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CONSTRAINING THE FEDERAL RULES OF CIVIL PROCEDURE THROUGH THE FEDERALISM CANONS OF STATUTORY INTERPRETATION

*Margaret S. Thomas**

The doctrine for deciding when to apply the Federal Rules of Civil Procedure to state claims heard in federal court has become a quagmire of exceptions and ephemeral distinctions, in large measure due to the persistent difficulty courts have in separating substantive rules from procedural ones in an era where special procedural rules are often used as an essential regulatory tool in state governance. This article examines the power of Federal Rules of Civil Procedure to displace contrary state law in diversity cases by focusing on the limited functional competence of the Supreme Court and its Advisory Committee to displace state policymaking decisions through the federal rulemaking process. It demonstrates that applying canons of statutory construction to the Rules Enabling Act that focus upon congressional intent and the political safeguards of federalism reveals the narrowness of the federal rulemaking power in the Enabling Act. It argues that reading the Enabling Act through a presumption against preemption and "clear statement" rules resonates with the core principles underlying the modern understanding of Erie Railroad Co. v. Tompkins.

This article concludes that the Court has no power under the Enabling Act to undermine state policymaking in areas left by Congress to the states that fall within the states' historic police powers, regardless whether the Rules themselves only purport to regulate procedural matters within the federal courts. In areas within the states' police power to regulate the general welfare, where Congress has left regulation to the states and the states have chosen to use the litigation process itself to shape social, economic, or political goals, the states' policies should prevail over the Federal Rules in diversity cases heard in federal court, even though the manner the states have used to effect such governance might conflict with the Federal Rules.

* Assistant Professor of Law, Louisiana State University, Paul M. Hebert Law Center. I wish to thank Berkeley Law for its support of this project during my fellowship there. This article was improved by helpful comments from Eric Biber, Wayne Brazil, Steve Bundy, Lee Epstein, Mark Gergen, David Oppenheimer, Bertrall Ross, Bo Rutledge, Suzanna Sherry, Fred Smith, and Jan Vetter, as well as faculty participants at presentations at Drexel University–Earl Mack School of Law and the 2012 Junior Faculty Federal Courts Workshop at Florida International University. I am particularly grateful to John Yoo for insightful critiques of early versions of the article. Any remaining errors are entirely my own.

INTRODUCTION

Since the United States Supreme Court issued its landmark opinion in *Erie Railroad Co. v. Tompkins* in 1938,[1] the Court has struggled to articulate a coherent theory of *Erie*'s meaning for the Federal Rules of Civil Procedure in cases involving state claims heard in federal courts. Put simply, the *Erie* doctrine has evolved into a short-hand summary requiring that federal courts apply state substantive law and federal procedural law in diversity cases litigated in federal court.[2] In practice, separating substance from procedure has proven to be at best complex, and at worst futile.[3] While it has long been hornbook law that valid Federal Rules generally ought to be followed even when they displace state commands in diversity cases,[4] the Supreme Court has created an intricate patchwork of ephemeral distinctions and murky exceptions, revealing its own deeply rooted discomfort with such displacement of state policymaking.[5]

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1. 304 U.S. 64 (1938).

2. *See, e.g.*, Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 427 (1996).

3. While there is no single authoritative definition of what makes a matter "substantive," Justice Harlan's definition is a helpful starting point. He would ask whether "the choice of rule would substantially affect those primary decisions respecting human conduct which our constitutional system leaves to state regulation." Hanna v. Plumer, 380 U.S. 460, 475 (1965) (Harlan, J., concurring); s*ee also infra* notes 168–174 and accompanying text.

4. *See Hanna*, 380 U.S. at 473–74.

5. *See generally* Patrick J. Borchers, *The Real Risk of Forum Shopping: A Dissent from* Shady Grove, 44 CREIGHTON L. REV. 29, 34 (2010) (describing the Supreme Court as lacking "a coherent theory of when federal and state rules collide"); Bradford R. Clark, Erie*'s Constitutional Source*, 95 CALIF. L. REV. 1289, 1310 (2007) (describing the line between substance and procedure as "murky at best" and the Supreme Court's doctrine in this area as consisting of "seemingly contradictory approaches") [hereinafter Bradford Clark, Erie]; Donald L. Doernberg, *"The Tempest":* Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co*.: The Rules Enabling Act Decision That Added to the Confusion—But Should Not Have*, 44 AKRON L. REV. 1147, 1155 (2011) (arguing many of the Supreme Court's decisions in this area in-

Despite wrestling with aspects of this problem for nearly the entire lifespan of the Federal Rules, the Supreme Court has made remarkably little progress in developing a theoretical framework with clearly articulated values. After three-quarters of a century, it is still struggling to define fundamental principles that might serve as a foundation for such a framework. The Court's most recent decision in this area, *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*,[6] leaves the creation of such a framework in a state of abject disarray. Recent cases lay bare an important disagreement within the Court's twenty-first century approach to federalism, which reflects a prudential commitment to a form of judicial restraint based on a narrow view of the Court's own power as it affects state policymaking. This form of federalism leads to restrained applications of federal procedure in order to avoid displacing state law in diversity cases, even though Congress has the constitutional power to regulate the procedures used in federal courts. Moreover, this vision of federalism sometimes crosses ideological divisions on the Court, creating unusual alliances between the justices.[7]

The Court's struggle over this form of federalism ultimately is a fight about the modern understanding of *Erie*'s constitutional dimension. The Court's contemporary disagreement about whether *Erie* has any relevance to the applicability of the Federal Rules in diversity cases is symptomatic of a broad historical disagreement about whether

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volve "sometimes regrettably well-disguised" balancing of state and federal interests); Jeffrey L. Rensberger, Hanna*'s Unruly Family: An Opinion for* Shady Grove Orthopedic Associates v. Allstate Insurance, 44 CREIGHTON L. REV. 89, 90 (2010) (concluding that various Supreme Court opinions in this area are "impossible to explain" under the reasoning of prior opinions); Jay Tidmarsh, *Foreword:* Erie*'s Gift*, 44 AKRON L. REV. 897, 901 (2010) (observing that the Supreme Court's opinions "have not always appeared consistent with each other"); Ralph U. Whitten, Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co*.: Justice Whitten, Nagging in Part & Declaring a Pox on All Houses*, 44 CREIGHTON L. REV. 116, 123 (2010) (describing the Supreme Court's decisions as "erratic").

6. 130 S. Ct. 1431, 1437–39 (2010). The Court in *Shady Grove* narrowly held that Federal Rule 23, which governs class actions, preempts a state law prohibiting plaintiffs from bringing class actions to recover small statutory penalties. *Id.* at 1441–42. There was no majority opinion for the reasoning supporting this result. Importantly, the Court could not form a majority as to the test for determining whether a Federal Rule was within the scope of the Court's rulemaking power. *See id.* at 1442–43 (Scalia, J., plurality); *see also id.* at 1449–50 (Stevens, J., concurring).

7. *Compare Gasperini*, 518 U.S. at 419, 439, 448 (1996) (showing that Justices Souter, Breyer, Kennedy, and O'Connor joined Justice Ginsburg's initial articulation of this vision of federalism, and that Chief Justice Rehnquist and Justices Scalia and Thomas rejected it, while Justice Stevens dissented on different grounds), *with Shady Grove*, 130 S. Ct. at 1435–36 (showing Justices Kennedy, Alito, and Breyer supporting Justice Ginsburg, and Chief Justice Roberts and Justices Scalia, Thomas, Sotomayor, and, to some extent, Stevens preferring less deference to state interests).

Erie has any constitutional basis.[8] Over the years, many scholars have expressed skepticism that such a basis exists at all.[9] Although the Court has come to accept that *Erie* has a constitutional basis, the Court has not articulated what that precise constitutional basis is.

The Court's many attempts to reconcile the Federal Rules with *Erie*'s lessons reflects the turmoil of the Court's concurrent commitments to both federalism and procedural uniformity, values that are at

8. *See, e.g.*, Charles E. Clark, *State Law in the Federal Courts: The Brooding Omnipresence of* Erie v. Tompkins, 55 YALE L.J. 267, 278 (1946) (describing *Erie*'s assertion that overruling prior doctrine was compelled by the unconstitutionality of that prior doctrine as "dictum"); Craig Green, *Repressing* Erie*'s Myth*, 96 CALIF. L. REV. 595, 596–97 (2008) (arguing against the "new" and "old" myths for *Erie*'s constitutional foundation); Arthur John Keeffe et al., *Weary* Erie, 34 CORNELL L.Q. 494, 497 (1948) (describing *Erie*'s claimed constitutional bases as "the Achilles heel of the opinion"); *c.f.* 19 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & EDWARD COOPER, FEDERAL PRACTICE AND PROCEDURE § 4505 (2d ed. 1996 & Supp. 2006) (noting that "[f]or eighteen years after the *Erie* decision the Court refrained from referring again to the Constitution in an *Erie* context" and "reduced [it] a few years later to a mere 'policy' "); Philip B. Kurland, *Mr. Justice Frankfurter, The Supreme Court & the* Erie *Doctrine in Diversity Cases*, 67 YALE. L.J. 187, 204 (1957) ("On the evidence as it now stands, the constitutional basis for the *Erie* doctrine is, at best unclear."). *But see* Bradford Clark, Erie, *supra* note 5, at 1308–11 (arguing that the Supremacy Clause provides *Erie*'s constitutional foundation); Gregory Gelfand & Howard B. Abrams, *Putting* Erie *on the Right Track*, 49 U. PITT. L. REV. 937, 948 (1988) ("[T]he subsequent cases readily demonstrate that the Supreme Court has consistently treated *Erie* as a decision of constitutional magnitude."); Paul J. Mishkin, *Some Further Last Words on* Erie*—The Thread*, 87 HARV. L. REV. 1682, 1682–83 (1974) (arguing *Erie* reflects the Constitution's "distinctive, independently significant limit on the authority of the federal courts to displace state law"); Adam N. Steinman, *What Is the* Erie *Doctrine? (And What Does It Mean for the Contemporary Politics of Judicial Federalism?)*, 84 NOTRE DAME L. REV. 245, 316–17 (2008) [hereinafter Steinman, *Judicial Federalism*] (arguing *Erie*'s "constitutional core" is that "federal judicial lawmaking cannot override substantive rights where such lawmaking has only an *adjudicative* rationale").

9. *See, e.g.*, Clark, *supra* note 8, at 278; Keeffe et al., *supra* note 8, at 497; Kurland, *supra* note 8, at 204. Craig Green has forcefully attacked both the constitutional bases cited in the *Erie* opinion itself, as well as later scholarly justifications. Green, *supra* note 8, at 602–22 (arguing that none of the "grounds" for the Supreme Court's decision "provide[ ] adequate constitutional support for *Erie*'s result"). Suzanna Sherry recently reignited this debate, arguing not only that *Erie* was incorrectly decided, but also that it was one of the worst decisions of all time. Suzanna Sherry, *Wrong, Out of Step, and Pernicious:* Erie *as the Worst Decision of All Time*, 39 PEPP. L. REV. 129, 130–32 (2011) [hereinafter Sherry, *Worst Decision*] ("[O]nly *Erie* satisfies all three requirements [of being 'the worst of all time']: it is wrong, it cannot be described as a product of its time, and it had—and continues to have—significant detrimental effects."); *see also* Suzanna Sherry, *Overruling* Erie*: Nationwide Class Actions and National Common Law*, 156 PENN. L. REV. 2135, 2137 (2008) ("*Erie* was probably wrong."). *But see* Donald Earl Childress III, *Redeeming* Erie*: A Response to Suzanna Sherry*, 39 PEPP. L. REV. 155, 161 (2011) (arguing even if *Erie*'s original reasoning was flawed, the decision is redeemable because it has "bestowed upon us" an "intuition" that protects "our federalism").

best in tension and at worst irreconcilable. The inability to harmonize the values driving the Court's decisions has made its doctrine unstable and has negatively impacted the Court's ability to offer guidance to lower courts. The confusion has resulted in the lower courts splitting on fundamental matters.[10] This unpredictability can increase the cost of federal litigation, create complex procedural satellite disputes that consume significant court resources, and generally delay adjudication of the merits of disputes. It also risks undermining important areas of state policymaking that Congress never intended to control through federal law.[11]

This article offers a new interpretation of the Rules Enabling Act (REA) that narrows the applicability of the Federal Rules in diversity cases where the Rules undermine certain kinds of state policymaking.[12] I argue that the importance of state participation in the political processes reveals an interpretive lens through which to reconsider the scope of the REA. This approach reframes the question of the scope of

10. *See, e.g.*, *infra* note 179 (describing split in federal courts as to enforceability of state anti-SLAPP laws).

11. In the wake of *Shady Grove*, there has been a growing chorus of commentators expressing concern over the decision's impact upon state policymaking. *See, e.g.*, Joseph P. Bauer, *Shedding Light on* Shady Grove*: Some Further Reflections on the* Erie *Doctrine from a Conflicts Perspective*, 86 NOTRE DAME L. REV. 939, 985 (2011) (criticizing the *Shady Grove* Court for failing to "take seriously . . . the agreed benefits of identifying, and then deferring to, state interests"); Borchers, *supra* note 5, at 40–41 (arguing the New York law in *Shady Grove* was "avowedly substantive" and the Supreme Court's decision "charts for [litigation in federal court] a new path unknown in New York law"); Rensberger, *supra* note 5, at 105 (arguing *Shady Grove* improperly "interferes with state law that has a substantive orientation while advancing no federal interest"); Whitten, *supra* note 5, at 132, 139 (criticizing the decision as reflecting "far too stingy an approach to interpreting state law" and disagreeing with *Shady Grove*'s reasoning and result due to the failure to follow state law " 'bound up' with a substantive right"); *see also* Helen Hershkoff, Shady Grove*: Duck–Rabbits, Clear Statements, and Federalism*, 74 ALB. L. REV. 1703, 1718–19 (2011) (describing the decision's effect as potentially "inhibit[ing] innovation by raising the costs of [state] political action and so prevent[ing] state legislatures from treating issues that are suppressed or ignored at the national level"); Alan 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, 1063 (2011) [hereinafter Ides, *Standard*] (observing that the plurality's approach in *Shady Grove* "undervalues a principle of federalism that arises when, in a diversity case, the conflicting law is both state-created and substantive"); *c.f.* Stephen B. Burbank & Tobias Barrington Wolff, *Redeeming the Missed Opportunities of* Shady Grove, 159 PENN. L. REV. 17, 52 (2011) ("[W]e hope to have made clear the need for a moderate and restrained interpretation of Federal Rules that otherwise would impinge on the freedom of Congress or the States to pursue lawmaking aims that might traditionally be characterized as substantive through means that one might traditionally characterize as procedural.").

12. 28 U.S.C. § 2072 (2006) (authorizing promulgation of the Federal Rules by the Supreme Court).

the Court's rulemaking power through preemption analysis, which generally involves "an inquiry into whether the ordinary meanings of state and federal law conflict."[13] The power to apply Federal Rules in a way that intrudes on traditional areas of state autonomy should require a clear manifestation of intent by Congress to displace state law in areas where states are exercising their historic police powers. This article thus proposes that the scope of the REA should be interpreted using canons of construction that safeguard federalism by presuming that Congress does not intend to preempt the police powers of the states.[14] It uses analytic tools from legislation and preemption to shed fresh light on the REA's scope. This approach reveals that the modern doctrinal framework for determining when the Federal Rules apply in diversity cases does not adequately account for the manner in which applying the Rules can undermine the states' police powers in areas Congress never occupied with federal lawmaking.

This article constructs a new framework for preempting state law in diversity cases that carefully preserves the balance of state and federal power struck by Congress. It demonstrates that both presumptions against preemption and "clear statement" rules (both of which require some manifestation of congressional intent to preempt state law in areas of traditional state autonomy) are particularly useful statutory interpretation tools in this context. These canons reflect values nearly identical to ones deeply imbedded in the modern understanding of *Erie*, reflecting the same theory of judicial restraint emanating from the political safeguards of federalism located in the legislative branch. In this analysis, the scope of the Court's rulemaking power in the REA turns on whether Congress intended for the Court to use the rulemak-

13. *See* Wyeth v. Levine, 555 U.S. 555, 588 (2009) (Thomas, J., concurring in the judgment) (quoting Bates v. Dow Agrosciences LLC, 544 U.S. 431, 459 (2005) (Thomas, J., concurring in judgment in part and dissenting in part)).

14. *See, e.g.*, *id.* at 565 ("'[I]n all preemption cases, and particularly in those in which Congress has legislated . . . in a field which the States have traditionally occupied, . . . we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" (quoting Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996) (internal citations omitted))); *Medtronic*, 518 U.S. at 485 (explaining that the Court has "used a 'presumption against the pre-emption of state police power regulations'" to interpret the scope of congressional intent to invalidate state law (quoting Cipollone v. Liggett Grp., Inc., 505 U.S. 504, 523 (1992))); BFP v. Resolution Trust Corp., 511 U.S. 531, 544 (1994) ("To displace traditional state regulation . . . the federal statutory purpose must be 'clear and manifest.'" (quoting English v. General Elec. Co., 496 U.S. 72, 79 (1990))); Gregory v. Ashcroft, 501 U.S. 452, 460 (1991) ("'[I]t is incumbent upon the federal courts to be certain of Congress's intent before finding that federal law overrides'" the usual constitutional balance defining federal and state powers (quoting Atascadero State Hospital v. Scanlon, 473 U.S. 234, 243 (1985))).

ing power to shift the federalism balance and oust the states from governing areas within their police powers. In the absence of a clear manifestation of such intent, if a Rule has such an effect, its application is improper, and state practice should prevail in diversity cases. The absence of clear direction from Congress to the Court to intrude on areas traditionally within the states' police powers in diversity cases limits the scope of the Court's own rulemaking power. The hornbook law regarding the primacy of the Federal Rules in diversity cases erroneously arrogates too much power to the Court to displace state law, at least in the narrow spheres where Congress has left the states to act as primary regulators of the general welfare, and states choose to do so using mechanisms that are arguably procedural.

Under this new approach, federal courts should not apply a Federal Rule to displace a state's law that is part of that state's regulation of the general welfare, or is otherwise related to the exercise of a state's police powers, in an area left by Congress to the states. The analytic focus becomes Congress's decision to leave states as primary regulators in such areas. To be clear, the proposed approach does not result in the Federal Rules failing to apply to *most* situations in diversity cases. It does, however, require federal courts applying such Rules to think carefully about what the Rules might be displacing.

Although conflicts between state practices and the Federal Rules in diversity cases present problems of federal law potentially displacing state law, they do not involve the "hard" form of preemption where federal law overrides *the entire operative force* of the state law being displaced. Rather they involve a "soft" form of preemption that only displaces the state law when it is invoked in a federal forum. This leaves the conflicting state law operational in cases being heard in the state's own courts and nonoperational in federal courts. In other words, the state law is effectively nullified when it is invoked in cases involving citizens of different states in federal court, but it continues to have force in similar cases in state court. This article refers to this latter form of "soft" preemption as "diversity preemption."[15] The Court's opinions treat diversity preemption as a form of preemption

15. The distinction between full preemption and "diversity preemption" in these cases deserves a fuller treatment than the scope of this article permits. For present purposes, it is sufficient to observe that both are ultimately the result of the Supremacy Clause. U.S. CONST., art. VI; *see also* Bradford Clark, Erie, *supra* note 5, at 1309–11 (discussing the relationship between *Erie* and the Supremacy Clause); Ernest A. Young, *Preemption and Federal Common Law*, 83 NOTRE DAME L. REV. 1639, 1655 (2008) [hereinafter Young, *Preemption*] (discussing the scope of federal common law in *Erie* as being a problem of preemption). *But see* Craig Green, Erie *and Problems of Constitutional Structure*, 96 CALIF. L. REV. 661, 665 (2008) (arguing

operating analogously to "hard" preemption,[16] thereby justifying the use of preemption's analytic tools in diversity cases.

This article's use of preemption's analytic tools in diversity cases avoids key problems present in two streams of academic literature and precedent, each of which emphasizes a conflicting value. The first stream attempts to harmonize state procedure with the Federal Rules by interpreting them to avoid conflicts, which has yielded narrow, strained, or unpredictable interpretations of Federal Rules.[17] I refer to this as the "conflict avoidism" position. A second, different stream attempts to apply the Federal Rules uniformly, regardless of what state policies they displace, which has caused the Rules to tread into policymaking decisions in areas where Congress left the states as primary regulators.[18] I refer to this second position as "procedural uniformism." The new solution offered in this article also avoids the seven-decade-old morass of sifting substance out of procedure when the two flow fluidly together, a task that has borne much debate but little fruit in the Court. Most importantly, this new interpretive approach focuses on the important political safeguards of federalism, a feature largely missing from proposals to apply the Federal Rules broadly to further national procedural uniformity.

This article's argument also pushes back against an important canonical understanding about the relationship between the *Erie* doctrine and the Federal Rules. For roughly half of the lifespan of the *Erie* decision, debates about the decision's meaning have been framed by the important contribution of John Hart Ely.[19] In light of Ely's work, it has generally been understood that *Erie* offers no guidance on the constitutional allocation of power between the states and the federal government in cases where there is some federal statute to ap-

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that the Supremacy Clause concerns only the preemptive power to "'displace' state law and 'bind' state judges").

16. *See, e.g.*, Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1448, 1452–53 (2010) (discussing preemption problem) (Stevens, J., concurring); Sibbach v. Wilson & Co., 312 U.S. 1, 9–10 (1941); *accord* Hanna v. Plumer, 380 U.S. 460, 471–72 (1965).

17. *See infra* Part II.A (discussing the criticisms raised by commentators of construing the Federal Rules to avoid conflicts with state law).

18. *See infra* Part II.A (discussing the national procedural uniformist position).

