

OF HATS AND ROBES: JUDICIAL REVIEW OF NONADJUDICATIVE ARTICLE III FUNCTIONS

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ABSTRACT

*We are accustomed to thinking of Article III courts and judges deciding cases and controversies. But, federal judges and courts have historically also engaged in official but nonadjudicative activities. In addition to a history of federal judges serving on nonjudicial commissions, federal judges and the Supreme Court participate in the rulemaking process for the federal procedural and evidentiary rules. Although some argue to the contrary, the Supreme Court has approved such arrangements in the face of separation of powers objections. Since Article III officers and courts perform nonadjudicative duties, the question arises of how federal courts who address a challenge to these nonadjudicative actions should review them. This article focuses on perhaps the most common enlistment of Article III entities in nonadjudicative activities: the creation of the Federal Rules of Civil Procedure (and other federal rules). Since these rules were created by federal judges, is some measure of deference due them when their validity is challenged? The federal procedural rulemaking apparatus resembles federal agency rulemaking, and in that context the Supreme Court has established a strong deference to agencies under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.* This article concludes that the federal courts as adjudicators should not defer to the federal judges or courts as rulemakers, because to do so deprives parties of the opportunity to challenge a federal rule in an adjudicated proceeding with the procedural protections that accompany litigation. Finally, the same reasons that lead to a rejection of deference in this context apply equally to other agency rulemaking, leading to the implication that *Chevron* deference in general should be rejected.*

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INTRODUCTION

We are accustomed, naturally enough, to think of the judicial branch of the federal government as performing judicial functions. It is, after all, the “judiciary.” And federal courts do indeed invest most of their time and energy to the adjudication of cases. But federal judges also perform other functions. Some of these functions, things such as working with a court clerk to manage a docket, are comfortably within the realm of what we would think of as judicial, even though they are not efforts to adjudicate a particular case. Beyond these nonadjudicative yet judicial functions lie other activities that may not even be judicial, let alone adjudicative, such as reporting on the condition of the federal courts to Congress.¹ That there are such nonadjudicative functions and that they are within the role established for the federal courts by Article III is clear from historical practice and caselaw. But when a federal judicial entity—a judge individually or a court—has acted in a nonadjudicative capacity, how should the federal courts review those prior actions when they are later challenged in litigation? Does or should an Article III court acting as a court (i.e., in adjudication) give some measure of deference to the decisions of Article III actors who engaged in nonadjudicative activities? The posture of such a review mimics that of judicial review of the actions of an administrative agency, and in that context there is a well-developed body of law that sets deferential standards of judicial review. But the caselaw proves to be inconsistent as to how the federal courts should review their own prior nonadjudicative actions. Moreover, there are theoretical problems with either giving deference to prior nonadjudicative activities or failing to do so. If in litigation a strongly deferential standard of review is applied, litigants’ access to an adjudicative judicial review is curtailed. On the other hand, if a federal court reviews nonadjudicative Article III activities without significant deference, it is affording the federal courts less deference than it does an administrative agency in a comparable situation.

This article takes up these issues. Rather than attempt to cover all instances of nonadjudicative Article III functions, it focuses on one of the most common and important: the role of the federal judiciary in promulgating federal rules.² In particular, it examines

1. See *infra* note 130 and accompanying text.

2. The body of court-promulgated federal rules consists of the Federal Rules of Civil,

judicial review of the validity of a federal rule. When, in litigation, a party challenges a federal rule as not being within the grant of authority of the Rules Enabling Act,³ should the court give the rule a presumption of validity since it was drafted and recommended by a group of federal judges and was transmitted to Congress by the Supreme Court? Should the study and adoption of the rule give it a near-absolute validity? This article begins in Part I by setting out the basics of Article III's grant of judicial authority to decide cases and controversies. This core of federal judicial power helps to establish a normative baseline against which we can compare less frequently considered nonadjudicative functions. Part II then briefly surveys the landscape of nonadjudicative Article III functions, examining both historical practice and caselaw on the propriety of Article III judges engaging in nonadjudicative activities. This places the role of Article III judges in creating the federal rules in a broader context. Part III turns to the question of judicial review of nonadjudicative activities, looking at how the lower federal courts and the Supreme Court have reviewed challenges to federal rules. Part IV discusses how federal courts should review the work of federal judges and courts tasked with drafting and promulgating the federal rules. It concludes that a strong regime of deference, such as the one that exists under the analogous doctrine of *Chevron* deference⁴ would improperly deprive litigants of the opportunity to contest the validity of a federal rule before an Article III court sitting as a court—an adjudicative body. Finally, it considers whether a failure to give deference to the federal judges who are the federal rulemakers can be reconciled with the deference required to be given to administrative agencies under *Chevron*.

I. ARTICLE III'S CORE: CASES AND CONTROVERSIES

Article III creates the judicial branch of the federal government. Its language calls for this branch to perform adjudicative functions. As we shall see, there is room within its confines for nonad-

Appellate, Criminal, and Bankruptcy Procedure; and the Federal Rules of Evidence. *See generally* 28 U.S.C. § 2072 (2012) (rules of procedure and evidence); *id.* § 2075 (bankruptcy).

3. 28 U.S.C. §§ 2071–77 (2012).

4. *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984).

judicative functions as well, but the core of its grant of power anticipates a branch that adjudicates.

The text of Article III presupposes an adjudicative branch. The entities created or allowed by Article III are described as “Courts”—“one supreme Court, and . . . such inferior Courts as the Congress may from time to time ordain and establish.”⁵ This contrasts with the creation of a “Congress” and a “President” in Articles I and II.⁶ And unsurprisingly, in Article III the officers holding positions in these “Courts” are called “Judges.”⁷ And what do these judges in these courts do? Their “judicial Power shall extend” to deciding “Cases” and “Controversies.”⁸ Thus, in a relatively straightforward way, a federal judiciary is created. These propositions are pedestrian and uncontroversial. Article III establishes courts staffed by judges who do the thing we expect judges to do—decide cases and controversies. Although some argue Article III allows for a larger role than merely narrowly deciding disputes, no one doubts that at the core of the Article III role is an adjudicative function.

*Marbury v. Madison*⁹ reveals the centrality of cases and controversies to the role of the federal judicial branch. *Marbury* established the power of the Court to review legislation and executive action and declare them unenforceable as unconstitutional,¹⁰ but a common understanding of *Marbury* is that Article III “authorized the Supreme Court to invalidate acts of the coordinate branches of government only when necessary to resolve particular disputes between the parties.”¹¹ Under this “classical view of constitutional adjudication” the federal courts are “entitled to decide constitutional issues only when the facts of a particular case *require* their resolution for a just adjudication on the merits.”¹² Interpreting the

5. See U.S. CONST. art. III, § 1.

6. See *id.* art. I, § 1; *id.* art. II, § 1, cl. 1.

7. See *id.* art. III, § 1 (“Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour . . .”).

8. See *id.* art. III, § 2, cl. 1.

9. 5 U.S. (1 Cranch) 137 (1803).

10. See *id.* at 177–78 (“It is emphatically the province and duty of the judicial department to say what the law is So if a law be in opposition to the constitution . . . the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.”).

11. See Girardeau A. Spann, *Advisory Adjudication*, 86 TUL. L. REV. 1289, 1324 (2012).

12. See *Desist v. United States*, 394 U.S. 244, 258 (1969) (Harlan, J., dissenting).

Constitution is not an end in itself for the federal courts but is rather a necessary incident of their true mission of deciding lawsuits:

The power and duty of the judiciary to declare laws unconstitutional is in the final analysis derived from its responsibility for resolving concrete disputes brought before the courts for decision; a statute apparently governing a dispute cannot be applied by judges, consistently with their obligations under the Supremacy Clause, when such an application of the statute would conflict with the Constitution. . . . But this vital responsibility, broad as it is, does not amount to an unlimited power to survey the statute books and pass judgment on laws before the courts are called upon to enforce them.¹³

Despite this “classical” understanding of *Marbury*, there is a dispute regarding how far beyond the core of deciding disputes—of adjudicating—Article III power extends. While the Supreme Court has not distinguished between “cases,” on the one hand, and “controversies,” on the other hand,¹⁴ some have argued that the terms are distinct and that a power that “extends” to “cases” includes a broader power to exposit general legal principles.¹⁵ Others disagree and maintain that “the word ‘case,’ like the word ‘controversy,’ requires an adversarial suit.”¹⁶ Under this view, Article III power is

13. See *Younger v. Harris*, 401 U.S. 37, 52 (1971) (citation omitted); see also Robert J. Pushaw, Jr., *Article III's Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 NOTRE DAME L. REV. 447, 447–48 (1994) (“[J]usticiability presupposes that a federal judge’s primary function is to resolve disputes, not to declare the law.”).

14. See Shane Pennington, Comment, *Cases, Controversies, and the Textualist Commitment to Giving Every Word of the Constitution Meaning*, 14 TEX. REV. L. & POL. 179, 184–85 (2009) (“Despite the textualist commitment to the idea that ‘each word of the Constitution is to be given meaning,’ constitutional scholars generally do not distinguish between ‘cases’ and ‘controversies’ in the Constitution.” (footnote omitted)).

15. See Pushaw, *supra* note 13, at 449–50.

In the eighteenth century, “case” referred to a cause of action requesting a remedy for the claimed violation of a legal right, in which a judge’s primary role was to answer the legal question presented through “exposition”—the process of ascertaining, applying, and interpreting the law in light of precedent and the facts presented. A dispute between parties was a usual—but not necessary—ingredient of a “case,” and resolving any such disagreement was less important than legal exposition. Thus, Article III contemplated that the federal courts’ main function in federal question, admiralty, and foreign minister “Cases” would be to declare the law in matters of national and international importance.

By contrast, “controversy” meant a bilateral dispute wherein a judge served principally as a neutral umpire whose decision bound only the immediate parties. Hence, the Framers expected federal courts to act chiefly as independent arbitrators in resolving Article III “Controversies,” with any legal exposition incidental.

Id. (footnotes omitted).

16. Martin H. Redish & Andrianna D. Kastanek, *Settlement Class Actions, the Case-or-Controversy Requirement, and the Nature of the Adjudicatory Process*, 73 U. CHI. L. REV.

limited to “cases of a Judiciary Nature,” which “was defined by early American practice and tradition as excluding feigned, nonadversarial suits.”¹⁷ There is also a debate about the proper approach to statutory interpretation, which goes to the question of what it is to be a “judge” and what is the “judicial Power.” Are judges to be mere “faithful agents” of the legislature, devoted textualists who wander not into the eddying streams of policy, or should they use a pragmatic, policy-based approach, becoming a “cooperative partner” in the lawmaking process?¹⁸

The ambiguity as to the extent of judicial creativity was nicely captured by Justice Holmes: “I recognize,” he said, that “judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions.”¹⁹ Regardless of the resolution of these issues, Article III officers are still engaged in adjudicating, even if they sometimes assume a power in that role that extends beyond the strict needs of resolving a concrete controversy between two or more parties. Those who would expand the role of a judge are not calling for him to become a senator or a president. He is still a judge, albeit one with a greater responsibility to shape the law.

The consequences of the limitations of Article III are a “cluster”²⁰ of familiar limitations. Federal courts may not issue advisory opinions; this is the “oldest and most consistent thread in the federal law of justiciability.”²¹ This prohibition “implements the separation of powers prescribed by the Constitution and confines federal

545, 565 (2006).

17. See *id.* at 566 (quoting 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 430 (Max Farrard ed., 1911)).

18. See William N. Eskridge, Jr., *All About Words: Early Understandings of the “Judicial Power” in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990, 991 (2001); see also John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 3–4 (2001). Eskridge concludes that Article III presupposes

an eclectic approach to statutory interpretation, open to understanding the letter of a statute in pursuance of the spirit of the law and in light of fundamental values. Furthermore, the original materials suggest that the founding generation expected judges certainly to trim the letter of the law to protect common law liberties and probably sometimes to expand the letter of the law to unprovided-for cases.

Eskridge, *supra*, at 997.

19. *S. Pac. Co. v. Jensen*, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting).

20. See *Allen v. Wright*, 468 U.S. 737, 750 (1984) (quoting *Vander Jagt v. O’Neill*, 699 F.2d 1166, 1178 (D.C. Cir. 1983) (Bork, J., concurring)).

21. *Flast v. Cohen*, 392 U.S. 83, 96 (1968) (quoting CHARLES ALAN WRIGHT, *HANDBOOK OF THE LAW OF FEDERAL COURTS* 34 (1963)).

courts to the role assigned them by Article III.”²² The party invoking jurisdiction must have standing.²³ This requires that a plaintiff alleges a “personal injury fairly traceable to the defendant’s allegedly unlawful conduct and likely to be redressed by the requested relief.”²⁴ The issue of standing persists across time as the litigation unfolds, and cases that have gone moot must be dismissed.²⁵ Collectively, these doctrines serve to define the judicial role under Article III. Each assesses whether the litigation before the court is sufficiently a case or controversy fit for an Article III court.

One additional point, a truism, before moving on: every action properly undertaken by a federal court is within Article III. Since federal courts are creatures of Article III, this is a mere tautology. Article III entities can perforce only operate properly within Article III. This truism, however, leads to an alluring, ultimately false, and yet nonetheless instructive syllogism: (1) The judicial power extends under Article III only to cases and controversies; (2) the federal courts are therefore limited to resolving “cases and controversies”; (3) if a given activity is not adjudicative, then it is not a case or controversy; and (4) the federal courts therefore cannot properly engage in nonadjudicative functions. As a matter of both historical practice and caselaw doctrine, the syllogism is wrong. Federal courts and judges *have* engaged in nonadjudicative activities across their history and this practice has been upheld in the caselaw.²⁶ The error in the syllogism is in its conflation of judicial power over cases and controversies with adjudicative acts. Not every action of a judge—even those taken in the course of resolving a case or controversy—is an act of adjudication. Some types of activities inhere in being a “judge,” the title Article III gives its officers, but are not acts of adjudication.

22. *Id.*

23. *Allen*, 468 U.S. at 750.

24. *Id.* at 751.

25. *See Lewis v. Cont’l Bank Corp.*, 494 U.S. 472, 477–78 (1990).

Article III denies federal courts the power “to decide questions that cannot affect the rights of litigants in the case before them,” and confines them to resolving “real and substantial controvers[ies] admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.” This case-or-controversy requirement subsists through all stages of federal judicial proceedings, trial and appellate. . . . The parties must continue to have a “personal stake in the outcome” of the lawsuit.

Id. (alteration in original) (citations omitted).

26. *See infra* Part II.B.

II. THE NONADJUDICATIVE ARTICLE III FUNCTIONS OF THE FEDERAL COURTS

The foregoing sets out the core of Article III—deciding cases and controversies. Part II explores the caselaw on, and historical practice of, federal judges' actions that do not involve deciding cases and controversies. It first clarifies what is meant by nonadjudicative functions. It then examines the leading caselaw on the propriety of federal judges engaging in nonadjudicative activities.

A. *The Range of Judges' Activities: Adjudicative and Nonadjudicative; Judicial and Nonjudicial*

Before examining the history of federal judges engaging in official but nonadjudicative activities, it is helpful to explore what judges do. Exploring the range of activities of judges provides a framework for looking at the caselaw and the history of nonadjudicative activities. It is also helpful to differentiate a broader concept of "judicial" activities or functions from the narrower concept of "adjudicative" ones.

Adjudicative functions are activities that lead to the resolution of a legal dispute between two or more parties.²⁷ Such activities are necessary to deciding a case or controversy. They are the things that jump to mind when describing what a judge does: making rulings on motions, admitting or excluding evidence, instructing a jury, and so on. They are necessary to resolving a live adversarial dispute, to doing justice between Able and Baker or between the government and Baker. They are the activities that are indispensable to a judge acting within the strictest interpretations of the doctrines of standing and mootness. Adjudicative functions are simply judges deciding cases.

The phrase "judicial functions" contemplates something broader. There are things that judges do that are not directly involved in deciding a dispute between adversaries. Actions that judges engage in can be placed on a continuum from those that are wholly adjudicative to those that are wholly nonadjudicative:

27. See JOHN FINNIS, *Adjudication and Legal Change*, in 4 PHILOSOPHY OF LAW 397, 399 (2011) ("Adjudication is the effort to identify the rights of the contending parties now by identifying what were, in law, the rights and wrongs, or validity or invalidity, of their actions and transactions when entered upon and done." (emphasis omitted)).

- 1) Instruct the jury.
- 2) Rule on evidentiary questions.
- 3) Rule on motions.
- 4) Set briefing schedule.
- 5) Craft strategic dicta.
- 6) Write local court rules.
- 7) Perform a marriage.
- 8) Hire a law clerk.
- 9) Drive to work.

Functions at the top of the list, such as instructing a jury and ruling on evidentiary questions and motions, are not only judicial but also adjudicative. They are an integral part of resolving a dispute between parties before the court. At the other end of the list are things, such as driving to work, that are only connected to adjudication in a loose “but for” sense (but for driving to work, the judge could not hear the case). Such activities are mere infrastructure supporting the adjudicative function. Judges do them, but they are not “judicial.” Other people—cashiers and accountants and senators—drive to work too but that does not make them judges. While it is necessary for the judge to commute to work, his or her manner of doing so does not affect how he or she adjudicates. He or she will not be a better jurist, nor a plaintiff-favoring or a defendant-favoring one, because he or she drives rather than takes a bus, has an electric car, or has a diesel pickup.²⁸

Toward the middle of the list fall functions that are judicial—they are a part of what judges do and what is expected of judges to do—but are not adjudicative. Judges are expected to select, hire, and supervise clerks and other staff. But hiring a clerk does not involve adjudication between parties.²⁹ Having a clerk indeed

28. There is, surprisingly, caselaw on whether a judge walking to the courthouse is engaged in “official duties.” The defendant in *United States v. Boone* was a most unlucky purse snatcher. 738 F.2d 763, 765 (6th Cir. 1984). His victim was Judge Cornelia Kennedy of the United States Court of Appeals for the Sixth Circuit, who lived in Detroit, but had commuted to Cincinnati, where the Sixth Circuit sits, for oral arguments. *Id.* at 764. She was assaulted on a Sunday afternoon as she was walking to the courthouse to do legal research for a case being heard the following morning. *Id.* The defendant was convicted of violating 18 U.S.C. § 111, which criminalizes one who “forcibly assaults, resists, opposes, impedes, intimidates, or interferes with . . . [a federal official] while engaged in or on account of the performance of his official duties.” *Id.* The entire Sixth Circuit recused itself from the appeal. *See id.* The court, consisting of judges from other circuits, upheld the conviction, finding that an out-of-town judge walking to the courthouse the evening before oral argument to do research was engaged in “official duties.” *See id.* at 765.

