Indiana Law Journal

Volume 75 | Issue 4 Article 3

Fall 2000

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Amenability to Jurisdiction As a "Substantive Right": The Invalidity of Rule 4(k) Under the Rules Enabling Act†

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There is cause for concern any time the federal civil rulemakers—the Supreme Court, the Judicial Conference and its committees—overstep the limits of rulemaking authority delegated to the Court under the Rules Enabling Act (the "REA" or "Act"). Although certainly not for the first time,[1] such a transgression occurred with the

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1. *See, e.g.*, Paul D. Carrington & Derek P. Apanovitch, *The Constitutional Limits of*

promulgation of Rule 4(k) in 1993. But in the unprecedented controversy over other amendments to the *Federal Rules of Civil Procedure*, particularly the amendments to Rule 11 and to the discovery provisions,[2] the metamorphosis of Rule 4 almost escaped notice.

Before the 1993 amendments, Rule 4 governed only the methods, and territorial reach, of service of process, a matter of procedure within the scope of the Court's authority under the Rules Enabling Act.[3] As amended, Rule 4 governs not only service, but now Rule 4(k) also explicitly purports to govern amenability to jurisdiction. In doing so, the amended Rule 4(k) impermissibly affects a "substantive right" within the meaning of the Rules Enabling Act. It therefore is beyond the scope of rulemaking authority allocated to the Court by that Act, and is invalid.

I. INTRODUCTION

The current process of civil procedure rulemaking for the federal courts is under attack.[4] Congress ceded the task to the Supreme Court in 1934 during the New Deal,[5] reflecting the faith that Congress and the public placed in the judiciary's expertise in matters of procedure.[6] The Court created a Rules Advisory Committee, which

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Judicial Rulemaking: The Illegitimacy of Mass-Tort Settlements Negotiated Under Federal Rule 23, 39 ARIZ. L. REV. 461, 482-93 (1997) (arguing that Rule 68, promulgated as part of the original rules in 1938, was invalid as violative of the "substantive right" limitation in the Rules Enabling Act, and that the Court subsequently interpreted the rule in a manner that was an even greater transgression of the limitations of the REA). Other problematic rules include Rule 15(c) (concerning relation back of amended pleadings and impermissibly affecting limitations periods) and Rule 35 (permitting court-ordered physical examinations). See generally, on the scope and the Court's treatment of the "substantive right" limitation in the REA, Leslie M. Kelleher, *Taking "Substantive Rights" (In the Rules Enabling Act) More Seriously*, 74 NOTRE DAME L. REV. 47 (1998).

2. *See* Laurens Walker, *A Comprehensive Reform for Federal Civil Rulemaking*, 61 GEO. WASH. L. REV. 455, 455-56 (1993). For a discussion of the 1993 amendments to the rules, see Leslie M. Kelleher, *The December 1993 Amendments to the Federal Rules of Civil Procedure—A Critical Analysis*, 12 TOURO L. REV. 7 (1995).

3. 28 U.S.C. § 2072(b) (1994).

4. *See* Paul D. Carrington, *The New Order in Judicial Rulemaking*, 75 JUDICATURE 161 (1991); Linda S. Mullenix, *Hope over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795 (1991); Walker, *supra* note 2.

5. *See* Rules Enabling Act of 1934, Pub. L. No. 73-415, 48 Stat. 1064 (codified as amended at 28 U.S.C. § 2072 (1994)).

6. *See* Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 944-48 (1987) (noting that the rules reflected New Deal principles, including greater discretion by the judiciary, which had expertise in the area); Laurens Walker, *The End of the New Deal and the Federal Rules of Civil Procedure*, 82 IOWA L. REV. 1269, 1269-75 (1997) (arguing that the delegation of responsibility for rulemaking to the Supreme Court reflected the New Deal commitment to expertise); Steven L. Winter, *Indeterminacy and Incommensurability in Constitutional Law*, 78 CAL. L. REV. 1441, 1462 n.96 (1990) (arguing that the Federal Rules were part of the New Deal); *cf.* Stephen N. Subrin, *Federal Rules, Local Rules and State Rules: Uniformity, Divergence and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999, 2005-06 (1989)

included experts from academia and practice.[7] Today, the Rules Advisory Committee, along with the Judicial Conference created by Congress in 1958,[8] has the primary responsibility for proposing amendments to the rules.[9]

Rules promulgated under the REA are to govern only "practice and procedure," and are not to "abridge, modify or enlarge any substantive right."[10] For decades, Congress was content to rely on the Court to comply with that limitation, satisfied with the Court's assurance that it would do so.[11] But since the end of the New Deal, Congress increasingly has regulated procedure and the rulemaking process.[12] The imbroglio over the Rules of Evidence in 1973 was just the beginning.[13] From that time, Congress continued to insinuate itself into the rulemaking process, by disapproving, delaying, and rewriting proposed amendments to the rules, propelled

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[hereinafter Subrin, *Federal Rules*] (pointing out that when the REA was enacted in 1934, many members of Congress and the public distrusted the conservative Supreme Court, which was perceived as antagonistic to progressive New Deal social legislation, and for that reason the Court's discretion in the promulgation of procedural rules was somewhat circumscribed, including a requirement that such rules be trans-substantive, and thus less easily manipulated to favor particular interests).

7. *See* Order of June 3, 1935, 295 U.S. 774 (1934).

8. *See* Act of July 11, 1958, Pub. L. No. 85-513, 72 Stat. 356 (codified at 28 U.S.C. § 331 (1994)). In 1956, the Supreme Court had discharged its Rules Advisory Committee, *see* Order Discharging the Advisory Committee, 352 U.S. 803 (1956), and the Judicial Conference was established by Congress to assume the role the Advisory Committee had played. The Judicial Conference created its own Rules Advisory Committee. *See* 1958 JUDICIAL CONFERENCE REPORT 6-7 (1958); *see also* 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 1006-1007 (2d ed. 1987).

9. For a description of the rulemaking process by a former Reporter for the Advisory Committee on the Civil Rules, see Paul D. Carrington, *Making Rules To Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-Trans-Substantive Rules of Civil Procedure*, 137 U. PA. L. REV. 2067 app. at 2119-24 (1989); *see also* Karen Nelson Moore, *The Supreme Court's Role in Interpreting the Federal Rules of Civil Procedure*, 44 HASTINGS L.J. 1039 (1993).

10. 28 U.S.C. § 2072(a)-(b) (1994).

11. *See* WRIGHT & MILLER, *supra* note 8, § 1001.

12. *See* Walker, *supra* note 6; *see also* Charles Gardner Geyh, *Paradise Lost, Paradigm Found: Redefining the Judiciary's Imperiled Role in Congress*, 71 N.Y.U. L. REV. 1165, 1167 (1996) (arguing that in the wake of Watergate and other scandals, public cynicism about government reached new highs and contributed to the imperiled role of the judiciary in procedural rulemaking).

13. The amendments to the Rules of Evidence proposed in 1973 included rules defining testimonial privileges. Concerned that the proposed rules were too substantive to be promulgated by the Court, and may have violated federalism limits by affecting privileges in diversity cases, Congress delayed the effectiveness of the amendments and later rewrote and enacted the Evidence Rules by legislation. *See* Act of Mar. 30, 1973, Pub. L. No. 93-12, 87 Stat. 9. "The title of the Act, an 'Act to promote the separation of constitutional powers,'" indicates Congress's concern that the Court had overstepped not just statutory, but also constitutional, rulemaking authority. Kelleher, *supra* note 1, at 83 n.155. For a discussion of the events surrounding the 1973 amendments to the Rules of Evidence, see Paul D. Carrington, *Learning from the Rule 26 Brouhaha: Our Courts Need Real Friends*, 156 F.R.D. 295, 299-301 (1994); John Hart Ely, *The Irrepressible Myth of* Erie, 87 HARV. L. REV. 693 (1974).

in large part by the lobbying efforts of various interest groups.[14] Congress also increased its oversight of, and public participation in, the rulemaking process, with the 1988 amendments to the Rules Enabling Act,[15] and with the Civil Justice Reform Act of 1990,[16] which required district courts to adopt local plans to reduce expense and delay in the judicial process. Indeed, the Civil Justice Reform Act was enacted over the Judicial Conference's objection that the matter should be dealt with by the rulemaking process established in the REA.[17] On occasion, lobbyists have convinced Congress to bypass the rulemaking process entirely, and provide special procedures for specific classes of cases by legislation, in order to favor certain interest groups. An obvious, and egregious, example is the Private Securities Litigation Reform Act of 1995 ("PSLRA"),[18] enacted in response to intense lobbying efforts by accounting, securities, and high-tech firms, which perceived themselves as victimized by abusive securities lawsuits. Rather than alter the substantive standards for such suits, Congress in the PSLRA provided procedural rules favorable to defendants, "to tilt the balance in securities litigation in favor of the defendant at virtually every juncture."[19]

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14. *See* Carrington, *supra* note 13, at 300; Moore, *supra* note 9, at 1053-61. The lobbying efforts against the introduction of Rule 26(a), requiring automatic disclosure, are another recent example. When efforts to persuade the Judicial Conference and Court to abandon the efforts were unsuccessful, opponents of the provision turned to Congress. A bill to eliminate the provisions was passed by the House, and, it seemed, would have been passed by the Senate, but had to go through the Senate Judiciary Committee first. As that Committee required unanimity, Senator Metzanbaum's objections to the House Bill were sufficient to prevent it reaching the Senate floor before adjournment of the session, and the provision became law. *See* Carrington & Apanovitch, *supra* note 1, at 484-85.

Ultimately, changes to the unpopular provision were left to the REA process. The Judicial Conference recently approved rules amendments that will limit the scope of automatic disclosure, and will send them to the Supreme Court with the recommendation that they be transmitted to Congress. A prior version of the proposed amendments is reprinted in Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, 181 F.R.D. 18 (1998). The Judicial Conference approved a slightly revised version, other than the proposed amendments to Rule 26(b)(2), dealing with cost bearing. The Court approved the amendments and forwarded them to Congress on April 17, 2000. *See* H.R. DOC. NO. 106-228 (2000), *available in* (visited May 31, 2000) <http//www.uscourts.gov/rules/approved.htm>. The amendments will become effective December 1, 2000, unless Congress decides to delay or change them by legislation.

On another front, Congress again entered the rulemaking arena by amending the Rules of Evidence to limit the admissibility of evidence regarding the history of victims of sexual assault. *See* Violent Crime Control and Enforcement Act of 1994, Pub. L. No. 103-322 § 320935(a), 108 Stat. 1796, 2135-37 (amending Federal Rules of Evidence by adding Rules 413-415).

15. 28 U.S.C. §§ 2073-2074 (1994) (providing increased congressional oversight of rules amendment process and greater public access to Rules Committee deliberations).

16. 28 U.S.C. §§ 471-482 (1994).

17. *See* Paul D. Carrington, *A New Confederacy? Disunionism in the Federal Courts*, 45 DUKE L.J. 929, 952-66 (1996); Linda S. Mullenix, *The Counter-Reformation in Procedural Justice*, 77 MINN. L. REV. 375 (1992).

18. Pub. L. No. 104-67, 109 Stat. 737 (1995).

19. John C. Coffee, Jr., *The Future of the Private Securities Litigation Reform Act: Or, Why the Fat Lady Has Not Yet Sung*, 51 BUS. LAW. 975, 995 (1996).

It may be that the demise of the current judiciary-dominated rulemaking process cannot be halted. Perhaps the increasing politicization of procedural rulemaking is inexorable and irreversible—that, as Professor Mullenix has warned, the judicial rulemakers are doomed to "go the way of the French aristocracy."[20] More optimistically, perhaps the rulemaking process can be overhauled, and the judiciary's valuable role salvaged.[21] Given their tenuous hold on the rulemaking process, the judicial rulemakers—the Supreme Court and the Judicial Conference and its committees—should do what they can to preserve their position. The most immediate action the Court and the rulemakers can take is to respect the "substantive right" limitation of the Rules Enabling Act.

Although in the past the Court often has failed to pay sufficient attention to the "substantive right" limitation of the Rules Enabling Act, the Court has, in recent years, begun to take that limitation more seriously.[22] The Judicial Conference and its Advisory Committees also appear to have been more attentive to the limits on the rulemaking authority. For example, in 1996, an amendment to Rule 23 was proposed that would have authorized for settlement purposes only the certification of class actions not otherwise qualified for purposes of trial under the rule.[23] The Judicial Conference's Standing Committee on Rules of Practice and Procedure received a large number of public comments opposing the amendments on the ground, among others, that such a rule would violate the limitations of the Rules Enabling Act as well as the constitutional separation of powers.[24] The proposed amendment was dropped. And when commentators raised similar objections to proposed amendments to Rule 4 concerning service in foreign countries, the Supreme Court sent the proposal back to the Civil Rules Advisory Committee for further study, and the offending provisions were revised in light of those concerns.[25]

The rulemakers, however, have not been consistently vigilant. Professors Burbank and Carrington, the latter of whom was at the time the Reporter for the Civil Rules Advisory Committee, raised concerns about the validity of Rule 4(k) when an earlier version of the amendment first was proposed.[26] The proposal was amended, although not in such a way as to totally alleviate those concerns.[27] The Committee (or Professor Carrington, at least) wanted Congress to enact legislation providing for nationwide service of process in federal question cases, rather than having it dealt with by rule.[28]

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20. Mullenix, *supra* note 4, at 802.

21. There is a vigorous debate on how best to reform the current rulemaking system. *See, e.g.*, Stephen B. Burbank, *Ignorance and Procedural Law Reform: A Call for a Moratorium*, 59 BROOK. L. REV. 841 (1993); Geyh, *supra* note 12, at 1233-41; Walker, *supra* note 2.

22. *See* Kelleher, *supra* note 1.

23. *See* Proposed Amendment to Fed. Rule Civ. Proc. 23(b).

24. *See* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 619 (1997) (citing, for example, Letter from Steering Committee to Oppose Proposed Rule 23, signed by 129 law professors (May 28, 1996), and Letter from Paul D. Carrington (May 21, 1996)); *see also* Carrington & Apanovitch, *supra* note 1, at 462-74.

25. *See infra* text accompanying note 144.

26. *See infra* Part III.D.

27. *See* Stephen B. Burbank, *The World in Our Courts*, 89 MICH. L. REV. 1456, 1484 n.164 (1991).

28. *See* Carrington & Apanovitch, *supra* note 1, at 486.

Instead, on the recommendation of a legislative staffer, the Committee settled for the unusual move of calling to Congress's attention the dubious authority with which it proposed the amendment to the rule.[29] Congress did nothing, and the amendment became law. Despite Congress's apparent lack of concern, the rulemakers and the Court should pay closer attention when two of the leading authorities on the Rules Enabling Act question the validity of a proposed rule. And, as this Article demonstrates, Rule 4(k) indeed is invalid, although not for the precise reasons previously suggested. The Court and the rulemakers should remedy the problem by proposing a repeal of 4(k) before it is challenged in an appropriate case,[30] and by recommending to Congress that a standard of nationwide amenability to jurisdiction for federal questions be provided by legislation. The Court that struck down the Line Item Veto Act's allocation of authority to deal with the budget deficit—to which Congress and the President had agreed[31]—surely cannot ignore an important limitation on its own delegated rulemaking power, particularly one based on separation of powers concerns.