19. *See* John Hart Ely, *The Irrepressible Myth of* Erie, 87 HARV. L. REV. 693 (1974). Ely recognized that *Erie* arose in the context of applying the Rules of Decision Act, 28 U.S.C. § 1652 (1948), a statute requiring application of state rules of decision when there is no federal law on point, such that diversity jurisdiction only "provide[s] an unbiased tribunal." *Id.* at 713. Against this, he contrasted cases involving the Federal Rules, which turned not on an understanding of the Rules of Decision Act at issue in *Erie*, but instead on the REA, 28 U.S.C. § 2072 (1934), in which Congress expressly authorized the promulgation of the Federal Rules. *Id.* at 718–23.

ply.[20] Ely demonstrated that *Erie* was "functional[ly] irrelevant" to the applicability of the Federal Rules in diversity cases,[21] despite Justice Harlan's famous pronouncement that *Erie* was "one of the modern cornerstones of our federalism."[22]

In pushing back against Ely's banishment of the *Erie* doctrine from the Federal Rules, this article builds on the insight of Paul Mishkin, who recognized that Ely's reframing of *Erie* showed that *Erie*'s constitutional principles reflected not only separation of powers principles but also federalism. The latter is shown by the Constitution's structural protection of state autonomy in entrusting lawmaking power to Congress, where states have representation, rather than to the courts, where states have none.[23] For Mishkin, *Erie* was "a fulfillment of the institutional structure of the Constitution" which requires weighing state policy concerns in the political branches.[24] Mishkin read the REA's delegation of the power to the Court to promulgate federal procedural rules as "restat[ing] . . . the constitutional perception that courts are inappropriate makers of laws intruding upon the states' views of social policy in areas of state competence,"[25] which he viewed as fully consistent with Ely's analysis of *Erie.* However, Mishkin's sensitivity to the structural role of state interests in the Constitution helps illuminate the manner in which the modern framework for applying the Federal Rules has become disconnected from both the REA's statutory grant of authority and the constitutional role of the political branches in weighing state interests. This article considers Mishkin's insight regarding *Erie*'s reflection of the constitutional role of the political branches as a point of departure and takes its implication significantly further than he did.

This article proceeds in four parts. Part I traces the historical inconsistency in the Court's deference to state policymaking in post-*Erie* cases involving applications of the Federal Rules, culminating in *Shady Grove*. Part II examines scholarly defenses of doctrinal approaches favoring either national procedural uniformism at the expense of state policymaking or deference to state policymaking through conflict avoidism that results in strained interpretation of the

20. *Hanna*, 380 U.S. at 469–70.

21. Ely, *supra* note 19, at 706.

22. *Hanna*, 380 U.S. at 474 (Harlan, J., concurring).

23. Mishkin, *supra* note 8, at 1683–85; *see also* Bradford Clark, Erie, *supra* note 5, at 1289–90 (agreeing with Mishkin's account of *Erie*'s constitutional rationale). *But see* Green, *supra* note 8, at 615 n.8, 616 (disputing Mishkin's account as a "new myth").

24. Mishkin, *supra* note 8, at 1685.

25. *See id.* at 1686–87.

Federal Rules. I conclude that these approaches ultimately fail to account for important values or fail to solve the problem posed by state policymaking that regulates substantive areas using procedural devices. Part III defines the modern federalism principles at stake in both preemption doctrine and *Erie*-related cases, then compares the evolution of those federalism principles in both the Court's preemption cases and its *Erie*-related cases. It concludes that the canons of statutory construction that protect federalism are consistent with, and share common values with, key constitutional principles associated with the modern understanding of *Erie*. Part IV applies the insights of the federalism canons to the REA, argues that *Shady Grove* fundamentally misconstrued the limited grant of rulemaking power contained in the REA, and argues that Congress never delegated any power to use the Rules to impede state policymaking in important areas of traditional state regulation. Thus, Federal Rules should not be applied in a manner that displaces this narrow category of state laws.

I.
The Historical Tension Between Federal Procedural Uniformity and Fidelity to Federalism in Diversity Cases

Many scholars have adeptly summarized the complex history of the development of the Supreme Court's case law in the nearly three-quarters of a century following the *Erie* decision.[26] This article will not attempt to recast that full history. Instead, I focus on cases where the Federal Rules collided with state procedures reflecting substantive policy goals, and the Court then struggled to pin down what effect, if any, the *Erie* decision had upon the applicability of the Rules. In tracing this legal history, this Part offers a fresh reading of the cases by honing in on the Court's varying interpretative methodologies regarding the scope of the Federal Rules and its intermittent deference to federalism. Part II will then turn to the scholarly controversy that grew out of this legal history.

26. For relatively recent examples, see Kevin M. Clermont, *The Repressible Myth of* Shady Grove, 86 Notre Dame L. Rev. 987, 1004–13 (2011); C. Douglas Floyd, Erie *Awry: A Comment on* Gasperini v. Center for Humanities, 1997 B.Y.U. L. Rev. 267, 271–82 (1997); Allan Ides, *The Supreme Court and the Law to Be Applied in Diversity Cases: A Critical Guide to the Development and Application of the* Erie *Doctrine and Related Problems*, 163 F.R.D. 19, 24–74 (1995) [hereinafter Ides, *Supreme Court*]; Steinman, *Judicial Federalism*, *supra* note 8, at 254–73.

A. The "Functional Irrelevance" of Erie *to the Federal Rules' Power to Override State Policymaking in Diversity Cases*

The Federal Rules went into effect in 1938, the same year the Court decided *Erie.* In 1938, the Court had no reason to believe that *Erie* would collide with the new Federal Rules, as it presented no procedural dispute.[27] *Erie* involved the Rules of Decision Act and whether to apply Pennsylvania's doctrine regarding tort liability to an injured trespasser in a premises liability case—a substantive question of tort law.[28] The Court chose to apply state tort law because it concluded that result was constitutionally required.[29]

The Supreme Court first faced a collision between the newly promulgated Rules and state law just three years later in 1941 in *Sibbach v. Wilson.*[30] *Sibbach* unleashed a struggle to define the relationship between the Federal Rules and *Erie* that still continues. That struggle reflects a commitment to federalism that has ebbed and flowed over many decades, along with a fluid understanding of *Erie*'s significance.

1. Sibbach*'s Broad Interpretation of the Court's Rulemaking Power*

In *Sibbach v. Wilson*, the first case to consider a collision between the Federal Rules and conflicting state procedure, the Court had to choose between applying Federal Rule 35, which permits a physical or mental examination of a party, and an Illinois common law rule forbidding such examinations.[31] In a 5–4 decision, the Court upheld the application of the Federal Rule, based on its status as federal law under the Supremacy Clause.[32] It found the Rule to be within the scope of Congress's power to regulate the federal courts and within

27. *See* Gregory Gelfand & Howard B. Abrams, *Putting* Erie *on the Right Track*, 49 U. PITT. L. REV. 937, 959–60 (1988) ("There is no evidence that Justice Brandeis saw any significance in the coincidental unveiling of the Federal Rules of Civil Procedure . . . ."); Edward Lawrence Merrigan, Erie *to* York *to* Ragan*—A Triple Play on the Federal Rules*, 3 VAND. L. REV. 711, 715 (1949–1950) ("It seems that the Court firmly believed that *Erie* and the Rules could live happily together in diversity cases because of the ever-present line of demarcation between matters of substance and matters of procedure."); *c.f.* Burbank & Wolff, *supra* note 11, at 28 (observing that in that era, "federal question cases dominated the civil docket of the federal courts").

28. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 69–70, 80 (1938).

29. *See id.* at 77–78.

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

31. *Id.* at 7–8.

32. *Id.* at 16.

the scope of Congress's delegation of its constitutional authority to the Court to make procedural rules governing the federal courts.[33]

The Court's power to promulgate the Rules pursuant to the REA contains two statutory limitations. The first requires that the Rules regulate "the forms of process, writs, pleadings and motions, and the practice and procedure of the district courts and courts of appeal."[34] The second prohibits the Rules from abridging, enlarging or modifying "substantive rights."[35]

The *Sibbach* Court rejected the suggestion that "substantive" rights referred to any "'important' or 'substantial'" rights.[36] It instead relied on a simple binary framework that categorized Rules as "procedural" when they regulate "the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them."[37] Rule 35's own subject was procedural, and that was enough to bring this discovery mechanism within the scope of the REA.[38] The Court viewed the dispute in *Sibbach* as one over whether the Rule in question was lawfully promulgated pursuant to the REA,[39] a problem not implicating *Erie.* The case merely required applying federal law that was binding on federal courts, pursuant to the REA.[40]

Justice Felix Frankfurter dissented, arguing that the majority's substance-procedure binary failed to yield a correct answer to the problem.[41] Rather than focus on the Federal Rule's purpose, he looked at the purpose of the state rule that might be displaced by the Federal Rule. He discerned a substantive purpose there, as the state's policy of forbidding mental and physical examinations was rooted in the "inviolability of the person."[42] He thus rejected the inference that a mere authorization to make procedural rules could do away with a long-held, historically grounded right.[43]

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33. *Id.* at 9–10.

34. 28 U.S.C. § 2072 (1934).

35. *Id.*; *see also Sibbach*, 312 U.S. at 10.

36. *Sibbach*, 312 U.S. at 11.

37. *Id.* at 14.

38. The Court also treated the REA's requirement that Congress have an opportunity to review the Rules before they took effect, and Congress's failure to stop these particular Rules from taking effect, as signaling Congress's view that "no transgression of legislative policy was found." *Id.* at 16.

39. *See id.* at 10–13.

40. *See id.*

41. *Id.* at 16 (Frankfurter, J., dissenting).

42. *Id.*

43. *Id.* at 18.

Sibbach revealed that the conflict over applying the Federal Rules in diversity cases depends in large measure on how one understands the REA. Under the majority's view, the REA's authorization to promulgate Federal Rules meant that state rules to the contrary had to yield in a federal forum, without regard to any substantive purposes of those state rules being displaced. Four current Supreme Court justices accept this view.[44]

By contrast, under Justice Frankfurter's dissenting view in *Sibbach*, it was not enough that the Rule targeted procedure. Rather, the *application* of the Rule must not trample state substantive rights. Frankfurter's view foreshadowed an interpretive methodology that still animates the approach of four current justices, as well as that of Justice Stevens prior to his retirement.[45]

Thus, seven decades after *Sibbach*, the Court remains sharply divided over precisely the same issue that split the Court in 1941: the scope of the limits Congress placed on the Court's own rulemaking power.

2. *The Post-*Sibbach *Backlash: Protecting State Policy-Making Interests from Encroachment by the Federal Rules*

Two years after *Sibbach*, another purported conflict between the new Federal Rules and state procedure reached the Court in *Palmer v. Hoffman*,[46] but with the opposite result. The parties in *Palmer* disagreed over who had the burden of proving the plaintiff's contributory negligence in a railroad accident.[47] The plaintiff argued that because Federal Rule 8(c) made contributory negligence an affirmative defense, it ought to be proven by the defendant like any other defense.[48]

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44. Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1442 (2010) (Scalia, J., plurality) ("What matters is what the rule itself *regulates*: If it governs only the manner and means by which the litigants rights are enforced, it is valid . . . .") (internal quotation marks and citation omitted); *id.* at 1444 ("[C]ompliance of a Federal Rule with the Enabling Act is to be assessed by consulting the Rule itself, and not its effects in individual applications . . . .").

45. *See id.* at 1452–53 (Stevens, J., concurring) (internal citation and footnote omitted) (arguing the plurality's interpretation of the REA "ignores the second limitation [in the Act] that such rules also 'not abridge, enlarge or modify *any* substantive right,' and in so doing ignores the balance that Congress struck between uniform rules of federal procedure and respect for a State's construction of its own rights and remedies." (quoting 28 U.S.C. § 2072(b)); *see also id.* at 1461 (Ginsburg, J., dissenting) (discussing the significance of the REA's limitation on abridging, enlarging, or modifying substantive rights); Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 422–23 (1996) (discussing policy goals underlying New York's procedures).

46. 318 U.S. 109 (1943).

47. *Id.* at 116–17.

48. *Id.* at 117.

The Court unanimously rejected this argument. The opinion invoked *Erie* and reasoned that Rule 8 on its face only speaks to the manner of *pleading* the defenses, not who has the burden of *proving* them.[49] The opinion was silent as to why the Rule did not imply that the burden of proving a defense would fall to the party pleading it.[50] The end result was that state law on the matter trumped the federal procedural rule's implication.

Palmer limited the impact of *Sibbach* by interpreting a Federal Rule to avoid directly colliding with the state procedural practice. This approach implied that if a Rule did not speak *directly and unmistakably* to the exact same matter as the state procedure, the conflict might be avoided, and *Sibbach*'s holding regarding the Rules' status as federal law was irrelevant.

In 1945, about a decade after *Erie*, in *Guaranty Trust Co. v. York*,[51] Justice Frankfurter took one of the core ideas from his dissent in *Sibbach* and made it a central feature of the Court's re-interpretation of *Erie. Guaranty Trust* did not involve the Federal Rules, but its reasoning had broad implications for the Rules. It presented the question of whether federal courts hearing diversity cases ought to apply the state's statute of limitations, a matter historically considered procedural, but not covered by federal law.[52] In the majority opinion, Justice Frankfurter unraveled *Sibbach*'s substance-procedure binary framework, describing a Rule's categorization as one or the other as "immaterial."[53] He observed that the division between substance and procedure was fluid and contextual.[54] Instead of engaging in the difficult task of separating substantive and procedural rules, his opinion directed federal courts to apply state law where necessary to ensure "the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court."[55] This formulation conceived of *Erie* as being fundamentally concerned with equalization of the federal and state forums for litigants in diversity cases.[56]

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49. *Id.*
50. *See id.*
51. 326 U.S. 99 (1945).
52. *See id.* at 107.
53. *Id.* at 109.
54. *See id.* at 108.
55. *Id.* at 109.
56. *Id.* at 109–10 ("The nub of the policy that underlies *Erie R. Co. v. Tompkins* [sic] is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away, should not lead to a substantially different result. And so, putting to one side abstractions regarding 'substance' and 'procedure', we have held that in diversity cases the federal courts must follow

Although *Guaranty Trust* did not involve any Federal Rule, its reasoning served as a severe blow to *Sibbach* and the primacy of the Federal Rules in diversity cases. Virtually any of the Federal Rules could affect the result in a case.[57] Indeed, *Sibbach* would have almost certainly come out differently had that Court applied the test from *Guaranty Trust*.[58]

In 1945, one might reasonably have concluded that *Sibbach* was a dead letter.[59] Such a conclusion would ultimately prove incorrect—though it took several decades for that fact to reveal itself.[60] *Sibbach*'s vanishing influence was evident in 1949, when the Court decided an important trilogy of cases, issued the same day, all relying on *Guaranty Trust* instead of *Sibbach*.[61] Two of those cases involved the Federal Rules.[62]

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the law of the State as to burden of proof, as to conflict of laws, as to contributory negligence.") (internal citations omitted).

57. *See, e.g.*, FED. R. CIV. P. 16 (setting forth the district court's power to order parties to appear for a pretrial scheduling conference and issue scheduling orders regarding discovery and trial preparation, with the possibility of case-terminating sanctions against disobedient parties); *see also* FED. R. CIV. P. 37(b)(2).

58. Even in the era of *Sibbach*, the Federal Rules governing discovery contained a provision permitting case-terminating sanctions for failure to comply with an order permitting physical or mental examination. *See* Sibbach v. Wilson & Co., 312 U.S. 1, 8–9 (1941) (citing Rule 37(b)(2)(iii)). Thus, a district judge had the power to dismiss a case (or strike an answer) for refusal to comply with a court-ordered examination, making the discovery dispute "outcome determinative." *See id.*

59. For example, while acknowledging that the federal court system is an independent system of adjudication with its own "forms and mode" of litigation, *Guaranty Trust* declined to allow space for federal courts to allow those variations in "forms and mode" to justify variations in outcome where recovery would be available in one forum but not the other. *Guaranty Trust*, 326 U.S. at 108–09 ("When, because the plaintiff happens to be a nonresident, such a right is enforceable in a federal as well as in a State court, the forms and mode of enforcing the right may at times, naturally enough, vary because the two judicial systems are not identic. But since a federal court adjudicating a State-created right solely because of the diversity of citizenship of the parties is for that purpose, in effect, only another court of the State, it cannot afford recovery if the right to recover is made unavailable by the State nor can it substantially affect the enforcement of the right as given by the State.").

60. A few months after deciding *Guaranty Trust*, in 1946 the Court invoked *Sibbach* to conclude that a Federal Rule should displace a conflicting state procedural provision where the Federal Rule at issue "relates merely to the 'manner and the means by which a right to recover . . . is enforced,'" without addressing variations in outcome under *Guaranty Trust*. *See* Miss. Publ'g Corp. v. Murphree, 326 U.S. 438, 445–46 (1946) (quoting *Guaranty Trust*, 326 U.S. at 109). This was the only major decision embracing *Sibbach*'s reasoning for two decades.

61. Ragan v. Merchs. Transfer & Warehouse Co., 337 U.S. 530 (1949); Woods v. Interstate Realty Co., 337 U.S. 535 (1949); Cohen v. Beneficial Indus. Loan Corp. v. Smith, 337 U.S. 541 (1949).

62. *Ragan*, 337 U.S. at 531 & n.1 (Rule 3); *Cohen*, 337 U.S. at 556 (Rule 23).

The first, *Cohen v. Beneficial Industrial Loan Corp.*,[63] showed the Court again engaging in the method of conflict avoidance first seen in *Palmer.* A New Jersey procedural rule required a plaintiff to post a bond not required by the Federal Rules.[64] As in *Palmer*, since the Federal Rule did not speak *directly* on such bond requirements, the Court followed state procedure.[65]

That same day, the Court also chose to follow a state procedural rule in *Ragan v. Merchants Transfer & Warehouse Co.*[66] Under Federal Rule 3, an action in federal court commences when the complaint is filed.[67] This would stop the running of the statute of limitations, making an action timely if filed before the end of the limitations period. Under Kansas state law, however, a limitations period would continue running until service of the summons (regardless of the date of the complaint's filing). The choice of procedure mattered in *Ragan* because the suit was time-barred under Kansas law but not under Rule 3.[68] The Court interpreted *Erie* through the lens of *Guaranty Trust* and found that the Kansas procedural rule governed because a federal court "cannot give [the claim] longer life . . . than it would have had in the state court . . . ."[69]

Ragan and *Cohen* taken together represented the high-water mark of the Court's deference to state procedural rules. Commentators promptly criticized the assault on uniform, national Federal Rules.[70]

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63. 337 U.S. 541 (1949). The 6–3 majority opinion was authored by Justice Jackson, *id.* at 543–57, who was not on the Court when *Sibbach* was decided in January 1941. He joined the Court six months later.

64. *Id.* at 544–45.

65. *Id.* at 556–57. Nevertheless, Justice Douglas (who wrote *Palmer*) and Justice Frankfurter (who defended the importance of state substantive rights in his *Sibbach* dissent) both disagreed in part with the majority in *Cohen*, on the ground that "[t]he New Jersey statute does not add one iota to nor subtract one iota from that cause of action," but rather merely regulates the method for enforcing the shareholders' rights. *Id.* at 557 (Douglas, J., dissenting). The dissent disagreed with the Court's conclusion about what the state's purpose was.

Justice Douglas's commitment to outcome parity between state and federal courts in diversity cases became clear in *Woods v. Interstate Realty Co.*, another *Erie*-related case decided in the trilogy that day. 337 U.S. at 535–36. Justice Douglas, writing for the majority, explained that *Guaranty Trust* was "premised on the theory that . . . where in such cases one is barred from recovery in the state court, he should likewise be barred in the federal court." *Id.* at 538.

66. 337 U.S. 530 (1949).

67. FED. R. CIV. P. 3.

68. *Ragan*, 337 U.S. at 531.

69. *Id.* at 533–34.

70. *See, e.g.*, Merrigan, *supra* note 27, at 711–12 (warning that "[p]ractising [sic] attorneys [were] unable to determine which of the Federal Rules will remain in full effect and which might be rejected by the courts on the theory that they conflict in a substantial way with some state law."); *id.* at 718 (arguing that *Ragan* and *Cohen*

3. Sibbach *Redux: The "Functional Irrelevance" of* Erie *to the Federal Rules' Power to Override State Policy-Making in Diversity Cases*

The vulnerability of the Federal Rules lasted until 1965, when the Court decided *Hanna v. Plumer* and disinterred *Sibbach* from the grave in which Justice Frankfurter had attempted to bury it twenty years earlier.[71] *Hanna* involved a Massachusetts claim in which a driver who allegedly negligently caused an automobile accident had died, and the plaintiff injured in the accident sued the decedent's estate and named the executor as the defendant.[72] The plaintiff served the executor in compliance with Federal Rule 4,[73] but this service did not comply with Massachusetts's special requirement that an executor be served personally.[74] *Hanna* reasoned that applying state rules in place of the Federal Rules governing the manner of service would "disembowel either the Constitution's grant of power over federal procedure or Congress's attempt to exercise that power in the Enabling Act."[75] It thus applied Federal Rule 4 over the conflicting state service rule.[76]

In concluding that the federal service rule affected no substantive rights, the *Hanna* Court declined to focus on whether the state rule at issue reflected an "important" state policy.[77] In a move that would have significant repercussions in future cases, it interpreted prior inconsistent cases as involving disputes where "the scope of the Federal Rule was not as broad as the losing party urged, and therefore, there being no Federal Rule which covered the point in dispute, *Erie* commanded the enforcement of state law."[78] Pre-*Hanna* cases involving the Federal Rules were thus construed as being about the *scope* of the

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"brought uniformity in federal procedure to an end"); *see also* Bernard C. Gavit, *States' Rights & Federal Procedure*, 25 IND. L.J. 1, 25–26 (1949) (noting that lawyers in federal courts "must guess as to the proper procedure" and disputing the idea that there is a state right to state procedure in federal courts).

71. *See* Hanna v. Plumer, 380 U.S. 460, 464 (1965) (quoting Sibbach v. Wilson & Co., 312 U.S.1, 14 (1941)) ("The test must be whether a rule really regulates procedure—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them.").

72. *Id.* at 461.

73. *Id.*

74. *Id.* at 462 (citing MASS. GEN. LAW, ch. 197, § 9).

75. *Id.* at 473–74.

76. *See id.* at 464. In contrast to the state rule that required that the executor be *personally* served, Federal Rule 4 permitted the summons and complaint to be left with the executor's wife at his home. *See id.* at 461–62.

77. *See id.* at 468 n.9.

78. *Id.* at 470.

Rule in question. *Hanna* ignored those cases' explicit reliance on *Erie* to resolve the question of that scope.

