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The Inherent and Supervisory Power

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THE INHERENT AND SUPERVISORY POWER

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Parties to litigation expect courts to operate both predictably and fairly. A core part of this expectation is the presence of codified rules of procedure, which ensure fairness while constraining, and making more predictable, the ebb and flow of litigation.

Within the courts of this country, however, there is a font of authority over procedure that courts often turn to in circumstances when they claim that there is no written guidance. This authority, referred to as the "inherent" or "supervisory" power of courts, is an almost pure expression of a court's exercise of discretion in that it gives courts the ability to do "all things reasonably necessary" for the administration of justice. The sweeping nature of this power requires us to examine the role of discretion in courts' decisions and to ask whether procedural goals of fairness, notice, and predictability can be met in circumstances when courts rely on their inherent powers. As a first step in this examination, this Article begins by considering and characterizing the use of inherent power by both federal and state courts, as well as its roots in common law judicial authority.

While the unconstrained exercise of inherent power is ever-less acceptable in a legal system that is increasingly moving toward written rules, the absence of such authority would present its own difficulties. This Article therefore concludes by suggesting that although courts should not be barred from using their inherent power, they should do so only after making two explicit findings: (1) why inherent power should be exercised, particularly in light of relevant positive law, and

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> *(2) what standards the court will use to determine whether to apply that power in a given case. Through these findings on whether and how the inherent power should be used, lower courts retain the procedural flexibility of inherent power while being discouraged from its unconstrained use. At the same time, appellate courts are given the tools they need to fully test the proper application of this otherwise sweeping power in future cases.*

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I. INTRODUCTION

A fundamental hallmark of legal procedure is that parties expect courts to operate in a fair and impartial manner. To advance that goal, courts are governed by rules that ensure fairness while constraining—and thereby making more predictable—the ebb and flow of litigation. Those who are legally trained in the United States are intimately familiar with these principles: the first-year law school class in civil procedure is focused on the ways written rules of procedure guide the choices of parties throughout civil litigation, while criminal procedure, with its particular focus on the protection of substantive constitutional rights, is a familiar part of not only law school training, but our national culture.

The practices governing both civil and criminal procedure have been codified in federal and state procedural rules. These codifications of procedure are the primary source for those seeking to identify both the authority of, and constraints upon, judicial control of legal procedure in the United States.[1] While it can be tricky to apply these rules appropriately, the scope of their coverage and the circumstances in which they apply are generally well-understood.

Within American courts, however, there is a font of authority over procedure to which courts often turn in the absence of written guidance. This authority, referred to as the "inherent" or "supervisory" power or authority,[2] is relied upon by courts as a last

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[1] The codification of federal rules of civil procedure, criminal procedure, and evidence, as well as the parallel codification of state rules of procedure and evidence, have gone far toward developing the legal community's expectation that our rules of procedure should be codified. *See* 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE, § 1004, at 49–51 (4th ed. 2019) (discussing the adoption of the Federal Rules of Civil Procedure); George H. Dession, *The New Federal Rules of Criminal Procedure*, 55 YALE L.J. 694, 698 (1946) (discussing the adoption of the Federal Rules of Criminal Procedure); Act of Jan. 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926 (1975) (adopting the Federal Rules of Evidence).

[2] Among those who seek to classify the exercise of these powers, the supervisory authority generally is limited to the power that superior courts (whether federal or state) have over inferior courts or the judicial system generally. *See* FELIX F. STUMPF, INHERENT POWERS OF THE COURT: SWORD AND SHIELD OF THE JUDICIARY 34 (1994). Despite this definitional effort, trial courts regularly characterize their power over litigants as a "supervisory power." *Cf.* United States v. Blech, 208 F.R.D. 65, 68 (S.D.N.Y. 2002) (declining to exercise the court's "supervisory power" to quash allegedly abusive witness interviews); United States v. Taylor, No. 10-CR-16, 2010 WL 1849922, at *2 (E.D. Wis. May 7, 2010) (considering whether the court could exercise its "supervisory power" to dismiss an indictment due to a twenty-six-day

refuge to exercise procedural control over litigation in circumstances where no written procedure guides the course of action being taken. Unconfined by positive law,[3] the inherent power has been deemed "nebulous" and "shadowy,"[4] and although some commentators have focused on particular aspects of this power,[5] there is very little commentary on the source and nature of this authority as a general matter.[6]

The exercise of this authority makes a difference to courts and litigants. Consider, for instance, *Thomas v. Arn*.[7] In this case, Kathy Thomas had been convicted of murder in Ohio and sought a writ of habeas corpus from the federal courts.[8] The district court judge referred the case to a magistrate, who issued proposed findings of

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delay between arrest and arraignment). This Article returns to this definitional question in Part II below.

[3] The absence of positive law regarding the nature of inherent and supervisory power makes it akin to many other fundamental procedural doctrines that govern the day-to-day processing of cases throughout our legal system, but that merits little discussion in the case law and only passing—if any—consideration in the rules that reflect those principles. Like the doctrines governing what counts as binding precedent, the determination of the scope of record on appeal, or the applicable standard of review, the doctrines governing the scope of inherent power amount to true "common law" rules of procedure. *See generally* Jeffrey C. Dobbins, *Changing Standards of Review*, 48 LOY. U. CHI. L.J. 205, 224–26 (2016) [hereinafter Dobbins, *Changing Standards*] (examining origins of standards of review); Jeffrey C. Dobbins, *New Evidence on Appeal*, 96 MINN. L. REV. 2016, 2029 (2012) [hereinafter Dobbins, *New Evidence*] (regarding consideration of new evidence on appeal); Jeffrey C. Dobbins, *Structure and Precedent*, 108 MICH. L. REV. 1453, 1460 (2010) [hereinafter Dobbins, *Precedent*] (examining rules of precedent). Arguably, these areas of attention could themselves be deemed exercises of a court's inherent power. For a further discussion and characterization of the use of inherent power, see *infra* Part II. *See generally* Amy Coney Barrett, *Procedural Common Law*, 94 VA. L. REV. 813 (2008) (discussing similar doctrines, but in the context of federal courts only, resulting in a focus on federal constitutional doctrine rather than on the role of common law judicial processes relied upon throughout both state and federal judicial systems—not to mention common law systems outside of the United States).

[4] *See* Eash v. Riggins Trucking Inc., 757 F.2d 557, 561 (3d Cir. 1985) (en banc); *see also* I.H. Jacob, *The Inherent Jurisdiction of the Court* (describing a similar power as then-exercised in the courts of the United Kingdom as "amorphous" and "uncharted"), *in* 23 CURRENT LEGAL PROBS. 23, 23 (Lord Lloyd of Hampstead & Georg Schwarzenberger eds., 1970).

[5] There is, in particular, a wealth of commentary focused on the exercise of this authority to (a) manage the bars of states and (b) sanction counsel and parties for various forms of litigation abuse. *See, e.g.*, Roger Silver, *The Inherent Power of the Florida Courts*, 39 U. MIAMI L. REV. 257, 271–74 (1985) (discussing state judicial control over the Florida bar).

[6] There are some limited exceptions. *See, e.g.*, Daniel Meador, *Inherent Judicial Authority in the Conduct of Civil Litigation*, 73 TEX. L. REV. 1805, 1820 (1995) (offering a Restatement-like formulation of the exercise of inherent powers in civil litigation).

[7] 474 U.S. 140 (1985).

[8] *Id.* at 145–46 (quoting United States v. Walters, 638 F.2d 947, 949–50 (6th Cir. 1981)).

fact and conclusions of law.[9] The Federal Magistrates Act (FMA) provides that a losing party *may* file objections to these proposed findings with the district court judge,[10] but Thomas did not.[11] The district court reviewed and adopted the magistrate's recommendations.[12] On appeal, the U.S. Court of Appeals for the Sixth Circuit relied on *United States v. Walters*, a 1981 decision in which it held that despite the apparently permissive language in the FMA, filing objections to the magistrate's recommendations was a necessary precondition to being able to appeal from the district court's judgment.[13] In ignoring the statutory language, the *Walters* court relied on the "exercise of [its] supervisory power."[14]

The U.S. Supreme Court endorsed the Sixth Circuit's exercise of supervisory power to impose this waiver rule, emphasizing that "this Court has acknowledged the power of the courts of appeals to mandate 'procedures deemed desirable from the viewpoint of sound judicial practice although in nowise commanded by statute or by the Constitution.'"[15] Thus, though conceding that the statute suggested that the filing of objections was permissive and that such a position was plausible,[16] the Supreme Court endorsed the Sixth Circuit's contrary conclusion and dismissed Thomas's appeal.[17]

For Thomas, as well as other litigants whose substantive rights have arguably been impaired through the exercise of a court's inherent or supervisory authority, this nebulous power is therefore all too tangible. Given the significance of this authority, several academics have attempted to bring structure to its use, with most of that literature focusing on its exercise in the federal system.[18]

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[9] *Id.* at 141–42.

[10] 28 U.S.C. § 636(b)(1)(C) (2009) ("Within fourteen days after being served with a copy [of the magistrate's proposed findings and recommendations], any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court.").

[11] *Thomas*, 474 U.S. at 144.

[12] *Id.*

[13] *See id.* at 145–46 (quoting *Walters*, 638 F.2d at 949–50).

[14] *Walters*, 638 F.2d at 950.

[15] *Thomas*, 474 U.S. at 146–47 (quoting Cupp v. Naughten, 414 U.S. 141, 146 (1973)).

[16] *Walters*, 638 F.2d at 950.

[17] *Thomas*, 474 U.S. at 155.

[18] In 1979, for instance, Michael Martin discussed the role of the "inherent judicial power" in the development and application of the Federal Rules of Evidence. *See generally* Michael M. Martin, *Inherent Judicial Power: Flexibility Congress Did Not Write into the Federal Rules of Evidence*, 57 TEX. L. REV. 167 (1979). In 1984, Sara Sun Beale discussed the use of supervisory power in federal criminal cases. *See generally* Sara Sun Beale, *Reconsidering*

But federal courts are not the only courts that exercise this authority. An emphasis on the role of the federal Constitution in the exercise of inherent authority focuses too little attention on the important role that inherent power plays in the procedures of state courts[19] and too much attention on the federal constitutional structure.[20] In the end, both federal and state courts exercise inherent powers, and it is the common source of this authority—and the common principles that structure its operation—to which this Article directs its attention.[21]

At its heart, the exercise of inherent power is an almost pure expression of a court's exercise of discretion.[22] The ability of a court

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Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts, 84 COLUM. L. REV. 1433 (1984). And in 2006, Amy Coney Barrett examined more generally the U.S. Supreme Court's supervisory power over the lower federal courts. *See generally* Amy Coney Barrett, *The Supervisory Power of the Supreme Court*, 106 COLUM. L. REV. 324 (2006). Other scholars have discussed the inherent powers of the federal courts. *See* Samuel P. Jordan, *Situating Inherent Power within a Rules Regime*, 87 DENV. U. L. REV. 311 (2010) (discussing the role of inherent power in context of federal rules of procedure); Joseph J. Anclien, *Broader Is Better: The Inherent Powers of Federal Courts*, 64 N.Y.U. ANN. SURV. AM. L. 37, 38 (2009) (noting how the "federal courts' use of inherent powers represents a sharp break from the usual pattern of congressional dominance"); Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735, 788–92 (2001) (explaining the significance of adjective lawmaking with respect to the federal court's inherent powers). In each of these discussions, however, the heart of the commentary focused on the role that the federal constitutional doctrines of separation of powers and the relationship of the U.S. Supreme Court to the inferior courts play in defining the scope and nature of the inherent and supervisory powers of federal courts.

[19] As Felix Stumpf's exhaustive survey into the exercise of inherent power in state courts demonstrates, courts in nearly every state use inherent or supervisory authority. *See generally* STUMPF, *supra* note 2.

[20] Indeed, at least some courts have emphasized that inherent power is necessarily separate from power granted as a matter of constitutional authority. *See, e.g.*, State v. Buckner, 527 S.E.2d 307, 313 (N.C. 2000) (describing inherent power as "that which a court necessarily possesses irrespective of constitutional provisions"). For federal courts, of course, the U.S. Constitution provides a foundation for the exercise of any authority, though even for federal courts, the inherent power is rooted in something other than an explicit constitutional grant of power.

[21] This Article directs its attention accordingly, fully aware of—though perhaps not adequately sensitive to—Frankfurter and Landis's warning that "resort[ing] to State cases [is] treacherous and unscientific" in the examination of inherent powers. Felix Frankfurter & James M. Landis, *Power of Congress over Procedure in Criminal Contempts in "Inferior" Federal Courts—A Study in Separation of Powers*, 37 HARV. L. REV. 1010, 1010 n.3 (1924).

[22] *See* Meador, *supra* note 6, at 1805 (noting the exercise of inherent judicial authority "rests in the discretion of the trial court"). There are, of course, constitutional constraints on what a court can do. While procedure can certainly affect substance, procedural rules likely will trump substantive rights only at the margins or in extreme cases. Furthermore, even procedural rulings are subject to constitutional challenge. *See id*. at 1816 ("[F]ederal and state

to do what is "reasonably necessary"[23] based on inherent authority that it claims for itself requires an examination of the role of discretion in judicial decisions and an inquiry into whether procedural goals of fairness, notice, and predictability[24] can be met in circumstances when courts rely on their inherent powers. These are questions that legal philosophers have been examining for decades; the lack of articulated standards governing the exercise of the inherent authority is a paradigmatic example of the type of judicial decisionmaking in which legal realists thrive, and against which legal formalists struggle.[25]

Of course, the exercise of inherent power is not the only way in which judges exercise discretion. The process of interpretation is arguably discretionary, for instance, and positive law can explicitly

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constitutions can also impose limits on a court's inherent authority."). Ultimately, this Article is about procedural, not substantive, determinations by courts.

[23] The North Carolina Supreme Court describes inherent power as the "authority to do all things that are reasonably necessary for the proper administration of justice." *Buckner*, 527 S.E.2d at 313 (quoting *In re* Alamance Cty. Court Facilities, 405 S.E.2d 125, 129 (N.C. 1991)).

