Maine Law Review

Volume 40 | Number 1 Article 3

January 1988

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SEPARATION OF POWERS RESTRICTIONS ON JUDICIAL RULEMAKING: A CASE STUDY OF FEDERAL RULE 4

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I also thank Ms. Mary Jo Donahue, a third-year student at Creighton Law School, for invaluable research and editorial assistance with this Article.

The Article was supported by a summer research grant from Creighton University.

I. INTRODUCTION

Debates over the validity of Federal Rules of Civil Procedure have historically centered on the "substantive rights" restriction of the Rules Enabling Act of 1934.[1] While Supreme Court decisions from *Sibbach v. Wilson & Co.*[2] through *Hanna v. Plumer*[3] and beyond[4]

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1. Rules Enabling Act of 1934, ch. 651, 48 Stat. 1064 (current version at 28 U.S.C. § 2072 (1982)). Originally, the "substantive rights" restriction appeared as the second sentence of the Act. *See id.* In the current codification, the restriction appears as the second paragraph of the Act. The full text of the current version of the Act states:

> The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions, including admiralty and maritime cases, and appeals therein, and the practice and procedure in proceedings for the review by the courts of appeals of decisions of the Tax Court of the United States and for the judicial review or enforcement of orders of administrative agencies, boards, commissions, and officers.
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> Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.
>
> Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported.
>
> All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court.

28 U.S.C. § 2072 (1982). Professor Stephen Burbank has extensively examined the legislative history of the Rules Enabling Act and argued persuasively that the second sentence was not intended to have independent significance. That is, the second sentence was designed only to emphasize a restriction inherent in the use of the word "procedure" in the first sentence of the Act. *See* Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1107-108 (1982) [hereinafter Burbank, *Rules Enabling Act*].

2. 312 U.S. 1 (1941).

3. 380 U.S. 460 (1965).

4. In Burlington Northern Railroad v. Woods, 107 S. Ct. 967, 969-71 (1987), the Court sustained the validity of FED. R. APP. P. 38, which was created under the Rules Enabling Act. In *Burlington Northern*, the issue concerned a conflict between Rule 38, which affords discretion to the courts of appeals to award damages and single or double costs to the appellee in cases of frivolous appeals, and an Alabama statute,

have arguably deprived the restriction of any practical force,[5] scholars have consistently favored a more rigorous interpretation[6] of the directive that federal rules not "abridge, enlarge, or modify any substantive rights."[7] Despite the historic impotence of the substantive rights restriction,[8] discussions of the validity of the Federal Rules of Civil Procedure continue, even today, to center on the substantive rights issue to the exclusion of other possible determinants of rule validity.[9]

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which imposed an automatic 10% penalty plus costs of court on the appellant for any unsuccessful appeal from a judgment awarding damages that had been stayed by the execution of an appeal bond. The Court interpreted Rule 38 as occupying the field covered by the Alabama statute and, as so interpreted, valid under the *Hanna* analysis. 107 S. Ct. at 970-71. For a discussion of *Burlington Northern* see Whitten, Erie *and the Federal Rules: A Review and Reappraisal After* Burlington Northern Railroad v. Woods, 21 CREIGHTON L. REV. 1 (1987).

5. *See, e.g.*, C. WRIGHT, THE LAW OF FEDERAL COURTS § 59, at 383 (4th ed. 1983) ("*Hanna* seems to state . . . [that any rule] arguably procedural, in that it falls 'within the uncertain area between substance and procedure,' is a valid rule" (quoting Hanna v. Plumer, 380 U.S. at 472)); Burbank, *Rules Enabling Act*, *supra* note 1, at 1187 (*Hanna* assimilated diversity to federal question cases, but "[b]ecause the Court had never acknowledged meaningful limitations on its rulemaking power in the latter" cases, few limitations were left at all); Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 718-20 (1974) (*Sibbach* and *Hanna* collapse the two standards of the Rules Enabling Act into one).

6. *See, e.g.*, C. WRIGHT, *supra* note 5, at 383; Burbank, *Rules Enabling Act*, *supra* note 1, at 1106-107 (canvassing the legislative history culminating in the 1934 Act and concluding that the substantive rights restriction of the Act was designed to allocate lawmaking power between the Supreme Court and Congress); Ely, *supra* note 5, at 725-26 (arguing for a broader interpretation of the substantive rights restriction than found in *Sibbach* and *Hanna*).

7. 28 U.S.C. § 2072 (1982).

8. The lack of restraint imposed by the Court's interpretation of the substantive rights restriction may be due, at least in part, to the notorious difficulty of distinguishing matters of "substance" from matters of "procedure." The Court has described the difficulty of distinguishing substance from procedure:

> Matters of "substance" and matters of "procedure" are much talked about in the books as though they defined a great divide cutting across the whole domain of law. But, of course, "substance" and "procedure" are the same key-words to very different problems. Neither "substance" nor "procedure" represents the same invariants. Each implies different variables depending upon the particular problem for which it is used. . . . 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.

Guaranty Trust Co. v. York, 326 U.S. 99, 108 (1945) (Frankfurter, J.) (citations omitted). *See also* 5 W. COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS 154-93 (1942).

9. *See, e.g.*, Burbank, *Proposals to Amend Rule 68 — Time to Abandon Ship*, 19 J. L. REFORM 425 (1986) [hereinafter Burbank, *Rule 68*]; Ely, *supra* note 5, at 739 (discussing the validity of the privilege rules in the original Federal Rules of Evidence

Curiously, neither courts nor commentators have focused much attention on potential constitutional restrictions on judicial rulemaking power.[10] Scholars who have examined possible constitutional limitations on federal judicial rulemaking authority have concluded either that such limitations extend as far as and no farther than the substantive rights restriction[11] or that any constitutional infirmity in the current rulemaking pattern results from the per se invalidity of congressional delegations of power to make rules that supersede statutes.[12]

When determining the validity of the Federal Rules of Civil Procedure, the Supreme Court has focused exclusively on whether the rules are within the constitutional power of Congress to promulgate, and, if so, whether Congress has delegated that power to the Court in the Rules Enabling Act. The Court has stated that once a federal rule is found to be applicable to a case and in conflict with state law, "[t]he Rule must then be applied if it represents a valid exercise of

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promulgated by the Court under the Rules Enabling Act).

10. A few Supreme Court decisions deal with the effect of Court-made rules on specific constitutional rights, such as those guaranteed by the seventh amendment. *See, e.g.*, Colgrove v. Battin, 413 U.S. 149 (1973) (local federal court rule providing that a jury for the trial of civil cases shall consist of six persons comports with the seventh amendment); Ross v. Bernhard, 396 U.S. 531 (1970) (right to trial by jury under seventh amendment extends to stockholders' derivative suits); Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962) (where both legal and equitable claims are presented in a single case, the seventh amendment requires a jury trial of factual issues common to the claims upon a proper demand); Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959) (The federal declaratory judgment act and the federal rules of civil procedure expanded the adequacy of legal remedies, with the result that the seventh amendment right to jury trial now attaches to some factual issues common to legal and equitable claims joined in an action which would formerly have been a pure equity case). Beyond these occasional decisions, however, there has been very little judicial consideration of possible constitutional restraints on court rulemaking.

11. *See, e.g.*, Landers, *Of Legalized Blackmail and Legalized Theft: Consumer Class Actions and the Substance-Procedure Dilemma*, 47 S. CAL. L. REV. 842, 854-55 (1974) (concluding that a proper construction of the Rules Enabling Act would be that the limitations on rulemaking power should be coextensive with constitutional limitations). Professor Burbank has observed that the original insertion of the substantive rights restriction into the Rules Enabling Act may have been intended to "safeguard limitations imposed by the Constitution on the Court's rulemaking power." Burbank, *Rules Enabling Act, supra* note 1, at 1118-19. *See also id.* at 1073. It was, however, apparently not the "primary purpose [of the drafters] in formulating the [Rules Enabling Act's] limitations . . . to tie them to the Constitution." *Id.* at 1119. Professor Burbank also observes that Professor Landers's "version of the 'constitutional limitations on the delegation of rulemaking power' . . . finds little support in any cases." *See id.* at 1117 n.464.

12. *See, e.g.*, Clinton, *Rule 9 of the Federal Habeas Corpus Rules: A Case Study on the Need for Reform of the Rules Enabling Acts*, 63 IOWA L. REV. 15, 69-77 (1977) (insofar as a prescribed rule is not inconsistent with prior acts of Congress, the Rules Enabling Act's procedures for approval of the prescribed rule are probably constitutional). For a discussion of the constitutionality of delegations of authority to make rules that supersede statutes, see *infra* text accompanying notes 101-22.

Congress's rulemaking authority, which originates in the Constitution and has been bestowed on [the Supreme] Court by the Rules Enabling Act . . . ."[13] Constitutional limitations on congressional rulemaking are said to "define a test of reasonableness."[14] This test is satisfied either by rules that "regulat[e] matters indisputably procedural," or by rules "regulating matters 'which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either.' "[15] Although the Court has agreed that the Rules Enabling Act's substantive rights restriction and the constitutional limitations on congressional power establish independent requirements, "[t]he cardinal purpose of Congress in authorizing the development of a uniform and consistent system of rules governing federal practice and procedure suggests that Rules which incidentally affect litigants' substantive rights do not violate [the Enabling Act] provision if reasonably necessary to maintain the integrity of that system of rules."[16] Indeed, according to the Court,

> [T]he study and approval given each proposed Rule by the Advisory Committee, the Judicial Conference, and [the Supreme] Court, and the statutory requirement that the Rule be reported to Congress for a period of review before taking effect give the Rules presumptive validity under *both* the constitutional and statutory constraints.[17]

The Court's analysis of rule validity has largely ignored constitutional limitations on judicial rulemaking that may exist under the separation of powers doctrine. Professor Stephen Burbank has observed:

> The Supreme Court has never satisfactorily explained — indeed it has hardly discussed — the place of court rulemaking in our constitutional framework. The early cases . . . in which the sources and limits of the rulemaking power were treated, set a pattern of ambiguity that has not been departed from. Not even the power of federal courts to regulate procedure by court rules in the absence of legislative authorization . . . is made clear in those cases, and it has not been made clear since.[18]

This Article examines the permissible scope of supervisory rulemaking by the Supreme Court under the separation of powers doctrine. The Article accepts as a basic assumption that the Su-

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13. Burlington N. R.R. v. Woods, 107 S. Ct. 967, 969 (1987).
14. *Id.* at 970.
15. *Id.* (quoting Hanna v. Plumer, 380 U.S. 460, 472 (1965)).
16. *Id.*
17. *Id.* (emphasis added and citation omitted).
18. Burbank, *Rules Enabling Act*, *supra* note 1, at 1115 (footnotes omitted). See *infra* text accompanying notes 33-58 for a discussion of the basis in precedent for federal judicial rulemaking.

preme Court's interpretations, since *Sibbach v. Wilson*, of the scope of Congress's power to regulate federal procedure and the restrictions imposed on the Supreme Court's supervisory rulemaking authority by the substantive rights limitation of the Rules Enabling Act will remain undisturbed in the future.[19] The Article argues that it is not sufficient to judge the validity of supervisory rules promulgated by the Supreme Court under the Rules Enabling Act by inquiring only whether Congress possesses the power to regulate a particular procedural matter and, if Congress does possess and has delegated such power, whether the Supreme Court has exercised it consistent with the substantive rights restriction. In addition, it is necessary to ask whether the federal rule in question deals with a subject that is reserved for Congress under the constitutional system of separation of powers.[20]

The thesis of the Article is that some purely procedural matters may be addressed only by the legislative branch of government. First, the express terms of article III and the fair implications of its text and history reserve some procedural matters solely for regulation by Congress. Second, long-standing congressional regulation of a procedural area may establish the area as one of exclusive legislative prerogative. In the latter situation, the Constitution allows the Supreme Court to modify congressionally established procedures under a general delegation of supervisory rulemaking authority, such as that found in the Rules Enabling Act, only where the most compelling possible reasons exist for the Court-made rules. Compelling reasons will ordinarily exist only if the rules support or protect congressionally established policies that are substantially more important than the policies that the rules supplant.

Initially, the Article establishes the context for supervisory rulemaking power in our system. The historical, textual, and precedential bases for our system of shared congressional and judicial

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19. Those interpretations have never resulted in the invalidation of any federal rule of civil or appellate procedure. *See* Hanna v. Plumer, 380 U.S. 460, 470 (1965). *See also* Burlington N. R.R. v. Woods, 107 S. Ct. 967, 971 (1987); Walker v. Armco Steel Corp., 446 U.S. 740, 751-53 (1980).

20. *Sibbach* suggested that there were limits to the ability of Congress to delegate supervisory rulemaking power to the Supreme Court. In commenting upon the restrictions on its rulemaking authority imposed by the Rules Enabling Act, the Court stated: "There are other limitations upon the authority to prescribe rules which might have been, but were not mentioned in the Act; for instance, the inability of a court, by rule, to extend or restrict the jurisdiction conferred by a statute." Sibbach v. Wilson, 312 U.S. at 10. Although cryptic, this statement suggests that there are separation of powers limits to the ability of Congress to delegate, or the Court to exercise, rulemaking power in some areas. Moreover, the quoted statement coincides with other, earlier statements by the Supreme Court suggesting that some procedural matters must be regulated exclusively by Congress. *See infra* notes 46-53 and accompanying text.

rulemaking are first explored.[21] Building on these materials, the Article constructs a theoretical framework by which exercises of supervisory rulemaking power may be judged under the separation of powers doctrine. A succession of hypotheticals demonstrates how far supervisory rulemaking might extend under a delegation of authority from Congress when Congress has not occupied a procedural area.[22] In addition, the Article discusses the effect that congressional occupation of a procedural field should have when coupled with delegations of specific and general rulemaking power to the Supreme Court.[23] The theoretical discussion then concludes with an examination of the effect of a recent Supreme Court decision on the validity of "supersession provisions"—delegations of rulemaking authority that provide that Court-made rules will supersede statutes.[24]

Having constructed a theoretical framework, the Article then applies it to portions of Federal Rule of Civil Procedure 4. Specifically, the Article explores the validity of original Rule 4(f), which authorized statewide service of process in multidistrict states. Advisory Committee discussion of the rule,[25] its early history in the lower federal courts,[26] and the Supreme Court's decision in *Mississippi Publishing Corp. v. Murphree*[27] demonstrate that the case for the Rule's validity is tenuous under traditional analysis. The Article then demonstrates how the theoretical framework developed here affords a far more powerful justification for the Rule's validity.[28] The Article next applies the theoretical framework to certain expansions of federal personal jurisdiction authorized by the 1963 amendments to Rules 4(e)[29] and 4(f),[30] concluding that the amendment to Rule 4(e) is valid, but that the validity of the amendment to Rule 4(f) is much

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21. *See infra* text accompanying notes 33-58.

22. *See infra* text accompanying notes 59-81. This Article is limited in scope to an examination of supervisory rulemaking, as opposed to local rulemaking, because the constitutional problems with the former power in our system are, as a practical matter, much more difficult. As Professor Burbank has observed, federal statutes "since the beginning of the Republic" have authorized local court rules, but have also required that such rules be consistent with statutes. *See* Letter from Stephen B. Burbank to David Beier (Sept. 20, 1985), *reprinted in Rules Enabling Act of 1985: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 99th Cong., 1st Sess. 280 (1985) [hereinafter Letter from Stephen B. Burbank to David Beier]. *See also* 28 U.S.C. § 2071 (1982) (authorizing local rulemaking consistent with federal statutes). Prospective, supervisory rulemaking by the Supreme Court in areas occupied by Congress is far more difficult to justify. *See id.* at 281.

23. *See infra* text accompanying notes 82-100.

24. *See infra* text accompanying notes 101-22.

25. *See infra* text accompanying notes 134-78.

26. *See infra* text accompanying notes 179-94.

27. 326 U.S. 438 (1946). *See infra* text accompanying notes 195-204.

28. *See infra* text accompanying notes 205-32.

29. *See infra* text accompanying notes 233-54.

30. *See infra* text accompanying notes 255-73.

more doubtful. The case study of Rule 4 culminates in an examination of the validity of a hypothetical nationwide long arm amendment to Rule 4(f)[31] and a discussion of the validity of certain rules of amenability to process that have evolved under Rule 4.[32]

II. Separation of Powers and Judicial Rulemaking

A. *The Shared Rulemaking Power*

The constitutional basis for congressional regulation of federal court procedure is article III, section 1,[33] which authorizes Congress to establish inferior federal courts. In conjunction with the "necessary and proper" clause of article I,[34] article III, section 1, authorizes Congress to prescribe lower federal court procedure.[35] The congressional authority to prescribe rules of practice and procedure is not

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31. *See infra* text accompanying notes 274-87.

32. *See infra* text accompanying notes 288-317.

33. Article III, section 1 states in pertinent part: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. Const. art. III, § 1. *See also* U.S. Const. art. I, § 8, cl. 9 (granting Congress power to "constitute Tribunals inferior to the supreme court"). Congress also possesses the power to make exceptions to and to regulate the appellate jurisdiction of the Supreme Court under article III, section 2. U.S. Const. art. III, § 2. This gives Congress at least a limited authority to prescribe procedures that shall be followed by the Court in the exercise of its appellate jurisdiction. *See, e.g.*, 28 U.S.C. §§ 1254(2), 1257(1)-(2) (1982) (review of courts of appeals and state court judgments by appeal); *id.* §§ 1256(1), 1257(3) (review of courts of appeals and state court judgments by certiorari); *id.* § 1254(3) (review of courts of appeals judgments by certification).

This Article discusses only the power of Congress to regulate procedure in the inferior federal courts because that power is pertinent to the question of the Supreme Court's authority to promulgate supervisory rules of procedure.

34. The "necessary and proper" clause states in its entirety: "[Congress shall have power to] make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. Const. art. I, § 8, cl. 18.

35. The Supreme Court has had no difficulty in finding that Congress has the power to regulate lower federal court procedure. For instance, in the early case of *Livingston v. Story*, the Court stated:

> That congress has the power to establish circuit and district courts in any and all the states, and confer on them equitable jurisdiction, in cases coming within the constitution, cannot admit of a doubt. It falls within the express words of the constitution. "The judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the congress may, from time to time, ordain and establish." . . . And that the power to ordain and establish, carries with it the power to prescribe and regulate the modes of proceeding in such courts, admits of as little doubt.

Livingston v. Story, 34 U.S. (9 Pet.) 632, 656 (1835) (quoting U.S. Const. art. 3, § 1). *See generally* 4 C. Wright & A. Miller, Federal Practice and Procedure § 1001 (2d ed. 1987) (weight of authority supports right of Congress to regulate judicial procedure for federal courts). *See also infra* notes 46-47 and accompanying text (discussion of Wayman v. Southard, 23 U.S. (10 Wheat.) 1 (1825)).

exclusive, however.[36] Judicial regulation of procedure is supported by pre-constitutional English practice, long-standing congressional assent, and case authority.

By the fourteenth century in equity and the fifteenth century at common law, the English courts were issuing rules and orders affecting the practice of courts.[37] "[T]hese Rules and Orders appear to have been for long issued by the Chancellor and Justices on their own responsibility, as controllers of the business of their courts; and, so long as they stood in that position, they belonged entirely to the judicial branch of legal authority."[38] But the rules and orders related only to the practice of the particular court issuing them; more general regulations affecting the practice in all courts had to be introduced by Parliament.[39] The history of English practice thus reveals a pattern of shared judicial-legislative regulation of practice and procedure. Under this pattern, the primary rulemaking initiative rested with the judiciary, subject to the superior general power of Parliament to control procedure as it saw fit.[40] If this pattern had dictated the practice under the United States Constitution, federal courts would have had power to make local rules subject to a more general power in Congress to provide supervisory rules for all courts.

Initially, federal rulemaking followed the English practice. The Judiciary Act of 1789 granted all federal courts the power "to make and establish all necessary rules for the orderly conducting [sic] business in the said courts, providing such rules are not repugnant to

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36. Because this Article addresses the question of limitations on supervisory judicial rulemaking in the context of the congressional delegation of rulemaking power that now exists under the Rules Enabling Act, it is, for the most part, unnecessary to devote attention to questions of "inherent" judicial power to make supervisory rules. "Inherent power" will, therefore, only be addressed briefly in conjunction with a discussion of the Court's power to issue original process in the absence of guidance from Congress, *infra* text accompanying notes 70-72, and when dealing with the validity of supersession provisions, *infra* text accompanying notes 101-22, because of arguments made by persons commenting on the validity of such provisions. For a more complete discussion of inherent power, see Williams, *The Source of Authority for Rules of Court Affecting Procedure*, 22 WASH. U.L.Q. 459, 473-506 (1937).

37. *See* E. JENKS, A SHORT HISTORY OF ENGLISH LAW 191 (1912).

38. *Id.*

39. *See* Tyler, *The Origin of the Rule-Making Power and its Exercise by Legislatures*, 22 A.B.A. J. 772, 773-74 (1936). Tyler observes, however, that uniformity was also "frequently achieved through the adoption by all the superior courts of common law of the same general rules." *Id.* at 774.

40. The early exercise of the parliamentary power to control procedure has been described as "incidental." 4 C. WRIGHT & A. MILLER, *supra* note 35, § 1001, at 25. As dissatisfaction increased with judicial regulation of procedure in the nineteenth century, Parliament exercised greater control. *See* J. WEINSTEIN, REFORM OF COURT RULEMAKING PROCEDURE 24-25 (1977). "What evolved was a cooperative scheme for rulemaking with legislative control over the overall procedural design and with authority over details left to the courts." *Id.* at 25.

the laws of the United States."[41] The Process Act of 1789, however, provided:

> That until further provision shall be made, and except where by this act or other statutes of the United States is otherwise provided, the forms of writs and executions, except their style, and modes of process and rates of fees, except fees to judges, in the circuit and district courts, in suits at common law, shall be the same in each state respectively as are now used or allowed in the supreme courts of the same. And the forms and modes of proceedings in causes of equity, and of admiralty and maritime jurisdiction, shall be according to the course of the civil law . . . .[42]

The Process Act of 1792[43] generally continued this static conformity to state law, but provided that in equity and admiralty cases the practice would henceforth accord with "the principles, rules and usages which belong to courts of equity and to courts of admiralty respectively, as contradistinguished from courts of common law."[44] All cases were subject to a power in the federal courts to make "such alterations and additions" as the courts would "deem expedient," and to a power in the Supreme Court of the United States to prescribe supervisory rules for the lower federal courts.[45] Thus, while

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41. Judiciary Act of 1789, ch. 20, § 17, 1 Stat. 73, 83 (current version at 28 U.S.C. § 2071 (1982)).

42. Process Act of 1789, ch. 21, § 2, 1 Stat. 93, 93-94 (footnotes omitted).

43. Process Act of 1792, ch. 36, § 2, 1 Stat. 275, 276.

44. *Id.*

45. *Id.* The static conformity to state procedure in common law cases established by the first two Process Acts in effect obligated the federal courts to adhere to the procedural law of the states in which they were sitting as that procedural law appeared in 1789. Thus, even though state procedural law changed, federal procedure in common law cases continued as it had existed in the states in 1789. This structure was made worse by the fact that the first Process Act did not apply to states admitted to the Union after 1789. Congress partially remedied the latter difficulty by subsequent Process Acts in 1828 and 1842. These Acts primarily dealt with the problem of newly admitted states, however, so that, for the most part, federal courts in the older states were bound by 1789 procedures. These later acts also included a delegation of local and supervisory rulemaking power to the courts. *See* Process Act of 1828, ch. 68, 4 Stat. 278; Process Act of 1842, ch. 109, 5 Stat. 499.

The courts might have minimized the difficulties of static conformity by use of their rulemaking power, but they did not, and the task again fell to Congress. In the Practice Conformity Act of 1872, ch. 255, § 5, 17 Stat. 196, 197, Congress withdrew the rulemaking authority and established a "dynamic conformity" to state procedures in common law actions — a conformity to state procedures as it appeared at the time the federal court was deciding a case. This dynamic conformity lasted until the merger of law and equity by the Federal Rules of Civil Procedure in 1938.

The story in equity cases was quite different. The Process Acts did not require conformity to state procedure in equity cases. Furthermore, the Supreme Court showed no reluctance to utilize its supervisory rulemaking power for equity cases. The Court promulgated thirty-three equity rules in 1822. 20 U.S. (7 Wheat.) v-xiii (1822). In 1842, the Court replaced the 1822 rules with ninety-two rules of federal equity practice. 42 U.S. (17 Pet.) lxi (1842) (unofficial reporter). The 1842 rules, in

the basic organization of the courts was fixed by the Judiciary Act of 1789, and the initial procedural practice was fixed by the Process Acts, Congress subsequently delegated power to the courts to alter this procedural practice by promulgating both local and supervisory rules.

