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REDISCOVERING THE LIMITED ROLE OF THE FEDERAL RULES IN REGULATING PERSONAL JURISDICTION

Patrick Woolley[*]

ABSTRACT

It is widely taken for granted that Federal Rule of Civil Procedure 4(k) may validly regulate whether a defendant is amenable to personal jurisdiction in federal court. But whether a person is subject to the authority of a court is a substantive matter outside the scope of rulemaking authorized by the Rules Enabling Act (REA). This fundamental principle was well understood when the Federal Rules were originally drafted. It has since been obscured by the failure of courts and commentators alike to place in historical context the 1938 version of Rule 4 and the Supreme Court's 1946 decision validating that Rule.

The 1938 Rule reflected a paradigm shift in jurisdictional thinking that began to take hold just before the REA became law in 1934: the recognition when a defendant is otherwise amenable to jurisdiction in a federal district, requiring that notice through service of summons be given in the district itself is a formality that serves no substantive purpose. The 1938 Rule simply put aside that formality.

Almost forty years later, the Court intimated in dicta that a Federal Rule may regulate whether a person is amenable to jurisdiction. But casual dicta in a decision that did not even discuss the

* Beck Redden LLP Professor in Law. I thank Bob Bone, Mechele Dickerson, David Robertson, Michael Sturley, Steve Vladeck, and Jay Westbrook for their helpful comments on earlier drafts. I also thank librarian Jane O'Connell and students Zachary Jarrett, Stefan Koller, Matthew Melançon, Alex Muller, and Zachary Tavlin for their invaluable research assistance. I dedicate this Article to the memory of Geoffrey C. Hazard, Jr.

REA cannot override basic statutory limits on rulemaking. And in the absence of a federal statute that requires otherwise, the Rules of Decision Act generally demands that state law govern amenability to jurisdiction.

Recognizing that the REA does not authorize rules regulating amenability will have a real (albeit limited) effect on jurisdiction in federal court. To the extent that effect is undesirable, the remedy lies with Congress.

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

We have lost sight of the proper role of the Federal Rules of Civil Procedure (the "Federal Rules") in regulating personal jurisdiction in federal court. When the Federal Rules were first promulgated in 1938, it was understood that rules governing whether a person is amenable to jurisdiction generally were outside the scope of the Court's authority to prescribe Federal Rules under the Rules Enabling Act (REA).[1] Today, by contrast, it is widely taken for granted that the Court has plenary authority to prescribe Federal Rules that govern amenability to jurisdiction in federal court, an assumption given a measure of support by offhand dicta in a 1987 Court decision that failed even to cite the REA.[2] In this Article, I argue that the assumption that the Court generally has power to prescribe Federal Rules that regulate amenability to jurisdiction cannot withstand serious and sustained scrutiny.[3]

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1. Rules Enabling Act, ch. 651, 48 Stat. 1064, 1064 (1934) (codified as amended at 28 U.S.C. § 2072 (2012)); *see infra* note 129.

2. *See* Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co., 484 U.S. 97, 111 (1987).

3. I am not the first to argue that the REA grants the Court only limited authority to prescribe Federal Rules that regulate personal jurisdiction. *See, e.g.*, Stephen B. Burbank, *The World in Our Courts*, 89 MICH. L. REV. 1456, 1484 n.164 (1991) (expressing concern about whether the Court had authority to prescribe Rule 4(k)(2)); 4 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1063, at 225 (2d ed. 1987) ("[I]t is doubtful whether the language of the Rules Enabling Act delegates sufficient authority to the Supreme Court to draft a federal rule touching upon [jurisdiction over the person]." (footnote omitted)). But except for a substantial article by Leslie Kelleher, see Leslie M. Kelleher, *Amenability to Jurisdiction as a "Substantive Right": The Invalidity of Rule 4(k) under the Rules Enabling Act*, 75 IND. L.J. 1191 (2000), this important question has not received the sustained attention it deserves. Although Professor Kelleher and I agree that the REA does not generally authorize the Court to prescribe Federal Rules governing a person's amenability to jurisdiction, we have profound differences about (1) what the REA requires, (2) the role of state law and federal common law in regulating amenability to jurisdiction in federal court, and (3) the proper role of the Federal Rules in fixing territorial limits on effective service. These differences lead us to radically different conclusions about the validity of Federal Rules that purport to address the personal jurisdiction of the federal district courts. To take one example, Professor Kelleher believes that Rule 4(k)(1)(A) is invalid. *See id.* at 1220 n.145 ("[T]he most problematic provision is Rule 4(k)(1), as it purports to impose in federal question cases a standard of amenability not imposed by any federal statute or in the Constitution."). By contrast, I take the position that Rule 4(k)(1)(A) is a valid restatement of the law that would govern amenability in the absence of a Federal Rule.

The erroneous assumption that the REA generally authorizes the Court to prescribe Federal Rules regulating amenability had its genesis in a common misreading of the Court's 1946 decision in *Mississippi Publishing Corp. v. Murphree*.[4] The Court in that case upheld Rule 4(f), which—in a departure from tradition—had authorized service of process throughout the state in which a federal district court sat. With a handful of exceptions, federal law had previously required that process be served within the federal district in which suit had been brought. But when Rule 4(f) was drafted, courts and commentators had begun to distinguish between a person's amenability to jurisdiction and the separate procedural requirement that *notice* of suit be provided through *service* of process. Once amenability and notice were disentangled, it became clear that the requirement that process be served within the district was a formality when (as in *Murphree*) the defendant was otherwise amenable to jurisdiction; the quality of notice does not depend on where it is served. Thus, *Murphree*—properly understood—simply stands for the proposition that the Court had the power to prescribe a Federal Rule that abolished a formal requirement that served no substantive purpose.

The REA authorizes the Court to prescribe rules of "practice and procedure," provided such rules do not "abridge, enlarge or modify any substantive right."[5] But Federal Rules governing amenability do not regulate the process by which claims and defenses are asserted and adjudicated within a lawsuit.[6] Rather, such rules govern whether a person served with process is even subject to the authority of the court. For that reason, rules governing amenability cannot properly be characterized as rules of "practice and procedure."[7]

Because the REA generally does not authorize the Court to prescribe Federal Rules governing amenability, the source of amenability law in federal court must be found elsewhere. It is uncontroversial that federal statutes regulate amenability in some kinds of cases. But in the absence of such a statute, the Rules of Decision Act (the RDA) *generally* requires application of state amenability law, whether the claims adjudicated find their source in state or federal law. It is sometimes thought that the RDA applies only in

4. 326 U.S. 438 (1946).

5. 28 U.S.C. § 2072(a)–(b) (2012).

6. *But see infra* notes 150–51 and accompanying text (recognizing the validity of Federal Rules prescribing or authorizing waiver of the jurisdiction defense when an appearing defendant fails to comply with its obligations under the Federal Rules).

7. 28 U.S.C. § 2072(a). For the same reason, such rules would "abridge, enlarge or modify" a substantive right. *Id.* § 2072(b); *see also infra* notes 138–42 and accompanying text.

diversity cases. But the RDA restates a basic structural principle applicable to all civil cases: If the Constitution, a treaty, or an Act of Congress does not otherwise require or provide, state law must govern because there can be no other law.

Part II of this Article provides the crucial historical foundation on which the analysis is built. Section II.A addresses the history of personal jurisdiction in the federal courts before the Federal Rules were promulgated in 1938. Section II.B canvasses the history of the Federal Rule prescribing "territorial limits on effective service" of summons, with special emphasis on the original Advisory Committee's understanding of Rule 4(f).

Part III analyzes the proper sources of personal jurisdiction law in federal court. Section III.A lays out why the REA generally does not authorize Federal Rules that regulate amenability to jurisdiction. Section III.B explains that the RDA generally requires a federal district court to apply state amenability law but recognizes that elaboration of federal common-law rules of amenability is appropriate in a handful of circumstances, including some categories of admiralty cases and jurisdiction over absent class plaintiffs. Section III.C recognizes the longstanding principle that a Federal Rule may restate a substantive rule that finds support in some other source of law. For that reason, Rule 4(k)(1)(A)—which, like the RDA, generally requires application of the law of the state in which the federal district court sits—undoubtedly is valid even if it governs amenability. Rule 4(k)(1)(C)—which incorporates by reference federal statutes regulating amenability in particular cases—similarly is a valid restatement of otherwise applicable law. Finally, Section III.D applies the analysis to the unique issues presented by subpoena jurisdiction.

Part IV notes the limited but real effect that recognizing the proper source of amenability law will have on current practice and concludes with the observation that if jurisdictional reformers believe that federal courts should have the power to exercise personal jurisdiction more broadly than this Article argues is currently legitimate, the proper course of action is to seek a remedy from Congress.

II. THE HISTORICAL BACKGROUND

A. The Pre-Rules Period

1. The Common Law and Statutory Context

a. Section 11 of the Judiciary Act of 1789

The Judiciary Act of 1789[8]—which established the federal judicial system[9]—addressed the personal jurisdiction and venue of the federal district and circuit courts in Section 11, which provided in relevant part:

> And no civil suit shall be brought before either of said 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 . . . .[10]

Although sometimes described as simply regulating venue, this sentence is "conceptually identical to a jurisdictional rule: it did not specify where a given action should be tried, but rather defined the reach of trial-court process."[11]

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8. Judiciary Act of 1789, ch. 20, 1 Stat. 73.

9. The Judiciary Act, among other things, divided the country into federal districts and created district courts and circuit courts. *Id.* §§ 2–4. Although circuit courts had appellate jurisdiction over district courts, both sets of courts had original jurisdiction over specified matters. *Id.* §§ 9, 11.

10. *Id.* § 11. The preceding sentence read: "But no person shall be arrested in one district for trial in another, in any civil action before a circuit or district court." *Id.* Although this provision potentially had important jurisdictional consequences, placing a defendant under arrest was not essential to exercising jurisdiction over a defendant. *See infra* notes 17, 33. In England, it was possible for King's Bench (which sat in Middlesex County) to obtain jurisdiction over a person outside the county by having them arrested and delivered to the King's Bench prison. *See* Nathan Levy, Jr., *Mesne Process in Personal Actions at Common Law and the Power Doctrine*, 78 YALE L.J. 52, 62 (1968). The arrest provision in Section 11 ensured that jurisdiction in a civil suit could not be obtained in a federal district by having a defendant arrested outside the district. This provision, with minor changes, remains a part of federal law. *See* 28 U.S.C. § 1693 (2012).

11. Allan R. Stein, *Forum Non Conveniens and the Redundancy of Court-Access Doctrine*, 133 U. PA. L. REV. 781, 799–800 (1985) (citing Kevin M. Clermont, *Restating Territorial Jurisdiction and Venue for State and Federal Courts*, 66 CORNELL L. REV. 411, 430 (1981) (relying on the language of Section 11 to conclude that "[t]erritorial jurisdiction and venue were largely indistinguishable concepts for more than the first half of the existence of the federal courts")). *Cf.* Robertson v. R.R. Labor Bd., 268 U.S. 619, 622–23 (1925) (Brandeis, J.) ("In a civil suit *in personam* jurisdiction over the defendant, as distinguished from venue, implies, among other things, either voluntary appearance by him or service of process upon him at a place where the officer serving it has authority to execute a writ of summons."); Roger S. Foster, *Place of Trial in Civil Actions*, 43 HARV. L. REV. 1217, 1217 (1930) ("Jurisdiction is said to depend on physical power over person or property. Venue . . . has come to signify the doctrines which determine whether a court having the requisite power happens to be at an appropriate place for trial.").

The effect of Section 11 on the personal jurisdiction of a federal circuit (or district) court in a civil action was authoritatively discussed by Justice Story in *Picquet v. Swan*.[12] Justice Story, sitting in that case as a Circuit Justice, concluded that, in the absence of legislation providing otherwise, "general principles" provide "that a court created within and for a particular territory is bounded in the exercise of its power by the limits of such territory."[13] Thus, "the exercise of the jurisdiction of the circuit courts by compulsive process, was essentially confined, by their very organization, within the limits of their respective districts."[14]

Justice Story recognized that the principle that a federal district or circuit court has jurisdiction only within its district was consistent with jurisdiction premised on the attachment of property within the district.[15] He nonetheless rejected the plaintiff's effort to rely on the attachment of defendant's property within the district. Attachment jurisdiction, he argued, was contrary to the principles of the common law,[16] which he understood to provide

12. *See* 19 F. Cas. 609 (C.C.D. Mass. 1828) (No. 11,134).

13. *Id.* at 611–12; *see also* United States v. Union Pac. R.R., 98 U.S. 569, 603 (1878) ("It would have been competent for Congress to organize a judicial system analogous to that of England and of some of the States of the Union, and confer all original jurisdiction on a court or courts which should possess the judicial power with which that body thought proper, within the Constitution, to invest them, with authority to exercise that jurisdiction throughout the limits of the Federal government."). State courts also applied the common-law principle to which *Picquet* adverted. *See, e.g.*, Tower Credit Corp. v. State, 187 So. 2d 923, 924 (Fla. Dist. Ct. App. 1966) ("Prior to the Constitution of 1885 the common law prevailing was that no court could send and have its processes executed beyond its territorial boundaries without express constitutional or legislative authority and neither existed." (citing generally State v. Jacksonville, Pensacola & Mobile R.R., 15 Fla. 201 (1875))).

14. *Picquet*, 19 F. Cas. at 612.

15. *Id.* ("Where he is not within such territory, and is not personally subject to its laws, if on account of his supposed or actual property being within the territory, process by the local laws may by attachment go to compel his appearance, and for his default to appear, judgment may be pronounced against him, such a judgment must, upon general principles, be deemed only to bind him to the extent of such property, and cannot have the effect of a conclusive judgment in personam, for the plain reason, that except so far as the property is concerned, it is a judgment coram non judice.") (formatting in original).

16. *Id.* at 613; *see also* Joseph J. Kalo, *Jurisdiction as an Evolutionary Process: The Development of Quasi In Rem and In Personam Principles*, 1978 DUKE L.J. 1147, 1158–61 (tracing the development of statutes in the Massachusetts Bay Colony authorizing attachment of property when the debtor was not in the jurisdiction); *id.* at 1161 ("Debt collection presented similar problems in other colonies and their response was essentially the same as that of Massachusetts Bay."); S.F. KNEELAND, A TREATISE ON THE LAW OF ATTACHMENTS IN CIVIL CASES § 3 (1884) ("It seems to be established beyond dispute that attachment, as an original or mesne process, is an American innovation upon the orderly procedure at common law; and, being in derogation thereof, the statutes creating the remedy must receive a strict and technical construction."); *cf.* The Invincible, 13 F. Cas. 72, 76 (C.C.D. Mass. 1814) (No. 7,054) (Story, J.) ("I accede to the position, that, in general, in cases of maritime torts, *a court of admiralty* will sustain jurisdiction, where either the person, or his property,

that "no judgment could be rendered in the circuit court against any person, upon whom process could not be personally served within the district."[17] Because the Judiciary Act of 1789 was enacted against the background of the common law, Justice Story argued that the "whole *structure* of that act proceeded upon the supposition" that personal service of process within the district was required,[18] at least in the absence of a voluntary appearance by the defendant. The relevant portions of Section 11, Justice Story argued, were merely enacted "from abundant caution, to guard against every possibility of latent doubt."[19] In other words, Section 11 was mostly declaratory of the rule that would have governed as a matter of common law in the absence of congressional legislation.[20]

Ten years after *Picquet*, the Supreme Court, in *Toland v.*

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is within the territory." (emphasis added)). The Supreme Court later ratified the understanding that attachment could be used in admiralty cases. *See* Brainerd Currie, *Attachment and Garnishment in the Federal Courts*, 59 MICH. L. REV. 337, 365 (1961) ("The question came before the Supreme Court . . . in *Manro v. Almeida* [23 U.S. 473 (1825)], and the propriety of proceeding by foreign attachment was solidly affirmed . . . .").

17. *Picquet*, 19 F. Cas. at 613. For illuminating discussions of the process used to initiate common-law suits, see generally Levy, *supra* note 10 (discussing English common law); Kalo, *supra* note 16, at 1153, 1157–58 (discussing application of common-law jurisdictional principles in Massachusetts); ROBERT WYNESS MILLAR, CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE 79–80 (1952) (discussing process in American common-law courts); *cf. id.* at 80 (discussing process in American equity courts). "Foreign attachment"—that is, attachment of property to obtain jurisdiction over a person not found in the jurisdiction—was not authorized at common law. *See supra* note 16 and accompanying text. But attachment could be used at common-law to compel a person who had been served with summons to appear. *See* Levy, *supra* note 10, at 56–60 (noting that attachment was a method to induce a defendant who had been served with summons to appear, a method that became obsolete in England as arrest and other methods of inducing appearance were introduced into law); MILLAR, *supra*, at 79–80 (noting that in the first decades of the eighteenth century, common-law suits in the New England states were "begun by summons" and "usually combined with an attachment of property").

18. *Picquet*, 19 F. Cas. at 613 (emphasis added).

19. *Id.* For that reason, jurisdiction premised on the attachment of property within the district was invalid even if Massachusetts law authorized jurisdiction on that basis. Justice Story rejected the argument that the Process Act of 1792 required the circuit court to accept jurisdiction based on attachment if the attachment would give personal jurisdiction to a Massachusetts court. *Id.* at 614–15. In explaining the relationship between state process and the personal jurisdiction of the federal district and circuit courts, Justice Story wrote: "Where jurisdiction is given by any act of congress, this court may use the appropriate state process to enforce it. But the state laws can confer no authority on this court to extend its jurisdiction over persons or property, whom it could not otherwise reach." *Id.* at 611.

20. Justice Story wrote that Section 11 expanded the jurisdiction of the federal courts in one respect: Congress "designedly enlarged the power to proceed in cases of inhabitancy, where the party happened at the time to be absent without any intentional change of domicil . . . ." *Id.* at 613.

Sprague, essentially adopted Justice Story's reasoning.[21] The Court concluded that "by the general provisions of the laws of the United States, the circuit courts can issue no process beyond the limits of their districts" and that "independently of positive legislation, the process can only be served upon persons within the same districts."[22] For these reasons, the Court rejected the availability of attachment jurisdiction in civil actions originally filed in federal court.[23] The Court nonetheless found that the circuit court had personal jurisdiction over Mr. Sprague because he had appeared and pleaded.[24]

b. Later Statutes

When the Judiciary Act of 1789 was enacted, with two exceptions, each state had a federal district that was coextensive with the boundaries of the state.[25] But as the country grew, more states were divided into multiple districts. Beginning in 1838, Congress enacted state-specific legislation to expand the personal jurisdiction of district courts in specified states with more than one federal district.[26] And in 1858, Congress enacted general legislation to expand the personal jurisdiction of federal courts in states with two or more federal districts. Section 1 of the Act of May 4, 1858, for example, provided that when suit is brought in a federal district in which one defendant resides, the federal district court may issue a "duplicate writ" against another defendant residing in a different

21. 37 U.S. (12 Pet.) 300, 328 (1838) ("Referring to the reasoning in [*Picquet*], generally, as having great force, we shall content ourselves with stating the substance of it in a condensed form, in which we concur."). Justice Story, who was still on the Supreme Court when *Toland* was decided, joined Justice Barbour's opinion. *See* Currie, *supra* note 16, at 351–52.

22. *Sprague*, 37 U.S. at 330. The Court also concluded that "the acts of congress adopting the state process, adopt the form and modes of service, only so far as the persons are rightfully within the reach of such process, and did not intend to enlarge the sphere of the jurisdiction of the circuit courts." *Id.*

23. *Id.* ("[T]he right to attach property, to compel the appearance of persons, can properly be used only in cases in which such persons are amenable to the process of the court, in personam . . . .").

24. *Id.* at 330–31. Four of the nine Justices disagreed that Section 11 barred the exercise of attachment jurisdiction, believed that it was unnecessary to decide the matter, or both. *Id.* at 336–38. They would have decided the case based solely on the defendant's voluntary appearance. *See id.*

25. Judiciary Act of 1789, ch. 20, § 2, 1 Stat. 73, 73 (dividing Massachusetts into the District of Massachusetts and the District of Maine and Virginia into the District of Virginia and the District of Kentucky). The Act did not create districts for North Carolina and Rhode Island because they had not ratified the Constitution when the Act was signed into law.

26. *See* Petri v. F.E. Creelman Lumber Co., 199 U.S. 487, 498–99 (1905) (citing state-specific legislation).

federal district in the same state.[27] But while Congress authorized modest exceptions to the limits on personal jurisdiction and venue set forth in Section 11, and authorized nationwide service of process in limited circumstances,[28] the relevant language of Section 11 remained virtually unchanged from 1789 to 1887, when Congress made a substantial change to the original language of the Judiciary Act of 1789. Specifically, after clerical errors in the 1887 Act were corrected in 1888, federal law provided in relevant part that:

> [N]o civil suit shall be brought before either of said courts 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.[29]

The changes made in 1887 and reenacted in 1888 could have been read to give the federal court in the district in which the plaintiff resides the power to serve process against the defendant in a diversity case anywhere in the United States. But the Supreme Court implicitly rejected this construction in dismissing the much less radical suggestion that the amendment had made possible attachment jurisdiction in an action originally filed in federal court.[30] Although Congress had not discussed the effect of the 1887

27. Act of May 4, 1858, ch. 27, § 1, 11 Stat. 272, 272. Section 1 of the 1858 Act also authorized service of process outside the district in which suit was brought in a different context. *Id.* ("In suits of a local nature, where the defendant resides in a different district, in the same State, from that in which the suit is brought, the plaintiff may have original and final process against him, directed to the marshal of the district in which he resides."). After the 1887 amendments to the Judiciary Act, it was unclear whether the 1858 Act had been impliedly repealed. *See, e.g.*, *Petri*, 199 U.S. at 493 (assuming for purposes of argument that the 1858 Act had been impliedly repealed by the 1887 Act). Congress reenacted the relevant portions of the 1858 Act in 1911. *See* Act of Mar. 3, 1911, ch. 231, §§ 52, 54, 36 Stat. 1087, 1101–02.

28. The first statute authorizing nationwide service of process appears to have been enacted in 1873. *See* Credit Mobilier Act, ch. 226, § 4, 17 Stat. 485, 509 (1873) (directing the attorney general to bring a specific suit against the Union Pacific Railroad and other persons in any circuit court and authorizing nationwide service of process against defendants).

29. Act of Aug. 13, 1888, ch. 866, § 1, 25 Stat. 433, 434 (correcting Act of Mar. 3, 1887, ch. 373, 24 Stat. 552).

30. Big Vein Coal Co. v. Read, 229 U.S. 31, 38 (1913) ("[W]e are of the opinion that this amendment to the statute was not intended to do away with the settled rule that, in order to issue an attachment, the defendant must be subject to personal service or voluntarily appear in the action."). By contrast, the Court had already decided that an attachment in state court could serve as the basis for jurisdiction in a case removed to federal court. *See* Currie, *supra* note 16, at 359–60 ("In *Clark v. Wells* [203 U.S. 164, 171–72 (1906)] the Supreme Court unanimously held that where an action is commenced by attachment

statute on attachment jurisdiction, the legislative history is explicit that the authorization to bring a diversity suit in the district in which either the plaintiff or defendant resides was not intended to change pre-existing law about where process might be served, but only to limit where suit might be brought.[31] In other words, *venue* would no longer be proper in a transitory action in any district in which a defendant could be served with process.

