Is The Supreme Court Disabling the Enabling Act, or is *Shady Grove* Just Another Bad Opera?[1]

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I. INTRODUCTION

When a party to a lawsuit in federal court argues that a Federal Rule of Civil Procedure governs an issue before the court, and the opposing party argues that state law governs the issue, the court has a Rules Enabling Act (Enabling Act or Act) problem.[3] To resolve it, the court must determine whether the Federal Rule is pertinent to the issue in dispute; if it is, whether the Rule is valid under the Enabling Act; and if it is, whether the Enabling Act itself is constitutional.[4] Think of this as the PVC standard.[5] If the answer to all three questions is yes, the court must apply the Federal Rule, for there can be no higher law.

A Federal Rule is pertinent to an issue in dispute if, by its own terms, it provides a standard for deciding that issue.[6] Rule 4 is pertinent to an issue of whether service of process is adequate, for example, because Rule 4, by its own terms, provides the federal

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[1] *See* DANIEL L. GROOVER & CECIL C. CONNER, JR., SKELETONS FROM THE OPERA CLOSET (1994) (listing the world's worst operas). Not all operas involving the Supreme Court are bad. *See Scalia/Ginsburg*, "an operatic fantasy" in the style of The Magic Flute, with lyrics based on Justices Ginsburg and Scalia's opposing views about constitutional interpretation. *See* Emily Langer, *Derrick Wang Discusses "Scalia/Ginsburg," His Opera About the Supreme Court Justices*, WASH. POST, Oct. 4, 2013, http://www.washingtonpost.com/lifestyle/style/derrick-wang-discusses-scaliaginsburg-his-opera-about-the-supreme-court-justices/2013/10/03/7ec92c2a-2624-11e3-b3e9-d97fb087acd6_story.html.

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[3] *See generally* 28 U.S.C. § 2072 (2012). There are esoteric versions of the Rules Enabling Act problem but the one involving a so-called direct collision between a Federal Rule and state law is the prototype. There can be an Enabling Act problem without such a "direct collision," *see* Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 26 n.4 (1998), but there is no such scenario in the case law, and the possibility is more theoretical than real. *See* Robert J. Condlin, *"A Formstone of Our Federalism": The* Erie/Hanna *Doctrine & Casebook Law Reform*, 59 U. MIAMI L. REV. 475, 508-12 (2005) [hereinafter *Formstone*] (describing the nature of a Rules Enabling Act problem).

[4] *See* Hanna v. Plumer, 380 U.S. 460, 465 (1965) ("We conclude that . . . Rule 4 (d)(1), designed to control service of process in diversity actions, neither exceeded the congressional mandate in the Rules Enabling Act nor transgressed constitutional bounds, and that the Rule is therefore the standard against which the District Court should have measured the adequacy of service.")

[5] Pertinence + Validity + Constitutionality = PVC. If the *Erie/Hanna* doctrine is a "Formstone of our federalism," see Condlin, *Formstone*, *supra* note 3, at 475 n.1, then Enabling Act jurisprudence is federalism's polyvinyl chloride.

[6] Walker v. Armco Steel Corp., 446 U.S. 740, 749-50 (1980). The Court often expresses the point as the Rule being "sufficiently broad" to "govern" or "control" the resolution of the issue.

standard for determining the adequacy of service.[7] A Federal Rule is valid under the Enabling Act if it is a "rule[] of practice and procedure" *and*[8] it does not "abridge, enlarge or modify any substantive right."[9] The Enabling Act authorizes the creation of only procedural rules and any attempt to use it to make substantive "rules of decision" would be invalid.[10] Finally, the Enabling Act itself must be a proper exercise of Congress's legislative power under the Judiciary Article and the Necessary and Proper Clause of the Constitution to authorize the creation of Federal Rules in the first instance.[11] That issue, once decided (as it has been),[12] remains an unstated premise of all Enabling Act analysis.

Over the years, the validity part of the PVC standard has proven the most difficult part to understand and apply, and that is a little surprising. The Enabling Act's language is relatively clear, but even if it was not, one would have expected seventy plus years of case law interpretation to have removed any lingering ambiguities and confusions. The fact that the Supreme Court never has found a Federal Rule invalid also suggests that the Act's validity standard is not that difficult to understand and apply.[13] But agreeing on a definitive statement of the Enabling Act's validity standard, as well as the proper method for determining the meaning of that standard, has proven elusive.

The Supreme Court's most recent foray into this interpretive thicket, in *Shady Grove Orthopedic Associates v. Allstate Insurance Co.*,[14] raised the hope that this longstanding problem finally would be resolved, but when the *Shady Grove* decision was announced it became clear that the lack of a resolution was the only thing that was final. Justices Scalia[15] and Ginsburg were the principal antagonists in *Shady Grove* and the differences in their views were as pronounced as any in the long history of the debate over the Act. Justice Scalia (with Justice Stevens's help), carried the day on outcome in

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[7] *See* FED. R. CIV. P. 4. The Federal Rules do not always govern when they seem to. For example, in *Walker*, the Court held that Rule 3 does not govern the issue of when a lawsuit is commenced for state statute of limitations purposes, notwithstanding that Rule 3, by its own terms, regulates the "commencement" of a lawsuit. Statutes of limitations are substantive, s*ee* Guaranty Trust Co. v. York, 326 U.S. 99, 110-11 (1945), and the Federal Rules cannot create substantive law. *See Walker*, 446 U.S. at 750-51, and the discussion in Condlin, *Formstone*, *supra* note 3, at 519-21. Whether a federal court must apply state law in the absence of a pertinent Federal Rule is governed by the Rules of Decision Act, not the Enabling Act. *See Hanna*, 380 U.S. at 469-70.

[8] I highlight the conjunction because over the years the Supreme Court has taken different positions on the question of whether the Act articulates a one- or two-part standard. *See infra*.

[9] 28 U.S.C. § 2072 (2012).

[10] Sibbach v. Wilson & Co., 312 U.S. 1, 9-10 (1941) ("Congress has undoubted power to regulate the practice and procedure of federal courts . . . but it has never essayed to declare the substantive law . . . .).

[11] U.S. CONST. art. III, § 2, and the Necessary and Proper Clause, U.S. CONST. art. 1, § 8, cl. 18.

[12] *Sibbach*, 312 U.S. at 9-10.

[13] The Court has found ways to take a Federal Rule out of the picture without invalidating it. *See* note 102, *infra*.

[14] Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 559 U.S. 393 (2010).

[15] This article was written before Justice Scalia's recent death, but the view of the Enabling Act he expressed in *Shady Grov*e is shared by other members of the Court and remains one of the two principal interpretations of the Act competing for dominance. It makes sense to continue to refer to the view as his. He was its most eloquent and forceful defender.

the case, but he was able to muster only three other votes for his particular interpretation of the Act; and now that Justice Scalia has died and Justice Stevens has retired, there may not be a majority on the Court for even the outcome.[16] The Court's failure to bring this longstanding interpretive brouhaha to a conclusion has left lower courts free to parse the Enabling Act on their own, and this has resulted in the wide variety of views one would expect when federal judges are free to think for themselves.[17] After all of these years, confusion and disagreement abound, at both the highest and lowest levels, so much so in fact that the Enabling Act now effectively has been disabled as a rule of law.[18] The temptation to ask how this could have happened is irresistible.

I will discuss the Enabling Act's interpretive discontents in the following manner. In Section II I will describe the competing views in the debate over the Act's meaning and the relatively small number of cases in which those views are defined and developed. In Section III I will explain how the *Shady Grove* decision clarifies the points of disagreement in the debate, but does not reconcile or resolve them. Finally, in Section IV I will explain why the debate may never end, why the Supreme Court is likely to oscillate indefinitely between the polar positions of Justices Scalia and Ginsburg (and their ancestors, heirs, and assigns), as if mired in an interminable Kipling-Marx debate grounded on incompatible premises and devoid of shared principles.[19]

II. THE RULES ENABLING ACT AND ITS INTERPRETIVE DISCONTENTS

On its face, the Rules Enabling Act does not seem to be a confusing statute. It says, in relevant part:

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[16] *See* Jeffrey W. Stempel, Shady Grove *and the Potential Democracy-Enhancing Benefits of* Erie *Formalism*, 44 AKRON L. REV. 907, 911 (2011) ("With Stevens's departure from the Court and replacement with Justice Elena Kagan, one can hardly be confident that *Shady Grove* would come out the same way were it reargued today.").

[17] Even when it is possible to predict when a federal court will apply a Federal Rule, it is difficult to know on what basis the court will make this decision, and thus difficult to know on what basis to argue the point. Lawyers must make every possible argument as a consequence, and charge clients for all of them. Disagreement over the Act's meaning not only is confusing, it also is expensive.

[18] *See infra* Section IV.

[19] The *Shady Grove* case does not lack for academic commentary or advice on how to resolve the debate. *See* Joseph P. Bauer, *Shedding Light on* Shady Grove*: Further Reflections on the* Erie *Doctrine from A Conflicts Perspective*, 86 NOTRE DAME L. REV. 939 (2011); Stephen B. Burbank & Tobias Barrington Wolff, *Redeeming the Missed Opportunities of* Shady Grove, 159 U. PA. L. REV. 17 (2010); Kevin Clermont, *The Repressible Myth of* Shady Grove, 86 NOTRE DAME L. REV. 987 (2011); Jack Friedenthal, *Defining the Word "Maintain"; Context Counts*, 44 AKRON L. REV. 1139 (2011); Jennifer S. Hendricks, *In Defense of the Substance-Procedure Dichotomy*, 89 WASH. U. L. REV. 103 (2011); Allen 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); Kermit Roosevelt III, *Choice of Law in Federal Courts: From* Erie *and* Klaxon *to* CAFA *and* Shady Grove, 106 NW. U. L. REV. 1 (2012); Adam N. Steinman, *Our Class Action Federalism:* Erie *and the Rules Enabling Act After* Shady Grove, 86 NOTRE DAME L. REV. 1131 (2011); Stempel, *supra* note 16; Catherine T. Struve, *Institutional Practice, Procedural Uniformity, and As-Applied Challenges Under the Rules Enabling Act*, 86 NOTRE DAME L. REV. 1181 (2011).

> (a) The Supreme Court shall have the power to prescribe general rules of practice and procedure . . . for cases in the United States district courts . . . and courts of appeals.
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> (b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.[20]

Read literally, this language seems to articulate a two-part standard for determining the validity of a Federal Rule. To be valid, a Rule first must be a rule of "practice and procedure" (subsection a), and second, it must "not abridge, enlarge or modify any substantive right" (subsection b).[21] The terms "practice and procedure" and "substantive right" are not self-defining, of course, but each has a long history in law and one would expect that the Enabling Act's use of them would have been made clear in the case law. In real life, however, one would be disappointed. The Supreme Court sometimes has interpreted the expression "rules of practice and procedure," to include both substantive and procedural rules, and sometimes interpreted the expression "substantive rights" to refer to nothing at all, and the decisions announcing these confusing and not always consistent interpretations continue to fuel the debate over the meaning of the Act.[22] I will review the most important of these decisions and describe the difficulties they create for understanding the Act.[23]

1) *Sibbach v. Wilson*

The Supreme Court interpreted the Enabling Act for the first time in 1941, in the celebrated case of *Sibbach v. Wilson*,[24] and that decision continues to play a prominent role in Enabling Act jurisprudence down to the present day. In *Sibbach*, the Court was asked to determine (in effect) whether the defendant's request to conduct a compulsory medical examination of the plaintiff was governed by Federal Rule 35, which authorized the examination, or conflicting state law, which arguably[25] prohibited it. The plaintiff had filed a negligence action in the Northern District of Illinois seeking to recover for injuries suffered in Indiana, and her medical condition was an issue in the case.[26] The

[20] 28 U.S.C. § 2072 (2012).
[21] 28 U.S.C. § 2072 (2012).
[22] *See* Martin Redish & Dennis Murashko, *The Rules Enabling Act and the Procedural-Substantive Tension: A Lesson in Statutory Interpretation*, 93 MINN. L. REV. 26, 35-41 (2008) (describing three conceivable interpretations of the intersection of procedure and substance in the Enabling Act). The Enabling Act also authorizes the creation of Federal Rules of Appellate Procedure and Evidence, but my focus in this article will be on the Civil Rules.
[23] Justices on all sides of the debate cite to the same limited number of core cases to support their contradictory views. The various opinions in *Shady Grove* discuss all of these cases.
[24] *Sibbach*, 312 U.S. 1 (1941).
[25] I say "arguably," not because the state law in question was unclear, but because it was not clear which state law applied, and of the two possible candidates, only one prohibited the physical exam. *See* note 28 *infra*.
[26] *Sibbach*, 312 U.S. at 6.

defendant moved for an order requiring the plaintiff to submit to a medical examination and the district court granted the motion.[27] The plaintiff refused to submit to the examination, however, arguing that it would invade her substantive right of bodily integrity under Illinois law.[28] The district court held the plaintiff in contempt for violating its order, the plaintiff appealed, and the Seventh Circuit affirmed the contempt order.[29] The Supreme Court reversed the Seventh Circuit on grounds unrelated to the Rule 35 issue,[30] but also held that Rule 35 was valid, and affirmed the district court's order requiring the plaintiff to submit to the examination.[31]

Writing for a five person majority, Justice Stanley Roberts asked whether Rule 35 was "within the mandate of Congress to this Court [in the Enabling Act]" to create Federal Rules of Civil Procedure.[32] After finding two Conformity Act precedents not dispositive,[33] the Court described itself as "thrown back . . . to the arguments drawn from the language of the [Enabling] Act."[34] In parsing that language it discussed the "practice and procedure" requirement now in subsection (a) of the Act and the "not abridge, enlarge or modify any substantive right" prohibition now in subsection (b), as if they were a single, one-part standard.[35] For a Rule to be valid, the Court said, in language that has carried down to the present day, "[t]he test must be whether a rule really regulates procedure,—the judicial process for enforcing rights and duties recognized by substantive law."[36] If it does, the Rule is valid, and if it also is pertinent, the court must apply it.[37]

The Court did not explain its use of the euphonious adverb "really,"[38] and the word does not have an obvious meaning in an Enabling Act context. For example, is a

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[27] *Id*.