The Supreme Court addressed the validity of this early delegation of rulemaking authority in *Wayman v. Southard*:[46]

> It will not be contended that Congress can delegate to the Courts, or to any other tribunals, powers which are strictly and exclusively legislative. But Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself. . . . The Courts . . . may make rules directing the returning of writs and processes, the filing of declarations and other pleadings, and other things of the same description. It will not be contended, that these things might not be done by the legislature, without the intervention of the Courts; yet it is not alleged that the power may not be conferred on the judicial department.
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> The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details. . . .
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> . . . The power given to the Court to vary the mode of proceeding in this particular [*i.e.*, to regulate whether the officer proceeding under a writ of execution shall leave the property taken by the officer in the hands of the debtor until the day of the sale], is a power to vary minor regulations, which are within the great outlines marked out by the legislature in directing the execution. To vary the terms on which a sale is to be made, and declare whether it shall be on credit, or for ready money, is certainly a more important exercise of the power of regulating the conduct of the officer, but is one of the same principle. It is, in all its parts, the regulation of the conduct of the officer of the Court in giving effect to its judgments. A general superintendence over this subject seems to be properly within the judicial province, and has been always so considered.[47]

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turn, were replaced by eighty-one rules of equity practice in 1912. 226 U.S. 627-73 (1912). With a few modifications, these rules lasted until 1938. Congress provided in the Law and Equity Act, ch. 90, 38 Stat. 956 (1915), that equitable defenses could be raised in actions at law. It also abolished the objection that the suit was not brought on the correct "side" of the court, an objection that had previously required dismissal of the action. *Id.*

46. 23 U.S. (10 Wheat.) 1 (1825). The issue in *Wayman* was the applicability of a Kentucky statute, enacted after 1789, regulating executions issuing on judgments. The Court held that the "static conformity" required by the Process Act of 1792 precluded the application of the Kentucky statute. For a discussion of "static conformity," see *supra* note 45.

47. Wayman v. Southard, 23 U.S. (10 Wheat.) at 42-45.

Several important principles appear in this passage: (1) Congress has the power to regulate the procedure of federal courts; (2) Congress may delegate some of its power over procedure to the courts; (3) Congress may not delegate any power to regulate procedure that is "strictly and exclusively legislative"; (4) the line between procedural regulations that are the exclusive province of Congress and those that may be delegated to the courts is not precisely drawn by the Constitution, but it should be drawn by separating "important subjects" from those of "less interest," which involve only the "details" of procedure; (5) it is relevant in drawing the line between important matters and matters of detail to determine whether a "general superintendence" over the subject has traditionally been considered properly within the "judicial province."

The Supreme Court addressed judicial rulemaking power in other early decisions, but never materially clarified the boundaries between matters of exclusive legislative prerogative and those delegable to courts.[48] The Court has stated that neither supervisory nor local rules can modify subject matter jurisdiction statutes,[49] a proposition that is relatively uncontroversial.[50] The Court also held, even before passage of the current Rules Enabling Act, that neither supervisory nor local rules may modify substantive rights[51] and that

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48. *See supra* text accompanying note 18. *See also* Beers v. Haughton, 34 U.S. (9 Pet.) 329, 363 (1835) (1831 rule of circuit court of Ohio providing for discharge of surety for defendant when defendant was absolved from his debts by state insolvency law was consistent with laws of Ohio existing in 1828, but even if the rule had not been consistent, the circuit court had the power under the 1828 Process Act to create the rule as regulation of proceedings on final process); Bank of the United States v. Halstead, 23 U.S. (10 Wheat.) 51 (1825) (power delegated by Congress in 1792 Process Act to make rules includes power to make rules to conform to changes in state practice on executions and was not an improper delegation of legislative power).

49. *See* Washington-Southern Navigation Co. v. Baltimore & Philadelphia Steamboat Co., 263 U.S. 629, 635 (1924) (rules of court, whether law, equity, or admiralty and whether supervisory or local, cannot enlarge or restrict jurisdiction, or abrogate or modify substantive law); Venner v. Great N. Ry., 209 U.S. 24, 35 (1908) (Supreme Court powerless to increase or decrease jurisdiction of the circuit courts by rule); Hudson v. Parker, 156 U.S. 277, 284 (1895) (Supreme Court "cannot, . . . by rule, enlarge or restrict its own inherent jurisdiction and powers, or those of the other courts . . . ," justices, or judges of the United States).

50. *See infra* text accompanying note 62. The proscription in FED. R. CIV. P. 82 against rules that extend or limit the jurisdiction of the district courts has been interpreted to refer only to subject matter jurisdiction. There is evidence, however, that the Advisory Committee drafting Rule 82 considered the proscription against jurisdictional modifications simply to be part of the restriction on the modification of substantive rights by rule in the Rules Enabling Act. *See infra* notes 136-41 and accompanying text.

51. *See* Washington-Southern Navigation Co. v. Baltimore & Philadelphia Steamboat Co., 263 U.S. at 635 (rules of court, whether law, equity, or admiralty and whether supervisory or local, cannot enlarge or restrict jurisdiction or modify substantive law); The Lottawanna, 88 U.S. (21 Wall.) 558, 579 (1874) (admiralty rule not intended to create new lien in in rem cases; Supreme Court could not create such a

local rules may not modify statutes.[52] These decisions, however, cast no clear light on potential separation of powers restrictions on judicial rulemaking as the decisions were based upon then current statutory rather than constitutional limits on the congressional delegation of rulemaking power to the courts.[53]

What is needed is some means of separating the important, or fundamental, procedural subjects that *Wayman* would allow only Congress to regulate from those that the courts may regulate. In this regard, it seems relevant that Congress did not extend the courts' rulemaking power to matters of basic court organization,[54] subject matter jurisdiction,[55] venue,[56] or personal jurisdiction[57] in the first Judiciary and Process Acts.[58] That Congress retained rulemaking authority over these areas may represent the judgment that they are "fundamental" and subject to its exclusive power. Exclusion of judicial rulemaking is not conclusive, however. Congress might have regulated an area in the first Judiciary or Process Acts because it thought it would be useful to retain control of the area until the practical problems of procedure in the new system could be examined against the day-to-day realities of litigation over some span of time and the area's susceptibility to judicial rulemaking evaluated accordingly. Hence, early statutory and judicial precedents do not

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lien by rule, since a lien is a right of property and not a mere matter of procedure); Ward v. Chamberlain, 67 U.S. (2 Black) 430, 437 (1862) (rules prescribed by Supreme Court for lower federal courts cannot enlarge, diminish, or vary the effect of mesne or final process on the property of a debtor).

52. *See* Davidson Bros. Marble Co. v. United States *ex rel.* Gibson, 213 U.S. 10, 18 (1909) (rule of circuit court attempting to compel waiver of personal jurisdiction objections in contravention of statutes of United States is invalid).

53. For example, the then current federal statutes provided that the Supreme Court would have power, "in any manner not inconsistent with any law of the United States . . . generally to regulate the whole practice, to be used, in suits in equity or admiralty, by the circuit and district courts." Process Act of 1842, ch. 188, § 6, 5 Stat. 516, 518 (subsequently codified at U.S. REV. STAT. § 917 (1878)) (current version at 28 U.S.C. § 2072 (1982)). The statutes granted power to "circuit and district courts" to regulate, "in any manner not inconsistent with any law of the United States, or with any rule prescribed by the Supreme Court[,] . . . their own practice as may be necessary or convenient for the advancement of justice and the prevention of delays in proceedings." Process Act of 1793, ch. 22, § 7, 1 Stat. 333, 335 (subsequently codified at U.S. REV. STAT. § 918 (1878)) (current version at 28 U.S.C. § 2072 (1982)). *See also* Shapiro, *Federal Diversity Jurisdiction: A Survey and a Proposal*, 91 HARV. L. REV. 317, 347-48 (1977) (discussing whether the courts could, by rule, extend or limit powers conferred by statute in the absence of delegated authority to do so).

54. *See* Judiciary Act of 1789, ch. 20, §§ 1-8, 1 Stat. 73, 73-76 (current version codified in scattered sections of 28 U.S.C.).

55. *See id.* §§ 9-14, 22, 25, 1 Stat. 73, 76-82, 84, 85-87 (current version codified in scattered sections of 28 U.S.C.).

56. *See id.* § 11, 1 Stat. 73, 78-79 (current version at 28 U.S.C. §§ 1391-1407 (1982)).

57. *See id.*

58. *See supra* text accompanying notes 41-45.

necessarily provide a complete picture of what areas are subject to exclusive congressional control. Separation of "important" or "fundamental" areas from areas over which Congress and the courts may exercise shared rulemaking authority requires a more abstract evaluation of the constitutional structure.

B. Judicial Power to Make Procedural Rules Under a Delegation Statute when Congress Has Not Occupied a Procedural Area

In determining the extent of exclusive congressional power over procedure, it is instructive to examine how far the judicial rulemaking power may extend if Congress does not occupy a field. Congress, however, has extensively regulated many aspects of federal procedure since the Judiciary Act of 1789; this discussion must, therefore in part, proceed hypothetically.

Assume first that Congress has done no more than establish a Supreme Court and delegate to it the following rulemaking authority: "The Supreme Court shall have the power by rule to ordain and establish courts inferior to itself and to define the subject matter jurisdiction such courts shall exercise within the limits of article III, section 2 of the Constitution." This delegation would clearly contravene the express language of the Constitution. Section 1 of article III states that the "judicial power of the United States, shall be vested . . . in such inferior Courts *as the Congress may* from time to time ordain and establish."[59] On its face, this language implies that only Congress can determine whether there will be inferior federal courts. This reading is supported by the historic compromise that produced the text of section 1, and which gave Congress discretion to create inferior federal courts.[60] Thus, both the text and the history of article III reveal that the decision whether to create inferior federal courts rests with Congress.[61]

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59. U.S. CONST. art. III, § 1 (emphasis added).

60. The Constitutional Convention originally approved of a national judiciary to be composed of a Supreme Court and one or more inferior courts. *See* 1 M. FARRAND, THE RECORDS OF THE CONVENTION OF 1787 104-105 (1937). *See generally* P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 11-12 (2d ed. 1973) [hereinafter HART & WECHSLER]; 13 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3502 (1975). Subsequently, the provision for inferior courts was stricken on the motion of those who felt that the state courts should be left with power to decide all cases of national concern in the first instance. *See* 1 M. FARRAND, *supra*, at 124. This action, in turn was followed by a compromise that gave Congress discretion to create inferior federal courts. *See id.* at 125.

61. Delegation of this discretionary authority to the Supreme Court would undermine the political safeguards established by this compromise. Representation of the states in the Senate would assure that state interests in keeping the cases described in article III, section 2, in their own courts would be adequately considered. *See infra* note 62.

It is equally clear that Congress could not delegate unlimited authority to the Supreme Court to define by rule the scope of the subject matter jurisdiction of lower federal courts created by Congress. This conclusion is compelled by the same evidence demonstrating that Congress must decide whether to create lower federal courts. The text of article III is only slightly less suggestive on this matter, and the compromise that produced the language indicates that Congress should decide not only whether to create inferior federal courts, but also whether, and to what extent, these courts would supplant the jurisdiction of state courts over national matters.[62]

In addition to decisions whether to create lower federal courts and how to define their subject matter jurisdiction, there are other matters of court organization and structure that seem so fundamental that Congress must determine them itself. Such matters include the number of lower federal courts,[63] their basic form,[64] the number of judges to sit on the courts and the qualifications of the judges,[65] and

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62. *See* 2 M. FARRAND, *supra* note 60, at 46. For instance, Madison noted: "Mr. Sherman was willing to give the power to the Legislature but wished them to make use of the State Tribunals whenever it could be done. [sic] with safety to the general interest." *Id.* Another commentator stated:

> [I]t seems to be a necessary inference from the express decision that the creation of inferior federal courts was to rest in the discretion of Congress that the scope of their jurisdiction, once created, was also to be discretionary. This is confirmed not only by such statements as Sherman's but by numerous indications of an expectation that Congress in the beginning would go no further than to vest an admiralty jurisdiction in inferior federal courts.

HART & WESCHLER, *supra* note 60, at 12.

A delegation of unlimited authority should, however, be distinguished from a situation in which Congress does not give the Supreme Court "unlimited discretion, but only the authority to choose among specific options on the basis of stated criteria determined by Congress itself." Shapiro, *supra* note 53, at 346. In the latter circumstance, the delegation of authority "in no way menaces the principle of separation of powers," *id.* at 347, because the basic policy decisions required by the language and history of article III have all been made by Congress. Judicial discretion is limited to selection of one subject matter configuration from a closed-ended set established by Congress. Moreover, legislatively established criteria for selecting among its options further limits the judicial role. Thus, for example, Congress might establish diversity jurisdiction of a particular scope, but give the Supreme Court the authority to limit or abolish it if federal case loads reach a certain level and the Court determines that the diversity case load is interfering with the dispatch of cases within other branches of federal subject matter jurisdiction. Such a confined delegation of rulemaking authority would arguably be compatible with separation of powers principles, even though broader grants of rulemaking power over subject matter jurisdiction would not. Whether limited delegation would be wise is another matter. If such power is desirable, Professor Shapiro is probably correct that it should be in the form of local rulemaking power. *See generally id.* at 339-41.

63. *See* Judiciary Act of 1789, ch. 20, §§ 2-4, 1 Stat. 73, 73-75 (current version at 28 U.S.C. §§ 41, 81-131 (1982)).

64. *See id.* (current version at 28 U.S.C. §§ 42-43, 132 (1982)).

65. *See id.* §§ 3-4, 1 Stat. 73, 73-75 (current version at 28 U.S.C. §§ 43-45, 132-36

the location of such courts.[66] By way of contrast, matters that might be delegated to the courts include the power to appoint court administrators,[67] to establish the number and length of court sessions,[68] and to determine the places where court records will be kept.[69] None of these matters seem so fundamental that Congress must retain exclusive authority over them.

Of central concern to this Article is whether the power to establish rules of venue and personal jurisdiction resides exclusively in Congress, or whether that power may be exercised by the Supreme Court under a grant of supervisory rulemaking authority. Congress has exercised power over venue and personal jurisdiction since the Judiciary Act of 1789.[70] Nevertheless, the question remains whether venue and personal jurisdiction are so fundamental that they *must* be regulated by Congress.

In examining this question, it is helpful to consider the following hypothetical: Suppose the first Congress created inferior federal courts, established their general location, and defined their subject matter jurisdiction, but did not provide them with rules of personal jurisdiction. In order to exercise their subject matter jurisdiction, the courts would have to confront the problem of personal jurisdiction. Unless deemed to possess inherent power to issue process com-

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(1982)).

66. The location of courts seems so closely intertwined with the establishment of the number of courts as to require, at least, some general rules of location. Thus, for example, it is difficult to see how the decision to establish "thirteen district courts" in the Judiciary Act of 1789 could be separated from the correlative decision to locate the district courts geographically. *Id.* §§ 2-3, 1 Stat. 73, 73-74 (current version at 28 U.S.C. §§ 41, 81-131 (1982)). The matters may be separated conceptually, but the numerical and locational decisions seem indistinguishable in importance. It is, however, also possible to see how, once a general locational decision has been made by Congress, locational matters of lesser importance might come up that could be delegated to the Supreme Court or the inferior courts. Thus, the places where court should be held within the general geographical areas in which the courts are situated might be decided by Congress or left to the courts themselves. *See id.* § 3, 1 Stat. 73, 73-74 (establishing the places where the district courts shall be held, but allowing discretion in the district judge to hold special courts "at such other place in the district, as the nature of the business and his discretion shall direct"). Even "fundamental" locational questions, however, should be distinguished from decisions about venue and personal jurisdiction. *See infra* text accompanying notes 70-80.

67. *See* Judiciary Act of 1789, ch. 20, § 7, 1 Stat. 73, 76 (current version codified in scattered sections of 28 U.S.C.).

68. In the Judiciary Act of 1789, this matter was the subject of explicit congressional control. *See id.* §§ 3, 5, 1 Stat. 73-75. Both the district and circuit courts, however, were given the power to hold special sessions at their discretion. *See id.*

69. *See id.* § 3, 1 Stat. at 74 (current version at 28 U.S.C. § 457 (1982)) (establishing general rules for the location of district court records, but giving the district judge the power to "appoint" the place for locating records in districts having more than one place for holding court).

70. *See id.* § 11, 1 Stat. 79 (current version at 28 U.S.C. §§ 1331-32, 1391 (1982)); *infra* notes 123-29 & 228-32 and accompanying text.

pelling defendants to appear and defend, the courts could not function as courts.[71] Logic dictates that the courts would have inherent power to issue original process. This inherent power would entail authority on a case-by-case basis to decide the extent of their personal jurisdiction.[72] It follows that the Supreme Court could review the lower court's decisions and ultimately settle the correct rule of personal jurisdiction.

Assume now that an additional element is added to this hypothetical. After establishing, locating, and defining the subject matter jurisdiction of lower courts, the first Congress conferred authority on the Supreme Court to create rules of practice and procedure for these courts and explicitly included the power to establish rules of personal jurisdiction. Would the lower courts' inherent power to issue original process and adjudicate questions of personal jurisdiction justify Supreme Court regulation of personal jurisdiction under an express grant of rulemaking authority?

In and of itself, the power to adjudicate an issue cannot establish the legitimacy of rulemaking power over the same issue. Adjudication is essentially retrospective, while rulemaking, like legislation, is prospective.[73] In the adjudicative hypothetical, a court's decision to issue original process and its subsequent determination of a personal jurisdiction issue is essentially interpretive in nature. The decision to issue process is justified because process is essential to the exercise of the subject matter jurisdiction conferred by Congress.[74] Similarly, subsequent adjudications of personal jurisdiction questions

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71. Without this inherent power, courts could not function as courts, at least not as courts were understood under the traditional common law model.

72. The practical solution would probably have been for the courts to limit the reach of their personal jurisdiction to defendants located within the geographical area in which the courts were situated. *See infra* text accompanying notes 123-25. But this conclusion is not inevitable. They might instead have concluded that, as national courts, their power to assert personal jurisdiction extended throughout the United States.

73. Judge Weinstein describes the legislative aspects of court rulemaking as follows:

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

J. WEINSTEIN, *supra* note 40, at 4-5 (footnotes omitted).

74. *See supra* text accompanying notes 71-72.

follow from the limited statutory scheme Congress created.[75] In contrast, creation of rules of personal jurisdiction under a delegation of supervisory rulemaking power by Congress potentially involves policy decisions by the Court without legislative guidance.[76] In addition, the supervisory rules would be made without the aid of individual fact situations and argument by self-interested parties, features of adjudication that protect courts from error.[77] Thus, whether the policy decision involved in creating a supervisory rule of personal jurisdiction must be reserved for Congress is not conclusively resolved by the existence of judicial power to adjudicate personal jurisdiction issues in the context of a concrete case.

Nevertheless, power to adjudicate personal jurisdiction issues within a limited statutory framework does seem relevant to rulemaking power. Where original process issued and personal jurisdiction questions were adjudicated on a case-by-case basis, the courts had only the barest indication of legislative policy preferences. The only clear message communicated by the legislature was that the courts should avoid defeat of the congressional purpose in creating lower federal courts and defining their subject matter jurisdiction. No discernible legislative policy existed to guide the choice between two or more[78] plausible, alternative schemes of personal jurisdiction that were consistent with the statutory scheme. Thus, the policy choices involved in adjudicating personal jurisdiction questions seem as significant as those involved in prospective, supervisory rulemaking.[79]

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75. In note 72, *supra*, it was assumed that if the courts had to evolve rules of personal jurisdiction in the process of adjudication from a limited statutory matrix, they would either conclude that they were limited in asserting jurisdiction over defendants or property located within the districts in which the court sat, or that they possessed nationwide personal jurisdiction authority. Other possibilities are, however, imaginable. In the face of congressional silence, the courts might conclude that Congress intended existing common law rules to remain in place to govern personal jurisdiction matters unless and until modified by statute. The Supreme Court drew such a conclusion in D'Arcy v. Ketchum, 52 U.S. (11 How.) 165 (1850), about the 1790 implementing statute to the full faith and credit clause of the Constitution. U.S. CONST. art. IV, § 1; Full Faith and Credit Act, ch. 11, 1 Stat. 122 (1790) (current version at 28 U.S.C. § 1738 (1982)). In *D'Arcy*, the Court reasoned that Congress had not, in enacting the statute, intended to overthrow the preexisting territorial rules of international jurisdiction. D'Arcy v. Ketchum, 52 U.S. (11 How.) at 175-76. For a discussion of *D'Arcy*, see Whitten, *The Constitutional Limitations on State-Court Jurisdiction: A Historical-Interpretative Reexamination of the Full Faith and Credit and Due Process Clauses Pt. 1*, 14 CREIGHTON L. REV. 499, 581-84 (1981).

76. In constructing a rule of personal jurisdiction, the Court might, of course, rely on the statutory matrix and attempt to remain close to its form and implications. The point is, however, that it need not do so.

77. *See supra* note 73.

78. *See supra* note 75.

79. Nor will the aid of a concrete case and the assistance of the parties necessarily add much to the Court's ability to determine the correct scheme of personal jurisdic-

When the Court is able to determine that there is no material difference in the policy choices involved in adjudication and rulemaking that would require exclusive legislative regulation of an area, there is no reason to reject as unconstitutional a delegation of rulemaking authority over the area. Similarity of policy choices in adjudication and rulemaking assures that differences between interpretive and legislative processes will not result in a separation of powers violation when supervisory rules are created under the delegation. In addition, the delegation itself represents the judgment of a coequal branch of government that judicial rulemaking does not usurp its prerogatives. Given these considerations, it seems that a congressional delegation of rulemaking power to the Court over personal jurisdiction should be accepted.

The determination that personal jurisdiction is an area of shared rulemaking power also supports the delegation to the Court of power to create venue rules. The policy import of venue and personal jurisdiction rules is virtually the same. Both kinds of rules regulate where an action may be brought. If either question is paramount, it is personal jurisdiction, because personal jurisdiction, like subject matter jurisdiction, has traditionally involved a question of "power,"[80] while venue has not. Therefore, if the power to make rules governing personal jurisdiction may be delegated to the Su-

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tion. A concrete factual setting may reveal the consequences to the parties of the selection of one rule rather than another, but these consequences may well be obvious even in the absence of an actual case. For example, it is easy to see the burdens that a scheme of nationwide federal personal jurisdiction would impose on defendants summoned from distant states, even in the absence of a concrete factual situation. Similarly, adversarial presentation will not necessarily aid in selection of the correct rule from a range of rules that are all equally plausible under the statutory scheme. When Congress has failed to provide policy guidance, adversaries may concoct nonexistent policies, but they will not be able to assist the Court in finding real policies where none exist.

80. A default judgment rendered without personal or subject matter jurisdiction has traditionally been considered invalid and susceptible to collateral attack, while a judgment rendered without proper venue has not. *See* J. FRIEDENTHAL, M. KANE & A. MILLER, CIVIL PROCEDURE § 14.7 at 642, 646 (1985); F. JAMES & G. HAZARD, CIVIL PROCEDURE § 2.1 (3d ed. 1985); RESTATEMENT (SECOND) OF JUDGMENTS §§ 1, 4 comment h (1982). This makes some sense because questions of personal jurisdiction may involve constitutional limitations on the power of courts, while questions of "mere venue" do not. *See* Clermont, *Restating Territorial Jurisdiction and Venue for State and Federal Courts*, 66 CORNELL L. REV. 411, 437-38 (1981). Nevertheless, it has been argued that no justification exists for two sets of rules governing the location of a federal action and that either rules of personal jurisdiction or rules of venue alone could satisfactorily perform that function. *See* Currie, *The Federal Courts and the American Law Institute Pt. 2*, 36 U. CHI. L. REV. 268, 300 (1969) (rules of personal jurisdiction); Barrett, *Venue and Service of Process in the Federal Courts — Suggestions for Reform*, 7 VAND. L. REV. 608, 628-33 (1954) (rules of venue). *But see* Clermont, *supra*, at 433-34 (arguing that neither personal jurisdiction rules nor venue rules offer the "optimal route" for determining locational questions, despite the substantial redundancy of the doctrines).

preme Court, so too may the power to create venue rules.

