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Taking Substantive Rights (in the Rules Enabling Act) More Seriously

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TAKING "SUBSTANTIVE RIGHTS" (IN THE RULES ENABLING ACT) MORE SERIOUSLY†

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We were all brought up on sophisticated talk about the fluidity of the line between substance and procedure. But the realization that the terms carry no monolithic meaning at once appropriate to all the contexts in which courts have seen fit to employ them need not imply that they can have no meaning at all. And they are the terms the Enabling Act uses.

—John Hart Ely[1]

INTRODUCTION

Conventional wisdom says that the Rules Enabling Act's (REA or Act)[2] proscription against Rules[3] affecting substantive rights is a dead letter. Commentators on the rulemaking process are fond of pointing out that the Court has never found a Rule invalid for impermissibly affecting a substantive right,[4] and that the Court, which puts its imprimatur on the Rules by transmitting them to Congress, rubberstamp though it may be, is unlikely ever to do so.[5] But conventional wisdom may be mistaken.

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1 John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 724 (1974) (citation omitted).

2 28 U.S.C. § 2072 (1994).

3 A reference to a Rule is a reference to a Federal Rule of Civil Procedure or other rule promulgated pursuant to the Rules Enabling Act.

4 *See, e.g.*, Thomas D. Rowe, Jr., *Not Bad for Government Work: Does Anyone Else Think the Supreme Court is Doing a Halfway Decent Job in its* Erie-Hanna *Jurisprudence?*, 73 NOTRE DAME L. REV. 963, 978 (1998); Paul D. Carrington & Derek P. Apanovitch, *The Constitutional Limits of Judicial Rulemaking: The Illegitimacy of Mass-Tort Settlements Negotiated Under Federal Rule 23*, 39 ARIZ. L. REV. 461, 474 & n.78 (1997); Ralph U. Whitten, *Developments in the Erie Doctrine: 1991*, 40 AM. J. COMP. L. 967, 970 (1992); Stephen B. Burbank, *Hold the Corks: A Comment on Paul Carrington's "Substance" and "Procedure" in the Rules Enabling Act*, 1989 DUKE L.J. 1012, 1041 (1989).

5 *See* Stephen B. Burbank, *Sanctions in the Proposed Amendments to the Federal Rules of Civil Procedure: Some Questions About Power*, 11 HOFSTRA L. REV. 997, 1006–07 (1983) ("As long as *Sibbach v. Wilson & Co.* remains law and the Court that promulgates Federal Rules and amendments has the final word on their validity, disputations re-

In several recent cases,[6] the Court has signaled its willingness to take the substantive rights limitation seriously, treating it as a rule of construction in reading Rules narrowly, so as not to overstep the bounds of the Court's rulemaking authority. This willingness comes none too soon, as the issue has increased in practical importance in the last several years. The Court's own rulemaking process under the Rules Enabling Act has become increasingly politicized. Several highly publicized and controversial Rules have been promulgated, such as the recent amendments to the discovery provisions; equally controversial proposals, such as proposed amendments to the Rules governing class actions, have been the subject of much public debate. Quite naturally, the political debate has spilled over into Congress, which has responded to the political pressures by circumventing the rulemaking process and enacting statutes containing procedural provisions favoring certain interest groups.

A central thesis of this Article is that, regardless of whether Congress' increasing role in determining procedural Rules is viewed as positive or negative, it has profound consequences for the allocation of procedural rulemaking authority between Congress and the Court. The broad outlines of that allocation of authority are set out in the rather Delphic language of the Rules Enabling Act, in which Congress allocates to the Court the "power to prescribe general rules of practice and procedure,"[7] subject to the limitation that "such rules shall not abridge, enlarge or modify any substantive right."[8] Despite the passage of more than six decades, neither the Court nor the commentators have managed to produce a workable definition of the "substantive rights" limitation.

It may appear, as one commentator has lamented, that the question of whether a Rule is "substantive" or "procedural" for purposes of the Rules Enabling Act is "inherently unresolvable."[9] But "they are the terms the Enabling Act uses,"[10] and the Court, ultimately, must determine what they mean. This Article is an attempt to aid in that determination. In doing so, the Article emphasizes that the terms of

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garding validity and invalidity are likely to be of purely academic interest . . . .") (citations omitted).

6 *See, e.g.*, Kamen v. Kemper Fin. Serv., 500 U.S. 90 (1991); *see also* Amchem Products, Inc. v. Windsor, 117 S. Ct. 2231, 2248 (1997); Gasperini v. Center for Humanities, Inc., 116 S. Ct. 2211, 2219 n.7 (1996);.

7 Rules Enabling Act, 28 U.S.C. § 2072(a) (1994).

8 28 U.S.C. § 2072(b) (1994).

9 Linda S. Mullenix, *The Constitutionality of the Proposed Rule 23 Class Action Amendments*, 39 ARIZ. L. REV. 615, 618 (1997).

10 Ely, *supra* note 1, at 724.

the Rules Enabling Act cannot be viewed in isolation, but must be interpreted in the context of all legislation governing procedure. The legal effect of the increasing reach of Congress' procedural legislation, whether a deliberate legislative decision or not, is to expand the scope of matters that should be considered "substantive" within the meaning of the REA and, concomitantly, to narrow the scope of the Court's rulemaking authority. Thus the Court, and Congress, must pay closer attention to, and be more conscious of, the consequences of Congress' increased role in procedural rulemaking.

After a brief look in Part I at the politicization of federal procedure, Part II of this Article examines the constitutional allocation of authority over procedure in federal courts. A careful examination of interrelated separation of powers and federalism issues is necessary to provide the constitutional backdrop against which the allocation of authority in the Rules Enabling Act must be viewed. Congress and the judicial branch share much of the authority to regulate procedure, with the courts' procedural common law pronouncements generally subject to congressional override, other than in a core area necessary to maintain an independent judiciary. There also are federalism limits on the power of both Congress and the judicial branch to displace state law with federal procedure, with separation of powers concerns requiring that Congress play the primary role in determining when state law will be displaced. In Part III, this Article examines the allocation of rulemaking authority under the Rules Enabling Act against the constitutional backdrop, and explores the meaning of the restriction on Rules affecting substantive rights. In that context, the consequences of congressional procedural enactments on the current allocation of rulemaking power under the REA, and on the validity of Rules promulgated under that Act, are explored. Increasing congressional involvement in enacting procedural provisions impacts on the scope of "substantive rights" referred to in the REA and, therefore, on the scope of the Court's authority to promulgate Rules of procedure. As Congress broadens its statutory reach to matters historically considered within the purview of the Court, it necessarily narrows the area in which the Court may exercise its rulemaking authority. The Article concludes, in Part IV, by proposing a new multifactor analysis for the Court and the Advisory Committee to use when evaluating the validity, or permissible scope, of Rules promulgated under the REA. Those factors take into account the sensitive separation of powers and federalism concerns and include the extent to which Congress has regulated in the procedural area, as well as the extent to which the matter is one traditionally left to regulation by the states.

I. BACKGROUND—THE POLITICIZATION OF PROCEDURE

Procedure and the rulemaking process have had a high profile in recent years. Several significant amendments to the Federal Rules of Civil Procedure have been made, many amid much controversy. The level of public debate over the mandatory disclosure provisions and the amendments to the sanctions provisions of Rule 11 in 1993 was unprecedented.[11] Before the Court's recent decision in *Amchem Products v. Windsor*,[12] proposals to amend Rule 23's class action provisions generated vigorous debate, much of it centered on the validity of those proposals under the Rules Enabling Act and the Constitution.[13] But some of the most significant recent changes to procedure in federal court are not a product of the rulemaking process set out in the REA, and are not even reflected in the Rules themselves. Rather, the changes originated in Congress, in the form of the Private Securities Litigation Reform Act of 1995 (PSLRA).[14]

The PSLRA, which has its origin in the Republican "Contract With America," was a direct result of lobbying efforts by accounting

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11 *See* Laurens Walker, *A Comprehensive Reform For Federal Civil Rulemaking*, 61 GEO. WASH. L. REV. 455 (1993).

12 117 S. Ct. 2231 (1997).

13 *See, e.g.*, Symposium, *Rule 23: Class Actions at the Crossroads*, 39 ARIZ. L. REV. 406 (1997); George L. Priest, *Procedural Versus Substantive Controls of Mass Tort Class Actions*, 26 J. LEGAL STUD. 521 (1997). Much of the controversy concerned a proposed amendment to Rule 23(b)(4), which would have permitted class certification for the purposes of settlement only, "even though the requirements of subdivision (b)(3) might not be met," and thus overrule the Third Circuit's ruling in *Georgine v. Amchem Products, Inc.*, 83 F.3d 610, 626 (3d Cir. 1996), *rev'd sub nom., Amchem Products Inc. v. Windsor*, 117 S. Ct. 2231 (1997). *See* Proposed Amendment to Fed. R. Civ. P. 23(b); INS v. Yang, 117 S. Ct. 350, 352–59 (1996). That proposal, which was sent back to the Advisory Committee by the Standing Committee after the period for public comment, was not sent forward again by the Advisory Committee, in light of the Supreme Court's decision in *Amchem*. The issue has been referred by the Advisory Committee to its Mass Torts Working Group. *See* Report of the Advisory Committee on Civil Rules 41–42 (Dec. 8, 1997). For a more recent discussion of the *Amchem* case and its impact on the proposals to amend Rule 23, see Note, *The Rules Enabling Act and the Limits of Rule 23*, 111 HARV. L. REV. 2294, 2305–10 (1998).

14 Pub. L. No. 104–67, 109 Stat. 737 (1995). The Act became law on December 22, 1995, when the Senate overrode a presidential veto. 141 CONG. REC. S19,180 (daily ed. Dec. 22, 1995). The House had voted to override two days earlier. 141 CONG REC. H15,223–24 (daily ed. Dec. 20, 1995). The president's veto message can be found at 141 CONG. REC. H15,214–15 (daily ed. Dec. 20, 1995).

On the background to the Act, see generally, John W. Avery, *Securities Litigation Reform: The Long and Winding Road to the Private Securities Litigation Reform Act of 1995*, 51 BUS. LAW. 335 (1996); Joel Seligman, *The Private Securities Reform Act of 1995*, 38 ARIZ. L. REV. 717 (1996).

firms, securities firms, and the high-tech industry,[15] which perceived themselves as victimized by abusive securities lawsuits.[16] At its core is a "safe harbor" provision, which insulates issuers from liability for forward-looking statements when they are accompanied by "meaningful cautionary statements."[17] The PSLRA also replaces joint and several liability with proportional liability[18] or imposes a new damages ceiling

15 *See* Avery, *supra* note 14, at 339–54; Richard M. Phillips & Gilbert C. Miller, *The Private Securities Litigation Reform Act of 1995: Rebalancing Litigation Risks and Rewards for Class Action Plaintiffs, Defendants and Lawyers*, 51 BUS. LAW. 1009, 1018–25 (1996); Richard H. Walker et al., *The New Securities Class Action: Federal Obstacles, State Detours*, 39 ARIZ. L. REV. 641 (1997).

16 Whether and to what extent such abuse occurred was hotly debated. At a Senate hearing on the issue, Subcommittee Chairman Dodd noted that "we found no agreement on whether there is in fact a problem." *Private Litigation Under the Federal Securities Laws: Hearings Before the Subcommittee on Securities of the Senate Committee on Banking, Housing, and Urban Affairs*, 103rd Cong., 1-3 (1993). *See also* Joel Seligman, *The Merits Do Matter: A Comment on Professor Grundfest's "Disimplying Private Rights of Action Under the Federal Securities Laws: The Commission's Authority,"* 108 HARV. L. REV. 438 (1994) (arguing that evidence was insufficient to justify increased burdens on securities litigation). *Compare* Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497 (1991) (reporting a study from which she concludes that the settlement value of litigation is not affected by its merits so much as by the nuisance value of the lawsuit once commenced).

17 The Private Securities Litigation Reform Act of 1995, § 102(c)(1). The PSLRA provides:

> [I]n any private action arising under this title that is based on an untrue statement of a material fact or omission of a material fact necessary to make the statement not misleading, a person . . . shall not be liable with respect to any forward-looking statement, whether written or oral, if and to the extent that -
>
> (A) the forward-looking statement is -
>
> (i) identified as a forward-looking statement, and is accompanied by meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those in the forward-looking statement . . . .

Id. This provision enacted both a new §27A to the Securities Act of 1933 (codified at 15 U.S.C. § 77z-2(c)), and a new §21E to the Securities Exchange Act of 1934 (codified at 15 U.S.C. §78u-5).

The safe-harbor provision has been highly criticized for giving issuers a license to commit fraud. *See, e.g., Veto Override Creates Safe Harbor for Fraud*, SEATTLE TIMES, Dec. 21, 1995, at B6 (describing the law as providing a "dispensation from truthfulness if the lies are armored with boilerplate warnings and cautions"). *Compare* John C. Coffee, *Safe Harbor for Forward-Looking Statements*, N.Y.L.J., Nov. 30, 1995, at 5 (arguing that such assessments are "overstatement"); *see also* Phillips & Miller, *supra* note 15.

18 *See* 15 U.S.C.A. § 78u-4(g)(2) (West 1997) (amending Securities Exchange Act of 1934, § 21D).

in certain cases,[19] and abolishes civil securities fraud as a predicate act for RICO violations.[20]

In addition, and more significantly for the rulemaking process, the PSLRA contains a set of procedural hurdles to filing and maintaining securities lawsuits in federal courts,[21] intended "to tilt the balance in securities litigation in favor of the defendant at virtually every juncture."[22] Each of the procedural provisions in the PSLRA concerns matters that otherwise are governed by the Federal Rules of Civil Procedure. Specifically, the PSLRA supersedes Rule 9 by providing a stricter pleading standard for private securities complaints;[23] contains a provision requiring specific findings as to whether Rule 11 has been

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19 *See* 15 U.S.C.A. § 78u-4(e) (West 1997).

20 *See* 18 U.S.C.A. § 1964(c) (West Supp. 1998) (Racketeering Influenced and Corrupt Organizations Act).

21 Dubbed the "law of unintended consequences" by Joseph Grundfest, the PSLRA may have simply driven many cases out of federal court and into state courts, at least for the first year after its enactment. *See* Walker et al., *supra* note 15; *Panelists Dispute Reform Law's Impact on Private Class Securities Fraud Litigation*, 29 Sec. Reg. & L. Rep. (BNA) 1134 (1997); Shelene Clark, *One Year's Experience With Reform Reveals Law May Have Unintended Results*, 29 Sec. Reg. & L. Rep. (BNA) 386, 386–88 (1997) (citing study by Joseph A. Grundfest, which can be located on the Internet at <http://securities.stanford.edu>). That trend showed some signs of reversing in 1997, with "an increase in the filings in federal court and a slow down in state court." *Congress Targets "Loophole" in 1995 Act Barring Vexatious Suits*, 29 Sec. Reg. & L. Rep. (BNA) 1211, 1212 (1997) (quoting Professor Grundfest). *See also SEC Finds Number of Class Actions Rose in 1997 to Pre-Reform Level*, 30 Sec. Reg. & L. Rep. (BNA) 275 (1998). Nevertheless, controversial bills recently introduced in the House would preempt state law, and give federal courts exclusive jurisdiction over private securities class actions involving nationally traded securities. *See* Securities Litigation Uniform Standards Act of 1997, H.R. 1689, 105th Cong. Another bill would require all securities fraud suits, not just class actions, involving nationally traded securities, to be commenced in federal court. Securities Litigation Improvement Act of 1997, H.R. 1653, 105th Cong. (1998). A bill similar to but with a slightly narrower scope than H.R. 1689 was introduced in the Senate on October 7, 1997. *See* Securities Litigation Uniform Standards Act of 1998, S. 1260, 105th Cong.; *see also Gramm, Domenici, Dodd Introduce Bill to Federalize Securities Class Actions*, 29 Sec. Reg. & L. Rep. (BNA) 1401 (1997). The Senate passed S. 1260 on May 13, 1998. On July 22, 1998, it was amended on the House floor by inserting the text of H. 1689, passed by the House, and sent to the Senate for concurrence. The Senate did not concur, and the bill was sent to Conference Committee on September 16, 1998.

22 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).

23 *See* 15 U.S.C.A. § 78u-4(b)(1), (2) (West 1997) (amending Securities Exchange Act of 1934, Ch. 404, 48 Stat. 881); *see infra* notes 43–44 and accompanying text; *see also* Coffee, *supra* note 22, at 977–85 (circuits had been split on pleading requirements normally required by Rule 9).

satisfied and providing mandatory sanctions for violations;[24] provides for a stay of discovery while a dispositive motion is pending, obviating the need for a motion for a protective order under Rule 26(c);[25] and contains provisions reforming securities class actions, including a provision under which the court will normally appoint as lead plaintiff the plaintiff with the greatest financial interest, a much different standard from that provided in Rule 23.[26] Much of the extensive commentary on the PSLRA is devoted to examining its impact on securities law and litigation.[27] But because Congress has bypassed the normal rulemaking process to create a subset of substance-specific procedural rules, the PSLRA also has broad implications for the allocation of authority in civil rulemaking.[28]

That Congress responded to lobbying by interest groups and took on the job of regulating procedure in securities lawsuits came as no surprise to observers of Rules reform, many of whom for years have noted, with varying levels of alarm, the increasing politicization of procedural rulemaking.[29] When Congress gave the Supreme Court su-

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24 *See* 15 U.S.C.A. § 77z-1(c)(2) (amending Securities Exchange Act of 1934 § 27(c)); 15 U.S.C.A. § 78u-4(c)(2) (amending Securities Exchange Act of 1934 § 27(b)). Note that the revisions to Rule 11 in 1993 were intended to get rid of mandatory monetary sanctions.

25 *See* 15 U.S.C.A. § 77z-1(a)(3) (adding § 27(b) to the Securities Exchange Act of 1933); 15 U.S.C.A. 78u-4(b)(3)(B) (adding § 21(D)(b)(3) to the Securities Exchange Act of 1934).

26 *See* 15 U.S.C.A. § 77z-1(a)(3)(B) (amending Securities Exchange Act of 1934 § 27(a)); 15 U.S.C.A. § 78u-4(a)(3) (amending Securities Exchange Act of 1934 § 21D). Rule 23 provides, *inter alia,* that the representative parties must "fairly and adequately protect the interests of the class."

27 *See, e.g., Symposium on the Private Securities Litigation Reform Act of 1995,* 51 BUS. LAW. 975 (1996).

28 The significance of the PSLRA for the rulemaking process has not gone unnoticed. *See e.g.* John Leubsdorf, *Class Actions at the Cloverleaf,* 39 ARIZ. L. REV. 453 (1997). At the 1996 AALS convention's Civil Procedure meeting, Professor Stephen Burbank warned that the Act should sound a "fire alarm" for those involved in the procedure-making process. Stephen B. Burbank, *Procedure and Power,* 46 J. LEGAL EDUC. 513, 516 (1996).

29 *See, e.g.,* 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 (1989); Jack H. Friedenthal, *The Rulemaking Power of the Supreme Court: A Contemporary Crisis,* 27 STAN. L. REV. 673 (1975); Richard L. Marcus, *Of Babies and Bathwater: The Prospects for Procedural Progress,* 59 BROOK. L. REV. 761 (1993); Linda S. Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking,* 69 N.C. L. REV. 795 (1991). Professor Burbank sees Congress' increasing role in the rulemaking process as a natural and predictable reaction by Congress to a procedural "power grab by the judiciary," which for years has failed to respect the allocation of power in the Rules Enabling Act. Burbank, *supra* note 28, at 513.

pervisory rulemaking authority in the 1934 Rules Enabling Act,[30] it was generally thought that a neutral set of uniform Federal Rules of procedure could best be drafted by the judiciary, as the judiciary was less subject to political pressures than the legislature. In addition, Congress was thought not to have sufficient experience or interest in such an arcane and technical matter.[31] The Court was to take care of the technical matter of procedure, and Congress could focus its attention on the more important policy issues of substantive law.[32]

This allocation of authority was set out in the REA: the Supreme Court was delegated authority "to prescribe by general rules . . . the practice and procedure in civil actions,"[33] subject to the proviso that "[s]aid rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant."[34] For the first thirty-five years, Congress stayed out of the rulemaking process and acquiesced in all the proposed Rules transmitted to it by the Court.[35] But in 1973, when the Advisory Committee and Court proposed Rules of evidence defining privileges, Congress stepped in to rewrite them, out of concern both that the proposed Rules were too substantive to be promulgated by the Court[36] and that the Rules, which displaced state laws on privilege, violated the federalism principles set out in *Erie*.[37] From that point, Congress began to increase its oversight of the Rules amending process by disapproving, delaying, or rewriting proposed amendments to the Rules.[38]

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30 28 U.S.C. §§ 2073–74 (1994). *See also* 28 U.S.C. § 331 (1994) (establishing the Judicial Conference).

31 *See* Roscoe Pound, *The Rule-Making Power of the Courts*, 12 A.B.A. J. 599, 601–03 (1926).

32 *See generally* Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982).

33 Act of June 19, 1934, Pub. L. No. 73-415, 48 Stat. 1064.

34 *Id.*

35 *See generally* 4 CHARLES ALAN WRIGHT & ARTHUR MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 1001 (2d ed. 1987).

36 *See* Paul D. Carrington, *Learning From the Rule 26 Brouhaha: Our Courts Need Real Friends*, 156 F.R.D. 295 (1994).

37 *See, e.g.*, Arthur J. Goldberg, *The Supreme Court, Congress, and Rules of Evidence*, 5 SETON HALL L. REV. 667 (1974).

38 The statutes by which Congress had, to that point, affected Rules of Evidence and of Civil Procedure are listed in a 1985 House Committee Report accompanying a precursor bill to the 1988 statute amending the Rules Enabling Act. *See* H.R. REP. No. 99-422, at 8-9 n.20 (1985) (technical and typographical errors in the report were corrected at 132 CONG. REC. E177–202 (daily ed. Feb. 3, 1986)). For a thorough analysis of the statutes and their implications for the rulemaking process, see Karen Nelson Moore, *The Supreme Court's Role in Interpreting the Federal Rules of Civil Procedure*, 44 HASTINGS L.J. 1039, 1053-61 (1993) (noting that "Congress' involvement in the pro-

In response to growing concerns that many of the Rules' amendments emanating from the Advisory Committee were too substantive to comply with the requirement that Rules not affect substantive rights, and concerns that the rulemaking process was too secretive and undemocratic,[39] Congress revised the 1934 Rules Enabling Act.[40] The 1988 amendments to the Act provided for greater public access to the ruminations of the Judicial Conference Rules committees, and greater congressional oversight of the rulemaking process. A few years later, the Civil Justice Reform Act of 1990 (CJRA)[41] was enacted, requiring federal district courts, after consultation with local advisory groups, to adopt procedural plans to reduce expense and delay in their litigation dockets, despite objections from the Judicial Conference that the issue should be dealt with by the rulemaking process under the REA.[42]

The intense lobbying efforts in Congress against the 1993 amendments to the discovery provisions, particularly the mandatory disclosure requirements of Rule 26, demonstrated the extent to which the rulemaking process was politicized by these events.[43] The new provisions generated a level of debate unprecedented for proposed Rules amendments as they worked their way through the Advisory Committee and to the Supreme Court for transmission to Congress.[44] Even the Supreme Court got caught up in the debate. In transmitting the proposed Rules to Congress, the Court disavowed having made any

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cess of amending Rules has been troubling," because of the disregard for the rulemaking process established by the Rules Enabling Act and, in at least one instance involving an amendment to Rule 35, was "a political response to the pressures of a discrete interest group rather than a carefully crafted response to procedural inadequacies of the prior Rule." *Id.* at 1057). *See also* Carrington, *supra* note 36, at 300 (noting in addition that "[i]n 1983, a proposal to amend Rule 4 was modified by Congress as a result of lobbying efforts of the National Association of Process Servers").

