Atlantic Marine and Stare Decisis
Ambivalence in Civil Procedure

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ABSTRACT
Atlantic Marine Construction Co. v. United States District Court for the Western District of Texas posed a simple question: is the Supreme Court bound by precedent when interpreting procedural rules and statutes? Unfortunately, the Court did not offer a similarly simple answer. By only partially upholding its prior interpretations of the statutes and rules at issue, the Court demonstrated its ambivalence toward stare decisis in the civil procedure context. Although courts consistently recognize the heightened importance of stare decisis in construing non-procedural statutes and rules, the Supreme Court has shown that it does not feel similarly bound in its civil procedure docket. As this comment concludes, the Court’s ambivalence toward stare decisis in interpreting procedural rules and statutes is unexplained and unjustified.

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INTRODUCTION

In 2009, Atlantic Marine Construction entered into a contract with J-Crew Management.\footnote{In re Atl. Marine Constr. Co., 701 F.3d 736, 737 (5th Cir. 2012).} After agreeing that J-Crew would provide construction labor, the companies “included a forum-selection clause [in the contract], providing that disputes ‘shall be litigated in the Circuit Court for the City of Norfolk, Virginia, or the United States District Court for the Eastern District of Virginia, Norfolk Division.’”\footnote{Id. at 737-38.} However, after Atlantic Marine allegedly failed to pay J-Crew for the latter’s work, J-Crew brought suit in the District Court for the Western District of Texas instead.\footnote{Id. at 738.}

Because J-Crew violated the contract’s forum-selection clause, Atlantic Marine moved to dismiss or, alternatively, to transfer the case to the Eastern District of Virginia.\footnote{Id.} Both parties agreed that the outcome of the case rested on the court’s interpretation of Federal Rule of Civil Procedure 12(b)(3) and two statutes, 28 U.S.C. § 1406(a) and 28 U.S.C. § 1404(a).\footnote{Compare Brief for Petitioner at 2-3, Atl. Marine Constr. Co. v. U.S. Dist. Ct. for the W. Dist. of Tex., 134 S. Ct. 568 (2013) (No. 12-929) [hereinafter Pet’r’s Br.] (arguing that J-Crew’s lawsuit must be dismissed under 12(b)(3) and § 1406 or transferred under § 1404), with Brief for Respondent at 1, 9, Atlantic Marine, 134 S. Ct. 568 (No. 12-929) [hereinafter Resp’t’s Br.] (responding that venue was proper in the Western District of Texas).} Under Rule 12(b)(3) and § 1406(a), a court must dismiss a case filed in an “improper” or “wrong”\footnote{Fed. R. Civ. P. 12(b)(3).} district, respectively. Even if the venue was not improper, § 1404(a) permits a court to transfer cases “in the interest of justice” to other districts “to which all parties have consented.”\footnote{28 U.S.C. § 1404(a).}

According to Atlantic Marine, J-Crew selected the wrong venue because a chosen forum cannot “violate[] the parties’ contractual choice.”\footnote{Pet’r’s Br., supra note 5, at 9.} Urging that “‘wrong’ in 28 U.S.C. § 1406(a) should be given its plain meaning,” which includes the “‘[b]reach of one’s legal duty’ or the ‘violation of another’s legal right,’” Atlantic Marine argued that J-Crew’s breach of contract rendered the non-contractual forum wrong.\footnote{Id. at 14-15.} In response, J-Crew pointed out that venue in Texas would have been proper but for their contract.\footnote{Resp’t’s Br., supra note 5, at 9-10.} As J-Crew stated, venue was proper in the Western District of Texas under 28 U.S.C. § 1391 because “a substantial part of the events or omissions giving rise to the claim occurred”

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there.\textsuperscript{12} Since “[p]rivate parties do not possess [the] power” to undo Congress’s decision by private agreement, venue remained proper in Texas.\textsuperscript{13}

J-Crew also relied on \textit{Stewart Organization, Inc. v. Ricoh Corp.}.\textsuperscript{14} As in \textit{Atlantic Marine}, the plaintiff in \textit{Stewart} had brought its complaint in a non-contractual forum, and the defendant moved to dismiss the suit under §\textsuperscript{1406} or to transfer under §\textsuperscript{1404}.\textsuperscript{15} Although the Court only adjudicated the §\textsuperscript{1404} issue, its opinion supported J-Crew’s arguments against dismissal under §\textsuperscript{1406} as well. First, the parties agreed that venue was permitted under §\textsuperscript{1406} if the statutory requirements were met.\textsuperscript{16} Second, the Court found it “conceivable” that a court “would refuse to transfer a case notwithstanding the counterweight of a forum-selection clause.”\textsuperscript{17} However, if all non-contractual districts were wrong, it would be impossible to keep the case in such a district. \textit{Stewart}’s opinion was thus incompatible with Atlantic Marine’s arguments for dismissal.

