U.C.L.A. Law Review

# Substance, Procedure, and the Rules Enabling Act

A. Benjamin Spencer


## ABSTRACT

The Supreme Court promulgates rules of procedure (based on the proposals of subordinate rulemaking committees) pursuant to the Rules Enabling Act. This statute empowers the Court to prescribe "general rules of practice and procedure," with the caveat that "[s]uch rules shall not abridge, enlarge or modify any substantive right." The Act is supposed to stand as a real constraint on what rules or alterations thereof the subordinate rulemaking bodies will consider or propose, as well as on how the Court will choose to interpret any given codified Federal Rule. However, the Act has not—to date—been employed to invalidate a promulgated Federal Rule, leading one to wonder whether the Act's admonitions have any real purchase beyond keeping the judiciary from crafting rules that regulate primary conduct. But just how far can the Federal Rules go? Does the fact that none have been invalidated mean that the rulemakers and the Court have managed to adhere successfully to the Act's strictures? This Article suggests that the answer to that latter question is no. No rule has been invalidated because the Court has not yet been confronted with a live controversy over a rule that challenges its ability to avoid the issue by a saving interpretation. As a result, the Court has not had the opportunity to crystallize the precise contours of what kind of rules the Act does and does not allow it to prescribe.

This Article takes up that enterprise, articulating an understanding of the Rules Enabling Act that will equip the Supreme Court with the ability to judge a rule's validity—and give the rulemakers much clearer guidance regarding the outer boundaries of their remit. Once such an understanding is in hand, a clear candidate for invalidation—Federal Rule of Civil Procedure (FRCP) 15(c)(1)(C)—comes to the fore. That rule—which (in some jurisdictions) eviscerates defendants' protection from liability, thereby disturbing their vested repose—alters substantive rights in ways the Act, properly understood, will not countenance. Other rules, such as FRCP 4(k) and 4(n), also fall afoul of the Rules Enabling Act if they are analyzed with a proper understanding of the Act's strictures.



## AUTHOR

Justice Thurgood Marshall Distinguished Professor of Law, University of Virginia School of Law.

I would like to thank those who were able to give helpful comments on the piece.

## TABLE OF CONTENTS

## INTRODUCTION

The rules that govern the process of adjudication in our federal courts are prescribed by the U.S. Supreme Court pursuant to a grant of authority contained in the Rules Enabling Act (REA),[1] which empowers the Court to craft "rules of practice and procedure," so long as those rules do not "abridge, enlarge or modify any substantive right."[2] It has rightly been claimed that the meaning of these admonitions has never clearly been articulated,[3] and that the delineation of the REA's strictures remains opaque.[4] Many scholars have wrestled with the REA's language in an attempt to understand the precise contours of its constraints.[5] Of particular concern has been how we should understand the nature of its directive that the rules may not alter substantive rights: Is this an additional constraint or simply another way of stating that the rules must be merely procedural?[6]

1. 28 U.S.C. § 2072 (2018).
2. *Id.* § 2072(a)–(b).
3. *See, e.g.*, Leslie M. Kelleher, *Taking "Substantive Rights" (In the Rules Enabling Act) More Seriously*, 74 NOTRE DAME L. REV. 47, 49 (1998) ("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.").
4. Dep't of Transp. v. Ass'n of Am. R.R., 135 S. Ct. 1225, 1250 (2015) (Thomas, J., concurring) (referring to "the difficulty in discerning which rules affected substantive private rights and duties and which did not," and remarking that "[w]e continue to wrestle with this same distinction today in our decisions distinguishing between substantive and procedural rules both in diversity cases and under the Rules Enabling Act").
5. *See* Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1106–12 (1982) [hereinafter Burbank, *Rules Enabling Act*] (favoring a separation of powers rationale for the constraints of the REA); Stephen B. Burbank & Tobias Barrington Wolff, *Redeeming the Missed Opportunities of* Shady Grove, 159 U. PA. L. REV. 17, 52 (2010) (arguing that the REA calls for "moderate and restrained interpretation of Federal Rules that otherwise would impinge on the freedom of Congress or the States to pursue lawmaking aims that might traditionally be characterized as substantive"); Paul D. Carrington, *"Substance" and "Procedure" in the Rules Enabling Act*, 1989 DUKE L.J. 281 (1989) (suggesting a functional, context-specific approach to giving meaning to the terms "substance" and "procedure"); John Hart Ely, *The Irrepressible Myth of* Erie, 87 HARV. L. REV. 693, 718–19 (1974) (insisting that the limitations of the REA are twofold: "Not only must a Rule be procedural; it must in addition abridge, enlarge or modify no substantive right."); Kelleher, *supra* note 3, at 108–21 (outlining a range of considerations rulemakers should use to determine whether the U.S. Supreme Court may regulate a matter under the REA); Martin H. Redish & Dennis Murashko, *The Rules Enabling Act and the Procedural-Substantive Tension: A Lesson in Statutory Interpretation*, 93 MINN. L. REV. 26, 30–31 (2008) (arguing for a "relaxed separation" interpretation of the two wings of the REA, under which "an incidental effect on substantive rights does not invalidate a rule"); Ralph U. Whitten, *Separation of Powers Restrictions on Judicial Rulemaking: A Case Study of Federal Rule 4*, 40 ME. L. REV. 41 (1988) (arguing that separation of powers concerns should animate interpretation of the REA).
6. Ely, *supra* note 5, at 719 ("Not only must a Rule be procedural; it must in addition abridge, enlarge or modify no substantive right."); *see also id.* at 719–20 (lamenting that, although the REA imposes two distinct requirements, "[y]ou would never know it from the case law," and that the collapsing

The Court itself has struggled to present a clear picture of the REA as well. Although there have been instances in which the Court has gestured toward the idea that the REA's "shall not abridge" language must be taken seriously as its own constraint, there is a nagging sense that the diminutive view of the REA continues to hold sway, because the Supreme Court has yet to apply the REA to invalidate a codified Federal Rule. When confronted with circumstances in which a proposed understanding of a procedural rule threatened to transgress the constraints of the REA, the Court has salvaged the rule by interpreting it to avoid the offense,[7] a move explicitly driven by the Court's sense that REA-imposed restrictions compelled that approach.[8] Doing so made sense from a pragmatic perspective, because finding to the contrary would require a determination that "the Advisory Committee, [the Supreme] Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions."[9] However, in taking this approach, the Court has never had to address head-on precisely what it is that the REA prohibits. As a result, it has been easy to conclude that the REA loosely confines rulemaking to the procedural sphere, without giving much thought to the seemingly academic question of whether the REA's "shall not abridge" provision adds anything to the analysis.

---

of "the Act's two questions . . . into one" has been "widely accepted by the literature and has continued to inform the Court's discussions"). Lower courts tend to gloss over any distinction, equating validity under the REA with a determination of whether a rule is procedural. *See*, *e.g.*, Ringrose v. Engelberg Huller Co., 692 F.2d 403, 408 (6th Cir. 1982) ("The issue under the Enabling Act is whether the rule 'really regulates procedure . . . .'" (quoting Hanna v. Plumer, 380 U.S. 460, 464 (1965))).

7. *See*, *e.g.*, Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 427 n.7 (1996) ("Federal courts have interpreted the Federal Rules, however, with sensitivity to important state interests and regulatory policies."); Walker v. Armco Steel Corp., 446 U.S. 740, 750–52 (1980) (interpreting Federal Rule of Civil Procedure 3 to avoid a conflict with state statute of limitations period tolling provisions).

8. *See*, *e.g.*, Semtek Int'l, Inc. v. Lockheed Martin Corp., 531 U.S. 497, 503 (2001) ("Indeed, such a rule would arguably violate the jurisdictional limitation of the Rules Enabling Act: that the Rules 'shall not abridge, enlarge or modify any substantive right.'" (quoting 28 U.S.C. § 2072(b) (2000))).

9. *Hanna*, 380 U.S. at 471. Initial consideration of revisions or additions to the various Federal Rules are undertaken by a set of Advisory Committees, which submit their proposals to the U.S. Judicial Conference's Committee on Rules of Practice and Procedure (also known as the Standing Committee). Once the Standing Committee approves any proposed changes (which will only come after public notice and comment), they are reviewed for approval by the Judicial Conference. The Judicial Conference forwards the proposals to the U.S. Supreme Court, which—after approving them—transmits them to Congress by May 1 of each year. Congress then has until December 1 of the same year to block the changes; barring such action, the changes take effect on December 1 of the year of congressional review. *See* 28 U.S.C. §§ 2073–74 (2018); *About the Rulemaking Process: Overview for the Bench, Bar, and Public*, U.S. COURTS, http://www.uscourts.gov/rules-policies/about-rulemaking-process/how-rulemaking-process-works/overview-bench-bar-and-public [https://perma.cc/DU2D-56DG].

This state of affairs has made Justice Harlan's prediction in *Hanna v. Plumer*[10] prophetic:

> So long as a reasonable man could characterize any duly adopted federal rule as "procedural," the Court, unless I misapprehend what is said, would have it apply no matter how seriously it frustrated a State's substantive regulation of the primary conduct and affairs of its citizens. Since the members of the Advisory Committee, the Judicial Conference, and this Court who formulated the Federal Rules are presumably reasonable men, *it follows that the integrity of the Federal Rules is absolute*.[11]

Indeed, it has become common wisdom that the various Federal Rules are regarded as presumptively valid,[12] suggesting that no serious person would construe the REA to reach a contrary conclusion, given that the Supreme Court itself has never done so.[13] Unfortunately, the implicit or explicit acceptance of this new "irrepressible myth"[14] has enabled us to become complacent with respect to whether each of the rules promulgated pursuant to the Rules Enabling Act are truly compliant with its terms. That is, the Court's failure to provide a rigorous articulation of the contours of the REA—including the degree to which its "shall not abridge" component should

10. 380 U.S. 460 (1965).
11. *Id.* at 476 (Harlan, J., concurring) (emphasis added).
12. *See* Burlington N. R.R. Co. v. Woods, 480 U.S. 1, 6 (1987) ("[T]he study and approval given each proposed Rule by the Advisory Committee, the Judicial Conference, and this Court, and the statutory requirement that the Rule be reported to Congress for a period of review before taking effect . . . give the Rules presumptive validity under both the constitutional and statutory constraints." (citation omitted)); *see also* Kelleher, *supra* note 3, at 99 ("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."); Peter Westen & Jeffrey S. Lehman, *Is There Life for* Erie *After the Death of Diversity?*, 78 MICH. L. REV. 311, 364 (1980) ("[I]f a rule of civil procedure survives the multi-step process of being drafted by an Advisory Committee, approved by the Judicial Conference, approved by the Supreme Court, and not vetoed by Congress, it should be presumed not to violate substantive rights, particularly if the substantive effect of the rule is apparent on its face.").
13. *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) [hereinafter Burbank, *Sanctions*] ("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 regarding validity and invalidity are likely to be of purely academic interest . . . ." (citation omitted)).
14. In Professor Ely's seminal work on *Erie*, he took on the "irrepressible myth," then prevalent, that *Erie* was the single rubric through which all vertical choice-of-law problems must be analyzed. *See* Ely, *supra* note 5, at 697–98. The new "myth" is the notion that the REA simply imposes a loose requirement that rules be "procedural" and that the Federal Rules are impervious to attack thereunder. *Id.*

be given independent weight—has, in my view, enabled some rules to escape being detected as ultra vires judicial regulation.

In this Article, I will offer my understanding of what constraints the REA imposes on Supreme Court rulemaking, hopefully providing some clarity regarding the basic and distinctive constraints that the "rules of procedure" and "shall not abridge" components of the REA impose. In brief, the REA's underlying purpose of policing the boundaries between what Congress and the Court may regulate via prospective, supervisory regulation[15] yields an appreciation that procedural rules are restricted to addressing to the manner of adjudication, while substantive rights pertain to our primary interactions with one another and with governments. With this understanding of the REA in hand, it appears that at least two of the Federal Rules of Civil Procedure (my particular bailiwick)[16] cannot stand up to scrutiny, an unfortunate but important determination to make.[17] In the process of uncovering these defects, my hope is that the Supreme Court and its subordinate rulemaking bodies are able to have much more clarity about what can and cannot be done when prescribing the rules that govern "practice and procedure" in our federal courts.

## I. THE ADMONITION OF THE RULES ENABLING ACT

What, exactly, is it that the REA permits and proscribes? Here is the current version of the REA in its entirety:[18]

> (a) The Supreme Court shall have the power to prescribe general[19] rules of practice and procedure and rules of evidence for cases in the United

15. *See* Burbank, *Rules Enabling Act*, *supra* note 5, at 1106 ("Nothing could be clearer from the pre-1934 history of the Rules Enabling Act than that the procedure/substance dichotomy in the first two sentences was intended to allocate lawmaking power between the Supreme Court as rulemaker and Congress.").
16. I currently serve as a member of the Advisory Committee on Civil Rules, which considers and proposes amendments to the Federal Rules of Civil Procedure. The views expressed in this Article are my own.
17. This Article makes no attempt to evaluate the validity of other rules promulgated pursuant to the REA, which include the Federal Rules of Appellate and Criminal Procedure, as well as some components of the Federal Rules of Evidence (other components of the Federal Rules of Evidence are directly enacted by Congress). However, the REA analysis I propound is equally applicable to this other body of regulations. The Federal Rules of Bankruptcy Procedure are promulgated pursuant to a distinct—though similarly worded—statute, 28 U.S.C. § 2075.
18. Subsections (a) and (b) of this version of the REA were enacted in 1988. Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 401(a), 102 Stat. 4642, 4648-50 (1988). Subsection (c) was added in 1990. Judicial Improvements Act of 1990, Pub. L. 101-650, § 315, 104 Stat. 5115. The original version of the Act was enacted in 1934. Rules Enabling Act of 1934, Pub. L. No. 73-415, 48 Stat. 1064.
19. I will not, in this Article, explore the import of the term "general." To some it may appear to be an instruction that the rules must be of general applicability to all cases in the federal courts, that is, trans-substantive rules. *See* Stephen B. Burbank, *Pleading and the Dilemmas of "General Rules"*, 2009 WIS. L. REV. 535, 541 ("One of the foundational assumptions of modern American procedure is that the Rules Enabling Act's reference to 'general rules' forecloses the promulgation

> States district courts (including proceedings before magistrate judges thereof) and courts of appeals.
>
> (b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.[20]
>
> (c) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.[21]

From this text, the principal command of the REA appears to be twofold: (1) The rules prescribed by the Court must be rules of "practice and procedure"[22] (or evidence) and (2) they may not "abridge, enlarge or modify any substantive right."[23]

---

of different prospective rules for cases that involve different bodies of substantive law."). I am sympathetic toward that view, although it is mainly policy reasons that advise adherence to this constraint. However, although whether the REA prohibits rules that are limited to certain kinds of cases is an interesting question, it is one that is beyond the scope of this Article.

20. The second sentence of subparagraph (b) is a supersession clause; I do not address this provision in this Article. It is worth noting, however, that one commentator has suggested that the limitations on the Court's rulemaking authority under the REA—namely that its rules may not abridge, enlarge, or modify substantive rights—mean that any rule that is true to those limitations will not supersede any substantive laws. *See* Kelleher, *supra* note 3, at 87 ("[S]tatutes 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."). I offer no views on this analysis here.

21. 28 U.S.C. § 2072 (2018).

22. As Professor Ely stated it, "the Act begins with a checklist approach—anything that relates to process, writs, pleadings, motions, or to practice and procedure generally, is authorized; anything else is not." Ely, *supra* note 5, at 718.

23. *See id.* at 719 ("The Act therefore contains . . . limitations of both the checklist and enclave variety. Not only must a Rule be procedural; it must in addition abridge, enlarge or modify no substantive right."). The *Sibbach* case has been criticized for collapsing these two distinct components of the REA into one. *Id.* at 719–20 (noting that in *Sibbach* "the Act's two questions were collapsed into one: '*The test* must be whether a rule really regulates procedure . . . .' This construction has been widely accepted by the literature and has continued to inform the Court's discussions."). Although the Court remedied this error in *Hanna v. Plumer*, 380 U.S. 460 (1965), Justice Scalia resurrected it in his plurality opinion in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, 559 U.S. 393 (2010), when he wrote:

> Congress has undoubted power to supplant state law, and undoubted power to prescribe rules for the courts it has created, so long as those rules regulate matters "rationally capable of classification" as procedure. In the Rules Enabling Act, Congress authorized this Court to promulgate rules of procedure subject to its review, but with the limitation that those rules "shall not abridge, enlarge or modify any substantive right."
>
> We have long held that this limitation means that the Rule must "really regulat[e] 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." The test is not whether the Rule affects a litigant's substantive rights; most procedural rules do. What matters is what the Rule itself *regulates*: If it governs only "the manner and the means" by which the litigants'

Informed by others who have sought to clarify the meaning of the REA before me, I endeavor to provide a sketch of the constraints that the REA imposes below.

### A. "Rules of Practice or Procedure"

Most of the scholarly and judicial discussion of the REA posits a basic substance–procedure divide: Something is either a matter of procedure or it is a matter of substance.[24] I want to complicate that a bit by arguing that there are multiple categories of rules beyond this duo.

We turn first to the REA's conferral[25] on the Supreme Court of the power to prescribe "*rules of practice or procedure*."[26] Everything that we know about the motivation and purpose behind the REA—thanks in large measure to Professor

---

rights are "enforced," it is valid; if it alters "the rules of decision by which [the] court will adjudicate [those] rights," it is not.

Shady Grove Orthopedic Assocs., P.A., 559 U.S. at 406–07 (opinion of Scalia, J.) (citations omitted) (quoting *Hanna*, 380 U.S. at 472). *See also id.* at 411 ("*Sibbach* adopted and applied a rule with a single criterion: whether the Federal Rule 'really regulates procedure.'").

24. *See, e.g.*, Burbank, *Rules Enabling Act*, *supra* note 5, at 1113 (referring to "the procedure/substance dichotomy in the Act's first two sentences"); *see also* Sun Oil Co. v. Wortman, 486 U.S. 717, 726 (1988) ("Except at the extremes, the terms 'substance' and 'procedure' precisely describe very little except a dichotomy, and what they mean in a particular context is largely determined by the purposes for which the dichotomy is drawn.").

25. On the question of whether Congress has conferred this power on the Supreme Court or merely recognized a power that the Court inherently possesses, see, for example, Kelleher, *supra* note 3, at 62–63 ("The questions of what, if any, inherent authority the judicial branch has to regulate procedure and whether that inherent authority includes authority to promulgate procedural Rules in the absence of a congressional delegation has not been so clearly decided."). Although the Supreme Court's authority to prescribe its own rules of practice is unquestionably inherent to its judicial power, it is less clear (if not dubious) that the Court's judicial power inherently includes the authority to prescribe *prospective, supervisory* rules for the inferior federal courts that Congress creates. That said, in the absence of Congressional rulemaking or the authorization thereof, each federal court would have to determine its own procedures as a prerequisite to exercising its adjudicatory role. One could imagine that in such a world, the Supreme Court, through the Judicial Conference, might develop a set of rules that each federal court could then choose whether to adopt. This would not guarantee uniformity, but likely would be wholly consistent with the scope of the inherent rulemaking power that each court has for itself. Congress's grant, to the Supreme Court, of the authority to prescribe prospective, supervisory rules operative in the federal courts thus appears to be the delegation of *legislative* power. This insight will be relevant to my construction of the REA below in Subpart II.B.

26. I will regard the terms "practice" and "procedure" as largely synonymous, as my perusal of their usage throughout Supreme Court jurisprudence reflects their interchangeable meaning. Indeed, the heading of Section 2072 is "Rules of procedure and evidence; power to prescribe"; Sections 2073 and 2074 also refer only to "Rules of procedure and evidence," without any reference to the word "practice," which strongly buttresses the idea that "practice" and "procedure" are to be regarded as synonymous. *See* Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc., 554 U.S. 33, 47 (2008) ("[S]tatutory titles and section headings 'are tools available for the resolution of a doubt about the meaning of a statute.'" (quoting Porter v. Nussle, 534 U.S. 516, 528 (2002))).

Stephen B. Burbank's extensive treatment of the subject[27]—indicates that the Act's reference to "procedure" and "substantive rights" was "understood to demarcate the spheres of lawmaking appropriate for the Supreme Court acting as rulemaker and for Congress," "foreclos[ing] the creation in court rules of rights that would approximate the substantive law in their effect on person or property."[28] Knowing this guides our understanding of what "rules of practice and procedure" must be: Procedural rules are rules pertaining to the internal administration of the judicial process, that is, "claim-processing rules."[29] They stand opposed to rules that govern primary conduct, which are the province of Congress and the states.

