

## ARE THE FEDERAL RULES OF EVIDENCE UNCONSTITUTIONAL?

ETHAN J. LEIB\*

*The Federal Rules of Evidence (FRE) rest on an unacceptably shaky constitutional foundation. Unlike other regimes of federal rulemaking—for Civil Procedure, for Criminal Procedure, and for Appellate Procedure—the FRE rulemaking process contemplated by the Rules Enabling Act is both formally and functionally defective because Congress enacted the FRE as a statute first but purports to permit the Supreme Court to revise, repeal, and amend those laws over time, operating as a kind of supercharged administrative agency with the authority to countermand congressional statutes. Formally, this system violates the constitutionally-delineated separation of powers as announced in Chadha, Clinton, and the non-delegation doctrine because it allows statutes of the United States to be effectively rewritten by the Supreme Court outside the constraints of bicameralism and presentment, requirements of Article I, Section 7. Especially in light of the Court’s signals in recent terms that it may be seeking to revivify the non-delegation doctrine soon, focusing on the FRE’s formal deficiencies is urgent. Yet functionalists about the separation of powers also need to condemn our current FRE rulemaking process. Functionally, the FRE rulemaking system is constitutionally suspect because it permits the Supreme Court—outside of its Article III authority to hear “cases and controversies”—to*

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\* John D. Calamari Distinguished Professor of Law, *Fordham Law School*. Thanks to Tom Bone Lee especially for guidance and engagement on this Article from soup to nuts. Andrew Kent was his usual skeptical and challenging self—and the Article is much better for it. Stephen Burbank, Roger Park, Michael Pardo, and Mike Martin lent their substantial wisdom and expertise. Julia Simon-Kerr, Mathilde Cohen, Minor Myers, Pam Bookman, Russ Pearce, Howie Erichson, Aaron Saiger, Olivier Sylvain, Rebecca Kysar, and Aaron-Andrew Bruhl made important interventions. Rick Hills was a helpful reality check at a helpful time. Adam Weber and Gail McDonald provided stellar research assistance. And, finally, faculty workshops at *Touro Law Center* and the *University of Connecticut Law School* helped tremendously as I tried to get this Article over the finish line.

*repeal and amend substantive statutes unilaterally, a power that can threaten bedrock commitments to our federalism and to our constitutional rights to the jury. The decisions about how and when to displace state law in favor of federal law and about how and when to grant powers to juries over judges cannot be vested in the Judicial Branch alone without the structural restraints of an Article III “case or controversy.” The paper concludes by offering some ways to fix our evidence law and to put it on firmer footing, permitting better power-sharing and dialogue between two branches of government—Congress and the Supreme Court—that both have reasonable claims to some authority in the area.*

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*This document contains the Federal Rules of Evidence . . . . The rules were enacted by Public Law 93-595 (approved January 2, 1975) and have been amended by Acts of Congress, and further amended by the United States Supreme Court.*

—The Foreword to the Federal Rules of Evidence  
U.S. Government Publishing Office  
Washington: 2018<sup>1</sup>

#### INTRODUCTION

Something is rotten in the state of the Federal Rules of Evidence (FRE).

Like the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, and the Federal Rules of Appellate Procedure, the FRE can be revised, amended, updated, or repealed through a process specified by the Rules Enabling Act (REA).<sup>2</sup> The REA in its current form—adopted first in 1934 and amended substantially in 1988<sup>3</sup>—has four core components. First, the Supreme Court has “the power to prescribe general rules of practice and procedure and rules of evidence for cases in the [lower federal courts]”<sup>4</sup> and may use the Judicial Conference and committees to assist it.<sup>5</sup> Second, the Court must submit proposed rules to Congress with an “explanatory note,”

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1. Bob Goodlatte, *Foreword* to Fed. R. Evid.

2. *Laws and Procedures Governing the Work of the Rules Committees*, U.S. COURTS, <https://www.uscourts.gov/rules-policies/about-rulemaking-process/laws-and-procedures-governing-work-rules-committees> [<https://perma.cc/5CJZ-H2CN>].

3. Act of June 19, 1934, Pub. L. No. 73-415, §§ 1–2, 48 Stat. 1064 (codified at 28 U.S.C. §§ 2071–77).

4. 28 U.S.C. § 2072(a). In the first version of the REA, the statute only delegated the right to make “rules of practice and procedure,” which led to some skepticism about whether the Supreme Court even had the authority to promulgate rules of evidence. See *Order of November 20, 1972*, 409 U.S. 1132, 1132–33 (1972) (Douglas, J., dissenting) (“I doubt if rules of evidence are within the purview of the statute under which we are authorized to submit proposed Rules to Congress . . . . I can find no legislative history that rules of evidence were to be included in ‘practice and procedure’ as used in [the Rules Enabling Act of 1934] . . . . The words ‘practice and procedure’ in the setting of the Act seem to me to exclude rules of evidence.”).

5. 28 U.S.C. § 2073. For ease of exposition, I will mostly focus on the Court as being invested with the power of prescription under § 2072 and the power of reporting and promulgating the Rules under § 2074, notwithstanding § 2073’s presumption that the Court will do its work through the Judicial Conference and relevant committees.

and Congress then has an opportunity to countermand the proposed rules through law of its own.<sup>6</sup> Third, as a side-constraint, the rules the Court promulgates may “not abridge, enlarge or modify any substantive right.”<sup>7</sup> And, finally, once a waiting period passes to give Congress time to decide whether it wants to countermand a Supreme Court proposal for a rule, “[a]ll laws in conflict with such rules shall be of no further force or effect after such rules have taken effect,” a provision known as the “supersession clause.”<sup>8</sup> Although Congress specifically excepted rules surrounding evidentiary privileges from those covered by this REA process,<sup>9</sup> the federal rulemaking regime covering civil procedure rules, criminal procedure rules, appellate procedure rules, and evidence law is otherwise subject to this framework statute.

But the FRE is unique in the tapestry of Federal Rules in that Congress decided to countermand wholesale the Supreme Court’s proposal for evidentiary rules by staying them in 1973<sup>10</sup> and then passing the FRE as a statutory regime in 1975.<sup>11</sup> This means that all revisions, amendments, updates, and repeals that go through the REA process and become law through the supersession provision effectively change statutory law that Congress passed and the President signed.

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6. §§ 2073–74(a). In the first version of the REA, this so-called “report-and-wait” provision was less clear about whether Congress had to countermand through an actual statute that met the Constitution’s Article I, Section 7 requirements of bicameralism and presentment. The current version of the REA is more explicit in this regard.

More interesting, perhaps, is that the FRE’s Enabling Act of 1975 was explicit that a one-house veto was sufficient for disapproving an amendment of the FRE by the Supreme Court. Act of Jan. 2, 1975, Pub. L. No. 93-595, 88 Stat. 1948 (codified at 28 U.S.C. § 2076 (since repealed)) (“[I]f either House of Congress within [the report-and-wait] time shall by resolution disapprove any amendment so reported it shall not take effect.”). How quirky, then, that the Supreme Court pointed to the FRE as evidence that the REA did not really violate the ban on legislative vetoes effectuated through *INS v. Chadha*, 462 U.S. 919, 959 (1983). More on this below, *infra* Section II.A.

7. 28 U.S.C. § 2072(b).

8. *Id.* Some refer to this provision as the “abrogation clause.” I’ll stick with “supersession,” as it is more distinctive to the REA context.

9. § 2074(b) (“Any such rule creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress.”).

10. Act of Mar. 30, 1973, Pub. L. No. 93-12, 87 Stat. 9 (“An Act to promote the separation of constitutional powers by suspending the effectiveness of the Rules of Evidence for United States Courts and Magistrates . . . transmitted to the Congress by the Chief Justice on February 5, 1973, until approved by Act of Congress.”).

11. Act of Jan. 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926.

Whatever else is permissible in light of the supposed death of the non-delegation doctrine, this delegation to the Supreme Court to alter, erase, or make ineffective statutes of the United States should be considered invalid under currently-settled constitutional law. The Supreme Court should not be able to repeal congressional statutes, especially outside of its core judicial power of adjudicating actual cases or controversies. This conclusion follows not only under the necessary formal implications of *INS v. Chadha*,<sup>12</sup> *Clinton v. City of New York*,<sup>13</sup> and the non-delegation doctrine, but also for functional reasons having to do with the special way rules of evidence tend to both be more likely to abridge, enlarge, or modify substantive rights,<sup>14</sup> and more likely to implicate federalism concerns and the rights to the jury in the U.S. Constitution. Thus, what is at stake here is not just an application of a set of doctrines (however criticized) that come together to undermine the foundation of our evidence rule-making system, but also structural commitments set in place to assure the functioning of our democracy.

Part I concludes that, as applied to the FRE, the REA process is constitutionally defective at its core for both formal and functional reasons. Part II then reviews the kinds of apologies others have made for supersession generally (often in the context of civil procedure rules, where the debate about supersession has sometimes been ventilated but without the complexity of the statutory nature of the FRE)—and tries to offer whatever defenses might be available for the FRE amendment system particularly (a context where the problems for supersession are more severe and less acknowledged). Part III concludes with some thoughts about how to rectify the formal and functional deficiencies with the FRE, charting a way forward. With some renovations, Congress can fix the REA and FRE without upending too much federal practice. Ultimately, the separation of powers demands a better rulemaking system for our federal rules about evidence law.

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12. 462 U.S. 919, 954–55, 957 n.22 (1983) (holding that the legislative veto is unconstitutional for failure to comply with Article I, Section 7 requirements in the Constitution).

13. 524 U.S. 417, 438–39 (1998) (holding the “Line Item Veto Act” to violate the Constitution under the authority of *Chadha*).

14. 28 U.S.C. § 2072(a)–(b).

I. WHY SUPERSESION FOR THE FRE IS UNCONSTITUTIONAL: FORM  
AND FUNCTION

It took about forty years after the REA's passage in 1934 for the Supreme Court to have the audacity to promulgate a version of the FRE.<sup>15</sup> There are several reasons that might have been so. On the one hand, the Court may have had constitutional and policy doubts of its own about a federally unified regime of evidence law, notwithstanding *Sibbach v. Wilson & Co.*<sup>16</sup> in 1941.<sup>17</sup> In that case, three years after the promulgation of the Federal Rules of Civil Procedure in 1938, barely recognizing its own conflict of interest in the case in adjudicating its own power to prescribe the Federal Rules, the Court blessed Congress's effort to delegate rulemaking power over civil procedure rules to the Supreme Court itself.<sup>18</sup> Yet the constitutional and policy implications of *Sibbach* for a federal *evidence* law—a traditional area of so much judicial discretion<sup>19</sup> and an area that so often implicates

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15. See Jon R. Waltz, *The New Federal Rules of Evidence: An Overview*, 52 CHI-KENT L. REV. 346, 348 (1975) (detailing the path of the new Federal Rules of Evidence that the Supreme Court promulgated in 1972).

16. 312 U.S. 1 (1941).

17. See Margaret A. Berger, *The Federal Rules of Evidence: Defining and Refining the Goals of Codification*, 12 HOFSTRA L. REV. 255, 264 (1984) (explaining the worry that a uniform Federal Rules of Evidence would lead to an increase in appeals, more reversals on evidentiary rulings, and that lawyers would “have a field day determining how many evidentiary angels can dance on the top of a pin”).

18. *Sibbach*, 312 U.S. at 10, 15.

19. Wigmore, in many ways the father of modern evidence law, was quite committed to thinking about evidence as essentially committed to judicial discretion—and for that reason, among others, tended to oppose unified evidence codes. See ANDREW PORWANCHER, JOHN HENRY WIGMORE AND THE RULES OF EVIDENCE: THE HIDDEN ORIGINS OF MODERN LAW 114–19 (2016). Others similarly saw evidence as importantly discretionary, which influenced their views about how codified evidence ought to be (including James Bradley Thayer, one of Wigmore's important early influences, see WILLIAM TWINING, THEORIES OF EVIDENCE: BENTHAM AND WIGMORE 5–6 (1985) (arguing that Thayer “exerted tremendous influence through his teaching [and] his casebooks on evidence”). See generally Eleanor Swift, *One Hundred Years of Evidence Law Reform: Thayer's Triumph*, 88 CAL. L. REV. 2437, 2439 (2000). It remains a widely-held view that evidence law is an area of significant judicial discretion even after codification. See Jon R. Waltz, *Judicial Discretion in the Admission of Evidence Under the Federal Rules of Evidence*, 79 NW. U. L. REV. 1097, 1119–20 (1984) (“[T]he amount of discretion in the admission of evidence conferred by the Federal Rules is quantitatively undramatic . . . .”); Victor J. Gold, *Limiting Judicial Discretion to Exclude Prejudicial Evidence*, 18 U.C. DAVIS L. REV. 59, 95 (1984) (arguing that judicial discretion to exclude relevant evidence gives judges immense power to “decide what social and political attitudes will be used to litigate issues of life, liberty, and property”); Thomas M. Mengler, *The Theory of*

matters of substantive state law and the constitutional right to the jury—may have led to reasonable hesitation to conclude that evidence was culturally “procedural” and should be treated the same way as the Federal Rules of Civil Procedure for the purposes of the REA.

There were also reasonable concerns about the Court’s statutory authority too, since the original version of the REA in 1934 failed to grant the Court a right to promulgate evidence laws explicitly, focusing instead on “general” rules of “practice” and “procedure.”<sup>20</sup> The predecessor statute to the REA—the Conformity Act of 1872<sup>21</sup>—had directed the lower federal courts to “conform” their “practice, pleadings, and forms and modes of proceeding” in actions at law to those “existing at the time in like causes in the courts of record of the State” within which each court was located. But evidence law got a special carve-out: it proclaimed that it did not “alter the rules of evidence under the laws of the United States, and as practiced in the courts thereof.”<sup>22</sup> Thus it is possible that the REA was reasonably read at first not to extend to evidence law (even though it did not have an overt carve-out as the Conformity Act did).

In the conventional telling,<sup>23</sup> however, when the Court decided the 1965 case of *Hanna v. Plumer*<sup>24</sup>—which seemed to allow any Federal Rule that was “arguably procedural” to preempt state law<sup>25</sup>—a stalled FRE project got the activation energy it needed.<sup>26</sup> If the FRE was going

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*Discretion in the Federal Rules of Evidence*, 74 IOWA L. REV. 413, 427 (1989) (advocating for the concept that judicial discretion under the FRE is not motivated by “the Rules’ policy in favor of admissibility”). *But see* David P. Leonard, *Power and Responsibility in Evidence Law*, 63 S. CAL. L. REV. 937, 939 (1990) (challenging the view that the FRE permit widespread trial court discretion).

20. Act of June 19, 1934, Pub. L. No. 73-415, §§ 1–2, 48 Stat. 1064. Indeed, some leading evidence scholars before the FRE opposed codification precisely because evidentiary decisions—so often context-driven—had to be particularized and discretionary. *See* Swift, *supra* note 19, at 2442 (identifying Thayer and Morgan as opponents of “rules” of evidence that might limit trial court discretion in particular cases).

21. Ch. 255, 17 Stat. 196.

22. *Id.* § 5, 17 Stat. at 197.

23. *See, e.g.*, Paul D. Carrington, “Substance” and “Procedure” in the Rules Enabling Act, 1989 DUKE L.J. 281, 298 (1989); Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1018–22 (1982).

24. 380 U.S. 460 (1965).

25. *Id.* at 476.

26. *See* James Wm. Moore & Helen I. 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

to be “arguably procedural,” there would be less question about it being validly promulgated and controlling in the lower federal courts.<sup>27</sup> Still, *Hanna* notwithstanding, Congress balked and did not allow the Supreme Court to use its then-existing REA authority in 1972 to create a new unified evidence code.<sup>28</sup> By disallowing the Supreme Court to use the REA as it then existed in 1973,<sup>29</sup> Congress put the brakes on the FRE until it could enact them itself a few years later. And in passing the FRE in 1975,<sup>30</sup> Congress also passed an “enabling act” on the model of the REA to allow for further revisions by the Supreme Court.<sup>31</sup> That enabling act made clear that, from that point forward, the general REA was going to treat evidence as enough like procedure that the Supreme Court would have statutory authority to promulgate amendments, revisions, and updates to the FRE, too—albeit subject to the REA’s side-constraint about “substantive rights.”<sup>32</sup> And Congress signed onto a supersession clause for the FRE in 1975 as well—which has importantly different implications for an evidence law that was enacted by Congress itself.<sup>33</sup>

What follows in this Part is a case for the unconstitutionality of the revision process the current REA envisions for the FRE. That case has both formal (Section I.A) and functional (Section I.B) dimensions.

#### A. Form

The core of the formal case against supersession in connection with the FRE is relatively simple. In short, allowing the Supreme Court’s FRE rulemaking authority to supersede congressional statutes that were clearly delineated, drafted, and deliberated upon violates the constitutionally demarcated separation of powers enunciated in *INS v.*

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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 . . .”).

27. *Hanna*, 380 U.S. at 476.

28. See *Rules of Evidence for United States Courts and Magistrates*, 56 F.R.D. 183 (1972).

29. See Act of Mar. 30, 1973, Pub. L. No. 93-12, 87 Stat. 9.

30. See Act of Jan. 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926.

31. 28 U.S.C. § 2072(a).

32. *Id.*

33. See generally Carrington, *supra* note 23, at 322–23 (discussing supersession provisions and how they affect Congressional rulemaking).

*Chadha*<sup>34</sup> (Section I.A.1), *Clinton v. City of New York*<sup>35</sup> (Section I.A.2), and in the non-delegation doctrine (Section I.A.3).<sup>36</sup>

### I. Chadha

Most people remember the *Chadha* decision as the “legislative veto” case, holding all legislative vetoes unconstitutional for their failure to comply with core Article I, Section 7 bicameralism and presentment requirements for lawmaking. On the chopping block in that case was a provision within the Immigration and Nationality Act which purported to allow either chamber in Congress to overturn by resolution an attorney general decision to suspend a deportation, pursuant to otherwise delegated authority to the Executive Branch.<sup>37</sup> The majority held invalid this device to share executive power because it felt the separation of powers that the Constitution announces does not permit a mixing of functions in the way the statute envisioned.<sup>38</sup> Although Justice Powell’s concurrence focused on the way the arrangement allowed a single chamber in Congress to co-opt and exercise adjudicatory functions,<sup>39</sup> the opinion for the Court emphasized the need for all laws of the United States to be vetted through the bicameralism and presentment requirements contemplated by the Constitution’s Article I.<sup>40</sup>

Although, formally speaking, the current REA with a supersession provision in connection with the FRE is not identical to a legislative veto, *Chadha*’s relevance to the REA and FRE did not go unnoticed by the Court itself, even in 1983. To wit, the Court’s footnote nine meditated on the relationship between the statute it was invalidating and another important statute in the legal corpus it did not want affected by its decision. The Court wrote that,

§ 244 resembles the “report and wait” provision approved by the Court in *Sibbach v. Wilson & Co.* The statute examined in *Sibbach* [i.e., the REA of 1934] provided that the newly promulgated Federal Rules of Civil Procedure “shall not take effect until they shall have been reported to Congress by the Attorney General at the beginning of a regular session thereof and until after

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34. 462 U.S. 919, 954–55 (1983).

35. 524 U.S. 417, 437–38 (1998).

36. See *infra* notes 75, 77 and accompanying text.

37. 8 U.S.C. § 1254(c)(2) (1982).

38. *Chadha*, 462 U.S. at 957–59.

39. *Id.* at 964–65 (Powell, J., concurring).