In the alternative, Atlantic Marine relied on 28 U.S.C. §\textsuperscript{1404(a)}, which permits a district court to transfer civil cases “in the interest of justice.”\textsuperscript{18} As Atlantic Marine explained, transfer to Virginia was just since “[t]he agreement itself becomes the measure of the parties’ equities.”\textsuperscript{19} Relying on Justice Kennedy’s concurring opinion in \textit{Stewart}, Atlantic Marine argued that J-Crew, the party that selected a non-contractual forum, should “bear a heavy burden to show that this was an ‘exceptional case’ in which the interests of justice overrode the right to contract.”\textsuperscript{20}

J-Crew disagreed, noting that \textit{Stewart} treated the forum-selection clause as a “significant” but not “dispositive” factor in the transfer analysis.\textsuperscript{21} Instead, the “individualized analysis Congress prescribed in §\textsuperscript{1404(a)} . . . encompasses consideration of the parties’ private expression of their venue preferences.”\textsuperscript{22} J-Crew claimed that “[t]he only way to reach the result sought by Atlantic would be to attribute ‘dispositive weight’ to Atlantic’s forum-selection clause—a standard expressly rejected by th[e] Court in \textit{Stewart}.”\textsuperscript{23}

The district court rejected Atlantic Marine’s arguments and adopted J-Crew’s approach. Relying on \textit{Stewart}, the district court held that §\textsuperscript{1404(a)}, and not §\textsuperscript{1406(a)} or Rule 12(b)(3), should “control[] Atlantic’s request to give

\textsuperscript{12} 28 U.S.C. § 1391(b)(2).
\textsuperscript{13} Resp’t’s Br., supra note 5, at 10.
\textsuperscript{14} 487 U.S. 22 (1988).
\textsuperscript{15} Id. at 24.
\textsuperscript{16} Id. at 28 n.8.
\textsuperscript{17} Resp’t’s Br., supra note 5, at 14 (quoting \textit{Stewart}, 487 U.S. at 30-31).
\textsuperscript{18} 28 U.S.C. § 1404(a) (2012).
\textsuperscript{19} Pet’r’s Br., supra note 5, at 10 (quoting U.S. Airways v. McCutchen, 133 S. Ct. 1537, 1548 (2013)).
\textsuperscript{20} Id. at 11 (quoting \textit{Stewart}, 487 U.S. at 33 (Kennedy, J., concurring)).
\textsuperscript{21} Resp’t’s Br., supra note 5, at 26.
\textsuperscript{22} \textit{Stewart}, 487 U.S. at 29-30.
\textsuperscript{23} Resp’t’s Br., supra note 5, at 29 (quoting \textit{Stewart}, 487 U.S. at 31).
effect to the parties’ contractual choice of a Virginia forum.” The court also concluded that §1404(a) provided courts with “an exhaustive and nonexclusive list of public and private interest factors” in determining whether to transfer a case; the “forum-selection clause is only one such factor.” Under this analysis, Atlantic Marine had the burden of demonstrating that a transfer was appropriate. The Fifth Circuit affirmed, finding that the district court did not abuse its discretion either in concluding that venue was not “wrong” or “improper” in Texas under Rule 12(b)(3) and § 1406(a) or in its analysis and application of the public and private interest factors under § 1404(a).

The Supreme Court granted certiorari. In seeking to answer whether the forum-selection clause should be enforced, the Court could not write on a blank slate; rather, it had to engage with its prior interpretations in Stewart. Not only did Stewart implicitly rule on similar motions to dismiss under Rule 12(b)(3) and § 1406, but it also explicitly ruled on a similar motion to transfer under § 1404. Thus, the Court was faced with the following question: is the Court bound by its prior interpretations of procedural rules (12(b)(3)) and statutes (§ 1404(a) and § 1406(a))? In non-procedural cases, the answer would clearly be yes, as stare decisis considerations are especially important in the statutory and regulatory contexts. But in procedural cases, the Court has demonstrated an anomalous ambivalence about stare decisis. Although the Court offered the typical respect for stare decisis when interpreting the Rules Enabling Act in Shady Grove Orthopedic Associates v. Allstate Insurance Co., it explicitly rejected a precedential interpretation of Rule 12(b)(6) in Bell Atlantic Corp. v. Twombly. Ultimately, Atlantic Marine furthered the disparity between the heightened respect for stare decisis in statutory and regulatory cases and the Court’s ambivalent treatment of precedent in equivalent civil procedure cases.

Part I of this Comment describes the traditional approach to stare decisis in the statutory and regulatory contexts. Part II contrasts this respect for stare decisis with the Court’s ambivalent treatment of procedural precedents. Part III describes the decision in Atlantic Marine and argues that the Court failed to resolve this ambivalence toward procedural precedents. While the Court followed its interpretive precedents in some respects, the Court also rewrote aspects of a prior statutory interpretation, the very practice it condemned in Shady Grove.

25. Id. (citing Stewart, 487 U.S. at 28).
26. Id.
29. 559 U.S. 393, 413-14 (2010).
I. RESPECT FOR STARE DECISIS IN STATUTORY AND REGULATORY

In non-procedural cases, the rule is clear: precedential interpretations of statutes and rules deserve respect. In statutory cases, the Court has found that stare decisis is especially important because Congress can amend erroneous readings of its statutes instead. Where it has not done so, the Court recognizes that Congress has tacitly accepted the interpretation. In regulatory cases, the U.S. Court of Appeals for the D.C. Circuit has held that the drafter of a rule—in non-procedural cases, an administrative agency—is bound by its previous interpretations of that rule. To amend such an interpretation, that drafter must follow rulemaking procedures instead. Thus, the requirement to adhere to prior interpretations of statutes and rules is well established.

A. Heightened Respect for Stare Decisis in Statutory Interpretation Cases

The Supreme Court has repeatedly held that adherence to precedent is especially crucial when deciding issues of statutory construction. In Patterson v. McLean Credit Union, the Court addressed whether racial harassment in employment violates 42 U.S.C. § 1981. At issue in the case was whether § 1981 applies to private contracts, an issue the Court had previously decided. In Runyon v. McCrory, the majority concluded that § 1981 “prohibits racial discrimination in the making and enforcement of private contracts.” As a result, the Court sought briefing on whether Runyon should be reconsidered. In rendering its decision, the Patterson Court found that there were strong arguments against applying § 1981 to private conduct and that the justices remained divided as to the law’s reach. But the Court nevertheless determined that heightened respect for stare decisis in statutory interpretation cases required upholding Runyon.

