



7-1-2011

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Recommended Citation

Allan Ides, *The Standard for Measuring the Validity of a Federal Rule of Civil Procedure: The Shady Grove Debate between Justices Scalia and Stevens*, 86 Notre Dame L. Rev. 1041 (2011).

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THE STANDARD FOR MEASURING THE VALIDITY
OF A FEDERAL RULE OF CIVIL PROCEDURE:
THE *SHADY GROVE* DEBATE BETWEEN
JUSTICES SCALIA AND STEVENS

*Allan Ides**

INTRODUCTION

In *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*,¹ alternative interpretations of § 2072(b) of the Rules Enabling Act (REA)² were offered by Justices Scalia and Stevens.³ The focus of this Article is on that disagreement. Neither alternative enjoyed a majority,⁴ adding a new complexity to an already challenging area of the law.⁵ One hopes that a majority of the Court will soon resolve this intracourt conflict. From a jurisprudential perspective premised on the text of the REA and precedent, I think Justice Stevens has the stronger argument. From a policy perspective premised on ease of application and judicial efficiency, Justice Scalia's alternative is not unattractive. However, as I explain below, since I think a statutory text should trump freestanding judicial policymaking—no matter how attractive that policy may be—I am inclined toward Justice Stevens's interpretation.

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1 130 S. Ct. 1431 (2010).

2 28 U.S.C. § 2072(b) (2006).

3 See *Shady Grove*, 130 S. Ct. at 1442–46 (plurality opinion); *id.* at 1448–60 (Stevens, J., concurring in part and concurring in the judgment).

4 See *id.* at 1436 (syllabus).

5 I suppose one could attempt to cobble a majority by reading tea leaves in the dissent, but such guesswork is a poor alternative to a definitive ruling by the Court.

The basic background of the *Shady Grove* decision is simple. New York law requires insurance companies to pay legitimate insurance claims within thirty days of receipt of the claim.⁶ A failure to comply with this provision triggers a statutory penalty assessed at two percent per month of the amount owed.⁷ *Shady Grove* filed an insurance claim with Allstate, which Allstate eventually paid, but not within the thirty-day time frame.⁸ Allstate refused to pay the statutory penalty—approximately \$500—and *Shady Grove* sued Allstate to recover that penalty in a U.S. district court, invoking that court's diversity jurisdiction.⁹

In its suit, *Shady Grove* alleged that Allstate routinely failed to tender timely payments on insurance claims.¹⁰ Consistent with this allegation, and in seeming accord with Federal Rule of Civil Procedure 23, *Shady Grove* filed the suit under the Class Action Fairness Act¹¹ as a class action.¹² Allstate moved to dismiss, arguing that under New York law, specifically section 901(b) of the New York Civil Practice Law and Rules Code,¹³ a suit to recover a statutory penalty cannot be "maintained as a class action."¹⁴ The district court and the court of appeals agreed with Allstate and ordered the case dismissed.¹⁵ The Supreme Court granted certiorari and reversed, holding that whether a class action was to be maintained was controlled by Rule 23 and not by New York law.¹⁶

In arriving at this conclusion, the Court held that Rule 23 answered the question in dispute—whether a class action may be maintained—and that the rule was valid under the standards of the REA.¹⁷ While the majority of the Court agreed as to why Rule 23 controlled the question in dispute,¹⁸ there was a disagreement within the

6 N.Y. INS. LAW § 5106(a) (McKinney 2009).

7 *See id.*

8 *See Shady Grove*, 130 S. Ct. at 1436.

9 *See id.* at 1436–37.

10 *See id.*

11 28 U.S.C. § 1332(d) (2006).

12 *See Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 549 F.3d 137, 140 (2d Cir. 2008), *rev'd*, 130 S. Ct. 1430.

13 N.Y. C.P.L.R. 901(b) (McKinney 2006).

14 *See Shady Grove*, 549 F.3d at 140 (quoting N.Y. C.P.L.R. 901(b)).

15 *See Shady Grove*, 130 S. Ct. at 1437.

16 *See id.* at 1448.

17 *See id.* at 1438.

18 *See id.* at 1436, 1437–42.

majority—the Scalia/Stevens debate—as to the proper standards to apply in assessing the validity of a Federal Rule under the REA.¹⁹

This Article is divided into six Parts. The first describes Justice Scalia’s interpretation of § 2072(b); the second describes Justice Stevens’s interpretation of that Section; the third provides a detailed discussion of *Sibbach v. Wilson & Co.*,²⁰ a case that is critical to both opinions; the fourth examines and evaluates the rationale behind each interpretation; the fifth discusses the underlying policy arguments behind each interpretation; and the sixth offers concluding remarks.

I. JUSTICE SCALIA AND FEDERAL RULE VALIDITY: THE RULE ITSELF

Parts I and II-A of Justice Scalia’s opinion reflect the views of a five-person majority.²¹ Part I describes the case and the basic question presented²² while Part II-A concludes that Rule 23 answered the “question in dispute”—in other words, whether a class action may be maintained.²³ Part II-A triggered a spirited, four-person dissent authored by Justice Ginsburg,²⁴ but that disagreement is not the topic of this Article. For purposes of this Article, I am assuming the majority was “correct” on this preliminary point.²⁵ In Part II-B of his opinion, Justice Scalia explains why Rule 23 is valid under the terms of the REA and particularly under § 2072(b).²⁶ Three other Justices—the Chief Justice and Justices Thomas and Sotomayor—joined Part II-B.²⁷

Justice Scalia’s Part II-B can be easily misunderstood. Read casually, most of the discussion in that section appears to describe and endorse a familiar approach to the REA, one that essentially tracks the statutory language and affirms a strong presumption of Federal Rule validity. It is not until the last few paragraphs of II-B (where Justice Scalia disposes of Allstate’s as-applied arguments against the validity of Rule 23) that the exact contours of his model become distinct and less familiar.²⁸

19 Compare *id.* at 1442–48 (plurality opinion), with *id.* at 1448–60 (Stevens, J., concurring in part and concurring in the judgment).

20 312 U.S. 1 (1941).

21 *Shady Grove*, 130 S. Ct. at 1436.

22 See *id.* at 1436–37.

23 See *id.* at 1437–42.

24 See *id.* at 1460–73 (Ginsburg, J., dissenting).

25 In point of fact, I think they were.

26 See *Shady Grove*, 130 S. Ct. at 1442–44 (plurality opinion).

27 See *id.* at 1436 (majority opinion).

28 See *id.* at 1444 (plurality opinion).

The discussion in Part II-B begins with a standard and generalized description of *Erie*,²⁹ it explains why the unguided *Erie* choice has no bearing on the validity of a Federal Rule³⁰ and then it provides the following well-established framework:

Congress has undoubted power to supplant state law, and undoubted power to prescribe rules for the courts it has created, so long as those rules regulate matters “rationally capable of classification” as procedure. In the Rules Enabling Act, Congress authorized this Court to promulgate rules of procedure subject to its review, but with the limitation that those rules “shall not abridge, enlarge or modify any substantive right.”³¹

Then comes the first hint of a twist. Having invoked the familiar framework, Justice Scalia focuses on the precise meaning to be attributed to § 2072(b)—REA’s abridge-enlarge-modify limitation³²—but he does not begin with the text of the REA. Rather, he begins with a quotation from *Sibbach v. Wilson & Co.*:

[T]he Rule must “really regulat[e] procedure,—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them.” The test is not whether the rule affects a litigant’s substantive rights; most procedural rules do. What matters is what the rule itself *regulates*³³

On first read, this might seem like a boilerplate REA mantra and an unremarkable allusion to the irrelevance of “incidental effects [that] necessarily attend the adoption of the prescribed new rules,” referenced in *Hanna v. Plumer*.³⁴ But as we will see, it is more than that. The key sentence in the above block quote turns out to be the last one: “What matters is what the rule *itself regulates*.”³⁵ The word “itself” signals, albeit faintly, a distinction between facial challenges (i.e., the rule itself) and as-applied challenges (i.e., the effect of applying the rule in a particular context). As we will see, under Justice

29 See *id.* at 1442.

30 See *id.*

31 *Id.* (citations omitted) (quoting *Hanna v. Plumer*, 380 U.S. 460, 472 (1965), and 28 U.S.C. § 2072(b) (2006)).

