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### Rule 4 and Personal Jurisdiction

Scott Dodson

UC Law SF, [dodsons@uclawsf.edu](mailto:dodsons@uclawsf.edu)

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## ARTICLES

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### RULE 4 AND PERSONAL JURISDICTION

*Scott Dodson\**

*State-court personal jurisdiction is regulated intensely by the Fourteenth Amendment's Due Process Clause, which the Court has famously used to tie state-court personal jurisdiction to state borders. Although the Fourteenth Amendment doesn't apply to federal courts, the prevailing wisdom is that federal courts nevertheless are largely confined to the same personal-jurisdiction limits as state courts because of Rule 4(k), which provides that service "establishes personal jurisdiction" in federal court only upon specified conditions, including when the state courts would have personal jurisdiction. Some commentators have further argued that Rule 4(k) sets a limit on federal-court personal jurisdiction independent of service and applicable to all claims in federal court, even those asserted postsummons. Courts have begun to adopt this interpretation. In this Article, I argue against the tide. Such a broad reading of Rule 4(k) would render it invalid under the Rules Enabling Act. I advance a different interpretation: Rule 4(k) regulates only service, not personal jurisdiction. It thus has no applicability to claims asserted without a summons, it has no effect on the scope of personal jurisdiction applicable in federal court, and it is valid under the Rules Enabling Act. This interpretation opens space for consideration of what controls on federal-court personal jurisdiction exist external to Rule 4(k), and I explore those options. I also offer guidance to litigants and courts about how, procedurally, to challenge non-compliance with Rule 4(k) in light of its restriction to service. The end result is a more modest, but more coherent, Rule 4(k).*

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\* James Edgar Hervey Chair in Litigation, Geoffrey C. Hazard Jr. Distinguished Professor of Law, and Director of the Center for Litigation and Courts, University of California College of the Law, San Francisco. I use the epicene singular "they" and its derivatives throughout.

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## INTRODUCTION

In federal court, the Fifth Amendment’s Due Process Clause sets the constitutional limits of a federal court’s exercise of personal jurisdiction over the parties.<sup>1</sup> These limits are light; Congress could give the district courts nationwide personal jurisdiction if it wished.<sup>2</sup> Congress can set the scope of federal courts’ personal jurisdiction by statute, of course, but rarely does so expressly.<sup>3</sup> Instead, the conventional wisdom is that subconstitutional controls on personal jurisdiction in the federal district courts are, today, set principally by Rule 4 of the Federal Rules of Civil Procedure, which provides that “[s]erving a summons . . . establishes personal jurisdiction over a defendant” under various conditions, including, most prominently, when the defendant “is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located.”<sup>4</sup>

Recently, a group of commentators has argued that, by “establish[ing] personal jurisdiction” under specified conditions, Rule 4(k) purports to regulate personal jurisdiction directly.<sup>5</sup> One commentator has gone further to argue that Rule 4(k) sets the subconstitutional scope of a district court’s personal jurisdiction even with respect to claims not served with a summons.<sup>6</sup> Papers and pleadings not

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1 *Omni Cap. Int’l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 102 (1987).

2 *Toland v. Sprague*, 37 U.S. (12 Pet.) 300, 328 (1838) (“Congress might have authorized civil process from any circuit court, to have run into any state of the Union.”). Recently, some judges and commentators have questioned whether the Fifth Amendment imposes any personal-jurisdiction limits. See Stephen E. Sachs, *The Unlimited Jurisdiction of the Federal Courts*, 106 VA. L. REV. 1703, 1708 (2020); *Douglass v. Nippon Yusen Kabushiki Kaisha*, 46 F.4th 226, 249 (5th Cir. 2022) (en banc) (Elrod, J., dissenting), *cert. denied*, 143 S. Ct. 1021 (2023).

3 Occasionally, for specific claims, Congress provides for nationwide service of process in federal court. See William S. Dodge & Scott Dodson, *Personal Jurisdiction and Aliens*, 116 MICH. L. REV. 1205, 1236 (2018). Although these statutes rarely say anything about personal jurisdiction, see Leslie M. Kelleher, *Amenability to Jurisdiction as a “Substantive Right”: The Invalidity of Rule 4(k) Under the Rules Enabling Act*, 75 IND. L.J. 1191, 1203 (2000) (stating that nationwide service statutes “often say nothing about amenability to jurisdiction”), they typically are interpreted to implicitly include authorization for district courts to exercise nationwide personal jurisdiction, see *Omni Cap.*, 484 U.S. at 104 (suggesting that service statutes are how Congress controls personal jurisdiction).

4 FED. R. CIV. P. 4(k)(1).

5 See Kelleher, *supra* note 3, at 1192; A. Benjamin Spencer, *Substance, Procedure, and the Rules Enabling Act*, 66 UCLA L. REV. 654, 711 (2019); Patrick Woolley, *Rediscovering the Limited Role of the Federal Rules in Regulating Personal Jurisdiction*, 56 HOUS. L. REV. 565, 605 (2019); Recent Case, *Waters v. Day & Zimmermann NPS, Inc.*, 23 F.4th 84 (1st Cir.), 136 HARV. L. REV. 990, 995 (2023).

6 A. Benjamin Spencer, *Rule 4(k), Nationwide Personal Jurisdiction, and the Civil Rules Advisory Committee: Lessons from Attempted Reform*, 73 ALA. L. REV. 607, 612 n.20 (2022)

accompanied by a summons, such as amended complaints and motions to intervene, are usually served under Rule 5, which says nothing about personal jurisdiction and contains no territorial restrictions.<sup>7</sup> And claims in certain aggregated cases, such as individual claimants who file a notice with the court to opt into a collective action under the Fair Labor Standards Act (FLSA), need not be served under Rule 4.<sup>8</sup> According to the interpretation of Rule 4(k) as divorced from the summons, however, the personal-jurisdiction limits set by Rule 4(k) constrain a district court's exercise of personal jurisdiction over all these postsummons claims.<sup>9</sup>

Courts have begun to adopt that theory. For example, the Sixth Circuit recently asserted, with respect to postsummons notices served under Rule 5 by employees opting into a collective action under the FLSA: "Civil Rule 4(k)'s requirement [is] that the defendant be amenable to the territorial reach of that district court for [each] claim. . . . Even with amended complaints and opt-in notices, the district court remains constrained by Civil Rule 4(k)'s—and the host State's—personal jurisdictional limitations."<sup>10</sup> Other circuits and district courts have followed this line of reasoning.<sup>11</sup>

The problem with reading Rule 4(k) this way—as regulating personal jurisdiction directly and without any connection to service of process—is that it would render Rule 4(k) invalid as exceeding the rulemaking authority Congress has delegated to the courts under the Rules Enabling Act, which authorizes only "rules of practice and procedure and rules of evidence" that do "not abridge, enlarge or modify

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("[T]he jurisdictional constraints imposed on federal courts by Rule 4(k)(1)(A) are regularly operative outside of the Rule 4 service of process context . . ."); see also Jonathan Remy Nash, *Personal Jurisdictional Limits over Plaintiff Class Action Claims*, 96 S. CAL. L. REV. (forthcoming 2023) (manuscript at 7), <https://ssrn.com/abstract=4261116> [<https://perma.cc/U3W7-BMEA>] (arguing that, for class actions, federal courts "must consider the propriety of personal jurisdiction as to each unnamed plaintiff's class member's claim against a defendant[,] . . . because they are in general—and certainly with respect to claims brought under state law—obligated under common understandings of current subconstitutional law to exert no greater personal jurisdictional authority than the courts of the state in which they sit").

7 See FED. R. CIV. P. 5.

8 See A. Benjamin Spencer, *Out of the Quandary: Personal Jurisdiction over Absent Class Member Claims Explained*, 39 REV. LITIG. 31, 42–43 (2019).

9 See A. Benjamin Spencer, *The Territorial Reach of Federal Courts*, 71 FLA. L. REV. 979, 981 (2019) (asserting that Rule 4 "declare[s] that federal district courts may not exercise territorial jurisdiction beyond the reach of the state courts where they are geographically located").

10 *Canaday v. Anthem Cos.*, 9 F.4th 392, 400 (6th Cir. 2021), cert. denied, 142 S. Ct. 2777 (2022).

11 See *infra* text accompanying notes 123–28.

any substantive right.”<sup>12</sup> Although commentators have raised that possibility,<sup>13</sup> courts have tended to ignore it entirely.<sup>14</sup> As precedent builds, courts are likely to continue to interpret Rule 4(k) expansively in ways that Congress neither intended nor authorized.

I offer a different reading of Rule 4(k) that is more consistent with the text, history, and constraints of the Rules Enabling Act. Under my reading, Rule 4(k) really regulates only service of process. As such, it has no applicability to any claims other than those served with the summons. Further, although Rule 4(k) regulates the conditions under which service of process is an effective precondition to a court’s exercise of personal jurisdiction, it has no effects on the amenability of a party to the court’s personal jurisdiction, which instead is set by law external to the rule. Because Rule 4(k) regulates procedure, has no effect on the scope of a federal court’s personal jurisdiction, and does not affect any substantive right, Rule 4(k) is consistent with the Rules Enabling Act.

The principal counterargument doesn’t convince me otherwise. The Sixth Circuit reasoned that Rule 4(k) *must* regulate personal jurisdiction beyond service of the summons because, otherwise, parties could easily circumvent Rule 4(k)’s summons-based limits by asserting claims through amended complaints or through other vehicles governed only under Rule 5.<sup>15</sup> But that fear is overblown, for several reasons. First, Rule 4(k) already contains significant limits on claims asserted with a summons, which a court potentially could order for nonsummons claims. Second, sources outside the rules—including the Rules of Decision Act and federal common law—could supply sub-constitutional rules limiting the exercise of personal jurisdiction applicable to nonsummons claims. Third, district courts have authority under other rules and statutes to police plaintiff-side attempts to game Rule 4, including by denying leave to amend or denying a motion to intervene.

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12 28 U.S.C. § 2072 (2018).

13 See Kelleher, *supra* note 3, at 1192; Spencer, *supra* note 5, at 713; Woolley, *supra* note 5, at 607.

14 The Sixth Circuit denied rehearing en banc in *Canaday* despite an amicus brief pointing out Rule 4(k)’s potential invalidity. See Order Denying Rehearing en Banc, *Canaday v. Anthem Cos.*, 9 F.4th 392 (6th Cir. 2021) (No. 20-05947); Brief of the Center for Litigation and Courts as Amicus Curiae in Support of Plaintiff-Appellant’s Petition for Rehearing en Banc at 2, *Canaday v. Anthem Cos.*, 9 F.4th 392 (6th Cir. 2021) (No. 20-5947).

15 See *Canaday*, 9 F.4th at 400 (“Rule 4(k)’s territorial constraints would come to naught. These core limitations on judicial power would be one amended complaint—with potentially new claims and new plaintiffs—away from obsolescence.”).

My argument that Rule 4(k) doesn't affect the scope of personal jurisdiction does alter the way that challenges to noncompliance with Rule 4(k) should proceed. I therefore offer explanation and guidance for courts and litigants grappling with that issue.

This Article proceeds as follows. Part I details the history of service and personal jurisdiction in the federal courts, setting the stage for teasing apart the various related elements whose conflation has waylaid courts like *Canaday*. Part II sets up the problem of unconstitutional limits of personal jurisdiction on nonsummons claims, and it documents how courts and commentators have begun to expand Rule 4(k) beyond its moorings. Part III articulates the Article's principal thesis: Rule 4 really regulates only the procedure and practice of service of process. Its effects on personal jurisdiction are limited to setting the conditions under which service of the summons is effective to vest in the court the personal jurisdiction to which the defendant is already amenable. This Part also responds to the principal counterargument to that thesis, that my reading would create an enormous loophole for Rule 4(k). Part IV explores the procedural implications of challenging noncompliance with Rule 4(k) under my reading. The Article then concludes.

## I. FEDERAL-COURT SERVICE AND PERSONAL JURISDICTION

Early English notions of court authority over the defendant were based on two principles. The first was notice, a fundamental principle since the Magna Carta.<sup>16</sup> The second was legitimacy based upon consent to power; the defendant's willing appearance and acquiescence in the proceedings was essential to the legitimacy of the judgment.<sup>17</sup> From these principles developed various means of compelling the defendant to appear before the court,<sup>18</sup> including attachment, *distringas*, outlawry, and arrest through *capias ad respondendum*.<sup>19</sup> The domicile of the defendant, any geographic connection to the case, and ideas of territorial court limits were legally irrelevant. If the defendant appeared, the court had authority.

Parliament passed the Frivolous Arrests Act in 1725,<sup>20</sup> which, in most cases, replaced civil arrest with service of a court summons on the

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16 See Harold L. Korn, *The Development of Judicial Jurisdiction in the United States: Part I*, 65 BROOK. L. REV. 935, 965 (1999).

17 See 2 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 105 (4th ed. 1936).

18 2 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW: BEFORE THE TIME OF EDWARD I, at 592 (2d ed. 1898).

19 See *id.* at 591; *Capias ad respondendum*, BLACK'S LAW DICTIONARY (11th ed. 2019).

20 12 Geo. 1 c. 29.

defendant, plus the posting of bail by the defendant.<sup>21</sup> The Act had the effect of supplanting physical arrest with constructive arrest by court order.<sup>22</sup> Worried about extravagant service, however, English courts looked to continental principles confining sovereign acts to sovereign borders.<sup>23</sup> Courts thus developed the principle that the defendant had to be served while within the court's territorial jurisdiction, at least for actions at law.<sup>24</sup>

The American colonies inherited this tradition, overlaid by their own common-law development and homegrown rules.<sup>25</sup> In one particularly important homegrown rule, colonial—and, later, state—courts developed territorial restrictions on service to advance “the larger enterprise to ‘form a more perfect union.’”<sup>26</sup> These developments translated to a doctrine akin to English law in words, though with more complexities in application among a confederation of states: a suit could not be heard without service of process upon the defendant while within the court's territorial limits, as established by colonial state borders.<sup>27</sup>

Under the Articles of Confederation, state-court decisions articulated and adhered to the requirement of in-state service. In *Kibbe v. Kibbe*,<sup>28</sup> a plaintiff sued in Massachusetts for breach of a warranty in a deed executed in Connecticut pertaining to property in Massachusetts.<sup>29</sup> The defendant resided in Connecticut, so the plaintiff attached a handkerchief in Massachusetts that allegedly belonged to the defendant.<sup>30</sup> The defendant was served in Connecticut by leaving the summons at the defendant's residence.<sup>31</sup> The defendant defaulted, and the Massachusetts court entered default judgment.<sup>32</sup> The plaintiff then attempted to enforce the judgment in Connecticut, but the

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21 See Nathan Levy, Jr., *Mesne Process in Personal Actions at Common Law and the Power Doctrine*, 78 YALE L.J. 52, 76 (1968).

