May Federal Courts Create New Presumptions?

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ABSTRACT

Federal courts periodically create and apply new evidentiary presumptions—inferential rules that conclude a particular fact exists—the application of which are frequently outcome determinative. Although presumptions have been the topic of academic literature, little attention has been paid to what authority federal courts have to create new presumptions in the first instance. Accordingly, this Article analyzes whether federal courts are authorized under the U.S. Constitution or other law to create new evidentiary presumptions. It concludes that federal courts have no inherent power to create new evidentiary presumptions. Rather, federal courts may create presumptions only pursuant to congressional delegation of rulemaking authority and consistent with the procedures delineated in the Rules Enabling Act. Consequently, when courts create new presumptions in individual cases, they violate both the constitutional separation of powers and the Rules Enabling Act. This Article continues by discussing the implications of new judicially created presumptions for procedural fairness and confidence in the judicial system. Lastly, this Article discusses how and when new presumptions may be created by the judiciary.

Table of Contents

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I. INTRODUCTION

This Article concerns the creation and application of new presumptions: evidentiary shortcuts judges use that alter proof or pleading standards in judicial proceedings. The meaning of the word "presumption" depends on context, but it most frequently refers to a legal inference that a particular circumstance exists or that a particular fact is

true.[1] As discussed below, federal courts periodically create and apply new presumptions that have not been enacted by statute or recognized in common law.[2] A presumption's application is a significant event in litigation because it can shift the burden of production[3] or persuasion[4] to the party opposing the presumption,[5] or alter burdens in other ways,[6] which can dispositively sway cases in favor of one of the parties.[7] For instance, burdens can help a party overcome pleading requirements or prevail at summary judgment or, by contrast, foreclose a party from proceeding beyond the motion to dismiss or summary judgment stage of litigation. Such presumptions are often created because of judges' intuitions about the way the world works, for the sake of convenience and expedience, or to achieve a desired policy outcome.[8] By creating and applying novel presumptions, federal courts change the bar that one party must clear to prevail in their case. By doing so, federal courts alter the equities of the case and—as argued here—violate the separation of powers.[9]

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1. *See Presumption*, BLACK'S LAW DICTIONARY (12th ed. 2024).

2. *See infra* Part III.

3. *See Burden of Production*, BLACK'S LAW DICTIONARY (12th ed. 2024):

> A party's duty to introduce enough evidence on an issue to have the issue decided by the factfinder, rather than decided against the party in a peremptory ruling such as a summary judgment or a directed verdict. The burden is discharged when sufficient evidence has been introduced to support a finding that a fact exists.

Id.

4. *See Burden of Persuasion*, BLACK'S LAW DICTIONARY (12th ed. 2024):

> A party's duty to convince the factfinder to view the facts in a way that favors that party. In civil cases, the plaintiff's burden is usu[ally] "by a preponderance of the evidence," while in criminal cases the prosecution's burden is "beyond a reasonable doubt." The burden is discharged when the tribunal responsible for determining the existence or nonexistence of a fact has been persuaded by sufficient evidence to find that the fact exists.

Id.

5. *See Presumption*, BLACK'S LAW DICTIONARY ("A presumption shifts the burden of production or persuasion to the opposing party, who can then attempt to overcome the presumption.").

6. *See*, *e.g.*, Schiller v. Physicians Res. Grp., Inc., 342 F.3d 563, 568 (5th Cir. 2003) (explaining "group pleading" presumption which eases pleading requirements); Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 258, 287 (2014) (Thomas, J., concurring) (explaining that court created presumption to avoid "difficulties of proof and class certification").

7. *See* Kaitlin Niccum, *Ethics and Presumptions: Lying to Burst the Bubble*, 25 GEO. J. LEGAL ETHICS 715, 716 (2012).

8. *See* EDMUND M. MORGAN & JACK B. WEINSTEIN, BASIC PROBLEMS OF STATE AND FEDERAL EVIDENCE 26–27 (5th ed. 1976).

9. *See infra* Section IV.A; *see also Halliburton*, 573 U.S. at 284–88, 292 (Thomas, J., concurring) (arguing against authority to make federal common law in context of presumptions).

Much has been written about the nature and consequences of evidentiary presumptions,[10] but little attention has been paid to the propriety and constitutionality of their creation by the federal judicial branch. This Article fills that gap by assessing the propriety of the judicial creation of new presumptions. To assess what powers courts possess to create novel presumptions, the Article examines different circumstances in which federal judges have crafted and applied new presumptions. This Article ultimately concludes that the structural separation of powers principle in the Constitution prohibits the creation of new presumptions by the federal judiciary absent a congressional delegation of authority. Relatedly, this Article argues that the Rules Enabling Act delegates to federal courts the authority to create presumptions but limits the way in which federal courts are permitted to create new presumptions. Lastly, the Article discusses what standards should govern the creation of new presumptions by federal courts. A study of the creation and application of novel presumptions is important given the consequences this phenomenon has for the balance of judicial and legislative authority, litigants' rights, and the standards for a fair trial.

This Article proceeds in five parts. Part II begins by providing background on presumptions. Part III examines examples of judicially created presumptions and the context in which they were created. Part IV turns to the constitutional and statutory limits on the federal judiciary's power to create new presumptions. Part V discusses the policy implications of creating new presumptions. Part VI proposes a standardized framework for creating and applying new presumptions. In particular, this Article suggests that new presumptions should be created only under the Rules Enabling Act and only when strong empirical evidence exists, demonstrating that the presumption is warranted, rather than mere intuition, and that presumptions should be applied only prospectively.

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10. *See generally, e.g.*, James B. Thayer, *Presumptions and the Law of Evidence*, 3 HARV. L. REV. 141 (1889) [hereinafter Thayer, *Presumptions*]; William Trickett, *Presumptions Built on Presumptions*, 10 FORUM 123 (1905); Victor H. Lane, *Presumptions*, 22 MICH. L. REV. 207 (1924); Otis H. Fisk, *Presumptions*, 11 CORN. L. REV. 20 (1925); John P. McBaine, *Presumptions; Are They Evidence?*, 26 CALIF. L. REV. 519 (1938), https://perma.cc/UMW2-H9KK; S. J. Helman, *Presumptions*, 22 CAN. BAR REV. 118 (1944); David Kaiser, *Presumptions of Law and of Fact*, 38 MARQ. L. REV. 253 (1955), https://perma.cc/29JX-LQZD; Howard M. Liebman, *Changing Law of Disqualification: The Role of Presumption and Policy*, 73 NW. U. L. REV. 996 (1979); Susan Frelich Appleton, *Presuming Women: Revisiting the Presumption of Legitimacy in the Same-Sex Couples Era*, 86 B.U. L. REV. 227 (2006); Anna Lvovsky, *The Judicial Presumption of Police Expertise*, 130 HARV. L. REV. 1995 (2017); Note, *The Presumption of Regularity in Judicial Review of the Executive Branch*, 131 HARV. L. REV. 2431 (2018). *See* MORGAN & WEINSTEIN, *supra* note 8, at 31.

II. BACKGROUND ON PRESUMPTIONS

This part discusses different categories of presumptions, the reasons for their creation, the effects of different presumptions, and the historical evolution of presumptions. The goal of this Part is four-fold. It seeks to clarify what the word "presumption" means, describe how presumptions are used, explain why presumptions matter, and trace the origins of presumptions. More broadly, this part situates this Article in the broader academic and judicial discussion on the use of presumptions to make factual determinations.

A. Categories of Presumptions

When used in the legal context, the term "presumption" has several different meanings and is consequently difficult to define in a manner that covers all usages.[11] That said, presumptions can be divided into different categories. To begin, presumptions are generally divided into two broad categories: rebuttable and irrebuttable.[12] As the name indicates, an irrebuttable presumption is an inference that, once established, the law does not allow to be contradicted by contrary evidence.[13] For example, some states have adopted an irrebuttable presumption that the child of a woman who is cohabitating with her husband is presumed to be the child of the husband.[14] That presumption prohibits any inquiry into whether another individual is actually the father of the child and does not permit introduction of evidence that

11. *See* PAUL C. GIANNELLI & JULES EPSTEIN, UNDERSTANDING EVIDENCE § 5.01 (6th ed. 2023) ("The law governing presumptions is one of the most difficult areas of evidence law . . . [and] some of the problems are caused by inconsistent terminology."); Leo H. Whinery, *Presumptions and Their Effect*, 54 OKLA. L. REV. 553, 553 (2001) ("There are at least seven senses in which the term has been used by legislatures and courts."); G. Michael Fenner, *Presumptions: 350 Years of Confusion and It Has Come to This*, 25 CREIGHTON L. REV. 383, 383 (1992) ("Here is the bottom line on presumptions. They are inextricably confused devices used to move burdens from one party to another and to allow judges to comment on the value of evidence."); Thayer, *Presumptions*, *supra* note 10, at 141 (providing, in latin, that "*[m]ateria quam aggressuri summus valde utilis est et quotidiana in pratica; sed confusa, inextricabilis fere*," which roughly translates to "the material addressed is very useful and everyday in practice; but it is confused, almost inextricable"); *see, e.g.*, *Presumption*, BLACK'S LAW DICTIONARY (12th ed. 2024).

12. *See* GIANNELLI & EPSTEIN, *supra* note 11, § 5.02; *Presumption*, BLACK'S LAW DICTIONARY (12th ed. 2024).

13. *See* GIANNELLI & EPSTEIN, *supra* note 11, § 5.02; *Conclusive Presumption*, BLACK'S LAW DICTIONARY (12th ed. 2024).

14. *See*, *e.g.*, Michael H. v. Gerald D., 491 U.S. 110, 117 (1989). The presumption of legitimacy traces its roots to the common law. "Traditionally, that presumption could be rebutted only by proof that a husband was incapable of procreation or had had no access to his wife during the relevant period." *Id.* at 124.

someone else is the biological father.[15] Because irrebuttable presumptions cannot be refuted, courts and scholars often assert that they are not "presumptions" but rather "substantive rules of law."[16] Additionally, because they cannot be challenged, and therefore deprive litigants of a procedural mechanism to prove the truth or falsity of a matter, "irrebuttable presumptions have long been disfavored under the Due Process Clauses of the Fifth and Fourteenth Amendments."[17]

In contrast, rebuttable presumptions are "procedural rule[s] that define[] the relationship between two facts—a basic fact and a presumed fact—[and] [i]f the basic fact is proved, the proved fact must be accepted as established unless rebutted."[18] For example, to state a claim for securities fraud, a plaintiff must allege that he relied on the defendant's fraudulent statement.[19] The plaintiff, however, can invoke a rebuttable presumption that he "presumptively relie[d] on a misrepresentation so long as it was reflected in the market price at the time of his transaction."[20] The "defendant may then rebut the presumption through any showing that severs the link between the alleged misrepresentation and either the price received (or paid) by the plaintiff, or his decision to trade at a fair market price."[21] Simplified, when courts apply a rebuttable

15. *See id.* at 117.

16. *See id.*; GIANNELLI & EPSTEIN, *supra* note 11, § 5.02. Wigmore provided a helpful description, *see* 9 WIGMORE ON EVIDENCE § 2492 (3d ed.):

> Wherever from one fact another is said to be conclusively presumed, in the sense that the opponent is absolutely precluded from showing by any evidence that the second fact does not exist, the rule is really providing that, where the first fact is shown to exist, the second fact's existence is wholly immaterial for the purpose of the proponent's case; and to provide this is to make a rule of substantive law, and not a rule apportioning the burden of persuading as to certain propositions or varying the duty of coming forward with evidence.

Id. Others have given similar descriptions. *See, e.g.*, James J. Duane, *The Constitutionality of Irrebuttable Presumptions*, 19 REGENT UNIV. L. REV. 149, 160 (2006), https://perma.cc/4893-LQKD (collecting authorities):

> [C]ourts and legal scholars universally agree that any so-called "irrebuttable presumption," regardless of whether one chooses as a matter of semantics to call it a true presumption, is not really a rule of evidence at all, but is actually a rule of *substantive* law masquerading in the traditional language of a presumption.

Id.

17. Vlandis v. Kline, 412 U.S. 441, 446 (1973); *see id.* at 445, 454 (holding unconstitutional "Connecticut's irreversible and irrebuttable statutory presumption that because a student's legal address was outside the State at the time of his application for admission or at some point during the preceding year, he remains a non-resident for as long as he is a student there" where the presumption was not necessarily or universally true in fact).

18. GIANNELLI & EPSTEIN, *supra* note 11, § 5.02.

19. *See* Erica P. John Fund, Inc. v. Halliburton Co., 563 U.S. 804, 810 (2011).

20. Goldman Sachs Grp., Inc. v. Ark. Tchr. Ret. Sys., 594 U.S. 113, 118 (2021) (quoting Erica P. John Fund, Inc. v. Halliburton Co., 563 U.S. 804, 813 (2011)).

21. *Id.* (cleaned up) (quoting Basic Inc. v. Levinson, 485 U.S. 224, 248 (1988)).

presumption, they presume some fact to be true in the first instance but then allow parties to introduce evidence to show that the fact is not actually true. The quantum of evidence required to refute a rebuttable presumption varies based on the presumption that is being applied.[22] This Article focuses exclusively on *rebuttable* presumptions.

This Article also draws a distinction between evidentiary presumptions and interpretive presumptions. On the one hand, evidentiary presumptions are those that relate to the facts of a case. Take, for example, the common law presumption that a person who has not been seen or heard from in seven years is dead.[23] That presumption determines a fact—e.g., that a specific individual is dead. Likewise, the presumption of reliance discussed above is a presumption about a fact—e.g., that an investor relied on a company's misrepresentations.[24]

On the other hand, interpretive presumptions, sometimes called canons of construction, are guidelines relating to how courts interpret legal texts—irrespective of the underlying facts in a case.[25] Courts apply these presumptions to determine how a binding legal text should apply to the facts. For example, the canon of construction called the presumption of consistent usage is the interpretive guideline advising that a word or phrase in a legal text is presumed to bear the same meaning throughout that text.[26] The presumption of consistent usage does not bear on the meaning of evidence in the case, but rather provides courts with a guideline on the meaning of text as it applies to the evidence.

This Article draws a distinction between evidentiary and interpretive presumptions for three reasons. First, as described above, interpretive presumptions are not "presumptions" in the sense used in this Article because they are tools to interpret text rather than determine evidentiary facts. Second, because it "is emphatically the duty of the Judicial Department to say what the law is,"[27] this Article takes it for

22. *See* GIANNELLI & EPSTEIN, *supra* note 11, §§ 5.04–.05 (discussing how rebuttable presumptions may be rebutted).

23. *See* Davie v. Briggs, 97 U.S. 628, 633 (1878) ("[A] person shown not to have been heard of for seven years by those (if any) who, if he had been alive, would naturally have heard of him, is presumed to be dead." (quoting Stephen, Law of Evid., c. 14, art. 99)); *see also* Malone v. Reliastar Life Ins., 558 F.3d 683, 688 (7th Cir. 2009) (applying Indiana common law presumption of death).

24. *See Goldman Sachs Grp.*, 594 U.S. at 118.

25. *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 51 (2012) (explaining that canons of construction "are not 'rules' of interpretation in any strict sense but presumptions about what an intelligently produced text conveys").

26. *See id.* at 170 ("A word or phrase is presumed to bear the same meaning throughout a text.").

27. Marbury v. Madison, 5 U.S. 137 (1803); *see also* Kunelius v. Town of Stow, 588 F.3d 1, 10 (1st Cir. 2009) ("We have explained that 'judges construe contracts, if only the words need be considered, and the jury does the job under instructions if

granted that it is appropriate for the judiciary to choose the tools it uses to interpret the meaning of legal text—including tools to understand the use of language in legal documents. Third, while it is the role of the courts to interpret text, it is the role of Congress to set the substantive law and procedures—including the use of evidentiary presumptions— by which litigants must prove the facts sufficient to prevail on their claims.[28] Hence, the distinction between interpretive and evidentiary presumptions matters because while the federal courts may have broad authority in employing interpretive tools, the same cannot be said of evidentiary presumptions, which effect the burdens of production and persuasion. Accordingly, this Article focuses on judicially created rebuttable evidentiary presumptions (here, "presumptions").

B. Effects of Presumptions

Even among rebuttable presumptions, different presumptions have different effects. Some presumptions shift the burden of production[29]: "a party's duty to introduce enough evidence on an issue to have the issue decided by the factfinder, rather than decided against the party in a peremptory ruling such as a summary judgment."[30] While it is generally the plaintiff's burden to come forward with evidence to support a particular proposition of fact needed to prove a claim and the defendant's burden to come forward with evidence to support an affirmative defense, a presumption can shift those burdens among the parties. As an example, under the *McDonnell Douglas* framework, once a plaintiff provides evidence supporting a presumption of racial discrimination (in essence, a prima facie case of racial discrimination), the burden of production shifts to the defendant to produce evidence showing that its actions were not discriminatory.[31]

Presumptions can also alter the burden of persuasion[32]: "[a] party's duty to convince the factfinder to view the facts in a way that favors that

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evidentiary issues have to be resolved.'" (quoting Fishman v. LaSalle Nat'l Bank, 247 F.3d 300, 303 (2001) (citations omitted))). *See generally* FED. R. EVID. 201 advisory committee's note (a) (drawing similar distinction between adjudicative and legislative facts).