[24] *See* Michael S. Pardo, *Pleadings, Proof, and Judgment: A Unified Theory of Civil Litigation*, 51 B.C. L. REV. 1451, 1468–69 (2010). Like other commentators on whom Pardo relies, Pardo includes in his list of goals for civil litigation the ideals of "accuracy," "efficiency," "political legitimacy," and an appropriate balance between fixed substantive rights and flexible procedures. *Id.*; *see also* Martin Redish, *Electronic Discovery and the Litigation Matrix*, 51 DUKE L. J. 561, 593–94 nn.129–30 (2001) (noting that the Federal Rules of Civil Procedure do not specify "normative goals" and positing that achieving accuracy should consist of assessing reliability through logical reasoning); Lawrence Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 183 (2004) (explaining that procedural justice requires meaningful participation through notice and "a reasonable balance between cost and accuracy").

[25] The broader the scope of judicial discretion, the more likely it is that extralegal factors might influence the direction of that decision. For legal realists and critical legal theorists, a court evaluating whether to exercise inherent power would find itself on a playground perfectly suited for the exercise of such external influences (although, of course, they would make a similar claim even when there are written "rules" governing a judge's decision). For formalists, these areas of pure discretion are among the most theoretically difficult to manage since they occur in circumstances in which there are very few recognized principles upon which observers could rely in identifying the objectivity and legitimacy of decisionmaking. *Cf.* Brian Leiter, *Legal Formalism and Legal Realism: What Is the Issue?* (Univ. of Chicago Pub. Law & Legal Theory, Working Paper No. 320, 2010), https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1178&context=public_law_and_legal_theory (describing and distinguishing between these two opposite poles of legal philosophy).

On a less philosophical but equally thoughtful front, Judith Resnik has written on the risks presented by largely unguided federal judicial control over procedure—control that is structured commonly as a decision pursuant to the "inherent power" of these courts. *See* Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 432, 444–45 (1982) ("The problems raised by managerial judging, problems that implicate the rights of all citizens, are simply too important to be left to the discretion of judges alone.").

delegate to courts discretion to make a range of decisions. For several reasons, however, the exercise of inherent power at issue in this Article is uniquely broad in terms of the scope of discretion available to the courts.

First, unlike most kinds of discretionary decisions, inherent power is not limited by positive law.[26] The language of a statute places limits on a court's freedom to define or interpret that law, and courts exercising discretion pursuant to a statutory scheme do so in the context of the language making that delegation.[27] With inherent power, on the other hand, there are effectively no limits beyond a court's determination that there are "procedures" that are "necessary."[28]

Second, the lack of constraints on the exercise of this power makes it particularly likely to be criticized simultaneously as antidemocratic[29] and poorly monitored by legislative oversight. Legislative actors are less likely to oversee these kinds of "procedural" decisions because such decisions are often viewed as less critical to outcomes than are cases bearing on the underlying substantive law.[30] Furthermore, legislatures often view procedural determinations as more clearly within a court's ability to govern its

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[26] *See* Chambers v. NASCO, Inc., 501 U.S. 32, 50 (1991) ("Although a court ordinarily should rely on such rules [of Civil Procedure] when there is bad-faith conduct in the course of litigation that could be adequately sanctioned under the rules, the court may safely rely on its inherent power if, in its informed discretion, neither the statutes nor the rules are up to the task.").

[27] *See* Beale, *supra* note 18, at 1503 ("Recent decisions generally refuse to disregard statutory language to achieve what the Court deems a fairer result, or to extend statutes beyond their terms.").

[28] *See* Nat. Gas Pipeline Co. of Am. v. Energy Gathering, Inc., 2 F.3d 1397, 1412 (5th Cir. 1993) ("The ultimate touchstone of inherent powers is necessity.").

[29] *See* Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 693–94 (1995) (discussing conflict between principles of judicial review and democratic governance in both elected and unelected judicial systems).

[30] David Marcus, *The Past, Present, and Future of Trans-Substantivity in Federal Civil Procedure*, 59 DEPAUL L. REV. 371, 398–99 (2010) (discussing observations to this effect among drafters of Federal Rules of Civil Procedure).

own operations[31] and may be reluctant to intervene directly in the judicial exercise of these "inherent" powers.[32]

Finally, the lack of standards for the initial use of this procedural authority makes appellate review of the exercise of this discretion difficult. Effective appellate review would benefit from articulated constraints on a lower court's use of its inherent power. While such constraints might eventually develop from a series of appellate cases reviewing the exercise of a particular type of inherent power,[33] many of the cases presenting these issues are *sui generis* and are therefore poor candidates for such evolutionary developments.

In light of these concerns, one might conclude that the use of inherent power should be substantially constrained, if not barred altogether. Such a limit, however, would present its own problems. If courts (or legislatures) adopted a preemptive rule that bars reliance on inherent authority, courts would have no alternative but to either (a) leave procedural problems unresolved, or (b) offer strained interpretations of existing rules to address those problems in light of codified rules.[34] Neither solution is ideal. While the

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[31] *Cf.* Amanda Frost, *Keeping Up Appearances: A Process-Oriented Approach to Judicial Recusal*, 53 U. KAN. L. REV. 531, 551–52 (2005) (noting, in the context of judicial recusal rules, that the "legislative and executive branches may feel that it is inappropriate to dictate the minutiae of procedures to be followed when litigants seek to remove a judge from a case, preferring to leave it to the judiciary to clean its own house"); Roscoe Pound, *Procedure under Rules of Court in New Jersey*, 66 HARV. L. REV. 28, 31–32, (1952) (noting legislative disinterest in procedural matters and a push in state constitutional and common law doctrines to leave procedural development to the courts).

[32] The same points used to challenge the democratic legitimacy of judicial lawmaking, *cf.* Croley, *supra* note 29, at 693–94 (describing such challenges), might also be raised with respect to the exercise of inherent power. If all exercises of governmental authority in a democratic system should arise out of entities elected by the people, the point should hold true for procedural determinations as well as substantive ones. Of course, the analysis on this point might well change when it comes to elected state judiciaries. *See id.* at 689; *see also* Aaron-Andrew P. Bruhl & Ethan J. Leib, *Elected Judges and Statutory Interpretation*, 79 U. CHI. L. REV. 1215, 1236–53 (2012) (making the case for divergence on the interpretive methods used by elected and unelected judges).

[33] *See* Henry J. Friendly, *Indiscretion about Discretion*, 31 EMORY L.J. 747, 772–773 (1982) ("Often, in time, the contours of a guiding rule or even principle may develop as the courts begin to identify the policies which should control.").

[34] There is another possibility: at least some state courts have concluded that their exercise of inherent power is so integral a part of their status as courts that they have rejected legislative efforts to limit their exercise of this power. *See, e.g.,* Kunkel v. Walton, 689 N.E.2d 1047, 1051 (Ill. 1997) ("[T]he separation of powers principle is violated when a legislative enactment unduly encroaches upon the inherent powers of the judiciary . . . . '[T]he legislature is without authority to interfere with a product of this court's supervisory and administrative responsibility.'" (quoting People v. Joseph, 495 N.E.2d 501, 506 (Ill. 1986))); *see also infra* Section II.B; *infra* note 49–50 and accompanying text (noting state

system might benefit from some limitation on the exercise of a court's inherent power, there are circumstances in which considerations of fairness are imperfectly addressed by written rules, and allowing flexibility through the exercise of inherent power is an important safety valve.[35] A wholly codified world in which courts have no power to exercise control over procedure would have echoes of the ossification of the courts of law that ultimately led to the development of the courts of equity and inherent power itself.[36]

There should be a middle ground. While the unconstrained exercise of inherent power is ever-less acceptable in a legal system that is increasingly moving toward written rules, the absence of such authority would have its own perverse effects. This Article, therefore, suggests a process that courts should use in exercising their inherent power. That process requires (1) a determination that inherent power should be used, which requires an evaluation of existing rules of written procedure to assess *whether* the use of inherent power is necessary at all, and (2) a clear statement about the standards that the court is using to determine precisely *how* its inherent power should be exercised in a particular circumstance.[37] This process would allow lower courts to retain the procedural flexibility of the power while requiring courts to self-monitor their own use of it.[38] Appellate courts have an incentive to impose this obligation on lower courts to ensure a more effective review for abuse of discretion.[39] Furthermore, by insisting on these

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constitutional bars on legislative limits of judicial contempt power); Adrian Vermeule, *The Judicial Power in the State (and Federal) Courts*, 2000 S. CT. REV. 357, 377–382 (2000) (discussing other cases taking a similar view). Whether such judicial resistance is available under federal or state law is a question beyond the scope of this Article. That said, such a direct constitutional clash between legislative and judicial powers is worth avoiding when possible.

[35] *See, e.g.*, Tobias Barrington Wolff, *Discretion in Class Certification*, 162 U. PA. L. REV. 1897, 1899 (2014) ("Discretion is a safety valve."); ROSCOE POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 132–33 (1922) (noting that "the margin of discretion in application of equitable remedies" is "an important engine of justice" and a "needed safety valve in the working of our legal system").

[36] *See infra* Section II.D (discussing the development of power in equity court and exercise of power in U.K. courts).

[37] *See infra* Part V.

[38] *See infra* Part V.

[39] *See infra* note 212 and accompanying text (discussing effect on appellate standards of review).

prerequisites to the use of inherent authority, appellate courts will discourage the indiscriminate use of such authority.[40]

This Article begins in Part I with an introduction of the concept of inherent authority and its related problems. Part II describes the general outline of the inherent and supervisory power as exercised by courts throughout the United States and classifies the use of that power into three broad categories. Part III discusses how the use of inherent power affects litigants in particular cases and outlines the scope of procedures that courts rely on when exercising that power. Part IV evaluates the use of inherent power in the context of a trial court's exercise of discretion and examines the role of appellate courts in reviewing lower court reliance on this power for abuses of discretion. Finally, Part V explains two proposed procedural prerequisites to the exercise of inherent power and offers some observations about how this approach might carry over into broader contexts. Part VI concludes.

II. INHERENT AND SUPERVISORY POWERS DEFINED

Inherent power is the power "possessed by a court simply because it is a court; it is an authority that inheres in the very nature of a judicial body and requires no grant of power other than that which creates the court and gives it jurisdiction."[41] This power is often described as "supervisory" power over the parties and actors within the jurisdiction of a particular court.[42] There are, of course, circumstances in which codified rules of procedure may bear on the outcome of a procedural problem. If that positive law does not exist, however, or if a court chooses to ignore or evade the direction provided by positive law, that court may rely instead on an unarticulated authority to do what the court believes necessary in order to achieve a particular procedural goal—an authority rooted in the court's inherent power.

Courts use the term "inherent power" or "inherent authority" in a wide variety of contexts, and "[i]ts employment in differing contexts inevitably leads to confusion and ambiguity."[43] There are three significant categories into which the exercises of these powers

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[40] *See infra* Part V.

[41] Meador, *supra* note 6, at 1805.

[42] *See supra* note 2 and accompanying text.

[43] FELIX F. STUMPF, INHERENT POWERS OF THE COURT 2 (2008).

might be divided: (1) "courts as governmental body" cases, in which courts rely on inherent power to exercise supervisory control over the court as a governmental entity/enterprise; (2) "judicial power" cases, in which courts rely on inherent power to defend their role and responsibility as courts within a constitutional system; and (3) "case management" cases, in which courts rely on the inherent power to impose procedural and substantive outcomes on the parties to a particular case. While the primary focus of this Article is on the last example—the exercise of judicial authority over individual parties and their counsel—it is useful to note the range of categories in which such powers are exercised.

A. COURTS AS GOVERNMENTAL BODY CASES

First, courts often cite "inherent" or "supervisory" authority as a source of power over a court's ability to set budgets, to hire and fire employees, to acquire and dispose of equipment and space, and to perform other largely administrative tasks necessary to the functioning of a court as a governmental body.[44] Insofar as these activities are not targeted at litigants, these operations are connected not so much with a court's inherent power as *a court* but rather with its status as a governmental body, with the accompanying administrative needs.[45] Because this authority is not party- or case-specific, and because it is the kind of power that might be exercised by governmental entities of any kind (not merely courts), this kind of decision rarely implicates the broad concerns of procedural fairness to litigants that are at issue in this Article.[46]

There are, of course, instances in which the exercise of this kind of power can present unique separation of powers problems and highlight momentous conflicts between the legislative, executive, and judicial branches. Consider, for instance, cases in which "trial

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[44] *See, e.g.*, STUMPF, *supra* note 2, at 31–61, 106–20 (describing exercise of "inherent powers" in areas of "court administration" and "logistical support"). Stumpf's treatise (as well as its 2008 revision) is an invaluable collection of the mass of cases in which state courts have relied on what they call "inherent power."

[45] *See id.* at 106–19.

[46] In excluding this category of cases, this Article also excludes cases in which courts rely on their inherent authority to manage the bar of a particular state. *See, e.g.*, Silver, *supra* note 5, at 271–74 (discussing Florida's control over the Florida bar). Because control over bar admissions and professional sanctions generally do not affect litigants directly (except for those counsel who are the subject of such cases, of course!), this Article considers this use of inherent power as included in the category of "governmental actor" inherent power.

courts order additional personnel and increased judicial salaries and mandate the construction of court facilities."[47] In the end, though, while these structural concerns are interesting and important in an era of limited governmental resources, the cases presenting these problems are outside the scope of this Article.

B. JUDICIAL POWER CASES

The second broad category of cases in which courts rely on inherent powers are those in which the power is incident to a court's status within a broader constitutional system. In these cases, courts often point to separation-of-powers principles as a source of inherent authority to either (1) shield them from legislative or executive interference with the judicial function, or (2) announce a general principle or rule of procedure through a mechanism outside established rulemaking processes.