22 See *id.* at 79.

23 See Alex Mills, *The Private History of International Law*, 55 INT'L & COMPAR. L.Q. 1, 25–27 (2006).

24 See Scott Dodson & Sebastian Spinei, *Judicial Jurisdiction and Competence*, in *COMPARATIVE CIVIL PROCEDURE* (C.H. van Rhee & Margaret Woo eds., forthcoming 2024).

25 See Joseph J. Kalo, *Jurisdiction as an Evolutionary Process: The Development of Quasi in Rem and in Personam Principles*, 1978 DUKE L.J. 1147, 1147–48; Korn, *supra* note 16, at 949–50, 965; Sachs, *supra* note 2, at 1717–18; James Weinstein, *The Early American Origins of Territoriality in Judicial Jurisdiction*, 37 ST. LOUIS U. L.J. 1, 34, 36 (1992).

26 Weinstein, *supra* note 25, at 41 (quoting U.S. CONST. pmb.).

27 See Sachs, *supra* note 2, at 1717–18.

28 1 Kirby 119 (Conn. Super. Ct. 1786).

29 See *id.* at 119, 122.

30 *Id.* at 119, 123.

31 *Id.* at 124.

32 *Id.* at 124–25.



Connecticut courts refused enforcement, reasoning that the defendant was not within Massachusetts's territorial jurisdiction at the time of service.<sup>33</sup> Other cases of the era held similarly; indeed, as one scholar has written, "it is difficult to find an early case that contradicted, in either dicta or result, the service of process requirement."<sup>34</sup>

After ratification of the U.S. Constitution, state courts continued to apply the in-state service doctrine. Joseph Story wrote, in his influential *Commentaries*: "[N]o sovereignty can extend its process beyond its own territorial limits, to subject either persons or property to its judicial decisions."<sup>35</sup> He later adopted that principle, as a matter of general law, in *Picquet v. Swan*, stating that state courts "are necessarily confined to the territorial limits of the state. Their process cannot be executed beyond those limits; and any attempt to act upon persons or things beyond them, would be deemed an usurpation of foreign sovereignty, not justified or acknowledged by the law of nations."<sup>36</sup>

Importantly, the in-state service rule wasn't, at the time, part of statutory or constitutional law.<sup>37</sup> As confirmed in the 1851 case of *D'Arcy v. Ketchum*, the in-state service requirement for state courts was a rule of "international law,"<sup>38</sup> or general law, lightly guided by principles of full faith and credit.<sup>39</sup> The famous case of *Pennoyer v. Neff*, decided in 1878, has been interpreted as constitutionalizing the state-borders rule but not changing its content: "To give such proceedings any validity," the Court wrote, a nonresident defendant "must be brought within its jurisdiction by service of process within the State, or his voluntary appearance."<sup>40</sup>

Meanwhile, federal courts operated somewhat differently. At the Founding, the federal courts adapted the rule of territorial limits on service: state courts were confined to state borders, so federal courts should be confined to federal-district borders. Congress reinforced this common-law backdrop. In the first Judiciary Act, Congress

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33 *Id.* at 126.

34 Weinstein, *supra* note 25, at 14.

35 JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 539 (6th ed. 1865).

36 *Picquet v. Swan*, 19 F. Cas. 609, 611 (C.C.D. Mass. 1828) (No. 11,134).

37 See James Weinstein, *The Federal Common Law Origins of Judicial Jurisdiction: Implications for Modern Doctrine*, 90 VA. L. REV. 169, 171–72 (2004); Sachs, *supra* note 2, at 1718 (calling the principles drawn from "the general common law and the law of nations").

38 *D'Arcy v. Ketchum*, 52 U.S. (11 How.) 165, 176 (1851).

39 See Patrick J. Borchers, *The Death of the Constitutional Law of Personal Jurisdiction: From Pennoyer to Burnham and Back Again*, 24 UC DAVIS L. REV. 19, 23–29, 23 n.10 (1990); see also Sachs, *supra* note 2, at 1718; Weinstein, *supra* note 37, at 172–73.

40 *Pennoyer v. Neff*, 95 U.S. 714, 733 (1878); see also Michael H. Hoffheimer, *The Case Against Neo-Territorialism*, 95 TUL. L. REV. 1305, 1321 (2021) (interpreting *Pennoyer* to constitutionalize territorial limits).

provided: “[N]o civil suit shall be brought before either of said courts against an inhabitant of the United States, by any original process in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ.”<sup>41</sup> The Act also circumscribed extraterritorial use of the arrest process: “[N]o person shall be arrested in one district for trial in another, in any civil action before a circuit or district court.”<sup>42</sup> A few years later, Congress authorized district courts to send subpoenas and writs of execution outside district borders but did not alter the in-district rule for original summonses against nonresident defendants.<sup>43</sup>

Lower federal courts assiduously followed this territorial limit on service of process.<sup>44</sup> In *Ex parte Graham*, in 1818, Justice Washington reasoned that the district-border rule was derived from Congress’s division of lower courts into separate districts and the Judiciary Act’s limitation on service to district borders:

It is admitted, that [the circuit] courts, in the exercise of their common law and equity jurisdiction, have no authority, generally, to issue process into another district, except in cases where such authority has been specially bestowed, by some law of the United States. The absence of such a power, would seem necessarily to result from the organization of the courts of the United States; by which . . . courts are allotted to each of the districts, into which the United States are divided . . . . This division and appointment of particular courts, for each district, necessarily confines the jurisdiction of the local tribunals, within the bounds of the respective districts, within which they are directed to be holden. . . . But the legislature of the United States, from abundant caution, as it would seem, has not left this subject to implication. . . . [The Judiciary Act] provisions appear manifestly to circumscribe the jurisdiction of those courts, as to the person of the defendant, by the limits of the district where the suit is brought . . . .”<sup>45</sup>

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41 Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78–79.

42 *Id.* at 79 (current version at 28 U.S.C. § 1693 (2018)).

43 See Act of Mar. 2, 1793, ch. 22, § 6, 1 Stat. 333, 335 (allowing witness subpoenas to “run into any other district” as long as the witness would not have to travel more than 100 miles); Act of Mar. 3, 1797, ch. 20, § 6, 1 Stat. 512, 515 (permitting writs of execution on judgments in favor of the United States to “be executed in any other state”); Act of May 20, 1826, ch. 124, 4 Stat. 184 (expanding the writ rule to all writs of execution).

44 See, e.g., *Hollingsworth v. Adams*, 12 F. Cas. 348, 348 (C.C.D. Pa. 1798) (No. 6,611) (holding initial service issued by a circuit court in Pennsylvania could not be served on a Delaware resident, even though the Delaware resident owned property in Pennsylvania, because the Delaware resident was “an inhabitant of another district . . . not found in Pennsylvania at the time of serving the writ”).

45 10 F. Cas. 911, 912 (C.C.E.D. Pa. 1818) (No. 5,657) (Washington, J.).

In *Picquet v. Swan*, in 1828, a French plaintiff sued, in federal court, an American expat living in Paris; the plaintiff served the defendant abroad.<sup>46</sup> When the defendant failed to appear, the plaintiff sought a default judgment, but Justice Story refused to issue one on the ground that “there ha[d] been no sufficient service of the process.”<sup>47</sup> That was because Congress had not authorized service outside of the United States clearly enough to overcome the “general principle[]” in keeping with the “law of nations” that courts within a territory are “bounded” in the exercise of their power “by the limits of such territory.”<sup>48</sup> Relying on the same indices of congressional intent as Justice Washington, Justice Story reasoned: “[T]he exercise of the jurisdiction of the circuit courts by compulsive process, was essentially confined, by their very organization, within the limits of their respective districts.”<sup>49</sup> Thus, “no judgment could be rendered in the circuit court against any person, upon whom process could not be personally served within the district.”<sup>50</sup>

The Supreme Court adopted this reasoning in the 1838 case of *Toland v. Sprague*.<sup>51</sup> There, a Pennsylvania plaintiff attached the in-state property of a Massachusetts defendant living in Gibraltar.<sup>52</sup> Because the defendant was not an “inhabitant of the United States,” the plaintiff argued that the Judiciary Act’s district-based restrictions did not apply.<sup>53</sup> That was a fair point, but the Court nevertheless held service ineffective because the background restriction of service to district boundaries remained in force.<sup>54</sup> In fact, the Court reasoned, Congress had implicitly endorsed that background territorial restriction by dividing the federal courts into districts in the first place:

The judiciary act has divided the United States into judicial districts. Within these districts, a circuit court is required to be holden. . . . Whatever may be the extent of their jurisdiction over the subject matter of suits, in respect to persons and property; it can only be exercised within the limits of the district. Congress might have authorized civil process from any circuit court, to have run into any state of the Union. It has not done so. . . . We think that the opinion of the legislature is thus manifested to be, that the process of a

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46 19 F. Cas. 609, 609–10 (C.C.D. Mass. 1828) (No. 11,134) (Story, J.).

47 *Id.* at 610, 616.

48 *Id.* at 611, 615.

49 *Id.* at 612.

50 *Id.* at 613.

51 37 U.S. (12 Pet.) 300, 328 (1838) (considering *Picquet’s* reasoning to have “great force” and “concur[ring]” with it).

52 *Id.* at 327.

53 *Id.* at 310.

54 *Id.* at 328–30.

circuit court cannot be served without the district in which it is established; without the special authority of law therefor.<sup>55</sup>

In this regime, state borders were largely irrelevant to territorial limits on federal-court service and jurisdiction.<sup>56</sup> In the Process Act of 1792, Congress had directed the lower federal courts to follow state laws prescribing the form and modes of service,<sup>57</sup> but, according to *Toland*, that directive did “not intend to enlarge the sphere of the jurisdiction of the circuit courts.”<sup>58</sup> Although the Judiciary Act gave most states a single federal district drawn along state lines,<sup>59</sup> such that state and district borders usually overlapped, when Congress began subdividing states into multiple federal districts in the 1800s, process limits remained, as a default, defined by district borders rather than state borders.<sup>60</sup>

Unlike for state courts, these territorial limits on the lower federal courts were entirely subconstitutional. Congress could authorize the territorial reach of the federal courts to national borders and perhaps even beyond.<sup>61</sup> But, absent congressional authorization, the federal courts adhered to the territorial limits of their districts as implied from common law and inferential interpretations of congressional acts. Federal courts adhered to these limits into the 1900s.<sup>62</sup>

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55 *Id.* at 328–29.

56 *See* Woolley, *supra* note 5, at 570–73 (noting that territorial jurisdiction of the courts at this time was instead “confined, by their very organization, within the limits of their respective districts,” *id.* at 571 (quoting *Picquet v. Swan*, 19 F. Cas. 609, 612 (C.C.D. Mass. 1828) (No. 11,134))).

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

58 *Toland*, 37 U.S. (12 Pet.) at 330; *see id.* at 328 (“Although the process acts of 1789 and 1792 have adopted the forms of writs and modes of process in the several states, they can have no effect where they contravene the legislation of congress.”).

59 *See* Judiciary Act of 1789, ch. 20, § 2, 1 Stat. 73, 73.

60 *See* Robert C. Casad, *Personal Jurisdiction in Federal Question Cases*, 70 TEX. L. REV. 1589, 1594 (1992). Occasionally, Congress gave federal courts limited authority to issue process in other districts in the same state, *see, e.g.*, Act of May 4, 1858, ch. 27, § 1, 11 Stat. 272, 272 (authorizing service in a different district for a second defendant if the first defendant was served within the forum’s district, and authorizing service of the primary defendant in a different district of the same state for suits of a local nature), but those limited exceptions prove the general rule that district borders, rather than state borders, were the presumptive territorial limit for federal-court service.

61 *See Picquet*, 19 F. Cas. at 613–15 (suggesting that Congress could constitutionally authorize overseas service of process even in ways that would offend the law of nations).

62 *See* Ralph U. Whitten, *Separation of Powers Restrictions on Judicial Rulemaking: A Case Study of Federal Rule 4*, 40 ME. L. REV. 41, 72 (1988); Woolley, *supra* note 5, at 568; *Ahrens v. Clark*, 335 U.S. 188, 190 (1948) (considering writs of habeas corpus to be confined to districts); *Georgia v. Pa. R.R. Co.*, 324 U.S. 439, 467–68 (1945) (“Under the general provisions of law, a United States district court cannot issue process beyond the limits of the district, and a defendant in a civil suit can be subjected to its jurisdiction *in personam* only by service

In 1934, Congress passed the Rules Enabling Act, which delegated to the Supreme Court “the power to prescribe, by general rules, for the district courts of the United States . . . , the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law. Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant.”<sup>63</sup> Under that authorization, the Supreme Court adopted the Federal Rules of Civil Procedure in 1938. Rule 4(f) stated:

**Territorial Limits of Effective Service.** All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held and, when a statute of the United States so provides, beyond the territorial limits of that state.<sup>64</sup>

Rule 4 thus authorized service of process beyond district borders to any district within the state where the court was located. Under the Rules Enabling Act, Rule 4 preempted contrary statutes and common-law rules.<sup>65</sup>

The advisory committee that drafted Rule 4 knew that it was expanding the territorial reach of service of process but denied that it was regulating court jurisdiction, which it deemed “not proper pleading, practice or procedure.”<sup>66</sup> The official advisory committee notes stated: “This Rule enlarges to some extent the present rule as to where service may be made. It does not, however, enlarge the jurisdiction of the district courts.”<sup>67</sup> The committee was aware of some uncertainty as to whether the Rules Enabling Act’s delegation included rulemaking on territorial limits of service.<sup>68</sup> But as Charles Clark, a member of the committee, later explained:

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within the district. Such was the general rule established by the Judiciary Act of September 24, 1789, in accordance with the practice at the common law. And such has been the general rule ever since.” (citations omitted)); *Robertson v. R.R. Lab. Bd.*, 268 U.S. 619, 622 (1925) (“Under the general provisions of law, a United States district court cannot issue process beyond the limits of the district, and a defendant in a civil suit can be subjected to its jurisdiction *in personam* only by service within the district.” (citations omitted)).

63 Act of June 19, 1934, ch. 651, § 1, 48 Stat. 1064, 1064.

64 FED. R. CIV. P. 4(f), 308 U.S. 667 (1938) (amended 1963).

65 Act of June 19, 1934, ch. 651, § 1, 48 Stat. 1064, 1064 (providing that “all laws in conflict” with the promulgated rules “shall be of no further force or effect”); *see also* Sachs, *supra* note 2, at 1752 (making this observation).

66 AM. BAR ASS’N, RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES WITH NOTES AND PROCEEDINGS OF THE INSTITUTE ON FEDERAL RULES 188 (William W. Dawson ed., 1938) [hereinafter RULES] (statement of William D. Mitchell).