40. *Id.* at 946–51 (majority opinion).

the close of such session.” This statute did *not* provide that Congress could unilaterally veto the Federal Rules. Rather, it gave Congress the opportunity to review the Rules before they became effective and to pass legislation barring their effectiveness if the Rules were found objectionable. This technique was used by Congress when it acted in 1973 to stay, and ultimately to revise, the proposed Rules of Evidence.<sup>41</sup>

In short, the majority sought to distinguish the REA from the invalidated legislative veto in *Chadha* by highlighting that when Congress wanted to countermand the Supreme Court’s proposal for the FRE in 1973, it did so through statute rather than resolution. True enough, Congress decided to halt and delay the adoption of the FRE through a statutory mechanism rather than “mere” resolution. But it may have done so not because the REA, as it then existed, actually required as much but because it wanted to stay the FRE adoption process for a substantial amount of time (beyond the amount of time permissible under the then-existing REA) so it could enact its own comprehensive approach to evidence law itself. There was real ambiguity about whether the original 1934 REA meant to delegate the formulation of evidence law through the Federal Rules regime—and Congress ultimately resolved that ambiguity in 1975 by amending the REA to make clear that it would cover evidence going forward (but in a way that almost confirms that it did not as of 1934).<sup>42</sup>

Yet it must be noted that when Congress amended the REA at the same time it adopted the FRE as a statutory system in 1975, it actually made clearer that further countermanding by Congress could be accomplished through *resolution of either chamber* rather than requiring that Congress countermand through statute.<sup>43</sup> The dissent properly picked up on this feature of the congressional adoption of the FRE, showing the majority that if it was serious about no more one-house vetoes, many statutes—including the REA as applied to the FRE as of 1983—would be rendered invalid.<sup>44</sup> From this perspective, footnote nine is an embarrassment to the Court’s *Chadha* opinion: the REA circa 1975, itself amended by the very process the Court cites to prove the

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41. *Id.* at 935 n.9 (citations omitted).

42. Karen Nelson Moore, *The Supreme Court’s Role in Interpreting the Federal Rules of Civil Procedure*, 44 HASTINGS L.J. 1039, 1041–42 (1993).

43. See Act of January 2, 1975, Pub. L. No. 93–95, § 2, 88 Stat. 1926, 1948, (codified at 28 U.S.C. § 2076) (proposed amendments to the FRE by Supreme Court may be disapproved by one-house resolution).

44. *Chadha*, 462 U.S. at 1003, 1009 (White, J., dissenting).

REA's immunity from *Chadhamaggedon*,<sup>45</sup> had a pretty explicit *Chadha* problem, since it enacted a one-house legislative veto. Awkward stuff.

It is true that Congress, some years after *Chadha*, removed from the REA the specific feature that was most offensive in light of *Chadha*'s most direct holding. That is, when Congress passed the 1988 amendments to the REA (bringing the REA into its present configuration), the REA was shorn of its one-house veto provision. It is now clear for all Federal Rules regimes that the "report-and-wait" provision for revisions contemplates congressional countermanding through statutory action rather than one-house or two-house resolutions, though this was not true of the REA circa 1983 when *Chadha* came down.

But that does not mean all *Chadha* problems with the REA disappeared with the 1988 amendments. Although there is no longer a legislative veto provision in the REA, there is an Article 1, Section 7 violation every time the Supreme Court purports to revise or repeal the statutory FRE. That is, because of supersession, the issue is not that Congress reserves a veto for itself but that congressional law gets effectively repealed, amended, or altered without proper adherence to bicameralism and presentment requirements under the Constitution. This is as much at the core of *Chadha*'s holding as the specific application to one-house veto provisions. Although functionalist<sup>46</sup> and formalist<sup>47</sup> cases later identified the core of *Chadha* as focused on congressional self-aggrandizement, some other formal cases—such as *Clinton*—helped reinforce the constitutional commitment to Article 1, Section 7 requirements for lawmaking, law amending, and law repealing as essential to *Chadha*'s holding, as well. The FRE, which started as a statute in 1975 but is subject to amendment and repeal through the REA process, is ultimately not compliant with the

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45. Yes, I am trademarking that.

46. See *Morrison v. Olson*, 487 U.S. 654, 694 (1988). Carrington uses the *Morrison* gloss on *Chadha* to minimize its force, see Carrington, *supra* note 23, at 326. But since he is not focused on the way supersession works specifically in connection with the FRE, he underestimates *Chadha*'s relevance. Moreover, even he—supersession's greatest champion—had to admit that "the fact that a constitutional argument [about supersession's invalidity] can be voiced on the basis of *Chadha* would suggest caution in the interpretation of the [REA]." *Id.*

47. See *Bowsher v. Synar*, 478 U.S. 714, 727 (1986).

constitutional norms of lawmaking *Chadha* reinforces. *Chadha* is not without its critics, of course,<sup>48</sup> but it is the law.

## 2. Clinton

If there had been any doubt that *Chadha* was only about congressional overreaching, *Clinton v. City of New York*<sup>49</sup> put that view to rest. Instead, in a case about whether Congress was constitutionally permitted to allow the President to “cancel” spending items in bills that had already become law (through bicameralism and presentment), the Court refused to allow Congress to permit the effective repeal of its own laws with the mere stroke of a pen by another branch. Focusing on the language in the relevant Line Item Veto Act (LIVA) that a cancellation would prevent an otherwise validly-enacted budget provision “from having legal force or effect,”<sup>50</sup> the Court held that when the President uses his cancellation authority under the statute, “[i]n both legal and practical effect, the President has amended . . . Acts of Congress by repealing” portions.<sup>51</sup> Quoting *Chadha*, the Court emphasized that “repeal of statutes, no less than enactment, must conform with Art[icle] I.”<sup>52</sup> And just as “[t]here is no provision in the Constitution that authorizes the President to enact, to amend, or to repeal statutes,”<sup>53</sup> as the Court announced in *Clinton*, there is no provision in the Constitution that allows the Supreme Court to promulgate rules that amend or repeal statutes, as the REA purports to permit with respect to the FRE.<sup>54</sup> Indeed, the operative language in the LIVA that led to its constitutional vulnerability is virtually identical to the REA’s supersession clause as it would apply in connection with the FRE.<sup>55</sup> Thus, although he thought the Court had wrongly decided

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48. E.g., E. Donald Elliott, *Why Our Separation of Powers Jurisprudence Is So Abysmal*, 57 GEO. WASH. L. REV. 506, 515–16 (1989); Peter L. Strauss, Comment, *Was There a Baby in the Bathwater? A Comment on the Supreme Court’s Legislative Veto Decision*, 1983 DUKE L.J. 789, 817–19 (1983); Laurence H. Tribe, *The Legislative Veto Decision: A Law by Any Other Name?*, 21 HARV. J. ON LEGIS. 1, 8 (1984).

49. 524 U.S. 417 (1998).

50. 2 U.S.C. § 691e(4)(B)–(C) (1994 ed., Supp. V). Does that language sound familiar?

51. *Clinton*, 524 U.S. at 437–38.

52. *Id.* at 438 (quoting *INS v. Chadha*, 462 U.S. 919, 954 (1983)).

53. *Id.*

54. *See id.* at 446 n.40.

55. Compare 2 U.S.C. § 691e(4)(B)–(C) (1994 ed., Supp. V) (providing that a cancellation prevents a direct spending or tax benefit from “having legal force or

*Clinton*, even Sai Prakash had to acknowledge that “[g]iven the logic of *Clinton v. City of New York* . . . statutes like . . . the Rules Enabling Act ought to be considered unconstitutional on Presentment Clause grounds.”<sup>56</sup> The REA—*particularly with respect to the FRE, which started as a congressional statute*—is especially vulnerable to *Clinton*’s reasoning and its adaptation of *Chadha*.

In emphasizing that “Congress cannot alter the procedures set out in Article I, Section 7, without amending the Constitution,”<sup>57</sup> the *Clinton* Court dropped a footnote of dicta about the REA, trying to distinguish it. But this footnote of dicta was not much more impressive than *Chadha*’s effort to reconcile itself with the REA. Focusing especially on how supersession of congressional statutes by Supreme Court rulemaking looks a lot like repeal outside of Article I, Section 7, the Court had to find some way to excuse it. But what it said below the line seemed flatly inconsistent with what it said above the line. It offered that “Congress itself made the decision [in the REA] to repeal prior rules upon the occurrence of a particular event—here, the promulgation of procedural rules by this Court.”<sup>58</sup> Notice the slick move here in calling the congressional decision in the REA as one that effectuates the repeal of “rules” rather than “statutes.” Further, one cannot help but conclude that what is bad for the goose (of delegating legislative authority to the President in *Clinton*) should be bad for the gander (of delegating legislative authority of repeal to the judiciary in the REA’s application to the FRE).

The Court tried to analogize the REA to a statute the Court had upheld in *Field v. Clark*,<sup>59</sup> the Tariff Act of 1890.<sup>60</sup> That statute had created a list of approximately 300 articles that were to be “free” of import duties “unless otherwise specially provided for in this act.”<sup>61</sup> Section 3 of the act then directed the President to suspend the exemptions for certain items on the list “whenever, and so often” he determined that any countries were being “reciprocally unequal and unreasonable.” At which point, the statute directed which duties the

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effect”), with 28 U.S.C. § 2072(b) (providing that “[a]ll laws in conflict with such rules shall be of no further force or effect after such rules have taken effect”).

56. Saikrishna Bangalore Prakash, *Deviant Executive Lawmaking*, 67 GEO. WASH. L. REV. 1, 42 (1998).

57. *Clinton*, 524 U.S. at 446.

58. *Id.* at 446 n.40.

59. 143 U.S. 649 (1892).

60. Act of Oct. 1, 1890, ch. 1244, 26 Stat. 567.

61. *Id.*

President needs to impose during the suspension.<sup>62</sup> Thus, although it is true that the President was given delegated authority to “suspend” (not “repeal” or “cancel”) tariff *exemptions* under the statute, it seems that: (1) the delegation in the 1890 statute had clear, intelligible conditions for the validity of the suspension authority; (2) imposed an obligation (a duty!) on the President to suspend statutory exemptions when he found particular facts; and, finally, (3) also planned substantively for the suspensions by providing statutorily-delimited duties for the periods of those suspensions.

Yet, none of these features appear in the REA’s application to the FRE: Congress gave the Supreme Court no parameters for rules of evidence law beyond that “[s]uch rules shall not abridge, enlarge or modify any substantive right,”<sup>63</sup> and that “[a]ny such rule creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress.”<sup>64</sup> Writing on a blank slate without limitation on motivating reasons was a hallmark of legislation that *Chadha* required be subject to Article I, Section 7 procedures. Furthermore, Congress did not impose upon the Supreme Court an obligation to pursue or revise evidence law under any condition, whether of desuetude, developing constitutional law, or otherwise. And, finally, the supersession provision simply requires full repeal of any statute in conflict with what the Court promulgates, with no other contingency plan. These features make the REA in connection with the FRE quite unlike the Tariff Act the Court tried to invoke in its flat-footed footnote 40.<sup>65</sup> Indeed, the repeal authority granted in the REA’s

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62. *Id.* at 612.

63. 28 U.S.C. § 2072(b). Since the provision in (a) gives the Court “the power to prescribe general rules of practice and procedure and rules of evidence,” it is not actually clear that evidence rules must be limited to procedure; they just may not futz with “any substantive right.” Perhaps they are allowed to create new ones as long as they do not “abridge, abolish, or modify” others. *Id.* §§ 2072(a)–(b).

64. *Id.* § 2074(b).

65. To be fair, the Court discusses a number of other tariff statutes that *Field* mentioned. See *Clinton v. City of New York*, 524 U.S. 417, 444–45 (1998). Those other statutes more clearly gave the President apparent “repeal” authority—but they were all constrained by obligations on the President to make specific findings in order to make the repeals effective. The Court in *Clinton* also highlighted that the President gets special deference in matters of foreign trade, see *id.* at 445 (citing *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936)), so it could have tried to argue—not super-plausibly, mind you, see *infra* note 191 and text accompanying notes 254–55—that a special competency about evidence (or procedure) in the district courts inheres in the Supreme Court to justify supersession in the REA. Still, the Court in *Clinton* differentiated LIVA from the tariff statutes because LIVA “authorizes the

application to the FRE is substantially worse from a constitutional perspective than the cancellation authority in the LIVA: in the LIVA (and the Tariff Act), the statutory text did not change;<sup>66</sup> the same cannot exactly be said of the FRE as amended through the REA and its supersession provisions.<sup>67</sup> Ultimately, as Justice Kennedy reinforces in his *Clinton* concurrence, “[t]hat a congressional cessation of power is voluntary does not make it innocuous[;] . . . [a]bdication of responsibility is not part of the constitutional design.”<sup>68</sup>

To be sure, *Clinton* has been subject to critical readings by scholars who think it was wrongly decided<sup>69</sup> and those who wish to cabin its formalistic force to its facts.<sup>70</sup> But its formal implications for the REA in the FRE context are hard to escape.<sup>71</sup> Even if, as other members of the Court believed, *Clinton* may have really been a non-delegation

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President himself to effect the repeal of laws, for his own policy reasons, without observing the procedures set out in Article I, § 7.” 524 U.S. at 445. It is thus clear that the REA as applied to the FRE is closer to LIVA than it is to the tariff statutes, whatever hand waving toward those statutes the Court offered in its footnote. Indeed, the President’s special competency in managing spending did not ultimately arm the Court with enough to uphold the constitutionality of the delegation to the President in the LIVA case; so, the Court’s special competency in evidence (if it even has that—something we can reasonably doubt) should not be used to bootstrap a bad delegation of legislative power in the case of the REA as applied to the FRE.

66. Prakash, *supra* note 56, at 40.

67. To be fair, one could insist that the Public Law never changes through supersession; such laws are just made inactive (have “no further force or effect”) by rules that supersede them. I think that counts as a technical repeal, but I can see how some resistance might come from the formalists here. Still, given how different the REA/FRE regime is to the regime in the Tariff Act of 1890, I think the Court’s effort in dicta to defend supersession through *Field v. Clark* is profoundly underwhelming. Thanks to Aaron Bruhl for pushing me here.

68. *Clinton*, 524 U.S. at 452 (Kennedy, J., concurring) (citing *INS v. Chadha*, 462 U.S. 919, 942, n. 13 (1983)).

69. *E.g.*, Prakash, *supra* note 56, at 4, 42.

70. *E.g.*, David J. Barron & Todd D. Rakoff, *In Defense of Big Waiver*, 113 COLUM. L. REV. 265, 315–18 (2013).

71. For arguments that *Clinton*’s formal requirements have meaningful implications for how to think about congressional decisions to allow other branches to repeal its laws, see Daniel T. Deacon, *Administrative Forbearance*, 125 YALE L.J. 1548, 1562, 1564 (2016) (seeming to concede the formal arguments from *Clinton* but wanting to use “functional” analysis to permit administrative “forbearances”); and R. Craig Kitchen, *Negative Lawmaking Delegations: Constitutional Structure and Delegations to the Executive of Discretionary Authority to Amend, Waive, and Cancel Statutory Text*, 40 HASTINGS CONST. L.Q. 525, 570 (2013) (combining formal and functional analysis to emphasize why such undermining of Article I, Section 7 requirements should not be permitted).

decision in disguise,<sup>72</sup> focusing instead on non-delegation norms will not render the REA as applied in the FRE context any less troublesome, as I now hope to show.<sup>73</sup>

### 3. *Non-delegation*

Both Justices Scalia and Breyer wrote influential opinions in the *Clinton* case encouraging the Court (unsuccessfully) to see the statute at issue in that case as raising non-delegation concerns rather than presentment concerns under Article I, Section 7.<sup>74</sup> When seen in that light—especially given the background of the very permissive delegation regime the Supreme Court affords congressional choices since the New Deal<sup>75</sup>—those Justices urged the Court to uphold Congress’s delegating to another branch responsibility for a kind of activity it was generally well-positioned to administer effectively, adding to governance efficiencies.<sup>76</sup> But even under a permissive account of how wide-ranging delegation of lawmaking can be in the modern administrative state, supersession in connection with the FRE crosses a line because it allows the Supreme Court to “usurp[] the nondelegable function of Congress and violates the separation of powers.”<sup>77</sup> Given

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72. See 524 U.S. at 465 (Scalia, J., concurring in part and dissenting in part); *id.* at 484 (Breyer, J., dissenting); see also Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2366 (2001) (“The real question in [*Clinton*] . . . was whether the power granted to the President constituted an impermissible delegation.”).

73. Leslie M. Kelleher, *Separation of Powers and Delegations of Authority to Cancel Statutes in the Line Item Veto Act and the Rules Enabling Act*, 68 GEO. WASH. L. REV. 395, 398–400 (2000), also recognizes the inadequacy of the way the Court sought to distinguish LIVA from supersession in the REA. But she ultimately thinks supersession can be defended under some combination of the Supreme Court’s “inherent authority” to make procedural rules, a non-aggrandizement account of the separation of powers, and Congress’s limited delegation in the REA that retains its “central role in the determination of policy.” I’ll take up that set of justifications in Part II.

74. 524 U.S. at 465 (Scalia, J., concurring in part and dissenting in part); *id.* at 484 (Breyer, J., dissenting).

75. See *Gundy v. United States*, 139 S. Ct. 2116, 2130–31 (2019) (Alito, J., concurring) (“[S]ince 1935, the Court has uniformly rejected nondelegation arguments and has upheld provisions that authorized agencies to adopt important rules pursuant to extraordinarily capacious standards.”).

76. *Clinton*, 524 U.S. at 469 (Scalia, J., concurring in part and dissenting in part); *id.* at 478 (Breyer, J., dissenting).

77. *Id.* at 465 (Scalia, J., concurring in part and dissenting in part). For a more ambitious effort to suggest that the entirety of the REA violates the non-delegation doctrine, see Josh Blackman, *Does the Rules Enabling Act Violate the Non-Delegation Doctrine?* (Jan. 28, 2015), <https://joshblackman.com/blog/2015/01/28/does-the->

that the Supreme Court might be poised to revisit some of its non-delegation jurisprudence rendering it somewhat less permissive in the years to come,<sup>78</sup> it is especially urgent to draw attention to the way the REA inappropriately delegates lawmaking in connection with the FRE. In this context, it is “inherently defective.”<sup>79</sup>

To be sure, soon after the Supreme Court was willing to be active in enforcing a non-delegation doctrine,<sup>80</sup> it still held fire against the REA in its early days. When the original REA was passed in 1934, which did not obviously delegate the right to make evidence law through rulemaking, the 1935 non-delegation cases had not yet come down. But *Wayman v. Southard*<sup>81</sup> had already held in 1825 that Congress may not transfer “powers which are strictly and exclusively legislative,”<sup>82</sup> and *J.W. Hampton, Jr. & Co. v. United States*<sup>83</sup> had already announced the “intelligible principle” test in 1928, disabling Congress from handing blanket powers to another branch without giving it some policy guidance.<sup>84</sup> Still, in 1941, the Supreme Court was compliant and complicit in the delegation to itself in *Sibbach v. Wilson & Co.*<sup>85</sup> By 1944, in *Yakus v. United States*,<sup>86</sup> the Court was already getting less formalistic about delegations more generally, insisting that the Constitution

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rules-enabling-act-violate-the-non-delegation-doctrine [https://perma.cc/NS7J-K748]. My argument here is limited to the REA as it applies to the FRE.

78. See *Gundy*, 136 S. Ct. at 2131 (Alito, J., concurring) (“If a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort.”). Chief Justice Roberts and Justice Thomas joined Justice Gorsuch’s effort to revive a non-delegation doctrine with more bite in *Gundy*. See *id.* (Gorsuch, J., dissenting). Although Kavanaugh did not participate in *Gundy*, there is good reason to think he sides with Gorsuch on these matters in light of his solidarity with Gorsuch in another administrative law case from the same term. See *Kisor v. Wilkie*, 139 S. Ct. 2400, 2439 (2019) (Gorsuch, J., concurring).

79. Martin H. Redish & Uma M. Amuluru, *The Supreme Court, the Rules Enabling Act, and the Politicization of the Federal Rules: Constitutional and Statutory Implications*, 90 MINN. L. REV. 1303, 1308 (2006).

80. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U. S. 495, 537 (1935); *Panama Refining Co. v. Ryan*, 293 U. S. 388, 430 (1935).

81. 10 Wheat. 1 (1825).

82. *Id.* at 42–43.

83. 276 U.S. 394 (1928).

84. *Id.* at 409. *Field v. Clark*, 143 U.S. 649 (1892), had also announced that “Congress cannot delegate legislative power[,] . . . a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution.” *Id.* at 692.

85. 312 U.S. 1 (1941).

