

INSTITUTIONAL PRACTICE, PROCEDURAL
UNIFORMITY, AND AS-APPLIED CHALLENGES
UNDER THE RULES ENABLING ACT

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INTRODUCTION

As others have observed, the Supreme Court’s decision last Term in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*¹ settles little with respect to the *Erie*² doctrine.³ For the purposes of diversity actions in federal courts, the Court held, Federal Rule of Civil Procedure 23 trumps a New York state statute—New York Civil Practice Law and Rules section 901(b)—barring the use of class actions “to recover a penalty, or minimum measure of recovery created or imposed by statute.”⁴ But beyond that, members of the Court agreed only at a high level of generality about how to interpret the federal Rule. And there is no majority opinion explaining why Rule 23, construed to govern the question in *Shady Grove*, is valid.

If the *Shady Grove* opinions settled little, they raised a host of interesting questions. Like Professor Ides,⁵ I will focus in this Article on the debate between the plurality and Justice Stevens concerning the availability of as-applied challenges to the validity of rules promulgated under the Rules Enabling Act.⁶ And like Professor Ides, I will argue that Justice Stevens has the better of the argument. Having had the benefit of reading a draft of Professor Ides’s article after I researched this Article but before I drafted it, I will try to minimize

1 130 S. Ct. 1431 (2010).

2 *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

3 See Stephen B. Burbank & Tobias Barrington Wolff, *Redeeming the Missed Opportunities of Shady Grove*, 159 U. PA. L. REV. 17, 25 (2010) (“When the dust settled at the end of the [*Shady Grove*] opinions, little was resolved.”); Kevin M. Clermont, *The Repressible Myth of Shady Grove*, 86 NOTRE DAME L. REV. 987, 991 (2011) (noting that *Shady Grove* “does little to move the *Erie* doctrine”).

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

5 See Allan Ides, *The Standard for Measuring the Validity of a Federal Rule of Civil Procedure: The Shady Grove Debate Between Justices Scalia and Stevens*, 86 NOTRE DAME L. REV. 1041 (2011).

6 28 U.S.C. §§ 2072–2077 (2006).

the extent to which I duplicate his insightful and persuasive arguments.

Part I of this Article frames the question by describing the dispute, in *Shady Grove*, over facial and as-applied challenges under the Rules Enabling Act. Part II reviews existing evidence for the possibility of as-applied Enabling Act challenges. Although the Supreme Court, famously, has never invalidated a rule under the Enabling Act, some statements by rulemakers and by Justices support the possibility of as-applied challenges to rule validity, and both the Court and lower federal courts have occasionally entertained such challenges. Parts I and II introduce a distinction between two sorts of as-applied review, which I will call (respectively) sub-rule as-applied review and state-specific as-applied review. The crux of the dispute in *Shady Grove* concerned the legitimacy of state-specific as-applied review; sub-rule as-applied review, by contrast, seems less controversial.

Part III sets out to assess the costs and benefits of as-applied Enabling Act review, with a particular focus on state-specific as-applied review. Subpart III.A sets the stage by briefly reviewing discussions of facial and as-applied challenges in other contexts. The choice among facial review, as-applied review, and a combination of the two appears to depend on both the institutional context and the nature of the constraint that forms the basis for the review. In subparts III.B and C, I focus on the benefits and costs of as-applied review in the particular context of Enabling Act review of federal rules. Subpart Part III.B suggests that though the rulemakers are attentive to the limits imposed by the Enabling Act, they may not always be able to foresee a rule's future effects on substantive rights. Admitting the possibility of the occasional as-applied challenge to a rule's validity permits questions of a rule's effect on substantive rights to develop in the context of concrete cases, before judges who are likely to have some familiarity with the relevant substantive law concerns. The information developed in such litigation can inform both a court's evaluation of the rule's application in the case before it and future deliberations of the rulemakers.

Subpart III.C considers the *Shady Grove* plurality's arguments against permitting state-specific as-applied challenges to federal rules. As Justice Scalia pointed out, such challenges can cause uncertainty, can be difficult to resolve, and can impair the nationally uniform application of the federal rules. But—cognizant of Justice Stevens's proposal that the threshold for an as-applied challenge be high—subpart III.C also considers the extent to which the costs of state-specific as-applied review could be controlled by requiring a strong showing before finding a rule invalid as applied. Subpart III.D places the dis-

uniformity argument in context by observing other features of federal court practice that currently produce significant interstate procedural variation, and by noting ways in which the federal system asks state courts to tolerate similar disuniformity in state procedure. Balancing out the costs and benefits of state-specific as-applied review, I conclude—as Professor Ides does—that Justice Stevens’s proposed approach strikes a reasonable balance: state-specific as-applied invalidation of a federal rule should be permissible but rare.⁷

I should note two limits of the analysis that I undertake here. First, because this Article focuses on the *Shady Grove* debate over as-applied review, and because that debate, in turn, focuses in large part on the interstate variation that can result from such review, most of my discussion will concern the federalism implications of the Rules Enabling Act scope limitations. Those limitations, in fact, have their roots in separation of powers concerns, and should impose constraints in federal question cases as well as diversity cases.⁸ It is possible to conceive of a debate over as-applied review, in the federal question context, that would very roughly parallel the debate on which this Article focuses. In the federal question context, the issue would be whether a federal rule might prove to be invalid as applied to the adjudication of a particular type of federal claim. The costs and benefits of that sort of substance-specific as-applied review would differ from those on which I focus in Part III, and in the light of space constraints, I have chosen to focus my discussion on state-specific as-applied review.

Second, I focus here on the methodological question of the appropriateness of as-applied review. The choice between facial and as-applied review inevitably implicates choices concerning the content of the limitation that the review seeks to enforce. But the Enabling Act’s constraints have not heretofore been defined with specificity,⁹ and I do not attempt a specific definition here. So long as the reader

7 See also Thomas D. Rowe, Jr., *Sonia, What’s a Nice Person Like You Doing in Company Like That?*, 44 CREIGHTON L. REV. 107, 110 (2010) (“Impermissible direct modification, enlargement, or abridgement of a substantive right, as opposed to permissible ‘incidental’ effects on such rights, by a truly procedural rule will be rare (indeed, its rarity is good reason not to shy from the prospect); but the possibility of recognizing such forbidden effects should and does remain open.” (footnote omitted)).

8 See Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1106 (1982) (noting that the Enabling Act was “designed to allocate lawmaking power between federal institutions”).

9 See Burbank & Wolff, *supra* note 3, at 52 (“[R]easonable minds can differ about what the standard for the validity of a Federal Rule under the Enabling Act should be—albeit not about the primary goal of the allocation scheme employed . . .”).

is willing to concede that the separation of powers thrust of the Enabling Act limitations is properly supplemented—in diversity cases—by federalism values, we can address the appropriateness of as-applied Enabling Act review without attempting a more precise articulation of those limitations.¹⁰ Similarly, in illustrating my discussion of as-applied review I discuss a number of instances where the validity of a rule’s application has been questioned. In order not to distend further an Article that is already overlong, I do not attempt to assess the merits of those questions. My focus throughout will be on the nature of the method of review rather than on the answer that should be produced by applying that method in a particular case.

I. SHADY GROVE ON AS-APPLIED CHALLENGES

It is worth noting, at the outset, that the petitioner in *Shady Grove* conceded the general propriety of as-applied Enabling Act challenges.¹¹ Thus, one might argue that Justice Scalia’s decision to question the practice falls within a venerable *Erie* tradition of deciding questions not raised by the parties.¹² Justice Scalia, for the *Shady Grove* plurality, attacked the practice of as-applied validity review, while Justice Stevens guardedly defended it and the dissenting Justices ignored the question. I will argue in this Part that the crux of the disagreement between Justices Scalia and Stevens concerns not all methods of as-applied review, but in particular what I will call state-specific as-applied review.

10 It is, of course, true that the choice of a particular method for determining whether a federal rule abridges, enlarges, or modifies a substantive right will affect the degree of uncertainty and disuniformity that would attend as-applied review of a rule’s validity under the Enabling Act. Rather than attempt to assess the implications of any particular interpretation of the Enabling Act, this Article agrees with Justice Stevens’s suggestion, in *Shady Grove*, that the standard for as-applied Enabling Act review can be calibrated so that it does not produce undue levels of uncertainty and disuniformity. See *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1448–60 (2010) (Stevens, J., concurring in part and concurring in the judgment).

11 See Petitioner’s Reply Brief at 14, *Shady Grove*, 130 S. Ct. 1431 (No. 08-1008) (“Allstate correctly points out that the facial validity of a rule does not mean that the rule can be applied in particular cases to abridge a substantive right . . .”). The petitioner argued, however, that “state rules of procedure prohibiting class certification [do not] create substantive rights that limit Rule 23.” *Id.* at 15 n.9.

12 See Edward A. Purcell, Jr., *The Story of Erie: How Litigants, Lawyers, Judges, Politics, and Social Change Reshape the Law*, in *CIVIL PROCEDURE STORIES* 21, 22–23 (Kevin M. Clermont ed., 2d ed. 2008) (“Neither party [in *Erie*] had questioned *Swift* or called for its overthrow.”).

Justice Scalia, joined by the Chief Justice and Justices Thomas and Sotomayor, argued in *Shady Grove* that the sole test for a Rule's validity under the Enabling Act is whether the Rule "really regulat[es] procedure"¹³ and "not whether the rule affects a litigant's substantive rights; most procedural rules do."¹⁴ After asserting (in a passage that others have understandably criticized as formalist¹⁵) that the availability of class treatment is a mere "incidental effect" that "leaves the parties' legal rights and duties intact and the rules of decision unchanged," the plurality went on to reject the respondent's argument that the New York statute was either substantive in its own right or enacted to serve substantive purposes:

The fundamental difficulty with both these arguments is that the substantive nature of New York's law, or its substantive purpose, *makes no difference*. A Federal Rule of Procedure is not valid in some jurisdictions and invalid in others—or valid in some cases and invalid in others—depending upon whether its effect is to frustrate a state substantive law (or a state procedural law enacted for substantive purposes).¹⁶

After citing *Sibbach v. Wilson & Co.*¹⁷ for this proposition,¹⁸ the plurality continued:

Hanna unmistakably expressed the same understanding that compliance of a Federal Rule with the Enabling Act is to be assessed by consulting the Rule itself, and not its effects in individual applications: "[T]he court has been instructed to apply the Federal Rule, and can refuse to do so only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions."¹⁹

In the next part of the opinion, joined only by the Chief Justice and Justice Thomas, Justice Scalia reiterated that his test for rule validity asks only whether the rule really regulates procedure—a test that "leaves no room for special exemptions based on the function or pur-

13 *Shady Grove*, 130 S. Ct. at 1442 (plurality opinion) (quoting *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941)).

14 *Id.*

15 See Burbank & Wolff, *supra* note 3, at 74 (arguing that *Shady Grove* may "stand as a monument to the collateral damage that results when single-minded formalism crowds out sensible pragmatism").

16 *Shady Grove*, 130 S. Ct. at 1444 (plurality opinion).

17 312 U.S. 1 (1941).

18 See *Shady Grove*, 130 S. Ct. at 1444 (plurality opinion) (citing *Sibbach*, 312 U.S. at 13–14).

19 *Id.* (quoting *Hanna v. Plumer*, 380 U.S. 460, 471 (1965)).

pose of a particular state rule.”²⁰ “*Sibbach’s* exclusive focus on the challenged Federal Rule,” Justice Scalia explained, was “driven by the very real concern that Federal Rules which vary from State to State would be chaos.”²¹

Justice Scalia’s plurality opinion makes clear that he opposes as-applied review of the validity of federal Rules, insofar as such review would focus on the rule’s effects on a particular state’s system of enforcement for substantive rights.²² But it is less clear whether he really meant that in all instances a rule’s validity “is to be assessed by consulting the Rule itself, and not its effects in individual applications.”²³ The plurality itself, after all, inserted the following limitation into its discussion of Rule 23’s validity:

Rule 23—at least insofar as it allows willing plaintiffs to join their separate claims against the same defendants in a class action—falls within § 2072(b)’s authorization. A class action, no less than traditional joinder (of which it is a species), merely enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits. And like traditional joinder, it leaves the parties’ legal rights and duties intact and the rules of decision unchanged.²⁴

What led Justice Scalia to insert this proviso? Did he have in mind a possible argument that a non-opt-out class action might, in some instances, transgress the limits of the Rules Enabling Act delegation?²⁵ Was he, instead, thinking about that rare type of class—a

20 *Id.* at 1445.

21 *Id.* at 1446.

22 The plurality also stated its view as follows: “[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.” *Id.* at 1444 (citations omitted). Professor Thomas Rowe has suggested that this reference to “incidental effects” might be read to temper the plurality’s rejection of as-applied review: “If the effect is not ‘incidental’ but of a direct sort that abridges, enlarges, or modifies a substantive right, conceivably under the plurality’s formulation § 2072(b) might still have some independent effect.” Rowe, *supra* note 7, at 107 n.3. However, Professor Rowe acknowledges counter-arguments: “[T]he sweeping nature of the plurality’s assertion may leave some judges thinking that no impact on substantive rights could ever invalidate a Federal Rule, even as applied. And other statements in the plurality opinion make it appear that it indeed intends its universal-validity view in the strongest form.” *Id.*

23 *Id.* at 1444.

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

25 *Cf. Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 842 (1999) (observing that a stringent interpretation of the requirements of FED. R. CIV. P. 23(b)(1)(B) “minimizes potential conflict with the Rules Enabling Act”).

defendant class?²⁶ Whatever the reasons, the proviso is intriguing, given Justice Scalia's statements in opposition to as-applied review. It seems to me that the opening of the quoted paragraph could be rephrased as follows: "Rule 23 is valid as applied to opt-out plaintiff classes." And this sentence's implied corollary is: "But we are not saying whether Rule 23 is valid as applied to, say, all non-opt-out plaintiff classes or to all defendant classes."

If that is a valid reading of the opinion, then Justice Scalia does not oppose *all* forms of as-applied validity review. As-applied review is permissible, his opinion suggests, if the application-specific analysis proceeds only with reference to the operation of the federal Rule. Adapting terminology employed by Richard Fallon,²⁷ I will call this "sub-rule as-applied review," to reflect the fact that this sort of as-applied review implicitly divides a rule into sub-rules—e.g., "an opt-out plaintiff class may be maintained if . . ." and "a non-opt-out plaintiff class may be maintained if . . ."—and assesses the validity of each of those sub-rules separately. What Justice Scalia's plurality opinion clearly opposes is what I will call "state-specific as-applied review"—namely, a validity analysis that takes into account a Rule's impact on the ways in which a state's system of procedure is intertwined with the enforcement of that state's substantive law.²⁸ And it was with respect to state-specific as-applied review that Justice Stevens took issue with the plurality.

Justice Stevens's partial concurrence first explained that a federal court's assessment of a state law, for *Erie* purposes, should avoid formalism; rather, the court should examine "whether the state law actually is part of a State's framework of substantive rights or remedies."²⁹ When assessing the import of a state procedural rule, the question should be whether the procedure is "so bound up with the state-created right or remedy that it defines the scope of that substantive right

26 Cf. Debra J. Gross, Comment, *Mandatory Notice and Defendant Class Actions: Resolving the Paradox of Identity Between Plaintiffs and Defendants*, 40 EMORY L.J. 611, 621 (1991) (noting "potential unfairness and due process violations inherent in defendant class actions").

27 See Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1325–26 (2000) ("[T]he meaning of statutes is not always obvious, but frequently must be *specified* through case-by-case applications; the process of specification effectively divides a statutory rule into a series of *subrules*; and in most but not all cases, valid subrules can be *separated* from invalid ones, so that the former can be enforced, even if the latter cannot." (footnote omitted)).

28 What I am calling state-specific as-applied review can be seen as a particular subcategory of sub-rule as-applied review.

29 *Shady Grove*, 130 S. Ct. at 1449 (Stevens, J., concurring in part and concurring in the judgment).

or remedy.”³⁰ And if a state rule turns out to be part and parcel of a state’s system of substantive rights, then that fact—in Justice Stevens’s view—should influence both the court’s interpretation of the federal Rule and the court’s assessment of the federal Rule’s validity:³¹

[T]he second step of the inquiry may well bleed back into the first. When a federal rule appears to abridge, enlarge, or modify a substantive right, federal courts must consider whether the rule can reasonably be interpreted to avoid that impermissible result. And when such a “saving” construction is not possible and the rule would violate the Enabling Act, federal courts cannot apply the rule.³²

As if to underscore that his model contemplates the possibility of as-applied invalidation under the Enabling Act, Justice Stevens quoted a 1963 statement by Justices Black and Douglas “that federal rules ‘as applied in given situations might have to be declared invalid.’”³³ And—demonstrating that (in my terminology) his model contemplates state-specific as-applied review—Justice Stevens asserted that

[a] federal rule . . . cannot govern a particular case in which the rule 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.³⁴

The dissent avoided entering into this debate. Justice Ginsburg (writing for herself and Justices Kennedy, Breyer, and Alito) concluded that Rule 23 simply did not cover the question in *Shady Grove*³⁵—a conclusion that obviated any need to consider whether Rule 23 (if it did control the question) would be valid under the Enabling Act.

So *Shady Grove* raises—but does not answer—the questions upon which I focus in this Article³⁶: Can validity challenges under the Ena-

30 *Id.* at 1450.