67 FED. R. CIV. P. 4(f) advisory committee’s note to 1937 rules.

68 *See id.* (“Some members of the bar question the power of the Court to make this extension.”); 1 ADVISORY COMM. ON RULES FOR CIV. PROC., PROCEEDINGS 37 (1943)

The question has been raised whether [Rule 4(f)] is not a substantive change, one affecting jurisdiction and venue. I might say on that, it is our theory that definitely it is not. This is not a matter of either the jurisdiction of the court, what matters the court shall hear and decide, or of the venue, which is the place where certain kinds of action shall be tried. This affects neither one of those points. It simply says that in cases where the district court already has jurisdiction and venue its process may reach as far as the confines of that state itself. In other words, that is why we consider it procedural. It is simply allowing people to be brought before the court within the entire state and not merely within one district.<sup>69</sup>

The rule makers thus saw Rule 4(f) as within the Rules Enabling Act's delegation of rulemaking authority over practice and procedure because the rule merely regulated service—the means by which a court could compel an unwilling defendant to defend in a place already authorized by Congress.<sup>70</sup>

In the 1946 case of *Mississippi Publishing Corp. v. Murphree*, the Supreme Court upheld Rule 4(f)'s territorial expansion as valid under the Rules Enabling Act, largely on the same grounds articulated by the committee.<sup>71</sup> There, a plaintiff filed a libel suit in the Northern District of Mississippi and served a summons on the defendant in the Southern District of Mississippi.<sup>72</sup> Because no one disputed that jurisdiction and venue were proper in the Northern District of Mississippi, the Court construed the problem as one of service, not jurisdiction:

Rule 4(f) serves only to . . . provid[e] a procedure by which the defendant may be brought into court at the place where Congress has declared that the suit may be maintained. . . . [Rule 4] does not operate to abridge, enlarge or modify the rules of decision by which that court will adjudicate its rights. It relates merely to “the manner and the means by which a right to recover . . . is enforced.”<sup>73</sup>

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(statement of William D. Mitchell, Chairman, Advisory Comm. on Rules for Civ. Proc.) (“When that rule was passed, I had the gravest doubt of its validity, and I was astounded when the Court passed it. I thought they would wipe it out.”); RULES, *supra* note 66, at 183, 183–84 (statement of William D. Mitchell) (“[T]he question arises whether this is a method of procedure or affects substantive rights.”); Paul D. Carrington, *Continuing Work on the Civil Rules: The Summons*, 63 NOTRE DAME L. REV. 733, 738 (1988) (asserting that Rule 4's expansion of territorial service was “a significant feature” whose validity under the Rules Enabling Act was “debatable”).

69 RULES, *supra* note 66, at 205–06 (statement of Charles E. Clark).

70 *Cf.* Carrington, *supra* note 68 (asserting that, today, such a rationale is generally accepted as permissible under the Rules Enabling Act).

71 326 U.S. 438, 444–45 (1946).

72 *Id.* at 439–40.

73 *Id.* at 445–46 (quoting *Guar. Tr. Co. v. York*, 326 U.S. 99, 109 (1945)).

*Murphree* coincided with a new conception, gradually developing since the early 1900s,<sup>74</sup> distinguishing between the scope of service and the scope of personal jurisdiction. Both proper service and personal jurisdiction were needed to exercise authority over the defendant, but the tests for proper service and the scope of personal jurisdiction were not necessarily the same. This new conception coincided with state efforts to authorize state-court service beyond state borders. By complying with both service authorization and personal-jurisdiction authorization, state courts could exercise personal jurisdiction over residents if properly served out of state<sup>75</sup> and over nonresidents properly served out of state if they had sufficient contacts with the forum state.<sup>76</sup> Notice remained an important component of service,<sup>77</sup> but the scope of a court's personal jurisdiction had foundation independent of effective service. Territorial limits of service, then, had little to do with the scope of a court's personal jurisdiction. However, because proper service was, as *Murphree* put it, "the procedure by which a court . . . asserts jurisdiction over the person of the party served,"<sup>78</sup> territorial limits on service had the effect of constraining the court's exercise of personal jurisdiction, even when the defendant was otherwise amenable to the court's jurisdiction.<sup>79</sup>

The scope of personal jurisdiction in state court became dominated by the Supreme Court's interpretation of the Due Process Clause of the Fourteenth Amendment, which demands a connection between the defendant, the claim, and the forum state itself,<sup>80</sup> and which requires a claim-by-claim, party-by-party application.<sup>81</sup> But the Court largely avoided developing personal-jurisdiction law under the Fifth Amendment's Due Process Clause, and Congress generally remained

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74 See, e.g., *Hess v. Pawloski*, 274 U.S. 352, 355 (1927); see also Edson R. Sunderland, *The Problem of Jurisdiction*, 4 TEX. L. REV. 429, 439, 442–43 (1926) (making the case that constitutional limits on personal jurisdiction should depend not upon formal rules but upon fairness and justice).

75 See *Milliken v. Meyer*, 311 U.S. 457, 462 (1940).

76 See *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

77 See *Woolley*, *supra* note 5, at 578–79.

78 326 U.S. at 444–45.

79 See *Sachs*, *supra* note 2, at 1713–14 ("The territorial limit on process functioned as a limit on personal jurisdiction. That wasn't because a federal court would lack authority to hear the cause, but because it couldn't issue a lawful command to the defendant to appear, which was a potential precondition to the *exercise* of its authority.").

80 See Scott Dodson, *Personal Jurisdiction, Comparativism, and Ford*, 51 STETSON L. REV. 187, 189–90 (2022).

81 See Scott Dodson, *Personal Jurisdiction and Aggregation*, 113 NW. U. L. REV. 1, 18, 21 (2018).

silent with respect to any subconstitutional restrictions on the scope of personal jurisdiction in federal court.

In the face of this uncertainty, some federal courts began interpreting Rule 4 to permit out-of-state service when such service was also permitted by state law.<sup>82</sup> After all, if a defendant was otherwise amenable to the federal court's and the state courts' personal jurisdiction, and Congress had made venue proper there, then as long as the service provided proper notice, what purpose could limiting the territorial reach of a federal court's service to state borders possibly fulfill?

In 1963, the Supreme Court adopted amendments to Rule 4 authorizing service "beyond the territorial limits of that state" when service was "made under the circumstances and in the manner prescribed" by state law.<sup>83</sup> The amendments were designed to authorize the out-of-state service that prior courts had interpreted the 1938 version of the rule to allow after the Supreme Court's expansion of state-court personal jurisdiction.<sup>84</sup> Even though Rule 4, for the first time, now authorized federal courts to exercise personal jurisdiction based on service made beyond state borders, lower courts interpreted the 1963 version of Rule 4 to be compatible with the Rules Enabling Act as regulating only service, not amenability to personal jurisdiction.<sup>85</sup>

In the early 1980s, some investors sued Omni Capital International, a New York corporation, in the Eastern District of Louisiana for fraud and misrepresentation under state and federal law.<sup>86</sup> Omni impleaded its British broker Rudolf Wolff & Co.<sup>87</sup> The broker moved to dismiss for lack of personal jurisdiction, arguing that personal jurisdiction could not be exercised because neither federal statute nor Rule 4 permitted service on Rudolf in the United Kingdom.<sup>88</sup> The lower

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82 See Benjamin Kaplan, *Amendments of the Federal Rules of Civil Procedure, 1961-1963* (I), 77 HARV. L. REV. 601, 620-21 (1964). Rule 4(d)(7) authorized service using the "manner prescribed by the law of the state in which the service is made" but did not speak to territorial limits. FED. R. CIV. P. 4(d)(7), 308 U.S. 666 (1938) (amended 1963).

83 FED. R. CIV. P. 4(f), (e), 374 U.S. 876 (1963) (amended 1966, 1980).

84 See FED. R. CIV. P. 4 advisory committee's note to 1963 amendment (stating that the rule was "amended to assure the effectiveness of service outside the territorial limits of the State in all the cases in which any of the rules authorize service beyond those boundaries"); *id.* ("Under amended subdivision (e) of this rule, an action may be commenced against a nonresident of the State in which the district court is held by complying with State procedures."); Carrington, *supra* note 68, at 739 (stating that the 1963 amendments were made to keep federal service parallel to state service after *International Shoe* effectively sanctioned state long-arm statutes).

85 See Whitten, *supra* note 62, at 107-08; *Arrowsmith v. United Press Int'l*, 320 F.2d 219, 226 (2d Cir. 1963).

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

87 *Id.*

88 *Id.* at 100.



courts agreed, and the investors sought review in the U.S. Supreme Court.<sup>89</sup> The Court affirmed.<sup>90</sup> It first reiterated the principle of *Murphy* that “[b]efore a federal court may exercise personal jurisdiction over a defendant, the procedural requirement of service of summons must be satisfied,”<sup>91</sup> and it noted that, ordinarily, courts look to Rule 4 “to determine whether a defendant is amenable to service, a prerequisite to its exercise of personal jurisdiction.”<sup>92</sup> The Court found no authorization under Rule 4 because neither Louisiana nor federal law allowed service on Rudolf in the United Kingdom.<sup>93</sup> Thus, even though Rudolf was arguably amenable to the personal jurisdiction of the federal courts under the Fifth Amendment because it violated a federal statute in the United States, the district court was unable to exercise that personal jurisdiction because no service was authorized to reach Rudolf. The Court noted “the consequences of the inability to serve process” under these circumstances and suggested that “[a] narrowly tailored service of process provision, authorizing service on an alien in a federal-question case when the alien is not amenable to service under the applicable state long-arm statute, might well serve the ends of . . . federal statutes.”<sup>94</sup> But “[t]hat responsibility,” the Court wrote, “rests with those who propose the Federal Rules of Civil Procedure and with Congress.”<sup>95</sup>

To the rule makers, *Omni* was an invitation to extend service under Rule 4 so that federal courts could exercise personal jurisdiction in such cases, and with that invitation came the belief that such a rule would be authorized under the Rules Enabling Act. The rule makers took up that invitation and carefully considered the effects of expanding service and its implications for personal jurisdiction. As the advisory committee’s reporter wrote:

It will doubtless occur to some minds to question whether a change in the rule resulting in nationwide service of process in federal question cases is a change properly made by rulemaking. . . . Insofar as the change affects only the mode of service, it would seem that the issue of rulemaking power has been resolved, but the

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89 *See id.* at 101–02.

90 *Id.* at 111.

91 *Id.* at 104; *see also id.* (“[B]efore a court may exercise personal jurisdiction over a defendant, there must be more than notice to the defendant and a constitutionally sufficient relationship between the defendant and the forum. There also must be a basis for the defendant’s amenability to service of summons. Absent consent, this means there must be authorization for service of summons on the defendant.”).

92 *Id.* at 105.

93 *See id.* at 107–11.

94 *Id.* at 111.

95 *Id.*

question may remain open insofar as the issue is the effect of a revised rule on the amenability of a defendant to the territorial jurisdiction of a distant federal forum. It is imaginable that a rule amendment would be held valid to alter the mode of service of the summons and complaint, but not effective to alter the principles governing the amenability of a defendant to the territorial jurisdiction of the federal court. Such a holding would leave the courts to solve the issue of amenability by the means of the federal common law, as informed by federal legislative history, state law analogues, and constitutional considerations . . . .

. . . .

. . . To the extent that Rule 4 governs only the ceremony or the manner of service, there is little need for conformity even when state law provides the basis of the claim . . . , provided that it is made clear that a claim not arising under federal law shall be dismissed for want of jurisdiction over the person or property of the defendant if it would have been dismissed for that reason in the local state court.<sup>96</sup>

The advisory committee opted to approve a revised rule along with a “special note” calling Congress’s and the Court’s attention to the rule.<sup>97</sup> As proposed and ultimately approved in 1993, with subsequent restyling, Rule 4 today states:

(k) TERRITORIAL LIMITS OF EFFECTIVE SERVICE.

(1) *In General.* Serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant:

(A) who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located;

(B) who is a party joined under Rule 14 or 19 and is served within a judicial district of the United States and not more than 100 miles from where the summons was issued; or

(C) when authorized by a federal statute.

(2) *Federal Claim Outside State-Court Jurisdiction.* For a claim that arises under federal law, serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant if:

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<sup>96</sup> Carrington, *supra* note 68, at 744, 746.

<sup>97</sup> FED. R. CIV. P. 4 advisory committee’s note to 1993 amendment (“SPECIAL NOTE: Mindful of the constraints of the Rules Enabling Act, the Committee calls the attention of the Supreme Court and Congress to new subdivision (k)(2).”).

(A) the defendant is not subject to jurisdiction in any state's courts of general jurisdiction; and

(B) exercising jurisdiction is consistent with the United States Constitution and laws.<sup>98</sup>

Rule 4(k)(2) was designed to correct the problem that arose in *Omni*,<sup>99</sup> but the advisory committee included new language in both (k)(2) and (k)(1) that serving a summons “establishes personal jurisdiction” under the stated conditions of the subsections. The advisory committee nevertheless asserted that Rule 4(k)(1) “retains the substance of the former rule in explicitly authorizing the exercise of personal jurisdiction over persons who can be reached under state long-arm law.”<sup>100</sup> The advisory committee also noted that Rule 4 applies only to service of summons, not to other service covered by other rules like Rule 5.<sup>101</sup>

## II. INTERPRETATIONS OF RULE 4 AS REGULATING PERSONAL JURISDICTION

Rule 4's long history has always tied the rule to service of process, but because the 1993 amendments altered Rule 4(k)'s terms to expressly state that service of a summons “establishes personal jurisdiction,” some prominent commentators recently have read Rule 4(k) as directly regulating amenability to personal jurisdiction. For example, Patrick Woolley contends that Rule 4(k), by regulating the effectiveness of service to establish personal jurisdiction, is really “a disguised regulation of amenability.”<sup>102</sup> And Leslie Kelleher goes further

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98 FED. R. CIV. P. 4(k).

99 See FED. R. CIV. P. 4(k) advisory committee's note to 1993 amendment (stating that Rule 4(k)(2) “responds to the suggestion of the Supreme Court made in *Omni*”); David D. Siegel, *The New (Dec. 1, 1993) Rule 4 of the Federal Rules of Civil Procedure: Changes in Summons Service and Personal Jurisdiction*, 152 F.R.D. 249, 252 (1994) (stating that Rule 4(k)(2) “in effect adopts by rule what [*Omni*] refused to do through the common law”).

100 FED. R. CIV. P. 4(k) advisory committee's note to 1993 amendment; see also FED. R. CIV. P. 4 advisory committee's note to 1993 amendment (“The present territorial limits on the effectiveness of service to subject a defendant to the jurisdiction of the court over the defendant's person are retained for all actions in which there is a state in which personal jurisdiction can be asserted consistently with state law and the Fourteenth Amendment.”).