39 *See, e.g.*, Carrington, *supra* note 36, at 300; Charles Gardner Geyh, *Paradise Lost, Paradigm Found: Redefining the Judiciary's Imperiled Role in Congress*, 71 N.Y.U. L. REV. 1165 (1996).

40 28 U.S.C. §§ 2073–74 (1988).

41 28 U.S.C. §§ 471–82 (1994).

42 *See generally* Linda S. Mullenix, *The Counter-Reformation in Procedural Justice*, 77 MINN. L. REV. 375 (1992); Carl Tobias, *Civil Justice Reform Roadmap*, 142 F.R.D. 507 (1992); Carl Tobias, *Civil Justice Reform and the Balkanization of Federal Civil Procedure*, 24 ARIZ. ST. L.J. 1393 (1992); Edwin J. Wesely, *The Civil Justice Reform Act; The Rules Enabling Act; The Amended Rules of Federal Procedure; CJRA Plans; Rule 83—What Trumps What?*, 154 F.R.D. 563 (1994). For an argument that the CJRA did not authorize local rules inconsistent with the FRCP, see Lauren K. Robel, *Fractured Procedure: The Civil Justice Reform Act of 1990*, 46 STAN. L. REV. 1447 (1994).

43 *See generally* Carrington, *supra* note 36; Mullenix, *supra* note 29.

44 *See* Carrington, *supra* note 36; Walker, *supra* note 11.

judgment as to their wisdom, stating that "[t]his transmittal does not necessarily indicate that the Court itself would have proposed these amendments in the form submitted."[45] And, in a highly unusual move, Justice Scalia, joined by Justices Thomas and Souter, vigorously dissented from the transmission of the Rules amendments, particularly the mandatory disclosure requirements, which he described as "potentially disastrous."[46] Justice Scalia's criticisms became a rallying point for opponents of the new Rules who, having failed to dissuade the Judicial Conference and Court to abandon the amendments, turned their attention to Congress. There, naturally, political pressures proved far more effective.[47] A bill to eliminate the mandatory disclosure provisions was quickly passed by the House, and failed to be enacted into law only because the Senate adjourned before an agreement could be reached about what to do with the related presumptive limits on discovery.[48] The brouhaha over the discovery provisions had

45 Order of April 22, 1993, Amendments to the Federal Rules of Civil Procedure, *reprinted in* 146 F.R.D. 402, 403 (1993) (letter from Chief Justice William H. Rehnquist to Speaker of the House Thomas S. Foley, Apr. 22, 1993).

46 Order of April 22, 1993, Amendments to the Federal Rules of Civil Procedure, 507 U.S. 1091, 1099–1101 (1993) (Scalia, J., with Thomas and Souter, JJ., dissenting) ("The proposed radical reforms to the discovery process are potentially disastrous and certainly premature—particularly the imposition on litigants of a continuing duty to disclose to opposing counsel, without awaiting any request, various information 'relevant to disputed facts alleged with particularity.'")

47 Professor Mullenix predicted this turn of events several years earlier:

> [T]he inevitable politicization of the Civil Rules Advisory Committee foreshadows the decline of that body's role in procedural rule-drafting. The partisan rule reformers will realize quickly that the Advisory Committee, by its nature, is an ineffectual forum in which to lobby for rule reform. Not only is the Advisory Committee painfully slow deliberative and dull, but its Article III judges have little incentive to bend to political will. Hence, the partisan rule reformers eventually will abandon the Advisory Committee and take their causes to other rulemaking bodies, namely the congressional committees with federal rulemaking oversight.

Mullenix, *supra* note 29, at 801–02 (footnotes omitted). *See also* Paul Carrington, *The New Order in Judicial Rulemaking*, 75 JUDICATURE 161, 165–66 (1991) (predicting as the Reporter for the Advisory Committee that "[i]f Congress is responsive, as is its wont, to every faction in the United States that detects a possible stake in a proposed amendment to the rules, the rulemaking tradition is doomed to disintegrate"); Walker, *supra* note 11, at 460–63.

48 The Civil Rules Amendment Act of 1993, H.R. 2814, 103rd Cong., which would have deleted the mandatory disclosure provisions of Rule 26(a)(1), was passed by the House and sent to the Senate in November of 1993. However, that Rule was part of a package of discovery amendments, which also included caps on the number of interrogatories and depositions. *See* Fed. R. Civ. P. 30(a)2(A); 31(a)(2)(A); 33(a). These caps were intended to encourage the use of mandatory disclosure. While lobbyists

barely died down when Congress once again entered the rulemaking arena, by amending the evidence Rules to provide for limits on the admissibility of evidence concerning the history of victims of sexual assault.[49]

While the politicization of procedure may not be desirable, it certainly was predictable. As we have seen, when the Court was given authority to promulgate Rules of procedure, it was subject to the proviso that the Rules not modify substantive rights, which were to be affected only by legislative action. But the line between substance and procedure is fluid, and observers of the Rules became increasingly

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and senators generally agreed that Rule 26(a)(1) should be deleted, they could not agree on what to do with the caps on formal discovery, or on whether Congress should simply delay the provisions to give itself more time to consider the issue. The bill was delayed and did not come to a vote before the Senate recessed. *See* Leslie M. Kelleher, *The December 1993 Amendments to the Federal Rules of Civil Procedure—A Critical Analysis*, 12 TOURO L. REV. 7, 9–10 (1995); Michael Wagner, *Too Much, Too Costly, Too Soon? The Automatic Disclosure Amendments to the Federal Rules of Civil Procedure 26*, 29 TORT & INS. L.J. 468 (1994); Carrington, *supra* note 36, at 308–10.

After the 1993 amendments came into effect, enthusiasm for the fight against the mandatory disclosure provisions waned, but a bill was introduced to repeal the equally controversial amendments to Rule 11. *See* Attorney Accountability Act of 1995, H.R. 988, 104th Cong. The bill did not become law. For a description of this and related bills, see Edward D. Cavanagh, *Rule 11 of the Federal Rules of Civil Procedure: The Case Against Turning Back the Clock*, 162 F.R.D. 383 (1995); Carl Tobias, *Common Sense and Other Legal Reforms*, 48 VAND. L. REV. 699 (1995); Carl Tobias, *Why Congress Should Reject Revision of Rule 11*, 160 F.R.D. 275 (1995). As already noted, mandatory sanctions are imposed in some securities suits under the PSLRA. *See* 15 U.S.C.A. §§ 78u-4(c)(1), (2) (West Supp. 1996); *see also* Simon DeBartolo Group L.P. v. Richard E. Jacobs Group, Inc., 985 F. Supp. 427 (S.D.N.Y. 1997). A more recent bill, the Prisoners Frivolous Lawsuit Prevention Act of 1997, H.R. 1492, 105th Cong., is pending. It would require the imposition of sanctions on parties and attorneys who violate Rule 11(b) in prisoner suits, and would eliminate the Rule 11(c)(2) limits on sanctions in such suits. On another front, the court reporters' lobby has managed to have a bill introduced into the Senate which, if passed, would repeal the 1993 amendments to Rule 30 and restore the preference for traditional stenographic, as opposed to videotaped, depositions. *See* S. 1352, 105th Cong. (1997).

On June 19, 1998, the Standing Committee on Rules of Practice and Procedure approved for publication and public comment amendments to the mandatory disclosure provisions proposed by the Advisory Committee. Rule 26(a)(1) would be amended to preclude local opting out of initial disclosure, but limit the disclosure of witnesses and documents to supporting information. The proposed amendments also would exempt certain types of proceedings from disclosure and permit a party who feels disclosure is inappropriate in the circumstances of the action to object to the court. *See* Proposed Amendments to Rule 26, *available at* <http://www.uscourts.gov>.

49 *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103–322, § 320935(a), 108 Stat. 1796, 2135–37 (amending Federal Rules of Evidence by adding Rules 413–15).

likely to perceive their substantive impact.[50] Pleading requirements are a good example. Pleading is quintessentially procedural; as one procedural scholar has said, "if [pleading requirements are] not procedure it is hard to know what is."[51] A primary goal of uniform Federal Rules was to "end the battles over pleading that had characterized much of the common law period and . . . continued under the Field Codes."[52] Indeed, the 1934 Rules Enabling Act specifically mentioned writs and pleading in its grant of authority to the Court.[53] But the impact of relaxed pleading requirements on substantive outcomes is apparent. The Supreme Court has held that state courts cannot apply strict local rules of pleading to "impose unnecessary burdens upon rights of recovery authorized by federal laws,"[54] and that lower federal courts cannot impose heightened particularity requirements in pleading to reduce the number of civil rights lawsuits.[55]

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50 Professor Carrington, at that time the Reporter to the Judicial Conference's Advisory Committee on Civil Rules, made the point as follows:

> Those few who observe judicial rulemaking are far more likely today to see social and economic consequences in what the Committee does than were earlier generations of observers. The substance-procedure line was never clear, and was never constant in its application to different contexts; but it also may be that its meaning has changed over the years, with more matters being perceived to be substantive than may once have been true.

Reporter, Memorandum to the Civil Rules Committee re: Questions About the Rulemaking Process (October 18, 1989), at 13–14, *quoted in* Mullenix, *supra* note 29, at 835–36.

51 CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS 291 (5th ed. 1994) (discussing *Brown v. Western Ry. of Ala.*, 338 U.S. 294 (1949) (holding that state court hearing a federal FELA claim could not apply strict state rule that complaints must be strongly construed against pleader, as to do so would impose a burden on the right to recovery provided by federal law)).

52 Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631, 648. *See generally* 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE CIVIL 2d §1202 (2d ed.1990) (discussing the differences between common law pleading, code pleading, and notice pleading).

53 *See* Act of June 19, 1934, Pub. L. No. 415, 48 Stat. 1064.

54 *Brown*, 338 U.S. at 298.

55 *See* Leatherman v. Tarrant County, 507 U.S. 163, 168 (1993) (rejecting a heightened pleading standard for "complaints alleging municipal liability under §1983," and noting that a heightened pleading standard is "[I]mpossible to square . . . with the liberal system of 'notice pleading' established by the plain language of Rule 8 and the ruling in *Conley v. Gibson* that Rule 8 meant what it said."). *But see* 1A MARTIN A. SCHWARTZ & JOHN E. KIRKLIN, SECTION 1983 LITIGATION: CLAIMS AND DEFENSES 21 (1997) (arguing that Leatherman left open the issue of whether a heightened pleading requirement could be imposed for § 1983 claims in which a qualified immunity defense is available, "on the ground that a factually detailed complaint is necessary to vindicate the official's immunity from suit"). On pleading requirements generally,

The importance of pleading requirements did not go unrecognized by repeat players in securities litigation. Prior to the passage of the PSLRA, a complaint was more difficult to defend in the Second Circuit than elsewhere against a motion to dismiss for failure to state a claim because of the Second Circuit's more stringent interpretation of Rule 9(b)'s requirement that fraud be plead with particularity.[56] Partisan rule reformers recognized the importance of a particularity requirement to the outcome of a case and bypassed the Advisory Committee completely, taking their proposals for procedural amendments directly to Congress. The strict pleading requirement of the PSLRA, which Congress intended to be even more stringent than the former Second Circuit standard,[57] is designed to favor defendants over plaintiffs in securities lawsuits, not to implement some carefully planned vision of the procedural system. It became one of the most hotly debated provisions of the PSLRA prior to its passage, and was one of the reasons cited by President Clinton in vetoing the legislation.[58]

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see Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433 (1986).

56 *Compare* Denny v. Barber, 576 F.2d 465 (2d Cir. 1978) (dismissing complaint for failing to comply with particularity requirements of Rule 9(b)) *with* Denny v. Carey, 72 F.R.D. 574 (E.D. Pa. 1976) (finding that similar complaint, involving same plaintiff represented by the same counsel, and naming the same accounting firm as a defendant, was sufficiently particular to withstand motion to dismiss). *See generally* Coffee, *supra* note 22, at 978–79; John F. Olson et al., *Pleading Reform, Plaintiff Qualification and Discovery Stays Under the Reform Act*, 51 BUS. LAW. 1101, 1108–09 (1996).

57 *See* Coffee, *supra* note 22, at 979–80 (noting that the Statement of Managers, which is the legislative history of the Conference Report, states that Congress desired a stricter rule than the Second Circuit's, but pointing out that the legislative history does not indicate what the new, stricter standard was intended to be). Several cases interpreting the PSLRA have rejected the former Second Circuit standard in favor of a more strict pleading requirement. *See, e.g.*, Friedberg v. Discreet Logic, Inc., 959 F. Supp. 42 (D. Mass. 1997); Norwood Venture Corp. v. Converse Inc., 959 F. Supp. 205 (S.D.N.Y. 1997). Other courts have continued to find sufficient a showing of "motive and opportunity" to defraud, or "circumstantial evidence of recklessness." *See, e.g., In re* Health Management, Inc., 970 F. Supp. 192 (E.D.N.Y. July 21, 1997); Shahzad v. Meyers, No. 95 Civ. 6196 (DAB), 1997 WL 47817 (S.D.N.Y. Feb. 6, 1997); Rehm v. Eagle Finance Corp., 954 F. Supp. 1246 (N.D. Ill. 1997). *See generally* Dennis J. Block & Jonathan M. Hoff, *Scienter Requirements Under Securities Litigation Reform*, N.Y.L.J., July 17, 1997, at 5 (analyzing cases). *See also* James Hamilton, *Securities Litigation Reform Act at Eighteen Months*, 1780 Fed. Sec. L. Rep. (CCH) ¶ 9,11 (Aug. 27, 1997).

58 In his veto message, the President indicated that while he found the pleading standard adopted in the Second Circuit acceptable, any stricter standard was not. *See* 141 Cong. Rec. H15, 214-15 (daily ed. Dec. 20, 1995). *See generally* Coffee, *supra* note 22, at 977–85.

The implications of congressional tinkering with procedure in securities cases extends far beyond securities law and litigation. The PSLRA is a clear illustration of the latest stage in the politicization of procedure. With the PSLRA, Congress has gone further than ever in providing procedural benefits to a particular group in order to vindicate the substantive goals of the Act.[59] As Congress and partisan lobbyists have discovered the usefulness of procedural provisions in effectuating substantive purposes, the hazy line between substance and procedure has been blurred further, and we should expect to see even more instances of statutory procedural provisions. This certainly defeats one of the purposes of the Rules Enabling Act, which was to "alleviate . . . the necessity of searching in two places, namely in the Acts of Congress and in the rules of the courts, for procedural prerequisites."[60] And it virtually eliminates any possibility of approaching a procedural system that is truly neutral. Whether a neutral procedural system even is possible is the subject of much debate,[61] but neutrality among litigants is more likely when judges, and not partisan lobbyists, determine the Rules of procedure.[62] Ominously, some commentators have warned that the increasing congressional role in regulating pro-

59 For other instances in which Congressional enactments have provided procedural advantages to particular groups, see generally Carl Tobias, *The Transformation of Trans-Substantivity*, 49 WASH. & LEE L. REV. 1501, 1502-04 (1992). On legislation concerning class actions, see Jack Greenburg, *Civil Rights Class Actions: Procedural Means of Obtaining Substance*, 39 ARIZ. L. REV. 575 (1997); see also Leubsdorf, *supra* note 28, at 454 ("We are witnessing the decline of a single, transsubstantive system of civil procedure where class actions are concerned. Legislators have, in effect, amended Rule 23, not across the board, but in specified substantive areas, and for substantive reasons.").

60 United States v. Furey, 514 F.2d 1098, 1104 n.5 (2d Cir. 1975) (citing U.S. CODE CONG. SERV., 80TH CONG., 2D SESS., 5 LEGISLATIVE HISTORY OF TITLE 28 at 1895, 1896 (1948)).

61 *See, e.g.*, Symposium, *The 50th Anniversary of the Federal Rules of Civil Procedure 1938–1988*, 137 U. PA. L. REV. 1873 (1989).

62 *See* Jack H. Friedenthal, *A Divided Supreme Court Adopts Discovery Amendments to the Federal Rules of Civil Procedure*, 69 CAL. L. REV. 806, 814–15 (1981) (arguing that it is "far better to leave procedural reform in the hands of the Supreme Court and its advisory committees, whose members are chosen for their dedication to the improvement of the judicial process, than to rely on elected politicians who must satisfy many constituents on a variety of issues"). *But see* Jonathan R. Macey, *Judicial Preferences, Public Choices, and the Rules of Procedure*, 23 J. LEGAL STUD. 627 (1994) (arguing that, in making and applying procedural rules, judges are influenced by their own interests, including their appetites for power, prestige, and leisure time, and that those interests sometimes may be contrary to the public interest). *See also* Janet Cooper Alexander, *Judges' Self-Interest and Procedural Rules: Comment on Macey*, 23 J. LEGAL STUD. 647 (1994).

cedure may signal the demise of the current rulemaking process.[63] Certainly, the politicization of procedure has sparked a vigorous debate on whether and how the current system should be reformed.[64] But any reform, however desirable, will not happen overnight. In the meantime, it is important to have a clear understanding of the present system, and the allocation of rulemaking authority, in order to assess the validity, or scope, of Rules promulgated by the Court.

II. The Constitutional Allocation of Authority to Regulate Federal Court Procedure

Before exploring the Rules Enabling Act's delegation to the Court of authority to promulgate Rules of procedure, it is helpful to examine closely the constitutional allocation of authority to regulate procedure in federal courts, which is the backdrop for that delegation. Separation of powers and federalism concerns bearing on the allocation of authority will be examined in turn.

A. Separation of Powers Concerns—Authority of Congress and the Courts

1. The Inherent Authority of the Judicial Branch

The Supreme Court has long accepted that Congress has constitutional authority to regulate practice and procedure in the federal courts, derived from the grant in Articles I and III of the power to create lower federal courts coupled with the power to make laws "necessary and proper" for the execution of that power.[65] The questions

63 *See* Carrington, *supra* note 47, at 165–66 (predicting that "if Congress is responsive, as is its wont, to every faction in the United States that detects a possible stake in a proposed amendment to the rules, the rulemaking tradition is doomed to disintegrate"); Mullenix, *supra* note 29, at 802 (predicting that because of Congressional meddling, the Advisory Committee may "go the way of the French Aristocracy").

64 *See, e.g.*, Stephen B. Burbank, *Ignorance and Procedural Law Reform: A Call for a Moratorium*, 59 Brook. L. Rev. 841 (1993) (urging that rulemakers obtain empirical evidence on the operation of present and proposed rules before amendments are promulgated); Carrington, *supra* note 47, at 166 (suggesting that a group be formed to lobby Congress to approve the amendments proposed by the Advisory Committee); Geyh, *supra* note 39 (proposing the creation of a commission designed to facilitate exchange of information among the branches of government); Walker, *supra* note 11 (arguing for a decrease in the discretion of the Advisory Committee via a Supreme Court order establishing general requirements for review and analysis of the systemic impact of amendments).

65 *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

of what, if any, inherent authority the judicial branch has to regulate procedure and whether that inherent authority includes authority to promulgate procedural Rules in the absence of a congressional delegation has not been so clearly decided. These issues sparked a lively debate before enactment of the 1934 Rules Enabling Act. Several commentators argued that the courts had inherent authority to regulate procedure by court rule,[66] with one commentator maintaining that the authority to regulate practice and procedure is inherently and exclusively part of the judicial power, and can be exercised even in the face of conflicting legislative enactments.[67] Other commentators argued that, whatever inherent authority courts possess, it does not include rulemaking authority, and a delegation of authority from Congress was necessary.[68] The latter view seemed to have had great

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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"). Interpreting these provisions, the Supreme Court has said that:

> [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.

Hanna v. Plumer, 380 U.S. 460, 472 (1965). *See also* Stewart Organization, Inc. v. Ricoh Corp., 487 U.S. 22 (1988); Livingston v. Story, 34 U.S. (9 Pet.) 632, 656 (1835); Wayman v. Southard, 23 U.S. (10 Wheat) 1 (1825); Bank of United States v. Halstead, 23 U.S. (10 Wheat) 51 (1825).

66 *See, e.g.*, Pound, *supra* note 31. *See generally* Burbank, *supra* note 32, at 1116 (gathering articles, and commenting that those arguing in favor of the inherent power of the court to regulate procedure by court rules often "ignor[e] distinctions between local and supervisory rules of court and between rules of court promulgated in a legislative vacuum and rules of court contravening statutes").

67 *See* John H. Wigmore, *All Legislative Rules for Judiciary Procedure Are Void Constitutionally*, 23 ILL. L. REV. 276 (1928). For a more recent example of a similar argument, see Linda Mullenix, *Unconstitutional Rulemaking: The Civil Justice Reform Act and Separation of Powers*, 77 MINN. L. REV. 1283 (1993); Linda Mullenix, *Judicial Power and the Rules Enabling Act*, 46 MERCER L. REV. 733 (1995) (arguing that separation of powers concerns and the requirement of an independent judiciary mandate that procedural rules be promulgated by the courts, rather than Congress).

68 *See* JACK B. WEINSTEIN, REFORM OF COURT RULE-MAKING PROCEDURE 177 n.231 (1977); 4 WRIGHT & MILLER, *supra* note 35, § 1001 (collecting cites); *see also* William W. Van Alstyne, *The Role of Congress in Determining Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effect of the Sweeping Clause*, 40 LAW & CONTEMP. PROBS., Spring 1976, at 102, 107 (contending that the "[necessary and proper] clause assigns to Congress alone the responsibility to say by law what additional authority, if any, the executive and the courts are to have beyond that core of

currency, and it appears that "doubts about the courts' inherent powers to enact simple rules of procedure led [then Supreme Court] Chief Justice Hughes . . . to seek a formal delegation from Congress."[69] Article III's provision that the judicial power be vested in the judicial branch mandates some level of inherent judicial authority over procedure in the courts. If Congress were to create the lower federal courts and define their subject matter jurisdiction, but make no provision for procedure, the courts, in order to function as courts, would have to adjudicate procedural issues on a case-by-case basis.[70] In several cases, the Supreme Court has noted the existence of the courts' inherent authority to make "procedural common law" pronouncements.[71] This federal "procedural common law"[72] differs from substantive federal common law in that it operates only in federal court, and does not bind state courts.[73] Furthermore, as dis-

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powers that are indispensable, rather than merely appropriate, or helpful, to the performance of their express duties under articles II and III of the Constitution").

69 WEINSTEIN, *supra* note 68, at 177 n.231 (citing P.G. FISH, THE POLITICS OF FEDERAL JUDICIAL ADMINISTRATION 62–65 (1973) and Edson R. Sunderland, *The Grant of Rule-Making Power to the Supreme Court of the United States*, 32 MICH. L. REV. 1116, 1120–21 (1934)).

70 *See* Ralph U. Whitten, *Separation of Powers Restriction on Judicial Rulemaking: A Case Study of Federal Rule 4*, 40 ME. L. REV. 41, 56–57 (1988).