As the Court explained, “any departure from the doctrine of stare decisis demands special justification.” This is especially true in statutory cases, since

32. Id. at 170 (citing 42 U.S.C. § 1981 (2006)).
34. Id. at 168.
35. Patterson, 491 U.S. at 171.
36. Id. (citing Runyon, 427 U.S. at 186 (Powell, J., concurring); id. at 189 (Stevens, J., concurring); id. at 192 (White, J., dissenting)).
37. Id. at 172-73 (majority opinion).
38. Id. at 172 (quoting Arizona v. Rumsey, 467 U.S. 203, 212 (1984)) (internal quotation marks omitted). To find otherwise would violate “a basic self-governing principle within the Judicial Branch, which is entrusted with the sensitive and difficult task of fashioning and preserving a jurisprudential system that is not based upon ‘an arbitrary discretion.’” Id. (quoting THE FEDERALIST NO. 78, at 490 (Alexander Hamilton) (H. Lodge ed., 1888)).
“the burden borne by the party advocating the abandonment of an established precedent is greater where the Court is asked to overrule a point of statutory construction.”

In contrast to constitutional cases, where only the Court can reverse erroneous readings, “[c]onsiderations of stare decisis have special force in the area of statutory interpretation” because “the legislative power is implicated, and Congress remains free to alter” mistaken interpretations. Where Congress tacitly accepts an interpretation of one of its statutes, the Court should not reverse that construction.

Patterson was no anomaly: the Court has repeatedly reaffirmed the special importance of stare decisis in statutory interpretation cases. In Square D Co. v. Niagara Frontier Tariff Bureau, Inc., the Court evaluated whether it should overrule previous interpretations of the Interstate Commerce Act and the Sherman Act. Again recognizing Congress’s ability to overrule erroneous statutory constructions, the Court found that “it is more important that the applicable rule of law be settled than that it be settled right . . . . This is commonly true, even where the error is a matter of serious concern, provided correction can be had by legislation.” If an interpretation should be changed, the change “must come from Congress.” Likewise, in Illinois Brick Co. v. Illinois, the Court found that “considerations of stare decisis weigh heavily . . . . where Congress is free to change [the] Court’s interpretation of its legislation.”

In short, “[m]ore than any other doctrine in the field of precedent, [adherence to past interpretations of statutes] has served to limit the freedom of the court. It marks an essential difference between statutory interpretation on the one hand and case law and constitutional interpretation on the other.”

As Professor William Eskridge pithily stated, statutory readings “often enjoy a super-strong presumption of correctness.”

B. Strict Adherence to Regulatory Interpretations and the One-Bite Rule

In the statutory interpretation context, it is possible to compare the Court’s interpretation of procedural laws to its construction of non-procedural laws.

39. Id.
40. Patterson, 491 U.S. at 172-73.
42. Id. at 410-11.
43. Id. at 424 (quoting Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting)).
44. Id. at 424.
46. Id. at 736.
But that is impossible in regulatory cases. Under the Rules Enabling Act, the Supreme Court can only prescribe “rules of practice and procedure.” Thus, it is impossible to compare the Court’s interpretation of its own procedural rules to its construction of its own non-procedural rules—as the latter body of rules does not exist. However, as Professors Lumen Mulligan and Glen Staszewski have argued, there is still an analogue against which to compare the Supreme Court’s interpretation of the Federal Rules of Civil Procedure: the judicially created requirements for an agency’s reinterpretation its own rules. Agencies are empowered to promulgate non-procedural rules, and the Court of Appeals for the D.C. Circuit has amply described the strict requirements that agencies must follow when reinterpreting their own rules. As this comment explains, the requirements for agency reinterpretations of their rules serve as an appropriate baseline for understanding the Supreme Court’s surprising ambivalence about stare decisis when reinterpreting its own procedural regulations.

Indeed, in civil procedure cases, the Court enjoys authority like that of an agency because “the Court may set civil procedure policy through case-by-case adjudication . . . or by promulgating generally applicable rules through a notice-and-comment rulemaking procedure.” Ever since Congress enacted the Rules Enabling Act in 1934, the Supreme Court has enjoyed the power to promulgate the Federal Rules of Civil Procedure. After Congress amended the Act in 1988, the rulemaking process—the process followed today—grew to include formal notice-and-comment periods. This rulemaking process is akin to the notice-and-comment requirements under the Administrative Procedure Act (APA), which governs agency rulemaking.

The current rulemaking regime has seven steps: (1) the Administrative Office of the U.S. Courts collects recommendations for rules or amendments; (2) an Advisory Committee obtains permission from the Standing Committee on Rules of Practice and Procedure to proceed; (3) the Advisory Committee publishes the proposal and receives public comment—like notice-and-comment rulemaking—and adopts or amends the proposed rule; (4) the Standing Committee adopts or returns the rule; (5) the Judicial Conference of the United States adopts or returns the rule; (6) the Supreme Court considers the rule and, if it decides to adopt the new rule, transmits it to Congress; and (7) the revision becomes law unless Congress rejects the proposal.

51. Id. at 1190.
52. Id. at 1198.
53. Id. at 1198-1202.
54. Id. at 1207 (explaining that “the latest version of the Rules Enabling Act largely mimics the APA”); see also 5 U.S.C. § 553 (2012).
55. Mulligan & Staszewski, supra note 50, at 1201-02. During the seventh step, “[i]f Congress decides to reject or modify proposed changes to the Rules during this period, it must promulgate a joint resolution that satisfies the constitutional requirements of bicameral-
In other contexts, the Court can only amend its decisions via adjudication. But in its civil procedure docket, the Court can amend or even adopt new rules through this complex rulemaking process as well. As such, “the Court in the civil procedure arena is an institution that sets policy. It engages in this task, much as an agency would, with a discretionary docket and the choice of setting policy by way of adjudication or rulemaking.” Thus, the judicially created rules that govern agencies’ treatment of their prior interpretations of their own rules offer a useful comparison.