After a brief examination in Part II of the allocation of rulemaking authority to the Supreme Court in the Rules Enabling Act, and the meaning of the Act's proscription against rules that "abridge, enlarge or modify any substantive right,"[32] Part III of this Article reviews the history and promulgation of the 1993 amended Rule 4(k). In a related article, a test for assessing the validity of rules under the Rules Enabling Act was proposed.[33] In Part IV, that analysis is applied to Rule 4(k). Part V concludes that, although provisions governing service of process are within the scope of the Court's authority under the Rules Enabling Act, to the extent that Rule 4(k) purports to alter the standards of amenability to jurisdiction, it impermissibly affects a "substantive right" within the meaning of the Act, and is beyond the authority conferred on the Court under that Act.

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29. *See id.*

30. The rule has been challenged, although not yet in a case with a compelling factual and procedural background. *See* Chew v. Dietrich, 143 F.3d 24 (2d Cir.), *cert. denied*, 525 U.S. 948 (1998).

31. *See* Clinton v. City of New York, 524 U.S. 417 (1998) (invalidating the Line Item Veto Act, 110 Stat. 1200, 2 U.S.C. § 691 (Supp. II 1996)). For a discussion of the decision and its implications for the validity of the REA's delegation to the Court of authority to cancel statutory provisions, see Leslie M. Kelleher, *Separation of Powers and Delegations of Authority To Cancel Statutes in the Line Item Veto Act and the Rules Enabling Act*, 68 GEO. WASH. L. REV. (forthcoming 2000).

32. 28 U.S.C. § 2072(b) (1994).

33. *See* Kelleher, *supra* note 1, at 108-20.

II. THE ALLOCATION OF PROCEDURAL-RULEMAKING AUTHORITY IN THE RULES ENABLING ACT

A. The Constitutional Allocation of Authority

Congress has broad constitutional authority to regulate procedure for the federal courts.[34] That authority extends not just to matters that are obviously procedural (that is, concerned only with and affecting only the orderly administration, fairness or efficiency of the judicial process) but also extends to those matters that fall "within the uncertain area between substance and procedure, [but] are rationally capable of classification as either."[35] Thus, even in diversity cases, in which state substantive law governs,[36] Congress has a great deal of power to regulate procedural matters, regardless of their substantive impact, subject, perhaps, to largely undefined federalism limits.[37] Congress has exercised its power over federal court procedure not just in statutes, but also by delegating to the Supreme Court, in the Rules Enabling Act, the authority to promulgate rules of procedure.

Even in the absence of a congressional delegation of authority, the federal courts have inherent constitutional authority to regulate procedure through procedural common law pronouncements in cases and controversies, as part of the judicial power vested in the judicial branch by Article III.[38] Although the limits of the courts'

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34. *See* U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."); U.S. CONST. art. I, § 8, cl. 9 ("The Congress shall have Power . . . To constitute Tribunals inferior to the supreme Court."); U.S. CONST. art. I, § 8, cl. 18 ("The Congress shall have Power . . . To make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States."); *see also* Hanna v. Plumer, 380 U.S. 460, 472 (1965); Livingston v. Story, 34 U.S. (9 Pet.) 632, 655 (1835); Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 22 (1825).

35. *Hanna*, 380 U.S. at 472.

> [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, which in turn includes a power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either.

Id.

36. *See* Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

37. *See* Kelleher, *supra* note 1, at 77-83.

38. *See* U.S. CONST. art. III. The courts' inherent authority to make procedural common law pronouncements has been recognized by the Supreme Court in several decisions. *See, e.g.*, Chambers v. Nasco, 501 U.S. 32 (1991) (holding that trial court has inherent authority to issue sanctions against a party for bad faith conduct); *Hanna*, 380 U.S. at 472-73 (noting that there are "matters which relate to the administration of legal proceedings, an area in which federal courts have traditionally exerted strong inherent power, completely aside from the powers Congress expressly conferred in the Rules [enactment process]") (citation omitted); Landis v. North Am. Co., 299 U.S. 248 (1936) (holding that federal court has inherent power to control its own docket, including the power to stay proceedings in one suit pending the determination

inherent authority are not fully defined,[39] it is clear that a core part of the judicial power, such as the power to sanction for contempt, may not be materially impaired by Congress.[40] Equally clear is that the greater part of the courts' authority to regulate procedure is subject to congressional control or override,[41] much in the same way that substantive common law is subject to legislative and regulatory override.[42] Congressional override or displacement of procedural common law can be in the form of statutes, or in the form of rules promulgated by the Judicial Conference and the Court pursuant to the authority delegated in the Rules Enabling Act. Just as substantive common law may be limited, or displaced, by statutory regulation sufficiently broad to "occupy the field,"[43] statutes or rules of procedure can so

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of another suit); *Ex parte* Burr, 22 U.S. (9 Wheat.) 529, 530-31 (1824) (holding that trial court has power to regulate the conduct of lawyers).

The Court has not clearly recognized an inherent authority in the judiciary to establish general rules of procedure, and whether such an inherent power exists is the subject of academic debate. Regardless, Congress has delegated to the Court the authority to promulgate prospective rules of procedure in the REA. *See* Kelleher, *supra* note 1, at 66-68.

39. *See* Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1115-16 (1982).

40. *See* Young v. United States *ex rel.* Vuitton, 481 U.S. 787, 799 (1987) (recognizing that the inherent contempt power of federal courts is subject to regulation by Congress, provided that such regulation does not completely abrogate that power, or render it "'practically inoperative'") (quoting Michaelson v. United States, 266 U.S. 42, 65-66 (1924)); *see also* United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32, 34 (1812).

> Certain implied powers must necessarily result to our Courts of justice from the nature of their institution. . . . To fine for contempt—imprison for contumacy—inforce [sic] the observance of order, &c. are powers which cannot be dispensed with in a Court, because they are necessary to the exercise of all others: and so far our Courts no doubt possess powers not immediately derived from statute . . . .

Id.; *see* Brainer v. United States, 691 F.2d 691, 697 (4th Cir. 1982) ("[W]e assume without deciding that federal courts possess some measure of administrative independence such that congressional intervention would, at some extreme point, 'pass[] the limit which separates the legislative from the judicial power.'") (alteration in original) (quoting U.S. v. Klein, 80 U.S. (13 Wall.) 128, 147 (1871)).

Consider also the views of Professors Levin and Amsterdam, who noted that "[t]here are spheres of activity so fundamental and so necessary to a court, so inherent in its very nature as a court, that to divest it of its absolute command within these spheres is to make meaningless the very phrase judicial power," A. Leo Levin & Anthony G. Amsterdam, *Legislative Control over Judicial Rule-Making: A Problem in Constitutional Revision*, 107 U. PA. L. REV. 1, 30 (1958) (emphasis omitted); and of Professor Redish, "a specific procedural rule [enacted by Congress] could so interfere with the courts' performance of the . . . adjudicatory process of finding facts . . . as to invade the courts' judicial power under Article III," Martin H. Redish, *Federal Judicial Independence: Constitutional and Political Perspectives*, 46 MERCER L. REV. 697, 725 (1995).

41. *See, e.g.*, Hanna v. Plumer, 380 U.S. 460 (1965); Wayman v. Southard, 23 U.S. (10 Wheat.) 1 (1825).

42. *See generally* Henry P. Monaghan, *The Supreme Court 1974 Term*, 89 HARV. L. REV. 1 (1975).

43. *See, e.g.*, City of Milwaukee v. Illinois, 451 U.S. 304 (1981) (holding that the 1972

completely regulate a procedural matter as to leave no room for supplementation by procedural common law. Thus, in *Omni Capital International Ltd. v. Rudolf Wolff & Co.*,[44] the Court refused to fashion a common law rule authorizing service of summons in a federal action "at this late date" on the ground that service was a field completely occupied by statute and rule, stating that "as statutes and rules have always provided the measures for service, courts are inappropriate forums for deciding whether to extend them."[45]

B. The Allocation of Authority in the Rules Enabling Act— The "Substantive Right" Limitation

In the 1934 Rules Enabling Act, Congress delegated to the Supreme Court the power to make prospective supervisory rules of procedure for federal courts.[46]

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amendments to federal statutes governing water pollution narrowed the scope of federal common law as defined in the earlier case of Illinois v. City of Milwaukee, 406 U.S. 91 (1972), and that federal common law was now displaced, and could not be used to impose more stringent standards than those set out in the amended statute and relevant regulations); *see also* 19 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4514 (2d ed. 1996); Monaghan, *supra* note 42.

44. 484 U.S. 97 (1987).

45. *Id.* at 110; *see also* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 620 (1997).

> [O]f overriding importance, courts must be mindful that the rule as now composed sets the requirements they are bound to enforce. Federal Rules take effect after an extensive deliberative process involving many reviewers: a Rules Advisory Committee, public commenters, the Judicial Conference, this Court, the Congress. . . . *The text of a rule thus proposed and reviewed limits judicial inventiveness.* Courts are not free to amend a rule outside the process Congress ordered . . . .

Id. (emphasis added).

46. Act of June 19, 1934, Pub. L. No. 73-415, 48 Stat. 1064 (repealed 1988), provided for rules of civil procedure:

> Be it enacted . . . [t]hat the Supreme Court of the United States shall have the power to prescribe, by general rules, for the district courts of the United States and for the courts of the District of Columbia, the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law. Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant. They shall take effect six months after their promulgation, and thereafter all laws in conflict therewith shall be of no further force or effect.

Id.

Prior to 1988, authority to promulgate rules of evidence and rules of procedure in criminal cases, criminal proceedings and bankruptcy proceedings was contained in separate statutes. *See, e.g.*, Act of Jan. 2, 1975, Pub. L. No. 93-595, § 2(a)(1), 88 Stat. 1926, 1948-49, *amended by* Act of Dec. 12, 1975, Pub. L. No. 94-149, § 2, 89 Stat. 805, 806 (rules of evidence). These Acts were repealed by the Judicial Improvements and Access to Justice Act (the 1988 Rules Enabling Act), Pub. L. No. 100-702, tit. IV, § 401(c), 102 Stat. 4642, 4650 (1988); 18 U.S.C. § 2075 (1970) (amended 1978, 1994) (bankruptcy rules); 18 U.S.C. §§ 3402, 3771, 3772 (1970) (criminal procedure), which provided a uniform mechanism for promulgating rules of procedure and evidence. The most complete history of the Rules Enabling Act can be found

Section 2072 of the Act, as amended in 1988, allocates rulemaking authority between Congress and the Court:

> (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 magistrates 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.[47]

Not surprisingly, given the judicial branch's inherent power over procedure, the Court has found that the delegation in the Act is constitutionally permissible,[48] and long has rejected arguments that rulemaking power is a nonadjudicative, exclusively legislative function that cannot be delegated to, and exercised by, the Court.[49] But the Court never has ruled clearly on the constitutionality of the supersession provision in the last sentence of subsection 2072(b), which effectively permits the Court to repeal statutory provisions by promulgating rules of procedure.[50] The validity of that

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in Burbank, *supra* note 39.

47. 28 U.S.C. § 2072 (1994).

48. See Mistretta v. United States, 488 U.S. 361, 387-88 (1989) (citing Sibbach v. Wilson & Co., 312 U.S. 1, 9-10 (1941)), for authority that delegation under the REA is an example of a constitutionally permissible delegation to the Court); *Sibbach*, 312 U.S. at 9-10 ("Congress has undoubted power to regulate the practice and procedure of federal courts, and may exercise that power by delegating to this or other federal courts authority to make rules not inconsistent with the statutes or constitution of the United States . . . .") (footnote omitted); *see also* Robert N. Clinton, *Rule 9 of the Federal Habeas Corpus Rules: A Case Study on the Need for Reform of the Rules Enabling Acts*, 63 IOWA L. REV. 15, 71-72 (1977) (concluding the delegation of rulemaking authority in the REA is valid, but contesting the validity of the supersession clause); Carole E. Goldberg, *The Influence of Procedural Rules on Federal Jurisdiction*, 28 STAN. L. REV. 395, 437-41 (1976) (concluding that the delegation in the REA is valid).

49. *See* Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 42-43 (1825). For an argument that rulemaking is an essentially legislative function that cannot be delegated to the Court, posited by a long-time chair of the Senate Committee on the Judiciary, and a chief opponent of uniform federal rules, see Thomas J. Walsh, *Rule-Making Power on the Law Side of Federal Practice*, 6 OR. L. REV. 1 (1926), *reprinted in* 13 A.B.A. J. 87 (1927). *See also* Martin H. Redish, *Separation of Powers, Judicial Authority, and the Scope of Article III: The Troubling Cases of* Morrison *and* Mistretta, 39 DEPAUL L. REV. 299, 314-19 (1990) (arguing that the delegation of rulemaking power violates the doctrine of separation of powers, and arguing that the Court in *Sibbach* did not rule directly on the validity of the REA under the case or controversy requirement of Article III).

50. *See* Kelleher, *supra* note 31, at nn.268-69. In *Clinton v. City of New York*, 524 U.S. 417 (1998), the Court invalidated the Line Item Veto Act's delegation to the President of authority to repeal statutory provisions. In doing so, the Court appeared to assume the validity of the supersession clause, which it distinguished from the Line Item Veto Act, on that ground that in the REA's supersession clause, Congress itself made the decision to repeal inconsistent statutes "upon the occurrence of a particular event—here, the promulgation of procedural rules by this Court." *Id.* at 2107 n.40. However, the grant of authority in the supersession clause never was limited to the repeal of prior-enacted statutes. *See* Stephen B. Burbank, *Hold the Corks: A Comment on Paul Carrington's "Substance" and "Procedure" in the Rules Enabling*

clause in light of Article I's Presentment Clause[51] and the doctrine of separation of powers has been the subject of intense debate since the Rules Enabling Act first was introduced in Congress.[52] The better view is that the supersession clause is valid, provided that the "substantive right" limitation on the Court's authority to promulgate rules is read in an appropriately narrowing manner, such that only rules that do not implicate policy decisions in areas reserved by Congress are found valid, and capable of superseding procedural statutes.[53]

The meaning of the "substantive right" limitation, and the scope of the Court's authority under the Act, however, have not been defined clearly, or consistently respected, by the Court and by the rulemakers—the Judicial Conference and its committees.[54] For many years it was widely, and erroneously, assumed that the Act's prohibition of rules affecting substantive rights was intended primarily to further the federalism principles reflected in the *Erie* line of decisions, and to prevent the inappropriate displacement of state substantive law by federal rules. That popular misconception was dispelled by Professor Burbank in his seminal study of the 1934 Rules Enabling Act.[55] If any doubts remained, the purpose of the "substantive right" limitation was made clear by the legislative history of the 1988 amendments to the Act.[56] It now generally is understood that Congress's animating concern with the Rules Enabling Act was the allocation of authority between Congress and the Court: that the Court has been allocated only those decisions concerned with procedure, and Congress has retained control over primary, substantive policy decisions.[57] This is not to say that substantive state law is not afforded protection against inappropriate displacement by rules of procedure. Any such protection, however, is an incidental effect of Congress retaining for itself the power to make primary policy decisions, including those that involve the displacement of state substantive law.[58]

Act, 1989 DUKE L.J. 1012.

