Article

The Rules Enabling Act and the Procedural-Substantive Tension: A Lesson in Statutory Interpretation

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INTRODUCTION

Originally enacted in 1934[1] and revised only slightly in 1988,[2] the Rules Enabling Act gives the Supreme Court "the power to prescribe general rules of practice and procedure."[3] It further specifies, however, that the rules "shall not abridge, enlarge or modify any substantive right."[4] The Act's importance is difficult to overstate, for it plays a foundational, and often central, role in all federal court litigation. The Act has enabled the Court to promulgate rules governing civil, bankruptcy, criminal, and appellate procedure in federal courts, as well as rules of evidence.[5] Simply put, the Act, through the various rules

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1. Act of June 19, 1934, Pub. L. No. 73-415, 48 Stat. 1064 (codified as amended at 28 U.S.C. §§ 2071–2077 (2000)).

2. *See* 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, 1029 (noting that, as between the 1934 and the 1988 versions of the Rules Enabling Act, "the words of the basic grant of rulemaking authority are similar"); *see also infra* notes 46–47 and accompanying text.

3. 28 U.S.C. § 2072(a) (2000).

4. *Id.* § 2072(a), (b).

5. *See* James C. Duff, The Federal Rules of Practice and Procedure Administrative Office of the U.S. Courts, The Rulemaking Process: A Summary for the Bench and Bar, Oct. 2007, http://www.uscourts.gov/rules/proceduresum

promulgated under it, in one way or another impacts every federal court litigant.

For the sake of everyone involved in the rulemaking process,[6] one might reasonably expect the Enabling Act to provide a clear indication of the types of rules that fall within the rulemakers' authority to promulgate. Unfortunately, this has not proven to be the case. To this day, no real consensus has developed as to how the Act should be interpreted.[7] This troubling state of affairs has given rise to the following problem: major rulemaking proposals generate fresh debates over what the rulemakers may and may not do under the Act.[8] Debate, in and of itself, is not a bad thing. What is troubling, however, is that this debate underscores the confusion at the heart of the rulemaking process concerning the rules' scope and legitimacy.[9]

The principal reason why construction of the Rules Enabling Act has eluded anything approaching consensus lies in the two key sections of the Act.[10] One section requires the rulemakers "to prescribe general rules of practice and procedure . . . for cases in the United States district courts."[11] As Professor Ely observed, this section mandates that rulemaking under the Act concern procedural goals, which he further defined as goals "designed to make the process of litigation a fair and efficient mechanism for the resolution of disputes."[12] The other opera-

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6. For a useful summary of rulemaking under the Rules Enabling Act, see *id.* (describing the involvement of five advisory committees—one each for appellate, bankruptcy, civil, criminal, and evidence rules—the Standing Committee, the Judicial Conference, the United States Supreme Court, and Congress).

7. *See infra* Part II.

8. *See, e.g.*, Lee H. Rosenthal, *Back in the Court's Court*, 74 UMKC L. REV. 687, 699 (2006) (noting, for example, that the 2001 proposed amendments to Rule 23 (class actions) generated extensive debate, after which "the Committee concluded that in light of the constraints on rulemaking under the Rules Enabling Act . . . , Congress rather than the rulemakers should address the role of the federal courts in national and multi-state class actions").

9. *See* Leslie M. Kelleher, *Taking "Substantive Rights" (in the Rules Enabling Act) More Seriously*, 74 NOTRE DAME L. REV. 47, 49 (1998) (noting that, "[d]espite the passage of more than six decades, neither the Court nor the commentators have managed to produce a workable [interpretation of the Rules Enabling Act]," resulting in uncertainty about the validity of proposed rules).

10. *See infra* Part I.A.

11. 28 U.S.C. § 2072(a) (2000).

12. John Hart Ely, *The Irrepressible Myth of* Erie, 87 HARV. L. REV. 693, 723–24 (1974) (citation omitted). In a similar vein, one federal court explained:

> [Procedural] rules "are addressed to lawyers and judges in their pro-

tive provision specifies that rulemaking under the Act "shall not abridge, enlarge or modify any substantive right."[13] Ely defined substantive rights as rights "granted for one or more non-procedural reasons, for some purpose or purposes not having to do with the fairness or efficiency of the litigation process."[14] The question is, how should the two sections be construed when taken together? What distinguishes a permissible rule from an impermissible one?

There exist basically three conceivable interpretations of the procedural-substantive intersection in the Rules Enabling Act.[15] First, relying on the notion of mutual exclusivity of procedure and substance, one could construe the second section as nothing more than restatement of the first (the "redundancy" construction). Under this approach the second provision effectively serves solely to place emphasis on the first. In other words, if a rule is to regulate procedure, then it necessarily cannot abridge, enlarge, or modify substantive rights. Under this reading, which at one point represented the Court's Enabling Act doctrine,[16] the second section is redundant, doing noth-

> fessional roles and govern the means by which disputes regarding the content or application of substantive rules should be resolved. The purpose of these rules is to achieve accuracy, efficiency, and fair play in litigation, without regard to the substantive interests of the parties."

Sims v. Great Am. Life Ins. Co., 469 F.3d 870, 882 (10th Cir. 2006) (quoting Michael Wells, *The Impact of Substantive Interests on the Law of Federal Courts*, 30 WM. & MARY L. REV. 499, 504 (1989)).

13. 28 U.S.C. § 2072(b).

14. Ely, *supra* note 12, at 725; *cf. Sims*, 469 F.3d at 882 ("Substantive rules 'are directed at individuals and governments and tell them to do or abstain from certain conduct on pain of some sanction. Substantive rules are based on legislative and judicial assessments of the society's wants and needs, and they help to shape the world of primary activity outside the courtroom.'" (quoting Wells, *supra* note 12, at 504)).

15. *See infra* Part I.A. The interpretations discussed in this Article assume the constitutional validity of the Enabling Act itself and simply seek to resolve the procedural-substantive interplay. One of us previously addressed possible interpretations with an eye towards "tak[ing] into account [the] democratic accountability critique" of the Act. 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, 1332 (2006).

16. *See, e.g.*, Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941) (stating the Enabling Act test as "whether a rule really regulates procedure[]—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them"). For a more complete discussion of *Sibbach*, see *infra* Part II.B.2.

ing more than emphasizing in the negative what the first section has already stated in the positive.

The other two conceivable readings of the Act instead interpret the second section as carving out a portion of rulemaking powers granted by the first. On one reading, the statutory directive that rules may not affect substantive rights means that having *any* effect whatsoever on a substantive right will invalidate a rule. This reading strictly separates the two sections of the Enabling Act and directs that each section possess independent meaning. This interpretation may be labeled the "strict separation" reading. The construction, which has never commanded a majority of the Court,[17] has received support in various Rules Enabling Act scholarship, most notably that of Professors Burbank[18] and Ely.[19] While Burbank and Ely define the relevant substantive rights differently,[20] they agree the second section of the Enabling Act should be read to impose a strict limitation on the first, rather than act as mere redundancy.

The final conceivable reading basically amounts to the second approach modified by an important exception. That exception permits rules to impact substantive rights if and only if they do so *incidentally*. "Incidentally" here means, in accordance with the term's dictionary definition, both "occurring by chance in connection with something else" and "accompanying but not a major part of something."[21] Thus, on the basis of this interpretation of the procedural-substantive tension contained in the Act, a rule impacting substantive rights is permitted as long as the effect either could not have been anticipated at the

17. In the one case where the Court seemed to read the Enabling Act to invalidate any Rule affecting substantive rights, it did so in dictum. *See* Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 503 (2001) (suggesting that a reading of Rule 41 as having claim-preclusive effect in other courts "would arguably violate" the Rules Enabling Act).

18. *See, e.g.*, Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1114 (1982) (arguing that rules promulgated under the Act may not affect substantive rights in a predictable and identifiable fashion). For a more complete discussion of Professor Burbank's approach, see *infra* Part II.B.4.

19. *See* Ely, *supra* note 12, at 722 (stating that the Enabling Act should be interpreted as prohibiting interference with state law provisions embodying substantive policy). For a more complete discussion of Professor Ely's approach, see *infra* Part II.B.3.

20. *Compare infra* Part II.B.3 (Ely) *with infra* Part II.B.4 (Burbank).

21. THE NEW OXFORD AMERICAN DICTIONARY 853 (Erin McKean ed., 2d ed. 2005).

outset by those adopting the rule (i.e., a spillover effect) or was anticipated but deemed necessary to the achievement of a procedural goal giving rise to the rule. We label this interpretation the "relaxed separation" construction of the Act because it does not demand as strict an enforcement of the second section as does the strict separation interpretation.

An example of a rule that intentionally but incidentally affects substantive rights is Rule 37, which authorizes courts to establish facts for purposes of the litigation, or even to dismiss a suit or grant a default judgment against a party violating a discovery order.[22] Certainly, such judicial action inescapably impacts litigants' substantive rights. But that effect is appropriately characterized as incidental because the primary goal of the rule is not to provide a substantive basis on which to resolve a suit. Rather, the primary goal is procedural—ensuring litigants comply with discovery orders—because discovery is deemed essential to the fair and accurate performance of the truth-finding function.[23] This goal undoubtedly satisfies Ely's definition of procedural goals insofar as discovery aims to promote a fair and efficient fact-finding process in litigation.[24] The rule's substantive effect, then, is merely a club by which courts can police compliance with procedural orders—a means to an end. Thus, the substantive effect serves a valid procedural purpose by ensuring that litigants do not subvert a legitimate procedural directive.

The relaxed separation construction of the procedural-substantive tension in the Enabling Act approximates the Court's current doctrine,[25] though subsequent dicta may have raised questions about that.[26] At no point, however, has the

22. *See* FED. R. CIV. P. 37(b)(2)(A)(i), 37(b)(1)(A)(v), (vi) (authorizing courts to establish facts, order dismissal, or enter default judgment, respectively, as discovery sanctions).

23. *See* Martin H. Redish, *Electronic Discovery and the Litigation Matrix*, 51 DUKE L.J. 561, 600 (2001) ("[Discovery] aids in achieving factual accuracy and, in doing so, may significantly facilitate the enforcement of governing substantive law.").

24. *See supra* text accompanying note 12.

25. *See* Burlington N. R.R. Co. v. Woods, 480 U.S. 1, 5 (1987) ("Rules which incidentally affect litigants' substantive rights do not violate [the Rules Enabling Act] if reasonably necessary to maintain the integrity of that system of rules."). For a more complete discussion of *Burlington Northern*, see *infra* Part II.B.5.

26. *See* Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 503 (2001) ("[I]t would be peculiar to find a rule governing the effect that must be accorded federal judgments by other courts ensconced in rules governing the

Court even attempted to fashion an adequate rationalization for its chosen interpretive methodology. In other words, the Court has not explained why the relaxed separation construction should prevail over the other two. Moreover, the Court's chosen interpretive mode has been the subject of intensive (and largely unanswered) scholarly attack.[27]

Each of the above three readings—redundancy, strict separation (i.e., any substantive impact invalidates a rule), and relaxed separation (i.e., an incidental effect on substantive rights does not invalidate a rule)—represents a plausible construction of the Enabling Act's text.[28] This plausibility, combined with the lack of a textually inevitable interpretation, likely explains why the last seventy years of doctrine and scholarship have failed to produce a generally accepted construction of the procedural-substantive interplay in the Act's two key provisions.

Our goal in this Article is to resolve the procedural-substantive tension in the Enabling Act's text and, in the course of doing so, to glean an important lesson in statutory interpretation. In construing a statute, an interpreter usually has to select—either implicitly or explicitly—among several available theories of statutory construction: an interpretation within the four corners of the statute,[29] a legislative history-driven search for the actual intent of the enacting legislators,[30] or a contextualist analysis that directs judges to interpret ambiguous statutory text in the context of objectively determined statutory purposes.[31] The last approach instructs judges to infer statutory purposes from a synthesis of statutory text, legislative history, and the social and legal contexts of the statute. The interpreting judge's task in using this approach is to employ a broadly based purposive inquiry in an effort to determine which purposes would have been recognizable by a reasonable, intelligent bystander observing the passage of the statute. The determination is objective because it posits as the interpretive key a reasonable observer or legislator rather than one or more of the enacting legislators with their subjective intentions.

internal procedures of the rendering court itself. Indeed, such a rule would arguably violate the jurisdictional limitation of the Rules Enabling Act . . . .").

27. *See, e.g.*, *infra* note 43.

28. *See infra* Part I.A.

29. *See infra* Part I.B.1.

30. *See infra* Part I.B.2.

31. *See infra* Part I.B.3.

The lesson we seek to impart is that the Rules Enabling Act serves as a quintessential illustration of a statute whose ambiguous text must be interpreted in light of objectively determined background purposes, rather than via a narrow focus on either the literal meaning of the text or the specifics of legislative history. This is so for two reasons. First, when statutory text is ambiguous, simultaneously giving rise to several conceivable interpretations (as is the case with the procedural-substantive interplay in the Enabling Act),[32] it makes little sense to employ the four-corners approach, which effectively requires interpretation of individual words without regard for an overall sense of the statute.[33] To glean that overall sense, unless the text permits only one construction, an interpreter must often venture beyond the narrow confines of the text. Second, a statute such as the Rules Enabling Act, which on its four corners provides only limited interpretive guidance, does not lend itself to interpretation through slavish resort to an assessment of the actual legislative intent of its enactors.[34] In enacting a sparsely worded statute, legislators as a group are unlikely to have thought through, much less reached consensus on, the statute's various applications in specific and frequently unforeseeable circumstances. Thus, the ambiguous text in the Rules Enabling Act, capable of several textually plausible interpretations, should be construed to facilitate the objectively determined purposes that a reasonable observer, using her knowledge of the relevant legal and social context and a good measure of common sense, would have understood to be the objective that the Act seeks to reach. The interpreter must then determine how a particular dispute over statutory application must be resolved in order to attain that endpoint.

To a reasonable bystander observing the passage of the Enabling Act, two underlying purposes should have been readily apparent: (1) creating a uniform and effective system of procedural rules for the federal courts, while (2) preserving the substantive lawmaking power for Congress,[35] free from chal-

32. *See infra* Part I.A.

33. *See infra* Part I.B.1.

34. *See infra* Part I.B.2.

35. While we are focusing on substantive rights under federal law, our interpretation of the Rules Enabling Act does not turn on whether affected substantive rights are grounded in state or federal law. The interpretation applies with equal force no matter the source of a substantive right in question. We concentrate on federal substantive law simply to avoid the unnecessary complication presented by *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

lenge or threat from the Supreme Court's newly created rule-making authority.[36] The inquiry then becomes, which of the three conceivable interpretations of the procedural-substantive interplay best facilitates the achievement of the two purposes? We argue the incidental-effects—or, relaxed separation—interpretation fashioned by the Court in *Burlington Northern Railroad Co. v. Woods*[37] most effectively promotes the two background purposes of the Enabling Act. Unlike the redundancy reading, the incidental-effects test furthers the goal of preserving substantive policymaking for Congress.[38] The test recognizes that it is not enough for a rule to promote a procedural goal; the rule also may not infringe a substantive right, a matter of congressional prerogative. But the incidental-effects test also rejects the strict separation reading that invalidates every rule having *any* effect on substantive rights. In so doing, the test appropriately recognizes that some provisions—for example, discovery sanctions provided for in Rule 37[39]—while they clearly and inevitably affect substantive rights, are nevertheless necessary to enforce compliance with the various rules. Compliance with the rules' procedural directives promotes uniformity and makes the rules effective, thus facilitating the other main purpose of the Act.

To support our choice of the incidental-effects construction of the Rules Enabling Act, we draw upon the seventy-plus years of Enabling Act doctrine and scholarship. By examining the works of courts and scholars that mistakenly advocate either the redundancy or strict separation constructions of the Act, we underscore the fallacies inherent in these modes of interpretation: both, in various ways, undermine the two overriding purposes unambiguously sought to be achieved by the Act's adoption. It is not surprising that every argument in favor of the redundancy or strict separation reading was based on an interpretation searching either for a four-corners meaning of statutory text or for the actual intent of the enacting legislative body—both wholly divorced from any inquiry into the extent to which these modes of construction actually further the Act's long range goals. Only when the *Burlington Northern* Court

36. *See infra* Part II.A. Notably, the two purposes "are potentially in tension—a fact of which the drafters appear to have been blissfully unaware." Redish & Amuluru, *supra* note 15, at 1332.

37. 480 U.S. 1, 5 (1987).

38. *See infra* Part II.B.5.

39. *See* discussion *supra* notes 22–24.

chose a method of statutory construction that most effectively implemented the Act's background purposes did it arrive at the most sensible interpretive conclusion. The *Burlington Northern* decision aside, however, the last seven decades of scholarly and judicial constructions of the Act provide ample illustration of statutory interpretation theory gone awry.

This Article proceeds in three steps. Part I explains the procedural-substantive tension in the two relevant sections of the Enabling Act by exploring and categorizing the three conceivable interpretations of those provisions. It also introduces the three broad theories of statutory interpretation potentially implicated in the Act's construction. Part II then works through the various interpretations of the Enabling Act that have been fashioned in its more than seven-decade-long history. This historical analysis enables us to advance our thesis that ambiguous and sparsely worded statutes such as the Enabling Act should be interpreted in light of the objectively determined purposes that would have been understood by a reasonable bystander observing the enactment, rather than by either a literal and narrow examination of the text's four corners or a fruitless attempt to discern the subjective intent of those making up the enacting legislative body.

Finally, Part III explains the *Burlington Northern* test and proposes a modification by removing the blanket presumption of validity that the Court bestowed upon every existing rule. The Court viewed existing rules to be beyond objection because they had traveled through several checking mechanisms on their way to promulgation: "the study and approval given each proposed Rule by the Advisory Committee, the Judicial Conference, and this Court, and the statutory requirement that the Rule be reported to Congress for a period of review before taking effect."[40] In Part III, recognizing the relevant institutional disadvantages of Congress and the Court during the rulemaking process, we suggest an alternative set of presumptions that does not readily postulate every rule's validity.

While the lessons for the theory of statutory construction to be gleaned from our examination of the Rules Enabling Act are important, the practical stakes of this interpretive battle are also quite high. If the Court were today to adopt either the redundancy or strict-separation constructions of the Act, serious harm to the uniformity and integrity of the federal rules would

40. Burlington N. R.R. Co. v. Woods, 480 U.S. 1, 6 (1987).

result.[41] Indeed, it is for this very reason that the incidental-effects construction makes so much sense. As we have noted, currently the Court appears to employ the incidental-effects construction.[42] However, in adopting this interpretive mode the Court has failed miserably in its efforts either to rationalize the test, ground it in the Act's text and purpose, or explain it in terms of a coherent theory of statutory interpretation. Moreover, the test has on occasion been vigorously attacked by respected commentators,[43] and in more recent dicta the Court itself has seemingly wavered in its adherence to the test.[44] Thus, this Article operates simultaneously on two levels: (1) as a lesson in the theory of statutory construction, gleaned from a detailed examination of one particular statute; and (2) as an effort to provide an intellectual grounding for the incidental-effects construction of the Rules Enabling Act, in an attempt to fortify that test against misguided scholarly and judicial attacks.