86. 321 U.S. 414 (1944).

allows Congress degrees of “flexibility” and “practicality.”<sup>87</sup> And in the 1989 *Mistretta v. United States*<sup>88</sup> opinion upholding the U.S. Sentencing Commission, the Court reinforced the wide latitude Congress has under the Constitution to delegate to, in that case, a Judicial Branch instrumentality (though it continued to emphasize the “intelligible principle” limitation to guide substantial delegations).<sup>89</sup> So is anything left in the flaccid non-delegation doctrine to challenge the REA’s application to the FRE (which is not controlled by the Court’s decision in *Sibbach* about an earlier version of the REA that did not clearly delegate the power to make and repeal evidence law)?

First, much of the Court’s *Sibbach* opinion focuses on the Federal Rules of Civil Procedure made under the REA being quite narrowly “procedural” rather than “substantive.”<sup>90</sup> This character of the Federal Rules at issue in the case is part of the justificatory matrix for upholding the delegation. Indeed, the Court emphasized that Congress “has never essayed to declare the substantive state law, or to abolish or nullify a right recognized by the substantive law of the state where the cause of action arose, save where a right or duty is imposed in a field committed to Congress by the Constitution.”<sup>91</sup> Thus, even if John Hart Ely was right that the *Sibbach* Court underemphasized or misunderstood the feature in the REA that no Federal Rule may “abridge, enlarge, [ ] or modify the substantive right of any litigant”<sup>92</sup> (which might have led to a different result if the relevant state actually protected the litigant from the physical exam ordered under the Federal Rules in the district court in the case),<sup>93</sup> there is no question that the Court’s willingness to go along with the delegation was tied up

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87. *Id.* at 425–26.

88. 488 U.S. 361 (1989).

89. *Id.* at 372.

90. *Sibbach*, 321 U.S. at 10, 14.

91. *Id.* at 10.

92. Pub. L. No. 73-415, 48 Stat. 1064, 1064 (1934); John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 718–20 (1974). Note that “of any litigant” disappeared in the modern version of the REA, highlighting that the relevant substantive rights may be more conceptual or related to third parties rather than possessory to specific litigants.

93. See Ely, *supra* note 92 (discussing the facts and holding in *Sibbach*). Not everyone agrees with Ely. See generally Burbank, *supra* note 23, at 1152 (arguing that this dimension of the REA was really intended to be a mirror of the first requirement that the Court promulgate general rules of procedure and was not an additional side-constraint).

with its view about the “procedural” nature of the relevant Federal Rules.

Yet, even if one were to concede that much of the FRE is sufficiently “procedural” and focused on internal housekeeping in the federal courts as a general matter,<sup>94</sup> it would be hard not to conclude that central issues to the FRE like how to think about character evidence, how to evaluate religious convictions or belief, and burdens of proof and presumptions for tort causes of action are “right[s] granted for one or more nonprocedural reasons, for some purpose or purposes not having to do with the fairness or efficiency of the litigation process,”<sup>95</sup> or some purpose extrinsic to the evaluation of evidence. Thus, with respect to the FRE, there may be so much in it that is susceptible to abridging, enlarging, or modifying substantive rights that it requires revisiting the soundness of *Sibbach*’s complacency about the delegation in the REA as it applies to the FRE.<sup>96</sup> Whether one thinks much of the FRE should be invalidated because it fails to comply with the REA’s statutory requirement of not abridging, enlarging, or modifying substantive rights or whether one focuses on the centrality of that limitation to render the delegation constitutional in the first place, the FRE puts *Sibbach*’s blessing of the delegation effectuated in the REA-as-of-1934 against the ropes as a way to justify our current REA-FRE interface.

Second, *Sibbach* relied to some extent on a congressional review process in the original REA that is no longer permitted under *Chadha*. The Court held in *Sibbach* that after the Federal Rules of Civil Procedure were proposed and submitted to Congress under the REA,

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94. See Edmund M. Morgan, *Rules of Evidence—Substantive or Procedural*, 10 VAND. L. REV. 467, 468 (1957) (arguing that evidence law is procedural, through and through). For the classic typologies of which parts of evidence law are *truly* procedural and which are harder to classify as such, see Jack B. Weinstein, *The Uniformity-Conformity Dilemma Facing Draftsmen of Federal Rules of Evidence*, 69 COLUM. L. REV. 353, 356 (1969); and Ronan E. Degnan, *The Law of Evidence Reform*, 76 HARV. L. REV. 275, 283 (1962).

95. Ely, *supra* note 93, at 725.

96. This is part of why Ely could have written in 1974, as follows: “Thus, in one slight sense it seems a pity that Congress intercepted the Evidence Rules. For the privilege provisions might well have presented the case that forced the Court to get serious about the Enabling Act.” *Id.* at 738. For him, it is clear that “[a] Federal Rule displacing [the husband-wife or physician-patient] . . . privilege would . . . violate the [REA’s] second sentence” about abridging substantive rights. *Id.* at 740. Although Congress moved privilege issues out of contention by requiring that they be regulated by statute, *id.*, many other FRE provisions affect substantive rights in similar ways but are still subject to the REA regime under current law.

“that body might examine them and *veto* their going into effect if contrary to the policy of the legislature.”<sup>97</sup> Focusing on the “value of the reservation” to vindicate the delegation (the “report-and-wait” dimension of the REA), the *Sibbach* Court used what looked to it in 1941 as a legislative veto provision in the original REA to find “no transgression of legislative policy,” further vindicating the delegation.<sup>98</sup> Although Justice Frankfurter’s dissent on this point seems right—that “to draw any inference of tacit approval from non-action by Congress is to appeal to unreality”<sup>99</sup>—the legislative veto provision in the REA is no longer a part of it, because Congress got rid of that form of review in 1988, after *Chadha*.<sup>100</sup> Thus, whatever relief that provision provided the *Sibbach* Court in upholding the delegation in 1941—as Congress could efficiently and quickly makes sure its policy preferences were being followed by the Court—was eroded by *Chadha*’s rendering all legislative vetoes unconstitutional.<sup>101</sup>

Third, and finally, the original version of the REA contemplated an all-at-once replacement of the procedural rules under the Conformity Act with the Federal Rules to come on the heels of the REA’s passage. The idea that the supersession provision in 1934 would have allowed the Supreme Court to supersede the Conformity Act in 1938 (with a potential that Congress might then systematically repeal statutes in conflict with the new Federal Rules after the dust settled from the passage of the Rules) and then in an ongoing way supersede its own Federal Rules with amendments and repeals of earlier versions of its Federal Rules is about as far as one can read the finding of a constitutional delegation in *Sibbach*, which we have to treat as the standing law. But that is a long way off from the modern modality of supersession in connection with the FRE, which has permitted the Supreme Court in an ongoing way for 45 years to amend and repeal virtually willy-nilly congressional statutes that were enacted through the constitutional procedures of bicameralism and presentment. The Foreword of the FRE should give any student of constitutional law

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97. *Sibbach*, 312 U.S. at 15 (emphasis added).

98. *Id.* at 15–16.

99. *Id.* at 18 (Frankfurter, J., dissenting).

100. See Pub. L. No. 100-702, 102 Stat. 4642, 4650 (1988) (removing the one-house legislative veto provision from the REA).

101. I discussed this feature of *Chadha* above. *Supra* text accompanying note 40. The Court willfully forgot in 1983 what it knew in 1941: that the original REA probably contained a legislative veto. See *INS v. Chadha*, 462 U.S. 919, 935 n.9 (1983) (discussing the “report-and-wait” provision the Court considered in *Sibbach*, 312 U.S. at 15).

pause: “This document contains the Federal Rules of Evidence . . . . The rules were enacted by Public Law 93-595 (approved January 2, 1975) and have been amended by Acts of Congress, *and further amended by the United States Supreme Court.*”<sup>102</sup> This is pretty wild stuff. Indeed, since Congress cannot countermand proposals to upend its statutes in any fast-tracked way (as it could have under the pre-*Chadha* REA), what we have now is closer to what was unimaginable even in *Mistretta*. It is as if Congress gave the Sentencing Commission the authority not only to set determinate sentencing guidelines for crimes set by Congress (as the Court blessed in *Mistretta*<sup>103</sup>) but also the power to amend and repeal substantive criminal law statutes on an ongoing basis, reserving for itself only the ability to countermand that Commission by going through the constitutional mechanisms of bicameralism and presentment. Even in 1989, when the Court was being pretty mushy about delegations to the Judicial Branch, the Court would not have gone along with such congressional abdication of its own lawmaking and law-repealing authority.

In short, and perhaps surprisingly for such a seemingly toothless framework, the non-delegation doctrine exposes the formal failures of the REA as applied to the FRE. Rather than “an empty exercise in judicial rhetoric,”<sup>104</sup> the non-delegation doctrine should be seen to proscribe how the REA functions in connection with the FRE.<sup>105</sup> To the extent that the doctrine tends to recede in the standard vanilla delegation to Article II administrative agencies, courts can rely on Article III judicial review as a backstop, thanks to the Administrative

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102. STAFF OF H. COMM. ON THE JUDICIARY, 116TH CONG., FED. RULES OF EVIDENCE III (Comm. Print 2019) (emphasis added).

103. 488 U.S. 361, 369, 379 (1989).

104. Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 480 (1989).

105. I would have to concede that even Gorsuch in Section II.B of his *Gundy* dissent looking to revive the non-delegation doctrine cites *Wayman*, 23 U.S. (10 Wheat.) 1 (1825), in service of his willingness to assume that courts have some constitutional grant to regulate their own practices. *See Gundy v. United States*, 136 S. Ct. 2116, 2136 (2019) (Gorsuch, J., dissenting) (citing *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 31, 43 (1825)). This ostensibly lessens his worry about certain kinds of delegations to the judiciary. As I’ll suggest more carefully below, much of evidence law is not mere regulation of courtroom practices but is instead substantive law implicating federalism and jury rights—and in any event the delegation of interest here is not the delegation to make rules for how to admit impeachment testimony, for example, but the delegation effectively to repeal statutes, a wholly different kind of delegation of legislative authority.

Procedure Act.<sup>106</sup> To the extent the doctrine fades away in many delegations to the President directly, the Court can—as Justice Breyer emphasizes in *Clinton*<sup>107</sup>—rely on the political process somewhat as a backstop. But in connection with a delegation to the Supreme Court, which is ultimately asked to sit in judgment on the reach of its own power and be the judges in their own cause, it is easier to see how the non-delegation doctrine can do some real work here.<sup>108</sup> It is, from this vantage point, not hard to understand why the Court has never struck down part of the FRE for being beyond the authorization in the REA.<sup>109</sup> It is thus a little ridiculous (or “unseemly”)<sup>110</sup> to think that the part of the REA that could be used to invalidate Federal Rules that infringe on substantive rights can be the thin reed on which to vindicate the constitutionality of supersession.<sup>111</sup>

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106. Pub. L. 79-404, 60 Stat. 237, 243 (1946).

107. *Clinton v. City of New York*, 524 U.S. 417, 490 (1998) (Breyer, J., dissenting).

108. As Andrew Kent observes to his constitutional law students every year, the Court is routinely unconcerned with separation of powers deviations in favor of judicial power. *See, e.g.*, *Mistretta v. United States*, 488 U.S. 361, 379 (1989) (permitting broad policymaking in the Judicial Branch’s Sentencing Commission); *Morrison v. Olson*, 487 U.S. 654, 676 (1988) (permitting the Judicial Branch to appoint an independent counsel as a prosecutorial officer to investigate the Executive Branch); *United States v. Nixon*, 418 U.S. 683, 685, 713 (1974) (upholding a Judicial Branch subpoena against an assertion by the President of “executive privilege”); *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941) (upholding a broad delegation to the Supreme Court).

Perhaps a formalist argument could be run as follows: It is actually the law that the Court is unconcerned with delegations to the judicial branch. Whether formally the law or practically the law, the Court will never strike down a delegation to itself. About this form of formalism, I can say two things: 1. I am about to offer a functionalist reason to be skeptical of such an argument; and 2. *mutatis mutandis, res ipsa loquitur*.

109. *See Mistretta*, 488 U.S. at 379 (holding that Congress’s broad delegation to the Judicial Sentencing Commission is permissible); *Nixon*, 418 U.S. at 713 (ruling in favor of judicial power over executive privilege).

110. Kelleher, *supra* note 73, at 443. For a trenchant critique about how the rulemaking process is a classic “foxes-watching-the-henhouse” problem, see Carrie Leonetti, *Watching the Hen House: Judicial Rulemaking and Judicial Review*, 91 NEB. L. REV. 72 (2012).

111. For one effort in this regard, notwithstanding an appreciation of this problem, see Kelleher, *supra* note 73, at 441 (“The failure by the Court to take seriously the limits on its authority to promulgate Rules could create a problem with the supersession provision.”). Kelleher also dismisses the worry about judges being the adjudicators of their own authority—the most basic *nemo iudex in sua causa* principle of natural justice, see Fred H. Blume, *Book Three Title Five in Annotated Justinian Code*, [http://www.uwo.edu/lawlib/blume-justinian/\\_files/docs/Book-3PDF/Book%203-5.pdf](http://www.uwo.edu/lawlib/blume-justinian/_files/docs/Book-3PDF/Book%203-5.pdf) [<https://perma.cc/7PJL-Y7ZG>]—because the Court merely “rubberstamps” the

### B. Function

The formal arguments against the constitutionality of the FRE's revision and amendment system are formidable. They are reason enough—even apart from the continuing ascendancy of formalism on Supreme Court<sup>112</sup>—to look for a better future for the FRE, putting it on firmer constitutional foundations. But there are also functional arguments that reinforce the conclusion that something structural has to change for the FRE rulemaking process, which I explore below. Although my formal arguments may have broader application for the way supersession in the REA also affects other federal rules regimes, the functional arguments I offer are targeted to its application in the FRE context, upon which I focus here.

#### 1. *Why evidence is special—like bankruptcy*

Consider Congress's choice to repeal supersession for the Bankruptcy Rules in the Bankruptcy Reform Act of 1978.<sup>113</sup> The Senate Report notes the following: “This bill extensively revises the bankruptcy law. Nearly all procedural matters have been removed and left to the Rules of Bankruptcy Procedure. Consequently, the need to permit the Supreme Court's rules to supersede the statute no longer exists. To the extent a rule is inconsistent the statute will govern.”<sup>114</sup> And when one looks closely at 28 U.S.C. § 2075—the REA's provisions that deal with the Supreme Court's authority to promulgate rules for bankruptcy proceedings—the absence of a parallel supersession

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work of an Advisory Committee and Judicial Conference and “actually plays very little role in the rulemaking process.” Kelleher, *supra* note 73, at 443. This is supposed to make us *more* comfortable with the REA's delegation to the Supreme Court to amend and repeal statutory law that regularly touches upon substantive rights? To the extent the delegation is a pass-through to the Advisory Committee, we inch ever closer to the problems associated with the delegation in *A.L.A. Schechter Poultry Corp. v. United States* in which a “roving commission” of private parties got to promulgate rules that affected substantive rights. 295 U.S. 495, 521–25 (1935); *id.* at 551 (Cardozo, J., concurring).

112. See Ofer Raban, *Between Formalism and Conservatism: The Resurgent Legal Formalism of the Roberts Court*, 8 N.Y.U. J.L. & LIBERTY 343, 344–45 (2014) (documenting the increase in formalistic decisions during the Roberts Court era).

113. Stephen B. Burbank, *Hold the Corks: A Comment on Paul Carrington's “Substance” and “Procedure” in the Rules Enabling Act*, 1989 DUKE L.J. 1012, 1045.

114. S. Rep. No. 989, 95th Cong., 2d Sess. 158 (1978); see also H.R. Rep. No. 595, 95th Cong., 1st Sess. 292 (1977) (“[T]he Rules would no longer create confusion if they are inconsistent with the statute, and the Supreme Court will lose the power to repeal *pro tanto* portions of the bankruptcy laws.”). Thanks to Stephen Burbank for these references.

provision is as salient as it is instructive.<sup>115</sup> Indeed, it mostly mimics the authorizations and procedures for promulgating rules of procedure and evidence in § 2072 and § 2074 with that one notable omission.<sup>116</sup> As Stephen Burbank notes, it is hard to understand why Congress's logic in 1978 did not generalize to the whole Federal Rules regime by 1988, when it was revisiting the REA anyway.<sup>117</sup>

As I've already discussed, unlike the Federal Rules of Civil Procedure, the FRE was first set in motion by Congress rather than the Supreme Court. Congress set into codified form statutory law that grants and limits many substantive rights that pre-empt local state law—just like substantive bankruptcy law. Thus, Congress should have rendered all substantive rules of evidence immune from supersession—and allowed the Court to promulgate only more purely procedural evidence guidelines. It appreciated this enough to disable the Supreme Court from in any way mucking with evidentiary privileges,<sup>118</sup> but missed its opportunity like it had with the bankruptcy overhaul to separate more clearly congressionally determined substantive rights in the laws of evidence from procedural ones that it could leave wholly in control of the Supreme Court both in the first instance and beyond, rendering supersession of congressional laws as unnecessary as it is unconstitutional.

What Congress should have done in 1988 was repeal all parts of the FRE that it thought purely procedural, leaving their status as “Rules” untouched even though they would no longer be statutes of the United States. It could then leave much of the FRE in the hands of the Advisory Committee and the Supreme Court without the awkwardness of the FRE being a statute. And once the rules that grant substantive rights remained codified, Congress should have repealed the supersession provision so it would be clear that statutes trump promulgated rules—business as usual, of course, in the rest of the administrative state.<sup>119</sup>

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115. See 28 U.S.C. § 2075.

116. *Id.*; *id.* § 2074(a); *id.* § 2072(b).

117. Burbank, *supra* note 113, at 1045.

118. “Any such rule creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress.” *Id.* § 2074(b). Admittedly, in practice this has led the Court to develop evidentiary privileges through the common law rather than through the rulemaking process. Whatever defects such developments create, at least the developments require actual cases and controversies and judicial reasoning—something absent in the rulemaking process.

119. Consider APA provision 5 U.S.C. § 706 (requiring that reviewing courts “shall . . . hold unlawful and set aside agency action, findings, and conclusions found to

To be sure, in light of the specialized treatment of bankruptcy in the REA, one could conclude that Congress seems to have made a deliberate choice in 1988 to sustain supersession for the FRE (a decision I am arguing is beyond its formal authority). Yet, one cannot escape the conclusion that several parts of the FRE ought to be outside the ambit of supersession because they are congressional policy choices that should not be so easily upset or undone by a mere rule pursuant to a delegation with no discernable standard. For example, putting to one side the controversy surrounding FRE Rules 413, 414, and 415<sup>120</sup>—rules permitting the admission of evidence that a defendant committed a previous similar crime of sexual assault or child molestation—which were added to the FRE by Congress through a 1994 statutory enactment,<sup>121</sup> it is hard not to see them as policy choices that should be outside the REA revision process. Yet notwithstanding that Congress expressed an intent for these FRE provisions to be immunized from supersession (at least in the first instance),<sup>122</sup> the Advisory Committee and the Supreme Court went ahead and amended—and superseded—them anyway through the REA process in 2011.<sup>123</sup>

Or consider three more FRE rules that were passed in Congress's original 1975 enactment: Rule 411 explains how evidence of liability insurance should not figure in proving negligence or wrongful

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be . . . in excess of statutory jurisdiction, authority, or limitations” or “otherwise not in accordance with [statutory] law”).

120. See, e.g., R. Wade King, Comment, *Federal Rules of Evidence 413 and 414: By Answering the Public's Call for Increased Protection from Sexual Predators, Did Congress Move Too Far Toward Encouraging Conviction Based on Character Rather than Guilt?*, 33 TEX. TECH. L. REV. 1167, 1169 (2002) (arguing that Rules 413 and 414 created an increased risk of wrongful conviction).

121. Pub. L. No. 103-322, 108 Stat. 1796, 2135–37 (1994) (codified as amended at 28 U.S.C. app. Fed. R. Evid. 413–15 (1994)).

122. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 2137 (“Not later than 150 days after the date of enactment of this Act . . . , the Judicial Conference of the United States shall transmit to Congress a report containing recommendations for amending the Federal Rules of Evidence as they affect the admission of evidence of a defendant's prior sexual assault or child molestation crimes in cases involving sexual assault and child molestation. The Rules Enabling Act shall not apply to the recommendations made by the Judicial Conference pursuant to this section.”).

123. See Elizabeth L. DeCoux, *Are the 2011 Changes to Federal Rules of Evidence 413–415 Invalid? The Rules Enabling Act and the Drafters' Definition of “Stylistic”*, 34 N.C. CENT. L. REV. 136, 136 (2012). Merely stylistic or not, the Supreme Court rewrote a congressional law.

conduct but may figure in proving a witness's bias, prejudice, agency, ownership, or control.<sup>124</sup> Rule 610 establishes that "[e]vidence of a witness's religious beliefs or opinions is not admissible to attack or support the witness's credibility."<sup>125</sup> And Rule 608, in part, provides that, "By testifying on another matter, a witness does not waive any privilege against self-incrimination for testimony that relates only to the witness's character for truthfulness."<sup>126</sup> These congressional commitments—to forms of proof in tort law and to constitutional principles associated with the freedom of religion and the right against self-incrimination—should not so easily be subject to amendment or repeal through the REA process, whatever else Congress intended within the REA. The delegation of repeal authority away from Congress should be seen as an abdication that our Constitution should not permit: Congress must remain the core lawmaker in these domains, subject to Article III judicial review where appropriate in a case or controversy. Even though the Supreme Court has not substantively or substantially yet used its authority to completely undo these particular congressional choices made in 1975,<sup>127</sup> the Court has used its REA authority in connection with each of these rules and replaced its wording for Congress's.<sup>128</sup> That just is not how important lawmaking should work—and it confuses the task of statutory interpretation, leaving courts interpreting their own work product rather than a congressional enactment. And nothing in the current REA adequately protects these provisions from repeal because Congress cannot countermand the Supreme Court without passing a new law with House and Senate majorities, along with presidential approval.<sup>129</sup>

Even fans of supersession generally recognize that

the congressional choice to enact legislation indicates a policy decision, which presumptively places the matter into the area of

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124. Fed. R. Evid. 411.

125. Fed. R. Evid. 610.

126. Fed. R. Evid. 608.

127. See STAFF OF H. COMM. ON THE JUDICIARY, 116TH CONG., FED. RULES OF EVIDENCE 11–12 (Comm. Print 2019) (demonstrating that subsequent Supreme Court amendments did not change these congressional choices).

128. Rule 411 was amended with the REA process on Mar. 2, 1987, eff. Oct. 1, 1987 and Apr. 26, 2011, eff. Dec. 1, 2011. Fed. R. Evid. 411. Rule 610 was amended with the REA process on both of these dates as well. Fed. R. Evid. 610. And Rule 608 was amended on the 2011 date, as well as dates in 1987, 1988, and 2003. Fed. R. Evid. 608.

129. See *INS v. Chadha*, 462 U.S. 919, 952 (1983).

“substantive rights,” and outside of the scope of matters delegated to the Court. Thus, statutes with a substantive purpose . . . are not subject to supersession, as a Court-promulgated Rule in conflict with the statute would impermissibly affect a substantive right within the meaning of the REA.<sup>130</sup>

In light of how much of the FRE is shot through with allocations of substantive rights, it would be better to parcel out the purely procedural and internal housekeeping provisions, render the latter exclusively rule-based and not statute-based through a repeal, re-enact the portions of the FRE that grant substantive rights of litigants, and repeal the parts of the REA that grant the Supreme Court the ability to supersede statutes, which has no place in the fabric of our laws.

## 2. Federalism

In Stephen Burbank’s authoritative study about the origins of the original REA in 1934, he argued that the baked-in REA condition that rulemaking not bump up against “substantive right” was not really about federalism.<sup>131</sup> To be sure, from a contemporary *Erie Railroad Co. v. Tompkins*<sup>132</sup> perspective (and *Erie* would not be decided for another four years after the passage of the REA), the REA’s permission to the Court to make rules of “procedure” looks like a “protection of ‘substantive’ state policies” with “roots in federalism concerns.”<sup>133</sup> Yet, Burbank’s careful history of the REA’s adoption furnishes the following conclusion: “It is difficult to find even a trace of concern that the uniform federal procedure bill [that became the REA] might lead to an inappropriate displacement of state law in any of the reports and other material produced by its ABA sponsors during the long campaign” to adopt the REA.<sup>134</sup> Rather, what the REA was really about was an allocation of powers between coordinate branches of government: procedure for the Court; substantive rights for Congress. The REA is a separation of powers statute, not a federalism statute.<sup>135</sup>

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130. Kelleher, *supra* note 73, at 442.

131. Burbank, *supra* note 23, at 1108–12.

132. 304 U.S. 64, 79–80 (1938).

133. Burbank, *supra* note 23, at 1108–09.

134. *Id.* at 1111.

135. *Id.* at 1111 n.435. As we just saw above, the FRE rulemaking regime is not faithful to this “original intent” for the REA because the Court is getting plenty of control over substantive right through Congress’s broad delegation. Hoping the Court will use its review powers (and its statutory limit against promulgating rules that upset substantive rights) to reign in its own authority seems to be a form of magical thinking.

All that said, from a post-*Erie* perspective, we simply have to apply the REA with federalism concerns in mind. *Erie* requires maintaining state sovereign control over state substantive law as part of the law of our federal courts. Second, whatever allocation of powers was first envisioned by the REA in 1934, 1975 gave us a different REA (to say nothing of the 1988 REA)—and an FRE that had more obvious potential to intersect with state substantive rights.<sup>136</sup> When those FRE rules are formal statutes of the United States, it is not controversial that federal law prevails over state law when Congress so intends (assuming Congress is acting within its constitutional jurisdiction), owing to settled views about preemption under the Constitution's Supremacy Clause.<sup>137</sup>

Indeed, it was not a great mystery why Congress countermanded the Supreme Court's proposal for the FRE in 1973: in meaningful part, the congressional record reveals a Congress worried directly about the federalism implications of the FRE (and particularly the way its privilege law would infringe state sovereignty).<sup>138</sup> Although it coped with its federalism anxieties by enacting the FRE itself and reserving the right to amend the privilege rules,<sup>139</sup> this compromise produced some other difficulties Congress did not fully appreciate at the time, especially owing to developments in constitutional law (and common law developments in privilege law that would not come through the REA process). To wit, the Supreme Court's supersession mechanisms for amendment and repeal that Congress approved in 1975 created a deep problem for American federalism. Those Court-made rules can too easily displace state substantive law without a congressional intent to preempt and with too loose oversight about which FRE rules are genuinely procedural and should be applied in diversity cases. Such Court-made rules should give way to state substantive policies that

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136. Kelleher, *supra* note 73, at 399, 444.

137. U.S. CONST. art VI.

138. See 119 CONG. REC., 8331–37 (1973) (worrying about how the FRE involve “delicate questions of Federal-State relations” and “abridge many important existing substantive rights of federal court litigants, thus violating principles or federalism”). For more analysis of these issues, see Earl C. Dudley, Jr., *Federalism and Federal Rule of Evidence 501: Privilege and Vertical Choice of Law*, 82 GEO. L.J. 1781, 1781–85 (1994); Charles H. Anderton, Jr., Comment, *The Constitutional and Erie Implications for Federal Diversity Cases of the Privilege Provisions of the Proposed Federal Rules of Evidence*, 8 LINCOLN L. REV. 151, 151–53 (1973); Martin I. Kaminsky, *State Evidentiary Privileges in Federal Civil Litigation*, 43 FORDHAM L. REV. 923, 923–24 (1975).

139. Dudley, *supra* note 138, at 1781–84.

cannot be so easily displaced under *Erie*.<sup>140</sup> To a Congress in 1975 that was allowed to reserve to itself a one-house legislative veto—and approved one specifically with respect to the FRE—it might have worried less. In a world without legislative vetoes post-*Chadha*, it must worry more. The entire legislative deal for the FRE might have been wrapped up with a one-house veto provision that is no longer constitutionally viable.

Rather than re-hashing the privilege issues—which are not really subject to the REA anyway, as Congress saw fit to exclude such a central federalism issue from the REA process<sup>141</sup>—consider, instead, Rule 407.<sup>142</sup> This rule—as passed by Congress in 1975—controls the admissibility of “subsequent remedial measures” a party might take, holding them inadmissible to prove negligence or culpable conduct.<sup>143</sup> Neither in 1975 was there nor today is there any reference to relevant state laws on this kind of evidence in state tort cases; references back to state law do, however, appear, in current Rule 302<sup>144</sup> on civil presumptions, Rule 501<sup>145</sup> on privileges, and Rule 601<sup>146</sup> on competency.<sup>147</sup> Yet notwithstanding that many states continue to have different substantive positions on how subsequent remedial measures should figure in state product liability law,<sup>148</sup> at least since Rule 407 was clarified by Supreme Court amendment in 1997 to apply to product liability cases<sup>149</sup> when those cases come before federal courts sitting in

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140. See generally Olin Guy Wellborn III, *The Federal Rules of Evidence and the Application of State Law in the Federal Courts*, 55 TEX. L. REV. 371 (1977).

141. See 28 U.S.C. § 2074(b) (“Any such rule creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress.”).

142. Fed. R. Evid. 407.

143. Fed. R. Evid. 407, as passed in 1975.

144. Fed. R. Evid. 302 (“In a civil case, state law governs the effect of a presumption regarding a claim or defense for which state law supplies the rule of decision.”).

145. Fed. R. Evid. 501 (“But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.”).

146. Fed. R. Evid. 601 (“But in a civil case, state law governs the witness’s competency regarding a claim or defense for which state law supplies the rule of decision.”).

147. 2 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 4:55 (4th ed. 2019) (“The Erie Problem”).

148. *Id.*

149. The Supreme Court was endorsing the Advisory Committee’s decision from 1993 on the matter. See Minutes of the Advisory Comm. on Fed. Rules of Evid. 3–4 (1993) (recognizing a circuit split on applying state substantive law to products liability cases).

diversity, federal courts are generally applying the FRE policy rather than state substantive law on remedial measures. The Supreme Court intervened with an FRE amendment to Rule 407 in 1997 precisely because some courts (and commentators) were taking *Erie* seriously and applying state substantive law in products liability cases when sitting in diversity.<sup>150</sup>

For fans of a uniform evidence law in the federal courts, maybe they do not see anything funky here. In the earlier version of Rule 407, there was some ambiguity about whether it effectively preempted state substantive law on the point; Congress's intent was not clear on the matter.<sup>151</sup> But after having this issue percolate in the lower courts from 1975 to 1997, the "rule maker" clarified how to resolve the question prospectively.<sup>152</sup>

Yet there is something amiss in this process because Rule 407 was a congressional statute—and the Supreme Court rewrote the law in substantive ways that have substantial federalism implications. Preemption of state law based on congressional silence to a Supreme Court rulemaking order does not seem like the best way to respect our federalism. True enough, the Supreme Court—through a case or controversy—ultimately would be able to determine the preemptive

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150. 2 MUELLER & KIRKPATRICK, *supra* note 147, at § 4:55. For some background on this dispute in the lead-up to the 1997 amendments, see, for example, Marcia Lyn Finkelstein, Note, *Comity and Tragedy: The Case of Rule 407*, 38 VAND. L. REV. 585 (1985) (focusing on Maine Rule of Evidence 407, which self-consciously departed from Federal Rule of Evidence 407, and arguing that it should not be preempted); Douglas McKeige, Note, *Federal Rule of Evidence 407: Can It Override Conflicting State Law?*, 59 TUL. L. REV. 1577 (1985) (arguing for state law to prevail over federal law); Lev Dassin, Note, *Design Defects in the Rules Enabling Act: The Misapplication of Federal Rule of Evidence 407 to Strict Liability*, 65 N.Y.U. L. REV. 736 (1990) (arguing that state law should control). These papers were motivated, in part, by the 10th Circuit's decision to give effect to state substantive law over Rule 407. See *Moe v. Avions Marcel Dassault-Breguet Aviation*, 727 F.2d 917, 932 (10th Cir. 1984) (holding that "state rule controls" when conflicts between Rule 407 and the Maine rule arise). But see *Flaminio v. Honda Motor Co.*, 733 F.2d 463, 472 (7th Cir. 1984) (applying Rule 407 against a claim that state products liability law should control). Once the Supreme Court promulgated its new version of Rule 407 in 1997, however, it was much harder to sustain the idea that state law should control; and courts have largely fallen into line. See Evan Stephenson, *Alone and Out of Excuses: The Tenth Circuit's Refusal to Apply Federal Rule of Evidence 407 to Product Liability Actions*, 36 N.M. L. REV. 391, 417 (2006) (encouraging the 10th Circuit to get into line after the 1997 amendments); 2 MUELLER & KIRKPATRICK, *supra* note 147, at § 4:55 (noting case development and embracing the consensus conclusion that Rule 407 now clearly controls state law).

151. 2 MUELLER & KIRKPATRICK, *supra* note 147, at § 4:55.

152. *Id.*

effects of Rule 407. But that decision would be in the context of an act of statutory interpretation and would therefore have to draw on Congress's intent through the traditional tools of statutory construction, wrestling with a host of presumptions against federal preemption of traditional state regulation (which most tort law obviously is),<sup>153</sup> and a strong rule against federal invasion of core state functions.<sup>154</sup> There is good reason to be skeptical that fundamental decisions of the preemption of substantive state law ought to be disposed of by unilateral rulemaking unconstrained by the Administrative Procedure Act that can supersede a congressional law on the matter.<sup>155</sup> And let's not forget that when those rulemaking decisions are challenged through the courts, none other than the rule maker itself performs the requisite judicial review.<sup>156</sup>

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153. See *Wyeth v. Levine*, 555 U.S. 555, 581 (2009) (holding that federal law does not preempt state law in failure-to-warn claims); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 232, 237 (1947) (finding that state law historically regulated warehousemen and Congress did not express intent to adopt new policy that would preempt warehousemen state law).

154. See, e.g., *Gregory v. Ashcroft*, 501 U.S. 452, 461–64 (1991).

155. Obviously, administrative agencies sometimes get a bit of control over preemption decisions. See, e.g., *Geier v. American Honda Motor Co.*, 529 U.S. 861, 865, 886 (2000). If one took the Court in its rulemaking function to be an administrative agency acting pursuant to delegated authority for some purposes, one might not be so troubled with the Court promulgating rules to clarify the preemption status of some of the FRE. But remember that these agency determinations of preemption can usually be reviewed by the courts, an independent branch, in some way. Judicial review just cannot be taken seriously if the Court were tasked with reviewing its own rulemaking work. Nor is the Supreme Court itself bound by the procedural requirements for rulemaking in the Administrative Procedure Act, which might contribute to rule legitimization.

156. Kelleher, *supra* note 73, at 398, 413.

I could offer other examples here<sup>157</sup> but I think the point is clear<sup>158</sup>: the FRE take positions that have serious implications for balancing state and federal interests in matters of substantive law.<sup>159</sup> For the FRE rules that interfere with state substantive law, Congress—or, alternatively, the Court in its Article III “case-or-controversy” posture—needs to be making the decisions about preemption of state law, not the Supreme Court as rule maker without a real compass from Congress.

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157. Consider, as another example, Rule 702. See, for example, Michael H. Gottesman, *Should Federal Evidence Rules Trump State Tort Policy? The Federalism Values Daubert Ignored*, 15 CARDOZO L. REV. 1837, 1872–73 (1994). Or Rule 408. See *Carota v. Johns Manville Corp.*, 893 F.2d 448, 451 (1st Cir. 1990) (affirming a district court’s refusal to apply the federal rule disallowing settlement negotiations to go to the jury because controlling state law permitted it and that substantive state policy should not be displaced by the FRE). One might also look to the way states handle impeachment of witnesses on the basis of crimes of “moral turpitude,” language that does not appear in Rule 609 but does remain in state codes of evidence. For more on the federal-state interaction on this issue, see Julia Ann Simon-Kerr, *Moral Turpitude*, 2012 UTAH L. REV. 1001, 1025–39 (exploring how the federal statute in 1975 departed from state codes on impeachment, many of which ended up mirroring the federal approach, but identifying Texas and California as holdouts).

158. Imagine that tomorrow the Supreme Court promulgates a parol evidence rule for federal courts sitting in diversity cases and Congress does not generate sufficient mobilization to countermand by statute. No one contests that the parol evidence is a substantive rather than procedural rule for *Erie* purposes, nor that different states choose different approaches to it. And it would be hard to argue that it would be beyond Congress’s institutional authority to enact a federal parol evidence rule—or delegate the authority to do so, though admittedly both of these propositions are contestable. Yet, in light of the widespread deference the FRE get thanks to *Hanna*, and thanks to the thinness of the “substantive right” limitation that never gets invoked to invalidate rules, it seems very likely that many federal courts would start ignoring substantive state contract law in diversity cases and adhere to an FRE parol evidence rule. That trenches on the federalism in the way *Erie* should have helped us avoid.

159. The Supreme Court understood early how tied up evidence law was with substantive state rights. Consider *M’Niel v. Holbrook*, 37 U.S. 84, 89 (1838):

We do not [perceive] any sufficient reason . . . to exclude . . . those statutes of the several states which prescribe rules of evidence, in civil cases, in trials at common law. Indeed, it would be difficult to [make] the laws of the state, in relation to the rights of property, the rule of decision in the circuit courts; without associating with them the laws of the same state, prescribing the rules of evidence by which the rights of property must be decided. How could the courts of the United States decide whether property had been legally transferred, unless they resorted to the laws of the state to ascertain by what evidence the transfer must be established?

### 3. *The jury*

There is yet a third functional reason to worry about the way the REA and FRE interact in our current rulemaking regime, reinforcing the formal arguments against supersession and the Supreme Court's delegated power to amend and repeal laws of evidence. That is the deep way evidence rules implicate the constitutional rights to a jury, guaranteed in Article III and the Sixth and Seventh Amendments.<sup>160</sup> Although there are undoubtedly important ways constitutional jury rights can be implicated by the Federal Rules of Civil Procedure<sup>161</sup> and the Federal Rules of Criminal Procedure,<sup>162</sup> rules of evidence so fundamentally control what end up as questions of law for courts and what juries are permitted to see that they might have a special constitutional status connected to jury rights as a whole. Indeed, many who do comparative work distinguish systems that use juries from civil

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160. U.S. CONST. art. III (“Trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . . .”); U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . .”); U.S. CONST. amend. VII (“In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.”).

161. See, e.g., FED. R. CIV. PR. 38 (“The right of trial by jury as declared by the Seventh Amendment to the Constitution—or as provided by a federal statute—is preserved to the parties inviolate.”); FED. R. CIV. PR. 39(c) (“In an action not triable of right by a jury, the court, on motion or on its own: (1) may try any issue with an advisory jury; or (2) may, with the parties’ consent, try any issue by a jury whose verdict has the same effect as if a jury trial had been a matter of right, unless the action is against the United States and a federal statute provides for a nonjury trial.”); FED. R. CIV. PR. 48 (“(a) NUMBER OF JURORS. A jury must begin with at least 6 and no more than 12 members, and each juror must participate in the verdict unless excused under Rule 47(c). (b) VERDICT. Unless the parties stipulate otherwise, the verdict must be unanimous and must be returned by a jury of at least 6 members. (c) POLLING. After a verdict is returned but before the jury is discharged, the court must on a party’s request, or may on its own, poll the jurors individually. If the poll reveals a lack of unanimity or lack of assent by the number of jurors that the parties stipulated to, the court may direct the jury to deliberate further or may order a new trial.”). Suja Thomas has also famously argued that the recognition of summary judgment in Rule 56 runs afoul of the rights to a jury, too. See Suja A. Thomas, *Why Summary Judgment is Unconstitutional*, 93 VA. L. REV. 139, 139–40, 179–80 (2007).