28. *See* Sibbach v. Wilson & Co., 312 U.S. 1, 9–10 (1941); Hanna v. Plumer, 380 U.S. 460, 472 (1965); *see also* Jackson v. Stinnett, 102 F.3d 132, 133 (5th Cir. 1996).

29. *See, e.g.*, St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506–07 (1993) (discussing burden shifting in discrimination context).

30. *Burden Of Production*, BLACK'S LAW DICTIONARY (12th ed. 2024).

31. *See St. Mary's Honor Ctr.*, 509 U.S. at 507 ("[T]he *McDonnell Douglas* presumption shifts the burden of production to the defendant." (emphasis altered)).

32. *See* Goldman Sachs Grp., Inc. v. Ark. Tchr. Ret. Sys., 594 U.S. 113, 126 (2021) (holding that presumption of reliance in securities context shifts burden of persuasion rather than burden of production).

party."[33] Whereas the burden of production is about the introduction of adequate evidence, the burden of persuasion is about the requisite degree of belief by which a party must convince a factfinder that a particular fact is true. In other words, while the burden of production is about providing *some* threshold amount of evidence, the burden of persuasion is about how convincing that evidence is. A presumption can shift the burden of persuasion from one party to another and/or change the quantum of evidence by which a party must prove the particular fact.[34] For example, a presumption can require the plaintiff to prove a fact by clear and convincing evidence rather than merely by a preponderance of the evidence,[35] which is the default standard for the burden of persuasion in civil cases.[36]

Lastly, changes to burdens can alter pleading requirements or the types of evidence a plaintiff must provide throughout litigation. For example, where a statute or a federal rule of procedure requires a plaintiff to point to certain facts with particularity,[37] courts have held that under some circumstances a plaintiff's more general allegations can invoke a presumption that fulfills the particularized pleading requirement.[38] In the securities fraud context discussed above, rather than point to a particular fraudulent statement that the plaintiff relied on, the plaintiff can invoke a presumption of reliance based on the market price of the security.[39] As another example, where class-wide proof is necessary to support the viability of a class action, courts have sometimes applied presumptions to satisfy the class-wide proof requirement.[40]

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33. *Burden of Persuasion*, BLACK'S LAW DICTIONARY (12th ed. 2024).

34. *See Goldman Sachs Grp.*, 594 U.S. at 126 (applying presumption to shift burden of persuasion to defendant and holding burden must be satisfied by preponderance of the evidence).

35. *See id.*; Rd. & Highway Builders, LLC v. United States, 702 F.3d 1365, 1368 (Fed. Cir. 2012) ("'[A] high burden must be carried to overcome this presumption,' amounting to clear and convincing evidence to the contrary." (quoting Am-Pro Protective Agency, Inc. v. United States, 281 F.3d 1234, 1239 (Fed. Cir. 2002))).

36. *See Burden of Persuasion*, BLACK'S LAW DICTIONARY (12th ed. 2024).

37. *See, e.g.*, FED. R. CIV. P. 9(b) ("In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake.").

38. *See* Dunn v. Borta, 369 F.3d 421, 434 (4th Cir. 2004); *see also* Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 258, 294 (2014) (Thomas, J., concurring) (arguing that presumption of reliance allows class plaintiffs to avoid compliance with Federal Rule of Civil Procedure 23 requirements).

39. *See Goldman Sachs Grp.*, 594 U.S. at 118.

40. *See, e.g.*, Menaldi v. Och-Ziff Cap. Mgmt. Grp., 328 F.R.D. 86, 93 (S.D.N.Y. 2018) ("There are two relevant ways in which classwide reliance can be presumed: the *Affiliated Ute* presumption and the *Basic* presumption."); *In re* Burlington Coat Factory Secs. Litig., 114 F.3d 1410, 1419 n.8 (3d Cir. 1997) ("The 'fraud on the market' theory accords plaintiffs in Rule 10b–5 class actions a rebuttable presumption of reliance if plaintiffs bought or sold their securities in an 'efficient' market.").

These changes to burdens or pleading standards have a particularly strong effect at the motion to dismiss or summary judgment stage of litigation where the judge, rather than a jury, determines whether a party has satisfied their burden. Because altered burdens can make it easier or more difficult for a party to prevail at these threshold stages of litigation, they can have a dispositive effect on the ultimate outcome. In other words, the application of a presumption may end a case for the party the presumption is applied against or, by contrast, help the benefited party prevail (or at least allow the benefited party to negotiate a favorable settlement even if that party would have been unlikely to prevail at trial).

Finally, courts occasionally use the word "presumption" imprecisely to mean something different. For instance, courts have used the word presumption to describe the parties' default burdens of proof or, alternatively, to describe the courts' use of a permissive inference which does not alter the burdens. In such cases, the courts' invocation of the word "presumption" has no substantive effect on the litigation—and merely causes confusion about the effect of the word. Accordingly, this Article assesses the circumstances in which courts apply a presumption to effect evidentiary burdens, rather than those in which courts use the word presumption but do not alter evidentiary burdens.

C. Purposes of Presumptions

Federal courts utilize presumptions for several reasons.[41] First, presumptions promote "speed and efficiency."[42] Because presumptions

41. *See* MORGAN & WEINSTEIN, *supra* note 8, at 26–27 (listing reasons); Edmund M. Morgan, *Some Observations Concerning Presumptions*, 44 HARV. L. REV. 906, 906 (1931) (explaining that a presumption is compelled because "it is believed to be justified on logical grounds by human experience, or because it accomplishes a procedural convenience, or because it furthers a result deemed socially desirable, or because of a combination of two or more of these reasons"). John H. Matthews described the bases for legal presumptions. *See* JOHN H. MATHEWS, TREATISE ON THE DOCTRINE OF PRESUMPTION AND PRESUMPTIVE EVIDENCE, AS AFFECTING THE TITLE TO REAL AND PERSONAL PROPERTY (1827), https://perma.cc/6LYK-3PQY:

> The ground upon which legal presumptions rest are various. They are founded in some cases on the law of nature, and the first principles of justice; in others on the nature and general incidents of property; and in others, on those innate principles of self-interest, and dictates of prudence or discretion, which for the most part actuate the conduct of mankind . . . . Other legal presumptions originate in the policy of the law . . . . Another class of legal presumptions, and perhaps the most important, comprises all those cases in which an act, that may have proceeded from one or other of several motives or intentions, is, in the absence of explanation by the part, referred to that which appears most consonant with reason and probability.

Id.

42. Lyzwa v. Chu, No. C-97-20053, 1998 WL 326768, at *4 (N.D. Cal. Feb. 2, 1998); *see also* Stewart v. Wohlgemuth, 355 F. Supp. 1212, 1215 (W.D. Pa. 1972)

simplify proof requirements and thereby reduce the need for extensive evidence-gathering and lengthy trials, they speed judicial resolution.[43] Judges are comfortable using presumptions in this way because presumptions reflect judges' "rough estimate of how the world generally functions."[44] Relatedly, presumptions are often conceived in situations where the same factual circumstance has arisen on multiple occasions, providing a basis for judges' views on the likelihood that a particular fact exists.[45]

Second, courts create presumptions to even the litigation playing field. In cases where one party has significantly more resources or access to information than the other, the court may use a presumption to assist the party with fewer resources or less access to information to prove a fact that it would otherwise be extremely difficult for that party to prove.[46] For example, in employment discrimination cases, a presumption of discrimination shifts the burden of proof to the employer to show that its actions were not discriminatory once the employee establishes a prima facie case because the employer generally has easier access to information relevant to discrimination and employment decisions.[47] Shifting the burden to the party with the easiest access to particular evidence also promotes efficiency. Additionally, presumptions

("[P]resumptions may promote speed and efficiency in decisions or conserve physical resources.").

43. *See, e.g.*, Palms of Pembroke Condo. Ass'n, v. Glencoe Ins., No. 13-62202-CIV, 2014 WL 5304890, at *2 (S.D. Fla. Oct. 17, 2014); United States v. Spence, 719 F.2d 358, 361 (11th Cir. 1983).

44. GIANNELLI & EPSTEIN, *supra* note 11, § 5.03; Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 359 n.45 ("Presumptions shifting the burden of proof are often created to reflect judicial evaluations of probabilities."); Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 258, 292 (2014) ("The . . . Court appears to have adopted this assumption . . . based only on what it believed to be common sense.").

45. *See* MATHEWS, *supra* note 41, at 1 ("Presumptions of law are suppositions or opinions previously formed on questions of frequent occurrence—being found from experience to be generally accordant with truth—and remain of force until repelled by contrary evidence.").

46. *See* GIANNELLI & EPSTEIN, *supra* note 11, § 5.03 (listing fairness, and in particular the possession of evidence, as a rationale for some presumptions); *Int'l Bhd. of Teamsters*, 431 U.S. at 359 n.45 (1977) ("Presumptions shifting the burden of proof are often created . . . to conform with a party's superior access to the proof."); Menaldi v. Och-Ziff Cap. Mgmt. Grp., 328 F.R.D. 86, 94 (S.D.N.Y. 2018) (explaining that the presumption to satisfy showing of reliance where reliance would otherwise be "impossible to prove" as "a practical matter").

47. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (setting forth burden shifting framework in cases where there is only indirect evidence of discrimination); Tex. Dep't of Cmty. Affs. v. Burdine, 450 U.S. 248, 255 n.8 (1981) ("In a Title VII case, the allocation of burdens and the creation of a presumption by the establishment of a prima facie case is intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination."); Teneyck v. Omni Shoreham Hotel, 365 F.3d 1139, 1149 (D.C. Cir. 2004) (explaining that *McDonnell Douglas* burden shifting framework is used "[i]n the absence of direct evidence of discrimination").

can "avoid an impasse" when obtaining evidence of the presumed fact is considered impossible.[48]

Third, beyond efficiency and fairness, presumptions may be used to effectuate policy goals. For instance, the presumption of innocence in criminal cases reflects the policy that it is preferable to let a guilty person go free than to convict an innocent one.[49] Even if the presumption of innocence requires higher evidentiary burdens, and thus potentially longer proceedings and the increased risk of leaving guilty parties free, American society accepts that trade-off in the name of a strong policy of decreasing the risk of accidental punishment of an innocent individual. As another example, courts sometimes apply a presumption in favor of arbitration to reflect "the federal policy favoring arbitration" over litigation.[50]

Finally, presumptions can help ensure consistency in judicial decisions by providing a standard approach to repeating factual scenarios. This can lead to more predictable outcomes and, consequently, more confidence in the legal system. For example, while one jury may find the existence of a certain fact significant, another jury could find it insignificant, leading to varying verdicts. But if there exists a presumption that the fact is significant and raises a rebuttable presumption, the significance of that fact becomes uniform.

D. Historical Evolution of Presumptions

The history of presumptions, particularly in criminal cases, stretches back into antiquity; "[e]arly traces of something like presumptions can be found in the classical tradition taken from Aristotle's *Rhetoric*, Cicero's *De invetione*, and Quintilian's *Institutes of the Orator*."[51] These sources first distinguished "inartificial from artificial proof."[52] Inartificial proof

48. MORGAN & WEINSTEIN, *supra* note 8, at 26.

49. *See, e.g.*, Coffin v. United States, 156 U.S. 432, 456 (1895) ("[T]he law holds that it is better that ten guilty persons escape than that one innocent suffer." (quoting 2 WILLIAM BLACKSTONE, COMMENTARIES 358 (1765))); *id.* ("[I]t is better five guilty persons should escape unpunished than one innocent person should die." (quoting 2 Hale, P. C. 290)); *see also* Letter from Benjamin Franklin to Benjamin Vaughn (Mar. 14, 1785), https://perma.cc/J9X8-9B7C ("That it is better 100 guilty Persons should escape, than that one innocent Person should suffer, is a Maxim that has been long & generally approv'd, never that I know of controverted.").

50. *See* Granite Rock Co. v. Int'l Bhd. of Teamsters, 561 U.S. 287, 302 (2010).

51. Barbara Shapiro, *Presumptions and Circumstantial Evidence in the Anglo-American Legal Traditions 1500–1900*, at 154, *in* THE LAW OF PRESUMPTIONS: ESSAYS IN COMPARATIVE LEGAL HISTORY 153 (R. H. Helmholz & W. David H. Sellar eds. 2009) [hereinafter THE LAW OF PRESUMPTIONS].

52. *Id.*

referred to direct evidence, whereas artificial proof referred to the use of rhetoric, such as presumptions.[53]

Over time, these modes of thinking about evidence and facts made their way into the English common law system.[54] Although the English system long sought to distinguish itself from continental and ecclesiastical law[55]—which historically relied more heavily on rhetoric such as presumptions[56]—common law lawyers nevertheless occasionally invoked canon and continental civil law,[57] with references to certain presumptions going back to the thirteenth century.[58] "From the sixteenth century onward [English] juries, who were judges of fact, considered testimony that they would have to evaluate for credibility."[59] Contemporary sources leave it unclear whether judges instructed jurors on the use of presumptions or whether they simply allowed lawyers to argue using presumptions, but renowned jurist and lawyer Sir Thomas More wrote that "[a] man may sometimes be so suspect of felony by reason of presumptions that though no man say h[im] do it . . . yet may be found[] [guilty] of it."[60]

Historical records show that by the early seventeenth century, the use of presumptions had become relatively accepted in criminal prosecutions. For example, in his famous work *Institutes*, English jurist and legal scholar Sir Edward Coke gives the example that, if a man is killed after being stabbed with a sword and another person is seen leaving the man's house with a bloody sword, a presumption arises that the person leaving the house is the killer.[61] But Coke and other common law jurists like Sir Matthew Hale cautioned that presumptions could be dangerous because they may not reflect the truth while leading to a severe punishment.[62]

At the start of the eighteenth century, presumptions were frequently used in criminal legal proceedings, but jurists continued to caution that they could not amount to "full proof" in a case unless it was impossible to prove the case with direct evidence.[63] By the mid-eighteenth century,

53. *See id.*
54. *See id.*
55. *See id.* at 158.
56. *See id.* at 157–58.
57. *See id.* at 159, 166.
58. *See* David J. Seipp, *Presumptions in Early English Common Law*, at 154, *in* THE LAW OF PRESUMPTIONS, *supra* note 51, at 153.
59. Shapiro, *supra* note 51, at 162.
60. *Id.* at 162–63 (quoting THOMAS MORE, THE DEBELLATION OF SALEM AND BIZANCE 1533, *in* III COMPLETE WORKS OF ST. THOMAS MORE 981 (1963)).
61. *See id.* at 165 (citing SIR EDWARD COKE, THIRD PART OF THE INSTITUTES OF THE LAWES OF ENGLAND 104, 232, 373 (1853)).
62. *See id.* at 165–66.
63. *See id.* at 171.

however, some jurists and lawyers took the position that reasoning by presumption was better evidence than direct evidence in criminal cases.[64] Yet, there continued to be significant debate about the weight to be afforded different presumptions: some were essentially irrebuttable while others could serve only as partial proof.[65]

In the civil context, presumptions were sometimes rejected outright as methods of proof.[66] For instance, when parties in a case involving inheritance attempted to argue using presumptions about whether a father or daughter died first in a shipwreck—for purposes of determining who an estate passed to—the jurist Lord Mansfield rejected an approach using presumptions to determine the timing of death.[67]

Courts in the American colonies, prior to the Founding of the United States, largely followed English common law,[68] and American lawyers often referred to English legal texts.[69] Some presumptions were commonly used in the colonial and pre-ratification state courts.[70] Additionally, at its first session in 1789, the U.S. Congress directed that federal courts use common law principles, like presumptions, in their proceedings.[71] Prominent early American jurists like James Wilson and Joseph Story discuss the use of presumptions in their treatises and decisions.[72]

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64. *See id.* at 173–74.

65. *See id.* at 178–79.

66. *See* T. P. Gallanis, *Death by Disaster: Anglo-American Presumptions 1766–2006*, at 189–90 (R. H. Helmholz & W. David H. Sellar eds.), *in* THE LAW OF PRESUMPTIONS, *supra* note 51, at 189 ("The position of the English courts of common law and Chancery in the eighteenth and nineteenth centuries was that the question should not be decided by the use of a presumption. Instead, the question as an issue of fact to be resolved in each instance.").

67. *See id.* at 190.

68. *See* Richard C. Dale, *The Adoption of the Common Law by the American Colonies*, 30 U. PA. L. REV. 553, 553–54 (1882), https://perma.cc/B56D-AQ6S; GORDON WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787, at 299–300 (1969) ("At the Revolution most of the state constitutions provided for the retention of as much of the English statute and common law as was applicable to the local circumstance, until it should be altered by future legislative acts.").

69. *See* Shapiro, *supra* note 51, at 181; *see also* WOOD, *supra* note 68, at 10.

70. *See generally, e.g.*, Meekins v. Burwell, 1 Va. Col. Dec. R15 (Va. Gen. Ct. 1729); Doe v. Myhil, 2 Va. Col. Dec. 152 (Va. Gen. Ct. 1735); Doe v. Burwell, 2 Va. Col. Dec. 168 (Va. Gen. Ct. 1735); Rose v. Cooke, 2 Va. Col. Dec. 179 (Va. Gen. Ct. 1736); Chew's Lessee v. Weems, 1 H. & McH. 463 (Md. 1772); Miller v. The Ship Resolution, 2 U.S. 19 (1781); Grier v. Grier, 1 U.S. 173 (1786); Gustin v. Brattle, 1 Kirby 299 (Conn. 1787).

