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Reassessing the Avoidance Canon in Erie Cases

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SYMPOSIUM: *ERIE* UNDER ADVISEMENT: THE DOCTRINE AFTER *SHADY GROVE*

REASSESSING THE AVOIDANCE CANON IN *ERIE* CASES

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I. INTRODUCTION

This Article chronicles the Supreme Court's inconsistent use of an avoidance canon in cases construing the substantive rights limitation of the Rules Enabling Act (Enabling Act or REA).[1] It focuses primarily on the avoidance canon as used in cases under the REA branch of the *Erie*

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1. Act of June 19, 1934 § 1, Publ. L. 73-415, 48 Stat. 1064 (codified as amended, 28 U.S.C. § 2072 (2006)).

doctrine[2] but also discusses avoidance in other REA contexts. The Article concludes that a reassessment and refocusing of the avoidance canon in Enabling Act jurisprudence is necessary. Avoidance, as used in the REA analysis under *Erie*, has varied over the years, with the Court often construing Federal Rules narrowly to avoid a conflict with state law,[3] (and sometimes construing against any meaning that the text and history of the Federal Rule at issue would appear to bear to avoid the conflict[4]), sometimes construing Federal Rules broadly and seeming to reach out to find conflict where conflict was not necessary,[5] and, most recently, engaging avoidance issues directly, but disagreeing about the extent and nature of an appropriate rule of avoidance under the REA.[6] If avoidance is appropriate in Enabling Act jurisprudence, and each of the opinions in the Supreme Court's most recent *Erie* case, *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*,[7] appears to conclude that some form of avoidance is appropriate,[8] the Court should identify an appropriate guiding purpose and methodology for avoidance. This Article explores the purposes and methodology that should guide avoidance in REA cases.

Through the REA, Congress delegated to the Supreme Court authority to promulgate prospective rules to govern procedure in the federal courts. Under this delegation, Congress gave broad authority to the Supreme Court to promulgate general rules of practice and procedure for the federal courts (Federal Rules or Rules[9]), and it elevated the status

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2. Erie R.R. Co. v. Tomkins, 304 U.S. 64 (1938). *See* 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, 1148 n.9 (2011) (noting that the term "*Erie* doctrine" applies to all vertical choice of law issues, including those under the REA).

3. *See, e.g.*, Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 427 n.7, 437 & n.22 (1996); Walker v. Armco Steel Corp., 446 U.S. 740, 750-51 & n.10 (1980). *See also* Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 501-05 (2001) (construing Federal Rule of Civil Procedure 41(b) narrowly, in part, to avoid abridging, enlarging, or modifying state law and, in part, to avoid violating the federalism principle of *Erie*).

4. *See, e.g.*, *Semtek*, 531 U.S. at 501-05; *Walker*, 446 U.S. at 750-51 & n.10.

5. *See, e.g.*, Burlington N. R.R. Co. v. Woods, 480 U.S. 1, 4-5 (1987); *cf.* Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 29-32 (1988) (construing federal statute broadly when in potential conflict with state law).

6. Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431 (2010); *see infra* notes 283-356 and accompanying text.

7. *Shady Grove*, 130 S. Ct. 1431.

8. *Id*. at 1441-42 & nn.7-8 (majority opinion); *id*. at 1450-52 & nn.5-6 (Stevens, J., concurring in part and concurring in the judgment); *id*. at 1460-69 & nn.2, 8, 10 (Ginsburg, J., dissenting).

9. "Federal Rule" or "Rule" refers to rules of procedure promulgated by the Supreme Court pursuant to the Rules Enabling Act process. *See* 28 U.S.C. §§ 2072-2074 (2006).

of properly promulgated, i.e., "valid" Federal Rules. Valid Federal Rules will (1) supersede existing, conflicting procedural statutes of Congress by reason of the provision of the REA often referred to as the "supersession clause";[10] and (2) preempt state procedure by reason of the Supremacy Clause[11] when the Rules of Decision Act (RDA)[12] would otherwise call for federal courts to use state law.[13]

The *Hanna v. Plumer*[14] decision recognized an important doctrinal division between cases presenting potential conflicts between state law and judge-made law and those cases presenting apparent conflicts between state law and congressional statutes or Federal Rules.[15] The *Hanna* Court categorized cases pitting state law and federal judge-made law as implicating a "relatively unguided *Erie* choice" under the RDA. I refer to these cases as requiring an "RDA analysis." The *Hanna* Court also recognized that cases involving potential clashes of a federal statute or Federal Rule and state law require a different and less searching analysis.[16] I focus, in this Article, primarily on a subset of this group of cases—cases presenting potential conflicts between state law and

10. The "supersession" clause of the REA authorizes valid Federal Rules to supersede existing, conflicting federal statutes: "All laws in conflict with [Federal Rules promulgated by the Supreme Court] shall be of no further force or effect after such rules have taken effect." 28 U.S.C. § 2072(b) (2006). *See generally* Stephen B. Burbank, *Hold the Corks: A Comment on Paul Carrington's "Substance" and "Procedure" in the Rules Enabling Act*, 1989 DUKE L.J. 1012, 1036-37, 1044 (1989) (discussing the supersession clause and Congress's 1989 attempt to repeal that clause); Bernadette Bollas Genetin, *The Powers That Be: A Reexamination of the Federal Courts' Rulemaking and Adjudicatory Powers in the Context of a Clash of a Congressional Statute and a Supreme Court Rule*, 57 BAYLOR L. REV. 587, 598-606 (2005) [hereinafter Genetin, *Powers That Be*] (discussing the importance of considering Court and congressional rulemaking authority in apparent clashes between federal statutes and Federal Rules); Bernadette Bollas Genetin, *Expressly Repudiating Implied Repeals Analysis: A New Framework for Resolving Conflicts Between Congressional Statutes and Federal Rules*, 51 EMORY L.J. 677, 726-29, 736-46 (2002) [hereinafter Genetin, *Conflicts Between Congressional Statutes and Federal Rules*] (proposing a framework for resolving conflicts between federal statutes and Federal Rules that would include examination of Court's authority under the substantive rights limitation of the REA); Karen Nelson Moore, *The Supreme Court's Role in Interpreting the Federal Rules of Civil Procedure*, 44 HASTINGS L.J. 1039, 1049-53 (1993) (discussing the proposed, but unsuccessful, 1988 amendments to the REA to repeal the supersession clause).

11. U.S. CONST. art. VI, cl. 2.

12. The Rules of Decision Act was part of the Judiciary Act of 1789, Act of Sept. 24, 1789, ch. 20 § 34, 1 Stat. 92 (current version at 28 U.S.C. § 1652 (2000)). It provides as follows: "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." *Id.*

13. Hanna v. Plumer, 380 U.S. 460, 463-65, 469-74 (1965).

14. *Hanna*, 380 U.S. 460.

15. *Id.* at 469-74. *See also* John Hart Ely, *The Irrepressible Myth of* Erie, 87 HARV. L. REV. 693, 697-99, 718-21 (1974).

16. *Hanna*, 380 U.S. at 463-65, 469-74.

Federal Rules promulgated by the Supreme Court under the REA. I refer to the analysis for these conflicts as requiring an "REA analysis." *Hanna* established that a Federal Rule will be considered valid, for purposes of an REA analysis, when it is both constitutional[17] and in compliance with the substantive rights limitation of the Rules Enabling Act,[18] which provides that a Federal Rule may not "abridge, enlarge, or modify any substantive right."[19]

At the time of the 1934 enactment of the REA, the Court, Congress, and federal rulemakers arguably considered substance and procedure to be easily separable categories, with procedure serving simply as a means of implementing substantive goals.[20] Commentators have long since concluded, however, that substance and procedure are not mutually exclusive. Instead, they overlap in significant part, thus, rendering the substantive rights limitation of the Rules Enabling Act difficult to define.[21] Indeed, Professor Doernberg has concluded that "[t]hree quarters of a century after Congress passed REA, we still lack an analytical technique for making the admittedly difficult decisions about whether something is substantive or procedural for REA purposes where rational arguments exist for either characterization."[22]

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17. *Id*. at 472 (stating that the "constitutional provision for a federal court system (augmented by the Necessary and Proper Clause)" provides congressional authority to make procedural rules "which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either").

18. *Id*. at 472-74. The majority, concurring, and dissenting opinions in *Shady Grove Orthopedic Assocs., P.A., v. Allstate Ins. Co.*, 130 S. Ct. 1431 (2010), likewise each conceded the continuing validity of the *Hanna* framework for REA issues. *Shady Grove*, 130 S. Ct. at 1437 (majority opinion); *id*. at 1448-49 (Stevens, J., concurring in part and concurring in the judgment); *id*. at 1461 (Ginsburg, J., dissenting).

19. 28 U.S.C. § 2072(b) (2006).

20. *See, e.g.*, Robert G. Bone, *"To Encourage Settlement": Rule 68, Offers of Judgment, and the History of the Federal Rules of Civil Procedure*, 102 NW. U. L. REV. 1561, 1612-13 (2008) [hereinafter Bone, *To Encourage Settlement*]; Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficiency*, 87 GEO. L.J. 887, 893-97 (1999) [hereinafter, Bone, *Process of Making Process*]; Thomas O. Main, *The Procedural Foundation of Substantive Law*, 87 WASH. U. L. REV. 801, 804-18 (2010); Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 945-47, 962 (1987).

21. *See, e.g.*, Bone, *Process of Making* Process, *supra* note 20, at 900-02; Main, *supra* note 20, at 810-11 (concluding that "substance" and "procedure" have been codified as though they were dichotomies and "characterized by mutually exclusive and mutually exhaustive categories" when they, instead, constitute an antinomy, in which some laws can be "both substantive and procedural . . . [and some can] be neither substantive or procedural"); David Marcus, *The Past, Present, and Future of Trans-Substantivity in Federal Civil Procedure*, 59 DEPAUL L. REV. 371, 374-75, 399-409 (2010).

22. Doernberg, *supra* note 2, at 1180.

This is the case, in part, I conclude, because the Court has consistently declined to address the issue. But the failure to derive an adequate translation of the substance-procedure distinction for REA purposes has not resulted in mere doctrinal untidiness. The substance-procedure divide allocates power between Congress and the Supreme Court,[23] limiting the Court to promulgation of Federal Rules that do not "abridge, enlarge or modify any substantive right."[24] Failure to identify an adequate analytical method for determining when a Court-created Rule impermissibly impacts substantive rights has led the Court to use avoidance techniques in the various scenarios in which the substantive-procedural distinction arises under the REA: (1) in the context of the Court's promulgation of Federal Rules;[25] (2) in instances in which Federal Rules conflict with congressional statutes;[26] and (3) in instances in which Federal Rules are in potential conflict with state law.[27] The Court's use of avoidance in Rule promulgation has resulted in unique costs and benefits. It has permitted promulgation of open-textured Rules that permit nominal transsubstantivity of the Rules,[28] but this has only deferred defining the substantive-procedural divide to the Rule

23. *See, e.g.*, Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1025-26, 1106-07, 1113-14 (1982); Burbank, *supra* note 10, at 1016; Genetin, *Conflicts Between Congressional Statutes and Federal Rules*, *supra* note 10, at 688; Leslie M. Kelleher, *Taking "Substantive Rights" (in the Rules Enabling Act) More Seriously*, 74 NOTRE DAME L. REV. 47, 92-94 (1998).

24. Rules Enabling Act, 28 U.S.C. § 2072(b) (1988).

25. Professor Burbank indicates that the original Advisory Committee appointed in 1935 "had no coherent or consistent view of the limitations imposed by the Act's procedure/substance dichotomy." Burbank, *supra* note 23, at 1132. Professor Burbank also notes that the Advisory Committee "approached [perceived problems of power] without a shared conception of the [REA's] limitations, . . . that the resolution of these problems were, therefore, essentially ad hoc. . . . and [in] applying the [REA's] limitations[,] normative considerations took a back seat to practical possibilities." *Id.* at 1132-35; *see also id.* at 1135-57.

26. *See, e.g.*, Kamen v. Kemper Fin. Servs., Inc., 500 U.S. 90, 95-97 (1991); Daily Income Fund, Inc. v. Fox, 464 U.S. 523, 542-44 & n.2 (1984) (Stevens, J., concurring in judgment). *Accord* Genetin, *Conflicts Between Congressional Statutes and Federal Rules*, *supra* note 10, at 731 (concluding that "if [a] Federal Rule appears to clash with a federal statute because it appears to abridge substantive rights impermissibly, the court would, if consistent with the context of statute and Rule, prefer a construction in which the Federal Rule would not impermissibly impact substantive rights"); Leslie M. Kelleher, *Separation of Powers and Delegations of Authority to Cancel Statutes in the Line Item Veto Act and the Rules Enabling Act*, 68 GEO. WASH. L. REV. 395, 442 (2000) (emphasizing that the Court has begun to take the "substantive rights limitation more seriously, particularly as a rule of construction, and to read Rules narrowly when necessary to avoid infirmity").

27. *See infra* Sections II.B and II.C.2.a.

28. Stephen B. Burbank, *Of Rules and Discretion: The Supreme Court, Federal Rules, and Common Law*, 63 NOTRE DAME L. REV. 693, 715 (1988); Marcus, *supra* note 21, at 394-95, 416-21.

interpretation context. Although I focus primarily on the third scenario—instances in which a Federal Rule is in potential conflict with state law (the REA analysis)—I suggest that attending to each of the scenarios that implicate the substantive-procedural divide of the REA is important to understanding the limitations of any one.

The difficulty of articulating an adequate definition of the substantive-procedural divide for purposes of the *Erie* doctrine resulted in the Court's development in *Guaranty Trust Co. v. York*[29] of a functional "outcome-determinative" test, which, as interpreted uncompromisingly by the Supreme Court, endangered the Federal Rules in the context of potentially conflicting state law.[30] Indeed, a short twelve years after the promulgation of the original Federal Rules, Charles E. Clark, the Reporter for the original Advisory Committee and the primary drafter of the original Rules, lamented that, given the "drastic logic" with which the Supreme Court implemented *Guaranty Trust*'s outcome determinative test, "hardly a one of the heralded Federal Rules can be considered safe from attack by shrewd lawyers and obedient lower tribunals."[31] The Court did, in some pre-*Hanna* cases, construe the Federal Rule narrowly to avoid a conflict between Federal Rule and state law,[32] but that avoidance had curious results for the Federal Rules. Construing Rule and state law to conflict meant, under the virtually absolute conformity ultimately required under *Guaranty Trust*, that state law would apply,[33] but, of course, construing the Federal Rule not to conflict also triggered the application of state law. In effect, avoidance may have had some formal benefit in preserving the Federal Rule, but, as a practical matter, it was inconsequential. In either case, the Federal Rule would be subordinated, and state law would apply alone or in tandem with the Federal Rule.[34] Moreover, the Court's decision to defer to state law under the outcome determinative test

29. 326 U.S. 99 (1945).

30. *E.g.*, Bernard C. Gavit, *States' Rights and Federal Procedure*, 25 IND. L.J. 1, 3, 24-26 (1949); Alfred Hill, *The* Erie *Doctrine and the Constitution*, 53 NW. U. L. REV. 427, 429-34 (1958); Edward Lawrence Merrigan, Erie *to* York *to* Ragan*—A Triple Play on the Federal Rules*, 3 VAND. L. REV. 711, 711-12, 717-25 (1950); Arthur John Keeffe et al., *Weary* Erie, 34 CORNELL L.Q. 494, 506-09, 513, 525 (1948-1949); Charles E. Clark, *Cases and Materials on Federal Courts*, 36 CORNELL L.Q. 181, 182-84 (1950) (book review).

31. Clark, *supra* note 30, at 183.

32. Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 555-56 (1949); Palmer v. Hoffman, 318 U.S. 109, 116-17 (1943). *Cf.* Bernhardt v. Polygraphic Co. of Am., 350 U.S. 198, 201-02 (1956) (using avoidance in apparent conflict between federal statute and state law).

33. *E.g.*, Gavit, *supra* note 30, at 1-3; Hill, *supra* note 30, at 429-37; Merrigan, *supra* note 30, at 717-18, 723-25; Clark, *supra* note 30, at 183.

34. *See infra* notes 92-163 and accompanying text.

resulted in dual meanings for Federal Rules—one that applied in diversity cases and a second in federal question cases.[35]

The Court ultimately countered with an overcorrection in *Hanna v. Plumer*,[36] creating a test for Rule validity under the REA, in event of a conflict between Federal Rule and state law, that established the Federal Rules as virtually invulnerable to suggestions that they might impermissibly abridge, enlarge, or modify substantive rights.[37] This had important consequences for Federal Rules: It meant that Federal Rules could be interpreted uniformly; indeed, the *Hanna* Court emphasized that uniformity of application was "[o]ne of the shaping purposes of the Federal Rules."[38] A Federal Rule would be considered valid after *Hanna* if the Rule "'really regulate[d] procedure,[ ] the judicial process for enforcing the rights and duties recognized by substantive law, and for justly administering remedy and redress for disregard or infraction of them,'"[39] an illusory standard that drew immediate and consistent criticism[40] (but which a plurality of the Supreme Court has reaffirmed in the *Shady Grove* opinion[41]). The hoped-for uniformity, however, has not materialized.

In the post-*Hanna* context, avoidance could play a major role as the Court itself illustrated in the *Hanna* opinion.[42] Indeed, in post-*Hanna* cases, the Court has invoked an avoidance canon fairly often, this time to prevent the potential overprotection of the Federal Rules (and

35. *See, e.g.*, Gavit, *supra* note 30, at 3, 25-26; Merrigan, *supra* note 30, at 717-19, 721.

36. 380 U.S. 460 (1965).

37. *See, e.g.*, Richard D. Freer, *Some Thoughts on the State of* Erie *After* Gasperini, 76 TEX. L. REV. 1637, 1643 (1998) (noting that "overzealous application of *Hanna* . . . [in *Burlington Northern Railroad Co. v. Woods*, 480 U.S. 1, 5-7 (1987) and *Stewart Organization, Inc. v. Ricoh Corp*., 487 U.S. 22, 29-32 (1988)] was so stark that one might be forgiven for becoming cynical; the tie-breaker in vertical choice of law was that the federal provision wins by invocation of *Hanna*"); John A. Lynch, Jr., *Federal Procedure and* Erie*: Saving State Litigation Reform Through Comparative Impairment*, 30 WHITTIER L. REV. 283, 289 (2008) (describing the "'really regulates procedure'" principle of *Hanna* as "a test the rules cannot fail").

38. *Hanna*, 380 U.S. at 472-73 (quoting Lumbermen's Mut. Cas. Co. v. Wright, 322 F.2d 759, 764 (5th Cir. 1963)). *See also Burlington Northern*, 480 U.S. at 5 (indicating that the "cardinal purpose" of Congress in enacting the REA was "the development of a uniform and consistent system of rules governing federal practice and procedure").

39. *Hanna*, 380 U.S. at 464 (quoting Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941)).

40. *See* Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1452 n.7 (2010) (Stevens, J., concurring in part and concurring in the judgment) (citing and approving scholarly criticism of the standard). *See also* Doernberg, *supra* note 2, at 1173-74, 1178-79; John C. McCoid, II, Hanna v. Plumer: *The* Erie *Doctrine Changes Shape*, 51 VA. L. REV. 884, 887, 901-04 (1965).

41. *Shady Grove*, 130 S. Ct. at 1442-43 (Scalia, J., for himself, Roberts, C.J., Thomas, J., and Sotomayor, J.).

42. *Hanna*, 380 U.S. at 470 & n.12.

consequent underprotection of state substantive law) under the Rule-protective standard for validity established in *Hanna*. The Court's construction of the scope of a Federal Rule—or whether the Rule "covered the point in dispute"[43]—however, has varied in post-*Hanna* cases, and its use of an avoidance canon of Rule interpretation has been uneven. Commentators have suggested, moreover, that the Court's recent use of an avoidance canon[44] not only avoids conflict between Federal Rule and state law, but it essentially rewrites the Federal Rules at issue in order to avoid a conflict with state law.[45] They have also concluded that the Court's use of avoidance has taken on an ad hoc quality that provides little guidance to lower courts.[46] A slim majority of the Supreme Court has signaled in *Shady Grove* that it will abandon this use of the avoidance canon,[47] but the remaining justices would pursue avoidance out of respect for important state interests and regulatory policies.[48]

In summary, in a post-*Hanna* world, much rides on a court's determination of whether the scope of a Federal Rule, "when fairly construed," is "'sufficiently broad' to cause a 'direct collision' with the state law or, implicitly, to 'control the issue before the court,' thereby leaving no room for the operation of that law."[49] The "conflict" decision

43. *Id.* at 470. Whether a Rule and state law are in conflict has been variously articulated, including "whether when fairly construed, the scope of [the] Federal Rule . . . is 'sufficiently broad' to cause a 'direct collision' with the state law or, implicitly to 'control the issue' before the court, thereby leaving no room for the operation of [state] law." Burlington N. R.R. Co. v. Woods, 480 U.S. 1, 4-5 (1987).

44. Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 501-05 (2001); Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 436-37 & n.22 (1996).

45. *See, e.g.*, 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, 708, 727 (2006); *see also* Stephen B. Burbank, Semtek, *Forum Shopping, and Federal Common Law*, 77 NOTRE DAME L. REV. 1027, 1042-46 (2002); Ralph U. Whitten, Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.: *Justice Whitten, Nagging in Part and Declaring a Pox on All Houses*, 44 CREIGHTON L. REV. 115, 118-24 (2010).

46. *See, e.g.*, Dudley & Rutherglen, *supra* note 45, at 708, 727 (noting that the Court has resorted to "case-by-case determinations" and to "ad hoc departure[s] from the literal terms of a Federal Rule and its commonly understood meaning" to resolve *Erie* issues implicating the Federal Rules); Armando Gustavo Hernandez, *The Head-On Collision of* Gasperini *and the Derailment of* Erie*: Exposing the Futility of the Accommodation Doctrine*, 44 CREIGHTON L. REV. 191, 192-95, 223 (2010).

47. Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1440-42 & nn.7-8 (2010) (majority opinion); *id*. at 1451-52 (Stevens, J., concurring in part and concurring in the judgment).

48. *Id*. at 1461-69 (Ginsburg, J., dissenting).

49. Burlington N. R.R. Co. v. Woods, 480 U.S. 1, 4-5 (1987) (citing Walker v. Armco Steel Corp., 446 U.S. 740, 749-50 & n.9 (1980); Hanna v. Plumer, 380 U.S. 464, 471-72 (1965)).

mediates between use of the RDA analysis, which virtually assures primacy of state law, and use of an REA analysis, which, under either the "really regulates procedure" principle of *Hanna*[50] or the seemingly more searching inquiry into whether a Rule "affects[s] litigants' substantive rights" more than "incidentally" under *Burlington Northern Railroad Co. v. Woods*,[51] has virtually assured that the Federal Rule will preempt state law. Two strands of avoidance have emerged in the Court's recent REA cases under *Erie*: (1) avoidance based primarily on an intent to "interpre[t] the federal rules to avoid conflict with important state regulatory policies"[52] and sometimes incorporating a type of interest balancing approach; and (2) avoidance resembling more nearly the canon to construe against serious constitutional doubts and guided by goals of preventing "arguabl[e] violat[ion] of the jurisdictional limitation of the Rules Enabling Act" and violation of the "federalism principle[s] of *Erie*."[53]

I reach two primary conclusions regarding the avoidance canon in this Article. Preliminarily, an avoidance canon is inadequate, standing alone, to satisfactorily divide substance and procedure for purposes of the REA. An avoidance principle necessarily presupposes some shared understanding of the standard to be avoided. Although commentators have celebrated the Court's use of an avoidance canon of Rule interpretation as signaling the Court's intent to take substantive rights in the Rules Enabling Act more seriously,[54] the Court must develop an administrable means of applying the substance-procedure distinction of the REA. Identifying a proper standard is beyond the scope of this Article, but among the likely candidates are proposals of Justice Scalia and Justice Stevens in the *Shady Grove* opinion, the standard established

50. *Hanna*, 380 U.S. at 464.

