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EXPRESSLY REPUDIATING IMPLIED REPEALS ANALYSIS: A NEW FRAMEWORK FOR RESOLVING CONFLICTS BETWEEN CONGRESSIONAL STATUTES AND FEDERAL RULES

*Bernadette Bollas Genetin**

INTRODUCTION

Congress and the Supreme Court are engaged in an ongoing debate over which branch should control the promulgation of federal procedural rules. As has been well catalogued,[1] for nearly forty years after the Supreme Court's 1938 promulgation of the Federal Rules of Civil Procedure ("Fed. R. Civ. P."), Congress deferred to Supreme Court promulgation of federal procedural rules ("Federal Rules" or "Rules"),[2] almost never vetoing proposed Federal Rules of the Court or proposing rules of its own. In the 1970s, however, Congress began to revitalize its rulemaking prerogative.[3] This initiated a new era of serious scholarly attention to the twin questions of which branch has the authority to promulgate the Federal Rules and which branch is better equipped to handle the task.[4]

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[1] *See, e.g.*, Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1018-20 (1982); Charles Gardner Geyh, *Paradise Lost, Paradigm Found: Redefining the Judiciary's Imperiled Role in Congress*, 71 N.Y.U. L. REV. 1165, 1169, 1186 (1996).

[2] The term "Federal Rules" or "Rules" refers to procedural rules promulgated by the Supreme Court pursuant to the Rules Enabling Act process. *See* 28 U.S.C. §§ 2072-2074 (1994).

[3] Geyh, *supra* note 1, at 1169.

[4] *See, e.g.*, Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887, 888-89 (1999); Burbank, *supra* note 1, at 1119-26; Paul D. Carrington, *"Substance" and "Procedure" in the Rules Enabling Act*, 1989 DUKE L.J. 281, 299-302 (1989); Linda S. Mullenix, *Hope over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795 *passim* (1991) (*"Hope over Experience"*); Linda S. Mullenix, *Unconstitutional Rulemaking: The Civil Justice Reform Act and Separation of Powers*, 77 MINN. L. REV. 1283 *passim* (1993) (*"Unconstitutional Rulemaking"*); Martin H. Redish, *Federal Judicial Independence:*

As Congress has become increasingly vocal in the rulemaking dialogue, the opportunity for conflict between the Supreme Court's procedural Rules and Congress' statutes has expanded. This increased potential for interbranch conflict can occur in contexts in which the clash of power between the coordinate branches is clear. For example, the clash of power was clear in *Marek v. Chesny*.[5] In *Marek*, the Supreme Court held that Fed. R. Civ. P. 68,[6] which limited "costs" that a plaintiff could recover after rejecting a settlement offer, could be "harmonized" with 42 U.S.C. § 1988[7] in a way that arguably nullified Congress' decision that prevailing civil rights plaintiffs should ordinarily receive attorneys' fees as part of "costs."[8] Just as often, however, the collision of coordinate branch power is played out in fairly mundane contexts that mask any underlying conflict of power. An example is the apparent clash between Federal Rule of Appellate Procedure ("Fed. R. App. P.") 24(a),[9] which permits appellate review of a district court's decision that an appeal in forma pauperis is not taken in good faith, and § 1915(a)(3) of the Prison Litigation Reform Act ("PLRA"),[10] which seems to negate that right of appellate review.[11] In other instances, the clash of statute and rule can occur in

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Constitutional and Political Perspectives, 46 MERCER L. REV. 697, 712-729 (1995); Lauren Robel, *Fractured Procedure: The Civil Justice Reform Act of 1990*, 46 STAN. L. REV. 1447, 1464-1483 (1994); Carl Tobias, *Civil Justice Reform Sunset*, 1998 U. ILL. L. REV. 547, 609-10, 616-18 (1998).

[5] 473 U.S. 1 (1985).

[6] FED. R. CIV. P. 68.

[7] 42 U.S.C. § 1988 (1994 & Supp. IV 1998). Section 1988 was enacted as part of the Civil Rights Attorneys' Fees Awards Act of 1976.

[8] *See, e.g.*, Chesny v. Marek, 720 F.2d 474, 479-80 (7th Cir. 1983) (Posner, J.) (holding that if "costs" in Fed. R. Civ. P. 68 were construed to include attorney fees, Rule 68 would intrude impermissibly on Congress' policy choices in § 1988), *rev'd*, 473 U.S. 1 (1985); *see also* Paul D. Carrington & Derek P. Apanovitch, *The Constitutional Limits of Judicial Rulemaking: The Illegitimacy of Mass-Tort Settlements Negotiated Under Federal Rule 23*, 39 ARIZ. L. REV. 461, 482-93 (1997) (concluding that interpreting Fed. R. Civ. P. 68 to include attorney fees would allow Rule 68 to abridge substantive rights, but acknowledging that the *Marek* Court based its decision in part on § 1988); Note, *The Conflict Between Rule 68 and the Civil Rights Attorneys' Fees Statute: Reinterpreting the Rules Enabling Act*, 98 HARV. L. REV. 828, 828-29 (1985). *But see* 13 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 68.08[4][c], at 68-47 to 68-48 (Daniel R. Coquillette et al. eds., 3d ed. 2001) ("MOORE'S FEDERAL PRACTICE"); Steven B. Burbank, *Proposals To Amend Rule 68—Time To Abandon Ship*, 19 U. MICH. J.L. REFORM 425, 438 n.69 (1986) (concluding that the *Marek* Court was probably right in stating that "costs" under Rule 68 includes attorney fees when the relevant statute provides for attorney fees, but noting that because § 1988 is discretionary while Rule 68 is mandatory, § 1988 should control when Rule 68 would deny post-offer attorney fees and § 1988 would permit them).

[9] FED. R. APP. P. 24(a), 109 F.R.D. 179 (1986) (amended 1998).

[10] 28 U.S.C. § 1915(a)(3) (Supp. IV 1998).

[11] *See, e.g.*, Callihan v. Schneider, 178 F.3d 800 (6th Cir. 1999) (holding that Fed. R. App. P. 24(a)(5), as modified by the Supreme Court in 1998, conflicts with denial of appellate review in 28 U.S.C. § 1915(a)(3) and, hence, supersedes § 1915(a)(3)); Floyd v. United States Postal Serv., 105 F.3d 274, 277-78 (6th Cir. 1997) (holding that § 1915(a) of the PLRA conflicts with the grant of appellate review in Fed. R. App. P. 24(a)

a context in which the conflict does not create a clash of power between the Court and Congress, such as when Congress enacted both Fed. R. Civ. P. 4(j)[12] and 46 U.S.C. app. § 742 of the Suits in Admiralty Act,[13] which created conflicting requirements for service of process.[14]

For the first time since promulgation of the Federal Rules in 1938, federal courts are consistently facing issues of allocation of procedural rulemaking authority not only in the context of whether the Supreme Court had authority to promulgate a particular Rule in the first instance,[15] but also in the context of whether and when a procedural Rule of the Court should yield to an enactment of Congress. These instances of conflicting congressional statutes and Court Rules are likely to continue as Congress increasingly determines to try its hand at developing procedural rules as well as to make substantive impact by tinkering with procedure.[16]

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and, hence, supersedes Fed. R. App. P. 24(a)(3)), *superseded by Rule as stated in Callihan*, 178 F.3d 800. *But see* Baugh v. Taylor, 117 F.3d 197, 200-02 (5th Cir. 1997) (when read in light of historical context, § 1915(a)(3) and Fed. R. Civ. P. 24(a) do not conflict). *Accord* Newlin v. Helman, 123 F.3d 429, 432 (7th Cir. 1997), *overruled on other grounds by* Lee v. Clinton, 209 F.3d 1025, 1026 (7th Cir. 2000); Wooten v. D.C. Metro. Police Dep't, 129 F.3d 206, 207 (D.C. Cir. 1997).

[12] FED. R. CIV. P. 4(j), Pub. L. 97-462, 96 Stat. 2527 (1983), *amended by* 146 F.R.D. 401, 405-19 (1993).

[13] 46 U.S.C. app. § 742 (1994), *amended by* 46 U.S.C. app. § 742 (Supp. IV 1998).

[14] *See, e.g.*, Henderson v. United States, 517 U.S. 654 (1996) (noting that Congress enacted both Fed. R. Civ. P. 4(j) and 46 U.S.C. app. § 742 of the Suits in Admiralty Act, but still examining, under a Rules Enabling Act analysis, whether Fed. R. Civ. P. 4(j) had a substantive effect and, hence, could not supersede § 742); *see also* United States v. Holmberg, 19 F.3d 1062, 1064-65 (5th Cir. 1994), *abrogated, Henderson*, 517 U.S. 654; Libby v. United States, 840 F.2d 818, 819-21 (11th Cir. 1988), *abrogated, Henderson*, 517 U.S. 654; Jones & Laughlin Steel, Inc. v. Mon River Towing, Inc., 772 F.2d 62, 66 (3d Cir. 1985).

[15] *See, e.g.*, Hanna v. Plumer, 380 U.S. 460, 472-73 (1965); Miss. Publ'g Corp. v. Murphree, 326 U.S. 438, 443-46 (1946); Sibbach v. Wilson & Co., 312 U.S. 1 (1941); *see also* Carrington & Apanovitch, *supra* note 8, at 462-74; Leslie M. Kelleher, *Amenability to Jurisdiction as a Substantive Right: The Invalidity of Rule 4(k) Under the Rules Enabling Act*, 75 IND. L.J. 1191 (2000); Linda S. Mullenix, *Judicial Power and the Rules Enabling Act*, 46 MERCER L. REV. 733, 734-35 (1995); Ralph U. Whitten, *Separation of Powers Restrictions on Judicial Rulemaking: A Case Study of Federal Rule 4*, 40 ME. L. REV. 41, 73-115 (1988).

[16] *See, e.g.*, Paul D. Carrington, *A New Confederacy? Disunionism in the Federal Courts*, 45 DUKE L.J. 929, 958-59 (1996) (noting that the dissatisfaction of tort defendants may have been behind the claims of cost and delay that spurred the Civil Justice Reform Act of 1990, "[b]ut few, if any, politicians were ready to discuss tort reform in 1990 or 1992, and so the less threatening subject of civil procedure served as a surrogate"); Patrick E. Longan, *Congress, the Courts, and the Long Range Plan*, 46 AM. U. L. REV. 625, 652 (1997) (contending that the concerns underlying Congress' procedural alterations in the Prison Litigation Reform Act were substantive, not procedural); Jeffrey A. Parness et al., *The Substantive Elements in New Special Pleading Laws*, 78 NEB. L. REV. 412, 413, 438-43 (1999) (noting that both Congress and state legislators have included substantive elements in pleading standards and that such elements will require decisionmakers to assess the substantive-procedural dichotomy in at least two contexts—separation of powers and choice of law); *see also* Jack B. Weinstein, *Procedural Reform as a Surrogate for Substantive Law Revision*, 59 BROOK. L. REV. 827, 829, 836-38 (1993) (suggesting that changes to substantive law that

Whatever the source of the conflict between statute and Rule—whether an overt clash of interbranch power, a covert clash of power, or a clash of statute and rule both enacted by Congress—the courts are searching for a method of analyzing the conflict. In these instances, courts increasingly have borrowed the analysis of the canon of statutory interpretation disfavoring implied repeals. Sometimes courts have used this analysis based on a determination that the so-called "supersession" or "abrogation" clause of the Rules Enabling Act[17] requires use of the implied repeals framework.[18] Sometimes courts have relied on analogy to the method of resolving conflicting congressional statutes to support use of the implied repeals framework.[19] The courts have sometimes, but not always, also noted that the Rules Enabling Act requires an important modification to this canon: Rules promulgated by the Supreme Court may not "abridge, enlarge or modify any substantive right."[20] Further, courts have virtually uniformly failed to consider other aspects of the differing scope of the Court's and Congress' procedural rulemaking power when resolving conflicting statutes and Rules.[21]

The implied repeals analysis that has become the centerpiece of the courts' analysis of conflicting statutes and Rules, however, was developed in a context in which there was no conflict of interbranch power, but simply a need to choose between two apparently conflicting statutes enacted by the same lawgiver at different times. In that instance, the relatively mechanical

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discourage civil litigation are being made in the name of procedural changes, thus obscuring discussion of the substantive changes).

[17] The supersession or abrogation clause of the Rules Enabling Act currently provides as follows: "All laws in conflict with [Supreme Court Rules] shall be of no further force or effect after such rules have taken effect." 28 U.S.C. § 2072(b) (1994).

[18] *See infra* note 121 and accompanying text.

[19] *See infra* note 122 and accompanying text.

[20] 28 U.S.C. § 2072(b) (1994); *see also infra* note 224 and accompanying text.

[21] *See* Burbank, *supra* note 1, at 1113-16, 1119 (noting that an historical review of the period preceding the enactment of the Rules Enabling Act reveals that the drafters were not, in allocating rulemaking power between the Court and Congress, primarily concerned with imposing constitutional limitations and were, in fact, "unwilling to remit [allocation] standards to changing constitutional interpretation"); Whitten, *supra* note 15, at 76 ("The legislative history of the Rules Enabling Act indicates that the purpose of the substantive rights limitation may have been partly to restate constitutional separation of powers restrictions on Supreme Court rulemaking although this point is far from clear.") (citing Burbank, *supra* note 1, at 1114-21). Other relevant issues regarding rulemaking authority include whether the Court Rule intrudes on an area committed to exclusive congressional regulation; whether Congress has withdrawn the Court's delegated rulemaking authority in a particular area; whether Congress has exceeded its rulemaking authority by impermissibly impeding the courts' ability to decide cases effectively or by impermissibly altering a constitutional requirement; and whether the statute and rule were both enacted by Congress, thus rendering the conflict of power issue irrelevant. *See infra* notes 297-335 and accompanying text.

reasoning of the implied repeals canon may be appropriate: Is there an irreconcilable conflict between the statutes? If so, the later in time controls to the extent of the actual conflict. If not, the two statutes should be harmonized absent a clear expression of congressional intent to the contrary.[22] This relatively perfunctory "later-in-time" analysis is inadequate to address the core issues of allocation of power that arise in instances of statute-Rule conflict.

Indeed, review of the cases applying the canon disfavoring implied repeals to statute-Rule conflicts raises serious questions about the appropriateness of borrowing the unmodified framework of implied repeals. The presumptions of the implied repeal canon, established to resolve conflicts between statutes of the same lawmaker, do not provide a good proxy for direct resolution of the questions regarding allocation of power that may be implicated when procedural provisions of Congress and the Supreme Court clash. Use of the canon may, moreover, obscure or encourage courts to subordinate the issues of conflict of power. Use of the canon, therefore, contributes to the following negative effects: increased tension between the courts and Congress;[23] development of an internally inconsistent body of cases;[24] the Supreme Court's limiting of its own Rules so that courts do not incorrectly supersede congressional statutes;[25] claims that the Court has exceeded the scope of its

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[22] *See, e.g.*, Radzanower v. Touche Ross & Co., 426 U.S. 148, 154 (1976) (quoting United States v. United Cont'l Tuna Corp., 425 U.S. 164, 168 (1976)); Morton v. Mancari, 417 U.S. 535, 549-50 (1974) (citing Posados v. Nat'l City Bank, 296 U.S. 497, 503 (1936)); *see also infra notes* 128-32 and accompanying text.

[23] *See, e.g.*, Bone, *supra* note 4, at 890, 906 n.106; Carrington, *supra* note 16, at 994; Geyh, *supra* note 1, at 1207-08; Todd D. Peterson, *Controlling the Federal Courts Through the Appropriations Process*, 1998 WIS. L. REV. 993; Jeffrey W. Stempel, *New Paradigm, Normal Science, or Crumbling Construct? Trends in Adjudicatory Procedure and Litigation Reform*, 59 BROOK. L. REV. 659, 685-86 (1993).

[24] *See infra* Part II.

[25] The Sixth Circuit's decision in *Callihan v. Schneider*, 178 F.3d 800 (6th Cir. 1999), seems to be a case in which the Supreme Court probably did not intend, by making stylistic changes to Fed. R. App. P. 24(a)(5) in 1998, to create a conflict between Fed. R. App. P. 24(a)(5) and 28 U.S.C. § 1915(a)(3) of the PLRA, much less to supersede § 1915(a)(3) of the PLRA. *See infra* notes 213-23 and accompanying text. Indeed, the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States is currently considering proposed amendments to Fed. R. App. P. 24(a)(2) and (a)(3) that would explicitly state, because of apparent conflicts between the PLRA and Fed. R. App. P. 24(a), that these portions of the appellate rules apply "unless the law requires otherwise." *See Memorandum from Judge Will Garwood, Chair, Advisory Committee on Appellate Rules, to Judge Anthony J. Scirica, Chair, Standing Committee on Rules of Practice and Procedure*, 195 F.R.D. 103, 129-32 (2000). This would effectively remove the supersession feature of the Rules Enabling Act with respect to Fed. R. App. P. 24(a)(2) and (a)(3). The proposed Advisory Committee Note explains that these changes are proposed because "future legislation regarding prisoner litigation is likely[; thus], the Committee has not attempted to incorporate into Rule 24 all of the requirements of the current version of 28 U.S.C. § 1915. Rather, the Committee has amended Rule 24(a)(2) [and 24(a)(3)] to clarify that the rule is not meant to conflict with anything required by the PLRA or any other law." *Id.* at 132.

rulemaking authority;[26] and increased need to resolve core issues of power as Congress enacts additional procedural provisions.

This Article, therefore, examines the manner in which apparently conflicting statutes and Rules have been analyzed; illustrates the confusion and conflicting results in cases relying primarily on canons of statutory construction to resolve statute-Rule conflicts; and attributes the failures in analysis to the failure to acknowledge the primary role of rulemaking authority and exercise of that authority. The Article then proposes a method of analyzing apparently conflicting statutes and Rules that accords primacy to allocation and exercise of interbranch power and recognizes that priority in time is a secondary issue when statutes and Federal Rules conflict.

Part I of this Article provides a framework for understanding the core issues of interbranch power implicated in statute-Rule conflicts by discussing the constitutional foundations of procedural rulemaking authority, Congress' statutory delegation of rulemaking authority to the Supreme Court in the Rules Enabling Act, and the experience of Court and congressional involvement in procedural rulemaking.

Part II examines the predominant method of analyzing apparent statute-Rule conflicts—use of the canon of statutory interpretation disfavoring implied repeals. Part II demonstrates that the Supreme Court has used this implied repeals analysis, but has never discussed directly or comprehensively the appropriate methodology for resolving statute-Rule conflicts. Part II also emphasizes how use of an unmodified implied repeals nanlysis fails to address paramount issues of power and also encourages courts to ignore, omit, or subordinate such issues.

Part III proposes an alternative framework for resolving conflicts between statutes enacted by Congress and Federal Rules promulgated by the Supreme Court pursuant to the Rules Enabling Act process taht accords primacy to the allocation of rulemaking power between the Court and Congress. This proposed method of analysis is referred to as the "rulemaking authority" framework to distinguish it from the implied repeals framework that accords primacy to principles of statutory interpretation.

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[26] *See, e.g.*, Marek v. Chesny, 473 U.S. 1, 35-38 (1985) (Brennan, J., dissenting).

I. SHARED PROCEDURAL RULEMAKING AUTHORITY OF CONGRESS AND THE SUPREME COURT

A. Constitutional Authority To Promulgate Procedural Rules

The Supreme Court has long recognized that its authority to promulate Federal Rules is primarily a delegated authority that derives from Congress' delegation to the Court of procedural rulemaking authority.[27] Indeed, the Supreme Court consistently has stated that Congress has the authority under Article I and III of the U.S. Constitution to enact procedural rules for the federal courts.[28] Article I authorizes Congress to "constitute Tribunals inferior to the Supreme Court"[29] and also permits Congress to enact all laws necessary and proper to execute the powers vested in it by the Constitution.[30] Article III also grants Congress the power to create courts inferior to the Supreme Court.[31]

At the same time, the Supreme Court has long recognized that Congress may delegate to the Court authority to promulgate procedural rules. As early as 1825, in *Wayman v. Southard*, the Court held that Congress had full authority to regulate procedure in the federal courts,[32] but that Congress had also permissibly delegated to the Court procedural rulemaking authority under the Judiciary Act of 1789.[33] Since 1825, courts routinely have recognized that Congress has the authority to delegate procedural rulemaking authority to the Supreme Court, that Congress has delegated that authority to the Supreme

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[27] *See, e.g.*, Hanna v. Plumer, 380 U.S. 460, 472-73 (1965); Sibbach v. Wilson & Co., 312 U.S. 1, 9-10 (1941) Bank of United States v. Halstead, 23 U.S. (10 Wheat.) 51, 53-55 (1825); Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 41-43 (1825); *see also* Peter G. McCabe, *Renewal of the Federal Rulemaking Process*, 44 AM. U. L. REV. 1655, 1658 (1995); Karen Nelson Moore, *The Supreme Court's Role in Interpreting the Federal Rules of Civil Procedure*, 44 HASTINGS L.J. 1039, 1045-46 (1993); Whitten, *supra* note 15, at 48-50.

[28] *See, e.g.*, Willy v. Coastal Corp., 503 U.S. 131, 136-37 (1992); *Hanna*, 380 U.S. at 472; *Sibbach*, 312 U.S. at 9-10; *Halstead*, 23 U.S. (10 Wheat.) at 53-65; *Wayman*, 23 U.S. (10 Wheat.) at 21-22; see Mistretta v. United States, 488 U.S. 361, 386-88 (1989); *see also generally* Moore, *supra* note 27, at 1045-46; Whitten, *supra* note 15, at 48-50.

[29] U.S. CONST. art. I, § 8, cl. 9.

[30] U.S. CONST. art. I, § 8, cl. 18.

[31] Article III vests the "judicial Power of the United States . . . in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1.

[32] *Wayman*, 23 U.S. (10 Wheat.) at 21-22.

[33] *Id.* at 42-45; *see also Sibbach*, 312 U.S. at 9-10 ("Congress has undoubted power to regulate the practice and procedure of federal courts, and may exercise that power by delegating to this or other federal courts authority to make rules not inconsistent with the statutes or Constitution of the United States . . . .").

Court, most recently pursuant to the Rules Enabling Act, and that Congress, by virtue of its delegation, retains the power to recall that delegation.[34]

This long history of Court deference to ultimate congressional authority in procedural rulemaking, however, has occurred against a backdrop in which the Court has rarely addressed in any detail the sources or limits of its own rulemaking power.[35] In accord with the Court's hesitance to delineate the boundaries of congressional and Court rulemaking authority is the 1995 Long Range Plan adopted by the Judicial Conference of the United States, which declined to recommend a strategy of confronting Congress with assertions of inherent authority in the struggle for control over or cooperation in federal procedural rulemaking.[36] This position also accords with the prevailing assumption of commentators that the courts should avoid confrontations that lead to intolerable conflict between the Court and Congress regarding procedural rulemaking authority. Modern commentators have championed this strategy, at least in part, to avoid further tension and confrontation between the Court and Congress. Earlier commentators proceeded under the assumption that both branches should and would "exhibit a decent amount of mutual respect and tolerance."[37]

The Supreme Court, nevertheless, also has recognized that Article III of the Constitution provides federal courts at least a measure of inherent authority in regulation of procedure through common law.[38] The Court has used this

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[34] *Wayman*, 23 U.S. (10 Wheat.) at 41-43; *see also* Mistretta v. United States, 488 U.S. 361, 386-88 (1989); *Sibbach*, 312 U.S. at 9-10; Callihan v. Schneider, 178 F.3d 800, 802 (6th Cir. 1999); Floyd v. United States Postal Serv., 105 F.3d 274, 277-78 (6th Cir. 1997), *superseded by Rule as stated in Callihan*, 178 F.3d 800; Jackson v. Stinnett, 102 F.3d 132, 135-36 (5th Cir. 1996).

[35] *See, e.g.*, Burbank, *supra* note 1, at 1021-22 & n.19, 1114-16; Carrington, *supra* note 16, at 967; Whitten, *supra* note 15, at 45, 52. At the same time that the Court has recognized ultimate congressional rulemaking authority, a small but respected group of scholars has persistently argued that the Court has power, apart from the authority delegated by Congress, to promulgate procedural rules as part of its inherent supervisory power over the courts. *See, e.g.*, Abraham Gertner, *Inherent Power of Courts To Make Rules*, 10 U. CIN. L. REV. 32, 34-36, 58-59 (1936); Mullenix, *supra* note 15, at 734; Mullenix, *Unconstitutional Rulemaking*, *supra* note 4, at 1297-98; John H. Wigmore, *All Legislative Rules for Judiciary Procedure Are Void Constitutionally*, 23 ILL. L. REV. 276, 277 (1928).

[36] Longan, *supra* note 16, at 652-56 (citing JUDICIAL CONFERENCE OF THE UNITED STATES, LONG RANGE PLAN FOR THE FEDERAL COURTS 2 (1995)).

[37] JACK B. WEINSTEIN, REFORM OF COURT RULE-MAKING PROCEDURES, 77-80 (1977) (citing Benjamin Kaplan & Warren J. Greene, *The Legislature's Relation to Judicial Rulemaking: An Appraisal of* Winberry v. Salisbury, 65 HARV. L. REV. 234, 247 (1951)); Silas A. Harris, *The Rule-Making Power*, 2 F.R.D. 67, 75-76 (1943).

[38] *See, e.g.*, Dickerson v. United States, 530 U.S. 428, 437 (2000); Chambers v. NASCO, Inc., 501 U.S. 32, 43, 46-49 (1991); Young v. United States *ex rel.* Vuitton et Fils S.A., 481 U.S. 787, 793 (1987); *see also* Kelleher, *supra* note 15, at 1197-98 & n.38; Robel, *supra* note 4, at 1474. Procedural rules created through

inherent power in two primary ways: to create through common law supervisory procedural and evidentiary rules primarily in criminal cases[39] and to protect core judicial functions from diminution.[40] Under the first type of inherent authority, the Court has noted that, because of its inherent supervisory authority over the federal courts, the Court may create rules of procedure and evidence to govern the lower federal courts.[41] Though defying precise definition, the second type of inherent authority is consonant with separation of powers, ensuring that neither Congress nor the Executive can diminish or nullify the judiciary's ability to decide cases effectively.[42] Based on these sources of authority, the Court has recently underscored that there are at least two constitutional limits on Congress' authority to enact rules to govern the federal courts: (1) a congressional standard cannot establish a constitutional standard or supersede a Rule that articulates a constitutional requirement;[43] and (2) a congressional provision cannot infringe on core judicial functions in a manner that diminishes the courts' ability to decide cases effectively.[44]

Thus, in the case of *Dickerson v. United States*,[45] in which the Court determined that Congress could not supersede the *Miranda* warnings, the Court emphasized that, if a procedural or evidentiary rule of the Court is required by

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inherent supervisory authority may be superseded by Congress, *see, e.g.*, *Dickerson*, 530 U.S. at 437 (Congress has power to set aside court-created procedural and evidentiary rules that are not constitutionally required); Palermo v. United States, 360 U.S. 343, 353 n.11 (1959), but the courts "'do not lightly assume that Congress has intended to depart from established principles' such as the scope of a court's inherent power." *Chambers*, 501 U.S. at 47 (quoting Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982) and citing Link v. Wabash R.R. Co., 370 U.S. 626, 631-32 (1962)).

[39] *See, e.g.*, *Dickerson*, 530 U.S. at 437 (citing Carlisle v. United States, 517 U.S. 416, 426 (1996) and Gordon v. United States, 344 U.S. 414, 418 (1953)); United States v. Hasting, 461 U.S. 499, 505 (1983); McNabb v. United States, 318 U.S. 332, 341 (1943); *see also* Hanna v. Plumer, 380 U.S. 460, 472-73 (1965). *See generally* Robel, *supra* note 4, at 1478.

[40] *See, e.g.*, *Chambers*, 501 U.S. at 43; *Vuitton et Fils S.A.*, 481 U.S. at 798; *Link*, 370 U.S. at 630-31; *Ex Parte* Burr, 23 U.S. (9 Wheat.) 529, 530-31 (1824); United States v. Hudson, 11 U.S. (7 Cranch) 32, 34 (1812). *See generally* Redish, *supra* note 4, at 725; Robel, *supra* note 4, at 1478.

[41] *See, e.g.*, *Dickerson*, 530 at 437 (citing *Carlisle*, 517 U.S. at 426).

[42] *See, e.g.*, Miller v. French, 530 U.S. 327, 349-50 (2000) (recognizing the possibility of congressional impairment of core judicial functions in a manner that threatens the independence of the judiciary, but concluding that the facts did not warrant a conclusion of such impairment); *Chambers*, 501 U.S. at 46-51; *Vuitton et Fils, S.A.*, 481 U.S. at 799; *In re* Snyder, 472 U.S. 634, 643 (1985); *Hanna*, 380 U.S. at 472-73; *Link*, 370 U.S. at 626-33; *Ex Parte* Burr, 23 U.S. (9 Wheat.) at 530-31; *Hudson*, 11 U.S. (7 Cranch) at 34; *see also* A. Leo Levin & Anthony G. Amsterdam, *Legislative Control over Judicial Rule-Making: A Problem in Constitutional Revision*, 107 U. PA. L. REV. 1, 29-33 (1958); Redish, *supra* note 4, at 725; Robel, *supra* note 4, at 1479.