An early congressional pronouncement described procedure as "the forms and modes of proceeding in suits."[30] The Supreme Court refined this category in *Sibbach v. Wilson & Co.*[31] when it defined "procedure" as "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."[32] In an earlier case—cited by congressional supporters of a predecessor bill to the REA—the Court had remarked, "The function of rules is to regulate the practice of the court and to facilitate the transaction of its business."[33] Filling this in further, Professor John Hart Ely listed among procedural rules those pertaining to "the form of pleadings, order of proof, time limits on responsive pleadings, and the method by which an adversary is given notice."[34] What these examples and the Court's definition in

27. *See* Burbank, *Rules Enabling Act*, *supra* note 5.
28. *Id.* at 1107, 1114.
29. Kontrick v. Ryan, 540 U.S. 443, 454 (2004); *see also* Hanna v. Plumer, 380 U.S. 460, 473 (1965) (describing procedural rules as "housekeeping rules").
30. Act of May 8, 1792, ch. 36, § 2, 1 Stat. 275, 276.
31. 312 U.S. 1 (1941).
32. *Id.* at 14.
33. Wash.-S. Navigation Co. v. Balt. & Phila. Steamboat Co., 263 U.S. 629, 635 (1924). This case was cited in the Minority Views section of the 1928 Senate Report to S. 2061, the bill that would later become the REA in 1934 (after having been stymied in 1928). The supporters of the bill sought to assuage opponents' concerns over the authority conferred by the proposed legislation by quoting the above language from *Washington-Southern*, and also writing (in their own voice), "Matters of jurisdiction and of substantive right are clearly within the power of the legislature. These are not to be affected. It can not be too strongly emphasized that the general rules of court contemplated under this bill will deal only with the details of the operation of the judicial machine." S. REP. NO. 70-440, pt. 2, at 16 (1928). *See also* Burbank, *Rules Enabling Act*, *supra* note 5, at 1092–98 (discussing this legislative history).
34. Ely, *supra* note 5, at 715–16. I depart from Professor Ely when he defines a procedural rule as "one designed to make the process of litigation a fair and efficient mechanism for the resolution of disputes." *Id.* at 724. The objective of rendering the dispute resolution process fair—which Ely elaborates as being inclusive of doing things a particular way "because it is thought to be more likely to get at the truth, or better calculated to give the parties a fair opportunity to present their sides of the story," *Id.* at 725—is not essential to rendering a rule procedural. A rule can be procedural without regard to its concern for such ends. *See* Carrington, *supra* note 5, at 308 ("[A]

*Sibbach* reveal is that procedural rules concern the *manner* in which a court processes a claim.[35]

That said, for these to be rules at all—in the sense that they have to be followed—there also must be related regulations or doctrines that indicate the consequences of noncompliance, such as the dismissal of one's claim, the imposition of a fine, or the entry of a default judgment.[36] These too are procedural rules, because they relate to and facilitate judicial processes.[37] Similarly, rules pertaining to qualifying and permitting advocates to represent litigants before the court—and rules regulating advocates' conduct in that capacity—relate to the adjudicatory process and fit comfortably within the realm of the procedural.[38]

Helpful as the above definition of a procedural rule may be, the category may be more deeply appreciated by describing precisely what a rule of procedure is not. The most apparent thing that a rule of procedure is not is a *rule of evidence*. The modern REA treats "rules of practice and procedure" and "rules of evidence" as two different things. This is not by accident. The original version of the REA omitted any reference to rules of evidence, mentioning only rules concerning "the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law."[39] The original Advisory Committee debated whether it had the authority to touch on matters pertaining to evidence.[40] It ultimately crafted rules

rule is functionally one of 'practice and procedure,' within the meaning of the first sentence, if the rule pertains to the operation of the federal courts and is integrated in a system generally applicable to all civil actions and suitably designed to achieve 'just, speedy, and inexpensive' determinations.").

35. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 122 (AM. LAW INST. 1971) (describing procedural rules as "rules prescribing how litigation shall be conducted"); *see also* Schriro v. Summerlin, 542 U.S. 348, 353 (2004) ("A rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes. In contrast, rules that regulate only the *manner of determining* the defendant's culpability are procedural." (citations omitted)); Palmer v. Hoffman, 318 U.S. 109, 117 (1943) ("Rule 8(c) covers only the manner of pleading. The question of the burden of establishing contributory negligence is a question of local law which federal courts in diversity of citizenship cases must apply." (citation omitted)).

36. *See, e.g.*, FED. R. CIV. P. 37(b)(2)(A)(i)–(vii) (providing for the imposition of sanctions in response to a litigant's failure to obey a court's discovery orders).

37. If the rules policing compliance with the judicial process became overly punitive in a manner not reasonably connected with furthering a court's procedural objectives, the impact on substantive rights might be impermissible, as discussed further in Subpart I.B.2.

38. Chambers v. NASCO, Inc., 501 U.S. 32, 43 (1991) ("[T]he Court has held that a federal court has the power to control admission to its bar and to discipline attorneys who appear before it." (citing *Ex parte* Burr, 22 U.S. 529, 531 (1824))).

39. Rules Enabling Act of 1934, Pub. L. No. 73-415, 48 Stat. 1064.

40. *See Foreword* to ADVISORY COMM. ON RULES FOR CIVIL PROCEDURE, PRELIMINARY DRAFT OF RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES AND THE SUPREME COURT OF THE DISTRICT OF COLUMBIA, at xvii (1936) ("There is some difference of opinion in the Committee as to the extent to which the statute authorizes the Court to make rules dealing with evidence. We have touched the subject as lightly as possible.").

relating to obtaining and presenting evidence,[41] as well as rules concerning admissibility[42] and authentication,[43] suggesting they saw evidentiary rules as falling within the charge to craft rules of procedure.

However, when a subsequent Advisory Committee proposed the Federal Rules of Evidence, Congress balked, blocking the rules[44] and taking it upon itself to enact rules of evidence legislatively.[45] The House Report supporting this legislation explained why Congress had blocked the evidence rules proposed by the Advisory Committee: "[R]ecognizing that rules of evidence are in large measure substantive in their nature or impact, the Subcommittee and the Full Committee concluded they were not within the scope of the enabling acts which authorize the Supreme Court to promulgate rules of 'practice and procedure.'"[46] Based on an extensive review of the

41. Rules 26 through 37 and 45 addressed discovery, depositions, and subpoenaing witnesses. FED. R. CIV. P. 26, 37, 45 (1939).

42. Original Rule 43(a) provided:

> (a) FORM AND ADMISSIBILITY. In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules. All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held. In any case, the statute or rule which favors the reception of the evidence governs and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made. The competency of a witness to testify shall be determined in like manner.

FED. R. CIV. P. 43(a) (1939).

43. Original Rule 44 prescribed the standards for authentication of documents. FED. R. CIV. P. 44 (1939).

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

45. Act of Jan. 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926 ("An Act to Establish Rules of Evidence for Certain Courts and Proceedings.").

46. H.R. REP. NO. 93-650, at 7076 (1973). There is additional evidence that Congress had this issue on its mind when it blocked the Rules of Evidence from taking effect. In the House Report accompanying the blocking legislation, one finds the following:

> Witnesses . . . have brought to the Committee's attention substantial questions for congressional consideration:
>
> > (1) Are there constitutional impediments to the promulgation of Rules of Evidence by the Supreme Court, rules which may impinge on state-created substantive rights and infringe on the constitutional separation of powers?
> > (2) Are the Rules of Evidence within the purview of the authority granted the Court by the enabling acts? Justice William O. Douglas, dissenting from the Court action, said he doubted that they were.
> >
> > . . .
> >
> > [I]t has become clear there is enough controversy wrapped up in the 168 pages of rules and Advisory Committee notes that the rules should not be permitted to become effective without an affirmative act of Congress, and then, only to the extent and with such amendments, as the Congress shall approve.

legislative history surrounding the drafting and adoption of the Rules Enabling Act of 1934, Professor Burbank concluded, "Congress was faithful to the original understanding in refusing to acquiesce in the proposed Federal Rules of Evidence in 1973."[47] According to Burbank's research, although matters pertaining to "the mode of taking and obtaining evidence" were within the procedural remit given to the Supreme Court, rules "regulating the admissibility of evidence" were not.[48] Thus, first in 1975[49] and then in 1988, Congress crafted legislation to provide—as the REA does today—that the Supreme Court may prescribe "rules of evidence,"[50] with the caveat that such rules pertaining to "an evidentiary privilege" may only take effect by an Act of Congress.[51]

Because the authority of the Supreme Court to prescribe rules of evidence is now explicit, drawing a distinction between a rule of procedure and a rule of evidence has no consequences for a rule's validity under the REA, since either are permissible. The point of drawing this distinction is that *rules are not confined to the substantive-versus-procedural dyad.* There are other types of rules that are neither "procedural" nor "substantive". A rule governing what is admissible into evidence is a rule of evidence, not a rule of procedure or a substantive rule; rules of evidence are their own category. On the other hand, rules governing how information may be collected and presented to the court are rules of procedure, for they pertain to the manner of adjudication. Therefore, "procedural" cannot simply mean "non-substantive." This level of precision is necessary when considering whether a particular Federal Rule can be fairly characterized as procedural under the REA.

A procedural rule may also be contrasted with another kind of rule: a rule of decision. A rule of decision is—simply put—a legal rule that determines the

H.R. REP. NO. 93-52, at 3–4 (1973); *see also* S. REP. NO. 93-14, at 2 n.2 (1973) ("In addition, it should be noted that this bill would not affect the power of the Supreme Court to issue rules of evidence in the future, assuming that such power already exists. If the Court does not have the power, then, of course, this bill would not grant it. If the Court does, this bill does not speak to the continuation of that power. On the controversy over the power to issue rules of evidence, see the dissenting view of Mr. Justice Douglas to the order of Nov. 20, 1972, promulgating the proposed rules of evidence.").

47. Burbank, *Rules Enabling Act*, *supra* note 5, at 1138.

48. *Id.* at 1141–43; *accord* 409 U.S. 1132, 1132–33 (1972) (Douglas, J., dissenting) ("I doubt if rules of evidence are within the purview of the statute under which we are authorized to submit proposed Rules to Congress. . . . I can find no legislative history that rules of evidence were to be included in 'practice and procedure' as used in § 2072.").

49. Act of Jan. 2, 1975, Pub. L. No. 93-595, § 2(a)(1), 88 Stat. 1926, 1948 (amending Title 28 of the U.S. Code to create Section 2076, which empowered the Supreme Court "to prescribe amendments to the Federal Rules of Evidence").

50. Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 401(a), 102 Stat. 4642, 4648 (1988).

51. 28 U.S.C. § 2074(b) (2018).

outcome, on the merits, with respect to a particular issue or matter that has been presented for adjudication.[52] Another way of phrasing it is a rule of decision is one that supplies the criteria for deciding a litigant's entitlement to relief.[53] Yet another way of describing rules of decision would be as those legal rules that define or delineate the duties, rights, and obligations that govern our lives and form the foundation for assessing liability and determining the compensatory, punitive, and remedial consequences that flow therefrom.[54] Congress has—through the Rules of Decision Act—commanded that state law supply this kind of rule in cases where the U.S. Constitution, treaties, or statutes of the United States do not otherwise require or provide.[55] Rules of decision are what many would rightly refer to as the "substantive law," although I will abjure use of that term (using "rules of decision" instead) because of its attendant baggage and imprecision.[56]

Subsumed within rules of decision are rules governing the resolution of conflicts among rules of decision. In federal court, the admonition to apply state law

52. *See* Guar. Tr. Co. v. York, 326 U.S. 99, 109 (1945) (indicating that *Erie* interpreted the Rules of Decision Act to ensure that "so far as legal rules determine the outcome of a litigation," in diversity cases the outcome "should be substantially the same . . . as it would be if tried in a State court"). The outcome that I refer to here is not the ultimate macro-outcome of the case—which, as is well known, may be determined by many different kinds of rules—but rather the micro-outcome of how an issue presented for adjudication is decided. An example would be a legal rule establishing the duty of care a proprietor owes to a trespasser, or those rules that determine whether one's behavior rises to the level of recklessness.

53. *See* Ely, *supra* note 5, at 712 (conceiving of rules of decision as those "rules by which the lawsuit was to be determined").

54. *See*, *e.g.*, Kelso v. Big Lots Stores, Inc., No. 8:09-cv-01286-T-EAK-TGW, 2010 WL 2889882, at *1 (M.D. Fla. July 21, 2010) ("Substantive law prescribes rights and duties, while procedural law concerns the means and methods to enforce those rights and duties."); Hadlich v. Am. Mail Line, 82 F. Supp. 562, 563 (N.D. Cal. 1949) ("Essentially venue is an incidence of procedure. It is a part of that body of law which bounds and delineates the forum and the manner and mode of enforcing a litigant's rights. It is distinguishable from and is not within the field of law, known as substantive, which recognizes, creates and defines rights and liabilities and causes of action."). Professor Ely's conclusion that "state rules controlling such things as burden of proof, presumptions, and sufficiency of evidence should be followed where they differ from the federal court's usual practice," Ely, *supra* note 5, at 714, fits comfortably within my description of a rule of decision, as the rules that he cites—burden of proof, presumptions, and sufficiency of the evidence—all pertain to the conditions under which liability may be properly assessed.

55. 28 U.S.C. § 1652 (2018); Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938). The Rules of Decision Act was first enacted by Congress as section 34 of the Judiciary Act of 1789. Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 73, 92.

56. *See Guar. Tr. Co.*, 326 U.S. at 108 ("Neither 'substance' nor 'procedure' represents the same invariants. Each implies different variables depending upon the particular problem for which it is used. And the different problems are only distantly related at best, for the terms are in common use in connection with situations turning on such different considerations as those that are relevant to questions pertaining to ex post facto legislation, the impairment of the obligations of contract, the enforcement of federal rights in the State courts and the multitudinous phases of the conflict of laws." (alteration in original) (citation omitted)). I cannot avoid, however, the term "substantive rights," which I will engage below. *See infra* Subpart I.B.

as the rules of decision necessitates a determination of which state's law to apply. This determination itself is controlled by the rules of the state where the relevant district court is located.[57] The Supreme Court reached that conclusion by application of the *Erie* doctrine: Given the tight connection with "local policies" that a state's conflicts rules have, the subversion of such rules in favor of "an independent 'general law' of conflict of laws" crafted by federal courts would "do violence to the principle of uniformity within a state upon which the [*Erie*] decision is based."[58] As a result, conflicts rules—at least so far as they control the selection of which rule of decision to apply—are not within the realm of the procedural, but rather are appurtenant to the rules of decision category.[59]

Where do *jurisdictional rules* fit (if they do) within this schema? If "jurisdiction" is taken to mean a court's authority or capacity to hear a case,[60] then—at first blush—jurisdiction may appear to pertain to the process whereby underlying rights and duties are adjudicated. Upon closer inspection, however, jurisdictional rules do not to bear on the manner in which a court resolves a matter, but instead concern whether that court has cognizance of the matter in the first place. Jurisdictional rules thus differ from procedural rules: They are not internal claim-processing rules, but metarules that provide prerequisites to the court engaging in the adjudicatory enterprise at all.[61] Rules governing jurisdiction also are distinct from rules of decision, as the latter concern the criteria for resolution of a claim—its

57. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941).
58. *Id.*
59. Relevant to the discussion of the "shall not abridge" provision of the REA below, *infra* Subpart I.B, the Court's recognition of the substantive tenor of conflicts rules indicates that any rule promulgated by the Supreme Court that purported to govern such matters would necessarily "abridge, enlarge or modify" a substantive right.
60. Granting that "'[j]urisdiction,' it has been observed, 'is a word of many, too many, meanings,'" *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 90 (1998) (citation omitted), it means at least what I have described. *See* Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 671 (1950) ("When concerned as we are with the power of the inferior federal courts to entertain litigation within the restricted area to which the U.S. Constitution and Acts of Congress confine them, 'jurisdiction' means the kinds of issues which give right of entrance to federal courts."); *see also* Henderson *ex rel.* Henderson v. Shinseki, 562 U.S. 428, 435 (2011), *rev'g* Henderson v. Shinseki, 589 F.3d 1201 (2009) ("We have urged that a rule should not be referred to as jurisdictional unless it governs a court's adjudicatory capacity, that is, its subject-matter or personal jurisdiction.").
61. Patchak v. Zinke, 138 S. Ct. 897, 906 (2018) (distinguishing section 2(b) of the Gun Lake Trust Land Reaffirmation Act, Pub. L. No. 113-179, 128 Stat. 1913 (2014)—which it found to be a jurisdictional rule—from "a 'claim-processing rule,' like a filing deadline or an exhaustion requirement, that requires the parties to 'take certain procedural steps at certain specified times.'" (quoting Henderson *ex rel.* Henderson v. Shinseki, 562 U. S. 428, 435 (2011))); Bowles v. Russell, 551 U.S. 205, 210 (2007) ("[S]everal of our recent decisions have undertaken to clarify the distinction between claims-processing rules and jurisdictional rules."); Kontrick v. Ryan, 540 U.S. 443, 454 (2004) (distinguishing "claim-processing rules" from prescriptions that "delineate what cases bankruptcy courts are competent to adjudicate").

"substantive adequacy"[62]—whereas jurisdictional rules are addressed to the power of the court to entertain it.[63] Put simply, jurisdictional rules tell a court whether it has adjudicatory power (the power to resolve), rules of decision determine the resolution of matters presented for adjudication on their merits (the standards for resolution), and rules of practice and procedure tell a court the manner in which the adjudication will unfold (the method of resolution).

I am well aware that the concept of "jurisdiction" is much more fraught than I have presented it to be.[64] Refining jurisdiction as a concept is not central to my purpose here, however. I assume only that there are some rules properly called "jurisdictional" which pertain to whether a given court may adjudicate a dispute in a way that binds certain parties and is respected by other jurisdictions. My concern is whether—pursuant to the REA—the Supreme Court can prescribe such rules, as "rules of practice and procedure."

The answer is clearly "no" for subject-matter jurisdiction,[65] for the Supreme Court has stated, "Only Congress may determine a lower federal court's subject-matter jurisdiction,"[66] pursuant to its constitutional authority to "ordain and establish" inferior federal courts.[67] Explicit recognition of this limitation is supplied in Rule 82 of the Federal Rules of Civil Procedure, which reads, in pertinent part, "These rules do not extend or limit the jurisdiction of the district courts . . . ."[68]

62. Arbaugh v. Y&H Corp., 546 U.S. 500, 504 (2006).
63. Republic Nat'l Bank of Miami v. United States, 506 U.S. 80, 100 (1992) (Thomas, J., concurring in part and concurring in the judgment) (noting that jurisdictional statutes "speak to the power of the court rather than to the rights or obligations of the parties").
64. *See generally* Scott Dodson, *Jurisdiction and Its Effects*, 105 GEO. L.J. 619 (2017) (discussing the "identity crisis" faced by the term "jurisdiction" and referencing other scholars who have explored the concept).
65. *See Bowles*, 551 U.S. at 213 ("[T]he notion of 'subject-matter' jurisdiction obviously extends to 'classes of cases . . . falling within a court's adjudicatory authority.'" (quoting Eberhart v. United States, 546 U.S. 12, 16 (2005))).
66. Hamer v. Neighborhood Hous. Servs. of Chi., 138 S. Ct. 13, 17 (2017) (quoting *Kontrick*, 540 U.S. at 452)).
67. Lockerty v. Phillips, 319 U.S. 182, 187 (1943); *see also Kontrick*, 540 U.S. at 452 (citing U.S. CONST. art. III, § 1). Although I have previously mused about whether the language and history of Article III support this view of congressional power, see A. Benjamin Spencer, *The Judicial Power and the Inferior Federal Courts: Exploring the Constitutional Vesting Thesis*, 46 GA. L. REV. 1 (2011), there is no prospect that those musings will ever have any sway, see *id.* at 66 ("Ultimately the traditional view challenged here—that Congress has authority over inferior federal court jurisdiction—is too entrenched and too relied upon to doubt at this late stage.").
68. FED. R. CIV. P. 82; *see also* Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 370 (1978) ("[I]t is axiomatic that the Federal Rules of Civil Procedure do not create or withdraw federal jurisdiction."); Sibbach v. Wilson & Co., 312 U.S. 1, 10 (1941) (noting "the inability of a court, by rule, to extend or restrict the jurisdiction conferred by a statute"); Wash.-S. Navigation Co. v. Balt. & Phila. Steamboat Co., 263 U.S. 629, 635 (1924) ("But no rule of court can enlarge or restrict jurisdiction."); Venner v. Great N. Ry. Co., 209 U.S. 24, 35 (1908) ("The jurisdiction of the circuit court is prescribed by laws enacted by Congress in pursuance of the Constitution, and this court

However, can the same be said for personal jurisdiction? Might a rule be considered to be one of "practice and procedure" if it addresses "jurisdictional" matters of that kind? Answering this question requires specifying what personal jurisdiction is really about:[69] the authority of a court to exercise power over a particular entity or person and render a binding determination of their rights. This seems jurisdictional in the sense I have thus far described.[70] Although individual due process rights demand that a court have territorial jurisdiction before it may render a binding judgment against a party,[71] whether a court has such authority over a person (or property) ultimately is a function of his or her connection to the geographical territory over which the court's sponsoring sovereign wields control.[72] In the absence of any such connection, whatever that court does with respect to such persons or property may be ignored, or at least challenged on that ground.[73] May rules of "procedure" concern themselves with the authority of a court to render binding judgments and still be properly considered "procedural"?

---

by its rules has no power to increase or diminish the jurisdiction thus created . . . ."). The inability of court rules to define federal subject-matter jurisdiction does not mean that such rules cannot address how the federal courts undertake the subject-matter jurisdiction determination; whether a court has jurisdiction is beyond the rules but the method it uses to make that call is not.

69. Obviously, this topic has been the subject of extensive debate, with most believing that the Court has provided insufficient clarity on this score. I have already offered my views of what personal jurisdiction *should* be about and will not rehash that discussion here. *See* A. Benjamin Spencer, *Jurisdiction to Adjudicate: A Revised Analysis*, 73 U. CHI. L. REV. 617 (2006). However, in my discussion below of Rule 4(k) and Rule 4(n), *see infra* Subpart II.B, I will offer more detail about the interaction between the Court's personal jurisdiction jurisprudence and these rules to the extent it bears on determining their validity under the REA.

70. *See* Van Cauwenberghe v. Biard, 486 U.S. 517, 526 (1988) ("[T]his Court has recognized that the individual interest protected is in 'not being subject to the binding judgments of a forum with which [the defendant] has established no meaningful "contacts, ties, or relations."'" (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 471–72 (1985))).

71. Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 (1982) ("The requirement that a court have personal jurisdiction flows not from Art. III, but from the Due Process Clause."); Pennoyer v. Neff, 95 U.S. 714, 733 (1877) ("[P]roceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law.").

72. Bristol-Myers Squibb Co. v. Superior Court, 137 S. Ct. 1773, 1780 (2017) ("[R]estrictions on personal jurisdiction 'are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States.'" (quoting Hanson v. Denckla, 357 U.S. 235, 251 (1958))); J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 880 (2011) (opinion of Kennedy, J.) ("As a general rule, neither statute nor judicial decree may bind strangers to the State. . . . A court may subject a defendant to judgment only when the defendant has sufficient contacts with the sovereign 'such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."'" (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945))).

73. *See Ins. Corp. of Ir.*, 456 U.S. at 706 ("A defendant is always free to ignore the judicial proceedings, risk a default judgment, and then challenge that judgment on jurisdictional grounds in a collateral proceeding.").

There are two distinct ways that a rule might address personal jurisdiction. The first way would be through a rule that articulated the circumstances under which a court could exercise jurisdiction over persons or property. The second way would be a rule that articulated how a litigant could appear in court to challenge a court's territorial jurisdiction without having such conduct be treated as grounds for the court's assertion of jurisdiction.[74] A rule of the first kind does not meet my definition of a rule of procedure.[75] Such a rule determines whether a court may adjudicate a matter, not the manner in which it may do so.