29. *See* Martin H. Redish & Uma M. Amuluru, *The Supreme Court, the Rules Enabling*

helps a judge in the adjudicative process, in that a clerk is a useful part of the work environment, but so is a laptop or a cup of coffee. To include all activities judges do in their work environment as a part the adjudicative function generalizes that term so as to deprive it of all conceptual utility. Writing local rules or standing orders likewise is nonadjudicative under this author's definition. While useful or even indispensable, local rules are not created to resolve a particular dispute. They are not written in order to judge between Able and Baker. They are, to be sure, judicial, but they are not adjudicative.

Officiating a marriage is also a judicial function, and federal judges are empowered to do so.³⁰ Some publicity attached, in fact, to Justice Ruth Bader Ginsberg presiding over same-sex marriages.³¹ Interestingly, she is reported to have stated that she acted under "the powers vested in her by the Constitution of the United States."³² This article does not question the authority of Justice Ginsberg or any other federal judge to perform a marriage, but it must be admitted that performing a marriage is decidedly not adjudicative. At a marriage celebration, there is (one hopes) no case or controversy. There is no adversarial posture. The judge does not decide between competing arguments as to whether the marriage should be granted. If the "judicial power" of Article III is limited to only adjudicative functions in a case or controversy, federal judges could not grant marriages.³³

Act, and the Politicization of the Federal Rules: Constitutional and Statutory Implications, 90 MINN. L. REV. 1303, 1323–24 (2006). Redish and Amuluru note that "the federal judiciary may hire law clerks and secretaries, even though neither activity, in and of itself, constitutes adjudication of a case or controversy" because such activities "have no readily discernable impact on the lives of citizens beyond the four walls of the courthouse."

30. Authority to perform a marriage is granted by state law and each state defines those who are officially sanctioned. State law typically lists federal judges. *See, e.g.*, 23 PA. CONS. STAT. § 1503(a)(3), (3.1), (4) (2009) (granting marriage authority to federal district court and bankruptcy judges of the Eastern, Middle, or Western District of Pennsylvania and to Third Circuit judges who reside in Pennsylvania). For a collection of state laws that define who is empowered to perform a marriage, see Robert E. Rains, *Marriage in the Time of Internet Ministers: I Now Pronounce You Married, but Who Am I to Do So?*, 64 U. MIAMI L. REV. 809, 842–77 (2010).

31. *See* Deena Zaru, *Ginsburg Emphasizes 'Constitution' While Presiding over Gay Wedding*, CNN (May 19, 2015, 12:29 PM), <https://www.cnn.com/2015/05/19/politics/ruth-bader-ginsburg-same-sex-marriage/index.html> [<https://perma.cc/6HA5-NYLP>].

32. *Id.*

33. For a longer discussion of why a marriage is not a judgment, see Jeffrey L. Rensberger, *Same-Sex Marriages and the Defense of Marriage Act: A Deviant View of an Experiment in Full Faith and Credit*, 32 CREIGHTON L. REV. 409, 421 (1998).

In the middle of this list is the crafting of strategic dicta. Strategic dicta nicely illustrates the distinction between the adjudicative and the judicial, for it is clearly the latter and by definition not the former. Strategic dicta is language purposefully crafted and inserted in an opinion to accomplish a purpose other than deciding the case. Writing dicta of any kind is a nonadjudicative act. By definition, dicta is *not* a decision of the controversy before the court.³⁴ If the language in question was a part of deciding the case, it would not be dicta. Some dicta is accidental,³⁵ a result of poor writing.³⁶ But some uses, as the use of the term “strategic” suggests, are intentional. Such passages of dicta are “deliberate . . . statements a judge makes knowing them to have no direct precedential weight, but which she nevertheless hopes will be influential.”³⁷ Some use the term “judicial dictum” (as opposed to “obiter dictum”) to refer to purposeful attempts “to guide the future conduct of inferior courts.”³⁸ Given that dicta is identified by its irrelevance to deciding the case before the court, it is not adjudicative—it does not help decide the particular case or controversy. But strategic dicta is cer-

34. The traditional definition of dicta is simply “any portion of the opinion that is inessential to the outcome.” Ryan S. Killian, *Dicta and the Rule of Law*, 41 PEPP. L. REV. 1, 8 (2013). More nuanced views are available. See, e.g., Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953, 1065 (2005) (“[Holdings are] propositions . . . that (1) are actually decided, (2) are based upon the facts of the case, and (3) lead to the judgment. If not a holding, a proposition stated in a case counts as dicta.”).

35. Whether dicta is an accident or not is not always easy to determine, since it turns on the subjective purposes of the author. Two examples of ambiguous intent can be found in the Supreme Court’s personal jurisdiction cases. *International Shoe Co. v. Washington* involved only a corporate defendant, but the Court famously denied the power to a state to “make binding a judgment in personam against an *individual* or corporate defendant with which the state has no contacts, ties, or relations.” 326 U.S. 310, 319 (1945) (emphasis added). And in *Shaffer v. Heitner*, a case involving only quasi in rem jurisdiction, the Court articulated that “*all assertions* of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny.” See 433 U.S. 186, 212 (1977) (emphasis added). Was the Court being sloppy or was it attempting to shape the future by speaking to other bases of jurisdiction such as that based on in-state service? The Court had to hash out the meaning of *Shaffer* in *Burnham v. Superior Court of California*, 495 U.S. 604, 619–20 (1990).

36. For some examples of accidental dicta, see Patrick J. McNulty & Adam D. Zenor, *Corporate Free Exercise of Religion and the Interpretation of Congressional Intent: Where Will It End?*, 39 S. ILL. U. L.J. 475, 497 n.186 (2015) (identifying “sloppy dicta” in a Supreme Court free exercise case).

37. Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2006 (1994). Dorf would include within the definition of the holding of a case any language that is necessary to the rationale. See *id.* at 1998 (proposing “a view of the holding/dictum distinction that attributes special significance to the *rationales* of prior cases, rather than just their *facts and outcomes*”).

38. See *United States v. Bell*, 524 F.2d 202, 206 (2d Cir. 1975).

tainly judicial. Crafting language for use as an escape route in future cases if the court later decides its doctrine has extended too far or, conversely, for use as a ladder to be used in future cases precisely in order to push the doctrine along in the next stage of its ascent is so embedded in the history of what judges in fact do that it cannot rightly be called nonjudicial. Justice Roberts, for example, in *National Federation of Independent Business v. Sebelius*³⁹ ultimately upheld the Affordable Care Act under the Taxation Power, but also wrote that the Act could not be justified under the Commerce Clause.⁴⁰ Since the Act was valid as a tax, it would seem beside the point that it was invalid under the Commerce Clause, yet Justice Roberts took pains to portray his commerce clause analysis as something more than simply dicta.⁴¹ There can be little doubt that Justice Roberts gave “political opponents a win in the case at hand” in order to lay “the groundwork for a far more restrictive view of congressional power in the long run.”⁴² The opinion was “a calculated choice to take a short-term hit in order to craft a larger long-term gain.”⁴³ One may criticize Justice Roberts or applaud him but given that such craftiness dates back to Justice Marshall in *Marbury v. Madison*, one can hardly say he was not acting “judicially.”⁴⁴

39. 567 U.S. 519 (2012).

40. *Id.* at 558, 563.

41. *See id.* at 574–75. For an interesting analysis of Justice Roberts’ strategic opinion writing, see Tonja Jacobi, *Obamacare as a Window on Judicial Strategy*, 80 TENN. L. REV. 763, 799 (2013).

[B]ecause he upheld the individual mandate under the Taxing and Spending Powers, his Commerce Clause analysis would ordinarily be considered dicta, as Ginsburg strongly implied it was. As such, future courts would easily cast it aside. It was vital for Roberts to overcome this strategic difficulty.

Roberts’s extensive Commerce Clause analysis not only constitutes dicta, its inclusion is contrary to norms of judicial minimalism, whereby the Court should only decide the minimum necessary. Furthermore, Roberts’s analysis offends the judicial canon of avoiding rulings on constitutionality wherever possible. Because the ACA was upheld under the Tax Power, it is not only dicta to surmise why it would not also be justified under the Commerce Clause, it would ordinarily be considered inappropriate to do so.

Roberts had an answer to the dicta accusation (if not the other two accusations), and it is there that we see what is arguably the most creative part of his opinion. In two paragraphs justifying why his analysis should not be considered dicta, Roberts developed an entirely new concept of constitutional analysis.

Id. (footnotes omitted).

42. Jacobi, *supra* note 41, at 766.

43. *Id.*

44. “Marshall holds that the Supreme Court has no jurisdiction . . . [and] establishes judicial review of acts of Congress and the hierarchical superiority of the Constitution.”

In summary, judges, including Article III judges, do things that other persons in other occupations also do—drive to work, sharpen pencils, and hire a staff, for example—but we would not call these things judicial. Other activities, such as celebrating a marriage or writing purposeful dicta, are judicial (they are activities that judges historically do in their role as judges) but not adjudicative. These judicial activities are not adjudicative activities because they do not resolve a particular case or controversy. And finally, federal judges do adjudicate cases and controversies. How far along this spectrum from (1) nonjudicial to (2) judicial but not adjudicative to (3) fully adjudicative does Article III extend? May federal judges perform nonadjudicative activities consistent with Article III's case or controversy limitation? The caselaw and historical practice is clear that Article III allows such actions. It is to the caselaw and history that we now turn.

B. *The Law and History of Article III Nonadjudicative Activities*

*Mistretta v. United States*⁴⁵ is the leading case on the propriety of Article III judges engaging in nonadjudicative activities. It provides a doctrinal explanation for the boundaries of nonadjudicative activities of Article III officers.⁴⁶ In addition, it gives an overview of the history and practice of federal judges engaging in activities that go beyond deciding cases and controversies.⁴⁷ This part sets out the doctrine of *Mistretta* and then moves to the history of federal judges engaging in nonadjudicative activities. The objective is not to argue for the correctness of *Mistretta*, or more generally the propriety of Article III judges engaging in nonadjudicative acts; based on caselaw and history, they have and may perform nonadjudicative acts. The question is how those nonadjudicative acts are judicially reviewed. The aim of this subpart is merely to briefly explore the landscape of nonadjudicative Article III functions.

1. *Mistretta v. United States*

In *Mistretta*, a criminal defendant challenged the constitutionality of the United States Sentencing Commission Sentencing

Louise Weinberg, *Our Marbury*, 89 VA. L. REV. 1235, 1238–39 (2003) (describing Justice Marshall's similarly sly assertion of judicial power while not exercising it).

45. 488 U.S. 361 (1989).

46. *See id.* at 376–79.

47. *See id.* at 363–67.

Guidelines.⁴⁸ He argued “that the Sentencing Commission was constituted in violation of the established doctrine of separation of powers, and that Congress delegated excessive authority to the Commission to structure the Guidelines.”⁴⁹ Congress established the Sentencing Commission⁵⁰ in 1984.⁵¹ Sentencing had previously operated under a shared responsibility of all three branches of the government: “Congress defined the maximum, the judge imposed a sentence within the statutory range . . . , and the Executive Branch’s parole official eventually determined the actual duration of imprisonment.”⁵² The Commission was charged with developing binding determinate sentencing guidelines.⁵³ The President appointed the seven members of the Commission, at least three of whom were to be federal judges.⁵⁴ The entity thus created was described by Congress as “an independent commission in the judicial branch of the United States.”⁵⁵

The Court began its separation of powers analysis by denying an absolutist doctrine: “the Framers did not require—and indeed rejected—the notion that the three Branches must be entirely separate and distinct.”⁵⁶ Instead “our constitutional system imposes upon the Branches a degree of overlapping responsibility, a duty of interdependence as well as independence.”⁵⁷ Separation of powers serves to protect individual liberty⁵⁸ by preventing the “accumulation of excessive authority in a single Branch.”⁵⁹ The underlying concern, the Court explained, was to prevent “encroachment and aggrandizement”—encroachment by one branch upon the functions of another and aggrandizement of that encroaching branch.⁶⁰

The Court put forth a two-part test for separation of powers issues involving the judiciary: “the Judicial Branch [must] neither

48. *Id.* at 370.

49. *Id.* The Court rejected the delegation argument, finding that “Congress’ delegation of authority to the Sentencing Commission is sufficiently specific and detailed to meet constitutional requirements.” *Id.* at 374.

50. 28 U.S.C. § 991 (2012).

51. *Mistretta*, 488 U.S. at 366.

52. *Id.* at 365.

53. *Id.* at 367.

54. *Id.* at 368.

55. 28 U.S.C. § 991(a) (2012).

56. *Mistretta*, 488 U.S. at 380.

57. *Id.* at 381.

58. *See id.* at 380.

59. *Id.* at 381.

60. *Id.* at 382.

be assigned nor allowed ‘tasks that are more properly accomplished by [other] branches,’”⁶¹ and legislation may not “‘impermissibly threaten[] the institutional integrity of the Judicial Branch.’”⁶²

Under the first limitation, the Court upheld the actions of the Commission as against the argument that Congress had improperly “required the [Judicial] Branch, and individual Article III judges, to exercise not only their judicial authority, but legislative authority—the making of sentencing policy—as well.”⁶³ The Court rejected the argument that rulemaking by judges is beyond the scope of Article III.⁶⁴ Although the grant to the judiciary in Article III is limited to “‘Cases’ and ‘Controversies,’”⁶⁵ and “‘executive or administrative duties of a nonjudicial nature may not be imposed on judges holding office under Art. III of the Constitution,’”⁶⁶ nonetheless “‘some nonadjudicatory activities by the Judicial Branch’ are appropriate.”⁶⁷ And precedent firmly establishes that congressionally delegated judicial rulemaking falls within this “‘twilight area’” of approved nonadjudicative activities.⁶⁸ The necessary and proper clause’s grant to Congress to make laws needed for “‘carrying into Execution . . . Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof’”⁶⁹ and the grant of jurisdiction to the federal courts in Article III, combine to empower Congress to legislate “‘for carrying into execution all the judgments which the judicial department has power to pronounce.’”⁷⁰

Judicial rulemaking has some implied limitations. Could Congress delegate to the Supreme Court, under the guise of rulemaking, some substantive legislative area within Congress’s authority? Could Congress, for example, validly delegate to the Court as a

61. *Id.* at 383 (second alteration in original) (quoting *Morrison v. Olson*, 487 U.S. 654, 680–81 (1988)).

62. *Id.* (quoting *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 851 (1986)).

63. *Id.*

64. *See id.* at 386.

65. *Id.* at 385.

66. *Id.* (quoting *Morrison*, 487 U.S. at 677).

67. *Id.* at 386.

68. *Id.*

69. U.S. CONST. art. I, § 8, cl. 18.

70. *Mistretta*, 488 U.S. at 388 (quoting *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 22 (1825)).

rulemaker the entire subject of income taxation or immigration? Presumably not.⁷¹ The Court in *Mistretta* confined Congress to authorizing “nonadjudicatory functions that do not trench upon the prerogatives of another Branch and that are appropriate to the central mission of the Judiciary.”⁷² But the Sentencing Guidelines fell on the right side of this divide. The federal courts had previously had a hand in sentencing.⁷³ It “long has been a peculiarly shared responsibility among the Branches.”⁷⁴ The Guidelines, even if “substantive,” did not “involve a degree of political authority inappropriate for a nonpolitical Branch.”⁷⁵

2. Historical Practice

Justice Holmes famously observed that on some topics a “page of history is worth a volume of logic.”⁷⁶ Justice Blackmun’s opinion in *Mistretta* reads as an effort to affirm that truth, although the reader might wish that Justice Blackmun could have constrained himself to something closer to Holmes’ “mere page” of history.

There is indeed a rich history of federal judges engaging in actions outside the bounds of deciding cases or controversies.⁷⁷ One branch of this history involves what may be called the “two-hat” problem.⁷⁸ In the founding generation, John Jay, the first Chief Justice, was also Ambassador to England.⁷⁹ Chief Justice Ellsworth similarly held a concurrent appointment of Minister to France.⁸⁰ And Chief Justice Marshall served as Secretary of

71. See Redish & Amuluru, *supra* note 29, at 1321 (“[W]ere Congress, hypothetically, to enact a law delegating to the Article III judiciary the authority to promulgate prospectively controlling ‘rules’ of federal products liability or consumer protection law, the legislation would be held unconstitutional. . . . [T]here is *some* point at which the Constitution would be found to prohibit the delegation of purely legislative authority to the Supreme Court.”).

72. *Mistretta*, 488 U.S. at 388.

73. See *id.* at 391 (“[T]he Judiciary always has played, and continues to play, in sentencing.”).

74. *Id.* at 390.

75. *Id.* at 396. The Court also found no threat to the integrity of the judicial branch. See *id.* at 405–11.

76. See *N.Y. Tr. Co. v. Eisner*, 256 U.S. 345, 349 (1921).

77. For an extensive treatment of this history, see Steven G. Calabresi & Joan L. Larsen, *One Person, One Office: Separation of Powers or Separation of Personnel?*, 79 CORNELL L. REV. 1045, 1131–41 (1994).

78. *Mistretta*, 488 U.S. at 404 (“[T]he Constitution, at least as a *per se* matter, does not forbid judges to wear two hats . . .”).

79. *Id.* at 398.

80. *Id.* at 398–99.

State.⁸¹ In more recent history, Justice Jackson was a prosecutor at the Nuremberg war crimes trials and Chief Justice Warren lead the eponymous Warren Commission.⁸²

The “two-hat” terminology is apt because these situations involve an individual, not an institution, assuming two distinct roles. Chief Justice Warren *was* the Chief Justice of the Supreme Court at the time he lead the Warren Commission, but he did not lead it *as* the Chief Justice.⁸³ The Court in *Mistretta* distinguished between assigning nonadjudicative tasks to individual judicial *officers* and assigning such functions to Article III *courts*.⁸⁴ Although the Sentencing Commission was created “as an independent commission in the judicial branch of the United States,”⁸⁵ the Commission’s powers were “not united with the powers of the Judiciary in a way that has meaning for separation-of-powers analysis.”⁸⁶ The Supreme Court upheld the participation by Article III judges in the Commission precisely because “the Commission is not a court, does not exercise judicial power, and is not controlled by or accountable to members of the Judicial Branch.”⁸⁷ *Mistretta* was careful to note that a more serious separation of powers problem might be presented if Congress conferred “on a court rulemaking authority such as that exercised by the Sentencing Commission.”⁸⁸ The kind of “policy judgments” that Congress might properly delegate to an agency, even one “located within the Judicial Branch” might be, if performed by a court constituted as a court, “incongruous to or destructive of the central adjudicatory mission of the Branch.”⁸⁹ As one lower court has said, “Congress may impose some extrajudicial duties on Article III judges individually—duties that under the separation of powers doctrine may not be imposed on the courts *qua* courts.”⁹⁰ Or as commentators have observed, “the Constitution speaks only of a separation of functions among three institu-

81. *Id.* at 399.