Thus far, it has been assumed that Congress explicitly authorized the Supreme Court to create rules specifically governing personal jurisdiction and venue. But suppose Congress conferred only *general* rulemaking authority on the Supreme Court, without specific reference to venue or personal jurisdiction. May the Court create valid rules of personal jurisdiction or venue under such circumstances?

This rises only to the level of a question of statutory interpretation. If, for example, the Court were to reason that by establishing courts within certain locations Congress intended to limit the geographical reach of their process, the Court would be unlikely to conclude that the general grant of rulemaking authority extends to matters of personal jurisdiction. Given its constitutionally superior authority to regulate federal court procedure,[81] Congress's exercise of power in an area justifies the conclusion that it intends to exclude judicial rulemaking in that area. Similarly, if there is no declared legislative policy in an area, Congress is more likely to intend a grant of rulemaking power to include authority within the area. This is especially true when the object of rulemaking is a procedure that is essential to the effective operation of the courts. Problems of a more serious and perhaps constitutional nature will arise only when Congress acts explicitly in a procedural area, confers rulemaking authority upon the Court within the same area, and also provides that Court-made rules will supersede inconsistent statutes.

C. Judicial Power to Make Procedural Rules Under a Delegation Statute when Congress Has Occupied a Procedural Area

The preceding discussion argued that an explicit delegation of rulemaking authority over personal jurisdiction should be accepted by the Supreme Court under certain circumstances. When Congress has not regulated personal jurisdiction by statute and the Court can see that it would face policy choices in adjudicating personal jurisdiction questions as significant as the policy choices it would face in rulemaking, it should accept an explicit delegation of rulemaking authority over personal jurisdiction.

This subsection alters the statutory context in material respects. Assume that Congress has legislated on the topic of personal jurisdiction, thus making a policy pronouncement in the area. In addition, assume that Congress has delegated supervisory rulemaking authority to the Court, either expressly over the area of personal jurisdiction or generally over the practice and procedure of the lower federal courts, and the delegation includes a provision that the rules made by the Court will supersede inconsistent statutes. Should the

81. *See supra* text accompanying notes 35-36 & 47.

Court conclude that the delegation of rulemaking power extends to personal jurisdiction, or should it conclude that the policy pronouncement by Congress precludes Court-made rules in the same area?[82]

The easiest case arises when Congress legislates in an area and also explicitly delegates supervisory rulemaking power to the Supreme Court over the same area.[83] In this situation, the Court should accept the delegation, as it would if Congress had not occupied the field. In effect, Congress has done no more than decide to regulate an area temporarily, perhaps until experience in the area reveals the desirability of alternatives to the congressionally established scheme.[84] The policy questions the Court will confront in rulemaking are still no more significant than they would have been in the absence of congressional occupation of the area and, indeed, may be a great deal easier. Presumably, the Court would not alter or replace the statutory scheme until such time as accumulated experience had revealed flaws in its operation. More important, the nature of the policy questions involved will not have changed in such a fashion as to make them "more fundamental" and thus less fit for judicial rulemaking. Furthermore, the explicit grant of rulemaking authority over the area still represents an important judgment by Congress that the area is not one over which it possesses, or wishes

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82. In examining this question, it will be helpful to assume for the time being that supersession provisions are not per se invalid: if it is valid for Congress to delegate rulemaking authority to the Court at all over a topic, it will be assumed that it is also valid for Congress to provide that Court-made rules will supersede inconsistent statutes. The constitutional problems discussed in this subsection will, therefore, be limited to those concerned with how the Court should determine whether an area falls within the exclusive rulemaking province of Congress. For a discussion of the validity of supersession provisions, see *infra* text accompanying notes 101-22.

83. The scheme described in the text resembles the existing delegation of rulemaking authority to the Supreme Court over rules of evidence in 28 U.S.C. § 2076 (1982). There, the Court is empowered to prescribe amendments to the statutorily prescribed Federal Rules of Evidence with the exception of rules of privilege, which must be approved by act of Congress. The story behind this statutory scheme is told in 21 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5006 (1977).

84. *See* Letter from Stephen B. Burbank to David Beier, *supra* note 22, at 281. Professor Burbank writes:

> I am somewhat more sanguine about the constitutional validity of specific supersession provisions, such as the authorization to prescribe amendments to the Federal Rules of Evidence . . . . Let us forget about "inherent power." Does Congress have the power to establish temporary rules in a statute and to provide for their supersession upon the promulgation of rules prescribed by the Supreme Court (or some other delegate) *under a delegation that is otherwise valid*? I should think so. Moreover, I should think that Congress could provide for supersession retrospectively so long as it identified the rules that, under this analysis, are "temporary." In both cases the repeal could, without too much strain, be attributed to Congress, acting in accordance with Article I.

Id. (emphasis added).

to exercise, exclusive authority.

A far more difficult question arises when Congress occupies a field and confers only general rulemaking authority on the Supreme Court in conjunction with a supersession provision. As noted earlier, the superior authority of Congress to regulate federal procedure justifies the conclusion that when Congress exercises power within an area, it means to exclude judicial rulemaking in that area.[85] Weighing against this conclusion in the present context, however, is the congressional delegation of general rulemaking authority to the Supreme Court, with the additional provision that Court-made rules shall supersede inconsistent statutes. The supersession provision represents a policy pronouncement by Congress that it is permissible for Court-made rules to nullify at least some procedural statutes.[86] In the absence of this provision, the Court would have to interpret the delegation of rulemaking power as limited to areas not occupied by Congress.

Clearly, however, the supersession provision cannot be read as authorizing the Court to make rules nullifying all procedural regulations by Congress, if for no other reason than because some procedural topics, such as wholesale regulation of subject matter jurisdiction, fall exclusively within the province of the legislative branch and cannot be delegated at all. Moreover, as discussed previously, whether other topics fall within the exclusive legislative province should be determined by a more fluid analysis that depends upon two factors: (1) the importance of the policy judgments to be made in the rulemaking process and (2) the legislature's judgment about the exclusivity of its own prerogatives in a particular area. The fact that supersession has been authorized, therefore, does not mean that the Court can exercise rulemaking power over a procedural topic also regulated by Congress. Instead, when a procedural area is occupied by Congress and rulemaking authority has not been explicitly delegated to the Court in that area, judicial rulemaking becomes highly suspect due to the lack of a specific judgment by Congress that it is *not* exercising exclusive control over the area.

Nevertheless, it would be a mistake to conclude that no rulemaking activity is permissible under these circumstances. Rulemaking may be desirable to adjust a procedural area to circumstances that have arisen since Congress originally legislated. Rules may also be

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85. *See supra* text accompanying note 81.

86. In fact, the original supersession provision was inserted in the version of the Rules Enabling Act discussed in the 1914 House Judiciary Committee Hearings precisely for the purpose of eliminating doubts about the ability of supervisory rules to repeal inconsistent statutes. *See Reforms in Judicial Procedure, American Bar Association Bills: Hearings Before the Committee on the Judiciary, House of Representatives*, 63d Cong., 2d Sess. 21-22, 25-29, 31, 33-37 (1914) [hereinafter *1914 Hearings*]; Burbank, *Rules Enabling Act*, *supra* note 1, at 1052-54.

needed to address gaps in the statutory scheme that may be filled without undermining established statutory policies. Finally, Court-made rules may be desirable to harmonize a statutory procedure with more important statutory policies established elsewhere in the procedural code. The accommodation of both congressional prerogatives and the purposes of the delegation of rulemaking power requires an evaluation of several factors. No single factor will necessarily be conclusive. Much depends upon the interaction of the factors in a particular area.

1. *The Detail with Which Congress Has Regulated the Procedural Area.*

One factor relevant to the validity of judicial rulemaking is the detail with which Congress has legislated in a procedural area. The right of Congress to control procedure to the exclusion of the courts dictates that the Court defer to any congressional concern that is expressed about specific procedural topics. Thus, the existence of detailed procedural regulations in a subject area is strong evidence that Congress intends to exclude judicial rulemaking in that area. Conversely, when Congress provides only the general outlines of procedure, the evidence is far weaker that it wishes to exclude judicial rulemaking. It makes a difference in judging the validity of federal rules of civil procedure governing pleading,[87] for example, that Congress simply required conformity to state law on such matters from 1789-1934 and did not extensively regulate the area itself. Although other factors also weigh in favor of the validity of judicially created pleading rules, it might nevertheless require greater effort to justify such rules if Congress had actively concerned itself with matters of pleading over the first one hundred and fifty years of federal procedural history.

2. *The Length of Exclusive Congressional Occupation of the Procedural Area.*

If Congress has long regulated a procedural area without judicial intervention, a strong presumption should exist that judicial rules in the area made under a general grant of rulemaking power are invalid. For example, though venue may fall under the heading of "practice and procedure," it would not be appropriate for the Supreme Court to promulgate rules of venue, given the history of specific legislative regulation of that area from 1789 to the present.[88] Long-standing congressional regulation, like detail, is strong evidence of an intent to exclude judicial policymaking. For Court-made rules to survive the presumption of invalidity created by long-standing *and*

87. *See* FED. R. CIV. P. 7-15.
88. *Cf.* FED. R. CIV. P. 82.

specific legislative regulation of a procedural field, the factors favoring judicial rulemaking in that field should be very strong indeed.

3. *The Apparent Importance of the Statutory Policy to Congress and Litigants.*

The apparent importance of a statutory scheme to Congress, as revealed by its position in the overall pattern of procedural regulation, should bear heavily on whether the Court may validly enter the area. In addition, the impact of a revision of the statutory scheme by rule on the litigants for whom Congress has provided the scheme bears heavily on the permissibility of Court-made rules in the area.

Again, venue provides a good example of a topic that, because of these factors, should not be altered by rule in the absence of weighty countervailing considerations. Venue rules are a step removed from fundamental rules of court creation and general subject matter definition, which fall within the exclusive regulatory province of Congress.[89] As previously observed, venue rules might be omitted from a federal procedural code altogether.[90] Such rules, however, clearly fall closer to the exclusive area of congressional concern than do, for example, pleading rules. Furthermore, the location of civil actions has significant implications for the burdens that will be endured by different classes of litigants. The impact on those litigants of an alteration of the statutory venue scheme thus weighs against the validity of judicial rulemaking within the area except under the most compelling circumstances.

4. *The Timing and Purpose of the Delegation of General Rulemaking Power in Relation to the Statutory Scheme.*

If a statutory regulation of a procedural topic is immediately conjoined with a general delegation of rulemaking power, it is more reasonable to conclude that the topic is susceptible to judicial rulemaking than if the delegation follows long after enactment of the procedural statute. For example, it is easier today to accept a general delegation of rulemaking power over the "forms of process, writs, pleadings, and motions"[91] of the district courts by virtue of the fact that rulemaking power was conferred on the Supreme Court over the "forms and modes of proceeding" in the Process Act of 1792 in conjunction with the congressionally imposed requirement of conformity to state law on the same subject.[92] It is more difficult to

89. *See supra* text accompanying notes 70-80.

90. *See supra* note 80.

91. 28 U.S.C. § 2072 (1982).

92. *See* Process Act of 1792, ch. 36, § 2, 1 Stat. 275, 276. *See also* Act of Aug. 23, 1842, ch. 188, § 6, 5 Stat. 516, 518 (supplementing the Judiciary Act of 1789). The Court's rulemaking power was confined in the Practice Conformity Act of 1872 by a requirement that the "practice, pleadings, and forms and modes of proceedings" in

accept a general delegation of rulemaking authority over "practice and procedure"[93] beyond matters of "form and mode" because of the absence of such a delegation in the original Process Acts.[94] Nevertheless, the general delegation of rulemaking authority over practice and procedure in the current Rules Enabling Act is, for the most part, acceptable even over procedural topics extending beyond "form and mode," because of the well-understood purposes of that Act to end conformity to state law and establish a uniform procedure for the district courts.[95] Thus, both the timing of the delegation and its purpose are important in assessing the validity of its application to specific subjects.

5. *The Extent to Which Court-Made Rules Will Impact on a Statutory Policy.*

The acceptability of judicial rulemaking in an area occupied by Congress depends in part upon whether the rules seek wholly to supplant the statutory scheme, to fill gaps in the scheme, or to deal with problems that have arisen with the operation of the statutory scheme. As the conflict between the rule and the statute grows, the likelihood increases that the rule is invalid. Thus, a rule abolishing the requirement in the general venue statutes that venue is proper in the district where the claim arose[96] would be much more questionable than a rule articulating factors that the courts should take into account in determining where the claim arose for purposes of the statute,[97] though other factors might tend to invalidate the latter rule also.[98]

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common law cases should conform "as near as may be" to state law "any rule of court to the contrary notwithstanding." Practice Conformity Act of 1872, ch. 255, § 5, 17 Stat. 196, 197. This does not detract from the force of the general delegation in the 1792 Act, however, which supports the conclusion that rulemaking authority over matters of "form and mode" is valid. For a discussion of the 1872 Act, see Burbank, *Rules Enabling Act*, *supra* note 1, at 1039-40.

93. 28 U.S.C. § 2072 (1982).

94. *See* Practice Conformity Act of 1872, ch. 255, § 5, 17 Stat. 196, 197; Act of Aug. 23, 1842, ch. 188, § 6, 5 Stat. 516, 518; Process Act of 1792, ch. 36, § 2, 1 Stat. 275, 276.

95. For a detailed discussion of the history of the current Act, see Burbank, *Rules Enabling Act*, *supra* note 1.

96. *See* 28 U.S.C. § 1391 (1982).

97. *Cf.* Leroy v. Great W. United Corp., 443 U.S. 173, 183-87 (1979) (reserving question whether claim can arise in more than one district, but articulating standard limiting plaintiff's choice in selecting among possible districts).

98. *See supra* text accompanying notes 88-90.

6. *The Extent to Which a Court-Made Rule Will Tend to Support or Protect Statutory Policies that Are More Important than the Statutory Policies Replaced by the Rule.*

One important factor favoring rule validity not yet mentioned[99] is the extent to which a supervisory rule will tend to implement, or perhaps prevent the defeat of, statutory policies that are more important than the statutes directly supplanted or contradicted by the rule. Thus, a rule protecting federal subject matter jurisdiction policies at the expense of federal statutes limiting the reach of the lower federal courts' personal jurisdiction authority is more easily justified than a rule contradicting established limits on personal jurisdiction without furthering subject matter jurisdiction policies.[100]

Further reflection may demonstrate that other factors should also have a bearing on rule validity. For present purposes it would not be desirable to establish a closed-ended set of criteria. Those discussed above are sufficient to set the stage for the case study of Rule 4 to be conducted in the next section. Only one obstacle remains before that study may be undertaken. Thus far, the discussion has assumed that supersession provisions are not invalid per se. A recent Supreme Court decision, however, has sometimes been read to invalidate supersession provisions. The question of the validity of supersession provisions is obviously crucial, because if Congress may not authorize the Supreme Court to make rules that supersede statutes, the entire modern Court rulemaking enterprise is jeopardized. Therefore, an inquiry into the validity of supersession statutes is necessary to complete the picture of the theoretical limits on Court rulemaking power.

D. The Validity of Supersession Provisions

The legislative history of the Rules Enabling Act of 1934[101] reveals that the supersession provision of that Act was included to *remove* doubts about the constitutionality of the delegation of rulemaking power to the Supreme Court.[102] Specifically, the drafters of the Act were concerned about the constitutionality of delegating to the Supreme Court the power to repeal existing statutes.[103] Ultimately, however, it was concluded that any superseding effect derived from

99. A number of factors supporting rule validity have been discussed above — notably the purposes of the statutory delegation of general rulemaking authority. *See supra* text accompanying note 95.

100. This particular factor, along with others, will play a large part in justifying or rendering invalid different portions of FED. R. CIV. P. 4. *See infra* text accompanying notes 205-27 & 239-50.

101. Rules Enabling Act of 1934, ch. 651, 48 Stat. 1064 (current version at 28 U.S.C. § 2072 (1982)). See *supra* note 1 for the complete text of the Act.

102. *See* Burbank, *Rules Enabling Act*, *supra* note 1, at 1052-54.

103. *See id.* at 1053.

the Rules Enabling Act itself rather than from the Court-made rules.[104] This conclusion is consistent with the preceding discussion in this Article. In the absence of an explicit provision authorizing rules to supersede statutes, the occupation of a procedural area by Congress warrants the conclusion that Court-made rules in the area are prohibited.[105] Thus, supervisory rulemaking authority could only be exercised over subjects upon which Congress had not spoken. The inconvenience of such a conclusion constitutes a powerful practical argument in favor of supersession provisions, which constitute policy statements that it is permissible for some procedural rules created under a general delegation of rulemaking power to supersede statutes regulating the same area.

Nevertheless, the Supreme Court's recent decision in *INS v. Chadha*[106] has caused some concern that supersession provisions such as that in the Rules Enabling Act violate the separation of powers doctrine. *Chadha* concerned the validity of a provision of the Immigration and Nationality Act[107] that allowed either the Senate or the House of Representatives to veto unilaterally decisions of the Executive Branch, made under authority delegated to the Attorney General by Congress, to allow deportable aliens to remain in the United States. The Supreme Court invalidated this provision on separation of powers grounds. In essence, the Court held that the one-house veto provision violated the bicameralism[108] and presentment[109] provisions of the Constitution.[110]

Obviously, *Chadha* does not directly invalidate provisions allowing Court-made rules to supersede statutes. *Chadha*, however, is sometimes read to cast doubt on such provisions because of several general points established in the Court's opinion: (1) amendment and repeal of statutes, no less than enactment, must conform to article I of the Constitution;[111] (2) there is no provision allowing Congress to repeal or amend laws other than by the legislative means provided by article I;[112] and (3) the explicit prescription for legislative action contained in article I cannot be amended by legislation.[113] The argument is, therefore, that because supersession of a statute by rule does not conform to the procedures in article I, supersession provisions are invalid.[114]

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104. *Id.*
105. *See supra* text accompanying notes 81-100.
106. 462 U.S. 919 (1983).
107. 8 U.S.C. § 1254(c)(2) (1982).
108. U.S. CONST. art. I, §§ 1, 7.
109. U.S. CONST. art. I, § 7, cl. 2.
110. INS v. Chadha, 462 U.S. at 946-59.
111. *See id.* at 954.
112. *See id.* n.18.
113. *See id.* at 958 n.23.
114. This point has been raised in recent legislative proceedings considering pro-

Despite these doubts, the better view is that supersession provisions are not invalid per se. Some supporters of supersession provisions have argued they are sound because the provisions do not, on their face, authorize the courts to repeal or amend existing statutes. Rather, they provide that conflicting laws shall be of no further force and effect once rules promulgated by the courts take effect. This is seen as a recognition by Congress of the inherent authority of the courts to regulate their own practice and procedure.[115] Supersession provisions are, therefore,

> an attempt by Congress to strike a constitutionally sound balance between the overlapping powers of the judicial and legislative branches to promulgate rules of practice and procedure to govern litigation in the federal courts, by withdrawing from the field once the courts have exercised that power in a particular instance. Thus, the supersession provisions do not involve an unconstitutional delegation of legislative authority to the judicial branch, but rather congressional forbearance or deference, in an area of shared constitutional authority, to the judiciary's inherent authority to promulgate rules of practice and procedure.[116]

This view is sound insofar as it recognizes that the critical inquiry in judging the validity of judicial rulemaking is whether a subject must be dealt with exclusively by Congress or whether it falls within an area of shared legislative-judicial power. There is some danger, however, that by focusing on the "inherent power" of the Court to make rules one will omit the separation of powers questions that must be asked about rulemaking in procedural areas previously occupied by Congress. For a delegation of rulemaking authority to be valid under the separation of powers doctrine, it is indeed true that the area of delegated authority must not be one that Congress has exclusive power to regulate; but, as noted earlier, Congress may have exclusive power to regulate a procedural topic for either of two reasons. Congressional power may be exclusive because the Constitution absolutely confides the subject to Congress, permitting no judicial intervention by rule even when Congress chooses not to act.[117]

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posed revisions to the rulemaking power. *See* H.R. REP. No. 422, 99th Cong., 1st Sess. 17, 23, 42 (1985) [hereinafter Rules Enabling Act Report]. *See also Rules Enabling Act, 1985: Hearings Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the Comm. on the Judiciary, House of Representatives*, 98th Cong., 1st & 2d Sess. 130-31, 134-35 (1984) [hereinafter *Rules Enabling Act Hearings*].

115. *See* Rules Enabling Act Report, *supra* note 114, at 46.

116. *Id.* The supersession provision was originally inserted in the 1914 version of the Rules Enabling Act (which was not enacted) to make it explicit that any superseding effect would result from the Act itself, rather than from the force of Court-made rules promulgated under the Act that were inconsistent with statutes. *See* Burbank, *Rules Enabling Act*, *supra* note 1, at 1052-54 & n.166. *See also 1914 Hearings*, *supra* note 86, at 21-22, 25-29, 31, 33-37.

117. *See supra* text following note 86.

Alternatively, an area may fall within the exclusive province of the legislative branch because Congress has occupied it by statute and no adequate justification exists for the Court to enter the area by supervisory rule.[118]

In effect, the latter possibility means that while "inherent power" in the judiciary to formulate rules in the absence of congressional action is relevant to the validity of supersession provisions, it does not ultimately solve the more important problem of whether the general delegation of rulemaking power over an area violates separation of powers restrictions when Congress has occupied the area by statute. Those who view the Federal Rules of Civil Procedure as valid after *Chadha* sometimes seem to view the validity of supersession per se as the only relevant inquiry. They reason that *Chadha* does not invalidate the rules because they are within the inherent power of the judiciary, and *Chadha* only invalidates nonlegislative rulemaking that occurs in an area where legislation is required.[119] This view is correct, however, only insofar as the validity of supersession provisions accompanying delegations of rulemaking power are concerned. That the judiciary would have inherent power to regulate an area Congress has not occupied by statute does indeed insulate supersession provisions from per se invalidity under the *Chadha* rationale; but inherent power to make procedural rules in the *absence* of congressional occupation of a field does not validate rulemaking in the same field when Congress has acted. For supervi-

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118. *See supra* text accompanying notes 85-86.

119. This view came out in hearings before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice on the Rules Enabling Act in 1984:

> The decision in the *Chadha* case suggests . . . that . . . to the extent that something must be done by a legislature as opposed to some other body — there is only one way that action can acquire article I sanction — and that is by passage by both Houses, and presentment to the President.
>
> Therefore, legislative sanction to the Federal rules was removed by the *Chadha* decision. Their validity now flows from the fact that they are within the inherent power of the judiciary to promulgate . . . .
>
> . . . .
>
> The problem emerges, though, because there is . . . clear consensus . . . that there are two types of rules. One type of rule lies within the inherent traditional power of the court to promulgate. Those are the housekeeping rules, the rules that don't really affect people's rights very much. They tell you what time the court opens; tell you, perhaps, how many days you have to file which piece of paper; how long to take to answer a motion. Those kinds of rules . . . continue to lie within the inherent judicial power to promulgate. And I don't think there is any question as to their validity.
>
> But there is another whole species of rules; rules like fee-shifting rules . . . .
>
> Those kinds of rules go far beyond the notion of housekeeping; they dramatically affect the substantive rights of all Americans . . . .

Rules Enabling Act Hearings, *supra* note 114, at 130-31 (statement of Mr. Neuborne).

sory rulemaking to be valid under the latter circumstance, an adequate justification must be offered for the Court-made rule.[120] A supersession provision in a statute delegating general rulemaking power to the Court is not, in and of itself, adequate justification.[121]

To determine further how the required process of justification affects particular kinds of rulemaking, it will be helpful to turn now to the final objective of this Article: the case study of Federal Rule of Civil Procedure 4. Original Rule 4 and its various amendments provide an example of supervisory rulemaking under a general delegation[122] of authority to the Supreme Court in an area regulated extensively by Congress.

III. Rule 4 and Separation of Powers

Prior to the Federal Rules of Civil Procedure, the power of the lower federal courts to issue process for defendants in civil actions was restricted, absent a specific federal long arm statute, to the districts in which the courts sat. This restriction was the product of statutes existing since 1789, such as the district-line statutes.[123] In *Toland v. Sprague*,[124] the Supreme Court interpreted the district-line statutes as restrictions on the power of the lower federal courts to assert personal jurisdiction over defendants in civil actions. The Court stated:

> The judiciary act has divided the United States into judicial districts. Within these districts, a circuit court is required to be holden. . . . 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 district. Congress

120. *See supra* text accompanying notes 82-100.