However, a rule specifying the method a court may use to make its jurisdictional determination is a rule of procedure: It guides the court's decisionmaking *process* rather than provides criteria that determine jurisdiction itself.[76] For example, Rule 12 of the Federal Rules of Civil Procedure—which provides that one may challenge personal jurisdiction by appearing in court and filing a motion to dismiss in response to a complaint—is a procedural rule because it does not address whether there is jurisdiction but how a litigant may raise a jurisdictional challenge.[77] To the extent a rule of this kind extends jurisdictional immunity as a component of this process, as to a litigant appearing only to contest jurisdiction, this immunity can fairly be seen as a necessary concomitant of the court's undertaking the jurisdictional inquiry at all, not a feature that robs the rule of its status as one of "practice and procedure."

Similarly, related rules that articulate the consequences of failing to adhere to the requirements for such jurisdictional immunity—such as Rule 12(h)'s admonition that personal jurisdiction challenges not raised initially are waived[78]—are still rules of practice and procedure. They simply announce that the

74. *See, e.g.*, FED. R. CIV. P. 12 (permitting personal jurisdiction to be challenged prior to filing an answer, thus enabling a litigant to appear without submitting to the court's jurisdiction generally); Segalis v. Roof Depot USA, LLC, 178 So. 3d 83, 85 (Fla. Dist. Ct. App. 2015) ("The law is clear and well-established that a simple notice of appearance by counsel does not constitute a general appearance by the client and does not waive the client's claims as to lack of jurisdiction or denial of due process.").

75. The Supreme Court appears to concur in this conclusion, having stated "[c]larity would be facilitated if courts and litigants used the label 'jurisdictional' not for claim-processing rules, but only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority." Kontrick v. Ryan, 540 U.S. 443, 455 (2004). Subdivisions (k) and (n) of Rule 4 are more thoroughly analyzed in relation to the REA in Subpart II.B, *infra*.

76. *See Ins. Corp. of Ir.*, 456 U.S. at 707 ("[T]he manner in which the court determines whether it has personal jurisdiction may include a variety of legal rules and presumptions, as well as straightforward factfinding. . . . [T]he mere use of procedural rules does not in itself violate the defendant's due process rights.").

77. FED. R. CIV. P. 12(b)(2), (g), (h).

78. FED. R. CIV. P. 12(h).

jurisdictional "state of nature" *external* to such rules (i.e. that voluntarily appearing in court subjects one to its jurisdiction) applies if the requirements *internal* to the rules are not met.

Considered in terms of the typical order of a court proceeding, we have touched on rules that determine whether a court may entertain a matter (jurisdictional rules), rules that prescribe the manner or method the court must use as it adjudicates a matter (procedural rules), rules that govern what material may be considered in adjudication (evidentiary rules), and rules that supply the criteria the court must use to resolve a matter one way or another (rules of decision).

One final category of rules must be noted: rules of redress.[79] Once adjudication concludes with a finding that the claimant has presented and proven a valid claim, the court is in the position to provide the claimant with some type of relief, which may be monetary or equitable in nature. The law that informs the court of what relief it is authorized to give may be described as rules of redress—those rules that articulate the consequences of a proven legal transgression. Although courts have inherent authority to determine the consequences of law violations in the context of particular adjudications, the promulgation of prospective, supervisory rules concerning such matters—at least at the federal level—would seem to be a quintessentially legislative, rather than judicial, act.[80] The entitlements one has under the law in the wake of a determination of another's liability do not pertain to the method of adjudication, but to rights and obligations that flow from a judgment reached at the conclusion of the adjudicatory process.

---

79. I am deliberately avoiding the term "remedy" here. There are times when the term "remedy" is used to mean redress or relief (for example, an injunction or monetary damages). *See, e.g.*, Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 343 (2008) (Ginsburg, J., dissenting) (referring to "damages" as "the law's traditional remedy for . . . tortious injury"). However, there are other times when courts use the term "remedial" to refer to something akin to justiciability, that is, a rule that addresses whether a substantive right violation can be judicially addressed. *See, e.g.*, Great Am. Fed. Sav. & Loan Ass'n v. Novotny, 442 U.S. 366, 376–77 (1979):

> Section 1985(3), by contrast, *creates* no rights. It is a purely remedial statute, providing a civil cause of action when some otherwise defined federal right—to equal protection of the laws or equal privileges and immunities under the laws—is breached by a conspiracy in the manner defined by the section. . . . The only question here, therefore, is whether the rights created by Title VII may be asserted within the *remedial* framework of § 1985(3).

*Id.* As used in *Novotny*, remedial means providing a federal avenue for vindicating rights defined elsewhere. "Remedial" in this sense is closer to a jurisdictional rule, but not quite that. To avoid such haziness, I am choosing to capture this category of rules with the term redress. There likely is a separate category of rules, distinct from "rules of redress" and "jurisdictional rules," that capture what is meant by a "remedial statute" as used by the Court in *Novotny*. The important point is that rules pertaining to such matters would not be fairly characterized as "procedural."

80. *Cf.* Mistretta v. United States, 488 U.S. 361, 396 (1989) (describing as a "legislative responsibility" the task of "establishing minimum and maximum penalties for every crime").

To summarize, a "rule of practice or procedure" concerns the method a court uses to adjudicate matters presented to it. Such a rule may not prescribe the rules that govern how a court determines a matter on its merits. Neither may a rule of procedure address whether a court may adjudicate a matter at all or exercise authority over particular persons or property—although it may prescribe the process a court uses to determine its authority in a given case. Finally, rules of procedure may not prescribe the range of permissible consequences of law violations.

### B. "Shall Not Abridge"

In addition to being confined to procedural rules, the REA next tells us that rules promulgated thereunder may not "abridge, enlarge or modify any substantive right." This text raises two questions. First, and most importantly, does it provide a separate and meaningful constraint on the rulemaking authority of the Supreme Court? Second, if so, what is the nature of that constraint? I will address these questions in reverse order.

#### 1. "Substantive Right"

As noted at the outset of this Article and elaborated below,[81] the REA's admonition against abridging substantive rights derives from constitutional limitations on Congress's delegation authority:[82] Congress may not delegate its legislative powers,[83] particularly the power to create prospective rules of substantive law untethered from adjudication.[84] I am in accord with Justice Thomas in seeing

81. *See infra* Subpart I.B.2.

82. *See* Burbank, *Rules Enabling Act*, *supra* note 5, at 1025 ("The historical evidence compels the view that the limitations imposed by the famous first two sentences of the Act . . . were intended to allocate power between the Supreme Court as rulemaker and Congress and thus to circumscribe the delegation of legislative power . . . .").

83. *See, e.g.*, *Mistretta*, 488 U.S. at 371–72 ("[W]e long have insisted that 'the integrity and maintenance of the system of government ordained by the Constitution' mandate that Congress generally cannot delegate its legislative power to another Branch." (quoting Marshall Field & Co. v. Clark, 143 U.S. 649, 692 (1892))).

84. The original Supreme Court Advisory Committee that crafted the Federal Rules of Civil Procedure appeared to recognize this constitutional limitation as guiding their understanding of the limits that the REA imposed. Its chair, Attorney General William D. Mitchell, noted that "constitutional limitations would have prevented the Congress, even if it had tried, from delegating to the courts power to make rules of substantive law." Remarks of Hon. William D. Mitchell (July 21, 1938), *in* AM. BAR ASS'N, RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES WITH NOTES AS PREPARED UNDER THE ADVISORY COMMITTEE AND PROCEEDINGS OF THE INSTITUTE ON FEDERAL RULES, CLEVELAND, OHIO 182 (William W. Dawson ed., 1938).

this limitation as meaning that the prescription of general rules governing private conduct at the federal level is a legislative act.[85] Therefore, a "substantive right" under the REA concerns what I may and may not do to others and what I can expect others not to do to me.[86] More specifically, a substantive right is an entitlement that arises out of the duties, obligations, and privileges we have with respect to one another that render us physically and mentally secure and protect our lives, liberty, and property.[87]

Substantive rights are relational, being a necessary concomitant of humans in society with one another.[88] Examples abound. I have a right not to experience negligent, reckless, or wanton conduct from others as I go about my daily life.[89] I

85. *See* Dep't of Transp. v. Ass'n of Am. R.R., 135 S. Ct. 1225, 1245 (2015) (Thomas, J., concurring in the judgment) ("[T]he core of the legislative power that the Framers sought to protect from consolidation with the executive is the power to make 'law' in the Blackstonian sense of generally applicable rules of private conduct."); *see also* WILLIAM BLACKSTONE, 1 COMMENTARIES ON THE LAWS OF ENGLAND 38 (Univ. of Chi. Press 1979) (1765) (describing the general law as a "rule of action, which is prescribed by some superior, and which the inferior is bound to obey"); Stephen B. Burbank, Response, *Hold the Corks: A Comment on Paul Carrington's* "Substance" and "Procedure" in the Rules Enabling Act, 1989 DUKE L.J. 1012, 1019–20 (1989) [hereinafter Burbank, *Hold the Corks*] ("I believe that, under the original Enabling Act, the restrictions on court rulemaking should have been read to effect the purpose of allocating federal lawmaking power of the legislative type . . . . I also believe that prospective federal lawmaking that necessarily and obviously involves policy choices with a predictable and identifiable impact on rights claimed under substantive law is properly the province of Congress.").

86. Paul Carrington offered a more political definition of how one may know whether a substantive right is implicated by a procedural rule: "Such a rule does not affect a substantive right, within the meaning of the second sentence of the Act, if its application is sufficiently broad to evoke no organized political attention of a group of litigants or *prospective* litigants who (reasonably) claim to be specially and adversely affected by the rule." Carrington, *supra* note 5, at 308. I disagree that this supplies the right lodestar; because many reforms to procedural rules inspire political attention and opposition, such a reaction cannot reliably indicate whether a rule offends substantive rights.

87. In articulating this definition of substantive rights, I focus more on their nature and effect than on the motivation underlying them, which is the focus of Professor Ely. *See* Ely, *supra* note 5, at 725–26 ("The most helpful way, it seems to me, of defining a substantive rule—or more particularly a substantive right, which is what the Act refers to—is as a right granted for one or more nonprocedural reasons, for some purpose or purposes not having to do with the fairness or efficiency of the litigation process."). I prefer not to define substantive rights merely in opposition to procedural rights, but rather to supply them with their own descriptive character. Nonetheless, I, like Ely, embrace a notion of substantive rights not limited to those that "affect people's conduct at the stage of primary private activity," but that extends also to those that relate to "the fostering and protection of certain states of mind." *Id.* at 725–26 (quoting H. HART & H. WECHSLER, THE FEDERAL COURT AND THE FEDERAL SYSTEM 678 (1953)).

88. *See* IMMANUEL KANT, GROUNDING FOR THE METAPHYSICS OF MORALS 114 (John Ladd ed. & trans., 2d ed., Hackett Publ'g Co. 1996) (concluding that people should participate in a legal system "if they ever could (even involuntarily) come into a relationship with one another that involves mutual rights").

89. *See, e.g.*, Iglehart v. Bd. of Cty. Comm'rs, 60 P.3d 497, 502 (Okla. 2002) ("Generally a 'defendant owes a duty of care to all persons who are foreseeably endangered by his conduct with respect to

have a right to have a valid contract enforced.[90] I have a right to exclusive enjoyment of property deeded in my name.[91] I have a right to use products that are not unreasonably dangerous.[92] I have a right to be warned of dangerous conditions that a proprietor knows or should know about.[93] I have a right not to be physically restrained against my will by one lacking lawful authority.[94]

Subsumed within these rights are a bundle of issues that determine their scope and extent. For example, one's entitlement to relief based on the negligent conduct of another depends on a range of factors. When did the alleged negligent conduct occur?[95] Did the alleged negligent conduct cause any harm to the purported victim?[96] To what extent did the victim's own negligence contribute to the injuries?[97] Was the victim well aware of the risk presented by negligent conduct but subjected themselves to it nonetheless?[98] Was the victim on the property as an

all risks which make the conduct unreasonably dangerous.'" (quoting Wofford v. E. State Hosp., 795 P.2d 516, 519 (1990))).

90. *See, e.g.*, Advantage Physical Therapy, Inc. v. Cruse, 165 S.W.3d 21, 24 (Tex. App. 2005) ("The elements of . . . an enforceable contract are: (1) an offer; (2) an acceptance in strict compliance with terms of offer; (3) a meeting of the minds; (4) a communication that each party consented to the terms of the contract; (5) execution and delivery of the contract with an intent it become mutual and binding on both parties; and ([6]) consideration.").

91. *See, e.g.*, Charleston Joint Venture v. McPherson, 417 S.E.2d 544, 549 (S.C. 1992) ("One in peaceable possession may maintain an action for trespass against another who interferes with his quiet and exclusive enjoyment of the property.").

92. *See, e.g.*, Town of Westport v. Monsanto Co., 877 F.3d 58, 65 (1st Cir. 2017) ("In order to establish a breach of the implied warranty of merchantability under Massachusetts law, a plaintiff must demonstrate that the product was 'defective and unreasonably dangerous' for the 'ordinary purposes' for which it was 'fit,' at the time that it left the supplier's hands." (quoting Evans v. Lorillard Tobacco Co., 990 N.E.2d 997, 1010 (Mass. 2013))).

93. *See, e.g.*, Armstrong v. Best Buy Co., 788 N.E.2d 1088, 1089 (Ohio 2003) ("A shopkeeper ordinarily owes its business invitees a duty of ordinary care in maintaining the premises in a reasonably safe condition and has the duty to warn its invitees of latent or hidden dangers.").

94. *See, e.g.*, Escambia Cty. Sch. Bd. v. Bragg, 680 So. 2d 571, 572 (Fla. Dist. Ct. App. 1996) ("The tort of false imprisonment or false arrest is defined as 'the unlawful restraint of a person against his will, the gist of which action is the unlawful detention of the plaintiff and the deprivation of his liberty.'" (quoting Johnson v. Weiner, 19 So.2d 699, 700 (1944))) .

95. *See, e.g.*, Swanson v. Howard Univ., 249 F. Supp. 3d 259, 263 (D.D.C. 2017) ("Because plaintiff's alleged injury occurred over fourteen years ago, her negligence claim is barred by the applicable statute of limitations."); *see also* Riddlesbarger v. Hartford Ins. Co., 74 U.S. 386, 390 (1868) ("[Statutes of limitations] are enacted to restrict the period within which the right, otherwise unlimited, might be asserted.").

96. *See, e.g.*, Petrauskas v. Wexenthaller Realty Mgmt., 542 N.E.2d 902, 905 (Ill. App. Ct. 1989) (requiring, to prove a cause of action for negligence in Illinois, that a plaintiff must prove facts that establish an injury proximately resulting from a breach of an owed duty).

97. *See, e.g.*, Dennis v. Jones, 928 A.2d 672, 676 (D.C. 2007) (Contributory negligence "is an affirmative defense in negligence cases and may operate as a complete bar to liability.").

98. Lascheid v. City of Kennewick, 154 P.3d 307, 310 (Wash. Ct. App. 2007) ("[A]ssumption of risk is a complete bar to recovery.").

authorized invitee/licensee or was the victim trespassing?[99] Each of these considerations, and more, feed into the definition of the right.[100] For example, the right to compensation for the negligent conduct of another may be one that is two years in duration and only available to actually harmed invitees upon property with no knowledge of any dangerous conditions who engage in no conduct that contributes to their own harm. When the requisite conditions obtain, the victim may have a right of action that is itself treated as a substantive right.[101]

We also have substantive rights respecting our relationship with governments. I have a right to vote if I am 18 years of age or older.[102] I have a right to bear arms.[103] I have a right to be secure from prosecution by the government for certain actions I take as a governmental official,[104] or as a member of Congress.[105] Certain children with disabilities have a right to a "free appropriate public education."[106] The list could go on.[107]

99. Salaman v. City of Waterbury, 717 A.2d 161, 164 (Conn. 1998) ("The status of an entrant on another's land, be it trespasser, licensee or invitee, determines the duty that is owed to the entrant while he or she is on a landowner's property.").

100. I take what I have described here—the notion that there are peripheral rules that are essential to defining the scope and extent of a substantive right and that should themselves be viewed as components of the substantive right—to be part of what Justice Stevens was getting at in his concurrence in *Shady Grove* when he wrote, "A federal rule, therefore, cannot govern a particular case in which the rule would displace a state law that is procedural in the ordinary use of the term but is so intertwined with a state right or remedy that it functions to define the scope of the state-created right." Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 423 (2010) (Stevens, J., concurring in part and concurring in the judgment).

101. *See, e.g.*, Bronner v. Exch. State Bank, 455 N.W.2d 289, 290 (Iowa Ct. App. 1990) ("Causes of action, including rights of action arising from contracts, constitute property rights.").

102. U.S. CONST. amend. XXVI.

103. U.S. CONST. amend. II.

104. Tolan v. Cotton, 134 S. Ct. 1861, 1864 (2014) (noting that the qualified immunity doctrine "immunizes government officials from damages suits unless their conduct has violated a clearly established right").

105. U.S. CONST. art. I, § 6, cl. 1 (Speech or Debate Clause); Rangel v. Boehner, 785 F.3d 19, 23 (D.C. Cir. 2015) ("Although criminal liability was the 'chief fear' of our forebears, the Speech or Debate Clause also provides absolute immunity from civil suit." (quoting United States v. Johnson, 383 U.S. 169, 182 (1966))).

106. Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400–82 (2012); Bd. of Ed. v. Rowley, 458 U.S. 176, 203–04 (1982) (interpreting predecessor version of the Individuals with Disabilities Education Act as conferring a right to an appropriate public education on disabled children).

107. What about rights like the right to a jury in certain criminal and civil legal cases—are those substantive rights? In the sense described above, these rights pertain to procedure, because they concern the manner in which the government may deprive us of our substantive rights. However, their constitutional basis protects them from interference nevertheless—not because they are substantive rights under the REA, but because they are constitutional entitlements. U.S. CONST. amends. VI, VII.

### 2. A Separate Constraint?

This understanding of substantive rights aids mightily in determining whether the "shall not abridge" language of the REA provides any constraint beyond the admonition that rules promulgated thereunder be rules of procedure. The governmental act of *prospectively*[108] conferring and defining the bundle of obligations and privileges that yield the entitlements described above is a legislative function (at least at the federal level) because such rights reflect basic policy decisions that shape our society.[109] Further, once conferred, legal (or further legislative) processes must be employed to deprive us of these rights.[110] The "shall not abridge" provision of the REA speaks to each of these concerns. It ensures that the Supreme Court does not (1) engage in the legislative act of creating or defining substantive rights prospectively or (2) deprive us of those rights under the guise of prescribing procedural rules.[111] The admonition not to abridge, enlarge, or modify substantive rights is thus fundamentally designed to police the separation of powers, confining the Court—in its rulemaking capacity—to its proper sphere.[112] Granting that the "shall not abridge" language serves this function, is it doing anything that the REA's limitation of the Court to prescribing "rules of practice and procedure" does not do?[113] It is true

108. *See* Am. Trucking Ass'ns v. Smith, 496 U.S. 167, 201 (1990) (Scalia, J., concurring) ("[P]rospective decisionmaking is incompatible with the judicial role, which is to say what the law is, not to prescribe what it shall be.").

109. *See* Mistretta v. United States, 488 U.S. 361, 415 (1989) (Scalia, J., dissenting) ("Except in a few areas constitutionally committed to the Executive Branch, the basic policy decisions governing society are to be made by the Legislature."); *see also* United States v. Brainer, 691 F.2d 691, 695 (4th Cir. 1982) ("[T]he prescription of general rules of substantive law lies at the heart of the legislative function.").

110. *E.g.*, U.S. CONST. amends. IV (requiring a search warrant), V (requiring due process with respect to federal governmental deprivations), XIV (requiring due process with respect to non-federal governmental deprivations).

111. *See* Hanna v. Plumer, 380 U.S. 460, 471–72 (1965) ("[N]either Congress nor the federal courts can, under the guise of formulating rules of decision for federal courts, fashion rules which are not supported by a grant of federal authority contained in Article I or some other section of the Constitution; in such areas state law must govern because there can be no other law."); *cf.* Guar. Tr. Co. v. York, 326 U.S. 99, 105 (1945) ("In giving federal courts 'cognizance' of equity suits in cases of diversity jurisdiction, Congress never gave, nor did the federal courts ever claim, the power to deny substantive rights created by State law or to create substantive rights denied by State law.").

112. *See* Burbank, *Rules Enabling Act*, *supra* note 5, at 1113 ("The purpose of the procedure/substance is . . . to *allocate* policy choices—to determine which federal lawmaking body, the Court or Congress, shall decide whether there will be federally enforceable rights regarding the matter in question and the content of those rights.").

113. The chair of the advisory committee that drafted the original Federal Rules of Civil Procedure answered this question in the negative:

> This statute provides that the rules shall relate to pleading practice and procedure, and that they shall not affect substantive rights of the litigant. That last phrase is

that both provisions address separation of powers concerns—but they do so in different and equally important ways.

There are two aspects of legislative power reflected in the REA. The first aspect is the power to prescribe prospective, supervisory rules of procedure operative in the inferior federal courts. The REA is necessary because the Constitution does not confer on the Supreme Court supervisory authority over the inferior federal courts[114] beyond its appellate jurisdiction.[115] Neither is such supervisory authority through prospective regulation an inherently judicial power, as it is not a necessary concomitant of the Supreme Court deciding the cases before it.[116] Rather, determining the practice before the inferior federal courts is something each respective inferior court could do individually as a prerequisite to adjudication,[117] or

> probably surplusage. If it had said "pleading practice and procedure" and stopped there, that would have excluded substantive rights, and furthermore constitutional limitations would have prevented the Congress, even if it had tried, from delegating to the courts power to make rules of substantive law.

Mitchell, *supra* note 84, at 182. Below, I will argue that Mitchell was mistaken to refer to the latter clause as surplusage, as it embodied and solidified the very constitutional constraints that he acknowledged in the same breath.

114. *Mistretta*, 488 U.S. at 389 ("[T]he judicial power of the United States is limited by express provision of Article III to 'Cases' and 'Controversies.'").

