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"SUBSTANCE" AND "PROCEDURE" IN THE RULES ENABLING ACT

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I. INTRODUCTION

A. *The Enabling Act in Congress: 1984-1988.*

"Supersession lives! Long live supersession!" If such a cry seems incongruous, and unlikely to be heard on the barricades, it may nevertheless express appropriate relief at a turning point in the so-called "counter-revolution" against court rulemaking.[1] On October 14, 1988, Congress enacted amendments[2] to the Rules Enabling Act[3] and brought to a close temporarily an obscure and muffled debate on rulemaking by retaining an unused and seldom-noted provision of that Act.[4]

The debate on the provision's retention was stimulated by a 1985 proposal for its deletion that was approved by the House of Representatives on the advice of its Judiciary Committee.[5] The issue remained on Congress's agenda for three years, along with other proposals for amendments to the Act intended to provide wider participation in rulemaking[6]

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1. *See* Risinger, *Another Step in the Counter-Revolution: A Summary Judgment on the Supreme Court's New Approach to Summary Judgment,* 54 BROOKLYN L. REV. 35, 35 (1988).

2. Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 401, 102 Stat. 4642, 4648-50 (1988) (amending 28 U.S.C. § 2072 (1982)).

3. 28 U.S.C. § 2072 (1982).

4. The provision is set forth in Pub. L. No. 100-702, §§ 401, 2072(b), 102 Stat. at 4649: "All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect."

5. H.R. REP. No. 422, 99th Cong., 1st Sess. 13, 16-17, 22-23 (1985).

6. *Id.* at 12, 16, 25-26.

and to control burgeoning local rules.[7] In 1988, the Senate conducted hearings limited to the supersession issue with voices not heard in the previous deliberations of the House Committee advocating support for the provision's retention, including those of the American Bar Association,[8] the American College of Trial Lawyers,[9] the Association of the Bar of the City of New York,[10] and several law professors.[11] Although advocates of the deletion approved earlier by the House were not lacking,[12] the supporters carried the day, at least for now.

This article will explain the modest significance of this widely unheralded event. Explanation of this event requires complexity that is unlikely to sustain the interest of many general readers seeking pleasure in these pages. Nor is this article likely to attract close study by the large group of specialists in the field because the issue raised is paradigmatically one for generalists: there is no group or class of disputants who have a foreseeable stake in an application of the questioned provision. Indeed, it is for these reasons that the issue is so "widely unheralded."

To call attention to the general lack of interest is not to apologize for the author's seemingly unnatural interest in a matter that others regard as a point best neglected. Rather the lack of public interest in the matter is itself a datum pertinent to the argument that will follow. An important reason for court rulemaking is that complex technical issues of judicial practice cannot sustain attention through the political process. What is everyone's business is no one's special political concern. Hence, if such issues are to receive thoughtful attention at all, such attention must come from outside the usual channels of democratic politics. That is the essential wisdom of court rulemaking and it bears, as well, on the issue of supersession.

The Rules Enabling Act[13] had achieved a venerable age. Fifty-five years is sufficient time to dim the collective memory of the reasons for its enactment. Unlike the Constitution, to which it is a loose appendage, the Act's benefits are not frequently apparent to its beneficiaries. It was therefore timely for Congress to renew its acquaintance with the Act.

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7. *Id.* at 14-16, 27-28.

8. Benjamin R. Civiletti, chair of the Association's Section on Litigation, appeared in opposition to repeal. *Hearing on Supersession before Subcomm. on Courts and Administrative Practice of Senate Comm. on the Judiciary,* (May 28, 1988) (forthcoming Fall 1989) at —.

9. *See id.* at — (Statement in lieu of testimony, May 25, 1988).

10. John G. Koeltl, presented the position of the Association. *Id.* at —.

11. *See, e.g., id.* at — (statements of Edward R. Cooper, Mary Kay Kane, and Charles Alan Wright).

12. *See id.* at — (statements of Stephen Burbank and Judith Resnik from ACLU).

13. Act of June 19, 1934, Pub. L. No. 73-415, 48 Stat. 1064 (codified as amended at 28 U.S.C. § 2072 (1982)).

The Act is deceptive in its simplicity. Prior to its 1988 revision, the statute was comprised of only four sentences.[14] Its legislative history is limited, and its meaning was soon obscured by its proximity in place and time to the portentous decision in *Erie Railroad Co. v. Tompkins.*[15]

A major source of misunderstanding is the Act's reliance on the familiar terms "substance" and "procedure" to define the authority of Court rulemaking. The concern expressed in Congress was that an expansive reading might be given to the statutory term "procedure" to enable a court rule to override political decisions made by Congress. The concern was heightened by a controversy that was brewing in 1983-1985 over proposed amendments to Rule 68 of the Federal Rules of Civil Procedure.[16] Some proposed provisions were criticized[17] as being inconsistent with The Civil Rights Attorney's Fees Awards Act of 1976,[18] and perhaps they were. Some imagined that the rulemakers might nevertheless promulgate such a Rule in order to supersede the 1976 Act, and thus use the provisions of the Rules Enabling Act to thwart the will of Congress.

Proposals to amend Rule 68 were permanently tabled by the Advisory Committee on the Civil Rules in January, 1986,[19] but the imaginary horrible lingered and occasioned a continuing interest in the repeal of the

14. Prior to the 1988 amendment, 28 U.S.C. § 2072 (1982) provided:

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

15. 304 U.S. 64 (1938).

16. The story of the controversy is briefly told in Burbank, *Proposals to Amend Rule 68—Time to Abandon Ship,* 19 U. MICH. J.L. REF. 425 (1986).

17. *See* 130 CONG. REC. H4104 (daily ed. Oct. 1, 1984) (statement of Rep. Kastenmeier criticizing proposed amendments to Rule 68); *see also* Note, *The Conflict Between Rule 68 and the Civil Rights Attorneys' Fees Statute: Reinterpreting the Rules Enabling Act,* 98 HARV. L. REV. 828, 835 (1985) (The Civil Rights Attorney's Fees Awards Act was enacted after promulgation of Rule 68 and should take precedence; Rule 68 should be interpreted as subordinate to substantive rights created by Congress).

18. Pub. L. No. 94-559, 90 Stat. 2641 (codified as amended at 42 U.S.C. § 1988 (1976)).

19. Minutes, Advisory Committee on the Civil Rules, Judicial Conference of the United States.

supersession provision. The frightful prospect of a constitutional crisis, however, rested on a misapprehension of the supersession provision's meaning. This misapprehension, easily understood in light of the history of the Act since 1934,[20] assumed an extravagant interpretation of the provision, well beyond that required for it to perform its role in the scheme of the statute. The interpretative problem lay in the mystic terms "substance" and "procedure" as used in the Act.

B. *The Familiar Principle of Variable Meaning.*

Analysis of these critical terms of the Rules Enabling Act should have proceeded from an important insight Walter Wheeler Cook expressed at the time of the Act's adoption.[21] Professor Cook published his luminous article, *"Substance" and "Procedure" in the Conflict of Laws*[22] in 1933. There is no evidence that the legislators who approved the Rules Enabling Act had read Cook.[23] It does not appear that Cook ever expressed any interpretation of that legislation, yet his wisdom provided its key. Alas, his critical insight has often been lost.

Most American lawyers, if unfamiliar with Cook's work, are familiar with his wisdom, which has been fully assimilated into our professional culture.[24] Cook began with a truism that distinctions do not lack respectability because they are not absolute: substance and procedure differ even if, at the margin, they become difficult to distinguish.[25] He then demonstrated that the characterization of a law as substantive or procedural depends on the purpose of the characterization.[26] By listing

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20. *See infra* text accompanying notes 106-17.

21. Professor Cook (1873-1943) set an apparently unchallenged record of itineracy, holding professorial appointments at Nebraska, Missouri, Wisconsin, Chicago, Yale, Columbia, Johns Hopkins and Northwestern over the course of his 40-year career. In 1933, he was at Johns Hopkins, His classic work, LOGICAL AND LEGAL BASES OF CONFLICT OF LAWS, was published in 1942.

22. Cook, *"Substance" and "Procedure" in the Conflict of Laws,* 42 YALE L.J. 333 (1933).

23. There is ample evidence that the rulemakers appointed to advise the Court on the exercise of its rulemaking power had read Cook. *See* Burbank, *The Rules Enabling Act of 1934,* 130 U. PA. L. REV. 1015, 1159 n.620 (1982) (citing Letter from William D. Mitchell to Charles E. Clark (May 19, 1937)).

24. The Supreme Court has cited Cook on numerous occasions, especially in connection with the Rules of Decision Act cases briefly discussed *infra* text accompanying notes 87-95. *See, e.g.,* Guaranty Trust Co. v. York, 326 U.S. 99, 108 (1945) (citing W. COOK, LOGICAL AND LEGAL BASES OF CONFLICT OF LAWS 163-65 (1942)); Hanna v. Plumer, 380 U.S. 460, 471 (1965) (citing W. COOK, *supra,* at 154-83).

25. *See* Cook, *supra* note 22, at 336 n.10 (" 'The distinction between substantive and procedural law is artificial and illusory. In essence, there is none.' ") (quoting 1 C. CHAMBERLAYNE, THE MODERN LAW OF EVIDENCE § 171 (1911)).

26. *Id.* at 337. Cook traces his own thinking to THE PHILOSOPHY OF WILLIAM JAMES, at 82 (H. Kallen ed. 1925) ("Test every concept by the question 'What sensible difference to anybody will its truth make?' and you are in the best possible position for understanding what it means and for discussing its importance."). Cook, *supra* note 22, at 336 n.9.

eight different purposes served by making such a distinction, he demonstrated that a sense of each purpose could inform decisions as to whether a particular rule should be deemed substantive or procedural for that purpose.[27] He also warned against the tendency to assume constancy of meaning in words, a tendency that he decried as having "all the tenacity of original sin."[28]

Cook was a prophet. A temptation to commit that sin promptly revealed itself with the appearance in 1938 of four new uses of "substance" and "procedure" to mark distinctions of constitutional significance. Two of these distinctions were created to express federalism principles and two to express separation of powers principles. An epidemic of conflation amongst these distinctions occurred.[29] In hindsight, this is not surprising. All four of these uses of the distinction bear on the Rules Enabling Act.

First, Justice Brandeis in *Erie* called attention to the constitutional restrictions on federal lawmaking with respect to rules governing decisions in cases brought in federal court to enforce state-created rights.[30] Congress was given limited substantive powers and responsibilities under Article I; substantive rights created in the exercise of those powers can, of course, be enforced in state as well as federal courts,[31] unless Congress provides for exclusive jurisdiction in one of the forums.[32] But in matters not controlled by the laws it creates under Article I that are brought to federal courts for resolution, Congress only has an undefined power over procedure in federal courts, which is implied from its Article III powers to create such courts.[33] These constitutional powers find one of their

27. Cook, *supra* note 22, at 341-43; *see also* Guaranty Trust Co. v. York, 326 U.S. 99, 108 (1945) ("Neither 'substance' nor 'procedure' represents . . . invariants. Each implies different variables depending upon the particular problem for which it is used.").

28. Cook, *supra* note 22, at 337.

29. *See, e.g.*, Sibbach v. Wilson & Co., 312 U.S. 1 (1941) (determining that FED. R. CIV. P. 35, authorizing medical examinations during pre-trial discovery, is procedural, not substantive); Burbank, *supra* note 23, at 1028-33 (interpreting *Sibbach*'s conflations); Ely, *The Irrepressible Myth of* Erie, 87 HARV. L. REV. 693, 698-99 (1974) (discussing limitations on procedural rules imposed by the Rules Enabling Act).

30. Erie R.R. v. Tompkins, 304 U.S. 64, 77-80 (1938).

31. Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 477-78 (1981). Congress presumably could make the federal jurisdiction exclusive. *Cf.* International Longshoreman's Ass'n v. Davis, 476 U.S. 380, 387 (1986) ("It is clearly within Congress' power to establish an exclusive federal forum to adjudicate issues of federal law in a particular area that Congress has the authority to regulate under the Constitution.").

32. *See* C. WRIGHT, FEDERAL COURTS 35-36 (4th ed. 1983). *See generally* 13A C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3527 (1984) (discussing limited situations in which federal courts have exclusive jurisdiction) [hereinafter FEDERAL PROCEDURE].

33. Livingston v. Story, 9 Pet. (34 U.S.) 632, 656 (1835) (text of article I authorizes Congress to make all laws which shall be necessary and proper for carrying into execution the enumerated powers).

bounds in a distinction between matters of substance and procedure.

Second, *Erie* put the 1789 Rules of Decision Act[34] in a new light. That Act requires that federal courts give effect to laws made by state courts wherever court-made law is an expression of state sovereignty applicable to disputes within federal judicial jurisdiction, as necessarily occurs in an exercise of jurisdiction based on the citizenship of the parties. While Justice Brandeis did not refer to the problem of distinguishing state law that must be obeyed from state law that does not apply to federal proceedings, soon it was apparent that a line had to be drawn between principles of state law that federal courts should respect as an expression of regard for state sovereignty and principles of state law that merely pertain to the operation of state courts and are not operational in the courts of another sovereignty.[35]

The third issue created in 1938 relates to the validity of the Federal Rules of Civil Procedure taking effect as a result of the Court's exercise of authority under the Rules Enabling Act.[36] By the Act, Congress conferred in the Supreme Court the power "to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts . . . ."[37] This first sentence of the Act was a delegation of some federal law-making power created by Article III, which authorizes Congress to establish lower federal courts.

While the limits of the power conferred on the Court seem to lie primarily in that first sentence of the Act, the second sentence also provides that the Court's rules shall not "abridge, enlarge or modify any substantive right," or the right to jury trial.[38] Inasmuch as the Supreme Court has not applied this second sentence to affect the outcome of a single case in the fifty years of its operative history,[39] the sentence might

34. Section 34 of the Federal Judiciary Act of 1789, ch. 20, 1 Stat. 92 (codified as amended at 28 U.S.C. § 1652 (1982)) provides: "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."

35. The issue was first presented to the Supreme Court in Sibbach v. Wilson & Co., 312 U.S. 1 (1941), where it was resolved on the basis of an interpretation of the Rules Enabling Act, thus establishing the unfortunate conflation of issues described in Burbank, *supra* note 23, at 1027-33.

36. Challenges to civil rules have been entertained by the Supreme Court in Hanna v. Plumer, 380 U.S. 460 (1965) (Rule 4(d)); Schlagenhauf v. Holder, 379 U.S. 104 (1964) (Rule 35(a)); Cold Metal Process Co. v. United Eng'g & Foundry Co., 351 U.S. 445 (1956) (Rule 54(b)); Sears, Roebuck & Co. v. Mackey, 351 U.S. 427 (1956) (Rule 54(b)); Mississippi Publishing Corp. v. Murphree, 326 U.S. 438 (1946) (Rule 4(f)); Sibbach v. Wilson & Co., 312 U.S. 1 (1941) (Rules 35, 37).

37. 28 U.S.C. § 2072 (1982).

38. *Id.*

39. *But cf.* Marshall v. Mulrenin, 508 F.2d 39, 44 (1st Cir. 1974) ("[A] rule is not to be applied to the extent, if any, that it would defeat rights arising from state substantive law as distinguished from state procedure.").

be considered excess verbiage. It may have been unnecessary for two reasons.