[28] The plaintiff's cause of action was governed by Indiana substantive law (because her claim arose in Indiana), and Indiana law permitted a compulsory physical exam. To avoid this, the plaintiff argued that she had an "important and substantial" right under Illinois procedural rules not to be compelled to submit to such an exam and that the federal court had to apply the Illinois procedural rule under the command of the Conformity Act. *Sibbach*, 312 U.S. at 6-7, 10-11.

[29] *Sibbach*, 312 U.S. at 7.

[30] The Court held that Rule 37 did not permit the use of the contempt sanction for a refusal to submit to a physical exam under Rule 35. *See Sibbach*, 312 U.S. at 16.

[31] *Id*.

[32] *Id*. at 9.

[33] The Enabling Act had replaced the Conformity Act seven years earlier. *See Sibbach*, 312 U.S. at 10. *See also* Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1176-77 (1982).

[34] *Sibbach*, 312 U.S. at 13.

[35] *See Sibbach*, 312 U.S. at 10-15. ("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.") At the time of *Sibbach*, the two provisions were both in section (a) of the Enabling Act. Section (b) of the Act at that time preserved the right to a jury trial in actions at law. *See* Burbank, *supra* note 33, at 1108.

[36] *Sibbach*, 312 U.S. at 14.

[37] *See id.*

[38] The Yuppie social class made "really" a popular colloquialism in the 1980s, *Yuppie*, WIKIPEDIA, http://en.wikipedia.org/wiki/Yuppie, and the term is still used today. *See, e.g.*, *The Strangerhood*, ROOSTERTEETH PRODUCTIONS, http://roosterteeth.com/archive/?id=85&v=more (last visited Apr. 20, 2016) (Dr. Cornelius Chambers Esquire, the Third, PhD, a character in the machinima series *The Strangerhood*, frequently says, "I mean, really!" when annoyed). The word also is listed in that popular repository of

Rule with substantive and procedural dimensions "really" substantive or "really" procedural? Is a procedural purpose enough to make a Rule "really" procedural, or is a procedural effect required as well? If a procedural purpose or effect is enough by itself, must that purpose or effect be the Rule's principal purpose or effect, or is a secondary or incidental purpose or effect enough? These questions, and others like them, arise inevitably when one tries to use the cryptic "really regulates procedure" phrase to determine the validity of a Federal Rule, but the Court said nothing in *Sibbach* about how to answer them.

Had it been forced to consider the question, the Court probably would have agreed with later commentators and courts that a Rule need not be exclusively procedural to be valid under the Enabling Act (it is difficult to make a rule that is exclusively procedural), it is enough that it have some significant procedural dimension, or (as Justice Harlan famously put it in a later case), that it is "rationally capable" of being classified as procedural."[39] The Court seemed to agree that if a Rule had only an insubstantial or incidental effect on substantive rights it would not abridge those rights, and thus would not violate the second part of the Act's standard.[40] If it were otherwise, few Federal Rules would be valid, since almost all procedural rules have some incidental effects on substantive law.[41] To be valid under the Act, insofar as the Court explained it in *Sibbach*, therefore, a Federal Rule need only avoid creating a "rule of decision," a rule for resolving the substantive merits of the legal claims in dispute.[42] If it does this, as Rule 35 did, the Rule is valid.[43]

The *Sibbach* majority supported its reading of the Enabling Act with three arguments. The first, what one might think of as an *ex cathedra* textualist claim,[44] declared that the Act's prohibition on abridging "substantive rights" was "confined to" (or "embraced") only rights "protected and enforced in accordance with the adjective law

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modern culture, the Urban Dictionary. *Really*, URBAN DICTIONARY, http://www.urbandictionary.com/define.php?term=really (last visited Apr. 17, 2016).

[39] *See* Hanna v. Plumer, 380 U.S. 460, 472 (1965).

[40] *See Sibbach*, 312 U.S. at 13-16 (describing how it was unnecessary to discuss Rule 35's effect on the state's rights in question); *Hanna*, 380 U.S. at 464-65.

[41] *See, e.g. Hanna*, 380 U.S. at 465 (quoting Mississippi Publishing Corp., v. Murphree, 326 U.S. 438, 445 (1946)).

[42] *See Sibbach*, 312 U.S. at 10-11.

[43] *See id.* at 16. Like Justice Potter Stewart and pornography, Justice Roberts seemed to believe that he knew a rule of practice and procedure when he saw it. Most Justices do not talk that way anymore. *Cf.* Bauer, *supra* note 19, at 974 ("[T]he [*Shady Grove*] plurality's 'test' of 'procedure' was so imprecise that it reminds one of Justice Stewart's definition of obscenity—'I know it when I see it.'").

[44] Think of *ex cathedra* textualism as a form of interpretation that, like the Catholic Church's doctrine of infallibility, grounds the force of a pronouncement, interpretive or otherwise, on the authority of the speaker. *Ex Cathedra*, MERRIAM WEBSTER ONLINE, http://www.merriam-webster.com/dictionary/ex%20cathedra (defining *ex cathedra*); *What Does the Term Ex Cathedra Mean and Where Did the Catholic Church Come Up with it?*, CATHOLIC ANSWERS, http://www.catholic.com/quickquestions/what-does-the-term-ex-cathedra-mean-and-where-did-the-catholic-church-come-up-with-it (same). Justice Scalia used to be the most accomplished practitioner of the method (the title to his book on statutory interpretation suggests that he might have agreed; reduced to an acronym, it reads *A Moi. See* ANTONIN SCALIA, A MATTER OF INTERPRETATION (1997), but now that he has died, Justice Alito is likely to be the method's most accomplished practitioner.

of judicial procedure."[45] While no doubt true, this attempt at a definition was not very helpful. It said, in effect, that substantive rights were rights enforced by procedural rights, but substantive and procedural rights are mutually exclusive categories by definition and describing one as not the other is question begging. The Court needed to define the concept of substantive rights in positive terms for the expression to have meaning (a task subsequent commentators have shown is possible[46]), and its failure to do that introduced a confusion into Enabling Act jurisprudence that has lingered to the present day.

The Court majority rejected the plaintiff's assertion that the term "substantive rights" was a synonym for "important and substantial rights theretofore recognized."[47] Interpreting the Act in that way, it said, would result in endless litigation and confusion as courts tried to differentiate between important and unimportant rights.[48] That difficulty notwithstanding, the Court quickly added that the right to be free from a physical examination was not more important than many other rights and thus not substantive under even the plaintiff's definition of the term.[49] A Federal Rule is valid under the Enabling Act, the Court repeated, if it "really regulates procedure." That is all you can know, and all you need to know.

The Court's second argument to support the "really procedural" paraphrase of the Enabling Act's validity standard was purposivist more than textualist.[50] The Enabling Act, it said, authorized the creation of Rules designed to promote the "speedy, fair and exact determination of the truth," and a rule providing for a compulsory medical

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[45] Roberts gave "the right not to be injured in one's person by another's negligence" as an example of a substantive law. *Sibbach*, 312 U.S. at 13.

[46] *See, e.g., Hanna*, 380 U.S. at 475 ("the proper line of approach in determining whether [a state rule is] substantive . . . is . . . by inquiring if the . . . rule would substantially affect those primary decisions respecting human conduct which our constitutional system leaves to state regulation") (Harlan, J., concurring); John Hart Ely, *The Irrepressible Myth of* Erie, 87 HARV. L. REV. 693, 726 (1974) (adding state laws regulating status, and states of mind to Harlan's idea of "primary" conduct); Redish & Murashko, *supra* note 22, at 58-66 (describing various ways to interpret the substantive rights language of the Enabling Act); Burbank & Wolff, *supra* note 19, at 47 ("[T]he grant of rulemaking power did not extend to 'matters involving substantive legal and remedial rights affected by the considerations of public policy.'" (quoting Stephen B. Burbank, *Proposals to Amend Rule 68—Time to Abandon Ship*, 19 U. MICH. J.L. REFORM 425, 433 (1986))); Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 559 U.S. 393, 442 n.2 (2010) (Stevens, J., concurring) (substantive law can include a rule that is "undeniably procedural in the ordinary sense of the term . . . [but which is] so bound up with the state-created right or remedy that it defines the scope of that substantive right or remedy").

[47] *Sibbach*, 312 U.S. at 11, 13.

[48] *Id.* at 13-14.

[49] *Id.* at 14.

[50] The argument was purposivist in the sense that Justice Roberts attributed reasonable purposes to the Act rather than deduced purposes from the statements of legislators made during the enactment process. *See Sibbach*, 312 U.S. at 14-15. Purposivism usually is associated with the Legal Process school of interpretation at Harvard Law School in the nineteen fifties and sixties, and while the Legal Process school did not emerge as a full blown view until after the decision in *Sibbach*, its methods were in circulation at the time Roberts wrote. *See* WILLIAM N. ESKRIDGE ET AL., LEGISLATION AND STATUTORY INTERPRETATION 228-29 (2006) (describing purposivist interpretation and its connection to the Legal Process school).

examination, such as Rule 35, "comport[s] with this policy."[51] This was uncontroversial as a description of the Act's purpose, but the connection between that purpose and a compulsory medical examination rule needed more of an explanation. Not all rules that accelerate litigation or promote the discovery of truth are authorized by the Enabling Act; there are countervailing substantive concerns, both federal and state, to be considered. But the Court did not discuss these concerns or take them into account. Instead, it seemed to assume that furthering any procedural purpose, however minimal, was enough to bring a Federal Rule within the ambit of the Act's authorization. That was the issue to be decided in *Sibbach*, however, not one to be assumed away.

The Court concluded its brief discussion of the Act by adding an intentionalist argument to the textualist and purposivist ones just described.[52] Pointing to a House Committee Report on the Bill that became the Enabling Act, and to the Notes of the Advisory Committee on the Rules on which the House Committee Report was based, it argued that Congress was aware of Rule 35's compulsory medical examination provision when it reviewed the draft Federal Rules and did not delete the provision in approving the Draft.[53] Gilding the lily a little, it also added that Congress knew that the right to a compulsory medical examination had been different under the Conformity Act, the Enabling Act's predecessor,[54] and yet, in a "dog did not bark fashion,"[55] it permitted a change in that practice to go into effect. From this inaction, the Court concluded, it was

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[51] *Sibbach*, 312 U.S. at 14.

[52] ESKRIDGE ET AL., *supra* note 50, at 221-30 (describing the differences between intentionalist and purposivist interpretation).

[53] *Sibbach*, 312 U.S. at 15. Justice Scalia would have been the first to denounce reliance on committee reports as a source of statutory meaning. *See* Wis. Pub. Intervenor v. Mortier, 501 U.S. 597, 621 (1991) (Scalia, J., concurring in the judgment) ("[W]e are a Government of laws, not of committee reports.").

[54] *See Sibbach*, 312 U.S. at 12-13.

[55] The Sir Arthur Conan Doyle story *Silver Blaze* inspired the expression. The story is about the disappearance of a famous racehorse and the apparent murder of its trainer on the eve of an important race. In the story Sherlock Holmes is able to identify the "agent" responsible for the trainer's death, in part, by noticing something that did not happen. Here is Dr. Watson's description of Holmes pointing out the importance of the non-event to a Scotland Yard inspector.

> As we stepped into the carriage one of the stable-lads held the door open for us. A sudden idea seemed to occur to Holmes, for he leaned forward and touched the lad upon the sleeve.
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> "You have a few sheep in the paddock," he said. "Who attends to them?"
>
> "I do, sir."
>
> "Have you noticed anything amiss with them of late?"
>
> "Well, sir, not of much account, but three of them have gone lame, sir."
>
> I could see that Holmes was extremely pleased, for he chuckled and rubbed his hands together.
>
> "A long shot, Watson, a very long shot," said he, pinching my arm. "Gregory, let me recommend to your attention this singular epidemic among the sheep. Drive on, coachman!"
>
> Colonel Ross still wore an expression that showed the poor opinion which he had formed of my companion's ability, but I saw by the inspector's face that his attention had been keenly aroused.
>
> "You consider that to be important?" he asked. "Exceedingly so."
>
> "Is there any point to which you would wish to draw my attention?"
>
> "To the curious incident of the dog in the night-time."
>
> "The dog did nothing in the night-time."
>
> "That was the curious incident," remarked Sherlock Holmes.

Sir Arthur Conan Doyle, *Silver Blaze*, *in* THE MEMOIRS OF SHERLOCK HOLMES 16-17 (Dover Thrift Editions 2010) (1895).

fair to infer that Congress intended to authorize the creation of a compulsory medical examination rule under the authority of the Enabling Act.[56]

At no time did the Court discuss explicitly whether the Enabling Act articulated a one- or two-part validity standard. Perhaps it believed it was not possible for a Rule that "really regulates procedure" to have more than an incidental or insubstantial effect on substantive rights, and thus not possible for it to "abridge, enlarge or modify" such rights. If so, it would not matter whether the standard had one or two parts, since the analysis would come out the same either way.[57] Answering the "one- or-two part standard" question is necessary only if a Federal Rule that "really regulates procedure" also has more than an incidental or insubstantial effect on substantive rights, and the Court in *Sibbach* decided that Rule 35 did not have that effect. In retrospect, however, the Court's failure to discuss the issue, even to dismiss it as unnecessary to the decision, was ill-advised, since it left future federal courts (including future Supreme Courts) free to conclude with equal legitimacy that *Sibbach* either had settled the question, or that it had left it open for another day.

While the *Sibbach* majority failed to take up the "one- or two-part standard" issue explicitly, Justice Frankfurter's dissenting opinion did, albeit in a somewhat indirect and oblique manner, and that dissent has important lessons for modern day Enabling Act analysis. Justice Frankfurter argued that Rule 35 was invalid because it violated a federal policy protecting the "inviolability of the person" articulated in the Conformity Act era case of *Union Pacific v. Botsford*.[58] That federal policy, he said, had historic roots in Anglo-American law and could not be curtailed "unless by clear and unquestionable authority of law."[59] A change in a policy so "touching the sensibilities of people or even their prejudices as to privacy," he argued, "ought not to be inferred from a general authorization to formulate rules for the more uniform and effective dispatch of business on the civil side of the federal courts."[60] An "invasion of the person," he continued, "stand[s] on a very different footing from questions pertaining to the discovery of documents, pre-trial procedure and other devices for the expeditious, economic and fair conduct of litigation."[61] He attached little significance to the fact that Congress did not delete the physical examination provision before approving the draft Rules. The "Rules are not acts of Congress," he said, and "can not be treated as such. . . . [T]o draw any

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[56] *Sibbach*, 312 U.S. at 15-16. It is difficult, if not impossible, to deduce a motive for acting from a failure to act, of course, but judges from all points on the political spectrum seem to like to do it nonetheless. *See, e.g.*, Scheidler v. Nat'l Org. for Women, 547 U.S. 9, 20 (2006); Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ., 550 U.S. 81, 90-91 (2007).