101 FED. R. CIV. P. 4 advisory committee's note to 1993 amendment (“Prior to this revision, Rule 4 was entitled ‘Process’ and applied to the service of not only the summons but also other process as well, although these are not covered by the revised rule. Service of . . . papers such as orders, motions, notices, pleadings, and other documents is governed by Rule 5. The revised rule is entitled ‘Summons’ and applies only to that form of legal process.”).

102 Woolley, *supra* note 5.

to argue that Rule 4(k) “explicitly purports to govern amenability to jurisdiction.”<sup>103</sup>

Benjamin Spencer goes furthest to argue that “Rule 4(k) supplies the applicable rule of personal jurisdiction in all cases in federal district court.”<sup>104</sup> In Professor Spencer’s view, Rule 4(k) operates as a limitation on personal jurisdiction even with respect to claims—such as those asserted in amended complaints or by way of intervention—that are not served under Rule 4.<sup>105</sup> He reasons that a contrary reading of Rule 4(k) that limits its jurisdictional effects to service of the summons alone “would provide a gaping loophole to the ordinary territorial restrictions on federal court jurisdiction that Rule 4(k) imposes” by allowing plaintiffs to “evade the restrictions applicable to claims contained within complaints” by asserting those claims postsummons in an amended complaint.<sup>106</sup> “It thus cannot be gainsaid that the territorial reach of federal courts over claims added to the action after the initial service of the summons is defined by Rule 4(k), even though none of those claims are served on defendants under Rule 4.”<sup>107</sup>

Professor Spencer’s view has taken hold among some federal courts, particularly those considering the personal-jurisdiction implications of opt-in notices filed in actions under the FLSA. That statute provides that an FLSA civil action may be maintained by an employee plaintiff “for and in behalf of himself or themselves and other employees similarly situated.”<sup>108</sup> These so-called “collective actions” are representative actions similar to class actions but with important differences, including the statutory requirement that collective-action members must opt into the action: “No employee shall be a party

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103 Kelleher, *supra* note 3, at 1192. Professor Spencer agrees. See Spencer, *supra* note 9, at 983–84 (“Rule 4(k) . . . is undoubtedly a rule of jurisdiction—rather than a rule of procedure—as it identifies the circumstances under which service of process ‘establishes personal jurisdiction over a defendant.’” (quoting FED. R. CIV. P. 4(k)(1), (2))).

104 Spencer, *supra* note 8, at 40 n.30; see also Spencer, *supra* note 9 (asserting that Rule 4 “declare[s] that federal district courts may not exercise territorial jurisdiction beyond the reach of the state courts where they are geographically located”).

105 See Spencer, *supra* note 6 (“[T]he jurisdictional constraints imposed on federal courts by Rule 4(k)(1)(A) are regularly operative outside of the Rule 4 service of process context when amended claims adding new parties and the claims of intervenors and co-parties are lodged and served under Rule 5, not Rule 4.”); Spencer, *supra* note 8, at 43 (“There is no question that . . . new claims appearing in amended complaints must satisfy the jurisdictional constraints imposed by Rule 4(k) . . .”).

106 Spencer, *supra* note 8, at 43.

107 *Id.* at 44. The same argument appears to be advanced in Recent Case, *supra* note 5, 990–91.

108 29 U.S.C. § 216(b) (2018).

plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.”<sup>109</sup> Those consents must be filed with the court but are served on the defendant under Rule 5, not Rule 4.<sup>110</sup> What are the implications for personal jurisdiction if the court has personal jurisdiction over the defendant with respect to the original plaintiff’s individual claims but not with respect to opt-in claimants’ claims?

Three federal circuit courts have held that Rule 4(k) limits personal jurisdiction with respect to the opt-in claimants’ claims. The leading case is *Canaday v. Anthem Cos.*, in which a Tennessee employee filed a collective action against her employer, Anthem, in a Tennessee federal court.<sup>111</sup> Anthem, a foreign corporation with its headquarters in Indiana, was subject to specific personal jurisdiction with respect to the plaintiff’s individual claim because the plaintiff’s claims arose in Tennessee, and so when the employee served Anthem with the summons and complaint under Rule 4(k)(1), that service ostensibly established the Tennessee federal district court’s personal jurisdiction over Anthem.<sup>112</sup> Anthem did not file a pre-answer motion to dismiss but instead filed an answer, which did not mention personal jurisdiction.<sup>113</sup>

After the complaint was served and answered, other similarly situated employees began to file written opt-in consents with the court.<sup>114</sup> Those consents were served on Anthem under Rule 5.<sup>115</sup> Some of those employees lived and worked in states other than Tennessee, so Anthem amended its answer to assert a defense based on the court’s lack of personal jurisdiction over it as to non-Tennessee claimants,<sup>116</sup> and Anthem then moved to dismiss the non-Tennessee claims from the collective action.<sup>117</sup> The district court granted the motion, and the employee appealed.<sup>118</sup>

The Sixth Circuit agreed with Anthem. It began by expressly interpreting Rule 4(k) as constraining amenability to personal

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109 *Id.*

110 *See Canaday v. Anthem Cos.*, 9 F.4th 392, 399–400 (6th Cir. 2021), *cert. denied*, 142 S. Ct. 2777 (2022).

111 *Id.* at 394.

112 *See id.* at 395.

113 *See* Defendant’s Answer & Defs. to Collective Action Complaint, *Canaday v. Anthem Cos.*, 439 F. Supp. 3d 1042 (W.D. Tenn. 2020) (No. 19-cv-01084).

114 *Canaday*, 9 F.4th at 399–400.

115 *Id.*

116 Defendant’s Amended Answer & Defs. to Collective Action Complaint at 13, *Canaday*, 439 F. Supp. 3d 1042 (No. 19-cv-01084).

117 *Canaday*, 9 F.4th at 395.

118 *Id.*

jurisdiction: “Any suggestion that Civil Rule 4(k) does not implicate jurisdiction . . . is belied by the rule’s reference to ‘personal jurisdiction.’”<sup>119</sup> Even though the non-Tennessee claims were asserted via notices filed postsummons and served under Rule 5, “that reality,” according to the court, “does not eliminate Civil Rule 4(k)’s requirement that the defendant be amenable to the territorial reach of that district court for that claim. . . . Even with amended complaints and opt-in notices, the district court remains constrained by Civil Rule 4(k)’s—and the host State’s—personal jurisdictional limitations.”<sup>120</sup> Channeling Professor Spencer, the court held: “The federal court’s authority to assert personal jurisdiction over the defendant with respect to the non-resident plaintiffs’ claims remains constrained by Civil Rule 4(k) (1) (A)’s territorial limitations.”<sup>121</sup> Otherwise, reasoned the court, “Civil Rule 4(k)’s territorial constraints would come to naught. These core limitations on judicial power would be one amended complaint—with potentially new claims and new plaintiffs—away from obsolescence. That is not how it works.”<sup>122</sup>

Two other circuit courts have held similarly. In *Fischer v. Federal Express Corp.*,<sup>123</sup> the Third Circuit asserted that “Rule 4(k) (1) (A) is the traditional source of personal jurisdiction in federal courts”<sup>124</sup> and held that a district court lacked personal jurisdiction under Rule 4(k) over an employer with respect to nonresident claimants opting into a collective action.<sup>125</sup> The Eighth Circuit held likewise in *Vallone v. CJS Solutions Group, LLC*, though without focused attention on Rule 4.<sup>126</sup> One circuit, the First Circuit, has held to the contrary in a collective-action case, rejecting the argument “that Rule 4(k) (1) operates as a

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119 *Id.* at 399.

120 *Id.* at 400 (citing *Tamburo v. Dworkin*, 601 F.3d 693, 700–01 (7th Cir. 2010)).

121 *Id.*

122 *Id.*

123 42 F.4th 366 (3d Cir. 2022), *cert. denied*, 143 S. Ct. 1001 (2023).

124 *Id.* at 382.

125 *Id.* at 380 (“Under Fed. R. Civ. P. 4(k) (1) (A), we first ask whether Pennsylvania’s service of process rules permit the exercise of personal jurisdiction with respect to opt-in plaintiffs’ claims. Here, because the out-of-state plaintiffs’ claims do not arise out of or relate to FedEx’s minimum contacts with Pennsylvania, the District Court did not have personal jurisdiction under Rule 4(k) (1) (A) broad enough to reach those claims.”); *see also id.* at 387 n.10 (“[W]e think joinder rules are still governed by the background service of process rules in Rule 4(k) (1) (A) and (1) (B).”).

126 *See* 9 F.4th 861, 865–66 (8th Cir. 2021). The court perfunctorily reasoned that state personal-jurisdiction restrictions apply to the opt-in claimants under Rule 4(k) (1). *See id.* at 865.

free-standing limitation on the exercise of personal jurisdiction in collective actions.”<sup>127</sup> The district courts are split on this issue.<sup>128</sup>

The FLSA context is analogous to class actions. Professor Spencer’s reading on Rule 4(k) has led him to conclude that, in a certified class action, Rule 4(k) constrains the scope of personal jurisdiction over the defendant with respect to every class member.<sup>129</sup> Other commentators agree.<sup>130</sup> According to a recent analysis, this argument “has arisen in more than sixty class action cases across the country and . . . has been accepted by numerous judges,”<sup>131</sup> including by Judge Silberman on the D.C. Circuit, who has written, in a class-action case: “[T]he

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127 *Waters v. Day & Zimmerman NPS, Inc.*, 23 F.4th 84, 93 (1st Cir. 2022), *cert. denied*, 142 S. Ct. 2777 (2022).

128 For district courts applying state-based limits on personal jurisdiction to collective-action claims, see *Bone v. XTO Energy, Inc.*, 561 F. Supp. 3d 1132, 1138 (D.N.M. 2021); *Parker v. IAS Logistics DFW, LLC*, No. 20 C 5103, 2021 WL 4125106, at \*3 (N.D. Ill. Sept. 9, 2021); *Martinez v. Tyson Foods, Inc.*, 533 F. Supp. 3d 386, 392 (N.D. Tex. 2021); *McNutt v. Swift Transp. Co. of Ariz., LLC*, No. C18-5668, 2020 WL 3819239, at \*8 (W.D. Wash. July 7, 2020); *Vallone v. CJS Sols. Grp., LLC*, 437 F. Supp. 3d 687, 691 (D. Minn. 2020), *aff’d*, 9 F.4th 861 (8th Cir. 2021); *Pettenato v. Beacon Health Options, Inc.*, 425 F. Supp. 3d 264, 270 (S.D.N.Y. 2019); *Turner v. Utiliquist, LLC*, No. 18-cv-00294, 2019 WL 7461197, at \*3 (M.D. Tenn. July 16, 2019); *Rafferty v. Denny’s, Inc.*, No. 18-cv-2409, 2019 WL 2924998, at \*7 (N.D. Ohio July 8, 2019); *Hickman v. TL Transp., LLC*, 317 F. Supp. 3d 890, 899 (E.D. Pa. 2018). For the opposite, see *Aiuto v. Publix Super Mkts., Inc.*, No. 19-CV-04803, 2020 WL 2039946, at \*4–5 (N.D. Ga. Apr. 9, 2020), *motion to certify appeal denied*, No. 19-CV-04803, 2020 WL 10054617 (N.D. Ga. May 14, 2020); *Warren v. MBI Energy Servs., Inc.*, No. 19-cv-00800, 2020 WL 937420, at \*5–7 (D. Colo. Feb. 25, 2020), *report and recommendation adopted in part*, No. 19-cv-00800, 2020 WL 5640617 (D. Colo. Sept. 22, 2020); *O’Quinn v. TransCanada USA Servs., Inc.*, 469 F. Supp. 3d 591, 614 (S.D.W. Va. 2020); *Hunt v. Interactive Med. Specialists, Inc.*, No. 19CV13, 2019 WL 6528594, at \*3 (N.D.W. Va. Dec. 4, 2019); *Mason v. Lumber Liquidators, Inc.*, No. 17-CV-4780, 2019 WL 2088609, at \*5–6 (E.D.N.Y. May 13, 2019), *aff’d*, No. 17-CV-4780, 2019 WL 3940846 (E.D.N.Y. Aug. 19, 2019); *Gibbs v. MLK Express Servs., LLC*, No. 18-cv-434-FtM-38, 2019 WL 1980123, at \*16 (M.D. Fla. Mar. 28, 2019), *report and recommendation adopted in part, denied in part*, No. 18-cv-434-FtM-38, 2019 WL 2635746 (M.D. Fla. June 27, 2019); *Seiffert v. Qwest Corp.*, No. CV-18-70-GF, 2018 WL 6590836, at \*1 (D. Mont. Dec. 14, 2018), *motion to certify appeal denied*, No. CV-18-70-GF, 2019 WL 859045 (D. Mont. Feb. 22, 2019); *Garcia v. Peterson*, 319 F. Supp. 3d 863, 879–80 (S.D. Tex. 2018); *Thomas v. Kellogg Co.*, No. C13-5136, 2017 WL 5256634, at \*1 (W.D. Wash. Oct. 17, 2017).

129 See Spencer, *supra* note 8, at 42 (arguing that Rule 4(k) applies to unnamed class-member claims upon certification of the class).

130 See Nash, *supra* note 6 (“[C]ourts must consider the propriety of personal jurisdiction as to each unnamed plaintiff’s class member’s claim against a defendant. State courts—my focus here—must do so as a matter of constitutional law, and federal courts must do so because they are in general—and certainly with respect to claims brought under state law—obligated under common understandings of current subconstitutional law to exert no greater personal jurisdictional authority than the courts of the state in which they sit.”).

131 Daniel Wilf-Townsend, *Class Action Boundaries*, 90 FORDHAM L. REV. 1611, 1613 (2022).

territorial limitations on amenability to service (and therefore personal jurisdiction) set out in [Rule 4(k)] remain operative throughout the proceedings”; otherwise, “litigants could easily sidestep the territorial limits on personal jurisdiction simply by adding claims—or by adding plaintiffs, for that matter—after complying with Rule 4(k) (1) (A) in their first filing.”<sup>132</sup> Other courts and commentators disagree, though they typically disagree on grounds that the class action is unique regarding questions of personal jurisdiction, rather than disagreeing with the general meaning and applicability of Rule 4(k).<sup>133</sup> The U.S. Supreme Court has not resolved the question,<sup>134</sup> but the trend appears to be toward interpreting Rule 4(k) as a direct limit on personal jurisdiction that applies to every claim asserted in federal court, even those not served with a summons under Rule 4.