162. See FED. R. CRIM. PR. 23 (“Jury or Nonjury Trial”); FED. R. CRIM. PR. 24 (“Trial Jurors”); FED. R. CRIM. PR. 30 (“Jury Instructions”); FED. R. CRIM. PR. 31 (“Jury Verdict”). The Constitution’s Fifth Amendment grand jury right is implicated in Rule 6 of the Federal Rules of Criminal Procedure—but I am leaving the grand jury right aside here, for the moment.

law jurisdictions that do not in part by highlighting that evidence rules are far more developed in the common law countries that need to worry about what a jury might see.<sup>163</sup> It is, thus, not just Rule 1008 about “Functions of the Court and Jury” in the FRE that provides meaningful specifications of the constitutional jury rights,<sup>164</sup> but it is many other corners of the FRE, as well.<sup>165</sup> This feature of the FRE makes it an especially poor candidate for supersession by unilateral rule of the Supreme Court (with countermanding permissible only through another enactment consistent with Article I, Section 7 requirements).

To see how thoroughly suffused with jury matters the FRE are, consider Rules 103 and 104, to start: Rule 103 instructs, “To the extent practicable, the court must conduct a jury trial so that inadmissible evidence is not suggested to the jury by any means.”<sup>166</sup> This reinforces that virtually every admissibility decision implicates what a jury is allowed to hear. Further, Rule 104 controls “preliminary questions” about admissibility, witness qualification, and the availability of privilege, all of which are supposed to be adjudicated outside the earshot of the jury (with a few listed exceptions).<sup>167</sup> Furthermore, Rules 105 and 201 both pertain to how a judge is supposed to instruct jurors

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163. See JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 180 (1898) (“[T]he greatest and most remarkable offshoot of the jury was that body of excluding rules which chiefly constitute the English ‘Law of Evidence.’”); Jennifer L. Mnookin, *Bifurcation and the Law of Evidence*, 155 U. PA. L. REV. PENNUMBRA 134, 134–37 (2006) (“That the law of evidence is the child of the jury system is not only oft-repeated but also, as a historical matter, probably true.”). For some discussion—and rejection—of the dichotomy between common law jurisdictions with meticulous evidence rules and civil law jurisdictions which allow “free proof,” see, for example, Karl H. Kunert, *Some Observations on the Origin and Structure of Evidence Rules Under the Common Law System and the Civil Law System of “Free Proof” in the German Code of Criminal Procedure*, 16 BUFF. L. REV. 122, 122–23, 163–64 (1966). And for more skepticism about the conventional wisdom that we can do away with evidence rules in cases without juries and that most evidence law is a form of jury control, see Fredrick Schauer, *On the Supposed Jury-Dependence of Evidence Law*, 155 U. PA. L. REV. 165, 165–68 (2006); and Lisa Dufrainmont, *Evidence Law and the Jury: A Reassessment*, 53 MCGILL L.J. 199, 209–10, 238 (2008).

I do not need to rely on any categorical claim about the centrality of juries to evidence law to observe that the FRE we have in the United States often and thoroughly enforces a division of labor between jury and judge—and in so doing significantly contours our constitutional rights to a jury.

164. Fed. R. Evid. 1008.

165. E.g., Schauer, *supra* note 163, at 195 (hearsay rules).

166. Fed. R. Evid. 103(d).

167. Fed. R. Evid. 104.

about the evidence she does admit.<sup>168</sup> Rule 403 allows judges to exclude relevant evidence if the judge is convinced its “probative value” would be “substantially outweighed by,” among other things, “misleading the jury.”<sup>169</sup> Rule 606, beyond taking the reasonable position that jurors should not be trial witnesses, also tightly controls what jurors may reveal about deliberations during an inquiry into the validity of a verdict, a question of constitutional magnitude about the privacy of jury deliberations.<sup>170</sup> Rule 703 provides guidance on what may be disclosed to the jury in connection with an expert’s opinion testimony.<sup>171</sup> Although these specific examples are just the most explicit, rules on relevance (Rules 400–14), witnesses (Rules 601–15), and hearsay (Rules 801–07) also have implications for the reach and scope of the jury rights in the Constitution, too.<sup>172</sup> It is, accordingly, troublesome that the Supreme Court appears to be able to rewrite congressional statutes on these matters at its pleasure.

To be sure, when Congress was mulling over the original proposals for the FRE in the 1970s, it focused more on the federalism implications than the jury right implications.<sup>173</sup> But Congress’s failure to appreciate the issue in the 1970s is not a good reason for us to ignore it any longer. And although the early version of the REA included a special mention that rules promulgated by the Supreme Court must “preserve[] . . . inviolate” “the right of trial by jury as at common law and declared by the seventh amendment to the Constitution,”<sup>174</sup> Congress removed the special mention of the jury in its 1988 revisions to the REA as “redundant”<sup>175</sup>: the jury was made just one more “substantive right” that cannot be “abridge[d], enlarge[d], or modif[ied],”<sup>176</sup> a provision notable for its never being enforced.

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168. Fed. R. Evid. 105; Fed. R. Evid. 201(f).

169. Fed. R. Evid. 403.

170. Fed. R. Evid. 606. For the Court’s exploration of the congressional legislative intent here, see *Tanner v. United States*, 483 U.S. 107, 111, 122–25 (1987), remanded sub nom., *United States v. Conover*, 845 F.2d 266 (11th Cir. 1988); and *Warger v. Shauers*, 574 U.S. 40, 48 (2014). Yet the REA process would seem to let the Court, without a case or controversy, supersede Congress’s policy choice here.

171. Fed. R. Evid. 703.

172. *E.g.* Schauer, *supra* note 163, at 195 (hearsay rules).

173. H.R. Rep. No. 99-650, at 27, 29 (1973) (separate views of Rep. Holtzman).

174. Act of June 19, 1934, ch. 651, § 2, 48 Stat. 1064.

175. H.R. Rep. No. 99-422, at 20 n.4 (1985) (“The requirement in present 28 U.S.C. 2072 that rules ‘preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution’ has been omitted as redundant.”).

176. 28 U.S.C. § 2072 (1988).

However, especially in light of the Supreme Court's recognition of the way the Federal Sentencing Guidelines implicated jury rights in the important case of *United States v. Booker*<sup>177</sup> (and therein deciding that because of jury right implications all the Sentencing Guidelines needed to be downgraded from mandatory to advisory),<sup>178</sup> it is high time we take seriously how the FRE sufficiently bump against jury rights that the REA-with-supersession is just the wrong way to respect the Constitution.

Basic principles of contemporary administrative law further underscore suspicion that delegation to the Supreme Court to decide significant and important questions of constitutional magnitude about the jury without an Article III case or controversy should be disfavored.<sup>179</sup> To wit, the Court itself has recently emphasized that it will not breezily and with substantial deference read Congress to delegate away policy decisions with significant social, political, or economic effects.<sup>180</sup> How much more should the Court look with skepticism on broad delegations not merely to make rules of constitutional moment, but to rewrite congressional statutes about these matters, too. Indeed, the Court should bring this administrative law model to bear against the delegation of major questions to itself in the REA with respect to the FRE. Although this administrative law apparatus usually controls delegation to Article II entities rather than Article III entities,<sup>181</sup> since Article III judges are effectively acting like a super-charged administrative agency when they author FRE rules that can supersede congressional statutes (and state law), the so-called

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177. 543 U.S. 220 (2005).

178. *Id.* at 266.

179. This is not just my quirky view. In 1975 when the House was considering what became the FRE, Elizabeth Holtzman gave expression to concerns about "the procedure for amending" the FRE: "The Supreme Court is not given the power under Article III of the Constitution to legislate rules on substantive matters. It can pass such judgments only in the context of a particular case or controversy. Yet, H.R. 5453 allows the Court to promulgate a rule in a substantive policy area without the benefit of an adversary proceeding. We cannot (and should not) delegate such rule-making power to the Supreme Court." H.R. Rep. No. 93-650, at 27, 28-29 (1973) (separate views of Rep. Holtzman).

180. See *King v. Burwell*, 576 U.S. 473, 484-87 (2015); *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 147 (2000). See generally Blake Emerson, *Administrative Answers to Major Questions: On the Democratic Legitimacy of Agency Statutory Interpretation*, 102 MINN. L. REV. 2019, 2021-24 (2018); Jacob Loshin & Aaron Nielson, *Hiding Nondelegation in Mouseholes*, 62 ADMIN. L. REV. 19, 20-22 (2010).

181. Loshin, *supra* note 180, at 27 n.36.

“major questions” doctrine can be read to throw shade upon the REA’s application to the FRE. Given that the Court is already loath to permit Congress to determine the metes and bounds of constitutional rights in the first place,<sup>182</sup> delegating that power away seems even less likely to be permissible. Even though that delegation ends up in the Court’s hands, it is not in its capacity as an expositor of the Constitution, convened as an Article III entity. Rather, it is operating during its rulemaking as a ministerial agency, so it should not have magisterial powers to contour the constitutional rights to the jury there.

Going back to Wigmore at least, evidence law from early on took a fairly pro-judge and anti-jury posture.<sup>183</sup> Although Wigmore distanced

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182. It will take me too far afield to explore the relevance of the *Crowell*, *Northern Pipeline*, *Schor*, and *Granfinanciera* line of cases. See *Crowell v. Benson*, 285 U.S. 22, 62–65 (1932); *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 52–55, 88 (1982) (plurality opinion); *CFTC v. Schor*, 478 U.S. 833, 858 (1986); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 36, 64 (1989). But it is modest to say they stand for a level of discomfort the Court has expressed with Congress delegating away jury rights to administrative agencies and non-Article III adjudicators. Perhaps the more direct path to support the more basic suspicion the Court has with Congress’s power to define constitutional rights would be *City of Boerne v. Flores*, 521 U.S. 507, 519–20, 533–34, 536 (1997) or *Boumediene v. Bush*, 553 U.S. 723, 798 (2008).

I concede, however, that it is hard to deny that administrative agencies routinely use their delegation to affect constitutional rights. See Gillian E. Metzger, *Administrative Constitutionalism*, 91 TEX. L. REV. 1897, 1897–98, 1900–02 (2013) (exploring and defending the practice). Still, courts would struggle with giving agencies deference on core questions of the reach of constitutional rights, even if the administrative interpretations would not be deemed *ultra vires* because the relevant statute could be read to delegate some authority in the area.

183. See PORWANCHER, *supra* note 19, at 42 (highlighting that Wigmore took from Thayer a preference for judge rather than jury determinations about facts regarding foreign law); *id.* at 55 (arguing that Wigmore took from Oliver Wendell Holmes, Jr. a “willingness to remove questions of negligence from the juror and entrust them to the judge” and a belief that “the judge was more favorably positioned than the jury to accord the resolution of an individual case with the aggregate social welfare”); *id.* at 69 (describing Wigmore as “dubious of juries”); *id.* at 78 (finding Wigmore to “express[] a certain pessimism about jurors”); *id.* at 79 (“A traditional view of evidence history—to which Wigmore . . . subscribed—holds that the law of evidence developed as a filter to guard against the bias of jurors.”); *id.* at 107 (“Wigmore championed increased judicial discretion . . .”); *id.* at 114 (“Wigmore consistently advocated increased judicial discretion throughout [his treatise].”); *id.* at 115 (noting that Wigmore believed the judge should express his or her opinion about the weight of evidence to jurors before they retired for deliberations); *id.* at 116 (highlighting the judge’s role in excluding evidence that could “confuse or mislead the jury”). As Eleanor Swift shows, this pre-dates Wigmore, too. See generally Swift, *supra* note 19, at 2439–40.

himself from the FRE project (which started as an ALI Model Code in his lifetime<sup>184</sup>) ultimately—in part because he thought it was better to keep the rules advisory, in part because he thought supersession was nutty, and in part because he was worried about the legacy of his own work should the Model Code or FRE succeed<sup>185</sup>—one has to be left with meaningful concerns about the ways our evidence law can too easily alter constitutional jury rights by judge-made rules that undermine the jury. At the very least this kind of concern must permit taking a fresh look at the processes by which all this law that surrounds the jury and its residual power gets made.<sup>186</sup>

And that process probably should not take the current form of the REA as it applies to the FRE. Rather, better interbranch dialogue<sup>187</sup> on these central constitutional jury rights is necessary. The current regime of supersession—the Supreme Court being able to convene as a non-Article III entity unilaterally capable of re-writing U.S. Code—is neither respectful of legislative supremacy in statutory realms nor of judicial supremacy in constitutional realms. What justifies judicial supremacy when it is appropriate (for those who embrace it, anyway) are the constraints of Article III: that the Supreme Court is announcing constitutional law in the context of a case or controversy. A Supreme Court acting outside of an adjudicatory Article III context<sup>188</sup> should not be able to trump our most democratic branch on matters that pertain

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184. PORWANCHER, *supra* note 19, at 159.

185. On Wigmore's ambivalent relationship to the Model Code, see *id.* at 159–61.

186. None of this is to deny that we are probably on a trajectory in evidence law to greater admissibility, which tends to mitigate the worry that judges just use their discretionary power to take questions away from the jury. See Paul Rothstein, *Some Themes in the Proposed Federal Rules of Evidence*, 33 FED. BAR J. 21, 21–26 (1974) (identifying the FRE as both granting more discretion to judges and increasing evidence admissibility); Posting of Frederick C. Moss to the Evidence Listserv, evid-fac-l@chicagokent.kentlaw.edu (on file with author) (detailing all the FRE that increase admissibility). However, even if that trajectory continues, there is a structural problem that remains: the judges are both the gatekeepers for the admission of evidence to the jury and are also the rule makers about how to allocate power between themselves and juries. There is a conflict of interest.

187. For a recent effort to explain what this can mean, see James J. Brudney & Ethan J. Leib, *Statutory Interpretation as "Interbranch Dialogue"?*, 66 UCLA L. REV. 346, 348–51 (2019).

188. See *United States v. Mistretta*, 488 U.S. 361, 392 (1989) (“[A]ll rulemaking is nonjudicial in the sense that rules impose standards of general application divorced from the individual fact situation which ordinarily forms the predicate for judicial action.”).

to what many might realistically perceive to be our most democratic institution, the jury.<sup>189</sup>

Notice that this view is not wholly in tension with the Court's announcement in *Mistretta* that "consistent with the separation of powers, Congress may delegate to the Judicial Branch nonadjudicatory functions that do not trench upon the prerogatives of another Branch and that are appropriate to the central mission of the Judiciary."<sup>190</sup> Although it might be a reach to say that the jury is a branch of its own, independent of the Judicial Branch, there is something a little untoward about judges alone—particularly ones on the Supreme Court who have no regular experience with juries<sup>191</sup>—fashioning the balance of power between judges and juries in a way that can rewrite Congress's preferences without the benefit of a case or controversy. That makes the FRE context unique and distinctively unacceptable. Even under *Mistretta*, the current rulemaking regime for the FRE, which puts the amending and repealing power "within the Judicial Branch,"<sup>192</sup> has the "practical consequences" of "pos[ing a] threat of undermining the integrity of the Judicial Branch or of expanding the powers of the Judiciary beyond constitutional bounds."<sup>193</sup>

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189. See generally SUJA A. THOMAS, *THE MISSING AMERICAN JURY: RESTORING THE FUNDAMENTAL CONSTITUTIONAL ROLE OF THE CRIMINAL, CIVIL, AND GRAND JURIES* (2016).

190. *Mistretta*, 488 U.S. at 388.

191. There was once a reported jury trial in the Supreme Court. See Lochlan F. Shelfer, *Special Juries in the Supreme Court*, 123 YALE L.J. 208, 210–13 (2013) (discussing *Georgia v. Brailsford*, 3 U.S. (3 Dall.) 1 (1794)). Shelfer reports that there were at least three jury trials in the Supreme Court in the 1790s but none for the last two centuries. *Id.* at 210. And of our sitting justices, only Justice Sotomayor has been a regular member of a trial court that could use juries. See, e.g., Robert W. Pratt, *A Trial Judge on the Supreme Court*, 23, FED. SENT'G REP. 159, 160–61 (2010) (observing that Justice Sotomayor's background as a trial judge is unique on the Court).

192. *Mistretta*, 488 U.S. at 393.

193. *Id.* It is probably worth noting that when the Court changed all of the Sentencing Commission's Guidelines from mandatory to advisory in *United States v. Booker*, 543 U.S. 220 (2005), it tried to hold the line on *Mistretta* and pretend as if the delegation holding there should remain untouched by the atmospherics of downgrading the Commission's power. But in doing so it actually misstated—in a revealing way—how to think about the FRE in light of *Mistretta*. The Court wrote: "We noted [in *Mistretta*] that the promulgation of the Guidelines was much like other activities in the Judicial Branch, such as the creation of the Federal Rules of Evidence, all of which are nonadjudicatory activities." *Id.* at 242. But the Judicial Branch did not create the FRE as law; Congress did. What the REA improperly does is give the Judicial Branch the power to rewrite the FRE—repeal authority it cannot have in "nonadjudicatory activities."

Something has to change. And we need a better model for legislative-judicial dialogue about federal-state relationships and core jury rights in connection with the FRE. Part III therefore takes up the project of where to go from here, given that a range of formal and functional arguments coalesce to make clear that something is amiss in the REA provisions that allow supersession in the FRE context. Before I get there, however, Part II explores a few efforts to justify supersession others have offered that I think are ultimately unsuccessful. If the Court, Congress, and the Advisory Committee are going to be asked to do their FRE business differently, we should be sure this case is air-tight.

## II. THE APOLOGETICS FOR SUPERSESSION

There are a variety of apologies others offer for the REA's design to allow Court-promulgated rules to displace congressional statutes. Many of them stem from a need to justify the first rulemaking effort in 1938 for the Federal Rules of Civil Procedure. But even if the original sin of supersession can be forgiven in 1938, many of those justifications have faded from relevance—and indeed are inapposite in the FRE context. It makes some sense why Congress felt the first version of the REA needed some kind of supersession provision: there was extant procedural “undergrowth” that spanned the federal statute books, and it would have been hard for Congress to specify all of the places in the U.S. Code that would need to be repealed in an anticipatory way to make room for a unified Federal Rules of Civil Procedure that was a few years in the offing.<sup>194</sup> So Congress made a choice that one might call a “conditional sunset”: when the rules were ready to take effect (as the Federal Rules of Civil Procedure in fact were in 1938, four years after the passage of the REA), Congress made explicit its intent to

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194. See Carrington, *supra* note 23, at 324 (arguing that supersession allows rulemaking to “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”). Although the “undergrowth” justification for supersession is made rather generally by Carrington, it is Stephen Burbank who is more explicit that this original justification in the 1934 version of the REA was especially plausible. See Burbank, *supra* note 113, at 1044 (“As originally formulated, the supersession clause was intended to ‘clear . . . undergrowth,’ although it was by no means limited to ‘procedural marginalia.’ Nor is it so limited today . . . . The notion that, in 1989, the statutory provisions at risk of supersession consist primarily of ‘procedural marginalia’ is, in any event, hard to accept.”); accord Burbank, *supra* note 23, at 1052–54; Kelleher, *supra* note 73, at 399.

repeal conflicting statutes, necessary in light of the canon of interpretation that implied repeals are to be disfavored.<sup>195</sup> Whatever one thinks of the legitimacy of this congressional delegation, it is a long way from a relatively specific conditional sunset to a generalized right to make rules that supersede and displace duly enacted statutes under the Constitution's Article I, Section 7 in an ongoing way, to apply even to statutes that have not yet been enacted. And that—in conjunction with the more subject-specific rationales in Section I.B—explains the real problem with the FRE rulemaking process as it exists today. Below I briefly review (and ultimately dismiss) some classes of justifications for this feature of the REA system as applied to the FRE. Putting to one side the particularized use of a conditional sunset—which has some other corollaries in the U.S. Code (Section II.C)—any modern law student who has a basic familiarity with constitutional law, legislation, and regulation could spot the issue with the delegation of legislative power to repeal statutory law.<sup>196</sup>

#### A. *The Congressional Research Service (1988)*

In the lead-up to the 1988 revisions to the REA, the House knew there was a “cloud” of suspicion about supersession and sought to get rid of the REA's authorization for rules that could undermine and repeal statutes.<sup>197</sup> Indeed, the House version of the bill was explicit that it prospectively rid the REA of supersession altogether for all federal rulemaking regimes.<sup>198</sup> The Report accompanying its bill repealing supersession insisted that the “original justification for the supersession clause [was] no longer valid,” and in light of recodifications of the U.S. Code and more specific repeals of procedural laws that preexisted the 1938 Federal Rules of Civil

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195. See *Morton v. Mancari*, 417 U.S. 535, 549 (1974).

