” for handling “difficult or protracted actions . . . involv[ing] complex issues, multiple parties, difficult legal questions, or unusual proof problems.” 173 Rule 16(f) permitted judges to impose sanctions (including payment of attorneys’ fees) for failure to participate in good faith in conferences—a provision designed “to obviate dependence upon . . . the court’s inherent power[s] . . .” 174 Ultimately, the judge was obliged to issue a scheduling order that had to “limit the time to join other parties, amend the pleadings, complete discovery, and file motions” and that could also address any other “appropriate matters.” 175 Rule 16, while broad, did not allow courts to disregard the REA and alter substantive rights.

Reinforcing Rule 16, Rule 26 set forth general disclosure requirements and discovery provisions. It has been amended thirteen times and specifically mandates a separate conference to work out discovery details. 176 Similarly, Rule 37 has been revised eleven times to give judges ever more discretion to sanction any discovery abuses (including by assessing attorneys’ fees). 177

Congress followed the REA blueprint in promulgating the Federal Rules of Criminal Procedure in 1946, 178 the Federal Rules of

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172. See FED. R. CIV. P. 16(c)(2)(I); see also id. at 16(a)(5) (identifying “facilitating settlement” as a purpose of pretrial conferences). Rule 16 did not “impose settlement negotiations on unwilling litigants,” but merely provided a neutral forum to discuss this possibility and encouraged mediation or non-binding arbitration. See Notes of the Advisory Committee on the Rule 16 Amendments in 1983. However, a separate statute or local rule could require such alternative dispute resolution in defined circumstances. Id.

173. FED. R. CIV. P. 16(c)(2)(L). The Advisory Committee in 1983 explained that this provision gave judges more flexibility and suggested that they use The Manual of Complex Litigation as a guide.

174. Notes of the Advisory Committee on the Rule 16 Amendments in 1983; see also Jeffrey A. Parness & Matthew R. Walker, Thinking Outside the Civil Case Box: Reformulating Pretrial Conference Laws, 50 U. KAN. L. REV. 347, 348, 366–74 (2002) (arguing that Rule 16 should be formally amended to encompass everything that might be tried or settled—including both unrepresented claims and non-party interests—instead of relying on judges to make such changes piecemeal by exercising their IPs, a practice that undermines the legislature’s role, lacks definite standards, prevents uniformity, and sows confusion).

175. FED. R. CIV. P. 16(b)(3)(A); 16(b)(3)(B)(vii).

176. FED. R. CIV. P. 26(f).

177. FED. R. CIV. P. 37(a)(5), (b)–(f).

Appellate Procedure in 1968,179 and the Federal Rules of Evidence in 1975.180 Furthermore, in 1948 Congress authorized federal courts to “issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.”181 Congress has also enacted many other adjective laws.182 One prominent example is the Alternative Dispute Resolution (ADR) Act of 1998, which requires each federal district court by local rule to devise an ADR program and encourage litigants to consider using mediation, voluntary arbitration, or other types of ADR.183 This mountain of adjective law, which encompasses all aspects of litigation and often grants federal courts significant discretion, should have vastly diminished IPs. Yet their usage and scope have inexorably increased.184

2. Jurisprudence on Inherent Powers

The Court has promoted this development by rhetorically acknowledging restrictions on IPs, then neutering those limits. Initially, the Court recognizes Congress’s constitutional power to regulate adjective law, but subverts that power by interpreting those statutes narrowly—particularly by applying an unfounded presumption that Congress intended to license IPs absent a clear statement to the contrary.185 The Court then typically cites

182. See Pushaw, supra note 22, at 755–57 (summarizing modern adjective laws).
183. See 28 U.S.C. § 651. Similarly, FRCP 16(c)(2)(I) authorizes federal courts to “us[e] special procedures to assist in resolving the dispute when authorized by statute or local rule.”
184. See Stephen B. Burbank, Procedure, Politics and Power: The Role of Congress, 79 Notre Dame L. Rev. 1677 (2004) (arguing that the Constitution, as originally understood and implemented for well over a century, granted Congress control over procedural rulemaking, and that Congress should reassert its dominant role against courts that have seized more power in this area); but see Yablon, supra note 101, at 1088–97 (approving federal judges’ assertion of IP to innovate through common law procedural rulemaking).
185. See Pushaw, supra note 22, at 759, 761, 776–79, 784–87, 850–53 (questioning the validity of such narrow, strained constructions of federal procedural statutes and rules to
Hudson in cautioning that IPs should be resorted to only when indispensably necessary, yet routinely allows invocations of IPs that are hardly essential to exercising “judicial power” or maintaining the integrity of “courts.” Finally, by focusing on the particular IP in each case, the Court has avoided the need to explain how its cumulative approval of massive IPs can be reconciled with its longstanding precedent holding that the Constitution stringently limits the judiciary and authorizes Congress alone to make all federal laws—including those governing the courts’ jurisdiction and procedures.

To illustrate the foregoing points, we will begin by canvassing cases that address the issue of which branch controls adjective law. We will then turn to litigation management, sanctions, and attorney regulation.

a. Adjective Lawmaking. The Court has consistently held that federal judges can make adjective law independently only in the absence of an applicable statute and that “Congress retains the ultimate authority to modify or set aside any judicially related rules of evidence and procedure that are not required by the Constitution.” But the Court has never clearly identified which rules are constitutionally mandated and hence form the core of impregnable inherent authority.

Hanna v. Plumer illustrates this studied ambiguity. On the one hand, the Court reaffirmed that the Constitution authorizes Congress to make procedural laws, either directly or by delegation to the judiciary. On the other hand, the Court stressed that the FRCP aimed to promote uniformity, “especially . . . of matters maximize IPs; cf. Elizabeth T. Lear, Congress, the Federal Courts, and Forum Non Conveniens: Friction on the Frontier of Inherent Power, 91 IOWA L. REV. 1147, 1163–66, 1206 (2006) (maintaining that the “clear statement” rule might defensibly be applied to statutes addressing indispensable IPs, but that its application to beneficial IPs effectively usurps Congress’s constitutional power).


188. See id. at 739–41.


191. Id. at 472–73 (citing Sibbach v. Wilson & Co., 312 U.S. 1, 9–10 (1941)).
which relate to the administration of legal proceedings, an area in which federal courts have traditionally asserted strong inherent power, completely aside from the powers Congress expressly conferred in the Rules." This dichotomy allows the Court to profess fealty to Congress’s constitutional authority to make adjective law, yet construe federal procedural statutes and rules narrowly to maximize the scope of IPs. The latter practice is especially dubious because the Court itself can always propose an FRCP to formally codify and define an IP.

The Court’s extreme deference to trial judges’ arrogation of power to develop and apply adjective law has bled over into other IPs. The Court has routinely approved judges’ independent

192. Id.

193. This creative interpretive method has enabled the modern Court to avoid striking down an exercise of IP as contrary to a statute or rule on civil procedure. Such an invalidation has occurred only once, in a case on dismissals for failure to prosecute, which was swiftly overturned. See infra notes 194, 210, 218 and accompanying text. Rather, the few invalidations have concerned IPs that disregarded criminal procedural rules. See Carlisle v. United States, 517 U.S. 416, 425–28 (1996); Bank of Nova Scotia v. United States, 487 U.S. 250, 254–55 (1988). That difference likely reflects the Anglo-American judicial tradition of demanding strict adherence to written criminal laws, procedural or substantive.

194. See Samuel P. Jordan, Situating Inherent Power Within a Rules Regime, 87 DENV. U. L. REV. 311 (2010) (arguing that (1) the Court should abandon the “clear statement” canon and instead recognize that using an IP as an alternative source of authority when a written federal procedural rule also applies undermines the rulemaking process established by Congress and its goals of fairness, predictability, and uniformity; and (2) the Federal Rules should be formally amended to clarify when they may be supplemented by IPs).

The Court has also abandoned review of each federal court’s supplemental procedural rules. For instance, it denied certiorari in a case challenging the Eleventh Circuit’s rule against hearing new issues raised after the filing of the opening brief, even though after that filing the Court had rendered a decision overturning contrary governing precedent on criminal law in that circuit. Joseph v. United States, 574 U.S. 1038–40 (2014). Three Justices wrote separately to note that this local rule was (1) not followed by any other circuit; (2) inconsistently applied by the Eleventh Circuit; and (3) in conflict with the Court’s settled principle of applying changes in law retroactively. Id. But even these Justices joined the decision on the ground that the Court rarely reviewed the validity of such idiosyncratic procedural rules, and instead expressed “hope” that each circuit court would “reconsider whether its current practice amounts to a ‘reasoned exercise’ of its authority.” Id. at 1040 (citing Ortega-Rodriguez v. United States, 507 U.S. 234, 244 (1993)). Justices Kennedy and Sotomayor would have granted cert. Id. at 1038. Although they did not explain why, they presumably sought to enforce the lower court’s duty to adhere to Supreme Court precedent.

195. See Robert G. Bone, Who Decides? A Critical Look at Procedural Discretion, 28 CARDOZO L. REV. 1961, 1962 (2007) (“[I]t is only a slight exaggeration to say that federal procedure, especially at the pretrial stage, is largely the trial judge’s creation, subject to minimal appellate review.”).
decisions regarding litigation management and sanctions, even when it appeared that Congress had treated these issues differently.

b. Managing Cases and Administering Internal Affairs. The Court has long recognized that the “judicial power” necessarily includes broad discretion to manage litigation and court business to ensure order and efficiency. Federal statutes, the FRCP, and local court rules typically have ratified and clarified such longstanding practices—for example, to appoint special masters, grant stays, and consolidate cases with common factual and legal issues. Indeed, Congress has directly or indirectly covered nearly all elements of litigation. Some of those rules are specific, such as the number of days required to file pleadings. Most rules, however, build in flexibility because each case is unique. For example, courts control their dockets by determining the timing of discovery, hearings, motions, and trials and by deciding whether to grant continuances, stays, or recesses. In short, Congress

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197. FED. R. CIV. P. 53. The Court had previously recognized this IP but acknowledged that it was not essential, and that therefore Congress could regulate or reject its exercise. See Ex parte Peterson, 253 U.S. 300, 306–07, 312–14, 317 (1920). This IP traces back to Heckers v. Fowler, 69 U.S. (2 Wall.) 123, 127–29 (1864). For discussions of similar IPs, see Robert L. Hess II, Note, Judges Cooperating With Scientists: A Proposal for More Effective Limits on the Federal Trial Judge’s Inherent Power to Appoint Technical Advisors, 54 VAND. L. REV. 547, 550–51 (2001) (arguing that, unlike the appointment of expert witnesses under the FRE’s written standards, courts’ exercise of IP to appoint technical advisors (1) unconstitutionally delegates judicial power, and (2) undermines the adversarial system by allowing advisors to usurp the role of parties in presenting evidence); Kendall Coffey, Inherent Judicial Authority and the Expert Disqualification Doctrine, 56 FLA. L. REV. 195 (2004) (criticizing lower federal courts’ invention of the IP to disqualify expert witnesses based on conflicts of interest without any finding of bad faith).


199. FED. R. CIV. P. 42(a). See Bowen v. Chase, 94 U.S. 812, 824 (1876) (recognizing this power).

200. See supra notes 156–184, 189, 192, 197–199 and accompanying text.

201. For instance, a defendant must file an answer within 21 days of being served with a complaint. FED. R. CIV. P. 12(a)(1)(A)(i).

202. See, e.g., Daniel J. Meador, Inherent Judicial Authority in the Conduct of Civil Litigation, 73 TEX. L. REV. 1805, 1810 (1995) (stressing that both Congress and the Court have realistically recognized that written procedural rules cannot prescribe all of the administrative decisions a trial judge must make). To take one example, the Sixth Circuit concluded that a trial judge did not abuse his discretion in exercising his inherent docket-control power by waiting until four days before trial to grant summary judgment. Anthony v. BTR Automotive Sealing Sys., 339 F.3d 506, 516–17 (6th Cir. 2003).
generally trusts judges to prudently manage such details, which are usually trivial.

Even when no positive law confers judicial discretion, the Court has approved particular IPs related to docket control, such as hearing motions in limine. Such invocations of beneficial IPs are debatable, as Congress should provide for such procedural tools. Even more dubiously, the Court has permitted judges to claim IPs that go far beyond administrative details, disregard applicable statutes and rules, or both. Most importantly, in two decisions the Court allowed a federal court with statutory jurisdiction and venue to invoke its IP to manage litigation to throw out the case.

First, in Gulf Oil Corp. v. Gilbert, the Court adopted the doctrine of forum non conveniens to enable district judges to dismiss complaints if they determined that another federal forum would be more appropriate, based on a discretionary weighing of factors. Justice Black dissented on the ground that Article III imposed a duty on federal courts to exercise all jurisdiction validly conferred by Congress.

Second, Link v. Wabash Railroad Co. involved Rule 41(b), which provides that “for failure of the plaintiff to prosecute . . . a defendant may move for a dismissal of any action.” The Court, without mentioning its recent holding that Rule 41(b) plainly authorized such dismissals only upon a defendant’s motion, now concluded that the Rule did not clearly state Congress’s intent to revoke federal judges’ IP to dismiss for lack of prosecution sua sponte. Dissenting, Justice Black argued that this dismissal violated due process because the plaintiff had not received notice before being deprived of his property right in his claim.

204. See supra note 24 and accompanying text.
206. Id. at 507–08.
207. Id. at 513–15 (Black, J., dissenting).
209. Societe Internationale v. Rogers, 357 U.S. 197, 207 (1958) (holding that FRCP 37 sanctions for disobedience of an order to produce documents were exclusive, and that therefore a trial court had erred in asserting IP to dismiss the case for failure to prosecute).
210. Link, 370 U.S. at 629–33.
211. Id. at 642–49 (Black, J., dissenting).
In its most recent IP case, the Court applied Link’s method of statutory construction. *Dietz v. Bouldin* held that a district judge’s inherent authority to manage litigation included rescinding his order that had discharged a jury and recalling it for further deliberations after he had discovered an error in its verdict. Justice Sotomayor noted that the Court had “never precisely delineated the outer boundaries” of IPs, but had “recognized certain limits.” The main restriction was that “the exercise of an inherent power must be a ‘reasonable response to the problems and needs’ confronting the court’s fair administration of justice.” She concluded that the judge had reasonably addressed the problem of a mistaken verdict in a way that avoided the waste of a new trial. The other key restraint was that an IP “cannot be contrary to any express grant of or limitation on the district court’s power contained in a rule or statute.” Justice Sotomayor interpreted Rule 51(b)(3), which explicitly authorizes giving a jury new instructions to rectify a mistake before it is discharged, as not implicitly limiting a judge’s ability to provide such curative instructions shortly after a jury has been released and recalled.

The Court cautioned, however, that this new IP “must be carefully circumscribed, especially in light of the guarantee of an impartial jury that is vital to the fair administration of justice.” Accordingly, a judge had to weigh several factors to ensure that none of the reassembled jurors had been exposed to prejudicial external information. The Court held that such a discretionary

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213. *Id.* at 42–54. In a personal injury action, defendant stipulated that plaintiff’s medical expenses were $10,136, so the only remaining issue was whether he could recover greater damages. *Id.* at 43. The jury returned a verdict for plaintiff but awarded him $0, and the judge discharged the jury. A few minutes later, the judge realized that this amount could not possibly be correct, recalled the jurors, explained the mistake, asked them to deliberate anew, and entered their revised verdict for $15,000. *Id.* at 43–44.

214. *Id.* at 45.

215. *Id.* (citing *Degen v. United States*, 517 U.S. 80, 823–24 (1996)).

216. *Id.* at 46–47, 51, 53–54.

217. *Id.* at 45.

218. *Id.* at 47–48 (citing *Link v. Wabash R.R. Co.*, 370 U.S. 626, 630–31 (1962)).

219. *Id.* at 48.