[43] *See Dickerson*, 530 U.S. at 437.

[44] *French*, 530 U.S. at 349-50.

[45] 530 U.S. 428 (2000).

the Constitution, Congress has no power to supersede that rule.[46] The *Dickerson* Court described the *Miranda* warnings as a judicially created rule of admissibility that required that certain warnings be given to a suspect who is subjected to custodial interrogation before the suspect's statement may be admitted into evidence.[47] The requirements of the *Miranda* warnings conflicted with a congressional statute providing that the admissibility of a suspect's statement given during custodial interrogation was to be based on whether the statements were "voluntarily" given, as defined by statute.[48] Although the *Dickerson* case dealt with the Court's supervisory authority to create procedural rules of evidence and procedure, i.e., its ability to articulate procedural rules in the context of a case in which no federal statute or Federal Rule is on point, the constitutional limitation on Congress' ability to override a procedural Rule created by the Court under the authority delegated in the Rules Enabling Act would be the same: Congress may override procedural or evidentiary Rules promulgated by the Supreme Court that are of nonconstitutional dimension,[49] but it may not, in enacting procedural standards, attempt to articulate a constitutional standard or to override a Court Rule that articulates a constitutional requirement.[50]

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[46] *See id.* at 437 (citing City of Boerne v. Flores, 521 U.S. 507, 517-21 (1997)); *see* Neal Devins, *Asking the Right Questions: How the Courts Honored the Separation of Powers by Reconsidering* Miranda, 149 U. PA. L. REV. 251, 276 (2000) ("[B]y concluding that Congress could not overturn *Miranda*, the Court could speak of the binding nature of their constitutional decisions on other parts of the government. In this way, *Dickerson* allowed the Justices to protect their turf and, in so doing, facilitated the Rehnquist Court's efforts to expand the authority of the Court vis-à-vis Congress.").

[47] *Dickerson*, 530 U.S. at 435.

[48] *Id.* at 437. The statute at issue was 18 U.S.C. § 3501, which provided, in part, that "a confession . . . shall be admissible in evidence if it is voluntarily given." *Id.* at 435. The voluntariness of the statement was to be determined by the totality of the circumstances, including but not limited to the following factors: (1) time between arrest and arraignment of the confessing defendant; (2) whether the defendant knew, at the time of confession, the nature of the offense of which he was charged or suspected; (3) whether the defendant knew he did not have to make a statement and that any statement could be used against him or was so informed; (4) whether the defendant had been told of his right to counsel; (5) whether an attorney was present at the time of questioning or confession. *Id.* at 435-46.

[49] *Id.* at 437 (citing Palermo v. United States, 360 U.S. 343, 345-48; Carlisle v. United States, 517 U.S. 416, 426 (1996); Vance v. Terrazas, 444 U.S. 252, 265 (1980)); *see also French*, 530 U.S. at 349-50.

[50] *See, e.g.*, *Dickerson*, 530 U.S. at 437; *see* WEINSTEIN, *supra* note 37, at 78 ("Should the legislature's acts deny due process or impinge on other constitutionally protected policies, the courts reserve adjudicative powers to strike down the legislation.") Of course, the opportunities for a statute to override a Rule articulating a constitutional standard may be relatively few for reasons of both power and prudence. With respect to power, Professor Burbank noted in his article chronicling the origins of the Rules Enabling Act, that the Rules Enabling Act's pre-1934 history indicated that the substantive rights limitation was meant to preclude Court rulemaking regarding "constitutional interests that are procedural in the sense that they are implicated only in the context of litigation." Burbank, *supra* note 1, at 1169; *see also* Robert N. Clinton, *Rule 9 of the Federal Habeas Corpus Rules: A Case Study on the Need for Reform of the Rules Enabling Acts*, 63

The Court has also recently affirmed a second limitation on congressional rulemaking: Congress may not diminish a court's ability to decide cases effectively. In *Miller v. French*,[51] the Supreme Court reviewed a statute authorizing automatic termination of prospective relief entered by federal district courts in certain prison litigation actions to determine if, among other issues, the statute encroached impermissibly on core judicial functions in violation of separation of powers concerns because it imposed a deadline on judicial decisionmaking.[52] The PLRA,[53] which was at issue in *French*, provided, in part, that federal courts could not grant or approve prospective relief in actions challenging conditions at prison facilities unless the court determined that the relief was "narrowly drawn, extend[ed] no further than necessary to correct the violation of the Federal right, and [wa]s the least intrusive means necessary to correct the violation of the Federal right."[54] Importantly, this new standard also applied to prospective relief previously ordered by federal courts: a court would have between thirty and ninety days[55] to determine whether existing injunctions met the new standard. If the court failed to rule within this time period, the existing prospective relief would automatically terminate and would remain suspended until the court entered its ruling on the motion.

The Court dispatched in a fairly summary manner the claim that Congress' imposition of a time limit on judicial decisionmaking infringed on core judicial functions in violation of separation of powers. The Court stated that a time line for judicial decisionmaking does not, in itself, create a structural separation of powers concern since Congress may certainly impose time lines that give

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IOWA L. REV. 15, 45 (1977) (asserting that the Court cannot alter procedural Rules required by the Constitution through the rulemaking process). Noting that most choices of procedural Rules will touch in some way on due process concerns, Professor Burbank suggested that the constitutional interests considered "substantive" for Rules Enabling Act purposes could be limited to those expressly set out in the Constitution. Burbank, *supra* note 1, at 1170-71. With respect to prudence, except when a Rule would merely incorporate prior Court constitutional decisions, commentators have suggested that using the rulemaking process to articulate constitutional standards is not optimal because the Court generally has relatively little input into the rulemaking process, the rulemaking process is not aided by an adversarial proceeding that might sharpen the issues, and the Court might later find it difficult to consider impartially Rules that it had previously promulgated. *See, e.g.*, *Id.* at 1129 & n.515, 1169-71 (quoting WINIFRED BROWN, FEDERAL RULEMAKING: PROBLEMS AND POSSIBILITIES 105 (1981)); Clinton, *supra* at 45.

[51] 530 U.S. 327 (2000).

[52] *Id.* at 349-50.

[53] Pub. L. No. 104-134, 110 Stat. 1321-66 (codified as amended in scattered sections of 18 U.S.C., 28 U.S.C., and 42 U.S.C.).

[54] 18 U.S.C. § 3626(a)(1)(A) (Supp. IV 1998).

[55] An initial time frame of thirty days was extendable to a maximum of ninety days on a showing of "good cause." *French*, 530 U.S. at 331.

ample time for decisionmaking.[56] The Court held that it is possible for Congress to encroach impermissibly on the judicial function by creating a time limit that is too short, but that the *French* case did not, as a factual matter, present such an intrusion.[57] Thus, in the context of a conflict between a congressional statute and the Court's traditional equitable powers, the *French* case acknowledged a second boundary on congressional rulemaking: statutes enacted by Congress may not intrude on core functions of Article III courts in such a way as to render ineffective the courts' ability to decide cases.

B. Congressional Delegation of Rulemaking Authority Under the Rules Enabling Act

In 1934, after more than two decades of debate, Congress enacted the Rules Enabling Act[58] through which Congress delegated procedural rulemaking authority to the Supreme Court. The Rules Enabling Act created a division of rulemaking authority between Congress and the Court: Congress would retain substantive rulemaking authority; the Court would have authority to promulgate procedural rules.[59] Through the substantive-procedural divide, Congress reserved to itself the policy decisions properly committed to the branch of the government that is responsive to the people, while allocating to the Court the authority to promulgate Rules on lesser subjects.[60] This "substantive rights" limitation on the Court's rulemaking authority is set forth in the current Rules Enabling Act as follows:

> The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.

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[56] *Id.* at 349-50.

[57] *Id.* at 350. The Court emphasized that in instances in which congressionally imposed time constraints were not so severe as to implicate separation of powers concerns, litigants might nevertheless challenge congressional deadlines on judicial decisionmaking as violating the litigant's due process rights. *Id.* Justice Souter, concurring in part and dissenting in part in the *French* decision, dissented from the portion of the Court's decision holding that the facts of the case presented no opportunity for exploring structural separation of powers issues. *Id.* at 350-53 (Souter, J., concurring and dissenting). Justice Souter would have remanded the case and permitted courts to determine, on the facts of particular cases, whether thirty to ninety days was adequate time to make the required findings. *Id.* at 352-53.

[58] 28 U.S.C. § 2072 (1934), Pub. L. No. 73-415, 48 Stat. 1064.

[59] 42 U.S.C. § 2072(a), (b); Steven B. Burbank, *Hold the Corks: A Comment on Paul Carrington's "Substance" and "Procedure" in the Rules Enabling Act*, 1989 DUKE L.J. 1012, 1016 ("*Hold the Corks*"); Burbank, *supra* note 1, at 1025-26, 1106-07.

[60] Burbank, *supra* note 1, at 1025-26, 1106-07, 1113-14.

> Such rules shall not abridge, enlarge, or modify any substantive right . . . .[61]

Under the Rules Enabling Act of 1934, the Court's delegated rulemaking authority was subject to the substantive rights limitation. Court rulemaking was also subject to an express right of Congress to veto proposed Rules, a concurrent right of Congress to enact its own procedural rules, a subsequent right of Congress to repeal Court Rules, and an ultimate right of Congress to rescind the Court's delegated procedural rulemaking authority. The current Rules Enabling Act retains this framework.[62]

In practice, the Rules Enabling Act process has resulted in minimal participation by the Supreme Court in the Rule promulgation process.[63] The Judicial Conference takes the lead in Rule amendment or promulgation. The Judicial Conference, which ultimately submits proposed Rules or Rule amendments to the Court for review, is assisted by a Standing Committee and five advisory committees—for the civil rules, criminal rules, appellate rules, bankruptcy rules, and rules of evidence. A proposed Rule or Rule amendment is considered first by the appropriate advisory committee. The proposed Rule or amendment is then sent to the Standing Committee for approval. Following approval by the Standing Committee, the proposed or amended Rule is sent to the Judicial Conference for approval. Finally, the Judicial Conference transmits the proposed or amended Rule to the Court. The Court has seven

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[61] 28 U.S.C. § 2072(a), (b) (1994).

[62] *See* 28 U.S.C. §§ 2072-74 (1994). Courts have consistently recognized Congress' right to withdraw procedural rulemaking authority in whole or in part. *See* Sibbach v. Wilson & Co., 312 U.S. 1, 9-10 (1941); United States v. Hinton, No. 99-1340, 2000 WL 717085, at *1-*2 (10th Cir. June 2, 2000); Callihan v. Schneider, 178 F.3d 800, 802 (6th Cir. 1999); Floyd v. United States Postal Serv., 105 F.3d 274, 278 (6th Cir. 1997), *superseded by Rule as stated in Callihan*, 178 F.3d 800; Jackson v. Stinnett, 102 F.3d 132, 134-35 (5th Cir. 1996); Gov't of the Virgin Islands v. Parrott, 476 F.2d 1058, 1060-61 (3d Cir. 1973); United States v. Rivera-Negron, 201 F.R.D. 285, 288 (D.P.R. 2001); United States v. Mitchell, 397 F. Supp. 166, 170 (D.D.C. 1974); *see also* Burbank, *supra* note 1, at 1117 & n.463 (quoting the Senate Report, S. REP. NO. 69-1174, at 7 (1926), which accompanied the 1926 version of the bill that ultimately became the Rules Enabling Act). S. REP. NO. 1174, provided, in part, as follows:

> But the bill proposed will not deprive Congress of the power, if an occasion should arise, to regulate court practice, for it is not predicated upon the theory that the courts have inherent power to make rules of practice beyond the power of Congress to amend or repeal. On the contrary, Congress may revise the rules made by the Supreme Court, or by legislation may modify or entirely withdraw the delegation of power to that body. In that sense the bill is experimental. It gives to the court the power to initiate a reformed Federal procedure without the surrender of the legislative power to correct an unsatisfactory exercise of that power.

Id. at 12; *see also* H.R. REP. NO. 63-462, at 13 (1914) (accompanying the 1914 version of the bill).

[63] Moore, *supra* note 27, at 1064-65, 1069-72.

months to review and transmit the proposed or amended Rule to Congress, which, in turn, has at least seven months to delay, modify, or veto the proposed Rule or amendments. Absent affirmative action by Congress, the proposed or amended Rule takes effect on the following December 1.[64]

Initially it was not difficult for Congress to assign procedural rulemaking functions to the Court and retain substantive rulemaking functions. From 1906 through 1938, the year in which the original Federal Rules of Civil Procedure were adopted by the Supreme Court under the Rules Enabling Act, the courts, Congress, and commentators shared similar views about the distinction between substance and procedure. Procedure was deemed to be different in kind from, and of a lower order than, substantive law. Procedure served simply as a means of implementing substantive goals.[65] These views made Court rulemaking not only possible, but advantageous.[66]

The goals of the supporters of the Rules Enabling Act and the drafters of the original Federal Rules were for the Court to craft procedural Federal Rules that were uniform, simple, predictable, "correlated," rather than a "patchwork" politically neutral,[67] and some suggest, "transsubstantive,"[68] i.e., applicable to all bodies of substantive law.

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[64] Information in this paragraph regarding the rulemaking process was taken primarily from McCabe, *supra* note 27, at 1664-74.

[65] *See, e.g*, Bone, *supra* note 4, at 894-96 (information in this paragraph was drawn primarily from Professor Bone's article); Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 945-47, 962 (1987).

[66] Bone, *supra* note 4, at 894-96; Burbank, *supra* note 1, at 1052 (citing Hearings on ABA Bills Before the House Committee on the Judiciary, 63rd Cong., 2d Sess. 22-23 (1914)); Geyh, *supra* note 1, at 1190; Edson R. Sunderland, *Character and Extent of the Rule-Making Power Granted U.S. Supreme Court and Methods of Effective Exercise*, 21 A.B.A. J. 404, 459 (1935) (quoting Re Coes and Ravensheaar, 1 K.B. 4 (1907) (procedural rules were merely the "handmaid" of substantive law).

[67] In his article detailing the origins of the Rules Enabling Act of 1934, Professor Burbank restored knowledge of the twenty-year history of the Rules Enabling Act, which he referred to as the "antecedent period of travail." Burbank, *supra* note 1, at 1019, 1024-25 (quoting George H. Jaffin, *Federal Procedural Revision*, 21 VA. L. REV. 504, 504 (1935)). Those years of antecedent travail produced the following congressional reports to accompany predecessors to the bill that ultimately became the Rules Enabling Act of 1934. See, for example, S. REP. NO. 69-1174, at 1-2, 12-13 (1926), which accompanied S. 477, 69th Cong. (1926), and H.R. REP. NO. 63-462, at 8-9, 13 (1914), which accompanied H.R. 133, 63d Cong. (1914). *See also* Burbank, *supra* note 1, at 1052; Mullenix, *Hope over Experience, supra* note 4, at 841; Linda S. Mullenix, *The Counter-Reformation in Procedural Justice*, 77 MINN. L. REV. 375, 380 (1992) ("*The Counter-Reformation*"); Subrin, *supra* note 65, at 955, 957-60; Carl Tobias, *Common Sense and Other Legal Reforms*, 48 VAND. L. REV. 699, 702-03 (1995).

[68] Tobias, *supra* note 67, at 703; *see also* Mullenix, *Hope over Experience*, *supra* note 4, at 837; Subrin, *supra* note 65, at 944. *But see* Stephen B. Burbank, *Procedure and Power, The Last Ten Years, What Your Students Should Know That You Should Know Too*, 46 J. LEGAL EDUC. 513, 514 (1996) ("*What Your Students Should Know*") (stating that the idea that procedural Rules should be transsubstantive was "always to a great

The prevailing view of scholars and legislators who supported adopting the Rules Enabling Act of 1934 was that, although the Rules Enabling Act would effect a shared rulemaking authority, the Supreme Court would be the superior procedural and, therefore, primary rulemaker. The assumption that the Court possessed an institutional superiority in procedural rulemaking proceeded from the following factors: (1) Congress was busy with issues of public policy and was ill-suited to determine the details of court procedure; (2) judges, directly involved with procedural issues on a day-to-day basis, had more expertise than Congress in procedural issues; (3) the Court's involvement and expertise would enable it to discover more readily inadequacies in the procedural Rules; (4) the Court could more easily remedy perceived inadequacies in Federal Rules because its promulgation process would not be as slow or cumbersome as statutory revision; and (5) the Court, as opposed to Congress, would be less partisan and less influenced by special interest groups; thus, it would be better situated to promulgate neutral rules.[69] Additionally, because the public held the courts and lawyers responsible for inadequacies in federal procedure, it was argued that the courts ought to have the authority to remedy perceived inadequacies.[70]

For all these reasons, it was assumed that Congress, though retaining ultimate rulemaking authority, would defer to the Court as the primary national rulemaker. For nearly forty years, this, in fact, was the experience under the Federal Rules.[71]

Today, it is clear that many of the aspirational goals of the drafters of the Rules Enabling Act and Federal Rules—uniformity, predictability, and neutrality—have not been achieved.[72] Instead, nonuniformity is the norm, for

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extent mythology" because the Rules confer such broad discretion on judges); Stephen B. Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925, 1934-35 & n.53 (1989) ("*Transformation*") (although the original rulemakers probably intended the Rules to be transsubstantive, there is no evidence that Congress had that intent).

[69] See S. REP. NO. 69-1174, at 7 (1926), which accompanied S. 477, 69th Cong. (1926), and H.R. REP. NO. 63-462, at 13-14 (1914), which accompanied H.R. 133, 63d Cong. (1914). *See also* Levin & Amsterdam, *supra* note 42, at 10.

[70] See S. REP. NO. 69-1174, at 7 (1926), which accompanied S. 477, 69th Cong. (1926), and H.R. REP. NO. 63-462, at 13-14 (1914), which accompanied H.R. 133, 63d Cong. (1914). *See also* Levin & Amsterdam, *supra* note 42, at 10.

[71] Bone, *supra* note 4, at 893; Geyh, *supra* note 1, at 1187.

[72] *See, e.g.*, Burbank, *supra* note 1, at 1042-98; Erwin Chemerinsky & Barry Friedman, *The Fragmentation of Federal Rules*, 46 MERCER L. REV. 757, 757-58, 778-80 (1995); Linda J. Rusch, *Separation of Powers Analysis as a Method for Determining the Validity of Federal District Courts' Exercise of Local Rulemaking Power: Application to Local Rules Mandating Alternative Dispute Resolution*, 23 CONN. L. REV. 483, 484 (1991). *But see* Robel, *supra* note 4, at 1449, 1483.

reasons that commentators have attributed to the considerable discretion accorded district court judges under the Rules, the proliferation of local court rules, standing orders, and other local procedures, and varying court interpretations of the Rules.[73] The predictability, neutrality, and simplicity of the Federal Rules have also been questioned.[74] Furthermore, a fundamental premise on which Court rulemaking was constructed has been undermined—substance and procedure simply will not stay conveniently on different sides of a clearly marked line.[75] These factors have spurred congressional activity in the rulemaking process.

C. The Supersession Clause

The original Federal Rules promulgated pursuant to the Rules Enabling Act were intended to replace the existing requirement, under the Conformity Act,[76] that the procedure in federal courts conform "as near as may be" to the procedure in the state in which the federal court sat.[77] Adherence to the Conformity Act had produced widely varying procedural requirements in the federal courts.[78] In addition to state differences in procedure, the Conformity Act, which required conformity "as near as may be" to state procedure, enabled the federal courts to fashion numerous exceptions to state procedure.[79] Congress, moreover, had enacted various procedural statutes that superseded the procedural requirements of the local state. The Conformity Act, at least as implemented, had made uniformity of procedure in the federal courts unattainable.

Congress added the supersession clause—the portion of the Rules Enabling Act that permits Federal Rules to supersede conflicting federal statutes[80]—for two reasons. First, the clause would permit the Conformity Act and other controlling procedural statutes to continue to govern procedure until the

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[73] Steven B. Burbank, *Of Rules and Discretion: The Supreme Court, Federal Rules, and Common Law*, 63 NOTRE DAME L. REV. 693, 715 (1988) ("*Of Rules and Discretion*"); Burbank, *Transformation*, *supra* note 68; Mullenix, *The Counter-Reformation*, *supra* note 67, at 380-81; Carl Tobias, *Civil Justice Reform and Balkanization of Federal Civil Procedure*, 24 ARIZ. ST. L.J. 1393, 1397-98 (1992).

[74] *See, e.g.*, Burbank, *Of Rules and Discretion*, *supra* note 73, at 715; Burbank, *Transformation*, *supra* note 68, at 1941-43, 1962; McCabe, *supra* note 27, at 1681.

[75] *See, e.g.*, Bone, *supra* note 4, at 889-902, 907.

[76] Act of June 1, 1872, 255 §§ 5 & 6, 17 Stat. 196.

[77] Burbank, *supra* note 1, at 1040-42.

[78] Burbank, *Transformation*, *supra* note 68, at 1929.

[79] Burbank, *supra* note 1, at 1040-42.

[80] The supersession clause currently provides that "[a]ll laws in conflict with such rules shall be of no further force or effect after such rules have taken effect." 28 U.S.C. § 2072(b) (1994).

original Rules could be promulgated. Second, the supersession clause was intended to still fears that the Court did not have authority, under the aegis of procedural rulemaking, to repeal preexisting, conflicting federal statutes, including the Conformity Act.[81] The supersession clause, however, by its terms, applied also to conflicts between statutes and Rules that might arise after the promulgation of the original Federal Rules.

In 1938, after the original Federal Rules of Civil Procedure had been drafted and presented to Congress, the supersession clause received renewed attention. House Bill 8892[82] would have jettisoned the proposed Federal Rules and restored conformity to local state procedure.[83] Senate Joint Resolution 281[84] would have delayed the effective date of the proposed Federal Rules to permit Congress time to study the legislation with which the proposed Rules conflicted and to determine which statutes were superseded or to harmonize potential conflicts of statute and Rule.[85] Key issues raised in favor of Senate Joint Resolution 281 were the anticipated difficulty in determining whether the Federal Rules superseded apparently conflicting statutes, the desirability of clearly stating which existing statutory provisions would be superseded by the new Federal Rules, and, not surprisingly, whether some of the proposed Federal Rules of Civil Procedure, in fact, had an impermissible substantive effect.[86] Ultimately, Congress declined to approve either House Bill 8892 or Senate Joint Resolution 281; the Rules Enabling Act remained intact, and the proposed Federal Rules became law.[87]

Despite the original purpose of the supersession clause to provide for continued federal procedure under the Conformity Act until the original Federal Rules had been adopted and then for repeal of preexisting, conflicting

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[81] *See, e.g.*, Clinton v. City of New York, 524 U.S. 417, 446 n.40 (1998); *see also* Burbank, *supra* note 1, at 1050-54; Charles E. Clark, *Power of the Supreme Court To Make Rules of Appellate Procedure*, 49 HARV. L. REV. 1303, 1310 (1936); Clinton, *supra* note 50, at 64-65 (stating that, although the clause was not discussed in legislative reports or debates on the Rules Enabling Act, the Supreme Court in *Sibbach v. Wilson & Co.*, 312 U.S. 1, 9-10 (1941), indicated that a potential reason for the clause was to allow the Conformity Act to be phased out without congressional action after adoption of the Rules under the Rules Enabling Act).

[82] H.R. 8892, 75th Cong. (3d Sess. 1938).

[83] Henry P. Chandler, *Some Major Advances in the Federal Judicial System*, 31 F.R.D. 307, 506 (1963).

[84] S.J. Res. 281, 75th Cong. (3d Sess. 1938).

[85] Chandler, *supra* note 83, at 509.

[86] *See Rules of Civil Procedure for the United States District Courts: Hearing Before a Subcomm. of the Senate Comm. on the Judiciary, Pt. 2*, 75th Cong. 27-48 (3d Sess. 1938) (statements of P.H. Marshall; Charles A. Keigwin, Professor of Law, Georgetown Law School; Challen B. Ellis). *See also* S. REP. NO. 69-1174, at 1-3 (1926); *see also* S. REP. NO. 75-1603, at 1-3 (1938).

[87] Chandler, *supra* note 83, at 509-12.

congressional statutes,[88] Congress retained the supersession clause when it formally repealed the Conformity Act as part of its comprehensive revision of the Judicial Code in 1948.[89] In so doing, Congress evinced a desire to continue to defer to the Court in the context of procedural rulemaking because of the Court's expertise.[90] The supersession clause also survived challenge in 1988, although this time Congress was careful to note that Court rulemaking does have limits.[91]

Courts today use the supersession clause to resolve apparent conflicts between current statutes of Congress and Rules of the Court. [92] Thus, the supersession clause has come to serve an important role in assuring an appropriate division of rulemaking authority between Congress and the Court.

D. Congressional Sharing of Rulemaking Authority

Having reviewed the constitutional and statutory foundations of the procedural rulemaking authority of the Court and Congress, this Part briefly examines the actual experience of shared rulemaking authority. The narrative of Court and congressional action to create Federal Rules and the increased tension between the federal courts and Congress over rulemaking is by now well told.[93] From the initial promulgation of the Federal Rules by the Supreme

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[88] *See supra* text accompanying notes 80-81.

[89] Pub. L. No. 80-733, 62 Stat. 961 (1948) (codified at 28 U.S.C.).

[90] H.R. REP. NO. 79-2646, Appendix, Reviser's Notes, pt. v., at A162 (1946) (quoting former Attorney General Homer Cummings, *The New Criminal Rules—Another Triumph of the Democratic Process*, 31 A.B.A. J. 236, 237 (1945)):

> Recognition by Congress of the broad rule-making power of the courts will make it possible for the courts to prescribe complete and uniform modes of procedure, and alleviate, at least in part, the necessity of searching in two places, namely in the Acts of Congress and in the rules of the courts, for procedural requisites.
>
> Former Attorney General Cummings recently said: "Legislative bodies have neither the time to inquire objectively into the details of judicial procedure nor the opportunity to determine the necessity for amendment or change. Frequently such legislation has been enacted for the purpose of meeting particular problems or supposed difficulties, but the results have usually been confusing or otherwise unsatisfactory. Comprehensive action has been lacking for the obvious reason that the professional nature of the task would leave the legislature little time for matters of substance and statesmanship. It often happened that an admitted need for change, even in limited areas, could not be secured."

Id.

[91] *See infra* notes 106-11 and accompanying text.

[92] *See infra* notes 121-36 and accompanying text.

[93] Bone, *supra* note 4, at 900-07; Burbank, *supra* note 1, at 1019-21; Geyh, *supra* note 1, at 1169; Moore, *supra* note 27, at 1053-61; Peterson, *supra* note 23, at 1030-33.

Court in 1938 until the early 1970s, the Court promulgated Rules under the Rules Enabling Act process, and Congress was passive.[94] During this interval, Congress did not veto or block a single Rule promulgated by the Court. Congress similarly declined to take the initiative with respect to rulemaking. Indeed, in the twenty years after the adoption of the original Federal Rules, Congress passed only one procedural statute.[95] In 1973, however, the era of congressional passivity ended abruptly when Congress—concerned that the proposed Rules of Evidence had substantive effect, particularly the Rules regarding privilege—blocked the Court's proposed Federal Rules of Evidence and replaced the Court's proposed evidentiary Rules with its own legislation.[96]

Since 1973, Congress has become a more active participant in the rulemaking process, sometimes enacting its own procedural standards as part of the Federal Rules without input from the Judicial Conference or Supreme Court,[97] sometimes altering proposed Court Rules and then enacting those altered Rules through legislation,[98] sometimes creating special procedural rules

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[94] Paul D. Carrington, *Learning from the Rule 26 Brouhaha: Our Courts Need Real Friends*, 156 F.R.D. 295, 301 (1994); McCabe, *supra* note 27, at 1660-61.

[95] Chandler, *supra* note 83, at 514-15; Charles E. Clark, *Two Decades of the Federal Civil Rules*, 58 COLUM. L. REV. 435, 443 & n.40 (1958).

[96] Bone, *supra* note 4, at 902-03; McCabe, *supra* note 27, at 1660-62.

[97] *See, e.g.*, Moore, *supra* note 27, at 1055-56 (Congress enacted changes to Fed. R. Civ. P. 35, with no input from the judiciary, to permit psychologists to perform mental examinations on parties, as part of the Anti-Drug Abuse Act of 1988. Additionally, Congress enacted, as part of the Anti-Drug Abuse Act, two technical changes that the Supreme Court had promulgated and transmitted to Congress under the Rules Enabling Act process.); Mullenix, *Hope over Experience*, *supra* note 4, at 846-48.