The Supreme Court's reading of the amendment was far from obvious, at least if the legislative history is ignored. Justice Story in *Picquet* and the Court in *Toland* had concluded that the relevant language of the Judiciary Act of 1789 regulated the power of federal district and circuit courts to exercise personal jurisdiction. But the Court read the 1887 Act as affecting only venue, not service of process. Congress, the Court indicated, had legislated against the background of the common law and had not intended to change the common-law rule with respect to service of process.

2. A Key Conceptual Breakthrough: The Disaggregation of Amenability and Notice

Personal jurisdiction today ordinarily is exercised through a command to appear on pain of default or other penalty. The command typically comes in the form of a summons or some other process. It is now understood that there are two prerequisites for the valid exercise of jurisdiction through a command to appear: (1) that proper notice of the command be given, and (2) that the person be subject to the command, i.e., be amenable to jurisdiction. Amenability depends on the nexus of the person with the relevant jurisdictional unit.[32]

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in a state court against a nonresident, without personal service or appearance, and is removed, the federal court has jurisdiction to proceed to judgment against the property attached precisely as if the case had remained in the state court.").

31. The following exchange took place on the Senate floor:

> Mr. MITCHELL, of Oregon. My friend then understands this section to mean that if the plaintiff, for instance, lives in the State of New York and the defendant lives in the State of California, then the plaintiff may either go to California and sue there, or, if he happens to find him in the State of New York, he may sue him there, but he can not sue him anywhere else.
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> Mr. HOAR. That is it exactly . . . .

18 CONG. REC. 2545 (1887); *see also* Currie, *supra* note 16, at 356–57 (discussing the legislative history).

32. *See* RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS § 4.4, at 125–26 (5th ed. 2006) ("Now that courts utilize many bases for jurisdiction other than personal presence in the forum, it is imperative to recognize notice and opportunity to be heard as a distinct and essential element in the constitutional exercise of judicial jurisdiction."); EUGENE F. SCOLES ET AL., CONFLICT OF LAWS § 5.16, at 324 (4th ed. 2004) ("In the United States there are other preconditions to effective judicial action commonly termed

Historically, the two prerequisites were inextricably intertwined. To the extent a person did not voluntarily appear in person or through his attorney, *in personam* jurisdiction depended on whether he had been served with process within the forum.[33] Service of process in the forum both provided notice of the command to appear and subjected the person to the jurisdiction of the court. But it was the role of process as a means of subjecting a person to the jurisdiction of the forum that was essential. Because the power of a forum court did not extend beyond the forum, service of process outside the forum was a nullity that could not subject a person to the jurisdiction of the forum court. Indeed, a court was without power to exercise jurisdiction over a person unless the person or his agent had voluntarily appeared or there had been service of process within the forum.

As the Court began to place greater emphasis on the importance of notice, it became clear that service of process in the forum would not always be sufficient if the defendant was outside the forum. In 1928, for example, the Court held in *Wuchter v. Pizzutti* that a statute authorizing service of process on the secretary of state when an out-of-state motorist caused an accident in the state would be valid *only if* the statute "contain[s] a provision making it reasonably probable that notice of the service on the Secretary will be communicated to the non-resident defendant who is

'jurisdictional.' One important requirement is that the defendant be given reasonable notice of the proceedings against him."); Harold L. Korn, *The Development of Judicial Jurisdiction in the United States: Part I*, 65 BROOK. L. REV. 935, 970 (1999) (noting that notice and an opportunity to be heard are part of "Anglo-American conceptions of judicial jurisdiction"); Comment, *Personal Jurisdiction over Foreign Corporations in Diversity Actions: A Tiltyard for the Knights of Erie*, 31 U. CHI. L. REV. 752, 754–55 (1964) ("Assuming appropriate subject matter jurisdiction, two conditions are essential to the validity of a default judgment: (1) adequate notice to the defendant; and (2) the existence, usually at the time of notification, of a specified relation—e.g., proximity—between the person and the court rendering the judgment."); Note, *Developments in the Law—State-Court Jurisdiction*, 73 HARV. L. REV. 909, 987 (1960) ("Since failure to provide proper notice, like absence of jurisdiction over the parties, will subject a judgment to collateral attack, it has been said that adequate notice is a prerequisite to jurisdiction.").

33. At one time, even service of process on the defendant in the jurisdiction was insufficient. At early common law, a court could exercise jurisdiction only if the defendant had voluntarily appeared or was in custody. *See* Levy, *supra* note 10, at 58 ("The early common law personal actions rested on a rather primitive jurisdictional basis. If the judgment sought was personal, the defendant had to make a voluntary appearance in court."); *id.* at 63 ("[B]y the latter part of the sixteenth century, the arrest of defendants under writs of *capias* (in Common Pleas), *latitat* (in King's Bench) and *quo minus capias* (in Exchequer) was the way in which most personal actions were begun [in England]."); *id.* at 95 ("Until the Frivolous Arrest Act of 1725, no judgment *nihil dicit* [that is, no default judgment] could be rendered for the plaintiff against a defendant in a personal action unless he either was in custody of the law or had entered an appearance. . . .").

sued."[34] Thus, although the Court had held that a nonresident motorist using the roads of a state could be deemed to have impliedly consented to the territorial jurisdiction of the court, service within the forum state on the agent designated by law was not sufficient to authorize the state court to exercise jurisdiction.

Four years later (in 1932), the Court in *Blackmer v. United States* indicated that a person could be subjected to jurisdiction even in the absence of service of process within the jurisdiction.[35] A federal statute required United States citizens abroad to obey a subpoena issued by a federal district court for testimony in a federal criminal case, provided the subpoena was personally served on the citizen by a United States consular official. In holding that service of process within the United States was not required, the Court stated "that one of the duties which the citizen owes to his government is to support the administration of justice by attending its courts and giving his testimony whenever he is properly summoned."[36] In modern terms, the Court recognized that a United States citizen is amenable to the personal jurisdiction of a federal district court when served with a subpoena for testimony in a criminal case; service of the subpoena in the United States is unnecessary. The Court noted that the function of service of process is to provide "appropriate notice of the judicial action and an opportunity to be heard."[37] For that reason, the Court dismissed the argument that a federal district court could not exercise jurisdiction unless there was constructive service in the United States.

At about the time *Blackmer* was decided, scholars similarly began to recognize that service of process within the jurisdiction was unnecessary to subject a person to jurisdiction. As G.W.C. Ross explained in 1933 while rejecting the view that service of process at the defendant's home is essential to the exercise of jurisdiction over an absent domiciliary:

> [T]hat plainly confuses the fact of jurisdiction with the requirement of due process in its exercise. If this court has the right to summon this person as defendant at all, the mode by which it may actually summon him into a particular litigation requires merely giving him "reasonable notice and opportunity to be heard," and that does not depend on the ability to hand the summons to him or to anyone for him, within

34. 276 U.S. 13, 18–19 (1928).
35. 284 U.S. 421, 438–39 (1932).
36. *Id.* at 438.
37. *Id.*

the state.[38]

The same understanding was evident in the Restatement of Conflicts' treatment of personal jurisdiction. With one exception, the Restatement—published in 1934—identified bases for the exercise of personal jurisdiction without reference to a need for service of process within the state exercising jurisdiction.[39] The Restatement simply noted that "[a] state cannot exercise through its courts judicial jurisdiction over a person, although he is subject to the jurisdiction of the state, unless a method of notification is employed which is reasonably calculated to give him knowledge of the attempted exercise of jurisdiction and an opportunity to be heard."[40]

In 1940 the Court validated this understanding of the law in *Milliken v. Meyer*. There the Court held that a domiciliary of a state who is served with process outside of the state may be subjected to personal jurisdiction even if there was no service of process within the state.[41] The Court concluded that the adequacy of such "substituted service"[42] "is dependent on whether or not the form of substituted service provided for such cases and employed is reasonably calculated to give him actual notice of the proceedings and an opportunity to be heard."[43]

In short, the Court's decisions in *Blackmer* and *Milliken* stand

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38. G. W. C. Ross, *The Shifting Basis of Jurisdiction*, 17 MINN. L. REV. 146, 150–51 (1933); *see also infra* notes 47–48 and accompanying text (noting that a requirement that process be served within the jurisdiction is a formality).

39. *See* RESTATEMENT (FIRST) OF CONFLICT OF LAWS §§ 77–93 (AM. LAW INST. 1934)). Section 91 provides that "[a] state can exercise through its courts jurisdiction over a foreign corporation which has appointed an agent or a public official in the state to accept service of process in actions brought against the corporation in that state, as to all causes of action to which the authority of the agent or official to accept service extends." *Id.* § 91.

40. *Id.* § 75.

41. Milliken v. Meyer, 311 U.S. 457, 462 (1940) (approvingly citing *In re* Hendrickson, 167 N.W. 172, 174 (S.D. 1918), which so holds and collects relevant authority). The Court in *Milliken* did not cite to Stevens v. Television, Inc., 162 A. 248 (N.J. Ch. 1932). Although *Stevens* arguably is distinguishable, the case is best read to stand for the proposition that if a person is otherwise amenable to the jurisdiction of the state, service of process outside the state is sufficient. *See id.* at 249. This understanding was reflected in the work of commentators at the time. *See* Comment, *Progress in Interstate Adjustment of the Place of Trial in Civil Actions: II*, 45 YALE L.J. 1235, 1247–48 & n.158 (1936) [hereinafter *Progress*] (citing *Stevens* for the proposition that service of process outside the state is sufficient when a person is otherwise amenable to the jurisdiction of the state) (collecting cases).

42. *Milliken*, 311 U.S. at 462. Substituted service is "[s]ervice of process upon a defendant in any manner, authorized by statute or rule, other than PERSONAL SERVICE within the jurisdiction; as by publication, by mailing a copy to his or her last known address, or by personal service in another state." *Substituted Service*, WEST'S ENCYCLOPEDIA OF AMERICAN LAW 392 (2d ed. 2005).

43. *Milliken*, 311 U.S. at 463.

for the proposition that service of process within the jurisdiction is unnecessary to establish jurisdiction premised on domicile or citizenship. Those cases—along with the American Law Institute and selected law review articles—suggested that the function of service of process is to notify a person that a court commands his appearance, a matter separate from whether a person has a sufficient connection to the jurisdiction to make him or her subject to the power of the court. Confirmation of this understanding came in *International Shoe Co. v. Washington*, in which the Court held that substituted service is sufficient if it "gives reasonable assurance that the notice will be actual."[44]

B. The Federal Rules of Civil Procedure

1. The 1938 Federal Rule Governing Territorial Limits of Effective Service

The Court first prescribed the Federal Rules of Civil Procedure in 1938. Rule 4(f) provided in part:

> **Territorial Limits of Effective Service.** All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held and, when a statute of the United States so provides, beyond the territorial limits of that state. . . .[45]

The Rule addressed the personal jurisdiction of the federal district courts, but its breadth has often been misunderstood by those who fail to distinguish between two interrelated but distinct prerequisites to the exercise of personal jurisdiction by a court through a command to appear: (1) that proper notice of the command to appear be given, and (2) that the person be subject to the command, i.e., amenable to jurisdiction.

The context in which the Rule was drafted indicates that the Advisory Committee sought to abrogate the requirement that process—through which notice of the command to appear is given—be served within the district. But there is no evidence that the Advisory Committee sought to prescribe a standard for determining whether a person is amenable to the personal jurisdiction of a federal district court.[46] As discussed above in Section II.A.2, by the

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44. 326 U.S. 310, 320 (1945) (collecting cases).

45. FED. R. CIV. P. 4(f) (1938 adoption).

46. Professor Kelleher writes: "The Committee, quite properly, distinguished amenability to jurisdiction from service of process. The Committee assumed that amenability was a substantive matter, and beyond the scope of rulemaking authority, while it considered service a procedural matter, and thus a proper subject for the rules." Kelleher, *supra* note 3, at 1205.

time the Advisory Committee began discussing the Federal Rules, both the Court and scholars had begun to recognize the distinction between amenability and notice. While amenability was understood to involve judicial power, the notice function of service of process could be understood as purely procedural. And by 1934, there were good grounds to believe that service of process within the district was simply a "formality"[47] if the defendant was otherwise amenable to jurisdiction. As Maurice Culp explained in an analogous context: "There is no real procedural difficulty to prevent a State from affecting the rights of persons beyond its boundaries. Notice can be authorized and given beyond its boundaries in a manner to satisfy the requirements of due process of law."[48]

Rule 4(f) was consistent with this new understanding.[49] In

47. *See Progress*, *supra* note 41, at 1247–48 ("[E]ven those comparatively few courts which have expressly recognized the recently proposed 'act' or 'submission' theories of jurisdiction have uniformly respected the *formality* of serving a statutory agent, although, if doing business or driving a car within the state is actually the basis of jurisdiction, there would seem to be no reason why the requirements of due process could not be met as well merely by the service of process directly upon the defendant without the state." (emphasis added) (footnote omitted)).

48. Maurice S. Culp, *Process in Actions Against Non-Residents Doing Business Within a State*, 32 MICH. L. REV. 909, 927 (1934).

49. When the Advisory Committee first discussed authorizing service of process beyond the district in which suit was brought, its members distinguished between service of process (which the Committee sought to regulate) and *venue* (which the Committee did not). *See* PROCEEDINGS OF CONFERENCE OF ADVISORY COMMITTEE DESIGNATED BY THE UNITED STATES SUPREME COURT TO DRAFT UNIFORM RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES AND THE SUPREME COURT OF THE DISTRICT COURT OF COLUMBIA UNDER THE ACT OF CONGRESS PROVIDING FOR SUCH UNIFORM OR UNIFIED RULES 278–90 (Nov. 14, 1935) [hereinafter NOVEMBER 1935 ADVISORY COMMITTEE]. There was barely any allusion to amenability. *But see id.* at 285 ("Mr. Mitchell. Is it not the sense of the Committee that the rule be ~~is~~ [sic] so drawn as to permit service anywhere in the State, provided it is not so drawn as to change the venue *or* require the defendant to respond in a different district in any different way than the present law does?" (alteration in original) (emphasis added)). The preoccupation with venue would not have been surprising to contemporaries. Venue requirements were sometimes phrased in terms of where suit might be brought by process. *See, e.g.*, *supra* notes 29–31 and accompanying text (discussing venue requirements in Section 1 of the Act of 1887). Thus, if the Committee sought to avoid regulating venue, it was especially important to draw a distinction between service of process and venue. Moreover, venue had been coextensive with or more limited than amenability from the dawn of the Republic. *See supra* notes 10–11, 28–31, and accompanying text. Thus, there was rarely a need to think about personal jurisdiction separately from venue. Perhaps for that reason, it was not unusual to conflate venue and personal jurisdiction in federal court. *See* Eastman Kodak Co. v. S. Photo Materials Co., 273 U.S. 359, 370 (1927) ("Whether or not the jurisdiction of the District Court was rightly sustained—which resolves itself into a question whether the venue of the suit was properly laid in that court—depends upon the construction and effect of § 12 of the Clayton Act . . . ."); Lumiere v. Mae Edna Wilder, Inc., 261 U.S. 174, 176–77 (1923) (Brandeis, J.) (using "venue" and "jurisdiction" interchangeably in determining whether venue under the Copyright Act was properly laid); Armistead M. Dobie, *Venue in Civil Cases in the United States District Court*, 35 YALE L.J. 129, 129 n.2 (1925) ("Many writers and judges use the term . . . 'jurisdiction over the person' for

cases in which a defendant, for example, had consented to jurisdiction in all the federal courts of a state through the appointment of an agent for service of process, Rule 4(f), in the words of the Court, "was intended . . . 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."[50] In other words, the elimination of territorial limits on effective service of process within the state simply authorized *notice* through service of process outside the district in which suit was brought.[51] As a member of the Advisory Committee noted early on, the Rule authorized service of process in Manhattan on a person who worked there even though suit was brought in Brooklyn where he resided.[52] Rule 4(f) also obviated the need to issue

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venue.").

50. Miss. Publ'g Corp. v. Murphree, 326 U.S. 438, 444 (1946) (summarizing the Advisory Committee's views).

51. The modesty of the contemplated change is evident in the transcript of the Advisory Committee meeting that addressed permitting service of process statewide. *See* NOVEMBER 1935 ADVISORY COMMITTEE, *supra* note 49, at 278–90. The following excerpts from the Advisory Committee minutes are indicative:

> Mr. Mitchell. Is it not the sense of the Committee that the rule be ~~is~~ so drawn as to permit service anywhere in the State, provided it is not so drawn as to change the venue or to require the defendant to respond in a different district in any different way than the present law does? Is that not what we want to provide? Can we not agree on that, and let the Reporter work it out?
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> . . . .
>
> Mr. Dodge. You can sue him in Brooklyn where he resides; but you can summons him in Manhattan, or wherever his office is; and I make the motion which Judge Olney suggests, that without affecting venue at all, service may be anywhere in the State.
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> . . . .
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> Mr. Mitchell. That is what I intended to express, to permit service anywhere in the district, provided you are not hampering with the rule regarding where the defendant must be found. I said in the district, I meant in the State.
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> . . . .
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> Mr. Wickersham. Now, it does not seem to me that the requirement that the suit shall be brought in one district precludes the provision that process in that suit may be served in another district in the same State. Like the instance stated by Mr. Dodge a few moments ago, a man living in Brooklyn, in the Eastern District of New York, in the same state, and he has an office in the City of New York, and suit is brought against him in the Eastern District, where he resides—that is, in Brooklyn . . . ; and in order to get jurisdiction over him, it seems to me you ought to be able to serve summons on him wherever he is found in the State, although it is across the river.
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> . . . .
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> Mr. Mitchell. Without any further motion, I think the principle has been well stated in the record, and unless there is some difference, we will consider the idea adopted.

Id. at 285–90 (alterations in original).

52. *Id.* at 288–89.

and serve a "duplicate writ" on a person outside the district but within the state as had been previously required in certain circumstances by Section 1 of the Act of May 4, 1858.[53] From this perspective, Rule 4(f) was a remarkably modest expansion of the rules that had governed personal jurisdiction in the federal courts since 1789. Indeed, to the extent "personal jurisdiction" is distinguished from notice through service of process, Rule 4(f) was not jurisdictional at all. As one member of the Advisory Committee later noted: "My own notion was that [Rule] 4(f) did not extend jurisdiction; it is just a matter of process and you would still be subject to ordinary rules of jurisdiction and venue."[54]

The Advisory Committee Note to Rule 4(f) further supports the view that the Rule affected formal, technical restrictions on the territorial effectiveness of notice, not amenability. The Note states: "This Rule enlarges to some extent the present rule as to where service may be made. It does not, however, enlarge the jurisdiction of the district courts."[55] The use of the unadorned term "jurisdiction" is maddeningly imprecise, but the Note appears to refer to what we would now call amenability to personal jurisdiction. The Court later construed the word "jurisdiction" in Rule 82 to refer only to subject-matter jurisdiction.[56] But that was not a plausible interpretation of the Advisory Committee Note to Rule 4. It was clear well before 1934 that rules relating to venue and process had no bearing on the subject matter jurisdiction of the district courts.[57] And in the context of personal jurisdiction,

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53. Act of May 4, 1858, ch. 27, 11 Stat. 272, 272 (at the time of the Advisory Committee meeting, Section 1 was codified in relevant part at 28 U.S.C. §§ 113, 115 (1934)); *see supra* note 27 and accompanying text. The statute was a focus of attention when the Advisory Committee considered authorizing service of process statewide. *See* NOVEMBER 1935 ADVISORY COMMITTEE, *supra* note 49, at 278, 281–83, 288–90.

54. *See* PROCEEDINGS OF ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE 1092 (May 20, 1943) [hereinafter MAY 1943 ADVISORY COMMITTEE] (statement of Mr. Lemann).

55. FED. R. CIV. P. 4(f) advisory committee's note (1937).

56. Miss. Publ'g Corp. v. Murphree, 326 U.S. 438, 445 (1946).

57. *See* Gen. Inv. Co. v. Lake Shore & Mich. S. Ry. Co., 260 U.S. 261, 272 (1922) (reaffirming that the venue provisions of the Act of Mar. 3, 1887 (as corrected in 1888) do "not affect the general jurisdiction of a District Court over a particular cause, but merely establish[] a personal privilege of the defendant, which he may insist on, or may waive, at his election, and does waive, where suit is brought in a district other than the one specified, if he enters an appearance without claiming his privilege"). The way in which Section 1 of the Act combined provisions relating to subject matter jurisdiction and venue could lead a reader to conclude that limitations on venue affected the subject matter jurisdiction of a federal court. Act of Mar. 3, 1887, ch. 373, § 1, 24 Stat. 552. In any event, an early version of the Note cited not to Section 1 of the Judiciary Act of 1887, but to a statutory provision authorizing service of a "duplicate writ" when defendants resided in different districts of the same state. *See* Tentative Draft No. III, Advisory Committee Note to Rule 4(b) (March 1936) (citing 28 U.S.C.A. § 113 (which is codified in part of Section 1 of the Act of 1858) for

scholars had drawn a distinction between what they called "jurisdiction" and "notice" achieved through service of process.[58]

Once the distinction between notice and amenability is kept in mind, seemingly contradictory statements made by members of the Advisory Committee in explaining the rules to the bar can be reconciled.[59] For example, Charles Clark, then Dean of the Yale Law School, suggested that there was no difficulty in extending service of process in a multidistrict state to the boundaries of the state, but that it "would [have] cause[d] a great deal of difficulty" had the Advisory Committee sought to restrict service of process under congressional statutes authorizing nationwide service of process.[60] Dean Clark's distinction makes sense once one accepts that congressional statutes authorizing nationwide service of process address both amenability and notice. When Congress authorizes nationwide service of process, it expands the relevant jurisdictional unit for purposes of determining whether a person is amenable to personal jurisdiction from the federal district to the nation as a whole.[61]

For similar reasons, Dean Clark's suggestion that it would be

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the proposition that the expansion of the territorial limits of effective service in the draft of Rule 4 did not expand the jurisdiction of the federal district court).

58. *See* Ross, *supra* note 38, at 150–51 (arguing that the notion that a defendant domiciled in a state must be served with process in the state "confuses the fact of jurisdiction with the requirement of due process in its exercise" and stating that *if* the court "has the right to summon this person as defendant at all, the mode by which it may actually summon him into a particular litigation requires merely giving him 'reasonable notice and opportunity to be heard,' and that does not depend on the ability to hand the summons to him or to anyone for him, within the state"); Culp, *supra* note 48, at 927 n.55 (lamenting that "[t]he question of due process in giving notice is frequently not clearly distinguished from that of judicial power").

59. *Cf.* Ralph U. Whitten, *Separation of Powers Restrictions on Judicial Rulemaking: A Case Study of Federal Rule 4*, 40 ME. L. REV. 41, 73–77 (1988) (arguing that the Advisory Committee's explanations were confused).

60. *See* RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES WITH NOTES AS PREPARED UNDER THE DIRECTION OF THE ADVISORY COMMITTEE AND PROCEEDINGS OF THE INSTITUTE ON FEDERAL RULES: CLEVELAND, OHIO JULY 21, 22, 23, 1938, at 209 (William W. Dawson ed., 1938) [hereinafter CLEVELAND INSTITUTE].