31 *Id.* at 1450–51.

32 *Id.* at 1452 (citations omitted).

33 *Id.* (quoting Order Amending the Federal Rules of Civil Procedure, 374 U.S. 865, 870 (1963) (Black & Douglas, JJ., dissenting)).

34 *Id.*

35 *Id.* at 1469 (Ginsburg, J., dissenting).

36 I respectfully disagree with Professor Clermont’s assessment that after *Shady Grove*, “if the pertinent Federal Rule regulates procedure, then it is valid and applicable in all federal cases. Period.” Clermont, *supra* note 3, at 1019. That would be true if Justice Scalia had garnered five votes for his rejection of as-applied validity review. But Justice Stevens specifically disavowed that rejection, and the dissenters avoided the question. Having only secured four votes in favor of rejecting as-applied review, Justice Scalia did not alter the law on this point in *Shady Grove*.

bling Act be as-applied? And if so, can a court engage not only in sub-rule as-applied review, but also in state-specific as-applied review? In the next Part, I survey the evidence on these questions from prior rulemaking and judicial practice.

II. AS-APPLIED CHALLENGES AND PRIOR PRACTICE

A number of scholars have assumed that validity analyses under the Enabling Act can be either facial or as applied.³⁷ This assessment reflects existing practice: there are precedents for reviewing a Rule's application in a particular context with an eye to the Rule's effect on substantive rights. Serious occasions for such review may be relatively rare, but they do exist. In Subpart II.A, I second Professor Ides's argument that neither *Sibbach* nor *Hanna v. Plumer*³⁸ forecloses as-applied review. I then proceed to discuss additional precedents for such review. To assess further the extent to which these precedents shed light on the debate in *Shady Grove*, I divide them into two categories—precedents for sub-rule as-applied review (discussed in subpart II.B), and precedents for state-specific as-applied review (discussed in subpart II.C).

A. *Sibbach (and Schlagenhauf) and Hanna*

Before adducing precedents for as-applied Enabling Act review, it makes sense, first, to address the *Shady Grove* plurality's assertion that *Sibbach* and *Hanna* foreclose such review. As Professor Ides persuasively argues, neither decision has this effect. And, indeed, the Court's later treatment of *Sibbach* in *Schlagenhauf v. Holder*³⁹ provides support for sub-rule as-applied review.

In *Shady Grove*, Justice Scalia acknowledged that his reading of the Enabling Act—by foreclosing as-applied review—appears to rest in tension with the statute's language:

It is possible to understand how it can be determined whether a Federal Rule “enlarges” substantive rights without consulting State law: If the Rule creates a substantive right, even one that duplicates some state-created rights, it establishes a new *federal* right. But it is hard to understand how it can be determined whether a Federal Rule “abridges” or “modifies” substantive rights without knowing

³⁷ See, e.g., Stephen C. Yeazell, *Judging Rules, Ruling Judges*, 61 LAW & CONTEMP. PROBS. 229, 246 (1998) (“The Court has the ultimate responsibility of deciding whether a Rule, on its face or as applied, violates the Rules Enabling Act . . .”).

³⁸ 380 U.S. 460 (1965).

³⁹ 379 U.S. 104 (1964).

what state-created rights would obtain if the Federal Rule did not exist.⁴⁰

But, Justice Scalia argued, *Sibbach* controls the question and *Sibbach*'s test—whether a rule “really regulates procedure”—should not be abandoned:

Sibbach has been settled law, however, for nearly seven decades. Setting aside any precedent requires a “special justification” beyond a bare belief that it was wrong. And a party seeking to overturn a *statutory* precedent bears an even greater burden, since Congress remains free to correct us, and adhering to our precedent enables it do so.⁴¹

It is, of course, true that statutory *stare decisis* carries particular weight.⁴² The problem with Justice Scalia's argument in *Shady Grove* is that, for the reasons that Professor Ides explains in this volume, *Sibbach* did not in fact rule out the possibility of as-applied Enabling Act challenges. As Professor Ides states:

[T]he context in which “really regulates procedure” first appears in the *Sibbach* opinion includes these critical factors: 1) the challenge in *Sibbach* to Rule 35 was facial, not as applied; 2) *Sibbach* conceded that the right at issue was procedural, thus simultaneously satisfying § 2072(a) and eliminating any potential application of § 2072(b); 3) the phrase appears in a section of the opinion that rejects *Sibbach*'s effort to extend the § 2072(b) proscription to otherwise non-substantive rights that are deemed “important” or “substantial”; and, 4) the phrase, both in itself and when read within the passage in which it appears, provides at best a cryptic and elliptical way of announcing a rather bold and superfluous interpretation of § 2072(b).⁴³

In fact, the Supreme Court's 1964 decision in *Schlagenhauf* demonstrates—in the context of the very rule upheld in *Sibbach*—the Court's willingness to consider as-applied challenges to a Rule. *Sibbach* had upheld Rule 35's validity against a challenge by Mrs. *Sibbach*, a plaintiff.⁴⁴ Justice Goldberg opened his opinion for the Court in *Schlagenhauf* by explaining that the latter case “involves the validity

40 *Shady Grove*, 130 S. Ct. at 1445–46 (plurality opinion).

41 *Id.* at 1446 (footnote and citations omitted).

42 I have recently relied on such an argument myself, with respect to a different area of statutory law. See Catherine T. Struve, *Shifting Burdens: Discrimination Law Through the Lens of Jury Instructions*, 51 B.C. L. REV. 279, 282 (2010) (finding only a “dubious basis” for the Supreme Court's decision in *Gross v. FBL Fin. Servs., Inc.*, 129 S. Ct. 2343 (2009), “to reject the 20-year-old *Price Waterhouse* precedent”).

43 Ides, *supra* note 5, at 1061–62 (footnotes omitted).

44 See *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941).

and construction of Rule 35(a) of the Federal Rules of Civil Procedure as applied to the examination of a defendant in a negligence action.”⁴⁵ The *Schlagenhauf* Court characterized this issue as an “undecided question[].”⁴⁶ And though the Court ultimately rejected the defendant’s challenge to Rule 35 in *Schlagenhauf* because it found no reason to distinguish between discovery sought from defendants and discovery sought from plaintiffs,⁴⁷ it in no way suggested that its validation of the Rule as applied to plaintiffs in *Sibbach* should have foreclosed consideration of the Rule’s validity as applied to defendants. To the contrary, the *Schlagenhauf* Court held that the defendant’s challenge—which was based on the asserted “lack of power in a district court to order a mental and physical examination of a defendant”—was sufficiently “substantial” to render a request for mandamus appropriate.⁴⁸ To employ the terminology I introduced in Part I, *Schlagenhauf* asserted (and the Supreme Court viewed as legitimate, though unpersuasive) a sub-rule as-applied challenge to Rule 35’s validity.

But what of the *Shady Grove* plurality’s reliance on *Hanna*? As noted above, in the plurality’s view, the Court’s 1965 decision in *Hanna* “unmistakably expressed the same understanding that compliance of a Federal Rule with the Enabling Act is to be assessed by consulting the Rule itself, and not its effects in individual applications.”⁴⁹ The unmistakable expression cited by the plurality is as follows:

When a situation is covered by one of the Federal Rules, the question facing the court is a far cry from the typical, relatively unguided *Erie* Choice: the court has been instructed to apply the Federal Rule, and can refuse to do so only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions.⁵⁰

Does this passage in fact reject the notion of as-applied challenges? Its tone might suggest that the probability of error by the

45 *Schlagenhauf v. Holder*, 379 U.S. 104, 106 (1964).

46 *Id.* at 109.

47 *See id.* at 113 (“We can see no basis under the *Sibbach* holding for such a distinction. Discovery ‘is not a one-way proposition.’ Issues cannot be resolved by a doctrine of favoring one class of litigants over another.” (quoting *Hickman v. Taylor*, 329 U.S. 495, 507 (1947))).

48 *Id.* at 110.

49 *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1444 (2010) (plurality opinion).

50 *Hanna v. Plumer*, 380 U.S. 460, 471 (1965).

rulemakers, the Court and Congress⁵¹ is low, but low probability does not mean zero probability. And the use of the term “prima facie judgment” is suggestive: Prima facie means “at first glance,” and—used in the legal context—the phrase contemplates that the prima facie assessment can be rebutted by further evidence.⁵² Certainly, the *Hanna* Court’s emphasis on the importance of uniform federal Rules suggests a strong reluctance to find a Rule invalid due to its clash with a contrary state practice. But, as Professor Ides points out, *Hanna* also “arguably invited the possibility of as-applied challenges to the Federal Rules.”⁵³ As the *Hanna* Court stated,

though a court, in measuring a Federal Rule against the standards contained in the Enabling Act and the Constitution, need not *wholly* blind itself to the degree to which the Rule makes the character and result of the federal litigation stray from the course it would follow in state courts, it cannot be forgotten that the *Erie* rule, and the guidelines suggested in *York*, were created to serve another purpose altogether. To hold that a Federal Rule of Civil Procedure must cease to function *whenever* it alters the mode of enforcing state-created rights would be to disembowel either the Constitution’s grant of power over federal procedure or Congress’ attempt to exercise that power in the Enabling Act.⁵⁴

The Supreme Court has asserted (citing *Hanna*) that the rulemaking process and the Enabling Act’s report-and-wait requirement “give the Rules presumptive validity”⁵⁵—but it is reasonable to argue that this presumption should be rebuttable, if the rebuttal evidence is strong enough.

B. Sub-Rule As-Applied Review

I noted in Part II.A that Schlagenhauf’s post-*Sibbach* challenge to Rule 35 sought sub-rule as-applied review: Rule 35 was valid under *Sibbach*, he argued, but not as applied to defendants. And in addition to the *Schlagenhauf* Court’s implicit validation of this sort of challenge,

51 As many have noted, inferences drawn from congressional inaction are by definition tenuous.

52 Thus, for example, *Black’s Law Dictionary* provides the following definition for the adverb “prima facie”: “At first sight; on first appearance but subject to further evidence or information <the agreement is prima facie valid>.” BLACK’S LAW DICTIONARY 1310 (9th ed. 2009). And it defines the adjective “prima facie” as: “Sufficient to establish a fact or raise a presumption unless disproved or rebutted <a prima facie showing>.” *Id.*

53 Ides, *supra* note 5, at 1062.

54 *Hanna*, 380 U.S. at 473–74 (emphasis added) (citation omitted).

55 *Burlington N. R.R. v. Woods*, 480 U.S. 1, 6 (1987).

I have already noted the *Shady Grove* plurality's suggestion concerning the possibility of future sub-rule as-applied challenges to Civil Rule 23.

Separating out the category of sub-rule as-applied challenges from that of state-specific as-applied challenges permits us to question whether the 1963 statement of Justices Black and Douglas—cited by Justice Stevens in his *Shady Grove* opinion⁵⁶—provides clear evidence in support of Justice Stevens's position. Justices Black and Douglas, dissenting from the promulgation of the 1963 amendments to the Civil Rules, vigorously criticized those amendments as impinging on the Seventh Amendment right to trial by jury and as altering substantive rights.⁵⁷ In addition, they also suggested altering the structure of the Enabling Act process. Explaining their proposal to shift promulgation authority from the Supreme Court to the Judicial Conference, Justices Black and Douglas asserted that “[t]ransfer of the function to the Judicial Conference would relieve us of the embarrassment of having to sit in judgment on the constitutionality of rules which we have approved and which as applied in given situations might have to be declared invalid.”⁵⁸ But the dissent does not specify what sort of as-applied review the Justices had in mind—so this statement could just as easily have contemplated sub-rule as-applied review as state-specific as-applied review. To find precedents for the latter, we must look to other sources.

C. *State-Specific As-Applied Review*

The possibility of state-specific as-applied review has been explicitly contemplated—albeit rarely—by the rulemakers, the Supreme Court, and lower federal courts. Three examples are illustrative. In section II.C.1, I describe the long-standing uncertainty over the validity of Civil Rule 23.1's contemporaneous-ownership requirement as applied to suits in states without such a requirement. Section II.C.2 discusses the adoption, via amendment to Civil Rule 15(c), of a result previously achieved by a lower court through what could be viewed as the use of state-specific as-applied review. Section II.C.3 notes the Court's apparent contemplation of the possibility of an as-applied challenge to Civil Rule 41. And section II.C.4 notes the existence of additional lower-court decisions engaging in as-applied review.

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

57 See *Order Amending the Federal Rules of Civil Procedure*, 374 U.S. 865, 866 (1963) (Black & Douglas, JJ., dissenting).

58 *Id.* at 870.

1. Civil Rule 23.1

For over sixty years, there has been an unresolved question whether the contemporaneous-ownership requirement in what is now Civil Rule 23.1⁵⁹ applies to diversity suits governed by the substantive law of a state that imposes no such requirement.⁶⁰ That, at least, is the way that a number of commentators have put the question. Stephen Burbank, in pointing out the Enabling Act's focus on separation of powers (rather than federalism), has instead argued that the decision whether to impose a contemporaneous-ownership requirement in derivative suits is one that could not validly be made by the rulemakers for claims under *either* state or federal law.⁶¹ Although Professor Burbank levels a forceful critique at the discussions I recount in this section, my purpose here is simply to note an instance in which rulemaking participants and Supreme Court justices appear to have contemplated state-specific as-applied review.

The contemporaneous-ownership provision—then contained in Civil Rule 23(b)(1)⁶²—was promulgated as part of the original package of Civil Rules. Between the promulgation of those Rules and their

59 See FED. R. CIV. P. 23.1(b) (“The complaint must be verified and must: (1) allege that the plaintiff was a shareholder or member at the time of the transaction complained of, or that the plaintiff’s share or membership later devolved on it by operation of law . . .”).

60 For a useful discussion of this question, see 19 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE § 4509, at 288–91 (2d ed. 1996).

61 Professor Burbank has argued that the [Enabling] Act, interpreted in the light of the pre-1934 history, would require that, as between the Supreme Court exercising rulemaking power and Congress, a decision to authorize (or not authorize) derivative actions be made by the latter. Similar reasoning leads to the conclusion that choices with respect to regulations having a predictable and identifiable effect on such a derivative claim are for Congress. The contemporaneous ownership requirement in Rule 23(b) appears to be of that type.

Burbank, *supra* note 8, at 1151–52 (citations omitted). Professor Burbank notes that Rule 23’s contemporaneous-ownership requirement had previously been justified as merely incorporating a preexisting rule of federal law. See *id.* at 1150 n.584. As he points out, if one turns to such incorporation as the justification for Rule 23’s treatment of the contemporaneous-ownership requirement, it is necessary to identify the source of authority for federal common lawmaking on this topic (because the preexisting federal law on this point had its origin in a Supreme Court decision rather than a federal statute). See *id.* at 1152–53.

62 Original Civil Rule 23(b) required the plaintiff in a derivative suit to “aver (1) that the plaintiff was a shareholder at the time of the transaction of which he complains or that his share thereafter devolved on him by operation of law.” FED. R. CIV. P. 23(b) (1938).

effective date, the Court decided *Erie*. And *Erie* led some to question Rule 23(b)(1)'s validity. After considering the matter for some years,⁶³ the Advisory Committee issued a Supplementary Note to Civil Rule 23 (without amending the Rule). The Note set forth the issue—whether the contemporaneous-ownership requirement “deals with a matter of substantive right or is a matter of procedure”—but declined to resolve it.⁶⁴ Instead, the Note suggested that the matter was for the courts to address:

If it is a matter of substantive law or right, then under *Erie R.R. Co. v. Tompkins* [Rule 23(b)(1)] may not be validly applied in cases pending in states whose local law permits a shareholder to maintain such actions, although not a shareholder at the time of the transactions complained of.⁶⁵

After reviewing the lower court case law on the subject, the Note closed by suggesting that the matter was best resolved in the first

63 The possible implications of *Erie* for Rule 23 are first mentioned in the minutes of the Civil Rules Advisory Committee in October 1943. Judge Clark explained: “This is the *Erie Railroad v. Tompkins* question. The Reporter was directed to prepare a note which would open the question” 2 Proceedings of Meeting of Advisory Committee on Rules for Civil Procedure of the Supreme Court of the United States 289–90 (Oct. 26–27, 1943).

64 The Committee was criticized for ducking the issue. William Mitchell, the Chair, reported to the Committee that certain New York lawyers had “raised hell with the Committee because we didn’t have guts enough to come out in the rules and say whether it was substantive or not.” 1 Proceedings of Meeting of Advisory Committee on Rules for Civil Procedure of the Supreme Court of the United States 195 (Mar. 25–28, 1946) [hereinafter *Advisory Committee Proceedings Volume 1*]. Mitchell recounted his response:

I wrote back and said, “If we hold that it is and eliminate it, that is all right; but suppose we hold that it isn’t and leave it in there, how does that settle anything? What is to prevent somebody from litigating the question in the Supreme Court, and can the Court lift itself over the fence by its own bootstraps?” They promptly subsided.

Id.