[57] Professor Burbank concludes that the "abridge, enlarge or modify any substantive right" provision was a redundancy and not intended to be an independent part of the Enabling Act's validity standard. *See* Burbank, *supra* note 33, at 1108. Not everyone agrees with his interpretation of the Act. *See* Redish & Murashko, *supra* note 22, at 67-77 (describing "Burbank's Mistakes in Interpreting the Rules Enabling Act").

[58] *Sibbach*, 312 U.S. at 17-18 (Frankfurter, J. dissenting). *See also* Union Pacific Ry. Co. v. Botsford, 141 U.S. 250, 252 (1891).

[59] *Sibbach*, 312 U.S. at 17 (Frankfurter, J. dissenting).

[60] *Id.* at 18. The "ought not to be inferred" phrasing seems to acknowledge that the Act could be interpreted in more than one way.

[61] *Sibbach*, 312 U.S. at 18.

inference of tacit approval from non-action by Congress is to appeal to unreality."[62] The change effected by Rule 35, he said, "would require explicit legislation."[63]

Frankfurter saw *Sibbach* as a separation of powers case, and Rule 35 as invalid because it invaded the lawmaking power of Congress.[64] Even though he did not say so, Frankfurter had to assume that the Enabling Act's "abridge substantive rights" prohibition was a separate and independent part of the test for the validity of a Federal Rule. It was clear that Rule 35 regulated practice and procedure, and if that by itself was enough to satisfy the Enabling Act's validity standard, he would have had to conclude that the Rule was valid. Only if the Act articulated a two-part validity standard did his argument make sense. The *Sibbach* majority disagreed with Frankfurter about the validity of Rule 35 and its disagreement might have been based on the assumption that the Enabling Act validity standard had only one part, that a Federal Rule was valid if it was a rule of "practice and procedure." But the majority also did not say this and its failure to do so makes it impossible to know the extent to which it considered and resolved the "one or two part standard" issue.

The decision in *Sibbach* was based on policy considerations as well as statutory language. The Justices disagreed, for example, about whether the interest in the uniform application of the Federal Rules was superior to the interest in protecting legislative prerogatives. If the Federal Rules were to have the same meaning everywhere, federal and state legislative enactments sometimes would have to give way. And if legislative enactments were to be given full force and effect Federal Rules would not have the same meaning everywhere.[65] It was not possible to protect both interests equally. Unfortunately, the *Sibbach* opinion failed to discuss this policy issue in any detail, making it impossible to determine just how large a role it played in the Court's analysis.[66] In the end, *Sibbach* combined a question-begging textualist rationale with perfunctory intentionalist and incomplete purposivist ones, to justify an *ex cathedra* pronouncement about the meaning of statutory text, expressed in the quaint argot of Yuppiespeak, while simultaneously giving short shrift to the policy concerns that underlay the debate over the text's meaning. These are not the qualities of a "final word" on the subject.

The Supreme Court returned to the task of parsing the Enabling Act infrequently over the next few years, and added little of significance to *Sibbach* when it did. As a consequence, the "really regulates procedure" paraphrase became a kind of default statement of the Enabling Act's validity standard for many Justices on the Court,[67]

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[62] *Id*.
[63] *Id.*
[64] *See id.* at 17-18.
[65] This was one of Justice Scalia's principle arguments in *Shady Grove. Shady Grove*, 559 U.S. 393, 411-12 (2010).
[66] Justice Stevens later argued that *Sibbach* failed to discuss the issue because the parties in the case did not raise it. *See Shady Grove*, 559 U.S. at 427-28 (Stevens, J., concurring).
[67] *See Shady Grove*, 559 U.S. 393, 407 (describing the "single criterion" test as something the Court has "long held.").

though a close examination of the case law will show this view to be more old than venerable.[68]

2) *Mississippi Publishing Corp. v. Murphree*

The Court's first, extensive, post-*Sibbach* discussion of the Enabling Act's validity standard, in *Mississippi Publishing Corp. v. Murphree*,[69] also continues to play an important role in the interpretation of the Act.[70] In *Murphree*, the Court was asked to reconcile the service of process provision of Federal Rule 4 with Mississippi personal jurisdiction law. The plaintiff filed the action in the Northern District of Mississippi and served the defendant in the Southern District, where it had its principal place of business and a registered agent.[71] The defendant moved to dismiss, arguing, *inter alia*, that Mississippi law did not provide for personal jurisdiction in the Southern District and that permitting service there amounted to a modification of state personal jurisdiction law in violation of Federal Rule 82.[72] The Supreme Court held for the plaintiff, finding that Rule 4 "did not affect . . . jurisdiction . . . but was intended . . . to provide a procedural means of bringing [a] defendant before the court" when the defendant otherwise was subject to the court's jurisdiction.[73] As such, it did not conflict with Rule 82's prohibition on extending personal jurisdiction.

The *Murphree* Court discussed the Enabling Act briefly, in a single paragraph at the end of its opinion, to make two points, one uncontroversial and the other unsubstantiated. It repeated *Sibbach's* familiar nostrum that "Congress's prohibition of any alteration of substantive rights . . . was obviously not addressed to . . . incidental effects . . . upon the rights of litigants who . . . have been brought before a court authorized to determine their rights,"[74] and also concluded that Rule 4 did "not abridge, enlarge or modify the rules of decision by which [the district] court will adjudicate [the defendant's] rights," because the Rule related "merely to 'the manner and the means by

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[68] *See* Redish & Murashko, *supra* note 22, at 74-76 (describing the post-*Sibbach* legislative history of the Enabling Act); Burbank & Wolff, *supra* note 19, at 52 (arguing the Court's 1988 amendments to the Enabling Act were an attempt to provide a standard more faithful to both the Act's original understanding and its evolving needs).

[69] 326 U.S. 438 (1946).

[70] *Shady Grove* relies heavily on *Murphree* in its interpretation of the Enabling Act. *Shady Grove*, 559 U.S. 407.

[71] *See Murphree*, 326 U.S. at 439-40. At the time, Rule 4 authorized service of process "anywhere within the territorial limits of the state in which the district court is held" when "the state embraces two or more [judicial] districts." *Id*. at 443. Mississippi state law provided for personal jurisdiction wherever a defendant had an agent for receipt of service of process. *Id*. at 442.

[72] *See Murphree*, 326 U.S. at 443-46. At the time, Rule 82 provided that the Federal Rules "shall not be construed to extend or limit the jurisdiction of the district courts of the United States." *Murphree*, 326 U.S. at 443.

[73] *See Murphree*, 326 U.S. at 444-46. Mississippi law provided for personal jurisdiction wherever the defendant had an agent for receipt of service, but the defendant argued that the statute did not apply in federal court. The Supreme Court held otherwise. *See Murphree*, 326 U.S. at 443. *See* note 79 *infra*, and accompanying text.

[74] *Id*. at 445.

which a right to recover . . . [would be] enforced.'"[75] Thus, the Court said, Rule 4 was "a rule of procedure and not of substantive right, and [was] not subject to the prohibition of the Enabling Act."[76]

Some read these brief comments to mean that the Court adopted the "single criterion" view of the Enabling Act validity standard,[77] but the *Murphree* opinion as a whole paints a slightly different picture. While the Court did say that Rule 4 did not abridge, enlarge, or modify any substantive right, it did so gratuitously, under circumstances in which there was no state substantive right to abridge.[78] The Court had eliminated any potential conflict between Rule 4 and state law when it held that appointing an agent for receipt of service of process under state law operated as consent to jurisdiction in both state and federal court, and not just state court as the defendant had argued.[79] Thus interpreted, state law did not conflict with Rule 4 and the two rules could be applied in combination, with Rule 4 controlling the issue of service.

Given the absence of any direct collision between state and federal law, the Court's quotation of *Sibbach's* "incidental effects" and "manner and means" language was the statement of abstract principles more than a legal conclusion necessary to the decision in the case. The statement that Rule 4 "does not operate to abridge, enlarge or modify the rules of decision by which [the] court will adjudicate [the plaintiff's] rights,"[80] was even more confusing. It mixed Rules of Decision Act language ("rules of decision") with Enabling Act language ("abridge, enlarge or modify"), to make a point required by neither Act.[81] The Court appeared to be quoting language for the sake of quoting it, rather than expressing a reasoned conclusion about the validity of Federal Rule 4. Given these confusions, the *Murphree* opinion left all of the hard Enabling Act issues right where it found them—unresolved.

3) *Hanna v. Plumer*

[75] *Id.* at 446 (quoting Guaranty Trust Co. v. York, 326 U.S. 99, 109 (1945)).
[76] *Id.*
[77] *Shady Grove*, 559 U.S. 393, 413 n.12 (2010).
[78] *See Murphree*, 326 U.S. at 445-46. Unlike in *Sibbach*, there also was no federal substantive right in *Murphree* with which Rule 4 might conflict. The personal jurisdictional authority of the federal court was based on state law.
[79] *Murphree*, 326 U.S. at 443.
[80] *Id.* at 445-46.
[81] "Rules of decision" is a synonym for "substantive law" in a Decision Act context, *see* Erie R.R. v. Tompkins, 304 U.S. 64 (1938) (substantive law of the state the "rules of decision" for federal courts sitting in diversity under the Rules of Decision Act), but as *Hanna v. Plumer*, 380 U.S. 460 (1965), makes clear, the Rules of Decision Act and Rules Enabling Act define "substantive" differently, *id.* at 471 ("The line between substance and procedure shifts as the legal context changes. . . . both the Enabling Act and the *Erie* rule say, roughly, that federal courts are to apply state 'substantive' law and federal 'procedural' law, but from that it need not follow that the tests are identical."), so the Court's use of Decision Act terminology in an Enabling Act context was confusing.

The Court's most extensive discussion of the Enabling Act's validity standard after *Sibbach* came in the celebrated case of *Hanna v. Plumer*,[82] but here too, the Court failed to say whether the standard had one or two parts. *Hanna* involved a dispute over the adequacy of service of process. Unlike *Sibbach* and *Murphree*, it also involved a direct collision between a Federal Rule and a state law. The plaintiff had served the defendant by leaving copies of a summons and complaint with the defendant's wife at the family residence as authorized by then-Federal Rule 4(d)(1).[83] Massachusetts State law, on the other hand, required that the defendant be served "in hand";[84] "usual place of abode" service was not adequate.[85] The defendant argued that state law governed the issue of service and moved for summary judgment based on the lack of adequate service. The district court granted the motion, and the First Circuit affirmed, holding that the dispute involved "a substantive rather than a procedural matter" and that, as such, *Erie* (i.e., the Rules of Decision Act), required the application of state law.[86] The Supreme Court granted certiorari and reversed.[87]

The Court began its analysis by finding Rule 4 pertinent to the issue in dispute.[88] The issue was adequacy of service and Rule 4 provided the federal standard for service of process. The Rule also passed muster as a rule of practice and procedure under

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[82] 380 U.S. 460 (1965). None of the Enabling Act cases between *Hanna* and *Shady Grove* make any fundamental changes in *Hanna*'s interpretation of the Act. *Gasperini v. Center for Humanities, Inc.* presented the Court with an opportunity to do so, but only Justice Scalia thought the Enabling Act issue in that case was worth discussing, *see Gasperini*, 518 U.S. 415, 468 (1996) (Scalia, J., dissenting), and Justice Ginsburg dismissed his argument in a footnote. *See id*. at 437 n.22 (majority opinion).

[83] At the time, Federal Rule of Civil Procedure 4 provided:

> Service shall be made as follows: (1) Upon an individual other than an infant or an incompetent person, by delivering a copy of the summons and of the complaint to him personally or by leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein . . . .

See Hanna, 380 U.S. at 461. The Rule has been amended substantially since then.

[84] *See* MASS. GEN. LAWS. ch. 197, § 9 (1958) (current version at MASS. GEN. LAWS. ch. 197, § 9 (2004)). At the time, the law provided, in relevant part, that:

> [A]n executor or administrator shall not be held to answer to an action by a creditor of the deceased which is not commenced within one year from the time of his giving bond for the performance of his trust, . . . unless before the expiration thereof the writ in such action has been served by delivery in hand upon such executor or administrator . . . .

Hanna, 380 U.S. at 462.

[85] *Id*. at 461-62.

[86] *See* Hanna v. Plumer, 331 F.2d 157, 159 (1st Cir. 1964). The First Circuit opinion in *Hanna* did not cite to *Erie,* but it based its decision on the fact that, as it puts it, "we are concerned with a substantive rather than procedural matter," found the Massachusetts state statute substantive, and cited to the *Cohen a*nd *Ragan* cases (rather than *Erie*) for authority. *Id*. *Cohen* was grounded on *Erie*, *see* Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 555-57 (1949), and *Ragan* distinguished itself from *Erie*, since it involved a Federal Rule and thus raised an issue under the Rules Enabling Act rather than the Rules of Decision Act. *See* Ragan v. Merchants Transfer & Warehouse Co., Inc., 337 U.S. 530, 553 (1949).

[87] 380 U.S. at 464. The Court divided its discussion into three distinct sections. The first expressed its principal Enabling Act analysis, *id.* at 464-65, the second explained why *Erie* did not govern the issue, *id.* at 469-72, and the third returned to the Enabling Act analysis to make minor changes in the description of the Act's validity standard. *Id*. at 472-74. *Hanna* is perhaps best known for its refinement of the outcome determination test for the Rules of Decision Act, but for our purposes, its Enabling Act analysis is more important.