220. *Id.* at 48–51 (clarifying that a court could not exercise this IP if it determined that any juror had been directly tainted and that it must also consider the time lag between discharge and recall, whether a juror had discussed the case with anyone, and whether he or
judicial determination, as well as changes in modern trial practice and treatment of juries, justified an exception to the common law bar on recalling a jury.221 In dissent, Justices Thomas and Kennedy contended that potential juror prejudice could be avoided only by strictly enforcing the common law rule, not countenancing a novel IP exercised through prudential application of malleable factors that would invite costly satellite litigation.222

With *forum non conveniens*, dismissals for failure to prosecute, and recalling juries, the Court could at least colorably claim that it was preserving IPs that Congress had not clearly eliminated or restricted. Recently, however, the Court has protected district judges’ IP to stay proceedings despite Congress’s unambiguous imposition of limits on that power.

Most notably, the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996 sharply curtailed federal judges’ previous discretion over habeas corpus.223 For example, Congress promoted finality in capital cases by giving petitioners incentives to exhaust all claims in state court before filing a federal habeas action and by placing strict time limits on such petitions.224 In *Rhines v. Weber*,225 the Court sustained a district judge’s assertion of IP to stay a habeas action (thereby tolling the limitations period) to allow a petitioner

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221. Id. at 51–54.

222. Id. at 54–58 (Thomas, J., dissenting). The majority cited *Hudson* for the proposition that courts had inherent power to manage their cases, but not its “indispensable necessity” language. Id. at 45. Some lower courts and commentators have read *Dietz* as eliminating that requirement. See, e.g., *In re Micron Technology, Inc.*, 875 F.3d 1091, 1100–01 (Fed. Cir. 2017) (approving IP to find waiver of a venue objection based on a discretionary judgment about facts and circumstances not mentioned in FRCP 12); James C. Francis IV & Eric P. Mandel, *Limits on Limiting Inherent Authority: Rule 37(e) and the Power to Sanction*, 17 SEDONA CONF. J. 613, 642 n.82 (2016). Other courts have correctly concluded that the Court would not have overturned such an ancient precedent *sub silentio*. See, e.g., United States v. Wright, 913 F.3d 364, 371–75 (3d Cir. 2019) (holding that a court could not assert powers that had not been granted in a statute or rule, except in the rare case when “necessary to address improper conduct and ensure respect for [its] proceedings”).


224. Id. § 2254(a)–(c). Congress also (1) prohibited federal courts from granting relief from a state court’s decision unless it had made “unreasonable” findings of fact or had ruled contrary to “clearly established” Supreme Court precedent; (2) barred successive habeas petitions; and (3) eliminated ineffective assistance of counsel as a ground for relief. Id. § 2254(d), (e), & (i).

to properly exhaust certain claims in a state forum, even though the stay admittedly frustrated Congress’s explicit AEDPA goals.\footnote{226 See id. at 276–78. The Court confined this IP to situations where, as here, petitioner had good cause for not exhausting his claims, this failure was not a dilatory tactic, and the claims were not plainly without merit. \textit{id}.} In \textit{Ryan v. Gonzales},\footnote{227 \textit{Ryan v. Gonzales}, 568 U.S. 57 (2013).} the Court reaffirmed district judges’ virtually unbridled discretion by declining to set forth legal standards for issuing stays in AEDPA cases.\footnote{228 \textit{id}. at 74–77. The Court ruled that judges had IP to determine whether to grant a stay for a petitioner who alleged mental incompetence, limited only by the caveat that a stay would be improper when there was no reasonable hope he would ever regain competence.} Finally, the Court has extended this broad IP over stays to removal orders under the Immigration Nationality Act,\footnote{229 See \textit{Nken v. Holder}, 556 U.S. 418, 428–33 (2009) (statutory citation omitted).} even though Congress amended that statute precisely to curb judicial discretion in this area.\footnote{230 The Court finessed its apparent defiance of Congress by maintaining that the statute only governed enjoining the removal of an alien and thus applied to the conduct of a party, whereas a \textit{stay} operated upon the judicial proceeding itself. \textit{id}. at 428. However, this “highly technical distinction” disregarded Congress’s intent to restrict federal judges’ discretion. \textit{id}. at 446 (Alito, J., dissenting).}

As troubling as they are, reported Supreme Court cases are only the tip of the iceberg. In exercising IP to aggressively manage litigation, trial judges typically operate off the record, which makes meaningful appellate review difficult and invites abuses.\footnote{231 A prominent scholar identified this problem four decades ago. See Resnik, \textit{supra} note 164, at 411–13, 424–31; see also Laura Margolis Washawsky, \textit{Objectivity and Accountability: Limits on Judicial Involvement in Settlement}, 1987 U. CHI. LEGAL F. 369, 371 (1987) (“The danger of undue coercion becomes particularly acute when one recognizes that a judge who may favor a particular result has an opportunity to use threats of sanctions or unfavorable treatment at trial—in addition to making representations as to his own view of the law and facts—to make a decision and then effectively insulate it from review by bringing about a settlement. And since judges have a personal interest in keeping their dockets under control, the incentive exists for judges to exercise their power accordingly.”).} To illustrate, judges’ personal interest in efficient disposition of cases often leads them to impose unreasonably short deadlines, dismiss possibly meritorious claims or defenses, coerce parties to use ADR or settle, and threaten anyone who objects with negative decisions or sanctions.\footnote{232 See Resnik, \textit{supra} note 164, at 402–03, 413, 424–31.} Even in the rare instances when such pressure tactics are reviewed, appellate courts tend to approve them\footnote{233 See, e.g., S. Cal. Edison Co. v. Lynch, 307 F.3d 794, 802–08 (9th Cir. 2002) (upholding a district court’s assertion of managerial IP to afford a party only one day to object to a} — for
example, the IP to compel unwilling parties to submit their case to private mediation\textsuperscript{234} despite the contrary ADR Act and FRCP 16.\textsuperscript{235} Such heavy-handedness compromises judges’ impartiality, which Article III sought to guarantee, and subverts basic due process values of fairness and justice.\textsuperscript{236}

d. Sanctions. Anglo-American judges have always punished litigation abuses.\textsuperscript{237} One ancient example is dismissing cases upon discovery of a fraud upon the court.\textsuperscript{238} Most importantly, since 1831 Congress has codified the traditional IP of contempt, which features three categories (misbehavior in court, disobeying orders, and misconduct by court officers in official transactions) and two penalties (fine or imprisonment).\textsuperscript{239} Furthermore, Congress has responded to modern changes in litigation by approving Federal Rules that extended contempt authority to include the failure to

\textsuperscript{234} See In re Atlantic Pipe Corp., 304 F.3d 135, 143–45 (1st Cir. 2002) (justifying this IP as possibly conserving judicial resources if the parties settled).

\textsuperscript{235} Congress required each federal district court to adopt a local rule setting forth an ADR program that encouraged litigants to consider using processes like mediation, which Rule 16(c)(9) reinforces. See supra notes 172, 183 and accompanying text. This statute and FRCP cannot sensibly be interpreted as (1) allowing an individual federal judge (as contrasted with the entire district court) to assert idiosyncratic discretion concerning ADR untethered to a written rule, or (2) authorizing either the court or any judge to compel, rather than encourage, the use of ADR. See Carrington, supra note 84, at 940–41. We therefore reject the argument that federal judges can require ADR based on their IPs to manage cases and control litigants and their attorneys. See Amy H. Pugh & Richard A. Bales, The Inherent Power of Federal Courts to Compel Participation in Nonbinding Forms of ADR, 12 D.U. L. REV. 1, 2, 20–26 (2003).

\textsuperscript{236} See Pushaw, supra note 22, at 738, 762–64.

\textsuperscript{237} See supra notes 42–46, 98, 137, 141–142, 145–147 and accompanying text.

\textsuperscript{238} See Hazel–Atlas Glass Co. v. Hartford Empire Co., 322 U.S. 238, 244 (1944) (noting the historical roots of this doctrine); see also Fed. R. Civ. P. 60(c) (codifying this power). This power is indispensable, both to protect the court’s integrity and to ensure that its judgments are based on true facts, not intentionally false representations.

obey orders during discovery\textsuperscript{240} and subpoenas at trial,\textsuperscript{241} as well as the submission of a summary judgment affidavit in bad faith.\textsuperscript{242}

During its first century, the Court acknowledged Congress’s Article I power to regulate sanctions and reined in trial judges who had exceeded statutory limits.\textsuperscript{243} In the late nineteenth century, however, the Court began to abandon restraints on contempt, particularly by allowing judges to invoke it to unfairly punish labor leaders.\textsuperscript{244} Judges later targeted figures such as Communists during the Cold War and civil rights activists in the 1960s.\textsuperscript{245}

More recently, the Court brushed aside the Act of Congress, dating back to 1789, confining contempt penalties to fine or imprisonment.\textsuperscript{246} The lone statutory exception permits courts to order lawyers who “unreasonably and vexatiously” multiply proceedings to pay their opponent’s attorneys’ fees.\textsuperscript{247} The FRCP also allow this sanction for frivolous filings\textsuperscript{248} and violations of particular discovery and disclosure rules.\textsuperscript{249} These federal statutes and rules, by identifying the few situations in which attorneys’ fees may be assessed, should preclude this penalty for any other conduct.


\textsuperscript{241} See Fed. R. Civ. P. 45(g).

\textsuperscript{242} Fed. R. Civ. P. 56(h). Furthermore, although certain other misconduct was not labeled “contempt,” courts could now sanction it. See Fed. R. Civ. P. 11(c) (submitting frivolous pleadings and motions); Fed. R. Civ. P. 16(f) (failure to participate in good faith in pretrial conferences); Fed. R. Civ. P. 26(g) (violation of duties to disclose and cooperate in discovery); Fed. R. Civ. P. 30(g) (failure to attend a deposition). United States Circuit Courts have similar discretion to sanction abuses, such as filing a frivolous appeal. See 28 U.S.C. § 1912 (2018); Fed. R. App. P. 58.

\textsuperscript{243} See supra notes 141–146 and accompanying text.

\textsuperscript{244} See, e.g., In re Debs, 158 U.S. 564, 577–600 (1895); Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 435–39, 450–52 (1911).

\textsuperscript{245} See Pushaw, supra note 22, at 738, 770–71 (citing cases).

\textsuperscript{246} See supra notes 98, 118, 142–146 and accompanying text. For example, the Court has continued to insist that federal judges retain broad IP to impose sanctions for violation of their orders, up to and including dismissal of the case. See State Farm v. U.S. ex rel. Rigsby, 580 U.S. 26, 37 (2016).


\textsuperscript{248} See Fed. R. Civ. P. 11(c)(4).

\textsuperscript{249} See Fed. R. Civ. P. 26(g)(3) and Fed. R. Civ. P. 37(a), (b), (c), (d) & (f). This sanction may also be imposed for failure to attend a deposition or submitting a summary judgment affidavit in bad faith. See Fed. R. Civ. P. 30(g) and Fed. R. Civ. P. 56(g).
Nonetheless, in *Chambers v. NASCO*\textsuperscript{250} the Court upheld a trial judge’s imposition of this sanction for bad-faith conduct,\textsuperscript{251} even as it reiterated that IPs could be invoked only when indispensably necessary.\textsuperscript{252} The Court presumed that Congress, in enacting and approving extensive federal statutes and rules governing sanctions, did not intend to displace inherent IPs absent a clear contrary statement.\textsuperscript{253} As the dissent pointed out, however, (1) these comprehensive federal laws did not provide for this penalty; (2) it was unnecessary, as the authorized sanctions (fine or imprisonment) sufficed to punish misconduct; (3) Congress has generally rejected the “English rule” requiring fee-shifting from the losing party; and (4) all of these published laws—unlike IPs—had emerged from a deliberative process supervised by the Court, thereby ensuring uniformity and giving litigants and their attorneys the notice required by the Due Process Clause.\textsuperscript{254} Despite these problems, the Court has reaffirmed *Chambers*\textsuperscript{255} and extended it to bankruptcy cases.\textsuperscript{256}

Overall, any true “court” must be able to sanction challenges to its authority and serious litigation misconduct. Nonetheless, powers such as contempt are uniquely susceptible to abuse because they concentrate all three government powers in a judge who

251. *Id.* at 42–58.
252. *Id.* at 43 (citing *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812)).
253. *Id.* at 41–51.
254. *Id.* at 61–72 (Kennedy, J., dissenting).
256. The Bankruptcy Code automatically entitles a debtor who meets certain conditions to convert from Chapter 7 to Chapter 13. *See 11 U.S.C. § 706(a) & (d).* A debtor satisfied those conditions, but the Court allowed a bankruptcy judge to refuse to grant the conversion by invoking his IP to sanction the debtor for bad faith (hiding assets). *See Marrama v. Citizens Bank*, 549 U.S. 365, 376 (2007); *but see id.* at 376–77 (Alito, J., dissenting) (arguing that courts cannot assert IP to contravene clear statutory provisions). The majority also justified this exercise of IP on the ground that the finding of bad faith would eventually result in a re-conversion to Chapter 7, so that denying the debtor access to Chapter 13 immediately would be more efficient. *Id.* at 376. In a later case, the Court relied on that latter rationale to insist that *Marrama* did not contradict the Bankruptcy Code, but actually furthered its overall purpose of processing bankruptcies expeditiously. *See Law v. Siegel*, 571 U.S. 415, 426 (2014).
often feels personally insulted—and hence cannot maintain the objectivity that Article III and due process require. That is why reasonable congressional checks are imperative.

d. Regulating Lawyers. Congress can regulate attorneys practicing in federal court, but has only exercised that power in a few statutory and FRCP provisions concerning litigation management and sanctions. Otherwise, Congress has authorized courts to promulgate rules for counsel in conducting cases. Instead of doing so, however, federal judges have usually exercised their IP with little oversight, as the Court has shown almost no interest in this area.

Historically, the IP to regulate lawyers has been limited to two items. The first was ensuring that attorneys involved in a case were qualified and fit to practice law. Although federal courts initially did so on an individual basis, the vast increase in their business and in the number of lawyers eventually led them to defer to the determinations of state supreme courts, which relied on bar associations. Second, a court has always been able to discipline

257. See Pushaw, supra note 22, at 765, 770–73, 785; see also id. at 793–97 (noting the many scholars over the years who have argued that judges’ invocation of IP to punish contempt was rarely essential to maintaining their authority and often violated due process and separation of powers). Until quite recently, the Court acknowledged such problems. See, e.g., supra notes 143–146, 239, 243 and accompanying text (describing misuses of contempt dating back to the early 1800s and the Justices’ willingness to defer to Congress’s regulation of that power). Most importantly, the Court often invalidated judges’ imposition of sanctions as violating due process rights. See, e.g., Hovey v. Elliott, 167 U.S. 409, 413–19 (1898) (concluding that the sanction of entering judgment against defendants deprived them of property without due process); see also Roadway Express, Inc. v. Piper, 447 U.S. 752, 767 (1980) (requiring notice and a hearing before leveling sanctions). In Chambers, however, the Court disregarded such constitutional concerns.


260. See Benjamin H. Barton, An Institutional Analysis of Lawyer Regulation: Who Should Control Lawyer Regulation—Courts, Legislatures, or the Market?, 37 GA. L. REV. 1167, 1211–13 (2003) (arguing that the Court lacks the time, resources, incentives, and expertise to regulate attorneys and therefore leaves this subject to lower federal courts).