51. U.S. CONST. art. I, § 7.

52. *See* Burbank, *supra* note 39, at 1050-54; Burbank, *supra* note 50, at 1044 (arguing that the supersession clause is invalid. *But see* Paul D. Carrington, *"Substance" and "Procedure" in the Rules Enabling Act*, 1989 DUKE L.J. 281, 325 (arguing that the supersession clause is valid); Clinton, *supra* note 48, at 65, 77.

53. *Accord* Ralph U. Whitten, *Separation of Powers Restrictions on Judicial Rulemaking: A Case Study of Federal Rule 4*, 40 ME. L. REV. 41, 60-66 (1988). The validity of the supersession clause is discussed in Kelleher, *supra* note 31, Part V.

54. *See* Carrington & Apanovitch, *supra* note 1, at 482-93.

55. *See* Burbank, *supra* note 39.

56. *See* Burbank, *supra* note 50, at 1029-40. Professor Burbank appeared as an invited witness at congressional hearings regarding the amendments to the Act, and provided other assistance to the House Judiciary Committee in the development of the 1988 amendments. *See* H.R. REP. NO. 99-422, at 7, 18-20 (1984), *reprinted in* 132 CONG. REC. E177-202 (daily ed. Feb. 3, 1986) (House Committee Report accompanying a precursor bill to the 1988 statute that amended the Rules Enabling Act); H.R. REP. NO. 99-422, at 7, 18 (1985) (technical and typographical errors in the report were corrected at 132 CONG. REC. E177-202 (daily ed. Feb. 3, 1986)); *see also* Burbank, *supra* note 50, at 1012.

57. *See* Kelleher, *supra* note 1, at 92-94, 101-04.

58. *See id.* at 93 (noting that the REA "holds the potential to serve federalism values, protecting both existing and potential state law by remitting to Congress the decision whether there shall be prospective federal law on 'substantive' matters and the content of that law.")

Although the Court acknowledged that the Rules Enabling Act imposed limits on its rulemaking authority separate from and in addition to those found in the Constitution,[59] for years it failed to give those limits any independent meaning. With few exceptions, the Court's opinions conflated the test for validity under the REA with the "rationally capable of classification as procedural"[60] constitutional test for Congress's authority to regulate procedure.[61] After Congress amended the Rules Enabling Act in 1988, however, the Court began to take the "substantive right" limitation more seriously. Although the Court has yet to invalidate a rule as beyond the Court's rulemaking authority under the REA, in several recent cases it has accorded the limitations of that Act greater deference, at least as a rule of construction, by reading rules narrowly to avoid running afoul of the prohibition against rules affecting substantive rights.[62] For example, in its 1991 decision in *Kamen v. Kemper Financial Services, Inc.*, a unanimous Court read Rule 23.1 as not addressing the substantive issue of whether a prior demand on the board was required in a derivative suit.[63] The Court stated that it was required to read the rule narrowly to avoid infirmity, noting that "[i]ndeed, as a rule of procedure issued pursuant to the Rules Enabling Act, Rule 23.1 cannot be understood to 'abridge, enlarge or modify any substantive right.'"[64]

Despite its apparent willingness finally to effectuate the "substantive right" limitation, the Court has not provided the rulemakers clear guidance as to the scope of the rulemaking power. In an earlier article, this author proposed guidelines for interpreting, and analyzing the validity of rules of procedure, consisting of a number of factors that should be considered in determining whether a rule impermissibly impacts substantive rights within the meaning of the REA, and intrudes into an area reserved by Congress.[65] Relevant factors may include: the extent to which Congress has regulated the matter; the impact of the procedural rule on congressional policy; whether the matter is one traditionally in the domain of the states; the trans-substantive nature of the rule; the implication of policies extrinsic to the business of the courts; and the importance of the matter to the orderly functioning of the courts. The list is not intended to be exhaustive. Nor are all factors are equally important to the analysis of the validity of all rules. In analyzing Rule 4(k), for example, the most significant factors are the extent of regulation—not just by Congress, but by the Constitution as well, and the implication of policies extrinsic to the business of the courts. Before considering the validity of Rule 4(k), it will be helpful to examine the background to the rule, and the circumstances surrounding its promulgation.

(citing Stephen B. Burbank, *Of Rules and Discretion: The Supreme Court, Federal Rules and the Common Law*, 63 NOTRE DAME L. REV. 693, 700-01 (1988)).

59. *See, e.g.*, Hanna v. Plumer, 380 U.S. 460, 464 (1965).

60. *Id.* at 472.

61. *See* Kelleher, *supra* note 1, at 94-100.

62. *See id* at 105-08.

63. 500 U.S. 90 (1991).

64. *Id.* at 96 (quoting 28 U.S.C. § 2072(b) (1990)).

65. *See* Kelleher, *supra* note 1, at 108-21.

III. THE 1993 AMENDMENT TO RULE 4

A. Background

Congress's authority to regulate procedure in federal courts includes power to regulate the manner and method of service of process, and Congress can, if it wishes, provide for nationwide service in federal question cases, as well as diversity cases.[66] Congress also has authority to regulate amenability to the jurisdiction of federal courts.[67] That authority, of course, is subject to constitutional limits. The Fifth Amendment Due Process Clause requires that service of process provide the defendant with notice, "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action," and an opportunity to be heard and present their objections.[68] In addition, a defendant will not be amenable to the jurisdiction of a federal court unless the Fifth Amendment requirement of sufficient affiliating contacts between the defendant and the nation as a whole is satisfied.[69]

Congress has provided specifically for nationwide service in a limited number of actions under federal law,[70] but has not enacted a general nationwide service provision. Those statutes in which Congress has provided for service often say nothing about amenability to jurisdiction.[71] Effecting service provides notice to the defendant of the commencement of the action, and marks the court's assertion of jurisdiction over the action.[72] Valid service, however, does not by itself guarantee that the court has personal jurisdiction over the defendant; an assertion of personal jurisdiction also must satisfy relevant statutory and constitutional requirements.[73] The

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66. *See* Mississippi Publ'g Corp. v. Murphree, 326 U.S. 438, 442 (1946) (holding, in a diversity case, that "Congress could provide for service of process anywhere in the United States") (citations omitted).

67. *See* Robert C. Casad, *Personal Jurisdiction in Federal Question Cases*, 70 TEX. L. REV. 1589, 1599-615 (1992).

68. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950); *see also, e.g.*, Blackmer v. United States, 284 U.S. 421 (1932) (requirement of notice under Fifth Amendment).

69. Other limitations on the assertion of jurisdiction imposed by the Fifth Amendment are discussed *infra* text accompanying notes 123-36.

70. *See, e.g.*, Federal Interpleader Act, 28 U.S.C. §§ 1335, 1397, 2361 (1994) (providing for nationwide service of process); *see also* Clayton Act § 12, 15 U.S.C. § 22 (1994) (providing for worldwide service of process); Securities Exchange Act of 1934 § 27, 15 U.S.C. § 78aa (1994); Securities Act of 1933 § 22, 15 U.S.C. § 77v(a) (1994). For a list of federal statutes providing for nationwide service of process, see Howard Erichson, *Nationwide Personal Jurisdiction in All Federal Question Cases: A New Rule 4*, 64 N.Y.U. L. REV. 1117, 1123 n.30 (1989).

71. Some federal statutes expressly call for the application of national contacts test. *See, e.g.*, The Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1605 (1994).

72. *See* Paul D. Carrington, *Continuing Work on the Civil Rules: The Summons*, 63 NOTRE DAME L. REV. 733, 733-34 (1988); Kent Sinclair, *Service of Process: Amended Rule 4 and the Presumption of Jurisdiction*, 14 REV. LITIG. 159, 163-65 (1994).

73. *See* WRIGHT & MILLER, *supra* note 8, § 1063, at 225; *see also* DeMelo v. Toche Marine, Inc., 711 F.2d 1260, 1264 (5th Cir. 1983).

The concept of personal jurisdiction comprises two distinct components:

separate issues of effective service of process and amenability to jurisdiction often are conflated, which has caused much confusion. Many courts, for example, have found, or simply assumed without any real analysis, that nationwide service provisions provide for nationwide personal jurisdiction as well, subject only to Fifth Amendment limits of national contacts, rather than Fourteenth Amendment limits of forum state contacts.[74] While that result certainly seems consistent with congressional intent, and is good policy, it would best be accompanied by recognition and acknowledgment that Congress has left the amenability issue to be decided by the courts. Thus, the courts must determine amenability issues as a matter of interstitial federal common law, in a way that "implements the federal Constitution and statutes, and is conditioned by them,"[75] in much the same manner that the courts often must determine limitations periods in the face of congressional silence.[76]

Much of Congress's power to regulate procedure has been delegated to the

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> amenability to jurisdiction and service of process. Amenability to jurisdiction means that a defendant is within the substantive reach of a forum's jurisdiction under applicable law. Service of process is simply the physical means by which that jurisdiction is asserted.

Id. (citations omitted).

74. *See, e.g.*, Leasco Data Processing v. Maxwell, 468 F.2d 1326 (2d Cir. 1972) (Securities Exchange Act of 1934); Paulson Inv. Co. v. Norbay Sec., Inc., 603 F. Supp. 613, 615 (D. Or. 1984) (Securities Exchange Act of 1934); Engineering Equip. Co. v. Waterside Ocean Navigation Co., 446 F. Supp. 706, 706 (S.D.N.Y. 1978) (admiralty case); *cf.* Casad, *supra* note 67, at 1596 & n.36 (citing cases in which courts have held that the defendant served under a federal statute providing for nationwide service nonetheless must have contacts with the forum state in order for the court to assert personal jurisdiction, which he criticizes as "totally inconsistent with congressional intent").

75. D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447, 472 (1942) (Jackson, J., concurring) (footnote omitted).

76. *Cf.* RICHARD H. FALLON ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 820-29 (4th ed. 1996) (discussing case law involving limitations periods and other quasi-procedural issues in federal actions determined by courts in the face of congressional silence); *see also* 28 U.S.C. § 1658 (1994) ("Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment of this section may not be commenced later than 4 years after the cause of action accrues."). While this uniform limitations period was welcome, and long overdue, it unfortunately only applies to actions arising under statutes enacted after 1990, when § 1658 was itself enacted. Thus, in many federal question cases, the limitations period remains a matter of federal decisional, or common, law. Of course, some matters governed by decisional law, such as the doctrine of laches, have their origin in equity, and thus are not appropriately designated matters of "common" law. However, as equity and common law are merged in federal courts, and for ease of reference, the phrase "federal common law" as used in this Article encompasses such equitable doctrines.

In diversity actions, however, the federal courts have no such authority to fashion common law, as Congress has provided in the Rules of Decision Act that state law shall govern. Thus, amenability to jurisdiction in diversity cases must be governed by state law, including the Fourteenth Amendment constitutional standard for amenability to jurisdiction applicable to state courts. *See* Insurance Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 709 (1982) (Powell, J., concurring); *see also infra* text accompanying notes 105-09 (discussing *Insurance Corp. of Ir.*).

Supreme Court in the Rules Enabling Act. The extent to which Court-promulgated rules could govern service of process was considered by the Court in *Mississippi Publishing Corp. v. Murphree.*[77] That case involved a challenge to the provision in former Rule 4(f) for statewide service of process by the federal methods. Before the Federal Rules came into effect in 1938, the Judiciary Act provided that a federal district court could issue process in civil actions only within the district in which it sat, absent a specific statutory authorization.[78] When the Federal Rules became law in 1938, they included Rule 4(f), which provided:

> All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held and, when a statute of the United States so provides, beyond the territorial limits of that state.

When this rule was first proposed, a concern was raised that it violated the "substantive right" limitation of the Rules Enabling Act by extending the reach of the district courts' personal jurisdiction beyond the limits imposed by the prior statutory restrictions. The Advisory Committee thought not. The Committee, quite properly, distinguished amenability to jurisdiction from service of process. The Committee assumed that amenability was a substantive matter, and beyond the scope of rulemaking authority, while it considered service a procedural matter, and thus a proper subject for the rules. Dean Clark stated the views of the Committee:

> The question has been raised whether this is not a substantive change, one affecting jurisdiction and venue. I might say on that, it is our theory that definitely it is not. This is not a matter of either the jurisdiction of the court, what matters the court shall hear and decide, or of the venue, which is the place where certain kinds of action shall be tried. This affects neither one of those points. It simply says that in cases where the district court already has jurisdiction and venue its process may reach as far as the confines of that state itself. In other words, that is why we consider it procedural. It is simply allowing people to be brought before the court within the entire state and not merely within one district.[79]

Rule 4(f) was challenged in *Murphree* as beyond the scope of the Court's rulemaking authority under the REA. The action in that case was commenced in diversity in the Northern District of Mississippi, but the defendant, a Delaware corporation with an office in Mississippi, was served in the Southern District of Mississippi, pursuant to Rule 4(f). The defendant challenged that provision as violating the substantive rights restrictions of the Rules Enabling Act. The Court upheld the provision, holding that "it serves only to implement the jurisdiction over the subject matter which Congress has conferred, by providing a procedure by which the defendant may be brought into court at the place where Congress has declared

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77. 326 U.S. 438 (1946).

78. *See* Judiciary Act of 1789, ch. 20, §§ 2, 11, 1 Stat. 73; Robertson v. Railroad Labor Bd., 268 U.S. 619 (1925); Toland v. Sprague, 37 U.S. (12 Pet.) 300 (1838).

79. RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES WITH NOTES AND PROCEEDINGS OF THE INSTITUTE ON FEDERAL RULES 205-06 (William W. Dawson ed. 1938) (remarks of Charles E. Clark, Reporter for Advisory Committee). From the context, it is clear that the references to jurisdiction are to subject matter, rather than personal, jurisdiction.

that the suit may be maintained."[80] Rule 4(f), the Court concluded, "does not operate to abridge, enlarge or modify the rules of decision by which the court will adjudicate [the litigants'] rights. It relates merely to 'the manner and the means by which a right to recover . . . is enforced.'"[81]

The Court's statement of the standard for determining when rules ran afoul of the REA's limitation was unduly generous, as were its other decisions on the issue.[82] Nonetheless, the result in *Murphree* was correct. Rule 4(f) governed only service—the procedural means of providing notice to, and asserting the jurisdiction of the court over, the defendant for an adjudication of its substantive rights. The provision had only a minimal, incidental effect on those rights. It did not purport to govern amenability to jurisdiction, which was left to be determined by the courts as a matter of interstitial federal common law,[83] subject to constitutional limits. Similarly, the "bulge" rule in Rule 4(f)[84] also was valid, even though it was the first time that a rule, rather than a statute, permitted service of process outside of the state in which the district court was situated. Under the "bulge" rule, service outside of the state, but within 100 miles of the district courthouse, was permitted on persons brought in as parties under Rules 14 or 19, and on persons required to respond to an order of commitment for civil contempt. Again, although the reach of service was extended, the "bulge" rule was not concerned with amenability to jurisdiction.[85]

Furthermore, that the methods and reach of service of process to that point had been governed by statute did not make the matter "substantive" within the meaning of the REA. Rather, Congress's intent to allocate to the Court authority over service is evidenced by the reference to service of process in the original 1934 Act, which specifically granted the Court "the power to prescribe, by general rules . . . the forms of process."[86] Congress contemplated that rules promulgated under the Act would

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80. *Murphree*, 326 U.S. at 445.

81. *Id.* at 446 (omission in original) (quoting Guaranty Trust Co. v. York, 326 U.S. 99, 109 (1945)).

82. *See* Kelleher, *supra* note 1, at 95-105 (discussing, inter alia, the Court's decisions in *Murphree*, 326 U.S. at 443, Sibbach v. Wilson, 312 U.S. 1 (1941), and Hanna v. Plumer, 380 U.S. 460 (1965), and noting that the Court failed to recognize any meaningful limits on its rulemaking authority under the REA).

83. *Cf.* LARRY L. TEPLY & RALPH U. WHITTEN, CIVIL PROCEDURE 364-65 & nn.432-35 (1994) (listing cases).

84. Former Rule 4(f) provided, in relevant part, that

> persons who are brought in as parties pursuant to Rule 14, or as additional parties to a pending action or a counterclaim or cross-claim therein pursuant to Rule 19, may be served [with the federal methods] outside the state but within the United States that are not more than 100 miles from the place in which the action is commenced, or to which it is assigned or transferred for trial; and persons required to respond to an order for commitment for civil contempt may be served at the same places.

FED. R. CIV. P. 4(f) (repealed 1993).

85. *Cf.* TEPLY & WHITTEN, *supra* note 83, at 457 (arguing that the expansion of the territorial reach of service in the bulge rule also is justified as furthering important federal subject-matter jurisdiction policies).

86. Act of June 19, 1934, Pub. L. No. 73-415, 48 Stat. 1064 (1934) (repealed 1988).

> Be it enacted . . . [t]hat the Supreme Court of the United States shall have the

supersede procedural statutes, and provided in the supersession clause that "all laws in conflict" with rules promulgated by the Court under the Act "shall be of no further force or effect."[87] The service provisions of the Judiciary Act were among the statutory provisions governing procedure that Congress intended to be, and which were, properly superseded by the rules.[88] That Congress was of that opinion is evidenced by the fact that in 1948, when the successor to that provision was revised by Congress, the territorial limitation on service of process was eliminated.[89] In contrast, as discussed below, amenability to jurisdiction is a substantive matter beyond the rulemaking authority allocated to the Court in the REA.

B. The Former (Pre-1993) Rule 4 and the Omni *Case*

Absent a specific statutory provision, service of process in federal court is governed by the general service provisions of Rule 4. Before the 1993 amendment, Rule 4(f) provided that service of process using the federal methods authorized in the rule could be effected only within the territorial limits of the state in which the district court was located.[90] Service of a summons outside of the forum state was governed

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> power to prescribe, by general rules, for the district courts of the United States and for the courts of the District of Columbia, the forms of process, writs, pleadings and motions, and the practice and procedure in civil actions at law. Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant. They shall take effect six months after their promulgation, and thereafter all laws in conflict therewith shall be of no further force or effect.

Id. It could be objected that rules involving the territorial reach of service of process involve more than simply the "forms of process." Similarly, manner of service is something separate from the "form." Both manner of service and its territorial reach, however, are sufficiently closely related to its form, whereas amenability to jurisdiction is much further removed, and implicates directly a constitutional right.

87. *Id.*

88. *See generally* Kelleher, *supra* note 31, Part V.

89. *See* Omni Capital Int'l Ltd. v. Rudolf Wolff & Co., 484 U.S. 97, 109 n.10 (1987) (citing Judiciary Act, ch. 646, 62 Stat. 869 (1948)).

Nor has the fairly pervasive congressional regulation of service of process removed the matter from the scope of the Court's rulemaking authority, although pervasive regulation often is an indication of congressional intent to do so. *See* Kelleher, *supra* note 1, at 109-13. Rather, because service of process cannot be effected without positive authority in a statute or rule, *see Omni*, 484 U.S. at 108-11, and because it is so important to the functioning of the courts, Congress should be taken to have intended that rules concerning service would be promulgated to govern those actions in which Congress failed to provide specifically for service. For a similar argument with respect to the validity of rules governing pleading, see Kelleher, *supra* note 1, at 109-10.

90. The federal methods of service were unchanged by the 1993 amendments, but now are available in any judicial district in the United States. *See* FED. R. CIV. P. 4(e), which provides that

> service upon an individual . . . other than an infant or incompetent person, may be effected in any judicial district of the United States . . . (2) by delivering a copy of the summons and complaint to the individual personally or by leaving

by the former Rule 4(e), which provided that, absent a specific federal service statute, service outside of the state was to be "made under the circumstances and in the manner prescribed" by the forum state's long-arm service statute or rule.[91]

A problem arose with the incorporation of state service statutes and rules in the Federal Rules. When a federal statute creating a civil cause of action did not also provide for nationwide service, a plaintiff had to use the forum state method of service to effect service outside of the state in which the district court was located. If the state statute or rule did not permit service on the defendant, the plaintiff could not effect service and thus was unable to commence the action. This was the situation in *Omni Capital International Ltd. v. Rudolf Wolff & Co.*:[92] because the defendants were not within the reach of the forum state's long-arm jurisdiction statute, they were not subject to service under the forum state's long-arm service provision.

In *Omni*, a British corporation and its agent, who was a British citizen and resident, were impleaded in an action in a federal court in Louisiana under the federal Commodities Exchange Act. The Commodities Exchange Act had no service provision, as the action was an implied private right of action. The district court dismissed the case, concluding that although the British defendants had sufficient contacts with the United States to satisfy the requirements of the Fifth Amendment, they did not have sufficient contacts with Louisiana to satisfy the requirements of the state long-arm jurisdiction statute, so that service could not be effected "under the circumstances and in the manner prescribed"[93] by the state law, and the action had to be dismissed. The Fifth Circuit, sitting en banc, affirmed, although a minority was prepared to find authority to serve the summons in federal common law to correct what it characterized as a "bizarre hiatus in the Federal Rules."[94] The Supreme Court sided with the majority, holding that service failed because it could not be effected under the Louisiana long-arm statute and there was no federal method of serving the defendants. In making its ruling, the Court invited action by Congress or the rulemakers:

> copies thereof at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and the complaint to an agent authorized by appointment or by law to receive service of process.

Id.; *see also id.* 4(h) (providing for service upon corporations and associations).

91. The former Rule 4(e) provided:

> Whenever a statute or rule of the court of the state in which the district court is held provides (1) for service of a summons . . . upon a party not an inhabitant of or found within the state, or (2) for service upon or notice to such a party to appear and respond or defend in an action by reason of the attachment or garnishment or similar seizure of the party's property located within the state, service may in either case be made under the circumstances and in the manner prescribed in the statute or rule.

Id. 4(e) (repealed 1993). The substance of this provision, and of the "bulge"rule in the former Rule 4(f), providing for service outside of the forum state, is now contained in Rule 4(k)(1).

92. 484 U.S. 97 (1987).

93. FED. R. CIV. P. 4(e) (repealed 1993).

94. Point Landing, Inc. v. Omni Capital Int'l Ltd., 795 F.2d 415, 428 (5th Cir. 1986), *aff'd*, *Omni*, 484 U.S. 97.

> We are not blind to the consequences of the inability to serve process. . . . A narrowly tailored service of process provision, authorizing service on an alien in a federal-question case when the alien is not amenable to service under the applicable state long-arm statute, might well serve the ends of the CEA and other federal statutes. It is not for the federal courts, however, to create such a rule as a matter of common law. That responsibility, in our view, better rests with those who propose the Federal Rules of Civil Procedure and with Congress.[95]

As discussed below, the 1993 Rule 4(k) originally was intended to fill the gap in the Federal Rule through which the defendants in *Omni* had managed to slip. But rather than doing so with a nationwide service provision, which would have been permissible under the REA, Rule 4(k) purports to govern amenability to jurisdiction, and is invalid.

Another question that arose under Rule 4(e) was whether, in addition to limitations on service and assertions of jurisdiction imposed by state statutes and rules, Rule 4(e) made applicable to federal courts the constitutional limitations on state court assertions of jurisdiction. An assertion of jurisdiction by a state court is subject to the limits imposed by the Due Process Clause of the Fourteenth Amendment, which, as interpreted by the Court in *International Shoe*[96] and its progeny,[97] requires that there be sufficient purposeful contacts of the defendant with the forum state "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[98] The Fourteenth Amendment does not apply to the federal government, however. Any direct constitutional limits on the jurisdictional reach of a federal court are derived from the Fifth Amendment, which, most courts have held, requires sufficient affiliating contacts between the defendant and the United States as a whole, not just the forum state.[99] It was unclear whether, when a defendant in

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95. *Omni*, 484 U.S. at 111.

96. International Shoe Co. v. Washington, 326 U.S. 310 (1945).

97. *See, e.g.*, Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102 (1987); Burger King v. Rudzewicz, 471 U.S. 462 (1985); Keeton v. Hustler Magazine, 465 U.S. 770 (1984); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980). For a discussion of the Supreme Court jurisprudence on the Fourteenth Amendment limits on the assertion of jurisdiction, see generally William M. Richman, *Understanding Personal Jurisdiction*, 25 ARIZ. ST. L.J. 599 (1993).

98. *International Shoe*, 326 U.S. at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

99. *See, e.g.*, *In re* Application to Enforce Admin. Subpoenas Duces Tecum of the SEC, 87 F.3d 413 (10th Cir. 1996) (considering the issue in the context of 1993 amended Rule 4(k)(2)); Busch v. Buchman, Buchman & O'Brien, 11 F.3d 1255, 1258 n.4 (5th Cir. 1994) (stating that every court that has considered the issue since 1982 has affirmed the national contacts approach); United Liberty Life Ins. Co. v. Ryan, 985 F.2d 1320 (6th Cir. 1993); Go-Video Inc. v. Akai Elec. Co., 885 F.2d 1406 (9th Cir. 1989); Lisak v. Mercantile Bancorp, Inc., 834 F.2d 668 (7th Cir. 1987), *cert. denied*, 485 U.S. 1007 (1988); Hogue v. Milodon Eng'g, Inc., 736 F.2d 989 (4th Cir. 1984); FTC v. Jim Walter Corp., 651 F.2d 251 (5th Cir. Unit A July 1981); Mariash v. Morril, 496 F.2d 1138 (2d Cir. 1974); PHILIP I. BLUMBERG, THE LAW OF CORPORATE GROUPS: PROCEDURAL PROBLEMS IN THE LAW OF PARENT AND SUBSIDIARY CORPORATIONS § 3.04, at 52 n.10 (1983) (collecting cases); WRIGHT & MILLER, *supra* note 8, § 1067.1, at 318 n.44 (collecting cases).

The Supreme Court declined to consider the issue in *Asahi*, 480 U.S. at 113, n.*, stating,

federal court was served pursuant to the forum state's long-arm statute, the personal jurisdiction of the court was limited by the national contacts test of the Fifth Amendment, or by the Fourteenth Amendment requirement of minimum contacts with the forum state. Many courts, conflating the issues of service and amenability to jurisdiction, erroneously assumed that Rule 4 governed both.[100] Those courts held that the former Rule 4(e) incorporated not only the limits on service found in state law, but also incorporated and imposed on federal courts the limits on jurisdiction found in the Fourteenth Amendment, both in diversity actions and in actions under federal law. Thus, for personal jurisdiction to attach, not only did service have to satisfy the requirements of the state long-arm service and jurisdiction provisions, but the defendant also had to have contacts with the forum state sufficient to satisfy the Fourteenth Amendment.[101]

A number of federal courts had read the former Rule 4(e) as incorporating Fourteenth Amendment limitations on territorial jurisdiction only when the action was brought in diversity, and not when it involved a federal question, even though process was served pursuant to a state long-arm statute. These courts were of the view

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"[w]e have no occasion here to determine whether Congress could, consistent with the Due Process Clause of the Fifth Amendment, authorize federal court personal jurisdiction over alien defendants based on the aggregate of [national] contacts, rather than on the contacts between the defendant and the State in which the federal court sits." (emphasis omitted). Subsequently, in *Republic of Argentina v. Weltover*, 504 U.S. 607, 620 (1992), the Court appeared to use a nationwide contacts test in an action against Argentina, holding that Argentina had "purposefully avail[ed] itself of the privilege of conducting activities within the [United States]." Although a breach of contract action, jurisdiction in that case was asserted under the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602-1611 (1994), which subjects foreign states to suit in American courts for, inter alia, acts taken "in connection with a commercial activity" that have "a direct effect in the United States," *id.* § 1605(a)(2), the Fifth Amendment standard. While the Court seemed in the quoted language to endorse the view that nationwide contacts can support an assertion of jurisdiction by a district court, it did not so clearly decide that issue, as the action was commenced in New York, the state with which Argentina had contacts. Thus, the Court has not yet decided clearly whether, under a Fifth Amendment nationwide-contacts standard, jurisdiction may be asserted by a federal court in a situation in which the affiliating contacts are with a state other than the forum state, so that the Fourteenth Amendment standard is not satisfied. For a discussion of whether the Fifth Amendment imposes additional limits on assertions of jurisdiction, see also *infra* text accompanying notes 123-36.

100. *Cf.* Gary B. Born, *Reflections on Judicial Jurisdiction in International Cases*, 17 GA. J. INT'L & COMP. L. 1, 6 n.23 (1987) ("[F]ederal courts sitting in diversity actions will apply the Due Process Clause of the fourteenth amendment . . . presumably on the grounds that it, like state statutory law, is incorporated by Rule 4.") (citing Arrowsmith v. United Press Int'l, 320 F.2d 219, 231-33 (2d Cir. 1963)).