71. *See* Judiciary Act of 1789, ch. 20, §§ 30, 34, 1 Stat. 73, 88–89, 92 (1789).

72. *See* Shapiro, *supra* note 51, at 181; BIRD WILSON, III THE WORKS OF THE HONOURABLE JAMES WILSON, L.L.D. 176 (1804); *see, e.g.*, JOSEPH STORY, COMMENTARIES ON THE LAW OF BILLS OF EXCHANGE, FOREIGN AND INLAND, AS ADMINISTERED IN ENGLAND AND AMERICA; WITH OCCASIONAL ILLUSTRATIONS FROM THE COMMERCIAL LAW OF THE NATIONS OF CONTINENTAL EUROPE 441–43 (4th ed. 1843) (relating presumption as to residence).

Throughout the nineteenth and early twentieth centuries, American courts continued to recognize and apply various common law presumptions, although the exact effect and procedural impact of presumptions was not always clear or consistently articulated.[73] For example, Jurist Simon Greenleaf explained that when considering presumptions of fact, jurors were not limited "by any boundaries but those of truth; to be decided by themselves, according to the convictions of their own understanding,"[74] suggesting that presumptions of fact were tools that a jury could utilize in determining the truth. Providing a different gloss on presumptions, Professor James Thayer's 1889 article, *Presumptions and the Law of Evidence*, argued that many of the presumptions recognized by federal courts were merely "prima facie" proof that could be overcome by contrary evidence, rather than hard-and-fast rules.[75] Thayer further argued that presumptions should not be thought of as evidence but should instead be thought of as a method of reasoning.[76] Thayer's argument foreshadowed debates in the twentieth century about the precise effect of presumptions on burdens of production and persuasion.[77]

Presumptions have continued to evolve over the twentieth and early twenty-first centuries. While one mid-twentieth century article defines a presumption as "essentially a rule of law which compels a certain finding of fact when a specified group of unopposed facts is proven,"[78] courts increasingly apply presumptions in favor or against certain groups without any particular set of facts being proven in the first instance, other than that the presumption applies to that group. For instance, the government is afforded a presumption of regularity merely upon showing it is the government.[79] Additionally, the quantum of proof for certain presumptions has shifted over time. When first invoking the presumption of regularity, "[t]he burden placed on the party seeking to rebut the presumption was nothing special," but over time the Supreme Court "appeared to heighten the rebuttal standard."[80]

The evolving history of the use of presumptions demonstrates the difficulty in consistently applying them. That difficulty suggests that the

73. *See, e.g.*, Shapiro, *supra* note 51, at 182; Thayer, *Presumptions*, *supra* note 10, at 141–65.

74. Shapiro, *supra* note 51, at 182 (quoting SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE 50, 51, 55 (1838)).

75. *See* Thayer, *Presumptions*, *supra* note 10, at 141–65.

76. *See id.*; JAMES B. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 314–15 (1898) [hereinafter THAYER ON EVIDENCE].

77. *See generally, e.g.*, MORGAN & WEINSTEIN, *supra* note 8.

78. Kaiser, *supra* note 10, at 261.

79. *See* Aram A. Gavoor & Steven A. Platt, *In Search of the Presumption of Regularity*, 74 FLA. L. REV. 729, 730–31 (2022).

80. *Id.* at 737.

benefits of presumptions may not outweigh their detriments. These tradeoffs further suggest that courts should not be creating evidentiary presumptions and certainly not without utilizing a consistent framework.

III. EXAMPLES OF JUDICIALLY CREATED PRESUMPTIONS

This part examines some of the common presumptions created by federal courts and showcases the problems with their creation and application. This part demonstrates in a concrete manner the way in which courts have created or applied presumptions in individual cases and by doing so showcases why the creation of novel presumptions in individual cases is inappropriate and unlawful.

A. Presumption of Diligent Prosecution

In the context of the Clean Water Act and Clean Air Act, courts have created a presumption labeled the "presumption of diligent prosecution."[81] The presumption posits that when a statute provides the government an opportunity to prosecute, the court can presume that the government is diligently prosecuting the laws it is tasked with enforcing in every case.[82] The presumption rests on the belief that the government is a zealous enforcer and that courts should not second guess the government's prosecutorial decisions.[83] The presumption becomes legally significant when a federal statute prohibits private suits against an entity if the government is already prosecuting a case against that entity—a situation that arises not infrequently under the Clean Water Act and Clean Air Act.[84]

Under the Clean Water Act, "any citizen may commence a civil action on his own behalf . . . against any person . . . who is alleged to be in violation of" particular provisions of the Clean Water Act.[85] The Act provides an exception, however, that "[n]o action may be commenced" if the government "is diligently prosecuting a civil or criminal action in a court of the United States" to enforce the provision of the Act against the alleged violator.[86] Simplified, individuals may file suits against polluters

81. *See* S. River Watershed All. v. DeKalb, 69 F.4th 809, 824 n.18 (11th Cir. 2023). More precisely, the District of Connecticut created the presumption in 1986, and other courts have since adopted it. *See id.* at 824–25.

82. *See id.* at 824.

83. *See* Friends of Milwaukee's Rivers v. Milwaukee Metro. Sewerage Dist., 382 F.3d 743, 760 (7th Cir. 2004) (noting that government's conduct was presumed diligent because statute anticipated government would be "the primary enforcer of the Clean Water Act"); Piney Run Pres. Ass'n v. Cnty. Comm'rs of Carroll Cnty., 523 F.3d 453, 459 (4th Cir. 2008) (same).

84. *See, e.g.*, *S. River*, 69 F.4th at 822 (collecting diligent prosecution bar cases).

85. 33 U.S.C. § 1365(a).

86. 33 U.S.C. § 1365(b).

for violating the Clean Water Act unless the government "is diligently prosecuting" the polluter for the same violation.[87] So, when the exception is raised, the statute requires a court to determine whether the government is (a) prosecuting and (b) doing so diligently.

In 1986, the U.S. District Court for the District of Connecticut held in *Connecticut Fund For Env't v. Cont. Plating Co.* that "[t]he court *must* presume the diligence of the state's prosecution of a defendant absent persuasive evidence that the state has engaged in a pattern of conduct in its prosecution of the defendant that could be considered dilatory, collusive or otherwise in bad faith."[88] As later explained by the U.S. Court of Appeals for the Eleventh Circuit, the district court's opinion in *Connecticut Fund* "does not explain the origin of this presumption."[89] Although "later courts have attempted to piece together its underpinnings,"[90] the *Connecticut Fund* court appears to have created the presumption out of thin air. Despite the district court providing no statutory or common law basis for its new presumption, several other circuits eventually cited the district court's opinion and began applying the presumption in Clean Water Act cases.[91] And eventually, the presumption found its way into cases adjudicating suits under the Clean Air Act.[92]

The bar against citizen suits in cases where the government is already prosecuting is an affirmative defense that an alleged polluter can raise in a citizen suit.[93] Generally, it is the burden of the party raising an affirmative defense to show by a preponderance of the evidence that the affirmative defense applies.[94] But the application of the presumption of

87. 33 U.S.C. § 1365.

88. 631 F. Supp. 1291, 1293 (D. Conn. 1986) (emphasis added).

89. *See* S. River Watershed All. v. DeKalb, 69 F.4th 809, 824 n.18 (11th Cir. 2023).

90. *See id.*

91. *See id.* at 824–25 (collecting cases).

92. *See* Citizens for Clean Power v. Indian River Power, LLC, 636 F. Supp. 2d 351, 357 (D. Del. 2009) (applying presumption of diligent prosecution in context of Clean Air Act); Dodge v. Mirant Mid-Atl., LLC, 732 F. Supp. 2d 578, 585 (D. Md. 2010) (same).

93. *See, e.g.*, Waterkeeper v. City of St. Petersburg, No. 8:16-cv-3319-T-27AEP, 2018 WL 549999, at *1 (M.D. Fla. Jan. 22, 2018) (treating diligent prosecution exception as affirmative defense); *cf.* Idaho Rural Council v. Bosma, 143 F. Supp. 2d 1169, 1182 (D. Idaho 2001) (treating similar citizen suit bar as affirmative defense).

94. *See* Smith v. United States, 568 U.S. 106, 112 (2013) (explaining that the "common-law rule was that affirmative defenses . . . were matters for the defendant to prove" and that when "Congress did not address . . . the burden of proof . . . [the Court] presume[s] that Congress intended to preserve the common-law rule." (some alterations in original) (quoting Martin v. Ohio, 480 U.S. 228, 235 (1987))); Schaffer *ex rel.* Schaffer v. Weast, 546 U.S. 49, 57 (2005) ("[T]he burden of persuasion as to certain elements of a plaintiff's claim may be shifted to defendants, when such elements can fairly be characterized as affirmative defenses or exemptions."); Cunningham v. Corn. Univ., 604 U.S. 693, 704 (2025) (quoting *Schaffer*, 546 U.S. at 57) (same); *see also* Ruan v. United States, 597 U.S. 450, 470 (2022) (Alito, J., concurring in the judgment) (explaining that

diligent prosecution flips this burden; rather than requiring the defendant to show that the government is already prosecuting diligently, the presumption requires the citizen suit plaintiff to show that the government is not diligently prosecuting.[95] Some courts have even required a heightened burden of proof to rebut this presumption.[96] Accordingly, although Congress, through the Clean Water Act, placed upon the defendant the burden to prove that the affirmative defense of diligent prosecution applies,[97] courts have flipped the evidentiary burden through the application of the presumption of diligent prosecution.

B. Presumption of Prudence in ERISA cases

In 1995, the U.S. Court of Appeals for the Third Circuit developed a new presumption in the context of cases brought under the Employee Retirement Income Security Act of 1974 ("ERISA"). ERISA governs standards for pension plans in private industry including by imposing certain fiduciary duties on the managers of covered pension plans, including a duty of care. The duty of care "imposes a 'prudent person' standard by which to measure fiduciaries' investment decisions and disposition of assets."[98] ERISA applies to employee stock option (or "ESOP") plans. An ESOP is a type of investment plan that provides employees with securities in the employees' company.[99] Under the text of the ERISA statute, managers of ESOP plans may invest in the employees' company but are still required to comply with ERISA's stringent fiduciary duty requirements.[100]

In *Moench v. Robertson*, the Third Circuit held that when an ESOP fiduciary "invests the assets in employer stock" that fiduciary "is entitled

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unless the text of the statute shows that Congress intended to "deviate from the common-law rule that the burden of proving 'affirmative defenses . . . rest[s] on the defendant'" the burden remains the common law rule (alteration in original) (quoting Patterson v. New York, 432 U.S. 197, 202 (1977))).

95. *See* Friends of Milwaukee's Rivers v. Milwaukee Metro. Sewerage Dist., 382 F.3d 743, 760 (7th Cir. 2004) ("We recognize that diligence on the part of the State is presumed."); Conn. Fund for the Env't v. Contract Plating Co., 631 F. Supp. 1291, 1293 (D. Conn. 1986) ("[T]he court must presume the diligence of the state's prosecution of a defendant *absent persuasive evidence* that the state has engaged in a pattern of conduct that could be considered dilatory, collusive, or otherwise in bad faith." (emphasis added)).

96. *See* Roanoke River Basin Ass'n v. Duke Energy Progress, LLC, No. 1:16cv607, 2017 WL 5654757, at *5 (M.D.N.C. Apr. 26, 2017) ("[T]he burden for proving non-diligence is heavy."); Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc., 890 F. Supp. 470, 487 (D.S.C. 1995) ("[The] burden is a heavy one").

97. *See Smith*, 568 U.S. at 112 (explaining that affirmative defense places burden on defendant).

98. Mass. Mut. Life Ins.v. Russell, 473 U.S. 134, 143 n.10 (1985) (citing 29 U.S.C. § 1104(a)(1)(B)).

99. Moench v. Robertson, 62 F.3d 553, 569 (3d Cir. 1995).

100. *See id.*

to a presumption that it acted consistently with ERISA by virtue of that decision."[101] The duty of care may require an ESOP manager to invest in assets other than the employees' company's ESOP securities, even though an ESOP plan is designed to allow employees to own their company's securities. Accordingly, the Third Circuit explained, "delineating the responsibilities of ESOP trustees [can be] difficult, because they 'must satisfy the demands of Congressional policies that seem destined to collide.'"[102] Hence, the Third Circuit held that, given ERISA's policies regarding ESOPs, it made sense to grant ESOP fiduciaries a presumption that they had acted prudently and with care when investing in the employees' company's securities.[103] Other circuits adopted the presumption.[104]

While the presumption may effectuate the policy supporting ESOPs, it is unsupported by the text of ERISA.[105] And different circuits applied the presumption of prudence in different ways.[106] In 2014, the Supreme Court granted certiorari on the question of what, if any, presumption of prudence is warranted when fiduciaries invest in ESOP company securities. The court ultimately held that—because the statute contemplated no such presumption—courts should not apply a presumption of prudence.[107]

C. Presumption of Group Published Information

The presumption of group published information is another court-created presumption and is relevant in cases alleging securities fraud. The presumption stands for the proposition that in "cases of corporate fraud where the false or misleading information" that constitutes the fraud "is conveyed in prospectuses, registration statements, annual reports, press releases, or other 'group-published information,' it is reasonable to presume that these are the collective actions of the officers" of the corporation.[108]

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101. 62 F.3d 553, 571 (3d Cir. 1995), *abrogated by*, Fifth Third Bancorp v. Dudenhoeffer, 573 U.S. 409 (2014).

102. *Id.* at 571 (quoting Donovan v. Cunningham, 716 F.2d 1455, 1466 (5th Cir.1983) (footnotes omitted)).

103. *Id.*

104. *See In re* Citigroup ERISA Litig., 662 F.3d 128, 138 (2d Cir. 2011) (noting that "[t]he Sixth, Fifth, and Ninth Circuits have all adopted the [Third Circuit's] *Moench* presumption"), *abrogated by*, *Fifth Third Bancorp*, 573 U.S.

105. *See Fifth Third Bancorp*, 573 U.S. at 417 ("Several Courts of Appeals have gone beyond ERISA's express provision.").

106. *See id.* at 414 (noting the "differences among the Courts of Appeals as to the nature of the presumption of prudence applicable to ESOP fiduciaries").

107. *See id.*

108. *See, e.g.*, Wool v. Tandem Computs. Inc., 818 F.2d 1433, 1440 (9th Cir. 1987), *overruled on other grounds*, Flood v. Miller, 35 Fed. Appx. 701, 703 n.3 (9th Cir. 2002);

This presumption is significant for its effect on the pleading requirements set forth under Rule 9(b) of the Federal Rules of Civil Procedure (Rule 9(b)).[109] Rule 9(b) requires that when a party raises allegations of "fraud or mistake" in their complaint, the "party must state with particularity the circumstances constituting fraud or mistake."[110] Among other requirements, the rule requires a plaintiff to allege "[t]he identity of the person who made the fraudulent statement."[111] This rule means that a "plaintiff must 'identify the role of each defendant in the alleged fraudulent scheme.'"[112]

In the context of securities fraud cases, courts have used the group published information presumption to relax the particularity requirement of Rule 9(b). The Ninth Circuit held that a "plaintiff may satisfy [Rule] 9(b) through reliance upon a presumption that the allegedly false and misleading 'group published information' complained of is the collective action of officers and directors."[113] In other words, in the securities context, this presumption permits plaintiffs to more easily overcome the barrier otherwise presented by Rule 9(b)'s pleading requirements because plaintiffs need not point to specific individuals who they allege committed fraud, but can instead vaguely wave at an entire group of corporate officers. More concretely, the presumption allows plaintiffs to survive a motion to dismiss that they would otherwise lose and makes it more difficult for defendants to prevail on a motion to dismiss for failure to plead with particularity.[114]

This presumption is not derivable from the text of Rule 9(b) or any other textual basis. The oldest Circuit Court opinion to reference the

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see also Patriot Expl., LLC v. SandRidge Energy, Inc., 951 F. Supp. 2d 331, 361 (D. Conn. 2013); Kuwait Inv. Off. v. Am. Int'l Grp., 128 F. Supp. 3d 792, 810 (S.D.N.Y. 2015).

109. *Wool*, 818 F.2d at 1439–40 ("Under such circumstances [of group published information], a plaintiff fulfills the particularity requirement of Rule 9(b) by pleading the misrepresentations with particularity and where possible the roles of the individual defendants in the misrepresentations.").

110. FED. R. CIV. P. 9(b).

111. 2 MOORE'S FEDERAL PRACTICE—CIVIL § 9.03 (2025).

112. United States v. United Healthcare Ins., 848 F.3d 1161, 1184 (9th Cir. 2016) (quoting Swartz v. KPMG LLP, 476 F.3d 756, 765 (9th Cir. 2007)).

113. *In re* GlenFed, Inc. Secs. Litig., 60 F.3d 591, 593 (9th Cir. 1995); *see* Schiller v. Physicians Res. Grp. Inc., 342 F.3d 563, 569 (5th Cir. 2003) ("'Group pleading' allows a plaintiff to rely on a presumption that statements in company generated documents represent the collective work of those individuals directly involved in the company's daily management."); *see also* Dunn v. Borta, 369 F.3d 421, 434 (4th Cir. 2004) (explaining, without adopting, presumption); ICD Cap., LLC v. CodeSmart Holdings, Inc., 842 F. App'x 705, 707 (2d Cir. 2021) (same); 2 MOORE'S FEDERAL PRACTICE § 9.03 (3d ed. 2025).