261. See supra notes 42–43, 143–148 and accompanying text (describing the historical lineage of this IP).

262. See supra notes 43, 148 and accompanying text.

263. See Barton, supra note 260, at 1170, 1175–246 (questioning this arrangement on the ground that state supreme courts are institutionally ill-suited to the legislative task of regulating attorneys because the justices are inaccessible to the public and too connected with—and sympathetic to—lawyers and state bar associations, whereas legislatures have the capacity to balance attorneys’ desires with the public interest, especially clients’ concerns).
attorneys for litigation misconduct that threatens its authority or ability to process and decide a case.\textsuperscript{264}

Gradually, however, Article III judges have claimed ever-expanding IP. For example, although federal courts often follow the state’s code of legal ethics or the ABA’s Model Rules of Professional Conduct, they have asserted discretion to modify or ignore such rules depending on the facts of the case.\textsuperscript{265} No judicial opinion, however, has identified a plausible legal basis for such a general authority to police lawyers’ ethics.\textsuperscript{266} A federal judge only has IP to address an attorney’s ethical violations as necessary to manage and dispose of a case.\textsuperscript{267} By contrast, many rules of professional responsibility are unrelated to specific litigation, such as those protecting third parties, preserving the image of the profession, or promoting public service.\textsuperscript{268} To take one example of overreach, some courts have asserted IP to compel lawyers to represent civil rights plaintiffs \textit{pro bono}.\textsuperscript{269}

Most pertinent for present purposes, a few judges have claimed IP to supervise attorneys’ fees and reduce amounts deemed unreasonable.\textsuperscript{270} Such a power has not been mentioned in any

\begin{footnotes}
\footnotetext{264}{See supra notes 42, 145–147 and accompanying text.}
\footnotetext{265}{See Judith A. McMorrow, The (F)utility of Rules: Regulating Attorney Conduct in Federal Court Practice, 58 SMU L. Rev. 1, 6–9, 11–12, 15–16, 19–43, 47–49 (2005) (describing and defending federal judges’ exercise of flexible IP to deal with lawyers on a case-by-case basis—usually in a minimalist and fair manner—rather than through written rules, which cannot cover every problem that might arise).}
\footnotetext{266}{See Fred C. Zacharias & Bruce A. Green, Federal Court Authority to Regulate Lawyers: A Practice in Search of a Theory, 56 Vand. L. Rev. 1303, 1306–09, 1324–25, 1339–42, 1352–53 (2003).}
\footnotetext{267}{See supra notes 44–45, 98–99, 144–147 and accompanying text.}
\footnotetext{268}{See Zacharias & Green, supra note 266, at 1303–13, 1324–78 (persuasively arguing that the IP to regulate lawyers cannot reasonably be extended to such matters, but rather should be limited to addressing attorneys’ litigation misconduct that impairs the court’s ability to operate or threatens the integrity of the judicial process—for example, violating written procedural rules, disrupting proceedings, bribing a witness, or suborning perjury).}
\footnotetext{269}{See Naranjo v. Thompson, 809 F.3d 793, 802–03 (5th Cir. 2015) (maintaining that appointing counsel was necessary to provide such plaintiffs with a meaningful hearing, which was critical to the fair administration of justice). But see Sarah B. Schnorrenberg, Mandating Justice: Naranjo v. Thompson as a Solution for Unequal Access to Representation, 50 Colum. Hum. Rts. L. Rev. 260, 283–92 (2019) (describing the lack of precedent for this asserted IP and the absence of later cases following it).}
\footnotetext{270}{See, e.g., Rosquist v. Soo Line R.R., 692 F.2d 1107, 1111 (7th Cir. 1982); United States v. Overseas Shipholding Grp., 625 F.3d 1, 9 (1st Cir. 2010). For instance, in Ross v. Douglas City., 244 F.3d 620 (8th Cir. 2001), the court rejected as unreasonable a contingent fee}
\end{footnotes}
statute, rule, or Supreme Court case. Moreover, since the mid-1800s, Congress has provided that losing parties should pay specified costs (e.g., for court reporters and printers) but has excluded attorneys’ fees.\textsuperscript{271} Congress has made two narrow exceptions: (1) as a sanction for specific types of misconduct,\textsuperscript{272} and (2) as a financial incentive for lawyers to represent certain “underdog” clients, such as plaintiffs in civil rights cases,\textsuperscript{273} unfair debt collection suits,\textsuperscript{274} and—most relevantly—class actions, with detailed requirements regarding notice, rights to object, hearings, and discretion to appoint a special master or magistrate to determine a reasonable fee award.\textsuperscript{275} These targeted federal statutes would make little sense if courts already had freestanding power to regulate attorneys’ fees.

The only valid justification for such an IP would be if it were essential to the performance of judicial duties. But a court reaches the issue of attorneys’ fees, if at all, after it has rendered its final judgment. Thus, the exercise of “judicial power”—the fact finding, law application, judgment, and associated case management—has already ended. Furthermore, if monitoring attorneys’ fees were truly necessary, judges would have long asserted such power.

c. Summary. In theory, the Court has acknowledged that the Constitution empowers Congress to regulate adjective law and allows federal judges to rely on their IP only when doing so is indispensable to maintain their authority or to adjudicate cases. In practice, however, the Court has approved the exercise of a

agreement in a civil rights case that would have entitled plaintiff’s counsel to 50% of the overall verdict plus 50% of the court-awarded attorneys’ fees. \textit{Id.} at 622. In Dale M. ex rel. Alice M. v. Bd. of Educ., 282 F.3d 984 (7th Cir. 2002), the Circuit Court reversed the district judge’s award of attorneys’ fees to plaintiffs, but they already turned the money over to their lawyer. \textit{Id.} at 985. The district court then invoked IP to order the lawyer to return the money to the defendant. \textit{Id.} The appeals court affirmed because it would have been unethical to allow the lawyer to keep the fee, and inefficient to order the plaintiffs to pay the sum to the defendant, which would then have forced the plaintiffs to sue their lawyer for unjust enrichment. \textit{Id.} at 985-86. Significantly, the court did not assert IP to consider the reasonableness of attorneys’ fees or to assess them as a sanction. Rather, the attorney legally was not entitled to any such fees.

\textsuperscript{271} See Fee Act of 1853, 10 Stat. 161 (currently codified at 28 U.S.C. § 1920 (2018)).

\textsuperscript{272} See supra notes 174, 177, 247–249 and accompanying text.


\textsuperscript{274} See Fair Debt Collection Practices Act, 15 U.S.C. § 813(a); see also Clayton Act, 15 U.S.C. § 15(a) (private antitrust suits). Similarly, Congress has allowed recovery of attorneys’ fees to prevailing parties in cases involving infringement of copyrights, patents, and trade secrets.

\textsuperscript{275} Fed. R. Civ. P. 23(h).
wide range of IPs, regardless of necessity or seemingly applicable federal laws.

D. Scholarship on Inherent Judicial Powers

Like the Court, scholars have typically focused on particular assertions of IP276 instead of providing a thorough analysis of all such powers.277 The two seminal studies that comprehensively considered IPs reached opposite conclusions.

1. The Meador and Pushaw Approaches

In 1995, Daniel Meador argued that the dramatic increase in the size and complexity of modern litigation justified the Court’s flexibility in leaving the exercise of IPs almost entirely to trial judges’ discretion.278 Meador simply assumed the constitutional legitimacy of IPs and instead looked at practical and policy issues.279

276. In section IC above, we cited many such works in analyzing adjective lawmaking, case management, sanctions, and regulating lawyers. Of special note are two studies that analyze a specific IP as a springboard to explore constitutional issues. See Ryan, supra note 150, at 765–75, 782–813 (arguing that the Constitution requires a federal court to apply procedural statutes and rules unless they unduly interfere with the core judicial function of adjudication, and concluding that Congress’s imposition of time limits that hinder judges’ deliberation falls within that narrow exception); Beale, supra note 150, at 1433–35, 1464–522 (maintaining that the Court should repudiate the IP to supervise federal law enforcement officials based on judicial notions of fairness and justice, as the Constitution restricts judges to ensuring that such officials comply with particular constitutional and federal statutory requirements).

277. Professor Carrington has praised the Court’s approach as enabling it to avoid explaining how its consistent approval of broad IPs on a case-by-case basis can coexist with its longstanding precedent acknowledging Congress’s constitutional power to regulate federal judicial procedure. Carrington, supra note 84, at 967–71. Similarly, Professor Yablon has applauded the Court for (1) deliberately collapsing essential and discretionary judicial power into a single category of “inherent authority,” and (2) declining to define either the limits on such IPs or the permissible scope of congressional regulation of them. Yablon, supra note 101, at 1027–41, 1054, 1096–97, 1106. He believes that this ambiguity usefully allows the Court to reaffirm extensive IPs to protect judges’ independence and effectiveness by innovating procedurally when they deem it expedient for optimal case management, yet sidestep constitutional clashes with Congress. Id. at 1037–41, 1044, 1050, 1054, 1088, 1093–94, 1096–97, 1106. The Court’s refusal to clear up these constitutional boundaries, however, has left attorneys and their clients at the mercy of federal judges who invoke IP without any legal standards or limits, thereby creating uncertainty and inviting abuses that threaten due process. See supra notes 10–14, 22–24 and accompanying text.


279. Instead of examining the Constitution’s history, Professor Meador asserted that American courts have long followed the British judiciary’s model of claiming broad and adaptable IPs. Id. at 1805–06, 1819–20. Although modern judges have done so, the Supreme
In 2001, one of us (Pushaw) provided the first analysis of all IPs in light of the Constitution’s text, structure, political theory, drafting and ratification history, and practice since 1789. Initially, he emphasized that the Court’s use of the term “inherent powers” to describe and approve an array of judicial actions conflicts with its longstanding jurisprudence recognizing three structural constitutional principles. First, allowing judges to exercise virtually unbridled discretion contravenes the Constitution’s limitation of the federal government to its enumerated powers (with special restrictions imposed on the judiciary). Second, Article I grants Congress “legislative power” to make laws, whereas Article III confines courts to the “judicial power” of interpreting existing laws—except when they must craft a rule because of a gap in a federal statute or the Constitution. Third, Articles I and III authorize Congress to regulate the federal courts’ jurisdiction and to make for them all laws (including adjective ones) that it deems “necessary and proper” to effectuate the exercise of judicial power.

Moreover, written procedural rules provide notice to parties and their attorneys, as required by the Due Process Clause. By contrast, such rights are infringed when judges creatively and arbitrarily invoke IPs on a case-by-case basis.

Pushaw therefore urged the Court to define IPs more precisely, which in turn would clarify Congress’s power to control judicial overreach and provide litigants with adequate notice. He began with Article III’s text, which explicitly vests “judicial power”—issuing a final judgment after applying the law to the

Court for well over a century correctly held that the significant constitutional differences between English courts and their American federal counterparts dictated a far narrower scope of IPs for the latter (only when indispensably necessary). See supra notes 98, 127–129, 136–137, 140–142, 149 and accompanying text. Moreover, the federal courts’ abandonment of traditional constitutional restraints on IPs is not a mere academic quibble, but rather has had substantial and troubling real-world effects.

280. For a detailed explanation of the points made in this paragraph, see Pushaw, supra note 22, at 739–47, 785, 798–99.

281. See id. at 759–60 n.102 and accompanying text, 761, 794–95, 850–51 n.592 and accompanying text. A countervailing due process argument is that federal courts must have broad IPs because otherwise their dockets might become so clogged that parties could not receive reasonably efficient justice. Although that contention might be valid in an extreme situation, the Constitution entrusts Congress with making this policy judgment about appropriate federal caseloads. If that were not true, federal judges could arbitrarily dismiss a percentage (say, half) of their cases to reduce their dockets to what they considered to be a reasonable level.

282. The following five paragraphs summarize the arguments made id. at 741–44.
facts in a litigated “case”—in “courts” staffed by independent “judges.” Turning to the Constitution’s early understanding and implementation, he argued that these express provisions were widely viewed as carrying with them certain implied powers, but that they fell into two very different categories.

First, “implied indispensable” powers were critical to the exercise of “judicial power” by “courts.” The “judicial power” has always had several elements. Initially, to ensure accurate fact-finding, a judge must have auxiliary power to supervise discovery and the presentation of evidence at trial; rule on fact-related motions; and appoint experts if necessary to elucidate complex matters. The next step in adjudication is identifying the governing law and applying it—or, in a jury trial, providing legal instructions. Courts would be unable to perform this vital function if federal legislators or executive officials tried to influence judicial exposition of the law. Finally, a court must enter a final judgment, which necessarily carries with it the ability to prevent political actors from tampering with that judgment.

The other kind of implied indispensable power flowed from Article III’s establishment of independent “courts,” which must be able to handle their internal administration and manage cases, maintain their authority, and safeguard the integrity of their processes. Courts have always done so by ensuring lawful and respectful behavior by everyone involved (parties, lawyers, witnesses, jurors, and spectators) and by sanctioning litigation-related misconduct.

Because implied indispensable powers were rooted in the Constitution, Congress could not prohibit or impair them. Rather, Article I’s grant of “legislative power” and its Necessary and Proper Clause authorized only statutes that facilitated the exercise of the “judicial power” vested in “courts.” This legislation would recognize that judges must have certain ancillary powers but would keep them within defined and reasonable boundaries to preserve due process.

Second, “beneficial” powers were helpful, useful, or convenient to judges in fulfilling their Article III role. The modern Court has approved many such beneficial IPs, which raises several constitutional difficulties. Most obviously, such approval contradicts the Court’s own admonition, dating back two centuries, that Article III permits courts to imply powers only when indispensable.
Furthermore, Article I authorizes Congress alone to make all prospective laws based on its policy judgments—including which (if any) beneficial powers are necessary and proper.

Hence, Pushaw rejected the claim that the growing volume and complexity of litigation licensed federal courts to create new IPs in common law fashion. Rather, judges should operate within the established federal legislative scheme and seek to have any novel powers formally recognized in a statute or a congressionally approved FRCP.

Pushaw recognized that, although ideally the Court should thwart all attempts by federal judges to claim beneficial powers independently, realistically it would not overrule its entrenched precedent sustaining such common law. Accordingly, as a second-best solution, he recommended that the Court make clear that beneficial IPs, unlike indispensable ones, can be modified or eliminated at Congress’s discretion.

283. See Anclien, supra note 150, at 71–73; see also Meador, supra note 202, at 1805–07, 1816–20 (making this argument, despite acknowledging that the modern proliferation of written adjective laws should have decreased resort to IPs). However, the appropriate volume of federal court business is a policy matter that Congress alone has constitutional power to address, as it has. See supra notes 3, 88, 94, 113–153, 165–184, 188, 191, 203–204, 207, 223–236 and accompanying text.

284. See Pushaw, supra note 22, at 741 n.18.

285. See id. at 743.

286. See id. One might claim that Congress has silently acquiesced to federal courts’ assertion of broad IPs (including in MDLs) by failing to affirmatively limit or prohibit their exercise. Congress’s inaction, however, likely reflects two political realities, not implied consent. First, Representatives and Senators prioritize high-profile substantive issues that most concern voters (e.g., taxes, crime, and the environment), not procedural matters. Second, many federal legislators are not attorneys, and almost none are experienced trial lawyers, so they tend to defer to federal courts’ superior expertise as to adjective law. That is exactly why Congress delegated the nuts and bolts of the Federal Rules of Civil Procedure and Evidence to the judiciary. Those rules tend to be amended only when federal judges themselves or an influential interest group are adversely affected. Judges like having great discretion, and mass-tort plaintiffs’ attorneys and corporations in MDLs have no incentive to upset the status quo. See infra notes 321, 380–382, 409, 416 and accompanying text. Individual plaintiffs and their chosen counsel, who involuntarily experience consolidation, do not have such clout. These practical considerations, however, do not excuse federal courts from misusing their power. By way of analogy, the exceedingly remote likelihood of impeachment should not lead a Justice to deliberately misinterpret the Constitution.
2. Post-2001 Literature

Over the past two decades, many scholars have focused on specific IPs and typically followed either Meador’s flexible, pragmatic approach287 or Pushaw’s constitutional framework.288 Two commentators have argued that the Constitution’s text and history support Pushaw’s analysis concerning implied indispensable powers, but that his approach should also be applied to beneficial ones.