The Act's second sentence is unnecessary primarily because the Court cannot make substantive rules by any means other than writing opinions in "cases or controversies," without taking leave of its role as defined by Article III. Although we are now all Legal Realists,[40] even those who read the Act fifty-five years after its enactment find it obvious that the Court cannot promulgate rules creating rights bearing on behavior external to it without fully taking leave of its assigned function in the constitutional scheme. By shielding substantive rights from abridgment and modification, the first sentence of the Act expresses constitutional principles that derive from Article III.

Another possible redundancy in the Act's second sentence exists.[41] If we were to assume that "procedure" in the first sentence of the Act is mutually exclusive of "substance" as it appears in the second,[42] it would follow ineluctably that a rule valid under the Act's first sentence could not offend the constraint of the second. The second sentence would then be redundant. In this respect, however, the presence of the second sentence more likely is a reflection of Congress's awareness that the terms "substance" and "procedure" are not mutually exclusive. Indeed, the seemingly redundant usage implies that the meanings of these terms are purposive and contextual, just as Professor Cook contended. Although applied rarely,[43] the Supreme Court has noticed the second sentence and affirmed that "substance" and "procedure" as used in that sentence are not mutually exclusive.[44]

The fourth application of these elusive terms is found in the supersession provision that was proposed for repeal in 1988.[45] This supersession provision has seldom been applied by any federal court,[46] and has never rated mention by the Supreme Court. The fourth sentence of the

40. *See generally* G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 100 (1982) (reminding readers that judges are limited to case decisions as a means of making law); K. LLEWELLYN, THE COMMON LAW TRADITION 4 (1960) (observing that a majority of lawyers doubt that judicial opinions represent more than expressions of the judges' wills).

41. *Cf.* Sibbach v. Wilson & Co., 312 U.S. 1, 10 (concerning the definition of "substantive rights" as compared to "procedure"); Burbank, *supra* note 23, at 1107-08 (stating that the Supreme Court has failed to attribute independent meaning to the Act's second sentence). *But see* Ely, *supra* note 29, at 698 ("Enabling Act contains significant limiting language").

42. Justice Frankfurter suggested in his dissent in *Sibbach,* 312 U.S. at 17, that the terms as employed in the Act may not be mutually exclusive.

43. *E.g.,* Burlington N.R.R. v. Woods, 480 U.S. 1, 5 (1987); *see also* 19 FEDERAL PROCEDURE, *supra* note 32, § 4509 (1982) (reviewing limiting provisions of Rules Enabling Act).

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

45. 28 U.S.C. § 2072(b); *see supra* note 4.

46. Two cases reached the courts of appeals: Waterman S.S. Corp. v. Gay Cottons, 419 F.2d 372, 373 (9th Cir. 1969) (proctor's docket fee in admiralty appeals superseded); Albatross Tanker

1934 Act is qualified by both of the first two sentences:[47] it could apply only to rules that are "procedure" within the meaning of the first sentence and not "substance" within the meaning of the second. Moreover, because the terminology functions differently with respect to supersession than to enablement, it is likely, as Professor Cook explained, that the terms would be given different meanings in a different context.

Manifestly, these four occasions for distinguishing substance from procedure are similar and related. Yet they are quite different with respect to the function that the familiar distinction serves. Hence, they have created a need to resist the "tenacious assumption" that words have a constant meaning, a need that has not often been recognized.

The Supreme Court took a positive step in sorting out the issues in its 1965 decision in *Hanna v. Plumer*.[48] John Ely's 1974 article[49] about *Hanna* also made a major contribution to clarity of thinking and Stephen Burbank, in his 1982 article on the Rules Enabling Act, provided further clarification.[50] Others also have contributed to this extended discourse.[51]

It seems, however, that we still have only partially applied Cook's teachings to the 1934 Act, particularly with respect to its little-used and often-neglected fourth sentence. The remaining task is to comprehend the function of supersession in the statutory scheme so that its meaning corresponds to that function. But understanding requires that we also have in mind the differing characterizations of "substance" and "procedure" that serve the other related purposes revealed in 1938.

C. *The Structure of this Article.*

To illuminate the various meanings of "substance" and "procedure" as used in these four contexts, this article will explore their applications to the most noisome challenge to a substance-procedure distinction—statutes of limitations. I choose limitations law as illustrative because it has been the source of many of the issues created by *Erie* and the Rules Enabling Act, including the familiar cases of *Guaranty Trust Co. v.*

Corp. v. S.S. Amoco Del., 418 F.2d 248, 248 (2d Cir. 1969) (provision for taxation of printing costs on appeal superseded).

47. *See, e.g.*, 19 FEDERAL PROCEDURE, *supra* note 32, § 4509 (1982).

48. 380 U.S. 460 (1965).

49. Ely, *supra* note 29.

50. Burbank, *supra* note 23.

51. *See, e.g.*, Landers, *Of Legalized Blackmail and Legalized Theft: Consumer Class Actions and the Substance-Procedure Dilemma*, 47 S. CAL. L. REV. 842, 849-61 (1974) (discussing substance/procedure distinction in context of class actions); Westen & Lehman, *Is There Life for* Erie *After the Death of Diversity?*, 78 MICH. L. REV. 311, 362-64 (1980) (discussing debate concerning possible statutory meaning of "substantive rights").

York,[52] *Ragan v. Merchants Transfer & Warehouse Co.*,[53] *Hanna v. Plumer*,[54] and *Walker v. Armco Steel Corp.*[55] In addition, limitations law is the subject of the Court's latest pronouncement in *West v. Conrail*[56] and remains a problem in 1989, as the rulemakers address the regretted decision of *Schiavone v. Fortune*[57] and the resulting need to amend Rule 15.

I will proceed first to state the reasons that limitations law today poses such a difficult task of characterization:[58] not all aspects of limitations law are equally "procedural." I will then characterize aspects of limitations law according to each of the four purposes that emerged in 1938.[59]

Only brief attention will be given to the first two substance-procedure characterizations that are intertwined with *Erie*;[60] this article is not about *Erie*, but must address it in order to clarify the differences between those issues of federalism and those of separation of powers presented in the Rules Enabling Act.

The most thorough attention will be given to the problem of characterization for the purposes of establishing the limits of rule enablement in the first two sentences of the Act.[61] A functional analysis of the terminology will be applied to test the validity of the four rules bearing on the matter of limitations, Rules 3, 4, 15, and 23.

Finally, consideration will be given to the supersession provision and its function in the scheme of the Rules Enabling Act.[62] That function differs from the function of the rule enablement provisions and a functional analysis leads me to conclude that the possible scope of application of supersession is narrow, and inconsequential with respect to federal statutes of limitations and judge-made limitations law. This concluding discussion will be brief, in part because courts have no significant experience with supersession. It has, in other words, worked smoothly in practice; the principle question raised by proponents of its repeal was whether or not it works in theory.

52. 326 U.S. 99 (1945).
53. 337 U.S. 530 (1949).
54. 380 U.S. 460 (1965).
55. 446 U.S. 740 (1980).
56. 481 U.S. 35 (1987).
57. 477 U.S. 21 (1986).
58. *See infra* notes 62-76 and accompanying text.
59. *See infra* notes 62-248 and accompanying text.
60. *See infra* notes 62-105 and accompanying text.
61. *See infra* notes 106-248 and accompanying text.
62. *See infra* notes 249-73 and accompanying text.

D. *The Characterization of Limitations Law.*

Limitations law is famously a body of rules that are neither grass nor hay, being at once both substantive and procedural. In one sense, limitations law is clearly procedural—a sibling or at least a cousin to summary judgment. It is a means of clearing dockets, of protecting both the court and the defendant from waste, and of protecting the defendant from the unjust coercion that can result simply from the threat of waste. It is also a crude means of evaluating proof, a device to protect fact finders from being beguiled by stale and, therefore, suspect proof. Statutes of limitations "discourage litigation by burying in one receptacle all the accumulations of past times, which are unexplained; and have now, from time to time become inexplicable."[63] They are a tool of judicial administration and an allocation of scarce judicial resources, and thus in classical American conflicts dogma are characterized as procedural.[64]

In another sense, however, limitations law is substantive. Repose is a social and political value with economic consequences. Limitations law is thus a means of healing and stabilizing relationships. It reduces the general level of stress and anxiety, protecting even plaintiffs from the self-injuries that result when resentments are nourished for too long. Limitations "quicken diligence by making it in some measure equivalent to right."[65] They also facilitate and induce economic planning and development. These effects of limitations law occur outside the courthouse and have no bearing on the quality or accuracy of judicial proceedings. To the extent that these considerations are paramount, limitations law can be characterized as substantive.[66]

The substance-procedure ambiguity can sometimes be resolved by referring to the legislative context in which a limitations provision appears. Limitations law found in a statute that creates a right or specifies claims to which it applies can be more readily characterized as substantive because it is a dimension of that right or claim.[67] It can be perceived

63. J. STORY, CONFLICT OF LAWS § 576 (5th ed. 1857); *see also* 2 J. KENT, COMMENTARIES ON AMERICAN LAW 462-63 (2d ed. 1832).

64. M'Elmoyle v. Cohen, 38 U.S. (13 Pet.) 312, 327 (1839) (prescribing the time within which a suit must be brought "is a thing of policy, growing out of the experience of its necessity"). The classic rule has now been materially qualified. Exceptions were long made by means of borrowing statutes, but other exceptions have now become common. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 142 & reporter's notes (1986). The constitutionality of the classic rule has, however, recently been upheld in Sun Oil Co. v. Wortman, 108 S. Ct. 2117 (1988).

65. J. STORY, *supra* note 62, § 576.

66. Continental courts have long characterized limitations for conflict-of-laws purposes in this way. 3 E. RABEL, THE CONFLICT OF LAWS: A COMPARATIVE STUDY 475 (1950).

67. *Cf.* Davis v. Mills, 194 U.S. 451, 454 (1904) ("[T]he fact that the limitation is contained in the same section or the same statute is material only as bearing on construction. It is merely a ground for saying that the limitation goes to the right created and accompanies the obligation every-

as a condition of the right and a measure of the force of the substantive policy that the right-creating enactment expresses. In contrast, limitations law of general application—without regard for the source or any substantive nature of the claim—can be more readily characterized as procedural because of its lack of connection to a specific substantive policy.

Seen in this light, aspects of limitations law may be distinguished for the purpose of characterization. Limitations provisions that are specific to a particular class of claims, such as provisions fixing the length of the limitation for claims arising under designated statutes, reflect political judgments and should be characterized as substantive for most purposes. On the other hand, limitations provisions that are generally applicable tend to reflect values related to the quality of the decisionmaking process and should more frequently be characterized as procedural.

The ambiguity of limitations law is inherent, but has increased since 1938. Limitations law was then generally merciless, being subject to few if any exceptions.[68] No longer so clean and hard, limitations law is now more complex and difficult to characterize for several reasons.

First, the number of limitations statutes has increased, providing a more frequent choice as to the correct limitation applicable to a particular case.[69] Second, the rise of the doctrine of implied rights[70] has increased the frequency with which courts must derive limitations law by implication from among a number of alternatives.[71] Third, more disputes now straddle jurisdictional lines and thus present traditional choice-of-law problems with respect to limitations law.

It is also often less clear now than it was fifty-five years ago when a limitation period is running and when it is tolled. For example, the law of fraudulent concealment of claims was then known to federal equity,[72] but its application was rare; today's rules concerning undiscovered

where."); The Harrisburg, 119 U.S. 199, 214 (1886) (state wrongful death statutes containing limitations periods cannot give rise to federal action after limitations periods have expired).

68. Guaranty Trust Co. v. York, 326 U.S. 99, 113-14 (1944).

69. *Cf.*, Special Project, *California Statutes of Limitation*, 16 SW. U.L. REV. 35 (1986) (lists and briefly describes each of California's statutes of limitations).

70. *See, e.g.*, Carlson v. Green, 446 U.S. 14 (1980) (recognizing right of action under FTCA for alleged intentional wrongdoing in conjunction with *Bivens* action).

71. *E.g.*, Del Costello v. Teamsters, 462 U.S. 151 (1983) (choosing six-month limitations period of National Labor Relations Act § 10(b) over 30-day Maryland period and 90-day New York period, since NLRA was designed to balance interests similar to those at stake in case before the Court). For an elaboration of the problems, see Beasley, *Report of the Task Force on Statute of Limitations for Implied Actions*, 41 BUS. LAW. 645 (1986).

72. *E.g.*, Bailey v. Glover, 88 U.S. 342 (1874). *See generally* Dawson, *Fraudulent Concealment and Statutes of Limitation*, 31 MICH. L. REV. 875 (1933) (discussing development of fraudulent concealment law as it suspends statutes of limitation).

claims are numerous, vary widely, and are often applied.[73] In some states, qualifying principles have been constitutionalized as requirements of due process, equal protection, or the novel provisions of state constitutions.[74] In response to these constitutional developments, legislatures have devised a variation on limitations law generally described as a "statute of repose" which is designed to eliminate exceptions with respect to a specified class of claims.[75] As the applications of the exceptions to the old, hard law of limitations turn, with increasing frequency, on what are characterized as issues of fact, limitations law becomes increasingly difficult to distinguish from the classical equity doctrine of laches. Stephen Subrin recently described contemporary procedure as a "triumph of equity"[76] and his comment has special pertinence to limitations law.

The process of deciding whether a limitation has been satisfied by steps timely taken has become increasingly difficult. Differences between limitations provisions that only require the filing of a claim and those that require service of a complaint may be more acute than they were in 1934 or 1938. California practice, which in some circumstances authorizes a plaintiff to toll the statute by filing a claim against an unnamed defendant, illustrates the range of possible differences.[77]

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73. *See generally* RESTATEMENT (SECOND) OF TORTS § 899 comment e (1977) (surveying holdings of different jurisdictions regarding fraudulent concealment claims); Marcus, *Fraudulent Concealment in Federal Court: Toward a More Disparate Standard?,* 71 GEO. L.J. 829, 915 (1983) (table showing increase each year in number of cases invoking doctrine of fraudulent concealment).

74. *See, e.g.,* Daugaard v. Baltic Coop. Bldg. Supply Ass'n, 349 N.W.2d 419, 424 (S.D. 1984) ("Appellants assert [that South Dakota limitations statutes] unconstitutionally locked the courtroom doors before appellants had an opportunity to open it. We agree."); *see also* Note, *The Constitutionality of Statutes of Repose: Federalism Reigns,* 38 VAND. L. REV. 627 (1985); *cf.* Mills v. Habluetzel, 456 U.S. 91, 101 (1982) (one-year limitations period for actions to establish paternity denies equal protection of law by discriminating against illegitimates); G.D. Searle & Co. v. Cohn, 455 U.S. 404 (1982) (tolling limitations period against company lacking agent in state may violate commerce clause; remanded for consideration of issue by lower court). *Compare* Bendix Autolite Corp. v. Midwesco Enters., 108 S. Ct. 2218, 2222 (1988) (statute of limitations provision held invalid as burden on interstate commerce) *with* Sun Oil Co. v. Wortman, 108 S. Ct. 2117, 2121 (1988) ("The Constitution does not bar application of the forum state's statute of limitations to claims, that in their substance are and must be governed by the law of a different state.").