[88] *Hanna*, 380 U.S. at 464-65.

subsection (a) of the Enabling Act since it defined the notice obligation for commencing a lawsuit, said nothing about how to resolve the substantive issues in dispute, and had no continuing effect in a lawsuit once it was complied with.[89] Its principal purpose and effect were procedural, in other words, and that made it "rationally capable of classification" as procedural.[90]

At that point, the Court should have turned its attention to subsection (b) of the Enabling Act and asked whether the defendant's right to in-hand service under Massachusetts law was substantive, and if yes, whether the application of Rule 4 would abridge that right; but it did not do this. Instead, it found that the differences between the state and federal service rules were not substantial enough to cause Rule 4 to "abridge" the rights created by the Massachusetts statute, whatever their nature.[91] Consequently, Rule 4 did not "exceed[] the congressional mandate embodied in the Rules Enabling Act . . . and [was] . . . the standard against which the District Court should have measured the adequacy of the service."[92] In a sense, the Court treated the Enabling Act's validity standard as having two parts, but found the second part satisfied under its "abridgement" rather than "substantive rights" component. The Court did not say this explicitly, however, leaving future courts free to decide for themselves whether the Court considered the question of whether the Enabling Act's validity standard had one or two parts.[93] For all of its extended discussion of the Enabling Act's text, *Hanna* did little to clear up the lingering confusion over the Act's central unresolved issue: whether its validity standard had one or two parts.

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[89] *Id.* (Rule 4 "does not operate to abridge, enlarge or modify the rules of decision by which [the] court will adjudicate [petitioner's] rights.)

[90] *See id.* at 472.

[91] *Hanna* has been criticized for using the similarity of the state and federal service rules as an excuse for passing on the opportunity to say whether section (b) of the Enabling Act articulated an independent test for determining the validity of the Federal Rule, and *a fortiori*, for failing to define the concept "substantive rights" referred to in that section, see Ely, *Irrepressible Myth*, *supra* note 46, at 720-21, and there may be merit to the criticism. The differences between the two rules were enough to change the outcome in the case. *See Hanna*, 380 U.S. at 465-66. On the other hand, while Professor Ely has argued that the Massachusetts statute did not create substantive rights, Ely, *Irrepressible Myth*, *supra* note 46, at 733-37, others have disagreed. *See* Abram Chayes, *The Bead Game*, 87 HARV. L. REV. 741, 751-52 (1974), and the issue is far from easy.

[92] *Hanna*, 380 U.S. at 464.

[93] There might be situations in which it is not possible to avoid the question of whether the Enabling Act validity standard has one or two parts. The case law does not provide a ready example, but it is possible to imagine one. Consider a variation on the *Hanna* facts in which Massachusetts has a statute prohibiting litigation-related activity of any kind from being conducted in a person's home. Assume that the statute was passed to protect the privacy of home life and that Massachusetts considered privacy a substantive right. (Such a statute might insulate Massachusetts citizens who never left home from being sued, but the Commonwealth might think this possibility so unlikely as not to pose a significant risk to any important state interest.) In such a circumstance, Rule 4 still would qualify as a rule of "practice and procedure" under section (a) of the Enabling Act, but now it also would have more than an insubstantial or incremental effect on a conflicting state right; it would destroy that right completely. If the Enabling Act is read literally, a court faced with such a situation would need to determine if section (b) of the Act states a separate and independent part of the test for determining the validity of a Federal Rule, and if it does, whether a state privacy right is substantive in the sense that term is used in the Enabling Act (since a state legislature cannot define the meaning of a federal law).

4) *Walker v. Armco Steel Corp.*

The next important case to interpret the Enabling Act,[94] *Walker v. Armco Steel Corp.*,[95] also failed to resolve the "one- or two-part validity standard" issue, but for a different reason.[96] *Walker* involved a dispute over when an action was commenced for state statute of limitations purposes. The state law in *Walker* provided that an action was commenced upon service of process, but Federal Rule 3 provided that it was commenced upon filing.[97] The plaintiff filed his case, but did not serve the defendant, within the state limitations period,[98] and the defendant moved to dismiss, arguing that state law controlled. Ultimately, the Supreme Court agreed, holding that Rule 3 was not intended "to toll a state statute of limitations, much less . . . to displace state tolling rules . . . it simply governs the date from which various timing requirements of the Federal Rules begin to run . . . ."[99] Thus interpreted, the "scope of the Federal Rule was not as broad as [the plaintiff] urged,"[100] and, "there being no Federal Rule [governing] the point in dispute, *Erie* command[ed] the enforcement of state law."[101]

Walker was a pertinence case, not an Enabling Act one, notwithstanding that the validity of a Federal Rule seemed to be one of the issues in dispute. When the Court held that Rule 3 did not define commencement of an action for statute of limitations purposes, however, it took the issue of the Rule's validity off the table.[102] There was no need to examine that question if the Rule did not apply to any issue before the court. Thus resolved, *Walker* added nothing to Enabling Act analysis. Some commentators question the Court's good faith in deciding *Walker* on a pertinence ground, arguing that such a narrow reading of Rule 3 was inconsistent with the Court's expansive reading of Rule 4

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[94] *Shady Grove* includes *Walker* in the list of cases it uses to interpret the Enabling Act. *See Shady Grove* 559 U.S. at 421-22.

[95] *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980). *Walker* was a clone of *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949). The Supreme Court called the two cases "indistinguishable," in part because the "predecessor to the Oklahoma statute [in *Walker*] was derived from the predecessor to the Kansas statute in *Ragan*." *Walker*, 446 U.S. at 748. Ordinarily one would not expect to find identical cases in the Supreme Court only thirty years apart, but many thought *Hanna* had overruled *Ragan*. *Walker* made it clear that it did not. *Walker*, 446 U.S. at 749-50.

[96] *Walker* also is important for its contribution to the question of whether the Federal Rules should be read narrowly to avoid conflicts with state law. Justice Ginsburg adopted this view in *Shady Grove*, but the Court in *Walker* rejected the idea and said the Rules should be given their ordinary meaning. *See Walker*, 446 U.S. at 750 n.9.

[97] *See Walker*, 446 U.S. at 742.

[98] *Id.* at 742-43. The statute permitted the defendant to be served within sixty days of filing, even if outside the applicable limitations period. *Id.* at 743. *See also Ragan*, 337 U.S. at 531 n.4 (interpretation of an identical commencement of the action statute).

[99] *Walker*, 446 U.S. at 750-51.

[100] *Id.* at 750.

[101] *Id.* (second alteration in original) (quoting *Hanna*, 380 U.S. at 470). *Id.* at 752 ("Since there is no direct conflict between the Federal Rule and the state law, the *Hanna* analysis does not apply.").

[102] *See, e.g.*, *Walker*, at 752 n.14 ("Since we hold that Rule 3 does not apply, it is unnecessary for us to address the second question posed by the *Hanna* analysis: whether Rule 3, if it applied, would be outside the scope of the Rules Enabling Act or beyond the power of Congress under the Constitution.").

in *Hanna*,[103] but this criticism is unwarranted. Finding that Rule 4 did not govern service of process in *Hanna* would have read Rule 4 out of existence. The Rule had no purpose other than to regulate service. But Rule 3 had a life as a timing rule, both for other parts of the Federal Rules and perhaps federal statutes of limitations,[104] independently of whether it defined commencement of an action for state statute of limitations purposes. That fact, combined with the Court's legitimate concern about modifying state substantive law through a Federal Rule (statutes of limitations are substantive under the Rules of Decision Act),[105] was more than enough to establish the reasonableness of the Court's view.[106]

5) *Burlington Northern Railroad Co. v. Woods*

Burlington Northern Railroad Co. v. Woods[107] is the last in the line of cases cited in *Shady Grove* to support the "single criterion" view of the Enabling Act's validity standard. That case, like *Hanna*, involved a direct collision between state and federal law. A district court jury awarded the plaintiffs $300,000 for injuries sustained in a motorcycle accident, the defendants appealed the verdict, and the Eleventh Circuit affirmed it.[108] The plaintiffs (respondents on appeal) moved for the imposition of a mandatory ten percent affirmance penalty required by Alabama state law.[109] The defendant Railroad (petitioner on appeal) objected, arguing that the award of a penalty on appeal was governed by Rule 38 of the Federal Rules of Appellate Procedure, and that Rule 38 provided for a discretionary penalty only if the appeal was frivolous.[110] The Eleventh Circuit held that state law, not Rule 38, governed the issue, and imposed a ten percent penalty on the Railroad.[111] The Supreme Court reversed, holding that Rule 38 governed because the Rule was valid under the Enabling Act, and because it occupied the same field of operation as the Alabama law, it pre-empted the state law.[112]

The Rule's purpose, the Court said, was "to penalize frivolous appeals and appeals interposed for delay"[113] and this made it "rationally capable of classification as [procedural],"[114] under the "practice and procedure" requirement of subsection (a) of the

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[103] *See, e.g.*, JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE: CASES AND MATERIALS 439 (11th ed. 2013) ("Why is Rule 4 read broadly, making a clash with state law 'unavoidable,' while Rule 3 is read to incorporate an implied exception for state statutes?").

[104] The Court withheld judgment on the latter issue. *See Walker*, 446 U.S. at 752 n.14.

[105] *See Guaranty Trust*, 326 U.S. at 110-11.

[106] The Advisory Committee Notes on the Rules raised the question of whether Rule 3 should be read to toll a state statute of limitations, but expressed no opinion on how it should be resolved. *See Walker*, 446 U.S. at 750 n.10.

[107] Burlington Northern R.R. Co. v. Woods, 480 U.S. 1 (1987).

[108] *Id.* at 2.

[109] *Id.* at 3.

[110] *Id.* at 4.

[111] *Id.* at 3.

[112] *See id.* at 7-8.

[113] *Id.* at 4.

[114] *Id.* at 5. The "rationally capable" standard is the test for determining the validity of a federal statute under the Judiciary Article of the Constitution, not the validity of a Federal Rule under the Enabling Act. *See* Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 31-32 (1998) (describing how a federal statute is tested

Enabling Act. If the Court thought the Act's validity standard had only one part it would have stopped there, but it did not. Instead, it went on to find that "the Rules Enabling Act . . . contains an additional requirement," that a "Federal Rule must not 'abridge, enlarge or modify any substantive right.'"[115] The characterization of this requirement as "additional" seemed to acknowledge that the Enabling Act standard had two parts, that it was not reducible to a "really regulates procedure" paraphrase, but like Enabling Act cases before it, *Burlington Northern* failed to say this explicitly and thus left the issue still in doubt.

The Court then combined an "incidental effects" argument reminiscent of the discussion in *Hanna*[116] with a policy argument reminiscent of *Sibbach*,[117] to avoid examining the nature of the right created by the Alabama law.[118] Rule 38, the Court acknowledged, had an incidental effect on the state law right, but this was acceptable under the Enabling Act because the effect was an inevitable consequence of the uniform application of the Federal Rules.[119] In effect, the court read an exception into the Enabling Act rather than defined its terms narrowly, as in *Hanna*,[120] but the difference between the two moves was cosmetic more than substantive, since the result in both cases was to interpret the Act to mean less than it said. The Court's failure to say definitively whether the Act's validity standard had one or two parts continued the Court's past practice of equivocating on that issue, and left *Burlington Northern* somewhat limited as an Enabling Act precedent.

Enabling Act decisions after *Burlington Northern* do not add much to the preceding story. Most deal with unusual fact situations, narrowly defined legal issues, or idiosyncratic disagreements over pertinence, and as a result, have limited implications for interpreting the Act. The cases now contain so many distinctive perspectives, in fact, that it is difficult to know which justices believe what with respect to the Act's validity standard. The case law does not lack for authorial firepower—many highly regarded

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directly against the constitution to determine if it comes within a grant of federal legislative power). The mistake was harmless, however, since the Judiciary Article and section (a) of the Enabling Act use the same language and have been interpreted to mean the same thing.

[115] *Id*. (quoting 28 U.S.C. § 2072).

[116] *Id.* at 5 ("The Rules Enabling Act, however, contains an additional requirement. The Federal Rule must not 'abridge, enlarge or modify any substantive right. . . .' 28 U.S.C §2072. The cardinal purpose of Congress in authorizing the development of a uniform and consistent system of rules governing federal practice and procedure suggests that Rules which incidentally affect litigants' substantive rights do not violate this provision if reasonably necessary to maintain the integrity of that system of rules."); *See Hanna*, 380 U.S. at 465 ("Congress' prohibition of any alteration of substantive rights of litigants was obviously not addressed to such incidental effects as necessarily attend the adoption of the prescribed new rules of procedure . . . ." (citing Sibbach v. Wilson & Co., 312 U.S. 1, 11-14 (1941).).

[117] *See Sibbach*, 312 U.S. at 14 (arguing for an interpretation of the Enabling Act that avoids endless litigation and confusion).

[118] *See Burlington Northern*, 480 U.S. at 5-6.

[119] *See Burlington Northern*, 480 U.S. at 5 ("Rules which incidentally affect litigants' substantive rights do not violate this provision if reasonably necessary to maintain the integrity of that system of rules [of procedure].").

[120] In effect, it read section (b) of the Act to say: "Such rules shall not substantially abridge, enlarge or modify substantive rights."

justices have taken a turn at parsing the Act[121]—and yet no one has been able to produce the definitive interpretation needed to put the question of the Act's meaning to rest.[122] Perhaps the Court thought it was ready to announce such an interpretation when it took certiorari in *Shady Grove*, but if so, it soon learned that not all expectations are realized.

III. *SHADY GROVE*

In a series of opinions produced by some moderately surprising alliances,[123] only one of which commanded five votes, the *Shady Grove* case separated the debate over the meaning of the Enabling Act into three distinct sub-parts. The Justices disagreed over whether to interpret the Act from a rule or policy perspective; if policy, what policy; and if rule, what understanding of the rule. Justices Ginsburg, Scalia,[124] and Stevens now were the principal antagonists, and while the issues on which they disagreed were similar to those separating Justices Roberts and Frankfurter in *Sibbach* (and the various other Justices paired in the voting over the years), they also were different in significant respects,. Unfortunately, these differences made the lines in the sand in Enabling Act jurisprudence more pronounced than ever.[125]

The *Shady Grove* case itself involved a dispute over statutory interest on an insurance subrogation claim.[126] Shady Grove Orthopedic Associates provided medical care to Sonia Galvez and as partial payment for that care Galvez assigned Shady Grove her rights to reimbursement under an insurance policy issued by Allstate Insurance. Shady Grove filed a claim on the policy and Allstate paid it, but not within the thirty days

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[121] The list includes Justice Frankfurter in *Sibbach* (dissenting); Justice Stone in *Murphree* (majority opinion); Justice Douglas in *Ragan* (majority opinion); Justices Warren (majority opinion) and Harlan (concurring) in *Hanna*; Justice Marshall in *Walker* (majority opinion) and *Burlington Northern* (majority opinion); Justice Ginsburg in *Gasperini* (majority opinion); and Justice Scalia in *Gasperini* (dissenting), *Semtek* (majority opinion), and *Shady Grove* (majority opinion).