First, Joseph Anclien contends that the Founders and the early Court understood that federal judges had expansive IPs—any action “naturally related” to the exercise of judicial power—that were “coextensive” with those of Congress.289 Thus, he concludes that Congress could only facilitate, not impede, the exercise of any IPs290—a thesis first proposed by David Engdahl.291

Although the Constitution’s grant of express powers did carry with them certain implied ones, it does not logically follow that each branch had “coequal” authority in this regard.292 Rather, the Constitution empowers Congress to make all federal laws, procedural and substantive—including those it deems “necessary and proper” to effectuate the powers of the judicial branch.293 That explains why the same Chief Justice Marshall who endorsed Congress’s broad Article I implied authority in McCulloch limited the courts’ inherent powers to indispensable ones in Hudson—an understanding that continued for well over a century.294 Finally, Anclien’s theory leads to the bizarre result that Congress must facilitate federal courts’ novel assertions of beneficial IPs to refuse

287. For example, commentators have endorsed expansive IP to order ADR and regulate lawyers. See McMorrow, supra note 265, at 6–49.
288. See, e.g., Lear, supra note 185, at 1152–206 (forum non conveniens); Parness & Walker, supra note 174, at 366–74 (pretrial conferences).
290. See id. at 42, 53, 74–77 (maintaining that Congress cannot curtail or abrogate any IP if doing so would intrude upon a court’s “basic function” or “central prerogative”).
291. See Engdahl, supra note 150, at 80–81, 94–175 (arguing that Congress can only enact laws concerning federal courts’ jurisdiction, inherent powers, or remedies that are “necessary and proper for carrying into execution” the Article III “judicial power”—and that therefore statutes impeding, rather than effectuating, the exercise of such powers are unconstitutional).
to exercise jurisdiction or apply adjective laws that Congress has validly enacted pursuant to Articles I and III.295

Second, Benjamin Barton agrees with Pushaw that the Constitution gives Congress near-plenary authority over the federal judiciary’s structure, jurisdiction, and procedures, with only one limit: A statute cannot interfere with adjudication itself or make it impossible for courts to function.296 However, he maintains that Article III’s language vesting “judicial power” in “courts” is too vague to permit solid inferences about the scope of IPs, except that judges have always had broad common law discretion to act where Congress is silent on a particular IP that they consider beneficial (again, subject to legislative override).297 That conclusion, however, conflicts with the weight of historical evidence.298

Although Pushaw’s approach captures the original understanding, he and his critics both recognize that the modern Court has consistently allowed several IPs that are merely beneficial. At the very least, however, the Court should require federal judges to clearly identify which IPs fall into this category (and are therefore subject to complete congressional control) and

295. Similarly unpersuasive are the following assertions: “[C]ourts have shown no propensity to abuse the authority they have arrogated. . . . Most rules springing from inherent powers have evolved to be exceedingly narrow. . . . [A]ppellate courts have been vigilant in monitoring the lower courts’ use of inherent powers. . . . [T]here is an innate restraining force, inherent in the judiciary, which tends to circumscribe the application of inherent powers and prevent a troubling incursion into the legislative domain.” Ancilien, supra note 150, at 67–69.

296. See Barton, supra note 122, at 5–31, 38–42.

297. Id. at 2–13, 32–38, 40–42. Another scholar argues that courts should independently exercise both indispensable and beneficial IPs (with the latter then subject to Congress’s complete control) because otherwise judges might describe IPs as indispensable when they actually are not, which would later force courts to resist congressional regulation. See Dustin B. Benham, Beyond Congress’s Reach: Constitutional Aspects of Inherent Power, 43 SETON HALL L. REV. 75, 90–94, 98–102 (2013); but see Pushaw, supra note 22, at 743 n.23 (contending that judges should have the burden of showing, not merely asserting, that a specific IP is essential, but conceding the possibility that “courts might act in bad faith and manipulate these categories” by claiming that a beneficial power is indispensable).

298. In a practical rather than historical analysis, Professor Dobbins recognizes that courts’ exercise of legally unconstrained discretion in asserting IPs is inconsistent with the very purpose of written procedural rules: to provide notice, predictability, and fairness. Jeffrey Dobbins, The Inherent and Supervisory Power, 54 GA. L. REV. 411, 414–18, 426–29, 433–34, 448–57, 455–62 (2020). Such a law-free use of IPs also precludes meaningful appellate review for “abuse of discretion.” Id. at 420–22, 450–54, 456, 460. Therefore, Dobbins recommends that courts assert an IP only if they (1) explain why they determined it was necessary to do so instead of applying an existing procedural rule, and (2) if so, articulate clear legal standards governing when and how the IP should be used. Id. at 421, 452–62.
which are indispensable (and hence amenable only to enabling legislation) instead of lumping all IPs together.

E. Applying the Distinction Between “Indispensable” and “Beneficial” Inherent Powers

To properly exercise Article III “judicial power,” federal “courts” must be able to maintain their authority and to process and decide cases independently. Congress cannot, and has almost never attempted to, hamper this essential function. On the contrary, it has worked with the Court to craft rules of procedure and evidence to handle all aspects of litigation and has allowed each district and circuit court to promulgate local rules, many of which confer significant discretion.

Unlike in the early days of the Republic, then, today it is almost never indispensably necessary for a federal judge to invoke IP to fill gaps in adjective law in order to manage and adjudicate a case. Rather, courts should amend their local rules, or recommend that the Court (with congressional approval) revise the Federal Rules, to meet that rare need. Such amendments safeguard due process by giving parties and their attorneys notice instead of subjecting them to arbitrary assertions of IPs.

Therefore, the Court erred in *Gulf Oil Corp. v. Gilbert* by announcing a new IP, *forum non conveniens,* that granted trial judges discretion to dismiss any case if they concluded that another federal court would be better suited to hear it. This power does not seem essential, as federal courts did without it for a century and a half, and its exercise did not alleviate the federal judiciary’s overall workload. Rather, it is a mere beneficial power that Congress chose not to bestow. Accordingly, the Court should not have unilaterally created the doctrine but instead asked Congress to do so. Remarkably, even after Congress ratified *Gilbert* by giving...
each district court discretion to transfer venue to a more convenient federal forum, the Court went beyond this statutory grant to permit trial judges to dismiss cases if they concluded that a state or foreign tribunal would be preferable.303

The Court’s treatment of forum non conveniens runs afoul of the Constitution in two ways. First, when Congress exercises its powers under Articles I and III to confer jurisdiction and venue on federal courts, they cannot legitimately refuse to proceed based on their notions of sound policy.304 Second, plaintiffs reasonably expect courts to discharge that constitutional duty. Thus, judges who dismiss a case without notice that they will be asserting discretion to decide whether to carve an exception to that obligation (as in Gilbert) violate the plaintiffs’ due process rights. This latter concern no longer exists as to forum non conveniens since plaintiffs now know it might be invoked, but the Court at a minimum should acknowledge and respect Congress’s regulation of this beneficial power (and all others).

Admittedly, written adjective laws tend to set forth flexible standards. Nonetheless, they sometimes contain clear legal rules, which judges should not be free to ignore or amend by invoking “inherent powers.” Unfortunately, the Court has permitted this result in two situations.

First, instead of giving effect to the obvious meaning of procedural statutes and rules, the Court has creatively read them as preserving IPs unless Congress clearly states otherwise. For example, FRCP 41(b) provides that if a plaintiff fails to prosecute, “a defendant may move” to dismiss. Specifying that a “defendant” can bring this motion naturally supports the conclusion that judges cannot dismiss such actions on their own, but the Link Court presumed that Congress did not intend to abrogate this IP.305 The power to delete a case from the docket, however, is not indispensably necessary to a district court’s ability to function. Therefore, the constitutional solution would have been for Congress, in consultation with the Court, to have amended Rule 41. The trial

304. See Lear, supra note 185, at 1148–53, 1166–207; see also supra notes 206–207, 211, 223–230, 293 and accompanying text.
judge’s idiosyncratic decision to ignore this rule without warning in Link overleapt Article III bounds and deprived the plaintiff of due process.

Although Link is a fait accompli, its constitutionally questionable approach should have been abandoned. Instead, the Court has repeated its mistake. For instance, in Dietz it construed Rule 51(b)(3), which authorizes giving a jury new instructions to rectify a mistake “before” it was discharged, as not clearly eliminating a judge’s IP to provide such curative instructions after the jury had been let go and then recalled. Yet such a power could not possibly have been indispensably necessary (or even beneficial) because courts have done without it for hundreds of years—indeed, have applied the opposite common law rule that prohibited recalling a jury after it had been discharged.

Second, the Court has sometimes abandoned the Link/Dietz pretense of merely “interpreting” federal rules as not clearly affecting IPs. Rather, the Court has permitted judges to exercise virtually unbounded IP to stay proceedings, despite conceding that Congress unambiguously intended to limit that power in AEDPA and INA litigation. Those statutes constrain such judicial discretion in narrowly defined circumstances to achieve Congress’s important policy goal of expediting death penalty and immigration cases, in contrast to a total or extensive ban on the courts’ ability to grant stays (which would raise serious Article III concerns). The Court should stop allowing judges to defy Congress’s valid exercise of its Article I power to regulate habeas corpus jurisdiction and immigration law.

Similar constitutional problems have arisen in the context of sanctions. An Article III “court” would be unable to exercise “judicial power” unless it had the ability to punish challenges to its

307. The majority acknowledged, but declined to apply, this ancient common law rule, even though it helped guarantee the constitutional right to an unbiased jury. Id. at 51–53.
308. See supra notes 223–230 and accompanying text.
309. See supra notes 223–24, 226, 229–230 and accompanying text.
310. Likewise, the Court has let district courts assert IPs and make local rules to reduce delay and costs without considering conflicting federal constitutional or statutory provisions. See Carrington, supra note 84, at 929–31, 938–64, 957–1007; see also supra note 194 (criticizing the Court’s practice of denying review of circuit courts’ supplemental procedural rules that plainly violate federal law and instead “hoping” that they will correct the error).
authority or actions that obstructed the administration of justice.\textsuperscript{311} Congress has never hindered this indispensable power. Rather, for nearly two centuries, Congress has carried the contempt power into effect by expressly acknowledging each court’s authority to fine or imprison anyone who misbehaves in its presence or disobeys its orders, as well as misconduct by court officers in official transactions.\textsuperscript{312} More recently, Congress has approved FRCPs that expanded the categories of contempt to address modern problems such as discovery abuses.\textsuperscript{313}

The foregoing statutes and rules enable federal courts to fully exercise their contempt power, while setting forth reasonable boundaries to prevent judges from imposing sanctions that are not a proportionate response to bad behavior but rather a manifestation of personal animosity.\textsuperscript{314} The Court faithfully adhered to these laws for many years. For instance, since 1789, Congress has restricted contempt punishments to the traditional ones of fine and imprisonment, and the Court respected that limit until 1991. In \textit{Chambers v. NASCO},\textsuperscript{315} however, it sustained a trial judge’s IP to impose a novel penalty for misconduct: paying the attorneys’ fees incurred by the other party.\textsuperscript{316} The Court declared that this IP could be exercised despite existing laws providing sanctions for the same behavior: “[I]f in the informed discretion of the court, neither the statute nor the Rules are up to the task, the court may safely rely on its inherent power.”\textsuperscript{317}

Applying that reasoning, however, a court might conclude that only summary execution would be an appropriate penalty, as an English judge once decreed.\textsuperscript{318} As that admittedly extreme example demonstrates, there must be some restraints on a judge’s sanctioning discretion. And constitutional separation-of-powers principles dictate that courts cannot always be trusted to impartially

\textsuperscript{311} See Pushaw, \textit{supra} note 22, at 742.  
\textsuperscript{312} See \textit{supra} notes 98–99, 118, 141–148 and accompanying text.  
\textsuperscript{313} See \textit{supra} notes 159, 174, 177, 240–242, 248–249 and accompanying text.  
\textsuperscript{314} See Pushaw, \textit{supra} note 22, at 742.  
\textsuperscript{316} \textit{Id.} at 42–58.  
\textsuperscript{317} \textit{Id.} at 49–50.  
\textsuperscript{318} See \textit{supra} note 46 and accompanying text.
limit themselves. Instead, only Congress can do so, as long as the restrictions are reasonable and do not impair the proper functioning of Article III courts.

Finally, the IP to regulate attorneys should be confined to ensuring that they are qualified to practice and do not engage in actions that threaten the court’s authority or its ability to process and decide a case. Such truly necessary IPs should be contrasted with powers recently asserted by federal judges that have nothing to do with lawyers’ competence or misconduct during litigation—most notably, assessing the reasonableness of attorneys’ fees.

F. Summary

Distinguishing “implied indispensable” from “beneficial” powers would enable the Court to reconcile its IP jurisprudence with its cases recognizing three other fundamental constitutional principles. First, the enumerated powers doctrine supports interpreting Article III as limiting federal courts to the exercise of the “judicial power” of deciding cases and other powers without which they would be unable to perform that role. Second, Article I grants Congress alone all “legislative power,” which includes making the substantive and procedural rules that the judiciary must apply. Nonetheless, Congress cannot enact laws that subvert the Constitution, such as by interfering with adjudication by Article III courts or denying them powers that are vitally necessary for them to perform that function or to maintain their authority. Rather, Congress can only facilitate the exercise of such indispensable powers. As to powers that are merely beneficial, however, Congress has complete discretion. Third, and relatedly, Articles I and III give Congress substantial control over the federal courts’

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319. Federal courts have routinely declared that, in addition to Congress’s checks on them, they must also enforce limits on themselves imposed by Article III, federalism, or separation of powers. Familiar examples are the various justiciability and abstention doctrines. The Court has labeled these doctrines as exercises of “self restraint,” but they can also be characterized as activism: refusing to exercise jurisdiction that Congress has constitutionally bestowed on them. See Robert J. Pushaw, Jr., Bridging the Enforcement Gap in Constitutional Law: A Critique of the Supreme Court’s Theory That Self-Restraint Promotes Federalism, 46 WM. & MARY L. REV. 1289 (2004) (developing this thesis). We cannot fully address this point here, but merely note that the federal courts’ demonstrable lack of self-restraint in asserting IPs has parallels in other areas, such as jurisdiction and substantive constitutional law.
structure and their jurisdiction, but Article III guarantees those judges independence in exercising the jurisdiction granted.

The foregoing framework should be applied to all IPs to keep them within constitutional bounds. It would be especially helpful in MDLs because courts handle such important and lucrative cases almost entirely by exercising IPs unguided by any legal standards or limits.

II. ASSERTIONS OF INHERENT POWERS IN MULTIDISTRICT LITIGATIONS

In this Part, we will show that the only implied indispensable power in MDLs is appointing “liaison counsel” to manage the practical details of litigation. Yet MDL judges have asserted many other IPs: (1) to name “lead attorneys” who do not merely coordinate with the plaintiffs’ hired lawyers but displace them; (2) to force plaintiffs to accept such representation; (3) to compensate lead attorneys; (4) to fund this compensation by taxing non-lead lawyers’ earnings; (5) to cap non-lead lawyers’ fees below the amounts they contracted for with their clients; and (6) to review settlements, including the discretion to disapprove them. These uses of IPs subvert the Constitution’s structure and violate the Due Process Clause. We therefore describe them as lawless, even though they are lawful in the less profound, positive sense that MDL courts have asserted them and have yet to be constrained by appellate courts.

Several peer reviewers challenged us to explain how MDL courts could process multitudes of lawsuits without the powers we condemn. Although we suggest alternatives in the discussions below, the burden of designing constitutional means rests with MDLs’ proponents. If judges must violate the Constitution for the procedure to work as desired, then it ought to be scrapped.