75. *See generally* RESTATEMENT (SECOND) OF TORTS § 899 comment g (1977) (describing statutes of repose; noting that statute of repose may run before a cause of action exists, and that "[t]his may well raise constitutional problems").

76. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective,* 135 U. PA. L. REV. 909 (1987); *see also* Chayes, *The Role of the Judge in Public Law Litigation,* 89 HARV. L. REV. 1281, 1292-96 (1976) (equitable remedies are especially important in class-action public-rights litigation).

77. The intricacies of the doctrine and its application to federal litigation are revealed in Note, *Doe Defendants and Other Relation Back Doctrines in Federal Diversity Cases,* 35 STAN. L. REV. 297 (1983). *Cf.* Lindley v. General Elec. Co., 780 F.2d 797, 802 (9th Cir. 1986) (applying California rule in federal diversity case).

These distinctions among the various statutory periods and modes of measuring the timeliness of compliance reflect policies that are both substantive and procedural. How should this body of law be characterized for the purposes of the four issues that emerged in 1938? As Cook would have us believe, the characterization between substance and procedure need not be the same for all purposes; with respect to each purpose, it depends on the function that the characterization serves.

II. "SUBSTANCE" AND "PROCEDURE" IN DETERMINING FEDERAL-STATE ISSUES OF LIMITATIONS LAW

A. *The Authority of Congress to Make Limitations Law.*

In *Erie,* Justice Brandeis emphasized that the Constitution does not allow the federal government to make substantive law applicable to cases merely on the basis of their presence on the federal dockets.[78] Nor is Congress generally empowered to regulate civil procedure in state courts.[79]

Congress does, however, have two sources of broad authority to enact limitations law. First, in the exercise of its enumerated powers under Article I, Congress can limit the time within which rights that it creates may be asserted. In fact, Congress frequently exercises this power to append limitations to substantive enactments.[80] The constitutional validity of such enactments is not in doubt, given the legitimacy of the aims of limitations law, the long history of federal practice, and the traditional deference of the Court to the power of Congress. Limitations, so enacted, are valid as an integral feature of federal substantive law.[81]

While enforcing these enactments, the federal courts have created a body of common law that is generally applicable to federally-created rights in the absence of contrary legislation. Such federal common law first appeared in 1874 when the Court applied the court-made doctrine of fraudulent concealment to toll the statutory limitations on actions brought on behalf of a bankrupt estate.[82] Moreover, when Congress creates rights, explicitly or by implication, without provision for limitation of time, the federal courts are often called upon to invent limitations law

78. Erie R.R. v. Tompkins, 304 U.S. 64, 77-80 (1938).

79. *But see* Brown v. Western Ry., 338 U.S. 294, 296 (1949) (interpreting state court pleading in a manner inconsistent with local rule of interpretation, because a "federal right cannot be defeated by local forms of practice").

80. *E.g.,* National Labor Relations Act § 10, (codified at 29 U.S.C. § 160(b)) (1982).

81. *Cf.* The Harrisburg, 119 U.S. 199, 214 (1886) (admiralty suit dismissed because filed after expiration of 12-month limitations period established by state law).

82. Bailey v. Glover, 88 U.S. 342, 349 (1875); *see also* Holmberg v. Armbrecht, 327 U.S. 392, 397 (1946).

by "absorption" of state limitations law[83] or by analogy to the federal law pertaining to similar rights.[84] In creating such a federal common law of limitations, the federal courts assist Congress in the exercise of the Article I power to make substantive law.

Secondly, Congress, in addition to its enumerated powers to create substantive law, can create inferior courts under its Article III powers.[85] This implies a power (not yet exercised) to bar a claim as being too stale to be heard in its federal courts, although it would not be barred in the forum of the sovereignty that created the asserted right. Article III also may imply a power to direct a district court to hear a claim that would be deemed too stale to be heard in the forum of the sovereignty creating the asserted right.[86] If valid, limitations law made pursuant to Article III is so because it is, at least, marginally procedural.

Thus, in applying a rule of court as a rule of limitation in *Hanna,* the Court stated:

> 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.[87]

But limitations enacted by Congress to govern non-federal civil proceedings in non-federal courts would be unsustainable as not being appropriately substantive under Article I or appropriately procedural under Article III.

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83. *See, e.g.,* Wilson v. Garcia, 471 U.S. 261, 276 (1985) (state tort claim limitations period applicable to § 1983 action); Chardon v. Fumero Soto, 462 U.S. 650, 661 (1983) (local Puerto Rico rule on tolling limitations period applies to § 1983 action); Board of Regents v. Tomanio, 446 U.S. 478, 483 (1980) (same); Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 463-64 (1975) (§ 1981 claim time-barred by state limitations period, which is not tolled by filing of federal administrative claim).

84. *See, e.g.,* Del Costello v. International Bhd. of Teamsters, 462 U.S. 151, 169-72 (1983) (federal limitations period for filing charges against employer also applies to related suit against union).

85. U.S. CONST. art. III, § 1.

86. The distinction between a shorter forum limitation, which bars a claim still viable under the law that created it, and a longer forum limitation, which revives a claim no longer viable under the law that created it, is a distinction well-known in the conflict-of-laws field. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 142 (1986) (action not barred by forum's statute of limitations will be maintained unless action would be barred by statute of limitations of another state with more significant relationship to action); *cf.* Sun Oil Co. v. Wortman, 108 S. Ct. 2117, 2121-26 (1988) (forum state may apply its own statute of limitations to actions governed by substantive law of different state).

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

B. *State Limitations Law in Federal Litigation.*

The second characterization question of 1938 arises under the Rules of Decision Act of 1789: does state limitations law govern in federal diversity litigation? We have, of course, some familiar answers to this traditional *Erie* issue.

In *York,* the Court held that a federal court, enforcing a local state law claim, cannot deny effect to that state's statute of limitations on account of the equitable nature of the federal remedy provided.[88] Justice Frankfurter's opinion is remembered for its description of the federal court as being "in effect, only another court of the State," which therefore must enforce state laws that "significantly affect the result of a litigation . . . ."[89] Of course, state law includes the local limitations law, even if that law might be deemed procedural for other purposes, such as the conflict of laws. As the *York* opinion was first read, it seemed simply to obliterate the distinction between substance and procedure.[90] Justice Rutledge's protest against obliteration is worthy of recall:

> [T]here is danger either of nullifying the power of Congress to control not only how the federal courts may act, but what they may do by way of affording remedies, or of usurping that function, if the *Erie* doctrine is to be expanded judicially to include such situations to the utmost extent.[91]

The ambivalence of limitations law was then illustrated in 1953 in *Wells v. Simonds Abrasive Co.*[92] In this case, a federal court in Pennsylvania applied Pennsylvania limitations law to an action brought under the Alabama wrongful death statute. Pennsylvania limitations law was deemed sufficiently substantive to be applicable in the federal court under the Rules of Decision Act, even though it was sufficiently procedural that the local Pennsylvania court would apply it to an Alabama claim.[93] Chief Justice Vinson's opinion in *Wells* derived in part from Justice Reed's opinion in *Klaxon Co. v. Stentor Electric Manufacturing Co.,*[94] which was an affirmation of the analysis of Judge Magruder in *Sampson v. Channell.*[95] *Sampson,* in turn, embraced Cook's observations about

88. Guaranty Trust Co. v. York, 326 U.S. 99, 107, 112 (1945).

89. *Id.* at 108-09.

90. The story of the enlargement of *York* is briefly told in Ely, *supra* note 29, at 708-09. Qualification came in Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525, 536-40 (1958) (absent strong possibility of difference in outcome, federal practice of determination of a defense by the jury will not yield to state practice of determination by judge, in the interest of uniformity).

91. *York,* 326 U.S. at 116 (Rutledge, J., dissenting).

92. 345 U.S. 514, 517 (1953).

93. *Id.* at 517.

94. 313 U.S. 487 (1941).

95. 110 F.2d 754 (1st Cir. 1940).

the variability of the substance-procedure dichotomy.[96]

One could have concluded twenty-five years ago that, pursuant to the Rules of Decision Act, state limitations law governs the outcome of diversity litigation because of the obligation of federal courts to respect state sovereignty by giving effect to that state's substantive law. But twenty-five years ago, we had not encountered the apparent conflict between an otherwise controlling state limitations law and a Federal Rule of Civil Procedure promulgated under the Rules Enabling Act. In 1938, it was possible to wonder whether the Federal Rules of Civil Procedure might have been stillborn,[97] at least in their application to diversity litigation. It appeared perhaps that the nineteenth century Conformity Act[98] had survived repeal by the Rules Enabling Act. The resulting preoccupation of a generation of lawyers and scholars with *Erie* led to conflation and an almost universal commission of the act described as sinful by Cook—assuming a constancy of meaning in terms.[99]

The Rules of Decision Act was clarified in *Hanna v. Plumer.*[100] Squarely addressing the question of whether that Act required federal courts to proceed in the manner of local state courts,[101] the Court concluded that it did not.[102] The Court reaffirmed the power of Congress to regulate procedure in the courts it had created and affirmed that Congress had delegated its power to the Court by the Rules Enabling Act, thus validating the use of the Federal Rules of Civil Procedure in diversity cases.[103] By protecting the Federal Rules from challenges mounted under the Rules of Decision Act, the Court seemed to endorse a sweeping interpretation of "procedure" as used in the first sentence of the Act; if a Federal Rule is "arguably procedural," the Court implied,[104] it meets

96. The application of a local statute of limitations as procedural was recently upheld against constitutional challenge in Sun Oil Co. v. Wortman, 108 S. Ct. 2117, 2121 (1988).

97. *See, e.g.,* Clark, *State Law in the Federal Courts: The Brooding Omnipresence of* Erie v. Tompkins, 55 YALE L.J. 267, 289 (1946) (noting that "there will remain a certain amount of uncertainty as to particular rules until the Supreme Court has spoken as to each"); Merrigan, Erie *to* York *to* Ragan—*A Triple Play on the Federal Rules,* 3 VAND. L. REV. 711, 712-13 (1950) (noting that "attorneys are unable to determine which of the Federal Rules will remain in full effect and which might be rejected by the courts").

98. Act of June 1, 1872, ch. 255, § 5, 17 Stat. 196, 197. The pre-Enabling-Act applicability of state procedure to federal litigation is described in Burbank, *supra* note 23, at 1036-42.

99. *See* Burbank, *supra* note 23, at 1027-35; Ely, *supra* note 29, at 698.

100. 380 U.S. 460 (1965).

101. *See supra* text accompanying note 86.

102. 380 U.S. at 463-64.

103. *Id.* at 473-74.

104. The enduring sentence of Chief Justice Warren's opinion is quoted *supra* text accompanying note 86. Justice Harlan, concurring, described this as a statement of the "arguably procedural" test. *Hanna,* 380 U.S. at 476 (Harlan, J., concurring).

the validity test, at least against a challenge based on principles of federalism as embodied in *Erie.*

Massachusetts limitations law[105] thus yielded to a principle of federal limitations law drawn from the Federal Rules.[106] A mere suggestion that federal law had bearing on the case was enough to invoke the authority of Congress and its supremacy over state law in regard to the operation of the federal courts. Congress could enact a federal limitations law and apply it to diversity litigation in the federal courts and the Court, as the surrogate of Congress, could do a bit of the same, even if, as in *York,* state law would control absent federal legislation.

III. RULE ENABLEMENT

A. *The False Step in* Hanna.

While one may quibble with the applications of its principle to the facts at hand,[107] *Hanna* surely seems to have gotten the Rules of Decision Act right. The problem with *Hanna* lay in the expression "arguably procedural," used by concurring Justice Harlan to encapsulate the majority position.[108] Although the "test" addressed the issue of federalism presented by the Rules of Decision Act, many promptly assumed it meant that the Court had endorsed an unconstrained view of its powers under the Act to make rules of court with substantive consequences.[109] The opinion's treatment of the Rules Enabling Act immediately encountered criticism.[110] Yet the Court decided the case at a time of general

105. Massachusetts Ann. Laws, ch. 197, § 9 (Law. Co-op. 1981), required that service of process on a decedent's estate be delivered "in hand" to the executor within the one year period provided for the bringing of such actions.

106. FED. R. CIV. P. 3 provides that a civil action is commenced by filing. *See infra* text accompanying note 145 (discussing Rule 3).

107. *See, e.g.,* Chayes, *Some Further Last Words on* Erie*—The Bead Game,* 87 HARV. L. REV. 741, 752 (1974) (Massachusetts statute makes it hard to sue defendants' estates because it imposes "special notification requirements substantially more onerous than those in ordinary lawsuits"; therefore statute involves a substantive right); Ely, *Some Further Last Words on* Erie*—The Necklace,* 87 HARV. L. REV. 753, 762 (1974) (statute is "precisely what you would expect an in-hand service requirement to be—a procedural requirement concerned with taking extra care to ensure that the papers will not get lost"); Mishkin, *Some Further Last Words on* Erie*—The Thread,* 87 HARV. L. REV. 1682, 1686-87 (1974) ("Congress' explicit refusal to delegate to the Court any power to 'abridge, enlarge or modify any substantive right' in my view rests upon—and restates—the constitutional perception that courts are inappropriate makers of laws intruding upon the states' views of social policy in the areas of state competence") (footnotes omitted).

108. *See supra* note 103 and accompanying text.

109. This interpretation was perhaps derived from the concurring opinion of Justice Harlan who perceived Chief Justice Warren to say for the Court that, inasmuch as rulemakers are reasonable, "the integrity of the Federal Rules is absolute." Hanna v. Plumer, 380 U.S. 460, 476 (1965).

110. *See, e.g.,* McCoid, Hanna v. Plumer: *The* Erie *Doctrine Changes Shape,* 51 VA. L. REV. 884, 901-03 (1965) (the *Hanna* Court "acknowledges that the validity of application of a federal rule requires that the rule come within the terms of the Act, but it makes no effort to test compliance, for

acceptance and little criticism of court rulemaking.[111] *Hanna* was accordingly taken as a commission to rulemakers to draft the Federal Rules of Evidence,[112] as they promptly did.[113] In this way, *Hanna* indirectly evoked an enlarged use of the rulemaking power and contributed to a reaction[114] against it that was manifested long before the 1984 controversy over Rule 68.[115]

The *Hanna* opinion lacked attention to the separation of powers issue that lay under the surface of the Rules Enabling Act but was concealed by the fashionable preoccupation with *Erie.* Although the Court may have been right with respect to the Rules of Decision Act, it led us off the trail with respect to the Court's power to enact limitations law, or other bodies of law based on the broad penumbra of the substance-procedure distinction.

In *Burlington Northern Railroad Co. v. Woods,*[116] the Court recently reiterated the language from *Hanna* that interpreted the first sentence of

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there is no attempt to determine the purpose of the competing (in this case, state) law") (footnotes omitted); *see also* Stason, *Choice of Law Within the Federal System:* Erie *Versus* Hanna, 52 CORNELL L.Q. 377, 401-04 (1967); Comment, Hanna v. Plumer: *An Expanded Concept of Federal Common Law—A Requiem for* Erie?, 1966 DUKE L.J. 142, 163-65; *cf.* Wright, *Procedural Reform: Its Limitations and Its Future,* 1 GA. L. REV. 563, 572-73 (1967) ("to fail to recognize a state-created privilege in a suit on a state-created claim that is in federal court only because of the accident of diversity of citizenship seems to me quite indefensible").