51. *Burlington Northern*, 480 U.S. at 5-6 (citing *Hanna*, 380 U.S. at 464-65; Miss. Publ'g Corp. v. Murphree, 326 U.S. 438, 445-46 (1946); 19 C. WRIGHT, A. MILLER, & E. COOPER, FEDERAL PRACTICE & PROCEDURE § 4509, at 145-46 (1982)).

52. *See, e.g.*, Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 436-37 & n.22 (1996). *See also* Lynch, *supra* note 37, at 321-26 (proposing comparative impairment for resolving conflicts between Federal Rules and state law, in the limited context of state litigation reform legislation); McCoid, *supra* note 40, at 912-14 (suggesting that the *Hanna* Court should have used a comparative impairment analysis).

53. Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 503-04 (2001).

54. *See, e.g.*, Stephen B. Burbank, *Procedure, Politics and Power: The Role of Congress*, 79 NOTRE DAME L. REV. 1677, 1712-14, 1736-37 (2004); Genetin, *Powers That Be*, *supra* note 10, at 592; Genetin, *Conflicts Between Congressional Statutes and Federal Rules*, *supra* note 10, at 728 & n.241; Kelleher, *supra* note 26, at 442.

in *Burlington Northern Railroad Co. v. Woods*,[55] and recent suggestions in scholarly commentary.[56]

Second, the varying rationales for avoidance should be unified and recalibrated to serve the separation of powers goals that underlie Congress's inclusion of the substantive rights limitation in the REA. I conclude that the Court should develop an avoidance canon analogous to the so-called "serious doubts" or "modern" avoidance canon of statutory construction that prefers an interpretation of a statute, when possible, that will avoid serious constitutional doubts.[57] Correspondingly, in the REA context, the Court should construe a Federal Rule that is in potential conflict with state law to avoid serious questions regarding a Rule's violation of the substantive rights limitation of the REA, but only if there is a plausible interpretation of the Rule that would permit avoidance. In determining whether avoidance is permissible, the Court should, in line with its use of avoidance in other Enabling Act contexts,[58] construe a Rule in accord with the Rule's text, history, and purposes, as set forth in the Advisory Committee Notes, reports, and other materials.[59]

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55. 480 U.S. 1, 4-5 (1987).

56. Justice Scalia, writing for a plurality in *Shady Grove* would adhere to a standard of whether a Rule "'really regulat[e][s] procedure.'" Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1442 (2010) (Scalia, J., for himself, Roberts, C.J., Thomas, J., and Sotomayor, J.). Justice Stevens, in concurrence in *Shady Grove*, suggests that the substantive rights limitation precludes Federal Rules that "would displace a state law that is procedural in the ordinary use of the term but is so intertwined with a state right or remedy that it functions to define the scope of the state-created right." *Id.* at 1452-53 & n.8-9 (Stevens, J., concurring in part and concurring in the judgment). In *Burlington Northern Railroad Co. v. Woods*, the Court held that "[t]he cardinal purpose of Congress in authorizing development of a uniform and consistent system of rules governing federal practice and procedure suggests that Rules which incidentally affect litigants' substantive rights do not violate . . . [the substantive rights] provision if reasonably necessary to maintain the integrity of that system of rules." *Burlington Northern*, 480 U.S. at 5. Professor Doernberg submits two suggestions, which he refers to as the "elements" approach and the "behavioral" approach, that are each likely candidates for this position. Doernberg, *supra* note 2, at 1185-86. Under the "elements" approach, the court would consider "whether the state law and Federal Rule at issue tend to establish or negate an element of the claimant's cause of action or a defense on the merits." *Id.* at 1185. A court following the "behavioral" approach would ask "whether, before the litigation began and assuming the parties were fully aware of the competing rules, they would rationally have ordered their conduct in accord with one of the rules." *Id.* at 1186.

57. *See, e.g.*, Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 138-39 (2010); Adrian Vermeule, *Saving Constructions*, 15 GEO. L.J. 1945, 1949 (1997); Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1575-76 (2000).

58. *See infra* notes 225-61 and accompanying text.

59. *Compare* Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. PA. L. REV. 1099, 1124-42, 1147 (2002) (suggesting that the nature of the Enabling Act process and reality of the rulemaking process counsel restraint in Court

Section II of this Article traces the Court's use of an avoidance canon in *Erie*, REA cases[60] and in non-*Erie*, REA cases.[61] Section II dwells on the pre-*Hanna* period, reminding that the Court's use of outcome-determinative principles under *Guaranty Trust* minimized the pre-*Hanna* role of avoidance,[62] subordinated Federal Rules to state law, and resulted in differing interpretations of Federal Rules in diversity and federal question cases. Section II then examines avoidance in post-*Hanna*, *Erie* cases. In these cases, the Court has generally construed Federal Rules narrowly with sensitivity to important state interests and regulatory policies. This federalism focus for avoidance permits state law to override Federal Rules and permits the "two plain meanings" for Federal Rules that commentators disparage in the Court's post-*Hanna* avoidance decisions.[63] It, thus, permits replication, Rule-by-Rule, of *Guaranty Trust*'s outcome-determinative results—subordination of Federal Rules and dual interpretations of Federal Rules in diversity and federal question cases. Section II, finally, examines the Court's use of avoidance in non-*Erie*, REA cases in which the Court has generally used serious doubts avoidance and has adopted saving constructions of Federal Rules that are more faithful to Rule text and Rule purposes and history as set forth in Advisory Committee materials.

Section III examines the views in the plurality, concurring, and dissenting opinions in *Shady Grove* regarding the extent and nature of an appropriate avoidance canon. In these opinions, the Justices draw on elements of the Court's historical use of avoidance in REA cases to suggest three competing avoidance principles. Justice Scalia, in dicta, proposes a type of "classical" or "narrow" avoidance;[64] Justice Stevens, in concurrence, suggests a broader avoidance canon modeled on "serious

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construction of Federal Rules, that the Court consider the Enabling Act process, and that it "give[] authoritative weight to the Advisory Committee Notes"), *with* Moore, *supra* note 10, at 1047-53 (1993) (proposing that the Supreme Court use an active or dynamic interpretation of the Rules it promulgates). *See also* Stephen B. Burbank & Tobias Barrington Wolff, *Redeeming the Missed Opportunities of* Shady Grove, 159 U. PA. L. REV. 17, 48-49 (2010) (advocating that unless a Federal Rule "actually makes a policy choice that Congress has had an opportunity to review [following its prescribed Enabling Act process] . . . the role that federal common law plays in providing content that the rulemakers did not prospectively entertain should be recognized" and emphasizing as well that "[m]any, if not most, of the Federal Rules are charters for discretionary decisionmaking, setting boundaries and leaving the actual choices to federal trial judges").

60. *See infra* notes 92-163 and 188-222 and accompanying text.

61. *See infra* notes 224-61 and accompanying text.

62. Although the Court limited the outcome determinative principle of *Guaranty Trust* in its decision in *Byrd v. Blue Ridge Rural Electric Coop., Inc.*, 356 U.S. 525 (1958), the Court did not use avoidance in REA cases between the *Byrd* and *Hanna* cases.

63. *See infra* note 199 and accompanying text.

64. *See infra* notes 283-323 and accompanying text.

doubts" principles, which would counsel avoidance if the most natural construction of a Rule would raise serious doubts about the Rule's validity under the REA;[65] and Justice Ginsburg, in dissent, advocates avoidance based almost solely on respect for important state interests and regulatory policies.[66]

In Section IV, I conclude that avoidance in REA cases under *Erie* should be based on separation of powers principles and should incorporate a serious doubts methodology. This includes aspects of Justice Stevens's approach in *Shady Grove*, but I conclude, as well, that the range of permissible "saving" constructions should be limited to Rule interpretations that are consonant with a Rule's text and its history and purposes as revealed in Advisory Committee Notes and other materials. I also discuss the advantages of a serious doubts avoidance model for Rule construction over the models suggested by Justices Scalia and Ginsburg.

II. AVOIDANCE IN ENABLING ACT CASES

In many ways, avoidance has, from the very enactment of the Rules Enabling Act, been the defining characteristic of the Court's construction of the substantive-procedural divide in the REA, in general, and in the REA branch of the *Erie* doctrine, in particular. Professor Burbank relates that, from the start, the original rulemakers lacked a coherent view of the REA's dividing line between substance and procedure.[67] In promulgating the original Federal Rules pursuant to the REA, the rulemakers, thus, avoided the substantive-procedural divide, in some instances, by incorporating state law[68] or existing federal law (based on federal statutes and federal common law)[69] into a Federal Rule and, in other instances, by promulgating general Rules that conferred broad, general discretion on trial judges.[70] In amending the Rules, contemporary rulemakers often avoid promulgating Rules that might be

65. *See infra* notes 324-47 and accompanying text.

66. *See infra* notes 348-56 and accompanying text.

67. Burbank, *supra* note 23, at 1132-37, 1145-46.

68. Burbank, *supra* note 23, at 1145-47.

69. Burbank, *supra* note 23, at 1147-57.

70. Robert G. Bone, *Making Effective Rules: The Need for Procedure Theory*, 61 OKLA. L. REV. 319, 324 (2008) [hereinafter Bone, *Making Effective Rules*]; Robert G. Bone, *Who Decides? A Critical Look at Procedural Discretion*, 28 CARDOZO L. REV. 1961, 1967-68, 1972-73 (2007) [hereinafter Bone, *Who Decides?*].

construed as substantive[71] and promulgate discretionary, open-textured Rules that leave normative decisions to trial court judges.[72]

Similarly, in construing potential Federal Rule-state law conflicts under *Erie*, the Court has often avoided addressing the substantive-procedural divide. This Section traces the history of the Court's use of avoidance in Enabling Act cases. Section II.A lays the groundwork by discussing the substantive rights limitation of the REA. Sections II.B and C examine the avoidance canon, as the Court has employed it in pre-*Hanna*, *Erie* cases; in its post-*Hanna*, *Erie* cases; and in other Enabling Act contexts. Section II.B reveals that, under the outcome-determinative standard of *Guaranty Trust*, Federal Rules appeared uniformly to yield to conflicting state law, and the Court occasionally used avoidance as a means of protecting the Federal Rule.[73] Section II.C demonstrates that the Supreme Court ultimately reaffirmed the superiority of valid Federal Rules over conflicting state law in *Hanna v. Plumer* and set a fairly high bar for finding Rules invalid under the REA.[74] Rather than using *Hanna*'s stringent standard to override conflicting state law, however, the Court has used avoidance based on federalism principles and construing Rules narrowly (and sometimes contrary to text and accompanying Advisory Committee Notes) to find that Federal Rule and state law do not conflict. This results in state law's controlling under an RDA analysis and may, Rule-by-Rule, reintroduce the outcome determinative results of *Guaranty Trust*. Section II concludes by showing that this method of avoidance has threatened the integrity of the Federal Rules as a coherent system, and that the method varies from the avoidance canon the Court uses in its non-*Erie*, REA cases.

A. The Substantive Rights Limitation of the REA

In the original Enabling Act, Congress delegated authority to the Supreme Court to promulgate general rules of practice and procedure for the lower federal courts, but it limited that authority to promulgation of Rules that would not "abridge, enlarge or modify any litigant's

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71. *See, e.g.*, Marcus, *supra* note 21, at 413-14.

72. *See, e.g.*, Bone, *Making Effective Rules*, *supra* note 70, at 326-37; Bone, *Who Decides?*, *supra* note 70, at 1974-75; Burbank, *supra* note 28, at 715; Stephen B. Burbank, *The Costs of Complexity*, 85 MICH. L. REV. 1463, 1473-75 (1987) (book review); Stephen N. Subrin, *The Limitations of Transsubstantive Procedure: An Essay on Adjusting the "One-Size-Fits-All" Assumption*, 87 DENV. U. L. REV. 377, 391 (2010).

73. *See infra* notes 92-163 and accompanying text.

74. Hanna v. Plumer, 380 U.S. 460, 472-74 (1965).

substantive rights."[75] The prohibition on Court-made Rules that impermissibly impact substantive rights has been modified by amendment to the REA and today provides as follows:

> The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts . . . .
> Such rules shall not abridge, enlarge or modify any substantive right. . . .[76]

Professor Burbank's scholarship has been instrumental in clarifying that the substantive rights prohibition was originally included in the REA as a separation or allocation of powers provision.[77] The substantive rights limitation was intended to separate the permissible bounds of the Supreme Court's prospective procedural rulemaking from the impermissible substantive realm, in which Court rulemaking would trench impermissibly on Congress's substantive lawmaking prerogative.[78] The REA, thus, delegates Congress's prospective procedural lawmaking authority to the Court,[79] but it also confines Court rulemaking to the procedural and, moreover, to procedural Rules that do not "abridge, enlarge, or modify any substantive right."[80]

Originally, there was little need for Congress to patrol this divide carefully. Congress, the Court, and commentators shared a vision of a

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75. Act of June 19, 1934, Pub. L. No. 73-415, 48 Stat. 1064 (codified as amended at 28 U.S.C. § 2072 (2006)).

76. 28 U.S.C. § 2072 (2006).

77. *See, e.g.*, Burbank, *supra* note 23, at 1025-26, 1106-14.

78. *Id*.

79. Through the REA, Congress delegated to the Supreme Court its power to create procedural rules for the federal courts. The Supreme Court has long recognized that Congress has the power, under Articles I and III of the Constitution, to make procedural rules. Article I authorizes Congress to "constitute Tribunals inferior to the Supreme Court," U.S. CONST., art. I, § 8, cl. 9, and also authorizes Congress to enact all laws necessary and proper to execute the powers vested in it by the Constitution. *See* U.S. CONST. art. I, § 8, cl. 18. Article III also permits Congress to "vest[] "judicial Power . . . in such inferior courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1. The Supreme Court has also long recognized that Congress has the power to delegate procedural rulemaking authority to the Supreme Court. *See, e.g.*, Mistretta v. United States, 488 U.S. 361, 386-88 (1989); Wayman v. Southard, 23 U.S. (1 Wheat.) 42-45 (1825).

80. *See, e.g.*, Burbank, *supra* note 23, at 1107-08 (concluding that the first sentence of the REA, which authorizes the Court to promulgate "general rules of practice and procedure," 28 U.S.C. § 2072(a), imposes significant, procedural restrictions on Court rulemaking and that the second sentence, which contains the prohibition that Rules may not "abridge, enlarge or modify any substantive right," 28 U.S.C. § 2072(b), is not an independent limitation, but is essentially "surplusage").

fairly abrupt divide between substance and procedure.[81] Procedure, they concluded, was different in kind from and subservient to substantive law.[82] The Supreme Court, moreover, enjoyed expertise in procedural matters. Thus, for nearly forty years after the enactment of the REA, Congress entered a period of rulemaking passivity, in which it deferred to the procedural expertise of the Supreme Court and generally declined to enact substantive legislation that included procedural provisions, declined to enact amendments to Federal Rules promulgated by the Court, and declined to object to Federal Rules promulgated by the Supreme Court.[83]

In the then-existing climate of congressional forbearance in procedural rulemaking, the role of the substantive rights provision in creating a boundary that allocated prospective lawmaking authority between the Court and Congress blurred. Court Rules were generally considered the equivalent of statutes.[84] Moreover, given Congress's acquiescence in Court rulemaking, conflicts between congressional statutes and Federal Rules, which I have previously referred to as "statute-Rule conflicts,"[85] rarely arose.[86] In the few instances in which such conflicts did arise, the question of the Court's rulemaking authority under the substantive rights provision of the REA, though not nonexistent, assumed lesser importance, not only because of the relative infrequence of statute-Rule conflicts, but also because of the prevailing assumptions of Court expertise and broad rulemaking authority and the seeming triviality of the issues that arose.[87]

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81. Bone, *Who Decides?*, *supra* note 70, at 1971-72; Bone, *Process of Making Process*, *supra* note 20, at 894-96; Subrin, *supra* note 20, at 945-47, 962. Toward the end of this time period, the idea of a strict separation between substance and procedure was receding, but the proponents of the REA persisted in seeking passage of a bill premised on a dichotomy between substance and procedure. *See, e.g.*, Burbank, *supra* note 23, at 1136 & n.540.

82. *See, e.g.*, Bone, *Process of Making Process*, *supra* note 20, at 894-96.

83. 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1001 (3d ed. 2010); Genetin, *Conflicts Between Congressional Statutes and Federal Rules*, *supra* note 10, at 694-96.

84. 4 WRIGHT & MILLER, *supra* note 83, § 1030 & n.1; Genetin, *Conflicts Between Congressional Statutes and Federal Rules*, *supra* note 10, at 680-82, 701-05 (discussing how courts typically resolve clashes between a congressional statute and Federal Rule through an "implied repeal analysis," in which the courts often treat the statute and Rule as though they were two provisions created by the same lawmaker, rather than provisions of lawmakers with uneven authority).

85. Genetin, *Conflicts Between Congressional Statutes and Federal Rules*, *supra* note 10, at 681.

86. *Id*. at 751.

87. *Id*. at 751 & n.343 (indicating that the few applications of the supersession clause included appellate rules that superseded legislation regarding time to appeal, whether printing costs were taxable, and certain fees in admiralty appeals). Professors Burbank and Wolff suggest as well that

During the forty years in which congressional procedural passivity limited the importance of the substantive rights provision as an arbiter of potential congressional statute-Federal Rule conflicts, however, the role of the substantive rights provision of the REA was assuming increasing importance in *Erie* cases. Although federalism interests are not irrelevant in inquiries regarding the Court's compliance with the substantive rights limitation of the REA, they are furthered not as a primary purpose of the REA's substantive rights limitation, but as a secondary effect of that allocation.[88] That is, to the extent that Congress does not enact legislation in an area and to the extent that the Court does not promulgate Rules, or rulemaking would intrude on Congress's substantive legislative prerogative (e.g., to the extent that Court Rules would abridge, enlarge or modify any substantive right), state law, if any, will govern. Of course, in some cases, the Federal Rule at issue may be augmented by federal common law, which would also override state law.[89] Nevertheless, at least in part because of the few opportunities, from 1938 to the 1970s, to consider the separation of powers purposes of the REA in confrontations between congressional statutes and Federal Rules,[90] the stage was set for the Court, in its *Erie* cases, to key on the secondary federalism aspects of the substantive rights limitation. Indeed, federalism purposes have long animated the Court's avoidance canon in *Erie* cases,[91] and it is only in the plurality and concurring opinions of *Shady Grove* that the Court has begun to deemphasize federalism interests in its avoidance analysis.

B. The Avoidance Canon in Erie*'s Pre-*Hanna *Cases*

In pre-*Hanna* cases featuring Federal Rule-state law conflicts, the Supreme Court used an avoidance canon sporadically to avoid resolving substantive-procedural issues, but avoidance had little practical significance. Working to offset the practical import of any avoidance

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the Court may have believed that a federalism perspective could enhance its rulemaking power and the integrity of the Rules. *See* Burbank & Wolff, *supra* note 59, at 29.

88. Burbank, *supra* note 23, at 1025-26, 1106-12.

89. Burbank and Wolff, *supra* note 59, at 29; Genetin, *Powers That Be*, *supra* note 10, at 591-92, 610-12.

90. Henry P. Chandler, *Major Advances in the Federal Judicial System 1922-1947*, 31 F.R.D. 307, 514-15 (1963); Charles E. Clark, *Two Decades of the Federal Civil Rules*, 58 COLUM. L. REV. 435, 443 & n.40 (1958); Genetin, *Conflicts Between Congressional Statutes and Federal Rules*, *supra* note 10, at 751 & n.351.

91. Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 503-04 (2001); Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 427 & n.7, 436-37 (1996); Walker v. Armco Steel Corp., 446 U.S. 740, 751-52 & nn.12-13 (1980); Hanna v. Plumer, 380 U.S. 460, 469-74 (1965).

canon of Rule interpretation were two significant decisions that put the integrity of the Federal Rules as a coherent unit in jeopardy—*Guaranty Trust Co. v. York*,[92] which introduced the outcome-determinative principle that would dominate *Erie* jurisprudence until 1958,[93] and *Ragan v. Merchants Transfer & Warehouse Co.*,[94] which seemed to apply outcome determination in the context of a Federal Rule and conclude that state law would control.[95] After *Guaranty Trust*, avoidance became the better part of Rule validity in pre-*Hanna* cases.[96] It was an ineffective kind of avoidance that the Court adopted, however, that could not protect the Federal Rule as a practical matter: If a Federal Rule were construed narrowly to avoid conflict with state law, the Federal Rule survived as a formal matter, but state law controlled or both Federal Rule and state-law controlled because, absent a conflict, courts applied state law alone or in conjunction with the Federal Rule.[97] If, however, Federal Rule and state law did conflict, the state law also controlled or seemed to control, based on application of *Guaranty Trust*'s outcome determinative formulation.[98] Thus, the Federal Rules were consistently on the losing end of the tossup in a paradigmatic heads-I-win, tails-you-lose scenario. The uniformity, predictability, and coherence of procedure in the federal courts sought by Congress through the Federal Rules were immediately imperiled, and Judge Charles Clark's lamentation that "hardly a one of the heralded Federal Rules can be considered safe from attack" reflected reality.[99]

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92. 326 U.S. 99 (1945).

93. In 1958, the Supreme Court reduced the impact of *Guaranty Trust*'s outcome-determinative principle when it introduced an interest balancing approach in *Byrd v. Blue Ridge Rural Electrical Cooperative, Inc.*, 356 U.S. 525 (1958).

94. 337 U.S. 530 (1949).

95. *Id*. at 533-34. *See, e.g.*, Ralph U. Whitten, Erie *and the Federal Rules: A Review and Reappraisal After* Burlington Northern Railroad v. Woods, 21 CREIGHTON L. REV. 1, 8-10 (1987).

96. *E.g.*, Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 555-56 (1949); *cf.* Bernhardt v. Polygraphic Co. of Am., 350 U.S. 198, 202 (1956) (employing avoidance in a case of apparent federal statute-state law conflict); *see also id*. at 207-08 (Frankfurter, J, concurring); *accord* Gavit, *supra* note 30, at 1, 3; Hill, *supra* note 30, at 429-34 (emphasizing that Federal Rules and statutes were imperiled under rigid application of outcome-determinative principles); Merrigan, *supra* note 30, at 711-12, 721-23.

97. *E.g.*, *Cohen*, 337 U.S. at 555-56 (state and federal law control); Palmer v. Hoffman, 318 U.S. 109, 116-17 (1943) (state law controls).

98. *E.g.*, Ragan v. Merchs. Transfer & Warehouse Co., 337 U.S. 530 (1949). *See also* Whitten, *supra* note 95, at 9-12 (noting that "[o]ne cannot read the *Ragan* opinion without drawing the conclusion that the Court viewed the case as one in which a Federal Rule conflicted with state law, and in which *Erie* required application of the state provision").