A. The Federal Rules of Civil Procedure Govern the Conduct of Cases Consolidated in Multidistrict Litigations

Because the MDL statute provides no procedures for these proceedings, judges have had to create them. Courts have not done so by rulemaking, however. Instead, they have drawn upon the Manual for Complex Litigation, a mere guidebook, and crafted
procedures on the fly.\textsuperscript{320} In effect, they have created a common law of procedure for MDLs. Judges like this approach because it maximizes their freedom to manage MDLs as they wish.\textsuperscript{321}

The common law of MDLs exists in tension with the FRCP. Most importantly, Rule 1 states that, with enumerated exceptions, “these rules govern procedure in all civil actions and proceedings in the United States district courts.”\textsuperscript{322} MDLs are not exempted. As the Sixth Circuit wrote:

The rule of law applies in multidistrict litigation . . . just as it does in any individual case. . . . That means an MDL court’s determination of the parties’ rights in an individual case must be based on the same legal rules that apply in other cases, as applied to the record in that case alone. . . . The rules at issue here are the Federal Rules of Civil Procedure, which have the same force of law that any statute does.\textsuperscript{323}

Addressing the complaint that “much that happens inside MDLs reminds one of the Wild West,”\textsuperscript{324} the court later added that

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\item[320.] The several editions of the \textit{Manual for Complex Litigation} discuss procedures for the conduct of MDLs at length. But even though the Manual reflects the accumulated wisdom of federal judges, it lacks the force of law. See \textit{Manual}, supra note 26, at 1 (The Manual “is not, and should not be cited as, authoritative legal or administrative policy. . . . It was produced under the auspices of the Federal Judicial Center, but the Center has no authority to prescribe practices for federal judges. The Manual’s recommendations and suggestions are merely that.”).
\item[322.] \textit{Fed. R. Civ. P. 1} (emphasis added).
\item[323.] \textit{In re Nat’l Prescription Opiate Litig.}, 956 F.3d 838, 841 (6th Cir. 2020).
\end{enumerate}
\end{footnotesize}
“MDLs are not some kind of judicial border country, where the rules are few and the law rarely makes an appearance.”  

Whether cases are consolidated or not, parties’ procedural rights are supposed to be identical. 

Because the FRCP apply in MDLs, any room that remains for the exercise of IPs is limited to matters the rules do not address. And, as always, the use of IPs is confined to problems with the potential to prevent MDL forums from functioning as courts - that is, from fulfilling the mandate to exercise the judicial power. It follows that judges may properly invoke IPs when dealing with managerial difficulties but may not use them to alter or override parties’ procedural or substantive rights. Unfortunately, courts do the latter routinely. MDL procedures must be overhauled completely.

B. Federal Judges May Appoint Liaison Counsel to Provide Managerial Assistance

Pressing administrative problems arise when MDLs involve multitudes of plaintiffs and attorneys. Matters that normally are handled easily, such as communicating with counsel, convening meetings, scheduling hearings, and managing document depositories, can be daunting. Typically, MDL judges minimize their burdens by assigning responsibility for administrative tasks to local plaintiffs’ lawyers who know the ropes. The chosen attorneys are called “liaison counsel.”

Multidistrict Litigation, 51 CONN. L. REV. 769, 773 (2019) (“Seizing on the lack of formal structures or individual protections, many have expressed concerns that MDL proceedings have become the Wild West of aggregation law.”).

325. In re National Prescription, 956 F.3d at 844. Andrew Bradt and Calen Bennett contend that the rhetoric in the Sixth Circuit’s opinion was taken from briefs submitted by the U.S. Chamber of Commerce and Lawyers for Civil Justice, organizations that have long campaigned against aggregate litigation and lobbied for tort reform. Andrew Bradt & Calen Bennett, Adult Supervision? Opioids, Mandamus, and “Law Reform” in Multidistrict Litigation (Oct. 25, 2020) (unpublished manuscript) (on file with the authors). If so, the chorus calling for MDL reform includes a range of voices, some of whom, including Professor Silver, have spoken loudly against tort reform for decades.


327. See supra Part I.
The IP to appoint liaison counsel was first recognized in *MacAlister v. Guterma*,328 which, employing the nomenclature of the day, referred to them as “general counsel.” In *MacAlister*, the defendants in three actions that were consolidated under Rule 42 asked the trial judge to coordinate the litigation by appointing general counsel for the plaintiffs. Believing that no power to do so existed, the judge declined. On interlocutory review, the Second Circuit reversed, finding that the power was “within the clear contemplation of [Rule 42]” and could also be based on the “inherent authority of every court ‘to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel and for the litigants.’”329

The power recognized in *MacAlister* was only to appoint a litigation manager. The Second Circuit based its holding, squarely and expressly, upon its understanding that plaintiffs’ retained lawyers would continue to represent their clients on substantive matters.

[General counsel is not substituted for the counsel of each party plaintiff’s choice. The function of general counsel is merely to supervise and coordinate the conduct of plaintiffs’ cases. The separate actions are not merged under the direction of one court appointed master of litigation—each counsel is still free to present his own case, to examine witnesses and to open and close before the jury, if there be one.330

Supervising and coordinating are the functions that liaison counsel perform today.

This power is not controversial. The FRCP give judges considerable freedom to process matters efficiently,331 and IPs are properly used to handle managerial problems that the rules do not address. Because the power asserted in *MacAlister* facilitated the
 litigation while also leaving retained lawyers free to represent their clients as they normally would, the decision to appoint general (liaison) counsel was appropriate.

C. Federal Judges Lack Inherent Power to Appoint Lead Attorneys

The conventional wisdom is that MDLs are “representative” proceedings in which federal judges possess inherent authority to empower lead counsel “to act for and to bind the cases that they represent,” including those filed by plaintiffs who are not their signed clients. On reflection, though, it is clear that no such power exists. Judges cannot lawfully burden plaintiffs with virtual representation by lead attorneys they never retained.

1. Lead Attorneys Exercise Extensive Control of Substantive Matters

MacAlister recognized the IP to appoint liaison counsel whose responsibilities are purely administrative or managerial. As shown, the court predicated its holding on the belief that plaintiffs’ retained lawyers would continue to represent their clients in the usual ways. Today, however, MDL judges completely ignore the limit MacAlister placed on appointed counsels’ authority. They burden plaintiffs with virtual representation by lead attorneys who displace individually retained lawyers and act in their stead. This practice is so well established that “the literature on complex litigation takes [such appointments] for granted.”

Lead attorneys’ powers and responsibilities are plenary. They

<formulate>... and present] positions on substantive and procedural issues during the litigation. Typically they act for the group ... in presenting written and oral arguments and suggestions to the court, working with opposing counsel in developing and implementing a litigation plan, initiating and organizing discovery requests and responses, conducting the principal examination of deponents, employing experts, arranging for support services, and seeing that schedules are met.
Appointment orders document the breadth of lead attorneys’ commissions. To illustrate, the order entered in the massive Roundup MDL empowers lead counsel to “[e]nter into stipulations with the defendants”; “[s]ign and file all pleadings relating to all actions in the MDL”; “[d]etermine the plaintiffs’ position on matters arising during the pretrial proceedings”; “[c]oordinate and conduct discovery on behalf of all plaintiffs”; “[l]iaise with defense counsel”; “engage in settlement negotiations with the defendants”; “propose...a plan of allocation”; and “[c]onsult with and employ expert witnesses.”

It also requires non-lead lawyers to obtain lead attorneys’ permission before communicating with the defendant or commencing settlement negotiations.

MDLs thus afford non-lead lawyers’ clients their day in court only indirectly. Judges put control of proceedings in the hands of lead attorneys and attribute their actions to all plaintiffs. By this means, all plaintiffs are deemed to have been able to file complaints, take discovery, offer and examine witnesses, argue motions, etc. As Paul Rheingold, an experienced mass tort lawyer, observed, “the court sets the ground rules for a steering committee, and the decision of the committee binds all of the cases made part of the litigation.”

2. Lead Attorneys Displace Non-Lead Lawyers

In addition to being plenary, lead attorneys’ dominion is exclusive. Professor Lynn Baker and Stephen Herman, a prominent lawyer who often receives judicial appointments, trace
exclusivity to appointment orders, which state “that the MDL leadership attorneys are ‘the only attorneys permitted’ to undertake various tasks.” Lead attorneys are supposed to consult non-lead lawyers, but the conversations are invariably one-sided because the latter cannot order the former to do anything. A disgruntled non-lead lawyer can appeal to a presiding judge, but this option is rarely effective. A non-lead lawyer who “disagrees with a strategic choice made by lead counsel . . . faces a steep uphill battle to reassert control over [a] representation.” Consequently, the “court-appointed lawyers on the ‘plaintiffs’ steering committee’ [] make the key strategic decisions and lead the negotiations with the defendant, with little to no input . . . from lawyers on the periphery.”

Disagreements between lead attorneys and non-lead lawyers matter greatly because actions taken by the former preclude subsequent efforts by the latter. For example, a non-lead lawyer who believes that a lead attorney’s deposition of an important witness was ineffective cannot depose the witness again. Nor can non-lead lawyers remake lead attorneys’ innumerable judgment calls. “Do overs” are forbidden because the point of the MDL procedure is to make litigation more efficient by eliminating duplication.


340. Redish & Karab, supra note 324, at 143.

341. Andrew D. Bradt & D. Theodore Rave, The Information-Forcing Role of the Judge in Multidistrict Litigation, 105 CALIF. L. REV. 1259, 1263 (2017) [hereinafter Bradt & Rave, The Information-Forcing Role]; see also Andrew D. Bradt & D. Theodore Rave, Aggregation on Defendants’ Terms: Bristol-Myers Squibb and the Federalization of Mass-Tort Litigation, 59 B.C. L. REV. 1251, 1314 (2018) (“[C]ourt-appointed lead] lawyers make most of the important strategic decisions on what discovery to pursue, which experts to hire, which cases to push forward towards bellwether trials, and lead the negotiations toward possible global settlements. So, although each plaintiff in the MDL has hired his or her own lawyer, those lawyers typically have little input into how their clients’ individual cases are litigated for as long as they remain consolidated in the MDL. They are at the mercy of the lead lawyers until the MDL judge determines that pretrial proceedings are over or the parties reach some sort of global settlement agreement.”).

342. Noll, supra note 333, at 454 ("Designating particular attorneys as leaders [would do] little to address coordination problems on the plaintiffs’ side if non-lead attorneys [were] free to engage in discovery and motion practice, engage with the court and defendants, and generally litigate however they want.").
3. The Practice of Appointing Lead Attorneys Rests on a Misreading of MacAlister v. Guterma, the Seminal Case

The fact that MDL courts routinely appoint lead attorneys who displace claimants’ retained counsel does not establish that the practice has a sufficient legal basis. MacAlister did not hold that judges’ IPs extend this far. As shown, the Second Circuit predicated its decision in support of the power to appoint general (liaison) counsel on the expressed belief that plaintiffs’ retained lawyers would continue to act for their clients.343

The first edition of the Manual for Complex Litigation applied the rule of MacAlister correctly.344 It advised courts to appoint liaison counsel but said nothing about lead attorneys, and it expressly discouraged judges from “compel[ling] a party to authorize counsel other than his own to make admissions by stipulations in matters of substance.”345 (To see how greatly MDL judges have expanded their powers, consider that the appointment order entered in the Roundup MDL authorized lead attorneys to “[e]nter into stipulations with the defendants.”)

To streamline the consideration of substantive matters, the first edition embraced an organic approach. Judges were to “urge counsel to cooperate to eliminate unnecessary motions, objections or other actions which would delay the discovery that will ultimately be required” and to adopt a practice of requiring lawyers “to meet and confer freely to resolve differences over forms and areas of discovery without the presence and intervention of the court.”346 If the authors of the first edition considered the possibility of imposing lead attorneys on plaintiffs and their retained counsel, they did not embrace it.

343. See supra notes 328–330 and accompanying text.
344. The first edition cited Rando v. Luckenbach Steamship Co, Inc., 25 F.R.D. 483 (E.D.N.Y. 1960), in support of the judicial power to appoint liaison (general) counsel. MANUAL FOR COMPLEX LITIGATION §§ 1.9 n.27 (1st ed. 1969). In turn, Rando relied on MacAlister when rejecting an objection to the appointment of general counsel brought by retained lawyers who feared being displaced. Rando, 25 F.R.D. at 484 (quoting MacAlister to the effect that “general counsel is not substituted for the counsel of each party plaintiffs’ choice”).
345. MANUAL FOR COMPLEX LITIGATION §§ 1.9 & 1.10 (1st ed. 1969).
346. Id. § 1.10. The possibility of allowing lawyers to create governance structures for MDLs is discussed further below. See infra notes 353–59 and accompanying text.
In later years, courts forgot or ignored the limitation that figured so prominently in MacAlister. For example, in Vincent v. Hughes Air W., Inc., the Ninth Circuit wrote:

MacAlister v. Guterma, 263 F.2d 65 (2d Cir. 1958), represented “the first time that the power of the courts to order consolidation for the pre-trial stages and the appointment of general (lead) counsel to supervise and coordinate the prosecution of plaintiffs’ case (was) presented to a federal appellate court.” Id. at 67. Defendants in a stockholders’ derivative suit moved the district court for an order consolidating various related actions and appointing lead counsel for the consolidated plaintiffs. The district court refused. On appeal, the Second Circuit held that the district court had the “inherent powers” to consolidate and appoint lead counsel . . . .

By equating “general counsel” with “lead counsel,” the Ninth Circuit made a colossal mistake. The general counsel contemplated in MacAlister had only the managerial powers that liaison counsel exercise today. Cases decided after Vincent carried forward the Ninth Circuit’s error.

4. Reconsidering the Inherent Power to Appoint Lead Attorneys

Because the belief that federal courts have IP to appoint lead attorneys is based on a misreading of the seminal case, the practice must be reconsidered, and the analysis of its legality must begin by recognizing that federal courts have no general IP to force lawyers

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348. The Fifth Circuit made the same blunder in In re Air Crash Disaster at Fla. Everglades on Dec. 29, 1972, 549 F.2d 1006, 1014 (5th Cir. 1977) (mischaracterizing MacAlister as “the leading case on the court’s power to appoint and rely on lead counsel”). Even the Second Circuit has conflated general counsel with lead counsel. See Farber v. Riker-Maxson Corp., 442 F.2d 457, 459 (2d Cir. 1971) (incorrectly stating that “in MacAlister . . . we described the salutary and indeed essential functions performed by lead counsel . . . in supervising and coordinating the conduct of a consolidated or class action”).

upon litigants. In the criminal context, judges cannot require pro se defendants to accept representation they do not want, the Court having held that the Constitution entitles them to represent themselves.\textsuperscript{350} And in both the civil and criminal realms, federal courts have repeatedly emphasized the importance of representation by counsel of choice.\textsuperscript{351} Knowing that “lawyers are not fungible,” judges have long been reluctant to take steps that would deprive parties of their retained attorneys.\textsuperscript{352}

In keeping with the analysis in Part I, MDL courts can have IP to appoint lead attorneys only if doing so is essential to their functioning. This condition is not met, however, because consolidated lawsuits can be managed, and have been managed, in other ways. For example, plaintiffs’ lawyers can work together cooperatively without having leaders forced upon them by courts.\textsuperscript{353} Rheingold reports that attorneys “set up litigation groups involving such diverse products as tampons, Ford transmissions, . . . fuel tanks, Jeeps, Syntex baby foods, Agent Orange, Bendectin and DES.”\textsuperscript{354} The \textit{Manual for Complex Litigation} agrees. It recognizes that “attorneys [may] coordinate their activities without the court’s assistance” and adds that “such efforts should be encouraged.”\textsuperscript{355}

The Roundup MDL provides a contemporary example of plaintiffs’ lawyers’ ability to coordinate organically. When applying for appointment as lead counsel, Aimee Wagstaff explained that