101. *See, e.g.*, United Elec., Radio & Machine Workers of Am. v. 163 Pleasant St. Corp., 960 F.2d 1080 (1st Cir. 1992); Max Daetwyler Corp. v. Meyer, 762 F.2d 290 (3d Cir.), *cert. denied*, 474 U.S. 980 (1985); DeMelo v. Toche Marine, Inc., 711 F.2d 1260, 1265-66 (5th Cir. 1983). *See generally* Gary B. Born & Andrew N. Vollmer, *The Effect of the Revised Federal Rules of Civil Procedure on Personal Jurisdiction, Service and Discovery in International Cases*, 150 F.R.D. 221, 224 (1993); Lisa Rouchell, *Federal Question Jurisdiction: Must a Defendant Have Minimum Contacts with the State Whose Long-Arm Statute Is Used To Serve Process?*, 54 LA. L. REV. 407 (1993).

that any constitutional limits on the defendant's amenability to jurisdiction in federal question cases derived from the Fifth Amendment's "national contacts" requirement,[102] and that no further limits were imposed by Rule 4(e). One criticism of the minority approach was that it simply ignored that Rule 4(e) itself did not differentiate between diversity and federal question cases.[103] This criticism was valid; the rule did not make any such distinctions. Nonetheless, the conclusion reached by these courts was correct, but for different reasons. Rule 4(e) did not govern the issue of amenability to jurisdiction at all, and could not have done so without violating the REA's prohibition on rules affecting substantive rights.[104] Rather, the standard for amenability to jurisdiction is a matter that may be altered only by Congress, subject to the limits of the Constitution.

Justice Powell's analysis in his concurring opinion in *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*[105] recognized this point. Justice Powell argued that, in diversity cases, Congress, with the Rules of Decision Act ("RDA"),[106] had imposed on federal courts the state-contacts limit on assertions of jurisdiction that applied to state courts under the Fourteenth Amendment. Justice Powell cited the RDA's provision that state law is to govern in diversity cases in federal court as the statutory basis of the requirement, articulated in Rule 4(e), that "the personal jurisdiction of the district courts is determined in diversity cases by the law of the forum State." Thus, Justice Powell noted, the ability of federal district courts to assert jurisdiction over a defendant "normally would be subject to the same due process limitations as a state court."[107] Later in his opinion, Justice Powell again emphasized that

> [b]ecause of the District Court's reliance on the [forum state's] long-arm statute—the applicable jurisdictional provision under the Rules of Decision Act—the relevant constitutional limits would not be those imposed directly on federal courts by the Due Process Clause of the Fifth Amendment, but those applicable to state jurisdictional law under the Fourteenth.[108]

Thus, Justice Powell interpreted the RDA's reference to "law of the forum state"

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102. *See, e.g.*, Handley v. Indiana & Mich. Elec. Co., 732 F.2d 1265 (6th Cir. 1984) (citing cases); *see also* Born & Vollmer, *supra* note 101, at 223-24 (collecting cases); BLUMBERG, *supra* note 99, § 3.04 (collecting cases); WRIGHT & MILLER, *supra* note 8, at 318 n.44 (collecting cases). For a discussion of the Fifth Amendment's limitations on assertions of jurisdiction, see *infra* text accompanying notes 123-36.

103. *See Handley*, 732 F.2d at 1272 (Krupansky, J., dissenting) ("On its face, rule 4(e) offers no support for the majority's conclusion that '... a federal district court considering a case that arises under federal law is not subject to precisely the same due process limitations which restrict its reach in diversity cases.'") (omission in original) (quoting *id.* at 1268).

104. *See infra* Part IV.

105. 456 U.S. 694 (1982).

106. 28 U.S.C. § 1652 (1994) provides: "The laws of the several states, except where the Constitution or treaties of the United States or Act of Congress otherwise require or provide, shall be regarded as [the] rules of decision in civil actions in the courts of the United States, in cases where they apply."

107. *Insurance Corp. of Ir.*, 456 U.S. at 712.

108. *Id.* at 713.

as incorporating, and imposing on federal courts, not only the state statutory limits on the assertion of jurisdiction, but also state-contacts requirement of the Fourteenth Amendment. As Justice Powell recognized, the constitutional constraint that operates directly on federal courts is that of the Fifth Amendment. Under the test enunciated by the Court in *Hanna*, Congress has authority to legislate with respect to all matters in cases in federal courts that are "rationally capable of classification as [procedural.]"[109] Thus, Congress can alter the standard of amenability to jurisdiction, so long as it does not attempt to provide less protection to the defendant than is afforded by the Constitution. Imposing the Fourteenth Amendment state-contact standard on federal courts affords greater protection to defendants than they otherwise would have, and thus it clearly is within Congress's authority to do so, and Congress has done so with the RDA's proscription that state law applies.

In an oft-cited article published several years ago, Professor Abraham suggested that principles of federalism articulated in *Erie* may limit Congress's power to give the federal courts nationwide jurisdiction in diversity cases, and may mandate the application of Fourteenth Amendment due process limits on federal courts sitting in diversity.[110] The *Erie* doctrine, however, is not so much concerned with the limits on Congress's power to displace state law as it is concerned with the limits on the federal courts' power to displace state law. That case "establishes that there are greater constitutional limits on the federal courts' common law making powers than on the legislative authority of Congress—that the federal courts' common law making power is not coextensive with Congress's."[111] Thus, a federal court in a diversity case may not displace state law with its common law making power in every situation in which Congress could displace state law by statute. Whereas Congress, exercising its Commerce Clause power, could have provided for a negligence standard for interstate railroads to apply in the situation presented in *Erie*, the federal court could not displace state law without congressional authorization. One might argue, by extension, that even without the proscription of the RDA, a federal court could not displace the Fourteenth Amendment state-contact standard that would apply in a state court. Even that proposition is dubious, however, because in the sense used in *Erie*, the Fourteenth Amendment is not truly state law, but federal constitutional law, and it is the Fifth, and not the Fourteenth, Amendment that by its terms applies to the federal government. Regardless, it does not follow from *Erie* that Congress cannot by legislation provide a nationwide amenability standard for diversity cases, as it has done for interpleader actions.[112]

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109. Hanna v. Plumer, 380 U.S. 460, 472 (1965).

110. *See* Gerald Abraham, *Constitutional Limitations upon the Territorial Reach of Federal Process*, 8 VILL. L. REV. 520, 523-31 (1963). In an otherwise admirable piece, Professor Abraham, unfortunately, makes the all-too-common error of conflating the issues of service of process and amenability to jurisdiction.

111. Kelleher, *supra* note 1, at 73.

112. While Congress has not explicitly provided for nationwide amenability to jurisdiction in statutory interpleader actions, it has provided for nationwide service of process. *See* 28 U.S.C. § 2361 (1994). As with other nationwide service provisions, courts have proceeded on the assumption that this provision provides a national contacts amenability standard. *See, e.g.*, Atkins v. Schmutz Mfg. Co., 435 F.2d 527 (4th Cir. 1970); New Jersey Sports Prods. v. Don King Prods., 15 F. Supp. 2d 534 (D.N.J. 1998).

The Supreme Court has assumed, without analysis, that in diversity cases the Fourteenth Amendment minimum contacts analysis of jurisdiction is applicable to federal courts.[113] However, it expressly has left open the question of the appropriate constitutional analysis of jurisdictional limits in federal question cases in which service was made pursuant to state law, as required by the former Rule 4(e). In *Omni*, a federal question case, the Court found that it did not have to decide whether, under the Fifth Amendment, aggregate contacts with the nation as a whole could be used as the basis for the exercise of federal court jurisdiction. Rather, the case was determined on the ground that the district court could not exercise jurisdiction over the defendants without authorization to serve process. As the defendants did not have sufficient contacts with the state to satisfy the state's long-arm jurisdictional statute, service was not available under state law, which was to be used under Rule 4(e).[114]

There are strong policy reasons for limiting the jurisdiction of federal courts in diversity cases to that which could be exercised by state courts. Inter-system forum shopping is discouraged, as a plaintiff cannot sue in federal court a defendant that he could not sue in state court. In addition, application of the Fourteenth Amendment requirement of forum state contacts protects not only the individual defendant, but, to the extent it is rooted in state territorial sovereignty,[115] it also ensures the protection of state interests and interstate federalism.[116] As Professor Silberman has pointed out,

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113. *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985). In *Rudzewicz*, the defendants were served outside of the forum state in accordance with Rule 4(e).

114. *See* Omni Capital Int'l Ltd. v. Rudolf Wolff & Co., 484 U.S. 97 (1987); *see also* Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 113 n.* (1987).

115. *See* Casad, *supra* note 67, at 1591-96.

116. In *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292, 294 (1980), Justice White, writing for the Court, noted that the territorial jurisdiction of the states is limited by "their status as coequal sovereigns in a federal system," and that "even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment." Three years later, however, in *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702-03 & n.10 (1982), Justice White, again writing for the Court, held that the requirement of personal jurisdiction could be waived, and rejected territorial sovereignty as an element of the due process analysis:

> The personal jurisdiction requirement recognizes and protects an individual liberty interest. It represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty. . . . The restriction on state sovereign power described in *World-Wide Volkswagen Corp.* . . . must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause.

Id.

Nonetheless, Professor Casad and others argue persuasively that the Fourteenth Amendment Due Process Clause actually has little bearing on personal jurisdiction, and that the source of limitations on the state courts' ability to assert jurisdiction is the Full Faith and Credit Clause, the Privileges and Immunities Clause, and unarticulated principles of interstate federalism. Thus, Professor Casad argues that "[t]he limits on state choice of law and the exercise of personal jurisdiction are probably better viewed as manifestations of interstate federalism," and that "the limitations on state court jurisdiction that the Supreme Court has recognized in the name of due process are at least in some respect based upon the territorial limits of the state's

the state contacts test operates also as a "disguised regulator of choice-of-law power."[117] These concerns are absent in actions governed by substantive federal law.[118] Furthermore, the RDA, which requires federal courts to apply state substantive law on amenability to jurisdiction, including Fourteenth Amendment limitations,[119] does not apply to actions under federal law. And former Rule 4(e) did not—as it could not—govern amenability to jurisdiction. Thus, the better view is that, in federal question cases, the relevant affiliating contacts are those with the nation, rather than the forum state.

C. The Amended (1993) Rule 4(k)

The 1993 amended Rule 4(k) was intended to fill the "bizarre hiatus" in federal law that presented itself in cases such as *Omni*,[120] where no nationwide service was available for an action under federal law. It is not, however, a narrowly drafted provision concerning only service, along the lines suggested by the Supreme Court in *Omni*. Rather, the amended Rule 4(k) now explicitly purports to govern not only

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sovereignty." Casad, *supra* note 67, at 1591, 1600.

Regardless of the sources and nature of the limits on assertions of jurisdiction by federal and state courts, courts and commentators ordinarily proceed on the assumption that those limits emanate (at least in part) from the Fifth and Fourteenth Amendments, respectively, and these assumptions are made in this Article as well.

117. Linda Silberman, *Reflections on* Burnham v. Superior Court*: Toward Presumptive Rules of Jurisdiction and Their Implications for Choice of Law*, 22 RUTGERS L.J. 569, 587 (1991).

118. *See* Casad, *supra* note 67, at 1596, 1600.

> Considerations of importance to Fourteenth Amendment due process—interstate federalism and protection of state interests—are irrelevant in federal question cases. There is no need in such cases to impose limits on the ability to acquire personal jurisdiction as a hidden method of controlling choice of law because national law defines the rights of the parties. . . . There are factors that limit the range of a state's legislative and judicial jurisdiction but have no relevance when applied to federal courts in federal question cases. The view that Fifth Amendment due process requires state contacts, then, must be rejected.

Id.; *see also* United Rope Distribs., Inc. v. Seatriumph Marine, Inc., 930 F.2d 532, 535 (7th Cir. 1991) ("State-federal allocations would be thrown out of kilter if a federal court could give judgment in a diversity case that the state itself would have to dismiss. That rationale does not carry over to federal question cases."); Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1123-25 n.6 (1966) ("[A]ny given state necessarily views the jurisdictional problem from the perspective of its community, but, insofar as federal-law questions are concerned, the appropriate community may become the nation as a whole."); *cf.* Ronan E. Degnan & Mary Kay Kane, *The Exercise of Jurisdiction over and Enforcement of Judgments Against Alien Defendants*, 39 HASTINGS L.J. 799, 817-24 (1988) (arguing that nationwide contacts should be considered in all suits against nonresident aliens).

119. *See Insurance Corp. of Ir.*, 456 U.S. at 711-12 (Powell, J., concurring).

120. *See* Committee Notes to the 1993 Amendments to the Federal Rules of Civil Procedure, H.R. DOC. NO. 103-74, at 168 (1993), providing, "This paragraph [Rule 4(k)(2)] corrects a gap in the enforcement of federal law . . . . In this respect, the revision responds to the suggestion of the Supreme Court made in *Omni* . . . ."

service, but also amenability to jurisdiction, which to that point had been left for determination by the courts on a case-by-case basis, interpreting the Constitution and congressional intent. It certainly is desirable to have the issues of service of process and amenability to jurisdiction clearly separated, as they often were confused both by courts and commentators.[121] But a Court-promulgated Rule of Procedure cannot deal with amenability, because, as discussed in Part IV, below, amenability is a substantive matter beyond the scope of authority granted to the Court in the Rules Enabling Act.

The amended Rule 4 includes a new, nationwide long-arm service provision, which provides that service of process now may be made in any judicial district of the United States pursuant to the federal methods, pursuant to the law of the state in which the district court sits, or pursuant to the law of the state in which service is effected.[122] Rule 4(k) explicitly recognizes that effecting proper service is not in itself sufficient to establish the personal jurisdiction of the court. The rule then purports to set out the standards for amenability to jurisdiction. Under Rule 4(k)(1)(A), service of the summons establishes jurisdiction over a defendant only if the defendant "could be subjected to the jurisdiction of a court of general jurisdiction in the state in which the district court is located." That is, both in diversity and federal question cases, a federal district court may exercise personal jurisdiction over a defendant only if a state court of general jurisdiction in the forum state could do so. A state court cannot exercise personal jurisdiction over a defendant unless the jurisdictional requirements of the state's long-arm statute are met, and there are sufficient affiliating contacts between the defendant and the forum state to satisfy the Fourteenth Amendment. The effect is much the same as under the majority application of the former Rule 4(e) under the majority interpretation: the limitations on jurisdiction of the Fourteenth Amendment Due Process clause, as well as the limitations of the forum state's long-arm jurisdictional statute, are incorporated by the rule, and apply to both diversity and federal question actions in federal courts.[123] That this was the intent of the Advisory Committee seems apparent from the notes accompanying the rule, which state that "[p]aragraph [4(k)](1) retains the substance of the former rule in explicitly authorizing the exercise of personal jurisdiction over persons who can be reached under state long-arm law."[124]

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121. *Cf.* Erichson, *supra* note 70, at 1119 ("The disentangling of these doctrines is sorely needed.").

122. See, for example, FED. R. CIV. P. 4(e), which provides that service on an individual, other than an infant or incompetent person, can be made in any judicial district in the United States pursuant to the federal method set out in Rule 4(e)(2) or, under Rule 4 (e)(1), "pursuant to the law of the state in which the district court is located, or in which service is effected . . . ." *See also id.* 4(h) (service on corporations and associations).