82. *Id.* at 400.

83. *Id.*

84. *Id.* at 388–89.

85. *Id.* at 368 (quoting 28 U.S.C. § 991a (2012)).

86. *Id.* at 393.

87. *Id.*

88. *See id.* at 394 & n.20.

89. *See id.*

90. *See In re President’s Comm’n on Organized Crime Subpoena of Scarfo*, 783 F.2d 370, 375 (3d Cir. 1986).

tions of government and not of a separation of powers among personnel.”⁹¹

A series of older cases upholds the appointment of an individual federal judge to perform some administrative duty or sit on a commission. *Hayburn's Case* is an early, notable example.⁹² *Hayburn* addressed the validity of a 1792 statute that created a procedure for awarding pensions to Revolutionary War veteran invalids.⁹³ It provided for an application to be filed in the local circuit court (the entry level court in the federal system at that time) to claim a pension.⁹⁴ The federal court was to decide the factual question of whether the applicant had been rendered an invalid by reason of military service, but before entering the claimant on the list of pensioners the Secretary of War was to verify that the applicant had indeed served in the Revolutionary War.⁹⁵ Any instance of declining to enroll a pensioner was then to be reported to Congress.⁹⁶ Thus, under the Act, decisions of a federal court were subject “first to the consideration and suspension of the Secretary at War, and then to the revision of the legislature.”⁹⁷ The Supreme Court ultimately did not pass on the validity of this scheme because Congress had enacted replacement legislation by the time the case was ripe for decision.⁹⁸ But the report described the decisions of three of the circuit courts on the validity of the Act, and all agreed that they could not hear the petitions because of what today would be called a separation of powers violation.⁹⁹ But the New York Circuit Court tried to save the substantive benefits of the Act by reasoning that since the duties as described in the Act could not be considered judicial, “the act can only be considered as appointing commissioners . . . by *official* instead of *personal* descriptions [and] . . . the

91. Calabresi & Larsen, *supra* note 77, at 1123.

92. 2 U.S. at 409, 410 (1792). For a detailed discussion of *Hayburn*, see Maeva Marcus & Robert Tier, *Hayburn's Case: A Misinterpretation of Precedent*, 1988 WIS. L. REV. 527.

93. See *Hayburn*, 2 U.S. at 409; Act of Mar. 23, 1792, ch. 11, 1 Stat. 243 (1792), *repealed in part and amended* by Act of Feb. 28, 1793, ch. 17, 1 Stat. 324 (1793).

94. Act of Mar. 23, 1792, ch.11, 1 Stat. 243 (1792) *repealed in part and amended* by Act of Feb. 28, 1793, ch. 17, 1 Stat. 324 (1793) (providing the “applicant” is to “attend . . . in person” the “circuit court of the district, in which they respectively reside”).

95. Act of Feb. 28, 1793, ch. 17, 1 Stat. 324 (1793).

96. See *id.*

97. *Hayburn*, 2 U.S. at 410.

98. See Marcus & Tier, *supra* note 92, at 539.

99. See *id.* at 529–32. The New York Circuit Court, for example, wrote the “duties assigned to the Circuit Courts, by this act, are not” judicial because “it subjects the decisions of these courts . . . first to the consideration and suspension of the Secretary at War, and then to the revision of the Legislature.” See *Hayburn*, 2 U.S. at 410.

Judges of this court regard themselves as being the commissioners designated by the act, and therefore as being at liberty to accept or decline that office.”¹⁰⁰ Thus, *Hayburn* established a distinction between federal judges sitting as a court and performing a nonjudicial function (forbidden) and individual federal judges serving as nonjudicial commissioners (allowed).

United States v. Ferreira,¹⁰¹ likewise distinguished between powers given to, on the one hand, a federal court and, on the other, an individual who is at the same time a federal judge.¹⁰² In that case, Congress had designated federal judges to determine claims under a treaty with Spain but provided for review of the determination by the Secretary of the Treasury.¹⁰³ The Court held that it had no jurisdiction to hear an appeal from such a proceeding,¹⁰⁴ since the federal judge was not acting as a judge. The district judge had “acted under the erroneous opinion that he was exercising judicial power strictly speaking under the Constitution.”¹⁰⁵ Instead, the judge had been appointed as a commissioner.¹⁰⁶ “*Ferreira* stands for the proposition that Congress may impose some extrajudicial duties on Article III judges individually—duties that under the separation of powers doctrine may not be imposed on the courts *qua* courts.”¹⁰⁷

When only individual judges and not the institution of a court are involved, problems arising from a dual role can be solved by recusal, the removal of the particular judge who wore a second hat. Such was the reasoning of *In re President’s Commission on Organized Crime Subpoena of Scarfo*.¹⁰⁸ *Scarfo* addressed the separation of powers issues raised by the President’s Commission on Organized Crime, which was organized to study organized crime and report to the President.¹⁰⁹ Its membership included a sitting federal judge.¹¹⁰ The Eleventh Circuit found that the Commission’s

100. See *Hayburn*, 2 U.S. at 410.

101. 54 U.S. (11 How.) 40 (1851).

102. See *id.* at 47.

103. *Id.* at 45.

104. *Id.* at 52.

105. *Id.* at 49.

106. *Id.* at 47.

107. *In re President’s Comm’n on Organized Crime Subpoena of Scarfo*, 783 F.2d 370, 375 (3d Cir. 1986).

108. See *id.* at 381.

109. See *id.* at 371.

110. *Id.*

creation violated separation of powers because “[a] judge who is charged with assisting and improving enforcement efforts against organized crime must adopt a pro-government perspective which is ill-suited to his obligation to be neutral in the courtroom.”¹¹¹ The Third Circuit in *Scarfo* disagreed, noting that a judge appointed to the Commission,

is not serving on the Commission as a representative or member of any court, and does not purport to act on behalf of the judiciary or any court. The appearance of bias which may result from his service on the Commission does not disable any other Article III judge or any court from performing properly assigned duties. In the event of recusals there will be a substitution of Article III judges and the work of the courts will not be impaired.¹¹²

Other instances of nonadjudicative activities by the judicial branch or its officers go beyond the two-hat problem. *Morrison v. Olsen*¹¹³ dealt with the validity of judicial appointments of independent counsel under the Ethics in Government Act.¹¹⁴ The Act was a hearty stew of separation of powers issues. In it, Congress (Article I) required the Attorney General (Article II) to apply to a newly created court, the “Special Division,” (Article III) for the appointment of an Independent Counsel (Article II) to investigate possible crimes by certain Article II officials.¹¹⁵ In short, Article I’s Congress imposed on Article III judges a requirement to impose upon Article II officials. Despite this complex compounding of the branches, the Court upheld the Act.¹¹⁶

First, the Court relied upon the Appointments Clause, which empowers Congress to vest appointing power of inferior officers (such as an Independent Counsel¹¹⁷) in, inter alia, the “Courts of Law.”¹¹⁸ Whether appointing Independent Counsel lay within the grant of Article III was irrelevant since “the power itself derives

111. See *In re Application of the President’s Comm’n on Organized Crime*, 763 F.2d 1191, 1197 (11th Cir. 1985).

112. 783 F.2d at 381.

113. 487 U.S. 654 (1988).

114. At the time of *Morrison*, independent counsel appointments were governed by the Ethics in Government Act of 1978, Pub. L. No. 95-521 (codified at 28 U.S.C. §§ 591–98 (1982)) (sunset after reauthorizations in 1999).

115. See *Morrison*, 487 U.S. at 660–61.

116. *Id.* at 696–97.

117. The Court found the Independent Counsel to be an “inferior” officer “in the constitutional sense.” *Id.* at 672.

118. See U.S. CONST. art. II, § 2, cl. 2 (“Congress may by Law vest the Appointment of such inferior Officers, as they think proper . . . in the Courts of Law . . .”).

from the Appointments Clause, a source of authority for judicial action that is independent of Article III.”¹¹⁹ Second, the role of Article III judges in appointing an Article II official did not violate a potential limitation on “interbranch” appointments because there was no “inherent incongruity” in a court having a hand in appointing “prosecutorial officers.”¹²⁰ Third, although the Act also gave the court certain additional powers in supervising Independent Counsel that were beyond any authority under the Appointments Clause,¹²¹ these powers did not “impermissibly trespass upon the authority of the Executive Branch.”¹²² Thus, *Morrison* stands for the proposition that an Article III court may exercise a power of appointment under the Appointments Clause *and may also* exercise other nonadjudicative powers so long as they “do not encroach upon executive or legislative authority or undertake tasks that are more properly accomplished by those branches.”¹²³

Finally, the Judicial Conference of the United States involves federal judges in a great many nonadjudicative functions. The Conference, created by 28 U.S.C. § 331,¹²⁴ is led by the Chief Justice of the United States, who is to “summon annually the chief judge of each judicial circuit, the chief judge of the Court of International Trade, and a district judge from each judicial circuit.”¹²⁵

The Conference has many duties. The Director of the Administrative Office of the United States Courts is “appointed and subject to removal by the Chief Justice of the United States, after consulting with the Judicial Conference.”¹²⁶ The Conference is to “make a comprehensive survey of the condition of business in the courts of the United States.”¹²⁷ It is to “submit suggestions and recommendations to the various courts to promote uniformity of management procedures and the expeditious conduct of court business.”¹²⁸ The Chief Justice is required to submit to Congress “an annual report

119. See *Morrison*, 487 U.S. at 678–79.

120. *Id.* at 676.

121. *Id.* at 680 (describing certain powers that “cannot be said to derive from the Division’s Appointments Clause authority”).

122. *Id.* at 681.

123. *Id.* at 680–81.

124. 28 U.S.C. § 331 (2012).

125. *Id.*

126. *Id.* § 601.

127. *Id.* § 331.

128. *Id.*

of the proceedings of the Judicial Conference and its recommendations for legislation.”¹²⁹

The Conference also considers matters of judicial misconduct.¹³⁰ It is responsible for hearing a petition for review by a judge or complainant aggrieved by the action of a Judicial Council,¹³¹ the entity that reviews allegations of judicial misconduct in the first instance.¹³² Interestingly, the governing legislation provides that “all orders and determinations” of the Judicial Conference “shall be final and conclusive and shall not be judicially reviewable on appeal or otherwise.”¹³³ The nonreviewable order in question has been made by a group of Article III judges including the Chief Justice. What would further review look like were it allowed? Presumably the intent was to foreclose review by way of an original action under 28 U.S.C. § 1331 in a district court. The question of the manner of judicial review of actions undertaken by the Judicial Conference is partly moot, since such review is generally precluded by this statute. But it is not entirely moot. Under a predecessor statute, the Court of Appeals for the District of Columbia concluded that such a limitation on review “does not withhold jurisdiction over” claims that the Act itself is unconstitutional.¹³⁴

Assuming there is to be some judicial review, what kind of deference would a district court give to the actions of the Judicial Conference? Does the Judicial Conference, a group of federal judges, act as a court adjudicating a controversy involving a judge’s misconduct? Or is this another instance of nonjudicial, two-hatted judges sitting on a commission? The inclusion of the word “appeal” in the prohibition of review indicates that Congress conceived of the Conference as a court. Indeed, the Conference is given powers normally granted a court: it may “hold hearings, take sworn testi-

129. *Id.*

130. *See id.* Section 331 provides that the “Conference is authorized to exercise the authority provided in chapter 16 of this title.” Chapter 16 provides the procedures for complaints of judicial misconduct. *See id.* §§ 351, 354–55, 357.

131. Each circuit has a Judicial Council, which consists of the “chief judge of the circuit, who shall preside, and an equal number of circuit judges and district judges of the circuit.” *Id.* § 332(a)(1).

132. *Id.* § 357(a).

133. *Id.* § 357(c).

134. *See* McBryde v. Comm. to Review Circuit Council Conduct & Disability Orders of Judicial Conference of the U.S., 264 F.3d 52, 58 (D.C. Cir. 2001).

mony, issue subpoenas and subpoenas duces tecum, and make necessary and appropriate orders in the exercise of its authority.”¹³⁵ Congress also took pains to disallow procedures that ordinarily occur only in judicial proceedings: “No person shall be granted the right to intervene or to appear as *amicus curiae* in any proceeding before a judicial council or the Judicial Conference under this chapter.”¹³⁶

There is caselaw support for viewing the Judicial Conference’s misconduct proceedings actions as judicial. In a suit challenging a misconduct investigation by a circuit Judicial Council, the District of Columbia Circuit held that “[g]iven the extensive rights of review the Act does provide before mature judges of the Judicial Conference and the councils, . . . the absence of *more formal judicial review* does not violate the Due Process clause.”¹³⁷ Under this view, then, the actions of the judicial conference are a form of “judicial review.”

On the other hand, the remedial powers of the Conference seem in part nonadjudicative, going beyond what is necessary to decide a controversy under Article III. The Conference, for example, is empowered to “certify and transmit the determination and the record of proceedings to the House of Representatives” if it believes that “impeachment may be warranted.”¹³⁸ Proceedings under these provisions are probably best seen as in part adjudicative (insofar as hearings are held to ascertain the applicability of legal standards) and in part nonadjudicative but judicial: overseeing the conduct of judges is an expected function of a court.¹³⁹

This brings us finally to role of lower federal court judges and of the Supreme Court in creating the various federal rules.¹⁴⁰ The

135. 28 U.S.C. § 331 (2012).

136. *Id.* § 359(b).

137. See *Hastings v. Judicial Conference of the U.S.*, 593 F. Supp. 1371, 1378 n.15 (D.D.C. 1984) (emphasis added), *aff’d in part and vacated in part*, 770 F.2d 1093 (D.C. Cir. 1985).

138. 28 U.S.C. § 355(b) (2012).

139. For a discussion of the referral for impeachment provision of this statute, see Elbert P. Tuttle & Dean W. Russell, *Preserving Judicial Integrity: Some Comments on the Role of the Judiciary Under the “Blending” of Powers*, 37 EMORY L.J. 587, 607–12 (1988). The authors defend the impeachment referral process as being “aimed at allowing the judicial branch to promote the integrity of the judiciary.” *Id.* at 611.

140. For descriptions of the rulemaking process, see Peter G. McCabe, *Renewal of the Federal Rulemaking Process*, 44 AM. U. L. REV. 1655, 1672–74 (1995); Lumen N. Mulligan & Glen Staszewski, *The Supreme Court’s Regulation of Civil Procedure: Lessons from Administrative Law*, 59 UCLA L. REV. 1188, 1201–02 (2012); Elizabeth G. Porter, *Pragmatism*

Rules Enabling Act empowers the Supreme Court to “prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts.”¹⁴¹ The Supreme Court receives proposed rules and amendments from the Judicial Conference.¹⁴² The Judicial Conference, in turn, relies upon the Standing Committee on Rules of Practice and Procedure.¹⁴³ The Standing Committee, appointed by the Chief Justice and composed of academics, practitioners, and federal judges,¹⁴⁴ in turn relies upon Advisory Committees that are responsible for a particular set of federal rules.¹⁴⁵ The actual drafting of proposed rule amendments originates in the Advisory Committees.¹⁴⁶ After receiving proposed rules from the Judicial Conference, the Supreme Court then has an opportunity to review and ultimately transmit them to Congress for adoption.¹⁴⁷ Unless Congress provides otherwise, the rules then take effect.¹⁴⁸

The rulemaking authorized (indeed, commanded) by the Rules Enabling Act is nonadjudicative, despite involving Article III judges and the Supreme Court. A pretrial discovery scheduling order or a final pretrial order issued by a federal judge¹⁴⁹ is similar to a rule enacted under the Rules Enabling Act in that it is prospective—it prescribes a procedure in advance of events in litigation. But such orders are adjudicative because they are addressed to a particular instance of litigation and are helpful, or even necessary, to the judicial resolution of a particular case or controversy.

Rules, 101 CORNELL L. REV. 123, 144–45 (2015).

141. 28 U.S.C. § 2072 (2012). Likewise, 28 U.S.C. § 2075 authorizes the Court to prescribe bankruptcy rules. *Id.* § 2075.

142. *Id.* § 331 (“The [Judicial] Conference shall . . . study . . . the operation and effect of the general rules of practice and procedure Such changes in and additions to those rules as the Conference may deem desirable . . . shall be recommended by the Conference . . . to the Supreme Court . . .”).

143. *Id.* § 2073(b) (“The Judicial Conference shall authorize the appointment of a standing committee on rules of practice, procedure . . .”).

144. For a description of the Committee, see *Committee Membership Selection*, U.S. COURTS, <http://www.uscourts.gov/rules-policies/about-rulemaking-process/committee-membership-selection> [<https://perma.cc/6DV4-TFHG>] (last visited Dec. 1, 2018). Advisory Committees are authorized by 28 U.S.C. § 2073(a)(2) (“The Judicial Conference may authorize the appointment of committees to assist the Conference by recommending rules to be prescribed under sections 2072 and 2075 of this title. Each such committee shall consist of members of the bench and the professional bar, and trial and appellate judges.”)

145. See Mulligan & Staszewski, *supra* note 140, at 1200.

146. McCabe, *supra* note 140, at 1672.

147. *Id.* at 1673.

148. *Id.*

149. FED. R. CIV. P. 16(b), (d).

On the other hand, a Federal Rule (of Civil Procedure or one from the other sets of rules) is not created to decide a particular dispute; in the studying and drafting of a rule under the Rules Enabling Act there is no case or controversy.¹⁵⁰ But while prescribing “general rules of practice and procedure and rules of evidence”¹⁵¹ is nonadjudicative, it is judicial.

There is an extensive debate in the literature on the existence and extent of the Supreme Court’s inherent authority to prescribe procedure for the federal courts.¹⁵² Some argue that the Supreme Court has such inherent authority and needs no authorization from Congress.¹⁵³ Some, on the other hand, argue that the Rules Enabling Act unconstitutionally grants power to the Supreme Court that transgresses the case or controversy limitation.¹⁵⁴ The debate over the Rules Enabling Act is of more theoretical than practical concern, since its constitutionality, for better or worse, is settled in the caselaw.¹⁵⁵ Whether or not this rulemaking must be and can be made to fit within a “case or controversy” limitation, it is surely a judicial, even if nonadjudicative, function. As one commentator has observed, if “Congress were to create the lower federal courts and define their subject matter jurisdiction, but make

150. See David Marcus, *Institutions and an Interpretive Methodology for the Federal Rules of Civil Procedure*, 2011 UTAH L. REV. 927, 942.