John Hart Ely's article expounding on the *Hanna* decision, one of the most influential commentaries ever written in this area of law,[79] sought to dispel the "myth" that *Erie* "carried some special constitutional magic of a sort that transcended ordinary issues of federal power."[80] He showed that *Hanna* revealed the choice between a valid Federal Rule and state procedural rule to be a straightforward statutory application in which *Erie* was relegated to "functional irrelevance."[81] If a Rule falls within the REA's grant of power, it applies by virtue of Congress's statutory command, and any conflicting state rule must yield.[82]

Through Ely's elucidation of *Hanna*, there was not one "*Erie* doctrine," but rather at least two distinct doctrines addressed to different problems.[83] The first was a pure expression of the Supremacy Clause: where Congress has enacted legislation governing diversity actions, the Court must follow it.[84] Under this situation, the reasoning of *Hanna* and *Sibbach* require federal courts to apply the Federal Rules to "procedural" matters. The other doctrine is the "true" *Erie* doctrine, covering matters where there is no federal statute or Federal Rule, and the question involves a choice between a federal common law provision and state law. In such circumstances, courts follow *Hanna*'s modified version of *Guaranty Trust*'s outcome-determinative test.[85]

Hanna's legacy has been to expand the power of the Federal Rules to subordinate state laws in diversity cases.[86] This result flows

79. In early 2012, Ely's article had been cited by seventy judicial opinions and several hundred law review articles, according to Westlaw's Key Cite service.

80. Ely, *supra* note 19, at 704–05.

81. *Id.* at 706.

82. *Id.* at 710; *see also Hanna*, 380 U.S. at 471 ("When a situation is covered by one of the Federal Rules . . . the court has been instructed to apply the Federal Rule, and can refuse to do so only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions.").

83. Ely, *supra* note 19, at 697–98.

84. *Id.* at 698; *see also* U.S. CONST., art. VI, cl. 2.

85. Allan Ides summarizes this new test as requiring the federal court to follow federal procedure "despite conflicting state law, unless the particular procedural rule being challenged encouraged choice of the federal forum due to a predictable and substantial effect that application of the rule would have upon the outcome of the litigation." Ides, *Supreme Court*, *supra* note 26, at 59–60; *see also* Ely, *supra* note 19, at 698–99.

86. *See, e.g.*, Ides, *Supreme Court*, *supra* note 26, at 80 (arguing that the proper framework for determining the applicability of the Federal Rules requires first ascer-

directly from an understanding that the validity of a Rule depends on whether "a rule really regulates procedure."[87] Nevertheless, *Hanna*'s attempt to establish a bright line with regard to the primacy of the Federal Rules only shifted the debate to focus on the scope and meaning of the Rules and required future courts to continue to interpret the Rules to avoid such conflicts.

B. Construing the Federal Rules to Avoid Collisions With Important State Interests

While *Hanna* has sometimes been lauded for providing clarity and coherence,[88] its troublesome effect became apparent in 1980 in *Walker v. Armco Steel Co.*,[89] which applied the conflict-avoidance technique.[90] *Walker* involved the lapsing of a state statute of limitations for a state negligence claim where the plaintiff had filed suit in federal court within the statute of limitations period, but had not served the defendant in a timely manner.[91] Instead of applying *Hanna*'s new "bright line" rule by enforcing Rule 3's definition of when an action commences in federal court,[92] the Court instead retreated to pre-*Hanna* rationales for applying state law.[93] *Walker* held there was no direct collision between Rule 3 and the Oklahoma statute, even though both explicitly set different triggers for when an action commenced.[94] The Court looked to the state's policy rationale

taining whether the rule covers the circumstances at hand and then inquiring whether the Rule is valid under the REA, with the understanding that "rules promulgated pursuant to the REA must, at least arguably, regulate the manner, method or means through which a case is litigated.")

87. Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941); *see also* Ely, *supra* note 19, at 719–20. This approach has been criticized for ignoring the second sentence of the REA's limitation on the Rules, namely that they may not abridge, enlarge, or modify any substantive right. *See* Ely, *supra* note 19, at 723–24. However, others have argued there is a "strong presumption of validity" for the Federal Rules. *See* Ides, *Supreme Court*, *supra* note 26, at 80–81.

88. *See* 19 WRIGHT, MILLER, & COOPER, *supra* note 8, at § 4505 (describing *Hanna*'s analytic framework as "coherent"); Ides, *Supreme Court*, *supra* note 26, at 56 (describing *Hanna* as "provid[ing] a coherent method for assessing the legitimacy of" the Rules). *But see* Ides, *Supreme Court*, *supra* note 26, at 59 (suggesting that the Court's failure to overrule *Ragan*, *Woods*, and *Cohen* "comes with the price of promoting unnecessary ambiguity").

89. 446 U.S. 740 (1980).

90. *Id.* at 750–52.

91. *Id.* at 742–43. Under Oklahoma law, just as in *Ragan v. Merchs. Transfer & Warehouse Co.*, 337 U.S. 530 (1949), the statute of limitations was not tolled by the filing of the complaint because the action was not "deemed commenced" until service of the summons. *Id.*

92. *Id.* at 747.

93. *Id.* at 752–53.

94. *Id.* at 751–52.

and found a "substantive decision" favoring actual service on a defendant to serve the purpose of the statute of limitations.[95]

Hanna did nothing to dissuade the Court from inquiring into the purpose served by state procedures in order to ascertain whether they cover the same matter as a Federal Rule in *Walker*.[96] Thus, even after *Hanna*, the Court continued to account for federalism concerns by examining the state policy purpose underlying the law being displaced,[97] and by using creative interpretive approaches to avoid applying particular Rules.[98] Nevertheless, the *Walker* opinion remarked somewhat ironically in a footnote that this application should not "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."[99] Surprisingly, the Court subsequently interpreted Rule 3 to have a *different* "plain" meaning in a federal question case than it had in diversity cases like *Ragan* and *Walker*, where there was a state law governing the same point.[100] It thus becomes impossible to account for *Walker*'s result using the text of Rule 3 alone.

The focus on state policymaking goals returned again in 1996 in *Gasperini v. Center for Humanities, Inc*.[101] In *Gasperini*, New York law required state court judges to award a new trial when a jury's award "deviate[d] materially from what would be reasonable compen-

95. Richard D. Freer, *Some Thoughts on the State of* Erie *after* Gasperini, 76 TEX. L. REV. 1637, 1641–42 & n.12 (1998) [hereinafter Freer, Gasperini].

96. Even decisions in this era applying the Federal Rules over state laws continued to examine the state's purpose in enacting those laws to illuminate whether there was an actual conflict between the state law and Federal Rule. *See* Burlington N. R.R. v. Woods, 480 U.S. 1, 7 & n.5 (1980) (finding the two potential sources of law in conflict, based in part on its reading of *the purpose* of the conflicting state procedure, which served the same goal as the Federal Rule).

97. *See* Clermont, *supra* note 26, at 1028–29 ("Federal judges have demonstrated an inclination, perhaps motivated by the irrepressible myth of *Erie*, to find some way to accommodate state interests."); Richard Freer & Thomas C. Arthur, *The Irrepressible Influence of* Byrd, 44 CREIGHTON L. REV. 61, 68–77 (2010) (arguing the Court implicitly balances state interests as part of a silent, behind-the-scenes application of the balancing test in *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525 (1958)).

98. *See* discussion *infra* notes 102–115 and accompanying text (regarding *Gasperini*).

99. *See* Walker v. Armco Steel Co., 446 U.S. 740, 750 n.9 (1980).

100. *See* West v. Conrail, 481 U.S. 35, 39 & n.4 (1987). *West*'s use of a different "plain meaning" for Rule 3 in a federal question case than in diversity cases was criticized by one commentator as a "sleight of hand." Stephen P. Burbank, *Of Rules and Discretion: The Supreme Court, Federal Rules and Common Law*, 63 NOTRE DAME L. REV. 693, 702 (1988).

101. 518 U.S. 415 (1996).

sation."[102] This state law purportedly contravened the Seventh Amendment's prohibition on re-examining facts tried by a jury,[103] as well as the federal common law practice of permitting district judges to review verdicts only to determine whether the amount awarded by the jury "shocked the conscience," and then having their findings reviewed on appeal only for abuse of discretion.[104] It also created a potential conflict with Federal Rule 59(a), which allowed 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."[105]

As in *Walker*, the Court examined the state legislature's rationale for passing the state law.[106] The federal "shocks the conscience" standard could have potentially allowed federal juries to award sums that did not shock the conscience, but still deviated materially from reasonable compensation by grossly exceeding the amount of awards in similar cases. Thus, as New York was attempting to limit how much state plaintiffs could recover on state-created claims, the Court concluded that the procedural rule had a substantive purpose.[107]

Confining its analysis to a cryptic footnote, the Court concluded that Rule 59(a) did not directly collide with the New York procedure because the Rule itself lacked any standard for determining new trial motions.[108] Absent any federal law to supply that standard, it found the only candidate to be state law.[109] It also hinted that any other conclusion might cause Rule 59(a) to violate the REA by abridging, enlarging, or modifying a substantive right.[110] In analyzing Rule 59(a),

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102. *Id.* at 418 (quoting N.Y. C.P.L.R. § 5501(c) (McKINNEY 1995)).

103. *See id.* at 419 ("The compatibility of [N.Y. C.P.L.R. § 5501(c) and the Seventh Amendment] . . . is the issue we confront in this case."); *see also* U.S. CONST. amend. VII ("[T]he right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.").

104. *Gasperini*, 518 U.S. at 422 ("[C]ourts would not disturb an award unless the amount was so exorbitant that it 'shocked the conscience of the court.' ").

105. FED. R. CIV. P. 59(a) (1997); *see also Gasperini*, 518 U.S. at 467–68 (Scalia, J., dissenting) (arguing that the principle behind application of N.Y. C.P.L.R. § 5501(c), rather than FED. R. CIV. P. 59(a), in this case "bears the potential to destroy the uniformity of federal practice and the integrity of the federal court system").

106. *Gasperini*, 518 U.S. at 429.

107. *Id.* ("In sum, § 5501(c) contains a procedural instruction . . . but the State's objective is manifestly substantive.").

108. *Id.* at 437 n.22.

109. *Id.* ("Whether damages are excessive for the claim-in-suit must be governed by some law. And there is no candidate for that governance other than the law that gives rise to the claim for relief—here, the law of New York.").

110. *Id.* (citing 28 U.S.C. §§ 2072(a)–(b)) ("Supreme Court shall have the power to prescribe general rules of . . . procedure"; "[s]uch rules shall not abridge, enlarge or

the Court invoked *Walker* as standing for the proposition that the Court should "'interpret the federal rules to avoid conflict with important state regulatory policies.'"[111] The *Gasperini* majority used the state policy rationale not just to determine the breadth of the New York law, but also to guide its interpretation of the federal procedural rules themselves,[112] thereby avoiding *Hanna*'s rule.

Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, rejected the majority's conclusion that the New York law was substantive.[113] He thought it was a mistake to reach the *Erie* analysis at all because *Hanna* required the Court to follow the Federal Rule.[114] Without explaining why Rule 59(a) covered the same situation addressed by the state rule, or addressing the use of the state policy rationale as an interpretive lens in prior case law, Scalia concluded that the Federal Rule controlled.[115]

Gasperini met with mixed reviews from academic commentators. One commentator lauded the efficacy of the Court's "remarkably stable" framework by pointing out that the Court was at least able to render an opinion for a clear majority in every leading *Erie*-related case.[116] By contrast, other scholars read *Gasperini* as having the po-

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modify any substantive right"). The Court found a substantive right in the New York standard for determining a new trial, because that standard was analogous to a limit on damages, which the Court surmised would be substantive. *Id.* at 440, 441 n.1 (Stevens, J., dissenting) (endorsing the majority's reasoning but disagreeing on the disposition of the case).

111. *Id.* at 437 n.22 (quoting R. FALLON, D. MELTZER, & D. SHAPIRO, HART & WECHSLER, THE FEDERAL COURTS & THE FEDERAL SYSTEM 729–30 (4th ed. 1996)).

112. This approach echoed the one proposed by Justice Scalia in his dissent in *Stewart Org. v. Ricoh Corp.*, 487 U.S. 22, 37–38 (1988) (Scalia, J., dissenting) ("[I]n deciding whether a federal procedural statute or Rule of Procedure encompasses a particular issue, a broad reading that would create significant disuniformity between state and federal courts should be avoided if the text permits."). However, Justice Scalia apparently no longer held this view by the time the Court decided *Gasperini*.

113. *Gasperini*, 518 U.S. at 464 (Scalia, J., dissenting) ("It seems to me quite wrong to regard this provision as a 'substantive' rule for *Erie* purposes.").

114. *Id.* at 467–68 ("[T]he court has no choice but to apply the Federal Rule, which is an exercise of what we have called Congress's 'power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either.'" (quoting Hanna v. Plumer, 380 U.S. 460, 472 (1965))).

115. *Id.* at 468. Though Scalia had earlier read *Walker*, *Cohen*, and *Palmer* as requiring statutory interpretations facilitating avoidance of conflict with state law, *Stewart*, 487 U.S. at 37–38 (Scalia, J., dissenting), he saw no possibility of applying such an interpretation here. *Gasperini*, 518 U.S. at 468.

116. Thomas D. Rowe, Jr., *Not Bad for Government Work: Does Anyone Else Think the Supreme Court Is Doing a Halfway Decent Job in Its* Erie-Hanna *Jurisprudence?*, 72 NOTRE DAME L. REV. 963, 1014–15 (1998). Any purported stability of the doctrine surely collapsed in the fractured opinion in *Shady Grove*. *See infra* Part I.C (discuss-

tential to lead to "unwarranted subordination of substantive state objectives to ad hoc judicial perceptions of amorphous federal procedural 'interests,'"[117] as "cast[ing] *Erie* adrift from its constitutional moorings" by disregarding *Hanna*,[118] and as "turn[ing] the *Erie* Doctrine on its head by creating 'a transcendental body of law outside of any particular State but obligatory within it.'"[119]

The disagreement over *Gasperini*'s reading of Rule 59(a) was a prelude to the fractured decision in *Shady Grove.*

C. Shady Grove*'s Confusion About the Relationship Between State Policymaking and the Meaning of the Federal Rules*

In *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*,[120] the Court finally confronted six decades of inconsistency in its interpretations of the scope of the Federal Rules. Its attempt to resolve this inconsistency failed abysmally. There was no majority opinion for significant aspects of *Shady Grove*'s rationale, and a majority of the justices disagreed on most of it.[121]

Shady Grove involved an alleged conflict between the federal class certification requirements set forth in Rule 23[122] and a New York statute prohibiting plaintiffs from bringing class actions to recover small statutory penalties to avoid allowing these small penalties to create "annihilating punishment" for defendants.[123] When an insur-

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ing the failure of the Supreme Court to resolve inconsistency understanding the scope of the Federal Rules).

117. Floyd, *supra* note 26, at 269–70.

118. Michael A. Berch & Rebecca White Berch, *An Essay Regarding* Gasperini v. Center for Humanities, Inc. *and the Demise of the Uniform Application of the Federal Rules of Civil Procedure*, 69 MISS. L.J. 715, 733–34 (1999).

119. Earl C. Dudley, Jr. & George Rutherglen, *Deforming the Federal Rules: An Essay on What's Wrong with the Recent* Erie *Decisions*, 92 VA. L. REV. 707, 707 (2006) (quoting Erie R.R. Co. v. Tompkins, 304 U.S. 64, 79 (1938)). In this vein, another scholar described *Gasperini* as "misbegotten precedent" and its reasoning as "unfathomable." John B. Oakley, *Illuminating* Shady Grove*: A General Approach to Resolving* Erie *Problems*, 44 CREIGHTON L. REV. 79, 79, 88 (2010) [hereinafter Oakley, Shady Grove].

120. 130 S. Ct. 1431 (2010).

121. *See id.* at 1442 (Part II.B, joined by the Chief Justice and Justices Thomas and Sotomayor); *id.* at 1444 (Part II.C, joined by the Chief Justice and Justice Thomas); *id.* at 1451 n.5, 1456 (Stevens, J., concurring) (agreeing with four dissenting justices' analytic approach but disagreeing on its application to the facts).

122. *See* FED. R. CIV. P. 23.

123. 130 S.Ct. at 1464 (Ginsburg, J., dissenting) (quoting Vincent Alexander, Practice Commentaries, C901:11, *reprinted in* 7B MCKINNEY'S CONSOLIDATED LAWS OF NEW YORK ANNOTATED 104 (2006)); *see also* N.Y. C.P.L.R. § 901(b) (MCKINNEY 2006); *Shady Grove*, 130 S. Ct. at 1438 ("The Second Circuit believed that § 901(b) and Rule 23 do not conflict because they address different issues . . . . We Disagree.").

ance carrier owed a total of approximately $500 in such penalties to one set of doctors due to delays in remitting payment for claims, the doctors brought a $5 million class action in federal court under the Class Action Fairness Act (CAFA), invoking diversity jurisdiction. The plaintiff doctors invoked Rule 23 to evade New York's prohibition on class treatment for such claims.[124]

Following *Hanna*, a majority of five justices agreed that the class action could be maintained in federal court because Rule 23, not New York law, controlled the requirements for certifying a class.[125] The majority held that the state's legislative purpose "cannot override the [state] statute's clear text" when that text collides with a Federal Rule, and there is "only one reasonable reading" of that Rule.[126] As in *Hanna*, *Shady Grove* distinguished prior cases that used strained interpretations of Rules to avoid conflicts with state policymaking as somehow involving Rules not covering the same subject as state laws that used almost exactly the same words.[127]

Four dissenters and Justice Stevens, who concurred with the majority as to the result, embraced the principle that the Federal Rules "must be interpreted with some degree of 'sensitivity to important state interests and regulatory policies.'"[128] This faction failed to form a majority, though, as the justices disagreed on how this vague principle should be applied to the facts. Nevertheless, the common ground they shared included some interpretive space in the Federal Rules to weigh federalism concerns in deciding the scope of any particular Rule. Given the majority's holding, however, this interpretative space now exists only where a Rule is susceptible to more than one "reasonable reading," and the Rule's plain text does not collide with the text of the state rule (as distinguished from the state's policy goals in enacting that rule).

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124. *Shady Grove*, 130 S. Ct. at 1437; *see id.* at 1460 (Ginsburg, J., dissenting) ("By . . . filing in federal court based . . . [on] diverse citizenship and requesting class certification, Shady Grove hopes to recover, for the class, statutory damages of more than $5,000,000. The New York Legislature has barred this remedy . . . .").

125. *Id.* at 1438.

126. *Id.* at 1440; *see also id.* at 1441 n.7.

127. *See id.* at 1441–42 ("If the Rule were susceptible of two meanings—one that would violate § 2072(b) and another that would not—we would agree. . . . But it is not. Rule 23 unambiguously authorizes any plaintiff, in any federal civil proceeding, to maintain a class action if the Rule's prerequisites are met. We cannot contort its text, even to avert a collision with state law that might render it invalid.").

128. *Id.* at 1449 (Stevens, J., concurring) (quoting Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 427 n.7 (1996)); *see also id.* at 1460 (Ginsburg, J., dissenting) ("I would continue to interpret Federal Rules with awareness of, and sensitivity to, important state regulatory policies.").

In the face of the apparent textual conflict between Rule 23 and the New York law, Justice Scalia, writing for a four-justice plurality, declined to delve into the state's "subjective intentions" and refused to invite a situation where "one State's statute could survive [diversity] pre-emption (and accordingly affect the procedures in federal court) while another State's identical law would not, merely because its authors had different aspirations."[129]

At least five justices rejected this aspect of the plurality's approach. Justice Ginsburg, writing for three other dissenting colleagues, emphasized the Court's long history of reading the Rules to avoid conflicts with state laws, both before and after *Hanna*.[130] She perceived the New York Legislature's intent to prevent the exorbitant inflation of penalties in class actions.[131] She viewed Rule 23 as being susceptible to an interpretation that would avoid conflicting with this state policy goal, as Rule 23 does not speak to the kind of remedy available to a party bringing a class action.[132] A plaintiff might seek some other remedy in a representative suit, but not the statutory penalty provided by New York law. Thus, Justice Ginsburg would have held the case was like *Gasperini* and followed the state law.[133]

The concurrence authored by Justice Stevens shared much of the dissent's analytic framework, but disagreed with the dissent's application of that framework to the facts of the case, and agreed with Justice Scalia that there was only one reasonable way to read Rule 23.[134] Justice Stevens parted ways with the dissenters in their understanding of the intent of the New York Legislature as targeting something different from Rule 23. He suggested such a finding was impossible where the state procedural law at issue was so generic as to apply not only to New York's own statutory penalties, but also to penalties under other states' laws, and where there was inadequate legislative history to show a substantive purpose.[135] For Justice Stevens, there was a failure of proof as to any substantive policy goals behind the New York statute at issue.[136] He thus agreed with Justice Ginsberg's general sensitivity to state policy goals, but he interpreted the specific goals in play in this case differently.

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129. *Id.* at 1441 (Scalia, J., plurality).
130. *Id.* at 1462–63 (Ginsburg J., dissenting).
131. *Id.* at 1464.
132. *Id.* at 1465–66.
133. *Id.* at 1472.
134. *Id.* at 1448 (Stevens, J., concurring).
135. *See id.* at 1457.
136. *See id.* at 1458.

In addition to fracturing over the role of state legislative intent in the analysis, the Court also split over conflicting understandings about the scope of the REA's rulemaking power. Justice Scalia argued on behalf of a plurality that, in accordance with *Sibbach*, a Rule is valid under the REA so long as it "governs only the manner and the means" by which litigants' rights are enforced, regardless of whether it affects substantive state rights.[137] In this schema, "compliance of a Federal Rule with the Enabling Act is to be assessed by consulting the Rule itself, and not its effects in individual applications."[138] Writing for an even smaller plurality, Justice Scalia would have extended *Sibbach* to effectively overrule *Gasperini*, and hold that even state procedures that are bound up with substantive rights can be displaced by Federal Rules.[139]

Justice Stevens again rejected this smaller plurality's position and instead recognized that Congress has not exercised its own power to "prescribe procedural rules that interfere with state substantive law in any number of respects."[140] Rather, he would interpret the REA to mean that the Federal Rules "cannot displace a State's definition *of its own* rights or remedies."[141] Like the four dissenters, Justice Stevens embraced *Gasperini*'s instruction that courts should interpret federal rules "with sensitivity to important state interests and regulatory policies."[142] Somewhat implausibly, he also signed on to the majority opinion's castigation of that very inquiry as "standardless" in a footnote in Part II.A of the majority opinion.[143]

Justice Stevens recognized the connection of the Rules to a congressional policy choice related to federalism. He concluded that the interpretation of the Federal Rules takes place against the background of a balance struck by *Congress* that focuses on the state law being displaced. In this balance, the form of the state law does not matter; it instead "turns on whether the state law actually is part of a State's

137. *Id.* at 1442.