65 FED. R. CIV. P. 23 advisory committee’s note (1946); *see also id.* (“The Advisory Committee, believing the question should be settled in the courts, proposes no change in Rule 23 but thinks rather that the situation should be explained in an appropriate note.”). By the time of the 1946 meeting at which the Supplementary Note was last discussed, the Court’s then-recent decision in *Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438 (1946), led Mitchell to express some hope that the Court would uphold Rule 23(b) against the sort of challenge discussed in the Supplementary Note: “Since they have held that it isn’t a jurisdictional matter to extend summons outside the statutory limits, I am beginning to hope that they will sustain this *Hawes v. Oakland* rule [i.e., the contemporaneous-ownership requirement] as not a substantive right.” *Advisory Committee Proceedings Volume 1*, *supra* note 64, at 195–96.

instance in the context of litigation, not rulemaking.⁶⁶ But the Note also suggested that if the Rule were to be invalidated as applied to diversity suits that were governed by the law of a state that had no contemporaneous-ownership requirement, the rulemakers would then acknowledge that holding by amending the Rule:

The decisions here discussed show that the question is a debatable one, and that there is respectable authority for either view, with a recent trend towards the view that Rule 23(b)(1) is procedural. There is reason to say that the question is one which should not be decided by the Supreme Court *ex parte*, but left to await a judicial decision in a litigated case

. . . If, however, the final conclusion is that the rule deals with a matter of substantive right, then the rule should be amended by adding a provision that Rule 23(b)(1) does not apply in jurisdictions where state law permits a shareholder to maintain a secondary action, although he was not a shareholder at the time of the transactions of which he complains.⁶⁷

Such a litigated case, however, never made its way to the Supreme Court;⁶⁸ and almost thirty years later the Court noted that the question was still unresolved. The Court's discussion is worth quoting, because though the Court took no position on the merits of such an as-applied challenge, its description of the issue suggests at least tacit approval of state-specific as-applied review:

66 FED. R. CIV. P. 23 advisory committee's note (1946).

67 *Id.*

68 In *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), the Court did address the question in dictum. In *Cohen*, the Court held that a federal court sitting in diversity in New Jersey and hearing a state law shareholder derivative suit must apply a New Jersey state statute "which makes the plaintiff, if unsuccessful, liable for all expenses, including attorney's fees, of the defense and requires security for their payment as a condition of prosecuting the action." *Id.* at 543, 557. In the course of rejecting the contention that Civil Rule 23 occupied the field and excluded the New Jersey state statute from operating, the Court reviewed the provisions of then-Rule 23 that applied to derivative suits (including the contemporaneous-ownership requirement) and concluded that "[t]hese provisions neither create nor exempt from liabilities, but require complete disclosure to the court and notice to the parties in interest. None conflict with the statute in question and all may be observed by a federal court, even if not applicable in state court." *Id.* at 556. The *Cohen* Court thus apparently approved the application of the contemporaneous-ownership requirement even in suits involving state law claims where the state in question would not impose a contemporaneous-ownership requirement; as the Court put it, "the federal court will not permit itself to be used to litigate a purchased grievance or become a party to speculation in wrongs done to corporations." *Id.* This statement, however, was dictum because the contemporaneous-ownership requirement's application was not at issue in *Cohen*.

The “contemporaneous ownership” requirement in shareholder derivative actions was first announced in *Hawes v. Oakland*, and soon thereafter adopted as Equity Rule 97. This provision was later incorporated in Equity Rule 27 and finally in the present Rule 23.1. After the decision in *Erie R. Co. v. Tompkins*, the question arose whether the contemporaneous-ownership requirement was one of procedure or substantive law. If the requirement were substantive, then under the regime of *Erie* it could not be validly applied in federal diversity cases where state law permitted a non-contemporaneous shareholder to maintain a derivative action. Although most cases treat the requirement as one of procedure, this Court has never resolved the issue.⁶⁹

2. Civil Rule 15(c)

The evolution of Civil Rule 15(c)’s relation-back provision reflects attention to the provision’s implications in cases where the law setting the statute of limitations for a claim would take a more generous approach to relation back. After such considerations were weighed by a court of appeals in what can be seen as state-specific as-applied review, the Supreme Court appeared to disregard (or at least omit to consider) the issue in *Schiavone v. Fortune*.⁷⁰ Responding to *Schiavone*, the rulemakers in 1991 amended Rule 15 so that it incorporates any more generous relation-back provision in the relevant limitations law.

In *Marshall v. Mulrenin*,⁷¹ the First Circuit refused to conclude that Rule 15(c), as it then stood, barred relation back in a case where Massachusetts law (which gave rise to the claim) would have permitted relation back. The *Marshall* court reasoned that “a [federal] rule is not to be applied to the extent, if any, that it would defeat rights arising from state substantive law as distinguished from state proce-

69 *Bangor Punta Operations, Inc. v. Bangor & Aroostook R.R. Co.*, 417 U.S. 703, 708 n.4 (1974) (citations omitted).

70 477 U.S. 21 (1986).

71 508 F.2d 39 (1st Cir. 1974).

ture.”⁷² But when the Supreme Court later addressed a similar question in *Schiavone v. Fortune*,⁷³ it took a different approach.

Schiavone involved diversity actions commenced by filing complaints naming as the defendant “Fortune”—a mistake, because the proper defendant was Time, Inc.⁷⁴ Though the original complaints were filed within the applicable state statute of limitations and though amended complaints (naming Time, Inc. as a defendant) were served on Time, Inc., within the period set by Civil Rule 4(m) for serving a summons and complaint (measured from the complaint’s original fil-

72 *Id.* at 44. I am indebted to Professor Ides for pointing out that *Marshall* can be viewed as an example of as-applied rule invalidation. See Posting of Professor Allan Ides to civ-pro@listserv.nd.edu (Nov. 20, 2009) (on file with author); see also WRIGHT, MILLER & COOPER, *supra* note 60, § 4509, at 282 (noting that in *Marshall*, “application of a Civil Rule was not automatic, but instead depended upon a careful analysis of a conflicting state rule”).

Professor Clermont’s thoughtful article in this issue argues that *Marshall* is not an example of as-applied invalidation but rather an instance in which the court held Rule 15(c) inapplicable to the case at hand. See Clermont, *supra* note 3, at 1008–09 & n.99. But the discussion in *Marshall* indicates that the court read Rule 15(c) to cover the issue at hand: “In the case at bar,” the court stated, “there is in fact a true conflict between the federal amendment of parties rule and the Massachusetts statute.” *Marshall*, 508 F.2d at 44. Two paragraphs later the court reasoned as follows:

Although Rule 15, on its face, conflicts with [the Massachusetts statute], to apply the rule would mean that the choice of forum “would wholly bar recovery.” We do not read *Hanna* to mean that although the statute of limitations would be tolled if an action were brought on the state side, because of the civil rules it will run if brought in the federal court. We accordingly hold that [the Massachusetts statute] permits the amendment adding appellees as defendants to relate back for the purpose of the Massachusetts statute of limitations in spite of the contrary provisions of Rule 15.

Id. at 44–45 (citations omitted). Professor Clermont has pointed out that *Marshall* does not cite the Rules Enabling Act; the case’s only oblique reference to the Act is its description of *Hanna*’s holding concerning the validity of Rule 4(d)(1). But it is difficult to conclude that the *Marshall* court’s ruling merely concerned applicability (as opposed to validity). There do, of course, exist cases that narrowly construe a rule and thus hold it inapplicable to a given question; but in those instances, courts are typically careful to say that the Federal Rule does not, in fact, govern the question at hand. See *infra* notes 123–31 and accompanying text. If the *Marshall* court was simply saying that Rule 15(c) did not purport to govern the question at hand, then why did it find a “true conflict” between that Rule and the state statute? Alternatively, if the *Marshall* court recognized that Rule 15(c) purported to govern the matter at hand, on what basis could it refuse to apply that Rule without questioning its validity as applied to the case at hand? For these reasons, though I recognize the points supporting Professor Clermont’s reading of *Marshall*, I believe that the case can also be read, instead, as an example of as-applied invalidation.

73 477 U.S. 21 (1986).

74 See *id.* at 22–23.

ing),⁷⁵ the Court held that the amendments did not relate back under the then-applicable version of Rule 15(c) because the applicable statute of limitations (as calculated by the court of appeals) had already run before Time, Inc. received notice of the suit.⁷⁶

Both the majority and the dissent in *Schiavone* focused their debate on Rule 15(c); neither gave attention to a provision in New Jersey state law that—plaintiffs had contended below—would have permitted relation back. The court of appeals had dismissed the plaintiffs’ contention about relation back under New Jersey law on the ground that, by conceding in the district court that the New Jersey relation-back provision was procedural rather than substantive, the plaintiffs had waived any argument that *Erie* required application of the state relation-back provision.⁷⁷ By the time that the plaintiffs briefed the merits of the case in the Supreme Court, they had evidently abandoned any attempt to rely on the New Jersey relation-back provision.⁷⁸ Thus, the decision left unresolved whether Rule 15(c) should be read to displace a more generous state relation-back provision.

The rulemaking process responded to this uncertainty. In 1991, Rule 15(c) was amended “to make it clear that the rule does not apply to preclude any relation back that may be permitted under the applicable limitations law.”⁷⁹ Citing *Marshall* with approval, the committee note accompanying the 1991 amendment explained that “[w]hatever may be the controlling body of limitations law, if that law affords a more forgiving principle of relation back than the one provided in

75 See *id.* at 33 (Stevens, J., dissenting).

76 See *id.* at 30 (majority opinion).

77 See *Schiavone v. Fortune*, 750 F.2d 15, 18-19 (3d Cir. 1984), *aff’d*, 477 U.S. 21 (1986).

78 See Brief for Petitioners, *Schiavone*, 477 U.S. 21 (No. 84-1839); Reply Brief for Petitioners, *Schiavone*, 477 U.S. 21 (No. 84-1839).

79 FED. R. CIV. P. 15(c) committee note (1991). My goal in this section is to consider the extent to which prior practice provides examples of state-specific as-applied review, but not to attempt an assessment of whether a given rule, as applied in a given situation, actually does violate the Enabling Act. I thus leave aside, for purposes of this discussion, the debate over whether Enabling Act concerns are raised in instances when Rule 15’s relation-back provisions are more generous than those in the law that supplies the statute of limitations. See GEOFFREY C. HAZARD, JR. ET AL., PLEADING AND PROCEDURE 555 (8th ed. 1999) (asking why “the state relation back doctrine [should] control over Rule 15(c) only when it is more generous,” and noting the argument “that a federal relation-back rule different from the state rule will always abridge someone’s state right”); cf. WRIGHT, MILLER & COOPER, *supra* note 60, § 4509, at 272–88 (arguing that it does not violate the Enabling Act for Rule 15(c) to include a more generous relation-back provision).

this rule, it should be available to save the claim.”⁸⁰ To the extent that *Schiavone* “imply[d] the contrary,” the committee note stated, the 1991 amendment was intended to displace *Schiavone*.⁸¹

3. Civil Rule 41

In *Semtek International Inc. v. Lockheed Martin Corp.*,⁸² the Court held that Civil Rule 41(b)’s provision concerning when an involuntary dismissal “operates as an adjudication upon the merits”⁸³ merely governs the judgment’s effect on an action re-filed in the same federal district court. “[T]he dismissal in the present case barred refileing of the same claim in the United States District Court for the Central District of California. That is undoubtedly a necessary condition, but it is not a sufficient one, for claim-preclusive effect in other courts.”⁸⁴

The Court’s reading of Rule 41(b) is of obvious interest to those studying the Enabling Act’s influence on the interpretation of the federal Rules. But for present purposes I wish to focus instead on the Court’s caveat concerning what its ruling did *not* do. Justice Scalia, writing for the unanimous Court, included the following footnote:

We do not decide whether, in a diversity case, a federal court’s “dismissal upon the merits” (in the sense we have described), under circumstances where a state court would decree only a “dismissal without prejudice,” abridges a “substantive right” and thus exceeds the authorization of the Rules Enabling Act. We think the situation will present itself more rarely than would the arguable violation of the Act that would ensue from interpreting Rule 41(b) as a rule of claim preclusion; and if it is a violation, can be more easily dealt with on direct appeal.⁸⁵

This caveat, it seems to me, explicitly leaves open the possibility of a state-specific as-applied validity challenge to Civil Rule 41(b).

80 FED. R. CIV. P. 15(c) committee note (1991).

81 *Id.*

82 531 U.S. 497 (2001).

83 *Id.* at 501 (quoting the then-applicable version of Civil Rule 41(b)). When Civil Rule 41(b) was restyled in 2007, “upon the merits” became “on the merits.” See FED. R. CIV. P. 41 committee note (2007) (explaining that the restyling changes were “intended to be stylistic only”).

84 *Semtek*, 531 U.S. at 506.

85 *Id.* at 506 n.2.

4. Other Rules

Without attempting a comprehensive listing of cases in which a court has engaged in as-applied validity review under the Enabling Act, I will mention two further examples.

In *Exxon Corp. v. Burglin*,⁸⁶ the fact that the Supreme Court had specifically considered the validity of Appellate Rule 38 less than eight years earlier did not prevent the Fifth Circuit from examining whether Rule 38 could validly apply in a case governed by Alaska substantive law.⁸⁷ An Alaska rule authorized appellate courts to “allow a party prevailing on appeal to recover partial attorneys’ fees and costs incurred on appeal or, in the case of a frivolous suit, full fees.”⁸⁸ As the court noted, “[b]y allowing even minimal recovery of attorneys’ fees in every civil appeal, Alaska Rule 508 directly collides with FED. R. APP. P. 38, which allows the recovery of attorneys’ fees only in the case of a frivolous appeal.”⁸⁹ Because the Court in *Burlington Northern Railroad Co. v. Woods*⁹⁰ had already upheld Rule 38’s validity,⁹¹ the *Exxon* court reasoned that in the present case it “need only consider [Rule

86 42 F.3d 948 (5th Cir. 1995).

87 *Exxon Corp.* may be taken to represent the views of judges familiar with the Enabling Act process. At the time of the decision, the opinion’s author was a member of the Appellate Rules Committee and another member of the panel chaired the Civil Rules Committee.

88 *Exxon Corp.*, 42 F.3d at 950.

89 *Id.* (citing *Burlington N. R.R. Co. v. Woods*, 480 U.S. 1, 7 (1987)).

90 480 U.S. 1 (1987).

91 The Supreme Court’s analysis in *Burlington* had relied on the Alabama Supreme Court’s reading of an Alabama statute when concluding that Appellate Rule 38 conflicted with that state statute. See *Burlington N. R.R. Co.*, 480 U.S. at 1. Appellate Rule 38 provides a court of appeals with discretion to impose a penalty for a frivolous appeal. See FED. R. APP. P. 38. The Alabama statute brooked no such discretion; it mandated a ten percent penalty whenever a money judgment that had been stayed pending appeal was affirmed. In addition to the fact that the discretionary Rule 38 analysis contrasted with the mandatory nature of the state penalty, the Court found evidence of conflict between the two provisions because “the purposes underlying the Rule are sufficiently coextensive with the asserted purposes of the Alabama statute to indicate that the Rule occupies the statute’s field of operation so as to preclude its application in federal diversity actions.” *Burlington N. R.R. Co.*, 480 U.S. at 7. And to evidence the purposes of the state statute, the Court cited decisions by the Alabama Supreme Court:

The purposes of the mandatory affirmance penalty are to penalize frivolous appeals and appeals interposed for delay, and to provide “additional damages” as compensation to the appellees for having to suffer the ordeal of defending the judgments on appeal.

Id. at 4 (citing *Birmingham v. Bowen*, 47 So. 2d 174, 179–80 (Ala. 1950); *Montgomery Light & Water Power Co. v. Thombs*, 87 So. 205, 211 (Ala. 1920)).

38's] as-applied legitimacy."⁹² After some analysis, the court concluded that "because the issue of attorneys' fees on appeal under Alaska law is one of procedure, we hold that, in this case, FED. R. APP. P. 38 does not violate the limitations of the Rules Enabling Act."⁹³

Professor Thomas Rowe has adduced another example of state-specific as-applied review.⁹⁴ In *Douglas v. NCNB Texas National Bank*,⁹⁵ the Fifth Circuit held that a creditor's debt collection claims should not be viewed as having been compulsory counterclaims in the debtors' prior federal diversity class action against the creditor. Stating that a court "must not apply a federal rule of civil procedure if application of the rule violates either the Constitution or the Rules Enabling Act,"⁹⁶ the *Douglas* court reasoned that

[u]nder Texas law, lenders have a substantive right to elect judicial or nonjudicial foreclosure in the event of a default, and debtors have no right to force the lender to pursue a judicial foreclosure remedy. Application of rule 13(a) in the instant case would abridge the lender's substantive rights and enlarge the debtor's substantive rights.⁹⁷

Though the *Douglas* court's antecedent assumption that Rule 13 would ordinarily govern the preclusive effect of a prior judgment requires further examination,⁹⁸ the case does provide an example of as-applied invalidation.

III. BENEFITS AND COSTS OF AS-APPLIED REVIEW

Thus far, we have seen that as-applied review of the validity of federal Rules is not unheard of. But is it desirable? And how does the debate over as-applied review for federal Rules fit within the larger debate over as-applied and facial review in other contexts? Part III.A. considers that larger debate, and concludes that the choice among as-applied review, facial review, and a combination of the two depends upon the costs and benefits of those options in the particular context

92 *Exxon Corp.*, 42 F.3d at 950.

93 *Id.* at 952.