I. THREE THEORIES OF STATUTORY INTERPRETATION: IMPLICATIONS FOR CONSTRUCTION OF THE RULES ENABLING ACT

In order to understand the lesson in statutory interpretation that we derive in Part II, one first needs to grasp the interpretive ambiguity inherent in the Enabling Act and the tools of statutory construction available to an interpreting judge. To that end, this Part first explains the source of persistent interpretive ambiguities in the Enabling Act and then describes the methodologies of various statutory interpretation theories.

A. AMBIGUITIES: PROCEDURE, SUBSTANCE, OR BOTH?

The two relevant provisions of the Enabling Act are as brief as they are cryptic. Section 2072 defines both the grant of and the limitation on rulemaking under the Act.[45] In paragraph (a)—what we refer to as the "enabling" provision—the Act pro-

41. *See infra* Parts II.B.2–4.

42. *See Burlington Northern*, 480 U.S. at 5; *see also* Bus. Guides, Inc. v. Chromatic Commc'ns. Enters., 498 U.S. 533, 553 (1991) (following *Burlington Northern* and explaining that rules having incidental effects on litigants' substantive rights do not violate the Rules Enabling Act).

43. *See, e.g.*, Burbank, *supra* note 2, at 1016 (describing the Court's approach as "flawed," with regard to both interpretation and practical application).

44. *See* Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 503 (2001).

45. 28 U.S.C. § 2072 (2000).

vides: "The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals."[46] Paragraph (b), in turn, defines the limitation on the power granted in paragraph (a): "Such rules shall not abridge, enlarge or modify any substantive right."[47] As a shorthand, we will refer to paragraph (b) as the "limiting" provision. Thus, the basic question is simply this: what, if anything, does the limiting provision (focusing on insulation of litigants' substantive rights) carve from the powers granted under the enabling provision (focusing on the Court's authority to regulate procedure in the federal courts)?

Before proceeding, it is worth pausing to define how we construe the terms *procedure* and *substance*. Professor Ely has supplied useful definitions. Rules impacting procedure are "designed to make the process of litigation a fair and efficient mechanism for the resolution of disputes."[48] Substantive rights, on the other hand, are rights "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."[49]

There are three plausible interpretations of a synthesis of the two provisions. On one reading, the limiting portion of the Enabling Act might be nothing more than mere redundancy, meaning that it does not overlap with the enabling provision but simply restates it in a negative fashion. If we assume—contrary to what we now know[50]—that rules regulating proce-

46. *Id.* § 2072(a). Congress amended the Act in 1988 and created the subsections quoted in the main text. Act of Nov. 19, 1988, Pub. L. No. 100-702, § 401(a), 102 Stat. 4648 (codified as amended in 28 U.S.C. §§ 2071–2077). Other than minor stylistic changes, however, the import of the Act largely remained faithful to the original legislation of 1934. In 1934, the relevant portion read:

> [T]he Supreme Court of the United States shall have the power to prescribe, by general rules, for the district courts of the United States and for the courts of the District of Columbia, the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law.

Burbank, *supra* note 18, at 1097–98 (quoting the Act of June 19, 1934, Pub. L. No. 73-415, 48 Stat. 1064 (codified as amended in 28 U.S.C. §§ 2071–2077)).

47. 28 U.S.C. § 2072(b). The 1934 version read: "Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant." Burbank, *supra* note 18, at 1098 (quoting Act of June 19, 1934).

48. Ely, *supra* note 12, at 724 (citation omitted).

49. *Id.* at 725.

50. *See* Redish & Amuluru, *supra* note 15, at 1311 ("[A] notion [of mutual

dure by definition fail to impact substantive rights, then it is clear the limiting provision is mere redundancy. To say that rules cannot abridge, enlarge, or modify a substantive right is to state nothing more than a negative of the requirement that rulemakers promulgate only those rules that deal with procedure in the federal courts.

When the original Rules Enabling Act was promulgated into law in 1934, many of its supporters believed that procedure and substance were indeed mutually exclusive.[51] Still, there would have been good political reason for them to add the limiting provision, even if it were assumed to be legally redundant. As Professor Burbank illustrated in his extensive historical treatment of the Act, the rhetoric of Senators opposing the Act—for example, Senator Walsh—evidenced their belief that procedure and substance might not be all that exclusive.[52] The redundancy, then, could be seen as an effective way of appeasing the political opposition. By adding the limiting provision, supporters of mutual exclusivity could have been saying something like, "while we believe the limiting provision is unnecessary, we choose to include it in the Act to make it doubly clear that rulemaking under the Enabling Act cannot spill over into the substantive territory."[53] Thus, assuming for purposes of argument the accuracy of the mutual exclusivity analysis, construing the limiting provision in the Enabling Act as redundancy makes good sense in light of what the Act's proponents tried to accomplish.[54]

One might reasonably object that the redundancy reading runs directly counter to the well-known descriptive canon of statutory interpretation that suggests nothing in statutory text is surplusage.[55] But the canon, when critically examined, might

exclusivity is] now universally recognized to be woefully unrealistic.").

51. *See id.* at 1312 (describing the importance of the Act's limiting language to the reformers' acceptance of the judiciary's rulemaking scope).

52. *See* Burbank, *supra* note 18, at 1112 ("[I]t may be that those who disagreed with [Senator Walsh] on the Senate Judiciary Committee in 1926 and 1928 interpreted [his complaints] to include the objection that the bill authorized rulemaking in discrete areas properly governed by state law.").

53. *See* Redish & Amuluru, *supra* note 15, at 1312 ("[T]he [limiting] language of the Rules Enabling Act codified the reformers' belief that as long as the judiciary limited its scope to 'procedural' matters and not 'substantive' ones, it would not encroach on legislative functions."); *id.* at 1324.

54. See *infra* note 59 for an analogy to the Tenth Amendment of the U.S. Constitution, which could be construed as nothing more than a rhetorical exclamation mark.

55. *See, e.g.*, Karl N. Llewellyn, *Remarks on the Theory of Appellate Deci-*

lose its bite for several reasons. First, descriptive canons draw their strength from the assumption that they accurately generalize how legislators communicate through text.[56] When that assumption breaks down, so too does the canon's claim to validity. In particular, the canon presuming the absence of surplusage has long been criticized for assuming something quite unrealistic about Congress—namely, that legislators are aware of how the various parts of the statute intertwine.[57] One can reasonably ignore the surplusage canon on this ground alone,[58] but ignoring the canon becomes even easier in light of the fact that the redundant provision in the Rules Enabling Act actually served an important strategic purpose in helping to placate those opposed to the Act.[59]

sion and the Rules or Canons About How Statutes Are to Be Construed, 3 VAND. L. REV. 395, 404 (1950) ("Every word and clause must be given effect." (citing HENRY CAMPBELL BLACK, HANDBOOK ON THE CONSTRUCTION AND INTERPRETATION OF THE LAWS § 60 (2d ed. 1911) and JOHN LEWIS, J. G. SUTHERLAND'S STATUTES AND STATUTORY CONSTRUCTION § 380 (2d ed. 1904)); *see also* Ely, *supra* note 12, at 719 (arguing that under the redundancy construction, "[one] would never know" that the Act contained two separate limitations).

56. *See* Stephen F. Ross, *Where Have You Gone, Karl Llewellyn? Should Congress Turn Its Lonely Eyes to You?*, 45 VAND. L. REV. 561, 572 (1992) ("By and large, descriptive canons are somewhat accurate generalizations of the way legislators communicate through statutory text.").

57. *See* Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 812–13 (1983).

58. There are two additional reasons for ignoring the surplusage canon in a particular case. First, the drafter might want to restate an earlier provision using the language that, to the drafter, appears clearer. *See* Ross, *supra* note 56, at 572 n.60. Second, a legislator might insist on a superfluous phrase simply because the phrase is her own and she would like to claim credit for drafting it. *See id.*

59. Regarding the usefulness of redundancy as an exclamation point, it is helpful to compare statutory exclamation marks to those in the Constitution. The Tenth Amendment, one could argue, was added to serve one discrete role—that of appeasing those who opposed the passage of the Bill of Rights on the grounds that the Bill would signal expansive federal government powers in areas not protected by the enumerated rights. The proponents of the Bill of Rights said, and we paraphrase, "we know it's redundant, but we'll put our quills where our mouths are and add an exclamation point to appease the opposition." *See, e.g.*, United States v. Darby, 312 U.S. 100, 124 (1941) ("The amendment states but a truism[,] . . . . its purpose [being] to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers."); United States v. Sprague, 282 U.S. 716, 733–34 (1931) ("The Tenth Amendment was intended to confirm the understanding of the people at the time the Constitution was adopted, that powers not granted to the United States were reserved to the states or to the people. It added nothing to the instrument as originally ratified . . . ."). In statutes as in constitutions, then, redundancy can

The other two conceivable constructions of the Enabling Act begin with the understanding that regulating procedure and impacting substance are in no sense mutually exclusive. Rejection of mutual exclusivity better comports with modern understanding of the procedural-substantive intersection.[60] Many of the current rules—for example, Rules 8(a) (notice pleadings),[61] 11 (sanctions),[62] 13(a) (compulsory counterclaims),[63] 23 (class actions),[64] 26–37 (discovery),[65] and 56 (summary judgment)[66]—readily illustrate the significant impact of provisions regulating procedure on litigants' substantive rights.[67] Unless one were to focus solely on the captioning requirement of Rule 10,[68] or comparable housekeeping provisions, one is likely to see procedure having an inevitable spillover impact on substance.[69]

Rejection of the assumption of mutual exclusivity leads one to focus on the two remaining interpretations of the procedural-substantive tension in the Act. If the limiting provision does something more than redundantly restate the requirement that the rules deal with procedure, then the substantive rights clause must somehow restrict the bundle of powers that the enabling provision grants to the rulemakers. But recognition of this fact fails, in and of itself, to specify the magnitude of the carved out portion.

On one reading, a rule that in *any way* abridges, enlarges, or modifies substantive rights is prohibited by the limiting provision. So construed, the Act implicitly acknowledges that rules of procedure may have substantive impact, and includes the substantive right qualifier as a means of confining legitimately authorized procedural rules to only those having absolutely no discernable substantive impact. Under this construction, for example, Rule 37(d) would necessarily be deemed invalid be-

serve a useful rhetorical purpose.

60. Redish & Amuluru, *supra* note 15, at 1314.

61. FED. R. CIV. P. 8(a).

62. FED. R. CIV. P. 11.

63. FED. R. CIV. P. 13(a).

64. FED. R. CIV. P. 23.

65. FED. R. CIV. P. 26–37.

66. FED. R. CIV. P. 56.

67. Redish & Amuluru, *supra* note 15, at 1324–25 & nn.99–103.

68. FED. R. CIV. P. 10(a) ("Every pleading must have a caption with the court's name, a title, a file number, and a Rule 7(a) designation.").

69. *See supra* notes 48–49.

cause it authorizes dismissal of the complaint if the plaintiff has ignored a discovery request.[70]

The other conceivable construction of the Act similarly treats the limiting provision as a restriction on the enabling provision. But this reading allows the rules to affect substantive rights when the effect is incidental to an overriding procedural purpose. The word "incidental," in this context, means that the rule's primary purpose is to achieve a valid procedural goal and not to affect litigants' substantive rights.[71] The rule's effect on substantive rights is thus only of unintended or nonessential importance. If we again take Rule 37(d) as an example, it is easy to see what is meant by incidental effects. When the rule allows courts to dismiss a complaint as a sanction for a litigant's disregard of a discovery request, assumedly the primary goal is to police discovery abuses that threaten to undermine the truth-finding mission of the judicial process. Logically, then, it follows that the primary objective of the rule is to allow both parties to discover whatever facts are necessary to prosecute or defend a particular lawsuit. To be sure, on occasion such requests might appropriately be deemed abusive or oppressive. But in such an event, the rulemakers must have believed, the efficiency and integrity of the litigation system is fostered by requiring the party from whom discovery is sought to affirmatively respond to the request by pointing out its illegality or inappropriateness. To assure that the litigants comply with the terms of this arrangement, the rulemakers chose to vest broad sanctioning powers in the district court. The rule, then, functions very much like a substantive club that judges can wave above litigants' heads to encourage an orderly discovery process. Acceptance of a separation reading of the limiting provision that nonetheless permits the rules to impact substantive rights when the effect is only incidental to a broader procedural purpose would necessarily validate rules such as Rule 37(d).

Both separation readings—the strict (absolutely no effect on substantive rights permitted) and relaxed (permitting incidental substantive impact) versions—are textually plausible. Recall the language of the limiting provision: "Such rules shall not abridge, enlarge or modify any substantive right."[72] The

70. FED. R. CIV. P. 37(d).

71. We further discuss the meaning of the word "incidental" in Part III.A. *See infra* notes 318–26 and accompanying text.

72. 28 U.S.C. § 2072(b) (2000).

strict reading flows from implicitly adding the following language at the end of the limiting provision: "even if the effect on a substantive right is secondary to the achievement of a procedural purpose." The relaxed reading flows from the following addition to the limiting language of the Act: "but not if the effect on a substantive right is secondary to the achievement of a procedural purpose." The additions—"even if" and "but not if"—are polar opposites, but each, albeit in a different way, refines and clarifies the limiting provision. It follows that the limiting provision is, purely as a textual matter, ambiguous on the question of the rules' permissible intersection with substantive rights.

Each reading—mutual exclusivity/redundancy, strict separation, and relaxed separation—has at some point appeared in the Court's decisions interpreting the procedural-substantive tension in the Enabling Act (though the strict separation reading came only in the form of dictum).[73] Respected scholars such as Ely and Burbank have embraced the strict separation reading, albeit on the basis of very different rationales.[74] But why does all of this matter?

Making a choice among the three conceivable means of interpreting the procedural-substantive tension is important because the choices provide rulemakers with three different answers as to the parameters of the kinds of rules they can promulgate. As discussed, Rule 37(d) provides a perfect example of the practical difference between the strict and relaxed separation readings. One reading invalidates Rule 37(d); the other does not. And the third reading—redundancy—defines the rulemakers' boundaries in yet another way, by authorizing

73. The Court appeared to accept the redundancy reading in *Sibbach*. *See* Redish & Amuluru, *supra* note 15, at 1324 & n.98 (arguing that the mutual exclusivity of substance and procedure "also appears to have been the early Supreme Court's view" (citing Sibbach v. Wilson & Co., 312 U.S. 1, 9–10 (1941))). In *Burlington Northern Railroad Co. v. Woods*, the Court embraced the relaxed separation reading. *See* 480 U.S. 1, 5 (1987) (interpreting the Act to permit effects on substantive rights that are merely incidental to a broader procedural purpose). Since *Burlington Northern*, the Court has not decided a case challenging the validity of a Rule under the Enabling Act. But in a case decided in 2001, the Court indicated in dictum that it might prefer the strict separation reading. *See* Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 504 (2001) (suggesting that interpreting Rule 41(b) to interfere with the California statute of limitations "would seem to violate" the limiting provision of the Enabling Act). For more discussion of these cases, see *infra* Part II.B.

74. For more on these scholars' theories of interpreting the Enabling Act, see *infra* Part II.B.3–4.

more rules as long as they touch in some way on procedural matters.

Thus, which interpretation of the Enabling Act's procedural-substantive tension rulemakers or interpreting courts select might very well dictate what types of rules they are authorized to promulgate. Indeed, the choice goes to the heart of rulemaking. It is only appropriate, then, to attempt to resolve which interpretation should govern.

B. AVAILABLE THEORIES OF STATUTORY INTERPRETATION

If the text of the Enabling Act plausibly supports three interpretations of rulemaking authority that differ so dramatically in scope, how should an interpreting judge decide on the correct approach? Since the statute's enactment, the Court at various points has tried each of the conceivable interpretations, but there is no definitive guidance at present.[75] No court or scholar has considered the tension in light of available theories of statutory interpretation. The remainder of this Part explains in detail three methods of statutory interpretation: four-corners, intentionalism, and contextualism.[76]

1. Four-Corners: A Literalist Construction of Text

One possible approach to statutory interpretation is the four-corners construction. The term "four-corners" refers to a

75. The Court's most recent authoritative statement is in *Burlington Northern*, 480 U.S. at 1, but the dictum in *Semtek*, which seemingly contradicts the *Burlington Northern* analysis, did not produce a single concurrence or dissent. *Semtek*, 531 U.S. at 503.

76. We do not address in this Article the interpretation of the Rules Enabling Act that would flow from use of the so-called dynamic interpretation theory advanced by Professor Eskridge. *See generally* WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION (1994). "[T]he judiciary, from the dynamist perspective, acts as an adjunct in the legislative process or, more precisely, a super legislature." Martin H. Redish & Theodore T. Chung, *Democratic Theory and the Legislative Process: Mourning the Death of Originalism in Statutory Interpretation*, 68 TUL. L. REV. 803, 807 (1994). Proponents of dynamic interpretation have not yet persuaded us that the federal judiciary may question the wisdom of Congress in enacting statutes, which is what dynamic interpretation authorizes federal judges to do. *See generally id.* at 831–58 (describing and criticizing dynamic statutory interpretation). Moreover, the approach is not readily embraced and acknowledged in the judiciary, even though some claim that it accurately describes what courts do when faced with statutory indeterminacies. *See* Amanda Frost, *Certifying Questions to Congress*, 101 NW. U. L. REV. 1, 11 (2007) ("Although few jurists would claim to practice dynamic statutory interpretation, some scholars claim it is a descriptively accurate account of how judges deal with indeterminate statutes.").

theory, used in the early twentieth century, to suggest that statutory text must be interpreted without reference to anything outside the page on which it is written.[77] Under this theory, an interpreting judge does not look to purpose, context, or whatever else might help clarify an ambiguous statute. The judge essentially assumes that every interpretation can be conducted within the four corners of a statute—effectively in a legal, social, and political vacuum.