61. It seems clear that a congressional decision to authorize nationwide or worldwide service of process addresses both notice through service of process and amenability to jurisdiction. To begin with, many such statutes were enacted during a period when notice through service of process and amenability were inextricably linked. *See generally supra* Section II.A (history of personal jurisdiction). But even statutes enacted since then should be construed in the same way in the absence of any indication that Congress intended to limit the force of such a provision to notice through service of process. In any event, "[m]any courts . . . have found[] or simply assumed . . . that nationwide service provisions provide for nationwide personal jurisdiction as well, subject only to Fifth Amendment limits of national contacts, rather than Fourteenth Amendment limits of forum state contacts." Kelleher, *supra* note 3, at 1204 & n.74 (collecting cases). For further discussion, see *infra* note 228 and the accompanying text.

outside the power of the Federal Rules to authorize attachment jurisdiction appears to illustrate that the Advisory Committee did not view the regulation of amenability as within its province. The Supreme Court had repeatedly rejected the availability of attachment jurisdiction when suit was originally brought in federal court.[62] And to the extent that the presence of property was understood to be distinct from the presence of a person as a basis for exercising judicial power, a Federal Rule authorizing attachment jurisdiction would regulate amenability. From that perspective, it is not surprising that Dean Clark would reject the possibility of authorizing attachment jurisdiction as a matter of jurisdiction outside the scope of the rule making power.[63]

Although Rule 4(f) addressed only notice through service of process—not amenability—its validity under the Rules Enabling Act of 1934 ("REA") was hardly free from doubt.[64] After all, in the absence of a voluntary appearance, notice and amenability had long been inextricably linked to service of process in the forum. Thus, it is not surprising that there was doubt about the validity of Rule 4(f), even among members of the Advisory Committee.[65] Indeed, William D. Mitchell, the Chairman of the Advisory Committee, expressed astonishment that the Court promulgated Rule 4(f): "When that rule was passed, I had the gravest doubt of its validity, and I was astounded when the Court passed it. I thought they would wipe it out."[66] But in its oft-misunderstood decision in *Mississippi Publishing Corp. v. Murphree*, the Court held that the Federal Rules could supersede limits on service of process in preexisting law that might bar a federal district court from exercising jurisdiction over a person otherwise amenable to its jurisdiction.[67] In short, the Court concluded that the Federal Rules could supersede a purely formal limit on the ability of federal courts to exercise territorial jurisdiction.

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62. *See supra* notes 23, 30–31 and accompanying text.

63. *See* CLEVELAND INSTITUTE, *supra* note 60, at 212.

64. *See* Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1172 n.673 (1982) ("It is a close question whether Federal Rules expanding the territorial jurisdiction of the federal courts are valid under the Act, interpreted in the light of the pre-1934 history.").

65. In a note addressing Rule 4(f)'s extension of the territorial limits of effective service, the Advisory Committee told the Court that "[s]ome members of the bar question the power of the Court to make this extension." FED. R. CIV. P. 4(f) advisory committee's note to the Supreme Court (1937); Burbank, *supra* note 64 (citing skeptical authority).

66. MAY 1943 ADVISORY COMMITTEE, *supra* note 54, at 37 (statement of William D. Mitchell, Chairman); *see also id.* at 1092 ("I have always contended that that [Rule 4(f)] is a real extension of jurisdiction . . . ." (statement of William D. Mitchell, Chairman)).

67. 326 U.S. 438, 444–46 (1946); *see also infra* Section III.A.1 (discussing *Murphree*).

2. Federal Rules Governing Service of Summons from 1938 to 1993

The text of the 1938 Rules arguably suggests that in the absence of a federal statute providing otherwise, service of process could be effective only within the state in which the federal district court sat.[68] But by the 1950s some courts nonetheless had begun to read Rule 4 to authorize service of process outside the state when permitted by the law of the state in which the federal district court sat.[69] The 1963 Amendment rewrote Rule 4 to expressly adopt the latter position.[70]

The 1963 Amendment also authorized service of process on persons joined pursuant to Rules 13(h), 14, and 19 "at all places outside the state but within the United States that are not more than 100 miles from the place in which the action is commenced . . . ."[71] The Advisory Committee relied on M*urphree* to support the 100-mile extension of service.[72] But *Murphree*—read in historical context—simply established that the Court had authority to supersede formal limits on the territorial effectiveness of service that would interfere with the ability of a federal district court to exercise jurisdiction over a person otherwise amenable to its jurisdiction. The 1963 Committee acted far more assertively. The Committee did not expressly address amenability. But it chose to determine territorial effectiveness of service by weighing

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68. *See* Kent Sinclair, *Service of Process: Rethinking the Theory and Procedure of Serving Process Under Federal Rule 4(c)*, 73 VA. L. REV. 1183, 1195 (1987) (stating that under the version of Rule 4 promulgated in 1938 "[i]t was unclear under the Federal Rules whether an action could be initiated in district court by using state-authorized service procedures to reach a defendant found outside the state").

69. *See* Benjamin Kaplan, *Amendments of the Federal Rules of Civil Procedure, 1961–1963 (I)*, 77 HARV. L. REV. 601, 620–21, 621 nn.88–89 (1964) (discussing collected authority).

70. *See* FED. R. CIV. P. 4(f) advisory committee's note to 1963 amendment (stating that Rule 4(f) had been "amended to assure the effectiveness of service outside the territorial limits of the State in all the cases in which any of the rules authorize service beyond those boundaries").

71. FED. R. CIV. P. 4(f) (1963 amendment).

72. The Advisory Committee Note read in relevant part:

> The bringing in of parties under the 100-mile provision in the limited situations enumerated is designed to 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.
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> . . . .
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> As to the Court's power to amend subdivision[] . . . (f) as here set forth, see *Mississippi Pub. Corp. v. Murphree* . . . .

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

some of the factors relevant to a determination of the circumstances in which a person should be amenable to jurisdiction. Specifically, the Advisory Committee Note suggested that the argument against extending the territorial effectiveness of service was weak when the minimal "hardship" the rule would cause "[i]n the light of present-day facilities for communication and travel" is weighed against enabling the resolution of "entire controversies."[73] The result was entirely predictable: To the extent courts mistakenly believed that a person's amenability to the jurisdiction of a federal district court need not be governed by the law of the state in which the district court sat, they were likely to elaborate federal common law rules of amenability that would give effect to the policy determinations embodied in the Federal Rule. The Federal Rule, after all, had been prescribed by the U.S. Supreme Court. And in fact, that is precisely what most lower courts did in the wake of the 1963 Amendment.[74]

3. The 1993 Amendments to Rule 4

Putting aside changes not important here, Rule 4(f) remained unchanged after 1963 until Rule 4 was completely rewritten in 1993.[75] The 1993 Amendments had their genesis in the Court's 1987 decision in *Omni Capital International v. Rudolf Wolff & Co., Ltd.* The Court in that case "intimated" that the Federal Rules could be amended to authorize the exercise of personal jurisdiction

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73. *Id.*

74. In discussing this change to Federal Rule 4(f), Benjamin Kaplan, the Reporter for the 1963 Amendments, had written:

> 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, *supra* note 69, at 633. Professors Teply and Whitten explain that "most courts" adopted Professor Kaplan's "suggestion." LARRY L. TEPLY & RALPH U. WHITTEN, CIVIL PROCEDURE 365 (1994); *see also* WRIGHT & MILLER, *supra* note 3, § 1127, at 335 ("Although . . . it seems desirable that a federal test always should govern questions of amenability when service is made under the 100-mile provision, the limited case law to date is inconclusive . . . ." (footnote omitted)).

75. *See* FED. R. CIV. P. 4 advisory committee's note to 1993 amendment. Between 1963 and 1993, the Court also exercised its rulemaking authority to prescribe other Federal Rules governing process. Specifically, significant changes were made to pre-existing rules governing the service of subpoenas, a form of process addressed separately in Section III.D. The Court also prescribed federal rules governing service of process in bankruptcy cases. For example, Bankruptcy Rule 7004(d)—which was promulgated in 1983 and remains in effect—provides: "The summons and complaint and all other process except a subpoena may be served anywhere in the United States." FED. R. BANKR. P. 7004(d).

to the limits of the Fifth Amendment Due Process Clause.[76] The Advisory Committee took the Court's offhand suggestion in *Omni* to heart and proposed amendments to Rule 4 that ultimately were adopted in 1993.[77] Of particular note, subdivision (k)(2) purported to authorize world-wide service of process in limited circumstances.

Although Rule 4(k)—like Rule 4(f) in previous iterations—is captioned "Territorial Limits of Effective Service," the Rule now provides that "[s]erving a summons or filing a waiver of service" in accordance with Rule 4(k) "*establishes* personal jurisdiction over a defendant."[78] Rule 4(k) is usually understood as regulating amenability in federal district courts in much the same way that state long-arm statutes regulate amenability in state courts,[79] a marked change from previous understandings of Rule 4.[80] But for the reasons discussed in the next Part, that construction of subdivisions (1)(B) and (2) of Rule 4(k) runs afoul of the REA.

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76. *See* Paul D. Carrington, *Continuing Work on the Civil Rules: The Summons*, 63 NOTRE DAME L. REV. 733, 744 (1988) (citing Omni Capital Int'l v. Rudolf Wolff & Co., 484 U.S. 97, 106–11 (1987)).

77. *See* FED. R. CIV. P. 4(k) advisory committee's note to 1993 amendment. For discussion of the "legislative history" of the 1993 amendments (in particular Federal Rule 4(k)(2)), see Robert C. Casad, *Personal Jurisdiction in Federal Question Cases*, 70 TEX. L. REV. 1589, 1597–99 (1992); Kelleher, *supra* note 3, at 1219–21 (further discussing the legislative history of the 1993 amendment); *see also* Burbank, *supra* note 3, at 1456 n.164 (raising concerns). The Supreme Court was alerted to the possibility of an REA issue with respect to Rule 4(k)(2) at the beginning of the Advisory Committee Note. *See* FED. R. CIV. P. 4 advisory committee's note, *reprinted in* 146 F.R.D. 401, 557 ("Mindful of the constraints of the Rules Enabling Act, the Committee calls the attention of the Supreme Court and Congress to new subdvision (k)(2).").

78. FED. R. CIV. P. 4(k)(1) (emphasis added).

79. *See, e.g.*, 4A CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1075 (4th ed. 2015) ("[T]he 1993 amendments establishing Rule 4(k) have clarified the question of which law governs whether a defendant is subject to personal jurisdiction in a particular federal district court."); Kelleher, *supra* note 3, at 1222 (arguing that Rule 4(k) is invalid because "it explicitly purports to govern amenability to jurisdiction, and thus affects a substantive right contrary to the Rules Enabling Act"); TEPLY & WHITTEN, *supra* note 74, at 361 (concluding that "Rule 4(k) now specifically addresses" questions of amenability). The same result can be achieved by reading the Rule 4(k) as limiting service of process within the vast boundaries of a Fifth Amendment amenability standard. *See infra* note 108. Both alternatives find plausible support in *Omni*'s offhand dicta. *See infra* Section II.A.2.

80. As Professors Teply and Whitten noted:

> Before 1993, Rule 4(d) and (f) did not specifically address problems of amenability. Instead Rule 4(d) provided for the manner of service on different categories of defendants, while Rule 4(f) simply provided where process might be served. Neither provision specifically attempted to authorize jurisdiction to be asserted over the different categories of defendants to be served.

TEPLY & WHITTEN, *supra* note 74, at 360; *see also* Kelleher, *supra* note 3, at 1206 (stating that Rule 4(f) "did not purport to govern amenability to jurisdiction, which was left to be determined by the courts as a matter of interstitial federal common law, subject to constitutional limits").

III. THE SOURCES OF PERSONAL JURISDICTION LAW IN FEDERAL COURT

In this Part, I explain why, in the absence of congressional legislation, state law generally governs whether a person is amenable to personal jurisdiction in federal court. In Section III.A, I discuss why it is a mistake to conclude that the Court generally has the power to prescribe Federal Rules governing amenability. In Section III.B, I explain that under the RDA, state law of its own force generally governs amenability to jurisdiction even in federal-question cases. I demonstrate that—with a handful of important exceptions—there is no sound basis for concluding that federal courts may create federal common law governing amenability to personal jurisdiction. For that reason, state law—in the absence of a congressional statute providing otherwise—generally governs amenability to personal jurisdiction in federal court. In Section III.C, I recognize that Federal Rules which merely memorialize otherwise applicable law are valid even if the Court did not have power to prescribe the Rule under the REA. And finally, in Section III.D, I address the special issues raised by subpoena jurisdiction.

A. The Rules Enabling Act

It is now often taken for granted that Federal Rules prescribed under the REA may determine whether a person is subject—that is, amenable—to a judicial command to appear in federal court on pain of default or other penalty. The assumption—which has crept into our understanding of the law with remarkably little scrutiny—is often based on two landmark cases that address the intersection of the Federal Rules and personal jurisdiction. But neither case holds that the Court has prospective rulemaking authority with respect to amenability to jurisdiction, and one of them fails even to cite to the REA. These cases at best provide tenuous support for the conclusion that the Court has plenary power to prescribe rules regulating amenability to jurisdiction. In Sections III.A.1 and III.A.2, I explain why the two cases respectively provide no authority and tenuous authority for the view that the REA authorizes the promulgation of Federal Rules governing amenability. I then explore the requirements of the REA. Section III.A.3 details why the REA generally does not authorize Federal Rules that regulate amenability. Finally, Section III.A.4 argues that a Federal Rule prescribing territorial limits on service of process is invalid to the extent it functions as a disguised regulation of amenability.

1. The Misreading of Mississippi Publishing Corp. v. Murphree

Any consideration of the Court's authority to prescribe Federal Rules relating to personal jurisdiction must begin with the Court's 1946 decision in *Mississippi Publishing Corp. v. Murphree* upholding the validity of Rule 4(f) as drafted by the original Advisory Committee.[81] Dennis Murphree, relying on diversity jurisdiction, had filed a libel suit against the Mississippi Publishing Corporation ("MPC") in the federal district court for the Northern District of Mississippi. Pursuant to Rule 4(f), the United States Marshal served an agent for service of process designated by MPC in the Southern District of Mississippi.[82] The Court granted certiorari in part to determine "whether [MPC] could be brought before the court and subjected to its judgment in the suit by service of summons on petitioner's agent in the southern district."[83]

There was no doubt that MPC was *amenable* to personal jurisdiction in the northern district. MPC had appointed an agent for service of process, as required by a Mississippi statute.[84] Although the agent was located in the Southern District of Mississippi, the Court had previously held that the appointment of an agent for service of process pursuant to such a state statute constituted consent to personal jurisdiction in *all* the federal districts of a state.[85] But before the promulgation of Rule 4(f), federal law since the Judiciary Act of 1789—with few exceptions—had authorized service of process only in the federal district in which suit was brought.[86]

The central question before the Court was whether Rule 4(f)—which had been intended to authorize notice through service of process anywhere in the state when suit was brought in a district in which the defendant was otherwise amenable to jurisdiction[87]—was valid. Because MPC was amenable to personal jurisdiction in the northern district, "[t]he court had jurisdiction over the parties

81. 326 U.S. 438, 445 (1946).

82. *Id.* at 440–41.

83. *Id.* at 440.

84. *Id.* at 442–43.

85. *See id.* at 442 ("By designating an agent to receive service of process and consenting to be sued in the courts of the state, the corporation had consented to suit in the district court, being a court sitting for a district within the state and applying there the laws of the state . . . ."); *id.* at 443 (noting that state statutes treating appointment of agent for service of process as consent to jurisdiction have "been uniformly construed to mean suits within the state which apply the law of the state, whether they be state or federal courts").

86. *See supra* Section II.A.1.

87. *See supra* Section II.B.1.

if [MPC] was properly brought before the court by the service of process within the southern district."[88] Thus, the only question before the Court was whether Rule 4 could validly authorize the federal district court to exercise personal jurisdiction over MPC "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."[89] The Court concluded that Rule 4(f) was valid. Citing the Advisory Committee, the Court explained that Rule 4(f) was designed "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."[90]

The Court found this construction of Rule 4(f) consistent with Rule 82, which provided that Federal Rules "shall not be construed to extend or limit the jurisdiction of the district courts of the United States or the venue of actions therein."[91] The Court's decision to define "jurisdiction" in Rule 82 solely as subject matter jurisdiction is in tension with the Advisory Committee's use of the term in its Note to Rule 4 and with comments that Dean Clark made in the course of officially explaining the Federal Rules.[92] The Court, however, may well have chosen to exclude personal jurisdiction from the definition of "jurisdiction" as used in Rule 82 because it was unwilling to treat notice through service of process as *not* jurisdictional even when the person served with process is otherwise amenable to jurisdiction. If so, defining the term "jurisdiction" in Rule 82 to refer solely to subject matter jurisdiction was essential to implementing the Advisory Committee's decision to loosen the territorial limits on effective service when the person

88. *Murphree*, 326 U.S. at 441 (emphasis added).

89. *Id.* at 445 (emphasis added).

90. *Id.* at 444 (emphasis added).

91. *Id.* at 443 (quoting FED. R. CIV. P. 82 (1938 adoption)). The Court explained:

> 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 . . . 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.

Id. at 445 (citation omitted).

92. *See supra* notes 54–63 and accompanying text. Apparently concerned that the reference to "jurisdiction" in Rule 82 might be construed to undermine Rule 4(f), then-Judge Clark in 1943 recommended that Rule 82 be amended to make it clear that it referred to subject matter jurisdiction rather than personal jurisdiction. *See* MAY 1943 ADVISORY COMMITTEE, *supra* note 54, at 1091–93. The Committee did not accept the recommendation, fearing that it would be treated as a concession that Rule 4(f) was jurisdictional. *Id.*

served would otherwise be amenable to personal jurisdiction.[93]

In short, the Court in *Murphree* simply held that Rule 4(f)—which governed notice through service of process—was valid. That said, there is language in the decision that arguably sheds light on whether the Court has power to prescribe a Federal Rule governing amenability. Specifically, the Court wrote:

> 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 relates merely to 'the manner and the means by which a right to recover . . . is enforced.' *Guaranty Trust Co. v. York*, 326 U.S. 99, 109.[94]

The Court's focus on the fact that an exercise of jurisdiction over the defendant would not abridge, enlarge, or modify the plaintiff's right to *recover* might be read in isolation to suggest endorsement of a theory that the REA bars only Federal Rules that modify, abridge, or enlarge a cause of action, the affirmative defenses thereto, and the remedies available if the claim is meritorious.[95] That construction of the REA would authorize the Court to prescribe Federal Rules governing amenability. But reading *Murphree* in that way would rip the quoted language out of context. Because the defendant was amenable to jurisdiction even without service of process, there was no question that the defendant had "been brought before a court authorized to determine [its] rights."[96] Rule 4 was simply the procedural mechanism through which that had been done. In other words, the case did not ask or answer whether the Court could prescribe Federal Rules

93. By contrast, the Court could adopt without difficulty the Advisory Committee's sensible view that service of process should not be conflated with venue. *See* CLEVELAND INSTITUTE, *supra* note 60, at 218 ("We are of the opinion that venue does not include the matter of service of process.") (statement by Dean Clark).

94. *Murphree*, 326 U.S. at 445–46.

95. For further discussion of this approach to the validity of the Federal Rules, see *infra* note 124.

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

governing amenability. The Court focused instead on the only other possible basis for invalidating Rule 4(f), that is, the argument that the Rule affected a "right to recover."[97] Rule 4(f) was valid, the Court concluded, because it had no more than "incidental effects" on that right.[98]

2. The Limited Relevance of Omni Capital International, Ltd. v. Rudolf Wolff & Co.

Although *Murphree* is often misread, it is indisputable that the Court in *Omni* intimated that the Court could prescribe a Federal Rule authorizing federal district courts to exercise personal jurisdiction to the limits of the United States Constitution.[99] But the suggestion came in a case in which the scope of the rulemaking power was wholly irrelevant to question before the Court. Indeed, the opinion never discussed or even cited the REA. Under these circumstances, the question is how much weight the Court's ill-considered dicta should be given when weighed in the light of the evidence that the Court was mistaken.

The case arose when persons who had participated in an Omni investment program filed multiple suits against the company in the United States District Court for the Eastern District of Louisiana, alleging that they had been fraudulently induced into participating.[100] Rudolf Wolff & Co., a British broker with offices in London, was joined as a defendant in two of the suits and impleaded as a third-party defendant in a third. Wolff & Co. sought dismissal of the Commodities Exchange Act ("CEA") claims for lack of personal jurisdiction. The district court at first concluded that it had personal jurisdiction over the defendant with respect to the CEA claims. The district court "reasoned that, in actions under the CEA, 'Congress intended for U.S. courts to exercise personal jurisdiction over foreign defendants not present in the United States to the limits of the due process clause of the Fifth Amendment.'"[101] But after a Fifth Circuit decision in an unrelated case, the district court reconsidered and determined that "'unless

97. *Id.* at 446. It is an exaggeration to say that choice of forum "undoubtedly," *id.* at 445–46, will affect a plaintiff's right to recover. That said, whether suit is brought in one federal district court or another may well affect a litigant's right to recover. The most concrete effect on the right to recover may arise when the choice of district will lead to different choice-of-law rules. *See* Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496–97 (1941) (holding that a federal district court should apply the choice-of-law rules of the state in which it sits); *see also infra* note 202.

98. *Murphree*, 326 U.S. at 445–46.

99. Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co., 484 U.S. 97, 111 (1987).

100. *Id.* at 99.

101. *Id.* at 100 (citation omitted).

jurisdiction [could] be asserted under the Louisiana long-arm statute, there [was] no personal jurisdiction over Wolff . . . .'"[102] The district court then dismissed because Wolff & Co. could not be reached under Louisiana's long-arm statute. The Fifth Circuit affirmed en banc, and the Court granted certiorari "to decide whether, in this federal-question litigation arising under the CEA, the District Court [could] exercise personal jurisdiction over Wolff . . . ."[103]

The Court agreed with the courts below that neither the Commodities Exchange Act nor federal common law authorized service of process on Wolff.[104] The Court further recognized that Rule 4 did not authorize service of process on the defendant.[105] What gives *Omni* its central importance, however, was the Court's suggestion in dicta that the gap in personal jurisdiction over aliens that the case had highlighted could be addressed *either* through federal rulemaking or through enactment of a federal statute. Specifically, the Court wrote:

> A narrowly tailored service of process provision, authorizing service on an alien in a federal-question case when the alien is not amenable to service under the applicable state long-arm statute, might well serve the ends of the CEA and other federal statutes. It is not for the federal courts, however, to create such a rule as a matter of common law. That responsibility, in our view, better rests with those who propose the Federal Rules of Civil Procedure and with Congress.[106]

The Court did not explain the basis for its suggestion that a Federal Rule could validly fill the jurisdictional gap. The statement might have been premised on the notion that amenability to jurisdiction simply requires a "constitutionally sufficient relationship between the defendant and the forum."[107] Given the minimal limits the Fifth Amendment Due Process Clause apparently places on the jurisdiction of the federal courts, this approach to amenability arguably would give rule makers a free hand to determine whether and where a person having the requisite contacts with the United States may be required to appear on pain of default or other penalty.[108] But this understanding of amenability is both

102. *Id.* at 101.