32 See 28 U.S.C. § 2072(b) (“Such rules shall not abridge, enlarge or modify any substantive right.”).

33 *Shady Grove*, 130 S. Ct. at 1442 (plurality opinion) (second alteration in original) (citations omitted) (quoting *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941)).

34 380 U.S. 460, 465 (1965) (quoting *Miss. Publ’g Corp. v. Murphree*, 326 U.S. 438, 445 (1946)).

35 *Shady Grove*, 130 S. Ct. at 1442 (plurality opinion) (first emphasis added).

Scalia's version of "really regulates procedure"—a version he believes to be mandated by *Sibbach*—only facial challenges are allowed.

Justice Scalia makes this distinction clear when he applies his standard to Rule 23. Thus, after surveying the small universe of cases in which the Supreme Court has affirmed the validity of various Federal Rules,³⁶ Justice Scalia explains why Rule 23 (and other rules of joinder) are valid under the really-regulates-procedure standard of the REA:

Such rules neither change plaintiffs' separate entitlements to relief nor abridge defendants' rights; they alter *only* how the claims are processed. For the same reason, Rule 23—at least insofar as it allows willing plaintiffs to join their separate claims against the same defendants in a class action—falls within § 2072(b)'s authorization. A class action, no less than traditional joinder (of which it is a species), merely enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits. And like traditional joinder, it leaves the parties' legal rights and duties intact and the rules of decision unchanged.³⁷

The focus of this analysis is on the rule itself—in other words, on what the text of the rule literally provides: a procedure for joinder that does not alter any substantive right. Thus, Rule 23 literally creates a method for adjudicating multiple claims in a single proceeding *and* literally nothing in the text of the rule purports to alter any substantive standard under which the joined claims will be adjudicated. As such, the rule is rationally capable of being classified as procedural *and* does not abridge, enlarge, or modify any substantive right. Thus, in Justice Scalia's view, the rule "really regulates" procedure.³⁸

Allstate made two arguments that Rule 23, as applied in the context of the section 901(b) class action proscription, did, in fact, transgress § 2072(b). First, Allstate argued that section 901(b) created a "substantive right . . . not to be subjected to aggregated class-action liability."³⁹ Justice Scalia rejected this argument out of hand. In his view, nothing about section 901(b)—neither its text nor its placement in the New York procedural code—fairly suggested that the limitation on class actions was anything but a procedural device.⁴⁰ Moreover, he explained, "the *consequence* of excluding certain class actions may be to cap the damages a defendant can face in a single suit, but the law itself

36 See *id.* at 1442–43.

37 *Id.* at 1443 (emphasis added).

38 See *id.*

39 *Id.* (alteration in original) (quoting Brief for Respondent at 31, *Shady Grove*, 130 S. Ct. 1431 (No. 08-1008)).

40 See *id.*

alters only procedure.”⁴¹ Second, Allstate argued that even if one were to construe section 901(b) as exclusively procedural, the section was enacted for “‘*substantive reasons*,’” its end being “not to improve ‘the conduct of the litigation process itself’ but to alter ‘the outcome of that process.’”⁴² Put slightly differently, Allstate argued, in essence, that section 901(b) was designed to operate, in practical effect, as an overall cap on damages and not just as a cap on the damages that may be imposed in a single proceeding.

Instead of addressing the merits of Allstate’s second argument, Justice Scalia observed more generally:

The fundamental difficulty with both these arguments is that the substantive nature of New York’s law, or its substantive purpose, *makes no difference*. A Federal Rule of Procedure is not valid in some jurisdictions and invalid in others—or valid in some cases and invalid in others—depending upon whether its effect is to frustrate a state substantive law (or a state procedural law enacted for substantive purposes).⁴³

Now his interpretation of § 2072(b) is clear: “it is not the substantive or procedural nature or purpose of the affected state law that matters, but the substantive or procedural nature of the Federal Rule.”⁴⁴ Under the really-regulates-procedure standard, a Federal Rule’s validity is thus measured independently of the particular circumstances to which it might apply. If, on its face, the rule regulates procedure and does not abridge, enlarge, or modify a substantive right, then the rule is valid regardless of how it might operate vis-à-vis potentially conflicting state law. Thus, a Federal Rule that literally (i.e., textually) imposed a cap on damages in class actions would violate the REA, but a Federal Rule that had only the potential (incidental or substantial) effect of doing so would not, even if that effect was realized in a particular case.

In short, under Justice Scalia’s approach, whether a Federal Rule is valid depends on the text of the rule read in isolation and not, in any fashion, on a state law with which that rule may conflict.⁴⁵ Thus, “compliance of a Federal Rule with the Enabling Act is to be assessed by consulting the Rule itself, and not its effects in individual applications.”⁴⁶

41 *Id.*

42 *Id.* (quoting Brief for Respondent, *supra* note 39, at 24, 26).

43 *Id.* at 1444.

44 *Id.*

45 *See id.*

46 *Id.*

We will examine Justice Scalia's defense of this test in Part IV. We now turn to Justice Stevens's interpretation of § 2072(b).

II. JUSTICE STEVENS AND FEDERAL RULE VALIDITY: THE RULE AS APPLIED

Justice Stevens's concurrence opens with a general description of the *Erie Railroad Co. v. Tompkins*⁴⁷ and REA landscapes.⁴⁸ That general description is essentially in accord with the basic framework described by Justice Scalia. Specifically, state laws must give way to valid Federal Rules. The REA—not *Erie* or the Rules of Decision Act (RDA)⁴⁹—provides the proper measure of that validity, and under § 2072(b) of the REA a federal rule may not abridge, enlarge, or modify any substantive right.⁵⁰ The Justices diverge only in their interpretation of this latter requirement.

Justice Stevens's interpretation of § 2072(b) focuses on the text of the statute and on what he perceives as the congressional mandate behind that text. In his view, § 2072(b) literally proscribes the application of any Federal Rule that, in the context of a diversity case, would “abridge, enlarge or modify any” state-created substantive right.⁵¹ This literal reading would appear to include both facial and as-applied challenges to a Federal Rule, for the focus is less on the rule than it is on the threatened substantive right. Read in this all-embracing fashion, the REA reflects a congressional “command that such rules not alter substantive rights.”⁵² Justice Stevens further explains, however, that his reading of § 2072(b) “does not mean that federal rules cannot displace state policy judgments; it means only that federal rules cannot displace a State's definition of its own rights or remedies.”⁵³ He continues:

[T]he balance Congress has struck [in the REA] turns, in part, on the nature of the state law that is being displaced by a federal rule. And in my view, the application of that balance does not necessarily turn on whether the state law at issue takes the *form* of what is traditionally described as substantive or procedural. Rather, it turns on

47 304 U.S. 64 (1938).

48 See *Shady Grove*, 130 S. Ct. at 1448–49 (Stevens, J., concurring in part and concurring in the judgment).

49 28 U.S.C. § 1652 (2006).