151. 28 U.S.C. § 2072 (2012).

152. For a collection of sources on this debate, see Leslie M. Kelleher, *Taking Substantive Rights (in the Rules Enabling Act) More Seriously*, 74 NOTRE DAME L. REV. 47, 62–64 (1998). See also Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1115 (1982) (“The Supreme Court has never satisfactorily explained—indeed it has hardly discussed—the place of court rulemaking in our constitutional framework.”); Linda S. Mullenix, *Judicial Power and the Rules Enabling Act*, 46 MERCER L. REV. 733, 734–38 (1995).

153. See, e.g., Linda S. Mullenix, *Unconstitutional Rulemaking: The Civil Justice Reform Act and Separation of Powers*, 77 MINN. L. REV. 1283, 1320–22 (1993).

154. See Marcus, *supra* note 150, at 942. (“Rulemaking proceeds without a case or controversy, and thus the Court cannot sit as an Article III tribunal when it approves proposed amendments.”); Redish & Amuluru, *supra* note 29, at 1330 (“Even assuming that the Court’s assessment of the Rules Enabling Act was correct, it would still not mean that judicial rulemaking constitutes adjudication of a case or controversy, which the Constitution’s text seems unambiguously to require, though concededly this point is probably of concern only to constitutional formalists.”); *id.* at 1335 (“By delegating important policy-making authority to the Supreme Court outside of the adjudication of cases or controversies, Congress in the Rules Enabling Act has violated the essence of the separation of powers, and in so doing has undermined the essence of the democratic process.”).

155. We of course do not mean to suggest that the constitutionality of the Rules Enabling Act—at least as a practical matter—is today in serious doubt. The Supreme Court has confidently asserted the Act’s constitutionality on more than one occasion, and there is absolutely no reason to imagine that this attitude will change in the foreseeable future.

Redish & Amuluru, *supra* note 29, at 1305–06.

no provision for procedure, the courts, *in order to function as courts*, would have to adjudicate procedural issues on a case-by-case basis.¹⁵⁶ Congress creating courts but enacting no procedure for them remains, however, eternally only a thought experiment; Congress did immediately provide a federal procedure as it created the federal courts.¹⁵⁷ The first Congress, contemporaneously with the first Judiciary Act, enacted the Process Act of 1789.¹⁵⁸ The original Process Act provided that in the new federal courts “the forms of writs and executions . . . in suits at common law, shall be the same in each state respectively as are now used or allowed in the supreme courts of the same.”¹⁵⁹ History and the testimony of the legislators of the founding generation thus supports a role for Congress in the adoption of federal procedural rules.

On the other hand, authority also exists for federal courts having inherent authority—independent of any grant by Congress—to craft their own procedure. Every court must have at least the inherent powers necessary for it to function as a court. Such powers accrue to a court “from the nature of their institution” and “cannot be dispensed with in a Court, because they are necessary to the exercise of all others.”¹⁶⁰ Such inherent powers are “governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs.”¹⁶¹ The powers include the power to punish contempt, to vacate a judgment for fraud, and to bar disruptive criminal defendants from the courtroom.¹⁶² These instances may be thought of as less than rulemaking, since they are each a reaction to a particular incident in the course of particular litigation and are not prospective in scope. On the other hand, once cases such as those listed above are appealed, the appellate court is necessarily establishing the proper bounds of procedure for future cases and is thereby creating a procedural federal common law. For example, the Supreme Court approved a lower court’s dismissal of

156. Kelleher, *supra* note 152, at 64 (emphasis added); *see also* Ralph U. Whitten, *Separation of Powers Restrictions on Judicial Rulemaking: A Case Study of Federal Rule 4*, 40 ME. L. REV. 41, 56–57 (1988) (making the same point as to the rule of personal jurisdiction).

157. *See* Act of Sept. 29, 1789, ch. 21, § 2, 1 Stat. 93, 93 (repealed 1992).

158. *Id.*

159. *Id.* The history of the Process Act is discussed in Anthony J. Bellia Jr. & Bradford R. Clark, *The Original Source of the Cause of Action in Federal Courts: The Example of the Alien Tort Statute*, 101 VA. L. REV. 609, 647–51 (2015).

160. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991) (quoting *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812)).

161. *Link v. Wabash R.R. Co.*, 370 U.S. 626, 630 (1962).

162. *See Chambers*, 501 U.S. at 44.

a case under the common law doctrine of forum non conveniens in *Gulf Oil Corp. v. Gilbert*.¹⁶³ In doing so, it established the doctrine as a matter of federal law, independent of any legislation. The Court noted that it was building on the foundation of “the common law” which had “worked out techniques and criteria for dealing with” unduly burdensome litigation.¹⁶⁴ Thus, to generalize, in “matters which relate to the administration of legal proceedings” the “federal courts have traditionally exerted strong inherent power, completely aside from the powers Congress expressly conferred in the Rules.”¹⁶⁵ This procedural rulemaking power inherent in courts makes the participation of judges and the Supreme Court in the rulemaking process under the Rules Enabling Act fall within the judicial role, even though it is not adjudicative.

The foregoing reveals a rich array of involvement by both Article III individual officers—judges—and by Article III institutions—courts—in nonadjudicative activities. Federal judges and courts are nominally confined to cases and controversies, but they in fact as federal governmental agents participate in activities that involve no case or controversy. Some of the activities in question could be textually reconciled to Article III by characterizing the activities as “judicial,” even if not adjudicative, and thus within Article III’s creation of “judges.” These are fascinating questions but are not the focus of this article. I take it as a given, as the caselaw directs, that the constitution countenances in some way these actions. The question is how a federal court is to judicially review the actions of an Article III actor that were undertaken in a nonadjudicative setting. It is to this question that we now turn.

III. CASELAW: THE PRACTICE OF JUDICIAL REVIEW OF NONADJUDICATIVE ARTICLE III ACTIVITIES

Theory is best informed by practice.¹⁶⁶ Rather than thinking abstractly about how federal courts should review nonadjudicative

163. 330 U.S. 501, 503, 572 (1947).

164. *Id.* at 507.

165. *Hanna v. Plumer*, 380 U.S. 460, 472–73 (1965) (quoting *Lumbermen’s Mut. Cas. Co. v. Wright*, 322 F.2d 759, 764 (5th Cir. 1963)); *see also* Mullenix, *supra* note 152, at 1321–22.

166. Keeping in mind, of course, that any analysis must explain the transition from what is to what ought to be. *See* Eric Engle, *Knight’s Gambit to Fool’s Mate: Beyond Legal Realism*, 41 VAL. U. L. REV. 1633, 1639–40 (2007) (explaining Hume’s critique of those who “begin with a series of descriptive statements” but then “reach a prescriptive conclusion”

actions taken by Article III courts or judges and then attempting to graft that onto our law, it is better to observe what the courts have in fact done and let any theory consult that practice. The caselaw is not lacking. It is, alas, neither well thought out nor consistent. But before jumping into the caselaw, it is useful to note the parameters of the problem. One can imagine judicial review of non-adjudicative actions in several settings. And there are several different conceivable levels of review that courts could employ. The following parts take these matters up.

A. *The Contexts in Which Courts Review Nonadjudicative Actions of Article III Judges and Courts*

What are some of the contexts of judicial review of nonadjudicative activities? First, a court might have before it a legal challenge to an action that is official (i.e., not performed in a personal capacity), but is neither adjudicative nor judicial. This occurs in the context of the “two-hat” problem, where an individual federal judge serves in some nonjudicial capacity. Suppose, for example, that Sylvia Odio, a witness whose testimony the Warren Commission declined to credit,¹⁶⁷ had sued Chief Justice Warren in federal court for libel.¹⁶⁸ Or suppose a claim of employment discrimination was brought as a civil suit, or as a complaint of judicial misconduct, against a sitting federal judge by one of his former clerks.¹⁶⁹ In contrast to the Earl Warren “two-hat” problem, the conduct in ques-

without “explain[ing] how they make this transition from descriptive ‘is’ statements to prescriptive ‘ought’ statements”).

167. Those who know the name Sylvia Odio will know the story. Those who have not heard of Odio will find this a well whose depth exceeds its reward. For the uninitiated, here is an introduction to the Odio matter: *The Odio Incident*, MARY FERRELL FOUND. https://www.maryferrell.org/pages/The_Odio_Incident.html [<https://perma.cc/W6CK-VUCW>] (last visited Dec. 1, 2018).

168. *See generally* 28 U.S.C. §§ 144, 455 (2012) (mandating when a judge must be recused for bias or prejudice); MODEL CODE OF JUDICIAL CONDUCT: CANON 2 r. 2.11 (AM. BAR ASS’N) https://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/model_code_of_judicial_conduct_canon_2/rule2_11disqualification.html [<https://perma.cc/2F4Y-L2BW>] (explaining when a judge must disqualify themselves for bias or prejudice); Lauren Keane, Note, *Williams v. Pennsylvania: The Intolerable Image of Judicial Bias*, 49 LOY. U. CHI. L.J. 181, 185–88 (2017) (discussing the statutory requirements for recusal).

169. *Cf. In re Complaint of Judicial Misconduct*, No. 17-90118-jm (Judicial Council of the 2d Cir., Feb. 5, 2018) <http://cdn.cnn.com/cnn/2018/images/02/05/doc020218.pdf> [<https://perma.cc/NHP2-5359>] (dismissing complaint against Judge Kozinski due to his retirement).

tion in this case is judicial, albeit nonadjudicative: hiring, supervising, and discharging clerks is within the judicial role by history and by practical necessity.

What would happen in such litigation? The Chief Justice (or, since he was acting as a commissioner, perhaps we should say Earl Warren) would surely assert qualified immunity, but that is beside the point.¹⁷⁰ If the litigation came before Chief Justice Warren, he certainly should recuse himself,¹⁷¹ but one would otherwise expect the case to go forward. Likewise, the judge accused of employment discrimination would be disqualified from hearing the matter, as perhaps would some or all of his or her colleagues on the same court.¹⁷² What certainly would *not* happen in either of these cases is the use of any deferential standard of review of the judge's conduct. A judge hearing the libel case or one hearing the employment discrimination case (or complaint of misconduct) would not defer to the actions of the judge on the ground that he had implicitly decided that his conduct was lawful. Instead, the matter would be adjudicated *de novo*, with recusal serving to protect the integrity of the adjudicative process. Recusal is in this context a double *de novo* review: no intentional deference is given to the previously involved judge (*de novo* in the usual sense) and the reviewing judge is by virtue of the recusal prevented from accidentally or surreptitiously deferring to the previously involved judge. The absence of any deference seems appropriate precisely because the judge whose actions are under review was not acting in an adjudicative setting. Even if Chief Justice Warren or the judge whose employment practices were being challenged had in fact performed a legal analysis of their actions at the time they acted, the decision was not reached in adjudication. There was no adversarial process with a right to be heard orally or through briefing. Since the judge was

170. For a definition of qualified immunity, see *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011) (“Qualified immunity shields federal and state officials from money damages unless a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was ‘clearly established’ at the time of the challenged conduct.”).

171. In fact, Chief Justice Warren foresaw this possibility and initially refused President Johnson's entreaties to lead the Kennedy assassination inquiry. See *Mistretta v. United States*, 488 U.S. 361, 401 n.26 (1989) (resisting the appointment to the commission because, among other things, “it was impossible to foresee what litigation such a commission might spawn, with resulting disqualification of the Justice from sitting in such cases” (quoting EARL WARREN, *THE MEMOIRS OF EARL WARREN* 356 (1977))).

172. See *Complaint*, *supra* note 169 (noting transfer of the complaint from the Ninth Circuit to the Second Circuit). See generally 2E GUIDE TO JUDICIAL POLICY, ch. 3, r. 25–26, <http://www.uscourts.gov/sites/default/files/guide-vol02e-ch03.pdf> [<https://perma.cc/DD9X-ZPNR>] (explaining when a judge must be disqualified from a case).

not acting in an adjudicative manner, there is no reason to give him or her the deference accorded a judge who was acting as an adjudicator.

The focus of the remainder of this article is a different context. As described above, the Supreme Court as an institution and lower federal judges as individuals participate in the creation and amendment of federal rules. When a litigant challenges one of the rules as unconstitutional,¹⁷³ or beyond the delegated power of the Rules Enabling Act,¹⁷⁴ a federal court reviews the work of the Supreme Court and of other federal judges involved in creating the rule. What deference is or should be paid to the drafters and promulgators of the rules? The rules were transmitted to Congress by the Supreme Court, so perhaps they should carry some level of presumption of regularity—a deference or a standard of review. At the extreme, the deference could be absolute: challenges to federal rules could be prohibited on the ground that the Supreme Court in promulgating them has already assessed their validity and its prior activity in creating the challenged rule is decisive and binding in the litigation. Thus, one could treat the act of transmission of a proposed federal rule as something akin to *stare decisis*, binding as a precedent on lower courts and taken as a given in the Supreme Court until overruled. On the other hand, the rule creators were not acting in an adjudicative capacity in creating the rules, so analyzing the matter as *stare decisis* is misaimed. But another form of deference is quite plausible; this deference doctrine requires some explanation.

B. *A Plausible Deferential Standard of Review: The Chevron Parallel*

The Judicial Conference, the Standing Committee on Rules of Practice and Procedure, and the Advisory Committees have appropriately been analogized to administrative agencies.¹⁷⁵ The Supreme Court reviews certain determinations of administrative

173. See, e.g., E. Donald Elliott, *Twombly in Context: Why Federal Rule of Civil Procedure 4(B) Is Unconstitutional*, 64 FLA. L. REV. 895 (2012) (describing how Federal Rule of Civil Procedure 4(B), could be considered unconstitutional).

174. See, e.g., *Sibbach v. Wilson & Co.*, 312 U.S. 1 (1941) (denying a petitioner's challenge that Rules 35 and 37 were not within the mandate of Congress).

175. Mulligan & Staszewski, *supra* note 140, at 1192 n.15, 1193–94.

agencies under a highly deferential standard of review. The Supreme Court could plausibly apply this model of deference to challenges to a federal rule. Although this article will ultimately reject this approach, its facial appeal deserves an explanation.

Both the grant of authority by Congress to an executive branch administrative agency and the creation of the federal rules follow roughly the same process. Congress enacts a statute whose broad terms charge a body in another branch to develop rules that are intended to be legally binding. This body, composed of experts in the field, goes through a rulemaking process, including opportunities for comment by the public. The rules are then duly promulgated according to the prescribed process and thereafter have the force of law.

This article is far from the first to observe the resemblance of the Rules Enabling Act's rulemaking apparatus to a congressionally empowered administrative agency. In both, Congress calls upon those with "direct experience and specialized knowledge" to "set agendas and incorporate policy preferences."¹⁷⁶ Both the federal rule drafters and Article II agencies have notice and comment procedures.¹⁷⁷ And in both instances, some of the rules created are challenged in litigation in federal court as beyond the authority of the agency rulemakers.¹⁷⁸ In the context of executive branch agency rules, the Supreme Court has taken highly deferential approach.

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.,¹⁷⁹ established a strongly deferential standard of review for agency interpretations of its governing statutes.¹⁸⁰ The "court does

176. Scott Dodson, *Should the Rules Committees Have an Amicus Role?*, 104 VA. L. REV. 1, 11 (2018).

177. *Id.*; see also 28 U.S.C. § 2073 (2012) ("The Judicial Conference shall prescribe and publish the procedures for the consideration of proposed rules . . ."); 1 GUIDE TO JUDICIARY POLICY § 440, http://www.uscourts.gov/sites/default/files/guide-vol01-ch04-sec440_procedures_for_rules_cmtes_1.pdf [<https://perma.cc/WK4D-8VDH>] (describing the rulemaking process, including opportunities for comments).

A slightly different use of the administrative law analogy is offered by Professors Mulligan and Staszewski. They argue that the Supreme Court should be analogized to an agency, which has the option of making law by rulemaking or by adjudication. Mulligan & Staszewski, *supra* note 140, at 1191–92; see also Porter, *supra* note 140, at 150–51 (explaining the trend among scholars to analogize the Supreme Court to an administrative agency and limit to its adjudicate power).

178. See, e.g., Mulligan & Staszewski, *supra* note 140, at 1203 n.89.

179. 467 U.S. 837 (1984).

180. *Id.* at 842–43.

not simply impose its own construction on the statute” in the face of an “administrative interpretation.”¹⁸¹ If the underlying statute is ambiguous, “the question for the court is whether the agency’s answer is based on a permissible construction of the statute.”¹⁸² *Chevron* has a two-step process: “*Chevron* deference instructs courts to defer to an agency’s interpretation of a statute the agency administers if, at step one, the statutory provision at issue is ambiguous and then, at step two, the agency’s interpretation of the statutory ambiguity is reasonable.”¹⁸³ *Chevron* shifts power from federal courts to the agencies.¹⁸⁴ Its “great change was to declare that congressional delegation of interpretative authority to agencies could be implicit and derived from mere ambiguity in the statute, a fictional delegation granting agencies the power to interpret statutes they oversee where there are gaps in those statutes.”¹⁸⁵ Application of *Chevron*’s deferential review has been characterized as “devolv[ing] into automatic judicial acquiescence to agency statutory interpretations.”¹⁸⁶ The “reasonableness” prong of *Chevron* is not an “exacting standard.”¹⁸⁷ It is satisfied even if the agency’s interpretation is “not particularly compelling” so long as it is “not patently inconsistent with the statutory scheme.”¹⁸⁸ Agency interpretations have been upheld where the agency merely “did not act irrationally.”¹⁸⁹ The deference required under this standard has

181. *Id.* at 843.

182. *Id.*

183. Christopher J. Walker, *Attacking Auer and Chevron Deference: A Literature Review*, 16 GEO. J.L. & PUB. POL’Y 103, 110 (2018). In addition to these steps, there is a preliminary step (the so-called “step zero”) that asks whether the matter is one to which *Chevron* applies. Kurt Eggert, *Deference and Fiction: Reforming Chevron’s Legal Fictions After King v. Burwell*, 95 NEB. L. REV. 702, 721 (2017) (“The question of whether the *Chevron* framework should even apply comes before the two steps of *Chevron*, and so the determination of this issue is referred to as ‘*Chevron* Step Zero’ . . .”).