[98] The history of the Rule revision process for Fed. R. Civ. P. 4 provides a good example. *See, e.g.*, Moore, *supra* note 27, at 1054-55, 1058-59; Mullenix, *Hope over Experience*, *supra* note 4, at 844-45 (noting that this was the first time that Congress had stepped in to delay and redraft proposed Rules that had been through the entire Rules Enabling Act process); Kent Sinclair, *Service of Process: Rethinking the Theory and Procedure of Serving Process Under Federal Rule 4(c)*, 73 VA. L. REV. 1183 (1987). Professor Sinclair has emphasized that the changes proposed by the Court and the changes ultimately made by Congress to Fed. R. Civ. P. 4 in 1983 occurred in a context in which the "interests of the Court system and litigants were insignificant." *Id.* at 1197. Of paramount importance was the "urgent" request of the U.S. Marshal Service that its role in serving process be diminished for budgetary reasons. *Id.* at 1197-98. Thus, in 1978, the Judicial Conference began considering amendments to Fed. R. Civ. P. 4 to allow for mail service to alleviate the financial burden on the Marshal Service. *Id.* at 1198-99. Congress also began working on legislation to diminish the burden on the Marshal Service. *Id.* at 1201-02. In early 1982, the Court promulgated proposed amendments to Rule 4; it transmitted the proposed amendments to Congress in April 1982. *Id.* at 1207. Congress delayed the effective date of these proposed amendments. *Id.* at 1208-09. Congress then enacted in February 1983 a substitute version of amendments to Rule 4. These amendments, which had been drafted in November 1982, received no committee hearings and were enacted without debate. *Id.* at 1209-10.

Ultimately, the Court revisited and revised Fed. R. Civ. P. 4 to amend portions of the congressional changes to Fed. R. Civ. P. 4 that proved to be problematic. *See, e.g.*, Paul D. Carrington, *Continuing Work on the Civil Rules: The Summons*, 63 NOTRE DAME L. REV. 733, 733-34 (1988); Mullenix, *Hope over Experience*, *supra* note 4, at 844-45.

for particular substantive causes of action,[99] and sometimes changing the rulemaking process of the Rules Enabling Act.[100] This increase in congressional rulemaking activity has led to increased tension between the Court and Congress.[101]

Underpinning Congress' revitalized interest in procedural rulemaking and the increased interbranch tension during the 1970s and 1980s was the realization that the division between substance and procedure is not at all clear.[102] The new conception of substance and procedure as shifting with context and as being merely part of a single continuum or even inextricably linked, led Congress to reconsider the perceived advantages of the Court as a procedural rulemaker. To support its new understanding of the difference between substance and procedure, Congress amended the Rules Enabling Act, as part of the Judicial Improvements and Access to Justice Act of 1988 ("JIAJA").[103] First, Congress changed the rulemaking process to require open meetings of committees in most instances, recording of minutes of committee meetings, recording of comments and positions in favor of and in opposition to proposed Rules, and a longer notice period for proposed Rules.[104] Commentators have noted that these changes effected at least a partial transformation of the procedural rulemaking process from one based on technical expertise of an informed elite to one based on interest group accommodation, perhaps to the detriment of the goals of creating a simple, uniform, and coherent body of procedural principles.[105]

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[99] The Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (1995) (codified in scattered sections of 15 U.S.C.), provides a good example. *See infra* notes 112-13 and accompanying text.

[100] Congress amended the Rules Enabling Act of 1934 in Title IV of the Judicial Improvements and Access to Justice Act of 1988, Pub. L. No. 100-702, 102 Stat. 4648 (1988). *See infra* notes 103-11 and accompanying text.

[101] Bone, *supra* note 4, at 890, 906 n.106; Burbank, *What Your Students Should Know*, *supra* note 68, at 516.

[102] Bone, *supra* note 4, at 889; Geyh, *supra* note 1, at 1212; Mullenix, *Hope over Experience*, *supra* note 4, at 836-37.

[103] Pub. L. No. 100-702, 102 Stat. 4642 (1988).

[104] McCabe, *supra* note 27, at 1667-1671; Moore, *supra* note 27, at 1062-63; Mullenix, *Hope over Experience*, *supra* note 4, at 799-800, 832.

[105] Bone, *supra* note 4, at 889, 902, 904, 949-50 (concluding that rulemaking should be national, court-based, and committee-centered with the rulemaker fashioning Rules by moving between concrete features of practice and considerations of judgments embedded in the law—a process in which a Court-centered, centralized committee is better qualified to engage than either the legislature or local rulemaking committees. Public participation, then, though perhaps helpful, would not be necessary to legitimize Court rulemaking and it could increase public choice problems); Mullenix, *Hope over Experience*, *supra* note 4, at 801, 838-41 (describing the core values of procedural rules as "transsubstantive, guided by principles of generality,

Second, Congress also seriously considered repealing the supersession clause of the Rules Enabling Act as part of the JIAJA.[106] In 1988, the Judiciary Committee of the House of Representatives asserted that the supersession clause ought to be repealed because it had fulfilled its original purpose, because Congress "tends to legislate against the backdrop of existing federal rules," because Congress has reacted quickly when the Judicial Conference indicates that procedural provisions in statutes are problematic, and because it is "unwise" to permit the rulemaking process effectively to "overturn provisions of law enacted by Congress."[107] The House of Representatives was also concerned that the Supreme Court had "overstepped the bounds of its rulemaking authority" in its recent rulemaking; thus, the House sought to emphasize the limitations on the Court's rulemaking authority.[108]

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flexibility, simplicity, forgiveness, coherence, and judicial professionalism . . . require an apolitical rulemaking process to ensure that rule amendments do not compromise the[se] primary principles . . . ."); Mullenix, *supra* note 15, at 736-37; Mullenix, *The Counter-Reformation*, *supra* note 67, at 439; Carl Tobias, *Some Realism About Federal Procedural Reform*, 49 FLA. L. REV. 49, 63-64 (1997) (experience suggests that the JIAJA politicized Rule revisions). *But see* McCabe, *supra* note 27, at 1683 (concluding that the move to open meetings, available records, and accessibility has enhanced the credibility of Court rulemaking); Moore, *supra* note 27, at 1073 (opening the rulemaking process will "result in a more conscious consideration of limitations on rulemaking inherent in the Rules Enabling Act and of the competing factors relevant to selection of a particular Rule"). Commentators have, moreover, recognized that the fundamental debate is not over which body has the greater expertise in procedural rulemaking. Instead, "[i]n the end the policy question relating to rulemaking allocation is not a debate between modes of expertise and non-expertise, but a policy question relating to majoritarian rule." Mullenix, *Unconstitutional Rulemaking*, *supra* note 4, at 1336.

[106] *See* H.R. REP. NO. 100-889, pt. 1, at 27-28 (1988); *see also* McCabe, *supra* note 27, at 1662-63; Moore, *supra* note 27, at 1051-52; Mullenix, *Hope over Experience*, *supra* note 4, at 850-51.

[107] H.R. REP. NO. 100-889, pt. 1, at 27-28 (1988) (citing H.R. REP. NO. 99-422, at 13-14 (1985)). The House of Representatives also supported repeal of the supersession clause based on the Supreme Court's decision in *INS v. Chadha*, 462 U.S. 919, 957-58 (1983), which the House concluded placed a "cloud" over supersession provisions, suggesting that such provisions may be constitutionally infirm because Article I of the Constitution requires repeal of congressional statutes by legislation that passes both houses of Congress and is presented to the President. Although this issue has never been squarely addressed, the Court, in dicta, has indicated that the supersession clause would withstand constitutional challenge. Clinton v. City of New York, 524 U.S. 417, 446 n.40 (1998) (holding that under the Rules Enabling Act, "Congress itself [makes] the decision to repeal prior statutes upon the occurrence of a particular event—there the promulgation of procedural rules by this Court"). This was the precise logic used in 1914 to quell initial concerns that the supersession provision might not pass constitutional muster. *See* Burbank, *supra* note 1, at 1052-53 & nn.161, 164-65 (citing *Hearings on ABA Bills Before the House Comm. on the Judiciary*, 63d Cong. 21-22 (1914)).

[108] *See* H.R. REP. NO. 99-422, at 20-22 (1985). In the Report of the House Judiciary Committee regarding the 1988 JIAJA, Pub. L. 100-702, 102 Stat. 4642 (1988), the Committee noted that the provisions of the JIAJA regarding the Rules Enabling Act evolved from activities of House subcommittees in both the 98th and 99th Congresses and were virtually identical to provisions that had passed the House unanimously in the 99th Congress. H.R. REP. NO. 100-889, pt. 1, at 26 (1988). The Report then stated that the House Report from the 99th Congress, H.R. Report No. 99-422 (1985), applied to the current bill. *See also* Burbank, *Hold the Corks*,

Indeed, in a world in which the Supreme Court had never invalidated a Federal Rule as having impermissible substantive effect, the supersession clause provided continuing opportunities for Federal Rules with substantive impact to alter Congress' substantive policy choices. The House of Representatives therefore approved a bill that would have repealed the supersession clause and would have substituted a requirement that Court Rules yield to conflicting federal statutes in most circumstances.[109] The Senate, however, concluded that the supersession clause should be retained because it had "worked well."[110] The Senate view ultimately prevailed, and Congress retained the supersession clause, in part based on Chief Justice Rehnquist's pledge to tread carefully in promulgating Federal Rules that might conflict with and, thus, supersede federal statutes.[111]

The 1990s saw further expansion of the congressional rulemaking prerogative as Congress enacted, among other procedural statutes, the Private Securities Litigation Reform Act ("PSLRA") and the Civil Justice Reform Act. The PSLRA[112] contained procedural provisions specifically tailored to constrain securities litigation: The PSLRA, among other procedural provisions, put limitations on lead plaintiffs in securities class action suits and on selection of class counsel; imposed a stay on discovery following the filing of a motion to dismiss or for summary judgment, absent certain limited exceptions;

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supra note 59, at 1030-33; Moore, *supra* note 27, at 1044-48; Note, *The Rules Enabling Act and the Limits of Rule 23*, 111 HARV. L. REV. 2294, 2298-99 (1998).

109 134 CONG. REC. 31,864 (1988).

110 Moore, *supra* note 27, at 1051 (citing 134 CONG. REC. S16,296) (daily ed. Oct. 14, 1988).

111 *Id.* at 1051-52. Commentators have differed over whether the 1988 changes to the Rules Enabling Act significantly altered the essential allocation of rulemaking authority between the Court and Congress. *See, e.g.*, Bone, *supra* note 4, at 950 ("The history of the 1934 Act indicates a congressional intent—not significantly changed by the 1988 amendments—to foreclose Supreme Court rulemaking where the choice among rules would have a 'predictable and identifiable effect' on rights recognized by the substantive law or create rights that 'approximate the substantive law in their effect on persons or property.'"); Burbank, *Hold the Corks*, *supra* note 59, at 1033-36 (noting that the House of Representatives, which was responsible for the language of the 1988 legislative changes to the Rules Enabling Act, sought to indicate that the use of similar statutory language in both the 1934 and 1988 enabling acts did not mean that the grant of power remained the same, while the Senate's view was unclear); Moore, *supra* note 27, at 1047-53 (stating that the legislative history of the JIAJA indicates a "possibly more circumscribed delegation of rulemaking" authority, but Congress did not change the language regarding the Court's grant of rulemaking power and it is, thus, difficult to determine the weight to accord the House Reports); Mullenix, *Unconstitutional Rulemaking*, *supra* note 4, at 1331-32 (the 1988 amendments to the Rules Enabling Act did not alter the allocation of procedural rulemaking authority).

112 *See* Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified in scattered provisions of 15 U.S.C.).

changed the application of Fed. R. Civ. P. 11; and strengthened the requirement of Fed. R. Civ. P. 9(b) that fraud be pleaded with particularity.[113]

Perhaps of even greater significance, the Civil Justice Reform Act of 1990 ("CJRA")[114] provided rulemaking authority to each of the ninety-four district courts to create local rules to reduce litigation costs and delays. The district courts, assisted by an advisory committee including attorneys, litigants, and the local U.S. Attorney, were required to adopt civil justice expense and delay reduction plans to "facilitate deliberate adjudication of civil cases on the merits, monitor discovery, improve litigation management, and ensure just, speedy, and inexpensive resolution of civil disputes."[115] The CJRA additionally required the district courts to consider six "principles and guidelines" of litigation management and delay and cost reduction identified by Congress and consider six specified "techniques" of litigation management and cost and delay reduction.[116] Some commentators concluded that the CJRA "implicitly encouraged" district courts to implement local rules in conflict with Federal Rules promulgated through the Rules Enabling Act process[117] or to ignore Rules created through that process.[118] The CJRA, as originally enacted,

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[113] John C. Coffee, Jr., *The Future of the Private Securities Litigation Reform Act: Or, Why the Fat Lady Has Not Yet Sung*, 51 BUS. LAW. 975, 977-78, 985-91 (1996); Leslie M. Kelleher, *Taking "Substantive Rights" (in the Rules Enabling Act) More Seriously*, 74 NOTRE DAME L. REV. 47, 60-62 (1998); Longan, *supra* note 16, at 646-48; Carl Tobias, *Reforming Common Sense Legal Reforms*, 30 CONN. L. REV. 537, 550-53 (1998).

[114] Pub. L. No. 101-650, 104 Stat. 5089 (codified at 28 U.S.C. §§ 471-82) (1994 & Supp. IV 1998) (amended 2000).

[115] Robel, *supra* note 4, at 1450-51 (quoting 28 U.S.C. § 471 (Supp. IV 1992)); Tobias, *supra* note 113, at 545-47.

[116] Mullenix, *The Counter-Reformation*, *supra* note 67, at 395-96; Robel, *supra* note 4, at 1451-52; Tobias, *supra* note 113, at 545-46; Tobias, *supra* note 67, at 711-13.

[117] Tobias, *supra* note 113, at 545. Professor Tobias concluded that "quite a few districts . . . [implemented] inconsistent local procedures." *Id.* at 546. Perhaps most dramatically, as discussed *infra* notes 305-23 and accompanying text, the U.S. District Court for the Eastern District of Texas promulgated a local "offer of settlement" rule pursuant to the CJRA that conflicted with Fed. R. Civ. P. 68. Although the local rule was later invalidated on other grounds, see Ashland Chem., Inc. v. Brace Inc., 123 F.3d 261, 268 (5th Cir. 1997), the U.S. District Court for the Eastern District of Texas held that local rules promulgated pursuant to the CJRA could permissibly conflict with Federal Rules promulgated pursuant to the Rules Enabling Act, *see* Friends of the Earth, Inc. v. Chevron Chem. Co., 885 F. Supp. 934, 939-40 (E.D. Tex. 1995), *abrogated Ashland Chem., Inc.*, 123 F.3d at 261, and the Fifth Circuit later stated in dicta that "the CJRA was intended to allow the district courts to experiment, perhaps even beyond the strict confines of the Federal Rules of Civil Procedure." *Ashland Chem. Inc*, 123 F.3d at 268.

[118] Mullenix, *The Counter-Reformation*, *supra* note 67, at 379 ("*The central importance of the Civil Justice Reform Act is this*: the Act has effected a revolutionary redistribution of procedural rulemaking power from the federal judicial branch to the legislative branch. Congress has taken procedural rulemaking power away from the judges and their expert advisors and delegated it to local lawyers.").

specified that the Act would "sunset" on December 1, 1997.[119] Nevertheless, it has been recognized that some local rules adopted under the CJRA may "linger" past the expiration of the Act.[120]

In summary, the constitutional and statutory framework underlying the shared rulemaking authority of the Court and Congress, as well as the recent experience of increased congressional involvement in procedural rulemaking, underscore that issues of rulemaking power and the exercise of that power must be given a prominent role in the analysis of statute-Rule conflicts. The frequently omitted issues that must be added to the implied repeals framework when resolving apparent conflicts between statutes and Rules are those issues that accord primacy to the division of rulemaking authority between the Court and Congress and to instances in which the Court or Congress has deferred to the other branch in rulemaking. These issues include, in addition to priority of promulgation, the following: whether a Court Rule articulates a constitutional requirement; whether a congressional provision would remove the ability of federal courts to decide cases effectively in violation of separation of powers; whether a Court Rule intrudes impermissibly on an area reserved to exclusive congressional regulation or has impermissible substantive impact; whether a congressional statute repeals Court rulemaking authority; whether Congress enacted both the statute and procedural rule at issue; and whether the Court or Congress has deferred to the other branch in the context of its rulemaking.

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[119] Pub. L. No. 101-650, § 103(b)(2), 104 Stat. 5097; *see also* 8 MOORE'S FEDERAL PRACTICE, *supra* note 8, § 40.03[2][b], at 40-18; Carl Tobias, *Did the Civil Justice Reform Act of 1990 Actually Expire?*, 31 U. MICH. J.L. REFORM 887, 891 (1998). Congress later passed a bill to make permanent the portions of the CJRA that required reports regarding motions and bench trials pending longer than six months before federal courts and cases pending longer than three years before federal courts. In so doing, Congress deleted from the CJRA's "sunset" provision not only the statutory provision regarding this reporting, but also the section requiring district courts to create delay and expense reduction plans, thus leaving some question regarding the future of those plans. Pub. L. No. 105-53, § 2, 111 Stat. 1173 (1997); *see also* 8 MOORE'S FEDERAL PRACTICE, *supra* note 8, § 40.03[2][b], at 40-18 to 40-19; Tobias, *supra*, at 891-92. Congress has since passed legislation confirming the sunset of the delay and expense reduction plans. Pub. L. No. 106-518, § 206, 114 Stat. 2410 (2000).

[120] *See, e.g.*, 8 MOORE'S FEDERAL PRACTICE, *supra* note 8, § 40.03[2][b], at 40-18; Longan, *supra* note 16, at 665-66.

II. GENERAL PRINCIPLES USED BY THE COURTS TO RESOLVE CONFLICTS BETWEEN FEDERAL STATUTES AND FEDERAL RULES

A. Use of the Canon Disfavoring Implied Repeals To Resolve Conflicts Between Congressional Statutes and Federal Rules

Courts have come to rely on the framework of the canon of statutory interpretation disfavoring implied repeals when resolving apparent conflicts between statutes and Federal Rules, basing use of the implied repeals analysis primarily on: (1) the language of the supersession clause of the Rules Enabling Act, which today provides that "[a]ll laws in conflict with [the Federal Rules promulgated by the Supreme Court] shall be of no further force or effect after such rules have taken effect;"[121] (2) direct analogy to the canon of statutory interpretation disfavoring implied repeals;[122] or (3) reference to both the

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[121] 28 U.S.C. § 2072(b) (1994). The following cases rely at least in part on the language of the supersession provision as creating a later-in-time analysis for resolving apparent conflicts between statutes and Rules. Some of the cases rely also on analogy to the canon disfavoring implied repeals. *See, e.g.*, Henderson v. United States, 517 U.S. 654, 668-69 (1996); Penfield Co. v. SEC, 330 U.S. 585, 589 n.5 (1947); *see also* United States v. Goodall, 236 F.3d 700, 707-08 (D.C. Cir. 2001) (Randall, J., concurring); United States v. Microsoft, 165 F.3d 952, 958-60 (D.C. Cir. 1999); Callihan v. Schneider, 178 F.3d 800, 802-03 (6th Cir. 1999); Floyd v. United States Postal Serv., 105 F.3d 274, 277-78 (6th Cir. 1997), *superseded by Rule as stated in Callihan*, 178 F.3d 800; Jackson v. Stinnett, 102 F.3d 132, 135-36 (5th Cir. 1996); Collins v. Gorman, 96 F.3d 1057, 1059 (7th Cir. 1996); Autoskill Inc. v. Nat'l Educ. Support Sys., Inc., 994 F.2d 1474, 1485 (10th Cir. 1993); American Paper Inst., Inc. v. ICC, 607 F.2d 1011, 1012 (D.C. Cir. 1979); Weinstein v. Paul Revere Ins. Co., 15 F. Supp. 2d 552, 560 (D.N.J. 1998); Benjamin v. Jacobson, 935 F. Supp. 332, 344 (S.D.N.Y. 1996), *aff'd in part and rev'd in part*, 124 F.3d 162 (2d Cir. 1997), *vacated on reh'g en banc*, 172 F.3d 144 (2d Cir. 1999), *cert. denied*, Benjamin v. Kerik, 528 U.S. 824 (1999); Note, *supra* note 8, at 835 n.42. Courts have uniformly interpreted the supersession clause to permit a Federal Rule to supersede only conflicting, preexisting congressional statutes. *See, e.g., Penfield*, 330 U.S. at 589 n.5; *Jackson*, 102 F.3d at 135-36; Note, *supra* note 8, at 835-36. The supersession clause does not affirmatively state the effect of a subsequent congressional statute that conflicts with a prior Federal Rule. By negative implication and in accord with the reasoning that Congress can repeal its delegation of rulemaking authority pro tanto by creating an irreconcilable conflict, however, courts have construed the supersession clause to provide that subsequent procedural statutes promulgated by Congress will supersede any prior, conflicting Federal Rule. *See, e.g., Jackson*, 102 F.3d at 135-36; *see also Callihan*, 178 F.3d at 802-03; *Floyd*, 105 F.3d at 278. This construction also accords with the statements of supporters of the original Rules Enabling Act that Congress can, at any time, supersede a procedural Rule promulgated by the Court or withdraw rulemaking authority. *See, e.g., Hearings on Reforms in Judicial Procedure American Bar Association Bills Before the House Comm. on the Judiciary, Pt. 2*, 63d Cong. 21-22 (1914) (statement of Thomas W. Shelton); S. REP. NO. 69-1174, at 7, 12 (1926); H.R. REP. NO. 63-462, at 13-14. *See also* Burbank, *supra* note 1, at 1117 & n.463 (quoting the Senate Report, S. REP. NO. 69-1174, at 7 (1926), which accompanied the 1926 version of the bill that ultimately became the Rules Enabling Act).

[122] In the following cases, the courts relied in whole or in part on an analogy to the canon disfavoring implied repeals of statutes. *See, e.g.*, Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437, 442, 445 (1987); *see also* Southern Nat'l Gas Co. v. Land, Cullman County, 197 F.3d 1368, 1373-75 (11th Cir. 1999);

supersession clause and the canon disfavoring implied repeals.[123]

The courts do not appear to have a clear preference for how they come to rely on the implied repeals analysis. In *Crawford Fitting Co. v. J.T. Gibbons, Inc.*,[124] the Supreme Court relied on analogy to the statutory canon disfavoring implied repeals; in *Henderson v. United States*,[125] the Court seemed to rely on the language of the supersession clause of the Rules Enabling Act.[126] The

Callihan, 178 F.3d at 802-03; Baugh v. Taylor, 117 F.3d 197, 200-01 (5th Cir. 1997); *Floyd*, 105 F.3d at 278, *superseded by Rule as stated in Callihan*, 178 F.3d 800; *Jackson*, 102 F.3d at 135-36; Gaubert v. Fed. Home Loan Bank Bd., 863 F.2d 59, 67 (D.C. Cir. 1988); Robbins v. Pepsi-Cola Metro. Bottling Co., 800 F.2d 641, 643 (7th Cir. 1986) (per curiam); Grossman v. Johnson, 674 F.2d 115, 122-23 & n.14 (1st Cir. 1982) (citing 7 MOORE'S FEDERAL PRACTICE ¶ 86.04[4], at 86-22 (2d ed. 1980)); Weiss v. Temporary Inv. Fund, Inc., 692 F.2d 928, 937 (3d Cir. 1982), *vacated*, 465 U.S. 1001 (1984); United States v. Gustin-Bacon Div. Certain-Teed Prods. Corp., 426 F.2d 539, 542 (10th Cir. 1970); Nat'l Fuel Gas Supply Corp. v. 138 Acres of Land in the Village of Springville, 84 F. Supp. 2d 405, 412-15 (W.D.N.Y. 2002); *see also* 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1030, at 162-64 & n.2 (3d ed. 2002) ("WRIGHT & MILLER").

[123] *See, e.g.*, *Callihan*, 178 F.3d at 802-03; *Floyd*, 105 F.3d at 278, *superseded by Rule as stated in Callihan*, 178 F.3d 800; *Jackson*, 102 F.3d at 135. In still other, primarily older, cases, the courts have not explicitly used an implied repeals analysis. In these instances, the courts generally omit analysis of whether there is an "irreconcilable" conflict and move directly to the issue of whether the later provision supersedes the former, *see, e.g.*, Feeder Line Towing Serv., Inc. v. Toledo, Peoria & W. R.R. Co., 539 F.2d 1107, 1108-09 (9th Cir. 1976); Motteler v. J.S. Jones Constr. Co., 447 F.2d 954, 954 (7th Cir. 1971); Jack Neilson, Inc. v. Tug Peggy, Inc., 428 F.2d 54, 55 (5th Cir. 1970); Hansen v. Trawler Snoopy, Inc., 384 F.2d 131, 132 (1st Cir. 1967); McConville v. United States, 197 F.2d 680, 682 (2d Cir. 1952); Cedarbaums v. Harris, 484 F. Supp. 125, 127-28 (S.D.N.Y. 1980), or to the issue of whether Congress clearly stated an intent to supersede a Federal Rule. *See, e.g.*, Walsh v. Ford Motor Co., 807 F.2d 1000, 1006-07, 1009 (D.C. Cir. 1986). Occasionally, a court will analyze the conflict between statute and Rule primarily as a matter of allocation of rulemaking authority and exercise of that authority, without reference to the implied repeals canon. *See, e.g.*, Durant v. Husband, 28 F.3d 12, 15 (3d Cir. 1994); Chesny v. Marek, 720 F.2d 474 (7th Cir. 1983) (Posner, J.), *rev'd*, 473 U.S. 1 (1985). In construing the intersection of Fed. R. Civ. P. 4(j) and 46 U.S.C. app. § 742, the following courts also examined issues of conflicting rulemaking authority first, although they need not have done so since both the statute and rule were enacted by Congress. *See, e.g.*, *Henderson*, 517 U.S. 660-64; United States v. Holmberg, 19 F.3d 1062, 1064-65 (5th Cir. 1994), *abrogated*, *Henderson*, 517 U.S. at 664-65; Libby v. United States, 840 F.2d 818, 819-21 (11th Cir. 1988), *abrogated*, *Henderson*, 517 U.S. 654; Jones & Laughlin Steel, Inc. v. Mon River Towing, Inc., 772 F.2d 62, 66 (3d Cir. 1985).

[124] 482 U.S. 437 (1987).

[125] 517 U.S. 654 (1996).

[126] The text of the supersession clause creates what is sometimes referred to as an "express general repeal clause." *See* 1A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION, § 23.8, at 454-57 (6th ed. 2002) ("SUTHERLAND ON STATUTORY CONSTRUCTION") (noting that such "express general repealing" clauses should be considered a nullity since repeals must be either express or implied. A general repeal provision cannot be considered "express" because it does not identify the statutes or portions of statutes to be repealed. Similarly, the clause does not create an implied repeal, but just establishes what would happen under the general doctrine of implied repeal—if there is a conflict, the later authority controls. The treatise concludes, relying, inter alia, on *United States v. Henderson*, 11 Wall 652 (1870), and *Hess v. Reynolds*, 113 U.S. 73 (1884), that inclusion of a "general repeal clause" is more often a hindrance than an aid to repeal because, with such a clause, only clearly inconsistent material can be repealed.) Such clauses are typically used in statutes

lower courts have tended recently to cite both the supersession clause and analogy to the canon disfavoring implied repeals.[127] Whatever route the courts use to reach the decision on the appropriate method of analysis, courts are increasingly turning to the framework of the canon disfavoring implied repeals to resolve apparent conflicts between statutes and Federal Rules.

The implied repeals canon instructs, first, that it is a "cardinal principle of statutory construction that repeals by implication are disfavored."[128] Courts have, however, created exceptions to the principle that implied repeals are highly disfavored. The first and most important exception for the discussion of conflicting statutes and Rules is the "irreconcilable conflict" exception: When two provisions are in irreconcilable conflict, the later constitutes an implied repeal of the former, to the extent of the actual conflict.[129] Under this "irreconcilable conflict" branch of the canon against implied repeals, if two statutes are capable of coexisting, the courts must harmonize the statutes, absent a clear expression of Congress to repeal.[130] In other words, the courts must give effect to both statutes if the provisions can coexist even if the result is a strained interpretation of the provisions. Only to the extent that the two provisions cannot coexist should there be an implied repeal.[131] In that instance

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and construed to mean that, if there is an "irreconcilable conflict" between federal statutes, then the statute that is later in time supersedes the prior statute, but only to the extent that the two enactments are in irreconcilable conflict. The clause is "express" because it is set forth in the statute; it is "general" because it does not attempt to list the provisions that are repealed, but just provides that, if an irreconcilable conflict arises, then the later in time controls. *See* 1A SUTHERLAND ON STATUTORY CONSTRUCTION, *supra* § 23.8. The express general repeals clause incorporates the principles of the canon disfavoring implied repeals. Recalling that the original purpose of the supersession clause was to preserve existing procedure under the Conformity Act and existing procedural statutes of Congress until the Supreme Court could adopt the original Federal Rules under the Rules Enabling Act, *see supra* notes 80-81 and accompanying text, it made some sense to use an express general repeal provision.