103. *Id.* at 102.

104. *Id.* at 106–07, 109–11.

105. *Id.* at 108.

106. *Id.* at 111.

107. *Id.* at 104.

108. *See, e.g.*, Kelleher, *supra* note 3, at 1222 ("The Fifth Amendment operates directly on federal courts and, in the absence of congressional provision, is the only limiting

ahistorical and inadequate. At the time scholars and courts first developed the distinction between amenability (to which they often referred as "jurisdiction") and notice through service of process, personal jurisdiction in federal court was governed by common law principles.[109] It was for that reason that in the absence of Congressional legislation providing otherwise, amenability to jurisdiction based on "presence" in federal court was limited to the federal district in which the person was present. Similarly, the federal courts were not authorized to exercise attachment jurisdiction in civil actions originally brought in federal court even though it was clear that the Constitution did not pose an obstacle to the exercise of *quasi in rem* jurisdiction.[110] Thus, as a historical matter, there is no basis for conflating amenability to jurisdiction in federal court with the limits imposed by the Constitution.

Nor did the shift from *Swift* to *Erie* change the basic principle that the Constitution is a limit on state and federal power with respect to personal jurisdiction, not a self-executing ground for the exercise of jurisdiction. It is easy to lose sight of this basic principle today when so many states have authorized their courts to exercise personal jurisdiction to the limits of the U.S. Constitution, thus conflating statutory authority with constitutional limits. But whether a person's amenability to jurisdiction should extend to the limits of the Constitution requires policy determinations that are distinct from the limitations imposed by the Constitution.

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standard to which the courts can turn in determining amenability to jurisdiction."); Jeffrey T. Ferriell, *The Perils of Nationwide Service of Process in a Bankruptcy Context*, 48 WASH. & LEE L. REV. 1199, 1205 (1991) ("Rule 7004(d), however, like Rule 4(e) of the Federal Rules of Civil Procedure, governs only the actual service of process, not the defendant's amenability to that process under the Due Process Clause of the Fifth Amendment."). There is language in *Omni* that arguably supports this position:

> [B]efore a court may exercise personal jurisdiction over a defendant, there must be more than notice to the defendant and a constitutionally sufficient relationship between the defendant and the forum. There also must be a basis for the defendant's amenability to service of summons. Absent consent, this means there must be authorization for service of summons on the defendant.

Omni, 484 U.S. at 104. I will argue below that the Court's authority to prescribe Federal Rules addressing territorial limits on effective service is limited by the REA. Because amenability to jurisdiction is substantive, Federal Rules governing the territorial effectiveness of service that have the effect of restricting the amenability of a person to jurisdiction enlarge the substantive rights of persons who would otherwise be subject to suit. *See infra* Section III.A.4.

109. *See supra* Section II.A.

110. *Compare supra* notes 23, 30–31 and accompanying text (explaining that attachment jurisdiction did not provide a basis for jurisdiction in action brought originally in federal court), *with* Pennoyer v. Neff, 95 U.S. 714, 725 (1877) (stating that the exercise of attachment jurisdiction is constitutional provided the property is attached at the outset of the suit).

Extending jurisdiction to the limits of the Constitution, for example, "maximizes" a jurisdiction's authority to protect its residents.[111] Conversely, imposing greater limits on the jurisdiction of a court "may promote the state's economy by allowing nonresident businesses more perceived freedom and thus greater incentive to conduct economic activity in the state."[112]

In short, state and federal courts cannot rely on the U.S. Constitution as a source of authority to exercise personal jurisdiction unless authorized to do so by statute or some other legitimate source of jurisdictional authority.[113] If the *Omni* Court in fact sought to suggest that the Fifth Amendment is the sole source of limits on the amenability of a person to jurisdiction in federal court, that conclusion could rest only on federal common law. But as I argue in the next part, federal courts generally do not have the authority to develop a federal common law of amenability.

The *Omni* Court's assumption that the Federal Rules could fill in the gap in jurisdiction alternatively may have been premised on the conflation of amenability to jurisdiction with "amenability to service of summons."[114] But whether the law authorizes service of summons on a person is distinct from whether a person is amenable to *jurisdiction*. That distinction is often elided today because a statute authorizing service of process—for example, a long-arm statute—may both authorize service of process and render amenable to jurisdiction a person subject to process under the statute.[115] But the distinction was crucial to the recognition in the early twentieth century that service of process within the territorial limits of a court or sovereign is unnecessary when a person is otherwise amenable to jurisdiction.[116] And the distinction between authority to serve process and amenability to jurisdiction remains crucial when the Court—or some other rule maker—has power to prescribe *only* rules of practice and procedure.[117] As discussed below, a Federal Rule that regulates amenability to jurisdiction generally

111. Douglas D. McFarland, *Dictum Run Wild: How Long-Arm Statutes Extended to the Limits of Due Process*, 84 B.U. L. REV. 491, 534 (2004).

112. *Id.* at 533.

113. For a different view, see Kelleher, *supra* note 3, at 1222 ("The Fifth Amendment operates directly on federal courts and, in the absence of congressional provision, is the only limiting standard to which the courts can turn in determining amenability to jurisdiction.").

114. Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co., 484 U.S. 97, 104 (1987).

115. *See supra* note 64 and accompanying text.

116. *See supra* Section II.A.2.

117. At least this is true if one assumes—as most courts and commentators have—that the REA gives the Court plenary authority to regulate service of process. I question that assumption below. *See infra* Section III.A.4.

is not a rule of "practice and procedure."[118]

If the Court nonetheless consciously chose to conflate authority to serve process with amenability to jurisdiction, it would suggest that Federal Rules may fill the gap identified in *Omni* by regulating amenability. But because the Court in *Omni* did not address whether the REA authorizes the Court to regulate amenability to jurisdiction, the case should not be read to stand for the proposition that the Federal Rules may do so. It would be unreasonable to read *Omni* as "casually obliterating"[119] the distinction between authority to serve process and amenability to jurisdiction when the distinction was neither relevant to the Court's holding nor even mentioned in the opinion.

In short, the *Omni* Court had no sound basis to assume that the jurisdictional gap identified in that case could be filled by prescribing a Federal Rule. Because the Court's suggestion was both ill-advised and wholly collateral to the question presented in the case, the Court's decision provides scant support for the view that, within the limits of the Fifth Amendment Due Process Clause, the Court has plenary authority to prescribe Federal Rules regulating where a person may be required to appear on pain of default or other penalty.[120]

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118. *See infra* Section III.A.3.

119. Burnham v. Superior Court, 495 U.S. 604, 621–22 (1990) (Scalia, J.) (plurality opinion).

120. The Court's decision in *National Equipment Rental, Ltd. v. Szukhent*, 375 U.S. 311 (1964), is also arguably in tension with the thesis that Federal Rules may not govern amenability. Citing Rule 4(d)(1), the Court in *Szukhent* noted that "[t]he Federal Rules of Civil Procedure provide that service of process upon an individual may be made 'by delivering a copy of the summons and of the complaint to an agent authorized by appointment . . . to receive service of process.'" *Szukhent*, 375 U.S. at 312. Rule 4(d)(1) regulated the manner and means of service, and there should be no question that the REA authorizes the Court to prescribe such a Rule. *See infra* note 143 and accompanying text. The question presented in *Szukhent* was "whether a party to a private contract may appoint an agent to receive service of process within the meaning of Federal Rule of Civil Procedure 4(d)(1), where the agent is not personally known to the party, and where the agent has not expressly undertaken to transmit notice to the party." *Szukhent*, 375 U.S. at 315. Justice Stewart, writing for the Court, answered that question in the affirmative. *Id.* at 316–17. The Court held that federal law determined whether the agency was valid under Rule 4(d)(1), while noting that the answer would be the same under the law of Michigan (where the defendant resided) and the law of New York (the forum selected by the contract). *Id.* The Court should simply have applied New York law to resolve whether the agency was valid: whether an agent is authorized to receive service of process determines whether a defendant is amenable to the jurisdiction of a court on the basis of consent. *See id.* at 315. But the Court conceptualized the case as addressing no more than the manner and means of service. *See id.* And nothing the Court said is inconsistent with the view that the REA does not grant the Court power to prescribe Federal Rules that directly or indirectly regulate amenability. With respect to amenability, the Court simply stated: "[I]t is settled, as the courts below recognized, that parties to a contract may agree in advance to submit to the jurisdiction of

3. Amenability to Jurisdiction: A Framework for Analysis

The REA authorizes the Court to prescribe rules of "practice and procedure" and requires that such rules not "abridge, enlarge, or modify any substantive right . . . ."[121] *Sibbach v. Wilson & Co.*—the Court's seminal decision on the REA—stated that the validity of a Federal Rule is to be determined by asking: Does the Federal Rule "really regulate[] procedure,—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them"?[122] This "really regulates procedure" test could be understood to suggest that the REA delegates to the Court the full authority of Congress to regulate matters that are arguably procedural.[123] If the REA grants the Court authority to regulate

a given court, to permit notice to be served by the opposing party, or even to waive notice altogether." *Id.* at 315–16. In reaching that conclusion, the Court cited to the law of New York where the suit had been filed (although the Court did not limit its citations to New York law). *See id.* at 316–17.

121. Sibbach v. Wilson & Co., 312 U.S. 1, 7–8 (1941) (citing Rules Enabling Act, ch. 651, 48 Stat. 1064, 1064 (1934) (codified as amended at 28 U.S.C. § 2072 (2012))).

122. *Id.* at 14.

123. *See* John B. Oakley, *Illuminating* Shady Grove*: A General Approach to Resolving* Erie *Problems*, 44 CREIGHTON L. REV. 79, 83–84 n.18 (2010) ("[I]n my view . . . 'really regulates procedure' is just another way of say[ing] 'arguably procedural.'"). *But see* Kevin M. Clermont, *The Repressible Myth of* Shady Grove, 86 NOTRE DAME L. REV. 987, 1004 (2011) (recognizing that the "arguably procedural" standard is different from the "really regulates procedure" standard). Justice Harlan pithily described the constitutional standard adopted by the Court in *Hanna v. Plumer* as "arguably procedural, *ergo* constitutional." Hanna v. Plumer, 380 U.S. 460, 476 (1965) (Harlan, J., concurring); *see id.* at 472 (majority opinion) ("For the constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) carries with it congressional power to make rules governing the practice and pleading in those courts, which in turn includes a power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either.").

In a decision addressing whether Congress constitutionally could authorize the U.S. Sentencing Commission to prescribe sentencing guidelines, the Court included language that could be understood to endorse the view that the REA authorizes the Court to prescribe Federal Rules on any matter within Congress's constitutional power over procedure:

> Although we are loath to enter the logical morass of distinguishing between substantive and procedural rules, see Sun Oil Co. v. Wortman, 486 U.S. 717 (1988) (distinction between substance and procedure depends on context), and although *we have recognized that the Federal Rules of Civil Procedure regulate matters 'falling within the uncertain area between substance and procedure, [and] are rationally capable of classification as either*,' Hanna v. Plumer, 380 U.S., at 472, we recognize that the task of promulgating rules regulating practice and pleading before federal courts does not involve the degree of political judgment integral to the Commission's formulation of sentencing guidelines.

Mistretta v. United States, 488 U.S. 361, 392 (1989) (emphasis added, brackets in original). In fact, the quoted language from *Hanna* specifically refers to the constitutional scope of congressional power over procedure, not the scope of rulemaking power under the REA. In context, the Court simply may have been trying to point out that a Federal Rule may validly

procedure that is coextensive with that of Congress, there can be no question that the Court has power to prescribe Federal Rules governing amenability to personal jurisdiction in federal court.[124] But John Hart Ely and Stephen Burbank together did much to delegitimize the notion that the REA grants the Court prospective rulemaking authority that is coextensive with congressional power to regulate procedure.[125] Their influence is obvious in the Court's most recent and extensive discussion of the REA, *Shady Grove v. Allstate*. In that case, *all* the Justices who construed the Act appeared to recognize that the Court's rulemaking authority is more limited than congressional power over procedure.[126]

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regulate "practice and procedure" notwithstanding the substantive *effect* of the regulation, a point the Court crisply implied later in the same paragraph. *Id.* ("This Court's rulemaking under the enabling Acts has been substantive and political in the sense that the rules of procedure have important effects on the substantive rights of litigants.").

124. Amenability to jurisdiction might also be deemed procedural under an "elements -only" approach to differentiating between substance and procedure. The most limited version of this analytical approach would invalidate Federal Rules that *change* the elements of a substantive claim, the affirmative defenses thereto, and presumably the remedies available if the claim is found to be meritorious. *See* Donald L. Doernberg, *"The Tempest":* Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.: *The Rules Enabling Act Decision That Added to the Confusion—But Should Not Have*, 44 AKRON L. REV. 1147, 1185 (2011). A somewhat more expansive version of this approach would also forbid the Court from prescribing rules of preclusion that would *extinguish* claims, affirmative defenses, or remedies. An "elements only" approach has been used to defend the validity of Rule 4(k)(2):

> [T]he rights affected by subdivision (k)(2) . . . are not "substantive" in the sense used in the statute, whose mission is to see that the rules are directed only to method—the "procedure" half of law's procedure/substance duo.
>
> The subdivision (k)(2) mission, however far reaching, is not designed to change in any particular the substantive law to be applied in the action against the defendant, but only to add the federal courts to the list of forums that can hear the action.

David D. Siegel, *The New (December 1, 1993) Rule 4 of the Federal Rules of Civil Procedure: Changes in Summons Service and Personal Jurisdiction (Part II)*, 152 F.R.D. 249, 253 (1994). Careful consideration of the REA in historical context, however, should leave no doubt that its limits on rulemaking cannot be reduced to the protection of substantive claims, affirmative defenses thereto and remedies.

125. John Hart Ely and Stephen Burbank vigorously disagreed on the correct construction of the Rules Enabling Act. But their disagreement was over the nature of the limits imposed on rulemaking by the REA, not on the existence of limits beyond those imposed by the Constitution. Professor Ely argued those limits should be understood primarily to protect federalism. *See* John Hart Ely, *The Irrepressible Myth of* Erie, 87 HARV. L. REV. 693, 718–38 (1974). Professor Burbank argued the limits should be understood to protect the separation of powers. *See* Burbank, *supra* note 64, at 1025–26 ("The historical evidence compels the view that the limitations imposed by the famous first two sentences of the Act . . . were intended to allocate power between the Supreme Court as rulemaker and Congress and thus to circumscribe the delegation of legislative power, that they were thought to be equally relevant in all actions brought in federal court, and that the protection of state law was deemed a probable effect, rather than the primary purpose, of the allocation scheme established by the Act.").

126. Justice Scalia, writing for a plurality, adopted an approach that focused on

The term "practice and procedure" as used in the REA is susceptible to a much narrower interpretation than the breadth of congressional power over procedure in the federal courts, especially when coupled with the admonition that the Federal Rules "shall neither abridge, enlarge, nor modify the substantive rights of any litigant."[127] In a 1926 Senate Report that predates the 1934 enactment,[128] the Senate Judiciary Committee expressly denied that granting the Court prospective rulemaking power over "practice and procedure" would delegate the full measure of congressional authority over any matter that could be characterized as procedural:

> Neither in England nor in any State of the United States where the courts are vested with the rule-making power, has it been assumed that the delegation of that power to them authorizes them to deal with such substantial rights and remedies as those just referred to. In Delaware, Virginia, New Jersey, and Colorado, where the courts have for years had power to make rules of practice and procedure, they have never assumed to make rules relating to limitations of actions, attachment or arrest, juries or jurors or evidence; and in each of those States such matters are reserved for statutory regulation.[129]

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whether a Federal Rule "really regulates procedure." Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 559 U.S. 393, 411 (2010). A close reading of the plurality opinion strongly suggests that the plurality interpreted *Sibbach* more narrowly than the constitutional test for congressional power over procedure that the Court articulated in *Hanna*. *See* Patrick Woolley, *The Role of State Law in Determining the Construction and Validity of Federal Rules of Civil Procedure*, 35 REV. LITIG. 207, 223–24 (2016). Justice Stevens, for his part, adopted an approach with roots in Professor Ely's work. *Id.* at 225–32. Nor was *Shady Grove* the first of the Court's cases to indicate that the rulemaking power is not coextensive with the Constitution. *See id.* at 216 (noting that in its post-*Hanna* cases applying the REA, "the Court chose not to construe the term 'practice and procedure'"—which Professor Ely had construed as synonymous with congressional authority over procedure, Ely, *supra* note 125, at 718—but "focused instead on applying the limits on rulemaking power set forth in what is now § 2072(b)"). The locus of debate between Justice Scalia and Justice Stevens in *Shady Grove* was about the proper interpretation of Section 2072(b). *See Shady Grove*, 559 U.S. at 412–13, 418.

127. Rules Enabling Act, ch. 651, 48 Stat. 1064, 1064 (1934) (codified as amended at 28 U.S.C. § 2072 (2012)).

128. S. REP. NO. 69-1174 (1926). While the Report substantially predates the enactment of the REA, it provides useful guidance on the meaning of the Act. *See* Woolley, *supra* note 126, at 254 n.158 (stating that "my reading of the Report and law review articles published at about the time the REA was enacted leaves me with no doubt that the Senate Report accurately describes basic and widely shared understandings about the nature of court rulemaking at the time the REA was enacted . . .").

129. S. REP. NO. 69-1174, at 9–10 (1926). *Cf.* Winberry v. Salisbury, 68 A.2d 332, 334 (N.J. App. Div. 1949) ("The grant of power to make rules governing the practi[c]e and procedure in all our courts does not include in its scope all adjective law. Most lawyers would probably agree that the Supreme Court is not empowered to make rules that would

Congress sought to limit the prospective rulemaking power of the Court even with respect to matters that could be characterized as procedural to avoid trenching on jealously guarded congressional prerogatives. The drafters of the legislation believed that Congress properly could grant the Supreme Court prospective rule-making authority with respect to matters of "practice and procedure" but that prospective rulemaking power with respect to other matters would give the Court too much legislative power.[130] As the Court more recently explained, "rulemaking is nonjudicial in the sense that rules impose standards of general application divorced from the individual fact situation which ordinarily forms the predicate for judicial action."[131] It has been clear since *Wayman v. Southard*[132] that courts—at least when authorized to do so by Congress[133]—may exercise some prospective rulemaking

supersede the Statute of Frauds or the Statute of Limitations, for instance."). The Rules Enabling Act of 1934 carefully limited its grant of authority to "the forms of process, writs, pleadings, and motions, and the *practice and procedure* in civil actions," a limitation that provides further evidence that the delegation of authority was not plenary with respect to any matter that could be characterized as procedural. Rules Enabling Act, ch. 651, 48 Stat. 1064, 1064 (1934) (emphasis added); *see also* Gustavus Ohlinger, *Questions Raised by the Report of the Advisory Committee on Rules of Civil Procedure for the District Courts of the United States*, 11 U. CIN. L. REV. 445, 451 (1937) ("On familiar canons of statutory construction it can well be argued that it was the intent of Congress to limit the general term 'practice and procedure' to particulars of the kind set out in the preceding enumeration, that is, to matters *ejusdem generis* as 'forms of process, writs, pleadings and motions' and that the general term cannot be extended to include matters of jurisdiction, power, modes of proof, rules of evidence and substantive law."); Joseph A. Wickes, *The New Rule-Making Power of the United States Supreme Court*, 13 TEX. L. REV. 1, 23 (1934) ("[R]ules of evidence have not customarily been treated as matters of 'practice and procedure' by the Supreme Court and the lower federal courts."). The REA was amended in 1975 to give the Supreme Court power to prescribe amendments to the congressionally-enacted Federal Rules of Evidence. *See* Act of Jan. 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926, 1948, *amended by* Act of Dec. 12, 1975, Pub. L. 94-149, 89 Stat. 805, 806.

The reference to "the forms of process, writs, pleadings, and motions" in the REA was removed from Section 2072 when the section was reenacted in 1988. *Compare* Act of June 19, 1934, ch. 651, § 1, 48 Stat. 1064, 1064, *with* Act of Nov. 19, 1988, Pub. L. No. 100-702, 102 Stat. 4642, 4648–49; *see also* 134 CONG. REC. 31,056 (1988) (describing "New Section 2072 of title 28"). There is no reason to believe that this change in language was intended to affect the meaning of Section 2072. So long as the term "practice and procedure" is construed narrowly, the deleted language was superfluous. The Senate's section-by-section analysis of the bill indicates that the change in language was not intended to affect the meaning of "practice and procedure." *See* 134 CONG. REC. 31,056 (1988) (noting that Section 2072, as amended, "consolidates but carries forward current law").

130. *See* Burbank, *supra* note 64, at 1106–08.

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

132. 23 U.S. 1 (1825).

133. *See* Leslie M. Kelleher, *Taking "Substantive Rights" (in the Rules Enabling Act) More Seriously*, 74 NOTRE DAME L. REV. 47, 62–68 (1998) (discussing whether the Court has inherent authority to engage in prospective rulemaking authority or must rely on a delegation of authority from Congress).

authority. But to the extent courts formulate substantive law, they must do so through elaboration of the common law rather than through prospective rulemaking.[134] Following this longstanding understanding, the Congress that enacted the REA carefully limited the scope of the Court's prospective rulemaking authority to preserve congressional prerogatives.[135]

Professors Burbank and Wolff have argued that *Sibbach* mistakenly understood the REA to safeguard federalism rather than the separation of powers.[136] But the standard set forth in *Sibbach* is responsive to the separation-of-powers concerns that led the drafters of the legislation to limit the prospective rulemaking authority of the Court. *Sibbach* focuses on whether the Federal Rule at issue is a rule of "practice and procedure" within the meaning of what is now § 2072(a)[137] and treats the requirement that a Federal Rule "shall not abridge, enlarge or modify any substantive

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134. For a discussion of federal common law, see note 209 and accompanying text; Section III.B.2.

135. Professors Burbank and Wolff have explained:

> [T]he historical record underlying both the 1934 Act and the 1988 amendments establishes: the primary purpose of the Enabling Act's procedure/substance dichotomy is to allocate prospective federal lawmaking between the Supreme Court and Congress, not to protect lawmaking choices already made, and certainly not to protect state lawmaking choices exclusively. To be sure, allocation standards may have the salutary effect of protecting existing lawmaking choices. . . . But that is a secondary consequence of the Enabling Act's primary concern, which is preventing the Supreme Court, exercising delegated legislative power to promulgate court rules, from encroaching upon Congress's lawmaking prerogatives.