[122] Legal scholars have made some efforts in this regard but with limited success. Professor Ely's article, *The Irrepressible Myth of* Erie, see Ely, *Irrepressible Myth*, *supra* note 46, is the most well-known examples. Most (though not all) major Procedure scholars approved of Ely's basic framework for doing Enabling Act analysis when he first articulated it, even though some disagreed about its application in particular cases, but over the years his view gradually has lost favor. *See* Condlin, *Formstone*, *supra* note 3, at 476-80, 558-59 (describing the initial appeal and gradual decline in the popularity of Ely's view).

[123] The *Shady Grove* facts involved a "little guy-big guy," "individual-corporation," "states' rights-federal rights," "plaintiff-defendant," "democrat-republican" dispute, and Ginsburg and Scalia come down on the opposite sides of what one would have predicted in each of these dichotomies. This makes it hard to explain the decision as a consequence of a result-oriented jurisprudence. Something principled, or confused, must be at the base of it. *See* Stempel, *supra* note 16, at 911 ("*Shady Grove* was . . . a wonderful departure from the Court's seemingly predictable ideological divide that has characterized other close cases in recent years.").

[124] *See* note 15 *supra*.

[125] *See* Clermont, *supra* note 19, at 1029 (*Shady Grove's* "splintered opinions will lead lower court judges for a while to see the doors [to accommodating the federalism and separation of powers issues in dispute] as slightly ajar.")

[126] Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 559 U.S. 393, 396-97 (2010).

required by New York state law.[127] This made Allstate liable for statutory interest under another New York law, but the company refused to pay the interest.[128] Shady Grove filed a diversity action against Allstate in the Eastern District of New York, seeking to recover the interest owed it and the class of all other health care providers Allstate had not paid in time under the New York statute.[129] The District Court refused to certify the class, however, finding that yet another New York statute prohibited class actions in suits to recover penalties, and that statutory interest was a penalty.[130] The Court also dismissed Shady Grove's individual claim because it fell short of the amount in controversy required for diversity jurisdiction.[131] The Second Circuit affirmed, holding that the New York penalty statute created substantive rights under *Erie* and as such, had to be applied by a federal court sitting in diversity.[132] The Supreme Court granted certiorari and reversed.[133]

Justice Scalia wrote the opinion for the Court.[134] He began with the pertinence issue, asking whether the New York penalty statute or Federal Rule 23 governed the issue of class certification: Was there a direct collision between the two rules, he asked, so that they could not be applied consistently with one another, or did they govern different issues?[135] The Second Circuit had thought the rules were compatible—that Rule 23 governed the issue of whether the class could be certified and the New York statute governed the antecedent issue of whether a claim was eligible for class certification in the first instance—but Justice Scalia dismissed this distinction as "entirely artificial."[136]

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[127] *Id.* at 397. Professor Stempel has described the enactment of the New York statutory interest statute and the purposes it was designed to serve in authoritative detail. *See* Stempel, *supra* note 16, at 932-67.
[128] *Shady Grove*, 559 U.S. at 397.
[129] *Id*.
[130] *Id.*
[131] *Id*.
[132] *Id*.
[133] *Id.* at 398, 416.
[134] Justices Roberts, Stevens, Thomas, and Sotomayor joined with Scalia on Part I of the opinion (describing the facts and procedural posture of the case), and part II-A (discussing whether Rule 23 was pertinent to the issue in dispute). Justices Roberts, Thomas, and Sotomayor joined with him on Part II-B (discussing whether the Enabling Act articulated a "single criterion" test for determining the validity of the Federal Rules), and part II-D (discussing whether Rule 23 was valid), and Justices Roberts and Thomas joined with him on Part II-C (responding to Justice Stevens's conflicting interpretation of *Sibbach*). Justice Stevens wrote a separate concurring opinion providing the fifth vote for the Court's judgment on the merits in the case, and Justice Ginsburg wrote a dissent in which Justices Kennedy, Breyer and Alito joined**.** There was no majority view on the question of whether the Enabling Act validity standard had one or two parts, though Professor Roosevelt seems to believe otherwise. *See* Roosevelt, *supra* note 19, at 51 ("The Justices split 5-4 over whether to give independent significance to the Rules Enabling Act's 'shall not abridge' language, with five agreeing that they should . . . ."). The citation he gives to support this conclusion says only that "Federal Rules must be interpreted with some degree of 'sensitivity to important state interests and regulatory policies,' . . . and applied to diversity cases against the background of Congress' command that such rules not alter substantive rights and with consideration of 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." This proposition, taken from Ginsburg's dissent in *Shady Grove*, mixes and matches Enabling Act and Rules of Decision Act language with federalism principles in a manner that makes it difficult to determine precisely what point is being made.
[135] *See Shady Grove*, 559 U.S. at 396-99.
[136] *See id.* at 399.

Both rules, he argued, articulated "preconditions for maintaining a class action."[137] "Relabeling Rule 23(a)'s prerequisites as 'eligibility criteria' would obviate [the Court's] objection," he said, but this was "a sure sign that [the] certifiability–eligibility distinction [was] made-to-order."[138] In his view, it was not possible to apply both rules to the class certification issue, one or the other had to control, and that one was Rule 23.

Justice Ginsburg disagreed, but for a different reason from that of the Second Circuit.[139] Rule 23, she argued, regulated "the procedural aspects of class litigation," and the New York statute regulated "the size of a monetary award a class plaintiff may pursue."[140] One rule was about procedure and the other was about remedy, and as such, the two rules could be applied compatibly with one another. The only question in the case, as she saw it, was whether the "*Erie* doctrine"[141] required the application of the New York statute.[142] For her, *Shady Grove* was a federalism case,[143] and the Rules of Decision Act, not the Enabling Act, was the controlling authority.[144] She also agreed

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[137] *See id.*

[138] *See id.*

[139] Ginsburg discussed the issue in terms of the "direct collision" language of *Hanna*, asking if the New York and Federal rules inevitably conflicted, or whether they could be applied together. *See Shady Grove*, 559 U.S. at 438-39 (Ginsburg, J., dissenting). "Our decisions . . . caution us to ask, before undermining state legislation: Is this conflict really necessary?" *Id.* at 437. She also invoked the narrow construction principle disavowed by the Court in *Walker*, adding that if the Court "interpreted [Rule 23] with awareness of, and sensitivity to, important state regulatory policies" the rules do not conflict. *See id.* at 437. *But see Stewart Org., Inc.*, 487 U.S. 26 n.4 ("direct collision" not necessary for an Enabling Act problem). *See also* Walker v. Armco Steel Corp., 446 U.S. 742, 750 n.9 (1980) (disavowing the principle that a Federal Rule must be construed narrowly to avoid a conflict with state law).

[140] *See Shady Grove*, 559 U.S. 446-47. Ginsburg based this characterization of the New York statute on what she took to be its purpose. As she put it, "while phrased as responsive to the question whether certain class actions may begin, § 901(b) is unmistakably aimed at controlling how those actions must end." *Id.* at 450. The statute responds to the concern that allowing statutory damages to be awarded on a class-wide basis would "produce overkill." *See id.* at 444. Scalia countered with the well-known textualist argument that a court must enforce a legislature's actions, not its purposes. *See id.* at 403. As he put it, "[t]he manner in which the law 'could have been written,' has no bearing; what matters is the law the Legislature *did* enact." *Id.* at 403 (majority opinion). He described the familiar catalogue of difficulties involved in trying to ascertain legislative purpose and concluded that "*whatever* the policies [the New York statute and Rule 23] pursue, they flatly contradict each other." *See id*. at 405. *But see* Roosevelt, *supra* note 19, at 53 ("Scalia's rather wooden textualism does not make much sense when trying to determine how a statute should operate in contexts the lawmakers did not contemplate.").

[141] Presumably she meant Rules of Decision Act. The "*Erie* doctrine" is not a law. *See* note 216, *infra*.

[142] *See Shady Grove*, 559 U.S. at 437-38, and 452 (Ginsburg dissenting) ("I would decide this case by inquiring 'whether application of the [state] rule would have so important an effect upon the fortunes of one of both of the litigants that failure to [apply the state law] would be likely to cause a plaintiff to choose the federal court.'").

[143] "By finding a conflict without considering whether Rule 23 rationally should be read to avoid any collision, the Court unwisely and unnecessarily retreats from the federalism principles undergirding *Erie*." *Shady Grove*, 559 U.S. at 451 (Ginsburg, J., dissenting).

[144] *See generally Shady Grove*, 559 U.S. at 443-45. This probably explains why Ginsburg began her analysis by discussing the status of the New York statute rather than the validity of Rule 23. If Rule 23 was pertinent and valid it would not matter if the New York statute was a "rule of decision"—Rule 23 would govern. This is the same sequencing mistake she made in *Gasperini*. *See* Condlin, *Formstone*, *supra* note 3, at 527-28 (describing the illogical sequence of Ginsburg's analysis in *Gasperini)*.

with the Second Circuit that the New York penalty statute was substantive and that, under *Erie*, the district court had to apply it.[145]

Justice Scalia rejected this procedure–remedy distinction as peremptorily as he had rejected the Second Circuit's eligibility–certifiability one before it because, as he put it, regulating remedy is "not what [the New York statute] does."[146] By its own terms, he said, "the [statute] precludes a plaintiff from maintaining a class action . . . [it says] nothing about what remedies a court may award."[147] The state statute, he continued, "prevents the class actions it covers from coming into existence at all,"[148] and because of this, the conflict between the state rule and the Federal Rule was unavoidable; the two rules could not be applied compatibly. Justice Stevens joined on this pertinence point to create a majority for the conclusion that Rule 23 governed the class certification issue, and in doing so, left only the issue of Rule 23's validity to be resolved.[149]

Turning to that question, Justice Scalia argued that the Enabling Act, as interpreted in *Sibbach*, articulated a "single criterion" standard for determining the validity of a Federal Rule.[150] To be valid under the Act, he said, repeating *Sibbach's* well-known phrase, a Rule must "really regulate procedure."[151] If it does this, no further inquiry is needed; the Rule is valid and must be applied.[152] A Rule "really regulates procedure," he continued, "if it governs only 'the manner and the means' by which the litigants' rights are 'enforced'"; the Rule does not regulate procedure "if it alters 'the rules of decision by which [a] court will adjudicate [those] rights.'"[153] Applying "that criterion" to Rule 23, he concluded that the Rule qualified as one of "manner and means" because it allowed "multiple claims (and claims by or against multiple parties) to be litigated together . . . [and left] the parties' legal rights . . . unchanged."[154] As a consequence, it was not necessary to ask whether the New York penalty statute created substantive rights. "The substantive nature of [the] New York law . . . *makes no difference*";[155] only the nature of the Federal Rule mattered.[156]

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[145] *See Shady Grove*, 559 U.S. at 452-58.
[146] *See id.* at 401 (majority opinion).
[147] *Id*.
[148] *Id.*
[149] *See id.* at 406-10.
[150] *Shady Grove*, 559 U.S. at 411-12. Scalia was joined on this view by only three other Justices.
[151] *Shady Grove*, 559 U.S. at 407.
[152] Scalia added that Congress was free to rewrite the Act if it did not like this reading of it, see *Shady Grove*, 559 U.S. at 413-14, though he did not say how it could make the intention to enact a two-part standard clearer.
[153] *See Shady Grove*, 559 U.S. at 407 (citation omitted). This was familiar language: all of the Enabling Act cases had used it, but the expression "manner and means" is not a great deal clearer than the expression "really regulates procedure," so Justice Scalia gave examples of Federal Rules that over the years had been held to regulate the "manner and means" of enforcing substantive rights. *Id.* at 407. These examples included rules authorizing service of process, providing for mental and physical examinations, and permitting sanctions for signing court papers without a reasonable inquiry. *Id.* Each of these rules, he said, "had some practical effect on the parties' rights, but each undeniably regulated only the process for enforcing those rights; none altered the rights themselves." *Shady Grove*, 559 U.S. at 407-08.
[154] *See Shady Grove*, 559 U.S. at 408.
[155] *Id.* at 409.

Justice Scalia might have intended to limit this "single criterion" reading of the Enabling Act to the familiar situation in which a Federal Rule had only an incidental or insubstantial effect on substantive rights, and take no position on the more difficult question of whether a Federal Rule is valid if it abridges substantive rights completely. He did not say this directly, but he seemed to imply that a rule written in the procedural language required by the Enabling Act could never abridge substantive rights because language was not that malleable. On the other hand, he also seemed to suggest that sometimes sacrificing substantive state law was just an inevitable consequence of preserving a uniform system of federal procedure. Either way, on his view subsection (b) of the Enabling Act said the same thing as subsection (a); it just said it again, louder. He admitted that his reading of the Act "gives short shrift to the statutory text,"[157] but argued that *Sibbach* had interpreted the Act in that way,[158] and "*Sibbach* has been settled law . . . for nearly seven decades."[159] Setting aside such a longstanding and well-settled precedent, he said, would "require a 'special justification' beyond a bare belief that it was wrong,"[160] and he found no such justification in *Shady Grove*.

Justice Stevens made the most sustained objection to this "single criterion" view,[161] grounding his argument principally on the "Surplusage" canon of statutory construction.[162] He argued, in a manner more commonly identified with Justice Scalia, that all parts of a statute's text must be given effect, that Congress is presumed to have intended everything it enacts.[163] *Sibbach* failed to discuss the Enabling Act's

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[156] *See id.* at 416. Justice Scalia supported this reading of the Act with an argument based on a combination of *Sibbach* and *Hanna*. As he put it, "[t]he validity of a Federal Rule depends entirely upon whether it regulates procedure. If it does, it is authorized by § 2072 and is valid in all jurisdictions, with respect to all claims, regardless of its incidental effect upon state-created rights . . . . To the extent *Sibbach* did not [say this], *Hanna* surely did." *Shady Grove*, 559 U.S. at 410-12, 412 n.9 (citation omitted). The use of *Hanna* as a backup in the event the argument from *Sibbach* fails suggests that Scalia may have had doubts about the argument from *Sibbach*.