### III. RULE 4, PERSONAL JURISDICTION, AND THE RULES ENABLING ACT

I argue against the tide. My principal thesis is that Rule 4(k) is confined to service of process. It therefore has no applicability to non-summons claims and does not directly regulate personal jurisdiction. Regulation of the scope of personal jurisdiction in federal court, including any regulation of amenability, must exist, if at all, elsewhere. I defend that thesis by relying on the text and history of Rule 4(k) and by taking into consideration the limits of the Rules Enabling Act. I then rebut the major counterargument to my thesis: that limiting Rule 4(k) to service creates a loophole for gaming personal jurisdiction.

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132 See *Molock v. Whole Foods Mkt. Grp., Inc.*, 952 F.3d 293, 309 (D.C. Cir. 2020) (Silberman, J., dissenting).

133 See David Marcus & Will Ostrander, *Class Actions, Jurisdiction, and Principle in Doctrinal Design*, 2019 BYU L. REV. 1511, 1520–31 (relying on class-action exceptionalism); Adam N. Steinman, *Beyond Bristol-Myers: Personal Jurisdiction over Class Actions*, 97 N.Y.U. L. REV. 1215, 1220 (2022) (arguing that named-plaintiff jurisdiction, plus Rule 23 class certification, is enough to extend personal jurisdiction over all class claims in a federal-court class action); Wilf-Townsend, *supra* note 131, at 1616 (relying on “historical and doctrinal support for treating representative litigation as meaningfully different from traditional litigation when it comes to questions of courts’ power and litigants’ rights”); *cf.* *Mussat v. IQVIA, Inc.*, 953 F.3d 441, 445 (7th Cir. 2020) (“Once certified, the class as a whole is the litigating entity, and its affiliation with a forum depends only on the named plaintiffs.” (citing *Payton v. Cnty. of Kane*, 308 F.3d 673, 680–81 (7th Cir. 2002))); Daniel Wilf-Townsend, *Did Bristol-Myers Squibb Kill the Nationwide Class Action?*, 129 YALE L.J. F. 205, 207, 229–33 (2019) (cataloging cases refusing to apply Rule 4(k) to individual class members).

134 See *Bristol-Myers Squibb Co. v. Superior Ct.*, 137 S. Ct. 1773, 1783–84 (2017); *id.* at 1789 n.4 (Sotomayor, J., dissenting) (noting “the question whether [the *BMS*] opinion . . . also appl[ies] to a class action in which a plaintiff injured in the forum [s]tate seeks to represent a nationwide class of plaintiffs, not all of whom were injured there”).



### A. Rule 4(k)'s Connection to Service of Process

The text of current Rule 4(k) supports a summons-linked regulation. The title is “Territorial Limits of Effective Service,” and the operative limits in the rule apply to “[s]erving a summons.”<sup>135</sup> Because the text expressly ties the rule to service of the summons, there is no basis in the text for reading the rule to limit personal jurisdiction beyond service of the summons. As the First Circuit recently noted, the text “nowhere suggests that Rule 4 deals with anything other than service of a summons, or that Rule 4 constrains a federal court’s power to act once a summons has been properly served, and personal jurisdiction has been established.”<sup>136</sup> The Fifth Circuit, in a different case, got it right: “Notwithstanding the amendments [in 1993], Rule 4(k) is still just a procedural rule about issuing summonses.”<sup>137</sup>

The rule’s text does set the conditions under which service of the summons “establishes personal jurisdiction over a defendant.”<sup>138</sup> But this language is *not* a regulation of the scope of a district court’s personal jurisdiction. The scope of a court’s personal jurisdiction is set by law external to the rules. Rule 4(k), by contrast, is a regulation of when service is effective. It is true—as it always has been—that effective service is a procedural precondition to the court’s exercise of personal jurisdiction,<sup>139</sup> and so conditions on the effectiveness of service may prevent the court from exercising personal jurisdiction. But a precondition to jurisdiction need not itself be jurisdictional.<sup>140</sup> There is an important difference between regulating the scope of service and directly regulating the scope of personal jurisdiction.<sup>141</sup> Rule 4 merely

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135 FED. R. CIV. P. 4(k).

136 *Waters v. Day & Zimmerman NPS, Inc.*, 23 F.4th 84, 93–94 (1st Cir. 2022), *cert. denied*, 142 S. Ct. 2777 (2022).

137 *Douglass v. Nippon Yusen Kabushiki Kaisha*, 46 F.4d 226, 234 (5th Cir. 2022) (en banc), *cert. denied*, 143 S. Ct. 1021 (2023).

138 FED. R. CIV. P. 4(k).

139 *See* *Omni Cap. Int’l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 104 (1987) (“Before a federal court may exercise personal jurisdiction over a defendant, the procedural requirement of service of summons must be satisfied.”); *Miss. Pub’g Corp. v. Murphree*, 326 U.S. 438, 444–45 (1946) (“Rule 4(f) serves only to . . . provid[e] a procedure by which the defendant may be brought into court at the place where . . . the suit may be maintained.”); 4 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & ADAM N. STEINMAN, *FEDERAL PRACTICE & PROCEDURE* § 1063 (4th ed. 2015) (“The primary function of Rule 4 is to . . . provide a ritual that marks the court’s assertion of jurisdiction over the lawsuit. Normally this is accomplished by service of a summons and complaint on the defendant . . . .” (footnote omitted)).

140 *See* Scott Dodson, *Hybridizing Jurisdiction*, 99 CALIF. L. REV. 1439, 1464–66 (2011).

141 *Cf.* Sachs, *supra* note 2, at 1748 (“[R]egulations of procedure can have jurisdictional consequences without themselves enlarging a court’s jurisdiction.”); Woolley, *supra* note 5, at

sets the means and conditions for bringing a defendant before a court that already has personal jurisdiction over the defendant. Under some of those conditions, service won't be effective, and so the court won't ultimately be able to exercise the personal jurisdiction that it otherwise could.<sup>142</sup> But those regulations of effective service don't alter the preexisting scope of personal jurisdiction.

That is the only way to read Rule 4 in harmony with itself. Both service of the summons and waiver of service “establish[] personal jurisdiction” under Rule 4(k). But the waiver-of-service rule states that “[w]aiving service of a summons does not waive any objection to personal jurisdiction or to venue.”<sup>143</sup> If waiving service establishes amenability to personal jurisdiction under Rule 4(k), then there would be no objection to personal jurisdiction in need of preserving under Rule 4(d)(5). The way to harmonize these provisions is to interpret Rule 4(k) as providing that waiver of service doesn't alter the scope of amenability to personal jurisdiction but rather establishes the personal jurisdiction to which the defendant was already amenable.

It is true that Rule 4(k)(1)(A) incorporates state-court personal-jurisdiction amenability rules to set the conditions of effective service in federal court. The scope of amenability to personal jurisdiction of a state court is set by laws external to Rule 4—namely, the Fourteenth Amendment and state law—that are not directly applicable to federal courts. Congress could set the scope of a federal court's personal jurisdiction to mirror the scope of a state court's personal jurisdiction, and perhaps Congress has done so by statute elsewhere.<sup>144</sup> But that isn't what Rule 4(k)(1)(A) does. Instead, as Rule 4 incorporates state-court personal-jurisdiction limits, it converts them, for federal-court purposes, from rules of personal jurisdiction applicable in state court to rules of effective service applicable in federal court. Rule 4 uses state-court personal jurisdiction as a touchstone for the scope of federal service but leaves the scope of federal-court personal jurisdiction untouched. Rule 4 sets the scope of *service*, not personal jurisdiction.

Historically, that's the way the Supreme Court and the rule makers have always understood Rule 4. The 1930s advisory committee recognized that expanding service to state borders had the incidental effect of expanding federal courts' *ability to exercise* personal

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595 (“[W]hether the law authorizes service of summons on a person is distinct from whether a person is amenable to *jurisdiction*.”).

142 See *Omni Cap.*, 484 U.S. at 111 (noting “the consequences of the inability to serve process,” namely, the inability to exercise personal jurisdiction even when the defendant is amenable to it).

143 FED. R. CIV. P. 4(d)(5).

144 See *infra* Section III.C.

jurisdiction, but they also recognized that Rule 4 did not affect the *scope* of that federal-court personal jurisdiction.<sup>145</sup> Rather, the rule “simply says that in cases where the district court already has jurisdiction and venue its process may reach as far as the confines of that state itself.”<sup>146</sup> The Supreme Court likewise interpreted Rule 4 to “provid[e] a procedure by which the defendant may be brought into court at the place where Congress has declared that the suit may be maintained.”<sup>147</sup>

In 1963, when Rule 4 was again expanded to allow out-of-state service in compliance with state service limits, commentators and courts continued to construe Rule 4 as regulating only service, not personal jurisdiction.<sup>148</sup> The Court, in *Omni*, confirmed this reading by characterizing territorial limits on service of process as procedural limits that could prevent a federal court from establishing personal jurisdiction over a defendant otherwise amenable to it.<sup>149</sup>

The 1993 amendments didn’t alter this relationship between service of process and personal jurisdiction. The reporter of the advisory committee had previously observed that a rule could “alter the mode of service of the summons and complaint” without “alter[ing] the principles governing the amenability of a defendant to the territorial jurisdiction of the federal court,” and he proposed that “Rule 4 governs only the ceremony or the manner of service.”<sup>150</sup> When the amendments were adopted, the advisory committee asserted that, despite the change in language, Rule 4(k)(1) “retains the substance of the former rule.”<sup>151</sup> Yes, the 1993 amendments changed the language of the rule to provide that effective service “establishes” personal jurisdiction. But service has always been a precondition that establishes the court’s jurisdiction; saying so expressly was no different from how it had always worked previously.<sup>152</sup>

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145 See FED. R. CIV. P. 4(f) advisory committee’s note to 1937 amendment (“This Rule enlarges to some extent the present rule as to where service may be made. It does not, however, enlarge the jurisdiction of the district courts.”).

146 RULES, *supra* note 66, at 206 (statement of Charles E. Clark).

147 *Miss. Publ’g Corp. v. Murphree*, 326 U.S. 438, 445, 444–45 (1946).

148 See Whitten, *supra* note 62, at 107–08; *Arrowsmith v. United Press Int’l*, 320 F.2d 219, 226 (2d Cir. 1963); see also Kelleher, *supra* note 3, at 1210 (interpreting Rule 4(e) as incorporating only state statutory restrictions rather than Fourteenth Amendment limits of personal jurisdiction).

149 See *Omni Cap. Int’l, Ltd., v. Rudolf Wolff & Co.*, 484 U.S. 97, 104–05 (1987) (reaffirming *Murphree* and distinguishing between “whether a defendant is amenable to service” and the scope of a court’s personal jurisdiction).

150 Carrington, *supra* note 68, at 744, 746.

151 FED. R. CIV. P. 4(k) advisory committee’s note to 1993 amendment.

152 See Sachs, *supra* note 2, at 1765–66.

The text and history of Rule 4 thus show that Rule 4 is restricted to service of the summons and does not affect the scope of federal-court personal jurisdiction. Were ambiguity to remain, the limits of the Rules Enabling Act would resolve the ambiguity in favor of my reading. The Rules Enabling Act, as amended, is a delegation of authority from Congress to the Supreme Court to promulgate “general rules of practice and procedure and rules of evidence.”<sup>153</sup> Rules purporting to directly regulate personal jurisdiction would exceed this authorization.<sup>154</sup> Regulating amenability to personal jurisdiction is not procedural because personal jurisdiction regulates not the process of claim assertion and adjudication<sup>155</sup> but rather whether the court has authority in the first place.<sup>156</sup> That’s been the consistent understanding of the Act since its passage,<sup>157</sup> and the Supreme Court has consistently interpreted jurisdiction to be outside the general delegation of the Rules Enabling Act.<sup>158</sup> Where Congress intended to

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153 28 U.S.C. § 2072(a) (2018).

154 See Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1078–79 (1982); Woolley, *supra* note 5, at 567 (arguing that the Rules Enabling Act doesn’t permit regulation of amenability).

155 Woolley, *supra* note 5, at 568.

156 *Id.* at 603; see also Spencer, *supra* note 5, at 667, 667–68 (“[J]urisdictional rules do not to [sic] bear on the manner in which a court resolves a matter, but instead concern whether that court has cognizance of the matter in the first place. Jurisdictional rules thus differ from procedural rules . . . .”); Spencer, *supra* note 9, at 983 (distinguishing between “internal case-processing rules” that are properly regarded as procedural and “rules governing where a case is to be decided (rules of jurisdiction and venue)”).

157 Woolley, *supra* note 5, at 567. Similarly, the Process Acts, which implicitly allow the Court to craft rules regarding the “forms and modes of proceedings,” Act of Sept. 29, 1789, ch. 21, § 2, 1 Stat. 93, 93; Act of May 8, 1792, ch. 36, § 2, 1 Stat. 275, 276, were never interpreted to authorize rulemaking for regulating personal jurisdiction directly, see Whitten, *supra* note 62, at 87.

158 See, e.g., *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 370 (1978) (“[I]t is axiomatic that the Federal Rules of Civil Procedure do not create or withdraw federal jurisdiction.”); *Snyder v. Harris*, 394 U.S. 332, 337–38 (1969) (“[T]he rule-making authority [is] limited by ‘the inability of a court, by rule, to extend or restrict the jurisdiction conferred by a statute.’” (quoting *Sibbach v. Wilson & Co.*, 312 U.S. 1, 10 (1941))); cf. *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004) (“Clarity would be facilitated if courts and litigants used the label ‘jurisdictional’ not for claim-processing rules, but only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court’s adjudicatory authority.”). For cases predating the Act expressing the sentiment that rules of court cannot alter the scope of jurisdiction, see *Wash.-S. Navigation Co. v. Balt. & Phila. Steamboat Co.*, 263 U.S. 629, 635 (1924) (“[N]o rule of court can enlarge or restrict jurisdiction.”); *Venner v. Great N. Ry. Co.*, 209 U.S. 24, 35 (1908) (“The jurisdiction of the Circuit Court is prescribed by laws enacted by Congress in pursuance of the Constitution and this court by its rules has no power to increase or diminish the jurisdiction thus created, though it may regulate its exercise in any manner not inconsistent with the laws of the United States.”); *Hudson v. Parker*, 156 U.S. 277, 284 (1895) (“This

delegate rulemaking authority over jurisdictional matters, it has crafted such delegations specifically, such as when it amended the Rules Enabling Act to permit rulemaking to “define when a ruling of a district court is final for the purposes of appeal.”<sup>159</sup> Congress has granted no similar kind of specific authorization for personal jurisdiction. For these reasons, I agree with others who have argued convincingly that a federal rule directly regulating the scope of personal jurisdiction would be invalid under the Rules Enabling Act.<sup>160</sup>

The Supreme Court has consistently interpreted federal rules in ways that would avoid rendering them invalid under the Rules Enabling Act. In *Ortiz v. Fibreboard Corp.*,<sup>161</sup> the Court considered whether Rule 23(b)(1) allowed certification of a class action under a limited-fund theory.<sup>162</sup> “The Rules Enabling Act underscores the need for caution,”<sup>163</sup> wrote the Court. Any tension between a lenient interpretation of Rule 23 and the Rules Enabling Act “is best kept within tolerable limits” by reading Rule 23(b)(1) narrowly.<sup>164</sup> Accordingly, the Court adopted a “limiting construction” of Rule 23 to “minimize[] potential conflict with the Rules Enabling Act.”<sup>165</sup> Likewise, in *Semtek International Inc. v. Lockheed Martin Corp.*,<sup>166</sup> the Court considered whether Rule 41(b) regulated the preclusive effect of a federal judgment, which the Court determined “would arguably violate the . . . Rules Enabling Act.”<sup>167</sup> The Court therefore applied the practice of *Ortiz* and adopted “a more reasonable interpretation” of Rule 41(b) as operating only to

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court cannot, indeed, by rule, enlarge or restrict its own inherent jurisdiction and powers, or those of the other courts of the United States, or of a justice or judge of either, under the constitution and laws of the United States.”).