Although the Supreme Court has never described the appropriate respect that agencies must accord to past interpretations of their rules, the D.C. Circuit did so in *Paralyzed Veterans of America v. D.C. Arena L.P.* In that case, the Department of Justice (DOJ) promulgated a rule requiring wheelchair areas in stadiums to have “lines of sight comparable to those for members of the general public.” The question in *Paralyzed Veterans* was whether DOJ’s regulation also covered sight “over standing spectators.” While one DOJ official, giving a speech to stadium operators, stated that the rule did not address lines of sight over spectators, the Department took the opposite position one year later and formalized that decision in a technical manual. As a result, the D.C. Circuit had to decide whether DOJ was allowed to simply change its mind.

The D.C. Circuit decided that DOJ could not. As the panel explained, “[o]nce an agency gives its regulation an interpretation, it can only change that interpretation as it would formally modify the regulation itself: through the process of notice and comment rulemaking.” Under the APA, agencies must “engage in notice and comment before formulating regulations, which applies as well to ‘repeals’ or ‘amendments.’” According to the panel, “[t]hat is surely why the Supreme Court has noted (in dicta) that APA rulemaking is required where an interpretation ‘adopt[s] a new position inconsistent with . . . existing regulations.’” The court ultimately held that allowing DOJ “to make a fundamental change in its interpretation of a substantive regulation without notice and comment obviously would undermine those APA requirements.”

The D.C. Circuit has since reiterated this rule. In *Alaska Professional Hunters Ass’n v. FAA*, the court clarified that an agency’s “current doubts

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56. *Id.* at 1202.
58. *Id.* at 581 (quoting 28 C.F.R. pt. 36, app. D, § 4.33.3 (2013)).
59. *Id.*
60. *Id.*
61. *Id.* at 581-82.
62. *Id.* at 586.
64. *Id.* (quoting Shalala v. Guernsey Mem’l Hosp., 514 U.S. 87, 100 (1995)).
65. *Id.*
66. 177 F.3d 1030 (D.C. Cir. 1999).
about the wisdom of the regulatory system [it] followed . . . does not justify disapp

gaging the requisite procedures for changing that system." This approach, known as the D.C. Circuit’s “one-bite-at-the-apple” rule, represents an even stricter form of adherence to precedent than the heightened stare decisis afforded in statutory interpretation cases: an agency is prohibited from amending a regulatory interpretation. Instead, the agency must proceed via a new rule-making, the same process that it would have to follow if it sought to amend the underlying regulation as well. In these cases, then, the drafter of a rule is bound by its prior interpretation of that regulation.

II. STARE DECISIS AMBIVALENCE IN THE CIVIL PROCEDURE DOCKET

Despite the consensus in favor of heightened respect for stare decisis when interpreting rules and statutes generally, the Court has wavered in adherence to precedent when interpreting procedural rules and statutes. In Bell Atlantic Corp. v. Twombly, the Court reversed its previous interpretation of Rule 12(b)(6). But three years later, in Shady Grove Orthopedic Associates v. Allstate Insurance Co., the plurality adhered strictly to the prior interpretation of the Rules Enabling Act, even as it disagreed with that interpretation. These cases demonstrate the Court’s ambivalence about heightened respect for stare decisis in its civil procedure cases.

A. Twombly and the Court’s Rejection of Stare Decisis in Procedural Interpretation Cases

Under Rule 12(b)(6), plaintiffs’ “failure to state a claim upon which relief can be granted” is grounds for dismissal of their complaint. In Twombly, plaintiffs filed an antitrust claim, arguing that telephone company defendants “entered into a contract, combination or conspiracy to prevent competitive entry in their respective . . . markets.” To prove a conspiracy, plaintiffs relied on the “parallel course of conduct that each engaged in to prevent competition” from the plaintiffs. However, while parallel conduct is “consistent with conspiracy, [it is] just as much in line with a wide swath of rational and competitive business strategy.” Thus, the Court had to decide if descriptions that could or could not demonstrate a conspiracy sufficed to state a claim.

67. Id. at 1035. The D.C. Circuit again reaffirmed its one-bite-at-the-apple approach last year. See Mortg. Bankers Ass’n v. Harris, 720 F.3d 966, 969-71 (D.C. Cir. 2013).
69. 559 U.S. 393, 413 (2010).
72. Id. at 552 (quoting Consolidated Amended Class Action Complaint ¶ 51, supra note 71).
73. Id. at 554.
Fifty years earlier, the Court had clarified the appropriate standard for evaluating 12(b)(6) motions. In *Conley v. Gibson*, a group of workers sued their union for failing to “represent all employees in the bargaining unit fairly and without discrimination because of race.” The Court rejected the union’s contention that the workers had failed to state a claim sufficient to survive a motion to dismiss. Rather, the Court adopted a permissive standard, holding that “a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”

The Second Circuit applied this analysis to the complaint in *Twombly*. The court accepted that a claim of conspiracy based on conscious parallel behavior could not survive a summary judgment motion; instead, plaintiffs would have to demonstrate the presence of “plus factors,” such as motive and communications among the alleged conspirators. However, recognizing the permissive standard at the pleadings stage, the court concluded that descriptions of parallelism, while not ideal, sufficed to state a claim. As Judge Sack explained, “to rule that allegations of parallel anticompetitive conduct fail to support a plausible conspiracy claim, a court would have to conclude that there is no set of facts that would permit a plaintiff to demonstrate that the particular parallelism asserted was the product of collusion rather than coincidence.”