111. Ely, *supra* note 29, at 693-97.

112. *See, e.g.,* Cleary, *The Plan for the Adoption of Rules of Evidence for United States District Courts,* 25 REC. ASS'N B. CITY N.Y. 142, 145 (1970) ("The effect of the decision was . . . the elimination of doubts generated not by *Erie* but by *Erie*'s progeny with respect to authority under the Enabling Act to legislate freely in the area traditionally considered evidence . . . ."); Green, *Drafting Federal Rules of Evidence,* 52 CORNELL L.Q. 177, 203-04 (1967) (since the *Erie* doctrine does not apply to the Federal Rules, the distinction that should be used in adopting rules of evidence is the one set forth in *Sibbach:* if a matter might rationally be classified as either substance or procedure, the subject may be regulated by Congress); Moore & Bendix, *Congress, Evidence and Rulemaking,* 84 YALE L.J. 9, 24-25 (1974) ("*Hanna v. Plumer* is also important because of the timing of the decision: Chief Justice Warren's opinion for the Court followed by only a short time his appointment of the Advisory Committee for the Rules of Evidence, thereby implying his acceptance of the view that the Court's authority under the Enabling Act extended to the code of evidence") (footnotes omitted).

113. The history of the drafting and ultimate congressional adoption of the Federal Rules of Evidence is briefly recounted by Burbank, *supra* note 23, at 1018-22. *See also* 21 FEDERAL PROCEDURE, *supra* note 32, § 5006 (1977).

114. *See* W. BROWN, FEDERAL RULEMAKING: PROBLEMS AND POSSIBILITIES 76-77 (1981); J. WEINSTEIN, REFORM OF COURT RULE-MAKING PROCEDURES (1977); Friedenthal, *The Rulemaking Power of the Supreme Court: A Contemporary Crisis,* 27 STAN. L. REV. 673 (1975). *But see* Hazard, *Undemocratic Legislation* (Book Review), 87 YALE L.J. 1284 (1978) (reviewing J. WEINSTEIN, REFORM OF COURT RULE-MAKING PROCEDURES (1977)) (arguing in favor of continued use of federal rulemaking power); Lesnick, *The Federal Rule Making Process: A Time for Reexamination,* 61 A.B.A. J. 579 (1975). *See generally* Burbank, *supra* note 23, at 1018-22 (arguing that confusion following *Hanna* made Congress less willing to adopt new federal rules).

115. *See supra* notes 16-19 and accompanying text.

116. 107 S. Ct. 967 (1987).

the Rules Enabling Act as authorizing the making of any rule that is "arguably procedural," but in the context of a challenge based on the Rules of Decision Act.[117] At the same time that it quoted the sweeping phrase, it acknowledged the importance of the second sentence of the Act as a qualification of the first.[118] The Court further observed:

> The cardinal purpose of Congress in authorizing the development of a uniform and consistent system of rules governing federal practice and procedure suggests that Rules which incidentally affect litigants' substantive rights do not violate the provision if reasonably necessary to maintain the integrity of that system of rules.[119]

A question that remains unanswered both in *Hanna* and *Burlington Northern* is the extent to which Congress has authorized the Court to create limitations law by rule of court. How much limitations law is "procedure" within the meaning of the first sentence of the Rules Enabling Act and not "substance" within the meaning of the second sentence?

Implied in *Burlington Northern* is a constraint on rules of court affecting substantive rights in ways that are more than "incidental." As Cook taught, consideration of the appropriate limits of substantive effects should proceed from the function of rulemaking in the sub-constitutional scheme that Congress created by authorizing rules "of practice and procedure."

B. *The Function of Rulemaking: A Cookian Interpretation of the Rulemaking Power.*

1. *The Reform Tradition and Its Aims.* The Rules Enabling Act was the outcome of a judicial law reform movement that was at least a century old. In making rules of court, the Supreme Court stands in a tradition in legal history that extends back from Charles Clark and the reformers of 1934 to Roscoe Pound[120] to David Dudley Field[121] to Henry Brougham[122] to Jeremy Bentham[123] and beyond. Other early

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117. *Id.* at 969.

118. *Id.* at 970.

119. *Id.*

120. *See* Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice,* 40 AM. L. REV. 729 (1906).

121. *See* DAVID DUDLEY FIELD: CENTENARY ESSAYS (A. Reppy ed. 1949); Subrin, *David Dudley Field and the Field Code: A Historical Analysis of an Earlier Procedural Vision,* 6 LAW & HIST. REV. 311 (1988).

122. A more florid version of Rule 1 is found in 2 SPEECHES OF HENRY, LORD BROUGHAM 485 (1838):

> It was the boast of Augustus . . . that he found Rome of brick and left it of marble . . . . But how much nobler will be the sovereign's boast when he shall have it to say that he found law dear, and left it cheap; found it a sealed book, left it a living letter; found it the

supports of the movement include Presidents Taft and Wilson.[124] The lofty aims of that movement, also served by unnumbered others, was articulated by the 1938 rulemakers in their Rule 1: to secure "the just, speedy, and inexpensive determination of every action."[125] This was and is the expression of an ideal; certainly no one would claim that the Federal Rules of Civil Procedure have achieved such a purpose.[126]

Beneath the surface of this ideal, but nonetheless readily visible, is an ambition to enhance the general substantive effectiveness of law through procedural reform. In significant measure, the Federal Rules of Civil Procedure have succeeded in that ambition because the federal courts are now, as they were not prior to 1938, an effective tool for social, economic, and political change as directed by the Constitution and Congress. To employ Kenneth Scott's phrase, the judicial law reform movement hoped to move beyond mere dispute resolution to "behavior modification."[127] As a goal of the 1938 rulemakers, this ambition was most strongly evidenced by the promulgation of discovery rules.[128] And this ambition of the Anglo-American judicial law reform movement was recognized by Max Weber, who cited the movement as important evidence of the larger phenomenon that he observed and optimistically described as the rationalization of legal institutions.[129] Weber perceived this larger phenomenon to be the essence of Western culture.

The idea of making courts more effective is popular in Congress for obvious reasons. Like the lofty aims expressed in Rule 1 that bear di-

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patrimony of the rich, left it the inheritance of the poor; found it the two-edged sword of craft and oppression, left it the staff of honesty and the shield of innocence.

These words were the peroration to a six-hour address to Parliament on February 7, 1828. The event is described in R. MILLAR, CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE 43 (1952). The speech led to the enactment of the Hilary Rules of 1834, of which Sir William Holdsworth remarked: "[N]ever was a more disastrous mistake made." 9 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 325 (1926).

123. Brougham acknowledged his debt to Bentham as the founder of procedural law reform in England. 2 SPEECHES OF HENRY, LORD BROUGHAM, *supra* note 120, at 287. *See generally* Dillon, *Bentham and His School of Jurisprudence,* 24 AM. L. REV. 727 (1890) (an "essay to define Bentham's place in the history of our law, and to attempt an estimate of the Character and influence of his writings").

124. *See* Burbank, *supra* note 23, at 1047-49.

125. FED. R. CIV. P. 1.

126. *See* Carrington, *Continuing Work on the Civil Rules: Judgment as a Matter of Law,* 137 U. PA. L. REV. — (forthcoming 1989).

127. Scott, *Two Models of the Civil Process,* 27 STAN. L. REV. 937, 938 (1975); *see also* Fiss, *The Social and Political Foundations of Adjudication,* 6 J. LAW & HUM. BEHAV. 121 (1982).

128. FED. R. CIV. P. 26-37.

129. *See generally* A. KRONMAN, MAX WEBER 72-92 (1983) (discussing Weber's theory of formal legal rationality). Terence Halliday, in an attempt to validate Weber's thesis empirically, uses the development of court rulemaking power as a datum of Weberian rationalization. *See* T. HALLIDAY, BEYOND MONOPOLY: LAWYERS, STATE CRISES, AND PROFESSIONAL EMPOWERMENT 288-91 (1987).

rectly on the dispute resolution function of courts, the effective administration of the law is a hard goal to criticize. Most Congressmen want laws to work as well as possible and, thus, Congress has surrendered some of its undoubted power over the courts it created.

2. *Substantive and Political Neutrality.* Roscoe Pound described the authority of the courts to make rules for all as the first principle of reform.[130] What reformers such as Pound had in mind was the depoliticization of judicial procedure. On the basis of experiences in England and the United States, they feared and expected that groups of prospective litigants seeking short-term advantage through the legislature would neutralize the long-term effectiveness of judicial institutions and subject them to close oversight by the legislature. The reformers had observed that neutralization is associated with the numbing complexity and rigidity of procedural law produced by a democratic pursuit of short-term interest in matters of judicial procedure.

Indeed, it was the mother of parliaments—the British Parliament—that first embraced the idea of transferring responsibility for civil procedure to the judges themselves.[131] The Rules Enabling Act of 1934 was an imitation of the English Judicature Act of 1875,[132] already imitated by several American states beginning with Wyoming in 1890.[133]

The Rules Enabling Act was avowedly anti-democratic in the sense that it withdrew "procedural" law-making from the political arena and made it the activity of professional technicians. The politically responsive organs of government, the legislative and executive branches, were substantially excluded from participation in the process created by the Act, as were those familiar and important influences now often known (perhaps unjustly) by the opprobrium "special interest groups."

An important attribute of this apolitical approach to matters of procedure, though not often heralded, is the advancement of interests of persons with less power in the political process. Particularly in a democratic legislature, groups representing persons with a personal or professional

130. Pound, *A Practical Program of Procedural Reform,* 22 GREEN BAG 438, 443 (1940).

131. *See generally* S. ROSENBAUM, THE RULE-MAKING AUTHORITY IN THE ENGLISH SUPREME COURT 21 n.1 (1917) (describes the history of rulemaking and not the prevalence of judges on the Rules Committee). Judicial rulemaking remains a part of the English scheme. Comparison to that scheme is, however, treacherous, so different is the role of Parliament from that of Congress. *See* P. ATIYAH & R. SUMMERS, FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW 298-335 (1987).

132. *See The English Judicature Act and the American Codes,* 64 CENT. L.J. 105, 105 (1907) (advocating adoption of English Judicature Act by American state court systems); Fiero, *Report of the Committee on Uniformity of Procedure and Comparative Law,* 19 REP. A.B.A. 411, 416-18 (1896) (advocating adoption of modernizing uniform rules similar to those in England).

133. *See* R. POUND, ORGANIZATION OF COURTS 171 (1940).

stake in the operation of the judicial institutions, such as "repeat players"[134] and the organized bar,[135] exercise disproportionate influence on the process. The influence of such groups tends to protect the financial interest, and even the "intellectual investments," of those who work at court.[136] While these influences are generally clothed in a concern for the public interest and are often benign, the long term effect of their cumulative effort is to make the democratic political system especially slow in responding to concerns about the effectiveness of civil law enforcement on behalf of disorganized (and hence powerless) interests.

The collective force of these influences evokes the historic quip of Arthur Vanderbilt that "law reform is no sport for the short-winded."[137] Robert Millar also observed this characteristic of procedure reforms.[138] Its cause is no mystery: there is a ubiquitous shortage of political energy to overcome the influence of those with a stake in the judicial enterprise.

While the rulemaking process, being in the hands of judges, can hardly be expected to be disinterested in matters affecting the judges themselves, rulemakers can be expected to be energetic in serving the longer-term interests of judicial institutions, and insensitive to the political influences that impede legislators' efforts to devise effective procedure. The process such persons devise more nearly resembles a "level playing field" than does a process that is the product of conventional legislation.

3. *Generalism.* A closely related second principle of judicial law reform has been the principle of generalism. This principle is embodied in the Rules Enabling Act's mandate of giving the Supreme Court power

134. Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Social Change,* 9 LAW & SOC. REV. 95, 135-39 (1975).

135. But some bar organizations may be co-opted by the judiciary. *See* P. FISH, THE POLITICS OF FEDERAL JUDICIAL ADMINISTRATION 329-37 (1973).

136. The Federal Rules of Civil Procedure Amendments Act of 1982, Pub. L. No. 97-462, 96 Stat. 2527 (1982) (codified at 28 U.S.C. § 2071, Fed. R. Civ. P. 4), which allowed service of federal summons by mail, was the result of the political intiative of several individuals and groups, marshals and professional process servers among them. *See* Letter from Robert A. McConnell to Hon. Peter W. Rodino, Chairman, House Committee on the Judiciary, *reprinted in* 128 CONG. REC. H9848-49 (daily ed. Dec. 15, 1982) (letter transmitting Department of Justice Report on Federal Rules of Civil Procedure Amendments Act of 1982); *see also* Siegel, *Practice Commentary on Federal Rule 4 (eff. Feb. 26, 1983) with Special Statute of Limitations Precautions,* 96 F.R.D. 88, 90-92 (1983).

137. A. VANDERBILT, MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION xix (1949).

138. R. MILLAR, *supra* note 120, at 11 ("only primitive procedures afford a genuine representation of the epoch to which they belong: in proportion as there are advance from origins and progress in civilization, there is an increased divergence between rules of procedure and the conditions and exigencies of the time.") (quoting the Italian jurist, Chiovenda, *Le riforme Processuali e le Correnti del Pensiero Mondero,* in 1 SAGGI DI DIRITTO PROCESSUALE CIVILE 381 (1930)).

to prescribe "general rules,"[139] and is expressed in Rule 2 of the Federal Rules of Civil Procedure, which decrees that there shall be one cause of action.[140] Manifestly, this rule and the principle it embodies are related to the abolition of the forms of action[141] and the tradition of the Court of Chancery operating separately from the courts of law.[142] In these respects, the idea of generalism is deeply rooted in the English experience. The costs of the differentiated procedure of England were well known to those who drafted the Rules Enabling Act and the 1938 Rules.[143]

This principle of judicial law reform and of the Rules Enabling Act is reflected throughout the text of the Rules. Certainly, not every rule is universally applicable by its terms to every matter arising in a federal court.[144] Some rules have qualifications such as "when authorized by a statute of the United States,"[145] others incorporate by reference the law of the state in which the federal court sits,[146] and others have been the subject of implied exceptions, such as the rules that apply differently to proceedings brought in a federal court on the basis of diversity of citizenship of the parties.[147] Allowing for such exceptions, though, civil rules generally are written to apply without regard to the substantive nature of the issues in dispute.

Functionally, generalism in procedure is linked to the aim of avoiding "interest group" politics. The principle of generalism also contrasts with the premises of those who devised procedural systems for the fed-

139. *See supra* note 14; *see also* Subrin, *Federal Rules, Local Rules, and State Rules: Lessons from Uniformity and Divergence,* 137 U. PA. L. REV. — (forthcoming 1989).

140. FED. R. CIV. P. 2 provides: "There shall be one form of action to be known as 'civil action.'"

141. *See generally* F. MAITLAND, EQUITY, ALSO THE FORMS OF ACTION AT COMMON LAW: TWO COURSES OF LECTURES 293-374 (1909) (discussing the destruction of the common law classification of real, personal and mixed forms of action).