115. U.S. CONST. art. III, § 2.

116. *See Mistretta*, 488 U.S. at 392 *(*"To be sure, all rulemaking is nonjudicial in the sense that rules impose standards of general application divorced from the individual fact situation which ordinarily forms the predicate for judicial action."); *see also supra* text accompanying note 25 (discussing this point). *But see* John H. Wigmore, Editorial Note, *All Legislative Rules for Judiciary Procedure Are Void Constitutionally*, 23 ILL. L. REV. 276 (1928) (arguing that promulgating rules for the judiciary is a judicial function). For more than a century prior to the enactment of the REA, the Supreme Court promulgated supervisory equity rules for the federal courts, but this too was done pursuant to congressional authorization, not the Supreme Court's inherent authority. *See* Act of May 8, 1792, ch. 36, § 2, 1 Stat. 275, 276 ("[T]he forms of writs, executions and other process . . . shall be the same as are now used in the said courts . . . in those of equity and in those of admiralty and maritime jurisdiction, according to the principles, rules and usages which belong to courts of equity and to courts of admiralty respectively . . . subject however . . . to such regulations as the supreme court of the United States shall think proper from time to time by rule to prescribe to any circuit or district court concerning the same.").

117. *See* Kelleher, *supra* note 3, at 66 ("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."); *see also* Chambers v. NASCO, Inc., 501 U.S. 32, 43 (1991) ("It has long been understood that '[c]ertain implied powers must necessarily result to our Courts of justice from the nature of their institution,' powers 'which cannot be dispensed with in a Court, because they are necessary to the exercise of all others.'" (quoting United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32, 34 (1812))). Professor Burbank has pointed out that *Heckers v. Fowler*, 69 U.S. (2 Wall.)123 (1865)—which 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 repugnant to the laws of the United States," *id.* at 128—was not suggesting an inherent authority of federal courts to engage in rulemaking, because the Court in that passage quotes (without attribution) the language of Section 17 of the Judiciary Act of 1789. Judiciary Act of 1789, ch. 20, § 17, 1 Stat. 73, 83; Burbank, *Sanctions*, *supra* note 13, at 1004–05 n.30.

that Congress can do pursuant to its power to "make all Laws which shall be necessary and proper for carrying into Execution . . . all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."[118]

To the extent that the Court's REA rulemaking power is both prospective and supervisory, it is—at the federal level at least—legislative. It is this very rulemaking power that Congress has conferred on the Supreme Court in the first sentence of the REA. The purpose of the REA's first provision, then, is to specify what it is that is being conferred: the ability to prescribe rules of procedure and rules of evidence. The prescription of rules of the other kinds described above (rules of decision, jurisdictional rules, and rules of redress) are ultra vires and beyond the delegation. The second sentence of the REA concerns the second aspect of legislative power already described: the articulation and alteration of substantive rights through prospective regulation. That enterprise is a legislative prerogative Congress has retained for itself, notwithstanding its grant of authority to make procedural rules. In sum, the REA's statement regarding "rules of practice and procedure and rules of evidence" is the authorization that the Court requires to exercise this power and the articulation of the genre of rules that the Court may prescribe; the REA's "shall not abridge, enlarge or modify" language is a qualification on the authorization, constraining the Court to a subfield of procedural and evidentiary rules that avoid the alteration of substantive rights (as would, for example, a procedural rule indicating that liability would be determined through a trial by ordeal).[119]

The relationship between the two wings of the REA is thus complementary: Regulations in the procedural sphere are permitted, but not those that revise or expand substantive rights. The refinements offered above with respect to both of these admonitions can not only guide the Supreme Court (and subordinate rulemaking committees) in the rulemaking enterprise, but also supply the Court with the required intelligible principle needed to render the congressional delegation in the REA constitutionally sound.[120] The REA's grant of authority is a permitted

118. U.S. CONST. art. I, § 8, cl. 18 (Necessary and Proper Clause); Hanna v. Plumer, 380 U.S. 460, 472 (1965) ("For the 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."); Livingston v. Story, 34 U.S. (9 Pet.) 632, 656 (1835) ("[T]hat the power to ordain and establish [federal courts], carries with it the power to prescribe and regulate the modes of proceeding in such courts, admits of . . . little doubt.").

119. *See, e.g.*, Brown v. Mississippi, 297 U.S. 278, 285–86 (1936) ("Because a state may dispense with a jury trial, it does not follow that it may substitute trial by ordeal. The rack and torture chamber may not be substituted for the witness stand.").

120. The Court has held that Congress may not delegate its legislative authority and has indicated that delegations that are constrained by an "intelligible principle" do not run afoul of this prohibition. *See* J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928) ("If Congress shall lay down

delegation of legislative power because the REA's twin admonitions delineate Congress's policy in this sphere—that there be "general rules" governing the processing of claims through the inferior courts created by Congress (and set the boundaries of the delegation), and that the rules may bear only on procedure or evidence and may not alter substantive rights.[121] Further, as the Supreme Court has indicated, "Congress may delegate to the Judicial Branch nonadjudicatory functions that do not trench upon the prerogatives of another Branch and that are appropriate to the central mission of the Judiciary."[122] Confining the Supreme Court to "rules of practice and procedure" while steering it away from regulation that alters substantive rights respects the Court's judicial role and facilitates rather than frustrates its judicial prerogatives.

If the "shall not abridge" portion of the REA is its own constraint on Supreme Court rulemaking, how is it operationalized? As an initial matter, it is worth disposing of the easy case where a promulgated rule fails the "rule of procedure" (or "rule of evidence") test outlined above: If it failed because it was a rule of decision or redress, the rule would of necessity abridge, enlarge, or modify substantive rights, resulting in no need to engage in a separate abridgement analysis. It is less clear whether a jurisdictional rule would necessarily abridge, enlarge or modify substantive rights. Opening up federal courts (or closing them) to a particular claim ultimately does not alter substantive rights but concerns whether those courts will be fora in which transgressions of substantive rights can be vindicated.[123] Nevertheless, because jurisdictional rules are not rules of procedure (or evidence), they would be invalid under the REA notwithstanding their failure to alter substantive rights.[124]

by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power.").

121. *See Mistretta*, 488 U.S. at 372–73 ("[T]his Court has deemed it 'constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority.'" (quoting Am. Power & Light Co. v. SEC, 329 U.S. 90, 105 (1946))).

122. *Id.* at 388.

123. *See, e.g.*, Great Am. Fed. Sav. & Loan Ass'n v. Novotny, 442 U.S. 366, 372 (1979) ("Section 1985(3) provides no substantive rights itself; it merely provides a remedy for violation of the rights it designates."); Pac. S.S. Co. v. Peterson, 278 U.S. 130, 134 (1928) ("By section 33 of the Merchant Marine Act, as heretofore construed, the prior maritime law of the United States was modified by giving to seamen injured through negligence the rights given to railway employees by the Employers['] Liability Act of 1908 and its amendments and permitting these new substantive rights to be asserted and enforced in actions *in personam* against the employers in federal or state courts administering common-law remedies." (footnotes omitted)).

124. Take note here: A jurisdictional rule, such as one that empowered federal courts to hear diversity cases, would not "abridge, enlarge or modify any substantive right," but it would not be a rule of procedure and thus would be beyond the congressional authorization. Thus, here we can see an example of the independent functions that the two wings of the REA perform.

If, on the other hand, the rule at hand concerns "procedure" (that is, an internal case-processing rule), then one must confront whether the rule abridges, enlarges, or modifies substantive rights. There are two ways in which prohibited alterations could occur. First, the rule in question could alter substantive rights by creating new ones, in which case the rule would be invalid as long as the newly created rights were substantive, as defined above.[125] But it is hard to imagine how any rule that achieved such a feat could fairly be classed as a rule of "procedure." Second, a procedural rule could abridge, enlarge, or modify *existing* substantive rights. For example, a rule that provided that a plaintiff's claim was to be decided by the toss of a coin undoubtedly would be a procedural rule, for it would prescribe the method of adjudication. However, a coin toss would not permit application of the relevant rules of decision, meaning that notwithstanding a state of facts that might entitle a plaintiff to relief, an adverse outcome on the coin toss would result in a finding that the plaintiff is not entitled to relief, depriving them of whatever substantive right was at issue in the case (for example, a right to have a contract breach compensated). Further, this coin toss would be a clear violation of due process for any coin-toss loser who would have prevailed on the merits: A losing plaintiff would be robbed of relief they were entitled to, while a losing defendant would be robbed of whatever money they were ordered to hand over as compensation, each because of a pure game of chance.

The determination of whether a rule abridges, enlarges, or modifies substantive rights cannot be made without taking state—and federal[126]—substantive rights into account.[127] As a practical matter, litigants will offer (as they have in the past) candidate substantive rights that they believe are impinged upon by a given Federal Rule, eliminating the need for courts to engage in a broad-based canvassing of the entire landscape of substantive rights. Rulemaking bodies, however, will have to think more broadly and creatively about whether a proposed rule or amendment alters

125. *See supra* Subpart I.B.1.

126. The REA prohibits alteration of "any" substantive right, leaving no question that the prohibition applies both to state and federal substantive rights. *See* Burbank, *Rules Enabling Act*, *supra* note 5, at 1109–10 ("[T]he Federal Rules contemplated by the Act were to apply in all civil actions tried in federal court, including those in which federal law furnished the rule of decision.").

127. Justice Scalia, in his plurality opinion in *Shady Grove*, rejected the idea that courts would consult state law to determine its substantive character as a component of the Rules Enabling Act analysis. *See* Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 409 (2015) (opinion of Scalia, J.) ("[T]he substantive nature of New York's law, or its substantive purpose, *makes no difference*. A Federal Rule of Procedure is not valid in some jurisdictions and invalid in others—or valid in some cases and invalid in others—depending upon whether its effect is to frustrate a state substantive law (or a state procedural law enacted for substantive purposes)."). I disagree, as I note in the main text.

some existing substantive right, perhaps inviting input on the question during the public comment phase of the rulemaking process.

### 3. The View From the Supreme Court

As noted at the outset of this Article, the Supreme Court has not been terribly clear on its views respecting the limitations imposed by the REA. Further, Justice Scalia's indication in *Shady Grove* that all that matters is that a rule must "really regulate procedure" without separate consideration of the alteration of substantive rights[128] is disconcerting. However, Justice Scalia's views can be fairly discounted on this point (for reasons I elaborate below), and other Supreme Court precedent on the topic supports a more robust view of the second wing of the REA in the validity analysis.

In his plurality opinion in *Shady Grove*, Justice Scalia stated the REA inquiry as follows:

> In the Rules Enabling Act, Congress authorized this Court to promulgate rules of procedure subject to its review, but with the limitation that those rules "shall not abridge, enlarge or modify any substantive right."
>
> We have long held that this limitation means that the Rule must "really regulat[e] 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." The test is not whether the rule affects a litigant's substantive rights; most procedural rules do. What matters is what the rule itself regulates: If it governs only "the manner and the means" by which the litigants' rights are "enforced," it is valid; if it alters "the rules of decision by which [the] court will adjudicate [those] rights," it is not.[129]

Justice Scalia is correct when he says that "if it alters the rules of decision by which the court will adjudicate those rights," then the rule would be invalid. However, Justice Scalia was wrong when he discarded the "shall not abridge" language of the REA ("The test is not whether the rule affects a litigant's substantive rights") and pronounced the fallacy that if a rule is procedural ("governs only 'the manner and the means'"), "it is valid." As the coin-toss rule example provided above demonstrates,

128. *Shady Grove*, 559 U.S. at 410 (opinion of Scalia, J.) ("We have held since *Sibbach*, and reaffirmed repeatedly, that the validity of a Federal Rule depends entirely upon whether it regulates procedure."); *id.* at 407.

129. *Id.* at 406–07 (citations omitted) (quoting Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941); Miss. Publ'g Corp. v. Murphree, 326 U.S. 438, 445–46 (1946)).

a rule can be procedural—pertaining to the judicial process—but also alter substantive rights.

Justice Scalia embraced what I call the unitary view of the REA based on his belief that it was mandated by *Sibbach v. Wilson & Co.*,[130] which, in his view, indicated that the sole test of the validity of a Federal Rule is whether it is procedural.[131] However, in urging this understanding of *Sibbach* and of the Court's approach to the REA, Justice Scalia—as he acknowledged—was yielding to *stare decisis* more than engaging in a faithful construction of the text of the REA. Regarding the text, Justice Scalia conceded that the REA could be read to distinguish between the "procedural" and "abridge, enlarge or modify" inquiries:

> [*Sibbach*'s] approach, the concurrence insists, gives short shrift to the statutory text forbidding the Federal Rules from "abridg[ing], enlarge[ing], or modify[ing] any substantive right." *There is something to that.* . . . *Sibbach*'s exclusive focus on the challenged Federal Rule . . . *is hard to square with § 2072(b)'s terms.*[132]

However, Justice Scalia went on to say, "Setting aside any precedent requires a 'special justification' beyond a bare belief that it was wrong."[133]

Notwithstanding his concession regarding the language of the REA—what might be felt to be a stunning move by a textualist[134]—Justice Scalia shunned the notion of independently applying the "abridge, enlarge or modify" portion of the REA because of its potential complexity and undesirable implications:

> But it is hard to understand how it can be determined whether a Federal Rule "abridges" or "modifies" substantive rights without knowing what state-created rights would obtain if the Federal Rule did not exist. *Sibbach*'s exclusive focus on the challenged Federal Rule [was] driven by the very real concern that Federal Rules which vary from State to State would be chaos . . . .

130. 312 U.S. 1 (1941); *Shady Grove*, 559 U.S. at 411 (opinion of Scalia, J.) ("This analysis [considering the substantive nature of the conflicting state legal rule] squarely conflicts with *Sibbach*, which established the rule we apply.").

131. *Shady Grove*, 559 U.S. at 410 (opinion of Scalia, J.) ("We have held since *Sibbach*, and reaffirmed repeatedly, that the validity of a Federal Rule depends entirely upon whether it regulates procedure.").

132. *Id.* at 412–13 (opinion of Scalia, J.) (emphasis added) (citations omitted).

133. *Id.* at 413 (opinion of Scalia, J.) (quoting Patterson v. McLean Credit Union, 491 U.S. 164, 172 (1989)).

134. *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 22 (1997) ("The text is the law, and it is the text that must be observed."); Engine Mfrs. Ass'n v. South Coast Air Quality Mgmt. Dist., 541 U.S. 246, 252 (2004) (Scalia, J.) ("Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." (quoting Park 'N Fly, Inc. v. Dollar Park & Fly, Inc., 469 U.S. 189, 194 (1985))).

> Instead of a single hard question of whether a Federal Rule regulates substance or procedure, that approach will present hundreds of hard questions, forcing federal courts to assess the substantive or procedural character of countless state rules that may conflict with a single Federal Rule. And it still does not sidestep the problem it seeks to avoid. At the end of the day, one must come face to face with the decision whether or not the state policy (with which a putatively procedural state rule may be "bound up") pertains to a "substantive right or remedy"—that is, whether it is substance or procedure. The more one explores the alternatives to *Sibbach*'s rule, the more its wisdom becomes apparent.[135]

These fears—which only two other Justices shared[136]—were unwarranted. In the context of a challenge to an existing rule, the burden is likely to rest with the party asserting that a particular Federal Rule transgresses the "abridge, enlarge or modify" portion of the REA to come forward with the purported substantive right that is altered by the applicable Federal Rule. In the context of evaluating the validity of a proposed rule, the rulemaking committees would be advised to give due consideration for any apparent conflicts with substantive rights, across states, and use their judgment to reach a plausible conclusion that substantive rights will not be affected by the rule; they would leave it to litigants to argue the abridgment of rights in a given case.

In light of the above, Justice Scalia's interpretation of the REA in *Shady Grove* should not lead us to embrace the if-procedural-then-valid approach. Moreover, Supreme Court precedent available to Justice Scalia and propounded since *Shady Grove* makes clear that the Court has embraced an understanding of the REA that gives its "abridge, enlarge or modify" language independent weight apart from the directive to confine rules to the procedural realm.

In *Mississippi Publishing Corp. v. Murphree*,[137] for example, the Court quoted the REA's prohibition against abridging, enlarging or modifying any substantive rights and wrote at some length about how the rule before it—Rule 4(f)—did not run afoul of that particular proscription:

> Undoubtedly most alterations of the rules of practice and procedure may and often do affect the rights of litigants. Congress' prohibition of any alteration of substantive rights of litigants was obviously not addressed to such incidental effects as necessarily attend the adoption of the prescribed new rules of procedure upon the rights of litigants who, agreeably to rules of practice and procedure, have been brought before a court authorized

135. *Shady Grove*, 559 U.S. at 412–13, 415 (footnotes omitted).
136. Only Chief Justice Roberts and Justice Thomas joined this part of Justice Scalia's opinion.
137. 326 U.S. 438 (1946).

> to determine their rights. *Sibbach v. Wilson & Co.*, 312 U.S. 1, 11–14. The fact that the application of Rule 4(f) will operate to subject petitioner's rights to adjudication by the district court for northern Mississippi will undoubtedly affect those rights. But it does not operate to abridge, enlarge or modify the rules of decision by which that court will adjudicate its rights.[138]

In its next breath, the Court wrote: "It relates merely to 'the manner and the means by which a right to recover . . . is enforced.' In this sense the rule is a rule of procedure and not of substantive right, and is not subject to the prohibition of the Enabling Act."[139]

Note two things here. First, the Court discussed whether the rule in question abridged, enlarged or modified substantive rights, and concluded that Rule 4(f) did not alter "the rules of decision by which that court will adjudicate its rights." Then it articulated the *York* understanding of a procedural rule to declare that Rule 4(f) is indeed "a rule of procedure and not of a substantive right." Granted, these analyses tightly interrelate the notion of the alteration of substantive rights with the characterization of a rule as a rule of decision or a rule of procedure. But the Court did not dispense with the substantive rights alteration analysis entirely in favor of an untethered and self-absorbed assessment of whether a rule was procedural.

It is *Burlington Northern Railroad Co. v. Woods*,[140] however, that most strongly confirms the distinctiveness of the "shall not abridge" portion of the REA. The Court first described the constitutional analysis for promulgated rules and then distinguished that from the constraints imposed by the REA:

> Rules regulating matters indisputably procedural are *a priori* constitutional. Rules regulating matters "which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either," also satisfy this constitutional standard. The Rules Enabling Act, however, contains an additional requirement. The Federal Rule must not "abridge, enlarge or modify any substantive right . . . ."[141]

If it were correct that the REA test boils down to simply whether the rule in question is procedural—as Justice Scalia asserted in *Shady Grove*[142]—then there would be no

138. *Id.* at 445–46.
139. *Id.* at 446 (quoting Guar. Tr. Co. v. York, 326 U.S. 99, 109 (1945)).
140. 480 U.S. 1 (1987).
141. *Id.* at 5 (quoting Hanna v. Plumer, 380 U.S. 460, 472 (1965); 28 U.S.C. § 2072 (1986)).
142. Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 410 (opinion of Scalia, J.) ("We have held since *Sibbach*, and reaffirmed repeatedly, that the validity of a Federal Rule depends entirely upon whether it regulates procedure.").

distinction between the REA analysis and the constitutional analysis,[143] nor would the Court's above-quoted statement from *Woods* make any sense. In other words, one would have to conclude that "the Act delegate[s] authority coextensive with Congress's constitutional rulemaking authority under Article III and the Necessary and Proper Clause."[144]

More recently, the Court has alluded to the REA's "abridge, enlarge or modify" language on its own as a relevant constraint on promulgated rules, without suggesting that satisfying that admonition may be achieved simply by being able to characterize such rules as "procedural." This has occurred several times in the context of interpreting and applying Rule 23. In *Tyson Foods, Inc. v. Bouaphakeo*,[145] the Court indicated that to permit Rule 23 to exclude evidence that would be relevant and probative of a plaintiff's individual claim, merely because the claim is brought on behalf of a class, "would ignore the Rules Enabling Act's pellucid instruction that use of the class device cannot 'abridge . . . any substantive right.'"[146] In *Wal-Mart Stores, Inc. v. Dukes*[147] the Court (per Justice Scalia) similarly declined to permit Rule 23 to be employed to deprive a defendant of its right to litigate defenses applicable only to individual claims, "[b]ecause the Rules Enabling Act forbids interpreting Rule 23 to 'abridge, enlarge or modify any substantive right.'"[148] And before *Shady Grove*, in *Ortiz v. Fibreboard Corp.*,[149] the Court declined to interpret Rule 23 as liquidating individual tort claims because "no reading of the Rule can ignore the Act's mandate that 'rules of procedure "shall not abridge, enlarge or modify any substantive right."'"[150]

143. Professor Burbank seemed to trace this error to *Hanna* when he wrote, "the [*Hanna*] Court did fail to make clear how the Enabling Act's restrictions are functionally different from those imposed on Congress by the Constitution." Burbank, *Hold the Corks*, *supra* note 85, at 1017.

144. 19 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4509 (3d ed. 2016) (arguing ultimately that this understanding of the REA is improper).

145. 136 S. Ct. 1036 (2016).

146. *Id.* at 1046.

147. 564 U.S. 338 (2011).

148. *Id.* at 367. The Court in *Tyson Foods* described this decision in the following terms: "The Court [in *Wal-Mart*] held that this 'Trial By Formula' was contrary to the Rules Enabling Act because it 'enlarge[d]' the class members' 'substantive right[s]' and deprived defendants of their right to litigate statutory defenses to individual claims." *Tyson Foods*, 136 S. Ct. at 1048 (quoting *Wal-Mart*, 564 U.S. at 367).

149. 527 U.S. 815 (1999).

150. *Id.* at 845 (quoting Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 613 (1997)); *see also Amchem Prods.*, 521 U.S. at 613 ("Rule 23's requirements must be interpreted in keeping with Article III constraints, and with the Rules Enabling Act, which instructs that rules of procedure 'shall not abridge, enlarge or modify any substantive right.'" (quoting 28 U.S.C. § 2072(b) (2012)).

Outside of the Rule 23 context, in *Semtek International, Inc. v. Lockheed Martin Corp.*,[151] when asked to read Rule 41(b) as determining the preclusive effect of federal court judgments, the Court (under the pen of Justice Scalia) refused, partly because "such a rule would arguably violate the jurisdictional limitation of the Rules Enabling Act: that the Rules 'shall not abridge, enlarge or modify any substantive right.'"[152] The *Semtek* Court also noted—without resolving—the question of whether a federal diversity court's entry of a dismissal with prejudice under circumstances in which a state court would only dismiss without prejudice "abridges a 'substantive right' and thus exceeds the authorization of the Rules Enabling Act."[153]

Both Justice Ginsburg and Justice Stevens acknowledged this perspective in their *Shady Grove* opinions.[154] Justice Stevens perhaps offered the most robust defense of the two-step approach when he wrote:

> Justice Scalia believes that the sole Enabling Act question is whether the federal rule "really regulates procedure," which means, apparently, whether it regulates "the manner and the means by which the litigants' rights are enforced." I respectfully disagree. This interpretation of the Enabling Act is consonant with the Act's first limitation to "general rules of practice and procedure," § 2072(a). But it ignores the second limitation that such rules also "not abridge, enlarge or modify *any* substantive right," § 2072(b) (emphasis added), and in so doing ignores the balance that Congress struck between uniform rules of federal procedure and respect for a State's construction of its own rights and remedies. It also ignores the separation-of-powers presumption and federalism presumption that counsel against judicially created rules displacing state substantive law.[155]

This is a remarkable passage, as Justice Stevens soundly took Justice Scalia to school here. Beyond merely relying upon the clear language of the REA (which undeniably is two-tiered in its structure) to note that there is both a "first limitation" and a "second limitation," Justice Stevens connected that structure to fundamental concerns relating to separation of powers and federalism.