The Supreme Court, in a 6-3 decision, reversed. Rather than assess the Second Circuit’s application of the *Conley* test, the majority attacked the Court’s old test directly. Justice Souter, writing for the majority, noted that under the “no set of facts” language, “a wholly conclusory statement” would suffice “whenever the pleadings left open the possibility that a plaintiff might later establish some ‘set of [undisclosed] facts’ to support recovery.” Citing courts of appeals’ opinions and law review articles, the Court found that “a good many judges and commentators have balked at taking the literal terms of the *Conley* passage as a pleading standard.”

Like an administrative agency, the Court was faced with a choice: promulgate a new rule to address concerns with the previous interpretation of Rule

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75. *Id.* at 42.
76. *Id.* at 45.
77. *Id.* at 45-46 (emphasis added).
79. *Id.* at 117-19.
80. *Id.* at 114.
82. *Id.* at 560-63.
83. *Id.* at 561 (alterations in original) (quoting Conley v. Gibson 355 U.S. 41, 45-46 (1957)).
84. *Id.* at 562 (citing Ascon Props., Inc. v. Mobil Oil Co., 866 F.2d 1149, 1155 (9th Cir. 1989); Geoffrey C. Hazard, Jr., *From Whom No Secrets Are Hid*, 76 TEX. L. REV. 1665, 1685 (1998)).
12(b)(6), or disregard precedent. Rejecting tenets of administrative law, the Court held for the latter approach. The Conley standard had “puzzled the profession for 50 years” and had been “questioned, criticized, and explained away,” the Court found that “this famous observation has earned its retirement.”85 The *Twombly* Court decided that the *Conley* interpretation was “best forgotten.”86 Applying a new plausibility requirement, the Court found that “nothing contained in the complaint invests either the action or inaction alleged with a plausible suggestion of conspiracy.”87

Had the Court—the drafter of the procedural rules—followed the one-bite rule that binds agencies’ interpretation of their own rules, it would have found that “replacing one interpretation of a Rule with another interpretation of the same Rule should proceed by way of rulemaking.”88 Any “contrary practice would, as with administrative practice, allow the Court to promulgate (or amend) legally binding rules of civil procedure without using the legislative rulemaking process Congress established for that purpose.”89 Surprisingly, the Court adopted that contrary practice.

There are two ways that the Supreme Court could potentially reconcile *Twombly* with the D.C. Circuit’s one-bite rule. First, the Court might conclude that *Paralyzed Veterans* and *Alaska Professional Hunters* were wrongly decided. Indeed, Professors Mulligan and Staszewski admit that the one-bite rule has received “sound criticism.”90 But the Court has never weighed in on the one-bite rule, instead denying certiorari in *Paralyzed Veterans*.91 Although the Court could easily reverse the D.C. Circuit’s approach, finding that the rule was not sufficiently based in the APA’s text, the Court instead chose to create an anomalous split between agency and procedural rules.

Second, the Court might find that, even if a one-bite rule is appropriate for agencies, differences between agencies and the Court warrant greater discretion for the latter. However, the justification for the one-bite rule applies equally to the Court. As the D.C. Circuit found, an agency cannot change interpretations

85. *Id.* at 562-63.
86. *Id.* at 563.
89. *Id.*
90. *Id.* (citing Richard W. Murphy, *Hunters for Administrative Common Law*, 58 ADMIN. L. REV. 917, 926-28 (2006); Richard J. Pierce, Jr., *Distinguishing Legislative Rules From Interpretative Rules*, 52 ADMIN. L. REV. 547, 566-73 (2000); Peter L. Strauss, *Publication Rules in the Rulemaking Spectrum: Assuring Proper Respect for an Essential Element*, 53 ADMIN. L. REV. 803, 846-47 (2001)). Evaluating the appropriateness of the one-bite rule in the agency context is beyond the scope of this comment. Rather, this comment seeks to highlight the inconsistencies between the application of this rule in administrative law and the Court’s treatment of stare decisis in the analogous civil procedure context.
of its regulations by adjudication because doing so would “undermine” the
APA notice-and-comment process. Adjudicating the Court’s interpretations via adjudication would comparably “undermine” the Rules Enabling Act’s similar method.93 If Congress believes the Court to be sufficiently different from an agency such that extensive rulemaking procedures are inappropriate, Congress can simply change the Rules Enabling Act. Until then, the Court, just like agencies, should follow Congress’s requirements for promulgating rules.

Ultimately, then, Twombly is incompatible with the traditional respect for precedent in regulatory interpretation cases. But Twombly does not stand alone. The Court has also rewritten its interpretations of its rules in other cases, including the summary judgment trilogy.94 Although agencies—which have similar rulemaking and adjudicatory powers—cannot amend interpretations of their rules without engaging in a new rulemaking, the Court is not similarly bound. This engenders an unexplained disparity between non-procedural and procedural rules: while private parties can rely on the former, knowing that they are not subject to change without notice and opportunity to comment, the latter can be changed at the Court’s discretion.

B. Shady Grove and the Court’s Reliance on Stare Decisis in Procedural Interpretation Cases

Three years after Twombly, the Court adopted a contrary approach, this time strongly affirming the importance of stare decisis in procedural cases. Under 28 U.S.C. § 2072, Congress empowered the Court to prescribe “rules of practice and procedure,” but clarified that these rules “shall not abridge, enlarge or modify any substantive right.”95 In Shady Grove Orthopedic Associates v. Allstate Insurance Co., the Court had to decide whether Rule 23, governing class actions in federal courts, violated § 2072’s limiting command.96 As in Twombly, the Court had previously developed a standard for deciding the application of the contested text.