114. *See, e.g.*, *In re* AnnTaylor Stores Secs. Litig., 807 F. Supp. 990, 1005 (S.D.N.Y. 1992); Fraternity Fund Ltd. v. Beacon Hill Asset Mgmt., 376 F. Supp. 2d 385, 395 (S.D.N.Y. 2005).

"group-published information" presumption is *Wool v. Tandem Computers Inc.*[115] The *Wool* court, in turn, cited to two district court opinions for the existence of the presumption: *Bruns v. Ledbetter*[116] and *Zatkin v. Primuth*.[117] *Bruns* relies on *Zatkin* to explain the presumption.[118] Thus, the Ninth Circuit's opinion in *Wool* comes down to *Zatkin*. But *Zatkin* itself does not provide any meaningful justification for the presumption to show that it is either permissible under Rule 9 or that it reflects the likely actions of corporate officers.[119] The entirety of the explanation for the presumption in *Zatkin* is the following: "Where alleged actions involve the issuance of annual reports or releases, it may be presumed that these are the collective actions of the directors and officers."[120] While *Zatkin* provides a "see" citation to *In re Equity Funding Corporation of America Securities Litigation* (1976) for that proposition,[121] *In re Equity Funding* likewise provides no reasoned justification for the presumption that all directors or officers are involved in corporate published information, instead simply holding that requiring particularity in such circumstances would be burdensome.[122] Evidently, the *Zatkin* and *In re Equity Funding* courts considered the presumption to have intuitive appeal and crafted it out of whole cloth.

D. Lanham Act Presumptions

Several judicially created presumptions arise in the context of the Lanham Act.[123] The Lanham Act authorizes a business to sue its competitors for false or misleading statements about the business's products or services.[124] To succeed on a false advertising claim under the Lanham Act, a plaintiff must show, among several other factors, "that the plaintiff 'has been or is likely to be injured as a result of the [defendant's] misrepresentation, either by direct diversion of sales or by

115. *See* 818 F.2d 1433, 1440 (9th Cir. 1987).

116. *See* 583 F. Supp. 1050, 1052 (S.D. Cal. 1984).

117. *See* 551 F. Supp. 39, 42 (S.D. Cal. 1982).

118. *See* Bruns v. Ledbetter, 583 F. Supp. 1050, 1052 (S.D. Cal. 1984) (stating that in *Zatkin*, "the court noted an exception to the particularity requirement of 9(b) in cases of corporate fraud where the false or misleading information is conveyed in a prospectus or registration statement . . . and can therefore be reasonably attributed to the defendant officers").

119. *See Zatkin*, 551 F. Supp. at 42.

120. *Id.*

121. *Id.* (citing *In re* Equity Funding Corp. of Am. Secs. Litig., 416 F. Supp. 161, 181 (C.D. Cal. 1976)).

122. *See In re Equity Funding Corp. of Am.*, 416 F. Supp. at 181 ("Nor is it necessary for the complaint, once it has adequately identified a particular defendant with a category of defendants allegedly responsible for some continuing course of conduct, to plead more than the group conduct of the defendants.").

123. *See* 15 U.S.C. § 1125.

124. *See* 15 U.S.C. § 1125(a).

a lessening of goodwill associated with its products.'"[125] The presumptions applicable to the Lanham Act often serve to make that showing easier.

1. Presumption of Injury from Comparative Advertising

It is the plaintiff's burden under the Lanham Act to "prove a 'causal connection' between the defendant's false advertising and the plaintiff's injuries."[126] Nevertheless, the Second and Seventh Circuits have held that "an injury could be presumed when a defendant engages in comparative advertising—i.e., when a defendant uses a false advertisement to compare its product to the plaintiff's product."[127] Ironically, the Second Circuit opinion recognizing this presumption explained that the district court that first created the presumption relied on a case disavowing the use of presumptions in assessing causation.[128] Nevertheless, the Second Circuit went on to hold that where a company falsely compares one product to another, the court can presume that the comparison caused an injury.[129]

The Second Circuit later expanded that presumption, holding that a presumption of injury can be applied even where the defendant did not explicitly compare two products provided that the market for the plaintiff's goods or services is "sparsely populated" because it would be clear what the comparator product would be.[130] The logic of the presumption works as follows:

> [I]f A and B are the only two products occupying a market or submarket, and if the producer of product B fraudulently represents its product as better than A, then it can be presumed that at least some consumers will choose product B over A in reliance on that

125. Vitamins Online, Inc. v. Heartwise, Inc., 71 F.4th 1222, 1233 (10th Cir. 2023) (quoting Bimbo Bakeries USA, Inc. v. Sycamore, 29 F.4th 630, 643–44 (10th Cir. 2022)); *see also* Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 132 (2014) ("[A] plaintiff suing under § 1125(a) ordinarily must show economic or reputational injury flowing directly from the deception wrought by the defendant's advertising.").

126. *Vitamins Online*, 71 F.4th at 1238; *see also* Campfield v. Safelite Grp., 91 F.4th 401, 411 (6th Cir. 2024) (requiring causal link between false advertising and harm to the plaintiff); Warner-Lambert Co. v. Breathasure, Inc., 204 F.3d 87, 93 (3d Cir. 2000) (same); Ortho Pharm. Corp. v. Cosprophar, Inc., 32 F.3d 690, 694 (2d Cir. 1994) (same).

127. *Vitamins Online*, 71 F.4th at 1239 (citing McNeilab, Inc. v. Am. Home Prod. Corp., 848 F.2d 34, 38 (2d Cir. 1988)).

128. *See McNeilab*, 848 F.2d at 38 ("The case [the district court] relied upon for this proposition, however, states, 'The likelihood of injury and causation will *not* be presumed, but must be demonstrated in some manner.'" (quoting Coca-Cola Co. v. Tropicana Prods., Inc., 690 F.2d 312, 316 (2d Cir. 1982))).

129. *See id.*

130. Church & Dwight Co. v. SPD Swiss Precision Diagnostics, GmBH, 843 F.3d 48, 72 n.12 (2d Cir. 2016).

> false advertising, thereby depriving the producer of A of some sales.[131]

The Tenth Circuit adopted this presumption holding the following:

> [O]nce a plaintiff has proven that the defendant has falsely and materially inflated the value of its product (or deflated the value of the plaintiff's product), and that the plaintiff and defendant are the only two significant participants in a market or submarket, courts may presume that the defendant has caused the plaintiff to suffer an injury.[132]

But while the presumption *may* plausibly reflect reality, it does not necessarily follow that comparative advertising has *actually* caused an injury in a given case, as required under the Lanham Act.[133] The Second and Seventh Circuits saw a shortcut for resolving the causation finding and took it, removing the need for factual determination on the issue of causation.

2. Presumption of Consumer Confusion

The Lanham Act has also given rise to the presumption of likelihood of consumer confusion with respect to trademarks[134] and trade dress.[135] A party may violate the Lanham Act by copying the distinguishing mark of a competitor's product in a way that "is likely to cause confusion, or to cause mistake, or to deceive," if the mark has acquired a meaning associated with the competitor's product.[136]

The presumption of consumer confusion posits that consumers will likely confuse two products or services when the trademark or trade

131. *Vitamins Online*, 71 F.4th at 1240.

132. *Id.*; *see also id*. at 1239 ("The presumption of injury applied by the district court originated in the Second Circuit, where our sister circuit concluded that an injury could be presumed when a defendant engages in comparative advertising—i.e., when a defendant uses a false advertisement to compare its product to the plaintiff's product.").

133. *See* Lexmark Int'l v. Static Control Components, Inc., 572 U.S. 118, 133 (2014) (holding that a "plaintiff suing under § 1125(a) ordinarily must show economic or reputational injury flowing directly from the deception wrought by the defendant's advertising; and that that occurs when deception of consumers causes them to withhold trade from the plaintiff").

134. A trademark is "[a] word, phrase, name, logo, device, or other sensory symbol used by a manufacturer or seller to distinguish its products or services from those of others." *Trademark*, BLACK'S LAW DICTIONARY (12th ed. 2024).

135. Trade dress is "[t]he overall appearance and image in the marketplace of a product or a commercial enterprise. For a product, trade dress typically comprises packaging and labeling. For an enterprise, it typically comprises design and decor. If a trade dress is distinctive and nonfunctional, it may be protected under trademark law." *Trade Dress*, BLACK'S LAW DICTIONARY (12th ed. 2024).

136. 15 U.S.C. § 1114(1); *see also* M. Kramer Mfg. Co. v. Andrews, 783 F.2d 421, 448–49 (4th Cir. 1986).

dress of one product or service is copied by the other product or service.[137] As a consequence, although the statute requires the plaintiff to show consumer confusion, the presumption has the effect of requiring the alleged infringer (the defendant) to demonstrate that the consumers were not misled by the similarities in the products.[138] The presumption has been attributed to Judge Learned Hand's decision in *My-T-Fine Corp. v. Samuels*.[139] Judge Hand's opinion—which holds that the copying of a trademark "raises a presumption that customers will be deceived"—has some intuitive appeal because it makes sense that the reason to copy a competitor's mark would be to deceive customers.[140] Nevertheless, the court recognized that even if a party copies a mark, it may yet "fail in execution" in misleading customers.[141] Yet, the court held that the presumption flips the burden by requiring that the alleged infringer defendant "must at least prove that his effort has been futile" rather than requiring the plaintiff to show that the copying caused confusion.[142]

> Whether there is a presumption of likelihood of consumer confusion from proof of intentional copying of trade dress is an issue that has divided the circuits. The Second, [Fourth,] and Ninth Circuits, for example, have held that a presumption of confusion arises from copying. The Third, Seventh, and Eleventh Circuits have held that although copying is a factor to consider, no presumption arises.[143]

Like other presumptions discussed in this part, the presumption of consumer confusion is not based in the text of the Lanham Act or trademark statutes—indeed, *My-T-Fine* was decided before enactment of the Lanham Act—and instead rests only on the intuitions of the courts that have adopted it.

E. Presumption of Personal Media Use

In *Lindke v. Freed*, the Supreme Court announced a new presumption in the context of 42 U.S.C. § 1983, a law that allows individuals to sue state and local government officials acting in their official capacities for violating the individual's constitutional rights.[144]

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137. *See* Osem Food Indus. Ltd. v. Sherwood Foods, Inc., 917 F.2d 161, 164 (4th Cir. 1990).

138. *See id.*

139. *See* 69 F.2d 76, 77 (2d Cir. 1934); *Osem Food Indus.*, 917 F.2d at 164.

140. *See My-T-Fine*, 69 F.2d at 77.

141. *Id.*

142. *Id.*

143. *Osem Food Indus.*, 917 F.2d at 164; *see id.* at 165 n.8 (holding that "presumption of likelihood of confusion flows from [defendant's] intentional copying").

144. *See* 601 U.S. 187, 202 (2024); 42 U.S.C. § 1983.

Lindke involved a § 1983 claim based on an alleged violation of the First Amendment.[145] There, a city official deleted a city resident's posts on the official's social media page.[146] The resident then sued the official under § 1983 alleging that the official had violated the resident's First Amendment rights by unconstitutionally restricting his speech.[147] In defense, the city official argued that his social media page was used in a private capacity and that, because only government restriction of speech violates the First Amendment, blocking the resident from posting on his page did not violate the First Amendment.[148]

Section 1983 "protects against acts attributable to a State, not those of a private person."[149] The Supreme Court was therefore required under § 1983 to determine whether the city official's action constituted government restriction of speech or private restriction of speech.[150] As part of that inquiry, the Supreme Court assessed whether the city official's use of his social media page was for private or governmental purposes.[151] The Supreme Court observed, "in a case involving a state or local official who routinely interacts with the public" "the line between private conduct and state action [can be] difficult to draw."[152] To make the complex evidentiary question of whether the social media page was personal or governmental easier to resolve, the Supreme Court pronounced a new presumption. It held that when a social media page contains a disclaimer that it is used in a personal capacity, the page owner is "entitled to a heavy (though not irrebuttable) presumption that all of the posts on his page were personal."[153] The Supreme Court reasoned that the presumption was appropriate because "[m]arkers like these give speech the benefit of clear context."[154] While the Supreme Court's reasoning has some intuitive appeal, the Court conducted no empirical assessment to determine whether social media is actually used in that manner before creating the "heavy" presumption.[155] Nor did the Court grapple with the text of Section 1983, which contains no indication that Congress considered presumptions an appropriate method of determining whether a defendant acted "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the

145. *See Lindke*, 601 U.S. at 202.
146. *See id.* at 193.
147. *See id.*
148. *See* Brief for the Petitioner at 13, *Lindke*, 601 U.S. (No. 22-611), 2023 WL 5279343, at *13; *Lindke*, 601 U.S. at 193.
149. *Lindke*, 601 U.S. at 194.
150. *See id.* at 198.
151. *See id.* at 198–204.
152. *Id.* at 195–96.
153. *Id.* at 202.
154. *Id.*
155. *Id. See generally id.*

District of Columbia," as required for liability to arise under the statute.[156]

* * *

The foregoing examples demonstrate that federal courts assume they have the authority to create new presumptions. When federal courts create new presumptions, they generally do so based on assumptions about how the world works rather than based on empirical evidence. And it appears that federal courts often create these presumptions to avoid wading into difficult evidentiary fact-finding.

IV. CONSTRAINTS ON THE JUDICIAL CREATION & APPLICATION OF NOVEL PRESUMPTIONS

There are two reasons the federal judiciary may not create novel evidentiary presumptions in individual cases: (1) constitutional structural separation of powers principles; and (2) the Rules Enabling Act. The separation of powers and the vesting clause of Article I grant to the legislative branch, rather than to the judicial branch, the authority to create substantive rules and rules of court procedure, meaning that courts cannot create presumptions without a delegation of Congress's authority. While Congress has delegated to the federal judiciary the power to create procedural rules, it has limited that authority to the mechanism delineated in the Rules Enabling Act. In other words, courts are not permitted to create new presumptions without following the procedures outlined in the Rules Enabling Act. Courts have not been conforming to that requirement when creating new presumptions, and so those presumptions are unlawful.

A. Separation of Powers

The creation and application of new presumptions in individual cases by the federal courts violates the Constitution's separation of powers principle in two ways. First, by creating presumptions, the federal courts exercise a form of legislative rather than judicial power, trenching on Congress's authority under Article I. Second, federal courts have no inherent Article III authority to create presumptions and exercising such authority reaches beyond the federal courts' powers set out in Article III.

156. 42 U.S.C. § 1983.

1. Judicially Created Presumptions Intrude on Congress's Authority Under Article I

Articles I, II, and III of the Constitution respectively grant the legislative, executive, and judicial branches of the federal government their own powers.[157] The separation of powers prohibits one branch from exercising another branch's core function.[158] The power to create presumptions fits within the legislative branch's core powers. This is so because the Constitution grants Congress both the power to regulate the procedures of the federal courts,[159] and the power to enact substantive law.[160] Presumptions are necessarily one or the other.[161] Therefore, the power to create presumptions falls within Congress's authority.

a. Power Over Procedure

"[T]he constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) carries with it congressional power to make rules governing the practice and pleading in those courts."[162] The "power of Congress to prescribe" the procedural

157. *See* INS v. Chadha, 462 U.S. 919, 946 (1983):

> "[T]he principle of separation of powers was not simply an abstract generalization in the minds of the Framers: it was woven into the document that they drafted in Philadelphia in the summer of 1787" . . . . The very structure of the articles delegating and separating powers under Arts. I, II, and III exemplify the concept of separation of powers.

Id. (quoting Buckley v. Valeo, 424 U.S. 1, 124 (1976)); Bowsher v. Synar, 478 U.S. 714, 722 (1986) ("The Framers provided a vigorous Legislative Branch and a separate and wholly independent Executive Branch, with each branch responsible ultimately to the people. The Framers also provided for a Judicial Branch equally independent with '[t]he judicial Power . . . extend[ing] to all Cases, in Law and Equity, arising under this Constitution, and the Laws of the United States.'" (alteration in original) (quoting U.S. CONST. art. III, § 2)); *see also* THE FEDERALIST NO. 79 (Alexander Hamilton) (advocating for "complete separation of the judicial from the legislative power").

158. *See* Morrison v. Olson, 487 U.S. 654, 688, 708 (1988); *see also* Emile Katz, *Grand Unified (Separation of Powers) Theory: Examining the United States Marshals*, 42 PACE L. REV. 322, 323 (2022).

159. *See* Wayman v. Southard, 23 U.S. 1, 3 (1825) ("Congress has, by the constitution, exclusive authority to regulate the proceedings in the Courts of the United States."); U.S. CONST. art. III (stating that Congress may create inferior federal courts and regulate the appellate jurisdiction of the Supreme Court).

160. JOHN SALMOND, JURISPRUDENCE 476 (Glanville L. Williams ed., 10th ed. 1947) ("[T]he substantive law defines the remedy and the right, while the law of procedure defines the modes and conditions of the application of the one to the other."); THE FEDERALIST NO. 75 (Alexander Hamilton) ("The essence of the legislative authority is to enact laws, or, in other words, to prescribe rules for the regulation of the society."); THE FEDERALIST NO. 51 (James Madison) (discussing separation of powers).