[157] *Shady Grove*, 559 U.S. at 412.

[158] *See id.* at 411-13.

[159] *Id.* at 413. Interestingly enough, about a decade earlier Justice Scalia had treated the Act as having a two-part validity standard. *See* Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 503 (2001) (arguing that "to find a rule governing the effect that must be accorded federal judgments by other courts ensconced in rules governing the internal procedures of the rendering court itself . . . would arguably violate the jurisdictional limitation of the Rules Enabling Act: that the Rules 'shall not abridge, enlarge or modify any substantive right . . . .'").

[160] *Shady Grove*, 559 U.S. at 413 (citation omitted).

[161] Justice Ginsburg made the strongest objections to Scalia's views in the *Shady Grove* opinion as a whole, but given her position that Rule 23 was not pertinent to the issue in dispute, she did not discuss the question of whether the Rule was valid, and thus did not discuss Scalia's *Sibbach*-based "single criterion" interpretation of the Enabling Act validity standard.

[162] ESKRIDGE ET AL., *supra* note 50, at 275 (describing the "rule against surplusage"). *But see* Redish & Murashko, *supra* note 22, at 37-38 (describing how the surplusage canon "when critically examined, might lose its bite for several reasons.").

[163] *See Shady Grove*, 559 U.S. at 426 (Stevens, J., concurring) ("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.").

independent prohibition on abridging substantive rights, he argued, because the parties did not raise the issue, not because the Court thought the prohibition was redundant.[164] Justice Scalia responded with a statutory construction argument of his own, grounded on what one might think of as the "Interpretive Gloss" canon.[165] The meaning of a statute, he argued, is found not only in its text but also in the interpretation given that text in case law over the years. The "single criterion" interpretation of the Enabling Act validity standard attributed to *Sibbach*, he continued, had been so widely and consistently followed as precedent for such a long time that it simply was too late in the game to begin the interpretation process all over again, too late to read the Enabling Act literally as if one was reading it for the first time.[166] The "really regulates procedure" paraphrase of the Act's validity standard was "settled law," he said, and only Congress could change it.[167]

A disagreement of this sort cannot be resolved at the level of interpretive method. There are no *meta* canons of statutory construction, for example, to say whether the Surplusage canon (and the policies embodied in it), or the Interpretive Gloss canon (and the policies embodied in it), is more authoritative. The Justices seemed to recognize this, since almost immediately they turned their attention to arguments based on the purposes and intentions underlying the Enabling Act. Justice Scalia supported his "single criterion" view, for example, with an argument reminiscent of the *Burlington Northern* case, that the Federal Rules should have the same meaning everywhere, all of the time, and in all types of cases.[168] He dismissed the idea that a Rule could be valid in one state and invalid in another depending upon the presence or absence of a particular state law.[169] Protecting federal procedural uniformity, he argued, was more important than protecting state legislative prerogatives.[170] Good textualist that he was, he did not frame his argument as a policy preference for uniform rules over legislative prerogatives, but

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[164] *See Shady Grove*, 559 U.S. at 426-27 (Stevens, J., concurring). Stevens also adopted Professor Ely's view that *Sibbach* passed on the opportunity to define the meaning of substantive rights because that would have resulted in "shifting control from the Federal Rules to the federal courts." *See* Ely, *Irrepressible Myth*, *supra* note 46, at 733-37.

[165] The "interpretive gloss" canon describes a collection of individual canons more than a single one, depending upon the particular institution responsible for adding the interpretive gloss. *See* ESKRIDGE ET AL., *supra* note 50, at 290 (the reenactment rule), at 391 (the acquiescence rule), at 298 (the common law rule), and at 292-94 (the *in pari materia* rule).

[166] *See Shady Grove*, 559 U.S. at 413-14 (majority opinion). Scalia seemed to admit that the text of the Act, if read literally, articulated a two-part standard, *see id.* at 411-12, and it seems hard to deny this.

[167] *See Shady Grove*, 559 U.S. at 413-14. Scalia and Stevens also disagreed over the proper method for defining "substantive rights" in section (b) of the Act. Scalia thought it proper to interpret the text using only language tools, *see id*., at 403-06, whereas Stevens thought it proper to consider the purposes and effects of the Act as well as its text. *Id.* at 432-35. For Stevens, a state law that protected substantive policies, even if framed in the language of procedure, would count as substantive under the Act. *Id.* In this, he agreed with Ginsburg. *See Shady Grove*, 559 U.S. at 419-20 (Stevens, J., concurring). *See also Shady Grove*, 559 U.S. at 443-445 (Ginsburg dissenting).

[168] *See Shady Grove*, 559 U.S. at 412-15 (majority opinion).

[169] *See Shady Grove*, 559 U.S. at 409 ("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.")

[170] *See id.* at 409-10. Scalia did not say why federal procedural uniformity was the superior interest. He simply assumed that to be the case.

instead as an argument for following "settled law."[171] He was not interested in policy arguments as such. The policy debate was over as far as he was concerned. It had been resolved in *Sibbach*.[172]

Justices Stevens and Ginsburg denied that the need for federal procedural uniformity trumped all other policy considerations, but each for a different reason. Justice Stevens argued that the Enabling Act was designed to "balance" the interest in uniform Federal Rules against the interest of respecting state legislative prerogatives, not elevate one interest over the other.[173] "While Congress [had] the constitutional power to prescribe procedural rules that interfered with state substantive law," he said, "that is not what Congress has done" in the Enabling Act.[174] The Act's prohibition on abridging substantive rights, he continued, "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."[175] "Congress has . . . struck a balance," he argued, between housekeeping rules for federal courts and state rules that affect the character and result of litigation,[176] and while "this can be a tricky balance to implement,"[177] it is what Congress had in mind in including both a "practice and procedure" requirement and an "abridgement of substantive rights" prohibition in the Enabling Act.[178] He would have struck the balance in favor of the Federal Rule in *Shady Grove* because, as he saw it, the New York statute was not unambiguously substantive,[179] but in a different case with a different state law, the balancing could come out the other way.[180]

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[171] *See id.* at 413.

[172] *See Shady Grove*, 559 U.S. at 407 (majority opinion). *But see* Burbank & Wolff, *supra* note 19, at 41 ("[T]he Shady Grove Court's wooden interpretation of Rule 23 was hardly ordained by precedent.").

[173] *Shady Grove*, 559 U.S. at 418-19 (Stevens, J. concurring).

[174] *Id.* at 417-18.

[175] *Id.* at 418.

[176] *See id.* at 419.

[177] *Id.* This is so, said Stevens, because it does not depend completely on the form of the state law. *See id.* "Rather, it turns on whether the state law actually is part of a State's framework of substantive rights or remedies." *Id.* "A state procedural rule, though undeniably procedural in the ordinary sense of the term, may exist to influence substantive outcomes, . . . and may in some instances become so bound up with the state-created right or remedy that it defines the scope of that substantive right or remedy." *Id.* at 419-20 (internal quotations and citation omitted). "And were federal courts to ignore those portions of substantive state law that operate as procedural devices, it could in many instances limit the ways that sovereign States may define their rights and remedies." *Id.* at 420. Stevens dismissed the concern that such an inquiry would "enmesh federal courts in difficult determinations about whether application of a given rule would displace a state determination about substantive rights." *Id.* at 426. The question, he said, "is not what rule we think would be easiest on federal courts. The question is what rule Congress established. . . . Courts cannot ignore text and context in the service of simplicity." *Id.*

[178] *See Shady Grove*, 559 U.S. at 424-25 (Stevens, J. concurring) (describing how "Congress struck [a balance] between uniform rules of federal procedure and respect for a State's construction of its own rights and remedies" by including two limitations on the construction of federal rules).

[179] *See Shady Grove*, 559 U.S. at 432 ("The text of CPLR §901(b) expressly and unambiguously applies not only to claims based on New York law but also to claims based on federal law or the law of any other State. . . . It is therefore hard to see how §901(b) could be understood as a rule that, though procedural in form, serves the function of defining New York's rights or remedies.")

[180] Justice Stevens does not say this explicitly, but it is a logical inference from his discussion of the balancing of interests policy he finds at the heart of the Enabling Act. *See Shady Grove*, 559 U.S. at 418-20 (Stevens, J., concurring).

Justice Ginsburg objected to Scalia's procedural uniformity argument for a different reason. For her, protecting "the federalism principles undergirding *Erie*"[181] was more important than preserving the uniformity of the Federal Rules. As she saw it, a federal court should "avoid[] immoderate interpretations of the Federal Rules that would trench on state prerogatives without serving any countervailing federal interest."[182] The *Erie* doctrine, not the Rules of Decision Act or Enabling Act, was the ultimate source of this obligation;[183] the two statutes simply "mark our way"[184] in applying that doctrine.[185] When Rule 23 is interpreted with an "awareness of, and sensitivity to, important state regulatory policies,"[186] she continued, the Rule did not conflict with the New York penalty statute and thus was not pertinent to the issue of whether Shady Grove's claim could be certified as a class action.[187] If the Rule was not pertinent to the certification issue it followed that there was no need to determine whether the Rule was valid, and thus no need to construe the Enabling Act's prohibition on abridging substantive law. Consequently, she did not discuss the point.[188]

It would have been better had the Justices conducted this debate over uniform-federal-rules-versus-state-legislative-prerogatives explicitly in policy terms rather than through the proxy of "settled law."[189] The law was not "settled," for one thing, and getting sidetracked on the issue of whether it was prevented a thorough examination of the policies at play in the case. It is not clear, for example, that accommodating state legislative prerogatives poses any greater threat to the uniform application of the Federal Rules than does the existence of different local rules from one federal judicial district to another.[190] Justice Scalia's portentous warning about the "disembowel[ment]"[191] of the

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[181] *See Shady Grove*, 559 U.S. at 451 (Ginsburg, J., dissenting).

[182] *See id.* at 439. Justice Stevens also adopted the "narrow construction" principle but did not agree that it made Rule 23 inapplicable. *See Shady Grove*, at 422-23 (Stevens concurring) (discussing the need to engage in a "savings" construction of the Federal Rule to avoid a conflict with state law.)

[183] Professor Sherry makes a similar argument. *See* notes 189-190, *infra*, and accompanying text.

[184] *Shady Grove*, 559 U.S. at 438.

[185] *See Shady Grove*, 559 U.S. at 438 (Ginsburg, J., dissenting) (describing how Federal Rule 23 did not apply to the issue before the court).

[186] *Id.* at 437

[187] *Id*. at 446 ("The Court, I am convinced, finds conflict where none is necessary.")

[188] She discussed the nature of the rights created by the New York penalty statute, but only to show that the statute created a rule of decision under *Erie*, not a substantive right under the Enabling Act. The Rules of Decision Act and the Enabling Act work with different definitions of "substantive" law. *See* Hanna v. Plumer, 380 U.S. 460, 471 (1965).

[189] This is Professor Sherry's view, since she sees the Enabling Act as a subset of the "*Erie* doctrine," and the *Erie* doctrine as policy more than law. *See* Suzanna Sherry, *A Pox on Both Your Houses: Why the Court Can't Fix the* Erie *Doctrine*, 10 J.L. ECON. & POL'Y 173, 178 (2013) ("[I]t is the *Erie* doctrine, not the [Enabling Act], that controls the decision of whether a particular state rule prevails over a conflicting federal one. . . [and] *Erie* . . . is quite explicitly tailored to protecting the substantive law and policies of individual states and thus allows federal law to operate in some states but not others."); *id.* at 193 ("Under my proposal, the Court would instead have to decide explicitly whether the federal interest in uniform, transsubstantive procedural rules for federal courts is more important than allowing states to make substantive policy choices.").

[190] Professor Rosenberg has characterized federal court local rules as a "procedural tower of Babel." *See Hearings on S. 915 and H. A 6111 before the S. Subcomm. on Improvements to Judicial Machinery*, 90th Cong., 1st Sess. 282 (1967) (testimony of Professor Maurice Rosenberg). *See also* Steven Flanders, *Local*

federal judicial system might have been hyperbole for effect more than an accurate prediction of the consequences of adopting a two-part view of the Enabling Act validity standard.[192]

Similarly, a system of uniform Federal Rules might pose little or no threat to state legislative prerogatives. It may not be possible to write Federal Rules in the language of "practice and procedure" required by the Enabling Act that have more than an incidental or insubstantial effect on state substantive rights.[193] Language simply may not be that flexible. Whether these and other such concerns are real, however, are empirical questions that needed to be answered by the Court on the basis of actual evidence rather than thought experiments, ideological commitments, and axiomatic pronouncements. The Justices needed at least a rough empirical sense of how often the Federal Rules were likely to conflict with state substantive law before they could answer the questions[194] and to have this sense, they first needed to define the Enabling Act's conception of "substantive rights."[195] Even dismissing subsection (b) of the Act as redundant required an understanding of what it said.

Rules in Federal District Courts: Usurpation, Legislation, or Information, 14 LOY. L.A. L. REV. 213 (1981); Robert Keeton, *The Function of Local Rules and the Tension with Uniformity*, 50 U. PITT. L. REV. 853, 853 (1989); Stephen N. Subrin, *Federal Rules, Local Rules, and States Rules: Uniformity, Divergence and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999 (1989). Professor Sherry points to another example of how the Rules are not applied uniformly in all cases. As she explains, the Supreme Court's insistence that the Federal Rules are transsubstantive does not comport with the Court's different application of them in different types of cases, depending upon the content of state law. Sherry, *supra* note 189, at 193 n.93. Allstate's brief in *Shady Grove* identified other state laws that might create a conflict with Federal Rules similar to that created by the New York penalty statute. *See* note 194, *infra*. On the importance of uniformity in federal procedural rules generally, see Thomas O. Main, *Procedural Uniformity and the Exaggerated Role of Rules: A Survey of Intra-State Uniformity in Three States That Have Not Adopted the Federal Rules of Civil Procedure*, 46 VILL. L. REV. 311 (2001).

[191] *Shady Grove*, 559 U.S. at 416 (majority opinion) (citing *Hanna*, 380 U.S. at 473-74).