159 28 U.S.C. § 2072(c) (2018); *see also id.* § 1292(e) (“The Supreme Court may prescribe rules, in accordance with [the Rules Enabling Act], to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for [by statute].”). The Supreme Court has confirmed this delegation. *See Swint v. Chambers Cnty. Comm’n*, 514 U.S. 35, 48 (1995) (“Congress thus has empowered this Court to clarify when a decision qualifies as ‘final’ for appellate review purposes, and to expand the list of orders appealable on an interlocutory basis.”).

160 *See, e.g.*, Stephen B. Burbank, *The World in Our Courts*, 89 MICH. L. REV. 1456, 1484 n.164 (1991); Paul D. Carrington & Derek P. Apanovitch, *The Constitutional Limits of Judicial Rulemaking: The Illegitimacy of Mass-Tort Settlements Negotiated Under Federal Rule 23*, 39 ARIZ. L. REV. 461, 485–86 (1997); Spencer, *supra* note 5, at 667–68; Spencer, *supra* note 9, at 982–84; Woolley, *supra* note 5, at 595–96.

161 527 U.S. 815 (1999).

162 *Id.* at 821.

163 *Id.* at 845.

164 *Id.*

165 *Id.* at 842.

166 531 U.S. 497 (2001).

167 *Id.* at 503.

bar relitigation in the same court.<sup>168</sup> Under the Court’s approach in these cases,<sup>169</sup> Rule 4(k) should be interpreted to avoid violating the Rules Enabling Act, i.e., interpreting it to not regulate the scope of personal jurisdiction.

The text, history, and limits of the Rules Enabling Act thus demonstrate that Rule 4(k) is restricted to service of process and does not regulate the scope of personal jurisdiction. It therefore has no bearing on the scope of personal jurisdiction applicable to claims unconnected to service of process, as the Sixth Circuit and other courts have supposed.<sup>170</sup> It even has no bearing on the scope of personal jurisdiction applicable to claims *connected* to service of process, as some commentators argue;<sup>171</sup> all Rule 4(k) does is to set the conditions under which a court can lawfully summon a defendant. That may have the effect of preventing a court from exercising the personal jurisdiction it otherwise has, but it doesn’t change the scope of that personal jurisdiction. Questions regarding the scope of the court’s personal jurisdiction over the defendant must be answered elsewhere.

### B. *Validity Under the Rules Enabling Act*

Even though Rule 4(k) doesn’t regulate the scope of personal jurisdiction, it does regulate when service is effective to allow a federal court to exercise that personal jurisdiction. As stated above, the Rules Enabling Act’s delegation of rulemaking authority is limited to “general rules of practice and procedure and rules of evidence”; in addition, the “rules shall not abridge, enlarge or modify any substantive right.”<sup>172</sup> In this Section, I argue that Rule 4(k)’s regulation of

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168 *Id.* at 505.

169 The Court has approved this approach in other cases. See *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 405–06 (2010) (Scalia, J.) (plurality opinion) (“If the Rule were susceptible of two meanings—one that would violate [the Rules Enabling Act] and another that would not—we would agree” with the approach of interpreting the rule “in a manner that avoids overstepping its authorizing statute.”); *id.* at 422–23 (Stevens, J., concurring in part and concurring in judgment) (“When a federal rule appears to [violate the Rules Enabling Act], federal courts must consider whether the rule can reasonably be interpreted to avoid that impermissible result.” (citing *Semtek*, 531 U.S. at 503)).

170 See *supra* text accompanying notes 111–34. Thus, these courts have interpreted Rule 4(k) in ways that would render it invalid under the Rules Enabling Act.

171 See *supra* text accompanying notes 102–03.

172 28 U.S.C. § 2072(a)–(b) (2018). The original version of the Act expressly authorized rulemaking on “the forms of process.” Act of June 19, 1934, ch. 651, § 1, 48 Stat. 1064, 1064. The 1988 amendments resulting in the current language subsumed “the forms of process” into “practice and procedure” but did not intend to change the meaning. See 134 CONG. REC. 31056 (1988) (indicating that the amendment “consolidates but carries forward current law”).

when service is effective to establish personal jurisdiction is within the limits of the Rules Enabling Act.

### 1. The “Really Regulates Procedure” Test

The Supreme Court has collapsed the two limits of the Rules Enabling Act into one test: whether a rule “really regulates procedure,” which is “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.”<sup>173</sup> What matters is not whether the rule has nonprocedural effects. After all, “most procedural rules do.”<sup>174</sup> Instead, “[w]hat matters is what the Rule itself *regulates*: If it governs only ‘the manner and the means’ by which litigants’ rights are ‘enforced,’ it is valid.”<sup>175</sup>

Rules regulating service of process, even by imposing territorial restrictions on service, really regulate procedure. As Stephen Sachs has pointed out: “[A] rule about how, when, and where process may be served will have jurisdictional consequences; but a rule about service is still *regulating* practice and procedure.”<sup>176</sup> The Court has always so held. *Murphree* upheld the 1938 version of Rule 4 because, even though it expanded the ability of federal courts to exercise personal jurisdiction by expanding the territorial scope of service of process beyond district borders, the rule “serves only to . . . provid[e] a procedure by which the defendant may be brought into court at the place where Congress has declared that the suit may be maintained. . . . It relates merely to ‘the manner and the means by which a right to recover . . . is enforced.’”<sup>177</sup> Although the Court hasn’t directly confronted challenges to Rule 4 amendments adopted after *Murphree*, it has interpreted Rule 4 in cases since and has never questioned its validity. In the 2010 case *Shady Grove*, a plurality of the Court approved of *Murphree*’s construction of Rule 4 and stated that even though Rule 4 “had some practical effect on the parties’ rights,” it “undeniably regulated only the process for enforcing those rights”; it did not “alter[]

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173 *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941); *see also Shady Grove*, 559 U.S. at 407 (reaffirming this test and stating that the Court has “long” adhered to it).

174 *Shady Grove*, 559 U.S. at 407.

175 *Id.* (quoting *Miss. Publ’g Corp. v. Murphree*, 326 U.S. 438, 446 (1946)).

176 Sachs, *supra* note 2, at 1744. Sachs believes that very little constrains the scope of personal jurisdiction in federal court. *See id.* at 1755, 1754–55 (“To exercise personal jurisdiction, a federal court needs no further authorization than lawful service of process . . .”). Thus, for Sachs, Congress and the rule makers have virtually unfettered discretion to set the territorial limits of service of process.

177 *Murphree*, 326 U.S. at 445–46 (quoting *Guar. Tr. Co. v. York*, 326 U.S. 99, 109 (1945)).

the rights themselves, the available remedies, or the rules of decision by which the court adjudicated either.”<sup>178</sup> *Shady Grove* gave no indication that anything in the amendments to Rule 4 since *Murphree* would counsel differently today.

If Congress had thought that the 1993 version of Rule 4(k) or its predecessors exceeded the legislative delegation of rulemaking authority, Congress could have prevented them from taking effect. Congress has prevented rules from taking effect before, as it famously did with the proposed Federal Rules of Evidence in the 1970s.<sup>179</sup> Rule 4, though perhaps not as high-profile as the proposed rules of evidence, is on Congress’s radar. In 1982, Congress acted to prevent a proposed amendment to Rule 4 from taking effect and instead passed its own amendments to it by legislative act.<sup>180</sup> While neither the proposed amendments nor Congress’s legislation involved territorial limits, the event shows that Congress pays attention to amendments to Rule 4, and the fact that Congress did nothing just a few years later to stop the 1993 amendments to Rule 4, which added language referring to personal jurisdiction, along with a special note calling Congress’s attention to it,<sup>181</sup> suggests that Congress didn’t read those amendments as regulating personal jurisdiction in violation of the Rules Enabling Act.

Although there was some uncertainty in the 1930s over whether rules regulating the territorial scope of service of process would fall within the ambit of the Rules Enabling Act,<sup>182</sup> nearly eighty-five years of such rulemaking show that it’s now accepted that they are.<sup>183</sup> As longtime advisory committee reporter Edward Cooper recently stated: “[P]ast Committees have concluded that the Enabling Act authorizes rules that expand personal jurisdiction by providing for service of process outside the court’s district or state. . . . They really are rules of

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178 *Shady Grove*, 559 U.S. at 407–08.

179 Act of Mar. 30, 1973, Pub. L. No. 93-12, 87 Stat. 9; *see also* Act of Jan. 2, 1975, Pub. L. No. 93-595, § 2(a)(1), 88 Stat. 1926, 1948; Burbank, *supra* note 154, at 1138. Later, Congress amended the Rules Enabling Act to expressly delegate rulemaking authority to promulgate “rules of practice and procedure *and rules of evidence*.” Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 401(a), 102 Stat. 4642, 4648 (1988) (emphasis added). The statute allows rules of “evidentiary privilege” only by act of Congress. 28 U.S.C. § 2074(b) (2018).

180 Act of Aug. 2, 1982, Pub. L. No. 97-227, § 1, 96 Stat. 246, 246; Federal Rules of Civil Procedure Amendments Act of 1982, Pub. L. No. 97-462, 96 Stat. 2527 (1983).

181 FED. R. CIV. P. 4 advisory committee’s note to 1993 amendment.

182 *See supra* note 68.

183 *See Kelleher, supra* note 3, at 1225–26 (agreeing that rules regarding service are procedural and within the Rules Enabling Act).



procedure, and they do not abridge, enlarge, or modify the underlying substantive rights.”<sup>184</sup>

## 2. The “Substantive Right” Limitation

Although the Supreme Court has conflated the second limit of the Rules Enabling Act—that rules “not abridge, modify or enlarge any substantive right”—into a joint test for whether the rule “really regulates procedure,”<sup>185</sup> scholars have persuasively argued that the two tests have independent meaning: that even a true rule of procedure could be invalid if it has a sufficiently significant impact on substantive rights.<sup>186</sup> And some commentators have argued that Rule 4(k) is invalid because it affects the substantive right of amenability to personal jurisdiction.<sup>187</sup>

Above, I made the case that Rule 4(k) doesn’t in fact affect the scope of personal jurisdiction, so even were amenability to personal jurisdiction a substantive right, Rule 4(k) wouldn’t abridge it. But two additional problems plague these commentators’ argument: subconstitutional amenability to federal-court personal jurisdiction is neither substantive nor a right.

Subconstitutional personal jurisdiction isn’t substantive. In a recent paper, Benjamin Spencer has persuasively argued that the procedure/substance dichotomy isn’t a dichotomy, and that jurisdiction is neither procedural nor substantive but an independent

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184 Information Item: Rule 4(k)—Expanded National Contacts Jurisdiction, *in* ADVISORY COMM. ON CIV. RULES, AGENDA BOOK 335, 339 (Apr. 2018); *see also* Kelleher, *supra* note 3, at 1192 (agreeing that a rule that “governed only the methods, and territorial reach, of service of process [would be] a matter of procedure within the scope of the Court’s authority under the Rules Enabling Act”); Sachs, *supra* note 2, at 1749–50 (stating that a rule regulating territorial service “likely qualifies as a rule of practice and procedure within the meaning of the [Rules Enabling] Act, rather than a usurpation of jurisdiction”); *cf.* Martin H. Redish & Dennis Murashko, *The Rules Enabling Act and the Procedural-Substantive Tension: A Lesson in Statutory Interpretation*, 93 MINN. L. REV. 26, 31, 30–31 (2008) (“[A]n incidental effect on substantive rights does not invalidate a rule . . .” *Id.* at 31.).

185 *See* Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 411 (2010) (Scalia, J.) (plurality opinion).

186 *See* John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 718–19 (1974); *see also* Spencer, *supra* note 5, at 718 (supporting this view).

187 *See* Kelleher, *supra* note 3, at 1192 (“Rule 4(k) also explicitly purports to govern amenability to jurisdiction. In doing so, the amended Rule 4(k) impermissibly affects a ‘substantive right’ within the meaning of the Rules Enabling Act.”); Woolley, *supra* note 5, at 594 n.108 (“Because amenability to jurisdiction is substantive, Federal Rules governing the territorial effectiveness of service that have the effect of restricting the amenability of a person to jurisdiction enlarge the substantive rights of persons who would otherwise be subject to suit.”).

category.<sup>188</sup> As he explains it, rules regulating the manner of adjudication are procedural,<sup>189</sup> claim-specific rules for decision on the merits are substantive,<sup>190</sup> rules regarding the admissibility and authenticity of evidence are a different category,<sup>191</sup> and rules regarding the scope of jurisdiction are yet another category.<sup>192</sup>

I agree with Professor Spencer. The nature of personal jurisdiction is different from substantive rights. Jurisdictional rules “tell a court whether it has adjudicatory power,” while substantive rules “determine the resolution of matters presented for adjudication on their merits.”<sup>193</sup> The Supreme Court has repeatedly endorsed this distinction in other contexts.<sup>194</sup>

Further, in the Rules Enabling Act context, Congress has expressly authorized rulemaking on certain appellate-jurisdiction matters without noting any tension between that authorization and the Act’s prohibition on affecting substantive rights. By statute, Congress has given circuit courts appellate jurisdiction only over “final” orders<sup>195</sup> and specified interlocutory orders.<sup>196</sup> These requirements are components of appellate jurisdiction.<sup>197</sup> As mentioned above,<sup>198</sup> however, Congress has provided that “[t]he Supreme Court may prescribe rules, in accordance with [the Rules Enabling Act], to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for [by statute],”<sup>199</sup> and it amended the Rules Enabling Act to expressly authorize the Supreme Court to promulgate rules that “define when a ruling of a district court is final for the purposes of

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188 See Spencer, *supra* note 5, at 661–72.