50 See *Shady Grove*, 130 S. Ct. at 1448–49 (Stevens, J., concurring in part and concurring in the judgment).

51 See *id.*

52 *Id.* at 1449.

53 *Id.*

whether the state law actually is part of a State's framework of substantive rights or remedies.⁵⁴

There are two key points here. First, the "nature" of a potentially altered state law is relevant to the § 2072(b) analysis. "Nature" refers to the distinction between substantive law and procedural law.⁵⁵ The § 2072(b) proscription is addressed only to the former—"any *substantive* right."⁵⁶ Second, in determining the nature of the state law, the operation of that law is more important than the form it takes. Justice Stevens elaborates on this point in the next paragraph, where he describes how an ostensibly procedural law could operate substantively. "Such laws, for example, may be seemingly procedural rules that make it significantly more difficult to bring or to prove a claim, thus serving to limit the scope of that claim."⁵⁷ If that were the case, a Federal Rule conflicting with the ostensibly procedural, but operationally substantive, state law might well run afoul of § 2072(b).⁵⁸

On both key points, Justice Stevens's approach diverges from that of Justice Scalia, for under the latter's approach state law is completely irrelevant. The only question, from Justice Scalia's perspective, is whether the Federal Rule itself—on its face and without regard to any conflicting state law—really regulates procedure.⁵⁹ Not surprisingly, Justice Stevens expressly rejects Justice Scalia's interpretation of § 2072(b):

Justice Scalia believes that the sole Enabling Act question is whether the federal rule "really regulates procedure," which means, apparently, whether it regulates "the manner and the means by which the litigants' rights are enforced." I respectfully disagree. This interpretation of the Enabling Act is consonant with the Act's first limitation to "general rules of practice and procedure." But it ignores the second limitation that such rules also "not abridge, enlarge or modify *any* substantive right," and in so doing ignores the balance that Congress struck between uniform rules of federal procedure and respect for a State's construction of its own rights

54 *Id.*

55 *See id.* at 1457–60.

56 28 U.S.C. § 2072(b) (2006) (emphasis added).

57 *Shady Grove*, 130 S. Ct. at 1450 (Stevens, J., concurring in part and concurring in the judgment).

58 *Id.* This is much like the approach adopted by Justice Frankfurter in *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945), describing the irrelevance of "whether a statute of limitations is deemed a matter of 'procedure' in some sense," where function supersedes labels. *Id.* at 108–09. Not surprisingly, Justice Stevens relies on Justice Frankfurter's realistic insight. *See Shady Grove*, 130 S. Ct. at 1449–50 (Stevens, J., concurring in part and concurring in the judgment).

59 *See supra* Part I.

and remedies. It also ignores the separation-of-powers presumption and federalism presumption that counsel against judicially created rules displacing state substantive law.⁶⁰

This critique of Justice Scalia is not quite accurate. Justice Scalia's approach does not eliminate the § 2072(b) proscription altogether; rather, it limits the scope of that proscription to facial challenges.⁶¹ Of course, the practical consequence of that interpretive limitation is that a facially valid Federal Rule may effectively abridge, enlarge or modify a substantive right as applied without running afoul of § 2072(b).

Justice Stevens applies his interpretation of § 2072(b) in Part III of his concurrence.⁶² In that discussion, he concedes that while virtually every procedural rule can be argued to have some effect on a substantive right, that is not the proper measure of validity:

In my view, however, the bar for finding an Enabling Act problem is a high one. The mere fact that a state law is designed as a procedural rule suggests it reflects a judgment about how state courts ought to operate and not a judgment about the scope of state-created rights and remedies. And for the purposes of operating a federal court system, there are costs involved in attempting to discover the true nature of a state procedural rule and allowing such a rule to operate alongside a federal rule that appears to govern the same question. The mere possibility that a federal rule would alter a state-created right is not sufficient. There must be little doubt.⁶³

Here, Justice Stevens appears to be invoking *Hanna's* refined outcome determinative test,⁶⁴ suggesting that there is more of an affinity between his approach and the "relatively unguided *Erie* choice" than he is willing to concede.⁶⁵ In any event, Justice Stevens makes it clear that Federal Rules carry a strong presumption of validity that will not be overcome by mere speculation as to the possible effects a particular rule's application may have on the outcome of a case.

Not too surprisingly, Justice Stevens's application of his preferred REA standard is longer and more complicated than the alternative

60 *Shady Grove*, 130 S. Ct. at 1452–53 (Stevens, J., concurring in part and concurring in the judgment) (footnotes omitted) (citations omitted).

61 *See supra* Part I.

62 *Shady Grove*, 130 S. Ct. at 1457–60 (Stevens, J., concurring in part and concurring in the judgment).

63 *Id.* at 1457.

64 *See Hanna v. Plumer*, 380 U.S. 460, 468 (1964).

65 *See Shady Grove*, 130 S. Ct. at 1448, 1449, 1456–57 (Stevens, J., concurring in part and concurring in the judgment).

application provided by Justice Scalia. While Justice Scalia's approach allows him to ignore New York law completely, Justice Stevens must examine section 901(b) to determine whether that section is, itself, substantive in the sense that it creates substantive rights or remedies or whether, despite its ostensibly nonsubstantive form, section 901(b) operates substantively in the sense that it is "bound up" with substantive rights or remedies. His conclusion that section 901(b) is procedural in both form and effect—and, hence, not protected by § 2072(b)—requires him to examine the text and legislative history of section 901(b), the relevance of section 901(b)'s placement in the New York code of procedure, and what he perceives as the nonsubstantive operation of that section, which does not, in his view, operate as a statutory cap on damages in actions seeking statutory penalties under New York law.⁶⁶ He concludes:

Because Rule 23 governs class certification, the only decision is whether certifying a class in this diversity case would "abridge, enlarge or modify" New York's substantive rights or remedies. Although one can argue that class certification would enlarge New York's "limited" damages remedy, such arguments rest on extensive speculation about what the New York Legislature had in mind when it created § 901(b). But given that there are two plausible competing narratives, it seems obvious to me that we should respect the plain textual reading of § 901(b), a rule in New York's procedural code about when to certify class actions brought under any source of law, and respect Congress' decision that Rule 23 governs class certification in federal courts. In order to displace a federal rule, there must be more than just a possibility that the state rule is different than it appears.⁶⁷

In short, under Justice Stevens's approach, the validity of a Federal Rule is assessed by examining the relationship between that rule and any potentially applicable state law to the contrary. If that state law is either substantive in form or operation, the Federal Rule will be deemed invalid to the extent that it alters substantive rights or remedies embodied or bound up in that state law. In this way, a Federal Rule might be valid in some states (or cases) and not in others.

III. *SIBBACH V. WILSON & CO.*

Justice Scalia's approach to the REA is premised on his perception of the stare decisis mandate of *Sibbach*. Indeed, he references this

⁶⁶ *Id.* at 1457–60.

⁶⁷ *Id.* at 1459–60 (citations omitted).

mandate several times in his opinion.⁶⁸ Of course, Justice Stevens specifically rejects Justice Scalia's interpretation of *Sibbach*.⁶⁹ Before examining Justice Scalia's defense of his position (and Justice Stevens's response to it), it might be helpful to examine *Sibbach* independently of the Scalia/Stevens debate. Perhaps in this way we can see the earlier decision as something other than a peg in a contemporary argument. To that end, I have tried to write a neutral, noninstrumental description of the *Sibbach* decision, based not on what courts and commentators have said about it, but on what *Sibbach* says about itself.