99. Clark, *supra* note 30, at 183-84. *See also infra* notes 115-63 and accompanying text.

The Court first used avoidance in Rule interpretation in the 1943 case of *Palmer v. Hoffman*,[100] at a time (before the *Guaranty Trust* decision) when the Court approached *Erie* issues by determining if an issue was substantive or procedural.[101] Avoidance mattered. If the issue were deemed procedural, the Federal Rule would prevail over state law in event of conflict;[102] if deemed substantive, state law would govern in event of conflict.[103] In *Palmer*,[104] the Supreme Court avoided finding a conflict between Federal Rule of Civil Procedure 8(c), which seemed to catalogue affirmative defenses, and state law, which allocated the burden of proving contributory negligence. The Court determined that the issue of burden of proof was substantive.[105] Absent avoidance, state law would have controlled. Avoidance was, thus, used to shield the Federal Rule, rather than to protect "important state interests" or "regulatory policies."[106] The Court's analysis paralleled what scholars have referred to, in the constitutional avoidance context as "narrow" or "classical avoidance,"[107] under which, if there are two possible constructions of a statute, one of which would render the statute unconstitutional and the other of which would not, the court will adopt the interpretation that will not result in unconstitutionality.[108] The classical avoider does not avoid the constitutional (or, in REA cases, the substantive rights) decision, but

100. 318 U.S. 109 (1943).

101. *See, e.g.*, Cities Serv. Oil Co. v. Dunlap, 308 U.S. 208, 210-12 (1939).

102. Sibbach v. Wilson & Co., 312 U.S. 1, 10-11 (1941).

103. *Cities Serv. Oil Co.*, 308 U.S. at 210-12.

104. 318 U.S. 109 (1943).

105. *Id.* at 116-17.

106. Some contemporary Supreme Court cases incorrectly reference *Palmer v. Hoffman* for the proposition that it evidences avoidance to protect important state interests and regulatory policies. *See, e.g.*, Shady Grove Orthopedic Assocs., P.A., v. Allstate Ins. Co., 130 S. Ct. 1431, 1462, 1468 (2010) (Ginsburg, J., dissenting); Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 37-38 (1988) (Scalia, J., dissenting).

107. The so-called "narrow" or "classical" avoidance is also referred to as the "unconstitutionality" canon. It provides that when "one interpretation of a statute would render it unconstitutional, the court should adopt any plausible interpretation that would avoid the question." *See, e.g.*, Barrett, *supra* note 57, at 138-39 (citing John Copeland Nagle, Delaware & Hudson *Revisited*, 72 NOTRE DAME L. REV. 1495, 1496 (1997) and referring to the canon as the "unconstitutionality" canon to distinguish it from the "doubts" version of avoidance); Vermeule, *supra* note 57, at 1949 (referring to the narrower avoidance principle as "classical" avoidance and noting that the difference between "classical" and "modern" avoidance is "that the former requires the court to determine that one plausible interpretation of the statute *would* be unconstitutional, while the latter requires only a determination that one plausible reading *might* be unconstitutional" (emphasis in original)); Young, *supra* note 57, at 1578-79 (using the terms "classical" and "modern").

108. Vermeule, *supra* note 57, at 1959; *see also* Barrett, *supra* note 57, at 138-39; Young, *supra* note 57, at 1578-79.

decides that question and then interprets the statute, if possible, to avoid an unconstitutional construction.[109]

The *Palmer* Court employed an analogous avoidance methodology. The district court had allocated to the defendant the burden of proving contributory negligence, although the defendant contended state law would have burdened the plaintiff.[110] The Plaintiff defended the district court's decision in the Supreme Court by arguing that Rule 8(c) made contributory negligence an affirmative defense in the federal courts.[111] Rule 8(c) could have been so interpreted. It provided that "[i]n responding to a pleading a party must affirmatively state any avoidance or affirmative defense, including . . . contributory negligence. . . ."[112] With a scant, one-sentence explanation, the Court rejected Plaintiff's argument and construed Rule 8(c) to avoid conflict with state law, holding that Rule 8(c) did not allocate the burden of proving contributory negligence, but dealt only with the manner of pleading.[113] By construing Rule 8(c) as a rule of pleading only, the Court did avoid the conflict between Federal Rule and state law. Having lost touch with the context of the *Palmer* case, current courts will use the case to support construing Federal Rules narrowly to protect important state interests.[114] In fact, narrow construction of the Federal Rule in *Palmer* prevented Rule 8(c) from yielding to the state law's conflicting apportionment of burden of proof.

Two important cases, *Guaranty Trust Co. v. York*,[115] and *Ragan v. Merchants Transfer and Warehouse Co.*,[116] fundamentally altered the *Erie* landscape before the Court returned to avoidance techniques in Rule interpretation. These cases would also stall any significant development of avoidance in pre-*Hanna* cases by rendering the avoidance decision of formal import only.

Given the difficulty of dividing substance and procedure, the Supreme Court, in *Guaranty Trust*, embraced avoidance.[117] It adopted a functional approach, ultimately referred to as the "outcome-

109. The "classical" avoidance doctrine has largely been supplanted by "modern" or "serious doubts" avoidance that permits a court to seek a less preferable construction of a statute if the most natural construction *might* be unconstitutional. Vermeule, *supra* note 57, at 1949.

110. Palmer v. Hoffman, 318 U.S. 109, 116 (1943).

111. *Id.* at 117.

112. FED. R. CIV. P. 8(c).

113. *Palmer*, 318 U.S. at 117.

114. *See supra* note 106 and accompanying text.

115. 326 U.S. 99 (1945).

116. Ragan v. Merchs. Transfer & Warehouse Co., 337 U.S. 530 (1949).

117. *Guaranty Trust*, 326 U.S. at 107-10.

determinative" approach, that would serve the "policy" of *Erie*[118] and would make unnecessary determination of the substantive-procedural divide. Emphasizing that the policy of the *Erie* opinion "touche[d] vitally the proper distribution of judicial power between State and federal courts,"[119] the *Guaranty Trust* Court concluded that the intent of the *Erie* decision was to ensure uniformity of outcome in federal and state courts:

> In essence, the intent of [the *Erie*] decision was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, 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.[120]

The *Guaranty Trust* Court, thus, made unnecessary *Erie*'s inquiries into whether there was federal power to make law in a particular case and, if so, whether that power was appropriately exercised by Congress or the Supreme Court in the case at issue. It replaced those questions with an inquiry (under the "policy" of *Erie*) into whether use of federal law would be outcome determinative in the particular litigation. Although the language of the *Guaranty Trust* decision would have permitted a more nuanced choice of federal or state law,[121] the Court applied its outcome-determinative approach inflexibly, concluding regularly that federal courts sitting in diversity were to be considered as "only another court of the State"[122] and, thus, that differing federal procedure must yield to state law. The Court's invocation of the

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118. *Id.* at 109-10.

119. *Id.* at 109.

120. *Id.*

121. *See, e.g.*, Hanna v. Plumer, 380 U.S. 460, 466-68 (1965).

122. *Guaranty Trust*, 326 U.S. at 108. *See also* Woods v. Interstate Realty Co., 337 U.S. 535, 538 (1949) (quoting Angel v. Bullington, 330 U.S. 183, 187 (1947)); Ragan v. Merchs. Transfer & Warehouse Co., 337 U.S. 530, 532 (1949) ("If recovery could not be had in the state court, it should be denied in the federal court"); Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 555 (1949) (noting that *Erie* and its progeny established a "far-reaching change in the relation of state and federal courts and the application of state law in the latter whereby in diversity cases the federal court administers the state system of law in all except details related to its own conduct of business") (citation omitted)); *Angel*, 330 U.S. at 187. The Supreme Court, in *Bernhardt v. Polygraphic Co. of America* articulated the conformity requirement as follows:

> The federal court enforces the state-created right by rules of procedure which it has acquired from the Federal Government and which therefore are not identical with those of the state courts. Yet, in spite of that difference in procedure, the federal court enforcing a state-created right in a diversity case is, as we said in Guaranty Trust Co. of New York v. York, . . . in substance "only another court of the State."

350 U.S. 198, 202-03 (1956).

"outcome-determinative" approach to bridging the substance-procedure divide in *Erie* cases focused on the desire to ensure vertical uniformity—a uniform outcome for state-law claims, whether tried in the state or federal courts—and caused many to doubt the validity, at least in diversity actions, of the newly created Federal Rules that had been intended to establish uniform, simple, and predictable procedural Rules for the federal courts.[123]

Guaranty Trust, of course, did not deal with a potential conflict between Federal Rule and state law. In this pre-*Hanna* era,[124] however, rigorous application of *Guaranty Trust*'s outcome-determinative principle threatened the validity of the nascent Federal Rules.[125] As Professor Alfred Hill wrote, "Inevitably the question arose whether the provisions of the Federal Rules of Civil Procedure could stand if they tended to promote an outcome at variance with the probable outcome in a state court . . . ."[126] The Court's 1949 decision in *Ragan v. Merchants Transfer & Warehouse Co.*,[127] cemented the grounds for concern, and, in fact, put at risk the integrity of the Rules.[128]

In *Ragan*, the Supreme Court seemed to subordinate Federal Rule of Civil Procedure 3 to state law, by applying outcome determinative

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123. For discussion of the purposes of the original Federal Rules, see Burbank, *supra* note 23, at 1024-25; Genetin, *Conflicts Between Congressional Statutes and Federal Rules*, *supra* note 10, at 690 & n.67. For an overview of the commentary despairing that Federal Rules could be effective in diversity after *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949) and the companion cases of *Cohen v. Beneficial Industrial Loan Co.*, 337 U.S. 541 (1949) and *Woods v. Interstate Realty, Co.*, 337 U.S. 535 (1949), see Gavit, *supra* note 30, at 1, 3, 24-26; Hill, *supra* note 30, at 432-35 (cataloguing uncertainty regarding the validity of federal statutes and at least the following Federal Rules in instances of potentially inconsistent state law, following the Court's decision in *Ragan*: Rule 15(c) (relation back of amended pleadings), Rule 6 (time computation principles), Rule 25(a) (substitution of parties), Rule 41(b) (dismissal of action for nonprosecution), Rule 13 (counterclaims and crossclaims), Rule 18(b) (joinder of principal claim with contingent claim), Rule 2 (joinder of legal and equitable claims), Rule 23(a)(3) ("spurious" class actions), Rule 43(a) (admissibility of evidence), Rule 35 (mental and physical exams), Rules 38 and 39 (denying a jury trial when a conflicting state law would permit jury trial), Rule 17(b) (capacity of certain types of persons to sue and be sued), Rule 23(b) (actions by shareholders), Rule 4(d) (substituted service)); Merrigan, *supra* note 30, at 711-12, 717-25; Keeffe et al., *supra* note 30, at 506-09, 513, 525; Clark, *supra* note 30, at 182-84.

124. *Hanna* solidified the difference between the Court's rulemaking, which is based on congressionally delegated authority, and Court common law or practice, and it released "valid" Federal Rules, i.e., Rules that complied with the Constitution and the REA's substantive rights provision, from the gravitational pull of the RDA analysis, which applies to cases subject to the "relatively unguided *Erie* choice." *Hanna*, 380 U.S. at 471; *see also* Ely, *supra* note 15, at 697-700, 718-22.

125. *See supra* note 123 and accompanying text.

126. Hill, *supra* note 30, at 429.

127. 337 U.S. 530 (1949).

128. *See supra* note 123 and accompanying text.

principles.[129] At issue was a potential conflict between Rule 3, which provided that "[a] civil action is commenced by filing a complaint with the court,"[130] and state law, which provided that "[a]n action shall be deemed commenced within the meaning of this article, as to each defendant, at the date of the summons which is served on him. . . ."[131] The plaintiff had filed a diversity action in federal court on September 4, 1945, regarding an accident that occurred on October 1, 1943—safely within the two-year statute of limitations prescribed by the governing Kansas law.[132] Service on the defendant, however, was not perfected until December 28, 1945, which was outside the two-year limitations period and which triggered the potential conflict between Federal Rule and state law. The *Ragan* Court concluded, in line with the uniformity policy of *Erie*, as articulated in *Guaranty Trust*, that, "[i]f recovery could not be had in the state court, it should be denied in the federal court."[133] Emphasizing that the state claim at issue "accrues and comes to an end when local law so declares," the Court concluded that the claim could not have "longer life in the federal court than it would have had in the state court without adding something to the cause of action."[134]

In so holding, the Court gave short shrift to arguments of the plaintiff in *Ragan*[135] and Justice Rutledge, in a dissent that he filed with respect to each of the three *Erie* cases decided on the same day as *Ragan*.[136] Each argued that, when Federal Rules were at issue, the *Erie* line of cases did not control.[137] Justice Rutledge took the majority to task for applying to Federal Rules *Guaranty Trust*'s "gloss on the *Erie* rule" that had positioned the federal court in diversity as "'merely another court of the state in which it sits,'" and, which, in Justice

129. *Ragan*, 337 U.S. at 532-34. *E.g.*, Whitten, *supra* note 95, at 9-10.

130. *Ragan*, 337 U.S. at 531 & n.1.

131. *Id.* at 531 & n.4.

132. *Id.* at 531.

133. *Id.* at 532.

134. *Id.* at 533-34.

135. Brief of Petitioner, at *7-24, *35-40, Ragan v. Merchs. Transfer & Warehouse Co., 337 U.S. 530 (1949) (No. 522), 1949 WL 50616 (arguing that *Sibbach v. Wilson & Co.*, 312 U.S. 1 (1941) and *Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438 (1946), provided the correct analysis for determining the validity of Rules promulgated under the REA and that it would be improper to extend the *Guaranty Trust* analysis to Federal Rules).

136. Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 558-59 (1949) (Rutledge, J., dissenting) (emphasizing that the three cases—*Ragan*, 337 U.S. 530; *Woods v. Interstate Realty Co.*, 337 U.S. 535 (1949), and *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949)—indicate the extent to which the Court is inappropriately submitting control of diversity jurisdiction to the states, based on a "gloss" on the language of *Erie v. Tompkins*, rather than to Congress, which "has the power to govern the procedure of the federal courts in diversity").

137. *See supra* notes 135 and 136.

Rutledge's view, had "seriously impaired Congress's power" to control procedure in diversity litigation.[138] He concluded that, although it is difficult to distinguish between substance and procedure, the Court must do so either mechanically by "reference to whether the state courts' doors are open or closed" or by reconciling the rule of *Erie* with Congress's conceded authority over procedure in the federal courts.[139] Without acknowledging these arguments, the *Ragan* Court permitted state law to control.

Although commentators' reports of the death of Rule 3 turned out to be premature,[140] it was not until much later—1965—that the *Hanna* Court (1) would reinterpret the *Ragan* case as one in which "the scope of the Federal Rule was not as broad as the losing party urged, and therefore, there [was] no Federal Rule which covered the point in dispute;"[141] and (2) would resurrect the notion—ignored by the Supreme Court in *Ragan*, but not in the federal circuit courts[142]—that Federal Rules and statutes were subject to different standards of validity than judge-made law.[143] In the interim, the sense that broad application of the outcome-determinative principle would override conflicting Federal Rules (and even federal statutes), combined with the growing arguments that outcome determination, as construed by the Court, elevated the states above Congress in matters of federal procedure,[144] to reduce the importance of an avoidance principle.

In *Cohen v. Beneficial Industrial Loan Corp.*,[145] a case decided on the same day as *Ragan*, the Court used an avoidance canon that seemed to straddle the divide between "classical" and "modern" or "serious doubts" avoidance.[146] In classical avoidance, a court must determine that the most natural interpretation of a provision *would be invalid* before turning to a narrowing construction of the language. In so-called

138. *Cohen*, 337 U.S. at 558-59 (Rutledge, J., dissenting).

139. *Id*. at 559.

140. *See, e.g.*, Hill, *supra* note 30, at 432 (stating that "Rule 3 (commencement of action) was struck down by the Supreme Court itself in the *Ragan* case").

141. Hanna v. Plumer, 380 U.S. 460, 470 (1965).

142. *See, e.g.*, Lumbermen's Mut. Cas. Co. v. Wright, 322 F.2d 759, 764 (5th Cir. 1963); D'Onofrio Constr. Co. v. Recon Co., 255 F.2d 904, 909-10 (1st Cir. 1958); Sampson v. Channell, 110 F.2d 754 (1st Cir. 1940).

143. *Hanna*, 380 U.S. at 463-65, 469-74.

144. *See, e.g.*, *Cohen*, 337 U.S. at 558-59 (Rutledge, J., dissenting). *See also* Gavit, *supra* note 30, at 26; Hill, *supra* note 30, at 427-34, 577-86 (recognizing that Court opinions had endangered the Federal Rules and, indeed, federal statutes, but arguing that there is federal power to create uniform rules of procedure).

145. *Cohen*, 337 U.S. 541.

146. *See supra* notes 107-09.

"serious doubts" avoidance, by contrast, the court will, if possible, avoid the most natural construction of a provision in favor of a less plausible construction, if the most natural interpretation presents a *serious question of potential invalidity*.

A majority of the *Cohen* Court avoided finding a direct conflict between Federal Rule of Civil Procedure 23(b), which included prerequisites for stockholder derivative actions, and a New Jersey statute that also imposed preconditions on derivative suits. The state statute required a plaintiff in a derivative action, who had specified minimal holdings in a defendant corporation, to pay attorney fees and expenses of the defendant if the suit were unsuccessful and also to post security for payment of the attorney fees and expenses.[147] The Court concluded that, because there was no conflict between the prerequisites of Rule 23 and those in the New Jersey statute, the provisions of both the Federal Rule and state law could apply consistently with the policy of *Guaranty Trust*.[148]

The *Cohen* Court parsed the statute into two categories—the clearly substantive and the possibly procedural. It concluded that the statutory requirement that plaintiff-stockholders with minimal corporate holdings pay attorney fees and expenses of the defendant corporation if the defendant prevailed created a new liability and was clearly substantive.[149] Respecting the requirement to post security for payment of attorney fees and expenses, however, the Court noted that procedural rules "do not always exhaust their effect by regulating procedure."[150] Emphasizing that the security requirement made meaningful the substantive liability for fees and costs, the Court concluded that it "[did] not think" the state requirement could be disregarded by a federal court as "a mere procedural device."[151] The Court then compared the procedural prerequisites to suit set forth in Rule 23 and those in the New Jersey statute. Finding no conflict in the provisions of Rule and statute and that all could be observed, the Court saw "no reason why the policy stated in *Guaranty Trust* . . . should not apply."[152] Again, pre-*Hanna*

147. *Cohen*, 337 U.S. at 543-44, 555-57.

148. *Id.* at 556-57.

149. *Id.* at 555-56.

150. *Id.* at 555.

151. *Id.* at 556. It is not clear whether the Court decided the issue of invalidity, as in "classical" or "narrow" avoidance, or whether its statement that it "[did] not think" that the statute "[could] be disregarded as . . . mere procedur[e]" is in fact, an abdication of a final decision and a use of serious doubts avoidance. *Id.*

152. *Id.* As with *Palmer v. Hoffman*, 318 U.S. 109 (1943), the *Cohen* Court's use of avoidance protected the Federal Rule as a formal matter. Rule 23(b) did not yield to state law, as seemed to be

avoidance protected the Federal Rule (but not very much), rather than state law.

The Supreme Court did not otherwise overtly reference an avoidance principle in pre-*Hanna* REA cases. That is unsurprising. As noted, avoidance, in the pre-*Hanna* period, meant only that the Federal Rules would not be invalidated as a formal matter. As a pragmatic matter, the Rules would be subordinated to state law in cases of seeming direct conflict, in which outcome determination, as applied by the courts, seemed to command that the federal court must sit as "another court of the state"[153] and that state law prevail. The Rules also yielded to state law (but were not formally invalidated) in instances in which the Court avoided a direct conflict, since, absent a conflict with a controlling Federal Rule, the state law would apply or both the Federal Rule and state law would control.[154] Indeed, some commentators, emphasizing the ineffectiveness of Federal Rules in diversity cases as opposed to federal question cases, began to suggest that the Court make it official and promulgate a Rule specifying that Federal Rules applied in federal question cases only.[155]

In one final pre-*Hanna* case, *Bernhardt v. Polygraphic Co. of America*,[156] the Court used an interpretive canon of avoidance. The *Bernhardt* Court examined a federal statute (rather than a Federal Rule) that was in potential conflict with state law. *Bernhardt*, thus, is inapposite in the REA context because the Court did not construe a Rule narrowly to avoid deciding the substantive-procedural limitation of the REA. (The substantive rights limitation, of course, is not applicable to federal statutes.[157]) Instead, the Court used "serious doubts" avoidance to construe the federal statute at issue narrowly in order to avoid deciding a serious question of constitutional law. State law, in

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required in the outcome-determinative period, but both state and federal preconditions for stockholder derivative suits applied. Current Supreme Court opinions, however, sometimes reference avoidance in *Cohen* as support for an avoidance principle that protects important state interests and regulatory policies. *E.g.*, Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1462, 1464 (2010) (Ginsburg, J., dissenting); Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 37-38 (1988) (Scalia, J., dissenting).

153. Guaranty Trust Co. v. York, 326 U.S. 99, 108 (1945). *See supra* note 122.

154. *Cohen*, 337 U.S. at 556-57 (observing that, where there was no conflict between the Federal Rule and state law, there was no reason why, under the policy of *Guaranty Trust*, both should not apply); *Palmer*, 318 U.S. at 116-17 (state law controls).

155. *See, e.g.*, Merrigan, *supra* note 30, at 727; Clark, *supra* note 30, at 183-84.

156. 350 U.S. 198 (1956).

157. Hanna v. Plumer, 380 U.S. 460, 472 (1965). *See also* Flaminio v. Honda Motor Co., Ltd., 733 F.2d 463, 470 (7th Cir. 1984); *accord* Genetin, *Conflicts Between Congressional Statutes and Federal Rules*, *supra* note 10, at 748.

Bernhardt, permitted revocation of an agreement to arbitrate at any time before an arbitral award; the Federal Arbitration Act (FAA), by contrast, rendered arbitration agreements covered by the FAA "valid, irrevocable, and enforceable" and permitted stay of a trial court action pending arbitration.[158] *Bernhardt*'s use of a "serious doubts" avoidance canon was significant, though not to REA avoidance. The serious question of constitutional law that the *Bernhardt* Court avoided was whether Congress had the power to require arbitration in diversity cases in the face of contrary state law. Avoidance, thus, permitted delay—at least until the *Byrd* decision two years later[159]—of the inevitable decision regarding whether the ultimate power over federal procedure in diversity cases lay with Congress or the states.

The battle lines were clearly drawn, however, and avoidance in *Bernhardt* would only buy time regarding the serious constitutional inquiry: Whether states (under the rationale of *Erie* and *Guaranty Trust*) or Congress (and, thus, also its delegate, the Supreme Court) under the authority of Articles I and III and the Supremacy Clause would prevail in event of an unavoidable conflict between state law and federal statute or Rule. In the interim, the *Bernhardt* decision to avoid the clash of state law and federal statute seemed to solidify the strength of state law over federal procedure and to indicate that even conflicting federal statutes would fall to state law under the outcome-determinative approach.[160] In fact, Judge Charles Clark reported that commentators, concluding that Federal Rules that differed from state law could not prevail in diversity, were recommending (1) that the principle for validity of any federal procedure (whether based on statute, Rule, or judge-made law) be based on whether differences between state and federal procedure would lead to "forum shopping"; (2) that the Federal Rules be amended to provide that they only applied in federal question cases;[161] or (3) that courts "merely hope" for a reversal in policy from the Supreme Court in "an inevitable reaction from the present low point."[162]

158. *Bernhardt*, 350 U.S. at 199-201.

159. Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525 (1958).

160. *See, e.g.*, Hill, *supra* note 30, at 431-32, 437.