138. *Id.* at 1444.

139. *Id.* at 1445–46 & n.13.

140. *Id.* at 1449.

141. *Id.* (emphasis added).

142. *Id.* at 1449 (quoting Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 427 n.7 (1996)).

143. *Id.* at 1441 n.7 (majority opinion). In this important footnote, the majority criticized *Gasperini*'s purported mandate to interpret the Federal Rules "with sensitivity to important state interests" and "to avoid conflict with important state regulatory policies" as "standardless," except where that practice is merely an attempt to interpret an ambiguous Rule in a way that "avoid[s] substantial variations [in outcomes] between state and federal litigation." *Id* (internal quotations omitted).

framework of substantive rights or remedies."[144] In such a framework, a procedural rule "may exist 'to influence substantive outcomes.' "[145] As Congress has not told states what form their substantive laws must take, state legislatures may regulate substantive matters in whatever way they see fit, including by using procedural devices.[146]

In answering whether a Rule is valid under the REA, Justice Stevens would have applied a "federalism presumption" that a Rule will not preempt state law unless that was "the clear and manifest purpose of Congress."[147] If the Rule appears to overstep the REA's limitation on modifying, abridging, or limiting substantive rights, the Court should interpret the Rule to avoid the problem if it can reasonably be so interpreted.[148] If such an interpretation is not possible, the Court cannot apply the Federal Rule to the state law at issue.[149] In this regard, Justice Stevens sought to avoid the need to declare whether the Rule is *facially* invalid, and focused only on whether it might be invalid *as applied* to a particular state's law.[150] Justice Stevens thus would not have looked solely to whether the Federal Rule regulates procedure, but would also have considered how it interacts with state law in conformity with the "federalism presumption."[151]

II.
Scholarly Approaches to Resolving the Tension Between Narrow Interpretations of the Federal Rules and the Need for Procedural Uniformity in the Federal Courts

The Court's historical uncertainty about interpreting the Federal Rules in the face of potential conflicts with state rules has given rise to two prominent lines of scholarship, each advocating for particular values emphasized in the precedent. Following Ely's pathmaking work,

144. *Id.* at 1449 (Stevens, J., concurring).

145. *Id.* at 1450 (quoting S.A. Healy Co. v. Milwaukee Metro. Sewerage Dist., 60 F.3d 305, 310 (7th Cir. 1995)).

146. *Id.*

147. *See id.* at 1451, 1453 (quoting Wyeth v. Levine, 555 U.S. 555, 565 (2009)) (internal quotation marks omitted).

148. *Id.* at 1452.

149. *Id.*

150. *See id.* at 1452 ("[W]hen such a saving construction is not possible and the rule would violate the Enabling Act, federal courts cannot apply the rule."). This is in some tension with the majority's observation that considering the subjective intent behind a state law would impermissibly open the door to allowing one state's law to survive preemption by a Federal Rule, but an identical law to yield to the Rule. *See id.* (majority opinion) at 1440–41.

151. *See id.* at 1453 (Stevens, J., concurring).

many scholars who have examined the problem have concluded that *Erie* offers no guidance on the applicability of the Rules in diversity cases. The scholarship emanating from this conclusion generally focuses on the importance of procedural uniformity throughout the federal courts and concludes that the Rules should trump state procedure to the contrary. This position is deeply rooted in the logic of *Sibbach* and *Hanna.* Against this, there is a second stream of scholarly criticism that emphasizes the importance of federalism to *Erie.* It argues that conflicts between the Rules and state procedure sometimes ought to be avoided, based on *Erie*'s core values, in order to leave room for state policymaking. This position resonates with *Palmer, Ragan, Walker,* and *Gasperini.* This Part will argue that while both streams of scholarship make important contributions, both ultimately fail to account fully for important values underlying the modern understanding of *Erie.*

A. Critiques of Incorporating State Policy Interests Into Interpretations of the Federal Rules: The Case for National Procedural Uniformity

Long before *Shady Grove*, the Court's practice of using interpretive techniques to avoid conflicts between the Federal Rules and state procedures was subject to scholarly critique focused on the need for uniform, predictable application of the Federal Rules.[152] Flexible interpretations of the Rules cause their meaning to shift haphazardly, according to the circumstances in which they are applied and the particular state interests at stake in each case. This haphazard shifting yields unpredictable Rules without fixed meanings. Commentators emphasized the importance and utility of uniform procedural rules in

152. *See, e.g.*, Merrigan*, supra* note 27, at 711–12 (warning that "[p]ractising [sic] attorneys [were] unable to determine which of the Federal Rules will remain in full effect, and which might be rejected by the courts on the theory that they conflict in a substantial way with some state law"); *id.* at 718 & n.32 (arguing that *Ragan* and *Cohen* "brought uniformity in federal procedure to an end"); *see also* Berch & Berch, *supra* note 118, at 747 (criticizing *Gasperini*'s "grudging[ ]" interpretation of Rule 59(a) as threatening the uniform application of the Federal Rules); Dudley & Rutherglen, *supra* note 119, at 708 & n.7 (describing "a chorus of academic criticism"); Bernard C. Gavit, *States' Rights & Federal Procedure*, 25 IND. L.J. 1, 25–26 (1949) (noting that lawyers in federal courts "must guess as to the proper procedure" and disputing the idea that there is a state right to state procedure in federal courts); *c.f.* Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. PA. L. REV. 1099, 1169 (2002) (arguing that the Court should be constrained to interpret the Federal Rules according to the text and the meaning suggested by the Rules Advisory Committee that drafted them).

federal courts.[153] This article denominates this general approach to interpreting and applying the Rules as "procedural uniformism."

The *Shady Grove* plurality's attempted return to strict, textual analysis reflects this uniformist view of the Federal Rules. The uniformist critique takes various forms, some more flexible than others, but its principle contribution is to illuminate that the Rules create a single, national system of procedure in the federal courts, as an independent system of adjudication. Such a national system provides predictability and coherence, along with ease of administration. Effective procedural rules should be capable of being applied efficiently to move cases to resolution on their merits. National procedural uniformity thus has significant practical benefits.[154]

The uniformist approach generally argues that the Federal Rules should be interpreted based primarily on the Rules' plain text.[155] However, some scholars have suggested that this plain text should be supplemented with interpretive information that can help reveal the Rules' objective meaning, without resorting to contextual reliance on state interests to interpret the Rules. For example, one proposal would look at the manner in which the history of a procedural device, such as class actions, affected the drafting of the Federal Rule.[156] Another would start with the text of the Rule, then evaluate four additional factors, including (1) the interpretation that will best achieve the Advisory Committee's purpose in promulgating the Rule,[157] (2) the policy

153. *See, e.g.*, Burbank & Wolff, *supra* note 11, at 45 (rejecting "particularistic and after-the-fact analysis of the policies underlying state law prescriptions on the very matter that the Federal Rule cover[s]" because such an approach "is hardly consistent with the vision of uniform and simple Federal Rules"); Oakley, Shady Grove, *supra* note 119, at 88 (agreeing with Justice Scalia that assessing the substantive or procedural character of state rules to assess their validity against Federal Rules would be "destabilizing"); Jeffrey W. Stempel, Shady Grove *and the Potential Democracy-Enhancing Benefits of* Erie *Formalism*, 44 AKRON L. REV. 907, 977 (2011) (arguing "against federal courts being too skittish about applying federal procedure merely because of its potential for differences with state court outcomes"). *But see* Whitten, *supra* note 5, at 130.

154. For example, Earl Dudley and George Rutherglen argued that narrow interpretations of the Rules "to avoid a conflict with state law ha[ve] the deleterious consequence of making the [R]ules themselves a disconcertingly unreliable guide to what federal procedure actually is." Dudley & Rutherglen, *supra* note 119, at 737. They characterized this history as reflecting "schizophrenic interpretation" of the Rules in which the Rules are usually followed but are "distorted beyond all recognition in a few cases in which they are thought potentially to conflict with state law." *Id.* at 740.

155. *See, e.g.*, Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1440 (2010).

156. Burbank & Wolff, *supra* note 11, at 53–63.

157. The Advisory Committee on Civil Rules considers suggestions to amend the Federal Rules, drafts proposed Rule amendments, authorizes the drafting of explana-

interests the Rule was designed to and should currently further, (3) whether interpreting the Rule can be deferred to case-by-case correction, and (4) how the Rule fits into the entire Federal Rules structure.[158] A third approach focuses on the text of the Rules with reference to the views of the Advisory Committee as an interpretive guide.[159]

These suggestions for extra-textual interpretation vary in the textual supplements they consider, but they generally reject using state interests as a trigger to interpret the Rules narrowly. While more sophisticated than the *Shady Grove* plurality's rigid textualist approach to the Rules, these forms of uniformism would potentially require the district courts to engage in a difficult analysis to interpret the Rules. This could potentially eviscerate the efficiency benefits that are ultimately the justification for procedural uniformism.

The proponents of the various theories favoring text-based interpretation of the Rules (or text-based interpretation supplemented by other references) generally agree that the Supreme Court would be better off invalidating a Rule that impinges on state substantive areas under the REA rather than avoiding the problem through narrow interpretation.[160] Nevertheless, procedural uniformism seems to require that the Court not actually take up this academic invitation and ever invalidate any Rule. As of 2012, the Supreme Court has yet to invalidate a Federal Rule—but if it ever does so, lower courts would potentially be tempted to follow the Court's lead and begin invalidating other Rules. Given the few cases heard by the Supreme Court each year, once the Court gives its imprimatur to striking down Rules as beyond the scope of the REA, the task would be taken up by the district and circuit judges (with the Supreme Court engaging in infrequent review, perhaps once a decade or so). As a practical matter, the goal of procedural uniformity in federal courts then would likely be

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tory notes, and ultimately submits these proposals to the Standing Committee, which may forward them to the Judicial Conference. Upon approval by the Judicial Conference, the proposals are transmitted to the Supreme Court, which may submit both the Rule amendment and explanatory note to Congress, which has an effective veto on a Rule's codification. *See* Struve, *supra* note 152, at 1103–04 (explaining the Rulemaking process).

158. Karen Nelson Moore, *The Supreme Court's Role in Interpreting the Federal Rules of Civil Procedure*, 44 HASTINGS L.J. 1039, 1096 (1993).

159. *See generally* Struve, *supra* note 152.

160. For example, one commentator has argued that where a Rule potentially violates the REA, the Court should not "rewrite a Rule" to avoid the REA problem by departing from the Rule's text and the Advisory Committee's notes. Struve, *supra* note 152, at 1151.

undermined by the practical dispersion of decision-making to many different circuits, with the risk of circuit splits developing.

Though criticized by procedural uniformists, the Court's use of narrow interpretations of the Rules to avoid the question of a Rule's validity so far has served as a signal to the lower courts not to take aim at the validity of particular Rules. The absence of such avoidance could create new incentives to venue-shop within the federal system in diversity cases in order to take advantage of circuit splits as to the validity of particular Rules. For example, at least six circuits have held that a district judge should apply the interpretation of *federal* law handed down by the circuit in which she sits, even if the case was transferred from a district in a circuit with a conflicting interpretation of federal law.[161] In transferred cases, interpreting the validity of a particular Federal Rule under the REA would likely be governed by the circuit precedent in which the *transferee* district is located. This would give parties powerful incentives to seek to transfer cases to venues where there might be advantageous case law regarding the enforceability of a Federal Rule. Such venue shopping would be a new twist, fraught with special problems, on the old concern dating back to *Erie* about unfair results in diversity cases due to forum shopping.[162]

Thus, while there is much to commend commentators' suggestions to strike down Federal Rules as outside the scope of the REA rather than engage in strained readings of Rules to avoid conflicts,[163] doing so would not necessarily advance the goal of national procedural uniformity. It has the potential to do quite the opposite, due to the risk of circuit splits on hard questions involving the Rules' validity.

Nevertheless, these commentators are correct in concluding that the Court should examine the plain meaning of the Rules to determine whether they conflict with state law in a way that might violate the

161. *See, e.g.*, McMasters v. United States, 260 F.3d 814, 819–20 (7th Cir. 2001); Murphy v. FDIC, 208 F.3d 959, 965–66 (11th Cir.), *cert. granted sub nom.* Murphy v. Beck, 530 U.S. 1306 (2000), *cert. dismissed*, 531 U.S. 1107 (2001); Campos v. Ticketmaster Corp., 140 F.3d 1166, 1171 n.4 (8th Cir. 1998); Newton v. Thomason, 22 F.3d 1455, 1460 (9th Cir. 1994); Menowitz v. Brown, 991 F.2d 36, 40–41 (2d Cir. 1993); *In re* Korean Air Lines Disaster of Sept. 1, 1983, 829 F.2d 1171, 1174–75 (D.C. Cir. 1987) (R.B. Ginsburg, J.). These courts have distinguished this rule from cases involving different, conflicting *state laws*, where the Supreme Court has held the law of the transferring jurisdiction controls. *See* Van Dusen v. Barrack, 376 U.S. 612, 638–39 (1964); *see also infra* Parts III.A and III.B.

162. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 74–77 (1938); *see also* Hanna v. Plumer, 380 U.S. 460, 467 (1965) ("The *Erie* rule is rooted in part in a realization that it would be unfair for the character or result of a litigation materially to differ because the suit had been brought in a federal court.").

163. *See infra* Parts III.A and III.B.

REA, but for a different reason. Preemption analysis actually requires that result.[164] However, as explained below, preemption analysis also accounts for federalism in a way that is inconsistent with an unyielding commitment to procedural uniformity.[165]

B. Justifications for Incorporating State Policy Interests into Interpretations of the Federal Rules: The Case for Conflict Avoidance

In contrast to the commentators who criticized *Gasperini* (and the *Shady Grove* dissent) for undermining the national uniformity of the Federal Rules, others have interpreted *Gasperini*'s directive that federal courts should interpret the Federal Rules with sensitivity to important state interests as reflecting a legitimate concern for the "substantive rights" limitation of the REA.[166] Under this view, *Hanna* may be a preemption rule gone awry with profound potential to intrude into legitimate matters of state regulation.[167] In contrast to the procedural uniformist approach, this perspective defers to state policymaking, resulting in a framework in which the Federal Rules and state procedures coexist in the federal system, with courts striving to harmonize them by interpreting the Federal Rules to avoid conflicts. This article refers to this as the "conflict avoidism" approach.

Adam Steinman has argued that conflict avoidism is statutorily mandated in that deference to state interests flows from the language

164. *See, e.g.*, Cipollone v. Liggett Grp., Inc., 505 U.S. 504, 521–22 (1992) ("'We must give effect to [a statute's] plain language unless there is good reason to believe Congress intended the language to have some more restrictive meaning.'" (quoting Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 97 (1983)).

165. *See infra* Part IV.

166. Freer, Gasperini, *supra* note 95, at 1643–44 ("[The Court] adopt[ed] a position long advocated by Professor Wright—that it is entirely appropriate for a federal court to assess the impact of a broad reading of a Federal Rule in construing that Rule; indeed, as Professor Wright has demonstrated, the concern reflected in the "substantive rights" limitation of the REA counsels such sensitive interpretation." (footnote omitted)).

This reading of the REA contrasts with Stephen Burbank's conclusion, based on research into the complex legislative history of the REA, that the REA's second sentence, forbidding the making of Rules intruding into substantive rights, was intended by its drafters to be mere "[s]urplusage," the original purpose of which was not to protect state law. *See* Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1107–08 (1982) [hereinafter Burbank, *REA*]. *But see* Ides, *Standard*, *supra* note 11, at 1063 (interpreting the same sentence as a "congressional mandate that expressly limits the scope of the congressional delegation of rulemaking authority to the Supreme Court").

167. *See* Richard D. Freer, Erie*'s Mid-Life Crisis*, 63 TUL. L. Rev. 1087, 1121 (1989) [hereinafter Freer, Erie] (describing the Court's efforts to avoid applying *Hanna*).

of the REA's limitation regarding "substantive rights."[168] This argument depends on how one defines the "substantive rights" that the Federal Rules may not "abridge, enlarge or modify" under the REA—a task the Court has strained to avoid. There are many competing definitions of "substantive rights."[169] Justice Harlan's definition from his concurrence in *Hanna* is as good a starting point as any: he would inquire whether "the choice of rule would substantially affect those primary decisions respecting human conduct which our constitutional system leaves to state regulation."[170] John Hart Ely would have inquired whether a right was "granted for . . . some purpose or purposes not having to do with the fairness or efficiency of the litigation process."[171] Judge Richard Posner similarly described such rights as "shap[ing] conduct outside the courtroom and not just improv[ing]the accuracy or lower[ing] the cost of judicial process.[172] Applying any of these definitions, however, has bedeviled courts since the earliest days of the Rules.[173] Indeed, a crisp separation of categories has proven elusive.

Categorical definitions of substance and procedure tend to be problematic because states use procedural tools to shape wide-ranging policy goals.[174] State laws targeting the mode of litigation have long been used to shape public policy under the label of "tort reform."[175] For example, some states use compulsory arbitration procedures,

168. *See* Steinman, *Judicial Federalism*, *supra* note 8, at 288 n.249.

169. *Id.*

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

171. Ely, *supra* note 19, at 725.

172. S.A. Healy Co. v. Milwaukee Metro. Sewerage Dist., 60 F.3d 305, 310 (1995); *see also* Ides, *Supreme Court*, *supra* note 26, at 81 ("[T]he difference is between rules that can be fairly characterized as housekeeping matters and rules more appropriately described as architectural or house building.").

173. *See, e.g.*, Sibbach v. Wilson & Co., 312 U.S. 1, 10–14 (1941) (analyzing whether Rule 35 affected substantive rights); *id.* at 17–18 (Frankfurter, J., dissenting) (disagreeing with the majority's understanding of the substantive nature of the state right).

174. *See* Freer, Erie, *supra* note 167, at 1134 ("[A] state rule rationally classified as either substantive or procedural may *function* to define the substantive law."); Whitten, *supra* note 5, 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.").

175. *See, e.g.*, Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 429–30 (1996) (discussing the reasons the New York legislature adopted its standard for granting new trials for excessive jury verdicts); *see also* John A. Lynch, Jr., *Federal Procedure & Erie: Saving State Litigation Reform Through Comparative Impairment*, 30 WHITTIER L. REV. 283, 309–20 (2008) (discussing examples of state tort reform measures that use procedural devices to achieve their ends).

mandatory screening panels, and other special procedural devices in medical malpractice cases.[176] While these procedures directly affect the litigation process, their goal is to reduce malpractice insurance premiums.[177] This is in turn supposed to diminish the number of doctors leaving high-risk medical specialty fields and make healthcare more accessible to patients.[178] By every definition, the latter goals are substantive, though the means used to further those goals are procedural, most likely because litigation is itself perceived as causing social problems outside the courtroom.[179]

This type of procedural rule presents special problems in diversity cases for those who want to make sense of whether a Federal Rule

176. *See* Shirley Qual, *A Survey of Medical Malpractice Tort Reform*, 12 WM. MITCHELL L. REV. 417 (1986); David M. Studdert et al., *Can the United States Afford a "No-Fault" System of Compensation for Medical Injury?*, 60 LAW & CONTEMP. PROBS., Spring 1991, at 1, 16 & n.79.

177. *See* Martin H. Redish, *Legislative Response to the Medical Malpractice Insurance Crisis: Constitutional Implications*, 55 TEX. L. REV. 759, 761 (1977) ("The apparent connection between the increasing number of malpractice claims and rising malpractice insurance rates has prompted many state legislatures to consider the adoption of sweeping changes in the substantive *and procedural rules governing the adjudication* of medical malpractice claims.") (emphasis added).

178. *See id.* at 760.

179. In another example, California, like many states, enacted procedures allowing defendants sued for exercising their free speech rights to end litigation quickly and transfer the costs of defending the suit to the plaintiff. *See* CAL. CIV. PROC. CODE § 425.16 (West 2010). Dubbed "strategic lawsuits against public participation" (SLAPPs), such suits allegedly chill protected activity by threatening the speaker with a meritless suit. The "anti-SLAPP" measures in California's Code of Civil Procedure include a special motion to strike the plaintiff's pleadings, *id.* § 425.16(b)(1), which suspends access to discovery until the court rules on whether the plaintiff can show a probability the claim will prevail. *Id.* § 425.16(b), (g). The purpose of these procedures is to "encourage continued participation in matters of public significance," *id.* § 425.16(a), a goal that appears to satisfy virtually any definition of "substantive." However, the state legislature chose procedural tools relating to litigation administration (e.g., a special motion to strike, burden shifting, and denial of discovery). Unsurprisingly, lower federal courts disagree about whether anti-SLAPP procedural devices should apply in diversity cases, as the substance/procedure distinction provides so little traction. Two circuits would apply state anti-SLAPP procedures in a diversity case. United States *ex rel.* Newsham v. Lockheed Missiles & Space Co., 190 F.3d 963, 973 (9th Cir. 1999); Godin v. Schencks, 629 F.3d 79, 81 (1st Cir. 2010); *accord* La. Crisis Assistance Ctr. v. Marzano-Lesnevich, 827 F. Supp. 2d 668, 680 (E.D. La. 2011), *vacated*, No. 11–2102, 2012 WL 2717075, at *8 (E.D. La. July 9, 2012); *cf.* Armington v. Fink, No. 09–6785, 2010 WL 743524, at *4 (E.D. La. Feb. 24, 2010) (applying Louisiana's anti-SLAPP statute). However, several district courts have taken the opposite view. *E.g.*, Stuborn Ltd. P'ship v. Bernstein, 245 F. Supp. 2d 312, 316 (D. Mass. 2003); Satkar Hospitality Inc. v. Cook Cnty. Bd. of Review, No. 10 C 6682, 2011 WL 2182106, at *4–5 (N.D. Ill. June 2, 2011); 1524948 Alberta Ltd. v. Lee, No. 1:10-CV-02735-RWS, 2011 WL 2899385, at *2–3 (N.D. Ga. July 15, 2011); *see also* Lynch, *supra* note 180, at 317–20 (reviewing earlier inconsistent federal opinions).

should apply by relying on the REA's language prohibiting impingement on "substantive rights." Those who favor accommodating state policymaking in substantive areas thus have to contend with the analytic structure's historical difficulty in areas where procedural rules operate to effect substantive policy goals. Moreover, there are important substantive implications in variations between state and federal procedural rules in a wide variety of other areas, including pleading and summary judgment standards.[180]

Even if the fluid boundary between substance and procedure could be meaningfully identified in a landscape where many rules have both attributes, one commentator has observed that reading the REA's prohibition on modifying substantive rights as an affirmative protection for important state interests potentially runs into trouble in the legislative history of the REA.[181] Stephen Burbank concludes that there is no evidence that the bill's drafters were concerned in 1934 that the Federal Rules would displace state law.[182] The substantive rights that the REA protected from infringement were originally thought to be *federally created* rights.[183] Burbank reads the REA's legislative history as implying that the restriction on affecting substantive rights prohibited the enactment of Rules "having an effect on rights recognized by the substantive law that is predictable and identifiable,"[184] in order to reserve to Congress the power to engage in federal lawmaking.[185] This approach returns to the need to separate substantive rights from procedural ones. It also appears to potentially tolerate serious effects upon substantive rights (however defined),

180. *See* Steinman, *Judicial Federalism*, *supra* note 8, at 288–90; *see also* Jeffrey O. Cooper, *Summary Judgment in the Shadow of* Erie, 43 AKRON L. REV. 1245, 1246 (2010) (arguing that the doctrinal confusion in this area makes "uniform summary judgment practice in federal courts . . . uncertain").