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\item \textsuperscript{350} Faretta v. California, 422 U.S. 806 (1975).
\item \textsuperscript{351} See, e.g., United States v. Gonzalez-Lopez, 548 U.S. 140 (2006) (holding that the erroneous disqualification of criminal defendant’s counsel of choice violated the Sixth Amendment and required a new trial); Venegas v. Mitchell, 495 U.S. 82 (1990) (requiring payment of a contingent fee that exceeded the fee award because a larger fee was needed to secure representation by the chosen attorney); Ambush v. Engelberg, 282 F. Supp. 3d 58, 62 (D.D.C. 2017) (noting that disqualification motions are disfavored because they deprive parties of representation by counsel of choice).
\item \textsuperscript{352} See United States v. Hughey, 147 F.3d 423, 433 (5th Cir. 1998); see also Nw. Nat. Ins. Co. v. Inso Co., Ltd., 866 F. Supp. 2d 214, 221 (S.D.N.Y. 2011) (“Courts in this district have long acknowledged that disqualification has an immediate adverse effect on the client by separating him from counsel of his choice. Moreover, I understand that . . . lawyers are not fungible.”); United States v. Gonzalez-Lopez, 399 F.3d 924, 928–29 (8th Cir. 2005), aff’d and remanded, 548 U.S. 140 (2006) (“Lawyers are not fungible, and often the most important decision a defendant makes in shaping his defense is his selection of an attorney.”); United States v. Mendoza-Salgado, 964 F.2d 993, 1015–16 (10th Cir. 1992) (same).
\item \textsuperscript{353} See Rheingold, \textit{Litigation Groups}, supra note 337, at 1; Paul D. Rheingold, \textit{The MER/29 Story – An Instance of Successful Mass Disaster Litigation}, 56 CAL. L. REV. 116 (1968).
\item \textsuperscript{354} Rheingold, \textit{Litigation Groups}, supra note 337, at 1.
\item \textsuperscript{355} \textit{Manual}, supra note 26, at § 10.22.
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she and other lawyers had voluntarily worked as a team, starting more than a year before the MDL was created:

A team of Plaintiffs’ attorneys across the nation has been working together to advance this litigation. This team filed the first Roundup® cases, filed most of the federal cases on file as of the date of PTO 1, has extensive experience leading and participating in MDLs generally, and is comprised of experienced trial attorneys with vast experience in mass torts and bellwether trials. . . . The attorneys comprising this team developed the factual and legal pleadings that underlie this litigation, successfully briefed and argued the motions to dismiss filed by Monsanto in federal districts (and also in two state actions), have selected a document vendor and are jointly reviewing documents, and have retained experts. Our team has a proven track record of working collaboratively and efficiently in large, complex cases with one another and with opposing counsel, and in this particular case we have worked together seamlessly and collaboratively for the past 13 months. We have met dozens of times to advance the speedy and just adjudication of these cases. We have created a joint litigation fund, housed in Denver at Andrus Wagstaff, and are mindful of containing expenses. We believe the team’s efforts have succeeded to date, evidenced by the fact that, to our knowledge, all firms with cases on file as of this filing support appointment of the team in the proposed positions.356

No court ordered the lawyers to cooperate. They did so because working together was advantageous. The collaboration operated so smoothly that when the time came to appoint lead counsel in the Roundup MDL, Wagstaff’s application was unchallenged and unopposed.357

The ability of MDL defendants to cooperate without having lead attorneys foisted upon them provides additional evidence that private orderings can succeed. As Professor David Noll reports,


357. See Plaintiffs’ Case Management Statement, In re Roundup Prods. Liab. Litig., No. 16-md-02741 (N.D. Calif. Oct. 27, 2016); see also Pretrial Order No. 236: Order Granting in Part and Denying in Part Motion to Establish a Holdback Percentage at 3, In re Roundup Prods. Liab. Litig., No. 16-md-02741 (N.D. Calif. June 21, 2021) (reporting that the selection of lead attorneys was easy because the candidates had formed a single slate).
“leadership appointments on the defense side are rare.”\textsuperscript{358} Judges refrain from appointing lead defense attorneys even when many defendants are sued. In the Opiates MDL, defendants number in the hundreds or possibly thousands, but the court-approved structure on the defense side includes only liaison counsel and steering committees.\textsuperscript{359} The MDL has proceeded in orderly fashion even so. On matters of common interest or concern, the defendants have self-organized into groups that are led by the largest entities. For example, the three largest distributors, AmerisourceBergen, McKesson, and Cardinal Health, draft motions and replies that the smaller ones join.

In sum, the practice of appointing lead attorneys who displace plaintiffs’ retained lawyers lacks a compelling basis in federal courts’ IPs. It is founded upon an incorrect reading of \textit{MacAlister v. Guterna}, which approved the appointment of only counsel with managerial powers. And the IP cannot be derived from first principles because MDL courts can satisfy the need for coordinated action by non-coercive means.

\textbf{D. The MDL Statute Confers No Authority to Appoint Lead Attorneys}

When considering whether the MDL statute empowers federal judges to appoint lead attorneys, analysis must begin with two facts. First, this law says almost nothing about transferee judges’ powers. Second, on the lone occasion when the statute mentions MDL judges’ powers, it indicates that they possess only the usual complement. Paragraph (b) of 28 U.S.C. § 1407 states that “[the] judge . . . [to whom transferred] actions are assigned, . . . may exercise the powers of a district judge in any district for the purpose of conducting pretrial depositions in such coordinated or consolidated pretrial proceedings.”\textsuperscript{360} The import of the phrase “the powers of a district judge” is plain. If the statute had endowed MDL

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{358} Noll, \textit{supra} note 333, at 458.
\item \textsuperscript{359} See \textit{The Manufacturer and Distributor Defendants’ Joint Motion Regarding Appointment of Steering Committees and Defendants’ Co-Liaison Counsel, In re Nat’l Prescription Opiate Litig.}, No. 17-md-02804 (N.D. Ohio Nov. 4, 2022) (requesting the appointment of liaison counsel and steering committees); Order [non-document] Granting Physician Defendants’ and Manufacturer and Distributor Defendants’ Motions to Approve Liaison Counsel and Steering Committee (Related Doc #23, 24), \textit{id.} (Dec. 29, 2017).
\item \textsuperscript{360} 28 U.S.C. § 1407 (emphasis added).
\end{itemize}
\end{footnotesize}
courts with special capacities, other language, such as “the powers conferred herein,” would have been required.

Two other considerations also weigh heavily against the possibility of deriving the authority to appoint lead attorneys from the statute. One is that the class action provided a model for placing lead counsel in charge of a mass proceeding that could have been adapted for use in MDLs but was not. The other is that Congress enacted the law in 1968, the first edition of the Manual appeared in 1969, and the same judges contributed to both.361 The Manual’s failure even to mention lead attorneys, therefore, clearly indicates a consensus that MDL judges had no power to appoint them.

The implication just stated is irresistible. The need to coordinate the actions of plaintiffs and lawyers in MDLs was at the forefront of the minds of the judges who pressed for the legislation. Even so, the statute conferred no appointment power that district court judges did not already possess. Professor Andrew Bradt’s historical study explains why. If plaintiffs’ attorneys had known they would lose control of their cases, they would have blocked the statute.362 To gain passage, the judges compromised, and their decision must frustrate any attempt to derive the power to appoint lead counsel from the statute today.

E. The Federal Rules of Civil Procedure Do Not Empower Judges to Appoint Lead Attorneys

When appointing lead attorneys, MDL judges often purport to derive their authority from Rules 16 and 42 of the FRCP. Whether these rules confer this power must therefore be considered. Intuitively, the answer should be no because a denial of representation by retained lawyers would violate the Due Process Clause. As the Court stated in Powell v. Alabama: “If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to


362. Id. at 839 (“The papers reveal the judges devised a political answer to th[e] problem [of the norms of party control and decentralized district courts]: consolidation for pretrial proceedings with eventual remand for trial. Such a ‘limited transfer’ structure would insulate the statute from both the resistance of plaintiffs’ lawyers who might fear loss of control over their cases (and their fees) and district judges who might fear invasion of their jurisdiction.”).
hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense.”

One could argue that the denial of representation by counsel of choice is not arbitrary because consolidating power in the hands of lead attorneys is essential to the management of MDLs. Judges have often offered this rationale when appointing lead attorneys in Rule 42 consolidations. They could also cite it to support appointment orders issued pursuant to Rule 16(c)(2)(L), which authorizes federal courts to “adopt[] special procedures for managing potentially difficult or protracted actions that may involve . . . multiple parties.”

One problem with the assertion that judges cannot manage MDLs without appointing lead counsel was identified above. Lawyers can and have coordinated their efforts organically, that is, without having lead attorneys forced upon them. The practice of appointing lead attorneys without giving lawyers an opportunity to plan for the efficient management of MDLs assumes that coercion is required when it may not be.

A deeper problem with grounding the power to appoint lead attorneys in the FRCP stems from the practice of treating MDLs as representative proceedings in which such attorneys act with binding effect for all plaintiffs, including those who are not their clients. The practice reflects the tendency to analogize MDLs to class actions, which are the paradigmatic representative proceedings. The resemblance between the two procedures is so strong that many judges have taken to calling MDLs “quasi-class actions” and have supported their assertions of power by citing Rule 23.

Unfortunately, the practice of treating MDLs as representative proceedings ignores distinctive features of class suits. One is that Rule 23 expressly empowers federal courts to appoint class counsel. Neither Rule 16 nor Rule 42 contains a similar provision. Another is that in MDLs but not class actions, judicial orders appointing lead

364. FED. R. CIV. P. 16(c)(2)(L).
365. See Silver & Miller, supra note 16.
366. See FED. R. CIV. P. 23(g).
367. Compare FED. R. CIV. P. 23(g) with FED. R. CIV. P. 16 and FED. R. CIV. P. 42.
attorneys deprive many plaintiffs of representation by counsel of choice. All plaintiffs who hire non-lead lawyers suffer this fate. A third is that non-lead lawyers’ clients have no assurance that lead attorneys will represent them adequately because neither Rule 16 nor Rule 42 imposes the protections that class members enjoy. The habit of treating MDLs as quasi-class actions ignores these differences or, at least, gives them no weight.\textsuperscript{368}

A final and crippling problem with the analogy is that because MDLs are not class actions, the FRCP cannot empower judges to treat them as representative proceedings. In \textit{Taylor v. Sturgell},\textsuperscript{369} the Supreme Court “signaled the demise of \textit{all} versions of virtual representation” (VR) except the class suit.\textsuperscript{370}

In its classic form, VR occurs when a judgment in a suit brought by one individual is deemed to bind a different person with similar interests who was neither a party to the prior action nor in privity with the plaintiff. In MDLs, VR reaches more broadly. The steps that lead attorneys take are deemed to satisfy the participatory rights of all claimants, including those who are not their clients. For example, a deposition conducted by a lead attorney is treated as having been taken by all plaintiffs, and this attorney’s argument on a motion for summary judgment counts as though all plaintiffs had an opportunity to be heard. MDLs serve their intended purpose, which is to conserve resources by eliminating repetition and duplication, by applying VR broadly.

\textsuperscript{368} See Judith Resnik, Dennis E. Curtis & Deborah R. Hensler, \textit{Individuals Within the Aggregate: Relationships, Representation, and Fees}, 71 NYU L. REV. 296 (1996) (contending that the class action paradigm, in which plaintiffs agree to be represented by lead counsel, cannot easily be applied to MDLs wherein plaintiffs retain their hired lawyers—and that this difference creates thorny problems for courts in allocating attorneys’ fees).


\textsuperscript{370} See Martin H. Redish & William J. Katt, Taylor v. Sturgell, \textit{Procedural Due Process, and the Day-in-Court Ideal: Resolving the Virtual Representation Dilemmas}, 84 NOTRE DAME L. REV. 1877, 1878 (2009); see also Morris A. Ratner, \textit{Achieving Procedural Goals Through Indirection: The Use of Ethics Doctrine to Justify Contingency Fee Caps in MDL Aggregate Settlements}, 26 GEO. J. LEGAL ETHICS 59, 71 (2013) ("The Supreme Court has made it abundantly clear that it intends to police the line, at least for purposes of non-party preclusion, between class actions certified under Rule 23, and other actions that involve merely ‘virtual representation.’") (citing \textit{Taylor v. Sturgell}). Post-\textit{Taylor} cases agree. See, e.g., Briscoe v. City of New Haven, 654 F.3d 200, 203 (2d Cir. 2011) ("\textit{Taylor} enumerated the six recognized categories of nonparty preclusion, . . . but rejected . . . an exception for instances of ‘virtual representation.’"); \textit{In re Consol. Salmon Cases}, 688 F. Supp. 2d 1001, 1008 (E.D. Cal. 2010) ("The Supreme Court has [] rejected ‘virtual representation’ as a basis for finding privity in the preclusion context.") (citing \textit{Taylor}).
Because MDLs are not class actions, however, they fall outside the exception the Court recognized in *Sturgell*. They also run afoul of the Court’s specific prohibition of “a common-law kind of class action” that would authorize preclusion based on identity of interests and some kind of relationship between parties and nonparties, shorn of the procedural protections prescribed in . . . Rule 23. These protections, grounded in due process, could be circumvented were we to approve a virtual representation doctrine that allowed courts to “create *de facto* class actions at will.”

By drawing analogies to class actions, that is precisely what MDLs’ judges do—create common law representative proceedings. If it is true that courts cannot manage MDLs without appointing lead attorneys to speak for non-lead lawyers’ clients, then the procedure always denies due process and must be discontinued.

The problem just described stems from the failure of MDL’s proponents on the bench and in the academy to attend to the need for attribution, which occurs when lawyers’ statements and actions bind their clients. In conventional lawsuits, attribution happens so routinely as to be invisible. An attorney’s receipt of notice satisfies a client’s right to service. A lawyer’s argument on a motion satisfies a client’s right to be heard. The law treats these actions and infinitely many others as though litigants perform them directly because parties authorize attorneys to speak and act for them with binding effect. But non-lead lawyers’ clients do not hire lead attorneys. Consequently, no legally recognized ground exists for attributing lead attorneys’ actions to these plaintiffs. The practice of treating MDLs as representative proceedings is a failed attempt to create one.

Many rejoinders might be offered to the point just made. One might contend, for example, that virtual representation helps plaintiffs because lead attorneys are vastly better than non-lead lawyers. Even assuming the truth of the factual assertion, this argument fails because the actions of an outstanding attorney who lacks authority to speak for a plaintiff cannot satisfy the latter’s right to be heard.

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Alternatively, one might argue that MDLs do not saddle plaintiffs with VR because, by failing to object, retained lawyers adopt lead attorneys’ actions as their own. Consent might also be inferred when retained lawyers refrain from supplementing lead attorneys’ filings, an option that case management orders usually preserve.

The adoption rejoinder has several defects. First, it infers far too much from retained lawyers’ silence. If they could prevent lead attorneys from usurping their roles, their failure to act might meaningfully reflect a desire to cede control. But they cannot. Retained counsel can neither prevent MDL judges from appointing lead attorneys, tell lead attorneys what to do, avoid having lead attorneys’ actions and filings attributed to their clients, nor insist on being able to handle their clients’ matters personally. Because retained lawyers can accomplish nothing of importance by objecting, their silence is meaningless.

Second, retained attorneys have a non-delegable fiduciary responsibility to exercise subjective judgment for the benefit of their clients. “Lawyers are not fungible.” By hiring one lawyer rather than another, a client expresses the desire to benefit from the former’s judgment. The duty to make discretionary calls personally is non-delegable for this reason. A retained lawyer who wants a court-appointed attorney to make decisions requiring the application of judgment must obtain a client’s consent before transferring the responsibility. But in MDLs, clients’ consent is never sought. The “silence implies consent” rejoinder thus puts all retained lawyers in violation of a core professional responsibility. Clients’ consent is required, not the tacit agreement of their lawyers.

373. See, e.g., In re Korean Air Lines Co., Ltd., 642 F.3d 685, 701 (9th Cir. 2011) (“A district court’s case management orders are generally not appealable on an interlocutory basis.”); In re Zyproxa Prod. Liab. Litig., 594 F.3d 113, 117 (2d Cir. 2010) (denying interlocutory review and mandamus relief on a challenge to a district court’s case management order requiring a holdback from settlement funds to compensate lead attorneys); In re Westwood Shake & Shingle, Inc., 971 F.2d 387, 389 (9th Cir. 1992) (denying interlocutory review of a case management order appointing counsel in a bankruptcy proceeding).