94 See Rowe, *supra* note 7, at 111 (discussing *Douglas v. NCNB Tex. Nat'l Bank*, 979 F.2d 1128 (5th Cir. 1992)).

95 979 F.2d 1128 (5th Cir. 1992).

96 *Id.* at 1130.

97 *Id.*

98 See Stephen B. Burbank, *Interjurisdictional Preclusion, Full Faith and Credit and Federal Common Law: A General Approach*, 71 CORNELL L. REV. 733, 772 (1986) ("Aside from the fact that it governs procedure in the rendering court, which lacks the power finally to determine the preclusive effects of its judgment, Rule 13(a) does not in so many words and could not validly provide a rule of preclusion.").

at issue. Subpart III.B considers the possible benefits of as-applied Enabling Act review, and subpart III.C considers the possible costs. Because one of the most significant costs of state-specific as-applied validity review is interstate variation in the applicability of federal rules, subpart III.D considers the extent to which the federal court system already tolerates such variation, and (by way of comparison) notes that the federal system sometimes requires state courts to tolerate a similar disruption of the uniform application of their own state procedures.

A. *As-Applied Review in Other Contexts*

How do adjudicators determine whether to engage in facial or as-applied review? Most of the discussions of this question have arisen in the context of constitutional challenges. In that context, Richard Fallon has noted that

[t]raditional thinking has long held that the normal if not exclusive mode of . . . adjudication involves an as-applied challenge, in which a party argues that a statute cannot be applied to her because its application would violate her personal constitutional rights. Within the customary understanding, “facial” attacks maintaining that a statute is more generally invalid were considered rare and suspect. And “overbreadth” doctrine, which allows a statute to be challenged facially on the ground that it has too many unconstitutional applications, was thought to be limited mostly if not exclusively to the First Amendment.⁹⁹

This conventional model has been subject to debate,¹⁰⁰ and the Justices have differed concerning the approach to apply to various sorts of constitutional challenges. Because Justice Scalia took the opportunity in *Shady Grove* to call into question the use of as-applied review—or, at least, the use of state-specific as-applied review—in the context of Enabling Act challenges, it is interesting to consider his preferences concerning facial and as-applied review in other contexts. It turns out that Justice Scalia’s preferred approaches span a spectrum: for cases that he views as posing challenges to federal legislative power he has advocated facial challenges but would permit as-applied

99 Fallon, *supra* note 27, at 1321 (footnotes omitted).

100 See, e.g., Matthew D. Adler, *Rights, Rules, and the Structure of Constitutional Adjudication: A Response to Professor Fallon*, 113 HARV. L. REV. 1371, 1390 (2000) (observing that Supreme Court “case law is—to be frank—confused and incoherent on the issue of ‘facial’ and ‘as-applied’ challenges”); Edward A. Hartnett, *Modest Hope for a Modest Roberts Court: Deference, Facial Challenges, and the Comparative Competence of Courts*, 59 SMU L. REV. 1735, 1749 (2006) (“[D]ispute, confusion, and uncertainty regarding facial versus as-applied constitutional challenges are becoming ubiquitous.”).

challenges as a fallback; for cases that he views as posing challenges based on individual constitutional rights he would prefer only as-applied and not facial challenges; and (as we have seen) for Enabling Act challenges to federal Rules he would never permit as-applied review and would invalidate a Rule only if it is facially invalid.

In the context of individual rights-based constitutional challenges, Justice Scalia is viewed as a leading proponent of as-applied, rather than facial, review.¹⁰¹ On a number of occasions he has defended the Court's statement in *United States v. Salerno*¹⁰² that "[a] facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid."¹⁰³ In Justice Scalia's view, the proper role of a federal court is to decide only the particular dispute before the court—a duty that requires at most a determination "that the statute is unconstitutional as applied to *this* party, in the circumstances of *this* case."¹⁰⁴

By contrast, Justice Scalia would relax this restriction on facial challenges in the context of challenges based on limits on legislative power.¹⁰⁵ As he asserted in *Nevada Department of Human Resources v. Hibbs*¹⁰⁶:

When a litigant claims that legislation has denied him individual rights secured by the Constitution, the court ordinarily asks first whether the legislation is constitutional *as applied to him*. When, on the other hand, a federal statute is challenged as going beyond Congress's enumerated powers, under our precedents the court first asks whether the statute is unconstitutional *on its face*.¹⁰⁷

This passage in *Hibbs* might, at first glance, be taken to support Justice Scalia's preference for facial over as-applied challenges under the Enabling Act. After all, Enabling Act challenges assert that the rulemakers exceeded the scope of their delegated powers. But in *Hibbs*, Justice Scalia took pains to make clear that his preference for

101 See, e.g., Marc E. Isserles, *Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement*, 48 AM. U. L. REV. 359, 376 (1998) ("Scalia, joined by three other Justices, has emerged as *Salerno's* most outspoken defender.").

102 481 U.S. 739 (1987).

103 *Id.* at 745.

104 *City of Chi. v. Morales*, 527 U.S. 41, 74 (1999) (Scalia, J., dissenting).

105 For thoughtful discussions of as-applied and facial challenges to exercises of Congress's Section 5 power, see Hartnett, *supra* note 100, and Gillian E. Metzger, *Facial Challenges and Federalism*, 105 COLUM. L. REV. 873 (2005).

106 538 U.S. 721 (2003).

107 *Id.* at 743 (Scalia, J., dissenting) (citing *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973)).

facial analysis of legislative power challenges does not foreclose an as-applied challenge when a facial challenge fails: “If the statute survives [the facial] challenge, however, it stands to reason that the court may, if asked, proceed to analyze whether the statute (constitutional on its face) can be validly applied to the litigant.”¹⁰⁸

In fact, this as-applied review, as envisioned in Justice Scalia’s *Hibbs* dissent, could be described as state-specific as-applied review. “In the context of § 5 prophylactic legislation applied against a State,” Justice Scalia has argued, evaluating an as-applied challenge “would entail examining whether the State has itself engaged in discrimination sufficient to support the exercise of Congress’s prophylactic power.”¹⁰⁹ A state, in this view, “will be entitled to assert that the mere facts that (1) it is a State, and (2) some States are bad actors, is not enough; it can demand that *it* be shown to have been acting in violation of the Fourteenth Amendment.”¹¹⁰

So in Justice Scalia’s view, state-specific as-applied review is warranted in some circumstances. Why not in the context of Rules Enabling Act challenges? Part of the answer undoubtedly lies in Justice Scalia’s view of the scope of Congress’s power under Section 5 of the Fourteenth Amendment. Another part of the answer, as I discuss in Part III.C.3, lies in Justice Scalia’s view of the importance of uniformity within a system of litigation procedure.

Justice Scalia should not be criticized merely because his approaches to facial and as-applied review vary by context. As commentators have noted, it makes sense for the choice among facial and as-applied approaches to vary depending on the nature of the doctrine under which the review proceeds.¹¹¹ But it is useful to contemplate the effect of the choice among approaches. In the context of constitutional challenges, the Justices are usually debating whether to

108 *Id.*

109 *Id.*

110 *Id.*

111 See, e.g., Matthew D. Adler, *Rights Against Rules: The Moral Structure of American Constitutional Law*, 97 MICH. L. REV. 1, 127 (1998) (“[T]he appropriate view may well depend on the constitutional clause or rule-validity schema at stake; on the strategic incentives of actors who can secure facial, as opposed to partial invalidations of rules; and on the existence of a statutory or regulatory severability clause for [rule] R (guiding its revision in the event R is held unconstitutional).” (footnotes omitted)); Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 294 (1994) (“[T]he proper approach to a constitutional case typically turns on the applicable substantive constitutional doctrine and the institutional setting, not the classification of a case as a facial or as-applied challenge.”); Metzger, *supra* note 105, at 888 (“[G]iven the role played by severability, the availability of facial challenges ultimately turns on the substantive constitutional doctrines that govern in a particular area.”).

permit a facial challenge or whether, instead, to require the challenge to proceed on an as-applied basis. In the context of that choice, it is generally acknowledged that as-applied review is less intrusive than facial review because a statute's as-applied invalidation leaves the government free to continue to apply the statute under other, distinguishable, circumstances.¹¹²

The terms of the individual-constitutional-rights debate may be unhelpful in contexts where the Court proposes to *forbid* as-applied challenges and permit *only* facial challenges. This choice—between permitting only facial challenges or permitting both facial and as-applied challenges—arises in the context of the Enabling Act. In addition, as I discuss in subpart III.D, there exists a similar debate over the choice between facial and as-applied review in the context of the adequate and independent state procedural ground doctrine. In the latter context, the question is whether a state procedural requirement should be held adequate to bar U.S. Supreme Court review of a state court judgment (or, similarly, adequate to bar federal habeas review). As I previously noted, in that context

opposition to as-applied adequacy review serves the function of raising the stakes: If as-applied review is unavailable, then a state procedural rule can be held inadequate only if the Court is willing to hold that the state cannot use that procedural rule to bar consideration of a federal-law contention under *any* circumstances—a standard likely to produce a finding of inadequacy only in the rarest of cases.¹¹³

So too in the context of Enabling Act challenges: If a federal Rule can be invalidated only on its face, and not as applied, then invalidation is less likely to occur.¹¹⁴ In considering whether as-applied chal-

112 See Samuel Estreicher & John E. Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U. L. REV. 681, 729 (1984).

113 Catherine T. Struve, *Direct and Collateral Federal Court Review of the Adequacy of State Procedural Rules*, 103 COLUM. L. REV. 243, 254 (2003). Edward Hartnett has suggested that

[t]his feature of facial challenges may help to explain why the Roberts Court has issued a series of unanimous rulings that lean heavily toward as-applied challenges. These cases cut across the broad swath of constitutional areas involving the question of facial as opposed to as-applied challenges: Congressional power under Section Five of the Fourteenth Amendment; substantive due process protection for abortion; and First Amendment limitation on campaign finance regulation.

Hartnett, *supra* note 100, at 1756–57.

114 Cf. Hartnett, *supra* note 100, at 1754 (“[D]octrine that discourages (or completely blocks) as-applied challenges can serve to reduce judicial findings of unconstitutionality . . .”).

lenges should be permissible in litigation under the Enabling Act, it makes sense to assess the relative roles of rulemaking and litigation in promoting compliance with the Enabling Act limitations¹¹⁵—a topic I take up in the next subpart—as well as the possible costs of as-applied challenges—a topic I address in subpart III.C.

B. Possible Benefits

The rulemaking process provides a powerful tool for recognizing and addressing ways in which a Rule might transgress the Enabling Act's substantive rights limitation. But in rare instances, it may be the case that a Rule's effect on substantive rights under the law of a particular state becomes apparent only in the course of litigation after the Rule's promulgation. If that were to happen, as-applied challenges in the course of litigation could provide a useful way in which the effect of the rule could be brought to light and addressed.

The Enabling Act process provides an opportunity for possible substantive effects of a proposed rule amendment to be considered in advance of the amendment's adoption. Participants in the rulemaking process include state court judges and other members from diverse geographic areas, thus increasing the chances that a proposed amendment's possible effects on state created substantive rights may be discerned. Moreover, the rulemaking process is an open one, and the notice-and-comment procedure provides an opportunity for securing input from a wide variety of practitioners, judges, and academics who may point out a proposal's possible implications for substantive rights (whether created by state or by federal law).

Participants in the rulemaking process are attentive to the Enabling Act's limits on rulemaking scope.¹¹⁶ Minutes of advisory committee meetings reflect discussion of the implications of those limits.¹¹⁷ Committee members, on occasion, cite those limits as a rea-

115 Cf. Dorf, *supra* note 111, at 238 (“The proper disposition of a facial challenge is intimately bound up in questions of substantive constitutional law, institutional competence, and statutory interpretation.”); Hartnett, *supra* note 100, at 1735 (“[A]n exploration of the comparative competence of courts regarding constitutional interpretation should inform the judiciary’s approach to facial, as opposed to as-applied, constitutional challenges.”).

116 My description of the rulemaking process focuses on that process as it has stood since the late 1980s. See generally Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. PA. L. REV. 1099, 1108–09 (2002) (discussing the evolution of the rulemaking process).

117 See, e.g., Advisory Comm. on Civil Rules, Judicial Conf. of the U.S., Minutes of the Meeting Apr. 19–20, 2007, at 20, available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CV04-2007-min.pdf> (“It was asked whether it might

son for their votes on a given proposal.¹¹⁸ And where a proposed rule might be seen as coming close to the bounds set by the Enabling Act, the proposal can be sent forward with a note flagging the issue. For example, when Rule 4(k) was amended to add a fallback provision authorizing nationwide service in federal question cases, the proposed rule was sent forward with a note raising the Enabling Act issue and suggesting that if the proposed Rule 4(k)(2) were invalid it should be severed from the other Rule 4(k) proposals:

Mindful of the constraints of the Rules Enabling Act, the Committee calls the attention of the Supreme Court and Congress to new subdivision (k)(2). Should this limited extension of service be disapproved, the Committee nevertheless recommends adoption of the balance of the rule, with subdivision (k)(1) becoming simply subdivision (k). The Committee Notes would be revised to eliminate references to subdivision (k)(2).¹¹⁹

These facets of the Enabling Act procedures support the Court's presumption in favor of the Rules' validity. But it is possible that, in rare instances, a particular rule's effect on substantive rights might come to light only after the fact. This might be true, for example, if the legal context changed markedly, during the years after a rule's promulgation, in such a way that a given procedural practice acquired a substantive rights valence that it previously had lacked.¹²⁰ Or it might be true because a rule's effect on substantive rights became noticeable only as the rule's meaning was elaborated through its application to individual cases. Or the rule's effect on substantive rights under the law of a particular state—or on substantive rights under a

be suitable to grant summary judgment as a sanction but also provide for an award against an attorney who fails to respond properly to compensate the summary-judgment loser's loss. But this possible substitute for a malpractice action may seem too close to establishing a new substantive tort right to be comfortable under the Rules Enabling Act. It may be better to refrain from saying anything about this subject either in rule text or Committee Note.”).

118 See, e.g., Advisory Comm. on Criminal Rules, Judicial Conf. of the U.S., Minutes of the Meeting Apr. 17, 2007, at 14, available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/Minutes/CRO4-2007-min.pdf> (noting that some members who voted to table a proposal to amend Criminal Rule 29 did so in part because they believed that “the proposed amendment is a substantive change that would, if approved, violate the Rules Enabling Act and which should instead be handled by Congress”).

119 FED. R. CIV. P. 4 committee note (1993).

120 See Burbank & Wolff, *supra* note 3, at 47 (“Over time, as thinking about law, litigation, and civil law enforcement has evolved, so has our understanding of what it means to have legal rights and what in the legal landscape—in addition to rules defining rights and duties—determines whether citizens will be able to fructify their legal rights.”).

particular federal statutory scheme—might not have become apparent during the process by which that rule was adopted. As a leading treatise notes, the presumption in favor of a rule’s validity

is strongest when any incidental effects on substantive rights or policies are a readily foreseeable consequence of a clearly intended application of a Rule or Rules. Conversely, the presumption is much weaker when the intended scope of a Rule is uncertain or when a Rule is to be applied in unusual situations that might not have been anticipated by the Advisory Committee, the Judicial Conference, or the Supreme Court during the Rule’s formulation.¹²¹

When a rule’s previously unforeseen effect on substantive rights surfaces after the rule’s adoption, as-applied validity review is not the only way in which the effect might be addressed. In some instances—where the rule is susceptible to more than one interpretation—the courts could instead apply an avoidance-based interpretive approach, construing the rule to minimize its effects on substantive rights. Indeed, the approach taken by the *Shady Grove* dissenters falls within this genre. And the Court has (with varying degrees of explicitness) employed similar avoidance-based approaches¹²² to Civil Rule 59 in *Gasperini v. Center for Humanities, Inc.*¹²³ to Civil Rule 23 in *Amchem Products, Inc. v. Windsor*¹²⁴ and *Ortiz v. Fibreboard Corp.*,¹²⁵ to Civil Rule

121 WRIGHT, MILLER & COOPER, *supra* note 60, § 4509, at 272 (citing Peter Westen & Jeffrey S. Lehman, *Is There Life for Erie After the Death of Diversity?*, 78 MICH. L. REV. 311, 364 (1980)).

122 Because my purpose here is merely to note the technique’s availability, I do not pause to assess the degrees of success of the applications of that technique listed in the text.

123 518 U.S. 415 (1996); *see id.* at 427 n.7 (“Federal courts have interpreted the Federal Rules . . . with sensitivity to important state interests and regulatory policies.”); *id.* at 437 n.22 (concluding the Civil Rule 59 does not supply a standard for determining whether damages are excessive, and citing with approval a leading casebook’s observation that the Court “interpret[s] the federal rules to avoid conflict with important state regulatory policies”).

124 521 U.S. 591 (1997); *see id.* at 612–13 (“Rule 23’s requirements must be interpreted in keeping with Article III constraints, and with the Rules Enabling Act, which instructs that rules of procedure ‘shall not abridge, enlarge or modify any substantive right’” (citation omitted)); *id.* at 628–29 (concluding that “Rule 23, which must be interpreted with fidelity to the Rules Enabling Act and applied with the interests of absent class members in close view,” did not authorize the asbestos-claims global settlement that had been approved by district court).