In Sibbach v. Wilson & Co.,97 the Court had evaluated the validity of Rules

96. Formally, the Court was asked to decide whether a state law “prohibit[ing] class actions in suits seeking penalties or statutory minimum damages” prohibited a federal court, sitting in diversity, from permitting such a class action to proceed under Rule 23. See 559 U.S. 393, 396 (2010) (plurality opinion) (permitting federal courts to entertain such actions despite conflicting state rules). Since five justices agreed that “Rule 23 answers the question in dispute,” Rule 23 controlled the decision “unless it exceed[ed] statutory authorization or Congress’s rulemaking power.” Id. at 398; see also id. at 429-30 (Stevens, J., concurring). Thus, these five justices had to interpret the extent of § 2072’s grant of rulemaking authority.
97. 312 U.S. 1 (1941).
35 and 37, which address physical and mental examinations of individuals and Spring 2014 ASL. ATLANTIC MARINE AND STARE DECISIS
rules, respectively. After describing other possible approaches for determining whether the two rules contravened § 2072, the Court settled on its test: “whether a rule really regulates procedure—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them.” In *Sibbach*, the Court concluded that the rules at issue did really regulate procedure and were thus “within the authority granted” by Congress under § 2072.

Justice Scalia, writing for a plurality that included two other members of the *Twombly* majority, admitted that *Sibbach* gave “short shrift to the statutory text.” Justice Scalia agreed with the numerous criticisms of *Sibbach* that Justice Stevens spelled out in a concurring opinion. As Justice Stevens noted, while *Sibbach* addressed § 2072’s first requirement (that the Court only enact rules of procedure), its approach ignored the second command (not to abridge, enlarge, or modify a substantive right). Not only did *Sibbach* pay inadequate attention to the text, but it was also “hard to understand how it can be determined whether a Federal Rule ‘abridges’ or ‘modifies’ substantive rights without knowing what state-created rights would obtain if the Federal Rule did not exist.” For that reason, the “really regulates procedure” test is “hard to square with § 2072(b)’s terms.” *Sibbach*, arguably, was wrongly decided.

Despite agreeing with Justice Stevens’s criticism, the plurality upheld *Sibbach* because it “has been settled law . . . for nearly seven decades.” In doing so, Justice Scalia provided a vigorous defense of stare decisis. As he noted, “[s]etting aside any precedent requires a ‘special justification’ beyond a bare belief that it was wrong.” Further, in statutory cases, a party seeking to overturn precedent “bears an even greater burden, since Congress remains free to correct [the Court’s decision], and adhering to [judicial] precedent enables it do so.” Even if *Sibbach* constituted an incorrect interpretation, Congress, and not the Court, should correct the error; the Court “do[es] Congress no service by presenting it a moving target.” The *Sibbach* Court might have made a mistake, but its judgment was still entitled to respect.

The Court’s decision in *Shady Grove* dovetails perfectly with the Court’s approach to its non-procedural interpretation cases. In *Shady Grove*, the Court

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99. *Id.* at 14 (emphasis added).
100. *Id.* at 16.
102. *Id.* at 422 (Stevens, J., concurring).
103. *Id.* at 412 (plurality opinion).
104. *Id.* at 413 (majority opinion).
105. *Id.*
106. *Id.* (quoting Patterson v. McLean Credit Union, 491 U.S. 164, 172 (1989)).
108. *Id.*
reiterated the traditional view that stare decisis considerations have special force in statutory cases. Not only did the Court consider the traditional heightened respect for statutory interpretations to be equally applicable in procedural cases, but it also relied on identical reasoning: Congress, not the Court, should fix an incorrect interpretation.\(^{110}\) Whether or not the statute at issue deals with procedure, the Court should not present Congress with a moving target.

Together, \textit{Twombly} and \textit{Shady Grove} are paradoxical. In \textit{Twombly}, the majority evinced little respect for stare decisis when interpreting a rule, and instead offered a new reading in its place. But in \textit{Shady Grove}, three members of that majority strictly adhered to precedent, insisting that the text, rather than its interpretation, should change. Notably, that option was also available in \textit{Twombly}. After all, the Court could have promulgated a new Rule 12(b)(6) that included a plausibility requirement. However, the Court never considered that possibility, instead doing what it condemned just three years later. Before \textit{Atlantic Marine}, the Court made one thing clear: its respect for stare decisis in civil procedure cases, anomalously, was ambivalent at best.

\section*{III.Atlantic Marine and the Unanimity of Ambivalence}

In a unanimous decision, the Court further muddied the waters in \textit{Atlantic Marine}. As in \textit{Twombly} and \textit{Shady Grove}, \textit{Atlantic Marine} required the Court to decide how much respect to give to its prior interpretations of procedural statutes and rules. Because J-Crew had violated a contractual forum-selection clause, the Court had two choices. First, the Court could agree with Atlantic Marine that J-Crew’s violation of the contract rendered dismissal (under Rule 12(b)(3) and 28 U.S.C. § 1406(a)) or transfer (under 28 U.S.C. § 1404(a)) appropriate. On the other hand, the Court could agree with J-Crew that venue remained appropriate in the Western District of Texas, affirming the district court’s and Fifth Circuit’s application of \textit{Stewart}.