1. Inherent Power as a Shield Against Legislative Interference.

Cases in which a court relies on inherent power to wield managerial authority like any other governmental body are quite different from those in which courts rely on inherent power to shield the exercise of judicial authority from legislative interference. In this latter category, courts necessarily rely on their perception of their role as a part of a constitutional government. Thus, in what is perhaps the leading federal judicial exposition of the scope of inherent authority, the U.S. Court of Appeals for the Third Circuit in *Eash v. Riggins Trucking Inc.* characterized these cases as relying on the use of an "irreducible inherent authority . . . involving activity so fundamental to the essence of a court as a constitutional tribunal that to divest the court of absolute command within this sphere is really to render practically meaningless the terms 'court' and 'judicial power.'"[48] This

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[47] STUMPF, *supra* note 2, at 47. Stumpf calls this category of cases "logistical support" cases and deems it the "most hotly disputed and debated area in the exercise of inherent powers." STUMPF, *supra* note 43, at 3. *See generally* Gary D. Spivey, Annotation, *Inherent Power of Courts to Compel Appropriation of Expenditure of Funds for Judicial Purposes*, 59 A.L.R. 3d 569 (1974).

[48] Eash v. Riggins Trucking Inc., 757 F.2d 557, 562 (3d Cir. 1985) (en banc); *see also* Chambers v. NASCO, Inc., 501 U.S. 32, 58 (1991) (Scalia, J., dissenting) ("I agree . . . that Article III courts . . . derive from the Constitution itself . . . the authority to do what courts have traditionally done in order to accomplish their assigned tasks. Some elements of that inherent authority are so essential to 'the judicial Power,' . . . that they are indefeasible.").

irreducible inherent power has been used, for instance, to void legislation requiring written opinions in every case[49] or requiring that every case be heard and decided within a certain amount of time.[50]

These cases of "irreducible inherent authority" are ultimately rooted in principles of separation of powers.[51] For that reason, each state court system (as well as the federal court system) has its own circumstances in which this form of the authority can be wielded successfully. There are, therefore, as many applications of this form of inherent authority as there are different state perspectives on the separation of powers.[52] Similarly, the academic commentary about the role of inherent power in the federal courts typically centers on the structural constitutional questions that arise out of this use of inherent power and assesses the relative authority of Congress and the Article III Courts in circumstances when this authority might be called into use.[53]

2. Inherent Power as a Justification for Judicial Rulemaking.

Somewhat different from the "shield" cases that use inherent power to defend the judicial branch from legislative interference are those judicial opinions that rely on an inherent authority to promulgate procedural rules outside of traditional rulemaking processes. In the comments to the 1983 Amendments to Rule 26(g) of the Federal Rules of Civil Procedure, for instance, the Advisory Committee on Rules pointed to "the court's inherent powers" as a source of authority for the rule provisions allowing (and requiring) sanctions for discovery abuses.[54] This authority also has been relied upon more generally to justify the exercise of a court's rulemaking

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[49] *See* Vaughan v. Harp, 4 S.W. 751 (Ark. 1887) (holding that not every opinion of the Supreme Court must be reduced to writing).

[50] *See* Atchison, Topeka & Santa Fe Ry. Co. v. Long, 251 P. 486 (Okla. 1926) (holding that a state cannot legislatively impose a time requirement on when a court must hear a case).

[51] *See supra* notes 34, 49–50 and accompanying text.

[52] Stumpf's review of state-specific approaches to the exercise of inherent power is heavily focused on cases of this type. *See* STUMPF, *supra* note 2, at 67–76.

[53] *See supra* notes 18–22 and accompanying text.

[54] *See* FED. R. CIV. P. 26 advisory committee's note to 1983 amendment ("Rule 26(g) makes explicit the authority judges now have to impose appropriate sanctions and requires them to use it. This authority derives from Rule 37, 28 U.S.C. § 1927, and the court's inherent power.").

authority.[55] The scholarly literature includes many discussions about the appropriate scope of what is sometimes characterized as "adjective lawmaking"—the power of courts to prescribe their own written rules of procedure.[56]

Although instances of adjective lawmaking generally are distinguishable from shield-from-legislative-interference cases, they are similar to the governmental body cases in that they present separation-of-powers problems and ask whether a court's ability to control its own operations conflicts too starkly with the legislative power to articulate positive law.[57] However, because written rules—whether properly promulgated or not—may be examined to determine whether a trial court properly applied the rule or properly exercised its discretion under the rule, the problems of notice, fairness, and predictability are not nearly as significant as are true in the final category of cases discussed below—case management cases.[58] Furthermore, any examination into the proper exercise of this authority is properly dependent upon the role of a given sovereign's judiciary within that sovereign's constitutional system and is, therefore, unique to that sovereign. Of more interest for purposes of this Article are those exercises of inherent authority that focus directly on or announce a rule in the context of individual litigants and their counsel—an authority that arises, as noted below, from historical common law sources of power that are shared by essentially every sovereign's courts within the United States.

The line between this type of judicial power case and the final case management category is somewhat blurry. As discussed below, courts also announce rules of procedure that apply prospectively in the course of deciding how to proceed in a particular case with

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[55] *See* Barrett, *supra* note 18, at 324 (discussing the U.S. Supreme Court's reliance on supervisory power to prescribe rules of procedure for inferior federal courts); Beale, *supra* note 18, at 1433–34 (discussing the U.S. Supreme Court's use of supervisory power to announce rules of criminal procedure).

[56] *See* Pushaw, *supra* note 18, at 788–92.

[57] *See generally, e.g.*, Roscoe Pound, *The Rule-Making Power of the Courts*, 12 A.B.A. J. 599 (1926); A. Leo Levin & Anthony G. Amsterdam, *Legislative Control over Judicial Rule-Making: A Problem in Constitutional Revision*, 107 U. PA. L. REV. 1 (1958). One of the most extreme examples of the exercise of this authority is in Mississippi, where the state supreme court concluded in the 1980s that it had inherent authority to promulgate rules of civil procedure and evidence. *See* Keith Ball, Comment, *The Limits of the Mississippi Supreme Court's Rule-Making Authority*, 60 MISS. L.J. 359, 359 (1990) (tracing the history of the landmark case *Hall v. State*, 539 So. 2d 1338 (Miss. 1989)).

[58] *See infra* Section II.C.

respect to particular parties. These adjudication-announced rules do not use internal court processes for formal written rulemaking, however, and therefore differ from the cases that use inherent power as justification for judicial rulemaking processes. Instead, this approach relies on the inherent authority of the court to generate rules in the process of adjudicating a particular case—rules that then bind the court going forward under principles of precedent.

Consider, for instance, *United States v. Walters*,[59] in which the Sixth Circuit announced the inherent-power-derived rule later approved by the U.S. Supreme Court in *Thomas v. Arn*.[60] Notably, however, the Sixth Circuit in *Walters* permitted the government to proceed on appeal, concluding that it would apply this policy only *prospectively*, given that the government's "position [that it would retain the right to appeal even after failing to object to the magistrate's report] was plausible, and our rule was not invariably anticipated."[61]

Those familiar with principles of administrative rulemaking will recognize in *Walters* an echo of the classic National Labor Relations Board (NLRB) decision *Excelsior Underwear, Inc.*, in which the NLRB announced a new "rule" by adjudication and applied it only prospectively.[62] That prospective-only ruling subsequently drew the disapprobation of several Justices in *NLRB v. Wyman-Gordon Co.*[63] In that case, a plurality opinion argued that the underlying ruling in *Excelsior* amounted to an improperly-issued rule.[64]

These "rules by rulings" are something of a hybrid. They bear a strong superficial resemblance to the creation of rules through established formal processes of district court- or circuit-level rulemaking, which are often partially rooted in the exercise of inherent judicial powers.[65] But the process of generating written rules through a rulemaking-like process, divorced from actual facts,

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[59] 638 F.2d 947 (6th Cir. 1981).

[60] *See id.* at 949–50 ("[T]hrough the exercise of our supervisory power, we hold that a party shall be informed by the magistrate that objections must be filed within ten days or further appeal is waived"); Thomas v. Arn, 474 U.S. 140 (1985); *see also supra* notes 7–17 and accompanying text.

[61] *Walters*, 638 F.2d at 950.

[62] Excelsior Underwear, Inc., 156 N.L.R.B. 1236, 1236 (1966).

[63] NLRB v. Wyman-Gordon Co., 394 U.S. 759, 759 (1969).

[64] *Id.*

[65] *See*, *e.g.*, Pushaw, *supra* note 18, at 788–92 (describing federal court procedural rulemaking).

is very different from the exercise of inherent judicial powers in a particular adjudication. While the inherent power may be used to justify the exercise of authority in both instances, the creation of written rules involves not only the exercise of inherent power but the application of previously announced positive law processes that are able to be vetted by interested participants in the legal community and known to future litigants.[66] When decisions with future impact are made in a particular adjudication, however, those broader interests—in terms of both future effect and the breadth of those effects—are rarely represented in any significant manner.[67] This Article is most interested in the latter circumstance: when a court wields inherent power in its purest and most common form as a justification for a ruling in a particular case in which written rules do not present the answer to a given problem. Whether the ruling at issue is intended to extend to future cases through the simple application of *stare decisis* or something more, it is the targeted use of the inherent power that presents most starkly the issues of fairness, notice, and predictability with which this Article is concerned.

C. CASE MANAGEMENT CASES

The third and final category of cases, and the one that presents the problems with which this Article is most interested, is the category of cases in which the inherent power serves as a kind of "catch-all" authority for the management of litigation and parties through procedures and consequences that are not otherwise described or defined in codified rules. These cases present themselves whenever there are "procedural gaps and omissions" that arise when "constitutions, statutes, court rules, or cases fail to address the legal issues that have arisen."[68] The *Eash* court divides

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[66] *See id*.

[67] *See, e.g.*, *Excelsior Underwear*, 156 N.L.R.B. at 1236.

[68] STUMPF, *supra* note 43, at 3 (labeling this category of cases as "Implementation of the Adjudicative Function" cases). In his 1995 paper on the conduct of civil litigation, Meador limited his discussion of the inherent authority to circumstances implicating the "authority of a trial court, whether state or federal, to control and direct the conduct of civil litigation without any express authorization in a constitution, statute, or written rule of court." Meador, *supra* note 6, at 1805.

Although the exercise of inherent power presumes the absence of written authority allowing the acts in question, there are arguably written rules governing the availability of inherent power. Thus, as originally adopted, Rule 83 of the Federal Rules of Civil Procedure

these cases into two groups: (1) those in which the relevant procedure is "essential to the administration of justice," and (2) those in which the relevant procedure is "necessary only in the practical sense of being useful."[69] In both cases, however, the focus of the court is on the procedures in a particular case and as applied to particular parties. This case-specific or party-specific exercise of judicial authority most directly presents concerns about notice, fairness, and predictability, since (almost by definition) these decisions are not, and are not intended to be, broadly applicable.[70]

Part III examines in further detail particular circumstances in which this type of inherent power is exercised.[71] Before moving to those examples, however, it is worth examining the roots of the inherent power in the historical, textual, and functional origins of our courts.

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provided that "in all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules." FED. R. CIV. P. 83 (1938). In 1995, the rule was revised to provide that when "there was no controlling law" a judge "may regulate practice in any manner consistent with . . . federal law." FED. R. CIV. P. 83(b) (1995). There is no indication that this provision was intended to expand or contract inherent powers under traditional practice; rather, it seems designed to simply retain any authority that would have traditionally been viewed as "inherent."

[69] Eash v. Riggins Trucking Inc., 757 F.2d 557, 562–63 (3d Cir. 1985) (quoting Michaelson v. United States, 266 U.S. 42, 65 (1924)).

[70] Except, of course, to the degree that they establish precedent for subsequent cases presenting similar issues. *C.f.* Jeffrey D. Pinsler, *The Inherent Powers of the Court*, SING. J. LEGAL STUD. 1, 33 (1997) (explaining that the Singapore Court of Appeals declared that it would "not decide on issues simply to have a decision that will be useful for similar cases in the future" (citation omitted)). As noted above, "court as legislator or governmental actor" inherent power cases can overlap with these "inherent power as case manager" cases. For instance, in *United States v. HSBC Bank USA*, the U.S. Court of Appeals for the Second Circuit relied on separation of powers principles to reject a trial court's exercise of "supervisory power" over a Deferred Prosecution Agreement that had been entered into between the United States and a defendant bank. 863 F.3d 125, 129 (2d Cir. 2017). In demanding reports regarding the implementation of that agreement (despite the lack of clear authority in the rules to do so), the trial court was engaged in an exercise of case-specific supervisory power that "permits federal courts to supervise 'the administration of criminal justice' among the parties before the bar." *Id.* at 135. The Second Circuit concluded, though, that the trial court's exercise of that supervisory power was improper because it was rooted not in a finding of impropriety by the prosecutors, but on "the mere theoretical possibility that the prosecutors might" engage in such impropriety. *Id.* at 136.

[71] *See infra* Part III.

D. THE FOUNDATIONS OF INHERENT POWER

In their 1924 examination of the inherent contempt power of the lower federal courts, Frankfurter and Landis catalogued the scope of possible sources of this inherent power:

> Whence and why do the powers "inhere" which are claimed to "inhere" in the inferior Federal courts? Do they "inhere" in nature, so that to deny these powers and yet to conceive of courts is a self-contradiction? Do they "inhere" in our history, so that the formulated experience of the past embodies them? Do they "inhere" in the idea of a court's usefulness, so that the courts would otherwise obviously fail in the work with which they are entrusted?[72]

The inherent power, then, might be rooted in "analysis, history[,] and social utility."[73] While their examination into the use of inherent power in the lower federal courts focused its attention on only one limited form of the exercise of this power, Frankfurter and Landis's general thoughts about the possible sources of the power are helpful. To rearrange their questions, we might characterize the exercise of inherent power as rooted in either an institutional source or a functional one. Institutionally, courts may be vested with inherent power as a result of their historical or textual origins. Alternatively, the function of courts—which engage in the process of "judging"—may require them to be able to exercise something like inherent power. This Section explores these two sources of authority in turn.

1. Institutional View: Historical and Textual Origins.

In his examination of the exercise of inherent power in the federal courts, Robert Pushaw noted that under the English common law system, all courts exercised authority derived from the expansive powers of the King.[74] It was the Chancery Court,

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[72] Frankfurter & Landis, *supra* note 21, at 1023.