161. *Cf.* Md. Cas. Co. v. Williams, 377 F.2d 389, 394 & n.2 (5th Cir. 1967) (explaining that presumptions are sometimes considered procedural and sometimes substantive).

162. Hanna v. Plumer, 380 U.S. 460, 472 (1965); *see Wayman*, 23 U.S. at 3; Willy v. Coastal Corp., 503 U.S. 131, 136–137 (1992) ("Congress[] [has] general power to

rules courts use to adjudicate cases is "long recognized."[163] The text of Article III suggests that Congress, rather than the judiciary, is responsible in the first instance for promulgating procedural rules; Congress decides whether to "ordain and establish" lower federal courts, the Supreme Court's appellate jurisdiction is subject to "Exceptions" and "Regulations as the Congress shall make," and "when [a crime is] not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed."[164] Along with the Necessary and Proper Clause in Article I,[165] these provisions grant Congress the authority to dictate the federal courts' procedural rules.[166]

Procedural rules are rules governing how a civil or criminal proceeding is carried out, including the "steps for having a right or duty judicially enforced."[167] As described above, presumptions can alter pleading requirements[168] and dictate how and when a party must present evidence[169] and can therefore be classified as procedural rules.[170] So classified, presumptions fall within the ambit of Congress's power to dictate court procedure.[171] Because the regulation of federal court procedures is a function that the Constitution places within the legislative branch, courts may exercise only those powers over procedure—

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regulate the courts and . . . specific power to authorize the imposition of sanctions."); Sibbach v. Wilson & Co., 312 U.S. 1, 9 (1941) ("Congress has undoubted power to regulate the practice and procedure of federal courts."); *see also* Burlington N. R.R. Co. v. Woods, 480 U.S. 1, 5 n.3 (1987) (applying the same rationale to Federal Rules of Appellate Procedure because they were authorized under same Rules Enabling Act as Federal Rules of Civil Procedure).

163. *Plumer*, 380 U.S. at 473; *see also* 1 MOORE'S FEDERAL PRACTICE § 1.03 (3d ed. 2025) ("The power of Congress to make procedural rules for the lower federal courts is firmly established."); THE FEDERALIST NO. 78 ("The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated.").

164. U.S. CONST. art. III, § 2, cls. 1, 2, 3.

165. *See* U.S CONST. art I, § 8, cl. 18.

166. *See* Budinich v. Becton Dickinson & Co., 486 U.S. 196, 199 (1988) ("We have held that enactments 'rationally capable of classification' as procedural rules are necessary and proper for carrying into execution the power to establish federal courts vested in Congress by Article III, § 1." (quoting *Plumer*, 380 U.S. at 472)); *see also* 1 MOORE'S FEDERAL PRACTICE § 1.03 (3d ed. 2025).

167. *Procedural Law*, BLACK'S LAW DICTIONARY (12th ed. 2024); *see also Rule of Procedure*, BLACK'S LAW DICTIONARY (12th ed. 2024).

168. *See, e.g.*, *In re* GlenFed, Inc. Secs. Litig., 60 F.3d 591, 593 (9th Cir. 1995) (presumption effecting pleading requirement).

169. *See* FED. R. EVID. 301.

170. *See* Universal Elecs. Inc. v. United States, 112 F.3d 488, 493 (Fed. Cir. 1997) (categorizing presumption with "other like procedural devices"); Dep't of Army, Aberdeen Proving Ground v. Fed. Lab. Rels. Auth., 890 F.2d 467, 477 (D.C. Cir. 1989) (categorizing presumption as a "procedural device"); Beaver v. Fid. Life Ass'n, 313 F.2d 111, 113 (10th Cir. 1963) (same).

171. *See, e.g.*, 33 U.S.C. § 920 (creating statutory presumption); 38 U.S.C. § 1118 (same); 35 U.S.C. § 282 (same).

including the crafting of new presumptions—either delegated to the courts by Congress[172] or otherwise inherent in the judicial power.[173] As explained in Part IV.A.2 below, when creating novel presumptions, courts have not acted pursuant to a congressional delegation or any inherent power.

b. Power Over Substantive Law

Congress is vested with authority by Article I of the Constitution to enact substantive law.[174] Substantive law is the "part of the law that creates, defines, and regulates the rights, duties, and powers of parties."[175] Therefore, "it is for Congress, not federal courts, to articulate the appropriate standards to be applied as a matter of federal law."[176] "Just as a court cannot apply its independent policy judgment to recognize a cause of action that Congress has denied, it cannot limit a cause of action that Congress has created merely because 'prudence' dictates."[177] In other words, it is up to Congress, not the federal courts, to make the policy judgments that go into crafting substantive law.

In *Medtronic, Inc. v. Mirowski Fam. Ventures*, the Supreme Court reaffirmed that "the burden of proof is a substantive aspect of a claim" that "cannot be considered a mere incident of a form of procedure."[178] Because Congress is the branch authorized to enact substantive law, "[i]t is the federal lawmaker's prerogative . . . to allow, disallow, or shape the contours of—including the pleading *and proof requirements*"—federal statutory schemes.[179] Moreover, in *E.M.D. Sales, Inc. v. Carrera*, the Supreme Court explained that "the preponderance-of-the-evidence standard has remained the default standard of proof in American civil litigation."[180] Therefore, the Court explained, federal courts may apply

172. *See* Wayman v. Southard, 23 U.S. 1, 43 (1825) (holding that Congress could delegate procedural authority to the federal courts).

173. See Section IV.A.2 for a discussion of the federal courts' inherent powers.

174. *See generally* U.S. CONST. art. I (granting Congress lawmaking powers over particular subjects).

175. *Substantive Law*, BLACK'S LAW DICTIONARY (12th ed. 2024).

176. City of Milwaukee v. Illinois, 451 U.S. 304, 317 (1981).

177. Lexmark Int'l v. Static Control Components, Inc., 572 U.S. 118, 128 (2014) (citation omitted).

178. Medtronic, Inc. v. Mirowski Fam. Ventures, LLC, 571 U.S. 191, 199 (2014) (cleaned up) (quoting Raleigh v. Illinois Dept. of Revenue, 530 U.S. 15, 20–21 (2000), and Garrett v. Moore-McCormack Co., 317 U.S. 239, 249 (1942)); *see also* Director, Office of Workers' Compensation Programs v. Greenwich Collieries, 512 U.S. 267, 271 (1994) ("[T]he assignment of the burden of proof is a rule of substantive law.").

179. Tellabs, Inc. v. Makor Issues & Rts., Ltd., 551 U.S. 308, 327 (2007) (emphasis added); *see also* McFarland v. Am. Sugar Ref. Co., 241 U.S. 79, 86 (1916) ("As to the presumptions, of course the legislature may go a good way in raising [presumptions] or in changing the burden of proof, but there are limits.").

180. E.M.D. Sales, Inc. v. Carrera, 604 U.S. 45, 50 (2025).

"[a] more demanding standard, such as clear and convincing evidence . . . [generally] *only* when a statute or the Constitution requires a heightened standard.'"[181]

While federal courts have filled in the proof requirements when Congress has failed to supply a standard,[182] after the Supreme Court's holding in *E.M.D. Sales*, courts must apply the background standard where Congress has not dictated a different standard.[183] The takeaway from *E.M.D. Sales* is that courts may not choose for themselves what proof requirements apply but rather must determine what proof standard Congress has set or what proof requirement formed "the legal backdrop against which Congress has legislated."[184] "To do otherwise would be to 'choose sides in a policy debate,'" which is Congress's role.[185]

As demonstrated in Part III, presumptions frequently dictate or alter proof requirements,[186] and can therefore be considered substantive rules under the Supreme Court's holding in *Medtronic, Inc. v. Mirowski Fam. Ventures, LLC*.[187] Furthermore, when courts create presumptions, they often do so primarily for policy reasons that undergird substantive legislation.[188] Indeed, some scholars have identified presumptions as disguised substantive law.[189] If classified as substantive law, presumptions fall within the legislature's power and, therefore, cannot be created by the judicial branch absent a delegation by Congress.

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181. *Id.* (emphasis added).

182. *See* Steadman v. SEC, 450 U.S. 91, 95 (1981).

183. *See E.M.D. Sales*, 604 U.S. at 50.

184. *Id.* at 54 (Gorsuch, J., concurring).

185. *Id.* at 53–54.

186. *See, e.g.*, Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc., 890 F. Supp. 470, 487 (D.S.C. 1995) (presumption effecting burden of proof); *see also* Ronald J. Allen, *Presumptions, Inferences, and Burden of Proof in Federal Civil Actions—An Anatomy of Unnecessary Ambiguity and a Proposal for Reform*, 76 NW. U.L. REV. 892, 900–901 (1982) (explaining that presumptions effect burdens).

187. *See* 571 U.S. 191, 199 (2014); Comm'r v. Produce Rep. Co., 207 F.2d 586, 587 (7th Cir. 1953) (treating presumptions of fact created by IRS commissioner as "rules of substantive law" and holding that commissioner had no authority to create rules of substantive law); McClintock-Trunkey Co. v. Comm'r, 217 F.2d 329, 332 (9th Cir. 1954) (same).

188. *See* Thayer, *Presumptions*, *supra* note 10, at 149; *cf.* Allen, *supra* note 186, at 899–901 (noting instances where courts have shifted parties' burdens for policy reasons, particularly using presumptions); Beaver v. Fid. Life Ass'n, 313 F.2d 111, 113 (10th Cir. 1963) ("The law has raised up numerous presumptions . . . in response to recognized social policies.").

189. *See* Ernest F. Roberts, *An Introduction to the Study of Presumptions*, 4 VILL. L. REV. 475, 484–85 (1959), https://perma.cc/PLT8-8FVV (recognizing presumptions as tools for creating judge-made law).

Regardless of whether presumptions are viewed as a matter of procedural or substantive law, they fall within the ambit of Congress's authority, not the authority of the federal judiciary.[190] Because Congress is the branch vested with authority to enact presumptions, courts may create presumptions only if Congress has delegated courts the authority to do so with an intelligible principle.[191]

Consistent with that understanding, the Supreme Court has suggested by implication—if not explicitly—that courts may utilize presumptions only when statutorily authorized to do so.[192] As described in Part III above, *Fifth Third Bancorp v. Dudenhoeffer* raised the question whether courts should apply a presumption of prudence to the actions of ESOP fiduciaries when those fiduciaries invest in the plan beneficiaries' employer.[193] Noting that multiple courts of appeals had applied such a presumption, the Supreme Court stated that it "must decide whether ERISA contains some such presumption."[194] Assessing the text of the statute, the Court rejected the idea that Congress sought to create a presumption.[195] The Supreme Court ultimately concluded that ERISA "does not create a special presumption favoring ESOP fiduciaries" and that "the same standard of prudence applies to all ERISA fiduciaries."[196] By holding that courts could not apply the presumption because it did not derive from the statute, the Supreme Court acknowledged that courts may not create presumptions divorced from statutory text.[197]

None of the cases described in Part III above draw their presumptions from a faithful interpretation of the text of a federal statute or constitutional provision. Rather, the courts in those cases created new presumptions without regard to—and in tension with—the statutory text.

190. *See also* Tellabs, Inc. v. Makor Issues & Rts., Ltd., 551 U.S. 308, 327 (2007); Nat'l R.R. Passenger Corp. v. Bos. & Me. Corp., 503 U.S. 407, 421 (1992) (noting creation of statutory presumption); McFarland v. Am. Sugar Ref. Co., 241 U.S. 79, 86 (1916) ("As to the presumptions, of course the legislature may go a good way in raising [presumptions] or in changing the burden of proof, but there are limits."); *see also* Va. & W. Va. Coal Co. v. Charles, 254 F. 379, 383 (4th Cir. 1918) ("Legislature may create the presumption where it did not before exist.").

191. *See* Gundy v. United States, 588 U.S. 128, 135 (2019); *id.* at 166 (Gorsuch, J., concurring).

192. *See* Fifth Third Bancorp v. Dudenhoeffer, 573 U.S. 409, 418 (2014).

193. *See id.*

194. *Id.*

195. *See id.*

196. *Id.* at 418, 425.

197. *See id.*; *see also* Garland v. Ming Dai, 593 U.S. 357, 365 (2021) (holding that a "court is 'generally not free to impose' additional judge-made procedural requirements on agencies that Congress has not prescribed and the Constitution does not compel" (quoting Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 524 (1978))).

By doing so, the courts exercised a power the Constitution reserves for the legislative branch. Because the power to regulate court procedure and substantive law is core to the legislative power, the federal courts' exercise of that power violates the separation of powers.

2. Courts Have No Independent Power to Create New Presumptions

Federal courts have only those powers granted by the Constitution or delegated by Congress.[198] Although the Supreme Court has sometimes "recognized a responsibility, in the absence of legislation, to fashion federal common law in cases raising issues of uniquely federal concern," it has consistently "emphasized that the federal lawmaking power is vested in the legislative, not the judicial, branch of government."[199] "Federal courts, unlike state courts, are not general common-law courts and do not possess a general power to develop and apply their own rules of decision."[200] The background principle is that "[t]here is no federal general common law."[201]

One response to the argument above, however, is that federal courts have inherent authority under Article III to craft and apply new presumptions. If Article III granted that power, courts would not require a delegation from Congress to create presumptions and would not violate the separation of powers principle by doing so.[202] To be sure, the Supreme Court has said that "courts of the United States, sitting as courts of law," have "equitable powers" over "their own process, to prevent

198. *See* Nw. Airlines, Inc. v. Transp. Workers Union of Am., 451 U.S. 77, 95 (1981) ("Although it is much too late to deny that there is a significant body of federal law that has been fashioned by the federal judiciary in the common-law tradition, it remains true that federal courts, unlike their state counterparts, are courts of limited jurisdiction that have not been vested with open-ended lawmaking powers."); *Wayman*, 23 U.S. at 43 (holding that Congress could delegate procedural authority to the federal courts). *See generally* U.S. CONST. art. III (delineating the powers of the judicial branch).

199. *Nw. Airlines*, 451 U.S. at 95; *see* Martin H. Redish & Uma M. Amuluru, *The Supreme Court, the Rules Enabling Act, and the Politicization of the Federal Rules: Constitutional and Statutory Implications*, 90 MINN. L. REV. 1303, 1305 (2006) ("The Constitution grants to the judiciary no purely legislative authority.").

200. City of Milwaukee v. Illinois, 451 U.S. 304, 312 (1981).

201. Rodriguez v. Fed. Deposit Ins. Corp., 589 U.S. 132, 136 (2020) (quoting Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938)); *see* Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 258, 289 (2014) (Thomas, J. concurring) (relating creation of presumption to long-rejected idea that courts have power to create common law causes of action); *cf.* Alexander v. Sandoval, 532 U.S. 275, 286 (2001) (affirming that federal courts lack common law power).

202. *See* Amy C. Barrett, *Procedural Common Law*, 94 VA. L. REV. 813, 846–79 (2008) (arguing that courts have inherent authority to craft procedural rules in areas where Congress has not legislated, while also recognizing that some historical evidence "cut[s]" against that argument and that the evidence is "mixed").

abuse, oppression, and injustice"[203] and courts have been creating common law presumptions for centuries, providing some evidence that the Founders would have considered the power to craft presumptions to be part of the judicial power vested by Article III. But stronger countervailing evidence demonstrates that Article III does *not* grant federal courts an inherent power to craft presumptions. This is so for several reasons.

First, unlike state courts, federal courts do not have the power to create common law. Under the Judiciary Act of 1789, Congress granted federal district courts only limited jurisdiction.[204] While the state courts often mirror the colonial and English courts in their power to create common law, federal courts do not have the power to create general federal common law. Thus, the fact that common law courts have a history of creating presumptions is not indicative of the more limited powers granted to the federal courts under Article III. To the extent the Founders believed that some courts could create presumptions, the power to do so was left to the state courts which were long the main forum for disputes absent diversity jurisdiction—and at the Founding the only forum.[205] Moreover, even if early federal courts created presumptions, that practice was likely the result of federal courts' initial belief that creating federal common law was within the authority granted by Article III—an understanding later rejected in *Erie R.R. Co. v. Tompkins*.[206]

Second, *The Federalist Papers* and *The Anti-Federalist Papers* suggest that only Congress is authorized to create presumptions. In *Federalist No. 48*, James Madison remarks that "[i]t is agreed on all sides, that the powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other departments."[207] Discussing the legislative power, Alexander Hamilton explained that "[t]he science of policy is the knowledge of human nature," suggesting that the creation of rules based on the knowledge of

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203. Gumbel v. Pitkin, 124 U.S. 131, 144 (1888). *See generally* Covell v. Heyman, 111 U.S. 176 (1884); Buck v. Colbath, 70 U.S. 334 (1865).

204. *See* Judiciary Act of 1789, ch. 20, 1 Stat. 73.

205. *See* RICHARD H. FALLON JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 779–81 (7th ed. 2015):

> [A]bsent diversity jurisdiction, private litigants in the antebellum period generally had to look to the state courts in the first instance for the vindication of federal claims, subject to limited review by the Supreme Court . . . Until the second half of the nineteenth century, Congress made no important additions to the original jurisdiction of the federal courts.

Id.

206. *See Erie*, 304 U.S. at 78 ("There is no federal general common law . . . . And no clause in the Constitution purports to confer such a power upon the federal courts.").