123. *See, e.g.*, L.H. Carbide Corp. v. Piece Maker Co., 825 F. Supp. 1425 (N.D. Ind. 1994); Unison Indus., L.P. v. Lucas Indus., PLC, No. 93-C-20249, 1994 WL 148718 (N.D. Ill. Apr. 22, 1994). As noted, the application of state law and Fourteenth Amendment limitations on assertions of jurisdiction in federal courts is a function of the application of the RDA, which is not applicable to federal actions. Thus, in federal question actions, the nationwide contacts test of the Fifth Amendment is applicable.

124. H.R. DOC. NO. 103-74, at 167. The remainder of subdivision 4(k)(1) provides that personal jurisdiction extends to parties added under Rules 14 and 19 who are served within 100 miles of the court (the "bulge rule"), to parties served under the Federal Interpleader Act, and

Rule 4(k)(2) is a long-arm jurisdiction provision for a limited number of actions arising under federal law:

> If the exercise of jurisdiction is consistent with the Constitution and laws of the United States, serving a summons or filing a waiver of service is also effective, with respect to claims arising under federal law, to establish personal jurisdiction over the person of any defendant who is not subject to the jurisdiction of the courts of general jurisdiction of any state.[125]

The constitutional limits referred to in the rule are those found in the Fifth Amendment,[126] which, it generally is accepted, requires sufficient affiliating contacts with the nation as a whole, rather than just the forum state.[127] The rationale of this approach is that the sovereign exercising jurisdiction is the United States, whose jurisdictional reach of which is not limited by the interests of "co-equal sovereigns" in the way that the jurisdictional reach of state courts is limited.[128]

A number of courts have held that the Fifth Amendment requires more than just affiliating contacts with the nation, and have applied a "basic fairness standard" for determining amenability to jurisdiction. Under this test, the inconvenience to the defendant of litigating in a particular venue within the United States must also be considered.[129] Some courts and commentators have argued that this basic fairness analysis is the only approach logically consistent with the Supreme Court's decision

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to defendants served under federal legislation that provides for nationwide or worldwide service in actions under specific federal laws.

125. FED. R. CIV. P. 4(k)(2).

126. *See* H.R. DOC NO. 103-74, at 168.

> There remain constitutional limitations on the exercise of territorial jurisdiction by federal courts over persons outside the United States. These restrictions arise from the Fifth Amendment rather than the Fourteenth Amendment, which limits state-court reach and which was incorporated into federal practice by the reference to state law in the text of the former subdivision (e) that is deleted by this revision. The Fifth Amendment requires that any defendant have affiliating contacts with the United States sufficient to justify the exercise of personal jurisdiction over that party.

Id.

127. *See id.*; *see also supra* note 99.

128. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980).

129. The leading cases to have adopted this test are *Oxford First Corp. v. PNC Liquidating Corp.*, 372 F. Supp. 191 (E.D. Pa. 1974), and *DeJames v. Magnificent Carriers*, 654 F.2d 280, 286 n.3 (3d Cir. 1981). The court in *DeJames*, an admiralty case, states, in dicta, that "we are not sure that some geographic limit short of the entire United States might not be incorporated into the 'fairness' component of the [F]ifth [A]mendment," and cites the *Oxford* case. *Id.* The Advisory Committee notes to the 1993 Rule 4 cite the *DeJames* case favorably for the proposition that there may be some constitutional limits on choice of venue. "[A] plaintiff's forum selection might be so inconvenient to a defendant that it would be a denial of 'fair play and substantial justice' required by the due process clause, even though the defendant had sufficient affiliating contacts with the United States." H.R. DOC NO. 103-74, at 168-69 (1993). For a discussion of the basic fairness standard, see Casad, *supra* note 67, at 1601-06, and Kelleher, *supra* note 2, at 51-53.

in *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*,[130] in which the Court rejected territorial sovereignty as an element of the due process analysis, and emphasized its goal of protecting the individual liberty interest of the defendant.[131]

Most courts have rejected the notion that even when sufficient affiliating contacts with the nation exist, the Fifth Amendment affords the defendant some additional protection from an inconvenient venue within the United States. These courts hold that the defendant's right to a fair forum is adequately protected by statutory venue and transfer provisions, and is not a constitutional issue.[132] But the Advisory Committee apparently shared the minority view.[133] In the notes accompanying Rule 4(k), the Committee noted that while statutory venue[134] and transfer[135] provisions normally will afford a defendant sufficient protection from an inconvenient forum, alien defendants may be sued in any district. The Committee then stated that "a plaintiff's forum selection might be so inconvenient to a defendant that it would be a denial of 'fair play and substantial justice' required by the due process clause, even though the defendant had significant affiliating contacts with the United States."[136]

It should be emphasized that Rule 4(k)(2) is a fall-back provision, which is to be used to establish personal jurisdiction only in a small number of federal question cases. It applies only when there is no state in which the defendant is subject to

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130. 456 U.S. 694 (1982); *see supra* note 116.

131. *See* GRM v. Equine Inv. & Management Group, 596 F. Supp. 307, 314 (S.D. Tex. 1984); Maryellen Fullerton, *Constitutional Limits on Nationwide Personal Jurisdiction in the Federal Courts*, 79 NW. U. L. REV. 1, 14-21 (1984). For a discussion of the Court's decision in *Insurance Corp. of Ir.*, see also *supra* note 116.

132. *See, e.g.*, Trans-Asiatic Oil Ltd. S.A. v. Apex Oil Co., 743 F.2d 956, 959 (1st Cir. 1984) (holding that in federal actions, the "nonconstitutional doctrine of forum non conveniens" protects a litigant's right to a fair forum), *dismissed on remand*, 626 F. Supp. 718 (D.P.R. 1985), *aff'd*, 804 F.2d 773 (1st Cir. 1986); Hogue v. Mildon Eng'g, Inc., 736 F.2d 989, 991 (4th Cir. 1984) (holding that fairness of jurisdiction by a bankruptcy court is a federal venue issue and not a constitutional issue); Fitzsimmons v. Barton, 589 F.2d 330, 334 (7th Cir. 1979) (rejecting analysis of *Oxford*, *see supra* note 129); *see also* Casad, *supra* note 67, at 1605-06 (arguing that the Supreme Court's decisions in Burnham v. Superior Court, 495 U.S. 604 (1990), and in Carnival Cruise Lines v. Shute, 449 U.S. 585 (1991), lend indirect support to the majority view).

133. *See* H.R. DOC NO. 103-74, at 168-69.

134. *See* 28 U.S.C. § 1391 (1994).

135. *See id.* § 1404.

136. H.R. DOC. NO. 103-74, at 168-69. In support, the Committee cites *DeJames v. Magnificent Carriers, Inc.*, 654 F.2d 280, 286-87 n.3 (3d Cir. 1974). The court of appeals in *DeJames* stated in dicta that "we are not sure that some geographic limit short of the entire United States might not be incorporated into the 'fairness' component of the [F]ifth [A]mendment," and cited *Oxford*. *See supra* note 129.

Additional support for the Committee's position can be found in Kevin M. Clermont, *Restating Territorial Jurisdiction and Venue for State and Federal Courts*, 66 CORNELL L. REV. 411, 431-41 (1981); Robert A. Lusardi, *Nationwide Service of Process: Due Process Limitations on the Power of the Sovereign*, 33 VILL. L. REV. 1, 32-40 (1988). *See also* Lea Brilmayer & Charles Norchi, *Federal Extraterritoriality and Fifth Amendment Due Process*, 105 HARV. L. REV. 1217, 1262 (1992) (arguing that Fifth Amendment due process limits should be generally "parallel to those of the Fourteenth Amendment").

personal jurisdiction, whether because the defendant does not have sufficient minimum contacts with any one state to satisfy the Fourteenth Amendment, or because the state with which the defendant has sufficient contacts does not have a long-arm jurisdictional statute that can reach the defendant. Ironically, as one commentator has pointed out, because the defendants in *Omni* likely would have been amenable to jurisdiction in a New York court, the provisions of Rule 4(k) would not have been applicable to them.[137] With few exceptions, Rule 4(k)(2) will apply only in cases involving foreign defendants domiciled outside of,[138] and served outside of,[139] the United States.[140]

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137. *See* Dora A. Corby, *Putting Personal Jurisdiction Within Reach: Just What Has Rule 4(k)(2) Done for the Personal Jurisdiction of Federal Courts?*, 30 MCGEORGE L. REV. 167, 186-90 (1998).

138. *Cf.* Milliken v. Meyer, 311 U.S. 457, 462-63 (1940). In *Milliken*, the Supreme Court found that a Wyoming court constitutionally could assert personal jurisdiction over the defendant Meyer, a Wyoming resident who was served in Colorado, pursuant to a Wyoming statute that permitted service out of state on absent residents. *See id.* at 463. In its ruling, the Court referred to citizenship, domicile, and residence, interchangeably, as justifying the assertion of jurisdiction. In its ruling, the Court stated, "[t]he state which accords . . . [the defendant] privileges and affords protection to him and his property by virtue of his domicile may also exact reciprocal duties." *Id.* This reasoning would seem to apply with equal force to alien domiciliaries. *See* Degnan & Kane, *supra* note 118, at 803 n.20.

139. If an individual defendant, including a nonresident alien, is personally served within a state, even in a suit unrelated to the activities of the defendant in that state, it appears that the state can assert "transient" jurisdiction over that defendant. *See* Burnham v. Superior Court, 495 U.S. 604, 610-19 (1990). In *Burnham*, the defendant husband was served personally with a summons and divorce petition while in California for three days for business reasons, and to visit his children, who lived in California with his estranged wife. The marital domicile had been in New Jersey. The Supreme Court unanimously held that California could assert personal jurisdiction, but there were two plurality opinions for four Justices, and one other concurrence by Justice White. Justice Scalia, writing for four Justices, found that jurisdiction could be established by service within the state, regardless of the contacts of the defendant with the state, as this was a traditional method of establishing jurisdiction, and thus did not offend traditional Fourteenth Amendment requirements of fair play and substantial justice. *See id.* at 616-28. Justice Brennan, also writing for four Justices, found that the service in *Burnham* was sufficient because the defendant had established enough affiliating contacts with the state during the three days of his visit in California. *Id.* at 638-40 (Brennan, J., concurring in judgment). Thus, *Burnham* does not conclusively establish that tag service will be sufficient grounds for an assertion of transient jurisdiction in all cases. Nor is it clear the extent to which transient jurisdiction may be asserted over corporate defendants. *See, e.g.*, Wenche Siemer v. Learjet Acquisition Corp., 966 F.2d 179 (5th Cir. 1992) (holding that transient jurisdiction cannot be asserted against a corporation based on service on an agent for service of process). *But see, e.g.*, *Burnham*, 495 U.S. at 610 n.1 (implying that the assertion of jurisdiction in *Perkins* was permissible where the president of the corporate defendant was personally served in the forum state).

140. There are some other circumstances in which Rule 4(k)(2) might be used to establish jurisdiction. For example, even where tag service does satisfy the requirements of the Fourteenth Amendment, if the only state in which a nonresident alien defendant could be personally served does not have a statute allowing for the assertion of transient jurisdiction, the defendant could be served pursuant to the federal methods of Rule 4, and transient

D. Early Concerns with the Validity of Rule 4(k)(2)

The fall-back provision of Rule 4(k)(2) applies to only a small group of federal question cases. Nonetheless, by virtue of Rule 4's new nationwide service provisions and Rule 4(k)(2), federal courts now will be able to hale into court defendants in federal actions who could not have been reached before. Even before the Advisory Committee first published proposed amendments to the Rule, the question had been raised whether a rule purporting to govern amenability to jurisdiction would run afoul of the REA's proscription against rules affecting substantive rights.[141] Professor Carrington, who was the Reporter to the Advisory Committee on the Civil Rules from 1985 to 1992, and the principal drafter of the amended Rule 4, alluded to the true nature of the problem with the amended rule in a 1988 article. In that article Professor Carrington published an initial draft of the proposed amendment, which would have provided a federal amenability standard for all federal question claims in federal court:

> It will doubtless occur to some minds to question whether a change in the rule resulting in nationwide service of process in federal question cases is a change properly made by rulemaking. Several thoughtful scholars have raised the question of authority under the Rules Enabling Act. The Supreme Court upheld Rule 4 against an early challenge of this kind [in *Mississippi Publishing Corp. v. Murphree*[142]], and has recently intimated that such a revision is within the rulemaking power [in *Omni Capital International Ltd. v. Rudolf Wolff & Co.*[143]]. *Insofar as the change affects only the mode of service, it would seem that the issue of rulemaking power has been resolved, but the question may remain open insofar as the issue is the effect of a revised rule on the amenability of a defendant to the territorial jurisdiction of a distant federal forum. It is imaginable that a rule amendment would be held valid to alter the mode of service of the summons and complaint, but not effective to alter the principles governing the amenability of*

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jurisdiction could be asserted under Rule 4(k)(2). *See* David D. Siegel, *The New (Dec. 1, 1993) Rule 4 of the Federal Rules of Civil Procedure: Changes in Summons Service and Personal Jurisdiction*, 152 F.R.D 249, 253-55 (1994) (Part II in Two-Part Series). In some circumstances, Rule 4(k)(2) also could be used to establish personal jurisdiction over a United States citizen. *See id.* at 255. For example, assume that the defendant, a citizen of state *X*, is temporarily living in Canada, and it is there that he performed the acts that give rise to the federal action against him. Under state *X*'s long-arm statute, there is no basis for the assertion of jurisdiction over the defendant, as state *X* does not assert jurisdiction on the basis of domicile, or on the basis of acts that occurred outside of the state, and there is no other state whose long-arm statute would reach the defendant. The defendant may be served in Canada under Rule 4(f), which provides for service in a foreign country, and jurisdiction can be asserted under Rule 4(k)(2), on the basis of his United States citizenship, which should create sufficient affiliating contacts to satisfy the requirements of the Fifth Amendment. *Cf.* Blackmer v. United States, 284 U.S. 421, 438-39 (1932) (holding that the United States had personal jurisdiction over an absent citizen).

141. *See, e.g.*, CHARLES A. WRIGHT & ARTHUR R. MILLER, 4 FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 1063, at 225 (2d ed. 1987) ("[I]t is doubtful whether the language of the Rules Enabling Act delegates sufficient authority to the Supreme Court to draft a federal rule touching upon . . . [jurisdiction over the person].").

142. 326 U.S. 438 (1946).