[192] Bauer, *supra* note 19, at 965 ("[T]he assertion that federal courts would encounter chaos in an absence of complete uniformity of procedural rules seems overwrought."). *See also* Burbank & Wolff, *supra* note 19, at 46-47 ("[W]e believe that the application of a Federal Rule may vary not according to the putative policies underlying state law on the same matter, but rather according to the structure and operation of state law as it interacts with and is implemented by the litigation process. Because schemes of substantive rights are not uniform, the respect for such schemes that the Enabling Act enjoins may require just such differential application.").

[193] *See* Burbank & Wolff, *supra* note 19, at 48 ("Many, if not most, of the Federal Rules are charters for discretionary decision making, setting boundaries and leaving the actual choices to federal trial judges. To that extent, they are only superficially uniform and superficially transsubstantive. The uniformity at which the Enabling Act aims must be measured in pragmatic terms, neither fatally undermined by an approach that focuses on policies underlying state law on the same issue, nor cemented by jingoistic dogma heedless of the evolving realities of court rulemaking and litigation practice . . . .").

[194] Justice Scalia suggested that there would be "hundreds" of such instances, but then changed that estimate to "countless state rules" later in the same sentence. *See Shady Grove*, 559 U.S. at 415. *See also id.* at 1468 n.11 (Ginsburg, J., dissenting) (describing "numerous state statutory provisions" that could conflict with Federal Rules); Brief for Respondent at App'x A, *Shady Grove*, 559 U.S. 393 (No. 08-1008), 2009 WL 2777648 (Allstate brief listing 96 examples of state laws that could conflict with Federal Rules).

[195] *See generally* Ely, *Irrepressible Myth*, *supra* note 46, at 733-37 (describing different ways to define "substantive rights" in the Enabling Act); Burbank, *supra* note 33, at 1122-25 (describing Congress's conception of substantive rights in enacting the statute).

Shady Grove was the first Supreme Court decision to raise the "one-or-two-part validity standard" issue explicitly and discuss it those terms. It did this presumably to resolve the issue, but when the dust had settled, the meaning of the Enabling Act was more uncertain than ever. In a little over seven decades, the Court had reduced a majority view ("really regulates procedure") to a plurality one, introduced a middle ground position ("balance" federal and state interests),[196] and failed to subject the policy considerations that underlay the competing interpretations of the Act to careful empirical testing. This is not exactly a loaves-and-fishes level of performance.

IV. DISABLING THE ENABLING ACT

In the period leading up to the passage of the Enabling Act, federal courts sitting in diversity applied federal substantive law and state procedural rules under the combined commands of *Swift v. Tyson* and the Conformity Act of 1872.[197] This order of things was reversed after the decision in *Erie,* the passage of the Enabling Act, and the promulgation of the Federal Rules, so that diversity courts now applied state substantive law and federal procedural rules, and this about-face forced the courts to consider both the federalism and separation of powers dimensions of the Enabling Act.[198] Separation of powers sentiments drove the passage of the Act and shaped Justice Frankfurter's dissent in *Sibbach* (not surprising since *Sibbach* presented a genuine separation of powers problem), but the *Sibbach* majority did not discuss the Act's federalism dimension for an understandable reason: the parties did not ask it to.[199] The *Hanna* and *Burlington Northern* cases raised federalism issues—each involved a direct collision between state and federal law—but the Court avoided the issue in each instance by finding that the differences between the state and federal rules were not substantial enough to amount to an abridgement of the rights created by the state law, whatever their nature. It was not until the Justices interpreted the Enabling Act from the incommensurable federalism and separation of powers perspectives of Justices Ginsburg and Scalia[200] in *Shady Grove* that the Court had to harmonize the two dimensions of the Act, but unfortunately, it was not ready to do so.

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[196] *Shady Grove*, 559 U.S. at 418-21 (Stevens, J., concurring) (describing the balance of federal and state interests interpretation of the Enabling Act*).*

[197] *Swift v. Tyson*, 41 U.S. 1 (1842); Conformity Act, ch. 255, § 8 5-6, 17 Stat. 196, 197 (1872).

[198] *See* Burbank & Wolff, *supra* note 19, at 37 (describing how *Sibbach* had become out of step with legal developments). The early twentieth century also saw a major extension of federal substantive law making power into areas previously regulated by the states. In this context, a federal statute prohibiting federal procedural rules from "abridging, enlarging or modifying substantive rights" inevitably would have been heard as reassurance to the states, not just Congress, that federal courts would not invalidate legislative enactments under the guise of making procedural rules. *See* Redish & Murashko, *supra* note 22, at 66-76 (describing the "broad statutory purposes and policies undoubtedly underlying the legislation enacted in 1934.")

[199] *See Shady Grove*, 559 U.S. at 427 n.11 (Stevens, J., concurring). As the majority saw it, the case also did not raise a conflict between state and federal law. *See Sibbach*, 312 U.S. at 14 (application of the Federal Rule does not result in an invasion of the state right to be free from personal restraint).

[200] Scalia attributed the separation of powers rendering of the Act to *Sibbach.* See *Shady Grove*, 559 U.S. at 411-14 (majority opinion).

The principles of separation of powers and federalism have long histories in American jurisprudence.[201] Each defines a fundamental feature of the American constitutional system and each evokes strong emotional and intellectual loyalties. Ordinarily, the two principles work in tandem, each governing a different aspect of the division of labor between courts and legislatures and the division of sovereignty between state and federal governments, and usually it is possible to give full effect to one without compromising the other. But sometimes the principles can collide, as they seemed to in *Shady Grove*, and when this happens, Justices reasoning sincerely and impeccably from incompatible starting points can speak past one another as if they were the only ones in the room. This reconfiguration of the Enabling Act debate into a conflict between not only different understandings of statutory language, but also between different constitutional principles, hardened the competing viewpoints in dispute and made agreement on a single, consensus interpretation of the Act less likely.[202]

Present day jurisprudential fashion has added an additional layer of complication to the problem. Since *Sibbach*, analysis of the Enabling Act has been based on competing assumptions about the proper way to do statutory interpretation, though rarely has this factor been discussed explicitly or been made an independent basis of the decisions in individual cases.[203] That also changed in *Shady Grove*, where the Justices' commitments to conflicting theories of interpretation were an express reason the Court

[201] Those histories are not static. For example, the conventional understanding of Federalism, which saw the several states as autonomous laboratories designed to "promote[] choice, foster[] competition, facilitate[] participation, enable[] experimentation, and ward[] off a national Leviathan" in political and legislative matters is now challenged by a new "nationalist" Federalism, in which the states are seen as the national government's agents for "improving national politics, knitting together the national polity, improving national policymaking, and entrenching national power and national policies." *See* Heather K. Gerken, *Federalism as the New Nationalism: An Overview*, 123 YALE L.J. 1890, 1891, 1894 (2014).

[202] The Enabling Act's text is a major source of this problem. The "practice and procedure" requirement in section (a) instructs the Supreme Court to stay within the limits of its constitutional authority when making Federal Rules (separation of powers), while the prohibition on abridging substantive rights in section (b) instructs it to respect the prerogatives of legislative actors (federalism). *See* Redish & Murashko, *supra* note 22, at 27-28 ("The principal reason why construction of the Rules Enabling Act has eluded anything approaching consensus lies in the two key sections of the Act. . . . The question is, how should the two sections be construed when taken together?"). Congress may not have intended to include both types of instructions in the Act, but it included them nonetheless, and courts ordinarily have an obligation to give effect to all of a law's text, not just the parts that were intended, or the parts the courts prefer. *See Shady Grove*, 559 U.S. at 403. As Justice Scalia might have put it, a court's job is to enforce law, not intentions, and law is what a legislature enacted, not what it intended to enact. He repeated this familiar mantra in *Shady Grove* in discussing the New York penalty statute. *See id.* ("[A] [l]egislature's purpose . . . cannot override the statute's clear text . . . . The manner in which the law 'could have been written, . . . has no bearing; what matters is the law the legislature *did* enact. We cannot rewrite that to reflect our perception of legislative purpose.") Oddly, however, he did not take his own advice in parsing the Enabling Act. *See Shady Grove*, 449 U.S. at 412 (majority opinion) (Scalia acknowledging "there is something to" the point that he is ignored statutory text).

[203] Professors Redish and Murashko provide a comprehensive and fair description of the presently popular theories of statutory interpretation. *See* Redish & Murashko, *supra* note 22, at 42-55. *See also* Roosevelt, *supra* note 19, at 53 ("*Shady Grove* is important because the way the Court interprets ambiguous state statutes will affect outcomes . . . ."); Redish & Murashko, *supra*, at 57-66 (describing "The Relevance of Statutory Interpretation Theory in Interpreting the Rules Enabling Act").

was unable to agree on anything but outcome.[204] Justice Scalia derived the meaning of the Act exclusively from (some of) its language and the interpretations given that language over the years. He ignored arguments based on statutory purpose, legislative intention, interpretive presumptions, and practical effects, and defended his "single criterion" interpretation of the Act as "unmistakably" correct, while dismissing the competing interpretations of Justices Ginsburg and Stevens as clearly rejected by the case law, or as "not so."[205] When he relied on non-textualist considerations to support his argument, as he did in invoking the policy of federal procedural uniformity, he couched those considerations in textualist rather than policy terms, as an argument for "settled law" rather than the superiority of one policy interest over another.[206] In a sense, he justified his interpretation of the Act much like a "Tiger"[207] parent telling a child why she had to take squash lessons: "Because I said so."

Justice Stevens, on the other hand, read the Act in light of its purposes, the real-world effects produced by one interpretation or the other, and presumptions about the proper role of separation of powers and federalism concerns.[208] He started from the federalism premise that "a federal rule [is not valid under the Act if it] would displace a state law that is procedural in the ordinary use of the term but is so intertwined with a state right or remedy that it functions to define the scope of the state-created right."[209] Reading the Act to authorize such a Rule, he said, would not show sufficient "sensitivity to important state interests . . . and regulatory policies."[210] In addition, he did not agree with Justice Scalia's assertion that the sole question to be asked under the Act is "whether [a Federal Rule] 'regulates the manner and the means' by which the litigants' rights are enforced."[211] This reading of the Act, he argued, out-textualizing Justice Scalia, "ignores the second limitation" in the Act's text—that the Federal Rules "not abridge, enlarge, or

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[204] *Id.*

[205] *See Shady Grove*, 559 U.S. at 410 ("*Hanna* unmistakably expressed the same understanding . . ."); *id.* at 411 n.9 ("There could not be a clearer rejection of the theory the concurrence now advocates."); *id.* at 399 ("Allstate suggests that eligibility must depend on the particular cause of action asserted, . . . But that is not so.").

[206] *See id.* at 412-13.

[207] AMY CHUA, THE BATTLE HYMN OF THE TIGER MOTHER 4 (2011) (explaining how a "working class" white father can be a "Chinese Tiger mother"). *See also* Amy Chua, *Why Chinese Mothers Are Superior*, WALL ST. J. (Jan. 8, 2011), http://www.wsj.com/articles/SB10001424052748704111504576059713528698754 (describing why a "Tiger" parent tells a child what to do, rather than explains why she should do it: "Chinese parents believe that they know what is best for their children and therefore override all of their children's own desires and preferences.") .

[208] This approach, say Redish and Murashko, asks how "a reasonable observer who is familiar with the socio-political or economic problem that the statute was designed to deal with or respond to would understand how the disputed statutory provision would apply to the specific factual situation before the court." *See* Redish & Murashko, *supra* note 22, at 52. They describe the approach as "an island of common sense amidst various interpretive approaches that ask a judge to do either too much (determining actual intentions of those enacting a particular statute) or too little (interpreting words in a vacuum)." *Id.* at 55.

[209] *See Shady Grove*, 559 U.S. at 423 (Stevens, J., concurring). He gave statutes of limitations, burden of proof rules, and rules for reviewing damages on appeal, as examples of federal procedural rules that could displace a State's formulation of its substantive law. *Id.* at 425 n.9.

[210] *Shady Grove*, 559 U.S. at 424 (citations omitted).

[211] *Id.* (citation omitted).

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 and remedies."[212] Both separation-of-powers and federalism presumptions, he said, "counsel against judicially created rules displacing state substantive law."[213]

Each Justice's approach to statutory interpretation respects the intentions of legislative actors, but each works with a different conception of legislative intent and a different understanding of how it is learned. For Justice Scalia, and textualists generally, legislative intent is intent at the time of enactment, found exclusively in the ordinary meaning of language, and once expressed, is static and timeless. For Justices Stevens and Ginsburg,[214] and purposivists generally, legislative intent is intent at the time of interpretation, found in the evidence of legislator states of mind and the purposes reasonably attributable to enactments, and is open-ended and malleable, capable of being adapted to changing circumstances and conditions.[215] Textualists are concerned that judges left free to speculate about legislator intent will substitute their personal preferences for those of democratically elected representatives, while purposivists are concerned that judges not free to speculate about such states of mind will fail to make the adjustments to new or changed social conditions that legislators would make were they in a position to do so.[216] Each view has a downside, of course, obtuseness in the case of textualism, and arrogance in the case of purposivism, and unfortunately there is no objectively correct way to choose between the two.[217] Debates over theories of

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[212] *Id.* at 424-25.

[213] *Id.* at 425.

[214] Justice Ginsburg probably would have interpreted the Enabling Act in much the same manner as Stevens had it been necessary for her to do so, but given her conclusion that Rule 23 was not pertinent to the class certification issue, she did not need to determine if the Rule was valid under the Enabling Act. Consequently, she did not need to consider whether the New York statute created substantive rights under section (b) of the Act, and if it did, whether Rule 23 abridged them. She did consider the question of whether the New York statute created a substantive right under the Rules of Decision Act, because she thought "*Erie*" required the application of the New York statute in federal court, and her general approach to statutory interpretation is evident in her analysis of the New York statute. But it is not possible to deduce her understanding of the Enabling Act by extrapolating from this analysis since the Enabling Act and Decision Act work with different definitions of substantive law. *See* Hanna v. Plumer, 380 U.S. 460, 465-66 (1965).

[215] Justice Scalia recognized that the meaning of a Rule's text can change over time, but only when the meaning of the language in question has changed. *See* Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 501-02 (2001) (acknowledging that "the meaning of the term 'judgment on the merits' [as used in Federal Rule 41(b)] has gradually undergone change" over the years and "has come to be applied to some judgments . . . that do *not* pass upon the substantive merits of a claim and hence do *not* . . . entail claim-preclusive effect.").