142. J. AMES, LECTURES ON LEGAL HISTORY 143-375 (2d ed. 1932).

143. *See* Burbank, *supra* note 23, at 1045 (noting ABA's reform move to halt costly litigation delays).

144. The three exceptions that stand out are FED. R. CIV. P. 23.1 (applicable to derivative shareholder suits); FED. R. CIV. P. 23.2 (applicable to suits involving unincorporated associations); FED. R. CIV. P. 71A (applicable to eminent domain proceedings); and the Supplemental Rules for Certain Admiralty and Maritime Claims. All were added after 1938. All can be described as elaborations of the general rules with which they are congruent.

145. *E.g.,* FED. R. CIV. P. 4(f) (process may be served outside territorial limits of state of district court, when authorized by statute).

146. *E.g.,* FED. R. CIV. P. 4(e) (summons may be served according to statutes or rules governing service in state where district court is located).

147. *E.g.,* FED. R. CIV. P. 3 ("A civil action is commenced by filing a complaint with the court."); *see also* West v. Conrail, 481 U.S. 35, 39 n.4 (1987) (in diversity cases, "state law not only provides the appropriate period of limitations but also determines whether service must be effected within that period").

eral administrative agencies,[148] which developed on a large scale during the same decade that the Federal Rules of Civil Procedure emerged.[149] Administrative procedure is avowedly designed to foster explicit, special substantive aims.[150]

A deficiency in the administrative process has been the lower level of institutional neutrality. To secure the apparent benefits of specialized adjudication in administrative agencies, it was necessary to trade off the appearance (and probably the reality) of greater disinterest than that which can be provided by general courts operating under rules promulgated by an apolitical process. Courts that aspire to substantive neutrality command greater acceptance and respect, and are more likely to be effective over the long term than are legal institutions with overt preferences for a particular group of litigants associated with a particular claim of right.[151] Acceptance of this premise is manifested in the constitutional subordination of specialized administrative decisionmaking to generalized judicial review.[152] Thus, the apolitical nature of the rulemaking process for courts and the requirement that rules of court be "general" has constitutional roots in the fifth amendment.[153]

A strength of generalist rules is simplicity. The virtue of simplicity was learned not only from common law procedure, but also from the

148. *See* J. LANDIS, THE ADMINISTRATIVE PROCESS 6-46 (1938); *see also id.* at 23 ("theorists have lifted the inexpertness that characterized our nineteenth century governmental mechanism to the level of a political principle.").

149. It is a curiosity that the Rules Enabling Act was adopted on the same day, June 19, 1934, as the Federal Communications Act. *See* Federal Communications Act of 1934, Pub. L. No. 73-416, 48 Stat. 1064. More at odds with the premises of the Rules Enabling Act was the National Labor Relations Act, adopted July 5, 1935. *See* Pub. L. No. 74-198, 49 Stat. 449 (1935).

150. *See generally* P. STRAUSS, AN INTRODUCTION TO ADMINISTRATIVE JUSTICE IN THE UNITED STATES 104 (1989) (noting "the close relationship between the substance of any particular agency's responsibility and the procedures it will employ").

151. On the need for triadic relationships, see the classic article , Fuller, *The Forms and Limits of Adjudication,* 92 HARV. L. REV. 353, 391 (1978).

152. *See generally* 5 K. DAVIS, ADMINISTRATIVE LAW TREATISE 253-460 (1984) (outlining constitutional and statutory standards for reviewability).

153. For these reasons, at least one state court has self-aggrandizingly declared a broad *inherent power* to make procedural rules. *See* Winberry v. Salisbury, 5 N.J. 240, 244-45, 74 A.2d 406, 408-09 (1950). For criticism, see Kaplan & Greene, *The Legislature's Relation to Judicial Rulemaking: An Appraisal of* Winberry v. Salisbury, 65 HARV. L. REV. 234 (1952); Levin & Amsterdam, *Legislative Conflict over Judicial Rulemaking: A Problem in Constitutional Revision,* 107 U. PA. L. REV. 1, 24-29 (1958) (reviewing debate on *Winberry;* concluding that courts should defer to legislated rules). *But see* Pound, *Procedure Under Rules of Court in New Jersey,* 66 HARV. L. REV. 28, 33 (1952) (praising court rule making powers and *Winberry*: "New Jersey, by conferring the full power on the highest court by constitutional provision, has obviated the difficulty which had long retarded this useful device for promoting the administration of justice."). As with English comparisons, *see supra* note 129, comparisons between state and federal systems are made difficult by differences in methods of selecting judges: a constitution providing for election of judges will appropriately have less concern for "undemocratic legislation" in the form of judicial rulemaking.

misfortunes of the English Hilary Rules of 1834[154] and the New York Throop Code of 1876,[155] both of which were intimately known to the generation of American lawyers who produced the Rules Enabling Act.[156] Procedural complexity, they knew, would be the master, not the servant, of substance.

The principle of generalism has been questioned by the late Professor Robert Cover[157] and others[158] who advocated "nontransubstantive" procedure. To the extent that this questioning assumes that a "nontransubstantive" procedure could be developed by rule of court, it simply ignores the nature of the rulemaking institutions. To the extent that it posits a large role for Congress, it takes leave (apparently unwittingly) of the major precepts of the reform movement.[159]

4. *Flexibility, Forgiveness, Integrality, and Judicial Professionalism.* In its link to simplicity of process, the generalism principle is related to other principles that are familiar to the judicial law reform movement. The 1938 Rules feature *flexibility* in the loosely textured drafting that leaves so much to the discretion of the judge who applies the Rules to a case at hand.[160] In this respect, the movement reflects a development also observed in other maturing legal systems "from rigidity to flexibility."[161]

Flexibility is a product of literary style in the writing of rules. Loosely-textured writing minimizes potential conflict of the rules with substantive rights. Procedure rules so written are adaptable to circumstance, and do not restrict judges. This flexibility is often made explicit in the text of a rule by conferring discretion on the court to employ a rule

154. *See* FIRST REPORT OF THE COMMISSION ON PROCESS, PRACTICE, AND PLEADING IN THE SUPERIOR COURTS OF COMMON LAW (1912).

155. *See generally* Burbank, *supra* note 23, at 1035-95 (discussing New York statutes of the 1800's).

156. *Id.*

157. Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules,* 84 YALE L.J. 718, 732-33 (1975) ("It is by no means intuitively apparent that the procedural needs of a complex antitrust action, a simple automobile negligence case, a hard-fought school integration suit, and an environmental class action . . . are sufficiently identical to be usefully encompassed in a single set of rules . . . .").

158. Burbank, *Of Rules and Discretion: The Supreme Court, Federal Rules and Common Law,* 64 NOTRE DAME L. REV. 693, 709 (1988); Resnik, *Failing Faith: Adjudicatory Procedure in Decline,* 53 U. CHI. L. REV. 494, 547-48 (1986); Subrin, *supra* note 75, at 985.

159. Carrington, *Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of "Non-Trans-Substantive" Rules of Civil Procedure,* 137 U. PA. L. REV. 2067, 2085-86.

160. *See generally* Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above,* 22 SYRACUSE L. REV. 635 (1971) (analyzing operation of trial court's discretion as a means of limiting appellate review).

161. R. MILLAR, *supra* note 120, at 5.

or not;[162] sometimes the flexibility results from a diction that is consciously open to allow for interpretation at the point of application.[163]

A secondary consequence of this literary style of rules is the ability to facilitate a re-integration of substance and procedure through court-made law. Rules of court that are flexible may be adapted in the course of their application to different substantive contexts.[164] In this way, loose texturing of rules sets the principle of generalism[165] and minimizes the likelihood of a genuine head-on conflict between court-made rules and congressional enactment.

Flexibility and simplicity also serve another principle close to the heart of the values of Rule 1: forgiveness. A comprehensive grievance against common law procedure and its derivative aspect associated with dispositions made on the basis of simple missteps by lawyers who also are officers of the court animated the reformers. The reform movement resisted the notion of litigation as a game of chance and tactical skill. A major purpose of allowing for discretion in the Federal Rules of Civil Procedure is to permit the process to be forgiving and to reduce the fre-

162. Of the eighty-six rules that comprise the Federal Rules of Civil Procedure, the term "discretion" appears in ten or so. Nevertheless, appellate courts have held that review-restraining discretion is implicitly present in thirty other provisions of the Rules. Sometimes the court finds it implied in the phrase "the court may" order, decrees, compel, or require, a particular result. For example, there are provisions reciting that the court may dismiss the complaint upon failure to take certain steps, or that it may impose costs, etc. The appellate courts reason that if the trial court *may* do something under the Rules, it also may not. That means the judge has a choice, *ergo* discretion.

Similarly, discretion is found implicit in the text of rules that authorize the court "for good cause" to order an act to be done or forborne; or that declare that the court "in the interest of justice" or "to avoid delay or prejudice" may make certain orders.

Rosenberg, *supra* note 158, at 655.

163. *See* R. MILLAR, *supra* note 120, at 5-6.

164. *See* Hazard, *The Forms of Action Under the Federal Rules of Civil Procedure,* 63 NOTRE DAME L. REV. 628, 635-44 (1988) (Two general purposes of Federal Rules of Civil Procedure are to allow all disputes regarding an out-of-court transaction to be litigated at once and to allow all relevant evidence to be considered. Yet, the generality of the rules has begun to give way in the face of differing concrete circumstances to judicial re-creation of forms of action via rules regarding joinder of claims, the scope of res judicata, burden of proof, and laws goveruing privileges and immunities.).

165. A second consequence of loose texture has been a contribution to the expanded role of the United States Courts of Appeals in reviewing procedural rulings of district courts. The "final decision" requirement for federal appellate jurisdiction, 28 U.S.C. § 1291 (1982), was in place when the Rules Enabling Act was adopted. Because the district courts have been supplied with sturdier tools and federal standards for their use, the exceptions and qualifications to the statutory requirement have grown since 1934, so that the work of adapting procedural rules to substantive context is often a task of a three-judge panel of a court of appeals. The result is a system that is flexible, but seldom controlled by the individual impulses of district judges. *See generally* Note, *Federal Civil Appellate Jurisdiction: An Interlocutory Restatement,* LAW & CONTEMP. PROBS., 3 Spring 1984 (orders regarding choice of forum, provisional and partial remedies, disqualification of judges, use of magistrates, masters, and jurors, counsel, pre- and post-trial orders, can be subjected to interlocutory review).

quency of arbitrary results from an act of negligence by a party or counsel.

Procedural flexibility makes greater demands on the professionalism of judges, based on the assumption that the judiciary can be trusted to strive (even if imperfectly) to apply the appropriate substantive law to cases it hears.[166] In this respect, the judicial law reform movement was linked not only to the development of professionalism in law, but also to professionalism among the judiciary. An additional linkage with judicial professionalism lies in the elevation of the judging profession that is associated with the exercise of rulemaking power by the Court. The Rules Enabling Act is a significant statement of Congress's confidence in the professionalism of its judiciary.

Flexibility and discretion relate to yet another characteristic of the procedural system. This characteristic is the integrality of the process: although staged, early steps anticipate later ones and the later ones are, of course, shaped by what went before. Implicit in the concept of general applicability and in the aims of Rule 1 is an expectation of coherence in rules promulgated under the Act. Coherence requires an interpretation of "practice and procedure" that allows the neutral process to complete itself. The characterization of a rule as substance or procedure must therefore take account of the extent to which the rule is integral to a system that serves the values stated in Rule 1.

5. *Testing the Validity of Rules of "Practice and Procedure" Not Affecting Substantive Rights.* The first two sentences of the Rules En-

166. This invites digression to consider the relation of procedural law reform to jurisprudence, a relationship most visible in the work of Roscoe Pound. It may have been a source of the friction between Pound and the youthful Karl Llewellyn that Pound perceived the more extreme declarations of Legal Realism to threaten the cause of judicial law reform. *See* Pound, *The Call for a Realist Jurisprudence,* 44 HARV. L. REV. 697, 701, 702, 705, 707, 708 (1931) (discussing extremes in five ideas most central to realist jurisprudence: a) "faith in masses of figures as having significance in and of themselves"; b) "belief in the exclusive significance or reality of some one method or line of approach"; c) "presupposition that some one psychological starting point is the *unum necessarium*"; d) "insistence on the unique single case rather than on the approximation to a uniform course of judicial behavior"; e) conception of law "as a body of devices for the purposes of business instead of as a body of means toward general social ends"); Llewellyn, *Some Realism about Realism—Responding to Dean Pound,* 44 HARV. L. REV. 1222 (1931) (rebutting Pound's descriptions of realist ideas as unsupported in the realist literature and listing nine of his own as more accurate, ultimately concluding that realists "are not a group"). To the extent that contemporary Critical Legal Studies teaches that judicial decisions are the product of class bias or cultural influence and not of professional judgment and discipline, the teaching does diminish prospects for the attainment, or even the pursuit, of the aims stated in Rule 1 (and perhaps any other aims). For an explanation of Critical Legal Studies, see generally M. KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES (1987). For further comment on the disutility of cultural determinism as a premise of law reform or other action, see Fish, *Dennis Martinez and the Uses of Theory,* 96 YALE L.J. 1773 (1987).

abling Act,[167] and the interpretative gloss that *Burlington Northern Railroad Co. v. Woods*[168] added, gain meaning from consideration of the values the Act seeks to achieve. As Cook would have it, a rule is functionally one of "practice and procedure," within the meaning of the first sentence, if the rule pertains to the operation of the federal courts and is integrated in a system generally applicable to all civil actions and suitably designed to achieve "just, speedy, and inexpensive" determinations. Such a rule does not affect a substantive right, within the meaning of the second sentence of the Act, if its application is sufficiently broad to evoke no organized political attention of a group of litigants or *prospective* litigants who (reasonably) claim to be specially and adversely affected by the rule. As applied to limitations law, this Cookian test allows rules of "practice and procedure" to include general limitations provisions, such as those pertaining to fraudulent concealment, discovery or disability, but clearly would disallow rules prescribing limitations of time for cases identified by substantive subject matter.

This test would not accord with the expectations of all participants in the deliberations that preceded the adoption of the Rules Enabling Act. Professor Burbank has demonstrated that at least some congressional draftsmen of the Rules Enabling Act did not intend to authorize the Court to make limitations law;[169] indeed, limitations was one of the few topics that was clearly identified in the rule debate as being excluded from rulemaking.[170]

The matter cannot, however, be resolved simply by reference to the historical materials that Professor Burbank has provided. Familiar difficulties inhere in any use of legislative history.[171] These difficulties are magnified when the statute to be interpreted is one that has acquired

167. 28 U.S.C. § 2072(a) (West Supp. 1988) and the first sentence of *id.* § 2072(b).

168. *See supra* note 43 and accompanying text.

169. *See* Burbank, *supra* note 23, at 1085-87.

170. *See* S. REP. NO. 1174, 69th Cong., 1st Sess. 9-10 (1926).