184. *But see* William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1090 (2008) (“[T]here has not been a *Chevron* ‘revolution’ at the Supreme Court level. The deference regime associated with the *Chevron* decision is not completely new and continues to exist alongside old feudal lords . . .”).

185. Eggert, *supra* note 183, at 718.

186. Catherine M. Sharkey, *Cutting in on the Chevron Two-Step*, 86 FORDHAM L. REV. 2359, 2369 (2018).

187. *See* *Cont’l Air Lines, Inc. v. Dep’t of Transp.*, 843 F.2d 1444, 1452 (D.C. Cir. 1988).

188. *Id.* (quoting *Rettig v. Pension Benefit Guar. Corp.*, 744 F.2d 133, 151–52 (D.C. Cir. 1984)).

189. *See* *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 60 (2011).

been said to be similar to “the evaluation of a statute’s constitutionality under the traditional rational basis review.”¹⁹⁰

The argument for applying *Chevron* to challenges to federal rules is relatively straightforward. Congress appoints an apparatus consisting of an Advisory Committee, the Standing Committee on Rules of Practice and Procedure, the Judicial Conference, and the Supreme Court to create the federal rules.¹⁹¹ Litigants sometimes argue that a particular federal rule is invalid because it is beyond the scope of the Rules Enabling Act, the statute authorizing the creation of the rules. The Rules Enabling Act grants the Supreme Court the “power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts . . . and courts of appeals,” provided that it does not “abridge, enlarge or modify any substantive right.”¹⁹² A litigant’s challenge to a federal rule is then a challenge to the interpretation of this statute made by the nonadjudicative rulemakers. And to cement the analogy, the Court has clarified that *Chevron* deference includes deference to “an agency’s interpretation of a statutory ambiguity that concerns the scope of the agency’s statutory authority (that is, its jurisdiction).”¹⁹³ If the application of *Chevron* to the creation of the federal rules is as suggested in this paragraph, then the rules would be essentially inviolate. And indeed, some of the caselaw points in that direction. But other lines of authority contradict that approach. The article now turns to this caselaw.

C. *Caselaw: The Review by the Federal Courts of Article III Rulemakers*

The Supreme Court has never explicitly described how it is supposed to review the rules. And its cases are inconsistent in the manner in which they actually perform the review. One can identify three distinct strands in the Supreme Court’s cases. The approaches range from de novo to extremely deferential. Lower federal courts tend to line up with one of these strands.

190. *McDaniels v. United States*, 300 F.3d 407, 412 n.2 (4th Cir. 2002).

191. *See* 28 U.S.C. §§ 2071–77 (2012).

192. *Id.* § 2072.

193. *See City of Arlington v. FCC*, 569 U.S. 290, 296–97 (2013).

*Mississippi Publishing Corp. v. Murphree*¹⁹⁴ is emblematic of the Court's imprecision in addressing how it reviews the rules. In addressing a challenge to the validity of Federal Rule of Civil Procedure 4,¹⁹⁵ the Court wrote that the "fact that this Court promulgated the rules as formulated and recommended by the Advisory Committee does not foreclose consideration of their validity, meaning or consistency. But in ascertaining their meaning the construction given to them by the Committee is of weight."¹⁹⁶ There are two separate propositions here, neither of which is supported by citation or analysis. The first disavows any strong deference by the Court as adjudicator to the Court as rulemaker—the Court's prior involvement with the rule does "not foreclose" later review.¹⁹⁷ But the Court gives no indication of *how* that review is to occur. Is there some deference to the Court as rulemaker? While that question remains unanswered, the Court does tell us that some deference is due, not to itself, but to the Advisory Committee.¹⁹⁸ But even here the Court is vague to the point of disutility. The input of the Advisory Committee is "of weight."¹⁹⁹ What weight is due, exactly? More fundamentally, taken at face value, this language says that the Court is not to give itself any deference but is to give some deference—"weight"—to the Advisory Committee. Why would the Court give more deference to a subordinate body than it gives to itself? Why is the servant greater than the master? Why would the Court defer to Article III judges not acting as judges (the Advisory Committee) but not to judges acting as a court (the Supreme Court) as transmitter of the rules? And if the Court as a court defers to the Advisory Committee, did the Court as a rulemaking transmitter also defer to it? If so, when exactly does the Court actually scrutinize the rules? This passage from *Mississippi Publishing* obviously raises more questions than it answers.

Some Supreme Court cases suggest a *de novo* approach, with the Court giving no deference to itself as a rulemaker. In *Sibbach v. Wilson & Co.*,²⁰⁰ the Court upheld Federal Rule 35, which provides for physical and mental examinations of a party as a part of discovery against an argument that it violated the Rules Enabling

194. 326 U.S. 438 (1946).

195. *Id.* at 443.

196. *Id.* at 444.

197. *Id.*

198. *See id.*

199. *Id.*

200. 312 U.S. 1 (1941).

Act.²⁰¹ The Court established this test for whether a rule is within the scope of the Enabling Act: the “test must be whether a rule really regulates procedure.”²⁰² This is almost comically unhelpful.²⁰³ It has been said to be “no test at all,” but instead “little more than a statement that a matter is procedural if, by revelation, it is procedural.”²⁰⁴ But the substance of the test, or lack of it, is beside the point. The Court applied it absolutely de novo, with no mention of, let alone deference to, its prior involvement in Rule 35’s creation. The Court upheld the Rule based solely on its own current assessment of whether it was within the Rules Enabling Act.²⁰⁵

One can find many lower court opinions exhibiting the de novo approach. Lower courts addressing challenges to the validity of Federal Rules sometimes proceed without so much as a glance at the role of the Article III rulemakers. What is notable about the cases using the de novo approach is not what they say, but what they fail to say. They find that a rule is valid by simply quoting the “really regulates procedure” language from the *Sibbach* test and applying it. But in the application of that test, these cases do not mention the role of the rule’s creators nor do they mention any deference to them. For example, in *Passmore v. Baylor Health Care System*,²⁰⁶ the court said:

A Federal Rule is invalid if it exceeds either constitutional constraints or the constraints of the Rules Enabling Act. . . . A Rule is constitutionally valid if it is [sic] regulates matters that “are rationally capable of classification.” . . . And, a Rule is valid under the Rules Enabling Act if it “really regulates procedure”

Rules 26 and 37 regulate discovery, a matter that is certainly capable of classification as procedural. These Rules therefore satisfy the constitutional standard. As to whether these Rules “really regulate[] procedure,” . . . the Supreme Court indicated that rules governing pre-trial discovery are procedural. . . . It therefore follows that Rules 26 and 37 are valid under the Rules Enabling Act.²⁰⁷

201. See FED. R. CIV. P. 35; *Sibbach*, 312 U.S. at 16.

202. *Sibbach*, 312 U.S. at 14.

203. See Jeffrey O. Cooper, *Summary Judgment in the Shadow of Erie*, 43 AKRON L. REV. 1245, 1251 (2010).

204. See 19 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4509 (3d ed. 2016).

205. The Court takes the same approach in *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 407–08 (2010) (upholding Federal Rule 23 as procedural because, entirely in the Court’s own assessment, it “regulated only the process for enforcing . . . rights”).

206. 823 F.3d 292 (5th Cir. 2016).

207. *Id.* at 298–99 (citations omitted).

Likewise, the court in *Abbas v. Foreign Policy Group, LLC*,²⁰⁸ upheld Rules 12 and 56 simply by straightforward application of the *Sibbach* test, which “[was] very simple to apply here.”²⁰⁹ No mention was made of deferring to the rulemakers. And again in *Kondaur Capital Corp. v. Cajuste*,²¹⁰ the court upheld Rule 16 because it “simply set forth the purpose[] of a pre-trial conference and method for scheduling and managing such conferences,” which “are matters properly classified as procedural in nature.”²¹¹ One may easily find many more such cases.²¹²

In fairness, these cases seldom present a serious challenge to the federal rule in question. The rule would be upheld under a deferential approach or under a de novo approach. So, little turns on whether the court articulates a deferential standard of review—the result is the same.²¹³ But other cases use a de novo standard of review in situations where it matters.

The Supreme Court has never held that a federal rule is beyond the scope of the Rules Enabling Act, but on occasion it has expressed a concern that a certain *interpretation* of a rule might lead to a Rules Enabling Act violation and therefore construed the rule in a way that avoids that concern. In *Semtek International Inc. v. Lockheed Martin Corp.*,²¹⁴ the Court rejected an argument that the res judicata effect of a federal court judgement in a diversity case is governed by Rule 41.²¹⁵ The Court asserted that such a construction “would arguably violate the jurisdictional limitation of the Rules Enabling Act: that the rules ‘shall not abridge, enlarge or

208. 783 F.3d 1328 (D.C. Cir. 2015).

209. *Id.* at 1337.

210. 849 F. Supp. 2d 363 (E.D.N.Y. 2012).

211. *Id.* at 372.

212. For examples of cases similarly upholding a federal rule without mentioning any deference to the rulemakers, see, for example, *Interfaith Cmty. Org. v. Honeywell Int’l, Inc.*, 726 F.3d 403, 409 (3d Cir. 2013); *Horowitch v. Diamond Aircraft Indus., Inc.*, 645 F.3d 1254, 1259 (11th Cir. 2011); *Morel v. DaimlerChrysler AG*, 565 F.3d 20, 24 (1st Cir. 2009); *Affholder, Inc. v. S. Rock, Inc.*, 746 F.2d 305, 309–10 (5th Cir. 1984); *Barthel v. Stamm*, 145 F.2d 487, 491 (5th Cir. 1944); *Lindner v. Meadow Gold Dairies, Inc.*, 515 F. Supp. 2d 1141, 1149–50 (D. Haw. 2007); *Newman v. Freeman*, 262 F. Supp. 106, 112 (E.D. Pa. 1966); *Baum v. Union Pac. R.R. Co.*, 9 F.R.D. 540, 541 (W.D. Mo. 1949).

213. See, e.g., *Hiatt v. Mazda Motor Corp.*, 75 F.3d 1252, 1259 (8th Cir. 1996) (“The appellant, however, has made absolutely no argument that Rule 14 violates either the Act or the Constitution. In the absence of any challenge, the Supreme Court has plainly directed that the Rule must be treated as presumptively valid.”).

214. 531 U.S. 497 (2001).

215. *Id.* at 500–01.

modify any substantive right.”²¹⁶ For that reason, the Court adopted a different interpretation of the Rule.²¹⁷ Thus, while not finding a Rules Enabling Act violation, the Court rejected an interpretation of a Rule on Rules Enabling Act grounds: the hypothetical interpretation “would seem to violate” the Rules Enabling Act.²¹⁸ This rejection of an interpretation of a Rule was performed, however, without any deference to the prior involvement of Article III actors. It is again *de novo*. Several other cases likewise reject an interpretation of a federal rule on the ground that it would result in a Rules Enabling Act violation without considering whether the Rule is shielded by a deferential standard of review. In *Ortiz v. Fibreboard Corp.*,²¹⁹ the Court rejected an interpretation of Federal Rule 23 on limited fund class actions because the “Rules Enabling Act underscores the need for caution.”²²⁰ “[N]o reading of the Rule,” the Court said, “can ignore the Act’s mandate that ‘rules of procedure ‘shall not abridge, enlarge or modify any substantive right.’”²²¹ The Court did not mention any presumption of validity of the rules. Similar cases exist in the lower courts.²²²

In addition, an occasional lower court has found a federal rule invalid. In *In re Greene*,²²³ the court considered whether Bankruptcy Rule 9006,²²⁴ which provides rules for computing time, could operate to extend the time of a preferential transfer, normally “90 days before the date of the filing of the petition,” when

216. *Id.* at 503 (quoting 28 U.S.C. § 2072(b) (2000)).

217. The practice of avoiding a Rules Enabling Act violation by interpreting a rule away from the violation has appropriately been called an “avoidance doctrine.” See Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. PA. L. REV. 1099, 1147 (2002).

218. *Semtek*, 531 U.S. at 503–04.

219. 527 U.S. 815 (1999).

220. *Id.* at 845.

221. *Id.* (quoting *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 613 (1997)).

222. See *Phila. Elec. Co. v. Anaconda Am. Brass Co.*, 43 F.R.D. 452, 460 (E.D. Pa. 1968) (avoiding an interpretation of a federal rule that might lead to a Rules Enabling Act violation; there is a “strong presumption of validity” of the rules but this “neither requires nor permits a strained interpretation of the rule in a manner likely to rebut the presumption”); *Bowles v. Tankar Gas, Inc.*, 5 F.R.D. 230, 233 (D. Minn. 1946) (construing Rule 15 on amended pleadings in a way that avoids a Rules Enabling Act problem because an alternative “interpretation would make the rule superior to every statute of limitations The invalidity of such a court rule is clear, and it is well settled that an interpretation leading to such a result is not favored or followed when a contrary and valid interpretation exists.”)

223. 223 F.3d 1064 (9th Cir. 2000).

224. See FED. R. BANKR. P. 9006.

the 90th day before the petition was a Saturday.²²⁵ The court concluded that the Rule was textually inapplicable and that even if the Rule were applicable it would be invalid as inconsistent with the Rules Enabling Act.²²⁶ The court reasoned that the “statutory mandate that a transfer, in order to be avoidable, be made ‘on or within 90 days before the filing date of the petition’” is “not procedural” but is instead a substantive “rule[] of decision.”²²⁷ In reaching this holding of invalidity, the court afforded no deference to the Advisory Committee, the Judicial Conference, or the Supreme Court.²²⁸

Finally, the Supreme Court, itself, has invalidated a Rule it created under an earlier Rules Enabling Act. In the Bankruptcy Act of 1898, Congress empowered the Supreme Court to prescribe for bankruptcy cases “[a]ll necessary rules, forms, and orders as to procedure and for carrying this Act into force and effect.”²²⁹ The substantive provisions of the 1898 Act made no provision for a bankruptcy petition to be filed by a partner against the partnership.²³⁰ But the Court’s General Order 8 and a related form appeared to authorize such a proceeding.²³¹ In a case brought solely by one partner of a partnership, the Court in *Meek v. Center County Banking Co.* held that General Order 8 and the form were beyond the grant of rulemaking power under the Act.²³² They did “not relate to the execution of any of the provisions of the Act itself; and therefore are without statutory warrant and of no effect.”²³³ The Court made no mention of its prior role in creating the rule and the review was thus *de novo*.

225. *Greene*, 223 F.3d at 1072 (citing 11 U.S.C. § 547 (2012)).

226. *Id.* at 1070. For the Bankruptcy Rules, the relevant Rules Enabling Act is 28 U.S.C. § 2075, which is in substance identical to the general Rules Enabling Act.

227. *Id.* at 1071.

228. For another example of a lower court holding a federal rule invalid using a *de novo* review, see *Henebry v. Sims*, 22 F.R.D. 10, 12 (E.D.N.Y. 1958) (“Rule 25(a) is invalid insofar as it attempts to abridge the plaintiff’s substantive right to bring her action to trial by placing a fixed time upon her right to apply for a substitution for the deceased defendant.”).

229. Act of July 1, 1898, ch. 1, § 30, 30 Stat. 544, 554.

230. See *Meek v. Ctr. Cty. Banking Co.*, 268 U.S. 426, 431 (1925) (“[T]here is no authority under the Act to adjudge a partnership bankrupt except upon its own voluntary petition or upon an involuntary petition filed against it by creditors; and none to make such an adjudication upon a petition filed against it by one of its members.”).

231. See *id.* at 433 (“It is clear that this General Order and Form contemplate that less than all the members of a partnership may file a petition for its adjudication as a bankrupt . . .”).

232. *Id.* at 434.

233. *Id.*

On the other hand, other Supreme Court cases reflect a deferential approach to the Supreme Court's rulemaking work. Such cases move toward a *Chevron*-style deference to the rulemakers. The Court in *Hanna v. Plumer*²³⁴ upheld the validity of Rule 4 under the Rules Enabling Act.²³⁵ In language frequently quoted in lower courts, the Supreme Court held that federal rules are obligatory unless "the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the [Rules] Enabling Act nor constitutional restrictions."²³⁶ Justice Harlan in a concurrence noted the extremely deferential effect of this approach: "Since the members of the Advisory Committee, the Judicial Conference, and this Court who formulated the Federal Rules are presumably reasonable men, it follows that the integrity of the Federal Rules is absolute."²³⁷ This approach is a far cry from the seemingly de novo review in *Mississippi Publishing, Sibbach, Semtek, and Meek*. The prior work of the Supreme Court, as well as the Advisory Committee, a group including lower federal court judges, and Congress, is viewed as a "judgment" that is entitled to be viewed as a "prima facie" answer to the question of validity. This deferential view also crops up—even more explicitly—in *Burlington Northern Railroad Co. v. Woods*.²³⁸ In *Burlington*, the Court found that Federal Rule of Appellate Procedure 38 conflicted with state law.²³⁹ In explaining the Rule's validity, the Court laid out a strongly deferential approach: "the study and approval given each proposed Rule by the Advisory Committee, the Judicial Conference, and this Court, and the statutory requirement that the Rule be reported to Congress for a period of review before taking effect . . . give the Rules presumptive validity under both the constitutional and statutory constraints."²⁴⁰ Similarly, in *Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*,²⁴¹ the Court upheld Federal Rule of Civil Procedure 11 against a Rules Enabling Act challenge.²⁴² Any such challenge, the Court said, has a "large hurdle to get over."²⁴³

234. 380 U.S. 460 (1965).

235. *Id.* at 474.

236. *Id.* at 471.

237. *Id.* at 476 (Harlan, J., concurring).

238. 480 U.S. 1 (1987).

239. *Id.* at 8.

240. *See id.* at 6 (emphasis added).

241. 498 U.S. 533 (1991).

242. *Id.* at 553–54.

243. *Id.* at 552.

This was due to the prima facie judgment made by the rule's creators.²⁴⁴ In *Business Guides*, the Court emphasized not only its own role and that of the Advisory Committee, but also that of Congress, which has "seven months to look them over" before rules go into effect.²⁴⁵

This deferential approach also prevails in lower court cases. Lower courts often start their validity analysis with a quotation of the prima facie validity language from *Hanna*.²⁴⁶ Others echo *Burlington Northern's* presumption of validity language.²⁴⁷ Rules are presumed to be valid "because the Rules Advisory Committee, the Judicial Conference, and the Supreme Court first craft and review these rules, and once crafted, the rules still do not take effect until after they have been reported to Congress for its review."²⁴⁸ A number of cases explicitly give the rules a presumption of validity, but do not explain why they enjoy this status.²⁴⁹ For example, one court stated that "[p]ublic policy, conventionally expressed in terms of a presumption of validity, supports the legality of a formal rule of the Federal Rules of Civil Procedure."²⁵⁰ The source or nature of this public policy was left unexplained. These cases do not clearly stand for the proposition that a federal court uses a deferential standard of review when reviewing the nonadjudicative work of Article III courts and judges. No such deference is expressed. In-

244. *Id.*

245. *Id.*

246. *See, e.g.,* *Champion Produce, Inc. v. Ruby Robinson Co., Inc.*, 342 F.3d 1016, 1027 (9th Cir. 2003); *In re Currency Conversion Fee Antitrust Litig.*, 361 F. Supp. 2d 237, 255 (S.D.N.Y. 2005); *see also* *Hanna v. Plumer*, 380 U.S. 460 (1965).