[73] *Id.*

[74] *See* Pushaw, *supra* note 18, at 805; *see also* Frankfurter & Landis, *supra* note 21, at 810 ("For many centuries, all judicial powers (including 'inherent' ones) derived from the King's delegation of his prerogative to ensure justice to the courts, which possessed his virtually unlimited discretion to do anything calculated to achieve that goal.").

however, and the Chancellor at the head of it, which exercised a broad scope of power that most closely resembles the modern inherent authority of U.S. courts.[75]

In its modern form, then, the inherent power of courts to exercise control over litigants is partly "rooted in the notion that a federal court, sitting in equity, possesses all of the common law equity tools of a Chancery Court . . . to process litigation to a just and equitable conclusion."[76] The historical source of equitable powers in state courts mirrors that of federal courts, such that the exercise of today's inherent power in both state and federal courts is, at least in part, a vestige of that once broad equitable authority.[77]

With few exceptions, the American legal system has merged common law courts and courts of equity.[78] Given the development of rules of procedure throughout our courts, one could reasonably conclude that these equitable powers have, to a substantial degree, been codified in a manner that limits their use. As Steve Subrin noted in his 1987 look at the history of the Federal Rules of Procedure, however, the history of these rules is largely a history in which "equity procedures have swallowed those of common law."[79] The processes of equity are therefore alive and well even in our codified procedural systems. While codification may have constrained the use of equitable procedures to some degree, the courts' inherent power remains in place.

The historical source of inherent power arises, at least in part, from the function of courts as courts.[80] To the degree that the

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[75] *See* Pushaw, *supra* note 18, at 804 n.360 ("Where there is Right and Equity, Forms of the Court and Orders shall not hinder me to examine it." (citing Shuter v. Gilliard, 22 Eng. Rep. 930, 930 (1677))). As Pushaw notes, the inherent power of the chancery courts extended not only to the inherent power to dictate procedures in the absence of clear written rules, but the power to ignore them altogether. *See id.* ("[T]he Chancellor always had discretion to ignore procedural rules where necessary to achieve justice.").

[76] ITT Cmty. Dev. Corp. v. Barton, 569 F.2d 1351, 1359 (5th Cir. 1978).

[77] The inherent power persists in the U.K. legal system as well, although in that system it is called the "inherent jurisdiction" of the court. *See generally* Jacob, *supra* note 4 (focusing on the power to prosecute and punish contempt, as well as "regulat[e] the practice of the court and preventing the abuse of its process").

[78] *See generally* John L. Garvey, *Some Aspects of the Merger of Law and Equity*, 10 CATHOLIC U. L. REV. 59 (1961); Charles T. McCormick, *The Fusion of Law and Equity in the United States Courts*, 6 N.C. L. REV. 283 (1928).

[79] Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 1000 (1987).

[80] *See* Pushaw, *supra* note 18, at 810 (discussing how judges cite the need "to control their proceedings in order to promote the fair and efficient administration of justice" as a justification for using their inherent powers).

inherent power is "inherent" to something, it suggests that the exercise of the power is bound up with the very nature of courts and judicial decisionmaking. The exercise of this power might be seen as rooted in the state or federal constitutions that codify and define the exercise of judicial authority in the legal systems of particular sovereigns.[81] To the degree that inherent power is rooted in this kind of textual foundation, it requires an examination into the role of judicial power within individual state and federal constitutional systems that is beyond the scope of this Article. As noted above, for instance, many commentators have examined the role of inherent power in the federal system and have identified aspects of the federal constitution that inform the existence and exercise of inherent power in the federal courts.[82] Similar work might be done at the level of individual state constitutions.[83] Ultimately, however, this kind of granular analysis of the role of "judicial power" within individual state and federal constitutional systems is beyond the scope of this Article.

2. Functional View: Discretion and the Process of Judging.

Commentators have long pointed out that the common law recognizes inherent power as derived "from the very nature of the court as the superior court of law."[84] In considering the then-current exercise of that authority in the United Kingdom, for instance, I.H. Jacob noted that "the essential character of a superior court of law necessarily involves that it should be invested with a power to maintain its authority and to prevent its process from being obstructed and abused."[85]

Earlier articles discuss other circumstances in which judges make decisions that are critical to the appellate process but that are nevertheless largely unconstrained by positive law. In judicial

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[81] *See, e.g.*, *id.* at 823–25 (arguing that the U.S. Constitution, although presumptively foreclosing inherent powers, permits federal officials to claim inherent powers where necessary to perform a constitutionally mandated duty).

[82] *See supra* note 18 and accompanying text.

[83] *See, e.g.*, Silver, *supra* note 5, at 271–74 (discussing the scope and source of judicial control over the bar of Florida).

[84] Jacob, *supra* note 4, at 27.

[85] *Id*. The equivalent to "inherent power" in the Commonwealth system is deemed the "inherent jurisdiction" of those courts. Interestingly, Jacob argues that this doctrine is "reflected in most, if not all, other common law jurisdictions, though not so extensively in the United States of America." *Id.* at 23 n.1.

determinations regarding the use of precedent, for instance,[86] as well as in determinations regarding the use of new evidence on appeal[87] and in evaluating and establishing standards of review,[88] many of the same characteristics of inherent power are present. While the courts managing such matters never articulate the source of their authority over these areas of procedure as matters of inherent power, these kinds of procedural determinations are as much—and perhaps more so—a fundamental exercise of judicial function as any of the exercises of inherent power discussed below.[89]

This observation, perhaps, suggests too much. Any time a court makes a decision that can be plausibly characterized as "procedural" and in which there is no obvious written guidance associated with that procedure, the court has arguably exercised inherent judicial power.[90] This suggests that in some ways the use of inherent power is little more than a particular instance of the exercise of judicial discretion writ large.[91]

With such a broad definition of inherent power, this Article is at risk of being swallowed into a much larger discussion about the role of discretion in judicial decisionmaking, a topic that has been examined in careful detail by many other commentators.[92] That said, as these prior articles have suggested, procedural common law decisions are most worrisome not because they rely upon the

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[86] *See generally* Dobbins, *Precedent*, *supra* note 3 (regarding rules of precedent).

[87] *See generally* Dobbins, *New Evidence*, *supra* note 3 (regarding appellate consideration of new evidence on appeal).

[88] *See generally* Dobbins, *Changing Standards*, *supra* note 3 (examining origins of standards of review).

[89] *See* STUMPF, *supra* note 2, at 31–61, 106–20 (describing exercise of "inherent powers" in areas of "court administration" and "logistical support").

[90] *See id*. (categorizing procedural uses of inherent power).

[91] To even further broaden the scope of inherent power, it is possible to think of the process of statutory or constitutional interpretation as an exercise of this authority. After all, while courts that are interpreting texts are limited by those texts, the need for "interpretation" arises when those texts are ambiguous or uncertain. A court "interpreting" an unclear text is, arguably, as unconstrained (in the given area of analysis) as a court exercising its inherent powers of contempt or its powers to control and manage its docket.

That said, textual interpretations are (like procedural rulemaking generated through established rulemaking processes) limited by established substantive texts or processes. Procedural decisions that are generated through the exercise of inherent power, on the other hand, present the starkest problems of unconstrained decisionmaking with which this article is concerned.

[92] *See, e.g.*, Friendly, *supra* note 33, at 747 (discussing the benefits and drawbacks of appellate review); Nicola Lacey, *The Path Not Taken: H.L.A. Hart's Harvard Essay on Discretion*, 127 HARV. L. REV. 636, 636 (2013) (discussing an unpublished Hart manuscript on discretion).

exercise of discretion—discretion provides necessary flexibility in the wielding of judicial authority—but rather because they use that authority without guidance from any articulated principles.

Inherent power can, then, be thought of as a flavor of judicial discretion generally. As such, it is certainly part of the process of judging: when a court is expected to decide disputes, that court should be able to wield authority necessary to carry out that function. As demonstrated by the scope of inherent powers discussed throughout, that authority sweeps quite broadly. To that end, the exercise of inherent power is also properly thought of in a functional way: a necessary means to ensuring that courts are able to manage interactions between parties, counsel, third parties, and the courts themselves.

Merely because inherent power serves functional purposes, however, does not mean that the use of inherent power is unassailable. As Part III demonstrates, inherent power is used in so many different circumstances that any system dedicated to procedural fairness should struggle with this form of near-plenary control over the procedures applicable to litigants in particular cases.

III. INHERENT AND SUPERVISORY POWERS EXERCISED

Others have attempted to characterize the full scope of the exercise of inherent powers,[93] so this Article makes no effort to replow that ground in detail—not even when narrowing the scope to the managerial cases described in Section II.C. To give context to the problems of inherent power cases, however, a brief summary of the range of those cases will be useful.

A. SANCTIONS FOR FRIVOLOUS, BAD FAITH, OR OTHERWISE IMPERMISSIBLE CONDUCT

This is the largest category of managerial cases relying on inherent power. Since early in the nation's history, courts have relied upon inherent power to sanction parties and counsel for conduct that courts believe to be inconsistent with the honest and

[93] *See generally, e.g.*, STUMPF, *supra* note 2.

efficient operation of the judicial system.[94] This authority takes on various forms depending on both the nature of the sanctions—ranging from charging fines and attorneys' fees to ordering adverse presumptions and dismissal—and the nature of the violations that they are intended to punish, including bad faith in or the abuse of pleading, discovery, and settlement negotiations.[95] While current written rules provide for sanctions, the scope of inherent power surpasses the authority explicitly set forth in the rules.

For instance, in *Eash v. Riggins Trucking Inc.*, the U.S. Court of Appeals for the Third Circuit, sitting en banc, concluded that a federal district court had inherent authority to impose a $390 fine on an attorney for his delay in responding to opposing counsel's settlement offers.[96] This fine represented the cost of empaneling the jury for a day, which proved unnecessary when the case finally settled on the eve of trial.[97] The court found that although it would be preferable for the trial court to develop local rules governing similar situations in the future, its use of inherent power to punish the offending attorney was not improper.[98]

In *Chambers v. NASCO, Inc.*, the U.S. Supreme Court endorsed this statement of the scope of trial court authority and even expanded it to cover cases in which written rules addressed the availability of relevant sanctions.[99] Chambers was the sole principal of a television station that initially agreed to be sold to NASCO. After Chambers changed his mind, he and his counsel engaged in ongoing efforts to interfere with NASCO's litigation filed in federal court.[100] Upon being notified of NASCO's intent to seek a temporary restraining order (TRO) preventing the sale of the station to a third party, but before the TRO was filed, Chambers sold the facility to a trust made up of his sister and children. At the TRO hearing, although the transaction was not yet complete, Chambers's counsel refused to inform the court about the status of the sale.[101] While the

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[94] *See, e.g.*, United States v. Hudson, 11 U.S. (7 Cranch) 32, 34 (1812) (noting the scope of powers to impose sanctions).

[95] *See generally* STUMPF, *supra* note 2, at 24–27 (detailing the types of sanctions imposed).

[96] 757 F.2d 557 (3d Cir. 1985) (en banc).

[97] *Id.* at 572.

[98] *Id.* at 569. The inherent power argument was made most strongly not by the parties to the appeal, but by a court-appointed *amicus* who argued that the district court's decision to sanction the attorney was a proper exercise of its inherent power. *Id.* at 559 n.1, 560–61.

[99] 501 U.S. 32 (1991).

[100] *Id.* at 36–41.

[101] *Id.* at 37.

court ultimately issued the TRO, Chambers continued to obstruct the progress of the suit by refusing to participate in discovery, filing meritless motions, refusing to comply with the court's order of specific performance, and filing frivolous appeals.[102] Ultimately, the U.S. Court of Appeals for the Fifth Circuit found the appeal frivolous, imposed attorneys' fees and costs as a sanction, and remanded for a determination of whether further sanctions for the conduct before the trial court were appropriate. The district court ultimately imposed nearly one million dollars—the full cost of NASCO's attorneys' fees—as sanctions against Chambers and imposed additional sanctions (including disbarment) against Chambers's attorneys.[103] While conceding that existing rules did not fully support the sanctions at issue, the Fifth Circuit concluded that its inherent authority supported the imposition of such sanctions.

On certiorari, Chambers argued that the existence of Rule 11 of the Federal Rules of Civil Procedure[104] and 28 U.S.C. § 1927[105] "reflect a legislative intent to displace the inherent power [to sanction]."[106] The U.S. Supreme Court rejected his argument, emphasizing the scope of inherent judicial authority over counsel, the parties, and the course of litigation. The Court noted that "[b]ecause of their very potency, inherent powers must be exercised with restraint and discretion[]" but concluded that such discretion included "the ability to fashion an appropriate sanction for conduct which abuses the judicial process"[107] and that "the imposition of sanctions in this instance transcends a court's equitable power concerning relations between the parties and reaches a court's inherent power to police itself."[108] As for the effect of Rule 11 and 28 U.S.C. § 1927, the Court concluded that nothing in those provisions reflected a congressional intent to displace the courts' inherent authority to control and sanction parties for their behavior during the course of litigation. This was true not only when the sanction imposed was *supplemental* to those allowed by the rules, but also

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[102] *Id.* at 37–41.

[103] *Id.* at 40.

[104] FED. R. CIV. P. 11 (permitting sanctions for documents filed in bad faith or without reasonable belief in their validity).

[105] 28 U.S.C. § 1927 (2012) (permitting sanctions against counsel for multiplying "the proceedings in any case unreasonably and vexatiously").

[106] *Chambers*, 501 U.S. at 42–43.

[107] *Id.* at 44.

[108] *Id.* at 46.

when the sanction imposed was within the explicit scope of the relevant written law.[109]

Notably, four justices dissented in *Chambers*. Justice Scalia argued that the court's inherent power could not reach beyond the confines of the parties' and attorneys' actions in the case before it and concluded that some of the sanctions were related not to behavior during litigation, but to the "bad faith breach of contract."[110] Accordingly, Justice Scalia would have remanded to ensure that no such contractual considerations were part of the sanctioning rationale.[111] Justice Kennedy, joined by Chief Justice Rehnquist and Justice Souter, viewed the majority decision as a "vast expansion of the power of federal courts" and would have required sanctions to hew far more closely to those permitted under Rule 11 and 28 U.S.C. § 1927.[112] As long as relevant written provisions provided a range of authority sufficient to control the parties during litigation, the courts should confine their exercise of authority to what is explicitly available under such provisions.[113] Allowing otherwise, he concluded, was "as illegitimate as it is unprecedented."[114]

Despite Justice Kennedy's concern over the Court's expansive view of the role of inherent power in the federal courts,[115] the

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[109] *Id.* at 50. As the Court concluded:

> [N]othing in the other sanctioning mechanisms or prior cases interpreting them . . . warrants a conclusion that a federal court may not, as a matter of law, resort to its inherent power to impose attorney's fees as a sanction for bad-faith conduct. This is plainly the case where the conduct at issue is not covered by one of the other sanctioning provisions. But neither is a federal court forbidden to sanction bad-faith conduct by means of the inherent power simply because that conduct could also be sanctioned under the statute or the Rules.