71 *See, e.g.*, Hanna v. Plumer, 380 U.S. 460, 472–73 (1965) (noting 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]") (quoting Lumbermen's Mut. Cas. Co. v. Wright, 322 F.2d 759, 764 (5th Cir. 1963)); Chambers v. Nasco, 501 U.S. 32 (1991) (finding trial court has inherent power to issue sanctions on a party for litigating in bad faith); Roadway Express, Inc. v. Piper, 447 U.S. 752, 765 (1980) (recognizing that "in narrowly defined circumstances federal courts have inherent power to assess attorney's fees against counsel"); Landis v. North Am. Co., 299 U.S. 248 (1936) (holding court has inherent power to control docket, including power to stay proceedings in one suit pending determination of another suit); *Ex parte* Burr, 22 U.S. (9 Wheat.) 529, 530–31 (1824) (finding that the trial court has inherent power to regulate the conduct of lawyers).

72 Professors Wright, Miller, and Cooper cite remittitur practice as an example of what they refer to as "'federal common law of procedure'—that is, judge-made rules of practice and procedure". 19 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: JURISDICTION 2D § 4505 n.61 (2d ed. 1996) (citing cases).

73 Substantive federal common law is binding on state courts under the Supremacy Clause of the Constitution. *See id.* § 4514 (citing *inter alia*, Free v. Bland, 369 U.S. 663 (1962)). A federal procedural rule, by contrast, normally will not be applied by a state court, even in a matter as to which federal law controls the substantive outcome. In some such matters, however, the federal procedural rule will be considered part of the substantive federal law, and thus binding on state courts. *See, e.g.*, Felder v. Casey, 487 U.S. 131 (1988); Dice v. Akron, Canton & Youngston R.R. Co., 342 U.S. 359 (1952); Brown v. Western Ry. of Ala., 338 U.S. 294 (1949).

cussed below,[74] while substantive federal common law always preempts state law, federal procedural common law will displace state law in diversity cases only when there is a sufficiently strong federal interest in the procedural principle, such as the federal allocation of functions between judge and jury.[75]

The Court has never fully explored the limits of the courts' inherent authority.[76] It is clear that, just as substantive federal common law rules are subject to congressional control or override,[77] so too is a large part of the judiciary's inherent authority to regulate procedure subject to congressional control or override.[78] That congressional override may be in the form of statutes or Court-promulgated Rules pursuant to delegated authority under the Rules Enabling Act.[79] The Court has also recognized, however, that although the courts' inherent authority generally is subject to control by Congress, some part of that inherent authority is absolute, immune from intrusion by Congress.[80] Thus, for example, Congress may not materially impair the

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74 *See infra* notes 103–05 and accompanying text.

75 *See* Byrd v. Blue Ridge Coop., 356 U.S. 525 (1958).

76 *See* Burbank, *supra* note 32, at 1115–16.

77 *See, e.g.,* City of Milwaukee v. Illinois, 451 U.S. 304 (1981) (holding that the 1972 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 WRIGHT ET AL., *supra* note 72, § 4514. *See generally* Henry Monaghan, *The Supreme Court 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975).

78 *See, e.g.,* Hanna v. Plumer, 380 U.S. 460 (1965); Wayman v. Southard, 23 U.S. (10 Wheat.) 1 (1825). As one prominent jurist has observed, "[t]here has never been a fully compartmentalized separation of powers." WEINSTEIN, *supra* note 68, at 53.

79 *See, e.g.,* Amchem Products, Inc. v. Windsor, 117 S. Ct. 2231, 2248 (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). *Cf.* Chambers v. Nasco, 501 U.S. 32, 47 (1991) (finding that "[i]t is true that the exercise of the inherent power of lower federal courts can be limited by statute *and rule*," but no statute or rule displaced the courts' inherent powers to sanction) (emphasis added).

80 *See Chambers*, 501 U.S. 32 (1991). In Chambers, the Court declined to clarify the extent to which the judiciary's inherent powers are subject to congressional control. In that case, the Court declined to adopt a three-tier categorization of inherent powers suggested by the Third Circuit in *Eash v. Riggins Trucking, Inc.*, 757 F.2d 557

courts' inherent power to sanction for contempt, as that power is indispensable to the courts' ability to function and to the preservation of an independent judiciary.[81]

The Court's decisions are fairly read as recognizing only an inherent authority in the judicial branch to control procedure in the context of adjudicating particular cases.[82] That power to adjudicate and

(3d Cir. 1985), the first tier of which were "irreducible powers derived from Article III," which were beyond the control of Congress. *Id.* at 562–63. The *Chambers* Court stated "this Court has never so classified the inherent powers, and we have no need to do so now . . .", as it found in that case no Congressional intent to limit the Court's inherent power to sanction. *Chambers*, 501 U.S. at 47–48 n.12.

81 *See* Young v. United States *ex rel.* Vuitton, 481 U.S. 787, 799 (1987) (citing Michaelson v. United States, 266 U.S. 42, 65–66 (1924)) (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, nor render it practically inoperative); *see also* United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32, 33 (1812) (noting that "[c]ertain 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 . . ."). *See generally* Felix Frankfurter & James M. Landis, *Power of Congress Over Procedure in Criminal Contempts in "Inferior" Federal Courts—A Study in Separation of Powers*, 37 HARV. L. REV. 1010, 1022 (1924) (discussing the extent to which Congress may control the contempt powers of the Court, and noting that "[a]s an incident to their being, courts must have the authority 'necessary in a strict sense' to enable them to go on with their work"). *Cf.* Roadway Express, Inc. v. Piper, 447 U.S. 752, 764 (1980) ("[b]ecause inherent powers are shielded from direct democratic controls, they must be exercised with restraint and discretion"); *see also* Brainer v. United States, 691 F.2d 691, 697 (4th Cir. 1982) ("we 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' ") (citing U.S. v. Klein, 80 U.S. (13 Wall.) 128, 147 (1871)). Consider also the views of Professors Levin and Amsterdam: "There 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); 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).

82 *Cf.* Burbank, *supra* note 4, at 1004 n.30. Burbank observed that:

> [C]ommentators are too quick to find assertions of inherent power [to make rules] in judicial opinions. Take, for instance, Hecker v. Fowler, 69 U.S. (2 Wall.) 123 (1865) . . . where the Court stated: "Circuit courts, as well as all other Federal courts, have authority *to make and establish all necessary rules for the orderly conducting business in the said courts, provided such rules are not repug-*

regulate procedure on a case-by-case basis does not necessarily imply the power to establish general rules of procedure, whether local or supervisory, which is like a legislative power in that it is essentially prospective.[83] Indeed, it appears that the Court in *Wayman* found that the authority to promulgate rules of procedure derives exclusively from a congressional delegation of authority.[84] Nevertheless, several commentators have concluded that even in the absence of delegation, the federal courts possess some inherent authority to promulgate prospective rules of procedure,[85] with one commentator going so far as to suggest that the Supreme Court may have not only the authority, but a

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> *nant to the laws of the United States.*" *Id.* at 128 (emphasis added). The case is cited for the proposition that the federal courts possess inherent power to make rules. . . . But the Court was not asserting any inherent power at all. Rather, it was, in the italicized language, directly quoting the Act of Sept. 24, 1789, ch. 20, § 17, 1 Stat. 73, 83.

Id. (citations to articles omitted).

83 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) (applying a formalism model of separation of powers to conclude that there are serious doubts about the constitutionality of an Article III court promulgating generalized rules of procedure outside of a case or controversy, even when Congress has purported to delegate what is, in Redish's view, essentially a legislative power); Redish, *supra* note 81, at 725; *cf.* Whitten, *supra* note 70, at 57 & n.73 (citing WEINSTEIN, *supra* note 68, at 4–5):

> Rule-making by federal courts represents a reversal of usual adjudicative patterns. In most instances a court acts in controversies based upon particular facts on a case-by-case basis, leaving subsequent decisions to synthesize general substantive and procedural rules. At the level of national rule-making, the Supreme Court lays down general standards applicable to all future cases without the aid of individual fact situations and argument. The Court does not have before it interested parties with a motive for presenting the case fully, as it does in litigation meeting constitutional justiciability requirements. In rule-making the Court makes legislative pronouncements . . . a departure from the usual instance where congressional legislation is measured and interpreted by the courts in the light of constitutional and other requirements.

Id. Unlike Professor Redish, however, Professors Whitten and Weinstein conclude that separation of powers does not prohibit delegation of rulemaking authority to the Court. WEINSTEIN, *supra* note 68, *passim* (1977).

84 *See* Wayman v. Southard, 23 U.S. (10 Wheat.) 1 (1825); *see also* Van Alstyne, *supra* note 68, at 124–25.

85 *See, e.g.*, Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 24 (1985).

constitutional responsibility, to promulgate supervisory rules of procedure for district courts.[86] For present purposes, fortunately, it is not necessary to resolve definitively the issue of whether the inherent authority of the courts includes a rulemaking power, because Congress has by statute delegated to the Supreme Court supervisory procedural rulemaking authority.[87]

2. A Preliminary Look at the Line Between "Substance" and "Procedure"

At this point, it is not necessary to define precisely the exact boundaries of "procedure" and "substance," as the meanings of those terms will vary with the context in which they are used.[88] The meanings of the terms "substance" and "procedure" take on greater significance in the context of the Rules Enabling Act, and their meanings in that Act will be discussed below.[89] Roughly, for conceptual purposes, "purely" procedural matters are those for which the governing decision or rule is one concerned with and affecting only the orderly dis-

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> Since the separation-of-powers principle is concerned only with judicial intrusion into lawmaking function of Congress, the promulgation of "housekeeping" rules that would have no impact on congressional policies is consistent with the constitutional division of powers. . . . [F]ederal courts should be regarded as having inherent authority [subject to congressional override] to adopt their own provisions regarding the conduct of litigation and internal operations without violating any principle of separation of powers.

Id.; *see also* Goldberg, *supra* note 37, at 669–71 (reviewing historical practice in English courts, and the adoption of those practices in the United States, and concluding that "[h]istorically, courts have been generally thought to possess certain rule making powers").

86 *See* Paul D. Carrington, *A New Confederacy? Disunionism in the Federal Courts*, 45 DUKE L. J. 929, 974 (1996) (arguing that federal procedure fashioned entirely by case law "in the short term would raise an issue whether due process of law requires that there be some rules of the game announced in advance of the commencement of play").

87 *See* 4 WRIGHT & MILLER., *supra* note 35, at 5 (stating that the debate as to the nature and scope of the courts' inherent power "really is of no practical importance with regard to federal practice" because it is assumed that Congress has the constitutional authority to regulate practice and procedure, and has delegated that authority to the Supreme Court).

88 *See* Guaranty Trust Co. v. York, 326 U.S. 99, 108 (1945) ("'[S]ubstance' and 'procedure' are the same key-word to very different problems. Neither 'substance' nor 'procedure' represents the same invariants. Each implies different variables depending upon the particular problem for which it is used."). *See generally* Walter Wheeler Cook, *"Substance" and "Procedure" in the Conflict of Laws*, 42 YALE L.J. 333 (1933).

89 *See infra* Parts III & IV.

patch or administration of judicial business, or with "mak[ing] the process of litigation a fair and efficient mechanism for the resolution of disputes."[90] An example of a purely procedural matter could be a rule governing the manner in which papers are filed with the court, such as whether facsimile copies are acceptable or whether electronic filing is available.[91] Such rules have no policy implications; they are solely for administrative convenience and have minimal impact on the parties' substantive rights. (Many, of course, would dispute that it is ever possible to have a "purely" procedural rule, as even the most ostensibly innocuous rule, such as a rule governing facsimile submissions, will have some impact on substantive rights and have some policy implications, in the sense that it will increase or decrease access to the courts). "Purely" substantive matters, by contrast, are those for which the governing decision or rule involves policy choices unrelated to the fairness, efficiency, or administration of the litigation process.[92] Examples are federal law defining securities fraud or state law defining negligence.

A legal rule can have both procedural and substantive purposes, and even if the animating policies of a rule ostensibly are procedural, it may have significant substantive implications, whether intended or not.[93] The area of overlap between substance and procedure, where matters are "rationally capable of classification as either,"[94] is quite large because, as demonstrated by the prior discussion of rules governing pleading requirements, most procedural rules have substantive implications. For another example, limitations periods may have procedural functions or implications, such as helping to ensure that evidence in a case will not be so stale that it is not untrustworthy or reducing the volume of litigation, and also may have substantive functions or implications, such as promoting diligence by plaintiffs, affording potential defendants some repose after the period has expired, or defining, temporally, the right to sue.[95] The precise boundaries of

90 Ely, *supra* note 1, at 724 (citation omitted) (using this phrase to describe "procedural rules" within the meaning of the Rules Enabling Act.). *See also* D. Michael Risinger, *"Substance" and "Procedure" Revisited With Some Afterthoughts on the Constitutional Problems of "Irrebuttable Presumptions,"* 30 U.C.L.A. L. Rev. 189, 204–09 (1982).

91 *See, e.g.*, FED. R. CIV. P. 5.

92 *See* Ely, *supra* note 1, at 724 (citation omitted) (describing "substantive rights" within the meaning of the Rules Enabling Act); *see also* Burbank, *supra* note 5, at 1019–20. *See generally* Risinger, *supra* note 90.

93 *See* Burbank, *supra* note 5, at 1027–28; *see also* Risinger, *supra* note 90.

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

95 *See generally* Tyler T. Ochoa & Andrew J. Wistrich, *The Puzzling Purposes of Statutes of Limitations,* 28 PAC. L. J. 453 (1997) (analyzing policies favoring and disfavoring limitations of actions). *See also* Risinger, *supra* note 90, at 209–10.

purely procedural matters are of little practical significance for a separation of powers analysis, as the Court has consistently accepted that, other than in some undefined area where the Court's authority over procedure is supreme, such as the core contempt power,[96] Congress has power to regulate not only purely procedural matters in federal courts but also matters "rationally capable of classification" as procedural or substantive.[97]

It should be noted that the inherent authority of the judicial branch to regulate procedure is not coextensive with Congress', in that it does not extend to all matters rationally capable of classification as procedural. As to some matters that fall in the area where procedure and substance overlap, separation of powers concerns and the constitutional structure prohibit a court from regulating them, even on a case-by-case basis, in the absence of some legislative or constitutional directive. An example of such a matter is the grant of subject matter jurisdiction to the courts, which by the Constitution is left to Congress, and authority over which cannot be delegated to the courts.[98] Other matters in this area are placed beyond regulation by either the Court or Congress by virtue of their being guaranteed by

96 *See, e.g.*, Michaelson v. United States, 266 U.S. 42, 65–66 (1924).

97 *Hanna*, 360 U.S. at 472.

98 *See* Whitten, *supra* note 70, at 55–56 ("The text of article III . . . and the compromise that produced the language indicates that Congress should decide not only whether to create inferior federal courts, but also whether, and to what extent, these courts would supplant the jurisdiction of state courts over national matters . . . . [T]here are other matters of court organization and structure that seem so fundamental that Congress must determine them itself. Such matters include the number of lower federal courts, their basic form, and the number of judges to sit on the courts and the qualifications of the judges, and the location of such courts.") (citations omitted).

See also Lawrence Gene Sager, *Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 22 (1981) ("The concept of subject-matter jurisdiction in our legal system refers to . . . the root power to adjudicate a specified set of controversies. Ultimately, jurisdiction is an essential part of what makes a court a court . . . . From the elemental, legitimating quality of jurisdiction it follows that, whatever other powers a court may have to change legal norms, it cannot generate its own jurisdiction."). The Court does exert some control over subject matter jurisdiction, when it refuses to exercise jurisdiction conferred on it by Congress, as with the abstention doctrines. *See* David Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543 (1985) (arguing for the legitimacy of the abstention doctrine). The constitutionality of this "jurisdictional common law" is questioned by some commentators. *See, e.g.*, Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71 (1984) (arguing that the doctrine of abstention is unauthorized). *See generally* Gene R. Shreve, *Pragmatism Without Politics—A Half Measure of Authority for Jurisdictional Common Law*, 1991 BYU L. REV. 767 (reviewing debate, and proposing a "middle ground").

the Constitution. Examples include the right to trial by jury and the right against self-incrimination.[99] The courts, of course, as arbiters of the meaning of the Constitution,[100] must define these constitutional norms, and the definitions may change from time to time; but, in theory at least, the norms are nonetheless generated by the Constitution and not the courts. Finally, some substantive matters involve policy choices of such significance that, even though federal courts may determine their scope as a matter of common law in appropriate cases,[101] separation of powers considerations mandate that they be

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Professor Whitten, in the article cited above, argues that separation of powers concerns also remove from the courts' powers matters as to which Congress has occupied the field with regulation. *See also* Linda J. Rusch, *Separation of Powers Analysis as a Method for Determining the Validity of Federal District Courts' Exercise of Local Rulemaking Power: Application to Local Rules Mandating Alternative Dispute Resolution*, 23 CONN. L. REV. 483, 503-04 (1991) (proposing a separation of powers analysis similar to Professor Whitten's to determine when courts may make local rules and when Congress must do so). Professor Whitten's analysis is not inconsistent with the thesis of this article, in that he agrees that in the absence of legislation, those matters would be within the inherent authority of the courts. It is contended in this Article that it is preferable to characterize the event as a "displacement" or "override" of the procedural common law. It is the contention of this Article also that the Rules Enabling Act does not purport to delegate to the Court authority to promulgate rules in areas where Congress has legislated extensively.

99 *See* U.S. CONST. art. III, § 2, cl. 3 (jury trial); U.S. CONST. art. III, § 3, cl. 1 (proof of treason); U.S. CONST. amend. V (grand jury and self-incrimination); U.S. CONST. amend. VI (trial by jury in criminal prosecutions and confrontation of witnesses); U.S. CONST. amend. VII (trial by jury in civil actions).

In addition, many commentators argue, Article III and the constitutional structure place limits on the power of Congress to control the subject matter jurisdiction of the federal courts. The Supreme Court has reasoned that the greater power of Congress to create or abolish lower federal courts includes the lesser power to control their jurisdiction. *See* Lockerty v. Phillips, 319 U.S. 182 (1943); Sheldon v. Sill, 49 U.S. (8 How.) 441 (1850). Some commentators argue, however, that Congress' power is not plenary, and cannot be used to deprive the courts of their "essential functions" of providing the ultimate determination as to meaning of federal law, and maintaining the supremacy of federal law. *See, e.g.*, Sager, *supra* note 98 (arguing that Article III requires that a federal court be available for a constitutional challenge). *But see* Martin H. Redish, *Constitutional Limitations on Congressional Power to Control Federal Jurisdiction: A Reaction to Professor Sager*, 77 NW. U. L. REV. 143, 157 (1982) ("Congress has complete authority to have constitutional rights enforced exclusively in the state courts . . . ."). Much of the extensive debate on the issue is collected in RICHARD H. FALLON, JR. ET AL., HART AND WESCHLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 358–87 (4th ed. 1996) [hereinafter HART & WECHSLER].

100 *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803); *see also* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 14 (1986) (noting that it has been accepted for 200 years that the court is the arbiter of the meaning of the Constitution).

101 *See infra* note 112 and accompanying text.

subject to prospective regulation only by a democratically elected legislature, rather than by court-promulgated rule.[102]

B. *Federalism Concerns—Limitations on the Powers of Congress and the Federal Courts to Displace State Law with Procedural Provisions*

It has been well established since at least 1825 that Congress has broad power under Article III, in conjunction with the Necessary and Proper Clause, to regulate practice and procedure in the federal courts.[103] Until the Rules Enabling Act of 1934, that power was used, through the Conformity Act,[104] to require federal courts to mimic state court procedure. At the same time, the Rules of Decision Act,[105] enacted as part of the First Judiciary Act, required that the federal courts apply substantive state law in diversity cases as well. In *Swift v. Tyson*,[106] however, the Court interpreted "laws" as including only statutes and not extending to state common law doctrines, so that federal courts were able to articulate substantive federal common law principles in diversity cases if no state statute controlled. In 1938, Justice Brandeis' decision in *Erie Railroad v. Tompkins*[107] overruled the *Swift* decision, and declared that state decisional law, as well as statutory law, must be applied in diversity cases. *Erie* established that neither Congress nor the federal courts have power to declare the substantive rules of decision in diversity cases in federal courts:

> Congress has no power to declare substantive rules of common law applicable in a State whether they be local in nature or "general," be they commercial law or part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts.[108]

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102 *Cf.* Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 43 (1825) (noting that "[t]he line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details").

103 *See id.* at 22; Livingston v. Story, 34 U.S. (9 Pet.) 632, 655 (1835) ("[T]hat the power to ordain and establish [federal courts], carries with it the power to describe and regulate the modes of proceeding in such courts, admits of . . . little doubt.").

104 Act of June 1, 1872, ch. 255, § 5, 17 Stat. 197. The 1872 Conformity Act provided for "dynamic" conformity; that is, the federal courts were to conform as nearly as possible to state procedure as it changed. For a summary of authority over federal court procedure under the prior Process Acts, see 1 JULIUS GOEBEL, HISTORY OF THE SUPREME COURT OF THE UNITED STATES, at 545–51 (1971).

105 28 U.S.C. § 1652 (1994).

106 41 U.S. (16 Pet.) 1 (1842).

107 304 U.S. 64 (1938).

108 *Id.* at 78.

Erie establishes that Article III gives no power to Congress to determine the substantive rules of decision in diversity cases; Congress must look to other constitutional powers. Nor may the federal courts constitutionally decide issues as a matter of federal common law solely on the basis of the Article III grant of diversity jurisdiction.[109] In *Erie* itself, Congress had undisputed authority under the commerce clause to enact a law controlling the outcome, as that case involved a railroad engaged in interstate commerce.[110] But as Congress had not exercised its constitutional power either by enacting applicable law or delegating common law-making authority to the courts, the Court was not able to determine the outcome of the case as a matter of federal common law. Thus, *Erie* also establishes that there are greater constitutional limits on the federal courts' common law making power than on the legislative authority of Congress—that the federal courts' common law making power is not coextensive with Congress' Article I powers.[111] While there is still some room for specialized federal common law, such as when there is a uniquely federal interest involved or federal common law is required by the constitutional structure,[112] sep-

109 *See id.*

110 *See* Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51–60 (1986) (establishing a federal cause of action for negligence against interstate railroads by their employees who are injured in the course of their employment). In *Mondou v. New York, N.H. & H.R. Co.* (*In re* Second Employers' Liability Cases), 223 U.S. 1 (1912), decided twenty-five years before *Erie*, the Court held that FELA was a valid exercise of Congress' power under the commerce clause of Article I. *See also* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937). In *NLRB*, which was decided the year before *Erie*, the Court interpreted the commerce clause as reaching activities that were previously seen as local and thus beyond Congress' power: "[a]lthough activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control." *Id.* at 37. *See also* Donald L. Doernberg, *Juridical Chameleons in the "New Erie" Canal*, 1990 UTAH L. REV. 759, at nn.17 & 202 and accompanying text (gathering contemporary commentary on *Erie*).

111 As Professor Monaghan has said, "*Erie* is, fundamentally, a limitation on the federal court's power to displace state law absent some relevant constitutional or statutory mandate which neither the general language of article III nor the jurisdictional statute provides." Henry P. Monaghan, *Hart and Weschler's the Federal Courts and the Federal System*, 87 HARV. L. REV. 889, 892 (1974) (book review) (citation omitted). *See also* Paul J. Mishkin, *Some Further Last Words on* Erie—*The Thread*, 87 HARV. L. REV. 1682 (1974); LARRY L. TEPLY & RALPH U. WHITTEN, CIVIL PROCEDURE 404 (1994).