161. *See, e.g.*, Merrigan, *supra* note 30, at 727 (recommending that the Federal Rules be repealed as to diversity cases (but not federal question cases) and that federal court conformity to state procedure be reinstituted by Court Rule or by statute); Gavit, *supra* note 30, at 26 (stating that the Federal Rules should be amended to state the Court's intent or to "state that in all diversity cases the Rules are not applicable" or the Court should state "that the Supreme Court which promulgated the Federal Rules . . ., having power so to do, decided the matter in controversy").

162. *See, e.g.*, Clark, *supra* note 30, at 183-84.

*C. The Avoidance Canon in Post-*Hanna *Cases*

Section II.C focuses on the Supreme Court's use of avoidance techniques in post-*Hanna* cases, broadening the exploration beyond use of avoidance in *Erie* cases to include avoidance in apparent clashes of congressional statutes and Federal Rules and avoidance in general construction of Federal Rules. Section III.C.1 resumes the narrative of the evolution of the *Erie* doctrine and its impact on an avoidance canon in REA cases. Specifically, Section II.C.1 discusses the Supreme Court's limiting of the outcome-determinative approach in *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.* and *Hanna v. Plumer* and the consequent increase in importance of the scope of a Federal Rule.

Section II.C.2.a discusses the post-*Hanna*, *Erie* cases in which the Court complied with the substantive-procedural divide by construing Rules narrowly and not to conflict with state law, thus making unnecessary a validity analysis under the REA. The post-*Hanna* cases lack a consistent approach to avoidance—other than that avoidance is based on federalism concerns.[163] They also underscore that avoidance based on federalism interests leads to differing definitions of Federal Rules in diversity and federal question cases. Section II.C.2.b concludes the historical retrospective with an examination of the Court's use of avoidance in other REA contexts, noting Congress's move to reclaim a role in federal procedural rulemaking in the 1970s and 1980s, which, in turn, reprised the importance of the substantive rights limitation in potential conflicts between congressional statutes and Federal Rules and in construction of Federal Rules. In these contexts, the Court has, in opting for avoidance, relied much more heavily on the text of the Rule, its historical context, and the Advisory Committee Notes than the Court has done in its use of avoidance in *Erie* cases. The Court also generally used "serious doubts" avoidance.

1. From *Byrd* to *Hanna*—the Elevation of the Importance of Scope

Two years after its decision in *Bernhardt* delaying confrontation regarding congressional and state power over procedure in federal courts, the Supreme Court decided *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*,[164] which began the process of making federal procedure relevant again in diversity cases. Rejecting the notion that

163. *See infra* notes 188-222 and accompanying text.

164. *Byrd*, 356 U.S. 525.

outcome determination was the only consideration when federal and state procedural laws clashed, *Byrd* introduced a form of interest balancing that permitted consideration of "affirmative countervailing" federal interests and state interests as well as the likelihood that applying federal law would be outcome determinative.[165] No longer would federal courts sitting in diversity be viewed as "only another court of the State," whose procedure must yield to conflicting state procedure or be construed narrowly not to apply. To the contrary, sometimes, in instances of conflict, federal procedural law would control. In this legal landscape, a narrow construction of the scope of the Federal Rule at issue could be consequential, and, after *Hanna*, would be dispositive.

The Supreme Court's decision seven years later, in *Hanna v. Plumer*,[166] completed the Supreme Court's "inevitable reaction" to rigid application of the outcome-determinative principle for which Judge Charles Clark had hoped.[167] *Hanna* limited even further the application of *Erie*'s uniformity policy, as articulated in *Guaranty Trust*;[168] acknowledged congressional superiority in federal procedural law enacted in compliance with Congress's broad authority over federal courts under Articles I and III of the Constitution as supplemented by the Necessary and Proper Clause;[169] and vastly empowered Federal Rules promulgated by the Supreme Court when in conflict with state law. After *Hanna*, Federal Rules that conflicted with state law would be valid and would control if they neither violated the Constitution, nor exceeded the statutory limitations of the Enabling Act.[170] A Federal Rule passed constitutional muster if the Rule, "though falling within the uncertain area between substance and procedure, [was] rationally capable of classification as either."[171] It complied with the substantive rights limitation of the Rules Enabling Act if it "'really regulate[d] 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.'"[172] As Justice Scalia emphasized in his plurality opinion in *Shady Grove*, under post-*Hanna*

165. *Id.* at 535-50.

166. 380 U.S. 460 (1965).

167. *See supra* note 163 and accompanying text.

168. *Hanna*, 380 U.S. at 467-68. *See also* Guaranty Trust Co. v. York, 326 U.S. 99, 103 (1945).

169. *Hanna*, 380 U.S. at 471-72.

170. *Id.* at 463-64, 471.

171. *Id.* at 472. *See also* Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 27-28, 31-32 (1988); Burlington N. R.R. Co. v. Woods, 480 U.S. 1, 5 & n.3 (1987).

172. *Hanna*, 380 U.S. at 464 (quoting Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941)).

Rule validity standards, the Supreme Court has rejected every challenge asserting that a Federal Rule failed to comply with the substantive rights limitation.[173] It is not clear, however, if this is a virtue or a vestige of the Supreme Court's willingness to construe Rules narrowly to safeguard "important state interests."[174] Indeed, Justice Stevens and a growing number of commentators have concluded that the Court must, on occasion, be willing to find a conflict between Federal Rule and state law; to reach the validity analysis; and, on occasion, to invalidate a Rule.[175] What is certainly clear is that, after *Hanna*, the scope of the Federal Rule became critical.

Hanna, in fact, also taught the first lessons of instrumental interpretation of the scope of Federal Rules in potential conflict with state law (1) by providing only a cursory analysis of the scope issue regarding Federal Rule of Civil Procedure 4(d)(1), which was at issue in *Hanna*; (2) by referencing, as governed by avoidance principles, prior cases in which the Federal Rule had seemed to fall to state law under an outcome-determinative analysis; and (3) by suggesting that avoidance would be governed by federalism concerns. In determining the scope of Rule 4(d)(1), which was at issue in *Hanna*, the Court did not use a canon of narrow construction or avoidance, but simply stated in a conclusory manner that "the clash is unavoidable,"[176] and it also concluded that Rule 4(d)(1) complied with both the constitutional and Enabling Act requirements, noting that Rules adopted through the Enabling Act process carried a presumption of validity.[177] Rule 4(d)(1) permitted

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173. Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1442-43 (2010) (Scalia, J., for himself, Roberts, C.J., Thomas, J., and Sotomayor, J.). The *Hanna* Court adopted the "really regulates procedure" standard that the *Shady Grove* plurality reaffirms. The Court, in *Burlington Northern*, articulated the standard for Rule validity as follows: "Rules which incidentally affect litigants' substantive rights do not violate . . . [the substantive rights limitation of the REA] if reasonably necessary to maintain the integrity of [a uniform and consistent system of rules governing federal practice and procedure]." *Burlington Northern*, 480 U.S. at 5 (citations omitted). The *Burlington Northern* Court also emphasized that the approval given to Federal Rules by the Advisory Committee, the Judicial Conference, and the Supreme Court, combined with the requirement to report Federal Rules to Congress for review provide presumptive validity to Rules under both the congressional and REA tests. *Id*. at 6 (citing *Hanna*, 380 U.S. at 471).

174. *Shady Grove*, 130 S. Ct. at 1468 & n.10 (Ginsburg, J., dissenting).

175. *Id*. at 1451-52, 1457 (Stevens, J., concurring in part and concurring in the judgment); *see also* Burbank & Wolff, *supra* note 59, at 51; Dudley & Rutherglen, *supra* note 45, at 743.

176. *Hanna*, 380 U.S. at 470.

177. *Id*. at 462-63 & n.1, 471-74. The *Hanna* Court discussed the standards for a Rule's validity under the Constitution and the substantive rights limitation of the REA, *id.* at 463-65, 471-74, and it also prescribed a presumption of Rule validity under the REA, indicating that "[w]hen a situation is covered by one of the Federal Rules, the question facing the court is a far cry from the typical, relatively unguided *Erie* Choice: the court has been instructed to apply the Federal Rule, and can refuse to do so only if the Advisory Committee, this Court, and Congress erred in their

service of process by leaving a copy of the summons and complaint at a defendant's residence with "some person of suitable age and discretion then residing therein . . . ," while the Massachusetts statute at issue provided for service to be made "by delivery in hand upon such executor or administrator" before the expiration of the statutorily specified one-year period.[178] In determining that Rule 4(d)(1) was valid, however, the Court ignored a potential substantive rights issue similar to that in *Ragan*—whether the method of substitute service under Rule 4(d)(1) interfered impermissibly with the state's choice to limit an executor's exposure to liability through the notice provision of the state service requirements.[179]

Second, in its harmonization of prior decisions in which Federal Rules had been in potential conflict with state law, the *Hanna* Court hastened to assure that no Federal Rule had ever been invalidated by the outcome-determination principle of the RDA analysis.[180] The Court instructed, instead, that in each case of apparent Federal Rule-state law conflict in which state law had prevailed, the Court had determined that the scope of the Federal Rule was not broad enough to cover the issue.[181] In support of the position, the *Hanna* Court appropriately discussed *Palmer v. Hoffman*,[182] in which the Court construed Rule 8(c) narrowly, and it avoided Rule nullification in the context of the Court's additional conclusion that burden of proof was substantive. It also appropriately

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prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions." *Id.* at 471 (citations omitted).

178. *Id.* at 461-62.

179. Of course, a state's choice to use procedure to enable a substantive purpose does not mean that a conflicting Federal Rule would necessarily impact impermissibly the substantive purpose. *See, e.g.*, Lynch, *supra* note 37, at 324-26 (advocating use of a comparative impairment approach only in the context of state litigation reform legislation which is identified as having "significant substantive objectives" and noting that, in instances of Federal Rule conflicts with litigation reform legislation, the federal courts might "usually, perhaps almost always, permit state litigation reform legislation to prevail," but not advocating that such legislation should always prevail); McCoid, *supra* note 40, at 913-14; Whitten, *supra* note 95, at 14-15.

180. *Hanna*, 380 U.S. at 470.

181. *Id.* The *Hanna* Court stated as follows:

> The *Erie* rule has never been invoked to void a Federal Rule. It is true that there have been cases where this Court has held applicable a state rule in the face of an argument that the situation was governed by one of the Federal Rules. But the holding of each case was not that *Erie* commanded displacement of a Federal Rule by an inconsistent state rule, but rather that 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.

Id.

182. 318 U.S. 109 (1943). *See also supra* notes 100-14 and accompanying text.

referenced *Cohen v. Beneficial Industrial Loan Corp.*,[183] in which the Court had narrowly interpreted the scope of the Rule 23(b) (now, Rule 23.1) and, thus, avoided the state-law's invalidation of the Federal Rule (although the court concluded that *both* state law and Federal Rule provisions would govern under principles of *Guaranty Trust*).

The *Hanna* Court's additional reference to *Ragan v. Merchants Transfer & Warehouse Co*, as a case decided on avoidance principles,[184] however, seemed, at best, strained and, at worst, disingenuous. The case had previously been widely construed as requiring Rule 3 to yield under outcome-determinative principles.[185] With the *Hanna* Court's new take on *Ragan* as decided under avoidance principles, it was possible to read *Ragan* as a case in which the Court (1) had elided an initial determination that the Federal Rule and state law did not conflict; and (2) had addressed the dispositive issue of whether federal or state law would control absent a Federal Rule on point. Imposing such a construction on competing federal and state provisions that both seemed to speak directly to when a case should be deemed "commenced," however, suggested that *Hanna* had, in fact, overruled *Ragan*. Alternatively, it implied that courts could construe a Federal Rule against the plain import of its text to conclude that the scope of the Federal Rule was not broad enough to control the point in issue.[186] Despite *Hanna*'s seemingly mechanical standard that would uniformly protect Federal Rules, the Court has chosen the latter option in its post-

183. 337 U.S. 541 (1949). *See also supra* notes 145-52 and accompanying text.

184. *Hanna*, 380 U.S. at 470 & n.12 (citing Iovino v. Waterson, 274 F.2d 41, 47-48 (2d Cir. 1959)). The Second Circuit in *Iovino*, indicated that Federal Rules controlled over state law when on point and neither beyond the scope of the Rules Enabling Act, nor outside Congress's authority over procedure under the Constitution. *Iovino*, 274 F.2d. at 45-46. The *Iovino* court, moreover, also construed prior Supreme Court cases as dealing with Rules not on point, including *Angel v. Bullington*, 330 U.S. 183 (1947), *Woods v. Interstate Realty Co.*, 337 U.S. 535 (1949), *Cohen v. Beneficial Industrial Loan Corp*., 337 U.S. 541 (1949), *Ragan v. Merchants Transfer & Warehouse Co*., 337 U.S. 530 (1949), and *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198 (1956). *Id.* at 47. Finding only the *Ragan* case troublesome in its conclusion that, in prior cases, Federal Rules had not been in conflict with state law, the *Iovino* court determined that Rule 3 dealt only with commencement of an action and not with tolling of the statute of limitations. *Id*. at 47-48.

185. *See, e.g.*, Gavit, *supra* note 30, at 3, 6-8 (explaining the Supreme Court's decision, but indicating that it was incorrect); Hill, *supra* note 30, at 432; Merrigan, *supra* note 30, at 718-20; *but see Iovino*, 274 F.2d at 47-48.

186. *Hanna*, 380 U.S. at 470-71 & n.12. The *Hanna* Court referenced the *Bernhardt* case with a "cf" citation. *Hanna*, 380 U.S. at 466, 470 n.12, 472 n.14. *Bernhardt*, in which the Court had construed a statute, the Federal Arbitration Act, narrowly to avoid serious constitutional doubts is doctrinally inapplicable to construing a Federal Rule narrowly to avoid a conflict abridging, enlarging, or modifying substantive rights, and the Court seems to acknowledge the distinction. The Court's reference can be construed as support for use of avoidance principles to prevent contravention of the substantive rights limitation of the REA. *Bernhardt*, 350 U.S. at 201-02.

Hanna avoidance jurisprudence, and has construed Rules narrowly on a seemingly ad hoc basis to avoid a conflict with state law. This has produced avoidance results that cannot be replicated in lower courts, has permitted Federal Rules to be subordinated to state procedural law, and has permitted Federal Rules to take on different meanings in diversity and federal question cases.

2. Avoidance in Post-*Hanna* Cases

a. Avoidance in Post-*Hanna*, *Erie* Cases

The Supreme Court's post-*Hanna*, *Erie* cases have generally premised avoidance, when it is used, on the federalism goals of avoiding interference with important state interests or important state regulatory policies,[187] but otherwise reveal a continuing search for an appropriate avoidance principle. The cases exhibit little consistency in approach to avoidance, in defining when state interests or regulatory policies would qualify as important, and little consistent reliance on Rule text, Rule history, or Advisory Committee Notes to limit permissible "saving" constructions. This avoidance, based on an unbounded concept of important state interests and regulatory policies, has led to differing interpretations of Federal Rules in diversity and federal question cases.

In *Walker v. Armco Steel Corp.*,[188] the Supreme Court revisited the issue it addressed in *Ragan*—whether Rule 3 or state law controls the commencement of an action for purposes of tolling the state statute of limitations.[189] Rule 3 and state law seemed to be in "direct conflict," and the appellate court so stated, although it "felt . . . 'constrained' to follow *Ragan*."[190] The Supreme Court in *Walker* also construed Federal Rule 3 not to conflict with the state statute, relying, in part, on *stare decisis* and the need to reconsider both *Hanna* and *Ragan* if it were to conclude that Rule 3 and the state statute conflicted.[191] The *Walker* Court additionally cautioned against a narrow construction of a Federal

187. Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 503-04 (2001); Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 427 & n.7, 436-37 (1996); Walker v. Armco Steel Corp., 446 U.S. 740, 751-52 & nn.12-13 (1980).

188. *Walker*, 446 U.S. 740.

189. *Id.* at 742-43. As in *Ragan*, the state statute in *Walker* provided that an action would be deemed commenced when the defendant was served, and Rule 3 provided for commencement when the complaint was filed. *Id.* at 742-43 & nn.3-4. Also paralleling *Ragan*, the plaintiff in *Walker*, filed the complaint within the state's statute of limitations, but did not perfect service within that time period. *Id.*

190. *Id.* at 744.

191. *Id.* at 745-49.

Rule to avert a conflict between Federal Rule and state law when contrary to a plain textual reading of the Rule at issue.[192] Having so advised, however, the Court construed Rule 3 narrowly and against a plain reading of its text and, perhaps, history[193]—an impermissible result under the analogous canon to construe ambiguous statutes to avoid an unconstitutional construction.[194]

Construing a Federal Rule against its text and doing so to protect state interests, rather than separation of powers interests, creates potential for inconsistencies when the same Rule is construed in federal question cases. This potential for inconsistency played out in the nondiversity case, *West v. Conrail*,[195] in which the Supreme Court construed Rule 3 differently than in *Walker*, holding that a complaint is timely filed if it is filed, in accord with Rule 3, before the applicable statute of limitations runs.[196] The Court expressly declined to borrow the statute of limitations provisions for service of process[197] and expressly noted that its construction of Rule 3 meant that Rule 3 would be construed differently in diversity and federal question cases, a methodology that commentators have disparaged as effectively giving "two plain meanings" to Rule 3.[198] More fundamentally, Court reliance on state interests to guide avoidance when state law is in potential conflict with Federal Rules but on "substantive rights" when federal law is in potential conflict with Federal Rules, creates two standards for Rule validity under the REA. When combined with a willingness to construe

192. *Id.* at 749-50 & n.9.

193. *Id.* at 750-51 & n.10. Given the Advisory Committee Note's discussion of the potential Rule-validity issue in instances in which Rule 3 clashed with law (federal or state) that tolled the statute of limitations based on service, it may be that the rulemakers anticipated a conflict that would trigger the Rule validity analysis.

194. *Cf.* Barrett, *supra* note 57, at 111, 165-67 (emphasizing that substantive canons "can never be applied to overcome the plain language of a statute . . . . [but can be used] to reject the most natural interpretation of a statute in favor of a less plausible one that advances a particular value," and noting that such an interpretation respects "the outer limits of statutory language"); Philip P. Frickey, *Getting from Joe to Gene (McCarthy): The Avoidance Canon, Legal Process Theory, and Narrowing Statutory Interpretation in the Early Warren Court*, 93 CAL. L. REV. 397, 459 (2005) (emphasizing that it is "an essential precondition" of use of the avoidance canon that the alternative interpretation be plausible); Young, *supra* note 57, at 1576 (providing that "Congress's intended construction governs where the intent is clear" and that "[t]he avoidance canon . . . comes up only when there is doubt . . . about what the statute means in the first place").

195. 481 U.S. 35 (1987).

196. *Id.* at 39.

197. *Id.*

198. *See* Dudley & Rutherglen, *supra* note 45, at 743-44; Gavit, *supra* note 30, at 3; Struve, *supra* note 59, at 1150-51.

Rules contrary to their text and history, moreover, the door is open again to "*Erie* unlimited."[199]

In its next REA case, the Court did not rely on avoidance, but construed the Federal Rule broadly to cover the point in dispute. In *Burlington Northern Railroad Co. v. Woods*,[200] the Court considered an apparent conflict between Federal Rule of Civil Procedure 38 and an Alabama statute that imposed a mandatory ten percent affirmance penalty when a money judgment was affirmed on appeal without substantial modification.[201] Rule 38, by contrast, provided that "[i]f the court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee."[202] The *Burlington Northern* Court noted the purposes of Alabama's mandatory affirmance penalty were to penalize frivolous appeals and to provide additional damages for having to undergo appeal,[203] and the purpose of Rule 38 was to permit "damages . . . by the court in its discretion in the case of a frivolous appeal as a matter of justice to the appellee and as a penalty against the appellant."[204] The Court, first, provided a broader definition of the scope of a Federal Rule, indicating that a Federal Rule conflicts with state law if it is "'sufficiently broad' to cause a 'direct collision' with the state law or, implicitly, to 'control the issue' before the court, thereby leaving no room for the operation of [state] law."[205] Under this standard, the Court concluded that the discretion permitted by Rule 38 conflicted unmistakably with the mandatory nature of the state statute, and the purposes of the federal and state provisions were "sufficiently coextensive" to establish that the Federal Rule "occupie[d] the [state] statute's field of operation so as to preclude its application."[206]

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199. Gavit, *supra* note 30, at 1.

200. 480 U.S. 1 (1987).

201. The Alabama statute provided, in pertinent part, as follows:

> When a judgment or decree is entered or rendered for money, whether debt or damages, and the same has been stayed on appeal by the execution of bond, with surety, if the appellate court affirms the judgment of the court below, it must also enter judgment against all or any of the obligors on the bond for the amount of the affirmed judgment, 10 percent damages thereon and the costs of the appellate court. . . .

Id. at 480 U.S. at 3.

202. *Id.* at 4.

203. *Id.*

204. *Id.* (citing Advisory Committee's Notes on Fed. R. App. Proc. 38, 28 U.S.C. App. p. 492).

205. *Id.* at 4-5 (citing Walker v. Armco Steel Corp., 446 U.S. 740, 749-50 & n.9 (1980); Hanna v. Plumer, 380 U.S. 460, 471-72 (1965)).

206. *Id.* at 7. Compare Whitten, *supra* note 95, at 21-25 & nn.117-120 (concluding that the Court should have found no conflict between Rule 38 and the Alabama statute because (1) Rule 38 dealt only with frivolous appeals and the Alabama statute dealt as well with nonfrivolous, but nonmeritorious appeals, such as the appeal in *Burlington Northern*; (2) if the Court had concluded

The *Burlington Northern* Court reached out to find a conflict where none was necessary since Rule 38 is, by its terms, limited to penalizing frivolous appeals and the Alabama statute at issue encompassed nonmeritorious as well as frivolous appeals. It also did so in the face of a substantive purpose of state law to augment available damages when a holder of a money judgment survived appeal with the judgment substantially intact. The case seemed to indicate that the Supreme Court was abandoning both avoidance as a principle of Rule interpretation and its prior protection of state interests.

Any such intent was short-lived, as the Court, in *Gasperini*, changed course yet again and endorsed a broad avoidance principle – an "accommodation" approach, in which the Court balanced and attempted to accommodate the interests underlying the potentially conflicting federal and state standards.[207] The *Gasperini* Court eschewed the *Hanna* methodology of beginning with an inquiry into the scope of the potentially conflicting Federal Rule. It, instead, concluded that the New York statute at issue, New York Civil Practice Law and Rules (CPLR) § 5501(c),[208] was both substantive and procedural,[209] and it emphasized that the "dispositive question . . . [was] whether federal courts can give effect to the substantive thrust of [CPLR] § 5501(c) without untoward alteration of the federal scheme for the trial and decision of civil cases."[210] In pursuit of the goal of interest accommodation, the

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that Rule 38's regulation of frivolous appeals impliedly negated ability to impose penalties for nonmeritorious appeals, it should have so stated and it should have distinguished *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 556 (1949); and (3) if other Federal Rules and statutes combined with Rule 38 to occupy the field of penalties for frivolous and nonfrivolous appeals, the Court should likewise have so stated), *with* Burbank & Wolff, *supra* note 59, at 38-39 (suggesting that the *Burlington Northern* Court may have been proposing a type of "field preemption" regarding federal provision of financial incentives that provide "losing federal court litigants' incentives to appeal," based on the existence of multiple federal statutes and Federal Rules regarding prejudgment and postjudgment interest and regarding imposition of costs and damages for improvident appeals).

207. Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 419, 436-38 & n.22 (1996).

208. New York CPLR § 5501(c) based appellate review of an itemized verdict on a standard of whether the verdict "deviates materially from what would be reasonable compensation" —a less deferential review standard than would have been imposed in federal court under standards encompassed by Fed. R. Civ. P. 59(a). N.Y.C.P.L.R. § 5501 (MCKINNEY 1997). Rule 59(a) provided that "[a] new trial may be granted . . . for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States." *Gasperini*, 518 U.S. at 467-68 (Scalia, J., dissenting) (quoting FED. R. CIV. P. 59 (emphasis that was added in the *Gasperini* case has been omitted here)).

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

210. *Id.* at 426. *See also id.* at 437 (noting that "the principal state and federal interests can be accommodated" and that "New York's dominant interest can be respected, without disrupting the federal system, once it is recognized that the district court is capable of performing the checking

Gasperini Court weighed the substantive and, thus, "dominant" state interest and federal interests and determined that both interests could be served by providing trial court review, rather than appellate review of the verdict.[211] The standard *Hanna* scope analysis was relegated to a footnote, was addressed much later in the opinion, and consisted primarily of statements that Federal Rule of Civil Procedure 59(a) was inapplicable and that the Court interprets Federal Rules to avoid conflict with important state regulatory policies.[212] *Gasperini*'s avoidance by accommodation hinged much less on adopting a plausible, though narrowed, construction of the text of Rule 59(a) than on the goal of limiting application of Rule 59(a), if important state and federal interests could both be served by finding a way to accommodate federal and state interests.

Finally, in *Semtek International Inc. v. Lockheed Martin Corp.*,[213] a unanimous Supreme Court likewise employed a broad avoidance principle, but this time one that paralleled the modern statutory canon to avoid serious constitutional doubts. It based avoidance on, among other factors, both separation of powers and federalism concerns. The *Semtek* Court construed Federal Rule of Civil Procedure 41(b) narrowly (but against its accepted meaning) to avoid conflict with California preclusion law that would have permitted a case to proceed.[214] Rule 41(b) provided that certain dismissals would operate as an "adjudication upon the merits,"[215] and it, thus, seemed to define judgments that would be eligible for claim preclusive effect. To avoid an interpretation of Rule 41(b) that conflicted with California's more lenient law and that was, thus, arguably in violation of both the substantive rights limitation of the REA and "the federalism principle of *Erie*," the Court contorted

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function, *i.e.*, that the court can apply the State's 'deviates materially' standard in line with New York case law . . . .").

211. *Id.* at 438-39.

212. *Id.* at 437 & n.22. This avoidance by accommodation foreshadows Justice Ginsburg's similar avoidance strategy in *Shady Grove*, in which she inquires, first, not about the scope of the Federal Rule, but whether a conflict is really necessary. Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1460-61 (2010) (Ginsburg, J., dissenting). More specifically, Justice Ginsburg counsels avoidance when "immoderate interpretations of the Federal Rules . . . would trench on state prerogatives without serving any countervailing federal interest." *Id.* at 1461.

213. 531 U.S. 497 (2001).

214. The issue in *Semtek* was "whether the claim-preclusive effect of a federal judgment dismissing a diversity action on statute-of-limitations grounds is determined by the law of the State in which the federal court sits." *Semtek*, 531 U.S. at 499.

215. *Id.* at 501 (quoting FED. R. CIV. P. 41(b)). Rule 41(b) provided, in part, as follows: "any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits." *Id.*

the meaning of "adjudication upon the merits," determining that it meant only that a litigant could not refile the suit in the same district court.[216] Commentators have referred to this limiting construction as "transparently dubious,"[217] "remarkably strained,"[218] and "wildly implausible."[219] The *Semtek* Court, thus, returned to a "serious doubts" avoidance analysis and appropriately based avoidance on the Rule's potential violation of substantive rights, but it also considered federalism interests. The saving construction adopted by the *Semtek* Court, moreover, was contrary to the unambiguous meaning of the text, the Rule's history as revealed in Advisory Committee Notes and other Advisory Committee information, and prior construction of Rule 41(b),[220] an impermissible result under "serious doubts" avoidance principles.[221]

In summary, avoidance in the post-*Hanna*, *Erie* cases has emerged as a malleable surrogate for meaningful guidance regarding the substantive rights limitation. The avoidance cases demonstrate little consistency, save for a consistent focus on avoidance to protect state interests, which has permitted differing interpretations of Federal Rules in diversity and federal question cases. This focus has permitted too much emphasis on unbounded "state interests" and too little on whether the Federal Rule impermissibly impacts substantive rights. The Court has also repeatedly changed its methodology for avoidance, thus demonstrating continuing dissatisfaction with its avoidance analysis and also contrasting with the Court's fairly consistent use of a serious doubts analysis, bounded by Rule text and history, in its admittedly few non-*Erie*, REA cases.

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216. *Id*. at 503-06.

217. *See, e.g.*, Burbank, *supra* note 45, at 1042-46 (referring to the Court's construction of Rule 41(b) as "a transparently dubious interpretation" and concluding that the Rule's history affords "no suggestion . . . that the rulemakers intended to cabin the effects [of Rule 41(b)] to the rendering court").

218. Patrick Woolley, *Choice of Law and the Protection of Class Members in Class Suits Certified Under Federal Rule of Civil Procedure 23(b)(3)*, 2004 MICH. ST. L. REV. 799, 815-16 (2004) (emphasizing that the interpretation was "contrary . . . to the text of the Rule" and "had no support in the legislative history of the Rule").

219. Patrick J. Borchers, *The Real Risk of Forum Shopping: A Dissent from* Shady Grove, 44 CREIGHTON L. REV. 29, 34 (2010).

220. *See, e.g.*, Burbank, *supra* note 45, at 1039-47; Struve, *supra* note 59, at 1150.

221. *See supra* note 195.

b. Avoidance in Other REA Contexts

While the Court has struggled with the scope of Federal Rules in Federal Rule-state law conflicts, the Court has also examined the issue of Rule scope in other contexts, including congressional statute-Federal Rule conflicts and in general Rule interpretation.[222] Though the Court has taken fewer opportunities to address avoidance in non-*Erie*, REA cases,[223] it has used a serious doubts model of avoidance and relied more heavily on text and history of the Rule, as described in Advisory Committee materials, as a limit on plausible Rule interpretation.

In resolving apparent congressional statute-Federal Rule conflicts, courts have sometimes treated Federal Rules as though they were statutes and as though the Court's prospective rulemaking authority were equivalent to Congress's lawmaking authority.[224] This is contrary to the Court's attitude in *Erie* REA cases in which the Court has often subordinated Federal Rules to state law. The attitude may be attributed, in part, to the period of nearly forty years following the enactment of the REA, in which Congress generally declined to enact legislation that included procedural provisions or to enact amendments to the Federal Rules.[225] Ultimately, following the 1973 skirmish over promulgation of the Federal Rules of Evidence,[226] Congress became concerned that the proposed evidence rules overstepped the substantive rights limitation. Congress, thus, became more active in the rulemaking process and more vigilant regarding potential rulemaking infractions of the substantive rights limitation. This meant that the substantive rights limitation would not be construed solely in *Erie* cases featuring Federal Rules and state law. The Supreme Court would now ignore the substantive rights limitation in statute-Rule cases to the detriment of its rulemaking

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222. *See, e.g.*, Ortiz v. Fibreboard Corp., 527 U.S. 815, 845-48 (1999); Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 612-22 (1997); Kamen v. Kemper Fin. Servs., Inc., 500 U.S. 90, 96 (1991); Daily Income Fund, Inc. v. Fox, 464 U.S. 523, 542-44 & n.2 (1984) (Stevens, J., concurring in judgment); *but see* Marek v. Chesny, 473 U.S. 1 (1985) (failing to consider directly potential substantive rights issue).

223. Genetin, *Conflicts Between Congressional Statutes and Federal Rules*, *supra* note 10, at 705-06, 721-26, 750-51 (discussing tendency of federal courts to use an analogy to the statutory canon of implied repeal in conflicts between congressional statutes and Federal Rules, which obscures issues of rulemaking authority under the REA).

224. Genetin, *Conflicts Between Congressional Statutes and Federal Rules*, *supra* note 10, at 704-05; *see also supra* notes 84-87 and accompanying text.

225. *See supra* notes 81-91 and accompanying text.

226. *E.g.*, Bone, *Process of Making Process*, *supra* note 20, at 902-03; Genetin, *Conflicts Between Congressional Statutes and Federal Rules*, *supra* note 10, at 694-96; Peter G. McCabe, *Renewal of the Federal Rulemaking Process*, 44 AM. U. L. REV. 1655, 1660-62 (1995); Moore, *supra* note 10, at 1054-61.

authority. In fact, some commentators believe the Court's disregard of the potential substantive rights infraction in *Marek v. Chesny*,[227] in part, triggered Congress's unsuccessful attempt to subordinate Court rulemaking to congressional statutes by repealing a portion of the REA.[228]

The Court's 1984 decision in *Daily Income Fund, Inc. v. Fox*,[229] appears to be the first congressional statute-Federal Rule case in which a justice counseled narrow construction of a Federal Rule to avoid potential violation of the substantive rights proviso (although the Court had been using an avoidance canon intermittently in *Erie* cases since 1943).[230] In *Daily Income Fund*, the Court considered whether Rule 23.1 imposed a demand requirement before a shareholder could initiate a derivative action against a mutual fund under § 36(b) of the Investment Company Act of 1940 (ICA). The majority in *Daily Income Fund* did not reach the REA issue.[231]

In a concurring opinion, however, Justice Stevens used a serious doubts analysis to read Rule 23.1 narrowly and not to impose a demand requirement in any scenario, in order to avoid the conclusion that Rule 23.1 impacted substantive rights in violation of the REA.[232] Justice Stevens conceded that a shareholder demand requirement in a derivative suit enhances the role of managerial prerogatives and expertise, is designed to improve corporate governance, and is substantive.[233] He emphasized, however, that "the history of Rule 23.1 and its predecessors . . . demonstrates" that the demand requirement was created by federal common law in *Hawes v. City of Oakland*,[234] and not in Rule 23.1.[235] Moreover, Rule 23.1, by its plain text, did not impose a demand requirement, but imposed only a pleading requirement—that the complaint allege with particularity the demand, if any, that the complainant had made on the corporation.[236] The Rule, thus, enabled a

227. 473 U.S. 1 (1985).

228. *See infra* note 250 and accompanying text.

229. 464 U.S. 523 (1984).

230. Palmer v. Hoffman, 318 U.S. 109 (1943).

231. *Daily Income Fund*, 464 U.S. at 533-42. The majority concluded that a § 36(b) action was not a "derivative action" because § 36(b) could not be enforced by a mutual fund. *Id.*

232. *Id.* at 542-44 & n.2 (Stevens, J., concurring in judgment).

233. *Id.* at 544 n.2 (citing Walker v. Armco Steel Corp., 446 U.S. 740 (1980) and Ely, *supra* note 15)).

234. *Id.* at 543-44 & n.2.

235. *Id.* at 543 (Stevens, J., concurring in judgment).

236. *Id.* Rule 23.1 provided at the time, in pertinent part, as follows:

> The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority and, if

court to ascertain from the pleadings whether an otherwise applicable demand requirement had been satisfied.[237] In language similar to the canon to construe against serious constitutional doubts, Justice Stevens determined that there is a "substantial doubt whether [Rule 23.1] could create . . . [a demand] requirement consistently with the Rules Enabling Act,"[238] and, thus, "[s]ince the rule does not clearly create such a substantive requirement by its express terms, it should not be lightly construed to do so and thereby alter substantive rights."[239] In so concluding, Justice Stevens relied on the text and history of Rule 23.1. The Supreme Court returned to the issue of whether Rule 23.1 should be construed narrowly and not to impose a demand requirement in the 1991 case of *Kamen v. Kemper Financial Services, Inc.*[240] Concluding that a demand requirement is substantive, it adopted the narrow construction of Rule 23.1 suggested by Justice Stevens in *Daily Income Fund*.[241]

The year after the Court decided *Daily Income Fund*, however, a majority of the Court, in *Marek v. Chesny*,[242] declined even to address the issue of whether the construction of Federal Rule of Civil Procedure 68 that it adopted would violate the substantive rights limitation. At issue was whether a prevailing plaintiff's right to attorney fees under the Civil Rights Attorney Fees Act, in which attorneys fees are defined to be part of "costs,"[243] would be subject to shifting of "costs" under Rule 68,[244] and, further, according to Justice Brennan in dissent, whether such

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> necessary, from the shareholders or members, and the reasons for his failure to obtain the action or for not making the effort.

Id. at 543 n.1 (Stevens, J., concurring in judgment).

237. *Id*. at 543.

238. *Id*. at 544 n.2 (citing Miss. Publ'g Co. v. Murphree, 326 U.S. 438 (1946); Sibbach v. Wilson & Co., 312 U.S. 1 (1941)).

239. *Id*. (citing Hanna v. Plumer, 380 U.S. 460, 470-71 (1965)).

240. 500 U.S. 90 (1991).

241. *Id*. at 96-97 (citing *Daily Income Fund*, 464 U.S. at 543-44 & n.2 (Stevens, J., concurring in judgment); Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 555-57 (1949); *Hanna*, 380 U.S. at 477).

242. 473 U.S. 1 (1985).

243. 42 U.S.C. § 1988b provided as follows:

> In any action or proceeding to enforce [relevant sections of this and other titles], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

42 U.S.C. § 1988(b).

244. Rule 68 provided, in part, as follows:

> (a) At least 14 days before the date set for trial, a party defending a claim may serve on an opposing party an offer to allow judgment on specified terms, with the costs then

a construction of Rule 68 would violate the substantive rights limitation of the REA. Disregarding the issue of impermissible impact on substantive rights, the *Marek* majority used a "plain meaning" construction of the intersection of Rule 68 and 42 U.S.C. § 1988, to conclude that the two provisions could be harmonized: Rule 68 provided for shifting of "costs" incurred after a plaintiff failed to accept a Rule 68 offer of judgment and later received less than the offer at trial, and § 1988 defined "costs" for purposes of the Civil Rights Attorney Fee Act to include "attorney fees."[245] Hence, the Court held that, absent a clear expression of congressional intent to the contrary, attorney fees in civil rights actions were "costs" that could be forfeited under Rule 68.[246] Justice Brennan forcefully asserted in dissent that the majority's interpretation of Rule 68 violated the substantive rights provision of the REA because it permitted a little known Federal Rule regarding "cost" shifting to override Congress's policy decision that prevailing plaintiffs in § 1983 civil rights actions should normally receive attorney fees.[247] Moreover, Judge Posner, who wrote the Seventh Circuit opinion that was ultimately overturned by the Supreme Court majority in *Marek*, advised a "serious doubts" type of avoidance, emphasizing that Federal Rules "have sometimes been interpreted or their domain of application narrowed to avoid abridging substantive rights;" he cited, inter alia, *Erie* REA avoidance cases; and he concluded that the term "costs" in Rule 68 should have been narrowly construed to avoid an interpretation that would abridge the right to attorney fees under 42 U.S.C. § 1988.[248]

The *Marek* decision sparked congressional concern that the Court was exceeding its prospective rulemaking authority under the REA and, in part, precipitated the House of Representative's ultimately unsuccessful attempt to amend the REA so that conflicting Federal Rules

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> accrued.
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> . . .
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> (d) If the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made.

FED. R. CIV. P. 68(a), (d).

245. *Marek*, 473 U.S. at 9; *id*. at 15-16 (Brennan, J., dissenting); *accord* Bone, *To Encourage Settlement*, *supra* note 20, at 611; Genetin, *Conflicts Between Congressional Statutes and Federal Rules*, *supra* note 10, at 706-10. The *Marek* majority did conclude that its construction of the intersection of § 1988 and Rule 68 was not inconsistent with Congress's objectives in enacting § 1988. *E.g.*, *Marek*, 473 U.S. at 10-11; Genetin, *Conflicts Between Congressional Statutes and Federal Rules*, *supra* note 10, at 709.

246. *Marek*, 473 U.S. at 9.

247. *Id*. at 28-38 (Brennan, J., dissenting).

248. Chesny v. Marek, 720 F.2d 474, 479 (7th Cir. 1984), *rev'd* 473 U.S. 1 (1985); *accord Marek*, 473 U.S. at 32-38 (Brennan, J., dissenting).

would not supersede congressional statutes.[249] *Marek* underscores, in the congressional statute-Federal Rule context, the real risks of Rule interpretation when courts rely on text unaided by the touchstones of history and purpose. Indeed, Professor Bone has characterized *Marek v. Chesny* as "perhaps the most notorious example of the hazards created by an oversimplified interpretive approach."[250] He has also concluded that the presumption of validity that *Hanna* extends to Federal Rules[251] should extend only to Rule interpretations that "further the Rule's actual purpose in some sufficiently direct way," since the presumption is premised on the Rule's having been vetted through the Enabling Act process.[252]

Finally, in *Ortiz v. Fibreboard Corp.*, the Supreme Court used a serious doubts avoidance methodology and relied on Rule text and history in adopting a narrowed construction of Rule 23(b)(1)(B).[253] In *Ortiz*, the Supreme Court adopted a limiting construction of the "limited fund" class action available under Rule 23(b)(1)(B) in order to avoid violating the REA's requirement that Rules not abridge, enlarge, or modify substantive rights and to stay close to the historical basis for the limited fund class.[254] The *Ortiz* Court rejected a proposed broad

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249. *E.g.*, Linda S. Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795, 850 (1991). *See also generally* Burbank, *supra* note 10, at 1030-39; Moore, *supra* note 10, at 1044-48; Note, *The Rules Enabling Act and the Limits of Rule 23*, 111 HARV. L. REV. 2294, 2298-99 (1998). The attempt to amend the REA to eliminate the provision permitting Federal Rules to supersede federal statutes failed because the Senate refused to pass similar legislation, in part based on Chief Justice Rehnquist's pledge to tread carefully in promulgating Federal Rules that might violate the substantive rights limitation. Moore, *supra* note 10, at 1051-52.

250. Bone, *To Encourage Settlement*, *supra* note 20, at 1615.

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

252. Bone, *To Encourage Settlement*, *supra* note 20, at 1616-17; David Marcus, *When Rules Are Rules: The Federal Rules of Civil Procedure and Institutions in Legal Interpretation*, ___ UTAH L. REV. (forthcoming 2011), *available at* http://ssrn.com/abstract=1852856 (concluding that, in interpreting Federal Rules of Civil Procedure, courts should "inquire into rulemaker intent or how a rule's authors hoped it would apply, and purpose, or what functions a rule's authors wanted it to serve").

253. 527 U.S. 815 (1999). *See also* Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997). In *Amchem*, the Supreme Court also referenced avoidance in construing Rule 23. The *Amchem* Court emphasized the "extensive deliberative process" under the REA and that the process is "properly tuned" to Congress's instruction that Federal Rules "shall not . . . abridge . . . any substantive right." *Id*. at 620. Observing that class action practice had become "ever more 'adventuresome,'" the Court reviewed the history of class action practice and concluded that federal courts "lack authority to substitute for Rule 23's certification criteria" the fairness hearing requirements. *Id*. at 617, 621-22.

254. *Ortiz*, 527 U.S. at 842-45. In *Ortiz*, attorneys, who proposed a settlement class action on a limited fund basis, sought certification of a 23(b)(1)(B) class that did not meet the following traditional requirements of a limited fund class: The totals of the aggregated liquidated claims and the fund available for satisfying them, set definitely at their maximums, should demonstrate the

mandatory settlement class rationale, concluding that although the text of the Rule could accommodate the proposed "adventurous"[255] application of the limited fund class, the Advisory Committee Notes showed that Rule 23(b)(1) was drafted in a "consciously retrospective" manner with an "intent to codify pre-Rule categories."[256] Further, the Court concluded that the substantive rights proviso of the REA also encouraged a cautious and narrower construction of the limited fund class action under Rule 23(b)(1)(B), noting that the broader construction of the Rule would set up a potential conflict between the pro rata distribution of available funds proposed in a Rule 23(b)(1)(B) class action and the right to complete recovery in personal injury actions under state law.[257] The Court emphasized that, even if some tension between a Federal Rule and state law is permissible, it is best to keep the tension within tolerable limits by narrowing the limited fund action available under Rule 23(b)(1)(B) to practice preceding adoption.[258] The Court, thus, applied a "serious doubts" avoidance methodology to adopt a limiting construction of Rule 23(b)(1)(B), and it limited the Rule's coverage to the "practice preceding its adoption" and "Advisory Committee's expressions of understanding" regarding the scope of limited fund class actions.[259]

Thus, in its few non-*Erie*, REA cases, the Court has generally used a serious doubts method of avoidance to stay within the substantive rights limitation of the REA, and it has calibrated its limiting interpretations to plausible interpretations based on the Rule's text, history, and purposes as discussed in relevant Advisory Committee Notes, reports, and other information. In *Marek v. Chesny*, the Court failed to do so, but at the price of heightened congressional concern that the Court was overstepping the substantive rights boundary.[260] In *Shady Grove*, the justices engage, once again, the important issues of

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inadequacy of the fund to pay all the claims, *id*. at 838-39, "the whole of the inadequate fund [should] . . . be devoted to the overwhelming claims," *id*. at 839, and the claimants identified by a common theory of recovery should be treated equitably among themselves. The proposed Rule 23(b)(1)(B) class fell short of these requirements because, inter alia, the dollar amount comprising the "limited fund" was set by agreement of the defendants, the claimants did not include all potentially interested claimants, and the proposed payout would not deliver the proceeds on a pro rata basis. *Id*. at 839-41.

255. *Id.* at 845.

256. *Id*. at 842-43.

257. *Id*. at 845.

258. *Id*.

259. *Id.* at 842-46.

260. *See, e.g.*, Burbank, *supra* note 10, at 1029-36; Genetin, *Conflicts Between Congressional Statutes and Federal Rules*, *supra* note 10, at 697-98, 709; Moore, *supra* note 10, at 1043-50.

appropriate methodology and guiding principles for avoidance in REA cases. They reference and adopt varying elements of the Court's historical use of avoidance, to propose three different methods for avoidance that span a range of providing a very narrow to an extremely broad scope for avoidance in REA issues.

III. THE *SHADY GROVE* DEBATE REGARDING AVOIDANCE IN REA CASES

The fractured opinions in *Shady Grove* reveal wide-ranging differences on the Court regarding both the interpretation of the substantive rights proviso of the REA[261] and the nature and extent of an appropriate avoidance canon of Rule interpretation in REA cases. Section II revealed that the Supreme Court has, since its first use of an avoidance canon in REA cases in *Palmer v. Hoffman*,[262] vacillated regarding whether it would even use an avoidance canon in interpreting compliance with the substantive rights limitation of the REA, concluding most often that avoidance was appropriate, but at other times that it would construe Rules broadly and find a conflict when no conflict seemed necessary.[263] The Court has also used differing avoidance methodologies. The majority, concurring, and dissenting opinions in *Shady Grove* exhibit the Court's continuing ambivalence regarding the appropriate model for avoidance, with Justice Scalia, in dicta, presenting a type of classical avoidance; Justice Stevens joining that portion of Justice Scalia's opinion, but also proposing a version of a serious doubts canon of avoidance; and Justice Ginsburg, in dissent, preferring a theory of avoidance by accommodation.