247. *See, e.g.,* *Comp. Econ., Inc. v. Gartner Grp., Inc.*, 50 F. Supp. 2d 980, 987–88 (S.D. Cal. 1999). In a case predating *Burlington Northern*, the court correctly anticipated the later-ordained presumption of validity. *See* *Helms v. Richmond-Petersburg Tnpk. Auth.*, 52 F.R.D. 530, 531 (E.D. Va. 1971) ("Anyone contending that a Rule having been prescribed by the Supreme Court as a rule of procedure is substantive in nature . . . carries a heavy burden. . . . A strong presumption exists that the Supreme Court, in prescribing the Rule, acted within the scope of its power.").

248. *In re Grand Jury Proceedings*, 616 F.3d 1186, 1196–97 (10th Cir. 2010); *see also* *3M Co. v. Boulter*, 842 F. Supp. 2d 85, 110 (D.D.C. 2012) (noting the role of the Advisory Committee, the Judicial Conference, and the Supreme Court, which gives the rules "presumptive of validity"); *Ward v. Estaleiro Itajai S/A*, 541 F. Supp. 2d 1344, 1356 (S.D. Fla. 2008) (stating all federal rules have a "presumption of validity").

249. *See* *Exxon Corp. v. Burglin*, 42 F.3d 948, 950 (5th Cir. 1995) ("[A]ll federal rules of court enjoy presumptive validity."); *In re Ain*, 193 B.R. 41, 44 (D. Colo. 1996) ("[T]he Supreme Court promulgated the Federal Bankruptcy Rules pursuant to authority granted by Congress Court rules are presumed to be within the guidelines of their enabling statute.>").

250. *See* *Gertler v. United States*, 18 F.R.D. 307, 309 (S.D.N.Y. 1955).

stead, there is a bare assertion of an unsourced presumption of validity.

Likewise, some other cases articulate a deferential standard of review, but exhibit no actual deference in their analysis of the rule. An early case, for example, notes that “the rules were authorized and tacitly ratified by Congress, and adopted by the Supreme Court,” but then analyzed whether the rule in question exceeded the Rules Enabling Act without any further reference to the previous involvement of the Court.²⁵¹ One such case went on to invalidate the rule after articulating a deferential standard of review. In *In re Management Data Services, Inc.*,²⁵² the court stated that federal rules are “entitled to a presumption that they were promulgated within the proper authority of the Supreme Court and do not affect substantive rights.”²⁵³ And so a party challenging a federal rule “bears a heavy burden of proof.”²⁵⁴ But then after a few pages of analysis, the court concluded that the rule was “a statement of substantive policy by a judicial body [and] . . . contravenes 28 U.S.C. § 2075 and is therefore invalid.”²⁵⁵

Finally, some lower court cases exhibit an even stronger form of deference than has been articulated by the Supreme Court. Some state an approach that seems to entirely preclude review:

[A] strong presumption exists that the Supreme Court in prescribing the rules acted within the power delegated to it by Congress, and that the court and Congress, as well as others who labored in connection therewith, thought that the rule in question was one of procedure and that its adoption would not affect the substantive rights of any litigant. Furthermore, *we think that the determination as to whether a mistake has been made in this respect can more appropriately be made by the Supreme Court*, which is given the power to amend.²⁵⁶

Others seem to leave room for review but stress the prior role of the Court and other rulemakers to a degree that would make a finding of invalidity a very surprising outcome. The federal rules are “strongly presumed” to be valid “because they are drafted by

251. *See* *Beach v. Beach*, 114 F.2d 479, 481 (D.C. Cir. 1940) (finding Rule 35 on physical examinations valid because the “rule relates exclusively to the obtaining of evidence, and is therefore procedural”).

252. 43 B.R. 962 (Bankr. W.D. Wash. 1984).

253. *Id.* at 966.

254. *Id.*

255. *Id.* at 970.

256. *H.F.G. Co. v. Pioneer Pub. Co.*, 162 F.2d 536, 539 (7th Cir. 1947) (emphasis added).

the judges who must rule on their validity.”²⁵⁷ Thus, “the rigorous adoption process” involving federal judges, the Court, and Congress, gives rise to a “strong presumption that the rules correctly reflect the dichotomy between substantive law and procedural law.”²⁵⁸ This articulation of a standard of review comes very close to ascribing a stare decisis effect to the Supreme Court’s role in promulgating the rules: they were, after all, “drafted by the judges who must rule on their validity.”²⁵⁹ A relatively recent case similarly implies that a binding effect attaches to the Court’s activity as a rulemaker. “The Federal Rules of Civil Procedure are promulgated by the Supreme Court, the *ultimate arbiters of constitutionality* in our system. As such, it would be an unprecedented move for this Court to find the Supreme Court’s own rules to be unconstitutional.”²⁶⁰

On the other hand, there are cases acknowledging but explicitly rejecting this absolutist position. In *Amstar Corp. v. S/S ALEXANDROS T.*,²⁶¹ a party challenged the validity of Rule C for Certain Admiralty and Maritime Claims.²⁶² The Court “reject[ed] the suggestion that the district court’s judgment must be affirmed because inferior courts lack the power to adjudicate the constitutionality of rules promulgated by the Supreme Court.”²⁶³ While lower courts are bound by stare decisis as to Supreme Court cases, rulemaking “is a legislative or administrative function rather than an act of adjudication.”²⁶⁴ Therefore, the “duty to consider a rule’s validity is not limited to the Supreme Court,” even though the rules are protected by the prima facie assessment of validity made by the Court as rulemaker.²⁶⁵

257. *In re Zimmerman*, 156 B.R. 192, 196 (Bankr. W.D. Mich. 1993).

258. *Id.*

259. *See id.*

260. *Hernandez v. Siemens Corp.*, No. SA-16-cv-00539, 2017 U.S. Dist. LEXIS 194465, at *16 n.1 (W.D. Tex. Nov. 27, 2017) (emphasis added).

261. 664 F.2d 904 (4th Cir. 1981).

262. *See* FED. R. CIV. P. app C, r. C(4).

263. *Amstar*, 664 F.2d at 906.

264. *Id.*

265. *Id.*

IV. HOW FEDERAL COURTS SHOULD REVIEW NONADJUDICATIVE RULEMAKING

Having found a variety of approaches to the problem of judicial review of the nonadjudicative action of creating the federal rules, this part will examine how the review should be conducted. This article concludes that neither the Supreme Court nor lower courts should defer to the Supreme Court's prior role as a transmitter of the rules. Nor should the federal courts defer to the federal judges who sat on the Advisory Committee. The chief problem with such deference, at least with any strong form of deference, is that it precludes the opportunity for a party to receive an Article III adjudication on the question of the rule's validity. Parties have opportunities in adjudication that are unavailable in the rulemaking process. To the extent this runs contrary to *Chevron*, it is an indication that *Chevron* likewise fails to give adjudicative opportunities to litigants.

A. *The Recusal Solution Fails*

This article discussed the “two-hat”²⁶⁶ problem, in which Article III judges engaged in nonadjudicative activities, such as serving on commissions. Some cases suggest recusal as a solution to this problem. But recusal is not applicable to all the participants in the federal rulemaking process.²⁶⁷ More fundamentally, recusals solve a different problem than the one under consideration here, the proper standard of review to be applied in cases challenging a federal rule.

First, recusal has no application to the Supreme Court as an entity involved in the creation of the rules. The individual Justices of the Supreme Court do not transmit proposed rules to Congress, rather the Court as an institution does. Under the Rules Enabling Act, it is the Supreme Court that is granted the “power to prescribe general rules of practice and procedure and rules of evidence.”²⁶⁸ It is the Supreme Court that “shall transmit to the Congress . . . a

266. See *supra* note 78 and accompanying text.

267. See *supra* note 78 and accompanying text.

268. 28 U.S.C. § 2072 (2012). The same is true of the bankruptcy rules. The Court, not the Justices individually, are empowered: “The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure in cases under title 11.” *Id.* § 2075.

copy of the proposed rule.”²⁶⁹ Thus, “as an institutional matter, it is the Supreme Court itself which has been given the responsibility for promulgating and implementing the Rules.”²⁷⁰ Recusal works as a response to the problem of later litigation of prior nonadjudicative acts only when an individual Article III judge is involved, not when a court as an institution is. Judges recuse themselves; courts do not. The main federal recusal statute provides that any “*justice, judge, or magistrate judge* of the United States shall disqualify himself” if “his impartiality might reasonably be questioned.”²⁷¹ The entire Supreme Court *as an institution* cannot recuse itself from a case. There have been cases where the entire *membership* of a court has had to recuse itself, but in such cases it was not a court recusing the court but each judge individually recusing himself until all were gone. *Johnson v. Darr* is an interesting example.²⁷² Litigation was brought in Texas involving the Woodmen of the World, a fraternal benefit society.²⁷³ The Woodmen were so popular in Texas²⁷⁴ that all three members of the Texas Supreme Court recused themselves.²⁷⁵ The Governor of Texas appointed three women, who by gender could not have been members of the Woodmen,²⁷⁶ to hear the case.²⁷⁷ The disqualification was not

269. *Id.* § 2074.

270. Joseph P. Bauer, Schiavone: *An Un-Fortune-ate Illustration of the Supreme Court's Role as Interpreter of the Federal Rules of Civil Procedure*, 63 NOTRE DAME L. REV. 720, 727 (1988).

271. 28 U.S.C. § 455(a) (2012) (emphasis added); *see also* 28 U.S.C. § 144 (2012) (providing for disqualification of a judge who has “a personal bias or prejudice.”).

272. 272 S.W. 1098 (Tex. 1925).

273. For a full account of the background to *Johnson*, see Alice G. McAfee, *The All-Woman Texas Supreme Court: The History Behind a Brief Moment on the Bench*, 39 ST. MARY'S L.J. 467, 468–72 (2008).

274. *Id.* at 472 n.25 (“[I]n Texas, most of the legal community were members.”).

275. *See id.* at 472.

276. *See Texas' All-Woman Supreme Court*, TEX. ALMANAC, <https://texasalmanac.com/topics/history/texas-all-woman-supreme-court> [<https://perma.cc/EZG7-KQKQ>] (last visited Dec. 1, 2018) (“[The Governor] appointed three women, who could not possibly be members of Woodmen of the World because that organization did not accept women members.”).

277. All members of the Supreme Court were disqualified to sit in this case, and so certified their disqualification to the Governor of the state, whereupon, under authority contained in section 1517 of Vernon's Sayles' Revised Statutes of Texas, the Governor appointed a Special Supreme Court, consisting of three women, Mrs. HORTENSE WARD, Special Chief Justice, and Miss RUTH VIRGINIA BRAZZIL and Miss HATTIE L. HENENBERG, Special Associate Justices, to hear and determine the issues.

Johnson, 272 S.W. at 1098 n.*.

of the court as an institution but of its members.²⁷⁸ This is necessarily the case since the Texas Supreme Court did in fact hear the case, albeit with a new, *A League of Their Own* style lineup.²⁷⁹

The “two-hat” problem does appear in the context of the Federal Rules Advisory Committees, the Standing Committee on Rules of Practice and Procedure, and the Judicial Conference. Individual federal judges—not courts—make up the Judicial Conference and sit on the Standing Committee and the subject matter Advisory Committees.²⁸⁰ These judges serve in the tradition of Article III judges appointed to nonadjudicative committees and commissions.²⁸¹ Caselaw suggests that recusal helps avoid *separation of powers* problems. As observed in a different context, judges sitting on nonadjudicative bodies are not “serving . . . as a representative or member of any court” and their serving on a Committee does not “disable any other Article III judge or any court from performing properly assigned duties.”²⁸² Thus, as a matter of separation of powers, recusal protects the judiciary from the taint of involvement in nonadjudicative activities that are later the subject of litigation. But the question here is different. Assuming that the judges who sat on a relevant Advisory Committee and the Standing Committee must recuse themselves from hearing a case involving a challenge to a federal rule, by what standard do the remaining federal judges review the rules? Recusal doctrines do not answer this question. If anything, offering recusal as a solution to the “two-hat” problem implies no deference and a *de novo* review. If recusal is a solution, then the problem of prior nonadjudicative involvement by a federal judge is solved by removing the troublesome judge. The uninvolved judges may simply proceed as they normally would—*de novo*.

278. *Id.*

279. The current version of the recusal statute provides for the recusal of “one or more justices of the supreme court.” The Governor is then to appoint “the requisite number of persons.” TEX. GOV’T CODE ANN. § 22.005 (West 2018) (emphasis added).

280. For example, Judge David G. Campbell, Judge of the United States District Court for the District of Arizona, is the current Chair of the Standing Committee on Rules of Practice and Procedure and Judge John D. Bates, Senior Judge of the United States District Court for the District of Columbia, is the current Chair of the Advisory Committee on Civil Rules. *Committees on Rules of Practice and Procedure: Chairs and Reporters*, U.S. COURTS (Oct. 1, 2017), http://www.uscourts.gov/sites/default/files/2017_committee_roster.pdf [<https://perma.cc/XF2X-DXJ7>].

281. See generally *supra* notes 79–102 and accompanying text.

282. *In re* President’s Comm’n on Organized Crime Subpoena of Scarfo, 783 F.2d 370, 381 (3d Cir. 1986).

In addition, it is far from clear that recusal is appropriate even for rulemaking judges. The recusal statute requires a judge to step aside if “impartiality might reasonably be questioned.”²⁸³ Recusal is mandatory when the judge “has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy.”²⁸⁴ But the judge’s prior “governmental employment” as a rulemaker did not involve “the proceeding” or the “particular case in controversy.”²⁸⁵ If recusal is not warranted, how is a judge sitting as a judge to review his work as a rulemaker on an Advisory Committee? The issue remains unsettled.

B. *Should the Supreme Court as a Court Defer to the Supreme Court as a Rulemaker?*

The Supreme Court, in its adjudicative role, should not defer to its own prior actions as a transmitter of the federal rules. Were the Supreme Court as an adjudicator of the validity of a federal rule to defer to its prior involvement as a nonadjudicative rulemaker, parties wishing to challenge the rule would lose their opportunity for judicial review. Any strong, *Chevron*-level deference would place the decision on the validity of a rule solely within a nonadjudicative setting rather than allowing the issue to be litigated before a court.

To be clear, what this article is considering is not litigation concerning the interpretation of a rule—what it means or how it applies. Much has been written about how the Court, in adjudication, should interact with the rulemaking apparatus.²⁸⁶ What this article contemplates here are challenges to a rule on the ground that it exceeds the delegation of authority under the Rules Enabling Act or that it is unconstitutional. The issue in such cases is not what is the best procedural system—the proper scope of discovery or the standards for summary judgment or of the sufficiency of pleadings, for example—but a focused legal question about a rule’s validity.

A series of cases in another context establish the necessity of providing an Article III decisionmaker. In general, civil litigation

283. 28 U.S.C. § 455 (2012).

284. *Id.* § 455(b)(3).

285. *See id.*

286. *See Porter, supra* note 140, at 149–51 (summarizing the literature).

must be housed in an Article III court, not in other entities created by Congress that lack Article III status.²⁸⁷ In *Stern v. Marshall*,²⁸⁸ a creditor sued a party in bankruptcy for defamation and the party in bankruptcy then filed a counterclaim for tortious interference with an anticipated testamentary disposition.²⁸⁹ The bankruptcy court dismissed the defamation claim and entered judgment on the counterclaim. The issue before the Court was the bankruptcy court's jurisdiction to hear a common law counterclaim asserted in a bankruptcy proceeding.²⁹⁰ It concluded that as a statutory matter, Congress had granted such jurisdiction,²⁹¹ but that this grant fell outside the limitations of Article III.²⁹² Bankruptcy judges are not Article III judges as they do not have the protections afforded by Article III.²⁹³ A basic separation of powers principle requires that matters which are sufficiently "judicial" be settled in the judiciary—before an Article III court. "Congress may not 'withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty.'"²⁹⁴ There is an exception for disputes involving "public rights," which can be finally determined by an agency, but the Court's public rights cases have limited "the exception to cases in which the claim at issue derives from a federal regulatory scheme, or in which resolution of the claim by an expert Government agency is deemed essential to a limited regulatory objective within the agency's authority."²⁹⁵ Thus actions which are "quintessentially suits at common law" cannot be removed from Article III courts.²⁹⁶ This description would cover the run of the mill civil cases in which a litigant challenges a federal rule, such as *Burlington Northern Railroad Co. v. Woods* (suit for damages for injuries sustained in a motorcycle accident),²⁹⁷ *Hanna v. Plumer* (suit for personal injuries

287. See *Stern v. Marshall*, 564 U.S. 462, 469 (2011).

288. *Id.*

289. *Id.* at 470.

290. *Id.* at 471.

291. *Id.* at 478.

292. *Id.* at 469.

293. See *id.* at 485.

294. *Id.* at 484 (quoting *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1856)).

295. *Id.* at 490.

296. See *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 56 (1989); see also *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 848 (1986) ("[The] guarantee of an independent and impartial adjudication by the federal judiciary of matters within the judicial power of the United States . . .").