171. The English have long supposed that legislation can mean only what it says, unenacted expressions of purpose having no constitutional status at all. *See* Millar v. Taylor, 4 Burr. 2303, 2332, 98 Eng. Rep. 201, 217 (1769) ("The sense and meaning of an Act of Parliament must be collected from what it says when passed into a law; and not from the changes it underwent in the house where it took its rise. That history is not known to the other house, or to the Sovereign."). The practice of using committee reports as a basis for understanding legislation is an American invention, stoutly protested in its early years by Justice Robert H. Jackson. *See, e.g.*, United States v. Public Util. Comm'n, 345 U.S. 295, 318-20 (1953) (Jackson, J., concurring) (offering several policy objections to use of legislative history, including unavailability of committee reports to most Americans); Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 395-97 (1951) (same). Charles Curtis described the process as "fumbling about in the ashcans of the legislative process." C. CURTIS, IT'S YOUR LAW 52 (1954). For a contemporary statement of the problems with using such material, see R. DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 137-64 (1975).

through long usage some importance as a subconstitutional accommodation between co-equal branches of the government; originalism applied to such a statute has some of the same deficiencies associated with originalism in constitutional interpretation.[172] For example, it is unlikely that the founding fathers of rulemaking intended that their extra-textual pronouncements be used by succeeding generations as interpretative keys.[173] It is not clear, moreover, what scope of limitations law these advocates of rules enablement had in mind when they provided assurances that limitations law would not be procedural according to their Act. It is important to remember that limitations law in 1934 was simple relative to the more general issues of commencement and tolling which have since gained importance and complexity.[174]

The proposed test is consistent with usage of the Act since 1938. The original Rules included two provisions that the draftsmen regarded as having possible limitations law consequences, Rule 3[175] and Rule 15(c).[176] There was doubt manifested in the Advisory Committee Note to Rule 3 as to whether the rule did or could have such consequences.[177] The note apparently reflected a dispute within the Committee.[178] With respect to Rule 15(c), however, no such doubt was expressed; at least the first sentence of that subdivision seems to have no meaning except as a tolling provision. Both of these provisions now have substantial histories and have been used directly to resolve limitations issues.[179] Although Rule 3 has been read narrowly in *Ragan* [180] and *Walker* [181] to allow ap-

172. *See* Sandalow, *Constitutional Interpretation,* 79 MICH. L. REV. 1033, 1071 (1981) (constitutional law in evolving context cannot be limited by intent of Framers in earlier context).

173. At the time of enactment of the Rules Enabling Act, committee reports, debates, and similar material were not considered to have legal significance. *See supra* note 169; *cf.* Powell, *The Original Understanding of Original Intent,* 98 HARV. L. REV. 885 (1985) (Framers of Constitution did not conceive of "original intent" as determinative of personal intentions of individual historical actors).

174. *See supra* text accompanying notes 67-75.

175. FED. R. CIV. P. 3 ("A civil action is commenced by filing a complaint with the court.").

176. In its original 1938 form, the Rule read:

> (c) RELATION BACK OF AMENDMENTS. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.

FED. R. CIV. P. 15(c), 308 U.S. 683 (1939).

177. FED. R. CIV. P. 3 advisory committee's note ("The answer to this question may depend on whether it is competent for the Supreme Court, exercising the power to make rules of procedure without affecting substantive rights, to vary the operation of statutes of limitations.").

178. The story is told by Burbank, *supra* note 23, at 1158-63 & 1159 n.619.

179. With respect to the history of Rule 15(c), see Lewis, *The Excessive History of Federal Rule 15(c) and Its Lessons for Civil Rules Revision,* 85 MICH. L. REV. 1507 (1987); with respect to Rule 3, see *infra* text accompanying notes 200-21.

180. Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530 (1949). One explanation offered for the difference in the outcome in *Hanna* and *Ragan* is that *Ragan* presented a false con-

plication of conflicting state limitations law, neither provision, however interpreted, has been questioned as exceeding the Court's authority to make rules.

On the other hand, despite the deplorable incoherence of federal limitations law,[182] few, if any, observers have advocated that the rulemaking process be used to develop a corpus of limitations law for use in federal litigation arising from federal substantive rights. This is so even with respect to principles of limitations law that have general applicability without regard to the specific substantive nature of the limited claims.

C. *Applying a Functional Test: The Validity of Rules 3, 4, 15, and 23.*

1. *Rule 15.* Subdivision (c) of Rule 15 is the only Federal Rule of Civil Procedure unquestionably touching on matters of limitations. In its 1938 form, it provided that certain amendments to pleadings might "relate back" to the date of the original pleading.[183] No explicit mention was made of limitations law, but the rule could have no other referent. Thus, even in 1938, it was clear enough to rulemakers that some rules bearing on limitations law would fall within the authority conferred by the first sentence of the 1934 Act.[184] Rule 15(c) expressed an aim of the reform movement to reduce the frequency with which outcomes result from missteps of counsel[185] and it was integral to the pleading rules, particularly Rule 8, a rule which is almost wholly forgiving of technical lapses in complaint drafting.[186] The forgiving spirit of Rule 8 required the liberal amendment provision of Rule 15(a),[187] which, in turn, re-

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flict in which the federal and state rules were not at odds. *See, e.g.*, J. FRIEDENTHAL, M. KANE & A. MILLER, CIVIL PROCEDURE 208-09 (1985).

181. Walker v. Armco Steel Corp., 446 U.S. 740, 750-52 (1980).

182. *See* Marcus, *Fraudulent Concealment in Federal Court: Toward a More Disparate Standard?*, 71 GEO. L.J. 829, 831-34 (1971) ("Given the ad hoc approach of the lower courts [to the tolling doctrine], haphazard results have been almost inevitable . . . .").

183. *See supra* note 174 (reprinting the subdivision in its original form). The first sentence of the subdivision reads today as it read in 1938. *See* FED. R. CIV. P. 15(c).

184. *See* Burbank, *supra* note 23, at 1160-61 (discussing "reverse incorporation," whereby a tolling function might be read into Rule 3 if Congress has not provided a governing rule).

185. *See* Clark, *The Handmaid of Justice*, 23 WASH. U.L.Q. 297 (1938); Pound, *Some Principles of Procedural Reform*, 4 ILL. L. REV. 388 (1910).

186. The pertinent language is: "A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief . . . ." FED. R. CIV. P. 8(a).

187. FED. R. CIV. P. 15(a) provides:

> A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend at any time within 20 days after it is served. Otherwise a party may amend the

quired the relation-back rule set forth in the old first sentence of Rule 15(c). Without the relation-back provision, the purpose of Rule 8 would have been frustrated by courts holding that minor and cosmetic pleading amendments were precluded by an applicable statute of limitations.

In 1934, Congress and others who favored simplicity in procedure and were sympathetic to Rule 8's forgiving purpose surely must have welcomed and approved the original Rule 15(c). It seems likely that there would have been general disappointment in the effectiveness of the Act if it had been deemed necessary to mount a political campaign in favor of the idea of relation back. In fact, it is difficult to imagine a group that might form a political unity around such an abstruse idea with so little foreseeable impact on identifiable persons. Obviating a need for just this kind of politics was an important aim of the Act. Functional analysis seems therefore to explain and fully justify this 1938 rule that most explicitly makes limitations law.

A similar analysis sustains the validity of the 1966 amendment to Rule 15(c) as an appropriate exercise of authority vested by the Rules Enabling Act. That amendment added the remainder of the present text of subdivision (c) and thus extended the application of the doctrine of relation back to at least some amendments that added parties to an action.[188] The 1966 addition served the specific purpose of terminating the Justice Department's practice of invoking time limitations against plaintiffs who commenced timely actions against the wrong officer or agency of the United States;[189] it also was intended to serve the general purpose of liberalizing the availability of relation back for plaintiffs who timely commenced suits against the wrong defendants and whose mistakes were

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party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

188. Added in 1966 was the following language, here set forth in its present, gender-neutralized form:

> An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against the party to be brought in by amendment, that party (1) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.
>
> The delivery or mailing of process to the United States Attorney, or the United States Attorney's designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named, satisfies the requirement of clauses (1) and (2) hereof with respect to the United States or any agency or officer thereof to be brought into the action as a defendant.

FED. R. CIV. P. 15(c) (as amended for gender neutrality in 1987).

189. *See generally* Byse, *Suing the "Wrong" Defendant in Judicial Review of Federal Administrative Action: Proposals for Reform*, 77 HARV. L. REV. 40 (1963) (discussing four cases in which courts reached inequitable results by restrictively interpreting pre-1966 versions of Rules 4(h), 15, and 21).

known to the intended defendants.[190]

The 1966 amendment was at issue in *Schiavone v. Fortune,*[191] decided in 1986. Schiavone was an uninformed plaintiff who served his defamation complaint on the officers of *Fortune* magazine, only to learn after the statute had run that Time, Inc. is the correct name of the institution against whom he claimed. This was an ordinary case of misnomer and possibly might have been handled before 1966 as a simple problem of pleading amendment under the first sentence of the present rule.[192] But alas, that is not what happened in 1986. The *Schiavone* opinion is a nightmare for rulemakers because it employs not only the text of the rule but even the Advisory Committee Notes to defeat the rule's liberalizing purpose, with all nine Justices deploring the result. It is a case ripe for analysis by literary theorists who suppose that the meaning of legal texts is wholly created by the reader.[193]

Partly in response to trenchant criticisms of both *Schiavone* and the present rule by Harold Lewis[194] and Robert Brussack,[195] rulemakers are presently trying to repair Rule 15(c). As this task proceeds, consideration has been given to a concern that, at the margins of its potential reach, Rule 15(c) arguably extends beyond the proper bounds of procedure as functionally defined.

Nevertheless, the pleading rules can and should allow for the correction of misnomers of the kind specifically involved in *Schiavone.* Where there is such a misnomer or even where there is an identity of interest between the person actually served and the person later joined, the liberal relation back provisions are integral to the procedural arrangements regarding joinder also set out in the Rules.

Integrality is, however, less clear if the second sentence of Rule 15(c) applies when timely service of the complaint is made on a defendant with name similarity but no link to the person intended to be sued. An illustrative case is *Ingram v. Kumar.*[196] In *Ingram,* the doctor who

190. *See* Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments to the Federal Rules of Civil Procedure (I),* 81 HARV. L. REV. 356, 408-10 (1967) (amendment of Rule 15(c) necessary to avoid "wooden application" of former Rule).

191. 477 U.S. 21 (1986).

192. *See* Haworth, *Changing Defendants in Private Civil Actions Under Federal Rule 15(c)—An Ancient Problem Lingers On,* 1975 WIS. L. REV. 552, 553-57 (prior to 1966, simple caption errors could be cured by amendment, subject only to requirements of Rule 15(c)'s first sentence).

193. *See, e.g.,* Fish, *Literature in the Reader: Affective Stylistics, reprinted in* READER-CENTERED CRITICISM 70, 77-78 (J. Tompkins ed. 1980) (No direct relation between meaning of a sentence and what its words mean; rather, experience of the reader provides *all* of its meaning).

194. Lewis, *supra* note 177.

195. *See* Brussack, *Outrageous* Fortune: *The Case for Amending Rule 15(c) Again,* 61 S. CAL. L. REV. 671 (1988).

196. 585 F.2d 566 (2d Cir. 1978), *cert. denied,* 440 U.S. 940 (1979).

was joined by amendment (after the statute had run) had not timely learned of a malpractice action by his former patient against another doctor having a similar name.[197] Was this a claim intended to be saved by the 1966 amendment to Rule 15(c)? In such a situation, is the rule fairly one of "practice and procedure," or does it enlarge a substantive right? In either case, the rule would overreach the authority of the Rules Enabling Act and the question presents more difficulty than generally presumed.

On the one hand, a rule that provides relation back in cases of mistaken identity is appropriately general and involves a matter of little or no short-term political interest to any organizable group of prospective litigants. It is difficult to imagine the Ingrams of the world marching on Congress to secure a more forgiving rule of limitations law. It is also difficult to consider the harsher rule as the product of a democratic political victory by defendants that ought not be disturbed by undemocratic procedural rulemaking. In these respects, a mistaken identity rule would seem to be linked to similar problems of misnomer and identity of interest and perhaps clearly within the authority conferred by the first sentence.

On the other hand, the consequences of the rule and the events giving rise to its application both occur outside the court. Either the real doctor Kumar can sleep more easily or not, but there is little connection between his slumber and the procedural values of Rule 1. Mistaken identity is not a mere technical misstep by an officer of the court, but rather a blunder that occurred before there was a civil action. Seen in this light, the marginal reach of Rule 15(c) can, perhaps, be questioned.

With the possible exception of mistaken identity, however, Rule 15(c) is clearly an appropriate exercise of rulemaking authority.[198] It is not plausible to contend that all applications of the relation back principle are outside the scope of power conferred by the Rules Enabling Act because the principle clearly serves the aims of Rule 1 and is functionally integral to the policy of forgiveness that reflects those aims.

2. *Rule 3.* A second rule with apparent consequences for limitations law is Rule 3, which provides simply that "[a] civil action is commenced by filing a complaint with the court."[199] This rule is, if nothing

197. 585 F.2d at 571.

198. *Cf.* Burlington N.R.R. v. Woods, 480 U.S. 1, 5 (1987) ("The constitutional constraints on the exercise of . . . rulemaking authority define a test of reasonableness.").

199. FED. R. CIV. P. 3.

more, a benchmark for time limits set forth in Rules 23,[200] 56,[201] and 64.[202] It remains unchanged from its 1938 form.[203]

Does Rule 3 also establish a commencement-by-filing rule for limitations purposes, or is it consistent with a commencement-by-service requirement, as may be imposed by the limitations legislation that otherwise controls? Professor Burbank has reminded us that, despite earlier assurances by the Rules Enabling Act's proponents that the rules would not create limitations law,[204] Charles Clark, the first Reporter for the Court's Civil Rules Advisory Committee, would have preferred that Rule 3 establish a commencement-by-filing rule.[205] Although the 1938 text leaves the issue open, Clark urged the Advisory Committee to state in the Committee Notes that Rule 3 was intended to have a tolling effect on limitations.[206] Perhaps Clark's inability to get the Advisory Committee to approve his note should have been understood as a confirmation that Rule 3 has no such purpose, but it was not so taken.

Rule 3 was considered in *Ragan*[207] and again in *Walker.*[208] In both cases, the Court read Rule 3 to be inapplicable to limitations issues arising in diversity litigation, but explicitly left open the question whether Rule 3 might be a source of limitations law in federal question litigation.[209] Despite this latter uncertainty, the Court's reading of Rule 3 appeared to confine the Rule to the function of benchmark.

But in *West v. Conrail, Inc.,* the Court recognized the tolling effect of Rule 3 without questioning whether such a tolling ruling is authorized by the Rules Enabling Act.[210] The action in *West* was one for breach of the federal duty of fair representation under the Landrum-Griffin Act.[211] Since Congress specified no limitation of time on Landrum-Griffin actions, the Court borrowed the period of limitation from the National Labor Relations Act (NLRA),[212] but applied a commencement-by-filing rule derived from Rule 3 and not the commencement-by-service rule

200. Rule 23 requires the court to determine "[a]s soon as practicable after the *commencement of an action*" whether it should proceed as a class action. FED. R. CIV. P. 23(c)(1) (emphasis added).

201. Rule 56 requires that a movant wait 20 days after the commencement of an action before moving for summary judgment. FED. R. CIV. P. 56(a).