112 *Erie* did not hold that there is no place for federal common law. Indeed, in another opinion by Justice Brandeis issued the same day, the Court announced that "whether the water of an interstate stream must be apportioned between . . . two States is a question of 'federal common law' upon which neither the statutes nor the decisions of either State can be conclusive." Hinderlider v. La Plata River & Cherry

aration of powers concerns, as well as the institutional structures of the federal system, mandate that Congress, not the courts, has the primary role in deciding whether to displace state law.[113] The *Erie* rule of requiring federal courts in diversity cases to apply state law, Justice Brandeis noted, also ensures uniformity of decision between state and federal courts and prevents discrimination among parties caused by forum shopping between state and federal courts. In his concurring opinion, Justice Reed questioned the holding that Congress could not declare substantive law in diversity cases, pointing out that "the line between procedural and substantive law is hazy, but no one doubts federal power over procedure."[114]

Seven years later, in *Guaranty Trust Co. v. York*,[115] the Court established that just as the institutional structure of the Constitution limits the ability of a federal court to impose federal substantive common law in a diversity case, it restricts the courts' ability to impose judge-made federal procedural rules that displace state law. In that case, the Court held that a federal court was required to apply a state limitations statute, rather than the doctrine of laches, which ordinarily would have been applied in a federal court, to determine if a claim was time-barred. In so holding, the Court cited the *Erie* "policy" of ensuring "so far as legal rules determine the outcome of a litigation," that the outcome of litigation in a federal court would be "substantially the same" as it would have been in state court.[116] For many, the *York* decision, along with the Court's 1949 *Cohen*,[117] *Woods*,[118] and

Creek Ditch Co., 304 U.S. 92 (1938). However, the proper scope of federal common law is the subject of much debate. For a discussion of some of the leading commentary on the issue, see HART & WESCHLER, *supra* note 99, at 752–58.

113 *See* Mishkin, *supra* note 111, at 1686 (arguing that the courts are inappropriate makers of laws intruding upon the states' views of social policy in the areas of social competence, and noting, in support, that the states and their interests are represented in Congress, but not in the federal courts); *see also* Thomas W. Merrill, *The Judicial Prerogative*, 12 PACE L. REV. 327 (1992); Larry Kramer, *The Lawmaking Power of the Federal Courts*, 12 PACE L. REV. 263 (1992); Doernberg, *supra* note 110, at 803 (citing Tennessee Valley Auth. v. Hill, 437 U.S. 153, 194 (1978)) ("[I]t is . . . the exclusive province of the Congress not only to formulate legislative policies and mandate programs and projects, but also to establish their relative priority for the Nation. Once Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is for the Executive to administer the laws and for the courts to enforce them . . . .").

114 *Erie*, 304 U.S. at 92 (Reed, J., concurring).

115 326 U.S. 99 (1945).

116 *See id.* at 109.

117 Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949) (discussed *infra* note 191).

118 Woods v. Interstate Realty Co., 337 U.S. 535 (1949) (discussed *infra* note 192).

Ragan[119] trilogy, raised a question as to whether there was any room for uniform rules of federal procedure, as any procedural rule will have some impact on the outcome of a case.[120] But in the *York* decision itself, the Court recognized that the federal and state systems were not identical and stated that federal courts might afford remedies not available in state courts.[121]

The 1958 decision in *Byrd v. Blue Ridge Electric Cooperative*[122] demonstrated that federalism had not been taken to the "absurd extreme"[123] perceived by critics of the *York* decision, and that there was some room for displacement of state law by federal judge-made procedural law. There, the Court held that the "outcome-determinative" test of *York* was not controlling when there were "affirmative countervailing considerations"[124] favoring the application of federal judge-made procedural law. In that case, the Court considered whether a federal court was obligated to follow a state rule relegating to a judge the determination as to whether the defendant was a statutory employer, when the federal court normally would have that issue decided by a jury. If uniformity of outcome were the only consideration, the Court stated, there might be a strong argument for requiring the federal court to follow state practice. But in this case the application of the state rule would undermine the federal allocation of functions between judge and jury—an essential characteristic of the independent federal system.[125] After carefully weighing the interests in uniform outcomes against the interests of the independent federal system, the Court determined that a deviation from the state practice was justified.[126] Thus, federal procedural common law may override state law in an appropriate case.

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119 Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530 (1949) (discussed *infra* note 193).

120 *See* Edward Lawrence Merrigan, Erie *to* York *to* Regan—*A Triple Play on the Federal Rules*, 3 VAND. L. REV. 711 (1950) and C. WRIGHT, THE LAW OF THE FEDERAL COURTS (5th ed. 1994).

121 *See York*, 326 U.S. at 106.

122 356 U.S. 525 (1958).

123 Charles E. Clark, *Federal Procedural Reform and States' Rights; to a More Perfect Union*, 40 TEXAS L. REV. 211, 220 (1961).

124 *Byrd*, 356 U.S. at 537.

125 The Court did not decide whether the result was mandated by the Seventh Amendment, choosing instead to leave that question open. *See Byrd*, 356 U.S. at 538. In a subsequent case, *Simler v. Connor*, 372 U.S. 221 (1963), the Court held that the Seventh Amendment does apply to diversity cases.

126 *See Byrd*, 356 U.S. at 538. The *Byrd* case does not make clear, however, just which "affirmative countervailing considerations" will justify departures from state

In its 1965 decision in *Hanna v. Plumer*,[127] the Court reaffirmed the principle of *Byrd* that the outcome determinative test of *York* "was never intended to serve as a talisman"[128] in resolving conflicts between state law and federal procedural law in federal courts.[129] However, the Court also reaffirmed *York's* principle that state law should be followed in federal court when the failure to do so would violate the "twin aims of *Erie*"[130] by either encouraging forum shopping or resulting in an inequitable application of the law. Thus, although not in such terms, the Court confirmed the strict limits imposed by the federal constitutional structure on the federal courts' inherent power to regulate procedure.

At that point, the Court reformulated its approach to cases involving the Federal Rules of Civil Procedure. The analysis of the *Erie* line of cases, the Court held, was not the appropriate test for validity of a Federal Rule of Civil Procedure. Rather, the validity of a Rule, which is promulgated pursuant to authority delegated by Congress to the Court in the Rules Enabling Act, is to be adjudged by whether it is within the scope of the delegated authority, and whether, under the Constitution, Congress has the authority it purported to delegate to the Court. In the Court's ruling, there seemed to be virtually no federalism constraints on Congress' power to regulate procedure in the federal courts. Congress' broad power to control, the Court stated, extends to matters that fall in the "uncertain area between substance and procedure, [but] are rationally capable of classification as either."[131] By distinguishing procedural matters from substantive, *Hanna* seemed to confirm the federalism principle articulated by Justice Brandeis in *Erie*, leaving substantive matters to the state. But the very "generous"[132] interpretation of Congress' authority under Article III to regulate procedure in federal court means that any federal statute rationally capable of classification as procedural will displace state law, regardless of how substantive, and even in diversity cases, where the claim is state-created. If the *Hanna* test is taken at face value, Justice Reed may have been correct in *Erie* after all; Congress has authority to declare the substantive law in a diversity case, provided that the law also has some procedural implication, no matter how small or how

practice. *See generally* WRIGHT ET AL., *supra* note 72, § 4504; TEPLY & WHITTEN, *supra note* 111, at 421–24.

127 380 U.S. 460 (1965).

128 *Id.* at 466-67.

129 *See id.* (citing *Byrd*).

130 *Id.* at 468.

131 *Id.* at 472.

132 WRIGHT ET AL., *supra* note 72, § 4505.

much its procedural characteristic is outweighed by its substantive implications.

Hanna's "arguably procedural, *ergo* constitutional"[133] test for congressional power (and, apparently, for the Court's authority under the Rules Enabling Act[134]) may not take into sufficient account the interests, and law-making authority, of the states. *Hanna* itself was a relatively easy case for the displacement of state law, involving simply, in the Court's view, the displacement of a procedural state provision for service of process by the federal service provision.[135] Indeed, the Court initially analyzed the provision as though it were federal procedural common law, and found that even applying a strict *Erie* analysis, displacement of state law was justified.[136]

The situation presented by the later case of *Stewart Organization v. Ricoh*[137] was more difficult, as the application of the *Hanna* rule resulted in the displacement of substantive state contract law by a federal procedural provision. In *Stewart,* the plaintiff filed a breach of contract claim in federal court in Alabama. The defendant moved, pursuant to 28 U.S.C. § 1404, to transfer the case to a federal district court in New York, as the contract contained a forum selection clause, which admittedly would not have been enforced by an Alabama state court. Were the federal rule one of procedural common law, state law would not be displaced. And, a Rule promulgated under the REA that purported to govern would be invalid as violative of the substantive rights limitation. But the federal law in *Stewart* was a statute enacted by Congress under which, the Court found, a forum selection clause was a factor to be considered in determining whether to grant a trans-

133 *Hanna,* 380 U.S. at 476 (Harlan, J., concurring) (arguing that the majority test for Congress' Article III power was inconsistent with the allocation of power between the state and federal systems, in that it permitted a federal rule that could reasonably be classified as procedural to apply in federal court "no matter how seriously it frustrated a State's substantive regulation of the primary conduct and affairs of its citizens").

134 Although the Court in *Hanna* recognized that the Rules Enabling Act presented a limit on the rulemaking authority of the Court independent of the constitutional limits on Congress' authority, in other parts of the decision the Court seemed to conflate the constitutional test with the test for validity under the REA. *See infra* text accompanying notes 221–222.

135 The state statute involved in *Hanna* was also, in part, a statute of limitations. The Court found, rather dubiously, that part of the statute was not implicated, as the action clearly was timely commenced. *See Hanna,* 380 U.S. at 462 n.1.

136 Justice Harlan, who strenuously objected to the broad power afforded Congress by the majority position, agreed with the result in the case, on the grounds that applying the federal rule would not impinge on the vitality of the state policy served by the state rule. *See Hanna,* 380 U.S. at 478 (Harlan, J., concurring).

137 487 U.S. 22 (1988).

fer. As the statute was one "doubtless capable of classification as a procedural rule,"[138] it overrode state contract law, which would have held a forum selection clause unenforceable and thus irrelevant to a motion to transfer venue. Justice Scalia, in dissent, argued that § 1404 should be read more narrowly, so as not to preempt state law in the absence of a clear expression of congressional intent to do so and in keeping with the federal policy, articulated in *Erie*, of striving for uniformity of outcome in federal and state court. He argued that state law should be applied first to determine the validity of the clause, which, if invalid, should be given no weight in a motion to change venue. Some commentators have gone even further than Justice Scalia and have also criticized the decision for failing to consider the constitutional limits of Congress' Article III power to control procedure.[139]

At face value, the *Hanna* and *Stewart* interpretation of Congress' Article III powers would permit Congress to override state law in diversity cases with respect to matters such as testimonial privileges, limitations periods, and arbitration, as each of these matters is at least "rationally . . . capable of classification" as procedural.[140] Yet each of these matters also has substantive implications for matters that, in diversity cases, are primarily the concern of the states. For example, a state law granting an immunity from being called to testify against one's spouse is intended to foster the marital relationship and represents a decision by the state, whether speaking through the legislature or court, that encouragement of that relationship "outweighs the need to have all relevant evidence in determining the truth of a matter."[141] In a case to enforce federal law, or a federal criminal matter, the federal interest in deciding what evidence should be available for enforcement of federal law is obvious, and it is not difficult to justify congressional interference with the state policy of fostering the marital relationship. But when a suit is in federal court in diversity, the federal interest in deciding what evidence should be available to en-

138 *Id.* at 32.

139 *See, e.g.*, Margaret G. Stewart, *Political Federalism and Congressional Truth-Telling*, 42 CATH. U. L. REV. 511, 536–43 (1993); *id.* at 538 ("Even assuming that the congressional command to enforce forum selection clauses is clearly expressed, there remains a concern with the source of congressional authority to displace contrary state law."); *see also* Richard D. Freer, Erie's *Mid-Life Crisis*, 63 TUL. L. REV. 1087, 1130 (1989) ("The increasing ease with which the Court invokes *Hanna* is a danger to separation of powers and to federalism.").

140 WRIGHT ET AL., *supra* note 72, § 4505.

141 Charles Alan Wright, *Procedural Reform: Its Limitations and Its Future*, 1 GA. L. REV. 563, 572 (1967) (citing 8 WIGMORE, EVIDENCE §2285 (McNaughton rev. 1961)).

force state law is less compelling. The interference with the independent administration of the federal system—that is, the impact on the accuracy of fact-finding—occasioned by the application of a spousal privilege rule in a diversity case arguably is not sufficient to justify disregarding a substantive state policy in applying state law.[142] As Professor Carrington has stated in another context, some "procedural" rules "arguably have too little bearing on the courthouse conduct of federal litigants, and too much bearing on the value of the substantive rights and defenses created by state law to be mere features of federal judicial administration."[143] Just as the constitutional federal structure places limits on Congress' ability to displace state law pursuant to Article I powers,[144] and just as Congress may not pursuant to its Article III powers set the standard for negligence in diversity cases,[145] Congress may be limited in its ability to affect substantive state law pursuant to its power to regulate procedure in federal courts in diversity cases.

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142 *See* Goldberg, *supra* note 37, at 682 ("[R]ules of privilege are substantive within the meaning of the *Erie* doctrine and therefore must yield to state law in diversity suits.") (collecting authorities); *see also* Stewart, *supra* note 139, at 530–34.

Cf. Wright, *supra* note 141, at 572 (concluding that under the *Hanna* decision, it appears that Congress and the Court constitutionally could adopt a federal rule denying a privilege where the state would grant one, but urging that such a rule not be adopted, as it would be an indefensible intrusion into state policy). Note that in 28 U.S.C. § 2074(b), Congress has forbidden the Supreme Court to promulgate rules overriding state privilege rules without congressional approval. This provision could be read to reflect Congress' belief that it has constitutional authority to promulgate or approve such provisions if it so desired. Regardless, Congress has not attempted to exercise such power, apparently out of concern both for the states' interests and because of the ambiguity as to the constitutional limits of Congress' power. For present purposes, it is more significant that Congress has made clear it has not delegated any such authority to the Court, reflecting the belief that the decision to override state law should be made by Congress, and not the Court. *Cf.* Mishkin, *supra* note 111, at 1685 (arguing that the constitutional structure confines that authority to Congress, where the states and their interests are represented); Rowe, *supra* note 4, at 982 (arguing that by § 2072(b), Congress has prohibited Federal Rules that conflict with state laws reflecting substantive state policy). This Article contends that state legislative policy is not determinative of the validity of a federal rule.

143 Carrington, *supra* note 86, at 1001. Professor Carrington concluded that "Congress may lack power to enact a fee-shifting rule designed to induce settlement of all civil cases in federal courts, and almost certainly lacks the power to enact a fee-shifting rule fashioned to induce settlement only of diversity cases." *Id.* at 1002.

144 *Cf.* United States v. Lopez, 514 U.S. 549 (1995) (striking down a statute making it a federal offense for a person knowingly to possess a firearm within a school zone, on the grounds it was not a valid use of commerce clause powers).

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

That there may be some limits on Congress' authority to displace state law in federal court with procedural enactments appears to have been an unspoken assumption of the Court's 1956 decision in *Bernhardt v. Polygraphic Company.*[146] That case, brought to federal court in diversity, involved an employment contract made in New York between New York citizens. The plaintiff then became a resident of Vermont, where he was to perform his duties. He was discharged, and sued in Vermont state court. The defendant employer removed the case to federal court and then moved to stay the proceedings so that the matter could be arbitrated in New York pursuant to an arbitration clause in the contract. The issue was whether the federal Arbitration Act, which provided that arbitration clauses were enforceable and that federal court proceedings were to be stayed pending arbitration, would displace Vermont law, which permitted revocation of the contract at any time before an award was made. The Supreme Court found that the Arbitration Act did not govern, as it applied only to maritime contracts or contracts involving interstate commerce, and the contract in question involved neither. The Court apparently felt compelled by federalism concerns to read the statute in that manner. To hold otherwise, the Court stated, might raise a constitutional question:

> *Erie Railroad Company v. Tompkins* indicated that Congress does not have the constitutional authority to make the law that is applicable to controversies in diversity of citizenship cases . . . § 3 [of the Arbitration Act], so read, would invade the local law field. We therefore read § 3 narrowly to avoid that issue.[147]

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146 350 U.S. 198 (1956).

147 *Id.* at 202. In his concurring opinion, Justice Frankfurter stated:

> I agree with the Court's opinion that the differences between arbitral and judicial determination of a controversy under a contract sufficiently go to the merits of the outcome, and not merely because of the contingencies of different individuals passing on the same question, to make the matter one of "substance" in the sense relevant for *Erie*. . . . In view of the ground that was taken in that case for its decision, it would raise a serious question of constitutional law whether Congress could subject to arbitration litigation in the federal courts which is there solely because it is "between Citizens of different States," . . . in disregard of the law of the State in which a federal court is sitting.

Id. at 207–08 (Frankfurter, J., concurring). Some commentators have criticized the suggestion in *Bernhardt* that Congress cannot "invade the field" of "local law." *See* Peter Westen & Jeffrey S. Lehman, *Is There Life for* Erie *After the Death of Diversity?*, 78 MICH. L. REV. 311, 355 (1980) ("[I]t is a fundamental mistake to think that the constitutional authority of the federal government is limited or demarcated by rigid 'enclaves' of 'local' law. The only significant constitutional question in any *Erie* case is whether the pertinent federal rule falls within one of Congress' enumerated pow-

Bernhardt, in which the Court averted only to Congress' powers under Article I, was decided before the Court in *Hanna* so clearly expressed the very broad "rationally capable of classification as procedural" test for Congress' Article III power to override state law in matters before federal courts. At face value, the *Hanna* test "would foreclose the constitutional doubts voiced in the *Bernhardt* decision, for arbitration . . . rationally is capable of classification as procedural and therefore within federal rulemaking authority for all diversity cases."[148] Just two years after the *Hanna* decision, in the *Prima Paint* case,[149] the Court rejected the opportunity to so hold. That case, like *Bernhardt,* was a diversity decision involving the enforceability of an arbitration clause and an application for stay of proceedings pending arbitration. This time the underlying contract involved interstate commerce, and for that reason, the Court found the federal Arbitration Act applicable. In addressing the constitutionality of the Act, the Court relied solely on Congress' Article I powers to regulate interstate commerce;[150] it made no reference to Congress' Article III powers to

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ers.") (citing Ely, *supra* note 1, at 701–02). In *Bernhardt,* however, the Court read the Arbitration Act narrowly in order to avoid that precise constitutional question of whether Article III gives Congress the power to require arbitration in diversity cases.

148 WRIGHT ET AL., *supra* note 72, §4505. *See also* Freer, *supra* note 139, at 1128 (arguing that *Stewart* and *Bernhardt* are irreconcilable).

149 Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967). For a critical discussion of the *Bernhardt* and *Prima Paint* decisions, see Westen & Lehman, *supra* note 147, at 353–56.

150 *Id.* at 405:

> The question in this case . . . is not whether Congress may fashion federal substantive rules to govern questions arising in simple diversity cases. See *Bernhardt*. . . . Rather, the question is whether Congress . . . plainly has power to legislate. The answer to that can only be in the affirmative. And it is clear beyond dispute that the federal arbitration statute is based upon and confined to the incontestable federal foundations of "control over interstate commerce and over admiralty."

(citation omitted). In subsequent cases, the Court ruled that the 1925 federal Arbitration Act, as an exercise of Congress' Article I powers, preempts state law and applies to cases in state court involving interstate commerce. *See* Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 26 (1983) ("[S]tate courts, as much as federal courts, are obliged to grant stays of litigation under § 3 of the Arbitration Act."); *see also* Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681 (1996); Southland Corp. v. Keating, 465 U.S. 1 (1984). The result of this line of cases is that a procedural statute intended to govern proceedings in federal courts, which was enacted by Congress as an exercise of its constitutional powers over federal courts, became a statute regulating interstate commerce. *See* IAN R. MACNEIL, AMERICAN ARBITRATION LAW: REFORMATION, NATIONALIZATION, INTERNATIONALIZATION 169 (1992). For a criticism of the Court's jurisprudence in the area, see Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction,* 1996 SUP. CT. REV. 331, 332 ("[T]he Court has completely federalized

regulate procedure in federal courts, or to the *Hanna* decision, as additional support for the ruling. Together, the *Bernhardt* and *Prima Paint* cases imply that there may be some matters that, although they are "rationally capable of classification as procedural" within the meaning of *Hanna*, nevertheless are so substantive that Congress cannot displace state law in the area other than through an exercise of Article I powers.[151]

The above discussion is not meant to suggest that Congress must always rely on Article I powers to displace state law with rules of procedure in federal courts.[152] Nor is it an attempt to delineate the limits of Congress' Article III power to displace state law. Rather, it is meant to suggest only that when Article III power alone is relied on, a careful assessment of the competing interests is required, and to point out that there is greater uncertainty as to the limits of that power than is apparent from an isolated reading of the *Hanna* and *Stewart* decisions. The uncertainty as to the extent of federal power to displace state law through procedural rules in the federal courts may have influenced Congress' decision to be cautious about displacing state law when it enacted the Federal Rules of Evidence. In 1972, the Advisory Committee proposed comprehensive Federal Rules of Evidence, which were transmitted to Congress by the Court.[153] Among other things, the proposed Rules restricted the privileges available in federal court to those listed in the Rules, and the scope of those privileges was narrower than that enjoyed in many states. The proposed Rules were to displace state law in all cases in federal court, including diversity cases. The Advisory Committee, relying on the Court's decision in *Hanna*,

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a body of law that was until recently regarded as an appropriate subject for the exercise of state sovereignty . . . .").

151 *See also* Moe v. Avions Marcel Dassault-Breguet Aviation, 727 F.2d 917 (10th Cir. 1984). In *Moe*, the court held that Federal Rule of Evidence 407, which excludes evidence of subsequent remedial measures as proof of culpability (and which was enacted by Congress), was not applicable in a diversity case when state law would admit the evidence, on the ground that the matter was one of state substantive law, and that to apply the Federal Rule would be an "unwarranted incursion into the *Erie* doctrine." *Id.* at 932. *But see* Flaminio v. Honda Motor Co., 733 F.2d 463 (7th Cir. 1984).

152 *But see* Stewart, *supra* note 139, at 533 ("[T]he limitation Congress has imposed on the Supreme Court's rulemaking power—that procedural and evidentiary rules must not displace substantive law—should be imposed on Congress as well if Congress lacks the authority to create the substantive law it displaces. Otherwise, the general police power which the constitutional structure sought to keep out of federal hands may creep in through a door thought to be locked by *Erie*.").

153 The proposed rules of evidence are reprinted at 56 F.R.D. 183 (1972). For an overview of the proposed rules, see generally William L. Hungate, *An Introduction to the Proposed Rules of Evidence*, 32 FED. B.J. 225 (1973).

rejected arguments that state rules of privilege are substantive law which, under the doctrine of *Erie*, had to be applied by federal courts sitting in diversity cases.[154] Congress, apparently, was of a different view. For the first time in thirty-five years since the Rules Enabling Act was passed, Congress suspended the effectiveness of the proposed Rules,[155] then rewrote the evidence Rules and enacted them into law.[156] Most notably, the proposed Rules on privileges were completely revised to require the application of state law whenever state law provides the substantive rule of decision.[157]

It was against this constitutional backdrop that Congress delegated to the Court rulemaking authority in the Rules Enabling Act. Before going on to examine the scope of that delegation, there remain two constitutional issues raised by the Act. The first is whether the delegation of rulemaking authority to the Court is constitutional. The second is whether the supersession provision of the Act, which provides that laws in conflict with valid Rules promulgated under the Act are of "no further force or effect,"[158] is constitutionally valid.