Id.

[110] *See id.* at 60 (Scalia, J., dissenting) ("I disagree, however with the Court's statement that a court's inherent power reaches conduct 'beyond the court's confines' that does not 'interfer[e] with the conduct at trial.'").

[111] *Id.*

[112] *Id.* at 60–61 (Kennedy, J., dissenting) (expressing concern over the implications of the decision on a federal court's power to reach beyond what was authorized by written rules).

[113] *Id.* at 62, 64.

[114] *Id.* at 63.

[115] In *Goodyear Tire & Rubber Co. v. Haeger*, a unanimous U.S. Supreme Court reaffirmed the inherent power of federal courts to issue discovery sanctions, but limited the scope of that power to compensatory sanctions. 137 S. Ct. 1178, 1186 (2017). While inherent power can extend to punitive sanctions, the Court concluded, such heightened sanctions must come with heightened procedure for the targeted party. *Id.* The *Goodyear* case is a somewhat surprising limitation on the scope of inherent authority in the absence of statutory or rule-based limits.

primary lesson from *Chambers*—a lesson that is echoed in state court cases from throughout the nation—is the primacy of inherent power when it comes to the ability of courts to manage the behavior of parties and litigation before them.[116] The scope of a court's inherent power to sanction, moreover, extends well beyond punishing the kind of obstructionism that took place in *Chambers* and includes authority to impose sanctions for spoliation of evidence in discovery[117] as well as for failing to proceed with good faith in considering settlements and participating in alternative dispute resolution.[118]

The *Goodyear* Court grounded the source of the compensatory-punitive line (and therefore the limit on inherent power) in its decision in *International Union, United Mine Workers of America v. Bagwell*, 512 U.S. 821, 825 (1994). *See Goodyear Tire & Rubber Co.*, 137 S. Ct. at 1186.

Bagwell, however, was a contempt case in which the Court was evaluating whether criminal contempt—not just *any* exercise of authority with a punitive or even deterrence-based rational—was acceptable without additional process. It is not clear why the *Bagwell* line would obviously mandate a similar process-based limit on the exercise of inherent sanction powers in order to deter bad behavior. The unanimous decision in *Goodyear* is not particularly forthcoming on this point.

[116] *See* STUMPF, *supra* note 43, at 47–48 ("[B]y far the greater number [of state courts] have followed and rely on *Chambers* to impose fees and costs for a broad range of litigation abuses committed by counsel."); *see generally* Debra Landis, Annotation, *Inherent Power of Federal District Court to Impose Monetary Sanctions on Counsel in Absence of Contempt of Court*, 77 A.L.R. Fed. 789 (1986) (collecting cases showing support for a federal district court's inherent authority to impose monetary sanctions).

[117] *See* STUMPF, *supra* note 2, at 24–27 (describing sanctions).

[118] *See generally* Annette Sansone, Annotation, *Imposition of Sanctions by Federal Courts for Failure to Engage in Compromise and Settlement Negotiations*, 104 A.L.R. Fed. 461 (1991) (finding authority in the inherent power of the court, the Federal Rules of Civil Procedure, and local court rules for imposing sanctions for parties failing to engage in compromise and settlement negotiations); *see also* Richard English, Annotation, *Alternative Dispute Resolution: Sanctions for Failure to Participate in Good Faith in, or Comply with Agreement Made in, Mediation*, 43 A.L.R. 5th 545 (1996) (showing a variety of sanctions a court may impost to "encourage the parties to participate in ADR and settle their differences").

B. CONTEMPT POWER

A classic application of a court's inherent power is its exercise of the power to deem a party or attorney[119] to be in contempt of court.[120] As the U.S. Supreme Court noted in *Ex parte Robinson*:

> The power to punish for contempts [sic] is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders, and writs of the courts, and consequently to the due administration of justice. The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power.[121]

State courts have echoed this sweeping authority, noting that the contempt power "has been characterized as essential to the courts' very existence," and that "[w]ithout contempt powers, courts could neither maintain their dignity, transact their business, nor accomplish the purpose of their existence."[122]

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[119] Or others! In *Zarcone v. Perry*, for instance, the U.S. Court of Appeals for the Second Circuit reviewed the size of a verdict against a local judge who had, according to the jury, violated the plaintiff's constitutional rights by detaining the plaintiff, a food truck vendor who had allegedly provided "putrid" coffee to the judge and got brought before him in handcuffs as a result. 572 F.2d 52 (2d Cir. 1978). While *Zarcone* was not a contempt case, it demonstrates the scope of offenses and range of individuals against which an overly enthusiastic judge might exercise unconstrained authority.

[120] Both contempt and sanctions of the sort discussed in the prior Section can be imposed against counsel or parties for kind of misconduct or bad faith behavior. Despite confusion in the literature and case law regarding the proper circumstances for imposing sanctions, civil contempt, and criminal contempt, the literature regarding the exercise of contempt is detailed enough that it merits separate discussion. *See generally* Greg Neibarger, Note, *Chipping Away at the Stone Wall: Allowing Federal Courts to Impose Non-Compensatory Monetary Sanctions Upon Errant Attorneys without a Finding of Contempt*, 33 IND. L. REV. 1045, 1055–68 (2000) (discussing distinctions between, and disputes regarding, the exercise of these forms of judicial authority over parties in connection with discovery disputes in federal court).

[121] 86 U.S. 505, 510 (1873); *see also id.* ("The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of th[e power of contempt]."); Paul A. Grote, Note, *Purging Contempt: Eliminating the Distinction Between Civil and Criminal Contempt*, 88 WASH. U. L. REV. 1247, 1250 n.24 (2011) ("Despite the ostensible legislative grant of the contempt power, the power of contempt is inherent in the courts and would have been vested in the courts in the absence of a specific legislative grant." (citing, *e.g.*, Anderson v. Dunn, 19 U.S. 204, 227 (1821))).

[122] State v. Thomas, 550 So. 2d 1067, 1070 (Ala. 1989) (concluding that juvenile court's exercise of contempt power against mother for failing to reveal location of convicted son was improper since the juvenile court did not have jurisdiction over the mother).

While legislatures in many systems have attempted to constrain or expand the scope of this inherent authority, these efforts have faced varying levels of success. The federal system is no exception.[123] The U.S. Supreme Court has held that Congress may limit the scope of the contempt power—at least with respect to the *lower* federal courts.[124] In many states, however, the judicial branch enjoys a different constitutional status, and at least some state supreme courts have concluded that the inherent power of their courts cannot be limited by the legislature. In Illinois and Florida, for instance, the high courts have held that their legislatures may not limit the scope of the judiciary's contempt powers.[125] Hawaii allows its legislature to alter the exercise of the contempt power, but only if the "alternative procedures and penalties . . . do not unduly restrict or abrogate the courts' contempt powers."[126]

C. DECISIONS CONTROLLING A COURT'S CALENDAR AND DOCKET

A court's authority over its day-to-day operations, as well as over the structure of litigation within a particular case, is an authority that is so much a part of the court's operations as to seem within the scope of the governmental body case law. If a court is to do anything, it must be able to determine which cases to hear, and in what order, just as an administrative agency must be able to manage the timing of when it will consider issues presented to it.[127]

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[123] *See* 18 U.S.C. § 401 (2012) (defining contempt); FED. R. CRIM. P. 42 (allowing sanctions for criminal contempt); *but cf.* 28 U.S.C. § 3003(c)(8)(C) (2012) ("This chapter shall not be construed to supersede or modify the operation of . . . the authority of a court to exercise the power of contempt under any Federal law.").

[124] *See, e.g.*, *Robinson*, 86 U.S. at 510–11 (holding that the power of *lower* federal courts to punish for contempt can be limited by Congress but saying nothing about the power of Congress to limit the U.S. Supreme Court's power to do so).

[125] *See In re* G.B., 430 N.E.2d 1096, 1098 (Ill. 1981) ("Because the power to enforce court orders through contempt proceedings inheres in the judicial branch of the government, the legislature may not restrict its use."); Walker v. Bentley, 678 So. 2d 1265, 1267 (Fla. 1996) ("Any legislative enactment that purports to do away with the inherent power of contempt directly affects a separate and distinct function of the judicial branch, and, as such, violates the separation of powers doctrine . . . of the Florida Constitution."); *see also* Timothy L. Bertschy & Nathaniel E. Strickler, *The Power Behind the Robe: A Primer on Contempt Law*, 97 ILL. B.J. 246, 247 (2009) (discussing the power of the Illinois state legislature to enlarge but not restrict a "state court's inherent ability to issue contempt orders" (citing *G.B.*, 430 N.E.2d at 1098)).

[126] *See In re* Doe, 26 P.3d 562, 568–69 (Haw. 2001) (emphasis omitted).

[127] For further discussion about the governmental body approach, see *supra* Section II.A.

For that reason, courts often cite their inherent power as a basis for managing and even dismissing cases when necessary to move their dockets forward. Daniel Meador noted, for instance, that trial court authority over whether to consolidate cases is often centered in a court's exercise of inherent judicial authority.[128] Courts cite their inherent powers as justification for staying proceedings pending the resolution of other cases, despite the opposition of parties.[129] The U.S. Court of Appeals for the Ninth Circuit has ruled that trial courts have inherent power to order the government to disclose witness lists well in advance of criminal trials.[130] And trial courts cite their inherent power to support their dismissal of cases for failure to prosecute by the plaintiffs—even in the absence of motions by the defendant.[131]

These examples seem straightforward, and it is difficult to imagine courts being constrained in their ability to make decisions about consolidation, stays, and the clearing of deadwood from their dockets. In many circumstances, however, a court's decision to use inherent authority to control the timing of cases has a significant effect on the litigants—an effect that is particularly galling in light of legislative language that on its face appears to constrain the exercise of such authority.[132]

Consider, for instance, *Carlton Associates v. Bayne*, in which the civil court of New York's Kings County postposed for a month the trial in a landlord-tenant action. [133] The relevant statute provided

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[128] Meador, *supra* note 6, at 1807–09 (discussing inherent power of courts to consolidate—or not—pending cases).

[129] *See, e.g.*, IBT/HERE Emp. Representatives' Council v. Gate Gourmet Div. Ams., 402 F. Supp. 2d 289, 292 (D.D.C. 2005) (granting stay).

[130] United States v. W.R. Grace, 526 F.3d 499, 509 (9th Cir. 2008) ("There is a 'well established' principle that '[d]istrict courts have inherent power to control their dockets.' Further, 'judges exercise substantial discretion over what happens *inside* the courtroom.' We have accepted that '[a]ll federal courts are vested with inherent powers enabling them to manage their cases and courtrooms effectively and to ensure obedience to their orders.'" (alterations in original) (citations omitted)).

[131] *See, e.g.*, Bartley v. Japan Processing Serv. Co., No. 11-CV-2759-BAS(JLB), 2016 WL 3280470 (S.D. Cal. June 15, 2016) (dismissing for failure to prosecute).

[132] *See, e.g.*, Hicks v. T.L. Cannon Corp., 66 F. Supp. 3d 312, 314 (W.D.N.Y. 2014) (preventing the litigants from filing further dispositive motions without leave of the court based on the court's "inherent power . . . to dictate the timing of a motion"); Carlton Assocs. v. Bayne, 740 N.Y.S.2d 785, 788 (N.Y. Sup. Ct. 2002) (granting a continuance well in excess of the statutorily mandated limit of ten days on grounds of the court's "inherent judicial power . . . to control [its] calendar, exercised through its discretion to stay proceedings." (citation omitted)).

[133] *Bayne*, 740 N.Y.S.2d at 785.

that the court could "adjourn the trial of the issue, *but not more than 10 days*, except by consent of parties."[134] Relying upon a sweeping inherent judicial power over its calendar, the Supreme Court of Kings County affirmed the ability of the trial court to grant a month-long extension despite the landlord's objection and the plain language of the statute.[135] Granting the adjournment was a necessary aspect of "the court's inherent power, to perform efficiently its function within the scope of its jurisdiction to protect its dignity, independence and integrity, and to make its lawful actions effective."[136] In so concluding, the court not only refused to acknowledge the relevance of the statute to the question of its calendaring power but also favorably cited an earlier decision by another state supreme court that effectively refused to validate *any* assertion of legislative authority over the calendaring of trial dates.[137]

D. DISCOVERY CONTROL

The equitable roots of inherent power are on clear display in the exercise of judicial control over the process of discovery. As the U.S. Court of Appeals for the Fifth Circuit noted in affirming a district court's ability to require production of discoverable information, a classic inherent power of the courts of Chancery was the ability to issue "the bill of discovery, which has been called the forerunner of all modern discovery procedures."[138] Given the significant role of discovery in modern trial practice, it is not surprising that the rules of discovery have been substantially codified in the relevant rules of civil (and, to some degree, criminal) procedure.[139] Nevertheless, courts still often rely on inherent power to circumscribe, expand, or altogether supersede written rules of discovery.

In *United States v. Nobles*, for instance, the U.S. Supreme Court concluded that trial courts had inherent power to order discovery of a defense investigator's summary of his interviews with key

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[134] *Id.* at 786 (emphasis added) (citing N.Y. Real Prop. Acts. Law § 745(1) (McKinney 2019)).

[135] *Id.* at 788–89.

[136] *Id.* at 788.

[137] *Id.* (citing Lang v. Pataki, 674 N.Y.S.2d 903, 913–914 (N.Y. Sup. Ct. 1998)).

[138] Nat. Gas Pipeline Co. v. Energy Gathering, Inc., 2 F.3d 1397, 1409 (5th Cir. 1993) (citing Hickman v. Taylor, 329 U.S. 495 (1947) (Jackson, J., concurring)).