202. Rule 64 makes provisional remedies available "[a]t the commencement of . . . an action." FED. R. CIV. P. 64.

203. *See* FED. R. CIV. P. 3, 308 U.S. 664 (1939).

204. S. REP. NO. 1174, 69th Cong., 1st Sess. 9-10 (1926).

205. *See* Burbank, *supra* note 23, at 1087-88.

206. *See id.,* at 1159 n.620.

207. Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530 (1949).

208. Walker v. Armco Steel Corp., 446 U.S. 740 (1980).

209. *Walker,* 446 U.S. at 751 n.11; *Ragan,* 337 U.S. at 532-33.

210. 481 U.S. 35, 39 (1987).

211. 29 U.S.C. § 185 (1982).

212. 29 U.S.C. § 160(b) (1982).

specified in the NLRA.[213] The Court answered the question that it had reserved in *Ragan* and *Walker* by holding that Rule 3 does have a tolling effect with respect to claims arising under federal law, at least in the absence of an explicit provision in the law giving rise to the action.[214]

Given the inadequacies of federal limitations law established by Congress,[215] the Court cannot be strongly criticized for using Rule 3 as it did in *West*. Perhaps the case can be best understood as a desperate resort to the Federal Rules of Civil Procedure as filler to occupy lacunae in the riddled corpus of federal limitations law as established by either Congress or the federal common law.[216] Yet the availability of pertinent filler from the NLRA makes this interpretation of the decision doubtful.

So how does one explain a Rule 3 that is a principle of limitations law applicable to some cases but not others, according to the basis of federal jurisdiction? It is important to recognize that the commencement-by-filing rule is one inherently attractive to the Court, perhaps for the same reasons that in 1937 it was attractive to Charles Clark and those who supported him.

One reason for the Rule's attractiveness is that commencement-by-filing is a more forgiving rule than commencement-by-service, which requires timely planning and management by counsel. Another reason is that a commencement-by-filing rule is less complex. Yet another possible reason is that there is virtue in having a single rule applicable to all cases so that more lawyers and litigants will know the rule and comply with it. A requirement of commencement-by-service can be a trap for the unwary—a rule that punishes a party for a misstep of an officer of the court. If these are the aims of Rule 3, they surely are congruent with Rule 1 and the procedural values animating the reform movement. Except insofar as the Rule generally favors plaintiffs and not defendants, it is lacking in interest to organizable "special interest" groups of the sort that the rulemaking process was designed to exclude. So understood, a commencement-by-filing rule is a valid exercise of authority conferred by the first sentence of the Rules Enabling Act.

On the other hand, it can be contended that a commencement-by-filing rule has little to do with the aims expressed in Rule 1, or with simplified pleading, discovery, joinder of claims and parties, or any of the

213. 29 U.S.C. § 160(b) provides: "[N]o complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom the charge is made[.]"

214. West v. Conrail, Inc., 481 U.S. 35, 37-38 (1987).

215. *See supra* text accompanying notes 77-86.

216. *But see* Burbank, *supra* note 23, at 1147-57 (discussing intentional incorporation of federal statutory and decisional law into the federal rules).

other central features of the new federal practice. A commencement-by-filing rule has as its direct effect the lengthening of the period during which a defendant is exposed to suit. Moreover, whether limitations periods are tolled by filing or by service of the complaint is an issue that strikes at the substantive heart of limitations policy. If limitations law is made to protect the repose of defendants, it is service, not filing, that ought to be the crucial act; if its purpose is to regulate plaintiffs, the opposite choice should be made. The choice in either event is essentially political and therefore not properly made by a procedural rule of court.

The *West* decision perhaps could be taken to mean that the former argument has carried the day over the latter. If so, and if Rule 3 does establish a commencement-by-filing rule in federal courts, why should it also not be applicable to state law claims brought to federal courts in the exercise of diversity jurisdiction? The Court has clearly left undisturbed *Walker* and *Ragan* by requiring deference to state law in diversity cases. The best explanation seems to be that *Walker* is simply an anomaly, a relic of the heyday of *Erie.* Because *Ragan* was a matter of statutory interpretation,[217] and not a very consequential matter at that, the Court did not choose to overrule it,[218] but rather left it to Congress or the rulemakers to make Rule 3 explicit, as Charles Clark might have advocated. Whatever doubts *Hanna* may have created about the sweep of the Rules Enabling Act,[219] it left no uncertainty that Congress or its surrogate rulemakers are equally free to write such a rule insofar as the Rules of Decision Act or considerations of federalism may apply. *West,* in turn, leaves little doubt that separation of powers considerations are also no impediment to the creation by court rule of a provision for commencement-by-filing. Thus, Rule 3 could have been written as Charles Clark wished:

> *For the purpose of tolling an applicable statute of limitations or for other purposes provided in these rules,* a civil action is commenced by filing a complaint with the court.

What may be lacking in this conclusion is an appreciation of the mystic second sentence of the Rules Enabling Act[220] and its possible revival to protect a substantive right or a limitation created by state law. Had *Hanna* been decided otherwise,[221] one might be tempted to suggest, as a problematic example, a case in which an action is timely filed but not timely served, as required by a specific state law that gave rise to the

217. Ragan v. Merchants Transfer and Warehouse Co., 337 U.S. 530, 533 (1949).

218. *See* Walker v. Armco Steel Corp., 446 U.S. 740, 748-52 (1980).

219. *See supra* text accompanying notes 106-17.

220. This sentence is now the first sentence of 28 U.S.C.A. § 2072(b) (West Supp. 1989): "Such rules shall not abridge, enlarge, or modify any substantive right."

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

action and that also created a right to prompt notice of claim by service on the defendant. The Massachusetts statute in question in *Hanna*[222] could have been said to confer such a right, and such a right could have been characterized as substantive within the meaning of the second sentence of the Rules Enabling Act. The Court in *Hanna* made no reference to that provision.

A more cautious reformulation of Rule 3 might read:

> For the purpose of tolling an applicable statute of limitations *of the United States,* unless the statute otherwise specifically provides, a civil action is commenced by filing a complaint with the court.[223]

There is no doubt that such a rule would be a valid exercise of power conferred by the first sentence of the Rules Enabling Act. It also would open the possibility of a different result in a case like *Hanna.*

3. *Rule 23.* On its face, Rule 23[224] has no bearing on limitations law. Limitations law in class actions, so far as it appears, was not on the mind of the draftsmen in 1938 or in 1966, when the rule was rewritten.[225] The incidental consequence of the 1966 amendment was first brought to the attention of the Supreme Court in 1974 in *American Pipe & Construction Co. v. Utah.*[226] That case involved a claim arising under a federal law that was subject to an explicit statute of limitations.[227] The action was timely filed as a class suit but, after the limitations period had run, the district court denied class certification for the reason that the class was not so numerous as to meet the classification requirement.[228] Sixty members of the class then filed a motion to intervene to assert their individual claims, and they succeeded in overcoming the limitations defense based on the contention that the statute of limitations had been tolled during the pendency of the class suit.[229] The Court emphasized that the

222. *Id.* at 474.

223. *See* Chayes, *supra* note 106, at 749. The definition of commencement has other purposes, *see supra* notes 197-99 and accompanying text, which can be ignored for this purpose.

224. FED. R. CIV. P. 23.

225. *See* FED. R. CIV. P. 23 advisory committee's note, 308 U.S. 689 (1939). The rule was rewritten and promulgated Feb. 28, 1966, effective July 1, 1966. *See* FED. R. CIV. P. 23 advisory committee's note, 383 U.S. 1047 (1965). The problem of limitations in class actions antedated the 1966 amendment, of course, but did not reach the Supreme Court. *See generally* Simeone, *Procedural Problems of Class Suits,* 60 MICH. L. REV. 905, 938-39 (1962) (traditional class action tolls limitations statute for all potential parties, but "spurious" class action, involving separate causes of action joined together for convenience, does not toll the statute for later parties seeking to join).

226. 414 U.S. 538 (1974).

227. Clayton Act, ch. 283 § 5(b), 69 Stat. 282 (1955) (current version at 15 U.S.C. § 16(i) (1982)) (one year limitations period).

228. *American Pipe,* 414 U.S. at 548.

229. *Id.* at 544.

individual plaintiff had not "slept on his rights,"[230] and that the substantive aims of limitations law would not be served by enforcing the time bar. To the contrary, imposition of the bar would defeat the aim of Rule 23 to foster confidence in representative litigation by requiring class members to intervene individually to protect themselves from the time bar.[231] While acknowledging the second sentence of the Act, the Court said that "[t]he proper test is not whether a time limitation is 'substantive' or 'procedural,' but whether tolling the limitation in a given context is consonant with the legislative scheme."[232] The Court concluded that the federal statute with its limitations provisions was "consonant" with the use of Rule 23 to toll the statute during the pendency of the class suit.

In *Chardon v. Fumero Soto,*[233] a class suit asserted claims arising under federal civil rights law[234] subject under federal law to the limitations law of Puerto Rico.[235] When the class action was dismissed, individual actions were filed.[236] The timeliness of the individual actions was challenged on the ground that the statutory period had run, even if it had been tolled during the pendency of the class action.[237] It appeared, however, that the Puerto Rico law of limitations provided that the limitation period would start to run anew when a tolling period comes to an end. The Court applied this Puerto Rican limitations law to save individual federal civil rights claims that otherwise would have been barred, explaining that "[s]ince the application of this state-law rule gives unnamed class members the same protection as if they had filed actions in their own names which were subsequently dismissed, the federal interest set forth in *American Pipe* is fully protected."[238] While this decision applied state law to save the individual actions, it did so on the authority of Rule 23. It thus reaffirmed the implication of *American Pipe* that limitations law that is integral to the concept of the class action could be derived from that source.

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230. *Id.* at 554 (citing Burnett v. New York Cent. R.R., 380 U.S. 424, 428 (1963)).

231. *Id.* at 555-56. This holding was extended in United Air Lines, Inc. v. McDonald, 432 U.S. 385, 393-96 (1977), to protect the right of the class member to intervene for the purpose of appealing a denial of class action certification. It was further extended in Crown Cork & Seal Co. v. Parker, 462 U.S. 345, 353-54 (1983), to protect the right of the class member to commence an individual action on the same claim formerly asserted in the class suit.

232. *American Pipe,* 414 U.S. at 557-58.

233. 462 U.S. 650 (1983).

234. 42 U.S.C. § 1983 (1982).

235. *See* Board of Regents v. Tomanio, 446 U.S. 478, 483 (1980) (in § 1983 cases, federal courts must apply local limitations law and local tolling provisions).

236. *Chardon,* 462 U.S. at 652-53.

237. *Id.* at 653.

238. *Id.* at 661.

In neither case did the Court entertain doubt that Rule 23 could and should be used as a source of limitations law, whether to facilitate tolling of a federal limitation as in *American Pipe* or to invoke the tolling provision of Puerto Rican law in *Chardon.* Both decisions were correct accommodations of federal civil procedure to the vagaries of limitations law, and of controlling limitations law to the needs of a federal procedure that is faithful to the expectations of the reform movement that created it. It would have been harsh gamesmanship in either case to bar the individual claimants who may have relied on the filing of the class suit to protect their interests, and nothing in the Rules Enabling Act could have required such results.

4. *Rule 4.* Rule 4[239] has no necessary bearing on limitations law.[240] It defines the ceremony by which the court provides notice to the defendant of the proceeding and imposes its power over that person. Should this rule be given effect as a prescription of the conduct required of the plaintiff—namely the means by which notice is given to the defendant—to make a timely commencement of an action? If so, is it a valid exercise of the rulemaking power?

Hanna gave an affirmative answer to both questions in an action to enforce a state-created right.[241] As a result of *Hanna,* Rule 4 displaced a specific Massachusetts limitation applicable to claims against a decedent's estate which required that the fiduciary have the complaint "in hand" within a short limitations period.[242] This result has been questioned not only by Justice Harlan in his concurring opinion,[243] but also by other critics, including Abram Chayes, who have observed that the Massachusetts statute manifests, by the explicitness of its application, a substantive purpose to wind up estates promptly,[244] a purpose that is impeded by the application of Rule 4 effectively to extend the short limitations period.

One may still wonder why the Court did not read Rule 4 more narrowly so that it applies only to resolve questions of the sufficiency of notice to the defendant and the power of the court over her person, and not to measure the timeliness, for limitations purposes, of the notice

239. FED. R. CIV. P. 4.

240. *But cf.* Siegel, *Practice Commentary on Amendment of Federal Rule 4 (Eff. Feb. 26, 1983) with Special Statute of Limitations Precautions,* 96 F.R.D. 88, 97-115 (1983) (discussing new 120-day limit, effects of private process server's wrongdoing, and time constraints when mail is used).

241. Hanna v. Plumer, 380 U.S. 460, 470, 473-74 (1965).

242. *Id.* at 470.

243. *Id.* at 478.

244. Chayes, *supra* note 106, at 751-52. *But see* Ely, *supra* note 106, at 759-60 (noting that the executor was, in fact, served inside the one-year period, although service was not made in hand).

given to the defendant. Such a narrow reading of Rule 4 would mirror the reading given Rule 3 in *Ragan,* and would have been consistent with the text and the functions of Rule 4—as the strained *Ragan* interpretation of Rule 3 was not. Such a reading also would have resembled the approach to Rule 23 later taken in *Chardon.* Moreover, such a holding would have reflected the Court's later dictum in *Burlington Northern Railroad Co. v. Woods.*[245]

Wonder as we may, the fact is that *Hanna* did establish Rule 4 as a source of limitations law. The Court seemed to say, with respect to limitations matters, that the Rules Enabling Act trumps the Rules of Decision Act wherever both are played on the same trick even with respect to provisions having no necessary application. As others have remarked, this position is inconsistent with the approach, although not the holdings, in *Ragan* and *Walker.*[246] But such remarks only emphasize the reality that Rule 4 is now a provision of federal limitations law as well as a prescription of the method by which defendants are notified of actions filed against them.[247] Perhaps for additional emphasis, Congress in 1982 also added subdivision (j) to Rule 4, a provision with potentially substantial consequences as limitations law.[248]

If there could be any doubt about Rule 4's validity as limitations law, the doubt was erased in 1982 by the adoption of Rule 4 as a statute.[249] Under this circumstance, no separation of powers issue can remain.[250]

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245. 480 U.S. 1, 4-5 (1987) ("The initial step is to determine whether, when fairly construed, the . . . Federal Rule . . . is 'sufficiently broad' to cause a 'direct collision' with a state law or, implicitly, to 'control the issue' before the court, thereby leaving no room for the operation of that law.").

246. *Cf. Hanna,* 380 U.S. at 476-77 (Harlan, J., concurring) (calling *Hanna* majority opinion inconsistent with *Ragan*); Burbank, *supra* note 23, at 1174-75 (discussing Court's attempt to distinguish *Hanna* and *Ragan*).

247. While Rule 4(j) merely limits the time within which service must be completed after filing, and calls only for dismissal without prejudice and not for the imposition of a time bar, it can be even more readily construed as an implied tolling provision than can those provisions of Rule 4 which originated with court rulemaking. Kane, *The Golden Wedding Years:* Erie R.R. v. Tompkins *and the Federal Rules,* 63 NOTRE DAME L. REV. 671, 681-84 (1988); Walker, *The 1983 Amendments to Federal Rule of Civil Procedure 4—Process, Jurisdiction and* Erie *Principles Revisited,* 19 WAKE FOREST L. REV. 957, 977 (1983).