The *Shady Grove* case involved a potential conflict between language in Fed. R. Civ. P. 23(b), which provides that "a class action may be maintained" if the requirements of Rule 23(a) and 23(b) are met, and CPLR § 901(b), which forbids maintenance of a class action for a statutorily prescribed penalty or minimum payment, unless the

261. Justice Scalia, writing for a plurality in *Shady Grove* would adhere to a standard of whether a Rule "'really regulat[e][s] procedure.'" Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1442 (2010) (Scalia, J., for himself, Roberts, C.J., Thomas, J., and Sotomayor, J.). Justice Stevens, in concurrence in *Shady Grove*, suggests that the substantive rights limitation precludes Federal Rules that "would displace a state law that is procedural in the ordinary use of the term but is so intertwined with a state right or remedy that it functions to define the scope of the state-created right." *Id.* at 1452-53 & nn.8-9 (Stevens, J., concurring in part and concurring in the judgment).

262. 318 U.S. 109 (1943).

263. Burlington N. R.R. Co. v. Woods, 480 U.S. 1, 4-7 (1987); *cf.* Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 26, 28-32 (1988) (apparent congressional statute-Federal Rule conflict at issue).

authorizing statute expressly permits a class action.[264] In the underlying case, Shady Grove had provided medical care to a patient and had taken, as partial payment, an assignment of insurance benefits issued to the patient in New York by Allstate Insurance Co.[265] When Shady Grove sought payment for the assigned benefits, Allstate paid but failed to do so within the thirty-day period in which New York required either payment or denial of a claim, and Allstate later refused to pay the statutorily required interest.[266] Shady Grove thereafter filed a class action suit against Allstate in the Eastern District of New York based on diversity jurisdiction to recover unpaid interest on its own claim and on claims of all others that Allstate had allegedly failed to pay timely.[267]

Allstate countered that CPLR § 901(b) prevented the proposed class action because it precludes a class action for a penalty or minimum recovery unless the statute creating the penalty or minimum statutory damages specifically permits a class action suit.[268] Allstate also argued that, absent the ability to collect other claims for unpaid interest in a class action, Shady Grove, which incurred approximately $500 in unpaid interest, could not meet the amount in controversy requirement for diversity jurisdiction.[269] These facts set up the potential conflict between CPLR § 901(b) and Rule 23(b), which provides, in part, that "[a] class action may be maintained if Rule 23(a) is satisfied and if" the proposed class action is within one of the categories of permissible class actions set forth in Rule 23(b).[270] The District Court held that Rule 23(b) and CPLR § 901(b) did not conflict and that CPLR § 901(b) precluded class action treatment of the claim at issue.[271] It, therefore, dismissed the action for lack of subject matter jurisdiction.[272] The Second Circuit affirmed.[273]

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264. N.Y.C.P.L.R. § 901(b) (MCKINNEY 2005).

265. *Shady Grove*, 130 S. Ct. at 1436 (majority opinion).

266. *Id.*

267. *Id.* at 1436-37.

268. N.Y.C.P.L.R. § 901(b) (McKinney 2005). Section 901(b) provides as follows:

> 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 a minimum measure of recovery created or imposed by statute may not be maintained as a class action.

Id.

269. *Shady Grove*, 130 S. Ct. at 1436-37 (majority opinion).

270. FED. R. CIV. P. 23(b).

271. Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 466 F. Supp.2d 467, 475 (E.D.N.Y. 2006).

272. *Id.*

273. Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 549 F.3d 137, 143-45 (2d Cir. 2008).

In a decision that featured fractured opinions and disparate reasoning, the Supreme Court reversed, with five justices concluding that Rule 23(b) and CPLR § 901(b) conflicted, that is, Rule 23(b) is broad enough to cover the issue in dispute.[274] Five justices also concluded that Rule 23(b) is valid and, thus, preempts state law, but they differed on the rationale for validity. Justice Scalia wrote a plurality opinion that was joined by Chief Justice Roberts and Justices Thomas and Sotomayor, which concluded that Rule 23(b) was valid because the standard for validity is whether the Rule "'really regulat[e][s] 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,'"[275] and the plurality concluded that Rule 23(b) satisfied that standard. Justice Stevens concurred in the decision that Rule 23(b) was valid, but he interpreted the substantive rights limitation to preclude Federal Rules that "would displace a state law that is procedural in the ordinary use of the term but is so intertwined with a state right or remedy that it functions to define the scope of the state-created right."[276] Concluding that CPLR § 901(b) was procedural and not sufficiently intertwined with substantive purposes, Justice Stevens concluded that Rule 23 governed.[277] Justice Ginsburg dissented. Writing for four dissenting justices, she determined that Rule 23(b) did not conflict with § 901(b) and would have applied an *Erie* analysis.[278]

In this Section, I examine the divergent methods for analyzing the scope of a Federal Rule in potential conflict with state law that are presented in the majority, concurring, and dissenting opinions in *Shady*

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274. *Shady Grove*, 130 S. Ct. at 1431-42 (majority opinion). Justice Scalia wrote this portion of the opinion—Sections I and II.A—on behalf of himself, Chief Justice Roberts, and Justices Stevens, Thomas, and Sotomayor. No other portions of the opinion commanded a majority.

275. *Id*. at 1442 (Scalia, J., for himself, Roberts, C.J., Thomas, J., and Sotomayor, J.) (quoting Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941) and also citing Hanna v. Plumer, 380 U.S. 460, 464 (1965); Burlington N. R.R. Co., 480 U.S. 1, 8 (1987)). A plurality in *Shady Grove* concluded that "[w]hat matters is what the rule itself regulates: If it governs only 'the manner and the means' by which the litigants' rights are 'enforced,' it is valid; if it alters 'the rules of decision by which [the] court will adjudicate [those] rights,' it is not" *Id.* (quoting Miss. Publ'g Corp. v. Murphree, 326 U.S. 438, 445 (1946)). The plurality concluded that Rule 23(b) met this standard. *Id*. at 1443-44.

276. *Id*. at 1452-54 (Stevens, J., concurring in part and concurring in the judgment). For Justice Stevens, the substantive rights limitation will preclude an application of a Federal Rule that abridges, enlarges, or modifies substantive rights. That will happen rarely, but if a state procedural law is sufficiently intertwined with a state right or remedy, a conflicting Federal Rule may be invalidated. *Id*.

277. *Id*. at 1456-60.

278. *Id*. at 1460-74 (Ginsburg, J., dissenting). Justice Ginsburg wrote the dissent on behalf of herself and Justices Kennedy, Breyer, and Alito.

Grove. I conclude that an avoidance principle is warranted in REA cases, and it should be based on analogy to construing statutes narrowly to avoid serious constitutional doubts, in a manner similar to the avoidance principles proffered by Justice Stevens in *Shady Grove*. Such an avoidance rule of interpretation, however, should be guided by whether a Rule would encroach on Congress's substantive lawmaking choices, rather than on whether a Rule might interfere with an unlimited concept of important state interests or regulatory policies.[279] Further, in determining whether avoidance is permissible, the Court should, in line with its use of avoidance in other Enabling Act contexts,[280] construe a Rule in accord with the Rule's text and its history and purposes, as set forth in the Advisory Committee Notes and other Advisory Committee sources.[281]

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279. Justice Stevens, at times, states broadly that "federal rules cannot displace a State's definition of its own rights or remedies." *Id.* at 1449 (Stevens, J., concurring in part and concurring in the judgment). Although this is, as a general matter, true, the Court has also recognized that "[t]he cardinal purpose of Congress in authorizing the development of a uniform and consistent system of rules governing federal practice and procedure suggests that Rules which incidentally affect litigants' substantive rights do not violate this provision if reasonably necessary to maintain the integrity of that system of rules." *Burlington*, 480 U.S. at 5-6(citing *Hanna*, 380 U.S. at 464-65; *Murphree*, 326 U.S. at 445-46; 19 C. WRIGHT, A. MILLER, & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4509, at 145-46 (1982)).

280. *See supra* notes 225-61 and accompanying text.

281. *Shady Grove*, 130 S. Ct. at 1452 (Stevens, J., concurring in part and concurring in the judgment) ("When a federal rule appears to abridge, enlarge, or modify a substantive right, the federal courts must consider whether the rule can reasonably be interpreted to avoid that impermissible result. . . . And when such a 'saving' construction is not possible and the rule would violate the Enabling Act, federal courts cannot apply the rule"). *See also* Bone, *To Encourage Settlement*, *supra* note 20, at 1615-17 (concluding that the text and purpose of Rule 68 better explain the Rule than the Court's plain language approach in *Marek v. Chesny*, 473 U.S. 1 (1985) and that, when construing Federal Rules in light of the substantive rights limitation, interpretations of Rules should be accorded *Hanna*'s presumption of validity only if they "further the Rule's actual purpose in some sufficiently direct way"); Marcus, *supra* note 253, at 5, 37, 48-51 (recognizing importance of the Advisory Committee Notes and other documents created in the rulemaking process and concluding that, in interpreting Federal Rules, courts should act as faithful agents of the rulemakers, absent extraordinary circumstances); Nathan R. Sellers, *Defending the Formal Federal Civil Rulemaking Process: Why the Court Should Not Amend Procedural Rules Through Judicial Interpretation*, 42 LOY. U. CHI. L.J. 327, 328-39 (2011) (concluding that the Court should amend Rules only through the formal Enabling Act process because of the opportunity for input from diverse constituencies, the greater ability to make systemic changes through the rulemaking process, the ability to clarify amendments, and the opportunity for review by Congress); Struve, *supra* note 59, at 1124-42, 1147 (suggesting that the nature of and reality of the Enabling Act process counsel restraint in Court construction of Federal Rules and that the Court should "give[] authoritative weight to the Advisory Committee Notes"). *See also* Burbank & Wolff, *supra* note 59, at 48-49 (advocating that unless a Federal Rule "actually makes a policy choice that Congress has had an opportunity to review [following its prescribed Enabling Act process]," the Court should be able to use its federal common lawmaking authority in Rule interpretation).

A. Avoidance by Analogy to the Canon to Construe Statutes Against Serious Constitutional Doubts

1. Justice Scalia, in Dicta, Endorses a Type of Classical Avoidance

In the portion of his opinion that attracted five justices,[282] Justice Scalia reiterated the two-part framework for resolving REA issues that has been standard since *Hanna v. Plumer*[283] and also discussed in dicta an avoidance canon for Federal Rule-state law conflicts. The REA framework, he noted, entails a twofold inquiry. First, one must ask whether the disputed point falls within the scope of the Federal Rule,[284] or as Justice Scalia stated in *Shady Grove*, in perhaps a broader formulation of the scope inquiry, whether the Rule and arguably conflicting state law "answer[] the same question."[285] If the answer to that question is affirmative, then, in contrast to the "relatively unguided *Erie* choice" under the RDA, one must inquire whether the Rule is within Congress's constitutional rulemaking authority and within the limits of rulemaking authority delegated to the Supreme Court in the REA.[286]

With respect to the initial inquiry regarding whether a Federal Rule and state law conflict, Justice Scalia, in dicta, endorsed a type of classical avoidance canon—avoidance that is triggered if a Rule is susceptible of two meanings, one that *would* violate the substantive rights proviso and one that would not.[287] This recharacterizes slightly, but significantly, the avoidance analysis Justice Scalia has used in previous opinions.[288] Of equal importance, Justice Scalia's analysis of the scope of Rule 23(b) in *Shady Grove* differs from his avoidance analysis in prior opinions in that he no longer appears willing to find the Federal Rule ambiguous or susceptible of two meanings and thus to permit a limiting construction.[289]

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282. Justice Scalia was joined by Chief Justice Roberts and Justices Stevens, Thomas, and Sotomayor in Sections I and II.A. of his opinion.

283. *Hanna*, 380 U.S. at 460, 463-65, 469-71.

284. *Id.* at 470-72.

285. *Shady Grove*, 130 S. Ct. at 1437 (majority opinion).

286. *Id.*

287. *Id.* at 1441-42 & nn.7-8.

288. *See, e.g.*, Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 501-04 (2001). *See also* Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 37 (1988) (Scalia, J., dissenting).

289. *Shady Grove*, 130 S. Ct. at 1437, 1442 (majority opinion) (finding that "[b]y its terms, [Rule 23(b)] creates a categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue his claim as a class action" and, moreover, that "Rule 23 unambiguously authorizes *any*

Justice Scalia has long recognized avoidance as a legitimate principle of statutory or Rule interpretation in *Erie* cases,[290] but his prior opinions turned at least in part on avoidance to prevent substantial disuniformity of outcome in state and federal courts, i.e., on federalism interests.[291] Thus, his formulation of avoidance was perhaps in need of recalibration, but not of the significant dismantling it seems to undergo in *Shady Grove*.

In his dissenting opinion in the 1987 case *Stewart Organization, Inc. v. Ricoh Corp.*,[292] Justice Scalia outlined an avoidance canon for congressional statutes in potential conflict with state law that is substantially similar to "classical" avoidance. Classical avoidance counsels construing a statute narrowly, if a narrowing construction is possible, and if the statute's most natural construction would be invalid.[293] He based avoidance on federalism interests,[294] however, rather than on the separation of powers principles that underlie the substantive rights limitation of the REA. This is unsurprising since *Stewart* involved a federal statute in potential conflict with state law, rather than a Federal Rule-state law conflict. Federal statutes, of course, are not subject to the REA proviso prohibiting abridging, enlarging, or modifying substantive rights.[295] Where Justice Scalia was perhaps analytically imprecise in *Stewart* was that, after formulating an

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plaintiff, in *any* federal civil proceeding, to maintain a class action if the Rule's prerequisites are met" (emphasis in original)). *See* Young, *supra* note 57, at 1577 (indicating that "the importance of any given canon or rule of construction will be, to a considerable extent, a function of the willingness of courts to find that statutes are 'unclear'").

290. Justice Scalia used avoidance principles in his dissenting opinion in *Stewart*, 487 U.S. at 37-38 (Scalia, J., dissenting) and in his opinion for a unanimous Court in *Semtek*, 531 U.S. at 503-04.

291. *Semtek*, 531 U.S. at 503-04 (adopting a limiting construction of Rule 41(b) because a broader construction "would arguably violate the jurisdictional limitation of the Rules Enabling Act" and because, if broadly interpreted, the Rule would "in many cases violate the federalism principle of *Erie R. Co. v. Tompkins*"); *Stewart*, 487 U.S. at 37-38 (Scalia, J., dissenting) (contending that the statute should be read narrowly to avoid "significant disuniformity between state and federal courts").

292. *Stewart*, 487 U.S. at 37-38 (1988) (Scalia, J., dissenting).

293. *Id.* There is, in Justice Scalia's dissenting opinion, no indication that he would limit avoidance to the narrow or classical form. Justice Scalia simply indicated that the conditions for classical avoidance had been met.

294. *Id.* (Scalia, J., dissenting) (advocating a limiting interpretation of 28 U.S.C. § 1404(a) in order to "avoid the significant encouragement to forum shopping that will inevitably be provided by the interpretation the Court adopts").

295. Hanna v. Plumer, 380 U.S. 460, 472 (1965); *See, e.g.*, Flaminio v. Honda Motor Co., Ltd., 733 F.2d 463, 470 (7th Cir. 1984) (holding that rules enacted by Congress are not subject to the substantive rights limitation of the REA); *see also* Genetin, *Conflicts Between Congressional Statutes and Federal Rules*, *supra* note 10, at 748.

avoidance canon regarding the federal statute at issue, he included Federal Rules, in dicta, as subject to the same avoidance principle.

In *Stewart*, the majority held that 28 U.S.C. § 1404(a),[296] regarding transfer of suits among federal district courts, controlled the effect to be given to the parties' contractual choice of forum agreement.[297] In dissent, Justice Scalia would have found § 1404(a), at best, ambiguous,[298] and, thus, would have construed § 1404(a) narrowly. Justice Scalia urged that "[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."[299] He explained that, since *Erie*, when a Federal Rule or statute is not on point (that is, in making an "unguided *Erie* choice" under the RDA analysis), courts have strived for substantially uniform outcomes in cases that are in federal court based on diversity jurisdiction.[300] That statement is unremarkable, at least with respect to Federal Rules. Justice Scalia concluded also that the impulse toward substantially uniform outcomes in federal and state courts derives from the constitutional and congressional plan for diversity jurisdiction.[301] In language quoted in all three *Shady Grove* opinions,[302] Justice Scalia advised that the Court "should assume . . . when it is fair to do so, that Congress is just as concerned as we have been to avoid significant differences between state and federal courts in adjudicating claims."[303] This may generally be an appropriate presumption with respect to congressional statutes,[304] a subject that is

296. 28 U.S.C. § 1404(a) provided as follows:

> For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

28 U.S.C. § 1404(a).

297. *Stewart*, 487 U.S. at 29-31 (concluding that the flexible standard set forth in 28 U.S.C. § 1404(a) included consideration of the parties' private expression of preference regarding venue).

298. *Id.* at 38 (Scalia, J., dissenting).

299. *Id.* Justice Scalia's articulation of avoidance also required that the limiting construction be a plausible interpretation of the text.

300. *Id.* at 37.

301. *Id.* at 39.

302. Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1441 & n.7 (2010) (majority opinion); *id.* at 1451 & n.5 (Stevens, J., concurring in part and concurring in the judgment); *id.* at 1461 (Ginsburg, J., dissenting).

303. *Stewart*, 487 U.S. at 37 (Scalia, J., dissenting).

304. *See, e.g.*, *Shady Grove*, 130 S. Ct. at 1451, 1453 (Stevens, J., concurring in part and concurring in the judgment) (citing *Wyeth v. Levine*, 555 U.S. 555, ___, 129 S. Ct. 1187, 1194-95 (2009) for the proposition that a federal statute will not displace state law "unless that was the clear and manifest purpose of Congress").

beyond the scope of this Article. Justice Scalia's inclusion, in dicta, of Federal Rules in his avoidance approach, however, was incomplete, since the substantive rights limitation of the REA provides the measure of Federal Rules.

Justice Scalia next addressed avoidance in *Semtek International Inc. v. Lockheed Martin Corp.*[305] Writing for a unanimous Court, Justice Scalia used a type of serious doubts avoidance to construe Rule 41(b) narrowly and, many have suggested, contrary to any plausible textual or historical construction of the Rule. Justice Scalia based avoidance both on avoiding arguable violation of the substantive rights limitation of the REA,[306] and on avoiding "violating the federalism principle of *Erie*."[307] Federalism interests still played a role, and perhaps a substantial role, in Justice Scalia's view of avoidance, although Justice Scalia started to realign avoidance to include separation of powers concerns. Of course, as indicated earlier, the *Semtek* case represented an instance in which no avoidance canon, regardless of underlying premise, should have been available under a serious doubts analysis because the Rule was not capable of the narrowing construction adopted, consistent with text and history.[308] Thus, the Court should have reached the issue of Rule validity.

In *Shady Grove*, Justice Scalia restated and narrowed any available avoidance principle, and he rejected "important state interests" and "state regulatory policies" as the guiding principle for avoidance. After determining that the Rule and state law were in conflict, Justice Scalia articulated an avoidance principle, in dicta, in *Shady Grove*, as follows: "If the Rule [is] susceptible of two meanings—one that would violate § 2072(b) and another that would not" —then the Rule at issue should be construed narrowly.[309] In this restated avoidance principle, Justice Scalia corrected his prior use of avoidance in REA cases,[310] which had focused in whole or in part on avoiding disuniformity of outcomes in federal and state courts.[311]

Justice Scalia's new formulation, however, limits the availability of an avoidance canon of Rule interpretation in several significant ways.

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305. 531 U.S. 497, 501-05 (2001).

306. *Id.* at 503-04 (citing Ortiz v. Fibreboard Corp., 527 U.S. 815, 842 (1999)).

307. *Id.* at 504.

308. *See supra* notes 214-22 and accompanying text.

309. *Shady Grove*, 130 S. Ct. at 1441-42 (majority opinion) (citing *Ortiz*, 527 U.S. at 842, and *Semtek*, 531 U.S. at 503-04).

310. *Id.* at 1441-42 & n.7 (rejecting the suggested narrowing of Rule 23(b) based on "important state interests" and "state regulatory policies" as "standardless").

311. *See supra* notes 291-310 and accompanying text.

First, he reverted to "classical" or "narrow" avoidance, no longer espousing avoidance based on serious doubts regarding Rule validity, but indicating, instead, that he would choose a limiting construction of an ambiguous Rule only if the Rule were susceptible of two constructions, one of which *would* violate the substantive rights limitation and the other of which *would not*. Second, Justice Scalia no longer construes Rules in terms of "limiting" or "reasonable" constructions[312] or "broad"[313] and "narrow" construction, but in terms of "artificial narrowing."[314] Thus, Justice Scalia is not willing to find ambiguity in Rule 23(b), but construes the Rule, instead, in categorical terms based on its text, thus reminding that interpretive philosophy will directly impact the availability of avoidance. Third, the combination of Justice Scalia's narrow definition of avoidance with his proposed broad standard for Rule validity means that avoidance will not be available in practice: A "classical" or narrow requirement that a Rule must be found to violate the substantive rights limitation to permit avoidance, combined with a "really regulates procedure" standard that admits of little if any possibility of Rule invalidity means that avoidance will be available in principle only. Justice Scalia seems, thus, to present a version of *Hanna* reinvigorated, which includes the Rule-protective features of *Hanna* but eliminates the escape hatch of avoidance through narrow Rule interpretation. Such an approach presents the very real possibility of underprotecting the separation of powers boundary that Congress included in the REA and, correspondingly, underprotecting state substantive rights. Of course, Justice Scalia discussed avoidance only in dicta, and there certainly is a danger of reading too much into his brief discussion.

Tellingly, however, Justice Scalia turned to discussion of avoidance principles in *Shady Grove* only after he had dispelled any notion that Rule 23(b) could be ambiguous and that avoidance might play a role in interpreting the Rule. Before considering avoidance principles, Justice Scalia concluded that, Rule 23(b), by its terms, provided that a class action "may be maintained" if the requirements of Rule 23(a) and 23(b) are met.[315] Rule 23(b), Justice Scalia concluded, provides a categorical, one-size-fits-all formula for determining when a class action may be maintained.[316] Absent a conclusion that the language of the Rule is

312. *Semtek*, 531 U.S. at 503, 505.
313. Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 37-38 (1988) (Scalia, J., dissenting).
314. *Shady Grove*, 130 S. Ct. at 1441 (majority opinion).
315. *Id.* at 1437.
316. *Id.* at 1437, 1440.

ambiguous or capable of more than one interpretation, no avoidance principle can apply.[317] Further, the "'really regulat[e][s] procedure'" standard Justice Scalia recognizes for Rule validity is extremely Rule protective.[318] What matters is the Federal Rule itself and what it regulates, not whether the Rule affects a litigant's substantive rights: "If [a Rule] governs only 'the manner and the means' by which the litigants' rights are 'enforced,' it is valid; if it alters 'the rules of decision by which [the] court will adjudicate [those] rights,' it is not."[319] Under this standard, Justice Scalia concluded that Rule 23(b) is simply a claims joinder rule that mandates joinder at plaintiff's option when the enumerated conditions of 23(a) and (b) are met.[320]

In summary, Justice Scalia backed away from a strong version of an avoidance canon, and he argued for a standard of Rule validity under which Federal Rules would rarely, if ever, be found to violate the substantive rights limitation. Both conclusions protect Congress's goal of delegating authority to the Supreme Court to create uniform, predictable, and simple procedural rules for the federal courts and protect the integrity of the Federal Rules, but, in tandem, they seem also to permit disservice of Congress's additional goal that Federal Rules not encroach on Congress's substantive policy choices.