The Supreme Court's decision in *Smith v. United States*[78] illustrates the four-corners approach. The defendant sought to purchase cocaine, using a gun as payment.[79] The jury convicted the defendant on drug-related charges and enhanced the sentence because the defendant had used a gun.[80] The statute providing for the enhancement required that "during and in relation to any . . . drug trafficking crime," the defendant "use[] . . . a firearm."[81] The defendant asked the Court to overturn the enhancement because the term "use" connoted using a gun as a weapon. The Court, in a 6-3 opinion, disagreed and read "use" to encompass the use of a gun as payment for cocaine.

Justice Scalia dissented. He explained, "When someone asks, 'Do you use a cane?,' he is not inquiring whether you have your grandfather's silver-handled walking stick on display in the hall; he wants to know whether you *walk* with a cane."[82] A

77. *See* John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 108–09 (2001). This approach is sometimes labeled "strict construction," "plain meaning," or "literalism." *See, e.g.*, ANTONIN SCALIA, A MATTER OF INTERPRETATION 23 (1997) ("Textualism should not be confused with so-called strict constructionism, a degraded form of textualism that brings the whole philosophy into disrepute."); Manning, *supra*, at 108–09 ("Modern textualists, however, are not literalists. In contrast to their early-twentieth-century predecessors in the 'plain meaning' school, they do not claim that interpretation can occur 'within the four corners' of a statute, or that 'the duty of interpretation does not arise' when a text is 'plain.' Rather, modern textualists acknowledge that language has meaning only in context. . . . [T]hey believe that statutory language, like all language, conveys meaning only because a linguistic community attaches common understanding to words and phrases, and relies on shared conventions for deciphering those words and phrases in particular contexts."). We use the term "four-corners" because it is most descriptive of what actually happens when a judge from this school of statutory interpretation construes text.

78. 508 U.S. 223 (1993). Both Justice Scalia and Professor Manning use this illustration. *See* SCALIA, *supra* note 77, at 23–24; Manning, *supra* note 77, at 110.

79. *See Smith*, 508 U.S at 225.

80. *See id.* at 226–27.

81. *See id.* at 227 (quoting 18 U.S.C. § 924(c)(1) (1990)).

82. *See id.* at 242 (Scalia, J., dissenting).

literalist four-corners interpreter, however, would construe the words "use a cane" as extending to canes hanging on a wall as decoration, for the simple reason that, at least in some sense, displaying a cane is "using" it. Similarly, a literalist interpreter[83] would read the words, "use a firearm" to include the use of a gun as payment. A judge not wedded to a literal construction of text, on the other hand, might inquire into the context and determine that a cane inquiry refers to walking with a cane, and a gun inquiry to using a gun as a weapon. But a literalist judge does nothing of the sort.

Another example along the same lines comes from Blackstone.[84] He pointed to a Bolognese statute that provided, "whoever drew blood in the streets should be punished with the utmost severity."[85] The obvious purpose of the statute is to control against street violence. A good Samaritan, who happens to be a surgeon, sees a person in pain, realizes that an immediate surgery is required to save the person's life, and operates right there on the street. In the course of the surgery, the good Samaritan literally *draws blood*. He is charged under the statute.

A literalist interpreter likely would say that the statute applies to the good Samaritan. He did, after all, *draw blood* in the streets. A judge willing to look beyond the narrow four corners, on the other hand, may recognize that the statute is ambiguous as to whether it covers good Samaritans as well as violent criminals. The next step for such a judge might be to consider the statute in light of its commonsense purpose. And since the purpose is to punish street violence—not to prevent people from helping those in need—our good Samaritan escapes punishment. Again, though, a four-corners judge sees words on a piece of paper and nothing else.

As both the *Smith* decision and Blackstone's example illustrate, the four-corners interpretive approach forces judges to

83. Justice Scalia acknowledged that he could not know whether his colleagues in *Smith* had ruled the way they had because they were relying on four-corners interpretation or for some other reason. *See* SCALIA, *supra* note 77, at 24. The purpose of using the example, though, is merely to illustrate how the approach would function.

84. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *59–60 (commenting on the "fairest and most rational method to interpret the will of the legislator").

85. *Id.* ("[W]here words bear either none, or a very absurd signification, if literally understood, we must a little deviate from the received sense of them . . . . [T]he Bolognian law . . . was held after long debate not to extend to the surgeon who opened the vein of a person that fell down in the street with a fit").

operate as if statutory text exists in a vacuum. Thus, "using a gun" takes on all meanings of the word "use," including using a gun as payment for something else. And a good Samaritan is guilty of "drawing blood" in the course of operating on a person in need. That these results might defy common sense, or at the very least appear inconsistent with relatively clear statutory purpose, is of no concern to a four-corners interpreter.

2. Intentionalism and Legislative History

In contrast to judges who employ the four-corners interpretation, intentionalists seek to construe statutes in a manner designed to advance the actual intent of the enacting legislative body, at least as the interpreter perceives that intent.[86] They may attempt to achieve this goal in one of two ways: archeological and hypothetical.[87] The archeological inquiry asks whether the enacting legislature has provided a signal as to how the disputed statutory issue is to be resolved. Even if the statutory text is unambiguously clear, the intentionalist would still look to legislative history, since text is merely one indication of legislative intent; it is by no means the only indication.[88]

86. William N. Eskridge, Jr. & Phillip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 325 (1990) (describing the judiciary as the "legislature's faithful servant" in "discovering and applying the legislature's original intent").

87. *See* Frost, *supra* note 76, at 11–13 (briefly describing the intentionalist approach); Redish & Chung, *supra* note 76, at 813–14 & n.33 (noting that the use of the term "archeological" is merely descriptive, rather than pejorative); *infra* Part I.B.3.

88. *See* Redish & Chung, *supra* note 76, at 813 ("[T]he statute's text would be one logical source of . . . a[n] [intentionalist] determination, but it is by no means necessarily dispositive."). This indiscriminate resort to legislative history is the reason why Justices who do not belong to this interpretive school frequently write separately to indicate their displeasure with peeking outside the text when it is unambiguous. *See, e.g.*, LaRue v. DeWolff, Boberg & Assocs., Inc., 128 S. Ct. 1020, 1028 (2008) (Thomas, J., concurring in judgment) (refusing to make his construction of an unambiguous statute "contingent on [modern] trends . . . []or . . . on the ostensible 'concerns' of [its] drafters"); Rowe v. N.H. Motor Transp. Ass'n, 128 S. Ct. 989, 999 (2008) (Scalia, J., concurring in part) (joining the majority's reasoning except for parts "that rely on the reports of committees of one House of Congress to show the intent of that full House and of the other—with regard to propositions that are apparent from the text of the law, unnecessary to the disposition of the case, or both"); Zedner v. United States, 547 U.S. 489, 510–11 (2006) (Scalia, J., concurring in part and in the judgment) (declining to join the majority's use of legislative history to confirm the meaning of an unambiguous statute because "if legislative history is relevant when it confirms the plain meaning of the statutory text, it should also be relevant when it contradicts the plain meaning, thus rendering what is plain ambiguous").

Suppose, for example, that a local ordinance forbids dogs in city parks. What if someone wants to bring a cat for a walk in a park? Does the statute apply, thereby excluding cats from parks? Assume that the cat-walker is fined for bringing the cat into a city park and wants to contest the fine. What result? In this situation, the job of a literalist (or even a less narrowly focused textualist) is relatively easy: the text of the statute mentions dogs, not cats. Case closed. *Expressio unius est exclusio alterius*: the mention of only one necessarily excludes others not mentioned.[89] But an intentionalist might very well argue that the text is unclear. The statute, in other words, does not specify what to do with respect to cats. Moreover, under an intentionalist interpretive model the judge would be obliged to consider the ordinance's legislative history even if she determines that the text is clear, for again, text is only one indication of legislative intent. An archeological intentionalist judge would attempt to determine if the legislative history provides some clue. Suppose several city aldermen have said the following in the course of enacting the ordinance: "The ordinance specifies that dogs are excluded from city parks, but this prohibition surely would apply to cats if someone were to bring a cat into a park." Such a statement might be enough for an archeological intentionalist to resolve the interpretive question against the hapless cat-walker.

Sometimes, however, no clues are to be found in either the statute's text or legislative history. In such cases, an intentionalist judge moves into the hypothetical interpretive mode, aptly labeled "imaginative reconstruction" by Judge Posner.[90] The judge, in the imaginative reconstruction mode, "should try to think his way as best he can into the minds of the enacting legislators and imagine how they would have wanted the statute applied to the case at bar."[91] In other words, while the judge is no longer using the enacting legislators' clues—by the very premise, there are none—she is still trying to ascertain how that particular legislature would have answered the disputed statutory provision had the legislature thought about it.

89. *See* SCALIA, *supra* note 77, at 25.

90. Posner, *supra* note 57, at 817. We should note, however, that this mode is not exclusive to intentionalists who have come up empty in terms of the statute's text or legislative history. Any intentionalist may well choose to begin (and perhaps end) the interpretive inquiry in the hypothetical mode.

91. *Id.*

In the hypothetical example of the dog-prohibiting ordinance, an intentionalist judge would turn to imaginative reconstruction in the absence of any legislative history helpful to the cat-walking issue. The judge might, for example, determine that the enacting legislature omitted cats simply because cat-walking is a relatively new practice. If the enacting legislators were actually familiar with the increasing instance of people walking their cats, they would have prohibited cats as well as dogs. The judge might therefore determine that the enacting legislature did not want any domestic animals in city parks, and enforce the ordinance accordingly.

It is necessary at this point to raise three serious objections to the actual intent theory of statutory interpretation. More precisely, the objections go to one particular element of intentionalism—the use of legislative history to derive clues and answers to specific questions facing an interpreting judge. Several well-known problems undermine the use of legislative history as a source for determining the so-called actual intent of the enacting legislature. But even though the objections are well known, the discussion would be incomplete without exploring them.

First, it is only statutory text that has satisfied the two constitutional requirements for enacting a federal statute—bicameralism and presentment.[92] Neither committee reports nor any other legislative history has done so. In *Immigration and Naturalization Service v. Chadha*, the Court could not have been more clear in demanding strict adherence to the dictates of formalism embedded in the bicameralism and presentment requirements: the two constitutional requirements, the Court said, "prescribe and define the respective functions of the Congress and of the Executive in the legislative process."[93] Thus, strict reliance on legislative history, at least at the expense of unambiguously contrary text, would be unconstitutional.

Second, even where statutory text is deemed ambiguous, legislative history provides at best only a limited source of legislative intent. It is notoriously imprecise and on occasion even contradictory, enabling opposing litigants each to find statements helpful to their arguments. It is important to recall

92. U.S. CONST. art. I, § 7 ("Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States.").

93. 462 U.S. 919, 945 (1983).

Judge Harold Leventhal's admonition that "the use of legislative history [is] the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one's friends."[94]

The inherent malleability and unpredictability of legislative history in answering very specific questions facing an interpreting judge gives rise to two corollary problems. First, it is statutory text, rather than legislative history, that provides the guide for private behavior. Legislative history is the domain of lawyers and judges, not private citizens. Second, that legislative history is so malleable is most likely a result of insufficient attention paid to how it is formed in the first place. As Justice Scalia famously quipped, "we are a Government of laws, not of committee reports."[95] But if a legislative committee—certainly not the whole or even a majority of Congress—can insert into a committee report preferences not expressed in statutory text, then the result is precisely a government of committee reports.[96] We have no reasonable basis for extrapolating a majority view from committee reports. Without such an extrapolation, to assign to legislative history dispositive effect is to turn over our representative government to "virtually unaccountable staff."[97]

Finally, a unique problem arises when an interpreter mines legislative history for answers to very specific questions, where statutory text itself is so sparse as to suggest either a congressional choice not to puzzle through the specifics of application or complete unawareness of the problem in the first place. Justice Scalia rejected any interpretive approach that invites judges to comb through legislative history for answers to specific questions: "For a virtual certainty, the majority [of the enacting Congress] was blissfully unaware of the *existence* of the [specific] issue, much less had any preference as to how it should be resolved."[98]

94. Conroy v. Aniskoff, 507 U.S. 511, 519 (1993) (Scalia, J., concurring) (recalling Judge Leventhal's observation).

95. Wis. Pub. Intervenor v. Mortier, 501 U.S. 597, 621 (1991) (Scalia, J., concurring in the judgment).

96. *See, e.g.*, Richard J. Lazarus, *Congressional Descent: The Demise of Deliberative Democracy in Environmental Law*, 94 GEO. L.J. 619, 650 (2006) (noting a troubling phenomenon of committee reports adding language to a statute).

97. Redish & Chung, *supra* note 76, at 823.

98. SCALIA, *supra* note 77, at 32.

Perhaps more important than all of the problems of practicality to which resort to legislative history gives rise is the simple formalist point that it was the text, not some external intent, enacted into law. Slavish reliance on some (often fruitless) search for legislative intent, then, improperly vaults the equivalent of external codicils to a level of interpretive preeminence.

3. Contextualism: Introducing a Purposive Element

Similar to intentionalism, a contextualist approach to statutory interpretation permits—indeed commands—interpreting judges to look beyond the four corners of the statute in an effort to construe *ambiguous* statutory text. But the approach markedly differs from intentionalism in the way that it restricts judges in making these determinations.

Before introducing the specifics of contextualism, it is necessary to explain our terminology. In shaping and explaining this mode of interpretation, we draw heavily upon the scholarship of Justice Scalia and Professor Manning. But both of them refer to "textualism," not "contextualism." Our label, however, has the additional benefit of clearly signaling the acceptance of the text's surrounding environment—its context.[99]

In a well-known essay, Justice Scalia noted the sad state of statutory interpretation in the United States and sought to improve it.[100] He captured the problem in the following quote from the famed Hart and Sacks materials on the legal process:

> Do not expect anybody's theory of statutory interpretation, whether it is your own or somebody else's, to be an accurate statement of what courts actually do with statutes. The hard truth of the matter is that American courts have no intelligible, generally accepted, and consistently applied theory of statutory interpretation.[101]

99. The other problem with the term "textualism" is the confusion brought about by those who refer to this method as "new textualism." Coined by Professor William N. Eskridge, Jr., in *The New Textualism*, 37 UCLA L. REV. 621 (1990), the term "new textualism," is unfortunate precisely because it gives rise to the false impression that there is something new about the mechanics of Justice Scalia's approach. As Eskridge himself acknowledges, however, "Justice Scalia's methodology is a return to the nineteenth century treatise approach to statutory interpretation." *Id.* at 623 n.11. The reason Eskridge used the adjective "new" is the approach's "intellectual inspiration: public choice theory, strict separation of powers, and ideological conservatism." *Id.* Without commenting on Professor Eskridge's perceived inspiration for Scalia's textualism, we can readily conclude that the approach is not new in the sense that it is interpreting statutes as has never before been done in the United States.

100. *See* SCALIA, *supra* note 77.

101. HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS 1169

Not satisfied with the existing state of affairs, Scalia set out to make a case for what we call a contextualist theory of statutory interpretation.

Simply put, contextualism accomplishes two things: it directs an interpreter to (1) read the words in a statute and (2) only when the text is vague or open-ended—that is, subject to more than one textually plausible construction—to interpret the words "in light of [the statute's] background purpose."[102] A contextualist acknowledges congressional latitude in specifying who will flesh out a particular statute: the courts or Congress.[103] When a congressional majority seeks to advance "precise legislative policies, it can enact detailed and specific statutes, increasing its ability to control discretion in the application of its commands, but risking greater over- and underinclusiveness. When flexibility is more crucial than precision, however, Congress is free to legislate in more open-ended terms."[104]

To interpret an ambiguous statute, a contextualist judge then will seek to decipher a purpose that can illuminate how a reasonable reader familiar with what the statute was meant to accomplish would have understood the ambiguity.[105] This aspect of the contextualist analysis is, admittedly, considerably less precise than the first. In the first step, the task is rather straightforward: determine what, if anything, the text of a statute tells us about a particular issue before the court. But when contextualist judges have determined that the text supplies no unambiguous answer, what are they to do next?

(William N. Eskridge, Jr. & Philip P. Frickey eds., 1994), *quoted in* SCALIA, *supra* note 77, at 14.

102. Manning, *supra* note 77, at 107–08.

103. *See id.*

104. *Id.*

105. *See* Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347, 358–60 & nn.32–38 (2005) (citing opinions of Justice Scalia and Judge Easterbrook employing legislative history to determine the objective semantic context of an ambiguous statute); *see also* Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 63 (1988) ("To use an algebraic metaphor, law is like a vector. It has length as well as direction. We must find both, or we know nothing of value. To find length we must take account of objectives, of means chosen, and of stopping places identified. All are important."); John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 75–76 (2006) ("[W]hen modern textualists find a statutory text to be ambiguous, they believe that statutory purpose . . . is itself a relevant ingredient of statutory context.").

It may be helpful first to explain what the purposive part of contextualism is *not*. The purposive element of contextualism is not to be confused with an interpretive theory known as purposivism and associated with Professors Hart and Sacks, although contextualism does share with that form of purposivism a number of assumptions about lawmaking in Congress.

The Hart and Sacks version of purposivism instructs an interpreting judge to construe the statute in question on the basis of the statute's purpose gleaned from statutory text and legislative history, as well as from "the entire legal landscape."[106] The theory is based on two fairly sensible assumptions about the legislative process. The first assumption posits a legislature "made up of reasonable persons pursuing reasonable purposes reasonably."[107] Second, "[e]very statute must be conclusively presumed to be a purposive act."[108] The two assumptions, taken together, proceed on the view that lawmakers enact laws not as a meaningless exercise but as a conscious effort to reach some objective. Contextualism shares these two very reasonable assumptions with the Hart and Sacks version of purposivism.[109]

Despite these shared assumptions, however, the two approaches do not fold into one. The central difference between contextualism and the Hart and Sacks version of purposivism is the relative importance of statutory text. Contextualism leaves no interpretive room for a judge to deviate from clear, unambiguous text.[110] A Hart and Sacks purposivist, on the other hand, is willing "to ignore what might appear to be clear statutory text . . . in favor of an interpretation that support[s] a particular reading . . . of that statute's purpose."[111]

We now turn to the methodological question: what steps should a contextualist judge take to determine background purposes of the disputed statute? The purposive component of

106. Redish & Chung, *supra* note 76, at 816 (describing the Hart and Sacks theory of statutory interpretation).

107. HART & SACKS, *supra* note 101, at 1378.

108. *Id.* at 1124.

109. *See* Redish & Chung, *supra* note 76, at 819 ("The idea that a legislative body aimlessly chooses words for a statute by a mental process equivalent to randomly selecting words from a hat is simply preposterous.").