Stephen B. Burbank & Tobias Barrington Wolff, *Redeeming the Missed Opportunities of* Shady Grove, 159 U. PA. L. REV. 17, 43–44 (2010); *see also* Donald L. Doernberg, *Horton the Elephant Interprets the Federal Rules of Civil Procedure: How the Federal Courts Sometimes Do and Always Should Understand Them*, 42 HOFSTRA L. REV. 799, 830 (2014) ("[T]o regard the REA's limiting language as a federalism instrument, rather than as a separation-of-powers instrument, is to indulge in a serious misreading of the REA's history and timing."); *id.* at 830–31 (quoting Sain v. City of Bend, 309 F.3d 1134, 1137 (9th Cir. 2002), for the proposition that "the Rules Enabling Act['s] . . . proviso restricting the permissible scope of the rules . . . was designed to serve the purposes of the anti-delegation doctrine by limiting the scope of rules that were adopted with minimal congressional involvement"); Paul D. Carrington, *"Substance" and "Procedure" in the Rules Enabling Act*, 1989 DUKE L.J. 281, 289 (recognizing that the limits imposed on rulemaking in the REA are founded in the separation of powers). For an exhaustive discussion of the legislative history, see generally Burbank, *supra* note 64.

136. Burbank & Wolff, *supra* note 135, at 28. ("We do not know why the *Sibbach* Court ignored such powerful evidence that separation of powers, rather than federalism, animated the Enabling Act's limitations on rulemaking by the Supreme Court.").

137. 28 U.S.C. § 2072(a) (2012) reads in relevant part as follows: "The Supreme Court shall have the power to prescribe general rules of practice and procedure . . . for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals." Until 1988, what is now part of § 2072(a) was part of an undivided statute. *Compare* Act of June 19, 1934, ch. 651, § 1, 48 Stat. 1064, 1064, *with* Act of Nov. 19, 1988, Pub. L. No. 100-702, 102 Stat. 4642, 4648–49.

right" in what is now § 2072(b)[138] as simply intended to "*emphasize*"[139] the restriction on the Court's "power to prescribe" set forth in § 2072(a).[140] A focus on what a Federal Rule actually regulates, rather than on how it may affect state law, fully protects congressional authority to legislate on matters not delegated to the Court.[141] And it is in this separation-of-powers light that *Sibbach*'s "really regulates procedure" test should be read. This is not to suggest that limits on prospective rulemaking do not protect state law. If a matter is outside the Court's prospective rulemaking authority and is not governed by federal common law, a treaty, an act of Congress, or the Constitution, "state law must govern because there can be no other law."[142]

Because the REA granted the Court prospective rulemaking authority with respect to matters of "practice and procedure," the Court's rulemaking authority is limited to rules governing *how* a lawsuit should proceed;[143] other arguably procedural matters should be governed by legislation or the common law. This in fact

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138. 28 U.S.C. § 2072(b) (2012) reads in relevant part as follows: "Such rules shall not abridge, enlarge or modify any substantive right."

139. Sibbach v. Wilson & Co., Inc., 312 U.S. 1, 10 (1941) (emphasis added).

140. *Id.* at 9–10; *see also* Clermont, *supra* note 123, at 1005 (noting that *Sibbach* "said that it read the Act's first sentence to limit the Rules to procedural matters, while reading the second sentence as an emphatic definition of procedural matters to mean nonsubstantive law . . . .").

141. As Professors Burbank and Wolff have argued:

> Justice Scalia's plurality opinion in *Shady Grove* . . . correctly declined to make the validity of a Federal Rule turn on a particularistic and after-the-fact analysis of the policies underlying state law prescriptions on the very matter that the Federal Rule covered. . . . Apart from its erroneous attention exclusively to state law, such an interpretation is hardly consistent with the vision of uniform and simple Federal Rules that animated the movement that brought us the Enabling Act.

Burbank & Wolff, *supra* note 135, at 46; *see also id.* at 51 (Justice Scalia's "insistence on a test for validity that does not depend on idiosyncratic aspects of state law rings true for a statute that was designed primarily to allocate federal lawmaking power *ex ante*, rather than to protect policy choices (let alone only state law policies) *ex post*." (emphasis added)).

142. Hanna v. Plumer, 380 U.S. 460, 471–72 (1965).

143. Rules prescribing the content of the summons and the manner of service comfortably fit within this interpretation of the "really regulates procedure" standard, at least if they are consistent with the requirements of procedural due process. If, as I argue below, a person's amenability to personal jurisdiction creates a substantive duty to appear if the court validly exercises its jurisdiction, rules prescribing *how* a person amenable to the court's jurisdiction is brought into the litigation are properly understood as "the judicial process for enforcing . . . [a] dut[y] recognized by substantive law." *Sibbach*, 312 U.S. at 14. In the words of *Murphree*, they are the "procedure" by which a person "may be brought into court." Miss. Publ'g Corp. v. Murphree, 326 U.S. 438, 445 (1946). The rules are written to govern the court, court officials, and parties in the conduct of the litigation. And the rules regulate a crucial step in the lawsuit without which a plaintiff cannot seek relief. For these reasons, the Court has power to prescribe such rules so long as they meet the minimum requirements of procedural due process.

was the consensus approach to prospective judicial rulemaking in the United States when Congress enacted the REA.[144] And there is no indication that Congress intended to depart from that consensus when it restored the Court's rulemaking authority in actions at common law.

Whether a rule governs *how* a lawsuit should proceed is sometimes debatable, but a person's amenability to the jurisdiction of the court determines not *how* the lawsuit should proceed but *whether* a person even is subject to the authority of the district court. In other words, a person's amenability to personal jurisdiction—like the timeliness of a lawsuit or the substantive merits of a cause of action[145]—is separate and apart from the procedural choices that must be made in deciding how a lawsuit is to proceed. This distinction is evident in the fact that the Court has insisted that due process requires that persons be allowed to order their day-to-day behavior outside the courtroom to avoid making themselves amenable to the jurisdiction of a particular sovereign.[146] As the Court explained in *World-Wide Volkswagen v. Woodson*:

> The Due Process Clause, by ensuring the "orderly administration of the laws," gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.
>
> When a corporation "purposefully avails itself of the privilege of conducting activities within the forum State," it has clear notice that it is subject to suit there, and can act to alleviate the risk of burdensome litigation by procuring

144. *See supra* text accompanying note 128. The Washington Supreme Court, for example, explained in 1929 that "[t]exts and authorities" defining the term "practice and procedure"

> are to the general effect that what constitutes practice and procedure in the law is the mode of proceeding by which a legal right is enforced, "that which regulates the formal steps in an action or other judicial proceeding; the course of procedure in courts; the form, manner and order in which proceedings have been, and are accustomed to be had; the form, manner and order of carrying on and conducting suits or prosecutions in the courts through their various stages according to the principles of law and the rules laid down by the respective courts."

State v. Pavelich, 279 P. 1102, 1103 (Wash. 1929) (citations omitted).

145. For a detailed explanation of why rules creating limitations periods should not be deemed rules of practice and procedure, see Woolley, *supra* note 126, at 226–30.

146. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297–98 (1980). *Cf.* Ely, *supra* note 125, at 725 ("The most helpful way, it seems to me, of defining a substantive rule—or more particularly a substantive right, which is what the Act refers to—is as a right granted for one or more nonprocedural reasons, for some purpose or purposes not having to do with the fairness or efficiency of the litigation process.").

> insurance, passing the expected costs on to customers, or, if the risks are too great, severing its connection with the State.[147]

Thus, as with liability on a substantive cause of action, a person's amenability to jurisdiction ordinarily depends on his or her behavior before suit is filed and to that extent is not properly within the scope of federal rulemaking. Legal rules directed at day-to-day behavior outside the courtroom by definition do not regulate the process by which claims and defenses are asserted and adjudicated *within* a lawsuit. Indeed, this is true *even if* the Rules Enabling Act is erroneously construed as intended to safeguard federalism.[148] For all these reasons, the REA gives the Court *no* authority to prescribe a Federal Rule governing amenability.[149]

The Court, however, does have authority under the REA to prescribe Federal Rules that govern *how* amenability is adjudicated. Thus, the Federal Rules may treat the failure of an *appearing* defendant to comply with the waiver and consolidation requirements of Rule 12 as a waiver of the jurisdictional defense.[150]

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147. *World-Wide Volkswagen*, 444 U.S. at 297 (citations omitted); *see* Ely, *supra* note 125, at 725 (arguing that at the heart of a proper definition of the term substantive within the meaning of the REA are "those rules of law which characteristically and reasonably affect people's conduct at the stage of primary private activity." (quoting H. HART & W. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 678 (1952))); *infra* notes 185–86 and accompanying text.

148. John Hart Ely and his disciples have argued that the REA should be construed primarily in light of federalism concerns. *See* Ely, *supra* note 125, at 718–38. Proponents of this approach conclude that Section 2072(a) gives the Court prospective rulemaking authority over any arguably procedural matter, *id.* at 718, but that Section 2072(b) on a case-by-case basis bars application of otherwise *valid* Rules that impermissibly interfere with a state substantive right, *id.* at 722–33. But while the choice between a separation-of-powers and a federalism reading of the REA may lead to different results with respect to some kinds of rules, that is not true of rules regulating amenability. As explained above, amenability is substantive because it does not regulate the procedures used in the lawsuit but rather whether a person is even subject to an exercise of authority by the court. *See supra* note 147 and accompanying text. And in the absence of congressional legislation, the amenability of person to jurisdiction in federal district court is governed by state law. *See infra* Section III.B. Thus, any Federal Rule purporting to displace state amenability standards with a federal standard would interfere with the definition of a state substantive right. *Cf.* Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 559 U.S. 393, 418 (2010) (Stevens, J., concurring) ("The Enabling Act's limitation . . . means only that federal rules cannot displace a State's definition of its own rights or remedies.").

149. This includes Rule 4(k) to the extent the Rule governs amenability. *See infra* Section III.C. (arguing that subdivisions (1)(A) and (1)(C) are valid restatements of the law that would govern amenability even in the absence of Rule 4(k)).

150. *See* Woolley, *supra* note 126, at 253 ("[I]t makes sense to conclude that Congress granted the Court authority to prescribe sanctions to enforce otherwise valid Federal Rules."); *id.* at 252–54 (defending that conclusion). *Cf.* Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 705–06 (1982) (treating waiver of the personal jurisdiction defense under Rule 12 as unproblematic). The Court in *Insurance Corp. of Ireland*

The Federal Rules similarly may authorize a district court to find in appropriate circumstances that jurisdiction has been established if an *appearing* defendant fails to comply with its obligations to submit to jurisdictional discovery.[151] But putting aside the waiver of jurisdictional objections for noncompliance with valid Federal Rules, amenability is not a proper subject of judicial rulemaking under the REA.

4. Federal Rules Prescribing the Territorial Limits of Effective Service

It is often assumed that even if the Court has no authority to prescribe Federal Rules governing amenability, the REA grants the Court plenary power to prescribe the territorial limits of effective service.[152] But that conclusion is based on a misreading of *Murphree*. The Court in that case simply held it had the authority to prescribe a Federal Rule that had abolished a formal—rather than substantive—limit on the jurisdiction of the federal district courts.[153] Nor would it make sense to conclude that the Court lacks authority to regulate amenability but enjoys plenary power to impose territorial limits on effective service. To the extent territorial limits on effective service are *narrower* than the standard governing amenability, such limits represent a disguised regulation of amenability. For that reason, the Court's power to prescribe territorial limits on effective service must be carefully circumscribed.

Rule 4(f)—as prescribed in 1938—was valid under this theory. By authorizing notice through service of process in the entire state in which the federal court sat, the Court in 1938 removed a wholly formal limit on the territorial effectiveness of service of process in cases in which the person was otherwise amenable to jurisdiction in the state. Because the federal district in which a person receives notice has *no* effect on the quality of notice, it serves *no* procedural purpose to impose territorial limits on service of process more restrictive than those governing amenability.[154] The Advisory

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focused on Due Process and did not mention the REA.

151. *Cf. Ins. Corp. of Ir.*, 456 U.S. at 695, 705–07 (holding that a finding of personal jurisdiction was an appropriate sanction for failure to comply with court orders with respect to jurisdictional discovery).

152. *See, e.g.*, Kelleher, *supra* note 3, at 1206 ("[T]he result in *Murphree* was correct. Rule 4(f) governed only service—the procedural means of providing notice to, and asserting the jurisdiction of the court over, the defendant for an adjudication of its substantive rights."); *id.* ("[T]the 'bulge' rule in Rule 4(f) also was valid, even though it . . . permitted service of process outside of the state in which the district court was situated. . . . [T]he 'bulge' rule was not concerned with amenability to jurisdiction.").

153. *See supra* Sections II.B.1 and III.A.1.

154. Rule 4—as prescribed in 1938—also had the effect of streamlining service of

Committee could have chosen to leave intact the pre-existing limits in federal law on service of process on a person amenable to jurisdiction. The Committee, however, wisely chose to recommend that those formal limits be superseded through the promulgation of Rule 4(f).

The original Advisory Committee may be criticized, however, for drafting a Federal Rule that did not clearly authorize service of process outside of the state unless a congressional statute did so. Not surprisingly, this failure garnered little attention at the time. After all, when Rule 4(f) was first promulgated in 1938, at most a handful of state statutes purported to authorize personal jurisdiction without requiring service of process within the state.[155] But as states, after *International Shoe*, began to enact long-arm statutes authorizing the exercise of jurisdiction through service of process outside the state,[156] Rule 4(f) arguably restricted jurisdiction over persons otherwise amenable to jurisdiction without any procedural justification for doing so.[157] This potential gap in the coverage of Rule 4(f) was addressed in 1963. Even before the 1963 Amendment, however, some courts had read Rule 4 as authorizing service of process outside of the state when state law authorized such service.[158] Putting aside the persuasiveness of this reading as a textual matter, those decisions are defensible on the ground that a contrary reading of Rule 4 would have rendered Rule 4(f) invalid.

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process under Section 1 of the Act of May 4, 1858, which made persons within the state amenable to the jurisdiction of a federal district court sitting in the state. The Act required a "duplicate writ" to be issued and served on defendants outside the federal district in which suit was brought. *See supra* note 27 and accompanying text. Because Rule 4 authorized service of process throughout the state, a duplicate writ was no longer required under the Federal Rules. If, as I argue below, *Erie* made reliance on federal general common law obsolete, the Act of May 4, 1858 was redundant to the extent that amenability to jurisdiction under state law was more expansive than that authorized by the Act.

155. *See* McFarland, *supra* note 111, at 493–94 ("For nearly a decade after *International Shoe*, the new jurisdictional authority to reach outside the boundaries of the state lay largely dormant, in part because, to extend authority, state legislatures had to create a long-arm statute."); *id.* ("Both before and after *International Shoe*, states took small statutory steps to assert jurisdiction over nonresidents in specific, limited situations.").

156. *See id.* at 492–97 (discussing development of long-arm statutes between 1945–1963).

157. *Cf. supra* Section II.B.1. When the Advisory Committee originally drafted Rule 4(f), the provision was intended to provide an *exemption* from the otherwise applicable general common law rule confining service of process to the federal district in which suit was brought. But once *Erie* rendered obsolete the federal general common law of personal jurisdiction, Rule 4(f) became a *source* of limits on the territorial effectiveness of service in federal court. This shift was not readily apparent to contemporaries. *See infra* note 213 (noting that as late as 1948, the Court believed that—in the absence of an applicable Federal Rule—federal law required service of process within the district).

158. *See* Kaplan, *supra* note 69, at 620–22.

After 1963, the territorial limits on effective service of summons in Federal Rule 4 were either coextensive with or broader than the limits on amenability to jurisdiction if, as argued below, amenability to jurisdiction is governed by federal statute or by the law of the state in which the federal court sits.[159] This remains true today to the extent Rule 4(k) is construed as simply imposing "[t]erritorial limits of effective service."[160] Limits on effective service coextensive with or broader than limits on amenability do not represent a disguised regulation of amenability and for that reason do not run afoul of the REA. That said, there is no sound procedural reason for the Federal Rules to impose *any* territorial limits on the effectiveness of notice through service of process.

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In short, a careful analysis of the REA and the nature of amenability indicates that the statute grants the Court no power to prescribe Federal Rules governing amenability. To the extent a Federal Rule regulates amenability, it is invalid unless the Rule serves as a restatement of otherwise applicable law or there is some other basis of rulemaking authority.

B. The Rules of Decision Act and Federal Common Law

This Section argues that—in the absence of a federal statute authorizing nationwide or worldwide service of process—state law generally governs a person's amenability to jurisdiction in federal court. For the reasons outlined in Section III.B.1, amenability to personal jurisdiction in federal court should be analyzed in light of the RDA even in federal-question cases. The RDA requires application of state law unless the Constitution, a federal statute, or a treaty of the United States otherwise requires or provides. And as explained in Section III.B.2, the Constitution, treaties, and federal

159. *Compare* Section II.B.2 (discussing the 1963 amendment to Rule 4 expressly adopting the position that authorizes service of process outside the state when permitted by the law of the state in which the court sits), *and* Section II.B.3 (discussing the 1993 amendment to Rule 4 as permitting personal jurisdiction over a defendant by serving a summons or filing a waiver of service), *with* Section III.B.1 (explaining that amenability to jurisdiction generally is governed by the law of the state in which the federal court sits or by federal statute). I put aside the cases in which I argue amenability to jurisdiction may be governed by federal common law, none of which affects this analysis.

160. FED. R. CIV. P. 4(k). *But see supra* notes 59–61 and accompanying text. If amenability to jurisdiction must be governed by federal statute or by the law of the state in which the federal courts sits, the territorial limits on effective service in subdivisions (1)(B) and (2) of Rule 4 are superfluous; they add nothing to the territorial limits on effective service set forth in subdivisions (1)(A) and (1)(C).

statutes do not generally authorize the federal courts to elaborate federal common law rules of amenability. For that reason, the RDA ordinarily requires the application of state standards of amenability in the absence of a federal statute authorizing nationwide or worldwide service of process. I close Section III.B.2 by identifying two exceptions to the general rule that, in the absence of a federal statute providing otherwise, state law governs personal jurisdiction in federal court: some categories of admiralty cases and jurisdiction over absent class plaintiffs.

1. A Framework for Analysis

Section 34 of the Judiciary Act of 1789—which as amended is known as the Rules of Decision Act—provided "[t]hat the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply."[161]

Swift v. Tyson held that the RDA did not prevent federal courts from applying general principles of commercial law—rather than the "laws of the several states"—as rules of decision in appropriate circumstances.[162] More broadly, *Swift* was consistent with the view that federal courts—independently of state law—had authority to apply the general principles of the "law of nations" as a matter of common law.[163] The law of nations, as that term was understood in the nineteenth century, included, among other things, some aspects of commercial law, the law of admiralty, and conflict of laws.[164] The law of nations was part of the "general common

161. The Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 73, 92 (codified as amended at 28 U.S.C. § 1652 (2012)). Since 1948, the Act has provided: "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." Judicial Code and Judiciary Act, ch. 646, § 1652, 62 Stat. 869, 944 (1948) (codified as amended at 28 U.S.C § 1652 (2012)).

162. *See* Swift v. Tyson, 41 U.S. 1, 18–19 (1842).

163. *See infra* notes 164–70 and accompanying text; Charles M. Yablon, *Madison's Full Faith and Credit Clause: A Historical Analysis*, 33 CARDOZO L. REV. 125, 165 n.198 (2011) ("According to historians of conflict of laws, the eighteenth century was the period when English common law courts began to recognize an *ius gentium* or law of nations, which was conceived as part of English law, enforceable in its courts.").

164. RANDALL BRIDWELL & RALPH U. WHITTEN, THE CONSTITUTION AND THE COMMON LAW 51 (1977) ("[E]ach of these bodies of law [i.e. admiralty, commercial law, and conflict of laws] was highly interrelated, and each was a constituent part of a more comprehensive jurisprudence known as the law of nations."); *see also* Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 VAND. L. REV. 819, 821–22 (1989) ("In its broadest usage, the law of nations comprised the law merchant, maritime law, and the law of conflicts of laws, as well as the law governing the relations between states."); Jay Conison, *What Does Due Process Have to Do with Jurisdiction*, 46 RUTGERS L. REV. 1071, 1104 (1994)

law," that is, common law purportedly *deduced* from general principles using the common-law method rather than *made* through an exercise of sovereign authority by a court.[165]

Between 1789–1860,[166] the hallmark of the law of nations was its customary nature. In some areas, the relevant customs were those established by the community of sovereigns. In others, "they proceeded according to custom . . . derived from the private behavior of the parties to a dispute and the behavior of others" in the relevant community.[167] Thus, the law of nations did not derive from the authority of a particular sovereign.[168] Sovereign authority—which could displace the law of nations—was instead exercised through statutes, treaties, and constitutions. That said, the applicability of a state statute or constitutional provision departing from general principles of the law of nations depended on conflict-of-laws principles.[169]

("Because it seemed obvious to treat the United States as a collection of interrelated but sovereign states, it was natural for courts to turn to the law of nations for appropriate principles and rules." (citations omitted)).

165. *See infra* notes 175–77 and accompanying text. Some commentators appear to conflate the general common law with the law of nations. *See, e.g.*, Anthony J. Bellia Jr. & Bradford R. Clark, *General Law in Federal Court*, 54 WM. & MARY L. REV. 655, 658 (2013) ("General law [at the time of *Swift*] was 'an identifiable body of rules and customs developed and refined by a variety of nations over hundreds and, in some cases, thousands of years.'" (quoting Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1279 (1996))). *Cf.* Stephen E. Sachs, Pennoyer *Was Right*, 95 TEX. L. REV. 1249, 1263 (2017) (identifying the law of nations at the time of *Swift* as part of a broader general common law). Because common law purportedly deduced from general principles using the common-law method was not confined to the law of nations, the two terms are not coextensive. The customs and usages of particular U.S. states—as opposed to the United States as a whole—were not part of the general common law. Nor was common law adapted to the needs of a particular state or the federal government through an exercise of lawmaking power not tied to custom or usage. The common law of crimes provides a salient example. *See* BRIDWELL & WHITTEN, *supra* note 164, at 47 (noting that the common law of crimes involved "*a specific selection* by the judicial branch . . . of those acts that the judges deemed criminal"). Indeed, at least in the absence of legislative authorization, federal common law of this sort came to be understood as a violation of the separation of powers. *See infra* note 176.

166. Professors Bridwell & Whitten argue that "after approximately 1860 the Supreme Court significantly departed from its practice prior to that time, and this departure ultimately produced the system of common law adjudication that the Court reacted to in *Erie*." BRIDWELL & WHITTEN, *supra* note 164, at 3.

167. *Id.* at 46.

168. *Id.* at 13 (contrasting the common law system of *Swift* with "the modern *Erie* notion that the common law is 'the law of [the] state existing by the authority of the state' . . . ." (citing Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 533 (1928) (Holmes, J., dissenting))).

169. *Id.* at 70 (stating that whether a state statute regulating a matter of commercial law "would apply to transactions between citizens of the enacting states and citizens of another state was controlled by well-understood principles of conflict of laws" (citation omitted); *id.* at 81 (noting that "in Justice Story's view, the Rules of Decision Act was a statute

Because territorial jurisdiction is part of the conflict of laws,[170] it is tempting to conclude that the territorial jurisdiction of the federal circuit and district courts was part of the law of nations before *Erie*. But recall that Justice Story in *Picquet* held that service of process was confined as a matter of "general principles" to the territorial boundaries of the *district* unless the jurisdiction of the court was extended by legislation of the sovereign that created the court,[171] a conclusion later ratified by the United States Supreme Court.[172] In other words, this holding involved the distribution of territorial jurisdiction *among* the courts of the United States. This is a matter of "municipal law" rather than the law of nations.[173] Justice Story accordingly cites *Picquet* in his conflict-of-laws treatise for a different—albeit related—proposition: that "no sovereignty can extend its process beyond its own territorial limits to subject either persons or property to its judicial decisions."[174]

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to be applied in strict accord with private international conflict of laws principles—that is, state law applied under the statute when such conflicts principles dictated that it apply, but not otherwise"). The applicability of local customs and usages was also understood to be governed by choice-of-law principles. *See* Swift v. Tyson, 41 U.S. 1, 18–19 (1842) (holding that local customs and usages are part of the "laws of the several states").