121. *See supra* text accompanying notes 85-100. In addition to distinguishing between justification for the validity of supersession provisions and justifications for the validity of the delegation of rulemaking authority to the Court, it is important also to keep in mind the differences between explicit and general delegations of rulemaking power to the Court. An explicit delegation of rulemaking power to the Court in an area occupied by Congress is a sufficient justification in itself for supervisory rulemaking in the area, as long as the area is not one confided absolutely to Congress by the Constitution. *See, e.g.*, 28 U.S.C. § 2076 (1982) (authorizing the Court to amend the Federal Rules of Evidence). *See supra* text accompanying notes 59-81. On the other hand, a delegation in general terms creates far greater difficulties. The conclusion that Congress meant to exclude rulemaking in the area when it occupied that procedural area is not overcome by a delegation of rulemaking power in general terms, as it would be by an explicit delegation. For example, a delegation of power over "practice and procedure" is inadequate. The additional justificatory process described above, *see supra* text accompanying notes 59-81, must therefore be employed to determine the validity of rulemaking in the area.

122. *See supra* note 121.

123. Judiciary Act of 1789, ch. 20, § 2, 1 Stat. 73 (current version at 28 U.S.C. §§ 81-131 (1982) (defining district lines in 50 states, District of Columbia, and Puerto Rico)).

124. 37 U.S. (12 Pet.) 300 (1838).

> might have authorized civil process from any circuit court, to have run into any state of the Union. It has not done so. . . . We think that the opinion of the legislature is thus manifested to be, that the process of a circuit court cannot be served without the district in which it is established; without the special authority of law therefor.[125]

A second statutory restriction on the district courts' personal jurisdiction was derived from section 11 of the Judiciary Act of 1789, which referred to the traditional common law form of process known as *capias ad respondendum*:[126] "[N]o person shall be arrested in one district for trial in another, in any civil action before a district or circuit court."[127] In *Toland*, the Supreme Court also interpreted section 11 to restrict the ability of district courts to assert personal jurisdiction over nonresidents of the district.[128]

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125. *Id.* at 328. In *Toland*, the Supreme Court was echoing the views expressed by Justices Washington and Story in prior circuit court decisions. In *Ex parte* Graham, 10 F. Cas. 911 (C.C.E.D. Pa. 1818) (No. 5657), Justice Washington stated:

> It is admitted, that [the circuit] courts, in the exercise of their common law and equity jurisdiction, have no authority, generally, to issue process into another district, except in cases where such authority has been specially bestowed, by some law of the United States. The absence of such a power, would seem necessarily to result from the organization of the courts of the United States; by which two courts are allotted to each of the districts, into which the United States are divided; the one denominated a district—the other a circuit court. This division and appointment of particular courts, for each district, necessarily confines the jurisdiction of the local tribunals, within the bounds of the respective districts, within which they are directed to be holden.

Id. at 912. The above statement by Justice Washington that the circuit courts must have "authority . . . specially bestowed, by some law of the United States," *id.*, may suggest that in the absence of any personal jurisdiction regulation by Congress, the courts could not authorize the issuance of process on either a case-by-case basis or by rule — that is, that the power over personal jurisdiction is exclusively confided to Congress by the Constitution. Washington's later remarks in the same passage, however, indicate quite clearly that special legislative authority is required because "[t]hese provisions appear manifestly to circumscribe the jurisdiction of those courts, as to the person of the defendant, by the limits of the district where the suit is brought . . . ." *Id.*

Justice Story expressed an identical view in Picquet v. Swan, 19 F. Cas. 609 (C.C.D. Mass. 1828) (No. 11,134): "[B]y the general provisions of the laws of the United States, the circuit courts could issue no process beyond the limits of their districts. . . . [I]ndependent of positive legislation, the process can only be served upon persons within the same districts." *Id.* at 615. *See also* Comment, *Personal Jurisdiction Over Foreign Corporations in Diversity Actions: A Tiltyard for the Knights of Erie*, 31 U. CHI. L. REV. 752, 766-67 (1964).

126. *See* J. KOFFLER & A. REPPY, HANDBOOK OF COMMON LAW PLEADING 73 nn.24-25 (1969).

127. Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78-79 (current version at 28 U.S.C. § 1693 (1982)).

128. *See* Toland v. Sprague 37 U.S. (12 Pet.) at 330. In *Toland*, the Court was again following the interpretation of section 11 made by Justices Washington and Story in prior circuit court decisions. *See supra* note 125. In *Ex parte Graham*, Jus-

These two general restrictions limited the personal jurisdiction of the district courts when the Federal Rules of Civil Procedure became law in 1938.[129] It was in this context that Federal Rule 4(f) was promulgated by the Supreme Court.[130] The Rule provided:

> (f) TERRITORIAL LIMITS OF EFFECTIVE SERVICE. All process other than a subpeona 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.[131]

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tice Washington, after declaring the effect that the district-line statutes had in restricting the jurisdiction of the circuit courts, stated:

> But the legislature of the United States, from abundant caution, as it would seem, has not left this subject to implication. After conferring upon [the circuit and district] courts, respectively, the portion of jurisdiction which congress intended they should exercise, the 11th section of the act of 24th September, 1789, declares, "that no person shall be arrested in one district, for trial in another, in any civil action, before a circuit or district court; nor can a civil suit be brought before either of those courts, 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." These provisions appear manifestly to circumscribe the jurisdiction of those courts, as to the person of the defendant, by the limits of the district where the suit is brought . . . .

Ex parte Graham, 10 F. Cas. at 912 (citation omitted). Justice Story agreed with this interpretation. In *Picquet v. Swan*, he wrote:

> Let us . . . consider what is the true interpretation . . . [of] this clause. It first provides that "no person shall be arrested in one district for trial in another, in any civil action before a circuit or district court." So that it is clear, that the process of capias is limited to the local boundaries of the court, by which it is issued.

Picquet v. Swan, 19 F. Cas. at 613. *See also* Abraham, *Constitutional Limitations Upon the Territorial Reach of Federal Process*, 8 VILL. L. REV. 520, 532 (1963); Foster, *Judicial Economy; Fairness and Convenience of Place of Trial: Long-Arm Jurisdiction in District Courts*, 47 F.R.D. 73, 79 (1968); Foster, *Long-Arm Jurisdiction in Federal Courts*, 1969 WIS. L. REV. 9.

129. Congress had, of course, enacted numerous special statutes that allowed the district courts to exercise nationwide long arm jurisdiction in specified cases. *See, e.g.*, Act of Feb. 22, 1917, ch. 113, 39 Stat. 929, *amended by* Act of Feb. 25, 1925, ch. 317, 43 Stat. 976 (interpleader); Act of May 8, 1926, ch. 273, 44 Stat. 416; Act of Jan. 20, 1936, ch. 13, 49 Stat. 1096, (codified as amended at 28 U.S.C. § 2361 (1982) (interpleader)); Securities Act of 1933, § 22, Pub. L. No. 73-22, 48 Stat. 74, 86 (codified as amended at 15 U.S.C. § 77v (1982)); Securities Exchange Act of 1934, § 27, Pub. L. No. 73-291, 48 Stat. 881, 902-903 (codified as amended at 15 U.S.C. § 78aa (1982)). In the absence of such special legislation, however, the restrictions described in the text operated fully.

130. *See* 308 U.S. 645, 667 (1937). On December 20, 1937, Chief Justice Hughes reported the new rules to the Attorney General with the request that he report the rules to Congress at the beginning of the next regular session in January 1938. *Id.* at 649. The Rules became effective "after the close of such session." Rules Enabling Act of 1934, ch. 651, § 2, 48 Stat. 1064 (current version at 28 U.S.C. § 2072 (1982)).

131. 308 U.S. at 667.

Hence Rule 4(f) extended the reach of the district courts' personal jurisdiction beyond the limits imposed by existing statutory restrictions. This is curious because Federal Rule 82 has provided since 1938 that the rules "shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein."[132] As this Article demonstrates later, the word "jurisdiction" in Rule 82 refers only to subject matter jurisdiction.[133] Rule 82 therefore prohibits extensions or limitations of subject matter jurisdiction and venue, but not personal jurisdiction. Given the long history of regulation by Congress of both federal venue and federal personal jurisdiction, and given the other similarities between venue and personal jurisdiction, why should Rule 82 exempt venue from modification by rule but not personal jurisdiction? As discussed below, no satisfactory answer has ever been given to this question.

A. The Validity of Rule 4(f)

1. *The Rulemakers' Reasoning.*

As noted above, Rule 82 forbids the extension or limitation of venue by rule, and states that the rules "shall not be construed to extend or limit the jurisdiction of the United States district courts . . . ."[134] The Rule does not define "jurisdiction," nor does the Advisory Committee's note accompanying Rule 82 address whether "jurisdiction" refers to personal and subject matter jurisdiction, or only to subject matter jurisdiction.[135] Discussions of the rules prior to their effective date, however, indicate that the Advisory Committee intended to distinguish "personal jurisdiction," or "service of process," from subject matter jurisdiction.

Rules 4 and 82 were discussed during the 1938 Cleveland Institute on the Federal Rules.[136] Former Attorney General William D. Mitchell, chairman of the Advisory Committee that drafted the federal rules, agreed that Rule 4(f) purported

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132. FED. R. CIV. P. 82.

133. *See infra* text accompanying notes 134-48.

134. FED. R. CIV. P. 82.

135. The complete advisory committee note to original Rule 82 is as follows:

> 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. The rule is declaratory of existing practice under the former Federal Equity Rules with regard to such provisions as former Equity Rule 26 on Joinder of Clauses [sic] of Action and Equity Rule 30 on Counterclaims. Compare Shulman and Jaegerman, Some Jurisdictional Limitations on Federal Procedure, 45 Yale L.J. 393 (1936).

FED. R. CIV. P. 82 advisory committee's note.

136. *See* RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES WITH NOTES AND PROCEEDINGS OF THE INSTITUTE ON FEDERAL RULES, CLEVELAND, OHIO, JULY 21, 22, 23, 1938 (W. Dawson ed. 1938) [hereinafter CLEVELAND INSTITUTE].

> to enlarge the limits within which process may be served in certain cases, enlarging the area, the territorial limits, from the district to the whole state, so that if there is a state in which there are two or more districts, the question arises whether this is a method of procedure or affects substantive rights.
>
> As to this problem I would say that this point was specifically called to the attention of the Supreme Court by special note, in which the question of power was raised for their consideration, and they adopted this rule. What conclusions are to be drawn from that you can determine for yourself.[137]

Two features of this statement are of interest. First, Mitchell considered Rule 4(f) problematic only because it represented a potential violation of the substantive rights restriction of the Rules Enabling Act.[138] As did others, he viewed the substantive rights restriction as the only limitation on the rulemaking power.[139] Second, Mitchell remarked that the Supreme Court had been alerted to the potential problems of the Rule and promulgated it anyway. The statement suggests that the Advisory Committee had not independently considered the content of the limits on the rulemaking power.

In later remarks, Mitchell commented directly on Rule 82: "Jurisdiction and venue are unaffected. That is stated in Rule 82, but the rule is really surplusage, because the jurisdiction and venue are matters of substantive right and not proper pleading, practice or procedure."[140] Subsequently, the remarks of Charles E. Clark, Dean of Yale Law School and Reporter for the Advisory Committee, confirmed that the Committee viewed the restrictions in Rule 82 as coextensive with the substantive rights limitation of the Rules Ena-

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137. *Id.* at 183-84. Despite the conclusions expressed here, apparently Mr. Mitchell had doubts about the validity of Rule 4(f). Professor Burbank has cited evidence to this effect arising after the effective date of Rule 4(f) and after several courts had invalidated it as an improper extension of "jurisdiction." *See* Burbank, *Rules Enabling Act*, *supra* note 1, at 1172 n.673.

138. *See supra* text accompanying notes 1-9.

139. *See infra* notes 140-45 and accompanying text.

140. CLEVELAND INSTITUTE, *supra* note 136, at 188. Mitchell made the same point later at the New York symposium on the federal rules: "The jurisdiction of the federal courts and venue in the federal courts are subjects unaffected by the rules, as stated in Rule 82, and that would be true in any event, because those are matters of substantive right." PROCEEDINGS OF THE SYMPOSIUM ON FEDERAL RULES OF CIVIL PROCEDURE AT NEW YORK CITY 231 (1938). Dean Clark equated jurisdiction and venue with substantive rights:

> We have an important rule toward the end here — Rule 82 — which provides that these rules do not either extend or limit the jurisdiction or venue of the federal courts. Of course these rules, being procedural rules, ought not to change these vitally important questions of policy, of legislative or at times even constitutional policy, between the state, and the Federal Government.

PROCEEDINGS OF THE INSTITUTE ON FEDERAL RULES OF CIVIL PROCEDURE HELD AT WASHINGTON, D.C. 60 (1938).

bling Act and that Rule 4(f) was not viewed as involving a substantive rights violation. Clark agreed that Rule 4(f) slightly extended the territorial jurisdiction of the district courts, but he nonetheless viewed the rule as valid:

> The question has been raised whether this is not a substantive change, *one affecting jurisdiction and venue.* I might say on that, it is our theory that definitely it is not. This is not a matter of either the jurisdiction of the court, what matters the court shall hear and decide, or of the venue, which is the place where certain kinds of action shall be tried. This affects neither one of those points. It simply says that in cases where the district court already has jurisdiction and venue its process may reach as far as the confines of that state itself. In other words, that is why we consider it procedural. It is simply allowing people to be brought before the court within the entire state and not merely within one district.[141]

Other remarks made during the Cleveland Institute, however, indicate that the Advisory Committee did not consider every facet of rulemaking on questions of personal jurisdiction exempt from the substantive rights restriction. Dean Clark observed that the last sentence of Rule 4(f) authorized service outside the state pursuant to federal long arm statutes.[142] He added: "This rule in effect slightly extends service, and certainly doesn't intend to restrict it anywhere, particularly in very important provisions for service generally throughout the country. It would cause a great deal of difficulty if we had in any way restricted such statutes."[143] Subsequently, a question was posed whether Rule 4(d)(7), which then authorized service on certain categories of defendants in the manner prescribed by state law,[144] allowed the use in federal court of state provisions permitting attachment of a nonresident defendant's property coupled with service by publication pursuant to the state statute. Dean Clark responded:

> My answer is, No, it does not. First, as I understand the law, I would say *it is more than a mere rule,* and that the federal law *jurisdiction* is as you state.
>
> Second, subdivision (7) is a method of service, and it is not a matter of the court's jurisdiction, and the matter you refer to is, I think, clearly a matter of the federal court's *jurisdiction.* Not only generally did we not expect or think we could change any matter of *jurisdiction,* but we have a special protestation that we did not do so. It is Rule 82 . . . .[145]

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141. *Id.* at 205-206 (emphasis added). *See also id.* at 217-18 (Dean Clark differentiating between venue and process).

142. *Id.* at 209.

143. *Id.*

144. The provisions of original Rule 4(d)(7) are now found in FED. R. CIV. P. 4(c)(2)(C)(i).

145. CLEVELAND INSTITUTE, *supra* note 136, at 212 (emphasis added). *See also id.*

What on earth is going on here? First, the provisions of Rule 4(f) are said not to involve violations of the rulemaking power; specifically, Dean Clark indicated that the extension of personal jurisdiction authority in Rule 4(f) was not the kind of jurisdiction referred to in Rule 82.[146] Subsequently, however, Dean Clark stated that a *restriction* of the personal jurisdiction authority conferred by a federal long arm statute would "cause a great deal of difficulty."[147] Finally, he clearly stated that an *extension* of personal jurisdiction authority to encompass the attachment and publication provisions in actions against nonresidents would constitute a violation of the rulemaking power as limited by Rule 82.[148] At least superficially it would seem either that the word "jurisdiction" in Rule 82 includes personal jurisdiction or it does not. Yet Dean Clark's remarks indicate that it does, but only some of the time. Furthermore, even though Rule 82 prohibits both extensions and limitations of jurisdiction, it might be possible to distinguish between rules restricting personal jurisdiction authority conferred by Congress and rules extending personal jurisdiction authority, the former being prohibited while the latter are not. Dean Clark, however, believed the extension made by Rule 4(f) was permissible, but believed an extension incorporating state attachment statutes would be impermissible.

The confusion that the Advisory Committee experienced in regard to limitations on the rulemaking power has been thoroughly documented by Professor Burbank.[149] The legislative history of the Rules Enabling Act indicates that the purpose of the substantive rights limitation may have been partly to restate constitutional separation of powers restrictions on Supreme Court rulemaking, although this point is far from clear.[150] Yet, in the absence of some indication from the Advisory Committee regarding the nature of the constitutional limitations it supposed were contained in the substantive rights restriction of the Act, even an assumption that the Act was attempting to restate the Constitution provides no guidance as to the meaning of the Advisory Committee's discussion of Rules 4 and 82. If some plausible, independent reasons for the Advisory Committee's view can be constructed, then one might justify the structure of the rules; but while some of the Committee's distinctions make

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at 381-82 (Mr. Mitchell responding negatively to a question whether Rule 4(d)(7) authorized use of state service by publication provisions on nonresident defendants in certain actions).

146. *See supra* text accompanying note 141.

147. *See supra* text accompanying note 143.

148. *See supra* text accompanying note 145.

149. See Burbank, *Rules Enabling Act*, *supra* note 1, at 1027, 1135-37. Professor Burbank also notes that the Committee's interpretation of the word "jurisdiction" in Rule 82 to exclude personal jurisdiction is not the only possible interpretation. *Id.* at 1172 n.673.

150. *See id.* at 1114-21.

sense, no persuasive case can be made for its view of the differences in the validity of rules affecting venue and those affecting personal jurisdiction.

The easiest way to understand the Advisory Committee's approach to rulemaking is to consider subject matter jurisdiction. One need not resort to the substantive rights restriction at either a constitutional or a statutory level to conclude that statutes fixing the definition of subject matter jurisdiction may not be superseded by Court-made rules under a general delegation of rulemaking power.[151] Nevertheless, evaluation of such statutes will virtually always reveal that they are supported by substantive policies.[152] For example, the general federal question jurisdiction of the district courts[153] satisfies the need for expert, uniform, and unbiased interpretation of federal substantive law.[154] The grant of general diversity jurisdiction rests on the ground that state courts might be prejudiced against noncitizens of the state.[155] These reasons transcend the narrow concerns for fairness and efficiency that are the basis of most purely "procedural" rules in that they focus on matters of broader impact on the substantive rights of litigants.[156] Thus, the Advisory Committee's

151. *See supra* notes 59-62 and accompanying text.

152. Some commentators have argued that subject matter jurisdiction is procedural in the sense established by the Supreme Court's interpretation of the Rules Enabling Act in Sibbach v. Wilson & Co., 312 U.S. 1 (1941), and Hanna v. Plumer, 380 U.S. 460 (1965), with the resulting conclusion that Rule 82 is not required by the Rules Enabling Act. *See* Goldberg, *The Influence of Procedural Rules on Federal Jurisdiction*, 28 STAN. L. REV. 395, 433 (1976). This conclusion is correct only because *Sibbach* and *Hanna* give relatively little content to the restrictions of the Act. *See supra* notes 2-6 and accompanying text. Nonetheless, this view does not alter the fact that the members of the Advisory Committee apparently saw a link between Rule 82 and the Rules Enabling Act. Nor does it affect the analysis of this Article, which focuses on non-substantive constitutional restrictions on the rulemaking power. Of course, modification of subject matter jurisdiction statutes by rule would also violate the *Sibbach* dictum that the rules may not "extend or restrict the jurisdiction conferred by a statute." *See* Sibbach v. Wilson & Co., 312 U.S. at 10. *See also supra* note 20. Although some regulation of subject matter jurisdiction by rule may be permissible if explicitly authorized and directed by Congress, *see supra* note 62, modification of subject matter jurisdiction statutes in the absence of such authorization is surely not permissible. Similarly, rules made to implement discretionary grants of subject matter jurisdiction, such as the certiorari jurisdiction conferred by sections 1254(3) and 1257(2) of the United States Code are clearly permissible, while rules impairing fixed subject matter jurisdiction policies would not be.

153. *See* 28 U.S.C. § 1331 (1982).

154. *See* ALI STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 164-68 (1969) [hereinafter ALI STUDY].

155. *See* C. WRIGHT, *supra* note 5, § 23, at 128.

156. *See* Ely, *supra* note 5, at 724-25. Even though the description of the diversity jurisdiction may seem to fit the description of purely procedural purposes described in the text, it is probable that the fairness sought to be achieved by that grant of jurisdiction is broader than the kinds of fairness referred to in the usual description of purely procedural rules. Professor Ely has noted that the usual definition of "sub-

view, expressed by Dean Clark, that modifications of subject matter jurisdiction statutes by Court-made rules would abridge substantive rights is correct.[157]

It is also relatively easy to understand how *restrictions* on congressionally conferred long arm jurisdiction would adversely affect substantive rights.[158] The conferral of nationwide long arm jurisdiction on federal courts has often occurred in conjunction with the creation of special federal substantive rights. Thus, for example, the Securities Act of 1933 and the Securities and Exchange Act of 1934 created new substantive rights and obligations in the securities area.[159] The federal courts were given subject matter jurisdiction over civil actions arising under these statutes, concurrently with the state courts in the case of the 1933 Act[160] and exclusive of the state courts in the case of the 1934 Act.[161] In addition, both Acts provided for liberal venue of actions as well as nationwide long arm jurisdiction.[162] The liberal venue and service provisions thus aided the vindication of the substantive rights conferred by Congress. Restriction of these provisions would consequently detract from the remedial purposes of the Acts.

Even when Congress has conferred federal long arm jurisdiction without creating federal substantive rights, such as in the federal interpleader statutes,[163] substantive reasons for the conferral of long arm jurisdiction are arguably discernible. For example, the first interpleader statute was enacted in 1917 and applied only to insurance companies and fraternal beneficiary societies.[164] The objective of the statute was to protect such institutions from the double liability possibility created by *New York Life Insurance Co. v. Dunlevy*,[165]

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stance" focuses on " 'rules of law which characteristically and reasonably affect people's conduct at the stage of primary private activity.' " *Id.* at 725 (quoting H. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 678 (1953)). This definition seems to fit the purposes of the diversity jurisdiction, which traditionally focused on the effect of state-court bias and prejudice on the "free movement and business activity throughout the several states" and the "incidental, nationalizing functions" of having federal courts in every state, which "may well have helped to break down the traditions of separate identity of the previously independent states and to make citizens of all states come to feel part of a larger union." ALI STUDY, *supra* note 154, at 101-102.

157. *See supra* text accompanying note 141.

158. *See supra* text accompanying note 143.

159. *See* Securities Act of 1933, § 22, Pub. L. No. 73-22, 48 Stat. 74, 86 (codified as amended at 15 U.S.C. § 77v (1982)); Securities Exchange Act of 1934, § 27, Pub. L. No. 73-291, 48 Stat. 881, 902-903 (codified as amended at 15 U.S.C. § 78aa (1982)).

160. *See* 15 U.S.C. § 77v (1982). No removal of actions filed in state court is permitted under this statute.

161. *Id.* § 78aa.

162. *Id.* §§ 77v, 78aa.

163. *See* interpleader statutes cited *supra* note 129.

164. *See* Act of Feb. 22, 1917, ch. 113, 39 Stat. 929.

165. 241 U.S. 518 (1916).

which had narrowly restricted the availability of interstate interpleader in state courts under the fourteenth amendment.[166] The nationwide long arm jurisdiction provided for under this statute was an essential part of the relief supplied to these institutions. It seems fair to characterize the purposes of this Act, at least in part, as substantive, due to the specific objective of the Act to aid a particular industry. Although the modern remedy of interpleader has been significantly broadened to include all classes of litigants,[167] the original substantive purposes of the 1917 Act continue to support the availability of the federal remedy. Therefore, restriction of the long arm jurisdiction provision by rule could plausibly be considered an abridgement of a substantive right.[168]

Justification of the Advisory Committee's distinction between venue and personal jurisdiction extensions is much more difficult. Venue modifications were prohibited by Rule 82 under the belief that such modifications would involve violations of substantive rights.[169] The extension of personal jurisdiction in Rule 4(f) was not deemed a violation of substantive rights and was not, therefore, considered to be invalidated by the prohibition on modifications of jurisdiction in Rule 82.[170] Nevertheless, an interpretation of Rule 4(d)(7) that resulted in incorporation of state attachment statutes was considered impermissible as an extension of "jurisdiction" prohibited by Rule 82.[171] Presumably, such an extension would involve an abridgment, enlargement, or modification of substantive rights.