Because the Court had already implicitly offered interpretations of Rule 12(b)(3) and § 1406(a) and explicitly construed § 1404(a), the case squarely presented the issue of adherence to prior interpretations of procedural rules and statutes. Moreover, J-Crew raised this issue directly, relying on \textit{Patterson} and \textit{Shady Grove} to remind the Court that Atlantic Marine bore a heavy burden to demonstrate that dismissal or transfer was appropriate.\(^{111}\) The Court failed, however, to affirm the application of stare decisis principles to its procedural docket. Instead, by upholding \textit{Stewart}’s implicit interpretation of Rule 12(b)(3) and § 1406(a) but then by subtly amending its interpretation of § 1404(a), the Court evinced a unanimous and unexplained ambivalence toward stare decisis in procedural interpretation cases.

\begin{footnotesize}
\begin{enumerate}
\item \textit{See id. at 413 (quoting Patterson, 491 U.S. at 172).}
\item \textit{Id. at 414.}
\item \textit{Resp’t’s Br., supra note 5, at 19-20.}
\end{enumerate}
\end{footnotesize}
A. Tepid Stare Decisis in Interpreting Rule 12(b)(3) and § 1406(a)

Writing for the Court, Justice Alito disagreed with Atlantic Marine’s contention “that a party may enforce a forum-selection clause by seeking dismissal of the suit under § 1406(a) and Rule 12(b)(3).”112 Instead, the Court found that “[w]hether venue is ‘wrong’ or ‘improper’ depends exclusively on whether the court in which the case was brought satisfies the requirements of federal venue laws, and those provisions say nothing about a forum-selection clause.”113 Since the Western District of Texas represented a proper venue under the federal venue law, the Court rejected the motion to dismiss, thus partially affirming the judgments of the district court and Fifth Circuit.114

The Court provided two reasons for its decision. First, the venue statute never mentions forum-selection clauses. Rather, 28 U.S.C. § 1391(b) lists three grounds for deciding where venue may lie—if a district meets one of the criteria, “venue is proper; if it does not, venue is improper.”115 Because the law “makes clear that venue in ‘all civil actions’ must be determined in accordance with the criteria outlined,” its language prohibits “judicial consideration of other, extrastatutory limitations on the forum.”116 Second, the law’s structure reveals that “so long as a federal court has personal jurisdiction over the defendant, venue will always lie somewhere.”117 However, granting Atlantic Marine’s motion under § 1406(a) or Rule 12(b)(3) would “mean that in some number of cases—those in which the forum-selection clause points to a state or foreign court—venue would not lie in any federal district.”118 Accordingly, Atlantic Marine’s motion had to fail.

After explaining why this construction of Rule 12(b)(3) and § 1406 was right, the Court also noted that this reading “follows from [the Court’s] prior decisions construing the federal venue statutes,”119 including Stewart.120 As Justice Alito recognized, the Stewart Court had already found that whenever “§ 1391 made venue proper, venue could not be ‘wrong’ for purposes of § 1406(a).”121 For that reason, “[t]hough dictum, the Court’s observation supports the holding” in Atlantic Marine.122 Indeed, “[a] contrary view would all but drain [Stewart] of any significance. If a forum-selection clause rendered venue in all other federal courts ‘wrong,’ a defendant could always obtain

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113. Id.
114. Id. at 578-79.
115. Id. at 577.
116. Id. (quoting 28 U.S.C. § 1391(b) (2012)).
117. Id. at 578.
118. Atlantic Marine, 134 S. Ct. at 578.
119. Id.
120. Id. (citing Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 28 n.8 (1988)).
121. Id. at 579.
122. Id.
automatic dismissal or transfer under § 1406(a) and would not have any reason to resort to § 1406(a) or Rule 12(b)(3).

Although the Atlantic Marine Court upheld the prior interpretations of Rule 12(b)(3) and § 1406, its discussion reveals ambivalence about stare decisis in procedural interpretation. On the one hand, the Court discussed Stewart, and refused to limit Stewart “to the presumably rare case in which the defendant inexplicably fails to file a motion under § 1406(a) or Rule 12(b)(3).”124 On the other hand, Justice Alito offered a thorough explanation for why his reading represented the right interpretation before mentioning Stewart. Unlike in Patterson and Shady Grove, the Court did not rest on the fact that a prior interpretation already existed and that consistency was paramount. The Atlantic Marine Court only noted that its readings of § 1406(a) and 12(b)(3) “also find[] support in Stewart.”125 Thus, while the result comported with heightened respect for precedential interpretations of rules and statutes, the unanimous opinion still treated stare decisis as a secondary consideration, at odds with its strong language in previous decisions.

B. An End to Procedural Stare Decisis? The Reinterpretation of § 1404(a)

Despite upholding its prior readings of Rule 12(b)(3) and § 1406(a), the Atlantic Marine Court proceeded to rewrite Stewart’s interpretation of § 1404(a). The Court agreed with Stewart that § 1404(a), which empowers a court to transfer a case to another district where venue may lie in the interests of justice, “provides a mechanism for enforcement of forum-selection clauses.”126 However, the Atlantic Marine Court then subtly disregarded Stewart’s description of how courts should weigh the forum-selection clause when evaluating a motion to transfer.

In Stewart, the Court applied § 1404(a) to find that “the parties’ agreement as to the most proper forum, should receive neither dispositive consideration . . . nor no consideration.”127 Instead, the clause should be “a significant factor that figures centrally in the district court’s calculus.”128 But Atlantic Marine recast this test, holding that “[w]hen the parties have agreed to a valid forum-selection clause, a district court should ordinarily transfer the case to the forum specified in that clause. Only under extraordinary circumstances . . . should a § 1404(a) motion be denied.”129 Stewart’s significant factor became a binding reality in all but extraordinary cases.

