

# THE YALE LAW JOURNAL

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## An Avoidance Canon for *Erie*: Using Federalism to Resolve *Shady Grove*'s Conflicts Analysis Problem

**ABSTRACT.** Eight years ago, the Supreme Court's tripartite split in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.* highlighted a troublesome lacuna in the Court's *Erie* jurisprudence. That case revealed that where it is ambiguous whether a Federal Rule of Civil Procedure and a state law conflict, the Court has no standard doctrinal method for resolving that ambiguity. This gap matters for our federal-state balance. Under the approach developed in *Sibbach v. Wilson & Co.* and affirmed in *Hanna v. Plumer*, once a valid Federal Rule is deemed to conflict with a state law, it displaces that state law in federal court. Thus, the operative question for whether state laws, even those with substantive purposes, will apply in federal court is whether a court believes there is a conflict. Recently, federal courts have struggled to reach consistent results in the face of this doctrinal gap. Divergent approaches to such *Erie* conflicts have opened circuit splits on a number of issues, ranging from the applicability of certain provisions of anti-SLAPP statutes to state pleading requirements.

This Note proposes a federalism-based avoidance canon to fill in this gap. Under this canon, federal courts facing a potential conflict would first ask whether there is a plausible interpretation of the Federal Rule in question that does not conflict with the relevant state law based on its text and, if necessary, Advisory Committee Notes. If there is, they would default to that interpretation; if there is not, they would apply the Court's standard approach from *Hanna* and *Sibbach*. This Note first evaluates the history of *Erie* conflicts and how the Court arrived at its result in *Shady Grove*. The Note then explores the role that statutory interpretation can play in resolving the *Shady Grove* split, especially through avoidance canons. Next, the Note offers five arguments in favor of this canon rooted in federalism, separation of powers, and institutional choice concerns and addresses several counterarguments and potential alternatives. It concludes by demonstrating how this canon would operate in the context of two ostensible conflicts that have produced circuit splits in recent years.

**AUTHOR.** Yale Law School, J.D. expected 2020. I am deeply indebted to Professor Abbe Gluck for her thorough feedback, insightful guidance, and encouragement throughout the development of this Note. I thank Professor Bill Eskridge for his introduction to the *Erie* doctrine in his Civil Procedure course and many subsequent, illuminating conversations on the subject. Thanks also go to Professor Kate Stith, Talya Lockman-Fine, and Alex Loomis for reading early drafts and to Keshav Poddar, Danny Gifford, and Robert Kindman for their unremitting support. Finally, I thank the editors of the *Yale Law Journal*, especially Bill Powell, for their thoughtful feedback and editing. All errors and omissions are my own.



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## INTRODUCTION

The *Erie* doctrine has long been a legal enigma, perplexing generations of lawyers from first-year procedure students to federal judges.<sup>1</sup> *Erie*'s guidance for choosing between federal and state law in diversity actions has suffered from ambiguity on several counts. Courts and commentators have struggled to define the boundary between substance and procedure; to determine whether and how that boundary should be drawn differently for federal procedural statutes, rules, and practices; and to identify the source of law that supplies the relevant standard for adjudication in each of those contexts. In situations governed by the Rules Enabling Act (REA), those involving a Federal Rule, *Erie* cases have faced a greater ambiguity: how to identify the existence of a conflict between a Federal Rule and state law necessitating application of the *Erie* doctrine in the first place.<sup>2</sup>

In 2010, *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.* highlighted a lacuna in the Supreme Court's *Erie* jurisprudence: there is no settled doctrinal approach for determining whether a Federal Rule and a state law actually conflict when there are multiple plausible interpretations of the Federal Rule.<sup>3</sup> Indeed, in *Shady Grove*, the Justices applied three distinct conflicts methodologies, yielding contradictory results and highlighting the extent of the doctrinal confusion over *Erie* conflicts.<sup>4</sup>

This question matters, particularly for our federal-state balance and the separation of powers. The plurality in *Shady Grove* affirmed the reading of the Rules Enabling Act adopted in *Hanna v. Plumer* and *Sibbach v. Wilson & Co.*, which allows any Federal Rule that is arguably procedural to displace conflicting state

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1. See Kermit Roosevelt III, *Choice of Law in Federal Courts: From Erie and Klaxon to CAFA and Shady Grove*, 106 NW. U. L. REV. 1, 2 (2012) (“*Erie* analysis is notorious for the puzzles it has produced.”).
  2. See Adam N. Steinman, *Our Class Action Federalism: Erie and the Rules Enabling Act After Shady Grove*, 86 NOTRE DAME L. REV. 1131, 1135-36 (2011).
  3. 559 U.S. 393, 398 (2010). This gap had not been lost on commentators. See Earl C. Dudley, Jr. & George Rutherglen, *Deforming the Federal Rules: An Essay on What's Wrong with Recent Erie Decisions*, 92 VA. L. REV. 707, 737 (2006) (“That leaves conflicts between the Federal Rules and state law as the principal arena in which controversies persist under the *Erie* doctrine.”); Allan Erbsen, *Erie's Starting Points: The Potential Role of Default Rules in Structuring Choice of Law Analysis*, 10 J.L. ECON. & POL'Y 125, 146-47 (2013) (“The scope of a federal rule is often the central disputed issue in *Erie* cases, yet the Court has tied itself in knots trying to explain how to determine that scope.” (footnote omitted)).
  4. See Margaret S. Thomas, *Constraining the Federal Rules of Civil Procedure Through the Federalism Canons of Statutory Interpretation*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 187, 210-12 (2013).

law.<sup>5</sup> Under that reading, the operative question for the survival of a state law in federal diversity actions is whether the law is really in conflict with a Federal Rule; if so, the state law won't apply.<sup>6</sup> But as the concurrence and dissent both observed in *Shady Grove*, state laws that are facially procedural will often be bound up with important state regulatory and policy goals.<sup>7</sup> The application of the *Hanna-Sibbach* approach thus substantially inhibits the effect of these state policy judgments when litigants find themselves in federal court and the state law is deemed to conflict with a Federal Rule. This raises federalism concerns, particularly if one believes in "resurgent dynamism at the state level" and the reinvigoration of states as independent repositories of democratic experimentation.<sup>8</sup>

*Shady Grove* also implicates the constitutional separation of powers. It is courts that determine whether arguably substantive state law will be displaced. This power is normally reserved for Congress and is typically exercised by the courts only in areas where Congress has already exercised its enumerated law-making powers (e.g., in interpreting the preemptive effect of congressional statutes).<sup>9</sup> Although Federal Rules have the force of law, it is dubious whether courts

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5. *Shady Grove*, 559 U.S. at 398, 409-10; *Hanna v. Plumer*, 380 U.S. 460, 464 (1965); *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941) ("The test must be whether a rule really regulates procedure . . ."). *Erie* questions do not divide the Court along the typical lines. In *Shady Grove*, Justice Scalia's plurality opinion was joined by Chief Justice Roberts, Justice Thomas, and Justice Sotomayor; Justice Ginsburg's dissent was joined by Justices Kennedy, Breyer, and Alito. It is thus hard to predict how the Court's new members would address an *Erie* conflicts case methodologically. See Steinman, *supra* note 2, at 1178.
  6. See Joseph P. Bauer, *The Erie Doctrine Revisited: How a Conflicts Perspective Can Aid the Analysis*, 74 NOTRE DAME L. REV. 1235, 1252 (1999) (noting the "[v]irtually irrebuttable presumptions . . . in favor of application of a Federal Rule in preference to a conflicting state procedural rule" once a conflict is determined to exist).
  7. See *Shady Grove*, 559 U.S. at 419-20 (Stevens, J., concurring in part and concurring in the judgment); *id.* at 443 (Ginsburg, J., dissenting); Leslie M. Kelleher, *Taking "Substantive Rights" (in the Rules Enabling Act) More Seriously*, 74 NOTRE DAME L. REV. 47, 68-69 (1998).
  8. Ernest A. Young, *A General Defense of Erie Railroad Co. v. Tompkins*, 10 J.L. ECON. & POL'Y 17, 20 (2013). *But cf.* Abbe R. Gluck, *Our [National] Federalism*, 123 YALE L.J. 1996, 1998-99 (2014) (arguing that today, federalism primarily inheres in congressional statutes providing a role for states). If Gluck is right, we should be doubly concerned about an interpretation of *Erie* that facilitates further federal intrusion into the realm of state authority, especially one with fewer political safeguards and opportunities for state contestation.
  9. See Ernest A. Young, *Preemption and Federal Common Law*, 83 NOTRE DAME L. REV. 1639, 1659 (2008) ("To the extent that such judicial lawmaking can be justified, it must be through either delegation by Congress or through 'constitutional preemption of state law that unduly impairs federal functions.'" (quoting Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1453 (2001))). Under *Erie*, federal common lawmaking has

interpreting them ought to be able to exercise the full scope of federal power to displace state law, because such Rules do not go through the full legislative process of bicameralism and presentment.<sup>10</sup>

As Ralph Whitten wrote after *Shady Grove*,

Combined with its failure to establish an appropriate and consistent method for interpreting Federal Rules to determine whether they conflict with state law, the Court leaves the fundamental, threshold question under the *Erie* doctrine in a state of incoherence. The result has and will continue to be chaos in the lower federal courts.<sup>11</sup>

Whitten's prediction proved correct. The Court's confused *Erie* doctrine has led to ongoing or emerging circuit splits in several areas, including (1) whether state laws creating special motions to dismiss for strategic lawsuits against public participation (SLAPPs)<sup>12</sup> conflict with Rule 12's motion to dismiss provisions;<sup>13</sup> (2) whether discovery-staying provisions in anti-SLAPP laws conflict with Rule 56's discovery rules;<sup>14</sup> (3) whether state laws requiring certain sworn statements

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also been interpreted to be permitted in areas of exclusively federal authority including interstate disputes and admiralty law, but these areas are less relevant to state interests and law. See Bradford R. Clark, *Erie's Constitutional Source*, 95 CALIF. L. REV. 1289, 1309 n.141 (2007) [hereinafter Clark, *Erie's Constitutional Source*] (arguing that these enclaves of federal authority do not constitute a true federal common law).

10. See *infra* Section III.B.1.
11. Ralph U. Whitten, *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.: Justice Whitten, Nagging in Part and Declaring a Pox on All Houses*, 44 CREIGHTON L. REV. 115, 125 (2010).
12. According to John Lynch, SLAPPs are lawsuits filed in response to unwanted speech or advocacy that are "intended not so much to win in court as to discourage advocacy disagreeable to the plaintiff through the prospect of ruinously expensive litigation," thereby burdening defendants' free speech. John A. Lynch, Jr., *Federal Procedure and Erie: Saving State Litigation Reform Through Comparative Impairment*, 30 WHITTIER L. REV. 283, 317 (2008). Anti-SLAPP laws provide special motions to dismiss in such cases, requiring plaintiffs to justify the merits of their potentially speech-inhibiting lawsuits before forcing defendants to incur these expenses.
13. Compare *Godin v. Schencks*, 629 F.3d 79, 86-91 (1st Cir. 2010) (finding no conflict), and *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 972 (9th Cir. 1999) (finding no conflict), with *Abbas v. Foreign Policy Grp., LLC*, 783 F.3d 1328, 1333-36 (D.C. Cir. 2015) (finding a conflict with Rule 12), and *Makaeff v. Trump Univ., LLC*, 715 F.3d 254, 274 (9th Cir. 2013) (Kozinski, C.J., concurring) (finding a conflict with Rule 12). See generally Tyler J. Kimberly, Note, *A SLAPP Back on Track: How Shady Grove Prevents the Application of Anti-SLAPP Laws in Federal Courts*, 65 CASE W. RES. L. REV. 1201 (2015) (explaining anti-SLAPP statutes and describing federal courts' approach to dealing with them).
14. Compare *Metabolife Int'l, Inc. v. Wornick*, 264 F.3d 832, 846 (9th Cir. 2001) (finding a conflict with Rule 56), with *Godin*, 629 F.3d at 90-91 (finding no conflict).

beyond the filing requirements of Rule 11 conflict with that Rule;<sup>15</sup> and (4) whether state laws barring requests for punitive damages without court permission conflict with Rule 8(a)(3)'s requirement that complaints contain a demand for relief.<sup>16</sup> Each of these splits has been driven, at least in part, by the application of inconsistent *Erie* conflicts methodologies, varying from plain textual interpretation to outright conflicts avoidance.

Responding to this confusion over methodology, Allan Erbsen has called for the development of "a default rule—which one might label an 'Erie canon'—to determine whether federal statutes and rules should be interpreted broadly or narrowly to embrace or avoid conflict with otherwise applicable state laws."<sup>17</sup> Erbsen argues that such a default rule would benefit *Erie* jurisprudence by improving judicial economy, reducing arbitrariness in decision-making, providing better ex ante guidance to rule drafters, and linking rule interpretation to broader normative commitments.<sup>18</sup> But he stops short of proposing a specific default rule.

In this Note, I offer just that: a federalism-based avoidance canon for *Erie* conflicts. This canon fills the interpretive gap left by *Shady Grove*. I argue that courts facing a potential conflict between a Federal Rule and a state law should first ask whether there is a reading of the Federal Rule that can be plausibly supported by the Rule's text and Advisory Committee Notes that does not conflict with the state law in question.<sup>19</sup> If the answer is "yes," the court should default

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15. Compare *Liggon-Redding v. Estate of Sugarman*, 659 F.3d 258, 263 (3d Cir. 2011) (finding no conflict), and *Trierweiler v. Croxton & Trench Holding Corp.*, 90 F.3d 1523, 1540 (10th Cir. 1996) (finding no conflict), with *Royalty Network, Inc. v. Harris*, 756 F.3d 1351, 1359–60 (11th Cir. 2014) (finding a conflict with Rule 11).
  16. Compare *Cohen v. Office Depot, Inc.*, 184 F.3d 1292, 1297–99 (11th Cir. 1999) (finding a conflict with Rule 8), *vacated in part on other grounds*, 204 F.3d 1069 (11th Cir. 2000), with *Allen v. Woodford*, No. 1:05-CV-01104-OWW-LJO, 2006 WL 1748587, at \*21 (E.D. Cal. June 26, 2006) (finding no conflict), *Jones v. Krautheim*, 208 F. Supp. 2d 1173, 1178 (D. Colo. 2002) (finding no conflict), and *Nereson v. Zurich Ins. Co.*, No. Civ. A3-91-72, 1992 WL 212233, at \*1 (D.N.D. Aug. 20, 1992) (finding no conflict).
  17. Erbsen, *supra* note 3, at 125. According to Erbsen, a default rule is "a starting point for judicial implementation of a potentially difficult inquiry" that establishes a default outcome for a particular species of legal question. *Id.* at 130. Erbsen specifically notes that defaults and "canons" can be used interchangeably. *See id.* at 147.
  18. *See id.* at 147 n.92.
  19. For a full explanation of the rulemaking process, see Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. PA. L. REV. 1099, 1103–04 (2002). Briefly, the current rulemaking process for Federal Rules of Civil Procedure entails (at least) seven steps. First, proposed rules or amendments are reported to the Advisory Committee on Civil Rules. At its next biannual meeting, the Advisory Committee votes to accept, reject, or defer the Reporter's proposed change. If the Committee accepts a proposal, the Reporter then

to that reading without analysis of the Rule or state law’s substantive purposes, thereby avoiding the conflict and the displacement of state law. If the answer is “no,” the court should apply the Federal Rule, per *Hanna*, so long as it is valid under the REA. This approach would resolve the troublesome lacuna in the Court’s current *Erie* jurisprudence, reducing the risk of future inconsistencies and circuit splits. It would also pay greater respect to important state interests by more often giving them effect in federal court. Finally, it would protect the separation of powers by limiting judicial power to displace state law.

This approach is somewhat radical in that it purports to rationalize a fundamentally ad hoc, functionalist doctrine with a formalist rule. Despite the difficulties it has created, one benefit of the Court’s existing *Erie* conflicts methodology (or lack thereof) is the flexibility it affords courts to make discretionary judgments about the relative importance of the federal and state interests at play.<sup>20</sup> Nevertheless, I believe that a federalism-based avoidance canon for *Erie* conflicts will achieve these objectives better than an ad hoc interest-balancing approach, given the Court’s past decisions and the institutional constraints involved.

What, then, would the new equilibrium for *Erie* cases look like under this canon? The canon’s principal effect would be far more consistent adjudication of *Erie* conflicts cases. This canon is intentionally triggered by a “plausible” non-conflicting reading of a Federal Rule in order to set the bar low enough to avoid

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prepares a draft rule or amendment and a proposed Note to accompany it. If the Committee accepts the language of the Rule or amendment and Note, the Committee then requests permission from the Standing Committee on Rules of Practice and Procedure to publish the proposal. If permission is granted, the Committee circulates the proposal in accordance with the 1988 amendments to the Rules Enabling Act. 28 U.S.C. § 2073 (2018). After the appropriate comment period, the Committee either approves and submits the proposal to the Standing Committee or revises it and provides additional opportunity for public comment (or decides not to move forward). Once the proposal is sent on, the Standing Committee then either approves the proposal as it is and sends it to the Judicial Conference; revises the proposal and sends it to the Judicial Conference; revises the proposal and sends it back to the Advisory Committee for additional public comment; or rejects it. Once the proposal is sent to the Judicial Conference, the Conference then determines whether to approve and send it to the Supreme Court. If they choose to do so, the Supreme Court then decides whether to approve. If the Court does approve, the Chief Justice must submit the proposal (including the Rule text and Note) to Congress by May 1 of the year in which the Rule or amendment is to take effect. Congress then has until December 1 to veto the proposal; otherwise, the Rule or amendment goes into effect on December 1.

20. The desire for flexible adjudication has long motivated opponents of more formalist approaches to *Erie*. See EDWARD A. PURCELL, JR., *BRANDEIS AND THE PROGRESSIVE CONSTITUTION: ERIE, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA* 218-20 (2000).



debate over the relative superiority of potential interpretations.<sup>21</sup> Judges have been known to differ in their assessments of statutory ambiguity.<sup>22</sup> Setting the bar at plausibility should, in theory, make it easier for those who find at least reasonable nonconflicting interpretations to convince others to join them.<sup>23</sup>

The canon's second-order effects are more conceptually interesting, if less immediately clear. There are two possible directional equilibria and a fluid middle ground between them. One option is that this canon will result in far greater application of state law in federal court. If the canon is faithfully applied and Rules interpreted narrowly are not amended to facially preempt state law, then relevant state law provisions will apply in diversity actions and their substantive goals will be given effect. From a federalism perspective, this outcome is desirable.

At the other end of the spectrum, it is possible that the Court, Rules committees, or Congress could undertake to amend narrowly interpreted rules to give them clearer preemptive effect. While this would undermine the canon's pure federalism objective, it would still be preferable to the current system on separation of powers grounds. It would still avoid some of the circuit splits and inconsistency wrought by the Court's present approach and would at least channel preemption through Congress and the formal procedures of the REA. Preemption is a blunt instrument, eviscerating state authority where applied, but one that Congress has the power to use when it acts pursuant to one of its enumerated powers.<sup>24</sup> Because Congress can displace state law in the face of weighty

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21. As Erbsen notes, using the proper standard for triggering any *Erie* conflicts canon is critical for its success. See Erbsen, *supra* note 3, at 150.