To conclude that a substantive *purpose* supports general venue statutes seems impossible. General venue statutes are simply legislative determinations about where classes of civil actions may most conveniently and efficiently be tried.[172] Of course, some special fed-

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166. *See* 7 C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE AND PROCEDURE § 1701, at 485-87 (2d ed. 1986).

167. *See* 28 U.S.C. §§ 1335, 1397, 2361 (1982).

168. *Cf.* Burbank, *Rule 68*, *supra* note 9, at 433-37 (discussing how procedural or "remedial" provisions can be selected by Congress to vindicate substantive rights).

169. *See supra* text accompanying notes 140-141.

170. *See supra* text accompanying notes 137 & 141.

171. *See supra* text accompanying note 145.

172. Professors Friedenthal, Kane, and Miller state:

> Every American court system, state and federal alike, has a number of venue statutes generally intended to channel litigation into those specific courts that are both convenient for litigants and witnesses, and efficient from a judicial administrative standpoint. The most common purpose of venue rules is to limit plaintiff's forum choice in order to insure that the locality of the lawsuit has some logical relationship either to the litigants or the subject matter of the dispute.

J. FRIEDENTHAL, M. KANE & A. MILLER, *supra* note 80, at 11 (footnotes omitted). *See also* F. JAMES & G. HAZARD, *supra* note 80, at 47 ("[Venue statutes] undertake to prescribe which court within the system ought to hear the case, their specifications in this regard being based on conceptions of fairness to the parties and convenience of trial.").

eral venue provisions are attached to statutes creating federal substantive rights and can fairly be deemed to have the support of substantive policies.[173] The prohibition on venue modifications in Rule 82 might, therefore, be justified by the administrative difficulty of separating these "substantive" venue provisions from the general venue provisions, at least insofar as the feasibility of writing a rule to forbid modification of the former, but permit modification of the latter, is concerned. The Advisory Committee's categorical statements about venue rules being substantive cannot, however, be supported.

Nor can the Advisory Committee's position on the impermissibility of incorporating state quasi in rem and service by publication procedures be squared with its position on Rule 4(f) as a non-substantive, non-jurisdictional rule. Professor Burbank has cited evidence that the Advisory Committee dealt cautiously with provisional remedies for fear that they involved substantive matters.[174] The Committee showed caution by incorporating state provisional remedies into the federal rules.[175] Clearly, however, the Committee's view of state quasi in rem and publication procedures as violative of Rule 82 could not be based on a view that incorporation of state provisional remedies procedures would violate restrictions on rulemaking generally. On the contrary, the views of Dean Clark are clearly based on the idea that incorporation of such provisions would impermissibly extend *jurisdiction.*[176] Yet, as rules of jurisdiction, they are indistinguishable from Rule 4(f) except that they would allow service outside the state. The difficulty with this distinction is that it does not explain why service outside the state involves a prohibited expansion or contraction of "substantive rights" or of "jurisdiction" within the meaning of Rule 82, while service across district lines internal to the state under Rule 4(f) does not. Moreover, neither the statutes drawing the district lines, nor the statute prohibiting arrest in civil actions outside the district draw a distinction between district lines internal to the state and those which conform to the states' borders.[177] From the face of the statutes, therefore, it is difficult to argue that district lines conforming to state borders are somehow more important than district lines internal to the state.[178]

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173. The Securities Exchange Acts, *supra* note 129, contain liberal venue provisions as well as nationwide long arm provisions. *See* notes 158-62 and accompanying text.

174. *See* Burbank, *Rules Enabling Act*, *supra* note 1, at 1145-47.

175. *See id.*; FED. R. CIV. P. 64.

176. *See supra* text accompanying note 145.

177. *See supra* notes 133-41 and accompanying text.

178. It should be noted that the Advisory Committee could not have been focusing on the doctrine of Klaxon v. Stentor Electric Mfg. Co., 313 U.S. 487 (1941), which required for the first time that district courts follow the conflict of laws rules of the

Thus far the reasoning of the Advisory Committee has provided no justification for the distinctions drawn in Rules 4(f) and 82. It remains to be seen whether the courts considering Rule 4(f) offered a more persuasive justification for its validity.

2. *Rule 4(f) in the Courts.*

Several lower federal court decisions invalidated Rule 4(f) soon after it became effective.[179] In *Melekov v. Collins*,[180] an action was brought in the Southern District of California against a defendant who had been served in the northern district. The court quashed service on the defendant's motion. In so doing, the court, like the Advisory Committee, identified "jurisdiction" and "venue" in Rule 82 with "substantive rights": "Rule 82, which is as much a part of the scheme of the modernized procedure in civil actions in the federal courts as Rule 4(f), is a definite statement that the long-established and well-settled principles of substantive rights of civil liti-

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state in which the district courts sit. *Klaxon* was not decided until 1941, long after the federal rules came into existence in 1938. Even after Erie R.R. v. Tompkins, 304 U.S. 64 (1938), the Supreme Court reserved, for a time, the question of whether the doctrine of that case applied to matters of conflict of laws. *See* Ruhlin v. New York Life Ins. Co., 304 U.S. 202, 208 n.2 (1938). As late as Sibbach v. Wilson & Co., 312 U.S. 1, 10-11 (1941), the Court seemed to be assuming the existence of independent conflict of laws authority in the federal courts. *See* C. WRIGHT, *supra* note 5, at 366.

The point is potentially important, because if *Klaxon* had already been decided when the federal rules were drafted, it might have been possible to reason that adoption of a state long arm statute or its equivalent could result in a change in applicable substantive rights. For example, assume that in the absence of the ability to use a state long arm provision, only the federal courts in State *X* would be able to hear an action and that State *X* conflict of laws rules would point to State *X* substantive law as applicable. Under a federal rule incorporating state long arm provisions, however, the plaintiff might be able to obtain personal jurisdiction over the defendant in a federal court in State *Y*. If State *Y*'s conflict of laws rules provided for the application of State *Y* substantive law, the incorporation of the state provision would work an alteration of substantive rights.

The above line of reasoning is of doubtful validity, however, because in the absence of the ability to use state long arm statutes in federal court, a plaintiff might simply sue in a state court in State *Y* and obtain the benefit of *Y*'s law. Thus, expansion of federal personal jurisdiction authority beyond state lines would not result in an increase in the substantive options open to federal plaintiffs unless the expansion broadened federal personal jurisdiction authority beyond that of the state in which the district court was sitting. This would not have occurred by incorporation of state quasi in rem or other long arm statutes.

In any event, the date of the *Klaxon* case makes it certain that this could not have been the basis of the Advisory Committee's reasoning about state attachment and publication procedures.

179. *See infra* notes 180-86 and accompanying text. *See also* Bird v. J.M. Farrin & Co., 4 F.R.D. 257, 258-59 (W.D. Mo. 1945) (defendant served in Eastern District of Missouri may not be compelled to appear in Western District; there is "no serious contention that Rule 4(f), . . . when read in connection with Rule 82[,] either limits or extends jurisdiction in this case.").

180. 30 F. Supp. 159 (S.D. Cal. 1939).

gants remain intact."[181]

While not so explicitly identifying "jurisdiction" and "venue" in Rule 82 with substantive rights, another court nevertheless showed by its citation of authority that it held the same view. In *Carby v. Greco*,[182] the plaintiff brought suit in the Western District of Kentucky for personal injuries suffered in an automobile accident. Nonresident service of process was made on the Kentucky Secretary of State in the Eastern District of Kentucky pursuant to the Kentucky nonresident motorist statute, the defendant being a citizen of Alabama. The court upheld the defendant's objection to personal jurisdiction, specifically stating that Congress had "refrained" from authorizing the Court to adopt rules of procedure that extended the territorial jurisdiction of the federal courts when it conferred rulemaking power in the Rules Enabling Act.[183] The court's citation of *Sewchulis v. Lehigh Valley Coal Co.*[184] reveals that it also thought the sole restriction on rulemaking was based on a prohibition against affecting substantive rights. In *Sewchulis*, the Second Circuit held that while the Conformity Act allowed service anywhere within the state pursuant to state law, the *effect* of the service was not a mere matter of practice regulated by the Act, but was "one of jurisdiction, and jurisdiction in turn must be tested by substantive law."[185] Neither *Carby* or *Sewchulis*, however, elaborated on the meaning of "substantive law" nor described an enlargement of personal jurisdiction authority as "substantive."[186]

A majority of lower federal court decisions upheld the validity of Rule 4(f).[187] In *Williams v. James*,[188] a personal injury action was commenced in the Western District of Louisiana and the Louisiana Secretary of State was served in the Eastern District pursuant to the state's nonresident motorist statute. The district court upheld the service. Although acknowledging that, prior to the federal rules, the authorities had considered personal jurisdiction to be a "substantive" matter, and that Rule 4(f)'s validity had been questioned before its promulgation, the court held that the presentation of ob-

181. *Id.* at 160.

182. 31 F. Supp. 251 (W.D. Ky. 1940).

183. *See id.* at 254.

184. 233 F. 422 (2d Cir. 1916), *cited in* Carby v. Greco, 31 F. Supp. at 254.

185. *Id.* at 424.

186. *See also* Richard v. Franklin County Distilling Co., 38 F. Supp. 513 (W.D. Ky. 1941) (following *Carby v. Greco*).

187. *See infra* notes 188-90 and accompanying text. *See also* Totus v. United States, 39 F. Supp. 7, 9-10 (E.D. Wash. 1941) (service out of Eastern District of Washington on defendant in Western District is valid); Sussan v. Strasser, 36 F. Supp. 266, 268-69 (E.D. Penn. 1941) (service out of Eastern District of Pennsylvania on defendant in Western District is valid); Salvatori v. Miller Music, Inc., 35 F. Supp. 845, 846 (E.D.N.Y. 1940) (dictum) (Rule 4(f) is procedural and does not affect the moving defendant's substantive rights of venue and jurisdiction).

188. 34 F. Supp. 61 (W.D. La. 1940).

jections to the Supreme Court and the Rule's subsequent survival through the process of promulgation and report to Congress gave it statutory effect and assured that it did not abridge substantive rights.[189] The older authorities classifying personal jurisdiction as a substantive matter had to "bow to [the] new and recent characterization" of such matters as procedural in Rule 4(f).[190]

Other decisions validating Rule 4(f) relied more directly on the Advisory Committee's reasoning. For example, in *O'Leary v. Loften*,[191] a New York plaintiff sued a Florida corporation in the Eastern District of New York. The defendant's business activities were confined to Florida, but it maintained an office in the Southern District of New York where it was served pursuant to Rule 4(f). The district court refused to quash process on the defendant's motion and upheld the validity of Rule 4(f). The court relied heavily on the remarks made by Chairman Mitchell and Dean Clark at the Cleveland Institute, concluding that personal jurisdiction, as opposed to subject matter jurisdiction and venue, was not considered a substantive matter inappropriate for rulemaking.[192]

The reasoning of the lower federal court decisions on the validity of Rule 4(f) is as unimpressive as the reasoning of the Advisory Committee, but at least the courts did not classify personal jurisdiction as purely procedural and then label it substantive without explanation, as did some members of the Advisory Committee.[193] In this state of affairs, it is no wonder that Chairman Mitchell predicted that the Supreme Court would invalidate the rule.[194] Mitchell was, however, mistaken. The issue arose in *Mississippi Publishing Corp. v. Murphree*,[195] and the Court upheld the rule. Nevertheless, the Court's reasoning was only slightly more persuasive than that of the Advisory Committee or the lower federal courts.

In *Murphree*, the plaintiff was a citizen of Mississippi residing in the Northern District of Mississippi. The defendant was a Delaware corporation, which had an office and place of business in the Southern District of Mississippi. The plaintiff sued the defendant in the

189. *See id* at 68. The court relied heavily on Sibbach v. Wilson, 108 F.2d 415 (7th Cir. 1939), in which the Seventh Circuit validated Rule 35 of the Federal Rules of Civil Procedure.

190. Williams v. James, 34 F. Supp. at 68. *See also* Andrus v. Younger Bros., 49 F. Supp. 499 (W.D. La. 1943) (relying on *Williams*).

191. 3 F.R.D. 36 (E.D.N.Y. 1942).

192. *See id.* at 38. *See also* Andrus v. Younger Bros. Inc., 49 F. Supp. at 500 (also quoting Dean Clark); Zwerling v. New York Cuba Marl S.S. Co., 33 F. Supp. 721 (S.D.N.Y. 1940) (finding no merit in objection that defendant was served in non-forum district).

193. *See supra* text accompanying notes 141-49.

194. *See* Burbank, *Rules Enabling Act*, *supra* note 1, at 1172 n.673 (quoting 1 PROCEEDINGS OF THE ADVISORY COMMITTEE ON RULES FOR CIVIL PROCEDURE 37 (May 17, 1943) (comments of Chairman Mitchell)).

195. 326 U.S. 438 (1946).

district court in the Northern District, but the defendant was served with process pursuant to Rule 4(f) in the Southern District. The defendant objected to service, claiming that Rule 4(f) was invalid under the substantive rights restriction of the Rules Enabling Act and was inconsistent with Rule 82.[196]

Much of the early part of the Court's opinion addresses whether the corporate defendant had consented to suit within Mississippi.[197]

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196. *See id.* at 443.

197. In Neirbo Co. v. Bethlehem Shipbuilding Corp., 308 U.S. 165 (1939), the Court had held that a corporate defendant waived objections to federal venue by designating an agent for service of process within the state. In *Murphree*, venue was established by the plaintiff's residence in the Northern District of Mississippi. *See* Mississippi Publishing Corp. v. Murphree, 326 U.S. at 442. The Court, however, considered the defendant's consent relevant to the question of personal jurisdiction:

> Unlike the consent to service in the *Neirbo* case the consent to service of process on petitioner's agent throughout the state was not significant as a waiver of venue, but it was an essential step in the procedure by which petitioner was brought before the court and rendered amenable to its judgment in the northern district. By consenting to service of process upon its agent residing in the southern district, petitioner rendered itself "present" there for purposes of service . . . . Had Congress specifically authorized service there for purposes of suit in the northern district, petitioner would have been properly brought before the district court for the purposes of the present suit, since Congress could provide for service of process anywhere in the United States . . . .
>
> Congress, having omitted so to direct, the omission was supplied by Rule 4(f) of the Rules of Civil Procedure . . . .
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> . . . .
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> Rule 4(f) . . . was devised so as to permit service of process anywhere within a state in which the district court issuing the process is held and where the state embraces two or more districts. It was adopted with particular reference to suits against a foreign corporation having an agent to receive service of process resident in a district within the state other than that in which the suit is brought. It was pointed out that the rule did not affect the jurisdiction or venue of the district court as fixed by the statute, but was intended among other things to provide a procedural means of bringing the corporation defendant before the court in conformity to its consent, by serving the agent wherever he might be found within the state . . . .

Id. at 442-44.

To this point, the Court's opinion might be interpreted as establishing a doctrine about service under Rule 4(f) that was familiar before the federal rules. The above quoted portion of the opinion can be read as stating that Rule 4(f) governs the *place* where process may be served, but not the *effect* of service. Only the latter concerns personal jurisdiction. As noted above, such a distinction had been drawn under the Conformity Acts. *See supra* text accompanying notes 184-86 (discussion of Sewchulis v. Lehigh Valley Coal Co., 233 F. 422 (2d Cir. 1916). Under such an interpretation, personal jurisdiction would have been conferred on the district court in *Murphree* by the consent of the defendant to suit throughout the state of Mississippi. Rule 4(f) would simply have allowed service in a district other than the one in which the action was brought. In the absence of such consent, as for example, where a nonresident individual was sued in the southern district of a state and served in the northern district while physically present there, but where the defendant had not consented to

The Court did not, however, make consent the basis of its holding. The remainder of the Court's opinion indicates that Rule 4(f) is a valid extension of the district courts' personal jurisdiction authority in *all* cases. In addressing whether Rule 4(f) violated Rule 82's prohibition on extensions of jurisdiction, the Court stated:

> It is true that the service 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. But it is evident that Rule 4(f) and Rule 82 must be construed together, and that the Advisory Committee, in doing so, has treated Rule 82 as referring to venue and jurisdiction of the subject matter of the district courts as defined by the statutes . . . rather than the means of bringing the defendant before the court already having venue and jurisdiction of the subject matter. Rule 4(f) does not enlarge or diminish the venue of the district court, or its power to decide the issues in the suit, which is jurisdiction of the subject-matter . . . to which Rule 82 must be taken to refer. Rule 4(f) serves only to implement the jurisdiction over the subject matter which Congress has conferred, by providing a procedure by which the defendant may be brought into court at the place where Congress has declared that the suit may be maintained. Thus construed, the rules are consistent with each other and do not conflict with the statute fixing venue and jurisdiction of the district courts.[198]

Thus, the Court validated rules extending personal jurisdiction, Rule 82 notwithstanding. Moreover, the Court validated Rule 4(f) generally, not simply as applied to a corporate defendant that has consented to suit within a state.[199]

Although the Advisory Committee had identified the restrictions in Rule 82 with the "substantive rights" limitation of the Rules Enabling Act,[200] the *Murphree* Court separated its discussion of Rule 82's restrictions from its discussion of the substantive rights restriction.[201] It is impossible to tell whether this separation evidenced the Court's disagreement with the Advisory Committee's view that the restrictions in Rule 82 were identical to those in the Act, or whether

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suit throughout the state, personal jurisdiction would not exist. The statutes confining the district courts' personal jurisdiction authority to the boundaries of the district would operate fully. For a discussion of Melakov v. Collins, 30 F. Supp. 159 (S.D. Cal. 1939), see *supra* text accompanying notes 180-81.

198. Mississippi Publishing Corp. v. Murphree, 326 U.S. at 444-45.

199. Wright and Miller cite *Murphree* as authority for the proposition that "jurisdiction" in Rule 82 refers only to subject matter jurisdiction. 12 C. WRIGHT & A. MILLER, *supra* note 35, § 3141, at 212 & n.8 (1973). The authors state: "[I]t has been authoritatively held that the reference in the rule to "jurisdiction" refers only to jurisdiction of the subject matter. The rules can and did extend jurisdiction over the person, primarily by extending the territorial limits of effective service." *Id.* at 212 (citation omitted).

200. *See supra* text accompanying notes 137-38, 141 & 145.

201. *See* Mississippi Publishing Corp. v. Murphree, 326 U.S. at 444-46.

the separation was inadvertent, for the Court also concluded that Rule 4(f) did not abridge, enlarge, or modify the substantive rights of the defendant.[202]

The Court's justification for its decision in *Murphree* is inadequate for at least one important reason: if modifications of general venue restrictions by rule are invalid, modifications of general restrictions on the personal jurisdiction authority of the district courts, which are indistinguishable in terms of the substantive rights restriction,[203] should also be invalid. Had the Court recognized the anomaly of permitting expansions of federal personal jurisdiction statutes by rule while forbidding similar expansions of federal venue, it might have seen that rule validity should be tested by an analysis that goes beyond interpretation of the substantive rights restriction in *Sibbach v. Wilson & Co.*,[204] and that even some purely procedural rules are constitutionally invalid under a properly applied separation of powers doctrine. The Court might also have seen that other such rules, while valid, must be justified by a more complex analysis than the substance-procedure dichotomy permits. Ironically, such a justification would have sustained the validity of Rule 4(f) more persuasively than did the Court's opinion in *Murphree*, and the permissibility of future rulemaking in the personal jurisdiction area could have been clarified in the process.

3. *Rule 4(f) Validated.*

To validate Rule 4(f) under the analysis recommended by this article, several factors weighing against rulemaking in the area of per-

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202. The Court wrote:

> We think that Rule 4(f) is in harmony with the Enabling Act which, in authorizing this Court to prescribe general rules for the district courts governing practice and procedure in civil suits in law and equity, directed that the rules "shall neither abridge, enlarge, nor modify the substantive rights of any litigant." 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 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. It merely relates to "the manner and the means by which a right to recover . . . is enforced." *Guaranty Trust Co. v. York*, 326 U.S. 99, 109. 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.

Mississippi Publishing Corp. v. Murphree at 445-46.

203. *See supra* text accompanying notes 169-73.

204. 312 U.S. 1, 9-10 (1941).

sonal jurisdiction must be overcome. First, at the time Rule 4(f) was promulgated, Congress had regulated the area of personal jurisdiction in some detail.[205] That regulation had generally restricted the personal jurisdiction authority of the federal courts to the districts in which they sat.[206] Additionally, Congress had shown ample ability to expand the personal jurisdiction authority from time to time through the creation of long arm statutes,[207] and had never modified general statutory restrictions on the abilities of the district courts to assert personal jurisdiction except by this piecemeal process.

Second, congressional regulation of personal jurisdiction dated from 1789 to the advent of Rule 4(f). The duration of this congressional occupation of the personal jurisdiction field without judicial intervention also weighs against the validity of judicial rulemaking within the area.[208] This factor, when considered with the specificity of congressional regulation, provides a strong case against the validity of Rule 4(f).

Third, although matters concerning the location of suit, such as venue and personal jurisdiction, do not fall within the areas of procedure constitutionally reserved for exclusive regulation by Congress,[209] such matters are not far removed from those areas.[210] Ordinarily, this proximity would weigh against the validity of Court-made rules of personal jurisdiction when Congress has previously occupied the area. In addition, expansion of federal personal jurisdiction authority may impose potentially significant burdens on defendants.[211] The slight expansion of jurisdiction involved in Rule 4(f), however, would tend to burden defendants less than other possible modifications.[212] Even in the absence of Rule 4(f), a plaintiff could usually sue in the same federal district within a state by resorting to a state court within the district possessing statewide personal jurisdiction authority. Any territorial shifts resulting from the location of the action in a federal court rather than a state court within the district would usually involve relatively insignificant burdens.

Fourth, although the early Process Acts granted the Supreme Court rulemaking power over the "forms and modes of proceeding,"[213] the Court never exercised this power to attempt to expand the personal jurisdiction authority of the lower federal courts. The

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205. *See supra* text accompanying note 87. At least that was the conclusion drawn by the courts. *See supra* text accompanying notes 123-25.

206. *See supra* text accompanying notes 123-25.

207. *See supra* note 129.

208. *See supra* text accompanying note 88.

209. *See supra* notes 70-81 and accompanying text.

210. *See supra* text accompanying notes 89-90.

211. *See supra* text following note 90.

212. *See infra* text accompanying notes 274-87.

213. *See supra* note 92 and accompanying text.

language of the Acts seems to exclude rulemaking power of such breadth. That the Court never attempted to expand personal jurisdiction authority suggests that it read "forms and modes of proceeding" narrowly. The delegation of rulemaking power to the Court over "practice and procedure"[214] in the Rules Enabling Act is, on its face, broader than the delegation in the Process Acts. It may not, however, be broad enough to encompass rules of personal jurisdiction. Putting aside whether rules that extend personal jurisdiction authority would be classified as mere rules of procedure or would violate the substantive rights restriction of the Rules Enabling Act,[215] it is still fair to question whether "practice and procedure" should be interpreted to include "important"[216] matters such as personal jurisdiction rules, or only the less important details of the district courts' procedure. Certainly it is possible to envision how the purposes of the Rules Enabling Act—to end conformity to state law and to establish a uniform procedure for the district courts[217]—could have been completely fulfilled without the creation of rules affecting personal jurisdiction. On the whole, therefore, the timing and purposes of the delegation of rulemaking power to the Supreme Court and the Court's long-standing refusal to regulate the personal jurisdiction authority of the lower federal courts weigh against the validity of Rule 4(f).

Fifth, Rule 4(f) replaced the statutory restrictions on federal per-

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214. *See supra* notes 93-94 and accompanying text. Professor Burbank has cited evidence from the 1924 hearings on a bill to confer supervisory rulemaking power on the Supreme Court that indicates the rulemaking power was not thought to extend to rules of personal jurisdiction designed to bring in nonresident defendants. *See* Burbank, *Rules Enabling Act*, *supra* note 1, at 1079 nn.275-76 (citing testimony from *Procedure in Federal Courts, Hearing on S. 2060 and S. 2061 Before a Subcomm. of the Senate Judiciary Comm.*, 68th Cong., 1st Sess. 61-62, 69-70 (1924)). The bill in question, like the Rules Enabling Act of 1934, provided for rulemaking power over the "forms of process, writs, pleadings, and motions, and the practice and procedure in actions at law." *See id.* at 1079 n.277 (quoting S. 2061, 68th Cong., 1st Sess., 65 CONG. REC. 1074 (1924)).