On November 24, 1937, Hertha Sibbach ("Sibbach") sued Wilson and Company ("Wilson") in the U.S. District Court for the Northern District of Illinois.⁷⁰ Invoking that court's diversity jurisdiction, Sibbach claimed that Wilson was liable to her for injuries she had sustained in an automobile accident that had occurred two months earlier in Indiana.⁷¹ When Sibbach filed her suit, the Federal Rules of Civil Procedure had yet to go into effect.⁷² Therefore, the procedure followed by the Illinois federal court was, pursuant to the Conformity Act⁷³ and in accord with longstanding practice, the procedural law of Illinois.⁷⁴ Under Illinois procedural law, state judges were not allowed to order a plaintiff in a personal injury suit to undergo a physical examination.⁷⁵ Hence, a federal district court sitting in Illinois also lacked the authority to do so. Had the suit instead been filed in Indiana, a state judge, and hence a federal judge sitting in that state, would have been empowered to order Sibbach to undergo such an examination.⁷⁶

All of the foregoing was perfectly clear until September 16, 1938, the date on which the Federal Rules of Civil Procedure went into effect.⁷⁷ From that date forward, instead of borrowing the procedural law of the state in which it sat, a federal district court would adhere to

68 See *id.* at 1442, 1444–45 (plurality opinion).

69 See *id.* at 1454–55 (Stevens, J., concurring in part and concurring in the judgment).

70 See *Sibbach v. Wilson & Co.*, 108 F.2d 415 (7th Cir. 1939), *rev'd*, 312 U.S. 1 (1941).

71 See *id.* at 415.

72 See *id.* at 416 (stating that the Federal Rules went into effect on September 16, 1938).

73 Act of Sept. 29, 1789, ch. 21, § 2, 1 Stat. 93, 93 (repealed 1948).

74 See GEOFFREY C. HAZARD, JR. & MICHELE TARUFFO, *AMERICAN CIVIL PROCEDURE* 27 (1993).

75 See *Sibbach*, 312 U.S. at 7 & n.3.

76 See HAZARD & TARUFFO, *supra* note 74, at 27.

77 See *Sibbach*, 108 F.2d at 416.

a new, uniform body of procedural rules.⁷⁸ Those new rules included a rule—Rule 35—that expressly vested federal district court judges with the authority to order a party to undergo a physical examination if that party's physical condition was "in controversy."⁷⁹

Because Sibbach's case remained pending on the effective date of the federal rules, Rule 35 potentially applied to her case, and Wilson made an appropriate motion under that rule.⁸⁰ The district court granted Wilson's motion. Sibbach, however, refused to comply with the court's order.⁸¹ Accordingly, the district court held her in contempt and ordered her committed until such time as she complied with the court's discovery order or was otherwise lawfully released from custody.⁸² Sibbach appealed, challenging the validity of Rule 35, and the court of appeals affirmed.⁸³ The Supreme Court granted certiorari in order to assess the validity of Rule 35 and to address the relevance of Rule 37, the latter providing the ostensible source for the district court's contempt order.⁸⁴

The *Sibbach* Court began its analysis by referencing six critical postulates,⁸⁵ all of which remain established principles of federal practice today. First, "Congress has undoubted power to regulate the practice and procedure of federal courts."⁸⁶ Second, Congress "may exercise that power by delegating to [the Supreme Court] authority to make rules not inconsistent with the statutes or constitution of the United States."⁸⁷ Third, the REA, which operates as such a delegation, "was purposely restricted in its operation to matters of pleading and court practice and procedure."⁸⁸ Fourth, the REA's proviso that the "court shall not 'abridge, enlarge, nor modify substantive rights,' in the guise of regulating procedure," was meant to emphasize this procedure-only restriction.⁸⁹ Fifth, a federal rule promulgated consistently with the above framework repeals the Conformity Act and the requirement that a federal court follow state procedural law.⁹⁰ And sixth, if an applicable state rule is, in fact, substantive, the RDA

78 See HAZARD & TARUFFO, *supra* note 74, at 27–28.

79 FED. R. CIV. P. 35.

80 See *Sibbach*, 312 U.S. at 6.

81 See *id.*

82 See *id.* at 7.

83 See *Sibbach*, 108 F.2d at 416–17.

84 See *Sibbach*, 312 U.S. at 7, 9.

85 See *id.* at 9–11.

86 *Id.* at 9.

87 *Id.* at 9–10.

88 *Id.* at 10.

89 *Id.*

90 See *id.*

requires the federal court (in a diversity case) to adhere to that state rule.⁹¹

In challenging the validity of Rule 35, Sibbach (and her attorney) faced a dilemma. If Sibbach established that her right to refuse to submit to a physical examination was premised on substantive law, the RDA was thought to require the district court to apply the law of Indiana, which recognized no such substantive right.⁹² Hence, Sibbach conceded that the right of a party claiming personal injuries to refuse to submit to a physical examination was a procedural right.⁹³ She argued, nonetheless, that the word “substantive” as used in the REA “translates . . . into ‘important’ or ‘substantial’ rights”;⁹⁴ hence, according to this argument, the abridge-enlarge-modify limitation of the REA precluded the federal district court from promulgating a rule that revised an important or substantial right.⁹⁵

Sibbach relied on two Supreme Court decisions, *Union Pacific Railway Co. v. Botsford*⁹⁶ and *Camden & Suburban Railway Co. v. Stetson*,⁹⁷ to support her position.⁹⁸ In *Botsford*, the Court had held, in 1891, that a specific federal statute regulating the taking of evidence in federal trials effectively stripped federal courts of any independent or nonstatutory authority to order a party to submit to a physical examination.⁹⁹ In *Stetson*, on the other hand, the Court held that a district court was required by the RDA to comply with a state statute that authorized state courts to order physical examinations in certain damages actions¹⁰⁰—there being no federal statute to the contrary.¹⁰¹ In addressing these precedents, the *Sibbach* Court emphasized that both cases assumed that the underlying right of refusal was procedural, not substantive.¹⁰² Moreover, both cases were consistent with the proposition that a federal court could order such an examination pursuant to a valid federal law: “In the instant case we have a rule which,

91 See *id.* at 10–11.

92 See *id.* at 10–11, 13 n.13; see also *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941) (describing the application of state law in federal diversity cases).

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

94 *Id.*

95 See *id.*

96 141 U.S. 250 (1891).

97 177 U.S. 172 (1900).

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

99 See *Botsford*, 141 U.S. at 256–57.

100 See *Stetson*, 177 U.S. at 177.

101 See *id.* at 174.

102 See *Sibbach*, 312 U.S. at 11–13. As to *Stetson*’s reliance on the RDA, the *Sibbach* Court suggested that the appropriate statute was the Conformity Act and not the RDA. See *id.* at 12–13.

if within the power delegated to this court, has the force of a federal statute, and neither the *Botsford* nor the *Stetson* case is authority for ignoring it.”¹⁰³ The key question, then, was whether Rule 35 was valid as measured by the REA.