297. See 480 U.S. 1, 2 (1987).

from an automobile accident),²⁹⁸ and *Mississippi Publishing Corp. v. Murphree* (suit for damages from libel).²⁹⁹

The doctrine expressed in *Stern* is based in part upon structural, separation of powers concerns.³⁰⁰ But it also serves to protect an individual liberty interest.³⁰¹ Article III protects the “integrity of judicial decisionmaking,”³⁰² in order to protect the individual from judicial decisions that are corrupted by the influence of the Executive or Congress: “the Framers sought to ensure that each judicial decision would be rendered, not with an eye toward currying favor with Congress or the Executive.”³⁰³ The Court, in *Commodity Futures Trading Commission v. Schor*,³⁰⁴ likewise reiterated that the judiciary created by Article III serves to “safe-guard litigants’ ‘right[s].”³⁰⁵ Indeed, *Schor* went so far as to say that Article III’s independent judiciary “serves to protect *primarily* personal, rather than structural, interests.”³⁰⁶

The context of *Stern v. Marshall* and similar cases differs from that addressed here in one way. Those cases rejected the sufficiency of a forum that was without doubt adjudicatory (an adversarial proceeding with procedural protections) but located in a non-Article III court.³⁰⁷ In contrast, the question considered here involves an Article III court declining to exercise its independent judgment as to the matter before it out of deference to a *nonadjudicative* rulemaking exercise by Article III entities.³⁰⁸ *Stern* rejected replacing an Article III adjudication with an Article I adjudication.³⁰⁹ Strong deference in the present context would have the effect of replacing an independent Article III adjudicative review with whatever protection is received from Article III judges in non-adjudicative rulemaking. A party’s only real chance to argue against the rule would have been in the comment period provided

298. See 380 U.S. 460, 461 (1965).

299. See 326 U.S. 438, 439–40 (1946).

300. See *Stern*, 564 U.S. at 483.

301. *Id.*

302. *Id.* at 484.

303. *Id.*

304. 478 U.S. 833 (1986).

305. *Id.* at 848 (quoting *United States v. Will*, 449 U.S. 200, 218 (1980)).

306. *Id.* (emphasis added).

307. See *Stern*, 564 U.S. at 469.

308. See *Schor*, 478 U.S. at 845–46.

309. See *Stern*, 564 U.S. at 482, 503.

for rule adoption.³¹⁰ Thus, the deference considered here would have the effect of eliminating *any adversarial adjudicative* proceedings, in an Article I or in an Article III court. If the Supreme Court grants weighty, *Chevron*-style, deference to itself as rule-maker, a party will have lost his opportunity to receive an adjudicated resolution to a legal issue in a private dispute. He will instead have had only the protection of the Court acting as a rule transmitter without the chance to participate in that process as a litigant.

A strong deference by the Supreme Court to its earlier incarnation as a rulemaker would conflict with the teaching of cases such as *Stern*. They “support a crucial dichotomy” that

although fact-finding may sometimes be reassigned to article I bodies, law declaration may not be assigned to such bodies. In order to maintain the checks and balances inherent in our constitutional framework, judicial review of article I adjudications must exist and independent review of questions of law must be permitted.³¹¹

To be sure, Congress may limit judicial review of administrative actions.³¹² Congress enjoys broad discretion to do so when the claim is merely that an agency violated a statute,³¹³ but Congressional bans on judicial review of constitutional claims raise “serious constitutional question[s]”³¹⁴ and so the intent to forbid judicial review in that context must be clear.³¹⁵ But this power to ban judicial review arises in the context of litigation against an agency, not in the application of a rule in a dispute between private parties. In any

310. See *Procedures Governing the Rulemaking Process* § 440.20.40, U.S. COURTS, <http://www.uscourts.gov/rules-policies/about-rulemaking-process/laws-and-procedures-governing-work-rules-committees-0> [<https://perma.cc/6WEQ-LYQR>] (last visited Dec. 1, 2018) (“A public comment period on the proposed change must extend for at least six months after notice is published in the *Federal Register*, unless a shorter period is approved under paragraph (d) of this section.”).

311. See Sanford N. Caust-Ellenbogen, *Blank Checks: Restoring the Balance of Powers in the Post-Chevron Era*, 32 B.C. L. REV. 757, 803 (1991); see also Sarah Zeleznikow, “Leaving the Fox in Charge of the Hen House”: *Of Agencies, Jurisdictional Determinations and the Separation of Powers*, 71 N.Y.U. ANN. SURV. AM. L. 275, 322 (2016) (agreeing with Caust-Ellenbogen).

312. See 5 U.S.C. § 701(a) (2012) (exempting from judicial review agency action in which “statutes preclude judicial review” or where “agency action is committed to agency discretion by law”).

313. See *Webster v. Doe*, 486 U.S. 592, 599–600 (1988).

314. *Id.* at 603 (quoting *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 681 n.12 (1986)).

315. See *id.*

event, there is no implied or explicit removal of judicial review under the Rules Enabling Act.

It is no answer to say that that adjudicatory review can be provided by the lower federal courts to satisfy access to an Article III court while the Supreme Court maintains a deferential aloofness. If the Supreme Court but not the lower courts exercise a *Chevron*-style deference, the former could not meaningfully review lower court decisions which do not employ a similar deference. Reviewing courts must apply the same standards as lower courts to avoid chaos. Suppose for example that a lower federal court applies a *de novo* review and invalidates a federal rule. On certiorari to the Supreme Court, would the Court then reverse the lower court and reinstate the rule under a deferential standard of review, reversing the lower court for failing to apply a standard that the lower court could not and did not apply? It would be nonsensical and pointless to have lower courts apply one standard of review and the Supreme Court another. And under such a regime, what if one circuit invalidates a rule but another circuit upholds it? How is the Supreme Court to resolve this split if it cannot engage in the same analysis in which the circuit courts engaged?

Nor is it an answer to say that one wishing to challenge a federal rule is adequately protected by the presence of Article III officers—federal judges—on the Advisory Committee, the Standing Committee, and the Judicial Conference. As an initial matter, the rulemaking bodies include, at the Standing and Advisory Committee level, persons who are not federal judges.³¹⁶ Among these non-judges is the influential Advisory Committee Reporter, a law professor upon whom “[e]ach committee . . . relies heavily.”³¹⁷ More fundamentally, the federal judges serving in these roles are not acting as

316. See James C. Duff, *Overview for the Bench, Bar, and Public: The Federal Rules Of Practice And Procedure Administrative Office of the U.S. Courts*, U.S. COURTS, <http://www.uscourts.gov/rules-policies/about-rulemaking-process/how-rulemaking-process-works/overview-bench-bar-and-public> [<https://perma.cc/BA2U-P9RG>] (last visited Dec. 1, 2018) (“The Standing Committee and the advisory committees are composed of federal judges, practicing lawyers, law professors, state chief justices, and representatives of the Department of Justice.”).

317. See *Committee Membership Selection*, *supra* note 144 (“Each committee also relies heavily on the services of its ‘reporter.’ The reporters are prominent law professors, who are the leading experts in their respective fields. . . . The reporters research the relevant law and draft memoranda analyzing suggested rule changes, develop proposed drafts of rules for committee consideration, review and summarize public comments on proposed amendments, and generate the committee notes and other materials documenting the rules committees’ work.”).

judges. As has been stressed in this article, their activities are non-adjudicative. Casting a party's protection upon a nonadjudicative process, even one overseen by a person holding an Article III judgeship, is a poor substitute for protection in litigation. A party challenging a federal rule and having available de novo or even mildly deferential adjudicative review could avail himself of many opportunities not available in the rulemaking process. The following table summarizes some of these differences:³¹⁸

Nonadjudicative Setting	In Adjudication
No control over the issues	Can frame the issues
Submit comments on the abstract merits of the rule	Can argue the merits of the rule in a concrete setting
Is one commentator among many	Is one of a few having the court's attention
Lacks any control of the process	Along with other parties, controls the litigation
The future effect of the rule on the party may be unclear	Has a concrete stake

It is doubtful whether any person wishing to challenge a federal rule would prefer the nonadjudicative setting. There is simply much more ability to protect one's interests in an adjudicative setting than in rulemaking.

And it is not just a question of what is best for a party. There are also serious questions of institutional competence. In administrative law, there is an ongoing debate on the relative merits of an agency making law through rulemaking as opposed to adjudication.³¹⁹ Whatever one may conclude is best for the Environmental Protection Agency or the National Labor Relations Board, in the

318. This list was inspired by Abram Chayes venerable article, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

319. See Mulligan & Staszewski, *supra* note 140, at 1206 (describing a "conventional wisdom in administrative law . . . that rulemaking is . . . superior" to adjudication); Jeffrey S. Lubbers, *The Potential of Rulemaking by the NLRB*, 5 FLA. INT'L U. REV. 411, 414–17 (2010) (describing trend of decreasing rulemaking). A seminal article on the issue concludes that "[i]n terms of fairness and efficiency neither rulemaking nor adjudication is an inherently superior mode of decisionmaking for all occasions. Each has its advantages and limitations." Richard K. Berg, *Re-Examining Policy Procedures: The Choice Between Rulemaking and Adjudication*, 38 ADMIN. L. REV. 149, 162 (1986). As to judicial oversight of an agency's choice of making law through adjudication or rulemaking, see *NLRB v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267, 294 (1974), which says, "[T]he choice between rulemaking and adjudication lies in the first instance within the Board's discretion."

context of the federal rules the rulemakers are mostly judges. Judges acting as rulemakers are stepping outside their usual and customary mode of decisionmaking. Various strands of our understanding of the federal judiciary reflect a premise that courts perform best when they act as courts, i.e., when adjudicating a live dispute. One sees this concern about competency in the political question doctrine. One strand of that doctrine requires federal courts to refrain from deciding cases whose resolution depends upon an underlying issue of foreign relations because “the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions . . . are delicate, complex, and involve large elements of prophecy . . . They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility.”³²⁰ A broader statement of the competency strand of the political question doctrine calls for abstention when there is “a lack of judicially discoverable and manageable standards for resolving” the case or “the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion.”³²¹ Likewise, the concrete injury requirement in the law of standing:

preserves the vitality of the adversarial process by assuring both that the parties before the court have an actual, as opposed to professed, stake in the outcome, and that the legal questions presented . . . will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action.³²²

And mootness similarly assures that the case will “present courts with the best arguments, made by the most eager adversaries, built on the most pertinent facts.”³²³ All of these doctrines help to assure accurate decision making by courts through a high quality of adversarial presentation in an adjudicatory setting.

It has been argued that rulemaking is superior to adjudication in the administrative law context and by analogy in the federal rules context.³²⁴ The argument as to the latter is that the Supreme Court should not reshape a rule by interpretation in litigation but instead should await redrafting and an amendment.³²⁵ But these

320. *Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948).

321. *Baker v. Carr*, 369 U.S. 186, 217 (1962).

322. *See Massachusetts v. EPA*, 549 U.S. 497, 517 (2007) (quoting *Lujan v. Def.' of Wildlife*, 504 U.S. 555, 581 (1992) (Kennedy, J., concurring)).

323. Frederic Bloom, *The Law's Clock*, 104 *GEO. L.J.* 1, 27 (2015).

324. *See Mulligan & Staszewski*, *supra* note 140, at 1206.

325. *See id.* at 1207 (“[R]ulemaking has definite advantages over adjudication as a tool

arguments are not persuasive in the context of deciding if a rule is within the scope of power granted under the Rules Enabling Act or is otherwise invalid. First, it is argued, rulemaking is superior for “making policy and exploring issues of legislative fact” because the process under the Rules Enabling Act mirrors that of the Administrative Procedure Act,³²⁶ which establishes procedures are “specifically designed for this purpose.”³²⁷ But questions of policy—of what a federal rule should be—are not within the purview of the judicial review being discussed here.³²⁸ The question is not a rule’s wisdom; it is its validity. Likewise, rulemaking proponents argue that rulemaking gives greater control to an agency in choosing which topics to prioritize and the sequence of rulemaking.³²⁹ But again, this goes to the content of a proposed federal rule, not the question of its validity. Proponents of rulemaking also point to the broader participation in rulemaking—anyone can participate by commenting on a proposed rule.³³⁰ But in cases that make it to the Supreme Court, parties frequently file amicus briefs, giving a much broader field of information to the Court. For example, in *Gasperini v. Center for Humanities, Inc.*,³³¹ an *Erie* case that addressed the validity and application of a federal rule,³³² amicus briefs were filed by: the Product Liability Advisory Council; the United States Chamber of Commerce; the City of New York; the American Council of Life Insurance; the American Insurance Association; certain Federal Jurisdiction and Legal History Scholars, among them Akhil Reed Amar, Erwin Chemerinsky, Daniel R. Co-

for agency lawmaking and policymaking’ [and] many . . . apply to the Court as a rule-maker.”).

326. 5 U.S.C. §§ 551–59 (2012); Mulligan & Staszewski, *supra* note 140, at 1207.

327. *See* Mulligan & Staszewski, *supra* note 140, at 1207.

328. Some argue that courts as adjudicators are superior to rulemakers even on questions of policy and the content of rules, at least as to rules that are fact-sensitive:

[T]he issues that the Court cannot answer using tools of statutory construction inevitably confront thorny fact-specific, substance-specific problems that would not be susceptible to resolution through rulemaking, particularly given the lengthy, consensus-based rulemaking process. Such discretionary, fact-laden questions are not within the institutional competence of rulemakers. To the contrary, doctrinal evolution through fact-bound applications over time is the bread and butter of the common law.

Porter, *supra* note 140, at 182.

329. *See* Mulligan & Staszewski, *supra* note 140, at 1209–10.

330. *See id.* at 1207–08.

331. 518 U.S. 415 (1996).

332. *Id.* at 437–38 n.22; *id.* at 467–68 (Scalia, J., dissenting).

quillette, Arthur F. Mcevoy and Arthur R. Miller; and the Association of Trial Lawyers of America.³³³ The Court hardly lacked for input.³³⁴ Finally, rulemaking is said to be fairer because it applies only prospectively and serves to give greater notice to parties in advance of their acting.³³⁵ But this argument has much more force for rules regulating substantive conduct than it does for procedural rules.

Finally, if rulemaking is superior to adjunction, why don't we have more of it from the Court? We entrust the Supreme Court and the adjudicative process in substantive contexts to make law. No one has proposed that the Supreme Court appoint an advisory committee on affirmative action or on levels of scrutiny for various classes in equal protection cases or on forum non conveniens or any other subject within its adjudicatory authority and then adopt the proposals. The Supreme Court is entrusted to decide cases, and in the process of doing so, make law. Parties have greater opportunities in litigation before the Court than in commenting to the Advisory Committee. And the Supreme Court is presumed to have sufficient competence to decide the weightiest of matters. If the Supreme Court lacks such competence when sitting as a Court, it is hard to see how lower court judges would suddenly acquire it when constituted as an Advisory Committee.

The Supreme Court should not in adjudication defer to itself as a transmitter of the rules. Judge Weinstein correctly raised the

333. This list can be found under the filings tab on the Westlaw view of *Gasperini*. Filings under *Gasperini v. Ctr for Humanities, Inc.*, 518 U.S. 415, THOMSON REUTERS WESTLAW, [https://www.westlaw.com/Document/I38fdc8339c4611d991d0cc6b54f12d4d/View/FullText.html?transitionType=Default&contextData=\(sc.Default\)&VR=3.0&RS=cblt1.0](https://www.westlaw.com/Document/I38fdc8339c4611d991d0cc6b54f12d4d/View/FullText.html?transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=cblt1.0) (click filings on top of page).

334. Chayes described decades ago the broader informational inputs in modern public law litigation:

[T]he court, although traditionally thought less competent than legislatures or administrative agencies in gathering and assessing information, may have unsuspected advantages in this regard. Even the diffused adversarial structure of public law litigation furnishes strong incentives for the parties to produce information. If the party structure is sufficiently representative of the interests at stake, a considerable range of relevant information will be forthcoming. And, because of the limited scope of the proceeding, the information required can be effectively focused and specified. Information produced will not only be subject to adversary review, but as we have seen, the judge can engage his own experts to assist in evaluating the evidence. Moreover, the information that is produced will not be filtered through the rigid structures and preconceptions of bureaucracies.

Chayes, *supra* note 318, at 1308 (footnotes omitted).

335. See Mulligan & Staszewski, *supra* note 140, at 1211–12.

concern that the prior involvement by the Court in the creation of the rules “inhibits” federal courts from “impartially” reviewing the rules and that “by adopting the Rules the Court to some extent forecloses questions concerning their validity, particularly in relation to the *Erie* doctrine.”³³⁶ Self-deference by the Court is to be avoided, not embraced. For the Supreme Court as a court to defer to itself as a rulemaker would deprive parties of a forum to challenge a federal rule before an Article III court with the protections and advantages that accrue to litigants. And the need to provide Article III review cannot be satisfied by either lower courts sitting as courts or by their participation in the rulemaking process.

C. *Should the Supreme Court as a Court Defer to the Advisory Committee, the Standing Committee, and the Judicial Conference?*

A slightly different argument is that the Supreme Court should defer to those who did the heavy lifting in studying and drafting the rules, the Advisory Committee, and to a lesser extent, the Standing Committee and the Judicial Conference. While such deference has support in the caselaw, any strong form of deference, such as a *Chevron*-level of deference, is inappropriate.

First, having the Supreme Court defer to the rules committees would put the master at the feet of the servant.³³⁷ The Chief Justice appoints the members of the rules committees.³³⁸ Congress has granted the “Supreme Court,” not the rules committees, the “power to prescribe” the rules.³³⁹ And it is the Court which “shall transmit” them to Congress.³⁴⁰ The Court sits atop the rulemaking hierarchy and has the institutional responsibility at the proposal stage to choose to transmit rules to Congress. As a formal matter, then, making the Court a lesser participant does not square with the institutional arrangements of the Rules Enabling Act.

336. Geoffrey C. Hazard, Jr., *Undemocratic Legislation*, 87 YALE L.J. 1284, 1288 (1978) (reviewing JACK B. WEINSTEIN, REFORM OF COURT RULE-MAKING PROCEDURES (1977)).

337. See Marcus, *supra* note 150, at 942 (noting the argument that “the Court—ostensibly the rulemaking principal by the terms of the Rules Enabling Act—[should not] have to defer to what the Court itself forges”); Porter, *supra* note 140, at 148 (noting the view that “both under the Enabling Act and as a matter of inherent adjudicative power, the Court is ultimately in charge of the Rules”).

338. See *Committee Membership Selection*, *supra* note 144.

339. 28 U.S.C. § 2072(a) (2012).

340. *Id.* § 2074(a).

It is true that in recent times the Advisory and Standing Committees have done the heavy lifting in the rulemaking process. The ongoing study of the rules, their drafting, and reviewing comments on drafts all occur in these committees.³⁴¹ It once could be said that the Court “is not merely rubberstamping proposals of the Advisory Committee,” because of the “frequent instances in which members of the Court . . . dissented from proposed amendments to the Rules.”³⁴² But for several decades now, there have been no rejections or even dissents from adoption of proposed rules.³⁴³ It is possible that the Supreme Court is now operating in total reliance on the rules committees and is a mere passive conduit to Congress. In fact, some Justices have expressed such a view.³⁴⁴ On the other hand, the Court’s silence may be the result of it closely examining the proposed rules and repeatedly finding them unobjectionable and literally unremarkable. The Court may simply be like the boy who did not speak until he was twelve, at which time he asked his father to pass the milk, and who upon being asked by his father why he had never before spoken, replied, “I didn’t have anything to say.” The Court is a “black-box” as to the rules proposals³⁴⁵ and so we are left to surmise.