This separation-of-powers concern has already been discussed.[156] Congress—not the Supreme Court—has the constitutional authority to regulate procedure,

151. 531 U.S. 497 (2001).
152. *Id.* at 503.
153. *Id.* at 506 n.2.
154. *See* Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 438 (2010) (Ginsburg, J., dissenting) ("[T]he Rules Enabling Act, enacted in 1934, authorizes us to 'prescribe general rules of practice and procedure' for the federal courts, but with a crucial restriction: 'Such rules shall not abridge, enlarge or modify any substantive right.'").
155. *Id.* at 424–25 (Stevens, J., concurring in part and concurring in the judgment) (citations omitted).
156. *See supra* text accompanying notes 108–118.

through prospective, supervisory rules that may simultaneously affect substantive matters.[157] In contrast, the federal judiciary can be presumed to possess only whatever supervisory rulemaking authority that Congress expressly gives it. Reading the REA as a congressional delegation of the full scope of rulemaking power that Congress enjoys—notwithstanding express language suggesting to the contrary—disrespects the separation of powers that the Constitution envisions.[158] Congress should not be presumed to have given the full scope of its own procedural regulatory authority in the absence of express language making that clear—and certainly not in the face of language that cuts the other way.

A unitary approach to the REA also conflicts with the solicitude for state substantive policies[159] that the Court counseled in *Erie Railroad Co. v. Tompkins*.[160] A federal judiciary that can make laws altering substantive rights undermines the state lawmaking authority secured by our Constitution.[161] Constitutional federalism requires that we presume the federal judiciary lacks the power to impinge upon state policies, notwithstanding that Congress has this power. Instead, Congress must

157. Hanna v. Plumer, 380 U.S. 460, 472 (1965) ("For the 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.").

158. *See* WRIGHT, MILLER & COOPER, *supra* note 144. They write:

> [T]he rulemaking authority of the federal courts generally is understood to extend only so far as Congress expressly permits or as is necessary to effectuate important federal policies as they have been defined by Congress. The mere fact, therefore, that Congress has the constitutional power to formulate substantive law in areas of federal concern does not in itself give the federal judiciary an equal power to fashion substantive rules, and certainly no such judicial power reasonably can be inferred from the delegation of authority to the Supreme Court to prescribe general rules of practice and procedure for the federal courts.

*See also* Burbank, *Rules Enabling Act*, *supra* note 5, at 1106–12 (arguing that the REA was designed to limit the prospective rulemaking authority of the Supreme Court in service of separation-of-powers concerns).

159. By featuring federalism concerns here I do not mean to suggest that the REA was crafted with an eye toward protecting federalism. Indeed, as Professor Burbank has so ably demonstrated, the notion that the REA was designed with this purpose in mind appears to be demonstrably false. *Id.* at 1108–12. However, an incidental and valuable consequence of the REA is the solicitude it can engender for state substantive rights. It is appropriate to read the REA to accommodate state substantive prerogatives rather than to undercut them, absent any evidence that Congress desired a contrary result.

160. 304 U.S. 64, 78 (1938) ("Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state.").

161. *See* Hanna v. Plumer, 380 U.S. 460, 474–75 (1965) (Harlan, J., concurring) ("[*Erie*] recognized that the scheme of our Constitution envisions an allocation of law-making functions between state and federal legislative processes which is undercut if the federal judiciary can make substantive law affecting state affairs beyond the bounds of congressional legislative powers in this regard. Thus, in diversity cases Erie commands that it be the state law governing primary private activity which prevails." (footnote omitted)).

expressly authorize the federal courts to interfere with state substantive policies via procedural rulemaking.[162] But in the REA we have the precise opposite—an express repudiation of any power in the federal courts to impinge on state (and federal) substantive rights: Congress commanded that "[s]uch rules shall not abridge, enlarge or modify any substantive right."[163] To presume to the contrary that the Supreme Court's rulemaking authority is constrained only by the admonition that such rules be "procedural" is to defy this command and arrogate powers that our federalism does not allow the Court to exercise by implication or its own fiat.

## II. IMPLICATIONS

What are the implications of reading the REA to require rules promulgated by the Supreme Court both (1) to be "rules of procedure" (or "rules of evidence") as opposed to rules of decision, jurisdiction, or redress, and (2) to "not abridge, enlarge or modify any substantive right"? As it turns out, some Federal Rules of Civil Procedure run afoul of these congressional commands in ways that require revision. I discuss two problematic rules here.[164]

---

162. *See* WRIGHT, MILLER & COOPER, *supra* note 144, at 293–94. They write:

> When matters of state substantive law are at issue, principles of federalism—which command that substantial deference be given to the ways in which the states have seen fit to structure social relationships in areas of state competence—also are implicated. Thus, even though Congress may have constitutional power to override state substantive laws and policies when exercising its authority to regulate the process and procedure of the federal courts, federalism concerns together with considerations related to the separation of powers militate against recognizing a similar power in the judiciary, at least not without explicit congressional authorization.

*Id.*

163. *See id.* at 294. The authors argue:

> Even if the Enabling Act did not include the "substantive rights" proviso, these considerations would dictate that judicial authority to prescribe procedural rules be exercised with a sensitive respect for the integrity of the structure of rights and responsibilities as defined both by Congress and the states within their respective areas of competence. The inclusion of the proviso in the Act, whatever its original meaning and intent, therefore, serves to emphasize and reinforce these institutional constraints upon the Supreme Court's rulemaking authority under it.

*Id.*

164. One of the rules I do not find problematic is Rule 35, the rule at issue in *Sibbach*. Neither a judge-made rule nor a codified federal rule could force a person to submit to a physical examination. But that is not what Rule 35 does. Rather, it indicates that if physical or mental condition is put in issue by a litigant, a prerequisite to adjudicating that issue is the litigant's submission to an independent physical examination on the request of the adversary (if good cause is shown). FED. R. CIV. P. 35(a). Personal autonomy and security of one's person is not violated, because the litigant is making a choice; there is no seizure and forced examination against the litigant's will. Indeed, there are consequences associated with not submitting to such an exam, but those are limited to the litigation itself and bear directly on the adjudicatory process surrounding the determination of the

## A. Rule 15(c)(1)

The relation back rule found in Rule 15(c)(1) of the Federal Rules of Civil Procedure raises a question of validity under the REA because it permits claims that are asserted after an applicable statute of limitations period[165] has expired to go forward. Here is the language of Rule 15(c)(1):

> **(c) Relation Back of Amendments.**
>
> **(1)** ***When an Amendment Relates Back.*** An amendment to a pleading relates back to the date of the original pleading when:
>
> **(A)** the law that provides the applicable statute of limitations allows relation back;
>
> **(B)** the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading; or
>
> **(C)** the amendment changes the party or the naming of the party against whom a claim is asserted, if Rule 15(c)(1)(B) is satisfied and if, within the period provided by Rule 4(m) for serving the summons and complaint, the party to be brought in by amendment:

claim to which the physical or mental exam relates. A finding of contempt of court is expressly made unavailable for refusing to submit to an exam under Rule 35. FED. R. CIV. P. 37(b)(2)(A)(vii). The rule thus abridges no substantive rights.

165. I will note here that statutes of repose—which are distinct from statutes of limitation—have been regarded by courts as not avoidable by application of Rule 15(c)'s relation back provisions. *See, e.g.*, Miguel v. Country Funding Corp., 309 F.3d 1161, 1165 (9th Cir. 2002) (finding that the Rules Enabling Act prohibited the application of Rule 15(c) to a claim that was barred by a statute of repose because it would expand a substantive right); Silvercreek Mgmt. v. Citigroup, Inc., 248 F. Supp. 3d 428, 451 (S.D.N.Y. 2017) ("[T]he statute of repose creates a 'substantive right' for a putative defendant to be free from suit for particular conduct after a certain period of time, whether the suit is brought by a new party or by a party with a lawsuit already pending. Liability for suit under an entirely novel cause of action a full seven years after the expiration of the statute of repose amounts to a more than incidental impact on the parties' substantive rights and . . . risks running afoul of the Rules Enabling Act." (citations omitted)); D & S Marine Transp., LLC. v. S & K Marine, LLC, No: 14-2048, 2015 WL 5838220, at *4 (E.D. La. Oct. 7, 2015) (concluding that "[p]ermitting relation back of a perempted [sic] claim under Rule 15(c) would expand a substantive right, which is prohibited by the Rules Enabling Act"); *cf.* Police & Fire Ret. Sys. v. IndyMac MBS, Inc., 721 F.3d 95, 109 (2d Cir. 2013) ("[T]he statute of repose in Section 13 [of the Securities Act] creates a *substantive* right, extinguishing claims after a three-year period. Permitting a plaintiff to file a complaint or intervene after the repose period set forth in Section 13 of the Securities Act has run would therefore necessarily enlarge or modify a substantive right and violate the Rules Enabling Act."). *But see* United States *ex rel.* Carter v. Halliburton Co., 315 F.R.D. 56, 64–65 (E.D. Va. 2016) (applying Rule 15(c)(1)(B) to circumvent a statute of repose).

> **(i)** received such notice of the action that it will not be prejudiced in defending on the merits; and
>
> **(ii)** knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity.[166]

This rule creates a legal fiction: New claims or claims against new parties asserted after the expiration of the applicable statute of limitations period are treated as if they were filed prior to the expiration of that period. Specifically, the court pretends that they were filed at the time of the original pleading,[167] which presumably was itself filed within the statute of limitations period. The effect of this legal fiction is that any applicable statute of limitations defense that would be valid under the circumstances is nonetheless defeated.[168] Is it proper under the REA for a Rule of Civil Procedure to work this effect?[169]

166. FED. R. CIV. P. 15(c)(1).

167. *See, e.g.*, Currier v. Sutherland, 218 P.3d 709, 716 (Colo. 2009) (en banc) ("When an amended complaint satisfies the requirements for relation back, it is as though the amended complaint were filed on the date that the original complaint was filed.").

168. *See, e.g.*, Oliva v. NBTY, Inc., No. 11-80850, 2011 WL 13115434, at *7 (S.D. Fla. Dec. 9, 2011) ("[T]he Court holds that the relation back doctrine is applicable here to defeat the affirmative defense raised by Defendant . . . .").

169. Professor Carrington analyzed this question in light of his functional approach to interpreting the REA, finding it to be valid under the Act. Carrington, *supra* note 5, at 310–13. Others have asked—but not thoroughly analyzed—this question, with some leaning towards a view that Rule 15(c) crosses the REA line. *See* C. Douglas Floyd, Erie *Awry: A Comment on* Gasperini v. Center for Humanities, Inc., 1997 BYU L. REV. 267, 287 ("The drafters of the Federal Rules have already taken a step toward displacing state limitations periods in diversity actions by incorporating in Federal Rule of Civil Procedure 15 'relation back' rules for amendments of complaints that may be more liberal than those of the states in which the federal court sits. The consistency of this aspect of Rule 15 with the Rules Enabling Act and the federalism rationale of *Erie* is not free from debate."); Harold S. Lewis, Jr., *The Excessive History of Federal Rule 15(c) and Its Lessons for Civil Rules Revision*, 85 MICH. L. REV. 1507, 1555 (1987) ("A substantial question remains, even after *Hanna*, about the constitutionality of applying a federal rule so as to trench on deeply held state limitations policy."); Renee Reichart Johnson, Note, *Civil Procedure—The* Erie *Doctrine and Relation Back of Supplemental Pleadings Under Rule 15(c)*–Davis v. Piper Aircraft Corp., 16 WAKE FOREST L. REV. 621, 640 (1980) ("If, however, Rule 15(c) is sufficiently broad to cover the precise issue in *Davis* [*v. Piper Aircraft Corp.*, 615 F.2d 606 (4th Cir. 1980)], it is possible that Rule 15(c) violates the Rules Enabling Act."). Professor Mary Kay Kane concluded that a prior iteration of Rule 15(c) did not violate the REA, resting her conclusion on the fact that its effect on litigant rights was "minimal" and that it "in no way modifies the decisional rules by which the court will adjudicate the rights involved." Mary Kay Kane, *The Golden Wedding Year:* Erie Railroad Company v. Tompkins *and the Federal Rules*, 63 NOTRE DAME L. REV. 671, 689 (1988). As I endeavor to show, although Rule 15(c) is on its face a procedural rule, using it to toll applicable limitation periods is a substantive enterprise that only Congress—not the Supreme Court—can undertake through prospective regulation.

### 1. Is Rule 15(c) a Procedural Rule?

The relation back rule is housed within the rule concerning amendments to pleadings. Certainly, pleading is a matter of procedure[170] and the rules governing when and under what circumstances pleadings may be amended are procedural as well, for both concern the manner in which claims are presented to the court for adjudication. Rule 15(c) takes things a step further and prescribes the date that will be ascribed to any claim, defense, or party introduced by the amendment. Time periods and the calculation thereof are important procedural topics for courts to address, as they ensure that claims will progress at some pace through the adjudicatory process. To the extent that Rule 15(c) merely designates a date of reference that a court will use to determine when a pleading has been presented to it, that designation seems—at least on its face—to concern the court's method of processing the claims contained in the pleadings.

### 2. Does Rule 15(c) Abridge, Enlarge, or Modify Substantive Rights?

The above analysis does not carry us very far, however. Although a rule designating the date of a pleading event for purposes of the judicial process concerns the method of adjudication in the abstract, what really matters are the purposes for which this designation is used and its attendant consequences. It is this latter set of considerations that reveal whether the rule impinges on or expands substantive rights.

The principal effect of Rule 15 is to avoid the consequences of an applicable statute of limitations period.[171] This avoidance occurs both when an amended pleading adds new claims against an existing defendant and when it names new defendants.

170. *See, e.g.*, Abbas v. Foreign Policy Grp., LLC, 783 F.3d 1328, 1337 (D.C. Cir. 2015) ("[P]leading standards . . . are procedural.").

171. *See, e.g.*, Singletary v. Pa. Dep't of Corr., 266 F.3d 186, 193 (3d Cir. 2001) ("Rule 15(c) can ameliorate the running of the statute of limitations on a claim by making the amended claim relate back to the original, timely filed complaint."); ROBERT WYNESS MILLAR, CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE 185 (1952) (noting that "[t]he principal object [of Rule 15(c)(2)] is to obviate the harsh and scholastic doctrine, which in case of an amendment after the statute of limitations had run on the claim, treated deviation from the original statement in almost any material particular as the averment either of a new cause of action or of a cause of action for the first time, and thus as bringing the claim with the bar of the statute"). *See also* 6 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE & PROCEDURE § 1471, at 587 (3d ed. 2010) (stating that Rule 15's "purpose is to provide maximum opportunity for each claim to be decided on its merits rather than on procedural technicalities"). Rule 15 does not have this effect when it is Rule 15(c)(1)(A) that is being applied; that provision simply permits relation back when "the applicable statute of limitations allows relation back," and thus it is not the federal rule that enables avoidance of the effect of the limitations period but the applicable limitations statute itself. Thus, Rule 15(c)(1)(A) presents no REA issues.

Regarding new claims against existing defendants, Rule 15(c)(1)(B) permits relation back only of claims that arise out of the "conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading."[172] Although newly asserted claims can avoid the effect of the expiration of an applicable limitations periods by operation of this rule, its requirement that such claims arise out of the same set of facts embodied in the original filing—and the fact that the correct defendant has already been named—assures that the substantive policy concerns addressed by statutes of limitation[173] are not undermined. One could thus argue that this makes any adverse effect of Rule 15(c)(1)(B) on substantive rights incidental, if not nonexistent. Further, the argument could continue, once a plaintiff initiates a claim based on a certain set of facts against the proper defendant, that defendant has been properly brought before the court to address that "constitutional case":[174] The addition of new legal theories of liability for the same set of facts would thus arguably not violate the defendant's right of repose.[175]

However, strictly speaking, it is not really the office of a rule promulgated pursuant to the REA to use such considerations to justify the circumvention of an applicable, expired statute of limitations period. Permitting Rule 15(c) to be used to circumvent that deadline would still arguably impinge on the defendant's substantive rights by abrogating the immunity from liability that the applicable statute of limitations period would otherwise confer (liability immunity being the substantive right here). The rejoinder to this point may be, however, that mere

172. FED. R. CIV. P. 15(c)(1)(B).

173. Artis v. District of Columbia, 138 S. Ct. 594, 608 (2018) (indicating that the primary purposes of limitations periods are "'preventing surprises' to defendants and 'barring a plaintiff who has slept on his rights.'" (quoting Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538, 554 (1974))); Wood v. Carpenter, 101 U.S. 135, 139 (1879) (statutes of limitations "promote repose by giving security and stability to human affairs" and "stimulate to activity and punish negligence"); Suzette M. Malveaux, *Statutes of Limitations: A Policy Analysis in the Context of Reparations Litigation*, 74 GEO. WASH. L. REV. 68, 75 (2005) ("[A]t the heart of the law of limitations, is the primacy of repose, or providing peace for the defendant.").

174. *Cf.* United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 725 (1966) (defining a "constitutional case" as being when claims "derive from a common nucleus of operative fact").

175. *See* Barthel v. Stamm, 145 F.2d 487, 491 (5th Cir. 1944). The court writes:

> [T]he Rules validly fix the potential scope of a petition in a federal court which identifies a claim, and the relation of an amendment which amplifies and further explains the transaction out of which the claims arises, for these things are procedural. Limitation is suspended by the filing of a suit because the suit warns the defendant to collect and preserve his evidence in reference to it. When a suit is filed in a federal court under the Rules, the defendant knows that the whole transaction described in it will be fully sifted, by amendment if need be, and that the form of the action or the relief prayed or the law relied on will not be confined to their first statement. So long as the amendment is of the sort described in the above quoted Rule it is within the scope of the original suit and a part of it.

*Id.*

impingement is not enough; the Court has recognized that there must be more than an "incidental" impact on substantive rights to offend the REA.[176] Thus, one could claim that the acknowledged adverse impact on the substantive rights of defendants that arises out of the relation back of new (but related) claims is insufficiently significant to conclude that the REA is violated thereby, given the full protection of the underlying substantive policy considerations behind limitations periods. That said, allowing for "incidental" impacts on substantive rights—a subjective concept which may vary by observer—has the potential to create a loophole of uncertain breadth,[177] undermining the greater certainty I seek to infuse into analyses under the REA.

I confess to being torn between these competing perspectives. I think the most reasonable and workable stance may be the position that the relation back of new claims based on the same set of facts does not sufficiently interfere with the named defendant's substantive rights, given that defendants in such circumstances are on notice that their conduct relating to a specific incident has been challenged—albeit on alternate legal grounds—by the plaintiff within the applicable deadline. Ultimately, however, settling this point may be largely unnecessary: Virtually no state actually precludes relation back of claims under the circumstances outlined in Rule 15(c)(1)(B),[178] meaning the rule will likely never permit relation back under circumstances in which the relevant state would not.[179] As a result, Rule 15(c)(1)(B) will not in practical terms abridge, enlarge or modify any substantive right.

The more difficult question is whether Rule 15(c)(1)(C)—which permits the relation back of party changes—alters substantive rights in violation of the REA. Examining this question requires further elaboration of how Rule 15(c) works in this

176. Miss. Publ'g Corp. v. Murphree, 326 U.S. 438, 445 (1946) ("Undoubtedly most alterations of the rules of practice and procedure may and often do affect the rights of litigants. Congress' prohibition of any alteration of substantive rights of litigants was obviously not addressed to such incidental effects . . . .").

177. Perhaps some (but not entirely satisfactory) aid can be supplied by conceptualizing an "incidental" effect as something less than an abridgement (curtailment), enlargement (expansion), or modification (revision) of the substantive right in question.

178. *See, e.g.*, ARIZ. R. CIV. P. 15(c)(1) ("An amendment relates back to the date of the original pleading if the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set forth, or attempted to be set forth, in the original pleading."); Pointe San Diego Residential Cmty., L.P. v. Procopio, Cory, Hargreaves & Savitch, LLP, 125 Cal. Rptr. 3d 540, 549–50 (Cal. Ct. App. 2011) ("[A]n amendment relates back to the original complaint if the amendment: (1) rests on the same general set of facts; (2) involves the same injury; and (3) refers to the same instrumentality. . . . [E]ven if the plaintiff alleges a different legal theory or new cause of action.").

179. Maryland professes to have a relation back rule that is narrower than Rule 15, although the light between the two seems minute, if not nonexistent. *See* Youmans v. Douron, Inc., 65 A.3d 185, 194–95 (Md. Ct. Spec. App. 2013).

context. For example, if I file and serve a tort claim against Smith on June 29, one day before the expiration of the applicable two-year limitations period, and then, twenty days later on July 19, I amend my complaint to replace Smith with Jones (because I mistakenly had the wrong fellow), Rule 15(c)(1)(C) will permit the court to regard me as having asserted a claim against Jones (the proper chap) on June 29, assuming Jones had knowledge of his status as the intended defendant no more than 90 days after the date the complaint was originally filed (here, June 29). I will have thereby avoided the consequences of initially commencing an action against Jones on July 19; under ordinary circumstances, doing so would be untimely, and my claim would be vulnerable to the affirmative defense that the statute of limitations bars the action.[180] However, thanks to Rule 15(c)(1)(C), that defense is no longer available and my claim may proceed.