196. Indeed, by 1985, a Harvard law student urged the invalidity of the supersession clause in the *Harvard Law Review*. See Note, *The Conflict Between Rule 68 and the Civil Rights Attorneys' Fees Statute: Reinterpreting the Rules Enabling Act*, 98 HARV. L. REV. 828, 835–37 (1985). And a 2011 Note by an NYU law student that was purporting to furnish a separation of powers defense for the REA process still could not quite find a way to address the “constitutional question of the supersession clause's validity.” Michael Blaise, Note, *A Separation of Powers Defense of Federal Rulemaking Power*, 66 N.Y.U. ANN. SURV. AM. L. 593, 638 (2011). Blaise claimed in his conclusion to have provided a “defense of the supersession clause,” *id.* at 639, but his tepid defense was largely that federal courts have failed to deal with it—so there must be “no clear answer,” *id.* at 638.

197. H.R. REP. NO. 99-422, at 1, 17 (1985).

198. H.R. 3550, 99th Cong., 131 Cong. Rec. 35,190 (1985).

Procedure, the clause “no longer serve[d] the purpose for which it was intended.”<sup>199</sup> Moreover, the Report concluded that “as a matter of policy, it is unwise to permit a procedural rule-making process to be used, in effect, to overturn provisions of law enacted by Congress,” and worried that the then-recently decided *Chadha* case might implicate the legality of supersession.<sup>200</sup>

Yet there was a concerted effort to lobby for supersession by the Advisory Committee on the Civil Rules, which was eager to preserve it<sup>201</sup> (and their power as a super-legislature of sorts with it). Here is how the Reporter of that committee remembers the issue:

I succeeded in enlisting the aid of the ABA Section on Litigation, the American College of Trial Lawyers, and the Association of the Bar of the City of New York . . . . Former Attorney General Ben Civiletti, then chair of the ABA Section, offered testimony in favor of supersession. Professors Edward Cooper, Mary Kay Kane, and Charles Alan Wright also submitted statements supporting supersession. Professors Judith Resnik, representing the ACLU, and Stephen Burbank submitted statements opposing supersession. The Advisory Committee’s support for supersession prevailed in the Senate, and the law as enacted in 1988 retained the supersession clause.<sup>202</sup>

Although the public record of the Senate’s consideration is pretty conclusory—“the Senate [was] not convinced that there [was] a . . . need to amend the supersession clause and was persuaded that the current system [was] working well and should be continued”<sup>203</sup>—the Congressional Research Service’s (CRS) American Law Division wrote a memo that outlined a defense of supersession that likely further convinced the Senate to preserve supersession in the 1988 update of

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199. H.R. REP. NO. 100-889, pt. 1, at 28 (1988), as reprinted in 1988 U.S.C.C.A.N. 5982, 5988.

200. *Id.* It is true, however, that they let through supersession anyway when push came to shove. *Id.* at 5989–90.

201. Paul D. Carrington, *Politics and Civil Procedure Rulemaking: Reflections on Experience*, 60 DUKE L.J. 597, 618 (2010).

202. *Id.* at 618–69.

203. 134 Cong. Rec. 31,052 (statement of Sen. Howell Heflin). The Senate seemed to draw this conclusion from three witnesses, including one Janet Napolitano. *Id.*; see *The Rules Enabling Act: Hearing Before the Subcomm. on Cts. and Admin. Prac. of the S. Comm. on the Judiciary*, 100th Cong. 4 (1989) (statement of Janet Napolitano) (“My testimony to you today boils down to one phrase: If it ain’t broke, don’t fix it.”).

the REA.<sup>204</sup> However, it did not provide genuinely convincing arguments.

While acknowledging constitutional problems with supersession that were before Congress as of 1988,<sup>205</sup> CRS focused attention on “the lenient requirements which the Supreme Court has developed for evaluating the validity of” delegations.<sup>206</sup> Drawing on Justice White’s functionalist dissent in *Chadha*, CRS argued that agency rulemaking must be understood realistically as a form of lawmaking.<sup>207</sup> From this minority view in *Chadha*, CRS further played word games with the Administrative Procedure Act. CRS highlighted that when Congress defined agency “rule[s]” there, it wrote that these are agency statements “designed to implement or *prescribe law* or policy,” ostensibly acknowledging that agencies can make law.<sup>208</sup> It also highlighted that many jurists often talk as if rules have “the force and effect of *law*,”<sup>209</sup> and that we allow agencies to use their “law” to preempt state law for the purposes of the Constitution’s Supremacy Clause.<sup>210</sup> Thus, CRS analogized the Court’s rulemaking power to a standard administrative delegation from a congressional statute.

Yet there is some important distance to travel from talking about executive agencies and their function of implementing and making effectual congressional statutes as a kind of lawmaking to arming entities with the power to repeal congressional laws. From the

204. See Memorandum from the Am. L. Div., Cong. Rsch. Serv. on Supersession Clauses of the Rules Enabling Acts to Rep. Robert Kastenmeier (April 18, 1988) [hereinafter CRS Memo] (available in *Court Reform and Access to Justice Act: Hearings on H.R. 3152 Before the Subcomm. on Cts., C.L. & the Admin. of Just. of the H. Comm. on the Judiciary*, 100th Cong. 1294–1304 (1989)). Eventually, the House bought into some form of supersession. See H.R. REP. NO. 100-889, pt. 1, at 3 (1988).

205. The memo cites an early article to raise these issues. CRS Memo, *supra* note 204, at 1 (citing Robert N. Clinton, *Rule 9 of the Federal Habeas Corpus Rules: A Case Study on the Need for Reform of the Rules Enabling Acts*, 63 IOWA L. REV. 15 (1977)).

206. CRS Memo, *supra* note 204, at 2.

207. *Id.* at 3–4 (citing *INS v. Chadha*, 462 U.S. 919, 985–86 (1983) (White, J., dissenting)).

208. *Id.* at 3 (citing 5 U.S.C. § 551(4)).

209. *Id.* at 3–4 (emphasis added) (citing, among five other cases, *Chevron U.S.A. Inc. v. Nat’l Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984)).

210. *Id.* at 7–8. CRS argues that since it is only “laws of the United States” that are supreme over state law, regulations’ pre-emptive force prove that they are laws as far as the Constitution is concerned. *Id.* at 7. There is a logical leap here worth noting: the agency gets its preemption authority from the organic statute itself, so it seems that CRS misses that whatever preemptive force a regulation has is derivative of an actual statute (a constitutional “law”).

unexceptional proposition that “limits are not reached by the conferral of authority to have some affect [*sic.*] upon statutes enacted by Congress”<sup>211</sup>—drawing upon sunset provisions and provisions that “revive[]” upon specific determinations by the Executive<sup>212</sup>—CRS too quickly analogized permissions for contingent legislation as somehow sanctioning statutory repeals by the Supreme Court via the REA (foreshadowing what the Court tried to say about the REA in its footnote in *Clinton*<sup>213</sup>).

The CRS found a better analogue in *J.W. Hampton & Co. v. United States*.<sup>214</sup> There, in an opinion by Chief Justice Taft, the Court blessed a congressional statute that set a base tariff in a statutory scheme and then delegated power to the President to adjust the tariff upward or downward up to fifty percent upon specific findings about changing differences in the costs of production.<sup>215</sup> Finding and establishing the “intelligible principle” standard for valid delegations, the Court claimed that Congress gave the President enough guidance to render his findings.<sup>216</sup> Although CRS invoked Louis Jaffe’s reading of the case that “[t]he President, thus, could in effect make a tax rate and by so doing repeal the existing one,”<sup>217</sup> that is a pretty generous reading of what was a constrained and pre-authorized adjustment of a tariff rate based on rather specific findings the President had to make to adjust the tax.<sup>218</sup> What CRS seemed to be relying on, in the final analysis, was that “the doctrine of nondelegation . . . appear[ed] unlikely to resurface in an area with such a long history of delegation, that of conferring court rulemaking authority upon the federal courts.”<sup>219</sup>

No doubt, many delegation issues associated with the REA seemed already disposed of by 1941 in *Sibbach v. Wilson & Co.*,<sup>220</sup> which upheld two Federal Rules of Civil Procedure that allowed a U.S. district court to order a physical exam of a plaintiff, which might not have been

211. *Id.* at 5.

212. *Id.* (citing *The Brig Aurora*, 11 U.S. (7 Cranch) 382 (1813)). CRS addressed other “contingency” cases in *id.* at 6–7.

213. *Clinton v. City of New York*, 524 U.S. 417, 446 n.40 (1998).

214. 276 U.S. 394 (1928).

215. *Id.* at 400–02, 409, 412–13.

216. *Id.* at 409.

217. CRS Memo, *supra* note 204, at 6 (quoting LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 59 (1965)).

218. I address one similar minor-rate-adjustment case in lower courts *infra* notes 280–88 and accompanying text.

219. CRS Memo, *supra* note 204, at 8–9.

220. 312 U.S. 1 (1941).

within the power of a state court to order. The Court held: “Congress has undoubted power to regulate the practice and procedure of federal courts, and may exercise that power by delegating to this or other federal courts authority to make rules not inconsistent with the statutes or [C]onstitution of the United States.”<sup>221</sup> Notwithstanding that the rule of procedure at issue might very well have “abridge[d], enlarge[d], [or] modif[ied] the substantive rights of [a] litigant” in the case, the Court had no trouble concluding that “a rule . . . if within the power delegated to this court, has the force of a federal statute.”<sup>222</sup> That sits in some tension, of course, with its earlier pronouncement that the rules must be “not inconsistent with the statutes.”<sup>223</sup> But one would not be crazy for thinking that the presumptive implication is that “the rules, if they are within the authority granted by Congress, repeal” congressional acts that are inconsistent with the Federal Rules.<sup>224</sup>

Although the CRS Memo did not fully pull all these strings from *Sibbach* together into a tight knot, this would be the strongest use of *Sibbach* in service of the validity of supersession (ignoring the possibility that supersession only would apply to statutes effective at the time of the REA or that the civil procedure rules are, after all, fundamentally different from the FRE). CRS did, after noting *Sibbach*'s permissiveness about the REA, draw attention back to the ways that the REA sought to be a contingent repeal of any and all pre-existing statutes<sup>225</sup> (even, presumably, statutes that post-date the REA but pre-date the promulgated Federal Rule in conflict with it).

Yet while it is true that the four dissenting justices in *Sibbach* lost even after announcing what cannot be denied—“[p]lainly the Rules are not acts of Congress and cannot be treated as such”<sup>226</sup>—it is hard to draw the general validity of supersession for all time from the specific contingent repeal theory, which at least has the virtue of limiting the potential repeals to a constrained world of procedural undergrowth as of 1934, a proposition that could have seemed plausible in 1941 but

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221. *Id.* at 9–10.

222. *Id.* at 7–8, 13.

223. *Id.* at 9.

224. *Id.* at 10. The Court was writing specifically of the Conformity Act of 1872, Act of June 1, 1872, ch. 255, § 5, 17 Stat. 197 (1878), the main “undergrowth” that Congress knew would be displaced by the forthcoming Federal Rules of Civil Procedure when it passed the REA in 1934.

225. CRS Memo, *supra* note 204, at 8–9.

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

should have seemed substantially more fishy by 1988. Still, CRS could not help but conclude that the “absence of constitutional challenge is suggestive,” and concluded that supersession was a permissible delegation of authority under *Chadha*.<sup>227</sup> Although it did not, and could not, deny that the Court as a whole in *Palermo v. United States*<sup>228</sup>—and various members of the Court in dissenting to Supreme Court orders promulgating rules under the REA<sup>229</sup>—expressed discomfort with the idea of supersession, CRS doubled-down on “no history of constitutional challenge,”<sup>230</sup> found some dicta in a 1973 case which suggested that supersession was probably just fine,<sup>231</sup> and admitted that there had not been serious “consideration of the issue” by lower courts.<sup>232</sup>

In the final analysis, the CRS Memo provided the Senate plausible cover but should not have been viewed as moving the needle far in favor of supersession. Indeed, although the memo was addressed to House member Robert Kastenmeier, Kastenmeier remained an opponent of supersession in the House version of the bill; the House Report post-dates the CRS Memo and, seemingly, was not significantly influenced by it.<sup>233</sup> As it shouldn't have been. And let's not forget that *Clinton* had yet to be decided, which makes supersession even less acceptable, at least with respect to the FRE.

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227. CRS Memo, *supra* note 204, at 9. Paul Carrington similarly concludes that “lack of public interest in the matter” of supersession “is itself a datum pertinent to the argument” in favor of supersession. Carrington, *supra* note 23, at 282. It is possible that complacency about constitutional violations is an argument against seeing violations as violations.

228. 360 U.S. 343, 353 n.11 (1959) (“The power of this Court to prescribe rules of procedure and evidence for the federal courts exists only in the absence of a relevant Act of Congress.”).

229. See the dissenting statements of Justices Black and Douglas in 374 U.S. 865 (1963) and 383 U.S. 1032, 1033 (1966), noting that the Rules of Civil Procedure determine substantive rights of litigants and the Constitution requires those to be enacted by Congress and approved by the President.

230. CRS Memo, *supra* note 204, at 9.

231. *Id.* at 10 (citing *Davis v. United States*, 411 U.S. 233, 241 (1973)) (“Were we confronted with an express conflict between the Rule and a prior statute, the force of [the Rules Enabling Act], providing that ‘[a]ll laws in conflict with such rules shall be of no further force or effect,’ is such that the prior inconsistent statute would be deemed to have been repealed.”).

232. *Id.* at 10.

233. H.R. REP. NO. 100-889, pt. 1, at 28 (1988) as reprinted in 1988 U.S.C.C.A.N. 5982, 5988. The report did, in the final analysis, sign onto a limited form of supersession, however ambivalently.

*B. The “Inherent Authority” Theory*

Another tactic used by supporters of supersession is to rely on some kind of “inherent judicial power”<sup>234</sup> to explain why it would be constitutionally acceptable for courts and the Supreme Court to ignore and repeal congressional statutes. There are formalist and functionalist flavors of this strategy, but neither one is quite successful.

A formalist might focus on Article III’s “vesting clause”<sup>235</sup> to argue that courts have a mandate (or a permission) to regulate procedure.<sup>236</sup> They might emphasize that federal courts have “inherent Article III power to control their internal process and the conduct of civil litigation,”<sup>237</sup> and that procedure is “an area in which the court has a special constitutional role,” such that “the courts . . . possess some inherent power to regulate procedure, even in the absence of congressional provision.”<sup>238</sup> They might point to the Supreme Court’s highlighting that there are “matters which relate to the administration of legal proceedings, an area in which federal courts have traditionally exerted strong inherent power, completely aside from the powers Congress expressly conferred in the Rules.”<sup>239</sup> Congress may even be said to recognize this reality that it ought to step aside in the way it wrote the REA—with a supersession clause, to boot (assuming this is not a little boot-strapping).<sup>240</sup>

But there is a sleight of hand here. Is some inherent power to control what goes on in the courtroom (say, by way of local rules or case-by-case exercise of discretion in contempt proceedings) enough to arm the judiciary with a non-adjudicative function of general rulemaking for the entire federal court system?<sup>241</sup> More importantly, even if Article

234. See generally Michael M. Martin, *Inherent Judicial Power: Flexibility Congress Did Not Write into the Federal Rules of Evidence*, 57 TEX. L. REV. 167 (1979).

235. U.S. CONST. art. III, § 1, cl. 1.

236. E.g., Leslie M. Kelleher, *Taking “Substantive Rights” (in the Rules Enabling Act) More Seriously*, 74 NOTRE DAME L. REV. 47, 63 (1998). For a careful argument about the powers courts should have over procedure—and their constitutional limits, see Amy Coney Barrett, *Procedural Common Law*, 94 VA. L. REV. 813, 815–17 (2008).

237. Linda S. Mullenix, *Unconstitutional Rulemaking: The Civil Justice Reform Act and Separation of Powers*, 77 MINN. L. REV. 1283, 1287 (1993).

238. Kelleher, *supra* note 73, at 435.

239. *Hanna v. Plumer*, 380 U.S. 460, 472–73 (1965).

240. See Ralph U. Whitten, *Separation of Powers Restrictions on Judicial Rulemaking: A Case Study of Federal Rule 4*, 40 ME. L. REV. 41, 68 (1988).

241. See Kelleher, *supra* note 73, at 436. Kelleher concludes that the “Court’s decisions are fairly read as recognizing only an inherent authority in the judicial

III goes that far *in the absence of congressional limitation*, it is far less likely that whatever implied non-adjudicative rulemaking power inheres in the judiciary is sufficient to displace Congress when it acts, underwriting supersession.<sup>242</sup> Think about this in *Youngstown's* Jacksonian terms: whatever “inherent power” there might be within Article III would be at its nadir when congressional law is in conflict with a judicial rule.<sup>243</sup> Yet the REA supersession regime always gives the judiciary a trump in a situation of conflict. That requires a very strong inherent authority argument.

Indeed, notwithstanding one very extreme argument that “all legislative rules for judiciary procedure are void constitutionally,”<sup>244</sup> it is widely understood that since Article III and Article I authorize Congress to set up lower courts, that greater power to set them up or abolish them includes the lesser authority to regulate their procedures.<sup>245</sup> The theory would have to be that there is some form of concurrent authority that would enable Congress to delegate away a form of its own lawmaking authority in this domain. Yet the Court itself, in the canonical case of *Wayman v. Southard*,<sup>246</sup> has held that its authority to promulgate rules emanates from congressional delegation, and the very issue in dispute is whether the delegation to allow an offloading of repeal authority is permissible. This is especially troubling in the FRE context where supersession has the regular effect of repeal. At least in the more “purely” procedural areas, Congress sets in motion its own getting out of the way in the REA. But in the context of the FRE, Congress asserted quite substantially its own authority by setting down the rules of evidence as statutes.<sup>247</sup> That is hardly taking a

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branch to control procedure *in the context of adjudicating particular cases.*” Kelleher, *supra* note 236, at 66 (emphasis added).

242. See Tyrrell Williams, *The Source of Authority for Rules of Court Affecting Procedure*, 22 WASH. U.L.Q. 459, 505–06 (1937) (highlighting the weakness of this kind of argument in supporting supersession); Burbank, *supra* note 23, at 1116 (same).

243. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637–38 (1952) (Jackson, J., concurring) (discussing when inherent power might be at its “lowest ebb”).

244. John H. Wigmore, *All Legislative Rules for Judiciary Procedure Are Void Constitutionally*, 23 ILL. L. REV. 276 (1929). Wigmore would have had to conclude that the Federal Rules of Evidence—since they were passed as statutes—were all void and unconstitutional upon adoption.

245. E.g., Carrington, *supra* note 23, at 285.

246. 23 U.S. (10 Wheat.) 1, 15, 42–43, 50 (1825).

247. Whitten acknowledges as much. See Whitten, *supra* note 240, at 69 (“[W]hile ‘inherent power’ in the judiciary to formulate rules in the absence of congressional

posture of “forbearance or deference” to the “judiciary’s inherent authority.”<sup>248</sup>

Shy of formal inherent authority from Article III, however, is a more functionalist story about special expertise that inheres rulemaking authority in the judiciary. As Linda Mullenix articulates it, “procedural rulemaking ought not to be a matter of majoritarian legislative public policy.”<sup>249</sup> Or Paul Carrington: “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.”<sup>250</sup> Carrington tells the story of procedural reformers like Pound who were focused on the “depolticization of judicial procedure”: “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.”<sup>251</sup> Thus the choice in the REA was self-consciously “anti-democratic in the sense that it withdrew ‘procedural’ law-making from the political arena and made it the activity of professional technicians.”<sup>252</sup>

This delegate-and-defer-to-expertise narrative is, of course, well known from administrative law<sup>253</sup> and should be familiar to anyone trying to justify the growth of the administrative state—around 1934 and beyond. And yet the expertise justification sounds like a just-so story, since the delegation is principally, remember, to the Supreme Court, which is not very expert about what goes on in the district courts; currently, only Justice Sotomayor has ever served on a district

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action is relevant to the validity of supersession provisions, it does not ultimately solve the more important problem of whether the general delegation of rulemaking power over an area violates separation of powers restrictions when Congress has occupied the area by statute.”).