22. See WILLIAM N. ESKRIDGE, JR. ET AL., STATUTES, REGULATION, AND INTERPRETATION: LEGISLATION AND ADMINISTRATION IN THE REPUBLIC OF STATUTES 520 (2014).

23. Here, I use "plausibility" to mean minimal interpretive reasonableness. As the Court noted in *Jean v. Nelson*, avoidance canons permit second-best interpretations up to the point that they become "disingenuous evasion" of the text. 472 U.S. 846, 854 (1985) (quoting *United States v. Locke*, 471 U.S. 84, 96 (1985)). This meaning of plausibility is distinct from its use in *Bell Atlantic Corp. v. Twombly*, where plausibility was contrasted with mere conceivability (i.e., the condition of being minimally reasonable or possible, a standard more akin to the one I adopt here). 550 U.S. 544, 570 (2007); see also *Ashcroft v. Iqbal*, 556 U.S. 662, 680 (2009) (applying the *Twombly* standard and its distinction between conceivable and plausible). Despite the potential confusion regarding the dual uses of "plausibility" in statutory interpretation and pleading contexts, I use the term "plausibility" because of its ubiquity in the avoidance canon literature. See, e.g., Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 118 (2010); Lisa A. Kloppenberg, *Avoiding Constitutional Questions*, 35 B.C. L. REV. 1003, 1025 (1994); Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945, 1949 (1997). Of course, the use of any standard for ambiguity still depends on agreement that there is ambiguity in the first place. See *infra* Section III.C.5.

24. See Thomas W. Merrill, *Preemption and Institutional Choice*, 102 NW. U. L. REV. 727, 732 (2008).

federal interests, the Court should not do so when Congress has chosen to remain silent, particularly given the absence of political safeguards for federalism when the Court displaces state law.<sup>25</sup> Process matters, normatively and constitutionally, even when the outcome is the same.<sup>26</sup>

Finally, these institutions could split the difference. The Court and committees might choose to amend Rules for preemptive effect only when some important federal interest is at issue. This outcome would likewise be normatively desirable for the reasons explained above. The real question is where on this spectrum we would end up. The record suggests some version of the first outcome is most likely. Five Supreme Court cases have interpreted Federal Rules narrowly to avoid conflict with state law – Rule 8 under *Palmer v. Hoffman*,<sup>27</sup> Rule 23 under *Cohen v. Beneficial Industrial Loan Corp.*,<sup>28</sup> Rule 3 under *Walker v. Armco Steel Corp.*,<sup>29</sup> Rule 59 under *Gasperini v. Center for Humanities, Inc.*,<sup>30</sup> and Rule 41 under *Semtek International Inc. v. Lockheed Martin Corp.*<sup>31</sup> – and all of the Federal Rules at issue retain the meaning given to them in those cases.<sup>32</sup> Subsequent amendments have not attempted to broaden these narrow readings.<sup>33</sup> Of

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25. To be sure, Congress nearly always rubber-stamps amendments to the Rules via inaction, which may undermine the strength of my process-federalism argument in practice. See Martin H. Redish & Dennis Murashko, *The Rules Enabling Act and the Procedural-Substantive Tension: A Lesson in Statutory Interpretation*, 93 MINN. L. REV. 26, 93-94 (2008). Still, process federalism is served by respecting the boundaries of the REA's delegation as a formal matter and by channeling contestation over these issues in practice into a forum with far greater state representation. Moreover, congressional overrides of Federal Rules that encroach on state authority are not unheard of, even if they are uncommon. See Young, *supra* note 8, at 75 (discussing the congressional override of proposed Federal Rules of Evidence "abrogating state laws") (quoting Paul J. Mishkin, *Some Further Last Words on Erie – The Thread*, 87 HARV. L. REV. 1682, 1685 (1974)).
26. See Young, *supra* note 8, at 115 ("By insisting that federal courts may not make federal law outside the constitutionally ordained legislative process, *Erie* became the central decision of modern process federalism."); Ernest A. Young, "The Ordinary Diet of the Law": *The Presumption Against Preemption in the Roberts Court*, 2011 SUP. CT. REV. 253, 280 [hereinafter Young, *Ordinary Diet*] ("[S]hifting preemptive authority away from Congress to judicial or executive institutions that do not represent the states and that can promulgate federal norms more easily than Congress amounts to a significant threat to state autonomy.").
27. 318 U.S. 109, 117 (1943).
28. 337 U.S. 541, 555-56 (1949).
29. 446 U.S. 740, 750 (1980).
30. 518 U.S. 415, 417 (1996).
31. 531 U.S. 497, 507-09 (2001).
32. See *infra* Section I.A.
33. See FED. R. CIV. P. 3, 8, 23, 41, & 59 advisory committee's notes.

course, it is possible that the advent of an explicit avoidance canon would galvanize overriding amendments in a way ad hoc avoidance has not. For now, though, it seems safe to assume that at least some narrow readings adopted under this canon would stand.

The remainder of this Note is organized as follows: Part I surveys the Court's prior cases involving potential conflicts between Federal Rules and state laws, including an explanation of the three divergent approaches of *Shady Grove*. Part II summarizes the literature on values-based statutory interpretation and avoidance, and the role each should play in resolving *Erie* conflicts. Part III presents the argument for my proposed conflicts avoidance canon and evaluates the canon in light of counterarguments and alternative methodologies. Finally, Part IV demonstrates how my canon would operate in practice.

## I. CONFLICT OVER CONFLICTS IN *ERIE* QUESTIONS

The *Shady Grove* decision represented the culmination of a seventy-year line of confusing and contradictory approaches to conflicts analysis in *Erie* cases.<sup>34</sup> In the wake of *Sibbach*'s rigid interpretation of the Rules Enabling Act, any state law in ostensible conflict with a Federal Rule that "really regulates procedure" was destined for the dustbin in federal court.<sup>35</sup> In *Sibbach*, the Court held that Rule 35's provisions for court-ordered medical examinations were valid under the Rules Enabling Act because they "really regulate[d] procedure[] – the judicial process for enforcing rights and duties recognized by substantive law."<sup>36</sup> This left the Court – still operating in the shadow of *Erie*'s federalism concerns – with the unenviable task of faithfully applying its holding in *Sibbach* without eviscerating the application of state law in diversity cases.<sup>37</sup> Using *Erie* conflicts analysis to avoid unnecessary clashes between the Federal Rules and state law would have been a natural way of pursuing this objective. Unfortunately, the

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34. See Thomas, *supra* note 4, at 197–210.

35. *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941); see John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 719 (1974).

36. *Sibbach*, 312 U.S. at 14. Although *Sibbach* did not involve a conflict with state law, it nonetheless established a standard for rule validity that would bear on this question in later cases.

37. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) ("Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern."); Stephen B. Burbank & Tobias Barrington Wolff, *Redeeming the Missed Opportunities of Shady Grove*, 159 U. PA. L. REV. 17, 25–26 (2010) (noting the "incentive for restrained interpretation" of the Federal Rules after *Sibbach* to avoid overstepping the boundaries of federal lawmaking authority).

Court never developed a standard doctrinal framework for doing so, using several competing—and often conflicting—methodologies over time. This scatter-shot approach eventually culminated in *Shady Grove*'s three conflicting tests.<sup>38</sup>

#### A. *The History of Conflicts and Avoidance in Erie Cases*

##### 1. *The Early Cases: Avoidance Ascendant*

Just two years after its decision in *Sibbach*, the Court confronted the question of how to assess the scope of a Federal Rule and its potential conflict with state law over the burden of proof for contributory negligence defenses.<sup>39</sup> In *Palmer v. Hoffman*, the Court adopted a narrow reading of Rule 8's provisions for pleading affirmative defenses, holding that the Rule spoke only to the *manner* of pleading its listed defenses rather than to which party held the burden of proof.<sup>40</sup> In so holding, the Court gave effect to a Massachusetts law allocating the burden of proof to the plaintiffs.<sup>41</sup> Although the Court did not make explicit its motivation to preserve the application of local law, *Palmer* nonetheless represents its first use of statutory interpretation to avoid conflict between a Federal Rule and state law, thereby preserving the application of both in federal court.<sup>42</sup>

Similarly, in *Cohen v. Beneficial Industrial Loan Corp.*, the Court held that Federal Rule 23, which at the time governed pleading requirements in shareholder-derivative actions, did not preempt a New Jersey law requiring the plaintiff to post a bond, contrary to the Federal Rule.<sup>43</sup> The Court was clear that it intended to protect the state policy embodied in this procedural rule, stating that “this statute is not merely a regulation of procedure . . . it creates a new liability where

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38. See Patrick J. Borchers, *The Real Risk of Forum Shopping: A Dissent from Shady Grove*, 44 CREIGHTON L. REV. 29, 34 (2010) (pointing to the Court's lack of “a coherent theory of when federal and state rules collide”); Burbank & Wolff, *supra* note 37, at 37 (“[T]he Justices have lurched from one extreme to the other.”); Thomas, *supra* note 4, at 190 (describing the Court's efforts to develop a coherent conflicts framework as being in a “state of abject disarray”).

39. See *Palmer v. Hoffman*, 318 U.S. 109, 117 (1943).

40. See *id.*

41. See *id.* at 117-18.

42. See Thomas, *supra* note 4, at 201 (arguing that *Palmer* is an example of conflict avoidance).

43. 337 U.S. 541, 555-56 (1949).

none existed before.”<sup>44</sup> *Palmer* and *Cohen* were thus part of a larger pattern of decisions in the mid-twentieth century that construed Federal Rules narrowly.<sup>45</sup>

These decisions were the forerunners to *Walker v. Armco Steel Corp.*,<sup>46</sup> arguably the archetypal *Erie* avoidance case. In *Walker*, the Court took a narrow view of Rule 3’s provisions for commencing a civil action in federal court, allowing Oklahoma’s state law governing the tolling of statutes of limitations based on service—rather than commencement—to coexist alongside the Federal Rule.<sup>47</sup> *Walker* for the first time articulated a two-step approach to applying the *Erie* doctrine to a Federal Rule: “The first question must . . . be whether the scope of the Federal Rule in fact is sufficiently broad to control the issue before the Court. It is only if that question is answered affirmatively that the *Hanna* [REA] analysis applies.”<sup>48</sup>

Although *Walker* represents a clear instance of conflict avoidance, its dicta on avoidance and conflicts methodology has caused ongoing confusion.<sup>49</sup> First, Justice Marshall arguably undercut the Court’s avoidance rationale when in a footnote he offered a caveat to *Walker*’s result: “This is not to suggest that the Federal Rules of Civil Procedure are to be narrowly construed in order to avoid a ‘direct collision’ with state law. The Federal Rules should be given their plain meaning.”<sup>50</sup> This both undermined the main thrust of the opinion and dodged the trickier question of what to do when plain meaning can support more than one construction. *Walker*’s duplicity on the question of conflicts analysis left the Court with an implicit avoidance approach in its result and an explicit warning

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44. *Id.* at 555. Joseph Bauer offers additional detail on the policy motivations underlying New Jersey’s statute and the Court’s reasoning. See Joseph P. Bauer, *Shedding Light on Shady Grove: Reflections on the Erie Doctrine from a Conflicts Perspective*, 86 NOTRE DAME L. REV. 939, 975 (2011). Some commentators liken *Cohen* to *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949), in discussing *Erie* avoidance, see, e.g., Bauer, *supra* note 6, at 1252 n.75, but this grouping is misplaced. *Ragan* was decided by classifying the relevant state law as substantive under *Guaranty Trust v. York*’s outcome determination test, thus mandating its application in federal court, not by narrowing the scope of Federal Rule 3 to avoid a conflict. 337 U.S. at 533-34.

45. See Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1032 (1982).

46. 446 U.S. 740 (1980).

47. See *id.* at 750-52.

48. See *id.* at 749-50.

49. Federal courts had long been applying Rule 3 for tolling purposes in nondiversity cases, suggesting a plausible alternative reading. See Mark N. Parry, *Commencement Rules and Tolling Statutes of Limitations in Federal Court: Walker v. Armco Steel Corp.*, 66 CORNELL L. REV. 842, 854-55 (1981).

50. *Walker*, 446 U.S. at 750 n.9.

against avoidance in its dicta. This confusion presaged the *Erie* conflicts ping-pong to come.

Second, Justice Marshall conducted the conflicts analysis in *Walker* by looking to the substantive intent of the state law and Federal Rule at issue, blurring the lines between his two-step approach.<sup>51</sup> It is logically tenuous to acknowledge the *substantive* aims of a Federal Rule before summarily labeling the Rule procedural under *Hanna* (which the Court has never failed to do once it reaches the second step).<sup>52</sup> There are clear functionalist advantages to Justice Marshall's approach, in that it allows judges to tailor their readings of the relevant Rule and state law to the substantive policy goals at hand. But the idea of acknowledging substantive content at the conflicts stage while maintaining the facade of "procedurality" at the validity stage is conceptually problematic, to say the least. It reflects the mental gymnastics the Court has undertaken to accommodate state interests while avoiding the invalidation of any Federal Rules. This is not to say that substance and procedure can be neatly separated (they cannot), only that making no formal attempt to separate them undermines the independent role of the second step of the *Walker* analysis. There is a better way to account for state interests while maintaining the logical integrity of the *Hanna-Sibbach* test, as I argue below.

## 2. *Hanna and its Progeny: State Law in Retreat*

The early avoidance cases naturally alarmed those who viewed the Rules Enabling Act as the path toward uniformity of federal procedure.<sup>53</sup> These fears were eventually assuaged by the Court's broad application of the Federal Rules in *Hanna v. Plumer*.<sup>54</sup> In *Hanna*, the Court held that Rule 4's provision for service of process "really regulates procedure," and thus displaces applicable state service law.<sup>55</sup> On the subject of conflicts, the *Hanna* Court explicitly construed earlier cases, such as *Palmer* and *Cohen*, to have turned on the scope of Rules insuf-

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51. *See id.* at 750-52, 750 n.10.

52. *See infra* Section I.B.2. This logical duplicity was not dispositive in *Walker* because the Court determined there was no conflict (and thus no need to rule on the validity of the Rule), but its specter has haunted *Erie* conflicts cases since.

53. *Id.*; *see also* Burbank & Wolff, *supra* note 37, at 31 (explaining that *Ragan* and other early avoidance cases "seemed to threaten the integrity of the Federal Rules").

54. 380 U.S. 460 (1965).

55. *Id.* at 464.

ficiently broad to govern in those cases. In *Hanna*, however, “the clash [was] unavoidable.”<sup>56</sup>

*Hanna* was notable for its reaffirmation and broadening of *Sibbach* to hold that where Rules are “rationally capable” of being classified as either substantive or procedural, they fall within the valid scope of the REA.<sup>57</sup> As John Hart Ely later wrote, *Hanna* gave us “a singularly hard-hearted rendition [of *Erie*]: any federal rule (or at least any Federal Rule) that is even arguably procedural is to be applied in a diversity action, state law to the contrary notwithstanding.”<sup>58</sup>

*Hanna* could have ended the debate over *Erie* conflicts by creating an unwavering presumption in favor of the Federal Rules, but it did not. Instead, by saying little about the practical mechanics of evaluating *Erie* conflicts, it gave the Court the ammunition it needed to disregard state laws that did not resonate with the Justices. At the same time, it left in place the ability to construe Federal Rules narrowly when state interests deemed sufficiently meritorious (or “substantive”) were to be protected. Despite its long recitation of precedent, *Hanna*’s case-specific conflicts analysis is somewhat cursory, confined mostly to a one-sentence parenthetical.<sup>59</sup> Taken at face value, though, it implies the principle that when the Federal Rules set a procedural bar (e.g., service by home delivery), state law may not impose a higher bar (e.g., in-hand service) in the federal courts. The Federal Rule functions as a ceiling, not a floor.

*Hanna*’s conflicts analysis took no position on other possible forms of Rule ambiguity, including cases where the establishment of one explicit procedural bar may or may not establish a second implicit bar on a related issue (e.g., commencement versus tolling in *Walker*) or cases where the enumeration of a set of procedures may or may not be construed as exhaustive (e.g., the creation of special motions to dismiss in addition to those listed in Rule 12).

The Court’s next two *Erie* conflicts cases after *Walker*—*Burlington Northern Railroad Co. v. Woods*<sup>60</sup> and *Stewart Organization, Inc. v. Ricoh Corp.*<sup>61</sup>—saw a Federal Rule and a federal statute read broadly to displace state law where coexistence was at least plausible. In each case, a federal rule or statute providing for judicial discretion (over penalties in *Burlington Northern* and venue transfer in

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56. *Id.* at 470.

57. *Id.* at 472.

58. Ely, *supra* note 35, at 697 (footnote omitted).

59. See *Hanna*, 380 U.S. at 470.

60. 480 U.S. 1 (1987).

61. 487 U.S. 22 (1988).

*Stewart*) was deemed to conflict with a state law mandating a particular outcome.<sup>62</sup> According to these cases, when state law eliminates some subset of discretionary outcomes allowable under federal law, the state law cannot apply.<sup>63</sup>

### 3. *Resurgent State Law and Avoidance*

After *Burlington Northern* and *Stewart*, the Court lurched back in the other direction. In *Gasperini v. Center for Humanities, Inc.*, a majority led by Justice Ginsburg managed to reconcile Rule 59(a) – allowing district judges to grant a new trial “for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States”<sup>64</sup> – with a New York law requiring judges to grant a new trial if a jury award “deviates materially” from reasonable expected compensation.<sup>65</sup> Since *Walker*, *Gasperini* represents the high-water mark for *Erie* avoidance applied at the conflicts analysis stage.

Justice Ginsburg took an interest-based avoidance approach, noting that despite *Hanna*’s holding, “[f]ederal courts have interpreted the Federal Rules . . . with sensitivity to important state interests and regulatory policies.”<sup>66</sup> Under her methodology, “[t]he dispositive question . . . is whether federal courts can give effect to the substantive thrust of [the state law at issue] without

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62. See *Burlington Northern*, 480 U.S. at 7; see also *Stewart*, 487 U.S. at 30 (“[W]here federal law’s ‘discretionary mode of operation’ conflicts with the nondiscretionary provision of Alabama law, federal law applies in diversity.” (quoting *Burlington Northern*, 480 U.S. at 7)).

63. *Burlington Northern* and *Stewart* also pose the second-order question of whether the process of evaluating the plausible plain textual meaning for conflicts purposes should be augmented by additional sub-rules for Rule construction. My answer is yes. Augmentation by sub-rules should be encouraged, provided these rules are made explicit. Sub-rules provide clearer ex ante drafting instructions to rule writers, help to avoid ambiguity, and minimize inconsistency in adjudication. Although I take no position here on the merits of different possible sub-rules of construction, it is worth noting that the development of such rules could provide a channel through which to protect federal or state substantive interests. By matching the direction of default for various sub-rules (pro- or no-conflict defaults) to the normative preference for privileging state or federal interests, those substantive interests could be protected even under a more formalist regime.

64. 518 U.S. 415, 417 (1996) (quoting FED. R. CIV. P. 59(a)).