Or look at the same scenario from Jones's perspective. The state has told Jones that June 30 of this year is my deadline to seek damages from him for his alleged tortious conduct that occurred two years prior, subject to whatever statutory or equitable tolling rules that state has provided.[181] After June 30, then, Jones is protected from suit based on this conduct and may assert that protection as an affirmative defense that will defeat my claim because it has expired. Yet on July 19, documents served on him in a federal court action inform him—for the first time—that this is not the case.[182]

Are these effects really an abridgement of rights from the defendant's perspective,[183] or an enlargement of rights from the claimant's perspective? It would

180. *See* FED. R. CIV. P. 8(c)(1) (listing "statute of limitations" as an affirmative defense); *see also, e.g.*, Midland Funding, LLC v. Johnson, 137 S. Ct. 1407, 1417 (2017) (Sotomayor, J., dissenting) ("In most States the statute of limitations is an affirmative defense, meaning that a consumer must appear in court and raise it in order to dismiss the suit.").

181. *See, e.g.*, GA. CODE ANN. § 9-2-61(a) (2017) ("When any case has been commenced in either a state or federal court within the applicable statute of limitations and the plaintiff discontinues or dismisses the same, it may be recommenced in a court of this state or in a federal court either within the original applicable period of limitations or within six months after the discontinuance or dismissal, whichever is later . . . .").

182. This scenario presumes a state whose law would not permit relation back or tolling of the statute of limitations period under these circumstances. *See, e.g.*, Hawkins v. Pac. Coast Bldg. Prods., Inc., 22 Cal. Rptr. 3d 453, 457 (Cal. Ct. App. 2004):

> As a general rule, "an amended complaint that adds a new defendant does *not* relate back to the date of filing the original complaint and the statute of limitations is applied as of the date the amended complaint is filed, not the date the original complaint is filed." But where an amendment does not add a "new" defendant, but simply corrects a misnomer by which an "old" defendant was sued, case law recognizes an exception to the general rule of no relation back.

*Id.* at 457 (citations omitted) (quoting Woo v. Superior Court, 89 Cal. Rptr. 2d 20, 24 (Cal. Ct. App. 1999)).

183. *Cf.* Henderson v. United States, 517 U.S. 654, 676 (1996) (Thomas, J., dissenting) ("[T]he Rules Enabling Act . . . expressly provides that the Federal Rules 'shall not abridge, enlarge or modify any substantive

seem so, at least when entirely new defendants are named, because Rule 15(c)(1)(C) takes what the Supreme Court has described as "the right to be free of stale claims"—a sense of repose,[184] if you will—and extinguishes it in favor of "the right to prosecute them."[185] To explore this question, we will need to distinguish between state and federal limitations periods.

### a. State Statutes of Limitation

The Supreme Court has made no bones about declaring that state limitations periods are substantive.[186] *Guaranty Trust Co. v. York*[187] is instructive:

> Is the outlawry, according to State law, of a claim created by the States a matter of 'substantive rights' to be respected by a federal court of equity when that court's jurisdiction is dependent on the fact that there is a State-created right, or is such statute of 'a mere remedial character,' which a federal court may disregard?[188]

Reference to "the outlawry" of a claim suggests that the claim is outlawed or barred[189] once the period has expired. The Court was thus asking, is the fact that the claim is outlawed under state law a matter of substantive rights or merely a "remedial"[190] concern? The Court answered this question by focusing not on terminology but on effect.[191] A federal court "cannot afford recovery if the right to recover is made

right.' Allowing [Suits in Admiralty Act] claims in which process is not served forthwith to proceed against the United States infringes upon the Government's immunity and thereby alters a substantive right in direct contravention of the Rules Enabling Act." (quoting 28 U.S.C. § 2072(b) (1994)).

184. *See, e.g.*, Rendall–Speranza v. Nassim, 107 F.3d 913, 917–18 (D.C. Cir. 1997) (explaining the right of repose arises when the defendant did not know it would need to defend against claims); Ely, *supra* note 5, at 726 (referring to "the feeling of release, the assurance that the possibility of ordeal has passed, that a state seeks to create by enacting a statute of limitations").

185. Burnett v. N.Y. Cent. R.R. Co., 380 U.S. 424, 428 (1965) (describing the theory behind statutes of limitations as being that "the right to be free of stale claims in time comes to prevail over the right to prosecute them" (quoting Order of R.R. Telegraphers v. Ry. Express Agency, 321 U.S. 342, 348–49 (1944))).

186. Lower courts have reached the same conclusion. *See, e.g.*, Barthel v. Stamm, 145 F.2d 487, 491 (5th Cir. 1944) ("We agree that limitation is a matter of substance rather than of procedure….").

187. 326 U.S. 99 (1945).

188. *Id.* at 107–08 (citation omitted).

189. *See* Wood v. Carpenter, 101 U.S. 135, 139 (1879) ("Mere delay, extending to the limit prescribed, is itself a conclusive bar.").

190. Remedial is a tricky word here. The Court is using the term "remedial" in opposition to "substantive rights." Some might view this as indicating the court meant the term to be synonymous with "procedural," although it is possible to understand the term to mean a rule that addresses whether a substantive right violation can be judicially addressed. *See supra* note 79.

191. *Guar. Tr. Co.*, 326 U.S. at 109:

> It is therefore immaterial whether statutes of limitation are characterized either as 'substantive' or 'procedural' in State court opinions in any use of those terms unrelated to the specific issue before us. *Erie R. Co. v. Tompkins* was not an

unavailable by the State nor can it substantially affect the enforcement of the right as given by the State."[192] Therefore, "a statute that would completely bar recovery in a suit if brought in a State court bears on a State-created right vitally and not merely formally or negligibly."[193] In *Walker v. Armco Steel Corp.*,[194] the Court reaffirmed these views: "'We cannot give [the cause of action] longer life in federal court than it would have had in the state court without adding something to the cause of action. . . .' [U]nder *York* that statute of limitations was part of the state-law cause of action."[195]

But perhaps *York* and *Walker* can only be used to affirm that the Court regards limitations periods as substantive only for *Erie* purposes, not necessarily for REA purposes. After all, the Court in *Hanna* said that the two tests are not identical and were created to serve different purposes.[196] However, although there are distinctions between the two tests, what qualifies as a substantive right under each is not one of them. The REA expressly concerns itself with avoiding the adulteration of "substantive right[s],"[197] which are defined as I have indicated above.[198] The *Erie*

> endeavor to formulate scientific legal terminology. It expressed a policy that touches vitally the proper distribution of judicial power between State and federal courts. In essence, the intent of that decision was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should 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.

*Id.*

192. *Id.* at 108–09.
193. *Id.* at 110.
194. 446 U.S. 740 (1980).
195. *Id.* at 746 (quoting Ragan v. Merchs. Transfer & Warehouse Co., 337 U.S. 530, 533–34 (1949)). Because the Court interpreted Rule 3 (Commencing an Action) as not applying to the issue of tolling a limitations period, *see Walker*, 446 U.S. at 746 ("We rejected the argument that Rule 3 of the Federal Rules of Civil Procedure governed the manner in which an action was commenced in federal court for purposes of tolling the state statute of limitations."), it did not have to confront the issue of Rule 3's validity under the REA. *Id.* at 749, 751 ("Application of the *Hanna* analysis is premised on a 'direct collision' between the Federal Rule and the state law. . . . Rule 3 governs the date from which various timing requirements of the Federal Rules begin to run, but does not affect state statutes of limitations."). However, with respect to Rule 15(c)(1)(C), "the clash is unavoidable," Hanna v. Plumer, 380 U.S. 460, 470 (1965), because Rule 15(c)(1)(C) is a tolling provision. Thus, we cannot avoid the REA analysis. *Walker*, 466 U.S. at 749–50 ("The first question must therefore be whether the scope of the Federal Rule in fact is sufficiently broad to control the issue before the Court. It is only if that question is answered affirmatively that the *Hanna* analysis applies.").
196. 380 U.S. at 471 ("It is true that both the Enabling Act and the *Erie* rule say, roughly, that federal courts are to apply state 'substantive' law and federal 'procedural' law, but from that it need not follow that the tests are identical. For they were designed to control very different sorts of decisions.").
197. 28 U.S.C. § 2072(b) (2018).
198. *See supra* Subpart I.B.1.

analysis, on the other hand, imposes a broader proscription on *ad hoc*, case-by-case judicial lawmaking that is measured by the effect such would have on litigant forum selection and equitable administration of the laws.[199] An admonition to avoid interfering with substantive rights is certainly subsumed within that command, but does not reflect its outer limit. Thus, interference with substantive rights—defined similarly within each sphere—is prohibited under both regimes; *Erie* additionally proscribes interference with laws that, regardless of their label or characterization, would render federal diversity courts inappropriately distinctive from their local state counterparts. Another way of looking at it is that the REA's directive is to avoid abridging, enlarging, or modifying substantive rights—what one could view as serious incursions—while the *Erie* doctrine is not so limited, prohibiting judicial interference with state legal rules, the ignoring of which would simply lead one to prefer federal court to state court (or work an inequity on those not empowered to choose between forums).

This lower bar for measuring offense to state prerogatives yields the wider aperture that the *Erie* lens provides as compared to that of the REA. In both domains, what is substantive is a constant; the tolerable adulteration thereof is what varies. Understood thusly, one can confidently assert that the *York* Court's labeling of limitations periods as substantive was not dependent on its *Erie* context. The affront in *York* rose to a level that would offend both regimes: By writing that "a statute that would completely bar recovery in a suit if brought in a State court bears on a State-created right *vitally and not merely formally or negligibly*,"[200] the Court indicated that the state-created right was being fundamentally—not incidentally—disturbed, the kind of interference that the REA expressly prohibits. I see no basis for reading *York* to suggest that stripped from its *Erie* context, statutes of limitations lose their substantive tenor. The original Advisory Committee apparently concurred, with its chair reporting, "The Committee concluded that statutes of limitation are matters of substantive law and not procedure . . . ."[201]

Returning to our discussion, the Court built on the foundation laid by *York* and *Walker* with respect to the substantive nature of limitations periods in *Jinks v. Richland County*,[202] when it addressed the constitutionality of the tolling provision contained in the federal supplemental jurisdiction statute.[203] The *Jinks* Court wrote:

199. *See Hanna*, 380 U.S. at 468–69 (refining *Erie*'s "twin aims" analysis).
200. Guar. Tr. Co. v. York, 326 U.S. 99, 110 (1945) (emphasis added).
201. Mitchell, *supra* note 84, at 183.
202. 538 U.S. 456 (2003).
203. 28 U.S.C. § 1367(d) (2018) ("The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.").

> For purposes of *Erie R. Co. v. Tompkins*, for example, statutes of limitations are treated as substantive. *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945). *Stewart v. Kahn*, 78 U.S. 493, 506–07 (1870), provides ample support for the proposition that—if the substance-procedure dichotomy posited by respondent is valid—the tolling of limitations periods falls on the "substantive" side of the line.[204]

Upholding the federal statutory tolling provision depended on holding rules on statutes of limitations to be substantive, because of Congress's lack of constitutional authority to prescribe the procedure operative in state courts.[205] More important for our purposes, however, the Court's determination that statutory tolling is substantive makes clear that tolling is not something a rule prescribed under the REA can do. The holding of *Jinks* was that Congress could impose on these state-created substantive rights by virtue of the Necessary and Proper Clause;[206] the Supreme Court does not enjoy that same power under the REA.

Given that a statute of limitations period confers on defendants a substantive right "to be free of stale claims,"[207] a Federal Rule that extinguishes that right for a person who was not sued on the same facts within the statutorily-prescribed period abridges that defendant's substantive rights.[208] Rule 15(c)(1)(C) tolls the running of an applicable statute of limitations, a maneuver the Supreme Court in *Jinks* said was a substantive undertaking.[209] And indeed it is, for one criterion of a claim's validity is its timeliness. Any rule that validates a claim regardless of when it is asserted—notwithstanding its statutory lifespan—if a set of other conditions (for example,

204. 538 U.S. at 465 (citations modified). *Stewart v. Kahn* stood for the proposition that Congress could toll state statutes of limitations pending the Civil War pursuant to the Necessary and Proper Clause in aid of the President's war powers. *Id.* at 461–62.

205. *See* Printz v. United States, 521 U.S. 898, 923–24 (1997) (discussing constitutional limitations on Congress's ability to micromanage regulation by the states).

206. 538 U.S. at 462.

207. *Burnett*, 380 U.S. at 428 (describing the theory behind statutes of limitations as being "that the right to be free of stale claims in time comes to prevail over the right to prosecute them"); *see also* Lewis, *supra* note 169, at 1554 ("It is not controverted that a state's interest in the policies underlying the selection of a limitations period is a 'substantive' state concern to which a federal diversity court must defer.").

208. Professor Ely suggested that the purpose behind a "door-closing" rule should be consulted before determining the REA implications of interfering with it. *See* Ely, *supra* note 5, at 733 ("Any rule that enforces its mandate by refusing to entertain, or dismissing, a suit is a door-closing rule. Here as elsewhere the nature of the state mandate thus enforced, and more specifically the concerns that gave rise to it, must be carefully scrutinized before the Enabling Act can be sensibly applied."). But he also acknowledged that the interests of repose furthered by statutes of limitation were indeed substantive. *See id.* at 726 (describing as substantive those rules of law that foster and protect "the feeling of release, the assurance that the possibility of ordeal has passed, that a state seeks to create by enacting a statute of limitations").

209. 538 U.S. at 465 ("[I]f the substance-procedure dichotomy posited by respondent is valid—the tolling of limitations periods falls on the 'substantive' side of the line.").

notice within ninety days of filing, awareness of the claimant's mistake, an understanding of having been the intended target) are met, is a rule of decision that displaces the ordinary timeliness rule, or at least alters substantive rights in ways prohibited by the REA.[210] The claimant's rights are enlarged by reviving an extinguished claim or by giving the claim a longer life than the state has prescribed;[211] the defendant's rights are abridged by subjecting him to liability from which he

210. As the Court explained in *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949), in the context of declaring federal courts impotent to alter state limitations period tolling provisions via judge-made rules:

> Since that cause of action is created by local law, the measure of it is to be found only in local law. It carries the same burden and is subject to the same defenses in the federal court as in the state court. It accrues and comes to an end when local law so declares. Where local law qualifies or abridges it, the federal court must follow suit. Otherwise there is a different measure of the cause of action in one court than in the other, and the principle of *Erie R. Co. v. Tompkins* is transgressed.

*Id.* at 533 (citations omitted).

211. As the Court remarked in *Ragan*, "We cannot give [the cause of action] longer life in the federal court than it would have had in the state court without adding something to the cause of action." 337 U.S. at 533–34. It is *Erie* that gives rise to this restriction when informal judge-made rules are at issue. *Id.* at 534. The REA imposes the same restriction when the Supreme Court's prospective, supervisory rules of procedure are in question, for "adding something to the cause of action" would be enlarging a substantive right. *See* Michelle L. Nabors, *Relation Back of Amendments Adding Plaintiffs Under Rule 15(c)*, 66 OKLA. L. REV. 113, 152–53 (2013) ("Recognizing the substantive policy behind statutes of limitations, some courts have been wary of expanding a plaintiff's right to bring a lawsuit. Because substantive rights may not be enlarged or modified by procedural rule, interpreting the rule in a way that does so would 'run afoul of the Rules Enabling Act.'" (quoting Brever v. Federated Equity Mgmt. Co. of Pa., 233 F.R.D. 429, 435 (W.D. Pa. 2005))).

would otherwise be protected.[212] The transgression of the REA's mandates, it would seem, could not be more clear.[213]

The inferior federal courts to confront this specific question have largely reached a different conclusion, upholding the validity of Rule 15(c) under the REA.[214]

212. To be clear, many states permit the relation back of party changes under the circumstances endorsed by the Federal Rules. *See, e.g.*, ARIZ. R. CIV. P. 15(c)(2) (providing for relation back under conditions identical to those found in Federal Rule 15(c)(1)(C)). In such states, no rights are altered because the relation back that is permissible in federal court does not vary at all from that which may occur in state court under state rules. However, in states that do not recognize relation back under the conditions approved by Federal Rule 15(c)(1)(C), the problematic alteration of rights discussed in the main text occurs. *See, e.g.*, Hawkins v. Pac. Coast Bldg. Prods., Inc., 22 Cal. Rptr. 3d 453, 457 (Cal. Ct. App. 2004) ("[A]n amended complaint that adds a new defendant does *not* relate back to the date of filing the original complaint and the statute of limitations is applied as of the date the amended complaint is filed, not the date the original complaint is filed." (quoting Woo v. Superior Court, 89 Cal. Rptr. 2d 20, 24 (Cal Ct. App. 1999)). In states with more generous relation back rules, *see, e.g.*, IDAHO R. CIV. P. 15(c)(1)(C) (providing a six-month grace period rather than the ninety days provided in Federal Rule 15(c)(1)(C)), the Federal Rule does not alter any substantive rights because litigants may access the more generous state relation-back rules via Rule 15(c)(1)(A). *See, e.g.*, Charlot v. Ecolab, Inc., 97 F. Supp. 3d 40, 74 (E.D.N.Y. 2015) ("Under Rule 15(c)(1)(A), 'if the applicable statute of limitations is determined by state law . . . courts should assess both the state and federal relation back doctrines and apply whichever law is more generous.'" (quoting Anderson v. City of Mount Vernon, No. 09 Civ. 7082(ER)(PED), 2014 WL 1877092, at *2 (Mar. 28, 2014 S.D.N.Y))); *see also* FED. R. CIV. P. 15(c)(1)(A) advisory committee's note to 1991 amendment (adding Rule 15(c)(1)(A) in 1991 "to make it clear that [Rule 15] does not apply to preclude any relation back that may be permitted under the applicable limitations law. . . . [I]f that law affords a more forgiving principle of relation back than the one provided in this rule, it should be available to save the claim.").

213. Professor Carrington reached a different conclusion, finding Rule 15(c)'s relation back provisions to be valid based on his functional approach to understanding the REA. *See* Carrington, *supra* note 5, at 310–13; *supra* note 169. He saw the relation back rule as procedural because it pertained to the operation of the courts and as not abridging substantive rights because "it is difficult to imagine a group that might form a political unity around such an abstruse idea with so little foreseeable impact on identifiable persons." Carrington, *supra* note 5, at 311. Professor Burbank, however, ably rebutted Carrington's argument:

> Both the prospective formulation of a limitations period—two years or four years?—and the prospective formulation of a rule to determine when that period ceases to run in response to litigation activity—filing or service?—involve policy choices . . . . They are not, contrary to Professor Carrington's view, suitable subjects for court rules. Neither is it appropriate for a court rule, under the guise of "relation back," to permit a new party to be haled into court beyond the period of the applicable limitations period, at least when there is no relationship between the original and new parties.

Burbank, *Hold the Corks*, *supra* note 85, at 1020.

214. *See* 6A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1503, at 238 (3d ed. 2010) ("[N]o federal court has suggested that the rule either is unconstitutional or is beyond the scope of the Rules Enabling Act. On the contrary, several cases have expressly held that the Hanna case settles the issue in favor of the application of Rule 15(c)."); *see, e.g.*, Johansen v. E.I. Du Pont De Nemours & Co., 810 F.2d 1377, 1380 (5th Cir. 1987) ("Rule 15(c) is a truly procedural rule because it governs the in-court dispute resolution processes rather

For example, in *Morel v. DaimlerChrysler AG*,[215] the First Circuit faced a challenge to Rule 15(c)'s validity because it was being applied to permit the relation back of a party change well after the expiration of the applicable limitations period.[216] The court in *Morel*—to its credit—acknowledged the two wings of the REA analysis, separately analyzing whether Rule 15(c) was a procedural rule and whether it abridged substantive rights.[217] After determining that the rule was procedural because it only concerned the manner in which the dispute was adjudicated,[218] it concluded that the defendant's rights would not be abridged by permitting relation back. Here is the court's entire analysis on that point:

> Moreover, even though Rule 15(c) is "intimately connected with the policy of the statute of limitations," Fed.R.Civ.P. 15(c) advisory committee notes (1966 Amendment), the Rule does not actually alter state limitations periods. Under Rule 15(c), the original complaint still must be filed within that state-supplied limitations period. So viewed, "[t]he state's underlying interest . . . in protecting persons against stale claims is adequately protected by the practical notice requirements built into Rule 15(c)." *Davis v. Piper Aircraft Corp.*, 615 F.2d 606, 612 (4th Cir. 1980); see 19 Wright et al., *supra* § 4509, at 273–75.[219]

There are four problems with this analysis. First, the court relied on pre–1991 support (both from case law and the rulemakers), but it was in 1991 that Rule 15 was amended to allow the relation back of party changes when defendants first learn of the action *outside of the limitations period*, something that was not possible before.[220] So it is not surprising that pre–1991 authorities would see less of an REA problem (although a similar problem existed then too). Second, the claim is not that Rule 15(c) alters state limitations periods. Rather, the claim is that Rule 15(c)(1)(C) *tolls* applicable state limitations periods, a fact that is undeniable. As a tolling provision, Rule 15(c)(1)(C) is without question engaging in prospective regulation permitted to Congress but not the courts; it is also abridging the right of repose that a limitations period ensures. Third, the quotation from *Davis* is disingenuous, as that case did not

than the dispute that brought the parties into court; consequently, it does not transgress the Rules Enabling Act.").

215. 565 F.3d 20 (1st Cir. 2009).
216. *Id.* at 23.
217. *Id.* at 24.
218. *Id.* at 24 (Rule 15(c) "is a truly procedural rule because it governs the in-court dispute resolution processes rather than the dispute that brought the parties into court" (quoting *Johansen*, 810 F.2d at 1380)).
219. *Id.* at 25.
220. Rule 15(c), prior to the 1991 amendment, required notice to the new defendant "within the period provided by law for commencing the action against the party to be brought in by amendment." FED. R. CIV. P. 15(c) (1988) (repealed 1991).

involve the tardy naming of a new party as a defendant, but an amendment to reflect the plaintiff's post–limitations-period appointment as an administrator for the estate of the decedent. Thus, the defendant's right of repose and protection against stale claims was not at issue, having been named as a defendant in the suit originally.[221] Finally, although the court here felt that Rule 15(c) adequately protected the interests that the state sought to protect in imposing a limitations period, that is a subjective determination with which I disagree when newly-named defendants are at issue. Further, circumventing the applicable limitations period based on such considerations is tolling pure and simple, which, again, the REA does not authorize the Supreme Court to do through its rulemaking power. It turns out, then, that this court's analysis—which typifies the acceptance of Rule 15(c)'s validity from other quarters[222]—should not carry much weight.