125 527 U.S. 815 (1999); *see id.* at 821 (holding that “a mandatory settlement class” cannot be certified “on a limited fund theory under Federal Rule of Civil Procedure 23(b)(1)(B)” unless “the fund is limited by more than the agreement of the parties, and has been allocated to claimants belonging within the class by a process addressing any conflicting interests of class members”); *id.* at 845 (noting “tension between the

41 in *Semtek International Inc. v. Lockheed Martin Corp.*,¹²⁶ to Civil Rule 3 in *Walker v. Armco Steel Corp.*¹²⁷—though, notoriously, not in *West v. Conrail*¹²⁸ (a federal question case)—to the predecessor to Civil Rule 23.1 in *Cohen v. Beneficial Industrial Loan Corp.*,¹²⁹ and (less famously) to Civil Rule 23.1 in *Daily Income Fund, Inc. v. Fox*¹³⁰ (a federal question case). But as the debate among the Justices in *Shady Grove* highlights, a key question in this enterprise is whether the rule in fact is susceptible to more than one interpretation. The potential for disagreement on this score makes it harder for litigants to predict whether courts will in fact select an interpretation of a rule that avoids collision

limited fund class action’s pro rata distribution in equity and the rights of individual tort victims at law” and concluding that “[e]ven if we assume that some such tension is acceptable under the Rules Enabling Act, it is best kept within tolerable limits by keeping limited fund practice under Rule 23(b)(1)(B) close to the practice preceding its adoption”).

126 531 U.S. 497 (2001); *see id.* at 506 (holding that the conclusion that a judgment is “on the merits” within the meaning of Civil Rule 41(b) merely bars reassertion of the same claim in the same federal district court and does not govern the judgment’s preclusive effects in other courts).

127 446 U.S. 740 (1980); *see id.* at 751 (“[I]n diversity actions . . . Rule 3 governs the date from which various timing requirements of the Federal Rules begin to run, but does not affect state statutes of limitations.” (footnote omitted)); *id.* 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.”).

128 481 U.S. 35 (1987); *see id.* at 39 (holding that in a federal question case Civil Rule 3 governs the commencement of the suit for statute of limitations purposes); *id.* n.4 (purporting to distinguish *Walker* on the basis that “[r]espect for the State’s substantive decision that actual service is a component of the policies underlying the statute of limitations requires that the service rule in a diversity suit ‘be considered part and parcel of the statute of limitations,’” and asserting that “[t]his requirement, naturally, does not apply to federal-question cases” (quoting *Walker*, 446 U.S. at 752)).

129 337 U.S. 541 (1949); *see id.* at 556 (reading the provisions in what was then Civil Rule 23 to be compatible with the imposition in a diversity case of an additional state-law prerequisite for a shareholder derivative suit).

130 464 U.S. 523 (1984); *see id.* at 542 (holding “that Rule 23.1 does not apply to an action brought by a shareholder under § 36(b) of the Investment Company Act and that the plaintiff in such a case need not first make a demand upon the fund’s directors before bringing suit”); *id.* at 532 n. 8 (noting that the Court’s holding—“that a suit brought under § 36(b) of the Investment Company Act is not a ‘derivative action’ for purposes of Rule 23.1”—permitted the Court to avoid deciding “whether the Rule itself, as a matter of federal procedure, makes demand on directors the predicate to a proper derivative suit in federal courts or whether any such obligation must instead be found in applicable substantive law.”).

with assertedly substantive interests.¹³¹ And in cases where a rule cannot feasibly be read to avoid an effect on substantive rights, this technique would not provide a substitute for as-applied review.

Avoidance-based interpretations by courts are not the only possible substitute for as-applied validity review. A late-surfacing concern with a rule's application in a particular context could be brought to the rulemakers as the basis for a proposal to amend the rule. As I note in subpart III.D, a variety of federal rules incorporate state practice, sometimes in contexts where the goal appears to have been to avoid a collision with substantive interests.¹³² Similar carve-outs might be adopted, in rare instances, to address concerns about a rule's application to particular sorts of substantive interests. The rulemaking process would be well suited to this enterprise, because of its ability to commission studies that would inform decisionmaking with empirical data, because of its opportunity for deliberative, multi-member consideration, and because of the possibility that relevant information could surface through the notice and comment process.

But though the rulemaking process provides a useful venue for addressing such concerns, the question here is whether it should provide the only venue. Permitting as-applied validity challenges to be made in the course of litigation could provide a useful supplement to the rulemaking process, by providing litigants with an incentive to bring such challenges to light.¹³³ We saw, for example, in section II.C.2 that the rulemakers took account of *Marshall* (a case involving a state-specific as-applied challenge) when amending what now is Civil Rule 15(c)(1)(A).

As-applied validity challenges, then, could provide the courts with a way to address validity concerns in instances where an avoidance-

131 The Court has not always selected the interpretation that would avoid potential clashes with features of preexisting law that some have argued to have substantive implications; the Court's interpretation of Civil Rule 4 in *Hanna* and its interpretation of Civil Rule 68 in *Marek v. Chesny*, 473 U.S. 1 (1985), provide counterexamples. See generally Burbank & Wolff, *supra* note 3, at 34 (observing that in *Marek* "the Court simply ignored the Enabling Act question that the operation of the existing version of Rule 68 posed"); Clermont, *supra* note 3, at 1010 (noting the Court's "vacillat[ion]" concerning "how to read the Rules").

132 Incorporating state law would not ordinarily address concerns about the scope of rulemaking power in federal question cases. A possible variant is to adopt the practices attached to whatever body of substantive law governs the relevant claim. See, e.g., FED. R. CIV. P. 15(c)(1)(A); *id.* R. 54(d)(2)(A).

133 In this respect, one might draw a very loose analogy to the respective roles of the Food and Drug Administration (FDA) and tort litigation in promoting drug safety: opponents of broad FDA preemption point out that tort litigation concerning drug safety can serve as an important supplement to FDA postmarketing surveillance.

based interpretive technique is unavailable. In addition, such challenges might in some cases bring to light information that could inform the rulemaking process. And these benefits might be particularly salient in the case of state-specific as-applied review because such review would permit courts to take account of idiosyncrasies in the law of a particular state that might have escaped notice during the process by which the relevant rule was promulgated.

One might, of course, respond that an idiosyncratic state system deserves less solicitude and that the consideration of state interests should focus only on a generalized view of such interests. To the extent that such a response is driven by the costs of state-specific consideration, I can understand the concern, and I address it in subpart III.C. But we should balance against that concern the values served by considering, not just an Esperanto-style generic portrait of state substantive interests, but also the way in which a particular state has constructed its system of substantive rights. One of the values of federalism is, in fact, the possibility of interstate variation; other things being equal, it would seem undesirable to slight a state's mode of configuring its substantive law just because that state takes an atypical approach to the matter.¹³⁴ State-specific consideration of substantive interests, thus, makes sense if it can be accomplished without imposing undue costs.

Accordingly, I turn in the next part to the potential costs of as-applied challenges, and—in particular—state-specific as-applied challenges.

134 In a recent article, Stephen Burbank and Tobias Wolff argue that Justice Scalia's "insistence on a test for validity that does not depend on idiosyncratic aspects of state law rings true for a statute that was designed primarily to allocate federal lawmaking power *ex ante* rather than to protect policy choices (let alone only state law policies) *ex post*." Burbank & Wolff, *supra* note 3, at 51. But Professors Burbank and Wolff would leave room for the Enabling Act analysis to take account of formerly idiosyncratic aspects of state law if those aspects gain wider acceptance: "Laws that are idiosyncratic in one historical period, however, may become the norm in another." *Id.* If—as seems reasonable—that sort of evolution properly forms a part of the Enabling Act validity analysis, then the analysis seems to range beyond considerations that would govern *ex ante* allocations of rulemaking power.

An alternative objection to my argument might be that it is awkward to invoke the values of federalism when interpreting a statute that was drafted primarily to police separation-of-powers boundaries. But my argument takes as a given that the body of Enabling Act doctrine properly takes into account not only separation of powers concerns but also (in cases where state law supplies the rules of decision) federalism concerns.

C. Possible Costs

Permitting as-applied review has costs. It injects uncertainty into litigation, because even a rule that has been upheld as facially valid might be subject to challenge in its application to the particular case. And state-specific as-applied review imposes additional burdens, because of the challenges of discerning how a particular state provision relates to that state's body of substantive law, and because state-specific as-applied invalidation of a federal rule would produce interstate variation in the application of the national rules.

1. Uncertainty

If facially valid rules are subject to challenge in a given case, litigants may be uncertain as to the procedure that will govern their dispute. Such uncertainty can raise the cost of litigation if litigants research and litigate the question of a rule's validity as applied. These costs arise from both sub-rule as-applied review and state-specific as-applied review, because both sorts of as-applied review create the possibility that a rule might not be applied to a given dispute. In assessing these costs, it is important to note that as-applied review is not the only possible source of such uncertainty; because the Court has not always been consistent in its interpretive approach,¹³⁵ in some cases litigants will confront uncertainty as to whether a given Rule will or will not be interpreted to govern the relevant question.

One of the virtues of Justice Stevens's proposed approach—which would require a particularly strong showing before concluding that a rule is invalid as applied—is that it lowers the costs of uncertainty, because litigants could rely on the application of the national rules except in the unusual case where there is strong evidence that the rule's application impinges on a substantive right.

2. Difficulty

In addition to the costs of uncertainty, state-specific as-applied review imposes costs on litigants and courts by requiring them to assess the role that a particular state practice plays within that state's system of substantive rights. To this concern one might reply, as Justice Stevens did, that ease of administration should not be the controlling factor in determining the features of validity review under the Enabling Act.¹³⁶ As the Court observed when rejecting a lower court's

135 See *supra* note 131 and accompanying text.

136 See *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1454 (2010) (Stevens, J., dissenting) (“The question, therefore, is not what rule *we*

refusal to exercise its jurisdiction in a case involving unsettled questions of state law, “[t]he diversity jurisdiction was not conferred for the benefit of the federal courts or to serve their convenience.”¹³⁷ But though Justice Stevens rejected the notion that administrability concerns should foreclose as-applied review, his preferred test does respond to such concerns—not by forbidding as-applied review, but by raising the burden of proof for the litigant seeking as-applied invalidation.

Examining state law may pose various difficulties. There is the challenge of mastering a body of unfamiliar state law. That particular challenge may be most acute for Justices on the Supreme Court, for whom the task could entail assessing the law of any of fifty states. Court of appeals judges are more likely to have some familiarity with the laws of states within their circuit; and district judges are more likely still to be acquainted with the law of the state in which they sit.¹³⁸

In addition to mastering unfamiliar subject matter, a federal court examining the valence of a state statute would also need (under a traditional approach) to ascertain and apply the interpretive methodology used by the courts of that state. Here, though, we should note that the majority opinion in *Shady Grove* appeared to endorse a departure from that traditional approach. Responding to the dis-

think would be easiest on federal courts. The question is what rule Congress established.”).

137 *Meredith v. City of Winter Haven*, 320 U.S. 228, 234 (1943). In *Meredith* the Court rejected a lower federal court’s refusal “to exercise its jurisdiction on the ground that decision of the case on the merits turned on questions of Florida constitutional and statutory law which the decisions of the Florida courts had left in a state of uncertainty.” *Id.* at 229.

138 That the task of interpreting and applying a particular state’s law may often be easier for a lower court judge than for judges on the court above does not mean that the lower court’s resolution of the question receives deference on appeal. See *Salve Regina Coll. v. Russell*, 499 U.S. 225, 239–40 (1991) (mandating “that courts of appeals review the state-law determinations of district courts *de novo*”). But it does mean that a higher court’s analysis will often be informed by the lower court’s reading of state law. As the Court earlier stated:

[O]rdinarily we accept and therefore do not review, save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts. When we are called upon to decide them, the expression of the views of the judges of those courts, who are familiar with the intricacies and trends of local law and practice, if not indispensable, is at least a highly desirable and important aid to our determination of state law questions.

Huddleston v. Dwyer, 322 U.S. 232, 237 (1944) (citing *Ruhlin v. N.Y. Life Ins. Co.*, 304 U.S. 202, 206–07 (1937)).

sent's contention that section 901(b)'s bar on class suits seeking statutory damages was designed to serve a substantive purpose—namely, limiting the total exposure of defendants—the majority first questioned the dissent's reading of section 901(b)'s legislative history. But more basically, the majority rejected the notion that section 901(b) should be read purposively:

[E]ven accepting the dissent's account of the Legislature's objective at face value, it cannot override the statute's clear text. Even if its aim is to restrict the remedy a plaintiff can obtain, § 901(b) achieves that end by limiting a plaintiff's power to maintain a class action. 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.¹³⁹

In this view, a textualist approach to interpreting the state statute would serve two interests—promoting nationally uniform application of the federal Rules and avoiding undue burdens on federal judges:

The dissent's approach of determining whether state and federal rules conflict based on the subjective intentions of the state legislature is an enterprise destined to produce "confusion worse confounded." It would mean, to begin with, that one State's statute could survive pre-emption (and accordingly affect the procedures in federal court) while another State's identical law would not, merely because its authors had different aspirations. It would also mean that district courts would have to discern, in every diversity case, the purpose behind any putatively pre-empted state procedural rule, even if its text squarely conflicts with federal law. That task will often prove arduous.¹⁴⁰

The majority's argument against purposive interpretation of state law is striking,¹⁴¹ both because its justifications are open to question

139 *Shady Grove*, 130 S. Ct. at 1440 (citation omitted) (quoting *id.* at 1472 (Ginsburg, J., dissenting)).

140 *Id.* at 1440–41 (citations omitted) (quoting *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941)).

141 The *Shady Grove* Court offered no reason (other than its preference for textualism) for rejecting the views of New York's highest court concerning the purposes of Section 901(b). In *Sperry v. Crompton Corp.*, 863 N.E.2d 1012 (N.Y. 2007), the New York Court of Appeals had recently stated that the legislature, in enacting section 901(b), was "[r]esponding to" concerns "that recoveries beyond actual damages could lead to excessively harsh results, particularly where large numbers of plaintiffs were involved" and "that there was no need to permit class actions in order to encourage litigation by aggregating damages when statutory penalties and minimum measures of recovery provided an aggrieved party with a sufficient economic incentive to pursue a claim." *Id.* at 1015; *see also id.* at 1017 ("[B]y including the penalty exception in CPLR 901(b), the Legislature declined to make class actions available where individual

and because its conclusion runs counter to a long tradition of deferring to a state's highest court on the content of state law.¹⁴² Preferring a textualist reading of all state statutes that may come into play during the course of an *Erie* analysis may lead to greater nationwide uniformity in result (though this is not self-evident).¹⁴³ To the extent that this is so, I take up in section III.D.1 the system's ability to tolerate some marginal decrease in the uniform application of the Rules. As to the question of workload, a textualist reading, it is true, provides an analytical shortcut, but one that the Court has traditionally eschewed.

Under a traditional approach, the choice of methodology for interpreting a state statute itself presents a question of state law on which the views of the state's highest court are determinative.¹⁴⁴ The basic premise that "state law is what the state courts say it is"¹⁴⁵ extends to state statutory law,¹⁴⁶ and encompasses the notion that the state court's own choice of methodology should govern the interpretation

plaintiffs were afforded sufficient economic encouragement to institute actions (through statutory provisions awarding something beyond or unrelated to actual damages), unless a statute expressly authorized the option of class action status."). The *Shady Grove* majority, however, gave little consideration to this view, mentioning *Sperry* only with an oddly generic reference to "a state court's statement" concerning the process of section 901(b)'s enactment. See *Shady Grove*, 130 S. Ct. at 1440; see also Joseph P. Bauer, *Shedding Light on Shady Grove: Further Reflections on the Erie Doctrine from a Conflicts Perspective*, 86 NOTRE DAME L. REV. 939, 955 (2011) (noting Justice Scalia's "singular adoption of a federal standard to characterize the state law" in *Shady Grove*); Burbank & Wolff, *supra* note 3, at 70 (noting that *Sperry* provided "controlling statements by New York's highest court, which define CPLR § 901(b) as an integral component of the state's policies on penalty liability").

142 See, e.g., *Johnson v. Fankell*, 520 U.S. 911, 916 (1997) ("Neither this Court nor any other federal tribunal has any authority to place a construction on a state statute different from the one rendered by the highest court of the State. This proposition, fundamental to our system of federalism, is applicable to procedural as well as substantive rules." (citation omitted)).

143 The uniformity-based argument for a textualist approach to the interpretation of state statutes assumes that there will be more variety in the purposes underlying state statutes (on a given subject) than in the texts of state statutes. It is, however, possible to imagine a scenario in which textually disparate statutes could be grouped into fewer categories when analyzed according to their basic purposes than when analyzed according to the particularities of their texts.

144 For a discussion of interpretive methods employed by the New York Court of Appeals, see Eric Lane, *How to Read a Statute in New York: A Response to Judge Kaye and Some More*, 28 HOFSTRA L. REV. 85 (1999).

145 Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853, 861 (1991).