[139] *See, e.g.*, FED. R. CIV. P. 26; FED. R. CIV. P. 27; FED. R. CRIM. P. 16.

prosecution witnesses before allowing testimony by the investigator on those conversations.[140] No rule provided for such discovery, and the Federal Rules of Criminal Procedure altogether precluded such discovery in the pretrial phase of the case.[141] Nevertheless, the Court concluded that district courts retained inherent power to "enhance" the "truth-finding process" by ordering criminal defense witnesses to produce copies of reports recording their conversations with prosecution witnesses—or, at least, to do so at trial when the defense witness was testifying about his conversation with those prosecution witnesses.[142] While the Court checked the trial court's power by ensuring that there was no constitutional problem in requiring the disclosure, the inherent authority of the district court won the day.[143]

Similarly broad authority over discovery exists in the civil context.[144] Courts have relied on inherent power to deny discovery of relevant documents when they conclude that public interest considerations outweigh the value of the discovery being sought.[145] They can rely on the power to stay discovery proceedings pending resolution of summary judgment motions[146] and can order that perpetuation depositions be taken outside of the circumstances

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[140] 422 U.S. 225 (1975).

[141] *Id.* at 234–36.

[142] *Id.* at 231–32.

[143] *See id.*; *see also* United States v. Beckford, 962 F. Supp. 748, 755 (E.D. Va. 1997) ("[N]umerous courts . . . have recognized that the discovery provisions in Rules 12.2 and 16(b) are not exclusive and do not supplant a district court's inherent authority to order discovery outside the rules."); Joe Z. v. Superior Court, 478 P.2d 26, 28 (Cal. 1970) (noting that although juvenile courts do not have written discovery procedures they do have discretion to grant discovery in appropriate circumstances and that "authority for such discovery derives not from statute but from the inherent power of every court to develop rules of procedure aimed at facilitating the administration of criminal justice and promoting the orderly ascertainment of the truth").

[144] *See* STUMPF, *supra* note 2, at 41–42 (noting the inherent authority of judges regarding discovery in civil courts).

[145] *See* Wesley Med. Ctr. v. Clark, 669 P.2d 209, 215 (Kan. 1983) ("[U]nder certain circumstances the trial court, under its general supervisory powers, may limit discovery of material not specifically subject to a statutory privilege."); *see also* Richards of Rockford, Inc. v. Pac. Gas & Elec. Co., 71 F.R.D. 388, 390–91 (N.D. Cal. 1976) (relying on "supervisory discretion" under discovery rules to limit access to communications between academic researchers and their sources, despite the lack of legal privilege).

[146] *See* Ohio *ex rel.* DeWine v. Helms, No. 28304, 2017 WL 3426654, at *3 (Ohio Ct. App. Aug. 9, 2017) ("A trial court has the inherent authority to control its docket and to decide discovery matters.").

specified in Rule 27 of the Federal Rules of Civil Procedure.[147] In short, courts are able to rely on inherent power to make a wide range of discovery decisions that are broader, narrower, or altogether unanticipated by discovery rules.[148] While some of the discretion embedded in the notion of inherent power is effectively codified in permissive language in discovery rules,[149] the range of judicial decisions going outside the scope of those rules demonstrates that even in an area as heavily codified as discovery, inherent power remains a significant force in determining judicial behavior.

E. FORUM NON CONVENIENS

The doctrine of forum non conveniens (FNC)—the idea that a court with subject-matter jurisdiction over a particular suit may nevertheless dismiss that case in favor of an alternative forum that is, for practical reasons, preferable[150]—is also an example of the exercise of a court's inherent authority.[151] While the nature of FNC dismissals is such that appellate courts have often addressed the circumstances under which the doctrine should appropriately apply,[152] the *source* of judicial authority to dismiss on FNC grounds

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147 *See* FED. R. CIV. P. 27; *see also* Archer v. Mead Corp., No. CV-05-S-2466-M, 2005 WL 8157955, at *1–2 (N.D. Ala. Dec. 7, 2005) (relying on inherent power to permit discovery before the pretrial planning and discovery conferences given the court's "fundamental duty of searching for truth and seeking justice").

148 As is suggested by case discussions surrounding inherent power in the discovery context, courts also rely on a broad exercise of inherent power in the consideration and admissibility of evidence. *See* STUMPF, *supra* note 2, at 41. Whether in determining relevance, in evaluating whether relevant information should be presented when it is cumulative or prejudicial, in managing witnesses, or in a myriad of other evidentiary contexts, trial courts wield very broad inherent power to guide and limit the scope of evidence as presented at trial. *Id.*

149 *Cf.* FED. R. CIV. P. 26(b)(1) (noting discovery is limited to information "proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit"); FED. R. CIV. P. 26(b)(2)(A) ("[T]he trial court may alter the limits in these rules on the number of depositions and interrogatories or on the length of depositions.").

150 *See* David W. Robertson, *The Federal Doctrine of Forum Non Conveniens: "An Object Lesson in Uncontrolled Discretion,"* 29 TEX. INT'L. L.J. 353, 367–68 (1994). The classic first year civil procedure case is *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981).

151 *See, e.g.*, Espinoza v. Evergreen Helicopters, Inc., 337 P.3d 169, 177–82 (Or. Ct. App. 2014), *aff'd*, 376 P.3d 960 (2016).

152 *See, e.g.*, *Piper Aircraft Co.*, 454 U.S. at 250.

has not been nearly so well discussed. As such, the exercise of FNC discretion is a perfect example of the significant authority a court can wield over a case by relying not on positive law, but rather on the court's inherent power.[153]

The doctrine of FNC has been so heavily scrutinized, and appropriate circumstances for its application so thoroughly discussed, that cases often cite the doctrine as a freestanding authority to decline jurisdiction rather than as an exercise of inherent judicial power.[154] This evolution of FNC doctrine into a separate area of the law demonstrates one path by which repeated uses of inherent authority in given situations may develop into a separate doctrine.[155]

F. APPELLATE COURT SUPERVISORY AUTHORITY AND INHERENT POWERS OVER ARGUMENTS AND RECORD ON APPEAL

Appellate courts also exercise inherent and supervisory powers in a variety of contexts. When exercising these powers, appellate courts often issue instructions to trial courts, for example, by requiring trial courts to explain the reasoning behind decisions or orders.[156] Other appellate courts rely on their supervisory power to consider interlocutory appeals in circumstances where statutory authority would not permit appellate review.[157] In a recent article, Toby Heytens addressed a further example of appellate court supervisory power: the ability of appellate courts to remand cases to trial courts with an order that the case be reassigned to a

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[153] *Cf., e.g.*, Friendly, *supra* note 33, at 749–50 (discussing discretion in the context of the doctrine of FNC).

[154] A Westlaw search for all federal or state cases within the last three years with the phrase "forum non conveniens" returns 966 cases; excluding cases that reference "inherent" or "supervisory" as well as "power" or "authority" returns 959 cases. Further limiting cases to those in which "forum non conveniens" appears in the headnotes returns 220 cases. Searching adv: ((HE:"forum non conveniens") % ((inherent or supervisory) /3 (power or authority))) (search last conducted Mar. 30, 2019).

[155] *See* Friendly, *supra* note 33, at 771–73 (discussing how initial exercises of broad discretion in the same context can over time evolve through appellate review into exercises of discretion guided narrowly by legal rules stated in case law).

[156] *See, e.g.*, Sowell v. Butcher & Singer, Inc., 926 F.2d 289, 295 (3d Cir. 1991) (relying on inherent power to require such an explanation when a trial court grants a motion for directed verdict; citing earlier case, also relying on inherent power, to mandate explanations from trial courts that grant motions for summary judgment).

[157] *See also* Crist v. Moffatt, 389 S.E.2d 41, 44 (N.C. 1990) (relying on supervisory power inherent in the state Constitution in order to review interlocutory order of trial court, despite lack of statutory authority to review the decision in that instance).

different judge.[158] As Heytens notes, "[i]t is striking just how little federal statutes and rules have to say about how trial court judges get assigned to hear cases, much less when or how those cases should be reassigned to other judges."[159] The exercise of this authority to reassign a case to a different trial court judge is a paradigmatic example of an appellate court's supervisory authority.[160]

Supervisory authority over trial courts, however, is not the only use of appellate courts' inherent power. Appellate courts also use inherent power to bypass or supplement written rules particular to parties, as well as to manage largely unwritten appellate court processes. One example is in appellate court management of the record on appeal. In *Ross v. Kemp*, a habeas corpus petitioner who had been convicted of murder in Georgia state court argued that the federal appellate court's record should be supplemented with statistical evidence regarding the racial makeup of his jury.[161] The petitioner argued that the evidence was not presented at the district court level because the state had previously suggested (whether intentionally or not) that the evidence did not exist, and that he only discovered after appealing that the information was, in fact,

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[158] *See* Toby Heytens, *Reassignment*, 66 STAN. L. REV. 1, 1 (2014) (discussing how and why assignment happens).

[159] *Id.* at 11 (noting that while one appellate court and several district courts have promulgated written rules regarding reassignment the number of courts with written rules in the federal system is limited in comparison to how often reassignment occurs, with no written rules in the "overwhelming majority").

[160] *See, e.g.*, *id,* at 11 n.190; *see generally* Calvaresi v. United States, 348 U.S. 961 (1955) (remanding the case for retrial before a different trial court judge "[i]n the interests of justice and in the exercise of the supervisory powers of this Court"); *see also* Cobell v. Kempthorne, 455 F.3d 317, 331 (D.C. Cir. 2006) ("We have authority to assign a case to a different district judge under "our general supervisory power to 'require such further proceedings to be had as may be just under the circumstances.'" (quoting United States v. Microsoft Corp., 56 F.3d 1448, 1463 (D.C. Cir. 1995))).

On the question of reassignment, it is worth mentioning the highly generic 28 U.S.C. § 2106, which provides that any

> court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

28 U.S.C. § 2106 (2012). This provision arguably provides appellate courts with a broad sweep of power to manage the circumstances associated with its review of a lower court's decision, though it is so vague as to provide very little in the way of constraints, and was enacted to codify, rather than to expand, existing judicial practice.

[161] 785 F.2d 1467, 1474 (11th Cir. 1986).

available.[162] In deciding to consider this new evidence on appeal, the U.S. Court of Appeals for the Eleventh Circuit emphasized that it had "inherent equitable authority to enlarge the record and consider material that [w]as not [] considered by the court below."[163] The court's decision to permit consideration of this new evidence on appeal runs against fundamental premises of appellate process but demonstrates the degree to which courts are able to use inherent power to bypass core procedural understandings.[164]

Appellate courts also exercise their inherent authority to consider arguments that would generally be deemed waived. In *North Carolina v. Jones*, for example, the defendant in a direct criminal appeal had abandoned all of his previous assignments of error.[165] Nonetheless, "due to the gravity of the sentence imposed," the North Carolina Supreme Court elected, "pursuant to [its] inherent authority . . . , to consider defendant's arguments as presented in his brief."[166] While this power is most typically wielded to avoid plain error in criminal cases, the Georgia Court of Appeals relied on a similar power in a civil suit where the defendant city had appealed and won, but then objected to the trial court's implementation of the appellate judgment after remand.[167] While the city had not preserved a number of issues in the leadup to the first appeal, the court noted that it "is within the inherent power of this court to consider issues which follow as a natural consequence of its decisions on appeal, whether or not specifically enumerated as error."[168]

As with many exercises of inherent power, many of these decisions by the appellate courts seem perfectly reasonable, particularly when considered from the perspective of the party that benefits from the use of that power. At the same time, however, it is not difficult to imagine these courts simply insisting on "normal practice" to bar their consideration of inadequately preserved arguments. The party not benefitting from the court's decision in

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[162] *Id.* at 1472–75.

[163] *Id.* at 1474 (accepting the new evidence as potentially relevant to the appeal but remanding to the trial court for further evaluation of whether the failure to present the evidence was ascribable to the defendant's counsel, or potentially to the state).

[164] *See generally* Dobbins, *New Evidence*, *supra* note 3.

[165] 266 S.E.2d 586 (N.C. 1980).

[166] *Id.* at 587.

[167] *See* City of Fairburn v. Cook, 393 S.E.2d 70, 73 (Ga. Ct. App. 1990).

[168] *Id.*

these cases is well within its rights to argue that in the absence of clear direction, courts should not rely on this nebulous "inherent power" to supersede fundamental processes simply because they think it is right to do so.[169] This conflict between "fairness" to the benefitted party or the efficiency of the court wielding inherent powers, on the one hand, and "fairness" to the opposing party that would benefit from the process that would flow in the absence of the exercise of inherent power, on the other hand, is the conflict that lies at the core of the exercise of inherent powers, and the one to which the rest of this Article now turns.

IV. THE INHERENT AND SUPERVISORY POWERS EXAMINED

The exercise of inherent authority in the above circumstances presents at least three difficult problems. First, how can the exercise of this unwritten authority be consistent with fundamental principles of fairness, notice, and predictability to which the procedural operations of the courts should aspire? Second, to what degree should the judicial exercise of inherent authority be constrained by the existence of written rules, approved at least in part by legislative or superior judicial actors, that do not explicitly bar the use of inherent power but fill the gaps of authority into which inherent power has traditionally stepped? And third, because the exercise of inherent power is ultimately an exercise of a court's discretion, to what degree do traditional limits on the exercise and review of a court's discretion adequately address concerns regarding the use of inherent power?

A. NOTICE, FAIRNESS, AND PREDICTABILITY

Because inherent power is exercised only in circumstances in which courts believe that existing law does not adequately address the problem at hand,[170] an exercise of this power is invariably

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[169] *See generally* Dobbins, *New Evidence*, *supra* note 3.