170. *See* Conison, *supra* note 164, at 1104–09.

171. Picquet v. Swan, 19 F. Cas. 609, 610–11 (C.C.D. Mass. 1828) (No. 11,134); *see supra* notes 12–20 and accompanying text (discussing *Picquet*).

172. Toland v. Sprague, 37 U.S. 300, 316 (1838) (generally adopting Justice Story's reasoning in *Picquet*); *see supra* notes 21–24 and accompanying text (discussing *Toland*). Federal courts accordingly treated as irrelevant to their jurisdiction state statutes that created additional bases for the exercise of personal jurisdiction. Specifically, federal courts refused to recognize attachment as a basis for jurisdiction in a suit originally brought in federal court, even when the federal court sat in a state that had enacted a statute authorizing jurisdiction on that basis. *See supra* notes 16–23 and accompanying text.

173. *See* James Weinstein, *The Dutch Influence on the Conception of Judicial Jurisdiction in 19th Century America*, 38 AM. J. COMP. L. 73, 89–90 n.77 (1990) (drawing a distinction between "municipal" limitations on the territorial jurisdiction of courts and limitations founded on the law of nations); *see also id.* at 91 (arguing that Justice Story in his conflict-of-laws treatise carefully distinguished between municipal limitations and "international limits" on territorial jurisdiction).

Municipal law could authorize the courts of a sovereign to exercise territorial jurisdiction in violation of the law of nations. But other sovereigns did not need not to give effect to judgments rendered in violation of jurisdictional limits on the law of nations. As Chief Justice Marshall explained:

> Of its own jurisdiction, so far as depends on municipal rules, the court of a foreign nation must judge, and its decision must be respected. But if it exercises a jurisdiction which, according to the law of nations, its sovereign could not confer, however available its sentences may be within the dominions of the prince from whom the authority is derived, they are not regarded by foreign courts.

Rose v. Himely, 8 U.S. (4 Cranch) 241, 276–77 (1808).

174. *See* JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC, IN REGARD TO CONTRACTS, RIGHTS, AND REMEDIES, AND ESPECIALLY IN REGARD TO MARRIAGES, DIVORCES, WILLS, SUCCESSIONS AND JUDGMENTS § 539, at 754 (Melville M. Bigelow ed., Boston, Little, Brown and Co. 8th ed. 1883) (1834)).

But although *Picquet*'s holding that the territorial jurisdiction of a district or circuit court was confined to the district in which it sat was *not* part of the law of nations, the general-common-law rule *Picquet* identified would not have been deemed illegitimate lawmaking by contemporaries. As Randall Bridwell and Ralph Whitten have explained, federal courts could legitimately apply the law of nations because it was understood to be a "system of predictable principles universally observed by the federal judiciary" that "highly circumscribed the exercise of judicial discretion."[175] The "general principle" announced in *Picquet* and later ratified by the Supreme Court comfortably fit within that definition of legitimacy. Unlike the federal common law of crimes that some thought required an illegitimate exercise of lawmaking authority,[176] there was no basis on which to view the use of the common-law process to identify the "general principle" set forth in *Picquet* as an illegitimate usurpation of authority by the judiciary.[177] Because the territorial jurisdiction of *federal* courts was at issue, the "general principles" identified in *Picquet*—not state law—were understood by contemporaries to be the relevant "rules of decision" in the absence of a conflicting federal statute.[178]

175. BRIDWELL & WHITTEN, *supra* note 164, at 6–7.

176. As Professors Bridwell and Whitten summarize the separation-of-powers objection to a federal common law of crimes:

> [E]ven the admiralty portion of the common law criminal jurisdiction would have involved *a specific selection* by the judicial branch of the national sovereign authority of those acts that the judges deemed criminal, as well as an imposition of that selection upon individuals who had no part in the selection process. This simply could not be done validly by the judiciary under our constitutional system of separation of powers, since the choice or selection of criminal acts was essentially an arbitrary one, fit only for the legislature.

Id. at 46–47. Whether federal courts could elaborate a federal common law of crimes was "[o]ne of the most hotly contested legal issues in the early history of the republic." *Id.* at 35. For a description of the controversy, see *id.* at 35–51 (noting, among other things, that Justice Story believed that federal courts could rely on "generally recognized and fixed principles" of common law to identify crimes).

177. *Cf. id.* at 11–12 (noting that between 1789 and 1860 "judges believe[d] that an exercise of "law-making" authority by them [was] illegitimate," supporting the notion that identifying general principles in the common law was not considered a legislative act).

178. *See Ex Parte* Graham, 10 F. Cas. 911, 912–13 (C.C.E.D. Pa. 1818) (No. 5657) (Washington, J.) (stating that the jurisdiction of the district and circuit courts is "limited, in point of locality, as well by the general principles of law, which our courts acknowledge as rules of decision, as by the express provisions of the 11th section of the judiciary law before mentioned"). Had no general principle of common law or applicable federal statute been available to decide the case, state law might have provided the only basis for a rule of decision. *Cf.* United States v. Mundell, 27 F. Cas. 23, 24–25 (C.C.D. Va. 1795) (No. 15,834) (Iredell, J.) (indicating that the common law of Virginia should govern the availability of bail in a civil case seeking a penalty payable to the United States in the absence of an applicable federal statute); Woolley, *supra* note 126, at 228 (noting that under the Court's interpretation of the RDA before *Erie*, "state statutes of limitation applied even to federal

The *Erie* decision—which in part reflected changing conceptions of the law—rendered obsolete the traditional approach to the personal jurisdiction of the federal courts exemplified by *Picquet*. Once the Court rejected as fiction the general common-law method exemplified in *Swift* and *Picquet*, personal jurisdiction could no longer depend on that anachronistic conception of the common law. Unless the Constitution, a federal statute, or a treaty of the United States otherwise requires or provides, state law must provide the "rule of decision" with respect to a person's amenability to jurisdiction in federal court.[179] As noted below, the Constitution, an Act of Congress, or a treaty may expressly "provide" for or implicitly "require" the elaboration of federal common law.[180]

The Court has never definitively defined the term "rule of decision." Given its most natural meaning, the term encompasses

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claims in the absence of an applicable federal statute of limitations because courts were not understood to have the power to elaborate limitations periods as a matter of common law").

179. This analysis takes as a given that that the final phrase of the RDA, "in cases where they apply," no longer provides a basis for refusing to apply state law. Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 73, 92 (codified as amended at 28 U.S.C. § 1652 (2012)). The phrase provided a textual basis for applying general common law rather than state law before *Erie*. *See* Patrick J. Borchers, *The Origins of Diversity Jurisdiction, the Rise of Legal Positivism, and a Brave New World for* Erie *and* Klaxon, 72 TEX. L. REV. 79, 112 (1993) (arguing that the last clause of the RDA "is a command to apply the general law where it applies—to general subjects"). But after *Erie* the phrase should be deemed mostly superfluous. *Cf.* Stephen B. Burbank, *Interjurisdictional Preclusion and Federal Common Law: Toward a General Approach*, 70 CORNELL L. REV. 625, 631–32 (1985) ("I do not accept the argument that the Rules of Decision Act plays a role but the role it plays is up to the reader, who is free to manipulate the language 'in the cases where they apply,' as he or she chooses."). I have argued elsewhere that "the admonition that '[t]he laws of the several states . . . shall be regarded as rules of decision . . . *in cases where they apply*' can be read as an express grant of common law authority to determine *which* state's law a federal court will apply." Patrick Woolley, Erie *and Choice of Law After the Class Action Fairness Act*, 80 TUL. L. REV. 1723, 1753 (2006) (second emphasis added) (footnote omitted); *see id.* at 1752 ("The text of the RDA, however, provides no support for the conclusion that a federal court must apply the choice-of-law rules of the state in which it sits.").

180. *See supra* Section III.B.2.a. Some commentators suggest that strict necessity is the appropriate standard. *See, e.g.*, Thomas W. Merrill, *The Judicial Prerogative*, 12 PACE L. REV. 327, 330–31 (1992) ("I would permit federal courts to go beyond conventional interpretation and make law in the common law mode provided they can show either that Congress has enacted law delegating lawmaking powers to courts, or that it is necessary to replace state with federal law in order to preserve a provision of enacted law."). At the other end of the spectrum, a more permissive standard could be premised on the fact that one definition of "require" is "to call for as suitable or appropriate." *Require*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/require [https://perma.cc/6839-SM7K] (last visited Jan. 30, 2019). *See, e.g.*, RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 649 (7th ed. 2015) [hereinafter HART & WECHSLER] (noting that the Court in *DelCostello v. International Board of Teamsters*, 462 U.S. 151, 158–59 & n.13 (1983), read the RDA to "'authorize[] application of state law only when federal law does not 'otherwise require or provide'" and concluded that there is "no barrier to formulation of a federal rule of decision when called for by 'the policies and requirements of the underlying cause of action'").

any rule that a court would apply in a civil action to decide a case, including rules of practice and procedure.[181] And as Alfred Hill noted, "the evidence shows that from an early date the [RDA] was applied not only in substantive matters but in procedural matters as well—operating on the procedural side as a sort of statutory catch-all for state procedural rules which seemingly were not within the scope of the Process or Conformity Acts."[182]

Other scholars have argued for a more restrictive construction of "rules of decision" that would exclude procedural matters from the ambit of the Act.[183] Thomas Merrill, for example, contends that "the Rules of Decision Act was probably intended to constrain the lawmaking powers of federal courts with respect to 'substantive' as opposed to 'procedural' issues."[184] But rules governing

181. Chief Justice Marshall's decision in *Wayman v. Southard*, 23 U.S. 1 (1825), supports this view. *See id.* at 24 (noting that the RDA "has . . . been generally considered by gentlemen of the profession, as furnishing a rule to guide the Court in the formation of its judgment; not one for carrying that judgment into execution. It is 'a rule of decision,' and the proceedings after judgment are merely ministerial"). The Court's opinion suggests that rules that a court applies in the course of deciding a case—be they procedural or substantive—are rules of decision. *But cf.* Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 32 & n.143 (1985) (citing the same language for the contrary proposition).

182. Alfred Hill, *State Procedural Law in Federal Nondiversity Litigation*, 69 HARV. L. REV. 66, 77 (1955).

183. *See, e.g.*, Martin H. Redish, *Federal Common Law, Political Legitimacy, and the Interpretive Process: An "Institutionalist" Prospective*, 83 NW. U. L. REV. 761, 787 n.104 (1989) ("[I]t is quite reasonable to construe [the phrase 'rules of decision'] to apply only to purely substantive matters."); Merrill, *supra* note 181, at 46–47 (arguing that rules which "involve merely a matter of judicial procedure or internal court governance" are not rules of decision within the meaning of the RDA). To the extent that rules of procedure are *not* rules of decision within the meaning of the RDA, there can be no question that federal courts may elaborate federal common law rules of procedure. *See, e.g.*, Martin H. Redish, *Federal Judicial Independence: Constitutional and Political Perspectives*, 46 MERCER L. REV. 697, 727–28 (1995) ("Absent preemptive congressional legislation, it is not only appropriate but essential for federal courts, as a matter of common law development, to fashion procedural principles to govern their internal operation." (footnote omitted)); Merrill, *supra* note 180, at 354 ("[F]ederal courts should be regarded as having an inherent power, in the absence of congressional intervention, to formulate rules of procedure and evidence." (footnote omitted)).

184. Merrill, *supra* note 181, at 32 (citing 2 W. CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 820–21 (1953)). Professor Merrill argues: "Had the Rules of Decision Act covered forms of 'process' (or 'procedure' as we would call it today), the Process Act would have been unnecessary." *Id.* at 32 n.143. But the Process Acts were not superfluous. They required *static* conformity with state procedural law in actions at common law. *See* HART & WECHSLER, *supra* note 180, at 562–63 (discussing Process Acts). It was not until Congress enacted the Conformity Act of 1872, 17 Stat. 196, that the law required dynamic conformity with state procedural law in actions at common law. *Id.* at 564. The RDA, by contrast, has always been construed by the Court to require *dynamic* conformity with state law. *Wayman*, 23 U.S. at 24–25. For an argument that the RDA was not enacted to require either static or dynamic conformity with state law, see WILFRED J. RITZ, REWRITING THE HISTORY OF THE JUDICIARY ACT OF 1789: EXPOSING

amenability qualify as "rules of decision" even under Professor Merrill's definition. He concludes that "'procedural' rules" are outside the ambit of the RDA as they "would not affect behavior in what Professor Hart . . . called 'everyday, prelitigation life.'"[185] As explained above, the law governing amenability may affect decisions in everyday, prelitigation life.[186]

John Hart Ely, for his part, argued that the *Erie* policy[187]—as implemented by *Hanna*'s modified outcome determination test[188]—defines whether a legal rule is a "rule of decision" within the meaning of the RDA.[189] In fact, neither *Erie* nor the Court's later decisions establish that the *Erie* policy is relevant to defining the term "rules of decision." The Court in *Erie* simply sought to determine whether "laws of the several states" included state interpretations of the general common law, and what later became known as the *Erie* policy provided a justification for reading "the

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MYTHS, CHALLENGING PREMISES, AND USING NEW EVIDENCE 79 (Wythe Holt & L. H. LaRue eds., 1990) (contending that "[i]t would have literally been unthinkable for the members of the First Congress to have directed national courts sitting in diversity cases to apply the law of the states in which they sat"); *id*. at 75–76, 141 (concluding that the reference to the "laws of the several states" meant "American law")."

185. Merrill, *supra* note 181, at 46 n.200 (citation omitted).

186. *See supra* Section III.A.3.

187. The *Erie* policy refers to the policy that the modified outcome-determination test of *Hanna* now implements. The genesis of the *Erie* policy is to be found in the second reason the Court in *Erie* offered for overruling *Swift*'s construction of the term "laws of the several states." 28 U.S.C. § 1652 (2012). "Experience in applying the doctrine of *Swift v. Tyson*, had revealed its defects, political and social." Erie R.R. v. Tompkins, 304 U.S. 64, 74 (1938). In this portion of the opinion, the Court noted that *Swift* had led to a lack of uniformity in the law applied between state and federal courts, even though the hope had been that the *Swift* rule would lead to greater uniformity. *Id.* The Court further noted that the forum shopping caused by *Swift* had "rendered impossible equal protection of the law[s]." *Id.* at 75. These concerns—which later decisions transformed into a "policy," see *Guaranty Trust Co. v. York*—provided the Court with a justification for construing the arguably ambiguous term, "laws of the several states," in a way that would avoid the evils identified by the Court. 326 U.S. 99, 109 (1945).

188. Hanna v. Plumer, 380 U.S. 460, 468 (1965) ("The 'outcome-determination' test therefore cannot be read without reference to the twin aims of the Erie rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws."); *cf. York*, 326 U.S. at 109 (indicating that *Erie* requires application of state law if it would "significantly affect the result of a litigation for a federal court to disregard a law of a State that would be controlling in an action upon the same claim by the same parties in a State court").

189. Professor Ely argued that the RDA was enacted because "the First Congress must have seen something . . . wrong with allowing federal courts to formulate their own rules of decision and thereby to create a separate regime [in diversity cases] for those nonresident plaintiffs who wish to avail themselves of it." Ely, *supra* note 125, at 710. But it is now well-established that *Swift v. Tyson* was consistent with the understanding of the founding generation. *See* Woolley, *supra* note 179, at 1761–62, 1762 n.181 (collecting authority). The notion that the First Congress enacted the RDA to implement the *Erie* policy is simply ahistorical.

laws of the several states" more broadly than *Swift* did.[190] Professor Ely dates "[t]he first significant attempt to formulate a test for the Rules of Decision Act"[191] to the *York* decision and argues that *Hanna* defined "rule of decision" in terms of the modified outcome determination test.[192] But *York* provides no greater support than does *Erie* for the view that the *Erie* policy defines the term "rule of decision" as used in the RDA. Although *York* discussed the RDA, the *York* Court did not rely on the outcome determination test to define the term "rules of decision" or any other term in the statute.[193] *Hanna* likewise did not address the relationship between the RDA and the modified outcome determination test.[194]

The *Erie* policy is best understood as providing a guiding principle—distinct from the RDA—for the application of federal common law in connection with state-law claims. After *Erie*, state and federal courts ordinarily are required to apply the same law in adjudicating a claim. But the Constitution grants the federal government the power to control the procedure in its courts.[195] And states presumptively have the same power in their courts.[196] Differences in state and federal procedure accordingly may lead to substantial differences in outcome. In the absence of an overriding federal interest,[197] *Hanna*'s modified outcome determination test ensures

190. *See supra* note 187.

191. Ely, *supra* note 125, at 708.

192. *See id.* at 709–10.

193. *See York*, 326 U.S. at 110–12.

194. *See generally* Hanna v. Plumer, 380 U.S. 460 (1965). Writing for the Court in *Gasperini v. Center for Humanities, Inc.*, Justice Ginsburg discussed the RDA and the *Erie* policy in a way that can be read to suggest that the RDA requires application of the *Erie* policy:

> *Erie* read the Rules of Decision Act: "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State." 304 U.S., at 78. Under the *Erie* doctrine, federal courts sitting in diversity apply state substantive law and federal procedural law.

518 U.S. 415, 427 (1996) (footnote omitted). Individual Justices have more clearly concluded that the RDA calls for application of the *Erie* policy. *See, e.g.*, Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins., Co., 539 U.S. 393, 439 (2010) (Ginsburg, J., dissenting) ("[The RDA] directs federal courts, in diversity cases, to apply state law when failure to do so would invite forum shopping and yield markedly disparate litigation outcomes." (citing *Gasperini*, 518 U.S. at 428)); Ferens v. John Deere Co., 494 U.S. 516, 539 (1990) (Scalia, J., dissenting) ("For me, the case involves an interpretation of the Rules of Decision Act, and the central issue is whether § 1404(a) alters the 'principle of uniformity within a state' which *Klaxon* says that Act embodies.").

195. *See supra* note 123.

196. *See* Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 508 (1954) ("The general rule, bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them.").

197. For discussion of when the *Erie* policy may be outweighed by the need for a

that a uniform federal common law rule of procedure will not be applied to a state-law claim when its application would run afoul of the *Erie* policy. Because the "laws of the several states" govern when application of a uniform federal common law rule of procedure to a state law claim would be inappropriate,[198] the *Erie* policy works hand-in-glove with the RDA in this context. The Court has also invoked the *Erie* policy to determine which state's law governs in the adjudication of state-law claims: a federal court generally must apply the choice-of-law rules of the state in which it sits. The Court so held in *Klaxon Co. v. Stentor Electric Manufacturing Co.*,[199] a case that relied in part on the *Erie* policy but is devoid of any reference to the RDA.[200]

But even if Professor Ely were correct that the modified outcome determination test should be used to define "rules of decision,"[201] a rule governing amenability would qualify as a rule of decision. That is because rules governing amenability determine which state's choice-of-law rules will govern, and choice of law indisputably is outcome determinative in the *Hanna* sense.[202]

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uniform federal rule, see Patrick Woolley, *The Sources of Federal Preclusion Law After* Semtek, 72 U. CIN. L. REV. 527, 559–68. (2003).

198. For a different view, see Peter Westen & Jeffrey S. Lehman, *Is There Life for* Erie *After the Death of Diversity* 78 MICH. L. REV. 311, 379 (1980) (arguing that the *Erie* "policy seeks to eliminate certain kinds of unfair 'discrimination' that occur when a case can be tried in either federal court or state court, by requiring the federal court to *borrow* state rules whenever those rules would influence the outcome of the litigation" (emphasis added) (footnote omitted)).

199. 313 U.S. 487, 496 (1941) (citing Erie R.R. v. Tompkins, 304 U.S. 64, 74–77 (1938)).

200. *Id.* The Court also has invoked the *Erie* policy as a rule of construction for federal procedural statutes and Federal Rules. *See* Shady Grove Orthopedic Assocs., P.A., v. Allstate Ins. Co., 559 U.S. 393, 405 n.7 (2010) ("If all the dissent means is that we should read an ambiguous Federal Rule to avoid substantial variations [in outcomes] between state and federal litigation," *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 504 (2001) (internal quotation marks omitted), we entirely agree."). "Used as a rule of construction, the *Erie* policy counsels a narrow reading of a Federal Rule (or statute) in order to avoid potential conflict with outcome-determinative state law." Woolley, *supra* note 126, at 210 No one contends that the RDA requires this rule of construction.

201. Ely, *supra* note 125, at 717–18. Professor Ely's conclusion on this point (as on others) has been highly influential. *See* Thomas D. Rowe, Jr., *Not Bad for Government Work: Does Anyone Else Think the Supreme Court is Doing a Halfway Decent Job in Its* Erie-Hanna *Jurisprudence?*, 73 NOTRE DAME L. REV. 963, 985 (1998) (noting that "the 'twin aims' approach" is "often regarded as arising under (if at most loosely governed by) the Rules of Decision Act"). Michael Green goes so far as to write that "virtually all federal courts and legal scholars, following John Hart Ely, accept . . . that the *twin aims* follow from the RDA." Michael S. Green, *Vertical Power*, 48 U.C. DAVIS L. REV. 73, 110 (2014). For another argument that the RDA does not require application of the *Erie* policy, see Westen & Lehman, *supra* note 198, at 365–77.

202. *See* Harold G. Maier & Thomas R. McCoy, *A Unifying Theory for Judicial Jurisdiction and Choice of Law*, 39 AM. J. COMP. L. 249, 255 (1991) ("Choice of judicial jurisdiction is choice of law because choosing a jurisdiction chooses the legal regime that will select,

Only if "rules of decision" are narrowly defined to include only the elements material to a claim and the remedies available for a violation of law is there a plausible case that rules governing amenability are not rules of decision. That narrow a definition finds no support in the more than two-hundred-year history of the Act.

In short, rules governing amenability are "rules of decision" within the meaning of the RDA. It has sometimes been argued that this conclusion is relevant only in diversity cases. For example, in an important article on amenability published in 2000, Leslie Kelleher flatly rejected the view that the RDA was relevant in federal-question cases: "[T]he RDA, which requires federal courts to apply state substantive law on amenability to jurisdiction, including Fourteenth Amendment limitations, does not apply to actions under federal law."[203] That understanding of the RDA was consistent with the view of many lower courts prior to 1993 amendments to the Federal Rules that federal common law governed amenability to jurisdiction in federal-question cases and state law governed amenability in diversity cases.[204] Justice Powell similarly adopted that position in his dissent in *Insurance Corp. of Ireland*.[205] But the conclusion that state law governs amenability only in diversity cases is premised on a misunderstanding of the RDA.