65. *Id.* at 437. The larger question in *Gasperini* was whether the Seventh Amendment’s Reexamination Clause precludes review of jury verdicts in federal court, with the Court ultimately holding that it precludes federal appellate review of the jury award for more than “abuse of discretion” but allows review of jury verdicts for material deviation (the New York standard) by federal trial courts. See *id.* at 432-36. The *Erie* conflicts question was whether, at the trial court level, Rule 59 preempts state law providing a specific standard of review for new trial motions. See *id.* at 437 n.22.

66. *Id.* at 427 n.7.



untoward alteration of the federal scheme for the trial and decision of civil cases.”<sup>67</sup> By construing Rule 59(a) not to preclude a state-law standard for new trial motions, Justice Ginsburg avoided the conflict and made room for the application of state law.<sup>68</sup>

In *Semtek International Inc. v. Lockheed Martin Corp.*, the Court’s final pronouncement on *Erie* conflicts before *Shady Grove*, the Court held that an involuntary dismissal in federal court under Rule 41(b) was not claim-preclusive in state courts.<sup>69</sup> That is, Rule 41 did not preempt state law governing claim viability. The Court’s decision was driven by a desire not to “violate the federalism principle of *Erie R[ailroad] Co. v. Tompkins* . . . by engendering substantial variations [in outcomes] between state and federal litigation” and to avoid an “arguable violation of the [Rules Enabling] Act.”<sup>70</sup> To achieve these objectives, however, required interpretive somersaults that cut against *Walker*’s “plain meaning” directive<sup>71</sup> and suggested an approach radically different from that of *Burlington Northern* and *Stewart*. The opinion’s strained reasoning – which Steven Burbank and Tobias Wolff have quipped “can only charitably be described as interpretation and only in Wonderland as an exercise in ‘plain meaning’ interpretation” – likely reflects the Court’s desire to avoid opening the Pandora’s Box of invalidating a Federal Rule.<sup>72</sup> The Court’s interpretation strikes many commentators as facially implausible – as avoidance gone too far.<sup>73</sup>

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67. *Id.* at 426.

68. *See id.* at 437 n.22; Steinman, *supra* note 2, at 1146-49 (explaining that Rule 59 lacked the depth to displace state law because the Rule itself did not provide the federal standard that was potentially in conflict with state law).

69. 531 U.S. 497, 507-09 (2001). The case involved a complicated set of contract and tort claims under California law, which were ultimately dismissed in federal court under California’s statute of limitations, and a simultaneous Maryland state court claim which was timely under Maryland’s statute of limitations but dismissed due to the res judicata effect of the federal court judgment on the California claims under Rule 41. *Semtek*’s appeal sought to overturn the claim-preclusive effect of the federal judgment in Maryland state court. *See id.* at 499-500.

70. *Id.* at 504, 506 n.2 (internal quotation marks omitted).

71. *Walker v. Armco Steel Corp.*, 446 U.S. 740, 750 n.9 (1980).

72. *See Burbank & Wolff, supra* note 37, at 40. True policing of the boundaries of the Rules Enabling Act would open the door to a variety of thorny interpretive questions and require the Court to (at least attempt to) address the distinction between substance and procedure ostensibly at issue in the Act’s second clause. The Court has implied that it is loath to do so. *See Struve, supra* note 19, at 1147 (observing “[t]he Court’s notorious failure to police the Act’s prohibition on Rules affecting substantive rights”).

73. *See* Stephen B. Burbank, *Semtek, Forum Shopping, and Federal Common Law*, 77 NOTRE DAME L. REV. 1027, 1041-42 (2002).

### B. *Erie Conflicts Today: The Shady Grove Problem*

All this confusion set up the Court for an inevitable clash over *Erie* conflicts in *Shady Grove*. Asked whether a New York law prohibiting penalty damages in class actions could be given effect in federal court in light of Rule 23, the Court took three distinct approaches. In this Section, I analyze these approaches and the role that conflicts analysis played in this divergence.

#### 1. *The Lessons of Shady Grove*

*Shady Grove* arose out of a class action suit brought by Shady Grove Orthopedic Associates to recover unpaid interest owed to them by Allstate on an overdue insurance claim. The interest was owed under a New York statute applicable to an insurance policy issued by Allstate in New York. At issue was whether a New York law precluding class action suits to recover a statutory “penalty” was displaced by Rule 23’s requirements for federal class actions.<sup>74</sup> The Court held that it was, but the Justices’ votes and reasoning were fractured. A four-justice plurality concluded that Rule 23 fully governed the issue and thus displaced the state law; a concurrence by Justice Stevens emphasized the absence of substantive relation to state rights and remedies in the New York law; and a four-justice dissent argued that Rule 23 was not sufficiently broad to govern the availability of remedies in class actions (i.e., there was no conflict).

For our purposes, the three opinions in *Shady Grove* may be best understood through their divergent takes on conflicts analysis and on the extent of separation between the conflicts and REA stages of analysis.<sup>75</sup> Justice Scalia took a strictly formalist approach, affirming the two-step ordering and focusing narrowly on the Rule’s text.<sup>76</sup> Justice Scalia’s opinion also evinced an awareness of the stakes of the conflicts analysis for the fate of state law: if the Rule “answers the question in dispute . . . it governs—New York’s law notwithstanding—unless it exceeds statutory authorization or Congress’s rulemaking power.”<sup>77</sup> The

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74. See *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 397 (2010).

75. Of course, some of the differences between Justice Scalia’s approach to *Erie* conflicts and that of Justices Stevens and Ginsburg reflect their broader textualist and purposivist approaches to statutory interpretation, respectively. Although I do not dwell on these underlying motivations and instead focus on their stated approaches to this narrower issue, such concerns no doubt inform the Court’s interpretive approach. My proposal seeks to draw on both sets of opinions, employing an interpretive methodology more akin to Justice Scalia’s in the service of the normative goals that motivated Justices Stevens and Ginsburg.

76. *Shady Grove*, 559 U.S. at 398.

77. *Id.*

dispositive question for Justice Scalia was whether the Federal Rule and state law purport to “answer the same question.”<sup>78</sup> If they did, the Federal Rule would govern so long as it really regulates procedure, per *Hanna* and *Sibbach*.

And yet, despite his previous efforts to avoid encroaching upon state interests in *Semtek*, Justice Scalia was evidently willing to do so in *Shady Grove*. Relying on “the statute’s clear text” and dismissing the (at least plausible) interpretations of the Rule taken by the Second Circuit and the dissent, Justice Scalia rejected the notion that Rule 23 could be interpreted to accommodate New York’s law.<sup>79</sup>

Commentators have lodged a variety of criticisms of Justice Scalia’s plurality opinion.<sup>80</sup> It embodies many of the problems with previous *Erie* conflicts jurisprudence that led us to this point in the first place. To begin, it lacks any formal canon or doctrine to constrain the interpretive preferences of the particular court reviewing each case (here, plain textual interpretation). This is a particular problem in *Erie* cases, where uniformity is among the key interests at stake. Justice Scalia’s ability to interpret the text of vexing statutes and rules aside, we should be wary of leaving *Erie* conflicts questions to the unguided instincts of individual courts. The Supreme Court’s—let alone lower courts’—track record in such cases leaves much to be desired in terms of consistency and respect for federalism.<sup>81</sup> Combined with its strict application of the *Hanna-Sibbach* test, this unguided interpretive approach is part of the reason that *Erie* jurisprudence is so fractured and that state substantive law has so often yielded to the Federal Rules when it need not have.

Justice Stevens’s concurrence similarly laid out the *Walker* ordering of conflicts and REA analysis as components of a “two-step framework” but then proceeded to conduct the steps largely contemporaneously.<sup>82</sup> His approach is worth examining in detail for its ambitious articulation of why avoidance of *Erie* conflicts is desirable and its deep attentiveness to federalism and the separation of

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78. *See id.* at 399.

79. *Id.* at 402. Justice Scalia’s analysis of the text of Rule 23 was terse, quickly determining the Rule’s plain textual meaning and then dismissing counterarguments in turn. “By its terms . . . Rule 23 provides a one-size-fits-all formula for deciding the class-action question.” *Id.* at 398-99.

80. *See, e.g.*, Bauer, *supra* note 44, at 957-69 (critiquing the plurality opinion for failing to follow its rhetoric of restraint by deferring to the purposes of state procedural laws to avoid conflicts); Burbank & Wolff, *supra* note 37, at 64-65 (critiquing Justice Scalia’s unwillingness to entertain the possibility of a more limited scope for Rule 23 or evaluate its effects on state substantive rights).

81. *See supra* Section I.A.

82. *Shady Grove*, 559 U.S. at 421 (Stevens, J., concurring in part and concurring in the judgment).

powers. Justice Stevens differed from Justice Scalia on two counts: the interpretation of the REA's second clause and the value of avoidance in such cases. First, Justice Stevens thought that "an application of a Federal Rule that effectively abridges, enlarges, or modifies a state-created right or remedy violates" the REA, even if the Rule is arguably procedural under *Hanna* and *Sibbach*.<sup>83</sup> For Justice Stevens, the determination of Rule validity rested on "whether the state law actually is part of a State's framework of substantive rights or remedies" (even if it is facially procedural).<sup>84</sup> This reading was intended to give meaning to both the text and original intent of the REA, an effort which faced a potential problem in light of *Hanna* and *Sibbach*.<sup>85</sup>

For this very reason, Justice Stevens endeavored to distinguish *Sibbach* on the grounds that it did not involve a conflict between the Federal Rules and state law, contesting the application of its holding in conflicts cases.<sup>86</sup> Instead of assessing conflict and then applying the *Hanna-Sibbach* test, Justice Stevens substituted his own *Erie* "two-step" analysis. First, he would assess the scope of the Federal Rule based on the substantive purposes of the state law, interpreting the Federal Rule narrowly to avoid conflict where possible.<sup>87</sup> Second, if no saving construction for the Federal Rule could be found, Justice Stevens would deny its application and allow state law to apply in federal court.<sup>88</sup>

Normatively, Justice Stevens's attempt to reinvigorate the limitations of the REA seems to have derived from two sources. The first was the federalism goal of protecting state substantive policy choices, whether embodied in facially substantive or facially procedural laws.<sup>89</sup> The second was to safeguard the separation

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83. *Id.* at 422.

84. *Id.* at 419.

85. See Burbank, *supra* note 45, at 1185-91. Justice Scalia nearly admitted as much, writing of Stevens's view that "[t]here is something to that" but ultimately concluding that "*Sibbach* has been settled law, however, for nearly seven decades." *Shady Grove*, 559 U.S. at 412-13.

86. See *Shady Grove*, 559 U.S. at 427-28 (Stevens, J., concurring in part and concurring in the judgment).

87. See *id.* at 422-23 ("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.").

88. *Id.* at 423. Whether the second step is truly a separate step or a consequence of the first is debatable, but not material to the analysis here. It also raises the question of the availability of as-applied challenges in REA cases, left open by Justice Stevens's divergence from the plurality on that matter. See generally Catherine T. Struve, *Institutional Practice, Procedural Uniformity, and As-Applied Challenges Under the Rules Enabling Act*, 86 NOTRE DAME L. REV. 1181 (2011) (favoring Justice Stevens's approach to as-applied challenges).

89. See *Shady Grove*, 559 U.S. at 418-20 (Stevens, J., concurring in part and concurring in the judgment).

of powers and limit the Court's ability to unnecessarily displace state law. Although "Congress may have the constitutional power to prescribe procedural rules that interfere with state substantive law in any number of respects, that is not what Congress has done."<sup>90</sup> Instead, Congress has "struck a balance" in which the "Enabling Act's limitation does not mean that federal rules cannot displace state policy judgments; it means only that federal rules cannot displace a State's definition of its own rights or remedies."<sup>91</sup> The upshot is that Justice Stevens recognized that the REA is at most an incomplete delegation of Congress's rulemaking power to the Court and that some zone of state substantive law lies beyond the Court's delegated power. The question is how to identify that zone and then to police it.

The second way in which Justice Stevens differed from Justice Scalia was his agreement with Justice Ginsburg's dissent that the Court should adopt narrow readings of Federal Rules to avoid conflict with state substantive interests protected by the REA.<sup>92</sup> He even went so far as to propose the equivalent of a presumption against preemption for *Erie* conflicts. As the Justice explained, even if Congress can displace state procedural law, "we should generally presume that it has not done so."<sup>93</sup> This presumption against Rule preemption was explicitly premised on the limits of REA delegation, which Justice Stevens noted "evinces the opposite intent" of a congressional purpose to preempt state law.<sup>94</sup>

Justice Ginsburg's dissent was equally deferential to state interests and relied on similar interpretive methods to Justice Stevens's. Her intention was "to interpret Federal Rules with awareness of, and sensitivity to, important state regulatory policies," pushing back against the consequences of *Hanna*'s holding.<sup>95</sup> To that end, her dissent traces the Court's long pre-*Hanna* history of "vigilantly read[ing] the Federal Rules to avoid conflict with state laws."<sup>96</sup> Unlike Justice Stevens, however, who focused primarily on the substantive purpose and function of the state law, Justice Ginsburg employed an approach that was fundamentally about balancing federal and state interests. "[W]e have avoided immoderate interpretations of the Federal Rules that would trench on state

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90. *Id.* at 417-18.

91. *Id.* at 418.

92. *See id.* at 430 (Ginsburg, J., dissenting).

93. *Id.* at 422 (citing the presumption against preemption as applied in *Wyeth v. Levine*, 555 U.S. 555, 574-75 (2009)).

94. *Id.*

95. *Id.* at 437 (Ginsburg, J., dissenting).

96. *Id.* at 439.

prerogatives *without serving any countervailing federal interest.*<sup>97</sup> She focused less on the statutory boundaries of the REA than Justice Stevens did and took a more functionalist approach to the protection of state interests. It was essentially an avoidance approach to *Erie* conflicts but one that relied on substantive-interest balancing to execute its default presumption against conflict.

My proposed canon has much in common with both *Shady Grove*'s concurrence and dissent. In Part III, I address my qualms with these approaches and why I believe an *Erie* avoidance canon can better ensure that the Federal Rules are “read in light of federalism concerns.”<sup>98</sup>

## 2. Ordering *Erie*: Conflicts and REA Analysis

Before reaching the thrust of my argument, it is important to settle two threshold matters: (1) the proper ordering of the conflicts and REA analyses in assessing *Erie* questions; and (2) the relevant focus of the substance/procedure analysis. The Court has been relatively consistent on the order of these questions since *Walker* (in rhetoric, if not in practice). Indeed, only *Gasperini* did not at least pay lip service to the *Walker* two-step.<sup>99</sup> Similarly, since *Hanna*, the Court has always focused on whether the relevant Federal Rule—as opposed to the relevant state law—is procedural (Justice Stevens notwithstanding). At least one circuit, however, has questioned both trends. This circuit either reverses the order of the analysis or takes Justice Ginsburg's substance-based approach to assessing conflicts, discussing substance and scope together.<sup>100</sup> Meanwhile, other lower courts have continued to follow *Walker*'s ordering, generating a circuit split that could pose challenges in future *Erie* cases.<sup>101</sup>

The substance-then-conflicts ordering, as well as approaches that assess them contemporaneously, should be rejected for four reasons. First, it is conceptually questionable—not to mention difficult to square with the text and intent of the Rules Enabling Act—to ascribe substantive content to a Federal Rule for conflicts purposes before labeling it procedural under *Hanna*.<sup>102</sup> And the Court

97. *Id.*

98. *Id.* at 431 (Stevens, J., concurring in part and concurring in the judgment); see *infra* Section III.D.

99. See *supra* Section I.A.

100. See *Adelson v. Harris*, 774 F.3d 803, 809 (2d Cir. 2014); *Liberty Synergistics Inc. v. Microflo Ltd.*, 718 F.3d 138, 153 (2d Cir. 2013); see also *Makaeff v. Trump Univ., LLC*, 715 F.3d 254, 273 (9th Cir. 2013) (Kozinski, C.J., concurring).

101. See *Godin v. Schencks*, 629 F.3d 79, 91-92 (1st Cir. 2010); *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 972-73 (9th Cir. 1999).

102. See *supra* Section I.A.

has *never* invalidated a Federal Rule for violating the REA's prohibition on Rules that alter substantive rights.<sup>103</sup> I take my canon's logical compatibility with *Hanna* and *Sibbach* at the second step of *Erie* analysis as an advantage, especially without any voice on the Court pushing back against the *Hanna-Sibbach* test, as Justice Stevens had.

One possible answer to this objection is *Hanna's* observation that there exists "congressional power to make rules governing the practice and pleading in [federal] courts, which in turn includes a power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either."<sup>104</sup> One could argue that this allows courts to impute substantive content to "procedural" Rules without running afoul of the REA. But on the *Hanna* Court's own terms, this power resides with Congress, not the Court. That raises the question of the extent of the rulemaking delegation in the REA. Where the scope of a Rule is sufficiently ambiguous to merit assessment of conflict, it creates separation-of-powers issues to assume the Court can exercise Congress's full power to give a Rule expansive, substantive effect or to assume that Congress intended the Rule to be preemptive.<sup>105</sup> Congress approves most rules by inaction; "to draw any inference of tacit approval from nonaction by Congress is to appeal to unreality."<sup>106</sup>

Second, the substance-then-conflicts ordering obscures the distinction between *Erie* analysis where there is a federal statute or Federal Rule on point and where there is not. This is often referred to as the "guided" vs. "unguided" *Erie* choice.<sup>107</sup> Following *Hanna*, whether a state law is substantive within the meaning of *Erie* is relevant only *after* a court has determined that the state law does not conflict with a federal statute or Rule and thus that the question is governed

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103. See Burbank & Wolff, *supra* note 37, at 41 (observing that "the Court has never held a Federal Rule invalid"); Bernadette Bollas Genetin, *Reassessing the Avoidance Canon in Erie Cases*, 44 AKRON L. REV. 1067, 1095 (2011); Struve, *supra* note 19, at 1149.

104. *Hanna v. Plumer*, 380 U.S. 460, 472 (1965).

105. Cf. Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2120 (2016) (reviewing ROBERT A. KATZMANN, *JUDGING STATUTES* (2014)) (arguing that "[w]hen courts apply doctrines that allow them to rewrite the laws (in effect), they are encroaching on the legislature's Article I power"). The same logic applies here. Whether understood as an encroachment on Congress's Article I legislative powers (that enable it to displace state law) or its Article I and Article III powers to create inferior federal courts (from which the delegated rulemaking power derives), judicial interpretations that broaden Federal Rules so expansively that they displace state substantive law in ways that are not textually unambiguous run up against separation-of-powers concerns.

106. *Sibbach v. Wilson & Co.*, 312 U.S. 1, 18 (1941) (Frankfurter, J., dissenting).

107. See *Hanna*, 380 U.S. at 471; see also Ely, *supra* note 35, at 698.

by the Rules of Decision Act.<sup>108</sup> Otherwise, the state law and its substance are not at issue.