143. 484 U.S. 97 (1987).

a defendant to the territorial jurisdiction of the federal court.[144]

Given the concerns as to the validity under the REA of a Rule governing amenability to jurisdiction, as well as concerns as to the wisdom of such a rule, Professor Carrington suggested that the provision for amenability to jurisdiction in federal cases be enacted by Congress.[145]

When the Advisory Committee issued the proposed amendments for public comment, the proposed federal nationwide amenability standard provided that, subject to the Constitution or federal statute, service in the United States was sufficient to establish personal jurisdiction in federal cases.[146] In a special note, the Committee recommended that if the federal amenability standard provided in the proposed amended rule were approved, then it should be given express congressional approval by statute.[147] At least one commentator objected that the proposed amenability standard violated the REA.[148] In response to criticism of other proposed provisions regarding waiver of service, the Court sent the entire rule back to the Committee for further study.[149] When the proposed amendments wound their way

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144. Paul D. Carrington, *Continuing Work on the Civil Rules: The Summons*, 63 NOTRE DAME L. REV. 733, 744 (1988) (citations omitted) (emphasis added).

145. *See id.* at 744. Professor Carrington's recommendation was that Congress enact the first sentence of the draft proposed Rule 4(k), governing only federal questions, the substance of which ultimately was incorporated into Rule 4(k)(2). *See id.* As discussed below, however, the most problematic provision is Rule 4(k)(1), as it purports to impose in federal question cases a standard of amenability not imposed by any federal statute or in the Constitution.

146. *See Preliminary Draft of the Proposed Amendments to the Federal Rules of Appellate Procedure and the Federal Rules of Civil Procedure*, 127 F.R.D. 237, 266 (1989).

147. *See id.*

148. *See* Burbank, *supra* note 27, at 1484 n.164.

149. The new "waiver of service" provision in Rule 4(d) replaced the "service by mail" provision of the former Rule 4(c)(2)(C)(ii), enacted by Congress in the Federal Rules of Civil Procedure Amendments Act of 1982, Pub. L. No. 97-462, 96 Stat. 2527 (1983). *See* H.R. DOC. NO. 103-74, at 157-63 (1993). Under the supersession clause of the Rules Enabling Act, the Court-promulgated amendments to the rules rendered the 1983 provisions "of no further force or effect," and effectively repealed them. 28 U.S.C. § 2072 (b) (1994); *see* Kelleher, *supra* note 31. An early version of the waiver of service provision, which was first published for comments in 1989, and submitted to the Supreme Court in November 1990, drew fire from foreign governments, as well as certain American governmental agencies and international lawyers. *See* Born & Vollmer, *supra* note 101, at 231-32; Burbank, *supra* note 27, at 1484 & n.163. One objection raised was that allowing the provision to be used for service abroad would violate the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, *opened for signature* Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163. *See* Burbank, *supra* note 27, at 1484-90 (discussing international concerns over the proposed waiver of service provisions, and arguing also that the proposed provisions were substantive, and would have violated the Rules Enabling Act). The Supreme Court sent the proposed amendments back to the Committee for further study, and the Committee made some minor changes to the text to meet the expressed concerns. In the Committee's view, the revised procedure does not violate the Convention or infringe on the sovereignty of other nations, as no summons is sent with the request for waiver, and thus it is not actually service of process. *See* Born & Vollmer, *supra* note 101, at 233. *But see* Burbank, *supra* note 27, at 1485 (concluding that the Committee's arguments are not persuasive, and that

back up to Congress, they had been rewritten, and the revised proposed Rule 4(k)(2) extended nationwide jurisdiction only to federal questions in cases in which the defendants were not amenable to the jurisdiction of a state court. This revision did not, however, solve the problem, as the proposed rule still purported to govern amenability.[150] But the recommendation that the provision be enacted by Congress had disappeared and, in its stead, the Committee Notes simply mentioned the concern that Rule 4(k) might be beyond the Court's rulemaking authority, leaving the issue to the Court and Congress to decide:

> SPECIAL NOTE: Mindful of the constraints of the Rules Enabling Act, the Committee calls the attention of the Supreme Court and Congress to the new subdivision (k)(2). Should this limited extension of service be disapproved, the Committee nevertheless recommend adoption of the balance of the rule, with subdivision (k)(1) becoming simply subdivision (k) . . . .[151]

The Supreme Court transmitted the proposed amendments to Congress without any changes,[152] and Rule 4(k) became effective seven months later.[153]

The few commentators who have considered the validity of the amended Rule 4 under the REA all have focused on Rule 4(k)(2), and most have concluded that it is valid,[154] relying heavily on the Supreme Court's decision in *Mississippi Publishing*

"the waiver of service mechanism is in fact a mechanism for defeasible service"). Furthermore, the cost-shifting provision is not available against a defendant outside the United States, or available to a plaintiff outside the United States. *See* Born & Vollmer, *supra* note 101, at 233. *But cf.* Carrington and Apanovitch, *supra* note 1, at 486-87 (arguing that one purpose of the waiver provision was to avoid unnecessary costs of translating complaints to be served on foreign multi-national corporations doing business in the U.S., and that the exemption of foreign defendants from the fee-shifting provision creates an "unjust asymmetry" that is but "one of the xenophilial provisions of our law that may explain the extraordinary success of foreign litigants in American courts").

Objections also had been made to proposed amendments to Rule 4 concerning service abroad, on the ground that the proposed rule would permit violation of international law and infringement on the sovereignty of foreign nations. *See, e.g.*, Burbank, *supra* note 27, at 1485 & n.173, 1489. The offending provision was eliminated. *See* FED. R. CIV. P. 4(f); *see also* H.R. DOC. NO. 103-74, 167-71 (1993).

150. *See* Burbank, *supra* note 27, at 1484 n.164.

151. H.R. DOC. NO. 103-74, at 154-55 (1993). According to Professor Carrington, this manner of bringing the issue to Congress's attention was advised by the congressional staffer consulted on the issue. *See* Carrington & Apanovitch, *supra* note 1, at 486.

152. *See* H.R. DOC. NO. 103-74, at 154-55 (1993) (reporting "communication from the Chief Justice of the United States transmitting amendments to the Federal Rule of Civil Procedure 4").

153. 28 U.S.C. § 2074 (1994) provides that the Supreme Court is to transmit to Congress by May 1 any amendments to the rules that is to become effective that year. Unless Congress provides otherwise by law, the rule will become effective December 1 of that year. *See id.*

154. *See, e.g.*, Erichson, *supra* note 70, at 1147 & n.197 (citing Mississippi Publ'g Corp. v. Murphree, 326 U.S. 438 (1946), among other authorities, for the proposition that personal jurisdiction is not a "substantive right" within the meaning of the REA); Sinclair, *supra* note 72, at 190.

Corp. v. Murphree.[155] For example, Professor Siegel, echoing language in *Murphree*, argues:

> [w]hile the rights affected by subdivision (k)(2) of Rule 4 are obviously substantial, they are not "substantive" in the sense used in the . . . [Rules Enabling Act] . . . .
> . . . [S]ubdivision (k)(2) . . . is not designed to change in any particular the substantive law to be applied in the action against the defendant, but only to add the federal courts to the list of forums that can hear the action.[156]

The main problem with this analysis is that it treats Rule 4(k) as though it merely extends the reach of federal courts by expanding the territorial reach of service of process, just as the former Rule 4(f) had done. But Rule 4(k), unlike the former Rule 4(f), does not govern only service of process. The amended Rule 4(k) is invalid, not because it expands the reach of service in federal courts, but because it explicitly purports to govern amenability to jurisdiction, and thus affects a substantive right contrary to the Rules Enabling Act. Indeed, the most problematic provision is Rule 4(k)(1), because it limits—rather than extends—the jurisdictional reach of federal courts in federal question cases in a manner not provided for by federal statute or by the Fifth Amendment. Under Rule 4(k)(1), amenability to jurisdiction in cases involving claims under federal law is limited by the state-contacts requirement of the Fourteenth Amendment. While that result had been reached by many courts prior to the amendments to Rule 4, it was wrong. Rule 4, promulgated under the REA, did not purport to govern amenability, but was concerned only with the reach of service. Nor could a procedural rule govern amenability, as it is a substantive matter beyond the scope of the Court's rulemaking authority under the REA. The Fifth Amendment operates directly on federal courts and, in the absence of congressional provision, is the only limiting standard to which the courts can turn in determining amenability to jurisdiction. The better view, therefore, is that only the Fifth Amendment nationwide-contacts limitation applies in actions under federal law.[157] As Rule 4(k)(1) purports to alter the standard for amenability, which is a substantive matter, it violates the Rules Enabling Act and is invalid.

Professors Teply and Whitten also have argued that Rule 4(k) (specifically Rule 4(k)(2)) is invalid, although not because of the constraints of the REA.[158] In their view, personal jurisdiction is not a substantive right, but is procedural within the meaning of the REA. However, they contend, because Congress has regulated federal long-arm jurisdiction to a large degree, the establishment of "nationwide or international long-arm jurisdiction independent of the states has, therefore, not traditionally been considered a matter fit for . . . court rulemaking."[159] Although a

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155. 326 U.S. 438 (1946).

156. Siegel, *supra* note 140, at 253.

157. *See supra* text accompanying notes 118-19.

158. *See* TEPLY & WHITTEN, *supra* note 83, at 458-60.

159. *Id.* at 459. Professors Teply and Whitten state that "[t]he detail with which Congress has regulated federal long-arm jurisdiction parallels the degree with which it has regulated federal venue," and the matter "has, therefore, not traditionally been considered a matter fit for general superintendence of the judiciary through court rule-making." *Id.* Professor Whitten originally developed this argument at greater length in a 1988 article, before Rule 4(k) was

provision extending jurisdiction nationwide is procedural within the meaning of the REA, they argue, because Congress has occupied the field, the area is reserved for Congress exclusively, and such a rule promulgated by the Court would violate separation of powers principles.[160]

While an analysis of the extent to which Congress has regulated a matter is important, that analysis first should be made in the context of determining the scope of authority Congress intends to allocate to the Court in the REA, as the issue of validity under the REA should be considered before consideration of the constitutional validity of a rule. If possible, the allocation of authority to the Court under that Act should be read in a sufficiently narrow manner to avoid constitutional infirmity, and so the constitutional issue need not even be reached.[161]

The validity of Rule 4(k) is analyzed below, in Part IV, using the factors analysis developed in an earlier, related article.[162] As already noted, the most significant factors to be considered with respect to Rule 4(k) are the degree of congressional—and constitutional—regulation of amenability to jurisdiction, and the extent to which the rule implicates policies extrinsic to the business of the courts.

IV. AMENABILITY TO JURISDICTION AS A "SUBSTANTIVE RIGHT" UNDER THE RULES ENABLING ACT

A. The Extent of Congressional and Constitutional Regulation

As a general rule, detailed, long-standing congressional legislation on a matter is a strong indication that Congress considers the matter outside the scope of authority allocated to the Court in the REA.[163] Nationwide service provisions often have been interpreted as also providing for nationwide amenability to jurisdiction.[164] Congress, however, rarely has explicitly legislated jurisdictional standards for cases arising

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promulgated. *See* Whitten, *supra* note 53, at 70-115 (analyzing the validity of Rule 4 under the separation of powers doctrine). In the passage quoted, Professors Teply and Whitten appear to be conflating the issue of service of process with personal jurisdiction, much as the courts assume that congressional statutes providing for nationwide service also provide for nationwide amenability to jurisdiction. While this Article agrees with that conclusion, it is more accurately as a matter of interstitial federal common law, rather than any true interpretation of the statute. Congress generally has not regulated amenability to jurisdiction at all, leaving it to the Court, and the constitutional standards. *See supra* text accompanying notes 70-78.

160. *See* TEPLY & WHITTEN, *supra* note 83, at 459.

161. *See* Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 346-49 (1936) (Brandeis, J., concurring) (stating that constitutional issues should be avoided if possible); *see also* Kelleher, *supra* note 1, at 112-13 (noting that considering the REA analysis first, and reading the scope of authority delegated by that Act in an appropriately narrow manner also averts constitutional infirmity of the REA's supersession clause).

162. *See* Kelleher, *supra* note 1, at 108-21.

163. *See id.*

164. *See supra* text accompanying note 74.

under federal law.[165] Rather, Congress has left amenability principles to be developed by the courts, subject to constitutional limits.

It could be argued that this lack of explicit congressional regulation indicates a decision by Congress to permit prospective regulation by Court-promulgated rules, and not just by pronouncements on a case-by-case basis. But there is substantive federal law governing amenability to federal court jurisdiction—the Fifth Amendment Due Process Clause. Thus, as the legislative history of the 1988 amendments to the REA indicates, amenability to jurisdiction is beyond the scope of authority that Act grants the Court. The House Committee Report states that

> the substantive rights protected by the proposed section 2072 include rights conferred, or that might be conferred, by rules of substantive law . . . . Thus, the bill does not confer power on the Supreme Court to promulgate rules regarding matters, such as limitations or preclusion, that necessarily and obviously define or limit rights under the substantive law.[166]

It may be argued that, although the right to be protected from an inconvenient forum is constitutionally protected, it is of a procedural nature, as it is implicated only in the context of litigation, and is, to a large extent (although perhaps not entirely) concerned with the "fairness . . . of the litigation process."[167] Even if amenability to jurisdiction is considered to implicate only "procedural" due process, it has such a significant impact in defining substantive rights that it also involves a "substantive right" within the meaning of the Rules Enabling Act.

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165. One of the statutes in which Congress has done so is the Foreign Sovereign Immunities Act of 1976, which subjects foreign states to suit in American courts for, inter alia, acts taken "in connection with a commercial activity" that have "a direct effect in the United States." 28 U.S.C. § 1605(a)(2) (1994); *cf.* Insurance Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 711-12 (1982) (Powell, J., concurring) (arguing that, in diversity cases, the imposition on federal courts of jurisdictional limits under state law, including Fourteenth Amendment limitations, is mandated by Congress in the Rules of Decision Act); *supra* text accompanying notes 105-11.

166. H.R. REP. NO. 99-422, at 21 (1985); *see also* 132 CONG. REC. 1434 (1986) (correcting technical and typographical errors in H.R. REP. NO. 99-422 (1985)). This is the Report on House Bill 3550, the language of which was, in relevant part, identical to the language of the REA bill that was ultimately passed in 1988. The Report on the 1988 House Bill (which was identical to the Senate Bill) incorporated by reference House Report No. 99-422. *See* H.R. REP. NO. 100-889, at 29 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5892, 5989. Professor Burbank (on whose work much of House Report No. 99-422 is based), as well as then-Professor (now Judge) Moore conclude that the House Report is the best evidence of congressional intent with respect to the Act. *See* Burbank, *supra* note 50, at 1030-36; Moore, *supra* note 9, at 1043-49. The Senate Report, however, provides contradictory evidence of congressional intent, which could make the House Report seem, at least to those antagonistic to using legislative history, an attempt by the drafters of the House Report to redefine the terms of the REA in a manner to which the Senate did not agree.

167. John Hart Ely, *The Irrepressible Myth of* Erie, 87 HARV. L. REV. 693, 725 (1974). Professor Richman has argued that although personal jurisdiction cannot be fairly characterized as an issue of "substantive" due process, it also cannot be characterized as "procedural" due process. *See* Richman, *supra* note 97, at 609. He proposes a separate category of "jurisdictional" due process. *See id.* at 609-10.