181. Burbank, *REA*, *supra* note 166, at 1025, 1108–11.

182. *Id.*; *cf.* Ely, *supra* note 19, at 720–21 ("The limiting language of the Enabling Act's second sentence ('abridge, enlarge or modify') is strong . . . .").

183. The drafters most likely focused on federally created substantive rights because pre-1934, when the REA was being drafted, *Erie* had not yet been issued. *See* Burbank, *REA*, *supra* note 166, at 1109; Ely, *supra* note, 19 at 720–21.

184. Burbank, REA, *supra* note 166, at 1160.

185. *Id.* at 1114. Martin Redish and Dinnish Murashko critiqued Burbank's interpretation of the REA and its legislative history. *See* Martin H. Redish & Dinnish Murashko, *The Rules Enabling Act and the Procedural-Substantive Tension: A Lesson in Statutory Interpretation*, 93 MINN. L. REV. 26, 67–87 (2008). They interpret the REA's limitation on affecting substantive rights as meaning that procedural rules' non-incidental effects on substantive rights are forbidden, but incidental effects are acceptable. *Id.* at 86–87 (deriving the "incidental-effects test" from the Court's reading of the REA in *Burlington Northern Railroad Co. v. Woods*, 480 U.S. 1 (1987)).

where those effects may not have been identifiable at the time of the rulemaking.

Both the uniformist and avoidist interpretations of the Rules are valuable contributions—they illuminate important values at stake on both sides of the debate. The Court itself continues to vacillate between commitments to federal procedural uniformity (as reflected in the majority opinion in *Shady Grove*) and conflict avoidance (as reflected in the majority opinion in *Gasperini*). Ultimately, both approaches have failed to produce settled doctrine, despite approximately seven decades of precedent.

This article proposes an alternative approach. It seeks to avert the troublesome substance-procedural dichotomy that has plagued both existing approaches by looking to preemption doctrine and the federalism canons of statutory construction to determine the scope of the REA. Part III examines the theoretical foundations of federalism in both preemption doctrine and the *Erie*-line of cases, arguing they are closely related. I then trace the evolution of the federalism canons of statutory construction, which presume that Congress does not intend to alter the federalism balance between state and federal governments absent some clear indication from Congress. I conclude that those canons have relevance for understanding the scope of the Court's rulemaking power in the REA, independent of the REA's textual limits on abridging substantive rights.

III.
FEDERALISM AS A BACKDROP TO PREEMPTION DOCTRINE AND *ERIE*

The fundamental question that arises when the Federal Rules are in conflict with state law in cases heard in federal court is one of diversity preemption (i.e., whether the Federal Rule should displace the state law in the federal forum).[186] The balance of power between the state and federal governments is a central problem in such cases.[187] Understanding the interplay between state laws and the Fed-

186. *See* Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1453 (Stevens, J., concurring) (discussing problem of "judicially created rules displacing state substantive law"); *see also supra* notes 15–16 and accompanying text (discussing preemption in diversity cases).

187. *See, e.g.*, *Shady Grove*, 130 S. Ct. at 1453 ("Congress struck [a balance] between uniform rules of federal procedure and respect for a State's construction of its own rights and remedies"); Geier v. Am. Honda Motor Co., 529 U.S. 861, 887 (2000) (Stevens, J., dissenting) (stating that the case "raises important questions concerning the way in which the Federal Government may exercise its undoubted power to oust state courts of their traditional jurisdiction over common-law tort actions"). Some

eral Rules thus requires acknowledgement of the background principles of federalism against which Congress legislates (in authorizing the promulgation of the Rules) and the Court adjudicates (in promulgating, interpreting, and applying the Rules). The Constitution limits the risk of congressional overreaching not only through restrictions on *what* Congress can control through legislation, but on *how* it exercises that control.[188] For example, Congress exercises its legislative power through elected representatives who often have incentives to defend state interests.[189]

The Court has identified several justifications for its fidelity to federalism in its preemption case law. It recognizes the democratic advantages of local control, where state governments are in a position to be more responsive to their citizens' needs and "increase[ ] opportunit[ies] for citizen involvement in democratic processes."[190] Additionally, the Court invokes the Jeffersonian view of states as experimental actors capable of innovative policy approaches that can be implemented on a small scale to test their efficacy, without posing a risk that those efforts will have a significant impact beyond that

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scholars regard preemption as the key problem that modern federalism theory must confront. *See, e.g.*, Ernest A. Young, *Making Federalism Doctrine: Fidelity, Institutional Competence, and Compensating Adjustments*, 46 WM. & MARY L. REV. 1733, 1848 (2005).

188. *See* Garcia v. San Antonio Metro. Trans. Auth., 469 U.S. 528, 547 (1985) (quoting Monaco v. Mississippi, 292 U.S. 313, 322 (1934)).

189. *Id.* at 550–51 (describing the states' direct influence in the Senate and indirect influence over the House of Representatives and presidency). *See generally* Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition & Selection of the National Government*, 54 COLUM. L. REV. 543 (1954) (discussing the various mechanisms and effects of the representational system). Herbert Wechsler's contribution in this area is undergoing something of a renaissance, with several modern commentators offering excellent analyses of the role of the Constitution's structure in safeguarding federalism. *See, e.g.*, Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1326 (2001) [hereinafter Bradford Clark, *Separation of Powers*] (arguing the constitutional procedures for making federal law serve to protect state authority by making the process to displace state law fairly difficult); Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 252–62 (2000) (making the historical case that the Framers expected Congress to be restrained from intruding on state sovereignty through the states' power to compose and select the national government); Ernest A. Young, *Two Cheers for Process Federalism*, 46 VILL. L. REV. 1349, 1355 (2007) [hereinafter Young, *Two Cheers*] (demonstrating Madison's emphasis on the constitutional structure as means to safeguard the institutional role of the states).

190. Gregory v. Ashcroft, 501 U.S. 452, 458 (1991); *see also* Erwin Chemerinsky, *Empowering States When It Matters: A Different Approach to Preemption*, 69 BROOK. L. REV. 1313, 1324–25 (2004) (observing theories of federalism generally present in the case law).

state's borders if the experiment fails.[191] It also perceives federalism's decentralization as promoting fundamental liberties by avoiding the concentration of power in any one governmental actor.[192]

These federalism theories value states' autonomy because of the way the exercise of that autonomy improves the process of governance. In this sense, they are neutral, for they do not favor any particular type of policymaking decisions within states, but rather focus on the procedural benefits of having decentralized policymaking generally. These values are not without controversy,[193] but they lurk within many of the Court's post-*Erie* cases.

In Part III.A, this article examines the relationship between these federalism concerns and preemption doctrine. Part III.B then reveals the deep connection between preemption doctrine and *Erie.*

A. Preemption Doctrine Against the Backdrop of Federalism

In the preemption context, the Court has applied at least two important canons of statutory construction dedicated to safeguarding federalism. The first is a general canon applicable whenever the Court is invoking the doctrine of implied preemption, where Congress has made no express statement about whether a statute should preempt state law.[194] It presumes that federal statutes generally do not displace state laws unless Congress has manifested its intent to do so.[195] According to the Court, preemption of state law "'start[s] with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress."[196] Following this general federalism canon, it is not enough for a state law merely to frustrate a federal purpose.[197] In the absence of clear statutory language, rebutting the presumption re-

191. *See Gregory*, 501 U.S. at 458 ("This federalist structure . . . allows for more innovation and experimentation in government.").

192. *See id.*; Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1984); *Garcia*, 469 U.S. at 582 (Powell, J., dissenting).

193. *See, e.g.*, Frank B. Cross, *The Folly of Federalism*, 24 CARDOZO L. REV. 1 (2002) (arguing federalism is inferior to centralization of governmental decision-making for various policy reasons).

194. *See* Gade v. Nat'l Solid Waste Mgmt. Ass'n, 505 U.S. 88, 98 (1992) ("Preemption may be either expressed or implied and 'is compelled whether Congress' [sic] command is explicitly stated in the statute's language or implicitly contained in its structure and purpose.'" (quoting Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977)).

195. Bradford Clark, *Separation of Powers*, *supra* note 189, at 1425.

196. Cipollone v. Liggett Grp., Inc., 505 U.S. 504, 516 (1992) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)) (alterations in original).

197. *See* Geier v. Am. Honda Motor Co., 529 U.S. 861, 905–06 (2000) (Stevens, J., dissenting).

quires a showing that preemption is implicitly required by the statutory structure or purpose.[198]

A second, more powerful federalism canon appears in the Court's "clear statement rule," which creates a strong presumption that Congress does not intend a statute to alter the usual constitutional balance between the states and the federal government.[199] This presumption can only be negated by "unmistakably clear" language *in the text* of the statute.[200] Applied less frequently than the general presumption against preemption, this form of the canon is harder to rebut and requires a much stronger showing of intent. It stems from the Court's view that "Congress does not readily interfere" with the states' sovereign powers.[201]

Both federalism canons impose no fixed limits on Congress's power to displace state law. They allow Congress to exercise its legislative power freely, so long as it actually manifests its intent to displace state law. However, the Court will not use judicial suppositions where Congress fails to demonstrate its own preemptive intent.[202]

Additionally, both canons protect what the Court has termed "weighty and constant values,"[203] by ensuring that Congress actually

198. *Cipollone*, 505 U.S. at 615.

199. *See* Gregory v. Ashcroft, 501 U.S. 452, 460–61 (1991) (quoting Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1984)).

200. *Id.*

201. *See id.* at 461; *see also* William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 597 (1992) (explaining that the canon uses judicial interpretation "to require[ ] an extraordinarily specific statement on the face of the statute for Congress to limit the states. . . .").

202. The Court's inconsistency in applying these federalism canons has earned considerable criticism. *See* Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 232 (2000) ("Most commentators who write about preemption agree on at least one thing: Modern preemption jurisprudence is a muddle."); Garrick B. Pursley, *Avoiding Deference Questions*, 44 TULSA L. REV. 557, 557 (2009) (describing preemption doctrine as "notoriously muddled"); Robert N. Weiner, *The Height of Presumption: Preemption & the Role of the Courts*, 32 HAMLINE L. REV. 727, 727 (2009) ("Few aspects of Supreme Court jurisprudence are as contradictory and convoluted as the so-called 'presumption against preemption.'"). This inconsistency shows that the Supreme Court's preemption jurisprudence has become disconnected from its underlying values. *See* Chemerinsky, *supra* note 190, at 1314 (describing the inconsistency); *id.* at 1327 (charging the Court with a results-oriented jurisprudence in its preemption cases where federal civil rights laws lack preemptive force against state challenges, but businesses relying on federal statutes to challenge state regulations prevail). The imperfection of the Court's application of the federalism canons (and the Court's occasional failure to apply them at all) should not detract from the canons' utility in serving the background principles of federalism. The Court could solve the problem simply by applying this doctrine more consistently, at least in the so-called "procedural *Erie*" cases.

203. Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104, 108 (1991).

considered and intended the displacement of state law.[204] As the states' primary protection against federal intrusion into areas historically regulated by the states is located in the political processes in Congress, these presumptions ensure that the preemption question is actually part of that political process.[205] In other words, they enforce the political safeguards of federalism by requiring the political branches to consider the state interests at stake before preempting them. Members of Congress (and potentially the President) must answer to state voters, who may value their own state's legislation.[206] The constitutional structure favors the federalism canons because the states have influence in the selection of elected members of the political branches, but they lack representation in the federal judiciary.[207]

The canons arguably are a mechanism to assign the countermajoritarian costs in any preemption calculus. Preemption asks whether the laws enacted by a democratically elected state legislature will be ignored by the unelected federal judiciary in a given case. It thus necessarily entails some countermajoritarian cost.[208] These costs can be placed upon either Congress (by requiring some indicia that Congress considered the state interest at stake before giving the federal law preemptive force) or the states (through preemption without indicia of congressional intent to displace state law).

Placing these costs on Congress, which can still enact the federal legislation and displace state law as needed after proper consideration, has a less onerous countermajoritarian effect than the alternative of allowing the judiciary to replace Congress as the entity deciding

204. *See Gregory*, 501 U.S. at 464; Bradford Clark, *Separation of Powers*, *supra* note 189, at 1425; Young, *Two Cheers*, *supra* note 189, at 1385.

205. *See Gregory*, 501 U.S. at 464 ("[T]o give the state-displacing weight of federal law to mere congressional *ambiguity* would evade the very procedure for lawmaking on which [the Court] relied [in *Garcia*] to protect states' interests.") (quoting LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW § 6–25, 480 (2d ed. 1988)).

206. *See* Nelson, *supra* note 202, at 280–81 (discussing political safeguards on state interests in Congress). *But see* Chemerinsky, *supra* note 190, at 1315, 1332 (observing that some of the Supreme Court's major federalism decisions in the last decade have *favored* preemption of state laws).

207. Bradford Clark, *Separation of Powers*, *supra* note 189, at 1429 ("[T]he Constitution gives states a role in selecting Congress and the President, but not federal courts.").

208. *See* Eskridge & Frickey, *supra* note 201, at 637–39 (describing the canons as being "quasi–constitutional" rules reflecting "a certain judicial haughtiness and uncooperativeness" with Congress, operating as a "backdoor" form of "constitutional activism"). Given the Court's own doctrinal inconsistency, where it adopts some form of these canons when it wants to do so but seems to ignore them in other cases, suspicion arises that it is engaging in outcome-oriented reasoning, using the canons as a tool to reach desired results. One response may be that the Court should be using some version of the canon more consistently to constrain this temptation.

whether preemption is sound policy. This is true whether federalism is potentially an "underenforced constitutional norm[ ],"[209] or an adequately-enforced one (a distinction that requires a value judgment about how much state autonomy is ideal in the federal system). At least in areas where Congress has the power to displace state law but has to decide how much of that power to actually exercise, enforcement of the federalism canons ensures that the decision about how much state autonomy is ideal is vested in the political branches, rather than in the judiciary. This ultimately minimizes the countermajoritarian cost of applying the canons.[210]

In the following discussion, this article turns to the historical evolution of the federalism canons as methods of protecting the political process in which preemption issues are properly located.

1. The Twentieth-Century Roots of the Federalism Canons

As early as 1902, the Court pronounced that "[i]t should never be held that Congress intends to supersede . . . the exercise of the police powers of the States, even when it may do so, unless its purpose to effect that result is clearly manifested."[211] Similar statements appeared several times in other opinions in the early twentieth century.[212] The

209. *Id.* at 597.

210. *See id.* (conceding that "the Court may have a legitimate role in forcing the political process to pay attention to the constitutional values at stake, and super–strong clear statement rules are a practical way for the Court to focus legislative attention on these values"). Despite this functional utility, the derivation of the federalism canons has occasionally come under scholarly criticism, disputing the historical or textual constitutional *source* of the canons. *See* Nelson, *supra* note 202, at 242–44, 255–58 (concluding that the Framers would not have understood there to be a general presumption disfavoring the preemption of state law); *see also* John F. Manning, *Clear Statement Rules & the Constitution*, 110 COLUM L. REV. 399, 411, 427, 432–33 (2010) (arguing that *Gregory*'s clear statement rule lacks a textual basis and exceeds the text's own limits on congressional power based on vague structural principles). *But see* Ernest A. Young, *The Continuity of Statutory and Constitutional Interpretation: An Essay for Phil Frickey*, 98 CALIF. L. REV. 1371, 1384–85 (2010) (showing clear statement rules can be functionally derived from the Constitution's structure). This constitutional debate is largely beyond the scope of this article.

211. Reid v. Colorado, 187 U.S. 137, 148 (1902); *see also* Savage v. Jones, 225 U.S. 501, 533 (1912).

212. *See, e.g.*, Allen-Bradley Local No. 1111 v. Wisc. Emp. Relations Bd., 315 U.S. 740, 749 (1942); Maurer v. Hamilton, 309 U.S. 598, 614 (1940) ("As a matter of statutory construction Congressional intention to displace local laws in the exercise of its commerce power is not, in general, to be inferred unless clearly indicated by those considerations which are persuasive of the statutory purpose. This is especially the case when public safety and health are concerned."); H.P. Welch Co. v. New Hampshire, 306 U.S. 79, 85 (1939) ("[I]t cannot be inferred that Congress intended to supersede any state safety measure prior to the taking effect of a federal measure found suitable to put in its place. Its purpose to displace the local law must be definitely

Court's presumption against preemption gathered steam in the middle of the century in large measure due to the work of Justice Frankfurter. In 1947, he presented a lecture to the Association of the Bar of the City of New York, setting forth a theory of statutory interpretation that called for deference to state policies when interpreting acts of Congress.[213] He explained that "[t]he underlying assumptions of our dual form of government, and the consequent presuppositions of legislative draftsmanship which are expressive of our history and habits" require narrow interpretations of federal statutes, such that judges should assume that where congressional regulation "readjusts the balance of state and national authority," Congress would be explicit about its intent to do so.[214]

In the same year that Justice Frankfurter underscored the importance of this interpretive model in his speech, the Court decided *Rice v. Santa Fe Elevator.*[215] The majority acknowledged an "assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."[216] The Court referred to the states' police powers in the constitutional sense, where state police powers have historically had a very broad meaning, "extend[ing] to all the great public needs."[217]

Looking back to the legislative history of the federal statute in question, the Court concluded that Congress intended to occupy the field of warehouse regulation, leaving no room for states to act.[218]

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expressed."); Kelly v. Washington *ex rel.* Foss Co., 302 U.S. 1, 12 (1937) ("The purpose of Congress to supersede or exclude state action . . . is not lightly to be inferred. The intention so to do must definitely and clearly appear.") (internal quotation marks omitted); Napier v. Atl. Coast Line R.R, Co., 272 U.S. 605, 611 (1926) ("The intention of Congress to exclude States from exerting their police power must be clearly manifested.").

213. Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 539–40 (1947). Specifically addressing new regulatory acts enacted pursuant to the Commerce Clause, Frankfurter described the judge's task as "one of accommodation as between assertions of new federal authority and historic functions of the individual states." *Id.* ("Federal legislation of this character cannot therefore be construed without regard to the implications of our dual system of government.").

214. *See id.* at 540.

215. 331 U.S. 218 (1947).

216. *Id.* at 230.

217. *See* Noble State Bank v. Haskell, 219 U.S. 104, 111 (1911) (stating that the police power "may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare"); *see also* Thurlow v. Massachusetts, 46 U.S. 504, 583 (1847) ("[W]hat are the police powers of a State? They are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions."), *rev'd on other grounds*, Leisy v. Hardin, 135 U.S. 100 (1890).

218. *See* Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 234–35 (1947).

Justice Frankfurter dissented, finding the indicia of congressional intent inadequate. He called for a high bar for inferring any congressional intent to displace state regulation of an area historically regulated by the states.[219] The majority opinion in *Rice* is often cited as an important example of the general federalism canon operating in a case of implied preemption where Congress has signaled its intent to occupy an entire field of regulation.[220] Yet, Justice Frankfurter's dissent arguably became the foundation for the modern clear statement rule.

The high bar Justice Frankfurter proposed in his dissent reflected his disinclination to displace state regulations in areas historically entrusted to the states, consistent with his view that safeguarding federalism was among the Court's highest priorities.[221] He favored the decentralization of power through the individual states, particularly when the centralizing force originated from the Court, not from Congress.[222]

Justice Frankfurter's interpretive model appears particularly significant when juxtaposed against his views in the post-*Erie* era, which reflect the same federalism theme.[223] While on the Court, he viewed diversity jurisdiction as an exception to the boundary defining state jurisdiction, and thus as something to be construed narrowly.[224] He

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219. *Id.* at 245 (Frankfurter, J., dissenting) ("[N]othing but *the clearest expression* should persuade us that the federal Act wiped out State fixation of rates and other State requirements deeply rooted in their laws.") (emphasis added).

220. *See, e.g.*, Gade v. Nat'l Solid Waste Mgmt. Ass'n, 505 U.S. 88, 98 (1992).

221. Albert M. Sacks, *Felix Frankfurter*, *in* 3 THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789–1969: THEIR LIVES AND MAJOR OPINIONS 2406 (Leon Friedman & Fred L. Israel eds., 1969); *see also* Mary Brigid McManamon, *Felix Frankfurter: the Architect of 'Our Federalism'*, 27 GA. L. REV. 697, 702 (1993) (documenting Frankfurter's commitment to federal judicial deference to the states).

222. *See* Sacks, *supra* note 221, at 2412 ("[H]e saw value in leaving states free to work out their own destiny through a process of trial and error."). In this, he shared some the federalism vision of Justice Brandeis, who "preferred that power be lodged with [state legislatures] rather than with the federal government" because of "bigness and centralization of power." PHILLIPA STRUM, BRANDEIS: BEYOND PROGRESSIVISM 83 (1993).