Third, this view represents a questionable reading of the case law going back to *Erie* itself. In his *Makaeff v. Trump University* concurrence, Chief Judge Kozinski began from the premise that “the question of a conflict only arises if the state rule is substantive; state procedural rules have no application in federal court.”<sup>109</sup> For this proposition, he cited *Erie*’s point that “the law to be applied in any [diversity] case is the law of the State’ except for ‘matters governed by the Federal Constitution or acts of Congress.’”<sup>110</sup> But this assumes away the question posed by the conflicts stage: if there is no Federal Rule on point, it cannot be fairly said that the matter is governed by Congress. As Justice Stevens put it: “If the federal rule does not apply or can operate alongside the state rule, then there is no ‘Ac[t] of Congress’ governing that particular question.”<sup>111</sup>

Fourth, there are substantial practical concerns—in particular judicial economy and risk of error—that counsel against resort to substantive-interest analysis unless absolutely necessary.<sup>112</sup> For these reasons, we ought to stick with the *Walker* ordering for *Erie* analysis: conflicts first, without substance, then REA. But we are still left with *how* to assess the existence of conflicts in the first stage of the analysis. That is the question to which I turn in Parts II and III.

## II. THE ROLE OF STATUTORY INTERPRETATION: FEDERALISM AND AVOIDANCE

Since the passage of the Rules Enabling Act, *Erie* has presented courts with a troublesome tension. They are tasked with balancing the uniformity of federal civil procedure against federalism and state autonomy, as well as against anti-forum shopping and vertical equity concerns.<sup>113</sup> Courts have struggled to balance these values because they inevitably conflict with each other. Any decision that preserves federal uniformity leaves less room for the operation of state law,

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<sup>108</sup>. See *Hanna*, 380 U.S. at 471.

<sup>109</sup>. *Makaeff v. Trump Univ., LLC*, 715 F.3d 254, 273 (9th Cir. 2013) (Kozinski, C.J., concurring).

<sup>110</sup>. *Id.* (quoting *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938)).

<sup>111</sup>. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 421 (2010) (Stevens, J., concurring in part and concurring in the judgment).

<sup>112</sup>. See *infra* Section III.B.

<sup>113</sup>. See generally Bauer, *supra* note 6 (discussing how choice of law principles can inform *Erie* doctrine given *Erie*’s goals of, inter alia, promoting uniformity, protecting state interests, and discouraging forum shopping); Ely, *supra* note 35 (arguing that courts have struggled to balance *Erie*’s competing values, in part because *Erie* is not a single doctrine but rather an amalgam of three distinct standards embracing these values to differing extents).



and vice versa. And the exact constitutional source of *Erie*'s holding has long been contentious, making it difficult to set clear boundaries in the service of *Erie*'s federalism value.<sup>114</sup> This ambiguity is one reason why structural values like federalism are often underenforced, including in the *Erie* context.<sup>115</sup>

After a period of disregarding the federal uniformity interest after *Sibbach*, the Court's *Erie* jurisprudence turned sharply toward strict enforcement of that interest and relative neglect of federalism.<sup>116</sup> Indeed, the main effect of *Hanna* has been to create a structural presumption in favor of the federal uniformity interest where the federal procedure in question is a rule promulgated under the Rules Enabling Act. Much of the work of the Court in *Semtek* and *Gasperini*, and of the concurrence and the dissent in *Shady Grove*, was to find a counterweight to *Hanna*'s heavy thumb on the scale.

In this Part, I argue that statutory interpretation—in particular a form of values-based avoidance—is the appropriate tool to address this problem.<sup>117</sup>

#### A. *The Expression of Constitutional Values in Statutory Interpretation*

Statutory interpretation seeks to provide rules and logic to guide judges' decisions in instances of ambiguity, particularly where that ambiguity has created

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114. *Erie* certainly implicates the Tenth Amendment at a general level, but that fact has proven insufficient to resolve these issues. Neither the Amendment nor the REA defines what powers remain reserved to the states, raising the same question courts have struggled to answer in *Erie* cases. Cf. Samuel Issacharoff, *Federalized America: Reflections on Erie v. Tompkins and State-Based Regulation*, 10 J.L. ECON. & POL'Y 199, 210-11 (2013) (questioning the Tenth Amendment as the source of *Erie*'s holding).

115. See William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 630-31 (1992) (pointing out the underenforcement of "structural" constitutional values, like federalism, relative to enumerated individual rights); Ernest A. Young, *Popular Constitutionalism and the Underenforcement Problem: The Case of the National Healthcare Law*, 75 LAW & CONTEMP. PROBS. 157, 158-59 (2012) (observing that, like some other constitutional values, "[f]ederalism is . . . underenforced in current law").

116. See Burbank & Wolff, *supra* note 37, at 32 ("While expressing admiration for the Court's attempt to prevent the frustration of valid federal law under the cloud of the Court's prior *Erie* jurisprudence, Justice Harlan expressed concern that it had moved 'too fast and far in the other direction,' effectively insulating the Federal Rules from challenge for improperly infringing on state lawmaking prerogatives." (quoting *Hanna v. Plumer*, 380 U.S. 460, 476 (1965) (Harlan, J., concurring)); Ely, *supra* note 35, at 720.

117. See ESKRIDGE ET AL., *supra* note 22, at 546-47 (discussing federalism and preemption canons); Vermeule, *supra* note 23, at 1948-49 (discussing the constitutional avoidance canon).

inconsistencies or other troublesome results.<sup>118</sup> The *Erie* conflicts discussed in the Introduction present such a scenario: where the text and Advisory Committee Notes for a Federal Rule will support more than one plausible reading, courts are faced with an ambiguity of tremendous import and no established methodology for resolving it.<sup>119</sup> This interpretive gap presents a problem, as the three-way split in *Shady Grove* demonstrates, but also an opportunity to develop a canon that serves values implicated by, but underenforced in, current *Erie* jurisprudence.

### 1. Values-Based Statutory Interpretation

Statutory interpretation is often an ideal place to inject constitutional values into our jurisprudence.<sup>120</sup> As William Eskridge has written, statutory interpretation is both a more frequent activity than constitutional review and a less politically fraught endeavor.<sup>121</sup> It is also a less risky one from the perspective of error correction: while undesirable interpretations can be revised by statutory override (or rulemaking), statutes that fall on the wrong side of constitutional review cannot be revived.<sup>122</sup> Suffusing fundamental constitutional values into courts' everyday interpretation of statutes and Rules ensures these values remain relevant.

The case for values-based statutory interpretation is particularly strong in the context of *Erie* questions because common critiques of statutory interpretation are less salient when it comes to the Federal Rules.<sup>123</sup> The countermajoritarian difficulty presents less of a concern because the Rules are already promulgated by the Supreme Court under the REA's delegation.<sup>124</sup> Congress assents to

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118. See Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as "Law" and the Erie Doctrine*, 120 *YALE L.J.* 1898, 1970 (2011) ("[S]tatutory interpretation methodology might be understood as a set of rules that provides courts with a reasoning process.").

119. See *supra* note 38 and accompanying text.

120. See Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 *HARV. L. REV.* 405, 459 (1989) ("Interpretive principles are often a product of constitutional norms.").

121. See William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 *U. PA. L. REV.* 1007, 1017 (1989).

122. See JOHN HART ELY, *DEMOCRACY AND DISTRUST* 4 (1980).

123. See Eskridge, *supra* note 121, at 1063 (articulating the countermajoritarian objection to values-based statutory interpretation).

124. Critically, the Rules themselves are not statutes and do not come with the same presumption of supremacy and preemptive power, even if they have the force of law. They are not products of bicameralism and presentment, and they lack the political safeguards of the congressional legislative process. Justice Frankfurter was clear on this point in *Sibbach*: "Plainly the Rules are not acts of Congress and cannot be treated as such." *Sibbach v. Wilson & Co.*, 312 U.S. 1,

nearly all Rules without a vote, so the risk of undercutting democratic legitimacy is low.<sup>125</sup>

In the specific context of assessing *Erie* conflicts, construction of the Rules does not pit the Court's interpretation against the legislature's intent. (If anything, it is likely to be the Advisory Committee's or the Court's intent that is in question.)<sup>126</sup> The choice is between the application of Federal Rules or state law, which will often originate in state legislatures. Democratically speaking, narrow interpretations of the Federal Rules are on sounder footing than the most criticized constructions of statutes (those that veer away from congressional intent), because narrow Rule interpretations often preserve state legislative intent.

Furthermore, federalism is already among the constitutional values at work in our canons of statutory interpretation, so it is a ready candidate for use in the *Erie* context.<sup>127</sup> I will not belabor the general point that federalism is a value of constitutional magnitude; much ink has been spilled justifying the importance of federalism and its role in safeguarding our democracy.<sup>128</sup> But it is also among the structural constitutional values that are most often underenforced by courts.<sup>129</sup> This is particularly true for *Erie* questions, where federalism as a background value is pitted against the statutory aim of uniformity in the REA.<sup>130</sup>

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18 (1941) (Frankfurter, J., dissenting); see also Struve, *supra* note 19, at 1125 (comparing Federal Rules to agency rules but noting that they have even less claim to democratic accountability because the Court is less accountable than the President and executive agencies are); Thomas, *supra* note 4, at 257 n.352 ("Confusion regarding the effect of the federalism presumptions upon the meaning of Rules themselves appears to flow from an erroneous theoretical assumption that the Rules themselves have the same status as statutes . . .").

125. See Burbank, *supra* note 45, at 1018-19; Thomas D. Rowe, Jr., *Sonia, What's a Nice Person Like You Doing in Company Like That?*, 44 CREIGHTON L. REV. 107, 108 (2010) (noting the "democratic deficit" in the rulemaking process).

126. See *infra* Section III.B.3.

127. See Eskridge, *supra* note 121, at 1023-26; Sunstein, *supra* note 120, at 469 ("Although no substitute for an inquiry into the relationship between state and federal law in the particular context, this principle [of federalism] will frequently aid interpretation in disputed cases.").

128. Among the commonly mentioned reasons relevant to *Erie* are the general interest in diffusion of sovereign power and the role of states as innovators, as competitors in a policy market, and as guarantors of legal rights. When federal courts displace state law with Federal Rules, they cut against all of these rationales. See Akhil Reed Amar, *Five Views of Federalism: "Converse-1983" in Context*, 47 VAND. L. REV. 1229, 1233-46 (1994); Jenna Bednar & William N. Eskridge, Jr., *Steadying the Court's "Unsteady" Path: A Theory of Judicial Enforcement of Federalism*, 68 S. CAL. L. REV. 1447, 1467-70 (1995); Heather K. Gerken, *Our Federalism(s)*, 53 WM. & MARY L. REV. 1549, 1552-56 (2012); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 3-10 (1988).

129. See Young, *Ordinary Diet*, *supra* note 26, at 319 ("[F]ederalism . . . has been underenforced at least since 1937 . . .").

130. See Burbank, *supra* note 45, at 1032-33.

2. *Erie's Lost Federalism*

The question, then, is whether federalism is both so deeply rooted in *Erie* and so underserved by the Court's current approach that it merits an interpretive canon. The answer is "yes." The *Erie* decision itself reflects a deep-seated commitment to federalism. The *Erie* Court intended to overturn *Swift v. Tyson's* invitation for federal courts to disregard state law in favor of general federal common law.<sup>131</sup> It is for this reason that Ernest Young has called *Erie* "the most important federalism decision of the twentieth century."<sup>132</sup> Writing for the majority in *Erie*, Justice Brandeis bemoaned the fact that "state decisions . . . were disregarded"<sup>133</sup> under *Swift* and emphatically concluded that "[e]xcept in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State."<sup>134</sup> *Erie's* federalism was manifest in the Court's early *Erie* cases that read the Rules of Decision Act to be highly protective of state policy choices and narrowly interpreted Federal Rules to avoid *Sibbach's* sword.<sup>135</sup>

In addition to *Erie's* traditional federalism-based concern with preserving the effect of state policies in federal court, *Erie* also reflected a deeper notion of federalism bound up in the separation of powers and constitutional structure. In *Erie*, Justice Brandeis quoted Justice Holmes's judgment that general federal

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<sup>131.</sup> See *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 18-19 (1842); see also Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 504-05 (1954) (describing *Swift v. Tyson* and the overlapping federal and state systems of substantive law it created).

<sup>132.</sup> Young, *supra* note 8, at 18.

<sup>133.</sup> *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 76 (1938).

<sup>134.</sup> *Id.* at 78.

<sup>135.</sup> See *Guar. Tr. Co. v. York*, 326 U.S. 99, 110 (1945) ("*Erie R.[R.] Co. v. Tompkins* has been applied with an eye alert to essentials in avoiding disregard of State law in diversity cases in the federal courts. A policy so important to our federalism must be kept free from entanglements with analytical or terminological niceties."); see also Ely, *supra* note 35, at 696 ("Beginning in the mid-1940's and continuing into the late 1950's, . . . the Court described *Erie* as considerably more protective of state prerogatives[,] . . . requiring the application of state law whenever applying federal law instead might generate a different outcome."). See generally *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 555-57 (1949) (applying a New Jersey law requiring a shareholder to post bond for expenses, even though the Federal Rules did not require posting bond); *Ragan v. Merchs. Transfer & Warehouse Co.*, 337 U.S. 530, 533-34 (1949) (applying Kansas's rules, rather than the Federal Rules, for determining when a statute of limitations has begun to run); *Palmer v. Hoffman*, 318 U.S. 109, 117 (1943) (holding that the "question of establishing contributory negligence is a question of local law which federal courts in diversity of citizenship cases must apply" (citation omitted)).

common law under *Swift v. Tyson* was “an unconstitutional assumption of powers by courts of the United States.”<sup>136</sup> What, exactly, was that assumption? Although *Erie*’s exact constitutional argument is notoriously unclear,<sup>137</sup> Justice Brandeis presumably meant that because “Congress has no power to declare substantive rules of common law applicable in a state . . . [a]nd no clause in the Constitution purports to confer such a power upon the federal courts,” the exercise of this power was unconstitutional.<sup>138</sup>

This seems to be a familiar federalism, but decades of scholarly inquiry have helped identify and hone a second form of “judicial” or “legal process” federalism undergirding *Erie*. The first clause of Justice Brandeis’s pronouncement—that *Congress* cannot declare rules of substantive common law applicable in the states—has become less and less true over time as the Court has affirmed exercises of congressional authority that extend into far-reaching areas within the states.<sup>139</sup> But expansive interpretations of Congress’s powers have no direct bearing on Justice Brandeis’s second claim—that *federal courts* have no power to declare substantive law within the states.<sup>140</sup>

In this way, *Erie* highlights a fundamental tenet of the separation of powers: that federal judicial lawmaking authority is not coextensive with Congress’s lawmaking authority.<sup>141</sup> Congress retains the legislative power and with it the power to displace state law (or to delineate areas where federal courts can do so).<sup>142</sup> Although Congress has made law in the area of federal court procedure by dele-

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136. *Erie*, 304 U.S. at 79 (quoting *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)).

137. See Clark, *supra* note 9, at 1289 (“The constitutional rationale of *Erie Railroad Co. v. Tompkins* has remained elusive for almost seventy years.” (footnote omitted)).

138. *Erie*, 304 U.S. at 78.

139. See Kevin M. Clermont, *The Repressible Myth of Shady Grove*, 86 NOTRE DAME L. REV. 987, 996-97 (2011); Gluck, *supra* note 8, at 1997-99; Issacharoff, *supra* note 114, at 212.

140. To the extent that federal courts do wield such power, it is only when they are interpreting law in areas where Congress has already exercised its enumerated powers. See Young, *Ordinary Diet*, *supra* note 26, at 282.

141. See Clark, *Erie’s Constitutional Source*, *supra* note 9, at 1302 (arguing that absent prior adoption of a “Law of the Land” through constitutionally legitimate sources, federal courts lack the constitutional authority to displace state law under the Supremacy Clause, which is the “exclusive basis for overriding state law”); Young, *supra* note 8, at 69.

142. See Young, *supra* note 9, at 1659.

gating its Article III rulemaking authority to the Court under the REA, that statute limits the scope of the delegation on its face.<sup>143</sup> And that limitation was reinforced by the REA's 1988 amendments, which prescribe specific procedures, including public notice and comment, for rulemaking.<sup>144</sup>

From the perspective of federalism, this separation-of-powers issue matters for two reasons. First, avoiding expansive Rule interpretations, where others are at least plausible, channels displacement of state law through the formal REA process in which the political safeguards of federalism (i.e., state representation in Congress) have some opportunity to function.<sup>145</sup> Second, just as the many veto gates and barriers to federal lawmaking generally constitute a constraint on federal action, forcing rule broadening to go through the formal REA process imposes a far higher burden than allowing broadening to happen through adjudication.<sup>146</sup>

But *Erie* has not looked like a bastion of federalism for quite some time. *Hanna* constituted a turning point in the Court's *Erie* jurisprudence that robbed it of much of its concern for federalism, at least once state law has been determined to conflict with a (valid) Federal Rule.<sup>147</sup> Justice Harlan observed as much in his concurrence in *Hanna*, explaining that *Erie* was "one of the modern cornerstones of our federalism . . . . The Court weakens, if indeed it does not submerge, this basic principle by . . . setting up the Federal Rules as a body of law inviolate."<sup>148</sup> The enforcement of federalism and the separation of powers as bulwarks against the displacement of state law has been relegated to the conflicts stage of *Erie* analysis when dealing with a Federal Rule. It follows that the role of these paramount concerns is wholly dependent on the conflicts analysis preferences of the court sitting in review.<sup>149</sup> As we saw in *Shady Grove*, that plainly is

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143. See Kelleher, *supra* note 7, at 72-76; Paul J. Mishkin, *Some Further Last Words on Erie—The Thread*, 87 HARV. L. REV. 1682, 1686-87 (1974); *infra* Section III.B.1.

144. Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 401, 102 Stat. 4642, 4648 (1988) (codified at 28 U.S.C. §§ 2073-2074 (2018)); see *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997) ("Courts are not free to amend a rule outside the process Congress ordered [in §§ 2073-2074] . . . ."); Struve, *supra* note 19, at 1126-30.

145. See Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1414 (2001).

146. Cf. Young, *supra* note 8, at 115 (discussing the higher burden that multiple veto gates impose on federal lawmaking).

147. See *supra* Section I.A.2.

148. *Hanna v. Plumer*, 380 U.S. 460, 474-76 (1965) (Harlan, J., concurring).

149. See *supra* Part I.

not enough and, in any case, has opened the door to unnecessary circuit splits caused by the application of divergent conflicts methodologies.<sup>150</sup>

### B. Avoidance

We need an interpretive methodology for *Erie* conflicts that reflects concern for federalism while minimizing the opportunity for subjectivity and error. An avoidance canon is suited to assuaging such concerns.<sup>151</sup> Interpretive avoidance involves the application of a default rule in favor of one sort of interpretation over another where doing so avoids the need to resolve an issue that would otherwise be implicated, such as the constitutionality of a constitutionally suspect interpretation of a statute.<sup>152</sup>

The theoretical underpinnings of avoidance canons as a form of default rule are twofold. First, there is the “cardinal principle” to “save and not to destroy” received from Justice Hughes’s opinion in *NLRB v. Jones & Laughlin Steel Corp.*<sup>153</sup> This principle derives from our constitutional norm of legislative supremacy and seeks to minimize the extent to which unelected judges substitute their judgment for that of elected bodies.<sup>154</sup> Second, avoidance is rooted in the inherent fallibility of human judges, the omnipresent risk of error where open-ended questions are to be decided, and the desire to avoid that risk where possible.<sup>155</sup>

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150. See *supra* Introduction.