The legislative history of the 1934 Rules Enabling Act indicates that the protection of substantive rights was intended to extend to "procedural" constitutional interests (although the liberty interest implicated in personal jurisdiction analysis was not specifically considered). For example, matters concerning the selection and qualifications of jurors were specifically referred to as "substantive" within the meaning of the REA.[168] And in 1963, Justices Black and Douglas dissented from the submission of amendments to Rule 50 governing directed verdicts on the ground that, although it could be characterized as a "procedural" protection, the right to trial by jury is a substantive matter beyond the scope of the Court's rulemaking authority.[169] Indeed, they went a step farther, and also urged the repeal of Rule 49, concerning special verdicts, on the ground that it impaired the power of the jury to render a general verdict, which was necessary, in the Justices' view, to preserving the right of trial by jury.[170]

A Court-promulgated rule, however, properly can govern the method of service of process—the mechanics by which the assertion of jurisdiction is made. The sufficiency of service in federal court—whether it provides the defendant adequate notice of the action, and an opportunity to be heard in a reasonable time—also is governed by the Due Process Clause of the Fifth Amendment.[171] It can be argued that a choice of the method by which service will be made, such as a choice of requiring personal service instead of substituted service at a person's home, will affect that interest. In fact, as Professor Burbank points out, virtually all Federal Rules and statutes concerning methods for the conduct of litigation implicate some aspect of due process, and thus, a constitutionally protected interest. For that reason, he urges that the only constitutionally protected interests relevant under the REA are those that are specifically enumerated in the Constitution, to ensure "that the entire enterprise does not founder in the lap of the due process clause."[172] The right to adequate notice of the action, for example, is not specifically mentioned in the Constitution. Thus, Professor Burbank argues, it should not be considered a "substantive right" within the

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168. *See* S. REP. NO. 69-1174, at 9 (1926), *discussed in* Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1083-89, 1169 (1982). Professor Burbank cites also the attention paid in the consideration of the Criminal Rules Enabling Act to the constitutional rights of criminal defendants which, although procedural in the sense that they go to the fairness of the trial, were clearly considered substantive rights, and beyond the purview of rules of court. *See id.* at 1169 & n.664.

169. *See* Order of January 21, 1963, 374 U.S. 865, 866-68 (Black and Douglas, JJ., dissenting).

170. *See id.* at 867-68; *see also* Carrington & Apanovitch, *supra* note 1, at 479-80 (criticizing the Court for upholding local rules reducing the size of civil juries, on the ground that such rules violate the Seventh Amendment and, inferentially, the REA limits on rulemaking).

171. *See, e.g.*, Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 318 (1950) (requirement of notice under Fourteenth Amendment); *see also, e.g.*, Blackmer v. United States, 284 U.S. 421, 436-41 (1932) (requirement of notice under Fifth Amendment).

172. Burbank, *supra* note 39, at 1171 (footnote omitted). Professor Burbank does not address the issue of whether amenability to jurisdiction implicates a substantive right, but his analysis of the interest in notice would, presumably, extend to all interests protected by the Due Process Clause, which he refers to as a constitutional provision of "exquisite generality." *Id.*

meaning of the REA, and is subject to regulation by rule.[173]

Provisions governing amenability to jurisdiction, however, can be distinguished readily from those governing the mechanics and reach of service of process. A provision establishing the mechanics of service does not purport to govern the determination of whether notice under that provision is adequate. A rule requiring personal service is more likely to ensure actual notice than a rule permitting substituted service, and thus more likely to be constitutionally valid. But such a rule does not alter the standard by which the adequacy of the notice afforded by the service made pursuant to the rule will be evaluated. That standard for adequacy of notice is established by the requirements of the Due Process Clause, and the rule has not imposed any greater requirement than that set by the Fifth or Fourteenth Amendment.[174] A rule purporting to govern personal jurisdiction is a very different creature. Such a rule does not set out merely the "manner" or "means" of asserting personal jurisdiction—that is what the service provisions do. Rather, it sets out a test by which amenability to jurisdiction is adjudged, a matter already governed by the substantive law of the Constitution. Rule 4(k), by purporting to govern amenability to service, is invalid, insofar as it imposes a standard different from—that is, more restrictive than—that provided by the Constitution, or by Congress.

B. The Impact of the Rule on Congressional Policy

A related factor is whether a rule will interfere with, or will promote, congressional policy.[175] A rule that incorporates congressional legislative policy is permissible, as it has no impact on that policy, but simply articulates that policy. Thus, to the extent that Rule 4(k) incorporates state law limits on federal court jurisdiction in diversity cases, including the Fourteenth Amendment state contacts requirement, it is valid, as it merely restates the congressional policy set out in the Rules of Decision Act.[176] With respect to federal questions, however, Congress has not expressed a similar policy decision that the standard of amenability to jurisdiction should be more restrictive than that provided in the Fifth Amendment, but has left the constitutional standard in place. Indeed, even in those statutes in which Congress has provided for nationwide service, it has not articulated explicitly any policy decision with respect to amenability. Thus, the only relevant congressional policy is the broad policy of the REA, that Court-promulgated procedural rules must not "abridge, enlarge or modify any substantive right."[177] As amenability to jurisdiction is substantive within the meaning of that Act, it may not be affected by a rule of procedure.

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173. *Id.* at 1170-71.

174. It is true that a challenge may be made to the sufficiency of the service, and if the required means is personal delivery, substituted service will not do. But the issue in such a challenge is only whether the service was properly effected in accordance with the rule's requirement. The issue is not whether the notice was adequate. The latter issue is determined by reference to the Due Process Clause, not by reference to the requirements of the rule.

175. *See* Kelleher, *supra* note 1, at 113-14.

176. *See supra* text accompanying notes 104-11.

177. 28 U.S.C. § 2072(b) (1994).

C. Whether the Matter Is One Traditionally in the Domain of the States

The presumption under the REA is that Congress did not intend to delegate to the Court authority to preempt state substantive law by procedural rules.[178] That presumption is buttressed by the Rules of Decision Act. Thus, as stated above, the incorporation of state amenability standards is appropriate in cases governed by substantive state law. In actions arising under federal law, however, there is no such concern with the displacement of state law, as there is no state law to displace. Rather, where Congress has not provided a specific amenability standard, in the absence of congressional regulation, the sole applicable law is the Fifth Amendment, which provides a national contacts standard. It already has been demonstrated that standard is substantive, and thus it should not be displaced by a rule of procedure.

D. The Trans-Substantive Nature of the Rule

One purpose of the REA was to provide uniform, general rules of civil procedure for federal courts, which Congress contemplated ordinarily would be trans-substantive—that is, that the rules would not vary with the substantive nature of the action.[179] With respect to amenability standards, however, there are strong policy reasons, influenced by constitutional principles, for differing standards in federal question and diversity cases.[180] If Congress were make no legislative provision, the nationwide contacts requirement of the Fifth Amendment would apply to cases in federal courts. In the Rules of Decision Act, Congress provided that state substantive law, including Fourteenth Amendment amenability standard, applies in diversity cases. Rule 4(k) would not be problematic if it simply were to incorporate these constitutional and statutory standards—that is, if the rule simply provided that the amenability standard in federal question cases is the national contacts test of the Fifth Amendment, and the Fourteenth Amendment state contacts standard for diversity cases. The rule, however, does not stop there. Rather, it distinguishes among actions under federal law based on whether the defendants would be subject to the personal jurisdiction of courts of general jurisdiction in any of the states. This distinction

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178. *See* Kelleher, *supra* note 1, at 114-15. Because of the substantive rights limitation under the REA, operating, in effect, as a rule of construction, the "'Rules should be read with sensitivity to important state interests and regulatory policies.'" *Id.* at 115 (quoting Gasperini v. Center for Humanities, Inc., 518 U.S. 415, 428 n.7 (1996)).

179. *See* Kelleher, *supra* note 1, at 115-17; *see also* Carrington, *supra* note 52, at 303-04 (arguing that the delegation of authority to promulgate "general" rules of procedure should be presumed to mean trans-substantive rules, citing the recent merger of law and equity as support, and the fact that the drafters were aware of the costs of differentiated procedure in England); Subrin, *Federal Rules*, *supra* note 6, at 2005-06 (arguing that in the political and social climate of the time, it would have been difficult to persuade Congress to confer on the Court the power to promulgate non-trans-substantive procedural rules, because of the potential for manipulation to favor particular interests). *But see* Burbank, *supra* note 50, at 1029-36 (arguing that there is no support in the legislative history for Professor Carrington's contention as to the meaning of "general").

180. *See supra* text accompanying notes 115-17.

among federal question cases based on the nature of the defendants' contacts with the various states is unjustified, and contrary to the basic requirement of uniformity trans-substantivity. Congress has not expressed an intent to limit the jurisdiction of federal courts in such cases, and such a policy should not be established by a rule of procedure.

E. The Implication of Policies Extrinsic to the Business of the Courts

The prospective formulation of a rule governing amenability to jurisdiction involves policy choices that are "extrinsic to the business of the courts,"[181] and more appropriately left to Congress. Of course, no rule or statute can allow a court to assert jurisdiction over a defendant in violation of the Constitution, but Congress, through statute, could limit the ability of the courts to assert personal jurisdiction over defendants, thus providing protections to defendants beyond those of the Fifth Amendment. Such additional protection may not be afforded by a Court-promulgated rule, however. Some of the policy considerations involved in the formulation of such a rule could be said to be procedural, such as concerns with the fairness and convenience to the defendant, the plaintiff, and to witnesses, and concerns with the allocation of court resources and efficiency. Other policy considerations, however, are more substantive, such as considerations of the duties of the court to render, and the rights of the parties to receive, judgments. Other substantive considerations include the impact that assertions of jurisdiction over aliens may have on the sovereign interests of other nations, and on the federal government's foreign relations policy. These decisions are appropriately dealt with by legislation passed by both Houses and presented to the President.[182]

F. The Importance of the Matter to the Orderly Functioning of the Courts

Amenability to jurisdiction is obviously of the utmost importance to the orderly functioning of the courts, as without jurisdiction the court has no authority to act. Thus, even in the absence of any prospective rule governing personal jurisdiction, a court would find it necessary to rule on the issue in order to function efficiently, which is a characteristic of a procedural matter. However, the limits on a court's ability to assert jurisdiction are determined by reference to constitutional standards. Thus, the court need not create its own amenability standard, other than interpreting the Constitution. As noted above, the constitutional regulation removes the amenability issue from the scope of procedural matters subject to prospective regulation by Court-promulgated rule.

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181. H.R. REP. NO. 99-422, at 22 (1985).

182. *See* Burbank, *supra* note 27, at 1486; *cf.* Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 115 (1987) (noting that the courts should exercise "'[g]reat care and reserve'" "'when extending our notions of personal jurisdiction into the international field'") (alteration added) (quoting United States v. First Nat'l City Bank, 379 U.S. 378, 404 (1965) (Harlan, J., dissenting)); Born, *supra* note 100.

V. CONCLUSION

While the means and territorial reach of service of process properly may be governed by the Federal Rules of Civil Procedure, the analysis above shows that amenability to jurisdiction is a substantive matter beyond the scope of the Court's authority under the Rules Enabling Act. As amended in 1993, Rule 4(k)(1) provides that service is effective to establish personal jurisdiction over a defendant "who could be subjected to the jurisdiction of a court of general jurisdiction" in the forum state.[183] This provision purports to govern amenability to jurisdiction in both federal question cases and diversity cases. Amenability to jurisdiction in diversity cases is governed by the Rules of Decision Act, which mandates that federal courts apply state law in diversity cases, including Fourteenth Amendment standards. Thus, with respect to diversity cases, Rule 4(k)(1) is in accord with the governing standard. Insofar as it purports to govern federal question cases, however, it is invalid. The RDA does not apply to actions under federal law, and thus the only governing standard is the Fifth Amendment, which permits aggregation of national contacts. If Rule 4(k)(1) were applied in federal question cases, it would afford defendants greater protection than they have under that standard, and would impermissibly affect substantive rights in violation of the Rules Enabling Act. Rule 4(k)(2), however, is not as problematic, insofar as it incorporates the appropriate constitutional standard. However, Rule 4(k)(2) is limited in application to a specific class of federal actions, in which the defendant is not subject to jurisdiction in a state court. Thus, that provision likely is also invalid, if the limiting language could not be severed, and if the provision were read as applying only to the specified federal actions, to excluding the application of Fifth Amendment standards in all others.[184]

The Committee Notes suggest that if Congress were to have disapproved Rule 4(k)(2), it should have permitted the remainder of the rule to become law.[185] These notes could be considered evidence of the Committee's intent to have Rule 4(k)(2) severed from the remainder of the rule were it adjudged invalid in subsequent litigation. However, as shown above, the problematic provision is not just Rule 4(k)(2). Rather, Rule 4(k)(1) also is problematic for extending to defendants in most federal actions greater protections from assertions of jurisdiction than they would have under federal law or the Constitution. That provision contains the substance of the bulge rule, which the Committee certainly did not envisage would be invalidated.[186]

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183. FED. R. CIV. P. 4(k)(1)(A).

184. Ironically, if Rule 4(k)(2) applied to all federal questions, as originally drafted, *see* Carrington, *supra* note 144, at 754-59, it would be valid, as it would simply be an articulation of the governing constitutional standard.

185. *See supra* text accompanying note 147.

186. The jurisdictional provision of Rule 4(k)(1)(B), which includes the substance of the former bulge rule, is itself problematic. That provision governs cases in diversity, providing that service effects jurisdiction, applying the Fifth Amendment standard of amenability. As a matter of policy, the rule is defensible, for it promotes judicial efficiency, by permitting the federal court to assert jurisdiction over persons who do not have sufficient contacts with the forum state, but who are important to the case. While Congress has constitutional authority to provide the standard for amenability to jurisdiction, as it has done for diversity cases in the

The only real solution is the one proposed at the outset. When the amendments to the rule originally were drafted, Professor Carrington, then the Reporter for the Advisory Committee, recommended that Congress enact legislation providing for a national amenability standard.[187] It is unfortunate that this recommendation did not make its way to Congress. The rulemakers should remedy that error, by recommending the repeal of Rule 4(k) in its entirety, by redrafting the rule to govern only service of process, and by recommending to Congress that it enact a uniform federal amenability provision for all actions arising under federal law. If Congress does not do so, courts will be left to determine amenability issues as a matter of interstitial federal common law, in a way that "implements the federal Constitution and statutes, and is conditioned by them,"[188] much as courts often are required to determine limitations periods.[189] Such an approach might be "unsettling,"[190] as Professor Carrington suggests, but it is even more unsettling to have the Court and the rulemakers ignore the limits of the delegation in the Rules Enabling Act.

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general provision of the Rules Decision Act, such a rule is beyond the scope of Court rulemaking authority in the REA.

187. *See supra* text accompanying notes 142-44.

188. D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447, 472 (1942) (Jackson, J., concurring).

189. *See supra* text accompanying note 76.

190. Carrington, *supra* note 144, at 744.