Moreover, the Court's previous decisions in *Semtek*, *Gasperini*, and *Walker* reveal its hesitance in permitting Federal Rules regularly to preempt potentially substantive state law. This reluctance suggests that, if a standard for Rule validity does not provide for meaningful consideration of substantive rights, the Court will continue to seek means of avoiding the issue of Rule validity, including continued ad hoc construction of Rules to accommodate state interests, adoption of a modern or serious doubts canon of avoidance, promulgation of Rules that more nearly include only "case processing" or "housekeeping" standards,[321] and perhaps acceptance of increased suggestions for congressional cooperation or participation in Rule promulgation.[322]

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317. *See supra* note 195.

318. *Shady Grove*, 130 S. Ct. at 1442 (Scalia, J., for himself, Roberts, C.J., Thomas, J., and Sotomayor, J.) (citing Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941); Hanna v. Plumer, 380 U.S. 460, 464 (1965); Burlington N. R.R. Co. v. Woods, 480 U.S. 1, 8 (1987)).

319. *Id*. at 1442, 1444 (quoting Miss. Publ'g Corp. v. Murphree, 326 U.S. 438, 446 (1946) (internal quotation marks omitted)).

320. *Id*. at 1442-43.

321. *See* Bernadette Bollas Genetin, *Summary Judgment and the Influence of Federal Rulemaking*, 43 AKRON L. REV. 1107, 1117 (2010) (observing that the Enabling Act process, as a practical matter, requires consensus, and that it has become most effective when it "codifies existing practice, makes stylistic changes that consciously avoid change to content, makes housekeeping or

2. Justice Stevens, in Concurrence, Espouses Avoidance Based on Serious Doubts Regarding Rule Validity

Justice Stevens joined the portion of Justice Scalia's opinion that discussed avoidance in dicta, but, in his separate concurrence, he also amplified his views on avoidance and developed a broader avoidance principle that incorporates a serious doubts methodology.[323] Like Justice Scalia, Justice Stevens began his analysis with the traditional *Hanna* acknowledgement that REA issues under *Erie* present two questions: (1) whether the scope of a Federal Rule is "'sufficiently broad'" to "'control the issue' . . ., thereby leaving no room for the operation" of apparently conflicting state law;[324] and (2) if so, whether the Rule is valid, i.e., constitutional and in compliance with the substantive rights limitation of the REA.[325] Justice Stevens, however, concluded that both inquiries can be relevant to the scope of a Federal Rule. He reasoned that if a Federal Rule appears to violate the substantive rights proviso, the second "substantive rights" inquiry might "bleed back into the first"[326] and counsel a narrower construction of the Federal Rule that would avoid a clash of Federal Rule and state law:

> When a federal rule *appears* to abridge, enlarge, or modify a substantive right, federal courts must consider whether the rule can reasonably be interpreted to avoid that impermissible result. . . . And when such a "saving" construction is not possible and the rule would violate the Enabling Act, federal courts cannot apply the rule.[327]

This formulation adopts the broader doubts model of avoidance, advising avoidance when it *appears* that a Rule will impermissibly

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claims processing changes, as with the recent time computation amendments, or alters Rules in ways that can otherwise be reached by consensus").

322. *See, e.g.*, Bone, *Process of Making Process*, *supra* note 20, at 890; Burbank, *supra* note 54, at 1737-42; Charles Gardner Geyh, *Paradise Lost, Paradigm Found: Redefining the Judiciary's Imperiled Role in Congress*, 71 N.Y.U. L. REV. 1165, 1234-36, 1247-48 (1996); McCabe, *supra* note 227, at 1687; Subrin, *supra* note 72, at 404-05.

323. *Shady Grove*, 130 S. Ct. at 1448-50 (Stevens, J., concurring in part and concurring in the judgment).

324. *Id*. at 1451 (citing Burlington N. R.R. Co. v. Woods, 480 U.S. 1, 4-5 (1987); Walker v. Armco Steel Corp., 446 U.S. 740, 749-50 & n.9 (1980)).

325. *Id*. at 1449, 1451.

326. *Id.* at 1452.

327. *Id*. (emphasis added) (citing Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 503 (2001); Ortiz v. Fibreboard Corp., 527 U.S. 815, 842, 845 (1999); Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 612-13 (1997)).

impact substantive rights,[328] without requiring the Court to determine that, in fact, the construction of the Rule *would* violate the substantive rights limitation (a position that Justice Scalia seems to prefer in his discussion of avoidance in *Shady Grove*[329]). Justice Stevens joins his serious doubts model of avoidance with an acknowledgment that the substantive rights limitation creates a more substantial hurdle than Congress's authority to create rules that are "'rationally capable of classification' as procedure."[330] The Court has used the serious doubts avoidance canon in prior REA cases.[331] It has also used a serious doubts avoidance model to assist in policing ambiguous delegations of authority[332] and to assist in policing constitutional and statutory

328. *Id.* at 1452 & n.6 (citing *Semtek*, 531 U.S. at 503; *Ortiz*, 527 U.S. at 842, 845; *Amchem*, 521 U.S. at 612-13). Justice Stevens does not apply the avoidance canon he suggests in *Shady Grove* because he finds the state law to be procedural. *Id*. at 1459-60. Thus, he also does not discuss the interpretive methodology a court should use in interpreting Federal Rules. In Section IV of this Article, I suggest that courts, in determining if a saving construction is available, should consider the text and the history and purpose of a Rule as evidenced in the Advisory Committee Notes and other materials. *Compare* Struve, *supra* note 59, at 1124-42, 1147 (suggesting that Supreme Court should "give[] authoritative weight to the Advisory Committee Notes"), *with* Moore, *supra* note 10, at 1047-53 (proposing that Supreme Court use an active or dynamic method of interpreting Federal Rules). *See also* Marcus, *supra* note 253, at 48-51 (suggesting that Advisory Committee Notes would occupy a "first tier" of Advisory Committee materials that a court should consider in Rule construction, but that a court should also consider other Advisory Committee reports and documents regarding the history and purpose of a Rule); Burbank & Wolff, *supra* note 59, at 48-49 (suggesting, for open-textured Rules in which the rulemakers have not made policy choices that Congress has had a chance to review, that the Court may rely on its federal common lawmaking powers in interpreting the Rule).

329. *See supra* notes 310-15 and accompanying text.

330. *Shady Grove*, 130 S. Ct. at 1448-51 (Stevens, J., concurring in part and concurring in the judgment). Justice Stevens also determined that Congress's delegation of rulemaking authority to the Court, rather than to a political branch, evidenced Congress's intent to hold Federal Rules to a more stringent standard of validity than the standard applied to congressional statutes. *Id*. at 1451.

331. *See, e.g.*, *Semtek*, 531 U.S. at 503-04; *Ortiz*, 527 U.S. at 842, 845; *Amchem*, 521 U.S. at 612-13; Kamen v. Kemper Fin. Servs., Inc., 500 U.S. 90, 96-97 (1991); *see also* Daily Income Fund, Inc. v. Fox, 464 U.S. 523, 542-44 & n.2 (1984) (Stevens, J., concurring in judgment); *accord* Chesny v. Marek, 720 F.2d 474, 479 (7th Cir. 1984) (Posner, J.), *rev'd*, 473 U.S. 1 (1985).

332. Frickey, *supra* note 195, at 461-62. Use of the serious doubts canon in Rule interpretation differs from its use to construe a statute narrowly to avoid constitutional violations. In the statutory context, the Court is construing a statute of Congress and may, in avoiding a constitutional decision, find the statute inapplicable in a manner tantamount to finding it unconstitutional. Avoidance, thus, permits a court to find a statute inapplicable as a subconstitutional manner and may deny statutory application when a straightforward decision would have determined the application of the statute at issue to be constitutional. In the Rule interpretation context, by contrast, avoidance means that the Supreme Court will find its own Rule inapplicable and will construe Congress's delegation to it more narrowly, in furtherance of Congress's limitation on Court rulemaking. This self-limiting action of the Court in prospective rulemaking is less suspect than avoidance in the statutory context, but it may interfere with Congress's second goal for rulemaking—the creation of uniform and consistent procedure for the federal court system.

boundaries that are, like the substantive rights limitation, characterized by difficult line-drawing decisions and, thus, can lead to underenforcement of structural norms, such as separations of powers.[333]

Under Justice Stevens's serious doubts conception of avoidance, if a Rule appears to be in violation of the substantive rights limitation and a narrow construction is available, a collision of Federal Rule and state law will be averted, and the court would use an RDA analysis under *Erie*.[334] When however, "such a 'saving' construction is not possible and the rule would violate the Enabling Act, federal courts cannot apply the rule."[335] Importantly, Justice Stevens concludes that it is through a combination of an application of avoidance when available and finding a Federal Rule invalid when necessary that a court demonstrates "sensitivity to important state interests" and "regulatory policies."[336] For Justice Stevens, then, respect for "important state interests" and "regulatory policies" no longer drives a court's decision to avoid a conflict,[337] except in the "rare" instances in which state procedural law "is part of a State's framework of substantive rights or remedies."[338] Instead, respect for "important state interests" and "regulatory policies" is the result of appropriate application of the substantive rights limitation, that is, it is the result of the Court's construing the Federal Rule narrowly to avoid a conflict if such a construction is available, and

333. *See, e.g.*, Barrett, *supra* note 57, at 171 (noting the use of avoidance to protect values that may be underenforced); Young, *supra* note 57, at 1552-53, 1603-08 (indicating that avoidance canons are particularly appropriate when the legal standard is characterized by difficulty of drawing bright lines and where avoidance can help prevent "confrontations between the courts and political branches").

334. *Shady Grove*, 130 S. Ct. at 1452 (Stevens, J., concurring in part and concurring in the judgment).

335. *Id.*

336. *Id.* at 1452.

337. Justice Scalia also has disavowed reliance on "important state interests" and "regulatory policies" as the guiding principle of avoidance. *See supra* note 311 and accompanying text.

338. Justice Stevens emphasizes that Federal Rules will still be interpreted with

> some degree of "sensitivity to important state interests and regulatory policies" . . . and applied to diversity cases against the background of Congress' command that such rules not alter substantive rights and with consideration of "the degree to which the rule makes the character and result of the federal litigation stray from the course it would follow in state courts."

Shady Grove, 130 S. Ct. at 1449, 1454 n.10 (Stevens, J., concurring in part and concurring in the judgment) (citations omitted). He would limit the instances in which state law would influence a court's decision to avoid a conflict to those cases in which "the state law actually is part of a State's framework of substantive rights or remedies." *Id.*

the Court's corresponding willingness to find a Rule invalid when necessary.[339]

Justice Stevens also defined the substantive rights limitation more broadly than Justice Scalia, and that broader reach is integral to his conclusion that proper application of the substantive rights limitation produces the respect for state substantive rights that Congress requires in the REA. For Justice Stevens, a Federal Rule violates the substantive rights limitation of the REA if it displaces a state law that is "procedural in the ordinary use of the term but is so intertwined with a state right or remedy that it functions to define the scope of the state-created right."[340]

In applying his framework, however, Justice Stevens stopped short of using his carefully considered avoidance canon of interpretation because he determined that the state law was procedural only.[341] Justice Stevens concedes that one could argue, as the dissent did, that "class certification [in the face of CPLR § 901(b)'s prohibition on class actions] would enlarge New York's 'limited' damages remedy"[342] and, thus, that § 901(b) served both procedural and substantive purposes. In fact, Justice Stevens concluded that there are "two plausible competing narratives" regarding § 901(b)—one narrative that would present § 901(b) as a procedural rule intertwined with a state right or remedy and, thus, as a rule that would function to define the scope of the state-created right[343] and a second narrative that would define § 901(b) as procedural only.[344] In light of the two competing narratives, however, Justice Stevens found it "obvious" that the Court should "respect the plain textual reading of § 901(b)."[345] That is, the Court should read § 901(b)

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339. Justice Stevens realigns a court's use of "sensitivity to important state interests" and "regulatory policies" from relying on it to guide avoidance to recognizing it as the result of abiding by the REA requirement that a Rule not "abridge, enlarge or modify any substantive right":

> A federal rule, therefore, cannot govern a particular case in which the rule would displace a state law that is procedural in the ordinary use of the term but is so intertwined with a state right or remedy that it functions to define the scope of the state-created right. *And absent a governing federal rule, a federal court must engage in the traditional Rules of Decision Act inquiry, under the* Erie *line of cases. This application of the Enabling Act shows "sensitivity to important state interests," . . . and "regulatory policies," . . . but it does so as Congress authorized, by ensuring that federal rules that ordinarily "prescribe general rules of practice and procedure," § 2072(a), do not "abridge, enlarge or modify any substantive right."*

Id. at 1452 (emphasis added) (citations omitted).

340. *Id.*

341. *Id.* at 1457-60.

342. *Id.* at 1459.

343. *Id.* at 1459-60.

344. *Id.* at 1457-59.

345. *Id.* at 1459-60.

as procedural only. In the potential clash of a Federal Rule and a purely procedural state requirement, of course, a Federal Rule will not abridge, enlarge or modify a substantive right and there is, correspondingly, no need to construe the Federal Rule narrowly. After developing a more sensitive avoidance canon for the REA analysis, Justice Stevens's opinion is disappointing in that it (1) fails to make a contextual examination of Rule 23(b), including examination of history and Advisory Committee materials, to determine if, in fact, the Rule was intended to be mandatory at the plaintiff's option; and (2) opts for an unnecessarily restrictive reading of state law. Although the purpose of this Article is not to resolve conclusively the clash between Rule 23(b) and § 901(b), Justice Stevens's conclusion that there are two competing narratives regarding § 901(b) is premised on a less than convincing plain meaning construction of § 901(b) and a similarly unconvincing conclusion that class action joinder is "classically procedural," and analogous to setting filing fees or briefing deadlines.[346]

B. Justice Ginsburg and Avoidance Based on Respect for Important State Interests

In a dissenting opinion joined by Justices Kennedy, Breyer, and Alito, Justice Ginsburg discusses avoidance based on an accommodation or interest balancing approach to avoiding conflict.[347] She also states that the Court's prior opinions have incorporated an interest balancing approach to avoiding conflict: "In our prior decisions on point, . . . we have avoided immoderate interpretations of the Federal Rules that would trench on state prerogatives without serving any countervailing federal interest."[348] Avoidance, for Justice Ginsburg, springs directly from federalism concerns[349] and is not ostensibly limited by the substantive rights prohibition of the REA, at least not on a conception of the prohibition as serving separation of powers interests. Indeed, the dissent emphasizes repeatedly that the Court has adopted and should continue to

346. *Id.* at 1457-59.

347. *Id.* at 1461 (Ginsburg, J., dissenting).

348. *Id.* Justice Ginsburg also references several times an article by former California Supreme Court Justice Roger J. Traynor entitled, *Is This Conflict Really Necessary?*, 37 TEX. L. REV. 657, 668-69 (1959), in which Justice Traynor recommended an interest balancing approach to reconciling potentially conflicting state laws. In language similar to that used by Justice Ginsburg in *Shady Grove*, Justice Traynor counseled that "courts must be on the alert against making exceptions . . . that would defeat a legitimate interest of the forum state without serving the interest of any other state." Traynor, *supra*, at 669.

349. *Shady Grove*, 130 S. Ct. at 1464 (Ginsburg, J., dissenting) (quoting Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 427, 438 & nn.7, 22 (1996)).

adopt narrowing constructions of Federal Rules to serve important state interests or regulatory policies.[350]

The dissenting opinion is also premised in large part on a marshalling of cases to establish that the Supreme Court's pre- and post-*Hanna* decisions demonstrate unwavering vigilance in construing "Federal Rules to avoid conflict with state laws" and "to avoid conflict with important state regulatory policies."[351] As discussed above, the *Erie* cases do not line up uniformly in support of any brand of avoidance canon. Avoidance in pre-*Hanna* cases sought to protect the Federal Rules, not important state interests.[352] Avoidance in post-*Hanna* cases has varied, but has been based primarily on protecting important state interests and regulatory policies.[353] Allowing an unbounded concept of "state interest" to guide avoidance,[354] however, rather than the REA's focus on abridging, enlarging, or modifying substantive rights, risks returning to the pre-*Byrd* and pre-*Hanna* position of elevating, Rule by Rule, the states' authority over congressional power in matters of federal procedure. Thus, rather than an unadorned interest balancing approach to avoidance,[355] avoidance should be based on the nature and extent of a Federal Rule's impact on substantive law and on plausible interpretations of the Rule at issue.

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350. *Id*. at 1461-64.

351. *Id*. at 1462-63.

352. As demonstrated above, in *Palmer v. Hoffman*, 318 U.S. 109 (1943) and *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), the Court used avoidance to protect the Federal Rule, at issue, not to avoid trenching on state prerogatives. *See supra* notes 92-155 and accompanying text. The pre-*Hanna* case of *Ragan v. Merchants Transfer & Warehouse Co*., 337 U.S. 530 (1949) was construed in *Hanna* to be premised on avoidance, but at the time of its issuance, the case was uniformly construed as one in which state law prevailed over the Federal Rule, under outcome-determinative principles, and it seemed, moreover, to toll the death knell of the Federal Rules in diversity actions. The use of avoidance in *Ragan* thus, would also have protected the Federal Rule, as a formal matter, not state interests. Pre-*Hanna* avoidance, thus, provides scant support for a contemporary avoidance canon premised on protection of state interests and regulatory policies.

353. *See supra* notes 188-222 and accompanying text.

354. As Justice Stevens recognized, "[t]he Enabling Act's limitation does not mean that federal rules cannot displace state policy judgments; it means only that federal rules cannot displace a State's definition of its own rights or remedies." *Shady Grove*, 130 S. Ct. at 1449 (Stevens, J., concurring in part and concurring in the judgment). Only once and indirectly, in quoting Professor Ely, does Justice Ginsburg concede that "it is relevant 'whether the state provision embodies a substantive policy or represents only a procedural disagreement with the federal rulemakers respecting the fairest and most efficient way of conducting litigation.'" *Id*. at 1466 (Ginsburg, J., dissenting) (quoting Ely, *supra* note 15, at 722).

355. By contrast, in his suggestion for use of a comparative impairment approach to avoidance, Professor Lynch would limit the approach to instances in which there is a strong likelihood that the state interest might affect substantive rights – potential conflicts of Federal Rules and state litigation reform law. *See generally* Lynch, *supra* note 37, at 324-26.

IV. SERIOUS DOUBTS AS AN APPROPRIATE MODEL FOR AVOIDANCE UNDER THE REA

Because the Court has failed to settle on either a consistent methodology or an appropriate guiding principle for avoidance, its avoidance jurisprudence in Enabling Act cases has been uneven and has approached the murky quality so often associated with the *Erie* doctrine. In this Section, I recognize, first, that avoidance should be based on separation of powers constraints and, propose, second, that it be based on the serious doubts model of avoidance that the Court has often used in REA cases. The methodology for avoidance would, thus, be akin to that proffered by Justice Stevens in *Shady Grove*,[356] but the Court should limit the range of permissible narrowing constructions of a Federal Rule to those that can be supported by consideration of Rule text and Rule history and purposes, as set forth in Advisory Committee Notes and other Advisory Committee sources.[357] This limitation on permissible saving constructions will prevent ad hoc avoidance and "rewriting" of Federal Rules, but, in cases of serious doubt regarding Rule validity, it will give the nod to protecting Congress's superior substantive lawmaking authority. Moreover, if no limiting construction is available, the framework requires the court to address Rule validity.

Any avoidance canon that will assist in defining the substantive rights limitation of the REA must recognize that the limitation enforces a separation of powers boundary that allocates prospective rulemaking authority to the Supreme Court but reserves substantive lawmaking choices to Congress.[358] Thus, the Court should acknowledge that the REA's prohibition on Rules that "abridge, enlarge or modify any substantive right" protects against Court Rules that would intrude on Congress's substantive lawmaking prerogative. Professor Burbank's germinal article uncovering the historical foundations of the REA reveals the separation of powers origin of the substantive rights limitation.[359] As Professor Burbank has emphasized, however, federalism interests are served by the REA's allocation of power between the Supreme Court and Congress, but, as "a probable effect, rather than the primary purpose of the allocation scheme established by the [Rules Enabling] Act."[360] The REA's date of enactment—four years

356. *Shady Grove*, 130 S. Ct. at 1451-52 (Stevens, J., concurring in part and concurring in the judgment).

357. *See infra* notes 380-89 and accompanying text.

358. Burbank, *supra* note 23, at 1025-26.

359. Burbank, *supra* note 23, at 1025-26, 1106-07.

360. Burbank, *supra* note 23, at 1025-26. Professor Burbank stated as follows:

before the *Erie* decision—also supports that the purpose was not to protect directly federalism interests.[361] Thus, a court grappling with whether a Rule complies with the substantive rights limitation weighs competing federal interests—Congress's interest in protecting its substantive lawmaking authority and Congress's intent that the Federal Rules be uniform, predictable, and simple.

The recognition that the substantive rights limitation protects against Court intrusion into substantive lawmaking choices of Congress means that "sensitivity to important state interests" and "important state regulatory policies" cannot be the guiding principle for avoidance. Five justices in *Shady Grove* recognize the illegitimacy of unlimited reliance on these factors,[362] but the four dissenting justices are insistent that the Court should interpret Federal Rules with "awareness of, and sensitivity to, important state regulatory policies"[363] and "important state

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> The relevant substantive rights under the [Rules Enabling] Act, however, are not . . . those that reflect existing state substantive policy choices on the same subject covered by a Federal Rule. The purpose of the procedure/substance dichotomy is not to protect state or federal policy choices on such matters, although it may have that effect. Its purpose is, rather, to allocate policy choices – to determine which federal lawmaking body, the Court or Congress, shall decide whether there will be federally enforceable rights regarding the matter in question and the content of those rights.

Burbank, *supra* note 23, at 1113.

361. Burbank, *supra* note 23, at 1108-12. *See also* Ely, *supra* note 15, at 720-21 ("It is true that there is no evidence to suggest that those responsible for the passage of the Enabling Act—which was finally enacted in 1934 (four years before *Erie*) after many years of skirmishing—had the Rules of Decision Act in mind as a guide to the boundaries of the Supreme Court's rulemaking authority.").

362. Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1441 n.7 (2010) (majority opinion). Justice Scalia observed as follows:

> The dissent also suggests that we should read the Federal Rules "'with sensitivity to important state interests'" and "'to avoid conflict with important state regulatory policies.'" . . . The search for state interests and policies that are "important" is just as standardless as the "important or substantial" criterion we rejected in *Sibbach v. Wilson.* . . .

Id. Justice Stevens, in his separate concurrence, limits, rather than rejects, the application of state interests. Justice Stevens emphasizes that Federal Rules will still be interpreted with

> some degree of "sensitivity to important state interests and regulatory policies" . . . and applied to diversity cases against the background of Congress' command that such rules not alter substantive rights and with consideration of "the degree to which the Rule makes the character and result of the federal litigation stray from the course it would follow in state courts."

Id. at 1449 (Stevens, J., concurring in part and concurring in the judgment) (citations omitted). Justice Stevens would limit the instances in which state law would influence a court's decision to avoid a conflict to those cases in which "the state law actually is part of a State's framework of substantive rights or remedies." *Id*.

363. *Id*. at 1460 (Ginsburg, J., dissenting).

interests."[364] Moreover, one searches the majority and concurring opinions in vain for a direct statement that separation of powers interests animate the substantive rights limitation. Using state interests, and certainly the unbounded state interests discussed in the *Shady Grove* dissent,[365] as the controlling principle of avoidance elevates state power regarding federal procedure over the authority of both Congress and its delegate, the Supreme Court. Strikingly, it threatens to create, not as a general principle, but Rule-by-Rule, a legal climate eerily similar to the pre-*Byrd* and pre-*Hanna* outcome-determinative period. In the outcome-determinative period, state law seemed to override the Federal Rules, and the Court created dual meanings for Federal Rules, one of which would apply in diversity cases and the other in federal question cases.[366]

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364. *Id*. at 1463.