151. See, e.g., Barrett, *supra* note 23, at 118.

152. See Vermeule, *supra* note 23, at 1948-49. Vermeule notes that there are multiple types of interpretive avoidance, including strong and weak forms (or “modern” and “classical” forms, as he describes them). Strong avoidance asks only whether an interpretation *might* be unconstitutional without actually deciding the question of constitutionality before defaulting to the clearly constitutional reading; weak avoidance requires actually deciding that one interpretation would be unconstitutional before defaulting to the other. *Id.* Avoidance, especially of the strong variety, is not without its critics. Many scholars have noted that strong avoidance may lead judges to construe statutes in ways Congress never intended to avoid alleged constitutional infirmities. See, e.g., HENRY J. FRIENDLY, *Mr. Justice Frankfurter and the Reading of Statutes*, in *BENCHMARKS* 196, 209-12 (1967); Richard A. Posner, *Statutory Interpretation – in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 816 (1983). Although this poses problems for legislative supremacy, these avoidance problems are less salient in the context of the canon I propose here. See *supra* notes 123-125 and accompanying text.

153. 301 U.S. 1, 30 (1937); see Vermeule, *supra* note 23, at 1952-53.

154. See Robert L. Stern, *Separability and Separability Clauses in the Supreme Court*, 51 HARV. L. REV. 76, 96-101 (1937).

155. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 200 (2d ed. 1986); Kloppenberg, *supra* note 23, at 1015-16.

To briefly draw a few parallels to the present subject, the conflicts stage of *Erie* analysis implicates the same concerns for protecting legislative supremacy and avoiding error. In determining that a Federal Rule conflicts with state law, a court places the two in zero-sum competition. Once a court proceeds to the REA analysis stage, one of the two will not be applied at all. By contrast, the adoption of a reading that avoids the conflict allows both the Federal Rule and state law to have at least partial effect. This follows Justice Hughes’s “cardinal principle” by saving rather than destroying the state law. Further, the state laws in question are themselves often the product of state legislative action.<sup>156</sup> Finally, the lack of a consistent and coherent *Erie* conflicts framework creates the same potential for error and bias. Today, a reviewing court at the conflicts stage may apply whatever methodology it chooses. We know how that goes.<sup>157</sup>

### III. A FEDERALISM-BASED AVOIDANCE CANON FOR *ERIE* QUESTIONS

The challenge, then, is what canon or default rule can be brought to bear on these *Erie* problems. In this Part, I take up that challenge by proposing a federalism-based avoidance canon, offering five arguments in support and assessing the shortcomings of a variety of counterarguments and existing alternatives.

#### A. Applying a Federalism-Based Avoidance Canon

My federalism-based avoidance canon is simple: at the conflicts stage, judges should ask whether there is a reading of the Federal Rule that can be plausibly supported by its text and the Advisory Committee Notes that does not conflict with the state law in question based on the plain textual meaning of that law. If the answer is “yes,” the court sitting in diversity should default to the reading that does not conflict with state law. This canon would rely on the existing presumption against preemption. It would require either clear textual intent to preempt state law in a given field of procedure (e.g., language indicating that a list of procedural elements is exhaustive and cannot be supplemented) or a finding by a court that there is no plausible reading of the Federal Rule under which the state law can continue to operate.<sup>158</sup>

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156. See Hart, *supra* note 131, at 492, 534; Thomas, *supra* note 4, at 207-14 (discussing the legislative action and intent underlying the rules at issue in *Gasperini* and *Shady Grove*).

157. See *supra* Part I.

158. Cf. Young, *Ordinary Diet*, *supra* note 26, at 271-72 (discussing clear statement rules and the presumption against preemption). This is not to say the default outcome is completely rigid.



A court using this approach to interpret Rule 23, as in *Shady Grove*, would first consider whether the interpretation put forward by the dissent (and the Second Circuit) is plausible on the basis of the text and Advisory Committee Notes. The Committee Notes prior to 2003 said nothing about the scope of remedies, only that class certification hinged on “satisfaction of the terms” in the Rule providing the requirements for class actions.<sup>159</sup> The 2003 Notes added only that “proceedings to define the remedy may demonstrate the need to amend the class definition or subdivide the class.”<sup>160</sup> This suggests some relationship between class maintenance and remedies, but in no way precludes the dissent’s reading. Given that the answer to the first question is “yes,” the court would default to the reading not in conflict with state law, avoiding the need for REA analysis. That’s it.

*B. The Case for Federalism-Based Avoidance*

This simplified avoidance canon at the conflicts stage is far less methodologically complex than the avoidance models in either the concurrence or dissent in *Shady Grove*. It does not require deep analysis of the substantive goals embodied in Federal Rules or state law – only analysis of the Rule’s text and Advisory Committee Notes.<sup>161</sup> It is far less susceptible to individual discretion and error. In this

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Direct textual implication of sufficiently important federal interests, e.g., the Seventh Amendment interest in the provision of federal jury trials, could trump the default rule favoring application of state law. But this sort of trumping should not be done lightly. It would require direct textual evidence of an interest of sufficient magnitude to warrant state law displacement. (The federal uniformity interest would not be enough on its own.) If a federal interest is of sufficient magnitude to displace state law, it is not too much to ask of Rule drafters that they put some direct reference to that interest in the Rule’s text. *Cf.* *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525, 537-39 (1958) (highlighting “the influence of the Seventh Amendment” in trumping the application of state law). In any case, I do not expect this sort of trumping to be common given the manifestly procedural nature of most Federal Rules. More importantly, rules with textual hooks for vital federal interests are unlikely to be ambiguous with respect to whether they preempt state law. And under the regime I propose, more rules will include such textual evidence because of the *ex ante* incentive to make preemption clear.

159. FED. R. CIV. P. 23(c)(1) advisory committee’s notes to 1966 amendment.

160. FED. R. CIV. P. 23(c)(1) advisory committee’s notes to 2003 amendment.

161. The use of Committee Notes to supplement the text in assessing the meaning of Federal Rules is a well-established practice for the Court. *See* *Schiavone v. Fortune*, 477 U.S. 21, 31 (1986) (noting that when interpreting a Federal Rule of Civil Procedure, “the construction given by the Committee is of weight” (citation and internal quotation marks omitted)); *Miss. Publ’g Corp. v. Murphree*, 326 U.S. 438, 444 (1946) (using the Advisory Committee Notes to aid Rule interpretation and noting that “in ascertaining [the Federal Rules of Civil Procedure’s] meaning the construction given to them by the Committee is of weight”); *see also* *Class v.*

Section, I outline five additional arguments in favor of a generalized federalism-based conflict-avoidance canon for *Erie*.

1. *Consonance with Existing Canons: Constitutional Doubts and Antipreemption*

A federalism-based avoidance canon best comports with existing canons of statutory interpretation, given ongoing doubts about the scope of Congress’s delegation under the REA.<sup>162</sup> Congress’s power to regulate the practice and procedure of federal courts derives from its Article I and Article III powers to create lower federal courts and the implications of the Necessary and Proper Clause in the context of exercising those powers.<sup>163</sup> Although federal courts also have some inherent powers to regulate procedure, at least on a case-by-case basis, the Court has never defined the scope of these powers or indicated that they extend beyond case management to general procedural policymaking.<sup>164</sup>

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United States, 138 S. Ct. 798, 806 (2018) (using Advisory Committee Notes to interpret the Federal Rules of Criminal Procedure); *United States v. Vonn*, 535 U.S. 55, 64 n.6 (2002) (commenting that when interpreting the Federal Rules of Criminal Procedure, “[i]n the absence of a clear legislative mandate, the Advisory Committee Notes provide a reliable source of insight into the meaning of a rule”); *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 315-16 (1988) (citing Committee Notes in interpretation of the Federal Rules of Appellate Procedure); *Genetin*, *supra* note 103, at 1133-35; *Struve*, *supra* note 19, at 1152-69. In his dissent in *Class*, Justice Alito argued that Advisory Committee Notes are actually *better* than typical legislative history because they are formally integrated into the rulemaking process and submitted to each relevant institution along with proposed rules. 138 S. Ct. at 808 n.2. Most important, and distinguishing the use of the Committee Notes in the face of common critiques of legislative history in adjudication, the Notes are canonical. They are submitted in a defined context, rather than in multiple forms from multiple sources, as is the case for most legislative history. See Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church*, 50 STAN. L. REV. 1833, 1867-77 (1998) (discussing the challenges of volume and heterogeneity that raise comprehensiveness and salience problems for legislative history).

162. See *supra* Section II.A.2.

163. See *Hanna v. Plumer*, 380 U.S. 460, 472 (1965) (“[T]he constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) carries with it congressional power to make rules governing the practice and pleading in those courts, which in turn includes a power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either.”); *Kelleher*, *supra* note 7, at 62.

164. See *Chambers v. NASCO, Inc.*, 501 U.S. 32, 47 (1991) (defending courts’ “inherent power to . . . sanction”); *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812) (recognizing “[c]ertain implied powers,” such as the power to “fine for contempt—imprison for contumacy—inforce [sic] the observance of order,” which are “not immediately derived from statute”); see also *Young v. United States ex rel. Vuitton*, 481 U.S. 787, 799 (1987); *Burbank*, *supra* note 45, at 1115; *Kelleher*, *supra* note 7, at 65.

Whatever initial constitutional allocation of rulemaking power exists, the combination of uncertainty around the scope of REA delegation, the Court's precedents, and broader separation-of-powers concerns is sufficient to warrant a presumption against interpreting Federal Rules to displace state law under the existing constitutional-doubts and antipreemption canons.

First, whatever inherent rulemaking power the courts have does not include the ability to displace state law, especially where that law is at least arguably substantive.<sup>165</sup> This was the main holding of *Erie*: the making of general federal common law that displaces state law is "an unconstitutional assumption of powers by courts of the United States."<sup>166</sup> Further, as Paul Mishkin has pointed out, "states, and their interests as such, are represented in the Congress but not in the federal courts."<sup>167</sup> The political safeguards of federalism that justify Congress's power to displace state law through the exercise of its *enumerated* powers do not exist in courts' exercise of their *unenumerated* (and highly limited) rulemaking powers.<sup>168</sup> Nothing about our constitutional structure suggests that the Court, absent some specific grant of statutory authority, can act on its own to displace state substantive law. Where possible, the Court's ability to displace state law on its own should be curtailed.<sup>169</sup>

Second, Congress has delegated only a portion of its rulemaking power to the Court via the REA and conditioned that delegation on a set of defined processes.<sup>170</sup> On its face, the REA's delegation does not include the full extent of Congress's rulemaking power; it explicitly denies the Court rulemaking authority that would displace state law providing for substantive rights.<sup>171</sup> And the

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165. See Henry P. Monaghan, *Hart and Wechsler's The Federal Courts and the Federal System*, 87 HARV. L. REV. 889, 892 (1974) (book review) ("*Erie* is, fundamentally, a limitation on the federal court's power to displace state law absent some relevant constitutional or statutory mandate which neither the general language of [A]rticle III nor the jurisdictional statute provides.").

166. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 79 (1938) (quoting *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)); see *supra* Section II.A.

167. Mishkin, *supra* note 143, at 1685.

168. See generally Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954) (explaining the theory of safeguards for federalism embedded in the political process, especially Congress).

169. See Young, *Ordinary Diet*, *supra* note 26, at 279-80.

170. See *supra* Section II.A.

171. See Jonathan M. Landers, *Of Legalized Blackmail and Legalized Theft: Consumer Class Actions and the Substance-Procedure Dilemma*, 47 S. CAL. L. REV. 842, 849-55 (1974).

Act's legislative history confirms it was intended as only a partial delegation.<sup>172</sup> There is clearly some category of state substantive law beyond the reach of the Court's delegated powers.<sup>173</sup> Where the Court displaces that law, it is transgressing its constitutional boundaries by exercising powers held exclusively by Congress.

Third, the text of the REA itself is more concerned with where *not* to preempt state law than where preemption might be intended, although presumably preemption of state procedural law in federal court is implied. The second clause, barring Rules that "abridge, enlarge or modify any substantive right," is an antipreemptive carve-out.<sup>174</sup> The question of specific preemptive intent regarding procedure is thus delegated to the Court, and any intent to displace state law would have to be found in the relevant Rule's text. From a statutory perspective, the Court is on shaky ground when its Rules ostensibly preempt arguably substantive state law, especially when the Rule text itself is ambiguous. Because Rules are enacted by default if Congress does not object, ambiguous rules cannot be assumed to bear the imprimatur of congressional approval or preemptive intent.<sup>175</sup>

These three premises imply that the Court's existing constitutional-doubts and antipreemption canons support avoiding *Erie* conflicts under the REA by defaulting to plausible nonconflicting interpretations. Under the constitutional-doubts canon, courts interpret statutes to avoid readings that cast doubt on a statute's constitutionality.<sup>176</sup> Under the modern application of this doctrine, serious doubts are enough to trigger avoidance; an affirmative ruling of unconstitutionality is not needed.<sup>177</sup>

A Federal Rule that could alter substantive rights by displacing state substantive law raises constitutional doubts concerning the separation of powers because it may be beyond the scope of both the Court's inherent powers and its delegated powers under the REA.<sup>178</sup> Under a faithful application of the modern

172. See Burbank, *supra* note 45, at 1025.

173. See *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 422 (2010) (Stevens, J., concurring in part and concurring in the judgment); Mishkin, *supra* note 143, at 1686.

174. 28 U.S.C. § 2072(b) (2018); see Thomas, *supra* note 4, at 243-44.

175. See Thomas, *supra* note 4, at 242-50; *supra* note 124 and accompanying text.

176. See Vermeule, *supra* note 23, at 1949.

177. See *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (citing *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 499-501, 504 (1979)); see also Kloppenberg, *supra* note 23, at 1027-35.

178. The procedures for rule promulgation added in the 1988 amendments to the REA raise a separate concern. § 2073. If, as the Court stated in *Amchem Products, Inc. v. Windsor*, "[c]ourts are not free to amend a rule outside the process Congress ordered [in § 2073]," then adoption of

constitutional-doubts canon, such a reading should be abandoned when the Rule's text can support an alternative nonconflicting construction. With strict separation of the conflicts and REA stages of *Erie* analysis, it is both possible and advisable to cabin such doubts without affirmatively ruling on the constitutional issue.<sup>179</sup>

Suppose, though, that a court is unconvinced that these doubts rise to the level needed to trigger constitutional avoidance.<sup>180</sup> Canons holding that statutes should not be interpreted to preempt state law without clear intent (and, in some cases, a clear statement) provide additional reasons to default to nonconflicting readings.<sup>181</sup> Although the REA as a whole contemplates preemption of state procedural law in federal court, it explicitly disavows preemption of state substantive law.<sup>182</sup> Preemptive intent must be discernable in the text or structure of the Rule itself, or at least of the Rule's Advisory Committee Notes, if assuming congressional acquiescence is to be even remotely reasonable. Where Rules are ambiguous, that is not the case. This framework casts doubt upon the constitutional basis for displacement of state law by such Rules.<sup>183</sup> Where two plausible interpretations can be supported by a Rule's text and at least one does not preempt state substantive law, courts should choose the nonpreemptive reading. Thus, whichever existing canon is applied, adopting narrower, nonconflicting interpretations is proper.

## 2. *Protection of State Interests*

A presumption in favor of nonconflicting interpretations will better protect state interests. It hardly needs to be noted that the line between substance and

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interpretations that displace state law *where such application is neither clearly intended nor necessary* may also transgress the Court's statutory boundaries because they bypass the procedural limitations on Congress's delegation. 521 U.S. 591, 620 (1997); *see also* Struve, *supra* note 19, at 1126-30.

179. *See supra* Section I.B.

180. Although many, including Justice Stevens, would say they do. *See* Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 422 (2010) (Stevens, J., concurring in part and concurring in the judgment) (observing that only Congress has "the constitutional power 'to supplant state law' with rules that are 'rationally capable of classification as procedure'" (quoting *id.* at 406 (plurality opinion))).

181. *See* BFP v. Resolution Tr. Corp., 511 U.S. 531, 544 (1994); Gregory v. Ashcroft, 501 U.S. 452, 460 (1991); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 237 (1947).

182. *See supra* Section II.A.2.

183. *See* Thomas, *supra* note 4, at 242-45.

procedure is hazy.<sup>184</sup> What is more pertinent is that states clearly use arguably procedural laws to accomplish arguably substantive goals (and instantiate substantive rights), so an *Erie* approach that frequently overrides state law will necessarily undermine state policies and regulatory goals.<sup>185</sup> Prominent examples include rules barring the introduction of evidence of not wearing a seatbelt in contributory negligence claims and rules affecting all manner of tort and litigation reforms.<sup>186</sup> The substantial extent to which the REA—as construed by *Sibbach*, *Hanna*, and *Shady Grove*'s plurality opinion—facilitates displacement of these state regulatory policies necessitates an additional layer of protection. In a federalist system, protecting state interests matters.<sup>187</sup>

### 3. Consistency, Accuracy, and Judicial Economy

Default rules are generally more likely to produce consistent outcomes in like cases than is ad hoc judicial reasoning. Legal consistency breeds fairness and predictability,<sup>188</sup> both of which have been particularly lacking in the Court's *Erie* conflicts jurisprudence and lower court decisions.<sup>189</sup> More important, a default rule for *Erie* conflicts will not only be more consistent, but will also improve judicial economy while minimizing error.

First, interest-balancing approaches are particularly error-prone relative to a default rule. As Adrian Vermeule argues, where the resolution of legal questions depends on party-driven fact-finding, parsing voluminous materials, and assessing the ambiguous content of heterogeneous sources, the risk of error and of

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184. See *Shady Grove*, 559 U.S. at 419 (Stevens, J., concurring in part and concurring in the judgment); Kelleher, *supra* note 7, at 58-59.

185. See Kelleher, *supra* note 7, at 69 (“A legal rule can have both procedural and substantive purposes, and even if the animating policies of a rule ostensibly are procedural, it may have significant substantive implications, whether intended or not.”); Thomas, *supra* note 4, at 220 (“[S]tates use procedural tools to shape wide-ranging policy goals.”); Whitten, *supra* note 11, at 132 (“[S]tate legislatures often create procedural rules for reasons that have nothing to do with the sort of efficiency policies that normally underpin such rules. Rather, the reasons often embody policies that are directed at limiting the scope of claims, defenses, or remedies available for the violation of primary rights existing under state law.”).

186. See LARRY L. TEPLY & RALPH U. WHITTEN, *CIVIL PROCEDURE* 513 (4th ed. 2009); Lynch, *supra* note 12, at 285-86.

187. See *supra* note 128 and accompanying text.

188. See ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION* 219 (2006).

189. See *supra* Introduction and Part I.

decision-making based on judges' individual policy preferences will increase.<sup>190</sup> All of these factors are present in the interest-balancing approaches employed in *Shady Grove*. Indeed, the concurrence and dissent split on their readings of the legislative history of the New York provision at issue, which Justice Stevens admitted “d[id] not clearly describe” the provision’s operation.<sup>191</sup> Justice Stevens’s reference to what class action opponents supporting the law “may have felt”<sup>192</sup> and Justice Ginsburg’s invocation of the “most likely explanation”<sup>193</sup> for the statute’s wording are suggestive of the difficulties inherent in this approach.<sup>194</sup> Substantive purpose cannot be treated as a reliable barometer of scope for conflicts purposes.