215. Professor Burbank has noted that one of the articulated purposes of Rule 4(f) was to eliminate discontinuities between federal and state personal jurisdiction authority. Because this affects allocation of business between state and federal courts, Professor Burbank noted that it may well violate the restrictions of the Rules Enabling Act, not as interpreted in *Sibbach*, but as read in light of the pre-1934 history of the Act. *See* Burbank, *Rules Enabling Act*, *supra* note 1, at 1173 n.673. This Article takes the *Sibbach* interpretation of the Act as a given and evaluates the permissibility of Rule 4(f) under a separation of powers analysis. Thus, Professor Burbank's conclusions do not affect the conclusions here. Nevertheless, it is somewhat ironic that the elimination of discrepancies between federal and state personal jurisdiction authority in order to affect allocation of business between state and federal courts is exactly what validates Rule 4(f) under the separation of powers analysis here advocated. *See infra* text accompanying notes 220-25.

216. *Cf. supra* text accompanying note 47.

217. *See supra* text accompanying note 95.

sonal jurisdiction only in regard to service of process within the state where the district court sat. The Rule did not attempt to expand the ability of district courts to assert personal jurisdiction beyond state lines. The Rule thus did not encroach on the power, long and exclusively exercised by Congress, to choose when to create federal interstate long arm jurisdiction. Rule 4(f) can, therefore, be viewed as having eliminated only a minor difference between the personal jurisdiction authority of the district courts and the courts of the states in which they were sitting.[218]

To this point, some of the factors in the separation of powers analysis point to the invalidity of Rule 4(f), while others weigh in favor of the Rule. The specificity and duration of congressional regulation of personal jurisdiction weigh against validity, as does the proximity of location-of-suit matters to areas of exclusive congressional prerogative. Also weighing against the Rule's validity, but less heavily so, are the timing and apparent purposes of the delegation of rulemaking power to the Supreme Court in the Rules Enabling Act, and the long period of time during which the Court had refused to exercise such rulemaking power under previous delegations. Weighing in favor of validity is that any burdens imposed on litigants by the expansion of jurisdiction in Rule 4(f) are slight, if they exist at all, and that the Rule itself constitutes a relatively minor encroachment on congressional prerogatives. If validity were to be judged by reference only to these factors, the balance might tip against the Rule. There is, however, one powerful factor weighing in favor of the rule's validity.

The Supreme Court in *Murphree* touched on the correct justification for the rule when it stated: "Rule 4(f) serves only to implement the jurisdiction over the subject matter which Congress has conferred, by providing a procedure by which the defendant may be brought into court at the place where Congress has declared that the suit may be maintained."[219] Had the Court elaborated this justification of Rule 4(f), the resulting opinion would have greatly clarified the permissible lengths to which rulemaking may extend in areas, such as personal jurisdiction, traditionally regulated exclusively by Congress. Ultimately, the factor weighing most heavily in favor of Rule 4(f)'s validity is the necessity to prevent defeat of the purposes of federal subject matter jurisdiction.

Next to direct and explicit constitutional limitations on the authority of the federal courts, the most fundamental set of policies directing the courts are those embodied in the various statutory grants of subject matter jurisdiction.[220] In the process of adjudica-

218. *Cf. supra* text accompanying notes 96-98.

219. Mississippi Publishing Corp. v. Murphree, 326 U.S. at 445.

220. The existence of "significant leeway for the exercise of reasoned discretion in matters relating to federal jurisdiction" is not inconsistent with this statement, since

tion, the Supreme Court has taken care to interpret these grants accordingly, and thus to provide rules to prevent the unnecessary defeat of federal subject matter jurisdiction by removing obstacles to its exercise that might encourage litigants to resort to state court instead.[221] Removal, by Court-made rules, of obstacles to the exercise of federal subject matter jurisdiction that would discourage litigants from resorting to federal court is also appropriate.

Rule 4(f) serves this purpose. Without the ability to assert personal jurisdiction over defendants located in different districts in the same state, plaintiffs might be forced into state court, or at least strongly encouraged to sue there. For example, a plaintiff residing in the northern district of a state seeking to sue a nonresident individual present in the southern district would either have to go to the defendant's state and district of permanent residence and sue in federal court, where venue would be proper and personal jurisdiction available, or sue in a state court in the northern district if the state court could acquire personal jurisdiction over the defendant.[222]

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such "discretion is necessary if courts are to be able to defend themselves against the imposition of unnecessary and unintended burdens, and if they are to avoid undue interference with the states and with other branches of government." Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 588 (1985).

221. The doctrine of pendent jurisdiction, for example, allows a plaintiff suing within the federal question jurisdiction to join a closely related state claim in the action even if there is no independent basis of federal subject matter jurisdiction over the state claim. Power over the state claim is based on the theory that the close relationship of that claim with the federal claim makes them both part of the same constitutional case and that federal courts, when they acquire subject matter jurisdiction due to the presence of a federal claim in a case, acquire power in a constitutional sense over the entire case, not just that part of the case over which independent grounds for subject matter jurisdiction exist—i.e., the federal claim. *See* United Mine Workers v. Gibbs, 383 U.S. 715 (1966). In part, pendent jurisdiction of the *Gibbs* variety is based at the statutory level on the desire not to discourage plaintiffs possessing factually related federal and state claims from resorting to federal court with their federal claims:

> Where the state and federal grounds are closely related, and depend on essentially the same facts, a contrary result . . . would have deterred resort to the federal court in cases that have a significant federal element and that appropriately should be heard there. At best, the plaintiff would have had to bring two law suits [sic], one in state court on the state ground and one in federal court on the federal ground. This is wasteful for the parties and wasteful for both sets of courts. The consequences for plaintiff would be even worse if it were held that he had "split a cause of action," so that a decision in one court as to one ground would preclude, as a matter of res judicata, consideration in the other court of the merits of his other ground. The possibility of such consequences would almost certainly induce the plaintiff to bring his suit in state court, no matter how important the federal issues.

ALI STUDY, *supra* note 154, at 209.

222. This hypothetical assumes the statutory venue scheme in place is the same as when Rule 4(f) was promulgated. Act of Mar. 3, 1911, ch. 231, §§ 50-51, 36 Stat. 1087, 1101 (the then relevant statute at 28 U.S.C. § 112 (Supp. V 1939)) (current version at

Often the inconvenience of suing in the defendant's home state would discourage the plaintiff from resorting to federal jurisdiction and would induce him to sue instead in the state court where the plaintiff resides. If the defendant chose to remove the action to federal court, personal jurisdiction and venue would lie in the district court for the northern district.[223] The plaintiff would thus suffer unnecessary delay and expense getting to federal court, where he wanted to be in the first place.[224]

On balance, therefore, Rule 4(f) is valid because it eliminates an obstacle to the exercise of federal subject matter jurisdiction that would often lead plaintiffs to choose a state court over a federal court located within the state. This analysis, however, raises one difficulty. If, as this Article contends, no fundamental difference exists between personal jurisdiction and venue, could the Court promulgate a valid rule modifying the general venue statutes so as to remove obstacles to the exercise of federal subject matter jurisdiction that would cause plaintiffs to choose state rather than federal court?[225] For example, could the Court promulgate a rule expanding

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28 U.S.C. § 1391(a) (1982)). That scheme did not include the possibility of suing where the claim arose, as does the present statute. *See* 28 U.S.C. § 1391(a) (1982).

223. This was true even when state quasi in rem procedures, which were not available in original actions in federal court, were utilized to secure jurisdiction to adjudicate an action over a particular defendant in state court. *See* 4A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1119 (2d ed. 1987). The current removal statute contains its own explicit venue provision, which makes venue proper in the district to which the action is removed, regardless of the fact that venue would have been improper in that district in an original action. *See* 28 U.S.C. § 1441(a) (1982); 14A C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3726 (2d ed. 1985). The version of the removal statute in effect when the federal rules were created spoke more ambiguously of removal "to the district court of the United States for the proper district." 28 U.S.C. § 71 (1934). This statute, however, was interpreted to mean that venue was proper in removed actions in the district wherein the state action removed to federal court had been pending. *See* General Inv. Co. v. Lake Shore & M.S. Ry., 260 U.S. 261, 274-79 (1922); 28 U.S.C. § 1441 note (1982).

224. To be sure, under Mississippi Publishing Corp. v. Murphree, 326 U.S. 438 (1946), and similar cases, another option was open to the plaintiff. Because of the Supreme Court's prior decision in Neirbo Co. v. Bethlehem Shipbuilding Corp., 308 U.S. 165 (1939), discussed *supra* note 197, the plaintiff might have sued the corporate defendant in a federal court in the Southern District of Mississippi, where venue was proper and service on the defendant could be obtained. This option would have been far less inconvenient to the plaintiff than suing the corporation in another state. Nevertheless, if forced to choose, the plaintiff might have preferred a state court in the northern district to a federal court in the southern district for reasons of convenience. Moreover, the Supreme Court must proceed by "general rules," under 28 U.S.C. § 2072 (1982), if it wishes to cure situations in which federal subject matter policies would be undermined. Under such general rules some situations will inevitably be included within the cure that do not pose as great a danger to subject matter policies as do other situations.

225. Rule 82 would not necessarily constitute an obstacle to this federal rule because the former could be amended to eliminate the restriction that the rules not modify venue statutes.

venue to allow actions to be brought in either district of a state by multiple plaintiffs residing in different districts in that state?[226] The rationale for such a rule might be the same as that for Rule 4(f): multiple plaintiffs unable to join in a federal action in their home state because of federal venue restrictions might easily decide to sue in a state court with proper venue in the state rather than to sue in federal court in another state. Federal subject matter jurisdiction would thus be defeated in favor of state court jurisdiction with no corresponding gain to the defendant in terms of suit location. For even if the defendant removes, venue will lie in the federal court to which the action is removed.[227] At best, therefore, the result would be a circuitous route to federal court for the plaintiff and, at worst, a direct contravention of federal subject matter jurisdiction policies.

The only distinction between venue and personal jurisdiction weighing against such a venue modification is the detail with which Congress has prescribed general venue in the judicial code as compared with the general intrastate personal jurisdiction restrictions in effect at the time Rule 4(f) was promulgated. Personal jurisdiction restrictions generally limited process to the district in which the district court sat. Venue was regulated separately for diversity and all other actions,[228] for actions against multiple defendants residing in different districts in the same state[229] and residing in different divisions in the same district,[230] for local actions,[231] and more.[232] The detail with which Congress addressed venue justified refusal to affect the area by rule. Although it is a close question, under the approach suggested here the balance tips against validity of supervisory venue rules. The power to make rules even to remove apparently unwarranted obstacles to the exercise of federal subject matter jurisdiction is limited. In a case where Congress has occupied the field with the detail and regularity found in the general federal

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226. *Compare* 28 U.S.C. § 1391(a) (1982) (diversity action may be brought only in judicial district where all plaintiffs or all defendants reside, or in which the claim arose) *with id.* § 1392(a) (any non-local civil action against defendants residing in different districts may be brought in any of such districts).

227. *See supra* note 223.

228. The venue statute in effect in 1934 provided in pertinent part:

> [E]xcept as provided in sections 113 to 118 of this title, no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant . . . .

28 U.S.C. § 112 (Supp. V 1934) (current version at 28 U.S.C. § 1391 (1982)).

229. *See id.* § 113 (current version at 28 U.S.C. § 1392 (1982)).

230. *See id.* § 114 (current version at 28 U.S.C. § 1393 (1982)).

231. *See id.* §§ 115-116 (current version at 28 U.S.C. § 1392 (1982)).

232. *See id.* §§ 119-122 (current version codified in scattered sections of 28 U.S.C. (1982)).

venue regulations, rulemaking under a general delegation of rulemaking power should be prohibited. The degree of congressional involvement and apparent concern over venue matters thus precludes the validity of Court-made rules in the venue area, even if such rules were designed to protect federal subject matter jurisdiction.

Rule 4(f) was not the last federal rule of civil procedure to expand the personal jurisdiction authority of the district courts. In fact, two subsequent amendments to Rule 4 have had an even more far-reaching effect on the extent of the district courts' personal jurisdiction authority.

B. The Validity of Rule 4(e) and of Rule 4(f)'s 100-Mile "Bulge" Provision

1. *Rule 4(e).*

Original Rule 4(e) simply provided for service of process and personal jurisdiction over nonresidents where otherwise authorized by a federal long arm statute.[233] In 1963, the rule was expanded to authorize service on and personal jurisdiction over nonresidents pursuant to state law:

> Whenever a statute or rule of court of the state in which the district court is held provides (1) for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state, or (2) for service upon or notice to him to appear and respond or defend in an action by reason of the attachment or garnishment or similar seizure of his property located within the state, service may in either case be made under the circumstances and in the manner prescribed in the statute or rule.[234]

The Advisory Committee's note provided the following practical justification for the expansion of personal jurisdiction authority worked by the amendment:

> The necessity of satisfying subject matter jurisdictional requirements and requirements of venue will limit the practical utilization

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233. The original Rule, in its entirety, provided:

> Whenever a statute of the United States or an order of court provides for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state, service shall be made under the circumstances and in the manner prescribed by the statute, rule, or order.

FED. R. CIV. P. 4(e), *reprinted in* 28 U.S.C.A. R. 4(e) (West 1960).

Although this wording seems to permit the assertion of personal jurisdiction on the basis of a court order alone, without the aid of a statute, this meaning was unintended; and in 1963 the word "thereunder" was added after the words "order of court" and "provides" to make this clear. *See* FED. R. CIV. P. 4(e) advisory committee's note (1963 amendment).

234. FED. R. CIV. P. 4(e).

> of these [state] methods of effecting service. Within those limits, however, there appears to be no reason for denying plaintiffs means of commencing actions in Federal courts which are generally available in the State courts.[235]

Regarding the validity of this amendment, as well as the amendment to Rule 4(f), the Committee stated: "As to the Court's power to amend subdivisions (e) and (f) as here set forth, see *Mississippi Publishing Corp. v. Murphree* . . . ."[236]

In justifying the expansion of personal jurisdiction by reference to *Murphree* only, the Advisory Committee neglected important distinctions between the scope of what was done in original Rule 4(f) and amended Rule 4(e). As discussed earlier, Congress has always taken an active role in determining whether to extend the scope of federal personal jurisdiction beyond state borders.[237] In a direct sense, therefore, Congress had chosen by its active participation in the area of personal jurisdiction over nonresidents to treat state borders more seriously than district lines within a state. By its periodic intervention in the area of federal nationwide long arm jurisdiction, Congress had demonstrated significant awareness of situations in which federal personal jurisdiction authority needed to be extended beyond the limits of the state and had thus occupied the field in a way inconsistent with judicial rulemaking in the area. Under such circumstances, the Committee should have advanced a more substantial justification for the Court's intervention in the area under Rule 4(e) than a mere citation to *Murphree*.[238]

Such a justification was at hand. The justification centers on a

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235. FED. R. CIV. P. 4(e) advisory committee's note (1963 amendment).

236. *Id.*

237. *See supra* text accompanying notes 158-62.

238. Recall, also, that members of the original Advisory Committee had stated that incorporation of state attachment statutes would violate the restriction that the rules not extend jurisdiction. *See supra* text accompanying notes 144-45. The prohibition in Rule 82 on rules that modified jurisdiction and venue, however, was apparently based on the notion that such subjects were "substantive." *See supra* text accompanying note 171. The Committee did not express clearly its concept of substantive rights, with the result that while the Advisory Committee that drafted Rule 4(e) should perhaps have been alerted to potential problems with the rule by the original Advisory Committee's concern, that concern in itself should not have been determinative because of its incoherence.

Note also that while Klaxon v. Stentor Electric Mfg. Co., 313 U.S. 487 (1941), had been decided by the time Rule 4(e) was promulgated, Rule 4(e) is arguably not invalidated by that decision. As was the case with Rule 4(f), Rule 4(e) did not involve any expansion of the substantive options open to plaintiffs because the option existed before Rule 4(e) to sue in state court under state long arm provisions and thus to secure such benefits as might exist under state substantive law. Rule 4(e) did not, therefore, result in some cases being tried within the state that would otherwise have had to be brought elsewhere. Consequently, the possibilities open to plaintiffs to forum shop for substantive law were not increased by amended Rule 4(e). See *supra* note 178 for a discussion of *Klaxon*.

change in the constitutional limitations on state court jurisdiction that caused the divergence between federal and state long arm jurisdiction to affect federal subject matter jurisdiction far more severely than it had in the past. When Rule 4(f) was originally framed, the state courts still operated under "territorial" restrictions imposed on them under the Supreme Court's interpretation of the fourteenth amendment in *Pennoyer v. Neff*.[239] Under those restrictions, the courts of a state could exercise jurisdiction over a nonresident defendant who was physically present within the state, who was domiciled within the state, who owned property within the state, or who consented, expressly or impliedly, to the jurisdiction of the state's courts.[240] Although the territorial restrictions on state court jurisdiction had been expanded since *Pennoyer*,[241] the territorial rationale of that decision remained the basis for limited state power over nonresidents. In this context, Rule 4(f)'s original expansion of federal personal jurisdiction may be viewed as a measured attempt to conform the power of federal courts roughly to the power that state courts possessed under the territorial principle of *Pennoyer*, in order to avoid forcing plaintiffs into state court to obtain the benefit of broader state personal jurisdiction power existing over defendants in some cases.[242]

In 1945, however, the Court began to relax the territorial restrictions on state court jurisdiction that existed under *Pennoyer*. In *International Shoe Co. v. Washington*,[243] the Court initiated a move away from the "mechanical or quantitative" territorialism of *Pennoyer* to a test that focused on the quality of a nonresident defendant's contacts with the state.[244] Over time, the "minimum contacts test" of *International Shoe* resulted in a distinct expansion of state

239. 95 U.S. 714 (1878).

240. *See* Note, *Developments in the Law—State-Court Jurisdiction*, 73 HARV. L. REV. 909, 919-48 (1960).

241. The restrictions had been expanded primarily through the fictional uses of the concepts of consent and presence. *See* Kurland, *The Supreme Court, the Due Process Clause and the In Personam Jurisdiction of State Courts—From Pennoyer to Denckla: A Review*, 25 U. CHI. L. REV. 569, 573, 578-86 (1958); Note, *supra* note 240, at 919-23, 945-47.

242. That the rulemakers did not go even further and authorize the use of state quasi in rem procedures or state long arm statutes generally is perhaps attributable to their confused notions about the content of the substantive rights restriction. *See supra* text accompanying notes 136-40. The expansion of federal personal jurisdiction authority to the limits of the state in Rule 4(f), however, did give rise to an enlarged ability to sue nonresidents of the state. For example, because state nonresident motorist statutes were based on the theory of implied consent and provided for service of the state secretary of state as the defendant's agent within the state, most federal courts concluded that Rule 4(f) could be used to effectuate jurisdiction under such statutes. *See* 4A C. WRIGHT & A. MILLER, *supra* note 223, § 1114, at 241; *supra* text accompanying notes 188-92.

243. 326 U.S. 310 (1945).

244. *See id.* at 319-20.

court jurisdiction.[245] The states responded to the decision by broadening the statutory bases upon which their courts could assert jurisdiction over nonresidents.[246] In 1955, Illinois became the first state to enact a modern long arm provision in response to *International Shoe*,[247] and the Illinois example was copied by a number of states.[248] These statutory developments were well underway when Rule 4(e) was amended.

The expansion of state court jurisdiction permitted by *International Shoe* and implemented by the expanded state long arm statutes posed a problem that could not be solved through statewide service under original Rule 4(f). The problem was an ever-widening discrepancy between the authority of state courts and that of federal courts to obtain jurisdiction over defendants residing outside the state. The broadening divergence between state and federal court authority threatened to increase the incentives for plaintiffs to abandon federal courts in favor of state courts.[249] Arguably, however, the potential impact of the new state long arm jurisdiction on federal subject matter jurisdiction was even greater than the impact of the divergence of territorial power before Rule 4(f), for it was impossible to predict how far the states would ultimately be permitted to extend the reach of their process under the *International Shoe*

245. The expansion was not immediate and was not achieved without some backing and filling. In *International Shoe* itself, the Court seemed to suggest that the *results* it had reached under the fictional consent and presence theories of jurisdiction over foreign corporations were still sound and, thus, that the new test simply reflected more accurately the reason for those results. *See id.* at 316-20. Subsequent decisions, however, indicated that state court jurisdiction had expanded significantly due to the abandonment of the territorial restrictions of *Pennoyer*, including fictional corporate presence and consent. *See* McGee v. International Life Ins. Co., 355 U.S. 220 (1957); Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952); Travelers Health Ass'n v. Virginia *ex rel.* State Corp. Comm'n, 339 U.S. 643 (1950); Kurland, *supra* note 241, at 593-610. Although the Court seemed to halt this expansion and turn back toward territorialism in Hanson v. Denckla, 357 U.S. 235 (1958), it was far from clear, even at the time, that the halt was permanent. *See* Kurland, *supra* note 241, at 622. The response of the state legislatures to the *International Shoe* test assured that the decision would have a permanent expansive effect. *See infra* text accompanying notes 246-52.

246. *See* Note, *supra* note 240, at 1000-1006.

247. 1955 Ill. Laws 2245 (current version at ILL. ANN. STAT. ch. 110, para. 2-209 (Smith-Hurd 1983)).

248. *See* 4 C. WRIGHT & A. MILLER, *supra* note 35, § 1068. *See also* Note, *supra* note 240, at 1003 n.604.

249. As was the case with the divergence of territorial authority between the state and federal courts prior to Rule 4(f), the option would reside with nonresident defendants whether to remove the action to federal court or leave it in the state court where it had been commenced. If the defendant removed, the divergence in personal jurisdiction authority would have resulted in a circuitous, time-consuming route to federal jurisdiction for the plaintiff. If the defendant did not remove, the plaintiff would, as a practical matter, have lost his congressionally conferred right to resort to federal court.

test. The heightened impact of the new jurisprudence of state court jurisdiction on federal subject matter jurisdiction policies therefore tips the balance in favor of the validity of Rule 4(e), despite the long-standing, extensive congressional concern with the subject of long arm jurisdiction.

Again, it is instructive to contrast the situation existing in the personal jurisdiction area with that in the area of venue. There were no developments between 1938 and 1963 in the venue area that would create incentives to abandon federal jurisdiction in favor of state courts, and which would thus justify modification by rule of the general venue scheme in the face of the traditional, extensive congressional concern with the area.[250] More important, however, Congress continued actively to concern itself with venue after the advent of the federal rules. In 1963, Congress modified the general venue statutes to permit tort claims to be brought in the district where the claim arose.[251] In 1966, Congress broadened the general venue statutes again to permit any civil action to be brought in the district where the claim arose.[252]

From this pattern, it is possible to see that modification by Court rule of the general venue statutes in 1963 would have been just as invalid as modification in 1938. No developments in state venue had resulted in a divergence between state and federal court venue authority that would have had any greater impact on federal subject matter jurisdiction than had existed in 1938. Congress had continued to devote attention to the general venue scheme and to modify it when inconvenient gaps appeared.[253] Accordingly, it is impossible to see how a rule modifying venue in 1963 could have been deemed valid. Additionally, the continued "hands-off" tradition of Court-

250. There had been some slight movement in the states away from the local action rule, which requires certain actions concerning real property to be brought where the land is located. *See* Reasor-Hill Corp. v. Harrison, 220 Ark. 521, 249 S.W.2d 994 (1952). Had there been a broad movement away from the rule in the states, a significant impact might arguably have existed on federal subject matter jurisdiction due to the continuing existence of the rule in the federal courts. *See, e.g.*, 28 U.S.C. § 1392(b) (1982) (prescribing venue for civil actions of a local nature where the land is located in different districts in the same state). Even this conclusion might be doubted, however, since local actions do not arise as frequently as do transitory actions. In any case, the movement away from the rule was not extensive. The vast majority of states follow the local action rule. *See* J. FRIEDENTHAL, M. KANE & A. MILLER, *supra* note 80, § 2.16, at 87.

251. *See* 15 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3806, at 42 (2d ed. 1986).