The RDA restates a basic structural principle: if the Constitution, a treaty, or an Act of Congress does not otherwise require or provide, state law should govern. Because the RDA simply makes explicit the basic structural principle that state law should apply in federal court in the absence of an appropriate justification for applying federal law, the Court properly has held that the RDA is "merely declaratory of what would in any event have governed the federal courts."[206] This basic structural principle cannot and should not be limited to cases asserting state-law causes of action

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interpret and apply the policies that will determine the result in the particular case."); *supra* note 97 and accompanying text.

203. *See* Kelleher, *supra* note 3, at 1214 (footnote omitted).

204. *See* WRIGHT ET AL., *supra* note 79, § 1075 (discussing case law).

205. Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 711 (1982) (Powell, J., concurring in judgment) (Relying on the RDA for the proposition that "in the absence of a federal rule or statute establishing a federal basis for the assertion of personal jurisdiction, the personal jurisdiction of the district courts is determined in *diversity* cases by the law of the forum State" (emphasis added)).

206. *See* Guaranty Tr. Co. v. York, 326 U.S. 99, 103–04, 108–09 (1945). The Court so held in applying the principle set forth in the RDA to a suit in equity. *York* cited to cases decided before *Erie* in support of this proposition. When *York* and the earlier cases were decided, the RDA expressly applied only in "trials at common law." *Compare* Federal Judiciary Act, ch. 20, 1 Stat. 73 (1789), *with* Act of June 25, 1948, ch. 646, 62 Stat. 944 (1948).

under a court's diversity or supplemental jurisdiction. Indeed, before the Court eventually concluded that the choice of limitations periods for federal causes of action was a matter better left to federal common law, *state*-enacted statutes of limitations governed *federal* causes of action in the absence of a congressionally enacted limitations period.[207] *Erie* changed the meaning of the RDA in only one crucial respect: after *Erie* "[t]here is no federal general common law"[208] that would justify a failure to apply state law. More broadly, *Erie* ratified a new understanding of "common law"[209] that courts could use to develop federal common law when "the Constitution, a treaty, or an Act of Congress requires or provides." Thus, the "laws of the several states" should govern amenability unless the Constitution, a treaty, or a federal statute authorizes the elaboration of federal common-law rules of amenability. Next, I explain why federal common law generally does not regulate amenability.

2. Amenability and Federal Common Law

a. Federal Common Law Rules of Amenability Generally Are Inappropriate

Although the RDA does not expressly refer to federal common law, its requirement that state law be applied unless "the Constitution, a treaty of the United States, or on Act of Congress requires or provides" has been understood to authorize the elaboration of federal common law in certain circumstances. In this Section, I consider whether the RDA authorizes what might be called a uniform federal common law of amenability that is generally applicable in federal court.

The most ambitious argument for the proposition that the federal courts have power to elaborate a federal common law of amenability rests on the idea that the Constitution gives the federal government *exclusive* authority to regulate jurisdiction in its courts. To the extent Congress has not enacted a federal statute expressly governing a person's amenability to jurisdiction, the

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207. *See* Woolley, *supra* note 126, at 227 n.78 (collecting authority). After *Erie* state-enacted statutes of limitations have often been borrowed as a matter of federal common law to provide a limitations period for federal causes of action, but they no longer apply of their own force to such causes of action. *See infra* notes 217–18 and accompanying text.

208. Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938).

209. *See* Henry J. Friendly, *In Praise of* Erie*—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 407 (1964) ("By focusing judicial attention on the nature of the right being enforced, *Erie* caused the principle of a specialized federal common law, binding in all courts because of its source, to develop within a quarter century into a powerful unifying force." (footnote omitted)).

argument goes, the federal courts have no choice but to elaborate federal common law rules of amenability. Although state law may be *borrowed* as the rule of federal common law under this approach, state law would not apply of its own force under the RDA.

The argument that the federal government has exclusive authority over amenability in federal court derives substantial strength from the fact that, before *Erie*, federal law did in fact exclusively govern personal jurisdiction in federal court.[210] Thus, even after *Erie* had rendered *Picquet* and *Swift*'s concept of common law obsolete,[211] it was easy to assume that personal jurisdiction in federal court continued to be governed exclusively by federal law.[212] But that assumption rests on a shaky foundation. Aside from the long history premised on a now-obsolete conceptual framework,[213] there is no good reason to think that the

210. *See supra* Section II.A.1 (explaining that federal law regulated the federal courts' power to exercise personal jurisdiction).

211. Because federal courts after *Erie* have sometimes looked to the general law as a source of uniform federal common law rules, the general common law persists in some form to this day. Caleb Nelson, *The Persistence of General Law*, 106 COLUM. L. REV. 503, 507–19 (2006) (noting that the Court has sometimes fashioned rules of federal common law by relying upon general common law rules in force before *Erie*). But as Randall Bridwell and Ralph Whitten have persuasively shown, the general law *properly understood* in historical context was not intended to grant courts the kind of policy-making discretion that is a central feature of federal common law making today. *See generally* BRIDWELL & WHITTEN, *supra* note 164.

212. The pre-*Erie* law of personal jurisdiction is not a plausible source of federal amenability rules today. Recall, for example, that the relevant jurisdictional unit under general law was the federal district. But although it is hardly unreasonable to limit the personal jurisdiction of a federal district court to the district in which it sits, the extent to which a court may exercise jurisdiction is ultimately a reflection of policy, rather than a matter to be deduced from the very existence of district lines. The key congressional policy at work in the creation of the federal trial courts has been respect for *state* lines. Indeed, with two minor exceptions, see 28 U.S.C. §§ 91, 131 (2012), federal districts have always remained within the boundaries of a single state. From that perspective, state lines—rather than district lines—would better represent the default congressional policy with respect to the appropriate jurisdictional unit in federal court. Moreover, the states have now abandoned the antiquated common law rule that the boundaries of a court determine the court's jurisdiction. For federal courts to conclude nonetheless that the federal district rather than the state remains the appropriate jurisdictional unit would put plaintiffs in federal court at an unjustified disadvantage vis-à-vis plaintiffs in state court. It would similarly make little sense for federal courts to look to the general law to determine whether federal law authorizes a court to invoke a specific jurisdictional basis. After all, the Court in *International Shoe* revamped jurisdictional due process to replace as bases for jurisdiction fictions like corporate "presence" and "implied consent." Int'l Shoe Co. v. Washington, 326 U.S. 310, 318, 320 (1945). Indeed, the law of jurisdiction has changed to such an extent that an attempt to return to the general law of jurisdiction as it stood in 1938 would pose substantial practical and constitutional problems.

213. This point was not immediately obvious to the Court. As late as 1948, the Court suggested that in the absence of congressional legislation, district lines should govern the personal jurisdiction of the federal district courts. *See* Ahrens v. Clark, 335 U.S. 188, 190 (1948), *abrogated*, Braden v. 30th Judicial Circuit Court, 410 U.S. 484 (1973) ("We start

amenability of a person to the personal jurisdiction of a federal court continues to be a matter of exclusive federal concern such that in the absence of congressional legislation or a valid Federal Rule, federal common law should fill the gap. [214]

It could be argued that the federal government has exclusive authority in its courts over all matters left to forum law under traditional conflict-of-laws principles, which include amenability to jurisdiction. Relying on Chief Justice Marshall's opinion in *Wayman v. Southard*,[215] some have made the less sweeping argument that the federal government has exclusive authority over all matters deemed procedural under traditional conflicts principles.[216]

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from the accepted premise that apart from specific exceptions created by Congress the jurisdiction of the district courts is territorial.") (citing Georgia v. Pa. R.R. Co., 324 U.S. 439, 467–68 (1945)). The Court has since recognized that the line of authority on which the Court relied in *Georgia* is open to question. *See* Omni Capital Int'l Ltd. v. Rudolf Wolff & Co., 484 U.S. 97, 109 (1987) ("Even were we to conclude that the bases for the rule in [the pre-*Erie* decision,] *Robertson* [*v. Railroad Labor Board*, 268 U.S. 619 (1925)] are no longer valid, we would not necessarily have the power to create service-of-process rules.").

214. In *Jaftex Corp. v. Randolph Mills, Inc.*, 282 F.2d 508, 512 (2d Cir. 1960), *overruled by Arrowsmith v. United Press International*, 320 F.2d 219 (2d Cir. 1963), Judge Clark argued that a federal common law standard should govern amenability to jurisdiction even in diversity cases. *See also Arrowsmith*, 320 F.2d at 235–40 (Clark, J., dissenting). He relied *in part* on 28 U.S.C. § 1693 (2012) as a source of the supposed policy that uniform federal common law rules govern amenability in federal court. *Jaftex*, 282 F.2d at 512–13; 28 U.S.C. § 1693 ("Except as otherwise provided by Act of Congress, no person shall be arrested in one district for trial in another in any civil action in a district court."). But this provision—which originated in Section 11 of the Judiciary Act of 1789—regulated only one technique for asserting jurisdiction over a defendant. *See supra* Section II.A.1 (discussing the general common law of personal jurisdiction before *Erie*); *supra* note 10 and accompanying text (noting that the civil arrest provision of Section 11 may have been a reaction to a more expansive use of the procedure in England); *see also Personal Jurisdiction over Foreign Corporations*, *supra* note 32, at 760 ("[T]he arrest of the defendant in a civil action is a somewhat drastic measure which might merit special limits on its use."). Thus, the civil arrest provision at best provides a tenuous basis for a uniform federal common law of amenability. Judge Clark suggested that the *Byrd* decision provided a "surer basis" for the conclusion that a uniform federal common-law rule of amenability governs even in diversity cases. *Jaftex*, 282 F.2d at 513 (citing Byrd v. Blue Ridge Elec. Coop., Inc., 356 U.S. 525, 537–40 (1958)). For an argument that *Byrd* does not support a uniform federal common law of amenability, see notes 219–21 and accompanying text.

215. 23 U.S. 1, 20 (1825). Chief Justice Marshall insisted: "It seems not much less extravagant, to maintain, that the practice of the Federal Courts, and the conduct of their officers, can be indirectly regulated by the State legislatures, by an act professing to regulate the proceedings of the State Courts." *Id*. at 49–50.

216. *See* Anthony J. Bellia, Jr., *Federal Regulation of State Court Procedures*, 110 YALE L.J. 947, 977 & n.167 (2001) (stating that "traditional conflicts principles were understood [by the Founders] to protect the sovereignty of forum states over the 'procedures' their courts used to enforce rights of action arising under the laws of other jurisdictions" and concluding that *Wayman* stands for the analogous proposition in federal court); Green, *supra* note 201, at 78–80 (stating that Chief Justice Marshall took the position in *Wayman* "that federal power over federal procedure is exclusive" and linking that view to the conflict of laws principles of the time).

But even the less sweeping argument is problematic. Just five years after *Wayman*, the Court, relying on the RDA and without dissent from Chief Justice Marshall, recognized that a state statute of limitations—traditionally characterized as procedural in the conflict of laws—could provide the applicable rule of decision for claims based on federal law.[217] Post-*Erie*, the Court has concluded that when federal law does not expressly provide a limitations period, federal courts instead should *borrow* limitations periods that are consistent with the policies that animate the substantive law creating the federal claim.[218] But the Court's modern limitations jurisprudence—like the Court's pre-*Erie* limitations jurisprudence—is not based on the notion that the federal government has exclusive authority in its courts over matters that traditionally were deemed procedural in the conflict of laws.

If amenability in federal court is within the exclusive authority of the federal government, there must be some basis other than traditional conflict-of-laws principles for that conclusion. Policy arguments do provide a basis for concluding that *some* matters in federal court that traditional conflicts principles confided to forum law should be within the exclusive authority of the federal government. Because the resolution of claims and defenses is the *raison d'être* of a court, federal courts must have the authority to fill gaps in legislation concerning the process by which claims and defenses are adjudicated, the meaning of court judgments (i.e., res judicata), and the process by which judgments and orders are enforced. And if the federal courts are to maintain their status as "an independent system for administering justice to litigants who properly invoke its jurisdiction,"[219] federal courts arguably must have exclusive authority to fill gaps in federal legislation in these areas.[220]

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217. *See, e.g.*, McCluny v. Silliman, 28 U.S. 270, 276–77 (1830). Professor Green suggests that *McCluny*'s reliance on the RDA is puzzling "[g]iven its incompatibility with the existence of the Process Acts (and with Marshall's position in *Wayman* that federal power over the procedure of federal courts is exclusive)." Green, *supra* note 201, at 123. But this suggestion rests on a misreading of the scope of the Process Acts and an over-reading of what Chief Justice Marshall wrote in *Wayman*. The Process Acts were too narrowly drawn to include statutes of limitations, and as discussed in the text above, Chief Justice Marshall suggested that federal power over federal *practice* was exclusive, not that federal power over any matter that could be characterized as procedural was exclusive.

218. *See* DelCostello v. Int'l Bhd. of Teamsters, 462 U.S. 151, 159 (1983) ("[When] there is no federal statute of limitations expressly applicable to this suit. . . . our task is to 'borrow' the most suitable statute or other rule of timeliness from some other source.").

219. Byrd v. Blue Ridge Elec. Coop., Inc., 356 U.S. 525, 537 (1958).

220. Amy Coney Barrett, *Procedural Common Law*, 94 VA. L. REV. 813, 838 (2008) (stating that "[i]t is well established that the procedure observed by the federal courts is a matter that the Constitution commits exclusively to federal control" and citing *Wayman* as "[t]he first and most forceful statement of this principle"). *Wayman*'s conclusion that the

There is no reason to think, however, that giving the federal government exclusive authority over amenability to jurisdiction in its courts protects the independence of the federal judicial system in performing its core function. The power to regulate the process by which claims and defenses are adjudicated in federal court, to determine the meaning of federal court judgments, and to prescribe the process by which federal judgments and orders are enforced addresses the question of *how* the federal courts are to perform their core function and the consequences of that performance. By contrast, the law governing amenability in federal court is largely—though not exclusively—about *which* federal district court will have jurisdiction over a person, a matter that has little bearing on the core function of a federal court,[221] and has far greater effect on the liberty of persons haled before a particular federal court. In whatever federal district a case is heard, the federal court will engage in the core function of adjudication in accordance with federal standards.

To the extent the question is *whether* a person is amenable to jurisdiction in *any* federal court, there is a stronger justification for concluding that the federal government has exclusive authority to prescribe the governing law. But the argument that the federal government has exclusive authority to prescribe the law governing procedure or amenability in federal court is open to serious questions on a separate ground. Keep in mind that the conclusion that the federal government has exclusive authority to prescribe law does *not* mean that a uniform federal common law rule will govern. If a uniform federal rule is inappropriate, state law is *borrowed* as the federal rule of decision.[222] The Court in recent years, however, has been reluctant to borrow state law as a federal common law rule of decision, even when a uniform federal rule is inapplicable,[223] and has done so only when applying state law *of its own*

federal government has exclusive authority over matters of federal practice is arguably antiquated. *See* Green, *supra* note 201, at 82 (arguing that the courts have "abandoned a theory of exclusive regulatory authority over procedure"). Consider, for example, the role of state law—"even of form and mode"—in federal court. *Byrd*, 356 U.S. at 536. The predominant view—which is inconsistent with the understanding that the federal government has exclusive authority over federal practice—is that when *Erie* so requires, state law applies of its own force to federal practice. By contrast, the Court has held that the federal government has exclusive authority over the effect of its judgments. Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 507 (2001) ("[W]e have long held that States cannot give [federal] judgments merely whatever effect they would give their own judgments, but must accord them the effect that this Court prescribes.").

221. *See supra* notes 219–20 and accompanying text.

222. *See, e.g.*, *infra* note 224 (illustrating this principle using the federal common law of preclusion).

223. As the Court explained in *Boyle v. United Technologies Corp.*:

force would disserve federal interests.[224] For that reason alone, state amenability law—to the extent consistent with the Fourteenth Amendment's Due Process Clause[225]—should govern of its own force under the RDA unless a uniform federal common law rule is applicable.

Neither the Constitution nor federal statutes "require" the elaboration of generally applicable, uniform federal common-law rules of amenability. As noted above, the question of *which* federal district court will have jurisdiction over a person generally is a matter that has little bearing on the core function of the federal courts (the resolution of claims and defenses) and much greater effect on the liberty of persons haled before a particular federal court.[226] Thus, a uniform federal common law rule of amenability generally would be inappropriate.

That said, the question of *which* federal district court will

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> We refer here to the displacement of state law, although it is possible to analyze it as the displacement of federal-law reference to state law for the rule of decision. Some of our cases appear to regard the area in which a uniquely federal interest exists as being entirely governed by federal law, with federal law deigning to "borro[w]," United States v. Little Lake Misere Land Co., 412 U.S. 580, 594 (1973), or "incorporat[e]" or "adopt" United States v. Kimbell Foods, Inc., 440 U.S. 715, 728, 729, 730 (1979), state law except where a significant conflict with federal policy exists. We see nothing to be gained by expanding the theoretical scope of the federal pre-emption beyond its practical effect, and so adopt the more modest terminology. If the distinction between displacement of state law and displacement of federal law's incorporation of state law ever makes a practical difference, it at least does not do so in the present case.

487 U.S. 500, 507 n.3 (1988).

224. *See* Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 507 (2001) ("[E]ven when States are allowed to give federal judgments (notably, judgments in diversity cases) no more than the effect accorded to state judgments, that disposition is by direction of *this* Court, which has the last word on the claim-preclusive effect of *all* federal judgments . . . ."). The federal common law of preclusion is a rare instance in which refusing to displace state law would disserve federal interests even when a uniform federal common law rule of preclusion is unnecessary. To the extent that state law applies of its own force, the courts of each state would have authority to determine the preclusive effect of a federal judgment in their state, and a federal district court applying *Klaxon* would be required to defer to the preclusion law of the state in which it sits. Thus, the preclusive effect of a federal judgment might vary depending on the state in which preclusive effect for the judgment is sought. *See* Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496–97 (1941). That "would create a significant conflict with the federal interest in giving federal judgments predictable effect." Woolley, *supra* note 197, at 539. By requiring state courts to borrow the preclusion law of the state in which the federal court which rendered the judgment sat, the Court displaced *Klaxon* with a special choice-of-law rule for the preclusive effect of federal judgments that safeguards the federal interest in giving federal judgments predictable effect.

225. Because state law is invalid to the extent it is inconsistent with federal constitutional limitations, the RDA generally requires a federal court to apply the relevant source of state law as limited by the Fourteenth Amendment Due Process Clause. *See* Kelleher, *supra* note 3, at 1214.

226. *See supra* notes 219–20 and accompanying text.

have jurisdiction over a person may sometimes have an important effect on the core function of the federal courts. For example, a plaintiff seeking to recover against defendants who are not all amenable to jurisdiction within the same state might be discouraged from vindicating rights that Congress gave the federal courts subject-matter jurisdiction to protect. Similarly, if *no* federal district court would be able to exercise jurisdiction over a defendant outside the personal jurisdiction of any state court, a plaintiff might also be discouraged from vindicating rights within the subject-matter jurisdiction of the federal courts. These obstacles to the exercise of subject-matter jurisdiction—in the abstract—provide a basis for limited federal common lawmaking. But because Congress has expressly authorized nationwide or worldwide service of process to vindicate specific rights when it believed it was appropriate to do so,[227] federal courts should refrain from elaborating federal common-law rules of amenability simply to avoid obstacles to the exercise of subject-matter jurisdiction.[228]

b. Exceptions to the General Rule

Although federal courts generally should refrain from elaborating federal common-law rules of amenability, the development of such rules may be appropriate in a handful of circumstances. This Section identifies two areas in which federal common-law rules should govern whether a person is amenable to jurisdiction

227. For a listing of some such statutes, see WRIGHT ET AL., *supra* note 79, § 1125 n.2. Leslie Kelleher has argued that when Congress enacts a statute authorizing nationwide or worldwide service of process, amenability to jurisdiction under such statutes is a matter of interstitial federal common law. Kelleher, *supra* note 3, at 1204. I have no quarrel with that characterization. But amenability in that context can just as persuasively be conceptualized as a matter of statutory interpretation. *Cf.* HART & WECHSLER, *supra* note 180, at 635 ("[T]he fact is that common lawmaking often cannot be sharply distinguished from statutory or constitutional interpretation.").

228. *See* Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co., 484 U.S 97, 110 (1987) (refusing to authorize creation of a common-law rule authorizing world-wide service in a Commodities Exchange Act case in part on the ground that "since Congress concededly has the power to limit service of process, circumspection is called for in going beyond what Congress has authorized"); Whitten, *supra* note 59, at 112 (noting that because "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," there should be "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"). Professor Whitten argues that constitutional limits premised on the separation of powers restrict the Court's authority to prescribe Federal Rules or to elaborate federal common law regulating amenability. *Id.* at 114–15 ("[A] federal common law rule of amenability for federally created rights cases is as invalid as a federal rule of civil procedure directly governing the same subject."). This Article, by contrast, focuses exclusively on the limits imposed by the REA and RDA respectively on rulemaking and on the development of federal common law.

in federal court but does not purport to identify *all* appropriate exceptions to the general rule.[229]

1. Jurisdiction over Absent Class Plaintiffs

Jurisdiction over absent class plaintiffs is an important exception to the general rule that amenability to jurisdiction is governed by state law. A person amenable to the jurisdiction of a court has an obligation to honor a valid summons or subpoena, even if noncompliance can be punished only with a default judgment or a judgment of contempt. An absent class plaintiff, however, has *no* obligation to appear to protect his or her interests even if he or she is subject to the jurisdiction of the class court. Instead, the class representative is charged with adequately representing the absent class member. As the Court explained in *Phillips Petroleum Co. v. Shutts*: "Unlike a defendant in a normal civil suit, an absent class-action plaintiff is not required to do anything. He may sit back and allow the litigation to run its course, content in knowing that there are safeguards provided for his protection."[230]

Because an absent class plaintiff has no obligation to appear, the existence of personal jurisdiction over an absent class member has no significance separate and apart from the validity of the class judgment. In *Semtek v. Lockheed Martin*, the Court held that the federal government has exclusive authority to prescribe the preclusive effect of its judgments.[231] Thus, in the absence of congressional legislation, whether a federal court may exercise personal jurisdiction over an absent class plaintiff is properly governed by federal common law.[232]

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229. The elaboration of federal common law rules of amenability may be appropriate in federal bankruptcy cases, for example, even in the absence of a congressional statute expressly authorizing nationwide or worldwide service of process. *See In re* Icenhower, 757 F.3d 1044, 1051 (9th Cir. 2014) ("One of the Bankruptcy Code's primary objectives is 'centralization of disputes concerning a debtor's legal obligations.'" (quoting *In re* Eber, 687 F.3d 1123, 1131 (9th Cir. 2012))); 11 U.S.C. § 541(a) (2012) (providing that the bankruptcy "estate is comprised of" specified "property, wherever located and by whomever held"). Whether federal common law rules of amenability should be applied in bankruptcy cases is beyond the scope of this Article.

230. 472 U.S. 797, 810 (1985). For discussion of personal jurisdiction over absent class plaintiffs, see generally Patrick Woolley, *The Jurisdictional Nature of Adequate Representation in Class Litigation*, 79 GEO. WASH. L. REV. 410, 419–26 (2011).

231. *See* Semtek Int'l, Inc. v. Lockheed Martin Corp., 531, 532 U.S. 497, 507 (2001); *supra* note 224 and accompanying text (discussing *Semtek*).