C. Constitutionality of the Delegation Under the Rules Enabling Act

We have seen that even in the absence of a congressional delegation, the federal judiciary has inherent authority to regulate practice and procedure before it, at least through procedural common law pronouncements and, more dubiously, through some prospective

154 *See* Advisory Committee Notes to Rule 501, Proposed Rules of Evidence, 56 F.R.D. at 233 (arguing that after *Hanna*, the decision whether to give state privileges effect was one "of choice rather than necessity"). In support of the Committee's conclusion, *see* Wright, *supra* note 141, at 573. *But see* Goldberg, *supra* note 37, at 682 n.86 ("It is likely that the Advisory Committee, relying on the Court's application in *Hanna* of a federal rule of civil procedure which contravened state law, reasoned that an analogous situation would exist if a federal rule of evidence contravened state law. However, this analogy is untenable because it fails to consider the inherent differences between a rule of procedure regulating service of process and a rule of evidence involving significant substantive rights.").

155 Act of March 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' concern that the Court had overstepped its constitutional and statutory rulemaking authority.

156 Act of January 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926. For a detailed recounting of Congress' intervention and redrafting of the evidence rules, see WRIGHT & GRAHAM, 21 FEDERAL PRACTICE & PROCEDURE: EVIDENCE, § 5006 (1977).

157 *See* Fed. R. EVID. 501 ("[I]n civil actions and proceedings, with respect to an element of a claim or defense as to which state law supplies the rule of decision, the privilege of a witness . . . shall be determined in accordance with State law."). References to state law are found also in Federal Rule of Evidence 302, which concerns the effect of presumptions, and Rule 601, which concerns the competency of witnesses.

158 28 U.S.C. § 2072(b) (1994).

rulemaking. A relatively small part of that inherent power, such as the power to sanction for contempt, may not be materially impaired by Congress, but the greater part of the inherent power of the judicial branch is subject to congressional control. Given the inherent power of the judicial branch, it is not surprising that the Supreme Court has long rejected arguments that rulemaking power is a nonadjudicative function that, under Articles I and III, cannot be delegated to the courts.[159] Rather, the Court has held, correctly, that Congress may delegate procedural rulemaking power to the Court, provided that the delegation does not include "powers which are strictly and exclusively legislative."[160] Thus, it seems that Congress may legitimately delegate to the Court authority to regulate by prospective rule matters that fall within the scope of the courts' inherent authority to regulate procedure, as it has with the Rules Enabling Act.[161] The shared authority of Congress and the judicial branch over procedure is, by definition, not a "strictly and exclusively legislative" power.[162] The Court also has held that the specific delegation of the Rules Enabling Act is

159 *See, e.g.*, Walsh, *supra* note 83; Redish, *supra* note 83.

160 Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 42–43 (1825).

161 Indeed, as discussed below, the matters as to which rulemaking authority has been delegated to the Court are narrower than the area of matters as to which the courts have inherent authority to make common law procedural pronouncements. It does not follow, however, that the REA was unnecessary surplusage. Even though the judicial branch has inherent authority in the area reached by the delegation, the ambiguity as to whether that inherent authority includes authority to promulgate prospective rules is enough to demonstrate the necessity, or at least wisdom, of the delegation in the Rules Enabling Act. *See supra* text accompanying note 69. The delegation to the Court can also be seen as a statement of congressional intent generally to defer to the Court in this area. Furthermore, even if it were uncontested that the Supreme Court has constitutional authority to promulgate supervisory rules of procedure for federal courts, the Court, acting without any assistance from the Judicial Conference or its committees, is hardly up to the task. Thus, the process established by the Rules Enabling Act, and the "rulemaking infrastructure" created by Congress, has an independent value. *Cf.* Carrington, *supra* note 86, at 974–75.

162 *Cf.* Supreme Court of Va. v. Consumers Union of the U.S., Inc., 446 U.S. 719 (1980). In *Consumers Union*, the Court found that in promulgating disciplinary rules for the Bar, the Virginia Supreme Court was acting in a legislative capacity, as the disciplinary rules "'are rules of general application and are statutory in character. They act not on parties litigant but on all those who practice law in Virginia. They do not arise out of a controversy which must be adjudicated, but instead out of a need to regulate conduct for the protection of all citizens.'" *Id.* at 731 (citing Consumers Union v. American Bar Ass'n, 470 F. Supp. 1055, 1064 (1979) (Warriner, J., dissenting in part and concurring in part)). Rules of procedure, on the other hand, operate only on litigants, not anyone outside of the courtroom.

constitutionally permissible.[163] The delegation does satisfy the requirements of the Court-articulated nondelegation doctrine. It includes "intelligible principle[s]"[164] to govern the exercise of the Court's discretion, in that it limits the Court to promulgating Rules of "practice and procedure" that do not "abridge, enlarge or modify any substantive right."[165] It also provides for congressional oversight of the exercise of the power through the "report and wait" provision.[166] Moreover, and more importantly, it does not impermissibly aggrandize the role of the judiciary at the expense of Congress or assign to the Court "tasks that are more properly accomplished"[167] by Congress, as rules of procedure are intimately related to the business of the judicial branch, which has greater expertise than Congress in this matter. Furthermore, rules of procedure concern matters as to which the judicial branch has some degree of inherent authority.

D. Constitutionality of the Supersession Provision

More problematic is the question of the constitutionality of the supersession provision of § 2072(b), which provides that "[a]ll laws in conflict with such rules [promulgated under the Rules Enabling Act] shall be of no further force or effect after such rules have taken ef-

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163 *See* Sibbach v. Wilson, 312 U.S. 1, 9–10 (1941) ("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 [sic] of the United States . . . .") (footnote omitted); *see also* Mistretta v. United States, 488 U.S. 361, 387–88 (1989) (citing *Sibbach*, 312 U.S. at 9–10, for authority that delegation under the Rules Enabling Act is an example of a constitutionally permissible delegation to the Court); Carole E. Goldberg, *The Influence of Procedural Rules on Federal Jurisdiction*, 28 STAN. L. REV. 395, 437–41 (1976) (concluding that the delegation of the REA is valid); 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). *But see* Redish, *supra* note 83, at 316 (arguing that the delegation of rulemaking power is violative of separation of powers concerns, and reading *Sibbach* as not directly ruling on the validity of the REA under the case-or-controversy requirement).

164 *See, e.g.*, Panama Refining Co. v. Ryan, 293 U.S. 388, 430 (1935).

165 28 U.S.C. § 2072(a), (b) (1994).

166 *See* 28 U.S.C. § 2073 (1994). The efficacy of that oversight is, admittedly, rather limited. *See infra* text accompanying notes 231–33.

167 *Mistretta*, 488 U.S. at 383. *But see* Redish, *supra* note 83, at 311–14 (arguing that *Mistretta's* functional test for separation of powers is "all but unworkable." *Id.* at 311)). *See also* Wayman v. Southard, 23 U.S. (10 Wheat.) 1 (1825), and the discussion of that case in Van Alstyne, *supra* note 68, at 124–25.

fect."[168] Although the constitutional validity of the provision has been the subject of much debate,[169] the validity of the provision has never been ruled upon by the Supreme Court.[170]

The Court's recent decision in *Clinton v. New York*,[171] holding the Line Item Veto Act invalid, may produce renewed calls for examination of the validity of the supersession provision. A thorough analysis of that issue, including a consideration of the Court's decision in the Line Item Veto Act case, as well as the earlier decision in *Chadha*,[172] will be the subject of a separate Article.

That Article will argue that the supersession clause is valid, provided that the substantive rights limitation of the REA is given effect in the way this Article suggests. If the scope of the REA's delegation of authority to the Court is read in an appropriately narrow manner to avoid constitutional infirmity, Rules promulgated under the Act are

168 28 U.S.C. § 2072(b) (1994). The 1934 Rules Enabling Act's supersession provision was substantially the same: "[The rules] shall take effect six months after their promulgation, and thereafter all laws in conflict therewith shall be of no further force or effect." Act of June 19, 1934, Pub. L. No. 73-415, 48 Stat. 1064.

169 *See* Burbank, *supra* note 32, at 1050–54. *See also* Clinton, *supra* note 163, at 65, 77; H.R. REP. No. 99-422, at 16 (1985) (citing Burbank, *supra* note 32); *Rules Enabling Act: Hearing Before the Subcomm. on Courts and Administrative Practice of the Comm. on the Judiciary, United States Senate*, 100th Cong. 1077 (1988).

170 On occasion, the Court has stated that it has no authority to promulgate Rules inconsistent with federal statutes. *See, e.g.*, Palermo v. United States, 360 U.S. 343, 353 n.11 (1959) ("The power of the Court to prescribe rules of procedure exists only in the absence of a relevant Act of Congress.") In *Granny Goose Foods, Inc. v. Teamsters Local No. 70*, 94 S. Ct. 1113, 1122 (1974) (Adv. Sheet ed.), the Court stated "We do not doubt that were there an actual conflict between [a statute] and [a Rule] the statute would control." The opinion was revised to delete this statement when the bound volume of the reports was issued. *See* Clinton, *supra* note 163, at 73. In other decisions, the Court has appeared to assume the validity of the provision. *See* Henderson v. United States, 517 U.S. 654 (1996). In *Henderson*, the supersession issue was not squarely presented, as the Rule in question had been enacted by Congress. The Court, however, appeared to assume the validity of that provision when it noted that "[a]s the United States acknowledges . . . a Rule made law by congress supersedes conflicting laws no less than a Rule this Court prescribes." *Id.* at 1646. *Cf.* Davis v. United States, 411 U.S. 233 (1973) (assuming first that a similar supersession provision for the Rules of Criminal Procedure would result in the repeal of a statute by a later enacted rule, but then noting that the supersession was a "difficult question" the Court need not face in that case). *Cf.* Sibbach v. Wilson & Co., 312 U.S. 1, 9–10 (1940) (stating first that Congress may delegate to the courts "authority to make rules not inconsistent with the statutes or Constitution of the United States," and then stating that "the rules, if they are within the authority granted by Congress, repeal [the Conformity Act]). In note 40 of its decision, the Court distinguished the REA's supersession clause from the Line Item Veto Act.

171 118 S. Ct. 2091 (1998).

172 INS v. Chadha, 462 U.S. 919 (1983).

not inherently "legislative," in the sense the term in used in *Chadha*, as they will not "alter[ ] the legal rights, duties, and relations of persons . . . ."[173] Furthermore, in contrast to the power Congress attempted to give the President in the Line Item Veto Act, the Court has been delegated authority to regulate only matters that are well within the judicial branch's inherent authority over procedure.[174]

Therefore, valid Rules, even those that supersede statutes, are not subject to the bicamerality and presentment requirements of Article I. The key question, to which this Article will turn next, is when does a Rule impermissibly affect substantive rights? Briefly, that issue is determined by a number of factors, including the extent to which Congress has legislated in the area. When Congress has legislated extensively on a procedural matter, it is presumed to have done so fully aware of the Rules Enabling Act and Rules promulgated pursuant to that Act.[175] The congressional choice to enact legislation indicates a policy decision, which presumptively places the matter into the area of "substantive rights" and outside of the scope of matters delegated to the Court. Thus, statutes with a substantive purpose, particularly those not enacted as a part of the Rules, are not subject to supersession, as a Court-promulgated Rule in conflict with the statute would impermissibly affect a substantive right within the meaning of the REA. A decision by Congress to place a procedural provision in the Rules, as with the Federal Rules of Evidence, is a strong, but rebuttable, indication that Congress perceives the matter to be procedural, and thus subject to supersession.[176] The supersession clause therefore will have a limited role, provided that the restriction on Rules modifying, abridging, or enlarging substantive rights is taken seriously, and

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173 *Id.* at 952.

174 In this respect, the delegation of authority to cancel laws under the REA is very different than the delegation in the Line Item Veto Act. The REA in no way aggrandizes the power of the judiciary beyond that envisaged in the constitutional structure. Providing the President with a line item veto, by contrast, results effectively in an end-run around the constitutional scheme set up in Article I, whereby the President is permitted a veto only of legislation prior to its passage, and has no inherent authority to cancel legislation after enactment pursuant to Article I. *Cf. Clinton*, 118 S. Ct. 2091 (1998).

175 *See* H.R. Rep. No. 99-422, at 13–17 (1985).

176 With the Rules of Evidence, Congress singled out Rules governing privileges as substantive, and thus requiring an affirmative act of Congress. Under 28 U.S.C. § 2074(b) (1994), any Court-promulgated Rule "creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress." *See infra* note 284 and accompanying text.

should come into play only to rid the statute books of "procedural marginalia."[177]

In the past, however, the Court has never found a Rule invalid as beyond the scope of the Rules Enabling Act, but has upheld against challenge questionable Rules, such as Rule 35, which appears to impermissibly affect substantive rights.[178] The failure by the Court to take seriously the limits on its authority to promulgate Rules could create a problem with the supersession provision. If a Rule promulgated under the REA impermissibly intrudes on an area reserved to Congress, it should be adjudged invalid under the REA. If it is not, and if the supersession clause is given effect, a Rule that should be adjudged invalid for impermissibly affecting substantive rights would effectively repeal a statute, and a true Article I and separation of powers problem would be created. Because of the possibility of such erroneous rulings, Professor Burbank has expressed doubts about the constitutionality, and wisdom, of the supersession provision.[179] But, this possibility does not so much demonstrate the invalidity of the supersession provision as it demonstrates the importance of taking the "substantive rights" provision of the REA seriously. As will be seen below, the Court has in a few recent decisions indicated its increased willingness to do so. The Court's jurisprudence in the area is muddled, and the meaning of the REA's substantive rights limitation has yet to be made clear, a task this Article has set out to accomplish.

III. The Allocation of Rulemaking Authority Under the Rules Enabling Act

With the Rules Enabling Act, Congress has delegated to the Supreme Court the power to make supervisory Rules of procedure for

177 *See* Paul D. Carrington, *"Substance" and "Procedure" in the Rules Enabling Act,* 1989 Duke L. J. 281, 325. *But see* Burbank, *supra* note 4, at 1044 ("As originally formulated, the supersession clause was intended to 'clear . . . undergrowth,' although it was by no means limited to 'procedural marginalia.' Nor is it so limited today. . . .") (citations omitted).

178 *See* Sibbach v. Wilson, 312 U.S 1 (1941); *cf.* Rowe, *supra* note 4, at 982 (arguing that Rule 35 would be invalid in the face of a state law reflecting a substantive policy choice). This Article, in Part IV.B, below, disputes Professor Rowe's thesis, and contends that the legislative policy of the state legislature is not determinative of the validity of federal Rules).

179 *See* Burbank, *supra* note 4, at 1036–37 (arguing that if the Court had promulgated amendments to Rule 68 that had been proposed in 1983 and 1984, and which appeared to transgress the "substantive rights" limitations of the REA, the Court also would have found that the Rule superseded conflicting statutes governing attorney's fees, a result he considers violative of the Constitution).

federal courts. In its present form, the Rules Enabling Act sets out the modern rulemaking scheme:

> (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.

The basic mechanism for promulgating the Rules is set out in the Act as well.[180] An Advisory Committee drafts proposed amendments to the Federal Rules of Civil Procedure, which are reviewed by a Standing Committee on Rules and Procedures, and then by the Judicial Conference. The proposed amendments are then sent to the

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179 28 U.S.C. § 2072 (1988). The 1934 version of the Act was similar, but provided only for rules of civil procedure:

> *Be it enacted, etc.*, That 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.

Act of June 19, 1934, Pub. L. No. 73-415, 48 Stat. 1064 (repealed 1988). Before the 1988 legislation amending the Act, which provided a uniform mechanism for promulgating rules of procedure and evidence, authority to enact rules of evidence and promulgate 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 (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); 28 U.S.C. § 2075 (1970) (bankruptcy rules); 28 U.S.C. §§ 3402, 3771, 3772 (1970) (criminal procedure). See generally Burbank, *supra* note 32, for an exhaustive and illuminating history of the Rules Enabling Act.

180 Since 1958, the Judicial Conference has been legislatively charged with carrying on "a continuous study of the operation and effect of the general rules of practice and procedure." Act of July 11, 1958, Pub. L. No. 85-513, 72 Stat. 356 (codified as 28 U.S.C. § 331 (1994)). The Judicial Conference created the Standing Committee on Rules of Practice and Procedure, and five Advisory Committees, including one on the rules of civil procedure. *See* JUDICIAL CONFERENCE OF THE UNITED STATES, ANNUAL REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 6–7 (1958). For a description of the rulemaking process generally, by the then-Reporter for the Advisory Committee on the Civil Rules, see Carrington, *supra* note 29, at 2119–24.

Supreme Court,[181] which transmits them to Congress before May 1 of the year in which they are to become effective.[182] Congress has until December 1 to act, and if it does nothing, the amendments become effective.[183] The language of the Act is relatively simple. But its meaning, particularly the scope of authority delegated to the Court, and the significance of the "substantive rights" limitation, has generated a great deal of debate—and confusion—among commentators and the Court. What is needed is a workable test that can be applied by the courts, and by the Advisory Committee, in determining the validity, or permissible scope, of Rules promulgated under the Act. Part IV of this Article attempts to set out such a test. Before doing so, it is helpful to examine the Court's jurisprudence and the legislative history of the 1988 amendments to the Act.

A. The "Myth of Federalism"[184]

One area of confusion was the long-standing and widespread assumption that the Act's prohibition on Rules affecting substantive rights was intended to further the federalism principles reflected in the *Erie*[185] line of decisions. Those cases established that in diversity cases, if a federal court policy or doctrine conflicts with state law, federal courts must apply state common law as well as state statutes in order to assure that "the outcome of the litigation in the federal court . . . [will be] substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court,"[186] unless there is a countervailing federal interest sufficient to justify deviating from the state rule.[187] In analyzing the Rules Enabling Act, the Supreme Court has attributed to the substantive rights limitation in the REA the federalism principle established in *Erie*. That is, the Court views the REA restriction as one intended to prevent Federal Rules from interfering with substantive rights created by state law, stating that "both the Enabling Act and the *Erie* rule say, roughly, that federal courts are to apply state 'substantive law' and federal 'procedural' law. . . ."[188] Similarly, commentators for years focused on feder-

181 For a discussion of the Supreme Court's role in the rulemaking process, see Moore, *supra* note 38.

182 28 U.S.C. § 2074 (1994).

183 *Id.*

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

185 Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

186 Guaranty Trust Co. v. York, 326 U.S. 99, 109 (1945).

187 *See* Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525 (1958).

188 Hanna v. Plumer, 380 U.S. 460, 471 (1965).

alism principles and the protection the Rules Enabling Act affords to substantive state law.[189]

This preoccupation with the principles of federalism enunciated in *Erie* was understandable, given that the first set of Federal Rules came into effect on the heels of that decision.[190] Although *Erie* itself did not involve a conflict between state law and a Federal Rule promulgated under the REA, for years there was a great deal of confusion as to whether the *Erie* doctrine, and *York's* outcome-determinative test, governed such a conflict, particularly in light of the opinions in the *Cohen*,[191] *Woods*,[192] and *Ragan*[193] decisions, which were widely interpreted as applying an outcome-determinative test to determine the applicability of Federal Rules.[194] The Court clarified much with its

189 *See, e.g.*, Abram Chayes, *Some Further Last Words on* Erie—*The Bead Game*, 87 HARV. L. REV. 741 (1974); Ely, *supra* note 1, at 718–40; John Hart Ely, *The Necklace*, 87 HARV. L. REV. 753 (1974); Mishkin, *supra* note 111, at 1686–87 (1974) (recognizing that the substantive rights limitation in the Rules Enabling Act reflects separation of powers considerations, but considering the substantive rights limitation as primarily resting on federalism concerns; the "constitutional perception that [federal] courts are inappropriate makers of laws intruding upon the states' views of social policy in the areas of state competence"); *see also* Darrell N. Braman, Jr. & Mark D. Neumann, *The Still Unrepressed Myth of* Erie, 18 U. BALT. L. REV. 403 (1989) (analyzing lower court decisions against the 'benchmark' of Professor Ely's analysis).

190 The decision in *Erie* was rendered on April 25, 1938. The Rules of Civil Procedure first came into effect on Sept. 16, 1938.

191 Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949) (holding that a federal court sitting in diversity was obligated to apply state law requiring a bond in derivative suit, and that Federal Rule of Civil Procedure 23, which governed derivative suits, did not address a bond requirement).

192 Woods v. Interstate Realty Co., 337 U.S. 535 (1949) (holding that a federal court sitting in diversity was required to apply a state statute prohibiting foreign corporations not qualified to do business in the state from suing in the state, but failing to consider the potential conflict between that state law and Federal Rule of Civil Procedure 17(b), which governs capacity to sue and be sued in a federal court).

193 Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530 (1949) (holding that state law requiring service of a summons to toll the statute of limitations applied, and finding that the provision in Rule 3 for commencement of the action upon filing did not govern tolling).

194 *See, e.g.*, Merrigan, *supra* note 120, at 717 ("The *York* case, of necessity, spelled death to the hope for a completely uniform federal procedure."); *see also* WRIGHT, *supra* note 120, § 59, at 401–03 ("Many observers believed . . . that [after *Cohen*, *Woods* and *Ragan* were decided] there was no longer much, if any, room for independent federal regulation of procedure. . . . After the three 1949 decisions the draftsman of the rules said that 'hardly a one of the heralded Federal Rules can be considered safe from attack.'") (citations omitted). For a discussion and explanation of the confusion about the meaning of these cases, see Ralph U. Whitten, Erie *and the Federal Rules: A Review and Reappraisal After* Burlington Northern Railroad v. Woods, 21 CREIGHTON L. REV. 1, 2–12 (1987).

decision in *Hanna v. Plumer*.[195] There, the Court stated that the *Erie* line of cases did not govern when a Federal Rule was involved, and explained the *Cohen, Woods,* and *Ragan* cases as situations in which the Federal Rules were not applicable. In *Hanna,* the Court distinguished between the case involving the "relatively unguided *Erie* choice," in which federal policy or doctrine, as articulated by the court, conflicts with state law, and the case in which a Federal Rule of Civil Procedure conflicts with state law. In the latter case, the Court explained, the Rule will prevail, by virtue of the Supremacy Clause, just as legislation enacted by Congress would prevail, provided that the Rule is validly enacted pursuant to the Rules Enabling Act and does not violate the "substantive rights" limitation. In *Hanna,* however, the Court characterized the main purpose of the "substantive rights" limitation as the protection of state substantive law, and the commentators accepted the view virtually without question.[196]

B. Exploding the Myth—Separation of Powers Concerns in the REA

This "myth of federalism"—that in limiting the Court's rulemaking authority in the Rules Enabling Act, Congress was primarily concerned with preventing the inappropriate displacement of state substantive law by a Federal Rule—was exploded by Professor Burbank in his exhaustive and illuminating study of the history of the 1934 Rules Enabling Act.[197] In a detailed analysis of the legislative history of the Act, Professor Burbank demonstrated, and it now is generally accepted,[198] that the lawmakers who drafted and enacted into law the Rules Enabling Act were primarily concerned with the allocation of "power to make federal law prospectively between the Supreme Court as rulemaker and Congress, not to protect lawmaking

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195 380 U.S. 460 (1965).