252. *See id.*

253. Although the 1963 venue modification occurred about the same time as new Rule 4(e) came into existence and the 1966 modification obviously occurred later, both modifications were in the works prior to 1963. The Judicial Conference of the United States had recommended the 1963 modification in 1959 and the 1966 modification in 1962. *See id.* at 41.

made rules in the venue area from 1938 through 1963 had further solidified commitment of the area to exclusive legislative regulation.[254]

2. *The 100-Mile "Bulge" Rule.*

The 1963 Amendments to Rule 4 also contained important modifications to Rule 4(f). After providing that federal process could be served anywhere within the state and anywhere outside the state "when authorized by a statute of the United States or by these rules," the amendment stated:

> In addition, persons who are brought in as parties pursuant to Rule 13(h) or Rule 14, or as additional parties to a pending action pursuant to Rule 19, may be served in the manner stated in paragraphs (1)-(6) of subdivision (d) of this rule at all places

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254. The pattern described would not necessarily preclude a judicial rulemaking role *consistent* with the general statutory venue scheme. For example, it is clear that the Court, in an adjudicative context, has the power to interpret the general venue statutes to determine their meaning, as where the Court decides where a claim arises for purposes of 28 U.S.C. § 1391 (1982). *See* Leroy v. Great W. United Corp., 443 U.S. 173 (1979). At least after such interpretations have occurred, there would seem to be no harm in constructing supervisory venue rules that effectively restate the factors to be considered by the lower federal courts in deciding the identical questions.

There is precedent for such a process in other areas. For example, the 1966 modifications to Rule 19 were made in large part to clarify how joinder questions should be analyzed. The original rule was defectively phrased, and thus misleading, even though the analytical process stated by the new rule was "well understood in the older equity practice" and original Rule 19 "could be and often was applied in consonance with [that older practice.]" *See* FED. R. CIV. P. 19 advisory committee's note (1966 amendment).

In any case, a mere restatement of prior statutory interpretations by Court rule for purposes of clarity arguably does not extend or limit the statute and should be permitted even under the terms of Rule 82. Any modification of a venue statute by rule could not be justified, however, even if the content of the modification *could* be evolved in an interpretive context, because the interpretive context involves deference to congressionally made policy judgments. The distinction between this situation and the one described above, *supra* text accompanying notes 73-78, is that the earlier textual discussion concerns only situations in which Congress has not occupied the field, whereas here, by hypothesis, Congress has occupied it. Furthermore, restatement in a Court-made rule of a judicial construction of a statute should be distinguished from interpretation of a statute *by* Court rule. The latter practice is just as impermissible as would be a modification of the statute by rule; because of the lack of specific focus on the facts of a case that would occur in the adjudicative context, interpretation by Court rule when Congress has occupied a field would inevitably turn on general questions of policy that should be reserved for the legislature. In contrast, when Congress has not occupied a field, as in the circumstances described above, *supra* text accompanying notes 73-78, the policy choices involved in adjudication may be as fundamental as in rulemaking, which would indicate that either process is acceptable. So long as the Court can conclude in the rulemaking context that the policy choice is not so fundamental as to disable it from acting at all — as would be true in the case of a rule extending or abridging a fixed subject matter jurisdiction statute — it should feel free to proceed by rule.

> outside the state but within the United States that are not more than 100 miles from the place in which the action is commenced, or to which it is assigned or transferred for trial; and persons required to respond to an order of commitment for civil contempt may be served at the same places.[255]

The Advisory Committee justified the amendment to Rule 4(f) on the grounds that it would promote

> the objective of enabling the court to determine entire controversies. In the light of present-day facilities for communication and travel, the territorial range of the service allowed, analogous to that which applies to the service of a subpoena under Rule 45(e)(1), can hardly work hardship on the parties summoned. . . . Any requirements of subject-matter jurisdiction and venue will still have to be satisfied as to the parties brought in, although these requirements will be eased in some instances when the parties can be regarded as "ancillary." The amendment is but a moderate extension of the territorial reach of Federal process and has ample practical justification.[256]

As noted earlier, the Advisory Committee justified the 100-mile rule by simply citing to *Mississippi Publishing Corp. v. Murphree*.[257] This justification, however, is even more inadequate when applied to the 100-mile bulge provision than when applied to the

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255. FED. R. CIV. P. 4(f) (amended 1966). Rule 4(f) was amended again in 1966 to make minor changes in wording to "accord with the amendment of Rule 13(h) referring to Rule 19 as amended." FED. R. CIV. P. 4(f) advisory committee's note (1966 amendment).

256. FED. R. CIV. P. 4(f) advisory committee's note (1963 amendment) (citations omitted). The portion of the amendment allowing service outside the state in cases of civil contempt was justified by a citation to cases in which persons who had violated valid court orders entered against them with jurisdiction could nevertheless remain immune from commitment to enforce the order by remaining just across the district line outside the state. FED. R. CIV. P. 4(f) (citing Mitchell v. Dexter, 244 F. 926 (1st Cir. 1917) (District Court for the Eastern District of Wisconsin without authority to issue process directing arrest by United States Marshall for the District of Massachusetts); Graber v. Graber, 93 F. Supp. 281 (D.D.C. 1950) (civil contempt order denied effect outside district in which issued); Teele Soap Mfg. Co. v. Pine Tree Prods. Co., 8 F. Supp. 546 (D.N.H. 1934) (beyond power of District Court of New Hampshire to issue process directing Massachusetts Marshall to arrest individual in Massachusetts); *In re* Graves, 29 F. 60 (N.D. Iowa 1886) (Illinois civil contempt order does not authorize Iowa court to arrest individual in Iowa)). Original Rule 4(f) had sufficiently modified the command of 28 U.S.C. § 1693 (1982), that "no person shall be arrested in one district for trial in another in any civil action" to allow service of such orders across the district lines within a state; but the statute remained, and remains today, effective as a barrier to service across state lines. The 100-mile bulge rule modified the proscription against arrest outside the state for persons within 100 miles of where the district court is located.

257. *See supra* note 236 and accompanying text. *Cf.* 4 C. WRIGHT & A. MILLER, *supra* note 35, § 1127, at 329, 333; Kaplan, *Amendments of the Federal Rules of Civil Procedure, 1961-1963 (I)*, 77 HARV. L. REV. 601, 632 (1964).

amendment of Rule 4(e).[258] Unlike original Rule 4(f) and amended Rule 4(e), the 100-mile bulge provision allows parties to be subjected to a federal action in a state when they could not be sued in the state courts of the same state.[259] Hence, the validity of the 100-mile bulge provision cannot be justified as necessary to relieve parties from having to resort to state courts of broader personal jurisdiction than federal courts in the same state. Thus, parties would not, in the absence of the 100-mile rule, have lost any benefits of federal subject matter jurisdiction to which they would otherwise have been entitled.[260] Without this significant factor favoring the validity of the rule, it is vulnerable to the same kinds of objections made to Rule 4(e),[261] with no countervailing factors of equivalent force favoring validity.

If the 100-mile provision can be justified at all, the grounds of the justification must be different from those heretofore examined. One point in favor of the Rule was made by the Advisory Committee and subsequently echoed by some courts considering the rule's validity: the rule involves only a "moderate" extension of federal personal

258. Indeed, the validity of the 100-mile provision is far more difficult to support under the "substantive rights" restriction of the Rules Enabling Act than were the provisions of original Rule 4(f) and amended Rule 4(e). For it is obvious that the 100-mile provision is only useful when no state or federal long arm statute exists that would allow a federal court to obtain personal jurisdiction over the parties described under Rule 4(e). *See* 4A C. WRIGHT & A. MILLER, *supra* note 35, § 1127, at 336-37 (amenability rules of the forum presumably will not extend to the "bulge"; if they did, service would be possible under Rule 4(d)(7) or Rule 4(e), which would make service under the 100-mile provision unnecessary). This means that in the absence of the 100-mile provision, third parties could be subjected to suit only in a federal or state court in a *different* state. For example, a third-party defendant would have to be sued separately for indemnity in a state where he could be subjected to process, rather than impleaded under Rule 14; and if a Rule 19 party were classified as indispensable, the action would have to be dismissed and brought, if possible, where all "indispensable" parties could be subjected to personal jurisdiction. Under the *Klaxon* doctrine, Klaxon v. Stentor Electric Mfg. Co., 313 U.S. 487 (1941), this would potentially mean that a *different* substantive law might be applied to resolve the dispute. *See supra* notes 178 & 238. The extensions of jurisdiction by Rule 4(f) and amended Rule 4(e) did not open up any possibilities of suit in locations broader than where actions could be brought prior to the Rules, as previously plaintiffs could resort to state courts in the same places that Rules 4(f) and (e) authorized federal actions. This is not true in the case of the 100-mile bulge provision, however. Rule 14 and Rule 19 parties are thus subject to federal actions in states where they could not be subjected to suit in the state courts. *Cf.* Abraham, *supra* note 128, at 528, 537 (arguing that *Klaxon* casts doubt upon, among other things, the validity of the 100-mile bulge provision). It is strong testimony to the "blinding" effect of the Sibbach v. Wilson & Co., 312 U.S. 1 (1941), Hanna v. Plumer, 380 U.S. 460 (1965), and Mississippi Publishing Corp. v. Murphree, 362 U.S. 438 (1946), decisions that such matters were not even considered important enough by the Advisory Committee to deserve comment in the notes to amended Rule 4(f).

259. *See supra* note 258.

260. *See supra* text accompanying notes 219-24 & 239-50.

261. *See supra* text accompanying notes 237-38.

jurisdiction authority beyond state borders.[262] The 100-mile provision does not apply to process against the original defendant(s) to an action. It extends only to persons summoned pursuant to Rules 13(h), 14 and 19, and to orders of commitment for civil contempt. Thus, the rule may be defended because it encroaches only minimally on congressionally established prerogatives to regulate federal long arm jurisdiction. As argued earlier, the extent to which a Court-made rule impacts on an area occupied by Congress is relevant to an assessment of the rule's validity.[263]

In addition, the rule's validity is supported by the Advisory Committee's observation that the jurisdictional expansion will not work "hardship on the parties summoned."[264] The location of a civil action has significant implications for the burdens incurred by litigants, and this is relevant to the validity of Court-made locational rules.[265] The fact that a rule involves no significant litigational hardships favors its validity.

Finally, that the 100-mile provision enables federal courts to determine "entire controversies"[266] weighs in favor of its validity. The multiparty joinder provisions of the federal rules represent important devices for avoiding the inconvenience of multiple lawsuits over the same basic matter, and the danger of inconsistent, multiple, or double liability.[267] These devices are important features of federal justice because they assure that the exercise of federal subject matter jurisdiction will not be unduly vexatious to litigants. Indeed, in the case of a Rule 19 party classified as "indispensable," so that a federal action has to be dismissed in his absence,[268] the 100-mile bulge rules may avoid even more severe miscarriages of justice, as in rare cases where there may be no court with proper subject matter jurisdiction, venue, and personal jurisdiction sufficient to allow joinder of all the indispensable parties without the rule. Of more direct relevance is the danger of double liability that arises when a particular party has to defend against multiple suits on the same matter. The potential due process problem that could result may sometimes be eliminated by the 100-mile provision.[269]

Despite these factors favoring the 100-mile bulge provision, serious doubts exist as to its validity under the analysis proposed here. The first two factors mentioned—the moderate nature of the juris-

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262. *See* Jacobs v. Flight Extenders, 90 F.R.D. 676, 679 (E.D. Pa. 1981). *See also supra* text accompanying note 256.

263. *See supra* text accompanying notes 96-98.

264. FED. R. CIV. P. 4(f) advisory committee's note (1963 amendment).

265. *See supra* text accompanying notes 89-90.

266. *See* FED. R. CIV. P. 4(f) advisory committee's note (1963 amendment).

267. *See* FED. R. CIV. P. 14, 19.

268. *See* FED. R. CIV. P. 19(b).

269. *See* J. FRIEDENTHAL, M. KANE & A. MILLER, *supra* note 80, § 6.5, at 336-37 (discussing Western Union Tel. Co. v. Pennsylvania, 368 U.S. 71 (1961)).

dictional extension and slight hardship to the parties—are relatively minor points in the rule's favor, given congressional willingness to prescribe federal long arm jurisdiction when needed. While aid to multiparty joinder weighs heavily in favor of validity, it does not involve as strong a federal policy as the policies directly supporting grants of federal subject matter jurisdiction. These may be seriously undermined by discrepancies between federal and state personal jurisdiction authority that encourage litigants to choose state over federal courts. Policies directly supporting grants of federal subject matter jurisdiction are not undermined as seriously by the inconvenience to litigants of multiple, perhaps federal, actions in different states, even where the possibility of inconsistent judgments is present, because Rule 13(h), 14, and 19 parties will usually be brought in at the behest of parties to the litigation placed in defensive postures. Because these persons are already parties, they cannot elect a state over a federal court without the cooperation of opposing parties and the court. Thus, while Rule 13(h), 14 and 19 parties may be inconvenienced by the inability to summon an additional party, they cannot take action to avoid that inconvenience which will directly undermine the policies supporting federal subject matter jurisdiction.

In part because of constitutional overtones and in part because of the serious risk of unfairness it poses to defendants, the danger of double liability has a more significant impact on federal subject matter jurisdiction. The policy that the federal courts should be instruments for achieving justice is obviously offended by the use of those courts to produce serious, perhaps unconstitutional, injustice.[270] The double liability danger is lessened, however, by the traditional willingness of Congress to act to alleviate it.[271] Given this history, as well as the option of dismissing the action in the face of incurable double liability possibilities,[272] it does not seem justifiable for the Supreme Court to create a rule that Congress has not seen fit to enact as a statute.

The analysis advocated by this Article is not mathematical in precision, however. In some cases, it will leave room for reasonable disagreement. Its virtue lies in the fact that it properly focuses the inquiry. Indeed, it would be difficult to disagree with the conclusion that the 100-mile provision is valid on the ground that it relieves a

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270. *See supra* text accompanying note 269 (raising the potential due process problem produced by the double liability possibility).

271. *See, e.g.*, 28 U.S.C. § 1335 (1982) (establishing requirements for district court jurisdiction of interpleader actions); *id.* § 1397 (establishing criteria for proper venue of interpleader actions); *id.* § 2361 (process and procedure for interpleader actions).

272. The possibility also exists of the Supreme Court reversing state courts on due process grounds if the state courts hear an action in disregard of the double liability danger. *See* J. FRIEDENTHAL, M. KANE & A. MILLER, *supra* note 80, § 6.5 at 336-37.

serious problem of injustice in federal multiparty cases, because that problem may be entitled to more weight than given to it here. More important than conclusions about the validity of the "bulge" provision is that this analysis establishes where the ultimate rulemaking line on personal jurisdiction should be drawn. As a consequence, a hypothetical federal long arm rule that might be valid under *Mississippi Publishing Corp. v. Murphree*[273] can, under the analysis advocated here, be shown to be clearly invalid as a violation of separation of powers.

C. *A Nationwide Federal Long Arm Rule*

As observed earlier, the Advisory Committee justified the Supreme Court's power to make the 1963 expansions of federal personal jurisdiction in Rule 4(e) and (f) solely by a citation to *Murphree*.[274] Professor Charles Alan Wright, discussing the 100-mile bulge provision during a lecture on procedural reform, suggested that *Murphree* would validate even greater expansions of federal personal jurisdiction:

> When I was a member of the Advisory Committee on Civil Rules, I supported and voted for the amendment to Rule 4(f), adopted in 1963, that in certain situations permits service of process outside of the state but not more than 100 miles from the court. I believe it would be desirable to have nationwide service of process in all cases in federal courts. . . . I have no doubt whatever that the Supreme Court could make a rule providing for nationwide service of process. But if a proposal to this effect were to come to the Standing Committee, of which I am now a member, I should want to think long and hard before deciding whether this is not so basic an alteration in the way of doing things that the change should be made by Congress rather than the Court.[275]

The only authority cited by Professor Wright for the validity of a Court-made rule of nationwide long arm jurisdiction was *Murphree*.[276]

Professor Wright correctly concluded that a federal rule of nation-

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273. 326 U.S. 438 (1946).

274. *See supra* text accompanying note 236.

275. Wright, *Procedural Reform: Its Limitations and Its Future*, 1 GA. L. REV. 563, 571 (1967) (footnotes omitted).

In Omni Capital International v. Wolff & Co., 108 S. Ct. 404, 411-13 (1987), the Supreme Court suggested that a federal rule of civil procedure might be created that would allow the assertion of long arm jurisdiction over an alien defendant in cases not now covered by an existing federal or state long arm provision. The Court's suggestion was pure dictum, however; the holding of the case was that a federal court in Louisiana could not assert personal jurisdiction over an alien defendant in the absence of an affirmative provision in state or federal law authorizing such an assertion of jurisdiction. *See id.* at 413.

276. *See* Wright, *supra* note 275, at 575 n.16.

wide long arm jurisdiction would be valid under *Murphree*, which held that Court-made rules of personal jurisdiction would not violate Rule 82 or the substantive rights restriction of the Rules Enabling Act.[277] Because these restrictions have been viewed as the only limitations on the Supreme Court's rulemaking power, a nationwide long arm jurisdiction rule would be valid under existing interpretations of the limits on supervisory rulemaking.

Professor Wright is equally correct in suggesting that a nationwide long arm rule might be "too basic" to be made by the Court. No such massive encroachments on legislative prerogatives are tolerable under the separation of powers doctrine. If the 100-mile provision of Rule 4(f) is valid, it is because it does not state a rule of original process for defendants. Rather it constitutes only a minor incursion on the frequently exercised prerogative of Congress to extend process beyond state borders. The rule also eliminates important obstacles to achieving justice in federal multiparty cases. Even so, the affirmative federal policies vindicated by the 100-mile bulge rule are not nearly as strong as those vindicated by original Rule 4(f) and amended Rule 4(e). Under such circumstances, the difference in degree between the 100-mile provision and a nationwide long arm rule could in no way be supported.[278] The encroachment on the prerogatives of Congress by a nationwide long arm rule would be complete, and would be enough to invalidate the rule. If more were needed, one might simply observe that the gains to federal justice from such a rule, given existing federal long arm statutes and the availability of state long arm statutes under Rule 4(e), are likely to be insufficient to justify the resulting encroachments on legislative power to prescribe basic policy.

At this juncture, however, it is fair to ask why Professor Wright's approach is not preferable to the one recommended in this Article. In essence, he argues that certain decisions may be too basic, *as a matter of wisdom*, for judicial rulemaking. This Article would classify such decisions as unconstitutional. What purpose is served by describing the analytical process as one of constitutional magnitude?

Certainly, it is preferable that the rulemakers themselves exercise a wise restraint. Certainly, also, that restraint should consider whether the subject of a proposed rule is so fundamental that, even if entirely procedural, it should be regulated by Congress if at all. Nevertheless, there are important reasons to consider the analysis one of constitutional magnitude. The previous discussion of the rulemaking power reveals that the substance-procedure distinction does not exhaust the constitutional limits on Court rulemaking. The Supreme Court itself has described the additional purely procedural

277. *See supra* text accompanying notes 224-25.

278. As Professor Wright has stated, "[D]ifferences of degree may be decisive." *See* Wright, *supra* note 275, at 571.

limits in terms of "important" subjects reserved for Congress versus "those of less interest" that can be the subject of court rulemaking.[279] The earlier discussion has also demonstrated that in some cases the "importance" of a subject depends upon the amount of attention that the legislature has devoted to it and the specificity with which the legislature has delegated rulemaking power to the courts.[280]

If additional reasons to question the constitutional validity of Court rules in an area occupied by Congress are needed, consider the following. Suppose Congress, fed up with the miserly and unrealistic time limits of Federal Rule 12(a), expands the time for defendants to answer the complaint in a federal action from twenty to sixty days by statute. The Supreme Court, outraged by this legislative slap, repromulgates original Rule 12(a)'s twenty day time limits the day after the statute becomes effective. Congress, occupied by debates over farm policy and arms control, as well as by election year politics, cannot get around to preventing the newly promulgated rule from going into effect. Would those who argue that the substance-procedure restriction is the exclusive limit on rulemaking consider the Court's time limit rule valid? If not, must the rule — clearly procedural under the decisions interpreting the Rules Enabling Act — not be invalid because it contradicts a statute intended to occupy a procedural area? And if the time limit rule can be constitutionally invalidated for contradicting a statute, should the validity of all rules not depend upon whether they encroach too far on congressionally prescribed areas of procedure?

Answering this hypothetical by arguing that the objectionable rule on time limits directly changes a congressionally prescribed limit, rather than filling a gap, as would, for example, a Court-made rule of nationwide long arm jurisdiction, does not seem convincing.[281] Gaps in statutory schemes can have policy implications quite as strong as express statutory provisions.[282] Otherwise, why consider a nationwide long arm rule to be "basic" in the first place?

A second reason for considering the analysis a constitutional one, rather than a mere question of wisdom, concerns the different consequences of unwise versus unconstitutional decisions. Even if "wise men [think] carefully"[283] before making federal rules of civil proce-

279. *See supra* text accompanying note 47.

280. *See supra* text accompanying notes 59-100.

281. The nationwide long arm rule would fill gaps, in the sense that there currently exist federal long arm statutes covering specific substantive areas, and in the sense, also, that there exist state long arm statutes that are available to cover many cases brought in federal court. A federal nationwide long arm rule would, therefore, have utility only in those cases not covered by the existing federal and state provisions.

282. *See infra* text accompanying note 299.

283. "To borrow a phrase of Professor [Ronan] Degnan's, the implication of

dure, wisdom and careful thought sometimes fail in beings possessing limited foresight.[284] In *Murphree*, the Supreme Court itself insisted that the validity of the federal rules is not insulated from challenge by "[t]he fact that [the] Court promulgated the rules as formulated and recommended by the Advisory Committee."[285] A litigant cannot, however, challenge the validity of a rule merely on the grounds that it is unwise; and under the Court's interpretations of the substantive rights restriction of the Rules Enabling Act, restrictions on rulemaking power are relatively slight.[286] A constitutional analysis is therefore essential if an unwisely crafted federal rule that seriously encroaches on congressional prerogatives is to receive meaningful review after promulgation.[287] In short, the Advisory Committee, Court, and Congress cannot be expected to preserve fully the separation of powers restrictions on Court rulemaking under the existing processes of rule formulation and promulgation. Such questions must be left open for litigants to raise in the context of actual disputes.

D. The Validity of Federal Amenability Rules

This section concludes by showing how the analysis advocated here might affect decisions on other matters of personal jurisdiction, or amenability to process,[288] by the federal courts. Specifically, this

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Hanna is not that the federal rules are valid because wise men made them, but because wise men thought carefully before making them." Wright, *supra* note 275, at 574.

284. In fact, there have been alleged abuses of the rulemaking power dating at least from the promulgation of the Federal Rules of Evidence under the Rules Enabling Act to recent proposals to amend Rule 68 of the Federal Rules of Civil Procedure in a fashion that would contradict strong statutory policies permitting awards of attorneys' fees to prevailing parties. *See generally Rules Enabling Act Hearings*, *supra* note 114, at 130-31, 134-35; Rules Enabling Act Report, *supra* note 114, at 323; Burbank, *Rule 68*, *supra* note 9, at 425. *See also* Burbank, *Sanctions in the Proposed Amendments to the Federal Rules of Civil Procedure: Some Questions About Power*, 11 HOFSTRA L. REV. 997 (1983).

285. Mississippi Publishing Corp. v. Murphree, 326 U.S. at 444.

286. *See supra* notes 2-8 and accompanying text.

287. Although Congress has been more active in scrutinizing proposed federal rules since the Federal Rules of Evidence, *see supra* note 284, it is nevertheless apparent that congressional review of the rules is not an adequate substitute for post-promulgation judicial review. As Justice Frankfurter observed in *Sibbach*:

> [L]ittle significance attaches to the fact that the Rules, in accordance with the statute, remained on the table of two Houses of Congress without evoking any objection . . . and thereby automatically came into force. Plainly the Rules are not acts of Congress and can not be treated as such. Having due regard to the mechanics of legislation and the practical conditions surrounding the business of Congress when the Rules were submitted, to draw any inference of tacit approval from non-action by Congress is to appeal to unreality.

Sibbach v. Wilson, 312 U.S. 1, 18 (1941) (Frankfurter, J., dissenting).

288. "Amenable to process" is the equivalent of "subject to personal jurisdiction."

subsection examines certain decisions of the lower federal courts under Rule 4 concerning the amenability to process of defendants who may be served in a manner prescribed by the Rule in a location also permitted by it.