[170] *See* Chambers v. NASCO, Inc., 501 U.S. 32, 50 (1991) (noting that courts that use inherent power generally do so because they believe that authority granted under positive law does not adequately reach the circumstances presented in a particular case). *Chambers* arguably disproves this point since it allows courts to exercise inherent power even in circumstances covered by authority granted under positive law. That said, the *Chambers* Court and courts in related cases that use inherent power generally do so because they believe that authority granted under positive law does not *adequately* reach the circumstances presented in a particular case.

conducted in unusual circumstances. There are, of course, "repeat" situations in which parties are likely to anticipate that courts will call on their inherent power to accomplish a particular procedural goal. In those circumstances, past cases may provide limits on the exercise of inherent authority that are not present in cases of first impression within particular jurisdictions. In other situations, however, inherent power might be re-invoked despite earlier cases having poorly—or having entirely failed—to articulate the rationale for and the scope of inherent power. As Felix Stumpf notes:

> [S]tate appellate courts sometimes suggest in their opinions that the exercise of inherent powers is so plainly understood, accepted, and self-evident that no justification for its future use in specialized or individual situations is required. As a result, when the doctrine is poorly articulated and justified conceptually, practitioners may be unsure of its application in other contexts of a similar nature. Almost every state supreme court has rendered an opinion that summarily mentions the use of inherent powers in a recital of past decisions without noting how and why the results that were reached were alike, unique, or justified by the facts.[171]

The long history of inherent power in the United States and the English courts before them may help to explain this cavalier attitude toward the use of such unfettered authority. Because these principles have been relied upon repeatedly in the past, there is a general understanding of the circumstances in which a court may call on its inherent authority to justify a procedural decision. That comfort level, however, can lead to a lack of care and an excessive reliance on inherent power in circumstances in which either (a) its exercise should be more carefully explained and circumscribed, or (b) its exercise should defer to written rules of procedure that may more clearly guide the appropriate outcome.

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[171] STUMPF, *supra* note 43, at 2.

B. INTERACTION WITH WRITTEN RULES

As the dispute between the majority and the dissents in *Chambers* demonstrates, the development of written rules and statutes in areas of judicial administration has reduced the need for courts to rely on inherent authority.[172] At the same time, however, the development of those rules has not precluded courts from relying on this authority, even in areas in which rules would seem to dominate the field. Notably, the majority in *Chambers* strongly endorsed the ability of federal courts to rely on inherent power—even when written rules constrained that power—and put inherent power on a stronger footing as a source of sanctioning power than before the decision.[173]

Many commentators have questioned the appropriateness of judicial use of inherent authority in cases where written law seems to provide substantial guidance in resolving a procedural problem.[174] As these commentators suggest, written rules address many of the concerns associated with the exercise of inherent power.[175] Written rules provide notice to parties about how a court's authority is going to be exercised, articulate relevant standards that govern the exercise of authority for all to see (and to criticize or seek to change, should the need arise), and provide guidance for appellate courts in determining whether a trial court's exercise of discretion in a particular case was appropriate or not.[176] When a court resorts to inherent power despite these written rules, it sacrifices those benefits for the convenience associated with the exercise of inherent power. Inherent power becomes "a stopgap remedial judicial device instead of a comprehensive method of resolving controversies or implementing legal solutions."[177]

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[172] Meador, *supra* note 6, at 1806 ("Because of the proliferation of written procedural rules in the late twentieth century, however, today's judicial case management—especially in the pretrial stage—need not rest on inherent authority.").

[173] *See, e.g.*, FED. R. CIV. P. 11; FED. R. CIV. P. 26; FED. R. CIV. P. 37; *Chambers*, 501 U.S. at 42–43 n.8.

[174] *See* Jordan, *supra* note 18, at 312 n.5 (collecting commentary on the role of inherent power in an increasingly rules-dominated federal system).

[175] *See, e.g.*, *id.* at 312 (discussing the implications that written rules have on inherent power).

[176] *See, e.g.*, *id.* at 318 (explaining the benefits of written rules, including the benefit of uniformity).

[177] STUMPF, *supra* note 43, at 2.

As Justice Kennedy's dissent in *Chambers* argues, inherent power should be exercised with caution, used only when absolutely necessary to accomplish the underlying needs of the court and always with sensitivity to the purposes underlying relevant written rules.[178] Ultimately, of course, the majority in *Chambers* disagrees with Justice Kennedy's assessment of whether inherent power is "necessary" in that case.[179] But even the majority conceded that "the exercise of the inherent power of lower federal courts can be limited by statute and rule," even if "we do not lightly assume that Congress" implicitly rejects the utility of long-standing authority like the implied powers.[180]

Despite the majority's conclusions in *Chambers*, the continuing trend in procedural law over the last century has been a proliferation of written rules of procedure. "We are now conditioned to think of procedural requirements primarily in terms of the rules, and . . . we also think of procedural reform in terms of amendments to those rules."[181] Given that trend, inherent power is something like a guest that has overstayed his welcome.[182] If inherent power is to play a continuing role in the development of procedure without drawing this kind of criticism, courts will need to use it in a narrower range of situations and explicitly ensure that its exercise does not ignore the input of political (or higher judicial) entities.

C. DISCRETION AND THE REVIEW THEREOF

We might rely on appellate review of decisions relying on inherent power to address and avoid the improper or excessive use of inherent authority. That review, however, is complicated by two distinct difficulties: (a) the difficulty of obtaining appellate review, and (2) the difficulty of applying appellate review.

First, the exercise of inherent power may, to some litigants, bear a resemblance to death by a thousand cuts. Because inherent power

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[178] *Chambers*, 501 U.S. at 64 (Kennedy, J., dissenting) ("Inherent powers are the exception, not the rule, and their assertion requires special justification in each case. . . . [A]t the very least[,] a court need not exercise inherent power if Congress has provided a mechanism to achieve the same end.").

[179] *Id.* at 50 (majority opinion) (finding the exercise of inherent authority appropriate).

[180] *Id.* at 47 (first citing *Ex parte* Robinson, 86 U.S. 505, 511 (1873); and then citing Weinberger v. Romero-Barcelo, 456 U.S. 305, 313 (1982)).

[181] Jordan, *supra* note 18, at 311.

[182] Meador, *supra* note 6, at 1806.

plays such a dominant role in trial court management of the litigation process, it is often applied in circumstances in which immediate appellate review is unavailable.[183] The lack of mechanisms for interlocutory appeal from, for instance, trial court decisions on motions in limine or determinations regarding trial or witness scheduling prevents serious appellate review of inherent power determinations at those early stages of a proceeding.[184] In the end, though, the unavailability of appellate review of some decisions will be assuaged by the sheer volume of decisions: at some point, parties will decide that the use of inherent power for case management should be raised on appeal.[185]

At that point, however, the second problem presents itself: while appellate courts are familiar with review for abuse of discretion, the underlying discretion exercised by trial courts in inherent power cases is qualitatively different than that exercised when the trial court has made a *substantive* discretionary determination. Appellate review is therefore likely to look different as well. After all, a court considering a motion for a new trial has discretion whether to grant the motion or not.[186] The appellate court then must assess whether the trial court considered relevant factors in making its decision. Ultimately, the call comes down to whether the verdict was "against the great weight of the evidence."[187] If so, and the trial

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[183] The federal system limits appeals—with few exceptions—to appeals from "final decisions" of the district courts. *See* 28 U.S.C. § 1291 (2012). As a result, "interlocutory appeals—appeals before the end of district court proceedings—are the exception, not the rule." Johnson v. Jones, 515 U.S. 304, 309 (1995). While state practices vary, it is generally difficult to get immediate appellate review of procedural decisions made before trial in the state courts as well. *See, e.g.*, OR. REV. STAT. § 183.480(3) (2017) (permitting interlocutory appeals in contested cases only if a party demonstrates "substantial and irreparable harm"); Joan Steinman, *The Puzzling Appeal of Summary Judgment Denials: When Are Such Denials Reviewable?*, 2014 MICH. ST. L. REV. 895, 932 n.134 (2014) (discussing Texas limits on review of orders denying summary judgment).

[184] *See, e.g.*, Narouz v. Charter Comm'cns, L.L.C., 591 F.3d 1261, 1265–66 (9th Cir. 2010) (rejecting interlocutory appeal of trial court's pretrial order on motion to strike and denial of extension due to parties' settlement agreement); Ultra-Precision Mfg. Ltd. v. Ford Motor Co., 338 F.3d 1353, 1356 (Fed. Cir. 2003) (rejecting effort to certify rulings on motions in limine for interlocutory review).

[185] *See, e.g.,* United States v. W. Elec. Co., 46 F.3d 1198, 1207 n.7 (D.C. Cir. 1995) (denying appeal of exercise of inherent power).

[186] FED. R. CIV. P. 59(a)(1) ("The court *may*, on motion, grant a new trial on all or some of the issues . . . ." (emphasis added)).

[187] WRIGHT & MILLER, *supra* note 1, § 2806.

court nonetheless refused to grant a new trial, it would be an abuse of discretion.[188]

A trial court's decision to exercise its inherent powers to sanction, to stage witnesses in a particular order, or to govern the course of discovery is very different. To the degree that "discretion" can be defined as "the power to choose between two or more courses of action, each of which is considered permissible,"[189] the decision to exercise inherent power is more than merely discretionary. It is unconstrained. A court resorts to inherent power in circumstances in which there are no particular options to choose between; there is simply a perceived need to act. That court is left to call upon its inherent power in deciding whether to exercise that power, the scope of options available to it in doing so, and which of the available options it has to choose.

There is, to be sure, a spectrum of discretion that ranges from decisions that are wholly unconstrained to decisions that are discretionary, with a range of possible decisions narrowly limited by existing case law. Consider, for instance, a decision to grant a motion for dismissal on grounds of forum non conveniens. Is such a decision wholly unconstrained, given that there is no positive law to guide it? Are such decisions, by virtue of accumulated case law regarding FNC, as constrained as discretionary determinations under Rule 59? Or are such decisions somewhere in between? Given that the scenarios presented in FNC cases are revisited on many occasions, the exercise of inherent power in these cases has been revisited repeatedly.[190] Decisionmaking in FNC cases, therefore, is an example of

> repeated discretionary decisionmaking over time, within a particular institution, [which has led] . . . to a process of accumulating guidelines, in something of the manner of the "institutional history" that Dworkin saw as an essential component in the decisionmaking

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[188] *See id.* § 2819 (referencing the holding in Taylor v. Wash. Terminal Co., 409 F.2d 145, 147 (D.C. Cir. 1969)).

[189] Friendly, *supra* note 33, at 754 (citing H. Hart & A. Sacks, The Legal Process 162 (1958) (unpublished manuscript)).

[190] *See, e.g.*, *supra* Section III.E.

> balance along with the principles emerging from institutional and background morality.[191]

In this way, the exercise of inherent power in the context of FNC decisions is quite well-developed. The accumulated case law has provided courts with a decisionmaking structure to which they can turn when they are deciding whether and how to implement the doctrine in a particular case.[192] That is not necessarily the case for appellate review of most other kinds of inherent power-based trial court decisions.

To be sure, appellate courts have not had an overwhelmingly difficult time when faced with the task of reviewing a trial court's exercise of inherent power. They review these decisions for abuse of discretion, applying the standard scope of appellate analysis in determining whether the trial court considered relevant factors appropriately.[193] This process is made all the easier, of course, when reviewing cases where accumulated case law sets out the relevant factors in some detail. The problem, however, is that these multiple layers of discretionary decisionmaking tend to obscure the underlying decision to use inherent power in the first place. The analysis on appeal generally focuses on whether, having chosen to use inherent power, the trial court properly exercised its authority to do so.[194] An honest appraisal of the use of inherent power on appeal, however, would look not merely at the last decision—whether the trial court's *use* of inherent power was an appropriate exercise of its discretion—but at the preceding question as well—whether the trial court's *reliance* on inherent power was appropriate? Without that kind of rigorous review of the use of inherent authority, there is little hope of limiting the use of this authority to truly necessary circumstances or of ensuring that it is exercised in a manner that ensures parties are fully aware of the considerations associated with its use.

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191 Lacey, *supra* note 92, at 644 (footnote omitted).

192 *See supra* Section III.E.

193 *See, e.g.*, Ryan v. Astra Tech, Inc., 772 F.3d 50, 56 (1st Cir. 2014) (reviewing sanctions imposed under the court's inherent power for abuse of discretion).

194 *See, e.g.*, *id*. (stating simply that trial courts have inherent power before turning to detailed analysis of how the trial court used that power).

V. THE INHERENT AND SUPERVISORY POWERS CONSTRAINED

Any exercise in drafting laws—whether constitutions, statutes, or rules—is an exercise in predicting and attempting to guide the future. It is necessarily an imperfect process; any effort to insist on written law as a basis for every procedural and substantive decision is bound to devolve into either futility or an exercise in self-deception. It would be impossible, therefore, to insist on written rules to guide every exercise of inherent and supervisory authority. This power is summoned to function where no written rules exist, and constraining its exercise to specific circumstances would unnecessarily limit the procedural flexibility of the courts.[195] Viewed through this lens, inherent authority is a necessary "escape hatch" that allows courts to control the process of litigation in circumstances that are not addressed or inadequately addressed by written rules.[196]

At the same time, however, allowing inherent power to be exercised without constraint threatens to surprise litigants by subjecting them to unknown and unclear standards and limits the ability of appellate courts to properly assess the exercise of that authority by the court below. Furthermore, allowing the authority to be used without reference to existing written procedure ignores the important and useful role of written procedure in the judicial

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[195] As Meador notes, "much of what trial courts do, and indeed must do, in the conduct of their business is not provided for in any rule or statute and thus necessarily rests on inherent authority." Meador, *supra* note 6, at 1806. This idea was echoed by Frankfurter and Landis nearly a century ago in discussing the "judicial power" in the form of judicial control over contempt:

> [W]e are . . . dealing with a process, the activities of which must be left unhampered by particularization, in order to be able to accommodate themselves to the changing demands of the administration of justice. The guiding consideration underlying the constitutional provisions for the judiciary was put presciently by Madison: "Much detail ought to be avoided in the constitutional regulation of this department, that there may be room for changes which may be demanded by the progressive changes in the state of our population."

Frankfurter & Landis, *supra* note 21, at 1017; *see also* Jacob, *supra* note 4, at 52 (in discussing the British court equivalent of inherent powers—the "inherent jurisdiction of the court"—noting that the use of this power is "a necessary part of the armoury [sic] of the courts to enable them to administer justice according to law," and that it also "operates as a valuable weapon in the hands of the court to prevent any clogging or obstruction in the stream of justice").