110. *See id.*

111. *Id.* at 816 (explaining the Hart and Sacks approach). The best known statement to this effect comes from *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459 (1892), where the Court said: "a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers." Justice Scalia uses the case as a poster child of what judges should not do. *See* SCALIA, *supra* note 77, at 18–23.

contextualism, while forbidding judges to displace clear statutory text, instructs them to determine the disputed statute's purpose by considering text and legislative history as well as by engaging in "a more expansive, holistic analysis that . . . allow[s] a judge to consider the societal context surrounding the statute at the time of its enactment."[112] As a result, a contextualist judge, having determined that statutory text is ambiguous, engages in a similar search for statutory purpose that a Hart and Sacks purposivist undertakes.

The contextualist search calls for use of a process akin to Posner's imaginative reconstruction to help a judge glean purposes from all of the contextual evidence that she has amassed. There is no mathematical precision in this step. It is not as if the judge can say empirically, by way of statistical inferences, that a statute's purpose is ninety-five percent likely to be *X*. What this step requires "is more an inference drawn from an evaluation of the available evidence."[113] Recall the manner in which a Posnerian imaginative-reconstruction judge would determine whether the ordinance prohibiting dogs in city parks applied to cats.[114] Unlike a judge who looks to legislative history to derive actual answers—for example, the statement in legislative history that the ordinance is expected to apply to cats—a judge applying imaginative reconstruction has to attempt to determine how the enacting legislators would have answered the question without the benefit of having their actual answer at hand. The difference between the purposive element of contextualism and Posner's imaginative reconstruction is that a contextualist does not much care how the actual enacting legislators would have resolved the interpretive question. Rather, the only relevant inquiry for a contextualist is how a reasonable observer who is familiar with the socio-political or economic problem that the statute was designed to deal with or respond to would understand how the disputed statutory provision would apply to the specific factual situation before the court. A contextualist does care about the wishes of the actual enacting legislature, but only to the extent the legislature has memorialized these wishes in unambiguous statutory text.

At times a contextualist judge will need nothing but her own common sense to ascertain the purpose of a particular sta-

112. Redish & Chung, *supra* note 76, at 866.

113. *Id.*

114. *See supra* text accompanying notes 90–91.

tute. In Blackstone's good Samaritan example,[115] for instance, the judge can determine as a matter of common sense that the statute punishing harshly those who "draw blood in the streets" does not apply to a good Samaritan who draws blood only because he has to perform a quick surgery on a person in need, even absent concrete evidence as to legislative intent. In other cases, something more than a resort to common sense may be required. But even then, a judge should not abandon this valuable tool; it may help both in sorting through all the contextual evidence and in determining the governing purposes.

We previously noted that the purposive component potentially involves, among other things, consideration of legislative history. The use of legislative history in contextualism, however, is drastically different from its central use in intentionalism. In a contextualist framework, the purpose could conceivably be gleaned from an examination of legislative history,[116] but if so it is only as a way of helping to understand the surrounding context of a particular statute. A contextualist judge does *not* read legislative history to determine the actual subjective intent of the enacting Congress.[117] This distinction separates intentionalists who rely on legislative history from contextualists who also resort to the same inquiry. For contextualists, the concept of divining the actual intent of a legislature, when the legislature has not sought to express its intent in statutory text, is anathema in part because judges are not equipped to do the divining.[118] Contextualism also seeks to discontinue the disturbing trend, which gained momentum in the late 1920s and 1930s, towards the use of legislative history as the primary interpretive inquiry, displacing the focus on statutory text.[119]

115. *See supra* text accompanying notes 84–85.

116. *See* Nelson, *supra* note 105, at 358–60 & nn.32–38.

117. *See* SCALIA, *supra* note 77, at 31 ("I object to the use of legislative history on principle, since I reject the intent of the legislature as a proper criterion of the law.").

118. *See* United States v. Pub. Utils. Comm'n of Cal., 345 U.S. 295, 319 (1953) (Jackson, J., concurring) ("I should concur in this result more readily if the Court could reach it by analysis of the statute instead of by psychoanalysis of Congress. When we decide from legislative history, including statements of witnesses at hearings, what Congress probably had in mind, we must put ourselves in the place of a majority of Congressmen and act according to the impression we think this history should have made on them. Never having been a Congressman, I am handicapped in that weird endeavor. That process seems to me not interpretation of a statute but creation of a statute."), *quoted in* SCALIA, *supra* note 77, at 30–31.

119. *See* SCALIA, *supra* note 77, at 30 ("The movement [in favor of using legislative history] gained momentum in the late 1920s and 1930s . . . .").

In other words, they do not wish to see the following in briefs filed in their courts: "Unfortunately, the legislative debates are not helpful. Thus, we turn to the other guidepost in this difficult area, statutory language."[120] And most importantly, contextualism posits that legislative history should not serve as an end in itself.

4. Key Differences Between the Theories: The Forest-Trees Problem

Faced even with an ambiguous statute, the four-corners interpreter plows ahead by interpreting the statute to advance *a* (but not necessarily *the*) plausible reading. An intentionalist judge, on the other hand, looks to legislative history to see if the legislature that promulgated the statute provided the answer to the interpretive question facing the judge. Neither approach carefully considers the basic reasons for promulgating the statute in the first place.

What unites the four-corners interpreters with intentionalists—and separates both from contextualists—can best be described by the forest-trees metaphor. The forest in this metaphor is whatever effect a particular statute is calculated to have on the existing legal and social environment—how it is supposed to alter the existing legal topography. The trees, then, are all the evidence that make up the process of statutory interpretation—text, legislative history, and whatever else a judge might consider. Notice what happens when a statute is ambiguous regarding a specific issue facing the interpreter[121]: four-corners and intentionalist judges both look to the trees rather than to the forest for answers. A four-corners interpreter, undaunted by textual ambiguities, selects a textually plausible reading and ends the inquiry. An intentionalist, on the other hand, looks to a different kind of tree. Instead of relying on text, she looks to legislative history and, having found an answer there, concludes the interpretive exercise. Neither approach looks to the forest and asks what effect on the existing legal order the statute was calculated to have.

A contextualist judge, however, recognizes that only when statutory text clearly and unambiguously resolves the interpre-

120. Brief for Petitioner at 21, Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701 (1989) (No. 87-2084), *quoted in* SCALIA, *supra* note 77, at 31.

121. In the absence of a textual ambiguity, the approaches might converge, with the possible exception of an intentionalist interpretation that may still look to legislative history. *See* discussion *supra* Parts I.B.1–3.

tive question facing the judge should the judge restrict the analysis to the trees. More precisely, a contextualist judge understands her role to be limited to the reading of statutory text when that text is clear and unambiguous.[122] But when statutory text is ambiguous, contextualism instructs judges to advance an interpretation that would help achieve the background purposes underlying the statute. As we have shown,[123] such an analysis sometimes lacks precision and may require an examination of vast amounts of evidence, as was the case with the Enabling Act. But that is the forest with which a contextualist judge must contend. Everything else is the trees, and a contextualist judge does not get lost in them. A contextualist judge, then, is an island of common sense amidst various interpretive approaches that ask judges to do either too much (determining actual intentions of those enacting a particular statute) or too little (interpreting words in a vacuum).

II. STATUTORY INTERPRETATION AND THE RULES ENABLING ACT

A. DECIPHERING THE PURPOSES OF THE RULES ENABLING ACT

In determining the purposes behind adoption of the Rules Enabling Act, an appropriate place to begin is Professor Burbank's extensive historical analysis of the Act. In Part III of his seminal Rules Enabling Act article—the section he labels "The Antecedent Period of Travail"—he examines in great detail the Act's vast pre-enactment history.[124] He commences his analysis in the nineteenth century with the Process Acts and the Conformity Act of 1872.[125] He points to the then-prevailing displeasure with the lack of uniformity that flowed from those Acts.[126] Under the Conformity Act, for example, federal litigation in different states would proceed according to different procedural rules.[127] Burbank then explains how the American Bar Association (ABA) and various other reformers, intrigued by procedural reforms in the State of New York, worked diligently in the

122. *See* discussion *supra* Part I.B.3.
123. *See* discussion *supra* Part I.B.3.
124. Burbank, *supra* note 18, at 1035–98.
125. *Id.* at 1036.
126. *See id.* at 1039–42.
127. *See id.* at 1040–42.

nineteenth and twentieth centuries to enact a uniform bill of procedure in the federal courts.[128]

Burbank discusses the involvement of a large number of people both inside and outside of Congress—the ABA officials and other reformers, United States Supreme Court Justices, prominent academics, and scores of legislators.[129] In the end, it is clear from Burbank's research that the evolution of what was to become the Enabling Act was in large part a result of "[d]evelopments in law and political theory."[130] And that is precisely what Burbank gives us: a detailed account of developments in law and political theory surrounding the passage of the Enabling Act. As illuminating as Burbank's historical exploration is on one level, however, it is important not to ignore the value of pure textual analysis and plain common sense in deciphering broad legislative purpose. Painfully detailed historical analysis, as valuable as it might be in the interpretive process, should not be allowed to overwhelm a commonsense understanding of the point sought to be achieved by the legislation in a sea of historical minutiae.

What, then, are the Enabling Act's predominant purposes that would have been observable by a reasonable bystander familiar with the Enabling Act's social and legal context? Quite clearly, there were two broad purposes motivating the Act. First, as Professor Burbank's extensive historical research revealed quite convincingly, the procedural-substantive tension in the Enabling Act was "intended to allocate power between the Supreme Court as rulemaker and Congress and thus to circumscribe the delegation of legislative power . . . ."[131] Congress was to remain responsible for "fundamental normative choices of social policy."[132] The second overriding goal of the Enabling Act's adoption was to establish a uniform procedural system in the federal courts.[133] The desire for uniform and simple rules, however, was not born in a vacuum. From the beginning of the twentieth century and until the passage of the Enabling Act in 1934,[134] the Act's framers were cognizant of a desire to move

128. *See id.* at 1043–45.

129. *Id.* at 1043–98.

130. *Id.* at 1035.

131. *Id.* at 1025; *see also* Redish & Amuluru, *supra* note 15, at 1332 (explaining that one of the goals was "the desire to preserve legislative authority over issues extending beyond the courthouse walls").

132. Redish & Amuluru, *supra* note 15, at 1306.

133. *E.g.*, *id.* at 1332 (citing Burbank, *supra* note 18, at 1023–24, 1065–68).

134. *See generally* Burbank, *supra* note 18 (laying out, in great detail, the

away from the common law pleading system where "[p]arties often lost their suits on procedural grounds rather than on the merits of their claims."[135] For this reason "[t]he key to the movement was the adoption of simple procedural rules that would enable litigants to reach the merits of their claims with relative ease."[136] The rules would be uniform to ensure that the whole federal court system stood in contrast to then-existing common law pleading structures. Uniformity would require effective rules that litigants would be required to follow. Thus, sometimes rulemakers would have to promulgate rules to provide courts with an enforcement mechanism by which to police litigants' compliance with the system's procedural directives.

Later in this Article, we criticize the interpretive conclusions that Professor Burbank draws from the historical examination of the Act.[137] Nevertheless, Burbank deserves substantial credit for helping uncover the Enabling Act's background purposes.

B. APPLYING STATUTORY INTERPRETATION THEORY TO THE RULES ENABLING ACT DEBATE

1. The Relevance of Statutory Interpretation Theory in Interpreting the Rules Enabling Act

As previously noted, there are three broad approaches to construction of the Rules Enabling Act: (1) the "mutual exclusivity" or "redundancy" construction, associated primarily with the Supreme Court's decision in *Sibbach v. Wilson & Co.*; (2) the "strict separation" construction advocated by Professors Ely and Burbank; and (3) the "incidental-effects" (relaxed separation) standard adopted by the Court in *Burlington Northern* and *Business Guides*. However, as we are about to demonstrate, the strict separation category may be subdivided into two versions, those advocated by Professor Ely (what we label the "true strict separation" approach) and by Professor Burbank (the "predictable-and-identifiable" interpretive model). By applying our underlying contextualist theory of statutory interpretation, we are able to simultaneously establish the superior-

history leading up to the Enabling Act's passage in 1934); Redish & Amuluru, *supra* note 15, at 1308–14 (summarizing the key parts of the Act's history, focusing on the desire to move away from rigid, formalistic common law pleading system).

135. Redish & Amuluru, *supra* note 15, at 1308–09.

136. *Id.* at 1309.

137. *See* discussion *infra* Part II.B.4.b.

ity of the currently employed incidental-effects interpretive model and the significant inadequacies of the alternative models. The advantage of the incidental-effects model is that it does a far better job than the others of recognizing and implementing the purposive DNA of the Rules Enabling Act. It does so because, when properly rationalized, the test represents a contextualist blend of socio-political history and common sense in perceiving and implementing the fundamental legislative purposes inherent in the Act. The alternative models, on the other hand, all suffer from one or more of the serious flaws that plague non-contextualist modes of statutory construction. As a result, they all end up suffering from the forest-trees pathology we described earlier. In short, by ignoring the broad purposive context surrounding the Rules Enabling Act, each approach ends up seriously threatening achievement of the Act's purposes.

2. The Mutual Exclusivity Model

In *Sibbach v. Wilson & Co.* the Court, attempting to adhere to and implement the Act's textual directive, concluded that if a rule satisfied the Act's first requirement that it regulate procedure, it automatically also satisfied the Act's second requirement that it not abridge, enlarge or modify a substantive right.[138] While this construction has been attacked because it renders the second requirement superfluous,[139] it may well be consistent with the understanding of many of those involved in the statute's enactment. The legislative history reveals that many legislators assumed the mutual exclusivity of substance and procedure.[140] If the two categories were, in fact, mutually exclusive, then the very fact that a rule regulated procedure would necessarily mean that it did not affect a substantive right. Understood in this manner, the second sentence constitutes nothing more than a political exclamation point for the first sentence. But the practical absurdity of the assumption of mutual exclusivity, even if not recognized by the members of Congress themselves, surely should have been perceived by the Court in *Sibbach* (as it explicitly was some seventeen years later in *Byrd v. Blue Ridge Electrical*).[141]

138. *See supra* text accompanying note 73.

139. *See* Ely, *supra* note 12, at 719–20; *supra* text accompanying notes 15–16.

140. *See* Redish & Amuluru, *supra* note 15, at 1311.

141. Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525, 536–40 (1958).

At issue in *Sibbach* was the validity of Rules 35 and 37 under the Enabling Act.[142] Rule 35 allowed the court in which the action is pending to order a party "to submit to a physical or mental examination by a physician."[143] Rule 37, in turn, enumerated the various sanctions available for violations of discovery orders.[144] The petitioner claimed these rules were "not within the mandate of Congress to this court."[145] She admitted the rules regulated procedure,[146] but argued they nevertheless abridged her substantive right to be free from compelled physical examinations.[147] According to the petitioner, the rules violated the Enabling Act when, as here, they interfered with "important" or "substantial" rights.[148]

Because the petitioner conceded that the rules in question were procedural, the Court rejected her argument that Rules 35 and 37 violated the Enabling Act. The test, reasoned the Court, "must be whether a rule really regulates procedure[]—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them."[149] Since the petitioner had conceded that the rules under attack in *Sibbach* regulated procedure, the Court reasoned that the rules did not and could not violate the Enabling Act.[150] Moreover, the Court deemed Rules 35 and 37 to be procedural in that they served the clear policy motivating the Act: "that the whole field of

142. *See* Sibbach v. Wilson & Co., 312 U.S. 1, 6 (1941).

143. *Id.* at 8 (quoting Rule 35 as it appeared in 1941). In its current formulation, the rule reads:

> The court where the action is pending may order a party whose mental or physical condition—including blood group—is in controversy to submit to a physical or mental examination by a suitably licensed or certified examiner. The court has the same authority to order a party to produce for examination a person who is in its custody or under its legal control.

FED. R. CIV. P. 35(a).

144. *See Sibbach*, 312 U.S. at 8–9 (quoting the 1941 version of Rule 37(b) ("Failure to Comply With Order")). The current version of Rule 37 is not remarkably different. *See* FED. R. CIV. P. 37(b).

145. *Sibbach*, 312 U.S. at 9.

146. *Id.* at 11.

147. *See* Supplemental Brief of Petitioner at 9, *Sibbach*, 312 U.S. 1 (No. 28).

148. *See Sibbach*, 312 U.S. at 11.

149. *Id.* at 14.

150. *Id.*

court procedure be regulated in the interest of speedy, fair and exact determination of the truth."[151]

Of some significance to the Court was Congress's failure to block the rules in question before they became effective. The Court noted that Rule 35 had been "attacked and defended before the committees of the two Houses."[152] Tellingly, or so the Court thought, "no adverse action was taken by Congress," which "indicate[d], at least, that no transgression of legislative policy was found."[153] In *Sibbach*, we see the first example of the Court's implicit acceptance of the mutual exclusivity approach to Enabling Act interpretation.[154] As Professor Ely astutely observed, "by [the Court's] lights, either a Rule was procedural *or* it affected substantive rights."[155] The Court did acknowledge the presence of the limiting provision in the Enabling Act, but it read that provision merely as a proviso emphasizing the enabling portion of the Act.[156] The Court thus saw matters of substance and procedure as belonging to two mutually exclusive categories.[157]

Justice Frankfurter, in dissent, did not think much of the argument from congressional silence. Paying "due regard to the mechanics of legislation and the practical conditions surrounding the business of Congress," he refused "to draw any inference of tacit approval from non-action by Congress."[158] To do so, he said, would be "to appeal to unreality."[159] Unlike the Court, Justice Frankfurter would have interpreted the Enabling Act to prohibit rules that undermine important rights by, for example, invading privacy.[160] He appeared persuaded by the petitioner's reading of the limiting provision as prohibiting the

151. *Id.*

152. *Id.* at 15.

153. *Id.* at 16.

154. *See* Redish & Amuluru, *supra* note 15, at 1328.

155. Ely, *supra* note 12, at 719.

156. *See Sibbach*, 312 U.S. at 10 (concluding that the Enabling Act "was purposely restricted in its operation to matters of pleading and court practice and procedure" and that the limiting provision "emphasize[s] this restriction").

157. *Id.* at 14.

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

159. *Id.*

160. *See id.* ("So far as national law is concerned, a drastic change in public policy in a matter deeply touching the sensibilities of people or even their prejudices as to privacy, ought not to be inferred from a general authorization to formulate rules for the more uniform and effective dispatch of business on the civil side of the federal courts.").

rules from interfering with important, substantial rights.[161] Frankfurter did not, however, articulate which rights should be deemed important or substantial.