207. THE FEDERALIST NO. 48 (James Madison).

human nature falls within the legislative domain.[208] Taken together, these statements suggest that the Federalists believed policy decisions based on intuitions about human nature should be left to the legislative branch. Moreover, successfully arguing against a council of revision—a proposed addition to the Constitution championed by Madison, aimed to involve both the executive and judiciary in reviewing legislation passed by Congress—founder and Anti-Federalist Luther Martin asserted that "[a] knowledge of mankind, and of Legislative affairs cannot be presumed to belong in a higher degree to the Judges than to the Legislature."[209] The inference from Luther's assertion is that the power to create presumptions was vested inherently in Congress and was not vested in the judiciary.

Historical practice provides further evidence that the power to create presumptions does not lay within the "judicial power" vested in the federal courts by Article III of the Constitution. Prior to the Founding, in England, presumptions were often created by statute rather than by courts in individual cases.[210] Likewise, Congress has repeatedly enacted presumptions through legislation—often about very specific facts and stating how and whether the presumption can be rebutted.[211] The fact that Congress has created and continues to create new presumptions through legislative enactments demonstrates that presumptions are creatures of the legislative branch, not the judicial branch.

Moreover, even if the federal courts have some inherent power over procedural or substantive law, the Supreme Court has held that "only limited areas exist in which federal judges may appropriately craft the rule of decision."[212] The Supreme Court "has never precisely delineated the outer boundaries of a district court's inherent powers."[213] Despite this, the Supreme Court has "recognized certain limits on [federal courts' inherent] powers."[214] "First, the exercise of an inherent power must be a 'reasonable response to the problems and needs' confronting the court's fair administration of justice . . . . [and] [s]econd, the exercise of an

208. 1 THE DEBATES IN THE SEVERAL STATE CONVENTIONS 436 (Jonathan Elliot ed. 1901), https://perma.cc/F6LD-QG8V.

209. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 76 (Max Farrand ed., 1911), https://perma.cc/P3PF-78AP; *see also id.* at 73 (noting Nathaniel Ghorum's similar view that "are not to be presumed to possess any peculiar knowledge of the mere policy of public measures").

210. *See* Thayer, *Presumptions*, *supra* note 10, at 152 (describing English statutes providing for presumptions).

211. *See, e.g.*, 7 U.S.C. § 2562; 12 U.S.C. § 3764; 12 U.S.C. § 5390(a)(12)(D); 18 U.S.C. § 228; 18 U.S.C. § 1469; 26 U.S.C. § 5121; 28 U.S.C. § 3007.

212. Rodriguez v. Fed. Deposit Ins., 589 U.S. 132, 136 (2020).

213. Dietz v. Bouldin, 579 U.S. 40, 45 (2016).

214. *Id.*

inherent power cannot be contrary to any express grant of or limitation on the district court's power contained in a rule or statute."[215] The Supreme Court has also long held that inherent powers are those that "cannot be dispensed with in a Court, because they are necessary to the exercise of all others."[216] The question then is whether an inherent power to create presumptions is necessary to the exercise of the courts' power under Article III.

The answer is no. Other situations in which the Supreme Court has identified inherent powers are instructive and demonstrate that the power to create presumptions is not the kind of power that is necessary under Article III.[217] In *Chambers v. Nasco*, the Supreme Court describes several actions a court may take pursuant to its inherent Article III power[218]:

> "Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates." . . .
>
> [A] federal court has the power to control admission to its bar and to discipline attorneys who appear before it . . . .
>
> [I]nherent power also allows a federal court to vacate its own judgment upon proof that a fraud has been perpetrated upon the court . . . .
>
> [A] court has the power to conduct an independent investigation in order to determine whether it has been the victim of fraud . . . .
>
> The court may bar from the courtroom a criminal defendant who disrupts a trial. It may dismiss an action on grounds of *forum non conveniens*, and it may act *sua sponte* to dismiss a suit for failure to prosecute.[219]

The Supreme Court explained that these powers are considered inherent because they "cannot be dispensed with in a court, because they are necessary to the exercise of all others."[220] The thread running through these actions is the necessity of the courts' use of power to stop the abuse or disregard of the judicial process. The powers are "necessary to the

215. *Id.*

216. United States v. Hudson, 11 U.S. 32, 34 (1812).

217. *See* Chambers v. NASCO, Inc., 501 U.S. 32, 43 (1991) ("Prior cases have outlined the scope of the inherent power of the federal courts.").

218. *See id.* at 43–44.

219. *Id.* (citations omitted) (quoting Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 227 (1821)).

220. *Id.* (quoting United States v. Hudson, 11 U.S. (7 Cranch) 32, 34 (1812)).

integrity of the courts" and prevent "wrong[s] against the institutions set up to protect and safeguard the public."[221]

By contrast, the Supreme Court has held that actions akin to the enforcement of law or legislative branch action are not within the inherent power of the federal courts. For instance, the Supreme Court held that the enforcement of common law crimes was not within the inherent powers of the Court, because the exercise of that authority is not necessary to the courts' exercise of its own power.[222] Additionally, the Supreme Court has held that although courts have the inherent power to amend a record, they have no authority to "recreate a record."[223] The Supreme Court explained that "although [the power to recreate a lost or destroyed record] may have been occasionally given by the legislature in cases of overwhelming necessity . . . such power has not been hitherto supposed to be inherent in courts of general jurisdiction."[224]

The power to create presumptions is not the type of power necessary for courts to function. Rather, the creation of novel presumptions is akin to the recreation of lost records or enforcement of the common law because presumptions essentially involve the spontaneous creation of evidence using common law lawmaking. In other words, whereas punishing contempt to enforce court orders, controlling who may appear before the court, and amending erroneous records are necessary for the integrity of the court system and the fair administration of justice, the creation of novel presumptions is not necessary for courts to function. Indeed, cases that do not employ presumptions are adjudicated in the same way as any other case without undermining the integrity of the court system; if anything, removing presumptions would bolster judicial integrity. The fact that courts often function without the use of presumptions—including in cases involving complex evidentiary questions—demonstrates that the power to create presumptions is not "necessary" and is therefore not inherent in the federal courts.

In summary, although presumptions can be created by statute or rulemaking, the Constitution does not vest the judiciary with an inherent power to create presumptions. Because federal courts have no independent power to create presumptions, the federal courts' creation and application of novel presumptions is unconstitutional absent a congressional delegation of power.

221. *Id.*
222. *See Hudson*, 11 U.S. at 33.
223. Gagnon v. United States, 193 U.S. 451, 457–59 (1904).
224. *Id.* at 458–59.

B. The Rules Enabling Act

Congress has taken its own action respecting the federal courts' power to create presumptions. Those actions are important here for two reasons.

First, Congress may delegate the power to create presumptions. Although the Supreme Court has held that federal courts "may, within limits, formulate procedural rules not specifically required by the Constitution or the Congress,"[225] when necessary to preserve judicial integrity, as described in Section IV.A above, "doubts about the courts' inherent powers to enact simple rules of procedure led Chief Justice Hughes . . . to seek a formal delegation from Congress" leading to the enactment of the Rules Enabling Act.[226] As explained above, the power to create procedural rules rests with Congress, and so congressional action is necessary to formulate rules like presumptions.

Second, "[e]ven assuming [federal] courts [have] [an] inherent authority [to create procedural or evidentiary rules like presumptions], 'the inherent powers of the courts may be controlled or overridden by statute or rule.'"[227] To the extent any federal common law exists, it is "'subject to the paramount authority of Congress.'"[228] When Congress has "enacted its intention into law in a manner that abides with the Constitution, that is the end of the matter; '[f]ederal courts are bound to

225. United States v. Hasting, 461 U.S. 499, 505 (1983); *see id.* (explaining that federal courts may create procedural rules when necessary to "to implement a remedy for violation of recognized rights," "preserve judicial integrity by ensuring that a conviction rests on appropriate considerations validly before the jury," and "as a remedy designed to deter illegal conduct"); *see also* A. Benjamin Spencer, *Substance, Procedure, and the Rules Enabling Act*, 66 UCLA L. REV. 654, 661 (2019) ("The questions of what, if any, inherent authority the judicial branch has to regulate procedure and whether that inherent authority includes authority to promulgate procedural Rules in the absence of a congressional delegation has not been so clearly decided." (quoting Leslie M. Kelleher, *Taking Substantive Rights (in the Rules Enabling Act) More Seriously*, 74 NOTRE DAME L. REV. 47, 63 (1998))).

226. JACK B. WEINSTEIN, REFORM OF COURT RULE-MAKING PROCEDURES 177 n.231 (1977), https://perma.cc/2VN7-8X3J; *see* Edson R. Sunderland, *The Grant of Rule-Making Power to the Supreme Court of the United States*, 32 MICH. L. REV. 1116, 1120–21 (1934), https://perma.cc/DV6U-966V; Kelleher, *supra* note 225, at 63 (describing debate over whether federal courts have inherent power over court rules).

227. Smith v. Spizzirri, 601 U.S. 472, 477 (2024) (quoting Degen v. United States, 517 U.S. 820, 823 (1996)); *see* Chambers v. NASCO, Inc., 501 U.S. 32, 47 (1991) ("[E]xercise of the inherent power of lower federal courts can be limited by statute and rule, for '[t]hese courts were created by act of Congress.'" (alteration in original) (quoting *Ex parte* Robinson, 86 U.S. 505, 511 (1873))); *see also* Barrett, *supra* note 202, at 853–54.

228. Nw. Airlines, Inc. v. Transp. Workers Union of Am., 451 U.S. 77, 95 (1981) (quoting New Jersey v. New York, 283 U.S. 336, 348 (1931); *see* Redish & Amuluru, *supra* note 199, at 1305 ("The Constitution grants to the judiciary no purely legislative authority.").

apply rules enacted by Congress with respect to matters . . . over which it has legislative power.'"[229] Thus, any exercise of an inherent power cannot conflict with a limitation on the courts' power as contained in a statute or rule.[230] As explained above, Congress, rather than the judiciary, is vested by the Constitution with the power to regulate the procedures of the federal courts.[231] Hence, "where Congress has spoken, [the federal courts defer] to 'the traditional powers of Congress to prescribe rules of evidence and standards of proof in the federal courts' absent countervailing constitutional constraints."[232]

The Rules Enabling Act codifies Congress's design for the promulgation of federal court rules and sets forth instructions for how courts can create new procedural and evidentiary rules.[233] As relevant here, the Act states that:

> (a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals.
>
> (b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.[234]

The Rules Enabling Act also specifies that "[n]o rule may be prescribed by a district court other than under" the procedures set forth in the Act.[235] Congress has therefore delegated to the federal courts the power to create procedural and evidentiary rules for court proceedings. But the Rules Enabling Act also constrains federal courts' authority by prohibiting them from promulgating rules in a manner that is inconsistent with the Act.[236] Any action taken by the federal courts that does not conform to the Rules Enabling Act is unlawful.

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229. Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 27 (1988) (alteration in original) (quoting Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S 395, 406 (1967)).

230. *See* Dietz v. Bouldin, 579 U.S. 40, 45 (2016).

231. *See* U.S. CONST. arts. I, III; Hanna v. Plumer, 380 U.S. 460, 472 (1965); Wayman v. Southard, 23 U.S. 1, 4 (1825) (holding it "completely self-evident" that Congress has the authority to establish procedural rules for the federal courts).

232. Steadman v. SEC, 450 U.S. 91, 95 (1981) (quoting Vance v. Terrazas, 444 U.S. 252, 265 (1980)).

233. *See* 28 U.S.C. §§ 2071–77.

234. 28 U.S.C. § 2072.

235. 28 U.S.C. § 2071(f).

236. *See* 28 U.S.C. § 2074 (stating that rules must be transmitted to Congress and may not go into effect "earlier than December 1 of the year in which such rule is so transmitted unless otherwise provided by law"). Prior to the enactment of the Rules Enabling Act, "actions at law in the federal courts were governed by the Conformity Act of 1872," which "dictated that a federal district court should apply, 'as near as may be,"

1. The Rules Enabling Act Requires Rules to be Transmitted to Congress Before Going into Effect

By requiring that proposed rules be transmitted to Congress before going into effect, the Rules Enabling Act prohibits rules from going into effect that have not been transmitted to Congress. Consider the text of the statute; while § 2073 states that the failure of the standing committee of the judicial conference to review a rule "does not invalidate" the rule,[237] the next section, § 2074 (requiring transmittal to Congress) contains no such provision, indicating that failure to transmit a rule to Congress invalidates the rule.[238] The transmittal requirement is an important limitation on the delegation of rulemaking authority because Congress can decide to block any rule with which it disagrees.[239] Indeed, Congress has demonstrated it is willing to block transmitted evidentiary rules from being adopted.[240]

Section 2074(b) further demonstrates that a rule may not go into effect without transmittal to Congress. That subsection adds a further limitation stating that a "rule creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress."[241] Hence, while most procedural rules can only go into effect if they are first transmitted to Congress and Congress fails to block them after a set interval of time, rules affecting evidentiary privileges cannot go into effect *at all* until affirmatively approved by Congress.[242]

The Rules Enabling Act, therefore "controls" any potential inherent power to create presumptions and constrains courts from creating novel presumptions when doing so conflicts with the rulemaking procedures set forth in the Rules Enabling Act. In other words, any hypothetical power federal courts have to make procedural rules is superseded by

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the procedures governing state court actions at law in the state where the federal court sat." 1 MOORE'S FEDERAL PRACTICE § 1app. 100 (3d ed. 2025) (quoting Act of June 1, 1872, ch. 255, §§ 5–6, 17 Stat. 196, 197). "In suits *in equity*, on the other hand, federal practice was governed by the federal Equity Rules of 1912." *Id.*

237. Under 28 U.S.C. § 2073, the Judicial Conference of the United States—the national policymaking body for the federal courts, including a standing committee on rules along with advisory committees—proposes rules and amendments to rules to the Supreme Court.

238. *See* City & Cnty. of S.F. v. EPA, 604 U.S. 334, 344 (2025) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (quoting Russello v. United States, 464 U.S. 16, 23 (1983))).

239. *See* Joanna R. Lampe, *Congress, the Judiciary, and Civil and Criminal Procedure*, CONG. RES. SERV. (May 22, 2020), https://perma.cc/JWQ7-CKVH.

240. *See* Act of Mar. 30, 1973, Pub. L. No. 93-12, 87 Stat. 9 (titled, in part, "An Act to Promote the Separation of Constitutional Powers").

241. 28 U.S.C. § 2074(b).

242. *See id.*

Congress's directive in the Rules Enabling Act. And while Congress has delegated some of its power over court procedures to the federal judiciary,[243] the consequence of Congress's delegation of the power to create procedural and evidentiary rules by specific procedures is that Congress did not grant the federal judiciary authority to create procedural and evidentiary rules through other methods.[244]

Presumptions are either substantive, procedural, or evidentiary rules.[245] Yet, none of the presumptions discussed in Part III above were adopted in conformity with the Rules Enabling Act's dictates. Each presumption was simply announced by a federal court without any basis in statutory authority. Given that none of the presumptions described above were promulgated pursuant to the Rules Enabling Act, each of the presumptions is unlawful.[246]

2. The Rules Enabling Act Prohibits the Adoption of Rules with Substantive Effect

In addition to the procedural infirmity in creating new rules outside of the procedures of the Rules Enabling Act, the creation of some novel presumptions are also contrary to the "shall not abridge" jurisdictional[247] provision in § 2072 of the Act—which states that the rules governing district and circuit court proceedings "shall not abridge, enlarge or modify any substantive right."[248] The "shall not abridge" language in the

243. *See* Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. CAL. L. REV. 405, 408 (2008) (noting that delegation of authority occurs when Congress allows courts to exercise some of its authority).

244. *See* SCALIA & GARNER, *supra* note 25, § 10 ("The expression of one thing implies the exclusion of others."); *cf.* Garland v. Ming Dai, 593 U.S. 357, 365 (2021) ("[I]t is long since settled that a reviewing court is 'generally not free to impose' additional judge-made procedural requirements on agencies that Congress has not prescribed and the Constitution does not compel." (quoting Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 524 (1978))); Est. of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 475 (1992) ("In a statutory construction case, the beginning point must be the language of the statute, and when a statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished.").

245. *See supra* Section IV.A.1; *see also* NLRB v. Tragniew, Inc., 470 F.2d 669, 674 (9th Cir. 1972) ("Presumptions in the law are a procedural substitute for evidence."); Dep't of Army, Proving Ground Installation v. FLRA, 890 F.2d 467, 477 n.13 (D.C. Cir. 1989) (stating that "presumptions are 'mere procedural devices'" (quoting Legille v. Dann, 544 F.2d 1, 10 (1976))); *Presumption*, BLACK'S LAW DICTIONARY (12th ed. 2024) ("Most presumptions *are rules of evidence* calling for a certain result in a given case unless the adversely affected party overcomes it with other evidence." (emphasis added)).

246. *See* 28 U.S.C. §§ 2073(e), 2074.

247. Semtek Int'l v. Lockheed Martin Corp., 531 U.S. 497, 503 (2001) (characterizing "shall not abridge" as jurisdictional limitation).

248. 28 U.S.C. § 2072.

