The Rule-Making Power and Powers Over Process

Among the incidental powers of courts is that of making all necessary rules governing their process and practice and for the orderly conduct of their business.[322] However, this power too is derived from the statutes and cannot go beyond them. The landmark case is *Wayman v. Southard*,[323] which sustained the validity of the Process Acts of 1789 and 1792 as a valid exercise of authority under the necessary and proper clause. Although Chief Justice Marshall regarded the rule-making power as essentially legislative in nature, he ruled that Congress could delegate to the courts the power to vary minor regulations in the outlines marked out by the statute. Fifty-seven years later, in *Fink v. O'Neil*,[324] in which the United States sought to enforce by summary process the payment of a debt, the Supreme Court ruled that under the process acts the law of Wisconsin was the law of the United States, and hence the government was required to bring a suit, obtain a judgment, and cause execution to issue. Justice Matthews for a unanimous Court declared that the courts have "no inherent authority to take any one of these steps, except as it may have been conferred by the legislative department; for they can exercise no jurisdiction, except as the law confers and limits it."[325] Conceding, in 1934, the limited competence of legislative bodies to establish a comprehensive system of court procedure, and acknowledging the inherent power of courts to regulate the conduct of their business, Congress authorized the Supreme Court to prescribe rules for the lower federal courts not inconsistent with the Constitution and statutes.[326] Their operation being restricted, in conformity with the proviso attached to the congressional authorization, to matters of pleading and practice, the

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[322] Washington-Southern Nav. Co. v. Baltimore & P.S.B.C. Co., 263 U.S. 629 (1924).

[323] 23 U.S. (10 Wheat.) 1 (1825).

[324] 106 U.S. 272, 280 (1882).

[325] *See* Miner v. Atlass, 363 U.S. 641 (1960), holding that a federal district court, sitting in admiralty, has no inherent power, independent of any statute or the Supreme Court's Admiralty Rules, to order the taking of deposition for the purpose of discovery. *See also* Harris v. Nelson, 394 U.S. 286 (1969), in which the Court found statutory authority in the "All Writs Statute" for a *habeas corpus* court to propound interrogatories.

[326] In the Act of June 19, 1934, 48 Stat. 1064, and contained in 28 U.S.C. § 2072, Congress, in authorizing promulgation of rules of civil procedure, reserved the power to examine and override or amend rules proposed pursuant to the act which it found to be contrary to its legislative policy. *See* Sibbach v. Wilson, 312 U.S. 1, 14–16 (1941). Congress also has authorized promulgation of rules of criminal procedure, *habeas*, evidence, admiralty, bankruptcy, and appellate procedure. *See* Hart & Wechsler (6th ed.), supra at 533–543 (discussing development of rules and citing secondary authority). Congress in the 1970s disagreed with the direction of proposed rules of evidence and of *habeas* practice, and, first postponing their effectiveness, enacted revised rules. Pub. L. 93–505, 88 Stat. 1926 (1974); Pub. L. 94–426, 90 Stat. 1334 (1976). On this and other actions, *see* Hart & Wechsler (6th ed.), supra.