### b. Federal Statutes of Limitation

Are substantive rights abridged when Rule 15(c)(1)(C) tolls a federal statute of limitations? The REA restrains the Supreme Court from prescribing procedural rules that alter "any" substantive right—not just state substantive rights.[223] However, federal courts may possess more authority to interfere with federal statutes of limitation than with state statutes. As we have just seen, the REA does not authorize rules abridging the protections granted by state statutes of limitations. Neither could

221. Additionally, as one commentator has argued, the REA was violated by application of Rule 15(c) in *Davis* because it "enlarged, or at least modified, the substantive rights of the plaintiff by allowing him to bring a suit that the state court would not have entertained." Johnson, *supra* note 169, at 641.

222. *See, e.g.*, Loudenslager v. Teeple, 466 F.2d 249, 250 (3d Cir. 1972) (amendment changing party defendant may relate back because Rule 15(c) "is entirely a matter of Federal practice"); Meredith v. United Airlines, 41 F.R.D. 34, 40 (S.D. Cal. 1966) ("Lockheed could not argue that § 2072 prohibits applying amended Rule 15(c) to achieve a relation back of the Amended Complaint. . . . [U]nder the facts here, Lockheed has no benefit or right under the California statute of limitations of which it is conceivably being deprived."); Westen & Lehman, *supra* note 12, at 364 ("[R]ule 15(c) should be deemed valid because, while it intrudes to some extent upon substantive rights under the state law, the intrusion is too slight to violate the statutory presumption of validity.").

223. Indeed, the REA was passed at a time when Congress must have been contemplating federal substantive rights, as the 1938 *Erie* decision—which brought about federal court solicitude for state substantive law—had yet to be decided. *See* Burbank, *Rules Enabling Act*, *supra* note 5, at 1109–10:

> It is not surprising that the preservation of state law, as such, was not a primary concern when the Act was formulated or when it was passed. Even in 1934, *Erie* was four years away. In the 1920's, *Swift v. Tyson* [41 U.S. (16 Pet.) 1 (1842)] was in full bloom, and *Erie* was considered by most to be an impossibility. Moreover, the Federal Rules contemplated by the Act were to apply in all civil actions tried in federal court, including those in which federal law furnished the rule of decision.

such abridgment be accomplished by federal courts without formal rules; the direct proscription of *Erie* and *York* would apply, obligating federal courts to apply the same limitations and tolling rules that would otherwise apply to state law claims in state court.[224]

When the source of the limitations period is a federal statute, however, *Erie* poses no barrier.[225] Notwithstanding that federal limitations periods are no less substantive in nature than their state-law based counterparts, the Supreme Court has indicated that federal courts may equitably toll federal limitations periods when doing so is consistent with the underlying "legislative scheme" in question.[226] This was done, for example, in *Burnett v. New York Central Railroad Co.*,[227] where the Court permitted a time-barred claim under the Federal Employers' Liability Act to go forward based on its determination that the filing of the same claim in state court within the limitations period tolled the statute.[228] Understand, though, that equitable tolling is a judicial function that a court undertakes in the context of a live controversy, ascertaining whether the facts of the case at hand warrant bypassing the bar that an expired limitations period would otherwise impose.[229]

Whether the Supreme Court may—untethered from adjudication—prescribe supervisory, prospective rules of procedure that toll federal statutes of limitation is another matter. It is not clear that an express tolling provision would be properly viewed as a rule of procedure in light of the Court's statement that "the tolling of limitations periods falls on the 'substantive' side of the line."[230] Imagine a Federal Rule that read as follows: "All claims arising under federal law previously asserted in

224. Guar. Tr. Co. v. York, 326 U.S. 99, 99 (1945). *See, e.g.*, *Walker*, 446 U.S. at 746 (indicating that state law governs the tolling of state limitations periods in federal diversity actions).

225. *See* Maternally Yours, Inc. v. Your Maternity Shop, Inc., 234 F.2d 538, 540 n.1 (2d Cir. 1956) ("[T]he Erie doctrine is inapplicable to claims or issues created and governed by federal law, even if the jurisdiction of the federal court rests on diversity of citizenship.").

226. Am. Pipe & Constr. Co. v. Utah, 414 U. S. 538, 557–58 (1974) ("The proper test is not whether a time limitation is 'substantive' or 'procedural,' but whether tolling the limitation in a given context is consonant with the legislative scheme."); *see also* Young v. United States, 535 U.S. 43, 49 (2002) ("It is hornbook law that limitations periods are 'customarily subject to equitable tolling,' unless tolling would be 'inconsistent with the text of the relevant statute.'" (quoting Irwin v. Dep't of Veteran Affairs, 498 U.S. 89, 95 (1990); United States v. Beggerly, 524 U.S. 38, 48 (1998))).

227. 380 U.S. 424 (1965).

228. *Id.* at 428–29; *see also* Herb v. Pitcairn, 325 U.S. 77, 78–79 (1945) (permitting previous filing in local state court as sufficient to satisfy statute of limitations period in a Federal Employers' Liability Act case, even though that prior action was dismissed).

229. United States v. Kwai Fun Wong, 135 S. Ct. 1625, 1631 (2015) ("[A] court usually may pause the running of a limitations statute in private litigation when a party 'has pursued his rights diligently but some extraordinary circumstance' prevents him from meeting a deadline." (quoting Lozano v. Montoya Alvarez, 572 U.S. 1, 10 (2014))).

230. Jinks v. Richland County, 538 U.S. 456, 465 (2003). *Stewart v. Kahn* stood for the proposition that Congress could toll state statutes of limitations pending the Civil War pursuant to the Necessary and Proper Clause in aid of the President's war powers.

state court and dismissed without prejudice may be refiled in federal court, notwithstanding the expiration of any applicable statute of limitations, for up to 1 year following the dismissal." Such a rule would directly affect a claim's validity. Further, as in the state law context, it would eliminate the protection from suit that a defendant otherwise would enjoy, a seeming abridgment of substantive rights. Thus, quite apart from whether a federal court could equitably toll the operative federal statute of limitations period under the circumstances reflected in the text of this fictitious rule, the Supreme Court's attempt to do so—through its delegated rulemaking authority—prospectively in all cases throughout the federal courts would not appear consistent with the REA.

How, then, can one explain *American Pipe & Construction Co. v. Utah*,[231] in which the Court seemed to interpret Rule 23 to toll a federal statute of limitations period? The Court was faced with a class action filed under the Sherman Act;[232] the action was commenced prior to the expiration of the applicable limitations period, supplied by the Clayton Act.[233] Shortly after the district court denied class certification, the unnamed members of the class moved to intervene in the action under Rule 24,[234] although by this time the limitations period had expired.[235] The Supreme Court held that the original filing of the action by the purported class representative tolled the limitations period,[236] which ultimately meant that the previously unnamed class members could be permitted to intervene to assert their claims.[237]

Although at first glance it may appear that the *American Pipe* Court held that Rule 23 tolled the federal limitations period, this would not be an accurate characterization. Instead, the Court was either engaging in equitable tolling of the kind previously discussed or exercising its federal common lawmaking authority.[238]

231. 414 U.S. 538 (1974).
232. Sherman Antitrust Act of 1890, ch. 647, 26 Stat. 209 (codified as amended at 15 U.S.C. §§ 1–7 (2018)).
233. 15 U.S.C. § 16(i) (2018).
234. FED. R. CIV. P. 24.
235. Am. Pipe & Constr. Co. v. Utah, 414 U. S. 538, 543–44 (1974).
236. *Id.* at 552–53 ("We hold that in this posture, at least where class action status has been denied solely because of failure to demonstrate that the 'class is so numerous that joinder of all members is impracticable,' the commencement of the original class suit tolls the running of the statute for all purported members of the class who make timely motions to intervene after the court has found the suit inappropriate for class action status." (quoting FED. R. CIV. P. 23(a)(1))).
237. *Id.* at 552–53, 561.
238. Professors Burbank and Wolff argue that the *American Pipe* tolling rule constitutes an exercise of federal common law. *See* Stephen B. Burbank & Tobias Barrington Wolff, *Class Actions, Statutes of Limitations and Repose, and Federal Common Law*, 167 U. PA. L. REV. 1, 29 (2018). However, the Court's own view is that *American Pipe* tolling was an exercise of the Court's "traditional equitable powers." Cal. Pub. Emps.' Ret. Sys. v. ANZ Sec., Inc., 137 S. Ct. 2042, 2051–52 (2017). I do not quarrel with Burbank's and

A federal court may equitably toll an applicable federal limitations period in a given case based on the facts and circumstances before it, provided doing so is consistent with Congress's legislative scheme.[239] In *American Pipe*, the legislative scheme that the Court took into account in deciding that tolling was warranted included Rule 23 itself: "Since the imposition of a time bar would not in this circumstance promote the purposes of the statute of limitations, the tolling rule we establish here is consistent both with the procedures of Rule 23 and with the proper function of the limitations statute."[240] However, in doing so, the Court was not invoking Rule 23 as the source of the tolling in question;[241] rather, it could be seen as identifying Rule 23 as a component of the "legislative scheme" with which its tolling had to be consistent,[242] or as the embodiment of the federal aggregate litigation policy that the *American Pipe* tolling rule was designed to uphold.[243]

In *Brever v. Federated Equity Management Co. of Pennsylvania*,[244] the district court appreciated the impropriety of letting Rule 15(c) toll an applicable federal limitations period when it rejected an effort of substitute plaintiffs to avail themselves

---

Wolff's views on this point and will readily concede that the conception of *American Pipe* that the Court offers may be off the mark. The important point is that under neither view is Rule 23 itself a tolling provision, which is what matters for my purposes.

239. *Am. Pipe & Constr. Co.*, 414 U.S. at 557–58 ("The proper test is not whether a time limitation is 'substantive' or 'procedural,' but whether tolling the limitation in a given context is consonant with the legislative scheme.").

240. *Id.* at 555.

241. *See Cal. Pub. Emps.' Ret. Sys.*, 137 S. Ct. at 2051–52. The court writes:

> As this discussion indicates, the source of the tolling rule applied in *American Pipe* is the judicial power to promote equity, rather than to interpret and enforce statutory provisions. Nothing in the *American Pipe* opinion suggests that the tolling rule it created was mandated by the text of a statute or federal rule. Nor could it have. The central text at issue in *American Pipe* was Rule 23, and Rule 23 does not so much as mention the extension or suspension of statutory time bars.
>
> The Court's holding was instead grounded in the traditional equitable powers of the judiciary.

*Id.*

242. *See* Lozano v. Montoya Alvarez, 572 U.S. 1, 10–11 (2014). The court writes:

> As applied to federal statutes of limitations, the inquiry begins with the understanding that Congress "legislate[s] against a background of common-law adjudicatory principles." Equitable tolling, a long-established feature of American jurisprudence derived from "the old chancery rule," is just such a principle. We therefore presume that equitable tolling applies if the period in question is a statute of limitations and if tolling is consistent with the statute.

*Id.* (quoting Astoria Fed. Sav. & Loan Assn. v. Solimino, 501 U.S. 104, 108 (1991); Holmberg v. Armbrecht, 327 U.S. 392, 397 (1946)).

243. Burbank & Wolff, *supra* note 5, at 29 ("*American Pipe* tolling is a federal common-law doctrine crafted by the Supreme Court to carry into effect the provisions of Rule 23 and the policies they embody: to preserve efficiency in aggregate litigation and protect the opt-out right that absentees enjoy in a Rule 23(b)(3) class action.").

244. 233 F.R.D. 429 (W.D. Pa. 2005).

of Rule 15(c) to access additional damages. After an initial plaintiff lost standing in a securities fraud case, substitute plaintiffs joined the action through an amended complaint, but sought to claim damages for one year prior to the previous plaintiff's initiation of the action; this was necessary due to the statute's limitation of damages,[245] making them recoverable for only one year prior to the commencement of the action.[246] The court found that if the substitute plaintiffs were permitted to have their claims relate back under Rule 15(c), that "would effectively toll the substantiative [*sic*] damage limitation . . . without an equitable basis warranting such relief" and "create substantive rights by application of a procedural rule and thus run afoul of the Rules Enabling Act."[247]

### 3. Can Rule 15(c)(1)(C) be Fixed?

Given the conflict between what the REA says that a Federal Rule cannot do—"abridge, enlarge, or modify any substantive right"—and the revelation that Rule 15(c)(1)(C) does precisely that (expanding the rights of claimants at the expense of defendants' right of repose), what can be done to correct this transgression? As a reminder, Rule 15(c)(1)(C) is a tolling provision that relieves claimants of the consequences of applicable federal and state statutes of limitations for tardily asserted claims against new defendants if the claim was timely filed against another defendant, if—within ninety days—the new defendant had notice of the action sufficient to make it aware that it was the intended party originally, and if the failure to name the new defendant initially was due to a mistake.[248] The problem with this is that a newly named defendant, who otherwise would be protected from claims asserted after the statutory deadline, is not. A couple of possible fixes come to mind.

#### a. Misnomer Correction

First, Rule 15(c)(1)(C) could be amended to restrict party-change relation back to simple misnomer correction. A plaintiff who files an action against John Smith and serves that person, only to find out that the proper spelling of the man's name is Jon Smythe, should be able to have an amendment that corrects the error relate back to the original time of filing. Mr. Smythe's right of repose has not been abridged, as the initial action served on him gave him actual notice that a claim based on the

245. 15 U.S.C. § 80a-35(b)(3) (2018) ("No award of damages shall be recoverable for any period prior to one year before the action was instituted.").
246. *Brever*, 233 F.R.D. at 431–32.
247. *Id.* at 432, 435.
248. FED. R. CIV. P. 15(c)(1)(C).

described set of facts was being asserted. This assumes that the proper defendant was served and the action was commenced within the time prescribed by the applicable law.[249] Although permitting relation back under such circumstances is not uncontroversial, it would be a fairly narrow allowance.

Could the understanding of misnomer be broader? In *Schiavone v. Fortune*,[250] the Court faced a broader instance of misnomer when "Fortune"—not an entity but rather a trademark for a magazine—was named as the defendant in a defamation case.[251] When the plaintiffs tried to substitute the corporate entity that published *Fortune* as the defendant, it was too late because the limitations period had expired.[252] The Supreme Court famously denied relation back under a previous version of Rule 15 that lacked the current permissive and expansive language it has today.[253] Indeed, the relation back provision of Rule 15 was amended to its current form as an effort to overturn *Schiavone*.[254] However, as is well known, Rule 15 permits relation back under circumstances far beyond the facts of *Schiavone*. Amending Rule 15(c)(1)(C) to focus on misnomers of the kind reflected in that case would bring the rule back in conformity with the REA. This could be achieved by the following alteration:

> (c) Relation Back of Amendments.
>
> (1) *When an Amendment Relates Back.* An amendment to a pleading relates back to the date of the original pleading when:
>
> * * *
>
> (C) the amendment ~~changes the party or~~ corrects the naming of the party against whom a claim is asserted, if Rule 15(c)(1)(B) is satisfied, and if, within the period provided by Rule 4(m) for serving the summons and complaint, the correctly named party ~~to be brought in by amendment:~~was served with the original or amended pleading.
>
> ~~(i) received such notice of the action that it will not be prejudiced in defending on the merits; and~~
>
> ~~(ii) knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity.~~

249. In many states, an action is not commenced for limitations purposes until the defendant is served in the action. *See, e.g.*, S.D. CODIFIED LAWS § 15-2-30 (2014) ("An action is commenced as to each defendant when the summons is served on him . . . .").
250. 477 U.S. 21 (1986).
251. *Id.* at 22–23.
252. *Id.* at 24.
253. *Id.* at 27, 29–30.
254. FED. R. CIV. P. 15(c)(1)(C) advisory committee's note to 1991 amendment ("This paragraph [now (c)(1)(C)] has been revised to change the result in *Schiavone v. Fortune* . . . with respect to the problem of a misnamed defendant.").

This revised language makes clear that it protects only misnomer correction, addressing a merely formal defect. The proper party has been identified but the name used to refer to that party was incorrect. The rule confines itself to technicalities associated with adjudicating the claim and refrains from disrupting the rights between the parties established under the applicable limitations law. If service of process has already occurred, there would be no need to re-serve the summons and complaint; the amended complaint would be served under Rule 5.[255] If service of process has yet to occur, formal service of the summons and amended complaint under Rule 4 could ensue. Courts would retain discretion to extend the ninety-day deadline for service for "good cause" if the court felt that the circumstances surrounding the misnomer correction warranted an extension.[256] This rule would not—and could not—alter operative state law governing the commencement of actions,[257] meaning that if a state requires filing and service of process within a limitations period,[258] nothing in the above proposal would circumvent that.

What this language would not address, however, is a true misidentification scenario.[259] When a plaintiff names and serves the wrong party, under a misapprehension of who bears responsibility for the injuries the claim seeks to vindicate, that is not a merely formal defect. True indeed, the subsequent discovery of the proper party would warrant an amendment substituting that party as a defendant. But to permit such an amendment to relate back and avoid the intervening expiration of the applicable limitations period would work the very abridgment of substantive rights we have already identified as flowing from Rule 15(c)(1)(C) in its current form.[260] By instituting an action near the expiration of the limitations period, a plaintiff assumes the risk that she will not be able to revise her

255. FED. R. CIV. P. 5(b).
256. FED. R. CIV. P. 4(m).
257. *Walker*, 446 U.S. at 750–52.
258. *See, e.g.*, S.D. CODIFIED LAWS § 15-2-30 (2014) ("An action is commenced as to each defendant when the summons is served on him . . . .").
259. Thus, this proposed revision would make Rule 15(c)(1)(C) consistent with the approach taken in several states. *See, e.g.*, Kaye v. Town of Manchester, 568 A.2d 459, 462 (Conn. App. Ct. 1990) ("[I]f the amendment is deemed to be a substitution or entire change of a party, it will not be permitted. If the amendment does not affect the identity of the party sought to be described in the complaint, but merely corrects the description of that party, the amendment will be allowed." (citations omitted)).
260. The fact that the newly named defendant must have had notice of the action within 90 days of its filing and that the action was intended to be brought against it does not eliminate the affront to substantive rights, because such notice occurs after the expiration of the limitations period when—under state law—the claim has become inert. Further, even if notice occurred *within the limitations period*, using that fact to extinguish the defendant's statute of limitations defense is equitable tolling that cannot be achieved by prospective rulemaking.

action to add new parties uncovered in the discovery process.[261] Thus, although the rulemakers intended misidentification to be protected by Rule 15(c) when it was revised in 1991,[262] the revision proposed above does not.

### b. Privity

An even broader allowance for relation back might permit party changes to relate back if the newly named party is legally or otherwise related to the originally named defendant in a relevant way. This is the approach taken to the relation back of party changes in many states[263] and reflects the circumstances under which the Supreme Court permitted relation back in *Krupski v. Costa Crociere S.p.A.*[264] For example, if a plaintiff names ABC, Inc. as the defendant but the proper defendant should be XYZ, Inc. (the corporate parent of ABC) could Rule 15 be revised to permit the naming of XYZ to relate back to the time of filing without violating the REA? The problem in this situation is that ABC, not XYZ, is the party served. XYZ may not be named and served until after the ninety-day grace period for service has expired. Permitting an amendment occurring outside of that period to relate back to the original filing would strip XYZ of the protection that it should enjoy (assuming that state law would not permit relation back under such circumstances). For this reason, it would be inappropriate for a Federal Rule to be the basis for tolling the operative limitations period. Even though equitable considerations might warrant tolling under these circumstances because the naming of a corporate relative as a defendant within the limitations period could be said to obligate the subsidiary to notify its parent of the pendency of an action, equitable tolling of state or federal limitations periods, as previously discussed, is outside the scope of what the Supreme Court's prospective, supervisory rules can do.[265]

### c. Congressional Enactment

An alternate fix would be for Congress to enact the tolling provision of Rule 15(c)(1)(C) legislatively as an Act of Congress (either as a statute or as a

261. *Cf. Burnett*, 380 U.S. at 428 ("[T]he courts ought to be relieved of the burden of trying stale claims when a plaintiff has slept on his rights.").
262. FED. R. CIV. P. 15(c)(1) advisory committee's notes to 1991 amendment ("[A] complaint may be amended at any time to correct a formal defect such as a misnomer or misidentification.").
263. *See, e.g.*, Kozich v. Shahady, 702 So. 2d 1289, 1291 (Fla. Dist. Ct. App. 1997) ("The addition of a party, however, does relate back where the new and former parties have an identity of interest which does not prejudice the opponent.").
264. 560 U.S. 538, 557 (2010) (permitting relation back of an amendment changing the named defendant in the action).
265. *See supra* Subpart II.A.2.

component of the Federal Rules of Civil Procedure).[266] The Supreme Court has already affirmed Congress's authority to enact legislation that tolls state limitations periods,[267] and its authority to toll federal limitations periods is unquestioned. It is a policy question whether the rule in its current form is worthy of enactment without alternation. That is, Congress would need to consider whether limitations periods *should* be tolled under the indicated circumstances.[268] But our concern here—the REA violation posed by Rule 15(c)(1)(C) in those states where it makes a difference—would disappear were Congress to enact it into law.[269]

### d. Abrogation

A final option to bring Rule 15 in compliance with the REA would be to abrogate Rule 15(c)(1)(C) (and possibly Rule 15(c)(1)(B) as well, since it does not go beyond what every state would recognize), which would make federal and state relation-back rules completely symmetrical in the party-change context.[270] There is precedent for relying on local law in the Federal Rules. For example, Rule 4 permits service consistent with the law of the forum state[271] and incorporates state law pertaining to personal jurisdiction.[272] Rule 64 makes available in federal court remedies that are

266. *Cf., e.g.*, Act of Jan. 12, 1983, Pub. L. No. 97-462, 96 Stat. 2527 (amending subdivisions (a), (c), (d), (e), and (g) of Rule 4 and adding subdivision (j)); Henderson v. United States, 517 U.S. 654, 678–79 (1996) ("[T]he Rules Enabling Act is 'technically inapplicable' in this case because Rule 4(j) was not promulgated by this Court but rather was enacted by Congress, and the Rules Enabling Act by its terms nullifies only statutory rules of procedure that conflict with rules promulgated *by the Supreme Court*." (citations omitted)).

267. Jinks v. Richland County, 538 U.S. 456, 461–62 (2003). Tolling state limitations periods would be constitutional because it is sufficiently connected to "carrying into execution Congress's power" to constitute inferior federal courts and "assure that those tribunals may fairly and efficiently exercise '[t]he judicial Power of the United States.'" Artis v. District of Columbia, 138 S. Ct. 594, 606–07 (2018) (quoting *Jinks*, 538 U.S. at 462).