Rules Enabling Act "ensures that the Supreme Court does not (1) engage in the legislative act of creating or defining substantive rights prospectively *or (2) deprive [individuals] of those rights under the guise of prescribing procedural rules*."[249]

Determining whether a rule affects a substantive right can be tricky because "[i]t is difficult to conceive of any rule of procedure that cannot have a significant effect on the outcome of a case."[250] Almost "any rule can be said to have 'substantive effects' affecting society's distribution of risks and rewards."[251] "Rules which incidentally affect litigants' substantive rights do not violate this provision if reasonably necessary to maintain the integrity of that system of rules."[252] The creation and application of novel presumptions arguably abridges substantive rights and the application of presumptions is not necessary to maintain the integrity of the rules—indeed, novel presumptions are created outside the scope of the rules.

When a court creates a new presumption that imposes a higher burden on a plaintiff—such as the presumption of diligent prosecution, which makes it more difficult for plaintiffs to file citizen suits, or the presumption of personal social media use, which makes it more difficult to establish government action in a suit against a government official—courts make it more difficult (or functionally impossible) for the plaintiff to exercise the rights conferred upon them by Congress. Such presumptions affect substantive rights. Moreover, unlike rules that undergo the process dictated by the Rules Enabling Act, presumptions should not be accorded any inference that they only incidentally effect substantive rights because they do not undergo the "study and approval given each proposed Rule by the Advisory Committee, the Judicial Conference, and [the Supreme] Court, and the statutory requirement that the Rule be reported to Congress for a period of review before taking effect."[253] Presumptions are often case dispositive rules that significantly affect the equities in the cases in which they are applied.[254] In that sense,

249. A. Benjamin Spencer, *Substance, Procedure, and the Rules Enabling Act*, 66 UCLA L. REV. 654, 676 (2019) (emphasis added).

250. Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins., 559 U.S. 393, 431 (2010) (Stevens, J., concurring) (quoting 19 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4508, at 232–33 (2d ed. 1996)).

251. *Id.* at 431–32 (Stevens, J., concurring) (quoting John Hart Ely, *The Irrepressible Myth of* Erie, 87 HARV. L. REV. 693, 722 (1974)).

252. Burlington N. R.R. Co. v. Woods, 480 U.S. 1, 5 (1987).

253. *Id.* at 6; *see* 28 U.S.C. § 2072.

254. *See* Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 258, 296 (2014) (Thomas, J., concurring) (explaining that presumptions can become essentially irrebuttable and that "in practice, the so-called 'rebuttable presumption' is largely irrebuttable"); *id.* at 300 (Thomas, J., concurring) (explaining that the decision on which

presumptions deprive litigants of substantive rights under the guise of procedural mechanisms.[255]

Additionally, if presumptions are considered rules of evidence,[256] their creation may also violate the "shall not abridge" provision, because evidentiary rules are "in large measure substantive in their nature or impact."[257] As explained by Professor Thayer, as presumptions become firmly entrenched they become increasingly difficult to rebut, ultimately taking on a status akin to positive law, granting a substantive right.[258] The fact that Congress rejected initial drafts of the Federal Rules of

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the Court relied "took an implied cause of action and grafted on a policy-driven presumption of reliance based on nascent economic theory and personal intuitions about investment behavior. The result was an unrecognizably broad cause of action ready made for class certification").

255. *Cf.* Abbas v. Foreign Policy Grp., 783 F.3d 1328, 1334 (D.C. Cir. 2015) (Kavanaugh, J.) (explaining that "[u]nder the Federal Rules, a plaintiff is generally entitled to trial if he or she meets the Rules 12 and 56 standards to overcome a motion to dismiss or for summary judgment" and that when other non-Rule requirements prevent a plaintiff from trial even after she satisfies those rules, the non-Rule requirement "conflicts with the Federal Rules by setting up an additional hurdle a plaintiff must jump over to get to trial"); *see* Semtek Int'l v. Lockheed Martin Corp., 531 U.S. 497, 503 (2001) (depriving litigant of right to sue "would arguably violate the jurisdictional limitation of the Rules Enabling Act"); Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 367 (2011) (explaining that right was substantive if it deprived defendants of their right to litigate statutory defenses to individual claims); Redish & Amuluru, *supra* note 199, at 1305 ("In numerous instances, procedural choices inevitably—and often intentionally—impact the scope of substantive political choices.").

* * *

Although not the focus of this Article, in certain cases, the application of a new presumption may also violate the Seventh Amendment. The Seventh Amendment preserves the right to a jury trial in federal civil cases that include legal—as opposed to equitable—claims. The right to a jury trial arises only when "there are issues of fact to be determined." *In re* Peterson, 253 U.S. 300, 310 (1920). The usual practice is that factual disputes regarding the merits of a legal claim go to the jury, even if that means a judge must let a jury decide questions he could ordinarily decide on his own." Perttu v. Richards, 605 U.S. 460, 470 (2025). That means that even procedural questions are decided by a jury if they are "intertwined with the merits of a claim that falls under the Seventh Amendment." *Id.* The Supreme Court has held "[t]he right to a trial by jury is 'of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right' has always and 'should be scrutinized with the utmost care.'" SEC v. Jarkesy, 603 U.S. 109, 121 (2024) (quoting Dimick v. Schiedt, 293 U.S. 474, 486 (1935)). The creation and application of novel presumptions by federal courts removes certain factual issues from the domain of the jury. Accordingly, in cases where the Seventh Amendment applies, the creation and application of new presumptions violates the Seventh Amendment.

256. *See Presumption*, BLACK'S LAW DICTIONARY (12th ed. 2024).

257. H.R REP. No. 93-650, at 7076 (1973).

258. Thayer, *Presumptions*, *supra* note 10, at 141; *see also Halliburton Co.,* 573 U.S. at 288 (Thomas, J., concurring) (describing how particular presumption has become virtually irrebuttable in practice); Allentown Mack Sales & Serv., Inc. v. NLRB, 522 U.S. 359, 378 (1998) (describing irrebuttable evidentiary presumptions as substantive rules of law).

Evidence and then codified the Rules of Evidence with several changes[259]—rather than permitting the originally proposed Rules of Evidence to go into effect in the normal course—suggests Congress's view that the Rules of Evidence are closer to substantive law than other rules subject to the Rules Enabling Act.

By restricting the judiciary to procedural rules and prohibiting changes to substantive rights, Congress ensured that key policy choices remain subject to the legislative process.[260] Yet the application of novel presumptions—especially outside the context of any rulemaking process—evades that restriction.

3. The Rules Enabling Act Displaces Earlier Procedural and Evidentiary Rules

To the extent that a presumption existed before the adoption of a relevant rule promulgated under the Rules Enabling Act, the text of the Rules Enabling Act also renders such presumptions superseded to the extent they conflict with the rule. The text of the Act states that "[a]ll laws in conflict with such rules shall be of no further force or effect after such rules have taken effect."[261]

Federal Rule of Evidence (FRE) 201 arguably conflicts with the way that courts employ several presumptions. Rule 201 governs what types of facts may be judicially noticed.[262] Judicial notice is "[a] court's acceptance, for purposes of convenience *and without requiring a party's proof*, of a well-known and indisputable fact" and "the court's power to accept such a fact."[263] "[Presumptions] are . . . closely related to the subject of judicial notice; for they furnish the basis for many of those spontaneous recognitions of particular facts or conditions which make up that doctrine."[264] In large part, judicial notice serves the same function as a presumption: namely, allowing the court to decide evidence without the need to present it to a jury.

Federal Rule of Evidence 201(b) specifies that "[t]he court may judicially notice a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned."[265] In this way, the Federal

259. *See* An Act to Establish Rules of Evidence for Certain Courts and Proceedings, Pub. L. 93-595, 88 Stat. 1926 (1975).

260. *See* Redish & Amuluru, *supra* note 199, at 1306.

261. 28 U.S.C. § 2072(b).

262. *See* FED. R. EVID. 201.

263. *Judicial Notice*, BLACK'S LAW DICTIONARY (12th ed. 2024) (emphasis added).

264. THAYER ON EVIDENCE, *supra* note 76, at 314.

265. FED. R. EVID. 201(b).

Rules specify the standards courts must use to take judicial notice. Given that the Rules of Evidence specify how courts may judicially notice new types of facts but do not address how courts may create new presumptions, we can infer that the rules do not permit courts to create new presumptions. Rather, if a court believes a relevant fact to be true, it may go through the process of determining whether judicial notice is warranted. But it may not circumvent the restrictions in FRE 201 by crafting a new presumption.

Additionally, Federal Rule of Evidence 201(f) specifies that "[i]n a civil case, the court must instruct the jury to accept the noticed fact as conclusive. In a criminal case, the court must instruct the jury that it may or may not accept the noticed fact as conclusive."[266] Thus, unlike presumptions which are often rebuttable, the Federal Rules of Evidence specify the effect of judicial notice. It is unlikely that Congress approved a procedure for judicial notice and yet left the courts discretion when crafting new presumptions. The implication is that Congress did not intend to leave the courts with authority to craft new presumptions other than through the process dictated in the Rules Enabling Act.

Federal Rule of Evidence 301 also informs whether the federal judiciary has the power to craft presumptions. The rule provides that "[i]n a civil case, unless a federal statute or these rules provide otherwise, the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption. But this rule does not shift the burden of persuasion, which remains on the party who had it originally."[267] While Rule 301 discusses the effect of presumptions, it does not directly address how presumptions are created. But the fact that, unlike Rule 201, which expressly authorizes judicial notice, Rule 301 does not expressly authorize courts to create new presumptions suggests that courts lack the power to create such presumptions under the Federal Rules of Evidence. Furthermore, the fact that Rule 301 references statutes and rules that govern presumptions suggests that presumptions should be created by statute or a rule promulgated through the procedures set forth in the Rules Enabling Act—i.e., not spontaneously and without any formal process. The Advisory Committee Notes to Rule 301 further support this inference by referencing statutorily created presumptions.[268]

That said, in *Goldman Sachs Group, Inc. v. Arkansas Teacher Retirement System*, the Supreme Court held that "Rule 301 'in no way restricts the authority of a court . . . to change the customary burdens of

266. FED. R. EVID. 201(f).

267. FED. R. EVID. 301.

268. *See generally* FED R. EVID. 301 advisory Committee's notes on the 1972 proposed rules.

persuasion' pursuant to a federal statute. And [the Court has] at times exercised that authority to reassign the burden of persuasion to the defendant upon a prima facie showing by the plaintiff."[269] It is somewhat unclear, however, how far the Supreme Court's statement in *Goldman Sachs* extends. If the Supreme Court intended to indicate that courts apply a different burden when a statute directs the courts to do so, that holding does not permit courts to shift burdens absent statutory direction. And if the Supreme Court intended to suggest that courts have discretion in deciding what burden to apply, that statement conflicts with the Court's later holding in *E.M.D. Sales, Inc. v. Carrera*. As discussed above, *E.M.D. Sales* explained that courts must apply the burdens that form the background or "default" standard of the statute when enacted and that courts do not have discretion to shift those background burdens absent statutory direction.[270]

Because Federal Rule of Evidence 201 and Federal Rule of Evidence 301 were enacted and amended after the adoption of the presumptions described above, to the extent those presumptions conflict with the rules, 28 U.S.C. § 2072 mandates that the presumptions are superseded.[271]

4. The Rules Enabling Act Requires that Local Rules be Promulgated with Notice and Comment

The Rules Enabling Act governs the creation of local court rules—"rules for the conduct of their business."[272] As an initial textual matter, it is unlikely that the authority to create "rules of conduct" encompasses the power to create presumptions because presumptions are not "rules of conduct."

But even if the creation and application of novel presumptions fell within the ambit of the federal courts' local rules power, § 2071 places

269. Goldman Sachs Grp., Inc. v. Ark. Tchr. Ret. Sys., 594 U.S. 113, 124–25 (2021) (citation omitted) (quoting NLRB v. Transp. Mgmt. Corp., 462 U.S. 393, 403 (1983)).

270. *See* E.M.D. Sales, Inc. v. Carrera, 604 U.S. 45, 49, 52 (2025) (applying "established default standard of proof in American civil litigation" at time when statute was enacted); *see also id.* at 54 (Gorsuch, J., concurring) ("[C]ourts apply the default standard unless Congress alters it or the Constitution forbids it.").

271. Although this article will not delve into the topic in detail, it is worth noting that Justice Thomas has observed at least one presumption that conflicts with Federal Rule of Civil Procedure 23. *See* Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 258, 294 (2014) (Thomas, J., concurring in the judgment) (noting that presumption of reliance "permits plaintiffs to bypass . . . requirement of evidentiary proof" in Rule 23).

272. 28 U.S.C. § 2071; *see* Baylson v. Disciplinary Bd. of Sup. Ct. of Pa., 975 F.2d 102, 107 (3d Cir. 1992) ("The federal district and circuit courts may . . . pursuant to 28 U.S.C. § 2071(a), prescribe local rules of practice so long as these rules are consistent with the rules of practice and procedure promulgated by the Supreme Court under section 2072.").

additional requirements on the courts when creating local rules. Specifically, § 2071 requires courts to promulgate local rules through notice and comment.[273] While federal courts can put a rule into effect before providing notice and comment when "there is an immediate need for a rule," the courts are nevertheless required to provide notice and comment "promptly thereafter."[274] None of the presumptions described in Part III above underwent the notice and comment rulemaking procedures required by the Act for local rules. Accordingly, any presumption created pursuant to that power would be invalid for failure to follow the procedures set forth by the Rules Enabling Act.[275]

Moreover, local rules must be consistent with the Rules promulgated under § 2072.[276] In particular, to promulgate a local rule, a district court or a court of appeals must act "by a majority of its" judges.[277] Additionally, under Federal Rule of Civil Procedure 83, "[c]opies of rules and amendments must, on their adoption, be furnished to the judicial council and the Administrative Office of the United States Courts and be made available to the public."[278] When courts have created novel presumptions, they have not conformed to the requirements of Rule 83.[279]

* * *

For the foregoing reasons, federal courts may not craft new presumptions unless they do so consistent with the Rules Enabling Act. To the extent that federal courts have periodically crafted new presumptions, they have not conformed to the Rules Enabling Act. Accordingly, such presumptions are unlawful.

V. POLICY CONCERNS WITH THE JUDICIAL CREATION OF NOVEL PRESUMPTIONS

Beyond the constitutional and statutory limitations on the judiciary's power to create new presumptions, the creation of presumptions can be analyzed as a normative matter. Ultimately, there are normative arguments both for and against the judicial creation of

273. *See* 28 U.S.C. § 2071.

274. 28 U.S.C. § 2071(e).

275. *See* Hollingsworth v. Perry, 558 U.S. 183, 191–93, 199 (2010) (concluding that the district court rule is likely invalid because the "district court failed to give appropriate public notice and an opportunity for comment, as required by federal law" (cleaned up) (quoting 28 U.S.C. § 2071)).

276. *See* 28 U.S.C. § 2071(a).

277. FED. R. CIV. P. 83(a); FED. R. APP. 47(a).

278. FED. R. CIV. P. 83(a).

279. *See supra* Part III.

novel evidentiary presumptions, but this Article concludes that the arguments against their creation outweigh those in favor.

A. Mismatch Between Reality and Presumption

Presumptions often fail to reflect reality and lead to a mismatch between the facts in existence and the facts as determined by the court applying the presumption. As explained above, presumptions generally reflect judges' "rough estimate of how the world generally functions."[280] But a judge's estimate of how the world generally functions can be drastically inaccurate.[281] Therefore, presumptions introduce inaccuracies by causing courts to infer facts that are not universally true or representative.[282]

This disconnect may be especially discordant when a court creates a presumption at an earlier date, but as time has passed, the presumption no longer accurately reflects current knowledge about how the world functions.[283] For example, in *Halliburton Co. v. Erica P. John Fund, Inc*., the Supreme Court was asked to overrule the presumption that "the market price of shares traded on well-developed markets reflects all publicly available information, and, hence, any material misrepresentations."[284] Although the Supreme Court refused to completely overrule the presumption, in an opinion concurring in the judgment, Justice Thomas explained why the presumption should no longer remain good law. Justice Thomas explained that the Court had created the presumption based on "a questionable understanding of disputed economic theory and flawed intuitions about investor behavior" that had since been debunked.[285] He further explained that the Court's "rather superficial analysis" of how people behave "does not withstand scrutiny."[286]

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280. GIANNELLI & EPSTEIN, *supra* note 11, § 5.03.

281. *See* Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 258, 285, 288 (2014) (Thomas, J., concurring in the judgment) (noting that Court had created a presumption in the securities fraud context based "on a questionable understanding of disputed economic theory and flawed intuitions about investor behavior" and that "[l]ogic, economic realities, and our subsequent jurisprudence have undermined the foundations of the . . . presumption, and *stare decisis* cannot prop up the façade that remains").

282. *See id.* at 291 (Thomas, J., concurring in the judgment) ("[E]conomists now understand that the [presumption] . . . is actually far from certain" and "rests on shaky footing."); *cf.* Loper Bright Enters. v. Raimondo, 603 U.S. 369, 399 (2024) ("Presumptions have their place in statutory interpretation, but only to the extent that they approximate reality.").

283. *See Halliburton Co.*, 573 U.S. at 288 (Thomas, J., concurring in the judgment) ("[P]assage of time has compounded [the presumption's] failings.").

284. *Id.* at 267 (Thomas, J., concurring in the judgment).

285. *Id.* at 288; *see id.* at 288–90, 292 (Thomas, J., concurring in the judgment).

286. *Id.* at 292 (Thomas, J., concurring in the judgment).