146 See, e.g., *Winters v. New York*, 333 U.S. 507, 514 (1948) ("The interpretation by the Court of Appeals puts these words in the statute as definitely as if it had been so amended by the legislature."); *Hebert v. Louisiana*, 272 U.S. 312, 317 (1926) ("The Supreme Court of the State having held that the two statutes must be taken together

of a state statute. Thus, for example, when rejecting a litigant's proposal to discard a state high court's interpretation of a state statute in favor of the statute's "literal import," the Court has characterized as "too well settled to permit of question" the principle "that this Court not only accepts but is bound by the construction given to state statutes by the state courts."¹⁴⁷ The explanation given by the Court for deferring to a state high court's ruling on statutory interpretation and severability when considering a constitutional challenge to a state statute seems apposite here as well:

It is well settled that in cases of this kind the interpretation placed by the highest court of the State upon its statutes is conclusive here. We accept the construction given to a state statute by that court. Nor is it material that the state court ascertains the meaning and scope of the statute as well as its validity by pursuing a different rule of construction from what we recognize.¹⁴⁸

All of this is designed to acknowledge that discerning the role played by a state procedural provision within the state's body of substantive law is a challenging business—often more challenging than the similar task that arises when the substantive rights at issue are created by federal rather than state law. But the challenge is not insurmountable; the federal courts have developed techniques for dealing with difficult state-law questions, and those techniques could be applied in this context as well.¹⁴⁹

3. Disuniformity

Even more than uncertainty and difficulty, the aspect of state-specific as-applied review that most seemed to trouble Justice Scalia in *Shady Grove* was the prospect that such review threatens the geographically uniform application of the federal rules.

Like the difficulty objection, the disuniformity objection applies to state-specific as-applied review with much greater force than it does to sub-rule as-applied review. Sub-rule as-applied review produces disuniformity in the sense that a rule does not apply uniformly to all situations; thus, for example, if Schlagenhauf's objection had pre-

in determining the penalty intended[,] we must accept that conclusion as if written into the statutes themselves.”).

147 *Aero Mayflower Transit Co. v. Bd. of R.R. Comm'rs of Mont.*, 332 U.S. 495, 499–500 (1947), *overruled on other grounds by Amer. Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266, 296 n.26 (1987).

148 *Smiley v. Kansas*, 196 U.S. 447, 455 (1905) (citing *St. Louis, Iron Mountain & S. Ry. Co. v. Paul*, 173 U.S. 404, 408 (1899)).

149 *Cf., e.g., Burbank & Wolff, supra* note 3, at 68 n.211 (advocating more frequent use of the option of certifying state law questions to state courts).

vailed, Rule 35 would authorize courts to subject plaintiffs but not defendants to physical and mental examinations. This sort of disuniformity is not insignificant. When we consider that the rules have been designed in many instances to function as a unified whole, we can see that in some instances invalidating one rule as applied to a given case might disrupt the functioning of other rules in that same case. Such a concern arises with respect to both sub-rule as-applied review and state-specific as-applied review, and this concern would justify considering—when deciding whether to invalidate a rule as applied to a given situation—whether the invalidation of that particular rule would disrupt the operation of other federal rules.¹⁵⁰

But sub-rule as-applied review produces no geographic disuniformity: If the Court had agreed with Schlagenhauf, Rule 35 discovery would have been unavailable from defendants throughout the country. State-specific as-applied review, by contrast, does pose the prospect that the national rules would apply differently in different states. After tackling the difficult task of discerning the role that a given practice played in the law of, say, New Hampshire, a federal court might conclude that the practice was part and parcel of New Hampshire's definition of substantive rights and, on that ground, might refuse to apply a conflicting federal Rule in cases governed by New Hampshire law. Yet a federal court adjudicating a claim under Nevada law and contemplating a superficially similar practice in Nevada procedure—after examining the practice's role in Nevada state law—might conclude that the Nevada practice is not an integral part of Nevada's definition of substantive rights and, thus, might reject any as-applied validity challenge to the conflicting federal Rule.

D. Tolerating Disuniformity

We saw in the preceding section that state-specific as-applied review of the validity of a federal rule can lead to interstate variation in the application of federal rules. The prospect of such state-to-state variation formed a central part of Justice Scalia's objection, in *Shady Grove*, to state-specific as-applied review.¹⁵¹ It thus is worthwhile to

150 See, e.g., WRIGHT, MILLER & COOPER, *supra* note 60, § 4509, at 283 (arguing that in evaluating whether to invalidate the pre-1991 Rule 15(c) as applied to cases in which state law would permit relation back but Rule 15(c) would not, it made sense to consider the fact that it was unlikely "that suspension of the notice requirement in occasional cases would have a ripple effect and frustrate the objectives and application of other Civil Rules governing pleadings, joinder of parties and claims, and discovery").

151 Justice Scalia has not always subscribed to the view that permitting the application of a federal procedural provision to depend on the content of state law would

assess whether the introduction of interstate variation (as a result of state-specific as-applied review) would fundamentally alter the way in which the national rules currently function; I undertake that analysis in section III.D.1. It also seems useful to consider, for purposes of comparison, the degree to which the federal system requires state courts to vary their procedures when adjudicating federal claims or issues; I address that question in section III.D.2.

1. Federal Court Examples

Those who put in place the system of Federal Rules undoubtedly sought to serve the purpose of national uniformity. Elsewhere in this issue, Professor Bauer notes the values served by promoting uniformity:

[U]niformity helps the parties, attorneys and judges know what the rules are. Uniformity in turn also leads to greater ease of administration of the judicial process; federal courts will have to look to fewer sources for resolving controverted issues, and they will be sources with which the courts are more familiar.¹⁵²

The sort of state-specific as-applied review contemplated in this Article does run counter to those values. As Stephen Burbank has argued, “neither uniformity nor simplicity is well served by a rulemaking charter that sanctions Federal Rules valid in one state and not in another, here today, gone tomorrow.”¹⁵³

But even if we leave aside the question of state-specific as-applied review, the goal of uniformity has hardly been achieved across the board. The Rules themselves enable interstate variation both by incorporating state law and by granting substantial discretion to dis-

lead to chaos. In *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988), Justice Scalia argued in dissent that a forum-selection clause should have no weight in a transfer-of-venue analysis under 28 U.S.C. § 1404(a) if the forum-selection clause would be void under the law applied by the state courts in the state in which the transferor court sat. Justice Scalia asserted:

Contrary to the opinion of the Court there is nothing unusual about having “the applicability of a federal statute depend on the content of state law.” We have recognized that precisely this is required when the application of the federal statute depends, as here, on resolution of an underlying issue that is fundamentally one of state law.

Stewart Org., Inc., 487 U.S. at 35 n.* (Scalia, J., dissenting) (citing *Comm’r v. Estate of Bosch*, 387 U.S. 456, 457, 464–65 (1967)).

152 Bauer, *supra* note 141, at 963. Having noted those values, Professor Bauer concludes that, under the circumstances treated in *Shady Grove*, New York’s interest in the application of section 901(b) outweighed the federal interest in uniformity. *See id.* at 966.

153 Burbank, *supra* note 8, at 1188.

trict judges. Local federal court rules add further variation. And as to *Erie* questions where no federal statute or rule governs, the applicable analysis—and especially the *Byrd*¹⁵⁴ balancing test—can incorporate state-specific consideration of a state practice’s role in the state’s system of substantive rights. As Professor Ides points out, a modest amount of disuniformity resulting from rare instances of state-specific as-applied review would not markedly alter this landscape.¹⁵⁵

a. Rules that Incorporate State Law

A number of Civil Rules contain one or more provisions that explicitly incorporate state law. Some rules incorporate state law as an alternative, effectively expanding the options available to a litigant.¹⁵⁶ Others incorporate state law as the sole governing law.¹⁵⁷ Either way, the incorporation of state law produces interstate variation in the operation of the federal Rules. Incorporation may occur with respect to topics that “involve strong local interests, little need for uniformity among federal courts, or difficulty in defining a uniform federal prac-

154 *Byrd v. Blue Ridge Electric Coop., Inc.*, 356 U.S. 525 (1958).

155 See Ides, *supra* note 5, at 1064 (“The occasional state law trumping of a Federal Rule” under Justice Stevens’s proposed as-applied test “certainly does not amount to anything like chaos”).

156 See, e.g., FED. R. CIV. P. 4(e)(1) (option of following service procedure of state where the summons is served or where the federal court sits); *id.* R. 4(j)(2)(B) (option of following state law for serving summons on a “state-created governmental organization”); *id.* R. 27(a)(4) (permitting use of deposition to perpetuate testimony “if the deposition either was taken under these rules or, although not so taken, would be admissible in evidence in the courts of the state where it was taken”); *id.* R. 28(a)(1)(A) (deposition to be taken before “an officer authorized to administer oaths either by federal law or by the law in the place of examination”); *id.* R. 45(b)(2)(C) (permitting service of subpoena throughout state in which issuing court sits to the extent that state statute or rule would permit service); *id.* R. 69(a)(2) (permitting use of state discovery procedure in aid of judgment or execution). Civil Rule 4(k)(1)(A)—providing for the exercise of personal jurisdiction under circumstances where a state court of general subject matter jurisdiction could take personal jurisdiction—could be seen as falling in this category; but for many types of claims, Rule 4(k)(1)(A) is not an alternative but rather the only option for establishing in personam jurisdiction. See *id.* R. 4(n)(2) (option, in specified circumstances, of using state attachment procedures to establish in rem or quasi in rem jurisdiction).

157 See, e.g., *id.* R. 4(g) (service on minor or incompetent must comply with state law in the state of service); *id.* R. 17(b) (providing in most instances that capacity to sue is determined by state law, and specifying choice of state law); *id.* R. 54(d)(2)(A) (“A claim for attorney’s fees and related nontaxable expenses must be made by motion unless the substantive law requires those fees to be proved at trial as an element of damages.”); *id.* R. 62(f) (“If a judgment is a lien on the judgment debtor’s property under the law of the state where the court is located, the judgment debtor is entitled to the same stay of execution the state court would give.”).

tice that integrates effectively with local practice.”¹⁵⁸ Strong local interests, for example, presumably influenced the development of Civil Rules 15, 71.1, 62, 64, and 69.

We have already seen one notable example of this phenomenon. Rule 15(c)(1)(A) provides that “[a]n amendment to a pleading relates back to the date of the original pleading when . . . the law that provides the applicable statute of limitations allows relation back.”¹⁵⁹ The 1991 Committee Note to what is now Rule 15(c)(1)(A) explains that “[w]hatever may be the controlling body of limitations law, if that law affords a more forgiving principle of relation back than the one provided in this rule, it should be available to save the claim.”¹⁶⁰ As noted in section III.C.2, the 1991 amendments rejected a broadly preemptive reading of Rule 15(c) and instead codified the rule of *Marshall*—a lower court decision that, taking an as-applied approach, had refused to apply Rule 15(c)’s more restrictive relation-back provision in a case where state law permitted relation back.¹⁶¹

Another, considerably more obscure, example is found in Civil Rule 71.1, which sets the procedures for federal court actions “to condemn real and personal property by eminent domain.”¹⁶² Rule 71.1(k) provides: “This rule governs an action involving eminent domain under state law. But if state law provides for trying an issue by jury—or for trying the issue of compensation by jury or commission or both—that law governs.”¹⁶³ Rule 71.1 (originally known as Rule 71A) first took effect in 1951. A report accompanying original Rule 71A explained that the drafters of the initial set of Civil Rules excluded trial-level condemnation proceedings from the ambit of those Rules in part because the Department of Justice asserted “that it preferred to have government condemnations conducted by local attorneys familiar with the state practice . . . [and] that it preferred to work under the Conformity Act without a uniform rule of procedure.”¹⁶⁴ But with the wartime growth in the number of condemnation proceedings, the

158 *Id.* R. 81(d)(1) committee note (2009). This committee note explains the reasons for including federal commonwealths and territories within the definition of “state” for purposes of the Civil Rules—reasons, the note states, that parallel “the reasons that counsel incorporation of state practice.” *Id.*

159 *Id.* R. 15(c)(1)(A).

160 *Id.* committee note (1991).

161 *See supra* notes 79–81 and accompanying text.

162 FED. R. CIV. P. 71.1(a).

163 *Id.* R. 71.1(k).

164 *Id.* R. 71.1(a) original report in advisory committee’s note.

report recounted, support arose for a uniform federal condemnation procedure.¹⁶⁵

Rule 71A may have regularized many aspects of federal condemnation proceedings, but on one central issue—namely, who should decide the amount of compensation for the condemned property—the rule made only a weak attempt at uniformity. In condemnation proceedings brought by the federal government, Rule 71A set a default principle—that a party could demand a jury—but made two exceptions. First, if a federal statute governing the condemnation proceeding created a special tribunal, that tribunal was to decide the issue of just compensation. Second, the court was given discretion to appoint a three member commission to determine the question of just compensation if it deemed a commission appropriate “because of the character, location, or quantity of the property to be condemned, or for other reasons in the interest of justice.”¹⁶⁶ Acknowledging explicitly that the grant of such discretion could produce interstate variation, a supplementary report accompanying the original Rule noted that the discretionary analysis could take into account, *inter alia*, “local preference or habit.”¹⁶⁷

On the question of who should decide just compensation in condemnation proceedings brought by states, the Rule’s deference to local procedure was absolute. Noting that state condemnation proceedings might in rare instances be removed to federal court, the original report had proposed that in such cases “[a]ny condition affecting the substantial right of a litigant attached by state law is to be observed and enforced.”¹⁶⁸ But after further consideration, the Committee decided that determining whether the choice of decisionmaker constituted such a condition would pose a “troublesome question,” and the Committee decided instead to offer the Supreme Court two alternative drafts, each of which took more specific positions.¹⁶⁹ One alternative would have sought to preempt any state provision that

165 *See id.*

166 Amendments to Federal Rules of Civil Procedure Governing Condemnation Cases in the District Courts of the United States, 11 F.R.D. 213, 217 (1951) (Original Rule 71 A(h)).

167 *Id.* at 222.

168 *Id.* at 243. Specifically, the 1948 draft of Rule 71A(k) provided:

If the action involves the exercise of the power of eminent domain under the law of a state, the practice herein prescribed may be altered to the extent necessary to observe and enforce any condition affecting the substantial rights of a litigant attached by the state law to the exercise of the state’s power of eminent domain.

Id. at 226.

169 *Id.* at 227.

called for the use of both a jury and a commission, but would have permitted a party to demand a jury when state law would provide one.¹⁷⁰ The other alternative—the one that the Supreme Court ultimately adopted and that remains in the Rule to this day—simply

accepts the state law as to the tribunals to fix compensation, and in that respect leaves the parties in precisely the same situation as if the case were pending in a state court, including the use of a commission with appeal to a jury, if the state law so provides.¹⁷¹

This choice, the supplemental report observed, “has the effect of avoiding any question as to whether the decisions in *Erie R. Co. v. Tompkins* and later cases have application to a situation of this kind.”¹⁷²

Civil Rule 64’s treatment of provisional remedies,¹⁷³ Civil Rule 69’s treatment of the execution of judgments,¹⁷⁴ and Civil Rule 62(f)’s provision for stays of execution¹⁷⁵ provide additional instances where the rules incorporate state procedure in what had, historically, been areas of strong state interest.¹⁷⁶ Stephen Burbank has noted that Rules 64 and 69

were (and are) exceptional in opting for conformity to state law in preference to uniform federal regulation. They took that form because, notwithstanding the desire of some members of the Advisory Committee to subject those matters, or some of them, to uniform federal law, the Committee as a whole recognized that to do so

170 *See id.*

171 *Id.*

172 *Id.*

173 *See* FED. R. CIV. P. 64(a) (“At the commencement of and throughout an action, every remedy is available that, under the law of the state where the court is located, provides for seizing a person or property to secure satisfaction of the potential judgment. But a federal statute governs to the extent it applies.”).

174 Rule 69(a)(1) provides:

A money judgment is enforced by a writ of execution, unless the court directs otherwise. The procedure on execution—and in proceedings supplementary to and in aid of judgment or execution—must accord with the procedure of the state where the court is located, but a federal statute governs to the extent it applies.

Id. R. 69(a)(1).

175 Rule 62(f) provides: “If a judgment is a lien on the judgment debtor’s property under the law of the state where the court is located, the judgment debtor is entitled to the same stay of execution the state court would give.” *Id.* R. 62(f).

176 The original committee notes to both rules pointed out that the rules carried on the prior statutory policy of conformity to state practice, except that the new Rules prescribed dynamic conformity, unlike the static conformity (subject to updating by rule) that had previously been mandated by statute for preliminary and final remedies.

would be controversial and would perhaps exceed the limits of the Court's power.¹⁷⁷

As Professor Burbank has explained, the nineteenth century history of provisions concerning the enforcement of judgments shows that the area was one of intense interest to the states, a number of which adopted laws designed to protect debtors during times of economic hardship.¹⁷⁸ By the late nineteenth century, he has observed, "it must have been clear that both provisional and final remedies involved questions of property law that held the potential consequentially to affect the balance of power between creditors and debtors, as well as the balance of power between the states and the federal courts."¹⁷⁹

b. Rules that Grant Discretion

The federal Rules, then, explicitly incorporate state law in several places. More subtly, implicit incorporation may occur as a result of the rules' conferral of judicial discretion. As the rulemakers noted with respect to Civil Rule 71A, granting discretion to the district court carries with it the possibility that the exercise of that discretion may vary by locale. And the Civil Rules, of course, embody numerous grants of discretion. To take just one example, Richard Nagareda argues in this issue that the New York state substantive policy concerns that failed to carry the day in *Shady Grove* may yet influence a court's analysis under Civil Rule 23(b)(3) of whether a class action is "superior" to other methods of adjudication.¹⁸⁰

As Stephen Burbank has noted, the federal Rules are "only superficially uniform and trans-substantive."¹⁸¹ Stephen Subrin has likewise

177 Stephen B. Burbank, *The Bitter with the Sweet: Tradition, History, and Limitations on Federal Judicial Power—A Case Study*, 75 NOTRE DAME L. REV. 1291, 1331 (2000); see also Burbank, *supra* note 8, at 1145–47. As Professor Burbank points out, if one views the Enabling Act limitations on the scope of rulemaking authority as driven by separation of powers concerns rather than federalism concerns, then a choice to incorporate state practice does not moot all questions of rulemaking power. See *id.* at 1147.