Second, the specific institutional features of *Erie* conflicts raise the risk of judicial error. For better or worse, federal judges are creatures of the federal courts. They are relatively less familiar with state law and state political ecosystems than they are with federal law and politics. They are thus comparatively worse equipped for tasks that rely on knowledge of state law.<sup>195</sup> These problems are magnified when federal judges must fill in interpretive gaps based on judgments of legislative intent for political systems from which they are relatively removed. This difficulty is further compounded by the specific features of the state laws in many *Erie* cases. When the substantive goals of a law are distinct from its facially procedural operation, intent is especially hard to pin down. And when federal judges are tasked with balancing the state substantive interests they unearth against the federal interests embodied in Federal Rules, we should be vigilant about the impartiality of this weighing. Federal interests will usually hit closer to home for federal judges than state law concerns. And because the Federal Rules apply in all federal civil actions, while any given state law will arise in federal court only rarely, federal procedural uniformity will always make the jobs of federal judges easier.

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190. See Vermeule, *supra* note 161, at 1857-77. While Vermeule makes this argument in the context of the legislative history debates, his reasoning is generalizable.

191. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 433 (2010) (Stevens, J., concurring in part and concurring in the judgment).

192. *Id.* at 434.

193. *Id.* at 453 (Ginsburg, J., dissenting).

194. My point here is not a broad indictment of legislative history; it is to say (1) that judicial economy and error-risk concerns are heightened for statutes whose facially procedural content differs from their substantive ends and (2) that bearing these risks is not necessary when a default rule can accomplish the same normative goals.

195. See Guido Calabresi, *Federal and State Courts: Restoring a Workable Balance*, 78 N.Y.U. L. REV. 1293, 1300 (2003) (“[F]ederal courts often get state law wrong because federal judges don’t know state law and are not the ultimate decisionmakers on it.”); see also Young, *supra* note 8, at 55 (noting that “state courts . . . have a comparative advantage in construing state law”).

The federal-judge-heavy composition of the Rules Advisory Committees and Standing Committee, as well as the exclusively federal composition of the Judicial Conference, suggest at the very least that Federal Rules will reflect interests that resonate with federal judges. In some cases, federal judges presiding over diversity cases may have even been involved in promulgating the Rule at issue.<sup>196</sup> The same cannot be said for state law. These challenges to an interest-based approach to *Erie* conflicts, if one is concerned with federalism, make the inquiry a prime candidate for a default rule.

None of this is to say that default rules entirely eliminate normative preferences from adjudication. Rather, the point is that a default rule based on a transparent normative premise (in this case, federalism) can be applied more consistently and fairly than an ad hoc approach that leaves normative judgments to the balancing whims of the particular judges in each case.

#### 4. *Democratic Legitimacy and Error Correction*

Courts should default to nonconflicting constructions for a fourth reason: democratic legitimacy. State law is equally, if not more, democratically legitimate than the Federal Rules. In nearly all cases, the Federal Rules and amendments to them are produced through congressional *inaction* rather than meaningful legislative debate and vote.<sup>197</sup> This “democratic deficit” is not lost on commentators, but has mostly engendered arguments for a broader reading of the REA’s limitations on alteration of substantive rights.<sup>198</sup> Although, under *Erie*, “state law” comprises judge-made law as well as state statutes, nearly all of the complex *Erie* cases producing potential conflicts have involved statutes with more democratic (i.e., legislative) origins than the Federal Rules at issue.<sup>199</sup>

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196. See *Membership of the Committee on Rules of Practice and Procedure and Advisory Rules Committees*, U.S. CTS. (Mar. 16, 2018), [http://www.uscourts.gov/sites/default/files/2017\\_committee\\_roster.pdf](http://www.uscourts.gov/sites/default/files/2017_committee_roster.pdf) [<https://perma.cc/6XKR-DK9H>]; see also Thomas, *supra* note 4, at 249-50 (arguing that the Federal Rules are unlikely to reflect state interests and noting that, at the time of her writing, there was only one state judge on the Standing Committee).

197. See Struve, *supra* note 19, at 1104; *supra* note 106 and accompanying text.

198. See Rowe, *supra* note 125, at 108.

199. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (concluding that state law is valid whether “declared by its Legislature in a statute or by its highest court in a decision”). And even where state law at issue in *Erie* conflicts is judge-made, state judges are still likely to be more directly democratically accountable than federal judges because they are often elected. See Young, *supra* note 8, at 56.



For reasons related to their democratic deficit, Federal Rules are relatively easy to amend.<sup>200</sup> Although there have been notable exceptions, amendments to Federal Rules are frequently insulated from public pressure.<sup>201</sup> Further, the difficulty of reaching majorities in both chambers of Congress to override a Rule amendment means that the weight of legislative inertia falls on the side of making Rule amendment easier, not harder.<sup>202</sup> For example, in 1993, despite politicized opposition to amendments to Rule 26's discovery provisions, the amendments passed because the Senate failed to reach an agreement and pass a version of the House bill that would have removed the mandatory discovery rules at issue.<sup>203</sup> More to the point, when Rules are uncontroversial and outside the political limelight, amendment will be at its easiest because Congress will have little incentive to intervene. When amendments are controversial, the formal rule-making process gives states an opportunity to access the political safeguards of federalism present in Congress and absent in the courts.

Critical to my proposal is the assumption that if an application of the *Erie* avoidance canon results in an interpretation of a Rule contrary to the intent of the Court or Committees, it can be reversed by proposing a new Rule that Congress chooses not (or fails) to override.<sup>204</sup> A canon that presumes against displacement of state law by Federal Rules offers two institutional-choice advantages in achieving the right balance between the interests of the Court and Committees in procedural uniformity and the interests of the states in achieving their substantive goals.

First, this default rule properly matches the burden of action in the rulemaking process. For a proposed Rule to take effect and potentially displace a state statute, all that is required is congressional *inaction*. In contrast, states worried

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200. This is not to say they are “easy” to amend in an absolute sense, only relatively so. Amending the Rules still requires agreement (or at least nonveto) by four distinct bodies before a proposed Rule or amendment reaches Congress: the Advisory Committee, the Standing Committee, the Judicial Conference, and the Supreme Court. See Struve, *supra* note 19, at 1109. This is, in part, the basis for my earlier contention that my proposed canon is not likely to be amended out of existence by frequent overrides. There are enough veto gates in the rulemaking process that narrow readings are likely to stand, even if Rule amendment is still easier than mobilizing Congress.

201. See *id.* at 1111 (noting that even though the 1988 amendments to the REA were designed to attract more public attention to rulemaking, “noncontroversial proposals often attract little attention from practitioners or other members of the public”).

202. See Kelleher, *supra* note 7, at 99 (“Sometimes Congress’[s] failure to act [to override a proposed Rule] reflects only the failure of both the House and the Senate to agree on the language of the legislation.”).

203. See *id.* at 57–58.

204. See Dudley & Rutherglen, *supra* note 3, at 739.

about the displacement of important policies must mobilize to convince Congress to proactively overrule a Rule, surely a higher burden.<sup>205</sup>

Second, placing the onus on the Court and Committees will likely result in faster error correction.<sup>206</sup> The case for an interpretive default rule is particularly strong when institutions are arrayed in a manner that facilitates correction of interpretations contrary to the rulemaking body's intent. In Einer Elhauge's terminology, "preference-eliciting canons" are justified by the availability of legislative correction because eliciting specific corrective action "will produce a . . . result that embodies enactable preferences more accurately than any judicial estimate could."<sup>207</sup> That is, a canon that results in higher rates of fixable error is preferable to one that results in lower rates of nonfixable error, as the former will encourage a productive judicial-legislative dialogue that best matches interpretation to intent in the long run.<sup>208</sup>

This is true of Federal Rules. Suppose lower courts adopt broad readings of Federal Rules that displace state law. States will need to wait years for a case on point to make its way through the federal court system to the Supreme Court, which might never happen at all. In contrast, if lower federal courts begin to adopt narrow readings that do not reflect rule drafters' intent, the Court or Committees can take advantage of the REA to correct the Rule's text to reflect their preemptive intent relatively more expediently.<sup>209</sup> If not perfect, it is at least faster than waiting for the Court.

### 5. *Forum Shopping and Equity*

As a consequence of more frequent application of state law in federal courts, this approach will better serve *Erie*'s twin aims of "discouragement of forum-shopping and avoidance of inequitable administration of the laws."<sup>210</sup> The logic is simple. Whenever a Federal Rule displaces state law in federal court, it results

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205. *See id.*

206. *See* VERMEULE, *supra* note 188, at 74-79 (explaining error correction as a criterion for interpretive approaches); Einer Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 COLUM. L. REV. 2162, 2165 (2002) (arguing that preference-eliciting canons yield superior results by prompting corrections and are most effective where the burden of doing so falls on a group that is procedurally or politically empowered).

207. EINER ELHAUGE, *STATUTORY DEFAULT RULES: HOW TO INTERPRET UNCLEAR LEGISLATION* 152 (2008).

208. *See id.* at 153-54.

209. *See* Struve, *supra* note 19, at 1134-35.

210. *Hanna v. Plumer*, 380 U.S. 460, 468 (1965).

in different legal standards in state and federal courts.<sup>211</sup> A federalism-based avoidance canon would minimize these differences.

Of course, this minimization comes at the expense of uniformity in the federal system, at least in the short term. If uniformity is seriously threatened, though, the “override button” of amending Rules still rests with federal courts.<sup>212</sup> And, as I discuss below, limits on uniformity within the federal system are tolerable, if not expected, and have not imposed unduly burdensome costs in the past.<sup>213</sup>

### C. Responding to Counterarguments

No interpretive approach is perfect. Below, I address five potential counterarguments to my proposal and explain why, on balance, they are outweighed. In addition to these specific counterarguments, there is also a risk of error in the application of this canon, as there is in any interpretive enterprise. Nevertheless, I maintain this risk of error is more muted under my approach than the alternatives.<sup>214</sup>

#### 1. Disuniformity in Federal Courts

Any *Erie* approach that privileges federalism and anti-forum shopping runs the risk of disrupting the uniformity of federal procedure. My canon could result in interpretations of Federal Rules that differ based on the nature of subject-matter jurisdiction and relevant state law.<sup>215</sup> Depending on how this canon is applied, disuniformity could become a genuine problem by putting a substantial burden on courts to engage in complex reasoning for each possible Federal Rule-state law pair.<sup>216</sup>

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211. See Roosevelt, *supra* note 1, at 32-33.

212. See VERMEULE, *supra* note 188, at 78 (suggesting that interpretation should be concerned with “whether and when formalist decisions that produce clear mistakes will be corrected . . . and whether the corrections have low or high costs”).

213. See *infra* Section III.C.1.

214. See *supra* Section II.B.

215. See Dudley & Rutherglen, *supra* note 3, at 744 (bemoaning the effect of narrowing interpretations where “supposedly uniform federal procedural rules become two-headed monsters meaning different things depending on whether the plaintiff’s claim is based on state or federal law”); Suzanna Sherry, *Normalizing Erie*, 69 VAND. L. REV. 1161, 1227 (2016).

216. See Bauer, *supra* note 44, at 963; see also *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 404 (2010) (condemning the “arduous” task of doing state-by-state analysis, especially when determining a state law’s purpose is required).

But this concern is overblown. The REA never intended to achieve full uniformity; the existence of any sphere of application for state law in diversity actions ensures some differences, for which the REA itself provides. Rule 83 even authorizes district courts to adopt their own local rules.<sup>217</sup> Part of this is motivated by *Erie*'s twin aims, in particular deterring forum shopping. For instance, the differential application of Federal Rules like Rule 3 (applied not only to govern commencement of actions in diversity cases but also to control tolling in federal-question cases) offers vertical uniformity in exchange, limiting vertical forum shopping.<sup>218</sup> In any case, the federal courts do not yet seem to have crumbled under the weight of these (fairly uncomplicated) differential applications. If disuniformity becomes a significant issue, the Court and Committees can always amend the Rule in question to preempt relevant state law.

## 2. *Perverse Incentives for State Rulemaking*

Others might argue that a federalism-based avoidance canon would encourage states to pass laws that occupy greater portions of the relevant field of procedure—to preempt the preemption.<sup>219</sup> That result surely would be “intolerable,”<sup>220</sup> but it is not likely to occur. Indeed, the opposite result is just as likely. Under an avoidance canon applied at the conflicts stage and paired with the *Shady Grove* plurality's reading of *Hanna* and *Sibbach* at the REA stage, states would be incentivized not to overstep the necessary scope of procedural laws because doing so would increase the difficulty of finding plausible nonconflicting readings of Federal Rules. That is, the broader a state law, the more likely it is to conflict with Federal Rules. It would then be displaced by those Federal Rules under *Hanna* and *Sibbach*. Indeed, the point is that only stricter policing of the REA's second clause at the second step of the analysis would create such an incentive. If Federal Rules will continue to be applied where conflict is unavoidable regardless of substantive effect, states cannot enlarge their scope of authority by courting conflict.

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217. See FED. R. CIV. P. 83(a); Thomas, *supra* note 4, at 245.

218. See Steinman, *supra* note 2, at 1151.

219. See Roosevelt, *supra* note 1, at 39 (“If a Rule that modifies a substantive right is invalid, then it seems that a single state could void a Rule by enacting a substantive law in conflict with it—void the Rule, that is, in the sense that it could not be applied even in states without such conflicting laws, or in federal question cases. That result is surely intolerable . . .”).

220. *Id.*

### 3. *Discretion for Expansive Self-Interpretation*

Some have also argued that the Court has discretion to expansively determine its own rules.<sup>221</sup> The Court has better knowledge of its own intent than any other body. And it has already been delegated the power to make rules of procedure and thus should be less concerned with separation-of-powers problems than in statutory interpretation, so the argument goes.<sup>222</sup>

But even if this view is correct, it does not absolve the Court of its federalism obligations or supersede the limits of the REA's delegation, to which the Court has not always been especially attentive. The fact that the Court may know its true intent does not mean Congress did or that Congress would not have overridden the Rule had the preemption been clear.<sup>223</sup>

Moreover, without an interpretive canon to narrow its discretion, the Court could in theory enlarge its own rulemaking powers with vague Rules and broad interpretations, given limited congressional oversight.<sup>224</sup> As Justice Scalia noted in *Decker v. Northwest Environmental Defense Center* regarding agencies' interpretations of their own rules, such a situation "violate[s] a fundamental principle of separation of powers – that the power to write a law and the power to interpret it cannot rest in the same hands."<sup>225</sup> Although on paper the Court merely advises Congress on what Rules or amendments to pass, in practice the Court often has the final word, given the infrequency with which Congress intervenes.<sup>226</sup> This separation-of-powers issue can be avoided by applying my canon to force the promulgation or amendment of Rules with preemptive effect to go through the defined process Congress has created, a process where the political safeguards of federalism can protect state interests (even if the political barriers to doing so are high).<sup>227</sup>

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221. See, e.g., Karen Nelson Moore, *The Supreme Court's Role in Interpreting the Federal Rules of Civil Procedure*, 44 HASTINGS L.J. 1039, 1093 (1993).

222. See Joseph P. Bauer, *Schiavone: An Un-Fortune-ate Illustration of the Supreme Court's Role as Interpreter of the Federal Rules of Civil Procedure*, 63 NOTRE DAME L. REV. 720, 729 (1988).

223. See Burbank, *supra* note 45, at 1019 (observing that Rules are often promulgated with little congressional interest or input).

224. See Struve, *supra* note 19, at 1119-20 (arguing that because allowing the Court to take expansive readings "enlarges the powers of the courts beyond their proper boundaries . . . courts should have, if anything, less latitude to interpret the Rules than they do to interpret statutes").

225. 568 U.S. 597, 619 (2013) (Scalia, J., concurring in part and dissenting in part); see also Struve, *supra* note 19, at 1168.

226. See *supra* Section III.B.4.

227. 28 U.S.C. § 2073 (2018).

4. *Difficulty Accounting for Federal Interests*

At first glance, my canon might appear to make it more difficult for federal courts to exercise discretion to protect implied federal interests. Suzanna Sherry has objected to the *Erie* doctrine for this reason, and my proposed canon would only amplify the issue by limiting the ways in which giving weight to federal interests can enter a court's calculus.<sup>228</sup> In Sherry's view, *Erie*'s "federalism" mandates the application of state law unless a federal interest has been codified. In contrast, "ordinary federalism" relies on a rebuttable presumption in favor of state law that can be overcome by a court's decision to prioritize unarticulated federal interests.<sup>229</sup> Sherry thus views *Erie* as anomalous and proposes that we "normalize" the doctrine by "recogniz[ing] the courts' authority to overcome the presumption [in favor of state law] and displace state law in order to protect unarticulated federal interests."<sup>230</sup>

Sherry's argument is unpersuasive for four reasons. First, it neglects existing federalism doctrines that cut against "ordinary federalism," most notably the presumption against preemption and the clear statement canon of *Gregory v. Ashcroft*.<sup>231</sup> While there are some canons that support Sherry's position, *Erie* is by no means extraordinary, particularly when it is situated among the federalism approaches taken during the Rehnquist Court's "federalist revival."<sup>232</sup>

Second, at least with respect to *Erie* questions that fall under the REA, *Erie* is already normalized to giving preference to federal interests. The *Hanna-Sibbach* test mandates the application of arguably procedural Federal Rules that would displace arguably substantive state law, even without evidence or consideration of an unarticulated federal interest. Sherry's worry that unarticulated federal interests nonetheless present in a federal statute (or Rule) cannot overcome state law in *Erie* cases is only true under the Rules of Decision Act, not the REA. For cases that fall under the REA, there are good reasons to prevent federal interests not manifested in the text of the relevant Rule from displacing state law.

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228. See Sherry, *supra* note 215, at 1164.

229. See *id.* at 1167-68.

230. *Id.* at 1216.

231. See 501 U.S. 452, 460-61 (1991); ESKRIDGE ET AL., *supra* note 22, at 546-47.

232. See Young, *Ordinary Diet*, *supra* note 26, at 319-20 (listing profederalism canons, including many invoked by the Rehnquist Court, such as "rules disfavoring interpretations of federal statutes that would impose conditions on states' acceptance of federal funds, subject the states to statutory liability under federal law, abrogate the states' sovereign immunity, regulate the traditional functions of state government, intrude on traditional concerns of state criminal law, or regulate at the outer limits of Congress's Commerce Clause authority" (footnotes omitted)).

Any unarticulated interests in a Rule will nearly always reflect the interests of the unelected committees and the Court, not Congress, so they are less entitled to judicial protection in the first place.<sup>233</sup> And if these federal interests are really of paramount importance, creating incentives to write them into Rules *ex ante* or to amend Rules to reflect them is reasonable.<sup>234</sup> My canon allows for federal interests to be accounted for so long as they are evident in the text or Advisory Committee Notes of a Rule, a standard common to several existing federalism canons.<sup>235</sup>

Third, Sherry's position is based in part on her pointed dismissal of those who believe they can "constrain judicial discretion by the adoption of either specific doctrines or specific methodologies."<sup>236</sup> Sherry's skepticism of default rules is rooted in realist concerns that judges "can wiggle out of any constraints."<sup>237</sup> The longstanding debate over the success of formalism in constraining judges is one I will not attempt to resolve here. In the case of *Erie*, though, my proposed canon sidesteps much of the difficulty in distinguishing substance and procedure that has plagued other formalist approaches. And, unlike some other canons that have drawn criticism, mine has no corresponding equal and opposite canon.<sup>238</sup>

Finally, as Michael Greve has noted, "normalizing *Erie*" would be a Herculean—if not Sisyphean—task.<sup>239</sup> Scholarly advocacy of radical change is one thing, but "no litigator or judge has that luxury."<sup>240</sup> A crucial element of my proposal is that it does not require overturning any of the key *Erie* precedents; it simply augments them in ways that draw on some of the existing approaches.