223. *See* Sibbach v. Wilson & Co., 312 U.S. 1, 16–19 (1941) (Frankfurter, J., dissenting); Guaranty Trust Co. v. York, 326 U.S. 99, 109–10 (1945). Some commentators actually credit Justice Frankfurter's work as a law professor for helping to bring about the decision in *Erie*, even though he was not yet on the Court. *E.g.*, McManamon, *supra* note 221, at 749 ("Cornell professor Arthur John Keeffe asserted that 'the propaganda which brought us *Erie R.R. v. Tompkins* [was] the Harvard Law School party line of the days when Felix Frankfurter was a Professor.' ") (internal citation omitted); *id.* at 754–55 (arguing that Frankfurter may even have helped inspire the structure for Brandeis's opinion while Frankfurter was still at Harvard).

224. Louis L. Jaffe, *The Judicial Universe of Mr. Justice Felix Frankfurter*, 62 HARV. L. REV. 357, 379 (1949); *see also id.* at 380 (describing Frankfurter's view of

understood that because federal diversity jurisdiction always assumes control of a matter grounded in state policymaking, the federalism stakes are especially high.

2. *The Rise of the Clear Statement Rule*

In the mid-1980s, the Court found its way back to Justice Frankfurter's view of statutory interpretation. Citing his 1947 speech at length in a footnote in *Kelly v. Robinson*,[225] the Court applied his theory to interpret the Bankruptcy Code.[226] Where the federal statute appeared to be at odds with Connecticut's restitution provisions for criminal defendants,[227] the Court acknowledged the state's strong interest in its own victim restitution policy and the lack of evidence that Congress intended to override that historical state regulation.[228]

The new clear statement rule found its boldest expression in 1991, in *Gregory v. Ashcroft*.[229] The plaintiffs, who were state judges, claimed that a Missouri state constitutional provision requiring municipal judges to retire at age seventy[230] violated the federal Age Discrimination in Employment Act (ADEA).[231] The ADEA prohibits employers from discharging any individual who is over forty years old on the basis of that individual's age.[232] Congress's intent was ambiguous as to the inclusion of appointed state judges under the ADEA, so the Court declined to find that the statute included them, even though Congress had the constitutional power to do.[233]

The Court recognized the importance in our dual system of government of dispersing power to the states to ensure that the government is "more sensitive to the diverse needs of a heterogeneous society," while adhering to the ideal of local "innovation and experimentation,"[234] two classic visions of federalism. As a check on the Supremacy Clause's power to impose federal power upon the states, the Court reasoned that the nature of the federal system requires the Court to "assume Congress does not exercise [that power] lightly."[235]

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the policy of diversity jurisdiction as one of "jealous restriction, of avoiding offense to state sensitiveness") (quoting Indianapolis v. State Bank, 314 U.S. 63, 76 (1941)).

225. 479 U.S. 36, 49 n.11 (1986).
226. *Id.*
227. *Id.* at 39–40.
228. *Id.* at 53.
229. 501 U.S. 452 (1991).
230. *Id.* at 455.
231. *Id.* at 455–56.
232. 29 U.S.C §§ 621–634 (1967).
233. *Gregory*, 501 U.S. at 470.
234. *Id.* at 458.
235. *Id.* at 460.

This view echoed Justice Frankfurter's view of the Court's role in regulating the constitutional structure. In this context, federal interference with the state's method for selecting its own judicial officers "would upset the usual constitutional balance of federal and state powers."[236] The Court assumed that Congress did not intend to alter this federalism balance absent a clear statement of intent.[237]

In 1994, the Court again cited Justice Frankfurter's 1947 speech in *BFP v. Resolution Trust Corp.*, a case that expanded the application of the clear statement rule.[238] *BFP* involved a decision about whether the federal Bankruptcy Code preempted state procedures for foreclosing on real property and would void a sale that was lawful under state law.[239] The Court applied a version of the clear statement rule,[240] not only presuming Congress did not intend to displace state regulation of real estate foreclosures,[241] but also looking for a clear *statutory* statement to rebut that presumption.[242] It concluded that doubt as to congressional intent must always be resolved in favor of preserving traditional state regulation.[243]

Foreshadowing language in *Gasperini*, *BFP* interpreted this federalism canon as applying where "[f]ederal statutes imping[e] upon *important* state interests."[244] Its application was triggered by a state interest involving "the general welfare of society."[245] Thus, the federalism canon's sweep became quite broad. In other words, the canon was not limited to matters directly related to state sovereignty in the sense of how the state organizes its own government, as addressed in *Gregory*. Rather, after *BFP*, the canon could conceivably encompass

236. *Id.*
237. *Id.*
238. 511 U.S. 531, 544 (1994).
239. *Id.* at 534. As the sale was sanctioned by the state's foreclosure law, the question was whether to void a sale that was lawful under state law based on the federal statutory provision allowing the bankruptcy trustee to avoid fraudulent transfers. *Id.* at 534–35.
240. *Id.* at 539–40 ("Absent a clear statutory requirement to the contrary, we must assume the validity of this state-law regulatory background and take due account of its effect. 'The existence and force and function of established institutions of local government are always in the consciousness of lawmakers and, while their weight may vary, they may never be completely overlooked in the task of interpretation.'" (quoting Davies Warehouse Co. v. Bowles, 321 U.S. 144, 154 (1944)).
241. *Id.* at 544.
242. *Id.* at 539. While it left open the possibility that the statute might override the state law "by implication," such an implication must be unambiguous. *Id.* at 546.
243. *Id.*
244. *See id.* at 544 (emphasis added).
245. *Id.* ("'The general welfare of society is involved in the security of the titles to real estate' and the power to ensure that security 'inheres in the very nature of [state] government.'") (internal citation omitted).

all matters that affect state sovereignty in the much broader sense of authority over the general welfare.[246] Where Congress's intent to override the state interest in that area is unclear, the Court held that "our federal system demands deference to long-established traditions of state regulation."[247]

B. The Connection Between Erie *and the Federalism Canons*

Elements of the political safeguards of federalism are at the heart of not only preemption jurisprudence, but also in the modern reading of *Erie* as reflecting a form of prudential judicial restraint.[248] While not without its critics,[249] this modern understanding posits that *Erie*'s elusive constitutional holding rests on a particularly narrow vision of judicial power that constrains judicial supervision of the states' policymaking choices.[250] Paul Mishkin, for example, argued that *Erie*'s endorsement of this form of judicial restraint reflected the basic constitutional principle that federal courts are functionally incompetent to

246. *See id.* at 544 n.8.

247. *Id.* at 546.

248. *See* Mishkin, *supra* note 8, at 1685 (describing the "inappropriateness of federal judicial lawmaking" in *Erie* as resting in part "on the structure established by the Constitution whereby the states, and their interests as such, are represented in the Congress but not in the federal courts."). *But see* Green, *supra* note 8, at 615–16 (disputing Mishkin's account as *Erie*'s "new myth"). For the germinal defense of this vision of federalism being a key feature in the constitutional design, see Wechsler, *supra* note 189. Wechsler identified various mechanisms for states to assert their interests in the national political process, including their role in selecting and composing the national government. *Id.* at 546–49, 552–57 (discussing the equal allocation of representation in the Senate, and that body's procedural rules permitting a small minority of states to impede legislation favored by a majority, the state's power to control congressional districting and voter qualifications influencing the House of Representatives, and the state influence in the Electoral College in selecting the president). For examples of criticism of Wechsler's position, see John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311 (1997) and Lynn A. Baker, *Putting the Safeguards Back into the Political Safeguards of Federalism*, 46 VILL. L. REV. 951 (2001). Even Wechsler's critics concede that the constitutional design intended for the states' involvement in the political branches to play *some* role in protecting state interests, even if that was to be a nonexclusive form of protection. *See* Yoo, *supra*, at 1318; *see also* Baker, *supra*, at 972. For purposes of this article, the fact that the political safeguards of federalism are supposed to play *some* role in protecting state interests is sufficient to establish the constitutional relevance of those safeguards and the importance of ensuring their continued functioning. This, in turn, demonstrates the utility of the federalism canons in preserving those safeguards. *See* Young, *Two Cheers*, *supra* note 189, at 1367–68.

249. For thoughtful critiques of the modern understanding of *Erie*, see Sherry, *Worst Decision*, *supra* note 9, at 143–46 (arguing this interpretation has no textual or contemporaneous support in *Erie* and is a scholarly reworking of the decision) and Green, *supra* note 8, at 618–22.

250. *See* Mishkin, *supra* note 8, at 1683.

intrude into state policy decisions in areas Congress has left to the states.[251]

It is beyond the scope of this article to resolve the disagreement between *Erie*'s critics and those who have read *Erie*'s text as containing a constitutional "kernel of truth" reflecting the political safeguards of federalism, other than to acknowledge that Mishkin's view has long been mainstream.[252] Instead, this article takes the Court at its word in modern cases that *Erie* has some constitutional basis. This prudential judicial restraint appears to be the thread running through later decisions that explicitly invoke *Erie.*

Although *Erie* somewhat cryptically suggested that Congress lacked the power to enact statutes in the areas covered by the "general law,"[253] Edward Purcell persuasively argued that *Erie*'s implicit point (which seems to have coalesced in the institutional significance of *Erie* developed in later cases) was not about a limitation on *Congress's* power, but rather on *the judiciary's*.[254] Instead of limiting Congress's power to act, *Erie* implied "that the federal courts should not—at least generally—initiate federal lawmaking *even over areas in which Congress does have authority* if Congress has not acted to assert federal control over that area."[255]

This narrow reading of the Court's power flows in part from separation of powers (as Ely recognized), in that the judiciary's powers are limited to those defined by the Constitution or legitimately authorized by Congress,[256] and in part from functional differentiation of

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251. *Id.* at 1686–87.

252. *See* EDWARD A. PURCELL, JR., BRANDEIS AND THE PROGRESSIVE CONSTITUTION 177 (2000) [hereinafter PURCELL, BRANDEIS]; Bradford Clark, Erie, *supra* note 5, at 1290 (agreeing with Mishkin's account of *Erie*'s constitutional rationale); Young, *Preemption*, *supra* note 15, at 1658 n.94 (describing the "view that *Erie* was, in fact, firmly grounded in separation of powers concerns about judicial lawmaking" as "widespread").

253. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 72 (1938).

254. Edward A. Purcell, Jr., *The Story of* Erie, *in* CIVIL PROCEDURE STORIES 60 n.116 (Kevin M. Clermont ed., 2008) [hereinafter Purcell, Erie] ("Congress almost certainly had authority to legislate over the facts of *Erie*, that is, over injuries to bystanders caused by railroads operating in interstate commerce."); *see also id.* at 62. *But see* Sherry, *Worst Decision*, *supra* note 9, at 151–53 (arguing that *Erie*'s view of judicial restraint was misguided).

255. Purcell, Erie, *supra* note 254, at 60 n.116 (emphasis added).

256. *Id.* at 59 ("*Erie* embodied a coherent and soundly based theory inspired by Brandeis's progressive faith in democratic government and legislative primacy, one rooted in the Constitution's fundamental structural principles. The first principle was that the Constitution made Congress the law making branch of the national government and delegated to it the legislative powers of that government.").

powers based on spheres of competence (as Mishkin recognized).[257] This latter element underscores the federal judiciary's functional incompetence to engage in the political balancing.[258]

Under this reading, *Erie* can be understood as a reflection of judicial restraint and a corollary form of federalism.[259] According to Purcell, "congressional abstention in any area within its authority represented a *political judgment* by the representative branch that states should exercise control in that area, and the courts should defer to that judgment."[260] This mirrors the principles underlying the federalism canons.

Erie's facts implicated the Rules of Decision Act (RDA),[261] rather than the Enabling Act. Nevertheless, reading *Erie* as reflecting federal judicial restraint with regard to state policymaking choices has profound implications for interpreting the Court's own power under the REA to displace state laws. While critics of this modern understanding view *Erie* as reflecting something quite different,[262] the modern understanding of *Erie* meshes tightly with the judicial philosophy of *Erie*'s author. Justice Brandeis was familiar with the risk the Federal Rules posed to federalism. In fact, he had long opposed the passage of the REA.[263] He was also the lone justice dissenting from the Court's approval of the newly promulgated Rules in 1937.[264] Purcell's historical research showed that Brandeis "cherished the hope that Con-

257. Mishkin, *supra* note 8, at 1686–87 (describing "the constitutional perception that courts are inappropriate makers of laws intruding upon the states' views of social policy in the areas of state competence").

258. *Id.*; *see also* PURCELL, BRANDEIS, *supra* note 252, at 174 ("Brandeis considered the judiciary, in contrast to the legislature, unsuited to the task of establishing the kind of laws that were necessary to deal with complex social and economic issues.").

259. PURCELL, BRANDEIS, *supra* note 252, at 177 (interpreting one of *Erie*'s points as being that "the federal courts should not, without compelling reason, displace state rules with those of their own making because Congress had not passed legislation to cover the facts of *Erie*.").

260. *Id.* at 174 (emphasis added). In the context of *Erie*, "because Congress had not asserted national authority in the area, the judiciary should follow suit and apply state law." *Id*.

261. 28 U.S.C. § 1652 (1948) (requiring that federal courts apply state law as rules of decision in civil actions "except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide").

262. For thoughtful critiques of the modern understanding of *Erie*, see Sherry, *Worst Decision*, *supra* note 9, at 143–46 (arguing that this interpretation has no textual or contemporaneous support in *Erie* and is a scholarly reworking of the decision), and Green, *supra* note 8, at 618–22.

263. PURCELL, BRANDEIS, *supra* note 252, at 135.

264. *Id.*

gress might veto the new [R]ules . . .” because “they represented another example of needless centralization.”[265]

Justice Brandeis is also remembered for his philosophical mission against the “Curse of Bigness,” conceived of as concentrations of power in large governments and large corporations.[266] For him, such political and social actors were inefficient[267] and imperiled liberty.[268] He preferred entrusting state legislatures rather than the federal government with power because centralization of power tended to foster corruption.[269] He also lauded experimentation by small governmental units whose promising solutions might be transferred to other states.[270] All of these views have familiar expressions in modern preemption doctrine and are consistent with the modern reading of *Erie* as embodying a principle of judicial restraint.

Under the federalism canons, congressional silence generally creates spaces for state autonomy, even in areas that Congress has the power to regulate.[271] Silence on the question of preemption reflects “the structure and limitations of federalism, which allow the States great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons.”[272] The

265. *Id.* at 135–36.

266. STRUM, *supra* note 222, at 73–74.

267. *Id.* at 78.

268. *Id.* at 82.

269. *Id.* at 83; PURCELL, BRANDEIS, *supra* note 252, at 134 (“He believed deeply in the virtues of a decentralized federalism and in the advantages of small units of social organization.”).

270. *See* PURCELL, BRANDEIS, *supra* note 252, at 134–35; STRUM, *supra* note 222, at 84; *see also* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the nation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

271. One notable area of exception is in the application of the Dormant Commerce Clause, where state action can be preempted even where Congress has been silent, if the state law places an undue burden on interstate commerce. *See, e.g.*, C.A. Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 401–02 (1994) (O’Connor, J., concurring) (“[T]he [Commerce] Clause not only empowers Congress to regulate interstate commerce, but also imposes limitations on the States *in the absence of congressional action*”) (emphasis added). The kinds of state regulations at issue in the “procedural *Erie*” cases, however, are outside this area of concern, as they are not laws discriminating against out-of-staters. While it is possible that a state *could* regulate commerce using a procedural device in a way that created a discriminatory burden on out-of-staters, that has never yet been an issue in the cases. Such a case might well require a different analysis, as it would implicate the Commerce Clause in ways not present in any of the post-*Erie* cases to date.

272. Gonzales v. Oregon, 546 U.S. 243, 270 (2006) (internal citations omitted).

Constitution's structure, in creating a federal government of limited power, presumes that interstitial lawmaking may be filled by the states in areas where there is no federal regulation.[273] The absence of federal law is thus an invitation for state law to fill the void.

Congress's failure to express an intent to preempt state law may be due to a pure omission (where Congress has not considered the question at all) or to the political effectiveness of state participation in the legislative process (where Congress may have considered the question and decided not to override popular state legislation). Either possibility precludes substituting judicial preferences for the political process in making the preemption decision.[274]

A closely related point is implicit in the modern reading of *Erie* as reflecting judicial restraint.[275] *Erie*'s restriction on the federal general common law in the absence of constitutional or statutory authority can be read as reflecting an analogous view of silence as a legal signifier.[276] Where both Congress and the Constitution are silent about delegating policymaking power to the Court to make federal general common law in diversity cases that displaces state law, such power does not exist.[277] While applying the federalism canons has been criticized because it involves the Court's choice of particular values or policy preferences,[278] these values are largely the same values underlying the modern understanding of *Erie*. They are not arbitrary or subjective preferences, but rather values that are embedded in a functional view of the constitutional structure, which provides for the representation of state interests within the legislative process.

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273. Bradford Clark, *Separation of Powers*, *supra* note 189, at 1326.

274. Congressional silence regarding agency actions operates analogously. In the context of congressional acquiescence to an agency's interpretation of a statute, the Court squarely rejected the idea that "failure to express an opinion" regarding regulations was evidence of approval of them. *See* Rapanos v. United States, 547 U.S. 715, 750 (2006). The Court explained that only if there was a record that Congress actually considered and rejected the exact issue before the Court would it deem Congress to have acquiesced. *Id.* This view is instructive on the question of congressional silence regarding preemption as it shows that in other contexts, the Court is unwilling to assume that silence means that Congress made some affirmative decision. Rather, it acknowledges the possibility that Congress may not have considered the issue at all, or may have even made a political decision not to confront the issue because of the interest groups with stakes in it. *See id.*

275. *See supra* Part III.B.

276. *See* PURCELL, BRANDEIS, *supra* note 252, at 177.

277. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) (concluding there is no general federal common law, and the Constitution does not give the Supreme Court the power to make such law).

278. *See* Eskridge & Frickey, *supra* note 201, at 636–37.

One commentator has argued for overriding any background presumption against preemption of state law by weighing whether there are "dominant federal interest[s]" that override state concerns.[279] Another commentator has suggested that diversity preemption analysis and the federalism presumption should be mere factors in interpreting the Federal Rules (particularly the Rules of Evidence)—but not necessarily determinative ones—as other factors should also be weighed,[280] such as the trans-substantive nature of a Rule, implications of policies extrinsic to the business of the courts, and the importance of the matter to the orderly functioning of the federal courts.[281] Both approaches overlook the role preemption analysis plays in construing the REA's limitation on the Court's rulemaking power: if Congress did not intend to displace state laws falling within states' historic police powers and instead chose to leave such areas to the states, there are no other interests or factors to weigh. On the other hand, if it did so intend, then the Supremacy Clause ends the preemption analysis.

If Congress did not fully delegate the power to make Rules displacing state law in areas Congress has otherwise left to the states to regulate, the Court may not substitute its own policy judgment for Congress's in those areas. The Court simply has no authorization from Congress to do so. The other factors and considerations suggested by the commentators become irrelevant if the Court is exceeding its rulemaking power as delegated by Congress. The argument here is not that following state procedure would offer the optimal or preferred solution in any particular circumstance. Instead, it does not matter if it is less convenient to require district judges to be familiar with state procedural rules or even whether state procedures are objectively inferior to the Federal Rules.[282] Expedience, the convenience or culture of the federal system, and other concerns would matter only if Con-

279. Donald L. Doernberg, *The Unseen Track of* Erie Railroad*: Why History & Jurisprudence Suggest a More Straightforward Form of* Erie *Analysis*, 109 W. VA. L. REV. 611, 645 (2007).

280. Leslie M. Kelleher, *Taking "Substantive Rights" (in the Rules Enabling Act) More Seriously*, 74 NOTRE DAME L. REV. 47, 109–12 (1998).

281. *Id.* at 115–21.

282. One commentator has suggested that *Erie* should be used to displace state lawmaking that federal judges find to be "unwise," with a high burden for finding that such laws affect substantive rights. *See* Stempel, *supra* note 153, at 969 ("Where legislation is the product of haste, misinformation, or unduly narrow interest group power, or where there is little evidence of public support or strong public benefit, courts can legitimately take a restrained view in applying the problematic law unless the law *clearly* qualifies as substantive for purposes of *Erie*.") (emphasis added). Such an approach is antithetical to the functional role of the judiciary reflected in the modern understanding of *Erie*, as well as in all the cases applying any form of the federalism canons.

gress had expressed intent to displace state law to the extent it was inconsistent with the general interests of the federal system. Moreover, multifactor tests are by nature flexible standards with high potential to create uncertainty. Such uncertainty should not exist for basic questions regarding summary judgment standards or methods of dismissing parties from a suit. For preemption doctrine to be useful in resolving these questions, it should provide clear results in most cases. The multifactor or interest-balancing approaches fail to do this. Indeed, to the extent that the existing cases reflect relative incoherence, that result may be due to ad hoc balancing of irreconcilable values and interests.[283]

As explained in Part IV, preemption doctrine can offer certainty and improved decision making in this area through a straightforward application of the federalism canons. It also offers a path out of the substance versus procedure briar patch.

IV.
Applying the Federalism Canons of Statutory Construction to the Rules Enabling Act

The historical tension between the Court's commitment to national procedural uniformity and its deference to state policymaking has resulted in muddled, unpredictable doctrine applying *Erie* to cases involving the scope of the Federal Rules. Indeed, in *Shady Grove*, the doctrine was not able to generate a clear answer regarding the scope of the Court's rulemaking power under the REA. This Part offers a method to resolve the confusion that draws on the modern understanding of *Erie* as a reflection of judicial restraint and connects it to preemption doctrine. As Part III demonstrated, *Erie* and the federalism canons of statutory interpretation are twin embodiments of the political safeguards of federalism built into the Constitution's structure. Connecting *Erie* to these canons illuminates a path to resolving the scope of the Court's rulemaking power. Applying the federalism canons to the REA is not only consistent with the core values underlying the modern interpretation of *Erie*, but also offers a way to account for commitments to *relative* procedural uniformity in the federal system and deference to state policymaking.

This Part will argue that the REA's scope is somewhat narrower than has previously been suggested by the Court or other commentators. It applies the federalism canons and concludes that Congress's

283. *See* Freer & Arthur, *supra* note 97, at 69–76 (discussing the subtextual balancing of interests in the cases).

incomplete delegation of power to the Court to make the Federal Rules preserved ample space for state policymaking through state procedural mechanisms in some, but not all, areas. It argues that Congress did not manifest intent to use the Federal Rules to intrude into areas of traditional state competence, areas where Congress has declined to engage in national policymaking in order to leave space for states to act as primary regulators. Applying the federalism canons thus leads to the conclusion that when the application of the Rules would displace state laws in such areas, the Rules should yield to state law.