178 See Burbank, *supra* note 177, at 1324–28 (discussing, *inter alia*, *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1 (1825), and the events that led to the enactment of the Process Act of 1828).

179 *Id.* at 1330.

180 See Richard A. Nagareda, *The Litigation-Arbitration Dichotomy Meets the Class Action*, 86 NOTRE DAME L. REV. 1069, 1085 (2011) ("[S]ection 901(b) properly informs the discretionary judicial inquiry into superiority under Rule 23(b)(3), adding to the doubts about superiority that would arise even without such a state law stricture.").

181 Stephen B. Burbank, *Of Rules and Discretion: The Supreme Court, Federal Rules and Common Law*, 63 NOTRE DAME L. REV. 693, 716 (1998).

pointed out that “[p]rocedural rules, as flexible and as judge-empowering as the Federal Rules, have always implied non-uniformity of treatment, with or without local rules.”¹⁸² The latter, of course, add a further dimension of geographic variation, to which I turn in the next section.

c. Local Federal Rules

Each set of national federal rules contemplates the adoption of local rules that are “consistent with—but not duplicative of—Acts of Congress and” any relevant set of national rules.¹⁸³ The national rules explicitly invite local rulemaking on a variety of topics,¹⁸⁴ but local rules are not limited to those areas. They address not merely mundane aspects of court management but also such pivotal phases of litigation as summary judgment. For example, a recent study of local rules on the latter subject found thirty-four districts with local rules requiring a movant to list in numbered paragraphs the material facts not in dispute and twenty districts imposing that requirement “on both the movant and respondent.”¹⁸⁵

Not surprisingly, critics of the upsurge in local rules have argued that such rules threaten the national uniformity of federal proce-

182 Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. REV. 2047–48 (1989).

183 FED. R. BANKR. P. 9029(a)(1); FED. R. CRIM. P. 57(a)(1); *see also* FED. R. CIV. P. 83(a)(1) (“A local rule must be consistent with—but not duplicate—federal statutes and rules adopted under 28 U.S.C. §§ 2072 and 2075 . . .”). 28 U.S.C. § 2071(a) provides that “[t]he Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed under section 2072 of this title.” 28 U.S.C. § 2071(a) (2006). The Bankruptcy Rules add the further requirement that local rules not “prohibit or limit the use of the Official Forms.” FED. R. BANKR. P. 9029(a)(1).

184 *See, e.g.*, FED. R. CIV. P. 5(b)(3), (d)(3) (electronic service and filing); *id.* R. 6(a)(4) (definition of “last day” for purposes of computing time); *id.* R. 16(b)(1) (exemption of categories of actions from scheduling orders); *id.* R. 26(b)(2)(A) (limits on requests for admission); *id.* R. 26(f)(4) (timing of parties’ conference and report regarding discovery plan); *id.* R. 40 (systems for scheduling trials); *id.* R. 54(d)(2)(D) (procedures for determining attorney’s fees); *id.* R. 56(c) (timing of summary judgment motion); *id.* R. 66 (procedure for administration of estate by receiver); *id.* R. 77(c)(1) (Saturday and holiday hours for clerk’s office); *id.* R. 81(a)(5) (proceedings regarding subpoenas issued by federal entities under federal statute).

185 JOE CECIL & GEORGE CORT, REPORT ON SUMMARY JUDGMENT PRACTICE ACROSS DISTRICTS WITH VARIATIONS IN LOCAL RULES 1 & app. A (2008), *available at* <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/sujulrs2.pdf>.

ture.¹⁸⁶ Thus, for example, Barry Friedman and Erwin Chemerinsky have argued that procedural uniformity reduces inter-district variation in litigation cost and outcomes, reduces forum shopping and litigation over forum choice, increases efficiency and reduces the likelihood of attorney error.¹⁸⁷ I will not attempt here to suggest an optimal level of, and set of topics for, local federal court rulemaking. I will simply note that the myriad local rules dealing with topics from the trivial to the vital suggest that the federal court system already tolerates a considerable amount of interstate and even intrastate variation.¹⁸⁸

d. *Erie* Questions Not Controlled by a Federal Provision

When no provision of federal non-judge-made law governs, federal courts sitting in diversity will in some cases apply state procedures that vary geographically. In this sense, federal practice in diversity cases includes some degree of interstate disuniformity. In addition, as I discuss in this subsection, some courts have interpreted *Byrd v. Blue Ridge Electric Cooperative, Inc.*¹⁸⁹ in a way that leads them to engage in a balancing analysis that takes account of the specific state interests served by a given state practice. In offering this as an additional example of state-specific variation in federal practice, I should note that the precise contours of the analysis that applies in the absence of a governing federal constitutional, statutory or Rule provision are contested. In particular, the nature and vitality of the analysis in *Byrd* are subject to dispute. My goal in this subsection is not to settle the question of *Byrd's* meaning and continued applicability, but rather to note that some courts interpret *Byrd* to entail a balancing of state and federal interests that encompasses consideration of the role that a particular state practice plays within the relevant state's substantive law.

In diversity cases where no federal constitutional provision, statute, or Rule governs a procedural question, a federal court faced with the choice between state and federal practices that would lead to

186 See, e.g., Erwin Chemerinsky & Barry Friedman, *The Fragmentation of the Federal Rules*, 46 *MERCER L. REV.* 757, 763 (1995) (“[S]ubstantial areas of procedure are covered by local rules, and these rules differ enormously across the country.”).

187 See *id.* at 781–83.

188 See Joseph P. Bauer, *The Erie Doctrine Revisited: How a Conflicts Perspective Can Aid the Analysis*, 74 *NOTRE DAME L. REV.* 1235, 1293–94 (1999) (arguing that “the importance of” nationwide uniformity has been “undermined by the flexibility, now under attack, that has been given to individual district courts to promulgate local rules”).

189 356 U.S. 525 (1958).

materially different results¹⁹⁰ asks whether the difference between the two practices is outcome determinative in the sense described by *Hanna*—that is to say, whether the difference would promote forum shopping or the inequitable administration of the laws.¹⁹¹ An affirmative answer to that question will lead the court to follow the state practice, unless the court concludes—under *Byrd*—that the federal interest in following the federal procedure is so strong as to outweigh the interests favoring application of the state procedure.

The question in *Byrd* was whether a federal court, sitting in diversity to hear a state law negligence claim, should follow the state courts' practice of allocating to the judge (not the jury) the task of deciding whether the plaintiff was a statutory employee (a finding that would have barred the plaintiff's negligence claim and remitted him to the state workers' compensation system).¹⁹² The *Byrd* Court opened its analysis of this question by asking whether the state practice was "bound up with [state-created] rights and obligations in such a way that its application in the federal court is required."¹⁹³ The analysis of this question focused on the specifics of South Carolina law; the Court inferred from South Carolina state case law that the state's allocation of the statutory-employee question to the judge was "grounded in the practical consideration that the question had theretofore come before the South Carolina courts from the Industrial Commission and the courts had become accustomed to deciding the factual issue of immunity without the aid of juries."¹⁹⁴ Having settled on this explanation, the Court concluded there was no evidence "to suggest that this rule was announced as an integral part of the special relationship created by the [workers' compensation] statute."¹⁹⁵

190 See *Hanna v. Plumer*, 380 U.S. 460, 467 (1965) ("The *Erie* rule is rooted in part in a realization that it would be unfair for the character of result of a litigation materially to differ because the suit had been brought in a federal court.").

191 See *id.* at 468 ("The 'outcome-determination' test therefore cannot be read without reference to the twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws.").

192 See *Byrd*, 356 U.S. at 527–28.

193 *Id.* at 535.

194 *Id.* at 536.

195 *Id.*

The *Byrd* Court conceded (equivocally)¹⁹⁶ that the choice of judge or jury might well affect the case's outcome.¹⁹⁷ But that possibility, the Court reasoned, was outweighed by "affirmative countervailing considerations"—namely, "the federal policy favoring jury decisions of disputed fact questions."¹⁹⁸

In concluding that the federal courts' allocation of decisionmaking power between judge and jury—"[a]n essential characteristic" of the federal system and one that implicated the Seventh Amendment¹⁹⁹—outweighed any interest in following the South Carolina practice, the Court left room for debate concerning the nature of the interests to be weighed in favor of following the state practice. On one hand, the Court stated the question as "whether the federal policy . . . should yield to the state rule in the interest of furthering the objective that the litigation should not come out one way in the federal court and another way in the state court"—a description that indicates that the interest weighing in favor of applying the state practice was a federal interest in vertical uniformity of outcome.²⁰⁰ On the other hand, in the immediately preceding sentence the Court suggested that it was taking into account its prior analysis of the function of the judge/jury allocation in the South Carolina workers' compensation system: "The policy of uniform enforcement of state-created rights and obligations cannot in every case exact compliance with a state rule—*not bound up with rights and obligations*—which disrupts the federal system of allocating functions between judge and jury."²⁰¹ The Court echoed this last point when—just over a year later—it applied *Byrd* to conclude that a federal court should not follow Pennsylvania's judge/jury allocation of decisions concerning whether a decedent was a statutory employee (under Pennsylvania's workers' compensation

196 *See id.* at 539 ("We have discussed the problem upon the assumption that the outcome of the litigation may be substantially affected by whether the issue of immunity is decided by a judge or a jury. But clearly there is not present here the certainty that a different result would follow, or even the strong possibility that this would be the case." (citation omitted)).

197 *See id.* at 537 ("It may well be that in the instant personal-injury case the outcome would be substantially affected by whether the issue of immunity is decided by a judge or a jury.").

198 *Id.* at 537–38.

199 In another equivocation, the Court invoked the Seventh Amendment but refused to decide whether it controlled the question in *Byrd*. *See id.* at 537 & n.10.

200 *See* Stephen B. Burbank, *Aggregation on the Couch: The Strategic Uses of Ambiguity and Hypocrisy*, 106 COLUM. L. REV. 1924, 1949 (2006) (stating that *Byrd* "balanced one federal policy against another, not 'federal and state interests'").

201 *Byrd*, 356 U.S. at 537–38 (emphasis added) (footnote omitted) (citation omitted).

scheme).²⁰² Some but not all commentators have interpreted *Byrd* to direct that the federal interest in applying the federal practice be weighed against the state's interest in application of the state practice.²⁰³

Some commentators have questioned *Byrd*'s vitality, noting the infrequency with which the Court has cited the case.²⁰⁴ In the Supreme Court's most recent discussion of *Byrd*, it adapted that case's balancing test by creating a hybrid of state and federal procedure.²⁰⁵ The Court held in *Gasperini v. Center for Humanities, Inc.*²⁰⁶ that New York law set the standard for resolving new trial motions based on the contention that the jury award on a New York state tort law claim was excessive; thus, the New York statute's "deviates materially" standard, rather than the federal courts' customary "shocks the conscience" standard, governed.²⁰⁷ But whereas the New York courts applied the "deviates materially" test de novo at two levels—the trial court and the

202 As framed by the Court, *Magenau v. Aetna Freight Lines, Inc.*, 360 U.S. 273 (1959)—a case argued in the court of appeals prior to the decision in *Byrd*—involved a similar question: should Pennsylvania's judge/jury allocation of decisions concerning whether a decedent was a statutory employee (under Pennsylvania's workers' compensation scheme) be followed by a federal court? The majority in *Magenau* concluded without much discussion that *Byrd* controlled, noting that Aetna had not attempted to argue that Pennsylvania's allocation of the fact issue to the judge was an "integral part of the special relationship" created by the workers' compensation statute, and that the Court had "been given no reason for the . . . Pennsylvania practice." *Id.* at 278 (quoting *Byrd*, 356 U.S. at 536). Justices Harlan and Stewart dissented on the ground that the Court should not assume that Pennsylvania's allocation of the fact question to the judge was "merely a 'form and mode' of procedure rather than 'an integral part' of the rights created by" Pennsylvania's workers' compensation statute. *Id.* at 286 (Harlan, J., dissenting). "Before deciding such a difficult and subtle question of local law," these dissenters argued, "this Court should have the aid of the Court of Appeals whose members are more competent than we to speak on Pennsylvania law." *Id.*

203 See Bauer, *supra* note 188, at 1262 ("While some commentators believed that this [balancing] approach was merely a 'throw-away' in *Byrd*, which therefore could be ignored in light of its disuse by the Supreme Court for more than three decades, the *Gasperini* Court's renewed attention to consideration of federal and state interests supports reliance on this methodology for resolving *Erie* conflicts."); Clermont, *supra* note 3, at 1001 (criticizing as "simply untrue" the view "that *Byrd*'s balancing of state and federal interests did not survive *Hanna*").

204 See Burbank, *supra* note 200, at 1949 ("[T]he Court has not cited [*Byrd*] very often, and the thrust of its *Erie* jurisprudence since *Byrd* has been a repudiation of the balancing process *Byrd* seemed to authorize.").

205 See Clermont, *supra* note 3, at 1002 ("*Gasperini* applied *Byrd* to reach its result that the federal government's interests in controlling its courts' standard of appellate review outweighed New York's substantive interests.").

206 518 U.S. 415 (1996).

207 See *id.* at 461.

intermediate state appellate court—the *Gasperini* Court ruled that federal trial courts’ application of the “deviates materially” standard should be reviewed only for abuse of discretion.²⁰⁸ *Gasperini*, like *Byrd*, was resolved in the shadow of the Seventh Amendment—though unlike *Byrd*, *Gasperini* split the difference between state and federal practices, resulting in a hybrid practice that conformed to neither.²⁰⁹ Significantly for purposes of the present discussion, the *Gasperini* Court gave detailed attention to the legislative history of the New York statute,²¹⁰ and the resulting hybrid practice can be seen as the product of the Court’s attempt to reconcile the particular purposes of New York’s practice with the federal system’s interest in allocating decision-making authority (concerning the review of jury verdicts) between the district courts and the courts of appeals.

It is possible to view the *Gasperini* Court’s choice of the abuse-of-discretion standard as one that flowed not from *Byrd* but from the Seventh Amendment itself.²¹¹ But that reading is not the only possible one: if the Seventh Amendment, of its own force, *dictated* the choice of the abuse-of-discretion standard, why did the Court describe the Seventh Amendment as “weight[ing]” the analysis and “combin[ing]” with “practical reasons” in leading to the choice of abuse-of-discretion review?²¹²

In any event, the Court has never overruled *Byrd*,²¹³ and a number of lower courts continue to follow it. Because my project here is descriptive—I am not seeking to prescribe how *Erie* ought to function, but rather to assess how courts currently apply it—it seems fair to consider the implications of *Byrd*’s balancing test for the level of interstate

208 See *id.* at 438.

209 See *id.* at 467 (Scalia, J., dissenting).

210 See *id.* at 423–24 (majority opinion). This detailed attention to state legislative history is consistent with the approach Justice Ginsburg took, in dissent, in *Shady Grove*. See *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1465 (2010) (Ginsburg, J., dissenting).

211 See Burbank, *supra* note 200, at 1949 n.164 (“*Byrd* was redundant because the Court evidently believed that the Reexamination Clause of the Seventh Amendment required the standard of appellate review it prescribed.”).

212 See *Gasperini*, 518 U.S. at 426 (“Parallel application of § 5501(c) at the federal appellate level would be out of sync with the federal system’s division of trial and appellate court functions, an allocation weighted by the Seventh Amendment.”); *id.* at 438 (“Within the federal system, practical reasons combine with Seventh Amendment constraints to lodge in the district court, not the court of appeals, primary responsibility for application of § 5501(c)’s ‘deviates materially’ check.”).

213 Cf. *Shady Grove*, 130 S. Ct. at 1446 n.12 (plurality opinion) (“We are unaware of any rule to the effect that a holding of ours expires if the case setting it forth is not periodically revalidated.”).

variation that is currently tolerated within the existing *Erie* framework. In fact, a number of lower federal courts have applied the *Byrd* balancing test with attention to the role played by the relevant state practice within the state's system of articulating substantive rights. Although some lower court decisions apply *Byrd*'s balancing test by articulating what appears to be a generic conception of a state interest in the relevant topic,²¹⁴ others have engaged in a state-specific analysis.²¹⁵

2. State Court Examples

As an additional measure of the degree to which systems can tolerate procedural disuniformity, it is informative to look at the ways in which the federal system requires state courts to alter their own procedures when adjudicating federal claims or federal issues. The reverse-*Erie* doctrine requires a state court to apply federal practices that are part and parcel of the relevant federal claim, despite the existence of conflicting state procedures.²¹⁶ And the independent and adequate state law grounds doctrine has even broader reach, because it has the potential to alter a state court's application of its usual procedures when the state court addresses a question of federal law in the course of any litigation (whether the right of action is created by state or federal law).