375. The prohibition on delegation without principals’ permission applies to all agents. See JOSEPH STORY, COMMENTARIES ON THE LAW OF AGENCY 274 (4th ed. 1851) (“A principal employs a broker from the opinion he entertains of his personal skill and integrity; and a broker has no right, without notice, to turn his principal over to another, of whom he knows nothing.”).
Third, a hallmark of VR is that represented persons cannot control litigation affecting their interests. For example, absent class members cannot tell class counsel what to do. Plaintiffs whose cases are consolidated in MDLs cannot give lead attorneys orders either. They cannot even rely on lead attorneys to protect their interests because, with the support of MDL judges, lead attorneys deny owing them a fiduciary responsibility. In this respect, MDLs are inferior to, and more dangerous than, class actions, where the fiduciary responsibilities of class counsel are solidly established.

In sum, Sturgell prohibits the application of VR in non-class proceedings “shorn of the procedural protections prescribed in . . . Rule 23.” Because MDLs lack these protections, due process is denied when lead attorneys’ actions are treated as binding retained lawyers’ clients. To solve this problem, MDL judges must allow retained lawyers to represent their clients in the usual way, as the Second Circuit expected when it recognized the power to appoint liaison counsel in MacAlister.

F. Federal Judges Lack Inherent Power to Compensate Lead Attorneys

MDL judges claim to possess IP to regulate lawyers’ fees and do so extensively. They free up funds with which to compensate lead attorneys by reducing non-lead lawyers’ fees. Sometimes, they cut non-lead lawyers’ fees even further when, in their assessment, contracted-for payments are excessive. These practices serve MDL judges and lead attorneys well by giving the former extraordinary leverage over the lawyers who appear before them and enabling the latter to collect billions of dollars in fees annually. Although initially novel and controversial, these practices quickly became settled, as MDL judges built up a corpus of supporting common law decisions, and appellate courts showed great reluctance to disturb practices that were disposing of cases en masse.

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376. The status and powers of named plaintiffs and absent class members are discussed in Nancy J. Moore, Who Should Regulate Class Action Lawyers?, 2003 U. Ill. L. Rev. 1477, 1484.
378. See supra notes 343–349 and accompanying text.
379. See Cirino v. City of New York (In re World Trade Ctr. Disaster Site Litig.), 754 F.3d 114, 126–27 (2d Cir. 2014) (sustaining the trial court’s discretionary decision to decrease plaintiffs’ attorneys’ fees from 33% to 25% of the settlement amount) (citing In re Goldstein, 430 F.3d 106, 110 (2d Cir. 2005)).
Then, in mid-2021, Judge Vincent Chhabria declared that the emperor had no clothes. After raising the possibility that judges “are too quick to assume that MDL courts can do whatever they want,” he carefully examined the justifications offered in defense of the practice of compensating lead attorneys and found most of them wanting.\(^\text{380}\) Neither the MDL statute, the common fund doctrine, nor the existence of free-riders, he concluded, empower MDL judges to holdback funds from non-lead lawyers’ fees for the purpose of paying lead attorneys.\(^\text{381}\) He questioned the need for supplementation too, pointing out that the lead attorneys are “likely making so much from settling their own ‘inventories’ that they can each afford to buy their own island” and adding that, because of their positions, their cases command higher values and generate larger fees than those being handled by non-lead lawyers.\(^\text{382}\) Until Judge Chhabria’s opinion appeared, only MDL critics made points like these.\(^\text{383}\)

In the end, however, Judge Chhabria accepted the contention that MDL courts have IP to transfer funds. Even then, he broke with tradition by emphasizing the power’s limits. Judges could use it only as needed to manage cases in federal MDLs, not to reach lawyers with related state court cases as the lead attorneys wanted and other courts had done.\(^\text{384}\) He also stressed that the power exists only if and to the extent that lead attorneys’ efforts enhance a monetary award, and that it has nothing to do with the IP to regulate lawyers, which concerns misconduct.\(^\text{385}\)

Judge Chhabria’s opinion is so clear and such an important addition to MDL jurisprudence that we are reluctant to suggest that it has any flaws. But even though his analysis of MDL judges’ IP to compensate lead attorneys is vastly better than any other judicial treatment, it left an important matter unexplored. Judge Chhabria accepted uncritically the belief that MDL judges have IP to appoint

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\(^{380}\) Pretrial Order No. 236: Order Granting in Part and Denying in Part Motion to Establish a Holdback Percentage at 27, In re Roundup Prods. Liab. Litig., No. 16-md-02741 (N.D. Calif. June 21, 2021) [hereafter Chhabria Order].

\(^{381}\) Id.

\(^{382}\) Id. at 29.

\(^{383}\) See Silver & Miller, supra note 16.

\(^{384}\) Chhabria Order, supra note 379, at 32.

\(^{385}\) Id. at 33.
lead attorneys, even though the practice rests on a gross misreading of *MacAlisier v. Guterma*, as shown in Part II.C.3.

He also erred by agreeing that the IP to appoint lead attorneys implies the power to pay them. A typical statement of this idea appears in the opinion awarding common benefit fees in *In re Chinese-Manufactured Drywall Prod. Liab. Litig.*

> [T]he Court [] finds authority to assess common benefit attorney fees in its inherent managerial authority . . . The Fifth Circuit has long recognized that a court’s power to consolidate and manage litigation necessarily implies a corollary authority to appoint lead or liaison counsel and to compensate them for their work. . . .

Descriptively, this statement is correct. In *In re Air Crash Disaster at Florida Everglades*, the Fifth Circuit did state that a district court’s power to appoint lead attorneys would be “illusory if it [depended] upon lead counsel’s performing the duties desired of them for no additional compensation.” The problem is that the Fifth Circuit was wrong.

It is plain that a court’s need for managerial assistance does not logically entail a power to compensate attorneys who provide it. Judges could fill plaintiffs’ steering committees with lawyers who agree to serve as volunteers. In *Florida Everglades*, the Fifth Circuit recognized this possibility but dismissed it on the policy ground that claimants could have no assurance that uncompensated lawyers would perform well. One problem with this assertion is that it focuses attention on adequacy of representation rather than judges’ ability to manage their proceedings. IPs exist to facilitate the latter, not to guarantee the former. Another problem is that state court judges have managed many large consolidations successfully without awarding common benefit fees. Their experience shows that the option of having lead attorneys serve as volunteers is practical, not fanciful.

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386. *In re Chinese-Manufactured Drywall Prod. Liab. Litig.*, 424 F. Supp. 3d 456, 496 (E.D. La. 2020). The final sentence in this passage also supports our contention that lead attorneys are expected to use their powers for the benefit of all plaintiffs, not just those who are their signed clients.

387. *In re Air Crash Disaster at Fla. Everglades on Dec. 29, 1972*, 549 F.2d 1006, 1016 (5th Cir. 1977).


To illustrate, in California, which is often ravaged by fires, courts have created many Judicial Council Coordination Proceedings (JCCPs) to deal with the resulting multitudes of lawsuits. In many of these JCCPs, lead attorneys have served while receiving fees from their signed clients only. The JCCPs created in the aftermath of the 1993 Guejito Fire, the 2007 San Diego Fires, the 2013 Powerhouse Fire, the 2015 Butte Fire, the 2017 North Bay Fires, and the 2018 Woolsey Fire all operated this way.\textsuperscript{390} In New Mexico, the 2011 Las Conchas Fire Consolidated Litigation, which lasted six years and included a jury trial, was also managed without the payment of common benefit fees.\textsuperscript{391}

Texas judges also have extensive experience with MDLs. Following the enactment of legislation authorizing transfers of related cases, “Texas MDL has been used to consolidate thousands of cases into scores of MDL proceedings.”\textsuperscript{392} The subject matters covered include insurance coverage for losses inflicted by storms, opioid abuse, fraudulent marketing of vehicles with diesel engines, failures to pay royalties to owners of oil-bearing lands, wildfires, pipeline taxes, the Deepwater Horizon disaster, and many others.\textsuperscript{393}

Texas’s rules are highly detailed. They give judges\textsuperscript{394} authority to decide “all pretrial matters,” including “jurisdiction, joinder, venue, discovery, trial preparation (such as motions to strike expert witnesses, preadmission of exhibits, and motions in limine), mediation, and disposition by means other than conventional trial on the merits (such as default judgment, summary judgment, 

\textsuperscript{390} Email from Gerald Singleton, Singleton Law Firm, to Charles Silver (Oct. 21, 2020, 10:37 AM) (on file with the authors). One of us (Silver) provided an expert report in support of Mr. Singleton’s opposition to the entry of a common benefit order in the JCCP created to handle the Southern California Fire Cases. See Expert Report of Professors Andrew Kull and Charles Silver on Management of Attorneys’ Fees, Southern California Fire Cases, No. 4965 (Cal. Super. Ct. June 25, 2020).


\textsuperscript{392} D. Theodore Rave & Zachary D. Clopton, Texas MDL, 24 LEWIS & CLARK L. REV. 367, 368 (2020); see also Stephen G. Tipps, MDL Comes to Texas, 46 S. TEX. L. REV. 829 (2005).

\textsuperscript{393} For a list of Texas MDLs, see Available Multidistrict Litigation Cases, TEX. JUDICIAL BRANCH, https://www.txcourts.gov/about-texas-courts/multi-district-litigation-panel/available-multidistrict-litigation-cases/ (last visited Oct. 2, 2020).

\textsuperscript{394} These courts are referred to as “pretrial courts.” See Tex. R. of Jud. Admin. 13.2(e) (2019).
Uncorstitutional Assertion of Inherent Powers

and settlement).” They also spell out the MDL court’s managerial powers and duties. For example, they instruct judges to conduct hearings for the purpose of creating case management orders “at the earliest practical date” and advise them to address in their orders “all matters pertinent to the conduct of the litigation,” including dates for “settling the pleadings,” “scheduling preliminary motions,” “issuing protective orders,” and nine other topics. The rules even authorize MDL judges to set dates at which cases will be tried in transferor courts after being remanded.

Missing from the details, however, is any mention of common benefit fee awards. Judges are expressly authorized to “appoint[] organizing or liaison counsel” but are given no power to pay them. Because the practice of granting common benefit awards was well-established in both federal MDLs and federal and state class actions when Texas enacted its MDL rules, the failure to provide for them in Texas’s MDL statute is telling.

In keeping with the rules’ silence, Texas judges have run many MDLs without common benefit awards. The list includes: In re: Ford Motor Company 6.0L Diesel Engine Litigation; In re: Volkswagen Clean Diesel Litigation: Consumer Case; In re: Chrysler-Dodge-Jeep Ecodiesel Marketing, Sales Practices, and Products Liability Litigation; In re Farmers Insurance Company Wind/Hail Storm Litigation; In re State Farm Lloyds’ Hidalgo County Hail Litigation; In re Allstate Lloyd’s and Allstate Fire and Casualty Company Hidalgo County Hail Litigation; and many others. The lawyers

395. See id. at 13.6(b); see also id. at 13.8 (providing that orders entered by MDL judges are binding on trial courts after remand).
396. Id. at 13.6(c).
397. Id. at 13.6(d).
398. Id. at 13.6(c)(7).
402. Information on all Texas MDLs involving wind- or hail-related lawsuits listed in the text was provided by Gregory Cox of the Mostyn Law Firm, who held lead or liaison
with experience in Texas MDLs who helped us compile this list identified only one proceeding in which a fund to pay common benefit fees was created.403

Although not an MDL, the consolidated litigation arising in the aftermath of the October 2017 mass shooting in Las Vegas provides another example of lawyers’ ability to work together without court-mandated common fund awards. Three law firms represented most of the decedents, injured victims, and relatives with tort claims against MGM Grand, the company that owned the Mandalay Bay Hotel from which the victims were shot. The law firms formed a working committee and jointly won an $800 million settlement.404


There is, then, a substantial track record establishing that judges can manage large consolidations without paying lead attorneys extra. Consequently, the asserted IP to award common benefit fees cannot be essential to the exercise of judicial power. Even if judges have IP to appoint counsel with substantive responsibilities, which we deny, they exceed their powers by forcing other lawyers to pay lead attorneys anything, let alone tens or hundreds of millions of dollars.

Although lawyers’ willingness to serve as lead attorneys without additional compensation may seem surprising, it is easily explained. Lawyers who represent tens, hundreds, or thousands of signed clients, as the attorneys leading the Roundup MDL did when the proceeding commenced, have sizeable financial interests in the conduct of their cases. They may value control as a means of maximizing their clients’ recoveries and, relatedly, their fees. Lead attorneys’ cases tend to settle for higher values than those handled by non-lead lawyers, as Judge Chhabria observed.

Attorneys with large client inventories are also contractually obligated to make the sizeable financial outlays that litigation requires. They may, therefore, willingly serve as lead counsel without additional compensation because they will already have to (1) perform most of the required services, such as drafting complaints, responding to dismissal motions, and taking discovery; and (2) bear most of the required expenses, such as those associated with hiring experts and maintaining document repositories.

Service as lead counsel also confers other substantial benefits. These include prestige and reputational enhancement, increased case referrals, the ability to communicate directly with the court, the opportunity to plan the conduct of litigation, the psychological rewards that come with standing at the head of a group of mass tort lawyers, and control of settlement negotiations.

405. See Memorandum in Support of Motion to Approve Order Establishing a Common Benefit Fund to Compensate and Reimburse Attorneys for Costs and Expenses Incurred and Services Performed for MDL Administration and Common Benefit at 4, In re Roundup Prod. Liab. Litig., No. 3:16-md-02741 (N.D. Cal. Dec. 16, 2016) (reporting that “the MDL Leadership members represent the overwhelming majority of cases that will be subject to the proposed common benefit order”).

No one doubts that MDLs generate serious management problems. But these needs can be met, and have been met, without forced fee transfers. Therefore, the asserted IP to move money from non-lead lawyers to lead attorneys is not essential. It is, at most, a beneficial power. Consequently, federal judges can properly assert it only with Congress’s approval.

G. Federal Judges Lack Inherent Power to Reduce Non-Lead Lawyers’ Contingent Fees

MDL courts routinely force non-lead lawyers to pay lead attorneys by withholding dollars from the formers’ contingent fees. Sometimes, judges go even further and cap non-lead lawyers’ fees at percentages below those that are needed to free up the funds that common benefit fee awards require.\(^4^0^7\) In the Vioxx MDL, Judge Fallon capped all non-lead lawyers’ gross fees at 32 percent even if their contracts entitled them to more, and he required these lawyers to pay the lead attorneys’ common benefit fees out of this amount. “[T]he 32 percent cap on total charges implie[d] that the [non-lead lawyers would] net fees of 24 percent.”\(^4^0^8\)

When capping fees, MDL judges claim to be exercising IP to police the legal profession and ensure that lawyers comport themselves ethically. Consider what Judge Fallon wrote in the Vioxx MDL:

First, any court presiding over a mass tort proceeding possesses equitable authority to examine fee arrangements. The Federal Rules of Civil Procedure expressly grant this power to district courts in class actions. . . . While an MDL is distinct from a class action, the substantial similarities between the two warrant the

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\(^{407}\) For a discussion of this practice and a critique of judges’ reliance on ethics rules when capping fees, see Ratner, supra note 369. For a critique of courts’ characterization of MDLs as “quasi-class actions,” see Silver & Miller, supra note 16. Judges presiding over class actions have also claimed to derive the power to cap lawyers’ fees from the duty imposed by FRCP 23 to protect absent class members from being exploited. Order Setting Caps on Individual Attorneys’ Fees at 1–2. In re Oil Spill by the Oil Rig Deepwater Horizon in the Gulf of Mexico, on Apr. 20, 2010, No. 12-968, 2012 WL 2236737 (E.D. La. June 15, 2012). We disagree with this assertion, which involves the use of a procedural rule to alter lawyers’ substantive contractual rights in violation of the Rules Enabling Act, 28 U.S.C § 2072(b). We do not discuss this subject further because it falls outside of the scope of this project.