Recall that prior to the Federal Rules of Civil Procedure, a distinction was drawn between the places where process might be served and the effect of service.[289] After Rule 4(f) expanded the authority to serve federal process throughout the state, it might have been possible to conclude that the Rule controlled place of service, but did not expand jurisdiction.[290] Under such circumstances, personal jurisdiction over the defendant would have to be conferred by some law other than Rule 4(f), such as a state statute implying the defendant's consent to suit within the state based on the appointment of an agent to receive process, or some other action by the defendant.[291] As we have seen, however, Rule 4(f) *has* been interpreted to govern the effect of service, although not to the broadest possible extent.[292] If no restraining interpretation had been placed on the Rule, a defendant served with federal process in a state might have been subjected to personal jurisdiction within the state even if the state's own courts would not assume jurisdiction over the defendant under state law in the same kind of case.

In *Arrowsmith v. United Press International*,[293] the Second Circuit Court of Appeals established a principle of amenability to process under Rule 4 in cases in which state law provides the exclusive rule of decision. In *Arrowsmith*, a citizen of Maryland sued a New York corporation in the United States District Court for Vermont. The defendant was served in Vermont under Rule 4(d)(3) by service on the manager of its Montpelier news bureau. The Second Circuit concluded that a federal court sitting in diversity cannot acquire personal jurisdiction by service pursuant to Rule 4(d) and 4(f) when the state in which the district court is located would not assert jurisdiction over the defendant. Although the court indicated that a federal long arm statute *or* a federal rule of civil procedure could validly authorize personal jurisdiction in such a case,[294] the court found no such statute, and considered the provisions of Rule 4(d) to deal only with manner of service, not amenability to suit.[295] The fact that

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Thus, a defendant who is "amenable to process" is one over whom the court may validly assert personal jurisdiction. The expression "amenability to process," therefore, refers to the defendant's susceptibility to a court's personal jurisdiction authority.

289. *See supra* notes 184-85 & 197 and accompanying text.

290. *See supra* note 197.

291. *See supra* note 197.

292. *See supra* text accompanying notes 198-99.

293. 320 F.2d 219 (2d Cir. 1963).

294. *Id.* at 226.

295. *Id.*

the defendant was served within the state as prescribed by Rule 4(f) did not confer personal jurisdiction on the district court. The *Arrowsmith* view subsequently became the unanimous view of the lower federal courts.[296]

The *Arrowsmith* rule is not contrary to *Murphree*. In *Murphree* the corporation had consented to suit by appointing an agent to receive process and was thus subject to the jurisdiction of the Mississippi courts. In *Arrowsmith*, the action was remanded to the district court for a determination whether state law would permit the Vermont courts to assert personal jurisdiction over the defendant; if the Vermont courts did not have personal jurisdiction as a matter of state law, Vermont federal courts could not assert jurisdiction over the defendant either.[297] Nor does *Arrowsmith* deny that Rule 4(f) extends federal personal jurisdiction authority by expanding the locations in which process may be served in multidistrict states. Vermont is a single district state.[298] In fact, the interpretation of Rule 4 in *Arrowsmith* complements the purposes of Rule 4(e) and 4(f). These rules were considered valid because they eliminated discrepancies between state and federal personal jurisdiction authority that undermined federal subject matter jurisdiction policies. In contrast, the hypothetical nationwide long arm rule discussed above was invalid because it created federal personal jurisdiction authority broader than that exercised by the states without similarly protecting against harm to federal subject matter authority or offering any other adequate justification for supervisory rulemaking in an area extensively occupied by Congress. *Arrowsmith* explicitly recognized the absence of statutory support for a federal amenability standard broader than that provided by Vermont law:

> We see nothing in the concept of diversity jurisdiction that should lead us to read into the governing statutes a Congressional mandate, unexpressed by Congress itself, to disregard the balance . . . struck by the states. The . . . reason for diversity jurisdiction . . . does not suggest that the founders were concerned with rendering diversity defendants, who might be either in-staters or out-of-staters, more readily suable in the federal court than they would be in the state court. Thus . . . no federal policy . . . makes it important to provide this Maryland plaintiff with a federal forum in Vermont, if Vermont itself would not entertain such an action.[299]

Restrictive amenability standards have also been established in cases where parties are brought in pursuant to the 100-mile bulge provision of Rule 4(f). Decisions of the lower federal courts under

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296. *See* 4 C. WRIGHT & A. MILLER, *supra* note 35, § 1075, at 489 n.32.

297. Arrowsmith v. United Press Int'l, 320 F.2d at 231-34.

298. *See* 28 U.S.C. § 126 (1982) (describing federal court system in the state of Vermont).

299. Arrowsmith v. United Press Int'l, 320 F.2d at 226-27 (citation omitted).

the 100-mile provision have, for the most part, agreed that the purpose of the rule was to extend the personal jurisdiction authority of the federal courts.[300] Limits have been placed, however, on the power of the courts to assert jurisdiction over parties served within the 100-mile "bulge" area under the rule. Generally, courts have insisted that for jurisdiction to exist the party served must have minimum contacts with the bulge area.[301] Most courts so holding seem to be adopting a suggestion made by Professor Kaplan that the 100-mile amendment should be interpreted to contain this limitation on amenability, an interpretation that, in effect, incorporates the fourteenth amendment minimum contacts test as part of the

300. *See* Sprow v. Hartford Ins. Co., 594 F.2d 412, 416 (5th Cir. 1979) (100-mile bulge rule extended long arm jurisdiction of federal courts beyond state lines subject to due process); Coleman v. American Export Isbrandtsen Lines, Inc., 405 F.2d 250, 252 (2d Cir. 1968) (service valid on third-party defendant outside state but within 100 miles of place where action begun under Rule 4(f)); Paxton v. Southern Pa. Bank, 93 F.R.D. 503, 505 (D. Md. 1982) (service on third-party defendant not constitutionally defective within 100-mile bulge even where service of process was not possible under state rules); School Dist. v. Missouri, 460 F. Supp. 421, 436 (W.D. Mo. 1978) (100-mile bulge rule does not affect service on original parties as Rule 4(f) is inapplicable to service of process on original parties); Lee v. Ohio Casualty Ins. Co., 445 F. Supp. 189, 193 (D. Del. 1978) (service allowed on agency within 100-mile bulge where agency had requisite contacts with the state of service and with the 100-mile bulge area); Pillsbury Co. v. Delta Boat & Barge Rental, Inc., 72 F.R.D. 630, 632 (E.D. La. 1976) (third-party defendant within 100-mile bulge is amenable to service where 100 miles is measured in a straight line); Spearing v. Manhattan Oil Transp. Corp., 375 F. Supp. 764, 771 (S.D.N.Y. 1974) (federal district court has personal jurisdiction over third-party defendant if within 100-mile bulge area even if outside forum state's boundaries, if bulge state chooses to exercise personal jurisdiction over him); McGonigle v. Penn-Central Transp. Co., 49 F.R.D. 58, 61-63 (D. Md. 1969) (application of the 100-mile bulge provision may be limited by procedural due process concepts, yet can allow service outside the forum state); Pierce v. Globemaster Baltimore, Inc., 49 F.R.D. 63, 66-67 (D. Md. 1969) (service on third-party defendants out of forum state but within 100-mile bulge measured through air-mile calculations to reduce disputes). *But see* Karlsen v. Hanff, 278 F. Supp. 864, 865 (S.D.N.Y. 1967) (Rule 4(f) affects service, but not amenability).

301. *See* Sprow v. Hartford Ins. Co., 594 F.2d 412, 416 (5th Cir. 1979); Drames v. Milgreva Compania Maritima, S.A., 571 F. Supp. 737, 738-39 (E.D. Pa. 1983); Paxton v. Southern Pa. Bank, 93 F.R.D. 503, 505 (D. Md. 1982); Jacobs v. Flight Extenders, Inc., 90 F.R.D. 676, 679 (E.D. Pa. 1981) (minimum contacts with either forum state *or* bulge must exist; here contacts with bulge existed); School Dist. v. Missouri, 460 F. Supp. 421, 436 (W.D. Mo. 1978); Lee v. Ohio Casualty Ins. Co., 445 F. Supp. 189, 193-94 (D. Del. 1978) (court need not determine whether amenability by law of forum or only contacts with bulge necessary, since both are present); Pillsbury Co. v. Delta Boat & Barge Rental, Inc., 72 F.R.D. 630, 632 (E.D. La. 1976); McGonigle v. Penn-Central Transp. Co., 49 F.R.D. 58, 62-63 (D. Md. 1969). *But see* Coleman v. American Export Isbrandtsen Lines, Inc., 405 F.2d 250, 252 (2d Cir. 1968) (process can be validly served in bulge only on persons over whom bulge state has jurisdiction and, very likely, only on persons over whom it has chosen to exercise jurisdiction); Spearing v. Manhattan Oil Transp. Corp., 375 F. Supp. 764, 771 (S.D.N.Y. 1974) (jurisdiction can be asserted only over persons over whom the bulge state has chosen to exercise jurisdiction).

provision.[302]

This restrictive interpretation of the 100-mile provision further supports the "moderate" nature of the jurisdictional extension effectuated by the Rule.[303] Thus, to the extent that the interpretation lessens the impact on a congressionally occupied area, it enhances the case for the Rule's validity.[304] The weight of the other factors militating against the validity of the 100-mile provision remains strong, however, and might still result in the conclusion that the Rule violates separation of powers restrictions.[305]

The restrictive interpretations of amenability in *Arrowsmith* and the 100-mile bulge cases tend to enhance, rather than diminish, the case for the validity of Rule 4(e) and (f). The same cannot be said of

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302. Professor Kaplan suggested:

> Questions of interpretation may arise, however, as to the scope of the amendment, questions not unfamiliar in kind, but novel in context. To what extent must a corporate party, served within the [bulge], have been active there in order to be subjected to a valid judgment? The amendment is certainly not intended to hold the corporation to judgment if the sole contact is the fact of service. Considerations of fairness to the party, viewed in the light of the animating purpose of the amendment, ought to control; and it seems a roughly accurate formula of decision to hold that the party should be amenable to the federal process if, considering its activities within the forum state plus the 100-mile area, it would be amenable to that state's process, had the state embraced this area and exerted judicial jurisdiction over the party to the degree constitutionally allowable.

Kaplan, *Amendments of the Federal Rules of Civil Procedure, 1961-1963 (I)*, 77 HARV. L. REV. 601, 632-33 (1964) (footnotes omitted).

Some courts, however, have apparently concluded that the amenability standard is compelled by the Constitution. Some have indicated that it is the due process clause of the fourteenth amendment that compels this result. *See, e.g.*, Paxton v. Southern Pa. Bank, 93 F.R.D. 503, 505 (D. Md. 1982) (sufficient contacts in bulge area make due process concerns inapplicable); McGonigle v. Penn-Central Transp. Co., 49 F.R.D. 58, 62 (D. Md. 1969) (application of 100-mile bulge provision may be limited by concepts of due process clause). This conclusion is clearly wrong, since the fourteenth amendment limits state court jurisdiction, not federal court jurisdiction. Other courts have cited the fifth amendment due process clause as the source of the amenability restriction. *See, e.g.*, Jacobs v. Flight Extenders, Inc., 90 F.R.D. 676, 679 (E.D. Pa. 1981) (fifth amendment's due process clause applies to service that is effected under federal rules and statutes). The traditional fifth amendment restriction, however, would focus on contacts with the United States, not simply with the bulge area. Still, concepts of convenience and fairness pervading fourteenth amendment analysis since International Shoe Co. v. Washington, 362 U.S. 310 (1945), may eventually also be incorporated into the fifth amendment as restrictions on the reach of federally authorized process. *Cf.* Whitten, *The Constitutional Limits on State-Court Jurisdiction — A Historical Interpretative Reexamination of the Full Faith and Credit and Due Process Clauses (Part Two)*, 14 CREIGHTON L. REV. 735, 851 (1981) (arguing for replacement of the traditional fifth amendment standard by one that focuses on the burdens placed on the defendant's opportunity to be heard by an assertion of federal jurisdiction).

303. *See supra* text accompanying note 262.

304. *See supra* text accompanying notes 262-63.

305. *See supra* text accompanying notes 269-72.

the amenability standards evolved to govern actions in federally created rights cases under Rule 4. The cases generally agree that a federal standard of amenability governs the ability of a district court to assert personal jurisdiction over a defendant when the plaintiff's action is based on a federally created right.[306] The issue only arises when the ability exists to serve a nonresident defendant within the state pursuant to Rule 4 and no federal or state long arm statute authorizes the assertion of jurisdiction over the defendant.[307] Obvi-

306. *See* Terry v. Raymond Int'l, Inc., 658 F.2d 398 (5th Cir. 1981) (federal standards govern amenability to personal jurisdiction where case arises under both diversity and federal question jurisdiction); Fraley v. Chesapeake & Ohio Ry., 397 F.2d 1 (3d Cir. 1968) (federal law governs question of district court's jurisdiction in federal action); Volkswagen Interamericana, S.A. v. Rohlsen, 360 F.2d 437 (1st Cir. 1966), *cert. denied*, 385 U.S. 919 (1966) (courts have tested amenability of any foreign corporation to suit by reference to standards developed under due process clause); Lone Star Package Case Co. v. Baltimore & O. R.R., 212 F.2d 147 (5th Cir. 1954) (where resort is had to federal court because federal right is claimed, limitations upon state courts do not control federal court sitting in state). *See also* 4 C. WRIGHT & A. MILLER, *supra* note 35, § 1075.

The cases disagree as to the proper content of the federal standard. Some cases hold the standard to be whether the defendant has minimum contacts with the state in which the district court is sitting, thus applying the fourteenth amendment due process restrictions on state power as the test of federal amenability. *See* Terry v. Raymond Int'l, Inc., 658 F.2d 398 (5th Cir. 1981); Fraley v. Chesapeake & Ohio Ry., 397 F.2d 1 (3d Cir. 1968); PPS, Inc. v. Jewelry Sales Representatives, Inc., 392 F. Supp. 375 (S.D.N.Y. 1975); Goldberg v. Mutual Readers League, Inc., 195 F. Supp. 778 (E.D. Pa. 1961). Other cases derive the federal standard from the due process clause of the fifth amendment, stating that the test is whether the defendant has minimum contacts with the United States. *See* Volkswagen Interamericana, S.A. v. Rohlsen, 360 F.2d 437 (1st Cir. 1966), *cert. denied*, 385 U.S. 919 (1966); Holt v. Klosters Rederi A/S, 355 F. Supp. 354 (W.D. Mich. 1973); Moriarity & Co. v. General Tire & Rubber Co., 289 F. Supp. 381 (S.D. Ohio 1967). Finally, there are some cases that apply a state standard of amenability in federally created rights cases when service is made in the *manner* prescribed by state law under Rule 4(c)(2)(C)(i), formerly Rule 4(d)(7). *See, e.g.*, Gkiafis v. S.S. Yiosonas, 342 F.2d 546 (4th Cir. 1965); Scott Paper Co. v. Scott's Liquid Gold, Inc., 374 F. Supp. 184 (D. Del. 1974).

307. The Supreme Court's recent decision in Omni Capital International v. Wolff & Co., 108 S. Ct. 404 (1987), should not be read as a rejection of the power of federal courts to apply federal amenability standards in the kind of case described in the text. In *Omni Capital*, the Court refused to create a federal common law amenability rule that would allow personal jurisdiction to be asserted over a *nonresident alien* defendant, where no federal statute, state statute, *or* federal rule of civil procedure authorized *service of process* on the defendant outside the state. *Id.* at 413. In contrast, the cases discussed in the text are ones in which process may be served on the defendant within the state under Rule 4. *Omni Capital* is, therefore, not necessarily controlling in those cases. Nevertheless, to the extent that the decision may herald a new restraint on the power of the federal courts to create amenability rules, it is welcome and, hopefully, will be extended by the Court to the cases described in the text.

A disturbing aspect of the *Omni Capital* opinion is its suggestion that "those who propose the Federal Rules of Civil Procedure," as well as Congress, might create a long arm jurisdiction rule to govern the case before the Court. *See id.* at 413. Obviously, this dictum is incorrect under the analysis proposed in this Article. *See also*

ously, a federal amenability standard that allows an assertion of personal jurisdiction over the defendant when the state in which the district court is sitting would not allow such jurisdiction differs fundamentally from the *Arrowsmith* and 100-mile bulge amenability standards described above. In effect, federal courts allowing personal jurisdiction to be asserted in accordance with a federal amenability standard are either interpreting Rule 4 as an affirmative authorization of federal long arm jurisdiction[308] or are creating a common law rule of long arm jurisdiction, notwithstanding that the standard may be phrased in terms of "minimum contacts" restrictions on the power of the courts.[309]

An interpretation that Rule 4 itself authorizes federal courts to assume personal jurisdiction over defendants not amenable to process under state law or a federal long arm statute is unwarranted. Under the *Arrowsmith* interpretation of Rule 4, the Rule is not an affirmative authorization to assert jurisdiction over defendants in diversity cases who are not subject to personal jurisdiction under state law or a federal long arm statute.[310] Nothing in the text of the rule purports to grant federal courts greater personal jurisdiction authority in federally created rights cases than they have in diversity cases.

Moreover, such an interpretation of the Rule effectively encroaches on the prerogatives of Congress to authorize long arm jurisdiction as much as would a federal rule of civil procedure authorizing long arm jurisdiction in cases where only state created rights are involved. Indeed, Congress has traditionally shown an even greater willingness to create federal long arm jurisdiction in federally created rights cases than it has in other kinds of cases.[311] This past behavior raises a strong presumption that Congress has assumed the policy-making role in such cases to the exclusion of the Supreme Court and, therefore, that any federal rule of long arm jurisdiction would violate separation of powers restrictions. In addition, the expansion of federal personal jurisdiction authority worked by the federal amenability standard in federally created rights cases does not have the virtue of being a narrowly drawn, relatively minor encroachment on congressional prerogatives, as does the 100-mile bulge provision. On the contrary, the federal amenability standard

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supra note 275. Hopefully, the Court's view of this matter will change after a careful consideration of the separation of powers principles discussed here.

308. The term "long arm" is usually applied only to provisions authorizing service of process outside the state. It seems apt, however, to employ it here in a broader sense to describe the authority of the federal courts to assert personal jurisdiction over defendants located within the state. It is clear that a federal court's assertion of jurisdiction over a defendant who can be served within the state when a state court would not do so is the equivalent, in terms of power, of long arm jurisdiction.

309. *See supra* note 306.

310. *See supra* text accompanying note 308.

311. *See supra* note 129.

would result in personal jurisdiction in many more cases than does the bulge rule.

In the final analysis, any justification for a broader interpretation of Rule 4 in federally created rights cases than in diversity cases must rest on a value judgment that federally created rights cases are somehow more important than diversity cases and thus deserve a correspondingly more expansive rule of long arm jurisdiction to support their greater importance. For such a value judgment to be a legitimate basis for rulemaking, however, it must derive from some statutory source. Nothing in the federal statutes creating federal subject matter jurisdiction directly supports such a value. True, there is a widespread feeling today that federal question jurisdiction is more important than diversity jurisdiction.[312] The fact that many federal judges, lawyers, and law professors share this view, however, does not make it a proper basis for federal rulemaking. In contrast, original Rule 4(f) and amended Rule 4(e) eliminated differences between federal and state personal jurisdiction authority that might deter litigants from resorting to federal court. A separate federal amenability standard in federally created rights cases *creates* differences between federal and state personal jurisdiction authority that may generate an incentive for litigants to pick federal over state courts with no indication that any statutory policy demands such an incentive. When federal and state subject matter jurisdiction are concurrent over federally created rights cases, a policy of neutrality is more appropriate because of this lack of statutory basis; and even where federal subject matter jurisdiction is exclusive, as in admiralty cases,[313] the willingness of Congress to provide nationwide long arm jurisdiction where it is thought necessary for the protection of federal rights creates a formidable obstacle to court rulemaking.[314]

The validity of an independent federal amenability standard for federally created rights cases is not enhanced if the standard is viewed as a common law rule, rather than as an interpretation of Rule 4. Some commentators have argued that if a federal rule of civil procedure violates the substantive rights restrictions of the Rules Enabling Act, the Supreme Court cannot evade those restrictions by creating a federal common law rule of procedure to the same effect outside the Act.[315] This may be somewhat of an over-

312. *See, e.g.*, ALI STUDY, *supra* note 154, at 99 (diversity jurisdiction should be permitted only upon a strong showing of reasons; it would be preferable to see the use of federal courts concentrated upon the adjudication of federal substantive rights); *id.* at 163 (modern commentators agree that federal question cases constitute one of the most important purposes, if not the most important function, of the federal court system).

313. *See* 28 U.S.C. § 1333 (1982).

314. *See, e.g., supra* note 128 (long arm jurisdiction in federal security cases).

315. *See* Westen & Lehman, *Is There Life for Erie After the Death of Diversity?*, 78 MICH. L. REV. 311, 365 (1980).

statement, however, as the sources of authority for valid federal rules of civil procedure and valid federal common law rules are different. Professor Burbank has argued that even when the Supreme Court is not authorized by the Rules Enabling Act to promulgate a federal rule of civil procedure in an area, it may nevertheless promulgate federal rules that express policies which help to shape valid federal common law rules:

> Federal Rules of Civil Procedure can . . . serve as sources of federal common law, not only by leaving interstices to be filled but also by expressing policies that are pertinent in areas not covered by the Rules. Even when legal regulation in a certain area is forbidden to the Rules, the policies underlying valid Rules may help to shape valid federal common law. But, when a Rule speaks to, and only to, a matter with which it has no proper concern, it is a troublesome, if not a bootstrap operation to invoke the Rule as legal justification for a federal common law rule that effects the same purpose.[316]

Even under Professor Burbank's view, however, a federal amenability standard may not be formulated on the grounds that it furthers policies expressed by Rule 4 or fills gaps left by the Rule because, for the reasons described above, Rule 4 may not legitimately embody federal long arm jurisdiction policies. The impact of such policies within an area occupied extensively by Congress would produce a separation of powers violation just as surely as would a rule directly effectuating long arm jurisdiction. In Professor Burbank's words, such policies are not, in this context, "validly the concern of federal rules."[317] This is due to Congress's occupation of the field, the impact of the rules on congressional prerogatives, and the absence of an otherwise valid justification for the rules, such as the prevention of the defeat of federal subject matter jurisdiction policies.

Moreover, even if a federal common law amenability rule is viewed as filling an "interstice" left by the federal rules, the amenability rule would violate separation of powers restrictions. If a common law rule is to fill an "interstice" left by, rather than being founded on a policy expressed in, a federal rule, then the common law rule must have another adequate policy basis. There is no such policy basis here, for reasons already given: the amenability rule is unnecessary to support important federal policies, such as subject matter jurisdiction policies, and it would have a significant impact on a congressionally occupied area. In sum, a federal common law rule of amenability for federally created rights cases is as invalid as

316. Burbank, *Interjurisdictional Preclusion, Full Faith and Credit and Federal Common Law: A General Approach*, 71 CORNELL L. REV. 733, 774 (1986) (footnote omitted).

317. *Id.*

a federal rule of civil procedure directly governing the same subject.

IV. Conclusion

This Article has argued that the traditional substance-procedure limitation, viewed either as a statutory or as a constitutional restriction, is not the only limit on Supreme Court rulemaking power. Separation of powers principles also restrict the authority of the Court to make even "purely procedural" rules under a general delegation of rulemaking power when Congress has occupied the procedural field in question. Such principles do not necessarily preclude Court-made rules that supersede statutes. Rather they limit Court rulemaking when the federal statutory policies supported or protected by a rule do not outweigh the encroachments on congressionally established procedural regulations affected by the rule.

A separation of powers analysis illuminates why the extension of federal personal jurisdiction authority throughout multidistrict states in original Rule 4(f) and the further incorporation of state long arm statutes by amended Rule 4(e) were permissible, while similar extensions of federal venue authority, which superficially seem indistinguishable, would not be permissible. Second, the analysis sheds light on why certain other extensions of federal personal jurisdiction authority, such as the 100-mile "bulge" provision of Rule 4(f), are of questionable validity. Third, it clarifies why the hypothetical nationwide long arm rule and the independent federal amenability standard in federally created rights cases should be for Congress to make, if they are made at all.

Nothing in this Article should be read as an argument against the Supreme Court's interpretation of the substantive rights limitation of the Rules Enabling Act. Rather the analysis suggested here should be seen as an *additional* inquiry to be made once the substantive rights limitation has been satisfied. Under the *Sibbach-Hanna* interpretation of the substantive rights restriction, the analysis proposed here would be necessary more often than under one of the more stringent interpretations of the Act that have been suggested. Even if the substantive rights limitation is given all the force imaginable, however, it will remain necessary in some cases to inquire whether the Court has exceeded its constitutional power to promulgate wholly procedural rules.