The constitutional power of *Congress* to enact such legislation, however, is a different issue from the breadth of the *Court's* power to make Rules based on Congress's delegation in the REA. The latter issue requires not only that there be some delegation to the Court, but also that the delegation be sufficient to support the Federal Rules actually promulgated. As Congress may delegate less than the full measure of its power, the terms of delegation are key. There is some dispute about how much of Congress's constitutional power was conferred to the Court in the REA.

Part IV.A thus examines the scope of Congress's delegation in the REA. It argues that the scope of the Court's power to promulgate Rules under the REA turns on two structural components: (1) Congress's constitutional power to regulate procedural matters in the federal courts, and (2) the scope of the statutory delegation of that power to the Supreme Court. There is little controversy over the first of those elements,[284] and this article assumes there is no reason to doubt the first element. Part IV.B demonstrates that applying the federalism canons to the REA leads to a conclusion that the Court's rulemaking power is not broad enough to displace state procedural rules that are part of a state regulatory scheme addressed to areas Congress has left to the states. It argues that the absence of consideration of state interests in the original legislative history of the REA, combined with decades of confusion about the scope of the REA and institutional structural disuniformity built into the Rules themselves, all support a conclusion that Congress never manifested an intent to use the Rules to displace matters otherwise within the state's historic police powers. Part IV.C then examines the narrowness of the scope of matters within

284. Hanna v. Plumer, 380 U.S. 460, 472 (1965) ("[T]he constitutional provision for a federal court system [in Article III] (augmented by the Necessary and Proper Clause) carries with it congressional power to make rules governing the practice and pleading in those courts."); *see also* Rowe, *supra* note 116, at 971–72 (observing the stability of this broad interpretation of congressional power in the Court's *Erie*-related decisions); *id.* at 973 ("[R]ealistic checks on Congress in this area . . . seem to be those of politics and good sense, rather than constitutional limits.").

that sphere of state regulation and proposes a framework to facilitate discerning such matters from other matters more easily preempted by the Rules. Part IV.D then concludes by reconstructing the *Shady Grove* decision through this new approach.

A. Congress's Incomplete Delegation of Rulemaking Power

Since 1941, the Court has accepted the view that a Federal Rule is valid under the REA so long as the Rule "really regulates procedure," in the sense that the Rule is targeted at some procedural aspect of litigation.[285] This understanding assumes that as long as a Rule is procedural, it falls within the scope of the REA's delegation of rulemaking power, without regard to what state law it displaces. This understanding implicitly assumes that Congress transferred the full measure of its own constitutional power. It interprets the Court's rulemaking power as extending as far as Congress's administrative power over the organization of the federal courts. In other words, it understands the REA as allowing the Court to engage in any rulemaking that would fall within the scope of Congress's own power. This conclusion has no textual support in the REA itself. As many commentators have observed, the delegation here was only partial, as the REA limits the Court to promulgating only certain classes of Rules: Rules that are not only procedural, but also refrain from impinging on substantive rights.[286]

In contrast to the Court's limited power under the REA, Congress itself might conceivably use its power under Article III and the Necessary and Proper Clause to create procedural rules for the lower federal courts in a manner that displaces both state and federal substantive rights. Its legislative power is thus broader than the statutory delega-

285. *See* Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941); *Hanna*, 380 U.S. at 471; *see also* Ely, *supra* note 19, at 719–20. This approach has been criticized for ignoring the second sentence of the REA's limitation on the Rules, namely that they may not abridge, enlarge, or modify any substantive right. Ely, *supra* note 19, at 718–19. However, others have argued there is a "strong presumption of validity" for the Federal Rules. Ides, *Supreme Court*, *supra* note 26, at 80–81.

286. *See, e.g.*, Ely, *supra* note 19, at 718–19; Whitten, *supra* note 5, at 127–28 (citing Ely, *supra* note 19, at 718–40). *But see* Burbank, *REA*, *supra* note 166, at 1107–08 (reaching the conclusion that the second sentence served only to emphasize the restriction established by the first sentence); Ides, *Standard*, *supra* 11, at 1063 ("§ 2072(b) is a congressional mandate that expressly limits the scope of the congressional delegation of rulemaking authority to the Supreme Court."). *C.f.* Clermont, *supra* note 26, at 1006 (interpreting cases to mean that the ambiguous second sentence of the REA had "explanatory and emphatic roles" but was not an independent limit on rulemaking).

tion in the REA. This difference demonstrates that Congress delegated less than the full measure of its full constitutional power.

It is therefore incorrect to argue that because Congress delegated authority to the Court to promulgate national, uniform procedure, the Rules always preempt state law to the contrary.[287] The space for state autonomy lies not in an area reserved by the Constitution to the states, but in areas where the political and legislative processes have declined to impose federal power.[288] State autonomy thus inhabits not only areas Congress cannot reach under its Article I powers, but also areas it can reach but has chosen to leave without federal legislation.

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? The incomplete delegation of congressional power to the Court in the REA has bearing on the answer to these questions. At a minimum, it suggests that Congress did not enact the REA with an express purpose of altering the federalism balance with respect to the states' police powers.

Congress's limitation regarding substantive rights in the REA functionally reinforces "the constitutional perception that courts are inappropriate makers of laws intruding upon states' views of social

287. To the extent that the Court has long conflated the delegation of the power to make procedural rules with the power to preempt state law in any area touched by those rules, they are actually distinct questions and ought to be treated as such. *But see* Clermont, *supra* note 26, at 1014 n.135 (discussing his disagreement with Professor Rowe's position that "only a 'politically accountable' branch of the federal government should be able to impinge on state substantive interests" and responding "that the Court has in fact held that Congress already delegated the authority to adopt nationwide procedure, even if we academics may dislike that holding") (quoting Thomas D. Rowe, Jr., *Sonia, What's a Nice Person Like You Doing in Company Like That?*, 44 CREIGHTON L. REV. 107, 108 (2010) (observing that there is a "democratic deficit" in the rulemaking process, as "no one officially involved in it ever, in his or her capacity as a committee member or federal judge, faces any voters or reports to anyone who does")).

288. Professor Ely argued forcefully against the notion that the Constitution fences off enclaves of exclusive state authority that might be protected from the Rules. Ely, *supra* note 19, at 701–02. In his view, there are no exclusive areas of state control that cannot be reached by the Federal Rules pursuant to the Constitution. The lack of constitutional text defining such enclaves, however, does not resolve whether the Rules can intrude into areas of state concern. As discussed in Part III, areas of state concern are also protected by political processes, even in areas Congress has the power to regulate. Focusing on state enclaves overlooks this other category of legislatively created autonomy.

policy in areas of state competence."[289] Modern process federalism arguments justify the importance of this limitation, even if they were not its historical motivation.[290] Thus, whatever the drafters' intent in 1934, the substantive rights limitation reinforces the process-based protection of federalism inherent in our constitutional structure where Congress had not itself decided to override state policymaking choices in particular areas. This leads to an inference that the REA may not be a manifestation of Congress's intent to use the Federal Rules to oust the states from areas of traditional state policymaking, particularly the expression of the states' police powers and regulation of the general welfare.

B. Presuming Congressional Intent to Preserve State Law in Traditional Areas of State Regulation

Applying the federalism canons to the REA leads to a conclusion that the Court's rulemaking power is not broad enough to displace state procedural rules that are part of a state regulatory scheme addressed to areas Congress has left to the states. The analysis commences with a presumption that Congress did not intend for the Rules to "imping[e] on important state interests," including policymaking affecting "the general welfare of society," where that policymaking has historically been a matter left by Congress to state regulation.[291] As non-preemption is the doctrinal default position, the absence of evidence of intent to the contrary cuts against diversity preemption. To rebut that presumption and conclude the REA conveyed the power to make Rules that displace such state interests would require a showing of a "clear and manifest" congressional purpose in the statute, under the strong version of the canon,[292] or *some* showing of congressional intent, even if that were something less than unmistakable statutory language, under the softer version of the canon.[293] Both are absent.

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289. Mishkin, *supra* note 8, 1686–87.

290. *E.g.*, *id.* at 1688. Process federalism generally invokes the political processes to safeguard the diffusion of power in our federal system. *See generally* Ernest A. Young, *Two Cheers for Process Federalism*, 46 VILL. L. REV. 1349 (2001) (discussing the debate over whether the "protection of the state-federal balance should be left to the political process" or whether there should also be judicial oversight).

291. *See* BFP v. Resolution Trust Corp., 511 U.S. 531, 544 (1994) (internal citation omitted).

292. *Id.*

293. Although the standard presumption against preemption can only be rebutted by a showing of the "clear and manifest purpose" of Congress, Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996) (internal citation omitted), this is different from the requirement of a clear statement in *Gregory.* The standard presumption may be rebutted not only by the text (as would be true of a clear statement in *Gregory*), but also by impli-

Given the absence of any consideration of state interests in the original legislative history of the REA,[294] there is nothing from which one could infer that Congress intended for the Rules to displace state laws in areas within the states' historic police powers.[295] In fact, Congress *could not possibly* have weighed the potential preemption of such state law in diversity cases in 1934, as the Supreme Court was then still applying its own federal general common law to decide state law questions.[296] This history makes it impossible to view the REA as signaling a deliberate intent to alter the federalism balance in such traditional state areas. This conclusion is further buttressed by the domination of the federal docket in the 1930s by federal question cases,[297] making it further unlikely that Congress would have any reason to focus upon diversity preemption through this statute.

While the soft form of the canon provides a closer case due to the general goal of procedural uniformity animating the REA, applying either version of the federalism canon nevertheless leads to the same conclusion because Congress never manifested intent to delegate broad power to the rulemakers to displace state law in areas of traditional state autonomy. An obvious argument to rebut this conclusion under the soft form of the federalism canon is that the original legislative goal of the REA was uniformity, so Congress must have meant to displace any and all state law that impeded the creation of such uniform federal procedure. Although the text of the REA itself does not expressly identify national uniformity as a goal, uniformity had been the animating concern of the REA's proponents for over a decade.[298] To effectuate this goal, the Rules had to preempt contrary state laws in diversity cases. Otherwise, there would be no uniform national procedure in the federal courts. This would arguably satisfy the soft form of

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cation based on the surrounding regulatory scheme or statutory framework, *id.* at 485–86, and the history of federal regulation in the field. *See* Wyeth v. Levine, 555 U.S. 555, 565–66 (2009).

294. *See supra* note 182 and accompanying text.

295. *See* Burbank, *REA*, *supra* note 166, at 1106 ("Nothing could be clearer from the pre-1934 history of the Rules Enabling Act than that the procedure/substance dichotomy in the first two sentences was intended to allocate lawmaking power between the Supreme Court as rulemaker and Congress. The pre-1934 history also makes clear that the protection of state law was deemed a probable effect, rather than the purpose of a limitation designed to allocate lawmaking power between federal institutions."). Professor Burbank's historical research led him to conclude that proponents of the REA "sought to demonstrate that the *effect* of the limitations on court rulemaking—limitations that were formulated for another purpose—was to [safeguard state law], unless Congress chose to legislate specifically in the area." *Id.* at 1112.

296. *See id.* at 1109–10.

297. Burbank & Wolff, *supra* note 11, at 28.

298. *See* Burbank, *REA*, *supra* note 166, at 1077–98.

the federalism canons, as the presumption against preemption could be rebutted by showing that preemption is implicitly necessary to effectuate the statutory structure or purpose.[299] There are, however, difficulties that emerge within this argument.

First, the REA's structure does not mandate absolute uniformity, only *relative* uniformity. By its own terms, it seems to expect some *dis*uniformity (i.e., when Rules abridge substantive rights, whether state or federal).[300] The goal of uniformity was always contingent upon the quality of the rulemaking, with a built-in safety valve to override uniformity under appropriate conditions. Second, the statutory structure is capable of accepting significant deviation from uniformity in diversity cases. This is evident in the long list of cases in which the Court declined to apply a seemingly on-point Rule in diversity cases.[301] Perhaps more importantly, one Rule may mean something different in a federal question case than it means in a diversity case,[302] which effectively splits a single rule into two distinct rules depending on the source of subject matter jurisdiction.

The REA's implementation has thus tolerated some disuniformity in diversity cases for almost as long as the Rules have existed, and the statute has survived intact. It thus seems impossible that preemption of all state practices is *necessary* to effectuate the REA's structure or purpose. Finally, Rule 83, which authorizes district courts to adopt their own local rules, enshrines additional disuniformity into the system by creating a system of local rules that vary by district.[303] Even in the earliest days of the Rules, there was a perceived need to accommodate local customs.[304] In the modern era, the disuniformity caused by these local rules is significant.[305] Accordingly, the general goal of uni-

299. Cipollone v. Liggett Grp., Inc., 505 U.S. 504, 516–17 (1992).

300. *See* Catherine T. Struve, *Institutional Practice, Procedural Uniformity, and As-Applied Challenges Under the Rules Enabling Act*, 86 NOTRE DAME L. REV. 1181, 1220–21 (2011) (discussing sources of disuniformity and concluding that "the goal of uniformity has hardly been achieved across the board").

301. *See* discussion *supra* Part I.A.2 (discussing *Palmer*, *Ragan*, and *Cohen*) and Part I.B (discussing *Walker* and *Gasperini*).

302. *See supra* note 100 and accompanying text (discussing *West v. Conrail*).

303. FED. R. CIV. P. 83(a).

304. David M. Roberts, *The Myth of Uniformity in Federal Civil Procedure: Federal Civil Rule 83 and District Court Local Rulemaking Powers*, 8 U. PUGET SOUND L. REV. 537, 537 (1985).

305. *See id.* at 538 (observing that in the mid-1980s, there were nearly 3,000 local rules in the district courts); *see also* Samuel P. Jordan, *Local Rules and the Limits of Trans-Territorial Procedure*, 52 WM. & MARY L. REV. 415, 433 (2010) (observing some local rules "impose substantial procedural requirements" such as "structur[ing] the summary judgment process, including details relating to the form and nature of the filings that must be submitted"); Mark Spottswood, *Live Hearings and Paper Trials*,

formity in the REA appears quite modest in this light and cannot bear the weight of rebutting the presumption against preemption.

The REA's displacement of traditional areas of state policymaking fares even worse under the strong clear statement form of the canons.[306] That version would require an express statement of congressional intent in the text of the statute, which is plainly missing here. One might respond that the strong version of the canon has no place in this context. *Gregory* applied the clear statement rule in a case involving state laws fundamental to the state's own definition of its qualifications for government officials, which presented an area of special state concern.[307] The structure of Justice O'Connor's opinion invokes the Tenth Amendment and a line of "political function" cases to carve out special protection for state laws related to choosing government officials.[308] To derive the clear statement rule, however, the opinion cited none of that authority on the "specialness" of laws related to how states constitute their own government organization. Rather, the derivation of this form of the clear statement rule came from an Eleventh Amendment case, *Atascadero State Hospital v. Scanlon*,[309] which in turn cited the classic case regarding the presumption against preemption, *Rice v. Santa Fe Elevator*.[310] The opinion goes so far as to conclude that the clear statement rule is "nothing more than an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere."[311] Thus, the "specialness" of the sovereignty issue in relation to the state's own definition of its political community did not appear to cause the Court to derive the clear statement rule in the opinion's structure; the Court first derived the

38 FLA. ST. U. L. REV. 827, 832–33 (2011) (observing that local rules "may constrain the ability of judges to make pretrial findings of fact in the manner of their choosing").

306. Although the standard presumption against preemption can only be rebutted by a showing of the "clear and manifest purpose" of Congress, Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996), this is different from the requirement of a clear statement in Gregory v. Ashcroft, 501 U.S. 452 (1991). The standard presumption may be rebutted not only by the text (as would be true of a clear statement in *Gregory*), but also by implication based on the surrounding regulatory scheme or statutory framework, *id.* at 487, and the history of federal regulation in the field, Wyeth v. Levine, 555 U.S. 555, 565 (2009).

307. *Gregory*, 501 U.S. at 461–63.

308. *Id.* at 462–63.

309. 473 U.S. 234 (1985).

310. *Gregory*, 501 U.S. at 460–61.

311. *Id.* at 461.

clear statement rule from a long line of cases in other contexts where the state "retained substantial sovereign powers."[312]

Moreover, whatever limitation one might discern from the unusual facts of *Gregory* is undermined by the application of a strong form of the canon in *BFP*,[313] a case involving a mundane state property foreclosure law.[314] In fact, the Court in *BFP* expressly rejected the dissent's contention that *Gregory* was inapposite by emphasizing that the state law at issue involved "the general welfare" (i.e., historic police powers) and that the case involved "the essential sovereign interest in the security and stability of title to land."[315]

Some displacements of state law by the Federal Rules may involve interests no less connected to the core political identity of the state than the state law at issue in *Gregory*. The procedure mechanisms in anti-SLAPP laws,[316] for example, relate to states' regulation of the right to petition the state government, an interest as intimately tied to the democratic identity of a political community as the employment qualification at issue in *Gregory*.[317] Thus, even under a parsimonious application of the strong version of the canon closely tracking *Gregory*'s "special" circumstances, state interests can arise in procedural contexts that merit its use in the "procedural *Erie*" context.

Alternatively, one might apply the so-called "presumed awareness" canon to argue that because Congress has long acquiesced in the Court's broad construction of the REA, it should be deemed to have approved that construction.[318] The broad understanding of rulemaking power has been in place since at least 1965 in *Hanna*, and was implied in 1941 in *Sibbach*. Under this argument, since Congress did nothing to rein in the application of the Rules, despite several amendments to the REA,[319] one could infer that Congress's inaction demonstrates approval of the Court's interpretation of the REA. In support of this view, there is a canon of statutory construction providing that where Congress uses terms with settled meanings based on case law, later

312. *Id.*

313. BFP v. Resolution Trust Corp., 511 U.S. 531 (1994).

314. *Id.* at 534.

315. *See id.* at 544 & n.8.

316. *See supra* note 179 (explaining anti-SLAPP laws).

317. *See, e.g.*, CAL. CIV. PROC. CODE § 425.16(a) (West 2012) (declaring that the anti–SLAPP law's purpose is "to encourage continued participation in matters of public significance" and that "this participation should not be chilled through abuse of the judicial process").

318. *See* Redish & Murashko, *supra* note 185, at 75.

319. *See* Struve, *supra* note 152, at 1105–09 (discussing amendments to the REA in 1958 and 1988).

courts should follow those settled meanings.[320] Along the same lines, when Congress re-enacts a statute, there is a presumption that the re-enacted statute incorporates settled interpretations.[321] There is thus an argument that the 1988 amendment of the REA, which was post-*Hanna*, incorporated whatever interpretations of the REA were on record and presumably known by Congress. Congress chose to continue to use the same key words in defining the scope of the Court's power. It would follow that if Congress had disagreed with the Court's broad interpretation of the rulemaking power, it would have made its disagreement known.[322]

Congress actually did make such disagreement known. The 1985 Judiciary Committee Report on amending the REA expressly criticized the Court's *Sibbach/Hanna* interpretation of the REA.[323] It found that "there is no shared conception" of the limitations on the delegation in the REA between Congress and the Court.[324] The "presumed awareness" canon is thus undercut by legislative history from the era of the 1988 reenactment.

Moreover, application of the "presumed awareness" canon requires a *settled,* authoritative interpretation of the statute. In fact, the Court has gone so far as to require that "the supposed judicial consensus [be] so broad and unquestioned that [it] must presume Congress knew of and endorsed it."[325] The meaning of the "substantive rights" limitation in the REA has never been settled—it split the Court in 1941 in *Sibbach*, appeared to have been impliedly overruled by *Guaranty Trust*, was glossed over in *Hanna*, and fractured the Court again in *Shady Grove*. Moreover, despite *Hanna*'s attempt to create a bright-line doctrine favoring broad rulemaking authority, the Court has been inconsistent in applying that doctrine, and *Hanna*'s rule was riddled with incoherent exceptions from its very inception.[326] In fact, the legislative history leading up to the 1988 amendment shows congressional awareness of this unsettled legal landscape, concluding that "important questions about the extent and propriety of the delegation

320. *See* Lorillard v. Pons, 434 U.S. 575, 580–81 (1978) ("[W]here, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute.").
321. *See* Redish & Murashko, *supra* note 185, at 75 (describing this canon of construction).
322. *See id.*
323. H.R. REP. NO. 99-422, at 13 & n.43, 20–21 (1985).
324. *Id.* at 21.
325. *See* Jama v. Immigration & Customs Enforcement, 543 U.S. 335, 349 (2005).
326. *See supra* Parts I.B and I.C (discussing the inconsistency of the Court's interpretation of its rulemaking power).

of power to the courts to make supervisory rules" in the REA remained answered.[327] There was thus no settled or authoritative interpretation of the REA against which Congress might have been legislating when it amended the REA in 1988.

Congress's failure to amend the REA to correct the Court's expansive interpretation might signal an expectation that the Court will eventually correct its own excesses, or simply an unwillingness to confront the issue, or the result of pressure from interest groups.[328] Or it may signal a simple lack of awareness of the specific federalism issues involved in the rulemaking process *because Congress has never considered them*, which is precisely the point of the federalism canons.

Nor is it an answer to argue that the Advisory Committee may sufficiently consider state interests at the Rule-drafting stage. That process seeks participation "by a broad segment of the community,"[329] and the Advisory Committee may reconsider proposals based on the criticism it receives.[330] Thus, federalism objections by state officials *might* affect the drafting of a proposed Rule, were state officials sufficiently prescient to predict the collision between a proposed Rule and state law in future litigation in diversity cases. Of course, the Advisory Committee need not defer to state interests as part of this process. The fifty states lack representation on the committee (though the standing committee currently includes *one* state judge).[331] The process has no political safeguard to prevent the exercise of its considerable discre-

327. H.R. REP. NO. 99-422, at 7; *see also id.* at 12–14 (discussing "instances where the Congress concluded that the Supreme Court had overstepped the bounds of its rulemaking authority" in the context of the Federal Rules of Evidence, highlighting problems with Advisory Committee proposals to amend Rule 68, recognizing as valid criticism that "the proposals would violate the Enabling Act," and noting the lack of standards to distinguish between substance and procedure); *id.* at 22 (explaining that the REA should be understood as "reserve[ing] to Congress decisions concerning prospective federal regulation of matters peculiarly within its competence, having regard to Congress'[s] representative nature and to its experience in prospective lawmaking that variously affects its constituencies in their out-of-court affairs" and expecting that Rules would be "refined" with these admonitions in mind).