\(^{408}\) Silver & Miller, supra note 16, at 136. Professor Silver served as consulting counsel for lawyers involved in the Vioxx MDL, who objected to the manner in which the court regulated attorneys’ fees.
treatment of an MDL as a quasi-class action. ... Accordingly, this Court found that “the Vioxx global settlement may properly be analyzed as occurring in a quasi-class action, giving the Court equitable authority to review contingent fee contracts for reasonableness.” ... 

Second, the Court recognized that inherent authority, and a concomitant duty, exists to review contingent fee arrangements \textit{sua sponte}, especially where there is a built in conflict of interest. ... In the instant case, the Court recognized that the claimant’s attorneys were unlikely to question the propriety of their own fees, and the defendant had no incentive to jeopardize the settlement agreement by raising the issue. Accordingly, the Court found it necessary to exercise its inherent authority to protect the large number of elderly Vioxx claimants by capping contingent fee agreements. ...

Further, past MDL courts have deemed it appropriate to cap contingent fees even though no claimants had challenged the reasonableness of their agreement. \textit{In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.}, MDL No. 05-1708, 2008 WL 682174, at *18 (D. Minn. Mar. 7, 2008) (“[T]his Court has the inherent right and responsibility to supervise the members of its bar in both individual and mass tort actions, including the right to review contingency fee contracts for fairness.”); see also \textit{In re Zyprexa Prods. Liab. Litig.}, 424 F.Supp.2d 488, 492 (E.D.N.Y. 2006) (“A federal court may exercise its supervisory power to ensure that fees are in conformance with codes of ethics and professional responsibility even when a party has not challenged the validity of the fee contract.”).\footnote{409}

The kitchen-sink approach exemplified by this passage is characteristic of fee-related opinions issued in MDLs. Courts offer all justifications that might conceivably support their actions, presumably because they are uncertain that any of them is right.\footnote{410}

Skipping over the quasi-class action rationale, which we have already addressed, the arguments regarding the protection of elderly plaintiffs and the inherent power to ensure compliance with state bar rules remain. The first is a makeweight. Not all

plaintiffs with Vioxx-related claims were elderly, and none were declared incompetent. To the contrary, Judge Fallon assumed their competency by allowing them to sign binding settlement agreements. The fee cap was not limited to engagements involving elderly clients either. Judge Fallon imposed it across the board. Finally, he showed neither that older claimants agreed to pay higher fees than younger ones nor that the market for legal services in which elderly clients shopped for counsel was other than competitive.

The remaining argument—that federal courts possess IP to enforce state bar rules—violates the constitutional limitation on IPs. As explained in Part I, IPs exist to help federal judges fulfill the mandate to exercise the judicial function, which they do by adjudicating cases. Sometimes, the need to manage their dockets, maintain decorum, deal with abusive tactics, or address other problems requires them to take steps to keep lawyers in line. But in the absence of obstructive conduct, they need never concern themselves with attorneys’ contingent fees. Judge Fallon’s assessment of the ethicality of the fee agreements was slap-dash as well. He found neither that the fees were unreasonable when negotiated, that the lawyers exerted undue influence on Vioxx plaintiffs, nor that the contracts required the plaintiffs to pay more than the lawyers’ usual and customary rates. He simply thought that the fees were too high and reduced them to a level he liked.

If proof is needed that federal judges can decide cases and manage their dockets efficiently without tinkering with, much less slashing, lawyers’ contingent fees, one can again look to the state courts in Texas. They process large consolidations even though, according to knowledgeable attorneys, they have never imposed fee reductions and even though, according to Texas precedent, they lack the power to cut lawyers’ fees sua sponte. The asserted power can therefore only be beneficial, not indispensable, and can properly be exercised only when authorized by Congress. Because Congress has never given federal courts a roving commission to enforce state bar rules, the courts have no business asserting such a novel IP on their own initiative.

H. Federal Judges Lack Inherent Power to Review Settlements

The FRCP authorize courts to explore settlement possibilities when conferring with parties at pretrial meetings, and many judges do so routinely. Some have gone further and threatened, implicitly or explicitly, to punish parties or lawyers who refuse to settle on what to judges seem like reasonable terms.412 These strong-arm tactics have elicited criticism.

The need for judges to encourage settlements has never been clear. On the prevailing economic account of the litigation dynamic, the opportunity to conserve litigation costs should motivate parties who estimate trial outcomes similarly to resolve disputes by agreement. Judges might accelerate the process by sharing their thoughts about the central issues, but they should not have to intervene at all, much less do so muscularly or coercively.

The standard economic model has many limitations, one of which is that it does not describe the litigation dynamic in MDLs. With few exceptions, cases folded into MDLs cannot be tried because the statute empowers transferee courts to handle only pretrial proceedings. Until cases are remanded, which they rarely are, there is no expected trial result for the parties to predict, and the main source of leverage in settlement negotiations disappears. Plaintiffs are left with the ability to threaten defendants with enormous litigation costs, revelation of unflattering information, and interference with business operations. Defendants can return fire by threatening to delay trials indefinitely, demonstrating their willingness to bear costs, and forcing plaintiffs to bear costs of their own.413

Because there can be no day of reckoning in a transferee court, judges who preside over MDLs must work especially hard to convince parties to settle. Their main weapon is the threat to keep cases bottled up until both sides collapse. Judge William G. Young described this tactic in DeLaventura v. Columbia Acorn Tr.414 After observing that “the ‘settlement culture’ for which the federal courts

412. See supra notes 172, 183, 231–236 and accompanying text.
413. MDL courts can dismiss, and occasionally have dismissed, plaintiffs’ cases on pretrial motions, but they cannot grant plaintiffs victories. Being able to lose but not to win should affect plaintiffs’ leverage in settlement negotiations straightforwardly.
are so frequently criticized is nowhere more prevalent than in MDL practice,” he added that

it is almost a point of honor among transferee judges acting pursuant to Section 1407(a) that cases so transferred shall be settled rather than sent back to their home courts for trial. This, in turn, reinforces the unfortunate tendency to hang on to transferred cases to enhance the likelihood of settlement. Indeed, MDL practice actively encourages retention even of trial-ready cases in order to “encourage” settlement.415

Judge Young then explained how judges’ refusal to remand cases affects parties’ settlement leverage.

Some, believing that any settlement is preferable to any trial, may consider this [inability to try cases] a desirable outcome. In actuality, however, this marginalization of juror fact finding perversely and sharply skews the MDL bargaining process in favor of defendants. Consider: All litigants bargain in the shadow of trial. Those averse to the inevitable uncertainties of the direct democracy of the American jury will factor the risks of trial into their settlement postures. Failure to arrive at a mutually acceptable settlement should, and in most cases does, result in a trial. In MDL practice, however, it is solely the transferee judge who controls the risk of trial. The litigant who refuses to settle can never get back to his home court to go before a local jury unless the transferee judge agrees.

Once trial is no longer a realistic alternative, bargaining shifts in ways that inevitably favor the defense. After all, a major goal of nearly every defendant is to avoid a public jury trial of the plaintiff’s claims. Fact finding is relegated to a subsidiary role, and bargaining focuses instead on ability to pay, the economic consequences of the litigation, and the terms of the minimum payout necessary to extinguish the plaintiff’s claims. Commentators generally agree that MDL practice favors the defense.416

Judge Young’s criticism has (at least) two important implications. One is that there is little reason to expect settlements struck in MDLs to reflect the legal and factual merits of claims. The other is that the settlement culture that pervades the MDL world has corrupted federal judges’ understanding of their role.

415. Id.
416. Id. at 152–55.
Instead of being adjudicators first and settlement-nudgers second, MDL judges let the desire to resolve cases en masse determine their approach to adjudication.\textsuperscript{417}

In view of the point just made, the recommendation endorsed by many scholars that MDL judges involve themselves even more deeply in the settlement process can only seem odd. Typically, commentators want judges to review the adequacy of settlements, the belief being that informed assessments will promote corrective justice,\textsuperscript{418} protect vulnerable plaintiffs,\textsuperscript{419} or produce information of value to regulators.\textsuperscript{420} But given the extent to which MDL courts participate in the settlement process already, it seems unlikely that judicial review would have much value.

Whatever their merit, calls for judicial policing of settlements assume that judges have IP to provide this service, which neither the FRCP nor the MDL statute confer.\textsuperscript{421} This assumption has not been tested against the relevant jurisprudence. Neither writers who endorse judicial review of settlements nor judges who perform these assessments have shown that the required IP exists.

\begin{footnotesize}
\begin{enumerate}
\item Linda S. Mullenix, \textit{Designing a Compensatory Fund: In Search of First Principles}, 3 STAN. J. COMPLEX LITIG. 1, 5 (2015). Professor Mullenix also raises the possibility that extensive power to oversee non-class settlements can be derived from the All Writs Act. Mullenix, \textit{Policing MDL Non-Class Settlements}, supra note 324, at 129.
\item Bradt & Rave, \textit{The Information-Forcing Role}, supra note 341, at 1306–07.
\item Mullenix, \textit{Policing MDL Non-Class Settlements}, supra note 324, at 162 (“Judge Weinstein could just have easily decided to intervene in the Zyprexa fee arrangements by invoking his inherent powers, without having to create the quasi-class action to do so.”).
\end{enumerate}
\end{footnotesize}
It also seems unlikely that courts have this power. Both the FRCP and several federal statutes require judges to review settlements in identified contexts. The FRCP mandate judicial approval of settlements in class actions, derivative suits, and cases involving receivers. Statutes require review, for example, in antitrust cases brought by the U.S. government. If federal courts have IP to assess all settlements, these specific empowering rules and statutes are superfluous. Judges also allow the vast majority of settlements to proceed without their approval. If the review power were an IP, they would have to employ it far more often.

The difficulty of deriving a general review IP from first principles is obvious too. IPs exist to help federal courts exercise their judicial power. But if there is one thing that duty does not require, it is review of settlements, which eliminate the need for adjudication and remove cases from judges’ dockets. Courts can enter orders dismissing cases without saying a word about the reasonableness of settlements, their desirability, or anything else having to do with them.

Professor Howard Erichson, who knows as much about aggregate settlements and their shortcomings as anyone in the field, framed the question precisely. Using the 9/11 responders’ litigation as an example, he noted that the presiding judge, Alvin Hellerstein, rejected a proposed settlement with an estimated value of $575 million to $657.5 million. Had Hellerstein not done so, the settlement would have resolved thousands of cases. In fact, it resolved none. Judge Hellerstein’s rejection forced the parties to resume bargaining. They eventually proposed a richer settlement, which Judge Hellerstein approved.

After reviewing these facts, Erichson writes:

To many observers, there may be something quite appealing about the court’s intervention. . . . What I wonder is where the judge got the power to “approve” or “reject” the settlement. I understand, of course, why a judge might wish he had that power. Overseeing a case gives a judge a strong investment in the outcome as well as a sense of what outcome might be just. But settlement is not adjudication. A settlement is a contract in which a claimant agrees to release a claim in exchange for something offered by the defendant. There are special circumstances that

422. FED. R. CIV. P. 23(e) (class actions), 23.1 (derivative suits), and 66 (receiverships).
require judicial approval of negotiated resolutions; these circumstances turn settlements into something akin to adjudication. But the September 11 clean-up litigation deal was not a class action settlement. It was not a consent judgment in which the parties sought the court’s ongoing supervision. It was not a settlement by minors or others legally incompetent to make their own decisions. Nor was it a shareholder derivative action or an action in which a receiver had been appointed. Rather, it was a settlement of individual claims, albeit in the context of a complex mass dispute.424

Erichson then examined the arguments pro and con and concluded that “[u]nlike the judge overseeing a class action, . . . the judge overseeing non-class litigation has no general power to accept or reject a settlement. . . . [This] decision belonged to the litigants.”425

The 9/11 responders’ litigation was a consolidation mandated by Congress, not an MDL. The difference is immaterial. In a co-authored article published after the settlement, Judge Hellerstein recognized that the “underlying problems” in the responders’ litigation and MDLs “are similar.”426 Moreover, the question at hand is whether federal judges have IP to review settlements. If they do, they can invoke it in all proceedings.

When defending his actions, Judge Hellerstein recognized that the FRCP provided no basis for them.427 Instead, he claimed to have “possessed inherent judicial authority to review the settlement and, if necessary in the interests of fairness, to reject it.”428 But the section of his article that “discusses [his] authority to reject the settlement” ignores IP doctrine completely.429 Instead, the crucial paragraph reads as follows:

Judge Hellerstein [] had recourse to only two federal rules [Rules 23 and 41], neither of which he could apply sensibly to the litigation. Given this vacuum, he struck a balance. He approved

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425. Id. at 1025–26.
427. Id. at 168 (“This was not a class action in which Rule 23 of the Federal Rules of Civil Procedure gives trial judges authority to pass on the fairness of a settlement.”); see also id. (acknowledging that no power to review the settlement was conferred by FRCP 41).
428. Id. at 157–58.
429. Id. at 159.
the essential structure of an elaborate settlement agreement but set aside those portions that he believed were manifestly unfair to plaintiffs. He certainly had sufficient factual grounds for his selective challenge to, and revision of, some aspects of the agreement. . . Judge Hellerstein was privy to information about the litigation that gave him a unique perspective. Having played a managerial role in bringing about the settlement discussions, he was invested to see that the process leading to settlement was fair. In this regard, he had reason to believe that it might not have been—that the plaintiffs’ lawyers were not sufficiently pressured to obtain the best deal for their clients.430

Apparently, the argument is that Judge Hellerstein possessed IP to review the settlement because he helped bring about the negotiations, invested a great deal of time and effort in the litigation, and was well versed in the facts.

It is obvious that Judge Hellerstein exercised a beneficial power, not an essential one. He felt a pressing need to assess the adequacy of the two proposals and indulged it. He did not even attempt to show that without the power, he would have been unable to manage his docket. The fact is that reviewing the proposals made his job harder. The decision to reject the first settlement kept alive thousands of cases that would otherwise have been voluntarily dismissed. And both assessments occupied swaths of his time that could have been used to adjudicate other matters. The possibility that the responders’ attorneys “were not sufficiently pressured to obtain the best deal” changes nothing, even if true. Congress has not given federal courts a general license to evaluate lawyers’ performance, and IP to do so can exist only when the quality of representation is so poor that a judgment may not be binding. When he rejected the first proposed settlement of the 9/11 responders’ litigation, Judge Hellerstein made no such contention.

Like so many other IPs claimed by MDL judges, then, the power to review settlements has no valid legal basis. It is yet another example of unchecked judicial overreach.

I. Recommendations to Limit Abuses of Inherent Powers in MDLs

Since the Court has allowed federal judges to use IPs willy-nilly in MDLs, it should take the lead in curbing the improper and
unlawful invocation of such powers. Unfortunately, because one of the main abuses by MDL judges is coercing settlements rather than remanding cases back to their original courts for trial, opportunities to appeal final judgments arise infrequently. The Court should therefore be receptive to either hearing such rare appeals or granting writs of mandamus that challenge MDL procedures. If the Court fails to do so, or if Congress at any time chooses to exercise its Article I powers, Congress should amend the MDL statute to provide that MDL courts cannot invoke their IPs to (1) independently appoint lead attorneys; (2) deprive plaintiffs of representation by their chosen counsel; or (3) force these retained lawyers to pay lead attorneys’ fees.

CONCLUSION

The Supreme Court has lost sight of the fundamental principle that the Constitution permits the use of IPs only when indispensably necessary to the proper exercise of “judicial power.” Instead, the Court has allowed federal judges to invoke “inherent powers” as a catch-all phrase to justify any actions they wish to take—whether strictly necessary, merely beneficial, or even contrary to federal statutes, procedural rules, or the Constitution.

This excessive resort to IPs has had pernicious effects. In MDLs, it has enabled judges to assume near-dictatorial control and to deprive parties and their chosen counsel of substantive and procedural legal rights, including rights guaranteed by the Due Process Clause. The Court or Congress must rein in MDL judges.