[127] *See, e.g.*, *Callihan*, 178 F.3d at 802-03; *Floyd*, 105 F.3d at 277, *superseded by Rule as stated in Callihan*, 178 F.3d 800; *Jackson*, 102 F.3d at 135.

[128] Radzanower v. Touche Ross & Co., 426 U.S. 148, 154 (1976) (quoting United States v. United Cont'l Tuna Corp., 425 U.S. 164, 168 (1976)); Morton v. Mancari, 417 U.S. 535, 549-50 (1974) (citing Posadas v. Nat'l City Bank, 296 U.S. 497, 503 (1936)).

[129] *Radzanower*, 426 U.S. at 154-55; *Posadas*, 296 U.S. at 503-05; *see also* 1A SUTHERLAND ON STATUTORY CONSTRUCTION, *supra* note 126, § 23.9, at 457-80.

[130] *Radzanower*, 426 U.S. at 155 (quoting *Morton*, 417 U.S. at 551); *see also* 1A SUTHERLAND ON STATUTORY CONSTRUCTION, *supra* note 126, § 23.9, at 464-66.

[131] *Radzanower*, 426 U.S. at 155 ("As the Court put the matter in discussing the interrelationship of the antitrust laws and the securities laws: 'Repeal is to be regarded as implied only if necessary to make the [later enacted law] work, and even then only to the minimum extent necessary. This is the guiding principle to reconciliation of the two statutory schemes.'" (quoting Silver v. New York Stock Exch., 373 U.S. 341, 357 (1963)); *Morton*, 417 U.S. at 551; *see also* 1A SUTHERLAND ON STATUTORY CONSTRUCTION, *supra* note 126, § 23.9, at 467-69.

of "irreconcilable" conflict, the later enacted provision will repeal the former to the extent of the actual conflict. This rule is of heightened significance when a court is asked to hold that a specific statute has been repealed by a general statute.[132] In these instances, the courts will not find a repeal of an earlier statute by a later one unless Congress has clearly expressed intent to repeal the former statute—thus, the "clear congressional intent" requirement of the canon.

In resolving clashes between statutes and Federal Rules under either the language of the supersession clause or by direct analogy to the canon disfavoring implied repeals, courts have used these same principles. Under this framework, courts have held that the first line of inquiry is whether there is an irreconcilable conflict between a federal statute and a Federal Rule. If so, the later enacted or promulgated controls and repeals the former to the extent of the actual conflict.[133] In determining whether there is an "irreconcilable conflict," many courts have held, in line with the canon disfavoring implied repeals, that the courts should choose a harmonizing construction that permits both statute and Rule to survive, if both provisions can coexist.[134] If the two provisions cannot coexist, then, just as with conflicting statutory provisions,

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[132] *Radazanower*, 426 U.S. at 153 (citing *Morton*, 417 U.S. at 550-51); *United Cont'l Tuna Corp.*, 425 U.S. at 168-69. A second exception to the principle that implied repeals are highly disfavored is that, "if the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act." *Radzanower*, 426 U.S. at 154 (quoting *Posadas*, 296 U.S. at 603).

[133] *See, e.g.*, Crawford Fitting Co. v. J.T. Gibbons, Co., 482 U.S. 437, 442, 445 (1987); United States v. Microsoft, 165 F.3d 952, 958-60 (D.C. Cir. 1999); Callihan v. Schneider, 178 F.3d 800, 802-03 (6th Cir. 1999); Floyd v. United States Postal Serv., 105 F.3d 274, 278 (6th Cir. 1997), *superseded by Rule as stated in Callihan*, 178 F.3d 800; Baugh v. Taylor, 117 F.3d 197, 200-01 (5th Cir. 1997); Jackson v. Stinnett, 102 F.3d 132, 136 (5th Cir. 1996); Autoskill, Inc. v. Nat'l Educ. Support Sys., Inc., 994 F.2d 1476, 1485 (10th Cir. 1993); Grossman v. Johnson, 674 F.2d 115, 122-23 (1st Cir. 1982); *see also* 1 MOORE'S FEDERAL PRACTICE, *supra* note 8, § 1.06, at 1-34; 7 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 86.04[4] (2d ed. 1984) ("[W]ithin their proper scope—practice and procedure—the Rules supersede all conflicting laws. . . . [A] subsequently enacted statute should be construed as to harmonize with the Federal Rule if that is at all feasible. If, however, there is a clear inconsistency then the rule must give way because of the paramount power of Congress. . . ."); 4 WRIGHT & MILLER, *supra* note 122, § 1030.

[134] *See, e.g.*, *Crawford Fitting*, 482 U.S. at 442, 445; Califano v. Yamasaki, 442 U.S. 682, 700 (1979); *see also* Marek v. Chesny, 473 U.S. 1, 9, 11-12 (1985); Baugh v. Taylor, 117 F.3d 197, 200-01 (5th Cir. 1997); Gaubert v. Fed. Home Loan Bank Bd., 863 F.2d 59, 67 (D.C. Cir. 1988); United States v. Gustin-Bacon Div. Certain-Teed Prods. Corp., 426 F.2d 539, 542 (10th Cir. 1970); Burlington N. & Santa Fe Ry. Co. v. Consol. Fibers, Inc., 7 F. Supp. 2d 822, 826 (N.D. Tex. 1998); United States v. Sharon Steel Corp., 681 F. Supp. 1492, 1495-98 (D. Utah 1987); 1 MOORE'S FEDERAL PRACTICE, *supra* note 8, § 106, at 1-34. *But see* Henderson v. United States, 517 U.S. 654, 661-63 (1996) (statute and rule cannot be harmonized if the proposed harmonization is at odds with the historical context and purpose of the rule).

courts will hold that the later of the two controls and supersedes the former to the extent of the actual conflict unless there is clear intent to supersede.[135]

The courts' use of the canon disfavoring implied repeals has resulted in a primary focus on the time of creation of the statute and Rule in resolving conflicts. Primary emphasis on priority of enactment may be appropriate in resolving conflicts between conflicting statutes enacted by the same lawgiver. In a context in which the principal inquiry is which of two provisions enacted by the same lawmaker should control, basing difficult decisions on time of enactment makes some sense. In the statute-Rule context, in which the principal question is not which statute of the same lawmaker should control, but which lawmaker's standard should control—the Court's or Congress'—using time of enactment as the initial and principal inquiry deflects the focus from issues of allocation and exercise of shared rulemaking power and often leads to omission of the issues altogether.[136]

B. The Supreme Court's Analysis of Conflicting Statutes and Federal Rules

The Supreme Court has never directly or comprehensively examined the appropriate methodology for analyzing conflicts between procedural provisions of federal statutes and Federal Rules. In its 1984 decision in *Daily*

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[135] *See, e.g.*, *Henderson*, 517 U.S. at 672 (later rule supersedes statute); United States v. Goodall, 236 F.3d 700, 708 (D.C. Cir. 2001) (Randolph, J., concurring) (later Rule should supersede statute); *Microsoft*, 165 F.3d at 958 (D.C. Cir. 1999) (later would supersede, but no conflict between statute and Rule); *Callihan*, 178 F.3d at 803 (later Rule supersedes statute); *Floyd*, 105 F.3d at 278, *superseded by Rule as stated in Callihan*, 178 F.3d 800 (later statute supersedes Rule); *In re* Prison Litigation Reform Act, 105 F.3d 1131, 1131 (6th Cir. 1997) (later statute supersedes Rule); *Autoskill, Inc.*, 994 F.2d at 1485 (later statute supersedes Rule); *Burlington N. & Santa Fe Ry. Co.*, 7 F. Supp. 2d at 826 (clear intent for statute to supersede Rule established); *Sharon Steel Corp.*, 681 F. Supp. at 1495-98 (same); *see also* 1 MOORE'S FEDERAL PRACTICE, *supra* note 8, § 1.06, at 1-34; 4 WRIGHT & MILLER, *supra* note 122, § 1030, at 162-63 & n.2; Note, *supra* note 8, at 835-36. The requirement of a clear statement of congressional intent for a statute to supersede a Federal Rule is emphasized in *Califano*, 442 U.S. at 700, and *Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1006-07, 1009 (D.C. Cir. 1986).

[136] Certainly, courts have, at times, noted that the substantive rights prohibition of the Rules Enabling Act, which precludes the Court from promulgating Rules that have substantive effect, has a role to play in the resolution of apparently conflicting federal statutes and Rules and, therefore, alters the "pure" implied repeals analysis. *See, e.g.*, *Henderson*, 517 U.S. at 663-72; Durant v. Husband, 28 F.3d 12, 15 (3d Cir. 1994); *Autoskill, Inc.*, 994 F.2d at 1485 n.8; Chesny v. Marek, 720 F.2d 474, 479-80 (7th Cir. 1983) (Posner, J.), *rev'd*, 473 U.S. 1 (1985); *see also Crawford Fitting*, 482 U.S. at 440-42 (stating that the statute at issue "embodie[d] Congress' considered choice" and interpreting the Federal Rule to incorporate the statute); *Marek*, 473 U.S. at 10-11 (emphasizing that the harmonization of statute and Rule at issue was not inconsistent with congressional policy choices). Often, however, this analysis is omitted. *See infra* text accompanying note 228. Further, courts generally omit other potential issues regarding allocation of rulemaking power.

Income Fund, Inc. v. Fox,[137] the Court did not rely on general principles of statutory construction to determine the interplay of statute and Rule, but relied instead on the context of the statute and Rule.[138] Since that time, however, the Court has used three different methods of analyzing statute-Rule conflicts, all of which rely primarily on principles of statutory construction[139] and two of which expressly invoke the implied repeals canon. First, the Court has referenced and applied general principles of statutory construction without referring explicitly to the implied repeals canon.[140] Second, the Court has expressly referred to and applied the canon disfavoring implied repeals.[141] Third, the Court has expressly applied both the implied repeals analysis and the substantive rights limitation of the Rules Enabling Act.[142]

1. Marek v. Chesny—*A "Plain Language" Approach To Resolving Statute-Rule Conflicts*

As recently as 1985, the Supreme Court made no reference to the implied repeals canon when confronted, in *Marek v. Chesny*,[143] with a classic clash of federal statute and Federal Rule.[144] In *Marek*, 42 U.S.C. § 1988 of the Civil Rights Attorneys' Fees Award Act of 1976, which provided for a prevailing plaintiff's recovery of attorney fees in § 1983 actions, collided with a

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[137] 464 U.S. 523 (1984).

[138] *Id.* at 528.

[139] The Court has fairly consistently invoked general rules of statutory construction when interpreting the Federal Rules. *See, e.g.*, Bus. Guides, Inc. v. Chromatic Communications Enters., Inc., 498 U.S. 533, 540 (1991); Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 397-98 (1990); Pavelic & LeFlore v. Marvel Entm't Group, 493 U.S. 120, 123 (1989). Some commentators have criticized this practice of analogizing to principles of statutory construction. *See, e.g.*, Moore, *supra* note 27, at 1039-40, 1091-107; Glen Weissenberger, *Evidentiary Myopia: The Failure of the Courts To See the Federal Rules of Evidence as a Codification of the Common Law*, 40 WM. & MARY L. REV. 1539, 1540-41 (1999).

[140] *See Marek*, 473 U.S. at 6-7. The Court in *Marek* did not expressly address the substantive rights limitation of the Rules Enabling Act, but the Court did state that its interpretation of the intersection of statute and Rule was not inconsistent with congressional policy choices. *See generally infra* notes 143-63 and accompanying text (discussing the Court's use of principles of statutory construction in resolving the statue-Rule conflict in the *Marek* decision).

[141] *See Crawford Fitting*, 482 U.S. at 442. In *Crawford Fitting*, the Court did not expressly refer to the substantive rights limitation of the Rules Enabling Act, but did conclude that its interpretation of the interplay of the statute and Rule at issue was consistent with Congress' policy choices. *Id.* at 440. *See generally infra* notes 164-87 and accompanying text (discussing the Court's use of the principles of the implied repeals canon in resolving the statute-Rule conflict in the *Crawford Fitting* decision).

[142] *See Henderson*, 517 U.S. at 664. *See generally infra* notes 188-202 and accompanying text (discussing the Court's use of an implied repeals analysis in the *Henderson* decision).

[143] 473 U.S. 1 (1985).

[144] Twelve years earlier, however, the Court had indicated, in dicta, that the implied repeals analysis would control in a conflict between a Rule and a statute. Davis v. United States, 411 U.S. 233, 241-42 (1973).

previously little used rule of civil procedure, Fed. R. Civ. P. 68.[145] Rule 68 provided that if a plaintiff refused a pretrial offer of settlement and the plaintiff ultimately obtained a judgment that was less favorable than the settlement offer, the plaintiff-offeree would have to pay the "costs" incurred after the defendant's offer of settlement. Prior to the *Marek* decision, Rule 68 "costs" had been considered to include only relatively minor costs, but not attorney fees.[146]

The principal issue in *Marek* was whether the term "costs" in Rule 68 included attorney fees ordinarily available to a prevailing civil rights plaintiff under 42 U.S.C. § 1988.[147] If so, then the prevailing plaintiff could not recover as "costs" the substantial attorney fees he incurred after the defendants' settlement offer because, though prevailing at trial, the plaintiff in *Marek* had ultimately recovered less than the defendant's settlement offer.[148]

In a six-to-three decision, the Supreme Court held that a "plain meaning" interpretation of the intersection of Rule 68 and § 1988 must govern, absent "congressional expressions to the contrary."[149] In its plain meaning analysis, the Court emphasized that the all-important term "costs" had not been defined in the Rule;[150] that the drafters of the Federal Rules had realized that sometimes Congress included attorney fees as a component of "costs" and sometimes Congress did not (since the Advisory Committee Note to Fed. R.

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[145] *See Court Rules: Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, Federal Rules of Criminal Procedure, Rules Governing Section 2254 Cases in the United States District Courts, and Rules Governing Section 2255 Proceedings in the United States District Courts*, 98 F.R.D. 337, 363 (Aug. 1983) ("*Preliminary Draft of Proposed Amendments*"). The Committee Note to proposed revisions to Fed. R. Civ. P. 68 states that Rule 68 had "rarely been invoked and [had] been considered largely ineffective" at its stated goals of "encourag[ing] settlements and avoid[ing] protracted litigation by taxing a claimant with costs if he should recover no more after trial then he would have received if he had accepted the defending party's offer . . . ." *Id.* The Committee Note further asserted that the primary reason for the ineffectiveness of Rule 68 was that the "costs" that were shifted were in most instances too small to matter to the parties. *Id.*; *see also* Chesny v. Marek, 720 F.2d 474, 475 (7th Cir. 1984) (Posner, J.) (noting that Rule 68 had been "[l]ittle known and little used" (citing Note, *Rule 68: A "New" Tool for Litigation*, 1978 DUKE L.J. 889, 890)), *rev'd*, 473 U.S. 1 (1985).

[146] *Preliminary Draft of Proposed Amendments*, *supra* note 145, at 363.

[147] 42 U.S.C. § 1988(b) (1984) allowed attorney fees to be included as costs available to the prevailing party.

[148] The plaintiff in *Marek* had rejected a pretrial offer of $100,000, which included both "costs now accrued and attorney fees" and had subsequently recovered only $92,000, which included $60,000 in damages and $32,000 in costs and attorney fees incurred before the defendant's offer of settlement. Marek v. Chesny, 473 U.S. 1, 3-4 (1985). The plaintiff later requested $171,692.47 in costs, including attorney fees. This amount included $139,692.47 in postoffer costs. *Id.* at 4, 7.

[149] *Marek*, 473 U.S. at 9.

[150] *Id.* at 8-9.

Civ. P. 54 expressly listed statutes that included attorney fees as costs and statutes that did not);[151] and that it was unlikely that the drafters would have omitted the definition of "costs" by oversight.[152] The Court, thus, held that "the most reasonable inference" was that the term "costs" in Rule 68 referred to costs as defined under the "relevant substantive statute."[153]

The Court did not expressly invoke the canon disfavoring implied repeals, but relied on what it characterized as a "plain meaning" analysis of statute and Federal Rule.[154] The Court's decision was, however, consistent with the canon disfavoring implied repeals. First, in accord with the "irreconcilable conflict" requirement of the canon, which requires that apparently conflicting provisions be construed harmoniously if they can coexist, the Court harmonized statute and Rule—Rule 68 incorporated "costs" as defined in the relevant substantive statute.[155] Since § 1988 included attorney fees as recoverable "costs," attorney fees must also be included as "costs" that could be forfeited for purposes of the Rule 68 cost-shifting provision.[156] Second, in accord with the "clear intent" requirement of the canon disfavoring implied repeals, the Court held that there would have had to be a "clear expression of congressional intent" to exempt the statute from the operation of Rule 68.[157] Although the Court did not expressly refer to or apply the canon disfavoring implied repeals, its opinion was consistent with that canon, probably as much because the Court applied general rules of statutory construction to determine the intersection of statute and Rule as anything else.

Justice Brennan forcefully asserted in dissent that the decision violated the substantive rights limitation on the Supreme Court's rulemaking authority under the Rules Enabling Act because it allowed a little known rule of civil procedure to override Congress' policy decision that prevailing plaintiffs in § 1983 civil rights actions should normally receive attorney fees.[158] Although never expressly referring to the substantive rights limitation of the Rules

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151 *Id.* at 8.

152 *Id.* at 9.

153 *Id.*

154 *Id.* at 9-10.

155 *Id.*

156 *Id.* at 9.

157 *Id.* at 9, 11-12 (quoting Califano v. Yamasaki, 442 U.S. 682, 700 (1979)).

158 *Id.* at 28-38 (Brennan, J., dissenting); *see* Chesny v. Marek, 720 F.2d 474, 479 (7th Cir. 1984) (Posner, J.), *rev'd*, 473 U.S. 1 (1985). Justice Brennan also complained in dissent that the majority's "plain language" approach was at odds with the history and structure of the federal rules of civil procedure and would result in "absurd variations in Rule 68's [application] based on . . . picayune differences in [Congress'] statutory phraseology." *Marek*, 473 U.S. at 14-15, 18-27 (Brennan, J., dissenting).

Enabling Act, however, the majority in *Marek* emphasized that Rule 68, as harmonized with § 1988, was not inconsistent with Congress' policy goals.[159] Justice Brennan further criticized the decision as particularly improvident because both Congress and the Judicial Conference had been considering for a number of years whether to include attorney fees as "costs" under Rule 68.[160]

The Court's decision in *Marek* created a heightened concern over the appropriate roles of the Court and Congress in procedural rulemaking. The *Marek* decision also precipitated the House of Representatives' call for repeal of the supersession clause of the Rules Enabling Act in 1988.[161] The harmonization of statute and Rule in the *Marek* case illustrates a potential danger of relying primarily on canons of statutory interpretation to determine when Federal Rules promulgated by the Court should supersede or be harmonized with statutes of Congress. The supersession clause, as widely construed by the federal courts, permits a Federal Rule to supersede or be harmonized with a federal statute based primarily on principles of statutory construction. If, in either case, there is a respectable argument that the Rule would have an impermissible substantive effect, the Court as the final arbiter of the division between substance and procedure may nullify a policy decision of the elected Congress without squarely addressing the alleged interbranch conflict. Of course, the majority and dissenting opinions in *Marek* took contrary views of whether the Court's interpretation of the intersection of § 1988 and Fed. R. Civ. P. 68 impermissibly impacted congressional policy choices. The majority concluded that its decision was not inconsistent with Congress' goals,[162] while the dissent concluded that the interpretation abridged Congress' policy decision that civil rights plaintiffs should ordinarily receive attorney fees and, thus, contravened the substantive rights limitation of the Rules Enabling Act.[163]

Importantly, for this analysis of the appropriate methodology for resolving apparent conflicts between statute and Federal Rule, the Court relied initially and primarily on principles of statutory construction to resolve the apparent conflict between § 1988 and Fed. R. Civ. P. 68. This initial focus on statutory construction rendered the issue of allocation of rulemaking power of secondary significance only—having determined, based on principles of statutory

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159 *Id.* at 10-11.
160 *Id.* at 39-43.
161 *See supra* notes 106-11 and accompanying text.
162 *Marek*, 473 U.S. at 10-11.
163 *Id.* at 28-38.

construction, to harmonize § 1988 and Fed. R. Civ. P. 68, the Court referenced issues of power only to determine whether that harmonization was "consistent" with congressional intent.

2. Crawford Fitting Co. v. J.T. Gibbons, Inc.—*Express Use of the Implied Repeals Canon To Resolve Conflicts*

Two years later, in *Crawford Fitting Co. v. J.T. Gibbons, Inc.*,[164] the Supreme Court resolved, by express invocation of the canon disfavoring implied repeals, an apparent conflict between Fed. R. Civ. P. 54(d) and two portions of congressional statutes that provided for taxation of court costs, 28 U.S.C. §§ 1920 and 1821(b).[165] Rule 54(d) provided, in pertinent part, "[e]xcept when express provision therefore is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs."[166] Sections 1920 and 1821(b) of the U.S. Code, respectively, listed (1) the kinds of expenses that a federal court could tax as costs and (2) the amounts that federal courts could assess for those costs.[167] The prevailing parties in *Crawford Fitting* sought reimbursement as court "costs" of the fees of their own expert witnesses in an amount exceeding the thirty dollars per day cap prescribed by § 1821(b) for compensation of a "witness."[168] Section 1920 did not explicitly provide for taxation of a party's own expert witness fees as reimbursable "costs," although the section did provide for the fees of a "witness" to be taxed as costs and also provided for fees of a "court-appointed expert" to be taxed as costs. Correspondingly, § 1821(b) required that fees of a "witness" not exceed thirty dollars per day, while fees of court-appointed experts could exceed that amount.[169]

The parties who had prevailed in the trial court argued that the language of Rule 54(d) gave the district court discretion to exceed the thirty dollars per-day limit on costs permitted for witnesses in § 1821(b), with respect to reimbursement of the parties' own expert witnesses, because the Rule created an independent source of authority and the relevant statutes made no express

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[164] 482 U.S. 437 (1987).

[165] *Id.* at 445. *See also* Davis v. United States, 411 U.S. 233, 241-42 (1973) (finding no express conflict between 18 U.S.C. § 3771 and Fed. R. Crim. P. 12(b)(2); hence, no need to consider the difficult question of repeal by implication of a federal statute by a later-promulgated Rule of criminal procedure).

[166] *Crawford Fitting*, 482 U.S. at 441.

[167] *Id.* at 440-41.

[168] *Id.* at 439.

[169] *Id.* at 440-41.

provision for a party's own expert witness fee.[170] The majority in *Crawford Fitting* rejected this interpretation and resolved the perceived conflict of statute and Rule primarily by resort to the canon disfavoring implied repeals.

The *Crawford Fitting* Court first examined the history of Congress' general statutory provisions regarding taxable costs, as set forth in §§ 1920 and 1821(b), and concluded that Congress had therein comprehensively regulated taxation of federal court costs.[171] The Court also concluded that § 1920 embodied Congress' "considered [policy] choice" regarding the categories of expenses that could be taxed as costs.[172] Having so concluded, the Court invoked the canon disfavoring implied repeals to resolve the apparent conflict between statute and Federal Rule. The majority in *Crawford Fitting* held that an interpretation of Rule 54(d), which would give the district courts discretion to exceed the limits established in § 1821(b), would render either § 1920 or § 1821 without meaning, i.e., superseded by implication. The Court reasoned that, because repeals by implication are not favored and because the provisions were not even "inconsistent,"[173] no interpretation could render part of Congress' comprehensive fee statutes superseded by implication.[174] The Court concluded that the "logical conclusion" from the text and "interrelation of the provisions" and the "better view" of the intersection of the three provisions was that Rule 54(d), § 1920, and § 1821(b) could be harmonized: § 1920

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[170] *Id.* at 441.

[171] *Id.* at 439-40. The Court noted that, in 1853, Congress had enacted comprehensive legislation to eradicate the "great diversity" in the practice of the courts in taxing court costs and to stop losing parties from being "unfairly saddled" with high costs. *Id.* at 440-41. The Court further noted that the 1853 Fee Act specified that the "following and no other compensation shall be taxed and allowed." *Id.* at 440. The Court, thereafter, concluded that the "sweeping reforms of the 1853 Act have been carried forward to today, 'without any apparent intent to change the controlling rules.'" *Id.* at 440 (quoting Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975)). The dissent in *Crawford Fitting*, by contrast, emphasized that commentators had previously agreed that Fed. R. Civ. P. 54(d) allowed discretion to district courts regarding court costs unless the issue was expressly covered by statute; that Rule 54(d), thus, adopted the discretionary practice regarding court costs from equity practice and applied that practice to both law and equity; and that Congress had substituted discretionary language in § 1920 for its previous mandatory language as to costs that "shall be paid" in order to permit discretion to the courts regarding court costs. *Id.* at 446-49 & n.3 (Marshall, J., dissenting).

[172] *Id.* at 440.

[173] The canon disfavoring implied repeals, of course, would have required "irreconcilable conflict," i.e., that the two provisions be incapable of coexisting, not merely that the provisions be "inconsistent." *See supra* notes 128-32 and accompanying text.

[174] *Crawford Fitting*, 482 U.S. at 442.

defined the term "costs" for purposes of Rule 54(d), and § 1821(b) determined the dollar amount payable for such costs.[175]

The *Crawford Fitting* majority concluded by essentially reciting the canon disfavoring implied repeals:

> We will not lightly infer that Congress has repealed §§ 1920 and 1821 either through Rule 54(d) or any other provision not referring explicitly to witness fees. As always, "'[w]here there is no *clear* intention otherwise, a specific statute will not be controlled or modified by a general one, regardless of the priority of enactment.'" . . . Any argument that a federal court is empowered to exceed the limitations explicitly set out in §§ 1920 and 1821 without plain evidence of congressional intent to supersede those sections ignores our longstanding practice of construing statutes *in pari materia* . . . .[176]

In expressly invoking the canon disfavoring implied repeals in the statute-Rule context, the Court cited two cases in which the canon against implied repeals had been used to determine which of two apparently conflicting congressional statutes would control,[177] *Radzanower v. Touche Ross & Co.*[178] and *Morton v. Mancari*.[179] The Court also inferred that Congress had "enacted" Rule 54(d),[180] and it referred to Rule 54(d) as a "statute" to be read *in pari materia* with other federal statues, if possible.[181]

Thus, although the Court nowhere considered or stated that the canon against implied repeals supplied the appropriate methodology for resolving all apparent conflicts between federal statutes and Federal Rules, the Court did apply that canon in its entirety, including the canon's exhortation to harmonize apparently conflicting authorities if they can coexist,[182] the principle that a

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[175] *Id.* at 441. The dissenting opinion argued that this interpretation rendered Rule 54(d) a nullity. The dissent also concluded that §§ 1920 and 1821(b) and Rule 54(d) could be read harmoniously without rendering any provision superfluous if the categories of costs listed in § 1920 were not considered to be exclusive. *Id.* at 448-50 (Marshall, J., dissenting).

[176] *Id.* at 445 (emphasis added in *Crawford Fitting* decision).

[177] *Id.* at 445.

[178] 426 U.S. 148, 153 (1976).

[179] 417 U.S. 535, 550-51 (1974).

[180] *Crawford Fitting*, 482 U.S. at 445. Congress does, of course, allow Federal Rules promulgated by the Court under the Rules Enabling Act process to become law if it takes no action on the Rules, but Congress generally does not take affirmative action to enact the Federal Rules. *See supra* notes 63-64 and accompanying text.

[181] *Crawford Fitting*, 482 U.S. at 445.

[182] *Id.* at 441-42, 444-45.

general statute should not repeal a more specific one,[183] and the presumption that Congress should not be considered to have repealed an apparently conflicting statute absent a clear statement of intent to do so.[184] The Court, thus, continued its tradition of applying concepts of statutory construction when interpreting the Federal Rules.[185] Courts have construed *Crawford Fitting* to establish the general methodology for resolving instances of apparent statute-Rule conflicts.[186]

Although the *Crawford Fitting* Court did not explicitly include an analysis of the substantive effect of its harmonization of Fed. R. Civ. P. 54(d) and 28 U.S.C. §§ 1920 and 1821, the Court may have considered that analysis to have been unnecessary because the Court held that Federal Rule 54(d) incorporated in whole the statutory provisions at issue, which the Court concluded represented Congress' "considered policy choice" regarding the kinds of expenses that were reimbursable as court costs.[187] Again, in *Crawford Fitting*, issues of statutory interpretation took precedence over issues of allocation and exercise of rulemaking authority.

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183 *Id.* at 445.

184 *Id.*

185 *See supra* note 139.

186 *See, e.g.*, Callihan v. Schneider, 178 F.3d 800, 802-03 (6th Cir. 1999); Floyd v. United States Postal Serv., 105 F.3d 274, 278 (6th Cir. 1997), *superseded by Rule as stated in Callihan*, 178 F.3d 800; Jackson v. Stinnett, 102 F.3d 132, 135-36 (5th Cir. 1996).