The scope of both these doctrines has been subject to debate over time, and those arguing for a restrained application of one or the other doctrine periodically point out the doctrine's disruption of the uniform application of the state's own procedure. Moreover, in the case of the independent and adequate state law grounds doctrine, Jus-

214 See, e.g., *Kohlrautz v. Oilmen Participation Corp.*, 441 F.3d 827, 831 (9th Cir. 2006) (finding, without first determining whether Texas or Nevada law would govern if state law governed, "no federal interest," and a "strong" state interest, in governing the immunity defense of "a state court-appointed quasi-judicial officer in a suit brought in state court and based on state law").

215 See, e.g., *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 970–71, 973 (9th Cir. 1999) (relying on California's strong substantive interest—as shown in California case law detailing history of SLAPP statute—in holding that California SLAPP statute's provisions concerning motion to strike and attorney fees applied to state-law counterclaims asserted against qui tam relators); *Trierweiler v. Croxton & Trench Holding Corp.*, 90 F.3d 1523, 1541 (10th Cir. 1996) (relying on Colorado court's discussion of Colorado legislature's intent in enacting certificate of merit requirement and concluding that "[t]he statute is 'bound up' with the substantive right embodied in the state cause of action for professional negligence, and therefore it should apply to professional negligence actions brought in federal court under diversity jurisdiction").

216 For an illuminating discussion of the connections between the *Erie* and reverse-*Erie* doctrines, see Kevin M. Clermont, *Reverse-Erie*, 82 NOTRE DAME L. REV. 1 (2006).

tics have recently debated the choice between as-applied and facial review in terms that are relevant here.

a. *Reverse-Erie*

Absent a valid excuse, state courts have an obligation to hear federal claims.²¹⁷ Generally, state courts can apply their usual procedures when adjudicating such claims. But occasionally, those procedures must yield to a conflicting federal procedure because the latter is deemed an integral part of the federal claim. A state court, when hearing a federal claim, may have to dispense with its ordinary practices concerning, say, notice-of-claim requirements,²¹⁸ pleading,²¹⁹ burdens of proof,²²⁰ or prejudgment interest.²²¹

A prominent example of this doctrine—and one that contrasts with the decision in *Byrd*—is the Court’s decision some six years earlier in *Dice v. Akron, Canton & Youngstown Railroad Co.*²²² In *Dice*, the Court held that federal law required state courts to give to the jury the question of the validity of a plaintiff’s release of a claim under the Federal Employers’ Liability Act. Ohio (where *Dice* had sued) provided a jury trial for negligence claims. However, one issue in the case concerned a purported release that *Dice* asserted had been obtained from him by fraud; and the state’s highest court had held that questions of fraud in the execution of that release were for the judge, not the jury.²²³ The U.S. Supreme Court disagreed. The right to a jury trial, the Court reasoned, was “‘part and parcel of the remedy afforded railroad workers under the Employers’ Liability Act,’”²²⁴ and was “too substantial a part of the rights accorded by the Act to permit it to be classified as a mere ‘local rule of procedure’ for denial in the manner that Ohio has here used.”²²⁵

Four members of the Court dissented from the Court’s opinion in *Dice* (though they concurred in the reversal of the judgment). Justice Frankfurter, writing for the dissenters, decried the majority’s interference with the uniform application of state procedure by state courts:

217 See *Testa v. Katt*, 330 U.S. 386, 392 (1947).

218 See *Felder v. Casey*, 487 U.S. 131, 153 (1988).

219 See *Brown v. W. Ry.*, 338 U.S. 294, 295–96 (1949).

220 See *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 249 (1942); *Cent. Vt. Ry. Co. v. White*, 238 U.S. 507, 512 (1915).

221 See *Monessen Sw. Ry. Co. v. Morgan*, 486 U.S. 330, 335–36 (1988).

222 342 U.S. 359 (1952).

223 See *id.* at 361–62.

224 *Id.* at 363 (quoting *Bailey v. Cent. Ver. Ry.*, 319 U.S. 350, 354 (1943)).

225 *Id.* (citing *Brown v. W. Ry. of Ala.*, 338 U.S. 294 (1949)).

The State judges and local lawyers who must administer the Federal Employers' Liability Act in State courts are trained in the ways of local practice; it multiplies the difficulties and confuses the administration of justice to require, on purely theoretical grounds, a hybrid of State and Federal practice in the State courts as to a single class of cases.²²⁶

As *Dice* illustrates, in the reverse-*Erie* context the goal of vindicating federal interests is sometimes in tension with the goal of respecting the integrity of a state's procedural system. As I discuss in the next subsection, similar tensions arise in the context of the independent and adequate state law grounds doctrine.

b. Independent and Adequate State Law Grounds

The independent and adequate state law grounds doctrine shields from U.S. Supreme Court review state court judgments that rest on a state law ground that is independent of any question of federal law and adequate to support the judgment. Prominent among the grounds that can thus bar Supreme Court review are state court procedural requirements; and a similar doctrine of procedural default applies to federal habeas review of state court judgments of conviction. It is commonplace for a litigant's failure to comply with a state procedure to bar the litigant from seeking Supreme Court review (and, in the case of criminal defendants, habeas review). But in relatively rare circumstances, such procedural requirements are held inadequate to bar federal review. The adequate state procedural grounds doctrine can, in effect, require the state courts to abandon certain of their usual procedures when addressing a federal issue; thus, it is not surprising to see the doctrine elicit objections concerning its disturbance of the uniform application of state law. And the adequate state procedural grounds doctrine also provides an interesting point of comparison in the present context, because Justices have likewise disputed whether courts applying the adequate procedural grounds doctrine can appropriately examine the adequacy of a facially valid state procedure as applied in a particular case.

State courts must vindicate federal rights, so long as those rights are properly asserted.²²⁷ The U.S. Supreme Court can review a state court's disposition of a federal law question,²²⁸ but not if there is a state law ground that is adequate to support the judgment below and

226 *Id.* at 368 (Frankfurter, J., dissenting from the Court's opinion).

227 *See* U.S. CONST. art. VI.

228 *See* 28 U.S.C. § 1257 (2006).

that is independent of the federal law question.²²⁹ One sort of adequate state law ground is suggested by the caveat with which I opened this paragraph: State courts generally may refuse to address a federal law contention if the contention's proponent failed to raise it in accord with state procedural requirements.²³⁰ In relatively rare instances, though, the Supreme Court will examine the state procedural requirement in question to verify that it truly is adequate to justify the state court's refusal to address the question of federal law.

There are various ways in which a state law procedural requirement might turn out to be inadequate to bar Supreme Court review.²³¹ The procedural requirement might violate due process. Relatedly, the procedural requirement might be so novel that the litigant lacked fair notice of it.²³² The requirement might be inconsistently applied, raising concerns that the state court might have applied it, in the case at hand, merely to block consideration of the federal issue.²³³ Or the requirement might unduly burden the assertion of the federal right—a branch of the doctrine that should remind readers of the reverse-*Erie* cases discussed in subsection III.D.2.a.

Like the reverse-*Erie* cases, the undue burden line of inadequate-state-grounds cases asks whether a particular state procedural requirement unduly burdens the assertion of a federal right. While the reverse-*Erie* cases take up this analysis in the context of claims created by federal law, the inadequate-state-grounds cases range more

229 See *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935).

230 In addition to any applicable requirements set by state law, the Court's own policy is not to decide federal issues that were not raised in the state courts. See *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969).

231 See generally Daniel J. Meltzer, *State Court Forfeitures of Federal Rights*, 99 HARV. L. REV. 1128, 1137–45 (1986) (categorizing instances when the U.S. Supreme Court has held a state law ground inadequate to bar review).

232 See, e.g., *Beard v. Kindler*, 130 S. Ct. 612, 619 (2009) (Kennedy, J., concurring) (“We have not allowed state courts to bar review of federal claims by invoking new procedural rules without adequate notice to litigants who, in asserting their federal rights, have in good faith complied with existing state procedural law We have also been mindful of the danger that novel state procedural requirements will be imposed for the purpose of evading compliance with a federal standard.”).

233 However, the mere fact that a state court has discretion to excuse noncompliance with a procedural requirement does not, in itself, render the requirement inadequate.

Nothing inherent in such a rule renders it inadequate for purposes of the adequate state ground doctrine. To the contrary, a discretionary rule can be “firmly established” and “regularly followed”—even if the appropriate exercise of discretion may permit consideration of a federal claim in some cases but not others.

Id. at 618 (majority opinion) (quoting *Lee v. Kemna*, 534 U.S. 362, 376 (2002)).

broadly, because they can encompass the assertion of federal rights during the adjudication of claims created by state law. But a common thread—concern for the vindication of federal rights—runs through both lines of case law. And a common cost appears in connection with both doctrines. In each instance, a ruling that a state procedure unduly burdens a federal right prevents the application of that procedure to such a claim of right²³⁴ and requires a state court to vary what otherwise may be a trans-substantive procedural requirement. The undue burden cases tolerate this impairment of the uniform application of state procedural law in order to ensure the appropriate vindication of federal rights.

There is a further way in which the inadequate-state-grounds doctrine illuminates the present question. As noted in subpart III.A., the Justices have recently debated whether the undue burden doctrine should examine a state procedure's adequacy only facially or also as applied to the circumstances of a particular case. In *Lee v. Kemna*,²³⁵ Lee, a habeas petitioner, challenged a state trial court's refusal to grant him a continuance to locate witnesses to support his sole defense (an alibi). The state appellate court had upheld the denial of the continuance on the ground that Lee had failed to comply with state rules "requir[ing] that continuance motions be in written form, accompanied by an affidavit [and] set[ting] out the showings a movant must make to gain a continuance grounded on the absence of

234 There has been debate over whether a finding that a state procedural requirement is inadequate to bar U.S. Supreme Court review prevents the state courts from applying the requirement in future cases. See Meltzer, *supra* note 231, at 1151–52. As I have explained elsewhere, I agree with Professor Meltzer's view that the adequacy doctrine should be viewed as federal common law that binds state courts. But even one who disagrees with this view would concede that the prospect of U.S. Supreme Court review or of federal habeas review may lead a state court to look past litigant conduct that it would otherwise view as a forfeiture.

235 534 U.S. 362 (2002). *Lee* was a habeas case, rather than a case involving direct U.S. Supreme Court review of a state court judgment. See *id.* at 365. A failure to comply with a state procedural requirement will typically constitute a ground for denying federal habeas review, so long as the state procedural ground is adequate, see *Cone v. Bell*, 129 S. Ct. 1769, 1780 (2009) (noting applicability of adequate state grounds doctrine in habeas), although habeas doctrine excuses such defaults in certain narrow circumstances, see *id.*; *Schlup v. Delo*, 513 U.S. 298, 316 (1995) (holding that a petitioner who fails to show cause and prejudice may surmount procedural bar by "present[ing] evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error"); *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977) (adopting framework excusing state-court procedural default—for purposes of federal habeas—if petitioner can show cause for the default and prejudice resulting from it).

witnesses.”²³⁶ The U.S. Supreme Court held that though the state rules in question “serve[] the State’s important interest in regulating motions for a continuance—motions readily susceptible to use as a delaying tactic,” those rules, as applied in Lee’s case, were inadequate to bar federal habeas review because he had “substantially, if imperfectly, made the basic showings” that the rules required:

Caught in the midst of a murder trial and unalerted to any procedural defect in his presentation, defense counsel could hardly be expected to divert his attention from the proceedings rapidly unfolding in the courtroom and train, instead, on preparation of a written motion and affidavit. Furthermore, the trial court, at the time Lee moved for a continuance, had in clear view the information needed to rule intelligently on the merits of the motion.²³⁷

Lee’s case, in the view of the majority, was one of those “exceptional cases in which exorbitant application of a generally sound rule renders the state ground inadequate to stop consideration of a federal question.”²³⁸

Justice Kennedy, joined by Justices Scalia and Thomas, dissented in *Lee* and decried the use of as-applied adequacy review. Such review, the dissenters argued, slighted a state’s legitimate interests in uniform, rule-like rules:

Procedural rules, like the substantive laws they implement, are the products of sovereignty and democratic processes. The States have weighty interests in enforcing rules that protect the integrity and uniformity of trials, even when “the reason for a rule does not clearly apply.” Regardless of the particular facts in extraordinary cases, then, Missouri has a freestanding interest in Rule 24.10 as a rule.²³⁹

The dissenters also pointed out that permitting as-applied challenges would impose costs on the state and federal courts tasked with evaluating such challenges:

All requirements of a rule are, in the rulemaker’s view, essential to fulfill its purposes; imperfect compliance is thus, by definition, not compliance at all. Yet the State’s sound judgment on these matters can now be overridden by a federal court, which may determine for itself, given its own understanding of the rule’s purposes, whether a requirement was essential or compliance was substantial in the unique circumstances of any given case The trial courts, then

236 *Lee*, 534 U.S. at 366 (citing Mo. S. Cr. R. 24.09–24.10).

237 *Id.* at 366.

238 *Id.* at 376.

239 *Id.* at 395 (Kennedy, J., dissenting) (quoting *Staub v. City of Baxley*, 355 U.S. 313, 333 (1958) (Frankfurter, J., dissenting)).

the state appellate courts, and, in the end, the federal habeas courts in numerous instances must comb through the full transcript and trial record, searching for ways in which the defendant might have substantially complied with the essential requirements of an otherwise broken rule.²⁴⁰

The *Lee* majority responded to the dissent's concerns by stressing both the rarity of successful as-applied adequacy challenges and their grounding in prior case law. The *Lee* Court emphasized that successful as-applied adequacy challenges formed a "limited category" of "exceptional,"²⁴¹ "atypical"²⁴² cases concerning "rare circumstances"²⁴³ in which "unyielding application of the general rule would disserve any perceivable interest."²⁴⁴ The Court accurately noted that it had employed as-applied review in a prior case, *Osborne v. Ohio*.²⁴⁵ In fact, as I have argued elsewhere, the Court's adequate state grounds precedents furnish a number of examples of nonfacial adequacy review.²⁴⁶ Occasional holdings that a state procedural requirement is inadequate as applied, the *Lee* Court stated, have not caused undue disruption:

If the dissent's shrill prediction that today's decision will disrupt our federal system were accurate, we would have seen clear signals of such disruption in the 11 years since *Osborne*. The absence of even dim distress signals demonstrates both the tight contours of *Osborne* and the groundlessness of the dissent's frantic forecast of doom.²⁴⁷

CONCLUSION

As Justice Scalia pointed out in *Shady Grove*, state-specific as-applied review of the validity of federal rules can impose costs by making litigation more uncertain, adjudication more difficult, and federal court procedure less uniform from state to state. Justice Stevens acknowledged as much in *Shady Grove*: "[T]here are costs involved in attempting to discover the true nature of a state procedural rule and allowing such a rule to operate alongside a federal rule that appears to

240 *Id.* at 395.

241 *Id.* at 376 (majority opinion).

242 *Id.* at 378.

243 *Id.* at 379–80.

244 *Id.* at 380.

245 495 U.S. 103 (1990).

246 See Struve, *supra* note 113, at 249 ("[T]he Court's prior analyses in a variety of branches of adequacy review cover a spectrum that ranges from purely facial to quite fact-intensive. The undue burden branch of the analysis is no exception.").

247 *Lee*, 534 U.S. at 386.

govern the same question.”²⁴⁸ Such costs, which I discussed in subpart III.C of this Article, suggest the wisdom of Justice Stevens’s proposal to require strong evidence of an effect on substantive rights before finding a federal rule to be invalid as applied.

Adopting such a proposal would leave the way open for as-applied challenges to federal rules—thus securing the possible benefits discussed in subpart III.B—while making it easier to adjudicate such challenges and more difficult to bring them successfully. Litigants’ state-specific as-applied challenges, in this model, would be permissible but rarely successful. The rare successful challenge would result in some disuniformity in the application of federal rules. But, as we saw in section III.D.1, the federal courts already tolerate a not insubstantial amount of interstate variation in practice, so the incremental increase produced by the occasional state-specific as-applied invalidation of a federal rule would not alter the character of federal practice.

In the same way that the federal system imposes a certain amount of disuniformity on state courts in order to vindicate federal rights, it may be reasonable to accommodate some disuniformity in federal practice in order to ensure that the federal rules, as applied, do not impinge on substantive rights (whether those rights are created by federal or state law).²⁴⁹

248 *Shady Grove Orthopedic Assocs., P.A. v Allstate Ins. Co.*, 130 S. Ct. 1431, 1457 (Stevens, J., concurring in part and concurring in the judgment).

249 As Professor Ides observes, “In the context of diversity cases, a strict application of the uniformity value, which occurs under Justice Scalia’s model, and which renders state substantive law irrelevant, fails to account for the prerogatives and nuances of state law, both of which reflect important federal policy concerns.” Ides, *supra* note 5, at 1066; see also Posting of Professor Thomas Rowe, trowe@law.duke.edu, to civ-pro@listserv.nd.edu (Apr. 5, 2010) (on file with author) (“Maintaining uniformity in having Federal Rules applicable is one definitely important value, but so . . . is leaving open the possibility—which Justice Scalia would foreclose—that a facially valid Federal Rule may be invalid as applied in limited circumstances.”).