268. I believe it would be fine for tolling of the kind permitted under Rule 15(c)(1)(C) to remain the rule (enacted by Congress) for claims arising under federal law. However, it seems inappropriate to permit the tolling of state statutes of limitation in federal court when such tolling would not occur under the applicable state's law.

269. The fact that the rules only take effect under the current system if Congress fails to enact legislation blocking them does not equate to congressional enactment, which requires affirmative bicameral approval and executive signature (or veto override) of a rule, not just its passive acceptance. U.S. CONST. art. I, § 7, cl. 2. Were congressional acquiescence sufficient to justify rules that exceed the authorization of the REA, the REA would be pointless and would provide no constraint on rulemaking beyond what Congress itself could do.

270. What would remain is what is now Rule 15(c)(1)(A): "An amendment to a pleading relates back to the date of the original pleading when the law that provides the applicable statute of limitations allows relation back." FED. R. CIV. P. 15(c)(1)(A).

271. FED. R. CIV. P. 4(e)(1), (g), (h)(1)(A).

272. *Id.* 4(k)(1)(A). But see *infra* Subpart II.B.1 for a discussion of the problem with Rule 4(k) under the REA.

available under the forum state's law.[273] Although these rules ensure that there will be variation on these matters from one district court to the next, that has not been viewed as problematic from a policy perspective and is irrelevant from an REA-compliance perspective. To the contrary, expressly yielding to the tolling and relation-back provisions found in the applicable state or federal law would honor the REA's prohibition against ex ante judicial regulation of such affairs.

### B. Rule 4(k) & Rule 4(n)

Rule 4 of the Federal Rules of Civil Procedure addresses the personal jurisdiction of federal courts in subdivisions (k) and (n). In Rule 4(k), personal jurisdiction is deemed to exist under several enumerated circumstances: (1) if the defendant would be subject to the jurisdiction of a court of the forum state;[274] (2) if the party is joined under Rule 14 or 19 and is served within a judicial district not more than 100 miles from the courthouse from which the summons emanated;[275] (3) if authorized by a federal statute;[276] and (4) when the defendant is not subject to jurisdiction in any state court and the claim is under federal law, if personal jurisdiction would be consistent with the U.S. Constitution.[277] Rule 4(n) provides that federal courts may assert jurisdiction over property if authorized by a federal statute[278] or, when personal jurisdiction cannot otherwise be obtained due to an inability to serve process, a federal court may assert jurisdiction over the defendant's assets found in the district.[279] How do these provisions measure up against the REA?

#### 1. Are Rules 4(k) and 4(n) Rules of Practice or Procedure?

The most glaring problem with subdivisions (k) and (n) of Rule 4 is that they are jurisdictional rules, not procedural rules. Recall our earlier discussion about the distinction between the two.[280] Procedural rules must be confined to addressing the manner in which adjudication occurs. Jurisdictional rules address a court's power to entertain a matter at all. Congress—not the courts—has the authority to delineate the jurisdictional reach of the inferior federal courts.[281]

273. FED. R. CIV. P. 64.
274. FED. R. CIV. P. 4(k)(1)(A).
275. *Id.* 4(k)(1)(B).
276. *Id.* 4(k)(1)(C).
277. *Id.* 4(k)(2).
278. *Id.* 4(n)(1).
279. *Id.* 4(n)(2).
280. *See supra* Subpart I.A.
281. *See* U.S. CONST. art. I, §8, cl. 9, 18; *see also supra* note 67.

The question is whether the REA conferred on the Supreme Court the authority to prescribe jurisdictional rules. Again, as previously discussed, jurisdictional rules are expressly beyond the remit granted by the REA, as the power conferred is limited to "rules of practice and procedure and rules of evidence."

One possible rejoinder to this analysis could be to point out that Rule 4(k) is concerned with addressing the "Territorial Limits of Effective Service" and that service of process is a procedural matter.[282] Although one might have been able to defend the predecessor to Rule 4(k)[283] in this way, the defense does not ring true for Rule 4(k) and Rule 4(n) today. First, the quoted heading is limited to Rule 4(k), and does not apply to Rule 4(n). The heading for Rule 4(n) is "Asserting Jurisdiction over Property or Assets."[284] Second, the heading of Rule 4(k) belies its actual operation; the text of the rule—which is what counts,[285] and which has been in place since 1993—pronounces, "Serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant" under subsequently enumerated circumstances.[286] Thus, Rule 4(k) does not actually create a geographical region within which service of process will be effective—which is precisely what original Rule 4(f) did and what Rule 45 does with respect to third-party subpoenas[287]—but instead outlines the conditions under which "personal jurisdiction" is "establishe[d]". Indeed, service of process is about more than notice; it is the very means by which a court asserts its

282. FED. R. CIV. P. 4(k)(1)(A). The quoted language is the heading of Rule 4(k).

283. As originally adopted in 1938, Rule 4(f) read: "TERRITORIAL LIMITS OF EFFECTIVE SERVICE. All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held and, when a statute of the United States so provides, beyond the territorial limits of that state. A subpoena may be served within the territorial limits provided in Rule 45." FED. R. CIV. P. 4(f) (1938).

284. *Id.* 4(n).

285. *See* Bhd. of R.R. Trainmen v. Balt. & Ohio R.R. Co., 331 U.S. 519, 528–29 (1947) (referencing "the wise rule that the title of a statute and the heading of a section cannot limit the plain meaning of the text"); *see also* Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc., 554 U.S. 33, 47 (2008) ("[S]tatutory titles and section headings 'are tools available for the resolution of a doubt about the meaning of a statute.'" (quoting Porter v. Nussle, 534 U.S. 516, 528 (2002))).

286. FED. R. CIV. P. 4(k)(1). Were confirmation needed from the Advisory Committee notes (though it is not), they state that Rule 4(k) is indeed intended to authorize the court's exercise of personal jurisdiction: "Paragraph (1) . . . explicitly authoriz[es] the exercise of personal jurisdiction over persons who can be reached under state long-arm law" and "Paragraph (2) . . . authorizes the exercise of territorial jurisdiction over the person of any defendant against whom is made a claim arising under any federal law if that person is subject to personal jurisdiction in no state." FED. R. CIV. P. 4 advisory committee's notes to 1993 amendment.

287. FED. R. CIV. P. 45(c)(1)(A), (d)(3)(A)(ii) (limiting the subpoena power of district courts to a 100-mile radius around a person's residence or place of employment or business).

jurisdiction,[288] explaining why Rule 4(k) addresses personal jurisdiction in the context of service. Thus, subdivisions (k) and (n) of Rule 4 both establish the jurisdictional reach of federal district courts, a function that is ultra vires under the REA.[289]

288. Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co., 484 U.S. 97, 104 (1987) ("[S]ervice of summons is the procedure by which a court having venue and jurisdiction of the subject matter of the suit asserts jurisdiction over the person of the party served." (quoting Miss. Publ'g Corp. v. Murphree, 326 U.S. 438, 444–45 (1946))).

289. Arguably, Rules 4(k) and 4(n) "limit the jurisdiction of the district courts," which is at odds with the declaration in Rule 82 that the Federal Rules do no such thing. FED. R. CIV. P. 82 ("These rules do not extend or limit the jurisdiction of the district courts or the venue of actions in those courts."); *see also* Wash.-S. Navigation Co. v. Balt. & Phila. Steamboat Co., 263 U.S. 629, 635 (1924) ("[N]o rule of court can enlarge or restrict jurisdiction."). The intent behind Rule 82 was likely that the term "jurisdiction" meant *federal subject-matter jurisdiction*. The Advisory Committee note to the 1937 adoption of the rule stated, "These rules grant extensive power of joining claims and counterclaims in one action, but, as this rule states, such grant does not extend federal jurisdiction." FED. R. CIV. P. 82 (1937) advisory committee's notes. However, the text of the rule does not make that specification, a fact noted by the Advisory Committee in its "Style Comment" accompanying the 2001 amendment to Rule 82:

> The recommendation that the change be made without publication carries with it a recommendation that style changes not be made. Styling would carry considerable risks. The first sentence of Rule 82, for example, states that the Civil Rules do not "extend or limit the jurisdiction of the United States district courts." *That sentence is a flat lie if "jurisdiction" includes personal or quasi-in rem jurisdiction.* The styling project on this rule requires publication and comment.

FED. R. CIV. P. 82 advisory committee's notes to 2001 amendment (emphasis added). Given the ambiguity, revising Rule 82 to specify subject-matter jurisdiction would be beneficial, although I am sure we could all continue to read Rule 82 in that way without too much peril.

### 2. Do Rules 4(k) and 4(n) Alter Substantive Rights?

The requirement of personal jurisdiction derives principally from the Due Process Clauses of the Fifth[290] and Fourteenth[291] amendments, depending on whether federal or state court authority is at issue. A court must have personal jurisdiction because absent such jurisdiction, any judicial deprivations would be arbitrary and without due process of law.[292] The content of this due process requirement, however, has been largely derived from notions of sovereignty: A person may not be bound by the pronouncements of a government with which it has no contacts.[293] Any court that purported to exercise jurisdiction over persons (or property) under conditions not consistent with the demands of due process would be violating the person's or property owner's substantive right not to be deprived of property without due process of law.

290. It is without question that the Fifth Amendment is the relevant provision that limits the territorial jurisdiction of the federal courts. *See, e.g.*, Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 619–20 (1992) (concluding that the Fifth Amendment's Due Process Clause did not foreclose personal jurisdiction because the defendant had "purposefully avail[ed] itself of the privilege of conducting activities within the [United States]") (citation omitted); *In re* Chase & Sanborn Corp., 835 F.2d 1341, 1344 (11th Cir. 1988) ("The due process clause of the fifth amendment constrains a federal court's power to acquire personal jurisdiction via nationwide service of process."), *rev'd on other grounds sub. nom*, Granfinanciera, S.A. v. Nordberg, 492 U.S. 33 (1989). However, the Supreme Court has not had occasion to define the precise contours of these limits. *See Omni Capital*, 484 U.S. at 102 n.5 (indicating there was no occasion in the case to address the scope of jurisdictional reach under the Fifth Amendment); Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 113 n.* (1987) (plurality opinion) (same). Nonetheless, the Second, Sixth, Seventh, Eleventh, and Federal Circuits have done so, "and all agree that there is no meaningful difference in the level of contacts required for personal jurisdiction" under the Fifth and Fourteenth Amendments. Livnat v. Palestinian Auth., 851 F.3d 45, 54–55 (D.C. Cir. 2017) ("The only difference in the personal-jurisdiction analysis under the two Amendments is the *scope* of relevant contacts: Under the Fourteenth Amendment, which defines the reach of state courts, the relevant contacts are state-specific. Under the Fifth Amendment, which defines the reach of federal courts, contacts with the United States as a whole are relevant.").

291. *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (applying the due process clause of the Fourteenth Amendment to determine the scope of state court jurisdiction).

292. *See* Pennoyer v. Neff, 95 U.S. 714, 733 (1877) ("[P]roceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law."); Spencer, *supra* note 69, at 625–26 ("This right of individuals to be protected against exercises of power in the absence of jurisdiction is a *substantive due process* right."); *see also* Zinermon v. Burch, 494 U.S. 113, 125 (1990) ("[T]he Due Process Clause contains a substantive component that bars certain arbitrary, wrongful government actions 'regardless of the fairness of the procedures used to implement them.'" (quoting Daniels v. Williams, 474 U.S. 327, 331 (1986))).

293. *See Int'l Shoe*, 326 U.S. at 319 ("That clause does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties, or relations.").

Subdivisions (k) and (n) of Rule 4 do not assert jurisdiction over persons or property in contexts that would be wayward under the standards of due process. Rather, they restrict the jurisdictional reach of federal district courts by limiting personal jurisdiction to a subset of the circumstances that the Fifth Amendment's Due Process Clause would otherwise permit.[294] As such, no substantive rights of plaintiffs or defendants are altered. Although federal courts could exercise nationwide personal jurisdiction,[295] there is no entitlement vested in plaintiffs for them to do so. Regarding defendants, so long as the jurisdictional reach of courts does not transgress outer constitutional limits, their rights are not abridged. Neither does restricting the territorial jurisdiction of some federal courts enlarge defendants' substantive rights; the underlying entitlements, duties, and obligations pertaining to their potential liability are not revised but, rather, the number of federal courts that may take up the matter are limited. Thus, although these provisions are improperly jurisdictional, rather than procedural, they do not "abridge, enlarge or modify any substantive right."

### 3. Bringing Rule 4 Into Compliance With the REA

As with Rule 15(c), the three routes to repairing Rule 4's REA violation are congressional enactment, abrogation, or an amendment confining the rule to service of process. The Supreme Court cannot define the territorial jurisdiction of the federal courts because Congress has not authorized the Court to make jurisdictional rules. Congress's own authority to do so is unquestioned. The way to

294. *See, e.g.*, Wells Fargo & Co. v. Wells Fargo Express Co., 556 F.2d 406, 418–19 (9th Cir. 1977). The court writes:

> [W]hen a federal statute authorizes world-wide service of process . . . the only relevant constraint is fifth amendment due process rather than statutory authorization. But not all federal statutes . . . contain an additional provision granting such broad service of process powers. The Lanham Act, presently before us, apparently does not. [Thus,] the district court's power to exercise in personam jurisdiction is limited here to that provided by the Federal Rules of Civil Procedure and, through them, the laws of the state of Nevada . . . .

*Id.* (citations omitted); *see also Livnat*, 851 F.3d at 55 (reflecting the view of circuits that have decided the question as being that "[u]nder the Fifth Amendment, which defines the reach of federal courts, contacts with the United States as a whole are relevant," as opposed to the relevant contacts having to be "state-specific" under the Fourteenth Amendment).

295. *See* Toland v. Sprague, 37 U.S. (12 Pet.) 300, 328 (1838) ("Whatever may be the extent of their jurisdiction over the subject matter of suits, in respect to persons and property; it can only be exercised within the limits of the [federal judicial] district. Congress might have authorized civil process from any circuit court, to have run into any state of the Union. It has not done so."); *see also* Miss. Publ'g Corp. v. Murphree, 326 U.S. 438, 442 (1946) ("Congress could provide for service of process anywhere in the United States."); Robertson v. R.R. Labor Bd., 268 U.S. 619, 622 (1925) ("Congress has power . . . to provide that the process of every District Court shall run into every part of the United States.").

maintain the regulatory status quo without running afoul of the REA, then, would be to have Congress enact Rule 4(k) and Rule 4(n) legislatively. Such an approach would actually be a return to how the territorial jurisdiction of the federal courts was addressed originally; in Section 11 of the Judiciary Act of 1789, Congress provided, "[N]o civil suit shall be brought before either of said courts [district or circuit] against an inhabitant of the United States, by any original process in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ."[296]

The second approach, abrogation of Rule 4(k) and Rule 4(n), would obviously be more dramatic. Were abrogation to occur, Congress could step in to delimit the territorial jurisdiction of federal courts legislatively. In the absence of such a move, however, the only remaining limit on the territorial jurisdiction of federal courts would be constitutional, which—under the Fifth Amendment—would authorize personal jurisdiction over defendants having minimum contacts with the United States, that is, nationwide personal jurisdiction.[297] This result is based on my view that no affirmative statutory authorization is needed to empower the federal courts to exercise personal jurisdiction in the first place,[298] which some may regard to be an open question.[299] Additionally, whether moving in the direction of nationwide

296. Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 79.

297. *See* FED R. CIV. P. 4 advisory committee's notes to 1993 amendment ("The Fifth Amendment requires that any defendant have affiliating contacts with the United States sufficient to justify the exercise of personal jurisdiction over that party." (citing *Wells Fargo & Co.*, 556 F.2d at 418)).

298. It is also based on my view that in the absence of any rule or statute addressing the territorial reach of federal courts, an *Erie* analysis would not compel courts to adhere to the jurisdictional constraints of their respective host states when state law is the basis for the claims. Because *Erie* is at least supposed to be an articulation of the constraints imposed by the Rules of Decision Act—which requires the federal courts to apply state law as rules of decisions in cases where they apply—a state's jurisdictional rules should not be regarded as falling within that category. That said, I acknowledge the argument that the "twin aims" analysis articulated in *Hanna* suggests that ignoring state jurisdictional rules would lead to forum shopping and the inequitable administration of the laws, just as ignoring a forum state's conflicts rules was judged to have a like effect. *See* Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941) ("The conflict of laws rules to be applied by the federal court in Delaware must conform to those prevailing in Delaware's state courts. Otherwise the accident of diversity of citizenship would constantly disturb equal administration of justice in coordinate state and federal courts sitting side by side.").

299. I do not believe this is an open question. Imagine what the territorial reach of federal courts would be in the absence of any rule or statute that addressed the matter. Say there were no statute or rule authorizing personal jurisdiction in the federal courts, but there was subject matter jurisdiction. Every person in this country would be subject to the territorial jurisdiction of the U.S. courts if they were found here or if they were citizens of this country. What would stop the courts from having that power over such persons? One would have no basis to challenge their jurisdiction unless one was not a citizen, or one was not found in the United States, or—per *International Shoe* as applied to the Fifth Amendment—if one lacked sufficient minimum contacts with the United States. The lack of statutory authorization, to my mind, would be immaterial; I do not see anything beyond due process that would constrain the territorial reach of the federal courts in this scenario. In other

personal jurisdiction would be wise is a policy question, and one that is worthy of debate. I have previously defended this approach,[300] and do so more fully in a separate forthcoming work.[301] However, given the interests that repeat defendants (that is, corporations) have in the status quo,[302] moving in this direction would likely be opposed vigorously from that quarter, making it too contentious for most rulemakers to suggest (although I would be willing to give it a go).

Finally, rather than outright abrogation of Rule 4(k), the Advisory Committee could modify it in a manner that returns the rule to its roots as a rule confined to the territorial reach of effective service. Rule 4(f)—the predecessor of Rule 4(k)(1)(A)—originally read: "All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held and, when a statute of the United States so provides, beyond the territorial limits of that state."[303] Rule 4(k) could be amended to address the limits of process, although in a manner that would not confine it to the territory of the forum state:

> (k) Territorial Limits of Effective Service. <u>All process other than a subpoena may be served anywhere within the territorial limits of United States. Nothing in these Rules limits the personal jurisdiction of a district court. [deleting the remainder of the current text]</u>

In addition to this change, Rule 4(n) would still need to be abrogated (or congressionally enacted). Under these revisions, Rule 4 would not address personal jurisdiction at all; jurisdiction would be determined with reference to the Fifth Amendment, and to any laws Congress might enact addressed to the matter.[304]

---

words, I do not think the federal courts need territorial jurisdiction conferred on them; jurisdiction flows directly from the power of the sovereign over people within (or with minimum contacts with) its domain, though Congress certainly can limit it to a narrower scope.

300. A. Benjamin Spencer, *Nationwide Personal Jurisdiction for our Federal Courts*, 87 DENV. U. L. REV. 325, 328 (2010) ("[I]f there are instances where the forum state cannot exercise personal jurisdiction over an individual, but a federal court within that state nonetheless would be a proper forum under applicable venue rules, the federal court's doors should be open to the dispute so long as exercising jurisdiction over the defendant would be constitutional with respect to the national sovereign."); *id.* at 329 ("[I]n most instances venue analysis is likely to identify federal districts to hear the action that will not present constitutionally undue burdens on defendants."). I grant that venue challenges can be waived by contract, *Atlantic Marine Construction Co. v. U.S. District Court*, 571 U.S. 49, 64 (2013), or procedural default, FED. R. CIV. P. 12(g)(2), (h)(1), meaning that there will be cases where the venue does not have any connection with the dispute.

301. A. Benjamin Spencer, *The Territorial Reach of Federal Courts*, 71 FLA. L. REV. (forthcoming 2019).

302. There are also some repeat players representing the interests of plaintiffs, such as lobbying organizations and the plaintiffs' bar, who might advocate on behalf of such a change.

303. FED. R. CIV. P. 4(f) (1938).

304. For a full discussion of my preferred revisions to Rule 4(k) and related considerations, see my forthcoming Article, *The Territorial Reach of Federal Courts*, *supra* note 301.

## CONCLUSION

Upon passage of the Rules Enabling Act, Charles E. Clark—who would later become the first reporter to the first Advisory Committee—and James W. Moore wrote, "It must be recognized that procedure is not an end in itself, but merely a means to an end, a tool rather than a product."[305] This observation is instructive as one attempts to understand the meaning of the REA. Congress conferred on the Supreme Court the authority to craft rules of *procedure*. Tricky though it might be to pin down that term, its meaning must be set in some way for it to serve as a real guide to what it is Congress was permitting the Court to do. Understanding procedure as "merely a means to an end" gets us quite far in appreciating the term, for it focuses us on the means or method of adjudication, not whether a court may adjudicate, not by what criteria must it adjudicate, and not what consequences should flow from adjudication. Federal Rules that exceed this remit—or the more recently added remit to prescribe "rules of evidence"—must be labeled as ultra vires and revised, abrogated, or taken up by Congress to cure the violation.

The alteration of substantive rights is also *verboten* under the REA. This does not mean the incidental impact that all rules are acknowledged to have is problematic.[306] Rather, the Supreme Court's rules cannot alter those rights—which can occur through impingement, augmentation, redefinition, or adulteration. Taking this prohibition seriously means being sensitive to substantive rights created by state and federal law and soberly ascertaining the consequence that application of the Federal Rule will have for said rights. If the impact of the rule with respect to the right is "now you see me, now you don't," our suspicion that the rule has gone too far should be piqued. An affirmative defense's disappearance through the hocus pocus of a federal relation-back rule is the kind of impingement on rights that should be treated as suspect.

Problems such as these are easy to ignore or interpret away. Unfortunately, doing so diminishes the integrity of the Federal Rules and the rulemaking enterprise. Confronting the wayward rules I have identified above will be a difficult and unwelcome endeavor for the rulemakers, but it is a task I think we must embrace. If we at least engage in the discussion, one product could be a more refined and transparent articulation of the REA's strictures, making it a better guide to

305. Charles E. Clark & James Wm. Moore, *A New Federal Civil Procedure*, 44 YALE L.J. 387, 392 (1935).

306. *See* Miss. Publ'g Corp. v. Murphree, 326 U.S. 438, 445 (1946) ("Undoubtedly most alterations of the rules of practice and procedure may and often do affect the rights of litigants. Congress' prohibition of any alteration of substantive rights of litigants was obviously not addressed to such incidental effects.").

rulemaking going forward. I am hopeful that some part of this revivified engagement with the REA will be taken up so that the proper division between judicial and legislative regulatory authority can be restored.