248. Letter from Phillip D. Brady, Acting Assistant Attorney General, to Hon. Peter Rodino, Chairman, Committee on the Judiciary, Sept. 16, 1985 (available in H.R. REP. NO. 99-422, at 46 (1985)) (arguing to retain supersession provisions that the House wanted to remove in their 1985 version of the REA that never passed the Senate).

249. Mullenix, *supra* note 237, at 1288.

250. Carrington, *supra* note 23, at 282.

251. *Id.* at 301.

252. *Id.*

253. See, e.g., Nestor Davidson & Ethan J. Leib, *Regleprudence—at OIRA and Beyond*, 103 GEO. L.J. 259, 287, 287 n.139 (2015).

court.<sup>254</sup> And whatever else can be said for the general idea that courts should make their own procedural rules when delegated authority to do so, the entire corpus of administrative law would have to be brought to bear on the rulemaking process to legitimate delegate-and-defer, a corpus which includes constitutional delegation limits.<sup>255</sup>

Finally, some variations of this pragmatic account of concurrent authority between Congress and the Court vindicate supersession through another part of the REA: the “report and wait” requirement, which gives Congress some time to process and deliberate about whatever rules the Supreme Court chooses to promulgate before they go into effect (as consequence of congressional silence).<sup>256</sup> For example, one analyst of this terrain concludes that “the ‘report and wait’ provisions of the REA, coupled with the relatively specific limiting language of the ‘substantive rights’ provision, do provide a degree of control over the exercise of delegated power sufficient to satisfy the requirement of the delegation doctrine.”<sup>257</sup> Carrington also thinks the reporting requirement is there to alert Congress to the possibility of supersession, somehow justifying it.<sup>258</sup> But Stephen Burbank put this idea to rest: not only is legislative acquiescence through silence a kind of canard in this context,<sup>259</sup> but reporting would be valuable even in the absence of supersession—so it is unlikely to be a good basis to vindicate supersession.<sup>260</sup>

In sum, Burbank seems to have it exactly right that supersession sends the wrong message about which entities should have

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254. Before her, the last Justice with U.S. district court experience was Charles Evans Whitaker, who left the court in 1962—long before the FRE came into effect. Thanks to Andrew Kent for the historical note.

255. There is an analogy here to Cass Sunstein—once Administrator of the Office of Information and Regulatory Affairs—telling us over and over again how technical the work of his expert office was such that we should not worry how opaque and undemocratic its functioning is. See Davidson & Leib, *supra* note 253, at 268 n.33 (“In Sunstein’s recent article on OIRA, he uses the term ‘technical’ twenty-three times in thirty-eight pages to describe the work done at the office . . . . The word ‘technical’ seems used to assuage us that the work is not lawmaking.”) (citing Cass R. Sunstein, Commentary, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838 (2013)).

256. 28 U.S.C. §§ 2074(a).

257. Kelleher, *supra* note 73, at 445.

258. Carrington, *supra* note 23, at 322–24.

259. Compare *Johnson v. Transportation Agency*, 480 U.S. 616, 629 n.7 (1987) (Brennan, J.) with *id.* at 671–72 (Scalia, J., dissenting).

260. See Burbank, *supra* note 113, at 1043.

polymaking power, especially in areas covered by the FRE, which so often bump up against substantive rights:

[It] is that the policy preferences of judges and their advisers, acting in a legislative capacity but without popular mandate or all of the restraining influences of the legislative process [or even the administrative process, I might add], are entitled to supremacy when they conflict with the policy preferences of the people's representatives. Whether or not the supersession clause is consistent with the formal requirements of the Constitution, it is not . . . consistent with the vision of a democratic society that inspires that document.<sup>261</sup>

### C. *Snippets of Precedent*

There is a different kind of functionalist argument available to defend supersession that is a little less complacent than moving from the “we’ve done it this way for a while without too much hassle” to “this must be constitutional” all-too-quickly. That argument takes the form of several other separation of powers settlements: supersession “has acquired through long usage some importance as a subconstitutional accommodation between co-equal branches of government.”<sup>262</sup> As in other separation of powers environments where different branches make reasonable claims on authority that is not clearly divvied up by the Constitution itself,<sup>263</sup> perhaps here, too, we should not get too fussy about supersession as a way Congress and the Supreme Court share power over procedure in the lower courts, a subject over which they both can claim some rightful territoriality.<sup>264</sup> Perhaps it is not much of a surprise that the Supreme Court and the academic elite—which gain power through Congress’s delegation<sup>265</sup>—are happy to maintain the status quo. But Congress is at least as complicit, as evidenced by its very limited interventions in rulemaking generally and its re-upping

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261. *Id.* at 1046.

262. Carrington, *supra* note 23, at 308–09.

263. See generally Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 412–15 (2012) (analyzing the ways in which the three branches of government have looked to historical practice to answer questions concerning the separation of powers).

264. The Court’s discussion of the REA in dicta in *Mistretta v. United States*, 488 U.S. 361, 386 (1989) emphasized the recognition of “the constitutionality of a ‘twilight area’ in which the activities of the separate [b]ranches merge,” drawing on *Sibbach v. Wilson & Co.*, 312 U.S. 1, 9–10 (1941) and *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

265. *Sibbach*, 312 U.S. at 9–10.

supersession in 1988, specifically.<sup>266</sup> Moreover, there is some reasonable precedent from more basic administrative law that might support this institutional settlement, too.

Consider the Controlled Substances Act of 1970.<sup>267</sup> When it was first passed, Congress sought to regulate five classes of controlled substances “to be known as schedules I, II, III, IV, and V.”<sup>268</sup> Schedule I drugs were to be the most highly regulated and Schedule V drugs were to be the least regulated.<sup>269</sup> Rather than awaiting agency determinations about which substances should go in which schedule, Congress instead furnished a baseline list of many drugs, compounds, and substances, assigning them to various “[initial schedules] . . . unless and until *amended* pursuant to section 811 of this title.”<sup>270</sup> Thus, not only did Congress contemplate that “[t]he schedules established by this section shall be updated and republished on a semiannual basis during the two-year period beginning one year after [October 27, 1970] and shall be updated and republished on an annual basis thereafter,”<sup>271</sup> but it expected actual “amendment” in accordance with a process described in § 811.

When one turns to § 811, one learns that the process of statutory amendment does not follow the structures of Article I, Section 7 of the Constitution. Rather, the statute gives the attorney general (AG) rulemaking authority (with the magic words triggering the relatively rare formal rulemaking) to futz with the original 1970 list by adding, removing, or transferring substances into schedules I through V.<sup>272</sup> With help from the Secretary of Health and Human Services, the AG is given a list of factors “determinative of control or removal from schedules” that should be considered<sup>273</sup> and is instructed to comply with international obligations.<sup>274</sup> When a criminal defendant sought to

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266. See Karen Nelson Moore, *The Supreme Court's Role in Interpreting the Federal Rules of Civil Procedure*, 44 HASTINGS L.J. 1039, 1053, 1058–59 (1993) (noting the limited instances in which Congress inserted itself in the rulemaking process following the passage of the REA in 1988, noting how it looks to be “moving to reclaim some degree of involvement in the rulemaking process,” but still keeping that involvement relatively limited).

267. 21 U.S.C. § 812 (1970).

268. *Id.* at § 812(a).

269. See *id.* at § 812(b).

270. *Id.* at § 812(c) (emphasis added).

271. *Id.* at § 812(a).

272. *Id.* at § 811(a).

273. *Id.* at § 811(c).

274. *Id.* at § 811(d).

challenge on non-delegation grounds the AG's temporary authority to engage in statutory amendment of the drug schedules under the Controlled Substances Act (a process with fewer procedural requirements than the more permanent amendments the AG can make through formal rulemaking), the Supreme Court unanimously rejected the challenge: in *Touby v. United States*,<sup>275</sup> the Court found that there were sufficient constraints on the AG that no non-delegation challenge could succeed.<sup>276</sup> Thus Congress and another branch share the control of the classification of drugs. However, the Executive Branch seems able to "amend" statutory law and no one bats an eyelash (though there are admittedly substantial procedural safeguards in place under the statute).

Or consider the Federal Circuit's decision in *Terran v. Secretary of Health and Human Services*.<sup>277</sup> The court there had to analyze a Presentment Clause challenge to dimensions of the National Childhood Vaccine Injury Act of 1986.<sup>278</sup> That Act provided for compensation to those injured or killed in vaccine-related incidents; it created an "Initial Table" setting rates and delegated to the Secretary of Health and Human Services regulatory authority to "modify" and "amend" that table.<sup>279</sup> Once the Secretary acted pursuant to its authority and promulgated a "Modified Table" that removed some DPT-related injuries from the chart, someone sued challenging the Secretary's authority to change statutory law under bicameralism and presentment and non-delegation theories.<sup>280</sup> The Federal Circuit was underwhelmed:

Although we acknowledge that the statutory language in section 300aa-14(c) refers to the Secretary's ability 'to modify' and 'to amend' the Vaccine Injury Table, 42 U.S.C. § 300aa-14(c)(1), (2) (1994), a closer reading of that section makes clear that when the

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275. 500 U.S. 160 (1991).

276. *Id.* at 169. The Court made no mention of the way the AG can effectuate statutory amendments by changing the statutory schedules. The Court was satisfied that the AG's decision-making was subject to intelligible principles and adequate process, so found no violation of the constitutional separation of powers.

Still, some delegation concerns have been ventilated in other ways, for example, disallowing the AG to use this kind of rulemaking authority to preempt Oregon's Death with Dignity Act in *Gonzales v. Oregon*. 546 U.S. 243, 274–75 (2006).

277. 195 F.3d 1302 (Fed. Cir. 1999).

278. Pub. L. No. 99-660, 100 Stat. 3755 (1986) (codified as amended at 42 U.S.C. §§ 300aa-1 to 34).

279. 42 U.S.C. §§ 300aa-14(a)–(c).

280. *Terran*, 195 F.3d at 1305–06, 1308.

Secretary acts pursuant to [her authority], she does not change in any way the original injury table found in [the statute], but rather promulgates an entirely new vaccine injury table. This new table applies only prospectively. The Initial Table remains codified and unaltered, and continues to apply to all petitions filed before the revision. Therefore, the Initial Table is not amended.<sup>281</sup>

To reinforce its creative reading effectively denying that this should count as an “amendment” or “repeal,” the *Terran* court reasoned that the delegation of authority to the Secretary here was a kind of contingent sunset—and drew upon the REA for support:

[T]he Supreme Court’s power to ‘repeal’ [*sic.*] laws by promulgating rules of procedure for the lower federal courts does not run afoul of the Presentment Clause because ‘Congress itself made the decision to repeal prior rules upon the occurrence of a particular event—here, the promulgation of procedural rules by this Court.’<sup>282</sup>

As R. Craig Kitchen summarizes, “[r]easoning that the Rules Enabling Act was thus functionally similar to the Vaccine Act, the court held that the amendment of the Vaccine Injury Table did not violate Article I, Section 7, since ‘Congress itself decided to render the Initial Table ineffective upon the Secretary’s action.’”<sup>283</sup>

The case did, however, generate a well-reasoned dissent:

In this case, Congress purported to provide for the amendment of existing legislation, which was otherwise valid and enforceable by the courts of the United States, in a manner different from that provided in the Constitution, namely by authorizing an Executive Branch official to do it. That effort must necessarily fail. The majority’s valiant effort to uphold the purported amended legislation must also fail, since no amount of verbal adroitness can change the reality of what happened.<sup>284</sup>

But the case has never been criticized by another court. Nor has the issue been taken up by the Supreme Court.<sup>285</sup> Nor has Congress since

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281. *Id.* at 1312.

282. *Id.* at 1313 (quoting *Clinton v. City of New York*, 524 U.S. 417, 446 n.40 (1998)).

283. Kitchen, *supra* note 71, at 570 (quoting *Terran*, 195 F.3d at 1313).

284. *Terran*, 195 F.3d at 1317 (Plager, J., dissenting).

285. *Terran*, cert. denied, 531 U.S. 812 (2000). Judge Plager’s dissent was not completely ignored, however. It was celebrated by Jeffrey A. McLellan, Note, *The Constitutional Challenge to the Vaccine Act in Terran v. Secretary of Health & Human Services and Its Policy Implications*, 12 FED. CIR. B.J. 687, 698–99, 710–11 (2003); Erik Loftus, Note, *Constitutional Law—Terran v. Secretary of Health and Human Services: Modification of Statutes and the Presentment Clause of the Constitution*, 24 W. NEW ENG. L.

tried to curtail the Secretary's seeming legislative authority under the Act.

A more recent case at the Supreme Court presumed the validity of supersession, though the issue was not squarely presented because the specific Federal Rule of Civil Procedure at issue had been enacted by Congress (and no one doubts that Congress can supersede itself).<sup>286</sup> Still, the Court wrote that "a Rule made law by Congress supersedes conflicting laws no less than a Rule this Court prescribes."<sup>287</sup> Justice Thomas (with Chief Justice Rehnquist and Justice O'Connor) wrote an opinion that questioned whether the REA is even applicable when Congress itself passes a general rule of procedure, such was at issue in the case, questioning the Court's reading of the supersession provision.<sup>288</sup> Yet, the Court's dicta was enough for Judge Easterbrook to claim that "[a]ny doubts about the force and validity of the supersession clause were laid to rest in *Henderson*."<sup>289</sup> That seems to over-read *Henderson*. But Easterbrook's recasting of supersession is still notable:

The Rules of Civil Procedure, which are established by the Supreme Court under the Rules Enabling Act, cannot "repeal" any statute; the Constitution does not give the Judicial Branch any power to repeal laws enacted by the Legislative Branch. But Congress may itself decide that procedural rules in statutes should be treated as fallbacks, to apply only when rules are silent. And it has done just this, providing in what has come to be called the supersession clause . . . .<sup>290</sup>

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REV. 177, 191 (2002); and Kitchen, *supra* note 71. The First Circuit, in *O'Connell v. Shalala*, also had alluded to constitutional issues in the statute as follows:

[T]he Act may raise questions under the Presentment Clause, which requires that all federal laws must be passed by both houses of Congress and signed by the President. *See* U.S. CONST. art. 1, § 7; *see also* INS v. Chadha, 462 U.S. 919, 954 (1983) ("Amendment and repeal of statutes, no less than enactment, must conform with Art[icle] I."). Since this issue is not raised in the instant petition, we take no view of it.

*O'Connell v. Shalala*, 79 F.3d at 173 n.2.

286. *See* *Henderson v. United States*, 517 U.S. 654, 668 (1996).

287. *Id.*

288. *See id.* at 679 (Thomas, J., dissenting) (arguing that the REA's supersession provision only applies to rules promulgated by the Supreme Court rather than procedural rules enacted Congress).

289. *N. Border Pipeline Co. v. 64.111 Acres of Land in Will Cnty., Ill.*, 344 F.3d 693, 694 (7th Cir. 2003).

290. *Id.*

Whether Easterbrook is right that the REA's supersession provision makes background procedural statutes mere "fallbacks" or rather, as the clause's plain meaning requires, renders them of no force or effect, several other circuit courts just decide their cases as if the supersession provision is a valid rule of construction to help decide which procedural rules apply in their courts.<sup>291</sup>

By way of conclusion, a few observations about these snippets of precedent that seem to support the validity of supersession in some ways. First, none of the relevant precedents about the REA deals with supersession *with respect to the FRE*. So whatever succor supersession enthusiasts are getting from these cases, the FRE is still a unique environment that demands fresh attention. Perhaps the bulk of the procedural rules are sufficiently within a supervisory authority of the Supreme Court and the judicial power that supersession in connection with rules of civil and appellate procedure does not raise too much controversy among the Court and Congress,<sup>292</sup> even as all know the procedure-substance divide is way more difficult to sustain in reality than in theory.<sup>293</sup> Yet, it is notable that supersession with respect to the FRE—which were passed first as a statutory code rather than through REA-style rulemaking—has not been tested in the same way. To be sure, it is the same supersession statute that now applies to all rules regimes (other than bankruptcy). But as Part I explained, the FRE is different, in its etiology as well as its ecology.<sup>294</sup>

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291. See, e.g., *Jackson v. Stinnett*, 102 F.3d 132, 134 (5th Cir. 1996); *Halasa v. ITT Educational Services, Inc.*, 690 F.3d 844, 849 (7th Cir. 2012); *Griffith Co. v. NLRB*, 545 F.2d 1194, 1197 n.3 (9th Cir. 1976); *United States v. Chase*, 18 F.3d 1166, 1171 (4th Cir. 1994); *Waterman S.S. Corp. v. Gay Cottons*, 419 F.2d 372, 374 (9th Cir. 1969); *Albatross Tanker Corp. v. S.S. Amoco Del.*, 418 F.2d 248, 248 (2d Cir. 1969) (*per curiam*).

292. Frankly, the rules of criminal procedure are so tied up with constitutional rights of criminal defendants, substantive law, and the jury that they would seem deeply inappropriate for supersession, too. But that is another paper. Very few people bother to write about these rules. *But see* Max Minzner, *The Criminal Rules Enabling Act*, 46 U. RICH. L. REV. 1047, 1047–49 (2012) (offering one of the only noteworthy discussions on the REA's restrictions on the Federal Rules of Criminal Procedure).

293. See, e.g., Redish & Amuluru, *supra* note 79, at 1319 ("It should by now be clear that the assumption of procedural-substantive mutual exclusivity that apparently underlay the thinking of both Congress and the Court . . . is totally misguided. No one today could seriously doubt that procedural rulemaking involves the weighing of substantial policy interests and dynamically alters the development of the substantive law.").

294. See *supra* Part I.

It is also worth highlighting that the general administrative law support for supersession largely comes from contexts in which Congress seems to set in motion specific baselines with fairly elaborate processes for accomplishing statutory amendments through other institutional actors: in the Controlled Substances Act context, Congress required *formal rulemaking* (a rarity) and consultation with a second agency, furnishing the Attorney General with a set of statutory factors for revising the substances schedules.<sup>295</sup> And Congress expected yearly reporting and publication of schedules, too.<sup>296</sup> Similarly, in the National Childhood Vaccine Injury Act of 1986, Congress set a baseline chart with instructions to the agency to revise it as necessary in consultation with an Advisory Commission,<sup>297</sup> requiring it to “provide for notice and opportunity for a public hearing and at least 180 days of public comment,”<sup>298</sup> anticipating pretty specific kinds of emendations. Aside from the quirky REA-as-applied-to-the-FRE, generalized, on-going, wall-to-wall supersession over congressional statutes with little to no guidance just is not a thing.<sup>299</sup> And as should be obvious, in the administrative context, administrative repeals, waivers, forbearances, negative lawmaking, or whatever one calls

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295. 21 U.S.C. § 811(a)–(c).

296. *Id.* at § 812(a).

297. 42 U.S.C. § 300aa-14(d) (“Except with respect to a regulation recommended by the Advisory Commission on Childhood Vaccines, the Secretary may not propose a regulation under subsection (c) or any revision thereof, unless the Secretary has first provided to the Commission a copy of the proposed regulation or revision, requested recommendations and comments by the Commission, and afforded the Commission at least 90 days to make such recommendations.”).

298. 42 U.S.C. § 300aa-14(c).