328. *See* Rapanos v. United States, 547 U.S. 715, 750 (2006) (plurality opinion). This view is supported by the Judiciary Committee's report from 1985. *See* H.R. REP. NO. 99-422, at 22 (1985).

329. Struve, *supra* note 152, at 1126 (quoting H.R. Rep. No. 99-422, at 26 (1985)).

330. *Id.*

331. *Committees on Rules of Practice and Procedure Chairs and Reporters*, U.S. COURTS, http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Members_List_Oct_2011.pdf (last updated June 12, 2012); *see also A Summary for the Bench and Bar*, U.S. COURTS, http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/RulemakingProcess/SummaryBenchBar.aspx (last visited March 5, 2012) ("The Standing Committee and the advisory committees are composed of federal judges,

tion to push forward Rules that may have deleterious effects on state policymaking. Even the most well-meaning committee might reasonably be unaware of the effect of a proposed Rule on the laws of a state in which the committee members have never practiced.

C. Proposed Alternative: Applying State Procedure in Areas Connected to the Exercise of States' Police Powers

Parts IV.A and IV.B demonstrate that the REA and structure of the Rules do not reflect the manifestation of any congressional intent for the Rules to alter the balance of federal and state power in areas traditionally regulated by the states. This Part applies the federalism canons to derive a new presumption in favor of state practices connected to the state's traditional areas of autonomy and offers an alternative test. It argues that federal courts should not apply a Federal Rule to displace state law that is part of the state's regulation of the general welfare, or otherwise related to the exercise of the state's police powers, in an area left by Congress to the states.

This article does not claim that Federal Rules should never apply in diversity cases, or even that they usually do not apply. Most states have adopted the Federal Rules of Civil Procedure, greatly reducing the incidence of conflicts in diversity cases.[332] Where there are variations, this article is not concerned with preemption of ministerial state choices—ranging from the number of interrogatories or peremptory challenges permitted to the kinds of records kept by court clerks. This article instead makes a narrower point: it focuses on a small body of state laws that accomplish some regulatory goal in a traditional state area Congress has chosen not to regulate. Historical examples include areas as diverse as health and safety, property transfer and zoning, insurance, domestic relations, probate, worker's compensation, and premises liability.[333] These are significant areas where the federalism balance has vested states with a primary role in regulating conduct within their own borders. Congress *could* federalize many of those

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practicing lawyers, law professors, state chief justices, and representatives of the Department of Justice.").

332. By 1986, thirty-three states had adopted the Federal Rules in full or part. John B. Oakley, *A Fresh Look at the Federal Rules in State Courts*, 3 NEV. L.J. 354, 357 (2003) [hereinafter Oakley, *Rules*]. Indeed, the original drafters of the Federal Rules hoped that the Rules would serve as a model for states to emulate. *See* Charles Allan Wright, *Procedural Reform in the States*, 24 F.R.D. 85, 86 (1959). However, in the last decade, the Federal Rules' influence on state procedure appears to have been waning. *See* Oakley, *Rules*, *supra*, at 383–84.

333. *See* Sandi Zellmer, *Preemption by Stealth*, 45 HOUSTON L. REV. 1659, 1666 (2009).

areas—and indeed in the twentieth century Congress did federalize vast areas that had previously been primarily regulated by the states.[334] However, in areas where states are *still* the primary regulators, the presumption against preemption has force.

The role of the state law being displaced in such a regulatory scheme is of critical importance in the diversity preemption analysis. The question of whether the state law bears a "procedural" or "substantive" label is in this sense beside the point. Under this view, even if the "substantive rights" limit is surplusage (or descriptive, emphatic, or otherwise something other than an additional limit beyond the requirement that Rules be limited to "practice and procedure"), displacing certain kinds of state laws is nevertheless to be avoided. The federalism canons lead to a conclusion that where a Rule's application, based on its plain meaning, would displace state laws that are connected to the state's regulation of the general welfare, or are in an area otherwise within the state's police powers and left by Congress to the states, federal courts should decline to use the Federal Rules to preempt state law. The crucial consideration is whether the law is in an area where Congress has declined to exercise federal power and the state law at issue is part of the manner in which the state governs the area. When a state's practice is *not* part of its regulation in an area of traditional state autonomy, applying the Federal Rule would be within the scope of Congress's delegation of rulemaking power. At that point, the question of whether the Rule is "really procedural" or in some way substantive matters. Given that areas within the states' police powers implicate deeply rooted federalism concerns (and reflect areas where the political safeguards of federalism in the legislative process are especially vital), there should not be an especially high burden required to connect state law to such a regulatory scheme. In these areas of special state authority where Congress has left states as the primary regulators, the Court should interpret the preemptive force of its own rulemaking narrowly. This is not only because Congress delegated less than the full constitutional measure of Congress's own power, but also because of the Court's functional incompetence to provide a forum for weighing state political interests in deciding preemption questions. For these reasons, ambiguity in a state law's purpose generally should militate against applying the Federal Rules if it

334. *See, e.g.*, Norman R. Williams, *The Commerce Clause & the Myth of Dual Federalism*, 54 UCLA L. REV. 1847, 1915–17 (2007); *see also* Jason Scott Johnston, *The Tragedy of Centralization: The Political Economics of American Natural Resource Federalism*, 74 U. COLO. L. REV. 487, 488 (2003).

is at least reasonably likely that the state law actually functions as part of such a special regulatory scheme.

To facilitate easy application of these principles, there should be a presumption that the Federal Rules will yield where the state practice being displaced bears a discernible relationship to the effective functioning of the state's regulation. This presumption might be rebutted through evidence of a different purpose in the state practice or the lack of a sufficiently close connection between the state practice and the regulatory purpose. The point, however, is that the 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.

This new presumption specifically targets areas where states are primary regulators, and therefore may help solve the practical difficulties that sometimes arise in ascertaining precisely what a state legislature intended when it enacted a practice without leaving behind clear legislative history. Resolving doubt about whether Federal Rules have impermissible effects on areas of state autonomy in favor of the states makes such situations easier for lower courts to navigate.

This approach would reach results that are largely consistent with proposals attempting to give force to the "substantive rights" limitation, though it operates independently of the procedure-substance distinction. The test here is at once both broader and narrower than that limitation. It is broader because it captures not only procedural rules that are "bound up" with substantive rights, but also procedural rules that regulate procedure qua procedure where doing so is part of the way the state tackles a social problem related to the general welfare.[335] It is also narrower in that it does not target all possible areas where states may create substantive rights (which includes areas co-regulated by the federal government, or even areas of primary federal control where state regulation is secondary or supplemental), which fall

335. For example, the entire mechanism of state anti-SLAPP laws are typically procedure qua procedure, in that the law creates special procedural techniques to extricate defendants quickly and cheaply from suits that would chill protected speech or petitioning the government, and *litigation itself* is in need of regulation in the eyes of the Legislature. Such laws typically have no companion substantive provision (*e.g.*, there is no substantive change to defamation or liable law). *See supra* note 179 and accompanying text (discussing the example of anti-SLAPP procedures).

outside areas of traditional state autonomy. Rather, this approach focuses its protective power exclusively on regulatory areas Congress has left to the states to act as primary governing entities.

One possible criticism of this new approach lies in the past difficulty the Court has had in assessing what matters fall within the historic police powers of the states in other areas of law. For example, in interpreting the scope of Congress's power under the Commerce Clause, the Court held in *National League of Cities v. Usery* that Congress lacks the power under the Commerce Clause to enforce certain kinds of legislative commands against the States "in areas of traditional governmental functions."[336] Nine years later in *Garcia v. San Antonio Metropolitan Transportation Authority*, the Court reconsidered the issue because federal and state courts struggled to separate traditional functions from nontraditional ones.[337] The Court concluded that its test relying on "traditional governmental functions" was unworkable and overruled *National League of Cities*.[338]

This might appear to suggest that trying to parse procedural rules based on the state's historic police powers or traditional areas of state regulation would be similarly unworkable. But such a conclusion is not warranted by *Garcia. Garcia* involved the application of the Fair Labor Standards Act (FLSA) to a municipal transit agency. Congress had already specifically made the FLSA applicable to state and local employees and public mass-transit carriers.[339] Under the old *National League of Cities* rule, a state employer could be immunized from having to obey the federal legislation if the legislation impaired its "'ability to structure integral operations in areas of traditional governmental functions.'"[340] This required the Court to embark on a philosophical inquiry into the political roles states had historically played in the field of transportation and what modern circumstances entailed.[341] The Court concluded that it lacked the ability "to specify precisely what aspects of a governmental function made the function necessary to the 'unimpaired existence' of the States."[342]

This is not the same inquiry the Court has applied to protect traditional areas of state regulation using the federalism canons. For

336. 426 U.S. 833, 852 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).
337. *Garcia*, 469 U.S. at 530.
338. *Id.*
339. *Id.* at 533.
340. *Id.* at 537 (quoting Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 288 (1981)).
341. *Id.* at 538–40.
342. *Id.* at 541 (internal citation omitted).

example, the problems identified by the Court in *Garcia* in 1985 posed no obstacle in *Gregory* or *BFP* in the 1990s. Nor did they pose problems in more recent cases applying the presumption against preemption. For example, in *Wyeth v. Levine*, the Court recently observed one of the "touchstones" guiding preemption questions in areas states have traditionally occupied: "[W]e 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.' "[343]

The preemption inquiry into police powers is more concrete than the one at issue in *National League of Cities* or *Garcia* in that it simply looks at whether the field is one the state has been left to regulate without federal interference, and whether the field affects the general welfare in that it implicates the manner in which the state preserves the security and well-being of its citizens. Factors that might guide a court in assessing whether the state's policy goals fall within areas that might trigger the protection of the federalism canons include: (1) whether Congress has subjected the area of policymaking to federal control,[344] (2) whether the state is using a regulation to solve a broader social problem, or, by contrast, (3) whether the state practice is a historical fortuity resulting from inaction in a field the state has not actively tried to regulate.

This approach would allow federal courts to look at how state law functions in a regulatory scheme to assess whether it is an exercise of historic police power.[345] This is a different approach from the one proposed by Justice Ginsburg, writing for the majority in *Gasper-*

343. Wyeth v. Levine, 555 U.S. 555, 565 (2009) (quoting Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996)).

344. *E.g.*, *id.* at 566–67 (recounting the history of congressional control of drugs and drug labeling).

345. Sergio Campos has observed that excavating policy justifications for procedural state rules may sometimes be unreliable, due to defects in the state's legislative process or political maneuvering. *See* Sergio J. Campos, Erie *as a Choice of Enforcement Defaults*, 64 FLA. L. REV. 1573, 1618-19 (2012). He argues that states should be forced to reveal substantive justifications for procedural rules or suffer a "penalty" of having the Federal Rule preempt the state rule in diversity cases. *Id.* at 1627. He would allow states to escape such preemption by tracking the language of the REA, but allow Congress to express countervailing considerations through legislation that might trigger broader preemption. *Id.* at 1628–29. Campos's argument seeks to understand *Erie* in this context as a problem of default rules, and his argument fits within the REA's "substantive rights" structure. His approach appears to substitute a different set of default rules for the presumption against preemption, where the default rule is already clear (and avoids preemption absent clear congressional intent to the contrary). Campos's approach is arguably consistent with the presumption against preemption, however, insofar as it places a burden on Congress to express countervailing considerations triggering preemption.

ini and from the dissent in *Shady Grove*. Justice Ginsburg's method of safeguarding federalism was to weigh "important" state interests as a means of interpreting the Rules to try to avoid conflict with those state interests, changing the meaning of the Rules to reach the desired result.[346] Neither the majority opinion in *Gasperini* nor the dissent in *Shady Grove* offered guidance on what constitutes an "important" state policy, opening Justice Ginsburg's approach to the criticism that it was "standardless."

By contrast, the Court's method in its preemption cases for classifying "important" state interests is not standardless. It is a standard that the Court has been applying with regularity since the time of the Framing through the modern era to identify the internal power of states to regulate matters within their borders to promote the general welfare of their citizens.[347] Looking to whether state laws fall into states' police powers separates state laws deserving of the strongest caution in the preemption analysis from those that may be more easily preempted. Focusing on the preemption analysis also leaves the Rules' plain meaning unaffected. The Rules either displace state law or they do not.

Preemption analysis requires an examination of what is being preempted. Even concluding that Congress intended to occupy the field in a particular area would still require a look at the state statute at issue to determine whether it actually falls in the same field occupied by Congress.[348] Contrary to the suggestion of the majority in *Shady Grove*, such analysis would not necessarily require delving into the subjective intentions of state legislators to divine whether they had a substantive purpose in mind, thereby condemning hapless federal judges to the menial task of "poring through state legislative history—which may be less easily obtained, less thorough, and less familiar

346. *See* Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1460 (2010) (Ginsburg, J., dissenting) ("I would continue to interpret Federal Rules with awareness of, and sensitivity to, important state regulatory policies.").

347. Historically, the police power referred to undefined powers reserved to the states. *See* Santiago Legarre, *The Historical Background of the Police Power*, 9 U. PA. J. CONST. L. 745, 783 & n.214 (2007). It eventually evolved to focus broadly upon the regulation of public health, morals and safety, *id.* at 789–90, then expanded to encompass "all the great public needs," including public convenience and the general prosperity. *Id.* at 793. The Court has applied the "police power" standard to examples as diverse as the inspection and quarantine of goods, removal of gunpowder, regulation of public laundries, manufacturing and sale of liquor, setting milk prices, mortgage regulations, eminent domain, and taxation. *Id*. at 784–94.

348. *See, e.g.*, Gonzales v. Oregon, 546 U.S. 243, 271 (2006) (discussing Oregon's physician-assisted suicide law and comparing it to the function of the federal Controlled Substances Act).

than its federal counterpart."[349] Judges can discern how procedural rules fit into the state's regulatory framework, and most importantly, what reasonable legislators would expect it to accomplish. There is nothing mystical, cryptic or even unusual about such a project. The drafters can generally be presumed to have intended whatever effects the statute has.

No Supreme Court decision involving the REA has ever applied any federalism canon in a "procedural *Erie*" case. Justice Stevens came close in his concurrence in *Shady Grove*, describing this presumption as "counsel[ing] against judicially created rules displacing state substantive law."[350] The reference seemed to imply the presumption applied to interpreting the *Federal Rules themselves*. Similarly, one commentator has suggested looking at whether the Rule drafters on the Advisory Committee "intended a particular Federal Rule 'to occupy the field' and whether accommodating state law would 'stand[ ] as an obstacle to the accomplishment and execution of the [Rule drafters'] full purposes and objectives.'"[351] However, the federalism canons' logical force applies to *congressional legislation.* They serve to ensure that *Congress* has actually considered the effect of the legislation in displacing state laws in important areas historically left to the states. Their theoretical justification is deeply rooted in the political safeguards of federalism. Applying the canons to the rulemaking process, where these safeguards do not exist, unhinges these substantive canons from their reason for being.

Moreover, if the conclusion is correct that Congress did not delegate the power to displace certain classes of state laws in areas traditionally regulated by the states, the intent of *the Rules Advisory Committee* to dislocate state law has no bearing on the diversity preemption question. The Advisory Committee cannot choose to preempt that which Congress has chosen to leave in place. Nor is the Committee's will to occupy a field and displace any and all state law a cure for

349. *Shady Grove*, 130 S. Ct. at 1441. Asking federal courts to *analyze* state legal sources that may be unfamiliar is *the essence* of diversity jurisdiction. The majority's argument is thus as much an argument against diversity jurisdiction as it is against trying to research state law. Fortunately, forty-eight states have enacted laws permitting federal courts to certify novel questions to the state's highest court. *See* 17A CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER, & VIKRAM DAVID AMAR, FEDERAL PRACTICE & PROCEDURE, JURISDICTION § 4248 n. 30 (3d ed. 2008 & 2010 Supp.) (collecting citations to state statutes authorizing procedures for certification).

350. *Shady Grove*, 130 S. Ct. at 1453 (Stevens, J., concurring).

351. Adam N. Steinman, *Our Class Action Federalism:* Erie *and the Rules Enabling Act after* Shady Grove, 86 NOTRE DAME L. REV. 1131, 1171 (2011) (discussing Rule 23).

the nonfunctioning of the states' constitutional political safeguards at the legislative level.[352] Understood as an expression of these political safeguards, the canons offer no interpretive model to apply to the Rules or the rulemaking process.

D. Reconstructing Shady Grove *Through the Federalism Canons*

Applying this proposed approach to the facts of *Shady Grove* would have taken the Court's analysis in a different direction. The analysis would begin not with the text of Rule 23, but with the application of any Federal Rule to displace New York's statute, which forbids maintaining a class action "to recover a penalty, or minimum measure of recovery created or imposed by statute," absent a specific statutory exception.[353]

Even without any legislative history, prohibiting class actions in areas of statutory penalties obviously functions to set the magnitude of financial punishment in the state's regulatory scheme.[354] The insurance penalty statute encourages insurance companies to pay quickly through a *small* penalty. In enacting this statute, the state legislature chose a low level of punishment. In the judgment of the New York Legislature, this potential sanction is proportional to the business error that caused it.[355] This is a policy choice: the state could have decided that prompt payment was so important that it would burden insurance companies with large penalties (perhaps even including punitive damages), creating claims of tortious bad faith for third parties (like doctors) to bring for unreasonably late payments. However, harsh penalty schemes may increase the administrative expenses of insurance com-

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—an idea that Justice Frankfurter argued against in *Sibbach*. Sibbach v. Wilson & Co., 312 U.S. 1, 18 (1941) (Frankfurter, J., dissenting) ("Plainly the Rules are not acts of Congress and can not be treated as such.").

353. N.Y. C.P.L.R. 901(b) (McKinney 2006) ("Unless a statute creating or imposing a penalty, or a minimum measure of recovery specifically authorizes the recovery thereof in a class action, an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action.").

354. *See* Burbank & Wolff, *supra* note 11, at 70 (discussing concerns in New York that "aggregation of penalties would lead to gross and destructive overenforcement") (quoting Sperry v. Crompton Corp., 863 N.E.2d 1012, 1015 (N.Y. 2007)); *id.* at 72 (observing another court had also read this New York law as "defin[ing] the scope of penalty liability . . . not merely the mechanisms available to enforce an aggregate proceeding").

355. *See Shady Grove*, 130 S. Ct. at 1464–65 (Ginsburg, J., dissenting) (discussing the legislative history of the New York statute).

panies and produce higher insurance premiums,[356] or drive carriers from the state, making insurance products less available and less affordable.

Limiting the magnitude of statutory late-payment penalties reflects a decision about New York's regulation of its own insurance industry. This may be good or bad policy, and, indeed, one could reasonably take issue with the unlikelihood that anyone would ever sue to recover a $500 penalty. The point, though, is that it was *New York*'s policy choice, and it falls squarely under New York's police powers, in an area traditionally left by Congress to the states to regulate. It is irrelevant whether there is a reasonable debate about the substantive merit of such a policy choice. It is a matter Congress left to the wisdom of the democratically elected lawmakers of the State of New York. Thus, the federalism canons protect New York's law from preemption in the absence of congressional intent to use the Rules to federalize state insurance regulations. In this instance, Rule 23 should have yielded to the state law.

The federalism canons offer a relatively clear path through the tangled thicket of *Shady Grove.* Given that the Court has no power under the Enabling Act to use the Rules to undermine state policymaking in areas left by Congress to the states that fall within the states' historic police powers, New York's law should not have been preempted. New York's law falls squarely within its police power to regulate the general welfare, and thus should have prevailed over Rule 23 in a diversity case heard in federal court, even though New York's mode of regulation might conflict with Rule 23.

Were the matter not within New York's police powers (such as an area Congress co-regulated with the states), this article's framework would suggest a different answer: there would be no presumption against preemption, and the matter would be open for debate as to whether it falls under the REA's "substantive rights" prohibition. Applying this article's framework, however, avoids that difficult inquiry

356. The manner in which the state organizes the availability and magnitude of penalties against insurers has the potential to affect statewide insurance premiums, and that in turn affects the availability of insurance generally—and the general welfare. *See, e.g.*, ANGELA HAWKEN, STEPHEN J. CARROLL, & ALLAN F. ABRAHAMSE, RAND INST. FOR CIVIL JUSTICE, THE EFFECTS OF THIRD-PARTY BAD FAITH DOCTRINE ON AUTOMOBILE INSURANCE COSTS AND COMPENSATION 52–53 (2001), *available at* http://www.rand.org/pubs/monograph_reports/2007/MR1199.pdf (analyzing the effect of California's former policy of allowing third parties to bring tortious "bad faith" claims to recover punitive damages against an insurer and concluding it caused a substantial increase in automobile insurance premiums in California during the period that this rule was in effect).

into whether New York's law affects substantive rights, to the extent it results in a conclusion that New York's law falls within that state's historic police powers.

CONCLUSION

Shady Grove threatens a wide array of state laws that regulate areas within the states' police powers. Indeed, any targeted calibration of tort liability using procedural mechanisms may be swept aside by a Federal Rule to the contrary. This puts the Court and the Advisory Committee in the position of being able to dictate to the states what kind of legislation states may use to regulate matters traditionally within the states' own sphere of competence, even in areas Congress has chosen to leave to the states as primary regulators.

The Court has much work ahead of it to untangle the confusing web left by the constellation of fractured opinions in *Shady Grove.* Left uncorrected, this judicial usurpation has the potential to do great harm to "Our Federalism." It will likely usher in a new era of forum shopping, as parties seek to take advantage of the federal forum to avoid state laws in diversity cases. The inconsistency of results between state and federal courts that troubled the Court in the era before *Erie* will again be part of the fabric of diversity suits. After nearly eight decades, *Shady Grove* returns us to a point strangely similar to the one where we started this long and winding journey in the era before *Erie.*

Returning to the values underlying the modern understanding of *Erie* and its commitment to principles of judicial restraint restores a federalism balance that leaves to Congress the role of assigning how much regulatory control to relinquish to states in areas within the scope of congressional power. It avoids allowing procedural rulemaking to become a back-door means of making substantive policy for the states in areas left by Congress to the states.

Like a tail wagging the dog, giving the Rules broad preemptive force in areas within the states' historic police powers gives the Rules more power than they deserve. By contrast, the framework offered in this article has the benefit of limiting the Rules' application to areas where they properly belong.