196 *See id.* at 465. In his influential and seminal article, *The Irrepressible Myth of* Erie, Professor Ely clarified even further the distinctions drawn in *Hanna.* Ely, *supra* note 1. Professor Burbank has stated that while Professor Ely's article was helpful in dispelling the "myth" that the *Erie* analysis governed in cases concerning the Federal Rules:

> [it helped] to entrench another . . . the myth of federalism, which would have us believe that, four years before *Erie*—when *Swift v. Tyson* was in full flower—and in a statute authorizing rules of practice and procedure for all civil litigation in the federal courts—litigation that even in the early 1930's involved predominantly questions of federal substantive law—Congress was only concerned, or even primarily concerned, about the inappropriate displacement of state law.

Burbank, *supra* note 184, at 700.

197 Burbank, *supra* note 32.

198 *See, e.g.,* Moore, *supra* note 38, at 1043; Carrington & Apanovitch, *supra* note 4, at 298.

that has already occurred, and certainly not to protect only state law."[199] Rather, Congress was primarily concerned that prospective federal lawmaking involving policy decisions, or requiring choices among competing interests, be left to Congress,[200] and that the Court's power to make procedural Rules be exercised in as politically neutral a fashion as possible.[201] As Professor Burbank points out, it makes little sense to think that Congress' motivating concern was that Court-promulgated Rules might inappropriately displace substantive state laws. The Rules Enabling Act was passed in 1934—four years before *Erie* was decided. At that time, under the doctrine of *Swift v. Tyson*,[202] federal courts were considered free to fashion general federal common law in the absence of congressional or state legislative action, so that federalism issues simply did not have the significance that they have today in diversity cases.[203]

Thus, Congress' animating concern with the Rules Enabling Act in 1934 was the allocation of authority between Congress and the Supreme Court. As we shall examine in more detail below, this same concern was at the heart of the 1988 revisions to the Act.[204] This does not mean that the Act does not also afford some protection to state substantive law. As Professor Burbank has noted, the Act "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."[205] That is, Congress has reserved to itself the decision whether there should be prospective federal procedural law where it has the potential of displacing substantive state law. There are matters falling within state competence that are rationally capable of classification as procedural, but are so "substantive" as to be beyond the scope of authority delegated to the Court under the REA. As to those matters, state law is subject to displacement only by act of Congress, or in limited cases, federal common law, and not by prospective Court-promulgated Rule.[206]

That the Rules Enabling Act reflects separation of powers concerns does not mean that it simply codifies the constitutional alloca-

199 Burbank, *supra* note 184, at 700.

200 *See generally* Burbank, *supra* note 32.

201 *See* Carrington, *supra* note 177; Carrington & Apanovitch, *supra* note 4, at 480.

202 41 U.S. (16 Pet.) 1 (1842).

203 *See* Burbank, *supra* note 184, at 700; *see also* Moore, *supra* note 38, at 1043.

204 On the legislative history of the 1988 Rules Enabling Act, see generally Burbank, *supra* note 4, at 1029–40. *See also* Moore, *supra* note 38, at 1047–51.

205 Burbank, *supra* note 184, at 700–01.

206 *See* H.R. REP. 99-422, at 22 (1985).

tion of authority over rulemaking. It does not. Rather, with both the original 1934 Rules Enabling Act and its amendment in 1988, Congress retained for itself exclusive authority to make federal law that "modifies, abridges, or enlarges substantive rights." "Substantive rights," as the term is used in the Act, includes matters, such as subject matter jurisdiction, as to which rulemaking authority could not constitutionally be delegated to the Court,[207] as well as matters, such as venue[208] or limitations periods,[209] as to which rulemaking authority could constitutionally be delegated to the Court.[210] However, the

207 *See supra* note 98. In this regard, the grant to the Court of authority to make rules defining the appellate jurisdiction of circuit courts of appeals, *see* 28 U.S.C. §§ 1292(e), 2072(c) (1994), raises interesting questions of constitutional validity, which, though deserving of study, are beyond the scope of this Article.

208 Venue is beyond the power of the Court because, by virtue of longstanding and extensive regulation by Congress, it involves a "substantive right" within the meaning of the REA. *Cf.* Whitten, *supra* note 70. In the absence of congressional legislation, however, courts could exercise inherent power to determine issues of venue.

209 *See* H.R. REP. 99-422, at 22 (1985) ("The bill does not confer power on the Supreme Court to promulgate rules regarding matters, such as limitations and preclusion, that necessarily and obviously define or limit rights under the substantive law."). There is, however, some inherent judicial power to determine the time in which actions must be filed, as illustrated by the doctrine of laches. Nonetheless, there may be constitutional limitations on the Court's—and Congress'—ability to declare limitations periods for matters governed by state law. *See infra* note 310 and accompanying text.

210 There is some debate as to whether Congress could delegate to the Court authority to make rules that affect substantive rights. To a large extent, that debate is tied up with the debate as to the meaning of the phrase "substantive rights" in the Rules Enabling Act. Some commentators argue that the restriction on Rules affecting substantive rights merely incorporates restrictions imposed by the doctrine of separation of powers, and particularly by the Article III requirement that the Court make law only in "cases or controversies" before it. *See* Mishkin, *supra* note 111, at 1686–87:

> Congress' explicit refusal to delegate to the Court any power to "abridge, enlarge or modify any substantive right" in my view rests upon—and restates—the constitutional perception that courts are inappropriate makers of laws intruding upon the states' view of social policy in the areas of state competence. Courts interpreting that Act are under a duty to give full scope to that prohibition—a legislative prohibition expressive of basic constitutional principles not only of federalism but also of *differentiation of powers.* (emphasis added).

Compare Carrington, *supra* note 177, at 287 ("[T]he Court cannot make substantive rules by any means other than writing opinions in 'cases or controversies' without taking leave of its role as defined by Article III.") *with* Burbank, *supra* note 32, at 1113 (arguing that the legislative history of the Act indicates that the Act's substantive rights limitation was intended to impose a limitation on the Court's rulemaking authority independent of, and in addition to, the constitutional separation of powers restrictions).

Court's jurisprudence on this point is muddled. In several decisions, it seems to treat the Rules Enabling Act as a plenary delegation of Congress' entire power to regulate practice and procedure, while recognizing, nonetheless, that the REA imposes an additional limitation on the Court's rulemaking authority.[211]

C. *The Supreme Court Decisions Prior to the 1988 Amendments to the REA*

Sibbach v. Wilson[212] was the Court's first decision on a challenge to the validity of a Rule. In that case, the plaintiff challenged Fed. R. Civ. P. 35, which provided that the district court could order a physical or mental examination of a party. Although the plaintiff admitted that the Rule regulated procedure, she argued that it affected a "substantive right," and thus was beyond the scope of authority delegated to the Court by the Rules Enabling Act. But the admission by the plaintiff that the Rule concerned procedure proved fatal to her case; to the majority, matters of procedure and matters of substance were mutually exclusive. Despite the text of the Act, which seems to recognize that substance and procedure are overlapping categories and to contemplate that a rule of procedure may affect substantive rights, the Court was of the opinion that a rule is either procedural or it affects substantive rights; it cannot be both.[213] The only test for validity under the REA, the Court stated:

> [M]ust be whether a rule really regulates procedure—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them.[214]

To the Court, the phrase "substantive rights" was confined to rights "conferred by law," such as the "right not to be injured in one's

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211 *See infra* text accompanying notes 223–25. Furthermore, the Court does seem to recognize that not all of Congress' power over procedure may be delegated to the Court because of separation of powers concerns. For example, in *Sibbach*, the Court noted: "There are other limitations upon the authority to prescribe rules which might have been, but were not mentioned in the Act; for instance, the inability of a court, by rule, to extend or restrict the jurisdiction conferred by a statute." Sibbach v. Wilson & Co., 312 U.S. 1, 10 (1941).

212 312 U.S. 1 (1941).

213 For an argument that the text of the Rules Enabling Act contemplates that some procedural rules may impermissibly affect substantive rights, and thus are beyond the scope of authority delegated to the Court, see Ely, *supra* note 1, at 718–19. *See also* Rowe, *supra* note 4, at 977–81; Whitten, *supra* note 195, at 5.

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

person by another's negligence."[215] The argument that the Rule permitting physical examinations infringed on an important right that had been previously recognized did not sway the Court, which noted that the states were split as to whether courts could require submission to examination in discovery. By which authority, the Court asked, had such a right been recognized? Under the old Conformity Act,[216] federal courts would have permitted examinations in a state where they were permitted in state court, and would not have ordered them in states where they were not permitted in state court. On the grounds that there had previously been no uniform federal policy on the issue, the Court rejected the argument that the new Federal Rule was a major change in policy.

The *Sibbach* decision was as much a creature of its time as the *Erie* decision was,[217] coming as it did a mere three years after the first set of uniform Federal Rules of procedure were promulgated. The necessity for a uniform Federal Rule on a matter of discovery seemed paramount. The Court could not readily accept that the availability of a physical exam in a federal court might vary from state to state, just as it had under the Conformity Act. It must have been counterintuitive to the Court, and does not seem to have been argued by the plaintiff, that the substantive rights limitation was intended to reserve certain areas for prospective regulation by Congress only, so that only a congressional enactment, and not a Court-promulgated Rule, could operate to preempt state law on the matter.[218] Equally incongruous to the Court may have been the notion that a matter of such significance that it was removed from the Court's authority, was not sufficiently important for Congress to have legislated. Furthermore, the Court noted, Congress had the opportunity to review the Rules, and, as it did not act, it obviously found no transgression of the authority it had conferred on the Court.

The *Sibbach* test for validity of a Rule under the REA—"whether a rule really regulates procedure"—sounds very much like the defini-

215 *Id.* at 13.

216 Act of June 1, 1872, ch. 255, § 5, 17 Stat. 196, 197 (1872). The Conformity Act required that federal trial courts in cases at common law follow the procedure of the state in which they were located.

217 *Cf.* Ely, *supra* note 1, at 702 (describing the *Erie* decision as a "creature of its time").

218 The Court assumed also that if the Rule was substantive within the meaning of the REA, it would be substantive also for conflicts of law purposes, and thus the Indiana state rule would govern, to allow the examination. Here the Court went further astray in assuming that substance and procedure have the same meaning for all purposes.

tion of Congress' constitutional authority to regulate practice and procedure in the federal courts which, the Court in *Hanna v. Plumer* later held, "includes a power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either."[219] Virtually any rule "rationally capable of classification as procedural"—that is, virtually all rules—can be said to "really regulate procedure." Thus, the Court treated the grant of authority to prescribe general Rules of procedure (in what is now § 2072(a)) as a plenary grant of Congress' power to regulate procedure. In doing so, the Court ignored the limiting language of what is now § 2072(b), that Rules could not impermissibly affect substantive rights.[220] The real issue for validity under the Rules Enabling Act is not whether the Rule is one that regulates procedure, within the meaning of § 2072(a), but whether the Rule impermissibly affects substantive rights within the meaning of § 2072(b).

The Court again ignored the limiting language of the REA in the *Hanna* case. There, the Court seemed to recognize that the Rules Enabling Act imposes a restriction on the Court's rulemaking authority separate from and in addition to the constitutional limitation on Congress' authority,[221] but failed to define the difference between the constitutional limits on Congress' power and the limits imposed by the Rules Enabling Act on the Court's rulemaking authority. Rather, the Court simply cited the *Sibbach* test—"whether a rule really regulates procedure"—to determine validity under the Act, thus conflating the test for Congress' constitutional authority with the test for the Court's authority under the Rules Enabling Act. With few exceptions, the Court has persisted in conflating the two tests. As late as 1988, in *Mistretta*, the Court buttressed its finding that a delegation of authority to the judiciary to create federal sentencing guidelines was constitutional by stating "we have recognized that the Federal Rules of Civil Procedure regulate matters 'falling within the uncertain area between

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

220 In his article *Rules Enabling Act of 1934*, Professor Burbank argued that the limiting language of the 1934 Act, prohibiting the promulgation of rules that "modify, abridge or enlarge substantive rights," was surplusage, serving only to emphasize the inherent restriction in the use of the word "procedure," which, he argued, referred only to matters of pure procedure fit for regulation by courts. Regardless, he was critical of the Court's decisions in *Sibbach* and other cases, as upholding rules that exceed the authority delegated to the Court. *See* Burbank, *supra* note 32, at 1107–08. Professor Ely, by contrast, concluded that the limiting language was not surplusage. *See* Ely, *supra* note 1, at 718–19; *see also* Rowe, *supra* note 4, at 981.

221 *See Hanna*, 380 U.S. at 464 (holding that Rule 4(d)(1) "neither exceeded the congressional mandate embodied in the Rules Enabling Act nor transgressed constitutional bounds").

substance and procedure, [and] are rationally capable of classification as either.'"[222]

In the few decisions in which the Court acknowledged that the Act's prohibition against Rules that affect substantive rights has significance independent of the constitutional test of whether a Rule is "rationally capable of classification" as procedural, it still failed to articulate any coherent standard for distinguishing procedural Rules that impermissibly affect substantive rights from those that do not. In *Mississippi Publishing Corp. v. Murphree*,[223] the Court considered a challenge to the former Rule 4(f), which permitted service anywhere in the state in which the federal court was situated, even outside of the district. Prior to the promulgation of the Rule, service could be made only within the district. Thus, the defendant argued, Rule 4(f) impermissibly affected its substantive rights by extending the jurisdiction of the court. In rejecting the argument, the Court recognized the restriction on Rules affecting substantive rights, but held that although the application of the service provision would result in subjecting the litigants' rights to adjudication in a federal court, this was merely an "incidental effect[ ]" on substantive rights that was permitted by the Act.[224] In language reminiscent of *Sibbach*, the Court noted that the provision for service "relates merely to 'the manner and the means by which a right to recover . . . is enforced'. . . . But it does not operate to abridge, enlarge, or modify the rules of decision by which th[e] court will adjudicate [the litigants'] rights."[225] But the Court does not make clear how much of an "incidental effect" on substantive rights is permissible under the Rules Enabling Act.

In *Burlington Northern Railroad Co. v. Woods*,[226] the Court stretched the concept of permissible "incidental effects" so far as to render it meaningless. There, the Court was faced with an argument that Rule 38 of the Federal Rules of Appellate Procedure exceeded the authority of the Rules Enabling Act. The Rule, which affords federal courts of appeals plenary discretion to award damages to an appellee when an appeal has been frivolous, was held to override a state rule imposing a fixed ten percent penalty on appellants who obtain stays of judgment pending appeals that ultimately are unsuccessful. The Court noted that the Rule was rationally capable of classification as proce-

222 Mistretta v. United States, 488 U.S. 361, 392 (1989) (Blackmun, J.) (citing *Hanna*, 380 U.S. at 472.) *See also* Gasperini v. Center for the Humanities, Inc., 518 U.S. 415, 468 (1996) (Scalia, J., dissenting).

223 326 U.S. 438 (1946).

224 *Id.* at 445.

225 *Id.* at 445–46 (citations omitted).

226 480 U.S. 1 (1986). For a criticism of *Burlington*, see Whitten, *supra* note 194.

dural, and thus satisfied the *Hanna* test of constitutionality. While the Court recognized that the Rules Enabling Act imposed an "additional requirement" that a Rule not "enlarge, abridge or modify any substantive right," it also noted, citing *Murphree* and *Hanna*, that an "incidental" impact on substantive rights was permitted, so long as the Rule in question is "reasonably necessary to maintain the integrity" of the "uniform and consistent system of rules governing federal practice and procedure . . . ."[227] Again, as in *Sibbach*, the Court seemed unable to contemplate that there might be no governing federal norm because the "cardinal purpose" of the Rules Enabling Act was the provision of a uniform system of federal Rules.

Thus, as in *Sibbach*, the desire for uniformity was paramount to the Court and determinative of the issue presented by the case. The Court could not seem to contemplate that Congress might have reserved for itself the authority to preempt state law on the issue and that state law would control if Congress did not act. The test in *Burlington*, in the end, is really no different than the *Sibbach* test: so long as the Rule really regulates procedure it is valid, it seems, regardless of the impact on substantive rights.

The Court not only failed to recognize any meaningful limits on its ability to promulgate Rules under the Rules Enabling Act, but also compounded its error by imbuing the Rules with a strong presumption of validity on the grounds that the Advisory Committee, the Court, and Congress, during the process of promulgating the Rules, have made a *prima facie* judgment that the Rules do not violate the Act.[228] Repeatedly, Congress' failure to act to enforce the limitations of the Rules Enabling Act has been pointed to by the Supreme Court as evidence that Congress agrees that the Rules do not exceed the authority granted in the Rules Enabling Act.[229] This conclusion that congressional inaction amounts to a tacit approval of the Rules is, as Justice Frankfurter said in his dissent in *Sibbach*, an "appeal to unreality."[230] Sometimes Congress' failure to act reflects only the failure of both the House and the Senate to agree on the language of the legislation[231]—the failure of Congress to act to delay the effectiveness of

227 *Burlington*, 480 U.S. at 5 (citing, *inter alia*, *Hanna* and *Mississippi Publ'g*).

228 *See Hanna*, 380 U.S. at 471; *see also Burlington*, 480 U.S. at 6.

229 *See* Sibbach v. Wilson & Co., 312 U.S. 1, 15–16 (1941); *Hanna*, 380 U.S. at 471.

230 *Sibbach*, 312 U.S. at 18 (Frankfurter, J., dissenting).

231 *See* Mishkin, *supra* note 111, at 1687 ("One important aspect of the fallacy [of the conclusion that Congressional inaction is an approval of the Rules] may be perceived from the fact that Congress will be deemed to have failed to act even if both Houses have passed specific bills so long as the two have not adopted identical language."); *see also* Burbank, *supra* note 32, at 1102.

the 1993 amendments to the discovery provisions is a recent example.[232] The prohibition in the Rules Enabling Act should be enough; Congress should not have to act affirmatively each time to ensure it is respected.[233]

It is equally unrealistic to assume that the Court, in transmitting proposed Rule amendments to Congress, has made a determination that the Rules are valid. As Justices Douglas and Black complained several times in dissents from submissions of amendments of the Rules to Congress, the Rules are given the Court's imprimatur without any real involvement by the Court in their drafting or any real consideration by the Court as to their validity. On that basis, Justices Black and Douglas urged that the Court be relieved of any role in the rulemaking process, arguing that the "[t]ransfer of the function to the Judicial Conference would relieve us of the embarrassment of having to sit in judgment on the constitutionality of rules which we have approved and which as applied in given situations might have to be declared invalid."[234] In 1980, Justice Powell, joined by Justices Stewart and Rehnquist, also noted that the Court's role in the rulemaking process was "largely formalistic."[235] Justice White, just prior to his retirement from the Court, echoed these sentiments in his statement on the submission of the 1993 Rules amendments to Congress: "[t]he Court's role [in the rulemaking process] . . . is to transmit the Judicial Conference's recommendations without change and without careful study . . . ."[236] The Chief Justice's transmittal letter itself disclaimed any approval of the Rules: "While the Court is satisfied that the required procedures have been observed, this transmittal does not necessarily indicate that the Court itself would have proposed these amendments in the form submitted."[237]

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232 *See supra* text accompanying note 48.

233 *See* Mishkin, *supra* note 111, at 1688 ("Where—as in the second sentence of the Rules Enabling Act—Congress has affirmatively enacted explicit limits on the authority it is delegating, it should not be put in the position of having to act affirmatively through both Houses again in order to prevent usurpation.").

234 Order of Jan. 21, 1963, 374 U.S. 865, 869–70 (Black and Douglas, JJ., dissenting). *See also* Order of Feb. 28, 1966, 383 U.S. 1031, 1032 (Douglas, J., dissenting).

235 Order of Apr. 19, 1980, 446 U.S. 997, 997–98 n.1 (Powell, Stewart and Rehnquist, JJ., dissenting).

236 Order of Apr. 22, 1993, Amendments to the Federal Rules of Civil Procedure, *reprinted in* 146 F.R.D. 402, 505 (Statement of Justice White). On the Court's role in the rulemaking process, see generally Moore, *supra* note 38, at 1061–73.

237 Order of Apr. 22, 1993, Amendments to the Federal Rules of Civil Procedure, *reprinted in* 146 F.R.D. 402, 403 (letter from Chief Justice William H. Rehnquist to Speaker of the House Thomas S. Foley, Apr. 22, 1993).

D. The 1988 Rules Enabling Act

It was in the context of the Court's jurisprudence that Congress amended the Rules Enabling Act in 1988. The Court apparently considered the "substantive rights" limitation as intended to protect state substantive law from intrusion. The Court treated the Rules Enabling Act as a plenary delegation of Congress' constitutional powers to make procedural Rules for the federal courts, with virtually none of that power reserved to Congress. And as Congress' constitutional power was interpreted very broadly by the Court to include power to regulate all matters "rationally capable of classification"[238] as procedural, state law was afforded little protection by the substantive rights limitation.

Propelled largely by Professor Burbank's study of the 1934 Rules Enabling Act,[239] commentators had begun to emphasize the allocation of power between Congress and the Court as the purpose behind the prohibition against Rules affecting substantive rights. The allocation of power was of central concern when Congress turned its attention to revising the Rules amendment process in the 1980's. Although the 1988 Rules Enabling Act retains the language of the original, in that it delegates to the Court authority to promulgate Rules of procedure subject to the condition that they not "abridge, enlarge or modify substantive right[s],"[240] the legislative history of the amended act attempts to "clarif[y] the limitations on national or supervisory rulemaking by the Supreme Court."[241] The 1985 House Judiciary Committee report noted that the Court had "overstepped the

238 Mistretta v. United States, 488 U.S. 361, 392 (1989).

239 Burbank, *supra* note 32.

240 Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941).

241 H.R. REP. No. 99-422, at 5 (1985). Technical and typographical errors in the Report were corrected at 132 CONG. REC. E1434 (1986). This is the report on H.R. 3550, whose language amending 28 U.S.C. § 2072, apart from language with respect to the supersession clause (not at issue here) was identical to that ultimately passed in 1988. The Report on the 1988 House bill (which was the source of, and identical to, the Senate bill) incorporated by reference House Report number 99-422. *See* H.R. REP. No. 100–889 at 29 (1988). For a discussion of the legislative history of the 1988 amendments to the Rules Enabling Act, see Burbank, *supra* note 4, at 1030–36. *See also* Moore, *supra* note 38, at 1043–49. Both Professors Burbank and Moore conclude that the House Report is the best evidence of congressional intent with the Act. *See also* Note, *The Rules Enabling Act and the Limits of Rule 23*, 111 HARV. L. REV. 2294, 2302–03 (1998). As discussed in note 256 below, however, the Senate Report provides contradictory evidence of congressional intent, which could make the House Report seem, at least to those hostile to the use of legislative history, a back-door attempt by the drafters of the House Report to redefine the terms of the REA in a manner not agreed to by the Senate.

bounds" of the authority delegated to it on several occasions,[242] and warned that "[p]roposed section 2072 contains limitations on the rulemaking power, careful observance of which is essential in the future if [similar] problems . . . are not to recur."[243]

The Committee elaborated on the limitations placed on the Court's rulemaking power by the Rules Enabling Act, relying heavily on Professor Burbank's work in support.[244] "The most important of those limitations," the Committee stated, is the requirement "that rules promulgated by the Supreme Court for lower federal courts (supervisory court rules) be 'rules of practice and procedure' that do not 'abridge, enlarge, or modify any substantive right.'"[245] This limiting language, the Committee noted, "is derived from current law. As interpreted by the Court, however, the language has little if any determinative content. As a result, the rules enabling acts have failed to provide guidance to the rulemakers or to Congress in considering the validity of proposed rules."[246] The Committee noted that in the 1934 Act the language apparently was "intended to emphasize some of the limitations on the delegation of prospective lawmaking power thought to inhere in the notion of court rules of 'practice and procedure.'"[247] But, "[b]ecause there is no shared conception of such limitations today, the Committee believes that it must take some care in stating its views on the scope of Congress' delegation under proposed section 2072."[248]

First, the Committee emphasized, the Act "contains independent limitations on . . . court rulemaking" above and beyond the constitutional limits on Congress' power to regulate procedure, and that Congress had delegated "only a portion of [its] power" in the Rules Enabling Act.[249] Second, the Committee noted that the prohibition against Rules affecting substantive rights is not solely a federalism concern. Rather, it protects Congress' lawmaking prerogative not just in cases in which state substantive law provides the rule of decision, but also reserves to Congress its ability to regulate in purely federal mat-

242 H.R. REP. No. 99-422, at 12 (1985).

243 *Id.* at 20.