In answering this question, the Court expressly rejected Sibbach’s attempt to equate “substantive” with anything that might be recognized as “important” or “substantial.”¹⁰⁴ In response to that assertion, the Court asked, “Recognized where and by whom?”¹⁰⁵ The Court then observed that the given right was “no more important than many others enjoyed by litigants in District Courts sitting in the several states, before the Federal Rules of Civil Procedure altered and abolished old rights or privileges and created new ones in connection with the conduct of litigation.”¹⁰⁶ In sum, the Court explained:

If we were to adopt the suggested criterion of the importance of the alleged right we should invite endless litigation and confusion worse confounded. The test must be whether a rule really regulates procedure,—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them. *That the rules in question are such is admitted.*¹⁰⁷

Thus, the validity of Rule 35 was easily resolved. Sibbach conceded that both the Federal Rule and the state law with which it conflicted were procedural and made no admissible argument that the rule—either on its face or as applied—abridged, enlarged, or modified a state-created “substantive right,” at least as that phrase was understood by the Court.¹⁰⁸ For, in the Court’s view, the term “substantive right” did not embrace concededly procedural rights merely because they might be deemed to be “important” or “substantial.”¹⁰⁹ Thus, given the “procedural” concessions and Sibbach’s default on § 2072(b), the rule was plainly valid.¹¹⁰

The Court ended its opinion by reversing the district court’s contempt order as plain error under the express terms of Rule

103 *Id.* at 13.

104 *See id.*

105 *Id.*

106 *Id.* at 14. Note, again, the emphasis on the procedural nature of the underlying right.

107 *Id.* (emphasis added).

108 *See id.* at 13–14.

109 *See id.* at 14.

110 *See id.* at 16.

37(b)(2)(iv), which exempted from punishment as contempt a refusal to obey an order to submit to a physical examination.¹¹¹

IV. THE *SIBBACH* MANDATE

A. *Justice Scalia and the Sibbach Mandate*

In Part II-C of his opinion, Justice Scalia offers “[a] few words in response to [Justice Stevens’s] concurrence.”¹¹² He begins by noting that the disagreement between him and Justice Stevens is narrow.¹¹³ Both agree on the basic REA framework. That framework requires: first, a determination of whether the federal rule applies and, if so, whether that rule conflicts with state law, and, second, if the previous questions are both answered affirmatively, a determination of whether the federal rule is valid under the REA—specifically under the abridge-enlarge-modify proscription of 28 U.S.C. § 2072(b).¹¹⁴ As Justice Scalia explains, he and Justice Stevens disagree only as to how this latter determination should be made.¹¹⁵ While Justice Scalia would decide the validity of a federal rule solely by asking whether the rule itself is procedural (i.e., whether the rule “really regulates procedure”),¹¹⁶ Justice Stevens would also look to whether “the state law [the rule] displaces is procedural”¹¹⁷ in order to determine if the limitation of § 2072(b) has been transgressed.¹¹⁸ In Justice Scalia’s view, the Stevens approach “squarely conflicts with *Sibbach*, which established the rule we apply.”¹¹⁹

To be clear, Justice Scalia is not saying that he would ignore the abridge-enlarge-modify limitation, but that in applying this limitation he would not consult potentially conflicting state law.¹²⁰ Oddly enough, he agrees that his approach “is hard to square with § 2072(b)’s terms.”¹²¹ As he explains it, while one can plausibly determine whether a particular Federal Rule enlarges federal rights with-

111 *See id.*

112 *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1444 (2010) (plurality opinion). It is something of a curiosity that Justice Sotomayor, who joined Part II-B of Scalia’s opinion, did not join this section of the opinion, which is, in essence, the defense of Part II-B.

113 *See id.*

114 *See id.*

115 *See id.*

116 *See id.*

117 *Id.*

118 *See id.* at 1444–45.

119 *Id.* at 1445.

120 *See id.* at 1445–46.

121 *Id.* at 1446.

out reference to state law, “it is hard to understand how it can be determined whether a Federal Rule ‘abridges’ or ‘modifies’ substantive rights without knowing what state-created rights would obtain if the Federal Rule did not exist.”¹²² Yet, such is the “settled” approach established by *Sibbach* and followed “for nearly seven decades,”¹²³ and Justice Scalia sees no “special justification” for overruling the precedent.¹²⁴

Justice Scalia provides two justifications for his interpretation of *Sibbach*. The first comes at the end of Part II-B, where he references what he sees as the key passage from *Sibbach*:

A Federal Rule of Procedure is not valid in some jurisdictions and invalid in others—or valid in some cases and invalid in others—depending upon whether its effect is to frustrate a state substantive law (or a state procedural law enacted for substantive purposes). That could not be clearer in *Sibbach*:

“The petitioner says the phrase [‘substantive rights’ in the Rules Enabling Act] connotes more; that by its use Congress intended that in regulating procedure this Court should not deal with important and substantial rights theretofore recognized. Recognized where and by whom? The state courts are divided as to the power in the absence of statute to order a physical examination. In a number such an order is authorized by statute or rule. . . .”

“The asserted right, moreover, is no more important than many others enjoyed by litigants in District Courts sitting in the several states before the Federal Rules of Civil Procedure altered and abolished old rights or privileges and created new ones in connection with the conduct of litigation. . . . If we were to adopt the suggested criterion of the importance of the alleged right we should invite endless litigation and confusion worse confounded. The test must be whether a rule really regulates procedure”¹²⁵

The principle Justice Scalia derives from the above quoted passage is that the validity of a Federal Rule does not depend on whether “its effect is to frustrate a state substantive law.”¹²⁶ But the quoted material says no such thing. As we know, *Sibbach* conceded that the right at issue—the right of a litigant to be free from a court-ordered physical examination—was a procedural right, and the *Sibbach* Court

122 *Id.* at 1445–46.

123 *Id.* at 1446.

124 *See id.* (quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989)).

125 *Id.* at 1444 (alterations in original) (quoting *Sibbach v. Wilson & Co.*, 312 U.S. 1, 13–14 (1941)).

126 *See id.*

emphasized its agreement with that concession at several points in its opinion.¹²⁷ *Sibbach* attempted to maneuver around this concession by arguing that that § 2072(b) should be extended to cover “important” or “substantial” rights, including the procedural right she asserted.¹²⁸ This was the precise argument being addressed and rejected in the above quoted passage. The “really regulates procedure” language, on which Justice Scalia places so much weight, operates as a tag to that rejection and is followed by the Court’s observation “[t]hat the rules in question are [procedural] is admitted.”¹²⁹ Thus, it was completely unnecessary for the Court to elaborate on the scope of § 2072(b) or to determine whether Rule 35 frustrated (or abridged, enlarged, or modified) any state substantive law.¹³⁰

Justice Scalia’s second defense of his *Sibbach* interpretation occurs in footnote 9, which appears in Part II-C of his opinion. Quoted in full, that footnote provides:

The concurrence claims that in *Sibbach* “[t]he Court . . . had no occasion to consider whether the particular application of the Federal Rules in question would offend the Enabling Act.” Had *Sibbach* been applying the concurrence’s theory, that is quite true—which demonstrates how inconsistent that theory is with *Sibbach*. For conformity with the Rules Enabling Act was the *very issue* *Sibbach* decided: The petitioner’s position was that Rules 35 and 37 exceeded the Enabling Act’s authorization; the Court faced and rejected that argument, and proceeded to reverse the lower court for failing to apply Rule 37 correctly. There could not be a clearer rejection of the theory that the concurrence now advocates.

The concurrence responds that the “the specific question of ‘the obligation of federal courts to apply the substantive law of a state’” was not before the Court. It is clear from the context, however, that this passage referred to the *Erie* prohibition of court-created rules that displace state law. The opinion unquestionably dealt with the Federal Rules’ compliance with § 2072(b), and it adopted the standard we apply here to resolve the question, which does not depend on whether individual applications of the Rule abridge or

127 See *Sibbach*, 312 U.S. at 10–11, 14.

128 See *id.* at 11.

129 *Id.* at 14.