232. *Id.* I have argued elsewhere that the "validity" of a federal judgment is governed by uniform federal common law rules of preclusion even in diversity cases. *See* Woolley, *supra* note 197, at 565; *see also* Burbank, *supra* note 179, at 633 ("Uniform federal rules may be required when dealing with some aspects of preclusion law . . . . [T]hese matters involve preconditions to status as a judgment entitled to recognition, such as validity and finality . . . where federal standards may be necessary to protect the basic obligation of

2. Admiralty Jurisdiction

Federal common law also governs amenability to jurisdiction in certain admiralty cases. The law of admiralty comprises "not only distinctive principles of liability and distinctive remedies but also a distinctive set of procedures."[233] This body of law includes jurisdictional rules unique to the law of admiralty such as the ability of a court to assert jurisdiction through the "arrest" of a ship.[234] For that reason, to the extent admiralty jurisdiction is exclusive and includes jurisdictional rules unique to admiralty, state law of its own force does not regulate amenability to jurisdiction in federal court.

C. The Federal Rules as A Restatement of Otherwise Applicable Law

In Section A, I demonstrated that the REA grants the Court no authority to prescribe Federal Rules regulating a person's amenability to personal jurisdiction in federal court. But I do not argue that a Federal Rule that purports to regulate amenability is necessarily invalid. Indeed, so long as the content of a Federal Rule finds support in some other source of law, the Federal Rule essentially serves simply as a restatement of valid law. As Stephen Burbank has aptly noted, the use of a Federal Rule as a mechanism for restating otherwise applicable law has the potential to lead to substantial confusion about whether the relevant source of law for a particular Federal Rule is the Court's authority to prescribe Federal Rules under the REA or some other source that cannot be modified through amendments to the Federal Rules.[235] Nonetheless, to the extent a Federal Rule simply restates law that the Court has no authority to promulgate through prospective rulemaking, there is no basis for invalidating the Federal Rule. Indeed, although federal courts' authority to engage in prospective

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respect.") Whether a class action judgment is valid with respect to an absent class plaintiff depends at least in part on whether the court had power to exercise personal jurisdiction over the absentee plaintiff.

233. HART & WECHSLER, *supra* note 180, at 561. The law is nonetheless clear that most admiralty cases can, at the plaintiff's option, be brought in state court or, if there is a basis for federal question or diversity jurisdiction, in federal court. *Id.* at 873 ("In general, the exclusivity of federal admiralty jurisdiction under § 1333 is limited to maritime actions brought in rem against a vessel or its cargo.").

234. *See* Amendments to Rules of Civil Procedure, Supplemental Rules for Certain Admiralty and Maritime Claims, and Rules of Criminal Procedure, 39 F.D.R. 655, 985 (1966), advisory committee's note to 1985 amendment ("Since their promulgation in 1966, the Supplemental Rules for Certain Admiralty and Maritime Claims have preserved the special procedures of arrest and attachment unique to admiralty law.").

235. Burbank, *supra* note 64, at 1147–57.

rulemaking has always been circumscribed, the Court in 1924 explained:

> Occasionally, a rule is employed to express, in convenient form, as applicable to certain classes of cases, a principle of substantive law which has been established by statute or decisions. But no rule of court can enlarge or restrict jurisdiction. Nor can a rule abrogate or modify the substantive law.[236]

This principle validates Rules 4(k)(1)(A) and 4(k)(1)(C). The validity of Rule 4(k)(1)(C) is particularly clear. The provision simply states that a federal court may exercise personal jurisdiction if authorized to do so by a federal statute. Rule 4(k)(1)(A), for its part, incorporates state jurisdictional law.[237] Because the proper source of amenability law in the absence of a federal statute providing otherwise is generally the law of the state in which the federal court sits, Rule 4(k)(1)(A) is similarly valid.[238]

D. Special Issues Raised by Subpoena Jurisdiction

To this point, the Article has focused on the rules governing the summons. But the summons and the subpoena have been subject to different legal rules over time,[239] and they continue to be subject to different rules. For that reason, the implications of this Article's thesis on the rules governing subpoenas warrant separate

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236. Washington-Southern Navigation Co. v. Balt. & Phila. Steamboat Co., 263 U.S. 629, 635 (1924).

237. *See* FED. R. CIV. P. 4(k)(1)(A), (k)(1)(C). The principle discussed in the text is also relevant to Rules 4(n) and 4.1. FED. R. CIV. P. 4(n), 4.1. Rule 4(n) authorizes a federal district court to exercise jurisdiction on the basis of attachment in certain specified circumstances, and Rule 4.1 purports to govern service of all process except for the summons and the subpoena. To the extent that Rules 4(n) and 4.1 restate the otherwise applicable law of jurisdiction, they are valid for the same reasons as Rules 4(k)(1)(A) and 4(k)(1)(C).

238. Whether the provisions of the Admiralty Rules addressing amenability to jurisdiction restate or impermissibly change otherwise applicable law is a matter best left to admiralty specialists. Moore's Federal Practice insists that

> the unified rules of admiralty promulgated in 1966 do not abrogate any rights traditional to the law of admiralty that were in existence "in the courts at the time of the passage of the Permanent Process Act [of 1792]. The process of attachment and garnishment, actions *in rem*, and all of the other rights traditional to admiralty are preserved by the Supplemental Rules.

29 JAMES W. MOORE, MOORE'S FEDERAL PRACTICE § 701.05[4][a] (Daniel R. Coquillette et al., eds., 3d ed. 2018); *see also supra* note 234.

239. Until the merger of law and equity, suits in equity were commenced by serving a subpoena on the defendant. *See* 1 ROGER FOSTER, A TREATISE ON FEDERAL PRACTICE CIVIL AND CRIMINAL § 160 (Callaghan & Company, 5th ed. 1913) ("The first process in a court in equity is the subpoena . . . which is a writ requiring the defendant to answer the bill under penalty therein expressed."). Such subpoenas were subject to the same jurisdictional rules as process that initiated actions at common law and are not addressed in this section.

treatment. Section III.D.1 considers the implications of the thesis for subpoenas for testimony at a trial or hearing. Section III.D.2 does the same for deposition subpoenas.

1. Subpoenas for Testimony at a Trial or Hearing

a. The Pre-Rules Period

Because a subpoena is a form of process, the amenability of a person to a federal subpoena pre-*Erie* was a matter of federal general common law except as modified by federal statute. Federal general common law rendered a person amenable to jurisdiction through a subpoena if he or she was properly served within the district.[240] But early in the history of the Republic, Congress expanded amenability beyond district lines with respect to subpoenas seeking testimony at a hearing or trial.[241] Section 654 of Title 28—the governing statute when the Federal Rules of Civil Procedure were first promulgated in 1938—stated in relevant part:

> [S]ubpoenas for witnesses who are required to attend a court of the United States, in any district, may run into any other district: *Provided*, That in civil causes the witnesses living out of the district in which the court is held do not live at a greater distance than one hundred miles from the place of holding the same."[242]

b. The 1938 Version of Rule 45

Rule 45—as originally prescribed—provided that "[a] subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within the district, or at any place without the district that is within 100 miles of the place of the hearing or trial specified in the subpoena . . . ."[243] The original Advisory Committee stated that Rule 45 "continues the substance of U.S.C., Title 28, [former] § 654 . . . ."[244] There is reason to be skeptical of the Committee's characterization. But to the extent Rule 45(e) purports to govern amenability, the validity of the provision after 1948 ultimately depends on the legal effect of the repeal of Section 654 as part of the 1948 revision and recodification of the

240. *See supra* Section II.A.1.

241. Act of March 2, 1793, ch. 22, § 6, 1 Stat. 333, 335 ("*And be it further enacted*, That subpœnas for witnesses who may be required to attend a court of the United States, in any district thereof, may run into any other district: *Provided*, That in civil causes, the witnesses living out of the district in which the court is holden, do not live at a greater distance than one hundred miles from the place of holding the same.").

242. 28 U.S.C. § 654 (1940).

243. FED. R. CIV. P. 45(e) (Supp. 1935–1939).

244. FED R. CIV. P. 45(e) advisory committee's note to 1938 rules.

Judicial Code.

In explaining the "[r]easons for omission and repeal" of Section 654 from Title 28, the Reviser's Notes simply stated that Section 654 had been "[s]uperseded by . . . Rule 45(e)(1) of the Federal Rules of Civil Procedure."[245] The Rules Enabling Act of 1934 provided that "all laws in conflict" with the Federal Rules "shall be of no further force or effect."[246] But that supersession provision could have force only with respect to *valid* Federal Rules. If, as I have argued in this Article, the Rules Enabling Act does not give the Court the power to prescribe Federal Rules governing amenability, it was a mistake to conclude that Rule 45(e)(1) had superseded Section 654.[247] Nor would it be appropriate to give that mistake effect by treating the omission and repeal of Section 654 as implicitly amending the permitted scope of rulemaking under the REA. The REA was enacted fourteen years before the revision of the Judicial Code, and it is clear that the 1948 Revision did not change the meaning of the REA.[248]

It could be argued that what matters is that Section 654 was repealed, not the reason for the repeal. From this perspective, the repeal of Section 654 should lead to the conclusion that state law governs the amenability of a person to a subpoena for testimony at a trial or hearing. Given the current popularity of the "plain meaning" approach to statutory construction, it is tempting to

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245. H.R. REP. NO. 80-808, at A238 (1947). The work performed by the revisers was described during a hearing before a subcommittee of the House Committee on the Judiciary:

> [The] revisers in cooperation with the members of the staff of the committee on revision of the laws undertook the preparation of . . . preliminary drafts, which were careful statements of the proposed title, with complete revisers' notes under each section clearly pointing out the source of the section, any changes that were effected, the reasons for the change, and any other explanatory notes that the reviser felt would be helpful.

Revision of Titles 18 and 28 of the United States Code: Hearings Before Subcomm No. 1 of the Comm. on the Judiciary, 80th Cong. 8 (1947) (statement of Rep. Keogh). Much of the work of revision and recodification was done by the West Publishing Co. and the Edward Thompson Co. which augmented their editorial staff with a staff of revisers. *See also id.* at 24 (statement of William W. Barron, Chief Reviser, West Publ'g Co.).

246. Act of June 19, 1934, ch. 651, 48 Stat. 1064 (codified as amended at 28 U.S.C. § 2072 (2012)).

247. *Cf.* Charles Alan Wright, *For[e]wor*d to LEGISLATIVE HISTORY OF TITLE 28 JUDICIARY AND JUDICIAL PROCEDURE iii (1971) ("The Reviser's Notes suggest that often the Reviser was wholly unaware of the significance of what he was doing.").

248. Had the revisers intended to change the meaning of the REA, they presumably would have said so. *Cf. Revision of Titles 18 and 28 of the United States Code*, *supra* note 245, at 6 (statement of Rep. Keogh) ("The policy that we adopted, which in my mind has been very carefully followed by the revisers . . . was to avoid wherever possible and whenever possible the adoption in our revision of what might be described as controversial substantive changes of law.").

focus exclusively on the fact of repeal. But as a student commentator once noted, "the general rule" has been "that the reviser's notes 'are authoritative in the construction of the [statutory] revision.'"[249] And it seems unduly "formalistic to invalidate a Federal Rule that arguably tracked an Act of Congress on the ground that the statute has been repealed, at least where repeal was itself premised on supersession of the statute by the Federal Rule."[250] The requirements of the REA and the 1948 recodification can best be reconciled by reading the repeal of Section 654 as ratifying the 1938 version of Rule 45(e)(1).[251] Under this reasoning, a person is amenable to subpoena jurisdiction for testimony at a trial or hearing only if the subpoena is served within the district or within 100 miles of the place of the hearing or trial specified in the subpoena.[252]

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249. Suzanne Raggio Westerheim, Note, *The Uniform Foreign-Money Claims Act: No Solution to an Old Problem*, 69 TEX. L. REV. 1203, 1212 (1991) (quoting Aberdeen & Rockfish R.R. v. Students Challenging Regulatory Agency Procedures, 422 U.S. 289, 309 n.12 (1975)); *see also* Alexander M. Bickel, *The Supreme Court, 1960 Term*, 75 HARV. L. REV. 40, 182 (1961) (stating that the Court in *Carbo v. United States*, 364 U.S. 611 (1961), refused to give a jurisdictional limit in a procedural statute a "literal reading" because doing so would change pre-revision law and because the Court found no evidence that Congress had intended to make such a change in the 1948 revision to the Judicial Code); Westerheim, *supra*, at 1212 ("Federal courts have long embraced the view that a 'codification of the general statutes then in force . . . is not lightly to be read as making a change.'" (footnote omitted)); *id*. at 1212 n.66.

250. Burbank, *supra* note 64, at 1156 n.608 (discussing the repeal of a federal statute on which Federal Rule 25 was based). There is conflicting authority on the effect of a repeal based on the REA's supersession provision in the courts. *Compare* Iovino v. Waterson, 274 F.2d 41, 46 (2d Cir. 1959), *cert denied*, 362 U.S. 949 (1960) ("We think it would be a reversion to the formalism of a bygone age to hold that the repeal of 28 U.S.C. § 778 by the Revision Act for the stated reason that Fed.R.Civ.Proc. 25(a)(1) rendered § 778 unnecessary invalidated the very Rule whose existence was the avowed reason for the repeal."), *with* Perry v. Allen, 239 F.2d 107, 111 (5th Cir. 1956) (concluding that Rule 25(a) cannot be construed as a limitations period after the repeal of Section 778 because "[s]uch a limitation may be placed solely by the legislature and is beyond the competence of a court exercising its power to formulate rules of procedure"). Professor Burbank notes that in amending Rule 25 in the 1960s, "the Court twice resolved the doubt in favor of power to amend by court rule." Burbank, *supra* note 64, at 1156.

251. The argument also supports the validity of Federal Rule of Criminal Procedure 17(e)(1). That rule provides that "[a] subpoena requiring a witness to attend a hearing or trial may be served at any place within the United States." That is the same rule of law that governed in criminal cases before the 1948 repeal of Section 654. *See supra* text accompanying note 242.

252. The substance of Rule 45(e)(1) remained unchanged until 1980 when the Court prescribed an *additional* basis for service of a subpoena for testimony at a trial or hearing. Rule 45(e)(1) as amended also authorized service of a subpoena "at a place within the state where a state statute or rule of court permits service of a subpoena issued by a state court of general jurisdiction sitting in the place where the district court is held." FED. R. CIV. P. 45(e)(1). Because this additional basis for service of a subpoena was not consistent with Rule 45(e)(1) as prescribed in 1938 and ratified by Congress in 1948, the amendment—to the extent it addressed amenability—arguably was outside the scope of rulemaking. *Cf.*

c. The 2015 Amendment

The 2015 Amendment flatly authorizes nationwide service of a subpoena on a witness for testimony at a trial or hearing.[253] But that authorization does not change the fact that the REA gives the Court no authority to prescribe a Federal Rule that governs amenability to subpoena jurisdiction. Unless and until Congress enacts a contrary statute, *either* Rule 45(e)(1) as originally prescribed *or* state law limits the ability of a federal district court to exercise subpoena jurisdiction.[254] As noted above, the choice should depend on whether the repeal of Section 654 is appropriately characterized as a ratification of Rule 45(e)(1) as originally prescribed. The provision authorizing nationwide service of process nonetheless should be deemed valid—if superfluous—because it is less restrictive than applicable amenability law.[255]

2. Deposition Subpoenas[256]

Congress has never enacted a general statute governing a person's amenability to subpoena jurisdiction in connection with a deposition.[257] For that reason, after *Erie*, state law should govern

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Burbank, *supra* note 64, at 1155–57, 1156 n.608 (arguing that the Court had no power to change Rule 25(a)(1)—which had previously tracked a congressional statute—in a way that would affect substantive rights).

253. FED. R. CIV. P. 45(b)(1). The effect of the amendment should not be exaggerated even if the nationwide service of process provision is construed as governing amenability to subpoena jurisdiction. The stringent restrictions set forth on how far a witness may be required to travel to a trial or hearing substantially limit the practical effect of the subpoena power. *See* FED. R. CIV. P. 45 (c)(1).

254. In recommending this change to Rule 45, the Advisory Committee relied in part on Federal Rule of Criminal Procedure 17(e). *See* Memorandum from the Honorable Mark R. Kravitz, Chair, Advisory Comm. on Fed. Rules of Civil Procedure, to the Honorable Lee H. Rosenthal, Chair, Standing Comm. on Rules of Practice & Procedure 5 (May 2, 2011) ("[Proposed Rule 45(b)(2)] is modeled on Fed. R. Crim. P. 17(e), which provides for nationwide service of subpoenas in criminal cases."). The statute on which Rule 17(e) was based, however, both authorized nationwide service of process in criminal cases and limited nationwide service of process in civil cases. *See supra* text accompanying note 242.

255. *See generally supra* Section III.A.4.

256. For the sake of simplicity, my references to deposition subpoenas also include subpoenas for the production of documents. Until the 1991 Amendment to Rule 45, documents could be obtained only through a deposition subpoena. *See* FED. R. CIV. P. 45 advisory committee's note to 1991 amendment (noting that Rule 45(a)(1) as amended in 1991 "authorize[d] the issuance of a subpoena to compel a non-party to produce evidence independent of any deposition"). There is no relevant distinction for purposes of this Article between deposition subpoenas and subpoenas for the production of documents.

257. Congress did play a role in *where* depositions taken pursuant to subpoena could be held *within* a federal district. A pre-Rules statute provided in relevant part that "[n]o witness shall be required . . . to attend at any place out of the county where he resides, nor more than forty miles from the place of his residence, to give his deposition." Act of Jan. 24, 1827, ch. 17, § 870, 1 Rev. Stat. 164. But although the provision limited the burden a federal court may impose on a deponent, the enactment should not be construed as regulating

the amenability of a person to subpoena jurisdiction in connection with a deposition.[258]

The 2015 Amendment to Rule 45 requires that a deposition subpoena be issued by the court in which the action is pending.[259] And if, as argued above, state law governs the amenability of a person to jurisdiction with respect to a deposition subpoena, the issuing court will lack jurisdiction over a deponent if the courts of the state in which the action is pending would lack jurisdiction over the deponent. But although service of process on a person who is not amenable to the issuing court's jurisdiction ordinarily is invalid, that should not be the case with respect to a subpoena for deposition testimony. That is because the 2015 Amendment severs the link between issuance of a deposition subpoena and the power to quash, modify, or enforce the subpoena by generally authorizing only a court for the federal district in which the subpoena requires compliance to modify, quash, or enforce the subpoena.[260]

Under the 2015 Amendment to Rule 45, the court issuing the subpoena generally serves only a clerical function, thereby rendering the deponent's amenability to the jurisdiction of the issuing court irrelevant.[261] Because personal jurisdiction requires a person to appear on pain of default or other penalty,[262] it is the court that has power to modify, quash, or enforce a subpoena that must have personal jurisdiction over the deponent. And in the absence of

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jurisdiction. The statute limited the place in which a deposition may be held *within* a federal district, the courts of which had jurisdiction to issue a subpoena to a deponent and enforce it. *Id*.

258. Rule 45 did not purport to regulate the service of a deposition subpoena until 1991. The 1991 Amendment authorized service of a subpoena (1) within the district of the issuing court, (2) at any place outside the district provided that "is within 100 miles of the place of the deposition," or (3) at any place in the state in which state law "permits service of a subpoena issued by a state court of general jurisdiction sitting in the place of the deposition." FED. R. CIV. P. 45(b)(2) (1991). To the extent the 1991 Amendment sought to expand a person's amenability to a subpoena beyond the limits prescribed by state law, the analysis of this Article suggests that the Amendment was invalid.

259. *See* FED. R. CIV. P. 45(a)(2)(A) ("A subpoena must issue . . . from the court for the district where the hearing or trial is to be held.").

260. *See* FED. R. CIV. P. 45(c)(3)(A) (authorizing the court in the federal district in which compliance is required to modify or quash a subpoena); FED. R. CIV. P. 45(g) (authorizing the court in the federal district in which compliance is required to hold in contempt a person who fails to comply with a subpoena). *But see infra* note 261 (identifying an exception to the general rule).

261. FED. R. CIV. P. 45(f) provides that "[w]hen the court where compliance is required did not issue the subpoena, it may transfer a motion under this rule to the issuing court if the person subject to the subpoena consents or if the court finds exceptional circumstances." Unless the deponent consents, this Article suggests that a motion may be transferred to the issuing court only if the deponent is otherwise amenable to the subpoena jurisdiction of the issuing court.

262. *See supra* text accompanying note 32.

congressional legislation providing otherwise, only the law of the state in which sits the district court authorized to modify, quash or enforce the subpoena governs amenability to subpoena jurisdiction.[263]

IV. CONCLUSION

In short, the assumption that the Court may use its rulemaking authority to regulate amenability to jurisdiction in federal court cannot withstand serious and sustained scrutiny. In the absence of an applicable federal statute, it is the law of the state in which suit is brought that generally determines a person's amenability to jurisdiction.[264] Rule 4(k)(1)(A) and Rule 4(k)(1)(C) correctly restate the law governing amenability in federal court and are indisputably valid.[265] By contrast, the other provisions of Rule 4(k) and the nationwide service provision of Rule 45 should be read narrowly to authorize service of process only when a person is otherwise amenable to jurisdiction.

Although most cases brought in federal court will not be seriously affected, the approach outlined in this Article will substantially restrict the power of a federal court to exercise jurisdiction in some cases. Litigants who would otherwise be able to obtain jurisdiction over foreign defendants under Rule 4(k)(2) will be negatively affected.[266] The same can be said of litigants who would otherwise be able to use Rule 4(k)(1)(B) to join a party under Rules 14 or 19.[267] And litigants may suffer inconvenience to the extent they are forced to rely on deposition testimony rather than in-person testimony because of limits on subpoena jurisdiction.[268]

To the extent such effects are undesirable, the proper course is not to ignore the REA's limits on prospective rulemaking but to seek legislation expanding the power of the federal courts to exercise jurisdiction. Given the difficulty of obtaining relief from

263. *See supra* Section III.B.

264. *Id.*

265. *See supra* Sections III.B and III.C (describing how Rule 4(k)(1)(A) and 4(k)(1)(C) are correct statements of the law governing amenability to jurisdiction). Rule 4(k)(1)(A) should be applicable only if 4(k)(1)(C) is not.

266. *See* FED. R. CIV. P. 4(k)(2).

267. *See* FED. R. CIV. P. 4(k)(1)(B). ("Serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant: . . . (B) who is a party joined under Rule 14 or 19 and is served within a judicial district of the United States and not more than 100 miles from where the summons was issued.").

268. *See* FED. R. CIV. P. 45(b)(2) (authorizing nationwide service of a subpoena). *But see supra* note 253 (explaining that restrictions in Rule 45(c) on the place of compliance limit the practical effect of the nationwide service provision). For reasons discussed in notes 260–63 and accompanying text, there should be little effect on subpoenas for deposition testimony or for the production of documents.

Congress, it is not surprising that reformers instead have sought to achieve arguably laudable reforms through the rulemaking process. But prospective rulemaking on a matter as fundamental as amenability to jurisdiction in federal court is illegitimate.