[216] Judge Richard Posner is the most articulate proponent of this "faithful agent" view. *See* Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 817 (1983) ("The judge should try to think his way as best he can into the minds of the enacting legislators and imagine how they would have wanted the statute applied to the case at bar.") *See also* Roosevelt, *supra* note 19, at 53 ("Scalia's rather wooden textualism does not make much sense when trying to determine how a statute should operate in contexts the lawmakers did not contemplate.").

[217] *See* Redish & Murashko, *supra* note 22, at 31 ("[T]he lack of a textually inevitable interpretation [of the Enabling Act] . . . explains why the last seventy years of doctrine and scholarship have failed to produce a generally accepted construction of the procedural-substantive interplay in the Act's two key provisions."). This "inevitability" notwithstanding, Professors Redish and Murashko do not give up on the possibility of

interpretation (in all fields, not just law), are as longstanding and intractable as any debates in the realm of ideas generally.[218] It is not surprising, therefore, that the Justices talked past one another at the epistemological and theoretical levels in *Shady Grove*, as well as the literal one.

Scholarly commentary on the Enabling Act provides little help in resolving these difficulties. Academic commentators have proposed a wide array of solutions to the Enabling Act interpretation problem over the years, and continue to do so, but none of these proposals has commanded the assent of other academic commentators or a majority of the Court. To use only recent examples, Professor Burbank argues that the Court should interpret the Act in terms of its original separation-of-powers purposes and neutralize the adverse federalism effects of such an approach by using federal common law and a dynamic approach to statutory interpretation to prevent intrusions by Federal Rules into the domain of state substantive lawmaking.[219] Professors Redish and Murashko dismiss this approach as a "house of cards,"[220] and argue instead for a refined version of the "incidental effects" test used in *Hanna* and *Burlington Northern* to enforce the "two broad purposes motivating the Act's framers."[221] This, they contend, would "avoid[] all the problems caused by the narrow and counterproductive attempt to discern the actual intent of the enacting Congress by instead seeking only to facilitate objectively determined background purposes motivating the Act."[222] Professor Sherry rejects both of

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convincing others to see things their way. They argue that "the Rules Enabling Act serves as a quintessential illustration of a statute whose ambiguous text must be interpreted in light of objectively determined background purposes, rather than via a narrow focus on either the literal meaning of the text or the specifics of legislative history." *Id.* at 32. They describe an "incidental effects interpretive model" that "does a far better job than the others of recognizing and implementing the purposive DNA of the Rules Enabling Act." *Id.* at 57-58. In this respect, their take on the Enabling Act debate is similar to a common theme in Irish nationalist music—"it's not over."

[218] *See* SCALIA, *supra* note 44, at 23 ("American courts have no intelligible, generally accepted, and consistently applied theory of statutory interpretation." (quoting HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS 1169 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994)). Theories of interpretation typically focus on language (textualism), actual legislator intent (intentionalism), reasonable legislator intent (purposivism), practical effects (consequentialism), or all of the above (dynamism), though most actual theories combine these elements in varying proportions to create hybrid views with different emphases. Theories of interpretation cycle in and out of influence on a regular basis. Every theory has had its day in the spotlight, usually when a well-known proponent, either academic or judicial, has achieved a high level of prominence, only to fade to black as its deficiencies become clearer with use, or its proponents lose influence.

[219] *See* Burbank, *supra* note 33, at 1114. Professors Redish and Murashko take issue with this approach. *See* Redish & Murashko, *supra* note 22, at 83 ("Burbank's . . . standard . . . . has the effect of seriously restricting the rulemakers' powers to enforce the rules' procedural directives. When Burbank has his standard recognize safety valves, it does so on the basis of completely imagined or rationally dubious factors.").

[220] *See* Redish & Murashko, *supra* note 22, at 83 ("If one carefully examines the historical basis and practical implications of Burbank's . . . standard, it is revealed for the house of cards that it is.").

[221] *See* Redish & Murashko, *supra* note 22, at 87. Professors Redish and Murashko trace the "incidental effects" test to the *Burlington Northern* decision, but the Court articulated this test first in *Hanna* twenty years earlier. *See id.* at 86 n.308 ("Although both *Murphree* and *Hanna* mention the phrase 'incidental effects'—the latter doing so only by mentioning *Murphree*—in neither decision has the Court gone through the trouble of explaining how the incidental effects test relates to broad purposes underlying the Enabling Act.").

[222] *See* Redish & Murashko, *supra* note 22, at 84.

these approaches as a "pox on both your houses," and argues instead for an approach that interprets the Enabling Act in light of the "*Erie* doctrine" to require a balancing of federal and state interests to determine the validity of a Federal Rule.[223] Like Justice Ginsburg, she sees the Act as an expression of policy more than law, and would make judges rather than legislators its principal authors. The variety and incompatibility of these different approaches to interpretation[224]—intentionalist, purposivist, and dynamic—make it clear that, if anything, academics are more divided than members of the Court on how to proceed.

In light of these difficulties, it seems unrealistic to expect the controversy over the Enabling Act's validity standard to be resolved anytime soon. It has been more than seventy years since *Sibbach* was decided and a consensus interpretation has yet to be reached.[225] An impasse of this magnitude and duration is not likely to be broken by a new analytical insight, innovative argument, or surprise research discovery,[226] making one point of view demonstrably correct and the others demonstrably false. Able and highly regarded Justices and scholars have tried all of those strategies and the impasse remains. Political alliances on the Court could change, of course, and a majority for one

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[223] *See* Sherry, *supra* note 189, at 190-91. There is a perhaps unintended irony in Professor Sherry's "*Erie* Doctrine" argument. The controlling law in *Erie* was the Rules of Decision Act, not a court-created legal doctrine. *See Erie*, 304 U.S. at 79-80 (1938) (describing how the Court reinterpreted the Rules of Decision Act to require the application of state substantive law). To think otherwise is to see the decision as grounded on a "brooding omnipresence of reason in the sky," the very conception of law *Erie* repudiated in overruling *Swift v. Tyson*, 41 U.S. 1 (1842). Professor Ely pointed out many years ago that *Erie* is the name of a case, not a doctrine, but many continue to miss the force of this point. *See* Condlin, *Formstone*, *supra* note 3, at 509-11 (describing the reluctance of some academic commentators to accept the idea that the decision in *Erie* was based on the Rules of Decision Act). If *Erie* was a doctrine, and the Enabling Act incorporated it, one still would not balance federal and state interests to determine the validity of a Federal Rule. *Byrd* is the only support for a balancing test in the *Erie* line of cases, but the Supreme Court repudiated *Byrd* balancing in *Hanna*. *See Hanna*, 380 U.S. at 468 n.9. *See also id.* at 516-17 (describing the *Hanna* decision's rejection of the *Byrd* balancing test).

[224] There are many more. *See* note 19, *supra*.

[225] *See* Redish & Murashko, *supra* note 22, at 27 ("To this day, no real consensus has developed as to how the Act should be interpreted.") The Court's impasse on this issue may reflect a larger difficulty it has with procedural rules generally. It is not clear, for example, why the Court took certiorari in *Shady Grove* if it was not ready to decide whether section (b) of the Act had independent content. That was the only difficult issue in the case. No one doubted that Rule 23 was a rule of practice and procedure. Yet, having taken the case, the Court could not resolve the issue. Something similar happened in the *McIntyre* case in the 2011 term, *see* J. McIntyre Machinery, Ltd. v. Nicastro, 131 S. Ct. 2780 (2011), where the Court granted certiorari seemingly to resolve a longstanding controversy over the nature of the purposefulness requirement in the "stream of commerce" subset of personal jurisdiction doctrine, only to find when it came time for a decision that no view commanded five votes. It is unusual to see the Court make two mistaken grants of certiorari in the same area of law, so close in time.

[226] These possibilities are only improbable, not out of the question. Compare the fortuitous discovery by Charles Warren, described in *Erie*, of a previously unknown draft of the Rules of Decision Act allegedly indicating that the Act intended to include state decisional law as well as state statutes in the phrase "rules of decision;" or the equally fortuitous discovery by Wilford Woodruff, President of the Church of Jesus Christ of Latter-day Saints, that the Lord approved of the Church's compliance with the Morrill Act (prohibiting polygamy). *See* Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 86 (1923) (describing a previously unknown draft of the Rules of Decision Act); B. CARMON HARDY, SOLEMN COVENANT: THE MORMON POLYGAMOUS PASSAGE 130 (1992) (describing Woodruff's discovery).

or another view could emerge,[227] but if that was going to happen it also probably would have happened before now. Seventy years is long enough for every point of view to rise to the surface and every political coalition to form. The disagreements in Enabling Act jurisprudence are philosophical and political more than linguistic and interpretive, and there is no overarching philosophical or political framework into which the competing perspectives can be converted, or set of reconciliatory principles through which the perspectives can be combined and synthesized.

The short of it then is that argument over the Enabling Act, at least in the Act's present form, is likely to continue indefinitely into the future, oscillating between incompatible sovereignty principles and competing theories of interpretation, in a debate no one can win (or lose). Like debates over the meaning of due process, commerce, religion, and other fundamental constitutional principles, debate over the Enabling Act's substance/procedure distinction is shaped by mutually exclusive intellectual commitments that make common ground more rather than less difficult to find. In the absence of a framework for reconciling or selecting among the competing views, therefore, muddling through is about all that is left.[228] But muddling through suspends Enabling Act interpretation in mid-air, effectively disabling the Act in litigation involving disagreements over the application of the Federal Rules, forcing litigants to guess whether the decision to apply a Federal Rule in a given case will depend upon predictable ritual, judicial power grab, or law-based judgment. Will the Rule automatically be found valid, as Justice Harlan famously predicted in his "arguably procedural, ergo constitutional" sarcasm (as Justice Scalia preferred),[229] will it be construed narrowly in light of tacit federalism principles, to be taken out of play on pertinence grounds whenever it threatens state legislative prerogatives (as Justice Ginsburg prefers),[230] or will it be tested against an actual substance/procedure standard everyone can agree on (as Justice Stevens preferred)? The first two of these possibilities promote cynicism about the rule of law, and the third looks as if it never will be tried.[231]

V. CONCLUSION

[227] Professors Burbank and Farhang describe the importance of politics in Enabling Act analysis. *See generally* Stephen B. Burbank & Sean Farhang, *Litigation Reform: An Institutional Approach*, 162 U. PA. L. REV. 1543 (2014).

[228] Justice Scalia was content with this option. *See Shady Grove*, 559 U.S. at 414-15 ("[W]e have managed to muddle through well enough in the 69 years since *Sibbach* was decided[.]")*.*

[229] *See Hanna*, 380 U.S., at 476 (Harlan, J., concurring). While wrong about the source of the standard (a Federal Rule is tested against the Enabling Act, not the Constitution), Harlan's phrase has proved to be a reasonably accurate paraphrase of *Sibbach's* "really regulates procedure" standard for determining the validity of a Federal Rule.

[230] *See* Burbank & Wolff, *supra* note 19, at 37 ("[S]ince *Walker*, the Justices have lurched from one extreme to the other, giving some Federal Rules a scope of application broader than appears plausible—certainly broader than necessary to escape a charge of infidelity to the text—while emptying others of content.")

[231] *See* Redish & Murashko, *supra* note 22, at 41 (describing the effects on federal court rulemaking of the inability to reach a consensus interpretation of the Enabling Act).

It is perhaps a little surprising that after all these years the Supreme Court has not been able to agree on the standard for determining the validity of a Federal Rule. Even a blind squirrel is reputed to discover an acorn now and then.[232] The central logjam in this interpretive odyssey—deciding whether the Enabling Act standard has one or two parts—seems simple enough to break, but the Court's efforts in that regard have been relentlessly unsuccessful. *Sibbach* reduced the standard to a single "practice and procedure" requirement and ignored the Act's prohibition on abridging substantive rights. *Hanna* recognized the prohibition on abridging substantive rights as an independent part of the standard, but discussed only the concept of "abridgement" and ignored that of "substantive rights." *Burlington Northern* also recognized the substantive rights prohibition as an independent part of the standard, but rewrote it, to include a "substantiality" requirement and, like *Hanna*, failed to say anything about the concept of substantive rights itself. The Court has not found it difficult to apply the standard over the years. The next time it finds a Federal Rule invalid will be the first time. But it has decided Enabling Act cases in such analytically different ways that agreement on outcome is about the only thing the cases have in common. Not until *Shady Grove* did the Court confront the question of whether the Act articulates a "one- or two-part validity standard," but then having done so, it could not muster a majority for one or the other answer. Perhaps it is time for Congress to act, this time to "really regulate procedure."

[232] *See* THE DICTIONARY OF MODERN PROVERBS 238-39 (Charles Clay Doyle et al. eds., 2012) (surmising that the squirrel and acorn version of this familiar proverb is a twist on an earlier version involving a pig and acorn). *See also* MARTIN H. MANSER, THE FACTS ON FILE DICTIONARY OF PROVERBS 74 (2007) ("even a blind pig occasionally picks up an acorn"); A DICTIONARY OF AMERICAN PROVERBS (Wolfgang Mieder et al. eds., 1992) ("even a blind pig occasionally picks up an acorn." Rec. dist.: Colo. Ill., Ky.); JON R. STONE, THE ROUTLEDGE BOOK OF WORLD PROVERBS (2007) ("even a blind pig finds an acorn now and then"—Russian); RICHARD M. DORSON, BUYING THE WIND: REGIONAL FOLKLORE IN THE UNITED STATES (1972) ("Even a blind pig will sometimes find an acorn.") (from EDWIN MILLER FOGEL, PROVERBS OF THE PENNSYLVANIA GERMANS (1929)) (listing the saying in Pa. German and High German). There also is a pig and truffle version of the proverb but it makes less sense. Pigs (more accurately, "truffle hogs"), find truffles by smelling and rooting them out with their noses, and being blind would not prevent them from doing this. *See* Walter Sullivan, "Truffles: Why Pigs Can Sniff Them Out," N.Y. TIMES (Mar. 24, 1982), http://www.nytimes.com/1982/03/24/garden/truffles-why-pigs-can-sniff-them-out.html.