130 Commentators have suggested that the really-regulates-procedure test “is no test at all—in a sense, it is little more than the statement that a matter is procedural if, by revelation, it is procedural.” 19 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, *FEDERAL PRACTICE AND PROCEDURE* § 4509, at 264 (2d ed. 1996). And, in *Sibbach*, that “revelation” was, in large part, a product of the plaintiff’s strategic concession. See *Sibbach*, 312 U.S. at 11.

modify state-law rights. To the extent *Sibbach* did not address the Federal Rules' validity vis-à-vis contrary state law, *Hanna* surely did, and it made clear that *Sibbach*'s test still controls.¹³¹

The first paragraph of footnote 9 is constructed on a rather obvious misinterpretation of the Stevens concurrence. The language Justice Scalia quotes from the concurrence comes from a passage in which Justice Stevens asserts that *Sibbach* involved a facial challenge to Rule 35 and not an as-applied challenge.¹³² (The full passage from which the Stevens quote is taken makes that abundantly clear.¹³³) Justice Scalia's response to Justice Stevens's assertion is that "conformity with the Rules Enabling Act was the *very issue Sibbach* decided," suggesting that Stevens was making a completely different and obviously incorrect point, namely, that conformity with the Enabling Act was not at issue in *Sibbach*.¹³⁴ Of course, Stevens made no such argument and Justice Scalia's dismantling of this never-made argument proves nothing about the position Stevens actually took or whether the *Sibbach* Court clearly rejected the theory of the concurrence.¹³⁵

The second paragraph of footnote 9 responds to Justice Stevens's contention that no issue of state substantive law was at issue in *Sibbach*.¹³⁶ Justice Scalia responds with a non-sequitur that morphs into a conclusion: "The opinion [in *Sibbach*] unquestionably dealt with the Federal Rules' compliance with § 2072(b), and it adopted the standard we apply here to resolve the question, which does not depend on whether individual applications of the Rule abridge or modify state-law rights."¹³⁷ Of course, the fact that *Sibbach* dealt with "compliance with § 2072(b)"¹³⁸ does not contradict Justice Stevens's obviously correct assertion that state substantive law was not at issue in *Sibbach*.¹³⁹ The latter part of Justice Scalia's response simply describes the standard he says he must apply.

The footnote concludes with the observation that if "*Sibbach* did not address the Federal Rules' validity vis-à-vis contrary state law,

131 *Shady Grove*, 130 S. Ct. at 1445 n.9 (plurality opinion) (alterations in original) (citations omitted).

132 *See id.* at 1454 (Stevens, J., concurring in part and concurring in the judgment).

133 *See id.* at 1454 & nn.11–12.

134 *Id.* at 1445 n.9 (plurality opinion).

135 *See id.*

136 *See id.*

137 *Id.*

138 *Id.*

139 *See id.* at 1454 (Stevens, J., concurring in part and concurring in the judgment).

Hanna surely did.”¹⁴⁰ But, yet again, the Stevens concurrence is misconstrued. The question for Stevens was not whether *Sibbach* addressed the validity of a federal rule vis-à-vis “contrary state law,”¹⁴¹ but whether it did so vis-à-vis contrary state *substantive* law.¹⁴² Justice Stevens says *Sibbach* did not do the latter, and Justice Scalia never actually refutes that point. And, of course, *Hanna v. Plumer*¹⁴³ did not involve a conflict between a Federal Rule and contrary state substantive law.¹⁴⁴

B. Justice Stevens’s Rejection of the *Sibbach* Mandate

In Justice Stevens’s view, “the plurality [has] misread[]” *Sibbach*.¹⁴⁵ Unlike the plurality, Justice Stevens found no *Sibbach* mandate against as-applied challenges to the Federal Rules. His interpretation of *Sibbach* was premised on what he perceived as two critical points in the *Sibbach* decision. First, “[t]he petitioner [in *Sibbach*] raised only the facial question whether ‘Rules 35 and 37 [of the Federal Rules of Civil Procedure] are . . . within the mandate of Congress to this court.’”¹⁴⁶ Second, “the specific question of ‘the obligation of federal courts to apply the substantive law of a state’” was not at issue in *Sibbach*.¹⁴⁷ Putting these two points together, Justice Stevens concludes, “The [*Sibbach*] Court, therefore, had no occasion to consider whether the particular application of the Federal Rules in question would offend the Enabling Act.”¹⁴⁸ He explained further:

Nor, in *Sibbach*, was any further analysis necessary to the resolution of the case because the matter at issue, requiring medical exams for litigants, did not pertain to “substantive rights” under the Enabling Act. Although most state rules bearing on the litigation process are adopted for some policy reason, few seemingly “procedural” rules define the scope of a substantive right or remedy. The matter at issue in *Sibbach* reflected competing federal and state judgments about privacy interests. Those privacy concerns may have been weighty and in some sense substantive; but they did not per-

140 *Id.* at 1445 n.9 (plurality opinion).

141 *See id.*

142 *See id.* at 1454 (Stevens, J., concurring in part and concurring in the judgment).

143 380 U.S. 460 (1965).

144 *See id.* at 461–62 (addressing a conflict between federal and state service of process provisions).

145 *See Shady Grove*, 130 S. Ct. at 1454 (Stevens, J., concurring in part and concurring in the judgment).

146 *Id.* (quoting *Sibbach v. Wilson & Co.*, 312 U.S. 1, 9 (1941)).

147 *Id.*

148 *Id.*

tain to the scope of any state right or remedy at issue in the litigation. Thus, in response to the petitioner's argument in *Sibbach* that "substantive rights" include not only "rights sought to be adjudicated by the litigants" but also "general principle[s]" or "question[s] of public policy that the legislature is able to pass upon," we held that "the phrase 'substantive rights'" embraces only state rights, such as the tort law in that case, that are sought to be enforced in the judicial proceedings.¹⁴⁹

Justice Stevens also offered a response to Justice Scalia's suggestion that *Hanna* adopted a no-as-applied-challenges approach to the REA:

Although this Court's decision in *Hanna* cited *Sibbach*, that is of little significance. *Hanna* did not hold that any seemingly procedural federal rule will always govern, even when it alters a substantive state right; nor, as in *Sibbach*, was the argument that I now make before the Court. Indeed, in *Hanna* we cited *Sibbach's* statement that the Enabling Act prohibits federal rules that alter the rights to be adjudicated by the litigants, for the proposition that "a court, in measuring a Federal Rule against the standards contained in the Enabling Act . . . need not wholly blind itself to the degree to which the Rule makes the character and result of the federal litigation stray from the course it would follow in state courts."¹⁵⁰

C. *Justice Stevens Is Correct*

The fact that Justice Scalia did not mount an effective defense for his interpretation of *Sibbach* does not mean that he was wrong. Perhaps there is a better argument. For example, if one reads the phrase "really regulates procedure"¹⁵¹ in isolation, one can certainly construct an argument that *Sibbach* melded the two requirements of the REA into a single standard—one that focuses entirely on the procedural character of the Federal Rule. Some commentators have read *Sibbach* in this fashion, but more as a critique of the opinion than as a celebration.¹⁵² Moreover, even these commentators have tended to assume a worst-case-scenario interpretation of *Sibbach* by focusing more on the isolated phrase than they do on the critical details of the

149 *Id.* at 1455 (alteration in original) (citation omitted) (quoting *Sibbach*, 312 U.S. at 2–3, 13–14).

150 *Id.* at 1455 n.14 (alteration in original) (citations omitted) (quoting *Hanna v. Plumer*, 380 U.S. 460, 473 (1965)).

151 *Sibbach*, 312 U.S. at 14.

152 See, e.g., 19 WRIGHT, MILLER & COOPER, *supra* note 130, at 260–66; John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 718–20, 733–34 (1974).

case.¹⁵³ In any event, I have seven difficulties with the Scalia (or worst-case) interpretation of *Sibbach*. I will state each briefly.