A Court using a broader contextualist analysis of the Enabling Act would have rejected the *Sibbach* test. Once the interpreting Court grasped that members of Congress may well have incorrectly proceeded on the fallacy of mutual exclusivity, the Court's role as implementer would have dictated the need for some form of interpretive recalculation. Apparently Congress proceeded on the incorrect assumption that it could achieve its statutory goals of allowing the Court to regulate procedure, while simultaneously retaining for itself exclusive control over matters of substance, simply by separating the two. A contextualist interpreter, once recognizing the fallacy inherent in the methodology chosen to achieve underlying legislative goals, would seek to construe the text in the manner that most effectively achieves those goals. In combining a broad historical understanding of legislative goals, Posnerian imaginative reconstruction, and a fair amount of common sense,[162] the Court should have asked itself how the competing legislative goals of the production of a uniform system of procedural justice on the one hand, and the preservation of substantive policy making by accountable legislative bodies on the other, could be achieved. A contextualist interpretive model, then, would have sought to implement the fundamental underlying purposes of the Act, rather than the narrow (mis)understandings of the legislators who enacted it. Such an interpretive recalculation, of course, would not have been permitted if the Enabling Act contained no textual ambiguities. Precisely because of the ambiguities, however, a recalculation in light of the objectively understood purposes motivating the Act is quite appropriate.

3. The True Strict Separation Model

In a well-known article, John Hart Ely effectively pointed out the fallacies of the mutual exclusivity approach.[163] In its place, he advocated a construction that meticulously adheres to the letter of the Act. The Enabling Act, he argued, "begins with a checklist approach—anything that relates to process, writs, pleadings, motions, or to practice and procedure generally, is

161. *See id.* at 17–18.
162. *See supra* notes 84–85 and accompanying text.
163. *See* Ely, *supra* note 12, at 724–33.

authorized; anything else is not."[164] The *Sibbach* Court stopped at that point, interpreting the whole "Act as a checklist only."[165] Ely disagreed. He saw in the limiting provision of the Act an independent condition that rulemakers had to satisfy. If a rule is on the checklist, the inquiry is not over, at least not for Ely, because the rule also cannot affect litigants' substantive rights.[166] This second condition is what Ely has termed the "enclave" limitation.[167]

According to Ely, the appropriate test for deciding whether a rule violates the Enabling Act would inquire "whether the state provision [in conflict with the federal rules] embodies a substantive policy or represents only a procedural disagreement with the federal rulemakers respecting the fairest and most efficient way of conducting litigation."[168] Ely described what he saw as the difference between substance and procedure as follows: A "procedural rule is . . . one designed to make the process of litigation a fair and efficient mechanism for the resolution of disputes."[169] A substantive right, on the other hand, is "a right granted for one or more nonprocedural reasons, for some purpose or purposes not having to do with the fairness or efficiency of the litigation process."[170]

Acknowledging, as he had to, the existence of rules which may simultaneously impact both procedural and substantive concerns,[171] Ely explained the steps courts should take in adjudging the validity of such rules under the Enabling Act.[172] Take a hypothetical federal rule establishing a statute of limitations, which is supported by a desire to keep dockets smaller (procedural) and to put at ease the minds of potential litigants after the passage of time (substantive).[173] The rule easily passes the statutory checklist, since at least in some sense it

164. *Id.* at 718.

165. *Id.* at 719.

166. *Id.* at 724–32.

167. *Id.* at 719 ("The Act therefore contains, as the Court used to say the Constitution contained, limitations of both the checklist and enclave variety.").

168. *Id.* at 722.

169. *Id.* at 724.

170. *Id.* at 725.

171. *Id.* at 726. *See also* Kelleher, *supra* note 9, at 69 ("A legal rule can have both procedural and substantive purposes, and even if the animating policies of a rule ostensibly are procedural, it may have significant substantive implications, whether intended or not.").

172. Ely, *supra* note 12, at 727, 733–34.

173. *Id.* at 726.

deals with procedure. But the statutory enclave would keep such a rule out.[174]

4. Professor Burbank's Predictable-and-Identifiable Model

The approach adopted in *Sibbach* illustrates the inadequacies of a four-corners construction that accepts one of the three conceivable interpretations of the procedural-substantive tension without adequately examining the Act's background purposes and their relevance to textual interpretation. Professor Ely's approach suffers from a similar flaw. In this section, we turn to Professor Burbank's suggested interpretation of the statutory tension. His approach fits within the intentionalist rubric because of his dispositive reliance on legislative history. In this section we describe Burbank's theory and detail the serious shortcomings of his interpretive approach.

Before proceeding to a detailed exploration of Professor Burbank's approach, it is first necessary to emphasize the high practical stakes. Burbank's approach would construe the Enabling Act to prohibit any rule that has a predictable and identifiable impact on substantive rights.[175] If logically applied,[176] this standard would have a dramatically negative impact on the current version of the rules. More importantly, it would effectively deprive the rulemakers of any meaningful power to back up their procedural directives, thereby depriving the rules of much of their force.

a. Deriving a Test from Legislative History

Professor Burbank's interpretation of the procedural-substantive statutory tension largely builds on the extensive historical research he presented in a seminal article on the origins of the Enabling Act.[177] Because the 1934 Act was the final product of many years of political efforts in Congress to authorize creation of a uniform system of federal procedure, Burbank

174. *Id.* at 726–27 (suggesting that in a conflict between federal and state statutes of limitations, the federal rule would "not get by" the enclave provision, "for the substantive rights established by state statutes of limitations would be abridged by applying such a Federal Rule").

175. *See* Burbank, *supra* note 18, at 1160 ("The history suggests, at the least, a prohibition against Federal Rules that have an effect on rights recognized by the substantive law that is predictable and identifiable.").

176. As will be seen, Burbank does not always apply his own standard in a logically consistent manner. *See infra* Part II.B.4.c (discussing Burbank's construction of Rules 13(a), 37(b), and 37(d)).

177. Burbank, *supra* note 18.

believes it both necessary and appropriate, in deciphering legislative intent, to draw on historical documents relevant to those earlier efforts.[178] Of the various pre-1934 legislative documents, he chooses to focus primarily on one, a 1926 report by the Senate Judiciary Committee,[179] because he believes it offers "the most detailed and informative of all the legislative materials concerning the bill that became the Act."[180] Of particular significance to the procedural-substantive tension, he concludes, is the fact that the report sets out the Committee's answer to those opposing the bill on the grounds that it would enable the Court to promulgate rules affecting substantive rights.[181]

The Committee faced the following charge from the opposition: "[T]he bill . . . attempts to vest in the Supreme Court the power to make rules covering limitations of actions, provisional remedies, such as orders of arrest and attachment, and the selection or qualification of jurors."[182] The Committee soundly rejected the notion that the proposed legislation vested in the Court rulemaking authority over such matters.[183] Professor Burbank, in turn, gleans a common element from the report's three examples of what lies beyond the rulemaking power. He explains:

> Most of the matters discussed and classified as substantive in the 1926 Senate Report involve, at their core, either potential effects on "rights" recognized by the "substantive law" that are *predictable and identifiable*, or the creation of remedial rights that *predictably and identifiably* affect personal liberty or the use and enjoyment of property.[184]

Burbank then discusses exactly what he means by the phrase "predictable and identifiable." Take the first example from the 1926 report, the choice of a limitations period that applies in a particular case. Burbank acknowledges, as he must,

178. *Id.* at 1098.

179. As we discuss in Part II.B.4.b *infra*, one of Professor Burbank's mistakes is the use of the 1926 legislature's views—or, more accurately, the views of just a small subset of that legislature, the Senate Judiciary Committee—to interpret a law enacted in 1934. *See* Burbank, *supra* note 18, at 1098–1101. Four Congresses separate Burbank's legislative history from the Act he is interpreting. This fact alone should give pause to anyone attempting to clarify a bill by using isolated statements in legislative history.

180. Burbank, *supra* note 18, at 1107.

181. *Id.* at 1083–89 (referencing S. REP. NO. 69-1174, at 9–16 (1926)).

182. S. REP. NO. 69-1174, at 9.

183. *See id.* ("The committee is of the opinion that the bill, if passed, would have no such effect.").

184. Burbank, *supra* note 18, at 1128.

that the choice of one limitations period over another does not obviously translate into a predictable effect on substantive rights.[185] A plaintiff who brings a suit one year after the cause of action has arisen would presumably be indifferent between two and three-year statutes of limitations. Nevertheless, Burbank is able to conclude that "experience with a variety of time periods tells us that some impact is assured, and it is identifiable."[186] What he probably means is that instead of looking at the impact of limitations laws at the time a cause of action arises, we should determine identifiability at the time a statute of limitation defense is asserted in the course of the litigation.[187] Then, a litigant who has waited two and a half years to file a lawsuit will very much care whether the applicable limitations is two, rather than three years. The predictable and identifiable effect in Professor Burbank's test appears to be a flexible concept. "The uncertainty [that] arises from the differences in ability of those whose substantive law rights are at stake to protect themselves"[188] is not fatal, and the effect may be predictable and identifiable even in light of that uncertainty.

The second example in the 1926 report referred to "provisional remedies, such as orders of arrest and attachment."[189] The choice between two rules that define differently the cases where an order of attachment may issue will impact someone's "use or enjoyment of property in much the same way as rules of substantive law."[190] Accordingly, under Burbank's formulation, the choice of a rule as to when an order of attachment may issue affects substantive rights predictably and identifiably.

The final example, "the selection or qualification of jurors,"[191] gives rise to a somewhat trickier problem, but it nevertheless demonstrates exactly how flexible the phrase "predictable and identifiable" really is. After all, how does the selection

185. *Id.*

186. *Id.*

187. *Id.* ("Clearly preclusive doctrines like a statute of limitations, laches, or res judicata dramatically affect the ability of litigants to enforce their substantive rights and, therefore, determine in a practical sense whether those rights exist at all, at least when viewed from the point in time at which they are asserted." (quoting 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, 59 (1977))).

188. Burbank, *supra* note 18, at 1128.

189. *Id.* (referencing S. REP. NO. 69-1174, at 9 (1926)).

190. *Id.* at 1128.

191. *Id.* (referencing S. REP. NO. 69-1174, at 9).

and qualification of jurors affect a constitutional right to jury trial?[192] It seems, however, that despite the test's very language, something less than a truly predictable and identifiable impact may be required under Burbank's test when a substantive right is of constitutional origin. The Committee, he argues, "may have intended to suggest that when the interest in question finds its source in the Constitution, the confidence with which a prediction and identification of impact must be made before choice is allocated to Congress under the Act should be reduced."[193]

Though the success of predicting and identifying the impact on substantive rights varies among the three examples, Professor Burbank remains adamant that the procedural-substantive tension is to be resolved by resort to the predictable-and-identifiable test. To him, it is simply a matter of what the controlling legislative history dictates. At no point does he consider how his interpretation comports with statutory text. Nor does he adequately consider whether his standard makes sense in light of the broad statutory purposes and policies undoubtedly underlying the legislation ultimately enacted in 1934. In the narrowest intentionalist mode, he gives dispositive effect to specific statements contained in legislative history: "[t]he pre-1934 history suggests an intent to exclude rulemaking by the Supreme Court, and to require that any prospective federal lawmaking be done by Congress, *where the choice among legal prescriptions would have a predictable and identifiable effect on such rights*."[194]

One can, of course, easily subject Burbank's proposed interpretive standard to all of the well-established criticisms traditionally hurled at heavy reliance on legislative history.[195] However, for reasons we are about to explore, Burbank's rigid reliance on legislative history is additionally subject to a unique line of even more serious criticism.

192. *See* 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.").

193. Burbank, *supra* note 18, at 1129.

194. *Id.* at 1114 (emphasis added).

195. *See supra* Part I.B.2.

b. Burbank's Mistakes in Interpreting the Rules Enabling Act

i. The 1926 Committee Report and the 1934 Congress

The foundation for Burbank's predictable-and-identifiable formulation, as explained above, lies exclusively in a 1926 Senate Judiciary Committee report, issued in support of an earlier proposed version of the Act that ultimately failed eight years prior to the Act's eventual adoption.[196] The committee report was published during the sixty-ninth Congress.[197] Yet it was the seventy-third Congress that eventually passed the 1934 Rules Enabling Act.[198] Why, one might reasonably ask, is a report separated from the enacting Congress by four intervening Congresses to be deemed dispositive in interpreting a statute enacted eight years later? One might also inquire what the legislative history from the 1934 Congress, the one that actually passed the Enabling Act, says on the subject. Professor Burbank tells us that the legislative history attributable to the 1934 bill, introduced at the behest of Attorney General Cummings, is silent regarding the allocation of powers between Congress and the Court.[199] In light of such silence, one should question whether it is appropriate to impute the views of the 1926 Congress to the 1934 legislators. Professor Burbank, though, rejects this concern for several reasons[200]—none of which is persuasive in the slightest.

One argument to which he points in support of his heavy reliance on the 1926 report relies on the "speed with which the Attorney General's bill was considered and enacted" in 1934.[201] Since the bill was introduced and passed in 1934 with astonishing speed, the argument proceeds, we cannot reasonably expect the 1934 Congress to have elaborated upon its views of the Act with the same level of detail supplied in the 1926 Report.[202] Far from providing support for Burbank's position, however, this argument actually seems to cut directly *against* Burbank's de-

196. *See supra* Part II.B.4.a.

197. S. REP. NO. 69-1174 (1926).

198. *See* Act of June 19, 1934, Pub. L. No. 73-415, 48 Stat. 1064 (codified as amended in 28 U.S.C. §§ 2071–2077)).

199. *See* Burbank, *supra* note 18, at 1098 ("The legislative materials arising out of the consideration of the bill introduced at the behest of Attorney General Cummings in 1934 provide only the most general sense of the statute's meaning.").

200. *See id.* at 1098–1101.

201. *Id.* at 1098 n.377.

202. *See id.*

cision to rely so heavily on the 1926 report. The speed with which the Enabling Act received approval suggests that a careful consideration of the bill, let alone awareness and careful study by the 1934 Congress of the 1926 Report, was all but inconceivable. It does not make sense, then, to decipher the meaning of the Enabling Act passed by the 1934 Congress through the interpretive prism of the 1926 report, for the simple reason that it is highly unlikely—or, at the very least, unproven—that very many of the members of Congress in 1934 were even familiar with the 1926 Report. And surely the burden of proof rests squarely on Professor Burbank's shoulders when an eight-year-old report is at issue.

Burbank's second justification for placing such inordinate reliance on the 1926 Senate Report is no more compelling. "Where the reports and debate preceding [the] passage of legislation by Congress have been similarly uninformative," he argues, "the Court has considered more detailed materials from prior sessions of Congress."[203] Since the Court has engaged in this practice in other areas, he reasons, it is equally appropriate to employ the approach in interpreting the Rules Enabling Act.[204] To support his use of such outdated legislative materials, Burbank points to three instances where the Court, he claims, has done just that.[205] It is worthwhile to examine the three examples closely because they illustrate just how thinly Burbank has to stretch the Court's precedent in this area to justify his virtually exclusive reliance on an eight-year-old Senate Report in construing the intent of Congress four terms later. Examination of the three examples demonstrates that, even apart from the more traditional arguments cautioning against reliance on legislative history in *any* context, the use of past congressional materials to which absolutely no subsequent reference was made is especially suspect.

First, Burbank relies on the Court's use of prior legislative history "with respect to [statutory] language that 'crystallized'

203. *Id.* at 1098–99.

204. *See id.* at 1099 ("[The Court] has done so with respect to language that 'crystallized' at an earlier time and appeared in the bill when enacted, 'where the essence of the legislation remained constant,' or where 'the operative language of the original bill was substantially carried forward into the Act.'" (quoting Transcon. & W. Air, Inc. v. Civil Aeronautics Bd. (*T.W.A.*), 336 U.S. 601, 605–06 n.6 (1949), Dawson Chem. Co. v. Rohm & Haas Co., 448 U.S. 176, 204 (1980), and United States v. Enmons, 410 U.S. 396, 404–05 n.14 (1973), respectively)).

205. *Id.*

at an earlier time and appeared in the bill when enacted."[206] He cites in support of this proposition a footnote in *T.W.A., Inc. v. Civil Aeronautics Board*.[207] In relevant part, the footnote states the following: "This history is relevant to our problem, for though it relates to the 1937 bill which was not passed, the 'make effective' clause crystallized at that time and appeared in the 1938 bill which was enacted."[208] To rely on *T.W.A.*, Burbank must argue that reliance on *eight-year-old* legislative history is permissible because the Court has, on one occasion, relied upon *one-year-old* history. But surely he must recognize the obvious difference between reliance on legislative history generated four Congresses prior, on the one hand, and reliance on legislative history from a previous session of *the same Congress*, on the other. In *T.W.A.*, the Court at least was dealing with the same set of legislators—something that cannot be said of reliance on the 1926 Senate Report as a means of interpreting the 1934 Enabling Act.

Second, Burbank argues the Court has relied on prior legislative history "where 'the essence of the legislation remained constant.'"[209] As support, he cites *Dawson Chemical Co. v. Rohm & Haas Co.*,[210] which states:

> In three sets of hearings over the course of four years, proponents and opponents of the legislation debated its impact and relationship with prior law. . . . Although the final version of the statute reflects some minor changes from earlier drafts, the essence of the legislation remained constant. References were made in the later hearings to testimony in the earlier ones. Accordingly, we regard each set of hearings as relevant to a full understanding of the final legislative product.[211]

The crux of the Court's reliance on legislative history from previous Congresses is explained by "[r]eferences . . . made in the later hearings to testimony in the earlier ones."[212] But no such reference was made to connect the 1934 passage of the Enabling Act with the 1926 Report.[213] Indeed, Burbank himself quite explicitly establishes the contrary: earlier "considered explications of the [1934] bill's provisions . . . were *not* specifically

206. *Id.* at 1099.

207. *Id.* at 1099 n.378 (citing *T.W.A.*, 336 U.S. at 605–06 n.6).

208. *T.W.A.*, 336 U.S. at 606 n.6.

209. Burbank, *supra* note 18, at 1099 (quoting Dawson Chem. Co. v. Rohm & Haas Co., 448 U.S. 176, 204 (1980)).

210. *Id.* at 1099 n.379.

211. 448 U.S. 176, 204 (1980).

212. *Id.*

213. Burbank, *supra* note 18, at 1099.

referred to in the scanty materials produced in 1934."[214] He attempts to preempt this objection by asserting, "[a]lthough the prior legislative hearing and reports on the Cummins bill were not mentioned in the 1934 legislative material, the fact that the ABA and others had recommended the provisions of the bill 'for a good many years' was."[215] But what difference does that fact make? Burbank does not establish the 1934 Congress's awareness of the ABA's efforts; he says not a word to address whether the ABA's campaign made the 1934 Congress aware of the substance of the 1926 report.