244 *See id.* at 22. Professor Burbank appeared as an invited witness at hearings and provided other assistance to the House Judiciary Committee in the development of the 1988 revisions to the Rules Enabling Act. *See id.* at 7, 18; *see also* Burbank, *supra* note 4, at 1012.

245 H.R. REP. 99-422 at 20.

246 *Id.*

247 *Id.* at 20–21.

248 *Id.* at 21.

249 *Id.*

ters, such as bankruptcy.[250] Third, the Committee emphasized that the allocation of powers between Congress and the Court was of primary importance, so that the substantive rights limitation is intended to protect not just lawmaking that already has occurred, but also prospective lawmaking. If Congress has not legislated in an area reserved to it under the REA, state law, or, in some cases, federal common law, will operate.[251] Fourth, the Committee commented on the meaning of "substantive rights" in the Act. It began with the obvious:

> [T]he substantive rights protected by proposed section 2072 include rights conferred, or that might be conferred, by rules of substantive law, such as "the right not to be injured . . . by another's negligence" or the right not to be subject to discrimination in employment on the basis of race. Thus, the bill does not confer power on the Supreme Court to promulgate rules regarding matters, such as limitations and preclusion, that necessarily and obviously define or limit rights under the substantive law.[252]

The Committee quickly made clear that, contrary to the Court's ruling in *Sibbach*,[253] the term "substantive rights" was not confined to "rights conferred by substantive law." Rather, the Committee stated:

> The protection extends beyond rules of substantive law, narrowly defined, however. At the least, it also prevents the application of rules, otherwise valid, where such rules would have the effect of altering existing remedial rights conferred as an integral part of the applicable substantive law scheme, federal or state, such as arrangements for attorney's fees under 42 U.S.C. 1988. More generally, proposed section 2072 *is intended to allocate to Congress, as opposed to the Supreme Court exercising delegated legislative power, lawmaking choices that necessarily and obviously require consideration of policies extrinsic to the business of the courts, such as the recognition or non-recognition of a testimonial privilege. In the absence of congressional choices, prospective regulation is left to the States.*
>
> So viewed, proposed section 2072 leaves to the Supreme Court primary responsibility for prospective federal regulation of matters peculiarly within the competence of judges. It reserves to Congress decisions concerning prospective federal regulation of matters peculiarly within its competence, having regard to Congress' representative nature and to its experience in prospective lawmaking that variously affects its constituencies in their out-of-court affairs.[254]

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250 *See id.*

251 *See id.*

252 *Id.*

253 Sibbach v. Wilson & Co., 312 U.S. 1, 13–16 (1941).

254 H.R. REP. 99-422, at 21–22 (1985) (emphasis added).

However, Congress did not change the language of the Act itself, which, given the history of apparent reluctance of the Court to give the limiting language any effect, may have been the surest way to ensure that a new interpretation be given the Rules Enabling Act by the Court.[255] Perhaps the scope of the delegation could have been clarified by listing the rights that are "substantive" within the meaning of the Act, and thus not subject to regulation by the Court. But Congress does not want to micromanage procedural rules; that is why it left the promulgation of Rules to the Judicial Conference and the Court in the first place. Additionally, detailing the areas as to which the Court has authority could lead to undesired consequences, as anything not specifically listed may be assumed excluded.[256] In the 1988 revisions to the Rules Enabling Act, Congress has again used the broadest of terms, recognizing that "[f]urther refinement of the scope of delegation will undoubtedly prove necessary."[257] It will be up to those who propose amendments to the Rules, and ultimately the Court, to set out the limits on the delegated authority. In doing so, they have little choice but to look to the legislative history for whatever guidance it

255 *See* Moore, *supra* note 38, at 1049. The Senate Report accompanying the bill stated that 2072(a) "consolidates but carries forward current law" and that 2072(b) "also carries forward the scope of current law." 134 CONG. REC. 31056 (1988). This language could be read as referring to judicial interpretations, as well as the language of the Act itself. However, because the prior judicial interpretation was unsettled, application of the "reenactment rule," or the presumption that Congress intended to incorporate judicial interpretation, is inappropriate. *Compare* Fogerty v. Fantasy, Inc., 510 U.S. 517, 527–35 (1994) (rejecting as inappropriate the application of the reenactment rule), *with* Lorillard, Inc. v. Pons, 434 U.S. 575 (1978). And because of the internal contradiction in the legislative history, it could be argued that the committee report is of little help in interpreting the 1988 Act. Professor Burbank, who provided assistance to (and, apparently, heavily influenced) the House Committee in the preparation of its report, disagrees, arguing that the Senate report should be given little weight, because "unlike both the 1985 and 1988 House Judiciary Committee reports, which were available to members of the House (and Senate) prior to the sessions at which action was taken, this analysis was first available to the members of the Senate during the late evening session when the Senate bill was discussed and approved." Burbank, *supra* note 4, at 1034–35 (citations omitted).

256 According to the canon of statutory construction, *expressio unius*, expression of one thing suggests exclusion of others. *See, e.g.*, EEOC v. Arabian Oil Co., 499 U.S. 244 (1991); Chan v. Korean Airlines, 490 U.S. 122, 132–33 (1989). Professor Gilson makes a similar point in the context of discussing the desirability of specific rules to deter socially undesirable behavior: "The more specific the prohibition, the more likely it is that undesirable conduct, which was intended to be prohibited and which would have been covered by a more general prohibition, will not be barred." Ronald Gilson, *A Structural Approach to Corporations: The Case Against Defensive Tactics in Tender Offers*, 33 STAN. L. REV. 819, 883 (1981) (citations omitted).

257 H.R. No. REP. 99-422, at 22 (1985).

may provide,[258] for if commentators and the courts can agree on nothing else, they can agree that the terms "substance" and "procedure" have no plain meaning.

E. The Supreme Court Begins to Take "Substantive Rights" Seriously–Post 1988

It is well-known that the Court has never found a Federal Rule of Civil Procedure invalid as beyond the scope of the Court's authority in the Rules Enabling Act, although, beginning with Justice Frankfurter's opinion in *Sibbach*, there have been vigorous dissents from opinions adjudging challenged Rules valid. In several recent decisions, the Court has given some indication that it is more willing to pay heed to the limiting language of the Rules Enabling Act, if not to strike down Rules, at least to read them in such a way that they do not run afoul of the prohibition against Rules affecting substantive rights. For example, in the 1990 decision in *Cooter & Gell v. Hartmarx Corp.*,[259] Justice O'Connor, writing for a unanimous Court on this point, stated that a Rule must be interpreted "according to its plain meaning . . . *in light of the scope of the congressional authorization [in the Rules Enabling Act].*"[260] The Court, however, was not unanimous as to the scope of that authority. Justice Stevens dissented from the Court's interpretation of Rule 11[261] as requiring the imposition of sanctions even after volun-

258 Justice Scalia has been critical of the use of legislative history in interpreting statutes, preferring a "textualist" or "plain meaning" approach. Although a majority of the Court has expressed its disagreement with Justice Scalia's rejection of legislative history, see *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 610 n.4 (1991), his influence has led to decreased reliance by the Court on legislative history. *See* Thomas Merrill, *Textualism and the Future of the* Chevron *Doctrine*, 72 WASH. U. L.Q. 351 (1994). But even Justice Scalia has looked to legislative history in a difficult case. *See* Green v. Bock Laundry, 490 U.S. 504, 527 (1989) (Scalia, J., concurring); *see also* JUDGES AND LEGISLATORS: TOWARD INSTITUTIONAL COMITY 174–75 (Robert A. Katzmann ed., 1988) (quoting Justice Scalia as saying "I play the game like everybody else . . . I'm in a system which has accepted rules and legislative history is used . . . . You read my opinions, I sin with the rest of them"); *see also* Burbank, *supra* note 4. For a discussion of the use of legislative history in the interpretation of statutes, and a collection of citations to major articles on the debate, see WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY, Ch. 8, and 751 n.3 (2d ed. 1995).

259 496 U.S. 384 (1990).

260 *Id.* at 391 (emphasis added) (Justice Stevens dissented with respect to one part of the opinion).

261 Rule 11 was amended in 1993, partly in response to, and in order to overturn, the ruling in *Cooter & Gell*. After 1993 Rule 11, sanctions are no longer mandatory, Rule 11(c), and monetary sanctions cannot be imposed on the court's initiative after the case has been dismissed or settled. *See* Rule 11(c)(2)(B). In addition, by virtue of

tary dismissal of a complaint under Rule 41(a)(1), on the ground that "the Rules Enabling Act does not give us authority to create a generalized federal common law of malicious prosecution divorced from concerns with the efficient and just processing of cases in federal court."[262]

The next term, in *Business Guides*,[263] the Court considered a Rules Enabling Act challenge to the former Rule 11, but, adopting a plain meaning analysis, held that the Rule mandated sanctions against a represented party for failure to make a reasonable prefiling inquiry.[264] Justice Kennedy, joined by Justices Marshall and Stevens,[265] dissented, arguing, among other things, that the Rule should be interpreted more narrowly, as the majority's interpretation would run afoul of the proscription in the Rules Enabling Act against Rules that affect substantive rights. "In the Rules Enabling Act," Justice Kennedy noted:

> Congress has delegated to the Court authority to prescribe "general rules of practice and procedure" . . . which may not "abridge, enlarge or modify any substantive right . . . . The grant of authority to regulate procedure and the denial of authority to alter substantive rights expresses proper concern for federalism and separation of powers. . . . Congress desired the courts to regulate "practice and procedure," an area where we have expertise and some degree of inherent authority. But Congress wanted the definition of substantive rights left to itself in cases where federal law applies, or to the States where state substantive law governs.[266]

To Justice Kennedy, "the majority's reading of Rule 11 raises troubling concerns with respect to both separation of powers and federalism." The reading of Rule 11 was inconsistent with the allocation of authority in the Rules Enabling Act, he argued. The "new duty

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the "safe harbor" provision of 11(c)(1)(A), no motion for sanctions under Rule 11 can be filed or presented to the court if a pleading is withdrawn within 21 days of the service of a formal motion on the offending party. *See generally* Kelleher, *supra* note 48, at 70–76.

262 *Cooter*, 496 U.S. at 410, 412.

263 Business Guides, Inc. v. Chromatic Communications Enters., Inc., 498 U.S. 533 (1991). Professor Burbank has stated that the *Business Guides* case was the first time since *Sibbach* that the Supreme Court was willing "to take at least somewhat seriously an Enabling Act challenge to a Federal Rule . . . ." Burbank, *supra* note 64, at 843.

264 For an argument that the plain meaning approach to Rules interpretation is "misguided, unwarranted, and inappropriate," see Moore, *supra* note 38, at 1085.

265 Justice Scalia also joined Justice Kennedy in dissenting from the majority opinion, but did not join in that portion of Justice Kennedy's dissenting opinion in which he discussed the Rules Enabling Act.

266 *Business Guides*, 498 U.S. at 565.

discovered by the majority in the text of the Rule," which required a represented party to make reasonable inquiry prior to the commencement of a lawsuit, "is one that should be created, if at all, by Congress," not by the Court.[267] Justice Kennedy pointed out that Congress had provided for fee-shifting in various statutes, and that it was not up to the Court to "invade the legislature's province by redistributing litigation costs"[268] with a Rule permitting the imposition of sanctions on a represented party. In addition to invading the province of Congress, he continued, the majority's interpretation of the Rule could be an incursion into matters reserved to the States, which have tort law governing malicious prosecution or abuse of process, thus raising once again a question as to the breadth of not just the Court's, but also Congress' authority.

The approach of the dissenters in *Cooter & Gell* and *Business Guides* was to look to the substantive rights limitation on the Court's rulemaking authority as a rule of construction in determining the scope, or application, of Federal Rules. That is, if a Rule can be read narrowly so as not to affect substantive rights, it should be. Although that approach had been disavowed explicitly by the Court as late as 1980 in *Walker v. Armco Steel Corp.*,[269] the Court has now explicitly adopted it. For the first time, in the 1991 decision in *Kamen v. Kemper Financial Services Inc.*,[270] a unanimous Court relied on the substantive rights limitation as a guide in interpreting the scope of a Rule, and cited the REA as a reason for giving a Rule a narrow reading. In that case, the Court held that the Rules Enabling Act's prohibition against Rules that affect substantive rights required a restrictive reading of Federal Rule of Civil Procedure 23.1, governing shareholder derivative suits. At issue was whether the Rule created any particular demand requirement to be applied in a derivative suit brought under a federal statute, the Investment Company Act. The demand requirement, Justice Marshall wrote, is clearly a matter of "substance" and not "procedure," as it delimits the respective powers of directors and shareholders to control corporate litigation. Thus, Justice Marshall held, the Rule does not—and could not—create any particular demand requirement. "Indeed, as a rule of procedure issued pursuant

267 *Id.*

268 *Id.*

269 446 U.S. 740 (1980). The Court noted: "This is not to suggest that the Federal Rules of Civil Procedure are to be narrowly construed in order to avoid a 'direct collision' with state law. The Federal Rules should be given their plain meaning. If a direct collision with state law arises from that plain meaning, then the analysis developed in *Hanna v. Plumer* applies." *Id.* at 750 n.9.

270 500 U.S. 90 (1991).

to the Rules Enabling Act, Rule 23.1 cannot be understood to 'abridge, enlarge or modify any substantive right.'"[271] Therefore, the Court held, the dimensions of the demand requirement must be ascertained by reference to the relevant substantive law, the Investment Company Act, which, the Court held, incorporated the state law demand requirement.

This approach was also followed by the Court in its most recent pronouncements on the Rules Enabling Act. In the 1996 decision in *Gasperini*,[272] the Court rejected the argument that Rule 59 applied to determine whether a jury verdict should be reviewed and a new trial granted in a diversity case, noting that "[f]ederal courts have interpreted the Federal Rules . . . with sensitivity to important state interests and regulatory policies."[273] Again, in the *Amchem* decision last term, the Court stated that Rule 23 must be read in light of the REA's "substantive rights" limitation.[274]

IV. THE PROPOSED TEST

The Court has provided little guidance for determining when a Rule has impermissibly affected substantive rights in violation of the REA, and its decisions on the issue are muddled. Recently, however, the Court seems to have signaled that it is more willing to take the substantive rights limitation of the REA more seriously, and to use it as a rule of construction in reading Rules so as to avoid invalidity. By doing so, the Court is moving in the right direction, but what is still needed is an explicit, coherent, and workable test that may be applied both by the rulemakers and the courts. In this Part, the Article sets out a number of factors that should be considered in determining the validity, or applicability, of a Rule. In doing so, it is important to keep in mind that we are dealing with the question of congressional intent—not just in the Rules Enabling Act, but in the entire body of statutes concerning procedure. What authority does Congress intend to delegate to the Court, and what powers does it intend to reserve for itself?[275] In determining the scope of delegation intended by Con-

271 *Id.* at 96.

272 Gasperini v. Center for Humanities, Inc., 518 U.S. 415 (1996).

273 *Id.* at 428 n.7. *See also id.* at 441 n.1 ("[T]here is no conceivable conflict between Federal Rule of Civil Procedure 59 and the application of the New York damages limit . . . .") (Stevens, J., dissenting).

274 Amchem Products, Inc. v. Windsor, 117 S. Ct. 2231, 2244 (1997).

275 Congressional intent is, of course, a fiction. A diverse body such as Congress cannot be said to have a single intent; each member may have his or her own motivation for acting. But the concept of a legislature's institutional intent is commonly understood (although hotly debated), and it is in that sense that it is used in this

gress under the REA, it is important to read the REA in light of other procedural statutes, and in light of sensitive separation of powers and federalism concerns. The phrase "substantive rights," as used in the REA, does not have the same meaning as in other areas of legal discourse. Some matters that in ordinary legal parlance are considered "procedural," such as venue or subject matter jurisdiction, are "substantive" for purposes of the REA. In determining the scope or validity of a Rule under the "substantive rights" limitation, this Article proposes the following factors should be considered, with no single factor determinative in all situations.

A. The Extent to Which Congress Has Regulated the Area

One important factor to consider is the extent to which Congress has legislated in a particular procedural area.[276] The scope of authority delegated to the Court may shift over time, as Congress enacts new procedural regulation and leaves fewer matters to the Court. In this respect, the detail, length of time, and scope of the congressional regulation is relevant. Detailed, long-standing congressional enactments in an area are a strong indication that Congress believes that the matter requires consideration of policies beyond the business of the courts and should be regulated by Congress. For example, venue generally is considered a matter of procedure. But, from the First Judiciary Act to the present time, Congress has regulated venue in federal courts,[277] providing a powerful indication that it has decided to remove authority over venue from the federal courts and to regulate the area directly itself.

Venue also is a good example of an area in which Congress has "occupied the field" completely. There is statutory provision for the appropriate venue of each case that may be commenced in a federal court,[278] a strong indication that it intended to exclude judicial rulemaking in the area. By contrast, the provisions in the PSLRA providing for a heightened pleading requirement in securities litigation are limited to a specific type of case, and while they preclude the oper-

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Article. For an overview of some of the extensive commentary on the concept of legislative intent, see generally ESKRIDGE & FRICKEY *supra* note 258, at 84–87; 524–31; 733–832.

276 *See, e.g.*, Business Guides, Inc. v. Chromatic Communications Enters. Inc., 498 U.S. 533 (1991) (Kennedy, J., dissenting).

277 *See* Whitten, *supra* note 70, at 56–57.

278 28 U.S.C. § 1391 provides a general venue rule. In addition, there are special venue provisions. *See, e.g.*, 28 U.S.C. § 1396 (internal revenue tax cases); 28 U.S.C. § 1397 (interpleader); 28 U.S.C. § 1401 (stockholders' derivative action suits); 28 U.S.C. § 1400 (patent and copyright cases).

ation of court-promulgated pleading Rules in securities cases,[279] they do not indicate a congressional desire to preclude the Court from promulgating general Rules governing pleading requirements in other cases.

As a corollary, a decision by Congress not to regulate a particular procedural area at all, even in the face of political pressure to do so, may be taken as an indicator that Congress has decided the area is more appropriately regulated by Rules promulgated by the Court. Thus, for example, the refusal of Congress to enact legislation repealing the mandatory disclosure requirements of the Rules could be viewed as an indication that Congress prefers the area of discovery and disclosure to be regulated by Court-promulgated Rules, and has concluded that the matter is not one that touches on substantive rights within the meaning of the REA.[280] In the case of the provisions

279 A subsequently-promulgated Rule will not supersede the PSLRA, despite the supercession clause, as any rule purporting to govern pleading requirements in securities cases would impermissibly affect what Congress has clearly indicated to be a substantive right and thus not be a valid Rule.

280 Professor Landers has suggested that the test for whether a matter involves a substantive right is whether it is "the subject of widespread public controversy, as differentiated from controversy among lawyers." Jonathan M. Landers, *Of Legalized Blackmail and Legalized Theft: Consumer Class Actions and the Substance-Procedure Dilemma,* 47 S. CAL. L. REV. 842, 857 (1974). Professor Carrington makes a similar argument. In commenting on extant proposals to amend Rule 23(b)(4) to permit certification of classes for settlement purposes only, he commented:

> Proposed paragraph (b)(4) is politically controversial, supported by some factions and opposed by others. That is solid proof of its substantivity in the pragmatic sense. When large political forces are marshaled in support of or in opposition to a proposed amendment to a rule . . . [it generally is] because the proposal has important effects extrinsic to the process by which the courts decide cases or controversies in accordance with the law.

Carrington & Apanovich., *supra* note 4, at 482–83. In the next paragraph, however, he states that even though the 1993 revisions to Rules 30 and 26 were opposed by court reporters and the bar, respectively, "those reforms were incontestably procedural in character, having no effect on right or duties bearing on relations and events outside federal judicial proceedings." *Id.* Thus, his "politically controversial" test has no meaning, for, under the test, a matter is substantive when it is the subject of political controversy, unless, it is not.

Professor Goldberg has criticized the "widespread controversy" test for causing the meaning of substantive rights, and the permissibility of a particular rule, to vary over time as public attention is focused on the issue. *See* Goldberg, *supra* note 163, at 437 n.244. While it may not be desirable to have the meaning of substantive rights vary over time, that will necessarily be the effect of increasing Congressional regulation in areas that were previously seen as procedural. But the relevant intent is that of Congress, not lobbyists. Thus, if Congress chooses to leave discovery issues to the Court, the extent to which interest groups lobby for congressional regulation is irrelevant. Certain matters, like discovery, are obviously and presumptively procedural, and

on mandatory disclosure requirements, Congress' failure to act appears not to be so much a conscious decision to leave the matter to Court-promulgated Rules as an inability of the members of Congress to agree on an alternative to Rules with which most members of Congress disagree.[281] Nonetheless, discovery is a matter so important to the functioning of the courts and the control of litigation before them that it is obviously and presumptively procedural (discussed at pages 169–70 below), so that the failure of Congress to act, regardless of the reason, could be considered to have as its necessary consequence the allocation of authority over the matter to the Court. This is not to suggest that any matter on which Congress does not regulate always is appropriately dealt with by the Rules, or that any Rule dealing with the matter is permissible. In the example of mandatory disclosure requirements, the Rules permit district courts to "opt-out" of those requirements,[282] and, as discussed below, the lack of trans-substantivity is a factor that would tend toward a finding of invalidity.

On a related point, a decision by Congress to enact a procedural provision as part of the Federal Rules of Civil Procedure or Federal Rules of Evidence should not be taken as an indication of congressional intent to remove the area from regulation by the Court. Rather, Congress' placing the statutory provision in the Rules should be taken as an indication that it considers the matter one of procedure and intends the provision to be subject to amendment by the Rules Enabling Act process, pursuant to the supersession clause, unless Congress indicates to the contrary. One example of an indication to the contrary is in 2074(b),[283] in which Congress has provided that any Rules purporting to affect evidentiary privilege must be approved by Congress. This provision makes it clear that the placement of congressional statutes governing privilege in the Rules of Evidence should not be considered evidence that such matters are procedural and subject to regulation pursuant to the REA Rules amendment process. While the failure to enact a procedural provision of part of the Rules is not determinative of whether the matter is substantive, it is a factor that should be considered.

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within the delegation of the REA, unless Congress removes them from the Court's authority.

281 *See supra* text accompanying notes 47–48.

282 Recently proposed amendments would eliminate most of the authorizations for local deviations from the 1993 scheme of disclosure and discovery. *See, e.g.*, Proposed Amendments to Rule 26(a)(1), (d), (f), *available at* <http:www.uscourts.gov>.