[196] *See* STUMPF, *supra* note 2, at 8 (noting that inherent powers are for courts "to do those things that are reasonable and necessary for the administration of justice").

system. With written procedure, parties are aware of the most likely procedural choices and the considerations that factor into making those choices. In addition, because written procedures possess political legitimacy, attention to those procedures will necessarily add to the political legitimacy of courts in developing new procedural approaches to problems.

This Article therefore suggests that courts use the following process when they find themselves in a situation in which it seems appropriate to use "inherent" or "supervisory" power. First, any court should be aware that it is about to enter an area of law that lacks standards and poses a risk of surprise and unfairness to parties. In such circumstances, courts have an obligation to identify why it is necessary to resort to that power rather than to some existing authority that may provide the necessary authorization for—or at least, some guidance regarding—the use of inherent authority in the circumstances presented.[197]

In considering whether the use of inherent authority is necessary, a court should therefore take care to search all relevant written authority for guidance regarding either (a) the exercise of power without resort to inherent authority, or (b) the exercise of inherent authority, albeit in a manner constrained by articulated written rules. It is important to leave courts the option to use their inherent authority, even in the presence of relevant written procedures. An excessively strict "rule of necessity" that rejects inherent power in the presence of marginally relevant written rules would lead courts to ignore obvious implications of those rules in order to take advantage of the flexibility of inherent power. The point here is not to force courts to avoid using their inherent power altogether; it is to encourage them to use that power in a manner that is informed by articulated standards and that capitalizes on the benefits of a procedure that insists on such standards, in terms of both appellate review and political legitimacy. Of course, if a court concludes that written procedures actually do provide all necessary

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[197] In a case addressing the exercise of inherent power in a governmental body or judicial power context when the lower court had ordered County Commissioners to provide adequate court facilities, the North Carolina Supreme Court suggested a restrained approach to the exercise of inherent power: "[D]oing what is 'reasonably necessary for the proper administration of justice' means doing *no more* than is reasonably necessary." *In re* Alamance Cty. Court Facilities, 405 S.E.2d 125, 132 (N.C. 1991).

guidance in resolving the legal problem presented, the court need not press forward with the use of inherent power.[198]

This step serves at least two important purposes. First, by requiring courts to go through the exercise of reviewing positive law before wielding their inherent power, this step will necessarily place a hurdle in the way of decisions to use those powers. Second, when courts articulate why positive law does not provide a sufficient basis for judicial control over parties, legislatures can choose to use those judicial statements as a roadmap for changes to positive law that are intended to constrain the use of inherent power in a similar case.

Once a court decides that the exercise of inherent power is appropriate and necessary given gaps in relevant written procedures, the court then should articulate the standards upon which it is relying in deciding whether and how to exercise its inherent authority. This process for identifying and limiting the exercise of inherent authority should be done with the knowledge and input of the parties. This adequately ensures that parties are not surprised and potentially prejudiced by a judicially-created solution to a problem. The "notice" part of this step may in some situations be relatively formal and require considerations of procedural due process;[199] in other situations, it may require something as simple as a conversation between the court and parties at a scheduling or status conference.

It may be worthwhile to look at contrasting examples of how inherent power might be exercised in a manner consistent with these principles. Consider, for instance, *In re Atlantic Pipe Corp.*,[200] in which the U.S. Court of Appeals for the First Circuit reviewed a district court's exercise of inherent power to require parties in a mass tort case to mediate. The court noted that although the district court could use its inherent power to require participation in

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[198] Such an approach is arguably in tension with *Chambers v. NASCO, Inc.*, in which the Court held that the use of inherent authority to sanction was not improper despite the existence of statutory and rule-based mechanisms for issuing sanctions under the circumstances presented in that case. 501 U.S. 32 (1991). However, *Chambers* might have effectively complied with this rule by explicitly noting the statutory gap (or ambiguity) that left the Court willing to allow trial court reliance on inherent power despite the presence of positive law relevant to the analysis.

[199] *See, e.g.*, STUMPF, *supra* note 43, at 48–49 (collecting and describing cases in which state courts have relied on procedural due process concerns to insist on notice and an opportunity to respond prior to a trial court's imposition of sanctions pursuant to the exercise of inherent power).

[200] 304 F.3d 135 (1st Cir. 2002).

mediation, it could only do so if it carefully examined whether written procedures—including local rules, statutes, and the Federal Rules of Civil Procedure—applied to the question.[201] After finding such written procedures inapplicable, the First Circuit examined the district court's exercise of inherent power. It reviewed prior cases that invoked inherent authority to determine whether its use was appropriate as a means of requiring participation in mediation and outlined the scope of those cases in which such an exercise of inherent authority would be appropriate in the future.[202] Although it did not follow this Article's recommended approach precisely, *In re Atlantic Pipe Corp.* offers a good example of how appellate courts can encourage a similar approach to the exercise of inherent power.[203] Hopefully, future First Circuit district courts will engage in this kind of analysis before resorting to the use of inherent authority.[204]

Contrast this explanatory approach to the use of inherent power with the trial court decision reviewed by the Mississippi Supreme Court in *Watts v. Pennington*.[205] The trial court imposed upon the parties a time limit for reporting a settlement to the court.[206] The parties settled but missed the deadline, and the trial court relied on its inherent power to impose sanctions of nine hundred dollars each on counsel for the defendant and its insurance company.[207] The

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[201] *See generally id*.

[202] *Id*. at 140.

[203] *Id*. at 143–45.

[204] Somewhat ironically, perhaps, an appellate court is relying on its inherent power when it requires district courts to fully explain their reasoning when issuing an order. *See* Sowell v. Butcher & Singer, Inc., 926 F.2d 289, 295 (3d Cir. 1991) (exercising its supervisory powers to require a district courts to sufficiently explain its reasoning before entering a directed verdict).

[205] 598 So. 2d 1308 (Miss. 1992).

[206] *Id*. at 1309 (discussing the trial court's pretrial conference date of approximately three weeks before trial). In announcing that date, the trial court emphasized that "each party and attorney should consider that [the pre-trial conference] . . . is the last opportunity to settle and that 'the jury is in the box.' When the pre-trial and related matters are concluded, your case will either be settled or definitely for trial!" *Id*. Despite the trial court's grant of a brief extension to settle after the pretrial conference, the parties did not actually settle the case until just before the close of business the day before trial. *Id*. at 1310.

[207] This sanction is similar to the one that the U.S. Court of Appeals for the Third Circuit reviewed in *Eash v. Riggins Trucking Inc.*, 757 F.2d 557 (3d Cir. 1985). In that case, the trial court sanctioned defendant's counsel $390 (the cost of impaneling the jury) for his eve-of-trial offer to settle the case despite plaintiff's repeated efforts, well before trial, to initiate settlement discussions that were within the scope of defendant's ultimate offer. *Id*. at 559. While the Third Circuit affirmed the trial court's power to impose such a sanction, it

Mississippi Supreme Court reversed.[208] While it emphasized that the trial court had substantial inherent power to manage its docket and calendar, it noted that the state's trial court rules gave parties until 5 PM the day before trial to report settlements.[209] In light of that positive law, the Mississippi Supreme Court concluded, the trial court lacked authority to impose sanctions for failing to comply with a shorter time frame.[210]

The Mississippi trial court was certainly frustrated with the defendant and its counsel—and perhaps rightfully so. Had it stopped to consider whether the exercise of its inherent authority to sanction was necessary and appropriate in light of existing rules, however, the trial court may well have been on stronger footing in imposing sanctions. One can imagine circumstances in which unique considerations—the difficulty of assembling a jury, for example, or the complexity of pretrial negotiations—might merit short-circuiting longer time periods established by rule. And the trial court is in the best position to evaluate those unique considerations. Under the circumstances of *Watts*, however, the Mississippi Supreme Court approached its review with the kind of deliberation that seems warranted in essentially every inherent power case.

This suggested process addresses each of the concerns set out in Part IV. First, the notice requirement will necessarily address fairness and notice concerns by providing parties with an opportunity to weigh in on whether, and—perhaps more importantly—on *how*, a court should use inherent power in resolving the legal issue before it. While this does not guarantee fairness, it at least provides parties with an early opportunity to point out potential unanticipated effects of a court's exercise of its authority or to draw the court's attention to written principles that might constrain (or provide a stronger basis for) the court's action.[211] Second, by requiring courts to specifically address the effect of

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remanded because the trial court had not notified counsel of the possibility of monetary sanctions for his delayed agreeability. *Id.* at 564, 570–71.

[208] *Watts*, 598 So. 2d at 1313.

[209] *Id.* at 1311.

[210] *Id.* at 1312.

[211] Robin Effron has argued for the use of administrative-law-like rulemaking procedures in connection with the exercise of judicial discretion within the limits of articulated rules. *See* Robin J. Effron, *Reason Giving and Rule Making in Procedural Law*, 65 ALA. L. REV. 683, 698 (2014) (articulating a notice-and-comment process in the context of a highly unconstrained area of procedural law).

positive law on the exercise of inherent power, this process ensures that courts specifically articulate whether written procedures address the question at issue and that courts incorporate or at least acknowledge those written procedures and the implications thereof. In other words, by imposing this obligation, the process recognizes the importance of linking inherent power to written rules where possible but allows courts to resort to inherent power when necessary. It also facilitates legislative correction when desired (and when it does not run up against constitutional constraints on the judicial power under the relevant constitution). Third, in requiring a court to specifically articulate the considerations relevant to its decision to use inherent power, this process improves the quality and scope of appellate review. With a clearly stated set of considerations associated with the exercise of inherent power, the appellate court can better identify and correct improper statements of law relating to the exercise of that power.[212] It also allows appellate courts to conduct more easily abuse of discretion analyses of each stage of a lower court's exercise of this authority—not only the decision about how to exercise inherent power, but about whether to exercise it at all. The obligation to articulate the conditions precedent to the exercise of authority has additional value in improving predictability in the exercise of this power for courts and litigants that face similar problems in the future.

Finally, and more generally, the imposition a somewhat burdensome process on a court's exercise of inherent power would likely, and appropriately, discourage its cavalier use. Because the use of that authority has been so prevalent in the past, it is often too easy for courts to rely upon it as a source of authority in circumstances where they feel compelled to act. The ease of its use also means that courts often fail to consider whether positive law offers a better source of authority or, for that matter, whether positive law imposes a limit on the court's proposed use of inherent power. A more deliberate use of inherent power would help to ensure that its exercise is limited to those circumstances in which its application is truly necessary, not merely convenient.

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[212] A trial court's articulation of the circumstances appropriate to the use of its inherent powers in similar circumstances would be a matter of law, and reviewable on appeal pursuant to a de novo standard of review. This legal review would help improve the body of law underlying the exercise of inherent power in particular circumstances, even though the actual balancing of the relevant factors by the lower court would still be reviewed for abuse of discretion.

The procedural obligations suggested here offer a more flexible solution to the problems of inherent power than that advocated by Samuel Jordan, who suggests that Rule 1 of the Federal Rules of Civil Procedure should be amended to expressly preempt the use of inherent power.[213] Such preemption would leave behind no safety net—at least in the federal context—for circumstances in which existing rules provide little guidance to courts facing procedural quandaries. In such circumstances, courts would be tempted to fill the gap with convoluted interpretations of existing rules in an effort to accomplish the purposes once left to inherent power. To be sure, the inherent power doctrine could benefit from narrowing; as Jordan notes, rules are only meaningful "if the rules themselves are meaningful," and "a broad understanding of the inherent power makes the rules less meaningful"[214] by allowing courts an easy path around the implication of written rules. To narrow the principle out of existence, however, fails to acknowledge the countervailing values associated with the exercise of discretion by the courts.

The proposal above—under which inherent authority may be used only after an explicit evaluation of the appropriateness of that use and of the conditions precedent to the exercise of inherent authority in a given case—strikes an appropriate middle ground between too much codification and too little. The inherent authority of courts is too important to the operation of both federal and state courts throughout the nation to jettison completely. By providing an escape valve when positive rules are ambiguous or missing, inherent power improves judicial flexibility and, in appropriate circumstances, fairness. Despite its value, however, courts' exercise of inherent power should not be unconstrained. Such a lack of constraint is not only inconsistent with the trend toward written procedure but encourages the proliferation of proposals to eliminate it altogether—an approach that takes the codification of procedure too far. Even in today's courts, there is a role for procedural common law. Because that role is too often unconstrained by appropriate concerns for fairness, notice, and predictability, however, establishing a process that requires courts to articulate standards for the use of these ancient doctrines benefits both courts and litigants.

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213 Jordan, *supra* note 18, at 323.

214 *Id.* at 319.

VI. CONCLUSION

Courts rely on inherent power in a variety of ways. That power can and should be used as a refuge to which courts may retreat when faced with procedural problems that cannot be solved by reference to positive law. But because it is inherent and so easily accessible to courts, inherent power also can be wielded as a convenient tool in circumstances when it is unnecessary or in ways that are poorly defined or largely unconstrained. When inherent power is used carelessly, litigants who lack notice may be treated unfairly (or at least feel that they have been), reviewing courts are unable to appropriately evaluate the propriety of a lower court's reliance on that power, and future courts that want to act fairly and consistently may find it impossible to discern the relevant standards necessary to carry forward into future cases.

Courts following the process set forth in this Article can avoid the risk to principles of fairness, notice, and predictability posed by the indiscriminate use of inherent power. By carefully identifying why resort to inherent power is necessary and surveying existing law to ensure that reliance on that power, rather than positive law, is necessary, courts will constrain its exercise only to circumstances when it is truly necessary. And in those rare circumstances where reliance on the inherent power is necessary, courts will improve notice to litigants and appellate court control by simultaneously and specifically articulating the standards they rely on when exercising this fundamental power.

While inherent power can be used in ways that are at odds with core principles of judicial process in the United States, that power is a longstanding reflection of the discretion that is inherent in, and necessary to, the process of judging. The key to avoiding its improper use is not a wholesale abandonment of the inherent power, but using it in a constrained manner that avoids its excesses while retaining the flexibility that is an inherent part of an efficient and effective judicial process.