248. FED R. CIV. P. 4(j):

> If a service of a summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion.

249. Federal Rules of Civil Procedure Amendments Act of 1982, Pub. L. No. 97-462, § 2, 96 Stat. 2527, 2528 (1982) (codified at 28 U.S.C. § 2071 note (Supp. V 1987)).

250. *Cf.* Jones & Laughlin Steel, Inc. v. Mon River Towing, Inc., 772 F.2d 62, 66 (3d Cir. 1985) (Rule 4(i) supersedes Suits in Admiralty Act); Flaminio v. Honda Motor Car, Ltd., 733 F.2d 463,

Despite this certainty, it may be useful to inquire whether a rule prescribing the proper means of notification for limitations purposes would, or should, be regarded as a rule authorized by the first sentence of the Rules Enabling Act. Again, such a rule is certainly a general one and evokes opposition from no one in particular. In addition, a need for some rule to deal with this issue is created by the commencement-by-filing rule at least partially established by Rule 3; in this sense, Rule 4 is integral. Indeed, a means-of-notice provision is much less consequential to the values served by limitations law than is the commencement-by-filing rule. The usual utilities of simplicity and uniformity are present.

A contrary argument is not easy to make. No visibly significant policy of Congress or a state legislature seems to be in jeopardy from a court rule defining the means of notice that are timely and effective to preserve an action timely commenced by filing. I therefore conclude that a means-of-notice provision is a valid exercise of the rulemaking power conferred by the Act.

5. *Civil Rules as Limitations Law.* Despite the absence of direct holdings by the Supreme Court, the authority of the rulemaking process to create limitations law is marked with reasonable clarity, not only by functional analysis but also by a half century of experience with rules touching on limitations issues. Rulemakers do have authority under the first sentence of the Act to make *general* limitations law that is integral to the federal procedural system of which it is a part.

The opposite conclusion is assured with respect to rules purportedly of "practice and procedure" that would make limitations law that is claim-specific, such as a limitation of time applicable to claims arising under a specified federal law. While perhaps "arguably procedural," such a rule would not be a "general rule of . . . procedure" within the meaning of the Act, and would modify or abridge a substantive right within the meaning of the second sentence.

These conclusions will not satisfy all sides in the continuing debate about the utility and importance of repose in civil disputes and the need for rigor in deadline enforcement. But partisans of harsher or more forgiving limitations law that are written to bear on particular classes of claims must be referred to Congress as the proper forum for their contest.

470-71 (7th Cir. 1984) (because Federal Rules of Evidence were enacted by Congress, they are not affected by the Rules Enabling Act and may affect substantive rights).

IV. SUPERSESSION

The text of the Rules Enabling Act confirms a relationship between the supersession provision and the enabling provisions. Supersession can be achieved only by "*such* rules" as have been promulgated under the Act. Thus, to supersede a pre-existing enactment, a Rule must: (1) be "general"; (2) prescribe "practice and procedure" in the federal courts; (3) not "abridge, enlarge, or modify any substantive right"; and (4) be "in conflict" with the pre-existing legislation.

By necessary implication from the text, a law conflicting with a rule of court can be superseded only in so far as it does not confer a "substantive right." Also necessarily, only a federal law could be superseded, for "such rules" are limited in their application to federal courts, and "all laws" therefore cannot include state laws written primarily to be enforced in state courts.[251]

Supersession has been applied seldom, and its immediate significance seems slight. The contested applications have involved the Federal Rules of Appellate Procedure, which were held to supersede congressional enactments bearing on such matters as extensions of time for appeal,[252] the taxability of printing costs,[253] and proctors' fees in admiralty appeals.[254] The fact that supersession has been rare and prosaic is not surprising. The generalist and flexible features of the rules serve to make the need to safeguard any substantive rights infrequent.[255]

The supersession provision was added to the 1934 Act to obviate a need for explicit repeal of any provisions of the Judicial Code which might later be found to be in conflict with the new rules.[256] At this time, it serves three possible functions.

First, it is functionally linked to the requirement that rules be reported to Congress.[257] The reporting requirement assures congressional

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

252. Cederbaums v. Harris, 484 F. Supp. 125, 128 (S.D.N.Y. 1980) ("To the extent that [28 U.S.C. §] 2107 conflicts with the Federal Rules of Appellate Procedure, the latter governs.").

253. Albatross Tanker Corp. v. S.S. Amoco Del., 418 F.2d 248, 248 (2d Cir. 1969) ("28 U.S.C. § 1923(c) has been superseded by [FED. R. APP. P.] 39(c)").

254. Waterman S.S. Corp. v. Gay Cottons, 419 F.2d 372, 373 (9th Cir. 1969) (discussing same rule and statute discussed in *Albatross*).

255. *See supra* text accompanying notes 106-17.

256. Burbank, *supra* note 23, at 1050-54.

257. Pub. L. No. 100-702, § 401(a), 102 Stat. 4642, 4649 (1988) (to be codified at 28 U.S.C. § 2074).

> The Supreme Court shall transmit to the Congress not later than May 1 of the year in which a rule prescribed under section 2072 is to become effective a copy of the proposed rule. Such rule shall take effect no earlier than December 1 of the year in which such rule is so transmitted unless otherwise provided by law.

Id.

knowledge of, and passive acceptance of, any supersession that may occur by operation of the Act.[258] Without the supersession provision, the purpose of a report to Congress is less clear. Reporting is not necessary to protect substantive rights established by Congress, for these cannot be abridged, enlarged, or modified. Nor is it likely that Congress intended the reporting process to be an invitation to itself to consider anew even the most technocratic and apolitical provisions of any reported amendments. Unconstrained review by Congress of rule promulgations, with the substitution of congressional judgment for that of the Court, would re-politicize the rules, defeat the neutrality goals of the reform movement, fragment the rules, increase complexity, elevate cost, diminish the stature of the judiciary, and decrease the effectiveness of law enforcement, all without material compensating benefits.

Congressional review of the Court's rulemaking is most appropriate and most functional if it is appropriately directed to a consideration of matters in which Congress has expertise: the short-term interests of specific groups with a special stake in a particular amendment to the rules of procedure. Supersession provides precisely that focus for congressional review. In authorizing supersession and assuming responsibility for a review of promulgated rules, Congress demands that it be asked whether a proposed rule conflicts with a procedural arrangement previously made by Congress and, if so, whether that arrangement is one on which the Congress will insist.

This relationship also can be considered from the perspective of politically organized groups that perceive themselves to have special stakes in procedure rules. The six-month window of time for review is an opportunity for such groups, when they perceive that their substantive interests are threatened by a proposed amendment, to marshal their political resources for self-protection. The possibility of supersession is an inducement to such groups to come forward in the legislative chambers before the procedure rules are effective, and a disincentive to those groups to unsettle procedure rules by later challenges in litigation.

In providing a focus for congressional review of court rules prior to their effective date, supersession also serves to protect the court rules from what otherwise would be the demeaning effects of congressional review. Congress does not review rules of procedure or substance that are enacted by administrative agencies.[259] Such review is not deemed necessary because agency-made rules cannot supersede an enabling stat-

258. This provision was the third sentence of the Act, *see supra* note 14. It is apparently modeled on provisions in organic acts of territories. Sibbach v. Wilson, 312 U.S. 1, 15 n.17 (1941).

259. *See generally* 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 6, at 447-634 (1978) (discussing rulemaking procedure and its limits).

ute and therefore cannot be enforced when they conflict with legislation.[260] If Congress were to subject Court-made rules to review prior to their effective date, without the supporting justification of the supersession provision, the inference would be that the Court is less trustworthy than an administrative agency to make rules that are consistent with legislation. For this reason, it is reasonable to contend that a repeal of the supersession clause should be accompanied by a repeal of the reporting requirement set forth in the third sentence of the Act.

The second function of the supersession provision is to provide a means by which the rulemaking process can clear away from the timbers of important and enduring federal legislation the undergrowth of procedural marginalia that may have been attached to legislation for faded or forgotten reasons. In this respect, supersession operates as a special variation on the principle of desuetude,[261] a variation allowing more active intervention by the judiciary but with notice to Congress and limited to matters of "practice and procedure" having no substantive consequences. It is also an expression of congressional policy to constrain the tendency of its own enactments to accumulate procedural complexity and thus to favor generality and flexibility in procedure rules. In this way, the availability of supersession contributes over time to the maintenance of rules that are general and a rulemaking process that is appropriately neutral.[262]

The supersession provision's third function has been to signify one aspect of the relationship between Congress and the federal courts as "coequal" branches of the government. By providing elevated status to Court-made rules, Congress has accorded to the federal judiciary primary responsibility for its own effectiveness. Many state constitutions confer broader responsibility directly on their highest courts;[263] by the supersession provision, "conflict" between a rule and a statute might provide occasion for supersession.

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260. *See* 5 U.S.C. § 706 (1982).

261. *Cf.* G. CALABRESI, *supra* note 40 (describing past attempts to deal with the growing number of statutes on the books which are not enforced and hold little prospect of being enacted in the current legal environment; prescribing appropriate method to deal with such statutes).

262. It is in this respect that the provision "has enabled the Rules of Procedure to be applied uniformly and has given confidence to lawyers and to litigants that the mechanics of filing a complaint, responding to an answer, conducting discovery, and trying a case, will not vary between one type of Federal lawsuit and another." Statement of Janet Napolitano, before Subcommittee on Courts and Administrative Practice of the Senate Judiciary Committee (May 25, 1988), *quoted by* Senator Heflin, 134 CONG. REC. S16,296 (daily ed. Oct. 14, 1988).

263. *See supra* text accompanying notes 130-31; *see also* Tolman, *Historical Beginnings of Procedural Reform Movement in this Country—Principles to be Observed in Making Rules,* 22 A.B.A. J. 783 (1936) (discussing development of grant of power to high courts as a mode of procedural reform).

It would be unreasonable, and would place the Court as rulemaker in grave jeopardy, to read the supersession provision more broadly to sweep away substantive political benefits hard won in the arena of partisan struggle. To use the supersession provision in such a way not only would be inconsistent with the text of the statute and the aims of the Rules Enabling Act as well as the reform movement that brought it to life, but it also would be a radical departure by the Court from its role in the constitutional scheme.

The compass of the supersession provision should be read, according to the functionalist manner of Professor Cook,[264] to reflect its function of clearing away procedural marginalia. The correct interpretation of the supersession provision is to read "such rules" in the second sentence of section 2072(b) with emphasis on the confining proscriptions of the first sentence of the subsection rather than on the broad enablement provisions of section 2072(a). This reading comports with the text of the Act and even confers practical significance on the otherwise neglected first sentence. In providing for such confined supersession, Congress has taken but a modest and controlled step in the direction of judicial autonomy and independence. Thus, to turn Justice Harlan's inference from the majority opinion in *Hanna*[265] around, a federal statute cannot be superseded to the extent that it is "arguably substantive." By allowing for limited supersession, Congress has assigned special value to the isolation of judicial institutions from "interest group" politics and thereby advances, through this subconstitutional structure, values of independence, clearly expressed in Article III,[266] and neutrality, expressed in the Due Process clause of the fifth amendment.[267]

To test this formulation, suppose the Supreme Court promulgated new Federal Rules of Civil Procedure bearing generally on the commencement and tolling problems raised by limitations laws, such as late discovery of claims, fraudulent concealment, and mental incompetence of the plaintiff. Would such rules, promulgated by the Court and not opposed by Congress, supersede conflicting provisions set forth in the United States Code? Or, to take a more specific illustration, could the provision of the NLRA requiring *service* of a summons within a six-month period[268] be superseded by a general rule of court that explicitly imposed the commencement-by-filing rule on all federal cases?

264. *See supra* text accompanying notes 21-28.

265. Hanna v. Plumer, 380 U.S. 460, 476 (1965) (Harlan, J., concurring).

266. *See supra* text accompanying notes 128-34. As to article III and "judicial independence" from politics, see THE FEDERALIST No. 79 (A. Hamilton).

267. *See supra* notes 150-51 and accompanying text.

268. 29 U.S.C. § 160(b) (1982).

I venture negative answers. The NLRA and those who have a stake in it are safe in their interests. On no account would the Court hold that the limitations provisions of the NLRA could be superseded by any general amendments to Rules 3 or 4. Nor would Rules 3 or 4 be read to "abridge or modify" the Labor Relations Act. This is all sufficiently clear now that the Supreme Court simply assumed it in dealing with the related case of *West v. Conrail.*[269]

Despite its narrow applicability, the supersession provision was challenged in the House of Representatives not only as a threat to the authority of Congress, but also as a possible delegation of Article I power by Congress that might be unconstitutional[270] in light of *INS v. Chadha.*[271] Properly understood, however, the supersession provision is not subject to serious constitutional challenge.[272] This conclusion may have been confirmed by the Court's comment on the Act in its recent opinion in *Chadha* and by its distinction of *Chadha* in the more recent decision in *Morrison v. Olson,* which emphasized that the Act challenged in *Morrison* was not "an attempt by Congress to increase its own power at the expense of the Executive Branch."[273] The Court in *Morrison* quoted words apposite here: "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity."[274]

Nevertheless, the fact that a constitutional argument can be voiced on the basis of *Chadha* would suggest caution in the interpretation of the statute. Such a possibility provides further assurance that the narrowly functional reading given here to that statute is correct.[275]

CONCLUSION

"Substance" and "procedure," as we have seen, are divided at two different places by the same brief Act. A Court-made rule that bears on

269. 481 U.S. 35, 38 (1987).

270. *See* H.R. REP. NO. 422, 99th Cong., 1st Sess. 23 (1985).

271. 462 U.S. 919 (1983) (invalidating one-house legislative veto).

272. For a review of early efforts to challenge supersession clauses in state rule enabling acts, see Willliams, *The Source of Authority for the Rules of Court Affecting Procedure,* 22 WASH. U.L.Q. 459 (1937). *But see* Whitten, *Separation of Powers Restrictions on Judicial Rulemaking: A Case Study of Federal Rule 4,* 40 MAINE L. REV. 41, 66-70 (1988) (suggesting that *Chadha* cases doubt on constitutionality of supersession).

273. 108 S. Ct. 2597, 2620 (1988).

274. *Id.* (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)).

275. *See* Wellington, Machinists v. Street: *Statutory Interpretation and the Avoidance of Constitutional Issues,* 1961 SUP. CT. REV. 49, 60-73.

limitations law may be sufficiently procedural to be a valid exercise of the power conferred by the first sentence, while a congressional enactment with precisely the same content would be sufficiently substantive to be shielded from supersession by the second sentence. This analysis is offered as one that Walter Wheeler Cook would have approved.[276] It is not only functional, but also consistent with the text of the Act, the tradition from which the Act arose, as well as the weight of case law.

Therefore, there is little cause for anxiety that rulemaking under the Act may threaten the power and status of Congress or the interests of groups with a claim on its attentions. The relaxation of such anxieties may help to rekindle the sense, now seemingly dim, that the traditions and institutions of judicial law reform serve the commonweal.

276. *See supra* note 22.