Finally, Burbank attempts to justify his reliance on prior legislative history "where 'the operative language of the original bill was substantially carried forward into the Act.'"[216] For this proposition, he cites the following language from *United States v. Enmons*:

> The remarks with respect to that bill . . . are wholly relevant to an understanding of the Hobbs Act, since the operative language of the original bill was substantially carried forward into the Act. The congressional debates on the Hobbs Act in the 79th Congress repeatedly referred to the legislative history of the original bill. . . . Surely an interpretation placed by the sponsor of a bill on the very language subsequently enacted by Congress cannot be dismissed out of hand, as the dissent would have it, simply because the interpretation was given two years earlier.[217]

Reliance on *Enmons* suffers from the same problem identified in the previous example: the enacting Congress there explicitly referred to prior legislative history,[218] a fact not true of the Congress that enacted the 1934 Enabling Act. But the problems with Burbank's reliance on *Emmons* go far deeper than this. Notice the essence of the Court's reasoning: *the bill sponsor's* earlier remarks are relevant in interpreting the bill. Unlike the situation in *Enmons*, the 1934 bill received a new sponsor—Senator Ashurst.[219] Senator Ashurst, as Burbank tells us, "had voted with the majority to report the Cummins [1924] bill *adversely* in 1928."[220] Not only was the 1926 Report authored by someone other than the 1934 bill's sponsor, but the sponsor of the 1934 bill had actually voted *against* the bill's earlier ver-

214. *Id.* (emphasis added).

215. *Id.* at 1099 n.383.

216. *Id.* at 1099.

217. 410 U.S. 396, 404–05 n.14 (1973) (citations omitted).

218. *See id.* ("The congressional debates on the Hobbs Act in the 79th Congress repeatedly referred to the legislative history of the original bill.").

219. *See* Burbank, *supra*, note 18, at 1100 n.385.

220. *Id.* (emphasis added).

sion. It makes no sense to conclude (at least absent far stronger supporting evidence) that the Senator who introduced the 1934 bill intended to give the bill an interpretation that the very same Senator had rejected only six years earlier.

The three Supreme Court decisions Professor Burbank cites, then, do not actually warrant the position he seeks to support: the virtually exclusive reliance on eight-year-old legislative history from a much earlier Congress by a Congress that made no reference to that history. But even if the Court's doctrine did support Burbank's obviously tortured approach, several additional reasons would counsel against its use. As we have previously shown, exclusive reliance on *any* form of legislative history in statutory interpretation is highly dubious.[221] *A fortiori*, reliance on one statement in a prior Congress's legislative report of which most enacting legislators may well have been totally unaware amounts to the height of folly.

Aside from stretching rather thinly three Supreme Court cases, Burbank also supports his reliance on the 1926 Senate Report by noting that nothing happened between 1926 and 1934 "to suggest that in using the identical language Congress sought to achieve different purposes, or to rob some of that language of its meaning."[222] This argument, however, blatantly ignores four congressional elections—in 1926, 1928, 1930, and 1932. This is especially significant in light of Burbank's inability to establish the 1934 Congress's awareness of—much less reliance upon—the 1926 Senate Report.

Burbank anticipates the objection by arguing that congressional preferences on the issue could not have changed because "for some of [the period between 1926 and 1934] the campaign for passage of the uniform federal procedure bill was actively pressed in Congress, and the bill's legislative sponsors in 1934 were both well acquainted with that campaign."[223] At most, all this argument proves is that the goal of procedural uniformity remained constant. But that says nothing of the allocation of powers between Congress and the Court. This is especially important because the predictable-and-identifiable test neither follows obviously from the text of the 1926 Report[224] nor is it by any means obvious as a matter of legislative policy.[225] There-

221. *See supra* Part I.B.2.
222. Burbank, *supra* note 18, at 1099.
223. *Id.* at 1099–1100.
224. *See infra* Part II.B.4.b.ii.
225. *See infra* Part II.B.4.b.ii.

fore, in light of the fact that the predictable-and-identifiable allocation formula was at best peripheral to the 1926 Report, it is particularly unconvincing to argue the formula applicable in 1934.

ii. The Language of the 1926 Report and the Predictable-and-Identifiable Test

On structural, process-based grounds, Professor Burbank's reliance on the 1926 report is suspect at best, for reasons we have just explained. But even if one were to suspend disbelief and grant the appropriateness of reliance on the 1926 report, there remains an additional problem with his use of legislative history. He fails to recognize that the predictable-and-identifiable test was at most peripheral to the report on which he relies and does not flow from it with any reasonable degree of certainty, even if one assumes the report's relevance to the 1934 Act. When the dust settles, then, we can see that Burbank's predictable-and-identifiable test derives exclusively from one Senate Committee Report issued four Congresses prior to passage of the Act, and, most critically, that report does not actually support the test in any event.

Above all other statements in the 1926 Report, Burbank selects the following language to support his proposed test:

> Limitations of time for the commencement of actions and the issuance of writs of attachment or of arrest, or the determination of what shall constitute the qualification of a juror, are matters involving substantive legal and remedial rights affected by the considerations of public policy. Their regulations are clearly solely within the legislative power.[226]

The report also expressed Congress's hope that in promulgating rules the Court would resolve any doubts against finding an attempt on Congress's part to delegate "what is in reality a legislative function."[227] On the basis of these statements in the 1926 report, Burbank formulates the predictable-and-identifiable test.[228] He then extends the test to add preclusion law to the list of prohibited items.[229] The basic argument can be

226. S. REP. NO. 69-1174, at 9 (1926).

227. *Id.* at 11.

228. *See* Burbank, *supra* note 18, at 1128 ("Most of the matters discussed and classified as substantive in the 1926 Senate Report involve, at their core, either potential effects on 'rights' recognized by the 'substantive law' that are *predictable and identifiable*, or the creation of remedial rights that *predictably and identifiably* affect personal liberty or the use and enjoyment of property.").

229. *See id.*

summarized in the following manner: the 1926 Report, by mentioning "[l]imitations of time for the commencement of actions,"[230] intended to prohibit the rules from dealing with any instances of preclusion.[231]

That such a sweeping argument goes too far can be seen by comparing two hypothetical rules. Suppose Rule *A* allows federal district courts to dismiss with prejudice (aiming to bar the claim under res judicata laws)[232] as a way of discouraging discovery abuse.[233] Rule *B*, on the other hand, sets forth nothing more nor less than a federal law of res judicata, perhaps by redefining the privity element.[234] Unlike Rule *A*, which affects substantive rights solely as a means of facilitating enforcement of the primary procedural directive, Rule *B*'s sole purpose is to alter rights beyond the four walls of the courthouse. In clearly prohibiting Rule *B*, the 1926 Report does not necessarily preclude Rule *A*. When the Report states that a Federal Rule of Civil Procedure cannot set forth a rule of preclusion, we do not know whether the Report intends to prohibit only rules that deal exclusively with preclusion apart from its impact on procedure or also rules that deal with preclusion as a means by which a procedural goal can be achieved. Moreover, the source of the examples in the Report offers good reasons to conclude the drafters were concerned with rules that deal *solely* with the substantive law of preclusion. The source of the concern evinced in the report was the New York Code, which had attempted to set forth "provisions as to substantive law."[235] The New York statutory provisions had set out unambiguous substantive laws without attempting thereby to further procedural

230. S. REP. NO. 69-1174, at 9.

231. But see *infra* Part II.B.4.c for an illustration that the predictable-and-identifiable test, as applied by Burbank, seems quite flexible in its treatment of preclusion-like provisions in the existing Federal Rules of Civil Procedure.

232. For a discussion of a hornbook approach to res judicata, which includes the "on the merits" or "with prejudice" requirement, see RICHARD L. MARCUS, MARTIN H. REDISH & EDWARD F. SHERMAN, CIVIL PROCEDURE 1140–45 (3d ed. 2000).

233. Rule 37, for example, contains a similar sanction for discovery violations. *See* FED. R. CIV. P. 37(b), (d).

234. The same parties or persons in privity with the parties have to be litigants in both actions to trigger res judicata laws. *See* Allen v. McCurry, 449 U.S. 90, 94 (1980). One example of a change in the privity requirement is dispensing with it completely. In other words, the only litigants bound by res judicata will be the actual parties in the first action. Admittedly, it might not be a realistic example, but it is an example nonetheless.

235. S. REP. NO. 69-1174, at 10 (1926).

goals.[236] This speaks to hypothetical Rule *B*, but most certainly not to hypothetical Rule *A*.

Finally, the Report contains at least one indication that procedurally motivated rules such as hypothetical Rule *A* were to be deemed permissible. According to the Report, "it was also held that [the phrase] 'modes of process' related only to the procedure by which the court could enforce its process."[237] If a court can dismiss a claim with prejudice for failure to follow some other rule, it is conceivably exercising a methodology (dismissal with prejudice) by which it is enforcing its process (some other procedural rule or rules violated by a litigant). Thus, the 1926 Report, in at least one place, actually undermines Burbank's reading that categorically places issues of preclusion beyond the reach of the rules.

iii. Fallacious Reliance on the 1988 Amendment of the Rules Enabling Act

Professor Burbank also looks to the 1988 revision of the Enabling Act for further support of his suggested predictable-and-identifiable standard of interpretation. Reliance on the 1988 reenactment, however, is dubious to say the least. In 1987, one year prior, the Supreme Court had decided *Burlington Northern Railroad Co. v. Woods*, in which it construed the procedural-substantive tension as set out in the original version of the Act to allow a rule to impact substantive rights as long as the effect is merely incidental to a broader procedural purpose—a standard drastically different from Burbank's predictable-and-identifiable formulation.[238]

The Enabling Act's 1988 amendment left the relevant statutory language virtually untouched.[239] However, Burbank points to a suggestion in the 1988 legislative history that courts "guard against the assumption that similar statutory language should be given the same meaning by the courts."[240] But the 1988 history explicitly states, "[t]he purpose of this title [dealing with the procedural-substantive tension in the Enabling Act] is to modernize the current statutory provisions relating to the Federal judiciary's role in promulgating amendments to the Rules of Evidence and various rules of procedure applicable to

236. *See id.* (describing how "the matter is all of substantive character").
237. *Id.* at 9.
238. *See* 480 U.S. 1, 5 (1987).
239. *See supra* notes 46–47 and accompanying text.
240. Burbank, *supra* note 2, at 1035.

the Federal courts."[241] If the 1988 Congress truly intended to depart from the existing Supreme Court construction of the Act, including the incidental-effects test set out only one year prior to the 1988 amendment, use of the word "modernize" would have been a strange way to accomplish so radical a change. Indeed, for Congress to employ the exact same statutory language and yet intend an unstated alteration of that language would come dangerously close to impermissible legislative deception—Congress, in other words, could be deceiving the electorate into thinking nothing has changed, but intending a change all along.[242]

It would surely be inappropriate for Congress to retain the previously construed statutory language yet simultaneously intend to alter its established construction. According to a well-accepted canon of construction, "[w]ords and phrases which have received judicial construction before enactment are to be understood according to that construction."[243] While the canon speaks to enactment, not amendment, the same logic would seem to apply equally in both contexts. Underpinning the canon is a commonsense observation that drafters familiar with how the courts have construed a particular word or phrase would draft the statute in light of that interpretation either by adopting or rejecting the judicial construction.[244] The point is even stronger in the context of the 1988 revision because there Congress affirmatively chose to reenact virtually the same words that the Court had construed only one year earlier in *Burlington Northern*.[245]

If the canon is assumed to apply in the context of an amendment, then the Court's 1987 decision in *Burlington Northern* should have substantial relevance to post-1988 inter-

241. H.R. REP. No. 100-89, at 26 (1988).

242. *See, e.g.*, Martin H. Redish & Christopher R. Pudelski, *Legislative Deception, Separation of Powers, and the Democratic Process: Harnessing the Political Theory of* United States v. Klein, 100 NW. U. L. REV. 437, 439 (2006); *cf.* Dennis Murashko, Comment, *Accountability and Constitutional Federalism: Reconsidering Federal Conditional Spending Programs in Light of Democratic Political Theory*, 101 NW. U. L. REV. 931, 936–42 (2007) (describing congressional accountability concerns in the context of the conditional spending doctrine).

243. Llewellyn, *supra* note 55, at 403.

244. *See, e.g.*, United States v. Dixon, 347 U.S. 381, 384–85 (1954) (construing reenacted statutory language in light of judicial interpretations that occurred between the original promulgation and the reenactment).

245. *Compare* Rules Enabling Act, Pub. L. No. 100-702, sec. 401, 102 Stat. 4648, 4649 (1988), *with* Burlington N. R.R. Co. v. Woods, 480 U.S. 1, 5 (1987).

pretations of the Enabling Act. That Court interpreted the Act to permit effects on substantive rights that are merely incidental to a broader procedural purpose.[246] Logically, then, by the canon's operation, the post-1988 interpretation of the Act must not deviate markedly from the *Burlington Northern* interpretation. To be sure, the canon would yield to a clear directive in the statute (perhaps in a definition section) that a word or phrase is to receive a different meaning from that in the prior version.[247] However, Congress supplied no such indication in the 1988 amendments to the Enabling Act; in fact, as we have already emphasized, the language is largely unchanged.[248] Indeed, the Senate's section-by-section commentary on the proposed language of the Enabling Act arguably provides a basis on which to believe the Senate in 1988 perceived the amended Act as accepting the *Burlington Northern* interpretation.[249] The amended limiting provision, according to the Senate, "carries forward the scope of current law."[250] The Senate considered the same to be true for the amended enabling provision.[251] The phrase "scope of" surely suggests the Senate understood not only that the amended Enabling Act would mirror the language of the 1934 Act, but also that the Court's interpretive doctrine would continue to apply. Thus, the legislative history of the 1988 revisions does not seem to help Professor Burbank as much as he thinks it does.

c. Applying the Predictable-and-Identifiable Standard to Individual Rules

Professor Burbank's extensive scholarship on the Rules Enabling Act provides illustrations of how his test is to apply to several current rules. All of these rules either expressly contain or necessarily imply preclusive directives.[252] We examine three of them below: Rules 13(a) (compulsory counterclaims)[253] as well as 37(b) and (d) (discovery sanctions).[254] Our analysis

246. *See Burlington Northern*, 480 U.S. at 5; Llewellyn, *supra* note 55, at 403.

247. Llewellyn, *supra* note 55, at 403.

248. *See supra* notes 46–47 and accompanying text.

249. *See* Burbank, *supra* note 2, at 1034.

250. *Id.* (quoting 134 CONG. REC. S16,284-01 (1988) (statement of Sen. Heflin)).

251. *Id.*

252. *See id.*

253. FED. R. CIV. P. 13(a).

254. FED. R. CIV. P. 37(b), (d).

clearly demonstrates that Burbank's interpretive approach, when properly applied, often leads to wholly untenable results.

i. Rule 13

Rule 13(a), which certain commentators have described as a res judicata-like provision,[255] provides:

> A pleading *must state as a counterclaim* any claim that—at the time of service—the pleader has against an opposing party if the claim: (A) arises out of the transaction or occurrence that is the subject matter of the opposing party's claim; and (B) does not require adding another party over whom the court cannot acquire jurisdiction.[256]

On its face, the rule unambiguously sets out a circumstance where, solely by its operation, litigants are precluded from raising a claim in future litigation. If a defendant has a potential counterclaim arising out the same transaction or occurrence as the plaintiff's claim, she *must* raise the counterclaim in the original lawsuit or be barred from bringing it in a separate proceeding.

There would appear to be little doubt that, on its face, Rule 13(a) includes a preclusion element, barring subsequent suits that are part of the unbrought counterclaims. After all, there must be *some* way to distinguish "compulsory" counterclaims provided for in Rule 13(a)[257] from the "permissive" variety provided for in Rule 13(b).[258] Otherwise, there of course would have been no reason for this distinction in the first place. Since there is no distinction between the two—at least in a non-jurisdictional sense—when the defendant actually files a counterclaim, the difference must occur when the defendant fails to file the counterclaim. If one were to ask what the difference between the "must" of Rule 13(a) and the "may" of Rule 13(b) is, the inevitable response would be that use of the word "must," unlike use of the word "may," necessarily implies an "or else" for failure to take the directed action.[259] In other words, there will be some negative consequence, the fear of which is de-

255. *See, e.g.*, MARCUS ET AL., *supra* note 232 ("Rule 13(a) [which governs compulsory counterclaims] is a sort of rule-mandated res judicata. It has the effect of barring a party from recovering on a claim [in certain circumstances] . . . .").

256. FED. R. CIV. P. 13(a) (emphasis added).

257. *Id.*

258. FED. R. CIV. P. 13(b) ("A pleading may state as a counterclaim against an opposing party any claim that is not compulsory.").

259. *See* MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 819 (Frederick C. Mish et al. eds., 11th ed. 2003).

signed to induce (or coerce) compliance.[260] Therefore, in the absence of any other explicit directive of negative consequence, the use of the word "must" in Rule 13(a) would be rendered incoherent unless implicit in its use is the implication that the failure to bring the counterclaim in the first litigation would preclude suit on that claim in the future.

The inexorably preclusive consequence of failure to comply with the directive of Rule 13(a) puts Burbank in a position of having to make a difficult choice: he has to either reject the rule as a violation of his predictable-and-identifiable Enabling Act construction or somehow construe the rule to exclude a preclusive element—a conclusion that, for reasons just explained, strains credulity. Nevertheless, Burbank opts for the latter. To him, "Rule 13(a) . . . is a product of history and, at most, a vehicle of legal support for federal common law."[261]

Arguing against a construction of Rule 13(a) as a res judicata-like provision, Burbank writes: "Aside from the fact that it governs procedure in the rendering court, which lacks the power finally to determine the preclusive effects of its judgments, Rule 13(a) does not in so many words and could not validly provide a rule of preclusion."[262] In effect, Burbank argues that Rule 13(a) *does not* contain a preclusive element, because it *cannot* do so—an inference that by no means follows logically. Indeed, such reasoning is entirely circular and question-begging. The very issue to be resolved, namely the legitimacy under the Rules Enabling Act of a rule having a preclusive impact, Burbank assumes away. In any event, whether it may do so or not, we have already shown that, absent an inherent preclusion mechanism, Rule 13(a) makes no sense: absent a preclusive impact for a defendant's failure to comply, a mandatory directive would have no consequences for failure to comply, effectively rendering it a permissive directive, in direct contradiction of its express terms and rendering Rule 13(b)'s provision for permissive counterclaims wholly (and incoherently) redundant.[263]

260. *See id.*

261. Stephen B. Burbank, *Interjurisdictional Preclusion, Full Faith and Credit and Federal Common Law: A General Approach*, 71 CORNELL L. REV. 733, 782 (1986).