First, the text of § 2072(b), in plain and understandable terms, imposes a substantive-rights limit on the scope of the REA delegation to the Supreme Court: "Such rules shall not abridge, enlarge or modify any substantive right."¹⁵⁴ This textual limit does not distinguish between facial and as-applied challenges, and it does not purport to create a redundancy with § 2072(a), which itself vests the Court with "the power to prescribe general rules of practice and procedure."¹⁵⁵ When reading the text of § 2072(a) and (b) together, one does not need an interpretive guide. The words are clear and speak for themselves. Hence, the explication of § 2072(b) should start and end with the text.¹⁵⁶

Second, if we must look to precedent to discover the meaning of § 2072(b), we should begin with the proposition that all judicial decisions are contextual and that the language used in any judicial decision must be read and understood contextually. I quite agree with Justice Harlan's observation that "shorthand formulations which have appeared in some past decisions are prone to carry untoward results that frequently arise from oversimplification."¹⁵⁷ So, while one could ride the phrase "really regulates procedure" down a trail that eviscerates or substantially curtails the text of § 2072(b), I would not take that option unless the factual and legal context that gave life to the phrase made the countertextual choice clear and inevitable. Typically, as was true in Justice Scalia's opinion, the choice to ride the really-regulates-procedure trail is premised largely, if not completely, on an acontextual reading of the operative phrase.¹⁵⁸

Third, the context in which "really regulates procedure" first appears in the *Sibbach* opinion includes these critical factors: 1) the challenge in *Sibbach* to Rule 35 was facial, not as applied;¹⁵⁹ 2) *Sibbach*

153 See Ely, *supra* note 152, at 719.

154 Rules Enabling Act, 28 U.S.C. § 2072(b) (2006).

155 See *id.* § 2072(a).

156 Even Justice Scalia agrees that his interpretation of *Sibbach* "is hard to square with § 2072(b)'s terms." *Shady Grove*, 130 S. Ct. at 1446.

157 *Hanna v. Plumer*, 380 U.S. 460, 475 (1965) (Harlan, J., concurring).

158 The highly regarded Professor Ely describes *Sibbach*'s § 2072(b) argument somewhat inaccurately as premised on an assertion that "the right not to be subjected to the sort of physical examination contemplated by Rule 35 was one recognized as substantive." Ely, *supra* note 152, at 733. Technically this is correct, but only to the extent that one understands the phrase "substantive" to include all rights, including procedural rights, deemed "important" or "substantial." Ely does not appear to be using the word in that limited fashion.

159 See *Sibbach v. Wilson & Co.*, 312 U.S. 1, 11 (1941).

conceded that the right at issue was procedural,¹⁶⁰ thus simultaneously satisfying § 2072(a) and eliminating any potential application of § 2072(b); 3) the phrase appears in a section of the opinion that rejects *Sibbach*'s effort to extend the § 2072(b) proscription to otherwise non-substantive rights that are deemed "important" or "substantial";¹⁶¹ and, 4) the phrase, both in itself and when read within the passage in which it appears, provides, at best, a cryptic and elliptical way of announcing a rather bold and superfluous interpretation of § 2072(b). With the combination of these factors, it is difficult, at the very least, to read the phrase "really regulates procedure" as proclaiming the irrelevance of state law and eliminating all as-applied challenges to the Federal Rules.¹⁶² Of course, this conclusion is in accord with Justice Stevens's concurrence in *Shady Grove*.¹⁶³

Fourth, despite the fact that *Sibbach* has been on the books for almost seven decades, the Supreme Court has never actually applied or even expressly endorsed the interpretation urged by Justice Scalia.¹⁶⁴ The Court's occasional references to *Sibbach* are not to the contrary. In *Hanna*, for example, the Court referenced the really-regulates-procedure formula, but had no occasion to consider whether the rule at issue before it abridged, enlarged, or modified a substantive right, because the right invoked in *Hanna* was a classically procedural right—specifically, the right to a particular method of service.¹⁶⁵ Indeed, the Court in *Hanna* arguably invited the possibility of as-applied challenges to the Federal Rules when it observed, "a court, in measuring a Federal Rule against the standards contained in the Enabling Act and the Constitution, need not wholly blind itself to the degree to which the Rule makes the character and result of the federal litigation stray from the course it would follow in state courts."¹⁶⁶ Similarly suggestive of an as-applied endorsement is the *Hanna* Court's favorable quotation of *Mississippi Publishing Corp. v. Mur-*

160 See *id.*

161 See *id.* at 13–14.

162 See *supra* Part III.

163 See *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1452–55 (2010) (Stevens, J., concurring in part and concurring in the judgment).

164 Professor Struve's careful analysis of the relevant precedent establishes that the as-applied model is, in fact, firmly rooted in the Court's jurisprudence. Catherine T. Struve, *Institutional Practice, Procedural Uniformity, and As-Applied Challenges Under the Rules Enabling Act*, 86 NOTRE DAME L. REV. 1181, 1190–1203 (2011).

165 See *Hanna v. Plumer*, 380 U.S. 460, 464 (1965).

166 *Id.* at 473. Justice Scalia describes the quoted passage from *Hanna* as "obscure *obiter dictum*," *Shady Grove*, 130 S. Ct. at 1446 n.12 (plurality opinion), providing an interesting contrast with his generous reading of *Sibbach*.

phree,¹⁶⁷ where the latter Court explained that Rule 4(f) “does not operate to abridge, enlarge or modify the rules of decision by which that court will adjudicate its rights.”¹⁶⁸

In fact, not only has the Court never endorsed Justice Scalia’s no-as-applied-challenges interpretation of § 2072(b), the unanimous Court seems to have endorsed opposite view in *Semtek International Inc. v. Lockheed Martin Corp.*,¹⁶⁹ where the Court observed that an interpretation of Rule 41(b) that would extinguish a state-recognized right to sue “would seem to violate” § 2072(b).¹⁷⁰ The *Semtek* opinion was, oddly enough, written by Justice Scalia.

Fifth, § 2072(b) is a congressional mandate that expressly limits the scope of the congressional delegation of rulemaking authority to the Supreme Court.¹⁷¹ A reading of *Sibbach* that would eviscerate or substantially curtail that limitation places the judiciary in the position of enhancing its own power in the face of a congressionally imposed mandate to the contrary. Given this potential aggrandizement of power, circumspection in one’s interpretation of *Sibbach* and § 2072(b) would seem to be a virtue.

Sixth, the narrowed construction of § 2072(b) endorsed by Justice Scalia undervalues a principle of federalism that arises when, in a diversity case, the conflicting law is both state-created and substantive.

Finally, if *Sibbach* did, in fact, adopt a narrow construction of § 2072(b), the opinion should be disavowed.¹⁷² I do not say “overruled” because the rule of *Sibbach* can be no broader than the case itself, and, as I have explained, *Sibbach* had nothing to do with as-applied challenges to the Federal Rules or to a Federal Rule said to abridge, enlarge, or modify a substantive right (as opposed to an “important” or “substantial” right). In short, ignore the dicta and apply the narrow and specific rule that emerges from the *Sibbach* decision.

Thus, if the question is one of statutory construction or of stare decisis, Justice Stevens was plainly correct.

167 326 U.S. 438 (1946).

168 *Hanna*, 380 U.S. at 465 (quoting *Murphree*, 326 U.S. at 446) (emphasis added).

169 531 U.S. 497 (2001).

170 *Id.* at 504; see Struve, *supra* note 164, at 1201.