187 *Crawford Fitting*, 482 U.S. at 440. It will not, of course, always be the case that a Federal Rule that incorporates a congressional provision in toto will be consistent with Congress' policy objectives and, thus, will not impermissibly impact substantive rights. Indeed, the dissenting opinion in *Marek v. Chesny* and some commentators have concluded that, by simply incorporating 42 U.S.C. § 1988 into Fed. R. Civ. P. 68, the *Marek* Court probably impermissibly infringed on substantive rights accorded civil rights plaintiffs by Congress. *See, e.g.*, Marek v. Chesny, 473 U.S. 1, 28-38 (1985) (Brennan, J., dissenting); Carrington & Apanovitch, *supra* note 8, at 482-93 (concluding that interpreting Fed. R. Civ. P. 68 to include attorney fees would allow Rule 68 to abridge substantive rights, but acknowledging that the Court based its decision in part on § 1988); Note, *supra* note 8, at 829-35 (arguing prior to the Court's decision in *Marek*, that Rule 68 must yield to § 1988 to avoid violation of the substantive rights limitation of the Rules Enabling Act). *But see* 13 MOORE'S FEDERAL PRACTICE, *supra* note 8, § 68.08[4][c], at 68-47 to 68-48; Burbank, *supra* note 8, at 438 n.69 (concluding that the *Marek* Court was probably right in stating that "costs" under Rule 68 include attorney fees when the relevant statute provides for attorney fees, but noting that since § 1988 is discretionary while Rule 68 is mandatory, § 1988 should control when Rule 68 would deny post-offer attorney fees and § 1988 would permit them).

3. Henderson v. United States—*Implied Repeal Plus Substantive Rights Analysis*

The majority opinion in the Supreme Court's 1996 decision in *Henderson v. United States,*[188] likewise, applied the principles of the canon disfavoring implied repeals to an apparent conflict between a Federal Rule of Civil Procedure and a federal statute. In apparent conflict in *Henderson* were Fed. R. Civ. P. 4(j)[189] and 46 U.S.C. app. § 742 of the Suits in Admiralty Act.[190] In *Henderson*, the Court also expressly analyzed the substantive effect, if any, of construing rule 4(j) to supersede § 742, although it need not have done so since both § 742 and rule 4(j) had been enacted by Congress.

The version of Fed. R. Civ. P. 4(j) that was relevant in the *Henderson* case permitted service of summons and complaint any time within 120 days plus any discretionary extension of time that the district court might grant,[191] while 46 U.S.C. app. § 742 of the Suits in Admiralty Act required service to be perfected "forthwith." The *Henderson* Court first determined that the requirements of § 742 and rule 4(j) for perfecting service conflicted irreconcilably because the statue and rule could not coexist: A plaintiff could not both perfect service on the last day allowed by rule 4(j) (the 120th day plus any discretionary time allowed by the court) and also serve "forthwith" as mandated by the Suits in Admiralty Act.[192] The Court then stated that, through the Rules Enabling Act, Congress had authorized the Court to promulgate Federal Rules to govern "practice and procedure" in the federal courts and that the supersession clause requires that nonsubstantive Court Rules supersede conflicting prior statutes.[193] The *Henderson* majority also applied the later-in-

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188 517 U.S. 654 (1996).

189 FED. R. CIV. P. 4(j), Pub. L. 97-462, 96 Stat. 2527 (1983), *amended by* 146 F.R.D. 401, 405-19 (1993).

190 46 U.S.C. app. § 742 (1994), *amended by* 46 U.S.C. app. § 742 (Supp. IV 1998).

191 FED. R. CIV. P. 4(j), Pub. L. No. 97-462, 96 Stat. 2527 (1983), *amended by* 146 F.R.D. 401, 405-19 (1993). In 1993, the Court's comprehensive amendment of Fed. R. Civ. P. 4 became effective. Among other things, the 1993 amendments relocated much of former Rule 4(j), including the 120-day time limitation, to Fed. R. Civ. P. 4(m). *See Amendments to the Federal Rules of Civil Procedure*, 146 F.R.D. 401, 417 (1993).

192 *Henderson*, 517 U.S. at 661-63. Importantly, defendant United States had argued, in part, in *Henderson*, that the two provisions could be and should be harmonized under an implied repeals analysis; if the Court held the 120-day period for service plus discretionary extensions permitted under Rule 4(j) constituted merely an outer limit on the time in which a plaintiff might serve, not a period of absolute entitlement, the two provisions could coexist. *Id.* After examining the historical context and purpose of the Rule and relevant Advisory Committee Notes, the Court rejected this position. *Id.*

193 *Id.* at 663, 668-70. The *Henderson* Court also noted that both the statute and Rule had been enacted by Congress. *Id.* at 668-69.

time analysis of implied repeal,[194] although it is unclear whether the Court relied on the implied repeals canon, the supersession clause, or both.[195]

Further, the *Henderson* Court explicitly examined the substantive-procedural dichotomy established by the Rules Enabling Act. This substantive-procedure analysis, however, was unnecessary. As noted, *Henderson* did not involve a conflict between a congressional statute and a Federal Rule of the Court, which would have warranted a substantive rights analysis under the Rules Enabling Act to ensure that the Court did not exceed the proper scope of its rulemaking authority.[196] Instead, the version of Fed. R. Civ. P. 4(j) that was at issue in *Henderson* had been enacted by Congress, which clearly has the right to enact substantive laws and the exclusive right to determine the subject matter jurisdiction of the federal courts.[197] Thus, the perceived conflict between rule 4(j) and § 742 of the Suits in Admiralty Act, in fact, constituted a potential conflict between two provisions enacted by Congress.

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[194] *Id.* at 668 ("[A] rule made law by Congress supersedes conflicting laws no less than a Rule this Court prescribes.") The Court did note that Congress, not the Court, had created Fed. R. Civ. P. 4(j), but the Court did not give particular significance to that fact. *Id.*; *see also infra* note 199 and accompanying text.

[195] *Compare Henderson*, 517 U.S. at 668 (stating "a Rule made law by Congress supersedes conflicting laws no less than a Rule this Court prescribes" (citing the supersession clause as discussed in the Brief of the United States)), *with id.* at 668-69 (noting that the United States, in its Brief, agreed "that Section 2072(b) [the supersession clause] provides the best evidence of congressional intent regarding the proper construction of Rule 4(j) and its interaction with other laws"); *see also id.* at 679 (Thomas, J., dissenting) ("The majority acknowledges the inapplicability of the Rules Enabling Act, . . . but appears to apply to the Act nonetheless, ... The majority is not entirely clear on this point, however, and it appears that the majority may instead find that Rule 4(j) effected an implied repeal . . . independent of the Rules Enabling Act.").

[196] The *Henderson* Court also noted that Fed. R. Civ. P. 82 requires that the Federal Rules of Civil Procedure not extend or limit the subject matter jurisdiction or venue of the U.S. district courts. *Henderson*, 517 U.S. at 664; *see also* Fed. R. Civ. P. 82. Rule 82 precludes the Federal Rules from extending subject matter jurisdiction because: Congress' involvement in the Rules Enabling Act process is minimal and Congress has the exclusive constitutional authority to regulate federal court jurisdiction. *See* 14 MOORE'S FEDERAL PRACTICE, *supra* note 8, § 82.02, at 82-5; 12 WRIGHT & MILLER, *supra* note 122, § 3141, at 485 ("The rules merely prescribe the method by which the jurisdiction granted the courts by Congress is to be exercised.") Rule 82 also assumes that the primary intent of rulemakers is "procedural fairness and efficiency." Thus, Rule 82 precludes unintended alterations of subject matter jurisdiction. 14 MOORE'S FEDERAL PRACTICE, *supra* note 8, § 82.02, at 82-5 to 82-6. *See also* Whitten, *supra* note 15, at 74-75 (the Advisory Committee for the original Federal Rules viewed Rule 82 as "coextensive with the substantive . . . limitations of the Rules Enabling Act"). The first rationale for Rule 82 would not apply to congressional rulemaking because Congress has authority to regulate the jurisdiction of the federal courts. The second rationale—assuming that the primary intent of rulemaking is procedural in order to prevent unintended alterations of subject matter jurisdiction—might arguably make some sense even in application to congressional rulemaking, even though Congress, as opposed to the Supreme Court, has both substantive and procedural legislative authority. Nevertheless, Fed. R. Civ. P. 82 was intended to limit Court rulemaking under the Rules Enabling Process, not congressional rulemaking.

[197] U.S. CONST. art. III, § 1.

The *Henderson* majority did note that both Fed. R. Civ. P. 4(j) and 46 U.S.C. app. § 742 of the Suits in Admiralty Act had been enacted by Congress,[198] but it did not act on the implications of this fact—that no substantive rights analysis under the Rules Enabling Act was necessary.[199] The *Henderson* Court, instead, emphasized that the litigants had acknowledged that "a Rule made law by Congress supersedes conflicting laws no less than a Rule this Court prescribes."[200] Defendant United States, moreover, had agreed that the Rules Enabling Act provided the correct means of analyzing the conflict.[201] Although as an abstract proposition, it is true that a later statute of Congress will generally supersede a conflicting Supreme Court Rule, the analysis that controls when conflicting provisions originate from the two coordinate branches that share procedural rulemaking authority may well, and this Article suggests should, differ from the analysis of conflicting provisions

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198 *Henderson*, 517 U.S. at 668-69.

199 The failure to accord significance to the fact that Congress had enacted both statute and Rule may have arisen in part because Fed. R. Civ. P. 4 was originally promulgated by the Court under the Rules Enabling Act process, then amended by enactment of Congress in 1983, then amended again in 1993 by the Court pursuant to the Rules Enabling Act process. *See supra* note 98. The cases that were decided before the 1983 congressional amendment of Fed. R. Civ. P. 4, thus, would have appropriately relied on an analysis of apparently conflicting statute and Court Rule. *See, e.g.*, Kenyon v. United States, 676 F.2d 1229, 1232, 1331 (9th Cir. 1982) (holding that service "forthwith" is jurisdictional requirement), *abrogated, Henderson*, 517 U.S. 654; Battaglia v. United States, 303 F.2d 683 (2d Cir. 1962) (same), *abrogated, Henderson*, 517 U.S. 654. Other cases were decided after Congress' amendment of Fed. R. Civ. P. 4 in 1983 and before the Court's 1993 amendments to Rule 4, but failed to note that the conflict was between a congressional statute and a congressional rule. *See, e.g.*, United States v. Holmberg, 19 F.3d 1062, 1064-65 (5th Cir. 1994) (holding that service "forthwith" is jurisdictional requirement; thus, rule 4(j) would abridge substantive rights if it superseded statute), *abrogated, Henderson*, 517 U.S. 654; Libby v. United States, 840 F.2d 818, 819-21 (11th Cir. 1988) (same), *abrogated, Henderson*, 517 U.S. 654; Amella v. United States, 732 F.2d 711, 713 (9th Cir. 1984) (holding that service "forthwith" is jurisdictional requirement), *superseded by Rule as stated in* Stewart v. United States, 903 F. Supp. 1540 (S.D. Ga. 1995). In one case, the court did note that both provisions were enacted by Congress, but failed to accord significance to the issue. *See, e.g.*, Jones & Laughlin Steel, Inc. v. Mon River Towing, Inc., 772 F.2d 62, 66 (3d Cir. 1985) (the *Jones* court noted that the 120-day period set forth in Rule 4(j) was a "congressional enactment" and was included by Congress in Pub. L. No. 97-462, § 2. The *Jones* court nevertheless concluded that the "congressional enactment of a uniform 120-day period for accomplishing service of process" must be construed in light of the supersession provision of the Rule Enabling Act, even though the Rules Enabling Act governs Rules promulgated by the Court). Thus, the originator—Supreme Court or Congress—of the pertinent portion of Fed. R. Civ. P. 4 varied in the different cases that formed the split in circuits on this issue of conflicting statute and rule, but scant attention was paid to this factor by the courts.

200 *Henderson*, 517 U.S. at 668.

201 *Id.* at 668-69. The Court noted that the brief for defendant United States conceded that 28 U.S.C. § 2072 provided the proper means of construing the statute and Rule. *Id.* (citing Brief for United States 16, n.14 ("We agree with petitioner . . . that Section 2072(b) provides the best evidence of congressional intent regarding the proper construction of Rule 4(j) and its interaction with other laws.")).

enacted by Congress. For instance, no substantive rights limitation need be imposed on Congress.[202]

The *Henderson* Court's use of an implied repeals analysis augmented by a discussion of the substantive rights limitation to resolve the conflict between a rule and statute that were both enacted by Congress illustrates how failing to emphasize the rulemaking power of the Court and Congress can lead to inappropriate analysis of statute-Rule conflicts.

C. The Lower Courts' Use of the Implied Repeals Analysis

In *Crawford Fitting Co. v. J.T. Gibbons, Inc.*[203] and *Henderson v. United States*,[204] the Supreme Court used principles of the canon disfavoring implied repeals in resolving particular clashes of congressional statutes and Federal Rules, sometimes augmenting that analysis with specific discussion of the substantive rights limitation of the Rules Enabling Act. Although the Court has never held that the implied repeals analysis should be used for all instances of perceived conflict between federal statute and Federal Rule, the lower courts have generally used that analysis. Furthermore, although the Court has used the canon in a manner that arguably displays sensitivity to at least the substantive rights provision of the Rules Enabling Act,[205] the lower courts have often displayed less appreciation of pertinent issues of authority, sometimes using the canon to perform a straight statutory construction analysis and omitting issues of allocation or exercise of rulemaking authority entirely. Two

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[202] *See, e.g.*, Flaminio v. Honda Motor Co., 733 F.2d 463, 470 (7th Cir. 1984) ("Having been enacted by Congress rather than promulgated by the Supreme Court pursuant to the Rules Enabling Act . . ., the Federal Rules of Evidence are not subject to the Act's proviso that rules promulgated under it 'shall not abridge, enlarge, or modify any substantive right. . . .'").

[203] 482 U.S. 437 (1987).

[204] 517 U.S. 654 (1996).

[205] In *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 440 (1987) and *Marek v. Chesny*, 473 U.S. 1, 10-11 (1985), the Court was careful to note that its harmonizations of statute and Rule were not inconsistent with Congress' policy choices. In *Henderson*, 517 U.S. at 663-72, the Court addressed the substantive rights provision directly, although it need not have done so because both the statute and rule had been enacted by Congress. In *Daily Income Fund, Inc. v. Fox*, 464 U.S. 523 (1984), Justice Stevens noted in his concurring opinion that the harmonization of statute and Rule proposed by the defendants would have violated the substantive rights limitation of the Rules Enabling Act and that interpretations of the intersection of statutes and Rules should be read to preclude a violation of the substantive rights limitation. *Id.* at 544 n.2 (Stevens, J., concurring).

recent Sixth Circuit cases, *Floyd v. United States Postal Service*[206] and *Callihan v. Schneider,*[207] are illustrative.

The clash of congressional and Court procedural provisions in *Floyd* centered on a litigant's right to appeal in forma pauperis after a district court certifies that the appeal is not taken in good faith.[208] In its 1997 decision in *Floyd*, the Sixth Circuit held that the then newly enacted § 1915(a)(3) of the PLRA eliminated a litigant's right to appeal in forma pauperis if the trial court certified that the appeal was not taken in good faith.[209] The *Floyd* court held that § 1915(a)(3) superseded Fed. R. App. P. 24(a), which provided, in part, that a party could obtain review of the trial court's certification decision by filing a motion for leave to proceed in forma pauperis on appeal within thirty days after the district court's certification decision.[210] The *Floyd* court construed the supersession clause and traditional implied repeals analysis to require that a later-enacted federal statute would repeal a Federal Rule with which it conflicted irreconcilably.[211] The court, thus, concluded that § 1915(a)(3) of the PLRA superseded Rule 24(a) because the federal statute had been enacted after the Federal Rule and the court concluded that the two provisions conflicted irreconcilably.[212]

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206 105 F.3d 274 (6th Cir. 1997), *superseded by Rule as stated in* Callihan v. Schneider, 178 F.3d 800 (6th Cir. 1999).

207 178 F.3d 800 (6th Cir. 1999).

208 105 F.3d at 274.

209 *Id.* at 278. Section 1915(a)(3), provided, in part, that "[a]n appeal may not be taken in forma pauperis if the trial court certifies in writing that the appeal is not taken in good faith." *Id.* at 277.

210 In 1997, Fed. R. App. P. 24(a) provided, in part, as follows: "A motion for leave to [proceed in forma pauperis] may be filed in the court of appeals within 30 days after service of notice of the action of the district court [certifying that the appeal was not taken in good faith]." *Id.*

211 Rule 24(a) was promulgated in 1967 and became effective on July 1, 1968. Later Supreme Court amendments to Rule 24(a) had an effective date of July 1, 1986. The PLRA, by contrast, was enacted in 1996, and, thus, was later in time than the Federal Rule. *Id.* at 278. The *Floyd* court, thus, concluded that the supersession clause required that the later-enacted statute supersede the earlier Federal Rule. *Id.* The *Floyd* court also stated that a second restriction on Congress' ability to alter the Federal Rules is that, in accord with the canon disfavoring implied repeals, Congress may only amend Federal Rules by clear statement of intent to do so. *Id. See also* Molly Carrier Hamilton et al., *Recent Sixth Circuit Decisions Regarding Procedure*, 30 U. MEM. L. REV. 515, 545-46 (2000).

212 Three other circuit courts that have addressed the issue of the interplay between § 1915(a)(3) of the PRLA and Fed. R. App. P. 24(a) have concluded, under an implied repeals analysis, that there is no conflict between PLRA § 1915(a)(3) and Rule 24(a); hence, both provisions survive. *See* Baugh v. Taylor, 117 F.3d 197, 200-02 (5th Cir. 1997) (examination of historical context of § 1915(a)(3) reveals that the identical provision had coexisted (though previously located in § 1915(a)) with Rule 24(a) for three decades and, further, that case law interpreting the interplay of the two provisions had consistently permitted review of the trial court's certification that an appeal was not in good faith. Absent "clear congressional intent to overrule this precedent," the Fifth Circuit held that it could not hold that the mere relocation in the PLRA of the text at issue removed the circuit court's ability to review the district court's certification decision). *See also* Newlin

Two years later, in *Callihan v. Schneider*,[213] the Sixth Circuit again addressed the apparent conflict between § 1915(a)(3) of the PLRA and Fed. R. App. P. 24(a). Section 1915(a)(3) was unchanged.[214] In the interval between the 1997 *Floyd* decision and the Sixth Circuit's 1999 decision in *Callihan*, however, the Court had made some minor textual changes to Fed. R. App. P. 24(a), including changing the use of passive voice to use of active voice, and had relocated the modified Rule 24(a) as Fed. R. App. P. 24(a)(5).[215] The Advisory Committee Note accompanying the changes report-ed that these 1998 amendments to Rule 24(a) were intended to "make the rule more easily understood" and "to make style and terminology consistent throughout the federal rules" and concluded that "[t]hese changes are to be stylistic only."[216]

The Sixth Circuit held in *Callihan*, however, that after the Supreme Court's 1998 amendments to Rule 24(a), the language of § 1915(a)(3) still purported to deny a right to appeal in forma pauperis if the district court certified that the appeal was not in good faith, while newly repromulgated Rule 24(a)(5) again purported to provide an avenue to challenge such decisions.[217] The Sixth Circuit, thereafter, recited the standard implied repeals formula that repeals by implication are disfavored, and held that, because the statute and Federal Rule were once again in irreconcilable conflict, the supersession clause of the Rules Enabling Act "dictate[d]" that the later of the two—this time the Federal Rule—must control.[218] *Callihan* emphasized that, under the supersession clause, a congressional statute passed after the effective date of a Rule will

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v. Helman, 123 F.3d 429, 432 (7th Cir. 1997), *overruled on other grounds*, Lee v. Clinton, 209 F.3d 1025 (7th Cir. 2000); Wooten v. D.C. Metro. Police Dep't, 129 F.3d 206, 207 (D.C. Cir. 1997).

213 178 F.3d 800 (6th Cir. 1999).

214 Section 1915(a)(3) continued to provide, as it had at the time of *Floyd*, that "[a]n appeal may not be taken in forma pauperis if the trial court certifies in writing that the appeal is not taken in good faith." 28 U.S.C. § 1915(a)(3) (Supp. IV 1998).

215 The new language of Rule 24(a)(5) provided in part that "[a] party may file a motion to proceed in forma pauperis in the court of appeals within 30 days after service of the notice [certifying that the action . . . had not been taken in good faith]." Rule 24(a) had previously provided, in part, that "[a] motion for leave to [proceed in forma pauperis] may be filed in the court of appeals within 30 days after service of notice of the action of the district court [certifying that the appeal was not taken in good faith or that the party was not otherwise entitled to proceed in forma pauperis]." *See Amendments to Federal Rules of Civil Procedure, Criminal Procedure, Evidence, and Appellate Practice*, 177 F.R.D. 530, 556-58 (1998).

216 20A MOORE'S FEDERAL PRACTICE, *supra* note 8, § 324App.04[2], at 324App.-9; *id.* at § 324App.100, at 324App.-9.

217 *Callihan*, 178 F.3d at 803-04.

218 *Id.* at 802-03; *see also* Hamilton et al., *supra* note 211, at 546 ("With the [1998 amendments to Rule 24(a)], Rule 24(a) was once again in conflict with § 1915(a)(3), requiring the *Callihan* court to reexamine *Floyd*. Consistent with the discussion in *Floyd* concerning Congress's authority to regulate court procedures and pursuant to the directives of the Rules Enabling Act, Rule 24(a) prevailed.").

repeal a Federal Rule to the extent of the actual conflict, and a Federal Rule passed after the effective date of a federal statute will supersede the federal statute at issue.[219] Based on this later-in-time analysis, the court held that newly promulgated Rule 24(a)(5) superseded § 1915(a)(3) of the PLRA to the extent of the actual conflict,[220] notwithstanding that the Advisory Committee Notes had emphasized that the "changes [were] intended to be stylistic only."[221]

In other words, *Callihan*, following an implied repeals, later-in-time analysis, held that the Court could repromulgate a Federal Rule without intending any substantive effect, and, because the Federal Rule was later in time, the Rule would trump a conflicting congressional provision.[222] *Callihan* made no reference to the substantive rights limitation on Court rulemaking established in the Rules Enabling Act nor did it engage other allocation of power issues. Its only reference to the rulemaking authority of Congress vis-à-vis the Court was to quote language from *Floyd*, discussing the analytically distinct situation of whether and when a later-enacted federal statute would supersede an earlier Federal Rule.[223]

Even in isolation the decision in *Callihan* is troubling. Congress had very recently enacted the provisions of the Prison Litigation Reform Act at issue, with the intent, as described by the Sixth Circuit in *Floyd*, to "impede inmates from initiating frivolous legal proceedings."[224] At the very least, we would have expected some analysis of: (1) whether, given Congress' ultimate authority over procedural rulemaking, the Supreme Court retained the power to promulgate a conflicting Rule regarding the issue, much less act within two years to nullify the congressional statute purporting to eliminate the right to appeal in forma pauperis; (2) whether, as a prudential matter, the Court may

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219 *Callihan*, 178 F.3d at 802-03.

220 *Id.* at 803.

221 The Advisory Committee Notes regarding the 1998 amendments to Fed. R. App. P. 24 provides that "[t]he language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only . . . ." *See* 20A MOORE'S FEDERAL PRACTICE, *supra* note 8, § 324App.04[2], at 324App.-9. Moore's Federal Practice concludes, in accord with the Advisory Committee Notes, that the 1998 amendments were simply to make the Rule easier to understand and to make style and terminology of the appellate rules uniform; the amendments "did not work any substantive changes." *Id.* § 324App.100, at 324App.-9.

222 *Callihan*, 178 F.3d at 802-03.

223 *Id.*

224 Floyd v. United States Postal Serv., 105 F.3d 274, 275 (6th Cir. 1997), *superseded by Rule as stated in Callihan*, 178 F.3d 800.

have declined in its Rule revision to nullify Congress' decision so shortly after enactment of § 1915(a)(3); or (3) whether the Rule, if construed to supersede the statute, would impermissibly impact substantive rights. In conjunction with the Sixth Circuit's 1997 decision in *Floyd*,[225] such analyses should have been mandatory.

If the notion of shared procedural rulemaking power under the Rules Enabling Act means anything, it should mean more than, whoever acts last—Congress or the Court—wins. That may be an entirely appropriate result when resolving which will control of two conflicting statutes enacted by the same lawgiver at different times.[226] In resolving conflicts between statute and Federal Rule, however, the essential question is a "who" question (whose standard should control—Congress' or the Court's), not a "which" question (which standard enacted by the same actor should control). In this context, the fact that the rulemaking authority of the Court and Congress differs and that both the Court and Congress are actively using their rulemaking authority renders insufficient a symmetrical implied repeals analysis based solely or primarily on temporal priority, such as that used in the *Callihan* case.

D. Why Initial or Sole Reliance on the Implied Repeals Analysis Is Inappropriate

Of course, unlike the court in *Callihan*, some courts would at least include an analysis of whether the Court's rule had substantive effect;[227] many courts, however, do not include such an analysis under the implied repeals framework.[228] Even appending a substantive rights analysis after the implied

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[225] *Id.*

[226] See *infra* note 231 for the view of some commentators that application of the canon disfavoring implied repeals is also inappropriate in resolving conflicts between congressional statutes.

[227] In several cases, the court addressed the issue of rulemaking authority first and did not reach the supersession clause or implied repeals analysis. *See, e.g.*, Durant v. Husband, 28 F.3d 12, 14-15 (3d Cir. 1994); Chesny v. Marek, 720 F.2d 474, 478-79 (7th Cir. 1983) (Posner, J.), *rev'd*, 473 U.S. 1 (1985); *see also* Daily Income Fund, Inc. v. Fox, 464 U.S. 523, 544 n.2 (1984) (Stevens, J., concurring). In some cases, the courts explicitly addressed the substantive rights issue in addition to determining whether the statute and Rule conflicted irreconcilably. *See* Henderson v. United States, 517 U.S. 654, 662-73 (1996) (statute and rule both enacted by Congress); Autoskill Inc. v. Nat'l Educ. Support Sys., Inc., 994 F.2d 1476, 1485 n.8 (10th Cir. 1993). In some cases, the courts did not explicitly refer to the substantive rights limitation, but noted that the interpretation of statute and Rule was consistent (or not inconsistent) with Congress' policy choices. *See, e.g.*, Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437, 440 (1987); Marek v. Chesny, 473 U.S. 1, 9, 11-12 (1985).

[228] *See, e.g.*, United States v. Goodall, 236 F.3d 700, 707-08 (D.C. Cir. 2001) (Randolph, J., concurring) (holding that Fed. R. Crim P. 11(e)(1)(C), which permits government and defendant to agree on a sentence outside the range prescribed by the pertinent sentencing range, should supersede 18 U.S.C. § 3553(b) of the

repeal calculus, however, cannot salvage principal reliance on the implied repeals framework. The implied repeals framework, while including some of the issues important to resolution of statute-Rule conflicts—the need to resolve apparent conflicts, the importance of priority in time,[229] and the importance of clearly expressed intent of the rulemaker—elevates priority in time to a position of primary, rather than secondary, importance and encourages courts to consider issues of priority in time before issues of rulemaking authority have been examined. When the questions of authority are raised in the analysis, however, can affect whether the questions are addressed at all as well as the answers the court reaches.