189 See *id.* at 661–63.

190 See *id.* at 665–67.

191 See *id.* at 663–65; see also Burbank, *supra* note 154, at 1138.

192 See Spencer, *supra* note 5, at 667–71.

193 Spencer, *supra* note 5, at 668; see also Scott Dodson, *Jurisdiction and Its Effects*, 105 GEO. L.J. 619, 621 (2017) (defining jurisdiction, including personal jurisdiction, as setting forum within a multiforum system); cf. Howard M. Wasserman, *Jurisdiction and Merits*, 80 WASH. L. REV. 643 (2005) (distinguishing conceptually between jurisdiction and merits).

194 See, e.g., *Sinochem Int’l Co. v. Malay. Int’l Shipping Corp.*, 549 U.S. 422, 430–31 (2007) (“[A] federal court generally may not rule on the merits of a case without first determining that it has jurisdiction over the category of claim in suit (subject-matter jurisdiction) and the parties (personal jurisdiction).” (citing *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 93–102 (1998))).

195 28 U.S.C. § 1291 (2018) (“The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts . . .”).

196 See *id.* § 1292.

197 See *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 103 (2009).

198 See *supra* text accompanying note 159.

199 28 U.S.C. § 1292(e) (2018).

appeal.”<sup>200</sup> The Supreme Court has promulgated rules under those delegations<sup>201</sup> without any intimation that those rules affect any substantive right, even though they clearly alter the rights of parties to seek appellate review.<sup>202</sup> If rules regulating when an appeal can be filed and heard don’t affect substantive rights, then it is hard to see why service rules that have an ancillary effect on personal jurisdiction do.

Additionally, subconstitutional amenability to federal-court personal jurisdiction isn’t a right. To be sure, the Supreme Court has, in state-court cases, alluded to the constitutional right of the defendant not to be subject to the coercive power of a sovereign that lacks personal jurisdiction,<sup>203</sup> but, in federal court, districts aren’t separate sovereignties, and, as long as the Fifth Amendment is met, all federal courts exercise U.S. sovereign power. None of the historical territorial limits recognized by the federal courts have anything to do with due process.<sup>204</sup> Nor are subconstitutional restrictions on personal jurisdiction about notice (covered in other parts of Rule 4) or geographic fairness and convenience (governed by venue statutes). Instead, subconstitutional personal jurisdiction in federal court reflects systemic policy choices about docket allocation, judicial relationships, and federalism. These are institutional and structural considerations, not rights.<sup>205</sup>

To illustrate the difficulty of articulating exactly what rights are at stake in Rule 4(k), consider the challenge in *Canaday*. There, the

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200 28 U.S.C. § 2072(c) (2018); *see also* *Swint v. Chambers Cnty. Comm’n*, 514 U.S. 35, 48 (1995) (“Congress thus has empowered this Court to clarify when a decision qualifies as ‘final’ for appellate review purposes, and to expand the list of orders appealable on an interlocutory basis.”).

201 *See, e.g.*, FED. R. APP. P. 4(a)(4) (prescribing the tolling effect of post-judgment motions); *id.* 5(a) (providing for interlocutory appeals); FED. R. CIV. P. 23(f) (providing for interlocutory appeal of a class-certification decision).

202 *Cf. Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427 (1956) (upholding Rule 54(b), which allows a district court to enter a final judgment as to part of a case, as within the Supreme Court’s rulemaking power). For a discussion of rulemaking authorization over rules regulating appellate jurisdiction, *see* Scott Dodson, *A Critique of Jurisdictionality*, 39 REV. LITIG. 353, 362–64 (2020).

203 *See, e.g.*, *Bristol-Myers Squibb Co. v. Superior Ct.*, 137 S. Ct. 1773, 1780 (2017) (emphasizing the burden on the defendant of defending in a state lacking coercive power). The Court has, in a federal-court case, stated that “[t]he personal jurisdiction requirement recognizes and protects an individual liberty interest,” but the Court was referring to the personal-jurisdiction limits supplied by the Fifth Amendment’s Due Process Clause, not subconstitutional limitations. *See Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982).

204 *Sachs, supra* note 2, at 1712.

205 *Id.* (“Jurisdictional questions at the Founding were fundamentally questions of powers, not rights, and nothing has happened since to change that.”).

defendant was subject to personal jurisdiction on Canaday's claim filed in federal court in Tennessee,<sup>206</sup> and the defendant would have been subject to personal jurisdiction on other employees' claims in federal court in other states. Those federal courts would all apply the same federal procedures and, because the claims were under the FLSA, the same federal substantive law. I cannot fathom what right of the defendant would be affected by allowing the out-of-state employees' claims to be litigated in federal court in Tennessee.<sup>207</sup>

Because subconstitutional amenability to personal jurisdiction in federal court isn't a substantive right, Rule 4(k) is valid under the Rules Enabling Act.

### C. The "Loophole" Counterargument

In this Section, I consider the primary argument against my thesis that Rule 4(k) regulates only service and not the scope of personal jurisdiction: that without Rule 4(k) regulating personal jurisdiction independent of service of the summons, litigants can easily circumvent Rule 4(k) through the facile loophole of asserting claims in amended complaints or through vehicles other than Rule 4. *Canaday* and others have relied on this reasoning to conclude that Rule 4(k) must directly establish limits on the scope of personal jurisdiction in federal court.<sup>208</sup> Of course, the principal reason why the loophole argument fails is that it would render Rule 4(k) invalid under the Rules Enabling Act and thus inapplicable anyway. But even on its own terms, the loophole argument isn't as convincing as its adherents suppose.

#### 1. The Power of the Summons-Based Limits of Rule 4(k)

Rule 4(k) is already a powerful limit on the exercise of personal jurisdiction by a federal court because it applies to all summons claims. Most claims require service. Any claim in the original complaint, for example, will require service with the summons in compliance with Rule 4(k). Further, because Rule 4(k) incorporates state-law limits of personal jurisdiction, the claim-by-claim restrictions on state-court personal jurisdiction are incorporated into effective federal-court service

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206 See *supra* text accompanying notes 111–12.

207 By forcing a state-by-state litigation strategy, the defendant avoided facing a single suit of aggregated claimants, but the defendant could hardly claim a "right" to do so because the right to aggregate was in fact given to the claimants by the FLSA, and there was no debate that the claimants could have aggregated in the defendant's home state of Indiana—in federal or state court—without any problems of personal jurisdiction.

208 See *supra* text accompanying notes 111–28.

under Rule 4(k). Thus, Rule 4(k)'s service limits apply to all claims in the original complaint.

Representative actions, to the extent they're asserted in the original complaint and served with the summons, are therefore covered by Rule 4(k). Even though collective-action members must file opt-in notices with the court after filing, and even though class-action members' claims are not judicable until certification,<sup>209</sup> the action purporting to assert and represent them is served with the summons and is therefore subject to Rule 4(k). If each member's claim is individually subject to the service limits in Rule 4(k), much in the same way as a mass action of individual claimants,<sup>210</sup> then *Canaday* was right for the wrong reasons: the out-of-state opt-in employees failed to satisfy Rule 4(k) not because Rule 4(k) contains an inherent limit on federal-court personal jurisdiction outside of service but because service of the summons failed to establish personal jurisdiction over the defendant with respect to them.<sup>211</sup>

Subsequent claims filed against new defendants under Rule 14 or Rule 19 are also specifically covered by a subsection in Rule 4(k) that limits service of the summons in those claims either to the same scope as the original summons or to within 100 miles of the federal courthouse.<sup>212</sup> The 100-mile rule gives parties some ability to circumvent state-based personal-jurisdiction limits, but not much. So Rule 4(k) already constrains party gamesmanship to a great degree.

As for subsequently asserted claims not specifically mentioned in Rule 4(k), Rule 4(k) would still apply to them if asserted with a summons, and no rule prevents the court from ordering a new summons, or an amended summons, to be served on a defendant in conjunction

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209 See Spencer, *supra* note 8, at 38 ("This means that at the point of filing, the action stands as one between the named class representatives and the defendant named in the complaint; the claims of absent class members are not yet before the court. It necessarily follows that when determining whether there is personal jurisdiction over the defendant with respect to claims asserted by the named plaintiffs in a *putative* class action, the only claims to be assessed by the court are those of the class representatives.")

210 See *Bristol-Myers Squibb Co. v. Superior Ct.*, 137 S. Ct. 1773, 1783 (2017) (holding that personal jurisdiction must be met as to each claim). Some have argued against treating representative actions the same as ordinary joinder of individual actions for purposes of personal jurisdiction and service. See *supra* note 133 (collecting sources arguing that personal jurisdiction for class actions should be evaluated as to the class as a whole rather than on a claim-by-claim basis). I do not take a position on whether personal jurisdiction applies on an individualized basis to members of representative actions.

211 Arguably, the defendant in *Canaday* waived its defense based on personal jurisdiction by failing to assert it in its original answer or pre-answer motion. See Defendant's Answer & Defs. to Collective Action Complaint, *supra* note 113.

212 FED. R. CIV. P. 4(k)(1).

with an amended complaint or a complaint in intervention. Indeed, a summons must be included, and served under Rule 4, when an amended complaint adds a new defendant, or when the original complaint has not yet been served on an existing defendant.<sup>213</sup> Admittedly, courts have not required service under Rule 4 when an amended complaint or complaint in intervention asserts claims against a defendant already properly summoned,<sup>214</sup> but some pre-rules precedent supports requiring such service,<sup>215</sup> and the rules are at least open to the interpretation that district courts retain discretion to permit or require service of a summons with amended complaints and complaints in intervention that assert new claims or add new plaintiffs when “fairness may require the court to order that jurisdiction be reasserted over the party.”<sup>216</sup>

Relatedly, Rule 4(k)’s regulation of the effectiveness of service to “establish[.]” personal jurisdiction could be read in a time-bound, claim-bound way, such that the subsequent addition of claims for which the defendant would not be amenable to service under Rule 4(k) either wouldn’t be covered by, or would retroactively negate, the effectiveness of the original service to establish personal jurisdiction. As Judge Barron put it in *Waters*:

The text of that rule is at least arguably ambiguous as to whether the summons “establishes” personal jurisdiction over the defendant for the life of the suit only if that defendant “is” subject to the

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213 See 4B WRIGHT ET AL., *supra* note 139, at § 1146 (“The service provisions of Rule 5 apply only to parties who have appeared. Thus it is clear that amended or supplemental pleadings must be served on parties who have not yet appeared in the action in conformity with Rule 4.”).

214 See Spencer, *supra* note 8, at 43–44; *Bonita Packing Co. v. O’Sullivan*, 165 F.R.D. 610, 613 (C.D. Cal. 1995) (“A summons and complaint in intervention, however, may be served in accordance with Rule 5(b) . . .”).

215 Cf. *Ex parte* Ind. Transp. Co., 244 U.S. 456, 458 (1917) (Holmes, J.) (“Not having any power in fact over the defendant unless it can seize him again, it cannot introduce new claims of new claimants into an existing suit simply because the defendant has appeared in that suit. The new claimants are strangers and must begin their action by service just as if no one had sued the defendant before.”). But see Spencer, *supra* note 8, at 44 n.41 (asserting that Rule 24 “abrogated” the former understanding that intervenor-plaintiffs had to serve defendants according to the usual limits of service of process).

216 4B WRIGHT ET AL., *supra* note 139, at § 1146; see also *id.* (stating that claims “radically different from those set out in the original pleading” may require courts to “direct personal service of the new pleading on the [defendant] pursuant to Rule 4”); 7C CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE & PROCEDURE § 1919 (3d ed. 2007) (suggesting that a complaint in intervention might need to be served under Rule 4 “[i]f an intervenor’s complaint states a claim entirely independent of the original complaint and the intervenor’s complaint could not have been properly served by the method used in serving the original complaint”).

jurisdiction of the state court *for the life of the suit* or whether the summons “establishes” personal jurisdiction over the defendant for the life of the suit so long as that defendant “is” subject to the jurisdiction of a state court *at the time that the summons is served*.<sup>217</sup>

The life-of-the-suit interpretation would make the Rule 4(k) conditions needed for the summons to establish personal jurisdiction to be continuing conditions throughout the life of the suit, thus being applicable to any subsequent claims. This interpretation was adopted by the Third Circuit in *Fischer*, which concluded that “the initial service of a summons cannot be used to exercise jurisdiction over [the defendant] under Rule 4(k)(1)(A) with regard to those claims” added later and outside the scope of state-court personal jurisdiction.<sup>218</sup> This interpretation does not require Rule 4(k) to directly regulate personal jurisdiction over later-filed claims; rather, it treats the conditions for when effective service of the original summons establishes personal jurisdiction over the defendant to be affected by later-filed claims.

To be clear, I do not mean to suggest that I agree with all the possibilities listed here. I only mean to point out that they are all plausible interpretations of Rule 4(k) that would alleviate fears of facile circumvention of Rule 4(k) without rendering Rule 4(k) invalid under the Rules Enabling Act.

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217 *Waters v. Day & Zimmerman NPS, Inc.*, 23 F.4th 84, 102 (1st Cir. 2022) (Barron, J., dissenting) (emphasis added), *cert. denied*, 142 S. Ct. 2777 (2022). Judge Barron found the latter interpretation “internally coherent” and in “accord[ance] with the intuition that it would be odd for a rule that seeks only to describe the means for making service of process effective to make those means dependent on events that might occur after service has been made. It is an arguable virtue of the majority’s reading of the rule that one need only attend to what has occurred up until service has been completed to know whether such service has been effective.” *Id.*

218 *Fischer v. Fed. Express Corp.*, 42 F.4th 366, 382 (3d Cir. 2022), *cert. denied*, 143 S. Ct. 1001 (2023). The court explained:

[I]f an additional plaintiff seeks to join the suit bringing her own claims, or if the original plaintiff seeks to add or amend claims, there is no need to serve the defendant again . . . [if] the defendant would already be subject to the jurisdiction of the court with respect to those claims.

*Id.* at 384. For arguments against this interpretation, see *Waters*, 23 F.4th at 96 (holding that once Rule 4(k) establishes personal jurisdiction over the defendant, the defendant is subject to the court’s personal jurisdiction for all aspects of the case unless restricted by the Fifth Amendment); Linda Sandstrom Simard, *Exploring the Limits of Specific Personal Jurisdiction*, 62 OHIO ST. L.J. 1619, 1646 (2001) (“By including the language limiting the court’s jurisdiction to particular claims in section 2 of the rule and omitting any similar restriction in section 1 of the same rule, the plain language of the rule suggests that section 1 is not intended to be limited to particular claims.”); *id.* at 1646 n.127 (noting that Rule 4(k)(1) speaks of personal jurisdiction over the “defendant” as opposed to a claim-specific establishment).