Consider also the presumption of regularity. That presumption is based on the courts' general understanding that the government conducts itself in a lawful manner. But while that fact may have been thought to be true when the presumption was established, the basis for that presumption has come under criticism and increasing scrutiny over time.[287] Nevertheless, the presumption of regularity has ossified the factual finding that the government conducts itself consistently and lawfully even in the face of facts showing that understanding does not reflect reality. Whereas a factfinder could take account of changed circumstances or better understanding over time, a presumption that a certain fact is true freezes factual findings in time, leading to presumptions that are inaccurate.

B. Equity Concerns

Presumptions may also be inequitable by favoring certain parties. Repeat litigants such as corporations, government entities, or institutional plaintiffs, may be beneficiaries of new presumptions because they often have a strategic advantage in shaping the development of legal doctrine over time.[288] Such parties have greater resources to invest in legal advocacy and more opportunities to select cases with favorable facts for showcasing the usefulness of a presumption, which can help those litigants situate a favorable presumption in binding precedent and control the scope of that presumption. Repeat defendants may advocate for presumptions that raise barriers to bringing certain types of claims or limit the scope of potential liability. Repeat plaintiffs may litigate to establish presumptions that ease evidentiary burdens or shift burdens to defendants. Ultimately, presumptions can help repeat litigants conserve resources and enhance settlement leverage.

Repeat litigants are also often better equipped to meet the burden of rebutting unfavorable presumptions because they can draw on institutional knowledge. By contrast, new litigants may not have the resources or knowledge necessary to overcome the presumption, even if their claims are meritorious. Accordingly, presumptions can exacerbate resource inequalities that lead to skewed case outcomes reflecting uneven access to resources rather than meritorious arguments. Presumptions can also exacerbate resource asymmetries in cases

287. *See* Gavoor & Platt, *supra* note 79, at 755. *See generally* Note, *supra* note 10.

288. *See* May v. AT&T Integrated Disability, 948 F. Supp. 2d 1302, 1313 (N.D. Ala. 2013) ("This court commends to any reader of this opinion the penetrating article written by Marc Galanter, entitled 'Why The "Haves" Come Out Ahead: Speculations On The Limits Of Legal Change.'" (citing 9 LAW & SOC'Y REV. 95 (1974)); *see also* Berkson v. Gogo LLC, 97 F. Supp. 3d 359, 382 (E.D.N.Y. 2015) (recognizing litigation advantages to repeat litigants). *See generally* Marc Galanter, *Why the 'Haves' Come out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95 (1974).

involving already disadvantaged groups. Presumptions that assume the regularity,[289] diligence,[290] impartiality,[291] or reliability[292] of established parties reinforce existing power structures by favoring institutional litigants to the detriment of non-institutional litigants. In other words, many presumptions may have distributional effects that tend to skew against litigants who are already more vulnerable.

Moreover, certain presumptions are—while technically rebuttable—so difficult to rebut that they become insurmountable as a practical matter.[293] This can especially be the case as the presumption becomes increasingly entrenched in the caselaw and given greater deference over time.[294] For example, the presumption of regularity has become such a deferential standard that a litigant essentially needs to point to direct evidence to rebut it,[295] but such evidence is usually unavailable to the party opposing the presumption, especially given privileges that the government can assert to prevent discovery.[296] Consider also the presumption of reliance discussed by Justice Thomas in *Halliburton*, in which Justice Thomas explained that "the realities of class-action procedure make rebuttal based on an individual plaintiff's lack of reliance virtually impossible."[297]

Additionally, when courts announce new presumptions not based in established statutory or common law, litigants may be unfairly surprised and disadvantaged by the application of that presumption. Even if a court in another circuit has applied the presumption, it may not be apparent to a litigant that a court in the circuit in which they are litigating would apply the presumption. Additionally, different courts apply what is ostensibly the same presumption in different ways. Parties structure their primary conduct, pre-litigation strategies, and trial preparation around

289. *See* Gavoor & Platt, *supra* note 79, at 730.

290. *See* Piney Run Pres. Ass'n v. Cnty. Comm'rs of Carroll Cnty., 523 F.3d 453, 459 (4th Cir. 2008) (discussing high standard to rebut presumption of diligence).

291. *See* Doe v. Mia. Univ., 882 F.3d 579, 601 (6th Cir. 2018) ("[I]t is also well established that school-disciplinary committees are entitled to a presumption of impartiality, absent a showing of actual bias." (quoting Doe v. Cummins, 662 F. App'x. 437, 443 (6th Cir. 2016))).

292. *See, e.g.*, Lee v. United States, 582 U.S. 357, 364 (2017) (discussing presumption of reliability for judicial proceedings).

293. *See* Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 258, 292 (2014) (Thomas, J., concurring in the judgment).

294. *See id.*

295. *See, e.g.*, Miley v. Principi, 366 F.3d 1343, 1347 (Fed. Cir. 2004) ("[I]n the absence of clear evidence to the contrary, the court will presume that public officers have properly discharged their official duties.").

296. *See, e.g.*, Kasva v. Browner, 133 F.3d 1159, 1166 (9th Cir. 1998) (holding that the state secrets privilege "is accorded the 'utmost deference' and the court's review of the claim of privilege is narrow").

297. *See Halliburton Co.*, 573 U.S. at 296 (Thomas, J. concurring in the judgment).

existing legal frameworks. The sudden imposition of a new presumption can upset these reasonable expectations. Lack of advance notice of a presumption denies parties a meaningful opportunity to gather evidence or adjust their arguments to meet its demands.

C. Public Perception and Court Legitimacy

Lastly, when courts apply presumptions in ways that appear to consistently favor one type of party over another, that application may undermine the public's perception of the courts' legitimacy—even if the evidentiary presumption is accurate. The perception that courts will be favorable to certain kinds of litigants poses a real risk to trust in the judicial system. The efficiency gained by using certain presumptions is not worth this risk of a perception of bias. Of course, if the presumption *does* disconnect with reality, the perception of bias is likely to be even greater.

VI. STANDARDIZATION AND PROPER APPLICATION OF PRESUMPTIONS

As discussed above, to comply with the separation of powers, federal courts may only create new presumptions consistent with the Rules Enabling Act. But even if courts create new presumptions under the Rules Enabling Act, they should still use a careful approach.

A "presumption" is "[s]omething that is thought to be true because it is highly probable."[298] If federal courts create new presumptions under the Rules Enabling Act, they should ensure that those presumptions reflect a high probability that the inferred fact is true. To the extent that they create new presumptions, courts should also ensure that the manner in which they do so is transparent and fair. Indeed, even assuming *arguendo* that the creation of presumptions was viewed as an inherent power of the federal courts, "[b]ecause of their very potency, inherent powers must be exercised with restraint and discretion."[299] There are several practices federal courts should adopt to ensure the creation of presumptions is consistent with these goals.

A. Criteria for Judicial Creation of Presumptions

Given the risks of inaccuracy and unfairness posed by unsupported presumptions, federal courts should create new presumptions only when the presumption is grounded in sound empirical evidence rather than a "judicial hunch."[300] If there is no expert consensus, judges should not create the new presumption.

298. *Presumption*, BLACK'S LAW DICTIONARY (12th ed. 2024).
299. Chambers v. NASCO, Inc., 501 U.S. 32, 44 (1991).
300. *Halliburton Co.*, 573 U.S. at 293 (Thomas, J. concurring).

Collaboration with scientific and social science experts can help ensure that presumptions reflect reliable and up-to-date knowledge. Courts—and particularly the Advisory Committee on Evidence Rules—should consider relevant scientific, economic, or sociological research and data in consultation with subject matter experts. As a hypothetical example, before crafting a presumption that a CEO's false misleading statements have impacted a stock price, the Rules Committee could consult with economists and researchers to determine whether there is an empirical basis to believe that inference is accurate. Robust empirical support can help justify presumptions and avoid speculative or outdated inferences.[301]

That empirical process could be similar to the process required under *Daubert v. Merrell Dow Pharmaceuticals Inc.*.[302] Under *Daubert*, trial judges act as gatekeepers and are required to "ensure that any and all scientific testimony . . . is not only relevant, but reliable."[303] The point of *Daubert* is to ensure that the evidence presented to the jury in the form of expert testimony is based on reliable information, not mere suppositions about how the world works.[304] In making that determination, trial courts use "special briefing or other proceedings [as] needed to investigate reliability."[305] The same should be true before the judiciary creates evidentiary presumptions that apply not only in one case, but in many cases going forward.

The judiciary could also request that a third party conduct independent research in validating presumptions.[306] In assessing whether real-world evidence bears out the proposed new presumption, the Rules Committee could ask outside experts and researchers to analyze existing studies, collect new data, explain expert consensus, or even conduct original experiments related to proposed presumptions. Promoting dialogue between courts and the scientific community on presumptions would hopefully lead to evidence-based standards.

Of course, not every presumption is amenable to precise quantification or experimental support. Many presumptions reflect value-laden determinations or rest on imperfect generalizations. In such

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301. *See id.* at 291 (2014) (Thomas, J. concurring) (pointing to "overwhelming empirical evidence" when asserting that judicially created presumption was not viewed as accurate).

302. *See* 509 U.S. 579, 589 (1993).

303. *Id.*

304. *See* Kumho Tire Co. v. Carmichael, 526 U.S. 137, 149 (1999) ("The trial judge's effort to assure that the specialized testimony is reliable and relevant can help the jury evaluate that foreign experience, whether the testimony reflects scientific, technical, or other specialized knowledge.").

305. *Id.* at 152.

306. *See* Laurens Walker & John Monahan, *Social Frameworks: A New Use of Social Science in Law*, 73 VA. L. REV. 559, 559–60 (1987).

situations, courts should avoid creating a presumption given the risks involved in doing so. A science-informed approach to presumptions that does not permit the creation of presumptions without empirical evidence would help counter the risk of courts enshrining "junk science" or baseless conventional wisdom into law.[307]

Ultimately, a key aim of standardizing the creation of judicial presumptions should be to better align them with demonstrated empirical reality and reliable scientific knowledge. Privileging data over conjecture or tradition would help mitigate the dangers of unfounded presumptions distorting outcomes. Moreover, codification of presumptions would also provide needed clarity and consistency.[308]

B. Transparency and Adequate Justification

Courts should provide a transparent and adequate justification for any presumption they create.[309] In *Goldman Sachs Group, Inc. v. Arkansas Teacher Retirement System*, Justice Barrett explains that the presumption of reliance, as endorsed by the Supreme Court in *Basic Inc. v. Levinson*,[310] is "premised on the theory that investors rely on the market price of a company's security, which in an efficient market incorporates all of the company's public misrepresentations."[311] That is the extent of the court's justification for that presumption. Yet as explained above, Justice Thomas has expounded at length why that presumption is inapt.[312] The Court's justification in *Goldman Sachs*, without additional empirical evidence or adequate justification, is insufficient to merit the continued application of the presumption of reliance. Rather, more empirical evidence should be required to show that a company's misrepresentations actually affect the overall market. Additional justification, including reference to empirical evidence, is necessary because—while the presumption may have intuitive appeal—

307. *See* Diaz v. United States, 602 U.S. 526, 551 (2024) (Gorsuch, J., dissenting) ("The problem of junk science in the courtroom is real and well documented.").

308. *See* Allen, *supra* note 186, at 892 (explaining that "[t]he primary values served by codifying a set of common law procedural rules are clarification and uniformity of treatment" and that "[t]he Federal Rules of Evidence for the most part have been successful in brining clarity and uniformity to the federal law of evidence"); *see also* Redish & Amuluru, *supra* note 199, at 1308 (explaining that codification in the "Rules Enabling Act arose out of a period of dissatisfaction with an American civil procedure system that had become overly complicated and cumbersome").

309. *See* Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 258, 289 (2014) (Thomas, J. concurring) (noting that Court had created presumption without "provid[ing] the necessary support for [it]" and that the presumption "is simply wrong").

310. *See generally* Basic Inc. v. Levinson, 485 U.S. 224 (1988).

311. Goldman Sachs Grp. v. Ark. Teacher Ret. Sys., 594 U.S. 113, 116 (2021).

312. *See Halliburton*, 573 U.S. at 289–94 (Thomas, J., concurring in the judgment).

there is evidence that it is inaccurate[313] and without empirical evidence in favor of its continued application, the presumption rests only on judicial conjecture. That conjecture should not undermine a defendant's ability to show that misrepresentations did not actually affect the market price.

C. Standardization Across Jurisdictions

The effect that a presumption has in a given case turns largely on how individual courts interpret the presumption.[314] Rather than an ad hoc understanding of new presumptions, it would be more efficient and consistent with rule of law for new presumptions to be codified and for that codification to explain what procedural effect the presumption has given a particular set of facts. Under the current system of uncodified presumptions, it is often unpredictable what effect, if any, a presumption has on the burden of production or persuasion, or pleading requirements. But if presumptions were put in place through the Federal Rules of Evidence rather than through ad hoc court rulings, one significant benefit would be clarity on the effect of different presumptions and uniformity of presumptions across federal jurisdictions. Additionally, standardization would reduce forum-shopping and promote more predictable outcomes.

The reduction in forum shopping would also have potential benefits for the perception of legitimacy because litigants would better see that courts in different fora treat litigants the same way. By contrast, under the current system where presumptions are created on an ad hoc basis in different jurisdictions, it may be hard to understand why a litigant is able to prevail in one jurisdiction but not another based on the same factual circumstances merely because one court applies a presumption and another court does not.

D. Notice of Presumption's Creation

To the extent courts disregard the limitations presented in this article, they should nevertheless apply presumptions only after the presumption has been previously declared in a prior binding case, so that the parties are on notice that the presumption exists and can conduct themselves accordingly. Prior notice is a core requirement of the Rules Enabling Act's rule-promulgating provisions and just as notice is beneficial for the promulgation of the federal rules, so too would notice be beneficial for the creation of presumptions.

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313. *See id.*

314. *See* S. River Watershed All., Inc. v. Dekalb Cnty., 69 F.4th 809, 824–25 (11th Cir. 2023) (explaining with respect to presumption of diligent prosecution that "[t]he First, Second, Third, Fourth, Seventh, and Tenth Circuits all grant varying degrees of deference, ranging from a low of 'some deference' to a high of 'presumed' diligence").

E. Periodic Review of Established Presumptions

One way to ensure that presumptions are satisfying their efficiency goals while not undermining procedural fairness would be to conduct periodic reviews of existing presumptions to ensure they remain fair and empirically sound over time.[315] As Justice Thomas explained concurring in *Halliburton Co.*, even if a presumption is "widely accepted" when first adopted, it may "los[e] its luster" over time and so should be periodically reevaluated.[316] To that end, the Federal Judicial Center, the American Bar Association, the American Law Institute, or another organization could take on the task of conducting an empirical review at regular intervals of the presumptions applied by the federal courts.

To the extent that the reviewing organization concluded that a particular presumption was no longer empirically sound, it would suggest an amendment to the Federal Rules of Evidence to clarify that the presumption should no longer be used.

F. Overruling When Opportunity Presents

Although district courts cannot refuse to apply binding precedents, courts should take the opportunity to reject the application of novel judicially created evidentiary presumptions whenever the opportunity to do so arises. If a party urges a district court to apply a judicially created presumption that has not been previously established in binding precedent, or codified by rule, the district court should refuse to do so. The same should be true at the circuit level; if the presumption is not already binding, the court should not adopt it. And to the extent circuit courts have an opportunity to overrule prior judicially invented presumption en banc, they should do so. Lastly, in an appropriate case, the Supreme Court should take the opportunity to clarify that courts do not have authority to create novel evidentiary presumptions and that only

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315. *See* Funk v. United States, 290 U.S. 371, 381 (1933):

> The fundamental basis upon which all rules of evidence must rest—if they are to rest upon reason—is their adaptation to the successful development of the truth. And, since experience is of all teachers the most dependable, and since experience also is a continuous process, it follows that a rule of evidence at one time thought necessary to the ascertainment of truth should yield to the experience of a succeeding generation whenever that experience has clearly demonstrated the fallacy or unwisdom of the old rule.

Id.

316. *Halliburton*, 573 U.S. at 290 (Thomas, J., concurring in the judgment); *see id.* at 291 (explaining that "overwhelming empirical evidence now suggests that" presumption was inaccurate (cleaned up) (quoting Lev and de Villiers, *Stock Price Crashes and 10b–5 Damages: A Legal, Economic and Policy Analysis*, 47 STAN. L. REV. 7, 20–21 (1994))).

those presumptions enshrined by statute or federal rule have any force and effect.

VII. CONCLUSION

The judicial creation of new presumptions in individual cases conflicts with the separation of powers principle enshrined in the Constitution and with the Rules Enabling Act because federal courts have no inherent authority to create new evidentiary presumptions and creating presumptions in individual cases does not conform to the procedures delineated in the Rules Enabling Act. Beyond these statutory and constitutional infirmities, judges are not rigorous when creating presumptions to ensure they accurately reflect reality. The judicial creation of new presumptions poses serious concerns for procedural fairness and undermines the public perception of the judiciary's impartiality. It is unlawful for courts to craft new presumptions outside of the mechanisms of the Rules Enabling Act and courts should overrule such presumptions when the opportunity presents itself. To the extent the federal courts create new presumptions consistent with the Rules Enabling Act, however, they should use a cautious approach, based on strong empirical evidence and with clear standards to preserve fairness, consistency, and judicial integrity.