##### 5. *Ambiguity in Identifying Ambiguous Rules*

In practice, my canon relies on judges to identify where ambiguity and competing plausible interpretations exist. This is not always easy. As then-Judge Ka-

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233. See Struve, *supra* note 19, at 1104 (describing the formal comment and review process for proposed new Rules).

234. See *supra* Section III.B.3.

235. See *supra* note 158 and accompanying text.

236. Sherry, *supra* note 215, at 1212.

237. *Id.* at 1213.

238. On the subject of equal and opposite canons, see Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401-06 (1950), which famously arrayed twenty-eight canons and their counter canons.

239. See Michael S. Greve, *Is Erie Normal?*, 69 VAND. L. REV. EN BANC 253, 263 (2016).

240. *Id.*

vanaugh wrote, “[T]here is often no good or predictable way for judges to determine whether statutory text contains ‘enough’ ambiguity to cross the line beyond which courts may resort to [interpretive canons].”<sup>241</sup> This presents a challenge for my canon because when judges refuse to acknowledge ambiguity where they ought to, the canon will not be triggered. But judgment cannot be completely removed from judging. My canon’s plausibility standard should ensure that the canon is triggered in most appropriate cases, even if not with perfect accuracy (a standard too demanding for any default rule).

#### D. Assessing Alternative *Erie* Conflicts Approaches

Having laid out the primary arguments for and against a federalism-based avoidance canon applied at the conflicts stage of *Erie* analysis, it is worth considering alternative methodologies and how my approach stacks up. I assess three sets of alternatives: the concurrence and dissent in *Shady Grove*, nonavoidance approaches from the academic literature, and avoidance approaches from the academic literature.

##### 1. The Shady Grove Alternatives

Justices Stevens and Ginsburg both provided alternative approaches to *Erie* conflicts problems in their separate writings in *Shady Grove*. In this Section, I demonstrate why each approach, though not without its merits, fails to best resolve the federalism, uniformity, and separation-of-powers issues at stake.

##### a. Justice Stevens’s Concurrence

Recall from Section I.B that Justice Stevens’s approach in his *Shady Grove* concurrence was premised on reading Federal Rules narrowly to avoid conflict with rights and remedies created by state law and thus to respect state interests and avoid running afoul of the REA.<sup>242</sup> Despite the admirable aims of Justice Stevens’s approach, his method ultimately falls short of its ambition to vindicate federalism and separation-of-powers concerns in three ways.

First, Justice Stevens’s approach is inconsistent with *Hanna* and *Sibbach*, which held that Federal Rules always displace conflicting state law so long as

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<sup>241</sup> Kavanaugh, *supra* note 105, at 2136; see also Gregory E. Maggs, *Reducing the Costs of Statutory Ambiguity: Alternative Approaches and the Federal Courts Study Committee*, 29 HARV. J. ON LEGIS. 123, 125 (1992) (“The term ‘statutory ambiguity’ itself could have several meanings.”).

<sup>242</sup> See *supra* Section I.B.



they truly regulate procedure.<sup>243</sup> This holding was reaffirmed by the Court in *Walker* and *Burlington Northern*, as well as by the plurality in *Shady Grove*.<sup>244</sup> And other Justices who have pushed for an avoidance approach at the conflicts stage, such as Justice Ginsburg,<sup>245</sup> have recognized this precedent. Implementing Justice Stevens's approach would require abandoning the *Hanna-Sibbach* test, a heavy lift given the weight of stare decisis. Indeed, Justice Stevens admitted as much, undertaking to distinguish *Sibbach* to avoid this problem.<sup>246</sup> But whatever the merits of Justice Stevens's position on *Sibbach*, his broader theory still cannot be squared with *Hanna* and subsequent *Erie* conflicts cases.<sup>247</sup>

Second, in practice, Justice Stevens's approach is highly subjective and relies on federal judges to accurately identify and faithfully apply the intent of numerous state laws. Although *Erie* itself requires this to an extent,<sup>248</sup> the interpretative difficulties caused by federal judges' relative unfamiliarity with state laws and distance from the political processes that give rise to them<sup>249</sup> are magnified in the context of gauging conflicts between Federal Rules and state laws. When "a

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243. See Ely, *supra* note 35, at 697.

244. See *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 411-12 (2010) (plurality opinion); *Burlington N. R.R. Co. v. Woods*, 480 U.S. 1, 5 (1987); *Walker v. Armco Steel Corp.*, 446 U.S. 740, 749-50 (1980).

245. See *Shady Grove*, 559 U.S. at 438 (Ginsburg, J., dissenting); *Gasperini v. Ctr. for Humanities, Inc.* 518 U.S. 415, 427 n.7 (1996).

246. See *Shady Grove*, 559 U.S. at 427-28 (Stevens, J., concurring in part and concurring in the judgment); see also 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, 1059-63 (explaining how Justice Stevens distinguished *Sibbach* and arguing that he was correct).

247. Ides argues that *Hanna* does not in fact apply *Sibbach* as Justice Scalia did in *Shady Grove*, because the state right at issue in *Hanna* was service, a "classically procedural right." This response is insufficient, though, because it both neglects subsequent applications that were less obviously procedural (e.g., *Burlington Northern*) and elides the actual operation of the test in *Hanna*. While a clearly state procedural right may make the outcome obvious (i.e., may make the test easy to pass), that does not mean that the test is not being applied. See Ides, *supra* note 246, at 1062-63.

248. Although it may seem odd to quibble with federal judicial interpretation of state law given *Erie*'s main holding, my objection is not to the act of interpretation at all but to specific contexts in which such interpretation may incorrectly cut against the ultimate application of state law under *Erie*. My approach seeks to avoid such situations.

249. See Young, *supra* note 8, at 55; *supra* Section III.B.3; cf. Lea Brilmayer & Charles Seidell, *Jurisdictional Realism: Where Modern Theories of Choice of Law Went Wrong, and What Can Be Done to Fix Them*, 85 U. CHI. L. REV. (forthcoming 2019) (arguing that statutes often do not yield clear answers regarding relevant forum interests and that filling in these gaps is often an act of discretionary policymaking that is acceptable where judges interpret domestic law but not foreign law).

State chooses to use a traditionally procedural vehicle as a means of defining the scope of substantive rights or remedies,”<sup>250</sup> the facial operation of the statute (procedural) purposefully differs from its intended effect (substantive), making intent especially hard to evaluate. Justice Stevens even acknowledged that “there are costs involved in attempting to discover the true nature of a state procedural rule” and consequently argued that in order for a state procedural law to be deemed substantive within the meaning of the REA, “there must be little doubt” about its purposes.<sup>251</sup> But what constitutes sufficiently little doubt is itself subjective. And his earlier point that a state law may meet this standard if it is merely “intertwined with a state right or remedy” such that “it functions to define the scope of the state-created right” makes the burden of this analysis on federal courts even greater.<sup>252</sup> The same challenges highlighted in Section III.B.3 apply here in full. When judges are not inclined to heed state interests or fail to accurately identify them, under this approach those interests can still be ignored.

Third, albeit less troublingly, Justice Stevens’s approach collapses the neat separation of the *Erie* two-step analysis set forth in *Walker*. He admitted as much, noting that if the conflicts analysis were to be done in light of the substantive thrust of the Federal Rule and state law, “the second step of the inquiry may well bleed back into the first.”<sup>253</sup> But, for the reasons elaborated in Section I.B.2, his ordering problem should be avoided where possible (and can be avoided under my approach).

#### b. Justice Ginsburg’s Dissent

Justice Ginsburg’s methodology faces similar challenges, particularly the problems of inconsistency, potential error, and judicial economy identified

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250. *Shady Grove*, 559 U.S. at 420 (Stevens, J., concurring in part and concurring in the judgment).

251. *Id.* at 432.

252. *Id.* at 423. There is a long history of judicial and scholarly doubt about the readiness of federal courts for such undertakings. See J. Skelly Wright, *The Federal Courts and the Nature and Quality of State Law*, 13 WAYNE L. REV. 317, 322-326 (1967) (“It has even been contended that *Erie* obliges . . . the federal court to digest and master the entire corpus of state law; my fear is that we on the federal bench lack the acuity, leisure, and stamina for undertaking these intellectual ordeals.”); see also HENRY J. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 143 (1973) (“Diversity jurisdiction . . . ‘can badly squander the resources of the federal judiciary’ . . .” (quoting Wright, *supra*, at 323)); sources cited *supra* note 195. And commentators have acknowledged this difficulty in the context of Justice Stevens’s *Shady Grove* approach. See Clermont, *supra* note 139, at 1014-15.

253. *Shady Grove*, 559 U.S. at 422.

above.<sup>254</sup> Although somewhat less conceptually demanding than Justice Stevens's approach in terms of the understanding of state law required to execute it, her approach incorporates two additional sources of potential error. First, it requires judges to fully assess the substantive purposes of both the state law *and* the Federal Rule in question.<sup>255</sup> Second, it asks that they appropriately weigh these substantive purposes against each other in determining the scope of permissible Rule interpretations.<sup>256</sup> Neither of these endeavors is easy and both are highly subjective (and, thus, prone to inconsistency and error relative to a default rule).

In some ways, however, this approach is not dissimilar from the one advocated in this Note. Justice Ginsburg's conflicts methodology also relies on a presumption against conflict, albeit one implemented by seeking nonconflicting interpretations based on substantive content.<sup>257</sup> My approach differs both in its use of a facially applied default rule and in the sort of *Erie* errors it produces on the margin. Broadly speaking, *Erie* cases allow for two types of erroneous results: the incorrect displacement of state substantive law and the incorrect application of state procedural law in federal courts. In terms of outcomes, the primary difference between Justice Ginsburg's approach and mine is that my approach will produce less erroneous displacement of state substantive law and more erroneous application of state procedural law. An avoidance approach that militates toward the application of state law without asking whether it is substantive or procedural—assuming a nonconflicting reading exists—all but ensures some state procedural laws will be incorrectly applied. In my view, the federalism interest in preserving the application of state substantive law is worth the cost of allowing some state procedural law to apply in federal court, even where not strictly necessary, where it has not been unambiguously displaced. If forced to choose, the former errors are far more consequential for our federal-state balance than the latter because incorrect displacement of state substantive law contravenes important state policy interests. Harms to federal procedural law are less consequential.

At bottom, *Shady Grove*'s concurrence and dissent both rely too heavily on the subjective identification and weighing of laws' substantive purposes. Because similar normative goals can be accomplished with a federalism-based default

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254. See *supra* Section III.B.3. Justice Ginsburg's approach is essentially the same as that proposed by Adam Steinman, although his technique separates into two steps the process of (1) identifying the principles underlying the state law and (2) determining the preemptive scope of the Federal Rule based on its purposes and objectives. See Steinman, *supra* note 2, at 1167-73.

255. See *Shady Grove*, 559 U.S. at 442-52 (Ginsburg, J., dissenting).

256. See *id.* at 449-50.

257. See *supra* Section I.B.

rule, the potential error costs inherent in these approaches are not worth bearing. A conflicts analysis premised on divining substantive intent is, as Justice Scalia wrote, “destined to produce ‘confusion worse confounded.’”<sup>258</sup>

## 2. *Nonavoidance Conflicts Approaches for Erie Questions*

Several academic commentators have written on the need for a unifying approach for assessing *Erie* conflicts.<sup>259</sup> Most of these proposals, however, face familiar pitfalls.

At one end of the spectrum, Joseph Bauer argues that courts adjudicating *Erie* questions should apply classical “interest analysis.”<sup>260</sup> This is essentially the approach of the dissent in *Shady Grove*: to “look at the comparative strengths of the federal and state interests” at issue.<sup>261</sup> While tempting as a way to accommodate the interests that really matter in a potential *Erie* conflict, this approach ultimately suffers from the classic problems of subjectivity, inconsistency, and error.<sup>262</sup> Bauer criticizes Justice Scalia’s brusque treatment of the New York policy interests in *Shady Grove*, but Bauer’s proposed approach allows for precisely this kind of subjective reasoning.<sup>263</sup> Interest analysis is simply too unreliable (and unreliably implemented) to resolve *Erie* conflicts in a satisfying manner.<sup>264</sup>

Jeffrey Stempel takes a different tack, supporting a formalist approach to construction of the Federal Rules, which he takes from Justice Scalia’s analysis in *Shady Grove*.<sup>265</sup> This methodology would afford great deference to Federal Rules, applying them broadly and biting the bullet on the rampant displacement of state law under *Hanna*’s interpretation of the REA.<sup>266</sup> Stempel’s formalism is motivated by the democratic process benefits of forcing state policy out of the

<sup>258</sup> *Shady Grove*, 559 U.S. at 404 (quoting *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941)).

<sup>259</sup> See Bauer, *supra* note 6, at 1239; Dudley & Rutherglen, *supra* note 3, at 708; Genetin, *supra* note 103, at 1068; Roosevelt, *supra* note 1, at 3; Jeffrey W. Stempel, *Shady Grove and the Potential Democracy-Enhancing Benefits of Erie Formalism*, 44 AKRON L. REV. 907, 916-17 (2011); Thomas, *supra* note 4, at 190-93.

<sup>260</sup> Bauer, *supra* note 6, at 1239; accord Lynch, *supra* note 12, at 321-26.

<sup>261</sup> Bauer, *supra* note 6, at 1265.

<sup>262</sup> See *supra* Section III.D.1.

<sup>263</sup> See Bauer, *supra* note 44, at 954 (“[R]emarkably, the plurality asserted that these claims [regarding the substantive reasons for § 901(b)] were irrelevant.”).

<sup>264</sup> Interest analysis more broadly has come under fire for these very reasons. See Lea Brilmayer, *Governmental Interest Analysis: A House Without Foundations*, 46 OHIO ST. L. REV. 459, 461-62 (1985).

<sup>265</sup> See Stempel, *supra* note 259, at 967-71.

<sup>266</sup> See *id.* at 973.

shadow of procedure and into the sunshine of substantive law. If a state really wants to protect its interests, it will have to pass clearly substantive laws. This is a collateral benefit but not sufficient to resolve our primary concerns with *Erie*, given that states may not respond to this incentive and federal courts may still displace their laws under the *Hanna-Sibbach* test.

Stempel also seeks to avoid the challenges raised above regarding interest analysis, namely the “cost of committing the evaluator to substantial examination of state lawmaking and public policy and . . . the risk of inconsistent or inaccurate assessments shaped by the values of the assessor.”<sup>267</sup> But Stempel runs too far in the other direction. He admits that his approach would lead to greater displacement of state law but fails to grapple with the preference this would afford Federal Rules at both stages of the *Erie* analysis.<sup>268</sup> In some ways, this approach is the opposite of avoidance: it creates conflicts where none are necessary.

Earl Dudley and George Rutherglen’s “strict interpretation” approach focuses on minimizing “narrow and esoteric interpretations” of the Federal Rules that disrupt the uniformity of procedure in federal courts.<sup>269</sup> They would pair this general refusal to adopt artificially narrow interpretations of the Federal Rules with a greater willingness to invalidate them under the REA.<sup>270</sup> There is clear merit to this idea: it gives protection to state policies that straddle the hazy line between substance and procedure while generally preserving the uniformity of federal procedure.

Still, strict interpretation is not without drawbacks. Dudley and Rutherglen focus on the Court’s most egregious abuses of “ambiguity” and argue that the need for a generalized interpretive approach is less pressing than some would have us believe.<sup>271</sup> The Court’s reasoning in *Semtek* was strained, as no shortage of scholars have pointed out, but possible conflicts like those in *Shady Grove* and the aforementioned anti-SLAPP cases are not so easily resolved based on the text alone.<sup>272</sup> Their approach also has the undesirable effect of forcing additional rulemaking where a narrow interpretation might have sufficed (because invalidated rules will need to be replaced or revised), which itself is not a costless en-

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267. *Id.* at 970.

268. *See id.* at 971 (admitting that “this can perhaps permit decisions that ride roughshod over strong state interests embedded within a procedural rule or code”).

269. Dudley & Rutherglen, *supra* note 3, at 737.

270. *See id.* at 741.

271. *See id.* at 722 (characterizing the Court’s approach in *Semtek* as “search[ing] for, and then . . . exaggerat[ing], any ambiguity”).

272. *See, e.g.,* Burbank & Wolff, *supra* note 37, at 51.

deavor.<sup>273</sup> Further, application of each new Rule requires courts to ascertain its appropriate scope anew, and it is preferable to minimize the instances in which the courts must undergo this interpretive process.<sup>274</sup> Finally, implementing this approach would require a departure from the Court's existing precedent. The application of the REA in *Hanna* and *Shady Grove* would have to be abandoned, likely an insurmountable obstacle.

Finally, Kermit Roosevelt advocates a two-step approach based on choice-of-law methods. In his view, the question at the conflicts analysis stage is “whether federal law or state law grants rights to the parties, or whether both laws do.”<sup>275</sup> In the latter case, the second step then assigns priority to one or the other. This schema is analytically useful in that it disaggregates the question of conflicts from the question of prioritizing the Federal Rule or state law. But it does not tell us what to do when it is unclear whether one body or the other grants rights or whether those rights actually conflict. Some methodology is still needed to resolve ambiguity.

### 3. *Avoidance Approaches for Erie Questions*

Finally, it is worth examining two existing *Erie* avoidance approaches in the literature to see how my federalism-based avoidance canon stacks up.

#### a. *REA Avoidance*

In one of the few articles that directly addresses the question of interpretive canons for *Erie* conflicts under the REA, Bernadette Bollas Genetin argues that a court should construe Federal Rules such that “in cases of serious doubt regarding Rule validity, it will give the nod to protecting Congress’s superior substantive lawmaking authority” by not intruding on congressional lawmaking powers.<sup>276</sup> Genetin takes issue with the form of avoidance based on state interests used by the dissent in *Shady Grove* on the grounds that the intent of the REA was to enforce the separation of powers between Congress and the judiciary, not

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273. See Maggs, *supra* note 241, at 129-30 (discussing the “replacement costs” incurred when the lawmakers must undo the decisions of courts with additional lawmaking).

274. See Moore, *supra* note 221, at 1073 (observing the “difficult questions involving the interpretation and application of various Federal Rules,” which would be magnified by a proliferation of new Rules).