## 2. Other Limits on Personal Jurisdiction External to Rule 4(k)

The argument that direct regulation of personal jurisdiction by Rule 4(k) is necessary to prevent circumvention of Rule 4(k)'s limits is undermined by the existence of potential limits on federal-court personal jurisdiction external to Rule 4(k). History provides support for two sources of external limits on personal jurisdiction potentially applicable to nonsummons claims: the Rules of Decision Act and federal common law. Either one could supply limits on a federal court's exercise of personal jurisdiction over nonsummons claims without forcing Rule 4(k) to do more than the Rules Enabling Act would permit.

### a. The Rules of Decision Act

Professor Patrick Woolley has been a leading proponent of the view that, in the absence of codified federal law to the contrary, the Rules of Decision Act sets the scope of a federal court's personal jurisdiction at the boundaries fixed by state law. The Act provides: "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."<sup>219</sup> In Professor Woolley's view, *Erie Railroad Co. v. Tompkins*<sup>220</sup> eliminated the "general law" of personal jurisdiction as developed by the federal courts, and thus, absent any contrary federal codified law, state law must supply the rule of decision regarding personal jurisdiction in federal court.<sup>221</sup> He reasons that personal jurisdiction is within the scope of the Act because the "most natural meaning" of the term "rule of decision" is "any rule that a court would apply in a civil action to decide a case, including rules of practice and procedure."<sup>222</sup> Others have argued that the Rules of Decision Act directs the application of state-court personal-jurisdiction limits only for claims founded on state law.<sup>223</sup> If the Rules of

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219 28 U.S.C. § 1652 (2018).

220 304 U.S. 64 (1938).

221 Woolley, *supra* note 5, at 612 ("The *Erie* decision—which in part reflected changing conceptions of the law—rendered obsolete the traditional approach to the personal jurisdiction of the federal courts exemplified by *Picquet*. . . . Unless the Constitution, a federal statute, or a treaty of the United States otherwise requires or provides, state law must provide the 'rule of decision' with respect to a person's amenability to jurisdiction in federal court.").

222 *Id.* at 612–13.

223 See, e.g., Kelleher, *supra* note 3, at 1227 ("In the Rules of Decision Act, Congress provided that state substantive law, including Fourteenth Amendment amenability standard, applies in diversity cases."); *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456



Decision Act is applicable to matters of personal jurisdiction—and I’m agnostic here as to whether it is<sup>224</sup>—then it would directly impose, subject to congressional override, state-court jurisdictional limitations on claims in federal court independent of Rule 4(k).

## b. Federal Common Law

Another possibility is that federal common law exerts subconstitutional controls on federal-court personal jurisdiction. The history of personal jurisdiction documented above shows that the federal courts long developed territorial constraints as part of federal common law, informed by inferences from congressional districting.<sup>225</sup> That history continued even into the late 1940s, after the Federal Rules of Civil Procedure were adopted and *Erie* was decided.<sup>226</sup> Commentators have suggested that federal common law supplies a potential source for subconstitutional limits on federal-court personal jurisdiction today.<sup>227</sup>

The application of federal common law could lead in different directions. In one direction, following the pattern of 1800s history, a federal common law of personal jurisdiction could rely on district borders. After all, Congress has continued to divide the country into federal districts, and the ancient civil-arrest limit remains codified

U.S. 694, 711 (1982) (Powell, J., concurring in judgment) (“Under the Rules of Decision Act . . . , in the absence of a federal rule or statute establishing a federal basis for the assertion of personal jurisdiction, the personal jurisdiction of the district courts is determined in diversity cases by the law of the forum State.”).

224 For arguments to the contrary, see Spencer, *supra* note 9, at 988 (disagreeing that the Rules of Decision Act has any bearing on jurisdictional constraints); *cf.* Sachs, *supra* note 2, at 1721 (suggesting that personal jurisdiction is not controlled by the Rules of Decision Act).

225 See *supra* text accompanying notes 25–62.

226 See *supra* note 62. One rationale justifying the creation of federal common law is that the geographic allocation of cases among the federal courts must necessarily be a question of federal law, with boundaries set by federal law alone, and regarding which the states have no authority to regulate. See Amy Coney Barrett, *Procedural Common Law*, 94 VA. L. REV. 813, 838 (2008) (“[T]he procedure observed by the federal courts is a matter that the Constitution commits exclusively to federal control.”).

227 See, e.g., Kelleher, *supra* note 3, at 1204 (arguing that, in federal-question cases, “courts must determine amenability issues as a matter of interstitial federal common law” when Congress is silent); *cf.* *Omni Cap. Int’l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 110 (1987) (suggesting that federal courts have common-law power in the area but declining to fashion it). *Contra* Woolley, *supra* note 5, at 619–20 (conceding that, “before *Erie*, federal law did in fact exclusively govern personal jurisdiction in federal court” but believing that, today, “there is no good reason to think that the amenability of a person to the personal jurisdiction of a federal court continues to be a matter of exclusive federal concern such that in the absence of congressional legislation or a valid Federal Rule, federal common law should fill the gap”).

today to provide: “Except as otherwise provided by Act of Congress, no person shall be arrested in one district for trial in another in any civil action in a district court.”<sup>228</sup> As *Toland* once held,<sup>229</sup> perhaps today federal common law, relying on inferences from Congress, could set default limits on federal-court personal jurisdiction at district borders.

Or, in light of congressional and rule developments since 1938, the federal common law could set default limits on federal-court personal jurisdiction at state borders.<sup>230</sup> In other areas of federal procedural common law, including areas outside of rulemaking authority, the Court has directed the content of federal common law to mimic state law, especially when intrastate uniformity is more important than interstate uniformity.<sup>231</sup> That scenario may well be applicable to federal-court personal jurisdiction.<sup>232</sup> In essence, the lower federal courts adopted this view, at least for diversity cases, in the 1960s. The leading case, *Arrowsmith v. United Press International*, considered whether a federal diversity court was constrained by state-court personal jurisdiction.<sup>233</sup> The court noted “an overwhelming consensus that the amenability of a foreign corporation to suit in a federal court in a diversity action is determined in accordance with the law of the state where the court sits,” as constrained by the Fourteenth Amendment.<sup>234</sup> Acknowledging that “[n]o federal statute or Rule of Civil Procedure speaks to the issue either expressly or by fair implication,”<sup>235</sup>

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228 28 U.S.C § 1693 (2018).

229 See *supra* text accompanying notes 51–55.

230 Cf. Stephen B. Burbank, *Interjurisdictional Preclusion, Full Faith and Credit and Federal Common Law: A General Approach*, 71 CORNELL L. REV. 733, 774 (1986) (“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.”).

231 See, e.g., *Semtek Int’l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 508 (2001) (“[F]ederal common law governs the claim-preclusive effect of a dismissal by a federal court sitting in diversity,” which “adopt[s], as the federally prescribed rule of decision, the law that would be applied by state courts in the State in which the federal diversity court sits.”); cf. *Blonder-Tongue Lab’ys, Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 322–27 (1971) (following state developments in abandoning the mutuality requirement for defensive issue preclusion).

232 See Cody J. Jacobs, *In Defense of Territorial Jurisdiction*, 85 U. CHI. L. REV. 1589, 1625–28 (2018) (defending state-based territorial personal jurisdiction in federal courts on grounds of predictability and stability).

233 320 F.2d 219, 222 (2d Cir. 1963).

234 *Id.* at 223.

235 *Id.* at 225.

and disavowing any compulsion of *Erie*,<sup>236</sup> the court appeared to rely upon federal common law as directing adherence to state-court limits for diversity actions,<sup>237</sup> largely on grounds of respect for state policy<sup>238</sup> and on the need to mirror diversity jurisdiction as closely to state-court practice as possible, except as to codified deviations.<sup>239</sup>

As with arguments for applying the Rules of Decision Act, I don't here defend arguments favoring the development of a federal common law of personal jurisdiction. I merely point out that those arguments are plausible and could act to confine the exercise of federal-court personal jurisdiction so that Rule 4(k) need not take on more weight than the Rules Enabling Act allows it to bear.

### 3. The Policy Argument

Even if no external controls exist, limiting Rule 4(k) to service of the summons, as I propose, would not be intolerable. To reiterate: nothing about unconstitutional personal jurisdiction in federal court has anything to do with due process, fairness, or notice. None of the principles articulated by the Supreme Court in cases developing Fourteenth Amendment limits on state-court personal jurisdiction has any inherent applicability to federal court.<sup>240</sup> To be sure, forum-shopping gamesmanship can be an evil worth remedying, but nonjurisdictional controls help mitigate even that. Rule 11 and inherent contempt powers ensure that the plaintiff has a good-faith basis for asserting an initial claim against the defendant in a state that would have personal

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236 See *id.* at 226 (“Congress or its rule-making delegate [could] authoriz[e] a district court to assume jurisdiction over a foreign corporation in an ordinary diversity case although the state court would not . . .”).

237 See Wilf-Townsend, *supra* note 133, at 222 (characterizing *Arrowsmith* as “rel[ying] on a longstanding rule of federal common law”).

238 See *Arrowsmith*, 320 F.2d at 227 (“State policy is involved . . . , and in the absence of an overriding federal interest intimated by Congress or its delegate, should be equally respected.”).

239 See *id.* at 229 (“[O]nce the state has made this [choice about personal jurisdiction], there is no reason for a federal court to go further—or less far—when it is acting under a head of jurisdiction supposedly designed to protect certain suitors from possible prejudice by state courts.”).

240 This is particularly true for federal-question cases. See Casad, *supra* note 60, at 1596 (“There is no good reason why contacts with the state in which the federal court sits should be necessary in cases arising under federal law. . . . Considerations of importance to Fourteenth Amendment due process—interstate federalism and protection of state interests—are irrelevant in federal question cases.”). It is also true for diversity cases, with the possible exception of deviations in horizontal choice of law that may be mitigable through venue transfer. See *infra* text accompanying notes 243–45.

jurisdiction over the defendant, as required by Rule 4(k).<sup>241</sup> If the plaintiff then moves to amend the complaint to add far-flung claims, or if a plaintiff with far-flung claims moves to intervene, in ways that would be unjust to the defendant, the court, in its discretion, can deny the motion.<sup>242</sup> For amendments that slip through,<sup>243</sup> venue transfer is available, “in the interest of justice,” to move the case to a forum “where it might have been brought,”<sup>244</sup> potentially with choice-of-law questions governed by the transferee state, as if the case had been filed there originally.<sup>245</sup> If collective actions under the FLSA are treated as a unit for personal-jurisdiction purposes, rather than on a member-by-member basis, perhaps employees from outside the forum state ought not be found to be “similarly situated” entitling them to be within the scope of the action. For these reasons, fears that plaintiffs will game the Rule 4(k) limits ought not drive an interpretation of Rule 4(k) that would render it invalid under the Rules Enabling Act.

#### IV. CHALLENGING NONCOMPLIANCE WITH RULE 4(K)

If I’m correct that Rule 4(k) regulates only service and not amenability to personal jurisdiction, then, procedurally, a litigant otherwise subject to the court’s personal jurisdiction should challenge noncompliance with Rule 4(k) on service grounds, not jurisdictional grounds. The state-court personal-jurisdiction limits referenced in Rule 4(k) are converted to service limits by the rule; they thus act not to deprive the federal court of personal jurisdiction but to limit the effectiveness of service. The rules provide for the applicable remedy: the defense of insufficient service of process, which can be asserted by a pre-answer motion to dismiss.<sup>246</sup>

True, service of a summons is a mechanism for the court to exercise the personal jurisdiction it otherwise has, but noncompliance with Rule 4(k) doesn’t mean the court “lack[s] . . . personal jurisdiction,”

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241 See FED. R. CIV. P. 11(b).

242 See *id.* 15(a)(2) (directing the court to “freely give leave when justice so requires”); *id.* 24(b)(1) (stating that “the court *may* permit” intervention (emphasis added)); *id.* 24(b)(3) (“In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties’ rights.”).

243 A plaintiff does get one opportunity to amend a complaint, under strict time limits, without needing permission of the defendant or the court. See *id.* 15(a)(1).

244 28 U.S.C. § 1404(a) (2018).

245 Cf. *Atl. Marine Constr. Co. v. U.S. Dist. Ct.*, 571 U.S. 49, 64–65 (2013) (developing a new rule that, for certain venue transfers, the transferee court’s state will supply the horizontal choice-of-law rules applied by the federal court).

246 FED. R. CIV. P. 12(b)(5).

as the defense is phrased.<sup>247</sup> Rather, the court has personal jurisdiction but can't exercise it.

To illustrate why the usual mechanism to challenge noncompliance with Rule 4(k)—a motion to dismiss for lack of personal jurisdiction—is misplaced, consider a defendant, sued in their home state, who is never served. That defendant nevertheless gets wind of the lawsuit and files a motion to dismiss only on grounds of lack of personal jurisdiction. The defendant is clearly amenable to personal jurisdiction because the defendant is a resident of the state, yet no rule expressly authorizes the court to exercise that personal jurisdiction because Rule 4(k) establishes personal jurisdiction only upon “[s]erving a summons or filing a waiver of service.”<sup>248</sup> But no one would contend that a defendant who resides in the forum state should prevail on a motion to dismiss for lack of personal jurisdiction under these circumstances. The proper remedy must be a motion to dismiss for insufficient service. The same should apply for service that is ineffective solely because of noncompliance with Rule 4(k).

The interesting question is how, then, the court can exercise personal jurisdiction without compliance with Rule 4(k). The answer is that Rule 4(k) is a *sufficient but not a necessary condition* for the exercise of personal jurisdiction. Personal jurisdiction can be established outside of Rule 4(k) by waiver of or consent to service. In essence, by waiving challenges to service, the defendant also waives any objection that the service precondition to personal jurisdiction wasn't met. Accordingly, a defendant failing to challenge service in a timely fashion has no basis for challenging the court's exercise of personal jurisdiction, so long as the defendant is otherwise amenable to it.<sup>249</sup>

## CONCLUSION

Rule 4(k) of the Federal Rules of Civil Procedure, widely interpreted as directly regulating personal jurisdiction in federal court, in fact regulates only service of a summons. That interpretation saves the rule from invalidity under the Rules Enabling Act. It also trains focus on open questions about other sources of personal-jurisdiction

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<sup>247</sup> *Id.* 12(b)(2).

<sup>248</sup> *Id.* 4(k). Filing a waiver of service is a specific kind of waiver particular to Rule 4(d), not to Rule 12. *Id.* 12(h)(1) (providing that the defenses of insufficient process and insufficient service are waived if not asserted in an initial filing).

<sup>249</sup> If the scope of personal jurisdiction in federal court is limited only by the Fifth Amendment, then a Maine resident with no connections to California would have *no* objections to a California federal court's personal jurisdiction if the defendant is sued in California federal court and waives service there. This result could change if some of the subconstitutional limits on personal jurisdiction discussed above apply.

constraints on federal courts, as well as leads to changes to the procedural practice for challenging noncompliance with Rule 4(k).