To the extent the Court is indeed deferring to the Advisory Committee at the time of transmittal to Congress, it certainly should not then defer to itself *again* in actual litigation concerning a rule. The Court would completely absent itself from the rulemaking process were it to engage in this double deference. The Court, that is, should not defer to an earlier decision it made to transmit the rules when that earlier decision was itself the product of deference to the Advisory Committee.

341. See *id.* § 2077(b); *How the Rule Making Process Works*, U.S. COURTS, <http://www.uscourts.gov/rules-policies/about-rulemaking-process/how-rulemaking-process-works> [<https://perma.cc/4DVC-BJ2V>] (last visited Dec. 1 2018).

342. See Bauer, *supra* note 270, at 727 n.38 (citing dissents from 1980 and before).

343. See Marcus, *supra* note 150, at 942–43. For a collection of the transmittals (with dissents) of rules from the Supreme Court to Congress, see CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* app. B. (2018).

344. See *Amendments to Federal Rules of Civil Procedure*, 146 F.R.D. 501, 505 (1993) (statement of White, J.) (“[T]he Court’s role . . . is to transmit the Judicial Conference’s recommendations without change and without careful study, as long as there is no suggestion that the committee system has not operated with integrity.”).

345. See Porter, *supra* note 140, at 146.

A rulemaker's expertise in the subject matter is one argument for deference to it. Agency expertise is part of the rationale of *Chevron* deference³⁴⁶ and its milder sibling, *Skidmore*³⁴⁷ deference.³⁴⁸ But the expertise rationale does not hold up as well in the context of federal rules. In the normal administrative law context, the federal courts review policy choices made by specialists who are regulating an often-technical subject matter. But the subject matter of the federal rules is procedure or evidence, not automotive safety or pollution control equipment or some other topic exotic to the mind of a judge. True, a district court judge would almost certainly have more hands-on experience with matters such as expert witnesses, discovery, or the practical effects of joinder rules.³⁴⁹ But the issue in litigation in this context is not the ideal content of a rule, on which a lower court judge may well be more informed, but its validity as within the Rules Enabling Act. To the extent there is a specialized field of knowledge involved, it is the Rules Enabling Act. As to that subject matter, the Supreme Court is no worse informed than lower federal court judges; indeed, it may be better informed.³⁵⁰ Moreover, the rosters of the Advisory Committees are

346. See *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984) (“Judges are not experts in the field . . .”).

347. See *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (“[T]he rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.”).

348. [T]he Rules Committees in this context are less like Congress and more like agencies. Like agencies, the Rules Committees have direct experience and specialized knowledge, which they use to set agendas and incorporate policy preferences into the rules. Like agency regulations, the rules pass through a notice-and-comment period. These similarities suggest that the Rules Committees, like agencies, ought to have a say when the Court interprets or construes the rules they drafted.

See *Dodson*, *supra* note 176, at 11 (footnotes omitted).

349. See *id.* at 10 (“[T]he Supreme Court is far less equipped to engage in rulemaking. The justices have limited federal trial-level experience and lack the procedural expertise of the rulemakers.”); see also *Order Adopting Federal Rules of Civil Procedure*, 507 U.S. 1091, 1094–95 (statement of White, J.) (1993) (“I did my share of litigating when in practice and once served on the Advisory Committee for the Civil Rules, but the trial practice is a dynamic profession, and the longer one is away from it the less likely it is that he or she should presume to second-guess the careful work of the active professionals manning the rulemaking committees, work that the Judicial Conference has approved. At the very least, we should not perform a *de novo* review and should defer to the Judicial Conference and its committees as long as they have some rational basis for their proposed amendments.”).

350. Justice Stevens sat on twenty-four cases in which the Rules Enabling Act was discussed during his tenure on the Court. See *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393 (2010); *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100 (2009); *Semtek Intern. Inc. v. Lockheed Martin Corp.*, 531 U.S. 497 (2001); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999); *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S.

not at all limited to district court judges. The 2017 Civil Rules Advisory Committee³⁵¹ had seventeen members, not counting liaison members. Seven were district court judges.³⁵² One was a circuit court judge and another was a justice of a state supreme court.³⁵³ There were three law professors, four practitioners, and a representative from the Justice Department.³⁵⁴ In sum, only nine of the seventeen were judges of any kind, and less than half were district court judges. Moreover, the Advisory Committee “relies heavily” on the Reporter, a law professor, who undertakes to “research the relevant law and draft memoranda analyzing suggested rule changes, develop proposed drafts of rules for committee consideration, review and summarize public comments on proposed amendments, and generate the committee notes and other materials documenting the rules committees’ work.”³⁵⁵

Finally, if the Supreme Court defers to the Advisory Committee, then an Article III court is farming out legal analysis to Article III actors (judges) engaged in a nonadjudicative role. The rulemakers in this scheme are much like the commissioners in cases like *Hayburn’s Case*.³⁵⁶ Applying a rule of deference in this context turns the teaching of those cases on its head. Article III judges, the cases teach, can be assigned nonadjudicative activities such as setting pensions or serving on presidential commissions, because they are simply individuals trading their robes for hats.³⁵⁷ But that means that in serving in such a capacity they are not acting as an Article

308 (1999); *Clinton v. City of New York*, 524 U.S. 417 (1998); *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997); *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415 (1996); *Henderson v. U.S.*, 517 U.S. 654 (1996); *Behrens v. Pelletier*, 516 U.S. 299 (1996); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995); *Swint v. Chambers Cty. Comm’n*, 514 U.S. 35 (1995); *Willy v. Coastal Corp.*, 503 U.S. 131 (1992); *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90 (1991); *Business Guides, Inc. v. Chromatic Comm’n Enters., Inc.*, 498 U.S. 533 (1991); *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990); *Mistretta v. United States*, 488 U.S. 361 (1989); *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988); *Frazier v. Heebe*, 482 U.S. 641 (1987); *Burlington Northern R. Co. v. Woods*, 480 U.S. 1 (1987); *Marek v. Chesny*, 473 U.S. 1 (1985); *Daily Income Fund, Inc. v. Fox*, 464 U.S. 523 (1984); *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980); *Deposit Guar. Nat. Bank v. Roper*, 445 U.S. 326 (1980).

351. *Committees on Rules and Civil Practice: Chairs and Reporters*, U.S. COURTS (May 25, 2017), http://www.uscourts.gov/sites/default/files/2016_committee_roster_0.pdf [<https://perma.cc/GA9Q-JB8Y>].

352. *Id.*

353. *Id.*

354. *Id.*

355. *See Committee Membership Selection*, *supra* note 144.

356. *See supra* notes 92–107 and accompanying text.

357. *See supra* notes 77–87 and accompanying text.

III officer. Therefore, the Supreme Court cannot treat the work of the Advisory Committee as if it were the product of a lower court decision and review it under a deferential standard of review. The grounds for deference cannot lie in those normally underlying a higher court deferring to a lower court (such as a clearly erroneous standard of review); instead any deference must come out of administrative law (*Chevron*), treating the Advisory Committee and Judicial Conference as an agency. Affording such deference removes the judiciary entirely from the process. The members of the Advisory Committee who are judges are acting in a nonadjudicative capacity. This is permissible,³⁵⁸ but then to assure that some Article III review is available, judges in litigation must actually decide the case independently.

D. *Implications for Chevron*

The actions of the federal rulemakers are analogous to those of an administrative agency making rules that are later challenged in litigation. In that context, *Chevron* instructs the federal courts to defer to reasonable statutory interpretations by the agency, even as to “jurisdictional” statutes (those empowering the agency).³⁵⁹ In the federal rules context, caselaw goes both ways on the question of deference,³⁶⁰ and this article argues against it. Given that position but the seemingly contradictory teaching of *Chevron*, there are three possibilities: (1) the *Chevron* context, although similar, is distinguishable; (2) the cases that suggest a de novo approach are wrong and the courts should act deferentially as in the *Chevron* context; or (3) *Chevron* is wrong.

Is *Chevron* distinguishable? *Chevron* has several rationales. First, *Chevron* is grounded in a doctrine of actual or presumed congressional intent: a statute may have an “express delegation” of authority to an agency by “explicitly [leaving] a gap [in the legislation],” in which case an agency’s “regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.”³⁶¹ In addition, a statute that is “silent or ambiguous with respect to the specific issue” may be read as an implicit grant

358. See *Hayburn’s Case*, 2 U.S. (2 Dall.) 409, 410 (1792).

359. See *supra* note 183 and accompanying text.

360. See *supra* Part III.B.

361. See *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984).

of authority.³⁶² When Congress has “left ambiguity in a statute meant for implementation by an agency,” Congress intended “that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.”³⁶³

How does the congressional intent rationale apply in the context of the Rules Enabling Act? The operative language in this statute is the empowerment of the Supreme Court to create “rules of practice and procedure and rules of evidence” and its prohibition against affecting “any substantive right.”³⁶⁴ It is now clear that *Chevron* fully applies to ambiguous grants of authority to an agency—its jurisdictional grant—which is what the Rules Enabling Act amounts to.³⁶⁵ The delegation of power in this instance does indeed turn on words—substance and procedure—that are now thought to be ambiguous.³⁶⁶ But there is one puzzle to this application of *Chevron*: Although we now perceive ambiguity in the substance-procedure dichotomy, “[w]hen the original Rules Enabling Act was promulgated into law in 1934, many of its supporters believed that procedure and substance were indeed mutually exclusive.”³⁶⁷ Presumably, under *Chevron*, the original understanding of the statutory terms as being unambiguous should control, since the point of the enterprise is to uphold congressional intent. This would mean that *Chevron* deference is inapplicable, since there is no implicit grant of authority from an ambiguous statute. This results in a paradox, however, because the result of not applying *Chevron* is to empower the federal courts to decide what is “substance” and what is “procedure,” and in so doing the courts would

362. See *id.*; see also *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001) (“[I]t can still be apparent from the agency’s generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute”); Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 GEO. L.J. 833, 872 (2001) (“[T]he congressional-intent theory is the best of the three explanations for the legal foundation of *Chevron* deference.”).

363. *Smiley v. Citibank (S.D.)*, 517 U.S. 735, 740–741 (1996).

364. See 28 U.S.C. § 2072 (2012).

365. See *City of Arlington v. FCC*, 569 U.S. 290, 297 (2013) (“It is a misconception that there are, for *Chevron* purposes, separate ‘jurisdictional questions’ on which no deference is due”).

366. See *Guar. Tr. Co. v. York*, 326 U.S. 99, 108 (1945) (“Matters of ‘substance’ and matters of ‘procedure’ are much talked about in the books as though they defined a great divide cutting across the whole domain of law. But, of course, ‘substance’ and ‘procedure’ are the same key-words to very different problems.”).

367. Martin H. Redish & Dennis Murashko, *The Rules Enabling Act and the Procedural-Substantive Tension: A Lesson in Statutory Interpretation*, 93 MINN. L. REV. 26, 37 (2008).

treat these words as having a non-self-evident meaning—they would interpret them—since they are *today* regarded as ambiguous.

On the other hand, if we use today's understanding of these terms as ambiguous, then the Supreme Court (and the various rules committees) as an agency was empowered to sort out the meaning of the terms substance and procedure and the Supreme Court as a court should defer to its prior actions in promulgating the rules as an agency. Thus, in litigation, the Court should accept the validity of the federal rules without the need for any analysis. Under this regime, in cases like *Burlington Northern Railroad Co. v. Woods*,³⁶⁸ which gave the rules “presumptive validity” based on “the study and approval given each proposed Rule by the Advisory Committee, the Judicial Conference, and this Court”³⁶⁹ if anything understate the degree of deference owed. And under this regime all questions of validity of a rule would be decided all but absolutely by Article III judges acting not in adjudication but as nonadjudicative rulemakers. Such an outcome—depriving litigants of the opportunity to challenge a federal rule in an adjudicative setting—may be unpalatable,³⁷⁰ but that is where *Chevron* leads.

A second rationale for deference under *Chevron* is the relatively greater expertise of the agency as to the subject matter.³⁷¹ It may be a matter of “technical expertise.”³⁷² Or the agency may have greater expertise because it was involved in drafting the underlying legislation or is frequently involved in interpreting it.³⁷³ This rationale does not seem particularly apt in the context of the Rules Enabling Act. If this deference were taken seriously, then the Supreme Court in litigation would reason that it was more of an expert when it transmitted the rules than it is today in litigation or that lower federal court judges who on sat on the Advisory Committee are more competent to interpret and apply a federal statute (the Rules Enabling Act) than the Justices of the Supreme Court even though it reviews their decisions in adjudicated cases. In this context, there is no nonlegal expertise belonging to the agency. The

368. 480 U.S. 1 (1987).

369. *See id.* at 6.

370. *See supra* notes 252–79 and accompanying text.

371. *See Zeleznikow, supra* note 311, at 294–95.

372. *See* Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 197 (2006).

373. *See Zeleznikow, supra* note 311, at 295.

expertise of the federal rulemakers is of the same species as the expertise of the Supreme Court.

Third, *Chevron* rests on a separation of powers rationale. It “guards against the Judiciary arrogating to itself policymaking properly left, under the separation of powers, to the Executive.”³⁷⁴ This rationale too is a bit of a puzzle in the context of the Rules Enabling Act. The rulemakers largely (but not entirely) consist of Article III judges. The rulemaking process sits under the Judicial Conference, a body of Article III judges. These facts tend to negate any separation of powers concerns. A court reviewing the validity of a federal rule would not be stepping on the toes of the Executive. But is the rulemaking apparatus in fact housed in Article III? True, the members of the rules committees are appointed by the Chief Justice.³⁷⁵ But the fact that the Committee’s members are largely federal judges is not decisive since, as we have seen, federal judges can serve as individuals on non-Article III commissions. In addition, the Advisory Committees include as members others who are not Article III judges.³⁷⁶ These factors make it hard to locate the rulemaking committees in an appropriate branch and muddy the separation of powers issue. It has been suggested that the rulemaking apparatus can be seen as “draft[ing] the Justices and other members of the federal judiciary into a legislative agency or committee.”³⁷⁷ The Supreme Court in *Mistretta v. United States* characterized the involvement of federal judges in rulemaking as “extra-judicial activities.”³⁷⁸

It is perhaps best to characterize the rulemakers the same way that Congress characterized the Sentencing Commission: “an independent commission in the judicial branch of the United States.”³⁷⁹ In short, while the exact nature of the rulemaking committees is unclear, they do at least have a heavy connection to Article III institutions and persons. At a minimum, this lessens any separation of powers concerns and argues for distinguishing *Chevron*.

Finally, a principle of electoral accountability informs *Chevron*. Although “agencies are not directly accountable to the people, the

374. See *City of Arlington v. FCC*, 569 U.S. 290, 327 (2013).

375. 28 U.S.C. § 331 (2012).

376. See *supra* notes 316–17 and accompanying text.

377. See Michael Blasie, Note, *A Separation of Powers Defense of Federal Rulemaking Power*, 66 N.Y.U. ANN. SURV. AM. L. 593, 606 (2011).

378. 488 U.S. 361, 390 (1989).

379. 28 U.S.C. § 991(a) (2012).

Chief Executive is.”³⁸⁰ In reviewing agency decisions, “lines will be drawn either by unelected federal bureaucrats, or by unelected (and even less politically accountable) federal judges.”³⁸¹ The idea is to give the most authority to the institution that is closest to the electoral process. In the normal administrative law context, this would be the agency, since dissatisfied voters can take it out on the President. In the context of the federal rules, however, the rule-makers are not accountable through an Executive having to stand for election; the unelected rulemakers here are appointed by the unelected Chief Justice. The identity or characteristics of a President’s nominee to the Supreme Court has in fact been a campaign issue. It is unimaginable, however, that any candidate would put a pledge in his or her platform to nominate a particular person to be Chief Justice *so that* he or she will appoint certain persons to the Rules Advisory Committee. This would be too far down in the weeds for even the most wonkishly informed voters. In this context, the Supreme Court itself is closer to the electoral process than the rulemakers.

There are thus several points of distinction between the commonly encountered agency under *Chevron* and the rulemaking committees. It is possible to distinguish *Chevron*, maintaining its realm of deference, but still allowing the federal courts to review the validity of the federal rules de novo. But it must be admitted that the typical agency rulemaking under *Chevron* bears more than a facial similarity to the rulemaking apparatus under the Rules Enabling Act. Even though this article rejects them, there are arguments to be made for applying *Chevron* to the federal rulemaking on the basis of expertise and legislative ambiguity. If *Chevron* is a good idea, one wonders why it has not made an explicit appearance in the Supreme Court cases addressing the validity of the federal rules.

In such a case, litigants should not be precluded from obtaining review by an Article III judge acting as a judge. The problems noted above that arise if a litigant cannot challenge in an adjudicative setting the validity of a federal rule have echoes in criticism of *Chevron*. Then Circuit Judge Gorsuch has written that *Chevron* allows “executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a

380. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984).

381. *See City of Arlington v. FCC*, 569 U.S. 290, 305 (2013).

way that seems more than a little difficult to square with the Constitution of the framers' design."³⁸² Justice Thomas too has been critical of *Chevron*. It "raises serious separation-of-powers questions" by "preclud[ing] judges from exercising that judgment, forcing them to abandon what they believe is 'the best reading of an ambiguous statute' in favor of an agency's construction."³⁸³ And many commentators have raised similar criticisms.³⁸⁴ An outcome in which the Supreme Court can overturn the judgment of the Advisory Committee on the validity of a federal rule is a demonstration of the problems *Chevron* creates under Article III.

CONCLUSION

Under Article III, the federal courts adjudicate cases and controversies. But they also do things that are not acts of adjudication. Drafting and transmitting federal procedural and evidentiary rules to Congress is one instance of the nonadjudicative activities of federal courts and judges. When nonadjudicative activities are later challenged in litigation, the adjudicating court should not give a strong, *Chevron*-style deference to the earlier actions of Article III actors. To do so would improperly deprive litigants of the opportunity to challenge in litigation the validity of a federal rule. To the extent this conflicts with the *Chevron* doctrine, it shows the weakness of that doctrine.

382. *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring).

383. *Michigan v. EPA*, 576 U.S. ___, ___, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring) (quoting *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 983 (2005)).

384. See Jonathan R. Siegel, *The Constitutional Case for Chevron Deference*, 71 VAND. L. REV. 937, 952–55 (2018) (summarizing scholarly critiques).