262. *Id.* at 772.

263. *See supra* text accompanying notes 255–60.

Burbank, we should note, does not completely deny a preclusive effect flowing from Rule 13(a).[264] However, he somehow manages to divorce this inexorable, preclusive impact from the text of the rule itself. He argues that, at most, Rule 13(a) may give rise to *a federal common law rule* precluding the filing in subsequent proceedings of what had been a compulsory counterclaim in the first proceeding.[265] But even if true, this does not alter the fact that Rule 13(a) operates as a necessary causal element in achieving that preclusive impact, an impact Burbank denies it can have under his construction of the Enabling Act.[266] Absent the unambiguously compulsory directive embodied in the provision, no such common law rule would ever exist in the first place.[267] It is solely because of Rule 13(a)'s compulsion that preclusion in other courts results, whether or not it occurs directly or is laundered through some mythical common law rule.[268] It is difficult to understand how Burbank believes he is able to divorce Rule 13(a) from its inherent, preclusive impact, merely by resort to some sleight-of-hand creation of an intermediate common law rule.

Finally, Burbank argues that Rule 13(a) merely expresses the rulemakers' *policy preference* in favor of compulsory counterclaims.[269] It is by means of this preference that we are led to federal common law, which supposedly acts as an enforcement mechanism. He reasons:

> Federal Rules of Civil Procedure can . . . serve as sources of federal common law, not only by leaving interstices to be filled but also by expressing policies that are pertinent in areas not covered by the Rules. Even when legal regulation in a certain area is forbidden to the Rules, the policies underlying valid Rules may help to shape valid federal common law.[270]

Was Rule 13(a) merely a statement of rulemakers' policy preferences, reminiscent of a statutory preamble? The Advisory Committee notes from 1937—the time of the original rule's promulgation—point to the contrary.[271] The Committee wrote:

264. *See* Burbank, *supra* note 261, at 774–75.

265. *See id.*; *infra* text accompanying note 274.

266. Burbank, *supra* note 261, at 772 ("Rule 13(a) does not in so many words and could not validly provide a rule of preclusion.").

267. *See supra* text accompanying notes 255–60.

268. *See supra* text accompanying notes 255–60.

269. *See* Burbank, *supra* note 261, at 774.

270. *Id.*

271. *See* FED. R. CIV. P. 13 advisory committee's note 7 (1937) (citing Am. Mills Co. v. Am. Surety Co., 260 U.S. 360 (1922) (addressing former Equity Rule 30)).

"If the action proceeds to judgment without the interposition of a counterclaim as required by subdivision (a) of this rule, the counterclaim is barred."[272] The language clearly manifests the Committee's intent to impose a mandatory consequence rather than merely express a policy preference to that effect. To be sure, if the rule as written is inconsistent with some higher legal authority—for example, the Rules Enabling Act or the Constitution—it must be invalidated. But that fact cannot logically alter the rule's unambiguous meaning.

The question then becomes whether Rule 13(a), construed as a rule of preclusion, is legally invalid for some reason. That reason is not to be found in the United States Constitution. Surely, nothing prevents Congress from allowing one federal court to impose a preclusive impact in another federal court. Similarly, the Supremacy Clause[273] would seem to enable Congress to bind subsequent state court actions.[274] The only conceivable basis for Burbank's insistence that a federal rule may not impose a preclusive effect is his own circular understanding of the Rules Enabling Act's scope. But such an analysis amounts to hopeless question-begging: it is the very fact that Rule 13(a) has so unambiguously and uncontroversially imposed a preclusive impact beyond the confines of the initial action that casts Burbank's construction into such serious doubt in the first place.[275]

In short, Burbank either has to reach the highly dubious conclusion that Rule 13(a) is invalid under the Enabling Act because it impermissibly creates a rule of preclusion, or abandon his predictable-and-identifiable test. That he purports to do neither demonstrates the incoherence and inadequacy of his approach to Enabling Act interpretation.

ii. Rule 37

Equally troublesome under Professor Burbank's predictable-and-identifiable standard is Rule 37, which authorizes the district court to impose sanctions, including the power to dismiss a complaint, award a default judgment, or, in most cases, hold a litigant in contempt.[276] Rule 37(b)(2) addresses sanctions

272. *Id.*

273. U.S. CONST. art. VI, cl. 2.

274. *See, e.g.*, Testa v. Katt, 330 U.S. 386, 394 (1947) (holding that state courts cannot refuse to adjudicate claims arising under valid federal laws).

275. *See supra* text accompanying notes 255–60.

276. *See* FED. R. CIV. P. 37(b), (d). Note, however, that the district court is

for litigants' failure to comply with a discovery order.[277] Among the possible sanctions are:

> (i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims; (ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence; (iii) striking pleadings in whole or in party; (iv) staying further proceedings until the order is obeyed; (v) dismissing the action or proceeding in whole or in part; (vi) rendering a default judgment against the disobedient party; or (vii) treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.[278]

Rule 37(d), in turn, allows the court in which the action is pending to apply these sanctions against a party who has failed to appear at her own deposition, to answer or object to interrogatories, or to answer or object to a request for document production.[279] To summarize, Rule 37 uses the potential club of substantive disposition in order to achieve a procedural goal—namely, attaining compliance with discovery orders and procedures as a means of facilitating performance of the truth-finding function. Courts have, on occasion, invoked this power.[280]

Does Rule 37, with its obvious substantive components, violate the Enabling Act because it has the "predictable-and-identifiable" effect on substantive rights that, according to Burbank's construction of the Enabling Act, is impermissible? Professor Burbank's answer is "no" because resort to the substantive aspect of the rule is discretionary with the trial judge.[281]

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denied authority to hold litigants in contempt for failure to comply with an order for a mental or physical examination. FED. R. CIV. P. 37(b)(2)(A)(vii).

277. *See* FED. R. CIV. P. 37(b)(2)(A) ("If a party or a party's officer, director, or managing agent—or a witness designated under Rule 30(b)(6) or 31(a)(4)—fails to obey an order to provide or permit discovery, including an order under Rule 26(f), 35, or 37(a), the court where the action is pending may issue further just orders.").

278. FED. R. CIV. P. 37(b)(2)(A)(i)–(vii).

279. FED. R. CIV. P. 37(d)(1)(A)(i), (ii) ("The court where the action is pending may, on motion, order sanctions if: (i) a party or officer director, or managing agent—or a person designated under Rule 30(b)(6) or 31(a)(4)—fails, after being served with proper notice, to appear for that person's deposition; or (ii) a party, after being properly served with interrogatories under Rule 33 or a request for inspection under Rule 34, fails to serve its answers, objections, or written response.").

280. *See, e.g.*, Tech. Recycling Corp. v. City of Taylor, 2006 FED App. 0448N (6th Cir.), 186 F. App'x 624, 637 ("[T]he district court did not abuse its discretion [under Rule 37] by dismissing the complaint with prejudice as a sanction for plaintiffs' willful failure to disobey discovery orders.").

281. *See* Burbank, *supra* note 18, at 1184.

Under the rule, the judge may, but is not required to, order sanctions against litigants who have violated discovery procedures.[282] The rule, says Burbank,

> leaves it to the discretion of the court to pick from among a variety of sanctions, only partially enumerated, as the facts of the case may warrant. At least to the extent the Rule does no more than enumerate sanctions that might have been imposed by a federal court prior to 1938, the Rule, since it makes no choices, is unexceptionable.[283]

Professor Burbank then compares Rule 37 with Rules 6(b) (extending time to perform a required act)[284] and 60(b) (relief from judgment),[285] both of which grant discretion "to relieve the parties from effects of Rules regarding time limitations after an action has been commenced and judgments entered without notice, that might otherwise be proscribed under the Act."[286] All of these provisions—Rules 37(b) and (d), 6(b), and 60(b)—preserve for the courts a feature of the common law method, which allows judges some flexibility in applying the law to the facts in individual cases.[287] As with Rule 13(a),[288] Burbank sees federal common law as a way to uphold the validity of Rules 37(b) and (d) under his predictable-and-identifiable test.[289] Because federal judges had been able to order sanctions even before the rules' promulgation in 1938, Rules 37(b) and (d) are unobjectionable to Burbank.[290]

Professor Burbank is no doubt correct in asserting that the substantive provisions of Rule 37 are indeed discretionary.[291] What is less clear, however, is why the discretionary nature of any rule should matter in determining its validity under the Enabling Act. Indeed, focus on the discretionary nature of a

282. *Id.*

283. *Id.*

284. FED. R. CIV. P. 6(b) ("When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion . . . order the period enlarged . . . .").

285. FED. R. CIV. P. 60(b) ("On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons . . . .").

286. Burbank, *supra* note 18, at 1184 n.729.

287. *See id.* ("Rule 19(b) . . . is . . . a valid statement of the criteria for determining whether to proceed or dismiss in the forced absence of an interested person." (quoting Provident Tradesman Bank & Trust Co. v. Patterson, 390 U.S. 201, 125 (1968))).

288. *See supra* note 265 and accompanying text.

289. *See* Burbank, *supra* note 18, at 1184 n.729.

290. *See id.* at 1184.

291. *See* FED. R. CIV. P. 37(b), (d).

rule's impact on substantive rights in determining the rule's validity under the Enabling Act amounts to a complete non sequitur.

The presence of a discretionary element should not control the inquiry into the validity of the rules. Assuming for argument's sake that Burbank's interpretation of the Enabling Act is sound, he fails to notice the wide opening his reliance on discretion leaves for the rule makers to achieve substantive results under the guise of procedure. Presumably the Supreme Court could promulgate a rule that would, for example, enable the judge to impose a cap on damages in a tort suit by a plaintiff who has violated a discovery order. Because the rule would be discretionary with the trial judge, Burbank would presumably have to find the rule valid—a preposterous result.

Burbank's reliance on the discretionary nature of the sanctions provides a puzzling basis on which to determine the rules' statutory validity. Whether the preclusive impact is automatic or discretionary with the court, the end result will often be the same: the use of substantive abridgement, explicitly authorized by the rules, as a sanction for a litigant's failure to comply with a procedural directive. It appears to make little sense to have anything turn on the sanction's tentative nature; in cases in which the judge does, in fact, impose the sanction, the preclusive impact is identical.

It may well be true, as Burbank argues, that prior to the rules' promulgation district courts possessed discretionary common law power to impose preclusion as a sanction.[292] But it is difficult to see from where in the statutory text or structure of the Enabling Act this factor can be discerned as an operative consideration in shaping the rulemaking power.

If one carefully examines the historical basis for and practical implications of Burbank's predictable-and-identifiable standard, it is revealed for the house of cards that it is. Proceeding from the flimsiest of bases in legislative history, the test (properly applied)[293] has the effect of seriously restricting the rulemakers' power to enforce the rules' procedural directives. When Burbank has his standard recognize safety valves, it does so on the basis of completely imagined or rationally dubious factors. But the flaws of Burbank's inquiry go much dee-

292. Burbank, *supra* note 18, at 1184 n.729.

293. As we have demonstrated, Burbank himself is often unwilling to recognize the inexorable implications of his own approach. *See supra* Part II.B.4.c.

per than even these serious defects. By focusing his inquiry on a myopic effort to slavishly recreate legislative intent from legislative history, he has ignored the commonsense implications of contextualist legislative interpretation. A contextualist interpretation of the Enabling Act, to which we now turn, avoids all the problems caused by the narrow and counterproductive attempt to discern the actual intent of the enacting Congress by instead seeking only to facilitate objectively determined background purposes motivating the Act.

5. *Burlington Northern*: A Contextualist Judge's Destination

Recall the two background purposes served by the Rules Enabling Act, uncovered by Professor Burbank's own research: (1) preserving substantive policymaking in Congress and (2) facilitating creation of a uniform system of procedural rules.[294] Guided by these two purposes, a contextualist judge arrives basically at the same place at which the Court ended up in establishing its current interpretive framework in *Burlington Northern Railroad Co. v. Woods*.[295] The Court in *Burlington Northern* was presented with two conflicting rules: Federal Rule of Appellate Procedure 38 and a provision of the Alabama Code.[296] Rule 38 gave federal appellate courts discretion to impose penalties for the filing of frivolous appeals.[297] The Alabama statute, in contrast, imposed an automatic ten percent penalty on the losing appellant in cases where "the judgment or decree [has been] affirmed without substantial modification."[298] The discretionary nature of the federal rule thus conflicted with the Alabama statute in a way that arguably abridged prevailing appellees' substantive right to the mandatory ten percent recovery. The Court interpreted the limits of the Enabling Act to apply to the Rules of Appellate Procedure as well as the Rules of Civil Procedure.[299]

294. *See supra* Part II.A.

295. 480 U.S. 1 (1987).

296. *See id.* at 3–4.

297. *See id.* at 4 ("If the court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee." (quoting FED. R. CIV. P. 38)).

298. *See id.* at 4 (citing Chapman v. Rivers Constr. Co., 227 So. 2d 403, 414–15 (1969)).

299. *See id.* at 5 n.3 (explaining that Federal Rules of Appellate Procedure "were also prescribed pursuant to the Rules Enabling Act"). The Enabling Act has since been amended explicitly to apply to rules applicable in federal appellate courts. *See* 28 U.S.C. § 2072(a) (2000).

To address the validity of Rule 38, the Court laid out the proper framework for judging the validity of rules under the Enabling Act. Therein lies the most significant contribution of the *Burlington Northern* opinion. The Court, instead of assuming the mutual exclusivity of substance and procedure, explained that the Constitution and the Enabling Act both define the extent of rulemaking: "Article III of the Constitution, augmented by the Necessary and Proper Clause of Article I, § 8, cl. 18, empowers Congress to establish a system of federal district and appellate courts and, impliedly, to establish procedural Rules governing litigation in these courts."[300] Thus, an indisputably procedural rule—for example, Rule 10(a), concerning captioning[301]—will simultaneously satisfy both the Constitution and the enabling provision of the Act. Equally easy is the case where a rule regulates only substance with nary a mention of procedure, which places the rule firmly outside the enabling provision.[302] One example of the latter is a rule that establishes, without more, that a tort plaintiff may recover punitive damages without a showing of malice.

A more complicated case, and the one that presents the interpretive puzzle under the Enabling Act, is a rule falling somewhere between purely procedural and entirely substantive. Rule 38, which regulated procedure in federal appellate courts but touched on the substantive right of prevailing appellees to recover damages for having to defend the trial victory on appeal,[303] was just such a rule. Under the Constitution, the *Burlington Northern* Court stated, the test is that of reasonableness.[304] Accordingly, rules that mix procedure and substance satisfy the Constitution when reasonably capable of classifica-

300. 28 U.S.C. § 2072(a). Besides Article III, Section 1, which mentions "such inferior Courts as the Congress may from time to time ordain and establish," and the Necessary and Proper Clause, Congress has the explicit Article I, Section 8 power to "constitute Tribunals inferior to the supreme Court." U.S. CONST. art. III, § 1, art. I, § 8. *See generally* Kelleher, *supra* note 9, at 62–88 (presenting an overview of the constitutional allocation of authority for regulating procedure in federal courts).

301. FED. R. CIV. P. 10(a) ("Every pleading must have a caption with the court's name, a title, a file number, and a Rule 7(a) designation.").

302. A purely substantive rule will violate the Enabling Act for failure to satisfy the enabling provision. *See* 28 U.S.C. § 2072(a) ("The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence . . . .").

303. FED. R. CIV. P. 38.

304. *See Burlington Northern*, 480 U.S. at 5.

tion as procedural.[305] The Necessary and Proper Clause, after all, is capable of accommodating substantive components of procedural rules reasonably necessary to the operation of the federal court system.[306]

Mixed rules, however, must also satisfy the Enabling Act, specifically the statute's limiting provision.[307] The *Burlington Northern* Court read the limitation in light of the broad purposes underlying the Act, explaining:

> The cardinal purpose of Congress in authorizing the development of a uniform and consistent system of rules governing federal practice and procedure suggests that Rules which *incidentally affect litigants' substantive rights* do not violate this provision if reasonably necessary to maintain the integrity of that system of rules.[308]

The Court thus saw the limiting provision as carving out a portion of what the enabling provision authorized, but only to the extent that the rule's effect on substantive rights was not "incidental."[309] This reading of the limiting provision effectively clarified the language by implicitly appending the following at the provision's end: "but not if the effect on substantive rights is secondary to the achievement of a primary procedural purpose."[310] Finally, the Court concluded that "the study and approval given each proposed Rule by the Advisory Committee, the Judicial Conference, and this Court, and the statutory requirement that the Rule be reported to Congress for a period of review before taking effect give the Rules presumptive validity under both the constitutional and statutory constraints."[311]

305. *See id.*

306. *See* U.S. CONST. art. I, § 8, cl. 18 ("To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.").

307. *See Burlington Northern*, 480 U.S at 5.

308. *Id.* (emphasis added) (citing Hanna v. Plumer, 380 U.S. 460, 464–65 (1965); Miss. Publ'g Corp. v. Murphree, 326 U.S. 438, 445–46 (1946)). Although both *Murphree* and *Hanna* mention the phrase "incidental effects"—the latter doing so only by citing *Murphree*—in neither decision has the Court gone through the trouble of explaining how the incidental effects test relates to broad purposes underlying the Enabling Act. *See Hanna*, 380 U.S. 460; *Murphree*, 326 U.S. 438. Nor did these decisions have to do that, as the challenged Rules are wholly capable of being deemed purely procedural. *See Hanna*, 380 U.S. 460; *Murphree*, 326 U.S. 438. This is why Professor Burbank is being less than careful when he says, "*Burlington Northern* reaffirmed the Court's toothless interpretation of the Enabling Act." Burbank, *supra* note 2, at 1018 n.37.

309. *See Burlington Northern*, 480 U.S. at 5.

310. *See supra* text accompanying note 72.

311. *Burlington Northern*, 480 U.S. at 6 (citation omitted).

This was similar to the conclusion of the *Sibbach* Court forty-six years earlier.[312] In a short paragraph, the *Burlington Northern* Court concluded Rule 38 did not violate the Enabling Act: "The choice made by the drafters of the Federal Rules in favor of a discretionary procedure affects only the process of enforcing litigants' rights and not the rights themselves."[313]

In interpreting the procedural-substantive tension within the Enabling Act, the *Burlington Northern* Court recognized the allocative purpose of the Act—distributing powers between the Supreme Court and Congress—when it construed the limiting provision to carve out rules that affect substantive rights.[314] However, the Court also recognized the importance of the procedural uniformity purpose.[315]

This reading of the Enabling Act properly advances both purposes: (1) allocate substantive policy judgments to Congress while (2) enabling rulemaking that uses substantive components incidental to attainment of the overriding procedural interests in creating a uniform and effective system of procedural rules. The Court thus appropriately interpreted the Rules Enabling Act in light of the two broad purposes motivating the Act's framers. Once the broader theory of interpretive contextualism is added as conceptual support,[316] the incidental-effects test can be seen to be by far the most effective means of construing the statutory text to achieve statutory ends.