As detailed above, in applying the traditional implied repeals analysis to statute-Rule conflicts, courts first inquire whether there is an irreconcilable

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Sentencing Reform Act, which requires that there be no departure from a prescribed sentencing range, absent aggravating or mitigating factors not appropriately considered in setting the range); *Callihan*, 178 F.3d at 802-03 (holding that Fed. R. App. P. 24(a), which permits appellate review of district court orders certifying that appeal in forma pauperis is not in good faith, supersedes § 1915(a)(3) of PLRA, which precludes appellate review); American Paper Inst., Inc. v. ICC, 607 F.2d 1011, 1012-13 (D.C. Cir. 1979) (holding that Fed. R. App. P. 15(a), which required that a petition for review need only specify the parties seeking review, the respondents, and the portion of order to be reviewed, superseded specificity requirements of 28 U.S.C. § 2344 of the Hobbs Act); Feeder Line Towing Serv., Inc. v. Toledo, Peoria & W. R.R. Co., 539 F.2d 1107, 1108-09 (7th Cir. 1976) (holding that Fed. R. App. P. 4(a), requiring filing of notice of appeal within thirty days of entry judgment, superseded 28 U.S.C. § 2107, providing ninety days for filing notice of appeal in admiralty action); Jack Neilson, Inc. v. Tug Peggy, Inc., 428 F.2d 54, 55 (5th Cir. 1970) (holding that Fed. R. App. P. 5(a), which provided ten days to file petition for interlocutory appeal under 28 U.S.C. § 1292(b), superseded the fifteen-day period provided in 28 U.S.C. § 2107); McConville v. United States, 197 F.2d 680, 682 (2d Cir. 1952) (holding that Fed. R. Civ. P. 73, excepting from time for appeal the time for a motion to amend judgment or for additional factual findings, superseded 28 U.S.C. § 2107, to the extent that these matters were not included in revised § 2107); Folkstone Mar., Ltd. v. CSX Corp., No. 88C 4040, 1988 WL 58592, at *1 (N.D. Ill. May 31, 1988) (holding that Supplemental Rule E(5)(a) of the Supplemental Rules for Certain Admiralty and Maritime Claims, Federal Rules of Civil Procedure, which states the procedure for setting a bond and permits bond to be set at the lesser of twice the plaintiff's claim or the value of the property, supersedes 28 U.S.C. § 2464, which would require a bond of twice the plaintiff's claim). The *Folkstone* court did not address the substantive-procedural dichotomy, except to state that Supplemental Rule E(5)(a) was intended to supersede § 2464 and to cite the Supreme Court's decision in *Burlington Northern R.R. Co. v. Woods*, 480 U.S. 1 (1987). Several commentators, however, have commented on the failure to consider whether Supplemental Rule E(5)(a) impermissibly impacts substantive rights. *See* GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY 797 (2d ed. 1975); George Rutherglen, *The Federal Rules for Admiralty and Maritime Cases: A Verdict of Quiescent Years*, 27 J. MAR. L. & COM. 581, 602 (1996). This list of cases in which the substantive rights limitation was not addressed when a later-enacted Federal Rule superseded a federal statute does not imply that a substantive rights analysis would have precluded the Federal Rule from superseding the statute. Instead, it illustrates that in many cases involving statute-Rule conflicts, courts avoid issues of rulemaking power.

[229] The importance of priority in time in resolving statute-Rule conflicts is independently supported by the supersession clause, which has been interpreted by the courts to require the later in time to control in event of conflict. *See supra* note 121.

conflict between statute and Rule. If so, the later enacted provision controls to the extent of the actual conflict.[230] This initial focus solely on time of enactment asks too much of the "time" element for two reasons. First, time of enactment cannot address the core issues of allocation and exercise of rulemaking authority. Second, the presumptions underlying the requirement to harmonize if two provisions can coexist or select the later provision to control if they cannot coexist were not created to achieve an appropriate allocation between the Court and Congress of their shared procedural rulemaking authority; hence, the temporal priority requirement is not helpful in reaching this goal. Instead, application of the principles of the implied repeals canon as the first step in analyzing conflicting statutes and Rules leads a court to complete all or the major portion of its analysis without considering rulemaking authority. If and when rulemaking authority is ultimately addressed, it is generally given lesser consideration.

The canon disfavoring implied repeals was derived from "assumptions about the legislative process and legislative drafting"[231] that are not fully responsive to the issues of allocating procedural rulemaking power between the Court and Congress. A primary underlying assumption about the legislative process is that Congress, when focused on one problem, should not be presumed to have repealed another statute, without some indication that

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230 *See infra* notes 128-35 and accompanying text.

231 Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 407, 475 (1989). Some commentators consider the presumptions underlying the canon disfavoring implied repeals to be "unrealistic" even in the context of conflicting statutes enacted by the same lawgiver at different times. *See, e.g.*, Bernard W. Bell, *Using Statutory Interpretation To Improve the Legislative Process: Can It Be Done in the Post-*Chevron *Era?*, 13 J.L. & POL. 105, 156-59 (1997); Richard A. Posner, *Statutory Interpretation—In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 808-09 (1983). Judge Posner has referred to this canon somewhat disparagingly as the "presumption of congressional omniscience," arguing that it inaccurately presumes that Congress is aware of all statutes as well as all interpretations of the statutes at the time it acts. Posner, *supra*, at 808. *See also* Friedrich v. City of Chicago, 888 F.2d 511, 516-17 (7th Cir. 1989) (Posner, J.) ("The canon is, indeed, a mixed bag. It protects some old statutes from, as it were, inadvertent destruction, but it threatens to impale new statutes on the concealed stakes planted by old ones. Congressmen do not carry the statutes of the United States around in their heads any more than judges do. The canon may therefor cause a forgotten old statute inadvertently to wreck a considered new one. . . . If Congress' knowledge of the entire contents of the United States Code cannot realistically be 'presumed'—and it cannot—then the best that can be said for the canon against repeals by implication is, first, that it provides a mechanical rule for deciding difficult cases and thus makes law simpler and curbs judicial discretion, and, second, that it encourages legislators and their staffs to do a thorough search of previous statutes before enacting a new one. The first point identifies real, although limited, social goods (legal simplification and the reduction of judicial discretion), but the second strikes us as unrealistic about the conditions under which legislators work. . . ."), *vacated*, 499 U.S. 933 (1991); Edwards v. United States, 814 F.2d 486, 488 (7th Cir. 1987) (Posner, J); *see also* Radzanower v. Touche & Ross Co., 426 U.S. 148, 164 & n.13 (1976) (Stevens, J., dissenting).

Congress has specifically considered that statute.[232] In other words, Congress is presumed to be aware of and to desire preservation of its preexisting statutes to the extent possible, unless it clearly states an intent to repeal.[233] This presumption leads to the canon's requirement that the statutes be harmonized, unless there is a conflict that cannot be reconciled, in order to give effect to both statutes.[234] A second assumption underlying the irreconcilable conflict requirement of the implied repeals canon is that the preexisting statute represents the "popular will;" thus, the courts should harmonize the two congressional statutes if possible to preserve as much of the existing "will of the people" as possible.[235]

Neither presumption fully addresses the delicate balance of rulemaking authority or exercise of that authority by the Court or Congress. First, although mechanical rules of construction that cabin judicial discretion may be desirable, it is difficult for such one-size-fits-all rules to capture the varying scenarios of conflicting statutes and Rules or to encompass the potential and complex issues of interbranch power that may be presented. Second, the Rules Enabling Act and principles of separation of power, which divide procedural rulemaking authority between the Court and Congress, do not contemplate simply that the procedural provision that is later in time will control, with the caveat that the earlier provision be preserved to the extent possible because the later rulemaker is presumably aware of and desires to retain all existing procedural provisions (and if the rulemaker is not aware, the rulemaker should be more detail-oriented the next time around). Nor does the shared rulemaking power contemplate that a preexisting Federal Rule or congressional rule be retained to the extent possible because it represents the "will of the people."

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[232] Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 240-41 & n.47 (2000) (arguing that implied repeals have been construed to show a disrespect for the earlier legislature as well as to dishonor the subsequent legislature by indicating that the later legislature was either ignorant or negligent in carrying out its duties); Sunstein, *supra* note 231, at 475.

[233] *Radzanower*, 426 U.S. at 153 (citing SEDGWICK, THE INTERPRETATION AND CONSTRUCTION OF STATUTORY AND CONSTITUTIONAL LAW 98 (2d ed. 1874)). *See also* 1A SUTHERLAND ON STATUTORY CONSTRUCTION, *supra* note 126, § 23.10, at 480-93 ("[T]he presumption against implied repeals is founded upon the doctrine that the legislature is presumed to envision the whole body of the law when it enacts new legislation. Therefore, the drafters should expressly designate the offending provisions rather than leave the repeal to arise by implication from the later enactment."); Posner, *supra* note 231, at 808; Bell, *supra* note 231, at 258, 261.

[234] 1A SUTHERLAND ON STATUTORY CONSTRUCTION, *supra* note 126, § 23.9, at 461-69.

[235] *Id.*; Nelson, *supra* note 232, at 241 n.47. Again, Judge Posner takes exception, contending that the opposite inference may be more plausible—that Congress desires a broader scope for its new enactment. Posner, *supra* note 231, at 808-09. Nevertheless, both federal and state courts rely heavily on the canon in resolving conflicting statutory mandates.

Instead, the Rules Enabling Act and separation of powers principles create a more complex, shared authority between the Court and Congress, which recognizes that the authority of the Court and Congress differ, that the institutional expertise of these bodies differs, and that only Congress is a majoritarian body. Thus, in resolving statute-Rule conflicts, priority of promulgation should be a relevant, but secondary, consideration.

More particularly, whatever may be the value of the implied repeal canon's presumption that a current Congress legislates with an awareness of and a desire to retain all applicable sections of the U.S. Code, the Court's purpose when promulgating procedural provisions has been to attempt to create a simple, coherent procedural framework to replace the patchwork of procedural rules in existence at the time of the adoption of the Rules Enabling Act—not to preserve all prior acts of Congress.[236] The Court's role has been to take the lead in procedural rulemaking, to replace congressional procedural statutes in some instances, and to defer to the congressional provision in other instances, such as when Congress intends for its rules to have substantive content.[237] Similarly, Congress, in its recent rulemaking, has not evinced a desire in each instance to preserve all prior Court Rules. Instead, Congress has varied its use of rulemaking authority. Although generally deferring to the Court's lead in rulemaking, Congress has sometimes enacted its own standards as part of the Federal Rules without input from the Judicial Conference or Court, sometimes altered proposed Court Rules, sometimes created special procedural rules for particular substantive causes of action, and has also changed the rulemaking process of the Rules Enabling Act.[238] Thus, a presumption that Congress is

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[236] *See supra* notes 67-68 and accompanying text.

[237] To be sure, as discussed above, the rulemaking arena has changed since 1934. Congress has become more active—sometimes drafting its own rules, sometimes vetoing Court Rules, sometimes modifying Court Rules, and sometimes including procedural provisions in substantive statutes. *See supra* notes 93-118 and accompanying text. Moreover, in forestalling even greater changes to the Rules Enabling Act than resulted under the 1988 amendments to the Rules Enabling Act, Chief Justice Rehnquist pledged that the Court would carefully consider changes before promulgating Federal Rules that would supersede congressional statutes. *See supra* note 111 and accompanying text. Nevertheless, Congress has not evinced a desire to act as the default or primary procedural rulemaker, but has enacted procedural provisions primarily in selected areas and, even then, has only modified portions of the procedural structure created by the Court. *See, e.g.*, Bone, *supra* note 4, at 921. Furthermore, in amending the Rules Enabling Act in 1988, Congress left intact the scheme of the original Rules Enabling Act—the Court should generally initiate rulemaking, but Congress has the authority to block or veto Court Rules, initiate its own rulemaking, or repeal Court rulemaking authority. Finally, most scholars recognize a continuing important role for the Supreme Court and Judicial Conference in providing expertise, creating coherence in the Federal Rules, and taking a leading role in procedural rulemaking. *See infra* notes 327, 329 and accompanying text.

[238] *See generally supra* notes 93-120 and accompanying text (discussing Congress' use of its procedural rulemaking authority).

aware of and intends to preserve the prior Rule of the Supreme Court may be generally appropriate, but only if it is used as a guidepost rather than as a canonical requirement.

Likewise, the "will of the people" rationale for the implied repeals canon does not support primary or exclusive reliance on the canon to resolve apparent statute-Rule conflicts. The Court's procedural Rules, of course, do not represent the will of the people since the Court, as opposed to Congress, is not an elected body and its members are not subject to periodic removal by the electorate. Thus, the "will of the people" rationale would, contrary to the congressionally created supersession clause, endorse a rule of construction requiring that the Court's Rule control *unless* in conflict with a congressional provision.

Because neither presumption underlying the canon disfavoring implied repeals deals with the core issues of conflicting rulemaking authority that may arise in statute-Rule conflicts, the canon's "irreconcilable conflict" and "later-in-time" analyses should not be the initial or sole inquiries in resolving statute-Rule conflicts. The courts' primary reliance on the canon disfavoring implied repeals and concomitant failure to articulate the issues underlying the clash of interbranch power that may occur in instances of statute-Rule conflicts, has, however, led to the omission or subordination of issues of rulemaking authority and exercise of that authority. Part III, therefore, presents a new framework for determining whether a congressional statute or a Federal Rule should govern in event of a perceived conflict between the two provisions.

III. PROPOSED ANALYSIS FOR RESOLVING CONFLICTS BETWEEN STATUTES AND FEDERAL RULES

A. The New Framework

A conflict between a congressional statute and a Court Rule differs significantly from a conflict between two legislative enactments: Questions of power do not arise when two congressional statutes conflict, but questions of rulemaking authority may arise when a statute and Rule conflict. Thus, Part III proposes a different methodology for resolving statute-Rule conflicts, which is referred to in this Article as the "rulemaking authority" framework and which correspondingly requires courts to resolve any conflict of Court and congressional rulemaking authority before resorting to canons of statutory interpretation. This rulemaking authority framework borrows from the canon dis-

favoring implied repeals as freely as it discards the portions of the canon that are inapt in resolving statute-Rule conflicts. It also develops new inquiries suited to identifying and resolving the interbranch conflicts that may arise when congressional statutes conflict with Federal Rules.

The principal focus in resolving statute-Rule conflicts should be on inquiries specifically tailored to resolve which rulemaker—the Court or Congress—has the authority to create the procedural standards in the specific context. This means that a decisionmaker should use a two-step analysis. In the first step of the analysis, the court should question: (1) whether the statute and Rule conflict, and (2) whether they conflict in a way that creates a clash of rulemaking authority in which one provision must yield to the other because of a lack of rulemaking authority in the particular context. A court will reach the second step of the analysis only if the two provisions conflict but do not create an irreconcilable conflict of rulemaking authority. If the court reaches the second step of the analysis, it will determine, as required by the supersession clause, which provision is later in time and, hence, will control.[239] Under this proposed rulemaking authority analysis, then, there are three potential outcomes. First, if statute and Rule do not conflict, the analysis is over. Both statute and Rule will survive. Second, if the provisions conflict and create a clash of authority such that one provision must yield to a superior rulemaking authority in the particular context, then the analysis begins and ends with the inquiry into rulemaking authority. Third, if the provisions conflict but do not create a clash of rulemaking authority requiring one provision to yield to the other based on issues of power, then the later-in-time requirement of the supersession clause provides the rule of construction: The later provision will supersede the earlier.

Specifically addressing issues of rulemaking authority first rather than determining initially whether, as a matter of statutory interpretation, statute and Rule can be harmonized, accomplishes two goals. First, this analysis removes the impossible burden currently placed on time of enactment by divorcing the issue of determining whether the Court or Congress has superior rulemaking

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239 The Court's analysis in *Henderson v. United States*, 517 U.S. 654 (1996), coincides with this analysis, although the Court purported to follow the principles of implied repeals and also undertook the analysis in the context of a statute and rule both enacted by Congress. The *Henderson* Court first examined the context of the rule and statute and determined that the provisions could not be harmonized; there was an irreconcilable conflict. The Court then directly examined the substantive rights prohibition, concluding that the rule did not contravene that limitation. Finally, given no irreconcilable clash of rulemaking authority, the Court held that the later-enacted rule controlled. Of course, the Court need not have examined issues of rulemaking authority in *Henderson* because both provisions were enacted by Congress.

authority in a particular case from the later-in-time analysis imposed by the supersession clause. The rulemaking authority analysis achieves this end by requiring a court to consider issues of rulemaking authority explicitly in the particular clash of statute and Rule and to resolve these issues before undertaking a later-in-time analysis. Second, the rulemaking authority analysis, thereby, gives time of enactment the same function it has in legislative-legislative conflicts—when there is a conflict of statute and Rule that does not implicate issues of power, the later-enacted will control to the extent of the conflict.

This proposed rulemaking authority analysis will focus the inquiry on the critical issue—whether the Court or Congress has rulemaking authority. The analysis will not necessarily change the results in any particular case, however, nor will it be the cure for all our sins.[240] Courts will still need to engage in a careful review of rulemaking power and take seriously substantive rights,[241]

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[240] Walter Wheeler Cook, *"Substance" and "Procedure" in the Conflict of Laws*, 42 YALE L.J. 333, 337 (1933) (arguing that the assumption that words have the same meaning when used in different contexts, including the words "substance" and "procedure," and that the dividing line between substance and procedure is the same in all contexts has "all the tenacity of original sin"); Carrington, *supra* note 4, at 285 (the "temptation to commit [the] sin" of ascribing consistent meaning to words revealed itself with the appearance in 1938 of four new uses of 'substance' and 'procedure' to make distinctions of constitutional significance. Two of these distinctions were created to express federalism concerns and two to express separation of powers principles. An epidemic of conflation amongst these distinctions occurred. In hindsight this is not surprising. All four of these uses of the distinction bear on the Rules Enabling Act" (citations omitted)); Burbank, *Hold the Corks*, *supra* note 59, at 1046 (expressing hope that future rulemakers will pay more attention to the problem that "if rulemakers are left to make choices as to matters that are rationally capable of classification either as procedure or substance, 'they will choose to advance those policies that are their own special province and to subordinate those that are not' . . . [and concluding that the hope that rulemakers will address this problem] has 'all the tenacity of original sin'" (citations omitted)). *See also* Chandler, *supra* note 83, at 508. Major Edgar B. Tolman, recognized by the Chairman of the House Judiciary Committee for his excellent testimony explaining the original Federal Rules, stated in part during his testimony that the Rules' provision for disjunctive pleading was "the cure for all my sins." *Id.* Representative Robert L. Ramsay of West Virginia, who vehemently opposed the Rules, posed the following question to Major Tolman, "As an old common-law pleader, do you approve of a disjunctive pleading?" Major Tolman responded, "I want to tell you something, that it did jar me when I first was confronted with it, but after I thought about it I said: 'There is the cure for all my sins.'" *Id.* at 507-08. Major Tolman was a member of the Advisory Committee appointed to assist the Supreme Court in preparing the original Federal Rules and was also Special Assistant to the Attorney General from 1934 through 1938, when the original Rules were drafted. *Id.* at 491-92. Major Tolman testified before the House Judiciary Committee regarding the proposed initial Federal Rules; he explained each Rule, the background and purpose of each Rule, and answered questions about each Rule. *Id.* at 507.

[241] *Compare* Stephen B. Burbank, *The Bitter with the Sweet: Tradition, History, and Limitations on Federal Judicial Power—A Case Study*, 75 NOTRE DAME L. REV. 1291, 1336 (2000) (the Court has taken substantive rights "more seriously" but "it remains the case that the Rules Enabling Act is most often invoked in dissent or . . . indirectly—a factor to be considered, but not too seriously"), *with* Leslie M. Kelleher, *Separation of Powers and Delegations of Authority To Cancel Statutes in the Line Item Veto Act and the Rules*

other power issues, and deference of rulemakers. Moreover, this analysis requires a more sophisticated assessment of statute and Rule than is required in applying the fairly mechanical, one-size-fits-all principles of the canon disfavoring implied repeals. The analysis will, however, ensure that issues of conflicting interbranch power will not be omitted, disregarded, or subordinated. Instead, these issues will assume primary importance, will be examined first, and will be decided only after carefully examining the context of the particular statute and Rule. The rulemaking authority analysis, thus, will enable the supersession clause to make more sense. The provision that is later in time may control and supersede the former, as the supersession clause directs, but only if the clash of statute and Rule is first tested for consistency with the rulemaking power of the Court and Congress.

B. The Relationship Between Power and Temporal Priority

Part III.A sketched in general terms the proposed rulemaking authority framework for resolving statute-Rule conflicts. The court questions, first, whether there is a conflict of statute and Rule and whether that conflict creates a clash of rulemaking authority of the Court and Congress necessitating that one provision yield to the other based on issues of rulemaking authority. Second, if there is no irreconcilable conflict of rulemaking authority, the court determines, under the supersession clause, which provision is later in time and, thus, will control. Part III.B examines in detail the three potential scenarios that can result under this analysis: (1) the statute and Rule do not conflict; hence, both provisions will govern; (2) the statute and Rule conflict and create an irreconcilable clash of rulemaking authority; thus, only the provision of the rulemaker with the superior authority will control; and (3) the statute and Rule conflict, but because there is no irreconcilable clash of authority, the provision that is later in time will control.

Enabling Act, 68 GEO. WASH. L. REV. 395, 442 (2000) (arguing that the Court has begun to take the "substantive rights limitation more seriously, particularly as a rule of construction and to read Rules narrowly when necessary to avoid infirmity").

Furthermore, commentators often note that the Court has failed to provide a workable definition of the substantive-procedural divide. *See, e.g.*, Bone, *supra* note 4, at 950-51; Carrington, *supra* note 4, at 283; Moore, *supra* note 27, at 1042; Whitten, *supra* note 15, at 42; *see also* H.R. REP. NO. 96-422, at 12, 20-21 (1985) (stating that the substantive rights limitation of the Rules Enabling Act "as interpreted by the Court, . . . has little if any determinative content. As a result, the rules enabling acts have failed to provide guidance to the rulemakers or to Congress in considering the validity of proposed rules.").

1. Do the Provisions Conflict and Require That One Provision Yield Based on Issues of Rulemaking Authority?

The first question in this rulemaking authority analysis remains whether the statute and Rule conflict, but with a twist—the question should be whether the statute and Rule conflict in a way that requires either the statute or the Federal Rule to yield to the other based on a deficit of rulemaking authority in the particular context.[242] Thus, this inquiry encompasses the first two possible scenarios when statute and Rule are in apparent conflict: (1) the statute and Rule do not conflict; and (2) the statute and Rule do conflict, and they conflict in a manner that requires one provision to yield based on issues of rulemaking authority.

In this rulemaking authority analysis, the courts should first separate the "conflict" decision from the analysis of whether there is an implied repeal of a statutory provision and place the "conflict" decision in the framework of whether there is an irreconcilable conflict of interbranch authority. Thus, the potentially conflicting provisions should not be construed initially to harmonize to prevent an implied statutory repeal. Instead, each provision should be construed in light of its context to determine the intent of the Court and Congress in the particular instance and to determine, if so viewed, the provisions conflict.[243] If the provisions do not conflict, both survive. If the

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[242] The "in conflict" decision can be the trigger for two separate issues: (1) whether there is an irreconcilable clash of congressional and Court power, requiring that one provision yield to the other as a matter of rulemaking authority; or (2) whether there is an irreconcilable clash of statute and Rule, requiring that one provision impliedly repeal the other as a matter of statutory construction. This Article proposes that the first issue should be the initial inquiry when statute and Rule clash. Traditional statute-Rule conflict analysis has used the "in conflict" decision to trigger the second inquiry under an implied repeals analysis.

[243] *See* Henderson v. United States, 517 U.S. 654 (1996) (declining to harmonize statute and congressionally enacted rule of civil procedure because harmonizing construction was inconsistent with context of statute and Rule); Daily Income Fund, Inc. v. Fox, 464 U.S. 523, 534-42 (1984) (construing Rule 23.1 regarding the demand requirement in derivative suits not to apply to § 36(b) of the Investment Company Act in light of structure, history, and purpose of Rule and statute which revealed the following: (1) an investment company has no cause of action under § 36(b), and (2) Rule 23.1's demand requirement is only triggered if the investment company can bring a cause of action. In so holding, the Court nullified the decisions of two appellate courts that had harmonized § 36(b) and Rule 23.1 to impose a demand requirement, *see* Hubbard v. Haley, 262 F.3d 1194, 1197-98 (11th Cir. 2000) (rejecting proposed harmonization of a provision of the Prison Litigation Reform Act, which required each prisoner bringing a civil action in forma pauperis to "pay the full amount of a filing fee," with the liberal joinder provisions of Fed. R. Civ. P. 20, in light of plain language and congressional purpose); Citizens Elec. Corp. v. Bituminous Fire & Marine Ins. Co., 68 F.3d 1016, 1019 (7th Cir. 1995); Durant v. Husband, 28 F.3d 12, 14-15 (3d Cir. 1994); Grossman v. Johnson, 674 F.2d 115, 122-23 & n.14 (1st Cir. 1982), *vacated*, 465 U.S. 1001 (1984); Weiss v. Temporary Inv. Fund, Inc., 692 F.2d 928, 936 (3d Cir. 1982), *vacated*, 465 U.S. 1001 (1984)); *see also* Baugh v. Taylor, 117 F.3d 197, 200-01 (5th Cir. 1997) (construing § 1915(a)(3) of the PLRA and Fed. R. App. P. 24(a) not to conflict in light of context, but

provisions do conflict, then each should be measured against the yardstick of the Court's and Congress' rulemaking authority.

If a presumption were applicable in a particular case at all, it would not be a presumption to preserve both statute and Rule to avoid an implied repeal of a portion of a statute, if possible. Instead, the presumption would be to minimize the conflict of interbranch authority, if that can be done consistently with the context of statute and Rule.[244] Thus, when faced with an intersection of statute and Rule in which the statute would potentially diminish a court's core judicial powers in violation of separation of powers or potentially impair constitutional requirements included in Rules, a court would, in accord with the canon of constitutional doubt, interpret the provisions to avoid such a construction if possible.[245] Similarly, if the Federal Rule appears to clash with a federal statute because it appears to abridge substantive rights impermissibly, the court would, if consistent with the context of statute and Rule, prefer a construction in which the Federal Rule would not impermissibly impact substantive rights.[246] Furthermore, as detailed below, when confronting instances in which a statute may be construed to remove the Court's delegated rulemaking

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also noting that its task was to harmonize, if possible, as required by the canon disfavoring implied repeals). These cases have varied regarding which sources of information should be considered as "context" of statute and Rule, just as the various theories of statutory construction vary regarding the appropriate sources to review in determining the meaning of a statute. *See generally* William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 321-24 (1990) (discussing sources of statutory interpretation important in three traditional theories of statutory interpretation—"intentionalism," which emphasizes the intent of the enacting legislature; "purposivism," which emphasizes the purpose of the statute; and "textualism," which emphasizes reliance on statutory text—and proposing a model of "practical reasoning," which would rely on a broad range of source material). This Article does not attempt to determine the appropriate sources of "context" of statute and Rule, but to propose that those sources, rather than the requirement to harmonize even if harmonization leads to a strained interpretation of the statute and Rule, should be the primary determinants of the intent of Congress and the Court.

244 *See, e.g.*, Kamen v. Kemper Fin. Serv., Inc., 500 U.S. 90, 96-97 (1991); *Daily Income Fund*, 464 U.S. at 544 n.2 (Stevens, J., concurring) (stating that when a Rule does not clearly create a substantive impact, when construed in conjunction with a statute, "it should not be lightly construed to do so and thereby alter substantive rights"); Chesny v. Marek, 720 F.2d 474, 479-80 (7th Cir. 1983) (Posner, J.) (noting, in construing intersection of 28 U.S.C. § 1988 and Fed. R. Civ. P. 68, that "rules have sometimes been interpreted or their domain of application narrowed to avoid abridging substantive rights") (citing Ragan v. Merch. Transfer & Warehouse Co., 337 U.S. 530, 533 (1949) and Gay v. Waiters' & Dairy Lunchmen's Union, Local No. 30, 86 F.R.D. 500 (N.D. Cal. 1980)), *rev'd*, 473 U.S. 1 (1985); *see also* Kelleher, *supra* note 241, at 442.

245 *See, e.g.*, Miller v. French, 530 U.S. 327, 336-41 (2000).

246 *See, e.g.*, *Kamen*, 500 U.S. at 96-97; *Daily Income Fund*, 464 U.S. at 544 n.2 (Stevens, J., concurring); *see also In re* Tidewater, Inc. v. Stelly, 249 F.3d 342, 346-47 (5th Cir. 2001); *Chesny*, 720 F.2d at 479-80 (Posner, J.), *rev'd*, 473 U.S. 1 (1985). *See also* Kelleher, *supra* note 241, at 442 (arguing that the Court has begun to take the "substantive rights limitation more seriously, particularly as a rule of construction and to read Rules narrowly when necessary to avoid infirmity").

authority under the Rules Enabling Act, a court would interpret the interplay of the statute and the Rules Enabling Act to preclude such a result if possible.[247]

This analysis will eliminate the pervasive use of the implied repeals requirement to harmonize statute and Rule. This loss, however, becomes an advantage since the reasons for construing potentially conflicting provisions to harmonize if possible are generally weaker when different lawmakers create the conflicting provisions.[248] This is particularly so in the case of apparently conflicting statute and Rule. First, the two rulemakers do not have coextensive rulemaking authority and the lead rulemaker (the Court) has the lesser authority. Thus, initial harmonization can and does lead to disputes regarding whether the Court has exceeded its rulemaking authority. Second, the two rulemakers have different and changing roles. The Court usually originates the Rules, but it does not always do so. Congress usually reviews the Rules, but it does not always act in a reviewing capacity. To the contrary, Congress has recently used its authority in varying ways, indicating that it does not always intend to supersede, to defer, or to harmonize. Finally, either the Court or Congress may be deferring to its rulemaking partner in a particular instance.[249] Thus, a general presumption to harmonize to avoid implied repeal is not helpful in statute-Rule conflicts. Instead, given the numerous possible rulemaking decisions of both the Court and Congress, the first inquiry should be to determine the intent of the Court and Congress in the particular case and to harmonize to avoid an irreconcilable clash of Court and congressional authority if possible.