275. See Roosevelt, *supra* note 1, at 12.

276. Genetin, *supra* note 103, at 1126; see also Struve, *supra* note 19, at 1147.

to safeguard federalism.<sup>277</sup> In her view, any interpretive canon adopted for *Erie* cases should focus on policing the limits of Congress's incomplete delegation of lawmaking power to the Court.<sup>278</sup>

This is certainly a worthy goal, particularly because the question of whether and when the Court exceeds the scope of its delegation to displace state law is of constitutional magnitude.<sup>279</sup> But it does not tell us whether there is a conflict in the first place, despite Genetin's recognition of the Court's shortcomings in this area.<sup>280</sup> Indeed, under a crisply defined two-stage *Erie* analysis that employs avoidance at the conflicts stage, courts often will not need to rule on the REA question at all. And, as discussed above, the separation-of-powers concern underlying *Erie* is intimately tied to federalism goals; one ought not preclude the other.<sup>281</sup>

*b. Traditional State-Authority Avoidance*

A second existing *Erie* avoidance approach is Margaret Thomas's proposal that courts institute a presumption in favor of state law where the law in question relates to traditional areas of state regulation, especially states' police powers.<sup>282</sup> Thomas roots her approach in the core premise that Congress's delegation to the judiciary under the REA was never intended to be a full delegation of Congress's power to regulate federal court procedures and displace contrary state law.<sup>283</sup> She argues that the REA's proscription of Federal Rules that infringe upon substantive rights ought to be interpreted as cabining Federal Rules to areas where Con-

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277. See Genetin, *supra* note 103, at 1126-27.

278. See *id.*

279. See Issacharoff, *supra* note 114, at 217 (“*Erie* emerges as a caution on a particular exercise of federal power through federal courts . . . *Erie* becomes a case [about] . . . the dangers inherent in the further reaches of federal judicial power.”).

280. See Genetin, *supra* note 103, at 1074 (observing that the Court's use of conflicts avoidance “has been uneven” and “has taken on an ad hoc quality that provides little guidance to lower courts”).

281. See *supra* Section II.A.

282. See Thomas, *supra* note 4, at 250 (explaining the approach and providing examples of traditional areas of state regulation, including “health and safety, property transfer and zoning, insurance, domestic relations, probate, workers’ compensation, and premises liability”).

283. See *id.* at 241-42 (“This difference demonstrates that Congress delegated less than the full measure of its full constitutional power.”).

gress has already chosen to exercise its legislative prerogatives to preempt state autonomy.<sup>284</sup>

This approach would yield similar results to my proposal but entails difficulties that a strict federalism-based avoidance canon does not.

First, this approach requires courts to engage in the fraught task of determining (a) whether a given law is indeed an integral part of a state's regulation; and (b) whether that regulation is within traditional areas of state control.<sup>285</sup> The former determination is vulnerable to the same errors and biases as other relatively open-ended interest-based inquiries. It places an exceptionally high burden on judges to understand the particular functions of state laws within state regulatory schemes, increasing the likelihood of error. Meanwhile, the latter determination is so subjective and difficult that the Court explicitly abandoned it in *Garcia v. San Antonio Metropolitan Transit Authority*.<sup>286</sup> There is little reason to resurrect it here or believe it will be any more effective as a dividing line between state and federal authority.

Second, this approach does not resolve conflicts questions where the state law is *not* within the zone of traditional state regulation. For those cases, Thomas's approach still leaves us without guidance. A default rule of general

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284. See *id.* at 242 (“The correct question is not whether the state procedure falls in some state enclave reserved by the Constitution to the states. Rather, given the constitutional list of enumerated federal powers, has Congress acted pursuant to one of those enumerated powers to intrude legitimately into all the states’ domains the Rules might reach, or has it chosen to leave some of those domains unaffected by federal power?”). Of course, after stating that her approach *does not* rely on the notion of a state enclave, Thomas proposes that courts avoid displacing the “small body of state laws that accomplish some regulatory goal in a traditional state area Congress has chosen not to regulate.” *Id.* at 250. Doctrinally, this approach creates an enclave by carving out a delineated area based on traditional practice.

285. See *id.* at 252 (“[T]he state practice in these special areas should be applied not only where it is ‘unmistakably clear’ that the practice is integral to the state’s regulatory structure, but also where it seems reasonably likely that it is. Where a rational state legislature likely used a given practice to accomplish state regulatory interests in an area of special state autonomy, and the practice is functioning to further that regulatory interest, the state practice should be followed.”).

286. 469 U.S. 528, 531 (1985) (concluding that “the attempt to draw the boundaries of state regulatory immunity in terms of ‘traditional governmental function’ is . . . unworkable”). Thomas attempts to preempt this critique by arguing that the difficulty in *Garcia* was *sui generis* and complicated by the fact that the Fair Labor Standards Act had already been applied to some state employees. In her view, identifying areas within the historic police power would be easier. But this is unpersuasive given the often murky connections between procedural rules and substantive goals and the need that Thomas’s approach would create for judges to classify these goals once they are identified. Where the classification is unclear, looking to factors like “whether the state is using a regulation to solve a broader social problem” simply is not enough to make the approach workable. Thomas, *supra* note 4, at 254.



applicability will go further in resolving *Erie* conflicts while sidestepping the trickiest part of Thomas's inquiry.

The bottom line is this: existing *Erie* conflicts approaches either retain the same problematic subjectivity and weak protection of federalism that has bedeviled the courts for decades or will be limited in their effect so long as the *Hanna-Sibbach* test is good law. Several fail to address the full scope of potential conflicts. The aim of my canon is to address these shortcomings with a formal default rule in favor of federalism concerns, applicable for all potential conflicts, that operates before courts reach the *Hanna-Sibbach* test.

#### IV. THE OPERATION OF THE CANON IN RESOLVING *ERIE* CONFLICTS

Having argued for the application of a federalism-based avoidance canon for *Erie* conflicts, let me now demonstrate how this canon would be operationalized. Beyond theoretical justification, a critical benefit of this canon is its simplicity in practice. My objections to Justices Stevens's and Ginsburg's approaches are operational, not normative. As such, it is important to demonstrate the operability of my avoidance canon and how it would function as a default rule to avoid the practical issues previously discussed. To do so, I apply the canon to two potential conflicts between the California, D.C., and Maine anti-SLAPP statutes and Federal Rules 12 and 56.

##### A. *No Conflict Between Special Motions to Dismiss and Rule 12*

All three of these anti-SLAPP statutes create a "special motion to dismiss" (or "strike," in the case of California) that must be filed within a defined period after service of the complaint.<sup>287</sup> These special motions operate similarly to Rule 12(b)(6) motions. They are generally filed before discovery and require the non-movant to demonstrate that their claim is viable, creating a higher barrier than Rule 12(b)(6) to the continuation of the suit.<sup>288</sup> Several courts have confronted

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287. CAL. CIV. PROC. CODE § 425.16 (West 2016); D.C. CODE § 16-5502 (2012); ME. REV. STAT. ANN. tit. 14, § 556 (2003).

288. See CAL. CIV. PROC. CODE § 425.16(b)(1) (providing that the motion is granted "unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim"); D.C. CODE § 16-5502(b) (providing that the motion is granted "unless the responding party demonstrates that the claim is likely to succeed on the merits"); ME. REV. STAT. ANN. tit. 14, § 556 (providing that the motion is granted "unless the party against whom the special motion is made shows that the moving party's exercise of its right of petition was devoid of any reasonable factual support or any arguable basis in law and that the moving party's acts caused actual injury to the responding party").

the question whether these special motions to dismiss can apply in federal diversity actions or whether they conflict with, and are displaced by, Rule 12.<sup>289</sup>

The first question under the *Erie* avoidance canon is whether there is a reading of the Federal Rule that can be plausibly supported by the text and Advisory Committee Notes that does not conflict with the state law in question. On its face, Rule 12's language does not preclude additional motions to dismiss created by state law. The prefatory clause to 12(b) – which states that “a party may assert the following defenses by motion”<sup>290</sup> – does not necessarily imply that *only* these defenses may be asserted. Indeed, the Rule easily could have been written to explicitly exclude other defenses. If defendants' anti-SLAPP motions fail, Rule 12 motions are still available to them, illustrating their separate rather than concurrent function.<sup>291</sup> Parsing the issue further to address a possible conflict with just Rule 12(b)(6), the court in *Godin v. Schencks* noted that anti-SLAPP motions are textually premised on specific activities; they do not substitute for Rule 12(b)(6)'s general procedural mechanism for testing the sufficiency of complaints.<sup>292</sup> These provisions are, at least plausibly, not answering the same question. To the extent they do fall within the Federal Rules' scheme for testing the sufficiency of a complaint, anti-SLAPP motions are far more akin to summary judgment motions than Rule 12 motions to dismiss. If preemption of special motions to dismiss is the intent of Rule 12, it should be updated to say so.<sup>293</sup>

This is not to say the D.C. Circuit's opposing conclusion in *Abbas v. Foreign Policy Group, LLC* necessarily misreads Rule 12. It is certainly a plausible reading of the Rule to say that it exclusively governs “the circumstances under which a court must dismiss a plaintiff's claim before trial.”<sup>294</sup> But this is not the *only* plausible reading. It is also plausible to argue that Rule 12 and state anti-SLAPP statutes can coexist because they cover different motions and procedures. The application of the *Erie* avoidance canon does not invalidate the analysis of readings

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289. See *supra* Introduction.

290. FED. R. CIV. P. 12(b).

291. See *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 972 (9th Cir. 1999).

292. 629 F.3d 79, 88-89 (1st Cir. 2010).

293. The Advisory Committee Notes to the 1946 Amendment of Rule 12 discuss at length that when extraneous factual material is necessary to dispose of a Rule 12(b)(6) motion, “a motion under Rule 12(b)(6) is thus converted into a summary judgment motion.” FED. R. CIV. P. 12 advisory committee's note to 1946 amendment. This discussion says nothing about foreclosure of motions with a similar function and may even be read, in light of its flexibility, to be capacious enough to encompass other special motions to dismiss.

294. 783 F.3d 1328, 1333 (D.C. Cir. 2015).

that result in conflict—it creates a default rule against applying them when there are plausible alternatives. Because the text of Rule 12 can plausibly be read to create room for the operation of state law, federal courts confronting this issue should default to the nonconflicting reading and apply anti-SLAPP special motion provisions.

*B. Conflict Between Discovery-Staying Provisions and Rule 56*

The question of conflict between the discovery-staying provisions of anti-SLAPP laws and Rule 56's discovery provisions for summary judgment motions is another matter entirely. The three state statutes at issue each stay discovery until the special motion has been disposed of, subject to the court's discretion to allow limited discovery after a showing of good cause.<sup>295</sup> Critically, the statutory standards to overcome these motions rely on an assessment of the probability of success on the merits and extant factual support for the claim, rather than the claim's facial plausibility.<sup>296</sup> Rule 12(d) stipulates that motions under Rule 12(b)(6) or 12(c) involving matters outside the pleadings shall be treated as Rule 56 motions for summary judgment.<sup>297</sup> If the special motions substitute for or conflict with any existing motions, it is these. As such, the question arises whether the discovery-staying provisions of anti-SLAPP statutes conflict with provisions allowing for discovery under Rule 56.<sup>298</sup>

Sufficient opportunity for discovery is an integral element of Rule 56.<sup>299</sup> On its face, Rule 56(f) provides for a grant of summary judgment “[a]fter giving notice and a reasonable time to respond.”<sup>300</sup> In *Anderson v. Liberty Lobby, Inc.*, the Court held that Rule 56(f) provides that “summary judgment be refused where the nonmoving party has not had the opportunity to discover information that

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295. See CAL. CIV. PROC. CODE § 425.16 (West 2016); D.C. CODE § 16-5502 (2012); ME. REV. STAT. ANN. tit. 14, § 556 (2003).

296. See *supra* note 288 and accompanying text.

297. See FED. R. CIV. P. 12(d).

298. See FED. R. CIV. P. 56(d)(2).

299. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (“Rule 56(c) mandates the entry of summary judgment, *after adequate time for discovery . . .*” (emphasis added)); Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73, 74 (1990) (“Summary judgment provides a mechanism for the courts to review cases prior to trial once the parties have concluded the discovery necessary to establish the existence of material issues in dispute.”).

300. FED. R. CIV. P. 56(f).

is essential to his opposition.”<sup>301</sup> And even beyond the clear textual evidence providing for summary judgment only after sufficient discovery in Rule 56(f), the entirety of Rule 56 is replete with textual evidence suggesting that opportunity for discovery is a prerequisite for summary judgment. Rule 56(a) provides that “[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact.”<sup>302</sup> Not only does this imply discovery to allow such a showing, but Rule 56(c)(1)(A) specifically provides that this showing must be supported by “citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations . . . , admissions, interrogatory answers, or other materials.”<sup>303</sup> The text of Rule 56 cannot plausibly be read to suggest that a summary judgment motion can be granted without discovery, and the Court affirmed this reading in *Anderson*.

Given this interpretation of the Rule’s text, it becomes implausible to arrive at any reading that allows discovery-staying provisions to apply simultaneously.<sup>304</sup> Although the First Circuit reached the opposite result in *Godin v. Schencks*, it mistakenly focused too narrowly on one provision of Rule 56 while neglecting the text of the Rule as a whole.<sup>305</sup> The First Circuit held that Rule 56 did not conflict with the discovery-staying provisions for two reasons. First, the court thought that “[i]nherent in Rule 56 is that a fact-finder’s evaluation of material factual disputes is not required.”<sup>306</sup> This is true but premised on the development of a sufficient factual record to justify such a conclusion. When discovery-staying provisions interfere with the development of that record, such a conclusion cannot rationally be reached. Second, the court construed the Maine statute as not conflicting with Rule 56 on the ground that its provisions for limited discovery upon a showing of good cause still provide for sufficient discovery

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301. 477 U.S. 242, 250 n.5 (1986); see also *Metabolife Int’l, Inc. v. Wornick*, 264 F.3d 832, 846 (9th Cir. 2001) (noting that, in *Anderson*, “the Supreme Court . . . restated the rule as requiring, rather than merely permitting, discovery”).

302. FED. R. CIV. P. 56(a).

303. FED. R. CIV. P. 56(c)(1)(A).

304. See *Metabolife Int’l*, 264 F.3d at 846.

305. 629 F.3d 79, 89 (1st Cir. 2010). In general, the fact that a panel of federal judges has adopted a given interpretation is strong evidence that it is at least plausible. But it is not dispositive. If it were, the mere fact of a court’s ruling that an interpretation is plausible would make that ruling unreviewable. In this case, the First Circuit’s error regarding discovery and summary judgment seems to be rooted in its focus on Rule 56(d)’s similar provisions to Maine law, rather than Rule 56 as a whole. And it is Rule 56 as a whole that makes compatibility implausible.

306. *Id.*

where needed.<sup>307</sup> On this view, the burden of proof under Maine’s law is the same as that under Rule 56(d) (where a court can defer a summary judgment motion or order additional discovery upon a nonmovant’s showing that it cannot present facts required to overcome the motion). In any case, the court said, “If a federal court would allow discovery under Fed.R.Civ.P. 56(d) then, in our view, that would constitute good cause under the Maine statute.”<sup>308</sup>

But the plain text of Rule 56 clearly contemplates an opportunity for discovery prior to initial consideration of the summary judgment motion. The fact that the burden is on the nonmovant to justify an extension of discovery later does not change that fact. Maine’s statute allows a defendant to force a plaintiff to justify the proof of the plaintiff’s claim or the need for discovery prior to any fact-finding, contrary to Rule 56. If these discovery-staying provisions are to have any procedural effect at all, one must believe they conflict with the Federal Rules.

Under any plausible interpretation, Rule 56 unavoidably conflicts with the state laws at issue. While it is *possible* to read Rule 56 in a nonconflicting manner, it is not plausible. Implausibility is a higher bar than impossibility. An implausible reading is one that is so strained in light of the text and facially evident function of the Rule that it cannot be reasonably maintained, even if it can be imagined. For the reasons described above, the First Circuit’s interpretation of Rule 56 cannot be reasonably maintained.

Having found a conflict, we then proceed to the REA stage of *Erie* analysis. Applying the *Hanna-Sibbach* test – whether a rule “really regulates procedure” – Rule 56 is clearly valid under the Rules Enabling Act.<sup>309</sup> It is indisputable that its provisions for summary judgment are facially procedural. As such, under this test, Rule 56 would displace state discovery-staying provisions in anti-SLAPP laws. This might go differently under Justice Stevens’s approach; indeed, that is exactly what the court held in *Godin*.<sup>310</sup> Although less textually clear than the D.C. or California anti-SLAPP laws, Maine’s statute as a whole evinces a substantive purpose.<sup>311</sup> I remain comfortable with the *Hanna-Sibbach* test, both because *stare decisis* concerns militate away from approaches that would require

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307. See *id.* at 90-91.

308. *Id.*

309. *Hanna v. Plumer*, 380 U.S. 460, 464 (1965); *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941).

310. See *Godin*, 629 F.3d at 89 (“Because Section 556 is ‘so intertwined with a state right or remedy that it functions to define the scope of the state-created right,’ it cannot be displaced by . . . Rule 56.” (quoting *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 423 (2010) (Stevens, J., concurring in part and concurring in the judgment))).

311. The statute’s special provisions apply only to claims “based on the moving party’s exercise of the moving party’s right of petition under the Constitution of the United States or the Constitution of Maine.” ME. REV. STAT. ANN. tit. 14, § 556 (2003).

disavowing it and because I believe a federalism-based avoidance canon can provide the necessary protection for state law without risking the invalidation of Federal Rules. As such, under this canon, Rule 56 would displace discovery-staying provisions.

## CONCLUSION

This Note proposes a federalism-based avoidance canon to resolve potential conflicts between Federal Rules and state law. My approach both addresses the confusion in the Court's *Erie* doctrine highlighted in *Shady Grove* and equalizes the structural protections afforded to constitutional values, including federalism and the separation of powers, that undergirded the original *Erie* decision. At present, the Court's decisions in *Sibbach*, *Hanna*, and *Shady Grove* afford a nearly insurmountable advantage to Federal Rules ostensibly in conflict with state laws, leading to unnecessary displacement of state laws representing important rights, interests, and policies. This imbalance can be rectified without undue disruption of precedent by inserting a countervailing default rule in favor of state law at the conflicts stage of *Erie* analysis.

There are three benefits to this approach. First, a federalism-based avoidance canon affords the requisite protection to democratically instantiated state interests without unduly burdening the federal interest in a uniform system of federal procedure. By relying on the relatively streamlined rulemaking process to correct interpretive errors, this approach achieves a reasonable compromise between *Erie*'s twin goals of federalism and uniformity. Second, this approach better accords with existing interpretive canons – in particular the constitutional-doubts and antipreemption canons – and *Erie* precedents. This point is especially important to *Erie*'s underlying judicial-federalism concerns. If one reads *Erie* to limit the ability of the judiciary to displace state law beyond the boundaries set by congressional action, it follows that one should presume in favor of state law where Federal Rules as written do not unambiguously displace state law. Finally, this canon minimizes the risk of inconsistent application and judicial error by removing the need for subjective interest-based analyses or the complex, case-by-case balancing decisions that have plagued alternative approaches.

If adopted by federal courts, this approach will minimize the occurrence of the irksome *Erie* splits that have plagued lower courts in recent years. This approach also helps clarify the distinct stages of analysis in *Erie* cases in a principled and generalizable manner. My hope is that this interpretive intervention offers a small step forward in achieving *Erie*'s original aims: to clarify and simplify the choice of law in diversity actions.