III. EXPLAINING AND REFINING THE INCIDENTAL-EFFECTS TEST

While the *Burlington Northern* standard effectively blended the two broad purposes served by the Act,[317] the test is in need of further explanation and refinement. We do both in this Part.

A. THE MEANING OF "INCIDENTAL" IN THE INCIDENTAL-EFFECTS TEST

The word "incidental"—the key to understanding and applying the test—is capable of more than one plausible defini-

312. Sibbach v. Wilson & Co., 312 U.S. 1, 15 (1941).

313. *Burlington Northern*, 480 U.S. at 8.

314. *Id.* at 5.

315. *See id.* (citing Hanna v. Plumer, 380 U.S. 460, 464–65 (1965); Miss. Publ'g Corp. v. Murphree, 326 U.S. 438, 445–46 (1946)).

316. *See supra* Part I.B.3.

317. *See Burlington Northern*, 480 U.S. at 1.

tion. On the one hand, in this context it could mean a consequence that accompanies the main occurrence unintentionally—an unintended substantive spillover, as it were. The Oxford American Dictionary phrases this version of the definition as "occurring by chance in connection with something else."[318] This meaning would obtain when, for example, the rulemakers could show that they did not, and perhaps could not, anticipate whatever effect on substantive rights to which a rule in practice gave rise.

An alternative definition of "incidental" focuses on the primacy of occurrences. Once again, according to the Oxford American Dictionary, "incidental" could mean "accompanying but not a major part of something."[319] This second meaning presupposes a foresight that the incidental occurrence will take place, and perhaps even an intention on the part of the actor to bring about the occurrence. But the meaning relegates the occurrence to a secondary place; some other goal must be the primary driver.

In the case of the federal rules, the term "incidental" may apply in either sense of the word. On the one hand, rules designed solely for procedural purposes may inevitably but unintentionally have spillover impact on substantive rights—that is, rights of litigants beyond the four walls of the courthouse.[320] For example, Rule 23, authorizing class actions, will inevitably impact the enforcement of substantive rights, thereby affecting issues of wealth redistribution and corporate behavior.[321] In such a situation it makes perfect sense, in light of the Act's underlying purpose to achieve a uniform and coherent system of procedural justice in the federal courts, to authorize rules de-

318. THE NEW OXFORD AMERICAN DICTIONARY 853 (Erin McKean ed. 2d ed. 2005).

319. *Id.*; *see also* BLACK'S LAW DICTIONARY 765 (7th ed. 1999) (defining "incidental" as "[s]ubordinate to something of greater importance; having a minor role").

320. Note that in a prior article, one of us has argued that, for this very reason, the Enabling Act's vestiture of rulemaking authority in the unrepresentative and unaccountable Supreme Court contravenes foundational dictates of American democratic theory and constitutional law. *See generally* Redish & Amuluru, *supra* note 15, at 1332. For present purposes, however, our analysis proceeds on the assumption of the Act's constitutionality, consistent with controlling Supreme Court doctrine. *See, e.g.*, Mistretta v. United States, 488 U.S. 361, 361 (1989); Sibbach v. Wilson & Co., 312 U.S. 1, 9–10 (1941).

321. *See* Martin H. Redish, *Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 U. CHI. LEGAL F. 71, 93–107.

signed for procedural ends, even if they incidentally impact substantive rights. Because the substantive-procedural intersection will often be inevitable, any other construction of the Act would seriously interfere with the Court's ability to fashion a coherent and uniform procedural system.[322]

A potential awkwardness in this suggested construction is that the drafters themselves may well have failed to recognize the entire problem of incidental impact, because at the time of enactment they were proceeding on the fallacious assumption of substantive-procedural mutual exclusivity.[323] Thus, use of a narrow intentionalist form of construction would likely fail to lead to acceptance of this first meaning of "incidental." However, once one recognizes the legal and practical reality that the Act's framers themselves likely failed to recognize, a contextualist recognizes the need for use of imaginative reconstruction.[324] An interpreting judge must ask, how would a Congress aware of the inevitable but incidental substantive spillover of many procedural rules have chosen to shape the substantive-procedural dichotomy in order to best achieve the Act's two basic purposes? The answer appears obvious: because Congress sought to preserve its substantive lawmaking power, it is reasonable to construe the Act to prohibit rules designed primarily or exclusively to alter substantive rights. Yet to prohibit rules having *any* substantive impact, no matter how incidental to procedure that impact may be, would seriously hinder the rulemakers' ability to fashion a uniform procedural system. The Act is therefore appropriately construed to permit creation of rules whose only impact on substantive rights is merely secondary to the primary procedural purpose.

The interpretive issue is further complicated by the second conceivable definition of the term "incidental." In addition to referring to an unintended spillover effect, the word could also be plausibly defined to include effects that are intermediary—in other words, effects that are means to an end.[325] Used in this

322. We should note, once again, that in this Article we are ignoring any conceivable constitutional problems in application of the Act. While one of us has previously raised such difficulties as a theoretical matter, *see* Redish & Amuluru, *supra* note 15, at 1327–32, at no point has the Court given the argument serious consideration.

323. *See* Burbank, *supra* note 18, at 1113; Redish & Amuluru, *supra* note 15, at 1311.

324. *See supra* Part I.B.3.

325. *See* THE NEW OXFORD AMERICAN DICTIONARY 853 (Erin McKean ed. 2d ed. 2005); BLACK'S LAW DICTIONARY 765 (7th ed. 1999).

sense, the word "incidental" in the *Burlington Northern* test would refer to the use of substantive impact in an instrumental sense—that is, as a method of ensuring litigant compliance with the rules' underlying procedural goals. To employ the examples previously considered,[326] Rule 13(a) (designed to achieve procedural efficiency by avoiding evidentiary duplication through use of a compulsory counterclaim rule to effectively bring about litigant compliance)[327] must have connected to it the substantive club of preclusion as a consequence for disobedience. The same is true for the availability of substantive sanctions for failure to comply with discovery directives: absent the availability of the substantive club of factual establishment or dismissal,[328] the discovery system, so central to the procedural framework adopted in the federal rules, could not be assured of functionality.[329] In light of the underlying statutory goal of establishing a uniform and effective procedural system, it makes sense to construe the Act's prohibition on substantive lawmaking to permit the rules to include such instrumental

326. *See supra* Part II.B.4.c.i. The phrase "incidental" in other areas of the law has already come to mean just that. *See* BLACK'S LAW DICTIONARY 1189 (7th ed. 1999) (defining "incidental power" as a "power that, although not expressly granted, must exist because it is necessary to the accomplishment of an express purpose"); *id.* at 128 (defining "incidental authority" as "[a]uthority needed to carry out actual or apparent authority" and using the following example to illustrate the definition: "the actual authority to borrow money includes the incidental authority to sign commercial paper to bring about the loan"); *cf.* Stevens v. United States, 302 F.2d 158, 163 n.8 (5th Cir. 1962) ("The fact that an establishment is a dance hall does not make it taxable per se. It is necessary to show the serving or selling of food, refreshments, or merchandise is more than 'merely incidental.' . . . . '[I]incidental' may have meanings in other contexts different from its meaning in this statute. In [*Geer v. Birmingham*, 88 F. Supp. 189 (N.D. Iowa 1950),] . . . the selling of refreshments was 'merely incidental', . . . [though it] represented 27 per cent of the ballroom's gross revenues and was an integral part of its operations. The quality that was present there was the subordinate relationship of the sale of refreshments to the principal feature of the ballroom, dancing . . . . We conclude that this subordinate relationship was the meaning intended by Congress in using the term 'incidental.'").

327. FED. R. CIV. P. 13(a).

328. FED. R. CIV. P. 37(b)(2); FED. R. CIV. P. 37(d).

329. *See* Link v. Wabash R.R. Co., 370 U.S. 626, 629–30 (1962) ("The authority of a federal trial court to dismiss a plaintiff's action with prejudice because of his failure to prosecute cannot seriously be doubted. The power to invoke this sanction is necessary in order to prevent undue delays in the disposition of pending cases and to avoid congestion in the calendars of the District Courts. The power is of ancient origin, having its roots in judgments of nonsuit and non prosequitur entered at common law . . . and dismissals for want of prosecution of bill in equity . . . .").

uses of substantive consequences. Hence, to the extent the *Burlington Northern* Court's use of the term "incidental" was intended to include both senses of the term, the decision's interpretive standard represents a legitimate exercise of the contextualist model of statutory construction.

When commentators have attacked the Court's *Burlington Northern* decision, they have done so by insisting on reading "incidental" as synonymous with "insubstantial" or "minimal." Professor Whitten, for example, has criticized the decision by interpreting the word "incidental" in the Court's test to mean "unimportant."[330] He argues, "under the Court's view of the purposes of the Alabama statute and its statement about the Enabling Act, it is quite probable that the Alabama statute created substantive rights that were *wholly*, rather than incidentally, undermined by the application of Rule 38 in its stead."[331] Whitten further argues that "[a] rule whose application altogether prevents a damage recovery permitted by state law can hardly be described as only 'incidentally' affecting the right that the recovery aims at vindicating."[332] For his part, Professor Burbank seems to approve of Whitten's analysis[333] and, in addition, relies on the Court's acknowledgment in *Mistretta v. United States* that rules have important effects on substantive rights to argue that the incidental-effects test, as applied by the Court, loses bite.[334]

Whitten (and Burbank, to the extent he agrees with Whitten) makes two critical mistakes in reading "incidental" as the equivalent of "insignificant." First, Whitten applies the incidental-nonincidental dichotomy to state law,[335] although it was in-

330. *See* Ralph U. Whitten, Erie *and the Federal Rules: A Review and Reappraisal After* Burlington Northern Railroad v. Woods, 21 CREIGHTON L. REV. 1, 32–34 (1987).

331. *Id.* at 31.

332. *Id.* at 34.

333. *See* Burbank, *supra* note 2, at 1018 & n.38 (citing approvingly Whitten's critique of *Burlington Northern* and describing Whitten as a "serious student of court rulemaking [who] regards *Burlington Northern* as a disaster").

334. *See id.* at 1042 n.189 ("So much for 'incidental effects.'" (quoting Mistretta v. United States, 488 U.S. 361 (1989))). In *Mistretta*, the Court said in dictum that "this Court's rulemaking under the enabling Acts has been substantive and political in the sense that the rules of procedure have important effects on the substantive rights of litigants." 488 U.S. at 392.

335. *See* Whitten, *supra* note 330, at 31 ("[I]t is quite probable that the Alabama statute created substantive rights that were *wholly*, rather than incidentally, undermined by the application of Rule 38 in its stead.").

tended to apply only to the federal rules themselves.[336] The affected state law is irrelevant under the Act. All that matters is whether the rules affect substantive rights incidentally, not whether the state law is wholly displaced by the rules themselves.[337] Second, the *Burlington Northern* Court did not view the term "incidental" as "insignificant," as is evidenced by its failure to assess the importance of Rule 38's effect on substantive rights protected by the Alabama statute.[338] As Whitten himself showed, the Court did not invalidate a rule "whose application altogether prevent[ed] a damage recovery permitted by state law."[339]

Even more fundamentally, the word "incidental" should not mean "insignificant" because the value of, for example, preclusive rules deployed as discipline depends very much on how important their substantive effect is to a litigant.[340] The effect on substantive rights is rather substantial when, as in the case of claim-preclusive sanctions, res judicata rules prevent litigants from recovering on their precluded claims. What can be more important than that? But, as explained above, a dismissal with prejudice is precisely the kind of substantive club by which courts can encourage litigants to heed procedural directives.[341] It makes little sense to prevent the federal system from employing important substantive encouragements because the more important the consequence, the more likely are litigants to comply with the federal courts' procedures. Encouraging litigant compliance with procedural rules only via unimportant consequences is tantamount to saying "please follow the rules or else," when "or else" is nothing more than a slap on the wrist. Thus, "incidental" in the incidental-effects test, whatever else it might mean, does not mean "insignificant."

It is appropriate, at this point, to contrast this contextualist construction of the Rules Enabling Act with the more intentionalist "predictable-and-identifiable" standard advocated by Professor Burbank. Under that standard, we are left with an interpretation that makes little sense as a means of implementing underlying statutory purposes. In contrast, by employing

336. *See* Burlington N. R.R. Co. v. Woods, 480 U.S. 1, 5–6 (1987).

337. Professor Ely made a similar mistake. *See supra* II.B.3.

338. *See Burlington Northern*, 480 U.S. at 8.

339. Whitten, *supra* note 330, at 34.

340. *But see* Burbank, *supra* note 18 (arguing that preclusion is not a valid province of federal rules).

341. *See supra* Introduction.

those purposes as the interpretive equivalent of the North Star, we are far more effective in fashioning commonsense means of connecting concrete modes of statutory construction with foundational legislative purposes.

B. REMOVING THE PRESUMPTIVE VALIDITY GLOSS

Though we have sought to provide an intellectual foundation on which to rationalize the incidental-effects test of *Burlington Northern*, we strongly disagree with an important part of the decision. The Court erred by adding the gloss of presumptive—indeed, all but irrebuttable—validity to measurement of rules under the standards of the Enabling Act. As the Court explained, "the study and approval given each proposed Rule by the Advisory Committee, the Judicial Conference, and this Court, and the statutory requirement that the Rule be reported to Congress for a period of review before taking effect . . . give the Rules presumptive validity under both the constitutional and statutory constraints."[342] The Court's presumptive validity of Rule 38 perhaps explains its conclusory approval of the rule without examining whether the rule's substantive effects were, in fact, truly incidental to an underlying procedural goal.[343] The incidental-effects test that the Court so effectively explicated in terms of the broad purpose in uniform and consistent federal procedure received insufficient consideration with respect to Rule 38.

Presumptive validity should not govern the rules' validity under the Enabling Act for two reasons.[344] First, as Justice Frankfurter powerfully argued in his *Sibbach* dissent, "to draw any inference of tacit approval from non-action by Congress is to appeal to unreality."[345] The inertia in Congress lies squarely

342. *Burlington Northern*, 480 U.S. at 6.

343. The Court's application of the enclave provision to Rule 38 was very cursory: "The choice made by the drafters of the Federal Rules in favor of a discretionary procedure affects only the process of enforcing litigants' rights and not the rights themselves." *Id.* at 8. *But see* Whitten, *supra* note 330, at 33 (pointing out that the Alabama statute amounted to a right of action "against an appellant for unsuccessful appellate litigation"). The Court must have intended to imply in its reasoning that whatever effect Rule 38 has on the Alabama statute is purely incidental. A more nuanced analysis would have been helpful in light of the Court's clear statement of how the enclave is to be interpreted. The presumptive validity gloss is the likely explanation for the Court's failure.

344. *See* Burbank, *supra* note 18, at 1101–02 (arguing that the presumptive validity notion is a dubious assumption); Kelleher, *supra* note 9, at 99.

345. Sibbach v. Wilson & Co., 312 U.S. 1, 18 (1941) (Frankfurter, J., dis-

in favor of inaction. To presume from such inaction an affirmative desire to approve a proposed rule has the same shaky foundation that partially underpins the so-called Dormant Commerce Clause doctrine—both fail to recognize that the constitutional inertia in Congress favors inaction.[346] Moreover, when we ask whether a rule promulgated in, say, 2006 satisfies the 1934 Enabling Act, why should it matter that the rule has received tacit approval of the 2006 Congress?

Second, the presumptive validity gloss draws on the Court's approval at times when the Court is at its weakest. Generally, as one of us has previously noted, the "federal courts were constitutionally constructed as passive entities," thus needing two or more adverse litigants for a sharp presentation of all sides of any given issue.[347] By design, the Court's role in rulemaking takes place in a non-adversarial setting.[348] While the more public form of rule adoption now employed by the Advisory Committee may often approximate an adversary exploration of such issues, this may not always be the case, and in any event the process would not take place before the Court itself. Moreover, it is important to note that no such public process took place for the vast majority of the existing rules.

The Court's imprimatur to a particular rule, then, comes without a formalized and careful adversary presentation of all sides of the issue of the rule's validity.

CONCLUSION

In more than seven decades since the original passage of the Rules Enabling Act, the procedural-substantive tension embedded in the Act has escaped conclusive interpretation. Partially to blame is the tension itself, which lends itself to three textually plausible interpretations. But an additional part of the explanation for the lack of resolution is the absence of a careful analysis of the Act in light of the theories of statu-

senting). Justice Frankfurter discarded the presumption of validity based on "due regard to the mechanics of legislation and the practical conditions surrounding the business of Congress when the Rules were submitted." *Id.*

346. *See* Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569, 592–93.

347. *See* Martin H. Redish & Andrianna D. Kastanek, *Settlement Class Actions, the Case-or-Controversy Requirement, and the Nature of the Adjudicatory Process*, 73 U. CHI. L. REV. 545, 574–75 (2006).

348. For an explanation of rulemaking under the Enabling Act, see Duff, *supra* note 5.

tory interpretation. To that end, this Article, by examining the various interpretations of the Act, gleans an important lesson in statutory interpretation. The Enabling Act, standing in for all sparsely worded ambiguous statutes, is the proverbial poster child for a contextualist analysis that relies on objective purposes to inform textual ambiguities. Only through a contextualist interpretation can an interpreter appreciate the forest—the overall goals sought to be attained by the Rules Enabling Act—rather than the trees.

In this Article, we have sought to contribute to the literature on two levels. On the most immediate level, the Article stands as an original theoretical defense of the often maligned incidental-effects construction of the Rules Enabling Act's substantive-procedural tension that characterizes current Supreme Court doctrine, and as the addition of a critical perspective on alternative interpretational standards. But we have sought to accomplish these goals by placing Rules Enabling Act construction within the broader framework of statutory interpretation theory. By use of such an approach, we have sought to advance understanding of both statutory interpretation in general and the Rules Enabling Act in particular. The lesson for statutory interpretation theory largely parallels the lesson to be learned in construing the Rules Enabling Act. In both, when dealing with ambiguous legislation, it is common sense and an attempt to translate underlying purpose into legal reality, rather than narrow, shortsighted adherence to textual literalism or legislative history, that more effectively further the goals of representative democracy.