299. *But see* Deacon, *supra* note 71, at 1551 (trying to call administrative repeals of statutes mere “forbearance” to make it okay). Even Deacon admits that “[a]s a purely doctrinal matter, it is indeed unclear whether current law allows for such” administrative repeals of statutes. *See id.* at 1560. Given that Deacon’s core example comes from the FCC’s explicit statutory authority to render certain specific statutory requirements “inapplicable” to particular mobile carriers and to “forbear” if certain conditions are met to apply regulatory or statutory requirements, it does not seem especially probative. *Id.* at 1568–69. Indeed, as we know from *MCI v. ATT*, 512 U.S. 218, 231–32, 234 (1994), if the FCC uses its modification authority too ambitiously, the Court will find it acting *ultra vires* in contravention of its statute. Congress wins. True enough, Congress modified the FCC’s authority to give it more power in the wake of *MCI*, but its careful specification of the FCC’s capacity for forbearance ultimately had to respect the strictures of the *MCI* decision. *See, e.g., Comcast Corp. v. FCC*, 600 F.3d 642, 661 (D.C. Cir. 2010) (finding the FCC to have exceeded its statutory authority). Thanks to Olivier Sylvain for some guidance here.

them<sup>300</sup> can be meaningfully subject to judicial review.<sup>301</sup> Judicial review of the Supreme Court's rulemaking authority is somewhat less robust, shall we say. Maybe there is a conflict of interest there?<sup>302</sup> Even Justices Black and Douglas urged that a "transfer of the [rulemaking] function to the Judicial Conference would relieve [the Court] of the embarrassment of having to sit in judgment on the constitutionality of rules which [the Court] approved."<sup>303</sup>

It is time to consider a more systemic fix to solve the problem associated with supersession, particularly with respect to the FRE.

### III. A FIX

Having identified a deep dysfunction in the FRE rulemaking system, I cannot conclude without devising a plausible solution. What I propose here may not be the only way to solve the constitutional infirmity of the current regime, but it seems to me the best way to sustain the important roles both Congress and the Supreme Court play in the FRE rulemaking environment. There are plenty of good reasons not to leave the entire apparatus of FRE rulemaking to Congress: they are inexpert at many of the workaday issues that arise in the courtroom<sup>304</sup> and we should expect substantial politicization and interest group pressures to distort what is really in the best interests of the vast majority of litigants.<sup>305</sup> And leaving it all to the judiciary might

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300. There is literature in administrative law that touches on these questions. *See, e.g.*, Deacon, *supra* note 71; Kitchen, *supra* note 71; Barron & Rakoff, *supra* note 70; Kelleher, *supra* note 73; Richard A. Epstein, *Government by Waiver*, NAT'L AFFS., Spring 2011.

301. Obviously, 5 U.S.C. § 706.

302. The Supreme Court has never invalidated one of its own rules as beyond its REA authority. *See* A. Benjamin Spencer, *Substance, Procedure, and the Rules Enabling Act*, 66 UCLA L. REV. 654, 658 (2019) ("Indeed, it has become common wisdom that the various Federal Rules are regarded as presumptively valid, suggesting that no serious person would construe the REA to reach a contrary conclusion, given that the Supreme Court itself has never done so.").

303. Order of Jan. 21, 374 U.S. 865, 870 (1963) (Black, J. & Douglas, J., dissenting).

304. *See* Wigmore, *supra* note 244, at 278 ("The judiciary knows the needs [of evidence law] better than does the legislature.").

305. *See, e.g., id.* ("The legislature—as experience shows—becomes the catspaw of a few intriguing lawyers, who from time to time secure an alteration of rules of procedure to serve selfish ends or to vent petty spite or to embody some personal narrow view."); Moore, *supra* note 266, at 1057 (claiming that "Congress's involvement in the process of amending Rules has been troubling" because of the disregard for the rulemaking process established by the REA and because, in at least one instance, a congressional amendment was "a political response to the pressures of a discrete

derogate from Congress’s powers to create the lower federal courts and the related power to make all laws “necessary and proper” thereto.<sup>306</sup> Moreover, because of the unique status of evidence law, the federalism and jury implications associated with the FRE that I explored in Section I.B, and the awkwardness of judges sitting in judgment on their own work-product, it would be best to bring the two branches into interbranch dialogue about important matters within the FRE. Of course, the structure of that dialogue needs to meet the formal demands of *Chadha*, *Clinton*, and the non-delegation doctrine.<sup>307</sup> Although state-level rulemaking about evidence law is not constrained by these same formal parameters, there is much one can learn from paying some attention to the vital and creative discussions in the states about how best to work through the various claims legislatures and courts can make on evidence rulemaking. There is not one model that states have agreed upon—but they are generally more sensitive than the federal rulemaking process is to the kinds of separation of powers issues I have explored here.<sup>308</sup>

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interest group rather than a carefully crafted response to procedural inadequacies of the prior Rule”).

306. See U.S. CONST. art. III; U.S. CONST. art I, sec. 8, cl. 9 & 18.

307. See discussion *supra* Section I.A.

308. See, e.g., Thomas A. Bishop, *Evidence Rulemaking: Balancing the Separation of Powers*, 43 CONN. L. REV. 265, 267 (2010) (exploring ways for the Connecticut courts to share authority with the legislature over laws of evidence); Robert G. Lawson, *Modifying the Kentucky Rules of Evidence—A Separation of Powers Issue*, 88 KY. L.J. 525, 545–46, 549–50 (2000) (developing ideas to manage the Kentucky version of the REA, which has similar supersession problems); Michael P. Dickey, *The Florida Evidence Code and the Separation of Powers Doctrine: How to Distinguish Substance and Procedure Now that It Matters*, 34 STETSON L. REV. 109, 109–10 (2004) (exploring tensions between Florida legislative evidence statutes and the highest court’s efforts to reject them); Patrick Vrobel, Note, *Harnessing the Hired Guns: The Substantive Nature of Ohio Revised Code § 2743.43 Under Article IV, Section 5(B) of the Ohio Constitution*, 21 J.L. & HEALTH 123, 124, 126–27 (2008) (exploring the Ohio Supreme Court’s efforts to supersede a state statute); Jeffrey A. Parness, *Survey of Illinois Law: The Ins and Outs of the New Illinois Evidence Rules*, 35 S. ILL. U.L.J. 689, 689–90 (2011) (discussing the need for legislative input over substance in Illinois’s state evidence code—and highlighting divergences from the FRE); Helen Hershkoff, *The Michigan Constitution, Judicial Rulemaking, and Erie-Effects on State Governance*, 60 WAYNE L. REV. 117, 117–18, 132–37 (2014) (highlighting that Michigan’s evidence law is predominantly promulgated by the courts). Innovations at the state level include Connecticut’s choice to have its lower courts doing the evidence rulemaking; Kentucky’s original effort to get its evidence law jointly promulgated by its legislature and its judiciary; and Michigan’s leaving evidence rulemaking mostly in the hands of the judiciary.

So, this is what I recommend for the federal system. First, Congress should repeal en masse the entirety of the FRE. If Congress wishes to continue to try to maintain control over privilege law at Rules 501 and 502 as it has wanted to do for federalism reasons (though with mixed success),<sup>309</sup> it could leave those alive as statutes.<sup>310</sup> This would leave the status of the remaining FRE as binding as any other rules regime<sup>311</sup>—without the infirmity of having decades of the Supreme Court promulgating amendments and repeals that effectively muck with the force and effect of the United States Code, a practice I have argued has formal and functional deficiencies. That repeal would also have the benefit of helping the courts develop a unified interpretive approach to Federal Rules more generally, a problem that is even more

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I have not undertaken an exhaustive fifty-state survey about how states manage similar separation of powers problems in their own evidence rulemaking regimes. I have no doubt such a project would be illuminating. But since state separation of powers doctrines and practices in the states often veer from the rules in the federal ecosystem, see, for example, Richard Briffault, *The Item Veto in State Courts*, 66 TEMP. L. REV. 1171, 1171 (1993) (highlighting that “many state constitutional provisions dealing with government structure have no federal analogues”), I sought to design a fix here that was calibrated to federal law.

309. It probably should be emphasized here that the Court has made its imprint on privilege law through common-law decision-making rather than through its rulemaking function. See, e.g., *Upjohn v. United States*, 449 U.S. 383, 386 (1981) (attorney-client privilege); *Trammel v. United States*, 445 U.S. 40, 41–42 (1980) (spousal privilege); *Jaffee v. Redmond*, 518 U.S. 1, 3–4 (1996) (psychotherapist-patient privilege). From one perspective, the rulemaking process might have produced clearer guidance if the REA had permitted privileges to be developed that way. But from a constitutional perspective, the Court was constrained in a case or controversy. Going forward, Congress might want to arm the Court with more rulemaking authority here; so long as there is an intelligible principle in helping the Court make rules, nothing needs to prevent Congress from ceding authority here. What it cannot do, however, is set a policy and then let the Court repeal that policy outside a case or controversy and with no guidance or meaningful constraint.

310. There is an argument to revert to the pre-2011 version of these rules, which were amended through the REA process rather than by statute, as Congress had specifically directed in 1975. The Supreme Court promulgated the 2011 amendments as “stylistic”—but even stylistic amendments make congressional law of no further force or effect.

311. If Congress repeals evidence laws that were otherwise never touched by the REA process after 1975, the Supreme Court probably would have to re-promulgate those Rules so as to maintain continuity. Given that such an action of dramatic repeal by Congress would not likely be done without some notice to the Supreme Court, all parties could prepare to sustain constitutionality and continuity by acting in a coordinated fashion.

bedeviling when the rules at issue are currently a messy hybrid in the FRE.<sup>312</sup>

This proposed repeal must also include a rewrite of the REA's supersession clause as it applies to the FRE. Although the Supreme Court can be delegated the task of updating its own rules going forward (so it can "supersede" its own rules), it cannot be delegated the power to override congressional statutes, as it has now. And when Congress passes that renovated REA, Congress probably also needs to spend some time passing actual *laws* of evidence that the *rules* of evidence would not be able to change, much like its effort in current Rules 501 and 502.<sup>313</sup> Such laws might include the range of 1975 commitments about liability insurance, religious beliefs, and self-incrimination that have been altered over time because of supersession's effects. Those laws should also furnish "intelligible principles" to help the Court in its rulemaking efforts to meet the basic demands of the non-delegation doctrine, but they must also take clear positions on the federalism implications about preemption and constitutional jury rights as well. This might mean that a significant portion of a reconfigured evidence law might ultimately remain statutory. But it will only be capable of being amended or repealed by another act of Congress, not by Supreme Court rulemaking. If Congress oversteps or specifies a constitutional jury right "incorrectly," the Court will have the ability to use its core Article III judicial power to invalidate or interpret statutes in cases and controversies before it, as befits the Constitution's structural design.

This division of labor for a reimagined FRE is most likely to generate a better balance for judiciary and legislature alike, bringing the branches into better conversation about matters of constitutional magnitude. The renovated REA can still sustain a "report-and-wait" provision, which can give Congress the ability to weigh in on rules that

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312. See Lumen N. Mulligan & Glen Staszewski, *Civil Rules Interpretive Theory*, 101 MINN. L. REV. 2167 (2017); Elizabeth G. Porter, *Pragmatism Rules*, 101 CORNELL L. REV. 123 (2015). Outside the FRE context, the Federal Rules are not statutes by and large, so can have a sui generis interpretive approach rather than being subsumed in debates about statutory interpretation more generally. Thus, moving most of the FRE back into rule interpretation rather than statutory interpretation should be cleaner for the whole of the federal rule regime.

313. Pub. L. No. 93-595, 88 Stat. 1926, 1933 (1975) (codified as amended at 28 U.S.C. app.); Pub. L. No. 110-322, 122 Stat. 3537, 3537 (2008) (codified as amended at 28 U.S.C. app.). With these Acts, Congress took the principles laid out in FRE 501 and 502 and made them law.

it believes the Court is getting wrong, too. And the Court can still sustain its judicial supremacy on matters within its jurisdiction, so long as it is using its Article III powers to do so. I have no doubt the Court and the Advisory Committee would have a seat at the table when Congress takes to doing its job of steering the FRE ship aright.

Still, there is reason to remain unsettled by the limited opportunity for dialogue between the branches that the post-*Chadha* “report-and-wait” provision currently affords.<sup>314</sup> Since getting Congress and the President mobilized to pass a law with full Article I, Section 7 compliance is a very challenging lift for countermanding what can otherwise be unilateral action of the Supreme Court, some rethinking of *Chadha* may ultimately be advisable. Not the part of it that requires passing, amending, and repealing laws in ways that are in conformity with constitutional procedures. That is what *Chadha* got right and part of what undermines the current REA’s legitimacy as applied to the FRE. But the FRE rulemaking context might be unique enough to permit some loosening of the blanket invalidity of legislative vetoes. So the Court might reconsider *Chadha* to this limited extent: in connection with the FRE (as renovated according to the new imagined regime I specified above), it would stimulate appropriate interbranch dialogue to allow legislative vetoes to countermand rules of evidence promulgated by the Supreme Court that genuinely touch on matters of federalism and the jury.<sup>315</sup> Because these are areas where there is a good reason to respect congressional preferences and maintain a legitimate concern about too much power being concentrated within the judiciary, a limited exception to *Chadha*’s prohibition on legislative vetoes is worth taking seriously here. Since the judiciary would be able

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314. 28 U.S.C. § 2074.

315. The vision of “interbranch dialogue” I have in mind draws from the legal process school’s suspicion of fetishistic formalism and its deep attention to institutional competence. See generally HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (“The Interrelationships of the Major Lawmaking Institutions in a Unitary System”); William N. Eskridge, Jr. & Philip P. Frickey, *The Making of The Legal Process*, 107 HARV. L. REV. 2031, 2033 (1994) (identifying core features of the legal process school and highlighting how institutions can collaborate together); Felix Frankfurter & Henry M. Hart, Jr., *The Business of the Supreme Court at October Term, 1934*, 49 HARV. L. REV. 68, 90–91, 94–96 (1935) (emphasizing attention to institutional competence); LON L. FULLER, *THE LAW IN QUEST OF ITSELF* 91, 123, 134, 192 (1940) (focusing on ways the interrelationships between the legislature and the judiciary can improve law); *MAKING POLICY, MAKING LAW: AN INTERBRANCH PERSPECTIVE* (Mark C. Miller & Jeb Barnes eds., 2004).

to use its Article III power in cases and controversies to make sure the FRE comports with its vision of the Constitution anyway, enhancing the possibilities for dialogue on these issues is ultimately to the good. And since nothing about this limited exception to the legislative veto ban involves supersession or having an entity other than the legislature passing or repealing laws, the core of *Chadha* can be sustained.<sup>316</sup>

Before I conclude, I have to say something about how to think about all the cases already decided under the current FRE, with its warts and all. Although I am convinced that the REA process in amending and repealing dimensions of the originally-enacted 1975 FRE is fundamentally flawed, there is not likely a one-size-fits-all way to approach the individualized unconstitutionality of the application of any particular rule of evidence. Many rules in the FRE have sustained their substantive shape since Congress passed them in 1975,<sup>317</sup> so the unconstitutionality of the REA's contribution to the FRE is not likely to undo many past cases. And even in the instances where an REA-based change should genuinely be thought to be unconstitutional, not all will trigger "harmful errors" that would furnish parties with many legitimate claims to upset final judgments.

On the civil side, Federal Rule of Civil Procedure 60 would govern the finality of judgments that might be challenged once Congress and the Court appreciate the constitutional infirmity of the combination of the REA with FRE.<sup>318</sup> Here, it seems as if it would only be a very rare case in which a district court would be authorized or motivated to upset a final judgment under Rule 60(b)(6), the singular part of Rule 60 that could sustain an effort to undo a judgment for an FRE problem.<sup>319</sup> This

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316. Another way through the thicket here, suggested to me by Aaron Bruhl, could be to consider a mechanism of statutory fast-tracking to promote interbranch cooperation, allowing the Advisory Committee to tee-up amendments to the FRE that Congress would be required to consider without the filibuster. *See generally* Aaron-Andrew P. Bruhl, *Return of the Line Item Veto? Legalities, Practicalities, and Some Puzzles*, 10 U. PA. J. CONST. L. 447, 448–50 (2008). This strategy has the upside of not needing to muck with current constitutional law—but the downside of an untested parliamentary environment (and one that potentially gives Congress too much authority too often).

317. *See, e.g.*, Pub. L. No. 93-595, 88 Stat. 1926, 1926–29 (1975) (codified as amended at 28 U.S.C. app.).

318. *See* FED R. CIV. P. 60 (outlining the court procedure for "mistake[s] arising from oversight or omission whenever one is found in a judgment").

319. *See* FED. R. CIV. P. 60(b) ("(b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly

is because it is legally settled that “[i]ntervening developments in the law by themselves rarely constitute the extraordinary circumstances required for relief under Rule 60(b)(6).”<sup>320</sup> Courts hearing Rule 60(b)(6) motions want to see that the party looking to be relieved from judgment actually appealed.<sup>321</sup> And “Rule 60(b) proceedings are subject to only limited and deferential appellate review.”<sup>322</sup> So the floodgates are not likely to open for many civil cases.

Nor will many litigants on the criminal side have access to many legitimate arguments to upset their convictions, either. First, even if the REA-as-applied-to-the-FRE is constitutionally defective and needs to change, one could reasonably be much less confident that as a general matter all rule-level deficiencies that flowed from the process failure should lead to retroactive relief per se. Collateral attacks based on constitutionally-infirm FRE provisions would be subject to 28 U.S.C. § 2255 and *Teague v. Lane*’s preclusion of claims based on a “new rule” in all but extreme cases.<sup>323</sup> Even if *Teague* does not apply because a court finds that a relevant defective FRE rule is not merely a “procedural rule,”<sup>324</sup> it still would seem to be very difficult for a litigant to succeed on collateral review because the litigant would need to show

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discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or (6) any other reason that justifies relief.”).

320. *Agostini v. Felton*, 521 U.S. 203, 239 (1997).

321. See *Ackermann v. United States*, 340 U.S. 193, 197–98, 202 (1950). This rule is not ironclad. See *Norgaard v. DePuy Orthopaedics, Inc.*, 121 F.3d 1074, 1076 (7th Cir. 1997); *GenCorp, Inc. v. Olin Corp.*, 477 F.3d 368, 374 (6th Cir. 2007) (“The intervening-change-in-law exception . . . exists to protect those who, despite due diligence, fail to prophesy a reversal of established adverse precedent.”); *Shoshone-Bannock Tribes of Fort Hall Rsrv. v. Leavitt*, 408 F. Supp. 2d 1073, 1082 (D. Or. 2005).

322. *Gonzalez v. Crosby*, 545 U.S. 524, 535 (2005).

323. *Teague v. Lane*, 489 U.S. 288, 315–16 (1989). *Teague*’s application to § 2255 (rather than state prisoner collateral review under § 2254) is widely accepted. See, e.g., *Chaidez v. United States*, 568 U.S. 342, 347–48 (2013) (applying *Teague* to determine whether the Court’s decision in *Padilla* applied retroactively). See generally RICHARD H. FALLON, JR. ET AL., *HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 1358 (7th ed. 2015) (“But although § 2255 contains no limitation on the scope of review similar to that added in 1996 by § 2254(d), the courts of appeals have held that the Supreme Court’s decision in *Teague v. Lane* . . . which precludes habeas courts from considering state prisoners’ claims based on new law in all but the most exceptional cases . . . also governs § 2255 proceedings.”).

324. This distinction is clear in *Bousley v. United States*, 523 U.S. 614, 620 (1998).

that the error was “a fundamental defect which inherently results in a complete miscarriage of justice.”<sup>325</sup> Nevertheless, I cannot rule out the possibility that some new litigation will arise about how to cope with the fact that we have had a constitutionally unacceptable rulemaking process in connection with the FRE for nearly half a century. That may be the cost of correcting a long-standing constitutional error.

#### CONCLUSION

What we have are Federal Rules of Evidence that were first passed by Congress as statutory law. Yet most dimensions of it can be and have been superseded by a rulemaking process housed at the Supreme Court, a process that is very hard to subject to meaningful judicial or congressional review. This just is not how important law is supposed to get made under our Constitution. The Supreme Court should be hearing cases or controversies under its Article III power to vindicate our constitutional rights, not making and repealing substantive federal law that can impact federal-state relations and our constitutional jury entitlements. The formal and functional separation of powers established by the Constitution ultimately requires a new approach to the FRE, one that does not permit Congress effectively to abdicate its power of amending and repealing statutes of the United States to the Supreme Court.

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325. *Hill v. United States*, 368 U.S. 424, 428 (1962).