While the two standards seem similar, such that one could plausibly argue

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123. Id.
125. Id. at 578 (citing Stewart, 487 U.S. 22).
126. Id. at 579.
128. Id. at 29.
129. Atlantic Marine, 134 S. Ct. at 581 (emphasis added).
that *Atlantic Marine* upheld the *Stewart* test while using different language, the Spring 2014 ATLANTIC MARINE AND STARE DECISIS 219

Relying on Justice Kennedy’s concurrence in that case, Justice Alito wrote that, “because the overarching consideration under § 1404(a) is whether a transfer would promote ‘the interest of justice,' ‘a valid forum-selection clause [should be] given controlling weight in all but the most exceptional cases.'”

However, this test—that forum-selection clauses deserve *controlling* weight—cannot be found anywhere in the majority opinion in *Stewart*. The *Stewart* majority argued that forum-selection clauses deserve “significant” weight instead.

While the *Stewart* majority surely could have adopted Justice Kennedy’s approach, it chose not to do so. *Atlantic Marine* thus rewrote § 1404(a) by adopting the very standard that failed to sway the Court twenty-five years earlier.

Read in light of *Patterson* and *Shady Grove*, the Court’s willingness to cast *Stewart* aside is surprising. The Court never stated how Atlantic Marine met the “greater burden” necessary to overturn a statutory precedent. Nor did it describe a “special justification” for reinterpreting § 1404(a) “beyond a bare belief that [the initial interpretation] was wrong.” Further, the Court never explained why the Court, and not Congress, should amend this longstanding interpretation. For a Congress seeking to amend § 1404(a), the Court provided it with the very “moving target” that a plurality of its members had decried just three years before.

While the disharmony between *Twombly* and *Shady Grove* could have been understood as a decision to treat interpretations of rules and statutes differently and uphold stare decisis only when construing the latter, the *Atlantic Marine* Court revisited a statutory interpretation. Thus, by upholding its interpretations of Rule 12(b)(3) and § 1406(a) but still rewriting § 1404(a), a unanimous Court affirmed its ambivalence toward procedural precedents.

**CONCLUSION: ATLANTIC MARINE AS A MISSED OPPORTUNITY**

In statutory and regulatory interpretation cases, stare decisis is entitled to heightened or binding effect. In *Square D*, the Court made clear that, because Congress could fix an erroneous judicial interpretation of a statute, “it is more important that the applicable rule of law be settled than that it be settled right.” Similarly, in *Paralyzed Veterans*, the D.C. Circuit decided that the

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130. Id. (quoting *Stewart*, 487 U.S. at 33 (Kennedy, J., concurring)) (alterations in original).

131. *Stewart*, 487 U.S. at 29 (majority opinion).


133. Id. at 413 (quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989)).

134. Id. at 414.

drafter of a rule is powerless to reverse its own interpretation of that regulation via adjudication. Yet in the Court’s procedural docket, another rule becomes clear: the Court will only sometimes defer to previous interpretations. While a plurality advocated for a stringent understanding of stare decisis in *Shady Grove*, the same justices reversed the Court’s interpretation of a rule in *Twombly* and rewrote its interpretation of a statute in *Atlantic Marine*. Sub silentio, this Court has developed an ambivalent relationship with stare decisis in civil procedure cases.

The disrespect for stare decisis in procedural decisions is unfortunate. In the regulatory context, the Court “does not necessarily have the institutional capacity to ascertain whether new information or changed circumstances warrant overruling a prior interpretation of the Rules.” 136 *Twombly*, in which the Court cited the costs of discovery to justify reinterpreting Rule 12(b)(6), is a perfect example. In *Twombly*, “it would [have been] worthwhile to know whether the costs and burdens of discovery are excessive, when this is true, if anything else could be done to address the problem, and the likely impact of a revised pleading standard.” 137 The Court’s rulemaking process, which includes public comment and consultation with expert committees, is a better avenue for determining these facts. Perhaps discovery costs did merit a change. If so, the Court could have amended the rule.

Likewise, in the statutory context, a Court that decides to reinterpret a Congressional law has failed its promise to value consistency over accuracy and has weakened Congress’s role in the interpretation of its statutes. Congress has repeatedly overruled the Court when it disagrees with an interpretation of a law; thus, when it does not do so, Congress has silently ratified the reading. 138 As the Court explained, “[a]ny belief in the notion of a dialogue between the judiciary and the legislature must acknowledge that on occasion an invitation declined is as significant as one accepted.” 139 This is also a separation-of-powers imperative—since “Congress will be more likely to override statutory interpretations that it does not like” if it knows that the Court will not do so, “statutory stare decisis functions as a democracy-forcing measure.” 140 But after *Atlantic Marine*, Congress can no longer presume that judicial interpretations of procedural laws will remain static. A Congress that considers revising a disfavored interpretation may wait instead, hoping that the Court will fix any such interpretive error. Moreover, if Congress agrees with an interpretation, it must still pass a redundant law confirming that interpretation in order to ensure that

136. Mulligan & Staszewski, supra note 50, at 1232.
137. Id. at 1219.
139. Johnson v. Santa Clara Cnty. Transp. Agency, 480 U.S. 616, 629 n.7 (1987) (“Congress has not amended the statute to reject our construction . . . and we therefore may assume that our interpretation was correct.”)
it is subsequently upheld. *Atlantic Marine* has thus diminished Congress’s incentive and ability to clarify procedural laws.

In interpreting rules and statutes that were implicitly or explicitly construed in *Stewart*, the *Atlantic Marine* Court could have clarified the importance of precedent in its civil procedure docket. The Court did not do so, furthering the gap between stare decisis in procedural and non-procedural cases instead. More than anything, this decision represents a missed opportunity.