171 See Rules Enabling Act, 28 U.S.C. § 2072(b) (2006).

172 See 19 WRIGHT, MILLER & COOPER, *supra* note 130, at 260–66; Ely, *supra* note 152, 718–20, 733–34.

V. THE POLICY QUESTIONS

Justice Scalia asserts two policy reasons in support of his interpretation of the REA. First, by allowing as-applied challenges to the Federal Rules, the Stevens interpretation would lead to “chaos,” with the Federal Rules varying from state to state.¹⁷³ Second, the Stevens interpretation requires a significantly more complicated inquiry than the approach endorsed by the plurality.¹⁷⁴

The first point is difficult to credit other than as a rhetorical flourish, for despite Justice Scalia’s insistence that *Sibbach* eliminated all as-applied challenges to the Federal Rules, lower federal courts have adhered to the text of § 2072(b) and, in so doing, have considered as-applied challenges to various Federal Rules, the vast majority of which fail under the strong presumption of validity accorded those rules.¹⁷⁵ As Justice Stevens points out, “the bar for finding an Enabling Act problem is a high one.”¹⁷⁶ Thus, “[i]t will be rare that a federal rule that is facially valid under 28 U.S.C. § 2072 will displace a State’s definition of its own substantive rights.”¹⁷⁷ The occasional state law trumping of a Federal Rule under this high bar certainly does not amount to anything like chaos.

With respect to Justice Scalia’s second point—ease of application—he is correct in his observation, but not on the consequences of it. As to the observation, if only facial challenges are permitted under § 2072(b), the inquiry will be brightline—no as-applied challenges—and easily applied since the entire analysis will focus on the text of the Federal Rule, asking only whether the rule *itself* abridges, enlarges, or modifies a substantive right. Moreover, as Justice Scalia points out, the “abridge” and “modify” limitations become wholly inoperative under this model, for the *Sibbach* mandate under which state law is irrelevant renders their application virtually impossible.¹⁷⁸ So, in fact, the only § 2072(b) question is whether the Federal Rule itself creates

173 See *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1446 (2010) (plurality opinion).

174 See *id.* at 1447 & nn.14–15.

175 See 17A JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE § 124.05 (3d ed. 2010) (citing cases applying § 2072(b)); 19 WRIGHT, MILLER & COOPER, *supra* note 130, at 273–92 (same).

176 *Shady Grove*, 130 S. Ct. at 1457 (Stevens, J., concurring in part and concurring in the judgment).

177 *Id.* at 1454 n.10; see MOORE ET AL., *supra* note 175, § 124.05 (noting the rarity of successful challenges under § 2072(b)); 19 WRIGHT, MILLER & COOPER, *supra* note 130, at 271–72 (examining the strong presumption of validity accorded the Federal Rules, but noting potential that § 2072(b) might be transgressed in “unusual cases”).

178 See *Shady Grove*, 130 S. Ct. at 1446 (plurality opinion).

a substantive right. The added bonus here is that it is unlikely that any substantive-right-creating rule would survive the rulemaking process. Thus, the Scalia standard would be both easy to apply and rarely, if ever, invoked. The Stevens model, on the other hand, requires a somewhat complicated inquiry (as evidenced by Justice Stevens's own application of that model),¹⁷⁹ and can be expected to be more than occasionally invoked, though rarely with success. Thus, if ease of application were the only concern, the nod would go to Justice Scalia.

There are two problems with the ease-of-application policy argument. The first is effectively addressed by Justice Stevens:

[The] inquiry is what the Enabling Act requires: While it may not be easy to decide what is actually a "substantive right," "the designations substantive and procedural become important, for the Enabling Act has made them so." The question, therefore, is not what rule *we* think would be easiest on federal courts. The question is what rule Congress established. Although, Justice Scalia may generally prefer easily administrable, bright-line rules, his preference does not give us license to adopt a second-best interpretation of the Rules Enabling Act. Courts cannot ignore text and context in the service of simplicity.¹⁸⁰

Of course, if you agree with Justice Scalia's interpretation of *Sibbach*, you might say that the bright-line rule adopted by him was a product of precedent and not of his interpretive choice. Quite obviously, for the reasons outlined in Part IV, I think it was more like the latter.

There is a second objection to the ease-of-application policy. While federal procedure should be no more complicated than necessary to promote the fair and efficient delivery of justice in a manner consistent with legitimate federal policy concerns, it does not follow that federal procedure should always be simple.

Consider this analogy. In the context of statutory federal question jurisdiction (28 U.S.C. § 1331), there are two tests for measuring whether the statute has been satisfied. One of those tests is relatively simple to apply, the other less so. The simple test—the "creation test"—asks whether federal law creates the plaintiff's claim or cause of action.¹⁸¹ If so, the case "arises under" federal law and thereby satisfies the standards of § 1331.¹⁸² If this were the exclusive test for mea-

179 See *id.* at 1454–55 (Stevens, J., concurring in part and concurring in the judgment).

180 *Id.* at 1454 (citations omitted) (quoting Ely, *supra* note 152, at 723).

181 See, e.g., *Am. Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916) ("A suit arises under the law that creates the cause of action.").

182 See *id.*

suring jurisdiction under § 1331, the determination of federal question jurisdiction would always be simple indeed. But there is, in addition to the creation test, a not-so-simple test. Under this test—the “essential federal ingredient test”—a claim or cause of action not created by federal law might nonetheless “arise under” federal law for purposes of jurisdiction if that claim or cause of action includes an essential federal ingredient.¹⁸³ This test is complicated and rarely serves as a basis for establishing jurisdiction. Some have, therefore, called for its elimination.¹⁸⁴ Yet, the test persists because, although it is relatively complicated and rarely invoked with success, it offers a jurisdictional safety valve for those cases that do not satisfy the creation test but for which the availability of a federal forum advances significant federal policy concerns.

The same can be said of the not-so-easy-to-apply approach to § 2072(b) endorsed by Justice Stevens. The uniformity of the Federal Rules is an important value, and a simplified approach to measuring the validity of those rules surely advances that value, but not without costs. In the context of diversity cases, a strict application of the uniformity value, which occurs under Justice Scalia’s model, and which renders state substantive law irrelevant, fails to account for the prerogatives and nuances of state law, both of which reflect important federal policy concerns. The strict uniformity model also assumes that the drafters of the Federal Rules possess a type of omniscience or prescience that enables them to account for all present and future variances in the modeling of state substantive law. By way of contrast, the added complexity—and it is not that complex—generated by enforcing § 2072(b) according to its text provides a limited but useful safety valve in service of legitimate federal policy interests (i.e., federalism and separation of powers) that may occasionally conflict with and override the uniformity principle.

CONCLUSION

The practical distinction between the interpretive models endorsed by Justices Scalia and Stevens is of limited consequence. Under both, it is unlikely that a Federal Rule will ever be invalidated on its face, and even under the Stevens model, *very* few Federal Rules will ever be limited in application by virtue of § 2072(b). So why care? In part, I care because those “very few” limited-in-application instances are nonetheless significant to the extent that they accommo-

183 See *Grable & Sons Metal Prods., Inc. v. Darue Eng’g & Mfg.*, 545 U.S. 308, 312 (2005).

184 See *id.* at 320–21 (Thomas, J., concurring).

date the Federal Rules to what should be the controlling principles of state substantive law. Even more importantly, however, I think that texts ought to matter, and that the interpretation of a text should not be a freewheeling exercise in judicial creativity and policymaking. The text of § 2072(b) matters; the text of the Court's opinion in *Sibbach* matters. Justice Scalia's approach to both feels like jagged fingernails scraping across the jurisprudential chalkboard. That is not a good thing.