365. *Id*. at 1460-61, 1463-64.

366. In both cases in the outcome-determinative era and current cases, the Court has construed Federal Rules differently when in potential conflict with state law – often construing Federal Rules against their plain language to avoid a conflict with state law, but construing the Federal Rules more in line with their plain language when in conflict with federal law. Commentators from both eras have noted and disparaged this tendency. *See, e.g.*, Gavit, *supra* note 30, at 3. Professor Gavit stated as follows:

> [T]he most recent cases have applied an extended version of the doctrine of *Erie* as against the Federal Rules; and those cases appear to warrant the broad statement that in a diversity case, in the event of a conflict between a state rule of procedure and the Federal Rules of Civil Procedure, the federal district court must apply the state rule and not the federal rule if the state advantage is claimed to be one of "substantial importance." It appears to be conceded on all fronts that in litigation involving federal law the Federal Rules of Civil Procedure are to be administered under the usual standards of interpretation. They are procedure in those cases; yet they are "substance" in a diversity case.

Id.; Merrigan, *supra* note 30, at 719. Merrigan similarly concluded as follows:

> It is noteworthy that the Court also held in the *Ragan* case that Rule 3 still prevails in cases involving only a federal question. In such a case, irrespective of state requirements, the action is still commenced and the applicable statute of limitations tolled by the mere filing of the complaint. In sum and substance, therefore, the Court delimited Rule 3 in diversity of citizenship cases, but preserved it for all other types of civil actions. As a result, all "strictly federal" cases will now be governed by Rule 3, while diversity cases must of necessity be commenced in accordance with prevailing state law.

Id. (citations omitted); Dudley & Rutherglen, *supra* note 45, at 743-44. Professors Dudley and Rutherglen concluded as follows:

> The most frequently felt temptation—at least at the Supreme Court level—is to construe federal law narrowly to avoid a conflict with state law. This was certainly the temptation to which the Court succumbed in *Walker*, *Gasperini*, and *Semtek* . . . . The . . . unhappy outcome is illustrated by *Walker* and *West*, where supposedly uniform federal procedural rules become two-headed monsters meaning different things depending on whether the plaintiff's claim is based on state or federal law.

Id.; Struve, *supra* note 59, at 1150-51 (concluding that "to the extent the Court views the Enabling Act limitation as serving federalism, and not separation of powers, concerns . . . , the Court's

Ultimately, an unbounded interest balancing approach based on important state interests treats the Federal Rule and state law as though they were adopted by co-equal sovereigns. It permits the law serving the "greater" interest to control or permits an accommodation of the two laws, but it ignores the constitutional superiority of federal law in event of conflict and, as applied, it has also minimized the federal interest in creating a uniform national procedure.[367]

The teaching of *Hanna* is to the contrary—Congress's delegation of rulemaking authority to the Supreme Court combined with the Supremacy Clause's elevation of federal law over state law require that Federal Rules will preempt some interests and regulatory policies that are important to states. Similarly, the supersession clause of the REA permits Federal Rules that do not impact substantive rights impermissibly to supersede congressional statutes.[368] The Federal Rules, then, do not operate only when nonconflicting or when in conflict with "unimportant" federal or state law, but have real power to override laws of both Congress and the states, as long as the Rules do not impact impermissibly substantive rights. Furthermore, the REA cases have demonstrated that there is no identity principle of separation of powers and federalism in construing the substantive rights limitation. That is, use of a separation of powers principle that prevents Court Rules from intruding impermissibly into Congress's substantive policy choices (including Congress's decision that there be no governing federal law) will protect against impermissible intrusion into substantive state law as a residual matter. Use of federalism principles as the touchstone for avoidance, however, will not protect Congress's interests in permitting the Supreme Court to establish uniform procedural Rules for the federal courts but ensuring no impermissible intrusion into substantive policy choices of Congress. Instead, a federalism focus for avoidance permits subordination of federal policy choices to state law and permits differing interpretations of the Rules in diversity and federal question cases. Thus, rather than ensuring protection of the separation of powers boundary in the face of difficult line drawing issues, use of important

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avoidance doctrine can produce Rules that have one meaning in diversity cases and another in federal question cases").

367. *See, e.g.*, Burbank, *supra* note 23, at 1024, 1040-45, 1084-85 & n.298 (discussing legislative history of proposed bills that were the forerunners of the Rules Enabling Act of 1934 in order to shed light on the REA); Dudley & Rutherglen, *supra* note 45, at 743-44, 747-48; Hill, *supra* note 30, at 582-83; McCoid, *supra* note 40, at 898 & n.62.

368. For articles discussing the supersession clause of the REA, which permits Federal Rules to supersede congressional statutes if in compliance with the substantive rights limitation, see *supra* note 10.

state interests and regulatory policies to guide avoidance may permit state law to override valid Federal Rules.[369]

Reorienting the focus of avoidance to key on preventing Court Rules from impermissibly abridging Congress's substantive policy choices would be a good first step in establishing the proper role of avoidance in Enabling Act cases. With five justices rejecting unlimited "sensitivity to important state interests" and "important state regulatory policies" as the basis for limiting Federal Rules, perhaps the *Shady Grove* case has taken that first step. There is, in *Shady Grove*, however, no direct statement that separation of powers concerns animate the substantive rights limitation. The second step in according avoidance its proper role in defining the substantive rights limitation is to invoke serious doubts avoidance and to establish a workable definition for the substantive-procedural divide. Although identification of that workable definition is beyond the scope of this Article, an administrable standard is essential to a serious doubts analysis because the serious doubts avoider must consider whether there is a serious doubt regarding Rule validity (though she need not definitely resolve the issue of Rule validity) before turning to possible limiting constructions for a Federal Rule.

Justice Stevens recommended serious doubts avoidance in his concurrence in *Shady Grove*, stating that the second phase of the *Hanna* inquiry regarding Rule validity "may well bleed back into the first," i.e., determination of Rule scope[370]: "When a federal rule appears to abridge, enlarge, or modify a substantive right, federal courts must consider whether the rule can reasonably be interpreted to avoid that impermissible result."[371] Serious doubts avoidance based on separation of powers constraints would favor a restrained reading of a Rule, when such an interpretation is available, to limit tensions between the Supreme Court and Congress caused by the Court's exceeding the substantive rights limitation.[372] The Supreme Court has also used a serious doubts

369. *See, e.g.*, Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497 (2001). *See* Burbank, *supra* note 23, at 1042-46.

370. *Shady Grove*, 130 S. Ct. at 1452 (Stevens, J., concurring in part and concurring in the judgment) (citations omitted); *see also* Daily Income Fund, Inc. v. Fox, 464 U.S. 523, 543-44 & n.2 (1984) (Stevens, J., concurring in judgment) (considering a congressional statute-Federal Rule conflict).

371. *Shady Grove*, 130 S. Ct. at 1452.

372. See *supra* note 332, indicating that use of a serious doubts avoidance principle in Rule interpretation is less problematic than in narrow construction of a statute to avoid an unconstitutional result. In providing a narrowing construction of a Rule that varies from the most natural interpretation of the Rule, the Court is self-limiting its own Rule in order to comply with

model in other REA cases.[373] Under the serious doubts model, the first-step analysis of scope of the Federal Rule, will involve a look at the second-step Rule validity analysis. The doubts principle, thus, assumes a shared understanding of the Rule validity standard at issue, but that the standard may involve difficult line drawing issues.

The crisper the standard for Rule validity and the easier it is for courts to apply the standard, the more, theoretically, serious doubts avoidance will play a supporting role, rather than a leading role, in defining the substantive rights divide. Further, the clearer the standard for dividing substance and procedure, the more the Court may invoke classical or narrow avoidance, as Justice Scalia suggests in *Shady Grove*. The clear standard of *Hanna*, however, which seemed to provide insufficient protection for state law, has historically had the opposite effect, causing the Court to search for avenues to avoid apparent conflicts, which would, in turn, permit application of the state-protective RDA analysis. Thus, the Court's avoidance cases have demonstrated that an appropriate standard must not only be clear or easily administrable to reduce reliance on avoidance techniques, it must also be sufficiently nuanced to include meaningful consideration of all relevant interests. Justice Scalia's proposed clear and easily administrable "really regulates procedure" standard for Rule validity in *Shady Grove*, thus, may paradoxically lead, yet again, to increased reliance on avoidance techniques.[374]

As the standard for defining the substantive rights limit of the REA becomes less clear and line-drawing more difficult, of course, courts would turn more often to avoidance, and here I recommend serious doubts avoidance, which has proved effective in dealing with standards characterized by difficulty in line-drawing.[375] With the REA's dual

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Congress's separation of powers constraint, rather than narrowing a statute of Congress, which has superior lawmaking authority and is a democratically elected body. Although the narrowing of a Federal Rule may threaten Congress's additional goal in enacting the REA—that the Supreme Court create uniform and consistent Rules for the federal procedural system—it does so in service of Congress's separation of powers goal that also animates Congress's delegation of rulemaking authority to the Court.

373. *See* McCoid, *supra* note 40, at 898 & n.62. Professor McCoid observed that the interest in the integrity of the federal system that is a formative purpose of the Federal Rules and that is emphasized in *Hanna v. Plumer*, 380 U.S. 460, 472-73 (1965), is not uniformly evidenced in each Rule. McCoid, *supra* note 40, at 898 & n.62. He concluded, in fact, that the interest in "unity of the rules" was not at issue in the case of the service Rule at issue in *Hanna*. McCoid, *supra* note 40, at 898 & n.62. That is, the federal system could tolerate and, in fact, the Rules provided for, varying methods of service.

374. *See supra* text accompanying notes 322-23.

375. *See supra* notes 332-33 and accompanying text.

interests in protecting substantive rights and protecting the integrity of a uniform federal procedure for the independent federal court system, it is likely that the Court will ultimately opt for a standard that does not in all cases permit a bright line determination of whether a Rule satisfies the substantive rights limitation. Indeed, the Court has demonstrated little satisfaction with the bright line tests it has used in the past—from outcome determination to "really regulates procedure"[376] to sensitivity to important state interests[377] (and, for four justices, back again to "really regulates procedure"[378]). But the ability to interpret a Rule narrowly to avoid a conflict with apparently substantive law must have limits if avoidance is to serve the purpose of protecting the separation of powers boundary established in the REA, and if, additionally, the Rules are to be construed uniformly in diversity and federal question cases.

Those limits can be found by further analogy to the statutory avoidance canon. A "cardinal principle" of the statutory avoidance canon is that when Congress's intent is clear, that intent, rather than a limiting interpretation, must govern.[379] And, if there is no permissible "saving" construction, the Court must address the constitutional issue. So, too, in the REA context, the Supreme Court has often stated, when analogizing to a serious doubts model, that a limiting construction of a Federal Rule may be appropriate, but only "when it is fair to [construe narrowly]."[380] Indeed, Justice Stevens, in his *Shady Grove* concurrence,

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376. Hanna v. Plumer, 380 U.S. 460, 464-65 (1965).

377. *See, e.g.*, Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 427 n.7, 437 & n.22 (1996); *see also* Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 501-05 (2001).

378. Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1442 (2010) (Scalia, J., for himself, Roberts, C.J., Thomas, J., and Sotomayor, J.).

379. *See, e.g.*, Young, *supra* note 57, at 1576; *see also supra* note 195 and accompanying text.

380. *See, e.g.*, Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 37-38 (1988) (Scalia, J., dissenting) (indicating that courts should "assume . . . when it is fair to do so, that Congress is just as concerned as [the Court has been] . . . to avoid significant differences between state and federal courts in adjudicating claims" and that limiting constructions may be used "if the text permits"); *accord Shady Grove*, 130 S. Ct. at 1452 (Stevens, J., concurring in part and concurring in the judgment) (stating that a limiting construction may be adopted when "the rule can reasonably be interpreted to avoid that impermissible result"); *id.* at 1441-42 (majority opinion) (recognizing, in dicta that a Rule may be narrowed to serve avoidance purposes if "susceptible of two meanings" but finding, on the facts of the case, that the Rule was unambiguous and in direct conflict with state law); *see also* Ortiz v. Fibreboard Corp., 527 U.S. 815, 842-45 (1999) (construing Rule more narrowly than text would require in light of "historical antecedents," the "Advisory Committee's expressions of understanding," and potential invalidity of Rule under the substantive rights limitation of the REA); Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 612-13, 620 (1997) (providing that a Rule's "requirements must be interpreted in keeping with . . . the Rules Enabling Act, which instructs that rules of procedure 'shall not abridge, enlarge or modify any substantive right'" and also that, in construing a Rule, courts "must be mindful that the Rule as now composed sets the requirements they are bound to enforce"); Daily Income Fund, Inc. v. Fox, 464 U.S. 523,

has once again concluded that, if a "rule can[not] reasonably be interpreted" to avoid arguable violation of the substantive rights limitation, then the Court must address whether the Rule is valid under the REA.[381]

Unfortunately, the Court has been less than consistent in determining when a narrowing construction would be "fair" or "reasonable" and has often declined to examine Rule history and purposes as revealed in Advisory Committee Notes and other sources when determining the appropriate reach of a Rule.[382] Commentators have made a persuasive case that Rules should be interpreted in light of text and Advisory Committee Notes and other Advisory Committee documentation regarding history and purpose. Structurally, the case for reliance on Advisory Committee Notes has increased since the Notes have been subjected to additional procedures in the rulemaking process, including that both the Rule text and Notes are submitted for public comment, both are subject to revision by the Advisory Committee and the Standing Committee, and both are submitted to the Supreme Court and Congress for approval.[383] Furthermore, the Enabling Act process

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543-44 & n.2 (1984) (Stevens, J., concurring in judgment) (noting that plain language and history of Rule supported construing Rule narrowly and not to conflict with a federal statute in the face of substantial doubt about the validity under the REA of a contrary construction).

381. *Shady Grove*, 130 S. Ct. at 1452 (Stevens, J., concurring in part and concurring in the judgment).

382. *See, e.g.*, *Semtek*, 531 U.S. at 503-04; Walker v. Armco Steel Corp., 446 U.S. 740, 742-43 & nn.3-4 (1980); *see also Gasperini*, 518 U.S. at 436-37 & n.22 (Court fails to address conflict issue until late in the case and makes no inquiry into context as provided in Advisory Committee materials); Marek v. Chesny, 473 U.S. 1 (1985) (in congressional statute-Federal Rule conflict, Court majority makes no inquiry into history of Rule, but uses a plain meaning construction that later research reveals to be inconsistent with Rule history and Advisory Committee Notes, *see* Bone, *To Encourage Settlement*, *supra* note 20, at 1615); *but see Ortiz*, 527 U.S. at 842-45 (interpreting Rule in light of "historical antecedents" and the "Advisory Committee's expressions of understanding" regarding the Rule); *Amchem*, 521 U.S. at 612-13, 620 (reminding that "the Rule as now composed sets the requirements [courts] are bound to enforce"); *Daily Income Fund*, 464 U.S. at 543-44 & n.2 (Stevens, J., concurring in judgment) (construing Rule narrowly and not to conflict with congressional statute, but also providing a saving construction that comported with the Rule's text and history).

383. Struve, *supra* note 59, at 1112-14. *See also* Marcus, *supra* note 253, at 48-49 (ranking Advisory Committee Notes in the "first tier" of Rule history materials that courts should review when seeking the meaning of a Federal Rule, but also advocating use of a broad range of materials that comprise the rulemaking history of a Federal Rule); Sellers, *supra* note 282, at 328-29. Alternatively, Professors Burbank and Wolff suggest a "more dynamic approach" to interpreting Federal Rules that would recognize "the actual policy choices that Federal Rules make and that Congress had an opportunity to review" but would also recognize that the Court's power to interpret Federal Rules extends to federal common lawmaking when the Federal Rules are "open-ended," "discretionary," and "leave actual choices to federal trial judges." Burbank & Wolff, *supra* note

includes broad input, multiple decisionmakers, notice and comment periods, and opportunity for review by the Supreme Court and Congress.[384] Indeed, Professor Bone has concluded that *Hanna*'s presumption of Rule validity is based on the "idea that the Rule has been vetted by the rulemaking process" and, thus, Rule interpretations that are not "sufficiently connected to the Rule as so vetted" should not be deemed presumptively valid.[385] Similarly, the Court's failure to stay close to Rule text, history, and purposes as set forth in Advisory Committee Notes and other materials in applying an avoidance canon in *Erie* cases has permitted dueling interpretations of a single Rule in diversity and nondiversity cases.[386]

Pragmatically, the Court should also use text and Advisory Committee materials to constrain the range of permissible saving constructions when using avoidance in *Erie* cases because the Court has often relied on those sources in other REA contexts;[387] because using different techniques for Rule interpretation in varying REA contexts leads to the "two plain meanings for Federal Rules" problem (one in diversity and one in federal question cases), experienced both in the outcome-determinative period and currently; and because, when it has not used these materials, the Court has permitted implausible Rule interpretations in both *Erie* and non-*Erie*, REA cases.[388]

Additionally, while I advocate attention to Rule interpretation for the limited purpose of restraining the range of permissible saving constructions that courts may adopt for Federal Rules, other commentators have suggested that attention to history and Advisory Committee context in Rule interpretation may, in fact, reveal enhanced Federal Rule competence, thereby potentially restricting the need to resort to avoidance principles. Thus, assessing Rule text and history as set forth in Advisory Committee materials may assist both in cabining

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59, at 26, 48-49. Thus, in the context of construing a Federal Rule the Court's power would emanate from the Rules as promulgated and from the Court's power in federal common lawmaking.

384. Struve, *supra* note 59, at 1112-14; Sellers, *supra* note 282, at 328-29. *See also* Bone, *To Encourage Settlement*, *supra* note 20, at 1615-17; Marcus, *supra* note 253, at 5-6, 18-29 (concluding that "institutional features, relationships, and values implicated [in] rule promulgation . . . explain why courts [should] have an obligation to interpret Federal Rules . . . [by] an interpretive method that defers to authorial expectations").

385. Bone, *To Encourage Settlement*, *supra* note 20, at 1617.

386. *See, e.g.*, *Semtek*, 531 U.S. at 503-04; *Walker*, 446 U.S. at 742-43.

387. *See supra* notes 230-60 and accompanying text.

388. *See supra* notes 189-200, discussing *Walker*, 446 U.S. 740, and *supra* notes 214-21, discussing *Semtek*, 531 U.S. 497. *See also* Bone, *To Encourage Settlement*, *supra* note 20, at 1615-16 (discussing implausible construction of Rule 68 in *Marek v. Chesny*, 473 U.S. 1 (1985), when Court failed to look to history and Advisory Committee materials).

the permissible range of limiting constructions of a Rule for avoidance purposes and in establishing greater federal authority of a Rule. For example, Professors Dudley and Rutherglen note that Court attention to the history and Advisory Committee Notes regarding Rule 59(a), in *Gasperini v. Center for Humanities, Inc.*,[389] would have established that Rule 59(a) "was no ordinary federal rule . . . but proceeded from the command of Congress to avoid any infringement of the right to jury trial under the Seventh Amendment."[390] They conclude that, if the *Gasperini* Court had considered the history of Rule 59(a), it might have concluded that the Rule incorporated the provisions of a federal statute and that the Rule could be accorded the higher level of federal competence accorded congressional statutes.[391] More broadly, Professors Burbank and Wolff have suggested that the Court's promulgation of open-textured Rules that leave normative choices to trial courts may provide a role for Supreme Court federal common lawmaking in Rule interpretation.[392]

In summary, using a serious doubts analysis that tethers any limiting constructions of a Federal Rule to its text and its history and purposes as revealed in Advisory Committee Notes and other materials produces multiple benefits. First, it will permit the doubts canon to protect the often underenforced structural value of separation of powers that underlies the REA and that Congress is now quick to patrol. Although this Article does not address the Rule validity standard, it is likely that any standard adopted by the Supreme Court will present the difficult line-drawing issues that are best protected through a doubts analysis, since the standard will likely seek to reconcile congressional intent to permit a uniform national procedural code for the federal courts while retaining for Congress substantive policy choices. The properly limited serious doubts canon will err on the side of protecting Congress's substantive prerogative in instances of serious doubt, but, when limited by text, history, and purposes as adduced in the Enabling Act process, it will preclude a "rewriting" of the Federal Rule. If Rule text and history do not permit a limiting construction, then the Court

389. 518 U.S. 415 (1996).

390. Dudley & Rutherglen, *supra* note 45, at 713-15. Professors Dudley and Rutherglen suggest as well that understanding the history and Advisory Committee information not only prevents improper limiting of Rule 59(a), it also establishes that the authority for Rule 59(a) comes from Congress itself and, thus, may preclude a need to consider the substantive rights limitation since congressional statutes are subject only to constitutional validity requirements. *See also* Burbank, *supra* note 23, at 1147-58 (discussing what he referred to as the "incorporation principle" in drafting of the original Federal Rules).

391. Dudley & Rutherglen, *supra* note 45, at 713-16.

392. Burbank & Wolff, *supra* note 59, at 48-49.

must proceed to the question of Rule validity. Second, by protecting Congress's substantive lawmaking choices, the court additionally protects federalism interests, but as the result of protecting Congress's substantive policy choices, not as the goal of avoidance. Third, it will protect Court rulemaking. Unbounded avoidance imposed to serve the goal of protecting state interests and regulatory policies permits differing interpretations for Federal Rules depending on whether the case is based on diversity or federal question jurisdiction and threatens both to alter Rules as promulgated through the Enabling Act process and to return to the pre-*Byrd* and pre-*Hanna* era in which state procedural law was elevated above Federal Rules and federal statutes. Fourth, this serious doubts framework harmonizes the methodology for avoidance in *Erie* and non-*Erie* REA cases because in each REA context—Federal Rule-state law conflict, congressional statute-Federal Rule conflict, or general Rule construction—the same issue of whether the Court Rule impinges impermissibly on Congress's substantive lawmaking prerogative is addressed.

V. CONCLUSION

The Court has long relied on avoidance to assist in policing the uncertain boundary of the substantive rights limitation of the REA, and, thus, to decide whether a Federal Rule or state law should prevail in event of an apparent Federal Rule-state law conflict. The Court's reliance on avoidance, however, has been inconsistent and improperly focused on federalism concerns. This Article suggests that use of avoidance remains appropriate, but it narrows instances of reliance on avoidance (1) by recognizing that "important state interests and regulatory powers" may not serve as the guiding principle of avoidance because the substantive rights limitation is premised on separation of powers purposes rather than federalism purposes; and (2) by limiting, through interpretation based on Rule text and Advisory Committee materials, the available saving constructions for a Rule. Furthermore, the proposal to use a serious doubts method of avoidance recognizes the competing federal principles under the substantive rights limitation of the REA—the integrity of the Federal Rules as a coherent system and the preservation to Congress of substantive lawmaking choices. Nevertheless, in instances of serious doubt as to whether a Federal Rule violates the substantive rights limitation, it recognizes that the REA limitation regarding separation of powers is part of the "constitution

outside the Constitution"[393] and that the constitutional and statutory value should be protected.

393. Ernest A. Young, *The Continuity of Statutory and Constitutional Interpretation: An Essay for Phil Frickey*, 98 CAL. L. REV. 1371, 1372-73, 1380 (2010).