This proposed rulemaking authority framework is similar to the analysis used by the Court in *Henderson v. United States*,[250] in which Fed. R. Civ. P. 4(j), requiring service of process within 120 days or any discretionary time

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[247] *See infra* notes 305-28 and accompanying text.

[248] *See* Nelson, *supra* note 232, at 255 (suggesting that the harmonization of conflicting federal and state statutes in preemption analysis is improper, based on the fact that the conflicting provisions are created by different lawmakers—Congress or a state legislature—as well as on the language of the Supremacy Clause).

[249] See, for example, *supra* note 25, discussing the proposed amendments to portions of Fed. R. App. P. 24(a)(2) and a)(3) to expressly state that the courts should not construe anything in Fed. R. App. P. 24(a)(2) or (a)(3) to conflict with any portion of the Prison Litigation Reform Act or any other statute. In effect, the Court is proposing to amend Rule 24(a) to eliminate the supersession feature so that federal courts do not misconstrue the Court's intent to defer. Neither the Court nor Congress will in every case indicate that they are deferring. Instead, the analysis of statute-Rule conflicts should allow for that possibility.

[250] 517 U.S. 654 (1996); *see also Daily Income Fund*, 464 U.S. at 534-42 (construing statute and Rule in light of structure, history, and purpose of Rule and statute); Durant v. Husband, 28 F.3d 12, 14-15 (3d Cir. 1994); *see also* Baugh v. Taylor, 117 F.3d 197, 200-01 (5th Cir. 1997) (construing statute and Rule in light of context, but also following implied repeal requirement to harmonize if possible).

allowed by the district judge, appeared to conflict with the service "forthwith" requirement of 46 U.S.C. app. § 742 of the Suits in Admiralty Act.[251] In *Henderson*, the United States, as the defendant, argued consistently with the harmonization requirement of the implied repeals framework, that rule 4(j) and § 742 could and should be harmonized: rule 4(j) and § 742 could be construed to coexist if the Court held that the 120-day period for service plus discretionary extensions permitted under rule 4(j) constituted merely an outer limit on a plaintiff's time for service, not a period of absolute entitlement.[252] After examining the historical context, purpose of the rule, and relevant Advisory Committee Notes, the Court rejected the proposed harmonization because it was incompatible with the context of the provisions.[253]

The *Henderson* Court then proceeded to determine if the conflicting provisions created an irreconcilable conflict of power in which one provision had to yield based on a lack of rulemaking authority—there, whether the rule should yield because it created an impermissible substantive impact. Finding no irreconcilable conflict of authority, the Court held that rule 4(j) would control because it was later in time.[254]

Thus, the first step in the proposed rulemaking authority analysis should be to determine whether the statute and Rule conflict by examining the intent of each rulemaker without the presumption to harmonize both provisions if possible, which is the hallmark of the implied repeals doctrine. If the provisions do conflict, the court should determine whether there is an irreconcilable conflict of the Court's and Congress' rulemaking authority that requires one provision to yield. It is in this portion of the analysis that the courts should attempt to harmonize or minimize the conflict of interbranch authority if that can be done consistently with the context of the statute and Rule. This is the analysis that courts should use to determine the first two potential outcomes in instances of statute-Rule conflict—whether the provisions conflict and whether, if the provisions do conflict, one must yield based on issues of rulemaking authority.

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251 *See generally supra* notes 188-201 and accompanying text.

252 *Henderson*, 517 U.S. at 661-63.

253 *Id.*

254 As noted earlier, the *Henderson* case did not present a conflict of congressional statute and Court Rule, but a conflict of two provisions enacted by Congress. Thus, the inquiry into rulemaking authority was unnecessary. Nevertheless, the Court's examination of context in determining whether the provisions conflicted irreconcilably is supported because, in instances of conflicting statutes and rules both enacted by Congress, the interaction of the Court's prior or subsequent Rule on the same issue may assist in understanding Congress' rulemaking.

a. Do the Provisions Conflict?

If examination of the apparently conflicting statute and Rule reveals that the provisions do not conflict, the analysis is over. Each of the nonconflicting provisions survives, and there is no need to address issues of rulemaking power or priority in time.

For example, in *Benjamin v. Jacobson*,[255] the U.S. District Court for the Southern District of New York held that arguably conflicting provisions of the PLRA and the Federal Rules of Civil Procedure did not conflict but simply provided "alternate mechanism[s]" for parties to modify a final judgment.[256] At issue in *Benjamin* was the interplay of 18 U.S.C. § 3626(b)(2) of the PLRA,[257] which required automatic termination of previous prospective relief if the district court failed to make certain findings regarding the previous prospective relief within thirty to ninety days,[258] and Fed. R. Civ. P. 60(b),[259] which permitted the district court to relieve a party from final judgment "upon such terms as are just."[260] The court held that the two provisions did not conflict with each other because the parties could seek relief from judgment under Rule 60(b), under the automatic stay provisions set forth in 18 U.S.C. § 3626(b)(2) of the PLRA, or under both provisions.[261] Thus, both provisions survived.

Similarly, by construing each provision in light of its context, the Sixth Circuit might have concluded in both *Callihan v. Schneider*[262] and *Floyd v. United States Postal Service*,[263] that Fed. R. App. P. 24(a) and § 1915(a)(3) of the PLRA did not conflict. Before 1996, Fed. R. App. P. 24(a) permitted appellate courts to review district court decisions finding that appeals in forma pauperis were not taken in good faith.[264] In 1996, Congress enacted the PLRA and included in § 1915(a)(3) a provision stating, in part, that "[a]n appeal may not be taken in forma pauperis if the trial court certifies in writing that the

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255 935 F. Supp. 332 (S.D.N.Y. 1996), *aff'd in part and rev'd in part*, 124 F.3d 162 (2d Cir. 1997), *vacated on reh'g en banc*, 172 F.3d 144 (2d Cir. 1999), *cert. denied*, Benjamin v. Kerik, 528 U.S. 824 (1999).

256 *Id.* at 344.

257 18 U.S.C. § 3626(b)(2) (Supp. IV 1998).

258 *See supra* notes 51-57 and accompanying text.

259 FED. R. CIV. P. 60(b).

260 *See Benjamin*, 935 F. Supp. at 344.

261 *Id.*; *see also* United States v. Michigan, 989 F. Supp. 853, 858-59 (W.D. Mich. 1996); Hadix v. Johnson, 933 F. Supp. 1362, 1365 (W.D. Mich. 1996), *rev'd on other grounds*, 144 F.3d 925 (6th Cir. 1998).

262 178 F.3d 800 (6th Cir. 1999).

263 105 F.3d 274 (6th Cir. 1997), *superseded by Rule as stated in Callihan*, 178 F.3d 800.

264 FED. R. APP. P. 24(a), 109 F.R.D. 179 (1986) (amended 1998).

appeal is not taken in good faith."[265] In 1998, the Supreme Court amended Rule 24(a) to provide, in part, that "[a] party may file a motion to proceed in forma pauperis in the court of appeals within 30 days after service of the notice [certifying that the appeal had not been taken in good faith]."[266]

Based on an examination of the bare language of these provisions, the Sixth Circuit held after Congress' 1996 enactment of § 1915(a)(3)[267] and again after the Supreme Court's 1998 promulgation of amended Rule 24(a)(5)[268] that the provisions conflicted irreconcilably. An examination of context of statute and Rule in each case would have raised significant questions regarding whether either rulemaker intended to create a conflict in provisions. With respect to whether Congress' 1996 enactment of the PLRA created a conflict with Fed. R. App. P. 24(a), the Fifth Circuit held, in *Baugh v. Taylor*,[269] that the provisions did not conflict.[270] Two other circuit courts have followed the *Baugh* court's analysis.[271] The *Baugh* court's examination of the context of § 1915(a)(3) and Rule 24(a) revealed that, although the statute and Rule were in apparent conflict, a provision identical to that included in § 1915(a)(3) of the PLRA had coexisted with Rule 24(a) for three decades, though the provision had been located in § 1915(a).[272] Moreover, courts had permitted appellate review of district court certification decisions in both civil and criminal actions.[273] Thus, because it discerned no clear intent to overrule Fed. R. App. P. 24(a) or prior case law, the Fifth Circuit declined to hold that the mere relocation of the provision from § 1915(a) to § 1915(a)(3) removed the appellant's right to obtain review of the certification decision.[274] Similarly, the Advisory Committee Notes accompanying the Court's 1998 amendment of Rule 24(a)(5), which reported that the 1998 amendments were stylistic only,[275] were consistent with a conclusion that the Court, in revising Rule 24, had no intent to create a conflict with § 1915(a)(3), much less supersede that

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265 28 U.S.C. § 1915(a)(3) (Supp. IV 1998).

266 FED. R. APP. P. 24(a)(5).

267 *Floyd*, 105 F.3d at 278, *superseded by Rule as stated in Callihan*, 178 F.3d at 800.

268 *Callihan*, 178 F.3d at 802-03.

269 117 F.3d 197, 200-02 (5th Cir. 1997).

270 *Id*; *see also* 20A MOORE'S FEDERAL PRACTICE, *supra* note 8, § 324.12[2][b][i], at 324-16 & n.4.3.

271 Newlin v. Helman, 123 F.3d 429, 432 (7th Cir. 1997), *overruled on other grounds*, Lee v. Clinton, 209 F.3d 1025, 1027 (7th Cir. 2000); Wooten v. D.C. Metro. Police Dep't, 129 F.3d 206, 207 (D.C. Cir. 1997).

272 *Baugh*, 117 F.3d at 201.

273 *Id.*

274 *Id.* at 200-02.

275 *See supra* note 221.

provision.[276] In fact, the Judicial Conference, having recognized the courts' struggles to reconcile apparent conflicts between § 1915(a) and Rule 24(a), is currently considering proposed amendments to clarify that Rule 24(a)(2) and (a)(3) control *unless* in conflict with the PLRA or other law.[277]

Courts have also held in other cases that potentially conflicting statutes and Rules are not in actual conflict.[278] In such instances, the inquiry ends upon the determination of no conflict.

b. Do the Provisions Conflict and Create a Conflict in Which One Provision Must Yield Based on Issues of the Rulemaking Authority of the Court Vis-à-vis Congress?

If the conflict inquiry reveals that the two provisions are in apparent conflict, the related inquiry is whether the apparent conflict also creates a clash of power that requires one provision to yield because of a lack of rulemaking authority in the particular context. This requires direct examination of relevant issues of rulemaking authority. The following nonexhaustive list of threshold inquiries relevant to whether the rulemaking authority of the Court and Congress clash irreconcilably is drawn from the constitutional and statutory rulemaking authority of the Court and Congress: (1) whether a Federal Rule intrudes impermissibly in an area committed to exclusive congressional regulation or has impermissible substantive impact;[279] (2) whether a prior congressional statute partially or wholly removed Court rulemaking authority;[280] (3) whether a statute diminishes core judicial powers in violation of separation of powers;[281] (4) whether a statute impairs constitutional requirements included in a Federal Rule;[282] and (5) whether Congress has enacted both statute and rule.[283] Though perhaps easily answered in the

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276 *See supra* note 221 and text accompanying notes 213-16.

277 *See supra* note 25.

278 *See, e.g.*, Daily Income Fund, Inc. v. Fox, 464 U.S. 523, 542 (1984); United States v. Microsoft Corp., 165 F.3d 952, 958-60 (D.C. Cir. 1999); Collins v. Gorman, 96 F.3d 1057, 1059 (7th Cir. 1996); Citizens Elec. Corp. v. Bituminous Fire & Ins. Co., 68 F.3d 1016, 1019 (7th Cir. 1995); Weinstein v. Paul Revere Ins. Co., 15 F. Supp. 2d 552, 560 (D.N.J. 1998); *In re* Complaint of N.Y.T.R. Transp. Corp., 105 F.R.D. 144, 145-46 (E.D.N.Y. 1996).

279 *See infra* Part III.B.1.b.i.

280 *See infra* Part III.B.1.b.ii.

281 *See infra* Part III.B.1.b.iii.

282 *See infra* Part III.B.1.b.iv.

283 *See infra* Part III.B.1.b.v.

negative in many instances, these issues should be addressed directly and before any later-in-time analysis under the supersession clause.[284]

Moreover, this list is not a static list of inquiries. For example, there is a debate about the extent of the Court's inherent rulemaking authority.[285] The proposed rulemaking authority analysis need not endorse any particular view of the boundaries of the Court's or Congress' rulemaking authority. It does require that, to the extent a boundary exists, that boundary should be considered when addressing conflicts of statutes and Rules, and it should be considered before applying the later-in-time analysis required by the supersession clause.

The Third Circuit, in *Durant v. Husband*,[286] for example, followed this analysis. In *Durant*, a plaintiff had obtained a judgment by default against the Virgin Islands when the Virgin Islands failed even to answer the complaint.[287] The statute creating a limited waiver of the Virgin Islands' sovereign immunity, however, conflicted with Fed. R. Civ. P. 55(a),[288] which provided for default judgments.[289] One statutory limitation on the Virgin Islands' waiver of sovereign immunity was that there could be no judgment against the Virgin Islands "except upon such legal evidence as would establish liability against an individual or corporation in a court of law, and no judgment by default shall be entered against the [g]overnment."[290] Rule 55(a), by contrast, permitted judgment by default to be taken against defendants, with some exceptions not pertinent to the Virgin Islands.[291]

After acknowledging the conflict between statute and Rule, the U.S. Court of Appeals for the Third Circuit did not in *Durant* proceed immediately to determine, under an implied repeals analysis, whether statute and Rule could be harmonized. Instead, the court first examined the context of both Rule and statute.[292] The court concluded that Rule 55(e) was not wholly procedural

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284 *See, e.g.*, Durant v. Husband, 28 F.3d 12 (3d Cir. 1994); Chesny v. Marek, 720 F.2d 474 (7th Cir. 1983), *rev'd*, 473 U.S. 1 (1985).

285 *See supra* notes 35-37 and accompanying text, and *infra* notes 327, 329.

286 28 F.3d 12 (3d Cir. 1994).

287 *Id.* at 14.

288 FED. R. CIV. P. 55(a).

289 *Durant*, 28 F.3d at 14-15. The Federal Rules were made applicable to the District Court for the Virgin Islands by legislation enacted in 1954. *See* 1 MOORE'S FEDERAL PRACTICE, *supra* note 8, § 1App.106[2], at 1App.-28 and § 1App.106[5], at 1App.-37 to 1App.-38.

290 *Durant*, 28 F.3d at 15.

291 *Id.*

292 *Id.*

because it incorporated "in a sense" a statute addressing the limitation on the United States' sovereign immunity.[293] The court then stated that the Virgin Islands' waiver of sovereign immunity was "flatly conditioned on the non-availability of a default judgment."[294] Accordingly, the Third Circuit concluded that the statute and Rule conflicted. After deciding that the provisions conflicted, the *Durant* court considered the impact of the substantive rights limitation of the Rules Enabling Act and held that to permit default judgments against the Virgin Islands under Rule 55(e) would "significantly 'enlarge' the substantive rights conferred by the Virgin Islands Torts Claims Act." Therefore, the Virgin Islands statute superseded Rule 55(e).[295]

The Third Circuit, thus, began and concluded its analysis of conflicting statute and Rule by determining that the provisions conflicted and the impact of that clash of power—the Federal Rule providing for default judgment would have an impermissible substantive impact in this particular intersection of statute and Rule. The court concluded its analysis without first attempting to harmonize statute and Rule to avoid an implied repeal and without ever reaching the supersession clause issue of priority in time. Had the court concluded that neither the substantive rights prohibition nor other considerations of rulemaking authority required the Federal Rule to yield based on issues of power, it would have appropriately moved on to a consideration under the supersession clause of which provision was later-in-time and, thus, would supersede the earlier provision.

Parts III.B.1.b.i. through iv., below, discuss issues of rulemaking authority that might require one provision to yield based on a conflict of that authority. Part III.B.1.b.v emphasizes that when Congress enacts both statute and rule, no analysis of rulemaking authority under the Rules Enabling Act is necessary. Furthermore, it is in making these decisions about whether a particular clash of power is irreconcilable that a court might determine to harmonize—to avoid, if possible, an irreconcilable clash of the power of the Court and Congress.[296] If the inquiry into rulemaking power, however, reveals that only Congress or only the Court has rulemaking authority in that context, then once again, the inquiry is over without ever reaching the later-in-time analysis required by the

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293 *Id.*
294 *Id.*
295 *Id.*
296 *See supra* notes 244-49 and accompanying text.

supersession clause. The standard of the only branch with rulemaking authority prevails.

i. Does the Federal Rule Intrude in an Area Committed to Exclusive Congressional Control or Have Impermissible Substantive Impact?

The prospective rulemaking authority of Congress and the Supreme Court is not coextensive. Congress may enact substantive or procedural law, while the Supreme Court is limited, under the Rules Enabling Act and by separation of powers principles, to promulgation of procedural Rules. Court rulemaking, thus, cannot intrude on matters committed exclusively to Congress, such as subject matter jurisdiction[297] or venue,[298] nor can it improperly impact substantive rights.[299] Thus, if a statute and Rule conflict, a court should consider both whether the rulemaking is in an area committed solely to congressional regulation under separation of powers principles and whether the Federal Rule has impermissible substantive impact.[300]

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297 *See, e.g.*, Henderson v. United States, 517 U.S. 654, 665-68, 671-72 (1996); United States v. Sherwood, 312 U.S. 584, 586-91 (1941) (holding that rules of procedure promulgated by a court cannot enlarge a court's subject matter jurisdiction); *see also* United States v. Mitchell, 445 U.S. 535, 538-40 (1980); Bolin v. Sears, Roebuck & Co., 231 F.3d 970, 973-74 (5th Cir. 2000) (holding that Congress' grant of power to the Supreme Court under 28 U.S.C. § 1292(e) to make Rules that expand the availability of interlocutory appeal did not constitute an impermissible delegation of power to the Court to expand subject matter jurisdiction, but was, instead, a permissible delegation of authority to create Rules governing activities within the judiciary's "central mission"). *See generally* Whitten, *supra* note 15, at 45-46, 52-53. Professor Whitten has emphasized that the Federal Rules may impermissibly intrude in an area that is reserved to Congress under constitutional separation of powers analysis. Professor Whitten further emphasizes that there are some purely procedural boundaries over which the Court may not cross through procedural rulemaking because such rulemaking would violate separation of powers. *Id.* at 46. He concludes that those boundaries can be identified by the "importance of the policy judgments to be made in the rulemaking process and . . . the legislature's judgment about the exclusivity of its own prerogatives in a particular area." *Id.* at 62. Professor Whitten also posits that the following factors should be examined to determine whether Court rulemaking regarding purely procedural issues is permissible or is precluded by separation of powers principles: (1) the detail of congressional legislation; (2) the length of exclusive congressional legislation; (3) the importance of the underlying policy issues to Congress and litigants; (4) the timing and purpose of the delegation to the Court of general rulemaking power; (5) the extent that Rules will impact statutory policy; and (6) the extent that the Rules will support or protect statutory policies deemed more important than those replaced. *Id.* at 63-66.

298 *See* FED. R. CIV. P. 82.

299 28 U.S.C. § 2072(a), (b) (1994).

300 *See Rules of Civil Procedure for the United States District Courts: Hearings Before a Subcomm. Of the Senate Comm. on the Judiciary, pt.* 2, 75th Cong. 48 (1938) (Appendix: Analysis of Some of the Rules Which Particularly Affect or Change the Nature of Trial by Jury, by Kahl K. Spriggs) ("[T]he rules are said to 'supersede' or 'modify' the statutes in conflict therewith. Whatever technical terminology may be employed to describe the effect of the new rules on statutes, it is plain that in actual operation they repeal many statutes of the United States, and probably affect many State statutes and decisions as well. In every instance,

These considerations seem so obvious as to not even warrant comment. Nevertheless, courts routinely fail to undertake an explicit analysis of whether the issue is within Congress' sole province or whether a Federal Rule has substantive effect,[301] perhaps because courts have been lulled by the relatively

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therefore, of conflict between the proposed rules and the statutes there must be of necessity an examination to determine whether 'substantive rights,' purportedly preserved by the enabling act have been changed by the rules, and the conflict must be clear and irreconcilable, because repeals by implication are not favored.") Commentators continue to debate the appropriate definition of the substance and procedure for initial Rule promulgation and supersession clause analysis. *See, e.g.*, Bone, *supra* note 4, at 892-93; Burbank, *What Your Students Should Know*, *supra* note 68, at 516-17; Burbank, *Hold the Corks*, *supra* note 59, at 1029-36; Burbank, *supra* note 1, at 1113-16, 1121-31; Carrington, *supra* note 4, *passim*; Carrington & Apanovitch, *supra* note 8, at 461-62, 474-76. The formula currently relied on by the Court is set forth in *Burlington Northern R.R. Co. v. Woods*, 480 U.S. 1, 4-5 (1987), in which the Court concluded that the constitutional constraint on rulemaking authority is based on a rule of reasonableness, with those matters that are "indisputably procedural [being considered] *a priori* constitutional" and Rules "'which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either,' also satisfy[ing] this constitutional standard." *Id.* (quoting Hanna v. Plumer, 380 U.S. 460, 472 (1965)). The *Burlington Northern* Court added, however, that the substantive rights limitation of the Rules Enabling Act also requires that the Rules only "incidentally affect litigants' substantive rights" and be "necessary to maintain the integrity of [the] system of [uniform and consistent] rules [governing federal practice and procedure]." *Id.* at 5. This Article concludes that, in resolving statute-Rule conflicts, the substance-procedure issue is too often improperly omitted or relegated to a matter of secondary importance. It is considered, in the usual case, if at all, only after the conclusion of statutory analysis to determine if the interpretation is consistent with Congress' policy choices.

[301] *See, e.g.*, United States v. Goodall, 236 F.3d 700, 707-08 (D.C. Cir. 2001) (Randolph, J., concurring) (stating that Fed. R. Crim. P. 11(e)(1)(C), which permits government and defendant to agree on a sentence outside the range prescribed by the pertinent sentencing range, should supersede 18 U.S.C. § 3553(b) of the Sentencing Reform Act, which requires that there be no departure from a prescribed sentencing range, absent aggravating or mitigating factors not appropriately considered in setting the range); Callihan v. Schneider, 178 F.3d 800, 803-04 (6th Cir. 1999) (holding that Fed. R. App. P. 24(a), which permits appellate review of district court orders certifying that appeal in forma pauperis is not in good faith, supersedes § 1915(a)(3) of PLRA, which precludes appellate review); American Paper Inst., Inc. v. ICC, 607 F.2d 1011, 1012-13 (D.C. Cir. 1979) (holding that Fed. R. App. P. 15(a), which required that a petition for review need only specify the parties seeking review, the respondents, and the portion of order to be reviewed, superseded specificity requirements of 28 U.S.C. § 2344 of the Hobbs Act); Feeder Line Towing Serv., Inc. v. Toledo, Peoria & W. R.R. Co., 539 F.2d 1107, 1108-09 (7th Cir. 1976) (holding that Fed. R. App. P. 4(a), requiring filing of notice of appeal within thirty days of entry judgment, superseded 28 U.S.C. § 2107, providing ninety days for filing notice of appeal in admiralty action); Jack Neilson, Inc. v. Tug Peggy, 428 F.2d 54, 55 (5th Cir. 1970) (holding that Fed. R. App. P. 5(a), which provided ten days to file petition for interlocutory appeal under 28 U.S.C. § 1292(b), superseded the fifteen-day period provided in 28 U.S.C. § 2107); McConville v. United States, 197 F.2d 680, 682 (2d Cir. 1952) (holding that Fed. R. Civ. P. 73, excepting from time for appeal the time for a motion to amend judgment or for additional factual findings, superseded 28 U.S.C. § 2107, to the extent that these matters were not included in revised § 2107); Folkstone Mar., Ltd. v. CSX Corp., No. 88C 4040, 1988 WL 58592, at *1 (N.D. Ill. May 31, 1988) (holding that Supplemental Rule E(5)(a) of the Supplemental Rules for Certain Admiralty and Maritime Claims, Federal Rules of Civil Procedure, which states the procedure for setting a bond and permits bond to be set at the lesser of twice the plaintiff's claim or the value of the property, supersedes 28 U.S.C. § 2464, which would require a bond of twice the plaintiff's claim). The *Folkstone* court did not address the substantive-procedural dichotomy, except to state that Supplemental Rule E(5)(a) was

long period in which congressional deference to Court rulemaking resulted in relatively few instances of conflict and, hence, of necessity to consider the issues of conflict in any great detail;[302] perhaps because application of the language of the supersession clause or of the unmodified implied repeals analysis avoids articulation of the underlying conflict of interbranch power;[303] perhaps because courts believe that, for the most part, the Federal Rules do not have substantive effect;[304] or perhaps because the particular interpretation of statute and Rule does not create an impermissible substantive effect.

ii. Did a Prior Congressional Statute Remove Court Rulemaking Authority?

Courts should also consider, in appropriate cases, whether a prior congressional enactment repealed in part[305] or in whole[306] the Court's

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intended to supersede § 2464. *Id.* Several commentators, however, have commented on the failure to consider whether Supplemental Rule E(5)(a) impermissibly impacts substantive rights. *See, e.g.*, GILMORE & BLACK, *supra* note 228, at 797; Rutherglen, *supra* note 228, at 602.

302 *See supra* notes 1-3, 94-96 and accompanying text.

303 The substantive rights limitation of the Rules Enabling Act itself certainly adverts to issues of power.

304 *See* Mullenix, *Hope over Experience*, *supra* note 4, at 840-41.

305 Many cases note that Congress can repeal the Court's delegated rulemaking authority. *See, e.g.*, Sibbach v. Wilson & Co., 312 U.S. 1, 9-10 (1941); *accord* United States v. Hinton, No. 99-1340, 2000 WL 717085, at *1-*2 (10th Cir. June 2, 2000); Callihan v. Schneider, 178 F.3d 800, 802 (6th Cir. 1999); Floyd v. United States Postal Serv., 105 F.3d 274, 278 (6th Cir. 1997), *superseded by Rule as stated in Callihan*, 178 F.3d 800; Jackson v. Stinnett, 102 F.3d 132, 134-35 (5th Cir. 1996); Gov't of the Virgin Islands v. Parrott, 476 F.2d 1058, 1060-61 (3d Cir. 1973); United States v. Rivera-Negron, 201 F.R.D. 285, 287-88 (D.P.R. 2001); United States v. Mitchell, 397 F. Supp. 166, 170 (D.D.C. 1974); *see* Note, *supra* note 8, at 843 (arguing, prior to *Marek v. Chesny*, 473 U.S. 1 (1985), that § 1988 had repealed Court rulemaking authority regarding costs and fee-shifting in civil rights actions); *see also supra* note 62.

306 The intense debate among commentators following the passage of the Civil Justice Reform Act ("CJRA") draws in sharp relief the possibility of complete congressional repeal of Court rulemaking authority. Briefly, through the CJRA, Congress required a so-called "bottom-up" approach to creating, through local district court rules, measures to deal with perceived excessive costs and delays in federal court litigation; through the CJRA, Congress charged the local federal district courts, with input from the "users" of the system, rather than the Court, with the task of creating civil rules to reduce litigation costs and delays. Mullenix, *The Counter-Reformation*, *supra* note 67, at 385, 391-92. The CJRA "requires each federal district court to implement a 'civil justice expense and delay reduction plan' intended 'to facilitate deliberate adjudication of civil cases on the merits, monitor discovery, improve litigation management, and ensure just, speedy, and inexpensive resolutions of civil disputes.'" Robel, *supra* note 4, at 1450-51; *see* Mullenix, *The Counter-Reformation*, *supra* note 67, at 389-90. Moreover, in completing these tasks, the courts were to work with advisory groups that included the courts' "users"—lawyers, litigants, and the local U.S. Attorney. Mullenix, *The Counter-Reformation*, *supra* note 67, at 394-95; Robel, *supra* note 4, at 1450-51. The advisory groups were to assess the courts' dockets, identify trends in demands on the courts, identify causes of excessive cost and delay, prepare a report on these issues, and recommend methods to reduce costs and delays. Mullenix, *The Counter-Reformation*, *supra* note 67, at 395-96; Robel, *supra* note 4, at 1451-52. The CJRA further specified that the advisory groups consider six principles of "litigation management and cost and delay

procedural rulemaking authority. Although Congress has delegated procedural rulemaking authority to the Court, Congress retains the authority to repeal, amend, or supersede individual Federal Rules promulgated by the Court *or* to repeal its delegation of procedural rulemaking authority in whole or in part.[307] Thus, a particular congressional statute may partially repeal Court rulemaking authority in a purely procedural area formerly committed to joint Court and congressional rulemaking or it may merely supersede a prior Federal Rule.[308] This issue, like the separation of powers and substantive rights issues, should

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reduction" and six specified techniques for managing litigation and reducing costs and delays. Robel, *supra* note 4, at 1452. Following this process, the federal district courts were to adopt a litigation management and cost and delay reduction plan. *Id.* Professor Tobias concludes that the CJRA "implicitly encouraged districts to apply measures which conflict with the Federal Rules, provisions in the United States Code, and strictures in other courts." Tobias, *supra* note 113, at 545; *see also* Robel, *supra* note 4, at 1452-54.