283 28 U.S.C. § 2074(b) (1994) ("Any . . . rule creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress.").

Before moving on to the next factor, Professor Whitten's contribution to the analysis of this first factor deserves acknowledgement, but his reasoning was quite different. Professor Whitten suggested that the degree of congressional regulation in a particular procedural area is a factor to be considered in determining whether a Rule promulgated by the Court in that area violates separation of powers restrictions on rulemaking.[284] The better approach, however, is to look to the degree of regulation by Congress as a factor in determining the scope of authority delegated to the Court, and thus not reach the constitutional issue. We have seen that there is no separation of powers limitations on Congress' delegating authority to the Court to regulate most procedural matters. The REA is an expression of a general congressional intent to delegate to the Court authority to regulate procedural matters, provided they do not impermissibly affect substantive rights. Extensive congressional regulation of a procedural matter should be taken as an indication of a specific congressional intent to remove that matter from the area subject to regulation by the Court. To put it another way, congressional regulation is evidence of Congress' determination that the particular matter is more properly characterized as one involving a substantive right. By viewing the significance of congressional legislation in this way, the issue of the constitutional infirmity of the delegation under the REA need not be confronted.[285] If at all possible, the REA should be read so as to be constitutional, rather than as an attempt by Congress to make an unconstitutional delegation of power.[286] In that way, a potential Article I problem with the supersession clause also is averted. When Congress has regulated in a procedural area, such as the PSLRA provision on pleading, there is a strong presumption that Congress has expressed a substantive policy and has removed from the Court authority to promulgate a Rule governing pleading in securities cases. Thus, a subsequently promulgated Rule should be read narrowly, if at all possible, as not applying to cases governed by the PSLRA. If the Rule

284 *See* Whitten, *supra* note 70.

285 *See* Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 346–49 (1936) (Brandeis, J., concurring). *See generally* Lisa A. Kloppenberg, *Avoiding Constitutional Questions*, 35 B.C. L. REV. 1003 (1994).

286 *See, e.g.*, United States v. IBM, 517 U.S. 843, 868 (1996) ("In interpreting statutes . . . we have long observed '[t]he elementary rule . . . that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality . . . .' This approach not only reflects the prudential concern that constitutional issues not be needlessly confronted, but also recognizes that Congress, like this Court, is bound by and swears an oath to uphold the Constitution. The Courts will therefore not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp powers constitutionally forbidden it.") (citations omitted).

did purport to govern the matter regulated by Congress, it would not be valid and could not supersede the congressional enactment.

B. Impact of the Rule on Congressional Policy

A related consideration is the extent to which a Court-promulgated Rule would interfere with congressional policy. Congress has power to regulate procedure, and in doing so may override federal procedural common law, as well as any Rule promulgated by the Court pursuant to authority delegated by Congress. A Rule that conflicts with Congress' expressed legislative policy is invalid, as it has crossed the line into "substantive rights," as that phrase is used by Congress in the REA. Thus, the Court could not promulgate new pleading Rules inconsistent with the pleading requirements in the PSLRA, as Congress therein expressed its policy choices between the competing interests of the divergent parties in cases governed by that Act. General pleading Rules, however, could still be promulgated to govern all other cases as to which Congress has not made a similar policy determination, as there is no interference with congressional policy in those cases.

In this regard, only congressional policy, and not state legislative policy, is significant. The extent to which a Federal Rule interferes with a particular state's legislative policy is relevant only to the extent that it impacts on preemption analysis (as discussed below, in Part IV C). The appropriate inquiry is not whether the particular state's law that is being displaced has a substantive purpose. The validity of a Federal Rule cannot vary from state to state. Whether the matter is one involving a substantive right is an issue of federal law—the meaning of the REA.[287] Expressed state legislative policy, however, may influence the determination of whether a matter is one traditionally in the domain of the states, which itself is an indicator that Congress considers it a matter implicating substantive rights, and affects the determination as to the preemptive effect Congress intended for a Rule on the matter. And expressed state legislative policy may, as a practical matter, act as a "red flag" to alert the Court to the necessity of proceeding cautiously, with due regard to issues of comity and federalism[288] and "with sensitivity to important state interests and regulatory

287 *Cf.* Guaranty Trust Co. v. York, 326 U.S. 99 (1945) (finding that whether a statute of limitations was deemed "procedural" or "substantive" by state courts was irrelevant to the determination of whether a federal court was required to apply it under the *Erie* doctrine, as that determination was made as a matter of federal law).

288 *Cf.* Younger v. Harris, 401 U.S. 37 (1971).

policies"[289] in interpreting the scope and applicability of the Federal Rules.

C. *Whether the Matter is One Traditionally in the Domain of the States*

We have seen that Congress can, if it wishes to do so, use its power to regulate procedure in federal courts to displace substantive state law, subject to the ambiguous limits imposed by the federal structure.[290] We have seen also that the courts' ability to displace state law, in the absence of congressional or constitutional directive, is more limited than Congress', as a function of the constitutional structure. There are matters as to which a federal procedural common law rule will not displace state law, but the same rule articulated by Congress will. An example is choice of law in diversity cases. In *Klaxon*,[291] the Court established that federal courts may not, as a matter of procedural common law, fashion their own choice of law rules in diversity cases, but must apply the choice of law rules of the forum state. Yet there is no serious doubt that Congress could, pursuant to its Article III power to regulate procedure in federal courts, enact choice of law rules for federal courts in diversity cases.[292]

As demonstrated by the Arbitration Act and the Rules of Evidence, however, Congress generally has been careful to avoid displacing state law with procedural enactments and has avoided delegating preemption authority to the Court. Under general preemption analysis, if a federal law concerns an area that traditionally has been the domain of the states, regulated by substantive state law, the federal law is less likely to be found to have a preemptive effect than a law in an area traditionally left to Congress. This presumption against preemption effectively operates to ensure that Congress carefully has weighed the concerns of the states, and considered the limits imposed on its powers by the federal system, in making its determination as to the scope of the federal law. There should be a similar presumption with respect to the authority delegated by Congress to the Court to make Federal Rules. In determining the scope of authority delegated to the Court under the REA, we are determining the preemptive effect Congress intended the Rules to have. In areas traditionally regulated by the states, it is unlikely that Congress intended Rules to have preemp-

289 Gasperini v. Center for Humanities, Inc., 518 U.S. 415, 428 n.7 (1996).

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

291 Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941).

292 *See generally* HART & WECHSLER, *supra* note 99, at 696–703 (arguing also, *inter alia*, that the result in *Klaxon* is not constitutionally mandated, and that the Court in *Klaxon* could have applied a federal choice of law rule).

tive force.[293] Just as congressional enactments should be read carefully to avoid unintended preemption of state law, the REA should be read narrowly to avoid unintended delegation of authority to displace state law. Rather, it should be presumed that Congress intended to reserve for itself the choice whether to preempt state law in the area with prospective federal regulation. As Professor Mishkin has argued, Congress, and not the Court, is constitutionally structured to weigh state interests in determining whether it may, and should, preempt state laws.[294]

The congressional intent to have a uniform set of federal procedural Rules is strong evidence that federal procedural common law may be overridden by Rules,[295] but it should not be considered sufficient evidence of intent to delegate to the Court authority to make the decision whether to preempt state law in a specific area.[296] The above discussion should not be taken as suggesting that the line between "substance" and "procedure" will vary between diversity cases and federal question cases. Rather, as the point was made by the Court in *Gasperini,* the REA's substantive rights limitation effectively operates as a rule of construction, and the Rules should be read "with sensitivity to important state interests and regulatory policies."[297] Thus, in *Kamen,* the Court appropriately declined to find that Federal Rule 23.1 governed the demand requirement in derivative suits, as that is a matter of internal corporate governance which traditionally has been in the domain of the states.[298]

D. The Trans-Substantive Nature of the Rule

When Congress enacted the Rules Enabling Act, it expressed its desire that there be a uniform set of federal procedural Rules that

293 *Cf.* Boggs v. Boggs, 117 S. Ct. 1754 (1997).

294 *See* Mishkin, *supra* note 111, at 1685.

295 *See supra* note 78 and accompanying text.

296 In this respect, the Court errs in giving the desire for uniformity a determinative effect in the *Sibbach* and *Burlington* cases. *See supra* text accompanying notes 212–19 and 226–27.

297 Gasperini v. Center for Humanities, Inc., 518 U.S. 415, 428 n.7 (1996) (citing *Walker*).

298 *See* Kamen v. Kemper Fin. Serv., 500 U.S. 90 (1991) (reaching this result even though the complaint was a derivative suit under the Federal Investment Company Act). In an earlier case, the Court left open the issue of whether the contemporaneous ownership requirement of Rule 23.1 can preempt a contrary state rule. *See* Bangor Punta Operations, Inc. v. Bangor & Aroostook R.R. Co., 417 U.S. 703, 708 n.4 (1974); *see also* Paul P. Harbrecht, *The Contemporaneous Ownership Rule in Shareholders' Derivative Suits,* 25 U.C.L.A. L. REV. 1041 (1978).

would be as neutral as possible.[299] That neutrality was to be reflected in trans-substantive Rules.[300] As Professor Carrington has noted, "generalism in procedure is linked to the aim of avoiding 'interest group' politics."[301] While there is an ongoing debate as to the practicality of trans-substantive rules, whether trans-substantive rules can be accurately said to be neutral, and as to whether it is even possible to actually achieve a politically neutral procedural system,[302] there is strong support for the argument that Congress intended to achieve the goal of neutrality, insofar as is possible, with the system established under the REA. Professor Carrington has argued that "given the universal relief which had just come with the abolition of the common law forms of action, and in the merger of law and equity," the delegation of authority to the Supreme Court to promulgate "general" Rules "should be presumed to mean that rules . . . should not be limited in their application either to a particular geographic area or to a particular subject matter of dispute."[303] Similarly, Professor Subrin points out that at the time that the REA was enacted, many in the American public and in Congress were distrustful of the conservative Supreme Court, which was perceived as standing in the way of social legislation. In such a political climate, it would have been difficult to persuade Congress to confer on the Court a power to promulgate procedural rules that were not trans-substantive, because of the potential that they could be manipulated to favor particular interests. The desire for uniform Federal Rules, he argues, encompassed a desire for trans-substantive uniformity.[304] Thus, a Rule that is not trans-substantive, such as the substance-specific local discovery rules permitted by the opt-out provisions of Rule 26, will face a strong, though rebuttable, argument for a presumption of invalidity. Similarly, Rules that apply only to specific kinds of actions, such as Rule 23.1, which concerns only deriva-

299 *See* Pound, *supra* note 31.

300 The term "trans-substantive" appears to have been coined in Robert M. Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L. J. 718, 732–40 (1975) (discussing the pros and cons of a single set of rules to govern all kinds of proceedings).

301 Carrington, *supra* note 177, at 303.

302 *See, e.g.*, Marcus, *supra* note 29; Judith Resnik, *The Domain of the Courts*, 137 U. PA. L. REV. 2219 (1989).

303 Carrington, *supra* note 29, at 2079; *see also* Carrington, *supra* note 177, at 303–04 ("The costs of the differentiated procedure of England were well known to those who drafted the Rules Enabling Act and the 1938 Rules."). *But see* Burbank, *supra* note 4, at 1041 (arguing that there is no evidence in the legislative history to support Carrington's contention).

304 *See* 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).

tive suits, are suspect, as they provide greater procedural protections to one class of litigants to the exclusion, and at the expense, of others.

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

Another important factor in determining whether a Rule impermissibly affects a substantive right is, in the words of the 1985 Committee Report, whether the lawmaking choice in the Rules "necessarily and obviously require[s] consideration of policies extrinsic to the business of the courts."[305] All procedural rules have some impact on substantive rights, in the sense that procedure will determine the manner in which substantive rights are determined in court. The Court has held that some incidental impact of Federal Rules on substantive rights is permitted,[306] although it has never made clear how great the impact must be before it ceases to be merely incidental.[307] At some point, however, the impact of a Rule on substantive rights will be too great, and it will cross the line into impermissibly "modify[ing], abridg[ing] or enlarg[ing] substantive rights."[308]

Rules affecting limitations periods, for example, which have an admittedly procedural goal in ensuring accuracy of evidence, also have the substantive goal of providing potential defendants with a sense of repose and of providing a temporal limit on the parties' rights. The legislative history of the 1988 Rules Enabling Act makes clear that the substantive implications of limitations periods are sufficiently significant that they place such matters beyond the scope of the Court's authority under the REA.[309] If Rule 3 were read as tolling limitations periods, it would be invalid under this standard. Thus, cor-

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305 H.R. REP. No. 99-422, at 22 (1985).

306 *See* Mississippi Publ'g Corp. v. Murphree, 326 U.S. 438 (1946).

307 The Court can be faulted, also, for stretching the concept of "incidental" impact so far as to render it a meaningless limit, in the *Sibbach* and *Burlington* cases. *See supra* text accompanying notes 212–19 and 226–27.

308 28 U.S.C. § 2072(b) (1994).

309 *See* H.R. REP No. 99-422 at 21 ("[T]he bill does not confer power on the Supreme Court to promulgate rules regarding matters, such as limitations and preclusion, that necessarily and obviously define or limit rights under substantive law."); *see also* Burbank, *supra* note 4, at 1033; *accord* Rowe, *supra* note 4 at 980–81. Indeed, for similar reasons, such matters may be beyond the scope of Congressional authority to regulate pursuant to its Article III power. Matters such as statutes of limitations may be too substantive to be preempted by Congress in diversity matters pursuant to a purely procedural statute. *See supra* text accompanying notes 137–51; *see also* Carrington, *supra* note 4, at 483; 19 WRIGHT ET AL., *supra* note 72, § 4509, n.17, at 266 (expressing doubt as to the extent of Congressional power to determine limitations periods in diversity actions).

rectly, the Court has refused to read the Rule in that manner.[310] Rule 4, on the other hand, governing service, may under some circumstances have an indirect impact on limitations periods, as in the *Hanna* case. Such an incidental impact, which is not the obvious purpose or result of the Rule, is permissible.[311]

As discussed above, congressional regulation in a procedural area is a strong indicator that Congress considers lawmaking choices in the area to require consideration of policy issues beyond the business of the courts. Regulation by state legislatures is also relevant, but not, as has been argued by Professor Ely, because it is important to determine whether the particular state legislation at issue in a particular case has a substantive, as opposed to a procedural, purpose.[312] Rather, as discussed above, it is relevant to the determination of whether the matter

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310 *See* Regan v. Merchant Transfer & Warehouse Co., 337 U.S. 530 (1949); Walker v. Armco Steel Corp., 446 U.S. 740, 749–51 (1980). Rule 15(c), permitting the relation back of amendments to complaints, does impact on limitations periods and, for that reason, its validity has been questioned by several commentators. *See, e.g.*, Burbank, *supra* note 4; C. Douglas Floyd, Erie *Awry: A Comment on* Gasperini v. Center for Humanities, Inc., 1997 B.Y.U. L. REV. 267, 287 n.102. *But see* 19 WRIGHT ET AL., *supra* note 72, at 272–77 (concluding that Rule 15(c) is valid because its impact on the substantive rights protected by state limitations periods is relatively minor, and because Rule 15(c) is a significant part of a comprehensive, uniform and rational system of federal procedure.). *Cf.* Rowe, *supra* note 4, at 1016:

> The conflict between Federal Rule of Civil Procedure 15(c) on relation back and a more liberal state provision that led to the First Circuit's decision in *Marshall v. Mulrenin*, 508 F.2d 39 (1st Cir. 1974), to regard the state rule as substantive and follow it, has been eliminated by the 1991 amendment permitting relation back when it is permitted by the law that provides the statute of limitations applicable to the action.' Fed. R. Civ. P. 15(c)(1).

Professor Rowe, however, ignores the conflict that arises when the federal rule is more lenient than the state rule in permitting relation back.

311 *See* Mississippi Publ'g Corp. v. Murphee, 326 U.S. 438, 445 (1946); *cf.* Hanna v. Plumer, 380 U.S. 460, 473 (1965).

312 Professor Ely argues that where state legislation has been enacted for one or more nonprocedural purposes, that is, for some purpose not having to do with the fairness or efficiency of the litigation process, it grants a substantive right within the meaning of the Rules Enabling Act, and cannot be overridden by a Federal Rule. *See* Ely, *supra* note 1, at 724–25 (citation omitted). Several other commentators have argued that a Federal Rule cannot supplant a "substantive" state law. *See, e.g.*, Whitten, *supra* note 194; *see also* Rowe, *supra* note 4. This approach is criticized by Professor Burbank as

> confining the Act to the protection of existing policy choices and, more importantly, to the protection of state law. It presents the additional problem of engaging the federal courts in the difficult and highly manipulable business of ascertaining the policies animating particular rules of state law . . . .

Burbank, *supra* note 4, at 1017–18 (1989) (citations omitted).

is one traditionally in the domain of the states, which affects the determination of what preemptive intent Congress should be deemed to have intended for the Rules on the matter. The determination of what authority was delegated to the Court, and thus whether a Rule should be read narrowly, or is invalid, should not, and does not, depend on the law of the forum state in which the issue is raised. The relevant inquiry is the extent to which all of the states traditionally have regulated the area, not just the regulation in the forum state.

Another strong indicator that policies extrinsic to the business of the courts necessarily are implicated is that a Rule concerns a matter within the penumbra of matters governed by the federal Constitution.[313] Congress should not be presumed to have delegated to the Court authority to promulgate Rules on matters such as the allocation of functions between judge and jury, which is a matter "influenced," although not necessarily governed, by the constitutional provision for jury trials.[314] In such areas, although Congress has reserved for itself the authority to make prospective rules, and overridden any inherent prospective rulemaking authority the Court may have had, the federal interest may still be sufficiently great to permit a displacement of state law through the Court's inherent procedural common law-making authority, as in the *Byrd* case, subject to control of Congress.[315]

A determination of whether a Rule necessarily implicates a consideration of policies beyond the business of the Court does not depend on the articulated policy behind the Rule, as evidenced by Committee notes. If the Committee notes reflect a substantive policy, it will be strong evidence that the Rule is one beyond the authority of

313 *Cf.* Burbank, *supra* note 32, at 1169 ("The concern for substantive rights expressed in the Act . . . apparently extends to constitutional interests that are procedural in the sense that they are implicated only in the context of litigation."). He suggests, however, that only those interests specifically enumerated in the Constitution, such as the right to a jury, are constitutional interests relevant under the Act, so that the "entire [rulemaking] enterprise will not founder in the lap of the due process clause." *Id.* at 1171. The extent to which matters that implicate due process concerns will be taken up in a subsequent article concerning the validity of Rule 4.

314 *Cf.* Byrd v. Blue Ridge Elec. Coop., 356 U.S. 525, 537 (1958) (allocation of function between judge and jury is "influenced, if not controlled by Seventh amendment"). In *Byrd,* the Court did not decide whether the Constitution dictated the result, but proceeded as though the allocation of functions between judge and jury was a matter of procedural common law. Out of concern that the 1963 amendments to Rule 50 encroached on the right to trial by jury, and were too substantive to be promulgated by the Court, Justices Black and Douglas dissented from their transmission to Congress. *See* Order of January 21, 1963, 374 U.S. 865 (Black & Douglas, JJ., dissenting).

315 *Cf.* Henry P. Monaghan, *Foreword: Constitutional Common Law,* 89 HARV. L. REV. 1 (1975).

the Court. But even if an admittedly procedural policy is the only professed rationale for a Rule, the notes will not be determinative on the issue.[316]

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

Another important consideration is the extent to which the procedural matter is central to the orderly functioning of the courts. Here, the relevant inquiry is whether the issue is one that has traditionally been in the domain of the courts, as opposed to a matter that Congress, or the state legislatures, traditionally have regulated. The extent to which a court would find it necessary to regulate the matter in the absence of legislative or constitutional guidance is important. If a court would find it necessary to determine an issue in order to function efficiently, the matter appears more procedural, and appropriately subject to regulation by court rule. An example is pleading. As discussed earlier, pleading rules can have a significant impact on substantive rights. Nonetheless, in the absence of any prospective rules, a court would find it necessary to determine whether a complaint was in proper form, provided sufficient notice of the action, and justified a hearing on the merits. A court also would find it necessary to determine which pleadings were permitted. Furthermore, pleading requirements have traditionally been relegated to the judiciary. Under the Conformity Act, the federal courts were to follow pleading rules applicable in the forum state's courts. The centrality of pleading rules to the functioning of the courts was recognized in the original Rules Enabling Act, which specifically mentioned pleadings in the delegation of authority to the Court.[317] Given the centrality of pleading requirements to the effective functioning of the courts, congressional regulation of pleading in a specific case, such as the statutory pleading rule for securities cases in the PSLRA, should not be considered an indication that Congress has determined pleading rules generally to be substantive, and beyond the reach of the Court. The general pleading rules are required to fill the interstices.

By contrast, rules governing limitations periods are less central to the functioning of the court. In the absence of any prospective rule

316 The Committee, of course, has an interest in having Rules upheld as valid, so a statement by the Committee as to the impact of the Rule will not be determinative. *Cf.* Laurens Walker, *Writings on the Margin of American Law: Committee Notes, Comments and Commentary*, 29 GA. L. REV. 993 (1995) (arguing that Committee notes generally should be given little weight in interpreting Federal Rules).

317 *See* Act of June 19, 1934, Pub. L. No. 73-415, Stat. 1064 (1988) (reproduced at *supra* note 179).

limiting actions, a court can function quite well.[318] Although limitations periods have procedural purposes, in that they do permit a court to operate more efficiently by clearing the docket, they are not central to the functioning of the courts.[319] Congressional regulation of these procedural matters, even though not complete, is strong evidence that Congress does not intend the Court to regulate limitations periods by the Rules.[320]

The list of relevant factors presented above is not intended to be an exhaustive list. Rather, the list is proffered as a starting point for a more reasoned analysis of congressional intent in the delegation of authority under the Rules Enabling Act and the validity of Rules promulgated pursuant to that authority. Analysis of particular Rules may make it apparent that other factors should also be considered.

CONCLUSION

The purpose of this Article has not been to debate the appropriate allocation of authority to regulate procedure in federal courts. Rather, the Article examines the allocation that now exists, both at the constitutional level and under the governing statute, the Rules Enabling Act, considered in the context of the entire body of procedural statutes. The delegation of authority to the Court under the Act has for decades been a source of debate, and confusion, among commentators and the courts. This Article attempts to set out a workable test for adjudging the validity of, or determining the permissible scope of, Rules promulgated under the Rules Enabling Act process. Potentially problematic Rules include Rule 4, which concerns not only service but amenability to jurisdiction; Rule 26(a), which, as of this writing, permits district courts to opt out of mandatory disclosure requirements for all or particular types of cases; Rule 23.1, governing derivative suits; Rule 15(c), which permits relation back of amended pleadings; and Rule 23, governing class actions. Further research and analysis remains to be done in order to apply the proposed test to these and other Rules.

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318 *See, e.g.*, 18 U.S.C. § 3281 (1994) (no limitations on prosecutions for capital offenses).

319 This is not to say that the courts do not have inherent authority over limitations periods, in the absence of any congressional guidance. Indeed, the doctrine of laches in equity cases was an exercise of the court's inherent authority in the area. The federal interest is not sufficiently strong, however, to permit the federal judge-made law to override state law of limitations. *Cf.* Guaranty Trust Co. v. York, 326 U.S. 99 (1945).

320 *See* H.R. REP. No. 99-422, at 22 (1985)