The implied repeals issue regarding the CJRA centered on whether Congress had, by implication, repealed the Rules Enabling Act in its entirety. Professor Redish has concluded that, even if the CJRA had undermined the Rules Enabling Act, Congress has the power to repeal or modify a previous statute that it has enacted. Redish, *supra* note 4, at 726. Acknowledging that implied repeals are heavily disfavored, Professor Redish nonetheless concluded that, though perhaps representing an unwise decision on Congress' part, no constitutional limitation would prevent Congress from enacting a statute that explicitly or implicitly modified, repealed, or created an exception to the Rules Enabling Act. *Id.* Professor Mullenix, by contrast, argued essentially that Congress could not, by implication (or explicitly) repeal the allocation to the Supreme Court under the Rules Enabling Act of procedural rulemaking authority because such action would "violate[] the separation-of-powers doctrine by substantially impairing the federal courts' inherent Article III power to control their internal process and the conduct of civil litigation." Mullenix, *Unconstitutional Rulemaking*, *supra* note 4, at 1287. Professor Mullenix contended that the Rules Enabling Act acknowledges two spheres of rulemaking authority: Congress has substantive rulemaking authority, and the federal courts have the procedural rulemaking authority. The Rules Enabling Act, thus, acknowledges limits on Congress' rulemaking authority as well as the Supreme Court's authority; Congress cannot enact procedural rules separate and apart from its establishment of substantive standards. Mullenix, *The Counter-Reformation*, *supra* note 67, at 426-27. Professor Mullenix concluded that the Civil Justice Reform Act "revoke[d] the Rules Enabling Act *sub silentio* and authorize[d] unconstitutional rulemaking." Mullenix, *Unconstitutional Rulemaking*, *supra* note 4, at 1287; *see also* Mullenix, *supra* note 15, at 747-48. Professor Robel weighed in on the issue concluding that the CJRA could be harmonized with previous congressional legislation and, when so harmonized, did not authorize the repeal of the Rules Enabling Act process in whole or in part. Robel, *supra* note 4, at 1455 & n.47. *See also* Carrington, *supra* note 16, at 976-77; Carl Tobias, *Recalibrating the Civil Justice Reform Act*, 30 HARV. J. ON LEGIS. 115, 126-27 (1993). *But see* Edwin J. Weseley, *The Civil Justice Reform Act; the Rules Enabling Act; the Amended Federal Rules of Civil Procedure; CJRA Plans; Rule 83—What Trumps What?*, 154 F.R.D. 563, 572 (1994) (stating that the CJRA supersedes the Rules Enabling Act and concomitantly the Federal Rules of Civil Procedure regarding issues specifically addressed in the CJRA).

307 *See supra* notes 62, 305.

308 *See* Note, *supra* note 8, at 842-46 (suggesting that 42 U.S.C. § 1988 repealed the Court's procedural rulemaking authority in the area of cost-shifting regarding attorney fees in civil rights cases). *See also* Kelleher, *supra* note 113, at 111-13 (suggesting that when Congress enacts procedural provisions as part of a substantive statute, rather than as an amendment to or a part of the procedural rules, the provision will usually be substantive and, hence, that the Court will usually be precluded from promulgating further Rules); Kelleher, *supra* note 241, at 442.

be considered before the later-in-time analysis in appropriate cases. If a statute removes Court rulemaking authority on an issue, a later-enacted Court Rule cannot supersede that prior statute.

The issue of partial repeal of Court rulemaking authority is not merely an academic one. In *Friends of the Earth, Inc. v. Chevron Chemical Co.*,[309] for example, the U.S. District Court for the Eastern District of Texas examined a local rule regarding offer of judgment that the district court had adopted as part of its Civil Justice Expense and Delay Reduction Plan required by the CJRA.[310] The offer of judgment provisions promulgated in the local rule conflicted with the offer of judgment rule in Fed. R. Civ. P. 68.[311] The local rule provided, in part, that either party could make an offer of judgment. If that offer was not accepted and the final judgment in the case was "of more benefit to the party who made the offer by 10%," then the rejecting party would be required to pay the "litigation costs" incurred after the offer was rejected.[312] "Litigation costs" was defined to include both reasonable attorney fees and expert witness fees.[313]

The *Friends of the Earth* court held that local rules adopted by district courts pursuant to the CJRA are not invalid even if in conflict with Federal Rules of Civil Procedure.[314] The court stated that, in the CJRA, Congress had created a second delegation of procedural rulemaking authority—this time to the individual federal district courts—and local rules adopted pursuant to the CJRA were not constrained by the Federal Rules of Civil Procedure but could displace those Rules.[315] The *Friends of the Earth* court, thus, concluded that the CJRA, if not repealing outright the authority of the Court to promulgate Rules under the Rules Enabling Act, would permit district courts to adopt rules

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309 885 F. Supp. 934 (E.D. Tex. 1995), *abrogated,* Ashland Chem., Inc. v. Barco, Inc., 123 F.3d 261 (5th Cir. 1997).

310 See *supra* notes 114-20, 306 and accompanying text for a discussion of the CJRA.

311 The court in *Ashland Chemical,* 123 F.3d at 267 n.5, listed three important differences between Fed. R. Civ. P. 68 and the local rule of the Eastern District of Texas. First, the local rule allowed any party to make an offer of judgment, while Fed. R. Civ. P. 68 allows only the defendant to do so. *Id.* Second, the local rule required that the final judgment be "of more benefit to the party who made the offer by 10%" for fee-shifting to apply, while Rule 68 requires that the final judgment ultimately obtained be "not more favorable than the offer" for cost-shifting to apply. *Id.* Third, the local rule shifted both costs and attorney fees, while Rule 68 shifts "costs." *Id.*

312 *Id.*

313 The local rule also limited the costs that could be recovered in personal injury and civil rights cases involving contingent attorney fees and permitted a court, in its discretion, to reduce an award of litigation costs to prevent "undue hardship." *Friends of the Earth*, 885 F. Supp. at 936 n.1.

314 *Id.* at 936-38.

315 *Id.* at 938.

that ignore the Rules of the Court, a sort of partial repeal by sleight of hand. In particular, the court held that Fed. R. Civ. P. 83, which requires that local rules promulgated by federal district courts be consistent with the Federal Rules of Civil Procedure, was inapplicable to local rules promulgated under the authority of the CJRA.[316] The court premised this conclusion on the legislative history of the CJRA,[317] the goals of the CJRA to "facilitate deliberate adjudication of civil cases on the merits, monitor discovery, improve litigation management, and ensure just, speedy, and inexpensive resolutions of civil disputes,"[318] and Congress' expressed desire to achieve these goals through decentralized "bottom up" reform.[319]

In *Ashland Chemical Inc. v. Barco Inc.*,[320] the U.S. Court of Appeals for the Fifth Circuit examined the same local rule regarding offer of judgment that was at issue in *Friends of the Earth*. It held that the local rule exceeded the district court's authority under the CJRA, not because the local rule conflicted with Fed. R. Civ. P. 68, but because the local rule created a substantive fee-shifting provision.[321] The Fifth Circuit explicitly declined to address the issue of whether the CJRA authorized district courts to adopt local rules that conflict with or ignore the Federal Rules,[322] but did state in dicta that it "agree[d] with the *Friends of the Earth* court's determination that the CJRA was intended to allow the district courts to experiment, perhaps even beyond the strict confines of the Federal Rules of Civil Procedure."[323]

In considering whether a particular statute repeals the Court's rulemaking authority rather than merely supersedes a Federal Rule, the courts are addressing an issue different from the statute-Rule conflicts that are the primary focus of this Article. That issue is whether Congress, through the particular statute at issue, intends to partially or wholly repeal rulemaking authority delegated to the Supreme Court under another congressional

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316 *Id.* at 936-37.

317 *Id.* at 937-38.

318 *Id.* at 937 (quoting 28 U.S.C.S. § 471 (Supp. 1994)).

319 *Id.* at 937-38; *see also* Weseley, *supra* note 306, at 572, 574 ("[T]he Congressional mandate of the CJRA supersedes the earlier Rules Enabling Act legislation, and consequently the Federal Rules of Civil Procedure, to the extent that a particular matter is specifically addressed by the CJRA."). Several commentators have argued that the CJRA does not supersede or displace the Rules Enabling Act, but should, instead, be harmonized with the Rules Enabling Act. *See, e.g.*, Carrington, *supra* note 16, at 977-79; Robel, *supra* note 4, at 1455 & n.47, 1464-70; Tobias, *supra* note 306, at 126-27.

320 123 F.3d 261 (5th Cir. 1997).

321 *Id.* at 268.

322 *Id.* at 263 n.1.

323 *Id.* at 268.

statute—the Rules Enabling Act. In such instances, application of the principles of the implied repeal canon is warranted. Indeed, the presumption that a later congressional statute should not repeal an earlier one by implication if a harmonizing construction of the two statutes is available makes the most sense in the case of a well-defined and clearly established rule of law or "an old rule that is an established and important part of our national policy."[324] The Rules Enabling Act fits both categories. In the current, uneasy sharing of rulemaking authority by Court and Congress, Congress is not only well aware of its delegation of rulemaking authority to the Court and its shared authority in the area, it has increasingly discussed its authority, exercised its rulemaking authority, and even explicitly amended the Rules Enabling Act in 1988. In such a context, it makes sense to require that when Congress intends to limit the Court's delegated rulemaking authority in an area otherwise committed to joint rulemaking authority, it must do so by clear statement. Absent clear statement of intent to repeal the Court's rulemaking authority, potential conflicts regarding the effect of congressional statutes on the delegation of procedural rulemaking authority in the Rules Enabling Act should be harmonized if the statutes can coexist even if such harmonization would result in a strained interpretation of the statutes.[325] Applying such an analysis to the intersection of the CJRA and the Rules Enabling Act, some commentators concluded that the CJRA did not repeal rulemaking authority or permit conflicting local rules to supersede Federal Rules.[326]

Imposing a clear statement requirement on Congress' repeal of Court rulemaking authority is warranted because of Congress' general acceptance of the Court's lead role in rulemaking.[327] Further, Congress is institutionally best

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[324] *See* Radzanower v. Touche Ross & Co., 426 U.S. 148, 164 (1976) (Stevens, J., dissenting). Justice Stevens noted in his dissent in *Radzanower* that, at bottom, the question when addressing conflicting statutes is the intent of Congress. *Id.* at 160. Sometimes, as when the rule embodied in the prior statute is clearly established and well-known or the rule is an important element of national policy, the presumption that Congress would not repeal the prior statute without clearly stating the repeal, is particularly helpful. *Id.* at 159-66.

[325] *See* Carrington, *supra* note 16, at 976-77; Robel, *supra* note 4, at 1455 & n.47, 1464-70; Tobias, *supra* note 306, at 126-27.

[326] Robel, *supra* note 4, at 1455, 1464-70; *see also* Carrington, *supra* note 16, at 976-77; Tobias, *supra* note 306, at 126-27. The court in *Friends of the Earth, Inc. v. Chevron Chemical Co.*, 885 F. Supp. 934, 938 & n.3 (E.D. Tex. 1995), *abrogated, Ashland Chemical, Inc.*, 123 F.3d 261, however, explicitly rejected this analysis.

[327] Even acknowledging the presence of a more active congressional player on the procedural rulemaking stage and the Court's pledge to act more cautiously in promulgating Rules that might supersede statutory provisions, Congress has not changed its reliance on the Court as the lead or default procedural rulemaker and the Court's role of creating a coherent procedural framework endures. *See, e.g.*, Bone, *supra* note 4, at 921.

suited to make its intent to repeal clear. Finally, in the event that the Court misreads congressional intent to withdraw rulemaking authority, Congress, under the Rules Enabling Act framework for sharing rulemaking authority, has three bites at the repealing apple: (1) it can clearly state that it is amending or repealing portions of the Court's delegated rulemaking authority; (2) it can veto proposed Rules that intrude on an area in which Congress intended to repeal the Court's authority before the proposed Rules even become effective;[328] and (3) if Congress fails to block an offending Court Rule, Congress can repeal the Rule by subsequent legislation.

iii. Does the Statute Diminish Core Judicial Powers in Violation of Separation of Powers?

Because the Supreme Court has recognized that Congress' procedural rulemaking power is generally superior to the procedural rulemaking power of the Supreme Court, Congress will generally have authority to enact procedural

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Indeed, when Congress does enter the procedural rulemaking game, the usual criticism is that Congress has failed to consider the changes against the fabric of the Federal Rules in general or has responded to special interest groups in a way that does not consider the coherence of the structure of the Federal Rules. *See, e.g.*, Geyh, *supra* note 1, at 1184; McCabe, *supra* note 27, at 1684-87; Moore, *supra* note 27, at 1053-61; Mullenix, *Hope over Experience*, *supra* note 4, at 844-46; Mullenix, *Unconstitutional Rulemaking*, *supra* note 4, at 1287; Tobias, *supra* note 105, at 77-78. Commentators have, in fact, advocated systems of shared rulemaking authority in which proposed procedural legislation and other legislation impacting the courts would be implemented by a cooperating judiciary and Congress, some indicating that the judiciary should take the lead even in areas that might impact substantive rights. *See, e.g.*, Bone, *supra* note 4, at 890 (arguing for congressional restraint in rulemaking and contending that a national, "court-based, and committee-centered process," in which courts develop Rules based on, among other factors, their understanding of current practice and the values favored in current law, should generally be followed in developing Rules); Burbank, *What Your Students Should Know*, *supra* note 68, at 516-17 (contemplating that the Court and Congress will forge a new treaty in which "the branches will cooperate, with the judiciary taking the lead, in the formulation and promulgation of reforms that would necessarily and obviously affect substantive rights"); Geyh, *supra* note 1, at 1234-35, 1247-48 (proposing creation of a "permanent, independent, fifteen-member Interbranch Commission on Law Reform and the Judiciary," including members from the three branches of government, litigation user groups, and academics, charged with the tasks of developing court reform proposals; evaluating legislative proposals regarding the courts; and reviewing and making recommendations (under a deferential standard of review) on proposed procedural Rules); Tobias, *supra* note 4, at 609-10, 616-18; Carl Tobias, *Fin-De-Siècle Federal Civil Procedure*, 51 FLA. L. REV. 641, 663-65 (1999); *see also* Levin & Amsterdam, *supra* note 42, at 14, 27-29.

[328] It may be very difficult for Congress to determine which, if any, Rules have substantive impact. Indeed, the Court has not always been particularly conscientious about indicating to Congress which Rules might have impermissible substantive content. *See, e.g.*, Burbank, *Hold the Corks*, *supra* note 59, at 1039-42. It should, however, be much easier for Congress to spot a Rule that attempts to regulate procedure in an area in which Congress has removed all rulemaking authority.

statutes.[329] Congress may not, however, encroach on core judicial powers protected by Article III or impair constitutional requirements articulated in Rules promulgated by the Court. Commentators and courts have long recognized that, notwithstanding that many court systems give the legislative branch "ultimate" control over procedure, there remains an area of "minimum functional integrity" that is protected by structural separation of powers concerns and is beyond the power of the legislature to invade.[330] Thus, if a congressional statute impermissibly encroaches on the judicial function of fully and effectively determining controversies, the statute would yield to the Rule.

iv. Does the Statute Impair Constitutional Requirements?

Similarly, if a federal statute attempts to articulate a constitutional standard or collides with a Federal Rule that articulates a constitutional requirement, then the federal statute must also yield to the Rule, notwithstanding the later-in-time requirement of the supersession clause. Congress has no authority to

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[329] *See* McCabe, *supra* note 27, at 1686 (noting that "[a]s a practical matter, the only restraints on Congress are self-imposed"). Prudential considerations regarding Congress' wisdom in bypassing the expertise of its chosen national rulemaker and of potential loss of neutrality, of thoroughness, or of coherence of the Rules may well be implicated when Congress enters the procedural rulemaking arena, rather than questions of power. *See, e.g.*, Edward D. Cavanagh, *The Civil Justice Reform Act of 1990: Requiescat in Pace*, 173 F.R.D. 565, 599-600 (1997); Geyh, *supra* note 1, at 1184; McCabe, *supra* note 27, at 1684-87; Mullenix, *Hope over Experience*, *supra* note 4, at 844-46; Mullenix, *Unconstitutional Rulemaking*, *supra* note 4, at 1287; Peterson, *supra* note 23, at 1023-32; Stempel, *supra* note 23, at 731; Tobias, *supra* note 105, at 77-78. *But see* Mullenix, *The Counter-Reformation*, *supra* note 67, at 384 ("[Congress'] attempt [through the Civil Justice Reform Act] to strip the judicial branch of its procedural rulemaking authority . . . violates separation of powers doctrine, which commits control over internal court housekeeping affairs, including the promulgation of procedural rules, to the judiciary."); Mullenix, *Unconstitutional Rulemaking*, *supra* note 4, at 1287. These prudential considerations weigh against routine exercise of the congressional rulemaking power, or at least in favor of cooperative rulemaking that would permit judicial input of some type into the legislative process when Congress legislates regarding procedure. *See supra* note 327.

[330] *See, e.g.*, Miller v. French, 530 U.S. 327, 349-50 (2000); Chambers v. NASCO, Inc., 501 U.S. 32, 43, 46-49 (1991); Young v. United States *ex rel.* Vuitton et Fils S.A., 481 U.S. 787, 793 (1987); Link v. Wabash R.R. Co., 370 U.S. 626, 630-31 (1962); *Ex Parte* Burr, 22 U.S. (9 Wheat.) 529, 530-31 (1824); United States v. Hudson, 11 U.S. (7 Cranch) 32, 34 (1812); *see also* Levin & Amsterdam, *supra* note 42, at 29-30, 32-33 ("There are spheres of activity so fundamental and so necessary to a court, so inherent in its very nature as a court, that to divest it of its absolute command within these spheres is to make meaningless the very phrase *judicial power*." (emphasis in original) (citations omitted)); Redish, *supra* note 4, at 725; Tyrrell Williams, *The Source of Authority for Rules of Court Affecting Procedure*, 22 WASH. U. L.Q. 459, 468, 494-500 (1937) ("For constitutional reasons it sometimes happens in this country that a rule of court will be superstatutory even if the legislature has not conferred rule-making power on the court and has deliberately designed to contravene or to prevent a particular rule of court."); *see also supra* notes 51-57 and accompanying text.

establish a rule of constitutional magnitude or to amend a Federal Rule that articulates a constitutional requirement.[331]

v. Did Congress Enact Both Statute and Rule?

In an age of increased congressional procedural rulemaking activity, we might even imagine a brave new world in which a congressional statute apparently conflicts with a federal rule created, not by the Court through the Rules Enabling Act process, but by congressional enactment.[332] In such a case, there is no clash of interbranch authority and no need to examine the authority of Congress vis-à-vis the Court. Failure to use an analysis that recognizes the impact of interbranch power, however, can lead courts to consider issues of power unnecessarily when resolving conflicts between statutes and procedural rules that were both enacted by Congress.[333] The Court in *Henderson v. United States*,[334] for example, used an implied repeals analysis followed by a consideration of whether the rule at issue, which had been enacted by Congress, violated the substantive rights limitation of the Rules Enabling Act. The Court need not, however, consider issues of rulemaking power when the conflicting provisions are both enacted by Congress.[335] Instead, if Congress enacted both provisions, courts should use the analysis for conflicting congressional statutes—typically the analysis of the canon disfavoring implied repeals.

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[331] Dickerson v. United States, 530 U.S. 428, 437-38 (2000); WEINSTEIN, *supra* note 37, at 78; *see also supra* notes 45-50 and accompanying text. For example, the requirement of Fed. R. Civ. P. 23(a)(4) that representative parties in a class action "fairly and adequately protect the interests of the class" is "designed to protect the due process rights of absent class members." 5 MOORE'S FEDERAL PRACTICE, *supra* note 8, § 23.25[1], at 23-111 to 23-112. Thus, Congress could not, by statute, abrogate this adequate representation prerequisite to class certification.

[332] *See, e.g.*, Henderson v. United States, 517 U.S. 654 (1996); United States v. Mateo-Mendez, 215 F.3d 1039, 1042-45 (9th Cir. 2000) (holding that Fed. R. Evid. 902(1), which permits public documents to be admitted without extrinsic evidence of admissibility if: (1) the document is under seal, and (2) the signer attests to the information, supersedes statutory provision requiring that admissibility without extrinsic evidence be based on sealed document signed by Attorney General or specifically designated official); United States v. Hornick, 815 F.2d 1156, 1159-60 (7th Cir. 1987) (noting apparent conflict between Fed. R. Evid. 501 and 18 U.S.C. § 3661, both of which were created by congressional statute, but declining to resolve the issue because the parties did not raise or brief it, and the issue did not rise to the level of plain error); Jackson v. Brinker, No. IP91-471-C, 1992 WL 404537, at *2 (S.D. Ind. Dec. 21, 1992).

[333] *See, e.g.*, *Henderson*, 517 U.S. at 665-72.

[334] *Id.*

[335] *See, e.g.*, Flaminio v. Honda Motor Co., 733 F.2d 463, 470 (7th Cir. 1984) (holding that rules enacted by Congress are not subject to the substantive rights limitation of the Rules Enabling Act).

2. *The Statute and Rule Conflict, But Neither Must Yield Based on Issues of Rulemaking Authority*

Thus far, the Article has examined two of the three potential scenarios under the proposed rulemaking authority analysis: (1) the statute and Rule do not conflict, and (2) the statute and Rule conflict and one must yield based on a lack of rulemaking authority. In neither scenario is the later-in-time analysis of the supersession clause and implied repeal framework implicated. This later-in-time analysis comes into play in only one instance—if a statute and Rule conflict, but the inquiry into the potential clash of rulemaking power reveals that neither provision must yield based on issues of rulemaking authority. In this case, the rule of temporal priority set forth in the supersession clause furnishes the rule of construction: The provision that is later in time supersedes the earlier provision.

The conflict between statute and Rule in *Jackson v. Stinnett*,[336] provides a good example of a collision of statute and Rule that does not implicate issues of rulemaking authority. In *Jackson*, a provision of the PLRA again appeared to conflict with a Federal Rule.[337] This time, § 1915(a) of the PLRA required a prisoner filing a civil appeal in forma pauperis to file an affidavit listing all his assets and to submit a certified copy of his prison trust fund account statement covering the preceding six months.[338] Fed. R. App. P. 24(a), on the other hand, permitted a prisoner to appeal a case in forma pauperis without further application to the court unless the district court had decertified the in forma pauperis status. The Fifth Circuit decided in *Jackson* that the procedural statute and Federal Rule conflicted since the PLRA required additional filing, while Rule 24(a) did not.[339] The Fifth Circuit then applied the traditional supersession clause/implied repeals analysis and concluded that the later-enacted § 1915(a) superseded the Federal Rule.[340]

Under the rulemaking authority analysis, after finding that § 1915(a) and Rule 24(a) conflicted, the court should ask whether either the Court or Congress had exceeded its rulemaking authority. In this instance, it does not appear that Congress' requirement of an affidavit listing assets and a certified copy of a prison trust fund account as a precondition to appeal in forma

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336 102 F.3d 132, 134-36 (5th Cir. 1996).
337 *Id.* at 134.
338 *Id.*
339 *Id.* at 134-36.
340 *Id.*

pauperis diminishes core judicial powers in violation of separation of powers or impairs constitutional requirements embedded in a Federal Rule. There is also no indication that Congress had previously removed Court authority to promulgate Rules regarding documents required to appeal in forma pauperis. Nor does it appear that the Court's prior Rule permitting in forma pauperis appeal without further documentation intruded impermissibly in an area committed to exclusive congressional regulation or had an impermissible substantive impact. There being no irreconcilable conflict of interbranch authority, the supersession clause would control.[341] Accordingly, Rule 24(a) appropriately yielded to the later-enacted congressional statute.

This rulemaking authority analysis contemplates a diminished role for the supersession provision, at least as compared to the role accorded the provision under traditional supersession clause/implied repeals analysis.[342] In the rulemaking authority analysis proposed in this Article, the supersession clause merely regulates which provision governs if it is first established that the particular statute and Rule conflict, but do not create an irreconcilable clash of interbranch power. The supersession clause and the implied repeals analysis do not provide a rule of construction requiring that the potentially conflicting provisions be harmonized. They do not inform the decisions regarding the substantive rights limitation on Court rulemaking power or other issues of rulemaking power, even by coming first in the analysis. As discussed above, the reasons for harmonizing potentially conflicting provisions are, in general, weaker when different lawmakers create the conflicting provisions. Those reasons are far weaker when the legislative power of the different lawmakers varies, both rulemakers actively use their rulemaking authority, and the lead rulemaker has constrained authority. Further, the later-in-time requirement of the supersession clause adds little to the resolution of the potential issues of rulemaking authority.

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341 See *supra* note 121 for an explanation of the supersession clause analysis.

342 A diminished role for the supersession clause is not out of line with the conclusion of other commentators. Professor Burbank would support repeal of the supersession clause. *See, e.g.*, Burbank, *Hold the Corks*, *supra* note 59, at 1036-46; Burbank, *supra* note 8, at 437 n.63. Professor Carrington has advocated a functional analysis of the supersession clause that would preclude Federal Rules from superseding any statute that is "arguably substantive." Under this view the supersession clause would permit Federal Rules to supersede only statutes that included "procedural marginalia." Carrington, *supra* note 4, at 324-25; *see also* Kelleher, *supra* note 241, at 441 ("Provided that the substantive rights limitation is taken seriously, the supersession clause will have a limited role, coming into play only to rid the statute books of 'procedural marginalia.'").

This apparently diminished role for the supersession provision is consistent with Congress' increased use of its rulemaking authority. During the nearly forty years following enactment of the Rules Enabling Act in which Congress generally declined to enact legislation including procedural provisions or to enact amendments to the Federal Rules, statute-Rule conflicts rarely arose.[343] When such conflicts did arise, the question of rulemaking authority, though not nonexistent, could be viewed as of lesser importance either based on the seeming insignificance of the issues involved in the few instances of statute-Rule clashes[344] or based on the shared agreement regarding the Supreme Court's broad rulemaking authority and superiority in rulemaking. In such a climate, courts could easily omit an analysis that was likely to lead to the foregone conclusion that the Court had rulemaking authority and accord primacy to the second issue—how best to reconcile the conflicting provisions. The same climate of congressional forbearance in rulemaking made the presumptions of the implied repeals canon more justifiable, i.e., in enacting legislation, Congress would disfavor an implied repeal of a Federal Rule unless it clearly stated a contrary intent. Thus, apparently conflicting statutes and Rules were harmonized if possible even if harmonization required a strained interpretation of the provisions.

Once Congress became more active in rulemaking, however, the issue of clash of rulemaking power became more important and the harmonization requirement of the implied repeals canon became less helpful as a general rule of construction. The rulemaking authority analysis proposed in this Article, thus, appropriately changes the focus of the resolution of statute-Rule conflicts from a clash of "statutory" provisions to a clash of interbranch power. It further helps change the focus of the inquiry from whether a superseding Rule or a harmonization of statute and Rule is consistent with current policy choices of Congress to an examination of whether the particular use of rulemaking authority by each branch is consistent with the allocation to that branch of rulemaking authority.[345]

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[343] Carrington, *supra* note 4, at 322 (noting that the few applications of the supersession provision had primarily involved whether appellate rules had superseded legislation regarding extension of time to appeal, whether printing costs were taxable, and certain fees in admiralty appeals). *But see* Burbank, *Hold the Corks*, *supra* note 59, at 1040 (noting that the information accompanying the Appellate Rules did not indicate to Congress that the Rules would have the superseding effects later attributed by the courts).

[344] Carrington, *supra* note 4, at 322.

[345] *See, e.g.*, Burbank, *Hold the Corks*, *supra* note 59, at 1039 & n.166; *see also* Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437, 440 (1987); Marek v. Chesny, 473 U.S. 1, 10-11 (1985).

CONCLUSION

The courts' pervasive reliance on the canon disfavoring implied repeals in resolving apparent conflicts between congressional statutes and Federal Rules can no longer be justified. The canon's emphasis on temporal priority cannot provide the primary mechanism for resolving potential conflicts between statutes and Rules, when, as now, the rulemaking power of the two rulemakers differs, the lead rulemaker has circumscribed authority, and both rulemakers are active in the rulemaking game. In such an environment, failing to address the issue of potential conflict of rulemaking authority initially and directly has obscured the importance of the allocation of rulemaking authority; has contributed to the development of an inconsistent body of case law; has added to the tension between the Court and Congress; and can, paradoxically, lead the Court to both exceed its rulemaking authority and to limit that authority unnecessarily.

Therefore, the method of analyzing statute-Rule conflicts should be changed from a framework relying primarily on canons of statutory interpretation that presume identical rulemaking authority to an analysis that gives primary consideration in each instance to the allocation of rulemaking authority between the Court and Congress.